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## An Expansive View of “Federal Financial Assistance”

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**ABSTRACT.** Pursuant to the Spending Clause, the federal government can attach conditions to the aid it grants. Grantees receive that aid so long as they agree to take – or not take – some action. Title VI, Title IX, Section 504 of the Rehabilitation Act, the Age Discrimination Act, and Section 1557 of the Patient Protection and Affordable Care Act are the antidiscrimination laws passed under the Spending Clause, and they have what this Essay dubs “ongoing” conditions. In exchange for federal financial assistance, funding recipients agree to a continuous, unending requirement: avoid discriminating on the basis of certain protected characteristics. Violators risk funding cutoffs, as well as private and public enforcement. But “federal financial assistance” is ill-defined. Though direct federal grants are clearly encompassed by the phrase, are low-interest federal loans like those paid out during the COVID-19 pandemic? What about tax exemptions, deductions, and credits? Or innovative forms of federal benefits yet to be developed? Courts confront these questions with little direction, leading to inconsistent results.

The nature of ongoing conditions adds special difficulties to this freehand approach because (1) funding recipients might not know they are funding recipients until they have already violated the terms of their agreement and risk being penalized, and (2) potential plaintiffs cannot know if they can hold bad actors accountable, casting a chilling effect over litigation. This Essay identifies these problems and examines them in practice before offering a solution to provide parties with both clarity and notice. Instead of creating minute distinctions between forms of aid which have more in common than not, this Essay argues that the definition of “federal financial assistance” should be expansively construed to include all federal benefits that do not compensate for services rendered.

### INTRODUCTION

A student attending a public high school can sue their school under Title IX if they are discriminated against on the basis of their sex.<sup>1</sup> If the facts are otherwise the same, but the school is a private high school, the student can still file suit so long as that school accepts federal grants to supplement services like their

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1. See, e.g., *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999).

free-lunch program or bus system.<sup>2</sup> But a student who attends a private school that receives an income-tax exemption but no direct grants from the federal government does not know whether they can sue their school under Title IX.<sup>3</sup> In fact, not even the *school* knows if it can be sued. That, for many reasons—among them, notice, fairness, and clarity—is a problem.

Title IX is a “Spending Clause” statute.<sup>4</sup> Spending Clause statutes are contractual in nature.<sup>5</sup> The federal government grants financial assistance and, in turn, recipients “agree to comply with federally imposed conditions.”<sup>6</sup> If a recipient fails to comply with the statute’s requirements, the federal government may withhold all or part of the program’s funds.<sup>7</sup> The antidiscrimination or civil-rights Spending Clause statutes specifically require recipients of “[f]ederal financial assistance”<sup>8</sup> to avoid discriminating on the basis of protected characteristics in exchange for funding. These statutes are Title VI of the Civil Rights Act of 1964,<sup>9</sup> Title IX of the Education Amendments of 1972,<sup>10</sup> Section 504 of the

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2. See, e.g., *Valesky v. Aquinas Acad.*, No. 09-800, 2011 WL 4102584, at \*10-12 (W.D. Pa. Sept. 14, 2011).
  3. See, e.g., *Buettner-Hartsoe v. Balt. Lutheran High Sch. Ass’n*, No. 20-3132, 2022 WL 2869041, at \*3 (D. Md. July 21, 2022) (“Neither the Supreme Court nor the United States Court of Appeals for the Fourth Circuit have directly addressed whether tax-exempt status under § 501(c)(3) constitutes federal financial assistance for purposes of Title IX.”).
  4. See, e.g., Terry Jean Seligmann, *Muddy Waters: The Supreme Court and the Clear Statement Rule for Spending Clause Legislation*, 84 TUL. L. REV. 1067, 1068-70 (2010); see also U.S. CONST. art. I, § 8, cl. 1 (stating that Congress has the power to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defense and general Welfare of the United States”).
  5. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1570 (2022) (“Our later cases . . . clarify[] that our consideration of whether a remedy qualifies as appropriate relief must be informed by the way Spending Clause ‘statutes operate’: by ‘conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.’” (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998))).
  6. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).
  7. See, e.g., Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 YALE L.J. 248, 251-52 (2014) (providing background on funding cut-offs).
  8. The phrase “Federal financial assistance” is originally used in Section 601 of the Civil Rights Act of 1964 (“Title VI”), 42 U.S.C. § 2000d (2018). It has since been adopted in the context of other antidiscrimination Spending Clause statutes. Cf. *McGlotten v. Connally*, 338 F. Supp. 448, 460-61 (D.D.C. 1972) (holding that federal tax benefits count as “Federal financial assistance”).
  9. 42 U.S.C. § 2000d (2018) (prohibiting discrimination on the basis of race, color, or national origin in any program receiving federal financial assistance).
  10. 20 U.S.C. §§ 1681-1683 (2018) (prohibiting discrimination on the basis of sex in education programs and activities that receive federal financial assistance).

Rehabilitation Act of 1973 (Rehab Act),<sup>11</sup> the Age Discrimination Act of 1975,<sup>12</sup> and Section 1557 of the Patient Protection and Affordable Care Act<sup>13</sup> (ACA or Affordable Care Act).<sup>14</sup>

But although courts have addressed the contractual relationship between funding recipients and the federal government,<sup>15</sup> no circuit precedent offers a clear interpretation of what is encompassed by “federal financial assistance.” And while scholarship discusses important related subjects, little has been written about defining federal financial assistance generally, likely because the phrase’s ambiguity deters litigation (and thus, limits available case law to analyze).<sup>16</sup> Some regulations offer up direction, but they too avoid offering a universal understanding.<sup>17</sup>

There is an urgent need to understand what federal financial assistance means in the context of the civil-rights Spending Clause statutes because those five laws have “ongoing” requirements for funding recipients.<sup>18</sup> That is, in general, a program immediately knows it is the recipient of federal financial assistance because it receives a benefit *after* it fulfills the initial terms of the agreement it has with the government. But when a benefit is provided *up front* with a

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11. 29 U.S.C. § 794 (2018) (prohibiting discrimination based on disability in programs that receive federal financial assistance).
  12. 42 U.S.C. §§ 6101-6102 (2018) (prohibiting discrimination based on age in programs that receive federal financial assistance).
  13. 42 U.S.C. § 18116 (2018) (prohibiting discrimination on the basis of race, national origin, ethnicity, sex, disability, and age in health programs or activities that receive federal financial assistance).
  14. For more on these statutes, see CHRISTINE J. BACK, CONG. RSCH. SERV., LSB10775, CIVIL RIGHTS REMEDIES IN *CUMMINGS* AND IMPLICATIONS FOR TITLE VI AND TITLE IX 1-2 (2022).
  15. For example, the Supreme Court interpreted who is a “recipient” of federal financial assistance in *Grove City College v. Bell*, 465 U.S. 555, 570-74 (1984); *U.S. Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597, 607 (1986); and *National Collegiate Athletic Ass’n v. Smith*, 525 U.S. 459, 468-69 (1999).
  16. See generally discussion *infra* Part IV (proposing a clearer framework by which to define federal financial assistance). To be sure, there is some discussion on the subject. See, e.g., Campbell Sode, *Unlocking Accommodations in Religious Private Schools*, 116 NW. U. L. REV. ONLINE 171, 181-84 (2021). But the limited scholarship available focuses on whether tax exemptions, specifically, qualify as federal financial assistance, rather than examining the nature of federal financial assistance itself.
  17. Compare 34 C.F.R. § 106.2(g) (2023) (defining federal financial assistance for Title IX purposes in Department of Education (DOE) regulations), with 28 C.F.R. § 42.102(c) (2023) (defining federal financial assistance differently for Title VI in Department of Justice (DOJ) regulations).
  18. There are other kinds of ongoing Spending Clause statutes, like 18 U.S.C. § 666(a)(2) (2018), which requires programs receiving federal funds to avoid soliciting or accepting bribes. They make up an important subclass of Spending Clause legislation.

continuing requirement – in this context, a requirement to not discriminate – an unsettled definition of federal financial assistance means an entity might not realize they have agreed to comply with federal antidiscrimination law until it is already being sued or losing the financial assistance. And on the flip side, survivors of discrimination do not know if they can hold parties accountable before bringing a lawsuit, casting a chilling effect over litigation against discriminatory practices.<sup>19</sup>

This Essay seeks to contribute to the limited literature on what federal financial assistance encompasses by advocating that courts interpret federal financial assistance to encompass all federal benefits that do not compensate for services rendered. It argues that the antidiscrimination Spending Clause statutes make it clear that the term federal financial assistance is not intended to be jealously guarded. In enacting Title VI, as well as the other antidiscrimination statutes, Congress's purpose was to reduce or eliminate the use of federal dollars in upholding the existence of discriminatory organizations.<sup>20</sup> That sweeping purpose, which the Supreme Court has recognized several times over,<sup>21</sup> suggests courts should adopt an expansive interpretation when examining whether some kind of aid is federal financial assistance. While the delta between this Essay's proposal and the courts' current approach means more defendants would be liable, it also means far more people would be protected under the civil-rights Spending Clause statutes. This proposal manages to be consistent with the purpose and structure of the antidiscrimination Spending Clause statutes without radically reshaping the law.

Part I lays out the background of the Spending Clause, including the anti-discrimination statutes passed under Congress's spending power. Part II lays out the landscape of cases that have taken up the question of whether tax exemptions create liability under the antidiscrimination Spending Clause statutes. In doing so, it identifies the ad hoc strategy courts employ when confronting unfamiliar forms of federal benefits. Part III then pulls several threads together to explain that federal financial assistance should be construed broadly and proposes a framework for doing so. Before concluding, Part IV discusses the implications of the status quo and of this Essay's proposal.

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19. One reason for this chilling effect is that civil-rights lawyers who typically work on contingency can be hesitant to bring cases in unsettled areas of law.

20. See *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992) (“Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.”).

21. See, e.g., *Cannon v. Univ. of Chi.*, 441 U.S. 677, 703, 709 (1979) (reading Title IX expansively to hold that, like Title VI, the statute implied a private cause of action for victims of illegal discrimination).

## I. THE OPERATION AND PROTECTION OF SPENDING CLAUSE STATUTES

Article I, Section 8, Clause 1 of the Constitution—the Spending Clause—enumerates that Congress has the power to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defense and general Welfare of the United States.”<sup>22</sup> Acts passed pursuant to this power are known as Spending Clause statutes and operate as contracts between funding recipients and the government. Though the terms of each individual contract might be different, the basic structure remains consistent: in exchange for federal funds, the recipient agrees to do—or not do—something.

Congress’s spending power ties nonfederal actors to the federal government through its conditions. For example, Congress uses its spending power to simultaneously offer state and local agencies grants to administer food stamps and demand that by accepting those grants, agencies agree to abide by certain requirements, like implementing processes for when someone’s benefits can be cut off.<sup>23</sup> Because the “federal” in federal financial assistance refers to where the aid is coming from, rather than to whom it is going, Congress’s ability to place conditions on grant recipients extends beyond just state actors. That is, a private health insurance company and a state-run Medicaid program that both accept federal grants from the same agency might be required to abide by similar conditions on when they can and cannot deny coverage for preexisting medical conditions.

Spending Clause statutes are sometimes one-off agreements with requirements that need to be met up front for funds to be disbursed. In exchange for raising the drinking age to twenty-one, for example, states received an additional five percent of federal highway funds.<sup>24</sup> But certain kinds of Spending Clause statutes, including the antidiscrimination civil-rights laws—Title VI and Title IX, Section 504 of the Rehab Act, the Age Discrimination Act, and Section 1557 of the Affordable Care Act—contain ongoing requirements. These statutes condition grants of federal financial assistance on an entity’s continuous agreement to not discriminate against participants in their programs based on certain protected characteristics. Title VI, for example, states that no person in the United States shall be “excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal

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22. U.S. CONST. art. I, § 8, cl. 1.

23. See, e.g., Pasachoff, *supra* note 7, at 252.

24. *South Dakota v. Dole*, 483 U.S. 203 (1987) (holding that a statute conditioning receipt of highway funds on the adoption of a minimum drinking age is a valid use of Congress’s Spending Clause authority).

financial assistance” on the basis of race, color, or national origin.<sup>25</sup> That means a hospital that agrees to comply with Title VI is agreeing to not discriminate on those protected grounds in perpetuity – or at least until it stops accepting federal funding. Violating the funding’s conditions at any point before then risks funding cutoffs or enforcement via other means.

But while the Supreme Court has partially weighed in on Congress’s Spending Clause power,<sup>26</sup> it has yet to wholly define federal financial assistance. So, while Title IX – which prohibits “discrimination on the basis of sex” in federally funded education programs and activities<sup>27</sup> – surely applies to a school that accepts direct grants of money from the government, it is less clear whether a private religious school that accepted an emergency pandemic low-interest federal loan needs to comply with that requirement.

## II. THE COURTS’ CURRENT MIXED APPROACHES TO FEDERAL FINANCIAL ASSISTANCE

Without binding circuit or Supreme Court precedent, a statutory definition, or explicit legislative history defining federal financial assistance,<sup>28</sup> courts that must determine if a form of aid is considered federal financial assistance sit in a difficult grey zone. They end up with varying conclusions and analyses because they have little to guide them. Some judges interpret federal financial assistance narrowly, others compare the aid’s structural similarity to subsidies, while still others rely on regulations or congressional intent to varying degrees. This confusion harms parties across the board: neither plaintiffs nor defendants can be sure whether the antidiscrimination Spending Clause statutes will apply to their case.

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25. 42 U.S.C. § 2000d (2018).

26. See, e.g., *Cummings v. Premier Rehab Keller*, P.L.L.C., 142 S. Ct. 1562, 1570 (2022) (“Our later cases . . . clarify[] that our consideration of whether a remedy qualifies as appropriate relief must be informed by the way Spending Clause ‘statutes operate’: by ‘conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.’” (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998))); Ann C. Juliano, *The More You Spend, the More You Save: Can the Spending Clause Save Federal Antidiscrimination Laws?*, 46 VILL. L. REV. 1111, 1151-60 (2001) (collecting cases); see also *supra* note 16.

27. 20 U.S.C. § 1681 (2018).

28. See, e.g., *McGlotten v. Connally*, 338 F. Supp. 448, 461 (1972) (“Nothing in the massive legislative history of the 1964 Civil Rights Act sheds any light on whether assistance provided through the tax system was intended to be treated differently than assistance provided directly.”); CHRISTINE J. BACK & JARED P. COLE, CONG. RSCH. SERV., R47109, FEDERAL FINANCIAL ASSISTANCE AND CIVIL RIGHTS REQUIREMENTS 18 (2022).

This lack of structured reasoning is a live issue. In 2022, for example, at least three different federal courts took up the question of whether tax exemptions qualify private schools as recipients of federal financial assistance.<sup>29</sup> Two courts ultimately answered in the affirmative but with divergent reasoning,<sup>30</sup> one disagreed,<sup>31</sup> and an interlocutory appeal has since been granted in one of the cases.<sup>32</sup> And during the pandemic, courts were forced to reckon with whether low-interest Paycheck Protection Program (PPP) loans from the government qualified as federal financial assistance.<sup>33</sup>

This Part offers insight into the inconsistent, case-by-case approach courts employ in analyzing whether a benefit is federal financial assistance by highlighting the debate over whether tax exemptions create liability under the antidiscrimination Spending Clause statutes. Although organizations with tax-exempt status save money in taxes, they are not receiving a direct infusion of cash from the government. And these noncash grants are the precise kind of federal benefits that raise questions for courts trying to determine what federal financial assistance means. Below, I review all the cases available on Westlaw that discuss whether tax-exempt status is a form of federal financial assistance. Section II.A discusses holdings that tax exemptions do not qualify as federal financial assistance, and Section II.B discusses holdings that tax exemptions do qualify as federal financial assistance.

#### A. *Excluding Tax Exemptions from Federal Financial Assistance*

Courts that have weighed whether tax exemptions create liability under the antidiscrimination Spending Clause statutes have predominantly held that tax exemptions are not a form of federal financial assistance. In *Bachman v. American Society of Clinical Pathologists*, the plaintiff sued a private organization refusing to provide him with accommodations.<sup>34</sup> He argued that the organization’s 501(c)(3) tax-exempt status made it a recipient of federal financial assistance and liable under Section 504 of the Rehab Act.<sup>35</sup> Judge Debevoise of the District of

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29. *Buettner-Hartsoe v. Balt. Lutheran High Sch. Ass’n*, No. 20-3132, 2022 WL 2869041, at \*3 (D. Md. July 21, 2022); *E.H. v. Valley Christian Acad.*, 616 F. Supp. 1040, 1049 (C.D. Cal. July 25, 2022); Order Granting in Part and Denying in Part TGS’s Motion to Dismiss at 4, *Doe v. Horne*, No. 23-cv-00185 (D. Ariz. Dec. 11, 2023).

30. See *infra* text accompanying notes 58-68.

31. Order Granting in Part and Denying in Part TGS’s Motion to Dismiss at 4, *Horne*, No. 23-cv-00185.

32. *Buettner-Hartsoe*, *appeal docketed*, No. 24-1453 (4th Cir. June 6, 2023).

33. See, e.g., *E.H.*, 616 F. Supp. at 1049 n.6 (collecting cases analyzing the issue).

34. 577 F. Supp. 1257, 1259 (D.N.J. 1983).

35. *Id.* at 1263-64.

New Jersey disagreed, stating that not all federal assistance that has some economic value can be construed as federal financial assistance.<sup>36</sup> The question, then, was “one of Congressional intent.”<sup>37</sup> He found that a combination of plain meaning, lack of legislative history (which forced the court to rely on administrative regulations), and Supreme Court precedent suggested that tax exemptions should not be considered federal financial assistance.

*Johnny’s Icehouse, Inc. v. Amateur Hockey Ass’n of Illinois* relied on similar logic, to an extent.<sup>38</sup> There, Judge Shadur of the Northern District of Illinois looked to the Department of Education’s regulation defining federal financial assistance to find that an organization’s tax-exempt status did not qualify it as a recipient of federal financial assistance.<sup>39</sup> But the judge also added that his holding was consistent with the Spending Clause because “[w]hile Congress may condition tax exempt status on an organization’s conforming to the specific categories in Section 501(c)(3) . . . that was not the power that Congress invoked to subject entities to the nondiscrimination requirements of Title IX.”<sup>40</sup>

In *Stewart v. New York University*, Judge Bonsal of the Southern District of New York interpreted federal financial assistance based on how thoroughly a particular form of assistance joined the government and recipient together—a strategy distinct from the judges in *Johnny’s Icehouse* and *Bachman*.<sup>41</sup> Bonsal stated that while “Congress did not expressly define the degree of governmental involvement with a defendant required for a private action . . . a private claimant must show greater governmental involvement with the defendant when that defendant is a nongovernmental entity.”<sup>42</sup> Citing to Second Circuit case law holding that tax deductions and exemptions did not sufficiently involve government and private organizations with each other, the judge found the “[f]ederal tax benefits granted to the Law School insufficient to support a claim under [Title VI].”<sup>43</sup>

Most recently, Judge Zipp of the District Court for the District of Arizona granted defendants’ partial motion to dismiss in *Doe v. Horne*, holding that tax-exempt status does not qualify as federal financial assistance “because the

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36. *Id.*

37. *Id.* at 1264.

38. 134 F. Supp. 2d 965, 972 n.5 (N.D. Ill. 2001) (“What has been said here was in large part the basis for a like ruling in the Rehabilitation Act context in *Bachman v. American Soc. of Clinical Pathologists*.” (citation omitted)).

39. *Id.* at 971-72.

40. *Id.* at 972.

41. 430 F. Supp. 1305, 1314 (S.D.N.Y. 1976).

42. *Id.* at 1313.

43. *Id.* at 1314.



bestowment of 501(c)(3) status does not, by and in itself, provide the 501(c)(3) organization with federal money, property, or services.”<sup>44</sup> That distinction makes tax-exempt status different from affirmative grants, she explained, because “the benefit of not having to pay certain taxes is realized only if the tax-exempt organization earns income which would otherwise be taxed.”<sup>45</sup> In reaching her conclusion, Judge Zipps rejected plaintiffs’ contention that the Department of Education’s regulations on federal financial assistance could plausibly refer to tax-exempt status.<sup>46</sup>

So, while courts have been fairly uniform in rejecting tax exemptions as a form of federal financial assistance, their reasoning has been varied. In four cases analyzing the very same issue, four judges independently came to the same conclusion, but each did so using their own method of analysis, with some overlap. This inconsistency leaves the status of tax exemptions in an ambiguous position. Ultimately, because each court operates as an island, each court’s reasoning becomes unpredictable. And this variance makes it difficult to apply their reasoning in other contexts, including and especially for other ambiguous forms of federal financial assistance.

#### B. Including Tax Exemptions as Federal Financial Assistance

Some other courts, however, consider tax exemptions a form of federal financial assistance, including in two recent decisions.<sup>47</sup> First, in *McGlotten v. Connelly*, plaintiffs argued that tax benefits granted to a racially exclusionary fraternal organization were a form of federal financial assistance that violated Title VI of the Civil Rights Act.<sup>48</sup> Like Judge Debevoise in *Bachman*, Judge Bazelon of the District Court of the District of Columbia stated that “[i]n the absence of strong legislative history to the contrary, the plain purpose of the statute is controlling.”<sup>49</sup> But unlike Debevoise, Bazelon held that organizations receiving tax

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44. Order Granting in Part and Denying in Part TGS’s Motion to Dismiss at 4, *Doe v. Horne*, No. 23-cv-00185 (D. Ariz. Dec. 11, 2023).

45. *Id.*

46. *Id.* at 3-5.

47. In *MHD v. Westminster Schools*, Judge Tjoflat of the Eleventh Circuit stated in dicta that a contention that a private school’s tax-exempt status constituted “federal financial assistance” which subjected the institution to Title IX liability was “neither immaterial nor wholly frivolous.” 172 F.3d 797, 802 n.12 (11th Cir. 1999). The statute of limitations barred the claim anyway, but this was the first – and only – appeals court to speak on the issue of tax exemption as liability. Tjoflat concluded by “express[ing] no view on the question [of] whether a federal tax exemption actually constitutes ‘[f]ederal financial assistance’ under Title IX.” *Id.*

48. 338 F. Supp. 448, 450 (D.D.C. 1972).

49. *Id.* at 461.

exemptions fall within Title VI's purpose "to eliminate discrimination in programs or activities benefitting from federal financial assistance" and extends to tax exemptions.<sup>50</sup> Thus, for Bazelon, distinguishing between tax exemptions and other kinds of federal funds "seem[s] beside the point, as the regulations issued by various agencies make apparent."<sup>51</sup>

Rather, the particulars of the tax exemption at issue were determinative. Judge Bazelon differentiated the tax-exempt status of fraternal orders under 501(c)(8) from the tax-exempt status of nonprofit clubs under 501(c)(7), finding the former, but not the latter, to be an example of federal financial assistance.<sup>52</sup> The distinction turned on whether the tax exemptions protected income: because 501(c)(7) exempted income derived from members' contributions from being taxed, but subjected the rest of their income, "including passive investment income, [to] tax[ation] at regular corporate rates," Bazelon concluded that the aid was defensive in nature, and thus should not bind the recipient to the requirements that federal financial assistance would.<sup>53</sup>

Later, Judge Sweet of the Southern District of New York accepted tax exemptions as a form of federal financial assistance with little discussion in *Fulani v. League of Women Voters Education Fund*.<sup>54</sup> In *Fulani*, plaintiffs claimed that a nonprofit had violated obligations under Title VI and Title IX, which they alleged the nonprofit had agreed to comply with when it received "federal assistance indirectly through its tax exemption and directly through grants from the Department of Energy and the EPA."<sup>55</sup> To Sweet, it was remarkably clear that the tax exemption was a "federal subsidy" that established liability.<sup>56</sup>

Two recent decisions highlight that there is a trend towards accepting tax exemptions as federal financial assistance. These decisions further underscore the complex landscape of reasoning courts employ and draw attention to the modern nature of the problems presented. In *Buettner-Hartsoe v. Baltimore Lutheran High School Ass'n*, plaintiffs sued a tax-exempt private school that otherwise accepted no federal benefits under Title IX.<sup>57</sup> The school claimed it could not be held liable because their tax-exempt status did not make them recipients

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50. *Id.*

51. *Id.*

52. *Id.* at 457-59.

53. *Id.* at 457-58.

54. 684 F. Supp. 1185, 1192 (S.D.N.Y. 1988).

55. *Id.*

56. *Id.*

57. Nos. RDB-20-3132, RDB-20-3214, RDB-20-3229, RDB-20-3267 & RDB-21-0691, 2022 WL 2869041, at \*5 (D. Md. July 21, 2022).

of federal financial assistance.<sup>58</sup> Judge Bennett of the District of Maryland disagreed, relying on a different line of reasoning than the prior cases discussed. He explained that “an institution still qualifies as a recipient of federal assistance under Title IX even if it did not apply for the aid or the aid is indirectly provided.”<sup>59</sup> He then cited to Supreme Court decisions *Regan v. Taxation with Representation*<sup>60</sup> and *Bob Jones University v. United States*.<sup>61</sup> Bennett quoted a line from *Regan*’s opinion that recognized 501(c)(3) status as a kind of congressional subsidy and the “equivalent of a cash grant.”<sup>62</sup> He ultimately leaned on *Bob Jones* to reason that the principles behind refusing to provide federal financial assistance to entities that discriminated on the basis of sex paralleled the requirement of tax-exempt institutions to serve and be in harmony with the public interest.<sup>63</sup> On those theories, Bennett held that “501(c)(3) tax exemption constitutes federal financial assistance for the purposes of Title IX” because enforcing the mandates of Title IX in schools with 501(c)(3) status “aligns with and protects the principal objectives of Title IX: ‘to avoid the use of federal resources to support discriminatory practices’ and ‘to provide individual citizens effective protection against those practices.’”<sup>64</sup> The Fourth Circuit heard oral argument in *Buettner-Hartsoe* in January 2024, but no decision has yet been handed down.<sup>65</sup>

Just a few weeks after the *Buettner-Hartsoe* district court opinion was released, Judge Frimpong of the Central District of California handed down *E.H. ex rel. Herrera v. Valley Christian Academy*.<sup>66</sup> There, a plaintiff filed an action against a parochial school under Title IX, arguing that the institution’s acceptance of a PPP loan and its tax-exempt status subjected Valley Christian to Title IX.<sup>67</sup> Frimpong agreed on both counts. Unlike Judge Bennett, Frimpong relied on *McGlotten*’s holding that absent other binding material, the statute’s plain purpose – which was to eliminate discrimination in programs or activities benefitting from federal financial assistance – controlled.<sup>68</sup>

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58. *Id.*

59. *Id.* at \*4.

60. *Id.* (citing *Regan v. Tax’n with Representation*, 461 U.S. 540 (1983)).

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

62. *Id.*

63. *Id.*

64. *Id.* at \*1, \*5 (citing *Cannon v. Univ. of Chi.*, 441 U.S. 667, 704 (1979)).

65. *Buettner-Hartsoe v. Balt. Lutheran High Sch. Ass’n*, *appeal docketed*, No. 23-1453, (4th Cir. Apr. 26, 2023).

66. 616 F. Supp. 3d 1040, 1044 (C.D. Cal. 2022).

67. *Id.*

68. *Id.* at 1050 (citing *McGlotten v. Connally*, 338 F. Supp. 448, 461 (D.D.C. 1972)).

Once again, we see that judges approach the same issues with their own methodologies and strategies. A plaintiff in the District of Maryland or Central District of California might think they can hold their school liable for a Title IX violation, only to learn that the judge assigned to their case feels differently. There is little clarity and even less notice.

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Courts have yet to come to a consensus on whether tax-exempt status is a form of federal financial assistance. But therein lies the problem: Despite tax exemptions' ubiquity,<sup>69</sup> courts struggle with consistency because they have no framework to analyze what federal financial assistance *is*. One judge points to the purpose of tax exemptions to explain their decision, while another finds that the plain purpose of the Spending Clause statutes controls. And there are many other kinds of federal benefits besides tax exemptions that exist in the limbo of federal financial assistance, such as tax credits, deductions, and low-interest loans. When courts must decide if the acceptance of unsettled forms of federal benefits induce liability under federal financial assistance, chaos abounds to the detriment of litigants—plaintiffs and defendants alike.

### III. THE PROPOSED APPROACH: ENDORSING AN EXPANSIVE UNDERSTANDING

Today, courts that reckon with an unsettled federal benefit might devote pages of analysis to determining whether it comports with generally accepted forms of federal financial assistance. As seen above, that analysis is usually ad hoc, and conclusions can diverge from one judge to another. But there is an alternative approach available. This Part proposes understanding federal financial assistance as *all forms of federal benefits that do not compensate for services rendered*. That is, courts should construe all federal aid to be federal financial assistance

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69. This Part does not even take up the other district court cases which discuss the same issue but do so with little commentary. See *Martin v. Del. L. Sch. of Widener Univ.*, 625 F. Supp. 1288, 1302 n.13 (D. Del. 1985), *aff'd*, 844 F.2d 1384 (3d Cir. 1989) (stating that “[a]ssistance’ connotes the transfer of government funds by way of subsidy, not merely exemption from taxation”); *Graham v. Tenn. Secondary Sch. Ath. Ass’n*, No. 95-cv-044, 1995 WL 115890, at \*11 n.4 (E.D. Tenn. Feb. 20, 1995) (“In concluding that TSSAA is a program or activity receiving federal financial assistance, the Court does not rely on plaintiffs’ contention that TSSAA receives federal financial assistance by way of its tax exempt status under 26 U.S.C. § 501(c)(3).”); *Zimmerman v. Poly Prep Country Day Sch.*, 888 F. Supp. 2d 317, 332 (E.D.N.Y. 2012) (rejecting a tax-exempt liability argument under Title IX).

because all federal aid plausibly offers some “economic benefit” to the recipient.<sup>70</sup> But when a benefit is offered in exchange for a service, the recipient is not receiving aid or assistance from the government; rather, the recipient is just being paid. Because it should not be difficult for entities to show that the benefit they received is compensation for a service, the burden should be on defendants in litigation to show that a federal benefit is not federal financial assistance. Independent of this inquiry, courts should exclude universally recognized exceptions (because of direct references in the legislative history or statutory text), like federally owned and operated programs, from being defined as federal financial assistance. This approach to federal financial assistance reflects the purpose and structure of the antidiscrimination Spending Clause statutes, which were intended to avoid the use of federal dollars to prop up discriminatory activities and have historically been interpreted as far-reaching. Courts that adopt this framework for understanding federal financial assistance would dramatically improve their consistency, as well as offer clarity and notice to all parties.

#### A. *Towards an Expansive Understanding*

To reach this proposed approach, begin with the proposition that federal financial assistance should be construed expansively because Congress used the phrase for a reason. Black’s Law Dictionary defines “[f]ederal” as “[o]f, relating to, or involving a system of associated governments with a vertical division of governments into national and regional components having different responsibilities.”<sup>71</sup> It further defines “[f]inancial assistance” as “[a]ny economic benefit . . . given by one person or entity to another.”<sup>72</sup> Proponents of a rigid understanding of federal financial assistance would have courts project nuance into the statement’s plain reading. But the Supreme Court has already stated that “[t]here is no doubt” that Title IX—treated as “legislatively linked” to the other antidiscrimination Spending Clause statutes<sup>73</sup>—must be “accord[ed] . . . a sweep as broad as its language” to help the statute reach “the scope that its origins dictate.”<sup>74</sup> By using sweeping language, Congress made its intentions clear. It would be hard to imagine a more expansive phrase that Congress could have

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70. See *Financial Assistance*, BLACK’S LAW DICTIONARY (11th ed. 2019); *Fischer v. United States*, 529 U.S. 667, 681 (2000) (“Any receipt of federal funds can, at some level of generality, be characterized as a benefit.”).

71. *Federal*, BLACK’S LAW DICTIONARY (11th ed. 2019).

72. *Financial Assistance*, BLACK’S LAW DICTIONARY (11th ed. 2019) (emphasis added).

73. BACK, *supra* note 14, at 1-2; see also *Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945, 953 (9th Cir. 2020) (“Title VI served as the model for Title IX, the Age Discrimination Act, and the Rehabilitation Act, so we interpret the four statutes similarly.”).

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

used if it still wanted to exclude forms of federal benefits from the sweep of antidiscrimination statutes.

The Supreme Court recognized the expansive nature of federal financial assistance in *Franklin v. Gwinnett County Public Schools*.<sup>75</sup> In *Franklin*, the plaintiff sought damages for intentional gender-based discrimination, sexual harassment, and abuse.<sup>76</sup> The Court's ultimate conclusion was that Title IX provided a damages remedy and was not limited to equitable relief.<sup>77</sup> But in reaching its holding, the Court had to deal with respondents' contention that "the normal presumption in favor of all appropriate remedies should not apply because Title IX was enacted pursuant to Congress' Spending Clause power."<sup>78</sup> Justice White, writing for the majority, was unconvinced. He distinguished intentional violations of Spending Clause statutes from unintentional violations, for which remedies *were* limited.<sup>79</sup> In his opinion, Justice White wrote that "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe."<sup>80</sup>

In *Franklin*, the Court interpreted the antidiscrimination Spending Clause statutes broadly to reflect their enacting purpose. Justice White and the majority did not break new ground by doing so. In preceding cases, the Supreme Court read Title IX and Title VI in their full contexts to find that the statutes contained causes of actions, even though nothing in either statute explicitly stated that private actors could bring actions under the laws.<sup>81</sup> But these enforcement mechanisms were necessary, the Court understood, because it was the only way that Congress's purpose to "avoid the use of Federal funds to support discriminatory practices and to protect citizens against discriminatory practices"<sup>82</sup> could be vindicated.

Because Congress sought to reduce the amount of federally funded discrimination within the United States with the antidiscrimination Spending Clause statutes,<sup>83</sup> it follows that when drafters used the term federal financial assistance, they meant to be comprehensive. An expansive interpretation means fewer

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75. 503 U.S. 60 (1992).

76. *Id.* at 63.

77. *Id.* at 76.

78. *Id.* at 74.

79. *Id.* at 74-75.

80. *Id.* at 75.

81. See, e.g., *Cannon v. Univ. of Chi.*, 441 U.S. 677, 703, 709 (1979).

82. *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 348 (11th Cir. 2012) (explaining the principal purposes of Title IX as outlined in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998)).

83. See *Franklin*, 503 U.S. at 75.

programs that benefit from federal aid can legally discriminate; a narrow one means more can. The former is much more in line with Congress’s intentions than the latter. That is, the presumption that Congress does not “hide elephants in mouseholes”<sup>84</sup> is not relevant here – the statutes and accompanying language are broad, and so the elephants are out in fields, exactly where they should be. The majority opinion in *Cannon v. University of Chicago* makes this very point: “Title IX, like its model Title VI, sought to . . . avoid the use of federal resources to support discriminatory practices.”<sup>85</sup> *McGlotten* lays it out even more plainly: Absent controlling precedent or strong legislative history to the contrary, “the plain purpose of the statute is controlling.”<sup>86</sup> And “[h]ere, that purpose is clearly to eliminate discrimination in programs or activities benefitting from federal financial assistance. Distinctions as to the method of distribution of federal funds or their equivalent seem beside the point.”<sup>87</sup>

The text of Section 1557 of the Affordable Care Act also suggests federal financial assistance refers to most forms of benefits.<sup>88</sup> Last to be passed among the five antidiscrimination Spending Clause statutes, the ACA specifically states that individuals cannot be discriminated against by health programs or activities that receive federal financial assistance, “including credits, subsidies, or contracts of insurance.”<sup>89</sup> Two things are noteworthy here: First, the word “including” indicates that the three examples put forth are not exclusive. And second, by the time Congress passed the ACA, it had begun to state upfront that federal financial assistance is wide-ranging enough to include forms of assistance like “credits” and “subsidies.” Taken together with the reciprocal nature of the Spending Clause antidiscrimination statutes (indeed, the ACA’s nondiscrimination provision even cites back to Title IX, Title VI, the Age Discrimination Act, and the Rehabilitation Act), it is plausible that Congress was speaking backwards to ratify the point that federal financial assistance generally encompasses many forms of benefits.

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84. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001) (“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”).

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

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

87. *Id.*; see also *E.H. ex rel. Herrera v. Valley Christian Acad.*, 616 F. Supp. 3d 1040, 1050 (C.D. Cal. 2022) (citing *McGlotten v. Connally*, 338 F. Supp. 448, 461 (D.D.C. 1972)). While *McGlotten*’s language tracks the expansive nature of federal financial assistance, its holding—which, by distinguishing between different kinds of tax exemptions, fails to promote the nondiscrimination principles of the antidiscrimination Spending Clause statutes—misses the ultimate point of the arguments laid out here.

88. See 42 U.S.C. § 18116 (2018).

89. *Id.*

Other sources, like legislative history and regulatory text, support an expansive reading of federal financial assistance, even if they are not controlling. Representative Edith Green, who chaired the hearings prior to the introduction of Title IX, stated outright that “[t]he purpose of Title [IX] is to end discrimination in *all* institutions of higher education . . . across the board.”<sup>90</sup> And at one point during the enactment process of Title IX, Senator Birch Bayh—whose statements, as “those of the sponsor of the language ultimately enacted” serve as “an authoritative guide to the statute’s construction”<sup>91</sup>—remarked that he “doubt[ed] very much whether even one institution of higher education today, private or public, is not receiving some Federal assistance.”<sup>92</sup> He also found it “rather clear” that if “[i]f Federal aid benefits a discriminatory program by freeing funds for that program, [then] the aid assists it.”<sup>93</sup>

While this Essay has not discussed the relevant regulations at length because they are nonbinding, are sometimes ignored by courts when they do not offer an immediate answer to whether a federal benefit is financial assistance,<sup>94</sup> and have varying definitions across agencies,<sup>95</sup> they are helpful here in one way. Every agency’s definition of federal financial assistance is broadly encompassing,<sup>96</sup> with several categories that together seem to contain nearly every kind of federal aid imaginable.<sup>97</sup> An expansive interpretation of federal financial assistance

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90. 117 CONG. REC. 39256 (1971) (emphasis added).

91. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526–27 (1982).

92. 117 CONG. REC. 30408 (1971).

93. *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ. of the H. Comm. on Educ. & Lab.*, 94th Cong. 175 (statement of Sen. Birch Bayh).

94. See, e.g., *McGlotten v. Connally*, 338 F. Supp. 448, 461 (D.D.C. 1972) (listing a regulation’s examples of federal financial assistance, then stating that the form federal financial assistance takes on is irrelevant).

95. Compare 34 C.F.R. § 106.2(g) (2023) (DOE’s definition of “federal financial assistance” in the Title IX context, which includes a catch-all “[a]ny other contract, agreement, or arrangement” which assists an “education program or activity”), with 28 C.F.R. § 42.102(c) (2023) (DOJ’s definition of federal financial assistance, which is nearly identical), and 42 U.S.C. § 2000d-1 (2018) (where “federal financial assistance” is defined broadly as a “grant, loan, or contract” for Title VI purposes). *But see* *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694 & n.16 (explaining that Title IX’s language empowering those distinct definitions is nearly identical to Title VI’s).

96. Off. for C.R., *What Is “Federal Financial Assistance” for Purposes of Civil Rights Complaints Handled by OCR?*, U.S. DEP’T HEALTH & HUM. SERVS. (Nov. 30, 2015), <https://www.hhs.gov/civil-rights/for-individuals/faqs/what-is-federal-financial-assistance-for-purposes-of-civil-rights-complaints-handled-by-ocr/402/index.html> [<https://perma.cc/SQ5L-V5VU>] (“Title VI regulations define the term ‘federal financial assistance’ broadly . . .”).

97. Indeed, many agencies have a catch-all when defining federal financial assistance. See, e.g., 28 C.F.R. § 42.102(c)(5) (2023) (DOJ); 6 C.F.R. § 21.4 (2023) (DHS); 34 C.F.R. § 106.2(g) (2023) (DOE). And even beyond the catch-all, the regulations are expansive. For example, DOJ’s definition of federal financial assistance for Title VI includes “grants and loans of



would comport with the wide-spanning nature of the regulations. Moreover, it would help courts avoid debate and confusion over the regulations themselves, which can be hard to parse. For example, it’s not immediately clear what “the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such a property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient” means.<sup>98</sup>

### B. Outer Bounds of an Expansive Understanding

Still, even an expansive understanding of federal financial assistance does not mean that *all* federal benefits are federal financial assistance. The Ninth Circuit held in *Jacobson v. Delta Airlines* that “payments . . . constitute federal financial assistance if they include a subsidy but that they do not constitute such assistance if they are *merely compensatory*.”<sup>99</sup> In that case, the defendant argued that payments from the federal government for carrying mail could not constitute federal financial assistance. The court agreed and stated that “[w]e think that in determining which programs are subject to the civil rights laws courts should focus . . . on . . . whether the government intended to provide assistance or merely to compensate.”<sup>100</sup>

Understanding “federal financial assistance” to mean “noncompensatory” benefits comports with a plain reading of the text. Compensation for services rendered is not the same as an “economic benefit, *such as a scholarship or stipend*”<sup>101</sup> given by one party to another. The aforementioned examples suggest a conferral, rather than a transactional exchange. And a “noncompensatory” framework would capture recognized forms of federal financial assistance. For example, provisions of federal personnel, rentals of land, interests in property, and grants of federal funds are all commonly accepted forms of federal financial assistance that might initially appear to have little in common.<sup>102</sup> But zooming

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Federal funds,” “the grant or donation of Federal property and interests in property,” “the detail of Federal personnel,” and “the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such a property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient.” 28 C.F.R. § 42.102(c) (2023).

98. 28 C.F.R. § 42.102(c)(4) (2023).

99. *Jacobson v. Delta Airlines, Inc.*, 742 F.2d 1202, 1210 (9th Cir. 1984) (emphasis added).

100. *Id.*

101. *Financial Assistance*, BLACK’S LAW DICTIONARY (11th ed. 2019) (emphasis added).

102. *Id.*

out, these are benefits that would rarely (if ever) be used to compensate a recipient for their services. The same is true for tax exemptions and PPP loans.

Moreover, focusing an inquiry into whether a federal benefit constitutes federal financial assistance on the effect and intent of that benefit, rather than on the precise form it takes, harmonizes with the Spending Clause contract-law analogy. If the federal government intends to aid a recipient and does, then the recipient should be required to comply with the government's conditions. But if the federal government neither intends to nor actually offers the recipient a form of assistance—if what the program receives is akin to money paid for a service rendered—then the recipient is surely not a genuine beneficiary of the government's aid. A private program which has performed a service for the government that it then receives a subsidy for has not, in other words, engaged in a “contract” with the government to not discriminate.

This framework is more coherent than other approaches to distinguishing federal financial assistance from general benefits, such as those used in *Doe v. Horne*<sup>103</sup> and *Stewart v. New York University*.<sup>104</sup> In *Horne*, Judge Zipp's held that tax-exempt status is not a form of federal financial assistance “because the bestowment of 501(c)(3) status does not, by and in itself, provide the 501(c)(3) organization with federal money, property, or services.”<sup>105</sup> But nothing in the antidiscrimination Spending Clause statutes suggests such a distinction matters. And this interpretation would lead to absurd results. For example, in *Grove City College*, the Supreme Court held that a college that enrolled students who accepted federal grants that could be applied to their tuition was accepting a form of federal financial assistance.<sup>106</sup> Under *Horne*'s line of thinking, however, if Grove City College instead received a discount on their income tax equivalent to the tuition grant for every qualified student that they enrolled, Grove City College would *not* be a recipient of federal financial assistance—a confusing, and ultimately negligible distinction. The *Horne* test wrongly focuses on the form, rather than the effect, of a federal benefit.

In *Stewart*, on the other hand, the court held that a necessary condition of liability-exposing federal financial assistance is that a benefit needs to create more than a “*de minimus*” relationship between the recipient and the federal government.<sup>107</sup> The court used this reasoning to ultimately find that tax deductions and exemptions, because they had previously been held to involve the

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103. No. 23-cv-00185 (D. Ariz. Dec. 11, 2023).

104. 430 F. Supp. 1305 (S.D.N.Y. 1976).

105. Order Granting in Part and Denying in Part TGS's Motion to Dismiss at 4, *Horne*, No. 23-cv-00185.

106. *Grove City Coll. v. Bell*, 465 U.S. 555, 572 (1984).

107. *Stewart*, 430 F. Supp. at 1314.

government only minimally in the activities of the recipient, could not establish liability under Title VI. That may or may not be true, but the *Stewart* test ignores the possibility that a benefit might establish a significant relationship between the government and recipient and still not be federal financial assistance.<sup>108</sup> In some ways, the *Stewart* test gets at some of the same basic ideas as the “noncompensatory” framework. But this Essay, unlike *Stewart*, advocates for a framework that presumes most forms of federal benefits are federal financial assistance because tests which place a heavy onus on plaintiffs to prove why a form of aid is federal financial assistance fail to meet the level of expansiveness that the phrase requires.

There are forms of aid which would not establish liability for the antidiscrimination Spending Clause statutes under this proposed expansive framework, even if they are noncompensatory. However, these rare exceptions are uniformly recognized through direct references in the legislative history or statutory text, and so are unlikely to confuse or surprise parties. For example, the Supreme Court found that a nationally operated air traffic control system in *Paralyzed Veterans* could not be construed as federal financial assistance to commercial airlines although that benefit is clearly not compensatory.<sup>109</sup> The Court came to this conclusion because Deputy Attorney General Katzenbach, in helping enact Title VI, wrote that “[a]ctivities wholly carried out by the United States with Federal funds . . . are not included in the list [of federally assisted programs].”<sup>110</sup> And likewise, Title VI explicitly states it does not apply to “[f]ederal financial assistance . . . extended by way of a contract of insurance or guaranty.”<sup>111</sup>

Some would argue that federal financial assistance should be narrowly construed, or at the very least that the antidiscrimination Spending Clause statutes should not be broadly enforceable. But all their points rest on a translation of an agency’s interpretation<sup>112</sup> or some spin on a prior judicial opinion.<sup>113</sup> And as

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108. It’s difficult to offer an example without a deeper understanding of what the *Stewart* court meant by the “*de minimus*” relationship, but we know that property grants from the federal government are sometimes considered federal financial assistance and are sometimes not. *See, e.g.*, 28 C.F.R. § 42.102 (2023). The *de minimus* relationship offers little guidance on how to parse these different situations.

109. 477 U.S. 597, 612 (1986) (“The federal air traffic control system . . . does not involve ‘financial assistance’ . . .”).

110. 110 CONG. REC. 13380 (1964).

111. 42 U.S.C. § 2000d-4 (2018).

112. *See* *Bachman v. Am. Soc’y of Clinical Pathologists*, 577 F. Supp. 1257, 1264 (D.N.J. 1983) (claiming that tax exemptions do not square with DOE regulations defining federal financial assistance).

113. Ed Whelan, *Addled Ruling that Tax-Exempt Status Subjects Private School to Title IX*, NAT’L REV. (Aug. 2, 2022, 1:57 PM), <https://www.nationalreview.com/bench-memos/addled-ruling-that-tax-exempt-status-subjects-private-school-to-title-ix> [<https://perma.cc/F9JG-7QQ5>]

discussed in Part II, these are the precise methodologies that lead to diverging judicial opinions and limited clarity for litigants. Additionally, the Supreme Court’s jurisprudence prioritizes the plain meaning of statutory and constitutional text whenever possible.<sup>114</sup> It is unclear why alternative interpretative constructions of the antidiscrimination Spending Clause—without engaging one way or another in their plausibility—should take precedence over the plain reading and clearly recognized purpose of the statutes in question.

#### IV. ASSESSING THE IMPLICATIONS OF THE STATUS QUO AND AN EXPANSIVE VIEW

The ad hoc approach that courts currently employ when analyzing whether an entity receives federal financial assistance is fraught with issues. It is confusing and unpredictable, which affects all involved actors. The freehand inquiry also forces judges to act as legislators. Without a clear statutory or regulatory definition of the phrase, judges try to discern congressional intent by looking at other sources, such as agency guidance and legislative history, but in this calculus end up necessarily giving special weight to what is important to them.<sup>115</sup> In other words, the courts’ current approach embroils them in an inquiry without a North Star.

Although these concerns are not determinative on their own—courts routinely handle issues of first impression that include similar hurdles—the Spending Clause’s contract-law analogy presents unique layers of complexity.<sup>116</sup> The contract-law analogy of the Spending Clause requires recipients to “‘knowingly accept’ the deal with the Federal government” and “understand . . . the obligations” that come along with doing so.<sup>117</sup> But limited clarity on what federal financial assistance means to begin with leaves recipients of various kinds of federal funds uncertain of where they stand.<sup>118</sup> This lack of clarity limits the

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(arguing that *Buettner-Hartsoe* conflicts with *National Collegiate Athletic Ass’n v. Smith*, 525 U.S. 459 (1999)).

114. See *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (“[W]e begin by analyzing the statutory language . . . [for] [w]e must enforce plain and unambiguous statutory language according to its terms.”).

115. See *supra* Section II.A and Section II.B.

116. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 219 (2022).

117. *Id.* (citing *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006)).

118. This is a notice issue partially because it might change the way a funding recipient responds to a given situation. For example, in *Valley Christian*, the defendant-school explicitly said that they did not want the plaintiff—a female football player—to compete against them because she was a woman. *E.H. ex rel. Herrera v. Valley Christian Acad.*, No. 21-cv-07574, 2022 WL 2953681, at \*1 (C.D. Cal. July 25, 2022). That is the response of a school that believes it is not

intended regulatory effects of the antidiscrimination Spending Clause statutes. Because the statutes are examples of “ongoing” Spending Clause legislation, where violators of the conditions of aid might only learn of their failure to comply with the terms of their “contract” when they risk enforcement, inconsistency in the courts’ approach towards interpreting federal financial assistance leaves receiving entities in a bind. Parties need to know whether they have received the kind of federal benefit that obliges them to follow the terms of the antidiscrimination Spending Clause statutes. That can only happen with clearer explanations upfront about what is and is not federal financial assistance.<sup>119</sup>

Some may argue that accepting a benefit should not create liability where parties are unsure whether the benefit is a form of federal financial assistance, perhaps by drawing on the Supreme Court’s recent reasoning in *Cummings*. There, the Court held that recipients must knowingly accept the deal with the federal government to be responsible for the accompanying obligations.<sup>120</sup> Thus, critics might suggest the same principle applies here. But this argument misses the mark.

Here, the issue is whether an institution knows that the federal benefit they accepted is federal financial assistance. But an institution can be sure that accepting *federal financial assistance* in the first place creates liability. And, as this Essay has argued, an institution that looked to the text of the statutes, legislative history, or the relevant regulations would have no reason to think that federal financial assistance is limited.<sup>121</sup> The same could not be said in *Cummings*, where the Court held that institutions may have assumed they were immune from emotional-distress damages because of “straightforward” “hornbook law” that “emotional distress is generally not compensable in contract.”<sup>122</sup> Thus, funding

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bound by Title IX. Perhaps Valley Christian, had they known they were required by federal law to avoid sex discrimination, would have made a different choice. Or perhaps they would have made the same one. Either way, they would have known the stakes of their liability before making a decision.

119. Funding recipients supposedly sign “assurances of compliance” to inform the government they will comply with the antidiscrimination statutes when they accept federal financial assistance. In theory, these documents would solve at least some of the notice issues presented. But courts do not seem to view these documents as determinative or necessary. For example, none of the courts in Part II factored the absence of assurances of compliance into their reasoning. *See supra*.

120. *Cummings*, 596 U.S. at 219-26.

121. Additionally, to the extent there is any precedent favoring these institutions’ position, it would have limited value within the contract-law analogy. Even though plaintiffs had won emotional distress damages under the Rehabilitation Act for years, the Supreme Court held in *Cummings* that these damages were not available under the Act because funding recipients were not on notice that they could be liable for them. *Id.* at 219. The same principle – valuing faithfulness to the statute over precedent – should apply here.

122. *Id.* at 221.

recipients who accept a form of aid like tax-exempt status and then operate as if they are immune from antidiscrimination law are voluntarily taking a gamble that a court will not recognize the benefit granted by a form of federal financial assistance—a wager that does not deserve deference.

Additionally, since Congress and agencies are loath to use funding cutoffs,<sup>123</sup> the responsibility to implement the antidiscrimination Spending Clause statutes is mostly left to agency enforcement actions and litigation. Without a consistent framework to determine who is liable under the statutes, however, survivors of discrimination cannot be sure whether they can hold bad actors accountable in court, limiting the effectiveness of these enforcement mechanisms. Take the private school hypothetical from the introduction of this Essay. Three students—one public school student, one student at a private school which accepts federal grant money, and one student at a private school that does not accept federal grant money but is tax-exempt—are discriminated against because of their sex. But only two of them know for certain that they can sue. The third lives in limbo, forced to deal with the discrimination, unsure if they have a viable claim for litigation. Inevitably, this casts a chilling effect over any potential lawsuits. Civil-rights lawyers, who mostly work on contingency,<sup>124</sup> are hesitant to take on cases where they risk having their time and energy wasted. An attorney could spend days drafting a complaint, researching the issues, and advising their client, only to end up drawing a judge who concludes private schools cannot be considered recipients of federal financial assistance by virtue of their tax-exempt status.

This Essay's proposed approach to federal financial assistance, on the other hand, offers clarity. In practice, it would also surely mean more government-funding recipients would be required to comport with the conditions of the civil-rights Spending Clause statutes. Understanding federal financial assistance to include all noncompensatory benefits means plaintiffs would consistently be able to bring lawsuits against, for example, their tax-exempt parochial school that enforces sex-based discriminatory practices. Additionally, under such an approach, funding recipients would know upfront that they have the ongoing responsibilities required by antidiscrimination Spending Clause statutes.

Some back of the envelope calculations might help clarify what an expansive interpretation of “federal financial assistance” could look like. In 2019, there were 12,943 private schools affiliated with religious private school associations in the

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123. See, e.g., Pasachoff, *supra* note 7, at 251–59 (explaining that funding cutoffs are rarely used).

124. 42 U.S.C. § 1988(b) (2018); see also Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL'Y 1, 1 (2008) (“Today civil rights plaintiffs are treated the same as ordinary tort plaintiffs by the private bar: without high damages, civil rights plaintiffs are denied access to the courts because no one will represent them.”).

United States.<sup>125</sup> It is impossible to tell how many of those schools accepted a direct federal grant or some other commonly accepted form of federal financial assistance versus how many only accepted a more unsettled federal benefit. But we do know that in 2020, 4,006 private religious schools received forgivable loans from the PPP loans.<sup>126</sup> While their status as federal financial assistance is still uncertain, most district courts to take up the issue have held that PPP loans create liability under the civil-rights antidiscrimination statutes.<sup>127</sup> So if we use “recipients of forgivable PPP loans” as a stand-in for the private religious schools that received a federal benefit which would make them liable under civil-rights Spending Clause statutes, that means there are still 8,397 private religious schools (or about 69.05% of all private schools affiliated with religious private school associations) that still would *not* be receiving the kinds of federal funds generally understood to require compliance with those laws. If even half these schools receive a federal income tax-exemption – almost certainly a low estimate<sup>128</sup> – that means there are 4,196 tax-exempt private religious schools (or 32.14% of all private schools affiliated with religious private school associations) in America that are not required to comply with, say, Title IX. Taking 32.14% of all the students attending private schools affiliated with religious private school associations (4,652,904 students in 2020) equals 1,495,443 students.<sup>129</sup> That means this Essay’s proposal could offer nearly 1.5 million new students Title IX’s protections against sex discrimination.

Although these numbers are admittedly rough, the implications of this Essay’s proposal are vast. Recall that the civil-rights Spending Clause statutes extend to far more situations than just schools. The statutes’ protections have been

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125. Table 14. *Number of Private Schools, Students, and Teachers (Headcount), by School Membership in Private School Associations: United States, 2019-20*, NAT’L CTR. EDUC. STAT. (2020), <https://nces.ed.gov/surveys/pss/tables/TABLE14fl1920.asp> [<https://perma.cc/SY9Y-9KDZ>].

126. SAMANTHA SOKOL, MAGGIE GARRETT & ELISE HELGESEN AGUILAR, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, *THE PAYCHECK PROTECTION PROGRAM HAS PROVIDED BILLIONS IN FEDERAL FUNDS TO PRIVATE AND RELIGIOUS SCHOOLS 2* (2020), [https://www.au.org/wp-content/uploads/2022/02/PPP-COVID-Relief-Money-for-Private-Schools-7.29.20\\_o.pdf](https://www.au.org/wp-content/uploads/2022/02/PPP-COVID-Relief-Money-for-Private-Schools-7.29.20_o.pdf) [<https://perma.cc/MM9B-JSJG>].

127. See, e.g., *Karanik v. Cape Fear Acad., Inc.*, 608 F. Supp. 3d 268, 281 (E.D.N.C. 2022), *motion to certify appeal granted*, No. 21-CV-169-D, 2022 WL 16556774 (E.D.N.C. Oct. 31, 2022).

128. See Note, *The Judicial Role in Attacking Racial Discrimination in Tax-Exempt Private Schools*, 93 HARV. L. REV. 378, 379 (1979) (“Prior to 1970, the IRS generally treated *all* private schools as charitable organizations. Income was tax exempt under section 501(c)(3) of the Internal Revenue Code and donors’ contributions were deductible under section 170.” (emphasis added)). After 1970, only private schools that complied with desegregation policies could receive tax-exempt status. *Id.*

129. NAT’L CTR. EDUC. STAT., *supra* note 125.

applied to all kinds of contexts, including nursing homes,<sup>130</sup> hospitals,<sup>131</sup> and workplace eligibility requirements.<sup>132</sup> Under an expansive view of federal financial assistance, the kinds of private facilities that would need to comply with federal civil-rights laws would greatly expand. (For example, a report co-authored by the American Civil Liberties Union and MergerWatch revealed that nearly one in six hospital beds in the United States were owned and operated by Catholic facilities in 2016.<sup>133</sup>) But any fear of this change snowballing into an avalanche of litigation is a boogeyman: funding recipients would still have the opportunity to correct discrimination before they actually become liable for violations because the antidiscrimination Spending Clause statutes require that institutions have an opportunity for voluntary compliance before enforcement proceedings may begin.<sup>134</sup>

Further research ought to be conducted to understand this Essay's implications beyond the antidiscrimination Spending Clause statutes. When other statutes use the phrase federal financial assistance, it does not necessarily follow to extend this Essay's conclusions to those contexts. For example, the Build America, Buy America Act (BABAA) requires all federal agencies to ensure that no federal financial assistance for infrastructure projects is provided "*unless all . . . construction materials used in the project are produced in the United States.*"<sup>135</sup> Although someone might plausibly argue that federal financial assistance should be construed broadly for the purposes of BABAA, at least some of their points would rest on different assumptions than the ones outlined in this Essay. The antidiscrimination Spending Clause statutes have an underlying expansiveness that, while not necessarily unique, is not universally applicable.

Though this Essay's proposed framework for understanding federal financial assistance helps plaintiffs, the clarity it offers is likewise helpful to aid recipients. They would no longer be forced to rely on a coin-flip chance of a court's determination to learn if they have violated the law. And while the proposed approach to federal financial assistance might plausibly discourage private organizations

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130. See, e.g., *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166 (2023).

131. See, e.g., *McGugan v. Aldana-Bernier*, 752 F.3d 224 (2d Cir. 2014).

132. See, e.g., *Tyrrell v. City of Scranton*, 134 F. Supp. 2d 373 (M.D. Pa. 2001).

133. *New Report Reveals 1 in 6 U.S. Hospital Beds Are in Catholic Facilities that Prohibit Essential Care for Women*, AM. C.L. UNION (May 5, 2016, 10:00 AM), <https://www.aclu.org/press-releases/new-report-reveals-1-6-us-hospital-beds-are-catholic-facilities-prohibit-essential> [<https://perma.cc/MH2L-CAZE>].

134. See, e.g., *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 275 (1998) ("Title IX's express means of enforcement requires actual notice to officials of the funding recipient and an opportunity for voluntary compliance before administrative enforcement proceedings can commence.").

135. Pub. L. 117-58 § 70914(a) (2021).



from accepting aid that the government would prefer them to take advantage of, policies and statutes do not exist in a void, able to avoid clashing with the goals of any other initiative. In other words, that some institutions might refuse benefits in order to maintain discriminatory practices may be a feature, rather than a bug, of the antidiscrimination Spending Clause statutes. In *Grove City College*, for example, the Court found that the defendant-university had accepted federal financial assistance when it enrolled students that had accepted certain kinds of federal grants.<sup>136</sup> While Grove City College went on to reject those grants in the future,<sup>137</sup> it is also plausible that the opposite scenario could have happened. The school might have decided it would not be able to admit the students it desired by rejecting those that sought to utilize federal aid. It could have determined that it was a worthwhile trade to be bound to federal antidiscrimination law in return for those students.

These are choices that funding recipients will need to make for themselves. And although the proposed framework might turn some programs away from accepting federal aid, it also ensures that entities that regularly benefit from federal funds can no longer skirt liability when they discriminate. In cases where the federal government feels strongly that they want the organization to accept aid, and the organization wants to avoid opening themselves up to liability, the government can carve out exceptions.

This Essay’s proposed solution to the uncertainty surrounding federal anti-discrimination law will change the protections offered to individuals who live, work, and learn within typically unaccountable institutions. It will also impact how some institutions operate and may affect the funding structure of private entities that seek to maintain their autonomy. There are costs – financial and otherwise – for the benefits this Essay’s proposals offers. But a calculus here is beside the point. This Essay focuses on the antidiscrimination Spending Clause statutes themselves: what they say, as well as what legislators hoped to achieve in their enactment. Ultimately, it is necessary to adopt an expansive view of federal financial assistance to fulfill the promises and goals of the statutes and their drafters.

## CONCLUSION

An unsettled understanding of federal financial assistance causes problems for the antidiscrimination Spending Clause statutes, notably because survivors

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<sup>136</sup>. *Grove City Coll. v. Bell*, 465 U.S. 555, 572 (1984).

<sup>137</sup>. *Financial Aid FAQ*, GROVE CITY COLL. (2023), <https://www.gcc.edu/Home/Admissions-Financial-Aid/Financial-Aid-Scholarships/FAQ> [<https://perma.cc/PM5A-VKUH>] (explaining that Grove City College does not accept federal aid).

of discrimination cannot know if they can hold certain bad actors accountable and because funding recipients might not realize they are beholden to the anti-discrimination laws until they violate them. In these circumstances, liability is uncertain—a serious threat to notice, clarity, and fairness.

This Essay proposes that courts could solve this problem by understanding federal financial assistance to mean all federal aid—that is, all federal benefits that are noncompensatory. This suggested approach offers a consistent framework to work within that simplifies the problem, aligns itself with binding precedent, and comports with the purpose and structure of the antidiscrimination Spending Clause statutes. But no matter what approach courts ultimately adopt to analyze if a benefit is federal financial assistance, judges should construe the phrase itself broadly. In the case of the antidiscrimination Spending Clause statutes, Congress wanted to eliminate the use of federal dollars for discriminatory ends. Creating distinctions for the sake of distinctions runs afoul of this purpose and risks further endangering those already most at risk. An expansive view of federal financial assistance embraces the purpose and text of the statutes in question and is especially important for those who experience the kinds of harm that the civil-rights laws sought to prohibit.

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