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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,

1 please -- please let me know.

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

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

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

25 CHIEF JUSTICE ROBERTS: Counsel, there's --

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

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

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

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

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

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

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

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

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

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

25 It specifically authorized the attorney

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

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

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

16 MR. ROTHFELD: The -- the Court did not. I
17 mean there, the -- the Court looked at what it took to
18 be the general -- the manifest congressional intent when
19 -- when it enacted title IX. But it did not
20 specifically rely on -- on the legislation. The
21 legislation, of course, goes to whether or not section
22 1983 suits were available, not to whether there is a
23 title IX implied right of action available.

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

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

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

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

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

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

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

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

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

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

21 (Banging sound.)

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

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

1 (Laughter.)

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

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

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

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

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

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

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

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

8 MR. ROTHFELD: Well, I think --

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

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

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

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

1 constitutional --

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

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

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

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

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

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

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

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

19 JUSTICE BREYER: Is that request here in the
20 record?

21 MR. ROTHFELD: Excuse me, Your Honor?

22 JUSTICE BREYER: Is that request here?

23 MR. ROTHFELD: The discovery request?

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

1 here?

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

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

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

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

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

22 MR. ROTHFELD: That is correct.

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

1 MR. ROTHFELD: That is exactly --

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

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

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

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

20 MR. ROTHFELD: Absolutely.

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

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

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

4 And I -- I think the way in which the court
5 of appeals decided the case actually suggests that it
6 was of the view that there was more in the case than
7 simply the title IX claims that had been rejected,
8 because one would have thought that if the court of
9 appeals was of the view that there is nothing to the
10 case beyond the title IX peer-on-peer harassment claim
11 that has been reject, it would have ended its discussion
12 at that point. It would have said: We reject your
13 title IX claim; there is nothing more to your section
14 1983 constitutional claim; that's the end of the matter.

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

25 JUSTICE GINSBURG: But we find that out on

1 remand.

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

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

6 MR. ROTHFELD: That's --

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

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

11 JUSTICE BREYER: How do we know that the
12 First Circuit wasn't just thinking about the facts of
13 this case in front of it when it said that there's no
14 1983 action. I mean, they didn't think there was no
15 1983 action for search and seizure. They must have had
16 some idea of what the limitations of their saying no --
17 no -- no 1983 action was. So why do we know that they
18 went beyond what they had in front of them in this case?
19 I'm not saying they didn't. I am just wanting to know
20 what we -- how we know that.

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

1 the case back down to the lower courts to --

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

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

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

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

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

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

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

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

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

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

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

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

25 First, there is the provision that I

1 mentioned regarding the attorney general, which -- which
2 expressly contemplates there will be continued section
3 1983 constitutional gender discrimination after the
4 enactment of title IX. I think that in and of itself is
5 dispositive and tells the Court all it needs to know.

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

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

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

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

1 section 1983 discrimination claims under title IX.
2 There had not been a single suggestion by any decision
3 that there might possibly be preclusion. And so, at the
4 time that Congress used the language of title IX, it
5 knew that that language had been uniformly, widely
6 construed across the country to allow the simultaneous
7 assertion of those claims, not the preclusion of section
8 1983 claims for discrimination.

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

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

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

1 CHIEF JUSTICE ROBERTS: Well, of course,
2 title IX is Spending Clause legislation, and that, under
3 our precedents, imposes certain limitations on how we
4 interpret it that would not be applicable under section
5 1983.

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

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

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

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

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

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

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

25 I'll make sort of two additional points,

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

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

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

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

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

1 the existence of that new right, prior to the creation
2 of that new right, remained available under section
3 1983. And that is exactly the situation that we have
4 here. Plaintiffs are not trying to allege a new
5 statutory right that is outside the section 1983's
6 remedial framework; instead, they are asserting
7 fundamental, pre-existing constitutional rights.

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

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

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

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

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

25 MR. ROTHFELD: I think, to the extent that

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

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

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

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

12 MR. ROTHFELD: That's exactly correct.

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

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 MR. ROTHFELD: Thank you.

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

20 ORAL ARGUMENT OF KAY H. HODGE

21 ON BEHALF OF THE RESPONDENTS

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

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

1 category of circumstances than the Equal Protection
2 Clause. Therefore, having title IX preclude section
3 1983 equal protection claims does not deny petitioners
4 in this or any other case any remedy --

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

8 MS. HODGE: Title IX --

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

11 MS. HODGE: Correct.

12 JUSTICE GINSBURG: Explain that to me.

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

1 JUSTICE GINSBURG: Give me an example.

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

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

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

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

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

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

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

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

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

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

4 JUSTICE GINSBURG: But --

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

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

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

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

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

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

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

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

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

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

1 MS. HODGE: I believe that that is true.

2 JUSTICE BREYER: Okay.

3 MS. HODGE: And I would point out --

4 JUSTICE BREYER: That's simple.

5 MS. HODGE: -- that in response to the
6 Petitioners' argument today, they have attempted to
7 suggest that there may be some issues that were not
8 discovered; that were not, in fact, fully reviewed by
9 the court below.

10 And I suggest that the First Circuit did, in
11 fact, look at specifically that issue. And the First
12 Circuit said in their decision that, in looking at the
13 equal protection claim in particular, that the
14 Petitioners offer -- or in that case, they offer, the
15 plaintiffs offer -- "no theory of liability under the
16 Equal Protection Clause other than the defendants'
17 supposed failure to take adequate actions to prevent
18 and/or remediate the peer-on-peer harassment that
19 Jacqueline experienced."

20 And I suggest to you that that is exactly
21 the issue that -- that that is exactly the issue. The
22 issue is whether or not, if you look at the complaint,
23 the claim that is being brought under title IX and the
24 claim that is being brought under section 1983 and the
25 Constitution are virtually identical, which is a second

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

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

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

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

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

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

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

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

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

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

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

5 MS. HODGE: Well, I believe --

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

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

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

22 JUSTICE GINSBURG: On the basis of gender.

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

25 JUSTICE GINSBURG: And Feeney says it wasn't

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

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

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

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

1 title IX, they also reserved the opportunity for the
2 Attorney General to become involved in a case under
3 1983, that the intention of that language was not
4 necessarily to preserve 1983 in cases against recipients
5 who are in fact covered, but it would have been to
6 reserve the right of the Attorney General to -- to
7 intervene in cases in which either the institution was
8 not covered -- because you are absolutely right, there
9 are institutions which are not covered -- and as you
10 decided in Mississippi v. Hogan, they would be subject
11 to section 1983; and/or individuals that the First
12 Circuit recognized might, because they -- if they are --
13 if they are State actors, that is not the case you have
14 here, which was peer-on-peer harassment -- but if you
15 had a situation where for example, a teacher or an
16 administrator was in fact the alleged harasser, that a
17 1983 could be brought against the individual, and indeed
18 the -- the Attorney General could intervene in those
19 cases.

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

22 MS. HODGE: Correct.

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

25 MS. HODGE: Correct.

1 JUSTICE BREYER: Okay.

2 MS. HODGE: But --

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

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

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

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

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

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

11 MS. HODGE: To the -- yes.

12 JUSTICE BREYER: Yes. Okay.

13 MS. HODGE: Yes.

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

19 MS. HODGE: Issue preclusion.

20 JUSTICE BREYER: They all have new names.

21 (Laughter.)

22 MS. HODGE: They do. They do.

23 JUSTICE BREYER: But the -- the -- okay.

24 That's your argument. So why don't we just send it
25 back, say that's right; this suit is not precluded by

1 1983; indeed, that's the only place you can bring it;
2 it's not precluded by title IX, and now, court, you go
3 decide whether claim preclusion exists, or whatever you
4 call it ---

5 MS. HODGE: The court --

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

8 MS. HODGE: Your Honor, I believe that they
9 did decide that in the language that I did quote to you
10 just a moment ago from the First Circuit opinion, which
11 is found at the appendix 23a -- or the decision.

12 Essentially they are -- they are saying that -- that
13 there was -- that because no theory of liability was
14 offered other than this, that there isn't any further
15 claim available.

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

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

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

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

16 (Laughter.)

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

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

1 presented or whatever.

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

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

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

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

25 JUSTICE SCALIA: But that doesn't -- that

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

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

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

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

14 JUSTICE SCALIA: You can't proceed under
15 1983.

16 MS. HODGE: You cannot proceed under section
17 1983.

18 JUSTICE SCALIA: So you are disagreeing.

19 MS. HODGE: Yes, we are.

20 JUSTICE SCALIA: You are disagreeing.

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

1 peer-on-peer harassment case --

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

7 MS. HODGE: Correct. Correct.

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

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

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

1 wouldn't it?

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

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

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

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

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

14 CHIEF JUSTICE ROBERTS: Well, that's --
15 that's because we're still in the business of implying
16 rights of action under Bivens. It's different to say --
17 you know, if you say we are implying it, but as soon as
18 Congress does something, we are not going to do that.
19 That's quite different than construing a provision, like
20 1983, that Congress has enacted.

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

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

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

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

15 MS. HODGE: Exactly. There was no
16 constitutional claim in Rancho Palos Verdes. However,
17 this Court did cite Smith and did cite Smith in its
18 decision and -- and favorably so. But moreover, we
19 would argue that the question is really, if you're
20 comparing a statute to a statute, which is title IX to
21 section 1983, Congress allowed for actions in section
22 1983, Congress allows for actions under title IX; or
23 whether or not you are really looking at the issue as
24 title IX versus a constitutional claim.

25 Now, I want to just make the point that

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

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

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

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

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

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

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

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

7 MS. HODGE: I don't believe it's anomalous.
8 I believe the reverse is anomalous because what you
9 would be suggesting if you do not preclude section 1983,
10 you would suggest that the recipient could have both the
11 1983 and a title IX; whereas, the nonrecipient would
12 have just section 1983.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 CHIEF JUSTICE ROBERTS: Thank you, Ms.
25 Hodge.

1 MS. HODGE: Thank you.

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

4 REBUTTAL ARGUMENT OF CHARLES A. ROTHFELD
5 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

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

16 MR. ROTHFELD: They said whenever there is a
17 claim of unconstitutional gender discrimination. I
18 think it's a blanket suggestion Congress believes that
19 --

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

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

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

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

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

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

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

9 If there are no further questions, Your
10 Honor.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 The case is submitted.

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

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