No. 01-2128

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANNETTE GRECO LITMAN,

Plaintiff-Appellant

v.

GEORGE MASON UNIVERSITY,

Defendant-Appellee

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

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

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STATEMENT OF JURISDICTION

Plaintiff filed a complaint in the United States District Court for the Eastern District of Virginia, alleging that George Mason University violated, *inter alia*, Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq*. The district court has jurisdiction over the case pursuant to 28 U.S.C. 1331. This appeal is from a final judgment entered on August 8, 2001. Plaintiff filed a notice of appeal on September 7, 2001. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

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

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

INTEREST OF THE UNITED STATES

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

Complaints by individuals are a critical means of assuring compliance with Title IX. The Department of Education's Title IX regulations require each recipient of federal financial assistance to "adopt and publish grievance procedures providing for prompt and equitable resolution" of discrimination complaints. 34 C.F.R. 106.8(b). In addition, the United States relies on individual complaints to federal agencies and the testimony of witnesses as part of its enforcement scheme. The United States thus has an interest in ensuring that

individuals have an effective means of redressing retaliation brought about by exercising their rights under Title IX. The United States has previously participated as amicus curiae on similar issues in *Lau* v. *Nichols,* 414 U.S. 563 (1974)*, Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), and *Alexander* v. *Sandoval*, 121 S. Ct. 1511 (2001).

STATEMENT OF THE CASE

This is an action by a private plaintiff against her school, George Mason University (GMU), and school officials under Title IX of the Education Amendments of 1972 and 42 U.S.C. 1983. This brief focuses only on the Title IX claims against GMU.

1. According to the district court's description of the summary judgment record (131 F. Supp. 2d 795, 797-798), Annette Litman was a student at GMU, a state-operated university that receives federal financial assistance. Litman enrolled in 1995 in a computer science course with Professor Eugene Norris, for whom she also worked as a research assistant. Over the course of the fall semester, Norris became infatuated with Litman, telling her routinely that he loved her and asking questions about her marriage and specifically about her sex life. Norris also stalked Litman, waiting for her after her speech class, on one occasion, to tell her that he "missed her" and that, despite her efforts to avoid him, he "had his ways" of locating her. After Litman terminated her research position with Norris, she received an e-mail from him stating, "Don't marry someone you can

live with, Marry someone you can't live without."

In February 1996, Litman filed a sexual harassment complaint against Norris with GMU's Equity Office, requesting that Norris be reprimanded for his conduct and ordered to stay away from her. The Equity Office ordered Norris to avoid contact with Litman, but refused to investigate the complaint further. Finding this response inadequate, Litman sought the intervention of GMU's president. She also circulated a petition urging GMU to investigate Norris' alleged wrongdoings, but GMU failed to undertake the requested investigation.

Unable to locate a professor to supervise her senior research project, Litman maintained that GMU's faculty refused to interact with her once it became known that she had filed a sexual harassment complaint against one of its members. She thereafter sent suggestive and hostile e-mail messages to certain faculty members, resulting in two professors instituting sexual harassment charges of their own against her. Following a trial before GMU's University Judicial Board in May 1996, the Board found Litman guilty of these charges and imposed academic sanctions against her, and expelled her from GMU. Litman's complaint against Norris was tried in October 1996, and resulted in a finding that Norris had not violated GMU's sexual harassment policy but had failed to live up to the professional standards expected of GMU professors. No sanctions were imposed on Norris.

2. In October 1997, Litman filed this action alleging that GMU and some of its employees discriminated and retaliated against her on the basis of her sex in violation of Title IX of the Education Amendments Act of 1972, 20 U.S.C. 1681(a). GMU moved to dismiss the complaint for lack of jurisdiction, arguing that 42 U.S.C. 2000d-7, Congress's effort to abrogate the States' Eleventh Amendment immunity, was unconstitutional. The United States intervened, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of Section 2000d-7. The district court held that GMU waived its Eleventh Amendment immunity by accepting federal funding that was unambiguously conditioned on the waiver of immunity. See 5 F. Supp. 2d 366 (E.D. Va. 1998).

On interlocutory appeal, this Court affirmed. See 186 F.3d 544 (1999). This Court explained that in voluntarily accepting federal financial assistance, "GMU is unequivocally put on notice of three conditions: (1) that it may not discriminate in its programs on the basis of sex; (2) that if it does discriminate on the basis of sex, it may be sued by a private individual; and (3) that in any such suit, it may not assert its Eleventh Amendment immunity." *Id.* at 553 (citations omitted). Thus, this Court concluded, "any state reading [42 U.S.C.] § 2000d-7(a)(1) in conjunction with 20 U.S.C. § 1681(a) would clearly understand the following consequences of accepting Title IX funding: (1) the state must comply with Title IX's antidiscrimination provisions, and (2) it consents to resolve disputes regarding alleged violations of those provisions in federal court." *Id.* at 554. The Supreme Court subsequently denied GMU's petition for a writ of

certiorari. See 528 U.S. 1181 (2000).

3. The constitutional issue having been resolved, the United States did not participate in the proceedings on remand. The district court ultimately granted summary judgment for GMU on Litman's claim of sexual harassment, holding that GMU was not deliberately indifferent to the sexual harassment once it had actual knowledge of it. See 131 F. Supp. 2d 795, 800 (E.D. Va. 2001) (relying on *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998)). But the court declined to enter judgment on plaintiff's claim of retaliation (*e.g.*, initiating the disciplinary hearings against Litman) because there were disputes of material fact regarding GMU's actual knowledge of and deliberate indifference to the alleged retaliatory acts. See *id*. at 802-804.

After the Supreme Court's decision in *Alexander* v. *Sandoval*, 121 S. Ct. 1511 (2001), GMU renewed its motion to dismiss. Noting that Litman, acting *pro se*, was unable to provide a "fully-developed legal argument," the district court nonetheless granted GMU's motion to dismiss the retaliation claim. See 156 F. Supp. 2d 579 (E.D. Va. 2001). The district court held that retaliation was not prohibited by Title IX, but only by the Title IX regulations promulgated by the United States Department of Education. *Id*. at 586. Following its understanding of *Sandoval*, the court held that there was no private right of action to enforce implementing regulations that went beyond the prohibitions of the statute itself. *Ibid*. It thus dismissed the retaliation claim. This timely appeal followed.

SUMMARY OF ARGUMENT

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

At the time Congress enacted Title IX, the statute on which Title IX was modeled had been interpreted to prohibit retaliation. The Supreme Court had also interpreted another anti-discrimination statute to contain within it a prohibition on punishing individuals for complaining about discrimination. These decisions were not unique. Subsequent decisions of the courts of appeals, including this Court, have held in a variety of settings that anti-discrimination statutes that do not expressly prohibit retaliation can and should be read to include retaliation claims.

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

The district court's contrary holding was based on a misreading of the Supreme Court's decision in *Alexander* v. *Sandoval*, 121 S. Ct. 1511 (2001). *Sandoval* involved an attempt to enforce an effects regulation that prohibited conduct the statute permitted. *Sandoval* is irrelevant in a case, like this, where an agency regulation simply clarifies what conduct the statute itself prohibits.

ARGUMENT

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

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

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

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

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

Although the statute does not specifically provide for a private right of action to enforce the statute, the Supreme Court has held that Congress intended to create such a right of action for violations of Section 901 against fund recipients, see *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), and that compensatory damages are available in such actions, see *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992). Congress ratified those holdings, particularly as applied to state defendants, by enacting 42 U.S.C. 2000d-7, which conditions the receipt of federal funds on a waiver of Eleventh Amendment immunity to private suits. See *Litman* v. *George Mason Univ.,* 186 F.3d 544, 553-554 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000); see also *Franklin*, 503 U.S. at 72 ("This statute cannot be read except as a validation of *Cannon*'s holding.").

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

Whether Section 901 can be interpreted to prohibit retaliation is a question of statutory interpretation, requiring a close examination of the text, structure, and history of the statute. See *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 460 n.5 (1998) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.").[1]

The district court held the text of Section 901 did not prohibit retaliation for complaining about sex discrimination because it prohibited only adverse conduct (exclusion, denial of benefits, or discrimination) "on the basis of sex." But the phrase "on the basis of" is broad language, subject to several interpretations. Cf. *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 284 (1978) (opinion of Powell, J.) (holding that language of Title VI was ambiguous); *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 592 (1983) (opinion of White, J.) (same). While the district court read it as prohibiting only that conduct that was primarily

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

motivated by sex, the phrase need not be read so narrowly. See *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 521 (1982) ("There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'").

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

1. In choosing among possible readings for Section 901, it is useful to note that reading the statute to prohibit retaliation is consistent with the interpretation

of Title VI and other anti-discrimination statutes in the years leading to Title IX's enactment. For example, in the 1960s, school districts could meet their obligations under Title VI and the Fourteenth Amendment to desegregate previously racially segregated school districts by enacting "freedom of choice" plans. Black students, however, were often retaliated against for exercising their right to attend formerly white schools. See *United States* v. *Jefferson County Bd. of Educ.*, 372 F.2d 836, 888 n.110 (5th Cir. 1966), adopted en banc, 380 F.2d 385, 389 (5th Cir. 1967), cert. denied, 389 U.S. 840 (1967); *Cypress* v. *Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 n.8 (4th Cir. 1967). For this reason, the Department of Health, Education, and Welfare (the predecessor to the Department of Education) issued guidelines under Title VI on freedom of choice plans that provided that school districts were responsible for protecting students who exercised their rights under a freedom of choice plan (*i.e.*, individuals attacked not because of their race but because they chose to exercise their rights). See Revised Statement of Policies for School Desegregation Plans under Title VI of the Civil Rights Act of 1964 § 181.52 (March 1966), reprinted in *Guidelines for School Desegregation: Hearings Before the Special Subcomm. on Civil Rights of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. App. A32 (1966). The Fifth Circuit, sitting en banc, held that these guidelines "comply with the letter and spirit of the Civil Rights Act of 1964," and incorporated them into a model decree that it required all district courts in the Circuit to employ. See *United States* v. *Jefferson County Bd. of Educ.*, 380 F.2d at 390, 392. This holding in a prominent

Title VI case can be presumed to have been known by Congress and incorporated into Title IX. See *Pollard* v. *E.I. du Pont de Nemours & Co.*, 121 S. Ct. 1946, 1949-1950 (2001) (when Congress enacted a provision in Title VII that "closely tracked" a previously enacted provision of the National Labor Relations Act, the "meaning of this provision of the NLRA prior to enactment of the Civil Rights Act of 1964, therefore, gives us guidance as to the proper meaning of the same language in" Title VII).

During this same period, the Supreme Court issued its opinion in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Sullivan was a white man who owned two homes in a community, each of which came with a "membership share" that entitled the shareholder to use a community park owned and operated by a non-profit corporation. Sullivan rented one of the houses to Freeman, a black man, and attempted to assign one of the membership shares to him. The board of directors refused to approve the assignment because Freeman was black. When Sullivan protested that action, he was expelled from the corporation and lost both his shares. He sued the corporation, alleging a violation of 42 U.S.C. 1982, which provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." The Court held that Sullivan had standing to maintain an action under Section 1982 not just for being denied the right to complete his transaction with Freeman, but for "expulsion for the advocacy of Freeman's cause." 396 U.S. at 237. The Court explained that

"[i]f that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property." *Ibid.*

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

2. This Court has likewise interpreted statutes that on their face deal only with discrimination to also prohibit retaliation. In *Fiedler* v. *Marumsco Christian School*, 631 F.2d 1144 (1980), this Court interpreted the scope of 42 U.S.C. 1981, which provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens." Defendants in the case had contended that the statute did not apply because they had not expelled the white plaintiff because she was dating a black student, but because she had complained to the NAACP about the defendants' actions. This Court held that the factual dispute was "immaterial" because Section 1981 "affords a remedy for both the initial expulsion and the retaliatory expulsions." *Id.* at 1149 n.7.

The basic rationale relied upon by the other courts of appeals in reaching this same holding under Section 1981 is that "a retaliatory response by an employer against such an applicant who genuinely believed in the merits of his or

her complaint would inherently be in the nature of a racial situation." *Sester* v. *Novack Inv. Co.*, 638 F.2d 1137, 1146 (8th Cir.), modified on other grounds, 657 F.2d 962 (en banc), cert. denied, 454 U.S. 1064 (1981); see *Goff* v. *Continental Oil Co.*, 678 F.2d 593, 599 (5th Cir. 1982) ("it would be impossible completely to disassociate the retaliation claim from the underlying charge of discrimination"). This is the consensus of the courts of appeals as to Section 1981.[2] There is no reason why Title IX should not be similarly interpreted.

3. A statute must be read in light of the problems with which Congress was confronted. See *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 118 (1983) ("As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve."); *Warner* v. *Goltra*, 293 U.S. 155, 158 (1934) (Cardozo, J.) ("Our concern is to define the meaning [of a term] for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained."). Congress was made aware not only of pervasive sex discrimination by recipients of federal funds, but also that persons who had complained about sex discrimination had been subjected to

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

retaliation.[3] Accepting the holding in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), that Congress intended individuals to be able to bring suit to enforce their rights under Title IX, surely Congress did not intend to create a right and a cause of action to enforce that right, but permit individuals to be punished for exercising their rights. See *id*. at 704 (Congress "sought to accomplish two

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

related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens *effective* protection against those practices." (emphasis added)).

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

But the courts have declined to find the existence of Title VII's anti-retaliation provision to be dispositive as to whether Congress intended to prohibit retaliation in other parts of the statute. For example, as originally enacted, Title VII did not apply to the federal government. Congress amended Title VII in 1972 to add a separate section providing that "[a]ll personnel actions affecting employees [of the federal government] or applicants for employment * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin," 42 U.S.C. 2000e-16(a), and providing for a private right of action for an employee aggrieved by the administrative decision "on a complaint of discrimination based on race, color, religion, sex, or national origin," 42 U.S.C. 2000e-16(c). Despite the absence of any mention of retaliation, the courts of appeals have held that this provision prohibits retaliation as well. Some courts of appeals have reasoned that the statute's broad prohibition on "any discrimination" necessarily encompasses retaliation. See, *e.g.*, *Porter* v. *Adams*, 639 F.2d 273, 277-278 (5th Cir. 1981); *White* v. *General Servs. Admin.*, 652 F.2d 913, 917 (9th Cir. 1981);[4] *Canino* v. *EEOC*, 707 F.2d 468, 472 (11th Cir. 1983); cf. *Forman* v. *Small*, No. 00-5256, 2001 WL 1435532, at *9-*11 (D.C. Cir. Nov. 16, 2001) (same for federal sector provision of Age Discrimination in Employment Act).

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

Another court of appeals concluded that because the federal sector provision was modeled on an earlier statute that had been administratively interpreted to prohibit retaliation, Congress had intended to incorporate that prohibition into the new statute as well. See *Sperling* v. *United States*, 515 F.2d 465, 484 (3d Cir. 1975), cert. denied, 426 U.S. 919 (1976). Either of these rationales would apply equally to reading Title IX to include an anti-retaliation prohibition.

Indeed, Congress would have had reason to believe that the specific prohibition on retaliation in Title VII was redundant. Congress used the National Labor Relations Act (NLRA) as the model for Title VII. See *Pollard*, 121 S. Ct. at 1949-1950; *Hishon* v. *King & Spalding*, 467 U.S. 69, 76 n.8 (1984); see also *Equal Employment Opportunity: Hearings Before the General Subcomm. on Labor of the House Comm. on Educ. & Labor*, 88th Cong., 1st Sess. 83-84 (1964) (noting that anti-retaliation provision of Title VII was drawn from NLRA). Section 8(a) of the NLRA regulates employer conduct; Section 8(b) regulates union conduct. See 29 U.S.C. 158(a) & (b). Section 8(a)(4) specifically prohibits retaliation by an employer against an employee for filing a complaint with or testifying to the National Labor Relations Board, 29 U.S.C. 158(a)(4), while there is no similar provision governing unions in Section 8(b). Yet at the time Congress enacted Title VII in 1964, the National Labor Relations Board had already held that the general language in Section 8(a)(1) and 8(b)(1) making it an "unfair labor practice" for an employer or union to "restrain or coerce employees in the exercise of the rights" to engage in concerted activities for the purpose of collective

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

Congress's decision to include a specific anti-retaliation provision in Title VII and omit it in Title VI and Title IX is thus not indicative of whether these broader statutory prohibitions encompass an anti-retaliation claim. Indeed, a similar structural argument was considered and rejected by the Court in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979). Defendants in that case argued that the existence of an express cause of action in Title VII was evidence that Congress did not intend to create a cause of action for Title VI. See *id*. at 710. The Court responded that such an argument was "unpersuasive" because, when dealing with "a complex statutory scheme" involving multiple provisions, the Court would not

engage in an "excursion into extrapolation of legislative intent" based on what Congress did in other provisions of the same statute in order to determine what Congress intended for the provision at issue. *Id*. at 711. On the same reasoning, the existence of a retaliation provision in Title VII does not demonstrate that Congress did not also intend Title VI and Title IX themselves to prohibit retaliation. And of course, the prohibitory terms of Titles VI and VII are different and interpretations of one cannot be indiscriminately applied to the other. Compare *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (Title VII prohibits disparate impact), with *Alexander* v. *Sandoval*, 121 S. Ct. 1511 (2001) (Title VI does not prohibit disparate impact).

5. If the language of the statute is susceptible to more than one interpretation, then the views of the agencies charged with its enforcement should be considered in selecting among possible meanings. See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997). Each federal agency that disburses federal financial assistance is charged with enforcement of Title IX as to its recipients. As a historical matter, however, the Department of Health, Education, and Welfare and its successor the Department of Education have been primary enforcers of Title IX. Because of this history, the Court has described the Department of Education as "charged with the responsibility for administering Title IX" and deferred to its reading of the statute. *Cannon*, 441 U.S. at 706, 708 & n.42; cf. *North Haven*, 456 U.S. at 522 n.12 (declining to give deference to Department of Education interpretation of Title IX because interpretation was in flux). In

addition, since 1980, the Department of Justice has been charged by Executive Order with the responsibility to "coordinate the implementation and enforcement by Executive agencies of" Title IX. See Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980). When Congress charges multiple agencies with enforcing a statute, the Supreme Court generally gives special deference to the interpretations of the agency charged by Executive Order with coordinating government-wide compliance. See *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 634 (1984); *Andrus* v. *Sierra Club*, 442 U.S. 347, 357-358 (1979).

The view of both agencies is that the statute itself prohibits retaliation. The Department of Education has stated that "retaliation is prohibited by Title IX." 62 Fed. Reg. 12,044 (1997). This same statement can be found in the Department's Revised Sexual Harassment Guidance. See 65 Fed. Reg. 66,106 (2000) (draft); 66 Fed. Reg. 5,512 (2001) (Notice of Availability). Similarly, the Department of Justice issued a manual to federal agencies regarding recipients' obligations under Title IX that stated that retaliation is one of the "general types of prohibited discrimination." U.S. Dep't of Justice, *Title IX Legal Manual* 57 (Jan. 11, 2001) (available at www.usdoj.gov/crt/cor/coord/ixlegal.pdf). It explained:

> A right cannot exist in the absence of some credible and effective mechanism for its enforcement and enforcement cannot occur in the absence of a beneficiary class willing and able to assert the right. In order to ensure that beneficiaries are willing and able to participate in the enforcement of their own rights, a recipient's retaliation against a person who has filed a complaint or who assists enforcement agencies in discharging their investigative duties violates Title IX.

Id. at 70.

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

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

As noted above, the Department of Education and other federal agencies have consistently interpreted Section 901 to prohibit retaliation. This interpretation has been embodied in regulations providing that retaliation for filing a complaint or exercising one's rights under Title IX is prohibited. See, *e.g.*, 34 C.F.R. 106.71 (incorporating 34 C.F.R. 100.7(e) (providing that "[n]o recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.")); see also 65 Fed. Reg. 52,858-52,895 (2000) (adopting Title IX rules for 21 federal agencies: 19 incorporated existing retaliation prohibitions

under Title VI; 2 adopted anti-retaliation provisions just for Title IX).

Relying on *Alexander* v. *Sandoval*, 121 S. Ct. 1511 (2001), the district court held that a private plaintiff could not bring a retaliation claim because the prohibition was the product of a regulation. This constituted a misreading of *Sandoval*. *Sandoval* held that while some regulations could not be enforced through the existing statutory cause of action, others could.

Sandoval involved a suit brought to enforce a regulation promulgated under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq*., a statute that was the model for Title IX. See 121 S. Ct. at 1516. Plaintiff in *Sandoval* had brought a class action alleging that the State's practice of administering driver's licensing exams only in English had an unjustified discriminatory effect on the basis of national origin in violation of discriminatory effects regulations promulgated by the federal funding agency. *Id*. at 1515.

Based on case law interpreting Title IX, the Court held that Congress intended to create a private cause of action to enforce Section 601. *Sandoval*, 121 S. Ct. at 1515-1516, 1518. The question was whether Congress had also intended these particular regulations to be privately enforced. The Court noted that there were two types of regulations. Regulations that simply "apply," "construe," or "clarify[]" a statute can be privately enforced through the existing cause of action to enforce the statute because a "Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of a statute to be so enforced as well." *Id.* at 1518. But regulations that go beyond the

statute require a separate cause of action, even if those regulations were a valid exercise of Congress's grant of rulemaking authority. *Id*. at 1519.

In applying this dichotomy, the Court relied on its uncontested holding in prior cases that Section 601 prohibits only disparate treatment (*i.e.*, intentional discrimination). *Id.* at 1516. Since the Title VI regulations expanded the Section 601 definition of discrimination to include effects, the effects regulations could not be viewed merely as an interpretation or application of Section 601. *Id.* at 1519. Accordingly, the Court concluded that Congress would have had to create (either explicitly or implicitly) a separate private cause of action to enforce such regulations. *Id.* at 1519-1520. Assessing the text and structure of the statute, the Court concluded that Congress had intended only agency enforcement of the discriminatory effects regulations and had not intended to create a private right of action to enforce those regulations that went beyond the statute. *Id.* at 1522-1523.

Because Title IX was modeled on Title VI of the Civil Rights Act of 1964, we agree with the district court that the same analysis applies to Title IX regulations as well. But the fact that the prohibition appears in a regulation is not dispositive of the inquiry. This is a regulation, unlike the Title VI effects regulation, that prohibits intentional differential treatment. The question is whether the text of Section 901 can be interpreted to include an anti-retaliation prohibition, as reflected in the Department of Education's regulation, in which case the anti-retaliation prohibition can be privately enforced through Section 901's cause of action, or whether it can be viewed (as defendant contended below)

only as a valid means of "effectuat[ing]" Section 901, in which case only the agency may enforce the anti-retaliation provision. Cf. *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998) ("Of course, the Department of Education could enforce the [regulatory] requirement [that recipients offer a grievance procedure] administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate, 20 U.S.C. § 1682, even if those requirements do not purport to represent a definition of discrimination under the statute.").[5] For the reasons discussed above, the text, structure, history, and administrative construction all support an interpretation of Section 901 to include a prohibition on retaliation.

This Court's decisions in *Preston* v. *Virginia*, No. 91-2020, 1991 WL 156224 (Aug. 18, 1991), adhered to after remand, 31 F.3d 203 (4th Cir. 1994), support reading the anti-retaliation regulation as merely a specific application of the prohibition in Section 901 itself. *Preston* involved a plaintiff who "argue[d] that retaliatory conduct is prohibited by Title IX." *Id*. at *2.[6] This Court "agree[d]" with that contention, reasoning that the Department of Education's Title IX regulation prohibiting retaliation was not an "unreasonable" application

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

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

of the statute, and remanded for further proceedings. *Ibid*. On plaintiff's appeal from an adverse jury verdict, this Court reiterated the first opinion's holding that "[r]etaliation against an employee for filing a claim of gender discrimination is prohibited under Title IX." 31 F.3d at 206. This Court explained that "[w]e previously concluded that the Secretary of Education's determination that Title IX should be read to prohibit retaliation based on the filing of a complaint of gender discrimination is reasonably related to the purpose of Title IX and therefore is entitled to deference by this court." *Id*. at 206 n.2

This Court should adhere to its decisions in *Preston* and hold that Section 901 is properly interpreted as including a prohibition on retaliation that can be enforced through Section 901's private right of action.

CONCLUSION

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

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 29(d), that the attached Brief for the United States as Amicus Curiae is proportionally spaced, has a typeface of 14 points, and contains 6999 words.

December 3, 2001

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CERTIFICATE OF SERVICE

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