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IN THE SUPREME COURT OF THE UNITED STATES

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RODERICK JACKSON, :  
Petitioner :

v. : No. 02-1672

BIRMINGHAM BOARD OF EDUCATION. :

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Washington, D.C.

Tuesday, November 30, 2004

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

APPEARANCES:

WALTER DELLINGER, ESQ., Washington, D.C.; on behalf of the Petitioner.

IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

KENNETH L. THOMAS, ESQ., Birmingham, Alabama; on behalf of the Respondent.

KEVIN C. NEWSOM, ESQ., Solicitor General, Montgomery, Alabama; on behalf of Alabama, as amicus curiae, supporting Respondent.

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

2 (10:50 a.m.)

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

5 Mr. Dellinger.

6 ORAL ARGUMENT OF WALTER DELLINGER

7 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 title VI --

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

4 MR. DELLINGER: That is correct.

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

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

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

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

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

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

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

20 MR. DELLINGER: Absolutely.

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

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

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

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

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



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

10 MR. DELLINGER: I think the Court --

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

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

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

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

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

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

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

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

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

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

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

14 MR. DELLINGER: That is correct.

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

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

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

23 MR. DELLINGER: Well --

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

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

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

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

14 MR. DELLINGER: That is correct.

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

17 MR. DELLINGER: That is correct.

18 JUSTICE O'CONNOR: -- petitioner.

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

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

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

9 MR. DELLINGER: That is --

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

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

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

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

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

1 What's the empirical evidence for that?

2 MR. DELLINGER: Well --

3 JUSTICE O'CONNOR: Do you know if administrative  
4 sanctions have been imposed under title IX against  
5 schools?

6 MR. DELLINGER: Well, I'm sure there have been  
7 some instances in which there have been administrative  
8 sanctions under title IX. And I don't -- I do not have  
9 figures on those, Justice O'Connor.

10 But let me --

11 JUSTICE GINSBURG: Have funds --

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

13 JUSTICE GINSBURG: -- have funds -- Mr.  
14 Dellinger, have funds ever been withdrawn from any school  
15 because of a violation of --

16 MR. DELLINGER: Not to my knowledge.

17 JUSTICE GINSBURG: -- title IX?

18 MR. DELLINGER: But I think --

19 JUSTICE SCALIA: That could be because --

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

21 JUSTICE SCALIA: -- the sanction is so draconian  
22 that nobody in his right mind is not going to rehire the  
23 coach. Of course, they're going to rehire. I -- I find  
24 it hard to believe why a draconian sanction is  
25 ineffective.

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

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

5 MR. DELLINGER: Justice --

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

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

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

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

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

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

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

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

1 absolutely. And Coach Jackson --

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

6 MR. DELLINGER: Because --

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

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

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

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



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

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

14           Thank you.

15           JUSTICE GINSBURG: Mr. --

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

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

22                   ORAL ARGUMENT OF IRVING L. GORNSTEIN

23                           ON BEHALF OF THE UNITED STATES,

24                   AS AMICUS CURIAE, SUPPORTING THE PETITIONER

25           MR. GORNSTEIN: Administrative sanction has

1 never been imposed under title IX.

2 JUSTICE KENNEDY: They have been under title VI?

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

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

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

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

1 person who is subjected --

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

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

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

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

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

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

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

9 JUSTICE SCALIA: '69.

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

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

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

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

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

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

1 damages.

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

13 MR. GORNSTEIN: Justice --

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

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

1 JUSTICE KENNEDY: But what about Virginia --

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

4 JUSTICE KENNEDY: What about Virginia  
5 Bankshares?

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE GINSBURG: -- OCR administers.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 and investigatory process.

2 Now, Justice Ginsburg --

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

5 MR. THOMAS: No, it did not.

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

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

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

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

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

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

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

19 MR. THOMAS: Yes.

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

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

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

25 MR. THOMAS: Yes.



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

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

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

16 JUSTICE BREYER: Yes.

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

18 JUSTICE BREYER: Yes, of course.

19 MR. THOMAS: But again --

20 JUSTICE BREYER: So therefore --

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

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

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

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

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

18           MR. THOMAS: Yes.

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

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

1 JUSTICE BREYER: Well, yes.

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

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

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

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

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

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

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

8           JUSTICE GINSBURG: But it's the --

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

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

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

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

1 appropriate office.

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

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

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

1 you say.

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

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

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

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

20 JUSTICE O'CONNOR: Thank you.

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

25 JUSTICE STEVENS: It had never anticipated a

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

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

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

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

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

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

21 MR. THOMAS: Yes, ma'am.

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

1 and that was the holding of this Court.

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

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

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

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

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

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

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

23 MR. THOMAS: I -- I --

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



1 will hop to it.

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

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

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

9 JUSTICE GINSBURG: This is your personal  
10 testimony.

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

12 (Laughter.)

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

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

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

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

25 MR. THOMAS: Two.

1 JUSTICE GINSBURG: Two? In how many years?

2 MR. THOMAS: In 26.

3 JUSTICE GINSBURG: Two in 20-something years.

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

6 (Laughter.)

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

8 JUSTICE STEVENS: Thank you, Mr. Thomas.

9 Mr. Newsom.

10 ORAL ARGUMENT OF KEVIN C. NEWSOM

11 ON BEHALF OF ALABAMA,

12 AS AMICUS CURIAE, SUPPORTING RESPONDENT

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

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

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

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

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

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

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

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

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

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

6 MR. NEWSOM: Of course not.

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

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

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

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

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

24 MR. NEWSOM: Absolutely, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

23                  MR. NEWSOM:  Certainly, Your Honor --

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

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

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

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

1 that came in '64 and '65.

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

17 JUSTICE STEVENS: Yes.

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

24 JUSTICE STEVENS: Thank you, Mr. Newsom.

25 MR. NEWSOM: Thank you, Justice Stevens.

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

3 REBUTTAL ARGUMENT OF WALTER DELLINGER  
4 ON BEHALF OF THE PETITIONER

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

14 JUSTICE SCALIA: Other statutes do it  
15 separately.

16 MR. DELLINGER: I understand.

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

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

1 Rehabilitation Act have all been construed that way.

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

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

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

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

25           If the captain of the boys' basketball team

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

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

16           Thank you.

17           JUSTICE STEVENS: Thank you, Mr. Dellinger.

18           The case is submitted.

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

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