IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-11303-BB

RODERICK JACKSON,

Plaintiff-Appellant,

v.

BIRMINGHAM BOARD OF EDUCATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

PLAINTIFF-APPELLANT'S PETITION FOR REHEARING OR HEARING *EN BANC*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellant certifies that the following is a complete list of the trial judge, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates, and parent corporations or other identifiable legal entities related to any party:

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- Roderick Jackson, Plaintiff-Appellant
- The Honorable Robert B. Propst, District Court Judge
- The Honorable T. Michael Putnam, District Court Magistrate Judge
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Respectfully Submitted,

____

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STATEMENT OF COUNSEL

Pursuant to Local Rule 35, I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States:

Alexander v. Sandoval, 532 U.S. 275 (2001)

Cannon v. University of Chicago, 441 U.S. 677 (1979)

Sullivan v. Little Hunting Park, 396 U.S. 229 (1969)

I also express a belief, based on a reasoned and studied professional judgment, that this appeal involves a question of exceptional importance:

Whether individuals who suffer retaliation because they complain about violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, have a private cause of action for the retaliation.

____
Marcia D. Greenberger
Attorney of Record for
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STATEMENT OF THE ISSUE

The panel that heard this case affirmed the dismissal of Plaintiff-Appellant Roderick Jackson's challenge to retaliation against him for protesting discrimination against the girls' high school basketball team that he coached. Improperly extending the decision in *Alexander v. Sandoval,* 532 U.S. 275 (2001), which holds that there is no private cause of action under the disparate impact regulations issued pursuant to Title VI of the Civil Rights Act of 1964, it determined that Congress did not intend to create a private cause of action for retaliation under Title IX of the Education Amendments of 1972.[1] The panel further held that even if there is such a right, "Jackson . . . plainly is not within the class meant to be protected by Title IX." 2002WL 31356658 (11th Cir. (Ala.)) at *9. These holdings involve questions of exceptional importance.

Jackson, who was acting *pro se* at the time of oral argument, respectfully submits that rehearing by the panel or hearing *en banc* is justified in this case.

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[1]Two similar cases are now pending before the Fourth Circuit, one involving a Title IX retaliation claim by a direct victim of discrimination, *Litman v. GMU*, 156 F. Supp. 2d 579 (E.D. Va. 2001), *appeal docketed*, No. 01-2128, and the other involving a Title VI retaliation claim by an indirect victim, *Peters v. Jenney*, ___F. Supp. 2d ___ (E.D. Va 2001), *appeal docketed*, No. 01-2413. The United States has filed briefs as *amicus curiae* in support of the plaintiffs in both these appeals, arguing that there is a private right of action for retaliation under both Title IX and Title VI.

Rehearing by the panel is warranted because of errors of law in two fundamental respects. *See* Fed. R. App. P. 40 (request for rehearing authorized where panel "overlooked or misapprehended" law). **First**, the panel erred in finding that Title IX does not provide a cause of action for retaliation. It failed to consider decades of Supreme Court and other precedent holding that protection against retaliation is an integral aspect of the right to be free from discrimination. The panel's failure to recognize this principle undermines the Supreme Court's holding in *Cannon* v. *University of Chicago,* 441 U.S. 677 (1979), that there is an individual right of action under Title IX. For, this right becomes meaningless if a person who is punished for exercising it cannot also seek redress for the retaliation. Moreover, the panel ignored the critical point that Congress reviewed the regulations implementing Title IX, including the regulation explicitly prohibiting retaliation, and concurred that they appropriately define the scope of statutory protections. Thus, the panel erred in finding that Congress did not intend to include protection from retaliation among the rights created by the statute.

Contrary to the panel's interpretation, *Sandoval* in no way bars -- and in fact authorizes -- this conclusion. In *Sandoval*, the Court held that there was no private right of action to enforce disparate impact regulations under Title VI, where the statute itself prohibits only intentional discrimination. But the Court expressly

reaffirmed the existence of a cause of action to enforce regulations -- under Title VI and other laws -- that "authoritatively construe" the statute under which they are issued. The retaliation regulation under Title IX falls squarely within this category. The panel thus erred in extending *Sandoval* beyond its plain language and meaning.[2]

Second, the panel erred in holding that Jackson, as the coach of a girls' basketball team that he believed had been treated discriminatorily, lacks a right of action to challenge retaliation against him for protesting that treatment -- even assuming that his students could have challenged retaliation directed against them. This holding overlooks the basic principle, consistently recognized by courts, that those who suffer injury as a result of discrimination – and, in particular, those who endure retaliation for protesting discrimination against others – have a cause of action to seek redress for that injury. Moreover, Jackson is not seeking to enforce the rights of his students; rather, he is challenging injury to *himself* – injury for which, in the case of the retaliation, he is the *only* effective challenger. The panel's failure to consider this precedent warrants review of its decision.

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[2]Jackson submits that *Sandoval* is applicable to Title VI only, and not to Title IX at all, because Title IX prohibits both intentional and disparate impact discrimination. For purposes of this Petition, however, Jackson assumes that *Sandoval* does apply to Title IX.

Alternatively, Jackson requests review *en banc.* The errors of law in the panel's decision are contrary to decisions of the Supreme Court and involve a "question of exceptional importance," Fed. R. App. P. 35: whether individuals can seek effective redress for retaliation for their complaints about violations of Title IX. This question is crucial to the enforcement of all anti-discrimination laws, for the lack of an individual cause of action for retaliation will have a chilling effect on those who wish to protest unlawful treatment. The panel's holding that Jackson himself has no standing here, despite the injuries that he suffered as a result of the school's discriminatory conduct, will similarly undermine the vindication of civil rights by unwarrantedly restricting the right to seek redress to the direct targets of discrimination. Resolution of both of these questions is critical to effective enforcement of the nation's civil rights laws. As a result, review *en banc* is warranted.

STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

Jackson filed a complaint alleging that the Birmingham Board of Education retaliated against him in violation of Title IX by removing him from his paid position as coach of the girls' basketball team after he complained that the Board denied equal treatment to his team. The district court, in an unreported decision, dismissed the complaint.

Jackson appealed to this Court. In his initial brief, Jackson's original attorneys failed to address *Sandoval*, or Jackson's right to proceed with a cause of action under the current legal standards discussed in this petition. Jackson dismissed his attorneys and filed his reply brief and conducted oral argument *pro se*. On October 21, 2002, this Court issued its decision upholding the dismissal.

The Court assumed for purposes of the appeal that Jackson had suffered retaliation for complaining about "perceived Title IX violations." 2002 WL 31356658 at *1. The panel held, however, that "neither Title IX itself nor 34 C.F.R. § 100.7(e) [the Title IX regulation that prohibits retaliation] implies a private right of action for retaliation in Jackson's favor." *Id.* at *3. In so holding, it also relied on the fact that Jackson was not a direct victim of sex discrimination, but rather had complained of sex discrimination against the girls' team he coached.

ARGUMENT

I. THE PANEL ERRED IN FINDING THAT TITLE IX DOES NOT PROVIDE A CAUSE OF ACTION FOR RETALIATION.

In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Supreme Court implied a private cause of action to enforce the statutory rights created by Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, finding such a cause of action critical to "providing individual citizens effective protection

against [discriminatory] practices." 441 U.S. at 703-04. As described below, the panel here erred in failing to recognize that Congress intended to include retaliation among the statutory protections and thus that the right to challenge retaliation is necessarily included in the cause of action based on the statute.

A. The Panel Erred in not Considering Precedents Establishing that Title IX Includes Protection from Retaliation.

Title IX expansively 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. The Supreme Court has stated that "to give [Title IX] the scope that its origins dictate, [courts] must accord it a sweep as broad as its language." *North Haven v. Bell,* 456 U.S. 512, 521 (1982) (citations omitted). Under decades of civil rights law, this broad prohibition of discrimination must be read to include protection from retaliation.

The Supreme Court has consistently recognized that protection from retaliation is an integral part of the right to be free from discrimination, based on the common-sense proposition that schools and other defendants could otherwise accomplish through retaliation what they could not achieve directly: the effectuation of discriminatory treatment. In *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229 (1969), for example, the Court considered the case of a white

homeowner who brought suit under 42 U.S.C. § 1982 when he was expelled from membership in his community for renting to a black man. The Court stated firmly 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." 396 U.S. at 237. Similarly, the Court has held that even though retaliation is not explicitly mentioned in the Constitution, it is necessarily actionable under 42 U.S.C. § 1983 in order to protect constitutional rights. *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 172 (1970).

Moreover, other civil rights laws have been interpreted to bar retaliation despite the absence of any statutory mention of it. In 1972, for example, the coverage of Title VII of the Civil Rights Act of 1964 was extended to federal employees. 42 U.S.C. § 2000e-16 (2001). Although the provision of Title VII that addresses retaliation, 42 U.S.C. § 2000e-3, was not specifically incorporated into this section, courts, including this Circuit, have uniformly found that Congress intended to protect federal employees from retaliation. *See, e.g., Canino v. EEOC,* 707 F. 2d 468, 471-72 (11th Cir. 1983); *Ayon v. Sampson,* 547 F.2d 446,

449-50 (9th Cir. 1976).[3] The Age Discrimination in Employment Act has been interpreted similarly. *See, e.g., Forman v. Small*, 271 F.3d 285, 298 (D.C. Cir. 2001) ("a work place cannot be free from any age discrimination if an employer can take an adverse employment action against its employees because the employee has brought an age discrimination claim against the employer. This is age discrimination, which [the statute] by its *own* terms alone prohibits."), *cert. denied*, 122 S. Ct. 2661(2002). These precedents are alone sufficient to show that the panel erred in concluding that Congress did not intend to include retaliation among the rights it protected in Title IX.

B. The Panel Erred in Not Recognizing that the Title IX Regulations Define the Scope of Statutory Protections.

The Title IX regulations provide, *inter alia*, that "[n]o recipient . . . shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege" secured by the statute, or "because he

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[3]The panel here noted that Congress' explicit prohibition of retaliation in Title VII as it applies to *private* employers "may indicate" that it did not intend Title IX to cover retaliation. 2002 WL 31356658 at *10 n.12. However, the totally different structure of the two statutes supports no such finding. In contrast to the expansive prohibition of Section 901 of Title IX, the provisions of Title VII spell out in detail the conduct that does – and does not – violate the statute. 42 U.S.C. § § 2000e-2 and 3. Since Congress did not bar *any* specific discriminatory practices in the language of Section 901(a) of Title IX, the failure to list one particular practice, such as retaliation, is not an indication that that practice is permitted under the statute.

has made a complaint . . . under this part." 34 C.F.R. § 100.7(e). This regulation, along with the others promulgated under Title IX, was submitted to Congress under a statutorily mandated procedure designed to determine "if 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 Subcommittee 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).[4]

Following submission of the regulations, Congress held multiple hearings and refused to approve numerous proposed resolutions of disapproval. As a result, the regulations, including the anti-retaliation provision, went into effect with Congressional blessing. *North Haven,* 456 U.S. at 533-34 n.24. While post-enactment developments are not dispositive:

> [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

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[4]The General Education Provisions Act, Pub. L. No. 93-380, 88 Stat. 567, 20 U.S.C. § 1232 (d)(1) (1970 & Supp. IV 1974), required that all proposed Title IX regulations be "laid before" Congress before they became effective. Although a similar requirement for Congressional approval was later invalidated by the Supreme Court, *I.N.S. 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.

> in other respects, then presumably the legislative intent has been correctly discerned.

Id. at 535 (citation omitted). The panel erred, therefore, in failing to recognize the anti-retaliation regulation implementing Title IX as authoritative evidence of Congress' intent in enacting the broad language of the statute.

C. The Panel Erred in Failing to Apply *Sandoval's* Authorization of a Cause of Action to Enforce Regulations that Authoritatively Construe the Statute.

As the panel recognized, "[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." 2002 WL 31356658 at *6, *quoting Sandoval.* However, the panel failed to understand that, unlike the disparate impact regulation at issue in *Sandoval,* the retaliation regulation fully meets this standard.

The Court rejected a cause of action for disparate impact discrimination in *Sandoval* because the Title VI regulations on which it was based "do not simply apply § 601 . . . they indeed forbid conduct that § 601 permits." 532 U.S. at 285. Under the Court's analysis, because Title VI itself bars only intentional discrimination, the disparate impact regulations do not merely interpret the statutory right; they instead establish a new right. *Id.*

By contrast, the Title IX retaliation regulation simply applies Title IX's ban on intentional discrimination. Moreover, far from forbidding conduct that the statute itself permits, the regulation, as set forth above, interprets the statute in a way necessary to provide the "effective protection" against discrimination that Congress intended. *Cannon,* 441 U.S. at 678. Thus, the panel failed to recognize that the retaliation Jackson challenges is covered by the cause of action implied in *Cannon*, and falls squarely within the statutory rights for which *Sandoval* explicitly preserved a cause of action.

For all of the above reasons, the panel clearly erred in concluding that the "absence of any mention of retaliation in Title IX," 2002 WL 31356658 at *8, demonstrates that Congress did not intend to include protection against retaliation in the broad language of Title IX. Jackson's petition for rehearing or rehearing *en banc* should therefore be granted.

II THE PANEL ERRED IN FINDING THAT JACKSON IS NOT WITHIN THE CLASS PROTECTED UNDER TITLE IX.

The panel's conclusion that Title IX does not extend to individuals "other than direct victims of gender discrimination," *Id.* at *9, contravenes longstanding precedents that recognize that actionable injury under the civil rights laws may be sustained by individuals harmed by discriminatory conduct of which they are not the direct targets. It is also factually inapposite here, where Jackson *was* the

direct target of the Board's retaliation, and where he is the only individual who can effectively challenge that conduct.

As the panel recognized, "[g]ender discrimination affects not only its direct victims, but also those who care for, instruct, or are affiliated with them." *Id.* The Supreme Court has consistently recognized that individuals who suffer such injury are within the class protected by the law when they sue to redress the discrimination that has resulted in their injury. *See, e.g., Sullivan v. Little Hunting Park*, Section I(A), *supra*; *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 97-98 (1979) (residents who acted as testers to track racial steering practices "were entitled to prove that the discriminatory practices documented by their testing deprived them, as residents of the adversely affected area, 'of the social and professional benefits of living in an integrated society'"); *see also EEOC Compliance Manual,* "Threshold Issues," available at www.eeoc.gov/docs/threshold.html (citing lower court cases under employment discrimination laws allowing suits by those harmed by prohibited discrimination directed against others).

These precedents are directly relevant here, where discrimination against female athletes harms their coach as well as the athletes themselves; the coach's reputation, ability to attract competitive players, likelihood of success in

competition, and job tenure itself can all be undermined where the athletes are provided unequal facilities, equipment, or training in violation of Title IX. By failing to treat female athletes fairly, the school fails to provide a coach with the opportunity to fully perform his or her job. *O'Connor v. Peru State College*, 781 F.2d 632, 642 n.8 (8th Cir. 1986). Therefore, a coach is within the class meant to be protected by Title IX and can sue to challenge the discrimination against his students that has resulted in that harm.

This is particularly true where a coach has been victimized by retaliation for asserting his -- and his students' -- rights to be treated non-discriminatorily. Under these circumstances, the coach *is* the direct target of the unlawful conduct; in fact, he is "the only effective plaintiff to bring this suit." *Clemes v. Del Norte County Unified School District*, 843 F.Supp. 583, 592 (N.D. Cal. 1994) (teacher retaliated against for protesting treatment of Native American and female students has standing to sue under Title VI, Title IX, and 42 U.S.C. §§ 1981 and 1982); *see also Nelson v. University of Maine System*, 923 F. Supp. 275, 284 (D. Maine 1996) (professor had standing under Title IX to challenge retaliation for protesting sexual harassment against students).

For all of the above reasons, the panel's conclusion that Jackson lacked standing to challenge retaliation against him was erroneous and should be

reviewed.

III THE PANEL'S DECISION VITIATES TITLE IX'S PROTECTIONS.

If Congress' goal of "providing individual citizens effective protection against [discriminatory] practices," *Cannon,* 441 U.S. at 703-04, is to be implemented, this Court must reexamine its decision that the broad prohibition of discrimination in Title IX does not provide protection against retaliation. Since Title IX contains *no* specific prohibitions, the absence of such specificity cannot be viewed as determinative of Congress' intent. Indeed, "[t]o treat Congress' mandate as other than comprehensive would produce absurd results, which courts are to avoid" *Forman*, 271 F.3d at 297.[5]

The Supreme Court has rejected the contention that Congress intended the sole means of enforcing Title IX to be the termination of federal financial assistance. *Cannon,* 441 U.S. at 702, 717. Although administrative remedies are important, there are limitations within the process that render them inadequate to provide effective redress to victims of discrimination. For example, the regulations governing complaint procedures do not allow an individual to compel

[5]Indeed, the panel's decision would also eviscerate protections against intentional discrimination under analogous civil rights statutes that lack specificity, including Title VI, Section 504 of the Rehabilitation Act and the Age Discrimination Act of 1975, 42 U.S.C. § 6102.

the government either to handle her claim or to enforce the law by filing suit in federal court; nor do they permit victims of discrimination to demand relief that is tailored to them, even if administrative action is taken. 34 C.F.R. § 100.7. "Effective protection" of the statutory rights, therefore, demands that retaliation be included in the *Cannon*-authorized cause of action, and that Jackson be permitted to bring this suit.

In enacting Title IX, Congress could not have intended to insulate those who spend federal monies from liability for conduct designed to prevent vindication of the broad right Congress was protecting. Accordingly, the panel's decision that provides such insulation should be reviewed.

CONCLUSION

For the reasons set forth above, the panel's decision should be reheard or heard *en banc.*

Respectfully submitted,

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Dated: November 11, 2002

CERTIFICATE OF SERVICE

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