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; VHC PHYSICIAN GROUP, LLC, d/b/a VHC Health Physician/OBGYN,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia at Alexandria
Case No. 1:22-cv-00987, Hon. Patricia Tolliver Giles

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS NIA LUCAS AND A.M., II

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Introduction

VHC seeks to exploit Nia Lucas's pro se status below by imposing inflexible pleading requirements that even counseled plaintiffs need not meet. This Court should reject VHC's invitation to require Lucas to perfectly delineate each count of her complaint. Instead, the Court should take Lucas's complaint for what it says: VHC failed to treat Lucas's pain and contractions and then terminated her care because of her race and disabilities and because she complained about VHC's discriminatory treatment.

VHC tries to enmesh this Court into factual questions that may not be resolved against Lucas at the pleading stage. This Court may not, for example, assume that Dr. Mir's race-based statement was unrelated to her authority over Lucas's treatment and the termination of her care. This Court is not free to conclude that VHC doctors considered Lucas's disabilities only so that they could provide her with appropriate medical treatment. Nor may the Court disregard Lucas's allegation that her care was terminated because she complained about discrimination, and then conjecture, in VHC's favor, that her termination resulted from unrelated complaints. On a proper construction of the pleadings at the 12(b)(6) stage—that Lucas is entitled to her facts and all favorable inferences drawn from them—Lucas has stated race-discrimination and disability-discrimination claims.

As for Lucas's retaliation claim, VHC's principal argument is that Congress *shouldn't* have created a retaliation cause of action in Section 1557.

But Congress did so—as a raft of time-honored precedent confirms—and VHC's policy concerns, even assuming their validity, cannot override the statutory text.

Argument

I. Lucas stated an ACA race-discrimination claim.

Contrary to VHC's assertions, Lucas's race-discrimination claim is not time-barred. Lucas filed a complaint challenging VHC's termination of her care within the limitations period and sufficiently pleaded that VHC did so because of her race. And she did not abandon her race-discrimination claim at the district court's Rule 12(b)(6) hearing.

A. To the extent that this Court reaches VHC's limitations defense, it should hold that Lucas's race-discrimination claim is timely.

VHC argues that Lucas's race-discrimination claim is time-barred, even though the district court did not reach that question. VHC Br. 9-11. This Court should follow the "general rule" that "a federal appellate court does not consider an issue not passed upon below," even when the appellee presents that issue as an alternative ground for affirmance. *Hulsey v. Cisa*, 947 F.3d 246, 252 (4th Cir. 2020) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). And the general rule is especially salient here, on appeal from a Rule 12(b)(6) dismissal, because VHC's statute-of-limitations defense does not present one of the "relatively rare circumstances where facts sufficient to rule on [the] affirmative defense are alleged in the complaint." *Goodman v.*

Praxair, Inc., 494 F.3d 458, 464 (4th Cir. 2007). But to the extent that this Court reaches the issue, it should reject VHC's timeliness arguments.

1. Lucas's claims are subject to the Affordable Care Act's four-year statute of limitations. 28 U.S.C. § 1658; *see Tomei v. Parkwest Med. Ctr.*, 24 F.4th 508, 515 (6th Cir. 2022). Lucas filed her complaint on August 29, 2022. JA 6. So, her suit was timely as to all claims accruing on or after August 29, 2018. Lucas received the hospital's dismissal letter—dated August 31, 2018—on September 5, 2018. JA 19. Dr. Mir then informed Lucas that her care had been terminated at a pre-scheduled appointment on September 6, 2018. JA 20. Lucas sued within the four-year limitations period, no matter whether the date of Lucas's termination is considered August 31, 2018, when the letter was dated, or September 6, 2018, when Dr. Mir conveyed the dismissal to Lucas in person.[1]

2. The timeliness of Lucas's claims based on VHC's discriminatory failures to treat her pain and contractions cannot be resolved at this stage. "A motion to dismiss … generally cannot reach the merits of an affirmative defense, such as the defense that the plaintiff's claim is time-barred." *Goodman*, 494 F.3d at 464. A statute-of-limitations defense may be resolved

[1] VHC does not dispute that Lucas's termination-of-care claims are timely. VHC asserts only that Lucas never brought a race-discrimination claim based on the termination of her care, or that, if she did, she later abandoned it. VHC Br. 11-12. Neither assertion is accurate, as we show below (at 6-8).

under Rule 12(b)(6) only "if all facts necessary to the affirmative defense 'clearly appear[ ] *on the face of the complaint*.'" *Id.*

The facts necessary to resolve a limitations defense in VHC's favor do not "clearly appear" on the face of Lucas's complaint. *Goodman*, 494 F.3d at 464. VHC argues that all events giving rise to Lucas's race-discrimination claim regarding VHC's treatment failures took place on August 24, 2018. VHC Br. 10-11. But the complaint doesn't say that. The dates attributable to each discriminatory incident are unclear. The complaint does not allege a date on which VHC staff refused to provide her the recommended care or pain management because they believed that Black people "could not feel pain" to the same extent as white people. JA 8. Nor does the complaint allege when VHC staff "assumed that, because [Lucas is] African American… [she] could withstand the contractions and pain." JA 9.

The complaint later alleges that Lucas first sought treatment at the hospital on August 24, 2018 and that she was discharged without treatment the next day. JA 18. But Lucas also alleges that she returned to the hospital on August 27, 2018 and received further substandard treatment then. JA 18-19. She does not specify on which of these dates staff refused to treat her pain because of her race. And claims arising out of events occurring on or after August 27, 2018 are timely because August 27, 2022 fell on a Saturday, extending the limitations period until Monday, August 29, 2022, the date

Lucas filed her complaint. *See* Fed. R. Civ. P. 6(a)(1)(C); *Baldwin v. City of Greensboro*, 714 F.3d 828, 840 (4th Cir. 2013).[2]

All told, this case tracks the circumstances in *Goodman*, 494 F.3d 458. There, this Court held that a breach-of-contract claim was not time-barred where the complaint "allege[d] neither a date when the contract was breached nor a date when Goodman may have discovered the breach." *Id.* at 464. Similarly, here, "the face of the complaint does not allege facts sufficiently clear to conclude that the statute of limitations ha[s] run." *Id.* at 466.

Given VHC's tacit concession that Lucas's termination-of-care claims are timely, one final point bears emphasis. Even if the district court determines on remand that some of the alleged discriminatory actions occurred too early to themselves give rise to a timely claim, Lucas may rely on those actions "as background evidence in support of a timely claim." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002). So, if some of the discrete discriminatory events alleged by Lucas fall outside the limitations period, evidence concerning those events may be used to prove that the hospital acted with discriminatory intent as to discrete acts of discrimination within the

[2] Lucas's amended complaint, which the district court should have accepted, *see infra* at 22-24, alleges that "[i]n and around September 14, 2018," Lucas "contacted VHC obstetrics" about serious prenatal complications but VHC "refused to provide her with any care." JA 76. This allegedly discriminatory event occurred within the limitations period.

limitations period (such as VHC's discriminatory termination of Lucas's care).

B. Lucas pleaded that VHC terminated her care because she is Black and never abandoned that claim.

1. VHC next contends that Lucas never pleaded a race- (or disability-) discrimination claim based on the termination of her care. VHC Br. 12-13. VHC fixates on Count III of Lucas's complaint, which alleges ACA violations but does not, VHC says, separately delineate her discrimination and retaliation claims. VHC Br. 12. But the Federal Rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Stanton v. Elliott*, 25 F.4th 227, 237-38 (4th Cir. 2022) (quoting *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014)). Thus, "[p]laintiffs need not put a claim under a special heading, quote the statute, or use magic words to make out a claim." *Id.* at 238. And, as a pro se plaintiff, Lucas is entitled to "a liberal construction" of her complaint, and this Court "must not put too much weight on the 'legal label[s]'" used. *Pendleton v. Jividen*, 96 F.4th 652, 656 (4th Cir. 2024); *see Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978) (noting that the usual "solicitude for a civil rights plaintiff" "must be heightened when a civil rights plaintiff appears pro se").

So, the question is not whether Lucas specified her race-discrimination allegations under "Count III," but whether her allegations, taken together, stated a race-discrimination claim that concerned the termination of her care. They do. Throughout, Lucas's complaint alleges that her care was

terminated because of race. Just after describing her termination by Dr. Mir, Lucas alleges that, at a prior appointment, Dr. Mir told Lucas "she does not take care of … 'Blacks.'" JA 20. That portion of the complaint is most naturally read—and certainly plausibly can be read—as alleging that Dr. Mir made good on her threat. That is, Dr. Mir told Lucas she does not treat Black people, and then she terminated Lucas's care because of her race. Earlier in the complaint too, Lucas alleges that VHC staff told her she could be "dismissed for any reason (e.g. race and disability)." JA 10.

Even zooming in on Count III alone (which, as just discussed, this Court should not do), Lucas stated there that "the Defendant's intentional discriminated and based on Ms. Lucas complaint of intentional discrimination retaliated in dismissing her in close temporal proximity to the complaint." JA 24. That allegation plausibly can be read as tying Lucas's dismissal to both retaliation and VHC's "intentional discriminat[ion]." *Id*.

2. VHC argues that even if Lucas pleaded a race-discrimination claim based on the termination of her care, she abandoned it at the Rule 12(b)(6) hearing. VHC Br. 12-13. That's incorrect. At the hearing, Lucas explained that "when I'm pleading, I'm talking about the discrimination," but added that she believed (wrongly, as it turned out) that the statute of limitations governing her discrimination claims had expired. JA 45. That does not constitute affirmative abandonment of her discrimination claims. Rather, it is an inaccurate statement of the law by a pro se plaintiff regarding an affirmative defense. As discussed above (at 2-5), Lucas's discrimination

claims based on both VHC's treatment failures and the termination of her care are not time-barred. And this Court is "forgiving" of "legal misstatements" at the pleading stage. *Stanton*, 25 F.4th at 238.

In any case, even the isolated snippet from the Rule 12(b)(6) hearing on which VHC relies indicates that Lucas *preserved*, rather than abandoned, her discrimination claim. Because of Lucas's misunderstanding of VHC's limitations defense, Lucas told the district court that her "*primary* focus is retaliation." JA 45 (emphasis added). That statement means necessarily that Lucas was pursuing her *other* claims, too—including her non-retaliation discrimination claims—even if not primarily.

Finally, when the district court asked Lucas whether she meant to allege that the termination of her care had been retaliatory, Lucas responded that "I *cannot concede*, because I really don't know." JA 45 (emphasis added). Thus, Lucas never conveyed a "clear and unambiguous" abandonment of any claim. *AirFacts, Inc. v. de Amezaga*, 909 F.3d 84, 93 (4th Cir. 2018). Everything considered, "'in the absence of an *express* and *explicit* indication that the plaintiff intended to leave one or more of [her] claims by the wayside,'" Lucas's "complaint controls." *Id.* at 92 (quoting *Lemmons v. Georgetown Univ. Hosp.*, 241 F.R.D. 15, 32 (D.D.C. 2007)).

C. Lucas pleaded an ACA race-discrimination claim.

With the brush cleared, it is evident that Lucas's complaint stated a race-discrimination claim based on VHC's termination of her care and its failures to treat her pain and contractions.

1. Dr. Mir's statement. Our opening brief explains (at 14-17) that Dr. Mir's statement that she does not treat Black patients is direct evidence of race discrimination that "bears directly" on VHC's failure to treat Lucas and on the termination of her care. *Taylor v. Va. Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) (en banc). It does so because it "relate[s] to the [] decision" at issue—the decision to stop treating Lucas—and it was made by the "actual decisionmaker," Dr. Mir, who communicated the dismissal to Lucas. *Schafer v. Maryland Dep't of Health & Mental Hygiene*, 359 F. App'x 385, 388 n.2, 389 (4th Cir. 2009); JA 20.

From the original complaint, it is reasonable to infer that Dr. Mir, as Lucas's doctor, made the decision to terminate Lucas's care. *Contra* VHC Br. 15-16. And Lucas's amended complaint, which the district court should have permitted her to file, *see infra* at 22-24, further demonstrates Dr. Mir's authority over the decision, by noting that it was she who signed Lucas's dismissal letter. JA 74. Moreover, if given the opportunity to replead, Lucas may further amend her complaint on remand to set forth additional details establishing Mir's authority over her care.

VHC says Dr. Mir's statement that she doesn't treat Black people is unrelated to its earlier failures to treat Lucas's pain and contractions because

Dr. Mir *herself* did not ignore Lucas's symptoms. VHC Br. 17. But Dr. Mir was Lucas's OBGYN throughout the period during which Lucas received substandard care, JA 8, so it's reasonable to infer that Dr. Mir *was* involved in providing most if not all of Lucas's substandard care. *See also* JA 65-66 (Lucas's proposed amended complaint stating that Dr. Mir was one of three doctors who provided Lucas's prenatal care on a rotating basis).

Moreover, Lucas's decision to report the treatment failures to Dr. Mir tends to demonstrate Dr. Mir's authority over Lucas's care, rather than calling it into question. *See* JA 19; *contra* VHC Br. 17. And instead of ensuring that Lucas received appropriate treatment, Dr. Mir chose to terminate Lucas's care. Far from being a stray remark, Dr. Mir's racist statement was "made by an individual with authority over the [] decision[s] at issue"—both the earlier treatment decisions and the later termination. *See Alberti v. Rector & Visitors of the Univ. of Va.*, 65 F.4th 151, 155 (4th Cir. 2023).[3]

Finally, contrary to VHC's contention, *see* VHC Br. 17, Dr. Mir's racist statement is temporally connected to the discriminatory treatment alleged in the complaint. Dr. Mir's statement to Lucas that she does not treat Black patients appears to have occurred at an appointment shortly before Lucas received substandard care at the hospital. *See* JA 20. Indeed, Lucas's proposed amended complaint specifies that Dr. Mir made the racist

[3] As explained below (at 11-13), Dr. Mir's authority over Lucas's care also confirms that VHC can be held liable for Dr. Mir's discriminatory acts (and for the discriminatory acts that were reported to her).

statement on August 14, 2018, shortly before the treatment failures and the abrupt termination of Lucas's care. JA 68-69; *see infra* at 22-23 (discussing allegations of proposed amended complaint).

2. Lucas's other allegations. Beyond Dr. Mir's statement, other allegations support Lucas's race-discrimination claim. *See* Opening Br. 16-17. VHC responds to only one, characterizing Lucas's allegation that staff discounted her pain because she is Black as baseless because the complaint did not attribute that statement to a particular VHC employee. VHC Br. 15. But VHC employees did not need to make that belief explicit to act on it. And other facts pleaded by Lucas render her disparate-pain-management allegation highly plausible: Lucas included this allegation in her complaint to VHC staff, JA 8; she was discharged without pain medication although the pain was noted in her medical record; *id.*; Dr. Mir had already made the explicitly racist "I don't-take-care-of-Black-people" statement; and Lucas witnessed discrimination against another patient of color, JA 9-10.

3. VHC's liability. VHC argues that it may not be held liable for its discriminatory acts because Lucas did not plead that a VHC official with sufficient authority committed them. VHC's objection appears to be twofold. VHC first suggests that it may not be held liable for its failure to treat Lucas's pain and preterm contractions because Lucas did not identify by name the doctors who failed to provide this care. VHC Br. 16, 22. But when a pro se civil-rights plaintiff "has alleged a cause of action which may be meritorious against a person or persons unknown, the district court should afford [her]

a reasonable opportunity to determine the correct person or persons against whom the claim is asserted, advise [her] how to proceed and direct or permit amendment of the pleadings to bring that person or persons before the court." *Gordon v. Leeke*, 574 F.2d 1147, 1152–53 (4th Cir. 1978).

VHS also says that it cannot be liable because it was not deliberately indifferent to its employees' discriminatory acts. *See* VHC Br. 16. True, VHC is not automatically liable for the actions of its employees under Title VI or the Rehabilitation Act. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (Title IX liability requires deliberate indifference by an appropriate person); *Koon v. North Carolina*, 50 F.4th 398, 403 n.2, 407 (4th Cir. 2022) (employer liability under the Rehabilitation Act operates in the same manner as under Title IX). But Lucas has adequately pleaded that VHC is liable for its deliberate indifference to the discrimination perpetrated by its employees.

For damages liability, *Gebser* requires that "an official" with "authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the [federal-funding] recipient's programs and fails adequately to respond." 524 U.S. at 290. Lucas's complaint identified several potentially liable officials. Begin with Dr. Mir, who, as discussed above (at 9), managed, and later terminated, Lucas's care. Dr. Mir appears to have had "complete discretion" over Lucas's treatment and termination, so it can be inferred that her decisions were not "subject to reversal." *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 350

(11th Cir. 2012). The dismissal letter attached to Lucas's proposed amended complaint confirms as much. That letter is signed by Dr. Mir and "discharge[s]" Lucas "as a patient from *my* medical practice." ECF 33-1, Ex. 17 (emphasis added). Imposing liability on VHC is therefore authorized under this Court's decision in *Basta v. Novant Health Inc.*, where the plaintiff sufficiently pleaded intentional discrimination based on the actions of hospital "staffers." 56 F.4th 307, 318 (4th Cir. 2022). Mir's authority well surpassed that of an average staffer.

Lucas has thus plausibly alleged that Dr. Mir is an "official" whose actions "can fairly be said to represent the actions of the organization." *Liese*, 701 F.3d at 350. So, VHC can be held liable for Dr. Mir's own actions—terminating Lucas after stating that she does not treat Black people. It can also be held liable for the discriminatory actions that Lucas reported to Dr. Mir and that Mir failed to correct—that is, other doctors' discriminatory failures to treat Lucas's pain and preterm contractions. JA 8.

Beyond Dr. Mir, the physicians who failed to treat Lucas are also "officials" under *Gebser*. These individuals include Dr. Burt, who saw Lucas as an emergency patient and then served as part of Lucas's care team, JA 7-8, and Dr. Orzechowski, to whom Lucas reported her disparate care, JA 8. Lucas's proposed amended complaint further shows that Dr. Burt was the attending physician when Lucas visited on August 25, 2018 and was thus someone who could have addressed Lucas's discriminatory treatment. ECF 33-1, Ex. 15.

Even assuming (incorrectly) that Lucas was required to report the discrimination to a VHC official other than a doctor, she did so. Lucas complained to Kelly White, "a business *manager* for the VHC Physician Group/OBGYN." JA 8 (emphasis added). It can be inferred that White, too, is an official who could have addressed the discrimination. And, it should go without saying that no official to whom Lucas reported did anything to address the discrimination she faced, other than to (unlawfully) terminate her care. JA 10.

II. Lucas stated an ACA disability-discrimination claim.

A. In confronting Lucas's disability-discrimination claim, VHC first renews its argument that Lucas did not plead the termination of her care as discriminatory. VHC Br. 12-13. As already shown (at 6-7), VHC's argument puts too much emphasis on what Lucas included under "Count III" of her complaint. Taking the complaint as a whole, Lucas alleged that she was told she "could be dismissed for any reason (e.g. race and disability)." JA 10. And, as our opening brief explains (at 21), the reason VHC gave for terminating Lucas—a purported "lack of trust"—resulted from Lucas's disabilities. The proposed amended complaint confirms this point by identifying mistrust as a symptom of Lucas's PTSD. JA 74; *see infra* at 24. So, Lucas has alleged that

she was terminated (at least in part) because of her disability, and not for any other nondiscriminatory reason. *See* Opening Br. 21.[4]

B. Citing *McGugan v. Aldana-Bernier*, 752 F.3d 224, 231-32 (2d Cir. 2014), VHC argues that the allegations giving rise to Lucas's disability-discrimination claim constitute "benign" discrimination, which, it says, is not prohibited by the Rehabilitation Act. VHC Br. 19-21. This Court should reject this atextual understanding of the Rehabilitation Act, which nowhere excludes "benign" conduct from its sweeping ban on "discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794. Indeed, as this Court has recognized, "[i]n passing the RA, Congress sought to target a type of 'thoughtless[ ] and indifferent[ ]' discrimination, which arises not out of 'invidious animus' but rather out 'of benign neglect.'" *Basta v. Novant Health Inc.*, 56 F.4th 307, 315 (4th Cir. 2022) (quoting *Alexander v. Choate*, 469 U.S. 287, 295 (1985)).

Regardless, Lucas does not allege benign discrimination by any stretch. *McGugan* characterizes "benign" discrimination as "drawing distinctions that are relevant to the qualities or characteristics of the thing observed," 752 F.3d at 231—pointing to a doctor who administers or withholds medical treatment because "the doctor's medical training leads her to conclude that the treatment is medically appropriate (or inappropriate)." *Id.* But *McGugan*

[4] VHC's argument that Lucas abandoned her disability-discrimination claim related to the termination of her care fails for the reasons discussed above (at 7-8) regarding Lucas's race-discrimination claim.

acknowledges that doctors who inflict or withhold medical treatment for "reasons dictated by bias" are liable under the Rehabilitation Act. *Id.*

That's just what Lucas alleges here. She claims that VHC staff refused to treat her pain and contractions because they believed she was "fabricating [their] seriousness," JA 18-19, even though her Maternal Fetal Medicine (MFM) provider sent her to the emergency labor and delivery unit for treatment, JA 7, and her symptoms were described in her medical record, JA 8. VHC also delayed providing Lucas medication prescribed by her MFM provider because VHC staff believed that Lucas's "physical pain was not real and only in her head," JA 8, even though staff witnessed Lucas's stomach gather into hard balls and heard her cry out in pain, JA 9. Assuming that a patient is lying because of her disabilities, contrary to medical and observed evidence, is not "tailor[ing] [] treatment based on [] known mental illnesses." VHC Br. 21. Instead, it involves doctors acting on "an assumption having no basis in fact," *McGugan*, 752 F.3d at 232—that individuals with PTSD invariably lie about their medical symptoms. Medical decisions driven by that type of biased, "improper consideration[]" create Rehabilitation Act liability. *Id.*[5]

[5] As with Lucas's race-discrimination claim, VHC says that it may not be held liable for its employees' disability discrimination. We disposed of that argument above (at 11-14).

III. Lucas stated an ACA retaliation claim.

As Lucas and the United States have explained, consistent with the Section 1557's text and decades of precedent, the ACA bars retaliation against a person who reports discrimination in healthcare programs. Opening Br. 23-25; U.S. Br. 10-11, 13-16. VHC principal response is that the policy consequences of our position "caution against" respecting the text and case law. VHC Br. 29. VHC's policy arguments cannot overcome Section 1557's clear words and are wrong on their own terms.

A. Section 1557 bars retaliation against a person who complains of discrimination.

1. Section 1557's text. Section 1557 provides that "an individual shall not, on the ground prohibited under [Title VI, Title IX, the ADA, or the Rehabilitation Act] be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance … ." 42 U.S.C. § 18116(a).

This language prohibits retaliation because retaliation is a form of discrimination. *See* Opening Br. 24; U.S. Br. 8-11. *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005)—which held that Title IX's ban on sex "discrimination" prohibits retaliation—explains why. Retaliation "is an intentional act" and "is a form of 'discrimination' because the [retaliation] complainant is being subjected to differential treatment." *Id.* at 173-74. Retaliation is also "discrimination 'on the basis of sex' because it is an

intentional response to the nature of the complaint: an allegation of sex discrimination." *Id.* at 174.

The Supreme Court has held that other broad prohibitions on discrimination encompass retaliation. *See Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969) (holding that 42 U.S.C. § 1982 bars retaliation); *Gomez-Perez v. Potter*, 553 U.S. 474, 479 (2008) (same as to Age Discrimination in Employment Act); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 445 (2009) (same as to 42 U.S.C. § 1981). So has this Court. *See Peters v. Jenney*, 327 F.3d 307, 319 (4th Cir. 2003) (holding that Title VI prohibits retaliation). Thus, in enacting Section 1557, Congress legislated against the background understanding that broadly worded bans on discrimination include a ban on retaliation. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988).

VHC's only response to the *Jackson* line of precedent is to note that none of those decisions concerns Section 1557. VHC Br. 25-26. That's no response at all. As the United States observes, the relevant text in Title IX (at issue in *Jackson*) and Section 1557 is "nearly identical." U.S. Br. 10. Both statutes provide that no individual shall "be excluded from participation in, be denied the benefits of, or be subjected to discrimination" in programs receiving federal assistance based on a protected characteristic. 20 U.S.C. § 1681(a); 42 U.S.C. § 18116(a).

2. Section 1557's incorporation of Title VI and Section 504. The statute also prohibits retaliation by incorporating Title VI and Section 504. Opening Br. 23-25; U.S. Br. 13-14. A plaintiff has stated an ACA claim when she has

"allege[d] facts adequate to state a claim under" the relevant cross-referenced statute. *Basta v. Novant Health Inc.*, 56 F.4th 307, 315 (4th Cir. 2022). Thus, "a claim under Section 1557 must reach at least as far as a corresponding claim under Title VI or Section 504." U.S. Br. 14. And this Court has held that both Title VI and Section 504 prohibit retaliation. *Peters*, 327 F.3d at 310; *S.B. ex rel. A.L. v. Bd. of Educ. of Harford Cnty.*, 819 F.3d 69, 78 (4th Cir. 2016). That should end the inquiry in Lucas's favor.

VHC responds that this Court in *Basta* held that Section 1557 incorporates the statutory framework for resolving only ACA discrimination claims, not retaliation claims. VHC Br. 25. But as just discussed, by definition, a retaliation plaintiff has "allege[d] facts adequate to state" a discrimination claim under Title VI or Section 504, as those statutes have been understood by this Court. *See Peters*, 327 F.3d at 310; *S.B. ex rel. A.L.*, 819 F.3d at 78.[6]

3. VHC's irrelevant parade of horribles. VHC's main argument is that permitting Section 1557 plaintiffs to bring retaliation claims "would be disastrous for the healthcare industry." VHC Br. 26. Even if that were true, "'no amount of policy-talk can overcome ... plain statutory' text." *Julmice v. Garland*, 29 F.4th 206, 210 (4th Cir. 2022) (quoting *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021)).

[6] Our opening brief explains (at 25-28) that Section 1557 retaliation claims are not limited to the employment context. *Accord* U.S. Br. 12-24. VHC does not argue otherwise.

But it's not true. VHC asserts, without citation, that if Section 1557 authorizes retaliation claims, patients could "complain about physicians" who legitimately take race, sex, or disability into account in treatment. VHC Br. 28. VHC provides no reason why this (purported) danger arises only as to retaliation claims, rather than also as to standard discrimination claims, which VHC acknowledges are actionable under Section 1557.

In any event, VHC's hypotheticals are nonsensical. A patient does not state a retaliation complaint based on a doctor's refusal to provide her with "ill-advised or unnecessary treatment" just because she has complained of discrimination in the past. VHC Br. 28. The plaintiff must show "a causal connection" between the complaint and the adverse action. *Peters*, 327 F.3d at 320.

VHC also suggests that if Section 1557 authorizes retaliation claims, providers would not be able to terminate their relationships with "antagonistic" patients with whom they cannot build trust. VHC Br. 28. Not so. A doctor who discharges a patient because she is too difficult to treat does not do so because the patient "engaged in protected activity," so any retaliation claim would fail. *Peters*, 327 F.3d at 320.

In any case, VHC's hypotheticals are far afield from the facts here. Lucas alleges not that VHC doctors took her race or disabilities into consideration to provide holistic treatment, but that doctors ignored her pain and contractions because of her race and disabilities and then, after she complained about this discrimination, terminated her care. JA 8, 18-19. In

deciding this appeal at the motion-to-dismiss stage, this Court need not determine whether or to what extent doctors may take a patient's race or disabilities into account to provide them with the best possible treatment.

B. Lucas alleged a Section 1557 retaliation claim.

VHC does not contest two of the three elements of Lucas's retaliation claim: that Lucas engaged in protected activity and that VHC took an adverse action against her. *See* Opening Br. 28 (setting forth elements). VHC argues only that Lucas failed to plead a causal connection between her discrimination complaint and the termination of her care because she also complained about other treatment lapses. VHC Br. 30. So, says VHC, the doctors must have terminated Lucas because she complained so much that they thought she didn't trust them, not because she complained about discrimination. *Id.*

But the many ways in which VHC failed Lucas tend to support, rather than defeat, her retaliation claim. That is, Lucas alleges that the failure to test her for gestational diabetes and other treatment lapses were part of the "intentional discrimination" she suffered at the hands of VHC's doctors. JA 19. But even if those lapses were viewed (inappropriately) as unrelated to Lucas's discrimination allegations, this Court may not assume that Lucas was terminated because of those unrelated complaints. After all, Lucas alleges that the termination of her care was a "retaliatory dismissal," JA 9, occurring just days after her "complaint of intentional race and disability

discrimination," JA 10. Put otherwise, the additional treatment mistakes made by VHC doctors do not come close to providing "an irrefutably sound and unambiguously nondiscriminatory and non-pretextual explanation" for terminating Lucas's care. *Woods v. City of Greensboro*, 855 F.3d 639, 649-50 (4th Cir. 2017).

IV. The district court should have granted Lucas's motion to amend her complaint.

As just shown, Lucas's original complaint contained no deficiencies, and all her claims should have survived VHC's motion to dismiss. But she should have been permitted to amend regardless. *See Adbul-Mumit v. Alexandria Hyundai, LLC*, 896 F.3d 278, 293 (4th Cir. 2018) (noting this Circuit's policy of liberally allowing amendment). And assuming, as the district court (wrongly) held, that Lucas's initial complaint had deficiencies, Lucas's amended complaint would have resolved them, so the district court should have granted her leave to amend for that reason too.

A. VHC argues that the additional details provided in the amended complaint contextualizing Dr. Mir's racist statement, *see* Opening Br. 33, "solved nothing" because Dr. Mir's comments had no temporal connection to the discriminatory conduct that Lucas alleged. VHC Br. 31. That argument is simply wrong. The amended complaint specifies that Dr. Mir made the racist statement on August 14, 2018—shortly before the failure to treat Lucas and the termination of her care. JA 68-69.

Moreover, the amended complaint includes other allegations that strengthen Lucas's race-discrimination claim. It clarifies that Dr. Mir was one of three doctors in charge of Lucas's care, JA 65-68, notes that Dr. Mir signed the letter terminating Lucas's care, JA 74, and includes the letter as an exhibit, ECF 33-1, Ex. 17. In that letter, Dr. Mir tells Lucas that "I am writing to discharge you as a patient from *my* medical practice." *Id.* (emphasis added). These facts all support the inference that Dr. Mir had the authority to dismiss Lucas, confirming that her racist comment was direct evidence of discrimination (*see supra* at 9) and that VHC may be held liable for her actions (*see supra* at 11-13).

Lucas's amended complaint also provides details about other VHC actors, solving any perceived deficiencies in pleading that VHC is liable for the actions of its employees. *See supra* at 13-14. Lucas complained about her dismissal to Marian Savage, the Associate Vice President of Risk Management, who "like Dr. Mir stated Ms. Lucas could be dismissed for her complaint of discrimination." JA 75. So, like the VHC doctors and business manager Kelly White, Savage was aware of the discrimination Lucas faced and did nothing to correct it, indicating that VHC was deliberately indifferent. *See Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 350 (11th Cir. 2012) (noting that an "official" whose actions can give rise to deliberate-

indifference liability "is someone who enjoys substantial supervisory authority within an organization's chain of command").[7]

B. VHC says that the proposed amendments do not strengthen Lucas's disability-discrimination claim because they would have introduced only a reasonable-accommodation claim that cannot succeed. VHC Br. 32. Yes, the amendments would have added a reasonable-accommodation claim. But they also added allegations that VHC officials, including Savage, told Lucas that they could "dismiss patients for any reason, to include race and disability." JA 75. The amendment also clarifies the allegation that VHC terminated Lucas's care because of her disability by identifying the reason given for Lucas's termination—mistrust—as "a symptom of Ms. Lucas['s] PTSD." JA 74.

Conclusion

This Court should reverse the district court's dismissal of Lucas's complaint and the denial of Lucas's motion for leave to amend and remand for further proceedings on each of Lucas's claims.

[7] The district court dismissed Lucas's retaliation claim on legal grounds unrelated to the factual sufficiency of her complaint. JA 95-96. But it's worth noting that Lucas's proposed amended complaint also strengthened her retaliation claim. Lucas alleged that Dr. Mir "specifically stated" that Lucas's August 21, 2018 complaint "was the reason for dismissal." JA 76. Dr. Mir's dismissal letter attached to the amended complaint references that August 21, 2018 discussion. JA 74; ECF 33-1, Ex. 17.

Respectfully submitted,

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This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,613 words, as calculated by Word 2021, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(a)(1). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Palatino Linotype, a proportionally spaced typeface.

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August 14, 2024

Certificate of Service

I certify that on August 14, 2024, I electronically filed this Reply Brief of Plaintiffs-Appellants Nia Lucas and A.M., II using the CM/ECF System, which will send notice of the filing to all registered CM/ECF users in this case.

/s/ Brian Wolfman

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