No. 99-1908

In the Supreme Court of the United States

JAMES ALEXANDER, ETC., ET AL., PETITIONERS

v.

MARTHA SANDOVAL, ETC.

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an implied private right of action exists under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, for injunctive relief against a recipient of federal financial assistance that, in violation of federal agency regulations implementing Title VI, uses criteria or methods of administration in the implementation of a program or activity that have the effect of subjecting persons to discrimination because of their race, color, or national origin.

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STATEMENT

This case involves a contention, sustained by the lower courts, that petitioners administered driver's license examinations in a manner that had the unjustified, and hence unlawful, effect of discriminating against individuals based on their national origin. Petitioners have not challenged in this Court the lower courts' conclusions that their driver's license examinations did have that discriminatory effect and that the effect was not justified by a legitimate governmental objective. Nor did petitioners contest in the court of appeals that their operation of a program with an unjustified discriminatory effect on individuals based on their national origin would contravene federal law. Rather, petitioners

argued below that respondents had no private right of action to sue to compel petitioners to change their policy. Both lower courts rejected that contention, which is the only issue properly before this Court.

1. Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, was enacted as part of Congress's comprehensive effort to combat discrimination on the basis of race, color, and national origin. Title VI was enacted to ensure that federal agencies, through the provision of federal financial assistance, did not support entities that engaged in programs or activities that had the purpose or effect of such discrimination. See 110 Cong. Rec. 6543 (1964) ("Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination.") (statement of Sen. Humphrey, quoting President Kennedy's message to Congress). From the outset, Congress anticipated that federal agencies would play a leading role in defining the prohibition against discrimination to which grant recipients would be required to adhere in order to obtain federal assistance. Thus, while Congress itself provided, in Section 601 of Title VI, 42 U.S.C. 2000d, that "[n]o 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," Congress also provided, in Section 602 of Title VI, that federal agencies are empowered to impose substantive conditions on grant recipients in order to effectuate the national policy against discrimination. Section 602 states in pertinent part:

> 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.

42 U.S.C. 2000d-1. Congress further required, in an unusual provision, that any such agency "rule[], regulation[] or order[] of general applicability" be reviewed by the President before becoming effective. *Ibid.* And Section 603 of Title VI, 42 U.S.C. 2000d-2, authorized judicial review of agency action taken "upon a finding of failure to comply with any requirement imposed pursuant to" Section 602, thus indicating that recipients' obligations would be governed by the requirements imposed by the agencies under the authority delegated in Section 602 as well as Section 601's broad statutory duty.

Shortly after Title VI was enacted, a Presidential task force and the Department of Justice drafted model Title VI regulations which specified that recipients of federal funds may not use "criteria or methods of administration which have the *effect* of subjecting individuals to discrimination" on the basis of race, color, or national origin. See 45 C.F.R. 80.3(b)(2) (1964) (emphasis added); 29 Fed. Reg. 16,274-16,305 (1964). The regulations at issue in this case, issued by the Departments of Justice and Transportation, followed the model regulations. See 31 Fed. Reg. 10,265 (1966) (Justice); 35 Fed. Reg. 10,080 (1970) (Transportation). Following the promulgation of the initial regulations, "every Cabinet Department and about 40 federal agencies had adopted standards in which Title VI was interpreted to bar programs

with a discriminatory impact." *Alexander* v. *Choate*, 469 U.S. 287, 294 n.11 (1985).[1]

2. Petitioners receive millions of dollars in federal financial assistance every year from the Department of Transportation and the Department of Justice. Pet. App. 76a-77a. In accordance with the conditions imposed by those agencies' Title VI regulations, petitioners have submitted assurances to the agencies that they will comply with Title VI and federal agency regulations promulgated thereunder. See *id.* at 115a.[2]

Before 1991, petitioners administered written driver's license examinations in as many as 14 foreign languages. Pet. App. 167a-168a. In 1991, after an amendment to the

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[1] We are informed that, at present, 26 federal agencies have regulations under Title VI that follow the model regulations in prohibiting recipients of federal financial assistance from operating their programs and activities in a manner that has the effect of subjecting individuals to discrimination on the basis of race, color, or national origin.

[2] Petitioners state (Pet. Br. 10-11) that the assurance they provided to the Department of Transportation in connection with that agency's grant did not require them to comply with federal agency regulations promulgated under Title VI, although it did require them to comply with the anti-discrimination rule of the statute itself. It appears, however, that the copy of the assurance that petitioners filed in district court contained only the front of the assurance form, but not the back side, which includes the promise to comply with Title VI regulations as well as the signature line. We are informed by the Department of Transportation that the one-sided unsigned form filed by petitioners in district court is an accurate copy of the original assurance that the state agency provided to that Department on August 19, 1992, but that the Department subsequently recognized the error and requested a signed assurance form from the state agency, including a promise to comply with federal regulations. On December 9, 1992, the state agency submitted to the Department of Transportation a signed two-page assurance form that includes a promise to "comply with all applicable requirements of all other Federal laws, executive orders, regulations and policies governing this program." We have lodged a copy of that signed assurance form with the Clerk.

Alabama state constitution declared English the official language of Alabama, petitioners adopted an "English-only" policy, which requires all portions of the driver's license examination process to be administered in English only, and which forbids the use of interpreters, translation dictionaries, or other interpretive aids, even if privately provided. *Id.* at 166a-167a, 169a-171a. Petitioners defended the English-only policy on the ground that proficiency in written and spoken English is necessary to the safe operation of a motor vehicle, to ensure that drivers can read traffic signs in English and follow directions in English from law enforcement officers. *Id.* at 208a-213a. Petitioners have continued, however, to provide driver's licenses to illiterate and deaf persons as well as non-resident non-English speakers, *id.* at 213a-216a, and also provide a "multitude of special accommodations" (*id.* at 217a) for such persons when they take the driver's license examination. The evidence at trial also demonstrated that even persons with limited English skills "could still understand road signs utilized in Alabama and around the world," *id.* at 215a, and that law enforcement officers in Alabama are able to make themselves understood to persons (such as deaf persons) who cannot speak or understand oral English by using other forms of communication, such as hand signals, *id.* at 215a-216a.

3. Respondents (an individual affected by the English-only policy and a class of persons similarly situated) brought suit in district court, alleging, *inter alia*, that petitioners' English-only policy violated agency regulations implementing Title VI in that the policy has the effect of subjecting non-English speakers to discrimination based on their national origin. Respondents pursued their claim against the state agency (the recipient of the federal funds)

directly under Title VI and its implementing regulations. J.A. 10.[3]

The district court agreed with respondents that petitioners' policy violated the federal agencies' Title VI regulations, insofar as those regulations prohibit recipients of federal assistance from operating programs and activities in manner that subjects individuals to discrimination based on national origin. Pet. App. 149a-252a. In particular, the district court concluded that, on the facts of this case, an English-only rule had the effect of discrimination based on national origin, since a "strong nexus between language and national origin" was shown, see *id.* at 158a, and since the

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[3] Respondents also brought suit against the Director of the Alabama Department of Public Safety in his official capacity under 42 U.S.C. 1983, alleging that the English-only policy violated the Fourteenth Amendment. J.A. 10. The district court subsequently permitted respondents to amend the complaint to name the Director as a defendant to the Title VI action directly, Pet. App. 68a-72a, but the complaint does not appear to proceed against the Director under 42 U.S.C. 1983 based on the violation of the federal regulations. Cf. *Maine* v. *Thiboutot*, 448 U.S. 1 (1980). At the time this lawsuit was filed, it was unclear whether the Eleventh Circuit would have permitted a suit under Section 1983 based on a violation of a federal regulation implementing a statute enacted under Congress's Spending Clause authority. See *Harris* v. *James*, 127 F.3d 993, 1008-1011 (11th Cir. 1997). Subsequently, that court ruled that a Section 1983 suit does lie to enforce regulations that "define the contours of [a] statutory right" even when the federal statute was enacted under the Spending Clause. See *Doe* v. *Chiles*, 136 F.3d 709, 717 (11th Cir. 1998). Thus, whether or not private individuals such as respondents may pursue a private right of action directly under Title VI to enforce agency regulations, it is possible that such individuals may be able to proceed under Section 1983 to enforce federal rights secured under such regulations. See *Powell* v. *Ridge*, 189 F.3d 387, 400-403 (3d Cir.), cert. denied, 120 S. Ct. 579 (1999). But because Title VI and agency regulations promulgated thereunder also apply to nongovernmental recipients of federal financial assistance, who are not subject to suit under Section 1983, the issue in this case has independent and continuing significance.

"vast majority" of non-English speakers in Alabama affected by the English-only policy are "from a country of origin other than the United States," *id.* at 163a. Relying on disparate-impact principles drawn from cases under Title VII of the Civil Rights Act of 1964 (see *id.* at 149a-152a), the district court further agreed with respondents that petitioners' English-only policy had a disproportionate adverse effect on individuals based on their national origin, see *id.* at 164a-204a, and that the policy was not supported by a substantial legitimate justification, see *id.* at 205a-246a. The court accordingly entered an injunction against future implementation of the policy and directed petitioners to fashion means for the accommodation of non-English speakers who seek driver's licenses. *Id.* at 253a.

4. On appeal, petitioners contended that respondents could not pursue a private right of action based on the agencies' Title VI regulations (Pet. C.A. Br. 24-33), that such an action was barred by Eleventh Amendment immunity, which had not been validly abrogated by Congress (*id.* at 34-39), and that the district court's ruling on the merits was erroneous (*id.* at 48-54). Petitioners did not argue, however, that the agencies' Title VI regulations were invalid insofar as they prohibited recipients from implementing programs or activities in a manner with a discriminatory *effect*.[4]

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[4] To the contrary, petitioners acknowledged in the court of appeals that "the Supreme Court [had] upheld the promulgation" of the agencies' discriminatory-effect regulations. Pet. C.A. Br. 27. As petitioners explained to the court of appeals (*id.* at 28):

> In [*Guardians Association* v. *Civil Service Commission of the City of New York*, 463 U.S. 582 (1983)], the Court affirmed the denial of compensatory relief to plaintiffs in a Title VI discrimination lawsuit. In so doing, the Court reached two conclusions. First, seven members of the Court agreed that proof of discriminatory intent was required to establish a violation of Title VI. [*Guardians*,] 463 U.S. 607 n.1 (opinion of Powell, J.). Second, five members joined "to form a

Because it appeared that petitioners had drawn in question the constitutionality of Congress's abrogation of the State's Eleventh Amendment immunity (at 42 U.S.C. 2000d-7) to private actions under Title VI, insofar as those actions seek to enforce agency regulations promulgated under Section 602, the United States intervened as a party in the court of appeals, pursuant to 28 U.S.C. 2403(a).[5]

The court of appeals affirmed. Pet. App. 1a-57a. The court noted that petitioners had "concede[d] that these agency implementing regulations [prohibiting discriminatory effects] are valid exercises of agency authority," *id.* at 5a n.2, and had also "concede[d] that the [Alabama] Department of Public Safety is subject to such regulations through monies it receives both from the Department of Transportation and the Department of Justice," *id.* at 36a. The court further noted that petitioners did "not challenge the district court's factual findings, its use of Title VII disparate impact principles to analyze [respondents'] Title VI claims, or its formulation of the disparate impact analyses," *id.* at 12a.

The court also rejected petitioners' Eleventh Amendment defense, concluding that the State had waived its immunity to suit by accepting federal funds in the face of clear notice that Congress intended States accepting federal assistance to be subject to suit under Title VI. Pet. App. 15a-19a. The court rejected (*id.* at 16a n.5) petitioners' contention that

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> majority for upholding the *validity* of the regulations incorporating a disparate-impact standard." *Id.*, 463 U.S. at 607 n. 27 (opinion of White, J.) (emphasis added); *see also*, *id.* at 584 n.2. While the Court upheld the validity of the regulations, it did not hold that a private right of action to enforce those regulations was available.

(Emphasis and words "emphasis added" in petitioners' appellate brief.) Petitioners also did not challenge the validity of the agencies' Title VI regulations in their petition for rehearing.

[5] The United States is therefore a respondent in this case under this Court's Rule 12.6.

Congress's clear statement that States accepting federal funds shall be subject to suit under Title VI, notwithstanding the Eleventh Amendment, did not apply to suits under the "accompanying administrative regulations promulgated under Section 602," observing that "[t]here is no evidence that Congress somehow differentiated between suits to enforce the statute and suits to enforce the regulations promulgated thereunder." The court further observed that the State remains free to decline federal funds if it objects to the conditions imposed by the agency regulations under Section 602, and so it found "no constitutional defect inherent" in Section 2000d-7. *Id.* at 19a.[6]

Thus, the "central issue" before the court was "whether there is an implied private cause of action to enforce agency regulations." Pet. App. 37a. Relying on prior circuit precedent (*id.* at 37a-42a) as well as this Court's decisions in *Lau* v. *Nichols*, 414 U.S. 563 (1974), *Guardians Association* v. *Civil Service Commission*, 463 U.S. 582 (1983), and *Alexander* v. *Choate*, 469 U.S. 287 (1985), the court concluded that "(1) disparate impact regulations promulgated pursuant to Section 602 of Title VI constitute an authoritative construction of Title VI's antidiscrimination provisions; (2) private parties may enforce these regulations to obtain declaratory and injunctive relief; and (3) Title VI's legislative history and scheme unequivocally support an implied cause of action under Section 601 and Section 602." *Id.* at 48a. Accordingly, the court concluded that respondents had properly invoked a private right of action under

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[6] The court also made clear that a suit against the Director of the Department of Public Safety in his official capacity seeking injunctive relief from future operation of the English-only policy could proceed under *Ex parte Young*, 209 U.S. 123 (1908), without Eleventh Amendment objection. See Pet. App. 32a-34a.

Title VI, *ibid.* It therefore affirmed the injunctive relief ordered by the district court. *Id.* at 57a.

SUMMARY OF ARGUMENT

I. Private individuals may pursue an implied right of action against a recipient of federal funds to enforce agency regulations implementing Title VI of the Civil Rights Act of 1964 that prohibit recipients from administering programs and activities in a manner that has the effect of subjecting individuals to discrimination based on their race, color, or national origin. Congress enacted Title VI at a time when the courts, including this Court, routinely permitted individuals injured by the violation of a statute and its implementing regulations to enforce the statute and regulations even absent an express cause of action or any particular manifestation of congressional intent that the statute and regulations should be privately enforced. While such liberal implication of private rights of action is no longer the rule, Congress's intent at the time of the enactment of Title VI must be viewed in light of that legal context. Title VI and its implementing regulations are precisely the kind of measure that Congress, at the time of enactment of Title VI, would have expected to be enforced by implied right of action. Title VI is broadly worded legislation empowering federal agencies to ensure that the public funds they disburse not support entities that engage in conduct with a discriminatory purpose or effect. And in Section 602 of the Act, Congress required each federal agency, with the concurrence of the President, to promulgate legislative regulations to effectuate the protection of individuals from discrimination on the grounds of race and national origin enunciated in Section 601.

Congress ratified the existence of an implied right of action to enforce Title VI regulations in the Civil Rights Restoration Act of 1987. Before that statute was enacted,

this Court had adjudicated private claims to enforce Title VI regulations in at least three cases, and the lower courts had consistently implied a private right of action to enforce the regulations at issue. Congress was specifically aware of private enforcement of the discriminatory-effect regulations but nonetheless expanded the scope of Title VI without limiting the private right of action. That legislative action preserved and ratified the private right of action for enforcement of Title VI regulations.

Private enforcement of Title VI regulations is consistent with the text of Section 602, which sets forth procedural requirements before a federal agency may take action because of noncompliance with Title VI either to terminate federal funding or to bring suit against a recipient to require compliance with Title VI. Those requirements apply to federal agency enforcement of Title VI, not to private enforcement. They are based largely on Congress's particular concerns that federal agencies not freely terminate federal assistance, and that the vast litigation resources of the federal government not overwhelm those of recipients, concerns not applicable to private enforcement. Further, the United States does not perceive that private enforcement has interfered or will interfere with the orderly administrative enforcement of Title VI regulations. Rather, private enforcement is consistent with, and in many instances necessary to ensuring that individuals have effective protection against discriminatory practices by recipients of federal funds. The courts also can ensure that agencies are heard on questions involving the interpretation and application of their regulations.

Petitioners' contention that no private cause of action to enforce Title VI may be implied is inconsistent with *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979). Nor do this Court's decisions establish any requirement that recipients of federal funds be put on clear notice not only of their legal

duties (an obligation met here by the statute and regulations) but also about the method by which a victim of their violations can enforce those duties. While the Court has tailored the availability of a compensatory damages remedy in implied rights of action to avoid burdening recipients with retrospective liability for unknowing violations, this Court's applicable precedents do not suggest that a private cause of action should be denied simply because Congress failed to expressly identify such private enforcement in the text of the statute.

II. Petitioners appear to maintain that federal agencies' discriminatory-effect Title VI regulations, on the books for more than 30 years, are invalid. That argument was neither preserved below nor presented in the certiorari petition and is therefore not properly before the Court. The contention is in any event meritless. The Court applied the regulations to grant relief in *Lau* v. *Nichols*, 414 U.S. 563 (1974), reexamined the regulations and found them valid in *Guardians Association* v. *Civil Service Commission*, 463 U.S. 582 (1983), and reaffirmed their validity in *Alexander* v. *Choate*, 469 U.S. 287 (1985).

Those holdings are consistent with the broad textual authority granted to the agencies in Section 602 and with the legislative history of Title VI, which makes clear that Congress intended that agencies would have authority to define the content of the prohibition against discrimination and could make effective the right to be free from discrimination by prohibiting facially neutral polices and practices that had the potential to be a subterfuge for intentional discrimination or to perpetuate the lingering effects of past intentional discrimination. Congress subsequently ratified the regulations by enacting legislation to implement this Court's decision in *Lau*, by requiring agencies enforcing other statutes to promulgate regulations similar to those issued under Title VI, and by adopting other anti-discrimination

statutes modeled on Title VI in full awareness of Title VI's administrative implementation, which Congress has consistently monitored very closely. The background to Congress's enactment of the Civil Rights Restoration Act of 1987 also shows that Congress expanded the coverage of Title VI while well aware of the agencies' discriminatory-effect regulations. Thirty-five years after the initial promulgation of the discriminatory-effect regulations (which were reviewed by the President before becoming effective), after decisions by this Court over the course of two decades, and after constant oversight and legislation by Congress in this area, it is much too late to say the regulations were never valid.

ARGUMENT

For more than thirty years, almost all federal agencies have had in place regulations, promulgated to effectuate the anti-discrimination principle of Title VI, that prohibit recipients of federal financial assistance from administering programs in a manner that has the effect of subjecting individuals to discrimination based on race, color, and national origin. This Court has consistently recognized the validity of those regulations. For many years as well, private individuals have pursued private rights of action against recipients of federal assistance to require recipients of federal financial assistance to adhere to those regulations, without any discernable detrimental effect on the separate enforcement responsibility of the federal agencies. Both the discriminatory-effect regulations and the existence of a private right of action to enforce them are consistent as well with Congress's intent in Title VI and with subsequent legislation enacted by Congress. The court of appeals therefore properly affirmed the district court's entry of injunctive relief.

I. INDIVIDUALS HAVE A PRIVATE RIGHT OF ACTION FOR INJUNCTIVE RELIEF AGAINST RECIPIENTS OF FEDERAL ASSISTANCE THAT VIOLATE FEDERAL AGENCIES' TITLE VI DISCRIMINATORY-EFFECT REGULATIONS

A. The Congress That Enacted Title VI Intended That Agencies' Substantive Title VI Regulations, Like The Statutory Prohibition Against Discrimination, Would Be Enforced By Private Right Of Action

1. Whether an implied private right of action exists to enforce the Title VI discriminatory-effect regulations is fundamentally a question of statutory construction. The Court's approach to the question of legislative intent to allow private rights of action, however, has changed since the time that Title VI was enacted. See *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 698-699 (1979); *id.* at 717-718 (Rehnquist, J., concurring). Whereas the Court today examines more recently enacted statutes under the somewhat restrictive test set forth in *Cort* v. *Ash*, 422 U.S. 66 (1975), "Congress, at least during the period of the enactment of the several Titles of the Civil Rights Act, tended to rely to a large extent on the courts to decide whether there should be a private right of action." *Cannon*, 441 U.S. at 718 (Rehnquist, J., concurring) (emphasis omitted). Thus, in determining whether a private right of action should be inferred from a statute, like Title VI, enacted well before *Cort*, the Court has given dispositive weight to Congress's expectations in light of the "contemporary legal context" when it enacted the statute. *Cannon*, 414 U.S. at 699 (opinion of the Court); see also *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 378-382 (1982); *Morse* v. *Republican Party of Va.*, 517 U.S. 186, 232 (1996) (opinion of Stevens, J.); *id.* at 240 (Breyer, J., concurring in judgment).

At the time Congress enacted Title VI, "the Court applied a relatively simple test to determine the availability of an implied private remedy. If a statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members of that class. Under this approach, federal courts, following a common-law tradition, regarded the denial of a remedy as the exception rather than the rule." *Merrill Lynch*, 456 U.S. at 374-375 (citation omitted); see, *e.g.*, *J.I. Case Co.* v. *Borak*, 377 U.S. 426 (1964); *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969). While the courts did occasionally refuse to recognize an implied remedy before *Cort*, they generally did so only when "the statute in question was a general regulatory prohibition enacted for the benefit of the public at large, or because there was evidence that Congress intended an express remedy to provide the exclusive method of enforcement." *Merrill Lynch*, 456 U.S. at 376.

2. When Title VI was enacted, courts had consistently recognized implied private rights of actions to enforce not only statutory prohibitions, but also regulatory provisions that validly implemented a statute. This Court recognized such a private right of action in *Borak*, *supra*, a case decided while the congressional debates on the 1964 Civil Rights Act were ongoing. *Borak* involved Section 14(a) of the Securities Exchange Act of 1934, which prohibited "any person * * * to solicit any proxy or consent or authorization in respect of any security" "in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate." 15 U.S.C. 78n(a). The plaintiffs in *Borak* alleged that "the proxy solicitation material * * * circulated was false and misleading in violation of § 14(a) of the Act and Rule 14a-9 which the Commission had promulgated thereunder," 377 U.S. at 429, causing them injury. The Court acknowledged that Section 14(a) "makes no specific reference to a private right of

action," but reasoned that "among [the statute's] chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result." *Id.* at 432. Although the SEC had authority to enforce its regulations regarding proxies administratively and through court actions, the Court held that "[p]rivate enforcement of the proxy rules provides a necessary supplement to Commission action." *Ibid.* That holding that individuals could enforce an SEC rule promulgated to enforce a statute was consistent with lower-court decisions permitting actions to enforce rules implemented by the SEC.[7]

Since *Borak*, this Court has continued to recognize implied private rights of action to enforce agency rules that implement statutes enacted before *Cort* v. *Ash*. In *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 13 (1971), the Court accepted the longstanding consensus of the lower courts regarding a suit brought under Section 10(b) of the Securities Exchange Act of 1934, which makes it unlawful for any person to "use or employ, in connection with the purchase or sale of any security * * * any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe," 15 U.S.C. 78j(b), and the Commission's implementing regulation, Rule

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[7] *See, e.g., Royal Air Properties, Inc.* v. *Smith*, 312 F.2d 210 (9th Cir. 1962); *Ellis* v. *Carter*, 291 F.2d 270 (9th Cir. 1961); *Matheson* v. *Armbrust*, 284 F.2d 670 (9th Cir. 1960), cert. denied, 365 U.S. 870 (1961); *Hooper* v. *Mountain States Sec. Corp.*, 282 F.2d 195 (5th Cir. 1960), cert. denied, 315 U.S. 814 (1961); *Fratt* v. *Robinson*, 203 F.2d 627 (9th Cir. 1953); *Birnbaum* v. *Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), cert. denied, 343 U.S. 956 (1952); *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783 (2d Cir. 1951). See generally Louis Loss, *The SEC Proxy Rules in the Courts*, 73 Harv. L. Rev. 1041, 1049-1052 (1960). Outside the securities context as well, courts permitted individuals to enforce agency regulations implementing a statutory scheme. *See, e.g., Roosevelt Field* v. *Town of N. Hempstead*, 84 F. Supp. 456 (E.D.N.Y. 1949) (Air Commerce Act of 1926); *Neiswonger* v. *Goodyear Tire & Rubber Co.*, 35 F.2d 761 (N.D. Ohio 1929) (same).

10b-5. This Court has consistently treated the "Rule 10b-5" action as one brought under the regulation.[8]

The lower courts have correctly drawn from these cases the principle that, if an implied private right of action will lie to enforce a statute embodying a substantive prohibition, then an implied private right of action also exists to enforce valid legislative-type rules promulgated to implement the statute's substantive prohibition.[9] Of course, not all agency regulations implementing statutory proscriptions will be privately enforceable. For example, purely procedural rules that govern the duties of the recipient to the funding agency should not be enforceable. Thus, no implied private cause of action should be recognized to enforce a recipient's duty to file an Assurance of Compliance with the funding agency, see 28 C.F.R. 42.105(a)(1), because the individual is not mentioned with regard to that requirement and noncompliance with that procedural provision does not directly subject the individual to discrimination. But when a valid regulation effectuating a prohibition in a statute that was "enacted for the benefit of a special class," *Cannon*, 441 U.S. at 689, prohibits a recipient from taking actions against individuals in that class, and an implied action is available to enforce the

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[8] See *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 508 U.S. 286, 291 (1993) ("The private right of action *under Rule 10b-5* was implied by the Judiciary on the theory courts should recognize private remedies to supplement federal statutory duties, not on the theory Congress had given an unequivocal direction to the courts to do so.") (emphasis added); see also *id.* at 297 ("right of action existing under Rule 10b-5"); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 737 (1975) (addressing "the contours of a private cause of action under Rule 10b-5").

[9] *See, e.g.*, *Lowrey* v. *Texas A & M Univ. Sys.*, 117 F.3d 242, 250 n.10, 253 n.20 (5th Cir. 1997); *Ashbrook* v. *Block*, 917 F.2d 918, 926 (6th Cir. 1990); *Polaroid Corp.* v. *Disney*, 862 F.2d 987, 994 (3d Cir. 1988); *Angelastro* v. *Prudential-Bache Sec., Inc.*, 764 F.2d 939, 947 (3d Cir.), cert. denied, 474 U.S. 935 (1985); *Robertson* v. *Dean Witter Reynolds, Inc.*, 749 F.2d 530, 536 (9th Cir. 1984).

statute, then individuals may enforce the regulation as well by private lawsuit.

3. The federal agencies' discriminatory-effect Title VI regulations promulgated pursuant to Section 602 are exactly the kind of substantive regulation that, at the time of the enactment of Title VI, Congress would have expected to be enforced through private right of action. The regulations are legislative-type rules that have the force and effect of law. Cf. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302-303 (1979). The regulations are based on an express grant of authority by Congress, in Section 602; they were promulgated according to the proper procedures (including review by the President) and are substantively valid, under the Court's decision in *Guardians Association* v. *Civil Service Commission*, 463 U.S. 582 (1983);[10] and they affect individual rights and obligations.[11] Like the regulations adopted by the Securities and Exchange Commission to implement Sections 10(b) and 14(a) of the Securities Exchange Act of 1934 at issue in *Bankers Life* and *Borak*, *supra*, the Title VI regulations give substantive content to a statutory proscription and have as much legal effect as a prohibition written in the statute itself.[12]

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[10] As we discuss in greater detail below (p. 36, *infra*), in *Guardians*, a majority of the Court concluded that federal agencies' Title VI discriminatory-effect regulations are valid exercise of agencies' authority under Section 602. See 463 U.S. at 584 (opinion of White, J.); *id.* at 608 n.1 (Powell, J., concurring in judgment) (recognizing this conclusion of majority); *id.* at 618-619 (Marshall, J., dissenting); *id.* at 642-645 (Stevens, J., dissenting). As we also note (pp. 34-35, *infra*) petitioners have waived any objection to the validity of the regulations.

[11] Congress clearly intended recipients' obligations to be governed by the regulations as well as Section 601's broad statutory duty. See pp. 38-41, *infra*.

[12] Moreover, contrary to petitioners' contention (Pet. Br. 46), there is nothing particularly unusual about private enforcement of federal agency

Moreover, the Title VI regulations were plainly intended for the benefit of a "special class," within the meaning of the Court's earlier private right of action cases such as *Cannon* and *Borak*. Petitioners argue (Pet. Br. 37) that neither Title VI nor the agency regulations at issue here were enacted for the benefit of a class such as the persons represented by respondents because the statute is merely coextensive with the Fourteenth Amendment and does not specifically bar discrimination on the basis of English-language proficiency. That argument is without merit. In the first place, respondents have alleged that the unlawful discriminatory effect in petitioners' English-only policy is its discriminatory effect on the basis of national origin, and both Title VI and the regulations protect individuals against discrimination on the basis of national origin. The district court found that, in this case, petitioners' English-only policy had the effect of discrimination on the basis of national origin; it did not de-

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regulations against state agents. Because valid federal agency regulations have the force and effect of law, the Supremacy Clause preempts any state or local laws that conflict with them, and such preemption claims have often been adjudicated in private lawsuits. See, *e.g.*, *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985); *Blum* v. *Bacon*, 457 U.S. 132, 145-146 (1982); cf. *Shaw* v. *Delta Air Lines*, 463 U.S. 85, 96 n.14 (1983); *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 119 (1989) (Kennedy, J., dissenting). That is so even if, as petitioners contend, Title VI is solely an exercise of Congress's Spending Clause authority. See *Blum*, 457 U.S. at 145-146 (state regulation in program receiving federal funds preempted by contrary federal regulation); *Lawrence County* v. *Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 270 (1985) (generally applicable state law governing locality's use of funds is preempted as applied to federal funds given to locality with intent of vesting it with discretion); see also *Alabama NAACP State Conf. of Branches* v. *Wallace*, 269 F. Supp. 346, 349 (M.D. Ala. 1967) (three-judge court) (holding that state law that interfered with local school districts' compliance with Title VI guidelines was invalid under the Supremacy Clause).

clare language proficiency and national origin to be equivalent concepts as a matter of law.

Second, Title VI and the regulations are not phrased as "laws enacted for the protection of the general public"; rather, they have an "unmistakable focus on the benefited class" of persons protected against discrimination by recipients of federal funds. See *Cannon*, 441 U.S. at 690-691; see also *id.* at 704 (in Title VI, Congress wanted "to provide individual citizens effective protection against [discriminatory] practices"). Both the statute and the regulations are "declarative of a civil right" (*id.* at 692 n.12) to be free of discrimination. Indeed, this Court has never expressed doubt that the statutory proscriptions of Title VI may be enforced by private right of action, given that statute's focus on the individual right against discrimination.[13] The same is true of the substantive agency rules promulgated under Section 602, which, like the statute, protect individuals who are members of a certain class from being subjected to discrimination on the basis of their race, color, or national origin.[14]

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[13] In *Cannon*, where the Court concluded that Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, may be enforced through private right of action, the Court stressed that the prohibitions in Title IX against sex discrimination by education programs or activities receiving federal financial assistance were "patterned after Title VI." 441 U.S. at 694. Thus, while the holding of *Cannon* was technically limited to Title IX, *Cannon* has uniformly been read as acknowledging a private right of action to enforce Title VI as well. See *Lane* v. *Peña*, 518 U.S. 187, 191 (1996); *Guardians*, 463 U.S. at 639 (Stevens, J., dissenting); see also *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 419-421 (1978) (Stevens, J., concurring in the judgment in part and dissenting in part).

[14] Unlike Section 601, which provides that "[n]o person * * * shall * * * be subjected to discrimination" on certain grounds, see 42 U.S.C. 2000d, the Title VI regulations state that "[a] recipient * * * may not * * * utilize criteria or other methods of administration which have the effect" of discrimination on certain grounds, 28 C.F.R. 42.104(b)(2). The

B. Congress Preserved And Ratified The Private Right of Action To Enforce The Effects Test In The Civil Rights Restoration Act

In response to this Court's decision in *Grove City College* v. *Bell*, 465 U.S. 555 (1984), Congress engaged in a comprehensive review of federal civil rights legislation before enacting the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (Restoration Act). The Restoration Act rejected part of the *Grove City* decision by defining the term "program or activity" in Title VI and related statutes to include "all of the operations of" an entity, "any part of which is extended Federal financial assistance." § 6, 102 Stat. 31 (codified at 42 U.S.C. 2000d-4a). Congress did so in full awareness that regulations under Title VI and similar statutes, as amended by the Restoration Act, would be the subject of private enforcement actions.

1. Congress enacted the Restoration Act against a background of consistent judicial acceptance of private rights of

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difference in language between the two does not suggest any retreat from the statute's focus on individual rights. The regulation, promulgated under Section 602, is intended "to effectuate the provisions of" Section 601, see 42 U.S.C. 2000d-1, and so necessarily maintains the statute's focus on the individual right to be free from discrimination. In addition, the regulation is phrased in terms of protecting "*the class of individuals* to whom * * * such services, financial aid, benefits, or facilities will be provided under any such program," and "the *class of individuals* to be afforded an opportunity to participate in any such program." 28 C.F.R. 42.104(b)(2) (emphasis added). And the prohibition in the regulation is phrased in terms of subjecting "*individuals* to discrimination because of their race, color, or national origin" and "impairing accomplishment of the objectives of the program as respects *individuals* of a particular race, color, or national origin." *Ibid.* (emphasis added). Thus, like the statute, the regulation is framed not as a regulatory prohibition for the protection of the general welfare but as an individual right of members of a certain class to be free from discrimination.

action to enforce Title VI and its regulations. In *Lau* v. *Nichols*, 414 U.S. 563 (1974), a private lawsuit brought against a school district, this Court held that the district violated Title VI when it required Chinese-speaking students to attend public school but refused to tailor the curriculum to take into account the fact that they did not speak English. The majority relied on agency Title VI regulations and guidelines, explaining that "[b]y § 602 of the Act [the agency] is authorized to issue rules, regulations, and orders to make sure that recipients of federal aid under its jurisdiction conduct any federally financed projects consistently with § 601." *Id.* at 567 (footnote omitted). "Discrimination is barred which has that *effect* even though no purposeful design is present," the Court held, citing the discriminatory-effect regulation. *Id.* at 568. The Court concluded that "the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned *by the regulations*," *ibid.* (emphasis added), and remanded the case "for the fashioning of appropriate relief," *id.* at 569. In an opinion concurring in the judgment, Justice Stewart, joined by Chief Justice Burger and Justice Blackmun, made clear the case did not involve intentional discrimination, but rather a "fail[ure] to act in the face of changing social and linguistic patterns." *Id.* at 570. Those three Justices believed the school district had not violated Section 601 "standing alone," but had violated the agency's regulations and interpretive guidance, which they also concluded were "reasonably related to the purposes of the enabling legislation." *Ibid.* (citation omitted).

In *Guardians*, a private lawsuit for employment discrimination brought against a city agency, a majority of the Court concluded that the Title VI discriminatory-effect

regulations are valid, although a different majority also concluded that no compensatory relief could be awarded in a private suit for a violation of those regulations. Four Justices voted to reverse the judgment below and reinstate the relief awarded by the district court under the Title VI discriminatory-effect regulations. 463 U.S. at 623 n.15 (Marshall, J., dissenting); *id.* at 639-645 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting). Justice White, although voting to affirm the judgment setting aside the relief (and providing the fifth vote to do so), also concluded that the agency discriminatory-effect regulations were valid. *Id.* at 589-590, 584 n.2.

This Court subsequently reexamined private litigation to compel compliance with another Title VI regulation in *Bazemore* v. *Friday*, 478 U.S. 385 (1986). In that case, private plaintiffs alleged that a recipient of federal funds had not complied with a Department of Agriculture Title VI regulation "requiring the [defendant] to take 'affirmative action' to overcome the effects of prior discrimination in its programs." *Id.* at 408 (opinion of White, J.). A majority of the Court implicitly endorsed the existence of a private right of action, by adjudicating the claim on the merits, holding that "we cannot accept petitioner's submission that the regulation has been violated." *Id.* at 409 (opinion of White, J.).

Thus, when Congress reexamined civil rights enforcement and enacted the Restoration Act, this Court had at least three times reviewed the merits of private lawsuits to enforce the Title VI regulations, including one case (*Lau*) in which the plaintiffs' claim was upheld on the merits. In addition, the courts of appeals after *Guardians* consistently found an implied right of action to enforce the discriminatory-effect regulations.[15] At the time of Con-

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[15] See *David K.* v. *Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988); *Gomez* v. *Illinois State Bd. of Educ.*, 811 F.2d 1030, 1044-1045 (7th Cir. 1987);

gress's enactment of the Restoration Act, therefore, the existence of a private right of action to enforce discriminatory-effect regulations was settled law.

2. When Congress amends a statute, it is presumed to be familiar with this Court's relevant decisions on the topic, and is also assumed to consider those decisions in amending the statute. See *McCarthy* v. *Bronson*, 500 U.S. 136, 140 (1991); *Conroy* v. *Aniskoff*, 507 U.S. 511, 516 (1993). The legislative history of the Restoration Act, moreover, reflects Congress's understanding that private plaintiffs would be able to sue recipients of federal funds for violations of the regulations. Witnesses at the congressional hearings explained that agency discriminatory-effect regulations could be enforced in federal court by private parties.[16] With regard to the Title VI discriminatory-effect regulations specifically, Senator Hatch argued that "[t]he failure to provide a particular share of contract opportunities to minority-owned businesses * * * could lead Federal agencies to undertake

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Latinos Unidos de Chelsea en Accion v. *Secretary of HUD*, 799 F.2d 774, 785 n.20 (1st Cir. 1986); *Castaneda by Castaneda* v. *Pickard*, 781 F.2d 456, 465 n.11 (5th Cir. 1986); *Georgia State Conference of Branches of NAACP* v. *Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985); *Larry P. by Lucille P.* v. *Riles*, 793 F.2d 969, 981-982 (9th Cir. 1984).

[16] See *Civil Rights Restoration Act of 1987: Hearings Before the Senate Comm. on Labor and Human Resources*, 100th Cong., 1st Sess. 640-641 (1987) (Prof. John H. Garvey) (*1987 Senate Labor Comm. Hearings*); *Civil Rights Restoration Act of 1985: Joint Hearings Before the House Comm. on Educ. and Labor and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 570-571 (1985); *Civil Rights Act of 1984: Hearings Before the Senate Comm. on Labor and Human Resources*, 98th Cong., 2d Sess. Pt. 2, at 42 (1984) (Prof. Charles Fried); *Civil Rights Act of 1984: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 142, 149 (1984) (Prof. Fried); *id.* at 423 (Center for Judicial Studies); see also *1987 Senate Labor Comm. Hearings*, *supra*, at 209, 238, 304.

enforcement action asserting that the failure to provide more contracts to minority-owned firms, standing alone, is discriminatory under agency disparate impact regulations implementing Title VI. * * * *Of course, advocacy groups will be able to bring private lawsuits making the same allegations before federal judges*." 134 Cong. Rec. 4257 (1988) (emphasis added).

The Executive Branch put forward the same understanding of the effect of the Restoration Act. A memorandum from the Office of Management and Budget submitted during the hearings, quoting the Department of Education's discriminatory-effect regulations, explained that "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 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 530 (1984) (second emphasis added). The memorandum reiterated that expanding the definition of "program" would "open up all of a recipients' [*sic*] activities to private suits over practices deemed to have 'discriminatory effects,'" brought by "members of the bar" acting as "private Attorneys General." *Id.* at 532.

Congress therefore understood that a discriminatory-effect regulation could be enforced by private parties and with that understanding nonetheless "restored" the scope of the statute to what Congress perceived as its pre-*Grove City* breadth. If Congress had intended by the 1988 amendment to expand the scope of the statute's coverage but not to extend the privately enforceable discriminatory effects standard, one would expect some indication in the legislative history to that effect. There is none. To the contrary, the legislative history makes clear that Congress did not intend

to alter settled law on the substantive definition of "discrimination." See S. Rep. No. 64, 100th Cong., 1st Sess. 29 (1987).

The Restoration Act's failure to preclude or limit private rights of action cannot be viewed as simple inaction. Congress amended Title VI after significant debate but did not preclude a private right of action. The circumstances of this case are thus analogous to those in *Merrill Lynch*, *supra*. That case involved private suits to enforce the Commodity Exchange Act (CEA), 7 U.S.C. 1 *et seq*., which also does not contain an express private right of action. Without determining whether implying a private right of action would comport with *Cort* v. *Ash*, the Court recognized the existence of such an action because at the time that Congress amended other parts of the statute (although not the particular provision from which the cause of action arose), "the federal courts routinely and consistently had recognized an implied private cause of action on behalf of plaintiffs seeking to enforce and to collect damages for violation of provisions of the CEA or rules and regulations promulgated pursuant to the statute." 456 U.S. at 379. The presumption that Congress knows the law, *ibid.*, coupled with the fact that Congress had been put on notice at the hearings regarding private enforcement of the statute, *id.* at 383-384, permitted the Court to conclude that Congress was "familiar" with the "implied private remedy." *Id.* at 382. "In that context, the fact that a comprehensive reexamination and significant amendment of the CEA left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy." *Id.* at 381-382.

C. The Procedures Identified In Section 602 For Agency Enforcement Of The Regulations Do Not Manifest An Intent To Preclude Private Enforcement

1. Petitioners argue (Pet. Br. 24-25, 27-29) that Section 602, which sets forth procedural steps the United States must take before it may bring suit or terminate federal financial assistance based on a violation of agency Title VI regulations, expressly precludes private enforcement of those regulations.[17] That argument is incorrect. Section 602 is plainly directed at the federal government's enforcement of the Title VI regulations; it has no application to private

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[17] After authorizing the promulgation of regulations, Section 602 provides:

> 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.

rights of action at all. Because Congress did not expressly address the issue of private rights of action to enforce Title VI when it enacted that legislation, but rather assumed, in accordance with the state of the law at the time, that the courts would determine whether such a cause of action should be fashioned (see pp. 15-17, *supra*), Section 602's prerequisites for federal agency enforcement of regulations cannot be read as an expression of congressional intent to limit the scope of an implied private right of action.

Moreover, the purposes served by the procedural requirements in Section 602 have little application to private lawsuits. Many of the procedural conditions imposed by Section 602—such as the requirement of an express finding of violation after a hearing, a report to Congress, and a 30-day waiting period—apply only to the termination of or refusal to grant or to continue federal financial assistance. Those requirements are designed to ensure that the "severe" (*Cannon*, 441 U.S. at 705) action of funding termination is taken only after careful agency deliberation, in light of Congress's concern that valuable programs be provided with federal assistance. The remedy of funding termination, however, is not available to private individuals suing a recipient of federal funds. See *Powell* v. *Ridge*, 189 F.3d 387, 398 (3d Cir.), cert. denied, 120 S. Ct. 579 (1999).

For the United States to initiate judicial action to obtain prospective compliance with an agency regulation, Section 602 requires that the agency concerned has (1) "advised the appropriate person or persons of the failure to comply with [the] requirement" and (2) "has determined that compliance cannot be secured by voluntary means." 42 U.S.C. 2000d-1. One purpose of those prerequisites to initiating suit is to reduce the risk that the federal government's resources in litigation would overwhelm those of recipients. See *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 420 n.26 (1978) (Stevens, J., concurring in the judgment in part and

dissenting in part). That particular concern is not applicable to private causes of action, which do not "bring[] the forces of the Executive Branch to bear on state programs." *Ibid.*[18]

In addition, the Court has looked to analogous notice provisions under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, for guidance in determining the proper scope of *relief* that may be awarded in a private cause of action. See *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288-291 (1998). But the Court has never suggested that those procedural limitations on government action should be transplanted *in toto* to the private right of action. *Gebser* merely found in those requirements an indication that Congress did not intend to authorize municipal liability in damages for conduct that had not been brought to the attention of the responsible policymakers—a principle not

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[18] Section 602 is thus similar to other provisions that require the government to notify or consult with a defendant, including a state or local agency, before bringing suit, even though private litigants have no such obligation. For example, Title IV of the Civil Rights Act of 1964 permits the Attorney General to bring suit against a public educational institution based on the deprivation of the equal protection of the laws only if she has given notice to the appropriate institution and has determined that the institution has had a reasonable time to adjust the wrongful condition, 42 U.S.C. 2000c-6(a), but private parties are not required to provide any such notice before bringing suit under 42 U.S.C. 1983 against a public educational institution. Similarly, the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq.*, requires that the Attorney General, when bringing suit to obtain relief from a pattern or practice of the deprivation of the civil rights of certain institutionalized persons, such as residents of psychiatric treatment institutions, certify to the court that, before filing the action, she notified an appropriate official of the alleged wrongful conditions and made a reasonable good faith effort to consult with officials about means to correct those conditions. 42 U.S.C. 1997b(a). Residents of such institutions, however, may bring suit for relief against alleged wrongful conditions under Section 1983 without exhausting state administrative remedies. See *Patsy* v. *Board of Regents*, 457 U.S. 496 (1981).

applicable here because this case involves neither damages liability nor conduct unknown to the relevant policymarkers.

Moreover, by authorizing the United States to obtain compliance with "*any* requirement adopted pursuant to this section," Section 602 makes clear that, even in cases involving intentional discrimination, the United States will be enforcing agency regulations effectuating Section 601. If petitioners were correct that any duty subject to Section 602's prerequisites could not be privately enforced because Congress wanted only agency enforcement of these requirements, then this Court's decision in *Cannon* could not be sustained. *Cannon*, in considering the provisions of Title IX that are "patterned after Title VI" (441 U.S. at 684), upheld a private cause of action to enforce the same nondiscrimination duty in Section 901 of Title IX, 20 U.S.C. 1681, which agencies enforce through Section 902, 20 U.S.C. 1682. *Cannon* made clear that private complainants are not required to exhaust administrative remedies before bringing a lawsuit under Title IX for injunctive relief from sex discrimination because private complainants have no role in the administrative proceedings. See 441 U.S. at 707-708 n.41.

2. Nor will a private right of action interfere with effective administrative enforcement of Title VI regulations. As was the case in *Lau*, *Bakke*, and *Cannon*, the United States "perceives no inconsistency between the private remedy and the public remedy." *Cannon*, 441 U.S. at 706-707; see also *Bakke*, 438 U.S. at 419-420 (Stevens, J., concurring in the judgment in part and dissenting in part); *Allen*, 393 U.S. at 557 n.23. Federal agencies have historically relied on private persons to act as "private attorney[s] general" to ensure optimal enforcement of the Title VI regulations. Cf. *Newman* v. *Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (per curiam). We are not aware of any informa-

tion suggesting that private enforcement has impaired federal agencies' administration of their Title VI regulations.

To the contrary, private enforcement provides a necessary supplement to government enforcement not only of Title VI itself but also of the regulations. For example, the regulations, but not the statute, prohibit retaliation against an individual who files a Title VI complaint with a federal agency alleging discrimination by a federal funding recipient. See 28 C.F.R. 42.107(e); 49 C.F.R. 21.11(e). Protection against retaliation, however, is a critical component of a statutory scheme that depends on the filing of complaints. Cf. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 345-346 (1997) (noting "persuasive" agency support for effective anti-retaliation provisions to ensure protection of anti-discrimination laws). Under petitioners' theory, individuals who believe they have suffered retaliation would have no judicial cause of action to enforce the prohibition against retaliation, and would have to seek agency enforcement to complain to federal agencies about discrimination. But because an agency may decide not to investigate a complaint "based on a lack of enforcement resources, rather than on any conclusion on the merits of the complaint," *Cannon*, 441 U.S. at 707 n.41, the regulations' prohibition against retaliation could not ensure protection for individuals who file complaints of discrimination. Unsurprisingly, therefore, courts have uniformly permitted private parties to sue funding recipients to enforce the rights, secured by regulation, to be free from retaliation. See *Lowrey* v. *Texas A & M Univ. Sys.*, 117 F.3d 242, 250-254 (5th Cir. 1997); *Preston* v. *Virginia*, 31 F.3d 203, 206 n.2 (4th Cir. 1994).

Moreover, should a private lawsuit raise novel questions about the interpretation or application of Title VI regulations, a federal court may invite the pertinent agency to participate as amicus curiae or otherwise in the court proceedings. See *Rosado* v. *Wyman*, 397 U.S. 397, 406-407

(1970); *Cannon*, 441 U.S. at 688 n.8. Federal Rule of Civil Procedure 24(b) also authorizes intervention by a federal agency, upon timely application, whenever a party to an action relies on an agency regulation for a claim or defense. And Federal Rule of Appellate Procedure 29(a) permits the filing of an amicus curiae brief by the United States without need for the consent of the parties or leave of court. We perceive little danger, therefore, that courts will enforce agency regulations without the benefit of agency expertise and interpretations of those regulations.

D. Implication Of A Private Right Of Action For Injunctive Relief Does Not Contravene Any Rule Of Statutory Construction Requiring A "Plain Statement" Or "Notice"

Petitioners contend (Br. 20-30, 33-37) that, because Title VI is Spending Clause legislation, this Court may not imply a private right of action to enforce *any* of its provisions, statutory or regulatory, against a state or local recipient of federal funds. That argument is irreconcilable with this Court's decisions and erroneously conflates several independent legal doctrines.

State agencies that receive federal funds are entitled to notice that Congress or a federal agency has attached legal obligations as substantive conditions to the acceptance of federal money. See *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). That requirement of notice is satisfied in this case. Agency regulations in force for more than 30 years have made clear that recipients of federal money may not administer programs in a way that subjects individuals to the effect of discrimination based on national origin.[19] And once that requirement of notice has

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[19] Nor, contrary to petitioners' contention (Pet. Br. 33, 38-39) is there anything particularly unclear about the discriminatory-effect regulations

been satisfied, the exact scope of the anti-discrimination obligation presents a straightforward matter of statutory and regulatory interpretation. See *Davis* v. *Monroe County Bd. of Educ.*, 526 U.S. 629, 643, 650 (1999); *Honig* v. *Doe*, 484 U.S. 305, 325 n.8 (1988); *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 286 n.15 (1987); *Bennett* v. *Kentucky Dep't of Educ.*, 470 U.S. 656, 665-666 (1985).

This Court's decisions establish no requirement that recipients of federal funds *also* be given a "clear statement" in a statute as to exactly how their substantive legal obligations will be enforced. Such a requirement could not be reconciled with the very nature of an implied right of action, which by definition is not made express in the text of a statute. Yet the Court has long accepted that a private right of action may be implied against a public recipient of federal funds. See, *e.g.*, *Franklin* v. *Gwinett County Pub. Schs.*, 503 U.S. 60, 65-66 (1992) (Title IX); *Lane* v. *Peña*, 518 U.S. 187, 191-192 (1996); cf. *Allen*, *supra* (implying private right of action against State covered by Section 5 of the Voting Rights Act of 1965).

The Court has tailored *remedies* under implied rights of action to ensure that recipients of federal funds will have notice that they could be held liable for the specific conduct

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at issue in this case. The lower courts correctly borrowed well-settled principles from "disparate impact" employment-discrimination cases under Title VII of the Civil Rights Act of 1964 to determine whether petitioners' English-only policy had an unjustified discriminatory effect on the basis of national origin. See Pet. App. 52a-54a; see also *Board of Educ.* v. *Harris*, 444 U.S. 130, 151 (1979) (analogizing from Title VII case law an "educational necessity" justification under statute proscribing disparate racial impact in educational setting). Nor did this case turn on whether petitioners had taken "reasonable" steps to provide information to beneficiaries about their program, the driver's license examination, in languages other than English (Pet. Br. 38-39), for it is undisputed that petitioners provided *no* access to the driver's license examination in any language other than English.

at issue in a case. The Court has, for example, precluded the award of money damages in a private right of action under Title IX when the recipient of federal funds had no actual knowledge that discriminatory conduct was occuring in its programs, in order to avoid subjecting the recipient to monetary liability years after it received the federal financial assistance, and in an amount potentially greater than that assistance. See *Davis*, 526 U.S. at 639-640; *Gebser*, 524 U.S. at 287; see also *Guardians*, 463 U.S. at 598 (opinion of White, J.) (concluding that damages are not available in private right of action under Title VI unless intentional discrimination is shown). When the only relief sought is a prospective injunction, however, no such problem of notice is presented. Once the court case is concluded on the merits and the court has issued an injunction embodying the parties' rights and responsibilities, the recipient has notice of its ongoing duties and retains the option of terminating the federal financial assistance in order to avoid further liability in the future. See *id.* at 596-597 (opinion of White, J.). The contractual nature of the arrangement is thus preserved without distorting the fabric of statutory interpretation.

II. FEDERAL AGENCY REGULATIONS PROHIBITING RECIPIENTS OF FEDERAL AID FROM ADMINISTERING PROGRAMS WITH DISCRIMINATORY EFFECTS ARE VALID MEASURES TO EFFECTUATE TITLE VI

In addition to arguing that agencies' discriminatory-effect Title VI regulations may not be enforced by private right of action, petitioners also appear to challenge the validity of those regulations. See Pet. Br. 26-27, 30, 45.[20] That issue is

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[20] Petitioners also appear to question the lower courts' application of those regulations to the facts of this case. See Pet. Br. 6-10, 36-39. That issue is not properly before this Court, as petitioners did not present it as

not fairly included within the only question presented by the certiorari petition, namely, whether a private right of action will lie to enforce those regulations. See Pet. i. Nor was that issue properly preserved in the lower courts, where petitioners not only failed to present a challenge to the regulations, but expressly conceded their validity. See pp. 7-8 & note 4, *supra*. Accordingly, this Court should decline to consider petitioners' belated challenge to the regulations.[21]

In any event, petitioners' challenge to the regulations is without merit. In *Guardians*, a majority of the Court concluded that the Title VI discriminatory-effect regulations are valid. Petitioners' suggestions that this Court is not bound by that holding or that it should be overruled are untenable. This Court's Title VI decisions, the statute's text, structure,

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a question presented in their certiorari petition (see Pet. i). Two observations are appropriate, however, in response to petitioners' assertions. First, although petitioners point out (Pet. Br. 7) that Congress has required applicants for naturalization to demonstrate understanding of English, Congress has not made—and, as far as we are aware, has never made—proficiency in English a requirement for an individual such as respondent Sandoval to obtain legal permanent residence in this country. Since the ability to drive is a "virtual necessity" for most people residing in this country, see *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977), it seems likely that Congress anticipated that aliens lawfully residing here would be able to drive without demonstrating proficiency in English. Second, petitioners point out (Pet. Br. 7-8) that federal agencies have required persons engaged in certain inherently dangerous activities, such as operators of *commercial* motor vehicles, seamen, and pilots, to demonstrate some working knowledge of English. But as the district court observed (Pet. App. 236a-238a), those activities are much more closely regulated, and involve much greater concerns about public safety, than the use of an ordinary driver's license.

[21] See *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97 n.4 (1991) (Court will not address claims raised by petitioners that are not fairly included within question presented in certiorari petition); *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) (this Court will ordinarily not address a basis for reversal not raised in the lower courts).

and legislative history, and Congress's subsequent legislative actions all show that the discriminatory-effect regulations are valid.

A. This Court Has Upheld Federal Agencies' Discriminatory-Effect Regulations Under Title VI

There can be no serious dispute that this Court has ruled that agency regulations validly prohibit recipients of federal funds from conducting programs in a manner with a discriminatory effect, even if Title VI itself prohibits only intentional discrimination. A majority of the Court so concluded in *Guardians*. 463 U.S. at 592 (opinion of White, J.); *id.* at 617-624 (Marshall, J., dissenting); *id.* at 642-645 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting). In *Alexander* v. *Choate*, 469 U.S. 287, 293 (1985), the Court stated that it "held [in *Guardians*] that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI." That holding was also consistent with the Court's earlier decision in *Lau*, where the Court ordered the entry of prospective relief against a recipient of federal funds based on a violation of discriminatory-effect regulations, even in the absence of a finding of discriminatory intent. See 414 U.S. at 568.[22]

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[22] Petitioners argue (Pet. Br. 41-42) that *Lau* was overruled by *Bakke*, which held that Section 601 reaches no farther than the Equal Protection Clause. But that was precisely the question before the Court in *Guardians*, in which a majority of the Court resolved the issue by concluding that *Lau* remained good law and on that basis upheld the discriminatory-effect regulations as a valid implementation of Title VI. Compare 463 U.S. at 589-591 (opinion of White, J.) (*Bakke* did not overrule *Lau*); *id.* at 617-618, 622-623 (Marshall, J., dissenting) (*Lau* survives *Bakke*); and *id.* at 643 (Stevens, J., dissenting) (relying on continuing validity of *Lau*) with *id.* at 611 (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment) (*Bakke* did overrule *Lau*); and

Principles of *stare decisis* counsel strongly against unraveling more than 25 years of precedent involving Title VI regulations promulgated 36 years ago, only months after the enactment of Title VI itself. "[*S*]*tare decisis* promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *United States* v. *IBM Corp.*, 517 U.S. 843, 856 (1996) (citation omitted). This Court's special "reluctance to overturn [non-constitutional] precedents derives in part from institutional concerns about the relationship of the Judiciary to Congress," for Congress is free to correct the Court's interpretation of the laws it passes or the regulations enacted by federal agencies. *Neal* v. *United States*, 516 U.S. 284, 295 (1996). No "special justification" (*Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984)) warranting the dramatic

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id. at 615 (O'Connor, J., concurring in the judgment) (*Bakke* requires overruling of *Lau*).

Petitioners also contend (Pet. Br. 44-45) that *Lau*, *Guardians*, and *Choate* were all overruled by a footnote in *United States* v. *Fordice*, 505 U.S. 717, 732 n.7 (1992). *Fordice*, however, did not involve the question whether Title VI discriminatory-effect regulations are valid. Rather, it involved a claim under Title VI and a regulation that required recipients to "take affirmative action to overcome the effects of prior [intentional] discrimination." *Ibid.* (quoting 34 C.F.R. 100.3(b)(6)(i) (1991)). This Court had previously interpreted that regulation to be merely co-extensive with the Constitution's requirements for redressing the continuing effect of past *de jure* discrimination. See *Bazemore* v. *Friday*, 478 U.S. 385, 408-409 (1986) (opinion of White, J.) (deferring to United States' interpretation of regulation); U.S. Br. at 38 n.41, *Bazemore* v. *Friday*, Nos. 85-93 & 85-428 ("the regulation simply embodies this * * * constitutional requirement"). Because in *Fordice* no party relied on an agency regulation that went further than Section 601 itself (such as the discriminatory-effect regulations at issue in this case), it was not surprising that the Court stated in *Fordice* that "the reach of Title VI's protection extends no further than the Fourteenth Amendment." 505 U.S. at 732 n.7.

change of course proposed by petitioners is present here. Quite the opposite is true. As we now show, the holding of *Guardians* was correct when decided and has been ratified by subsequent congressional activity.

B. The Discriminatory-Effect Regulations Are Consistent With The Text And Legislative History Of Title VI

1. The *Guardians* holding is well grounded in the language and structure of Title VI. Section 602 directs each agency empowered to extend federal financial assistance "to effectuate the provisions of [Section 601] 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." The regulations prohibiting discriminatory effects still have the force and effect of law since they are not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). The statute's grant of authority to promulgate rules to "effectuate" Title VI is a broad grant of power. It authorizes agencies not only to define what actions constitute "discrimination," but also to make effective the prohibition by establishing mechanisms to ensure that such discriminatory actions are no longer engaged in by programs or activities that receive federal funds.

The legislative history of Title VI confirms that Congress expected the agencies to promulgate legislative-type rules defining not only procedural requirements, but also practices that would be substantively prohibited. During the Senate Hearings on the Civil Rights Act, Senator Ervin observed that the agencies would be writing definitions of the term "discrimination" and "prescribing the acts and omissions which shall constitute illegal discrimination."

Civil Rights—The President's Program, 1963: Hearings Before the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. 398 (1963) (*1963 Senate Judiciary Comm. Hearings*). Attorney General Kennedy agreed with Senator Ervin that it would be up to the administrator of each agency to write rules setting out "not only what constitutes discrimination in their programs but also what acts or omissions are to be forbidden," *id.* at 399-400. Senator Ervin then inquired whether the regulations would have "the force and effect of law," and the Attorney General responded: "That is correct, Senator." *Id.* at 400.[23] The floor debates also made clear Congress's understanding that agencies would "establish nondiscrimination standards" and would define the term "discrimination" in their rules, and that a violation of the regulations would give rise to liability.[24] Indeed, it was precisely the "latitude" granted to the agencies that led Congress to require that the President approve each agency's Title VI regulations.[25]

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[23] Attorney General Kennedy similarly observed in the House hearings that Section 601 states a "general criterion" of non-discrimination and that the agencies "will establish the rules that will be followed in the administration of the program—so that the recipients of the program will understand what they can or cannot do." *Civil Rights: Hearings Before the House Comm. on the Judiciary*, 88th Cong., 1st Sess. Pt. 4, at 2740 (1963) (*1963 House Judiciary Comm. Hearings*); see also *id.* at 1890, 2703, 2766; *Civil Rights: Hearings Before the House Comm. on Rules*, 88th Cong., 2d Sess. Pt. 2, at 321-322 (1964) (*1964 House Rules Comm. Hearings*) (remarks of Rep. Celler, the sponsor in the House); *id.* at 330, 336, 434, 437-438, 447.

[24] See 110 Cong. Rec. 1519 (1964) (Rep. Celler); *id.* at 1632 (Rep. Dowdy); *id.* at 6049 (Sen. Talmadge); *id.* at 6050 (Sen. Javits); *id.* at 12,320 (Sen. Byrd); *id.* at 13,130 (Sen. Gore); *id.* at 9083-9084 (Sen. Gore); *id.* at 2468 (Rep. Rodino); *id.* at 12,715 (Sen. Humphrey).

[25] See 110 Cong. Rec. 2499 (1964) (Rep. Lindsay). In addition, the legislative history of Title VI yields repeated references to broad prophylactic purposes for that statute—to "prevent," "preclude," "end," or

2. This evidence from the legislative history suggests at least two purposes to be served by permitting federal agencies to adopt regulations that bar recipients of federal funds from engaging in actions that have the effect of subjecting individuals to discrimination. First, a regulation prohibiting discriminatory effects is appropriate to detect a violation where facially neutral criteria may be used, at least in part, as a subterfuge for intentional discrimination. Congress was aware of strenuous covert resistance to this Court's non-discrimination decisions involving voting, education, and public services. Such concealed intentional discrimination, combined with persistent "subconscious stereotypes and prejudices," has led Congress to make unlawful practices that can "in operation be functionally equivalent to intentional discrimination," despite the inability of a plaintiff to prove discriminatory intent. *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 987, 990 (1988), see also *City of Rome* v. *United States*, 446 U.S. 156, 174, 177 (1980).

Second, the discriminatory-effect standard recognizes the continuing repercussions of past intentional discrimination and seeks to ensure that programs accepting federal money are not administered in a way that perpetuates those effects. As the Court has explained, the disparate racial impact of certain actions may well be traceable to the long history of invidious race discrimination. See *Griggs* v. *Duke Power Co.*,

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"get away from" discrimination; to "insure" or "make sure" that discrimination does not occur; to avoid the use of funds to "perpetuate" or "cause" discrimination; and to prevent the use of funds in a way that discriminates. See, *e.g.*, *1963 House Judiciary Comm. Hearings*, *supra*, at 2683-2684, 2774; *1964 House Rules Comm. Hearings*, *supra*, at 94, 321, 330, 336, 343, 346-348, 422; *1963 Senate Judiciary Comm. Hearings*, *supra*, at 328, 330, 397-403, 413; 110 Cong. Rec. 1519-1520, 1527-1528 (1964) (Rep. Celler); *id.* at 1542 (Rep. Lindsay); *id.* at 1599 (Rep. Minish); *id.* at 1613 (Rep. Meader); *id.* at 1629 (Rep. Halpern); *id.* at 1677 (Rep. Celler); *id.* at 2595 (Rep. Donahue); *id.* at 6562 (Sen. Kuchel); *id.* at 7065 (Sen. Ribicoff).

401 U.S. 424, 430-431 (1971); see also *City of Rome*, 446 U.S. at 176-177; *Gaston County* v. *United States*, 395 U.S. 285, 297 (1969).

In crafting regulations to "effectuate" a prohibition on discrimination, as authorized by Congress in Section 602, agencies may also take cognizance of the well-recognized point that "an invidious discriminatory purpose may often be inferred from * * * the fact, if it is true, that the law bears more heavily on one race than another." *Washington* v. *Davis*, 426 U.S. 229, 242 (1976). The long history of discrimination on the basis of race and national origin, the close (albeit not inevitable) correlation between discriminatory intent and disparate effects, and the difficulty in many circumstances of proving intent together are sufficient to justify a rule that prohibits recipients of federal funds from administering programs with a discriminatory effect, in the absence of proof of untainted and legitimate justifications for that discriminatory effect. Cf. *United States* v. *O'Hagan*, 521 U.S. 642, 676 (1992) (upholding "prophylactic" agency regulations intended to mitigate "proof problem[s]"). That is particularly true given the breadth of authority granted the Executive Branch in Section 602 and the fact that the regulations (a) represent the longstanding and consistent view of the federal government, promulgated only months after the enactment of the statute, (b) were crafted in part by the Attorney General, who assisted in drafting Title VI, and (c) were personally approved by the President himself.

C. Congress Has Ratified The Discriminatory-Effect Regulations

1. Congress has consistently given close attention to agencies' enforcement of their Title VI regulations. In 1966 and 1967, Congress reviewed the Department of Health, Education and Welfare's (HEW) implementation of its Title VI regulations, including a regulation to the effect that

school districts subject to a court order of desegregation would be deemed to be in compliance with Title VI as long as they provided an assurance that they were in compliance with the court order.[26] In response to reports that HEW intended to modify that regulation, Congress enacted the regulatory language almost verbatim into law as part of the Elementary and Secondary Education Amendments of 1967.[27] Congress also investigated HEW's practice of deferring decisions on applications for new funds based on noncompliance with Title VI and imposed statutory time limits on agency decision-making.[28] But despite that active monitoring and legislative involvement in HEW's implementation of Title VI, in 1966 the House rejected a proposal to amend Title VI to prohibit only intentional discrimination, see 112 Cong. Rec. 18,715 (1966), and the proposal never emerged

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[26] 45 C.F.R. 80.4(c)(1) (1964); see *Guidelines for School Desegregation: Hearings Before the Special Subcomm. on Civil Rights of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 104-111 (1966); *Proposed Cutoff of Welfare Funds to the State of Alabama: Hearings Before the Senate Comm. on Finance*, 90th Cong., 1st Sess. (1967); *Policies and Guidelines for School Desegregation: Hearings Before the House Comm. on Rules*, 89th Cong., 2d Sess. (1966) (*1966 House Rules Comm. Hearings*); *U.S. Office of Education: Hearings Before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor*, 89th Cong., 2d Sess. 661-773 (1966).

[27] See Pub. L. No. 90-247, § 112, 81 Stat. 787 (codified as the proviso in 42 U.S.C. 2000d-5).

[28] See *1966 House Rules Comm. Hearings*, *supra*, at 39, 90-91, 103 (investigating HEW's practice); Elementary and Secondary Education Amendments of 1966, Pub. L. No. 89-750, Tit. I, § 182, 80 Stat. 1209 (codified at 42 U.S.C. 2000d-5) (imposing limits on HEW's deferral practices); see also Elementary and Secondary Education Amendments of 1969, Pub. L. No. 91-230, § 2, 84 Stat. 121 (1970) (codified at 42 U.S.C. 2000d-6(a)) (expressing federal policy that "guidelines and criteria established pursuant to title VI * * * shall be applied uniformly in all regions of the United States").

from committee in the Senate. See *Guardians*, 463 U.S. at 620 n.8 (Marshall, J., dissenting) (summarizing legislative history).

But Congress did not simply acquiesce in the Title VI regulations; it affirmatively embraced them. In 1974, Congress manifested its approval of this Court's decision in *Lau* directing the entry of relief based on agency discriminatory-effect regulations by enacting the Bilingual Education Act, Pub. L. No. 93-380, 88 Stat. 503 (currently codified as subsequently amended at 20 U.S.C. 7401 *et seq.*). In that Act, Congress found that "the Federal Government, as *exemplified by title VI of the Civil Rights Act of 1964* * * *, has a special and continuing obligation to ensure that States and local school districts take appropriate action to provide equal educational opportunities to children and youth of limited English proficiency," 20 U.S.C. 7402(a)(15) (emphasis added), and provided funds to assist school districts in providing bilingual education to comply with *Lau*. See H.R. Rep. No. 805, 93d Cong., 2d Sess. 69 (1974); S. Rep. No. 763, 93d Cong., 2d Sess. 44-45 (1974).

Congress also enacted several statutes after *Lau* that specifically required agencies to promulgate regulations "similar" to those under Title VI. Three statutes required agencies to ensure that no person is "excluded from receiving [benefits], or participating in any activity" under the program at issue "because of" or "on the grounds of" race, creed, color, national origin or sex, and required agencies to promulgate "rules" or "regulations" that "shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964."[29] Another four statutes

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[29] See 15 U.S.C. 719*o* (enacted 1976); 49 U.S.C. 47123 (enacted 1976, reenacted in 1982 and 1994); 43 U.S.C. 1863 (enacted 1978); see also Pub. L. No. 93-153, § 403, 87 Stat. 590 (1973). The regulations that define "dis-

provided that a prohibition on sex discrimination in federally-assisted programs "will be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination, under title VI of the Civil Rights Act of 1964."[30] Especially when viewed in light of this Court's reliance on the discriminatory-effect regulation in *Lau*, 414 U.S. at 568, those statutes clearly ratify the Title VI regulations, including the discriminatory-effect standard.

Congress also used Title VI as a model for later civil rights statutes that broadly prohibit discrimination in programs and activities receiving federal financial assistance. In Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, Congress intended that the effectuating regulations be modeled on existing Title VI regulations. See *Grove City*, 465 U.S. at 575; *Cannon*, 441 U.S. at 696. Congress extensively reviewed proposed Title IX regulations and actually amended the statute to curb what it perceived as regulatory excesses, see *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 531-535 (1982), but it took no action in regard to agency regulations prohibiting discriminatory effects, despite objections having been raised.[31]

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crimination" under those statutes prohibit discriminatory effects. See 43 C.F.R. 27.3(b)(4); 49 C.F.R. 27.7(b); 43 C.F.R. 34.4(b)(3)(viii).

[30] See 15 U.S.C. 775 (enacted 1974); 42 U.S.C. 5891 (enacted 1974); 40 U.S.C. 476 (enacted 1976); 42 U.S.C. 6709 (enacted 1976); see also Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 13, 86 Stat. 903 (enacted 1972); 23 U.S.C. 324 (enacted 1973). Regulations that define "discrimination" promulgated under these statutes likewise prohibit discriminatory effects. See 10 C.F.R. 1040.13(c); 10 C.F.R. 4.12(b); 23 C.F.R. 200.5(f); 40 C.F.R. 12.4(b)(2) (1974).

[31] See 121 Cong. Rec. 21,512 (1975) (Sen. Helms); *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ. of the House Comm. on Educ. and Labor*, 94th Cong., 1st Sess. 249, 551-552 (1975).

Regulations promulgated to effectuate Section 504 of the Rehabilitation Act, 29 U.S.C. 794, which prohibits discrimination on the basis of disability in programs or activities receiving federal financial assistance, also demonstrate Congress's acceptance of the Title VI discriminatory-effect regulations. While Section 504 was modeled on Section 601 of Title VI, Congress did not include a provision analogous to Section 602 that expressly authorized agencies to promulgate regulations to effectuate the prohibition. But even absent such statutory language, this Court held that Congress intended the federal agencies distributing federal financial assistance to bear the "important responsibility" of determining what "amounts to discrimination against the handicapped," *Southeastern Community College* v. *Davis*, 442 U.S. 397, 413 (1979); see also *Alexander*, 469 U.S. at 304 n.24. This Court has also observed that "Congress itself endorsed the regulations in their final form," *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 634 (1984), which it did at a time when they included a regulation modeled on the Title VI discriminatory-effect regulations, 45 C.F.R. 84.4(b)(4)(ii). Thus, there can be no doubt that Congress perceived the discriminatory-effect regulations as fully consistent with the statute.

2. Congress's actions after this Court's decision in *Guardians* likewise show that it has ratified the discriminatory-effect regulations. As we have explained (pp. 21-26, *supra*), in 1988, after several years of deliberations, Congress amended Title VI in the Civil Rights Restoration Act. The legislative history of the Restoration Act makes quite clear that Congress was actually aware of *Guardians* and understood that case as upholding agency discriminatory-effect regulations.[32] The Department of

[32] See H.R. Rep. No. 829, 98th Cong., 2d Sess. Pt. 1, at 24 (1984). Senator Kennedy explained that "title VI regulations use an effect

Justice explained that the proposed Restoration Act would provide "expanded federal jurisdiction" over claims arising "under Federal regulations which forbid conduct [that] falls with a disproportionate impact on particular groups," 134 Cong. Rec. 4237-4238 (1988) (quoting Department letter), leading one Representative to claim that President Reagan's veto (subsequently overridden by Congress) was based on a preference "to rely on 'intent' rather than 'effect' in identifying discrimination so that in the absence of 'discriminatory purpose,' effective discrimination is allowed," *id.* at 4779 (Rep. Richardson). Aware of the discriminatory-effect regulations and the Court's validation of them in *Guardians*, Congress nonetheless expanded the statute's scope.

The text of the Restoration Act also clearly demonstrates Congress's understanding that it was ratifying the existing regulatory scheme. The Restoration Act's preamble states that "legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of [Title VI, Title IX and Section 504] as previously administered." Pub. L. No. 100-259, § 2, 102 Stat. 28. In debates surrounding an existing Title IX regulation involving abortion, Members of Congress explained that this preambulatory language would ratify all existing regulations. Senator Danforth stated that the language of the preamble "quite expressly" affirms existing

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standard to determine violations" and that "the Federal courts have upheld the use of an effect standard." 134 Cong. Rec. 229 (1988); see also 130 Cong. Rec. 27,935 (1984) (Sen. Kennedy). Senator Hatch explained that the legislation provided "expansive coverage" of "agency disparate impact regulations implementing Title VI." 134 Cong. Rec. 4257 (1988); accord *id.* at 4231, 4239, 4252, 4259 (Sen. Hatch). A member of the House observed that the legislation would bring about an "extension of the effects test." *Id.* at 4784 (Rep. Boulter); see also *id.* at 4767 (Rep. McEwen); *id.* at 4246 (Sen. Symms).

regulations, and that "the bill without the Danforth amendment expressly reaffirms a regulation" relating to abortion.[33] That was also the view of the Executive Branch.[34] To address those concerns, Congress enacted the Danforth Amendment, 20 U.S.C. 1688, providing that Title IX does not require recipients of federal funds to pay for any benefits or services relating to abortion. Thus Congress demonstrated its understanding that it was ratifying all existing regulations that it did not expressly disavow. But *no* proposal was made to limit the discriminatory-effect regulations, despite Congress's awareness of their existence during Congress's deliberations that resulted in expansion of the coverage of Title VI. The Restoration Act therefore ratified the discriminatory-effect regulations upheld in *Guardians*.

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[33] 134 Cong. Rec. 347 (1988); see also *id.* at 350 ("we are, by statute, reaffirming a regulation"); *id.* at 352 ("The bill in its present form expressly ratifies those regulations."); *id.* at 342 (Sen. Durenberger) ("we are voting to reaffirm the regulations"); *id.* at 345 (Sen. Hatch) (enacting bill "effectively codifies" regulations).

[34] See *1987 Senate Labor Comm. Hearings*, *supra*, at 442 (Mark Disler, Deputy Assistant Attorney General, Civil Rights Division); see also *id.* at 135, 231, 519.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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