No. 03-____

IN THE
Supreme Court of the United States

RODERICK JACKSON,

Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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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.

PARTIES TO THE PROCEEDING

Petitioner is Roderick Jackson, who was plaintiff in the district court and appellant in the court of appeals. Respondent is the Birmingham Board of Education, defendant in the district court and appellee in the court of appeals.

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LEGISLATIVE MATERIAL

PETITION FOR A WRIT OF CERTIORARI

Petitioner Roderick Jackson respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is reported at 309 F.3d 1333 (11th Cir. 2002) and reprinted in the Appendix (App.") at 1a. The memorandum opinion and order of the district court are not reported. App. 27a.

JURISDICTION

The court of appeals' decision was filed on October 21, 2002. The petition for rehearing and rehearing en banc was denied on January 13, 2003. App. 34a-35a. An application for an extension of time in which to file this petition was granted by Justice Kennedy on March 31, 2003, extending the time in which to file this petition to May 13, 2003. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(1)-(4). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1681(a) of Title 20, United States Code, provides in relevant part: "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."

STATEMENT OF THE CASE

This petition presents a question that squarely divides the federal courts of appeals and is critical to effective enforcement of Title IX of the Education Amendments of 1972: whether individuals who protest Title IX violations and are then subject to reprisal discrimination may sue to redress

such retaliatory conduct.

This is *not* a case about the existence of a private right of action under Title IX. That issue is settled already: violations of Title IX do give rise to private rights of action, despite the fact that no private remedy is expressly articulated in the statute. *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979). That private right of action, the Court has held, is necessary to afford individual citizens "effective protection" against practices made unlawful by Title IX. *Id.* at 704; *see also id.* at 705-06.

The only question in this case is whether retaliatory conduct falls into the category of practices prohibited by Title IX and is thus subject to private suit. On that question, the Eleventh Circuit stands alone. The holding below – that Title IX does not prohibit retaliation – is in conflict with that of every other federal court of appeals to reach the issue. It also conflicts with precedent of this Court construing similarly broad anti-discrimination statutes, and with the position of the agencies primarily responsible for enforcement of Title IX. Indeed, the United States has intervened before the Fourth Circuit as *amicus curiae* in support of a private right of action for the victims of reprisal discrimination under Title IX. *See* Brief for the United States as *Amicus Curiae* Supporting Plaintiff and Urging Reversal, *Litman v. George Mason Univ.*, No. 01-2128 ("U.S. *Litman* Brief").

Because the decision below creates a direct conflict among the federal circuits and threatens to undermine a fundamental protection against sex discrimination in all federally funded educational settings, this Court should grant certiorari review.

A. Background

1. Section 901 of Title IX provides that no person shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" a federally funded

education program or activity "on the basis of sex." 20 U.S.C. § 1681(a). The Court has held that this general prohibition is to be construed broadly, *see North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982), and protects individuals against conduct not specified in the statutory language, including employment discrimination based on gender, *id.*, and student-on-student sexual harassment, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). The Court also has construed Title IX to allow for money damages in a private cause of action, though the statute does not expressly provide for such damages. *Franklin v. Gwinnett County Pub. Sch. Sys.*, 503 U.S. 60 (1992).

Section 902 of Title IX authorizes all federal agencies that fund educational activities to issue regulations implementing the substantive provisions of the statute. 20 U.S.C. § 1682. Under that authority, the Department of Education has made it clear that no recipient of federal funds may "intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section [901] of the Act . . . because he has made a complaint." 34 C.F.R. § 106.71 (incorporating 34 C.F.R. § 100.7(e)). That regulation, along with others promulgated under Title IX, became effective only after Congress considered and declined to disapprove it.

2. In 1993, petitioner Jackson was hired by the Birmingham Board of Education ("Board") as a physical education teacher and girls' basketball coach. He was later transferred to Ensley High School, where his duties again included coaching the girls' basketball team. When petitioner discovered that the girls' team was denied equal funding and equal access to athletic equipment and facilities, he protested the unequal treatment to his supervisors. Shortly after, petitioner began receiving negative work evaluations, and in May 2001, he was relieved of his paid coaching duties. Petitioner remained employed as a physical education teacher. App.

3a.

B. District Court Proceedings

In July 2001, petitioner filed suit against the Board in the Northern District of Alabama, alleging, *inter alia*, that he was retaliated against in violation of Title IX due to his complaints about the discriminatory treatment of the girls' basketball team. The Board moved to dismiss petitioner's complaint on the ground that Title IX does not provide a cause of action for retaliation.

The case was referred to a magistrate judge. The magistrate concluded that there was a "persuasive" case for recognizing retaliation claims under Title IX, relying on the Fifth Circuit's decision in *Lowrey v. Texas A & M University System*, 117 F.3d 242 (5th Cir. 1997). But he believed that he was bound to dismiss the complaint by a prior decision of the same district court, summarily affirmed without published opinion, rejecting a claim of retaliation under Title IX. *See Holt v. Lewis*, 955 F. Supp. 1385 (N.D. Ala. 1995), *aff'd*, 109 F.3d 771 (11th Cir. 1997) (Table No. 96-6046), *cert. denied*, 522 U.S. 817 (1997). App. 31a-32a.

The district court adopted the report and recommendation of the magistrate judge. Like the magistrate, the court relied exclusively on *Holt* and concluded that absent any "controlling Eleventh Circuit or Supreme Court authority holding that Title IX expressly or implicitly creates a private cause of action for retaliation," petitioner's complaint must be dismissed. App. 27a.

C. Court of Appeals Proceedings

Petitioner appealed the dismissal of his complaint to the Eleventh Circuit. The court of appeals "assume[d] for purposes of this appeal that the Board retaliated against Jackson for complaining about perceived Title IX violations." App. 3a. Accordingly, the only question before the court was

whether Title IX provides petitioner with a private right of action against the Board for allegedly retaliatory conduct. *Id.* In acknowledged conflict with the Fifth Circuit's decision in *Lowrey*, *id.* at 25a n.15, the court answered that question in the negative.

The court began by announcing that its analysis would be "governed in substantial measure" by *Alexander v. Sandoval*, 532 U.S. 275 (2001). App. 8a. At issue in *Sandoval* was whether a regulation prohibiting practices with a "disparate impact" on protected classes, promulgated under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, gives rise to a private right of action for disparate impact violations. This Court concluded that because Title VI itself was not intended to reach practices with a disparate impact, no private right of action to challenge disparate impact discrimination exists. App. 10a-12a; *Sandoval*, 532 U.S. at 285-86. In concluding that this case is controlled by *Sandoval*, the court below relied heavily on the fact that petitioner's claim implicates a regulation – the Department of Education's anti-retaliation regulation, 34 C.F.R. 106.71 – as well as Title IX itself. App. 9a.

After lengthy discussion of *Sandoval* and the availability of a private claim for disparate impact under Title VI, the court turned to the question presented by this case: whether claims for retaliation are cognizable under Title IX. Under *Sandoval*, the court reasoned, that question must be answered by reference to legislative intent. App. 11a-12a. The court found no evidence that Congress intended to prohibit retaliatory conduct under Title IX. Beginning with the text of § 901, it reasoned that the "absence of any mention of retaliation . . . weighs powerfully against a finding that Congress intended Title IX to reach retaliatory conduct." App. 20a. And § 902, the court found, concerned with administrative enforcement and not substantive rights, sheds no light at all on "what harm Title IX is meant to remedy." *Id.* at 21a.

In short, "review of §§ 901 and 902 unearths absolutely no indication that Congress intended Title IX to prevent or redress retaliation." *Id.* at 22a. There can be no private cause of action, the court concluded, for conduct that is not prohibited by the statute. *Id.* Though that conclusion was enough to dispose of the case, the court went on to suggest that "even if Title IX did aim to prevent and remedy retaliation," it would not extend to persons who were not themselves victims of gender discrimination. "[T]here 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." *Id.* at 23a-24a.

As noted above, the court acknowledged that its decision was in conflict with Fifth Circuit precedent, *id.* at 25a n.15, and also inconsistent with a case from the Fourth Circuit recognizing a reprisal cause of action under Title IX, *id.* at 23a n.13. The court observed that both cases were decided before this Court's decision in *Sandoval*, and deemed the contrary authority "unpersuasive" in light of that decision. *Id.* at 25a n.15.

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with decisions from every other federal court of appeals to consider the issue presented here. Every one of those courts has agreed that Title IX prohibits retaliation and that individuals therefore have a cause of action for reprisal discrimination.

The court of appeals seems to believe that this conflict is immaterial because it is based entirely on case law that predates *Sandoval*. That is wrong, for two separate reasons. First, court of appeals decisions recognizing a cause of action for retaliation have issued after as well as before *Sandoval*. Second, there is no reason to think that circuits would reverse course on Title IX in light of *Sandoval*. As the Fourth Circuit recently concluded in the analogous Title

VI context, *Sandoval* does not limit the availability of a private right of action for reprisal discrimination. *See Peters v. Jenney*, No. 01-2413, 2003 WL 1908728, at *7 (4th Cir. Apr. 22, 2003).

2. The decision below is also inconsistent with a long line of cases – from this Court as well as from the federal courts of appeals – recognizing that a prohibition on retaliation is necessarily implicit in an anti-discrimination mandate. This Court has found that fundamental civil rights statutes like 42 U.S.C. §§ 1982 and 1983, which do not have an express prohibition on reprisal discrimination, do protect against retaliation. It is now well-established that "[r]etaliation of this sort bears such a symbiotic and inseparable relationship" to intentional discrimination that it would be reasonable to "conclude that Congress meant to prohibit both, and to provide a remedy for victims of either." *Peters*, 2003 WL 1908728, at *8.

3. The case for application of that rule is particularly strong with respect to Title IX. Title IX's legislative history makes clear that Congress understood the importance of protecting against retaliation, and approved the implementing regulation that construes Title IX to prohibit such retaliation. Moreover, the Departments of Education and Justice have long taken the position that Title IX encompasses a prohibition on retaliation – agency positions entitled to deference that was not accorded by the court below.

The Court should grant review to resolve the conflict created by the decision below and to affirm what Congress, numerous other courts of appeals, and the federal agencies tasked with interpreting and enforcing Title IX have all recognized: reprisal discrimination is prohibited under Title IX, and individuals who are retaliated against for opposing unlawful sex discrimination have a private right of action to redress such violations.

I. THERE IS A CONFLICT AMONG THE FEDERAL COURTS OF APPEALS ABOUT WHETHER THERE IS A PRIVATE RIGHT OF ACTION FOR RETALIATION UNDER TITLE IX.

A. The Decision Below Directly Conflicts With Decisions Of Several Other Courts Of Appeals.

1. In holding that petitioner does not have a private cause of action for retaliation under Title IX, the court below expressly and properly recognized that its decision was contrary to the Fifth Circuit's holding in *Lowrey*. App. 25a n.15.

Like this case, *Lowrey* involved a coach of a women's sports team who complained to her supervisors about inequalities in the treatment of male and female athletes. Like petitioner, the plaintiff in *Lowrey* alleged that she suffered retaliation – including removal from her job as Women's Athletic Coordinator – as a consequence of her protests. *Lowrey*, 117 F.3d at 244. In contrast to this case, the Fifth Circuit held that the plaintiff in *Lowrey* did have a cause of action for retaliation under Title IX. *Id.* at 249. Recognizing that the "prohibition against retaliation is intended to vindicate the antidiscrimination principle of title IX," *id.* at 248 n.6, the court held that a right of action for retaliation is essential to the goals of Title IX for two reasons: it encourages individuals to "expose violations" of the statute and "protect[s] such whistleblowers from retaliation," *id.* at 254.

The two cases are indistinguishable on their facts. But individuals in the Fifth Circuit may sue for retaliation under Title IX; those in the Eleventh Circuit may not. That conflict by itself warrants the Court's intervention.

2. In discussing (and dismissing) the Fifth Circuit's precedent, the court below suggested that *Lowrey* is the "lone circuit decision" contrary to its own holding. App. 25a n.15; *but see id.* at 23a n.13 (noting contrary Fourth Circuit authority). But several other circuits also have held that Title

IX gives rise to a cause of action for retaliation.[1]

Indeed, every circuit to consider the issue has concluded, contrary to the decision below, that Title IX prohibits reprisal discrimination and gives victims of retaliation a cause of action to redress the violation. *See Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 67 (1st Cir. 2002) (establishing standard that must be met in order for student to prevail on Title IX retaliation claim); *Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243, 251 (2d Cir. 1995) (same); *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994) (recognizing private right of action because "[r]etaliation against an employee for filing a claim of gender discrimination is prohibited under Title IX"). Other courts of appeals have at least implicitly recognized that Title IX prohibits reprisal discrimination. *See Brine v. Univ. of Iowa*, 90 F.3d 271, 272-73 (8th Cir. 1996); *Willner v. Budig*, 848 F.2d 1032, 1033 (10th Cir. 1988).[2]

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[1] The court may have singled out *Lowrey* because that case, like this one, involved a claim by a coach who was not a so-called "direct victim of gender discrimination." App. 24a. But that factual point is of no help in distinguishing contrary precedent. First, the decision below discusses petitioner's "indirect" victim status only after holding that Title IX does not in any event provide a cause of action for retaliation, and that discussion is thus dicta. App. 23a; *see supra* p. 6. Second, there is no reason in precedent or logic for protecting only those who are the direct targets of the discrimination. On the contrary, as the Fourth Circuit recently observed, a long line of precedent beginning with this Court's decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (cause of action for retaliation under § 1982), provides those who protest discrimination against others with the same protection from retaliation as those who protest discrimination against themselves. *Peters*, 2003 WL 1908728, at *8; *see infra* pp. 13-14. Moreover, discrimination against women's teams is interconnected with discrimination against the teams' coaches.

[2] Despite the near-consensus in the federal circuit courts, there appears to be increasing confusion among lower courts, where the retaliation issue arises repeatedly and results in inconsistent decisions. *Compare Burwell v. Pekin Comm. High Sch. Dist. 303*, 213 F. Supp. 2d 917,

The conflict of authority created by the decision below is far broader than the court of appeals acknowledged. The federal circuit courts have for years recognized that Title IX allows for suits by victims of reprisal discrimination, and the decision below is in conflict with a substantial body of case law.

B. This Court's Decision In *Sandoval* Does Not Resolve The Conflict.

Contrary to the suggestion of the court below, this Court's decision in *Sandoval* does not explain away the conflict in the courts of appeals, and *Sandoval* does not render certiorari review unnecessary.

1. The conflict among the courts persists. Since *Sandoval* was decided, the First Circuit has held that Title IX does provide a cause of action for retaliation, *see Frazier*, 276 F.3d at 67, and the court below has held to the contrary. *Sandoval* has not resolved the issue in the circuit courts.

Sandoval – a case about disparate impact claims under Title VI – simply has no bearing on whether Title IX prohibits retaliation. What *Sandoval* holds is that there can be no implied cause of action for conduct that the Court has held is *permissible* under a statute, even when such a right might be implied by agency regulation. 532 U.S. at 291 ("language in a regulation [cannot] conjure up a private cause of action that has not been authorized by Congress"). Because Title VI does not itself prohibit disparate impact practices, the Court concluded that it is "clear that the private right of ac-

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934-35 (C.D. Ill. 2002) (recognizing claim for retaliation under Title IX), *with Litman v. George Mason Univ.*, 156 F. Supp. 2d 579, 585-87 (2001) (no private right of action for retaliation available under Title IX), *appeal pending*, No. 01-2128. *See also, e.g.*, *Atkinson v. Lafayette Coll.*, No. 01-CV-2141, 2002 WL 123449, at *8 (E.D. Pa. June 29, 2002) (acknowledging that "*Lowrey* is, admittedly, right on point" but declining to follow *Lowrey* in view of *Sandoval*).

tion to enforce [Title VI] does not include a private right to enforce [disparate impact] regulations." *Id.* at 285.

At the same time, *Sandoval* confirms that when Congress "intends [a] statute to be enforced through a private cause of action [it] intends the authoritative interpretation of the statute to be so enforced as well." *Id.* at 284. The question presented by this case is whether Title IX itself – either by its own terms or through regulations that "authoritatively construe the statute," *id.* – prohibits retaliation. If it does, then the private right of action recognized in *Cannon* extends to actions for retaliation. The only issue here is whether Title IX does in fact prohibit retaliation, and on that issue, *Sandoval* says nothing at all.[3]

2. The limited scope of *Sandoval* is confirmed by the Fourth Circuit's recent decision in *Peters v. Jenney*, 2003 WL 1908728, recognizing a cause of action for retaliation under Title VI, as implemented by an anti-retaliation regulation identical to the Title IX regulation. *Sandoval*, the court reasons, applies only when a regulation prohibits conduct that the statute itself permits. The Title VI anti-retaliation regulation, on the other hand, is a valid interpretation of Title VI's "core antidiscrimination mandate," and hence enforceable under Title VI's long-established private cause of action. *Id.* at *6. In short, *Sandoval* does not limit the availability of a private right of action for conduct that is prohibited by statute and regulations that authoritatively construe the statute. *Id.* at *9.

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[3] *Sandoval* is limited to the question of whether *Title VI* authorizes a cause of action for *disparate impact*. It does not address whether a cause of action for retaliation is available under Title VI, *see Peters v. Jenney*, No. 01-2413, 2003 WL 1908728, at *5, 13 (4th Cir. Apr. 22, 2003) (recognizing claim for retaliation under Title VI), let alone whether such an action is available under Title IX. Nor does *Sandoval* preclude a private right of action for disparate impact under Title IX.

That reasoning – which reflects a proper reading of *Sandoval* – cannot be squared with the view of the court below that *Sandoval* somehow settles the question of whether Title IX provides a cause of action for reprisal discrimination. Indeed, both the majority and the dissent in *Peters* acknowledged, implicitly or expressly, that the Fourth Circuit's reading of *Sandoval* is inconsistent with the approach taken by the Eleventh Circuit in the decision below. *See id.* at *8 n.10; *id.* at *14 (Widener, J., dissenting).

As *Peters* demonstrates, there is no reason to think that other courts will make the same mistake as the court below, and overrule their prior Title IX precedent in light of *Sandoval*. The conflict of authority in the federal courts of appeals will not be resolved without this Court's intervention.

II. PROTECTION FROM RETALIATION IS A CRITICAL ELEMENT OF TITLE IX'S ANTI-DISCRIMINATION MANDATE.

The decision below is inconsistent not only with decisions of other federal circuits, but also with this Court's own precedent. The Court has long recognized that protection from retaliation is an integral part of anti-discrimination laws, whether or not those laws expressly prohibit retaliation. That general rule applies with special force in the Title IX context, where the legislative history clearly shows that Congress intended Title IX to reach reprisal discrimination as well as other forms of discrimination.

A. This Court And The Federal Circuit Courts Have Recognized That Protection Against Retaliation Is Implicit In The Non-Discrimination Mandate Of Civil Rights Statutes And The Constitution.

1. When Congress enacted Title IX in 1972, this Court had already established that a right to be free of retaliation is implicit in the right to be free from discrimination. If

schools and other defendants could freely retaliate against those who protest discriminatory treatment, they would effectively be engaging in the discrimination prohibited by statute. *See generally* Floyd D. Weatherspoon, *Don't Kill the Messenger: Reprisal Discrimination in the Enforcement of Civil Rights Laws*, 200 L. Rev. M.S.U.-D.C.L. 367 (2000) (retaliation one of most significant obstacles to enforcement of civil rights laws).

In *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), the Court considered whether 42 U.S.C. § 1982, which prohibits discrimination in property transactions,[4] also protects those who complain about such discrimination from retaliation. Though the statute makes no reference to retaliation, the Court concluded that it protected a white man expelled from membership in his neighborhood board because he protested the community's unwillingness to approve assignment of his membership share when he rented to a black man. *Id.* at 237. The Court explained that if the expulsion "can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property." *Id.* For the same reason, the Court later held that although neither the United States Constitution nor 42 U.S.C. § 1983 expressly bars retaliation, reprisal discrimination must be actionable under § 1983 in order to make meaningful the rights protected by the statute and Constitution.[5] *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 173-74 (1970); *Perry v. Sindermann*, 408 U.S. 593, 597

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[4] Section 1982 provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

[5] Section 1983 provides a cause of action for individuals who have been deprived, "under color" of law, of any of the "rights, privileges, or immunities secured by the Constitution and laws."

(1972); *see also Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998) ("The reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right.").

2. Following this Court's lead, the federal courts of appeals have held that other civil rights statutes that do not expressly address retaliation provide causes of action to redress such conduct. Several courts of appeals, for instance, have concluded that 42 U.S.C. § 1981, prohibiting discrimination in contracting,[6] gives rise to a cause of action for retaliation. *See, e.g., Foley v. Univ. of Houston Sys.*, 324 F.3d 310, 315 (5th Cir. 2003) (right to be free from retaliation under § 1981 is "clearly established" for purposes of qualified immunity); *Andrews v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1411-13 (11th Cir. 1998) (upholding claim of retaliation under § 1981); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 576 (6th Cir. 2000) (relying on *Sullivan* in recognizing retaliation claim under § 1981); *Fiedler v. Marumsco Christian Sch.*, 631 F.2d 1144, 1149 n.7 (4th Cir. 1980) (§ 1981 affords a "remedy for both the initial expulsion and the retaliatory expulsions"). The same is true of the Age Discrimination in Employment Act, 29 U.S.C. § 621. *See, e.g., Forman v. Small*, 271 F.3d 285, 298 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 958 (2002) (federal employees protected against retaliation despite absence of express provision). The principle on which the courts rely is the same as the one articulated by this Court in *Sullivan*: because retaliation bears "a symbiotic and inseparable relationship" to discrimination, *Peters*, 2003 WL 1908728, at *8, "a prohibition on discrimination should be judicially construed to include an implicit prohibition on

[6] Section 1981 provides, in relevant part, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, 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."

retaliation against those who oppose the prohibited discrimination," *id.* at *7 (recognizing cause of action for retaliation under Title VI).

3. The *Sullivan* principle also applies to Title IX and its non-discrimination mandate. The court below suggested that because Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, expressly prohibits retaliation by private employers, the absence of a similar provision in Title IX "may indicate" that Title IX does not cover retaliation. App. 20a n.12. That reasoning is not only contrary to the decisions of this Court discussed just above, but also unsound on its own terms.

First, the statutory structures of Title IX and Title VII are entirely different. In contrast to the expansive language of § 901 of Title IX, Title VII spells out in detail the conduct that does and does not violate the statute. 42 U.S.C. §§ 2000e-2 and 3. Because Congress did not bar *any* specific discriminatory practices under Title IX, the failure to prohibit one particular practice, such as retaliation, says nothing about whether that practice is permissible. Second, Title VII itself has been construed to prohibit retaliation even where it does not expressly do so. When Title VII was amended to reach federal employees in 1972, Congress did not specifically incorporate the anti-retaliation provision into this new section. *See* 42 U.S.C. § 2000e-16. Despite this absence, the courts have held uniformly that Title VII does protect federal workers against retaliation. *See, e.g., Aronberg v. Walters*, 755 F.2d 1114, 1115-16 (4th Cir. 1985); *Canino v. EEOC*, 707 F.2d 468, 471-72 (11th Cir. 1983).

The logic of *Sullivan* and its progeny should apply especially forcefully in contexts – like the Title IX context – in which internal conciliation and voluntary compliance can put an end to discriminatory practices quickly and effectively. Internal compliance efforts depend on the willingness of employees, students, and others to come forward with informa-

tion about potentially unlawful discrimination – to do exactly what petitioner Jackson did in this case. Those enforcement efforts would be undermined significantly – and discrimination thus perpetuated, *see Sullivan*, 396 U.S. at 237 – if individuals who bring discrimination to the attention of the appropriate officials are not protected against retaliation.

B. Congress Intended To Prohibit Retaliation Under Title IX.

1. As this Court has recognized, Congress intended to prohibit a broad range of discriminatory conduct when it enacted Title IX. "There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'" *North Haven*, 456 U.S. at 521 (quoting *United States v. Price*, 383 U.S. 787, 801 (1996)) (alteration in original). In *North Haven*, the Court reasoned that if the statute does not expressly or impliedly *exclude* a particular discriminatory practice from coverage – there, discrimination in hiring – the default assumption should be that Title IX is intended to reach the practice. *Id.* Taking the same expansive view of Congress' intent in enacting Title IX, the Court has construed the general terms of the statute to reach such conduct as student-on-student sexual harassment, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 653 (1999), and to make damages available in private actions, *Franklin v. Gwinnett County Pub. Sch. Sys.*, 503 U.S. 60, 76 (1992).

2. There is considerable evidence that Congress specifically intended to prohibit retaliation under Title IX. The Department of Education's anti-retaliation regulation, 34 C.F.R. § 100.7(e), along with other regulations promulgated under Title IX, was submitted to Congress under a statutorily mandated procedure designed to determine whether "the regulation writers have read [Title IX] and understood it the way the lawmakers intended it to be read and understood." *Sex Discrimination Regulations: Hearings Before the Subcom-*

mittee on Postsecondary Education of the House Committee on Education and Labor, 94th Cong., 1st Sess. 1 (1975) (statement of Rep. O'Hara, Chair of the Subcommittee). Following the submission of those regulations, Congress held multiple hearings to consider several proposed resolutions of disapproval, all of which it failed to approve.

As a result, those regulations, including the anti-retaliation regulation, became effective with implicit congressional blessing. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 521, 531-35 (1982)(discussing post-enactment history of Title IX regulations). While post-enactment developments are not dispositive, this Court recognized in discussing all the Title IX regulations that "[w]here an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *Id.* at 535 (internal quotation marks and citations omitted).[7]

Additional evidence of the relevant "legislative intent" can be found in the congressional hearings that preceded enactment of Title IX. Congress heard abundant testimony about the prevalence of retaliation against students and employees who protested sex discrimination in educational settings, and about the toll such retaliation exacted. *See Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. & Labor*, 91st Cong., 2d Sess. 242 (1970) (testimony of Dr. Ann Harris) ("women who have criticized their faculties for sexual discrimination have been 'censured for conduct unbecoming,' a rare procedure in academe normally reserved for ac-

[7] Although a similar requirement for Congressional approval was later invalidated by this Court, *INS v. Chadha*, 462 U.S. 919 (1983), that holding does not undermine the weight of Congress' approval of the Title IX regulations at issue here.

tions such as outright plagiarism"); *id*. at 302 (statement of Bernice Sandler) ("It is also very dangerous for women students or women faculty to openly complain of sex discrimination on their campus. * * * At a recent meeting of professional women I counted at least four women whose contracts were not renewed after it became known that they were active in fighting sex discrimination at their respective institutions."); *id*. at 463 (testimony of Daisy Fields) ("few women have dared to file complaints of sex discrimination" because "[w]e know of a number of such cases" in which "women who have filed complaints have suffered reprisals in the form of having their jobs abolished" or "have been reassigned to some degrading position far below their capabilities in anticipation they might resign"); *id*. at 588 (statement of Women's Rights Commission of New York Univ. Sch. of Law) ("It was recently discovered that one woman had tried to get [the dormitory] opened up ten years ago, when the whole building * * * was closed to women. She raised a complaint at a faculty meeting about this situation; blackballing letters written by faculty members were subsequently placed in her employment file at the law school without her knowledge."); *id*. at 1051 (reprinting magazine article) ("A few [women] fight back – and pay the penalty for bucking the male dominated system."); *see also* 118 Cong. Rec. 5812 (1972) (reprinting article stating that "on some campuses it is still dangerous to fight sex discrimination. I know of numerous women whose jobs were terminated, whose contracts were not renewed, and some who were openly and directly fired for fighting such discrimination").

Particularly when assessed against the background principle that Congress anticipated that Title IX would sweep broadly, the relevant legislative history confirms that Title IX was intended to prohibit retaliation. Though the court below pays lip-service to the relevance of the "legislative history and context within which [Title IX] was passed," App. 13a (quoting *Sandoval*, 532 U.S. at 288), it never ad-

dresses that history, and its holding is inconsistent with the best evidence of Congress' intent.

III. THE FEDERAL AGENCIES RESPONSIBLE FOR IMPLEMENTING AND ENFORCING TITLE IX PROPERLY CONSTRUE THE STATUTE TO PROHIBIT RETALIATION.

In light of the precedent and legislative history discussed above, there is no question but that Title IX is intended to and does preclude reprisal discrimination. But even if there were some doubt on that score, it would be resolved by the interpretations adopted by the federal agencies chiefly responsible for implementing and enforcing the statute. The court below erred again when it failed to accord proper deference to the positions of the Department of Education and the Department of Justice, both of which construe Title IX to prohibit retaliation.

1. The Department of Education (formerly part of the Department of Health, Education and Welfare) historically has been the agency "charged with the responsibility for administering Title IX." *Cannon v. Univ. of Chi.*, 441 U.S. 677, 706-08 & n.42 (1979) (discussing agency position with respect to Title IX). For over two decades, an executive order has made the Department of Justice responsible for "coordinat[ing] the implementation and enforcement" of Title IX by all executive agencies. *See* Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980). The long-standing and consistent view of both those agencies is that Title IX prohibits retaliation against those who protest unequal treatment in educational settings.

The Department of Education promulgated 34 C.F.R. 100.7(e) (applicable to Title IX via incorporation under 34 C.F.R. 106.71), the regulation expressly prohibiting retalia-

tion under Title IX.[8] The Department of Justice treats retaliation as prohibited conduct in its Title IX enforcement manual. Dept. of Justice, *Title IX Legal Manual* 57 (Jan. 11, 2001). As explained in the manual: "A right cannot exist in the absence of some credible and effective mechanism for its enforcement and enforcement cannot occur in the absence of a beneficiary class willing and able to assert the right. In order to ensure that beneficiaries are willing and able to participate in the enforcement of their own rights, a recipient's retaliation against a person who has filed a complaint . . . violates Title IX." *Id.* at 70. The two agencies recently filed a joint *amicus* brief before the Fourth Circuit, arguing that Title IX prohibits retaliation and gives rise to a private right of action to redress retaliatory conduct. *See generally* U.S. *Litman* Brief, *supra*.

2. The positions of the agencies responsible for implementing and enforcing Title IX are entitled to substantial deference in construing the statute. The Department of Education's anti-retaliation regulation, of course, is due considerable deference under the *Chevron* standard: so long as the agency's position is not unambiguously precluded by the statute, the courts must defer. *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see Yellow Transp., Inc. v. Michigan*, 123 S. Ct. 371, 377 (2002) (discussing *Chevron* deference). Here, as discussed above, the Department's position is not only consistent with the statute and its legislative history, but also vital to enforcement of the statutory anti-discrimination mandate. Under *Sandoval*, it is an "authoritative interpretation of the statute"

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[8] *See also* Dept. of Educ. Sexual Harassment Guidelines, 62 Fed. Reg. 12,034, 12,044 (Mar. 13, 1997) ("retaliation is prohibited by Title IX"); Dept. of Educ. Revised Sexual Harassment Guidelines, 65 Fed. Reg. 66,092, 66,106 (Nov. 2, 2000) (draft for public comment); Dept. of Educ. Revised Sexual Harassment Guidance, 66 Fed. Reg. 5,512 (Jan. 19, 2001) (Notice of Availability).

enforceable via Title IX's implied right of action. 532 U.S. at 284.

The Department of Justice's position, reflected in both its *Title IX Legal Manual* and its brief in *Litman*, is also entitled to deference. *See Barnhart v. Walton*, 535 U.S. 212, 221 (2002) (fact that agency "reached its interpretation through means less formal than 'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due"). Indeed, when Congress charges multiple agencies with enforcing a statute, this Court generally gives special deference to the interpretations of the agency charged by Executive Order with coordinating government-wide compliance. *See Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984); *Andrus v. Sierra Club*, 442 U.S. 347, 357-58 (1979).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-11303

D. C. Docket No. 01-01866 CV-PT-S

RODERICK JACKSON,

Plaintiff-Appellant,

versus

BIRMINGHAM BOARD OF EDUCATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(October 21, 2002)

Before DUBINA, MARCUS and GOODWIN*, Circuit Judges.

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* Honorable Alfred T. Goodwin, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

MARCUS Circuit Judge:

Roderick Jackson appeals the dismissal of his complaint alleging that the Birmingham Board of Education (the "Board") retaliated against him in violation of Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681 et seq., and the regulations implementing it. While employed by the Board as the coach of a girl's basketball team, Jackson complained about practices that he believed discriminated against his team in violation of Title IX. The school, he maintains, retaliated against him by removing him from his coaching position. 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. After review of the text and structure of the statute, we can discern no congressional intent in Title IX to create by implication such a private cause of action. Accordingly, we affirm the dismissal of Jackson's complaint.

I.

A.

We review de novo an order granting a motion to dismiss the complaint, see McDonald v. S. Farm Bureau Life Ins. Co., 291 F.3d 718, 722 (11th Cir. 2002), taking the facts alleged in the complaint as true and construing them in the light most favorable to the plaintiff. See Covad Communications Co. v. Bellsouth Corp., 299 F.3d 1272, 1276 n.2 (11th Cir. 2002); Stephens v. Dep't of Health & Human Servs., 901 F.2d 1571, 1573 (11th Cir. 1990) ("On a motion to dismiss, the facts stated in appellant's complaint and all reasonable inferences therefrom are taken as true."). "A motion to dismiss is only granted when the movant demonstrates 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Harper v. Blockbuster Entm't Corp., 139 F.3d

1385, 1387 (11th Cir. 1998) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957)).

B.

According to his complaint, Jackson was hired by the Board as a physical education teacher and girls' basketball coach on or about August 1993. He was transferred to Ensley High School in August 1999, where his duties included coaching the girls' basketball team. While coaching at Ensley, Jackson came to believe that the girls' team was denied equal funding and equal access to sports facilities and equipment. He complained to his supervisors about the apparent differential treatment and, shortly thereafter, he began receiving negative work evaluations. Jackson was ultimately relieved of his coaching duties in May 2001, but remains employed as a tenured physical education teacher.

We assume for purposes of this appeal that the Board retaliated against Jackson for complaining about perceived Title IX violations. The only question before us today is whether Title IX provides Jackson a private right of action and a private remedy against the Board for its allegedly retaliatory actions. Conceding that Title IX creates no private rights of action expressly, see Cannon v. Univ. of Chicago, 441 U.S. 677, 683, 99 S. Ct. 1946, 1950, 60 L. Ed. 2d 560 (1979) ("The statute does not . . . expressly authorize a private right of action by a person injured by a violation of § 901."), Jackson claims that such a right is impliedly created by §§ 901 and 902 of Title IX, 20 U.S.C. §§ 1681-82, in conjunction with 34 C.F.R. § 100.7(e), an anti-retaliation regulation promulgated by the Department of Education to enforce Title IX.

Section 901 of Title IX, with certain exceptions not at issue here, provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination

under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a).[1]

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[1] In relevant part, § 901, 86 Stat. 373, as amended, as set forth in 20 U.S.C. § 1681, provides:

> (a) Prohibition against discrimination; exceptions
>
> 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 . . .
>
> (b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance
>
> Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.
>
> (c) "Educational institution" defined
>
> For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such terms means each such school, college, or department.

In section § 902, Congress created and authorized an elaborate administrative enforcement scheme for Title IX. See Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 638-39, 119 S. Ct. 1661, 1669, 143 L. Ed. 2d 839 (1999).[2] Pursuant to § 902, any federal department or agency that "is empowered to extend Federal financial assistance to any education program or activity" is "authorized and directed to

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[2] Section 902, 86 Stat. 374, as set forth in 20 U.S.C. § 1682, titled "Federal administrative enforcement; report to Congressional committees," provides in relevant part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . 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 . . . . 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 . . . , 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.

effectuate the provisions of" § 901. 20 U.S.C. § 1682. To do so, agencies are required to "issu[e] rules, regulations, or orders of general applicability," which do not "become effective unless and until approved by the President." Id. The primary enforcement mechanism that § 902 gives to agencies is cessation of federal funding: "[c]ompliance with any requirement adopted pursuant to this section may be effected . . . by the termination of or refusal to grant or to continue assistance . . . ." Id.

There are a number of procedural requirements that must be met, however, before an agency may cut off funding. First, an agency must attempt to obtain voluntary compliance with the requirements it has imposed to enforce § 901: "no . . . 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." Id. Second, if any agency fails to obtain voluntary compliance, an agency must hold a hearing regarding any alleged regulatory violation, because only a "recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with" a regulation enacted pursuant to § 902 may have its funding cut off. Id. Third, even after making an "express finding" of noncompliance, an agency may not cut off funding unless it files "a full written report" to "the committees of the House and Senate having legislative jurisdiction over the program or activity involved" and waits "until thirty days have elapsed after the filing of such report." Id.[3]

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[3] In addition to the congressional review required by § 902, § 903 of Title IX, 86 Stat. 374, as set forth in 20 U.S.C. § 1683, provides for judicial review of "[a]ny department or agency action taken pursuant to section [902]." 20 U.S.C. § 1683. Section 903 provides in full that:

Using the authority vested in it by § 902, the Department of Education promulgated 34 C.F.R. § 100.7(e),[4] which prohibits retaliation against anyone who complains of a Title IX violation:

> No receipt [of federal funds] or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section [901 of Title IX] of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

34 C.F.R. § 100.7(e) (emphasis added).

> Any department or agency action taken pursuant to section 1682 or this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

[4] 34 C.F.R. § 100.7(e) was originally promulgated by the Department of Justice to enforce Title VI of the Civil Rights Act of 1964 ("Title VI"), 78 Stat. 252, as amended, 42 U.S.C. § 200d et seq. The Department of Education has incorporated by reference § 100.7(e) and other regulations enforcing Title VI to enforce Title IX. See 34 C.F. R. § 106.71.

Jackson urges that a private right of action ought to be implied in his favor from the statute and, more particularly, from 34 C.F.R. § 100.7(e). We are unpersuaded. For the reasons we make clear below, we hold that neither Title IX itself nor 34 C.F.R. § 100.7(e) implies a private right of action for retaliation in Jackson's favor.

C.

Our analysis of Jackson's claim is governed in substantial measure by the Supreme Court's recent decision in Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001), which we explicate fully for three reasons. First, Sandoval distills and clarifies the approach we are obliged to follow in determining whether to imply a private right of action for a statute.[5] Second, Sandoval

[5] The Supreme Court implied private rights of action with a relatively free hand, see J.I. Case Co. v. Borak, 377 U.S. 426, 433-34, 84 S. Ct. 1555, 1560, 12 L. Ed. 2d 423 (1964), until its decision in Cort v. Ash, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975). In Cort, the Court articulated four factors that must be considered before a private right of action may be implied:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted" -- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. at 78, 95 S. Ct. at 2088 (quoting Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39, 36 S. Ct. 482, 484, 60 L. Ed. 874 (1916)) (additional citations omitted). Since the late 1970's, the Court has gradually receded from reliance on three of these four factors, focusing more and more exclusively on legislative intent alone. See, e.g., Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16, 100

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. See Cannon, 441 U.S. at 694-95, 99 S. Ct. at 1956-57 ("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 benefited class."); see also id. at 694-696 nn.16 & 19, 99 S. Ct. at 1956-57 nn. 16 & 19 (setting forth the legislative history of Title IX, which, inter alia, notes that "[t]his is identical language, specifically taken from Title VI"). Because we therefore read Titles VI and IX in pari materia, Sandoval's interpretation of Title VI powerfully informs our reading of Title IX. 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.

S. Ct. 242, 245, 62 L. Ed. 2d 146 (1979) ("While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, what must ultimately be determined is whether Congress intended to create the private remedy asserted . . . .") (citations omitted); Touche Ross & Co. v. Redington, 442 U.S. 560, 575, 99 S. Ct. 2479, 2489, 61 L. Ed. 2d 82 (1979) (the "central inquiry" is "whether Congress intended to create, either expressly or by implication, a private cause of action"); Thompson v. Thompson, 484 U.S. 174, 179, 108 S. Ct. 513, 516, 98 L. Ed. 2d 512 (1988) ("The intent of Congress remains the ultimate issue . . . .") Sandoval is the culmination of this trend, announcing that "[s]tatutory intent . . . is determinative." 532 U.S. at 286, 121 S. Ct. at 1519; see also Gonzaga Univ. v. Doe, -- U.S. --, 122 S. Ct. 2268, 2276-77, 153 L. Ed. 2d 309 (2002) (applying Sandoval mode of analysis). The other three Cort factors remain relevant only insofar as they provide evidence of Congress's intent. See Thompson, 484 U.S. at 189, 108 S. Ct. at 521 (Scalia, J., concurring in the judgment) (The Court has "convert[ed] one of [the Cort test's] four factors (congressional intent) into the determinative factor, with the other three merely indicative of its presence or absence.") (emphasis or original).

In Sandoval, the Supreme Court held that Title VI does not imply a right of action for private litigants to sue recipients of federal funds for "disparate impact" violations. See Sandoval, 532 U.S. at 293, 121 S. Ct. at 1523. At issue in Sandoval was the claim that the Alabama Department of Public Safety's policy of administering all tests for drivers' licenses in English only has a discriminatory effect on racial minorities. Section 601 of Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. Recognizing that Title VI itself reaches only acts of intentional discrimination, see Alexander v. Choate, 469 U.S. 287, 293, 105 S. Ct, 712, 716, 83 L. Ed. 2d 661 (1985), the plaintiff in Sandoval alleged that Alabama's restriction violated 28 C.F.R. § 42.104(b)(2), a Department of Justice regulation promulgated pursuant to § 602 of Title VI, [6] that forbids recipients of federal funding from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . . ." 28 C.F.R. § 42.104(b)(2) (1999) (emphasis added).[7]

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[6] Section 602 authorizes and directs "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . to effectuate the provisions of [§ 601] with respect to such program or activity by issuing rules, regulations, or orders of general applicability . . . ." 42 U.S.C. § 2000d-1.

[7] 28 C.F.R.§ 42.104(b)(2) provides in full that:

> 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

The Court in Sandoval held that, although a private cause of action exists to enforce § 601, see 532 U.S. at 279, 121 S. Ct. at 1516 ("private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages"), that right plainly does not extend to the enforcement of disparate impact regulations promulgated under § 602. See Sandoval, 532 U.S. at 293, 121 S. Ct. at 1523.

In reaching this decision, the Supreme court stressed that legislative intent is the only basis upon which a private right of action may be inferred:

> Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. Raising up causes of action where a statute has not created them

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> 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.

The Department of Transportation has promulgated an identical regulation. See 49 C.F.R. § 21.5(b)(2).

> may be a proper function for common-law courts, but not for federal tribunals.

Id. at 286-87, 121 S. Ct. at 1519-1520 (citations and quotations omitted and emphasis added); see also Gonzaga University v. Doe, -- U.S. --, 122 S. Ct. 2268, 2276, 153 L. Ed. 2d 309 (2002) (The inquiry "simply require[s] a determination as to whether or not Congress intended to confer individual rights upon a class of beneficiaries.").

Sandoval also clearly delimits the sources that are relevant to our search for legislative intent. First and foremost, we look to the statutory text for "'rights-creating' language." Sandoval, 532 U.S. at 288, 121 S. Ct. at 1521; see also Gonzaga University, 122 S. Ct. at 2275 n.3 ("Where a statute does not include this sort of explicit 'right- or duty-creating language' we rarely impute to Congress an intent to create a private right of action."); Cannon, 441 U.S. at 690 n.13, 99 S. Ct. at 1954 n.13 ("Not surprisingly, the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action."). "Rights-creating language" is language "explicitly conferr[ing] a right directly on a class of persons that include[s] the plaintiff in [a] case," Cannon, 441 U.S. at 690 n.13, 99 S. Ct. at 1954 n.13, or language identifying "the class for whose especial benefit the statute was enacted." Tex. & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39, 36 S. Ct. 482, 484, 60 L. Ed. 874 (1916), quoted in Cannon, 441 U.S. at 689 n.10, 99 S. Ct. at 1953 n.10. In contrast, "statutory language customarily found in criminal statutes . . . and other laws enacted for the protection of the general public," or a statute written "simply as a ban on discriminatory conduct by recipients of federal funds," provides "far less reason to infer a private remedy in favor of individual persons." Cannon, 441 U.S. at 690-93, 99 S. Ct. at 1954-55.

Second, we examine the statutory structure within which the provision in question is embedded. If the statutory structure provides a discernible enforcement mechanism, Sandoval teaches that we ought not imply a private right of action because "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." Sandoval, 532 U.S. at 290, 121 S. Ct. at 1521-22.[8]

Third, if (and only if) statutory text and structure have not conclusively resolved whether a private right of action should be implied, we turn to the legislative history and context within which a statute was passed. See Sandoval, 532 U.S. at 288, 121 S. Ct. at 1520 ("In determining whether statutes create private rights of action, as in interpreting statutes generally, legal context matters only to the extent it clarifies text.") (citation omitted).[9] We examine legislative history with a skeptical eye, because "[t]he bar for showing legislative intent is high. 'Congressional intent to create a

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[8] See also Karahalios v. Nat'l Fed'n of Fed. Employees, 489 U.S. 527, 533, 109 S. Ct. 1282, 1286-87, 103 L. Ed. 2d 539 (1989) ("[I]t is . . . 'an elemental canon' of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies.") (quoting Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19, 100 S. Ct. 242, 246, 62 L. Ed. 2d 146 (1979)); McDonald, 291 F.3d at 725 ("When Congress creates certain remedial procedures, we are, 'in the absence of strong indicia of contrary congressional intent, . . . compelled to conclude that Congress provided precisely the remedies it considered appropriate.'") (alteration in original) (quoting Karahalios, 489 U.S. at 533, 109 S. Ct. at 1286-87 (quoting Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 15, 101 S. Ct. 2615, 2623, 69 L. Ed. 2d 435 (1981))).

[9] See also Thompson, 484 U.S. at 179, 107 S. Ct. at 516 ("Congress' intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment.'") (quoting Transamerica Mortgage Advisors, 444 U.S. at 18, 100 S. Ct. at 246); McDonald, 291 F.3d at 723 ("Legislative history can be taken into account where relevant, but the central focus of judicial inquiry must be the 'text and structure' of the statute itself.") (citation omitted).

private right of action will not be presumed. There must be clear evidence of Congress's intent to create a cause of action.'" McDonald, 291 F.3d at 723 (quoting Baggett v. First Nat'l Bank of Gainesville, 117 F.3d 1342, 1345 (11th Cir. 1997)). Moreover, the legislative history of a statute that is itself unclear about whether a private right of action is implied is unlikely to provide much useful guidance. See Cannon, 441 U.S. at 694, 99 S. Ct. at 1956 ("[T]he legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question.").

Relying exclusively on the text and structure of Title VI, see Sandoval, 532 U.S. at 288, 121 S. Ct. at 1520 ("We . . . begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI."), the Court in Sandoval concluded that Title VI implies no private right to sue for actions not motivated by discriminatory intent that result in a disparate impact. See id. at 293, 121 S. Ct. at 1523. Examining § 601, the Court determined that it does not imply a private right of action for disparate impact claims, because, as noted above, "§ 601 prohibits only intentional discrimination." Id. at 280, 121 S. Ct. at 1516.

The Court turned next to § 602, which, like § 902 of Title IX, authorizes federal agencies "to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d-1. The Court concluded that this provision does not imply a private right of action. It first observed that "'rights-creating' language . . . is completely absent from § 602." Sandoval, 532 U.S. at 288, 121 S. Ct. at 1521. Indeed, "[f]ar from displaying congressional intent to create new rights, § 602 limits agencies to 'effectuat[ing]' rights already created by § 601." Id. at 289, 121 S. Ct. at 1521 (second alteration in original) (citation omitted). Further, the Court noted,

> the focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI's protection. 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 the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating.

Id. (quoting California v. Sierra Club, 451 U.S. 287, 294, 101 S. Ct. 1775, 1779, 68 L. Ed. 2d 101 (1981)); see also Touche Ross & Co. v. Redington, 442 U.S. 560, 576, 99 S. Ct. 2479, 2489, 61 L. Ed. 2d 82 (1979) ("The question whether Congress . . . intended to create a private right of action [is] definitely answered in the negative" where a "statute by its terms grants no private rights to any identifiable class[.]"). The Court thus concluded that, "[s]o far as we can tell, this authorizing portion of § 602 reveals no congressional intent to create a private right of action." Sandoval, 532 U.S. at 289, 121 S. Ct. at 1521.

The Court also found that "the methods § 602 . . . provide[s] for enforcing its authorized regulations . . . suggest" an intent not to create a private right of action. Id. Section 602 provides for extensive administrative enforcement, as well as "elaborate restrictions" of that enforcement, which "tend[s] to contradict a congressional intent to create privately enforceable rights through § 602 itself." Id. at 290, 121 S. Ct. at 1521. In fact, the Court continued, "[t]he express provision of one method of

enforcing a substantive rule suggests that Congress intended to preclude others." Id. at 290, 121 S. Ct. at 1522.[10]

Having determined that § 601 does not imply a private right of action for disparate impact claims and that § 602 does not imply any private right of action at all, the Court concluded that the regulations promulgated by agencies with the power granted to them by § 602 to enforce the provisions of § 601 also cannot be the basis of an implied private right of action for disparate impact claims:

> Language 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. Thus, when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable. 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.

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[10] The Court observed that the suggestion created by an extant enforcement scheme that Congress did not intend to create another enforcement mechanism is "[s]ometimes . . . so strong that it precludes a finding of congressional intent to create a private right of action, even though other aspects of the statute (such as language making the would-be plaintiff 'a member of the class for whose benefit the statute was enacted') suggest the contrary." Id. at 290, 121 S. Ct. at 1522 (quoting Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S., 134, 145, 105 S. Ct. 3085, 3092, 87 L. Ed. 2d 96 (1985)). We need not address any potential tension between the language of a statute and its structure, however, because Jackson's claim creates no conflict between Title IX's text and its structure.

> Agencies may play the sorcerer's apprentice but not the sorcerer himself.

Id. at 291, 121 S. Ct. at 1522 (citations and quotations omitted); see also Touche Ross, 442 U.S. at 577 n.18, 99 S. Ct. at 2489 n.18 ("[T]he language of the statute and not the rules must control"). Thus, while regulations that merely interpret a statute may provide evidence of what private rights Congress intended to create, see Sandoval, 532 U.S. at 284, 121 S. Ct. at 1518 ("A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well."), "regulations that go beyond what the statute itself requires" are not enforceable through a private right of action. Id. at 293, n.8, 121 S. Ct. at 1523 n.8. Sandoval thus concluded there is no private right of action to pursue disparate impact claims under Title VI.

II.

With this template in front of us, we turn to Jackson's contention that Title IX, in conjunction with 34 C.F.R. § 100.7(e), implies a private right of action to remedy the type of retaliation he claims to have suffered.

As noted above, Title IX does not expressly provide any private right of action. See supra at ___. In Cannon v. Univ. of Chicago, 441 U.S. 677, 688-89, 99 S. Ct. 1946, 1953, 60 L. Ed. 2d 560 (1979), however, the Supreme Court held that Title IX implies a private right of action in favor of direct victims of gender discrimination. A woman who was denied admission by two medical schools brought suit against the schools under Title IX, alleging that their admissions policies discriminated against women. Carefully applying the four-part test set out in Cort v. Ash, 422 U.S. 66, 78, 95 S. Ct.

2080, 2088, 45 L. Ed. 2d 26 (1975), see supra note ___,[11] the Court found that Title IX implies a private right of action "in

[11] The Court first noted that the text of § 901 "explicitly confers a benefit on persons discriminated against on the basis of sex." Cannon, 441 U.S. at 694, 99 S. Ct. at 1956. That is, Title IX contains precisely the type of "rights-creating language" in favor of an identifiable class -- victims of gender discrimination -- that militates in favor of implying a private right of action. The second Cort factor, the Court likewise found, cuts in favor of finding a private right of action, because at the time of Title IX's passage, Title VI -- on which Title IX was modeled, see supra at ___ -- was understood to imply a private right of action. See Cannon, 441 U.S. at 696, 99 S. Ct. at 1957 ("In 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy."). Congress, the Court reasoned, was therefore aware that Title IX would be interpreted similarly and tacitly consented to this interpretation.

Under the third Cort factor, the Court gleaned from Title IX's legislative history that it was enacted to promote "two related, but nevertheless somewhat different, objectives:" "to avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices." Cannon, 441 U.S. at 704, 99 S. Ct. at 1961; see also id. at 704 n.36, 99 S. Ct. at 1961 n.36 (discussing legislative history of Title IX); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286, 118 S. Ct. 1989, 1997, 141 L. Ed. 2d 277 (1998). The Court observed that the first of these objectives is "generally served by the statutory procedure for the termination of federal financial support for institutions engaged in discriminatory practices" set forth in § 902. Cannon, 41 U.S. at 704, 99 S. Ct. at 1961. Cutting off federal funding is, however, a "severe" remedy of "last resort" that "often may not provide an appropriate means of accomplishing the second purpose . . . ." Id. at 704-705 & n.38, 99 S. Ct. at 1961-62 & n.38. The Court thus concluded that "[t]he award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with -- and in some cases even necessary to -- the orderly enforcement of the statute." Id. at 705-06, 99 S. Ct. at 1962.

Finding the fourth Cort factor also favored implying a private right of action, the Court in Cannon concluded that "all of [the Cort factors] support the same result. Not only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination." Id. at 709, 99 S. Ct. at 1964 (emphasis added).

favor of private victims of discrimination." Id. at 709, 99 S. Ct. at 1964 (emphasis added). The Court implied this private right of action in the plaintiff's favor based, not on § 902 or the regulations promulgated pursuant to it, but exclusively on the text, structure, and legislative history of § 901.

The Supreme Court has plainly receded from the four-part Cort analysis that animated Cannon, focusing instead only on congressional intent to create a private right of action. See supra note ___. But the court has not overturned the specific holding of Cannon, and so a direct victim of gender discrimination still may pursue a private right of action under Title IX to remedy the discrimination she has suffered.

In Cannon, however, the Supreme Court had no occasion to address the questions 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.

A.

We begin with the text of § 901. See supra at ___. Section 901 aims to prevent and redress gender discrimination and does so by requiring that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a); see also Cannon, 441 U.S. at 704, 99 S. Ct. at 1961. Nothing in the text indicates any congressional concern with retaliation that might be visited on those who complain of Title IX violations. Indeed, the statute makes no mention of retaliation at all.[12] Our task, as Sandoval makes clear, is 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 weight powerfully against a finding that Congress intended Title IX to reach retaliatory conduct. See Litman v. George Mason Univ., 156 F. Supp. 2d 579, 584-85 (E.D. Va. 2001) ("Congress was aware that it could create a right of action for retaliatory treatment, and it did so in Title VII; it did not do so in Title IX.").

Section 902 of Title IX, see supra note ___, does not vary our conclusion that Congress did not intend Title IX to

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[12] In contrast, when Congress wished to prohibit retaliation against individuals who complain about employment discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"), 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq., it did so explicitly as part of the statute itself. See 42 U.S.C. § 2000e-3(a). The anti-retaliation section of Title VII provides in pertinent part that it shall be an unlawful employment practice for any employer to retaliate against an employee or an applicant for employment "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). We recognize that Title VII is of limited usefulness in interpreting Title IX, both because Title VII was enacted pursuant to Congress's Commerce power, while both Title VI and IX were enacted pursuant to Congress's Spending Clause power, and because the text and structure of Title VII are markedly different than that of Title IX. See Gebser, 524 U.S. at 286, 118 S. Ct. 1989. Nonetheless, the fact that Congress felt required to prohibit retaliation expressly under Title VII may indicate that Congress did not intend the concept of "discrimination" in Title IX to be read sufficiently broadly to cover retaliation.

prohibit retaliation. Section 902, like its twin § 602, is devoid of "rights-creating" language of any kind -- whether against gender discrimination, retaliation, or any other kind of harm. Instead, again like § 602, it explicitly directs and authorizes federal agencies to regulate recipients of federal funding to effectuate the anti-discrimination provisions of § 901. As detailed above, see supra at ___, it provides an enforcement mechanism -- the cessation of federal funding -- and imposes "elaborate restrictions on agency enforcement." Sandoval, 532 U.S. at 290, 121 S. Ct. at 1521. These restrictions include requirements that agencies first attempt to attain voluntary compliance, that agencies hold a hearing and make express findings of noncompliance before cutting off funding, and that agencies provide Congress thirty days to consider any proposed funding cut off. See 20 U.S.C. § 1682. That § 902 is thus concerned exclusively with the power of federal agencies to regulate recipients of federal funds renders its focus, like § 602's, "twice removed" from any consideration of what harm Title IX is meant to remedy. Sandoval, 532 U.S. at 289, 121 S. Ct. at 1521. Section 902 plainly does not disclose any congressional intent to imply a private right of action of any kind, let alone against retaliation.

Moreover, as Sandoval teaches, Section 902's provision of an administrative enforcement mechanism, coupled with § 903's provision of judicial review, strongly counsels against inferring a private right of action against retaliation, because "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." Sandoval, 532 U.S. at 290, 121 S. Ct. at 1521-22.

We conclude, 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. While we "have a

measure of latitude to shape a sensible remedial scheme that best comports with the statute" when determining the scope of a judicially implied right and the remedies it makes available, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 284, 118 S. Ct. 1989, 1996, 141 L. Ed. 2d 277 (1998), we are not free to craft a right that there is no evidence Congress intended to create. See id. ("[W]e generally examine the relevant statute to ensure that we do not fashion the scope of an implied right in a manner at odds with the statutory structure and purpose."); see also id. at 285, 118 S. Ct. at 1997 (We must "'attempt to infer'" from all available indicia "'how the [1972] Congress would have addressed the issue had the . . . action been included as an express provision in the' statute.") (alterations in original) (quoting Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 178, 114 S. Ct. 1439, 1448, 128 L. Ed. 2d 119 (1994)); Sandoval, 532 U.S. at 286, 121 S. Ct. at 1519 ("Statutory intent . . . is determinative."). Our review of §§ 901 and 902 unearths absolutely no indication that Congress intended Title IX to prevent or redress retaliation. Because the text thus evinces no concern with retaliation, we are not free to imply a private right of action to redress it.

Nor does 34 C.F.R. § 100.7(e)'s prohibition on retaliation, see supra at ___, imply such a private right of action or create a private remedy. It is true, as Jackson asserts, that § 100.7(e) identifies a class to which it extends its protection: "any individual" retaliated against for "complain[ing], testif[ying], assist[ing], or participat[ing] in any manner in an investigation, proceeding or hearing" undertaken to enforce Title IX. This regulatory identification of a protected class cannot be taken, however, as "rights-creating," for the simple reason that "[l]anguage in a regulation . . . may not create a right that Congress has not." Sandoval, 532 U.S. at 291, 121 S. Ct. at 1522. Quite simply, if Congress did not enact a statute creating a private

cause of action, we cannot find its intent to do so in this regulation. Because Congress has not created a right through Title IX to redress harms resulting from retaliation, 34 C.F.R. § 100.7(e) may not be read to create one either.[13]

B.

Moreover, even if Title IX did aim to prevent and remedy retaliation for complaining about gender discrimination, Jackson is plainly is not within the class meant to be protected by Title IX. As Cannon held, § 901 identifies victims of gender discrimination as the class it aims to benefit, and so implies a private right of action in their favor. Nowhere in the text, however, 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 easily have provided some protection or form of relief to these

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[13] In our only previous encounter with the question, we expressly declined to resolve whether 34 C.F.R. § 100.7(e) creates a private right of action for retaliation. See Paisey v. Vitale, 807 F.2d 889, 895 n.8 (11th Cir. 1986) ("Paisey . . . makes the argument that . . . he is entitled to an injunction as part of his relief pursuant to his private cause of action against Nova for violation of the anti-retaliation regulation. That issue is not properly before us."). Before *Sandoval*, the Fourth Circuit had determined that a victim of gender discrimination does have a private right of action for retaliation. See Preston v. Commonwealth of Va. ex rel. New River Cmty. Coll., 31 F.3d 203, 206 (4th Cir. 1994) ("Retaliation . . . for filing a claim of gender discrimination is prohibited under Title IX."). The only two cases that have resolved a claim for retaliation under Title IX after Sandoval -- both of which were decided by district courts -- have both reached the opposite conclusion. See Atkinson v. Lafayette Coll., 2002 WL 123449 at *11 (E.D. Pa. Jan. 29, 2002) ("[I]n the wake of Sandoval, there is no private right of action under Title IX to enforce the anti-retaliation regulation. . . ."); Litman, 156 F. Supp. 2d at 584-85 ("Congress was aware that it could create a right of action for retaliatory treatment, and it did so in Title VII; it did not do so in Title IX.").

other interested individuals had it chosen to do so -- especially for a harm as plainly predictable as the retaliation here at issue[14] -- 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. We are not free to extend the scope of Title's IX protection beyond the boundaries Congress meant to establish, and we thus may not read Title IX so broadly as to cover anyone other than direct victims of gender discrimination.

We 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

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[14] In an analogous statutory context, claims for retaliation are often raised by individuals who are not themselves disabled but are affiliated with disabled individuals under § 504 of the Rehabilitation Act, 29 U.S.C. § 794. See, e.g., Weber v. Cranston Sch. Comm., 212 F.3d 41, 43-44 (1st Cir. 2000) (parent); Hoyt v. St. Mary's Rehab. Ctr., 711 F.2d 864, 865 (8th Cir. 1983) (friend); Lillbask v. Sergi, 193 F.Supp. 2d 503, 515 (D. Conn. 2002) (guardian); Whitehead v. Sch. Bd. for Hillsborough County, 918 F.Supp. 1515, 1522 (M.D. Fla. 1996) (parents); Ross v. Allen, 515 F.Supp. 972, 976 (S.D.N.Y. 1981) (school psychologist). Courts have generally found that a private right exists to redress this type of retaliation, but this is in large part because the statutory text of the Rehabilitation Act explicitly extends its remedies to "any person aggrieved by an act or failure to act by any recipient of Federal assistance . . . under section 794 of this title." 29 U.S.C. § 794a(a)(2) (emphasis added).

discrimination suffered by others.[15] Statutory intent remains the touchstone of our analysis. Without it -- and the mandate of Sandoval is crystal clear on this point -- we simply cannot imply a private right of action, no matter how desirable the result may be. And our review of both the text and structure of Title IX yields no congressional intent to create a cause of action for retaliation, particularly for a plaintiff who is not a

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[15] As far as we can discern, we are the first court of appeals to resolve this question after the Supreme Court rendered its opinion in Sandoval. Our decision today is, we note, contrary to the lone circuit decision that addressed this question prior to Sandoval, Lowrey v. Texas A & M Univ. Sys., 117 F.3d 242 (5th Cir. 1997). The Fifth Circuit held in Lowrey that 34 C.F.R. § 100.7(e) can of its own force provide the basis for an implied private right of action for retaliation suffered by individuals not themselves the victims of gender discrimination. See id. at 253. To reach this conclusion it relied on an earlier Fifth Circuit opinion that had observed in passing while construing the Wagner-Peyser Act of 1933 (which establishes the United States Employment Service, see 29 U.S.C. § 49 et seq.) that "civil remedies may be implied from regulations, as well as statutes." Gomez v. Fla. State Employment Ser., 417 F.2d 569, 576 n.29 (5th Cir., 1969). Ignoring the statutory text contained in §§ 901 and 902 of Title IX and focusing exclusively on 34 C.F.R. § 100.7(e), Lowrey applied the four-part Cort test to reach its conclusion that § 100.7(e) implies a private right of action. To reach this conclusion, Lowrey relied heavily on the third Cort factor -- finding that "the implication of a private right of action for retaliation would serve the dual purposes of title IX, by creating an incentive for individuals to expose violations of title IX and by protecting such whistleblowers from retaliation," id. at 254 (footnote omitted)-- while giving conspicuously little consideration to whether Congress intended to create such a private right of action.

After Sandoval, we believe the reasoning in Lowrey is unpersuasive. Accordingly, we do not follow Lowrey, either in its exclusive reliance on 34 C.F.R. § 100.7(e) to imply a private right of action, see Sandoval, 532 U.S. at 291, 121 S.Ct. at 1522 ("[I]t 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."), or in its application of the Cort factors that gives short shrift to legislative intent. See Sandoval, 532 U.S. at 286-87, 121 S. Ct. at 1519-1520 ("Statutory intent . . . is determinative.").

direct victim of gender discrimination. Congress is, of course, free to create a private right of action for retaliation under Title IX and may extend its protection beyond direct victims of gender discrimination. Until it does so, however, Sandoval plainly precludes a federal court from implying such a right or expanding the class benefited by Title IX. The district court was therefore correct to dismiss Jackson's complaint.[16]

AFFIRMED

[16] Because we find that Jackson has no private right of action under Title IX, we do not reach the Board's other claims that (i) Jackson lacks standing to assert such a right because he has not suffered an adverse employment action, or that (ii) his claim for retaliation is preempted by the retaliation provisions of Title VII.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RODERICK JACKSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CV-01-TMP-1866-S
	)	
BIRMINGHAM BOARD OF EDUCATION,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This cause comes to be heard on plaintiff Roderick Jackson's objection to the magistrate judge's Report and Recommendation entered on January 10, 2002.

The court adopts the magistrate judge's Report and Recommendation and overrules plaintiff's objections thereto. The court finds persuasive the case of *Holt v. Lewis,* 955 F. Supp. 1385 (N.D. Ala. 1995), *aff'd*, 109 F.3d 771 (11th cir. 1997) (TABLE, No. 96-6046), *cert. denied*, 522 U.S. 817 (1997). In the absence of controlling Eleventh Circuit or Supreme Court authority holding that Title IX expressly or implicitly creates a private cause of action for retaliation, the court finds that the Title IX does not create such a right. Thus, the defendant's motion to dismiss is **GRANTED** and the complaint in this action is **DISMISSED**.

DONE and **ORDERED** this 25th day of February 2002.

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ROBERT B. PROPST
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RODERICK JACKSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CV-01-TMP-1866-S
	)	
BIRMINGHAM BOARD OF EDUCATION,	)	
	)	
Defendant.	)	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This cause is before the court on the defendant's motion to dismiss the complaint, filed July 27, 2001. The motion to dismiss argues that the complaint is due to be dismissed because it fails to state a claim for which relief can be granted, the plaintiff lacks standing to assert a claim under Title IX of the Education Amendments of 1972, and the claim asserted is preempted by Title VII of the Civil Rights Act. Because the court agrees, it is recommended that the complaint be dismissed.

Procedural History

Plaintiff's complaint is expressly and exclusively grounded on the gender-discrimination provisions of Title IX of the Education Amendments of 1972, codified at 20 U.S.C. 1681, et seq. He alleges that he is employed by the defendant as a physical education teacher. He was transferred to Ensley High School in August 1999, where part of his duties involved coaching the girls' basketball

team. In doing so, he discovered that the girls' team was denied equal access to sports facilities and equipment, even being denied a key to the gymnasium. When he complained about the differential treatment of the girls' team, he received negative work evaluations and was ultimately relieved of his coaching duties in May 2001. He remains employed as a tenured physical education teacher.[1]

Defendant filed its motion to dismiss the complaint on September 10, 2001, asserting that any employment claims raised by plaintiff are preempted by Title VII of the Civil Rights Acts, that he has no standing to assert a claim under Title IX of the Education Amendments of 1972 because he was not the victim of the alleged gender discrimination (those being the members of the girls' basketball team), and that he has failed a allege a claim for which relief can be granted. On this latter ground, defendant argues that plaintiff's claim consists entirely of the contention that he suffered retaliation for complaining about the gender-discriminatory treatment of the girls' basketball team when his coaching duties were terminated in May 2001, and that Title IX, unlike Title VII, does not provide a remedy for retaliation. See Holt v. Lewis, 955 F. Supp. 1385 (N.D.Ala. 1995) aff'd 109 F.3d 771 (11th Cir. 1997) (TABLE, NO. 96-6046), cert. denied, 522 U.S. 817, 118 S. Ct. 67, 139 L.Ed.2d 29 (1997); Litman v. George Mason University, 156 F.Supp.2d 579 (E.D.Va. 2001). Plaintiff has responded to the motion, expressly eschewing any reliance on Title VII and contending that there is a growing trend nationwide

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[1] Although the complaint states that plaintiff was "terminated" on May 7, 2001, the defendant's motion contends, and plaintiff concedes, that he is still employed as a tenured physical education teacher; only his coaching duties were terminated. Parties agreed at oral argument on the motion, however, that termination of the plaintiff's coaching duties also meant the end of his "coaching supplement" -- additional pay awarded to compensate teachers for coaching duties over and above their ordinary teaching duties.

recognizing retaliation claims under Title IX. See Lowrey v. Texas A & M University System, 117 F.3d 242 (5th Cir. 1997); Blalock v. Dale County Board of Education, 84 F.Supp.2d 1291 (M.D.Ala. 1999); Legoff v. Trustees of Boston University, 23 F.Supp.2d 120 (D. Mass. 1998); Clay v. Board of Trustees of Neosho County Community College, 905 F.Supp. 1488 (D.Kan. 1995). Plaintiff contends that this court should go with the trend.

Discussion

At the outset, the court agrees that plaintiff has no standing to assert the claims of the female members of the Ensley High School girls' basketball team for the substantive violations of their right to equal educational opportunities under Title IX. To the extent that the girls' basketball team was treated less favorably that the boys' basketball team in terms of facilities and equipment, a potential violation of Title IX occurred because the girls were the victims of discrimination due to their gender. Title IX, now codified as 20 U.S.C. § 1681, states, "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." Clearly, subjecting female athletes to deprivations not suffered by comparable male athletes runs afoul of this provision. Nevertheless, the "persons" being subjected to the illegal discrimination are the female members of the basketball team, not the coach; it is they who are being "denied the benefits of" the educational activity of competitive basketball. 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. Thus, insofar as plaintiff bases his claim simply on the fact that the girl's basketball team was discriminatorily denied equal

access to sports facilities and equipment, he has no standing to prosecute the action.

The court also agrees that, to the extent plaintiff is asserting the discriminatory loss of some employment benefit, that is, his coaching duties and the supplemental pay that went with them, his claim must rest exclusively under Title VII, and not Title IX. Employment related discrimination by educational institutions is dealt with comprehensively by Title VII, which preempts any employment-discrimination claim under Title IX. See Lowrey v. Texas A & M University System, 117 F.3d 242 (5th Cir. 1997); Lakoski v. Thomas M. James, M.D., 66 F.3d 751 (5th Cir. 1995); Gibson v. Hickman, 2 F.Supp.2d 1481 (M.D.Ga., 1998); Hazel v. School Board of Dade County, Florida, 7 F.Supp.2d 1349 (S.D.Fla., 1998); Cooper v. Gustavus Adolphus College, 957 F. Supp. 191 (D.Minn. 1997); Howard v. Board of Education of Sycamore Community Unit School District, 893 F. Supp. 808 (N.D.Ill. 1995); Storey v. Board of Regents, 604 F. Supp. 1200 (W.D.Wis. 1985). Because plaintiff has expressly renounced any reliance on Title VII, any allegation of employment discrimination in the complaint fails to raise a claim for which relief can be granted under Title IX.

Finally, plaintiff also alleges that he was the victim of retaliation due to his complaints about the discriminatory treatment of the girls' basketball team. Defendant answers that Title IX, unlike Title VII, simply does not encompass a cause of action for retaliation. Although the court finds persuasive those cases, including Lowery, which recognize a retaliation claim under Title IX, it feels bound by the decision in Holt v. Lewis, which was affirmed without opinion by the Eleventh Circuit. First, it is correct that Title VII does not preempt a retaliation claim which is based on reprisal arising *not* due to *employment* discrimination. As Lowery makes clear, Title VII prohibits retaliation only for

complaints concerning or opposition to employment practices that are illegal under Title VII. Thus, if the nature of the plaintiff's complaints does not involve perceived *employment* discrimination, retaliation for making those complaints falls outside of Title VII. Here, plaintiff alleges that he complained about the discriminatory treatment of students, not discrimination in employment. Consequently, insofar as a retaliation claim might arise under Title IX, it is not preempted here.

Simply stated, however, the Eleventh Circuit's affirmance of Judge Acker's decision in Holt v. Lewis, 955 F. Supp. 1385 (N.D.Ala. 1995), aff'd, 109 F.3d 771 (11th Cir. 1997) (TABLE, NO. 96-6046), cert. denied, 522 U.S. 817, 118 S.Ct. 67, 139 L.Ed.2d 29 (1997), leaves this court with little option but to reject the argument that Title IX implicitly creates a private cause of action for retaliation. While neither Judge Acker's opinion nor the Eleventh Circuit's unpublished opinion, nor even the Supreme Court's denial of certiorari are binding, the affirmance by the court of appeals has very definite meaning. Although Eleventh Circuit Rule 36-2 clearly states that "Unpublished opinions are not considered binding precedent," it does not state that they have *no* precedential value. This court must assume that the court of appeals would not have affirmed Judge Acker's holding in Holt v. Lewis, unless they felt it was correct. Certainly, the judges of that court would not have affirmed a decision they believed was *wrong*. Thus, although it is an unpublished opinion, the affirmance by the court of appeals must be deemed, at least implicitly, as holding in agreement with Judge Acker that Title IX simply does not recognize a cause of action for retaliation.[2] That implicit holding by the

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[2] The differing natures of appeal and certiorari are highlighted here. Any precedential value in the denial of certiorari by the Supreme Court can be disregarded by certiorari is a discretionary review, one which the Court may decline for reasons unrelated to the merits of the lower-court decision. The Eleventh circuit has no such luxury. It must decide cases

Eleventh Circuit, if not binding on this court, certainly tips the scales of indecision in favor of that view. Thus, the court holds, consistent with Holt v. Lewis, as affirmed by the Eleventh Circuit, that no private cause of action for retaliation is found under Title IX, and plaintiff's complaint must be dismissed.

RECOMMENDATION

Based on the foregoing considerations, the magistrate judge RECOMMENDS that the defendant's motion to dismiss be GRANTED and the complaint in this action be DISMISSED.

Any party may file specific written objections to this report and recommendation within fifteen (15) days from the date it is filed in the office of the Clerk. Failure to file written objections to the proposed findings and recommendations contained in this report and recommendation within fifteen (15) days from the date it is filed shall bar an aggrieved party from attacking the factual findings on appeal. Written objections shall specifically identify the portions of the proposed findings and recommendation to which objection is made and the specific basis for objection. A copy of the objections must be served upon all other parties to the action.

The Clerk is DIRECTED to forward a copy of this report and recommendation to all counsel of record.

DONE this 10th day of January, 2002.

T. MICHAEL PUTNAM
CHIEF MAGISTRATE JUDGE

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properly appealed to it *on the merits*. Thus, its affirmance or reversal of a lower-court decision, even if unpublished, must be given some weight in any effort to interpret the law in this circuit.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-11303 BB

RODERICK JACKSON,

Plaintiff-Appellant,

versus

BIRMINGHAM BOARD OF EDUCATION,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ____ F.2d ____).

Before: DUBINA, MARCUS and GOODWIN, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

* Honorable Alfred T. Goodwin, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.