SUPREME COURT OF THE UNITED STATES

No. 02–1672

RODERICK JACKSON, PETITIONER *v.* BIRMINGHAM BOARD OF EDUCATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[March 29, 2005]

JUSTICE THOMAS, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.

The Court holds that the private right of action under Title IX of the Education Amendments of 1972, for sex discrimination that it implied in *Cannon* v. *University of Chicago,* 441 U. S. 677 (1979), extends to claims of retaliation. Its holding is contrary to the plain terms of Title IX, because retaliatory conduct is not discrimination on the basis of sex. Moreover, we require Congress to speak unambiguously in imposing conditions on funding recipients through its spending power. And, in cases in which a party asserts that a cause of action should be implied, we require that the statute itself evince a plain intent to provide such a cause of action. Section 901 of Title IX meets none of these requirements. I therefore respectfully dissent.

I

Title IX provides education funding to States, subject to §901's condition that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U. S. C. §1681(a). Section 901 does not refer to retaliation. Consequently, the

statute prohibits such conduct only if it falls within §901's prohibition against discrimination "on the basis of sex." It does not.

A claim of retaliation is not a claim of discrimination on the basis of sex. In the context of §901, the natural meaning of the phrase "on the basis of sex" is on the basis of the plaintiff's sex, not the sex of some other person. See *Leocal* v. *Ashcroft*, 543 U. S. ___, ___ (2004) (slip op., at 7) ("When interpreting a statute we must give words their ordinary or natural meaning" (internal quotation marks omitted)). For example, suppose a sexist air traffic controller withheld landing permission for a plane because the pilot was a woman. While the sex discrimination against the female pilot no doubt adversely impacted male passengers aboard that plane, one would never say that they were discriminated against "on the basis of sex" by the controller's action.

Congress' usage of the phrase "on the basis of sex" confirms this commonsense conclusion. Even within Title VII of the Civil Rights Act of 1964 itself, Congress used the phrase "on the basis of sex" as a shorthand for discrimination "on the basis of such individual's sex." Specifically, in ensuring that Title VII reached discrimination because of pregnancy, Congress provided that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions." 42 U. S. C. §2000e(k); cf. *California Fed. Sav. & Loan Assn.* v. *Guerra,* 479 U. S. 272, 277 (1987) (describing how Congress amended Title VII to specify that sex discrimination included discrimination on the basis of pregnancy). The reference to "on the basis of sex" in this provision must refer to Title VII's prohibition on discrimination "because of such individual's . . . sex," suggesting that Congress used the phrases interchangeably. §2000e–2(a)(1). After all, Title VII's general prohibition against discriminatory employer practices does

not use "[t]he terms 'because of sex' or 'on the basis of sex.'" It uses only the phrase "because of such individual's . . . sex." *Ibid.*

This Court has also consistently used the phrase "on the basis of sex" as a shorthand for on the basis of the claimant's sex. See, *e.g.*, *United States* v. *Burke,* 504 U. S. 229, 239 (1992); *Meritor Savings Bank, FSB* v. *Vinson,* 477 U. S. 57, 64 (1986). Thus, for a disparate-treatment claim to be a claim of discrimination on the basis of sex, the claimant's sex must have "actually played a role in [the decisionmaking] process and had a determinative influence on the outcome," *Hazen Paper Co.* v. *Biggins,* 507 U. S. 604, 610 (1993). Cf. *Teamsters* v. *United States,* 431 U. S. 324, 335, n. 15 (1977) ("'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or [other protected trait]").

Jackson's assertion that the Birmingham Board of Educaton (Board) retaliated against him fails to allege sex discrimination in this sense. Jackson does not claim that his own sex played any role, let alone a decisive or predominant one, in the decision to relieve him of his position. Instead, he avers that he complained to his supervisor about sex discrimination against the girls' basketball team and that, sometime subsequent to his complaints, he lost his coaching position. App. 10–11. At best, then, he alleges discrimination "on the basis of sex" founded on the attenuated connection between the supposed adverse treatment and the sex of others. Because Jackson's claim for retaliation is not a claim that his sex played a role in his adverse treatment, the statute's plain terms do not encompass it.

Jackson's lawsuit therefore differs fundamentally from other examples of sex discrimination, like sexual harassment. *Ante*, at 5. A victim of sexual harassment suffers

discrimination because of her own sex, not someone else's. Cases in which this Court has held that §901 reaches claims of vicarious liability for sexual harassment are therefore inapposite here. See, *e.g.*, *Davis* v. *Monroe County Bd. of Ed.,* 526 U. S. 629, 641–649 (1999); *Gebser* v. *Lago Vista Independent School Dist.,* 524 U. S. 274, 277 (1998); *Franklin* v. *Gwinnett County Public Schools,* 503 U. S. 60, 75 (1992). In fact, virtually every case in which this Court has addressed Title IX concerned a claimant who sought to recover for discrimination because of her own sex. *Davis*, *supra*, at 633–635; *National Collegiate Athletic Assn.* v. *Smith,* 525 U. S. 459, 462 (1999); *Gebser*, *supra*, at 277–279; *Franklin*, *supra*, at 63–64; *Mississippi Univ. for Women* v. *Hogan,* 458 U. S. 718, 721 (1982); *North Haven Bd. of Ed.* v. *Bell,* 456 U. S. 512, 517–518 (1982); *Cannon*, 441 U. S., at 680. Again, Jackson makes no such claim.

Moreover, Jackson's retaliation claim lacks the connection to actual sex discrimination that the statute requires. Jackson claims that he suffered reprisal because he *complained about* sex discrimination, not that the sex discrimination underlying his complaint occurred. This feature of Jackson's complaint is not surprising, since a retaliation claimant need not prove that the complained-of sex discrimination happened. Although this Court has never addressed the question, no Court of Appeals requires a complainant to show more than that he had a reasonable, good-faith belief that discrimination occurred to prevail on a retaliation claim.[1] Retaliation therefore

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[1] See, *e.g.*, *Higgins* v. *New Balance Athletic Shoe*, *Inc.*, 194 F. 3d 252, 262 (CA1 1999); *Gregory* v. *Daly*, 243 F. 3d 687, 701 (CA2 2001); *Aman* v. *Cort Furniture Rental Corp.*, 85 F. 3d 1074, 1085 (CA3 1996); *Byers* v. *Dallas Morning News, Inc.*, 209 F. 3d 419, 428 (CA5 2000); *Johnson* v. *University of Cincinnati*, 215 F. 3d 561, 579–580 (CA6 2000); *Talanda* v. *KFC Nat. Management Co.*, 140 F. 3d 1090, 1096 (CA7 1998); *EEOC* v. *HBE Corp.*, 135 F. 3d 543, 554 (CA8 1998); *Moore* v. *California Inst.*

cannot be said to be discrimination on the basis of anyone's sex, because a retaliation claim may succeed where no sex discrimination ever took place.

The majority ignores these fundamental characteristics of retaliation claims. Its sole justification for holding that Jackson has suffered sex discrimination is its statement that "retaliation is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination." *Ante*, at 4.[2] But the sex-based topic of the complaint cannot overcome the fact that the retaliation is not based on anyone's sex, much less the complainer's sex. For example, if a coach complains to school officials about the dismantling of the men's swimming team, which he honestly and reasonably, but incorrectly, believes is occurring because of the sex of the team, and he is fired, he may prevail. Yet, he would not have been discriminated against on the basis of his sex, for his own sex played no role, and the men's swimming team over which he expressed concern also

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of Technology Jet Propulsion Lab., 275 F. 3d 838, 845, n. 1 (CA9 2002); *Crumpacker* v. *Kansas Dept. of Human Resources*, 338 F. 3d 1163, 1171 (CA10 2003); *Meeks* v. *Computer Assoc. Int'l.*, 15 F. 3d 1013, 1021 (CA11 1994); *Parker* v. *Baltimore & Ohio R. Co.*, 652 F. 2d 1012, 1019–1020 (CADC 1981); cf. *Clark County School Dist.* v. *Breeden*, 532 U. S. 268, 271–272 (per curiam) (2001) (where no reasonable person could have believed that the incident constituted sex harassment violating Title VII, employee could not prevail on her retaliation claim).

[2]Tellingly, the Court does not adopt the rationale offered by petitioner at oral argument. According to petitioner, "[b]ut for the discrimination on the basis of sex, he would not have complained, and . . . had he not made a complaint about sex discrimination, he would [not] have lost his [coaching] position." Tr. of Oral Arg. 8. This "but for" chain exposes the faulty premise in the position that retaliation is on the basis of sex. The first and necessary step in this chain of causation is that "discrimination on the basis of sex" occurred. Yet, retaliation claims require proving no such thing. Thus, the "but for" link articulated by counsel between "discrimination on the basis of sex" and the adverse employment action does not exist.

suffered no discrimination on the basis of sex. In short, no discrimination on the basis of sex has occurred.

At bottom, and petitioner as much as concedes, retaliation is a claim that aids in enforcing another separate and distinct right. Brief for Petitioner 13 (noting the relationship retaliation bears to "primary discrimination"). In other contexts, this Court has recognized that protection from retaliation is separate from direct protection of the primary right and serves as a prophylactic measure to guard the primary right. See *Crawford-El* v. *Britton,* 523 U. S. 574, 588, n. 10 (1998) ("The reason why such retaliation offends the Constitution is that it threatens to inhibit the exercise of the protected right").[3] As we explained with regard to Title VII's retaliation prohibition, "a primary purpose of antiretaliation provisions" is "[m]aintaining unfettered access to statutory remedial mechanisms." *Robinson* v. *Shell Oil Co.,* 519 U. S. 337, 346 (1997). To describe retaliation as discrimination on the basis of sex is to conflate the enforcement mechanism with the right itself, something for which the statute's text provides no warrant.

Moreover, that the text of Title IX does not mention retaliation is significant. By contrast to Title IX, Congress enacted a separate provision in Title VII to address retaliation, in addition to its general prohibition on discrimination. §2000e–3(a). Congress' failure to include similar text in Title IX shows that it did not authorize private retaliation actions. This difference cannot be dismissed, as the majority suggests, on the ground that Title VII is a more specific statute in which Congress

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[3] See also *Great American Fed. Sav. & Loan Assn.* v. *Novotny,* 442 U. S. 366, 387 (1979) (White, J., dissenting) ("Clearly, respondent's right under §704(a)—to be free from retaliation for efforts to aid others asserting Title VII rights—is distinct from the Title VII right implicated in this claim under §1985(3), which is the right of women employees not to be discriminated against on the basis of their sex").

proscribed particular practices, as opposed to the general prohibition here. *Ante*, at 6. The fact that Congress created those specific prohibitions in Title VII is evidence that it intended to preclude courts from implying similar specific prohibitions in Title IX.

Even apart from Title VII, Congress expressly prohibited retaliation in other discrimination statutes. See, *e.g.*, 42 U. S. C. §12203(a) (Americans with Disabilities Act of 1990); 29 U. S. C. §623(d) (Age Discrimination in Employment Act of 1967). If a prohibition on "discrimination" plainly encompasses retaliation, the explicit reference to it in these statutes, as well as in Title VII, would be superfluous—a result we eschew in statutory interpretation. The better explanation is that when Congress intends to include a prohibition against retaliation in a statute, it does so. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.,* 511 U. S. 164, 176–177 (1994). Its failure to do so in §901 is therefore telling.

II

The Court's holding is also inconsistent with two lines of this Court's precedent: Our rule that Congress must speak with a clear voice when it imposes liability on the States through its spending power and our refusal to imply a cause of action when Congress' intent to create a right or a remedy is not evident.

A

As the majority acknowledges, Congress enacted Title IX pursuant to its spending power. *Ante*, at 11 (citing *Davis,* 526 U. S., at 640; *Gebser,* 524 U. S., at 287; *Franklin,* 503 U. S., at 74–75, and n. 8 (1992)); U. S. Const., Art. 1, §8, cl. 1. This Court has repeatedly held that the obligations Congress imposes on States in spending power legislation must be clear. Such legislation is "in the nature of a contract" and funding recipients' acceptance of

the terms of that contract must be "voluntar[y] and knowin[g]." *Pennhurst State School and Hospital* v. *Halderman,* 451 U. S. 1, 17 (1981); see also *Barnes* v. *Gorman,* 536 U. S. 181, 186 (2002). For their acceptance to be voluntary and knowing, funding recipients must "have notice of their potential liability." *Davis*, 526 U. S., at 641. Thus, "[i]n interpreting language in spending legislation, we . . . 'insis[t] that Congress speak with a clear voice,'" *id.*, at 640 (quoting *Pennhurst*, 451 U. S., at 17), and a condition must be imposed "unambiguously," *ibid.*; *Gonzaga Univ.* v. *Doe,* 536 U. S. 273, 280 (2002); *Barnes*, *supra*, at 186.

The Court's holding casts aside this principle. As I have explained, *supra*, at 2–7, the statute's plain terms do not authorize claims of retaliation. The same analysis shows that, at the least, the statute does not clearly authorize retaliation claims. The majority points out that the statute does not say: "[N]o person shall be subjected to discrimination on the basis of *such individual's* sex." *Ante*, at 9 (emphasis in original). But this reasoning puts the analysis backwards. The question is not whether Congress clearly excluded retaliation claims under Title IX, but whether it clearly included them. The majority's statement at best points to ambiguity in the statute; yet ambiguity is resolved in favor of the States, which must be aware when they accept federal funds of the obligations they thereby agree to assume.

The majority asserts that "the Board should have been put on notice by the fact that our cases since *Cannon*, such as *Gebser* and *Davis*, have consistently interpreted Title IX's cause of action broadly to encompass diverse forms of intentional sex discrimination." *Ante*, at 13. *Gebser* and *Davis* did not hold or imply that Title IX prohibited "diverse forms of intentional sex discrimination"; they held that schools could be held vicariously liable for sexual harassment committed by students or teachers. See *Geb-*

ser, *supra*, at 277; *Davis*, *supra*, at 633. There was no question that the sexual harassment in those cases was sex discrimination. See *Meritor Savings,* 477 U. S., at 64 ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex"). These cases hardly gave notice to the Board here that retaliation liability loomed.

More important, the Court's rationale untethers notice from the statute. The Board, and other Title IX recipients, must now assume that if conduct can be linked to sex discrimination—no matter how attenuated that link—this Court will impose liability under Title IX. That there is a regulation proscribing retaliation in Title IX administrative enforcement proceedings is no answer, *ante*, at 13, for it says nothing about whether retaliation is discrimination on the basis of sex, much less whether there is a private cause of action for such conduct. Rather than requiring clarity from Congress, the majority requires clairvoyance from funding recipients.

B

Even apart from the clarity we consistently require of obligations imposed by spending power legislation, extending the cause of action implied in *Cannon* to Jackson's claim contradicts the standard we have set for implying causes of action to enforce federal statutes. Whether a statute supplies a cause of action is a matter of statutory interpretation. See *Touche Ross & Co.* v. *Redington,* 442 U. S. 560, 568 (1979). We must examine whether the statute creates a right. That right "must be phrased in terms of the person benefited." *Gonzaga*, *supra*, at 284 (internal quotation marks omitted); see also *Virginia Bankshares, Inc.* v. *Sandberg,* 501 U. S. 1083, 1102, 1103 (1991). And our inquiry is not merely whether the statute benefits some class of people, but whether that class in-

cludes the plaintiff in the case before us. Our role, then, is not "'to provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute," but to examine the text of what Congress enacted into law. *Alexander* v. *Sandoval*, 532 U. S. 275, 287 (2001) (quoting *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 433 (1964)); *Virginia Bankshares, supra*, at 1102; *Touche Ross & Co.*, *supra*, at 578. If the statute evinces no intent to create a right for the plaintiff in the case before us, we should not imply a cause of action.

This Court has held that these principles apply equally when the Court has previously found that the statute in question provides an implied right of action and a party attempts to expand the class of persons or the conduct to which the recognized action applies. *Virginia Bankshares, supra*, at 1102. More specifically, this Court has rejected the creation of implied causes of action for ancillary claims like retaliation. In *Central Bank*, we concluded that §10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, as amended, 15 U. S. C. §78j provided no civil action against those who aid and abet individuals engaging in manipulative or deceptive practices, though the respondents urged that such a claim was necessary to fulfill the statute's protection against deceit in the securities marketplace. 511 U. S., at 177, 188. We declined to do so even though this Court had implied a cause of action for §10(b). See *Borak*, *supra*. In our view, while the statute's language potentially reached the conduct of some aiders and abettors, the full scope of liability for aiding and abetting would have extended liability beyond the conduct prohibited by the statute. *Central Bank*, 511 U. S., at 176. We surveyed other statutes and found that "Congress knew how to impose aiding and abetting liability when it chose to do so." *Id.*, at 176–177. Our view that the statute did not reach aiding and abetting was also confirmed by the fact that an "element critical for recovery" in actions

against those engaging in fraudulent and manipulative acts was not required in proving that someone had aided and abetted such persons. *Id.*, at 180.

The same reasons militate equally against extending the implied cause of action under Title IX to retaliation claims. As in *Central Bank*, imposing retaliation liability expands the statute beyond discrimination "on the basis of sex" to instances in which no discrimination on the basis of sex has occurred. Again, §901 protects individuals only from discrimination on the basis of their own sex. *Supra*, at 2–4. Thus, extending the implied cause of action under Title IX to claims of retaliation expands the class of people the statute protects beyond the specified beneficiaries. As with the absence of aiding and abetting from the statute at issue in *Central Bank*, I find it instructive that §901 does not expressly prohibit retaliation, while other discrimination statutes do so explicitly. And like the aiding and abetting liability in *Central Bank*, prevailing on a claim of retaliation lacks elements necessary to prevailing on a claim of discrimination on the basis of sex, for no sex discrimination need have occurred.

The majority's reliance on *Sullivan* v. *Little Hunting Park, Inc.,* 396 U. S. 229 (1969), is wholly misplaced. *Ante*, at 6–7. Rather than holding that a general prohibition against discrimination permitted a claim of retaliation, *Sullivan* held that a white lessor had standing to assert the right of a black lessee to be free from racial discrimination pursuant to Rev. Stat. §1978, 42 U. S. C. §1982. 396 U. S., at 237 ("[T]here can be no question but that Sullivan has standing to maintain this action," citing *Barrows* v. *Jackson,* 346 U. S. 249 (1953), a standing case)).[4] To make out his third-party claim on behalf of the

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[4]Title 42 U. S. C. §1982 provides: "All 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

black lessee, the white lessor would necessarily be required to demonstrate that the defendant had discriminated against the black lessee on the basis of race. Jackson, by contrast, need not show that the sex discrimination forming the basis of his complaints actually occurred. Thus, by recognizing Jackson's claim, the majority creates an entirely new cause of action for a secondary rights holder, beyond the claim of the original rights holder, and well beyond *Sullivan*. In any event, *Sullivan* involved §1982, a statute enacted pursuant to Congress' Thirteenth Amendment enforcement power, *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, 437–438 (1968), not its spending power. *Sullivan* therefore says nothing about whether Title IX clearly conditions States' receipt of federal funds on retaliation liability.

III

The Court establishes a prophylactic enforcement mechanism designed to encourage whistleblowing about sex discrimination. The language of Title IX does not support this holding. The majority also offers nothing to demonstrate that its prophylactic rule is necessary to effectuate the statutory scheme. Nothing prevents students—or their parents—from complaining about inequality in facilities or treatment. See, *e.g.*, *Franklin*, 503 U. S., at 63 (student brought suit); *Davis*, 526 U. S., at 633 (suit brought by minor's parent). Under the majority's reasoning, courts may expand liability as they, rather than Congress, see fit. This is no idle worry. The next step is to say that someone closely associated with the complainer, who claims he suffered retaliation for those complaints, likewise has a retaliation claim under Title IX. See 2 Equal Employment Opportunity Commission, Compliance Manual §8–II, p. 8–10 (1998) ("[I]t would be unlawful for a

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real and personal property."

respondent to retaliate against an employee because his or her spouse, who is also an employee, filed an EEOC charge").

By crafting its own additional enforcement mechanism, the majority returns this Court to the days in which it created remedies out of whole cloth to effectuate its vision of congressional purpose. In doing so, the majority substitutes its policy judgments for the bargains struck by Congress, as reflected in the statute's text. The question before us is only whether Title IX prohibits retaliation, not whether prohibiting it is good policy. *Central Bank*, 511 U. S., at 177. For the reasons addressed above, I would hold that §901 does not encompass private actions for retaliation. I respectfully dissent.