GRANTED

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**

# REPLY BRIEF FOR PETITIONERS


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## REPLY BRIEF FOR PETITIONERS

After two rounds of briefing, this much is clear. In enacting Title VI in 1964 under the Spending Clause, Congress did not expressly establish a disparate-impact standard of care and did not expressly create a private right of action. And while numerous federal agencies have established disparate-impact standards in implementing Title VI, not one of them has created a private cause of action to enforce this or any other standard. To prevail on this record, respondents thus must convince the Court to embrace two innovations that it has never directly considered—and accepted—before. The first is the contention that Congress may create private-party causes of action against States, as opposed to other entities, *see Cort v. Ash*, 422 U.S. 66 (1975), by implication rather than by explicit design. The second is the claim that federal agencies may do so themselves when the National Legislature has not.

The former theory cannot tenably co-exist with the clear-statement requirements of the Court's Spending-Clause jurisprudence and the principles that inform it. As this case comes to the Court, all that allows the Federal Government to dictate the number of foreign languages in which States must offer their driving-license examinations is a State's express consent to these extra-constitutional duties. Yet only a most fictional form of consent exists when federal courts may infer causes of actions, standards of care and other requirements to be named later that the Congress itself did not explicate.

The latter theory has no pedigree whatsoever. In case after case, the Court has gone to great lengths in explaining why the inter-branch comity between the National Government and the States requires *Congress* to be unambiguous in regulating core state functions and in permitting private parties to sue States in federal court. Here, however, it is not just Congress that has been silent about the creation of this disparate-impact private right of action. Not even the federal agencies themselves—all 40 of them, U.S. Br. 3—have

explicitly said that private parties may sue to enforce these regulations. Accordingly, even if Congress could delegate to federal agencies authority to create private rights of action against States, the agencies exercised no such authority here. On this ground alone, respondents' claim should fail.

Nor, even on their own terms, do respondents' efforts to extend *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and *Cort v. Ash* to private rights of action against States succeed in this setting. It was one thing in *Cannon* to say that Congress could imply an intentional-discrimination right of action in spite of the extensive oversight requirements that Congress imposed on the agencies' implementation of Title IX. It is quite another to allow these same agencies to innovate the very theory of care that this private right of action enforces. And not even the most muscular interpretation of *Cort v. Ash*—which starts with "the statute" and ends with whether the cause of action is in an area "traditionally relegated to state law," 422 U.S. at 78—can create an implied private right out of Title VI to establish the number of foreign languages in which States must offer driving-license examinations.

1. Of all the principles auditioning to govern this case, the most compelling start with the source of authority by which the Federal Government claims supervisory power over these state licensing examinations. Neither set of respondents claims plenary authority to oversee this everyday exercise of the local police power, whether under Section 5 of the Fourteenth Amendment or under the Commerce Clause. All instead concede that this exercise of authority rises or falls under Congress's indirect power to impose extra-constitutional obligations on the States through the spending power.

Resolution of this case, then, starts not with the traditional Supremacy Clause assumption that the Federal Government has direct authority over this area, but with the assumption that the States remain free to consent to this extra-constitutional assertion of power on their own terms. Like all waivers of



constitutional guarantees, as we have shown (Pet. 21-23), such claims of consent must be narrowly construed. *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) ("courts indulge every reasonable presumption against waiver of fundamental constitutional rights") (quotation omitted); *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) ("[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights"). When Congress thus "desires to condition" funding (*South Dakota v. Dole*, 483 U.S. 203, 207 (1987)) on the States' consent to federal authority to regulate beyond Article I's "enumerated legislative fields," *id.* at 207 (quotation omitted), and beyond the "Tenth Amendment limitation on congressional regulation of state affairs," *id.* at 210, "it 'must do so unambiguously.'" *Id.* at 207 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). That requirement, case law makes clear, applies whether Congress attempts to regulate core local police powers, as in *South Dakota v. Dole* (setting national minimum-age requirements for drinking), whether it attempts to make the States amenable to suit, as in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (trying to expose States to suits under the Rehabilitation Act), or whether it tries to do both—as here by trying to supervise state driving-license examinations *and* by exposing non-consenting States to private-party enforcement actions.

Respondents do not challenge these core premises. They do not contest that only the Spending Clause may sustain this federal supervision of these traditional state activities. They do not contest the existence of a clear-statement requirement accompanying this source of authority. And they do not contest that Congress failed in 1964 unambiguously to create this cause of action in Title VI.

Instead, they argue (Resp't 41) that this duty of clarity extends only to "a state's substantive obligations," not to "the

existence of a cause of action." *See* U.S. 32-34; Resp't 37-41. But the Court's Spending-Clause cases say no such thing. They require Congress to state all conditions upon which States receive federal funds "unambiguously" so that the States are "'knowingly[] cognizant of the consequences of their participation.'" *South Dakota*, 483 U.S. at 207 (quoting *Pennhurst*, 451 U.S. at 17). One such consequence to be sure is the standard of care that States must follow. But the other consequence, no less essential in scope, is how that standard may be enforced.

From the time of Blackstone forward, legal obligations from common law property to tort have gone hand in hand with the circumstances under which they may be enforced. And, indeed, most of the Court's clear-statement cases in the federalism arena deal not with the duty of care but with how and where that duty may be enforced. Consider *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), and *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985). Both considered whether States could be sued in federal court, not whether States ultimately had a legal obligation to comply with 42 U.S.C. § 1983 in the one case or the Rehabilitation Act in the other. *See also National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582 (1995); *Employees of Dep't. of Pub. Health & Welfare v. Missouri Dep't of Pub. Health & Welfare*, 411 U.S. 279 (1973). The same is true regarding the States' amenability to suit by the Federal Government but not by private individuals; the issue there is not one of duty but of who may bring the claim. *United States v. Texas*, 143 U.S. 621 (1892). In the end, not just the obligations themselves, but the effects of allegedly violating them, are the types of "consequences" that the Court requires Congress to make the States "knowingly[] cognizant" before it will assume that they have consented to them. *South Dakota*, 483 U.S. at 207. *See United States v. Heth*, 7 U.S. (3 Cranch) 399, 409 (1806) (Johnson, J.) (resolving ambiguity "most strongly '*contra proferentem*'"); *id.* at 413 (Paterson, J.)



("the words of a statute, if dubious, ought, in cases of the present kind, to be taken most strongly against the law makers").

Absent an unambiguous description of the standard of care, together with an express description of the parties who may sue and be sued, it thus is impossible to say that the States have consented to this exercise of federal power and impossible to say that the imposition of extra-constitutional duties is permissible. The very "legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms" of the funding. *Pennhurst*, 451 U.S. at 17. No such acceptance occurred here.

2. Nor may Congress circumvent this rigorous requirement by claiming (U.S. 32) that Alabama was "on notice" that its receipt of federal funds came with legal obligations—including the obligation to follow the Title VI regulations—and that this notice alone suffices to satisfy the *Pennhurst* clear-statement requirement. Yet again, notice of legal obligations is one thing; notice of the manner in which they may be enforced—whether by federal agencies or private parties—is quite another.

Two Terms ago, the Federal Government promoted a similar theory of notice in trying to make an equivalent argument of consent against the States. At issue in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), was the federal Lanham Act, and as here the question was not whether the States had a duty to comply with the Act's standard of care, but rather whether that duty could be enforced through private rights of action in federal court. In arguing that the States had "impliedly" or "constructively" consented to such suits in federal court, *id.* at 676, the Federal Government argued that the States did so by entering into commercial areas of interstate activity covered by the Lanham Act after being on notice of the

Act's substantive and enforcement terms. Not so, the Court held:

> There is a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity. In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. That is very far from concluding that the State made an altogether voluntary decision to waive its immunity.

527 U.S. at 680-81 (quotation omitted). If a State does not waive its immunity from suit by violating the Lanham Act after being on "notice" of its terms, surely it does not consent to suit by accepting federal funding after being on "notice" of the of the Title VI regulations. The Court's rejection of the one theory of constructive consent necessarily defeats the other.

Nor are respondents' case citations to the contrary. Not one of them involves claims against States or state officials brought in the name of enforcing Spending-Clause legislation. One is a claim against a county, *see Franklin v. Gwinnett County Public Schs.*, 503 U.S. 60 (1992); another is a claim against the Federal Government in which relief was denied, *see Lane v. Pena*, 518 U.S. 187 (1996); and the last is a statutory claim against a State arising from an exercise of Congress's enforcement power under the Fifteenth Amendment, *see Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). These cases provide a slim reed upon which to rest the broad assertion (U.S. 33) that "the Court has long accepted that a private right of action may be implied against" States.

3. The private respondents next argue (Resp't 39-40) that the State's position "demonstrably proves too much," because if it were accepted, "*any* implied cause of action would



be impermissible." But this argument does not maintain that *all* implied causes of action should be barred, just those against States. And that is as the Court's cases indicate it should be. How else does one fairly ensure that the extra-constitutional requirements that the Spending Clause allows Congress to impose on States properly stem from actual, as opposed to constructive, consent? The *sotto voce* implications and inferences that *Cort v. Ash* requires in the end have no place in the context of private rights of action against States arising under Spending-Clause legislation.

Far from causing a sea change in the law (*see* Resp't 8), this is a view that the Congress has long appreciated and long accepted. Not only do recent laws expressly create causes of action against States when that is what the National Legislature meant, *see, e.g.*, Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*, but since 1964 Congress has appreciated this very point in the context of Title VI and related statutes. One of the private respondents' principal arguments confirms this development. In claiming (Resp't 32-33) that the Rehabilitation Act Amendments of 1986 expressly make States amenable to suit by private individuals for violations of Title VI, Title IX, and Section 504 of the Rehabilitation Act, *see* 42 U.S.C. § 2000d-7, *Franklin v. Gwinnett County Public Schs.*, 503 U.S. at 72, respondents ultimately prove our point—that Congress, like the Court, appreciates that States are not traditional civil defendants and before they may be made amenable to suit in the Spending-Clause context, the obligation and private right of action must be expressly identified. Notably, however, the 1986 Rehabilitation Act Amendments say nothing at all about private rights of action to enforce agency regulations. They specifically refer only to "suit[s]" under "Federal statute[s]," and "suit[s] against a State for a violation of a statute." 42 U.S.C. § 2000d-7(a)(1)&(2). Both sets of respondents conspicuously fail to respond to, much less rebut, this component (Pet. 46) of our opening brief.

4. All of this leads to the real consequence of accepting respondents' arguments—not a preservation of the implied right of action doctrine but its novel extension to agency regulations. Not one of the applicable disparate-impact regulations, as we pointed out in our opening brief (Pet. 33), expressly creates a cause of action against States or for that matter against anyone else. This deficiency not only undermines the contention that the State consented to this cause of action by accepting federal funds, but more fundamentally confirms the ambition of respondents' position—a desire to extend *Cannon v. University of Chicago* to claims against States and to private rights of action implied not by Congress but by federal agencies. This sudden development has no support in precedent, and would positively undermine the constitutional justification that makes Congress's extensive legislation under the spending power otherwise "legitima[te]." *Pennhurst*, 451 U.S. at 17.

Attempting to justify this extension of precedent, the Federal Government starts by arguing (U.S. 14) that the question should not be analyzed under the "somewhat restrictive" implied-right-of-action test followed "today" but should be gauged by the standards of statutory construction embraced in 1964. It then argues (*id.* at 15) that in 1964, "courts had consistently recognized implied private rights of action to enforce not only statutory prohibitions, but also regulatory provisions."

This invitation to step back in time deserves short shrift. For one, this is not a neutral principle but a one-sided one. In making this argument, the government shows no inclination to set the clock back on other congressional expectations—for example, the number of foreign languages in which licensing examinations ought to have been given, or were given, in 1964. Recall that the 1964 legislative history says utterly nothing about the multi-lingual policy that the government now wishes to convert into a cause of action in 2001. For another, it is



unclear why 1964 rather than say 1986 or 1987 ought to be the appropriate benchmark, since Congress also amended Title VI (as respondents elsewhere argue) in these later years. For still another, the *Pennhurst/South Dakota* rule of construction has constitutional underpinnings—both in its legitimization of Congress's exercise of the spending power and in its presumption that Congress will not lightly regulate core state functions. *See Gregory v. Ashcroft*, 501 U.S. 452 (1991). Time does not alter the Constitution's presumptions against altering the Federal-State balance.

More fundamentally, respondents err in suggesting that Congress showed more willingness in 1964 to expose States to implied private rights of action under administrative regulations than it has today. The one case against a State that the Federal Government cites, *see Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), involved a right of action under a statute, not a regulation. And the government's other efforts to bolster this point turn on securities law actions against private parties. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). But this action, quite simply, is not a securities case. It involves state defendants, not private defendants; it involves the spending power, not the power to regulate interstate commerce; and it involves an administrative scheme in section 602 that implies the non-existence of such private rights of actions rather than their existence.

Even on their own terms, moreover, these securities cases do not allow the kind of freestanding private rights of action that respondents suggest. Just six years ago, in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), the Court confirmed the point in examining a claim under the most-frequently invoked rule issued by the Securities Exchange Commission—Rule 10b-5. Far from blessing rights of action developed by agencies rather than by

Congress, the Court unequivocally reasoned that in considering "the scope of conduct prohibited by section 10(b), the text of the statute controls our decision." *Id.* at 173. "Of course," the Court observed, "a private plaintiff now may bring suit against violators of section 10(b). But the private plaintiff may not bring a 10b-5 suit against a defendant for acts not prohibited by the text of section 10(b). . . . We have refused to allow 10b-5 challenges to conduct not prohibited by the text of the statute." *Id. See id.* at 177 ("It is inconsistent with settled methodology in section 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text."). Not only did the Court decline to look at the state of statutory construction in 1934 (when section 10(b) was enacted), *compare id.* at 195 (Stevens, J., dissenting), and not only did it refuse to rely on the SEC's view that such a cause of action should be allowed, *compare id.* at 199, but it also prohibited exactly the type of cause of action sought here—a "challenge[] to conduct not prohibited by the text of the law" under the guise of an agency regulation. Though Alabama relied on *Central Bank* and the above language in its opening brief (Pet. 27), neither of the respondents even acknowledges the contention. To the extent federal securities law offers any instruction regarding the resolution of this case, *Central Bank* supplies far more insight than any other case.

5. Still more unavailing are respondents' efforts to establish that the Court has already recognized such rights of action under its Spending-Clause precedents. The Court, to start with, has not done so under Title IX. *Cannon* was a discriminatory-intent case, and neither holds nor suggests that it would permit private rights of action under administrative regulations. That the private respondents feel obliged to make the unremarkable observation (Resp't 12) that "nothing in" the "phrasing" of the decision indicates that it was "limited to violations of" the statute, as opposed to the regulations, only confirms the point. Instead of ushering in a different view, *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459



(1999), involved "a private action under Title IX," *id.* at 462, in which the Court ultimately ensured that the Title IX regulations were read in a way that "accords with the teaching" of two decisions of the Court construing the relevant *statutory* language, *id.* at 468. That is all Alabama asks here.

The section 504 cases follow a similar path. *Alexander v. Choate*, 469 U.S. 287 (1985), *rejected* the private right of action sought there and ultimately concluded that "the regulations do not in fact support respondents' action." *Id.* at 294 n.10. More, *Alexander* recognized what respondents have not—that section 504 of the Rehabilitation Act, unlike Title VI, did reach "action that discriminated by effect as well as by design," and thus "resisted" "too facile an assimilation of Title VI law to Section 504." *Id.* at 293 n.7, 297. Likewise, *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273 (1987), did not involve a State and found (*id.* at 286 n.15) that "both" the statute and regulations supported its interpretation that the statutory term "handicapped" covered persons with a contagious disease. That is a far cry from this case, where the statute bars only intentional discrimination and claimants seek authority to infer a cause of action based on disparate effects. Of course, in none of these cases did anyone object to the creation of an implied private right of action to enforce an agency regulation.

6. That leads to the Title VI precedent, which is far less developed in recognizing implied rights of action than either the Title IX or Section 504 case law. Respondents do not, and cannot, plausibly rebut two reasons why *Lau v. Nichols*, 414 U.S. 563 (1974), fails to advance their claim. The first is that *Lau* "rel[ied] solely on section 601" in invalidating a school program that simultaneously compelled Chinese-speaking students to attend public school and refused to supply all of them with "special English instruction." *Id.* at 564 n.1 & 566. The second is that section 601 bars only what the Fourteenth Amendment bars, which is intentional discrimination. *See*

*Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Washington v. Davis*, 426 U.S. 229 (1976). Under these circumstances, one of two things is true about *Lau*: Either the decision is no longer good law because it mistakenly concluded that section 601 covers disparate "effect[s]," 414 U.S. at 568, or it implicitly turned on a finding of intentional discrimination. Either way, the decision does not help respondents. And given *Lau*'s failure explicitly to consider the scope of section 601, any references to section 602 and the regulations in the decision—all in a case in which no one asked whether an implied right of action could exist and whether an agency rule could create such a right of action when section 601 did not—are equally unhelpful.

Like *Lau*, *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983), raises far more questions than it answers. It, too, was not a claim against a State and for that reason alone *Guardians* and *Lau* do not support this claim. Above all, however, *Guardians rejected* the private right of action that plaintiffs brought. Any effort to read into the six opinions a controlling theory for *recognizing* a private right of action therefore is necessarily wishful. The same is true of *Bazemore v. Friday*, 478 U.S. 385 (1986), which did not remotely address whether an implied right of action existed to enforce Title VI regulations and which at all events *rejected* the plaintiffs' claim.

Surely, moreover, the kind of casual opinion reading that would conclude *Guardians* and *Bazemore* (or for that matter *dicta* from any non-Title VI case) established a private right of action to enforce disparate-effects regulations is one that would also have to conclude that this principle was no longer good law by 1992. That year, in *United States v. Fordice*, 505 U.S. 717(1992), the Court addressed a claim against a State, not a city, and the 8-1 decision unequivocally stated that "[o]ur cases make clear . . . that the reach of Title VI's protection extends no further than the Fourteenth Amendment." *Id.* at 732 n.7.



For this reason, the Court rejected claimants' reliance on an "affirmative action" regulation that purported to require more than the Fourteenth Amendment requires. *Fordice*'s broad statement about the reach of "Title VI," which repeats equally broad statements about Title VI in *Bakke*, was anything but casual. It would have dramatically changed the dynamics, if not the outcome, of both *Fordice* and *Bakke* to permit private parties to bring disparate-effect claims under the Title VI regulations.

Whatever principles of opinion reading would allow respondents to argue for victory under *Guardians* and *Bazemore* necessarily augur defeat under *Fordice* and *Bakke*. In the end, the public and private respondents do not further their defense of the Eleventh Circuit's decision by attacking one of its central conclusions (Pet. App. at 42a)—that this "Court has yet to squarely answer the question" whether "Title VI creates a private implied cause of action" against States "to enforce the disparate impact regulations promulgated under Section 602." On that point, the lower court was correct, and that is precisely why the question presented must be assessed based on the Court's traditional Spending-Clause principles and its traditional reluctance to presume that Congress would regulate core state functions and expose non-consenting states to private rights of action without expressly saying so.

7. Nor, for these same reasons, can respondents plausibly argue (Resp't 32-37, U.S. 41-47) that Congress "ratified" the existence of an implied right of action under the disparate-impact regulations. To the extent anything has been ratified, it is that private rights of action exist under the statute, not under the regulations, and that Congress knows the difference. *See* The Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7. That is why respondents carefully say (Resp't 33) that the Rehabilitation Act Amendments of 1986 and the Civil Rights Restoration Act of 1987 "presumptively encompass[]" rights of action based on the regulations, as

opposed to the statute. Yet, in the absence of a pre-existing holding accepting the point, as opposed to one rejecting it, *see Guardians*, it is sheer fiction to claim victory from either enactment. The former was a response to *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), which held that Congress did not explicitly abrogate the States' Eleventh Amendment immunity through a *statute*, and the latter was a response to *Grove City College v. Bell*, 465 U.S. 555 (1984), which limited the types of "program or activity" under the *statute* that must comply with Title VI and related statutes when an entity receives federal funds. It is equally contrived to claim that Congress ratified lower-court decisions in 1986 and 1987 as the lower courts were not of one mind on the point. *See, e.g., Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983) (finding an open question whether a private right of action exists under the Title VI disparate-impact regulations).

These elaborate fictions turn to farce when respondents proceed to seek ratification (Resp't 34; U.S. 46) through the individual statements of legislators, not even collective committee reports, over the last 36 years. Even a brief attempt at this exercise confirms that there are as many unfriendly faces as friendly ones regarding the point respondents are trying to make. *See, e.g.*, 110 Cong. Rec. 2467 (1964) (Rep. Gill); *id.* at 6562 (Sen. Kuchel); *id.* at 7065 (Sen. Keating); *see generally Bakke*, 438 U.S. at 381, 385-86 (White, J., concurring in part and dissenting in part). The view that these two Acts and their legislative history "ratified" rights of action under disparate-impact regulations ultimately requires far more implications and inferences than even *Cort v. Ash* does.

8. Separate and apart from the fact that claimants brought this action against a State, as opposed to a private party or municipal corporation, their effort to infer a right of action based on agency regulations founders on the terms of Title VI itself. As we showed in our opening brief (Pet. 24-30), Congress in section 602 of the Act established elaborate



procedural restrictions regarding when and how federal agencies could enforce the anti-discrimination mandate of section 601. These restrictions include the explicit proviso "[t]hat 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." 42 U.S.C. § 2000d-1. And the "no such action" mandate applies by its terms both to "termination[s]" of funding and to "any other means authorized by law" to obtain compliance with section 601. *Id.*

In this instance, all agree that neither the federal Department of Transportation nor the Department of Justice "advised" Alabama that it had failed to comply with Title VI and did not seek to obtain "compliance" through "voluntary means." Nor have the departments given the district court (U.S. 32) "the benefit of agency expertise." At no point did either agency explain to the federal district court for example why Alabama's licensing requirements violate Title VI while the National Government's extensive English-proficiency requirements do not. To date, the record still awaits an explanation why a tenth grade level of English proficiency is invalid in Alabama for driving licenses but an "elementary" level of English proficiency is valid in the entire United States for naturalization purposes. *See* 8 U.S.C. § 1423(a)(1); 8 C.F.R. § 312.1(c)(2). *See also* 8 U.S.C. § 1423(a)(2) (requiring "a knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States"). The modest difference between the two standards hardly explains why one amounts to discrimination on the basis of national origin and the other does not. Still less does it do so when one considers that the Alabama requirement is at least a generally-applicable one while the Federal requirement applies *only* to individuals on the basis of their national origin.

To all of this, claimants respond that the section 602 notice and voluntary compliance requirements apply just to terminations of funding, not to other enforcement actions. But the "no such action" language of section 602, to repeat, applies to "termination[s]" of funding *and* to "any other means authorized by law" to obtain compliance with section 601. *Id.* The language of the statute cannot sustain this distinction.

Nor does *Cannon* support a contrary interpretation. *Cannon*, it is true, found an implied right of action under Title IX, which in many respects parallels section 601 and section 602 of Title VI. But the decision inferred a private right of action directly under the equivalent of section 601, not under the equivalent of section 602. That is to say, it was a claim arising directly from the intentional-discrimination mandate of the statute itself. That cause of action, however, is a far cry from an implied right of action arising from regulations promulgated by the very agency that Congress instructed could not enforce the Act save when it complied with Congress's notice and voluntary compliance prerequisites. It would be surpassingly strange to place these extensive enforcement restrictions on a federal agency, then allow that same agency to avoid every one of them by creating a new right of action not established by section 601. A Congress concerned with the former would not lightly allow the latter.

Because *Cannon* concerned a right of action implied directly under the statutory anti-discrimination standard, as opposed to an administrative one, it offers no support for a contrary rule. Indeed, one might fairly ask whether the sharply-divided decision in *Cannon* would have come out the same way had the majority been forced to shoulder not just the burden of justifying an implied right of action under the statute's intentional-discrimination mandate but under an agency-created disparate-impact standard as well. To sustain that conclusion, the Court would have been forced to embrace an interpretation recognizing the role of a "private attorney



general" (*Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (per curiam)) and suddenly a "private legislator" too.

9. The Federal Government offers no response to the contention (Pet. 37-40) that these regulations do not satisfy even the bare minimums for implying a right of action under *Cort v. Ash.* Indeed, they only mention the case (U.S. 14) to say that the Court should not follow "the somewhat restrictive test set forth in *Cort v. Ash.*" The private respondents, for their part, offer (Resp't 31-32) only a brief rejoinder to the point. And neither set of respondents offers *any* response to Alabama's reliance (Pet. 35-37) on *Suter v. Artist M.*, 503 U.S. 347 (1992), and its indication that even *Cort v. Ash* requires the "unambiguous[]" (503 U.S. at 356, 363-64) (quotation omitted) creation of a cognizable right before it may be enforced against State defendants. *Suter* is nowhere mentioned in either brief.

No satisfactory answer, we respectfully submit, exists to these points. First, Title VI offers little support for the view that it "create[d] a federal right in favor" of those who are not yet proficient in English, and even less does it do so unambiguously. *Cort*, 422 U.S. at 78. It has never been the case, whether in 1964 or today, that generally-applicable English-proficiency requirements unconstitutionally discriminate on the basis of national origin. It therefore is difficult to say that Title VI, whose substantive anti-discrimination provision parallels the Constitution, clearly created a right in favor of respondents. Second, in light of the extensive administrative enforcement scheme, every "indication of legislative intent" diminishes the claim that these same agencies may imply a right of action that Congress has not. *Id.* Third, it is not "consistent with the underlying purposes of the legislative scheme" to infer such a remedy -- if for no other reason than nothing in the legislative record suggests either that the prohibition of such English-proficiency requirements was intended or that lawsuits regarding such requirements were

to be encouraged. *Id.* Such a legislative design also makes scant sense in light of the extensive English-proficiency requirements that the United States and all 50 States have, and which are presumably a private lawsuit away from threatened invalidity if respondents' position is sustained. *See* Pet. Appendix. Fourth, English-proficiency requirements and driving-license requirements are precisely the kinds of matters that have been "traditionally relegated to state law" rather than to "cause[s] of action based solely on federal law." *Id.*

In response, claimants tepidly argue (Resp't 31-32) that the regulations and agency intent (as opposed to the statutes and congressional intent) satisfy each of these inquiries. The only citation offered (*id.*) to support this elision of legislative and administrative design is *Cannon*, but as noted it identified an implied right of action under a statute, not a regulation. Even then, the agency regulations do little to explain how the disparate-effects test applies to English-language requirements —except to say that States should take "reasonable steps" to address the needs of non-English-speaking residents. 28 C.F.R. § 42.405(d)(1). It was precisely the inscrutability of a similar "reasonable efforts" requirement in *Suter* that precluded the creation of an implied right of action in that case either under the *Cort v. Ash* test or under 42 U.S.C. § 1983. *See* 503 U.S. at 360 (provision unenforceable given "[n]o further statutory guidance . . . as to how 'reasonable efforts' are to be measured").

Each of these legal explanations for declining enforcement of this regulation through a private right of action points to a more practical reason. It may in some settings be appropriate to allow federal agencies to promulgate vague regulations that they themselves enforce. Then at least courts may probe what the regulation means, how it is applied in other settings and what its limits are -- all in a setting where judges may obtain answers from the very agency that authored the regulation and obtain assurances that the agency will apply the rule



consistently. It is a far different matter, however, to allow federal agencies to promulgate vague regulations, then unleash them on unwitting plaintiffs, States and courts to ascertain concrete principles from such ineffable concepts as a disparate-impact test that just requires a "reasonable steps" remedy. Federal officials receive acclaim for banning such disparate effects yet face no accountability for explaining what the regulation means -- a development that even the most public-spirited federal (or state) official would find hard to resist and could hardly be expected to stop on his or her own.

The facts of this case illustrate the point. One might have thought that it was "reasonable" in the first instance to require all residents of Alabama to obtain a tenth-grade proficiency in English not just for driving-license purposes but for all manner of good-government reasons. That requirement assuredly would not violate the Constitution -- particularly in light of the many public and private resources the State offers for all residents (native born or not) to learn the language. Likewise, it is difficult to apprehend why the decision of Alabama residents to be as particular about their common language as say the French violates anything in Title VI. Yet the prosecution of this implied right of action compelled the State to a class action trial over the reasonableness of these policy decisions and cross-examination over the number of languages in which its driving-license tests ought to be offered. Worse, respondents now seek (Resp't 4 & n.4) to gain leverage on appeal from one district court's "factual determinations" regarding the evidence in the case, including its "finding" that this disparate impact was "unjustified" and that the State's safety justifications were insufficient. Throughout this trial, no federal agency or for that matter any member of Congress offered their views on what was "reasonable" in this area. This hardly gives a "government of laws" a good name.

10. Respondents' extensive defense of the validity of the regulations is neither relevant nor persuasive. It is irrelevant

because whether the regulations are valid or not, no basis exists for implying a private right of action under them. The Court has not traditionally recognized implied rights of actions under regulations before, and it has never done so against States. As we indicated in our opening brief (Pet. 45), the regulations may indeed be validly enforced by the agency that promulgated them -- an approach that respects the enforcement restrictions of section 602 and still gives the agency ample discretion to implement Title VI. Nor, as the government mistakenly claims (U.S. 31), does our position necessarily preclude private rights of action for retaliation claims. A retaliatory motive after all will frequently demonstrate discriminatory intent.

The defense of the regulations is unpersuasive because, as shown (Pet. 30-33), one does not "effectuate" a statute by dramatically altering its meaning. In enacting a law that reaches only intentional discrimination, Congress did not give federal agencies a warrant to promulgate vague "disparate effects" rules through its delegation of rulemaking power to "effectuate" section 601. *See Guardians*, 463 U.S. at 613 (O'Connor, J., concurring in the judgment) ("Such regulations do not simply 'further' the purpose of Title VI; they go well beyond that purpose."); *id.* at 611 n.5 (Powell, J., concurring in the judgment) ("Administrative agencies do not have -- and should not have -- such lawmaking power"). That is not to say, however, that the regulations ought to be invalidated in this case. The issue need not be addressed. Rather, the dubious validity of the regulations simply makes implying this right of action all the more exceptional and all the more unwarranted.

## CONCLUSION

The lower-court decision should be reversed.

Respectfully submitted,

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