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No. 77-926

In the Supreme Court of the United States

October Term, 1977

Geraldine G. Cannon, petitioner

v.

The University of Chicago, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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THE UNIVERSITY OF CHICAGO, ET AL.

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BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. A-2 to A-21) is reported at 559 F. 2d 1063. The opinion on rehearing (Pet. App. A-22 to A-34) is reported at 559 F. 2d 1077. The memorandum of decision of the district court is reported at 406 F. Supp. 1257.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1976. The court's opinion on rehearing was issued on August 9, 1977. A timely petition for

rehearing was denied on October 3, 1977. The petition for a writ of certiorari was filed on December 28, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a private person may sue to enforce the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. (Supp. V) 1681 *et seq.*

STATEMENT

Petitioner initially brought these actions for declaratory, injunctive, and monetary relief against respondents, the University of Chicago, Northwestern University, and various individual officers of those institutions. She later joined as defendants the Secretary of Health, Education, and Welfare ("the Secretary") and the Regional Director of HEW's Office for Civil Rights. Petitioner alleged that she had been discriminatorily denied admission to medical school on the basis of her sex, in violation of Title IX of the Education Amendments of 1972, 86 Stat. 373, 20 U.S.C. (Supp. V) 1681 *et seq.*[1] With exceptions not relevant here, Title IX prohibits discrimination on the basis of sex in "any education program or activity receiving Federal financial assistance." Petitioner sought injunctions directing respondent universities to reevaluate her medical school applications and to admit her

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[1] Petitioner also alleged violations of several other federal statutes (see Pet. App. A-4). She does not now challenge the lower court's disposition of these aspects of her complaints (see Pet. 3).

to medical school. She also sought declaratory relief and damages. Alternatively, she asked the district court to compel the Secretary to act favorably in response to her administrative complaints.

The district court dismissed petitioner's suits for failure to state a claim upon which relief could be granted (406 F. Supp. 1257).[2] The court held, *inter alia,* that Title IX does not authorize a private right of action against recipients of federal financial assistance, and that the Secretary's delay in acting on petitioner's administrative complaints did not justify bypassing the administrative procedure established in Title IX (see 20 U.S.C. (Supp. V) 1682).

The court of appeals affirmed (Pet. App. A-1 to A-21). The panel ruled that Title IX does not provide a private right of action for individual victims of sexual discrimination practiced by educational institutions receiving federal financial assistance. Rather, said the court, the only remedies available to such persons are those specifically enumerated in the statute, namely, administrative efforts to secure voluntary compliance with Title IX from allegedly offending institutions, followed by agency termination of funding if conciliatory efforts fail (Pet. App. A-10 to A-16).

After the court of appeals issued its original opinion, Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641

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[2] The reported opinion deals only with the complaint against the University of Chicago and its officers. The complaint against Northwestern University was subsequently dismissed in reliance on the earlier opinion.

(to be codified at 42 U.S.C. 1988). In pertinent part, that statute authorizes the award of attorney's fees to the prevailing party in actions brought to enforce the provisions of Title IX. Principally in order to give the parties an opportunity to discuss the possible implications of the Attorney's Fees Awards Act, the court of appeals granted rehearing limited to the question "whether a private right of action lies under Title IX" (Pet. App. A-23). On rehearing, the federal respondents supported petitioner.[3] Nevertheless, the panel adhered to its previous holding that "implication of a private judicial remedy would be inconsistent with the legislative intent and underlying purposes of the statutory scheme" (Pet. App. A-29).

DISCUSSION

The court of appeals correctly held that petitioner's complaints did not state a claim upon which relief could be granted against the federal respondents. The petition does not address this aspect of the judgment below, and review by this Court is not warranted. The court of appeals erroneously ruled that Title IX does not authorize a private right of action against the non-federal respondents. If permitted to stand, this decision will pose a serious obstacle to the effective

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[3] As reflected in a September 1974 letter from the Assistant General Counsel of HEW (Pet. App. A-36 to A-38), the Secretary's views on rehearing corresponded with the long-standing HEW position regarding Title IX. The failure of the federal respondents to endorse this position earlier in this litigation is attributable to communication lapses between national and regional HEW offices, not to any eleventh hour policy shift.

enforcement of Title IX. Petitioner seeks review of this facet of the judgment below, and the important issue is squarely raised. Accordingly, the federal respondents urge this Court to grant review limited to the question presented in the petition.

1. The courts below properly determined that petitioner's complaints failed to state a claim against the federal respondents. Even if it were conceded that federal courts might, in appropriate circumstances, entertain Title IX suits brought against federal officials by actual or intended beneficiaries of federally assisted programs, cf. *Adams* v. *Richardson,* 480 F. 2d 1159 (C.A. D.C.); *Gautreaux* v. *Romney,* 448 F. 2d 731 (C.A. 7); *Shannon* v. *Housing and Urban Development,* 436 F. 2d 809 (C.A. 3) (all involving complaints under Title VI of the Civil Rights Act of 1964), it would not follow that *any* such action could survive a motion to dismiss. A Title IX suit against federal defendants can be maintained, if at all, only where a plaintiff alleges general abdication of statutory responsibilities, *e.g., Adams* v. *Richardson, supra,* 480 F. 2d at 1162, or conscious collaboration in allegedly discriminatory conduct by a recipient of federal funds, *e.g., Gautreaux* v. *Romney, supra,* 448 F. 2d at 737–739, or agency violation of an explicit statutory prohibition, *e.g., Leedom* v. *Kyne,* 358 U.S. 184.[4] Petitioner has not advanced and does not now advance

[4] As the district court noted, delay in administrative action does not justify federal court intervention under Title IX (406 F Supp. at 1260). See also Pet. App. A-17 and n. 19.

any such allegation. Particularly in light of the petition's failure to challenge the disposition below as it affects the federal respondents, this portion of the court of appeals' decision does not merit review.

2. By contrast, the existence *vel non* of a private right of action under Title IX to sue recipients of federal financial assistance is an important issue that this Court should resolve.[5] On several occasions this Court has found it necessary to decide whether particular statutes, though silent on the subject of private remedies, should nevertheless be construed to authorize enforcement through private suits. See, *e.g.*, *Cort* v. *Ash*, 422 U.S. 66; *Rosado* v. *Wyman* 397 U.S. 397; *Allen* v. *State Board of Elections*, 393 U.S. 544. The comparable question presented here is no less deserving of the Court's attention. Title IX is a noteworthy piece of legislation designed to eliminate gender discrimination in federally funded education programs. The availability of a private right of action under Title IX would contribute substantially to effective implementation of the statute's goals. Although the Seventh Circuit is thus far the only court of appeals to rule on the issue, a number of district courts have reached conflicting conclusions on whether private suits may be maintained under Title IX.[6] The ques-

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[5] Of course, in answering the question presented by petitioner, this Court need not reach the merits of her claim, a subject on which the federal respondents express no opinion.

[6] Compare, *e.g.*, *Piascik* v. *Cleveland Museum of Art*, 426 F. Supp. 779 (N.D. Ohio) (private right of action does exist),

tion is sufficiently significant to the administration of an important federal statute to merit resolution by this Court even in the absence of a disagreement among the courts of appeals.

In addition, the decision of the court of appeals challenged by petitioner represents an unjustified departure from the approach adopted by this Court in *Cort* v. *Ash, supra,* and *Allen* v. *State Board of Elections, supra.* In those cases, the Court considered whether private actions could be maintained under a criminal statute prohibiting corporate campaign contributions in Presidential elections, 18 U.S.C. 610, or under Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, 42 U.S.C. 1973c, despite the fact that those statutes did not explicitly authorize such suits. In *Cort,* the Court listed four factors relevant in "determining whether a private remedy is implicit in a statute not expressly providing one" (422 U.S. at 78):

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," * * *—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? * * * Third, is it consistent with the under-

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with *Cape* v. *Tennessee Secondary School Athletic Association,* 424 F. Supp. 732 (E.D. Tenn.), reversed on other grounds, 563 F. 2d 793 (C.A. 6); and *Lodwig* v. *Board of Education of Pleasant Local School District,* Civ. No. C–76–604 (N.D. Ohio, March 31, 1977), appeal pending, No. 77–3375 (C.A. 6) (private right of action does not exist).

> lying purposes of the legislative scheme to imply such a remedy for the plaintiff? * * * And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

With respect to the first question posed in *Cort*, the decision in *Allen* is dispositive. Petitioner is plainly one of the class for whose special benefit Title IX was enacted. Section 901 of Title IX, 86 Stat. 373, 20 U.S.C. (Supp. V) 1681, creates a right in favor of all potential beneficiaries of federally assisted education programs. It provides:

> No person * * * shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *.

Similarly, Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, at issue in *Allen*, provides that "no person shall be denied the right to vote for failure to comply" with a state voting qualification requirement covered by, but not approved under, Section 5. The *Allen* Court held that the particular phrasing chosen by Congress evidenced a legislative intention to identify and protect a particular class of citizens and to confer on that class a legally enforceable right. In the Court's words (393 U.S. at 557), "[t]he guarantee of § 5 * * * might well prove an empty promise unless the private citizen were allowed to seek judicial en-

forcement of the prohibition." Likewise here, where Congress has used the same "no person" construction, the legislature has displayed an intention to protect a particular class of individuals, prospective participants in federally funded education programs, and petitioner is indisputably a member of that class.

The court of appeals, however, decided that application of the second and third criteria outlined in *Cort* [7] compelled the conclusion that no private right of action exists under Title IX. A different result, said the court (Pet. App. A-29), "would be inconsistent with the legislative intent and underlying purposes of the statutory scheme." This assertion is incorrect. None of the contemporaneous legislative history of Title IX concerns the viability of private actions under that statute.[8] Nevertheless, several elements coalesce to demonstrate that such actions are consistent with congressional intent and do promote the underlying purpose of Title IX.

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[7] The fourth test suggested in *Cort*, whether a particular cause of action or subject area has been traditionally relegated to state law, presents no obstacle to implication of a private right of action here.

[8] In *Cort* v. *Ash*, *supra*, 422 U.S. at 82, this Court said that,

> in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling.

No such denial, explicit or otherwise, is contained in the legislative history.

First, Title IX was avowedly based upon Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U.S.C. 2000d,[9] and by the time Title IX was enacted in 1972, several courts had already interpreted Title VI to provide a private right of action against recipients of federal financial assistance. See, *e.g.*, *Bossier Parish School Board* v. *Lemon*, 370 F. 2d 847 (C.A. 5), certiorari denied, 388 U.S. 911; *Gautreaux* v. *Chicago Housing Authority*, 265 F. Supp. 582 (N.D. Ill.). Other courts had impliedly recognized such a right by sustaining on the merits private parties' claims based upon Title VI. See, *e.g.*, *Gautreaux* v. *Romney, supra; Shannon* v. *Housing and Urban Development, supra.*[10] Where the courts had thus indicated their willingness to entertain private causes of action under Title VI,[11] it is reasonable to infer that Congress intended a similar remedy to be avail-

[9] See, *e.g.*, 118 Cong. Rec. 5807 (1972) (remarks of the bill's sponsor, Senator Bayh).

[10] Other courts, including this Court, have impliedly recognized a private cause of action under Title VI subsequent to the enactment of Title IX. See, *e.g.*, *Lau* v. *Nichols*, 414 U.S. 563; *Serna* v. *Portales Municipal Schools*, 499 F. 2d 1147 (C.A. 10); *Garrett* v. *City of Hamtramck*, 503 F. 2d 1236 (C.A. 6); *Adams* v. *Richardson, supra; NAACP, Western Region* v. *Brennan*, 360 F. Supp. 1006 (D.D.C.); *Anderson* v. *San Francisco Unified School District*, 357 F. Supp. 248 (N.D. Cal.).

[11] The government's contention that there is a private right of action under Title VI is discussed in detail in the Supplemental Brief for the United States as Amicus Curiae in *Regents of the University of California* v. *Bakke*, No. 76-811, pp. 24-32. Copies of that brief are being furnished to the parties in this case.

able under Title IX, a statute deliberately modeled after Title VI.[12]

The court below ruled (Pet. App. A–12, A–31 and n. 6), however, that no individual private right of action exists under either Title VI or Title IX. In rejecting the availability of private suits under Title VI, the court of appeals misread this Court's decision in *Lau* v. *Nichols,* 414 U.S. 563. In *Lau,* the Court decided a private Title VI claim on its merits. The court below discounted *Lau's* implicit holding that a private suit may be maintained under Title VI, because *Lau* "involved an attempt by a large number of plaintiffs to enforce a national constitutional right" (Pet. App. A–12). In the view of the court of appeals, *Lau* "does not indicate that Title VI provides a pri-

[12] In dealing with a different statute, Congress has assumed without question that both Title VI and Title IX authorize private actions. Section 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U.S.C. (Supp. V) 794, provides that no handicapped person "shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." This provision "was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964 * * * and section 901 of the Education Amendments of 1972 * * *." S. Rep. No. 93–1297, 93d Cong., 2d Sess. 39–40 (1974). The Senate Labor and Public Welfare Committee noted (*id.* at 40) that "section 504, which closely follows the models of the above-cited anti-discrimination provisions, would * * * permit a judicial remedy through a private action." Apparently in recognition of these comments, this Court has instructed a lower federal court to reach the merits of a private suit brought under Section 504. *Campbell* v. *Kruse*, No. 76–1704, decided October 3, 1977.

vate right of action for each individual discriminatee" (*ibid.*). In support of its conclusion, the court cited Mr. Justice Blackmun's concurring opinion in *Lau*. The relevant portion of that opinion states (414 U.S. at 571–572):

> * * * I stress the fact that the children with whom we are concerned here number about 1,800. This is a very substantial group that is being deprived of any meaningful schooling because the children cannot understand the language of the classroom. * * *
>
> * * * [If] we * * * [were] concerned with * * * just a single child * * * I would not regard today's decision * * * as conclusive * * *.

These remarks suggest only that the relief granted in the case of a given school district, *e.g.*, mandatory initiation or continuation of bilingual instruction, may well vary depending upon the number of non-English speaking children in that district, not that Title VI created a private right of action only for large groups of children.[13]

On rehearing, the court of appeals reaffirmed its reading of *Lau* (Pet. App. A–33), and added that, in any event, the decision provides no support for peti-

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[13] Three Justices, concurring in the result in *Lau*, noted that the respondents in that case did not contest the standing of the complainants "to sue as beneficiaries of the federal funding contract" there involved. 414 U.S. at 571 n. 2 (Stewart, J., concurring). The opinion of the Court, however, explicitly upheld the complainants' statutory claim (414 U.S. at 566) without discussing any question of standing.

tioners, because *Lau* was brought under the authority of 42 U.S.C. 1983 (Pet. App. A–34). The court adopted a similar assessment of other cases involving private suits under Title VI (Pet. App. A–31 n. 6). But this analysis is incomplete. Although the court correctly asserted that Section 1983 may provide a vehicle for the enforcement of federal statutes (see, *e.g.*, *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 543 n. 7), that use of Section 1983 is rare, especially in contrast to the statute's frequent invocation in the enforcement of constitutional provisions. More important, the pre-1972 cases that formed the background for the congressional determination to model Title IX after Title VI do not even mention Section 1983. See, *e.g.*, *Bossier Parish School Board* v. *Lemon*, *supra*, 370 F. 2d at 852 ("The Negro school children, as beneficiaries of the Act [*i.e.*, Title VI], have standing to assert their section 601 rights").[14]

Secondly, in 1976 Congress enacted the Civil Rights Attorney's Fees Awards Act, Pub. L. 94–559, 90 Stat. 2641 (to be codified at 42 U.S.C. 1988), which authorizes courts to grant attorney's fees to the prevailing party in any action brought to enforce, among other civil rights statutes, Title IX and Title VI.

[14] Moreover, in a number of cases, courts have granted relief under Title VI where an action under Section 1983 would not lie. For example, a Section 1983 suit could not have been maintained against the Secretary of Health, Education, and Welfare in *Adams* v. *Richardson*, *supra*, because Section 1983 does not provide a right of action against federal defendants, at least in the absence of evidence that the federal defendants acted under color of state law.

Supporters of the bill assumed that a private right of action existed under Title IX. See, *e.g.*, 122 Cong. Rec. S16251 (daily ed., September 21, 1976) (remarks of Senator Scott); *id.* at H12164 (daily ed., October 1, 1976) (remarks of Representative Holtzman). While the Attorney's Fees Awards Act did not itself create a new cause of action, the statements of the Act's supporters do demonstrate that private suits would not be inconsistent with the underlying scheme of Title IX.

Finally, enforcement through private actions would effectively complement the administrative enforcement mechanism provided under the statute.[15] The existence of a right to challenge Title IX violations in private suits would greatly encourage voluntary compliance with the statute's ban on sex discrimination in federally financed education programs. In *Allen* v. *State Board of Elections, supra,* this Court observed that the Attorney General's enforcement of the Voting Rights Act of 1965 might well prove less than adequate if not supplemented by privage legal action. The Court stated (393 U.S. at 556–557, footnotes omitted):

> The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. For example, the provisions of the Act extend to States and the *subdivisions*

[15] Section 902 of the statute, 20 U.S.C. (Supp. V) 1682, provides that federal departments authorized to grant federal financial assistance may enforce the prohibitions of Title IX through termination of such assistance, or by any other means authorized by law.

> *thereof.* The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government. It is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies with the § 5 approval requirements.

See also *Trafficante* v. *Metropolitan Life Insurance Co.,* 409 U.S. 205, 210–211. Concern about potential gaps in administrative enforcement of Title IX is equally compelling, in light of the large number of federally funded education programs and participants therein. Congress' authorization of attorney's fees recoveries in civil rights suits recognizes the utility of such suits as an enforcement device. See *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400; *Bradley* v. *School Board of the City of Richmond,* 416 U.S. 696. If the broadly remedial purpose of Title IX is to be realized, enforcement should not be relegated entirely to federal agencies whose resources are necessarily limited.

Moreover, the administrative remedy available under Section 902 is essentially prospective; a program that has discriminated in the past may continue to receive federal financial assistance if it desists from doing so in the future and takes the steps necessary to come into compliance with the statute. Although future compliance would include, in many cases, rectifying the effects of past discrimination, as a practical matter this process may not afford effective relief to individual victims of unlawful discrimination. See

the Supplemental Brief for the United States in *Bakke, supra*, note 11, at pp. 28-31.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, this Court may wish to defer consideration of the petition until a decision is rendered in *Regents of the University of California* v. *Bakke, supra*.

Respectfully submitted.

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