No. 02–1672

IN THE

# *Supreme Court of the United States*

OCTOBER TERM, 2004

RODERICK JACKSON, *Petitioner*
v.
BIRMINGHAM BOARD OF EDUCATION, *Respondent*

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

## BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, ALABAMA ASSOCIATION OF SCHOOL BOARDS, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AMERICAN ASSOCIATION OF PRESIDENTS OF INDEPENDENT COLLEGES AND UNIVERSITIES AND ASSOCIATION OF SOUTHERN BAPTIST COLLEGES AND SCHOOLS IN SUPPORT OF RESPONDENT

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## QUESTION PRESENTED

Does Title IX of the 1972 Education Amendments encompass a third party private right of action for retaliation?

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## INTEREST OF THE *AMICI*[1]

The National School Boards Association (NSBA) is a federation of 49 state school boards associations, the Hawai'i State Board of Education, and the school boards of the District of Columbia and the U.S. Virgin Islands. NSBA represents the 95,000 school board members who serve America's 15,000 public school districts.

The American Association of School Administrators (AASA) is a professional organization representing over 14,000 educational leaders across America and abroad. AASA's mission is to support and develop school district leaders who are dedicated to the highest quality public education for all children.

The American Association of Presidents of Independent Colleges and Universities (AAPICU) is a nationwide association of more than 180 presidents of private colleges and universities. The institutions represented by AAPICU's members range in size from small colleges to very large research universities such as Baylor University and Brigham Young University.

The Association of Southern Baptist Colleges and Schools is a membership organization including 54 institutions in 19 states, almost all coeducational. Most of ASBCS's member institutions have prominent teacher-education programs for the training of elementary and secondary teachers.

The Alabama Association of School Boards (AASB) is recognized under state law as "the organization and representative agency of the members of the school boards of Alabama," and every local public school board in the state is an AASB member. AASB promotes and

[1] *Amici* file this brief with the consent of both parties. Letters attesting to their consent are on file with this Court. No counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

supports the interests of its member boards of education on a variety of legal and educational issues.

*Amici* fully support the policy of non-discrimination underlying Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (Title IX). At the same time, *Amici* also have a critical interest in reducing wasteful litigation against public schools and other institutions of learning and in ensuring the effective management of school, college, and university personnel. Although not all of the issues raised by this case affect all private colleges and universities in the same manner as they do public school districts, *Amici* share concerns over both the broader potential impact of this case as well as its specific effect on the public school systems that prepare students for higher education.

## SUMMARY OF THE CASE

Respondent Birmingham Board of Education employed Petitioner Jackson as a teacher and girls' basketball coach. During his service as coach, he became convinced that his players were being denied equal access to funding, facilities, and equipment and complained to various school officials. He alleges that, as a result of his complaints, he received negative performance evaluations and eventually was relieved of his coaching duties,[2] although he continued as a teacher in the district.

The district court dismissed Petitioner's complaint for failure to state a claim, holding that Title IX does not prohibit retaliation. The Eleventh Circuit Court of Appeals affirmed the dismissal, finding that Title IX does not prohibit retaliation, and that Petitioner is not within the class that would be protected by such a cause of

[2] Because this case was decided on a motion to dismiss, the Eleventh Circuit assumed that the board removed Petitioner from his coaching duties in retaliation for his complaints. *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1335 (11th Cir. 2002).

action since the statute protects only direct victims of gender discrimination.[3]

## SUMMARY OF THE ARGUMENT

The key question in this case is whether Congress intended to give third parties who experience no gender discrimination the right to seek judicial remedies under Title IX. Since there is no express private right of action under Title IX, Petitioner can prevail only by establishing an implied private action for retaliation that extends to third parties. This Court in *Alexander v. Sandoval*[4] held that congressional intent is the key to finding an implied private right of action. There is no reason to believe Congress intended to extend a cause of action beyond persons discriminated against on the basis of sex. Instead, Congress provided for comprehensive administrative enforcement and judicial access for direct victims of gender discrimination. An implied right of action under Title IX for retaliation is not necessary to achieve the statute's purposes since those who advocate the rights of others are adequately protected from retaliation by numerous discrete rights.

The Court's decision on this Title IX issue will have implications for other statutes affecting school boards and educational institutions, potentially subjecting schools to litigation never contemplated by Congress. Litigation against school boards represents a diversion of scarce resources and a distraction from their mission of academic achievement that the nation's schools can ill afford. This Court should be mindful of this when contemplating whether to add a cause of action to other existing avenues of redress for plaintiffs such as Petitioner, although no such cause of action has been set

[3] *Id.*
[4] 532 U.S. 275 (2001).

forth explicitly in the statute. These effects would inflict significant costs on communities and their schools.

## ARGUMENT

*Amici* fully support the purpose and goals of Title IX and acknowledge Title IX's critical role in bringing gender equity to schools. *Amici* also agree that if left unchecked, retaliation against individuals for asserting Title IX rights would diminish the effectiveness of the statute in achieving gender equity. That said, however, *Amici* do not concede that Congress intended Title IX to grant individuals who complain of sex discrimination directed at others the right to sue for alleged retaliation. Nor do *Amici* believe such judicial access necessary to the enforcement of Title IX. In fact, it would encourage needless litigation for school districts and other educational institutions, with little compensating benefit to victims of gender discrimination.

### I. Creating a private right of action for third party advocates is not necessary to further the goals of the statute.

Title IX 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."[5] To ensure that the objective of this provision is fulfilled, the statute grants extensive monitoring and enforcement authority to an administrative agency and provides an implied right of action for "victims of illegal discrimination."[6] These remedies make a right of action

[5] 20 U.S.C. § 1681(a) (2004).
[6] *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979).

for third party advocates to assert retaliation claims unnecessary to achieving the statutory goals.

### A. Congress provided for broad agency enforcement of Title IX, ensuring gender discrimination victims effective administrative remedies.

Congress modeled Title IX on Title VI of the 1964 Civil Rights Act,[7] delegating broad authority to an administrative agency to create a regulatory structure that relies heavily on complaints filed by individuals or agency-initiated compliance reviews to administratively enforce the nondiscrimination obligations imposed on schools. While these regulations do not exclude third party advocates from involvement in agency investigations and proceedings, they clearly are meant to provide direct victims of discrimination a means to complain and obtain an administrative remedy.

The regulations require educational institutions receiving federal funds to submit to the agency regular compliance reports, to grant the agency access to district books, records, accounts, and other sources of information to ascertain compliance, and to make such information available to students and staff in such a manner to apprise them of the protections against discrimination assured them by the law.

In addition, the regulations require periodic compliance reviews by the agency, allow individuals to file complaints with the agency about discrimination prohibited by the law, and require the agency to conduct investigations whenever it receives information that indicates possible failure by a recipient to comply with the statute. The regulations encourage informal means to resolve complaints and prohibit retaliation against individuals who complain or participate in agency

[7] 42 U.S.C. § 2000d (2004).

investigations. In the event voluntary compliance cannot be secured, the agency is authorized to suspend, terminate, or refuse to grant or continue federal financial assistance, or may refer the case to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce the Act.[8]

The Office for Civil Rights (OCR) of the U.S. Department of Education is responsible for enforcing Title IX. When OCR receives a timely complaint, it determines its jurisdiction over the school district and the issue and attempts to resolve the matter. OCR may do this through:

1) The *Early Complaint Resolution*, a mediation process in which OCR attempts to facilitate an agreement between the complainant and the school district;

2) Negotiated agreements known as *Agreements to Resolve* in which the school district undertakes certain commitments such as reviewing and revising policies and procedures, reporting to OCR on actions taken, and allowing monitoring by OCR to ensure compliance; or

3) Investigation and enforcement which may result in a negotiated corrective action plan; a formal letter of finding that includes a statement of OCR's jurisdictional authority, a statement of issues, findings on each issue, and a conclusion for each issue; initiation of administrative proceedings to suspend federal funds; or referral to the Department of Justice.

Complaints can arise from the general public, direct victims of sex discrimination, or even third party advocates. OCR can even initiate review, without ever receiving a complaint.[9]

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[8] 34 C.F.R. 106.71 (2004) (incorporating Title VI procedural provisions found at 34 C.F.R. 100.6 - 100.11 (2004) and 34 C.F.R. part 101) (2004).

[9] U.S. Department of Education, Office for Civil Rights, CASE RESOLUTION MANUAL (2004).

Other regulatory mechanisms ensure that students, staff, and parents understand Title IX protections and are aware of the procedures available for review and enforcement. Under the regulations, schools are required to:

1) Designate a responsible employee as a Title IX coordinator;
2) Provide annual notice of the identity of the coordinator and how to contact this coordinator for assistance;
3) Adopt and publish grievance procedures to implement Title IX and its regulations; and
4) Provide annual and specific public notice of the school district's policy on non-discrimination.[10]

This comprehensive regulatory scheme provides effective redress and remedies to gender discrimination victims. Implying a right of action for third parties to assert a retaliation claim in court on their own behalf is not necessary to promote the purposes of Title IX.

### B. Congress provided an implied right of action for victims of gender discrimination.

This Court has ruled that Congress intended to provide a private right of action for the limited class of individuals for whose benefit Title IX was enacted, i.e., victims of discrimination or exclusion on the basis of gender.[11] In so ruling, the Court viewed a private

[10] 34 C.F.R. 106.8, 106.9 (2004).
[11] *Cannon*, 441 U.S. 677. In *Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60 (1992), this Court held that Title IX authorizes damages as a remedy for intentional violation of Title IX. *Accord Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

litigant's direct access to judicial relief as "fully consistent with—and in some cases necessary to—the orderly enforcement of the statute."[12] But the Court made clear that this right of action belongs only to "victims of illegal discrimination."[13] This additional remedy creates strong incentives for schools to eliminate intentionally discriminatory practices that would violate the statute. Granting a separate private right of action for third party advocates who seek a remedy for alleged retaliation in their own right is not necessary to protect the rights of gender discrimination victims under Title IX.

### C. A third party advocate is not "the only effective adversary" of Title IX discrimination.

Despite the fact that under Title IX gender discrimination victims enjoy adequate access to school officials, administrative remedies, and the courts to assert their claims, Petitioner seeks to anoint teachers and coaches as "the only effective adversar[ies]" or advocates for students subjected to sex discrimination, thus entitling them to judicial remedies for any alleged retaliation based on such advocacy. Supposedly, these staff members qualify for this role because of their access to inside information necessary to determine discrimination is occurring, their interest in promoting equal treatment at their schools, and their relative courage and maturity to bring charges of discrimination. Not only does this argument ignore the underlying legal

[12] *Cannon*, 441 U.S. at 705-06.

[13] Direct victims who bring lawsuits to challenge illegal discrimination could no doubt introduce evidence of any retaliation they might have experienced for protesting the discrimination in earlier stages of the dispute as proof that the discrimination was intentional.

rationale for granting non-victim advocates access to judicial remedies,[14] it does not reflect reality.

Petitioner portrays students as "generally poorly situated to recognize discrimination or to raise complaints."[15] In fact, as any parent knows, children are more than able to voice their perceptions of unfair treatment from an early age. Children do not need to know detailed information about the differences in budget allocations between similarly situated teams to recognize that their school has stuck them with lousy uniforms, inadequate practice facilities, and a third rate coach or has in some other manner treated them unfairly. Petitioner assumes that students in such circumstances would keep this information to themselves rather than express their concerns and that parents are so uninvolved in or clueless about their children's extracurricular pursuits that they would fail to recognize on their own that their children are being shortchanged.

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[14] In *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), the Court granted *standing* under section 1982 to a white homeowner who had been expelled from a private community corporation after he protested the corporation's refusal to allow him to transfer his membership shares to a black family to whom he had rented a home in the community. The Court did so in part because Sullivan was the "only effective adversary" of the discrimination against the black lessees. If Sullivan lacked standing, then there would have been no litigant able to seek a court order to stop the discriminatory acts by the community corporation; the black family who was denied the membership shares had moved from the community and so was limited to seeking damages. Under Title IX, discrimination victims can seek administrative and judicial remedies on their own and so do not require a third party to assert their rights *in court* to stop illegal discrimination. It is significant that Sullivan was continuing to advocate for the discrimination victims in court and was not simply seeking a remedy for the retaliation alone. Granting the private right of action sought by Petitioner in this case would allow third party advocates to bring Title IX actions that may provide them individual relief from retaliation but do nothing to force an offending educational institution to cease the discriminatory practices that triggered the protests in the first place.

[15] Brief of Petitioner at 40.

To those who govern and manage the nation's schools, this notion is mystifying. Many parents are actively involved in every aspect of their children's education through direct communication with their children, teachers, and other parents, attendance at school activities, and participation in school organizations such as parent-teacher associations and booster clubs that support student athletic and arts programs—all of which is encouraged and supported by the school system itself. Parents are anything but hesitant to bring their concerns, large and small, about their children's education or the operation of school programs to the attention of teachers, school administrators, school boards, local government officials, administrative agencies, the news media, and, if they feel necessary, the courts. Parents are in a real sense and under the law the primary advocates for their children's rights, including those afforded by Title IX. They are more than able to invoke the readily available administrative and judicial remedies on behalf of their children.

### D. Many other discrete remedies for retaliation effectively protect those who protest discrimination against others.

*Amici* agree that educational institutions should not be able to retaliate against individuals for complaining about perceived gender discrimination against others. But we do not agree that these individuals need a private right of action for retaliation under Title IX in order to encourage their advocacy for others. Many protections from retaliation were already available to staff and students at the time Title IX was enacted, protections about which Congress knew and assumed would be available to anyone retaliated against

for speaking about violations of the statute it was enacting.[16]

Since Title IX's enactment the legal protections against retaliation have increased, making it patently clear that this Court need not find an implied private right of action for retaliation under Title IX based on the specious argument that effective enforcement of Title IX and achievement of its purposes will be seriously undermined without it. The fact of the matter is that teachers, coaches, and students have a well-stocked legal arsenal against unjust retaliation for speaking up about discrimination.

**First Amendment protections.** One of the most effective remedies available at the time of Title IX's enactment was the First Amendment right of staff and students at public schools to express their views on matters of public importance. In 1968, the Court had decided in *Pickering v. Board of Education of Township High School District*[17] that a teacher may not be dismissed from employment based on exercise of his or her right to speak on issues of public importance.[18] One year later, this Court declared that schools cannot restrict students from engaging in private speech on public policy issues absent material and substantial disruption of

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[16] The fact that Congress heard witnesses testify at hearings that women at their schools who protested sex discrimination experienced retaliation does not support an implicit private right of action for retaliation. To the contrary, if after hearing such testimony, Congress felt the retaliation remedies that already existed at the time of enactment to be insufficient to support Title IX's purposes, it would have had every reason to make a private right of action explicit and to make clear that this right applies to anyone subjected to retaliation for alleging or complaining of discriminatory practices that violate the statute. Congress did not do so.

[17] 391 U.S. 563 (1968).

[18] In fact, some of the issues about which Mr. Pickering spoke out concerned the differences in the school board's expenditures on athletic facilities and programs in two separate high schools, a situation analogous to the one at hand.

school operation or infringement of the rights of others. *Tinker v. Des Moines Independent Community School District*.[19]

Since this Court's rulings in *Pickering* and *Tinker*, courts across the country have issued numerous decisions [including subsequent opinions from this Court] to clarify the extent of these rights balanced against the interests of schools as educators in maintaining environments conducive to learning and as employers in operating schools in an efficient manner to accomplish their educational mission.[20] School staff and students understand that the First Amendment protects their right to speak up about issues of public concern, which would include discrimination occurring at their schools or unfairness in their schools' athletics programs. Judicial dockets testify to the fact that members of the school community do exercise these rights and do not hesitate to sue schools when they believe their district has punished them for speaking out.[21]

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[19] 393 U.S. 503 (1969).

[20] *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (upholding school authority to regulate school sponsored student speech based on legitimate educational concerns); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (upholding school authority to regulate student speech containing sexual innuendo); *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274 (1977)(allowing school district to show that it would have reached same decision to discipline a teacher even in absence of protected speech).

[21] *See, e.g., Seamons v. Snow*, 84 F.3d 1226, 1237-38 (10th Cir. 1996) (recognizing that student athlete who was suspended from team for reporting locker room hazing and refusing coach's order to apologize to the team for the reporting stated First Amendment claim); *Boyd v. Board of Directors of McGehee Sch. Dist. No. 17*, 612 F. Supp. 86 (E.D. Ark. 1985) (awarding damages to black student athletes for coach's violation of their First Amendment rights by suspending them after they protested "election" of white homecoming queen); *Bowman v. Pulaski County Special Sch. Dist.*, 723 F.2d 640 (8th Cir. 1983)(finding that district's involuntary transfer of football coaches who spoke out against corporal punishment of athletes violated coaches' First Amendment rights); *Lowery v. Texas A&M University System*, 11 F. Supp. 2d 895 (S.D. Tex. 1998) (finding female basketball coach's

**Civil rights statutes.** Another effective measure against retaliation that existed at the time Congress enacted Title IX was the anti-retaliation provision set forth in Title VII of the 1964 Civil Rights Act.[22] Like the First Amendment, Title VII's deterrent force is undiminished after 40 years, as courts continue to recognize retaliation claims brought by school employees under that statute.[23] While Title VII relates only to employment discrimination and not to other forms of discrimination that Title IX reaches, it does provide strong protection against employers imposing adverse employment consequences on school staff members who might speak out against gender-based discrimination in working conditions and employment practices.

In addition, most states have enacted civil rights laws that forbid sex discrimination in employment[24] and some have broadened this prohibition specifically to education programs and opportunities,[25] thus providing an additional layer of protection for staff and students.

**Public policy exception.** More than a decade before Title IX was enacted, courts had recognized a public policy exception to the employment at will doctrine. This exception allows employees terminated for reasons contrary to a clear mandate of public policy to bring wrongful termination cases against their

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comments on gender equity problems at university qualified as speech on matters of public concern for which university officials could not retaliate against her), on remand from, 117 F.3d 242 (5th Cir. 1997) (pre-*Sandoval* decision finding coach had private right of action under Title IX for retaliation based on regulatory language).

[22] 42 U.S.C. § 2000e-3(a)(2004).

[23] *See, e.g., Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001); *Tesser v. Board of Educ. of City Dist. of City of New York*, 370 F.3d 314 (2d Cir. 2004); *Cherry v. Ritenour Sch. Dist.*, 361 F.3d 474 (8th Cir. 2004).

[24] *See, e.g.*, ALASKA STAT. § 18.80.220 (Michie 2003); ARK. CODE ANN. § 41-1463 (Michie 2004); CAL. GOV'T CODE § 12940 (2004).

[25] *See, e.g.*, ALASKA STAT. § 14.18.010 (Michie 2003); ALA. CODE § 6-82-1102 (2003).

employers.[26] Since then, courts have greatly expanded the public policy exceptions that limit retaliatory actions by employers.[27] Courts have made clear that the public policy underlying wrongful discharge claims may derive from many sources including legislation, administrative rules, regulations or decisions, and judicial decisions.

**Whistleblower statutes**. Employees are also shielded by whistleblower statutes from retaliation when they engage in activities promoting public policy. Although such statutes were not in place when Title IX was passed, all states now have provisions that protect employees from adverse employment actions and provide various remedies such as reinstatement, back pay, and special damages such as attorneys' fees, expert witness fees, and litigation costs. The statutes do vary as to the type of employees covered (public or private) and what constitutes protected activities, but all provide protection to public employees who report unlawful activity.[28]

In addition to these explicit protections against retaliation, other legal rights allow school staff and students to challenge disciplinary actions taken against them for improper reasons. While not specific to retaliation claims, these constitutional, contractual, and statutory rights prevent schools from imposing disciplinary consequences without first meeting

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[26] *See, e.g., Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959)(protecting from discharge employee who refused to follow employer's instruction to commit perjury).

[27] *See, e.g., Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975)(finding wrongful discharge based on employee's taking time off for jury duty); *Harless v. First National Bank in Fairmont*, 246 S.E.2d 270 (W. Va. 1978)(finding wrongful discharge based on employee's urging bank's compliance with consumer protection laws); *McNulty v. Borden*, 474 F. Supp. 1111 (E.D. Pa. 1979)(finding violation of public policy in discharging employee who refused to cooperate with pricing scheme prohibited by antitrust laws).

[28] *See* Victoria L. Donati, *Whistleblowers and Other Retaliation Claims*, 697 PLI/LIT. 987, 999 (Practicing Law Institute 2003).

substantive and procedural criteria meant to ensure fairness and protection of individual rights.

**Due process protections**. Both staff and students have due process protections under the Fourteenth Amendment against retaliatory discipline that offer them a spectrum of procedures ranging from notice of charges, to opportunity to be heard, to evidentiary hearings and appeal mechanisms meant to ensure that discipline is meted out fairly.[29]

**Statutory tenure rights.** In almost all states, a combination of state statutory and case law grants tenure to teachers who have been teaching for two or three years.[30] This property right to continuous employment, which is protected by the Fourteenth Amendment of the Constitution, guarantees teachers significant substantive and procedural due process rights in the event of attempted dismissal.[31] In terms of substantive rights,

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[29] *See Goss v. Lopez*, 419 U.S. 565 (1975)(ruling that student may not be excluded from school without notice and an opportunity to be heard); *Perry v. Sindermann*, 408 U.S. 593 (1972)(deciding public employee with property interest in continued employment created by agency rules or employer's words or conduct entitled to due process); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)(finding that where government confers a property right in continued employment through tenure statute, due process must be provided before termination of the right).

[30] *See* Education Commission of the States, *Teacher Tenure/Continuing Contract Laws: Update for 1998* (1998), *available at* http://www.ecs.org/clearinghouse/14/41/1441.htm; EDWIN BRIDGES, MANAGING THE INCOMPETENT TEACHER 2 (Education Resources Information Center 1990).

[31] *See Cleveland Bd. of Educ.*, 470 U.S. 532. School staff who are not covered by tenure laws may still have some due process protections by virtue of their interest in employment based on civil service laws applicable to public employees generally. Even where teachers have no property interest in their employment, they have a liberty interest pursuant to the Fourteenth Amendment if the school district's action stigmatizes them or disables them from taking advantage of other employment opportunities. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). Where a liberty interest is at stake in a

local school districts frequently can terminate tenured teachers only under extreme and statutorily defined conditions.[32] While these criteria vary by state, typical grounds for dismissal include incompetence, immorality, insubordination, and neglect of duty.[33] Even in egregious cases, proving that a teacher's conduct met these statutory criteria can be difficult.[34] The procedural rights guaranteed by state statutes and case law likewise vary among jurisdictions. Generally, however, a tenured teacher is entitled to timely and adequate notice of the reasons for dismissal, a fair hearing with legal counsel before the school board, an opportunity to cross-examine witnesses, and an impartial decision based solely on the evidence presented.[35] Moreover, all states allow teachers to appeal the school board's decisions to some entity—a state court, a tenure commission, the state board of education, etc.[36] Many states allow teachers to appeal to the state supreme court, meaning the case could be reviewed four or five times.[37]

**Contractual rights**. Additional rights often provided in collective bargaining agreements also make terminating teachers difficult. Approximately two of three

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teacher termination, the teacher has a due process right to notice and a hearing to clear his or her name. *See id*. at 573 n.12.

[32] *See* Education Commission of the States, *supra* note 30; BRIDGES, *supra* note 30.

[33] *See id*.

[34] Under some state statutes, teachers may only be terminated for very egregious conduct. *See, e.g.*, OHIO REV. CODE ANN. § 3319.16 (West 2004) (providing that tenured teacher can be dismissed only for "gross inefficiencies or immorality; for willful and persistent violations of reasonable regulations of the board of education; or for other good and just cause." The burden of proof in teacher termination cases often is on the school district. *See* BRIDGES, *supra* note 30; David M. Pederson, *Statutory Dismissal of School Employees*, in TERMINATION OF SCHOOL EMPLOYEES: LEGAL ISSUES AND TECHNIQUES 10-4 to 10-5 (National School Boards Association 1997).

[35] *See* BRIDGES, *supra* note 30; Pederson, *supra* note 34, at 10-1-10-2.

[36] *See* Education Commission of the States, *supra* note 30.

[37] *See id*.

states have enacted collective bargaining statutes covering teachers and mandating that local school boards bargain with unions over the terms and conditions of employment.[38] Collective bargaining agreements often establish rights and procedures applicable to disciplining and terminating teachers, which usually exceed the rights set forth in state statutes.[39] Typically, these rights include discipline and dismissal for just cause only, which generally involves progressive discipline, due process requirements prior to and during the disciplinary process, and extensive grievance and arbitration procedures that supplement or displace statutory hearing procedures. Perhaps more important than the rights guaranteed to teachers through the collective bargaining process is the benefits of union representation where termination is sought. Unions often provide legal representation at no charge to teachers who have been terminated.

Given that ample legal remedies against retaliation are already provided under other laws, a third party advocate's cause of action under Title IX is not

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[38] *See* Education Commission of the States, *State Collective Bargaining Policies for Teachers* (June 2002), *available at* http://www.ecs.org/clearinghouse/37/48/3748.htm.

[39] Even where employees are not covered by collective bargaining statutes, courts have held that employee handbooks can create a contractual agreement between employer and employees. *See, e.g., Toussaint v. Blue Cross and Blue Shield of Michigan,* 292 N.W.2d 880 (1980) (finding employee could not be discharged except for cause as stated in personnel policy manual); *Weiner v. McGraw-Hill, Inc.,* 57 N.Y.2d 458, 443 N.E.2d 441 (1983) (holding employer's right to discharge was limited by statement in employee handbook that dismissal could only be based on just and sufficient cause). Likewise, courts in some states have recognized an implied covenant of good faith and fair dealing in at will employment. *See, e.g., Luedtke v. Nabors Alaska Drilling, Inc.,* 834 P.2d 1220 (Alaska 1992) (requiring based on an implied covenant that employers exercise their discretion reasonably, fairly and in good faith by treating employees alike, by not discharging employees for unconstitutional reasons and by not violating public policy in dealing with employees).

necessary to ensure that students and employees can speak out and identify perceived sex discrimination. If individuals are deterred from asserting their own rights or the rights of others, it is for reasons other than lack of legal protection.[40] Yet another path to the courthouse simply is not necessary for effective enforcement of Title IX.

## II. Courts should not, as a matter of course, read into all anti-discrimination statutes an implied cause of action for retaliation, especially as to plaintiffs who do not allege that they were victims of discrimination.

### A. A rule of statutory construction requiring that wide reaching causes of action be inferred in all anti-discrimination statutes is incorrect as a matter of law.

Invoking this Court's ruling in *Sullivan v. Little Hunting Park*,[41] Petitioner posits a "general rule that broad statutory bans on discrimination are construed to include prohibitions on retaliation."[42] Petitioner further cites several civil rights statutes for the proposition that anti-discrimination statutes "consistently protect all those who complain even if they complain solely about discrimination against others."[43]

These statutory provisions neither reflect such a general rule nor undermine the rationale for

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[40] *Amici* acknowledge that not all of these remedies are necessarily available to every individual who might experience retaliation for protesting the violation of someone else's Title IX rights. But in most cases, a potential plaintiff would have at least one, if not more, legal protections against retaliation. For example, Petitioner could have asserted a free speech claim.

[41] 396 U.S. 229 (1969).

[42] Brief of Petitioner at 8.

[43] Brief of Petitioner at 38.

distinguishing claims by non-victims where Congress has not expressly extended a statute's reach so widely. To the contrary, they vindicate this Court's reasoning in *Sandoval* and illustrate *Sandoval's* applicability to the question presented by this case.[44]

That Congress has taken such care to specify causes of action for retaliation, and to define their reach, in so many statutes is reason to view with caution the assertion that Congress intended similar causes and reach where it has not so specified. Examples of express statutory retaliation provisions are found in the Title VII of the Civil Rights Act of 1964,[45] the Americans with Disabilities Act (ADA),[46] the Age Discrimination in Employment Act (ADEA),[47] the Rehabilitation Act,[48] the

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[44] 532 U.S. at 288 ("In determining whether statutes create private rights of action, as in interpreting statutes generally,...legal context matters only to the extent it clarifies text.").

[45] 42 U.S.C. § 2000e-3(a) (prohibiting discrimination against employee because employee has opposed any unlawful employment practice under Title VII or has participated in related proceeding). Petitioner is mistaken in suggesting, in support of its proffered rule of broad statutory construction, that courts merely have construed this language to ban retaliation despite the absence of the word "retaliation." *See* Brief of Petitioner at 15, 18. The term "discrimination" as used here refers not generally to the race-based discrimination that Title VII prohibits but expressly and specifically to actions taken against an employee for opposing unlawful employment practices. This section of Title VII applies to any practice made unlawful "by this subchapter," including Title VII's more recently enacted provision concerning federal employment. 42 U.S.C. § 2000e-16 (2004). This obviated the need for Congress to repeat such express language in the new section. *See* Brief of Petitioner at 35. Title IX lacks comparable language.

[46] 42 U.S.C. § 12203(a) (2004) (prohibiting discrimination against any individual because individual has opposed act or practice made unlawful under ADA or participated in related proceeding).

[47] 29 U.S.C. § 623(d) (2004) (prohibiting employment discrimination against employee because employee has opposed any unlawful employment practice under the ADEA or has participated in related proceeding). As with Title VII, and in contrast to Title IX, this provision expressly provides a cause of action for retaliation. *See supra* note 45.

Fair Labor Standards Act (FLSA),[49] the Family and Medical Leave Act (FMLA),[50] and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).[51]

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[52] Where it wishes to extend express statutory causes of action beyond the range initially set forth, Congress can revise the statute accordingly, and has done

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[48] 29 U.S.C. § 794(d) (2004) (incorporating by reference standards under ADA to determine violations of Rehabilitation Act as to complaints alleging employment discrimination); 29 U.S.C. § 791 (2004) (establishing affirmative duties of federal employers to meet needs of disabled employees and incorporating by reference ADA's standards as to employment claims for determining violation under this section). The ADA, in turn, expressly prohibits retaliation against an individual for opposing a practice made unlawful under its provisions. *See supra* note 46.

[49] 29 U.S.C. § 215(a)(3) (2004) (prohibiting employer from discriminating against any employee because employee has filed FLSA complaint or is involved in some way with related proceeding).

[50] 29 U.S.C. § 2615 (2004) (prohibiting employer from discharging or in any other manner discriminating against any individual for opposing any practice made unlawful under FMLA or participating in related proceeding). Congress's use of the term "discrimination" in this context is consistent with its use in the express anti-retaliation provisions of Title VII and the ADEA, as FMLA is not an anti-discrimination statute. *See supra* notes 45, 47.

[51] 38 U.S.C. § 4311(b) (2004) (prohibiting discrimination in employment or adverse employment action against any person for taking action to enforce protection afforded any person under USERRA or participating in related proceeding and providing expressly that such prohibition "shall apply with respect to a person regardless of whether that person has performed service in the uniformed services"). This provision affords a compelling example of Congress expressly extending a retaliation cause of action to those who champion the rights of others.

[52] *United States v. Wong Kim Bo,* 472 F.2d 720, 722 (5th Cir. 1972) (quoted in *Russello v. United States,* 464 U.S. 16, 23 (1983)).

so.[53] Congress' record of providing express causes of action for retaliation in new and existing statutes in the years since the *Sullivan* decision is wholly incompatible with the suggestion that, since then, Congress has understood its proscriptions against discrimination implicitly to accomplish this end, particularly as to plaintiffs who are not victims of discrimination.

Several of the instances in which courts have recognized implicit causes of action for retaliation under federal statutes do not bear on the Title IX analysis. Unique considerations distinguish *Sullivan's* treatment of the § 1982 retaliation claim in that case from the case now before the Court.[54] Cases finding that white plaintiffs can sue under § 1981 for retaliation on the basis of race in the making and enforcement of private contracts have held that white plaintiffs are, in fact, members of the protected class under the statute.[55] That lower courts sometimes have reached back to the "*ancien regime*" of the *Sullivan*-era cases in other statutory contexts, such as Title IX, Title VI, and the Rehabilitation Act,[56] merely highlights the need for greater clarity concerning *Sandoval's* requirements and applicability.[57]

This chronological context also is significant as to the assertion, made in support of the asserted broad rule of statutory construction, that courts have not precluded claims by plaintiffs who do not allege that they suffered discrimination themselves and that no Title IX case has turned on whether the plaintiff was a direct victim.[58]

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[53] For example, the Rehabilitation Act was amended in 1992 to incorporate by reference the ADA's standards as to employment actions.

[54] *See supra* note 14.

[55] *See McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273, 287 (1976).

[56] *See infra* p.22-23 and notes 60-65.

[57] 532 U.S. at 287 (declining invitation to "revert in this case to the understanding of private causes of action that held sway 40 years ago....").

[58] Brief of Petitioner at 38.

This argument in the negative is akin to the argument that Congress, by not expressly *precluding* retaliation claims in certain contexts, implicitly authorizes them.[59] The Eleventh Circuit noted that, as far it was aware, it was the first court of appeals to consider the question after this Court's decision in *Sandoval* and only one court of appeals had considered the matter before *Sandoval*.[60]

### B. A ruling in this case suggesting a rule of statutory construction requiring that wide reaching causes of action be inferred in anti-discrimination statutes would have far reaching repercussions.

A decision by this Court to read a cause of action for retaliation into Title IX, including for plaintiffs who do not allege that they were victims of discrimination, would have implications for litigation under other anti-discrimination statutes which provide no express cause of action, under which no implicit cause has yet been recognized by the courts, or as to which courts have split on the issue. Indeed, Petitioner cites this concern in reverse; it expresses concern that affirming the Eleventh Circuit may have negative implications for other anti-discrimination protections, although several of the statutes that it cites as examples need not be so implicated since, unlike Title IX, they include express proscriptions on retaliation enacted by Congress.[61]

If this Court reverses the Eleventh Circuit in this case, one result could well be increased retaliation claims under Title VI. A split panel of the Fourth Circuit held in *Peters v. Jenney* that this Court's ruling in *Sandoval* does

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[59] *See* Brief of United States at 11 ("The text of Title IX does not require that the victim of discriminatory retaliation must also be the victim of the discrimination that is the subject matter of the original complaint.").

[60] *See Jackson*, at n.15.

[61] Brief of Petitioner at 18.

not preclude an implicit cause of action for retaliation by a plaintiff who was not herself a victim of discrimination.[62]

Similarly, reversal could also have implications for litigation under the ADEA. In 1996 a split panel of the Fifth Circuit ruled in *Holt v. JTM Industries* that an employee who had not engaged in conduct protected from retaliation under the ADEA was not entitled to automatic standing to sue for retaliation by virtue of his marriage to another employee who alleged discriminatory dismissal.[63]

Inferring claims for retaliation under all anti-discrimination statutes also could have implications for the Individuals with Disabilities Education Act (IDEA), a federal statute that already engenders an extraordinary volume of litigation and other legal proceedings.[64] The First Circuit has recognized a retaliation claim under the IDEA,[65] notwithstanding the fact that, as one district court noted, "because the IDEA contains no retaliation provision, [p]laintiffs can have no viable distinct retaliation claim under the IDEA."[66] If third party causes of action are to be read into Title IX, and retaliation claims are read into IDEA, then school employees and other third party plaintiffs presumably will be able to allege retaliation for school district acts or omissions in connection with IDEA.

The effect of a ruling by this Court to reverse the Eleventh Circuit in this case could extend beyond the

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[62] 327 F.3d 307 (4th Cir. 2003).

[63] 89 F.3d 1224 (5th Cir. 1996), *cert. denied* 520 U.S. 1229 (1997).

[64] *See* Perry A. Zirkel and Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 WELP 731 (2002).

[65] *See Weber v. Cranston Sch. Comm.*, 212 F.3d 41 (1st Cir. 2000). Like many courts and parties, the First Circuit considered the issue as one of standing rather than of cause of action. *See generally, Davis v. Passman*, 442 U.S. 228, 239 n. 18 (distinguishing between standing and cause of action); *Holt*, 89 F.3d at 1229-30 (Dennis, J., dissenting) (citing *Davis v. Passman* and arguing that majority confused concepts of standing and cause of action).

[66] *P.N. v. Greco*, 282 F. Supp. 2d 221, n.3 (D.N.J. 2003).

employment context and beyond anti-discrimination statutes. Unless such a ruling were narrowly written, it might be asserted in retaliation claims wherever any alleged adverse consequence to any plaintiff somehow can be equated with statutorily proscribed "discrimination" against the protected class or where inferring such an implied cause of action arguably would further the policy purposes of the underlying statute.[67]

The Court's approach in this case to the question of inferring Congressional intent has potential implications for other jurisprudential contexts where discerning legislative statutory intent can be dispositive as to whether a claim may proceed. In order to abrogate state sovereign immunity under the Eleventh Amendment, for example, Congress must clearly manifest its intention to do so.[68] Local school boards in California,[69] Maryland,[70] and South Carolina[71] have been deemed "arms of the state" for Eleventh Amendment sovereign immunity purposes, and the Hawai'i Board of Education is a state agency.[72] Beyond the federal realm, state courts sometimes construe claims under state statutory or common law remedies for discrimination claims by

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[67] Petitioner cites dictionary definitions of "basis" to argue that as long as sex played some role as a "supporting element" or "underlying condition" or "circumstance" in the events leading to a retaliation claim, the retaliation itself constitutes impermissible discrimination "on the basis of sex." See Brief of Petitioner at 17. This approach to defining what constitutes discrimination on the basis of a suspect classification would encompass a wide array of situations.

[68] *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

[69] *See, e.g., Belanger v. Madera Unified Sch. Dist.*, 963 F.3d 248, 254 (9th Cir. 1992).

[70] *See, e.g., Doe v. Board of Educ. of Montgomery County*, 453 A.2d 814, 822 (Md. 1982) (holding that Maryland school boards can invoke Eleventh Amendment sovereignty immunity defense as to claims in excess of $100,000).

[71] *See Smith v. School Dist. of Greenville County*, 324 F. Supp. 2d 786 (D.S.C. 2004).

[72] *See* HAW. REV. STAT. § 26-35.5 (2003).

reference to federal courts' approach to analogous federal claims.[73]

The Court should consider cautiously the implications of Petitioner's argument that, in a Title IX case, a plaintiff who is not the alleged victim of discrimination must have a cause of action because he or she frequently may be the "only effective adversary."[74] This same line of reasoning could extend to other statutory contexts anytime the alleged victims are children or others who are arguably at some disadvantage, making not just their parents and guardians, but also employees and undefined others, into potential plaintiffs who can allege violations and threaten lawsuits.[75] This kind of justification was, in fact, among the rationales cited by the First Circuit in its decision to

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[73] *See, e.g., Wolfe v. Becton Dickinson & Co.,* 662 N.W. 2d 599, 603-05 (Neb. 2003) (weighing state whistleblowing and retaliation claims with reference to U.S. Supreme Court and federal circuit court rulings regarding federal retaliation claims).

[74] *Sullivan,* 396 U.S. at 237 (quoting *Barrows v. Jackson*, 346 U.S. 249, 259 (1953)).

[75] In addition to other problems with this rationale (*see supra* Part I.C.), it amounts to a bootstrapping argument. The Court has made clear that in the absence of clear statutory language the touchstone is legislative intent: "Without it, a cause of action does not exist and courts may not create one, no matter how desirable that may be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 286-87; s*ee also Holt v. JTM Industries, Inc.*, 89 F.3d 1224, (5th Cir. 1996) (acknowledging possible risk that employee could be target of retaliatory action prompted by spouse's protected actions as employee, but holding that ADEA's plain language will suffice to protect employees and that, "[i]f we hold that spouses have automatic standing to sue their employers for retaliation, the question then becomes, which other persons should have automatic standing to guard against the risk of retaliation"), *cert. denied* 520 U.S. 1229 (1997). Petitioner's approach effectively would recast any compelling policy argument as obvious evidence of legislative intent, rendering meaningless the Court's repeated admonitions.

permit retaliation claims to proceed under the Rehabilitation Act and IDEA.[76]

### C. A rule of statutory construction requiring that wide reaching causes of action be inferred in anti-discrimination statutes would inflict additional burdens on educational institutions.

Reading third party causes of action into Title IX and other anti-discrimination statutes would further complicate the already daunting task schools boards and school administrators confront in disciplining and dismissing teachers and other school personnel. The process of terminating public school employees is especially costly and time consuming, as numerous cases, studies, and news articles reflect.[77] In a recent survey,

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[76] See *Weber*, 212 F.3d at 48-49 (surmising that Congress intended to provide cause of action for retaliation to non-disabled advocates and that this was in apparent recognition of disabled individuals' need for assistance).

[77] *See, e.g., Cooper v. Oak Park Sch. Dist.*, 624 F.Supp. 515 (E.D. Mich. 1986) (resolving case that took seven years from initial disciplinary hearing to resolution and generating 2,200 page transcript at initial disciplinary hearing stage alone); *Beebee v. Haslett Pub. Schs.*, 278 N.W.2d 37 (Mich. 1979) (resolving case in district's favor 11 years after teacher's discharge); *Proposed Termination of James E. Johnson's Teaching Contract with Indep. Sch. Dist. No. 709*, 451 N.W.2d 343 (Minn. App. 1990) (addressing case in which 83 witnesses called, 157 exhibits received in evidence, and transcript filled 29 volumes containing 6,455 pages); *Greendale Educ. Ass'n v. Greendale Sch. Dist.*, 655 N.W.2d 546 (Wis. App. 2002), *unpublished decision*, (resolving dismissal of teacher after five years, including arbitration hearing lasting 10 days in which 61 witness called). *See also* Jeffery Handelman & Heather Adams, *Disciplinary Process Shorter, Less Costly for Districts*, NEW YORK STATE SCHOOL BOARDS, July 21, 1997 (reporting 1997 study of New York State school districts that found that it takes on average 319 days from time school board brings disciplinary charges until hearing officer reaches decision, at average cost of $94,527); Keith Ervin, *Fired, Rehired: Teacher Tenure Stirs Debate*, SEATTLE TIMES, Aug. 6, 2003 (reporting teacher termination

only four percent of superintendents and three percent of principals reported that it was "relatively easy to fire a tenured teacher, even if the teacher was terrible in the classroom."[78] Sixteen percent of superintendents and 30 percent of principals said this was all but impossible.[79] As with less drastic actions that may be challenged as retaliatory, terminating school employees takes so long and is so expensive because of the formidable array of constitutional, statutory, regulatory, and, often, collective bargaining protections such employees typically enjoy.[80]

The formal protections,[81] frequently vigorous union representation,[82] and practical realities[83] sometimes combine to complicate effective personnel management. As administrators gather evidence and documentation, as attorneys are retained to represent both parties, as hearings and appeals are conducted, as teachers continue to collect pay while on administrative leave pending resolution of the matter, school officials are confronted with an unenviable choice: to tolerate the teacher's shortcomings or transfer him or her from position to

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case that lasted two years, resulted in 22 days of hearings, and cost school district over $500,000).

[78] STEVE FARKAS ET AL., ROLLING UP THEIR SLEEVES, SUPERINTENDENTS AND PRINCIPALS TALK ABOUT WHAT'S NEEDED TO FIX PUBLIC SCHOOLS 32 (Public Agenda 2003).

[79] *See id*.

[80] See *supra* Part I.D.

[81] The burden of proof in teacher termination cases often is on the school district. *See* BRIDGES, *supra* note 30.

[82] *See* Michael Chapman, *Why Bad Teachers Can't Be Fired: Unions Defend Tenure—At Students' Expense*, INVESTOR'S BUSINESS DAILY, Sept 21, 1998.

[83] An exhaustive record of negative teacher evaluations and other written documentation of poor performance over time typically are necessary for successful dismissal. *See* Kelly Frels, et al., *Documentation of Teacher Performance*, in TERMINATION OF SCHOOL EMPLOYEES: LEGAL ISSUES AND TECHNIQUES 1-1 (National School Boards Association 1997). Such documentation often is wanting, owing to the time and resource constraints administrators face. *See* BRIDGES, *supra* note 30, at 19-57, 58-59.

position,[84] to offer the teacher a financial settlement to leave the district, which frequently will not prevent the teacher from working elsewhere,[85] or to expend the time, money, and emotion to see the termination through. While the third option may be most desirable to fulfill the school board's obligations to its students, responsible school officials must balance this imperative against the costs it entails relative to other district priorities in an era of lean school budgets.

The considerable legal difficulties many school districts encounter and apprehend even in routine matters of employee discipline already afford strong protection for employees from retaliatory acts and impose

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[84] *See* Peter Schweizer, *Firing Offenses: Why is the Quality of Teachers So Low? Just Try Getting Rid of a Bad One*, NATIONAL REVIEW, Aug. 17, 1998 (quoting school attorney as observing that, "For a principal, it can seem a lot easier to hang onto the dead wood. Teachers are more protected than any other class of employees, with all the procedural rights that can drag a civil case out for years."); Rebecca Jones, *Showing Bad Teachers the Door*, AMERICAN SCHOOL BOARD JOURNAL (Nov. 1997), at 22 ("Many administrators decide it's not [worth the time and headache to terminate a teacher] and resort to the time-honored practice of transferring bad teachers from school to school or position to position. In what's known as the Dance of the Lemons (or, less elegantly, Passing the Trash), they try to wear down the teacher—or find a spot where the teacher's awfulness will do the least damage and draw the fewest complaints.").

[85] *See* Schweizer, *supra* note 84 ("Often, as a way to save time and money, an administrator will cut a deal with the union in which he agrees to give a bad teacher a satisfactory rating in return for union help in transferring him to another district. The problem teacher gets quietly passed along to someone else."). In 1992, the Detroit Free Press reviewed over 600 Michigan teacher tenure cases from the previous 10 years and more than 200 settlements of teachers who had resigned. The Free Press concluded that in many instances districts became so frustrated by the termination process that they worked out settlements to induce teachers to resign. Under many of these settlements, the circumstances leading to the districts' action were not made public and thus were obscured from prospective employers. Three settlements exceeded $100,000. *See* Joan Richardson & Margaret Trimer-Hartley, *Schools Pay to Get Rid of Problems: Instructors Can Dig in for Years*, DETROIT FREE PRESS, Mar. 25, 1992.

significant costs on school systems.[86] If, under the Court's decision in this case, any employee can even more readily don the mantle of champion of any protected group, and thereby can assert a retaliation claim, these difficulties and costs will be exacerbated.[87] Importantly, a retaliation claim is easier to assert than is a violation of the underlying statute itself.[88] It is relatively easy to make a *prima facie* case of retaliation to avoid summary judgment, shifting the burden of proof to the employer. Indeed, retaliation claims sometimes proceed even when the court determines that the employer in fact engaged in no impermissible discrimination.[89]

In light of the perhaps unmatched protections already available to school employees alleging employment retaliation, *Amici* urge the Court to be

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[86] Although our discussion has focused on the most difficult, and most discussed and documented, challenge presented by teacher dismissals, even school district personnel actions short of dismissal are subject to many of the same legal complications and expenses.

[87] Employment retaliation claims have been on the increase. By way of illustration, the Equal Employment Opportunity Commission reports that charge filings with that agency for retaliation more than doubled from 11,096 in 1992 to 22,690 in 2003, or from 15.3 percent to 27.9 percent of total charges. *See* EEOC, *Charge Statistics FY 1992 to FY 2003*, *available at* http://www.eeoc.gov/stats/charges.html.

[88] *See Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 762 (2d Cir. 1998) ("It sometimes happens—more frequently than might be imagined—than an employee whose primary claim of discrimination cannot survive pre-trial dispositive motions is able to take to trial the secondary claim that he or she was fired or adversely affected in retaliation for asserting the primary claim."). *See also,* Lisa Cooney, Understanding and Preventing Workplace Retaliation, 88 MASS. L. REV. 3 (2003) ("Employees are more routinely filing discrimination claims in tandem with claims of retaliation since retaliation claims can survive even when the underlying discrimination claims have no merit.").

[89] *See, e.g., Crumpacker v. Kansas Dep't of Human Res.*, 338 F.3d 1163 (10th Cir. 2003), *cert. denied*, 124 S. Ct. 1416 (Feb 2004), (holding that congressional authorization to pass prophylactic legislation to deter gender discrimination in workplace extends to prohibition of retaliation even when underlying Title VII claim has failed.).

especially mindful as it considers this case of the need to balance carefully the important purposes of federal anti-discrimination legislation "against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel."[90]

## CONCLUSION

Reading more expansive causes of action for retaliation into Title IX is unnecessary to achieve the statute's purposes and would come at a significant cost to the nation's educational institutions, especially its public schools. The need to distinguish between statutorily protected actual victims of discrimination and third party plaintiffs is wholly consistent with Congressional intent and need be no more mystifying to the nation's courts and need confront them with no more "subtle fact distinctions"[91] than do the other determinations as to whether a plaintiff has standing or is a member of a protected class—indeed, perhaps less so.[92] The District Court and the Court of Appeals were able to determine without too much difficulty that a Title IX retaliation claim was not Petitioner's appropriate remedy in this case. *Amici* urge this Court to affirm.

Respectfully submitted,

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[90] *Laughlin v. Metropolitan Wash. Airports Auth*., 149 F.3d 253, 259-260 (4th Cir. 1998) (quoting *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 231 (1st Cir.1976)).
[91] Brief of Petitioner at 41.
[92] *See supra* n. 65.