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No. 82-792

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GROVE CITY COLLEGE,
individually and on behalf of its students
MARIANNE SICKAFUSE; KENNETH J. HOCKENBERRY;
JENIFER S. SMITH; and VICTOR E. VOUGA,

Petitioners,

v.

T.H. BELL, Secretary of U.S. Department of Education;
HARRY M. SINGLETON, Acting Assistant Secretary for
Civil Rights, U.S. Department of Education,

Respondents.

[redacted]

BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

ON BEHALF OF

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MOUNTAIN STATES LEGAL FOUNDATION
and
AMERICAN ASSOCIATION OF PRESIDENTS
OF INDEPENDENT COLLEGES AND UNIVERSITIES

Susan J. Bard
Maxwell A. Miller*

Mountain States Legal Foundation
1200 Lincoln Street, Suite 600
Denver, Colorado 80203
Telephone: 303/861-0244

Attorneys for Amici Curiae

*Counsel of record

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Respondents.

MOTION FOR LEAVE TO FILE BRIEF*

ON BEHALF OF
MOUNTAIN STATES LEGAL FOUNDATION
and
AMERICAN ASSOCIATION OF PRESIDENTS
OF INDEPENDENT COLLEGES AND UNIVERSITIES

Mountain States Legal Foundation (MSLF) and the American Association of Presidents of Independent Colleges and Universities (AAPICU) respectfully move this Court, pursuant to Rule 42 of the Rules of the United States Supreme Court, for leave to file the annexed brief amici curiae. In support of its motion, these organizations state:

1. The Mountain States Legal Foundation is a nonprofit, membership, public interest law firm dedicated to bringing before the

courts those issues vital to the defense and preservation of individual liberties, private property rights, and the free enterprise system. The Foundation seeks to protect its members and the public from overly intrusive, unnecessary, and costly governmental regulation.

2. The American Association of Presidents of Independent Colleges and Universities is a nonprofit corporation comprised of nearly two hundred (200) presidents of independent institutions of higher learning located throughout the United States. The Association includes members from large universities, such as Pepperdine, Roosevelt, and Brigham Young, and small colleges like Grove City, Hillsdale, and Rockford. AAPICU also includes a diversity of private interests. Some of AAPICU's members preside over church-related institutions, representing such denominations as Baptist, Christian Scientist, Catholic, Methodist, Jewish, Nazarene, and Mormon. The Association also includes members from nonsectarian schools.

The amici filed a brief in support of petitioner Grove City College before the Third Circuit and have been asked by petitioner to do so again before this Court. Amici intend to supplement rather than duplicate Grove City's arguments. Specifically amici's brief will address policy issues surrounding the application of Title IX to private educational institutions receiving no direct federal financial assistance.

WHEREFORE, amici pray that their Motion to File Brief be granted and their brief accepted.

Respectfully submitted,

Susan J. Bard
Maxwell A. Miller

Mountain States Legal Foundation
1200 Lincoln Street, Suite 600
Denver, Colorado 80203
Telephone: 303/861-0244

Attorneys for Amici Curiae

TABLE OF AUTHORITIES

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INTEREST OF AMICI CURIAE

The amici curiae are membership organizations which represent individuals, colleges and universities, all sharing an interest in promoting the vitality of private education in America by limiting unnecessary federal regulation.

The Mountain States Legal Foundation (MSLF) is a nonprofit, membership, public interest law firm dedicated to bringing before

the courts those issues vital to the defense and preservation of individual liberties, private property rights, and the free enterprise system. The Foundation seeks to protect its members and the public from overly intrusive, unnecessary, and costly governmental regulation.

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AAPICU has frequently been called upon to participate as amicus in important court proceedings impacting upon education, and has expressed its views before congressional committees assigned educational matters. The common bond of all AAPICU members is a belief in the integrity of private education.

INTRODUCTION

This Court must decide whether private educational institutions will be smothered by mechanisms of federal control. A decision adverse to Grove City College in this case threatens the independence and academic freedom which are the very soul of private education in America.

Amici, MSLF and AAPICU, are unquestionably supportive of equal opportunity in higher education. They believe, however, that the administrative regulations to Title IX not only exceed their statutory limitations, but represent a dangerous and illegal extension of federal control over higher education. It is amici's deepest-held conviction that if America's institutions of higher learning lose

control over admissions, hiring, curriculum, and campus policy, in effect over who attends, who teaches, and what standards are enforced, then truly independent higher education will cease to exist.

STATEMENT OF CASE AND QUESTIONS PRESENTED

This case reaches the Supreme Court with pure questions of law, and undisputed facts. Since Grove City College will offer a complete statement of the facts, Amici will merely highlight those they consider the most salient.

Grove City College is a private Christian college with approximately 2,100 students. Throughout its history the college has refused the benefits of government funding in order to maintain its academic independence. Some of Grove City's students do receive Basic Education Opportunity Grants (BEOGs) and federally insured Guaranteed Student Loans (GSLs) from private commercial banks to defray their educational expenses. In both programs, students receive money *directly* from the federal government or bank. In neither program does Grove City receive or administer the federal funds; in neither program is money channeled through the college. All parties concede that Grove City College in no way discriminates on the basis of sex in any of its programs or activities. The college protests the government's control of its programs as a matter of conscience, not as a cover-up for discrimination.

The issue addressed in this brief is whether Title IX authorizes the United States Department of Education (the Department) to regulate an entire private academic institution solely because some students receive federal grants and loans.

In order to protect the integrity of private education in America the answer must be "no."

SUMMARY OF ARGUMENT

The purpose of Title IX is to assure that federal funds are not used to support educational programs and activities that discriminate on the basis of sex. This laudable goal is not, however, served by the Department's regulations. Contrary to the intent of Congress, these regulations instead subject the whole of an academic institution to federal control solely because its students receive federal education grants and insured loans.

The regulations ignore the express limitations of the statute by defining "recipient" to include an entire educational institution. And this, even when neither it nor any of its programs receive any direct federal assistance! Application of this 'institutional' approach has resulted in contradictory and absurd results:

First, by the Department's regulations, the more indirect the federal aid and the more remote its benefits, the more pervasively a private college will be regulated.

Second, the Department has manufactured a fictionalized relationship between the government and Grove City College to justify its sweeping regulation of the college.

Third, the characterization of an entire academic institution as a "program" renders the 'program-specific' limitation of Title IX meaningless.

And finally, designation of Grove City College as a "recipient" subject to federal control hurts the very individuals Title IX is intended to help — the students.

Any benefit Grove City College derives from the federal government is remote, any aid indirect, and any value de minimus. To subject an entire academic institution to federal regulation on this sole basis defeats the purpose of Title IX and threatens the academic freedom which is essential in any truly free society.

ARGUMENT

TITLE IX APPLIES ONLY TO THOSE EDUCATIONAL PROGRAMS AND ACTIVITIES THAT RECEIVE DIRECT FEDERAL FINANCIAL ASSISTANCE.

Grove City College has neither sought nor received federal financial assistance. Despite efforts to maintain its autonomy, the college must now seek to cast off the federal regulation it and others like it have so scrupulously avoided. Solely because it enrolls students who themselves participate in BEOG and GSL programs, the Department maintains that the college is a "recipient" of federal financial assistance, and thus subject to the entire panoply of federal regulation.[1]

Title IX was enacted to assure that federal funds would not be used to support educational programs or activities that discriminated on the basis of sex. The statute provides that:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination *under any education program or activity receiving Federal financial assistance*. . .

20 U.S.C. § 1681 (1976) (emphasis added). The italicized language demonstrates that Congress clearly intended Title IX to apply only to those *education programs and activities* that receive federal financial assistance. Only if a specific program or activity receives government aid is it subject to Title IX regulations. The question thus becomes whether the *program or activity* is a recipient of federal aid for purposes of Title IX analysis.

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[1] These regulations specify available courses, manner of student housing, provision of health services, and student participation in extracurricular activities. *See* 45 C.F.R. §§ 86.34; 86.32; 86.39; 86.31(a); and 86.41. They also control student curfew hours, pareitals, and such matters as the consequences of student marriages, pregnancies, and abortions. *See* 45 C.F.R. §§ 86.31(b)(4); 86.21(c); and 86.40.

This reading of the statute is obvious and self-evident from the plain language of § 1681. Confusion and contradiction have nevertheless persisted over the proper application of Title IX to private educational institutions. The source of this contradiction lies not in the statute, but rather in the Department's regulations.

The regulations to Title IX, 45 C.F.R. §§ 86.2(g)(1)(ii) and (h) (1982) state:

> (g) "Federal financial assistance" means any of the following, when authorized or extended under a law administered by the Department:
>
> (1) A grant or loan of Federal financial assistance, including funds made available for:
>
> . . . .
>
> (ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.
>
> (h) "Recipient" means *any* State or political subdivision thereof, any public or private agency, *institution*, or organization, or other entity, or any person, *to whom Federal financial assistance is extended* directly or through another recipient *and which operates an education program or activity which receives or benefits from such assistance*, including any subunit, successor, assignee, or transferee thereof. (emphasis added).

These regulations have transformed the 'program-specific' intent of § 1681 into an 'institutional' definition of recipient.

The Department defines "recipient" on the basis of any direct or indirect aid or benefit. Contrary to Title IX it does not require that there be an identifiable program or activity. Thus if the federal government insures a student's educational loan and that student in turn enrolls in a college and uses the loan proceeds to pay tuition, the

entire institution is subject to Title IX regulation. The underlying problem clearly rests with the Department's definition of "recipient."

In drafting these regulations the Department has relied on a Senate version of Title IX which was ultimately rejected by Congress. The proposed statute was 'institutional' in nature and provided that:

> No person in the United States shall, on the ground of sex, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any program or activity conducted by a public *institution . . . which is a recipient of Federal financial assistance* for any education program or activity . . .

117 Cong. Rec. 30156 (1971) (emphasis added). This version determined applicability of Title IX on the basis of whether the *institution* itself was a recipient of federal assistance. Like the current regulations, this defeated Senate version would have the government first determine whether the institution was a recipient of federal aid, and if so, subject all of its programs and activities to federal control.

Congress chose instead to adopt the present 'program-specific' version of Title IX. The statute as enacted requires one to *first* identify an educational program or activity receiving federal financial assistance. This *specific program* is then subject to the regulations and enforcement of the statute. The institution as a whole is simply not under consideration.

The Department has persisted in its overbroad 'institutional' approach despite Congress' rejection of the Senate version. If a private educational insitution has only one student enrolled who receives any type of federal financial aid, even a federally insured GSL from a private bank, the institution as a whole is deemed a "recipient" just the same as a school which receives millions of dollars of direct aid. This recharacterization of the programmatic statutory language chosen by Congress has resulted in contradictory and absurd results:

A. *Regulation Of Private Education Ironically Becomes More Pervasive as Federal Aid Declines.*

The more indirect and remote the benefits of federal aid, the more pervasively a private college will be regulated. This irony is easily demonstrated by comparing the case at bar with a similar case now pending before this Court, *Hillsdale College v. Department of Health, Education & Welfare,* 696 F.2d 418 (6th Cir. 1982), *petition for cert. filed* (U.S. Mar. 16, 1983) (No. 82-1538). Like Grove City College, Hillsdale College is a small private institution which has refused direct federal financial assistance. Its students, however, do receive grants and insured loans from the federal government. Unlike Grove City College, these funds do not go directly to students but *rather* are given to the college, which in turn selects on the basis of need those students who will receive assistance.

As Hillsdale has administrative and discretionary authority to select beneficiaries of federal educational assistance, the Sixth Circuit held that its federal grant and loan program was a "recipient" within the meaning of § 1681. The court stressed that the limited application of Title IX necessarily restricted the Department's enforcement authority to only those specific programs actually receiving federal funds. The federal loan and grant program, and that program alone, was thus subject to Department regulation. *Id.* at 429-30.

By contrast, the students at Grove City College receive their assistance directly from the federal government. The college has no administrative or discretionary role whatsoever concerning those funds. Even though Grove City College has less administrative involvement than Hillsdale College *all* of its programs are regulated while only Hillsdale College's federal student aid program is regulated. In allowing this anomaly to occur, the Third Circuit has ignored the 'program-specific' mandate of the statute.[2]

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[2] This Court recently acknowledged the 'program-specific' nature of Title IX in *North Haven Board of Education v. Bell,* 456 U.S. 512, 535-39 (1982).

A proper application of the statute avoids this disparity. By looking first to the program receiving federal aid, it is clear that at Hillsdale College the student aid office receives, in hand, monies from the federal government and is charged with discretionary authority in administering those funds. As a recipient, that specific program is prohibited from discriminating on the basis of sex in its administration of those federal funds. Logically following from that application of the statute, Grove City College has no program or activity that receives federal funds and therefore neither the college nor any of its programs are subject to Title IX regulation. Only by manufacturing a fictionalized relationship between the government and the college has the Department been able to justify its sweeping regulations.

B. *The Department Has Manufactured A Fictionalized Relationship Between The Government And The College To Justify Its Sweeping Regulations.*

As this Court found in *Walz v. Tax Commission,* 397 U.S. 664 (1970), some forms of benefit derived from the federal government by private institutions are so minimal and remote as to essentially fail to create a nexus between the two entities. *Id.* at 675-76. That is the case here. The money received by Grove City by way of student tuition payments from federal grants and insured loans has not created any relationship between the college and the federal government. The money goes to the student and it is his choice at which institution to use his loan or grant.[3] The relationship vis-a-vis that money is thus between the school and the student: BEOGs and GSLs award federal aid to a student not the college.

By the attenuated logic of the Department "the corner grocer and the A&P are 'recipient institutions' because some of their customers receive social security checks. The New York Times and the Chicago Tribune are federal contractors because welfare recipients

[3] 20 U.S.C. § 1078(a)(8)(A) (1976); 34 C.F.R. § 690.94 (1982).

buy papers."[4] Similarly a college is a recipient of federal financial assistance if it enrolls students who receive food stamps, V.A. benefits, child welfare payments or military severence pay.

In Grove City College, the student, like the grocery shopper, is the actual recipient of the federal aid, and not the private institution. It is the student who contracts with the federal government to receive assistance and it is the federal government that decides who shall receive the funds and in what amounts. The college is not even privy to this information. Its only role is to respond to a government inquiry whether the students requesting aid are currently enrolled in the school.[5] Sweeping regulation based on a fictionalized relationship between the college and the government is irreconcilable with the 'program-specific' limitation on the Department's regulatory and enforcement power under Title IX.

C. *Characterization Of An Entire Academic Institution As A "Program" Renders The 'Program-Specific' Limitation Of Title IX Meaningless.*

The Department justifies regulation of an entire institution by application of the 'benefit theory.' Under this theory every dollar of federal money that goes into a program frees up funds for use by other educational programs and activities throughout the rest of the college. Therefore, reasons the Department, the entire institution is 'benefiting' from that money and the entire institution is subject to federal regulation.

It is not disputed that Grove City College, and other similarly situated educational institutions, do receive some benefit by having students enrolled who receive federal grants and insured loans. However, the question before the Court is not whether the school derives benefit, but rather, how much benefit must be derived before

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[4] Statement by Dr. Milton Friedman, *Newsweek*, Dec. 29, 1975 at 47.

[5] *Grove City College v. Harris*, 500 F. Supp. 253, 259 (W.D. Pa 1980) (Amended Findings of Fact ¶¶17, 18, 20, 21), *aff'd*, *Grove City College v. Bell*, 687 F. 2d 684, 689 (3rd Cir. 1982).

a school will be considered a "recipient" subject to Title IX regulation of its entire admissions, faculty, curriculum and campus programs. To designate an entire institution a "program" when the benefit it derives is remote, the aid indirect and the value de miniums defeats the purpose and the intent of the congressional legislation.

Numerous courts have recognized that application of the 'benefit theory' renders the entire 'program-specific' limitation of Title IX meaningless.[6] Under the Department's theory, every college program and activity would be subject to regulation the minute one dollar of federal aid entered the general fund by way of student tuition payments. The result of this unwarranted extention of Departmental authority unfortunately serves nothing more than to punish innocent students.

D. *Designation Of Grove City College As A "Recipient" Subject To Federal Control Hurts The Very Individuals Title IX Is Intended To Help — The Students.*

The Department has intentionally extended federal control over private institutions on the sole basis of student receipt of federal grants and insured loans. Any institution resisting this ultra vires extention of federal control finds its students stripped of their BEOGs and GSLs. The government is forcing private colleges and their students to make unfortunate choices. An institution must either submit to pervasive federal regulation of its admissions, curriculum and campus policies or exclude those students who receive federal educational benefits in order to maintain its academic autonomy. Similarly the student must choose whether to sacrifice federal scholarships and loans in order to attend the college or university of his choice or to forego that freedom and enroll in an institution which is already highly regulated. By placing private colleges and

[6] *Hillsdale College v. Department of Health, Education & Welfare*, 696 F.2d at 430; *Rice v. President and Fellows of Harvard College*, 663 F.2d 336, 338 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982); *University of Richmond V. Bell*, 543 F. Supp. 321 (E.D. Va. 1982); *Bennett v. West Texas State University*, 525 F. Supp. 77, 80-81 (N.D. Tex. 1981), *rev'd without opinion*, 698 F.2d 1215 (5th Cir. 1983), *appeal filed* (U.S. April 6, 1983) (No. 82-1683).

their students in this position, the Department is defeating any purpose of free academic choice Congress may have had in passing equal education opportunity legislation.

CONCLUSION

Conflict between the government and private education is not new to this Court. Others have come to defend our noble tradition of academic freedom. Perhaps the most eloquent was Daniel Webster in *Trustees of Dartmouth College v. Woodward,* 17 U.S. 518 (1819). *Dartmouth College* was a property case, although not one concerned with tangible property. The college property that Daniel Webster sought to secure from governmental encroachment was intangible — its reins of power. Its commonality with the *Grove City College* case is obvious in the question it asks: shall the government wield control over our country's private educational institutions? Mr. Webster thought not, as he directed his closing argument to Chief Justice John Marshall:

> This, sir, is my case! It is the case not merely of that humble institution, it is the case of every college in our land! It is more! It is the case of every eleemonsynary institution throughout our country — of all those great charities founded by the piety of our ancestors to alleviate human misery, and scatter blessings along the pathway of life! It is more! It is, in some sense, the case of every man among us who has property of which he may be stripped, for the question is simply this, "Shall our state legislatures be allowed to take *that which is not their own,* to turn it from its original use, and apply it so such ends and purposes as they in their discretion shall see fit!"
>
> Sir, you may destroy this little institution; it is weak, it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out! But if you do so, you must carry through your work! You must extinguish,

> one after another, all these great lights of science which for more than a century have thrown their radiance over our land![7]

And Chief Justice Marshall replied:

> That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to goverment, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society. . .

Trustees of Dartmouth College v. Woodward, 17 U.S. at 634.

The decades of sacrifice made by these private institutions to avoid federal control will be rendered meaningless if the Department is permitted to usurp control over the academic freedom of our independent colleges and universities.

Respectfully submitted,

Susan J. Bard
Maxwell A. Miller

Mountain States Legal Foundation
1200 Lincoln Street, Suite 600
Denver, Colorado 80203
Telephone: 303/861-0244

Attorneys for Amici Curiae

[7] Recorded in letter from Chauncy A. Goodrich to Rufus Choate (Nov. 25, 1852, *Dartmouth College*) (reporting on *Dartmouth College* oral argument) (cited in L. Baker, *John Marshall* 661-62 (1970)).