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IN THE SUPREME COURT OF THE UNITED STATES

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RODERICK JACKSON, :
Petitioner :
v. : No. 02-1672
BIRMINGHAM BOARD OF EDUCATION. :

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Washington, D.C.
Tuesday, November 30, 2004

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:50 a.m.

APPEARANCES:

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Petitioner.

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supporting Respondent.

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P R O C E E D I N G S

(10:50 a.m.)

JUSTICE STEVENS: We'll hear argument in Jackson
against the Birmingham Board of Education.

Mr. Dellinger.

ORAL ARGUMENT OF WALTER DELLINGER

ON BEHALF OF THE PETITIONER

MR. DELLINGER: Justice Stevens, and may it
please the Court:

Under the decision below, title IX stands alone
as the only major civil rights statute that would permit
retaliation against those who complain that the law is
being violated. There are at least a half a dozen anti-
discrimination laws that do not contain a separate
retaliation provision, and every one of them has been
found to prohibit retaliation as one kind of
discrimination.

There's a reason for that. Anti-discrimination
laws simply can't be effective if threats of retaliation
are allowed to chill those who would seek to bring their
institutions into compliance.

JUSTICE KENNEDY: Of course, the question is
whether -- that -- that may be true, but there would be an
administrative remedy. The question here is a private
cause of action for damages.

1 MR. DELLINGER: That is true, Justice Kennedy.

2 JUSTICE KENNEDY: Even -- even assuming the --
3 the validity of your premise, you still have another step.

4 MR. DELLINGER: I understand that other step,
5 and I think that was largely resolved in Cannon v. the
6 City of Chicago, a decision which this Court upheld a
7 right of action to enforce title IX, even though there was
8 also administrative remedies available and which was
9 validated by Congress, as this Court -- every member of
10 this Court recognized in -- in Sandoval.

11 JUSTICE SCALIA: I thought -- I thought
12 that Cannon -- we've -- we've allowed Cannon to stay on
13 the books, but I thought we have sworn off the kind of
14 creation of -- of implied remedies that Cannon
15 exemplifies.

16 MR. DELLINGER: In this case, there is no doubt
17 that the two established principles together that are
18 settled support this cause of action. The first is that
19 there is a cause of action to enforce title IX. That's
20 Cannon through Congress, through Sandoval, through -- your
21 opinion in Sandoval acknowledges that Cannon is solid law
22 and, the second point, that the statute itself is
23 violated.

24 Title IX is violated by retaliatory action
25 against Coach Jackson. He's -- and -- and this is an

1 important part of title IX because, particularly here,
2 people like Coach Jackson need to come forward because
3 students are often minors. They're not in the best
4 position to know the budgets. It is people like Coach
5 Jackson who make it work, and indeed, I think what is
6 recognized about the -- about the cause of action for
7 retaliation is that it is very important to enable people
8 to bring their institutions into compliance without
9 resorting to litigation.

10 JUSTICE SCALIA: It's very -- it's very useful,
11 I'm sure, but it -- it could be very disruptive also, I am
12 sure. If I were -- if I were a coach, one of the first
13 things -- especially a coach of a women's team in high
14 school, one of the first things I would do would be to
15 complain about not -- not getting enough facilities. This
16 would make it a lot more difficult to fire me whether --
17 whether I'm a lousy coach or not. You -- you would have
18 to think twice before you fire me because I would have a
19 retaliation claim.

20 MR. DELLINGER: Justice Scalia, the burden, of
21 course, is on the plaintiff to demonstrate causation.

22 And you should take great comfort from the fact,
23 the Court can take great comfort from the fact that
24 retaliation has been established as a violation of all of
25 the major civil rights statutes, going back to 30 years to

1 title VI --

2 JUSTICE SCALIA: Some of them specifically
3 provide for retaliation, don't they?

4 MR. DELLINGER: That is correct.

5 JUSTICE SCALIA: Why do they do that if, as you
6 assert, the mere word discrimination embraces it?

7 MR. DELLINGER: Well, Congress has taken a
8 different approach. In some cases, there would be a
9 textual problem. Title VII, for example, speaks of
10 discrimination based on such individual's race or national
11 origin. Title -- and -- and therefore, it might need a
12 specific retaliation provision. Title IX speaks upon --
13 about discrimination on the basis of sex.

14 And here I think to -- to allay your concern
15 about the coach, we have had -- title IX's retaliation
16 provision has been the established law. It was the law at
17 the time Congress -- it was understood, at the time
18 Congress enacted title IX, that the identical wording of
19 title VI had been construed by the administrative agency
20 to include a cause of action for retaliation. Congress
21 enacted title IX against the background of the Sullivan
22 decision, which had recognized that discrimination can
23 include retaliation.

24 So that it comes as no surprise that every court
25 of appeals that has addressed this issue has found that

1 there's retaliation under title IX. In over 30 years,
2 there -- at most we can find 140 reported cases in the
3 Federal system where there is a claim for retaliation
4 under title IX, and under title IX and all of the other
5 discrimination provisions, courts have found it perfectly
6 satisfactory to work out the causation requirements and --
7 in -- in dealing with retaliation cases.

8 Now, here, what the respondent did is they
9 discharged the coach who was seeking equal treatment for
10 girls. When it singled Coach Jackson out for adverse
11 treatment, it was discriminating, and when it did so,
12 because he was seeking equal treatment for girls, it was
13 discriminating on the basis of sex.

14 JUSTICE SCALIA: Do you think that it -- it is a
15 reasonable description of what happened -- he was fired
16 for complaining about his girls' team not getting enough
17 facilities -- that he was, on the basis of sex, excluded
18 from participation in, denied benefits of, or subjected to
19 discrimination under an education program?

20 MR. DELLINGER: Absolutely.

21 JUSTICE SCALIA: Do you think that -- that
22 remotely describes what happened to this coach?

23 MR. DELLINGER: Absolutely. First of all, the
24 -- the court of appeals correctly says -- in the petition
25 appendix at 3a, the court of appeals says we assume for

1 the purposes of this appeal that the board retaliated
2 against Jackson for complaining about perceived title IX
3 violations. But for the discrimination on the basis of
4 sex, he would not have complained, and he not -- had he
5 not made a complaint about sex discrimination, he wouldn't
6 have lost his position. He is denied the benefit of
7 coaching in the program. He's denied the ability to
8 participate in this federally funded program as a coach,
9 and he is discriminated against by being singled out for
10 retaliation.

11 And this is not a case in which -- that has
12 concern -- I mean, Justice Kennedy raised the question
13 about this being a funding case, and I understand the
14 special sensitivity that the Court has about rules that
15 are based upon spending requirements where you want to be
16 sure that States understand what they're agreeing to when
17 they accept the Federal funds.

18 This is not a case in which it could not have
19 been anticipated when those funds were accepted. At that
20 time, at the time these funds were accepted, which would
21 have been about 1999 or 2000, title IX's ban on sex
22 discrimination was itself, of course, universally known.
23 Retaliation was understood to be part and parcel of that.
24 We had had 30 years where both the Department of Education
25 and --

1 JUSTICE KENNEDY: But -- but that's again the
2 question of the substantive scope of the provision, and
3 that's different from whether there was a congressional
4 intent to create a private cause of action for this sort
5 of violation. And was it -- Virginia Bankshares and so
6 forth tells us that this is not the heyday of prior cause
7 of actions anymore. You have to show that there's a
8 congressional intent in the Spending Clause to create a
9 private cause of action for damages.

10 MR. DELLINGER: I think the Court --

11 JUSTICE KENNEDY: And that's -- that's quite
12 separate from --

13 MR. DELLINGER: Yes. I -- I --

14 JUSTICE KENNEDY: -- from this -- from the
15 question of substantive liability.

16 MR. DELLINGER: I understand that. Here, first
17 of all, when Congress acted, unlike the earlier time when
18 it passed title VI, when Congress passed title IX, it was
19 a background in the law from Sullivan v. Little Hunting
20 Park that -- that retaliation was considered a part of
21 discrimination. The title VI regulations were themselves
22 well known based on identical language, virtually verbatim
23 language. It provided for retaliation.

24 And moreover, this Court as recently as the
25 Davis case, Franklin and Davis, and in the North Haven

1 case has found that employment discrimination, sexual
2 harassment by teachers and peer-on-peer sexual harassment
3 all come within title IX and have, therefore, agreed that
4 Cannon v. the City of -- v. the University of Chicago
5 creates that cause of action.

6 Now, this case is actually a lot easier than
7 Davis, even taking into account the concerns that -- that
8 you and other Justices expressed there, because this is
9 not a case where liability is being imposed, you know, for
10 the acts of third parties like students over whom you may
11 have limited control. This is deliberately undertaken
12 actions by the responsible officials acting intentionally.
13 It's not a novel concept the way one could argue that
14 peer-on-peer sexual harassment was as a part of
15 discrimination. But it's been accepted for more than 30
16 years by the responsible Federal agency.

17 JUSTICE SCALIA: Yes, but it's separate enough
18 from discrimination that in other statutes, although
19 Congress does create a cause of action for discrimination,
20 it goes out of its way to create a separate cause of
21 action for retaliation. It's sufficiently separate, and
22 if it is that sufficiently separate, it doesn't seem to me
23 that you could clearly say that -- that when the State
24 signed on to receiving Federal funds under title IX, they
25 should have known that this door to litigation was being

1 opened to them. Yes, litigation for -- for discrimination
2 against -- against female athletes, but not -- not
3 discrimination suits alleging retaliation. That's a
4 whole, new area.

5 MR. DELLINGER: Justice Scalia, with -- with all
6 due respect, I don't think there's any way, when the
7 district accepted these funds, that they could have
8 reasonably relied on the assumption that they would be
9 free to retaliate against people who tried to comply --

10 JUSTICE O'CONNOR: Well, but there was -- there
11 was -- let's go back to this for just a moment -- an
12 administrative remedy available for retaliation expressly
13 under the regs?

14 MR. DELLINGER: That is correct.

15 JUSTICE O'CONNOR: And did this petitioner seek
16 an administrative remedy at all?

17 MR. DELLINGER: He did not seek an
18 administrative remedy. He went through the school system
19 itself at every level. He went through five different
20 levels, following the chain of command.

21 JUSTICE O'CONNOR: What would the administrative
22 remedy have allowed here --

23 MR. DELLINGER: Well --

24 JUSTICE O'CONNOR: -- had it been sought?

25 MR. DELLINGER: Here, as in Franklin, as in

1 Davis, as in Cannon v. the University of Chicago, as in
2 every one of this Court's title IX cases, indeed, as in
3 all of its title VI cases involving Federal funds with
4 race, you can call this to attention to the office of
5 civil rights of the relevant agency and they can begin an
6 inquiry. Ultimately they have the authority of the
7 draconian sanction of cutting off the funds to the --

8 JUSTICE GINSBURG: Do they have any other
9 sanction? Because the notion of an administrative remedy
10 ordinarily would be a remedy for the individual who's
11 complaining. But as I understand it, this administrative
12 process, this detailed administrative process, leads only
13 to one sanction, the one you have described as draconian.

14 MR. DELLINGER: That is correct.

15 JUSTICE O'CONNOR: So that's it. It would not
16 have permitted a restoration of the job to the --

17 MR. DELLINGER: That is correct.

18 JUSTICE O'CONNOR: -- petitioner.

19 MR. DELLINGER: That is not part of the -- the
20 administrative process is only about institutional
21 funding, which is why the Court has consistently upheld
22 the right to bring these actions for what are violations
23 of the statute itself.

24 JUSTICE SOUTER: Well, if we don't accept --
25 let's assume, just for the sake of argument, that -- that

1 we're having trouble accepting the -- the analysis that it
2 is a violation of the statute in the statute's own terms.
3 You then made the argument that, in fact, you should
4 recognize retaliation as a claim because in the context of
5 -- of school students and so on, if you don't allow
6 retaliation, the teachers are not going to blow the
7 whistle, and if the teachers blow the whistle, the statute
8 is going to be a dead letter.

9 MR. DELLINGER: That is --

10 JUSTICE SOUTER: So -- so the -- the argument is
11 you -- you should recognize this as a necessity.

12 That, it seems to me, still goes back to Justice
13 O'Connor's question. Why do we have to recognize a
14 private cause of action as opposed to the government
15 allowing an administrative remedy? And I thought you were
16 leading up to saying the administrative remedy simply
17 isn't effective because it's so draconian that, in fact,
18 they don't impose it, or for some other reason.

19 So my question is, is there an argument to say
20 that the administrative remedy simply is not good enough
21 to preclude -- to -- to deter retaliation and that's why
22 you've got to have a private cause of action?

23 MR. DELLINGER: That -- that is absolutely
24 right.

25 JUSTICE SOUTER: What's -- what are the facts?

1 What's the empirical evidence for that?

2 MR. DELLINGER: Well --

3 JUSTICE O'CONNOR: Do you know if administrative

4 sanctions have been imposed under title IX against

5 schools?

6 MR. DELLINGER: Well, I'm sure there have been

7 some instances in which there have been administrative

8 sanctions under title IX. And I don't -- I do not have

9 figures on those, Justice O'Connor.

10 But let me --

11 JUSTICE GINSBURG: Have funds --

12 MR. DELLINGER: -- let me suggest --

13 JUSTICE GINSBURG: -- have funds -- Mr.

14 Dellinger, have funds ever been withdrawn from any school

15 because of a violation of --

16 MR. DELLINGER: Not to my knowledge.

17 JUSTICE GINSBURG: -- title IX?

18 MR. DELLINGER: But I think --

19 JUSTICE SCALIA: That could be because --

20 MR. DELLINGER: -- I actually have --

21 JUSTICE SCALIA: -- the sanction is so draconian

22 that nobody in his right mind is not going to rehire the

23 coach. Of course, they're going to rehire. I -- I find

24 it hard to believe why a draconian sanction is

25 ineffective.

1 MR. DELLINGER: Well, if it's never -- I -- I --

2 JUSTICE SCALIA: It seems to me it's -- it's
3 overwhelmingly effective. You tell the school you either
4 rehire the coach or we're cutting off your money.

5 MR. DELLINGER: Justice --

6 JUSTICE SCALIA: Is it hard to decide what
7 they're going to do?

8 MR. DELLINGER: I do have an answer, first, for
9 Justice Ginsburg's question from Ms. Greensberger. The
10 sanction has never been imposed under title IX of cutting
11 off funds. And it --

12 JUSTICE GINSBURG: And I can't imagine anyone
13 who would want such a sanction. Which doesn't help --

14 MR. DELLINGER: That is certainly not what --

15 JUSTICE GINSBURG: -- the girls on the team.

16 MR. DELLINGER: -- Coach -- Coach Jackson would
17 have sought, and -- and because that process is not one
18 that's responsive to the individual case -- if you're down
19 in Birmingham, Alabama, the idea that there is some office
20 that has control over Federal funds that's never imposed a
21 sanction, the fact of the matter is -- and it's the
22 reason --

23 JUSTICE KENNEDY: Well, you're saying the coach
24 cares more about it than the Government does?

25 MR. DELLINGER: That may well be the case,

1 absolutely. And Coach Jackson --

2 JUSTICE KENNEDY: Well, if -- if the Government
3 is charged with -- with just spending the funds and
4 doesn't think that this is worth its time, why should
5 there be a private cause of action --

6 MR. DELLINGER: Because --

7 JUSTICE KENNEDY: -- when -- when a private
8 cause of action is harder for us to imply than it -- than
9 it is to an administrative remedy?

10 MR. DELLINGER: Because in this case people like
11 Coach Jackson -- it's hard enough for Coach Jackson to
12 come forward. If he's not able to -- if he's not
13 protected and able to come forward, if retaliation is
14 possible, then you can't expect the -- the teenagers
15 themselves to carry this burden.

16 And in fact, it's the reason this Court
17 recognizes a private cause of action in Franklin and in
18 Davis and in Cannon itself, that you're not going to
19 protect the whistle blower and they're not going to be
20 able to come forward.

21 And it's not just whistle blowers, Justice
22 Kennedy. It's people that want to make their institutions
23 comply and when those efforts at compliance result in
24 penalties against them. It has not led to an excessive
25 amount of litigation, but it has been very effective in

1 giving people comfort to know that they can't be
2 retaliated against.

3 And -- and I -- I understand the -- going to the
4 necessity, but I do think I'm very comfortable with the
5 statute because it is a form of discrimination on the
6 basis of sex. It is part and parcel. The history of
7 discrimination, on which title VI drew, was that firing
8 people from their jobs is what you did when they
9 complained about discrimination, when they tried to vote,
10 when they tried to enroll their students in schools, and
11 it is part and parcel of that discrimination. And it is
12 discrimination against Coach Jackson for his actions on
13 behalf of sex.

14 Thank you.

15 JUSTICE GINSBURG: Mr. --

16 MR. DELLINGER: I'll reserve the balance of my
17 time.

18 JUSTICE O'CONNOR: Mr. Gornstein, do you have
19 any light to shed on the extent to which administrative
20 sanctions have ever been imposed against schools and --
21 and the feasibility of going that route?

22 ORAL ARGUMENT OF IRVING L. GORNSTEIN

23 ON BEHALF OF THE UNITED STATES,

24 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

25 MR. GORNSTEIN: Administrative sanction has

1 never been imposed under title IX.

2 JUSTICE KENNEDY: They have been under title VI?

3 MR. GORNSTEIN: There has been one case in which
4 an administrative sanction was imposed under title VI,
5 Justice Kennedy.

6 It -- the agency does have some flexibility to
7 attempt to get voluntary resolutions that are short of the
8 sanction, the final sanction, but --

9 JUSTICE O'CONNOR: Do you take the position that
10 what occurred here can amount to a direct violation of the
11 statute as discrimination?

12 MR. GORNSTEIN: We do, Justice -- Justice
13 O'Connor. I'm sorry. Retaliation against a person
14 because that person has complained about sex
15 discrimination under title IX is itself discrimination
16 within the meaning of title IX. And that conclusion flows
17 from four considerations, beginning with the Court's
18 decision critically in Sullivan because in that case, the
19 Court held that a person subjected to retaliation because
20 he complained about racial discrimination against his
21 lessee could sue under section 1982's prohibition, which
22 only prohibits racial discrimination. Against the
23 backdrop of that decision in Sullivan, Congress would have
24 understood its prohibition against sex discrimination to
25 afford comparable protection against retaliation. So a

1 person who is subjected --

2 JUSTICE O'CONNOR: Why would Congress then in
3 some statutes expressly cover retaliation and in others
4 not? I mean, that's a little odd, isn't it?

5 MR. GORNSTEIN: It is, Justice O'Connor, but the
6 explanation for that for -- in title VII, for example, is
7 that the core prohibitions in title VII refer to
8 discrimination based on such individual's race, sex, or
9 national origin, and that such individual's language rules
10 out the kind of retaliation claim we are talking about
11 here.

12 JUSTICE SCALIA: It rules out this one, but
13 it doesn't rule out the main -- look it, this is a weird
14 kind of retaliation claim. Usually the retaliation claim
15 is the person who has been discriminated against complains
16 about the discrimination, and for that complaint, the
17 person who was discriminated against is demoted or not
18 promoted, or whatever. That's -- that's the classic
19 retaliation claim. And that classic claim is surely
20 covered by -- on the basis of that person's sex. If --

21 MR. GORNSTEIN: If it's based on the fact
22 that the -- that the person is complaining about sex
23 discrimination and not on the sex of the complainer, it's
24 exactly the same theory of discrimination that we have
25 here, Justice Scalia. And that theory of discrimination

1 was recognized in the Sullivan decision. Discrimination
2 occurs when there is retaliation against a person because
3 he's complaining about racial discrimination.

4 JUSTICE SCALIA: What was the date of the
5 Sullivan case?

6 MR. GORNSTEIN: It was 3 years before Congress
7 enacted section -- I think it was '68 -- '69. I'm sorry.
8 '69.

9 JUSTICE SCALIA: '69.

10 MR. GORNSTEIN: It was '69, Justice Scalia.

11 JUSTICE SCALIA: And -- and you think that we
12 take the same approach to implied causes of action today
13 that we took in 1969?

14 MR. GORNSTEIN: You do not, Justice Scalia, when
15 you are starting afresh, but --

16 JUSTICE KENNEDY: And we certainly did not with
17 a Spending Clause case.

18 MR. GORNSTEIN: That's true, Justice Kennedy.

19 But to answer Justice Scalia's question, first,
20 you operate in the legal context in which Congress was
21 operating at the time, and Congress would have understood
22 -- and this Court has twice relied on the Sullivan
23 decision in interpreting title IX, once in deciding that
24 there was a private right of action and once in deciding
25 that the private right of action included a claim for

1 damages.

2 JUSTICE SCALIA: I don't know what case it is,
3 but one of our cases, the argument was precisely made that
4 the statute before us had been enacted by Congress before
5 we had set our face against implied causes of action, and
6 therefore, we should interpret that statute the way we
7 used to in 1969, and we rejected that argument. We said
8 that our new rule, as to when you find implied causes of
9 action, will be applied to all statutes, whether they were
10 enacted by a Congress that -- that thought we would go
11 skipping along forever as we did in 1969 or -- or not.
12 And -- and that's what you're asking us to do here.

13 MR. GORNSTEIN: Justice --

14 JUSTICE SCALIA: Just because Congress in -- in
15 the -- at the time this statute was enacted believed in
16 the existence of a Supreme Court that would readily find
17 implied causes of action, we -- we have to do that for all
18 these old statutes.

19 MR. GORNSTEIN: Let -- let me talk about the
20 cases that I think the principle that you're talking about
21 emerges from. One is the Central Bank case, and what you
22 were asked to do there was to add the words, aiders and
23 abettors, to the statute. We're not asking you to add
24 words to this statute. We're asking you to interpret the
25 words that are there --

1 JUSTICE KENNEDY: But what about Virginia --

2 MR. GORNSTEIN: -- in light of the relevant
3 context.

4 JUSTICE KENNEDY: What about Virginia
5 Bankshares?

6 MR. GORNSTEIN: I'm -- I'm not sure about
7 Virginia Bankshares, but I don't think it -- it states a
8 principle.

9 The other case that I was thinking about,
10 Justice Kennedy, is the -- is the Sandoval case. And
11 again, there somebody was asking you to afford a private
12 right of action for something that the statute did not
13 itself prohibit. And what we are saying here is,
14 interpret this statute in light of the legal context that
15 Congress had it, which is --

16 JUSTICE O'CONNOR: Well, it -- it's arguable
17 except that Mr. Jackson was not discriminated against
18 because of his gender.

19 MR. GORNSTEIN: That's correct. But this
20 statute does not require discrimination because of such
21 individual's sex. It require --

22 JUSTICE O'CONNOR: -- exactly like title VII,
23 but --

24 MR. GORNSTEIN: It's -- it's written exactly not
25 like title VII, Justice O'Connor, and it's written far

1 more like section 1982, which was at issue at Sullivan,
2 which doesn't have a such individual's limitation. And in
3 -- and section 1982 was interpreted to mean discrimination
4 on the basis of race in depriving people of interests of
5 property violates that statute and affords a private right
6 of action to the victim of retaliation.

7 And so too here. And a person who is victimized
8 by retaliation because that person has been subjected
9 before -- because he complained about sex discrimination
10 is a victim of discrimination within the meaning of this
11 statute.

12 JUSTICE SCALIA: And that's where you hang. You
13 -- you really think Congress, when it enacted title IX,
14 paid close attention and said -- instead of saying no
15 person in the United States shall on the basis of that
16 person's sex be excluded from participation, you think
17 somebody had -- had suggested that language, and they
18 said, oh, no, no, no, that would make it too narrow. We
19 have to take out that person's. I -- I don't -- it
20 doesn't strike me as a -- as an obvious import of not
21 including the word that person's sex. It's a very natural
22 way to write it: no person in the United States shall on
23 the basis of sex.

24 MR. GORNSTEIN: But this is -- it opens it up to
25 this interpretation, and then you have to look at all the

1 relevant considerations. Inserting the words, such
2 individual's, would foreclose that kind of retaliation
3 claim, and it's not here. And so it's -- then you have to
4 look at all the other relevant considerations, including
5 Sullivan, including the fact that this is of vital
6 importance to promoting the purposes of the act, including
7 the fact that the agencies responsible for enforcing this
8 provision have both interpreted -- the key agencies have
9 interpreted it to encompass protection against
10 retaliation, and including the fact that there's
11 absolutely no legitimate interest that a -- a recipient
12 has in retaliating against somebody simply because he's
13 filed a title IX sex discrimination complaint.

14 JUSTICE GINSBURG: Mr. Gornstein, what
15 implication would there be, if we took the view of the
16 circuit here, for Federal employment? Title VII does have
17 a discrete retaliation provision, but it doesn't with
18 respect to Federal employees, if I understand.

19 MR. GORNSTEIN: That's correct. In -- it -- we
20 -- we have taken the position that there is, based on a
21 textual argument within the Federal sector provision, a
22 basis for finding a retaliation prohibition over and above
23 the use of discrimination. We have not taken that
24 position with respect to the -- to some other statutes.
25 So we do think this is a statute-by-statute analysis and

1 that you just can't adopt an automatic principle that
2 because there's an anti-discrimination provision, it
3 automatically always picks up retaliation protection. You
4 have to look at it on a statute-by-statute basis.

5 And here, though, all the relevant
6 considerations, including Sullivan, including the need for
7 this kind of protection to further the purposes of the
8 statute, including the agencies' interpretation of this
9 statute which, by the way, does provide fair notice that
10 this was prohibited, included in -- I think I wanted to
11 get back to Justice Kennedy's question about the Spending
12 Clause.

13 What the Spending Clause does not require is
14 that it specifically refer to retaliation any more than it
15 required that it specifically refer to peer-on-peer
16 harassment. What it does require, though, is fair notice,
17 and that fair notice is supplied by the Sullivan decision,
18 this Court's cases saying that Sullivan is an important
19 backdrop principle against which title IX was enacted, and
20 finally the regulations themselves, which specifically
21 forbid retaliation.

22 JUSTICE SCALIA: Are punitive damages available
23 under title IX?

24 MR. GORNSTEIN: I'm sorry. Punitive damages
25 would not be available against a municipality or against a

1 -- but it could be available against some other private
2 recipients.

3 JUSTICE STEVENS: Thank you, Mr. Gornstein.
4 Mr. Thomas.

5 ORAL ARGUMENT OF KENNETH L. THOMAS
6 ON BEHALF OF THE RESPONDENT

7 MR. THOMAS: Justice Stevens, may it please the
8 Court:

9 Justice O'Connor, I would like to respond to the
10 question that you raised immediately. I can't think of
11 any school board lawyer who is called by his
12 superintendent and told that I had a letter from OCR and
13 they want to know why you aren't doing this and that who
14 would not be in that superintendent's office that moment
15 because when OCR comes in, they canvas everything. I
16 mean, and as a part of negotiating and their investigative
17 teams, they're lay people. They're not lawyers. They
18 come in demanding, and what they prepare for compliance, I
19 can't even begin to articulate how overreaching it is.
20 And so I say I wanted you to --

21 JUSTICE GINSBURG: How often has OCR come to the
22 school district in question under title IX? There are
23 many statutes that --

24 MR. THOMAS: And I would want to suggest --

25 JUSTICE GINSBURG: -- OCR administers.

1 MR. THOMAS: In 1996, we had a conclusion of an
2 OCR title IX investigation because it dealt with boys'
3 football as it related to related sports offered for
4 girls. So we -- we know about OCR, and they're in
5 Atlanta. They are about 167 miles away and when -- and
6 when they come, they come, Your Honors.

7 If I may, I'd like to get right now to what I
8 had raised as the issue here, and that's whether or not an
9 implied private right of action under title IX for
10 retaliation for petitioner who himself says that he's not
11 a victim of discrimination, but merely an advocate. He's
12 an advocate of gender equity, and we say no.

13 JUSTICE GINSBURG: How does he differ -- how
14 does he differ from the renter in Sullivan who was
15 complaining about the refusal to sell or lease property to
16 African Americans? He wanted to lease his property, and
17 as a result, he was thrown out of the club. And this
18 Court said he could maintain that suit.

19 MR. THOMAS: Justice Ginsburg, I offer this one
20 observation. Under 1982, there is not a corollary
21 administrative remedy. So in the Sullivan situation, the
22 only advocate available at that time was the owner of the
23 home. And -- but I would comment that as he continued in
24 his litigation, he continued to advocate.

25 Under title IX, as we have discussed, for the

1 advocate is the phone call, the toll-free call to OCR and
2 express your concerns and your issues about what's
3 happening. And we find significance in that because the
4 ultimate benefit is for the designated class, which would
5 be the basketball team. In a private lawsuit filed by Mr.
6 Jackson, the damage award goes directly to him. If he's
7 successful in getting injunctive relief, it goes only to
8 him. In other words, school board, you can't retaliate or
9 you're enjoined from retaliating against him in the
10 future, but nothing from that Federal court would go to
11 benefit the girls' basketball team.

12 JUSTICE SOUTER: Well, what -- what do you make
13 of the -- the point that Mr. Dellinger stressed and others
14 have stressed that, in fact, there is no administrative
15 remedy in the real world? It's -- it's -- there -- there
16 have never -- there has never been an instance in which
17 funds have been withheld.

18 MR. THOMAS: Well, again, Justice Souter, no,
19 the funds have not been terminated. But I can only share
20 with you my experiences with dealing with these people.

21 JUSTICE GINSBURG: May I ask you with respect to
22 that, is OCR so different from other agencies that have to
23 pick and choose because they simply don't have the
24 resources to enforce? Now, how often does OCR, in fact,
25 go in and investigate? How many times do they say, well,

1 that's low priority for us, girls' soccer or girls'
2 basketball, and we have bigger fish to fry?

3 MR. THOMAS: Justice Ginsburg, the only thing
4 that I can say is that on my watch, the number one
5 priority is to keep OCR out. So -- so therefore --

6 JUSTICE GINSBURG: But that wasn't my question.
7 My question is of the universe of complaints that are made
8 under title IX, how many does OCR actually follow up, or
9 isn't it strapped for resources so that it can't, however
10 much it may want to, come in the way you described?

11 MR. THOMAS: Well, Your Honor, that was
12 something that was recognized in Cannon. I -- I think
13 that was cited in several of the footnotes.

14 JUSTICE GINSBURG: And that was the very reason
15 for recognizing a private right of action because the --
16 the requirement, the anti-discrimination requirement,
17 would be a dead letter if you didn't have people who could
18 enforce it.

19 MR. THOMAS: But -- but again, stay mindful.
20 Geraldine Cannon, though, she said, I did not get
21 admission to the -- the med school because of my sex, and
22 she is clearly within the proviso of no discrimination on
23 the basis of sex. So --

24 JUSTICE SOUTER: Yes, but the -- the argument
25 that's being raised is whether we're talking about the

1 person who is listed in the statute as the primary
2 beneficiary of the anti-discrimination statute or whether
3 we're talking about the teacher who blows the whistle and
4 so on -- the -- the argument is unless you allow this
5 teacher or this whistle blower to -- to bring the private
6 action, your statute is a dead letter, that the -- that if
7 -- if -- once you recognize a private action, you've
8 either got to recognize this kind of private action or you
9 can forget the whole thing. That's the argument, and --
10 and so simply to say, well, they're not within the -- the
11 primary ambit of benefit of the statute is -- is not to
12 the point of the argument.

13 MR. THOMAS: Justice Souter, let me offer this
14 in two ways. One, it's not realistic. In -- in other
15 words, when -- when you have a scenario about the private
16 cause of action, teachers aren't -- I mean, these parents
17 and -- and the -- and especially in Birmingham, we have an
18 athletic director at the school. We have a director of
19 athletics for the whole school system. And so that --
20 that's not realistic, I mean, because at the end of the
21 day, the administration is very conscientious about all of
22 its programs.

23 JUSTICE GINSBURG: Well, that's -- to say trust
24 me is -- is not an answer. Cannon is one thing, a woman
25 in her 30's. A sixth-grader who is told she can't play on

1 a team because there's none for girls is hardly similarly
2 situated and the law won't be enforced as to her unless
3 you have someone who is best positioned to know what is
4 going on, who is the coach.

5 MR. THOMAS: But, Justice Ginsburg, we get back
6 to the point who really benefits because -- and especially
7 in this scenario, if the advocate sues and receives the
8 monetary damages, that goes to the advocate.

9 JUSTICE GINSBURG: The -- the point is if you
10 say to the school, you cannot retaliate against someone
11 because a complaint has been made, that's a powerful
12 incentive for the school not to retaliate against someone
13 and to do something about the discrimination.

14 MR. THOMAS: Well, but again, though, Justice
15 Ginsburg, the other side of that would be when under the
16 spending legislation, the school board had a right to know
17 what the terms and conditions of the financial assistance
18 would be, and I respectfully submit to you that there was
19 nowhere on the landscape that --

20 JUSTICE GINSBURG: Why wasn't it in the
21 regulations of the agency spelled out rather clearly --
22 the -- the agency that says, Congress has told us to
23 implement this statute, here are our regulations and our
24 regulations are you don't retaliate?

25 MR. THOMAS: But that's a part of the complaint

1 and investigatory process.

2 Now, Justice Ginsburg --

3 JUSTICE SCALIA: The regulations didn't say
4 anything about a private cause of action, did it?

5 MR. THOMAS: No, it did not.

6 JUSTICE SCALIA: And the statute didn't say
7 anything about a private cause of action.

8 MR. THOMAS: It's not on the face.

9 JUSTICE O'CONNOR: But the regulation did tell
10 the school not to retaliate in effect.

11 Tell me, does the record disclose what happened
12 to the petitioner, Jackson? What -- what has been the
13 result of all this? Does the record tell us that?

14 MR. THOMAS: No, it does not, Justice O'Connor.

15 And -- and again, it's on a motion to dismiss,
16 and obviously, once it was --

17 JUSTICE O'CONNOR: Does it tell us that he was
18 removed as coach?

19 MR. THOMAS: Yes.

20 JUSTICE O'CONNOR: Does the record tell us that?

21 MR. THOMAS: It -- it does say that he was
22 relieved.

23 JUSTICE BREYER: Can I ask you a legal question,
24 nothing to do with, you know, practicalities?

25 MR. THOMAS: Yes.

1 JUSTICE BREYER: But suppose you go back to the
2 very old, bad days of the 1950's in the South, the '60's.
3 They pass some civil rights legislation. A lot of
4 legislation was passed in the '60's. Now, under that
5 civil rights legislation, imagine an individual had been
6 kept out of a restaurant or he'd been treated physically
7 badly, not because of his race. He was white, but he was
8 associating with people who were black. And they both go
9 into the restaurant and they both are refused service.
10 Maybe they're beaten up. I mean, both of them.

11 Now, can the white individual bring a lawsuit
12 under the -- the civil rights statute? I've always
13 thought the answer to that question is, of course, he can.
14 Would you -- do you think it's the contrary answer?

15 MR. THOMAS: Justice Breyer, in that context --

16 JUSTICE BREYER: Yes.

17 MR. THOMAS: -- I -- I would say yes.

18 JUSTICE BREYER: Yes, of course.

19 MR. THOMAS: But again --

20 JUSTICE BREYER: So therefore --

21 JUSTICE SCALIA: Is this a civil rights statute
22 that provides for a private cause of action? I -- I want
23 to know what the hypothetical is.

24 JUSTICE BREYER: I'd -- I'd like to -- I'm
25 thinking of various civil rights statutes which make it

1 unlawful to describe -- to -- to discriminate. And now, I
2 agree with you on that answer. The white person could
3 bring a lawsuit on the basis of someone else's race
4 because he's being discriminated against not because of
5 his own race, but because he's being -- he's associated
6 with people who are being discriminated against. I agree
7 with your answer.

8 And so my question is if that's so and if we
9 have a long history here of the words, on the basis of
10 sex, including retaliation not on the basis of my sex, but
11 retaliation on the basis of someone else's sex -- that's
12 what I've complained of -- why isn't this the same thing

13 And to get out my whole question -- there are
14 two parts -- why isn't this the same thing? And the
15 second part is, because I think it is the same thing --
16 the second part is once it is included in 1981 -- in -- is
17 it 1681(a)?

18 MR. THOMAS: Yes.

19 JUSTICE BREYER: Once we include this in
20 1681(a), that's the end of this case because Sandoval then
21 supports the other side. It doesn't support you. All
22 right. That's my question.

23 MR. THOMAS: Justice Breyer, don't we have to
24 consider at some point in time what the congressional
25 intent was?

1 JUSTICE BREYER: Well, yes.

2 MR. THOMAS: And again -- and I submit to you --

3 JUSTICE BREYER: So you -- you go ahead. I'm
4 doing it purely as a matter of logic. I'm saying the old
5 civil rights cases make clear it doesn't have to be on the
6 basis of your own race. History makes clear that
7 retaliation on the basis of someone else's race does fit
8 within -- or gender does fit within 1681, and then that's
9 the end of the case. So I would like your response to
10 that logic.

11 MR. THOMAS: And I would want to submit to you
12 interveningly you have had the passing of the Voting
13 Rights Act of 1965. So everybody now has access to
14 Congress. The whole spectrum of American society is in
15 Congress. So if Congress is being well represented, when
16 it passes the law in 1972, as it did here, it had a
17 different perspective on it.

18 Going back to 1969, some things were foreclosed
19 to some of the citizens of the United States. So,
20 obviously, the scenario of someone advocating, like in
21 Sullivan, would make sense. But I submit to you
22 respectfully, that's not the case now. Over there in
23 Congress is where this debate needs to be, and on the face
24 of this statute, it's not there. Retaliation is not
25 there.

1 If I may, though, Justice Breyer, let me also
2 add as a practical consideration --

3 JUSTICE STEVENS: Of course, you say it's not
4 there, but the agencies interpreting the statute thought
5 it was there. Isn't that correct?

6 MR. THOMAS: But -- but that's an -- an
7 investigatory -- the administrative enforcement scenario.

8 JUSTICE GINSBURG: But it's the --

9 JUSTICE STEVENS: No, but their reading of the
10 statute was that the word discrimination included a
11 retaliation claim. That's the kind of regulations they
12 drafted on the basis of their understanding of what
13 Congress intended by using the word -- the words in this
14 statute.

15 MR. THOMAS: But don't we go -- Justice Stevens,
16 don't we go back to Sandoval? Can you in a regulation do
17 more than what the statute requires?

18 JUSTICE STEVENS: You cannot use the regulation
19 that goes beyond the meaning of the statute. That's what
20 that holds. But a regulation interpreting what the
21 statute itself provides is in a different ball park. And
22 that's what I understand these regulations to have done,
23 to say what the agencies thought the statute itself meant.

24 MR. THOMAS: But -- but again, that's
25 retaliation after someone has filed a complaint with the

1 appropriate office.

2 JUSTICE BREYER: Well -- I mean, Sandoval is
3 very clear. It's a very clear opinion in my view. Very
4 clear. And the key language I thought is, the language
5 statutes that focus on the person regulated rather than
6 individuals protected create no implication of an intent
7 to confer the private right. So they're looking at
8 disparate impact and disparate impact, according to the
9 majority -- I was in the dissent -- did not intend to
10 protect the person discriminated against, but was a way of
11 regulating people so they wouldn't intentionally
12 discriminate. I can understand that. But I apply the
13 same -- I didn't agree with it, but I can understand it.

14 The -- the -- I apply the same reasoning here.
15 The reasoning here is that this retaliation thing is not
16 trying to protect university behavior one whit more than
17 the whole underlying thing is trying to protect university
18 behavior. This is about victims. Retaliation and being
19 fired is about victims. And so given Sandoval, then we
20 have the history, we have the language, and we have that
21 sentence from Sandoval. And all that suggests -- it goes
22 into 1681(a), in which case Sandoval says, a private right
23 of action, given Cannon, would be inferred.

24 Now, what's -- what's -- that's how -- I'm
25 tracing out the logic of the thing. So I want to see what

1 you say.

2 MR. THOMAS: Well, Justice Breyer, on the face
3 of the statute, I just can't get there. I apologize for
4 that, respectfully, but -- but I can't.

5 And Justice O'Connor, as a follow-up,
6 interestingly enough, in a case on all fours in 1995, Holt
7 v. Lewis, the United States District Court for the
8 Northern District of Birmingham -- for the Northern
9 District of Alabama made very clear that an implied
10 private right of action was not cognizable under title IX,
11 and that the regulation was not a basis to follow it. And
12 -- and I submit to you on that basis, that in Birmingham,
13 at very least, because the case was affirmed by the
14 Eleventh Circuit and this Court denied cert in 1997, so
15 anyone who would go --

16 JUSTICE O'CONNOR: We -- we can't -- you don't
17 base your argument on giving some legal effect to denial
18 of certiorari --

19 MR. THOMAS: No, no, I don't, Justice O'Connor.

20 JUSTICE O'CONNOR: Thank you.

21 MR. THOMAS: But -- but to say -- I was trying
22 to emphasize was the notice and the mind set of the board
23 when it accepted these Federal funds. It had no way of
24 anticipating that retaliation --

25 JUSTICE STEVENS: It had never anticipated a

1 private right of action, even though it read the Cannon
2 opinion, which was written some 20 years ago? Maybe more
3 than that. I don't remember.

4 MR. THOMAS: Justice Cannon, your opinion there
5 is going to be around for a long time. The scholars are
6 going to have to debate it for years.

7 JUSTICE SCALIA: There were some later cases
8 that cast a good deal of doubt on whether we would apply
9 Cannon anymore.

10 JUSTICE STEVENS: But Congress itself has
11 adopted the rule set forth in Cannon.

12 MR. THOMAS: But -- but if I may, but then
13 Justice Rehnquist cautioned very clearly that the Court --
14 in his concurring opinion, that the Court in the future
15 should be extremely reluctant to imply a cause of action
16 absent such specificity on the part of the legislative
17 branch. And that just speaks volumes to me.

18 JUSTICE GINSBURG: It said in this statute we
19 do, having in mind that title VI would be interpreted in
20 the identical way --

21 MR. THOMAS: Yes, ma'am.

22 JUSTICE GINSBURG: -- title VII -- VI
23 proscribing race discrimination in all Federal programs.
24 So it said these statutes aimed at race discrimination,
25 sex discrimination do have a -- a private right of action,

1 and that was the holding of this Court.

2 MR. THOMAS: Yes, ma'am. Well, but -- but
3 again, it goes -- goes back to -- but would that include
4 retaliation? And -- and --

5 JUSTICE GINSBURG: Well, it seems to me that if
6 you're talking about the sixth grade soccer team,
7 realistically the only one who is going to know anything
8 -- enough and be brave enough to complain will be the
9 teacher. And if you cut the teacher out, then forget it.
10 You have nice words on paper and they'll never be
11 enforced.

12 MR. THOMAS: But, Justice Ginsburg, that teacher
13 could easily, if they don't get a positive response from
14 the administration, they can call OCR.

15 JUSTICE GINSBURG: And OCR says, as it usually
16 does, we're too busy. Sorry.

17 MR. THOMAS: No. They -- no --

18 JUSTICE GINSBURG: Congress didn't give us
19 enough money to do the job.

20 JUSTICE SCALIA: Do we know that? I mean, do we
21 have any idea how effective the enforcement of OCR is?
22 Just because they haven't cut off funds --

23 MR. THOMAS: I -- I --

24 JUSTICE SCALIA: -- they may well not have cut
25 off funds because anybody who gets a directive from them

1 will hop to it.

2 MR. THOMAS: Justice Scalia, that's exactly it.
3 I mean, I have firsthand knowledge that when they call,
4 we're supposed to jump. It's no doubt about it.

5 JUSTICE SCALIA: And do they call more than
6 infrequently?

7 MR. THOMAS: All the time. And -- and the other
8 side of that coin --

9 JUSTICE GINSBURG: This is your personal
10 testimony.

11 MR. THOMAS: Yes, ma'am. Yes, it is.

12 (Laughter.)

13 MR. THOMAS: And -- and Justice --

14 JUSTICE GINSBURG: There is -- there is much
15 testimony on the other side that says we call and call and
16 they don't come.

17 MR. THOMAS: Well, I've been in educational law
18 now almost 27 years, representing both teachers and school
19 boards. So I have firsthand knowledge. I mean -- and
20 I've experienced it both at the secondary level and higher
21 ed. I mean, when they come in, they come in.

22 JUSTICE GINSBURG: How many title IX complaints
23 in your -- in your experience? You mentioned one. Is
24 there any other?

25 MR. THOMAS: Two.

1 JUSTICE GINSBURG: Two? In how many years?

2 MR. THOMAS: In 26.

3 JUSTICE GINSBURG: Two in 20-something years.

4 MR. THOMAS: Yes, ma'am. But they're all
5 memorable.

6 (Laughter.)

7 MR. THOMAS: They're all -- thank you.

8 JUSTICE STEVENS: Thank you, Mr. Thomas.

9 Mr. Newsom.

10 ORAL ARGUMENT OF KEVIN C. NEWSOM

11 ON BEHALF OF ALABAMA,

12 AS AMICUS CURIAE, SUPPORTING RESPONDENT

13 MR. NEWSOM: Thank you, Justice Stevens, and may
14 it please the Court:

15 I'd like to address, if I may, several concerns
16 that have been raised during the -- the preceding
17 arguments.

18 One is to clarify some things about the scope of
19 the administrative remedy. The other side, with respect,
20 wants you to think that without the implied right of
21 action for damages and fees, whistle blowers are left out
22 in the cold. That is not true. The administrative remedy
23 -- it's not just about funding termination. 34 C.F.R.
24 106.3 says that the OCR may use any remedy that it deems
25 necessary. The OCR, as we say in our brief, has itself

1 touted its flexible approach to enforcement which
2 includes, among other things, as this Court noted in
3 Gebser, citing back to its earlier -- pardon me --
4 decision in North Haven, individualized relief in
5 appropriate circumstances. So the point, as Senator Bayh
6 himself noted on the floor of the Senate, is that it is
7 the threat of -- of funding termination. So while the OCR
8 is wielding the club of funding termination, they can
9 extract or leverage individualized relief in appropriate
10 cases.

11 JUSTICE SOUTER: Do we -- do we have any -- any
12 empirical evidence as to -- as to what they have thus
13 leveraged?

14 MR. NEWSOM: None that I am aware of, Your --
15 Your Honor, but --

16 JUSTICE SOUTER: The -- the other side says,
17 look, dead letter. What do we know about such life as
18 there may be in the letter?

19 MR. NEWSOM: Well -- well, I will, I assume,
20 perhaps foolishly, defer to the Solicitor General's office
21 to tell you what -- what the DOJ has and hasn't done.
22 What I can tell you is that -- that the DOJ manual that
23 the other side cites throughout its briefs expressly
24 encourages agencies, when enforcing these -- these things,
25 to leverage even damage awards on behalf of individual

1 claimants. So I can tell you that, as a matter of policy,
2 this is far from a dead letter.

3 JUSTICE SCALIA: You -- you don't concede the
4 point that it is the role of this Court to determine
5 whether agencies are inefficient or not --

6 MR. NEWSOM: Of course not.

7 JUSTICE SCALIA: -- and if they are inefficient
8 to -- to raise up private attorneys general to -- to fill
9 the void?

10 MR. NEWSOM: Of course not, Justice Scalia, and
11 -- and the Court knows very well from my brief that our
12 position is that when you're talking about implied rights
13 of action, this Court has made clear, in the cases leading
14 up to Sandoval, culminating in Sandoval, that these sorts
15 of policy considerations really are not relevant.

16 JUSTICE BREYER: All right. If they're not
17 relevant, do you think that the regulation which provides
18 -- do you think it's unlawful?

19 MR. NEWSOM: We do not contest the validity of
20 the regulation.

21 JUSTICE BREYER: Okay. If you don't contest the
22 validity of it and you think it's lawful, do you think
23 it's doing something other than interpreting 1681(a)?

24 MR. NEWSOM: Absolutely, Your Honor.

25 JUSTICE BREYER: What -- what is it doing?

1 MR. NEWSOM: It -- section 100.7(e), the
2 regulation upon which Jackson chiefly relies, we readily
3 concede is a valid, effectuating 902 regulation, but all
4 -- all it does by its text -- and its structure makes
5 clear all it does -- is to govern the internal processes
6 of official OCR investigations. It does not go further
7 than that.

8 This Court in Sandoval was very clear that it
9 was -- that it was only authoritative interpretations of a
10 statute's terms that can be enforced pursuant to that
11 statute's implied right of action.

12 Another point I want to make about the
13 administrative remedy. Justice Ginsburg asked whether
14 funds had ever been withdrawn, and even there, again, if
15 the answer is no, the point is not whether funds have been
16 withdrawn, but that as Senator Bayh himself noted, that
17 the threat of funds is where the heavy lifting is done in
18 administrative enforcement.

19 Another point about administrative enforcement
20 is whether or not there are sufficient resources. That,
21 obviously, was a valid concern in Cannon, given presumably
22 the inordinate number of complaints about core,
23 traditional discrimination. But as the other side has
24 made clear in its briefing in this case, at page 26 of the
25 petitioner's brief -- and then there's a brief filed on

1 behalf of the Southern Poverty Law Center that spins this
2 out in some detail -- there just aren't many of these
3 retaliation claims out there, either in the -- either --
4 either in the judicial system or at OCR.

5 JUSTICE O'CONNOR: Why is that, do you think?

6 MR. NEWSOM: Well, my -- I'm sorry.

7 JUSTICE O'CONNOR: Is it because no remedy is
8 available, or is it because there are just very few
9 instances giving rise to such?

10 MR. NEWSOM: Well, I think in all likelihood, it
11 is the latter. Certainly I would think that the Court
12 would presume -- would not presume ill of local school
13 districts and -- and even State universities, but would
14 presume that they are complying with, if not clearly
15 articulated law, certainly good public policy.

16 The second point is that what the -- the absence
17 of private actions for retaliation shows is that title
18 IX's remedial apparatus is kicking along just fine without
19 the implied right of action.

20 JUSTICE O'CONNOR: Do we decide this case on the
21 assumption that there was retaliation here by virtue of a
22 complaint of violation of title IX?

23 MR. NEWSOM: Certainly, Your Honor --

24 JUSTICE O'CONNOR: We should decide it on that
25 assumption?

1 MR. NEWSOM: You have to take as true, of
2 course, the facts as pledged in the -- as pleaded in the
3 complaint.

4 Another point I'd like to make briefly is about
5 the comparison to title VII. The other side wants you to
6 look very closely at title VII when you're -- whether it's
7 on the basis of sex or on the basis of such individual's
8 sex, but they want you to ignore title VII and the fact
9 that it very clearly and expressly deals with retaliation
10 in a separate subsection, a separate provision. And I
11 didn't -- I'll have to confess I didn't hear much during
12 the first argument. I had my head in my own book, but
13 what I did hear is Justice Souter referring to the -- the
14 -- an instance in which Congress has a choice of two
15 models for -- for constructing a statute, and it chooses
16 one over the other, and isn't it a reasonable inference to
17 allow Congress to make that choice. That's what happened
18 here.

19 JUSTICE GINSBURG: Like the choice it made in
20 1982, very spare statute. When Congress got to title IX,
21 it knew about Sullivan and so it -- this -- this statute
22 in its breadth and its simplicity bears a striking
23 resemblance to the old pattern in 1981 and 1982 and 1983.
24 So if you say to me, look at the closest model, it would
25 be that and not the more detailed civil rights legislation

1 that came in '64 and '65.

2 MR. NEWSOM: Well, if -- if I could answer in
3 two parts. First, to say that I think what was going on
4 in 1964 in the Civil Rights Act, obviously, you have
5 Congress in title VII addressing itself both to
6 discrimination and to retaliation separately; in title VI,
7 passed as part of the same piece of legislation,
8 addressing itself solely to discrimination. And to use
9 Justice Souter's analogy, in '72 Congress takes the title
10 VI model and not the title VII model.

11 Now, to get to your question specifically, I
12 think, about Sullivan is at the heart of your question,
13 Sullivan -- I think there are a number of problems with
14 the other side's reliance on Sullivan. First, with all
15 due respect to this Court, Sullivan itself is pretty
16 opaque. It certainly does not announce with flashing
17 lights a principle that every anti-discrimination
18 provision necessarily entails a subsidiary or corollary --

19 JUSTICE GINSBURG: It says if you're thrown out
20 of the club because you champion the rights of a black
21 man, you have a right to sue under this statute.

22 MR. NEWSOM: Even if I were to grant your
23 assumption of clarity in Sullivan, which Justice Harlan, I
24 presume, would not agree with -- he was left sort of
25 scratching his head trying to figure out what the Court

1 was trying to do. But even granting your assumption, if
2 1982 can be construed that way, that -- that construction
3 does not necessarily carry over to every anti-
4 discrimination provision. 1982, of course, uses different
5 language to begin with and, more importantly, is -- is
6 passed under Congress's power under the Thirteenth
7 Amendment, which is the broadest conceivable --

8 JUSTICE STEVENS: Yes, but it did construe the
9 word discrimination, didn't it?

10 MR. NEWSOM: No, sir. Discrimination is not
11 even in -- is not even in title -- rather, in 1982. So
12 the language is very different --

13 JUSTICE GINSBURG: On account of race is in it.
14 Right?

15 MR. NEWSOM: I'll have to confess I don't -- it
16 does say something like every person shall have the same
17 right as -- dot, dot, dot, as white persons. But so the
18 -- the language frankly is pretty different, and the more
19 fundamental point I'm trying to make is that even if
20 that's true for -- for that statute passed under that
21 constitutional power, here we are talking, as Justice
22 Kennedy made clear at the very outset of the argument
23 about a Spending Clause statute, where it is required that
24 conditions on the acceptance of Federal funds be express,
25 and it is not clear to me where the Birmingham Board would

1 have gotten its clear notice in this case. If you can
2 imagine --

3 JUSTICE GINSBURG: It seems to me they would get
4 it when Congress says, and here's the statute, very spare,
5 and agency, you get up guidelines, that any responsible
6 school board would say, well, we've got only one sentence
7 in the statute. We better look at the regulations to find
8 out what's required.

9 MR. NEWSOM: I agree, and -- and if -- and if
10 the Birmingham Board, which I trust it did, looked to the
11 regulation here, what it would have found is a regulation
12 not that clarifies the substantive scope of title IX, but
13 instead that -- that manages the internal operating
14 procedures for official agency investigations. So to be
15 sure, the Birmingham Board was on notice that it could not
16 retaliate in -- in the business of an official OCR
17 investigation, and if it did, it would be subject to
18 administrative enforcement, but it was -- it was not on
19 notice either of the fact that there was a generic anti-
20 retaliation prohibition, much less the fact that if it
21 violated any such nonexistent --

22 JUSTICE GINSBURG: But it's -- we're not talking
23 about the procedure, I mean, what procedural moves. What
24 must you do to comply? And it has in there you don't
25 retaliate. So you mean that a board could responsibly

1 take the position, well, the -- the regulations tell us we
2 don't retaliate, but when we're not faced with any agency
3 breathing down our neck, all we have is a teacher in front
4 of us, then we can retaliate? I mean, they must have
5 known the statute meant don't retaliate.

6 MR. NEWSOM: And -- and with respect, I think
7 there is a difference, particularly given the clear notice
8 requirements that this Court has -- has used in Spending
9 Clause cases between retaliation in the context of an OCR
10 investigation and retaliation generally, but -- I'm sorry.

11 JUSTICE GINSBURG: I -- I really don't get that.
12 If the rule is don't retaliate and if we investigate,
13 that's one of the things we're going -- that's going to be
14 on our checklist. But the substantive rule is don't
15 retaliate.

16 MR. NEWSOM: Justice Stevens, may I respond?

17 JUSTICE STEVENS: Yes.

18 MR. NEWSOM: Even granting your assumption,
19 Justice Ginsburg, what is painfully not clear is that the
20 -- is that the Birmingham Board would be subject to -- to
21 a private right of action for damages and fees even in --
22 in the event that there were some generally applicable
23 anti-retaliation provision.

24 JUSTICE STEVENS: Thank you, Mr. Newsom.

25 MR. NEWSOM: Thank you, Justice Stevens.

1 JUSTICE STEVENS: Mr. Dellinger, you have about
2 3 and a half minutes.

3 REBUTTAL ARGUMENT OF WALTER DELLINGER

4 ON BEHALF OF THE PETITIONER

5 MR. DELLINGER: I should make it clear that
6 we're not asking this Court to create or infer a new cause
7 of action. We're asking the Court to interpret the cause
8 of action that the Court itself recognized in Cannon v.
9 the University of Chicago, that was validated by Congress.
10 It was reaffirmed in the Court's opinion in Sandoval. And
11 when you look at the scope of that -- of that prohibition,
12 that cause of action, why would it not extend to
13 retaliation? The idea that you --

14 JUSTICE SCALIA: Other statutes do it
15 separately.

16 MR. DELLINGER: I understand.

17 JUSTICE SCALIA: Other statutes don't view the
18 one as -- as being incorporated in the other.

19 MR. DELLINGER: The practice of Congress has not
20 been consistent on incorporating express provisions
21 sometimes because of language differences, but there are
22 half a dozen major statutes that the courts of appeal have
23 consistently assumed included retaliation as part of
24 discrimination. Section 1981, section 1982, title VI,
25 1982 as determined by this Court, parts of the

1 Rehabilitation Act have all been construed that way.

2 And why would they not? The notion that you
3 have to admit Geraldine Cannon to the University of
4 Chicago Medical School, you can't discriminate against her
5 on the basis of sex, but then you could turn around and
6 expel her for complaining about your admissions policy
7 makes no sense.

8 In this case, relying upon the vagaries of what
9 any administration might do about enforcement is not
10 necessarily what Congress wanted, and that was this
11 Court's decision in Cannon. And it's reaffirmed it
12 frankly --

13 JUSTICE SCALIA: There are no vagaries in
14 private enforcement. Private attorneys general always act
15 in the interest of the whole polity. There are no
16 vagaries there.

17 MR. DELLINGER: Well, in this case, it has been
18 known to effectuate anti-discrimination laws in order to
19 bring them about by allowing people to step forward. The
20 last point they make is that even if there's a cause of
21 action, and even if the cause of action covers
22 retaliation, it cannot be brought by Coach Jackson because
23 he's not also the victim of the underlying discrimination.
24 That makes no sense in law or in logic.

25 If the captain of the boys' basketball team

1 joins with the captain of the girls' basketball team in a
2 supportive way to say, they're just not treating girls'
3 basketball equally and fairly, and they're both suspended
4 from their teams or dropped from the honor society in
5 retaliation, it makes no sense. Either they both have --
6 they've both been discriminated against on the basis of
7 sex because they're trying to rectify sex discrimination
8 or neither is.

9 And in this case, it's going to be critically
10 important that this valuable statute, which has meant so
11 much for athletic and academic opportunities for women, to
12 have people like Coach Jackson able to be confident that
13 they've got a right that they can enforce that will allow
14 them to come forward within the school itself and try to
15 rectify these anomalies in and under title IX.

16 Thank you.

17 JUSTICE STEVENS: Thank you, Mr. Dellinger.

18 The case is submitted.

19 (Whereupon, at 11:51 a.m., the case in the
20 above-entitled matter was submitted.)

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