No. 99-1908

IN THE

Supreme Court of the United States

JAMES ALEXANDER, *in his official capacity as the Director of the Alabama Department of Public Safety*, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, *Individually and on Behalf of All Others Similarly Situated*,

Respondents.

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

BRIEF FOR NATIONAL WOMEN'S LAW CENTER, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, AMERICAN JEWISH COMMITTEE, *et al.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

(Additional *Amici* Listed Inside)

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December 13, 2000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTION PRESENTED

Whether disparate impact regulations adopted by federal agencies to effectuate Title VI of the Civil Rights Act of 1964 are enforceable by private litigants in actions for declaratory and injunctive relief?

ADDITIONAL *AMICI*

Anti-Defamation League

Connecticut Women's Education And Legal Fund, Inc.

Council Of The Great City Schools

Girls Incorporated

National Organization For Women Foundation

National Partnership For Women & Families

Now Legal Defense And Education Fund

Title IX Advocacy Project

Trial Lawyers For Public Justice, P.C.

Women Employed

Women's Law Project

Women's Sports Foundation

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are organizations committed to the elimination of discrimination on the basis of gender, race, or national origin through effective enforcement of the civil rights laws. *Amici* submit this brief to address the important issue of whether disparate impact regulations adopted to effectuate Title VI of the Civil Rights Act of 1964 are privately enforceable in actions for declaratory and injunctive relief. Descriptions of *amici* and their membership are set forth in Appendix A.

STATEMENT

A. FACTUAL BACKGROUND.

Until 1991, Alabama – like almost every other State – administered the written portion of its driver's license exam in several foreign languages. During this time, as officials of the Alabama Department of Public Safety ("the Department") testified, the Department did not experience any significant problems in administering the foreign language examinations, either in terms of the costs of doing so or the integrity of the exam process. Pet. App. 168a. Translations of the examination into foreign languages were produced at no cost to the Department, and the Department undertook to develop new foreign language examinations if the demand was great enough. *Id.* Nor was there any evidence that non-English speaking drivers in Alabama posed a greater safety risk than English-speaking drivers. *Id.* at 168a-169a.

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[1] No counsel for any party authored this brief either in whole or in part, and no persons other than the *amici curiae* and their counsel made any monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

This long-standing practice abruptly ended following the ratification in 1990 of Amendment 509 to the Alabama Constitution, which establishes English as the official language of the State and requires officials of the State to "take all steps necessary to insure that the role of English as the common language of the state of Alabama is preserved and enhanced." Pursuant to Amendment 509, the Department adopted an English-only policy with respect to the driver's licensing process, requiring all phases of the process, including the written exam, to be conducted in English. Non-English speaking applicants taking the exam are not allowed to use translators, translation dictionaries, or other interpretive aids. Pet. App. 170a-171a.

At the same time that Alabama requires non-English speaking applicants to take the written exam in English, it "render[s] substantial aid, and provide[s] substantial assistance above and beyond the standard examination procedure for illiterate and handicapped English speaking applicants." Pet. App. 175a. For example, the Department administers oral examinations for illiterate applicants and administers videotaped sign language examinations for hearing-impaired applicants. *Id.* at 179a-180a. In addition, Alabama allows non-English speakers who hold valid driver's licenses from other States or foreign countries to either drive in Alabama with their foreign licenses, or exchange them for Alabama licenses without taking either the written or performance exam. *Id.* at 185a.

B. PROCEEDINGS BELOW.

The instant suit was filed against the Department and its Director on December 31, 1996 by Martha Sandoval, on her own behalf and as representative of the class of Alabama residents who are otherwise qualified to obtain a driver's license but cannot do so because they are not sufficiently fluent in English. The plaintiffs asserted claims under 42 U.S.C. §§ 1981 & 1983, the Equal Protection Clause of the Fourteenth Amendment, and Title VI of the Civil Rights Act

of 1964, 42 U.S.C. §§ 2000d, *et seq.*, and its implementing regulations, alleging that the Department's English-only policy with respect to the driver's licensing process violated their right to be free from discrimination on the basis of national origin. They sought a judgment declaring the Department's policy to be unlawful and unconstitutional and an injunction prohibiting its enforcement.

After a bench trial, the District Court ruled in plaintiffs' favor. In addressing various threshold issues, the District Court rejected defendants' argument that plaintiffs lacked a private right of action to enforce Title VI's disparate impact regulations. Pet. App. 82a-117a.

On the merits, the District Court held that the Department's English-only policy had a disparate impact on the basis of national origin.[2] It entered an injunction prohibiting the Department's enforcement of the English-only policy pursuant to Title VI and ordered the Department "in conjunction with the Plaintiffs, [to] fashion proposed policies and practices for the accommodation of Alabama's non-English speaking residents who seek Alabama driver's licenses." Pet. App. 252a-253a.

The Eleventh Circuit affirmed the District Court's ruling that there is an implied private cause of action to enforce disparate impact regulations promulgated pursuant to Title VI.[3] The court of appeals noted that it had recognized an

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[2] At trial, the District Court granted the defendants' motion for judgment as a matter of law on plaintiffs' claims of intentional discrimination "with the full agreement of the Plaintiffs." Pet. App. 247a. The District Court also granted defendants' motion for summary judgment on plaintiffs' Section 1981 claims on the ground that they were duplicative of their Section 1983 claims. Pet. App. 5a-6a; *but see* Sandoval Brief in Opposition to Petition for Certiorari at 3 (noting that district court "ultimately reserved ruling on ... Equal Protection" claim).

[3] The Eleventh Circuit also rejected the State's arguments that the instant lawsuit is barred by the Eleventh Amendment and that the District

implied private cause of action to enforce Title VI disparate impact regulations in three prior cases. Pet. App. 38a-40a. It further noted that its position was consistent with that of at least eight other courts of appeals. *Id.* at 40a-41a. Although acknowledging that this Court "has yet to squarely answer the question," it concluded that a "close reading" of *Lau* v. *Nichols*, 414 U.S. 563 (1974), *Guardians Association* v. *Civil Service Commission of New York*, 463 U.S. 582 (1983), and *Alexander* v. *Choate*, 469 U.S. 287 (1985), "necessarily establishe[d] several holdings logically supporting an implied private cause of action under section 602 of Title VI." Pet. App. at 42a.

SUMMARY OF ARGUMENT

I.

This Court should reject Petitioners' invitation to disrupt settled law in two significant areas of federal civil rights enforcement. In the 36 years since Title VI of the Civil Rights Act of 1964 was enacted, both the private right of action to enforce § 601 of the Act against public as well as private recipients of federal financial assistance and the disparate impact regulations adopted to "effectuate" § 601 have become well-established elements of the federal civil rights enforcement scheme.

Since this Court's decision in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), the availability of a federal court private right of action to enforce the federal rights created by § 601 against both public and private recipients of federal financial assistance has been firmly established. In the three decades since Title VI was enacted, Congress consistently has acted on the premise that a federal court private right of action to enforce the federal rights created

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Court erred in concluding, on the merits, that the State's English-only policy for driver's license exams has a disparate impact on the basis of national origin. Those rulings are not at issue here.

under § 601 was available. In enacting Title IX of the Education Amendments of 1972, Congress acted on the premise that there was a private right of action under Title VI. Section 718 of the Education Amendments of 1972, which authorized federal courts to award attorney's fees in private actions against public education agencies "explicitly presumes the availability of private suits to enforce Title VI in the education context." *Cannon*, 441 U.S. at 699 & n.26. The Civil Rights Attorneys Fees Act of 1976 authorizes an award of attorneys fees to prevailing parties in actions to enforce Title VI. The Rehabilitation Act Amendments of 1986, which abrogate the States' Eleventh Amendment immunity under Title VI and other civil rights statutes, confirm the availability of a private right of action to enforce Title VI against State recipients of federal financial assistance. Finally, throughout the debates on the legislation that became the Civil Rights Restoration Act of 1987, Congress confirmed its understanding and acceptance of the well-established private right of action to enforce Title VI against recipients of federal financial assistance.

The disparate impact regulations have been a part of the civil rights enforcement scheme almost from the beginning. Those regulations are reasonable, properly adopted pursuant to an express delegation of authority to "effectuate" § 601, and have the force and effect of law. See *Alexander*, 469 U.S. at 293 (explaining the Court's previous holding that "Title VI itself directly reached only instances of intentional discrimination," but "actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI").

Congress expressly authorized federal agencies to adopt appropriate regulations to "effectuate" § 601 of Title VI. This Court has concluded that § 601 directly reaches only intentional discrimination. As a condition of federal financial assistance, however, the agency disparate impact regulations impose limited obligations reasonably necessary to effectuate

§ 601. Direct proof of intentional discrimination is seldom available, and the distinction between intentional discrimination and "disparate impact" is not always clear. A policy or practice that disproportionately and adversely affects a racial or ethnic group, adopted with knowledge of its likely disparate effects, may evidence intentional discrimination. Absent sufficient justification, knowing adoption of a policy or practice that produces discriminatory effects might well support an inference of intentional discrimination.

Given the difficulties of proving intentional discrimination without direct evidence, there is a risk that some intentional discrimination will remain concealed. For this reason, it is reasonable for federal agencies to require recipients of financial assistance to avoid unjustified practices that have the effect of discriminating on the basis of race, color, or national origin. In effect, the regulations require recipients of federal financial assistance to steer clear of any policy or practice that approaches intentional discrimination of the sort directly proscribed by § 601 as a condition of receiving federal financial assistance. No State is required to accept federal financial assistance. If a State chooses to do so, however, the disparate impact regulations impose reasonable obligations to effectuate the requirements of § 601. The regulations create an appropriate margin of safety to assure that federal tax dollars are not used to finance programs that effectively exclude participation on the basis of race, color, or national origin.

Shortly after Title VI was enacted, the Department of Justice, which participated in drafting Title VI, also drafted model regulations reflecting its contemporaneous view of the conditions appropriate to effectuate § 601. The model regulations incorporated a disparate impact standard. Federal agencies responsible for administering financial assistance programs promptly adopted regulations to implement Title VI based on the model regulations, which incorporated the disparate impact standard. In the intervening three decades,

effectuating regulations adopted throughout the Executive Branch of the federal government have incorporated the disparate impact standard. In consideration of federal financial assistance under a host of programs, public and private recipients voluntarily have assumed a duty to comply with the disparate impact regulations by avoiding unnecessary practices or policies that have the effect of discriminating on the basis of race, color, or national origin.

For decades, Congress has acquiesced in the disparate impact regulations adopted to effectuate Title VI as well as the parallel language of Title IX relating to discrimination on the basis of sex. In 1975, Congress considered disparate impact regulations proposed to effectuate Title IX. Pursuant to a statutorily prescribed "laying before" procedure, the regulations implementing Title IX were submitted to Congress for review before they became effective. Congress permitted the Title IX disparate impact regulations to become effective without change. Similarly, during consideration of legislation that became the Civil Rights Restoration Act of 1987, opponents of the legislation argued that broadening the reach of Title VI and Title IX would have far-reaching consequences precisely because of the disparate impact regulations. Yet, Congress took no action to limit the regulations or disapprove them as inappropriate conditions for federal financial assistance.

II.

Disparate impact regulations can be enforced in a private right of action for equitable relief. The standard for determining whether federal regulations can be enforced in a private right of action implied under Title VI should be no more stringent than that used for determining whether such regulations can be enforced in an express private right of action under 42 U.S.C. § 1983.

Whether the private right of action is express, as under § 1983, or implied under Title VI, Congress has provided a

remedy authorizing a person to seek enforcement of Title VI rights in a federal court. For that reason, the separation of powers issues raised by implying a private right of action in the first instance are not implicated in this case, and there is no question of jurisdiction or judicial power. Here, the issue is simply whether the disparate impact regulations can be enforced in the private right of action that Congress has authorized.

If the disparate impact regulations create federal rights enforceable under Title VI, they should be presumptively enforceable in a private right of action that Congress has authorized. As in the § 1983 context, therefore, unless there is some indication that Congress intended to foreclose private enforcement of the regulations, equitable relief to compel compliance in an appropriate case should be available.

In determining whether a particular statute or regulation is a "law" that can be enforced in a § 1983 action, this Court has identified three relevant considerations: *first*, whether the language of the statute or regulation creates an enforceable federal right for the benefit of the plaintiff (*i.e.*, whether the statute or regulation imposes a duty that is not too vague or amorphous to be enforced by a federal court); *second*, whether Congress expressly foreclosed private enforcement; *third*, whether private enforcement would be inconsistent with a comprehensive alternative enforcement scheme established by Congress.

Applying the § 1983 analytic framework in this analogous context leads to the straightforward conclusion that the disparate impact regulations can be enforced in a private right of action for equitable relief under Title VI. First, the disparate impact regulations create a federal right. As an express condition of federal financial assistance, the regulations require recipients of federal financial assistance to assume a duty to refrain from using unnecessary practices that have the effect of discriminating on the basis of race, color, or national origin. Thus, the regulations establish a correlative

right of every person in the United States to participate in programs financed with federal tax dollars free from the burdens of unnecessary practices that have the effect of discriminating on the basis of race, color, or national origin. Second, there is no evidence Congress intended to foreclose private enforcement of the disparate impact regulations. Third, private enforcement of the disparate impact regulations will not interfere with the administrative enforcement scheme prescribed in § 602.

As requirements imposed only as a condition of federal financial assistance, the disparate impact regulations provide an appropriate basis for equitable relief, which would not include damages. See *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998). Petitioners' reliance on *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981), is entirely misplaced. The duty to comply with the requirements of the disparate impact regulations is unambiguous and longstanding; the regulations indisputably can be enforced by administrative action. The prospect of private enforcement has been clear since this Court's 1973 decision in *Lau* v. *Nichols*. Moreover, whether Alabama anticipated the result in this case or not, the plaintiffs seek nothing more than prospective compliance with the requirements of the regulations, as construed by the district court and the court of appeals. If Alabama believes the obligation to offer its written driving test in languages other than English is unreasonably burdensome, it can forgo federal financial assistance and avoid the obligation entirely. Alabama cannot, however, take the money and ignore the obligation.

Title VI, Title IX, and other similar civil rights statutes, as well as the disparate impact regulations adopted to effectuate them, have contributed significantly to the increased participation in all aspects of our society by those protected by these laws. Effective federal civil rights enforcement is vital to continued progress toward full participation.

ARGUMENT

I. THE PRIVATE RIGHT OF ACTION TO ENFORCE TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 AND THE DISPARATE IMPACT REGULATIONS ARE WELL-ESTABLISHED ELEMENTS OF THE FEDERAL CIVIL RIGHTS ENFORCEMENT SCHEME.

In the 36 years since the Civil Rights Act of 1964 was enacted, the private right of action to enforce the requirements of Title VI against all recipients of federal financial assistance and the disparate impact regulations have become well-established elements of the federal civil rights enforcement scheme – accepted as appropriate throughout the Executive Branch and by Congress, by the lower federal courts, and by recipients of federal financial assistance. The Court should reject Petitioners' invitation to disrupt well-settled principles of law governing these two important elements of federal civil rights enforcement.

A. The Private Right Of Action To Enforce Title VI Against Both Public And Private Recipients Of Federal Financial Assistance Is Well-Established.

Section 601 of the Civil Rights Act of 1964 provides that "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. Since this Court's decision in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1977), the availability of a federal private right of action to enforce federal rights created under § 601 of the Civil Rights Act of 1964 ("Title VI") in a federal court has been firmly established.

In *Cannon* the Court held that Congress intended a private right of action to enforce the requirements of § 901 of the

Education Amendments of 1972 ("Title IX"). The Court explained that the language of Title IX "explicitly confer[red] a benefit on persons discriminated against on the basis of sex," 441 U.S. at 694, the plaintiff in that case was a member of the "class for whose special benefit the statute was enacted," *id.*, and therefore "the first of the four factors identified in *Cort* [v. *Ash*, 422 U.S. 66 (1975)] favors the implication of a private right of action." *Id.* at 693-94. The pertinent language of Title VI is identical to the language of Title IX, "[e]xcept for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI." *Id.* at 694-95. Indeed, "Title IX was patterned after Title VI of the Civil Rights Act of 1964." *Id.* at 694.

The second *Cort* factor supported implication of a private right of action. The Court found compelling evidence that Congress intended Title IX to be enforced in private actions in federal courts in the same way Congress understood Title VI was enforced. *Id.* at 703 ("We have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination").

The third *Cort* factor is whether private enforcement is consistent with the purposes of the legislation. "Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." *Id.* at 704. The Court found that an implied private right of action was consistent with the administrative fund termination scheme established in Title IX. Because of the severity of fund termination, the Court explained, a private right of action was a useful and potentially more efficient supplement to the administrative scheme. *Id.* at 704-06.

The fourth *Cort* factor also favored implication of a private right of action under Title IX. Sex discrimination – like discrimination on the basis of race, color, and national origin, addressed in Title VI – traditionally has not been the exclusive concern of the States. On the contrary, "[s]ince the Civil War, the Federal Government and the federal courts have been the "'*primary* and powerful reliances'" in protecting citizens against such discrimination." *Id.* at 708 (citations omitted, emphasis added).

The respondent in *Cannon* agreed that the virtually identical provisions of Title VI and Title IX should be construed in the same way, but argued that no private right of action had been intended under Title VI. *Id.* at 710. Although noting "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was," *id.* at 711, the Court rejected the argument on the merits. After a careful review of the legislative history of Title VI, the Court found no evidence "that any member of Congress voted in favor of the statute in reliance on an understanding that Title VI did not include a private remedy." *Id.* at 716; see *id.* at 710-16. *Cannon* thus established the availability of a private right of action under both Title IX and Title VI.[4]

In the 36 years since the Civil Rights Act of 1964 was enacted, Congress consistently has acted on the presumption that there was a private right of action under Title VI. In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 72 (1992), this Court explained that the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. § 2000d-7,

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[4] Not surprisingly, therefore, the lower federal courts consistently have assumed the availability of a private right of action under Title VI. *See, e.g., Buchanan* v. *City of Bolivar*, 99 F.3d 1352 (6th Cir. 1996); *New York Urban League, Inc.* v. *New York*, 71 F.3d 1031 (2d Cir. 1995); *United States* v. *LULAC*, 793 F.2d 636, 648-49 (5th Cir. 1986); *Bryan* v. *Koch*, 627 F.2d 612, 616 (2d Cir. 1980).

which abrogated the States' Eleventh Amendment immunity under Title IX, Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975, "cannot be read except as a validation of *Cannon*'s holding" that a private right of action for damages is available under Title IX. Justice Scalia emphasized the point: "The Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7(a)(2), must be read, in my view, not only 'as a validation of *Cannon*'s holding,' but also as an implicit acknowledgment that damages are available." *Id.* at 78 (citation omitted). The same is clearly true with respect to Title VI.

Long before the Rehabilitation Act Amendments of 1986, however, the premise that there was a private right of action to enforce the requirements of Title VI in federal courts against public and private recipients of federal financial assistance had been affirmed by Congress on many occasions. For example, Section 718 of the Education Amendments of 1972, 20 U.S.C. § 1617 (repealed 1979), which authorized federal courts to award attorneys fees to the prevailing parties in private actions against public education agencies to enforce Title VI in the context of elementary and secondary education, "explicitly presumes the availability of private suits to enforce Title VI in the education context." *Cannon*, 441 U.S. at 699; see *id.* at 699 n.26. As described above, in enacting Title IX, Congress expressly presumed that a private right of action was available under Title VI.

The Civil Rights Attorneys Fees Awards Act of 1976 authorizes an award of fees to prevailing parties in actions to enforce Title VI. 42 U.S.C. § 1988. The Senate Report accompanying the attorneys fees statute confirms Congress' understanding that private enforcement of Title VI was not only available, but essential to the effective enforcement of the civil rights laws: "All of these civil rights laws [including Title VI] depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important

Congressional policies which these laws contain." S. Rep. No. 94-1011, at 2 (1976), *quoted in Cannon*, 441 U.S. at 685-86 n.6.[5]

Throughout the four-year debate on what became the Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28, Congress reiterated and confirmed its understanding that there was a private right of action under Title VI, Title IX, and § 504 of the Rehabilitation Act. *E.g.*, H.R. Rep. No. 98-829, pt. 1, at 33, 35 (1984).[6]

B. The Disparate Impact Regulations Are Valid And Well-Established.

Contrary to the suggestion in Petitioners' Brief (at 26-27), the validity of the disparate impact regulations is not before the Court in this case. The issue was not raised in or decided by the court of appeals; nor is it fairly encompassed by the question presented in the petition for writ of certiorari. Accordingly, the Court need not address the validity of the regulations. See, e.g., *Blessing* v. *Freestone*, 520 U.S. 329,

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[5] *See Cannon*, 441 U.S. at 686-87 n.7 (quoting 122 Cong. Rec. 31472 (1976) (Sen. Kennedy)) ("It is Congress['] obligation to enforce the 14th amendment by eliminating entirely such forms of discrimination, and that is why both title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972 have been included [in the amendment to § 1988]. As basic provisions of the civil rights enforcement scheme that Congress has created, it is essential that private enforcement be made possible by authorizing attorneys' fees in this essential area of the law.") (alterations in original).

[6] It is not entirely clear, but Petitioners seem to concede (albeit grudgingly) that it is far too late in the day to question the availability of a private right of action under Title VI against State and private recipients of federal financial assistance. *See* Brief for Petitioners at 45 ("*Cannon* suggested, without deciding the issue, that Section 601 of Title VI permits an implied right of action for intentional-discrimination claims. The *Cannon* suggestion also *may have been* codified in the Rehabilitation Act Amendments of 1986....") (emphasis added; citations omitted).

340 n.3 (1997) ("We decline to address ... questions which ... were not presented in the petition for certiorari.").[7]

In any event, the disparate impact regulations are valid and enforceable. See *Alexander*, 469 U.S. at 293; *Guardians*, 463 U.S. at 584 n.2, 607 n.27 (White, J.); *id.* at 623 n.15 (Marshall, J., dissenting); *id.* at 642-45 (Stevens, Brennan, and Blackmun, JJ., dissenting). Congress expressly "authorized and directed" "[e]ach Federal department and agency ... empowered to extend Federal financial assistance to any program or activity" to adopt "rules, regulations, or orders of general applicability ... consistent with achievement of the objectives of the statute authorizing the financial assistance" "to effectuate" § 601 of the Civil Rights Act of 1964 "with respect to such programs or activity." 42 U.S.C. § 2000d-1.[8] Reasonable regulations properly adopted pursuant to an express delegation of rulemaking authority have the force and effect of law. See, *e.g.*, *United States* v. *O'Hagan*, 521 U.S. 642, 673 (1997); *Chrysler Corp* v. *Brown*, 441 U.S. 281, 301-03 (1979); *Batterton* v. *Francis*, 432 U.S. 416 (1977).

There is no basis for revisiting the long standing and consistent position of the Executive Branch that the disparate impact regulations are appropriate to "effectuate" Title VI. Justice Marshall described the early history of the regulations in *Guardians* as follows:

> Shortly after enactment of Title VI, a Presidential task force produced model Title VI enforcement regulations specifying that recipients of federal funds not use "criteria or methods of administration which have the *effect* of subjecting individuals to discrimination." The

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[7] The reasons the Court should not address the validity of the regulations in the circumstances of this case are more fully described in the brief of amicus NAACP Legal Defense and Education Fund, Inc. at 2-6, 9-13.

[8] Section 602 of Title VI is set out in full in Appendix B to this brief. App. 8a-9a.

> Justice Department, which had helped draft the language of Title VI, participated heavily in preparing the regulations. Seven federal agencies and departments carrying out the mandate of Title VI soon promulgated regulations that applied a disparate-impact or "effects" test.

463 U.S. at 618-19 (dissenting opinion) (citations and footnotes omitted). Since "the initial promulgation of regulations adopting an impact standard, every Cabinet Department and about 40 federal agencies [have] adopted standards interpreting Title VI to bar programs with a discriminatory impact." *Id.* at 619 (Marshall, J., dissenting).

Fundamentally, Title VI is Spending Clause legislation. See *Gebser*, 524 U.S. at 286 (Title VI and Title IX "operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds").[9] The benefits and burdens of participation in any federal financial assistance program are entirely voluntary. Reasonable regulations requiring recipients of federal financial assistance to bear the relatively modest burden of avoiding unnecessary policies or practices that have the "effect" of discriminating on the basis of race, color, or national origin in consideration of the benefits of federal financial assistance are appropriate means of "effectuat[ing]" § 601.

Title VI was enacted to assure that federal tax dollars collected from all the people would not be used to subsidize programs from which any person is excluded on the basis of race, color, or national origin. Direct evidence of intentional discrimination is seldom available. In many cases, the line between disparate impact or discriminatory "effects," on the

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[9] Section 5 of the Fourteenth Amendment provides additional support for Title VI and Title IX. *See* note 5, *ante*.

one hand, and intentional discrimination, on the other, is likely to be indistinct and not easily discernible. For example, evidence that, without adequate justification, Alabama adopted and maintained a policy knowing that it would disproportionately exclude Hispanics from participation in a particular program and, further, rejected alternative policies that would have accomplished its legitimate objectives without disparate impact on Hispanics, might not compel an inference of intentional discrimination (although such an inference might well be supported by such evidence). See, *e.g.*, *Washington* v. *Davis*, 426 U.S. 229, 242 (1976) (evidence of discriminatory impact may be probative of discriminatory intent); *In re Employment Discrimination Litig. Against the State of Ala.*, 198 F.3d 1305, 1319 (11th Cir. 1999) (disparate impact is one of the factors a court may consider in identifying discriminatory animus).

Requiring recipients of federal financial assistance to forgo unnecessary practices that have the effect of denying the benefits of federally subsidized programs on the basis of race, color, or national origin thus minimizes the risk that federal dollars will be used to subsidize discriminatory practices contrary to the objectives of Title VI, because of the practical difficulty of establishing intentional discrimination without direct evidence. The disparate impact regulations reasonably require recipients of federal financial assistance to steer clear of anything approaching intentional discrimination, in effect, establishing a margin of safety appropriate to achieve Congress' objective. On its face the burden of the disparate impact regulations is modest, since a recipient would be required to forgo policies or practices that have discriminatory effects only if the policies or practices cannot be justified by reference to legitimate considerations. See, *e.g.*, *Guardians*, 463 U.S. at 623 n.15 (Marshall, J., dissenting) (noting that a defendant would have the opportunity to respond to *prima facie* showing of discriminatory impact by demonstrating that the policy or practice was justified by

nondiscriminatory considerations); see also *New York Urban League*, 71 F.3d at 1038-39 (accepting State's justification for the asserted disparate impact); *Bryan*, 627 F.2d at 616-20 (same). Whatever the burden, however, it is voluntarily assumed and endured. Alabama is always free to avoid the burden by forgoing federal financial assistance.

Moreover, each recipient of federal financial assistance has long been on notice that one of the conditions for federal financial assistance is compliance with applicable disparate impact regulations adopted by the agency or department responsible for administration of the particular federal financial assistance program. If the risk of an unreasonable interpretation of the disparate impact regulations in a particular program is too great, the State need not participate. Alternatively, if a particular interpretation of the disparate impact regulations is wholly unanticipated, the State always retains the option of forgoing future federal financial assistance and completely avoiding any such obligation.

Although this Court has construed the language of § 601 as directly reaching only intentional discrimination, the Court has never found any evidence that Congress intended to approve policies or practices that had the effect of excluding participation in federally financed programs on the basis of race, color, or national origin. Nor is there any evidence that Congress intended to preclude regulations that reached discriminatory effects under particular programs. On the contrary, in *Guardians* five members of the Court concluded that the disparate impact regulations were valid and enforceable in an action for equitable relief. 463 U.S. at 607 n.27 (White, J.) ("The dissenters ... join with me to form a majority for upholding the validity of the regulations incorporating a disparate-impact standard."); see *id.* at 584 n.2 (White, J.), 623 n.15 (Marshall, J., dissenting), 642-45 (Stevens, Brennan, and Blackmun, JJ., dissenting). Shortly after *Guardians* was decided, in an opinion for a unanimous Court, Justice Marshall explained the holding in *Guardians* as

follows: "First, the Court held that Title VI itself directly reached only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI." *Alexander*, 469 U.S. at 293.

At a minimum, Congress' long acquiescence in the disparate impact regulations confirms its view that requiring recipients of federal financial assistance to forgo policies or practices that have the effect of discriminating on the basis of race, color, or national origin as a condition of federal financial assistance is a reasonable means of effectuating the objectives of § 601. In 1966, Congress considered and rejected a proposal intended to invalidate the disparate impact regulations adopted to effectuate Title VI. See *Guardians*, 463 U.S. at 620 & n.8 (Marshall, J., dissenting).

In 1975, drawing on the Title VI regulations, the Department of Health, Education, and Welfare promulgated regulations to implement Title IX, including disparate impact regulations. As this Court has recognized, those regulations went through a "unique" enactment process that provides strong evidence that they – and inferentially the Title VI regulations upon which they were based – accurately reflect congressional intent. *Grove City College* v. *Bell*, 465 U.S. 555, 567 (1984). Specifically, the regulations were "submitted ... to Congress for review," *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 531, pursuant to a statutory procedure that afforded Congress "an opportunity to invalidate aspects of the regulations it deemed inconsistent with Title IX," *Grove City*, 465 U.S. at 568. None of the proposed regulations, which included disparate impact regulations, see 40 Fed. Reg. 24128, 24140, 24141, 24143 (June 4, 1975), was disapproved by Congress. Although this Court has noted that Congress's failure to disapprove the regulations is "not dispositive," *Grove City*, 465 U.S. at 568, it has recognized that "it strongly implies that the regulations accurately reflect

congressional intent." *North Haven*, 456 U.S. at 533-34. Accordingly, the unique postenactment history of Title IX provides strong evidence that Congress regarded disparate impact regulations as consistent with its intent and objectives in adopting the broad anti-discrimination provisions in Title IX and, by implication, Title VI as well.

Finally, during consideration of legislation that became the Civil Rights Restoration Act of 1987, Congress heard testimony that this Court had upheld the validity of the disparate impact regulations in *Guardians*. See H.R. Rep. No. 98-829, pt. 1, at 24 ("[t]he substantive regulations were affirmed as valid in ... *Guardians*"); *id.* at 33-35; 130 Cong. Rec. 27935 (1984) (Sen. Kennedy); *Civil Rights Act of 1984: Hearings on S. 2568 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary*, 98th Cong. 23-24 (1984) (representatives of the U.S. Commission on Civil Rights describing *Guardians* as holding that while § 601 only proscribes intentional discrimination, disparate impact regulations are permissible). Yet, Congress took no action to disapprove the regulations.

Particularly in this "contractual" context, see, *e.g.*, *Gebser*, 524 U.S. at 286, where the Executive Branch, the Legislative Branch, the lower federal courts, and the recipients of federal financial assistance have accepted the validity of the disparate impact regulations for nearly four decades under a host of federal spending programs and contracted on that basis, this Court should not disrupt the settled expectations of the parties.[10] Here, Congress has had ample opportunity to consider and correct any error the agencies or the courts

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[10] *Cf. Square D Company* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986) (quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)) ("'*Stare decisis* is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled'" the way a current majority of this Court might have decided the issue in the first instance.)

might have made in this area. There is no reason for the Court to relieve Petitioners of obligations voluntarily assumed in consideration of federal financial assistance – obligations that can be avoided by simply forgoing future federal financial assistance.[11]

II. THE DISPARATE IMPACT REGULATIONS CAN BE ENFORCED IN A PRIVATE RIGHT OF ACTION FOR EQUITABLE RELIEF.

The standard for determining whether federal regulations can be enforced in an implied private right of action should be no more stringent than that used for determining whether such regulations can be enforced in § 1983 actions.[12]

The reason the § 1983 analytic framework should be borrowed in this case is because, as discussed above, Congress has authorized a private right of action to enforce federal rights created under Title VI. Consequently, the question presented is not one of federal court jurisdiction or judicial power as it might be in a case involving the implication of a private right of action in the first instance. For the same reason, the separation of powers issues raised by

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[11] Nothing in this Court's decision in *Central Bank* v. *First Interstate Bank*, 511 U.S. 164 (1994), suggests that the disparate impact regulations are beyond the authority granted in § 602. In *Central Bank* this Court reiterated the view expressed in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976), that the SEC's authority to proscribe "manipulative or deceptive device[s] or contrivance[s]," *id.* at 197, does not reach conduct that is neither manipulative nor deceptive. *Central Bank*, 511 U.S. at 173-74. *See generally United States* v. *O'Hagan*, 521 U.S. 642 (1997). In *Central Bank* the Court held that Section 10(b) and the SEC's rule 10b-5 did not reach "aiding and abetting" manipulative or deceptive conduct. 511 U.S. at 175-76. In *Hochfelder*, the Court held that the statute did not reach negligence and the rule could not be read to impose damages for negligence. 425 U.S. at 199.

[12] The § 1983 analytic framework is a useful alternative to the *Cort* v. *Ash* analysis in the circumstances of this case, although we believe the result would be the same if the *Cort* v. *Ash* analysis were applied.

implying a private right of action in the first instance are not implicated in this case. Compare *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 508 n.9 (1990), with *Cannon*, 441 U.S. at 730-31, 742-47 (Powell, J., dissenting). Rather, the controlling issue here is simply whether the disparate impact regulations can be enforced in the private action already determined to have been authorized by Congress. As in the § 1983 context, unless there is some evidence that Congress intended to foreclose private enforcement of the disparate impact regulations, equitable relief to compel compliance with the regulations in an appropriate case is presumptively appropriate.

In determining whether a statute or regulation is a "law" that can be enforced in a § 1983 action, this Court has identified three relevant considerations. See, *e.g.*, *Blessing*, 520 U.S. 329 (1997); *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498 (1990); *Wright* v. *City of Roanoke Redev. & Hous. Auth.*, 479 U.S. 418 (1987). The first is whether the language of the statute or regulation creates an enforceable federal right for the benefit of the plaintiff (*i.e.*, a binding obligation that is not too vague and amorphous to be enforced by a federal court).[13] The second and third considerations are whether Congress expressly foreclosed private enforcement, *Wright*, 479 U.S. at 423-24, and whether private enforcement would be inconsistent with an alternative comprehensive enforcement scheme. Compare *Blessing*, 520 U.S. at 346-48, with *Smith* v. *Robinson*, 468 U.S. 992, 1016-21 (1984), and

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[13] This factor significantly limits the nature and scope of the regulations that will be enforceable by private parties. *See Suter* v. *Artist M*, 503 U.S. 347, 355-57 (1992); *compare Blessing*, 520 U.S. at 342-46 (O'Connor, J.) (emphasizing the need to focus on the language of the specific provision asserted to create a federal right), *with Wright*, 479 U.S. at 438 (O'Connor, J., dissenting) (suggestion that "*any* regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or promulgating agency contemplated such a result" would be "troubling").

Middlesex County Sewerage Auth. v. *Nat'l Sea Clammers Ass'n*, 453 U.S. 119-21 (1981).

Using a similar analysis to determine whether the Title VI disparate impact regulations can be enforced in this case is reasonably straightforward. The disparate impact regulations create a federal right. As a condition of federal financial assistance, the regulations require recipients to administer their programs or activities without using unnecessary practices that have the effect of discriminating on the basis of race, color, or national origin. The regulations establish the correlative right of every person in the United States to participate in programs financed with federal financial assistance free from the burden of unnecessary practices that have the effect of discriminating on the basis of race, color, or national origin.

There is no indication that Congress intended to foreclose private enforcement of the disparate impact regulations adopted pursuant to § 602, just as this Court found no indication Congress intended to foreclose a private action to enforce § 601. See *Cannon*, 441 U.S. at 712-14 n.49; *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 420 n.28 (1978) (Stevens, J. dissenting). On the contrary, as the Court explained in *Cannon*, one of the purposes of both Title IX and Title VI was "to provide individual citizens [with] effective protection against" discrimination. 441 U.S. at 704.

Nor will a private action to enforce the disparate impact regulations interfere with the administrative enforcement scheme. See *Blessing*, 520 U.S. at 347-48 ; *Wilder*, 496 U.S. at 520-23; *Wright*, 479 U.S. at 427-29. Contrary to the Brief for Petitioners (17, 27-28), the oversight Congress thought appropriate for agency termination of funding is irrelevant to private actions by individuals seeking only to protect their interest in participating in federally financed programs free from unnecessary practices that effectively discriminate on the basis of race, color, national origin, sex, or other bases proscribed in civil rights statutes. Indeed, the distinction

between private enforcement action and fund termination was specifically noted by Senators Humphrey and Case during consideration of Title VI. *Cannon*, 441 U.S. at 713-14 n.49. As the Court summarized the matter in *Cannon*: "The administrative provisions in §§ 602 and 603 were simply means by which additional – and far more controversial – procedures [*i.e.*, fund termination] were established and then limited." *Id.* at 714 n.49; see also *id.* at 711 n.47; *Bakke*, 438 U.S. at 420 n.28 (Stevens, J., dissenting).

Further, during consideration of the Civil Rights Restoration Act of 1987, Congress was warned that disparate impact regulations might be enforced in private actions, but again Congress took no action to limit the statute or the regulations. For example, the Office of Management and Budget submitted a memorandum stating:

> Currently, the scope of [the DOE disparate impact regulations] ... is limited to a recipient's federally funded programs and activities. The effect of extending them to all of a recipient's activities would be significant. Any assistance to a State or city government would, for example, apply such requirements to all of their licensing and professional certification procedures. As noted, bar exams, medical boards, teacher competency exams, and a host of similar standards alleged by advocacy groups to have "discriminatory effects" would now be covered by the existing regulations for the first time and would be subject to agency enforcement activities *and private lawsuits*.

Civil Rights Act of 1984: Hearings on S. 2568 Before the Subcomm. on the Const. of the Senate Comm. on the Judiciary, 98th Cong. 530 (1984) (emphasis in original omitted; emphasis added); see also *id.* at 532 (OMB memorandum warning of the prospects of increased exposure to "'discriminatory effects'" litigation in private enforcement actions); *Civil Rights Restoration Act of 1985: Joint Hearings on H.R. 700 Before the House Comm. on Educ. & Labor and*

the Subcomm. on Civil & Const. Rights of the House Comm. on the Judiciary, 99th Cong. 734, 1095, 1099 (1985); 134 Cong. Rec. 42567 (1988) (Sen. Hatch) ("Of course, advocacy groups will be able to bring private lawsuits making the same allegations [of violations of disparate impact regulations] before federal judges.").[14]

In a private action, the disparate impact regulations provide an appropriate basis for equitable relief, which would not include recovery of damages. See *Gebser*, 524 U.S. at 287-92 (distinguishing between standard for damages relief and standard for prospective relief). The obligation to comply with the requirements of the long-standing disparate impact regulations is unambiguous and well recognized as an important component of the Title VI legal framework; recipients of federal financial assistance accept the money with full notice of the requirements and agree to comply. Recipients of federal financial assistance have been on notice of the prospect of private enforcement at least since this Court's decision in *Lau* v. *Nichols*, 414 U.S. 563 (1973). See

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[14] Several courts of appeals have expressly held that disparate impact regulations promulgated by agencies under Title VI may be enforced in a private right of action. *See Powell* v. *Ridge*, 189 F.3d 387, 400 (3d Cir. 1999); *Burton* v. *City of Belle Glade*, 178 F.3d 1175, 1202 (11th Cir. 1999); *David K.* v. *Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988). Others have assumed the availability of a private right of action to enforce disparate impact regulations under Title VI. *See, e.g., Indianapolis Minority Contractors Ass'n.* v. *Wiley*, 187 F.3d 743 (7th Cir. 1999); *Boulahanis* v. *Board of Regents*, 198 F.3d 633 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 2762 (2000); *Ferguson* v. *City of Charleston*, 186 F.3d 469 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 1239 (2000); *Buchanan* v. *City of Bolivar*, 99 F.3d 1352 (6th Cir. 1996); *New York Urban League, Inc.* v. *New York*, 71 F.3d 1031 (2d Cir. 1995); *Quarles* v. *Oxford Mun. Separate Sch. Dist.*, 868 F.2d 750 (5th Cir. 1989); *Larry P.* v. *Riles*, 793 F.2d 969 (9th Cir. 1984); *Castaneda* v. *Pickard*, 781 F.2d 456 (5th Cir. 1986); *United States* v. *LULAC*, 793 F.2d 636 (5th Cir. 1986); *Latinos Unidos de Chelsea en Accion (LUCHA)* v. *Sec'y of Hous. & Urban Dev.*, 799 F.2d 774 (1st Cir. 1986); *Georgia State Conference of Branches of NAACP* v. *Georgia*, 775 F.2d 1403 (11th Cir. 1985); *Bryan* v. *Koch*, 627 F.2d 612 (2d Cir. 1980).

Cannon, 441 U.S. 687 n.8; *Bakke*, 438 U.S. at 419 n.25 (Stevens, J., dissenting).

Whether Alabama anticipated the result in this case or not, plaintiffs seek no more than prospective compliance with the requirements of applicable federal regulations, as construed by the federal district court and the court of appeals. For this reason, Petitioners' reliance on *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1 (1981) is entirely misplaced. See *Gebser*, 524 U.S. at 287 (O'Connor, J.) (quoting *Franklin*, 503 U.S. at 74) (the central concern in *Pennhurst*, *Franklin*, and *Guardians* was ensuring that the receiving entity has "'notice that it will be liable for a monetary award'"). If Alabama believes the obligation to offer its written driving test in languages other than English is too onerous, it retains the option of forgoing federal financial assistance and avoiding the burden altogether. Alabama cannot, however, take the money and ignore the obligation.

III. FULL PRIVATE ENFORCEMENT OF THE CIVIL RIGHTS LAWS IS ESSENTIAL TO PROVIDE EQUAL OPPORTUNITY.

The question whether disparate impact regulations adopted by federal agencies to effectuate Title VI of the Civil Rights Act of 1964 are privately enforceable is important to those who are discriminated against on the basis of race, color, national origin, sex, age, or disability.

In the case of Title IX, for example, which protects women against discrimination in education, this Court has held that Title IX should be accorded "'a sweep as broad as its language'" in order to give the anti-discrimination provision "'the scope its origins dictate.'" *North Haven*, 456 U.S. at 521. Consistent with the expansive purpose of the statute, the Department of Education's Office for Civil Rights has adopted regulations to effectuate Title IX that prohibit

conduct or policies that have a disparate impact based on sex.[15]

Title IX's disparate impact regulations have been essential to the progress made to date, ending policies and practices that, although not facially gender-biased, had a disproportionately adverse impact on women. For example, Title IX's disparate impact regulations have stamped out discriminatory practices against students who are married or have children – students for whom education is particularly critical to their prospects for economic self-sufficiency. The regulations make clear that Title IX's proscription against discrimination on the basis of sex prohibits discrimination against students on the basis of marital or parental status. 34 C.F.R. §§ 106.21(c), 106.40, 106.57.

Title IX's disparate impact regulations also are an important means of ensuring that standardized tests are designed and used in a manner that is free from gender bias. The Title IX regulations provide that tests used as admissions criteria must validly predict success in the area being tested. See *id.* § 106.21(b)(2) (schools cannot use tests as admissions criteria that have a "disproportionately adverse effect" on women "unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable"). It is well-documented that "[t]here is a substantial record of disparities in scoring between male and female students on many standardized tests dating from

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[15] *See, e.g.*, 34 C.F.R. § 106.21(b)(2) (prohibiting tests or other criteria for admission which have a "disproportionately adverse effect on persons on the basis of sex"); *id.* § 106.52 (prohibiting tests or other criteria for employment which have "a disproportionately adverse effect on persons on the basis of sex"); *id.* § 106.34(d) ("Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.").

before Title IX's enactment and continuing over the last 25 years," including the SAT and PSAT. Nat'l Coalition for Women and Girls in Educ., *Title IX at 25: Report Card on Gender Equity* 35 (June 1997) ("*Report Card*"). Title IX's disparate impact regulations have proven to be an important means of challenging the design and use of such tests. For example, in response to a complaint filed with the Education Department's Office for Civil rights alleging that the PSAT was gender-biased in violation of Title IX, the College Board revised the PSAT to include a test of written English. *Id.* at 37. Similarly, a federal court enjoined the State of New York from relying exclusively on SAT scores to award certain college scholarships because it concluded that such reliance had a discriminatory impact on female students in violation of the Title IX regulations. *Sharif* v. *New York State Educ. Dep't.*, 709 F. Supp. 345 (S.D.N.Y. 1989). As a result, the State began to take grades into consideration as well and "the scholarship awards became more equitably distributed among male and female students." *Report Card* at 38.[16]

Finally, Title IX has had a significant impact in women's higher education. In 1979, women college undergraduates outnumbered men college undergraduates for the first time since World War II. Nat'l Advisory Council on Women's Educ. Programs, *Title IX: The Half Full, Half Empty Glass* 7 (Fall 1981). When Title IX was enacted in 1972, women were awarded 44 percent of all bachelor's degrees, 41 percent

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[16] *See also Cureton* v. *NCAA*, 37 F. Supp. 2d 687, 697-714 (E.D. Pa.), *rev'd on jurisdictional grounds*, 198 F.3d 107 (3d Cir. 1999) (district court held (1) that NCAA minimum standardized test scores for eligibility to participate in intercollegiate athletics and to qualify for athletic scholarships had an unjustified disproportionate impact on African American women and men in violation of Title VI regulations; and (2) there were reasonable alternatives to the policy that would have met the NCAA's legitimate objectives with less of a disproportionate impact). The benign description of the eligibility standard offered in the NCAA Amicus Brief (at 4) simply ignores the district court's findings.

of master's degrees, 16 percent of doctoral degrees, and six percent of first professional degrees. *Report Card* at 6. The figures for 1996-97 were 56 percent of bachelor's degrees, 51 percent of master's degrees, 39 percent of doctoral degrees, and 40 percent of first professional degrees. *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDICES

APPENDIX A

STATEMENTS OF INTEREST

The National Women's Law Center

The *National Women's Law Center ("Center")* is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunities in education for girls and women through full enforcement of Title IX of the Education Amendments of 1972. The Center has provided assistance or participated as counsel or *amicus curiae* in a range of cases to secure the equal treatment of women under the law, including successfully arguing before the Supreme Court that Title IX requires schools to address student-to-student sexual harassment in *Davis v. Monroe County Board of Education*.

The American Association of University Women

For well over a century, *American Association of University Women (AAUW)*, an organization of 150,000 members, has been a catalyst for the advancement of women and their transformation of American society. In more than 1,500 communities across the country, AAUW members work to promote education and equity for all women and girls, lifelong learning, and positive societal change. AAUW plays a major role in activating advocates nationwide on AAUW's priority issues, including: gender equity in education; reproductive choice; social security; and workplace and civil rights issues. AAUW supports constitutional protection and enforcement of civil rights for all individuals, and opposes all forms of discrimination.

The American Jewish Committee

The *American Jewish Committee ("AJC")*, a national organization of approximately 100,000 members and supporters, was founded in 1906 to protect the civil and religious rights of Jews. AJC believes that the only way to achieve this goal is to safeguard the civil and religious rights of all Americans, and has long been a staunch opponent of discrimination, whether based on religion, race, gender, or national origin. We join in this case because we take the position that English-only policies, which are a direct outgrowth of the anti-immigrant movement, unfairly penalize new immigrants, are inherently divisive, and serve no positive function in that they have not been shown to increase English literacy.

The Anti-Defamation League

The *Anti-Defamation League (ADL)* was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL has long been vitally interested in protecting the civil rights of all Americans, believing that every American has a constitutional right to be treated as an individual, equal under the law, rather than as a part of a racial, ethnic, religious, or gender-defined group. Pursuant to this mandate, ADL has previously filed *amicus* briefs in numerous discrimination cases before this Court, including such landmarks as *Brown v. Board of Education*, 347 U.S. 483 (1954); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

The Connecticut Women's Education and Legal Fund, Inc.

The *Connecticut Women's Education and Legal Fund, Inc.* (CWEALF) is a nonprofit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional

lives. CWEALF was founded in 1973 and has a membership of over 1,000 individuals and organizations.

The Council of the Great City Schools

The *Council of the Great City Schools* was organized in 1961 and is the only organization in the nation exclusively representing the needs of urban public schools. It is composed of 55 large city school districts that serve over 6.0 million school children. Over 80% of Council member students are African-American, Hispanic, or Asian American. Council member students come to school speaking 120 different languages. All Council members are themselves federal fund recipients, with federal funding representing just under 11% of their total revenues. One of the Council's central missions is to advocate for inner-city students so that they may share on a fair and equitable basis in the education opportunities that are so vital to success in our society.

Girls Incorporated

Girls Incorporated is a national organization that provides direct services to school age girls through its affiliates and nationally addresses gender-specific and youth issues. We have published our Advocacy Statements that delineate our position on such matters as equitable allocation of resources and girls' rights.

The National Organization for Women (NOW) Foundation

The *National Organization for Women (NOW) Foundation* is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with a contributing membership of over 500,000 women and men and more than 500 chapters in all 50 states and the District of Columbia. Since its inception in 1986, a major goal of NOW Foundation has been to ensure full equality for all women, including the elimination of discrimination on the basis of

race or national origin. In furtherance of that goal, NOW Foundation has supported related litigation and legislation, and has an ongoing interest in the availability of private rights of action to enforce civil rights laws and the regulations implementing them.

The National Partnership for Women & Families

The *National Partnership for Women & Families* is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. Founded in 1971 as the Women's Legal Defense Fund, the National Partnership has grown from a small group of volunteers into one of the nation's most powerful and effective advocates for women and families. Working with business, government, unions, nonprofit organizations, and the media, the National Partnership is a voice for fairness, a source for solutions, and a force for change. The National Partnership has devoted significant resources to combating sex and race discrimination in education and has filed numerous briefs *amicus curiae* in the federal circuit courts of appeal to advance women's opportunities in education.

NOW Legal Defense and Education Fund

NOW Legal Defense and Education Fund (NOW LDEF) is a leading national nonprofit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women and girls equal opportunity. For years, NOW LDEF has fought for educational equity for girls and the full enforcement of Title IX. NOW LDEF has appeared as *amicus* in numerous cases concerning girls' rights to be free from sex discrimination in education programs

under Title IX and joins this case because of its importance to ensuring equal opportunity in all educational programs.

Title IX Advocacy Project

The *Title IX Advocacy Project ("the Project")* is a youth empowerment and educational/legal advocacy organization that was founded in September 1994 to work with young people and their adult allies to promote gender equity in low-income middle schools and high schools in greater Boston. Currently, the Project focuses on eliminating 1) sexual harassment in school, 2) discrimination against pregnant and parenting students, and 3) gender inequity in school-based athletics programs, all of which violate Title IX, the federal law that prohibits gender discrimination in schools receiving federal funds.

Trial Lawyers for Public Justice, P.C.

Trial Lawyers for Public Justice, P.C. ("TLPJ") is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation and is dedicated to using trial lawyers' skills and strategies to advance the public good. Litigating throughout the federal and state courts, TLPJ prosecutes cases designed to advance civil rights and civil liberties, environmental protection and safety, consumers' and victims' rights, the preservation and improvement of the civil justice system, and the protection of the poor and powerless. TLPJ has litigated numerous discrimination cases under federal civil rights laws, including Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and federal agency regulations implementing these statutes. These cases demonstrate TLPJ's longstanding commitment to advancing equal opportunity in federally funded programs and activities. To ensure that such programs and activities conduct themselves in a non-discriminatory manner, TLPJ believes it is critical that they continue to be subject to private lawsuits

for engaging in conduct that has an unjustified disparate impact on minorities, women and/or other protected classes.

Women Employed

Women Employed is a national association of working women based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed believes that women are entitled to the same rights and opportunities as men, whether their interests lie in sports, arts, or business.

The Women's Law Project

The *Women's Law Project (WLP)* is a nonprofit public interest law firm located in Philadelphia, PA. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. Throughout its history, the WLP has worked to eliminate sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by federal civil rights laws. The WLP has a strong interest in the proper application of civil rights laws to provide appropriate and necessary redress to individuals victimized by discrimination.

The Women's Sports Foundation

The *Women's Sports Foundation* is a 501(c)(3) nonprofit educational organization dedicated to expanding opportunities for girls and women to participate in sports and fitness and creating an educated public that supports gender equity in sports. The Foundation distributes over $1 million per year in grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquires a year concerning Title IX and other women's sports related questions, and

administers award programs to increase public awareness about the achievements of women in sports.

APPENDIX B

Section 602 of the Civil Rights Act of 1964 is follows:

> Each Federal department and agency which is empowered to extend federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and

> Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

42 U.S.C. § 2000d-1.