IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

M. Dione Smith, Plaintiff, v. JERRY ANN WINTERS, PAUL GRIFFIN, UNIVERSITY OF SOUTH FLORIDA, by and through the FLORIDA BOARD OF EDUCATION, Defendants.	)	C.A. NO. 8:00-CV-1771-T-23MAP

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN RESPONSE TO DEFENDANT UNIVERSITY OF SOUTH FLORIDA'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION AND INTEREST OF THE UNITED STATES

Dione Smith ("Smith") has sued the University of South Florida ("USF") and individual defendants Jerry Ann Winters ("Winters") and Paul Griffin ("Griffin") for alleged violations of Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. §§ 2000d et seq. Plaintiff alleges, inter alia, that defendants violated Title VI by discriminating against her in retaliation for her complaints concerning racial discrimination in the USF's women's basketball program. (Second Am. Compl., ¶¶ 69-73.)

Title VI prohibits discrimination on the ground of race in any program or activity receiving federal financial assistance. 42 U.S.C. § 2000d. The United States Department of Education administers federal financial assistance to education programs and activities and is authorized by Congress to effectuate Title VI in those programs and activities. 42 U.S.C. § 2000d-1. The Department of Justice, through its Civil Rights Division, coordinates the

implementation and enforcement of Title VI by the Department of Education and other executive agencies. See Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980).

Voluntary compliance with Title VI and its regulations is critical to achieving the objective of the statute – the elimination of racial discrimination in federally-funded programs. Cf. Local No. 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501, 515 (1986). The United States, thus, has an interest in ensuring that individuals advocating compliance with or opposing violations of Title VI's prohibition on racial discrimination have an effective means of redressing retaliation. The United States has previously participated as amicus curiae on similar issues in the Supreme Court in Cannon v. Univ. of Chicago, 441 U.S. 677 (1979), and Alexander v. Sandoval, 532 U.S. 275 (2001); and recently filed briefs as amicus curiae on the retaliation issue before the Fourth Circuit in Litman v. George Mason University, 156 F. Supp. 2d 579 (E.D. Va. 2001) (Title IX retaliation case), appeal filed, No. 01-2128 (4th Cir. 2001), and Peters v. Sch. Bd. of Virginia Beach, C.A. No. 01-CV-120 (E.D. Va., October 31, 2001) (Title VI retaliation case), appeal filed, No. 01-2413 (4th Cir. 2001)[1]. Pursuant to this interest, the United States hereby submits this amicus brief to address the issues of whether plaintiff may bring a claim for retaliation under Title VI and its implementing regulation, 34 C.F.R. § 100.7, and the standard for establishing a prima facie case.

STATEMENT OF FACTS

The facts pertinent to Smith's retaliation claim are as follows.[2] Following the 1998-99

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[1]A copy of the unpublished court order granting defendant's Motion for Summary Judgment in Peters is attached.

[2]These facts are taken from Smith's Second Amended Complaint, which defendant USF
(continued...)

season, members of the USF women's basketball team, including Smith, met with Hiram Green, an assistant athletic director at the time, to complain of alleged racially discriminatory treatment by Winters. (Second Am. Compl., ¶ 19.) Green, at Griffin's direction, began an investigation into the allegations. (Id., ¶ 21.)

As part of his investigation, Green interviewed African-American teams members, including Smith, and met with Winters. (Id. at 20.) Additionally, Green obtained a written statement from Smith. In April 1999, Green wrote to Griffin that, based on his investigation, there "is a general atmosphere within the [team] that lacks reasonable sensitivity to the issue of race." Griffin met with Winters and ordered her to attend sensitivity training. (Griffin Mot. for Summ. J. at 4.)

Upon learning of the investigation, Winters initiated one-on-one meetings with her players, including Smith, to discuss the investigation and their participation in it. (Second Am. Compl., ¶ 25.) Winters tape recorded these meetings. (Id.) Following these meetings, Winters called a team meeting to voice her displeasure with the investigation and warned players that there would be "consequences" for any player who in the future complained to third parties about Winters or the basketball program in general. (Id., ¶ 30.)

Following the 1999-2000 season, Winters dismissed Smith from the team, allegedly for insubordination resulting from Smith's conduct on a trip home from a basketball tournament. (Id., ¶¶ 47-49.) In April, 2000, shortly after her dismissal, Smith made a complaint to USF's Equal Opportunity Affairs ("EOA") office. (USF Mot. for Summ. J. at 10.) Smith's complaint

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[2](...continued)
treats as true for purposes of the summary judgment motion. (USF Mot. for Summ. J. at 2 n.2).

alleged that Winters had dismissed her from the team in retaliation for Smith's participation in Green's investigation during the previous year, and for alleging that Winters had engaged in racial discrimination. The EOA office investigated Smith's complaint, interviewing Smith, Winters, other players, and assistant coaches. In October 2000, the EOA office issued a determination letter stating that "there is a reasonable cause to believe that [Smith] was subjected to retaliation by [Winters], in violation of the Equal Opportunity Policy of the University." (USF Mot. for Summ. J., Exhs. 9, 10.)

Winters appealed the EOA office's determination. That appeal was denied, and USF terminated Winters in December, 2000. (USF Mot. for Summ. J. at 10.) Smith was reinstated to the basketball team in January, 2001, the first academic term following the EOA decision. (Id.)

ARGUMENT

This brief addresses two issues: (1) whether the scope of Title VI's private right of action includes a claim of retaliation; and (2) whether to establish a prima facie case of retaliation, a plaintiff must have specific knowledge of her statutory rights when complaining of discrimination.

With respect to the first question, USF argues that Title VI does not expressly address retaliation and that the recent Supreme Court decision in Alexander v. Sandoval, 532 U.S. 275, 121 S. Ct. 1511 (2001), precludes a private right of action for retaliation under § 100.7(e). (Mot. for Summ. J. at 18-19.) Defendant is wrong on each ground.

First, the scope of Title VI's private right of action includes a claim for retaliation. Title VI was enacted to redress a pervasive problem of race discrimination in programs and activities receiving federal financial assistance. The broad language of Title VI can be read to encompass a

prohibition on discriminating against persons who complain about or oppose race discrimination. Indeed, Title VI has been consistently interpreted to prohibit retaliation. The Supreme Court and other courts of appeal have held in a variety of settings that anti-discrimination statutes that do not expressly prohibit retaliation can and should be read to include retaliation claims. The federal agencies charged with the enforcement of Title VI have also taken the position that retaliation is prohibited by Title VI. This interpretation, consistent with the text and history of the statute, furthers the statute's purposes by assuring that persons cannot be punished for opposing violations of Title VI.

Second, Alexander is inapposite here where plaintiff seeks a remedy for retaliation based on her complaints about defendant's race discrimination. Alexander involved an attempt to enforce a discriminatory effects regulation that prohibited conduct the statute permitted. Alexander does not bar individuals from bringing an action alleging intentional discrimination, such as retaliation, where an agency regulation simply clarifies what conduct the statute itself prohibits.

With respect to the second question, concerning the establishment of a prima face case of retaliation, case precedent makes clear that a plaintiff need not specifically mention an anti-discrimination statute or file a formal complaint in order to engage in expression protected from retaliation. Rather, Smith's complaint to Green, an official in USF's athletic department, about incidents of racial discrimination is sufficient to invoke Title VI's prohibition against retaliation.

***A. Individuals have a private right of action for claims of retaliation under Title VI*.**

1. Individuals have a cause of action to enforce Section 601.

Section 601 of Title VI of the Civil Rights Act of 1964 provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. Section 602 authorizes agencies providing federal financial assistance "to effectuate the provisions of section [601] of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability," and to enforce such regulations administratively. 42 U.S.C. § 2000d-1. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et. seq., which prohibits sex discrimination in educational programs or activities receiving federal financial assistance, was modeled on Title VI and the statutes are generally interpreted in tandem. See Cannon v. Univ. of Chicago, 441 U.S. 677, 694-96 (1979).

Although Title VI does not specifically provide for a private right of action to enforce the statute, the Supreme Court has held that Congress intended to create such a right of action for violations of Section 601 against fund recipients, see Cannon, 441 U.S. at 696; Alexander, 532 U.S. at 279-80, and that compensatory damages are available in such actions, see Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992). Congress ratified those holdings, particularly as applied to state defendants, by enacting 42 U.S.C. § 2000d-7, which conditions the receipt of federal funds on a waiver of state agencies' Eleventh Amendment immunity to private suits. See Alexander, 532 U.S. at 280; Litman v. George Mason Univ., 186 F.3d 544, 553-54 (4th Cir. 1999).

2. Section 601 itself prohibits retaliation for opposing race discrimination.

Whether Section 601 can be interpreted to prohibit retaliation is a question of statutory interpretation, requiring a close examination of the text, structure, and history of the statute. See

Regions Hosp. v. Shalala, 522 U.S. 448, 460 n.5 (1998) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.").

In its motion for summary judgment, USF asserts that Title VI does not address retaliation because retaliation and discrimination are "entirely different causes of action." (See USF Mot. for Summ. J. at 18-19). Stated differently, according to USF, the statute prohibits adverse conduct "on the ground of race" and this does not include retaliation. But the phrase "on the ground of" is broad language, subject to several interpretations. Cf. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 284 (1978) (opinion of Powell, J.) (holding that language of Title VI was ambiguous); Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 592 (1983) (opinion of White, J.) (same). The relevant definition of the word "ground" is "[t]he underlying condition prompting an action." The American Heritage Dictionary 775 (4th ed. 2000); Webster's II New Riverside University Dictionary 550 (1988) (same); see also Random House Dictionary of the English Language 843 (2d ed. 1987) ("the foundation or basis on which a belief or action rests"). Certainly a recipient that acts adversely to a person (either by excluding her from the program, denying her the program benefits, or otherwise subjecting her to discrimination) because she has opposed race discrimination is taking an action in which race-motivated conduct is an "underlying condition" or "basis" of its decision. USF's interpretation, by contrast, is inconsistent with the broad scope that should be accorded this language. Cf. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) ("There is no doubt that "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'").

In choosing among possible readings of Section 601, it is useful to note that reading the

statute to prohibit retaliation is consistent with early interpretations of Title VI, including the former Fifth Circuit's. For example, in the 1960s, school districts could meet their obligations under Title VI and the Fourteenth Amendment to desegregate previously racially segregated school districts by enacting "freedom of choice" plans. Black students, however, were often retaliated against for exercising their right to attend formerly white schools. See United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 888 n.110 (5th Cir. 1966), adopted en banc, 380 F.2d 385, 389 (5th Cir. 1967);[3] Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n, 375 F.2d 648, 653 n.8 (4th Cir. 1967); Coppedge v. Franklin County Bd. of Educ., 273 F. Supp. 289, 295-96 (E.D.N.C. 1967), aff'd, 394 F.2d 410 (4th Cir. 1968).

For this reason, the Department of Health, Education and Welfare (the predecessor to the Department of Education) issued guidelines under Title VI that provided that school districts were responsible for protecting students who exercised their rights under a freedom of choice plan (*i.e.*, individuals attacked not because of their race but because they chose to exercise their rights). See Revised Statement of Policies for School Desegregation Plans under Title VI of the Civil Rights Act of 1964 § 181.52 (March 1966), reprinted in Guidelines for School Desegregation: Hearings Before the Special Subcomm. on Civil Rights of the House Comm. on the Judiciary, 89th Cong., 2d Sess. App. A32 (1966). The former Fifth Circuit, sitting en banc, held that these guidelines "comply with the letter and spirit of the Civil Rights Act of 1964," and incorporated them into a model decree that it required all district courts in the Circuit to employ. See Jefferson County Bd. of Educ., 380 F.2d at 390, 392. This holding in a prominent Title VI

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[3]Decisions of the former Fifth Circuit are binding precedent on the Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206, 1209-11 (11th Cir. 1981) (en banc).

case can be presumed to have been known and ratified when, after studying the guidelines, Congress amended Title VI to add a provision stating that is was a national policy that the "guidelines and criteria established pursuant to title VI * * * dealing with conditions of segregation by race, whether de jure or de facto, in the schools of the local educational agencies of any State shall be applied uniformly in all regions of the United States." Elementary and Secondary Education Amendments of 1969, Pub. L. No. 91-230, § 2, 84 Stat. 121 (1970) (codified at 42 U.S.C. § 2000d-6). See Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986) ("Where, as here, 'Congress has not just kept its silence by refusing to overturn the administrative construction, but has ratified it with positive legislation,' we cannot but deem that construction virtually conclusive.").

The Supreme Court and a majority of other courts of appeals have interpreted other anti-discrimination statutes to contain within them a prohibition on punishing individuals for complaining about or advocating an end to discrimination even absent a specific mention of retaliation.

The Supreme Court did so in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969). Sullivan was a white man who owned two homes in a community, each of which came with a "membership share" that entitled the shareholder to use a community park owned and operated by a non-profit corporation. Sullivan rented one of the houses to Freeman, a black man, and attempted to assign one of the membership shares to him. The board of directors refused to approve the assignment because Freeman was black. When Sullivan protested that action, he was expelled from the corporation and lost both his shares. He sued the corporation, alleging a violation of 42 U.S.C. § 1982, which provides that "[a]ll citizens of the United States shall have

the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." The Court held that Sullivan had standing to maintain an action under Section 1982 not just for being denied the right to complete his transaction with Freeman, but for "expulsion for the advocacy of Freeman's cause." 396 U.S. at 237. The Court explained that "[i]f that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property." Id.

Courts of appeals have likewise interpreted statutes that on their face deal only with discrimination to also prohibit retaliation. For example, in Fiedler v. Marumsco Christian School, 631 F.2d 1144 (1980), the Fourth Circuit interpreted the scope of 42 U.S.C. § 1981, which provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens." In that case, a white student was initially expelled from a private school because she was dating a black student; the school subsequently offered to rescind the expulsion if she would not associate with the black student, but upon learning that her father had contacted the NAACP about the school's actions, decided that her expulsion would remain in effect and expelled her sister as well. The Fourth Circuit held that it was "immaterial" whether the expulsion was viewed as caused by her "association with" the black student "or because of [her family's] attempts to vindicate their constitutional and statutory rights" because Section 1981 "affords a remedy for both the initial expulsion and the retaliatory expulsions." Id. at 1149 n.7.

The basic rationale relied upon by other courts of appeals in reaching this holding under

Section 1981 is that "a retaliatory response by an employer against such an applicant who genuinely believed in the merits of his or her complaint would inherently be in the nature of a racial situation." Setser v. Novack Inv. Co., 638 F.2d 1137, 1146 (8th Cir. 1981), modified on other grounds, 657 F.2d 962 (en banc). This is the consensus of the courts of appeals, including the Eleventh Circuit, as to Section 1981.[4] There is no reason why Title VI should not be similarly interpreted.

A statute must also be read in light of the problems with which Congress was confronted. See Dickerson v. New Banner Inst., Inc., 460 U.S. 103, 118 (1983) ("As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve."); Warner v. Goltra, 293 U.S. 155, 158 (1934) (Cardozo, J.) ("Our concern is to define the meaning [of a term] for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained."). By the time Congress enacted Title VI in 1964, not only had it received a multi-volume report from the United States Commission on Civil Rights documenting that retaliation and reprisal against those who advocated non-discrimination were widespread,[5] but it also heard testimony to the same effect in

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[4]See, e.g., Webster v. Fulton County, ___ F.3d ___, ___, 2002 WL 312531, at *1 (11th Cir. Feb. 28, 2002); Andrews v. Lakeshore Rehab. Hosp., 140 F.3d 1405, 1411-13 (11th Cir. 1998); Hawkins v. 1115 Legal Serv. Care, 163 F.3d 684 (2d Cir. 1998); In re Montgomery County, 215 F.3d 367 (3d Cir. 2000), cert. denied, 531 U.S. 1126 (2001); Winston v. Lear-Siegler, Inc., 558 F.2d 1266 (6th Cir. 1977); Skinner v. Total Petroleum, Inc., 859 F.2d 1439 (10th Cir. 1988); cf. McKnight v. General Motors Corp., 908 F.2d 104, 111 (7th Cir. 1990) (requiring showing that retaliation had racial motivation).

[5]For evidence from the Commission's *Report* (1961), of retaliation in the public school setting in particular, see, *e.g.*, Volume 1, supra, at 164 ("In six of the counties, white school officials were said to have warned Negro teachers not to try to register or to 'agitate' for their own rights or those of others on pain of losing their jobs."); id. ("teachers must sign a statement (continued...)

its own hearings on the subject, leading Senator Keating (one of the sponsors of the Civil Rights Act) to state that "[t]here is no question that school officials and parents and children have been harassed in a number of cases."[6]

Indeed, courts at the time took judicial notice that many entities had resisted the Supreme Court's decisions prohibiting racial discrimination and that such resistance included "manifestations of ill will toward white and colored citizens who are known to be sympathetic with the aspirations of the colored people for equal treatment, particularly in the field of public education." NAACP v. Patty, 159 F. Supp. 503, 515-516 (E.D. Va. 1958) (three-judge court),

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[5](...continued) that they are not now, have not been, and will not become members of the NAACP");Volume 2, supra, at 42-43, 179 (harassment and assault of whites who did not boycott integrated schools); id. at 53, 74-75 (state laws punishing school board members and teachers who supported segregation); Volume 5, supra, at 35 (attack on reverend attempting to enroll black children in white school). For examples outside the school context, see, e.g., Volume 1, supra, at 45, 60-61, 164; Volume 5, supra, at 7-8, 29-33, 35, 36, 40, 174 n.35, 176 n.39, 188-189 n.51.

[6]Integration in Public Education Programs: Hearings Before the Subcomm. on Integration in Federally Assisted Public Educ. Programs of the House Comm. on Educ. & Labor, 87th Cong., 2d Sess. 439 (1962); see also id. at 469, 491-522 (incidents in which university faculty members were removed because they were perceived as supporting integration); id. at 470-71, 486 (Arkansas, Mississippi, and South Carolina barred public employment of members of the NAACP); id. at 480, 696 (white families who refused to boycott integrated schools subject to harassment and coercion); id. at 485, 591 (state laws limited NAACP's right to bring desegregation lawsuits); id. at 487 (Louisiana required discharge of any teacher who recommended a black student to a previously white university); Civil Rights – 1959: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 86th Cong., 1st Sess. 108 (1959) (Sen. Douglas) ("there have been other tragic efforts to intimidate and repress those who would assert their rights and also the friends and sympathizers who want the law of the land to be observed in their communities"); id. at 89-101, 529-32, 557, 579, 1527-1603 (testimony and summaries of laws and newspaper reports regarding reprisal, violence, and intimidation against NAACP, blacks who exercised their rights, and whites who opposed discrimination); Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary, 88th Cong., 1st Sess. 1070-1075, 1212-1213, 1249-1250, 1280-1282, 1340-1341 (1963) (same).

vacated on abstention grounds, 360 U.S. 167 (1959); see also NAACP v. Button, 371 U.S. 415, 435 & n.15 (1963) (citing Patty as support for "the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia").[7]

Accepting the holding Cannon v. University of Chicago, 441 U.S. 677 (1979), and Alexander v. Sandoval, 532 U.S. 275 (2001), that Congress intended individuals to be able to bring suit to enforce their rights under Title VI, surely Congress did not intend to create a right and a cause of action to enforce that right, but permit individuals to be punished for exercising their rights or opposing violations of those rights. See Cannon 441 U.S. at 704 (Congress "sought to accomplish two related, but nevertheless somewhat different, objectives. First,

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[7]Other published decisions of the time reflected the variegated methods used to retaliate against those who advocated in favor of non-discrimination. See, e.g., NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958) (law requiring identification of rank-and-file members of organization advocating desegregation "exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility"); Scull v. Virginia ex rel. Comm. on Law Reform & Racial Activities, 359 U.S. 344 (1959) (legislative committee investigating person who counseled blacks about their rights); Brewer v. Hoxie Sch. Dist., 238 F.2d 91 (8th Cir. 1956) (individuals harassing and intimidating school officials and parents to prevent integration); Louisiana State Univ. v. Ludley, 252 F.2d 372, 375 (5th Cir. 1998) (state law providing that school teachers shall be fired for "advocating or in any manner * * * bringing about integration of the races within the public school system or any public institution of higher learning"); United States ex rel. Goldsby v. Harpole, 263 F.2d 71, 82 (5th Cir. 1959) (lawyers for criminal defendants fail to challenge exclusion of blacks from jury due to "risk of personal sacrifice which may extend to loss of practice and social ostracism"); Bullock v. United States, 265 F.2d 683 (6th Cir. 1959) (mob assaulting an "integrationist" who escorted black children into a formerly segregated school); United States v. Wood, 295 F.2d 772 (5th Cir. 1961) (sheriff arresting person instructing blacks how to register to vote); Jordan v. Hutcheson, 323 F.2d 597 (4th Cir. 1963) (legislative committee investigating and harassing lawyers for black plaintiffs); United States v. McLeod, 229 F. Supp. 383 (S.D. Ala. 1964), rev'd, 385 F.2d 734 (5th Cir. 1967) (grand jury investigating lawyers bringing civil rights cases); United States v. Dallas County, 229 F. Supp. 1014 (S.D. Ala. 1964), rev'd, 385 F.2d 734 (5th Cir. 1967) (sheriff arresting persons assisting blacks in registering to vote).

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

USF mistakenly relies on the reasoning of Litman v. George Mason Univ., 156 F. Supp. 2d 579 (E.D. Va. 2001), appeal pending, No. 01-2128 (4th Cir.); see also Atkinson v. Lafayette College, 2002 WL 123449 * 11 (E.D. Pa. Jan. 29, 2002) (finding no private right action to enforce Title IX retaliation regulation); Holt v. Lewis, 955 F. Supp. 1385 (N.D. Ala. 1995) (same). Litman reasoned that the structure of the Civil Rights Act of 1964 cut against finding that Title VI itself prohibited retaliation. Title VII of the Civil Rights Act of 1964, enacted contemporaneously with Title VI, has a separate anti-retaliation provision that makes it unlawful for an employer to "discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). Because Congress is presumed not to enact redundant provisions, the presence of an anti-retaliation provision in Title VII might be understood to mean that Congress did not intend Title VII's general prohibition on discrimination against any individual "because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2, to encompass such claims. The district court in Litman concluded that because Congress had used language similar to Title VII's general prohibition in Title VI, the same absence of intent to proscribe retaliation existed in Title VI.

But courts have declined to find the existence of Title VII's anti-retaliation provision to be dispositive as to whether Congress intended to prohibit retaliation in other parts of the statute. For example, as originally enacted, Title VII did not apply to the federal government. Congress amended Title VII in 1972 to add a separate section providing that "[a]ll personnel actions affecting employees [of the federal government] or applicants for employment * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-16(a), and providing for a private right of action for an employee aggrieved by the administrative decision "on a complaint of discrimination based on race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-16(c). Despite the absence of any mention of retaliation, the courts of appeals have held that this provision prohibits retaliation by a federal government employer as well. Most courts of appeals, including the Eleventh Circuit, have reasoned that the statute's broad prohibition on "any discrimination" necessarily encompasses retaliation. See, e.g., Canino v. EEOC, 707 F.2d 468, 472 (11th Cir. 1983); Porter v. Adams, 639 F.2d 273, 277-78 (5th Cir. 1981); White v. General Servs. Admin., 652 F.2d 913, 917 (9th Cir. 1981); cf. Forman v. Small, 271 F.3d 285, 296-298 (D.C. Cir. 2001) (same for federal sector provision of Age Discrimination in Employment Act). This rationale would apply equally to reading Title VI to include an anti-retaliation prohibition.

Consequently, Congress's decision to include a specific anti-retaliation provision in Title VII and omit it in Title VI is not indicative of whether these broader statutory prohibitions encompass an anti-retaliation claim. Indeed, a similar structural argument was considered and rejected by the Supreme Court in Cannon v. Univ. of Chicago, 441 U.S. 677 (1979). Defendants in that case argued that the existence of an express private cause of action in Title VII was

evidence that Congress did not intend to create a private cause of action for Title VI. See id. at 710. The Court responded that such an argument was "unpersuasive" because, when dealing with "a complex statutory scheme" involving multiple provisions, the Court would not engage in an "excursion into extrapolation of legislative intent" based on what Congress did in other provisions of the same statute in order to determine what Congress intended for the provision at issue. Id. at 711. On the same reasoning, the existence of a retaliation provision in Title VII does not demonstrate that Congress did not also intend Title VI itself to prohibit retaliation. And of course, the prohibitory terms of Titles VI and VII are different and interpretations of one cannot be indiscriminately applied to the other. Compare Griggs v. Duke Power Co., 401 U.S. 424 (1971) (Title VII prohibits disparate impact), with Alexander v. Sandoval, 532 U.S. 275 (2001) (Section 601 of Title VI does not prohibit disparate impact).

If the language of the statute is susceptible to more than one interpretation, the views of the agencies charged with its enforcement should be considered in selecting among possible meanings. See Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997). Each federal agency that disburses federal financial assistance is charged with enforcement of Title VI as to its recipients. As a historical matter, however, the Department of Health, Education, and Welfare and its successor the Department of Education have been primary enforcers of Title VI administratively. See Regents of the University of California v. Bakke, 438 U.S. 265, 343 (1978) (Brennan, J., concurring in part). Because of this history, the Court has described the Department of Education as "the expert agency charged by Congress with promulgating regulations enforcing Title VI" and deferred to its reading of the statute. Id. at 372, 342. In addition, the Department of Justice has been charged by Executive Order with the responsibility to "coordinate the

implementation and enforcement by Executive agencies of" Title VI since its inception. See Exec. Order No. 11,247, 30 Fed. Reg. 12,327 (1965); Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980). When Congress charges multiple agencies with enforcing a statute, the Supreme Court generally gives special deference to the interpretations of the agency charged by Executive Order with coordinating government-wide compliance. See Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 634 (1984); Andrus v. Sierra Club, 442 U.S. 347, 357-358 (1979).

The view of both agencies is that the statute itself prohibits retaliation. The Department of Justice issued a manual to federal agencies regarding recipients' obligations under Title VI that stated "[a] complainant may bring a retaliation claim under Title VI or under a Title VI regulation that prohibits retaliation." U.S. Dep't of Justice, Title VI Legal Manual 65 (Jan. 11, 2001) (available at www.usdoj.gov/crt/cor/coord/vimanual.pdf). As the Department explained in its contemporaneously issued manual regarding Title IX:

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

U.S. Dep't of Justice, Title IX Legal Manual 70 (Jan. 11, 2001) (available at www.usdoj.gov/crt/cor/coord/ixlegal.pdf). The Department of Education, consistent with its early guidance discussed on page 9, supra, concurs in this interpretation.

The agencies' view is not only consistent with the text of the statute, but it furthers its purpose as well, and is thus entitled to deference to the extent it is based on a hands-on understanding of how the statute operates. See Robinson, 519 U.S. at 346. The agencies'

interpretation comports with the general understanding that a substantive right is chimerical if a person can be punished for exercising that right. Cf. Crawford-El v. Britton, 523 U.S. 574, 588 n.10 (1998); Hanson v. Hoffmann, 628 F.2d 42, 52 (D.C. Cir. 1980) ("The creation of a right is often meaningless without the ancillary right to be free from retaliation for the exercise or assertion of that right.").

In arguing for the dismissal of plaintiff's Title VI retaliation claim, USF also asks this court to ignore the substantial amount of precedent upholding such claims. See e.g., Paisey v. Vitale, 634 F.Supp. 741 (S.D.Fla 1986), aff'd on other grounds, 807 F.2d 889 (11th Cir.1986) (Title VI retaliation claim); Belgrave v. City of N.Y., No. 95-CV-1507, 1999 WL 692034, at *37-*38 (E.D.N.Y. Aug. 31, 1999) (same); Ellis v. Morehouse Sch. of Med., 925 F. Supp. 1529, 1549 (N.D. Ga. 1996) (same); Scelsa v. City Univ., 806 F. Supp. 1126, 1141 (S.D.N.Y. 1992) (same); Davis v. Halpern, 768 F. Supp. 968, 984-85 (E.D.N.Y. 1991) (same).

In short, allowing a cause of action for retaliation is supported by statutory construction, legislative history, and significant case authority.

B. Section 100.7(e) validly construes and effectuates the purpose of the statute.

Defendant's second argument is premised on a misinterpretation of the Supreme Court's recent decision in Alexander v. Sandoval, 121 S. Ct. 1511 (2001). Alexander involved a challenge to the Alabama Department of Public Safety's decision to administer driver's license examinations only in English, pursuant to a state constitutional provision declaring English "the official language" of Alabama. The Alexander plaintiffs based their claim solely on one specific provision of the Title VI regulations that prohibits disparate impact discrimination by forbidding covered entities from "utiliz[ing] criteria or methods of administration which have the effect of

subjecting individuals to discrimination because of their race, color or national origin." Id. at 1515 (quoting 28 C.F.R. § 42.104(b)(2) (1999) (DOJ regulation)).

The Supreme Court granted certiorari on the question of whether private parties could enforce the Title VI disparate impact regulation and held that the disparate impact regulation was not privately enforceable. Alexander, 121 S. Ct. at 1523. In reaching that conclusion, the Court distinguished between two provisions of Title VI. See id. at 1516-17. Section 601 contains Title VI's basic anti-discrimination statement and provides that "[n]o person shall on the ground of race, color, or national origin, be excluded from participation, be denied the benefits of, or be subjected to discrimination" under any covered program. 42 U.S.C. § 2000d. Section 602 "authorize[s] and direct[s]" federal agencies "to effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability." Id. § 2000d-1. Section 602 further prescribes a detailed procedure that federal agencies are to follow in administratively enforcing Title VI that includes providing notice of the alleged violation and attempting to secure voluntary compliance. Id.

Analyzing Title VI's text and structure, the Court in Alexander began with three premises: (1) Section 601 is privately enforceable; (2) Section 601 prohibits only intentional discrimination; and (3) for purposes of its analysis, it assumed that the regulations promulgated under Section 602 legitimately may proscribe activities that have a disparate impact on a protected group even though such activities may be permissible under Section 601's intentional discrimination standard. Alexander, 121 S. Ct. at 1516-17.

The Court held that Section 601 itself could not confer a private right of action for the disparate impact regulation, given that section's prohibition against intentional discrimination only. Id. at 1518-19. The question thus became whether Section 602 confers a private right of action to enforce the disparate impact regulation. The Court held it did not, finding that Section 602's text "reveal[ed] no congressional intent to create a private right of action," and Section 602's enforcement scheme "tend[ed] to contradict a congressional intent to create privately enforceable rights through Section 602 itself." Id. at 1521-22.

Based on Alexander, defendant asserts that plaintiff's Title VI claim here must fail. In so arguing, defendant reaches the erroneous conclusions that 34 C.F.R. § 100.7(e) addresses conduct not prohibited by Title VI and therefore goes beyond the reach of the statute. (See USF Mot. For Summ. J. at 18-19.) First, Alexander makes clear that a private plaintiff may bring a cause of action under agency regulations so long as they validly construe the statute itself:

> [R]egulations applying § 601's ban on intentional discrimination are covered by the cause of action to enforce that action. Such regulations, if valid and reasonable, authoritatively construe the statute itself, and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.

121 S. Ct. at 1518 (citations omitted). Because Title VI itself has been held to prohibit retaliation, a private plaintiff may bring a cause of action to enforce a regulation prohibiting the same conduct.

Second, as explained in Section A, supra, § 100.7(e) does not go beyond the reach of Title VI's prohibition against discrimination based on race but in fact effectuates the statute. In relying on Alexander, USF mistakenly equates the anti-retaliation regulation with the disparate

impact regulation at issue in Alexander. But a regulation that forbids disparate impact discrimination -- conduct that may be permitted under Title VI -- is not analogous to a regulation prohibiting retaliation -- conduct that contravenes Title VI's ban on intentional discrimination. Without any protection from retaliation, individuals would risk retribution for complaining about violations of Title VI. As noted above, such a circumstance clearly would frustrate Congress's intent to protect individuals from discriminatory practices.

C. USF Misconstrues the Prima Facie Elements for Retaliation

USF finally asserts that to establish a prima facie case of retaliation, Smith must have possessed substantive knowledge of Title VI and her rights under that statute at the time that she complained of racial discrimination in the women's basketball program. In other words, USF argues that not withstanding its own determination that Winters had retaliated against Smith, Smith has failed to show a sufficient legal claim for retaliation in this case. As shown below, USF is wrong.[8]

First, ignoring Title VI's express prohibition against racial discrimination, USF argues that Smith's retaliation claim fails because her initial allegations of discriminatory treatment by Winters, "although . . . allegations of racial discrimination, . . . are not allegations of Title VI violations." (USF Mot. for Summ. J. at 19.) Smith, however, was not required to specifically reference Title VI in alerting USF officials to alleged discrimination in the basketball program.

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[8]Courts evaluating retaliation claims under Title VI generally look to the standard applied to retaliation claims brought under Title VII. See, e.g., Paisey v. Vitale, 634 F.Supp. 741 (S.D.Fla 1986), aff'd on other grounds, 807 F.2d 889 (11th Cir.1986). Thus, to establish a prima facie case of retaliation, a plaintiff must show (1) that she engaged in statutorily protected expression, (2) that she suffered an adverse action, and (3) a causal relationship between the two events. Meeks v. Computer Assoc. Int'l, 15 F.3d 1013, 1021 (11th Cir. 1994).

To the contrary, simply by complaining to Green of specific instances of racial discrimination by Winters and her assistant coaches and relying on USF's internal grievance procedures, Smith enjoyed protection from retaliation under Title VI. See Rollins v. Florida Dep't of Law Enforcement, 868 F.2d 397, 400 (11th Cir. 1989) (protection afforded against retaliation "is not limited to individuals who have filed formal complaints, but extends as well to those, like Rollins, who informally voice complaints to their superiors or who use their employers' internal grievance procedures"); Johnson v. Booker T. Washington Broadcasting Serv., Inc., 234 F. 3d 501 (11th Cir. 2000) (in establishing a prima facie case of retaliation, "[s]tatutorily protected expression includes filing complaints with the EEOC and *complaining to superiors* about sexual harassment") (emphasis added); England v. Compass Bank, No. CV-98-N-1029-S, 1999 WL 1825225, at *9 (N.D. Ala. Sept. 14, 1999) ("In the Eleventh Circuit, 'statutorily protected expression' includes filing an EEOC charge, formal and informal complaints to an employer, written protests, and warnings from employers not to complain about alleged discriminatory practices.") (internal citations omitted); Derasmo v. City of Gainesville, No. GCA 97CV118, 1998 WL 798639, at * 8 (N.D. Fla. Sept. 21, 1998) ("[V]oice complaints can trigger a retaliation claim to the same extent as formal filed grievances."). Indeed, as the record indicates, USF ultimately conducted an investigation of Smith's dismissal from the women's basketball program pursuant to internal university procedures, and subsequently concluded that Smith was retaliated against because of her participation in the Green investigation.

The case cited by USF, Doe v. Granbury Indep. Sch. Dist., 19 F. Supp. 2d 667 (N.D. Tex. 1998), does not hold to the contrary. The Granbury court granted summary judgment for defendant because, after reviewing the evidence, it held that there had been no retaliation by the

school district when plaintiff complained of sexual harassment under 42 U.S.C. § 1983 or Title IX. Specifically, the Granbury court noted that there is no "summary judgment evidence" that the defendant "knew of any request or denied Jane Doe II any benefits available," 19 F. Supp. 2d at 677, and "no evidence that Jane Doe II was retaliated against for complaining of violations of Title IX," id. at 678. Here, in contrast, the most that USF can say is that there are material facts in dispute as to whether Smith was retaliated against for participating in the 1999 race discrimination investigation conducted by the USF athletic department.

Second, USF argues that Smith failed to show an "objectively reasonable, good-faith belief that the conduct she opposed violated Title VI." (USF Mot. for Summ. J. at 20.) (citing Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385 (11th Cir. 1998)). Harper involved a challenge to an employer's grooming policy; the plaintiffs alleged that the policy was discriminatory and that they had been terminated in retaliation for protesting the policy. Harper, 139 F.3d at 1386. The Eleventh Circuit held that the plaintiffs had failed to show a prima facie case of retaliation because they could not show a good faith, reasonable belief in the policy's unlawfulness given "the unanimity with which the courts have declared grooming policies like Blockbuster's non-discriminatory." Id. at 1388.

Here, Smith complained to Green about discrimination in the women's basketball program. The conduct which Smith complained of to Green that created a hostile environment – including segregated rooming arrangements and the use of the particular racial slurs complained about – could not be considered lawful. If proven, these allegations would clearly violate Title VI. Moreover, Green, in investigating Smith's allegations found a lack of sensitivity to racial issues in the women's basketball program and recommended that Griffin follow up on the matter.

The underlying allegations clearly support that Smith held a reasonable, good-faith belief that she had suffered discrimination in the basketball program.[9]

CONCLUSION

Because the plaintiff has stated an actionable claim for retaliation under Title VI and the implementing regulation, § 100.7(e), this Court should deny USF's motion for summary judgment concerning the Title VI retaliation claim.

Respectfully submitted,

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[9]Even if the trier of fact found against Smith on the underlying allegations of race discrimination, this does not preclude a finding in Smith's favor on the retaliation claim. See Sullivan v. Nat'l R.R. Passenger Corp., 170 F.3d 1056, 1058 (11th Cir. 1999) (jury's finding against plaintiff on her sexual harassment claim does not necessarily men that jury rejected plaintiffs' retaliation claim for failure to show good faith belief that sexual harassment occurred)

CERTIFICATE OF SERVICE

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