IN THE SUPREME COURT OF THE UNITED STATES

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LISA FITZGERALD, ET VIR., :

Petitioners :

v. : No. 07-1125

BARNSTABLE SCHOOL :

COMMITTEE, ET AL. :

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Washington, D.C.

Tuesday, December 2, 2008

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:09 a.m.

APPEARANCES:

CHARLES A. ROTHFELD, ESQ., Washington, D.C.; on behalf of the Petitioners.

KAY H. HODGE, ESQ., Boston, Mass.; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:09 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 07-1125, Fitzgerald v. Barnstable School Committee.

Mr. Rothfeld.

ORAL ARGUMENT OF CHARLES A. ROTHFELD

ON BEHALF OF THE PETITIONERS

MR. ROTHFELD: Thank you. If it please the Court:

The court of appeals in this case -- excuse me, Your Honor.

JUSTICE GINSBURG: Maybe you could lift the podium?

MR. ROTHFELD: Actually, I have never used this before, so it's a learning experience for me, Your Honor.

JUSTICE SCALIA: That's enough.

MR. ROTHFELD: Okay?

JUSTICE SCALIA: We can't see you.

(Laughter.)

MR. ROTHFELD: That -- that may be an advantage, Your Honor.

JUSTICE GINSBURG: But we can hear you.

MR. ROTHFELD: If -- if I should modify it,

please -- please let me know.

The court of appeals in this case made two fundamental and separate errors, each of which should require reversal of its decision. First, all agree that the question whether title IX precludes the use of section 1983 to enforce the Constitution is a matter of congressional intent. Yet, the court of appeals entirely disregarded all of the ordinary indicia of congressional intent: the statutory text; the statutory background, structure, and evolution; the unquestioned legislative purpose.

Each of these considerations points conclusively towards a single outcome: Congress did not mean title IX to preclude the use of section 1983 to enforce the Constitution.

Second, rather than consider any of this direct and compelling evidence of what Congress actually had in mind in title IX, the court of appeals applied what it thought to be a presumption that the availability of title IX's implied right of action to enforce title IX's own statutory prohibition of gender discrimination somehow should be taken to mean that Congress meant to preclude the use of section 1983 to enforce constitutional rules against discrimination.

CHIEF JUSTICE ROBERTS: Counsel, there's --

there's a little bit of an air of unreality about all this, because, of course, Congress didn't provide a cause of action in title IX to start with. And the reason they don't have all these limitations and restrictions is because they didn't put in the cause of action.

We implied it from the statute, and so it seems kind of awkward to say, well, there are no limitations, as I said, when there was no cause of action.

MR. ROTHFELD: Well, I -- I guess there -- there are a number of points that I -- I can make in response to that, Your Honor. First of all, I think what -- what you say is absolutely right. Congress did not expressly provide a cause of action in title IX.

And so since -- since the question in a preclusion case, the question of whether or not Congress meant to preclude the use of section 1983, is whether there is a clear indication of congressional intent to do so, that there -- as a matter of definition, that can't be present here. But -- but before --

JUSTICE SCALIA: Maybe the question ought to be whether this Court intended to have the title IX action, which it invented, preclude 1983. Why don't we look to the intent of this Court?

MR. ROTHFELD: Well, I -- I think not, Your Honor. I think that --

JUSTICE STEVENS: Would you agree that this Court invented the cause of action?

MR. ROTHFELD: No, I -- I don't agree with that. I -- I do think -- and -- and -- this is not my principal point, but I do think it's quite clear that if we are talking about what is the clear intent of Congress regarding preclusion of use of section 1983, the fact that Congress did not expressly create a -- a private right of action at all bears very significantly on that.

I don't at all disagree that Congress intended and expected that the courts would recognize a right of action under -- under title IX. But Congress actually in title IX specifically, I think, addressed the preclusion question that we have here.

There is clear statutory text that answers the question in this case in -- in several respects. First of all, when Congress enacted title IX, it specifically provided that -- it specifically contemplated that there would be continued, private constitutional litigation challenging gender discrimination.

It specifically authorized the attorney

general to intervene in private litigation whenever -- and I am here quoting from the text of the statute -- whenever suit is initiated in any court of the United States to assert rights, the deprivation of equal protection under the -- under the Fourteenth Amendment of the Constitution on account of sex.

Congress, therefore, specifically contemplated, when it enacted title IX, that there would be -- there would, in fact, be constitutional litigation challenging gender discrimination on account of sex. And Congress surely knew that that litigation would proceed under section 1983. Respondents --

CHIEF JUSTICE ROBERTS: Did we rely on that provision in implying the right of action under title IX?

MR. ROTHFELD: The -- the Court did not. I mean there, the -- the Court looked at what it took to be the general -- the manifest congressional intent when -- when it enacted title IX. But it did not specifically rely on -- on the legislation. The legislation, of course, goes to whether or not section 1983 suits were available, not to whether there is a title IX implied right of action available.

And, as I say, in that -- in that legislative language, Congress made expressly clear that

it intended -- and intended actually to facilitate by allowing the attorney general to intervene in -- continued section 1983 litigation to enforce allegations of -- of gender discrimination.

JUSTICE GINSBURG: Mr. Rothfeld, I follow your argument entirely, and then in the civil rights area there are a lot of overlapping statutes. You can sue under title VII. It doesn't take away your right under 1981.

But in this case, if we get down to what this case is about, we have a determination by a court that the school district acted reasonably in relation to these complaints. And then you say: But we have constitutional claim. A constitutional claim requires you to show deliberate, intentional conduct if it's an individual; if you are talking about an institution, some kind of not just one incident, but a custom, a pattern.

What, when you get down to the merits, is different about those? In other words, is it on the wrong track to talk about precluding a statute instead of talking about just plain old issue preclusion? What is different about 1983?

Yes, you have two claims, but if you lose under IX, you are going to lose under 1983 as well.

MR. ROTHFELD: Well, that -- that is right, Your Honor, to the extent that the claims are identical and that they have actually been adjudicated.

The -- the First Circuit in this case resolved the title IX claim focusing on deliberate indifference in response to peer-on-peer sexual harassment. To the extent that there is a federal constitutional claim growing out of that conduct of the same sort and to the extent that the elements of that claim are identical, then we agree that at that point that would be precluded. But we think that there is more to this case than that one issue that has been resolved.

JUSTICE GINSBURG: What more? What more is alleged in the complaint? I thought the complaint just spoke about deliberate indifference.

MR. ROTHFELD: Well, I -- I guess there are -- are two points in -- in response to that, Your Honor. First of all, I think that the complaint can be taken to allege in addition more generic --

(Banging sound.)

MR. ROTHFELD: I hope I am not responsible for that.

CHIEF JUSTICE ROBERTS: We will give you an extra 10 seconds.

(Laughter.)

MR. ROTHFELD: And I -- I assure you I will -- I will use them, Your Honor.

The -- the complaint, we think, should be taken also to be generally in response to complaints of -- of misconduct by individuals within the school, but in --

JUSTICE GINSBURG: Spell that out -- spell that out practically. I know you used the disparate --

MR. ROTHFELD: Well, I think -- for example, Your Honor, we think that one thing that -- that could be developed and explored further is disparate treatment of complaints; for example, the treatment of complaints of bullying by boys more favorably than complaints of harassment by girls, believing testimony of boys rather than believing testimony of girls.

JUSTICE GINSBURG: But there was no allegation at all of that kind in this complaint.

MR. ROTHFELD: I -- I -- I agree that that was not set out specifically in the complaint. The complaint did say in a -- in a general sense that Jacqueline Fitzgerald was denied equal access to the benefits of education. It said that the discrimination she suffered included but was not limited to sexual harassment. It asked for relief, injunctive relief, to

bar unconstitutional treatment not only of Jacqueline Fitzgerald but of all female students in the school, which I think --

JUSTICE BREYER: I mean, could you have brought a claim that they didn't let the female students play hockey, under your complaint? I mean, that's additional discrimination.

MR. ROTHFELD: Well, I think --

JUSTICE BREYER: Didn't it have to be related to the particular facts?

MR. ROTHFELD: Yes, that's right. I think --

JUSTICE BREYER: And is there -- and you talked about you wanted some additional discovery. What? What is it that you could go to a district judge now and say, Judge, I have a basis here for asking for discovery on a different but related theory? What words would you use? What would you write in that request?

MR. ROTHFELD: Well, there are a number of points I should make in response to that, Your Honor. I think one is, just as a general matter, we think that that's something -- this entire set of questions are things that are better resolved by the courts of appeals -- on -- the court of appeals on remand. I think that there are -- there are unresolved

constitutional --

JUSTICE BREYER: The reason I ask is obviously if this case happens to be a case in which, because of the finding that there was no intentional discrimination and the school board behaved properly, that if that's the finding and therefore you have no claim under 1983 in respect to that, it becomes very theoretical to say that they went too far and said you might have no other 1983 claim because you would have some other 1983 claim, but we should dismiss this as improvidently granted and wait until somebody does this again.

MR. ROTHFELD: Well, certainly -- I -- certainly, I understand that suggestion, Justice Breyer. And let me give you two responses to that. First a specific response to why it could happen on remand. This is not a theoretical possibility. There was actually discovery that was requested concerning additional complaints, concerning additional disciplinary action against other students, concerning requests for bus monitors, as to which it could have been developed that there was disparate treatment as to those. The Respondents declined to --

JUSTICE GINSBURG: I still don't follow. What disparate treatment? Did you have to have that

they treated girl's complaints one way and boy's complaints another way?

MR. ROTHFELD: That -- that would be one way in which --

JUSTICE GINSBURG: And as far as this record shows, there has just been this one incident of harassment --

MR. ROTHFELD: Again, Your Honor, I think one of the problems is that this case sort of went off the tracks at the earliest possible stage, at the -- at the time that the motion to dismiss was granted. And it could have developed in quite a different way.

For example, discovery was requested on these subjects that I -- that I mentioned to Justice Breyer, which -- which could have been used to develop that, in fact, requests by boys were treated more favorably than requests by girls; complaints by boys were responded to more -- more favorably --

JUSTICE BREYER: Is that request here in the record?

MR. ROTHFELD: Excuse me, Your Honor?

JUSTICE BREYER: Is that request here?

MR. ROTHFELD: The discovery request?

JUSTICE BREYER: Do I have the request in the joint -- in the -- do I have it in the appendix

here?

MR. ROTHFELD: No, no. It is not --

JUSTICE BREYER: So, we don't even have it in front of us?

MR. ROTHFELD: You do not have it in front of you. But I can tell you that the request was made, the Respondents declined to respond to it for, among other reasons, the -- the assertion that it would not lead to the discovery of relevant evidence or admissible evidence. After the 1983 preclusion ruling, and because of the preclusion ruling, that was not followed up because it would have been futile to try to develop additional argumentation in that -- in that direction.

Had the case not hopped the track at this point, if the complaint could have amended -- could have been amended, additional individual defendants could have been added, the case could have gone on in quite a different direction.

JUSTICE SCALIA: Mr. Rothfeld, we were -- we were warned about all these problems in the brief in opposition, weren't we?

MR. ROTHFELD: That is correct.

JUSTICE SCALIA: Didn't that focus almost entirely upon the fact that there is no 1983 cause of action anyway?

MR. ROTHFELD: That is exactly --

JUSTICE SCALIA: And we nonetheless granted -- granted cert?

MR. ROTHFELD: Precisely the same arguments were made in almost identical language in the brief in opposition that are now being made as an argument as to why this Court should decide the merits of the 1983 claim or dismiss as improvidently granted.

The Court -- I don't presume to tell the Court what it was thinking when it granted review of the case, but it did presumably reject those arguments at that point, and there's no reason that they are any additional basis now.

JUSTICE STEVENS: Do I understand, Mr. Rothfeld, that if you win on the question presented, you would agree that the -- the arguments the other side makes on the -- on whether there's a cause of action under equal protection and so forth, that would remain open on remand?

MR. ROTHFELD: Absolutely.

JUSTICE STEVENS: And you may still lose the lawsuit even if you win here?

MR. ROTHFELD: That is -- that is absolutely correct. The constitutional arguments were made on the merits to the district court and to the court of

appeals. They were not addressed by either. Those courts cut it short and threw the case out on preclusion grounds.

And I -- I think the way in which the court of appeals decided the case actually suggests that it was of the view that there was more in the case than simply the title IX claims that had been rejected, because one would have thought that if the court of appeals was of the view that there is nothing to the case beyond the title IX peer-on-peer harassment claim that has been reject, it would have ended its discussion at that point. It would have said: We reject your title IX claim; there is nothing more to your section 1983 constitutional claim; that's the end of the matter.

But it didn't do that. It decided the title IX claim on the merits, rejecting it. And it then separately went on to address the section 1983 constitutional claim and said: We are not going to address those merits at all; we are going to say that those claims are precluded as a matter of per se title IX law, that title IX is preclusive. And, therefore, one would think that the court of appeals had it in mind that there was more that could have been decided about the merits --

JUSTICE GINSBURG: But we find that out on

remand.

MR. ROTHFELD: And we'll find that out on remand.

JUSTICE GINSBURG: What you're saying is they made a basic legal error.

MR. ROTHFELD: That's --

JUSTICE GINSBURG: You may have a losing case under 1983, but let the First Circuit decide that?

MR. ROTHFELD: That -- that is absolutely correct. That is our --

JUSTICE BREYER: How do we know that the First Circuit wasn't just thinking about the facts of this case in front of it when it said that there's no 1983 action. I mean, they didn't think there was no 1983 action for search and seizure. They must have had some idea of what the limitations of their saying no -- no -- no 1983 action was. So why do we know that they went beyond what they had in front of them in this case? I'm not saying they didn't. I am just wanting to know what we -- how we know that.

MR. ROTHFELD: Well, I -- I think one of the problems is, of course, we don't know for sure what -- what they were thinking, and therefore, it makes sense, I think, for this Court, in the regular course of its practice, to decide the question presented and to send

the case back down to the lower courts to --

JUSTICE BREYER: But you see, the question presented, I guess is -- I'm trying to get the exact words, but it's whether the title IX replaces the -- what is it, it's whether -- I'm sorry. You have it right in front of you there.

MR. ROTHFELD: Whether title IX precludes the assertion of constitutional claims for gender discrimination in schools under section 1983. The -- the -- the reason that I think --

JUSTICE BREYER: You think they're -- they're referring to all of title IX, no matter what the claims, whether they are overlapping or not?

MR. ROTHFELD: I think that that is the language that the First Circuit used. The First Circuit said, in so many words, that title IX is the exclusive avenue for the assertion of claims of gender discrimination arising out of -- arising from schools.

JUSTICE GINSBURG: Well, because they were relying on cases where we did say that a very detailed scheme was pre-emptive.

MR. ROTHFELD: They were relying on one case in which the Court said that, in Smith v. Robinson, the only time in 140 years that section 1983 has been on the books that this Court has ever said that Congress meant

to preclude its use to enforce a particular constitutional right. And I think --

JUSTICE GINSBURG: And it did that because if you could use 1983, then the very elaborate mechanism that Congress had set up, who would use it?

MR. ROTHFELD: That's -- that's absolutely right. But I -- I -- I add parenthetically that Congress promptly responded to the Court's decision in Smith by restoring the remedy --

JUSTICE GINSBURG: Just on that one issue on attorneys' fees.

MR. ROTHFELD: Well, I think that the language used is actually broader in the -- in the corrected legislation. But that, as I say, is a parenthetical point.

I -- I think that something that we have here which was not present in Smith at all -- and as you say, Justice Ginsburg, it's absolutely right that there was a much more elaborate, involved administrative remedial scheme in the statute considered there. There is nothing remotely like that in title IX. But before you even get to that point, there is this express evidence in the statutory text of title IX that Congress did not mean to preclude use of section 1983.

First, there is the provision that I

mentioned regarding the attorney general, which -- which expressly contemplates there will be continued section 1983 constitutional gender discrimination after the enactment of title IX. I think that in and of itself is dispositive and tells the Court all it needs to know.

But beyond -- there is -- there is more. Beyond that, there is the language of the antidiscrimination provision of title IX, which was borrowed directly, is identical to the language of Title VI of the Civil Rights Act of 1964. Congress dropped the phrase "race, color, and national origin" that appears in title VI and substituted "sex" in title IX.

And, so, the Court has recognized that Congress expected and intended that title IX would be interpreted just as -- as had been title VI.

JUSTICE GINSBURG: Have there been any decisions on title VI and 1983?

MR. ROTHFELD: There -- there have been myriad such decisions. There have been -- as we cite in our brief, as the American Bar Association cites in its amicus brief supporting us, the American Civil Liberties Union cites in its brief -- there have been almost two dozen cases decided before the enactment of title IX in which courts allowed the simultaneous assertion of statutory discrimination claims under title VI and

section 1983 discrimination claims under title IX. There had not been a single suggestion by any decision that there might possibly be preclusion. And so, at the time that Congress used the language of title IX, it knew that that language had been uniformly, widely construed across the country to allow the simultaneous assertion of those claims, not the preclusion of section 1983 claims for discrimination.

And so it's when Congress -- when legislative language has been the subject of judicial construction, as the Court has said many times, and Congress repeats that language in a new statute, its expectation and intention is that the judicial construction is going to be taken as well.

And so that I think that is also dispositive of the question in this case, because Congress chose language that it necessarily knew had been understood not to preclude the use of section 1983.

And I will mention as well, just to sort of throw in the suspenders along with the belt, an additional consideration that the court of appeals ignored here was the manifest legislative purpose of section -- of title IX, which was to expand and strengthen protections against discrimination in schools.

CHIEF JUSTICE ROBERTS: Well, of course, title IX is Spending Clause legislation, and that, under our precedents, imposes certain limitations on how we interpret it that would not be applicable under section 1983.

MR. ROTHFELD: Absolutely correct. And I think that there are --

CHIEF JUSTICE ROBERTS: Well, the point is that that would then allow 1983 actions to circumvent those limitations on the title IX remedy.

MR. ROTHFELD: Well, I -- I think not, for a couple of reasons, Your Honor. First, as I say, there is this direct evidence of what Congress had in mind. It specifically referred to constitutional litigation under the Fourteenth Amendment when it enacted title IX, and, therefore, by definition it could not have been concerned about evasion in that sense. But I think that there -- "evasion" is not the word to use here because, on the one hand, there are statutory rights created by title IX; on the other, there are pre-existing constitutional rights --

JUSTICE GINSBURG: And those constitutional rights have -- I think it might be -- it's at least arguable that it would be harder to win a 1983 case, given that, as to the individual, you have qualified

immunity, and, as to the institution, you have to show a custom or practice.

MR. ROTHFELD: Well, the only availability for individual liability is under the Constitution, because title IX, at least as construed by the lower courts, does not permit suits directly against the individual, only against the institution, which I think is a significant distinction between the two and supports the argument that Congress could not have intended to preclude it because, as the Court has recognized, repeatedly, the availability of individual liability greatly adds to the -- the deterrence, the effect of deterring constitutional violations.

And the suggestion that, when Congress enacted title IX, it would have -- it meant to have the perverse effect of allowing a school, by accepting federal funds, to insulate school policymakers from any personal statutory liability, you know, for even the most blatant and obvious acts of unconstitutional sex discrimination would turn title IX on its head. It's inconceivable that Congress could have had that intent in mind when it enacted a statute that was clearly designed to expand and strengthen protections against gender discrimination.

I'll make sort of two additional points,

Your Honor. As I -- as I suggest, I think the direct evidence in the statutory text, as well as the legislative purpose, is dispositive here and the Court need not go beyond that to answer the question here. That leaves the question of how the court of appeals got the matter so far wrong. And I think that the reason that they did is, ignoring the text, they applied what they thought to be a presumption derived from this Court's decisions in cases like Smith v. Robinson and the Palos Verdes case that the creation of a new statutory right and a new statutory remedy necessarily reflects a congressional intent to preclude the use of section 1983 to enforce overlapping constitutional remedies. There has never been such a presumption.

The Court has said repeatedly, I think, as was suggested earlier in the discussion, that when Congress creates new statutory rights and new statutory remedies, they are presumed to overlap with and to supplement existing statutory rights and remedies, unless the two are positively repugnant to one another, unless they are inconsistent and can't be reconciled. That certainly is not the case here. The section 1983 constitutional claims and title IX supplement and complement each other. The two statutes are by no means coterminous in who can be sued.

The Court has certainly never presumed that the creation of any statutory right or statutory remedy bars the use of section 1983 to enforce the Constitution, as suggested by Justice Ginsburg's question. The Court has only once in well more than a century that section 1983 has been on the books held that availability of the constitutional remedy had been precluded. As I say, Congress promptly responded by providing that remedy.

The Palos Verdes decision, which was the fulcrum of the court of appeals' decision, I think suggests what's wrong with its analysis. Palos Verdes involved a new statutory right, a new statutory action to enforce that right. The statutory action was limited in significant respects, and the Court concluded, as a matter of common sense, that one could infer from that situation Congress intended that the new right -- with the new remedial system would be exclusive, otherwise plaintiffs could immediately go to court and render that system a dead letter.

But, as Justice Scalia pointed out in his opinion for the Court, that holding had no effect whatsoever on section 1983. It meant that Congress had placed the new remedy outside of section 1983's remedial framework, but that claims that were available prior to

the existence of that new right, prior to the creation of that new right, remained available under section 1983. And that is exactly the situation that we have here. Plaintiffs are not trying to allege a new statutory right that is outside the section 1983's remedial framework; instead, they are asserting fundamental, pre-existing constitutional rights.

CHIEF JUSTICE ROBERTS: I take it they don't have to bring these actions together. They can sue under title IX; if they lose, then they can start a whole new lawsuit under 1983?

MR. ROTHFELD: Well, I think that to the extent -- as was suggested by Justice Ginsburg's line of questioning, to the extent that the claims are the same, then they would preclude it, the 1983 claim, if it has the same elements, if it's the same cause of action --

JUSTICE GINSBURG: It would be a different claim, but there would be issue preclusion.

MR. ROTHFELD: There would be issue -- yes, that's right.

CHIEF JUSTICE ROBERTS: Even if you have different -- I guess you would have a different set of defendants, right? You would have the school in the title IX case, the individuals in the 1983 action?

MR. ROTHFELD: I think, to the extent that

the suit was initially brought against the school under title IX for a type of claim that could have been brought as a parallel claim against the individual under section 1983, and the title IX claim was rejected, to the extent that the elements are the same, presumably there would be a defensive claim of collateral estoppel.

JUSTICE GINSBURG: And the official -- it's the plaintiff who would be precluded.

MR. ROTHFELD: That's right. That's right.

JUSTICE GINSBURG: And the plaintiff has had a full and fair opportunity to argue those issues.

MR. ROTHFELD: That's exactly correct.

If the Court has no further questions, Your Honor --

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. ROTHFELD: Thank you.

CHIEF JUSTICE ROBERTS: Ms. Hodge, we will hear from you on behalf of the Barnstable School Committee.

ORAL ARGUMENT OF KAY H. HODGE

ON BEHALF OF THE RESPONDENTS

MS. HODGE: Thank you. Mr. Chief Justice, may it please the Court:

Title IX provides for sex discrimination and provides a remedy for sex discrimination in a broader

category of circumstances than the Equal Protection Clause. Therefore, having title IX preclude section 1983 equal protection claims does not deny petitioners in this or any other case any remedy --

JUSTICE GINSBURG: Go over -- go over that again. I didn't understand it. You said title IX provides --

MS. HODGE: Title IX --

JUSTICE GINSBURG: -- against sex discrimination than the Constitution does.

MS. HODGE: Correct.

JUSTICE GINSBURG: Explain that to me.

MS. HODGE: The title IX prohibits discrimination on the basis of sex. The Equal Protection Clause -- or section 1983 and the Equal Protection Clause require that additional intentional discrimination that this Court found in Personnel Administrator of Massachusetts v. Feeney. We -- we would suggest to the Court that title IX actually covers a broad range of circumstances that may not involve that very specific intent required to perfect a constitutional violation. And clearly -- if you look at the cases, the cases clearly involve a variety of instances which would not be sufficient under, say, a constitutional evaluation.

JUSTICE GINSBURG: Give me an example.

MS. HODGE: An -- an example would be the situation such as this -- this particular situation. Recall that this is a case of peer-on-peer, student-on-student harassment. In this situation, the standard as decided by this Court in Davis is deliberate indifference.

JUSTICE GINSBURG: And what would the standard be under 1983?

MS. HODGE: The standard under 1983 is also deliberate indifference, but it requires then that the deliberate indifference be shown to be not just the act of a school administrator who does not do what they should do in order to pursue a particular complaint; but, rather, there needs to be the specific intent to discriminate or -- specific intent to choose boys over girls or girls over boys in that decisionmaking process.

JUSTICE STEVENS: Yes, but if you lose under -- under title IX, a fortiori, you would lose under the Constitution, I would think.

MS. HODGE: I -- I believe -- and that is, in essence, the position that the Barnstable School Committee and Superintendent Dever are arguing in this case; that is, that because deliberate indifference is the standard that is applicable both under title IX and

also under the Constitution, that it is -- it is -- having lost the issue of deliberate indifference before the First Circuit, that finding of the First Circuit precludes any further controversy between the parties in this case.

JUSTICE GINSBURG: But they didn't go on issue preclusion. If they had done that, it would be a different case. They said that title IX is pre-emptive of 1983. And they cited the cases where -- like Smith against Robinson where that is what the Court held.

MS. HODGE: I believe -- I believe, Your Honor, that we have a situation in which you have both claim preclusion -- both preclusion under Smith v. Robinson as well as issue preclusion, which makes it somewhat complicated. But I would suggest in this case under these circumstances, because the issue was deliberate indifference and because there was a finding both as a legal matter as well as a factual matter of deliberate indifference, that essentially the two sort of collapsed into one.

With regard to Smith, I would point out to -- under the Smith theory, constitutional claims can be precluded if the -- under the statute under review it has a comprehensive, remedial scheme. And we would argue that there is a comprehensive remedial scheme, and

that this Court has, in fact, sort of found that and even added to it in the development -- have found that Congress intended to add to the remedial scheme --

JUSTICE GINSBURG: But --

MS. HODGE: -- an implied right of action.

JUSTICE GINSBURG: You -- you must, I think, recognize that the elaborate scheme that Congress set up under the Education of the Handicapped Act is quite different from what this Court did. It just said there's a private right -- right of action. There's an implied private right of action.

It didn't set up any administrative mechanism. It didn't set up any regime for going to an agency first and then coming to the court, none of that.

MS. HODGE: There is not. But I would suggest that that is appropriate under the circumstances, that the -- and I would also suggest that there is, in fact, an administrative scheme. The regulations that, in fact -- that have been promulgated by the Office of Civil Rights at the Department of Education, in fact, have a number of prerequisites and requirements. They impose upon the --

CHIEF JUSTICE ROBERTS: You are not arguing that the agency regulations have the effect of precluding a 1983 action?

MS. HODGE: No. I'm -- we are not arguing -- we are arguing that some of those steps are illustrations of sort of the -- the scheme that was created. But there is a remedial -- the -- the remedial scheme leads to the potential loss of Federal funding -- of --

JUSTICE BREYER: Are you saying -- is this what you are saying: We imagine that we have a institution that is receiving Federal assistance, okay? And we also imagine that somebody is claiming that, on the basis of gender, they have been excluded from participating in, or denied the benefit of, or subject to discrimination.

Are you saying that it is impossible for anyone to imagine a circumstance in which it would be held the defendant did not violate title IX, but in which the court held it did violate the Equal Protection Clause? There is no such circumstance; no one can imagine one. Is that what you are saying?

MS. HODGE: Your Honor, what I am saying is I cannot imagine one. And I don't believe --

JUSTICE BREYER: You cannot imagine one. You think no one can imagine one. So an obvious question on rebuttal is, since we have limited it to that universe, would be the other side must imagine one?

MS. HODGE: I believe that that is true.
JUSTICE BREYER: Okay.
MS. HODGE: And I would point out --
JUSTICE BREYER: That's simple.
MS. HODGE: -- that in response to the Petitioners' argument today, they have attempted to suggest that there may be some issues that were not discovered; that were not, in fact, fully reviewed by the court below.
And I suggest that the First Circuit did, in fact, look at specifically that issue. And the First Circuit said in their decision that, in looking at the equal protection claim in particular, that the Petitioners offer -- or in that case, they offer, the plaintiffs offer -- "no theory of liability under the Equal Protection Clause other than the defendants' supposed failure to take adequate actions to prevent and/or remediate the peer-on-peer harassment that Jacqueline experienced."
And I suggest to you that that is exactly the issue that -- that that is exactly the issue. The issue is whether or not, if you look at the complaint, the claim that is being brought under title IX and the claim that is being brought under section 1983 and the Constitution are virtually identical, which is a second

prong of the Smith test: If there is a comprehensive remedial scheme. Again, it's a remedial scheme.

And, second, the question is: Are the claims virtually identical? And I would suggest to you that the First Circuit found that they were virtually identical. And I would suggest that that is what leads to preclusion.

Now, that doesn't mean that there aren't other claims that could be made with regard to others. But for the institution, it -- I -- the -- it is very important. Congress established this particular scheme under section 19 -- under title IX, and it would be our view that Congress specifically and intentionally focused its -- the responsibility for sex discrimination on the institution and on the institutional recipient of Federal financial assistance.

And that if you were to allow section 1983 claims, that enforcement would not be nearly as equitable. We would point out that it's obvious, but it is important to consider, that recipients of Federal financial assistance include not only municipalities that run public schools; they include State entities which under this Court's decision -- under this Court's prior decision in Wills v. Michigan, are not subject to suit under section 1983 and private entities that are

not subject to 1983 at all. It -- the --

JUSTICE BREYER: Does a disparate-impact claim violate section -- title IX?

MS. HODGE: There -- there -- it is not 100 percent clear except for the following, and I would suggest this: Title IX prohibits discrimination. If it were determined that a policy or other practice led to a denial of equal access to the benefits and -- and participatory activities of an individual student based on their gender, I believe it is covered; and I believe it is discrimination; and I believe it is prohibited.

And the fact of the matter is, though, that under the law as developed by this Court in the Equal Protection Clause, the fact of the matter is, is that it would not cover disparate impact, because this Court has held that disparate impact is not covered.

JUSTICE GINSBURG: Do you have any case in all of title IX where -- that fits that abstract picture that you have just described? I mean, you have to have a pattern and practice of what? A pattern and practice of discrimination to get -- to get under the Constitution or under 1983.

You have to have deliberate indifference to what? To the gender harassment, to the gender discrimination. So can you describe to me anything, any

title IX case that has a disparate impact? We really didn't want to -- a Feeney type of case. We really didn't want this to happen but we had a test, and it came out that way.

MS. HODGE: Well, I believe --

JUSTICE GINSBURG: Can you describe a title IX case that's like Feeney in that respect where we didn't want this diverse impact to occur; we really didn't want it at all, but it happened?

MS. HODGE: I believe that the fact that it happens is sufficient discrimination to come under title IX. I would point out to Your Honor that the Cannon case, in fact, involved essentially the -- a disparate-impact type case. It dealt with admissions policies and the effect of the admissions policies on individuals.

And, consequently, I believe that it is not ethereal. It is quite real. But the difference is, is that the question becomes one of whether or not an individual, based on their gender, is being denied the benefits of, and participation in, the various --

JUSTICE GINSBURG: On the basis of gender.

MS. HODGE: On the basis of gender. On the basis of gender, but I don't believe the --

JUSTICE GINSBURG: And Feeney says it wasn't

on the basis of gender. It was on the basis that she wasn't a veteran.

MS. HODGE: But you see, I believe that the impact, which would have been that an individual would not have been allowed to participate, may be an additive factual conclusion which would go to the general discrimination issue. The position that -- the argument that we are making to this Court includes the fact that since title IX is as broad, if not broader -- and I would suggest the following sort of visual picture.

JUSTICE GINSBURG: But there is -- there is -- you are leaving out something quite glaring in that respect. For example, single-sex schools, military academies, admissions to elementary and high schools are not covered by title IX.

MS. HODGE: Oh, you are absolutely correct, Your Honor, and under those circumstances, we would suggest that, as this Court found in Mississippi v. Hogan, that those institutions would then be subject to section 1983 review, but on the highly constitutional standard which requires intentional discrimination; and second of all, we believe that that is -- that Mississippi is an illustration of the reason why the argument of Petitioner regarding 2000h of title IX, which deals with the fact that -- that when they passed

title IX, they also reserved the opportunity for the Attorney General to become involved in a case under 1983, that the intention of that language was not necessarily to preserve 1983 in cases against recipients who are in fact covered, but it would have been to reserve the right of the Attorney General to -- to intervene in cases in which either the institution was not covered -- because you are absolutely right, there are institutions which are not covered -- and as you decided in Mississippi v. Hogan, they would be subject to section 1983; and/or individuals that the First Circuit recognized might, because they -- if they are -- if they are State actors, that is not the case you have here, which was peer-on-peer harassment -- but if you had a situation where for example, a teacher or an administrator was in fact the alleged harasser, that a 1983 could be brought against the individual, and indeed the -- the Attorney General could intervene in those cases.

JUSTICE BREYER: If it's an individual, under title IX you can't bring the suit?

MS. HODGE: Correct.

JUSTICE BREYER: All right. But you could under 1983?

MS. HODGE: Correct.

JUSTICE BREYER: Okay.

MS. HODGE: But --

JUSTICE BREYER: So your point then is -- and that's why I've had trouble with this case -- is that if you look at the First Circuit opinion, it sort of seems to say: If there's a difference, of course you can have a 1983 suit, but if there's no difference, you can't. I mean, everybody here seems to agree to that, I guess.

So I'm not certain what to do, because Selya started his opinion by saying this isn't a case where title IX doesn't apply; it does apply; they have the funding; but he doesn't talk about the exemptions and he doesn't really talk about the -- a difference between suing an institution and suing an individual. So maybe what we should say is, maybe he meant it, but he didn't say it.

MS. HODGE: Well, I would argue -- I would argue, of course, that I would hope that this Court would take -- would affirm the First Circuit opinion, but I would say to -- to -- to Your Honor the following: that with regard to the individual defendant in this case, who is a superintendent of schools, who as we argue, the question presented only deals with the institutional recipient; but nevertheless the First

Circuit found that the individual was acting only in their official capacity. And once again, that -- that issue is not before this Court.

And having decided that they were acting in -- in the individual's official capacity, we would argue therefore that the individual would not be sued, because the claim and all of the facts --

JUSTICE BREYER: So you are saying if it's an individual acting in his official capacity, you cannot sue him under title IX?

MS. HODGE: To the -- yes.

JUSTICE BREYER: Yes. Okay.

MS. HODGE: Yes.

JUSTICE BREYER: Then their answer to that which -- say, look, we want to sue an individual in his official capacity; that's why we want to bring our 1983 suit. And then you reply: But there are bars here of collateral estoppel, claim preclusion -- whatever it is.

MS. HODGE: Issue preclusion.

JUSTICE BREYER: They all have new names.

(Laughter.)

MS. HODGE: They do. They do.

JUSTICE BREYER: But the -- the -- okay. That's your argument. So why don't we just send it back, say that's right; this suit is not precluded by

1983; indeed, that's the only place you can bring it; it's not precluded by title IX, and now, court, you go decide whether claim preclusion exists, or whatever you call it ---

MS. HODGE: The court --

JUSTICE BREYER: -- collateral estoppel, or -- you understand what I mean.

MS. HODGE: Your Honor, I believe that they did decide that in the language that I did quote to you just a moment ago from the First Circuit opinion, which is found at the appendix 23a -- or the decision. Essentially they are -- they are saying that -- that there was -- that because no theory of liability was offered other than this, that there isn't any further claim available.

With regard to sending this case back, I -- we argue, based upon the deliberate indifference standard, which I think is indisputably the standard both under title IX and the standard under the Equal Protection Clause, that that deliberate indifference standard and -- and the fact the First Circuit found that -- that there was -- that the Barnstable School Committee acted reasonably and without deliberate indifference, precludes -- there is no issue in controversy anymore.

JUSTICE SCALIA: Yet the other side says that there may be, and I don't know why we ought to get into that. Why can't we just send it back and let them figure that out? And -- and -- and decide what we took this case to decide, namely, the split that now exists in the Federal courts over whether title IX precludes the use of 1983. That's an important question. It's why we took the case. Why can't we decide that issue and then for all these loose ends, send it back to the court of appeals?

MS. HODGE: Because there must be an issue in controversy for this Court to send any -- there must be an issue in controversy here and also --

JUSTICE SCALIA: He says there is an issue in controversy. That's good enough for me.

(Laughter.)

MS. HODGE: Well -- well, with all due respect, I would suggest that what you have to look at is the complaint, and you have to look at the argument, you know, what was in fact argued. And I would suggest what --

CHIEF JUSTICE ROBERTS: So -- I'm sorry to interrupt. So you seem to be saying that they're right, that 1983 actions are not always precluded, depending upon whether there's a difference in the issues that are

presented or whatever.

So you should never say that title IX precludes an action under 1983. In fact, you should say that sometimes the issues that are litigated under title IX may result in the fact that you don't have available -- you don't get relief under 1983, but there is still a cause of action.

MS. HODGE: I don't -- I don't believe that that is -- that that -- that that should -- that should be the result of your decisionmaking.

CHIEF JUSTICE ROBERTS: It's kind of odd to say that -- as I understand what you are saying, you are saying whenever there is issue preclusion, a consequence is that 1983 is precluded in the sense that actions were precluded in Smith. Well, why don't -- I guess I'm -- maybe I am repeating the question. Why do we have to decide that? And we would just say there is a 1983 action, but you may not be able to pursue it, I guess is the way to put it, if your claims are precluded or the issues result in the fact that you don't recover.

MS. HODGE: I -- I believe that that would be satisfactory. From our point of view, because we believe that the issue preclusion applies, that would be satisfactory because we should --

JUSTICE SCALIA: But that doesn't -- that

doesn't cover the situation in which a plaintiff says, I don't want to proceed under title IX; I want to proceed first under 1983. Then there is going to be no question about whether 1983 is -- is unavailable because of issue preclusion. He is starting with 1983.

MS. HODGE: There's no question but in those circumstances then as to an institution --

JUSTICE SCALIA: What's your position on that --

MS. HODGE: Our position is that as a recipient of Federal -- if the institution involved is a recipient of Federal financial assistance who is covered by title IX --

JUSTICE SCALIA: You can't proceed under 1983.

MS. HODGE: You cannot proceed under section 1983.

JUSTICE SCALIA: So you are disagreeing.

MS. HODGE: Yes, we are.

JUSTICE SCALIA: You are disagreeing.

MS. HODGE: Oh, no, we are disagreeing, and I would suggest that the difficulty that this Court is having, or at least as I experience it, the difficulty with regard to issue preclusion and claim preclusion turns in this case on the fact that this perhaps being a

peer-on-peer harassment case --

JUSTICE STEVENS: Isn't it quite clear that we can forget about issue preclusion and assume, as Justice Scalia did, that the plaintiff brought an action under 1983 and did not rely on title IX at all, and just sued the school board? You would say he can't do that?

MS. HODGE: Correct. Correct.

JUSTICE STEVENS: And that's your issue, whether that's right or wrong. We don't have to talk about issue -- issue preclusion to decide that issue.

MS. HODGE: That is correct, except that as we argue -- what we have argued before the Court is that under Smith the question is, is there a comprehensive remedial scheme? And we would argue that there is, but then you have to determine whether or not the claims are virtually identical; and we would argue that here the claims are virtually identical --

JUSTICE GINSBURG: Wouldn't your reasoning apply to, say, a race discrimination case in employment? You've got title VII and you have 1981. Title VII has a lot of accoutrements, a lot of text to go through; 1981 is plain and simple. So therefore, title VII ought to pre-empt 1981, right? So you -- in the area of race discrimination and employment, title VII would end any access to 1981. It would be the same kind of argument,

wouldn't it?

MS. HODGE: I believe that -- that there is that argument, but to be honest, I'm not in a position right now to reflect on exactly -- I believe that that would be certainly the direction, however, there are unique aspects of race. And I believe that that is yet another basis on which I would quarrel with the Petitioner with regard to suggesting that title VI and -- and title IX ought to be treated exactly the same. The history of the -- sex discrimination versus race discrimination are quite different and separate.

JUSTICE GINSBURG: What has that got to do with what you were arguing? That is, you've got an elaborate mechanism, which you said you have under title IX. I think that is debatable. But that was certainly the picture in Smith, and it's the picture in title VII, title VII versus 1981. That -- that fits your -- the -- your description, title VII and 1981, much better than title IX and 1983, I think.

MS. HODGE: I guess I -- I don't agree. It is our -- it is our view that 19 -- that in this particular instance -- and I -- and I think I may have misspoken if the view is, is that it's the administrative schemes that get compared. I -- I believe under Smith, the issue is whether or not there's

a comprehensive remedial scheme, and here you have the remedy -- both an administrative remedy as well as a private right of action, which we would argue should preclude the 1983 claims.

Moreover, we would also look, with regard to the fact that this is a constitutional claim, to the -- to Bivens -- to the line of cases under Bivens which we cite in our brief, the fact that when Congress provides a remedy for a particular area -- in a particular area, that that remedy can preclude an independent action which -- even if based on the Constitution. And we would suggest that that would be -- that that is something that we would urge this Court to consider --

CHIEF JUSTICE ROBERTS: Well, that's -- that's because we're still in the business of implying rights of action under Bivens. It's different to say -- you know, if you say we are implying it, but as soon as Congress does something, we are not going to do that. That's quite different than construing a provision, like 1983, that Congress has enacted.

MS. HODGE: Well, that is correct, except that this Court has, in fact, applied its preclusion doctrine by looking at whether or not Congress has made any statement in the statute. Then if you want to take it statute to statute, then what you would be looking at

is you would be looking at essentially Rancho Palos Verdes. And as -- as this Court did in -- when it decided Rancho Palos Verdes, it remanded for consideration Communities of Equity, which is a title IX case for reconsideration by, I believe it's the Eighth Circuit under the Rancho Palos Verdes decision.

And while that case ultimately did not come back to this Court, the -- the circuit court determined that it treated -- it treated the issue differently, and we would argue that that is a part of this split, and that that is -- and that that is not the appropriate resolution.

JUSTICE GINSBURG: There was no constitutional claim in -- what was it -- Palos Verdes.

MS. HODGE: Exactly. There was no constitutional claim in Rancho Palos Verdes. However, this Court did cite Smith and did cite Smith in its decision and -- and favorably so. But moreover, we would argue that the question is really, if you're comparing a statute to a statute, which is title IX to section 1983, Congress allowed for actions in section 1983, Congress allows for actions under title IX; or whether or not you are really looking at the issue as title IX versus a constitutional claim.

Now, I want to just make the point that

preclusion makes sense. Congress really did put the focus in title IX on the institution, and Congress is also seeking to have equity of enforcement.

Further, as set for in the amici in support of the Respondents' position, we would point out that if section 1983 claims are not precluded, that it would require the expenditure of funds by -- by recipients of Federal financial assistance on a variety of issues that are totally unnecessary including qualified immunity.

And in the peer-on-peer harassment case -- and I think it's very important to focus on what this case is. It is a peer-on-peer, student-on-student harassment where, what you would have is, if you were going to allow additional claims under section 1983 against the institution, it would -- it would intrude and interfere with the school's processes of disciplining students.

And I would also suggest that it might also interfere in the classic manner in which --

JUSTICE STEVENS: Let me ask you one sort of anomaly that keeps running through my mind in this case. If you have two school boards, one of -- two schools, State schools. One of them gets Federal funds and the other does not. Does this preclude -- no 1983 remedy against one, but there is a 1983 remedy against the

other. That's your view, isn't it?

MS. HODGE: It is exactly our view because the recipient would be subject to the remedial scheme set forth in title IX.

JUSTICE STEVENS: Isn't it sort of anomalous to think it --

MS. HODGE: I don't believe it's anomalous. I believe the reverse is anomalous because what you would be suggesting if you do not preclude section 1983, you would suggest that the recipient could have both the 1983 and a title IX; whereas, the nonrecipient would have just section 1983.

JUSTICE STEVENS: But should it prove the same facts in both cases? I mean, a case that would involve the same evidence, same alleged wrongdoing, and in one case you can rely on 1983 and the other you can't.

MS. HODGE: I believe under those circumstances, Justice Stevens, that what we would be talking about would be the situation where a -- under title IX, there is -- there's actually an easier path to recovery, if you will, because it does not require the specific intent required by Massachusetts v. Feeney, which we believe sets a slightly higher -- a higher bar and a higher level of intentionality.

JUSTICE GINSBURG: I thought you just said deliberate indifference under both statutes, under 1983 and title IX.

MS. HODGE: Your Honor, it is -- deliberate indifference is the standard. However, in order to prove a constitutional violation, you must also have the specific intent for invidious discrimination that we -- that this Court has not imposed and did not impose in Davis for violations of peer -- for peer-on-peer harassment cases.

So, while the discrimination needs to be intentional under title IX, it is not required that there be the specific intent to favor one over the other or one's protected status over the other.

JUSTICE GINSBURG: Then you wouldn't have gender discrimination.

MS. HODGE: But you -- excuse me, I'm sorry. You would have gender discrimination if you have a typical -- in the peer-on-peer harassment cases, the question is whether or not the institution was or was not deliberately indifferent in the manner in which it responds. In -- in a deliberate indifference --

JUSTICE GINSBURG: Responds to what? In response to --

MS. HODGE: To a complaint of -- to a

complaint about sexual harassment. If the institution fails to respond appropriately, the lower courts have found that that can be gender discrimination under title IX. They do not in any way look to ensure that -- look to determine whether or not there is that specific invidious discrimination that we would argue this Court has imposed in its cases under the Equal Protection Clause.

JUSTICE GINSBURG: So you wouldn't have -- if you work for a municipality and your boss has been harassing you, you would not have a case under 1983?

MS. HODGE: If you were a municipality and -- and the -- and your boss was harassing you, and -- in a school setting by a recipient of Federal financial assistance?

JUSTICE GINSBURG: Well, you were saying the constitutional standard is different, so I was just giving you a case. It could be a school; it could be another -- another municipal employment.

MS. HODGE: It would -- you would need to have the specific intent, invidious intent that we believe is an additional element and a much harder element to prove in that situation.

CHIEF JUSTICE ROBERTS: Thank you, Ms. Hodge.

MS. HODGE: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Rothfeld, you have five minutes remaining.

REBUTTAL ARGUMENT OF CHARLES A. ROTHFELD

ON BEHALF OF THE PETITIONERS

MR. ROTHFELD: Thank you, Your Honor. And I'll try not to use my extra 10 seconds.

Two principal points: First, on the proper disposition of this case, the First Circuit's holding -- and I'm reading from page 24a of the petition appendix: "The comprehensiveness of Title IX's remedial scheme...indicates Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions... It follows that the plaintiffs' equal protection claims are precluded."

That was not a holding that had to do with claim preclusion, issue preclusion, collateral estoppel; it was a holding that constitutional claims simply cannot go forward. So there are constitutional claims that were advanced below, argued to both courts, have not been discussed by any court at any point, and I think the proper disposition here -- the most regular course in a case of this sort to is decide the question presented, send the case back.

It certainly is not the case -- it's a commonplace that the Court has threshold questions that are presented to it. There are remaining issues that have to be resolved on -- on remand. It's certainly not the Court's usual practice to decide whether or not the plaintiffs can -- can prevail on those claims on remand before deciding the threshold questions on which cert was granted. I think that's the appropriate approach for the Court to take here.

On the merits, very quickly. Again, I think we have here the gold standard of evidence as to preclusion. We have express statutory text that deals with it. My learned colleague suggested that the Attorney General intervention provision was somehow limited to cases involving claims by schools that don't accept Federal funds or somehow are not subject to title IX. That is not the language of the provision. The provision says whenever -- whenever a claim is initiated in a court of the United States asserting deprivation of rights, equal protection on account of sex, the Attorney General can intervene.

Clearly, Congress had it in mind that there would be such claims. And this was enacted as part of title IX. This was enacted as part of the statute that creates rights against discrimination by schools

receiving Federal funds. It makes no sense to suggest that Congress --

JUSTICE SCALIA: Well, does that provision apply only when there is a title IX cause of action?

MR. ROTHFELD: No. No. It is --

JUSTICE SCALIA: So -- well, if it doesn't, then it -- then it has validity whether or not you agree with your position.

MR. ROTHFELD: That's true, but I think it answers the preclusion question because it suggests that Congress has it in mind that there would in fact be section 1983 constitutional litigation involving gender discrimination.

JUSTICE SCALIA: Yes, but maybe they thought only in cases where there is no title IX action.

MR. ROTHFELD: They said whenever there is a claim of unconstitutional gender discrimination. I think it's a blanket suggestion Congress believes that --

JUSTICE SCALIA: Oh, you don't think they mean whether there's a -- there's a valid claim? Even when there is a claim that isn't allowed under the law?

MR. ROTHFELD: I am suggesting that the language says that whenever a claim of gender discrimination is advanced under the Constitution, the

Attorney General can intervene. I think what we draw from that is that Congress imagined that there would be continued constitutional litigation involving gender discrimination after they enacted title IX. And because that provision was added to the law as part of title IX, Congress surely contemplated that these suits would involve gender discrimination involving schools.

The other sort of clear textual indication which I -- again, my learned colleague has not really discussed, is the title VI history of enforcement prior to the enactment of title IX, which was absolutely consistent. There are almost two such dozen decisions, which, this Court suggested in Cannon, it is not only appropriate but realistic to think that Congress was aware of at the time it enacted title IX. Those decisions clearly indicated that there was no preclusion. The language of title VI and title IX is identical. There can be no doubt, I think, that Congress would have had it in mind that preclusion is not appropriate in this context as well.

And one final, very quick point. This is an implied right of action; to suggest that Congress meant to preclude the use of the Constitution to enforce the -- preclude section 1983 to enforce the Constitution while leaving it to the courts to imply the alternative

remedy and to devise the contours on and the limitations on that remedy, would require -- hypothesize a remarkable leap of faith on the part of Congress.

It also would require the most extravagant and speculative reading of title IX, to understand it to not only to include private rights of action but to preclude the assertion of express rights of action created by Congress by language in another statute.

If there are no further questions, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:10 p.m., the case in the above-entitled matter was submitted.)