

No. 25-183

IN THE
Supreme Court of the United States

THOMAS CROWTHER, ET AL.,
Petitioners,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM
OF GEORGIA, ET AL.,
Respondents.

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

**BRIEF OF *AMICUS CURIAE* LAMBDA LEGAL
DEFENSE AND EDUCATION FUND, INC.
IN SUPPORT OF PETITIONERS**

Gregory R. Nevins
Counsel of Record
LAMBDA LEGAL DEFENSE
& EDUCATION FUND, INC.
1 West Court Square
Suite 105
Decatur, GA 30030
(404) 897-1880
gnevins@lambdalegal.org
Counsel for Amicus Curiae

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INTERESTS OF THE *AMICUS*

Lambda Legal Defense and Education Fund, Inc.¹ is the nation's oldest and largest non-profit legal organization committed to achieving full recognition of the civil rights of LGBTQ people and people living with HIV through impact litigation, education, and public policy work. Combatting discrimination on the basis of sex is what we do, and access to the courts is how we do it. We have appeared frequently before this Court as party counsel and *amicus* in sex discrimination cases, including those under Title IX and Title VII. *E.g.*, *West Virginia v. B. P. J. by Jackson*, Nos. 24–43 and 24–38, 2026 WL 1868739, U.S. (June 30, 2026); *Bostock v. Clayton Cty.*, 590 U.S. 644 (2020). We have weighed in as *Amicus* previously when this Court has considered private rights of action, *see, e.g.*, *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 129 S. Ct. 788 (2009). *Amicus* has a particular interest in the issue of access to justice.

INTRODUCTION AND SUMMARY OF ARGUMENT

While there sometimes can be confusion about the basis for a court's ruling, usually a concise statement beginning with “we hold that . . .” will prevent confusion. Sometimes an explicit disclaiming of a different rationale is required. And then there is

¹ This brief was authored by the undersigned counsel with no contribution, substantively or financially, from anyone else, including any party or party counsel, beyond general charitable contributions to our organization, which defray the compensation paid to staff. *Amicus* did receive an in kind donation of printing services from Legal Printers, LLC.

Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005), which did both of those and explained that the disclaimed rationale would be contrary to a specific precedent. That did not stop the court below or the United States from offering up the disclaimed rationale as the basis for this Court’s holding in *Jackson*. And this isn’t *Jackson*’s first bout with such disrespect; this Court specifically called out a prior instance by a different court of appeals. *Amicus* respectfully requests that it do the same here.

Amicus Lambda Legal endeavors to minimize repetition of the excellent legal presentation of Petitioners and instead largely focuses on the dispositive nature of *Jackson* and the errors of the lower court in *Joseph v. Bd. of Regents of the Univ. Sys. of Georgia*, 121 F.4th 855 (11th Cir. 2024) (hereinafter “*Joseph*”), and the United States in their misplaced use of *Alexander v. Sandoval*, 532 U.S. 275 (2001), *Gonzaga v. Doe*, 536 U.S. 273 (2002), and *Jackson*. Specifically, *Amicus* provides the following points supporting reversal:

- *Jackson* actually decided the question presented over two decades ago, with its unequivocal holding that intentional discrimination in employment by a funding recipient gives rise to a private right of action under Title IX.
- *Sandoval* and *Gonzaga* did indeed articulate exacting standards for implied private rights of action, but *Joseph* completely ignores the most relevant, Title IX-specific parts of those opinions, which support Petitioners, as well as *Jackson*’s careful adherence to *Sandoval* and *Gonzaga*.

- *Joseph* and the United States attempt to resurrect the long-rejected method for interpreting statutes by ascertaining what serves the primary interest that motivated the law's passage—here, ending discrimination against students—and rejecting any application of the law that comports with its text but does not serve that primary motivating goal.
- *Joseph* and the United States depict *Jackson* as a case only about retaliation, not discrimination, the holding of which was based on the public policy of needing to protect people like Mr. Jackson, who complain about discrimination against students. In sharp contrast, the *Jackson* Court describes *Jackson* as a case about intentional acts of discrimination against employees, “on the basis of sex” because that is what the statute proscribes and that is what retaliation is. While public policy does favor antiretaliation protections, that could not and did not form the basis of the ruling.
- While the *Joseph* court criticizes other courts’ ignoring of *Sandoval*, *Joseph* itself accomplishes the remarkable feat of ascribing to *Jackson* a public policy rationale that *Jackson* not only explicitly disclaims but disclaims for the explicit reason that public policy rationales for implying private rights of action are forbidden by *Sandoval*.

In addition to establishing the dispositive nature of *Jackson*, the brief also advocates for this Court’s continued respect for *Jackson* and its other

precedents concerning Title IX private rights of action. The final section of the brief discusses the argument that Title VII precludes employment discrimination claims under Title IX. The brief does not repeat the fine presentation of Petitioners regarding this Court's repeated approval of overlapping claims and remedies under the two statutes. Instead, *Amicus* stresses that Title VII preclusion has occurred only when there was a true undermining of clear, compelling interests if the preclusive mechanism was not followed, using the experience of LGBTQ federal employees to illustrate how federal employment, the one particular instance of preclusion differs profoundly from this case and every other rejected effort seeking Title VII preclusion.

I. ***JACKSON* IS AN EMPHATIC,
UNEQUIVOCAL HOLDING THAT A TITLE
IX PRIVATE RIGHT OF ACTION EXISTS
FOR INTENTIONAL EMPLOYMENT
DISCRIMINATION.**

It is hard to imagine a clearer, more definitive declaration about whether there is a Title IX private right of action for intentional sex discrimination than this quote from *Jackson*: “[W]e hold that Title IX's private right of action encompasses suits for retaliation, because retaliation falls within the statute's prohibition of intentional discrimination on the basis of sex.” If retaliation earns a private right of action, but only because retaliation is discrimination, then it must be the case that intentional discrimination earns a private right of action. And it is also the case that *Joseph* is flat

wrong in stating that this Court “has never extended the implied private right of action under Title IX to claims of sex discrimination for employees of educational institutions.” *Joseph*, 121 F.4th at 867; *see also* SG Brief at 6. Mr. Jackson's claim was determined by this Court to be a “claim[] of sex discrimination” by an “employee of [an] educational institution[]” for which there was an “implied private right of action under Title IX.” *Id.* Hard stop.

Or more simply, one cannot legitimately argue against a private right of action for discrimination by distinguishing *Jackson* as a case about retaliation, when the precise holding of *Jackson* is that retaliation is discrimination under Title IX. The assertions by *Joseph* and the United States that this Court has not decided the question presented are the equivalent of saying that this Court has never upheld a tax to regulate conduct that Congress otherwise could not regulate, and dismissing *NFIB v. Sebelius* as not about a tax, but about an “individual mandate” to pay a financial penalty for not obtaining health insurance. *See Nat’l Fed. Of Ind. Bus v. Sebelius*, 567 U.S. 519, 575 (2012). Additionally, *Jackson*’s precise holding that a private right of action existed only because retaliation is a claim “for sex discrimination in employment” demonstrates just how untenable is the assertion by *Joseph* and the United States that *Jackson* does not even “speak to whether Title IX created an implied right of action for sex discrimination in employment.” 121 F.4.th at 867; SG Brief at 15.

II. JOSEPH IGNORES THE MOST RELEVANT, TITLE IX-SPECIFIC PORTIONS OF SANDOVAL AND GONZAGA, AND JACKSONS FAITHFUL ADHERENCE TO THOSE PRECEDENTS.

Joseph cites extensively from *Sandoval* and *Gonzaga*, specifically the stringent standards they establish regarding key aspects of the private right of action determination: the need for the cause of action to be provided by the statute Congress passed, the clarity with which it must be expressed, and the forbidding of policy concerns or regulatory provisions to be the basis for implying a cause of action if the statute did not intend to provide one. *See Joseph*, 121 F.4th at 864-66. Of course, the relevant point is not so much what *Sandoval* and *Gonzaga* say generally about private rights of action, but specifically how those decisions affect the Title IX private right of action determination. *Sandoval* involved Title VI and *Gonzaga* involved FERPA, the Family Educational Rights and Privacy Act of 1974. Reading *Joseph*, one would not know whether either *Sandoval* or *Gonzaga* mentioned Title IX.

A. The Extensive Discussions of Title IX in *Sandoval* and *Gonzaga* Strongly Support Petitioners Here.

Of course, we all know the answer to whether *Sandoval* and *Gonzaga* mentioned Title IX: they both did so, both extensively and in a way that strongly supports Petitioners here. Petitioners detailed exhaustively in their brief *Sandoval*'s confirmation of

a string of cases implying a private right of action for intentional conduct in violation of Title IX, with the clarifications that the conduct must violate the statute itself and not a regulation, and the hugely important qualification, as will be seen *infra*, that a right of action cannot be based on policy concerns, no matter how urgent and essential they are.

And *Gonzaga* said, in essence, that for those demanding standards set forth regarding rights-creating language and a focus on benefited classes, look to the language of Title IX for the definitive way to satisfy those tests. *Gonzaga* was practically effusive in depicting Title IX's text as a paragon of rights-creating language. "Title IX of the Education Amendments of 1972 create[s] individual rights because . . . [it is] phrased 'with an *unmistakable focus* on the benefited class.'" *Gonzaga*, 536 U.S. at 284, quoting *Cannon*, 441 U.S. at 691 (emphasis added by *Gonzaga*). In the footnote to that sentence, the Court declared Title IX's language, "*No person* in the United States *shall*, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance," to be the proper "sort of explicit 'right- or duty-creating language.'" 536 U.S. at 284 n.3. Additionally, *Gonzaga* held that the statute at issue there, FERPA "lack[s] the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights, . . . [u]nlike the individually focused terminology of Titles VI and IX ('No person . . . shall . . . be subjected to discrimination')." *Id.* at 287 (cleaned up); *See also id.* (approvingly quoting *Cannon*'s passage that "drafting Title IX with an unmistakable focus on the benefited class" was a "reason to infer a

private remedy in favor of individual persons”) (*quoting Cannon v. University of Chicago*, 441 U.S. 677, 691 (1979)). In sum, *Sandoval* and *Gonzaga*, when read fully, reinforce *Jackson’s* holding that Title IX creates a private right of action for intentional discrimination on the basis of sex.

B. *Joseph* Completely and Conveniently Ignores *Jackson’s* Fidelity to the Principles Set Forth in *Sandoval* and *Gonzaga*.

If ignoring Title IX-specific language of *Sandoval* and *Gonzaga* is bad, considerably worse is ignoring an actual application of those principles in a later Title IX case, such as *Jackson*. Still worse is excoriating your fellow lower courts for relying on *Jackson* instead of *Sandoval* and *Gonzaga* while never mentioning that *Jackson* adhered carefully and explicitly to the principles in those cases. *See Joseph*, 121 F.4th at 867 (“our sister circuits that have allowed claims of sex discrimination in employment under Title IX to proceed have failed to grapple with the inquiry required by *Sandoval* (and later *Gonzaga*); they instead have relied primarily on *Bell* (and later *Jackson*) to hold that Title IX prohibits employment discrimination.”)

In finding a private right of action under Title IX, the *Jackson* Court ruled consistently with *Sandoval* instead of deferring to a regulation as justification for the holding, as two circuit courts incorrectly had done. The two circuit court decisions that had upheld a Title IX cause of action for retaliation had relied on 34 C.F.R. 100.7. *Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242, 248 (5th Cir. 1997); *Preston v. Com. of Va. ex rel. New River Cmty.*

Coll., 31 F.3d 203, 206 n2 (4th Cir. 1994) (“34 C.F.R. § 100.7(e) (1993), prohibits retaliation for filing a claim of discrimination” and “is reasonably related to the purpose of Title IX and therefore is entitled to deference by this court.”). And of course, few could dispute the overwhelming societal benefits to providing retaliation protections to those who alert schools to sex discrimination, especially given that such notice is often essential to establishing a Title IX violation. But, under *Sandoval*, such rationales were traps: a private right of action cannot be based on a regulation alone, nor on manifest need. *See Sandoval*, 532 U.S. at 287 (congressional intent to create a private right of action is essential, “no matter how desirable that might be as a policy matter, or how compatible with the statute.”).

Justice O’Connor, who was in both the *Sandoval* and *Gonzaga* majorities, authored the opinion in Mr. Jackson’s favor. That opinion met head on the arguments about reliance on regulations instead of the statute and on public policy grounds. As to each argument, *Jackson* responded with two points: an explicit agreement legally that regulations or public policy would be an improper basis for implying a private right of action, and a vehement disclaiming of any such reliance on either a regulation, *see* 544 U.S. at 178 (“We do not rely on regulations extending Title IX’s protection beyond its statutory limits; indeed, we do not rely on the Department of Education’s regulation at all, because the statute itself contains the necessary prohibition”), or on even the desperate need for retaliation protections for the successful operation of the statute. *Id.* at n.2 (“We agree with Justice Thomas that

plaintiffs may not assert claims under Title IX for conduct not prohibited by that statute. . . . We interpret Title IX's text to clearly prohibit retaliation for complaints about sex discrimination”).

**III. THIS COURT SHOULD CONTINUE TO
ADHERE TO *JACKSON*'S HOLDING AND
REJECT ATTEMPTS TO ASCRIBE A
NAKED POLICY RATIONALE TO THE
JACKSON COURT.**

Not long after *Jackson*, the First Circuit considered whether the Age Discrimination in Employment Act, with a similarly broad prohibition on discrimination, covered retaliation claims. That court incorrectly rejected analogies to *Jackson* and held against ADEA retaliation claims, saying “the Supreme Court premised its holding in *Jackson* partially on the fact that Title IX prohibits discrimination in educational institutions,” and the protection of “teachers and coaches” was wise because they “are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators.” *Gomez-Perez v. Potter*, 476 F.3d 54, 58 (1st Cir. 2007), *rev'd*, 553 U.S. 474, (2008), *quoting Jackson*, 544 U.S. at 181.

This Court reversed the First Circuit and recognized ADEA retaliation claims. *Gomez-Perez v. Potter*, 553 U.S. 474 (2008). Justice Alito, writing for the Court, also specifically called out the lower court’s incorrect depiction of *Jackson*’s holding as based on a policy rationale, saying that the lower court’s policy “argument ignores the basis for the decision in *Jackson*. *Jackson* did not hold that Title IX prohibits

retaliation because the Court concluded as a policy matter that such claims are important. Instead, the holding in *Jackson* was based on an interpretation of the “text of Title IX.” *Gomez-Perez*, 553 U.S. at 484, *citing Jackson*, 544 U.S. at 173, 178.

Joseph’s ascribing a policy rationale to *Jackson* is more extensive and problematic than what the First Circuit did in *Gomez-Perez*. *Joseph* not only ruled against a private right of action for intentional employment discrimination, it also ruled that the right of action for retaliation in *Jackson* did not apply when the plaintiff alleges retaliation based on his participation in an investigation of his conduct. *Joseph*, at 121 F.4th at 869. *Joseph* actually cited *Jackson* in purported support of its ruling, attributing a naked “protecting students” policy rationale as the basis for *Jackson*’s holding: “Because Title IX’s remedial scheme depends in large part on people being willing to report Title IX violations, those reporters are owed protection under the statute.” *Id.* And *Joseph* was not merely citing benefits from retaliation protections; it specifically held that a retaliation claim does not exist if it does not provide those benefits, rejecting Crowther’s retaliation claim because “That situation bears none of the features of the *Jackson* implied right of action: it does not protect students, and it does not encourage reporters to come forward.” *Id.* at 870.

The United States also depicts the *Jackson* holding as being based on protecting students: “*Jackson* held only that “Title IX provides a private right of action for *retaliation* for an employee’s complaint about discrimination *against students*.” SG Brief at 16, *quoting Joseph*, 121 F.4th at 866 (first

emphasis in *Joseph*; second emphasis added by SG); *see also* SG Brief at 13 (Title IX’s “language refers most directly to students, who are the primary participants in and beneficiaries of educational programs.”).

Moreover, a quick look at the case *Joseph* cites in support of its cutting back on antiretaliation protections provides a glimpse of how extensive the problem is with lower courts attributing a policy rationale to *Jackson*: “*Jackson* makes clear that Title IX retaliation claims must arise from a protected activity, like complaining of sex discrimination.” *Du Bois v. Bd. of Regents of Univ. of Minnesota*, 987 F.3d 1199, 1204–05 (8th Cir. 2021). Of course, “protected activity” is nowhere in the *Jackson* opinion, nor, more importantly, in the text of Title IX.

It is sufficient to decide this case by reaffirming *Jackson*’s actual holding identifying a Title IX private right of action for intentional employment discrimination on the basis of sex. But *Amicus* submits that it may be advisable, as it was in *Gomez-Perez*, to remind lower courts of the error of viewing *Jackson*’s holding as being based on policy rationales.

IV. TITLE VII DOES NOT DISPLACE THE TITLE IX RIGHT OF ACTION FOR EMPLOYMENT DISCRIMINATION.

Petitioners cogently explain why “overlap” between lawsuits and remedies under Title IX and under Title VII are not problematic under this Court’s precedents. *Amicus* addresses the discrete situation where this Court held that Title VII does provide the exclusive remedy for employment discrimination:

federal employment. There are real, tangible benefits that come from requiring federal workers to proceed through the EEOC's "federal sector" administrative process, benefits that flow both to federal workers, federal agencies, and the EEOC as the agency primarily charged with ensuring equal employment opportunity within the federal government writ large.

In ruling in favor of Title VII exclusivity for federal employment, *Brown v. Gen. Servs. Adm'n*, 425 U.S. 820 (1976) notes that "Section 717(c) permits an aggrieved employee to file a civil action in a federal district court to review his claim of employment discrimination." *Id.* at 832. That provision's primary importance lies in the fact that no such right to go to court is afforded the federal agency. The unilateral right of the employee to reject the final decision of the administrative process helps prevent lowball determinations and promotes fairness in a system where both the employer and those making the determination regarding discrimination are federal workers who report to higher federal workers. And the fairer, higher quality determinations provide a great benefit to the system, as knowledgeable and experienced decision-makers prepare determinations that can be important precedents in and of themselves, or lead to such precedents if appeals are made to the Office of Federal Operations, or ultimately to the full Commission.

That process has led to concrete benefits for LGBTQ federal workers. A number of years before this Court's landmark decision in *Bostock* ruled that Title VII covers discrimination based on sexual orientation and transgender status, the EEOC had made the same legal determination, on similar bases

in two landmark administrative rulings, *Complainant v. Foxx*, EEOC Appeal 0120133080, 2015 WL 4397641 (EEOC July 15, 2015) (sexual orientation); *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012) (gender identity and transgender status).

In sum, *Brown's* uniqueness in Title VII preclusion caselaw makes sense. The federal sector administrative process provides real benefits that warrant exclusivity for federal workers, and that do not justify it in other contexts.

CONCLUSION

Congress made the commitment that “no person” would be subject to discrimination and smiled when this Court made that promise real and interpreted “no person” to mean “no person.” While unanimity on everything that fits within Title IX’s scope of discrimination on the basis of sex remains elusive, we long ago achieved consensus on the consequence: that the targets thereof get their day in court. The judgment below should be reversed.

Respectfully Submitted,

/s/ Gregory R. Nevins

Gregory R. Nevins

LAMBDA LEGAL DEFENSE

& EDUCATION FUND, INC.

1 West Court Square, Suite 105

Decatur, GA 30030

gnevins@lambdalegal.org

(404) 897-1880

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