No. 24-1128

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NIA LUCAS; A.M., II, a minor, by and through
his Guardian ad Litem, Nia Lucas,

Plaintiffs-Appellants

v.

VHC HEALTH, d/b/a Virginia Hospital Center, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

SAMUEL R. BAGENSTOS
General Counsel

MARC S. ALLEN
Deputy Associate General Counsel

CARY LACHEEN
Attorney
Department of Health & Human Services
200 Independence Ave., SW
Washington, D.C. 20201

KRISTEN CLARKE
Assistant Attorney General

NICOLAS Y. RILEY
JESSICA MERRY SAMUELS
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 598-9337

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INTEREST OF THE UNITED STATES

This appeal concerns whether retaliation claims are cognizable under the Patient Protection and Affordable Care Act's anti-discrimination provision. Pub. L. No. 111-148, Tit. I, Subtit. G, § 1557, 124 Stat. 260 (42 U.S.C. 18116). That provision—known as Section 1557—protects the rights of individuals seeking nondiscriminatory access to health programs and activities that receive federal funding. *Ibid.* Congress has authorized the Secretary of Health and Human Services (HHS) to promulgate regulations implementing Section 1557. 42 U.S.C. 18116(c); 89 Fed. Reg. 37,522 (May 6, 2024).

Because Section 1557 incorporates elements of other federal anti-discrimination laws, this case also concerns the application of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) and Section 504 of the Rehabilitation Act (29 U.S.C. 794(a)). The federal government is charged with enforcing these statutes, *see* 42 U.S.C. 2000d-1; 29 U.S.C. 794a(a)(2), and the Department of Justice (DOJ) coordinates implementation and enforcement by federal agencies, *see* Exec. Order No. 12,250, 3 C.F.R. 298 (1981); 28 C.F.R. 0.51. In light of these regulatory and enforcement responsibilities, the United States has a substantial interest in the resolution of this appeal and ensuring that Section 1557 and the underlying anti-discrimination provisions are correctly interpreted.

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES

Section 1557 of the Patient Protection and Affordable Care Act (ACA) prohibits discrimination on several grounds—including race and disability—in health programs or activities that receive federal funding. 42 U.S.C. 18116.

The United States addresses the following questions:

1. Whether Section 1557's prohibition on discrimination encompasses retaliation claims.

2. Whether retaliation claims under Section 1557 are limited to the employment context, as the district court held below.[1]

STATEMENT OF THE CASE

A. Statutory Background

Section 1557 of the ACA prohibits discrimination in federally funded health programs or activities on the grounds specified in other pre-existing anti-discrimination laws. The statute provides:

> [A]n individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or [Section 504 of the Rehabilitation Act,] section 794 of title 29, be excluded from

[1] The United States takes no position on the merits of Lucas's claims or any other issue presented in this appeal.

> participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving [f]ederal financial assistance.

42 U.S.C. 18116(a). Title VI, in turn, prohibits discrimination "on the ground of race, color, or national origin" in "any program or activity receiving [f]ederal financial assistance." 42 U.S.C. 2000d. And Section 504 provides that "[n]o otherwise qualified individual" with a disability "shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance." 29 U.S.C. 794(a). In terms of enforcement, Section 504 adopts "[t]he remedies, procedures, and rights" in Title VI. 29 U.S.C. 794a(a)(2).

Section 1557 also incorporates "[t]he enforcement mechanisms provided for and available under" the enumerated provisions. 42 U.S.C. 18116(a).

B. Factual Background[2]

Plaintiff-Appellant Nia Lucas "is a disabled veteran, African American female." JA 11.[3] She has been "diagnosed with Traumatic Brain Injury, Post-

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[2] The following facts are drawn from Lucas's pro se complaint. In reviewing defendants' motion to dismiss, these allegations must be accepted as true, *Ray v. Roane*, 948 F.3d 222, 226 (4th Cir. 2020), and construed with "special judicial solicitude" given Lucas's pro se status below, *Beaudett v. City of Hampton*, 775 F.2d 1274, 1277 (4th Cir. 1985).

[3] "JA __" refers to page numbers in the Joint Appendix. "Pls.' Br. __" refers to page numbers in Lucas's opening brief.

Traumatic Stress Syndrome, Depression, Anxiety, and Panic Attacks" in connection with her military service "in Afghanistan with the United States Army." JA 18.

In August 2018, when Lucas was pregnant and in her third trimester, she began experiencing "pre-term contractions and pain." JA 7-10, JA 20. On August 24, she was admitted to Virginia Hospital Center (VHC) in Arlington, Virginia, but she was not treated in accordance with the recommendation of the VHC physician who referred her for emergency care. JA 7, JA 18. Instead, Lucas was discharged the following day "without treatment" of her symptoms, and she was told by the emergency physicians "that if she was to miscarry to do so at home." JA 18.

For the next two days, Lucas continued to experience painful "pre-term contract[ions]." JA 7. On August 27, her VHC treating physician sent Lucas back to the same VHC hospital for treatment. JA 7, JA 18. At the hospital, Lucas was prescribed medication to stop contractions, but "the staff made it clear that they believed" she "was fabricating the seriousness of" her symptoms because of her "diagnosed emotional conditions" and "disabilities." JA 18-19. As before, Lucas was discharged the following day. JA 19.

During the time she was being treated by VHC, Lucas complained to three staff members that she "was receiving disparate care from White patients, because of her race and that of her son (African American) and her service-connected

disability (PTSD and depression)." JA 8-10; *see also* JA 19 (describing Lucas's complaints about unequal care and treatment). Lucas also reported "intentional discrimination" she had "witnessed" at the VHC practice "against . . . another patient of color" who "did not speak English." JA 9-10, JA 19. At some point during her prenatal treatment, Lucas and her partner were told by a VHC doctor during a medical appointment that the doctor "does not take care of veterans or 'Blacks.'" JA 20.

The week after making her discrimination complaints, Lucas received a letter from the VHC medical practice (dated several days earlier) informing her that "she was being dismissed" as a patient because "there was no trust between" her and her doctors. JA 19. Although the letter directed Lucas to find a new provider in less than 14 days, "her medical records were not readily available" to be transferred to another practice. JA 19. While Lucas tried to find a new doctor, she experienced "rashes," "extreme physical pain," "emotional distress," "racing heart rate," and "anxiety." JA 10.

C. Procedural History

Lucas filed this suit pro se in the Eastern District of Virginia against VHC and the physician group that treated her. JA 6, JA 11-12, JA 27. The complaint asserted claims of race discrimination, disability discrimination, and retaliation

under Section 1557 of the ACA, based on Lucas's allegations about the inadequate medical care she received and her dismissal from the VHC practice. JA 21-26.[4]

The district court granted defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), concluding that Lucas's complaint failed to state any valid claims. JA 86-96. As relevant here, the district court held that Lucas's retaliation claim is not cognizable under Section 1557, stating: "The Court is unaware of any case law that supports an independent cause of action under Section 1557 of the ACA for retaliation." JA 95-96. The court also asserted that, under Section 504 of the Rehabilitation Act—one of the underlying statutes incorporated in Section 1557—"retaliation claims . . . can only be brought in the employment context." JA 95. Because Lucas "does not allege that she is an employee or job applicant" with respect to the defendants, the district court dismissed her retaliation claim. JA 95-96.

Lucas moved for reconsideration, which the district court denied. JA 97-101. Among other things, Lucas argued that the district court had erred in dismissing her retaliation claim, but the court disagreed and adhered to its prior conclusion that the claim is not cognizable under Section 1557. JA 99-101. In doing so, the district court reiterated that "[p]laintiff has again failed to proffer any

[4] Lucas has withdrawn all other claims originally asserted in her complaint. Pls.' Br. 8 n.1.

case in which a federal court interpreted Section 1557 of the ACA as providing a cause of action for retaliation outside of the employer-employee context." JA 99-100; *see also* JA 100-101 ("Section 1557 of the ACA does not appear to imply an independent cause of action for retaliation, given that no federal court has read such a cause of action into the statute, absent an employer-employee relationship."). Lucas timely appealed. JA 102.

SUMMARY OF ARGUMENT

Section 1557 of the Affordable Care Act prohibits discrimination in healthcare. That prohibition includes protection against retaliatory conduct for anyone seeking medical care from a federally funded program—not just employees. The district court's holding to the contrary is error and should be reversed.

1. Supreme Court precedent interpreting similar anti-discrimination provisions instructs that Section 1557's text is best read to encompass retaliation. In *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), the Court held that the prohibition against "discrimination" in Title IX—another Spending Clause statute with nearly identical language to Section 1557—necessarily prohibits retaliation, because retaliation is a form of discrimination that undermines civil rights enforcement. The same is true here.

2. The statutory protections incorporated in Section 1557 also establish that retaliation claims are authorized under the ACA and not limited to employment relationships. Both Title VI and Section 504 have been widely understood to encompass retaliation, and case law and regulatory history make clear that the protection against retaliation applies beyond the employment context.

3. Because the district court erroneously dismissed Lucas's retaliation claim as not cognizable under Section 1557, the case should be remanded so that the district court may evaluate the merits of that claim in the first instance.

ARGUMENT

Retaliation claims are cognizable under Section 1557 of the Affordable Care Act, regardless of whether a claim arises in the employment context.

The district court erred in dismissing Lucas's retaliation claim under Section 1557 of the Affordable Care Act. Both the text of Section 1557 itself, as well as the statutory protections it incorporates, each provide an independent basis to hold that Section 1557 authorizes retaliation claims, and that those claims are not limited to suits brought by employees against their employers.

A. The language Congress chose to use in Section 1557 encompasses retaliatory conduct.

1. Supreme Court precedent instructs that retaliation is a form of "discrimination."

Section 1557 provides that "an individual shall not . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under"

a covered health program or activity based on any of the "ground[s]" enumerated in four other anti-discrimination statutes. 42 U.S.C. 18116(a). Under the Supreme Court's decision in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), this statutory text—specifically, the prohibition on "discrimination"—necessarily encompasses retaliation as well.

Jackson considered the validity of retaliation claims under Title IX, another Spending Clause statute that contains materially identical language to Section 1557. Title IX provides that no individual shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination" on the basis of sex in any covered "education program or activity." 20 U.S.C. 1681(a); *cf.* 42 U.S.C. 18116(a) (providing that no individual shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination" in any covered "health program or activity"). In *Jackson*, the Court interpreted this language to reach both discrimination and retaliation, reasoning that "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination." 544 U.S. at 173.

As the Court explained, "[r]etaliation is, by definition, an intentional act," and it is "a form of discrimination because the complainant is being subjected to differential treatment." *Jackson*, 544 U.S. at 173-174 (citation and internal quotation marks omitted); *see also id.* at 174 (noting that retaliation "is an

intentional response to the nature of the complaint," which is "an allegation of . . . discrimination"). "[E]ffective protection against retaliation" is also critical to anti-discrimination enforcement, the Court reasoned, to ensure that "individuals who witness discrimination" are not "loath to report it." *Id.* at 180 (citation omitted); *see also ibid.* ("[I]f retaliation were not prohibited, Title IX's enforcement scheme would unravel."). The Court accordingly concluded: "when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional 'discrimination' 'on the basis of sex,' in violation of Title IX." *Id.* at 174.

Jackson's reading of Title IX applies equally to Section 1557. As Title IX does for education, Section 1557 "outlaws discrimination" in health-related programs "receiving federal funds." *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 218 (2022). "By linking the prohibition to federal funding," both Section 1557 and Title IX "seek[] to prevent federal resources from supporting discriminatory conduct," and "by authorizing a private right of action," both statutes "seek[] to provide individuals a means of protecting themselves from such conduct." *T.S. by & through T.M.S. v. Heart of CarDon, LLC*, 43 F.4th 737, 741 (7th Cir. 2022). It therefore comes as no surprise that the operative text in both statutes is nearly identical. *See* p. 9, *supra*. Given these similarities, *Jackson*'s

determination that Title IX prohibits retaliation applies with equal force to the scope of Section 1557.

While *Jackson* alone is sufficient to resolve the issue, it is hardly the only Supreme Court decision to hold that broadly worded anti-discrimination statutes encompass retaliation claims. *See, e.g.*, *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (holding that 42 U.S.C. 1982 allows for retaliation suits); *Gomez-Perez v. Potter*, 553 U.S. 474, 481 (2008) (same for federal-sector provision of the Age Discrimination in Employment Act); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 451 (2008) (same for 42 U.S.C. 1981). Together, these cases stand for the "general proposition that Congress' enactment of a broadly phrased antidiscrimination statute may signal a concomitant intent to ban retaliation against individuals who oppose that discrimination, even where the statute does not refer to retaliation in so many words." *University of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 355 (2013). That general proposition is directly on point here.[5]

[5] *Wilcox v. Lyons*, 970 F.3d 452 (4th Cir. 2020)—which neither the district court nor defendants cited below—is not to the contrary. In that case, the Court rejected "a pure retaliation claim" under the Equal Protection Clause of the Fourteenth Amendment, and in doing so, distinguished *Jackson* and cases like it as interpreting statutory—rather than constitutional—anti-discrimination provisions. *Id.* at 455, 463-464. *Wilcox* has no bearing here for the same reason: Lucas seeks to bring a statutory claim for retaliation under Section 1557, not a constitutional one. The *Jackson* line of cases therefore applies with full force.

2. Section 1557's prohibition against retaliation is not limited to employment relationships.

Contrary to the district court's holding, there is no basis for restricting retaliation claims under Section 1557 to only "employee[s] or job applicant[s]." JA 96; *see also* JA 99-100 (holding that Section 1557 does not "provid[e] a cause of action for retaliation outside of the employer-employee context"). The statutory text does not contain any reference to employees, employers, or employment; rather, it applies to "any health program or activity, any part of which is receiving [f]ederal financial assistance, including credits, subsidies, or contracts of insurance." 42 U.S.C. 18116(a). Nor do the relevant anti-discrimination protections incorporated in Section 1557's text suggest that the statute is limited to employment, and the district court's analysis under the Rehabilitation Act is directly contradicted by case law as explained below. *See* pp. 23-24, *infra*. As a matter of statutory interpretation, moreover, the Supreme Court's reasoning in *Jackson* applies to both employment and non-employment claims alike: just as the threat of losing a job can deter complaints of discrimination in the workplace, so too can the prospect of being denied medical care at a hospital. 544 U.S. at 180.

The legislative context in which Section 1557 was enacted further undermines any suggestion that Congress sought to impose an employment-based limitation on the statute's scope. *See Pulsifer v. United States*, 144 S. Ct. 718, 730-731 (2024) (interpreting statute by "considering the paragraph's text in its legal

context”). Section 1557 is aimed at discrimination across the American healthcare system, so it would make little sense to restrict the statute to only employment. *Accord* 156 Cong. Rec. 4638 (2010) (noting that Section 1557’s protections were designed “to ensure that all Americans are able to reap the benefits of health insurance reform equally, without discrimination”). In short, the breadth of Section 1557’s coverage reaches far beyond the employee-employer relationship and would be significantly curtailed by any such limitation.[6]

B. Section 1557 incorporates elements of Title VI and Section 504, both of which authorize retaliation claims beyond the employment context.

Separate and apart from the text of Section 1557 itself, the underlying anti-discrimination protections incorporated in the statute independently establish that it reaches retaliation claims like the one Lucas asserts here.

Lucas alleges that she was dismissed from defendants’ medical practice because of her complaints about what she believed to be unlawful race and

[6] Though not cited below, the ACA contains a separate whistleblower provision (29 U.S.C. 218c) that does pertain specifically to employees. But that provision does not limit Section 1557 to the employment context. The two statutes differ in reach and scope: while the whistleblower provision protects employees who report violations of the ACA, Section 1557 applies to anyone who suffers discrimination in a covered health program. *See* 29 C.F.R. 1984.100(a); *see also Wilson v. EI DuPont de Nemours & Co.*, 710 F. App’x 57, 57 n.1 (3d Cir. 2018) (noting that Section 218c “generally protects employees from retaliation stemming . . . [from] activity protected under Title I of the ACA”).

disability discrimination. JA 8-10, JA 19. This retaliation claim falls within the anti-discrimination protections that Section 1557 incorporates. Specifically, Section 1557 adopts the "ground[s]" on which discrimination is prohibited under Title VI and Section 504—race and disability—as well as "[t]he enforcement mechanisms provided for and available" under those statutes. 42 U.S.C. 18116(a).

Given this statutory structure, a claim under Section 1557 must reach at least as far as a corresponding claim under Title VI or Section 504. *See Basta v. Novant Health Inc.*, 56 F.4th 307, 314-315 (4th Cir. 2022) (relying on Section 504 standards to assess whether plaintiff "plausibly pled a claim under the ACA"). It is well settled that both statutes authorize retaliation claims, regardless of whether those claims arise in the context of an employee-employer relationship.

1. Retaliation claims are cognizable under Title VI and not limited to employment.

a. This Court has already determined that Title VI encompasses retaliation claims. In *Peters v. Jenney*, the Court held that "Title VI provides a cause of action for retaliation based upon opposition to practices that Title VI forbids." 327 F.3d 307, 310 (4th Cir. 2003). In doing so, the Court explained that retaliation "bears . . . a symbiotic and inseparable relationship to intentional racial discrimination," *id.* at 318—as the Supreme Court went on to conclude less than two years later in *Jackson* with respect to sex discrimination. *See* pp. 9-10, *supra*. Other circuits have similarly recognized retaliation claims under Title VI. *See*

Whitfield v. Notre Dame Middle Sch., 412 F. App'x 517, 522 (3d Cir. 2011) ("Title VI . . . supports a private cause of action for retaliation."); *Farrukh v. University of S. Fla. Bd. of Trs.*, No. 21-13345, 2022 WL 3973703, at *3 (11th Cir. Sept. 1, 2022) ("Title VI's prohibition on racial discrimination is also construed as prohibiting retaliation for complaining about discrimination.").[7]

That conclusion is also consistent with longstanding administrative interpretations adopted across the federal government. Months after Title VI was adopted in 1964, the Department of Health, Education, and Welfare (HEW)—the predecessor agency to HHS—issued regulations under the new law as part of an effort by federal agencies to "adopt[] uniform and consistent regulations implementing Title VI." Exec. Order No. 11,247, 3 C.F.R. 177 (1965 Supp.). Those initial regulations prohibited retaliation, *see* 29 Fed. Reg. 16,301 (Dec. 4, 1964), and that prohibition remains in effect today, *see* 45 C.F.R. 80.7(e). Since

[7] Several additional circuits have implicitly assumed that retaliation claims are cognizable under Title VI. *See, e.g.*, *Williams v. City Univ. of N.Y.*, 633 F. App'x 541, 542 (2d Cir. 2015); *Ross v. Michigan State Univ. Bd. of Trs.*, No. 11-2278, 2012 WL 3240261, at *3 (6th Cir. June 20, 2012); *Junhao Su v. Eastern Ill. Univ.*, 565 F. App'x 520, 521-522 (7th Cir. 2014); *Shi v. Carlson*, 399 F. App'x 254, 255 (9th Cir. 2010); *Bird v. Regents of N.M. State Univ.*, 619 F. App'x 733, 762 (10th Cir. 2015). The Second Circuit is currently considering a case that raises retaliation claims under Title VI. *Bloomberg v. New York City Dep't of Educ.*, No. 23-343 (2d Cir. argued Jan. 25, 2024).

then, other agencies implementing Title VI have adopted materially identical anti-retaliation provisions.[8]

b. As to the scope of these claims, there is no support for limiting Title VI retaliation to employment. Indeed, this Court has expressly recognized that "no employment relationship is required" to assert "[a] Title VI anti-retaliation claim." *Alberti v. Rector & Visitors of the Univ. of Va.*, 65 F.4th 151, 156 n.6 (4th Cir. 2023) (citing *Peters*, 327 F.3d at 320). The Court has accordingly allowed Title VI retaliation claims to proceed in non-employment cases. *See, e.g.*, *Carnell Const. Corp. v. Danville Redevelopment & Hous. Auth.*, 745 F.3d 703, 713 (4th Cir. 2014) (holding that corporate entity "ha[s] standing to assert claims of race discrimination and retaliation under Title VI" in connection with bid and contract to work on public housing project funded in part by federal agency).

The structure of Title VI confirms that its protections reach more broadly than just employment relationships. The statute itself actually *excludes* claims regarding "any employment practice of any employer," unless the "primary objective of the [f]ederal financial assistance is to provide employment." 42 U.S.C. 2000d-3. If Title VI's prohibition against retaliation applied only in the

[8] Among many examples, *see* 30 Fed. Reg. 315 (Jan. 9, 1965) (22 C.F.R. 141.6(e)) (Department of State); 31 Fed. Reg. 10,267 (July 29, 1966) (28 C.F.R. 42.107(e)) (Department of Justice); 68 Fed. Reg. 10,907 (Mar. 6, 2003) (6 C.F.R. 21.11(e)) (Department of Homeland Security).

employment context, this statutory carve-out would leave an arbitrarily narrow set of claims to which the landmark civil rights law might apply.[9]

Federal agencies responsible for implementing Title VI have also consistently understood the statute to apply outside the employment context. In particular, HHS's Title VI regulations list several "[s]pecific discriminatory actions" that are "prohibited" and have nothing to do with the relationship between employees and their employers. 45 C.F.R. 80.3(b). To take a few examples, federal-funding recipients may not, on the basis of race: "[d]eny an individual any service, financial aid, or other benefit" provided by the relevant program; "[s]ubject an individual to segregation or separate treatment" in the provision of any "service, financial aid, or other benefit"; or "[t]reat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition" to receive benefits under the program. 45 C.F.R. 80.3(b)(1). Other agencies have similarly interpreted Title VI to prohibit discrimination in situations beyond just employment. *See, e.g.*, 28 C.F.R. 42.104(b) (Department of Justice); 22 C.F.R. 141.3(b) (Department of State); 34 C.F.R. 100.3(b) (Department of Education).

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[9] Interpreting Title VI in this way would also effectively nullify Section 1557's protection against retaliation for complaining about race discrimination in health programs or activities (*see* pp. 14-16, *supra*), since the primary purpose of federal funding in healthcare is typically to provide medical care, not employment.

2. Section 504 relies on Title VI's enforcement scheme and thus also recognizes retaliation claims outside the employment context.

a. Like Title VI, Section 504 also encompasses retaliation claims. This similarity is not just a coincidence: Section 504's enforcement provisions expressly incorporate Title VI's enforcement regime.

Under the Rehabilitation Act, violations of Section 504's non-discrimination mandate are subject to "[t]he remedies, procedures, and rights set forth in [T]itle VI of the Civil Rights Act of 1964." 29 U.S.C. 794a(a)(2). Those "remedies, procedures, and rights" include Title VI's protection against retaliation for making a complaint. *See* pp. 10, 14, *supra* (describing relationship between prohibiting retaliation and enforcing anti-discrimination guarantees). Applying these provisions, courts across the county have consistently recognized that the Rehabilitation Act prohibits retaliation. *See, e.g.*, *Reed v. Columbia St. Mary's Hosp.*, 782 F.3d 331, 337 (7th Cir. 2015) (holding that "[plaintiff] may . . . seek compensatory damages under the Rehabilitation Act for retaliation"); *Barker v. Riverside Cnty. Off. of Educ.*, 584 F.3d 821, 825 (9th Cir. 2009) ("[T]he anti-retaliation provision in Title VI of the Civil Rights Act has been incorporated by the Rehabilitation Act."); *Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 48 (1st Cir. 2000) (describing "the broad remedial provisions of Title VI and the Rehabilitation Act and the breadth of the anti-retaliation regulation adopted pursuant to those

laws"); *Hoyt v. St. Mary's Rehab. Ctr.*, 711 F.2d 864, 867 (8th Cir. 1983) (agreeing that "retaliation against persons who make complaints under § 504 is actionable"); *Wilbanks v. Ypsilanti Cmty. Schs.*, 742 F. App'x 84, 86 (6th Cir. 2018) (noting that "Section 504 incorporates the anti-retaliation provision of Title VI").

Reading Section 504 to prohibit retaliation is also consistent with the way federal agencies have interpreted the statute for decades. Even before the Rehabilitation Act incorporated Title VI's enforcement regime as a statutory matter, HEW—the agency originally responsible for coordinating the implementation of Section 504—issued regulations that adopted "[t]he procedural provisions applicable to [T]itle VI of the Civil Rights Act of 1964" as set forth in the pre-existing Title VI regulations. 42 Fed. Reg. 22,685 (May 4, 1977) (45 C.F.R. 84.61). The Title VI regulations, as noted above (*see* p. 15, *supra*), prohibited retaliation. 29 Fed. Reg. 16,301 (Dec. 4, 1964) (45 C.F.R. 80.7(e)). The following year, Congress blessed that interpretation by amending the Rehabilitation Act to expressly incorporate "[t]he remedies, procedures, and rights" of Title VI for violations of Section 504—which is how the statute still reads today. Pub. L. No. 95-602, § 120(a), 92 Stat. 2983 (1978); 29 U.S.C. 794a(a)(2); *see also Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 635 &

n.16 (1984) (noting that Section 794a(a)(2) "codifie[d] existing practice" under HEW's Section 504 regulations (citation omitted)).[10]

b. Also like Title VI, Section 504's prohibition against retaliation reaches beyond just employment relationships. The remedial provision of the Rehabilitation Act (29 U.S.C. 794a) includes two subsections—one that applies to federal employment practices (Subsection (a)(1)), and one that applies more broadly (Subsection (a)(2)). In particular, Subsection (a)(2) covers "*any person* aggrieved by any act or failure to act by any recipient of [f]ederal assistance" under Section 504. 29 U.S.C. 794a(a)(2) (emphasis added). The breadth of this provision shows that Section 504's protections—including against retaliation—are not limited to employment, but rather extend to *anyone* aggrieved by federal-funding recipients' unlawful conduct.[11]

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[10] Other agencies, including the Department of Justice, have also consistently interpreted Section 504 to encompass retaliation claims. *See, e.g.*, 45 Fed. Reg. 37,622 (June 3, 1980) (28 C.F.R. 42.503(b)(1)(vii)) (Department of Justice); 45 Fed. Reg. 69,445 (Oct. 21, 1980) (22 C.F.R. 142.70) (Department of State); 47 Fed. Reg. 29,553 (July 7, 1982) (Department of the Interior) (43 C.F.R. 17.280).

[11] Although not cited by the district court, 29 U.S.C. 794(d) is not relevant here. That provision incorporates portions of the Americans with Disabilities Act—including the anti-retaliation provision, 42 U.S.C. 12203—for "complaint[s] alleging employment discrimination." 29 U.S.C. 794(d). But it says nothing about non-employment retaliation claims and has no effect on the incorporation of Title VI's enforcement regime for "any person aggrieved" by a violation of Section 504. 29 U.S.C. 794a(a)(2).

For this reason, the Seventh Circuit has rejected the view that plaintiffs may bring retaliation claims under Section 504 only in employment cases. *Reed*, 782 F.3d at 337 ("The Act does not limit retaliation claims to the employment context."). To hold otherwise, the court explained, would be to "split with . . . other circuits," which have "recognized that the Rehabilitation Act provides for retaliation claims outside the employment context." *Ibid.* (citing cases).

This Court has implicitly assumed that plaintiffs may bring retaliation claims under the Rehabilitation Act in cases that do not involve employment. For example, *Zimmeck v. Marshall University Board of Governors* involved a "retaliation claim under the Rehabilitation Act . . . and the Americans with Disabilities Act" brought by student against a medical school that had dismissed her. 632 F. App'x 117, 120 (4th Cir. 2015) (per curiam). The Court ultimately affirmed summary judgment in favor of the defendant, but in doing so, set forth the elements of "a prima facie retaliation claim" under the Rehabilitation Act (RA) without reference to any employee-employer relationship. *Ibid.* Section 504 retaliation claims have also been addressed in other non-employment contexts as well. *See, e.g.*, *Timpson v. Anderson Cnty. Disabilities & Special Needs Bd.*, 31 F.4th 238, 249 (4th Cir. 2022) (considering "RA claim[] alleging discrimination in the provision of public services and retaliation"); *SE.H. v. Board of Educ. of Anne Arundel Cnty. Pub. Schs.*, 647 F. App'x 242, 250 (4th Cir. 2016) (per curiam)

(remanding retaliation claim under Section 504 for further consideration in public education case).[12]

Administrative interpretations implementing Section 504 (including the prohibition against retaliation) provide further support. In particular, HHS's regulations specifically address non-employment contexts—such as accessibility, education, and social services—where Section 504's protections apply. *See* 45 C.F.R. Subtit. A, Subchap. A, Pt. 84. Other agencies have similarly adopted regulations under Section 504 that contemplate enforcement beyond employment relationships. *See, e.g.*, 28 C.F.R. 42.520 (Department of Justice) (addressing accessibility of fund recipients' facilities); 22 C.F.R. Ch. I, Subchap. O, Pt. 142 (Department of State) (applying Section 504 regulations to accessibility, education,

[12] Other circuits have likewise accepted that Section 504 authorizes retaliation claims outside of the employment context. *See, e.g.*, *A.C. ex rel. J.C. v. Shelby Cnty. Bd. of Educ.*, 711 F.3d 687, 696-697 (6th Cir. 2013) (stating, in non-employment case, that "Section 504 prohibit[s] retaliation against any individual because of his or her opposing practices made unlawful by the Acts or otherwise seeking to enforce rights under the Acts"); *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 41 (1st Cir. 2012) (evaluating retaliation claim in education case "under the Rehabilitation Act"); *Mershon v. St. Louis Univ.*, 442 F.3d 1069, 1074 n.3 (8th Cir. 2006) (recognizing in non-employment case that "retaliation against persons who make complaints under the Rehabilitation Act is actionable" (citation omitted)); *Weixel v. Board of Educ. of City of New York*, 287 F.3d 138, 149 (2d Cir. 2002) (reversing dismissal of retaliation claim "under Section 504" in non-employment case).

and social services). And DOJ and HHS have issued joint guidance recognizing that Section 504 prohibits retaliation in "child welfare programs."[13]

c. The cases on which the district court relied in limiting retaliation claims to employment are not on point. *See* JA 95, JA 99-100.

First, in *Burlington Northern v. White*, 548 U.S. 53 (2006), the Supreme Court construed the anti-retaliation provision in Title VII, not Section 504. *Id.* at 56-57. Even if the same prima facie standard governs retaliation claims under both statutes (*see* JA 95), applying that standard to evaluate the sufficiency of a plaintiff's claim does not cabin Section 504 to only those cases within Title VII's reach. Nor would that interpretation make any sense, as each statute establishes its own anti-discrimination regime: while Title VII (not a Spending Clause statute) covers discrimination based on race, color, religion, sex, and national origin in employment, Section 504 (enacted under the Spending Clause) covers disability discrimination by federal-funding recipients in any of their programs and activities.

Second, this Court's decision in *S.B. ex rel. A.L. v. Board of Education of Harford County*, 819 F.3d 69 (4th Cir. 2016), addressed a retaliation claim that

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[13] Civ. Rights Div., U.S. Dep't of Justice, *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act*, Q&A #3 (issued Aug. 1, 2015), https://perma.cc/V7BM-6G46.

arose in an employment context. But nothing in the opinion suggests that retaliation claims under Section 504 are limited to that context alone. *Id.* at 78-80.

Finally, *Brown v. United States*, No. 21-829, 2022 WL 953064 (D. Del. Mar. 30, 2022), considered whether an individual doctor's actions in providing dental treatment could be imputed to a hospital; it did not consider whether retaliation claims are restricted to employment. *See id*. at *6-7. Furthermore, the court in that case went on to consider the merits of the plaintiff's retaliation claim, even though it arose from the provision of dental care rather than any employment relationship.

C. This case should be remanded for the district court to consider the merits of Lucas's retaliation claim in the first instance.

Having concluded—erroneously—that Lucas's retaliation claim is not cognizable under Section 1557, the district court did not address whether the complaint stated a plausible claim on the merits. Remanding would allow the district court an opportunity to do so first, before any further consideration by this Court on appeal. *See United States v. Buster*, 26 F.4th 627, 636 n.3 (4th Cir. 2022) ("Mindful that we are a court of review, not of first view, we leave any such questions to the court of first instance." (alteration and citation omitted)); *see also, e.g.*, *In re Beach First Nat'l Bancshares, Inc.*, 702 F.3d 772, 780 n.5 (4th Cir. 2012) (remanding where "the district court has not first had the opportunity to address these defenses on the merits").

CONCLUSION

The Court should hold that retaliation claims are cognizable under Section 1557, and that those claims are not limited to the employment context. Based on that holding, the Court should vacate the dismissal of Lucas's retaliation claim and remand for further proceedings.

Respectfully submitted,

SAMUEL R. BAGENSTOS
General Counsel

MARC S. ALLEN
Deputy Associate General Counsel

CARY LACHEEN
Attorney
Department of Health & Human Services
200 Independence Ave., SW
Washington, D.C. 20201

KRISTEN CLARKE
Assistant Attorney General

s/ Nicolas Y. Riley
NICOLAS Y. RILEY
JESSICA MERRY SAMUELS
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 598-9337

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 5695 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it was prepared in Times New Roman 14-point font using Microsoft Word for Microsoft 365.

s/ Nicolas Y. Riley
NICOLAS Y. RILEY
Attorney

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