No. 03-3426

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

EVE ATKINSON,

Plaintiff-Appellant

v.

LAFAYETTE COLLEGE, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFF AND URGING REVERSAL

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STATEMENT OF THE ISSUE

Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a) prohibits discrimination on the basis of sex in any education program or activity receiving federal financial assistance. In this brief, the United States will address the following question:

Whether Section 901, and thus the implied private right of action for violations of Section 901, encompasses a prohibition on retaliation for complaining about sex discrimination.

INTEREST OF THE UNITED STATES

The United States Department of Education administers federal financial assistance to education programs and activities and is authorized by Congress to

effectuate Title IX in those programs and activities. 20 U.S.C. 1682. The Department of Justice, through its Civil Rights Division, coordinates the implementation and enforcement of Title IX by the Department of Education and other executive agencies. Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980).

Complaints by individuals are a critical means of assuring compliance with Title IX. The Department of Education's Title IX regulations require each recipient of federal financial assistance to "adopt and publish grievance procedures providing for prompt and equitable resolution" of discrimination complaints. 34 C.F.R. 106.8(b). In addition, the United States relies on individual complaints to federal agencies and the testimony of witnesses as part of its enforcement scheme. The United States thus has an interest in ensuring that individuals have an effective means of redressing retaliation brought about by exercising their rights under Title IX. The United States filed a brief as *amicus curiae* addressing this issue in *Litman* v. *George Mason University*, No. 01-2128 (4th Cir.), and a similar issue in *Peters* v. *Jenney*, 327 F.3d 307 (4th Cir. 2003).[1]

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[1] On October 6, 2003, the Supreme Court invited the Solicitor General to file a brief as *amicus curiae* expressing the views of the United States as to whether certiorari should be granted to review the Eleventh Circuit's decision in *Jackson* v. *Birmingham Board of Education*, 309 F.3d 1333 (11th Cir. 2003), petition for writ of certiorari filed, 71 U.S.L.W. 3736 (May 27, 2003) (No. 02-1672). The *Jackson* petition presents the question whether the implied right of action for violations of Section 901 of Title IX encompasses a prohibition on retaliation for complaining about sex discrimination.

STATEMENT OF THE CASE

According to the allegations of the complaint, plaintiff Eve Atkinson was appointed by defendant Lafayette College as "Director of Athletics and Professor and Department Head of Physical Education and Athletics" on December 28, 1989. *Atkinson* v. *Lafayette Coll.*, 2002 WL 123449 (E.D. Pa. Jan. 29, 2002). In January 1996, Atkinson began raising issues of gender equality in the College's athletic budget, and submitted various plans to a committee of the College's Board of Trustees to ensure compliance with Title IX. The complaint further alleged that on November 18, 1998, Atkinson was physically threatened by the College's Dean of Students, as a result of tensions raised by public discussion and debate of the issues she had raised. On November 4, 1999, Atkinson was notified by the College's President that her employment would be terminated on June 30, 2001. *Ibid*.

Atkinson filed suit against the College and its President, alleging unlawful employment discrimination and retaliation on the basis of sex in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq*.) and state law, and a retaliation claim in violation of Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq*.). The College moved to dismiss the complaint with respect to Title IX, arguing that there was no private right of action to bring a claim of retaliation. The College also moved to dismiss the complaint with respect to Title VII, arguing that Atkinson failed to exhaust administrative remedies.

On January 29, 2002, the district court granted the College's motion with respect to the Title IX claim. *Atkinson* v. *Lafayette Coll.*, 2002 WL 123449 (E.D.

Pa. Jan. 29, 2002). The district court examined Title IX and held that under *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), there was no evidence showing that Congress intended to create a private right of action against retaliation. *Atkinson*, at *5–*11. The district court denied the College's motion with respect to the Title VII claim, stating that it would consider exhaustion arguments at the summary judgment stage of the proceedings. *Id*. at *2–*3.

The College moved for summary judgment with respect to the remaining claims. On July 24, 2003, the district court granted summary judgment to the College with respect to the Title VII employment claim, holding that Atkinson failed to establish a prima facie case. *Atkinson* v. *Lafayette Coll*., 2003 WL 21956416, at *5–*8 (E.D. Pa. July 24, 2003). The district court also found that Atkinson failed to exhaust her administrative remedy under Title VII by failing to present her claim of retaliation before the Equal Employment Opportunity Commission. *Id*. at *8–*9. The district court also granted the College's motion for summary judgment with respect to Atkinson's state law claims. *Id.* at *10–*12.

SUMMARY OF ARGUMENT

Title IX of the Education Amendments of 1972 was enacted to redress comprehensively a pervasive problem of sex discrimination in educational programs and activities. The broad language of Section 901 can be read to encompass a prohibition on discriminating against persons who invoke their right to be free from sex discrimination. This is the better reading of the statute.

At the time Congress enacted Title IX, Title VI, the statute on which Title IX

was modeled, had been interpreted to prohibit retaliation. The Supreme Court had also interpreted another anti-discrimination statute, 42 U.S.C. 1982, to contain within it a prohibition on punishing individuals for complaining about discrimination. These decisions were not unique. Subsequent decisions of the courts of appeals, including this Court, have held that anti-discrimination statutes that do not expressly prohibit retaliation can and should be read to include retaliation claims.

The federal agencies charged with the enforcement of Title IX have also taken the position that retaliation is prohibited by Section 901. This interpretation, consistent with the text and history of the statute, furthers the statute's purposes by assuring that persons cannot be punished for invoking their Title IX rights.

The district court's contrary holding was based on a misreading of the Supreme Court's decision in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). *Sandoval* involved an attempt to enforce an effects regulation that prohibited conduct the statute permitted. *Sandoval* is irrelevant in a case, like this, where an agency regulation simply clarifies what conduct the statute itself prohibits.

In *Peters* v. *Jenney*, 327 F.3d 307 (2003), the Fourth Circuit correctly held that Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, itself prohibits retaliation for opposing the racial discrimination prohibited by Title VI. In so holding, the Fourth Circuit did not follow the Eleventh Circuit's contrary interpretation of Title IX in *Jackson* v. *Birmingham Board of Education*, 309 F.3d 1333 (2002), petition for writ of certiorari filed, 71 U.S.L.W. 3736 (May 27, 2003)

(No. 02-1672). See 327 F.3d at 318 n.10. Because the Eleventh Circuit in *Jackson* failed to consider those cases interpreting anti-discrimination statutes as encompassing a prohibition on retaliation, this Court should instead follow the Fourth Circuit's better-reasoned decision in *Peters*.

ARGUMENT

INDIVIDUALS HAVE A PRIVATE RIGHT OF ACTION FOR CLAIMS OF RETALIATION UNDER TITLE IX

A. *Individuals Have A Cause Of Action To Enforce Section 901*

Section 901 of Title IX of the Education Amendments of 1972 provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * * .

20 U.S.C. 1681(a). Section 902 authorizes agencies providing federal financial assistance "to effectuate the provisions of section [901] of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability," and to enforce such regulations administratively. 20 U.S.C. 1682.

Although the statute does not specifically provide for a private right of action to enforce the statute, the Supreme Court has held that Congress intended to create such a right of action for violations of Section 901 against fund recipients, see *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), and that compensatory damages are available in such actions, see *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992). Congress ratified those holdings, particularly as applied to state defendants, by enacting 42 U.S.C. 2000d-7, which conditions the

receipt of federal funds on a waiver of Eleventh Amendment immunity to private suits. See *Litman* v. *George Mason Univ.,* 186 F.3d 544, 553-554 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000); see also *Franklin*, 503 U.S. at 72 ("This statute cannot be read except as a validation of *Cannon*'s holding.").

B. *Section 901 Itself Prohibits Retaliation For Complaining About Sex Discrimination*

Whether Section 901 can be interpreted to prohibit retaliation is a question of statutory interpretation, requiring a close examination of the text, structure, and history of the statute. See *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 460 n.5 (1998) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.").[2]

It can be argued that the text of Section 901 does not prohibit retaliation for complaining about sex discrimination because it prohibits only adverse conduct (exclusion, denial of benefits, or discrimination) "on the basis of sex." But the phrase "on the basis of" is broad language, subject to several interpretations. Cf.

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[2] The standard rules of statutory construction apply even when the statute is an exercise of Congress's power under the Spending Clause. See *Regions Hosp.*, 522 U.S. at 457-464; *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 414-420 (1993); *Rust* v. *Sullivan*, 500 U.S. 173, 184-190 (1991); *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15 (1987); *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 665-666 (1985); see also *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999) (citing *Bennett* for the proposition "that Congress need not 'specifically identif[y] and proscrib[e]' each condition in the legislation" so long as the "statute made clear that there were some conditions placed on receipt of federal funds").

Regents of the Univ. of Cal. v. *Bakke*, 438 U.S. 265, 284 (1978) (opinion of Powell, J.) (holding that language of Title VI was ambiguous); *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 592 (1983) (opinion of White, J.) (same). While the phrase can be read as prohibiting only that conduct that was primarily motivated by sex, it need not be read so narrowly. See *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 521 (1982) ("There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'").

The primary definition of the word "basis" is "1. A supporting element." *Webster's II New Riverside University Dictionary* 156 (1988); see also *The American Heritage Dictionary* 150 (4th ed. 2000) ("1. A foundation upon which something rests."); *ibid*. ("4. An underlying circumstance or condition"); *Webster's Third New Int'l Dictionary of the English Language Unabridged* 182 (1993) ("1a: the bottom of anything considered as a foundation for the parts above"); *ibid*. ("3. something that supports or sustains anything immaterial"). It is only a secondary definition that imports the idea of near exclusivity or primacy. See *American Heritage*, *supra* ("2. The chief constituent; the fundamental ingredient."); *Webster's II*, *supra* ("2. The chief component or fundamental ingredient."); *Webster's Third*, *supra* ("2: the principal component of anything"). Certainly a recipient that acts adversely to a person (either by excluding her from the program, denying her the program benefits, or otherwise subjecting her to discrimination) because she has complained about sex discrimination is taking an

action in which sex-motivated conduct is a "supporting element" or "underlying circumstance" in its decision.

1. In choosing among possible readings for Section 901, it is useful to note that reading the statute to prohibit retaliation is consistent with the interpretation of Title VI and other anti-discrimination statutes in the years leading to Title IX's enactment. For example, in the 1960s, school districts could meet their obligations under Title VI and the Fourteenth Amendment to desegregate previously racially segregated school districts by enacting "freedom of choice" plans. Black students, however, were often retaliated against for exercising their right to attend formerly white schools. See *United States* v. *Jefferson County Bd. of Educ*., 372 F.2d 836, 888 n.110 (5th Cir. 1966), adopted en banc, 380 F.2d 385, 389 (5th Cir. 1967), cert. denied, 389 U.S. 840 (1967); *Cypress* v. *Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 n.8 (4th Cir. 1967). For this reason, the Department of Health, Education, and Welfare (the predecessor to the Department of Education) issued guidelines under Title VI on freedom of choice plans that provided that school districts were responsible for protecting students who exercised their rights under a freedom of choice plan (*i.e.*, individuals attacked not because of their race but because they chose to exercise their rights). See Revised Statement of Policies for School Desegregation Plans under Title VI of the Civil Rights Act of 1964 § 181.52 (March 1966), reprinted in *Guidelines for School Desegregation: Hearings Before the Special Subcomm. on Civil Rights of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. App. A32 (1966). The Fifth

Circuit, sitting en banc, held that these guidelines "comply with the letter and spirit of the Civil Rights Act of 1964," and incorporated them into a model decree that it required all district courts in the Circuit to employ. See *Jefferson County Bd. of Educ*., 380 F.2d at 390, 392. This holding in a prominent Title VI case can be presumed to have been known by Congress and incorporated into Title IX. See *Pollard* v. *E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 847-849 (2001) (when Congress enacted a provision in Title VII that "closely tracked" a previously enacted provision of the National Labor Relations Act, the "meaning of this provision of the NLRA prior to enactment of the Civil Rights Act of 1964, therefore, gives us guidance as to the proper meaning of the same language in" Title VII).

During this same period, the Supreme Court issued its opinion in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Sullivan was a white man who owned two homes in a community, each of which came with a "membership share" that entitled the shareholder to use a community park owned and operated by a non-profit corporation. Sullivan rented one of the houses to Freeman, a black man, and attempted to assign one of the membership shares to him. The board of directors refused to approve the assignment because Freeman was black. When Sullivan protested that action, he was expelled from the corporation and lost both his shares. He sued the corporation, alleging a violation of 42 U.S.C. 1982, which provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase,

lease, sell, hold, and convey real and personal property." The Court held that Sullivan had standing to maintain an action under Section 1982 not just for being denied the right to complete his transaction with Freeman, but for "expulsion for the advocacy of Freeman's cause." 396 U.S. at 237. The Court explained that "[i]f that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property." *Ibid*.

Thus, at the time Congress enacted Title IX, Title VI had been understood to prohibit retaliation and the Supreme Court had interpreted an anti-discrimination statute to contain within it a prohibition on punishing individuals for complaining about discrimination.

2. The courts of appeals have likewise interpreted statutes that on their face deal only with discrimination to also prohibit retaliation. In *Fiedler* v. *Marumsco Christian School*, 631 F.2d 1144 (4th Cir. 1980), for example, the court interpreted the scope of 42 U.S.C. 1981, which provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens." Defendants in the case had contended that the statute did not apply because they had not expelled the white plaintiff because she was dating a black student, but because she had complained to the NAACP about the defendants' actions. The court held that the factual dispute was "immaterial" because Section 1981 "affords

a remedy for both the initial expulsion and the retaliatory expulsions." *Fiedler*, 631 F.2d at 1149 n.7.

The basic rationale relied upon by the courts of appeals in reaching this same holding under Section 1981 is that "a retaliatory response by an employer against such an applicant who genuinely believed in the merits of his or her complaint would inherently be in the nature of a racial situation." *Sester* v. *Novack Inv. Co.*, 638 F.2d 1137, 1146 (8th Cir.), modified on other grounds, 657 F.2d 962 (en banc), cert. denied, 454 U.S. 1064 (1981); see *Goff* v. *Continental Oil Co.*, 678 F.2d 593, 599 (5th Cir. 1982) ("it would be impossible completely to disassociate the retaliation claim from the underlying charge of discrimination"). This is the consensus of the courts of appeals as to Section 1981, including this Circuit.[3] There is no reason why Title IX should not be similarly interpreted.

3. A statute must be read in light of the problems with which Congress was confronted. See *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 118 (1983) ("As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve."); *Warner* v. *Goltra*, 293 U.S. 155, 158 (1934) (Cardozo, J.) ("Our concern is to define the meaning [of

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[3] See, *e.g.*, *Hawkins* v. *1115 Legal Serv. Care*, 163 F.3d 684 (2d Cir. 1998); *In re Montgomery County*, 215 F.3d 367 (3d Cir. 2000), cert. denied, 531 U.S. 1126 (2001); *Winston* v. *Lear-Siegler, Inc.*, 558 F.2d 1266 (6th Cir. 1977); *Miller* v. *Fairchild Indus., Inc.*, 876 F.2d 718 (9th Cir. 1989); *Skinner* v. *Total Petroleum, Inc.*, 859 F.2d 1439 (10th Cir. 1988); *Andrews* v. *Lakeshore Rehab. Hosp.*, 140 F.3d 1405 (11th Cir. 1998); cf. *McKnight* v. *General Motors Corp.*, 908 F.2d 104, 111 (7th Cir. 1990) (requiring showing that retaliation had racial motivation), cert. denied, 499 U.S. 919 (1991).

a term] for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained."). Congress was made aware not only of pervasive sex discrimination by recipients of federal funds, but also that persons who had complained about sex discrimination had been subjected to retaliation.[4] Accepting the holding in *Cannon* v. *University of Chicago*, 441 U.S.

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[4] In considering Title IX, Congress heard testimony that women (both employees and students) who had complained about sex discrimination had been subjected to various forms of retaliation. See *Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. & Labor*, 91st Cong., 2d Sess. 242 (1970) (testimony of Dr. Ann Harris) ("At other educational institutions, women who have criticized their faculties for sexual discrimination have been 'censured for conduct unbecoming,' a rare procedure in academe normally reserved for actions such as outright plagiarism."); *id*. at 247 ("Other women have spoken to me privately [about the sex discrimination they experienced], but were reluctant to testify publicly for fear of reprisals."); *id*. at 302 (statement of Bernice Sandler) ("It is also very dangerous for women students or women faculty to openly complain of sex discrimination on their campus. * * * At a recent meeting of professional women I counted at least four women whose contracts were not renewed after it became known that they were active in fighting sex discrimination at their respective institutions."); *id*. at 463 (testimony of Daisy Fields) ("few women have dared to file complaints of sex discrimination" because "[w]e know of a number of such cases" in which "women who have filed complaints have suffered reprisals in the form of having their jobs abolished" or "have been reassigned to some degrading position far below their capabilities in anticipation they might resign"); *id*. at 588 (statement of Women's Rights Commission of New York Univ. Sch. of Law) ("It was recently discovered that one woman had tried to get [the dormitory] opened up ten years ago, when the whole building * * * was closed to women. She raised a complaint at a faculty meeting about this situation; blackballing letters written by faculty members were subsequently placed in her employment file at the law school without her knowledge."); *id*. at 1051 (reprinting magazine article) ("A few [women] fight back – and pay the penalty for bucking the male dominated system."); see also 118 Cong. Rec. 5812 (1972) (reprinting article stating that "on some campuses it is still dangerous to fight sex discrimination. I know of numerous women whose jobs were terminated, whose contracts were not renewed, and some who were openly and directly fired for fighting such discrimination.").

677 (1979), that Congress intended individuals to be able to bring suit to enforce their rights under Title IX, surely Congress did not intend to create a right and a cause of action to enforce that right, but permit individuals to be punished for exercising their rights. See *id*. at 704 (Congress "sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens *effective* protection against those practices." (emphasis added)).

4. It may be argued that the structure of the Civil Rights Act of 1964 cuts against finding that Title VI, and thus Title IX, itself prohibits retaliation. Title VII of the Civil Rights Act of 1964, enacted contemporaneously with Title VI, has a separate anti-retaliation provision that makes it unlawful for an employer to "discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. 2000e-3(a). Because Congress is presumed not to enact redundant provisions, the presence of an anti-retaliation provision in Title VII might be understood to mean that Congress did not intend Title VII's general prohibition on discrimination against any individual "because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. 2000e-2, to encompass such claims. It could be argued that since Congress had used language similar to Title VII's general prohibition in Title

VI, the same absence of intent to proscribe retaliation existed in Title VI, and that this intent also applied to Title IX, which was modeled on Title VI.

But the courts have generally declined to find the existence of Title VII's anti-retaliation provision to be dispositive as to whether Congress intended to prohibit retaliation in other parts of the statute. For example, as originally enacted, Title VII did not apply to the federal government. Congress amended Title VII in 1972 to add a separate section providing that "[a]ll personnel actions affecting employees [of the federal government] or applicants for employment * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin," 42 U.S.C. 2000e-16(a), and providing for a private right of action for an employee aggrieved by the administrative decision "on a complaint of discrimination based on race, color, religion, sex, or national origin," 42 U.S.C. 2000e-16(c). Despite the absence of any mention of retaliation, the courts of appeals have held that this provision prohibits retaliation as well. Some courts of appeals have reasoned that the statute's broad prohibition on "any discrimination" necessarily encompasses retaliation. See, *e.g.*, *Porter* v. *Adams*, 639 F.2d 273, 277-278 (5th Cir. 1981); *White* v. *General Servs. Admin.*, 652 F.2d 913, 917 (9th Cir. 1981);[5] *Canino* v. *EEOC*, 707 F.2d 468, 472 (11th Cir. 1983); cf. *Forman* v.

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[5] In an earlier opinion, the Ninth Circuit had reasoned that the federal sector Title VII provision prohibited retaliation because it incorporated a remedial provision of the private sector Title VII that itself referred to retaliation. See *Ayon* v. *Sampson*, 547 F.2d 446, 450 (9th Cir. 1976). This rationale, while correct, is rooted in textual provisions of Title VII that have no analogy in Title IX and thus would not

(continued...)

Small, 271 F.3d 285, 296-298 (D.C. Cir.) (same for federal sector provision of Age Discrimination in Employment Act), cert. denied, 536 U.S. 958 (2001). Moreover, this Court has concluded that because the federal sector provision was modeled on an earlier statute that had been administratively interpreted to prohibit retaliation, Congress had intended to incorporate that prohibition into the new statute as well. See *Sperling* v. *United States*, 515 F.2d 465, 484 (3d Cir. 1975), cert. denied, 426 U.S. 919 (1976). Either of these rationales would apply equally to reading Title IX to include an anti-retaliation prohibition.

Indeed, Congress would have had reason to believe that the specific prohibition on retaliation in Title VII was redundant. Congress used the National Labor Relations Act (NLRA) as the model for Title VII. See *Pollard*, 532 U.S. at 847-850; *Hishon* v. *King & Spalding*, 467 U.S. 69, 76 n.8 (1984); see also *Equal Employment Opportunity: Hearings Before the General Subcomm. on Labor of the House Comm. on Educ. & Labor*, 88th Cong., 1st Sess. 83-84 (1964) (noting that anti-retaliation provision of Title VII was drawn from NLRA). Section 8(a) of the NLRA regulates employer conduct; Section 8(b) regulates union conduct. See 29 U.S.C. 158(a) & (b). Section 8(a)(4) specifically prohibits retaliation by an employer against an employee for filing a complaint with or testifying to the National Labor Relations Board, 29 U.S.C. 158(a)(4), while there is no similar provision governing unions in Section 8(b). Yet at the time Congress enacted Title

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[5](...continued)
support the argument in the text.

VII in 1964, the National Labor Relations Board had already held that the general language in Section 8(a)(1) and 8(b)(1) making it an "unfair labor practice" for an employer or union to "restrain or coerce employees in the exercise of the rights" to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection also encompassed such retaliation, see *Local 138, Int'l Union of Operating Eng'rs*, 148 N.L.R.B. 679, 681-682 (1964); *Consolidated Ventilation & Duct Co.*, 144 N.L.R.B. 324, 331 (1963), thus making Section 8(a)(4) redundant. The Supreme Court confirmed this reading of the statute in 1968. See *NRLB* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968) (unions prohibited from retaliating against employee for filing a charge with NLRB under Section 8(b)(1)); see also *Roberts* v. *NLRB*, 350 F.2d 427, 428 (D.C. Cir. 1965) (anti-retaliation provision of NLRA "only made clear that which was implicit" in general prohibition). While there is no question that the prohibitory language of Title VII differs from that of the NLRA, that the statute Congress relied upon in drafting Title VII had been interpreted so as to make the anti-retaliation provision redundant weakens the usual anti-redundancy presumption.

Congress's decision to include a specific anti-retaliation provision in Title VII and omit it in Title VI and Title IX is thus not indicative of whether these broader statutory prohibitions encompass an anti-retaliation claim. Indeed, a similar structural argument was considered and rejected by the Court in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979). Defendants in that case argued that

the existence of an express cause of action in Title VII was evidence that Congress did not intend to create a cause of action for Title VI. See *id*. at 710. The Court responded that such an argument was "unpersuasive" because, when dealing with "a complex statutory scheme" involving multiple provisions, the Court would not engage in an "excursion into extrapolation of legislative intent" based on what Congress did in other provisions of the same statute in order to determine what Congress intended for the provision at issue. *Id*. at 711. On the same reasoning, the existence of a retaliation provision in Title VII does not demonstrate that Congress did not also intend Title VI and Title IX themselves to prohibit retaliation. And of course, the prohibitory terms of Titles VI and VII are different and interpretations of one cannot be indiscriminately applied to the other. Compare *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971) (Title VII prohibits disparate impact), with *Alexander* v. *Sandoval*, 532 U.S. 275 (2001) (Title VI does not prohibit disparate impact).

5. If the language of the statute is susceptible to more than one interpretation, then the views of the agencies charged with its enforcement should be considered in selecting among possible meanings. See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997). Each federal agency that disburses federal financial assistance is charged with enforcement of Title IX as to its recipients. As a historical matter, however, the Department of Health, Education, and Welfare and its successor the Department of Education have been primary enforcers of Title IX. Because of this history, the Court has described the Department of Education as

"charged with the responsibility for administering Title IX" and deferred to its reading of the statute. *Cannon*, 441 U.S. at 706, 708 & n.42; cf. *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 522 n.12 (1982) (declining to give deference to Department of Education interpretation of Title IX because interpretation was in flux). In addition, since 1980, the Department of Justice has been charged by Executive Order with the responsibility to "coordinate the implementation and enforcement by Executive agencies of" Title IX. See Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980). When Congress charges multiple agencies with enforcing a statute, the Supreme Court generally gives special deference to the interpretations of the agency charged by Executive Order with coordinating government-wide compliance. See *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 634 (1984); *Andrus* v. *Sierra Club*, 442 U.S. 347, 357-358 (1979).

The view of both agencies is that the statute itself prohibits retaliation. The Department of Education has stated that "retaliation is prohibited by Title IX." 62 Fed. Reg. 12,044 (1997). Similarly, the Department of Justice issued a manual to federal agencies regarding recipients' obligations under Title IX that stated that retaliation is one of the "general types of prohibited discrimination." U.S. Dep't of Justice, *Title IX Legal Manual* 57 (Jan. 11, 2001) (available at www.usdoj.gov/crt/cor/coord/ixlegal.pdf). It explained:

> A right cannot exist in the absence of some credible and effective mechanism for its enforcement and enforcement cannot occur in the absence of a beneficiary class willing and able to assert the right. In order toensure that beneficiaries are willing and able to participate in the enforcement of their own rights, a recipient's retaliation against a person who has filed a

complaint or who assists enforcement agencies in discharging their investigative duties violates Title IX.

Id. at 70.

The agencies' view is not only consistent with the text of the statute, but it furthers its purpose as well, and is thus entitled to deference to the extent it is based on a hands-on understanding of how the statute operates. See *Robinson*, 519 U.S. at 346. The agencies' interpretation comports with the general understanding that a substantive right is chimerical if a person can be punished for exercising that right. Cf. *Crawford-El* v. *Britton*, 523 U.S. 574, 588 n.10 (1998); *Hanson* v. *Hoffmann*, 628 F.2d 42, 52 (D.C. Cir. 1980) ("The creation of a right is often meaningless without the ancillary right to be free from retaliation for the exercise or assertion of that right."); *Goff*, 678 F.2d at 598 (similar).

C. *The Fact That Retaliation Is Also Prohibited By Agency Regulations Does Not Bar Private Enforcement Through The Section 901 Right Of Action*

As noted above, the Department of Education and other federal agencies have consistently interpreted Section 901 to prohibit retaliation. This interpretation has been embodied in regulations providing that retaliation for filing a complaint or exercising one's rights under Title IX is prohibited. See, *e.g.*, 34 C.F.R. 106.71 (incorporating 34 C.F.R. 100.7(e) (providing that "[n]o recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated

in any manner in an investigation, proceeding or hearing under this part")); see also 65 Fed. Reg. 52,858-52,895 (2000) (adopting Title IX rules for 21 federal agencies: 19 incorporated existing retaliation prohibitions under Title VI; 2 adopted anti-retaliation provisions just for Title IX).

Relying on *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), the district court held that a private plaintiff could not bring a retaliation claim because the prohibition was the product of a regulation. This constituted a misreading of *Sandoval*. *Sandoval* held that while some regulations could not be enforced through the existing statutory cause of action, others could.

Sandoval involved a suit brought to enforce a regulation promulgated under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq*., a statute that was the model for Title IX. See 532 U.S. at 278-279. Plaintiff in *Sandoval* had brought a class action alleging that the State's practice of administering driver's licensing exams only in English had an unjustified discriminatory effect on the basis of national origin in violation of discriminatory effects regulations promulgated by the federal funding agency. *Ibid*.

Based on case law interpreting Title IX, the Court held that Congress intended to create a private cause of action to enforce Section 601. *Sandoval*, 532 U.S. at 279-280, 283. The question was whether Congress had also intended these particular regulations to be privately enforced. The Court noted that there were two types of regulations. Regulations that simply "apply," "construe," or "clarify[]" a statute can be privately enforced through the existing cause of action

to enforce the statute because a "Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of a statute to be so enforced as well." *Id.* at 283-285. But regulations that go beyond the statute require a separate cause of action, even if those regulations were a valid exercise of Congress's grant of rulemaking authority. *Id*. at 285-286.

In applying this dichotomy, the Court relied on its uncontested holding in prior cases that Section 601 prohibits only disparate treatment (*i.e.*, intentional discrimination). *Id.* at 280. Since the Title VI regulations expanded the Section 601 definition of discrimination to include effects, the effects regulations could not be viewed merely as an interpretation or application of Section 601. *Id*. at 285-286. Accordingly, the Court concluded that Congress would have had to create (either explicitly or implicitly) a separate private cause of action to enforce such regulations. *Id.* at 285-287. Assessing the text and structure of the statute, the Court concluded that Congress had intended only agency enforcement of the discriminatory effects regulations and had not intended to create a private right of action to enforce those regulations that went beyond the statute. *Id.* at 290-293.

Because Title IX was modeled on Title VI of the Civil Rights Act of 1964, we agree with the district court that the same analysis applies to Title IX regulations as well. But the fact that the prohibition appears in a regulation is not dispositive of the inquiry. This is a regulation, unlike the Title VI effects regulation, that prohibits intentional differential treatment. The question is whether the prohibition of intentional discrimination in the text of Section 901 can be

interpreted to include an anti-retaliation prohibition, as reflected in the Department of Education's regulation, in which case the anti-retaliation prohibition can be privately enforced through Section 901's cause of action, or whether it can be viewed only as a valid means of "effectuat[ing]" Section 901, in which case only the agency may enforce the anti-retaliation provision. Cf. *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998) ("Of course, the Department of Education could enforce the [regulatory] requirement [that recipients offer a grievance procedure] administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate, 20 U.S.C. § 1682, even if those requirements do not purport to represent a definition of discrimination under the statute.").[6] For the reasons discussed above, the text, structure, history, and administrative construction all support an interpretation of Section 901 to include a prohibition on retaliation.

D. *This Court Should Adopt The Fourth Circuit's Holding In Peters That A Broad Prohibition Against Discrimination Encompasses A Prohibition Against Retaliation, Rather Than The Eleventh Circuit's Contrary Conclusion In Jackson*

Relying in large measure upon the above analysis, the Fourth Circuit correctly concluded in *Peters* v. *Jenney*, 327 F.3d 307, 319 (2003), that "§ 601's implicit prohibition on retaliation is congruent with and limited by [] § 601's basic prohibition on intentional discrimination," and is "enforceable via an implied right

[6] The limitations of Title IX administrative proceedings were chronicled in *Cannon*, 441 U.S. at 706 n.41, 708 n.42.

of action to the extent that [it] forbids retaliation for opposing practices that one reasonably believes are made unlawful by § 601." The *Peters* court explained (*id*. at 318):

> Neither § 601, nor §§ 1981 or 1982, contains an explicit retaliation provision. Yet, as a matter of substance, a matter of standing, and a matter of the availability of a private right of action, myriad courts, before and after *Cannon*, have held that the general prohibitions on intentional discrimination embodied in §§ 1981 and 1982 extend to provide a cause of action to those who can demonstrate that they have been purposefully injured due to their opposition to intentional racial discrimination.

Thus, the court decided that the agency regulation "target[ed] retaliatory action actually intended to bring about a violation of § 601's core prohibition on intentional discrimination." *Ibid.* This sort of retaliation "bears such a symbiotic and inseparable relationship to intentional racial discrimination that an agency could reasonably conclude that Congress meant to prohibit both and to provide a remedy for victims of either." *Ibid.* In so holding, the court observed that "[o]ur conclusion in this respect accords with the position urged by the United States as *amicus curiae*, whose participation in this appeal has been helpful to the court." *Id.* at 319 n.13.

The Fourth Circuit in *Peters* also did not follow the Eleventh Circuit's contrary conclusion in *Jackson* v. *Birmingham Board of Education*, 309 F.3d 1333 (2002), petition for writ of certiorari filed, 71 U.S.L.W. 3736 (May 27, 2003) (No. 02-1672), because that decision "did not consider the impact of *Sullivan* and its

progeny on the question that we decide today." *Id.* at 318 n.10.[7] We agree that the Eleventh Circuit's analysis in *Jackson* is incomplete and incorrect, and accordingly urge this Court to reject it.[8]

CONCLUSION

The cause of action under Section 901 encompasses claims of retaliation. The district court's contrary holding should be reversed.

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[7] *Sullivan* is discussed at pp. 10-11, *supra*.

[8] As indicated on p. 2 n.1, *supra*, the Supreme Court has invited the Solicitor General to file a brief as *amicus curiae* expressing the views of the United States as to whether the petition for writ of certiorari should be granted to review the Eleventh Circuit's decision in *Jackson*.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set out in Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d). The brief was prepared using WordPerfect 7.0, and contains 6,805 words.

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2003, two copies of the Brief For The United States As Amicus Curiae Supporting Plaintiff And Urging Reversal were served by overnight mail, postage prepaid, on each of the following persons:

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