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P R O C E E D I N G S

(11:09 a.m.)

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

Mr. Rothfeld.

ORAL ARGUMENT OF CHARLES A. ROTHFELD

ON BEHALF OF THE PETITIONERS

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

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

JUSTICE GINSBURG: Maybe you could lift the podium?

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

JUSTICE SCALIA: That's enough.

MR. ROTHFELD: Okay?

JUSTICE SCALIA: We can't see you.

(Laughter.)

MR. ROTHFELD: That -- that may be an advantage, Your Honor.

JUSTICE GINSBURG: But we can hear you.

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's --

1 there's 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 of 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 STEVENS: 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 -- 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 the fact that 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 a  
15 right of action under -- under title IX. But Congress  
16 actually in title IX specifically, I think, addressed  
17 the preclusion question that we have here.

18                   There is clear statutory text 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 gender  
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, the deprivation of equal  
5 protection under the -- under the Fourteenth Amendment  
6 of the 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, I think the -- the Court looked at what it  
18 took to be the general -- the manifest congressional  
19 intent when -- 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 to whether there is a  
23 title 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, if 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 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 10 seconds.

1 (Laughter.)

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

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

8 JUSTICE GINSBURG: Spell that out -- spell  
9 that out practically. I know you used the disparate --

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

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

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

1 to bar unconstitutional treatment not only of Jacqueline  
2 Fitzgerald but of all female students in the school,  
3 which I think --

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

8 MR. ROTHFELD: Well, I think --

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

11 MR. ROTHFELD: Yes, absolutely. I  
12 completely --

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

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

1 constitutional --

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

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

24 JUSTICE GINSBURG: I still don't follow.  
25 What disparate treatment? Did you have to have that

1 they treated girl's complaints one way and boy's  
2 complaints another way?

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

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

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

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

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

21 MR. ROTHFELD: Excuse me, Your Honor?

22 JUSTICE BREYER: Is that request here?

23 MR. ROTHFELD: The discovery request?

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

1 here?

2 MR. ROTHFELD: No, no. It is not --

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

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

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

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

22 MR. ROTHFELD: That is correct.

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

1 MR. ROTHFELD: That is exactly --

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

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

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

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

20 MR. ROTHFELD: Absolutely.

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

23 MR. ROTHFELD: That is -- that is absolutely  
24 correct. The constitutional arguments were made on the  
25 merits to the district court and to the court of

1 appeals. They were not addressed by either. Those  
2 courts cut it short and threw the case out on preclusion  
3 grounds.

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

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

1 JUSTICE GINSBURG: But we find that out on  
2 remand.

3 MR. ROTHFELD: And we'll find that out on  
4 remand.

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

7 MR. ROTHFELD: That's --

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

10 MR. ROTHFELD: That -- that is absolutely  
11 correct. That is our --

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

22 MR. ROTHFELD: Well, I -- I think one of the  
23 problems is, of course, we don't know for sure what --  
24 what they were thinking, and therefore, it makes sense,  
25 I think, for this Court, in the regular course of its

1 practice, to decide the question presented and to send  
2 the case back down to the lower courts to --

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

8 MR. ROTHFELD: Whether title IX precludes  
9 the assertion of constitutional claims for gender  
10 discrimination in schools under section 1983. The --  
11 the -- the reason that I think we know what's --

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

15 MR. ROTHFELD: I think that that is the  
16 language that the First Circuit used. The First Circuit  
17 said, in so many words, that title IX is the exclusive  
18 avenue for the assertion of claims of gender  
19 discrimination arising out of -- arising from schools.

20 JUSTICE GINSBURG: Well, because they were  
21 relying on cases where we did say that a very detailed  
22 scheme was pre-emptive.

23 MR. ROTHFELD: They were relying on one case  
24 in which the Court said that, in Smith v. Robinson, the  
25 only time in 140 years that section 1983 has been on the

1 books that this Court has ever said that Congress meant  
2 to preclude its use to enforce a particular  
3 constitutional right. And I think --

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

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

11 JUSTICE GINSBURG: Just on that one issue on  
12 attorneys' fees.

13 MR. ROTHFELD: Well, I think that the  
14 language used is actually broader in the -- in  
15 the corrected legislation. But that, as I say, is a  
16 parenthetical point.

17 I -- I think that something that we have  
18 here which was not present in Smith at all -- and as you  
19 say, Justice Ginsburg, it's absolutely right that there  
20 was a much more elaborate, involved administrative  
21 remedial scheme in the statute considered there. There  
22 is nothing remotely like that in title IX. But before  
23 you even get to that point, there is this express  
24 evidence in the statutory text of title IX that Congress  
25 did not mean to preclude use of section 1983.

1           First, there is the provision that I  
2 mentioned regarding the attorney general, which -- which  
3 expressly contemplates there will be continued section  
4 1983 constitutional gender discrimination after the  
5 enactment of title IX. I think that in and of itself is  
6 dispositive and tells the Court all it needs to know.

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

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

17           JUSTICE GINSBURG: Have there been any  
18 decisions on title VI and 1983? Whether --

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

1 statutory discrimination claims under title VI and  
2 section 1983 discrimination claims under title IX.  
3 There had not been a single suggestion by any decision  
4 that there might possibly be preclusion. And so, at the  
5 time that Congress used the language of title IX, it  
6 knew that that language had been uniformly, widely  
7 construed across the country to allow the simultaneous  
8 assertion of those claims, not the preclusion of section  
9 1983 claims for discrimination.

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

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

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

1 schools.

2 CHIEF JUSTICE ROBERTS: Well, of course,  
3 title IX is Spending Clause legislation, and that, under  
4 our precedents, imposes certain limitations on how we  
5 interpret it that would not be applicable under section  
6 1983.

7 MR. ROTHFELD: Absolutely correct. And I  
8 think that there are --

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

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

23 JUSTICE GINSBURG: And those constitutional  
24 rights have -- I think it might be -- it's at least  
25 arguable that it would be harder to win a 1983 case,

1 given that, as to the individual, you have qualified  
2 immunity, and, as to the institution, you have to show a  
3 custom or practice.

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

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

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

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

1 coterminous in who can be sued.

2           The Court has certainly never presumed that  
3 the creation of any statutory right or statutory remedy  
4 bars the use of section 1983 to enforce the  
5 Constitution, as suggested by Justice Ginsburg's  
6 question. The Court has only once in well more than a  
7 century that section 1983 has been on the books held  
8 that availability of the constitutional remedy had been  
9 precluded. As I say, Congress promptly responded by  
10 providing that remedy.

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

22           But, as Justice Scalia pointed out in his  
23 opinion for the Court, that holding had no effect  
24 whatsoever on section 1983. It meant that Congress had  
25 placed the new remedy outside of section 1983's remedial

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

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

13 MR. ROTHFELD: Well, I think that to the  
14 extent -- again, as was suggested by Justice Ginsburg's  
15 line of questioning, to the extent that the claims are  
16 the same, then they would be precluded, the 1983 claim,  
17 if it has the same elements, if it's the same cause of  
18 action --

19 JUSTICE GINSBURG: It would be a different  
20 claim, but there would be issue preclusion.

21 MR. ROTHFELD: There would be issue -- yes,  
22 that's right.

23 CHIEF JUSTICE ROBERTS: Even if you have  
24 different -- I guess you would have a different set of  
25 defendants, right? You would have the school in the

1 title IX case, the individuals in the 1983 action?

2 MR. ROTHFELD: I think, to the extent that  
3 the suit was initially brought against the school under  
4 title IX for a type of claim that could have been  
5 brought as a parallel claim against the individual under  
6 section 1983, and the title IX claim was rejected, to  
7 the extent that the elements are the same, presumably  
8 there would be a defensive claim of collateral estoppel.

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

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

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

14 MR. ROTHFELD: That's exactly correct.

15 If the Court has no further questions, Your  
16 Honor --

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 MR. ROTHFELD: Thank you.

19 CHIEF JUSTICE ROBERTS: Ms. Hodge, we will  
20 hear from you on behalf of the Barnstable School  
21 Committee.

22 ORAL ARGUMENT OF KAY H. HODGE

23 ON BEHALF OF THE RESPONDENTS

24 MS. HODGE: Thank you. Mr. Chief Justice,  
25 may it please the Court:

1 Title IX provides for sex discrimination and  
2 provides a remedy for sex discrimination in a broader  
3 category of circumstances than the Equal Protection  
4 Clause. Therefore, having title IX preclude section  
5 1983 equal protection claims does not deny petitioners  
6 in this or any other case any remedy --

7 JUSTICE GINSBURG: Go over -- go over that  
8 again. I didn't understand it. You said title IX  
9 provides --

10 MS. HODGE: Title IX --

11 JUSTICE GINSBURG: -- more relief against  
12 sex discrimination than the Constitution does.

13 MS. HODGE: Correct.

14 JUSTICE GINSBURG: Explain that to me.

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

1 instances which would not be sufficient under, say, a  
2 constitutional evaluation.

3 JUSTICE GINSBURG: Give me an example.

4 MS. HODGE: An -- an example would be the  
5 situation such as this -- this particular situation.  
6 Recall that this is a case of peer-on-peer,  
7 student-on-student harassment. In this situation, the  
8 standard as decided by this Court in Davis is deliberate  
9 indifference.

10 JUSTICE GINSBURG: And what would the  
11 standard be under 1983?

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

20 JUSTICE STEVENS: Yes, but if you lose under  
21 -- under title IX, a fortiori, you would lose under the  
22 Constitution, I would think.

23 MS. HODGE: I -- I believe -- and that is,  
24 in essence, the position that the Barnstable School  
25 Committee and Superintendent Dever are arguing in this

1 case; that is, that because deliberate indifference is  
2 the standard that is applicable both under title IX and  
3 also under the Constitution, that it is -- it is --  
4 having lost the issue of deliberate indifference before  
5 the First Circuit, that finding of the First Circuit  
6 precludes any further controversy between the parties in  
7 this case.

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

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

23 With regard to Smith, I would point out to  
24 -- under the Smith theory, constitutional claims can be  
25 precluded if the -- under the statute under review it

1 has a comprehensive, remedial scheme. And we would  
2 argue that there is a comprehensive remedial scheme, and  
3 that this Court has, in fact, sort of found that and  
4 even added to it in the development -- have found that  
5 Congress intended to add to the remedial scheme --

6 JUSTICE GINSBURG: But --

7 MS. HODGE: -- an implied right of action.

8 JUSTICE GINSBURG: You -- you must, I think,  
9 recognize that the elaborate scheme that Congress set up  
10 under the Education of the Handicapped Act is quite  
11 different from what this Court did. It just said  
12 there's a private right -- right of action. There's an  
13 implied private right of action.

14 It didn't set up any administrative  
15 mechanism. It didn't set up any regime for going to an  
16 agency first and then coming to the court, none of that.

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

25 CHIEF JUSTICE ROBERTS: You are not arguing

1 that the agency regulations have the effect of  
2 precluding a 1983 action?

3 MS. HODGE: No. I'm -- we are not arguing  
4 -- we are arguing that some of those steps are  
5 illustrations of sort of the -- the scheme that was  
6 created. But there is a remedial -- the -- the remedial  
7 scheme leads to the potential loss of Federal funding --  
8 of Federal --

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

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

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

24 JUSTICE BREYER: You cannot imagine one.  
25 You think no one can imagine one. So an obvious

1 question on rebuttal is, since we have limited it to  
2 that universe, would be the other side must imagine one?

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

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

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

19 And I suggest to you that that is exactly  
20 the issue that -- that that is exactly the issue. The  
21 issue is whether or not, if you look at the complaint,  
22 the claim that is being brought under title IX and the  
23 claim that is being brought under section 1983 and the  
24 Constitution are virtually identical, which is a second  
25 prong of the Smith test: If there is a comprehensive

1 remedial scheme. Again, it's a remedial scheme.

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

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

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

1 JUSTICE BREYER: Does a disparate-impact  
2 claim violate section -- title IX?

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

11 And the fact of the matter is, though, that  
12 under the law as developed by this Court in the Equal  
13 Protection Clause, the fact of the matter is, is that it  
14 would not cover disparate impact, because this Court has  
15 held that disparate impact is not covered.

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

22 You have to have deliberate indifference to  
23 what? To the gender harassment, to the gender  
24 discrimination. So can you describe to me anything, any  
25 title IX case that has a disparate impact? We really

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

4 MS. HODGE: Well, I believe --

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

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

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

21 JUSTICE GINSBURG: On the basis of gender.

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

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

1 wasn't a veteran.

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

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

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

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

19 JUSTICE BREYER: If it's an individual,  
20 under title IX you can't bring the suit?

21 MS. HODGE: Correct.

22 JUSTICE BREYER: All right. But you could  
23 under 1983?

24 MS. HODGE: Correct.

25 JUSTICE BREYER: Okay.

1 MS. HODGE: But --

2 JUSTICE BREYER: So your point then is --  
3 and that's why I've had trouble with this case -- is  
4 that if you look at the First Circuit opinion, it sort  
5 of seems to say: If there's a difference, of course you  
6 can have a 1983 suit, but if there's no difference, you  
7 can't. I mean, everybody here seems to agree to that, I  
8 guess.

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

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

1 their official capacity. And once again, that -- that  
2 issue is not before this Court.

3 And having decided that they were acting in  
4 -- in the individual's official capacity, we would argue  
5 therefore that the individual would not be sued, because  
6 the claim and all of the facts would be identical --

7 JUSTICE BREYER: So you are saying if it's  
8 an individual acting in his official capacity, you  
9 cannot sue him under title IX?

10 MS. HODGE: To the -- yes.

11 JUSTICE BREYER: Yes. Okay.

12 MS. HODGE: Yes.

13 JUSTICE BREYER: Then their answer to that  
14 which -- say, look, we want to sue an individual in his  
15 official capacity; that's why we want to bring our 1983  
16 suit. And then you reply: But there are bars here of  
17 collateral estoppel -- claim preclusion -- whatever we  
18 use.

19 JUSTICE GINSBURG: Issue preclusion.

20 JUSTICE BREYER: They all have new names.

21 (Laughter.)

22 MS. HODGE: They do. They do.

23 JUSTICE BREYER: But the -- the -- okay.  
24 That's your argument. So why don't we just send it  
25 back, say that's right; this suit is not precluded by

1 1983; indeed, that's the only place you can bring it;  
2 it's not precluded by title IX, and now, court, you go  
3 decide whether claim preclusion exists, or whatever you  
4 call it ---

5 MS. HODGE: The court --

6 JUSTICE BREYER: -- collateral estoppel, or  
7 -- you understand what I mean.

8 MS. HODGE: Your Honor, I believe that they  
9 did decide that in the language that I did quote to you  
10 just a moment ago from the First Circuit opinion, which  
11 is found at the appendix 23a -- or the decision.

12 Essentially they are -- they are saying that -- that  
13 there was -- that because no theory of liability was  
14 offered other than this, that there isn't any further  
15 claim available.

16 With regard to sending this case back, I --  
17 we argue, based upon the deliberate indifference  
18 standard, which I think is indisputably the standard  
19 both under title IX and the standard under the Equal  
20 Protection Clause, that that deliberate indifference  
21 standard and -- and the fact the First Circuit found  
22 that -- that there was -- that the Barnstable School  
23 Committee acted reasonably and without deliberate  
24 indifference, precludes -- there is no issue in  
25 controversy anymore.

1 JUSTICE SCALIA: The other side says that  
2 there may be, and I don't know why we ought to get  
3 into that. Why can't we just send it back and let them  
4 figure that out? And -- and -- and decide what we took  
5 this case to decide, namely, the split that now exists  
6 in the Federal courts over whether title IX precludes  
7 the use of 1983. That's an important question. It's  
8 why we took the case. Why can't we decide that issue  
9 and then for all these loose ends, send it back to the  
10 court of appeals?

11 MS. HODGE: Because there must be an issue  
12 in controversy for this Court to send any -- there must  
13 be an issue in controversy here and also --

14 JUSTICE SCALIA: He says there is an issue  
15 in controversy. That's good enough for me.

16 (Laughter.)

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

22 CHIEF JUSTICE ROBERTS: So -- I'm sorry to  
23 interrupt. So you seem to be saying that they're right,  
24 that 1983 actions are not always precluded, depending  
25 upon whether there's a difference in the issues that are

1 presented or whatever.

2           So you should never say that title IX  
3 precludes an action under 1983. In fact, you should say  
4 that sometimes the issues that are litigated under title  
5 IX may result in the fact that you don't have  
6 available -- you don't get relief under 1983, but there  
7 is still a cause of action.

8           MS. HODGE: I don't -- I don't believe that  
9 that is -- that that -- that that should -- that should  
10 be the result of your decisionmaking.

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

21           MS. HODGE: I -- I believe that that would  
22 be satisfactory. From our point of view, because we  
23 believe that the issue preclusion applies, that would be  
24 satisfactory because we should --

25           JUSTICE SCALIA: But that doesn't -- that

1 doesn't cover the situation in which a plaintiff says, I  
2 don't want to proceed under title IX; I want to proceed  
3 first under 1983. Then there is going to be no question  
4 about whether 1983 is -- is unavailable because of issue  
5 preclusion. He is starting with 1983.

6 MS. HODGE: There's no question but in those  
7 circumstances then as to an institution --

8 JUSTICE SCALIA: What's your position on  
9 that --

10 MS. HODGE: Our position is that as a  
11 recipient of Federal -- if the institution involved is a  
12 recipient of Federal financial assistance who is covered  
13 by title IX --

14 JUSTICE SCALIA: You can't proceed under  
15 1983.

16 MS. HODGE: You cannot proceed under section  
17 1983.

18 JUSTICE SCALIA: So you are disagreeing.

19 MS. HODGE: Yes, we are.

20 JUSTICE SCALIA: You are disagreeing.

21 MS. HODGE: Oh, no, we are disagreeing, and  
22 I would suggest that the difficulty that this Court is  
23 having, or at least as I experience it, the difficulty  
24 with regard to issue preclusion and claim preclusion  
25 turns in this case on the fact that this perhaps being a

1 peer-on-peer harassment case --

2 JUSTICE STEVENS: Isn't it quite clear that  
3 we can forget about issue preclusion and assume, as  
4 Justice Scalia did, that the plaintiff brought an action  
5 under 1983 and did not rely on title IX at all, and just  
6 sued the school board? You would say he can't do that?

7 MS. HODGE: Correct. Correct.

8 JUSTICE STEVENS: And that's the issue,  
9 whether that's right or wrong. We don't have to talk  
10 about issue -- issue preclusion to decide that issue.

11 MS. HODGE: That is correct, except that as  
12 we argue -- what we have argued before the Court is that  
13 under Smith the question is, is there a comprehensive  
14 remedial scheme? And we would argue that there is, but  
15 then you have to determine whether or not the claims are  
16 virtually identical; and we would argue that here the  
17 claims are virtually identical --

18 JUSTICE GINSBURG: Wouldn't your reasoning  
19 apply to, say, a race discrimination case in employment?  
20 You've got title VII and you have 1981. Title VII has a  
21 lot of accoutrements, a lot of text to go through; 1981  
22 is plain and simple. So therefore, title VII ought to  
23 pre-empt 1981, right? So you -- in the area of race  
24 discrimination and employment, title VII would end any  
25 access to 1981. It would be the same kind of argument,

1 wouldn't it?

2 MS. HODGE: I believe that -- that there is  
3 that argument, but to be honest, I'm not in a position  
4 right now to reflect on exactly -- I believe that that  
5 would be certainly the direction, however, there are  
6 unique aspects of race. And I believe that that is yet  
7 another basis on which I would quarrel with the  
8 Petitioner with regard to suggesting that title VI  
9 and -- and title IX ought to be treated exactly the  
10 same. The history of the -- sex discrimination versus  
11 race discrimination are quite different and separate.

12 JUSTICE GINSBURG: What has that got to do  
13 with what you were arguing? That is, you've got an  
14 elaborate mechanism, which you said you have under title  
15 IX. I think that is debatable. But that was certainly  
16 the picture in Smith, and it's the picture in title VII  
17 -- title VII versus 1981. That -- that fits your -- the  
18 -- your description, title VII and 1981, much better  
19 than title IX and 1983, I think.

20 MS. HODGE: I guess I -- I don't agree. It  
21 is our -- it is our view that 19 -- that in this  
22 particular instance -- and I -- and I think I may have  
23 misspoken if the view is, is that it's the  
24 administrative schemes that get compared. I -- I  
25 believe under Smith, the issue is whether or not there's

1 a comprehensive remedial scheme, and here you have the  
2 remedy -- both an administrative remedy as well as a  
3 private right of action, which we would argue should  
4 preclude the 1983 claims.

5 Moreover, we would also look, with regard to  
6 the fact that this is a constitutional claim, to the --  
7 to Bivens -- to the line of cases under Bivens which we  
8 cite in our brief, the fact that when Congress provides  
9 a remedy for a particular area -- in a particular area,  
10 that that remedy can preclude an independent action  
11 which -- even if based on the Constitution. And we  
12 would suggest that that would be -- that that is  
13 something that we would urge this Court to consider --

14 CHIEF JUSTICE ROBERTS: Well, that's --  
15 that's because we're still in the business of implying  
16 rights of action under Bivens. It's very different to  
17 say -- you know, if you say we are implying it, but as  
18 soon as Congress does something, we are not going to do  
19 that. That's quite different than construing a  
20 provision, like 1983, that Congress has enacted.

21 MS. HODGE: Well, that is correct, except  
22 that this Court has, in fact, applied its preclusion  
23 doctrine by looking at whether or not Congress has made  
24 any statement in the statute. Then if you want to take  
25 it statute to statute, then what you would be looking at

1 is you would be looking at essentially Rancho Palos  
2 Verdes. And as -- as this Court did in -- when it  
3 decided Rancho Palos Verdes, it remanded for  
4 consideration Communities of Equity, which is a title IX  
5 case for reconsideration by, I believe it's the Eighth  
6 Circuit under the Rancho Palos Verdes decision.

7 And while that case ultimately did not come  
8 back to this Court, the -- the circuit court determined  
9 that it treated -- it treated the issue differently, and  
10 we would argue that that is a part of this split, and  
11 that that is -- and that that is not the appropriate  
12 resolution.

13 JUSTICE GINSBURG: There was no  
14 constitutional claim in -- what was it -- Palos Verdes.

15 MS. HODGE: Exactly. There was no  
16 constitutional claim in Rancho Palos Verdes. However,  
17 this Court did cite Smith and -- did cite Smith in its  
18 decision and -- and favorably so. But moreover, we  
19 would argue that the question is really, if you're  
20 comparing a statute to a statute, which is title IX to  
21 section 1983, Congress allowed for actions in section  
22 1983, Congress allows for actions under title IX; or  
23 whether or not you are really looking at the issue as  
24 title IX versus a constitutional claim.

25 Now, I want to just make the point that

1 preclusion makes sense. Congress really did put the  
2 focus in title IX on the institution, and Congress is  
3 also seeking to have equity of enforcement.

4 Further, as set for in the amici in support  
5 of the Respondents' position, we would point out that if  
6 section 1983 claims are not precluded, that it would  
7 require the expenditure of funds by -- by recipients of  
8 Federal financial assistance on a variety of issues that  
9 are totally unnecessary including qualified immunity.

10 And in the peer-on-peer harassment case --  
11 and I think it's very important to focus on what this  
12 case is. It is a peer-on-peer, student-on-student  
13 harassment where, what you would have is, if you were  
14 going to allow additional claims under section 1983  
15 against the institution, it would -- it would intrude  
16 and interfere with the school's processes of  
17 disciplining students.

18 And I would also suggest that it might also  
19 interfere in the classic manner in which --

20 JUSTICE STEVENS: Let me ask you one sort of  
21 anomaly that keeps running through my mind in this case.  
22 If you have two school boards, one of -- two schools,  
23 State schools. One of them gets Federal funds and the  
24 other does not. Does this preclude -- no 1983 remedy  
25 against one, but there is a 1983 remedy against the

1 other. That's your view, isn't it?

2 MS. HODGE: It is exactly our view because  
3 the recipient would be subject to the remedial scheme  
4 set forth in title IX.

5 JUSTICE STEVENS: Isn't it sort of anomalous  
6 to think it --

7 MS. HODGE: I don't believe it's anomalous.  
8 I believe the reverse is anomalous because what you  
9 would be suggesting if you do not preclude section 1983,  
10 you would suggest that the recipient could have both the  
11 1983 and a title IX; whereas, the nonrecipient would  
12 have just section 1983.

13 JUSTICE STEVENS: But you would prove the  
14 same facts in both cases? I mean, a case that would  
15 involve the same evidence, same alleged wrongdoing, and  
16 in one case you can rely on 1983 and the other you  
17 can't.

18 MS. HODGE: I believe under those  
19 circumstances, Justice Stevens, that what we would be  
20 talking about would be the situation where a -- under  
21 title IX, there is -- there's actually an easier path to  
22 recovery, if you will, because it does not require the  
23 specific intent required by Massachusetts v. Feeney,  
24 which we believe sets a slightly higher -- a higher bar  
25 and a higher level of intentionality.

1 JUSTICE GINSBURG: I thought you just said  
2 it was deliberate indifference under both statutes,  
3 under 1983 and title IX.

4 MS. HODGE: Your Honor, it is -- deliberate  
5 indifference is the standard. However, in order to  
6 prove a constitutional violation, you must also have the  
7 specific intent for invidious discrimination that we --  
8 that this Court has not imposed and did not impose in  
9 Davis for violations of peer -- for peer-on-peer  
10 harassment cases.

11 So, while the discrimination needs to be  
12 intentional under title IX, it is not required that  
13 there be the specific intent to favor one over the other  
14 or one's protected status over the other.

15 JUSTICE GINSBURG: Then you wouldn't have  
16 gender discrimination.

17 MS. HODGE: But you -- excuse me, I'm sorry.  
18 You would have gender discrimination if you have a  
19 typical -- in the peer-on-peer harassment cases, the  
20 question is whether or not the institution was or was  
21 not deliberately indifferent in the manner in which it  
22 responds. In -- in a deliberate indifference --

23 JUSTICE GINSBURG: Responds to what? In  
24 response to --

25 MS. HODGE: To a complaint of -- to a

1 complaint about sexual harassment. If the institution  
2 fails to respond appropriately, the lower courts have  
3 found that that can be gender discrimination under title  
4 IX. They do not in any way look to ensure that -- look  
5 to determine whether or not there is that specific  
6 invidious discrimination that we would argue this Court  
7 has imposed in its cases under the Equal Protection  
8 Clause.

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

12 MS. HODGE: If you were a municipality and  
13 -- and the -- and your boss was harassing you, and -- in  
14 a school setting by a recipient of Federal financial  
15 assistance?

16 JUSTICE GINSBURG: Well, you were saying the  
17 constitutional standard is different, so I was just  
18 giving you a case. It could be a school; it could be  
19 another -- another municipal employment.

20 MS. HODGE: It would -- you would need to  
21 have the specific intent, invidious intent that we  
22 believe is an additional element and a much harder  
23 element to prove in that situation.

24 CHIEF JUSTICE ROBERTS: Thank you, Ms.  
25 Hodge.

1 MS. HODGE: Thank you.

2 CHIEF JUSTICE ROBERTS: Mr. Rothfeld, you  
3 have five minutes remaining.

4 REBUTTAL ARGUMENT OF CHARLES A. ROTHFELD  
5 ON BEHALF OF THE PETITIONERS

6 MR. ROTHFELD: Thank you, Your Honor. And  
7 I'll try not to use my extra 10 seconds.

8 Two principal points: First, on the proper  
9 disposition of this case, the First Circuit's holding --  
10 and I'm reading from page 24a of the petition appendix:  
11 "The comprehensiveness of Title IX's remedial  
12 scheme...indicates Congress saw Title IX as the sole  
13 means of vindicating the constitutional right to be free  
14 from gender discrimination perpetrated by educational  
15 institutions... It follows that the plaintiffs' equal  
16 protection claims are precluded."

17 That was not a holding that had to do with  
18 claim preclusion, issue preclusion, collateral estoppel;  
19 it was a holding that constitutional claims simply  
20 cannot go forward. So there are constitutional claims  
21 that were advanced below, argued to both courts, have  
22 not been discussed by any court at any point, and I  
23 think the proper disposition here -- the most regular  
24 course in a case of this sort to is decide the question  
25 presented, send the case back.

1           It certainly is not the case -- it's a  
2 commonplace that the Court has threshold questions that  
3 are presented to it. There are remaining issues that  
4 have to be resolved on -- on remand. It's certainly not  
5 the Court's usual practice to decide whether or not the  
6 plaintiffs can -- can prevail on those claims on remand  
7 before deciding the threshold questions on which cert  
8 was granted. I think that's the appropriate approach  
9 for the Court to take here.

10           On the merits, very quickly. Again, I think  
11 we have here the gold standard of evidence as to  
12 preclusion. We have express statutory text that deals  
13 with it. My learned colleague suggested that the  
14 Attorney General intervention provision was somehow  
15 limited to cases involving claims by schools that don't  
16 accept Federal funds or somehow are not subject to title  
17 IX. That is not the language of the provision. The  
18 provision says whenever -- whenever a claim is initiated  
19 in a court of the United States asserting deprivation of  
20 rights, equal protection on account of sex, the Attorney  
21 General can intervene.

22           Clearly, Congress had it in mind that there  
23 would be such claims. And this was enacted as part of  
24 title IX. This was enacted as part of the statute that  
25 creates rights against discrimination by schools

1 receiving Federal funds. It makes no sense to suggest  
2 that Congress --

3 JUSTICE SCALIA: Well, does that provision  
4 apply only when there is a title IX cause of action?

5 MR. ROTHFELD: No. No. It is --

6 JUSTICE SCALIA: So -- well, if it doesn't,  
7 then it -- then it has validity whether or not you agree  
8 with your position.

9 MR. ROTHFELD: That's true, but I think it  
10 answers the preclusion question because it suggests that  
11 Congress has it in mind that there would in fact be  
12 section 1983 constitutional litigation involving gender  
13 discrimination.

14 JUSTICE SCALIA: Yes, but maybe they thought  
15 only in cases where there is no title IX action.

16 MR. ROTHFELD: They said whenever there is a  
17 claim of unconstitutional gender discrimination. I  
18 think it's a blanket suggestion Congress believes that  
19 --

20 JUSTICE SCALIA: Oh, you don't think they  
21 mean whether there's a -- there's a valid claim? Even  
22 when there is a claim that isn't allowed under the law?

23 MR. ROTHFELD: No, I am suggesting that the  
24 language says that whenever a claim of gender  
25 discrimination is advanced under the Constitution, the

1 Attorney General can intervene. I think what we draw  
2 from that is that Congress imagined that there would be  
3 continued constitutional litigation involving gender  
4 discrimination after they enacted title IX. And because  
5 that provision was added to the law as part of title IX,  
6 Congress surely contemplated that these suits would  
7 involve gender discrimination involving schools.

8           The other sort of clear textual indication  
9 which I -- again, my learned colleague has not really  
10 discussed, is the title VI history of enforcement prior  
11 to the enactment of title IX, which was absolutely  
12 consistent. There are almost two such dozen decisions,  
13 which, this Court suggested in Cannon, it is not only  
14 appropriate but realistic to think that Congress was  
15 aware of at the time it enacted title IX. Those  
16 decisions clearly indicated that there was no  
17 preclusion. The language of title VI and title IX is  
18 identical. There can be no doubt, I think, that  
19 Congress would have had it in mind that preclusion is  
20 not appropriate in this context as well.

21           And one final, very quick point. This is an  
22 implied right of action; to suggest that Congress meant  
23 to preclude the use of the Constitution to enforce  
24 the -- preclude section 1983 to enforce the Constitution  
25 while leaving it to the courts to imply the alternative

1 remedy and to devise the contours on and the limitations  
2 on that remedy, would require -- hypothesize a  
3 remarkable leap of faith on the part of Congress.

4 It also would require the most extravagant  
5 and speculative reading of title IX, to understand it to  
6 not only to include private rights of action but to  
7 preclude the assertion of express rights of action  
8 created by Congress by language in another statute.

9 If there are no further questions, Your  
10 Honor.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.

12 The case is submitted.

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

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