

# FOLLOWING THE FIFTH CIRCUIT: TITLE VII AS THE SOLE REMEDY FOR EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEX IN EDUCATIONAL INSTITUTIONS RECEIVING FEDERAL FUNDS

ALICIA MARTINEZ\*

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\* Juris Doctor Candidate, American University Washington College of Law, 2020; BA in Political Science, Boston College. Thank you to my friends, family, and coworkers for their support throughout my legal education as an evening law student and to my partner, Andrew Melton, for his constant faith and encouragement. A special thank you to the *Journal of Gender, Social Policy & the Law* Volume 26 and 27 for their diligence and feedback.

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#### INTRODUCTION

Sexual harassment in educational institutions has been a salient issue in education policy and victim advocacy on a state and federal level since the late 1950s.<sup>1</sup> Harassment of any kind has adverse effects on the learning and

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1. “Sexual harassment” is used throughout to include acts of sexual violence

development experience that students receive at an educational institution.<sup>2</sup> Numerous studies in recent years have shown how sexual harassment in educational institutions has particularly lasting educational, health, social, and economic implications for its victims.<sup>3</sup> The issue of sexual harassment in educational institutions has been acknowledged since the civil rights era; however, no meaningful federal legislation existed to combat the problem until Congress passed Title IX of the Education Amendments of 1972.<sup>4</sup> Prior to promulgating these federal protections for students, the federal government established protections against sexual harassment in the workplace with Title VII of the Civil Rights Act of 1964.<sup>5</sup>

New federal guidance and state laws have broadened protections for individuals covered under Title IX.<sup>6</sup> Recently, the Third Circuit expanded the protections provided under Title IX by deciding that an employee at a teaching hospital can bring a sexual harassment claim under both statutes.<sup>7</sup> This Comment argues that the Third Circuit was incorrect in determining that medical residents can sue under either statute, and that the Fifth Circuit

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including assault. See Eilene Zimmerman, *Campus Sexual Assault: A Timeline of Major Events*, N.Y. TIMES (June 22, 2016), <https://www.nytimes.com/2016/06/23/education/campus-sexual-assault-a-timeline-of-major-events.html> (compiling a list of major sexual assault cases from 1957 to 2016).

2. See Beverly M. Black & Cecilia Mengo, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 J. OF C. STUDENT RETENTION: RES., THEORY & PRAC. 234, 242-46 (2015) (analyzing the impact of sexual harassment on victims' academic performance and school retention).

3. See CHRISTOPHER P. KREBS, ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) viii (Oct. 2007) (unpublished manuscript) (on file with the Nat'l Crim. Just. Reference Serv.) (examining the prevalence, nature, and reporting of sexual harassment experienced by students on college campuses).

4. See 20 U.S.C. §§ 1681-83, 1685-88 (1972) (codifying protections against discrimination on the basis of sex in educational institutions).

5. See 42 U.S.C. § 2000e-2 (2010) (codifying protections against discrimination on the basis of sex in the workplace); 29 C.F.R. § 1604.11 (2018) (establishing sexual harassment as a violation of section 703 of Title VII).

6. See Lavinia M. Weizel, Note, *The Process That Is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1642-45 (2012) (advocating for continued clarification and guidance surrounding the protections provided under Title IX).

7. John Barry and Edna Guerrasio, *A Circuit Split At Intersection of Title VII And Title IX*, LAW360 (Apr. 20, 2017), <https://www.law360.com/articles/913845/a-circuit-split-at-intersection-of-title-vii-and-title-ix> (explaining this change is significant because Title IX does not require administrative exhaustion and has a better statute of limitations).

was correct in establishing that Title VII provides the sole remedy for medical residents to sue for sexual harassment.<sup>8</sup> This Comment examines the reasons future courts should defer to the Fifth Circuit's decision.

Part I of this Comment provides a brief legislative history of Title VII and Title IX and introduces the cases related to each statute.<sup>9</sup> Part I also introduces the circuit court cases that address whether Title VII provides the sole remedy to individuals who wish to bring a sexual harassment claim in a teaching hospital.<sup>10</sup> Part II supports the Fifth Circuit's assertion that Title VII and its subsequent case law preempts Title IX as a remedy for employees of educational institutions who have experienced discrimination on the basis of sex.<sup>11</sup> Part III discusses the policy recommendation for why Title IX should not provide a bypass to Title VII's well-established remedial process for addressing cases of discrimination on the basis of sex in teaching hospitals.<sup>12</sup> Part IV concludes that the Fifth Circuit is correct in this circuit split.<sup>13</sup>

## I. BACKGROUND

The Federal Government has made strides to promote the rights of victims of sexual harassment by carefully balancing the needs of survivors with the rights of accused parties under Title IX.<sup>14</sup> Over the past twenty years, there have been various legislative efforts to protect victims of sexual harassment.<sup>15</sup> Discrimination against employees on the basis of sex was outlawed in the United States with the passing of the 1964 Civil Rights Act.<sup>16</sup> A decade later, Congress also outlawed discrimination on the basis of sex in

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8. *See id.* (describing the Third Circuit's view that medical residents should be able to recover under both Title VII and Title IX).

9. *Infra* Part I.

10. *Infra* Part I.

11. *Infra* Part II.

12. *Infra* Part III.

13. *Infra* Part IV.

14. *See* Lauren Sieben, *Education Dept. Issues New Guidance for Sexual-Assault Investigations*, CHRON. HIGHER EDUC., (Apr. 4, 2011), <http://chronicle.com/article/Education-Dept-Issues-New/127004/> (explaining the evolving guidelines under Title IX).

15. *See* HEATHER M. KARJANE ET AL., NAT'L INST. JUST., SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT ii, 1-2 (2005), <https://www.ncjrs.gov/pdffiles1/nij/205521.pdf> (acknowledging the efforts made to protect victims of sexual assault utilizing Title IX and accompanying legislation).

16. *See* 42 U.S.C. § 2000e-2 (2010) (outlawing discrimination based on sex, race, color, nationality, and religion).

educational institutions by passing Title IX of the Education Amendments of 1972.<sup>17</sup> Since then, the federal government has worked to expand and clarify the protections available to individuals who experience sexual harassment in the workplace and within educational institutions.<sup>18</sup>

*A. Overview of Employment Discrimination Law Under Title VII and Title IX*

*I. Title VII of the Civil Rights Act of 1964*

Title VII of the Civil Rights Act made it unlawful for employers to discriminate against employees with respect to compensation, terms, conditions, or privileges of employment based on sex, race, color, national origin, and religion.<sup>19</sup> Following the enactment of this federal law, the Supreme Court affirmed the statutorily-established protection against discrimination on the basis of sex in the Supreme Court case *Meritor Savings Bank v. Vinson*.<sup>20</sup> In this case, the Supreme Court established that, under Title VII, an employee has the right to be free from a “hostile environment” created by occurrences of discrimination on the basis of sex.<sup>21</sup> Numerous types of sexual harassment can create a “hostile environment,” including but not limited to quid pro quo sexual harassment, in which certain acts and sexual harassment are linked to granting or denying of specific economic

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17. See 20 U.S.C. §§ 168-83, 1685-88 (1972) (prohibiting discrimination that excludes an individual from participation in, or denies an individual the benefits of, any educational program or activity that receives federal financial assistance).

18. See generally Dear Colleague Letter: Sexual Violence from Sec’y for the Office of Civil Rights, U.S. Dep’t of Educ. 1-19 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (providing executive guidance expanding the rights of survivors in disciplinary processes at higher education institutions); *New Requirements Imposed by the Violence Against Women Reauthorization Act*, AM. COUNCIL ON EDUC. 1-3 (Apr. 4, 2014), <http://www.acenet.edu/news-room/Documents/VAWA-Summary.pdf> (providing guidance on the 2013 reauthorization of VAWA, which extended protections for victims of sexual harassment in educational institutions).

19. 42 U.S.C. §§ 2000e, 2000e-2 (2010) (applying generally to employers with fifteen or more employees, including federal, state, and local governments; private and public colleges and universities; employment agencies; and labor organizations).

20. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 59-61, 73 (1986) (discussing that plaintiff sued employer after her dismissal, alleging that she was subjected to sexual harassment during four years of employment and arguing that this harassment created a “hostile working environment” as defined by Title VII of the Civil Rights Act of 1964).

21. *Id.* at 65 (relying, in part, on Equal Employment Opportunity Commission guidelines, which identify two types of sexual harassment that constitute discrimination on the basis of sex in the workplace: quid pro quo and hostile environment).

employment benefits.<sup>22</sup> However, the hostile environment sexual harassment theory establishes that sexual harassment in the workplace can create a hostile or offensive work environment even when economic benefits are not readily affected or perceived to be affected.<sup>23</sup>

## 2. *Title IX of the Education Amendments of 1972*

Congress enacted Title IX of the Education Amendments of 1972 to protect students and employees of educational institutions from sexual harassment.<sup>24</sup> Although there is no specific language in Title IX that explicitly mentions protection from any form of sexual violence, the Supreme Court later interpreted Title IX to include protection against sexual harassment.<sup>25</sup> The two seminal cases that imbued Title IX with the authority to protect against sexual violence in educational institutions were *Gebser v. Lago Vista Independent School District* and *Davis v. Monroe County Board of Education*.<sup>26</sup> In *Gebser v. Lago Vista*, Alida Gebser, a high school student, had a sexual relationship with one of her teachers.<sup>27</sup> Through this case, the Supreme Court established a two-part test to determine whether the plaintiff can recover damages.<sup>28</sup> In *Davis v. Monroe County*, fifth grader LaShonda Davis was sexually harassed by a fellow student.<sup>29</sup> The Supreme Court

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22. See generally CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979) (voicing the disadvantages of a hostile work environment created by sexual harassment).

23. Compare *Meritor Savings Bank*, 477 U.S. at 65-66 (contending that women can suffer psychological harm from harassment whether it results in the loss of a job benefit or not), with *Davis v. Bd. of Educ.*, 526 U.S. 629, 650, 653-54 (1999) (determining that sexual harassment creates a hostile environment, depriving students of the benefits or participation in an educational program or activity on the basis of sex).

24. See 20 U.S.C. §1681 (stating that this statute was meant to protect any person from being excluded from participation, denied the benefits, or subjected to discrimination from any educational program or activity receiving federal funds).

25. See *id.*; see also *Davis*, 526 U.S. at 650, 653-54 (holding schools may be liable for student-on-student harassment under Title IX); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292-93 (1998) (holding a school was not liable for harassment by a teacher under Title IX absent actual notice and deliberate indifference).

26. See *Davis*, 526 U.S. at 653-54; *Gebser*, 524 U.S. at 292-93.

27. See *Gebser*, 524 U.S. at 277-79 (narrating that Gebser sued the district under Title IX seeking damages for being subjected to sex-based discrimination in an education program).

28. See *id.* at 290-91 (requiring plaintiffs to show that first, the school knew of the harassment and second, that the school deliberately failed to respond to the known harassment in order to succeed on a Title IX claim).

29. See *Davis*, 526 U.S. at 633-34 (stating that Davis's mother sued on her behalf alleging that officials from the Monroe County Board of Education failed to address the

found that the school officials might have acted with “deliberate indifference” in response to Davis’s complaints of harassment, depriving LaShonda of an education free from sex-based discrimination promised under Title IX, and therefore reversed the circuit court’s dismissal of her complaint.<sup>30</sup> Although these cases were collectively a step forward toward the goal of protecting victims of sex-based harassment, the cases set a high bar for a plaintiff to successfully recover damages through a Title IX claim.<sup>31</sup>

### B. Review of the Split Between the Third and Fifth Circuits

The case law from which this circuit split derives began with the 1994 Fourth Circuit case *Preston v. Virginia*.<sup>32</sup> A year later, in *Lakoski v. James*, the Fifth Circuit categorically disagreed with the Fourth Circuit.<sup>33</sup> In 1996, the Sixth Circuit sided with the Fourth Circuit in *Ivan v. Kent State University*.<sup>34</sup> In that same year, the Seventh Circuit sided with the Fifth Circuit when the Seventh Circuit determined that Title VII is the “exclusive avenue of relief” for employment discrimination claims by medical residents who are employed at a teaching hospital.<sup>35</sup> The most recent case to revive this circuit split was the Third Circuit’s decision in *Doe v. Mercy Catholic*

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harassment).

30. See *id.* at 686, 653-54 (affirming that victims of sexual harassment are denied the equal access to education that Title IX means to protect by applying *Davis*’ factors to student-on-student harassment).

31. See Grayson Sang Walker, Note, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 110-12 (2010) (emphasizing the burdens for victims who attempt to seek relief for the sexual harassment they endure, including establishing (1) that the school had knowledge of the harassment and acted in deliberate indifference to addressing the harassment and (2) that the harassment created a hostile environment that deprived the victim of the benefits of the educational program or activity).

32. See *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 204-06 (4th Cir. 1994) (discussing a case of employment discrimination on the basis of sex in which an employee filed a claim against the college where she was employed alleging that the college denied her applications for promotions in retaliation).

33. See *Lakoski v. James*, 66 F.3d 751, 753, 758 (5th Cir. 1995) (concluding that Title VII provides sole relief for sex-based employment discrimination for rights created under Title VII).

34. See *Ivan v. Kent State Univ.*, No. 94-4090 1996 U.S. App. LEXIS 22269, at \*5-8 (6th Cir. July 26, 1996) (holding that individuals can pursue a private right of action for employment discrimination under Title IX, regardless of the availability of Title VII remedies).

35. See *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 862 (7th Cir. 1996); *Lakoski*, 66 F.3d at 753, 758.

*Medical Center*.<sup>36</sup>

*1. The Third Circuit Held that Both Title VII and Title IX Provide a Remedy for Employment Discrimination Claims on the Basis of Sex.*

The most recent Third Circuit case reversed the preceding district court case that concluded Title VII was the sole remedy for employees in federally-funded education programs to bring claims of discrimination based on sex.<sup>37</sup> In the case *Doe v. Mercy Catholic Medical Center*, plaintiff Jane Doe, a former resident at Mercy Catholic Medical Center, brought claims of sex discrimination, retaliation, and harassment against the private teaching hospital where she previously worked as a medical resident.<sup>38</sup> The Third Circuit outlined four principles that guided the reversal, including that Congress should determine whether it is undesirable to allow employees of education programs to circumvent Title VII's well-established administrative requirements through Title IX.<sup>39</sup> The Third Circuit arrived at these four principles by relying on the Supreme Court cases of *Johnson v. Railway Express Agency Inc.*, *Cannon v. University of Chicago*, *North Haven Board of Education v. Bell*, and *Jackson v. Birmingham Board Of Education*.<sup>40</sup>

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36. See *Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d 545, 553-58 (3d. Cir. 2017) (joining the Fourth and Sixth Circuit in determining that Title VII is not the sole remedy for employment discrimination in teaching hospitals).

37. See *id.* at 553-58, 567 (reversing the district court's decision that Title VII provides the sole remedy to medical residents who could also bring the same claim under Title VII).

38. See *id.* at 550-52 (alleging that the director of the hospital's residency program, Dr. James Roe, sexually harassed her and then retaliated against her after she reported him to Human Resources, and Mercy Catholic allegedly responded by suspending and then terminating Doe from its residency program).

39. See *id.* at 562-63 (determining that (1) medical residents are not limited to Title VII as the sole remedy from employment discrimination; (2) if they are, Congress should expressly determine that; (3) the provision in the statute that implies Title IX's private cause of action encompasses employees and students; and (4) the cause of action extends to employees of federally-funded education programs who allege sex-based retaliation claims).

40. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171, 173-75, 180 (2005) (explaining the four guiding principles used by the Third Circuit to support its decision that Doe could bring her claim under Title IX without filing a claim under Title VII); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 n.26 (1982) (finding Congress has often instituted overlapping remedies); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 693-98 (1979) (finding a private cause of action implied in Title IX); *Johnson v. Railway Express Agency Inc.*, 421 U.S. 459, 461 (1975) (holding an individual alleging employment discrimination is not deprived of remedies other than those available under Title VII);



2. *The Fifth Circuit Held that Title VII Provides the Sole Remedy for Employment Discrimination Claims on the Basis of Sex.*

Courts in the Fifth Circuit have consistently taken the opposite approach from the Third Circuit in deciding possible joint liability cases under Title VII and Title IX.<sup>41</sup> In the Fifth Circuit case *Lakoski v. James*, the claim that Congress intended for Title IX to offer a way to circumvent the administrative remedial process carefully crafted under Title VII did not persuade the court.<sup>42</sup> The court held that it could not say that Title IX provided a remedial scheme sufficiently comprehensive to indicate by itself that Congress intended to resolve employment discrimination claims via Title IX as opposed to Title VII.<sup>43</sup> The Fifth Circuit consequently denied claims brought by an employee of a medical university under Title IX, asserting that Title VII provides the exclusive remedy for claims brought by individuals alleging employment discrimination on the basis of sex.<sup>44</sup> Additionally, the Fifth Circuit claimed that allowing employees to bring a private right of action under Title IX would undermine Title VII's "carefully balanced remedial scheme for redressing employment discrimination."<sup>45</sup>

The district court in *Doe v. Mercy Catholic* also agreed with the Fifth Circuit by asserting that there could be no joint liability under Title IX for employees in private institutions that receive federal funds and engage in some sort of educational program or activity.<sup>46</sup> The district court's assertion

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*Doe*, 850 F.3d at 562-63.

41. See *Lakoski v. James*, 66 F.3d 751, 753, 758 (5th Cir. 1995) (delineating that Congress enacted Title VII to provide a remedy for victims of employment discrimination and enacted Title IX to enable federal agencies to withhold federal funds).

42. See *id.* at 752-53, 758 (stating that a professor filed suit against appellant medical school alleging that the denial of her tenure was based on sexual discrimination in violation of Title IX).

43. Compare *id.* at 754 (commenting that the only remedy expressly provided in Title IX is the termination of federal funds to an education institution that fails to adequately address allegations of known sexual harassment), with *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 552 (1982) (Powell, J., dissenting) (noting that Title IX explicitly contains only the one remedy of termination of funds to educational institutions).

44. *Lakoski* at 753, 758 (determining the main avenue for resolving claims of discrimination based on sex is through Title VII administrative process and not Title IX).

45. See *Lakoski*, 66 F.3d. at 755 (ruling that Congress did not intend for Title IX to be a mechanism in which employees could bypass Title VII's carefully balanced remedial scheme).

46. See *Doe v. Mercy Cath. Med. Ctr.*, 158 F. Supp. 3d 256, 260-61 (E.D. Pa. 2016) (finding that extending Title IX's coverage to the residency program in question would, in effect, rewrite the statute and overstep the bounds of judicial restraint).

further supports the Fifth Circuit's conclusion that Title VII provides a robust remedial process meant to serve as the sole method of relief for individuals alleging employment discrimination on the basis of sex.<sup>47</sup>

## II. ANALYSIS

### A. *The Fifth Circuit Correctly Determined that Title VII Provides the Sole Remedy for Individuals Seeking Relief for Employment Discrimination on the Basis of Sex in Federally Funded Educational Institutions.*

The Fifth Circuit correctly determined that Title VII offers the appropriate and sole remedy to victims of employment discrimination on the basis of sex.<sup>48</sup> The Fifth Circuit's thorough analysis concluded that Congress did not enact Title IX to provide a bypass to Title VII's specific and well-established remedial administrative procedures.<sup>49</sup> The Fifth Circuit highlighted three reasons why Title VII affords the exclusive remedy for claims of employment discrimination on the basis of sex.<sup>50</sup> First, the circuit court established that it does not believe that Congress intended for Title IX to be a bypass for Title VII's well-established remedial procedures.<sup>51</sup> Second, the court disagreed that the aggregate of *Cannon v. University of Chicago*, *North Haven Board of Education v. Bell*, and *Franklin v. Gwinnet County Public Schools* added up to an implied right of action that provides an implied remedy under Title IX.<sup>52</sup> The Fifth Circuit also distinguished these three

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47. *See id.*; *Lakoski*, 66 F.3d at 754, 756 (affirming that Title VII provides the sole remedy for individuals alleging sex-based employment discrimination because Congress did not intend for Title IX to provide a bypass to Title VII's well-established administrative remedial process).

48. *See Lakoski*, 66 F.3d at 751, 752 (reversing the judgment of the district court in favor of the university).

49. *See id.* at 753 (limiting the Court's holding only to individuals seeking money damages).

50. *See id.* at 753-54 (explaining the reasons why Title IX is not the appropriate remedy for victims of employment discrimination who could also bring a claim under Title VII).

51. *See id.* at 753; (noting that although the plaintiff had a colorable claim under Title VII, she did not pursue administrative remedies under that Title); *see also* 42 U.S.C. § 2000e-5(d)-(f) (2009) (establishing a specific administrative process that requires an individual to pursue administrative remedies before pursuing judicial redress).

52. *See Lakoski*, 66 F.3d at 754 (rejecting *Lakoski*'s "jurisprudential arithmetic" and not finding an implied remedy for employees discriminated on the basis of sex because the cases did not address the relationship between Title VII and Title IX). *But see Cannon v. Univ. of Chi.*, 441 U.S. 677, 709 (1979) (finding an implied private cause of action under Title IX for an individual against universities); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 n.26 (1982) (affirming that employment discrimination at educational

cases from the facts and legal questions presented in *Lakoski v. James*, specifically in relation to the analysis of Title VII and Title IX remedial processes.<sup>53</sup> Third, the court argues that “Title IX provides limited remedies for victims of employment discrimination.”<sup>54</sup>

*1. The Fifth Circuit’s Reading of Title VII and Title IX Correctly Establishes that Congress Intended Title VII to be the Primary Remedial Measure for Employment Discrimination Claims.*

Both circuits analyzed congressional intent to varying degrees, but the Fifth Circuit provided the more compelling argument to support Congress’s remedial intent.<sup>55</sup> The Fifth Circuit relied more heavily on its discussion of congressional intent for two parts of its analysis.<sup>56</sup> The Third Circuit only discussed congressional intent in the second part of its four-part argument and thus did not sufficiently address Congress’s intent for what remedies should exist under each statute.<sup>57</sup> The Fifth Circuit began its analysis by bringing to light the explicit remedial process that exists under Title VII; the same process which was circumvented in *Lakoski*.<sup>58</sup> The Fifth Circuit was not persuaded that Congress created Title IX to be a bypass of Title VII’s administrative process.<sup>59</sup> The Third Circuit, on the other hand, improperly asserted that Title VII’s concurrent applicability does not hinder Doe’s ability to seek relief under Title IX.<sup>60</sup>

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institutions receiving federal funds falls under Title IX); *Franklin v. Gwinnet Cty. Pub. Schs.*, 503 U.S. 60, 76 (1992) (finding that actions for money damages may be brought through the implied right of action under Title IX).

53. See *Lakoski*, 66 F.3d at 754 (emphasizing that in the three referenced cases, Title VII was not implicated).

54. See *id.* (explaining that the sole remedy for expressly stated in Title IX is the termination of federal funds).

55. See *id.*; see also *Doe v. Mercy Catholic Med. Ctr.*, 850 F.3d 545, 559, 564 (3d Cir. 2017) (questioning whether Congress intended for Title IX to bypass Title VII’s remedial scheme by allowing individuals to seek relief under Title IX for employment discrimination claims that could also be brought under Title VII).

56. See *Lakoski*, 66 F.3d at 755-57 (comparing the legislative histories of Title IX and Title VII).

57. See *Doe*, 850 F.3d at 562 (arguing that this remedial issue is a matter of “policy,” which courts have held need to be addressed by Congress, and not decided by the courts).

58. See *Lakoski*, 66 F.3d at 753 (referring to Title VII’s well-established remedial scheme that requires individuals to first seek administrative remedies before seeking redress in the courts).

59. See *id.*

60. Compare *id.* at 758 (concluding that Title VII and Title IX contain the same prohibitions against discrimination on the basis of sex, but Congress did not intend to

The Fifth Circuit broke down its congressional intent analysis into two portions.<sup>61</sup> In the first portion, the court effectively concluded that Congress intended for Title VII to include the primary damage remedy and therefore excluded a damage remedy under Title IX for individuals submitting a claim of employment discrimination.<sup>62</sup> The court relied on *Great American Federal Savings & Loan Ass'n v. Novotny* and *Brown v. GSA* to establish that Title VII is the exclusive remedy in cases where the right violated was initially created by Title VII because both cases stressed that a more “precisely drawn, detailed statute pre-empts more general remedies.”<sup>63</sup> In the second portion, the Fifth Circuit discussed the remedies that Congress wrote into Title VII and Title IX.<sup>64</sup>

The Third Circuit failed to properly analyze congressional intent and consequently failed to acknowledge that Congress intended for Title VII to be the sole relief for employment discrimination in educational institutions receiving federal financial assistance.<sup>65</sup> The Third Circuit primarily discussed congressional intent through the second prong of the four principles the court derived to support its decision.<sup>66</sup> The court cited *Brown v. GSA* and distinguished it from *Johnson v. Railway Express Agency, Inc.* to wrongly imply that *Johnson* points to Title VII not preempting other

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create mechanisms under Title IX with which individuals could bypass preexisting Title VII remedies), *with Doe*, 850 F.3d at 563-64, 566 (concluding that Doe could bring her retaliation and quid pro quo harassment claims under Title IX, but not reaching the hostile environment claim because it was time-barred).

61. *See Lakoski*, 66 F.3d at 754-57 (analyzing which remedies Congress and subsequent case law expressly provided remedies under Title IX and remedies Title VII).

62. *See id.* at 756, 758 (finding that Title VII's extension to local and state governments meant that Title IX did not intend to create a bypass for Title VII's remedial scheme).

63. *See id.* at 755. *Compare* *Brown v. GSA*, 425 U.S. 820, 835 (1976) (establishing that Title VII preempts § 1985 actions because otherwise a complainant would be able to avoid most if not all of Title VII's remedial administrative process), *with* *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 378 (1979) (holding that a violation of Title VII cannot also be a cause of action under § 1985(3)).

64. *See Lakoski*, 66 F.3d at 754, 756 (illustrating the contrast between remedies under Title VII, which allow individuals to seek redress for claims of employment discrimination, with remedies under Title IX, which allow federal agencies to withhold funding from educational institutions that do not address claims of employment discrimination brought against them).

65. *See Doe*, 850 F.3d at 562 (finding that Title IX's private cause of action applies to employees, as well as students, of federally funded educational institutions).

66. *See id.* at 562 (arguing that this issue is a matter of “policy” that should be decided by Congress and not decided in the courts).

available remedies in private employment.<sup>67</sup> Through this assertion, the Third Circuit missed the opportunity to thoroughly address congressional intent and instead inadequately used the precedent in *North Haven* and *Johnson* to argue that the Supreme Court has refused to decide on policy-based rationales.<sup>68</sup>

2. *A Private Right of Action for Damages Is Not Established Under Title IX Because the Cases Used by the Third Circuit are Distinguished from the Lakoski Case and a Well-Established Private Remedy Already Exists Under Title VII.*

The district court in *Lakoski* introduced three Supreme Court decisions to argue that, when read together, these cases allow for a private right of action to seek damages for employment discrimination claims under Title IX.<sup>69</sup> The Fifth Circuit correctly rejected the assertion that these cases amounted to an implied right of action because all three of these cases failed to address the relationship between the remedial processes established in Title VII and Title IX.<sup>70</sup> The Third Circuit failed to acknowledge and analyze the precedent set in *Lakoski* thoroughly and used the cases *North Haven Board of Education v. Bell* and *Cannon v. University of Chicago* in an attempt to once again construct a private right of action that allows for individuals to recover damages under Title IX.<sup>71</sup>

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67. See *id.* at 560-61 (noting that the court considered *Johnson* inapposite in *Brown* because private employment does not raise sovereign immunity issues). Compare *Brown*, 425 U.S. at 835 (1976), (holding that Title VII provides the exclusive remedy to federal employees for claims of employment discrimination), with *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459 (1975) (suggesting that a victim of employment discrimination is not limited to Title VII when seeking relief).

68. See *Doe*, 850 F.3d at 562 (dismissing the issue of bypassing Title VII's remedial scheme as a matter of policy that the Court should not rule on); *Johnson*, 421 U.S. at 459; (declining to express a preference for one remedy over another without Congressional guidance); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) (arguing that once Congress has made a decision about a policy matter, the Court is not free to ignore that decision).

69. See *Lakoski*, 66 F.3d at 753-54; *Cannon v. Univ. of Chi.*, 441 U.S. 677, 749 (1979) (holding that individuals denied admission on the basis of sex to an educational institution have an implied private right of action under Title IX); *North Haven*, 456 U.S. at 538 (upholding Title IX regulations prohibiting sex-based employment discrimination in federally funded educational institutions); *Franklin v. Gwinnet Cty. Pub. Schs.*, 503 U.S. 60, 76 (1992) (holding that a student harassed by her teacher could seek monetary damages in a private claim under Title IX).

70. See *Lakoski*, 66 F.3d at 754 (distinguishing *Cannon* and *Franklin* because neither case involved a claim of employee discrimination).

71. See *Doe*, 850 F.3d at 562 (finding that employees are encompassed by Title IX's

The Fifth Circuit was correct to dismiss Lakoski's argument on the basis that these cases were distinguished from the facts and legal premises set out in the *Lakoski* case.<sup>72</sup> The Fifth Circuit pointed out that *North Haven*, *Franklin*, and *Cannon* each failed to address the relationship between the remedial processes outlined in Title VII and Title IX, and specifically *Franklin* and *Cannon*, did not involve a claim of employment discrimination in a federally funded educational institution.<sup>73</sup> In *North Haven*, the court held that employment discrimination on the basis of sex is included within Title IX's broad discrimination prohibition.<sup>74</sup> Although this case thoroughly analyzed Congress's intent to extend Title IX to protect employees of educational institutions, the court does not conduct this analysis in relation to Title VII's preexisting protections of this same class of employees.<sup>75</sup> In *Cannon*, the court analyzed whether an implied right of action existed in the absence of an express right of action.<sup>76</sup> The application of the *Cort v. Ash* test determined whether Congress did intend to include an implied right of action for a certain class of individuals.<sup>77</sup> The court's analysis, however, did not include any mention of Title VII.<sup>78</sup> Therefore, the court did not properly consider Congress's intent in relation to a right already existing expressly

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private cause of action because the statutory language does not expressly exclude them).

72. See *Lakoski*, 66 F.3d at 754 (refusing to acknowledge that *Cannon*, *North Haven* and *Franklin* amounted to a private right of action available to victims of employment discrimination on the basis of sex).

73. See *id.* (distinguishing *North Haven*, *Franklin*, and *Cannon* from *Lakoski* because the cases did not directly involve a discussion around Title VII's remedial scheme while in *Lakoski*, circumventing Title VII's remedial scheme is the central issue).

74. See *North Haven*, 456 U.S. at 530 (holding that although Title IX does not expressly protect employees of federally funded educational programs or activities, the statute implies a broad intention to include any individual in the educational program or activity).

75. See *id.* at 537-38 (relying on Title IX's "program-specific" language and legislative history to affirm its extension to employees without addressing how this affects preexisting remedies applying to the same class of individuals).

76. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 678 (1979) (holding that even if Title IX does not expressly provide a private cause of action, courts may still find that Congress implied one by analyzing the statute with the four-steps from *Cort v. Ash*).

77. See *id.* at 688-89; see also *Cort v. Ash*, 422 U.S. 66, 78 (1975) (establishing the four factors that would indicate Congressional intent: (1) whether the statute is meant to benefit a special class of which the plaintiff belongs, (2) whether there is legislative intent to create a private remedy, (3) whether the remedy is consistent with the purposes of the legislation, and (4) whether implying a federal remedy is inappropriate because it concerns the States).

78. *Cort*, 422 U.S. at 78.

under Title VII.<sup>79</sup> Finally, in *Franklin*, the court held that relief through monetary damages was allowed under Title IX because any appropriate relief is available to remedy the violation of a federal right.<sup>80</sup> The court in *Franklin* relied heavily on the *Cannon* decision and similarly failed to consider the preexisting, well-established remedies available under Title VII for victims of employment discrimination on the basis of sex.<sup>81</sup>

The Third Circuit failed to directly address the Fifth Circuit's dismissal of a private right of action under Title IX and instead attempted to reestablish this right by arguing that Congress meant to paint Title IX's remedial measures with a broad stroke so as to not exclude employees in educational institutions that receive federal financial assistance.<sup>82</sup> The Third Circuit incorrectly concluded that Title IX's lack of explicit or implied exclusion of employees demonstrates that Congress intended for "persons" to include employees because "Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' if it had wished to restrict" Title IX's remedial scope.<sup>83</sup> The Third Circuit's holding directly contradicts the Fifth Circuit's holding regarding the application of *Cannon* and *North Haven* to reach the conclusion that an implied right of action exists under Title IX.<sup>84</sup> Additionally, the Third Circuit inadequately extended its analysis to include *Jackson v. Birmingham Board of Education* to support the assertion that the implied private cause of action derived from *North Haven* and *Cannon* explicitly extended to employees of educational institutions that receive federal financial assistance.<sup>85</sup> The Third Circuit incorrectly applied the

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79. See *Cannon*, 441 U.S. at 695-96 (comparing Title IX's implied rights with Title VI's implied but not its express rights).

80. See *Franklin v. Gwinnet Cty. Pub. Schs.*, 503 U.S. 60, 76 (1992) (determining that monetary damages were an appropriate relief under Title IX for individuals who were victims of discrimination on the basis of sex).

81. See *id.* at 72 (noting that in three previous cases where the Court found an implied right, it also found approved monetary damages, without mentioning Title VII).

82. See *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (arguing that Title IX's private right of action includes not only students but employees as well).

83. See *Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d 545, 562 (3d Cir. 2017) (interpreting Congress's lack of an explicit or implied exclusion of "employees" to mean that Congress intended for employees to be included under Title IX's remedial measures).

84. See *Cannon*, 441 U.S. at 709; *North Haven*, 456 U.S. at 535; see also *Lakoski v. James*, 66 F.3d 751, 754 (5th Cir. 1995) (distinguishing the facts in *Cannon* and *North Haven* to determine that these cases presented legal questions in which Title VII was not directly implicated and therefore did not adequately address the relationship between Title VII and Title IX).

85. Compare *Doe*, 850 F.3d at 562-63 (maintaining that the *Jackson* case supports a wide reading of Title IX to include all individuals who are victims of intentional sex

*Jackson* case because the court failed to adequately address the Fifth Circuit's pre-established argument that *North Haven*, *Franklin*, and *Cannon* do not amount to a private right of action under Title IX.<sup>86</sup>

3. *Title VII Expressly Provides Individuals with Administrative and Judicial Remedies While Title IX Expressly Provides Federal Agencies with the Ability to Withhold Funds to Address Known Employment Discrimination.*

The second part of the Fifth Circuit's congressional intent analysis addressed the express and implied remedies that Congress intended to provide under Title VII and Title IX.<sup>87</sup> The court carefully looked at the legislative histories to determine what Congress meant to accomplish with each statute.<sup>88</sup> The Fifth Circuit correctly concluded that although Congress essentially created two remedies for the same right, it did so by tailoring the remedies available to different individuals.<sup>89</sup> The remedies Congress created under each statute supported the Fifth Circuit's compelling reasoning for which statute should be used to protect victims in different instances of discrimination on the basis of sex.<sup>90</sup> The Fifth Circuit determined that Congress created a more robust and detailed remedy under Title VII in order for individuals like the plaintiff in *Lakoski* to seek relief under this statute

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discrimination), *with Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) (clarifying that Title IX's broad prohibition of discrimination on the basis of sex includes narrow exceptions, and an implied private right of action for victims of retaliation is not one of these narrow exceptions).

86. *See Doe*, 850 F.3d at 562 (finding an implied private right of action under Title IX by relying on an application of *Jackson* and *Gwinnett*).

87. *See Lakoski*, 66 F.3d at 755-57 (distinguishing between Title VII, which provides a remedy to individual victims of employment discrimination, and Title IX, which provides a remedy by which administrative agencies can withhold federal funds from educational institutions that do not address allegations of discrimination).

88. *Compare id.* (analyzing the timeline of Title VII's extension to local and state government employees as well as concluding that Congress did not intend for Title IX to be a mechanism which could be used to circumvent preexisting Title VII remedies), *with Doe*, 850 F.3d at 562 (declaring that the issue of whether an individual could circumvent Title VII's remedial process was a policy issue that Congress has not expressly settled but that is up to Congress to address).

89. *See Lakoski*, 66 F.3d at 757 (concluding that Congress meant to provide individuals facing discrimination with administrative and judicial remedies under Title VII, and to empower federal agencies to withhold federal funds from educational institutions that fail to address employment discrimination).

90. *See id.* (explaining Title IX was intended to bolster the existing prohibitions on sex discrimination under Title VII).



instead of under other less robust and established statutes such as Title IX.<sup>91</sup>

First, the Fifth Circuit adequately pointed out that Congress created only one main remedy expressly stated under Title IX.<sup>92</sup> The Fifth Circuit concluded that among Title IX's limited remedies, Congress only expressly provided the termination of federal financial assistance as the remedy for violations of Title IX.<sup>93</sup> In *Doe v. Mercy Catholic*, the Third Circuit did not adequately analyze the implications surrounding the conclusions various courts have reached and thus also failed to fully explore the relationship between the remedial schemes of each statute.<sup>94</sup> Second, the Fifth Circuit discussed separate cases in which courts have found that Title VII preempts Section 1983 and Section 1985 suits based on violations of Title VII rights.<sup>95</sup> The Fifth Circuit was correct in using Title IX's limited remedial scheme along with the cases that hold Title VII to preempt other less specific remedies to conclude that Title VII also preempts the less specific Title IX remedial scheme.<sup>96</sup>

In the Fifth Circuit's analysis of Title VII as related to Section 1983 claims, the court used *Great American Federal Savings & Loan Ass'n v. Novotny* to correctly establish that in a fact pattern similar to the *Lakoski* case, the Supreme Court ruled that Title VII preempts other remedies that if asserted could circumvent Title VII's remedial administrative scheme.<sup>97</sup> The

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91. *See id.* at 755-56 (reasoning that Congress intended to strengthen the already existing Title VII prohibition against discrimination on the basis of sex in federally funded educational institutions through Title IX but did not intend for Title IX to be a way for individuals to circumvent Title VII's established remedial procedures).

92. *Compare id.* at 754-55, *with* *Cannon v. Univ. of Chi.*, 441 U.S. 667, 717 (1979) (finding an implied remedy in Title IX, although it was not expressly provided in the statute), *and* *Franklin v. Gwinnet Cty. Pub. Schs.*, 503 U.S. 60, 76 (1992) (holding that individuals can seek relief under Title IX for claims of intentional discrimination).

93. *See Lakoski*, 66 F.3d at 754; *see also* 20 U.S.C. § 1682 (2012) (discussing the protections available to victims of sex-based discrimination).

94. *See Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d 560, 563 (3d Cir. 2017) (overlooking the role that Title VII's remedial scheme plays in relation to Title IX's remedial process).

95. *See Lakoski*, 66 F.3d at 755 (declaring through these cases that the well-established remedial structure of Title VII provides the exclusive remedy for Title VII rights); *see also* *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 377 (1979) (holding that Title VII precludes § 1985 claims when these claims are sought in violation of a Title VII right); *Irby v. Sullivan*, 737 F.2d 1418, 1428 (5th Cir. 1984) (holding that Title VII precludes § 1983 claims).

96. *See Lakoski*, 66 F.3d at 755 (questioning Title IX's limited remedies and holding that Title VII's established remedies preclude more general and less established statutory remedies).

97. *See id.* at 755 (determining that for rights created under Title VII, Title VII

*Novotny* case, along with the *Brown v. GSA* case, supports the Fifth Circuit's correct assertion that Congress created Title VII's remedial scheme with the purpose of creating a "precisely drawn, detailed statute" that "preempts more general remedies."<sup>98</sup> Since the Third Circuit did not thoroughly consider the precedent set by the Fifth Circuit, the Third Circuit failed to address why Title IX should be a bypass to Title VII's established remedial process.<sup>99</sup>

*B. The Third Circuit Incorrectly Decided Doe v. Mercy Catholic Because It Failed to Distinguish Jackson from Lakoski and Failed to Address the Federal Financial Assistance Requirement.*

*1. The Supreme Court's Decision in Jackson v. Birmingham Board of Education is Distinguished from Lakoski v. James.*

The Third Circuit determined that a medical resident could bring a claim under Title IX without having to bring a claim under Title VII.<sup>100</sup> The Third Circuit relied on *Jackson v. Birmingham Board of Education* to hold that the implied right of action the court derived from *Cannon* and *North Haven* extended to "employees of federally-funded education programs who allege sex-based *retaliation* claims under Title IX."<sup>101</sup> An important distinction noted by the Third Circuit is that *Jackson* was decided after the Fifth Circuit decided *Lakoski* in 1995.<sup>102</sup> The Third Circuit ineffectively relies on the *Jackson* decision to support its holding without considering that this case is

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provides the exclusive remedy).

98. See *Novotny*, 442 U.S. at 377; *Brown v. GSA*, 425 U.S. 820, 832 (1976) (extrapolating that Congress wrote specific rights and remedial structures into Title VII with the express purpose of Title VII preempting less specific remedial measures that seek to provide relief for the violation of rights created under Title VII).

99. Compare *Lakoski*, 66 F.3d at 755 (maintaining that Title IX's limited remedial structure only expressly includes the termination of federal funding), with *Doe*, 850 F.3d at 560, 563 (overlooking Title VII's well-established remedial scheme as compared to Title IX's limited remedial scheme).

100. See *Doe*, 850 F.3d at 563-64 (concluding that employees of educational institutions that receive financial funds have a private right of action under Title IX regardless of whether they could also bring that claim under Title VII).

101. See *id.* at 562 (emphasis added) (arguing specifically that retaliation against an employee for complaining about an instance of discrimination on the basis of sex is intentional sex discrimination); see also *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690-92 (1979).

102. See *Doe*, 850 F.3d at 563 (contrasting the assertion in *Jackson* that Title IX beneficiaries include anyone subjected to sex-based discrimination with the Fifth Circuit assertion ten years prior in *Lakoski* that Title VII is the sole remedy for medical residents who are victims of sex-based employment discrimination).

legally distinguished from *Lakoski* because *Jackson* does not adequately analyze the relationship between Title VII's and Title IX's remedial measures and procedures.<sup>103</sup>

The Fifth Circuit properly dismissed the argument in *Lakoski* regarding the aggregate of the *Cannon*, *Franklin*, and *North Haven* cases because each of these cases did not thoroughly acknowledge and analyze the relationship between Title IX and Title VII in relation to each statute's remedial procedures.<sup>104</sup> In contrast with these three cases, the court in *Jackson* did address, to a limited extent, the relationship between Title VII and Title IX in terms of the remedial procedures expressed and implied in each statute.<sup>105</sup> The Third Circuit adopted for a broader reading of Title IX as espoused in *Jackson* and which allows Title IX to extend to all individuals and not just individuals who cannot succeed on a Title VII claim.<sup>106</sup> The Third Circuit was wrong in its analysis because, in *Jackson*, the Supreme Court held that Title VII and Title IX are vastly different statutes and did not address the relationship between each statute's remedial measures.<sup>107</sup> Although the court briefly touched on the relationship between these two statutes, this analysis did not adequately address whether Title IX could be used to bypass Title VII's remedial procedures.<sup>108</sup>

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103. *See id.* at 562 (rationalizing that if recipients of federal financial assistance could retaliate freely, then individuals who witness sex-based discrimination in the institutions where they work would be dissuaded from reporting the discrimination).

104. *See Lakoski*, 66 F.3d at 753-54 (rejecting *Lakoski*'s claims that the aggregate of the *Cannon*, *North Haven*, and *Franklin* cases create an implied right of action because these cases failed to address Title IX in relation to Title VII).

105. *See Jackson*, 544 U.S. at 174-75 (comparing Title IX's broad language, which implicitly prohibits retaliation against someone who complains about discrimination on the basis of sex, with Title VII's express and specific prohibitions against retaliation against someone who complains about employment discrimination).

106. *See Doe*, 850 F.3d at 563 (noting that Congress's use of the broad term "discrimination" indicates its intention to allow this statute to broadly cover individuals who experience a wide range of intentional unequal treatment on the basis of sex).

107. *See Jackson*, 544 U.S. at 168, 175 (explaining that Title VII's prohibition against retaliation is expressly mentioned while Title IX does not expressly mention this prohibition because Title IX is written as a broad prohibition against discrimination and includes exceptions to this broad prohibition while Title VII was written to specifically list the conduct it covers).

108. *See id.* at 175 (finding that since "Congress did not list any specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered.").

2. *The Third Circuit Incorrectly Decided Doe v. Mercy Catholic Medical Center Because Receiving Medicaid Funds that Stem from Contracts of Insurance Does Not Meet the Standard of Receiving Federal Financial Assistance Required by Title IX.*

The Third Circuit did not address in depth whether the type of funds received by Mercy Catholic Medical Center meet the standard required to be considered an educational institution receiving federal funds as required by Title IX.<sup>109</sup> In *Doe*, the Third Circuit assumed that Mercy Catholic received federal financial assistance even when the medical center argued that the Medicare payments intended to supplement residency training costs instead “stem from contracts of insurance.”<sup>110</sup> Mercy Catholic denied that the federal funds received would qualify as the federal funds required by Title IX.<sup>111</sup>

The Third Circuit did not address the issue that the Medicare payments Mercy Catholic receives do not meet the necessary standard of federal financial funds because Mercy Catholic did not raise this issue in the district court.<sup>112</sup> However, this question may guide future courts to distinguish the Third Circuit’s incorrect decision and correctly side with the Fifth Circuit’s opposing view.<sup>113</sup> The Third Circuit emphasized the importance and far-reaching effects that its decision could have on future cases.<sup>114</sup>

The Third Circuit incorrectly interpreted the “contracts of insurance” to mean traditional contracts such as those involving “individual bank accounts

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109. See 20 U.S.C. §§ 1681-82 (2012) (defining “federal financial assistance” to include the award or grant of money or other assistance in nonmonetary funds, but not contracts of guaranty or insurance by the federal government).

110. See *Doe*, 850 F.3d at 558 (denying review of Mercy Catholic’s argument in the circuit court because Mercy Catholic did not raise the issue in the district court).

111. See *id.* at 558; see also Brief for Appellee at 25, *Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d 545 (3d Cir. 2017) (No. 16-1247) (arguing that the Medicare funds received by Mercy Catholic fall under the express exclusion of the type of federal financial assistance statutorily required under Title IX).

112. See *Doe*, 850 F.3d at 558 (declining to address this argument in accordance to procedural rules and sending the issue back to the lower courts to decide).

113. See *Lakoski v. James*, 66 F.3d 751, 758 (5th Cir. 1995); *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 865-66 n.4 (7th Cir. 1996) *abrogated in part by* *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009); *Preston v. Virginia*, 31 F.3d 203 (4th Cir. 1994) (disagreeing on whether employees at private medical residency programs that receive federal funds have concurrent liability under Title IV and Title IX).

114. See *Doe*, 850 F.3d at 552 (emphasizing that this question of first impression touches on the administrative power to address gender discrimination in medical residency programs through existing federal law).

in a bank with federally guaranteed deposits.”<sup>115</sup> The Third Circuit’s assumption that the Medicaid contract payments qualify as “federal financial assistance” is incorrect and could lead future courts to distinguish the Third Circuit’s argument that Title VII and Title IX provide concurrent liability for victims of employment discrimination to be able to seek relief under both statutes.<sup>116</sup> If the Medicare payments received by Mercy Catholic are indeed contracts of insurance, then they would be a type of federal financial assistance that is expressly excluded from the Title IX definition of federal financial funds.<sup>117</sup> Regulations under Title IX clarify the types of payments that qualify as federal financial assistance and specifically states that federal financial assistance includes “[a]ny other contract, agreement, or arrangement that has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.”<sup>118</sup>

In Footnote 2 of Mercy Catholic’s appellee brief, Mercy Catholic Medical Center asserts that the payments made through the Medicare and Medicaid programs are defined as federal health insurance programs.<sup>119</sup> Doe and the amicus brief filed in favor of Doe, argue that the Medicare and Medicaid insurance funds qualify as Graduate Medical Education (“GME”) funding and thus meet the threshold of federal financial assistance required to establish Title IX liability.<sup>120</sup> On the other hand, Mercy Catholic argues that

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115. *Id.* at 558 (contending that all federal civil rights statutes intend to refer to contracts in the traditional meaning of the term) (citing *United States v. Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1048 (5th Cir. 1984)).

116. *See Doe*, 850 F.3d at 558 (presuming without deciding that Mercy Catholic receives the type of “federal financial assistance” statutorily required under Title IX, leaving it for the district court to address on remand).

117. *See* 20 U.S.C. § 1685 (2012) (requiring the educational program or activity to receive federal financial assistance in order for it to fall under the purview of Title IX); *see also* 45 C.F.R. § 618.105 (2012) (defining “federal financial assistance” as excluding federal contracts of guaranty or insurance).

118. *See* 45 C.F.R. § 618.105 (2012) (defining “federal financial funds” and providing the statutory exclusions for the types of funds and payments that do not qualify as federal financial assistance to an educational program or activity as required under Title IX).

119. *See* Brief for Appellee, *supra* note 111, at 25 n.2 (noting that federal insurance is a type of guarantee of insurance that is excluded from Title IX); *see also* 42 U.S.C. § 1395; *Thomas Jefferson Univ. Hosp. v. Shalala*, 512 U.S. 504, 506-07 (1994) (noting that Medicare is a federally funded health insurance program for elderly and disabled patients).

120. *See* Brief for Appellant at 13, *Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d 545 (3d Cir. 2017) (No. 16-1247); Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant at 13-14, *Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d 545 (3d Cir. 2017) (No. 16-1247) (defining GME funding as direct or indirect payments received through the Federal Medicare program to cover the costs related to educating medical residents).

the GME payments funded through Medicare and Medicaid payments qualify as “contracts of insurance” and are thus explicitly excluded as the type of federal financial assistance required under Title IX.<sup>121</sup> In its brief, Mercy stated that it receives its federal financial payments directly from the Department of Health and Human Services (“HHS”) for services rendered to elderly and disabled patients.<sup>122</sup> Mercy clarifies that “[t]he GME payments are not ‘federal assistance,’ but rather, federal health insurance payments made directly to the hospital on behalf of the elderly and disabled patients to whom Mercy has provided hospital services.”<sup>123</sup>

In Footnote 2, Mercy Catholic Medical Center asserts that whether Medicare and Medicaid reimbursements constitute payments under a federal contract has not been addressed or resolved in conjunction with the statutory requirements expressed under Title IX.<sup>124</sup> While the Third Circuit, in following procedural rules, does not address this argument, it still explains that the contracts of insurance brought up in Mercy Catholic’s brief tend to refer to traditional contracts “like those involving ‘individual bank accounts in a bank with federally guaranteed deposits.’”<sup>125</sup> The Third Circuit’s explanation is wrong because these contracts of insurance are expressly the kind that are included as a statutory exception under Title IX.<sup>126</sup>

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121. See Brief for Appellee, *supra* note 111, at 7-8 n.2.

122. *Id.* at 7-8; see also 42 U.S.C. § 1395ww(a)(4) (regarding the classification of federal payments to hospitals for different types of inpatient services).

123. See Brief for Appellee at 7-8 n. 2, *Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d 545 (3d. Cir. 2017) (No. 16-1247); see also 42 U.S.C. § 1395ww(h) (2018); 42 U.S.C. § 1395ww(d)(5)(B) (2018) (addressing the direct and indirect costs for which HHS provides reimbursements to medical hospitals which include the costs of graduate medical education).

124. See Brief for Appellee, *supra* note 111, at 7-8 n.2 (noting that in *Henschke v. New York Hosp. Cornell Med. Ctr.*, 821 F. Supp. 166, 172 (S.D.N.Y. 1993), the district court held in abeyance the question of whether Title IX covered the university hospital based on whether the hospital receives the type of federal financial assistance required to meet the requirements of Title IX).

125. See *Doe*, 850 F.3d at 558 (assuming without discussion that these types of contracts of insurance should be treated as traditional contracts) (citing *United States v. Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1048 (5th Cir. 1984)).

126. Compare Brief for Appellee, *supra* note 111, at 7-8 n.2 (arguing the Medicare payments received to support the teaching hospital are contracts of insurance that do not meet the definition of federal financial funds required under Title IX), with 45 C.F.R. § 618.105 (1972) (defining “federal financial funds” and providing the statutory exclusions under Title IX).

## III. POLICY RECOMMENDATION

The Third Circuit's decision that remedial joint liability exists under Title VII and Title IX should not set a precedent for future courts.<sup>127</sup> The attempt to broadly apply Title IX to instances of discrimination already covered under Title VII goes against the interest of strengthening protections for victims of sexual harassment in the workplace. Applying Title IX's less established and unclear remedial process could yield inconsistent results in the courts. Title IX does not provide for a clear set of procedural guidelines that could be applied consistently and thoroughly to employment discrimination claims.<sup>128</sup> Instead, Title IX relies on clarification from the Department of Education's Office of Civil Rights ("OCR") to interpret Congress's intent through nonbinding policy documents.<sup>129</sup>

The Fifth Circuit's legal conclusion that Title VII is the sole remedy for victims of employment discrimination on the basis of sex supports the compelling policy interest that Title VII's robust remedial scheme should not be weakened by the creation of competing remedies.<sup>130</sup> Congress expressly created the rights and supported these rights with a robust remedial scheme under Title VII to protect victims of sex-based discrimination in the workplace.<sup>131</sup> Title VII provides a solid set of remedial measures that should not be undermined by seeking relief through other recourses, especially if these recourses are more general and less established.<sup>132</sup> To strengthen the protections for victims of employment discrimination on the basis of sex,

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127. *See Doe*, 850 F.3d at 560 (holding that Title VII and Title IX allow for joint liability under which employees could seek relief for employment discrimination using either statute).

128. *See* 20 U.S.C. §§ 1681-88 (2012) (codifying into law protections against discrimination on the basis of sex in educational programs or activities that receive federal financial assistance).

129. *See, e.g., See, e.g., Dear Colleague Letter from Candice Jackson, Acting Assistant Sec'y for the Office of Civil Rights, Dep't of Educ. 1* (Sept. 22, 2017) (on file with Dep't of Educ.) (implementing Title IX's regulatory requirements through nonbinding policy manuals and guidance).

130. *See Lakoski v. James*, 66 F.3d 751, 758 (5th Cir. 1995) (holding that Title VII provides the sole remedy for individuals alleging employment discrimination on the basis of sex and that Congress did not intend for Title IX to provide a bypass to Title VII's well-established administrative remedial process).

131. *See* 42 U.S.C. § 2000e-2 (2010) (codifying protections against discrimination on the basis of sex in the workplace); 29 C.F.R. § 1604.11 (2018) (establishing sexual harassment as a violation of section 703 of Title VII).

132. *See id.* (providing a robust, congressionally mandated administrative and judicial process for individuals who have experienced employment discrimination on the basis of sex).

future courts should determine that Title VII preempts all other less established remedies for the rights initially created under Title VII.<sup>133</sup>

#### IV. CONCLUSION

The Fifth Circuit correctly decided that Title VII is the sole avenue for individuals to file claims of employment discrimination on the basis of sex in educational institutions such as medical residency programs that receive federal financial assistance.<sup>134</sup> The Fifth Circuit used a three-part test to comprehensively analyze the role of Title VII and Title IX and correctly determine that Title VII provides the most adequate and consequently sole remedy.<sup>135</sup> First, the court analyzed the congressional intent and determined that Congress did not intend to create a bypass to Title VII's robust remedial process through the provisions established by Title IX.<sup>136</sup> Second, the court determined that the aggregate of *Cannon v. University of Chicago*, *North Haven Board of Education v. Bell*, and *Franklin v. Gwinnet County Public Schools* cases did not create an implied right of action that provides a remedy under Title IX.<sup>137</sup> Finally, the court concluded that Title IX's limited established remedies for claims of employment discrimination on the basis of sex indicate that Title VII was created as the main procedural avenue under which to bring these claims.<sup>138</sup> As such, the Fifth Circuit was correct in concluding that Title VII's remedial process preempts Title IX and is the sole remedy for claims of employment discrimination on the basis of sex.

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133. See *Lakoski*, 66 F.3d at 755 (holding that Title VII's precise, comprehensive, and well-established remedial process preempts Title IX's unclear and unestablished remedial process).

134. See *id.* at 758 (concluding that Title VII is the sole remedy for employment discrimination on the basis of sex for rights created under Title VII).

135. See *id.* at 758 (concluding that Title VII's well-established remedial process preempts other less specific remedies).

136. Compare *id.* at 758 (employing a two-step congressional intent analysis that pointed to Congress not intending for Title IX to provide a bypass to Title VII's remedial process), with *Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d 545, 560-63 (3d. Cir. 2017) (overlooking congressional intent relating to the relationship between Title VII's and Title IX's remedial processes).

137. See *Lakoski*, 66 F.3d at 753 (dismissing with the argument that the aggregate of the *Cannon*, *North Haven*, and *Franklin* cases create an implied right of action because these cases failed to address Title IX in relation to Title VII).

138. See *id.* at 754 (establishing that the only remedy expressly provided in Title IX is the termination of federal funds to an educational institution that fails to adequately address allegations of known sexual harassment).