No. 01-2413

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHERYL A. PETERS,

Plaintiff-Appellant

v.

TIMOTHY JENNEY, individually and in his official capacity as Superintendent of Schools; K. EDWIN BROWN, individually and in his official capacity as Assistant Superintendent for Accountability; NANCY GUY, individually and in her official capacity as a School Board member; SHEILA MAGULA, individually and in her official capacity as Associate Superintendent for Curriculum and Instruction; SCHOOL BOARD OF THE CITY OF VIRGINIA BEACH, VIRGINIA,

Defendants-Appellees

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

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

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STATEMENT OF THE ISSUE

Section 601 of Title VI of the Civil Rights Act of 1964 prohibits discrimination on the ground of race in any program or activity receiving federal financial assistance. 42 U.S.C. 2000d. In this brief, the United States will address the following question:

Whether Section 601, and thus the implied private right of action for violations of Section 601, encompasses a prohibition on retaliation for opposing unlawful race discrimination.

INTEREST OF THE UNITED STATES

The United States Department of Education administers federal financial assistance to programs and activities and is authorized by Congress to effectuate Title VI in those programs and activities. 42 U.S.C. 2000d-1. The Department of Justice, through its Civil Rights Division, coordinates the implementation and enforcement of Title VI by the Department of Education and other executive agencies. Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980).

Voluntary compliance with Title VI and its regulations is critical to achieving the objective of the statute -- the elimination of racial discrimination in federally-funded programs. Cf. *Local No. 93, Int'l Ass'n of Firefighters* v. *Cleveland*, 478 U.S. 501, 515 (1986). The United States thus has an interest in ensuring that individuals advocating compliance with or opposing violations of Title VI's prohibition on racial discrimination have an effective means of redressing retaliation. The United States has previously participated as amicus curiae on similar issues in the Supreme Court in *Lau* v. *Nichols,* 414 U.S. 563 (1974), *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), and *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), and recently filed a brief as amicus curiae on a similar issue before this Court in *Litman* v. *George Mason University*, No. 01-2128.

STATEMENT OF THE CASE

According to the allegations of the complaint, the Office for Civil Rights (OCR) of the U.S. Department of Education determined that the Virginia Beach School District's program for gifted children had discriminated against minority children in violation of Title VI of the Civil Rights Act of 1964. Cheryl Peters, who had experience in redesigning programs for gifted children to meet the requirements of OCR, was hired in August of 1997 by the school district as the director of gifted education and magnet school programs. The district asked Peters to construct an action plan for the gifted program to bring it into compliance with the requirements of Title VI. The school board and OCR both approved the plan Peters designed (Complaint ¶¶ 14-15, 12-13, 16, 18-19).

When Peters began to implement the plan, however, school officials discredited Peters and undermined her authority because of her efforts to end discrimination, on the ground of race, in the gifted program. School officials recommended that she be suspended, but after public opposition by parents of minority students, the recommendation was withdrawn. In 1999 Peters' employment contract was not renewed for the same retaliatory reason (Complaint ¶¶ 26-27, 33, 37, 39-40).

In February 2001, Peters filed this action alleging that the school district and some of its officials and employees retaliated against her in violation of Title VI of the Civil Rights Act of 1964 and the First Amendment (through 42 U.S.C. 1983), as well as defamed her in violation of state law (Complaint ¶¶ 41-51).

Defendants moved to dismiss the Title VI claim solely on the ground that retaliation was not prohibited by Title VI, but only by the Title VI regulations, and that there was no private right of action to enforce the regulations in light of the Supreme Court's decision in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001).[1] The district court agreed, relying on the holding of *Litman* v. *George Mason University*, 156 F. Supp. 2d 579 (E.D. Va. 2001), appeal pending, No. 01-2128 (4th Cir.), for the proposition that retaliation was prohibited by regulations and not the underlying statute (10/30/01 Tr. 8). Finding no merit to Peters' other claims, the court entered judgment for defendants. This appeal followed.

SUMMARY OF ARGUMENT

Title VI of the Civil Rights Act of 1964 was enacted to redress a pervasive problem of race discrimination in programs and activities receiving federal financial assistance. The broad language of Section 601 can be read to encompass a prohibition on discriminating against persons who complain about or oppose race discrimination. This is the better reading of the statute.

Title VI has been consistently interpreted to prohibit retaliation. The Supreme Court has also interpreted another anti-discrimination statute to contain a

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[1] Although captioned a Motion for Summary Judgment, defendants did not argue that there were no disputes of material fact regarding whether the non-renewal of her contract was retaliatorily-motivated. Instead, they argued that plaintiff "fails to state a claim upon which relief can be granted" (R. 11 at 9, 10) because, regardless of the facts, retaliation was not actionable under Title VI. Thus, the United States relies on the allegations of the complaint in describing the underlying case. The United States takes no position regarding whether plaintiff will be able to prove these allegations on remand.

prohibition on punishing individuals for opposing discrimination. These decisions are not unique. Decisions of the courts of appeals, including this Court, have held in a variety of settings 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 VI have also taken the position that retaliation is prohibited by Section 601. This interpretation, consistent with the text and history of the statute, furthers the statute's purposes by assuring that persons cannot be punished for opposing violations of Title VI.

The district court's contrary holding was based on a misreading of *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). *Sandoval* involved an attempt to enforce a discriminatory effects regulation that prohibited conduct the statute permitted. *Sandoval* does not bar individuals from bringing an action alleging intentional discrimination, such as retaliation, where an agency regulation simply clarifies what conduct the statute itself prohibits.

ARGUMENT

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

A. *Individuals Have A Cause Of Action To Enforce Section 601*

Section 601 of Title VI of the Civil Rights Act of 1964 provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. 2000d. Section 602 authorizes agencies providing federal financial

assistance "to effectuate the provisions of section [601] 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. 42 U.S.C. 2000d-1. Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, which prohibits sex discrimination in educational programs or activities receiving federal financial assistance, was modeled on Title VI and the statutes are generally interpreted in tandem. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 694-696 (1979); *Preston* v. *Virginia*, 31 F.3d 203, 206 n.2 (4th Cir. 1994).

Although Title VI 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 601 against fund recipients, see *Cannon*, 441 U.S. at 696; *Alexander* v. *Sandoval*, 532 U.S. 275, 279-280 (2001), 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 by enacting 42 U.S.C. 2000d-7, which conditions the receipt of federal funds on a waiver of state agencies' Eleventh Amendment immunity to private suits. See *Alexander*, 532 U.S. at 280; *Litman* v. *George Mason Univ.,* 186 F.3d 544, 553-554 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000).

B. *Section 601 Itself Prohibits Retaliation For Opposing Race Discrimination*

Whether Section 601 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]

1. Relying on *Litman* v. *George Mason University*, 156 F. Supp. 2d 579 (E.D. Va. 2001), appeal pending, No. 01-2128 (4th Cir.), the district court held the text of Section 601 did not prohibit retaliation for opposing race discrimination because it prohibited only adverse conduct (exclusion, denial of benefits, or discrimination) "on the ground of race." But the phrase "on the ground of" is broad language, subject to several interpretations. Cf. *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).

The relevant definition of the word "ground" is "[t]he underlying condition prompting an action." *The American Heritage Dictionary* 775 (4th ed. 2000); *Webster's II New Riverside University Dictionary* 550 (1988) (same); see also

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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").

Random House Dictionary of the English Language 843 (2d ed. 1987) ("the foundation or basis on which a belief or action rests"). 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 opposed race discrimination is taking an action in which race-motivated conduct is an "underlying condition" or "basis" of its decision. The district court's interpretation, by contrast, is inconsistent with the broad scope that should be accorded this language. Cf. *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.'").

2. In choosing among possible readings of Section 601, it is useful to note that reading the statute to prohibit retaliation is consistent with early interpretations of Title VI. 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); *Coppedge* v. *Franklin County Bd. of Educ.*, 273 F. Supp. 289, 295-296 (E.D.N.C. 1967), aff'd, 394 F.2d 410 (4th Cir. 1968). For this reason, the Department of

Health, Education, and Welfare (the predecessor to the Department of Education) issued guidelines under Title VI 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. *United States* v. *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 and ratified when, after studying the guidelines, Congress amended Title VI to add a provision stating that it was national policy that the "guidelines and criteria established pursuant to title VI * * * dealing with conditions of segregation by race, whether de jure or de facto, in the schools of the local educational agencies of any State shall be applied uniformly in all regions of the United States." Elementary and Secondary Education Amendments of 1969, Pub. L. No. 91-230, § 2, 84 Stat. 121 (1970) (codified at 42 U.S.C. 2000d-6). See *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986) ("Where, as here, 'Congress has not just kept its silence by refusing to overturn the

administrative construction, but has ratified it with positive legislation,' we cannot but deem that construction virtually conclusive.").

3. The Supreme Court, this Court, and a majority of the courts of appeals have interpreted anti-discrimination statutes to contain within them a prohibition on punishing individuals for complaining about or advocating an end to discrimination even absent a specific mention of retaliation.

The Supreme Court did so 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*.

This Court has 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 (1980), this 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." In that case, a white student was initially expelled from a private school because she was dating a black student; the school subsequently offered to rescind the expulsion if she would not associate with the black student, but upon learning that her father had contacted the NAACP about the school's actions, decided that her expulsion would remain in effect and expelled her sister as well. This Court held that it was "immaterial" whether the expulsion was viewed as caused by her "association with" the black student "or because of [her family's] attempts to vindicate their constitutional and statutory rights" because Section 1981 "affords a remedy for both the initial expulsion and the retaliatory expulsions." *Id*. at 1149 n.7.

The basic rationale relied upon by the other 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.[3] There is no reason why Title VI should not be similarly interpreted.

4. 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 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."). By the time Congress enacted Title VI in 1964, not only had it received a multi-volume report from the United States Commission on Civil Rights documenting that retaliation and reprisal against those who advocated non-discrimination were widespread,[4] but it

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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).

[4] For evidence from the Commission's *Report* (1961), of retaliation in the public school setting in particular, see, *e.g.*, Volume 1, *supra*, at 164 ("In six of the

(continued...)

also heard testimony to the same effect in its own hearings on the subject, leading Senator Keating (one of the sponsors of the Civil Rights Act) to state that "[t]here is no question that school officials and parents and children have been harassed in a number of cases."[5] Indeed, courts at the time took judicial notice that many entities has resisted the Supreme Court's decisions prohibiting racial

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[4](...continued)
counties, white school officials were said to have warned Negro teachers not to try to register or to 'agitate' for their own rights or those of others on pain of losing their jobs."); *ibid*. ("teachers must sign a statement that they are not now, have not been, and will not become members of the NAACP");Volume 2, *supra*, at 42-43, 179 (harassment and assault of whites who did not boycott integrated schools); *id*. at 53, 74-75 (state laws punishing school board members and teachers who supported segregation); Volume 5, *supra*, at 35 (attack on reverend attempting to enroll black children in white school). For examples outside the school context, see, *e.g.*, Volume 1, *supra*, at 45, 60-61, 164; Volume 5, *supra*, at 7-8, 29-33, 35, 36, 40, 174 n.35, 176 n.39, 188-189 n.51.

[5] *Integration in Public Education Programs: Hearings Before the Subcomm. on Integration in Federally Assisted Public Educ. Programs of the House Comm. on Educ. & Labor*, 87th Cong., 2d Sess. 439 (1962); see also *id*. at 469, 491-522 (incidents in which university faculty members were removed because they were perceived as supporting integration); *id*. at 470-471, 486 (Arkansas, Mississippi, and South Carolina barred public employment of members of the NAACP); *id*. at 480, 696 (white families who refused to boycott integrated schools subject to harassment and coercion); *id*. at 485, 591 (state laws limited NAACP's right to bring desegregation lawsuits); *id*. at 487 (Louisiana required discharge of any teacher who recommended a black student to a previously white university); *Civil Rights – 1959: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 86th Cong., 1st Sess. 108 (1959) (Sen. Douglas) ("there have been other tragic efforts to intimidate and repress those who would assert their rights and also the friends and sympathizers who want the law of the land to be observed in their communities"); *id*. at 89-101, 529-532, 557, 579, 1527-1603 (testimony and summaries of laws and newspaper reports regarding reprisal, violence, and intimidation against NAACP, blacks who exercised their rights, and whites who opposed discrimination); *Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 1070-1075, 1212-1213, 1249-1250, 1280-1282, 1340-1341 (1963) (same).

discrimination and that such resistance included "manifestations of ill will toward white and colored citizens who are known to be sympathetic with the aspirations of the colored people for equal treatment, particularly in the field of public education." *NAACP* v. *Patty*, 159 F. Supp. 503, 515-516 (E.D. Va. 1958) (three-judge court), vacated on abstention grounds, 360 U.S. 167 (1959); see also *NAACP* v. *Button*, 371 U.S. 415, 435 & n.15 (1963) (citing *Patty* as support for "the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia").[6]

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[6] Other published decisions of the time reflected the variegated methods used to retaliate against those who advocated in favor of non-discrimination. See, *e.g.*, *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (law requiring identification of rank-and-file members of organization advocating desegregation "exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility"); *Scull* v. *Virginia ex rel. Comm. on Law Reform & Racial Activities*, 359 U.S. 344 (1959) (legislative committee investigating person who counseled blacks about their rights); *Brewer* v. *Hoxie Sch. Dist.*, 238 F.2d 91 (8th Cir. 1956) (individuals harassing and intimidating school officials and parents to prevent integration); *Louisiana State Univ.* v. *Ludley*, 252 F.2d 372, 375 (5th Cir.) (state law providing that school teachers shall be fired for "advocating or in any manner * * * bringing about integration of the races within the public school system or any public institution of higher learning"), cert. denied, 358 U.S. 819 (1958); *United States ex rel. Goldsby* v. *Harpole*, 263 F.2d 71, 82 (5th Cir.) (lawyers for criminal defendants fail to challenge exclusion of blacks from jury due to "risk of personal sacrifice which may extend to loss of practice and social ostracism"), cert. denied, 361 U.S. 838 (1959); *Bullock* v. *United States*, 265 F.2d 683 (6th Cir.) (mob assaulting an "integrationist" who escorted black children into a formerly segregated school), cert. denied, 360 U.S. 909 (1959); *United States* v. *Wood*, 295 F.2d 772 (5th Cir. 1961) (sheriff arresting person instructing blacks how to register to vote), cert. denied, 369 U.S. 850 (1962); *Jordan* v. *Hutcheson*, 323 F.2d 597 (4th Cir. 1963) (legislative committee investigating and harassing lawyers for black plaintiffs);

(continued...)

Accepting the holding in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), and *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), that Congress intended individuals to be able to bring suit to enforce their rights under Title VI, 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 or opposing violations of those rights. See *Cannon*, 441 U.S. 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)).

5. The district court relied on the reasoning of *Litman* v. *George Mason University*, 156 F. Supp. 2d 579 (E.D. Va. 2001), appeal pending, No. 01-2128 (4th Cir.). *Litman* reasoned that the structure of the Civil Rights Act of 1964 cut against finding that Title VI itself prohibited 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

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[6](...continued)
United States v. *McLeod*, 229 F. Supp. 383 (S.D. Ala. 1964), rev'd, 385 F.2d 734 (5th Cir. 1967) (grand jury investigating lawyers bringing civil rights cases); *United States* v. *Dallas County*, 229 F. Supp. 1014 (S.D. Ala. 1964), rev'd, 385 F.2d 734 (5th Cir. 1967) (sheriff arresting persons assisting blacks in registering to vote).

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. The district court in *Litman* concluded 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.

But courts have 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. Most 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); *Canino* v. *EEOC*, 707 F.2d 468, 472 (11th Cir. 1983); cf. *Forman* v. *Small*, 271 F.3d 285, 296-298 (D.C. Cir. 2001) (same for federal sector provision of Age Discrimination in Employment Act). This rationale would apply equally to reading Title VI to include an anti-retaliation prohibition.[7]

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* v. *E.I. du Pont de Nemours & Co.*, 121 S. Ct. 1946, 1949-1950 (2001); *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

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[7] Courts have relied on two other rationales for finding that Title VII's federal-sector provision prohibits retaliation. 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 part of 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 VI and thus would not support the argument in the text.

Similarly, the Third Circuit 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). While the rationale of that case would support finding that statutes modeled on Title VI, such as Title IX, prohibited retaliation, it also does not directly support the argument in the text.

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. 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 VII in 1964, the National Labor Relations Board had already held that Section 8(a)(4) was redundant because 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); 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). 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)). While there is no question that the prohibitory language of Title VII differs from that of the NLRA, Congress's reliance in drafting Title VII on a statute whose anti-retaliation provision had been found to be redundant undermines the usual anti-redundancy presumption.

Consequently, Congress's decision to include a specific anti-retaliation provision in Title VII and omit it in Title VI 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 itself 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) (Section 601 of Title VI does not prohibit disparate impact).

6. If the language of the statute is susceptible to more than one interpretation, 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 VI 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 VI administratively. See *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 343 (1978) (Brennan, J., concurring in part). Because of this history, the Court has described the Department of Education as "the expert agency charged by Congress with promulgating regulations enforcing Title VI" and deferred to its reading of the statute. *Id*. at 372, 342. In addition, the Department of Justice has been charged by Executive Order with the responsibility to "coordinate the implementation and enforcement by Executive agencies of" Title VI since its inception. See Exec. Order No. 11,247, 30 Fed. Reg. 12,327 (1965); 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 Justice issued a manual to federal agencies regarding recipients' obligations under Title VI that stated "[a] complainant may bring a retaliation claim under Title VI or under a Title VI regulation that prohibits retaliation." U.S.

Dep't of Justice, *Title VI Legal Manual* 65 (Jan. 11, 2001) (available at www.usdoj.gov/crt/cor/coord/vimanual.pdf). As the Department explained in its contemporaneously issued manual regarding Title IX:

> 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 to ensure 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.

U.S. Dep't of Justice, *Title IX Legal Manual* 70 (Jan. 11, 2001) (available at www.usdoj.gov/crt/cor/coord/ixlegal.pdf). The Department of Education, consistent with its early guidance discussed on page 9, *supra*, concurs in this interpretation.

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. *Since Retaliation Is Prohibited By Section 601, That Retaliation Is Also Prohibited By Agency Regulations Does Not Bar Private Enforcement Through The Section 601 Right Of Action*

As noted above, the Department of Education and other federal agencies have consistently interpreted Section 601 to prohibit retaliation. This interpretation has been embodied in regulations providing that retaliation for filing a complaint or exercising one's rights under Title VI is prohibited. See, *e.g.*, 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 *Title VI Legal Manual*, *supra*, at 65 (noting that "most agency Title VI regulations" contain anti-retaliation provision).

1. 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 embodied in 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 discriminatory effects regulation promulgated under Title VI. *Id*. at 278-279. Based on case law interpreting Title IX, the Court held that Congress intended to create a private cause of action to enforce Section 601. *Id*. at 279-280, 284. 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 284. 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 at issue 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 284-285. Accordingly, the Court concluded that Congress would have had to create (either explicitly or implicitly) a separate private cause of action to enforce the effects regulations. *Id.* at 285-286. 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 291-293.

The retaliation regulation, unlike the Title VI effects regulation, prohibits intentional differential treatment. The Court in *Sandoval* explained that "[w]e do not doubt that regulations applying § 601's ban on intentional discrimination are covered by the cause of action to enforce that section." *Id*. at 284. Therefore, contrary to the district court's understanding, the fact that the prohibition on retaliation appears in a regulation is not dispositive of the inquiry. The question is whether the text of Section 601 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 601's cause of action for intentional discrimination -- or whether it can be viewed only as a valid means of "effectuat[ing]" Section 601 -- 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.").[8] For the reasons discussed above, the text, structure, history, and administrative construction all support an interpretation of Section 601 to include a prohibition on retaliation.

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

2. This Court's decisions in *Preston* v. *Virginia*, No. 91-2020, 1991 WL 156224 (Aug. 18, 1991), adhered to after remand, 31 F.3d 203 (1994), support reading the anti-retaliation regulation as merely a specific application of the prohibition in Section 601 itself. *Preston* involved a plaintiff who "argue[d] that retaliatory conduct is prohibited by Title IX." *Id*. at *2.[9] This Court "agree[d]" with that contention, reasoning that the Department of Education's Title IX regulation prohibiting retaliation was not an "unreasonable" application of the statute, and remanded for further proceedings. *Ibid*. On plaintiff's appeal from an adverse jury verdict, this Court reiterated the first opinion's holding that "[r]etaliation against an employee for filing a claim of gender discrimination is prohibited under Title IX." 31 F.3d at 206. This Court explained that "[w]e previously concluded that the Secretary of Education's determination that Title IX should be read to prohibit retaliation based on the filing of a complaint of gender discrimination is reasonably related to the purpose of Title IX and therefore is entitled to deference by this court." *Id*. at 206 n.2. The Court also concluded that "Congress intended that Title IX be interpreted and enforced in the same manner as Title VI." *Ibid*.

[9] The first decision in *Preston* was unpublished, but was relied on for this legal holding in the published decision on appeal after remand. Pursuant to Circuit Rule 36(c), we have attached a copy of the unpublished opinion as an addendum to this brief.

This Court should adhere to its decisions in *Preston* and hold that Section 601 is properly interpreted as including a prohibition on retaliation that can be enforced through Section 601's private right of action.

CONCLUSION

The cause of action under Section 601 encompasses claims of retaliation. The district court's judgment on this claim should be reversed and the case remanded for further proceedings.

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 29(d), that the attached Brief for the United States as Amicus Curiae is proportionally spaced, has a typeface of 14 points, and contains 6990 words.

February 27, 2002

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2002, two copies of the Brief for the United States as Amicus Curiae Supporting Plaintiff and Urging Reversal were served by first-class mail, postage prepaid, on the following counsel:

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