



## Office of the President

November 9, 2022

Catherine E. Lhamon  
Assistant Secretary for Civil Rights  
U.S. DEPARTMENT OF EDUCATION  
400 Maryland Avenue, SW  
Washington, D.C. 20202

**Re:** Azusa Pacific University Assertion of Religious Exemption in  
OCR Case No. 09-21-2318

Dear Ms. Lhamon:

I write on behalf of Azusa Pacific University,<sup>1</sup> in further response to the Notice of Investigation we received on May 3, 2022,<sup>2</sup> and to a subsequent communication dated August 24, 2022, addressed to the University's General Counsel.<sup>3</sup>

### Background

As you know, the Notice received by the University concerns a Title IX investigation opened by the Office of Civil Rights (OCR) based on a Title IX complaint made by a plaintiff in the *Hunter* litigation.<sup>4</sup> The University responded to the Notice by letter dated May 18, 2022 ("the first letter"), broadly asserting an exemption from the allegations contained in the Notice based on our character as an evangelical Christian university governing our community as commanded by our Christian faith.

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<sup>1</sup> The University, since its founding in 1899, has been organized under California law as a California nonprofit religious corporation.

<sup>2</sup> Letter from Anamaria Loya, Chief Attorney, OCR's San Francisco office, to Andrew Barton, Interim President, dated May 3, 2022. I was named to succeed Dr. Barton as 18<sup>th</sup> President of the University upon my election by the University's Board of Trustees on May 13, 2022, effective July 1.

<sup>3</sup> Letter from Monique L. Dixon, Deputy Assistant Secretary for Policy, to James R. Buckley, General Counsel, August 24, 2022.

<sup>4</sup> *Hunter, et al v. U.S. Department of Education*, Case No. CV-00474, U.S. Dist. Ct. (D. Or.) (First Amended Complaint filed June 7, 2021) (seeking to overturn the right of religious colleges and universities to participate in the federal funding of education).

*God First Since 1899*

In that first letter (which I incorporate by reference here, together with all its attachments),<sup>5</sup> the University asserted that its conduct – in the first instance – is protected not by statutes or regulations but under the Free Exercise Clause of the First Amendment of the U.S. Constitution.<sup>6</sup> Still, we acknowledge that Title IX’s statutory and regulatory provisions for a “religious exemption” serve as helpful frames for evangelical Christian institutions like our University to discuss our freedom to govern ourselves in accordance with our understanding of the Bible’s revelation and instruction on matters of biological sex and human sexuality.<sup>7</sup> In using these frames in this matter, the University continues to maintain that these constructs merely explain – but cannot diminish – that which the First Amendment already guarantees.

Institutions of higher education across the country claim certain “cornerstones” as governing their internal character and their relationship with those around them. These typically include such concepts as scholarship, community, and service. But to these, evangelical Christian colleges and universities like Azusa Pacific University add a crucial fourth cornerstone, *Jesus Christ*, who Scripture describes as the “Chief Cornerstone” (Matt. 21:42). All four of these cornerstones<sup>8</sup> are fundamental to our character and our mission – but what sets us apart from secular institutions is our Chief Cornerstone, Christ.

My stepping into the role of President of the University comes at a time of great challenge for all Christian higher education. It is being said that over the coming years, several faith-based institutions will unfortunately crash financially, or cave *missionally*. This idea of “mission” was central to the long series of discussion I had with the University’s Board of Trustees leading to my selection as President. Coming into those discussions, the principle of faithfulness to a Christ-centered and God-honoring mission was a topic near and dear to my heart. My conversations with the Board affirmed that this guiding principle for me proved to align with the same desire – and strong commitment – likewise present in the Board. Together, we have joined in a shared vision of a Spirit-led leadership for the University that is truly “on mission.”

This Spirit-led vision, and the shared commitment to this vision that exists between the Board and the leadership team I have assembled, drives our passion for a Christ-honoring community of disciples and scholars at Azusa Pacific University. And this commitment is not new. For more than 100 years, Azusa Pacific has held to its core Christian identity as prescribed in our original Articles of Faith as an institution anchored in its belief in the trinity of the Godhead, the deity of Jesus Christ our Lord, the inspiration of the Holy Scriptures, the fall of

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<sup>5</sup> These attachments included our founding documents from 1899, together with current governing documents, the declaration of our beliefs that we post on our website, and which are affirmed by every Trustee, Officer, faculty member, and employee, and our community standards binding on all students, together with dozens of pages of supporting materials.

<sup>6</sup> “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

<sup>7</sup> 20 U.S.C. §1681(a)(3); 34 C.F.R. part 106.12.

<sup>8</sup> The University’s logo, seen in our letterhead, depicts these four cornerstones of Jesus Christ, Scholarship, Community, and Service.

man, the judgment of God, justification through faith in Jesus Christ, the sanctification of believers, the imminent coming again of Jesus, and the speedy evangelization of the world.

The purpose of the balance of this letter is to describe what this “vision and commitment” looks like in the context of the challenges posed by the secular worldview adopted by OCR that is inconsistent – even hostile – to our faith.

### **Our Response to OCR’s August 24 Letter**

In our first letter, we provided extensive information on the religious organization that controls the University (specifically, the University’s Board of Trustees, consisting of pastors, educators, and business executives),<sup>9</sup> and on the *foundational* tenet that the inerrant guidance of God’s Word revealed in the Bible anchors all our evangelical beliefs.<sup>10</sup> We also explained that our religious commitments on matters of *gender*<sup>11</sup> and human sexuality flow directly from our understanding of the Bible’s authority.<sup>12</sup>

OCR’s August 24 letter helpfully acknowledged our discussion of these areas, but maintained that we could not receive the government’s “assurance” of our free-exercise constitutional right unless we follow a precise regulatory process to identify – with particularity – how our religious beliefs intersect with specifically identified regulatory requirements of Title IX.

OCR’s regulatory framing of the University’s constitutional right strikes us as straying into impermissible constitutional territory.<sup>13</sup> Without waiving our legal position on this point, we accept the Department’s invitation to explain our spiritual and theological commitments in more detail, to provide additional information about the conflict between our constitutionally protected free exercise of our beliefs and the regulatory requirements that appear to form the basis of the OCR investigation.

#### **1. The University’s Specific Religious Tenets Concerning Matters of *Gender***

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<sup>9</sup> The first letter, at 3.

<sup>10</sup> This is the first element of the University’s Statement of Faith. *See*, the first letter at 3.

<sup>11</sup> Over recent decades, the traditional definition of “gender” has shifted from being essentially synonymous with “sex;” “gender” is now used “more broadly to denote a range of identities that do not correspond to established ideas of male or female.” *Oxford Dictionary of English* app (2020). As is discussed in more detail below, the Department is now advocating a definition of “sex” that adds to established ideas of male and female “sexual orientation and gender identity.” To avoid confusion, this letter will use “biological sex” to refer to established ideas of male and female, and *gender* (in italics) to refer to this enlargement of the definition of “sex” by the Department.

<sup>12</sup> The first letter, at 6.

<sup>13</sup> University’s counsel notes that the U.S. Supreme Court recently addressed an attempt by New York State to circumscribe fundamental constitutional rights by constraining these rights with procedurally particular regulatory requirements. *New York State Rifle & Pistol Assn. Inc. v. Bruen*, 597 U.S. \_\_\_\_ (2022) (decided June 23, 2022). Although *Bruen* is a Second Amendment case, Justice Thomas’ opinion for the Court stated in part, “We know of no ... constitutional right that an individual may exercise only after demonstrating to governmental officials some special need. That is not how the First Amendment works when it comes to free speech or the free exercise of religion.” *Slip Opinion*, at 62-63.

As an “evangelical Christian community of disciples and scholars”<sup>14</sup> that embraces the historical Christian understanding of Scripture, we hold the conviction that all people are created in the image of God and hold equal intrinsic value and worth before both God and one another (Gen. 1:26-27, 31). This conviction is the starting point for governing the University’s relationships within our community.

With respect to the Department’s approach to matters of *gender*, the University’s religious standards are grounded in key tenets in four areas:

a. *God’s Truth Is Revealed in the Bible*: The first is that our evangelical Christian worldview is grounded in the religious and spiritual conviction that the Bible’s authority is the inerrant, revealed Word of God – the ultimate Truth – that expresses God’s design for how we are to live in fellowship with Him and with each other. The University affirms this conviction in the authority of Scripture as the foundational tenet of any discussion of our beliefs.

b. *Our Relationship with All Students Is One of Love*: The second key tenet that guides us is that Scripture affirms God’s intention that we are to love *all* His image-bearers (all people). Indeed, not only are we to love them as we love ourselves (Matt. 19:19), but we are to love them as Christ has loved us (John 13:34). Moreover, God calls us to treat one another with equal dignity *irrespective of any human distinction*: “There is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female; for you are all one in Christ Jesus” (Gal. 3:28).

c. *The Bible Presents God’s Design for Biological Sex, Human Sexuality, and Marriage*: Finally, and specifically with respect to *gender* and human sexuality, we believe that God’s original and continued intent in the creation of humanity is expressed in two (and only two) distinct, biologically-rooted sexes, male and female (Gen. 1:27). This truth is reinforced by Jesus Christ: “And He answered and said, ‘Have you not read that He who created them from the beginning made them male and female’” (Matthew 19:4; Mark 10:6). This God-ordained character of humanity results in the determination of one’s biological sex at the time of conception (Ps. 139:13-16).

In addition to His design of biological sex, we believe that God’s revealed truth is quite clear on key issues of human sexuality: Same-sex sexual relations and transgenderism are proscribed in the most strenuous terms (Lev. 18:22, 20:13; Deut. 22:5; Rom. 1:26-27); biblical marriage can exist only between one man and one woman (Gen. 2:24); and sex outside of marriage or with a married person who is not one’s spouse is forbidden (1 Cor. 6:13, 18-20; Exod. 20:14).

d. *God expresses His love, Forgives Our Sins, and Redeems Our Dignity Through the Cross*: None of us is perfect: Just as all in our community share in the equality of our status

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<sup>14</sup> See this quote from the University’s mission statement in our letter to Blake Thompson, Deputy Chief Attorney, OCR-San Francisco, dated May 18, 2022 (“the first letter”), at 2.



as image-bearers of God, so, too, do we all share in our status of falling short of what God requires (Rom. 3:23). Our calling in Christ, however, is neither to judge one another nor to surrender to our weaknesses, but rather to turn from our worldly choices and to instead embrace God's design – both individually and communally. We are called to support and encourage one another, pressing on toward the goal for the prize of the upward call of God in Christ Jesus (Phil. 3:14).

These biblically-informed religious beliefs concerning the equal dignity of all persons as image-bearers of Christ, his divine plan for biological sex, human sexuality, marriage, and the redemptive work of the cross are broader and more compelling than – and antecedent to – any civil policy, guidance, rule, or statute concerning *gender* and marriage. They are, collectively, the foundational tenets of the University that are key to this discussion between the University and the Department on the matters of *gender* and marriage addressed in the OCR investigation.

## 2. The “Title IX Regulatory Provisions that Conflict ...”

To receive OCR's “assurance” of our religious exemption, the OCR letter of August 24, 2022, requires the University to “identif[y] the Title IX regulatory provisions that conflict with specific religious tenets of [the University].”<sup>15</sup> But as we have worked to respond to the OCR letter, I am told that, arguably, Title IX itself only prohibits discrimination on the basis of “sex,” as defined in the law, not as defined on the basis of cultural constructs of *gender*.<sup>16</sup> I understand that the Department currently has pending a Notice of Proposed Rule Making (NPRM) that expressly proposes to define Title IX's construct of discrimination “on the basis of sex” to encompass “sexual orientation and gender identity,” among other things, but this proposed rule is still only on the horizon.<sup>17</sup>

To summarize the current state of Title IX, there is no statute, no final rule, and no judicial decision of universal application that extends discrimination “on the basis of sex” to include *gender* as framed in the Title IX NPRM; there is only OCR's June 2021 enforcement policy.

Seeking to comply with the August 24 OCR letter's guidance for receiving assurance of religious exemption, we will – for the purposes of this letter – respond to the “the Title IX

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<sup>15</sup> August 24, 2022 letter, at 1.

<sup>16</sup> University counsel notes that although the U.S. Supreme Court has ruled that in the context of Title VII employment discrimination the phrase “because of sex” also encompasses actions based on “sexual orientation” or “sexual identity,” the opinion of the Court was quite clear in limiting its ruling to the Title VII case before it. The dissent foresaw waves of litigation among some one hundred other federal statutes that similarly address discrimination framed as being “because of sex.” *Bostock v. Clayton County*, 590 U.S. \_\_\_\_ (2020). That litigation in fact continues to unfold across the country, particularly with respect to the extrapolation of *Bostock* to Title IX.

<sup>17</sup> In the remainder of this letter, where we use the term *gender*, it will be with reference to the NPRM's expanded definition of “sex discrimination” in proposed revised section 106.10 of the Title IX regulations: “Discrimination on the basis of sex includes discrimination on the basis of *sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.*”

regulations” that are inconsistent with the University’s religious tenets as being the factual predicates that form the basis of the May 3 Notice of Investigation. Namely:

1. “The University ... discriminate[s] against LGBTQ+ students based on sexual orientation and gender identity because its policies and practices, including in its current Student Handbook, prohibit sexual intimacy outside of marriage and endorse the doctrine that marriage is between a man and a woman;” and
2. “The University ... discriminate[s] against LGBTQ+ students based on sexual orientation and gender identity by refusing to fully recognize the LGBTQ+ student groups on campus.”<sup>18</sup>

The University acknowledges that diverse cultural views on *gender* and human sexuality have been developing in some parts of the world in recent years. The Bible, however, instructs our faith community thus: “do not be conformed to this world, but be transformed by the renewing of your mind, so that you may prove what the will of God is, that which is good and acceptable and perfect” (Rom. 12:2).

Thus, in the area of worldly, “culturally-located” constructs of *gender*, the University stands on its core theological convictions: that God has created humanity in accordance with our biological sex at birth – male and female; that biblical marriage has been ordained by God as being between one man and one woman, and that sexual relationships are limited to one man and one woman within the context of marriage. As stated above, all of humanity struggles with our fallen nature: On a personal level, this is an issue for each individual to approach in their relationship *with* God. But leaders of a faith community have a responsibility to govern that community by the standard set *by* God. Because God has declared same-sex relationships to be deeply offensive to Him, our leaders must set a standard for our community that conforms not to the world’s view in these matters, but that instead calls for the transforming of our hearts and minds – with all our strength – to loving what God requires.

In light of the discussion above, the stated grounds of OCR’s Notice of Investigation pose an irreconcilable conflict with the religious tenets and standards that govern the religious exercise and expression of our community. Any government directive that would require this “faith and learning community” to align our standards with culturally-located views on *gender*, sexual intimacy, and the definition of marriage that conflict with our religious tenets would be a clear infringement of the University’s right to the free exercise of our faith and to the religiously-based ordering of our community. Indeed, such a government directive purporting to force the University to “fully recognize” and to grant autonomy to *gender*-based student groups would

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<sup>18</sup> Notice of Investigation, at 1.

violate our religious tenets and would be “a shocking development that calls out for [judicial] review.”<sup>19</sup>

### 3. Beyond the Notice of Investigation

Based on this explanation of our religious tenets and how conforming to what OCR seems to require would be inconsistent with our religious beliefs, I believe that our University has complied with the elements set forth in OCR’s August 24 letter. But there is another matter that I feel compelled to address.

I am aware that in other investigations, OCR has reserved for itself continuing jurisdiction over the exercise of faith by religious institutions who similarly sought “assurance” of their religious exemptions. The language used by OCR in separate but parallel OCR proceedings against other religious institutions is worth quoting in detail:

Please note that this letter should not be construed *to grant an exemption from the requirements of Title IX and the regulations other than as stated above*. In the event that OCR receives a complaint against your institution, we are obliged to determine initially whether the allegations fall *within the exemption recognized*. Also, in the unlikely event that a complaint alleges that the practices followed by an institution are not based on the religious tenets identified in your request, OCR may contact the controlling organization to verify those tenets. *If* the organization provides an interpretation of tenets that has a different practical impact than that described by the institution, *or if* the organization denies that it controls the organization, *OCR will not recognize this exemption*.<sup>20</sup>

If *every* complaint received by OCR triggered seriatim review of the same religious institution based on the same religious tenet, triggered by a series of differing factual predicates, such reviews would subject the institution to repetitive OCR investigations to a harassing degree. But if *not every* complaint results in OCR action, by what standard would OCR exercise its discretion to undertake such further review, without wading into matters of faith, religious doctrine, and observance? We are understandably concerned with government overreach in this broad assertion of continuing jurisdiction over the content and application of our beliefs on a recurring basis. This assertion is deeply troubling.<sup>21</sup>

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<sup>19</sup> See, *Yeshiva University, et al. v. YU Pride Alliance, et al.* (No. 22A184), 597 U.S. \_\_\_\_ (2022), on application for stay (dissent by J. Alito, in which three other Justices joined) (Sept. 14, 2022), at 4.

<sup>20</sup> This language appears in more than one letter from OCR to a religious institution under OCR investigation. This example is from Letter from Catherine E. Lhamon, OCR Assistant Secretary for Civil Rights, to Kevin J. Worthen, President of Brigham Young University, dated January 3, 2022, at 3 (emphasis added).

<sup>21</sup> University counsel takes the position that OCR’s language to the effect that it is the *source* of grants of exemptions from the requirements of Title IX is constitutionally and statutorily incorrect.

Regardless of how the Department attempts to recast its authority over matters concerning “*gender*,” our conversation will follow the same pattern:

- We will affirm our constitutionally protected commitment to the inerrancy of the Bible;
- We will continue to invite all prospective students to join us in our Christian community regardless of their beliefs, we will hold all students to the same standards of community expectations, and we will love every student with the love of Christ; and
- We will continue to govern our community in accordance with our evangelical Christian beliefs in all areas, conforming ourselves to the image of Christ and declining to conform our faith to secular constructs of *gender*, alternate expressions of human sexuality, and redefinitions of marriage – all of which are preemptively defined and ordained by God in His Word.

To the extent that the secular world’s norms of “*gender*,” human sexuality, and marriage create conflicts with our religious tenets, the University is called by Scripture to navigate its course through such areas anchored in our faith and guided by the prayer and spiritual discernment of its appointed leaders ... to do what God requires of us (Matt.22:21).

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For the University to stay on mission, we must – and will – take Jesus’ command in John 15:5 seriously – to *abide* in Him. Christ’s message was that His followers must emphasize the importance of their absolute dependence on Him. He illustrated this with the metaphor of a vine in a vineyard: “I am the vine; you are the branches. If you remain in Me and I in you, you will bear much fruit; apart from me you can do nothing.”

We reiterate the message of our first letter: No matter how *gender*-based claims in an OCR investigation are characterized, they all ultimately clash with the University’s exercise and expression of its religious tenets. This conflict would assail our assertion of our rights under the Free Exercise Clause of the First Amendment to practice our faith and to live in biblically-based and Christ-centered community without government interference. The University will continue to answer His call to abide in Him, and to love all our students as Jesus loves us. We will continue to stand firm on mission, and to resist all the pressure exerted by the world to bow before anything but the name of Jesus.

God does not change, and His instruction to us on these issues of biological sex and human sexuality has not changed. Likewise, Azusa Pacific University’s century-old commitment to its mission as a Christ-centered institution has not changed. As set forth in detail in the first letter, the University makes clear to applicants, students, faculty, and staff who we are, what we believe, and the expectations by which we are to live together in community.

The movement of OCR to expand “based on sex” to include the new, worldly construct of *gender* would force the University to accept OCR as the editor of God’s Word. This we cannot do.



**Catherine E. Lhamon**

Assistant Secretary for Civil Rights

November 9, 2022

We appreciate your desire for us to understand each other with clarity, and pray that you appreciate our response as being an expression of our sincerely held religious beliefs – firmly grounded in our Biblical understanding and obedience.

We look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read 'Adam', with a long, sweeping horizontal stroke extending to the right.

Adam J. Morris, PhD

President, Azusa Pacific University

cc: Azusa Pacific University Board of Trustees

James R. Buckley, General Counsel & University Integrity Officer

Blake Thompson, Deputy Chief Attorney, OCR-San Francisco