No. 02-1672

IN THE
Supreme Court of the United States

RODERICK JACKSON,

Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

1. In August 1999, the Petitioner, Roderick Jackson, began working for the Birmingham Board of Education ("Board") at Ensley High School as a physical education teacher. Joint Appendix ("J.A.") 10. In addition to working as a teacher, the Petitioner also coached the girls basketball team. J.A. 10. It was in the Petitioner's latter capacity that he allegedly observed differential treatment among the girls and boys basketball teams. J.A. 10-11. Petitioner claimed that he complained about the alleged treatment to his supervisor, and as a result, he allegedly received a negative work evaluation that eventually led to the discontinuation of his coaching duties in May 2001. J.A. 10-11. It is undisputed that Petitioner retained his tenured position as a physical education teacher at Ensley. J.A. 10-11.

2. On July 27, 2001, the Petitioner filed a Complaint, alleging that the Board discriminated against him on the basis of his gender in violation of 20 U.S.C. § 1681, *et seq.* ("Title IX"). *See* J.A. 9-12. The Complaint, however, was not a model of clarity. J.A. 13. Construing the Complaint in a light most favorable to the Petitioner, it appeared that he was attempting to assert both a claim that the Board discriminated against him on the basis of his gender in violation of Title IX and 20 U.S.C. § 1681, and a retaliation claim. *See* J.A. 9-12. Also in the Complaint, the Petitioner made a broad reference to Title VII. However, he did not state a Title VII claim, and significantly, he never filed the requisite EEOC charge that is required as a condition precedent to filing a Title VII lawsuit. J.A. 9-12, 14.

3. On July 30, 2001, the Petitioner subsequently filed an Amended Complaint. *See generally*, J.A. 9-12. In his Amended Complaint, he alleged that the girls team was not provided a key to the padlock for the sports facility, and they were prohibited from using certain equipment. J.A. 10-11. Yet, the Petitioner made no specific allegations as to how the Board discriminated against him on the basis of his gender. He instead alleged that he received "negative evaluations" and that he "was terminated on May 7, 2001." J.A. 11. This, however, was untrue. J.A. 16. The Petitioner finally

conceded that he was still employed with the Board at the time that he filed his lawsuit, and he has remained employed with the Board at all times relevant to this matter. J.A. 25.

4. On September 10, 2001, the Board filed a Motion to Dismiss, contending that Petitioner lacked standing to assert a Title IX claim, and that he failed to state a claim under Title IX. *See generally*, J.A. 13-23. The Board also contended that Title VII was the exclusive remedy for allegations of employment discrimination on the basis of sex in federally funded educational institutions. J.A. 18-19. On September 13, 2001, the Petitioner filed a response to the Board's Motion. *See generally*, J.A. 24-28.

5. On January 10, 2002, the Magistrate Judge entered a Report and Recommendation ("Report"), recommending the dismissal of the Petitioner's Complaint. Petition Appendix ("Pet. App.") 28a-33a. In his Report, the Magistrate Judge rejected each and every one of the Petitioner's claims. *See* Pet. App. 28a-33a. More specifically, the Magistrate Judge found that the Petitioner failed to state a claim for which relief could be granted, he lacked standing to assert a claim under Title IX, and his claim was pre-empted by Title VII. Pet. App. 30a-31a.

6. The Magistrate Judge's finding that the Petitioner lacked standing was premised on the fact that the Petitioner, a male coach, had no standing to assert the claims of the female members of the girls basketball team for alleged violations of their rights. Pet. App. 30a. Consequently, the Magistrate Judge reasoned that the "persons" allegedly subject to discrimination under Title IX were the female members of the basketball team — not their male coach: "Their coach has no standing to assert for them their claims of discrimination in this regard because he has suffered no personal loss or injury due to the discrimination, which is the sine qua non of standing." Pet. App. 30a.

7. Furthermore, the Magistrate Judge held that to the extent that the Petitioner was asserting the loss of an employment benefit — i.e., the discontinuation of his coaching

responsibilities and denial of the corresponding coaching salary — this was more properly a claim of employment-related discrimination under Title VII, rather than Title IX. Pet. App. 31a. Such claims "must rest exclusively under Title VII, and not Title IX . . . which preempts any employment-discrimination under Title IX." Pet. App. 31a. The Magistrate Judge further held that the Petitioner's denouncement of any reliance on Title VII essentially mooted his claims of employment discrimination as Title VII was the exclusive mechanism upon which the Petitioner could have brought these claims. Pet. App. 31a.

8. The Magistrate Judge subsequently recommended that the Board's Motion to Dismiss be granted, and the Petitioner's Complaint dismissed. Pet. App. 33a.

9. On February 25, 2002, United States District Judge Robert B. Propst adopted the Magistrate Judge's Report. Pet. App. 27a. The court also found the holding in *Holt v. Lewis*, 955 F. Supp. 1325 (N.D. Ala. 1995), *aff'd*, 409 F.3d 771 (11th Cir. Feb. 21, 1997), *cert. denied*, 522 U.S. 817, 118 S. Ct. 67, 139 L. Ed. 2d 29 (Oct. 6, 1997), persuasive, particularly as it found no controlling Eleventh Circuit or Supreme Court authority supporting the Petitioner's contention that Title IX created a private cause of action for retaliation. Pet. App. 27a. Rather, the district court found that Title IX did not create such a right and affirmed the Magistrate Judge's recommendation of the dismissal of the Petitioner's lawsuit. Pet. App. 27a.

10. On March 5, 2002, the Petitioner filed a Notice of Appeal with the Eleventh Circuit.

11. On October 21, 2002, the Eleventh Circuit issued its Opinion. After construing the facts alleged in the Complaint in a light most favorable to the Petitioner, the Eleventh Circuit still held that the Petitioner's claims were due to be dismissed. *See* Pet. App. 1a-26a. Specifically, the Eleventh Circuit held that "*Alexander v. Sandoval* plainly precluded a federal court from implying a right of action for retaliation or expanding the class benefitted by Title IX." Pet. App. 26a. In ultimately dismissing the Petitioner's Complaint, the Eleventh Circuit

found that no private right of action or private remedy existed for retaliation.

12. The primary basis for the Eleventh Circuit's holding was this Court's decision in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). Pet. App. 6.

> First, *Sandoval* distills and clarifies the approach we are obliged to follow in determining whether to imply a private right of action from a statute. Second, *Sandoval* resolved a claim under Title VI of the Civil Rights Act of 1964 ("Title VI"), 78 Stat. 252, as amended, 42 U.S.C. § 2000d *et seq.*, which is the model for Title IX and whose language Title IX copies nearly verbatim. . . . Third, like Jackson, the plaintiffs in *Sandoval* relied on a regulation promulgated to enforce Title VI as the basis for implying a private right of action.

Pet. App. 8a-9a. *Sandoval*, in turn, held that Title VI did not imply a right of action for private litigants to assert a cause of action for disparate impact. Morever, in *Sandoval*, the Supreme Court instructed that legislative intent was the only basis upon which a private right of action could be properly inferred.

13. *Sandoval*, then, was the "template" that the Eleventh Circuit followed exclusively in reaching its decision to affirm the dismissal of the Petitioner's Complaint. Pet. App. 17a, 24a-26a.

14. The Eleventh Circuit also utilized the four (4) prong test of *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975) in its analysis of the Petitioner's claims. However, the Court recognized that the Supreme Court had "receded" from the test set forth in *Cort*. Pet. App. 19a.

15. The Eleventh Circuit also distinguished the Supreme Court's holding in *Sandavol* from *Cannon v. University of Chicago*, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979), to the extent that *Cannon* did not address the question that was before them. The question was "whether Title IX implies a private right of action to redress retaliation resulting from Title

IX complaints or whether individuals other than direct victims of gender discrimination have any private rights under Title IX at all." Pet. App. 19a.

16. In response to the question, the Eleventh Circuit concluded that, "after reading Title IX in the manner required by *Sandoval*, we can find nothing in the language or structure of Title IX creating a private cause of action for retaliation, let alone a private cause of action for retaliation against individuals other than direct victims of gender discrimination." Pet. App. 19a.

17. Initially, the Eleventh Circuit looked to the text of § 901 of Title IX, which it observed made no mention of retaliation at all. Pet. App. 19a-20a. The fact that retaliation was not mentioned anywhere in the statute led the Eleventh Circuit to conclude that the omission "weigh[ed] powerfully against a finding that Congress intended for Title IX to reach retaliatory conduct." Pet. App. 20a.

18. The Eleventh Circuit then looked to § 902 of Title IX and held that it also did not reveal any intent by Congress to imply a private right of action for retaliation. The Court further held that § 902 did not reveal any private right of action of any kind. Pet. App. 20a-21a.

19. Based on its review of §§ 901 and 902, the Eleventh Circuit concluded "much like the Supreme Court did in *Sandoval*, that nothing in the text or structure of §§ 901 and 902 yields the conclusion that Congress intended to imply a private cause of action for retaliation." Without evidence of congressional intent, the Eleventh Circuit determined that it was not empowered to create a right that Congress did not intend to create. As the text of these sections revealed no indication that Congress intended that Title IX prevent or redress retaliation, they could not "imply a private right of action to redress it." Pet. App. 21a-22a.

20. The Eleventh Circuit also rejected the notion that Title IX's regulations-which did reference retaliation-created a private remedy. Quoting *Cannon*, the Eleventh Circuit

reiterated the general principle that, "[l]anguage in a regulation. . .may not create a right that Congress has not." Pet. App. 22a.

21. Furthermore, the Eleventh Circuit held that Title IX was only intended to protect direct victims of gender discrimination. As the statute did not specifically mention individuals other than actual victims of discrimination, indirect victims could not be brought under the umbrella of the class that was meant to be protected under Title IX. Pet. App. 24a.

22. The Eleventh Circuit concluded that Title IX did not imply a private right of action for individuals who were allegedly retaliated against for complaining about the gender discrimination suffered by others. "Statutory intent," the Court stressed, "remains the touchstone of our analysis." Pet. App. 24a-26a. Without such intent, the Eleventh Circuit determined that it could not imply a private right of action, regardless of how desirable the implied right may be. *Id.*

23. On May 2, 2003, the Petitioner filed a Petition for Writ of Certiorari with this Court. The question presented by Petitioner was, as follows:

> Whether the private right of action for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, encompasses redress for retaliation for complaints about unlawful sex discrimination.

The Petitioner's question, however, completely fails to address whether an implied right exists as to indirect victims of discrimination.

24. On July 15, 2003, the Respondent filed a Brief in Opposition to the Petition for Writ of Certiorari.

25. On June 14, 2004, this Court granted the Petition.

SUMMARY OF ARGUMENT

Retaliation is not referenced in the text of Title IX. In fact, a plain reading of Title IX reveals that the word "retaliation" is nowhere in its text. Presumably, retaliation is not mentioned because Congress did not intend for Title IX to encompass such claims. Accordingly, there is no enforceable private right of action for retaliation under Title IX. The Petitioner, however, contends that he is entitled to an implied private remedy because an anti-retaliation provision is implicit in civil rights statutes. Yet, this argument fails because it is not consistent with Congressional intent or to this Court's current approach to implied private rights of action. The Petitioner's reliance on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400 (1969), is also unsustainable since it was decided after Congress enacted Title VI. This is an important distinction since Title IX has been held to be in *pari materia* with Title VI. Defects in finding implied rights under Title VI, reveal similar defects in Title IX. In turn, if *Sullivan* does not apply to Title VI, then it is equally inapplicable to Title IX. It cannot be said, then, that Congress implied a right for retaliation under either Title VI or Title IX or by its silence on *Sullivan*.

Moreover, there is a palpable difference between discrimination and retaliation. That is, being punished for speaking out on an issue regarding sex is not the same as being discriminated against on the basis of one's sex, particularly where the complainer's sex is not at issue. This distinction is significant since liability under Title IX turns "on the basis of sex." 20 U.S.C. § 1681. If the complainer's sex is not at issue, he is reduced to the status of an "indirect" victim of discrimination, who falls outside of Title IX. The Petitioner has not alleged discrimination on the basis of *his* sex. Rather, he has alleged discrimination on the basis of someone else's sex. Therefore, he is an indirect victim of discrimination. Accordingly, he fails the "on the basis of sex" proviso of Title IX.

Additionally, the Petitioner may not reference Title VII's anti-retaliation provision by analogy. Title VII and Title IX are two (2) different statutes. Title VII was enacted pursuant to

the Commerce Clause, has a strict administrative scheme, and it also has an express anti-retaliation provision built into the body of the statute. Title IX, on the other hand, was enacted under the Spending Clause, and it has no anti-retaliation provision in its body. Title VII is, however, illustrative of what Congress did not do with Title IX: enact an anti-retaliation provision.

Nor do the regulations implementing Title IX bolster the Petitioner's search for redress. Specifically, Congress did not articulate an express desire to expand Title IX's ban on discrimination to include retaliation. The statute does not even speak to the issue of a private right of action generally, and it certainly does not refer to a private right of action for retaliation, specifically. In fact, the prohibition against retaliation is found only in the regulations for Title VI, that is, 34 C.F.R. § 100.7(e) ("§ 100.7(e)"). By prohibiting an act that is not prohibited by the statute, § 100.7(e) improperly extends beyond Title IX. As no private right of action may exist under a regulation that does not also exist in the actual statute, § 100.7(e) is out of harmony with Title IX, and is not entitled to deference by this Court.

In addition to being outside of the scope of Title IX, § 100.7(e) cannot be treated as an interpretation of the statute. In *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d (1984), this Court held that where a statute is ambiguous, courts may rely on the administrative agency's interpretation of the statute in construing the statute. No such ambiguity exists here. Title IX clearly describes the type of discrimination prohibited and retaliation against third-party complainers is not included. Since there is no ambiguity as to whether Title IX creates a private cause of action for retaliation, § 100.7(e) is not entitled to deference, nor would it be since it has impermissibly exceeded the statute.

Title IX should not be afforded the "broad sweep" encouraged by the Petitioner. A broad interpretation would lead to an abrogation of the actual statute as implied terms would replace express terms, allowing for almost unlimited

liability. Such boundless liability is in contravention of Title IX which, by its own terms, has only one express remedy: suspension or termination of federal funds. 20 U.S.C. § 1681. This would also be violative of the principles of *Pennhurst State Sch. & Hosp. v. Halderman*, which necessitates that when Congress imposes a condition on a state's receipt of federal funds, it "must do so unambiguously." 451 U.S. 1, 17, 101 S. Ct. 1531, 1540 67 L. Ed. 2d 694 (1981). For that matter, statutes enacted under Title IX are said to be in the nature of a contract between the government and the funding recipient; the terms of the contract, then, must be clear and unambiguous. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 656, 119 S. Ct. 1661, 1678, 143 L. Ed. 2d 839 (1999) (Kennedy, J., dissenting). Since Title IX does not create an explicit private cause of action, this Court must engage in finding a private right by implication. Implying rights, however, is inapposite to the actual notice standard required under the Spending Clause. The question then becomes did the Board have actual notice that it would be liable under Title IX for allegedly retaliating against a male coach for complaining against sex discrimination. The answer is no. The Board did not have "clear and unambiguous" notice that it would be liable in damages for allegedly retaliating against a person that it did not discriminate against on the basis of his sex.

The structure of Title IX also weighs against an implied remedy for retaliation. Title IX already contains an express administrative remedy. This fact strongly suggests that Congress meant to preclude other remedies not specifically listed. Thus, the structure of Title IX as well as its express administrative remedies discourage any further expansion of implied remedies.

Further, an important distinction must be made between "direct" and "indirect" victims of discrimination. The Eleventh Circuit recognized this distinction when it held that, as an indirect victim of discrimination, the Petitioner did not have an implied or private cause of action under Title IX for discrimination "on the basis of sex." Since the Petitioner was

deemed to be an "indirect victim" of discrimination, he was not protected by Title IX.

Lastly, *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001), should — like it did three (3) years ago — guide this Court's holding today. *Sandoval* addressed the interpretation of statutes when implied causes of action are at issue. Relying on this precedent, the Eleventh Circuit held that neither the text nor the structure of Title IX indicate that Congress intended the statute to provide a private cause of action for retaliation discrimination. The Petitioner, however, asserts that the Eleventh Circuit's application of *Sandoval* is the only one of its kind. This is simply not true. As discussed below, district courts, as well as dissenters from other circuit courts, have adopted the Eleventh Circuit's holding that a private cause of action for retaliation does not exist under either Titles IX or VI. Contrarily, the only "rogue" circuit has been the Fourth Circuit which, through its holding in *Peters v. Jenney*, 327 F.3d 307, 318 (4th Cir. 2003), ignored the precedent of *Sandoval (supra)* and *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333 (11th Cir. 2002).

As it stands, the Eleventh Circuit's reasoning in *Jackson v. Birmingham Bd. of Educ.* (*supra*), was correct, and should be affirmed by this Court.

ARGUMENT

I. INTRODUCTION

Title IX begins with the declaration that, "[n]o person 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." Notably, this statute — which is deceptively straightforward — says nothing about retaliation or even sports. Instead, it stands for a general prohibition against discrimination on the basis of one's sex by recipients of federal funds. Moreover, the "sex" referred to in the statute has predominantly stood for females.

The crux of the statute lies in the following five (5) words: "on the basis of sex." This means that a victim of discriminatory treatment must show that their sex motivated the improper treatment. The aforementioned five (5) words compelled the United States District Court for the Northern District and the United States Court of Appeals for the Eleventh Circuit to conclude that the Petitioner had no cognizable claim under Title IX since he had not been discriminated against on the basis of *his* sex. In other words, the Petitioner's claims were not rooted in discrimination "on the basis of sex" as the statute requires. Rather, his claims were based on alleged retaliation– conduct which is clearly not within the express language of Title IX. Retaliation, though prohibited by enabling regulations, is not prohibited by its text. In fact, retaliation is not mentioned anywhere in the text of the statute. Presumably, no specific mention is made of retaliation because Congress did not intend for Title IX to encompass such claims.

Much jurisprudence has, however, centered not on what statutes provide expressly, but rather on what they do *not* provide and what may be implied from the omission. Hence, the corpus of law regarding implied rights of action was born. *Cannon v. University of Chicago*, 441 U.S. 677, 732, 99 S. Ct. 1946, 1975-76, 60 L. Ed. 2d 560 (1979) (Powell, J., dissenting), *citing*, *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 36 S. Ct. 432, 60 L. Ed. 874 (1916). An implied right, however, turns on a finding of Congressional intent; Congressional intent, whether self-evident or implied, is the veritable yardstick by which implied rights of action are measured. Yet, where the intent to create an implied right is not clear by analysis of the statute's text and structure, no such right is found to exist. *Alexander v. Sandoval*, 532 U.S. 275, 286-87, 121 S. Ct. 1511, 1519-20, 149 L. Ed. 2d 517 (2001).

The text of Title IX does not support the Petitioner's retaliation claim. He simply does not have a cognizable private right of action for retaliation according to Title IX's express terms. Reaching this conclusion, however, does not diminish the effective purpose of the statute or adversely affect those who Congress intended to benefit under its provisions. Nor

does reaching this conclusion disturb enforcement of the statutory purpose. That is, women's place in our society would not regress to before 1972 when Title IX was first enacted. Further, direct victims of sex discrimination would still have a mechanism for pursuing their rights under Title IX. The only difference would be that the express terms of the statute would override any implication or inference. This Court, in turn, would no longer need to forage for a cause of action under Title IX where there simply is none. Furthermore, to deny the Petitioner's Title IX claims would avoid the assured slippery slope he advances. The statute would be upheld according to its *express* terms and direct victims of discrimination would benefit from the same. Affirming the lower courts' decisions to dismiss the Petitioner's claims would ensure that Title IX protects its "unmistakable focus on the benefitted" class of persons rather than mere bystanders like the Petitioner. *Cannon*, 441 U.S. at 691, 99 S. Ct. at 1955.

Additionally, to read an anti-retaliation provision into Title IX would be tantamount to an amendment, which is well beyond a mere interpretation of the law. Certainly, if Title IX is to be amended to include a claim for retaliation, Congress is the proper Branch to cause such to occur. "[A]bsent specific direction by Congress," this Court "should be extremely reluctant to imply a cause of action" and should be even more reluctant to "sit as a committee of review" or attempt to "wield a power to veto" that was not congressionally bestowed upon it. *See Cannon*, 441 U.S. at 744-45, 99 S. Ct. at 1982 n.14 (Powell, J., dissenting), *quoting University of Cal. Regents v. Bakke*, 438 U.S. 265, 418-421, 98 S. Ct. 2733, 2814-15, 57 L. Ed. 2d 750 (1978). Our system of government is a tripartite one — Executive, Legislative and Judicial — rather than a quadripartite system, where its federal agencies are the fourth Branch. A Federal agency may not rise to the level of Congress, and its regulations may not rise to the status of law. This is especially so where the regulations are contrary to the express provisions of the statute. Thus, to the extent that *stare decisis* conflicts or clouds the same, these prior decisions are due to be reconsidered by this Court and a ruling entered that harmonizes with this

Court's reasoning set forth less than three (3) years ago in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). Specifically, no further extension of *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969), *Cannon v. University of Chicago*, or *Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1991), is necessary, and the implied right of action test under *Cort v. Ash* is due to be limited to its proper sphere of influence.

II. THE EXPRESS LANGUAGE OF TITLE IX DOES NOT SUPPORT A CAUSE OF ACTION FOR RETALIATION

When Title IX was enacted in 1972, it was enacted with two (2) principal objectives in mind: "[t]o avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 301, 118 S. Ct. 1989, 2005, 141 L. Ed. 2d 277 (1998), *quoting Cannon*, 441 U.S. at 744-45, 99 S. Ct. at 1961-62. It was modeled after Title VI of the Civil Rights Act of 1964, with the exception that Title VI substitutes "sex" with "race." *Grove City College v. Bell*, 465 U.S. 555, 566, 104 S. Ct. 1211, 1217-18, 79 L. Ed. 2d 516 (1984). Title IX has an express means of enforcement, including the ability of agencies who disburse education funding, namely the Department of Education and its Office of Civil Rights ("OCR"), to terminate or suspend funding to a recipient. 20 U.S.C. § 1682. Although these agencies are empowered to enforce Title IX in its entirety, § 901 is the paragraph that is the essence of Title IX. This Section begins with, "[n]o person . . . shall, on the basis of sex," and concludes by referencing discrimination. *See* 20 U.S.C. § 1681, *et seq.* Conspicuously absent from § 901 is the one word that has brought this matter from a federal court in the Northern District of Alabama to its present place before this Court: retaliation.

Title IX itself seems clear and unambiguous on the issue of retaliation since it is not referenced in the text of the statute. Discrimination, on the other hand, is mentioned. Presumably, no specific mention is made of retaliation because Congress

did not intend for Title IX to encompass such claims. Yet, as evident from the Petitioner's contentions and a few corroborative cases from the Fourth Circuit[1], the exclusion of retaliation from the text of Title IX has not stopped private litigants from attempting to breath life into what appears to be a dead issue. By endeavoring to cull a cause of action out of congressional silence and statutory omission, this private litigant seeks to create by implication that which is not within the statutory coverage. The Petitioner further contends that discrimination is, in effect, retaliation and that the two (2) exist symbiotically. *See* Petitioner's Brief ("Pet. Br.") 12-14. The text of the statute, however, belies the Petitioner's contentions.

Contrary to the Petitioner's contentions, this case *is* about whether this Court should recognize a new cause of action. In fact, by seeking to enforce a right by implication rather than one that is expressly granted by the statute, this Court would either have to create a new right out of whole cloth or expand its current provisions to embrace a right that the statute does not expressly provide. Thus, the real question before this Court is two-fold: (1) how to define the scope of the implication; and (2) to resolve whether, even if such a right is implied, should it be extended to this Petitioner, an alleged indirect victim who is not basing his claim on gender discrimination as addressed by Title IX. Specifically, this Court must determine whether such a private action exists. If so, whether that right extends to one who was not a direct victim of gender discrimination.

The Eleventh Circuit — principally relying on this Court's holding in *Alexander v. Sandoval* — answered the implication in the negative. That is, the Eleventh Circuit concluded that no implied private right of action existed because Title IX did not expressly prohibit retaliation, and there was no Congressional intent to create such an implied right. *See* Pet. App. 1a-26a. The Eleventh Circuit also found that the administrative regulations at issue could not create a remedy that Congress itself did not intend to create. Pet. App. 22a-

1. *See Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003); *see also, Preston v. Virginia ex rel. New River Community College*, 31 F. 3d 203 (4th Cir. 1994).

23a. The Eleventh Circuit also answered the latter part of the issue, that is, whether Title IX extends to indirect victims of gender discrimination. Again, their response was "no": "[w]e thus hold that Title IX does not imply a private right of action in favor of individuals who, although not themselves the victims of gender discrimination, suffer retaliation because they have complained about gender discrimination suffered by others." Pet. App. 24a-25a. The Petitioner's prayer for relief, then, is not confined to defining the scope of a "statutory right long recognized." Pet. Br. 11. Rather, the only way he may bring his claim for retaliation is by recreating and rewriting Title IX so that he, as an indirect victim of discrimination, may benefit.

A. TITLE IX ONLY PROHIBITS DISCRIMINATION, NOT RETALIATION

The Petitioner contends that "retaliation is a variant of discrimination," and advances the notion that prohibiting one inexorably prohibits the other. Pet. Br. 13. Yet, the reality is that retaliation and discrimination are not as identical as he contends. As the Fifth Circuit has noted, "[w]hile retaliation is technically a form of employment discrimination, *it is not independently prohibited by the proscription against discrimination on the basis of sex in federally-funded educational institutions, which is the heart of Title IX*." *Lowrey v. Texas A&M Univ.*, 117 F.3d 242, 248 n.6 (5th Cir. 1997) (emphasis in original).

1. *A Prohibition Against Retaliation is not Implicit in Civil Rights Statutes Generally*. The Petitioner argues that he is entitled to an implied private remedy because anti-retaliation is implicit in civil rights statutes. Pet. Br. 12-15. This argument fails because it is not consistent with Congressional intent or this Court's current approach to the creation of implied private rights of action. The Petitioner relies principally on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969), to support his position, however, *Sullivan* cannot sustain his claim.

Sullivan allowed a private cause of action for retaliation under 42 U.S.C. § 1982. The Petitioner claims that *Sullivan* established that anti-retaliation prohibitions are generally included by implication in civil rights statutes. However,

Sullivan does not justify the reliance that the Petitioner places upon it. First, the argument from *Sullivan*, as advanced by the Petitioner, conflicts with *Alexander v. Sandoval* — a later precedent of this Court — which clearly holds that implied rights and remedies can be recognized only if Congress so intended. 532 U.S. 278, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). *Sandoval* specifically noted that the previous, liberal understanding of private rights of action was abandoned in *Cort v. Ash*, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975). *See Sandoval*, 532 U.S. at 287, 121 S. Ct. at 1520. Thus, cases under the "*ancien regime*" have been abandoned and should be approached with caution to the extent that they conflict with *Sandoval* and *Cort v. Ash. See Sandoval*, 532 U.S. at 288, 121 S. Ct. At 1520. *Sullivan* has not been overruled, but *Sandoval* requires that it be limited to its facts.[2]

Still, the most glaring problem with *Sullivan* is the fact that it was decided *after* Congress enacted Title VI. Thus, in enacting Title VI, Congress could not have known that courts would imply a cause of action for Title VI based on *Sullivan*, which dealt with an entirely different statute.

As it stands, *Sullivan* is distinguishable from the instant case on its facts. Moreover, its expansive treatment of the implied rights doctrine is contrary to this Court's attempts to retreat from the same. *See Touche Ross v. Redington*, 442 U.S. 560, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979); *see also*, *Thompson v. Thompson*, 484 U.S. 174, 108 S. Ct. 513, 98 L. Ed. 2d 512 (1988); *Sandoval*, *passim*. Due to the dated nature of *Sullivan* and its incongruence with current law, it should be reconsidered or at the very least, limited by this Court.

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2. It is not clear to what extent *Sullivan* survived *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989), which held that 42 U.S.C. § 1981 covered only discrimination in the making and enforcement of contracts and not racial harassment during the employment relationship. *Patterson* was overruled by statute, but this Court later held that the amendment was not retroactive, implicitly rejecting arguments that § 1981 should have been broadly construed from the outset. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994). Neither *Patterson* nor *Rivers* discussed *Sullivan*, but their holdings caution against an expansive reading of that case.

2. *The Text of Title IX Does Not Reveal That its Prohibition Against Discrimination Includes a Similar Ban Against Retaliation*. A plain reading of discrimination under Title IX does not encompass retaliation. As discussed by the court in *Litman v. George Mason Univ.*:

> A comparison of the two claims provides an answer to the query by highlighting the differences. Section 1681 prohibits discrimination "on the basis of sex," which means a victim of discriminatory treatment must show she directly suffered harm from that discrimination and that her gender motivated the improper treatment. On the other hand, a claim of retaliation is fundamentally an assertion that one spoke out about discrimination and *was punished for speaking out*. The harm from retaliation is not a direct result of discrimination on the basis of sex but stems from the actions one took in response to the discrimination. In other words, the harm suffered by a victim of retaliation, while prohibited by the Title IX regulations, is not clearly prohibited by Title IX's text, because it does not result directly from unlawful discrimination *on the basis of sex*.

156 F. Supp. 2d at 585 (E.D. Va. 2001) (emphasis in original). Thus, being punished for speaking out on an issue regarding sex is not the same as being discriminated against on the basis of one's sex, particularly where the complainer's sex is not at issue. For instance, being passed over for a promotion for a lesser qualified applicant of another race, is not the same as being passed over for a promotion after challenging the hiring practices of the employer. In the former instance, the employee's race is center stage and is the cause of the employee's injury. In the latter instance, his *speech* is center stage and his race is not an issue at all. Instead, he is being penalized for his speech. As evident from the example, discrimination and retaliation may exist separately and apart from each other.

One must recognize that Congress explicitly decided not to create a private right of action for retaliation under Title IX. This choice is evident by their corresponding choice not to include the language anywhere in the statute or in a separate provision, as it did in Title VII. Additionally, the standard for Title IX is codified in the following words: "on the basis of sex." These words are the gatekeeper of Title IX claims, meaning, that one should not proceed without first satisfying this requirement. *See Lamb-Bowman v. Delaware State Univ.*, 152 F. Supp. 2d 553, 561 (D. Del. 2001) (holding that the plaintiff had "not demonstrated that she suffered retaliation because she complained of discrimination based on her sex"). As evident from the Petitioner's Complaint, he has not alleged discrimination on the basis of *his* sex. Rather, at all times, he has alleged that the basis of his retaliation claim is the discriminatory treatment of others based on *their* sex. This clearly fails the "on the basis of sex" proviso of Title IX. To allow the Petitioner to delude this basic requirement would render "on the basis of sex" meaningless. Title IX would devolve from a statute that bans only sex discrimination to a garden-variety discrimination statute whereby anyone could bring a claim of discrimination, regardless of whether sex was even an issue. Certainly, this was not Congress' intent.

3. *Title IX's Text Should Not Be Expanded in Accordance with Title VII*. To offer some clarity to this issue, some courts have instructed that a claim for employment-related retaliation under Title IX should be analyzed in line with the framework of Title VII. *Preston v. Virginia ex rel. New River Community College*, 31 F. 3d 203, 206 (4th Cir. 1994); *A.B. v. Rhinebeck Central Sch. Dist.*, 2004 WL 1944338, *8 (S.D. N.Y. Aug. 24, 2004), *citing Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 248 (2d Cir. 1995). Yet, there is no consensus on this issue among the circuits. *But see, e.g., Litman v. George Mason Univ.*, 156 F. Supp. 2d 579, 583 (E.D. Va. 2001) (noting that the text of Title VII's retaliation provision is "markedly different" and is therefore "of limited usefulness in interpreting the Title IX retaliation provision."). Title VII is at least instructive since it is one of the civil rights statutes that has an express anti-

retaliation provision in its body.[3] Perhaps the most significant instruction that one may garner from Title VII is its illumination of what Congress did *not* include in Title IX: "an explicit statement that retaliation for exercising one's rights to be free from unlawful discrimination is itself a form of prohibited discrimination [under Title IX]." *Litman*, 156 F. Supp. 2d at 586. It is further proof that where Congress "was aware that it could create a right of action for retaliatory treatment . . . it did so in Title VII," whilst choosing not to create a similar right of action under Title IX. *Litman*, 156 F. Supp. 2d at 584-85.

Nevertheless, Title VII and Title IX are very different. For instance, they have distinct enforcement mechanisms and statutory provisions. The most obvious distinction is the investigatory process of the Equal Employment Opportunity Commission ("EEOC") that inhibits an aggrieved party's ability to file a lawsuit under Title VII until after the EEOC has first had an opportunity to investigate the complaint. 42 U.S.C. § 2000e-4. Additionally, Title IX was enacted pursuant to Congress' Spending Clause power, while Title VII was enacted pursuant to its Commerce Clause power. *Litman*, 156 F. Supp. 2d at 583. A further point of distinction is found in the fact that, unlike Title IX, Title VII contains an express cause of action for damages. 42 U.S.C. § 1981. In contrast, Title IX's remedies are judicially implied and lack the benefit of "legislative expression of the scope of available remedies." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284, 118 S. Ct. 1989, 1996, 141 L. Ed. 2d 277 (1998); *see also*, *Cannon v. University of Chicago*, 441 U.S. 677, 716-17, 99 S. Ct. at 1968, 60 L. Ed. 2d 560 (1979) (noting that Congress directly addressed the issue of damages under Title VII as well as the maximum amount recoverable). Thus, although Title VII may be instructive, its instructions are limited to serving as an example

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3. This section deems it to be an unlawful employment practice for any employer to retaliate against an employee "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).

of what Congress could have done with Title IX if it had chosen to do so, not as a green light to expand Title IX beyond its express terms.

As to those courts that have utilized Title VII by analogy, the federal court in *Litman v. George Mason Univ.*, noted that although Title VII "defines retaliation as a form of discrimination," Congress "defined discrimination more broadly in Title VII than Title IX." 156 F. Supp. 2d at 584; *see also*, *Waid v. Merrill Area Public Sch.*, 91 F.3d 857 (7th Cir. 1996) (holding that Title VII preempted an employee's claims for sex discrimination under Title IX and 42 U.S.C. § 1983). Such a broad definition, however, was tempered by Congress imposing greater restrictions on an aggrieved party's right to bring suit, including strict adherence to a comprehensive administrative scheme prior to the filing of any lawsuit. *Id.* at 584. The *Litman* court cautioned against expanding Title IX to infer a claim for retaliation under discrimination, like it had done with Title VII. *Id*. at 584. Specifically, the court advised that, "when Congress so clearly chose to limit the scope of Title VII's right of action for retaliation to Title VII complaints, and further to restrict court action on that right to claims that have been administratively exhausted, the Court is reluctant to extend that right (and the manner in which the courts have interpreted it) to the Title IX context." *Id.* at 585. Further,

> the marked differences between both the statutory prohibitions and the administrative schemes created by Title VII and Title IX strongly weigh against expanding the scope of potential liability under Title IX for those receiving federal funds by interpreting "discrimination" to include retaliation, as under Title VII, when Congress did not clearly articulate such an understanding in the statutory text itself.

Litman, 156 F. Supp. 2d at 584. This language is axiomatic of the well-settled principle that, "when Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and

thereby enlarge their jurisdiction." *Cannon*, 441 U.S. at 730-31, 99 S. Ct. at 1975 (Powell, J., dissenting). Congress did not articulate any desire to expand Title IX's ban on discrimination to include retaliation — even though a bureaucracy may have done so.[4] The statute does not even speak to the issue of a private right of action. This right has been judicially implied, as have the damages available under the same. *E.g.*, *Cannon*, *passim; see also*, *Franklin*, *passim*. In turn, there is no legislative expression of the scope of available remedies under Title IX, as there is under Title VII. Since Congress has not spoken to the issue of retaliation under Title IX — and has in fact distinguished Title IX from Title VII by codifying an anti-retaliation provision for one and not the other — it is inappropriate to extend Title IX in accordance with Title VII. The marrying of retaliation and discrimination is contrary to the express terms of Title IX.

Here, Congress has chosen not to create a private right of action for retaliation under Title IX. This choice appears to be evident by Congress' corresponding choice not to include or even reference retaliation in the statute, or to enact a separate anti-retaliation provision.

B. THE TEXT OF TITLE IX SHOULD NOT BE CONSTRUED TOO BROADLY

The Petitioner avers that Title IX should be accorded "a sweep as broad as its language." Pet. Br. 12. A broad interpretation is contrary to the strict interpretation normally afforded to statutes enacted under the Spending Clause. *See Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 28-29, 101 S. Ct. 1531, 1545-46, 67 L. Ed. 2d 694 (1981). Moreover, couched in the Petitioner's request for broad interpretation is a similar request for a broad remedy. This request invokes an

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4. Again, Congress did not include retaliation anywhere in the text of Title IX. This is an important distinction as the only reference to retaliation under Title IX is found in its regulations which were written by the Department of Health, Education and Welfare and the Department of Education. Furthermore, the agency's regulation only references retaliation to the extent that it adopts an anti-retaliation regulation in another statute, namely Title VI. *See* 34 C.F.R. § 100.7(e).

application of the "any appropriate relief" standard which has been used before to justify damages outside of the statute. *See Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 61-69-71, 112 S. Ct. 1028, 1029-1034-1035, 117 L. Ed. 2d 208 (1992). The unavoidable result of broad interpretation, in tandem with implied rights, would be the replacement of express terms with implicit ones, and an abrogation of the actual statute.

1. *Too Broad a Construction of Title IX Would Extend Beyond the Scope of the Statute.* The right the Petitioner seeks to assert under Title IX — as would be the case for any private right asserted under the statute — would have to be judicially implied. A broad interpretation, coupled with an implied right, would allow for almost unlimited recovery under Title IX which, by its own terms, has only one express remedy: suspension or termination of federal funds. *See* 20 U.S.C. § 1681, *et seq.*

Such interpretative liberty would allow an implicit remedy to supercede an express one. It "would be anomalous . . . for a judicially implied cause of action [to be expanded] beyond the bounds [Congress] delineated for comparable express cause of action." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 289-90, 118 S. Ct. 1989, 1999, 141 L. Ed. 2d 277 (1998). The Court has already allowed for a private cause of action under Title IX — in contravention of the statute *(see Cannon, passim*), and allowed damages from the same — also in contravention of the statute (*See Franklin, passim*). Now, this Court finds itself in familiar territory, but should not reach the same result. A broad reading of Title IX has led to an expansion of implied rights with no stopping point in sight. The implied rights of Title IX are becoming farther removed from the express terms of the statute. If this Court takes the position of the Petitioner and his amici, there would be no end. Implication would substitute interpretation. This substitution, however, "[would not be] faithful either to our [the Supreme Courts'] precedents or our duty to interpret, rather than to revise, congressional commands." *Gebser,* 524 U.S. at 293, 118 S. Ct. at 2001 (Stevens, J., dissenting).

Worse still is the Petitioner's assertion that Congress' amendments of Title IX, Title VII and the Age Discrimination in Employment Act ("ADEA"), post-*Cannon v. University of Chicago* is evidence of its acceptance of implied causes of action under Title IX. Pet. Br. 15. In essence, the Petitioner has elevated Congress' inaction to wilful conduct and silence to acceptance. Yet, this Court has already cautioned against treating, "[congressional] silence as the equivalent of the broadest imaginable grant of remedial authority." *Franklin*, 503 U.S. at 78, 112 S. Ct. at 1039 (Scalia, J., concurring). Moreover, isolated amendments are not proof positive of congressional approval of the Court's statutory interpretation. *Alexander v. Sandoval*, 532 U.S. 278, 292, 121 S. Ct. 1511, 1523, 149 L. Ed. 2d 517 (2001).

As it stands, simultaneous broad interpretation and implication of rights would leave funding recipients flailing in the wind. The standard of "all appropriate relief" coupled with the standard of judicially implied causes of action would be an ambush. A funding recipient may face the risk of having their federal funds suspended or terminated, or be liable in money damages to the alleged victim, or face injunctive relief, or all four (4). Assuming the worst, institutions like the Board could conceivably lose their federal funds and still have to pay compensatory and punitive damages, all from one adverse judgment. Yet, Title IX's only express means of enforcement is through administrative agencies, and its only express remedy is the termination or suspension of its federal funds. 42 U.S.C. § 1681. At least under these provisions, the recipient has the benefit of an investigation by the OCR prior to any action being taken against it. In the Petitioner's version, recipients would not have the benefit of an investigation or any curative process whatsoever. Rather, recipients would be subjected to a strict liability regime where their federal funds and entire budgets would be at stake.

Title IX litigants already receive the benefit of foregoing the statute's administrative scheme and proceeding straight to court. This is a benefit that other victims of sex discrimination under Title VII do not have. *See West v. Gibson*, 527 U.S. 212, 119 S. Ct. 1906, 144 L. Ed. 2d 196 (1999). Title IX

litigants get a free pass and may immediately arm themselves with a lawsuit. Conversely, Title VII claimants must first file a complaint with the EEOC or risk having their federal law claims dismissed. *See* 42 U.S.C. § 2000e, *et seq*. In both instances, the victim has alleged sex discrimination, but the person under Title VII must exhaust all of their administrative remedies before proceeding to court. Immediate gratification for Title IX litigants after *Cannon* all but ignores the comprehensive administrative scheme of Title IX. *See Gebser*, 524 U.S. at 288, S. Ct. at 1999. This concern was noted by Justice Powell in his dissent in *Cannon*:

> [w]e have recognized in other contexts that implication of a private cause of action can frustrate those alternative processes that exist to resolve such disputes and, given the costs of federal litigation today, may dramatically revise the balance of interests struck by the legislation . . . That this concern applies fully to litigation under Title IX is borne out by the facts of this case.

Cannon, 441 U.S. at 748 n.19, 99 S. Ct. at 1984 n.19 (Powell, J., dissenting). This case will be no different. What plaintiff would elect to complain to the OCR if they could just shortcut to federal court and obtain the satisfaction of a money judgment? Surely, this was not contemplated by Congress in its creation of Title IX's administrative scheme, and should not be condoned by this Court.

2. *Pennhurst and its Progeny Do Not Permit Broad Interpretation of Spending Clause Statutes.* As a general rule, when Congress imposes a condition on a state's receipt of federal funds, it "must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981). Moreover, legislation enacted pursuant to Congress' spending power is much in the nature of a contract: "the legitimacy of Congress' exercise of its power to condition funding on whether the State voluntarily and knowingly accepts the terms of the 'contract'." *Pennhurst*, 451 U.S. at 17, 101 S. Ct. at 1540. Naturally, there can be "no knowing acceptance [of the terms of the putative contract]

if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it." *Pennhurst*, 451 U.S. at 17, 101 S. Ct. at 1540. In turn, this Court has insisted that Congress "speak with a clear voice" so that states are "knowing and cognizant of the consequences of their participation." *Id*.

For its part, Title IX does not create a private cause of action, nor does it define the circumstances in which money damages are available. 20 U.S.C. § 1681. Instead, any and all private causes of action under Title IX are judicially implied. *See Cannon v. University of Chicago*, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979). As private causes of action and damages are both judicially implied, the Court must inexorably indulge in a degree of speculation — much as it must with any right that is implied. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 656, 119 S. Ct. 1661, 1677-78, 143 L. Ed. 2d 839 (1999) (Kennedy, J., dissenting), *quoting*, *Gebser*, 524 U.S. at 284, 118 S. Ct. 1989 (noting that, defining the scope of the private cause of action and the concomitant damages, "inherently entails a degree of speculation, since it addresses an issue on which Congress has not specifically spoken."). Yet, when the statute at issue was enacted under the Spending Clause, as Title IX was, "this element of speculation is particularly troubling because it is in significant tension with the requirement that Spending Clause legislation give States clear notice of the consequences of their acceptance of federal funds." *Davis*, 526 U.S. at 656-57, 119 S. Ct. at 1678 (Kennedy, J., dissenting). Accordingly, this Court "must not imply a private cause of action for damages unless it can demonstrate that the congressional purpose to create the implied cause of action is so manifest that the State, when accepting federal funds, had clear notice of the terms and conditions of its monetary liability." *Davis*, 526 U.S. at 656, 119 S. Ct. at 1678. Thus, under contract terms, the recipient must have actual notice of the government's "offer" at the time that it "accepts." Consequently, the Department of Education's regulations may not qualify as actual notice under Spending Clause principles. *Davis*, 526 U.S. at 668, 119 S. Ct. at 1683 (Kennedy, J., dissenting).

The question then becomes, did the Board have actual notice? That is, did it knowingly and voluntarily accept federal money with the understanding that it would violate Title IX by retaliating against a male coach, who did not allege discrimination on the basis of his sex? The obvious answer is no. The Board did not have notice that its funding would be jeopardized by the above scenario. Nevertheless, a contract existed between the Board and the federal government and the terms seemed clear: by accepting the funds, the Board was precluded from discriminating against others "on the basis of sex." The implied rights doctrine via *Cannon*, *Franklin* and *Davis* would alter the terms of this contract, however, to include retaliation–a term which is not expressly written into the contract, but rather is implied. The Board could have no notice that it would breach this contract by allegedly retaliating against a male coach. However, the standard for Spending Clause statutes is actual notice. Thus, liability by implication runs contrary to the actual notice standard under the Spending Clause. Relatively little notice, if any, may be said to exist where the terms and remedies are only implied. *See Davis*, 526 U.S. at 656, 119 S. Ct. at 1677-78. Implied rights of action and actual notice, then, are strange bedfellows. At least one Justice has recognized this tension by espousing that actual notice and implied rights are "neither sensible nor faithful to Spending Clause principles." *Davis*, 526 U.S. at 657, 119 S. Ct. at 1678. (Kennedy, J., dissenting).

Title IX's contractual nature, then, has real implications for the Court's construction of the scope of available remedies. *Barnes v. Gorman*, 536 U.S. 181, 187, 122 S. Ct. 2097, 2101, 153 L. Ed. 2d 230 (2002). This includes placing practical limits on the application of its appropriate relief standard. For instance, since punitive damages are not available for breach of contract actions, neither should they be available against a funding recipient under Title IX. *See Barnes*, 536 U.S. at 187-88, 122 S. Ct. at 2102 (holding that punitive damages are not available under Title IX). Nor may punitive damages be implied under Title IX. *Id*. Still, gleaning an implied remedy from an implied

cause of action is boundless. This Court has already expressed its concern regarding remedies under implied causes of action:

> [w]e have acknowledged that compensatory damages alone might well exceed a recipients level of funding, punitive damages on top of that could well be disastrous. Not only is it doubtful that funding recipients would have agreed to such unorthodox and indeterminate liability; it is doubtful whether they would even have *accepted the funding* if punitive damages was a required condition.

Id. at 188 (emphasis in original). Moreover, a finding of Congressional intent to impose conditions on federal funding is heightened where a recipient's potential obligations are "legally indeterminate," as they currently are for implied rights. *See Pennhurst*, 451 U.S. at 24, 101 S. Ct. at 1543.

Here, the Board's liability would be unlimited or "legally indeterminate" if an implied right of action is found. Not only would this be violative of traditional Spending Clause principles, but it would also be a breach of contract for the judiciary — assuming it is a party to said contract — to insert an additional term by implication, and of which the Board was not originally aware. The question of whether the Board would have accepted federal funds if it would have known of its liability to indirect victims of discrimination for retaliation is a speculative, "no." The speculation of this answer is no more speculative than inferring a private cause of action from a Spending Clause statute. Still, the Court must resolve whether the Board was on notice at the time it accepted federal money that it would be liable under Title IX for allegedly engaging in conduct not prohibited by the statute, namely retaliation. The Court must also resolve whether the Board had notice that its alleged retaliation against a male coach — an indirect victim — who complained about discriminatory treatment of others violated Title IX. The Board's response to these necessary inquiries is also "no." The Board did not have "clear and unambiguous" notice that it would be liable in

damages for allegedly retaliating against a person whom it did not discriminate against on the basis of his sex.

Still, the standard remains that Congress must speak with a "clear voice" on the conditions it places on federal funds. If the Court has to imply a cause of action only to then imply a remedy, this is evidence that Congress did not speak with the requisite clarity. Instead, it has spoken with whispers and double entendres. To impose liability upon the Board under these circumstances would "impose on [it] liability that was unexpected and unknown, [and the] contours of which are, as yet, unknowable." *See Davis*, 526 U.S. at 657, 119 S. Ct. at 1678.

III. THE REGULATIONS ARE CONTRARY TO THE EXPRESS TERMS OF TITLE IX AND ARE NOT DUE TO BE ENFORCED

Congress authorized certain governmental agencies to "effectuate the provisions of 20 U.S.C. § 1681 . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." 20 U.S.C. § 1682. The U.S. Department of Education, through the OCR, promulgated 34 C.F.R. § 100.7(e), a regulation which prohibits retaliation against any person who complains that an education program is not in compliance with Title IX. 34 C.F.R. § 100.7(e).[5] This regulation is an adoption of a similar regulation from Title VI. Regulations, however, may only "construe the statute itself" (*Nations Bank of N.C., N.A. v. Variable Annuity Life Ins.* Co., 513 U.S. 251, 257, 115 S. Ct. 810, 130 L. Ed. 2d 740 (1995)), and a "private plaintiff may not bring a [suit based on a regulation] against a defendant for acts not prohibited by the text of the statute." *Central Bank of Denver, N.A. v. First Interest Bank of Denver,* N.A., 511 U.S. 164, 173, 114 S. Ct. 1439, 1446, 128 L. Ed. 2d 119 (1994); *see also, Alexander v. Sandoval*, 532 U.S. 275, 291, 121 S. Ct. 1511, 1522, 149 L. Ed. 2d 517 (2001) (noting that, "language in a regulation may invoke a private right of action that Congress through

5. 34 C.F.R. § 100.7(e) was originally promulgated to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000, *et seq*., but it has been incorporated by reference to enforce Title IX. *See* 34 C.F.R. § 106.71.

statutory text created, but it may not create a right that Congress did not."). As has been recognized by many courts, Titles VI and IX are in *pari materia* such that cases interpreting Title VI and Title IX may be used interchangeably in analyzing similar issues. *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1339 (11th Cir. 2002). Still, analogies to Title VI should be made carefully. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 529, 102 S. Ct. 1912, 1957, 72 L. Ed. 2d 299 (1982); *Cannon*, 441 U.S. at 725-26, 99 S. Ct. at 1972-73 (White, J., dissenting) (noting that, "an erroneous interpretation of Title VI should not be compounded through importation into Title IX under the guise of effectuating legislative intent.").

The genesis of the Petitioner's claim for a private cause of action for retaliation under Title IX is not Congress. Rather, it is born out of a federal agency — namely the Department of Health, Education and Welfare ("HEW") and later, the Department of Education — exceeding its congressional grant of authority to implement the statute. Instead of implementing Title IX, they have attempted to create law through a regulation. The specific regulation at issue bars a recipient of federal funding from retaliating against a person who complains of gender discrimination in violation of Title IX. *See* 34 C.F.R. § 100.7(e).

Title IX, however, makes no reference whatsoever to retaliation. 20 U.S.C. § 1681, *et seq*. In the short paragraph that comprises the pith of Title IX, the word "retaliation" is nowhere to be found. 20 U.S.C. § 1681. The prohibition against retaliation is found only in the regulations for Title VI. 34 C.F.R. § 100.7(e). Accordingly, the reach of the regulation has extended beyond the grasp of Title IX since it makes conduct unlawful that would not otherwise be unlawful under the actual statute. It is well-settled that no private right of action exists where it is born out of a regulation rather than the actual statute. *Sandoval*, 532 U.S. at 291, 121 S. Ct. at 1522 (noting that, "it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress"). As stated by this Court in *Dixon v. United States*, "the rulemaking power granted to an

administrative agency charged with the administration of a federal statute is not the power to make law." 381 U.S. 68, 74, 85 S. Ct. 1301, 1305, 14 L. Ed. 2d 223 (1965), *quoting, Manhattan Gen. Equip. Co., v. Comm'r*, 297 U.S. 129, 134, 56 S. Ct. 397, 400, 80 L. Ed. 528 (1936). Yet, penning an anti-retaliation provision into the regulations of Title IX eclipses mere interpretation and is an attempt by the agency to make law. *E.g., Touche Ross & Co. v. Redington*, 442 U.S. 560, 577, 99 S. Ct. 2479, 61 L. Ed. 2d 82 n.18 (1979). Thus, to the extent that the Department of Education's regulations do more than just interpret Title IX or have created a rule out of harmony with the statute, they are a "mere nullity." *Manhattan Gen. Equip. Co.*, 297 U.S. at 134, 85 S. Ct. at 400. Specifically, 100.7(e) is out of harmony with Title IX, and as such, is not entitled to deference by this Court. As it stands, the retaliatory conduct of which the Petitioner complains would violate only the regulation, and would not violate Title IX. In turn, no right may be enforced from it by the Petitioner, and there can be no Title IX violation nor entitlement to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984).

A. THE REGULATIONS DO NOT DESERVE ANY DEFERENCE

The Petitioner asserts that the regulations are interpretations of Title IX, and thus deserve deference. Pet. App. 27. *Chevron*, 467 U.S. at 842-44. As discussed above, the regulations are outside of the scope of Title IX. Therefore, the subject regulations cannot be treated as an interpretation of the statute. Furthermore, Title IX does not require additional interpretation from the regulations as it is clear on its face. The Petitioner also argues that the regulations deserve deference because Congress has not acted against them. Pet. App. 27, 29-31. *Sandoval* established that Congress' silence towards regulations does not equal an approval of the same. 532 U.S. 275, 121 S. Ct. 1511.

1. *Title IX Is Not Ambiguous, Therefore, the Regulations Are Not Entitled to Chevron Deference.* In *Chevron*, this Court stated that where a statute is ambiguous, the Court will rely on the

administrative agency's interpretation of the statute in construing the statute. 467 U.S. at 842-43, 104 S. Ct. at 2781-82. The Petitioner states that there may be some ambiguity as to whether Title IX's prohibition of discrimination includes retaliation. Pet. App. 26-27. No such ambiguity exists here. The statute clearly describes the type of discrimination to be prohibited, and retaliation against third-party complainers is not included. In *Sandoval*, the Court did not find that the statute was unclear on whether Title VI created a private cause of action for disparate-impact discrimination. 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). The statute simply did not speak to or include such an action. Therefore, there was no ambiguity or need to defer to the regulations. Similarly, there is no ambiguity as to whether Title IX creates a private cause of action for retaliation. The statute simply does not even purport to prohibit such practices. Furthermore, regulations that construe the statute in an impermissible manner are not entitled to deference even where there is ambiguity. *Chevron*, 467 U.S. at 843, 104 S. Ct. at 2782. The Petitioner's interpretation of the regulations would yield an impermissible construction of the statute. The Eleventh Circuit was correct in following the *Sandoval* model and not extending any deference to the regulations on this issue.

2. *The Regulations Are Not Entitled to Deference Simply Because Congress Has Not Acted Against Them*. In *Sandoval*, this Court gave little credence to congressional inaction. 532 U.S. at 292-93, 121 S. Ct. at 1523. The Petitioner advances the argument that the regulations deserve deference, separate and apart from *Chevron*, because Congress had the opportunity to reject or modify them and it did not do so. Pet. App. 27, 29-31. The Petitioner's argument is questionable given this Court's rejection of a similar argument in *Sandoval* where it was argued that congressional inaction somehow "ratified" judicial decisions, allowing for disparate-impact claims under Title VI. 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). This Court was not persuaded by this same argument in *Sandoval*, finding that "when, as here, Congress has not comprehensively revised a statutory scheme but has made only isolated

amendments, we have spoken more bluntly: It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation." 532 U.S. at 292-93, 121 S. Ct. at 1523. In light of this language in *Sandoval*, it was reasonable and proper for the Court of Appeals not to extend any deference to the regulations.

Sandoval is sound jurisprudence regarding statutory construction. The Eleventh Circuit properly applied the framework in *Sandoval* in holding that the text of Title IX does not create a private cause of action for retaliation. Furthermore, the Eleventh Circuit gave the proper deference — none — to the regulations in holding that they do not create a private cause of action for retaliation. As such, the judgment of the Eleventh Circuit should be affirmed.

B. EVEN UNDER THE REGULATIONS, THE PETITIONER DOES NOT HAVE THE REQUISITE STANDING TO ENFORCE A RETALIATION CLAIM UNDER TITLE IX

According to the Petitioner, this case is about the scope of an implied right already recognized rather than the creation or expansion of a right. Pet. Br. 10-11. This statement, however, is contradicted by the unlimited purview of the Question Presented: "Whether the private right of action for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, *et seq.*, encompasses redress for retaliation for complaints about unlawful sex discrimination." Pet. Br. i. By asking whether Title IX affords relief for retaliation is to first assume that retaliation is even cognizable under Title IX. This is tantamount to placing the cart before the horse since it skips a vital analytical step: to assume a right to relief is to assume that a right has been violated. Yet, as evident from the face of Title IX, no right of the Petitioner has been violated.

At this time, any right asserted by the Petitioner exists through the grace of implication and a single regulation.

Since he seeks relief from a cause of action whose existence, to date, remains unproven, this question has already been answered by the Eleventh Circuit in the negative. Pet. App. 2a. A similar negative response may be gleaned from this Court's decision in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) — which was the basis of the Eleventh Circuit's ruling in *Jackson* — and subsequent district court opinions that have followed *Sandoval*.[6] The Petitioner's question, however, is a loaded one. To answer affirmatively is to open the door to indirect victims of discrimination, seemingly without limitation. It would also erase the only bright line under the statute, that is, the "on the basis of sex" requirement.

In *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333 (11th Cir. 2002), the Eleventh Circuit was faced with an issue of first impression, namely, whether an implied right of action for retaliation existed under Title IX. The court stated the issue more succinctly, as follows:

> The question before us is whether Title IX implies a private right of action in favor of individuals who, although not themselves the victims of gender discrimination, suffer retaliation because they have complained about gender discrimination suffered by others.

Pet. App. 2a. This appears to be a more accurate depiction of the issues than the myopic question advanced by the Petitioner today. Nevertheless, before the Eleventh Circuit could attempt to define the parameters of the right asserted by the Petitioner, it had to first consider whether the right even existed. What the Petitioner advanced was an inference— upon a presumption — upon an inference approach: for the Eleventh Circuit to first infer that a retaliation claim could be implied, only to then presume that indirect victims like himself were protected, and lastly,

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6. *See Mock v. South Dakota Bd. of Regents*, 267 F. Supp. 2d 1017, 1018 (D.S.D. 2003); *see also, Atkinson v. Lafayette College*, 2002 WL 123449 at *11 (E.D. Pa. Jan. 29, 2002).

to imply that he was entitled to redress. Again, with this Court's decision in *Sandoval* as a guide, the Eleventh Circuit's response was a resounding no, as set forth below:

> In *Cannon*, however, the Supreme Court had no occasion to address the question before us today: whether Title IX implies a private right of action to redress retaliation resulting from Title IX complaints or whether individuals other than direct victims of gender discrimination have any private rights under Title IX at all. Nor has any subsequent decision of the Supreme Court or this Court resolved these questions. We therefore face the basic question of whether to imply a private right of action and a private remedy for retaliation in favor of an individual who is not himself a direct victim of gender discrimination. After reading Title IX in the manner required by *Sandoval*, we can find nothing in the language or structure of Title IX creating a private cause of action for retaliation, let alone a private cause of action for retaliation against individuals other than direct victims of gender discrimination.

Pet. App. 19a.

Consequently, the question posed by the Petitioner is only part of the issue. Couched in this question is an alternative query: whether the private right of action for violations of Title IX encompasses a claim for retaliation from complaints by indirect victims about unlawful sex discrimination against others. Again, the Eleventh Circuit's response was "no". Specifically, the Eleventh Circuit held that, as an indirect victim of discrimination, the Petitioner had no implied or private cause of action under Title IX for discrimination "on the basis of sex." Accordingly, not only did the Petitioner's claim fail the fundamental "on the basis of sex" criterion, it also failed on the issue of standing since he was an "indirect victim" of discrimination. Indirect victims of discrimination were not protected by Title IX. 309 F. 3d at 1347.

The Eleventh Circuit, steadfast to the actual terms of the statute, simply refused the Petitioner's invitation to traverse a slippery slope, that is, to allow an indirect victim to prevail where a direct victim could not do so. The text of the statute did not allow it, so the Eleventh Circuit would not enforce it. Pet. App. 25a ("we simply cannot imply a private right of action, no matter how desirable the result may be."). Thus, the Petitioner did not have standing under the statute, nor did he have standing under the regulations. Based on the Eleventh Circuit's reasoning, indirect victims did not have standing, either under Title IX or its regulations. The benefit of Title IX and its regulations, then, remained vested in direct victims, rather than indirect victims or bystanders like the Petitioner.

The Eleventh Circuit further recognized, as follows, the inherent dangers of expanding the class of beneficiaries under Title IX to persons twice and thrice-removed from actual victims of gender discrimination:

> . . . Jackson is plainly not within the class meant to be protected by Title IX. Nowhere in the text . . . is any mention made of individuals *other* than victims of gender discrimination. Gender discrimination affects not only its direct victims, but also those who care for, instruct, or are affiliated with them — parents, teachers, coaches, friends, significant others, and coworkers. Congress could have easily provided some protection or form of relief to these interested individuals had it chosen to do so — but it did not do so expressly. Nor does any language in § 902 evince an intent to protect anyone other than direct victims of gender discrimination. Indeed, as with § 602 of Title VI, the focus of § 902 is "twice removed" from victims of gender discrimination, *Sandoval*, 532 U.S. at 289, 121 S. Ct. at 1521, and, consequently, thrice-removed from individuals like Jackson who are not themselves the victims of gender discrimination. Here, there is quite simply no indication of any kind that

> Congress meant to extend Title IX's coverage to individuals other than direct victims of gender discrimination.

Pet. App. 23a-24a. Clearly then, indirect victims like the Petitioner have no cognizable right for retaliation under Title IX. They, however, may find solace in other statutes, such as 42 U.S.C. § 1983 or Title VII, where appropriate. *See Cannon*, 441 U.S. at 723-725, 99 S. Ct. at 1971-1972 (Powell, J., dissenting).

Without a distinction between direct and indirect victims, recipients of federal funds — like the Board — will face double and triple exposure as disgruntled employees file lawsuits under the guise of whistle-blowing. Actual victims, in turn, will receive no redress for their actual harm. Whistle-blowers would receive judgments, and the actual victims would be subject to res judicata. Moreover, the Board would be held to be in violation of Title IX, and face the real risk of losing federal funds for engaging in conduct that is far removed from the "on the basis of sex" standard. The "on the basis of sex" standard would be transmuted to an "on the basis of anything" standard. Any and every employee could file a lawsuit based on their observations rather than their personal injury or harm. Standing under Title IX would open wide to embrace any employee who ever complained about someone else's troubles, whether real or imagined. The Board, in turn, would be faced with crushing financial liability for violating an imagined right asserted by an indirect victim. Certainly, Congress did not intend for Title IX to devolve into a catch-all statute, such as the Petitioner envisions.

IV. CONGRESS DID NOT INTEND TO CREATE AN IMPLIED PRIVATE RIGHT OF ACTION UNDER TITLE IX FOR RETALIATION

The Petitioner can recover under Title IX only if he can establish congressional intent to create an implied private right of action against retaliation. It is undisputed that Title IX does not create an express private right of action or private remedy of any kind. An implied private right of action for direct

discrimination was recognized by this Court in *Cannon v. University of Chicago*, 441 U.S. 677, 717, 99 S. Ct. 1946, 1968 (1979). This implied remedy was later extended to include monetary damage remedies in *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 77, 112 S. Ct. 1028, 1039, 117 L. Ed. 2d 208 (1992). This Court has not, however, similarly extended the statute to create an implied remedy for retaliation against one who is not a direct victim of gender discrimination.

A. THE TEXT OF § 901 BELIES ANY INTENT TO CREATE AN IMPLIED PRIVATE RIGHT OF ACTION FOR RETALIATION

The analysis in this case can begin and end with the text of the statute. Section 901, the only section that creates any private rights, does not prohibit retaliation for opposing gender discrimination. Section 901 provides, in pertinent part, that "[n]o person . . . 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). Clearly, this section says nothing about retaliation, and instead applies only to persons who are discriminated against on the basis of sex. The Petitioner was not discriminated against on the basis of sex, nor does he claim that he was.[7] *Jackson*, 309 F.3d at 1335. Rather, his sole claim is that he was subjected to retaliation for complaining about alleged discrimination against members of the girls basketball team.

Because Congressional intent is the only permissible basis for creating implied private rights, the definition of covered rights in § 901 is of paramount importance. Although this Court has interpreted § 901 to include implied rights and remedies, it has been careful not to extend the scope of those rights beyond the discrimination prohibited

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7. That fact distinguishes this case from most of the cases cited by the Petitioner where a student claims both direct discrimination and retaliation for complaining about the original discrimination.

in the text of the statute. That is, the Court has not gone far afield to create additional rights or classes of beneficiaries not described in the statute itself.

This Court's holding in *Davis v. Monroe County Bd. of Educ.*, dictates a cautious approach to implied rights, and does not justify judicial creation of the broad right against retaliation sought by the Petitioner. 526 U.S. at 650-51, 119 S. Ct. 1675 (1999). A broad prohibition against retaliation would exceed the scope of the statute and result in judicial creation of a right that Congress did not intend. The role of the judiciary is to interpret only those rights which Congress intended to create, not to create new rights. This is the case no matter how desirable the result or how consistent with the policy goals of the statute.

As noted by the Eleventh Circuit in *Jackson*, the text of § 901 does not prohibit retaliation or imply any such prohibition. 309 F.3d at 1344. Therefore, the Eleventh Circuit refused to create a new right and construed its task as merely,

> to interpret what Congress actually said, not to guess from congressional silence what it might have meant. The absence of any mention of retaliation in Title IX therefore weighs powerfully against a finding that Congress intended Title IX to reach retaliatory conduct.

Jackson, 309 F.3d at 1344-45. This conclusion is reinforced by the contrast between Title IX and Title VII, the latter which contains an express prohibition against retaliation. 42 U.S.C. § 2000e-3(a). Clearly Congress knew how to prohibit retaliation when it so chose, militating against an implied prohibition.[8] It may be safely assumed, therefore, that Congress chose not to create a similar prohibition against retaliation in Title IX.

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8. Unlike "sexual harassment," "retaliation" is not a subset of discrimination, which is a point made clear by the fact that Title VII contains specific language defining discrimination to include retaliation. No such language exists in Title IX.

B. THE STRUCTURE OF TITLE IX AND THE EXISTENCE OF AN EXPRESS ADMINISTRATIVE REMEDY MILITATE AGAINST AN IMPLIED REMEDY

The structure of Title IX also weighs against an implied remedy for retaliation 20 U.S.C. § 1681. That is, the statute already contains an express administrative remedy. 20 U.S.C. § 1681. The Department of Education enforces the provisions of Title IX through an administrative process that they culminate in a complete denial of federal funds to an entity in violation of Title IX. This structure suggests that Congress — by providing an express remedy — meant to preclude other remedies not specifically listed. *E.g.*, *National R. R. Passenger Corp. v. National Assn. of R. R. Passengers*, 414 U.S. 45, 94 S. Ct. 690, 38 L. Ed. 2d 646 (1974) (Ct. Refused to imply private right because administrative remedy was expressly available. Although some implied remedies have been recognized, the structure of Title IX and its express administrative remedies caution against any further expansion of implied remedies.

In sum, the text of § 901 and the structure of Title IX clearly establish that Congress did not intend to create a private right of action for retaliation. The *Sandoval* analysis compels the conclusion that no basis exists for the courts to create an implied right of action for retaliation, and the decision below is correct.

V. THIS COURT'S HOLDING IN *ALEXANDER v. SANDOVAL* IS CONTROLLING

Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001), serves as the most recent guidepost for statutory construction. Specifically, *Sandoval* addresses the interpretation of statutes when implied causes of action are at issue. Relying on this precedent, the Eleventh Circuit held that neither the text nor the structure of Title IX indicates that Congress intended the statute to provide a private cause of action for retaliation. *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1345 (11th Cir. 2002). Moreover, the Eleventh

Circuit was not persuaded that § 902 added any weight to the Petitioner's contention that he has a cause of action for retaliation.

A. *SANDOVAL* REVEALS THAT CONGRESS DID NOT INTEND TO CREATE A PRIVATE CAUSE OF ACTION FOR RETALIATION

The statute interpreted in *Sandoval* was Title VI. There, the issue was whether Title VI, or the regulations promulgated pursuant to § 602 of Title VI, created a private cause of action for disparate-impact discrimination. Here, the issue is whether Title IX, or the regulations promulgated pursuant to § 902, create a private cause of action for retaliation. Petitioner asserts that *Sandoval* has no bearing on this case because of these differences. However, it has been the long-standing opinion of this Court that Title VI serves as the model for Title IX. *Cannon v. University of Chicago*, 441 U.S. 677, 694-95, 99 S. Ct. 1946, 1956-57, 60 L. Ed. 2d 560 (1979) ("Title IX was patterned after Title VI. . . . Except for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI, the two statutes use identical language to describe the benefitted class."). Furthermore, this Court did not limit the steps to utilize in statutory analysis to Title VI only. In fact, this Court and other Circuit Courts of Appeal, have relied on the framework in *Sandoval* to construe other statutes. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 284, 122 S. Ct. 2267, 2275-76, 153 L. Ed. 2d 309 (2002) (construing § 1983 and the Family Educational Rights and Privacy Act); *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178 (Fed. Cir. 2004) (construing the Digital Millennium Copyright Act); *Walls v. Wells Fargo Bank*, 276 F.3d 502, 508 (9th Cir. 2002) (construing the Fair Debt Collection Practice Act). As such, the Eleventh Circuit correctly deemed *Sandoval*'s interpretation of Title VI and its regulations to control its interpretation of Title IX and its regulations.

In *Sandoval*, this Court began–and ended–its interpretation of whether § 602 of Title VI created a private

cause of action for disparate-impact discrimination by examining the text and the structure of the statute. This examination was mainly pursued to evince any intent on the part of Congress to create such an action. *Sandoval*, 532 U.S. at 288-89, 121 S. Ct. at 1520-21. This Court found that § 602, which allowed federal agencies to issue rules, regulations or orders to effectuate the statute, did not contain any rights-creating language, nor did it reference a class of persons to benefit under the statute. *Alexander v. Sandavol*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 5171 (2001). Rights-creating language, then, is essential to infer Congressional intent to bestow the right to pursue a cause of action.

The Eleventh Circuit also examined § 902 for any rights-creating language, and found none. In a manner similar to § 602, § 902 simply allows federal agencies to create rules and regulations provided such does not conflict with Congress' intent. *See* 20 U.S.C. § 1682. The text and structure of Title IX are devoid of any Congressional intent to create a private cause of action for retaliation or any other discriminatory practices. Furthermore, in its authorization of agencies to promulgate rules, the Section does not refer to any class of people to benefit from the rules. Therefore, the Eleventh Circuit was correct in holding that no evidence existed in § 902 that Congress intended to create a private right of action for retaliation.

B. THE REGULATION CITED BY PETITIONER IS FAR LESS ENCOMPASSING OF TITLE IX THAN THE REGULATION INVOLVED IN *SANDOVAL* IS OF TITLE VI

Title VI's regulations begin by setting forth a general prohibition against discrimination: "No person in the United States shall, on the ground of race, color, or national origin . . . be otherwise subjected to discrimination . . ." 28 C.F.R. § 42.104(a). The language in the regulation is strikingly similar to the rights-creating portion or text of Title VI, § 601. The regulation then lists in subsection (b)(1) specific discriminatory acts that are prohibited by the

regulation. Despite the regulation's similarities to the actual statute and its specificity in defining discrimination, this Court held that the regulation did not create a private cause of action. *See Sandavol*, 532 U.S. at 292, 121 S. Ct. at 1522.

The Petitioner relies mainly upon the Department of Education's regulation, 34 C.F.R. § 100.7. This regulation does not encompass Title IX's statutory scheme. The rights-creating portion of Title IX §, 901, provides that "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. . . ." Unlike Title VI's regulations, Title IX's regulations do not incorporate any language from the actual text of the statute. *See* 28 C.F.R. § 42.104; *compare* 34 C.F.R. § 100.7. In fact, the subject of the regulation is how the Department of Education should conduct its investigation of possible violations of Title IX. 34 C.F.R.§. 100.7(e). The Petitioner has practically ignored that this regulation deals almost exclusively with the investigatory process and the administrative scheme of Title IX and not discriminatory practices or retaliation. Furthermore, there are limited references — without definitions, examples, or explanations — to the conduct of recipients and the rights of employees. 34 C.F.R. § 100.7(e). The subsection of particular interest to the Petitioner is subsection (e) of 24 U.S.C. § 100.7. This Section of the regulation bears the title "Intimidatory or retaliatory acts prohibited." 34 C.F.R. § 100.7(e). However, this Section does not even purport to define retaliation or discrimination. Additionally, neither this section nor the entire regulation mentions "sex" or "gender," which are key terms to a Title IX lawsuit since they define the class of beneficiaries to be protected under the statute.

In *Sandoval*, this Court found that no private right of action can exist where there is no rights-creating or beneficiary language.

> Statutes that focus on the person regulated rather than the individuals protected create 'no

> implication of an intent to confer rights on a particular class of persons.' Section 602 is yet a step further removed: It focuses *neither on individuals protected nor even on the funding recipients being regulated,* but on the agencies that will do the regulating. Like the statute found not to create a right of action in *Universities Research Assn., Inc. v. Coutu*, § 602 is 'phrased as a directive to federal agencies engaged in the distribution of public funds.' *Id.*, at 772, 101 S. Ct. 1451. *When this is true, '[t]here is far less reason to infer a private remedy in favor of individual persons*.'

Sandoval, 532 U.S. at 289, 121 S. Ct. at 1521 (internal citations omitted). Although the passage quoted above discusses the absence of rights-creating language in the actual statute, the same can be said of the regulations promulgated pursuant to the statute. The Department of Education's regulation does not focus on the benefitting class or funding recipients. Rather, the focus is on the Department itself and its administrative procedures. Under a *Sandoval* analysis, it cannot be found that this regulation bestows any right to a private cause of action for discrimination.

C. PETITIONER SEEKS TO EXTEND THE REGULATION BEYOND THE STATUTE

It is evident from the absence of a prohibition against retaliation in Title IX, and the absence of Title IX's statutory scheme within 34 C.F.R. § 100.7, that the regulation is outside of the scope of Title IX. The Petitioner's argument that the regulation creates a private cause of action for retaliation under Title IX is an impermissible extension of the statute. Whether the regulation actually speaks to retaliation and discrimination is debatable. Assuming that it does, the Petitioner still cannot overcome the fact that the statute itself does not contain such a prohibition. In *Sandoval,* this Court stated that a regulation cannot create a right that is not pre-existing in the statute or one that has not been approved by Congress. *Alexander v. Sandoval,* 532 U.S. 275, 291, 121 S. Ct. 1511, 1522, 149 L. Ed. 2d 517 (2001). "But it is most certainly

incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice, but not the sorcerer himself." *Sandoval*, 532 U.S. at 291, 121 S. Ct. at 1522. Relating back to § 902, the Department of Education was authorized under this Section to create rules to enforce Title IX. However, the Department was not authorized to create private causes of actions in the regulations that go beyond what the statute requires or intended. The regulation, as interpreted by the Petitioner, goes beyond what is proscribed under Title IX. Therefore, any private cause of action, implied or otherwise, gleaned from the regulation would be a stretch of Title IX without Congress' approval. This attempt to unilaterally amend the statute is violative of this Court's holding in *Sandoval*.

This Court has previously expressed its reluctance to extend statute's beyond the scope prescribed by Congress. *See 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 600-601, 71 S. Ct. 515, 520, 95 L. Ed. 566 (1951) (stating that "[i]n our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute [Federal Food, Drug and Cosmetic Act] beyond the point where Congress indicated it would stop"); *see also, Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177, 114 S. Ct. 1439, 1448, 128 L. Ed. 2d 119 (1994) (stating that "[i]t is inconsistent with settled methodology in §§ 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text"); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161, 120 S. Ct. 1291, 1315-16, 146 L. Ed. 2d 121 (2000) stating that

> no matter how 'important, conspicuous, and controversial' the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress . . . we must take care

> not to extend the scope of the statute beyond the point where Congress indicated it would stop.

This Court should maintain its reluctance in extending the scope of Title IX through the regulations as requested by the Petitioner. This impermissible extension of the statute would essentially allow plaintiffs, who are not in the beneficiary class of Title IX, to bring actions for "retaliation" without proving any actual discrimination. The effect upon school boards would be disastrous. The increased exposure to liability would hamper school boards' authority to make necessary employment actions for fear of Title IX lawsuits alleging retaliation. In following the framework provided in *Sandoval*, the Eleventh Circuit held that the regulations could do no more than the actual statute, and effectively maintained the scope of Title IX as intended by Congress.

D. OTHER JURISDICTIONS HAVE ADOPTED AN APPLICATION OF *SANDOVAL* IDENTICAL OR SIMILAR TO THAT OF THE ELEVENTH CIRCUIT

The Petitioner would have this Court believe that the Eleventh Circuit's application of *Sandoval* is the only one of its kind. This is not true. District courts, as well as dissenters from circuit courts, have adopted the Eleventh Circuit's analysis either in whole or in part and held that a cause of action for retaliation does not exist under Titles IX or VI.

1. *The United States District Court for the District of South Dakota Adopted the Eleventh Circuit's Application of Sandoval*. In *Mock v. South Dakota Bd. of Regents*, 267 F. Supp. 2d 1017, 1018 (D.S.D. 2003). The court adhered to the Eleventh Circuit's *Jackson* decision, holding that Title IX does not provide a private cause of action for retaliation. In so doing, the court refuted *Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2001), and its discord with *Jackson*. *Mock*, 267 F. Supp. 2d at 1020-22. First, the court stated that the Fourth Circuit's holding that Title VI needed no express provision for retaliation in light of *Sullivan* was wrong because Title VI was enacted prior to *Sullivan*. Second, the court stated that the Fourth Circuit, unlike the Eleventh Circuit, did not address the

inference that, if Congress made express prohibitions for retaliation in statutes such as Title VII, than it could have also done so for Title VI and Title IX. The absence of such provisions in Title IX lent credence to the fact that Congress' intent to prohibit retaliation was proven through the text and structure of the statute. The court's third and fourth difficulties with *Peters* was that the Fourth Circuit relied heavily on *Cannon* and *Sullivan*'s language regarding implied rights of action, but did not consider those cases in light of the Supreme Court's most recent holding in *Sandoval*. *Mock*, 267 F. Supp. 2d at 1021-22. The court stated that *Sandoval* "is the proper approach to analyzing implied private rights of action and the Eleventh Circuit's decision in *Jackson* properly applied to that approach." *Mock*, 267 F. Supp. 2d at 1022.

2. *The United States District Court for the Eastern District of Pennsylvania applied an Analysis of Sandoval Similar to That of the Eleventh Circuit*. In *Atkinson v. Lafayette College*, 2002 WL 123449, (E.D. Pa. Jan. 29, 2002). The court gave *Sandoval* the same treatment as the Eleventh Circuit. In *Atkinson*, the plaintiff alleged that the college retaliated against her in violation of Title IX when she was terminated after raising concerns regarding gender equality. She sued for retaliation and discrimination pursuant to Title IX. Like the Petitioner, the plaintiff in *Atkinson* argued that the regulations provided for this private cause of action. The court held that a *Sandoval* analysis of Title IX dictated that there was no such action under Title IX. The court then stated that its analysis had to begin by examining the text and the structure of Title IX for evidence of Congressional intent to create a private right of action to enforce the anti-retaliation regulation. The court examined § 902 of Title IX and held that the text of this section did not show that Congress intended to create a private right to enforce 34 C.F.R. § 100.7(e). The court stated that § 902 differs from § 901 — which states that no person shall be discriminated against on the basis of sex. The difference is that § 901 refers to a class of people to receive a benefit from the statute, whereas § 902 does not refer to those benefitting from the statute's protection. Therefore,

§ 901 shows that Congress intended to create a private cause of action for discrimination on the basis of sex, and § 902 simply creates an enforcement mechanism. This enforcement mechanism, however, did not create a prohibition of retaliation under Title IX.

According to the court, although, the regulation is presumed to be valid, but it cannot create a private cause of action because the text and the structure of the actual statute do not confer this benefit. The court noted that, although there are several pre-*Sandoval* cases which concluded that Title IX does include a private cause of action for retaliation, these cases, according to the court, are not in line with *Sandoval*'s holding that, "[l]anguage in a regulation may invoke a private right of action that Congress, through statutory text created, but it may not create a right that Congress has not." *Sandoval*, 532 U.S. at 291, 121 S. Ct. at 1522.

3. *Fourth Circuit Is Not Unanimous in its Holding That Title VI Creates a Private Cause of Action for Retaliation.* There is even some dissension within the Fourth Circuit as to whether a private cause of action for retaliation exists under Title VI. In *Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003), a case relied on by the Petitioner and many of his supporting *amici*, Judge Widener dissented from the majority opinion's rejection of *Jackson* in holding that a private cause of action for retaliation exists under Title VI. *Peters*, 327 F.3d at 324 (Widener, J., dissenting). In his dissent, Judge Widener stated that he agreed with the Eleventh Circuit's conclusions that third-party complainers are not within the benefitted class of persons under Title IX, and that a private right of action for retaliation does not exist under the statute given this Court's directions in *Sandoval*. *Peters*, 327 F.3d at 326 (Widener, J. dissenting). In opining that no private cause of action for retaliation exists under Title VI, the dissent reiterated the holdings in *Sandoval* that "for a private right for retaliation to exist it must be found in the statute created by Congress," and that courts may not create a private cause of action, no matter how desirable, without evidence of congressional intent. *Peters*, 327 F.3d at 324-326 (Widener, J.

dissenting). The dissent adopted the Eleventh Circuit's holding that "the text and the structure of Title IX yields no congressional intent to create a cause of action for retaliation. . . ." *Id*. at 325.

> *Jackson* was a Title IX case, while *Sandoval*, as is the case at hand, was a Title VI case. On the authority of *Cannon*, 441 U.S. at 694-95, 99 S. Ct. 1946, the *Jackson* court read Titles VI and Title IX *in pari materia* as do I. . . . *On that account, the holding in Jackson, that there is no cause of action for retaliation is, for all practical purposes, the holding of a sister circuit on the same question, contrary to the decision of the majority in this case.*

Id. at 326 (Widener, J. dissenting). According to the dissent, *Peters*, and not *Jackson*, is the renegade opinion and is out of line with *Sandoval*.

The Petitioner further cites to *Peters* for the proposition that there is an implied right of action for retaliation.[9] *Peters*,

9. Despite suggestions of "near-consensus in the federal circuit courts," there are really only three cases–this case, *Peters*, and *Lowery v. Texas A&M Univ. Sys.*, 117 F.3d 242 (5th Cir. 1997), a Fifth Circuit decision prior to *Sandoval* — that have squarely addressed whether Title IX created an implied private right of action for retaliation against someone other than the victim of gender discrimination. The other cases cited by the Petitioner are of marginal relevance because they contain no detailed analysis to support an implied right of action and because they ultimately rejected the retaliation claims at issue. The additional cases that ate cited by Petitioner are:

Murray v. New York Univ. College of Dentistry, 57 F.3d 243, 251 (2d Cir. 1995), was decided prior to *Sandoval* and involved a retaliation claim by a dental student who also claimed to be a direct victim of sexual harassment. The opinion assumed that there was a cognizable claim for retaliation, but did not cite any authority for that position nor perform any analysis on the threshold question. It affirmed a dismissal of all claims, including direct discrimination and retaliation.

Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 67 (1st Cir. 2002), also involved a student who asserted claims for direct discrimination and retaliation. That court assumed, also without analysis or citation to authority, that a Title IX retaliation claim involved the same elements as a Title VII retaliation claim. This opinion ultimately affirmed dismissal on the basis that the complaint did not allege facts sufficient to support either Title IX claim — the retaliation claim or the direct discrimination claim.

which was a Title VI case, does not establish such an implied right and pays only lip service to the *Sandoval* analysis. *Peters* did not analyze in depth whether Congress intended to create an implied right against retaliation, but focused primarily on 34 C.F.R. § 100.7(e) as an interpretative regulation that somehow defined "retaliation" as an implicit component of prohibited discrimination. This regulation, however, is not an interpretative regulation, and thus, it cannot validly expand the scope of the statute. *Peters* also relied heavily on *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S. Ct. 400 (1969), for the proposition that retaliation is implicit in civil rights statutes. Significantly, *Peters* was decided after the Eleventh Circuit's opinion in this case, yet the majority opinion barely acknowledges it. Instead, it discusses *Jackson* only in a single footnote. *Peters*, 327 F.3d at 318, n. 10.

The Petitioner seeks to limit *Sandoval* to disparate impact cases, Pet. Br. 10, but fails to acknowledge its more fundamental holdings, that (i) the intent of Congress is the primary desideratum for analyzing implied rights and remedies, and (ii) the federal courts should be reluctant to speak where Congress has been silent. *Sandoval*, 532 U.S. at 287-91, 121 S. Ct. at 1520-22 . The Petitioner, however, sees the central focus of *Sandoval* as being the effect of authoritative interpretative regulations. Pet. Br. 11. This is incorrect, because, as this Court held in *Sandoval*, such regulations may interpret a statute, but cannot create rights that Congress did not create. As this Court stated in *Sandoval*, "we have found no evidence anywhere in the text [of § 602] to suggest that Congress intended to create a private right to enforce regulations promulgated under § 602." *Sandoval*, 532 U.S. at 291, 121 S. Ct. at 1522.

The Eleventh Circuit's application of *Sandoval* is proper adherence to this Court's precedent. Furthermore, its resulting analysis and holding that no private cause of action for retaliation exists under Title IX or any promulgated regulations, is correct in light of this precedent and should not be disturbed.

CONCLUSION

As evident from the discussion above, as well as the decision below, the Eleventh Circuit correctly held that Title IX contains no implied private right of action for retaliation. The statute itself contains no express private remedy of any kind anywhere in its text, and absent evidence of Congressional intent to create such a remedy, this Court should not constrain to create the same. Consequently, the law in this matter is clear: inasmuch as Title IX contains no reference to retaliation, any implied private remedy for retaliation is, therefore, precluded. This Court advanced the same clarity in its decision in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511 (2001), wherein it held that Congressional intent is the key to implied private rights and remedies, and that this intent could only be ascertained from the text and structure of the statute. The Eleventh Circuit merely adhered to this Court's reasoning from *Sandoval* in denying the Petitioner's Title IX claims against the Board on the grounds that Title IX simply did not permit the type of relief the Petitioner sought. Thus, regardless of what the administrative regulations, or the Petitioner, attempt to create, the Eleventh Circuit's decision was correct. The text and structure of Title IX clearly do not support an implied private right of action for retaliation, particularly not for alleged indirect victims like the Petitioner.

Respectfully submitted,

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APPENDIX A — STATUTORY PROVISIONS INVOLVED

Pertinent provisions of 20 U.S.C. § 1682 are as follows:

§ 1682. Federal administrative enforcement; report to Congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of Section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided*, *however*, That no such action shall be taken until the department or agency concerned has advised the appropriate

person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Pertinent provisions of 42 U.S.C. § 1981 are as follows:

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

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(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Pertinent provisions of 42 U.S.C. § 1983 are as follows:

42 U.S.C. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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Pertinent provisions of Title VII of the Civil Rights Act of 1964 are codified at 42 U.S.C. § 2000d, *et seq*. as follows:

> **42 U.S.C. § 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin**
>
> 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.

Pertinent provisions of 42 U.S.C. § 2000e are as follows:

> **42 U.S.C. § 2000e. Definitions**
>
> For the purposes of this subchapter —
>
> **(a)** The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.
>
> **(b)** The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any

agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the Untied States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in *section 2102 of Title 5*), or (2) a bona fide private membership club (other than labor organization) which is exempt from taxation under *section 501(c) of Title 26*, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rate of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

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(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization —

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [*29 U.S.C.A. § 151* et seq.], or the Railway Labor Act, as amended [*45 U.S.C.A. § 151* et seq.];

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within

the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization;

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employee by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof;

or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [*29 U.S.C.A. § 401* et seq.], and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [*43 U.S.C.A. § 1331* et seq.]

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employers's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or

related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in *section 2000e-2(h)* of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employee from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to *section 2000e-16* of this title.

APPENDIX B — REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the federal regulations effectuating Title VI of the Civil Rights Act of 1964 are published at 28 C.F.R. part 42 as follows:

§ 42.104 Discrimination prohibited.

(a) General. 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 otherwise subjected to discrimination under any program to which this subpart applies.

(b) Specific discriminatory actions prohibited.

(1) A recipient to which this subpart applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:

(i) Deny an individual any disposition, service, financial aid, or benefit provided under the program;

(ii) Provide any disposition, service, financial aid, or benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) Subject an individual to segregation or separate treatment in any matter related to his receipt of any disposition, service, financial aid, or benefit under the program;

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(iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any disposition, service, financial aid, or benefit under the program;

(v) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which individuals must meet in order to be provided any disposition, service, financial aid, function or benefit provided under the program; or

(vi) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program (including the opportunity to participate in the program as an employee but only to the extent set forth in paragraph (c) of this section).

(vii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient, in determining the type of disposition, services, financial aid, benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.

(3) In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this subpart applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this subpart.

(4) For the purposes of this section the disposition, services, financial aid, or benefits provided under a program receiving Federal financial assistance

shall be deemed to include all portions of the recipient's program or activity, including facilities, equipment, or property provided with the aid of Federal financial assistance.

(5) The enumeration of specific forms of prohibited discrimination in this paragraph and in paragraph (c) of this section does not limit the generality of the prohibition in paragraph (a) of this section.

(6)(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

(c) Employment practices.

(1) Whenever a primary objective of the Federal financial assistance to a program to which this subpart applies, is to provide employment, a recipient of such assistance may not (directly or through

contractual or other arrangements) subject any individual to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, employment, layoff, or termination, upgrading, demotion, or transfer, rates of pay or other forms of compensation, and use of facilities). That prohibition also applies to programs as to which a primary objective of the Federal financial assistance is (i) to assist individuals, through employment, to meet expenses incident to the commencement or continuation of their education or training, or (ii) to provide work experience which contributes to the education or training of the individuals involved. The requirements applicable to construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it.

(2) In regard to Federal financial assistance which does not have providing employment as a primary objective, the provisions of paragraph (c)(1) of this section apply to the employment practices of the recipient if discrimination on the ground of race, color, or national origin in such employment practices tends, on the ground of race, color, or national origin, to exclude persons from participation in, to deny them the benefits of or to subject them to discrimination under the program receiving

Federal financial assistance. In any such case, the provisions of paragraph (c)(1) of this section shall apply to the extent necessary to assure equality of opportunity to and nondiscriminatory treatment of beneficiaries.

Pertinent provisions of the federal regulations effectuating Title VI of the Civil Rights Act of 1964 are published at 34 C.F.R. part 100 as follows:

§ 100.6 Compliance information.

(a) Cooperation and assistance. The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) Compliance reports. Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs. In the case in which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary

recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) Access to sources of information. Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law.

(d) Information to beneficiaries and participants. Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation.

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Pertinent provisions of the federal regulations effectuating Title IX of the Education Amendments of 1972 are published at 34 C.F.R. part 106 as follows:

§ 106.71 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 34 C.F.R. 100.6–100.11 and 34 CFR, Part 101.