No. 02-1672

IN THE

Supreme Court of the United States

RODERICK JACKSON,
Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,
Respondent.

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

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

With more than 408,000 members, the American Bar Association ("ABA" or "Association") is the world's largest voluntary professional membership organization and the leading organization of the legal profession in the United States. The ABA's mission is, in part, to serve the public and the profession by promoting justice and respect for the law.[2]

In August 1975, the ABA's policymaking House of Delegates adopted policy urging "the prompt, vigorous, and effective implementation and enforcement of Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq.*, which promotes equal educational opportunity without regard to sex, to the full extent of the powers granted in the statute." In August 2004, the House of Delegates adopted policy reaffirming the 1975 policy and clarifying "that retaliation constitutes a form of discrimination prohibited by Title IX for which a private right of action exists to enforce the statute." In the intervening years, the ABA actively supported the right of women and girls to protection from discrimination in education, advocated passage of related civil rights legislation that would augment those protections, and encouraged full enforcement of Title IX by the Executive Branch.

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[1] This brief was not authored, in whole or in part, by counsel for either party, and no person or entity other than the *amicus curiae*, its members, and its counsel contributed monetarily to the preparation or submission of the brief. The parties consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

The ABA's record of dedicated advocacy supporting equal opportunity for women and girls in public education is consistent with the Association's commitment to equal opportunity for women and girls generally, including in the legal profession. Among its official institutional goals, Goal IX seeks the "full and equal participation of women, minorities and persons with disabilities in the legal profession." Consistent therewith, the ABA Commission on Women in the Profession, for example, pursues the full and equal participation of women in the ABA, the legal profession, and the justice system by assessing the status of women in the legal profession (including legal education) and identifying barriers to their advancement, thus reflecting the purpose and spirit of Title IX.

More broadly, this Court's decision whether a private right of action to bring a retaliation claim exists under Title IX most assuredly will affect the ability of ABA members to achieve Association Goal II: "To promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition." For, as explained herein, without a private right of action against retaliation under Title IX, the ability of lawyers to effectively vindicate Title IX rights on behalf of those subjected to gender discrimination nationwide will be severely curtailed.

SUMMARY OF ARGUMENT

Congress intended Title IX to provide victims of retaliation with a private right of action. When Congress enacted Title IX, it was aware that the courts had interpreted the civil rights statutes of the Reconstruction era and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, neither of which explicitly refers to retaliation, to cover retaliation implicitly. *See, e.g., Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (finding an implicit

prohibition against retaliation in 42 U.S.C. § 1982). Accordingly, Congress would have had no reason to assume that similar statutory language in Title IX would be construed differently than Title VI and the Reconstruction era civil rights statutes.

The legislative history of Title IX, both before and after its initial enactment, reflects Congress's understanding that the statute would be interpreted as covering retaliation. Among other things, Congress refused to alter regulations submitted to it by the Executive Branch that expressly prohibited retaliation under Title IX. *Cf. N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 531-34 (1982) (noting the significance of Congress's refusal to alter administrative regulations as proposed). Although Congress later amended Title IX on several occasions, including to reverse certain judicial interpretations of the statute, it has never acted to alter the statute's implementation in accordance with the regulations prohibiting retaliation.

Through Title IX, Congress sought not only to prevent the use of federal resources to support discriminatory practices in education, it also "wanted to provide individual citizens effective protection against those practices." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979). The administrative process provides no means for complainants to present evidence or to advocate their case, and "even if those proceedings result in a finding of a violation, a resulting voluntary compliance agreement need not include relief for the complainant." *Id.* at 706 n.41. Thus, access to the courts is particularly important with respect to retaliation claims under Title IX, whose enforcement largely depends on the willingness of third parties, such as teachers and coaches, to contest discrimination on their students' behalf. Congress intended through Title IX to eradicate gender discrimination in the educational setting, an objective that, consistent with this Court's understanding of anti-discrimination law in other

contexts, requires providing access to the courts to remedy retaliation.

ARGUMENT

I. CONSISTENT WITH ESTABLISHED PRECEDENT, CONGRESS INTENDED TO PROVIDE PROTECTION AGAINST RETALIATION WHEN IT ENACTED TITLE IX.

When Congress enacted Title IX in 1972, the courts, including this one, had universally recognized that retaliation is a form of intentional discrimination proscribed by the civil rights statutes. The courts had held, in a variety of cases involving statutes which, like Title IX, do not expressly refer to retaliation, that those laws implicitly covered retaliation as a form of prohibited discrimination because their enforcement so heavily depends on protection for persons who raise claims of violations. Congress was well aware of these decisions when enacting Title IX. *See Cannon*, 441 U.S. at 696-97.

A. Congress Enacted Title IX Against a Landscape of Judicial Precedent That Recognized Retaliation as a Form of Discrimination Prohibited by Civil Rights Statutes.

Three years before Title IX's passage, the Court concluded that retaliation is a form of discrimination covered by 42 U.S.C. § 1982,[3] even though that statute does not mention retaliation expressly. *See Sullivan v. Little Hunting*

[3] Section 1982 provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." 42 U.S.C § 1982.

Park, Inc., 396 U.S. 229 (1969).[4] In construing the statute, the Court recognized that providing relief against retaliation is necessary to the statute's effective enforcement. *See id.* at 237-38. The Court further held that Section 1982's implicit prohibition against retaliation applied irrespective of whether the victim of retaliation had sought protection of the statute with respect to discrimination against himself or rather discrimination against another person. *See id.* The plaintiff in *Sullivan* was a Caucasian who was expelled from a private corporation in retaliation for opposing the corporation's racially exclusive (anti-African-American) leasing policy, and the Court recognized that, if a state court judgment sustaining the white complainant's expulsion "[could] be imposed, then [petitioner would be] punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property." *Id.* at 237.[5]

In *Perry v. Sindermann*, 408 U.S. 593 (1972), the Court noted the necessity of a private action to redress the retaliation alleged in order to protect the underlying right, because absent such redressability, fundamental rights "would

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[4] As the Fourth Circuit has observed, *Sullivan* was wholly ignored by the Court of Appeals in the decision below. *See Peters v. Jenney*, 327 F.3d 307, 318 n.10 (4th Cir. 2003). Accordingly, *Peters* held that Title VI's ban on intentional discrimination also bans retaliation and is enforceable through private suit.

[5] This Court and the lower courts have understood the potential evils of retaliation in a wide variety of contexts. *See, e.g., Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions."); *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.").

in effect be penalized and inhibited." *Id.* at 597.[6] *See also Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431, 439-40 (1973) (allowing white members of defendant swimming pool association to plead claims under 42 U.S.C. § 1981 and Section 1982 for adopting a restriction that prevented them from bringing their black guest to the pool).[7]

Congress was aware of these decisions when it enacted Title IX. In addition, it was aware that the lower courts, in interpreting Title VI of the Civil Rights Act of 1964 ("Title VI"), which served as the template for Title IX, had recognized retaliation as a form of discrimination prohibited by and actionable under that preexisting statute. *See, e.g.*, *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836,

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[6] In *Perry*, a state college instructor alleged that the decision not to rehire him was an act of retaliation against him for public criticism of the regents who supervised the college. *See Perry*, 408 U.S at 594-95. The instructor asserted violations of the First and Fourteenth Amendments, whose express terms, like those of Section 1983, nowhere mention the word "retaliation."

[7] Although this Court has not addressed retaliation claims under Section 1981 (providing that all citizens have "the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens," 42 U.S.C. § 1981), the Courts of Appeals for the First, Second, and Sixth Circuits have held that this statute contains an implied right of action for retaliation. *See Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9 (1st Cir. 1979); *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266, 1270 (6th Cir. 1977); *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, 312 (2d Cir. 1975). The First Circuit held that the statute provides an implied right of action "against any other person who, with a racially discriminatory intent, injures [the plaintiff] because he made contracts with non-whites." *Des Vergnes*, 601 F.2d at 14. Similarly, the Court of Appeals for the D.C. Circuit has acknowledged that other circuits have recognized an "[i]mplicit . . . cause of action protecting people from private retaliation for refusing to violate other people's rights under § 1981 or for exercising their own § 1981 rights." *Fair Employment Council v. BMC Mktg. Corp.*, 28 F.3d 1268, 1279-80 (D.C. Cir. 1994).

888 n.110 (5th Cir. 1966) (Wisdom, J.) (finding that African-American students enjoy protection against retaliation for exercising their rights under Title VI to attend desegregated schools), *adopted en banc*, 380 F.2d 385, 389 (5th Cir. 1967). Congress therefore had reason to understand that Title IX would cover retaliation as a form of prohibited gender discrimination. *See also Cannon*, 441 U.S. at 696 n.20 (relying on lower court interpretation of Title VI to demonstrate that Congress intended to create a private right of action under Title IX, because a private right of action already had been recognized in Title VI).

In fact, judicial and congressional recognition of retaliation as a form of discrimination prohibited by Title VI, the civil rights statutes, and the Equal Protection Clause has been so universally accepted that private rights of action for retaliation have been enforced for nearly forty years. Until the Eleventh Circuit issued its ruling in this case, no court in any jurisdiction had held otherwise in any published decision.[8]

B. Congress Intended That Title IX Cover Retaliation as a Form of Discrimination Prohibited by the Statute.

In light of the pre-Title IX case law interpreting anti-discrimination statutes as implicitly encompassing protection from retaliation, the fact that Congress did not include a specific prohibition on retaliation in Title IX is not surprising:

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[8] The only other court to reach a similar conclusion likewise did so based on arguments from another *pro se* plaintiff, and the opinion in that case has since been reversed. *See Litman v. George Mason Univ.*, 156 F. Supp. 2d 579 (E.D. Va. 2001), *rev'd*, No. 01-2128, 2004 WL 345758, slip op. (4th Cir. Feb. 25, 2004). Notably, the plaintiff in *Peters v. Jenney*, unlike Mr. Jackson, was represented by counsel on appeal and was supported by an *amicus* brief submitted by the United States.

it reflects the legislators' understanding that such a prohibition is inherent in the ban against discrimination in federal anti-discrimination law. Indeed, the legislative history of Title IX provides substantial evidence that Congress considered retaliation as a type of discrimination warranting remediation under Title IX.

Congress explicitly emphasized that Title IX was designed to extend the anti-discrimination mandates of Title VII of the Civil Rights Act of 1964, which includes a prohibition against retaliation, to the educational setting.[9] *See* H.R. Rep. No. 92-554 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2462, 2467 (Title IX "further amends existing law to . . . [r]emove the exemption of persons employed in educational institutions from the equal employment provisions of the Civil Rights Act.").[10] Such an extension would be incomplete absent incorporation of the prohibition on retaliation. Indeed, Congress heard substantial testimony regarding numerous incidents of retaliation against persons complaining of gender discrimination in the

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[9] Both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 *et seq.*, and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, expressly provide private rights of action for retaliation. When Congress extended the protections of Title VII and the ADEA to federal sector employees, it did not reference such rights expressly, *see* 42 U.S.C. § 2000e-16(a); 29 U.S.C. § 633a, but the courts have found those rights to be implicitly included as just another form of prohibited discrimination. *See, e.g., Porter v. Adams*, 639 F.2d 273, 277-78 (5th Cir. 1981); *White v. Gen. Servs. Admin.*, 652 F.2d 913, 917 (9th Cir. 1981); *Canino v. EEOC*, 707 F.2d 468, 472 (11th Cir. 1983); *cf. Forman v. Small*, 271 F.3d 285, 296-98 (D.C. Cir. 2001) (same for federal sector employees provision of ADEA).

[10] The fact that Title VII expressly prohibits retaliation, while Title IX does not, does not suggest a contrary conclusion. *See Cannon*, 441 U.S. at 711 ("The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section.").

educational setting. *See, e.g.*, Discrimination Against Women: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. & Labor, 91st Cong. 242 (1970) (testimony of Dr. Ann Harris) ("women who have criticized their faculties for sexual discrimination have been 'censured for conduct unbecoming,' a rare procedure in academe normally reserved for actions such as outright plagiarism").

In 1975, subsequent to Title IX's passage, the U.S. Department of Health, Education and Welfare ("HEW") promulgated regulations interpreting the statute. As required by law at the time, HEW submitted these regulations to Congress for review.[11] Congress deliberated at length[12] and, following significant debate, rejected each and every attempt to modify or disapprove the regulations.[13] These regulations included an express prohibition on retaliation. *See* 40 Fed. Reg. 24,128, 24,155 (1975), *codified at* 34 C.F.R. § 106.71 (incorporating 34 C.F.R. § 100.7(e), which states 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 901] of the Act or this part, or because he has made a

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[11] Section 431(d)(1) of the General Education Provisions Act, Pub. L. No. 93-380, 88 Stat. 567, as amended 20 U.S.C. § 1232(d)(1) (repealed in 1994), provided that in addition to publishing a regulation in the Federal Register, the regulation must be transmitted to Congress and "shall become effective not less than forty five days after such transmission unless the Congress shall, by concurrent resolution, . . . disapprove such [regulation]."

[12] The House Subcommittee on Postsecondary Education of the House Committee on Education and Labor held six days of hearings on the regulations. *See* Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong. (1975).

[13] *See* S. Con. Res. 46, 94th Cong., 121 Cong. Rec. 17,300 (1975); H.R. Con. Res. 310, 94th Cong., 121 Cong. Rec. 19,209 (1975).

complaint, testified, assisted or participated in any manner in an investigation, proceeding or hearing under this part").[14] Congress clearly knew and understood how HEW interpreted and intended to enforce Title IX, including its prohibition on retaliation. *Cf. N. Haven*, 456 U.S. at 531-34 (noting the significance of Congress's refusal to alter the Title IX regulations as proposed).

Since the adoption of the implementing regulations, Congress has never suggested any disagreement with their provision of protection against retaliation. This is not for want of opportunity to address the issue. In fact, Congress has repeatedly amended Title IX when it thought its intent was being misconstrued. Following the Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), which held that a nonconsenting State could not be sued for violations of the Rehabilitation Act, Congress explicitly amended Title IX and similar statutes to reflect its intent to abrogate the states' sovereign immunity thereunder. *See* Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1845 (1986) (*codified at* 42 U.S.C. § 2000d-7

[14] The successor U.S. Department of Education later readopted these regulations in 1980. Title IX Regulations, 45 Fed. Reg. 30,955 *et seq.* (May 9, 1980). The U.S. Department of Justice, which is responsible for coordinating the implementation and enforcement of Title IX by all executive agencies, specifically has emphasized the importance of retaliation claims for effective enforcement. *See* U.S. Dep't of Justice, Civil Rights Division, Title IX Legal Manual at 71-72 (Jan. 11, 2001) *available at* http://www.usdoj.gov/crt/cor/coord/ixlegal.pdf ("*Retaliation protections are designed to preserve the integrity and effectiveness of the enforcement process itself.* … Retaliation claims have their own remedial purpose in that they seek to ensure that rights created under a federal civil rights statute do not go unenforced for fear of adverse reaction. This goal is undercut if recipients are allowed to retaliate against persons subject to their authority who publicly object to discrimination against others.") (emphasis added); Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980) (charging Department of Justice by Executive Order with Title IX enforcement powers).

(2002)). Likewise, in response to *Grove City College v. Bell*, 465 U.S. 555 (1984), in which the Court construed Title IX as regulating sex-based discrimination only in those specific programs that receive federal assistance, Congress amended Title IX's definition of "program or activity" to make express its intent to apply Title IX's broad mandates institution-wide. *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (*codified at* 20 U.S.C. § 1687 (2002)); *see generally Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 72-73 (1992) (discussing the significance of Congress's subsequent amendments to Title IX to cure constructions with which it disagreed).[15] The fact that Congress has, on several occasions, directly focused on Title IX as applied under the Executive Branch's regulations, and has never indicated any disagreement with those regulations' prohibition on retaliation, indicates Congress's intent that Title IX include such a prohibition.

C. This Court's Title IX Jurisprudence Further Demonstrates That the Statute Prohibits Retaliation Against Persons Who Seek To Enforce It.

Since its initial determination that Title IX provides a private right of action in the courts, *Cannon*, 441 U.S. at 706-08, the Court has held that the statute covers a broad array of types of discrimination not expressly mentioned in the statute

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[15] In fact, Congress affirmatively rejected proposed amendments to Title IX that would have narrowed its apparent scope. In 1975, Senator Helms introduced a bill that would have added a provision to Title IX stating that "[n]othing in [§ 901] shall apply to employees of any educational institution subject to this title." S. 2146, 94th Cong. § 2(1) (1975); *N. Haven*, 456 U.S. at 534-35 (describing post-enactment legislative history). Similar efforts by Senator McClure in 1976 failed as well. *N. Haven*, 456 U.S. at 535.

itself. The Court has found that Title IX prohibits teacher-student sexual harassment, *Franklin*, *supra; Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), student-on-student sexual harassment, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999), and employment discrimination, *N. Haven*, *supra*. Further, Title IX provides for the full complement of remedies for victims of such actions. *Franklin*, *supra*. In finding that Title IX reaches these various forms of gender discrimination, the Court understood that all such forms were implicitly embraced in Title IX's broad proscription against "[excluding] participation in, [denying] the benefits of, or [subjecting] to discrimination" a person "on the basis of sex."[16] Similarly, retaliation for complaining about activity proscribed by Title IX should be understood to be "[excluding] participation in, [denying] the benefits of, or [subjecting] to discrimination" "on the basis of sex."

A determination that Title IX does not recognize a right of action for retaliation would be starkly at odds with this Court's Title IX jurisprudence. As the Court has previously observed, "There is no doubt that 'if we are to give [Title IX] the scope its origins dictate, we must accord it a sweep as broad as its language.' " *N. Haven*, 456 U.S. at 521 (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)); *see also Dickerson v. New Banner Inst. Inc.*, 460 U.S. 103, 118 (1983) (emphasizing that statutes must be interpreted "in light of the purposes Congress sought to serve"). The Court has yet to find that Title IX's prohibition of discrimination "on the basis of sex" limits a cause of action or means of recovery, and this case provides no grounds for doing so now.

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[16] 20 U.S.C. § 1681.

II. THE INTENDED BENEFICIARIES OF TITLE IX WILL NOT BE ADEQUATELY PROTECTED IF THE COURTS CLOSE THEIR DOORS TO RETALIATION CLAIMS.

"Title IX, like its model Title VI, sought to accomplish two related . . . 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." *Cannon*, 441 U.S. at 704 (emphasis added). As the Court recognized in this articulation of Title IX's purposes, the first congressional objective can be served through the administrative process and its withdrawal of federal funding, while the second congressional objective can only be achieved through the courts, because only the courts have the power to enter the injunctive relief or to award the monetary damages necessary to make victims whole. *See id.* at 704-08; *Gebser*, 524 U.S. at 284-85 (1998); *Davis*, 526 U.S. at 639-40; *Alexander v. Sandoval*, 532 U.S. 275, 279-80 (2001) ("[I]t is . . . beyond dispute that private individuals may sue to enforce" Title VI and Title IX).

The *Cannon* Court thoroughly explained the importance of the administrative and judicial enforcement mechanisms of Title IX and how these mechanisms complement and supplement each other. *See Cannon*, 441 U.S. at 704-08 (noting the HEW's position that the "individual remedy will provide effective assistance to achieving the statutory purpose"). The availability of these complementary enforcement mechanisms is just as important for achieving Title IX's statutory purpose regarding retaliation as it is for addressing other forms of discrimination, because administrative remedies alone are insufficient to make whole the victims of such discrimination.

A. Effective Enforcement of Title IX Requires Access to the Judicial System Because Administrative Remedies Alone Are Insufficient.

The Office for Civil Rights ("OCR") in the Department of Education ("DOE"), the administrative body that oversees Title IX retaliation claims, has limited enforcement powers. Unlike the Equal Employment Opportunity Commission and other administrative bodies that oversee discrimination claims, the DOE-OCR only has one remedy available for complainants: the termination of federal funds. *See* 20 U.S.C. § 1682. It has no authority to order an educational institution to remedy discrimination, to reinstate a wrongfully terminated employee, or to pay such an employee back pay or monetary damages. Essentially, DOE-OCR has no ability to remedy the actual harms suffered by an individual complainant. Therefore, judicial enforcement through a private right of action is the only realistic way to make such a person whole or provide him or her with "effective protection." *See, e.g., Franklin*, 503 U.S. at 76 (monetary damages in private suit appropriate since administrative action would leave complainant "remediless").[17]

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[17] Although the threat of termination of federal funding should encourage educational institutions to comply with Title IX, the DOE never has withheld federal funding for a Title IX violation, despite well-documented noncompliance. *See* U.S. Commission on Civil Rights, Office of Civil Rights Evaluation, Draft Report for Commissioners' Review, Ten-Year Checkup: Have Federal Agencies Responded to Civil Rights Recommendations? Vol. IV at 31 (May 2004), *available at* http://www.usccr.gov/pubs/10yr04/10yr04.pdf (hereinafter "Civil Rights Evaluation") (finding that between 1996 and 2003 OCR did not defer or terminate federal financial assistance for a Title IX violation). Thus, the administrative threat has done little to promote actual compliance. In contrast, commentators have argued that the threat of private litigation

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Moreover, judicial enforcement through a private right of action is the only realistic way for a complainant to achieve the purpose of his complaint – the elimination of discrimination. People who complain about discrimination in a federally funded program want to end the discrimination, not the program.

The administrative process also does not provide any means for complainants to present evidence or to advocate their case. In fact, they are completely excluded from the process. As this Court has noted:

> [The Title IX] complaint procedure adopted by HEW does not allow the complainant to participate in the investigation or subsequent enforcement proceedings. Moreover, even if those proceedings result in a finding of a violation, a resulting voluntary compliance agreement need not include relief for the complainant.

Cannon, 441 U.S. at 706 n.41. Thus, the *Cannon* Court recognized that administrative remedies are not always

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encourages schools to remedy discriminatory practices before having to face lawsuits. *See, e.g.*, Gary L. Galmore, Congressional Research Service, Title IX and Sex Discrimination in Education: An Overview 2-3 (Mar. 4, 2003) (finding that pressure for stronger enforcement of Title IX has come largely as a result of court suits rather than through agency action); National Association of State Boards of Education, Sexual Harassment in Schools: A Policy Guide at 6, 18 (1998), *available at* http://www.nasbe.org/Educational_ Issues/Reports/Sexual%20Harrass.pdf (finding that *Franklin* seized the attention of educators and that educators now "have a vested financial interest in preventing sexual harassment"). If complainants were not protected from retaliation, administrative enforcement would become less effective, because fear of retaliation would deter the filing of administrative complaints.

sufficient by themselves to remedy harms of the intended beneficiaries and that, therefore, to fulfill congressional intent, a private right of action must exist to supplement the administrative process. *See id.* at 705-06 ("The award of individual relief to a private litigant . . . is not only sensible but is also fully consistent with – and in some cases even necessary to – the orderly enforcement of the statute.").

In addition to being excluded from the administrative enforcement process, a Title IX complainant also cannot compel the OCR to investigate a claim in a timely manner. Instead, OCR generally enters into a voluntary resolution with the offender with no involvement of the complainant. In fact, the complainant usually knows nothing about the resolution until after it is completed and has no effective means of challenging it as inadequate.[18]

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[18] Commentators have found additional problems with the OCR complaint process that limit opportunities of complainants to exercise Title IX rights. *See* American Association of University Women ("AAUW") Legal Advocacy Fund, A License for Bias: Sex Discrimination, Schools and Title IX 52-54 (2000) (hereinafter "A License for Bias"). For instance, OCR will not even consider a complaint if it is made after OCR's six-month statute of limitations, a considerably shorter limitations period for Title IX complaints than that of state and federal courts. *See id.* at 52 (noting also that lack of knowledge of Title IX or OCR is not considered by the OCR as grounds for an extension of the limitations period). Furthermore, although OCR can refer a case to the Department of Justice for litigation if it cannot reach a resolution with an offender, it has never done so for Title IX. *See* Civil Rights Evaluation at 31 (finding OCR has referred only two cases to DOJ for judicial enforcement, one under Title VI and one under the Rehabilitation Act). Indeed, the OCR also is deficient in its initiated compliance reviews for Title IX violations, the alternative mechanism to complaint resolution for OCR to regulate civil rights compliance. *See id.* at 30 (finding that "due to competing priorities OCR is not conducting compliance reviews on girls' access to and participation in advanced math and science education"); A License for Bias at 13, 30-31 (finding that while sex discrimination complaints accounted for 10 percent of OCR's caseload

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Furthermore, a victim of discrimination or retaliation obtains no benefit from the termination of federal funding. To the contrary, such potential termination could harm the victim and all persons at an educational institution by eliminating essential programs. Termination of federal funding for an entire school would be a harsh penalty for isolated discrimination or retaliation against one student or one employee. Under such circumstances, withdrawing federal funds from schools further punishes the students who experienced discrimination by taking away funds that would be used to educate them. Thus, Congress intended funding termination to be a "last resort" remedy and neither the only nor even the preferred remedy. *Cannon*, 441 U.S. at 705 n.38 (noting that Congress itself recognized the severity of the fund-cutoff remedy and that " '[i]n most cases, alternative remedies, principally lawsuits to end discrimination, would be the preferable and more effective remedy' ") (quoting 110 Cong. Rec. 7067 (1964) (statement of Sen. Ribicoff)). Holding otherwise in this case would deprive the statute of much of its intended ability to root out sex discrimination, as the limitations of DOE-OCR's available remedies stand as substantial deterrents to exposing such discrimination.

B. The Protection of Third Parties, Such as Teachers and Coaches, from Retaliation Is Critical to Effective Enforcement of Title IX.

Access to the courts for teachers and coaches to redress retaliation is especially important under Title IX and other civil rights-in-education statutes. Title IX violations take place not only in a university setting but also in

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during 1993-1997, the agency devoted only 3.2 percent of its compliance reviews to this area).

secondary and elementary schools, where students face forms of discrimination similar to those found in higher education.[19] Students in the lower age brackets especially may not understand whether a violation has occurred, may lack information on how to complain about any harm recognized, or may be intimidated from voicing any complaint. As minors, they are also legally prohibited from bringing any actions on their own behalf and must rely on adults, such as their parents, to enforce their rights for them.

In many cases, teachers, coaches, and other adult employees are the first to notice or witness discriminatory treatment.[20] They also have access to the documents, budgets, and other evidence of discrimination that students do not. And, they often participate in the decisions that lead to discrimination. If they are not protected from retaliation, then

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[19] *See, e.g., Davis*, 526 U.S. at 629 (Title IX case involving fifth-grade female student who suffered persistent sexual advances by fellow student); *Gebser*, 524 U.S. at 277-78 (Title IX case involving sexual misconduct of high school teacher with student that started in eighth-grade); *Communities For Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805 (W.D. Mich. 2001) (Title IX case against high school athletic association finding that female high school athletes were denied benefits of school athletic programs); *Haines v. Metro. Gov't of Davidson City*, 32 F. Supp. 2d 991 (M.D. Tenn. 1998) (Title IX case involving ten-year-old female student who was sexually harassed by two eleven-year-old students).

[20] *See, e.g.*, U.S. Department of Education, Office of Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (Mar. 13, 1997) (explaining that under DOE-OCR standards "in addressing allegations of sexual harassment, the judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX").

they may not point out the discrimination at that time to stop it from happening in the first place.[21]

Denying a private right of action to remedy retaliation under Title IX would work a manifest injustice on students and third parties alike, wholly contrary to the intent of Congress for full and effective enforcement of the civil rights laws of the United States.

CONCLUSION

For all the foregoing reasons, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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[21] Third parties may be in a better position to bring complaints against an institution. *See, e.g.*, U.S. Department of Education, Office of the Undersecretary, Educator Sexual Misconduct: A Synthesis of Existing Literature at 31 (June 2004) *available at* http://preview.ed.gov/rschstat/research/pubs/misconductreview/report.pdf ("Schools are a place where teachers are more often believed than are students and in which there is a power and status differential that privileges teachers and other educators.").