IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - -X

JAMES ALEXANDER, DIRECTOR, :
ALABAMA DEPARTMENT OF PUBLIC :
SAFETY, ET AL., :
Petitioners :
v. : No. 99-1908
MARTHA SANDOVAL, INDIVIDUALLY :
AND ON BEHALF OF ALL OTHERS :
SIMILARLY SITUATED :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, January 16, 2001

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

JEFFREY S. SUTTON, ESQ., Columbus, Ohio; on behalf of the Petitioners.

ERIC SCHNAPPER, ESQ., Seattle, Washington; on behalf of the Private Respondents.

SETH P. WAXMAN, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent United States.

C O N T E N T S

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 99-1908, James Alexander v. Martha Sandoval.

Mr. Sutton.

ORAL ARGUMENT OF JEFFREY S. SUTTON

ON BEHALF OF THE PETITIONERS

MR. SUTTON: Thank you, Mr. Chief Justice, may it please the Court:

There are two points that I would like to make this morning. The first is that it is never appropriate for a branch of the Federal Government to imply the creation of a private right of action under the spending power. The second is that, regardless of the participation of the State as a defendant in this case, the Court's implied right-of-action doctrine does not extend to these disparate effect regulations.

Let me start with the first point. In case after case over the last two to three decades the Court has made clear that States are not run-of-the-mill civil defendants. They are not mere interest groups. They are coequal sovereigns and, as a result, the Court has not lightly inferred that Congress means to regulate the States as States, to regulate in core areas of local

sovereignty, or, as here, to expose the States to a private right of action. Those principles are particularly critical when it comes to the spending --

QUESTION: Well, we're not dealing with a damages action here, are we?

MR. SUTTON: That's true, Your Honor. That's exactly --

QUESTION: We're dealing with prospective relief.

MR. SUTTON: That's true, Your Honor.

QUESTION: Declaratory and prospective.

MR. SUTTON: Exactly, Your Honor and, of course, the Eleventh Amendment applies even to injunctive relief and even, as this particular case reveals, you can still alter the Federal-State balance by allowing private rights of action. Indeed, in Cannon, the Court distinguished a case not unlike this one on just this ground.

In Cannon, in footnote 13, the Court reviewed many of the implied right-of-action cases it had decided, and it looked at a case called Santa Clara Pueblo, a case in which the Court had not implied a right of action against a tribe, and for that -- and the reason it did not imply a right of action was because tribes are sovereigns. Now, they're statutory sovereigns, whereas States are constitutional sovereigns.

QUESTION: Mr. Sutton, do I understand what you just told us to mean that if the Cannon case had been against the State medical school instead of against a private university there would have been no claim?

MR. SUTTON: I think that's right, Your Honor. I think that's right, and it would have been -- of course, it's an even harder claim here, because this claim is under regulations, which is something the Court has never inferred before from congressional actions.

QUESTION: That's a different point, but I wanted to know how sweeping your position is, and you are saying that if Cannon had been against the University of Illinois instead of the Medical School of the University of Chicago, it would have been thrown out?

MR. SUTTON: That's exactly what I'm saying, Your Honor, and I think that's true, and that is our first principal point. And I think, Your Honor, it follows from all of the cases -- I mean, whether you look at Gregory v. Ashcroft, Atascadero, or South Dakota v. Dole, Pennhurst, all of those cases made clear, when you alter the Federal-State balance Congress has to be unmistakable in what it's doing, and in this case it was anything but unmistakable. Everyone agrees --

QUESTION: Cannon itself said that's -- as far as implied rights of action it said, we come from a past

when Congress was reacting to the courts' activity and knew that the courts were implying private rights of action. I thought Cannon said, this much but no further. Congress, we're now putting you on notice that henceforth we are not going to imply private rights of action, but we understand that Cannon comes from a different milieu, and we're going to -- not going to change that.

MR. SUTTON: But, Your Honor, States are different. The Court -- the only case that's been identified so far by respondents involving what seems to be an oxymoron, implied right of action against the State, is the Allen case from 1969. That was not a Spending Clause case, point number 1, but point number 2, more importantly, that's a case that falls under this case's -- this Court's decisions, specifically Atascadero, where you can have an overwhelming implication in the statute that a right of action was created.

In Allen, had there not been a right of action, the individuals would not have been able to enforce other parts of section 5 of the Voting Rights Act. That case is not a classic implied right-of-action case where there's no suggestion in the statute that Congress meant to create a right of action.

In this case, it's just the opposite. Here, Congress did create a right of action, just not by private

individuals, by agencies, so you said my first proposition is a sweeping one, and perhaps it is, but there are not a lot of cases recognizing the implied right-of-action doctrine against States. I mean, that's not something the Court has been doing.

QUESTION: That's true, but you do -- in your view, is this -- do I have your argument correct that there'll be a certain number of civil rights statutes where, in respect to an implied right of action, there is basically silence, and do you think there could be a number of those statutes where you would imply from that silence a private right of action against an individual but not against a State? That's your view?

MR. SUTTON: That may be true, Your Honor, but I did --

QUESTION: It is your view?

MR. SUTTON: It is my view, Your Honor.

QUESTION: All right. If that's your view, then you're reading a lot of complication into the silence.

MR. SUTTON: The reason you're saying that is because States will be treated differently from other litigants in the statutes?

QUESTION: Yes. You're reading all that into a silence, so if you're going to read that much complication into the silence, why not read into it that you could

bring injunctive actions but not damage actions, given the Eleventh Amendment?

MR. SUTTON: Well, Your Honor, first of all, as Justice Powell said in Atascadero, States are different. I mean, to quote him at page 246, given their constitutional role, the States are not like any other class of recipients of Federal aid. That's exactly the premise for the Court's clear statement decisions.

QUESTION: Is there any authority for that kind of interpretation of a silence that we get out of the silence actions against a private person but not actions against the State?

MR. SUTTON: That's exactly Atascadero, where you could get money damages actions against private individuals under Section 504, but not against States, so there is authority for that exact point.

But I do want to go back to, I think a premise in your question, which is that this argument is somehow sweeping because there are lots of other civil rights statutes where somehow there would not now be a right of action against the State, and we're concerned about that. I don't think that's true, however. I don't know what those statutes are. No one's pointed them out.

The Civil Rights Act of 1964 itself, Congress was very explicit when it wanted either private rights of

action, as in Title II or Title VII, or AG enforcement actions, as in Title III and Title IV. Title VI --

QUESTION: Atascadero, which you put so much reliance on, is distinguishable in that it did involve a money damage action, and it explicitly involved the Eleventh Amendment. That's not the issue here, is it?

MR. SUTTON: That's true, Your Honor, but as I pointed out, in Cannon, in footnote 14, the Court has already dealt with this very issue. Santa Clara Pueblo was a case that was an ex parte Young action against a tribe. What the statute in that case said is, we create an express right of action for habeas corpus relief. It said nothing else under the Indian Civil Rights Act. That was the statute at issue.

The Court said, in light of the silence, in light of the express creation of one cause of action, silence about any other one, and in light of the sovereignty of the -- the statutory sovereignty of tribes, we're not going to imply a right of action. That's Cannon itself, and that is this case. If you don't imply rights of action casually against statutory sovereigns, you surely don't do it against constitutional sovereigns.

QUESTION: Would you explain, Mr. Sutton, the impact in the civil rights remedies, Equalization Act that I thought waived the Eleventh Amendment immunity for Title

VI, Title IX -- and 504 cases, no?

MR. SUTTON: You're referring to the 1986 Rehabilitation Act amendments?

QUESTION: Right.

MR. SUTTON: Your Honor, that's a very good point, and we're very sympathetic to it, but I just want to clarify one thing. That point goes to the application of the standard I'm advocating. It does not contest the standard, because what happens in 1986 is, Congress shows it understands this dialogue between the Court and Congress as to what is required before you regulate the States in these areas, and I think there's a very good argument that Congress was express in 1986 that there were causes of action against States, but conspicuously missing from those amendments is any indication that they were causes of action under regulations, as opposed to the statutory antidiscrimination --

QUESTION: I thought you were stating sweepingly that when you answered my question, Cannon was under the basic prohibition, not against --

MR. SUTTON: Title IX.

QUESTION: Right.

MR. SUTTON: Under 901, yes.

QUESTION: Right, and you said there would be no such claim, but now I think you're amending that, because

you said after the '86 act there would be.

MR. SUTTON: Well then, I misunderstood your question. I thought you were referring to all other cases. I mean, in other words, all statutes that are silent about creating a private right of action, and I'm acknowledging the argument is sweeping in that respect. It applies to all statutes.

You are right, after 1986, when it comes to Section 504, Title IX and Title VI, the argument's not sweeping at all when it comes to the antidiscrimination mandate, because, as respondents have argued, in 1986 Congress picked up on the dialogue and said, we are going to create an express right of action, so when it comes to intentional discrimination, that which is barred by Title VI or Title IX, there is a right of action.

But the critical failing with that particular argument, and I think that's why it's really not being relied upon by respondents, is Congress says nothing at all about rights of action under regulations, which you know, after all, is an extraordinary concept.

QUESTION: What if it were a city who was the -- which was the defendant in the case?

MR. SUTTON: In this particular case?

QUESTION: Uh-huh.

MR. SUTTON: Well, I think, as this Court has

said, cities are different from States. I mean, in my view, cities are -- they're statutory sovereigns. They're State --

QUESTION: Do you acknowledge there would be a private right of action for enforcement of the regulations against a city?

MR. SUTTON: There would be with respect to the first argument I'm making, but let me switch now to the second argument we're making, where I do not think there would be a right of action against a city, county, or for that matter, a private person.

When one looks at all of the Court's implied right-of-action cases whether it's 1964 in the Borak decision, or Cannon, or more recent decisions, they all start with and agree that the most important point is congressional intent, congressional meaning and design.

There are several indicators in Title VI that Congress did not mean to imply the creation of a private right of action under the section 602 regulations. The first is that as this case comes to the Court there's no doubt what the antidiscrimination mandate means. Everyone agrees.

No one's contesting Bakke, Fordice, for the view that 601 only prescribes what the Equal Protection Clause prescribes, so first of all it's a very unusual way for

Congress to work, to prescribe one type of State action or city, county action and then somehow implicitly create a cause of action with an entirely different standard of review.

The second indicator of congressional intent, it may be helpful to look at the statute itself, and if you look at -- if you're interested, if you look at page 1 and 2 of the blue brief, our opening brief, I'd like to point out some language that I think is -- well, we're obviously a little biased, but close to dispositive on this particular point. If you're relying on Section 602 to implicitly create this cause of action, you've got to read all of Section 602.

Granted, it does create rulemaking authority for the agencies, but if you look on page 2 -- it's about eight or nine lines down, the beginning of a new sentence -- you have the sentence that says, compliance with any requirement adopted pursuant to this section may be affected, so once again, compliance with any requirement adopted in accordance with this section.

In other words, Section 602 does give rulemaking authority to agencies, but it then says, if you want to enforce those rules, here's how you do it, and the here's how you do it creates special rules when it comes to termination of funding --

QUESTION: Well, it also says, or by any other means authorized by law, so isn't that the issue?

MR. SUTTON: Exactly, Your Honor, and this is critical. The second possibility for getting compliance with these rules is by any other means authorized by law and, as the Federal Government acknowledged in its brief, I think at page 11, that includes, for example, injunctive relief so, for example, under that, at a minimum all agree an agency could come in and enjoin the State conduct, for example, the way Alabama is administering its driver's licenses.

But here's now the critical second statutory point. You then have this proviso, exactly after the line that Justice O'Connor has quoted, that now says that no such action -- the such is obviously referring to everything they've discussed so far -- says, shall be taken until the department or agency concerned has advised the appropriate persons, here the Alabama Department of Public Safety, of the failure to comply with a requirement, has determined that compliance cannot be secured by voluntary means.

How in the world could a private individual establish that a State is in compliance with a Federal agency rule? That's not something they have --

QUESTION: Well, one way the two could be

reconciled, and I'm not suggesting that it's the best way, but one way to reconcile them would be to say that the private right of action is contingent upon the States having taken the steps in the proviso, so that until the State had notified, and until there had been some conclusion drawn that voluntary compliance would not be reached in the absence of action, the private party could not seek the injunction.

MR. SUTTON: But Your Honor, let's take the most virtuous and earnest State Attorney General. They're faced with one of these private enforcement actions, and the private litigant does what you're suggesting. They first put them on notice. They send a letter, listen, we don't think what you're doing is permissible under this rule --

QUESTION: Well, I was suggesting something perhaps even more awkward. I was suggesting that the private litigant couldn't go ahead until the State agency had said, you know, you're out of compliance, and the State agency had come to some conclusion that voluntary compliance was in fact not feasible. At that point the individual could then go ahead with the suit, and one of the predicates for the private injunctive suit would be, the State has tried to get voluntary compliance and it can't.

MR. SUTTON: And the point -- I guess the point I'm making is that, take the ideal State Attorney General. They get this lawsuit, and the private individual says, listen, we'd like to give you an opportunity to voluntarily comply, and here's how we suggest you do it. What assurance, what guarantee is there that the State is now in compliance with a Federal agency's rules that this --

QUESTION: Mr. Sutton, look at the sentence, provided, however, that no such action shall be taken until the department or agency concerned. Does the phrase department or agency there refer to the Federal department or agency in question?

MR. SUTTON: It does, Your Honor, and you're -- this is a better point than the one I'm making in response to Justice Souter.

That language makes it clear who is the one that's doing the advising, and if we're going to draw any inferences from this statutory scheme, it's an inference that whatever could be done under Section 601, under Section 602, that was an enforcement provision for agencies, enforcement provision in the sense that they could promulgate rules to effectuate Section 601, and then they could go about enforcing them, but as the Chief Justice's question points out, it is the Federal

department or agency that they're referring to.

QUESTION: Oh, I -- actually, as I guess my question implied, I think that is certainly the easier reading, but I guess I also think that if we felt otherwise impelled to recognize the private action here based on other principles, I don't suppose this would necessarily stand in the way of that.

QUESTION: Mr. Sutton, do you think the word compliance talks about private actions as well as actions by the Federal Government? I always thought that sentence referred to compliance may be effected, as by the Federal Government may be effecting this, but that isn't talking about private actions, is it? Do you think --

MR. SUTTON: Oh, Your Honor, but --

QUESTION: Do you read it that way?

MR. SUTTON: Well, I do, Your Honor.

QUESTION: Even though -- do you think there's an express cause of action, rather than an implied cause of action under Title VI?

MR. SUTTON: Here's the reason I read it this way, and I want to make sure I'm answering your question --

QUESTION: Do you think there's an express cause of action under Title VI?

MR. SUTTON: I think there's a very good

argument that there's an overwhelming implication after 1986 that there is a cause of action under Section 601.

QUESTION: No, that's not my question. The question is, do you think there's an express cause of action, as opposed to one that we found in Cannon that Congress intended to imply a cause of action?

MR. SUTTON: Are you referring to 602, or 601?

QUESTION: 602.

MR. SUTTON: I think there's a very good argument that there is an express cause of action for all of Title VI.

QUESTION: I see.

MR. SUTTON: After 1986, so post Cannon. I think that there is a very good argument for that. Again, it requires implications, but I think that falls under the Atascadero point that it has to, if it's a sufficiently overwhelming implication, then we're going to recognize it.

After all, in 1986 they didn't create a right of action. All they did is, they said, we're abrogating the State immunity.

But I want to make sure I'm understanding a point that I'm not sure I addressed, and this goes back to the compliance sentence about nine lines down on page 2. It says, compliance with any requirement adopted according

to this section, and I don't know how one can read that to say, you don't follow these rules when you try to obtain compliance.

QUESTION: Well, one could read it to say, that sentence just refers to actions instituted by the Federal Government --

MR. SUTTON: But it's --

QUESTION: -- compliance actions, which is a fairly normal way to refer to the --

MR. SUTTON: Well, maybe this is my confusion. When it says, any requirement adopted according to this section, the requirement's referring to the rules. Section 602 does two things. It says, you can promulgate rules, number 1, and number 2 you can go out and enforce them, and it does seem to me that that requirement language is referring to the requirements promulgated under the section, and so --

QUESTION: Well, why do you --

MR. SUTTON: I may be wrong. I may be wrong, but that is the way we think we read it, and we certainly think, given the requirement of clarity, at a minimum it's not ambiguous the other way. I mean, that seems to me quite striking.

If I could shift to a few other points, there are some other indicators --

QUESTION: Do you concede that Congress has authorized the regulations at issue here?

MR. SUTTON: No, Your Honor, we do not, and we think the better reading is that these regulations are invalid, but as we indicated in our opening brief and our reply, we don't think the Court needs to address the validity of the regulations.

QUESTION: Well, let's assume that the regulations are permitted. Make that assumption. That, then, is simply an implementation of 601. I mean, it has to be or we have a delegation problem.

MR. SUTTON: Well, Your Honor, and that's a possibility, but you still have the problem of rules of the language in Section 602 that I just referred to that suggest indicates that all of those rules were rules that agencies were to enforce, not private individuals, so even if you decided -- and I don't think you need to decide this, but even if you decide the rules were valid, it would still be rules that could be enforced by the agencies. In other words, if you thought --

QUESTION: But the substantive obligation that the State must meet is a 601 obligation, as interpreted by the agency under 602.

MR. SUTTON: Absolutely.

QUESTION: Why can't you say the suit is under

601?

MR. SUTTON: Well, I don't think anyone agrees -- I mean, I want to be clear but I don't think anyone agrees that this suit can be characterized as being under 601.

QUESTION: I understand that, but I want to know why.

MR. SUTTON: And the reason, the reason is that the Court has already made clear that Section 601 does not cover disparate-effect legislation and, as Justice O'Connor and Justice Powell indicated in Guardians, one does not effectuate a statutory antidiscrimination mandate by redefining it.

QUESTION: But once the regulation is in place, doesn't the statute then have a new meaning, as interpreted by the agency?

MR. SUTTON: No.

QUESTION: Or else why does the agency have authority to do this at all?

MR. SUTTON: Respectfully, no, Your Honor.

QUESTION: As a preventative measure?

MR. SUTTON: The most that can be said is that you would be enforcing at that point Section 602, and Section 602 is the part of the statute that gives the agencies rulemaking authority. I mean, that's the way

respondents have characterized their action, that's the way the lower court characterized their action.

QUESTION: Would the agency not have had any rulemaking authority without Section 602? Wouldn't it have had the ability to promulgate interpretive regulations --

MR. SUTTON: That is possible. In other words --

QUESTION: -- setting forth what its own view of the anti-intentional discrimination provision of 601 was?

MR. SUTTON: That's true, and that's not the way the case has been argued, but if that were true, then I think it's fair you would need to look at whether that's a legitimate interpretation of Section 601.

QUESTION: Right, and under our case law it wouldn't be?

MR. SUTTON: Absolutely not, because Chevron deference --

QUESTION: So the only way the regulation here is valid is on the assumption that it is not an interpretive regulation, but rather is a regulation that goes beyond the meaning of 601 in a prophylactic way to, as 601 puts it, to effectuate the provisions of 601?

MR. SUTTON: That's exactly right, and there's some guidance in the Court's cases. In fact, it even

comes from the line of authority in which respondents are relying, and that's the securities cases. There have been many cases under Section 10(b) and under Rule 10(b)(5) where plaintiffs have attempted to bring a cause of action that broadens Section 10(b). The most notable of them is Central Bank from six terms ago.

Another one, Ernst & Ernst v. Hockhelder in 1976 were both situations in which the private litigants attempted to create a cause of action to Rule 10(b)(5), which actually has an even broader source of statutory authority, and the Court rejected them because they created a cause of action that contained fewer elements than the statutory right of action, and I think that's a good analogy here.

QUESTION: Is the same true of Rule 14?

MR. SUTTON: Excuse me?

QUESTION: The proxy rules, the statute and the proxy rules, is the same -- what you're saying now true --

MR. SUTTON: Well, Your Honor, that, of course, is the Hagen case that you wrote for the Court in 1997 --

QUESTION: Where I thought I --

MR. SUTTON: Under Rule -- I want to make sure I'm answering your question.

QUESTION: Yes.

MR. SUTTON: Under Rule 14(e)(3) you've got a

different statutory authorization of rulemaking power. There, the operative language is that the agency can promulgate rules that, quote, prevent the underlying prohibition.

QUESTION: But the rule, the regulation there, the rule went beyond the statute. It was kind of like a prophylactic, and I don't know -- perhaps you can tell me if there is any other instance of splitting the regulation from the statute. I mean, the private right of action, the 10(b)(5) action, the Rule 14 action, they're all wedded to a statutory text, and as far as I know there's no distinction between, oh, I'm bringing it under Rule 10(b) and not -- rather than the statute, or Rule 14 rather than the statute.

MR. SUTTON: Your Honor, I couldn't agree more, and I don't think there is precedent for that point. I mean, that, I think, is our main point, that if the case comes to court, we all know what Section 601 means, and that's why they have to characterize --

QUESTION: But that's on your argument that the regulation is invalid. If the regulation is valid, then it seems to me we just decide Rule 14.

MR. SUTTON: But Your Honor, the implied right of action inquiry is an inquiry that goes really to the same question that you ask when you decide whether an

agency rule is valid, and that's what did Congress mean, what did Congress authorize here, so it's true, if there's not an implied right of action it may make these regulations of dubious validity, but that's not necessarily true. The Federal Government --

QUESTION: If I understand your argument, you're saying even the Federal Government couldn't bring this argument.

MR. SUTTON: If the regulations are invalid, that's true.

QUESTION: Well, your position is, they are invalid, therefore the Government couldn't bring this action, either.

MR. SUTTON: That -- it is our -- we do think they're not valid, but I want to make clear, we think that's a harder --

QUESTION: You wouldn't need to worry about all the argument about implied cause of action and all the rest if the regulation's invalid.

MR. SUTTON: Well, that is one way to proceed, and we've argued that they're not valid. That is an easier way to proceed.

QUESTION: But that's not the question for which we took the case, and I'm assumingm and will assume that the regulations are valid.

Now, are -- is it your position -- is it your position that if the agency promulgated a regulation that was an interpretive regulation which was not precluded by our prior case law, namely, it didn't say that you don't have to have intentional discrimination but it said, this is what intentional discrimination consists of, and that regulation is within the bounds of reasonableness that would satisfy Chevron, is it your position that that regulation also would not be able to be vindicated by a private right of action?

MR. SUTTON: That's a harder case, Your Honor, but the reason -- I think the way to look at it is, does the text unambiguously create this right. If the text doesn't do it, I don't know how a rule can do it by --

QUESTION: Well, a text cannot -- you're -- a text cannot unambiguously create a right for the agency to issue a Chevron-based rule which is premised upon an ambiguity in the statute. I mean --

MR. SUTTON: Your Honor, you're right. Let me --

QUESTION: The agency has no Chevron power unless there's an ambiguity in the statute, right?

MR. SUTTON: This question gets to the distinction between my first argument and my second. When it comes to the creation of an implied right of action

against the State, the Court has always said it's about what's in the text, so if the State is a defendant, then I stick with what I just said.

QUESTION: Okay.

MR. SUTTON: If it's a private party, city, or county, then I do not.

QUESTION: It doesn't matter to you whether it's an interpretive rule or a substantive rule, you can't imply it against the State in a private right of action?

MR. SUTTON: That's exactly right.

If I could reserve the rest of my time for rebuttal.

QUESTION: Very well, Mr. Sutton.

Mr. Schnapper, we'll hear from you.

ORAL ARGUMENT OF ERIC SCHNAPPER

ON BEHALF OF THE PRIVATE RESPONDENTS

MR. SCHNAPPER: Mr. Chief Justice, and may it please the Court:

The petitioners in this case are proposing substantial changes in the law in a number of distinct areas. First, they characterize this case as involving a fundamental change in Federal-State relations requiring a particularly clear and explicit statement that Congress intends to do that. This is a classic Ex parte Young injunction. It's an injunction against Mr. Alexander in

his official capacity to restrain future violations of the law.

This Court held in Will that is precisely the kind of remedy that is not --

QUESTION: In what case, Mr. Schnapper?

MR. SCHNAPPER: In Will v. Department of Corrections, that that is precisely the kind of legislation that does not fundamentally disturb Federal-State relations, and I think the whole line of cases since Ex parte Young simply could not survive if that were the law. Secondly --

QUESTION: Well, that handles the Eleventh Amendment argument, but it doesn't handle the Spending Clause argument, you know, the argument that any conditions you're imposing upon the States under the Spending Clause have to be clear.

MR. SCHNAPPER: I -- to which I'm about to turn.

They -- Mr. Sutton next suggests that there cannot be an implied cause of action in Spending Clause legislation, that any cause of action in Spending Clause legislation has to be explicit. If that is right, Cannon and Guardians were wrongly decided. They are Spending Clause legislation, Guardians is this very statute. They both recognize an implied cause of action, and that whole line of cases would have to be overruled.

QUESTION: What was Cannon? I thought that was Title VII.

MR. SCHNAPPER: Title IX.

QUESTION: Title IX?

MR. SCHNAPPER: Title IX.

QUESTION: So that's strictly Spending Clause?

MR. SCHNAPPER: Strictly Spending Clause.

QUESTION: In Cannon, Cannon did not involve the regulation, right? It involved -- that was a claim under the substantive standard itself, whether -- I think it was a statute.

MR. SCHNAPPER: The specific claim in Cannon was actually an effect claim. The plaintiff was a woman who asserted that the university's practice of rejecting medical school applicants over a particular age had a discriminatory effect.

QUESTION: Right, but the university wasn't a State university, it was a private university.

MR. SCHNAPPER: Yes, I understand. I understand.

QUESTION: Well, that's sort of crucial to your Spending Clause argument, isn't it?

MR. SCHNAPPER: It's not --

QUESTION: I don't think our cases say that even when you're using your Spending Clause power to give

private individuals the rights to some Federal money you have to be clear. I thought we only have said that when you're giving money to the States under the Spending Clause you have to be clear.

MR. SCHNAPPER: I'm about to turn to the State issue, but I think a fair reading of the -- I think the Spending Clause argument is, as they make it, would encompass private defendants.

QUESTION: Well, but the Spending Clause argument is, as I understand it, goes to the fact that you're trying to make a State a defendant, so Cannon can't be dispositive of that.

MR. SCHNAPPER: If the Spending Clause rules are limited in that fashion, then that would be correct. I'm not -- but then there --

QUESTION: But I thought you said to accept the Spending Clause argument meant that Cannon had been wrongly decided.

MR. SCHNAPPER: Well, if you conclude, were to conclude that the Spending Clause limitations don't apply to private parties or to cities at all, then you -- then that problem would be solved, but the next problem would not, because this Court has been applying this implied cause of action to State defendants. It did so in Bazemore v. Friday, and in Alexander v. Choate. Those

were classic Ex parte Young injunctions against State officials, and the Court had no hesitation in applying it.

QUESTION: Did it explicitly decide the question, or did it just assume it in those cases?

MR. SCHNAPPER: I think it's fair to say that it assumed it, as have the lower courts for years. I mean, this is an established part of the fabric of the law, and it has been for many years.

QUESTION: Did either of those cases involve regulations as the immediate premise for the suit?

MR. SCHNAPPER: Both.

QUESTION: Both did?

MR. SCHNAPPER: In Bazemore we relied on a Title VI regulation, and in Alexander we relied on a Section 504 regulation.

QUESTION: So in other words, you're saying that if you take the silence -- this is -- I'm trying to follow the complicated -- if you take the silence, and if you -- you either read the silence as a whole, just private rights of action against States and individuals for damages and injunctions, or you try to create epicycles, or split the atom, if you're going to split that atom of silence, and if you split it to distinguish between State and private defendants, then you should also split the State defendants to distinguish between injunctive actions

and damage actions.

At least, that's what you'd have authority for under case law, because you have some cases, injunctions versus States, and you have other cases, damages versus private.

MR. SCHNAPPER: Right.

QUESTION: Is that right?

MR. SCHNAPPER: That is right. In our view, the provisions of the Eleventh Amendment and the sort of penumbra of the Eleventh Amendment issue in Will exhaust the federalism problems that are applicable in a situation like this, and when you get to an Ex parte Young injunction that problem no longer exists.

QUESTION: Mr. Schnapper, the two cases that you said did involve regulations, Bazemore and Alexander, were they?

MR. SCHNAPPER: Yes.

QUESTION: Did they involve a regulation that could not possibly have been an interpretive regulation? You see, I mean that's what's distinctive about this --

MR. SCHNAPPER: I --

QUESTION: That's what's distinctive about this case.

MR. SCHNAPPER: Yes.

QUESTION: Here we have a regulation that cannot

possibly represent the agency's view of what the statute, 601, requires, because we've said what 601 requires, and it doesn't require this.

Now, did those, either of those two cases involve that kind of a regulation?

MR. SCHNAPPER: They did not. They did not. I mean, there was an authoritative determination of what the scope of the statute was in the context in which those regulations were invoked.

Petitioners have suggested that there can never be an implied cause of action to enforce a regulation, or I would have to say here as well a rule, because that's really where this has come up, that contains a prohibition not contained in the statute itself.

This Court has done that on two occasions. In Borak v. J.I. Case, which was decided shortly before the announcement of the adoption of this statute, the Court recognized an implied cause of action to enforce rule, part of Rule 14. And then in the Superintendent of Insurance case 7 years later, the Court did the same thing with regard to Rule 10(b)(5). Those were implied cause of actions to enforce --

QUESTION: Those were a long time ago, weren't they, Mr. Schnapper?

MR. SCHNAPPER: Yes, but the Court has continued

to recognize that cause of action. In any event, those decisions reflected the standard for implying causes of actions that were prevailing at the time the 1964 Civil Rights Act was adopted and it's been the practice of this Court, in addressing the question of whether it would imply a cause of action, to look at the law that existed when the statute was adopted, on the presumption that Congress would have intended whatever result would follow from the then-prevailing law.

QUESTION: Well, it would be '64 to '86. I mean, you're relying to some extent on much later amendments to the Act. I mean, that's a substantial part of your case, isn't it?

MR. SCHNAPPER: We have -- we think --

QUESTION: And at least by the time those amendments were adopted, those earlier cases were subject to considerable doubt.

MR. SCHNAPPER: Right, but we think that an implied cause of action was appropriate under the '64 act as written.

QUESTION: Without resort to the '86?

MR. SCHNAPPER: Without resort to the '86 act.

Finally, with regard to the suggestion of the petitioners, they urge quite specifically that a regulation cannot forbid action not forbidden by the

statute itself. The Court has addressed that question on several occasions, in Morning v. Family Publications Service with regard to the truth-in-lending law, and in Gemsco v. Walling, a 1946 decision with regard to the minimum wage.

Both cases involved prohibitions containing regulations which clearly went beyond the language of the statutes. Both cases, they were upheld by this Court, and Gemsco again was the prevailing law at the time the Congress authorized regulations in 602, so it seems to me that's appropriate to look to here.

With regard to the argument regarding the limitations on the preconditions for certain actions under Section 602, this Court has addressed that question already in Cannon. It's important to note here that Congress clearly intended that the limitations in Section 602 on an agency action would apply in a discriminatory intent case. Indeed, the -- that was a particular focus -- intentional commission was a particular focus in 1964.

The one thing that's certain is that Congress didn't intend to permit an agency to cut off a State agency or a city agency or a private entity from Federal funding without going through all the loops set up in Section 602. That is to say, Section 602 applies even

where we're dealing with a Section 601 violation.

So the Court had that problem before it in Cannon, and this very argument was made. It was made in Justice White's dissent in Cannon. It was made in Justice White's opinion in Bakke. It was made in Justice Powell's dissent in Guardians. It was made by the defendants --

QUESTION: Which argument do you say was made?

MR. SCHNAPPER: That -- I'm sorry. That the notice and predetermination clause of Section 602 would be evaded if you allowed a private cause of action, because private parties don't make those -- you know, can't, or don't do those things. That very argument was made in all three cases and it's never been accepted by the Court, indeed, specifically was rejected by this Court.

QUESTION: Well, but when you start talking about Guardians, to suggest that it hasn't been accepted, really nothing was accepted, nothing much was accepted in Guardians, there were so many different opinions.

MR. SCHNAPPER: Well, with all -- am I answering?

QUESTION: Yes.

MR. SCHNAPPER: With all respect, there were three different issues in Guardians, two of which were clearly resolved, one of which was opaque. The question of whether there was an implied cause of action was

clearly resolved. There were six members of the Court who ruled that there was. The question of the validity of the regs was expressly resolved. Five members of the Court addressed it and resolved it.

What was unresolved was the scope of the remedy in one of those cases. That was the issue.

QUESTION: Yes, but the reasoning of the various opinions was not identical. In the cases where -- in those cases where they did -- where there was a holding, there was not any majority-accepted reasoning.

MR. SCHNAPPER: I think the reasoning with regard to the first two issues I mentioned was perfectly consistent.

QUESTION: Well then, why were there different opinions?

MR. SCHNAPPER: Because the -- because there were differing views as to the -- as to subsidiary -- as to other issues. There was a difference about Section 601 covered intent, which separated Justice White and Justice Marshall from Justices Stevens, Brennan, and Black, so they had to write different opinions.

Thank you.

QUESTION: Thank you, Mr. Schnapper.

General Waxman, we'll hear from you.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE RESPONDENT UNITED STATES

GENERAL WAXMAN: Mr. Chief Justice, and may it please the Court:

For over 25 years, courts have afforded injunctive relief against violations of Title VI regulations against State officials as well as other public officials and private officials. That practice is consistent with the expectations of the Congress that enacted Title VI, particularly considering the legal and social contexts that existed in 1964, and successive Congresses have validated the private right of action.

QUESTION: What social context existed in 1964?

GENERAL WAXMAN: Well, among other things, Mr. Chief Justice, the persistent practice of many local jurisdictions in evading the dictates of this Court and of Congress with respect to a variety of civil rights issues, the most prominent one being --

QUESTION: You're referring to what was -- what various local jurisdictions were doing at the time?

GENERAL WAXMAN: Yes, local and State jurisdictions. For example, the kind of thing that prompted the Voting Rights Act of '65.

QUESTION: Can you say anything about -- it's 35 years, and you said in 35 years everyone has assumed that there is a private right of action for injunctive relief

based on a regulation under Title VI, but have there only been like one or two in 35 years, or have there been a lot, or is this the first time it's come up, or the second time, or --

GENERAL WAXMAN: Are you talking about against --

QUESTION: You can say anything --

GENERAL WAXMAN: Against States, or generally speaking, because the answer is yes --

QUESTION: Well, let's say against a governmental body, however you want to answer it. I'm just trying to get an empirical idea of whether people really -- this really is embedded in the public mind or not.

GENERAL WAXMAN: I think that it is utterly embedded. The cases, the decided cases are collected in Mr. -- in two appendices to Mr. Schnapper's brief, but with respect to States in particular -- I mean, let me speak first to the regulations issue and then to the States issue, which I take to be the State of Alabama's principal points.

There is no case of which I am aware in which this Court has ever even suggested, much less held, that in determining the scope of a right of action, whether expressed or implied, that a distinction should be made

between rights articulated in a statute itself, and rights articulated in substantive regulations that the statute mandates that the agency promulgate.

QUESTION: Well, one --

GENERAL WAXMAN: This is a separation of powers issue.

QUESTION: General, I may -- I think I agree with the proposition you start with, but one reason to look at it differently now would be this. We have -- since the statute was passed, we have taken a different and at least in the minds of some of us a more realistic view of the circumstances in which you really can in fact infer a congressional intent to provide -- to recognize a private right of action, so we're trying to preserve Congress' expectations with respect to the law that was passed under the earlier regime, but it's also sensible for us not to expand that earlier regime any further than it necessarily has to go based upon the precedent that the Congress might have assumed.

GENERAL WAXMAN: That's --

QUESTION: And therefore there may be a good reason simply because this is no longer the world of Case and Borak, to draw just the kind of distinction which you point out we never have drawn before, but which we have never recognized, which we have never precluded drawing

before.

GENERAL WAXMAN: I would like to make two points, Justice Souter, in response to that observation, with which I agree. First of all, the implication of drawing the kind of distinction that's been suggested here has very, very broad ramifications beyond enforcement of civil rights statutes.

If you look at the cases, either implied or under 1983, in which private parties have sought to enforce against State agencies obligations under the medicare and medicaid statutes, those are regulatory obligations.

The contemporary legal context in which Title VI and the other civil rights provisions of the '64 act were enacted, as this Court recognized in Cannon and, in particular, in then-Justice Rehnquist's separate opinion in Cannon, were enacted in a regime in which it was understood that legislative silence with respect to a statute that created substantive rights for the benefit of individuals would be enforced by the courts in an implied right of action, and that existed in regulatory cases. We've talked about Borak. Merrill Lynch was decided somewhat later in 1982. The --

QUESTION: None of those, though, were against States.

GENERAL WAXMAN: Well -- no, no, no. It's quite right that those weren't against States, and Mr. Schnapper has cited some of the Title VI and Title IX cases that have operated against States. My only point on distinguishing between regulations and statutes for purpose of implying a right of action is that you will run into this Court's decided case law under the medicare and medicaid statutes whether under implied rights of action or under 1983, the Wright, Wilder, Blessing --

QUESTION: Were those regulations that you're concerned about regulations that plainly went beyond an interpretation of the statute?

GENERAL WAXMAN: They were --

QUESTION: You see, I mean, that's what's distinct about this case. In addition to the fact that it involves a State, you have a regulation that cannot possibly be characterized as simply an agency interpretation of the statute. Now, are the medicare regulations that you're talking about of that genre?

GENERAL WAXMAN: I wish I were more expert in medicare and medicaid regulations. My understanding --

QUESTION: I wish I were, too.

GENERAL WAXMAN: If --

(Laughter.)

GENERAL WAXMAN: I will gladly take guidance

from you, Justice Scalia, on this, but I believe that those statutes, like others in 1983 actions against State officials, involved both substantive and interpretive regulations and, of course, if you were going to draw a distinction here, it would drive a wedge right through the heart of this Court's cases, including Chrysler Corporation v. Brown and Chevron, that hold that substantive regulations that are mandated by statute have the force of law.

Let me go to the State point, the notion that States --

QUESTION: My only thought, they may have the force of law, but they may not have the force of the unequivocal for purposes of the Spending Clause.

GENERAL WAXMAN: Well, I don't think I can do better than simply to repeat what I -- the point I hope that I had made, which is, there is no case suggesting that for purposes of enforcing a Spending Clause obligation there is a distinction in recognizing a cause of action based on a statute, or on regulations that the funding agency is mandated to put forward. The principle --

QUESTION: But there's no case suggesting that there isn't, either. I mean, I think Justice Souter's point was that this is an area where there is no precise

authority one way or the other.

GENERAL WAXMAN: Correct. What we have on our side is, I believe, a completely unbroken practice of enforcing obligations under both the Spending Clause and otherwise equally, whether they arise within the four corners of the statute, or under substantive regulations that are mandated by the statute.

Now, I understand that this -- that our position puts great weight on the validity of these regulations, but that point, as the court of appeals noted, was expressly conceded by the State below, and we don't think that it's at issue here.

With respect to the implication of a, an implied private right of action against a State official, which was Mr. Sutton's first point, Mr. Schnapper cited some of the cases under Title VI and its cognate statutes, but I think it's also important to recognize not only the long line of 1983 cases, many of which enforce Spending Clause statutes and their regulations in injunctive action, but also the point that Justice Kennedy made in his dissent in Golden State Transit for himself and Justice O'Connor and the Chief Justice, which is that there may be instances in which a healthy disagreement may arise as to whether a particular provision of Federal law creates a right, privilege, or immunity, but when what is being sought is

injunctive relief, prospective relief only against a State official, the courts have long recognized a cause of action under the Supremacy Clause, Sections 1331 and 2201, including in Spending Clause cases which we have cited and discussed probably too briefly in footnote 12 of our brief.

Cases like Blum v. Bacon and Lead-Deadwood are Spending Clause cases -- Blum was, even involved a regulation -- in which a suit was brought by a private party against the State official saying, look, the State has a policy. It's reflected in a regulation or a statute that operates in a manner that's inconsistent with Federal law and therefore it is preempted, and the background principle, the principle of law, I respectfully submit, that Mr. Sutton is advocating runs directly contrary to the particular cases we cited under Title VI and its cognate statutes and 1983, but also this more underlying, long line of cases that includes but goes well beyond Spending Clause precedents.

Our position fundamentally in this case is that for 25 years, it is true, Mr. Chief Justice, there is not a holding directly on point that says, you may have a private right of action to enforce the Title VI regulations, but there -- for 25 years at least there has been a shared understanding among the three branches,

reflected in a unanimous set of, body of case law from the federal courts, from successive congressional enactments.

In addition to the attorney's fees amendment, the Rehabilitation Act amendments, and the Civil Rights Restoration Act, Congress has enacted 11 cognate civil rights statutes in which the funding agencies are expressly directed to promulgate regulations patterned after those under Title VI, all against a backdrop in which, at least since Lau v. Nichols and running up to the present, implied rights of action against State public agencies and other public agencies have been adjudicated, and the executive branch across administrations -- I've pulled out briefs filed on behalf of the United States by my predecessors, Robert Bork and Rex Lee, explaining to the Court that the implied private right of action to enforce these cases, and I believe that the former one was in Alexander, which was a case against a State, are important for the -- an important complement to Federal enforcement officials.

Our brief in Darrone said, quote, the award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is fully consistent with and, in some cases, even necessary to the orderly enforcement of the statute.

If there are no further questions, we'll submit.

QUESTION: Thank you, General Waxman.

Mr. Sutton, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF JEFFREY S. SUTTON

ON BEHALF OF THE PETITIONERS

MR. SUTTON: A few brief points, Your Honor. In terms of the question of what vantage point the Court uses in looking at this issue, there are many cases from the eighties and nineties where the Court has not looked to the date on which the statute was enacted for determining whether it's an applied right of action.

Touche-Ross, involving the 1934 Securities Act, is the very same statute that Borak involved, and it didn't look back in time. It followed what the Court was doing at that point in time. The true is -- the same is true of Transamerica, California v. Sierra Club, and Northwest Airlines. Even Cannon itself applied the Court v. Ash test which came 4 years after Title IX.

Now, as for the question whether Guardians has resolved this, the last thing that Guardians resolved was the question of whether there was an applied right of action. Even if one allowed for the counting of dissents and plurality votes, you only had two justices agreeing there was an implied private right of action in Guardians, so that surely was not decided there.

And the notion that pre-1983 there were settled

expectations on this point can't possibly be true. Look at Justice Marshall's opinion in Guardians. Footnote 1 identifies the split in lower court authority on the very question the Court tried to resolve but didn't, so that doesn't seem possible.

As far as the preemption cases that the Federal Government is relying on, I think it's footnote 11 or 12 in its brief, that's a very different issue. The question of whether a properly promulgated rule would preempt State law is one issue. It's a second issue whether a private individual can enforce it.

I have no other points. Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Very well, Mr. Sutton.

The case is submitted.

(Whereupon, at 10:57 a.m., the case in the above-entitled matter was submitted.)