

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LISA FITZGERALD, ET VIR. :

4 Petitioners :

5 v. : No. 07-1125

6 BARNSTABLE SCHOOL :

7 COMMITTEE, ET AL. :

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9 Washington, D.C.

10 Tuesday, December 2, 2008

11

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

15 APPEARANCES:

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

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

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	CHARLES A. ROTHFELD, ESQ.	
4	On behalf of the Petitioners	3
5	KAY H. HODGE, ESQ.	
6	On behalf of the Respondents	27
7	REBUTTAL ARGUMENT OF	
8	CHARLES A. ROTHFELD, ESQ.	
9	On behalf of the Petitioners	52
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (11:09 a.m.)

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

6 Mr. Rothfeld.

7 ORAL ARGUMENT OF CHARLES A. ROTHFELD

8 ON BEHALF OF THE PETITIONERS

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

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

13 JUSTICE GINSBURG: Could you raise the
14 podium?

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

18 JUSTICE STEVENS: That's enough.

19 MR. ROTHFELD: Okay.

20 JUSTICE STEVENS: We can't see you.

21 MR. ROTHFIELD: That -- that may be an
22 advantage, Your Honor.

23 (Laughter.)

24 JUSTICE GINSBURG: But we can hear you.

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

1 please -- please let me know.

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

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

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

25 CHIEF JUSTICE ROBERTS: Counsel, there is --

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

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

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

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

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

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

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

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

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

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

25 It specifically authorized the attorney

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 (Banging sound.)

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

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

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

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

7 JUSTICE GINSBURG: Spell that out -- spell
8 that out practically. I know you used --

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

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

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

1 Fitzgerald but of all female students in the school,
2 which I think --

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

7 MR. ROTHFELD: Well, I think --

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

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

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

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

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

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

23 JUSTICE GINSBURG: I still don't follow.
24 What disparate treatment? Did you have to have that
25 they treated girl's complaints one way and boy's

1 complaints another way?

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

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

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

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

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

20 MR. ROTHFELD: Excuse me, Your Honor?

21 JUSTICE BREYER: Is that request here?

22 MR. ROTHFELD: The discovery request?

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

1 MR. ROTHFELD: No. No. It --

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

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

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

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

21 MR. ROTHFELD: That is correct.

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

25 MR. ROTHFELD: That is exactly --

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

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

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

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

19 MR. ROTHFELD: Absolutely.

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

22 MR. ROTHFELD: That is -- that is absolutely
23 correct. The constitutional arguments were made on the
24 merits to the district court and to the court of
25 appeals. They were not addressed by either. Those

1 courts cut it short and threw the case out on conclusion
2 grounds.

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

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

24 JUSTICE GINSBURG: But we find that out on
25 remand.

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

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

5 MR. ROTHFELD: That's --

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

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

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

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

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

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

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

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

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

21 MR. ROTHFELD: They were relying on one case
22 in which the Court said that, in *Smith v. Robinson*, the
23 only time in 140 years that Section 1983 has been on the
24 books that this Court has ever said that Congress meant
25 to preclude its use to enforce a particular

1 constitutional right. And I think --

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

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

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

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

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

25 First there is the provision that I

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

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

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

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, of course,

1 Title IX is Spending Clause legislation, and that, under
2 our precedents, imposes certain limitations on how we
3 interpret it that would not be applicable under Section
4 1983.

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

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

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

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

1 to show a custom or practice.

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

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

24 I'll make sort of two additional points,
25 Your Honor. As I suggest, I think the direct evidence

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

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

25 The Court has certainly never presumed that

1 the creation of any statutory right or statutory remedy
2 bars the use of Section 1983 to enforce the
3 Constitution, as suggested by Justice Ginsburg's
4 question. The Court has only once in well more than a
5 century that Section 1983 has been on the books held
6 that availability of the constitutional remedy had been
7 precluded. As I say, Congress promptly responded by
8 providing that remedy.

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

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

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

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

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

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

18 MR. ROTHFELD: Issue preclusion. That's
19 right.

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

24 MR. ROTHFELD: I think, to the extent that
25 the suit was initially brought against the school under

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

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

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

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

11 MR. ROTHFELD: That's exactly correct.

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

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 MR. ROTHFELD: Thank you.

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

19 ORAL ARGUMENT OF KAY H. HODGE

20 ON BEHALF OF THE RESPONDENTS

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

23 Title IX provides for sex discrimination and
24 provides a remedy for sex discrimination in a broader
25 category of circumstances than the Equal Protection

1 Clause. Therefore, having Title IX preclude section
2 1983 Equal Protection claims does not deny petitioners
3 in this or any other case availability --

4 JUSTICE GINSBURG: Would you go over that
5 again? I didn't understand it. You said Title IX
6 provides --

7 MS. HODGE: Title IX --

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

10 MS. HODGE: Correct.

11 JUSTICE GINSBURG: Explain that to me.

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

25 JUSTICE GINSBURG: Give me an example.

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

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

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

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

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

1 having lost the issue of deliberate indifference before
2 the First Circuit, that finding of the First Circuit
3 precludes any further controversy between the parties in
4 this case.

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

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

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

1 added to it in the development -- have found that
2 Congress intended to add to the remedial scheme an
3 implied right of action.

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

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

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

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

25 MS. HODGE: No. I mean we are not arguing

1 -- we are arguing that some of those steps are
2 illustrations of sort of a -- the -- the scheme that was
3 created. But there is a remedial -- the -- the remedial
4 scheme leads to the potential loss of federal funding --
5 of --

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

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

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

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

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

2 JUSTICE BREYER: That's simple.

3 MS. HODGE: And I would point out that in
4 response to the Petitioners' argument today, they have
5 attempted to suggest that there may be some issues that
6 were not discovered; that were not, in fact, fully
7 reviewed by the court below.

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

18 And I suggest to you that that is exactly
19 the issue that -- that that is exactly the issue. The
20 issue is whether or not, if you look at the complaint,
21 the claim that is being brought under Title IX and the
22 claim that is being brought under Section 1983 in the
23 Constitution are virtually identical, which is a second
24 problem of the Smith test: If there is a comprehensive
25 remedial scheme. Again, it's a remedial scheme.

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

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

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

25 JUSTICE BREYER: Does a disparate-impact

1 claim violate section -- Title IX?

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

10 And the fact of the matter is, though, that
11 under the law as developed by this Court and the Equal
12 Protection Cause, the fact of the matter is that it
13 would not cover disparate impact, because this Court has
14 held that --

15 JUSTICE GINSBURG: Do you have any case in
16 all of Title IX that -- that fits that abstract picture
17 that you have just described? I mean you have to have a
18 pattern and practice of what -- a pattern and practice
19 of discrimination -- to get -- to get under the
20 Constitution or under 1983?

21 You have to have deliberate indifference to
22 what: To the gender harassment, to the gender
23 discrimination? So can you describe to me that --
24 anything, any Title IX case, that has a disparate
25 impact? We really didn't want a Feeney type of case.

1 We really didn't want this to happen but we had a test,
2 and it came out that way.

3 MS. HODGE: Well, I believe --

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

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

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

20 JUSTICE GINSBURG: On the basis of gender.

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

23 JUSTICE GINSBURG: And Feeney says it wasn't
24 on the basis of gender. It was on the basis that she
25 wasn't a veteran.

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

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

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

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

17 JUSTICE BREYER: If it's an individual,
18 under Title IX you can't bring the suit.

19 MS. HODGE: Correct.

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

22 MS. HODGE: Correct.

23 JUSTICE BREYER: Okay.

24 MS. HODGE: But --

25 JUSTICE BREYER: So your point then is --

1 and that's why I have had trouble with this case -- is
2 that if you look at the First Circuit opinion, it sort
3 of seems to say, "if there is a difference, of course
4 you can have a 1983 suit, but if there is no difference,
5 you can't." I mean, everybody here seems to agree to
6 that, I guess.

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

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

25 And once again, that -- that issue is not

1 before this Court. And having decided that they were
2 acting in the individual's official capacity, we would
3 argue therefore that the individual would not be sued,
4 because the claim and all of the facts --

5 JUSTICE BREYER: So you were saying if it's
6 an individual acting in his official capacity, you
7 cannot sue him under Title IX?

8 MS. HODGE: To the -- yes.

9 JUSTICE BREYER: Yes. Okay.

10 MS. HODGE: Yes.

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

17 MS. HODGE: Issue preclusion.

18 JUSTICE BREYER: They all have new names.

19 (Laughter.)

20 MS. HODGE: Okay.

21 JUSTICE BREYER: The -- the -- okay, so
22 that's your argument.

23 So why don't we just send it back, say
24 that's right; this suit is not precluded by 1983;
25 indeed, that's the only place can you bring it; it's not

1 precluded by Title IX, and now court, you go decide
2 whether claim preclusion exists, or whatever they call
3 it. Collateral estoppel, or -- you understand what I
4 mean.

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

12 With regard to sending this case back, we
13 argue, based upon the deliberative difference standard,
14 which I think is indisputably -- the standard falls
15 under Title IX, and the standard under the Equal
16 Protection Clause -- that that deliberative difference
17 standard and -- and the fact the First Circuit found
18 that -- that there was -- that the Barnstable School
19 Committee acted reasonably and without deliberative
20 difference, precludes -- there is no issue in
21 controversy anymore.

22 JUSTICE SCALIA: Yet the other side says
23 that there may be, and I don't know why we ought to get
24 into that. Why can't we just send it back and let them
25 figure that out? And -- and -- and decide what we took

1 this case to decide, namely, the split that now exists
2 in the Federal courts over whether Title IX precludes
3 the use of 1983. That is an important question. It's
4 why we took the case. Why can't we decide that issue
5 and then for all these loose ends, send it back to the
6 court of appeals?

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

10 JUSTICE SCALIA: He says there is an issue
11 in controversy, that's good enough for me.

12 (Laughter.)

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

18 CHIEF JUSTICE ROBERTS: So -- I'm sorry, so
19 you seem to be saying that they were right, that 1983
20 actions are not always precluded, depending on whether
21 there is a difference in the issues that are presented
22 or whatever.

23 So you should never say that Title IX
24 precludes an action under 1983. In fact, you should say
25 that sometimes the issues that are litigated under Title

1 IX may result in the fact that you don't have
2 available -- you don't get relief under 1983, but there
3 is still a cause of action.

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

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

18 MS. HODGE: I -- I believe that that would
19 be satisfactory. From our point of view because we
20 believe the issue preclusion applies that would be
21 satisfactory because we --

22 JUSTICE SCALIA: That -- but that doesn't
23 cover the situation in which a plaintiff says, I don't
24 want to proceed under Title IX; I want to proceed first
25 under 1983. Then there is going to be no question about

1 whether 1983 is -- is unavailable because of issue
2 preclusion. He is starting with 1983.

3 MS. HODGE: There is no question, but in
4 those circumstances then as to an institution --

5 JUSTICE SCALIA: What is your position on
6 that --

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

11 JUSTICE SCALIA: You can't proceed under
12 1983.

13 MS. HODGE: Cannot proceed under 1983.

14 JUSTICE SCALIA: So you are disagreeing.

15 MS. HODGE: Yes, we are. Yes, we are
16 disagreeing, and I would suggest that the difficulty
17 that this Court is having, or at least as I experience
18 it, the difficulty with regard to issue preclusion and
19 claim preclusion turns in this case on the fact that
20 this perhaps being a peer-on-peer harassment case --

21 JUSTICE STEVENS: Isn't it quite clear we
22 can forget about issue preclusion and assume as
23 Justice Scalia did, the client brought an action under
24 1983 and did not rely on Title IX at all, and just sued
25 the school board, you would say he can't do that?

1 MS. HODGE: Correct. Correct.

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

5 MS. HODGE: That is correct, except that as
6 we argue -- what we have argued before the Court is that
7 under Smith the question is, is there a comprehensive
8 remedial scheme, and we would argue that there is; but
9 then have you to determine whether the claims are
10 virtually identical; and we would argue that here the
11 claims are virtually identical.

12 JUSTICE GINSBURG: Wouldn't your reasoning
13 apply to, say, a race discrimination case in employment?
14 We have got title VII and you have 1981. Title VII has
15 a lot of accoutrements, a lot of text to go through;
16 1981 is plain and simple. So therefore, title VII ought
17 to preempt 1981, right? So you -- in the area of race
18 discrimination and employment, title VII would end any
19 access to 1981. It would be the same kind of argument,
20 wouldn't it?

21 MS. HODGE: I believe that -- that there is
22 that argument, but to be honest, I'm not in a position
23 right now to reflect on exactly -- I believe that that
24 would be certainly the direction, however, there are
25 unique aspects of race. And I believe that that is yet

1 another basis on which I would quarrel with the
2 Petitioner with regard to suggesting that Title VI
3 and -- and Title IX ought to be treated exactly the
4 same. The history of sex discrimination versus race
5 discrimination are quite different in scope.

6 JUSTICE GINSBURG: What does that have to
7 got to do with what you are arguing is that if you have
8 an elaborate mechanism, which you said you have under
9 Title IX, I think that is debatable? But that was
10 certainly the picture in Smith, and it's the picture in
11 Title VII, Title VII versus 1981. That -- that fits
12 your -- the -- your description, Title VII and 1981,
13 much better than Title IX and 1983, I think.

14 MS. HODGE: I guess I -- I don't agree. It
15 is our -- it is our view that 19 -- that in this
16 particular instance -- and I -- and I think I may have
17 misspoken if the view is, is that it's the
18 administrative schemes that get compared. I -- I
19 believe under Smith, the issue is whether or not there
20 is a comprehensive remedial scheme, and here you have
21 the remedy -- both an administrative remedy as well as a
22 private right of action, which we would argue should
23 preclude the 1983 claims.

24 Moreover, we would also look with regard to
25 the fact that this is a constitutional claim to the --

1 to Bivens -- to the line of cases under Bivens which we
2 cite in our brief, the fact that when Congress provides
3 a remedy for a particular area -- in a particular area,
4 that that remedy can preclude an independent action
5 which even is based on the Constitution. And we would
6 suggest that that would be -- that that is something
7 that we would urge this Court to consider --

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

15 MS. HODGE: Well, that is correct, except
16 that this Court has, in fact, applied its preclusion
17 doctrine by looking at whether or not Congress has made
18 any statement in the statute, then if you want to take
19 it statute to statute, then what you would be looking at
20 is you would be looking at essentially Rancho Palos
21 Verdes. And as -- as this Court did in -- when it
22 decided Rancho Palos Verdes, it remanded for
23 consideration communities of equity, which is a Title IX
24 case for reconsideration by, I believe it's the Eighth
25 Circuit under the Rancho Palos Verdes decision.

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

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

9 MS. HODGE: Exactly. There was no
10 constitutional claim in Rancho Palos Verdes. However,
11 this Court did cite Smith and did cite Smith in its
12 decision and -- and favorably so. But moreover, we
13 would argue that -- the question is really a different
14 -- comparing a statute to statute, which is Title IX to
15 section 1983. Congress allowed for actions in 1983,
16 Congress allows for actions under Title IX, or whether
17 or not you are looking at the issue of Title IX versus a
18 constitutional claim.

19 Now, I want to just make the point that
20 preclusion makes sense. Congress really did put the
21 focus in Title IX on the institution, and Congress is
22 also seeking to have equity of enforcement.

23 Further, as set for in the amici in support
24 of the Respondents' position, we would point out that if
25 section 1983 claims are not precluded, that it would

1 require the expenditure of funds by -- by recipients of
2 federal financial assistance on a variety of issues that
3 are totally unnecessary including qualified immunity.

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

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

13 JUSTICE STEVENS: Let me ask you one sort of
14 anomaly that keeps running through my mind in this case.
15 If you have two school boards, one of -- two schools,
16 state schools, one gets federal funds and the other does
17 not, does this preclude -- no 1983 remedy against one,
18 but there is a 1983 remedy against the other, that's
19 your view, isn't it?

20 MS. HODGE: It is exactly our view because
21 the recipients would be subject to the remedial scheme
22 set forth in Title IX.

23 JUSTICE STEVENS: Is it anomalous to think
24 it --

25 MS. HODGE: I don't think anomalous. I

1 believe the reverse is anomalous, because what you would
2 be suggesting if you do not preclude section 1983, you
3 would suggest that the recipient could have both the
4 1983 and a Title IX, whereas the nonrecipient would have
5 just section 1983.

6 JUSTICE STEVENS: Would it prove the same
7 facts in both cases? I mean, the case of it would
8 involve the same evidence, same alleged wrongdoing, and
9 then one case you can rely on 1983 and the other you
10 can't?

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

19 JUSTICE GINSBURG: I thought you just said
20 that a deliberate indifference under both statutes,
21 under 1983 and Title IX.

22 MS. HODGE: Your Honor, it is -- deliberate
23 indifference is the standard. However, in order to
24 prove a constitutional violation, you must also have the
25 specific intent for invidious discrimination that we --

1 that this Court has not imposed and did not impose in
2 Davis for violations of peer -- for peer-on-peer
3 harassment cases.

4 So, while the discrimination needs to be
5 intentional under Title IX, it is not required that
6 there be the specific intent to favor one over the other
7 or one protected status over the other.

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

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

16 JUSTICE GINSBURG: Response to what?
17 Response --

18 MS. HODGE: To a complaint about sexual
19 harassment. If the institution fails to respond
20 appropriately, the lower courts have found that that can
21 be gender discrimination under Title IX. They do not in
22 any way look to ensure that -- look to determine whether
23 or not there is that specific invidious discrimination
24 that we would argue this Court has imposed in its cases
25 under the Equal Protection Clause.

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

4 MS. HODGE: If you were a municipality and
5 your boss was harassing you, in a school setting by a
6 recipient of federal financial assistance?

7 JUSTICE GINSBURG: You were saying the
8 constitutional standard is different, so I am just
9 giving you a case. It could be a school, it could be
10 another municipal employment.

11 MS. HODGE: You would need to have the
12 specific intent, invidious intent that we believe is an
13 additional element and a much harder element to prove in
14 that situation.

15 CHIEF JUSTICE ROBERTS: Thank you, Ms.
16 Hodge. Mr. Rothfeld, you have five minutes, remaining.

17 REBUTTAL ARGUMENT OF CHARLES A. ROTHFELD

18 ON BEHALF OF THE PETITIONERS

19 MR. ROTHFELD: Thank you, Your Honor. I
20 will try not to use my extra ten seconds.

21 Two principal points. First on the proper
22 disposition of this case. The First Circuit's holding,
23 and I'm reading from 24a of the petition appendix: the
24 comprehensiveness of Title IX's remedial scheme
25 indicates Congress saw Title IX solely as vindicating

1 the constitutional right to be free from gender
2 discrimination perpetrated by educational institutions;
3 it follows that the plaintiff's equal protection claims
4 are precluded.

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

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

23 On the merits, very quickly. Again I think
24 we have to -- the gold standard of evidence as to
25 preclusion, we have expressed statutory text that deals

1 with it. Learned colleague suggested that the Attorney
2 General intervention provision somehow limited the cases
3 involving claims by schools that do not accept Federal
4 funds are somehow not subject to Title IX. That is not
5 the language of the provision. The provision says
6 whenever -- whenever it is claimed, it is initiated, in
7 a court of the United States asserting deprivation of
8 rights essentially on account of sex, the Attorney
9 General can intervene. Clearly Congress had it in mind
10 that there would be such claims, and this was enacted as
11 part of -- Title IX was enacted as part of the statute
12 that creates rights against discrimination by schools
13 receiving Federal funds. It makes no sense to suggest
14 that Congress --

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

17 MR. ROTHFELD: No. No.

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

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

1 JUSTICE SCALIA: They thought only in cases
2 where there is no Title IX action.

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

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

9 MR. ROTHFELD: I am suggesting that the
10 language says that whenever a claim of gender
11 discrimination is advanced under the Constitution, the
12 Attorney General can intervene. I think what we can
13 draw from that is Congress imagined, it said there would
14 be constitutional litigation involving gender
15 discrimination after they enacted the law. And because
16 that provision was added to the law as part of Title IX,
17 Congress surely contemplated that these suits would
18 involve gender discrimination involving schools.

19 The other sort of clear textual indication
20 which again, again my learned colleague has not really
21 discussed, is the Title VI history of enforcement prior
22 to the enactment of Title IX, which would absolutely --
23 that there are almost two such dozen decisions, which
24 this Court incorporated into the canon, which suggests
25 it is not only appropriate, it's realistic to think that

1 when Congress was aware of at the time it enacted Title
2 IX. Those decisions clearly indicated there was no
3 preclusion. The language of Title VI and Title IX is
4 identical. There can be no doubt, I think, that
5 Congress would have had it in mind, which, if it is not
6 appropriate in this context as well.

7 One final, very quick point. This is an
8 implied right of action; to suggest that Congress meant
9 to preclude the use of the Constitution to enforce --
10 preclude section 1983 to enforce the Constitution while
11 leaving it to the courts to imply the alternative
12 remedy, to devise the contours on and the limitations on
13 that remedy, would require -- hypothesize a remarkable
14 leap of faith on the part of Congress.

15 It also would require the most extravagant
16 and speculative reading of Title IX, to understand that
17 it's not only to include private rights of action but to
18 preclude the assertion of express rights of action
19 created by Congress by a language in another statute.

20 If there are no further questions, Your
21 Honor.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.
23 The case is submitted.

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

A	addition 9:20	23:15	31:15 48:5	attempted 33:5
able 43:14	additional 11:6	allows 48:16	53:21 55:25	attorney 6:25
above-entitled	11:13 12:18,18	alternative	56:6	8:2 20:1 37:24
1:12 56:25	14:12,15 15:12	56:11	appropriately	38:3,15 54:1,8
absolutely 5:14	21:20 23:24	amended 14:14	51:20	55:12
15:19,22 17:8	28:15 49:8	14:15	area 8:7 45:17	attorneys 19:10
19:5,17 22:5	52:13	Amendment 7:5	47:3,3	authorized 6:25
37:14 38:6	additive 37:3	22:14	arguable 22:23	availability 4:20
55:22	address 16:16	American 20:20	argue 27:10	23:2,10 25:6
abstract 35:16	16:18	20:21	30:23 39:15,16	28:3
academies 37:11	addressed 6:17	amici 48:23	39:21 40:3	available 7:22
accept 54:3	15:25	amicus 20:21	41:13 45:6,8	7:23 25:24
accepting 23:15	adds 23:11	analysis 25:11	45:10 46:22	26:1 36:19
access 10:21	adequate 33:15	and/or 33:16	48:4,13 51:24	41:11 43:2
35:6 45:19	adjudicated 9:3	38:8	argued 42:16	avenue 18:16
account 7:6,10	administrative	anomalous	45:6 53:9	aware 56:1
54:8	19:18 31:10,17	49:23,25 50:1	arguing 29:22	awkward 5:8
accoutrements	46:18,21	anomaly 49:14	31:22,25 32:1	a.m 1:14 3:2
45:15	administrator	answer 24:3	46:7	
act 20:10 29:10	28:17 29:11	40:11	argument 1:13	B
31:6	38:13	answers 6:18	2:2,7 3:4,7 8:6	back 17:25
acted 8:12 41:19	admissible 14:8	54:22	15:5 23:8	40:23 41:12,24
acting 39:23	admissions	antidiscrimin...	27:19 33:4	42:5 48:2
40:2,6	36:12,13 37:12	20:8	37:5,21 40:22	53:13
action 4:20 5:3,6	advanced 53:9	anymore 41:21	42:15 45:19,22	background
5:10,15,24 6:4	55:11	anyway 14:24	52:17	4:10
6:11,15 7:14	advantage 3:22	appeals 3:11 4:2	argumentation	Banging 9:21
7:23 12:19	affirm 39:17	4:7,18 11:23	14:12	bar 10:25 20:20
14:24 15:16	agency 31:12,23	11:23 15:25	arguments 15:3	50:17
17:13,14,16	ago 41:7	16:4,8,21	15:10,15,23	Barnstable 1:6
25:12,13 26:15	agree 4:4 6:3,5	21:21 24:4	arising 18:17,17	3:4 27:17
26:23 31:3,8,9	9:10 10:18	25:10 42:6	asked 10:24	29:21 41:18
31:24 42:24	15:15 39:5	APPEARAN...	asking 11:15	bars 25:2 40:14
43:3,14 44:23	46:14 54:19	1:15	aspects 45:25	based 35:7
46:22 47:4,9	air 5:1	appears 20:12	assert 7:4	36:18 41:13
54:16 55:2	AL 1:7	appendix 13:24	asserting 26:5	47:5
56:8,17,18	allegation 10:17	41:8 52:23	54:7	basic 17:4
actions 22:8	allegations 8:3	applicable 22:3	assertion 14:7	basis 11:15
26:8 33:15	allege 9:20 26:3	29:24	18:7,16 20:24	15:12 28:13
42:20 43:11	alleged 9:15	applied 4:18	21:7 56:18	32:10 36:20,21
48:15,16	38:14 50:8	24:6 47:16	assistance 32:8	36:22,24,24
activities 35:7	allow 21:6 22:8	applies 43:20	34:14,19 44:9	46:1
actors 38:10	34:15 49:8	apply 39:9,9	49:2 52:6	bears 6:11
acts 23:18	allowed 20:24	45:13 54:16	Association	behalf 1:16,18
add 19:6 31:2	37:3 48:15	applying 47:11	20:20	2:4,6,9 3:8
added 14:16	55:8	approach 53:21	assume 44:22	27:17,20 52:18
31:1 55:16	allowing 8:2	appropriate	assure 10:1	behaved 12:4

believe 29:20 30:10 32:20 33:1 35:8,8,9 36:3,8,15,22 37:1,20 41:5 43:4,18,20 45:21,23,25 46:19 47:24 50:1,11,17 52:12	20:20,21,22 47:2 bring 26:8 38:18 40:13,25 broad 28:19 37:7 broader 19:12 27:24 37:7 brought 11:4 26:25 27:2 33:21,22 38:14 44:23	28:22,22 30:8 38:2,4,16 47:1 50:7 51:3,12 51:24 54:2 55:1 category 27:25 cause 5:3,5,9,15 6:4 14:23 15:16 26:15 35:12 43:3 54:16 century 25:5 cert 15:2 53:20 certain 22:2 39:7 certainly 12:12 12:13 24:21,25 45:24 46:10 53:14,17 challenging 6:23 7:10 CHARLES 1:16 2:3,8 3:7 52:17 Chief 3:3 4:25 7:13 9:24 21:25 22:7 26:7,20 27:14 27:16,21 31:22 42:18 43:7 47:8 52:15 56:22	50:12 circumvent 22:8 cite 20:19 47:2 48:11,11 cited 30:8 cites 20:20,22 civil 8:6 20:10 20:21 31:19 claim 8:14,14 9:5,8,10 11:4 12:6,8,9 15:7 16:9,12,13,15 16:17 26:17 27:1,2,3 30:11 33:11,21,22 35:1 40:4,15 41:2,11 44:19 46:25 48:8,10 48:18 53:6 55:4,7,8,10 claimed 54:6 claiming 32:9 claims 8:24 9:2 16:6,19 18:7 18:12,16 20:25 21:1,7,8 24:22 25:24 26:13 28:2 30:21 34:2,7,16 43:15 45:9,11 46:23 48:25 49:8 53:3,7,8 53:19 54:3,10 classic 49:12 clause 22:1 28:1 28:14,15 32:17 33:14 41:16 51:25 clear 5:19 6:7,8 6:18 7:25 35:3 44:21 55:19 clearly 23:21 28:21,22 54:9 56:2 client 44:23 collapsed 30:18 collateral 27:5	40:15 41:3 colleague 54:1 55:20 color 20:11 come 36:9 48:1 coming 31:12 Committee 1:7 3:5 27:18 29:22 41:19 common 25:15 commonplace 53:15 communities 47:23 compared 46:18 comparing 48:14 compelling 4:17 complaint 9:15 9:15,19 10:3 10:17,19,20 11:5 14:14 29:12 33:20 42:15 51:18 complaints 8:13 10:4,12,13 12:18,25 13:1 13:16 complement 24:23 complicated 30:14 comprehensive 30:23,24 33:24 45:7 46:20 comprehensiv... 52:24 concerned 22:16 concerning 12:17,18,19 concluded 25:14 conclusion 14:9 14:10 16:1 37:4 conclusively 4:13 conduct 8:15 9:8
belt 21:20 benefit 32:11 benefits 10:22 35:6 36:19 better 11:22 46:13 beyond 16:9 17:17 20:6,7 24:3 bit 5:1 Bivens 47:1,1,10 blanket 55:5 blatant 23:18 board 12:4 44:25 boards 49:15 books 18:24 25:5 borrowed 20:9 boss 52:2,5 Boston 1:18 boys 10:13,14 13:15,16 29:14 29:15 boy's 12:25 Breyer 11:3,8 11:12 12:1,13 13:14,18,21,23 14:2 17:10 18:1,10 32:6 32:21 33:2 34:25 38:17,20 38:23,25 40:5 40:9,11,18,21 brief 14:19 15:4	bullying 10:13 bus 12:20 business 47:9 <hr/> C C 2:1 3:1 call 41:2 Cannon 36:11 canon 55:24 capacity 39:24 40:2,6,13 case 3:4,11 4:2 5:17 6:19 8:10 8:11 9:4,12 12:2,2 13:8 14:13,16 15:10 16:1,4,5,9 17:7 17:12,17,25 18:19,21 21:16 22:24 24:8,21 26:23 28:3 29:3,23 30:4,7 30:14 33:12 35:15,24,25 36:5,11,12 37:25 38:11 39:1,8,20 41:12 42:1,4 44:19,20 45:13 47:24 48:1 49:4,5,14 50:7 50:9 52:3,9,22 53:12,13,14 56:23,24 cases 20:23 24:8	century 25:5 cert 15:2 53:20 certain 22:2 39:7 certainly 12:12 12:13 24:21,25 45:24 46:10 53:14,17 challenging 6:23 7:10 CHARLES 1:16 2:3,8 3:7 52:17 Chief 3:3 4:25 7:13 9:24 21:25 22:7 26:7,20 27:14 27:16,21 31:22 42:18 43:7 47:8 52:15 56:22 choose 29:14 chose 21:16 circuit 9:4 17:7 17:11 18:14,14 30:2,2 33:8,10 34:3 38:9 39:2 39:17,23 41:7 41:17 47:25 48:2 Circuit's 52:22 circumstance 32:14,17 circumstances 27:25 28:19 30:15 31:16 37:15 44:4	circumvent 22:8 cite 20:19 47:2 48:11,11 cited 30:8 cites 20:20,22 civil 8:6 20:10 20:21 31:19 claim 8:14,14 9:5,8,10 11:4 12:6,8,9 15:7 16:9,12,13,15 16:17 26:17 27:1,2,3 30:11 33:11,21,22 35:1 40:4,15 41:2,11 44:19 46:25 48:8,10 48:18 53:6 55:4,7,8,10 claimed 54:6 claiming 32:9 claims 8:24 9:2 16:6,19 18:7 18:12,16 20:25 21:1,7,8 24:22 25:24 26:13 28:2 30:21 34:2,7,16 43:15 45:9,11 46:23 48:25 49:8 53:3,7,8 53:19 54:3,10 classic 49:12 clause 22:1 28:1 28:14,15 32:17 33:14 41:16 51:25 clear 5:19 6:7,8 6:18 7:25 35:3 44:21 55:19 clearly 23:21 28:21,22 54:9 56:2 client 44:23 collapsed 30:18 collateral 27:5	40:15 41:3 colleague 54:1 55:20 color 20:11 come 36:9 48:1 coming 31:12 Committee 1:7 3:5 27:18 29:22 41:19 common 25:15 commonplace 53:15 communities 47:23 compared 46:18 comparing 48:14 compelling 4:17 complaint 9:15 9:15,19 10:3 10:17,19,20 11:5 14:14 29:12 33:20 42:15 51:18 complaints 8:13 10:4,12,13 12:18,25 13:1 13:16 complement 24:23 complicated 30:14 comprehensive 30:23,24 33:24 45:7 46:20 comprehensiv... 52:24 concerned 22:16 concerning 12:17,18,19 concluded 25:14 conclusion 14:9 14:10 16:1 37:4 conclusively 4:13 conduct 8:15 9:8

Congress 4:13 4:17,23 5:2,14 5:17 6:9,10,13 6:16,20 7:7,11 7:25 18:24 19:4,7,23 20:10,14 21:4 21:9,12,16 22:12 23:8,13 23:20 24:16 25:7,16,22 31:2,5 34:9,11 47:2,11,14,17 48:15,16,20,21 52:25 54:9,14 54:23 55:5,13 55:17 56:1,5,8 56:14,19 congressional 4:7,9 5:19 7:18 24:10 consequence 43:10 consequently 36:15 consider 4:16 34:18 47:7 consideration 21:21 47:23 considerations 4:12 considered 19:19 Constitution 4:6 4:15 7:6 23:3 25:3 28:9 29:19,25 33:23 35:20 47:5 55:11 56:9,10 constitutional 4:24 6:23 7:9 8:14,14 9:8 11:25 15:23 16:13,17 18:7 19:1 20:3 22:13,20,21 23:12 24:12,22	25:6 26:6 28:21,24 30:21 37:18 46:25 48:8,10,18 50:24 52:8 53:1,7,8 54:24 55:14 construction 21:11,14 construed 21:6 23:4 construing 47:13 contemplated 6:22 7:8 55:17 contemplates 20:2 context 56:6 continued 6:22 8:3 20:2 contours 56:12 controversy 30:3 41:21 42:8,9,11 correct 14:21 15:23 17:9 22:5 27:11 28:10 37:14 38:19,22 45:1 45:1,5 47:15 coterminous 24:24 counsel 4:25 27:14 56:22 country 21:6 couple 22:11 course 5:2 7:21 17:21,23 21:25 39:3 53:11 court 1:1,13 3:10,11 4:2,7 4:18 5:23,25 6:4 7:3,16,17 8:11 11:23 15:6,8,9,24,24 16:3,7,21 17:23 18:22,24	20:5,13 21:11 21:21 23:9 24:2,4,14,25 25:4,10,14,18 25:21 27:12,22 28:16,18 29:5 30:9,25 31:7 31:12 32:16 33:7 35:11,13 37:6,16 39:16 39:16 40:1 41:1 42:6,8 44:17 45:6 47:7,16,21 48:2,2,11 51:1 51:24 53:10,15 53:22 54:7 55:24 courts 6:14 11:22 16:1 17:25 20:24 23:5 42:2 51:20 53:9 56:11 Court's 19:7 24:7 34:21,21 53:18 cover 35:13 43:23 covered 35:8 37:13 38:2,5,7 44:9 covers 28:18 create 6:10 created 22:18 32:3 56:19 creates 24:16 54:12 creation 24:9 25:1,25 custom 8:17 23:1 cut 16:1 <hr/> D <hr/> D 3:1 Davis 29:5 51:2	dead 25:19 deals 37:22 39:21 53:25 dealt 36:12 debatable 46:9 Debra 29:22 December 1:10 decide 15:6 17:7 17:24 41:1,6 41:25 42:1,4 43:13 45:4 53:12,18 decided 16:4,14 16:22 20:23 29:4 38:7 40:1 47:22 deciding 53:20 decision 4:4 19:7 21:2 24:7 25:9,10 33:10 34:21,22 41:8 47:25 48:12 decisionmaking 29:15 43:6 decisions 20:17 20:19 55:23 56:2 declined 12:22 14:6 defendant 32:15 39:19 defendants 14:15 26:22 33:14 defense 27:5 definition 5:20 22:15 deliberate 8:15 9:5,16 29:5,9 29:10,23 30:1 30:15,17 35:21 50:20,22 51:15 deliberately 51:14 deliberative 41:13,16,19 denial 35:6	denied 10:21 32:11 36:18 deny 28:2 Department 31:19 depending 42:20 deprivation 7:4 54:7 derived 24:7 describe 35:23 36:4 described 35:17 description 46:12 designed 23:21 detailed 18:19 determination 8:11 determine 45:9 51:22 determined 35:5 48:2 deterrence 23:11 deterring 23:12 develop 13:14 14:11 developed 10:11 12:21 13:11 35:11 development 31:1 devise 56:12 difference 36:16 39:3,4,11 41:13,16,20 42:21 different 8:20 8:23 11:16 13:11 14:17 26:16,21,21 30:7 31:7 46:5 47:10,13 48:13 52:8 differently 48:3 difficulty 44:16
---	--	--	--	---

44:18 direct 4:17 22:12 23:25 direction 14:12 14:17 45:24 directly 20:9 23:5 disagree 6:13 disagreeing 44:14,16 disciplinary 12:19 disciplining 49:10 discovered 33:6 discovery 11:13 11:15 12:17 13:12,22 14:8 discriminate 29:14 discrimination 4:22,24 6:24 7:10 8:4 10:22 11:6 12:4 18:8 18:17 20:3,25 21:1,8,24 23:19,23 27:23 27:24 28:9,13 28:16 32:12 34:13 35:4,9 35:19,23 36:9 37:5,19 45:13 45:18 46:4,5 50:25 51:4,9 51:11,21,23 53:2 54:12,25 55:4,11,15,18 discussed 53:10 55:21 discussion 16:10 24:15 dismiss 12:9 15:7 dismissal 13:10 disparate 10:11 12:21,24 35:13 35:24	disparate-imp... 34:25 36:12 disposition 52:22 53:11 dispositive 21:15 24:2 disregarded 4:8 distinction 23:7 district 8:12 11:14 15:24 diverse 36:6 doctrine 47:17 doubt 56:4 dozen 20:23 55:23 draw 55:13 dropped 20:10 due 42:13 D.C 1:9,16 <hr/> E E 2:1 3:1,1 earlier 24:15 earliest 13:9 easier 50:14 education 10:22 31:6,19 educational 53:2 effect 23:11,15 25:21 31:23 36:13 Eighth 47:24 either 15:25 38:4 elaborate 19:3 19:18 31:5 46:8 element 52:13 52:13 elementary 37:12 elements 9:9 26:15 27:4 employment 45:13,18 52:10 enacted 6:20 7:8	7:19 22:14 23:14,21 47:14 54:10,11 55:15 56:1 enactment 20:4 20:23 55:22 ended 16:10 ends 42:5 enforce 4:6,15 4:21,24 8:3 18:25 24:11 25:2,13 56:9 56:10 enforcement 34:16 48:22 55:21 ensure 51:22 entire 11:21 entirely 4:8 8:6 14:23 entities 34:20,23 equal 7:4 10:21 15:17 27:25 28:2,13,14 32:16 33:11,14 35:6,11 41:15 51:25 53:3 equitable 34:17 equity 47:23 48:22 error 17:4 errors 4:3 ESQ 1:16,18 2:3 2:5,8 essence 29:21 essentially 30:18 36:11 41:8 47:20 54:8 established 34:9 estoppel 27:5 40:15 41:3 53:6 ET 1:3,7 ethereal 36:16 evaluation 28:24 evasion 22:16,17	everybody 39:5 evidence 4:17 14:8,9 19:22 22:12 23:25 50:8 53:24 evolution 4:10 exact 18:2 exactly 14:25 26:2 27:11 33:18,19 45:23 46:3 48:9 49:20 example 10:9,12 13:12 28:25 29:1 37:11 38:13 excluded 32:10 exclusive 18:15 25:17 excuse 3:11 13:20 51:10 exemptions 39:10 existence 25:25 existing 24:18 exists 41:2 42:1 expand 21:23 23:22 expectation 21:13 expected 6:14 20:14 expenditure 49:1 experience 3:16 44:17 experienced 33:17 Explain 28:11 explored 10:11 express 56:18 expressed 19:22 53:25 expressly 5:15 6:10 7:25 20:2 extent 9:2,7,9 26:12,13,24	27:4 extra 9:25 52:20 extravagant 56:15 <hr/> F facilitate 8:1 fact 7:9 13:15 14:23 30:25 31:17,18,20 33:6,9 35:10 35:12 36:8,11 37:6,23 38:2 38:14 41:17 42:16,24 43:1 43:16 44:19 46:25 47:2,16 54:23 facts 11:9 17:11 40:4 50:7 factual 30:17 37:4 fails 51:19 failure 33:15 fair 27:10 faith 56:14 falls 41:14 far 12:7 13:4 24:5 favor 13:17 51:6 favorably 10:13 13:16 48:12 federal 9:7 23:16 32:4,8 34:14,18 42:2 44:8,9 49:2,16 52:6 54:3,13 Feeney 28:17 35:25 36:5,23 50:16 fees 19:10 female 11:1,4 figure 41:25 final 56:7 financial 34:14 34:19 44:9 49:2 52:6
--	--	---	--	---

find 16:24 17:1	fundamental	26:12	38:12 44:20	41:5 50:22
finding 12:3,5	4:3 26:6	girls 10:14,15	49:4,6 51:3,12	52:19 56:21
30:2,16	funding 32:4	13:16 29:15,15	51:19	hope 9:22 39:16
first 4:4 5:13	39:10	girl's 12:25	harder 22:23	hopped 14:13
6:20 9:4,19	funds 23:16 49:1	give 9:24 12:14	52:13	hypothesize
12:14 17:7,11	49:16 54:4,13	28:25	head 23:19	56:13
18:14,14 19:25	further 10:11	given 22:24	hear 3:3,24	
22:11 30:2,2	27:12 30:3	giving 52:9	27:17	I
31:12 33:8,9	41:11 48:23	glaring 37:10	held 25:5 30:9	idea 17:15
34:3 38:9 39:2	56:20	go 11:14 24:2	32:15,16 35:14	identical 9:2,10
39:17,22 41:7	futile 14:11	25:18 28:4	high 37:12	15:4 20:9
41:17 43:24		30:5 37:4 41:1	higher 50:17,18	33:23 34:2,4
52:21,22	G	45:15 53:7	highly 37:18	45:10,11 56:4
fits 35:16 46:11	G 3:1	goes 7:21	history 46:4	ignored 21:21
Fitzgerald 1:3	gender 4:21	going 8:25 16:17	55:21	ignoring 24:6
3:4 10:21 11:1	7:10 8:4 18:7	16:18 21:14	hockey 11:5	illustration
five 52:16	18:16 20:3	31:11 43:25	Hodge 1:18 2:5	37:21
fixed 34:12	32:10 35:8,22	47:12 49:7	27:16,19,21	illustrations
focus 14:22	35:22 36:18,20	gold 53:24	28:7,10,12	32:2
48:21 49:5	36:21,22,24	good 42:11	29:1,8,20	imagine 32:7,9
focused 34:12	51:9,11,21	gotten 43:12	30:10 31:14,25	32:14,18,20,21
focusing 9:5	53:1 54:24	granted 12:10	32:19 33:1,3	32:22,24
follow 8:5 12:23	55:4,10,14,18	13:10 15:2,2,7	35:2 36:3,8,21	imagined 55:13
followed 14:10	general 7:1,18	15:9 53:21	37:1,14 38:19	immediately
following 35:3	8:2 10:20	greatly 23:11	38:22,24 39:15	25:18
37:8 39:18	11:20 20:1	grounds 16:2	40:8,10,17,20	immunity 22:25
follows 53:3	37:4,24 38:4	growing 9:8	41:5 42:7,13	49:3
forget 44:22	38:15 54:2,9	guess 5:11 9:17	43:4,18 44:3,7	impact 35:13,25
forth 15:17	55:12	18:2 26:21	44:13,15 45:1	36:6 37:2
49:22	generally 10:4	39:6 43:11,15	45:5,21 46:14	implied 4:20 5:7
fortiori 29:18	generic 9:20	46:14	47:15 48:9	7:23 31:3,9
forward 53:8	Ginsburg 3:13		49:20,25 50:11	56:8
found 28:16	3:24 8:5 9:14	H	50:22 51:10,18	imply 56:11
30:25 31:1	10:7,16 12:23	H 1:18 2:5 27:19	52:4,11,16	implying 7:14
34:3 37:16	13:4 16:24	hand 22:18	Hogan 37:16	47:9
39:23 41:8,17	17:3,6 18:18	Handicapped	38:7	important 34:9
51:20	19:2,9,17	31:6	holding 52:22	34:18 42:3
Fourteenth 7:5	20:16 22:21	happen 12:15	53:5,7	49:5
22:14	26:16 27:6,9	36:1	honest 45:22	impose 31:21
framework	28:4,8,11,25	happened 36:7,9	Honor 3:12,17	51:1
25:24 26:5	29:6 30:5 31:4	happens 12:2	3:22 5:13 6:2	imposed 51:1,24
free 53:1	35:15 36:4,20	harasser 38:14	9:2,18 10:2,10	imposes 22:2
front 14:3,4	36:23 37:9	harassing 52:3,5	11:19 13:7,20	impossible
17:12,17 18:5	45:12 46:6	harassment 9:7	22:11 23:25	32:13
fulcrum 25:10	48:7 50:19	10:24 13:6	27:13 30:10	improvidently
full 27:10	51:8,16 52:1,7	16:9 29:4	32:19 36:10	12:10 15:7
fully 33:6	Ginsburg's 25:3	33:16 35:22	37:15 39:18	incident 8:17

13:5 include 34:19,20 34:20 56:17 included 10:23 includes 37:6 including 49:3 inconceivable 23:20 inconsistent 24:20 incorporated 55:24 independent 47:4 indicated 56:2 indicates 52:25 indication 5:19 55:19 indicia 4:8 indifference 9:6 9:16 29:5,9,10 29:23 30:1,16 30:18 35:21 50:20,23 51:15 indifferent 51:14 indisputably 41:14 individual 8:16 14:15 22:24 23:3,6,10 27:2 35:7 36:18 37:2 38:15,17 39:12,19,23 40:3,6,12 individuals 10:5 26:23 36:14 38:9 individual's 40:2 infer 25:15 initially 26:25 initiated 7:3 54:6 injunctive 10:24 instance 46:16 instances 28:23	institution 8:16 22:25 23:6 32:8 34:8,13 38:5 39:12 44:4,8 48:21 49:9 51:13,19 institutional 34:14 39:22 institutions 37:17 38:6 53:2 insulate 23:16 intended 5:23 6:14 8:1,1 20:14 23:9 25:16 31:2 intent 4:7,9 5:19 5:25 6:8 7:18 24:11 28:20 29:13,14 50:16 50:25 51:6 52:12,12 intention 21:13 37:25 intentional 8:15 12:3 28:15 37:19 51:5 intentionality 50:18 intentionally 34:11 interfere 49:9 49:12 interpret 22:3 interpreted 20:15 intervene 7:1 8:2 38:4,16 54:9 55:12 intervention 54:2 intrude 49:9 invented 5:24 6:4 invidious 50:25 51:23 52:12 involve 28:19,22	50:8 55:18 involved 19:18 25:12 36:11 37:25 44:8 involving 54:3 54:24 55:14,18 issue 8:22 9:12 19:9 26:17,18 30:1,6,13,15 33:9,19,19,20 37:5 39:25 40:17 41:20 42:4,7,9,10 43:9,20 44:1 44:18,22 45:2 45:4,4,4 46:19 48:3,17 53:6 issues 27:10 33:5 42:21,25 43:16 49:2 53:16 IX 4:5,14,18 5:3 5:15,23 6:15 6:16,20 7:8,15 7:19,23 8:25 9:5 16:6,9,12 16:15,20,20 18:3,6,11,15 19:20,22 20:4 20:8,12,14,23 21:1,4,23 22:1 22:9,14,19 23:4,14,19 24:22 26:9,23 27:1,3,23 28:1 28:5,7,12,18 29:18,24 30:7 32:15 33:21 34:10 35:1,4 35:16,24 36:5 36:10 37:7,13 37:22,23 38:18 39:9 40:7 41:1 41:15 42:2,23 43:1,24 44:10 44:24 46:3,9 46:13 47:23	48:14,16,17,21 49:22 50:4,14 50:21 51:5,21 52:25 54:4,11 54:16 55:2,16 55:22 56:2,3 56:16 IX's 4:20,21 52:24 <hr/> J <hr/> Jacqueline 10:21,25 33:17 joint 13:24 judge 11:14,15 judicial 21:10 21:13 Justice 3:3,13 3:18,20,24 4:25 5:22 6:3 7:13 8:5 9:14 9:24 10:7,16 11:3,8,12 12:1 12:13,23 13:4 13:13,18,21,23 14:2,18,22 15:1,13,20 16:24 17:3,6 17:10 18:1,10 18:18 19:2,9 19:17 20:16 21:25 22:7,21 25:3,20 26:7 26:12,16,20 27:6,9,14,16 27:21 28:4,8 28:11,25 29:6 29:17 30:5 31:4,22 32:6 32:21 33:2 34:25 35:15 36:4,20,23 37:9 38:17,20 38:23,25 40:5 40:9,11,18,21 41:22 42:10,18 43:7,22 44:5	44:11,14,21,23 45:2,12 46:6 47:8 48:7 49:13,23 50:6 50:12,19 51:8 51:16 52:1,7 52:15 54:15,18 55:1,6 56:22 <hr/> K <hr/> KAY 1:18 2:5 27:19 keeps 49:14 KENNEDY 6:3 kind 5:8 8:17 10:17 43:7 45:19 knew 7:11 21:5 21:17 know 4:1 10:8 17:10,16,18,19 17:21 20:5 23:17 41:23 42:16 47:10 <hr/> L <hr/> language 7:25 15:4 18:14 19:12 20:7,9 21:4,5,10,12 21:17 38:1 41:6 54:5 55:10 56:3,19 Laughter 3:23 40:19 42:12 law 16:20 35:11 55:8,15,16 lawsuit 15:21 26:10 lead 14:8 leads 32:4 34:4 leap 56:14 learned 54:1 55:20 learning 3:16 leaves 24:3 leaving 37:10
--	--	--	---	---

56:11 led 35:5 legal 17:4 30:17 legislation 7:20 7:21 19:13 22:1 legislative 4:11 7:25 21:10,22 24:1 letter 25:19 level 50:18 liability 23:3,11 23:17 33:13 41:10 Liberties 20:21 limitations 5:4,9 17:15 22:2,9 56:12 limited 10:23 25:13 32:23 54:2 line 47:1 LISA 1:3 litigated 42:25 litigation 6:23 7:1,9,11 8:3 22:13 54:24 55:14 little 5:1 look 5:25 28:21 33:9,20 39:2 40:12 42:14,15 46:24 51:22,22 looked 7:17 looking 33:10 47:17,19,20 48:17 loose 42:5 lose 8:24,25 15:20 26:9 29:17,18 losing 17:6 loss 32:4 lost 30:1 lot 8:7 45:15,15 lower 17:25 23:4 51:20	<hr/> M making 37:6 manifest 7:18 21:22 manner 49:12 51:14 Mass 1:18 Massachusetts 28:17 50:16 matter 1:12 4:6 5:20 11:20 16:13,19 18:11 24:4 25:15 30:17,17 35:10 35:12 56:25 mean 4:14,22 7:17 11:3,5 17:13 19:23 31:25 34:6 35:17 39:5 41:4 50:7 55:7 means 24:23 meant 4:23 5:18 18:24 23:14 25:22 39:13 56:8 mechanism 19:3 31:11 46:8 mention 21:19 mentioned 13:13 20:1 merits 8:19 15:6 15:24 16:15,18 16:23 53:23 Michigan 34:22 military 37:11 mind 4:18 16:21 22:12 23:20 49:14 54:9,23 56:5 minutes 52:16 misconduct 10:5 Mississippi 37:16,20 38:7 misspoken 46:17 modify 3:25	moment 41:7 monitors 12:20 motion 13:10 municipal 52:10 municipalities 34:19 municipality 52:2,4 myriad 20:19 <hr/> N N 2:1,1 3:1 names 40:18 national 20:11 nearly 34:16 necessarily 21:17 24:10 38:1 need 24:2 52:11 needs 20:5 29:13 51:4 negated 22:22 never 3:15 24:12 24:25 42:23 nevertheless 39:22 new 21:12 24:9 24:9,16,16 25:12,12,16,17 25:23,25 26:1 26:3,10 40:18 nonrecipient 50:4 number 5:12 11:18 31:20 <hr/> O O 2:1 3:1 obvious 23:18 32:22 34:17 obviously 12:2 occur 36:6 odd 43:7 offer 33:12,12 33:13 offered 41:10 Office 31:19	official 27:6 39:24 40:2,6 40:13 Oh 37:14 54:18 55:6 okay 3:19 32:9 38:23 40:9,20 40:21 old 8:22 once 25:4 39:25 open 15:18 opinion 25:21 39:2,8,17 41:7 opportunity 27:10 37:24 opposition 14:20 15:5 oral 1:12 2:2 3:7 27:19 order 29:12 50:23 ordinary 4:8 origin 20:11 ought 5:22 41:23 45:16 46:3 outcome 4:13 outside 25:23 26:4 overlap 24:17 overlapping 8:7 18:12 24:12 <hr/> P P 3:1 PAGE 2:2 Palos 24:8 25:9 25:11 47:20,22 47:25 48:8,10 parallel 27:2 parenthetical 19:13 parenthetically 19:6 part 48:4 54:11 54:11 55:16 56:14	participate 37:3 participating 32:11 participation 36:19 participatory 35:7 particular 11:9 18:25 29:2,12 33:11 34:9 46:16 47:3,3 parties 30:3 passed 37:23 path 50:14 pattern 8:18 35:18,18 peer 51:2 peer-on-peer 9:6 16:9 29:3 33:16 38:12 44:20 49:4,6 51:2,12 percent 35:3 perfect 28:20 permit 23:5 perpetrated 53:2 personal 23:17 Personnel 28:16 perverse 23:15 petition 52:23 Petitioner 37:22 46:2 petitioners 1:4 1:17 2:4,9 3:8 28:2 33:4,12 52:18 phrase 20:11 picture 35:16 37:8 46:10,10 place 40:25 placed 25:23 plain 8:22 45:16 plaintiff 27:7,9 43:23 plaintiffs 25:18 26:3 33:13
--	---	--	---	---

<p>53:19 plaintiff's 53:3 play 11:5 please 3:9 4:1,1 27:22 podium 3:14 point 6:7 9:10 14:14 15:11 16:11 19:14,21 22:7 26:12 30:20 33:3 34:17 36:10 38:25 43:19 48:19,24 53:10 56:7 pointed 25:20 points 4:12 5:12 9:18 11:19 23:24 52:21 policies 36:13,13 policy 35:5 policymakers 23:16 position 29:21 37:5 44:5,7 45:22 48:24 54:20 positive 20:5 positively 24:19 possibility 12:16 possible 13:9 possibly 21:3 potential 32:4 practically 10:8 practice 17:24 23:1 35:5,18 35:18 53:18 precedents 22:2 Precisely 15:3 preclude 4:14 4:23 5:18,24 18:25 19:23 21:18 23:9 24:11 26:14 28:1 46:23 47:4 49:17 50:2 56:9,10</p>	<p>56:18 precluded 9:11 16:19 25:7 27:7 30:22 40:24 41:1 42:20 43:10,11 43:16 48:25 53:4 precludes 4:5 18:6 30:3 41:20 42:2,24 precluding 8:21 31:24 preclusion 5:17 6:9,17 8:22 21:3,7 26:17 26:18 30:6,12 30:12,13 34:5 40:15,17 41:2 43:9,20 44:2 44:18,19,22 45:4 47:16 48:20 53:6,6 53:25 54:22 56:3 preclusive 16:20 preempt 45:17 preemptive 30:7 prerequisites 31:20 present 5:21 19:16 presented 15:14 17:24 18:2 39:21 42:21 53:13,16 preserve 38:1 presumably 15:10 27:4 presume 15:8 presumed 24:17 24:25 presumption 4:19 24:7,13 prevail 53:19 prevent 33:15 pre-emptive</p>	<p>18:20 pre-existing 22:19 26:6 principal 6:7 52:21 prior 25:24,25 34:22 55:21 private 6:11,22 7:1 31:8,9 34:23 46:22 56:17 problem 33:24 problems 13:8 14:19 17:21 proceed 7:12 43:24,24 44:11 44:13 process 29:16 processes 49:10 prohibited 35:9 prohibition 4:21 prohibits 28:12 35:4 promptly 19:7 25:7 promulgated 31:18 proper 52:21 53:11 properly 12:4 protected 51:7 protection 7:5 15:17 27:25 28:2,14,15 32:16 33:11,14 35:12 41:16 51:25 53:3 protections 21:23 23:22 prove 50:6,24 52:13 provide 5:2,15 provided 6:21 provides 27:23 27:24 28:6 47:2 providing 25:8</p>	<p>provision 7:14 19:25 47:13 54:2,5,5,15 55:16 provisions 20:8 public 34:20 purpose 4:11 21:22 24:2 pursue 29:12 43:14 put 5:5 43:15 48:20 p.m 56:24</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualified 22:25 49:3 quarrel 46:1 question 4:5 5:16,17,22 6:17,19 15:14 17:24 18:1 21:16 24:3,4 25:4 32:23 34:1 36:17 39:21 42:3 43:12,25 44:3 45:7 48:13 51:13 53:12,20 54:22 questioning 26:13 questions 11:21 27:12 53:15 56:20 quick 56:7 quickly 53:23 quite 6:7 13:11 14:16 31:7 36:16 37:10 44:21 46:5 47:12 quote 41:6 quoting 7:2</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1</p>	<p>race 20:11 45:13 45:17,25 46:4 raise 3:13 Rancho 47:20 47:22,25 48:10 range 28:19 reading 52:23 56:16 real 36:16 realistic 55:25 really 35:25 36:1,6 39:11 48:13,20 55:20 reason 5:4 12:1 15:11 18:9 24:5 37:21 reasonably 8:12 41:19 reasoning 45:12 reasons 14:7 22:11 rebuttal 2:7 32:23 52:17 receiving 32:8 54:13 recipient 34:14 39:22 44:8,9 50:3 52:6 recipients 34:18 38:2 49:1,21 recognize 6:14 31:5 recognized 20:13 23:10 38:9 reconciled 24:20 reconsideration 47:24 record 13:4,19 recover 43:17 recovery 50:15 referred 22:13 referring 18:11 reflect 45:23 reflects 24:10 regard 30:20 34:7 39:19</p>
---	--	--	--	---

<p>41:12 44:18 46:2,24 regarding 6:9 20:1 37:22 regime 31:11 regular 17:23 53:11 regulations 31:17,23 reject 15:10 16:10,11 rejected 16:6 27:3 rejecting 16:15 related 11:9,16 relation 8:12 relevant 14:8 relief 10:24,24 43:2 rely 7:13,20 44:24 50:9 relying 18:19,21 remain 15:17 remained 26:1 remaining 52:16 53:16 remand 11:23 12:15 15:18 16:25 17:2 53:17,19 remanded 47:22 remarkable 56:13 remedial 19:19 25:17,23 26:5 30:23,24 31:2 32:3,3 33:25 33:25 45:8 46:20 49:21 52:24 remediate 33:16 remedies 24:12 24:17,18 remedy 19:8 22:9 24:10 25:1,6,8,21,23 27:24 46:21,21</p>	<p>47:3,4 49:17 49:18 56:12,13 remotely 19:20 render 25:18 repeatedly 23:10 24:14 repeating 43:12 repeats 21:12 replaces 18:3 reply 40:14 repugnant 24:19 request 11:17 13:18,21,22,23 14:5 requested 12:17 13:12 requests 12:20 13:15,16 require 4:4 28:15 49:1 50:15 56:13,15 required 28:20 50:16 51:5 requirements 31:21 requires 8:14 29:9 37:19 reserve 37:24 38:3 resolution 48:6 resolved 9:5,13 11:22 53:17 respect 12:6 36:5 37:10 42:14 respects 6:19 25:14 respond 14:6 51:19 responded 13:17 19:7 25:7 Respondents 1:19 2:6 7:12 12:22 14:6 27:20 48:24</p>	<p>responds 51:15 response 5:13 9:6,18 10:4 11:19 12:15 33:4 51:16,17 responses 12:14 responsibility 34:12 responsible 9:22 restoring 19:8 restrictions 5:5 result 43:1,6,16 reversal 4:4 reverse 50:1 review 15:9 30:22 37:18 reviewed 33:7 right 4:20 5:14 6:11,15 7:14 7:23 8:8 9:1 11:10 18:5 19:1,6,17 24:9 25:1,12,13,16 25:25 26:1,4 26:19,22 27:8 27:8 31:3,8,8,9 38:3,6,20 40:24 42:19 45:3,17,23 46:22 53:1 56:8 rights 7:4 8:6 20:10 22:18,20 22:22 24:16,18 26:6 31:19 47:9 54:8,12 56:17,18 ROBERTS 3:3 4:25 7:13 9:24 21:25 22:7 26:7,20 27:14 27:16 31:22 42:18 43:7 47:8 52:15 56:22 Robinson 18:22 24:8 30:9,12</p>	<p>Rothfeld 1:16 2:3,8 3:6,7,9 3:15,19,25 5:11 6:1,5 7:16 8:5 9:1,17,22 10:1,9,18 11:7 11:10,18 12:12 13:2,7,20,22 14:1,4,18,21 14:25 15:3,14 15:19,22 17:1 17:5,8,20 18:6 18:13,21 19:5 19:11 20:18 22:5,10 23:2 26:11,18,24 27:8,11,15 52:16,17,19 54:17,21 55:3 55:9 ROTHFIELD 3:21 rules 4:24 ruling 14:9,10 running 49:14</p> <hr/> <p>S S 2:1 3:1 satisfactory 43:19,21 saw 52:25 saying 17:3,15 17:18 32:6,7 32:13,18,19 39:8 40:5 41:9 42:19 43:8,9 52:7 says 10:22 18:15 36:23 41:22 42:10 43:23 54:5 55:10 Scalia 5:22 14:18,22 15:1 25:20 41:22 42:10 43:22 44:5,11,14,23 54:15,18 55:1</p>	<p>55:6 scheme 18:20 19:19 30:24 31:2,5,17 32:2 32:4 33:25,25 34:9 45:8 46:20 49:21 52:24 schemes 30:23 46:18 school 1:6 3:5 8:12 10:5 11:1 12:4 23:15,16 26:22,25 27:17 29:11,21 41:18 44:25 49:15 52:5,9 schools 18:8,17 21:24 34:20 37:11,12 39:20 49:15,16 54:3 54:12 55:18 school's 49:10 scope 46:5 se 16:19 search 17:14 second 4:16 33:23 34:1 37:19 seconds 9:25 52:20 section 4:6,14 4:23 5:18 6:9 7:12,21 8:3 16:16 18:8,23 19:23 20:2 21:1,7,18,22 22:3 24:11,21 25:2,5,22,23 26:1,4 27:3 28:1,14 33:22 34:10,15,23 35:1 37:17 38:8 48:15,25 49:8 50:2,5 54:24 56:10 see 3:20 18:1</p>
---	---	--	--	--

37:1 seeking 48:22 seizure 17:14 Selya 39:7 send 17:24 40:23 41:24 42:5,8 53:13 sending 41:12 sense 10:20 17:22 22:16 25:15 43:10 48:20 54:13 separate 4:3 separately 16:16 set 10:19 11:21 19:4 26:21 31:6,10,11 48:23 49:22 sets 50:17 setting 52:5 sex 7:6,10 20:12 23:18,22 27:23 27:24 28:8,13 34:12 37:11 46:4 54:8 sexual 9:6 10:23 51:18 short 16:1 show 8:15 23:1 shown 29:10 shows 13:5 side 15:15 32:24 41:22 significant 23:7 25:14 significantly 6:11 simple 33:2 45:16 simply 16:6 53:7 simultaneous 20:24 21:6 single 4:13 21:2 37:11 situation 25:16 26:2 29:2,2,4 30:11 38:12	43:23 50:13 52:14 slightly 50:17 Smith 18:22 19:8,16 24:8 30:8,12,20,21 33:24 43:11 45:7 46:10,19 48:11,11 solely 52:25 somebody 12:10 32:9 somewhat 30:13 soon 47:11 sorry 18:4 42:18 51:10 sort 9:9 13:8 23:24 30:18,25 32:2 39:2 49:13 53:12 55:19 sound 9:21 specific 12:15 28:20 29:13,14 50:16,25 51:6 51:23 52:12 specifically 6:16 6:21,21,25 7:7 7:20 10:19 22:13 33:9 34:11 speculative 56:16 spell 10:7,7 Spending 22:1 split 42:1 48:4 spoke 9:16 stage 13:9 standard 29:4,7 29:8,24 37:18 41:13,14,15,17 50:23 52:8 53:24 start 5:3 26:9 started 39:8 starting 44:2 state 34:20	38:10 49:16 statement 47:18 States 1:1,13 7:4 54:7 status 51:7 statute 5:7 7:2 8:21 19:19 21:12 23:21 30:22 47:18,19 47:19 48:14,14 54:11 56:19 statutes 8:7 24:23 50:20 statutory 4:9,9 4:21 6:18 19:22 20:25 22:18 23:17 24:1,9,10,16 24:16,18 25:1 25:1,12,12,13 26:4 53:25 steps 32:1 Stevens 3:18,20 15:13,20 29:17 44:21 45:2 49:13,23 50:6 50:12 strength 23:22 strengthen 21:23 structure 4:10 student 35:7 students 11:1,4 12:19 49:10 student-on-st... 29:3 49:6 subject 21:10 32:12 34:22,24 37:17 38:8 49:21 54:4 subjects 13:13 submitted 56:23 56:25 substituted 20:12 sue 8:8 26:8 40:7,12	sued 24:24 40:3 44:24 suffered 10:23 sufficient 28:23 36:9 suggest 23:25 28:18 30:14 31:15,16 33:5 33:8,18 34:2,4 35:4 37:8,16 42:14,17 44:16 47:6 49:11 50:3 54:13 56:8 suggested 24:15 25:3 26:12 54:1 suggesting 46:2 50:2 55:9 suggestion 12:13 21:2 23:13 55:5 suggests 16:4 25:11 54:22 55:24 suing 39:12,12 suit 7:3 26:25 34:23 38:18 39:4 40:14,24 suits 7:22 23:5 55:17 superintendent 29:22 39:20 supplement 24:18,22 support 48:23 supporting 20:21 supports 23:8 supposed 33:15 Supreme 1:1,13 sure 17:21 surely 7:11 55:17 suspenders 21:20 system 25:17,19	T T 2:1,1 take 8:8 26:7 33:15 39:17 47:18 53:22 taken 4:22 9:19 10:4 21:14 talk 8:21 39:10 39:11 45:3 talked 11:12 talking 6:8 8:16 8:22 50:13 teacher 38:13 tell 14:5 15:8 tells 20:5 ten 9:25 52:20 test 6:18 33:24 36:1 testimony 10:14 10:15 text 4:9 7:2 19:22 24:1,6 45:15 53:25 textual 55:19 Thank 3:9 27:14 27:15,21 52:15 52:19 56:22 theoretical 12:7 12:16 theory 11:16 30:21 33:13 41:10 thing 10:10 things 11:22 think 5:13 6:1,2 6:6,7,16 9:11 9:19 10:3,9,10 11:2,7,11,20 11:20,24 13:7 16:3,21 17:13 17:20,23 18:9 18:10,13 19:1 19:11,15 20:4 21:15 22:6,10 22:16,22 23:6 23:25 24:5,14 25:10 26:11,24
---	--	--	---	---

29:19 31:5 32:22 41:14 46:9,13,16 49:5,23,25 53:10,21,23 54:21 55:5,6 55:12,25 56:4 thinking 15:9 17:11,22 thought 4:19 9:15 16:7 24:6 50:19 55:1 threshold 53:15 53:20 threw 16:1 throw 21:19 time 13:10 18:23 21:4 56:1 times 21:11 title 4:5,14,18,20 4:21 5:3,15,23 6:15,16,20 7:8 7:14,19,22 8:8 9:5 16:6,9,12 16:14,19,20 18:3,6,11,15 19:20,22 20:4 20:8,9,12,12 20:14,15,17,23 20:25 21:1,4 21:22 22:1,9 22:14,19 23:4 23:14,19 24:22 26:9,23 27:1,3 27:23 28:1,5,7 28:12,18 29:18 29:24 30:7 32:15 33:21 34:10 35:1,4 35:16,24 36:4 36:10 37:7,13 37:22,23 38:18 39:9 40:7 41:1 41:15 42:2,23 42:25 43:24 44:10,24 45:14 45:14,16,18	46:2,3,9,11,11 46:12,13 47:23 48:14,16,17,21 49:22 50:4,14 50:21 51:5,21 52:24,25 53:6 54:4,11,16 55:2,16,21,22 56:1,3,3,16 today 33:4 told 29:3 totally 49:3 track 8:21 14:13 tracks 13:9 treated 12:25 13:15 46:3 48:3,3 treatment 10:11 10:12,25 12:21 12:24 trouble 39:1 true 33:1 54:21 try 14:11 52:20 trying 18:2 26:3 Tuesday 1:10 turn 23:19 turns 44:19 two 4:2 8:24 9:18 12:14 20:22 23:7,24 24:19,23 30:18 49:15,15 52:21 55:23 type 27:1 35:25 36:12 typical 51:12	56:16 understood 21:17 uniformly 21:5 Union 20:22 unique 45:25 United 1:1,13 7:3 54:7 universe 32:24 unnecessary 49:3 unquestioned 4:10 unreality 5:1 unresolved 11:24 urge 47:7 use 4:5,14,23 5:18 6:9 10:2 11:16 18:25 19:3,4 21:18 22:17 24:11 25:2 42:3 52:20 56:9 uses 18:14 usual 53:18	34:11 43:19 46:15,17 49:19 49:20 VII 8:8 45:14,14 45:16,18 46:11 46:11,12 vindicating 52:25 violate 32:15,16 35:1 violation 28:21 50:24 violations 23:12 51:2 VIR 1:3 virtually 33:23 34:2,3 45:10 45:11 visual 37:8	22:23 word 22:17 words 8:20 11:16 18:3,15 work 52:2 wouldn't 45:12 45:20 51:8 52:1 write 11:17 wrong 8:21 24:5 25:11 45:3 wrongdoing 50:8
				X
				x 1:2,8
				Y
				years 18:23
				0
				07-1125 1:5 3:4
				1
				100 35:2 11:09 1:14 3:2 12:10 56:24 140 18:23 19 34:10 46:15 1964 20:10 1981 8:9 45:14 45:16,17,19 46:11,12 1983 4:6,14,23 5:18,24 6:9 7:12,22 8:3,23 8:25 12:6,8,9 14:9,23 15:6 16:12,16 17:7 17:13,14,16 18:8,23 19:3 19:24 20:3,17 21:1,8,18 22:4 22:8,23 24:11 24:21 25:2,5 25:22 26:2,10 26:14,23 27:3 28:2,14 29:7,8

30:8 31:24				
33:22 34:15,23				
34:24 35:20				
37:18,25 38:1				
38:8,14,21				
39:4 40:14,24				
42:3,19,24				
43:2,10,14,25				
44:1,2,12,13				
44:24 46:13,23				
47:13 48:15,15				
48:25 49:8,17				
49:18 50:2,4,5				
50:9,21 52:3				
54:24 56:10				
1983's 25:23				
26:4				
<hr/> 2 <hr/>				
2 1:10				
2000h 37:22				
2008 1:10				
23a 41:8				
24a 52:23				
27 2:6				
<hr/> 3 <hr/>				
3 2:4				
<hr/> 5 <hr/>				
52 2:9				