

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JAMES ALEXANDER, DIRECTOR, :

4 ALABAMA DEPARTMENT OF PUBLIC :

5 SAFETY, ET AL., :

6 Petitioners :

7 v. : No. 99-1908

8 MARTHA SANDOVAL, INDIVIDUALLY :

9 AND ON BEHALF OF ALL OTHERS :

10 SIMILARLY SITUATED :

11 - - - - -X

12 Washington, D.C.

13 Tuesday, January 16, 2001

14 The above-entitled matter came on for oral

15 argument before the Supreme Court of the United States at

16 10:03 a.m.

17 APPEARANCES:

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

19 Petitioners.

20 ERIC SCHNAPPER, ESQ., Seattle, Washington; on behalf of

21 the Private Respondents.

22 SETH P. WAXMAN, ESQ., Solicitor General, Department of

23 Justice, Washington, D.C.; on behalf of the

24 Respondent United States.

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P R O C E E D I N G S

(10:03 a.m.)

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

Mr. Sutton.

ORAL ARGUMENT OF JEFFREY S. SUTTON
ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

8 QUESTION: We're dealing with prospective
9 relief.

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

11 QUESTION: Declaratory and prospective.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 QUESTION: It is your view?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 QUESTION: Right.

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

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

21 MR. SUTTON: Title IX.

22 QUESTION: Right.

23 MR. SUTTON: Under 901, yes.

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

1 you said after the '86 act there would be.

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

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

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

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

23 MR. SUTTON: In this particular case?

24 QUESTION: Uh-huh.

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

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

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

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

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

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

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

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

5 The second indicator of congressional intent, it
6 may be helpful to look at the statute itself, and if you
7 look at -- if you're interested, if you look at page 1 and
8 2 of the blue brief, our opening brief, I'd like to point
9 out some language that I think is -- well, we're obviously
10 a little biased, but close to dispositive on this
11 particular point. If you're relying on Section 602 to
12 implicitly create this cause of action, you've got to read
13 all of Section 602.

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

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

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

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

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

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

25 QUESTION: Well, one way the two could be

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

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

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

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

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

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

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

1 department or agency that they're referring to.

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

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

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

15 QUESTION: Do you read it that way?

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

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

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

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

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

1 argument that there's an overwhelming implication after
2 1986 that there is a cause of action under Section 601.

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

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

8 QUESTION: 602.

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

12 QUESTION: I see.

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

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

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

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

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

7 MR. SUTTON: But it's --

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

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

18 QUESTION: Well, why do you --

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

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

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

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

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

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

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

24 MR. SUTTON: Absolutely.

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

1 601?

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

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

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

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

17 MR. SUTTON: No.

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

20 MR. SUTTON: Respectfully, no, Your Honor.

21 QUESTION: As a preventative measure?

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

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

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

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

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

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

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

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

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

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

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

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

15 QUESTION: Is the same true of Rule 14?

16 MR. SUTTON: Excuse me?

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

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

21 QUESTION: Where I thought I --

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

24 QUESTION: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 QUESTION: Okay.

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

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

10 MR. SUTTON: That's exactly right.

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

13 QUESTION: Very well, Mr. Sutton.

14 Mr. Schnapper, we'll hear from you.

15 ORAL ARGUMENT OF ERIC SCHNAPPER

16 ON BEHALF OF THE PRIVATE RESPONDENTS

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

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

1 his official capacity to restrain future violations of the
2 law.

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

5 QUESTION: In what case, Mr. Schnapper?

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

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

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

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

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

3 MR. SCHNAPPER: Title IX.

4 QUESTION: Title IX?

5 MR. SCHNAPPER: Title IX.

6 QUESTION: So that's strictly Spending Clause?

7 MR. SCHNAPPER: Strictly Spending Clause.

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

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

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

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

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

23 MR. SCHNAPPER: It's not --

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

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

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

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

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

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

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

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

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

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

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

11 MR. SCHNAPPER: Both.

12 QUESTION: Both did?

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

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

1 and damage actions.

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

6 MR. SCHNAPPER: Right.

7 QUESTION: Is that right?

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

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

17 MR. SCHNAPPER: Yes.

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

21 MR. SCHNAPPER: I --

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

24 MR. SCHNAPPER: Yes.

25 QUESTION: Here we have a regulation that cannot

1 possibly represent the agency's view of what the statute,
2 601, requires, because we've said what 601 requires, and
3 it doesn't require this.

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

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

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

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

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

25 MR. SCHNAPPER: Yes, but the Court has continued

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

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

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

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

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

21 QUESTION: Without resort to the '86?

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

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

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

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

12 With regard to the argument regarding the
13 limitations on the preconditions for certain actions under
14 Section 602, this Court has addressed that question
15 already in *Cannon*. It's important to note here that
16 Congress clearly intended that the limitations in Section
17 602 on an agency action would apply in a discriminatory
18 intent case. Indeed, the -- that was a particular
19 focus -- intentional commission was a particular focus in
20 1964.

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

1 where we're dealing with a Section 601 violation.

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

7 QUESTION: Which argument do you say was made?

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

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

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

21 QUESTION: Yes.

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

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

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

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

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

14 QUESTION: Well then, why were there different
15 opinions?

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

22 Thank you.

23 QUESTION: Thank you, Mr. Schnapper.

24 General Waxman, we'll hear from you.

25 ORAL ARGUMENT OF SETH P. WAXMAN

1 ON BEHALF OF THE RESPONDENT UNITED STATES

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

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

12 QUESTION: What social context existed in 1964?

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

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

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

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

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

5 GENERAL WAXMAN: Are you talking about
6 against --

7 QUESTION: You can say anything --

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

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

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

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

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

4 QUESTION: Well, one --

5 GENERAL WAXMAN: This is a separation of powers
6 issue.

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

20 GENERAL WAXMAN: That's --

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

1 before.

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

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

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

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

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

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

13 GENERAL WAXMAN: They were --

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

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

22 QUESTION: I wish I were, too.

23 GENERAL WAXMAN: If --

24 (Laughter.)

25 GENERAL WAXMAN: I will gladly take guidance

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

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

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

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

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

1 authority one way or the other.

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

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

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

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

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

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

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

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

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

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

1 QUESTION: Thank you, General Waxman.

2 Mr. Sutton, you have 3 minutes remaining.

3 REBUTTAL ARGUMENT OF JEFFREY S. SUTTON

4 ON BEHALF OF THE PETITIONERS

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

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

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

25 And the notion that pre-1983 there were settled

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

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

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

13 CHIEF JUSTICE REHNQUIST: Very well, Mr. Sutton.

14 The case is submitted.

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

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