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No. 82-792

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GROVE CITY COLLEGE, *et al.*,
Petitioners,

v.

T. H. BELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF *AMICUS CURIAE* OF HILLSDALE COLLEGE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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INTEREST OF HILLSDALE COLLEGE

This case concerns the lawful interpretation of Title IX of the Education Amendments of 1972,[1] and the proper extent of the Department of Education's regulatory authority[2] under this statute. At issue before the Court

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[1] 20 U.S.C. §§ 1681-1686 (1976) ("Title IX").

[2] When this lawsuit was initiated, these regulations were administered by HEW and were codified at 45 C.F.R. Part 86. They were recodified at 34 C.F.R. Part 106 in substantially identical form on

is the propriety of the Department's attempted exercise of regulatory control over the operations of Grove City College, a private, co-educational, liberal arts college located in western Pennsylvania. From its inception, Grove City College has consciously and consistently refused any form of Federal financial assistance, so as to preserve its institutional autonomy and freedom from governmental intervention into its private academic affairs.

The factual posture of the *Hillsdale College v. Department of Education*[3] case is strikingly similar. In that case, identical issues with respect to the proper scope of the Title IX legislation, and its implementing regulations, have been raised. Hillsdale College is a private, non-sectarian, co-educational college located in Hillsdale, Michigan. Since its founding in 1844, Hillsdale has also refused to accept any federal or state financial assistance because of its real fear that to do so would inevitably subject it to governmental prescription of education policies, thereby jeopardizing the College's academic independence.

The sole basis for the efforts made by the Department to regulate the academic affairs of Hillsdale and Grove City Colleges is the fact that both Colleges accept for enrollment students who participate in certain federal programs and who receive federal financial assistance in

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May 9, 1980, in connection with the establishment of the Department of Education ("the Department"). 45 Fed. Reg. 30802, 30962-63 (1980).

[3] *Hillsdale College v. HEW*, 696 F.2d 418 (6th Cir. 1982), *petition for cert. filed sub nom. Hillsdale College v. Department of Education*, 51 U.S.L.W. 3704 (U.S. March 16, 1983) (No. 82-1538) ("*Hillsdale College*"). No decision has been announced on Hillsdale's application. The Court may have followed the Solicitor General's suggestion that it be held in abeyance pending resolution of *Grove City College v. Bell.*

the form of federal grants or loans.[4] The Department has argued that the participation in student assistance programs by certain students attending these Colleges suffices to allow the categorization of the entire educational institution which they attend as a "recipient" of "federal financial assistance," as contemplated by Title IX. It should be stressed that no allegations or findings of discrimination have been made against either College; rather, at issue is the initial coverage and jurisdiction of the statute absent a finding of sexual (or other) discrimination.

As a result of this interpretation of Title IX in both the *Hillsdale College*[5] and *Grove City College v. Bell*[6] cases, the Department has claimed regulatory authority over the Colleges and has sought the submission by the Colleges of an executed Assurance of Compliance with the Title IX regulations.[7] This document requires a signatory to confirm that each education program or activity operated by the applicant/institution to which the regulations apply will be conducted in compliance with Title

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[4] The particular grant program at issue in the *Grove City College* case is the Basic Educational Opportunity Grant Program ("BEOG") (20 U.S.C. § 1070a (1976 & Supp. V 1981)). Grants under this program are now called "Pell Grants." For the sake of consistency, we will continue to refer to this program as the BEOG Program. At Hillsdale, students also participate in the National Direct Student Loan Program ("NDSL") (20 U.S.C. §§ 1087aa *et seq.* (1976 & Supp. V 1981)) and the Supplemental Educational Opportunity Grant Program ("SEOG") (20 U.S.C. § 1070b (1976 & Supp. V 1981)). As discussed *infra* at 11-15, Hillsdale believes that the legal analysis of the Colleges' involvement in the student assistance programs, and whether they constitute a "program or activity" under Title IX, remains the same in both factual contexts.

[5] *Hillsdale College, supra* n.3, at 2.

[6] 687 F.2d 684 (3rd Cir. 1982), *cert. granted*, 51 U.S.L.W. 3598 (U.S. Feb. 22, 1983) (No. 82-792) ("*Grove City College*").

[7] The document the Colleges were asked to submit was HEW Form 639A.

IX and the regulations.[8] Both Hillsdale and Grove City Colleges have resolutely refused to execute such an Assurance because they challenge both the applicability of the statute to *any* of their operations, and because they question the entire theory of regulatory coverage advanced by the Department.

Hillsdale and Grove City Colleges have interposed administrative and judicial challenges to the Department's attempted exercise of regulatory authority over their academic operations. In the *Hillsdale College* case, the Court of Appeals for the Sixth Circuit recently entered its decision wherein it "agree[d] with Hillsdale in part and HEW in part."[9] The Sixth Circuit also agreed *in part* with the earlier ruling made by the Court of Appeals for the Third Circuit in the analogous case of *Grove City College*.

In its decision, the Sixth Circuit found Hillsdale to be a "recipient" of "federal financial assistance" under Title IX, and therefore subject to regulation under the statute.[10] This aspect of the decision is consonant with the ruling by the Third Circuit Court of Appeals in the *Grove City College* case.[11] Thus, a fundamental premise of Hillsdale and Grove City Colleges' position has been

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[8] The basis for the Department's requirement is found in 34 C.F.R. § 106.4 (1982), which provides:

> (a) General. Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part.

[9] *Hillsdale College*, 696 F.2d at 430.

[10] *Id.*

[11] *Grove City College*, 687 F.2d at 693.

rejected by the Circuits and, as a result of these rulings, the Colleges have been made subject to coverage and regulation under Title IX.[12] Moreover, unless these private educational institutions capitulate in their pursuit of basic academic principles and independence, the federal educational assistance monies (in the form of loans and grants) received by their students have been made subject to termination.

However, in its decision in *Hillsdale College* the Sixth Circuit agreed with the College's position with regard to the "program-specificity" issue. It found that the Department's policy of enforcement and regulation was invalid—to the extent that it sought to subject Hillsdale's operations to institutionwide control. The court concluded that the regulations "as applied . . . , contravene the program-specific nature of Title IX by equating the statutory phrase 'education program and activity' with the educational institution itself."[13] Thus, the Sixth Circuit in the *Hillsdale College* case rejected both the Department's *and* the Third Circuit's position concerning the proper ambit of regulatory authority under the statute. In *Grove City College*, by contrast, the Third Circuit held that the entire operation of the College can properly be considered the relevant "program" under Title IX.[14]

Thus, as noted, the factual postures of the *Hillsdale College* and *Grove City College* cases are, in many respects, identical. This factual similarity points out the

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[12] Hillsdale is particularly disheartened by the Sixth Circuit's ruling on the "recipient" issue, in that the rationale behind the court's ruling on this important matter is not readily decipherable from the court's opinion. Thus, the College has been made subject to Title IX and its regulations without being informed of the basis therefor.

[13] *Hillsdale College*, 696 F.2d at 424.

[14] *Grove City College*, 687 F.2d at 700.

fact that the issues in the *Grove City College* case impact upon Hillsdale College as well as a number of other private educational institutions. In addition, Hillsdale respectfully submits that its direct involvement in issues which are before the Court in this case warrants particular consideration of its brief by the Court.

Grove City College recently petitioned this Court for a writ of certiorari relying, in part, upon the conflict produced by the Sixth Circuit's decision in the *Hillsdale College* case.[15] On February 22, 1983, a writ of certiorari was granted by the Court in the *Grove City College* case. After the decision by the Sixth Circuit in the *Hillsdale College* case, Hillsdale College also sought review of its case by the Court and, to this end, filed a petition for writ of certiorari on March 16, 1983. In its petition, the College noted, *inter alia*, the presence of a conflict between the Circuits, and suggested that consolidation of the *Hillsdale College* and *Grove City College* cases for review and consideration by this Court would be appropriate.

It is apparent that the Court has deferred making a decision on Hillsdale's petition pending consideration of the *Grove City College* case. However, Hillsdale's interests remain critically and inextricably involved in the instant proceeding before the Court. The proper interpretation of Title IX and its implementing regulations necessarily involves significant issues which directly concern Hillsdale College, and which will affect many of its future actions. For this reason, the College hopes that this brief will provide assistance to the Court in its consideration of this important matter.

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[15] *See* Grove City College Petition for Writ of Certiorari, filed Nov. 9, 1982, at 13-14. *See also* Grove City College Reply Brief (to Brief for the United States in Opposition to Grove City College Petition for Writ of Certiorari), filed Feb. 4, 1983, at 1, 9, 10.

Moreover, Hillsdale, an institution representative of the many private educational institutions which have sought to avoid intrusive federal intervention into their private academic affairs, can contribute significantly to these proceedings. Hillsdale believes that these private institutions provide important diversity and balance to the American educational experience. This very important public-interest factor should be given due consideration by the Court.

SUMMARY OF ARGUMENT

This case presents important issues which require clarification by this Court. Title IX of the Education Amendments of 1972 is limited in its application to those particular programs and activities within an educational institution which receive federal assistance under specific federal grant statutes. The Department of Education's theory of coverage, and the ruling of the court below, contravene this statutory limitation and should, therefore, be interdicted by this Court.

Private educational institutions which decline federal assistance and which do not discriminate should be allowed to exercise academic freedom and independence from governmental interference in their affairs. In order to allow such educational institutions full academic autonomy, the Court should provide clarification and guidance as to the proper interpretation of the Title IX legislation. This judicial clarification is particularly necessary because of the changing administrative interpretations and arguments made by the Department of Education and its predecessor at different times and in different places on the same issues.

In its brief *amicus curiae*, Hillsdale College does not address all of the issues of importance raised by this proceeding; rather, the College endeavors to assist the Court by discussing certain of the broader issues presented by this case.

ARGUMENT

I. Title IX Is Expressly Limited to Those Particular Activities and Programs Within an Educational Institution Which Receive Federal Financial Assistance Under Specific Federal Grant Statutes; Regulations Extending Beyond the Statute Which Attempt to Reach Educational Institutions That "Benefit" from Such Grants Are Excessive and Invalid.

Under Title IX of the Education Amendments of 1972, the beneficiaries of federally assisted education programs and activities are protected from discrimination on the basis of sex by the institution which operates such programs and activities. Specifically, 20 U.S.C. § 1681 (1976) provides that no person shall, on the basis of sex:

—be excluded from participation in any education program or activity receiving federal financial assistance;

—be denied the benefits of any education program or activity receiving federal financial assistance; or

—be subjected to discrimination under any education program or activity receiving federal financial assistance.[16]

Under the statute, therefore, before an educational institution can be deemed a "recipient" of federal financial assistance and thereby subject to Title IX, the institution must operate an "education program or activity" which *receives* federal financial assistance, *i.e.*, a program or activity authorized by and funded under federal assistance statutes.[17]

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[16] 20 U.S.C. § 1681(a) (1976).

[17] By way of illustration, the proper application of Title IX would occur, for example, when a college operates a program to train bilingual teachers funded under the Bilingual Education Act. 20 U.S.C. §§ 3221 *et seq.* (Supp. V 1981). The college operating such a program would be the "recipient" of the federal aid, and the students eligible to enroll in that program would be the beneficiaries of

The Department concedes that neither Hillsdale nor Grove City College operates any such activities or programs, but nevertheless has insisted that it may subject these Colleges to Title IX and its implementing regulations.[18] This assertion of authority has occurred despite the fact that none of the programs or activities operated by these Colleges *receive* federal financial assistance. The Department's claim of authority is contained in the regulations it has promulgated to effectuate the prohibitions contained in Title IX. These regulations erroneously define the coverage of the statute and its regulations, and the crucial words "recipient" and "federal financial assistance." A cursory review of the pertinent regulations clearly illustrates the problem. 34 C.F.R. § 106.11, which sets forth the coverage of the regulations, provides:

> Except as provided in this subpart, this Part 106 applies to every recipient and to each education program or activity operated by such recipient which receives *or benefits* from Federal financial assistance.[19]

Moreover, 34 C.F.R. § 106.31(a), which sets forth the regulatory prohibition upon sexual discrimination in "education programs and activities," states that:

> Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient

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such aid. In such an instance, Title IX would prohibit the recipient institution from taking any action which would, because of the student's sex, exclude such student from participation in, or deny such student the benefits of, or subject him or her to discrimination under, this federally funded program.

[18] 34 C.F.R. Part 106 (1982).

[19] 34 C.F.R. § 106.11 (1982) (emphasis added).

> which receives *or benefits* from Federal financial assistance. (Emphasis added.)

Under the definitional section of the regulations, "Recipient" is defined to include:

> [A]ny 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.[20]

In addition, "Federal financial assistance" is defined in the following manner to include:

> 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.[21]

Thus, although the coverage of Title IX is, by its very precise terms, limited to "education program[s] or activit[ies] *receiving* Federal financial assistance, . . ." [22] the Department's theory of regulatory coverage, and its regulatory definition of "recipient," is wholly at odds with this particular statutory limitation. Instead of "receipt" of federal assistance being the sole basis for inclusion under the statute, as distinctly provided by Title IX, the Department asserts that receives *or benefits* are the operative words for coverage—even though the words "receipt" and "benefit" are not equivalent in meaning. Due to the erroneous equation advanced by the Department and the implementing regulations' definition of "federal financial assistance" (incorporating this con-

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[20] *Id.* at § 106.2(h) (emphasis added).

[21] *Id.* at § 106.2(g)(1)(ii).

[22] 20 U.S.C. § 1681(a) (emphasis added).

cept) quoted above, the Third Circuit in the *Grove City College* case found the College's educational programs and activities to be subject to regulation, solely because the College accepts for enrollment students who receive federal financial assistance—which assistance *may* in turn be used to pay for certain educational services provided by the College.[23]

Because colleges are said to "benefit" from such student assistance, Grove City and Hillsdale Colleges are deemed to be "recipients" of Federal financial assistance—and are said to be subject to Title IX and its regulations. Hillsdale submits that it is self-evident that all of these regulations, as applied to Grove City and Hillsdale Colleges, are in excess of the statutory authority conferred upon the Department by Congress. The "federal financial assistance" which triggers the requirements of Title IX must be to an *educational activity or program.* Hillsdale and Grove City Colleges enroll students who "receive federal financial aid," but these Colleges do not operate any "education program or activity" which itself receives such assistance. The financial aid at issue here is not financial assistance to "an education program or activity," but *assistance to the students* to enable them to attend the colleges they wish.

At this juncture, an analysis should be made of the particular student assistance programs at issue in the *Grove City College* and *Hillsdale College* cases. In the *Grove City College* case, the effect of student participation in the Basic Educational Opportunity Grant Program[24] is under consideration. Under the BEOG program, federal assistance is provided directly to the students. By statute and federal regulation, the College's only function is ministerial—as it certifies students' enrollment and educational costs. Certain of Hillsdale's

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[23] *See* discussion *infra* at 14-15.

[24] 20 U.S.C. § 1070a.

students participate in this assistance program. Moreover, at Hillsdale College certain students also participate in other federal assistance programs—namely, the National Direct Student Loan Program [25] and the Supplemental Educational Opportunity Grant Program.[26] In these student assistance programs, the College voluntarily functions in an administrative capacity.[27] Under the NDSL and SEOG programs, the College disburses educational funds provided by the federal government to those students who apply for such assistance. It must be stressed that this disbursement is made *solely* on the basis of predetermined eligibility criteria prescribed by regulations which consider financial requirements and the expected family contribution to educational costs. The determination of eligibility is based upon financial statements filed by student applicants interested in securing such assistance. This statement is examined by a private firm which, in accordance with regulatory requirements, runs a "needs analysis" evaluation and determines the appropriate family contribution to a student's educational costs. As noted, a college whose students participate in these programs then disburses available assistance monies based solely upon this independently determined needs analysis. The various student assistance programs funded under Title IV of the Higher Education Act of 1965, as amended,[28] are carefully prescribed. Specifically, an educational institution whose students receive monies under these programs

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[25] *Id.* at §§ 1087aa *et seq.*

[26] *Id.* at § 1070b.

[27] The College may apply for reimbursement of the administrative expenses incurred in running these programs; however, it foregoes such monies in order to maintain its educational independence.

[28] *See* 20 U.S.C. §§ 1070 *et seq.* (1976 & Supp. V 1981). Title IV student assistance programs include, *inter alia,* the BEOG, NDSL, SEOG and Guaranteed Student Loan (20 U.S.C. §§ 1071 *et seq.* ("GSL")) Programs.

must certify that the educational funds will be used solely for purposes specified in the regulations, and that the assistance programs will be administered in accordance with the pertinent statutory and regulatory provisions.[29]

Hillsdale asserts that it is clear that under *all* of the programs at issue in the *Grove City College* and *Hillsdale College* cases, the only "recipient" of federal assistance is the *student*—who then uses the monies provided for a variety of educational purposes. Under these programs, the educational institutions are not given any monies to use for their own purposes. Instead, under certain programs (*e.g.*, BEOG, GSL), assistance monies go directly to the students, whereas in other programs (*e.g.*, NDSL, SEOG), assistance monies are sent to the educational institution for disbursement to eligible students based upon an independently determined analysis of financial need. In the latter situation, the college serves only in a traditional fiduciary capacity. The college has no ability to use the funds transmitted by the federal government for its own purposes and, instead, has been given a carefully defined administrative responsibility to disburse funds based upon financial need to those particular students who apply for such assistance.

Under all of these programs, the student who applies for and is awarded federal financial assistance is the "recipient." There is *no* educational activity or program at these Colleges which receive federal assistance, and therefore there is no basis for statutory or regulatory coverage under Title IX.*

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[29] *See* 34 C.F.R. §§ 674.8 (NDSL), 676.8 (SEOG) (1982).

* On June 6, 1983, as it was going to press with this brief, Hillsdale College received a copy of the brief *amici curiae* in support of Petitioners, filed in this proceeding by Mountain States Legal Foundation and the American Association of Presidents of Independent Colleges and Universities. In their brief, these groups assert that certain student assistance programs at Hillsdale subject the College

In addition, it must be stressed that Hillsdale and Grove City Colleges accept for enrollment students who receive federal grants and loans. Student beneficiaries of federal educational assistance in turn spend these monies in exchange for a variety of educational services—*only some* of which may be provided by the colleges. The fact of this potential payment to the colleges of some funds derived from a federal grant does not suffice to transform the educational institutions into "recipients" of "federal financial assistance." Instead, the use of federal assistance monies at private educational institutions are payments for services rendered, and do not constitute assistance to the educational institutions.[30] Moreover, the logical extension of this "benefits" theory would extend federal statutory and regulatory authority over numerous other private vendors whose services a student might pay for with assistance monies received from the federal government. Hillsdale submits that this is an absurd result which was never countenanced by Congress.[31] The assistance provided to students under

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to Title IX and its regulations because the College has "administrative and discretionary authority to select beneficiaries . . ." (*see Amici Curiae* Brief at 8), whereas at Grove City College there is no such basis for regulatory authority because the students *directly* receive educational assistance monies. For the reasons discussed in its brief, Hillsdale respectfully submits that no meaningful factual or legal distinction can be drawn based upon the type of student assistance program involved. Hillsdale receives no federal assistance under the "campus-based" educational assistance programs in which its students participate. The fiduciary duty imposed upon the College concerning disbursement of assistance monies, and the requirements imposed by statute and regulations, confirm this conclusion.

[30] *See University of Richmond v. Bell*, 543 F. Supp. 321, 330 (E.D. Va. 1982).

[31] For example, assistance monies may properly be used to pay for a student's room and board expenses. Under the Department's interpretation of the statute, payments made for these services would constitute an adequate basis to characterize vendors providing same as "recipients" of federal financial assistance under Title IX, and

these federal loan and grant programs is not federal assistance to the educational institution such students attend, and does not constitute a valid basis for the assertion of federal regulatory authority under Title IX.

The clear and unambiguous significance of the terms of the statute, which limit coverage to educational activities or programs which receive federal financial assistance, should not be tortured beyond recognition to produce the result advanced by the Department and by the Third Circuit in the *Grove City College* case. It is well established that the starting point for statutory interpretation is the language of the statute itself.[32] Absent a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.[33] Moreover, in cases involving statutory construction, words are normally interpreted as taking their ordinary, contemporary and common meanings.[34] Under these fundamental precepts of statutory construction, it is clear that the statute's limitation upon coverage—to those who *receive* federal financial assistance—should be honored by the courts and by the agency entrusted with the enforcement of this legislation.

In addition, the accuracy of this conclusion—that neither Hillsdale nor Grove City Colleges are "recipients" of "federal financial assistance" under Title IX—is confirmed by a brief analysis of the pertinent legislative

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would require their execution and filing of the requisite Assurance of Compliance.

[32] *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979). ("It is elementary that '[t]he starting point in every case involving construction of a statute is the language itself'." (citations omitted.))

[33] *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

[34] *Perrin v. United States*, 444 U.S. 37, 42 (1979); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975).

history of this legislation, and by reference to the legislative history of Title VI.[35]

A review of the limited legislative history surrounding the enactment of Title IX simply cannot support an interpretation of the statute, which would extend the statutory language "receiving federal financial assistance" beyond its naturally understood meaning, to the Department's regulatory concept of coverage which maintains that receipt of *or benefit from* federal assistance triggers the applicability of Title IX and its regulations. Thus, the Department and the Third Circuit in the *Grove City College* case have acted in a manner contrary to both the clear and evident meaning of the statute and its legislative history.

Specifically, when Title IX was pending in Congress the question of the proper treatment of student assistance was raised. Senator Bayh, the sponsor of the Senate version of Title IX, was asked what kind of aid the Department could terminate for violation of the then-to-be promulgated sex discrimination regulations. Bayh confirmed that Congress did not intend a denial of aid to students as a sanction under Title IX. This conclusion is found in a discussion had between Senators Bayh and Dominick, wherein Senator Bayh stated:

> It is unquestionable, in my judgment, that this [termination power] would not be directed at specific assistance that was being received by individual students, but would be directed at the institution . . . .[36]

Hillsdale believes that Senator Bayh's response to the question posed concerning student assistance indicates

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[35] Consideration of the legislative history of Title VI is appropriate, as Title IX was in part based upon the earlier legislation enacted as Title VI of the Civil Rights Act of 1964 (which prohibits race discrimination in federally assisted programs). *See Cannon v. University of Chicago*, 441 U.S. 677, 694-98 (1979).

[36] 117 Cong. Rec. 30408 (1971).

that he did not consider such assistance to be federal financial assistance *received* by an educational institution but, rather, viewed as educational assistance provided to individual students.[37]

It is unquestionable that aid to a student is *not* aid to an activity or program, and that receipt of federal financial assistance is one thing whereas benefitting from its existence is quite another. The Department's obliteration of these critical distinctions renders meaningless Congress' careful use of the words "program or activity receiving Federal financial assistance" to define the scope of Title IX's coverage, and resurrects the very institution-wide coverage which Congress rejected.[38]

The legislative history and interpretation by the Executive Branch of the terms "program or activity" (which appear in Title VI) also confirm that there is indeed a critical distinction between aid "to a person" and aid "to a program or activity." By letter written to Representative Emmanuel Celler (Chairman of the House Judiciary Committee when Title VI was pending), the Justice Department described certain programs which would *not* be considered to be covered by statute. This list included:

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[37] *See also* a later colloquy between Senator Bayh and Rep. Quie during hearings held by the House reviewing the Department's Title IX regulations:

> Rep. Quie: . . . I have heard it claimed that that [the view that the educational institution is a "recipient" if a student is receiving Federal assistance] is one of the reasons why they [the Department] have jurisdiction.
>
> Senator Bayh: I have not.

Hearings Before the Subcomm. on Post-Secondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 182 (1975).

[38] *See* original Senate (amendments to S. 659, 92d Cong., 1st Sess., 117 Cong. Rec. 30156 (1971)) and administration (H.R. 5191, 92d Cong., 1st Sess. § 1001(b) (1971)) versions of the Title IX legislation.

> [a] number of programs administered by Federal agencies [which] involve direct payment to individuals possessing a certain status . . . . [T]o the extent that there is financial assistance . . . the assistance is *to an individual and not to a 'program or activity'* as required by Title VI.[39]

Hillsdale submits that the strained interpretation of Title IX advanced by the Department and by the Third Circuit in *Grove City College* is contrary to both the clear terms of the statute itself and the pertinent legislative history surrounding its enactment.

II. Private Education Provides Important Diversity to American Education.

The *Grove City College* and *Hillsdale College* cases raise issues of critical importance to a sizeable segment of the academic community. At issue is the ability of private colleges to operate independently from governmental control and intervention, which the Department asserts as a condition of its continuation of educational assistance to the Colleges' students. Specifically, at issue is the legality of efforts to designate Grove City College a "recipient" of Federal financial assistance, and the concomitant effort made by the Department and the Third Circuit to subject all of the activities and programs of Grove City College to federal control. Grove City and Hillsdale Colleges do not argue with the merits of the Title IX legislation; rather, they dispute the authority of the federal government to regulate the activities of private, independent colleges which refuse federal assistance, and which are not even alleged to be in violation of the anti-discrimination laws.[40]

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[39] *Hearings Before the Comm. on the Judiciary on H.R. 7152, As Amended by Subcomm.*, 88th Cong., 1st Sess. 2773 (1963) (emphasis added).

[40] Hillsdale College has historically followed a policy of nondiscrimination. The College admitted both blacks and women *before* the Civil War. Indeed, the first woman in Michigan to graduate

There is a broad and valid consensus that independent, private educational institutions provide important diversity and balance to what would otherwise be an exclusively state-run system, and that the preservation of that diversity is in the national interest. For example, Joseph Califano, a former Secretary of the Department, stated of private colleges and universities:

> They have been guardians of independent thinking and academic freedom, enjoying a bit more insulation from the whims and pressures of politics than their tax-supported sisters.
>
> Perhaps the greatest contribution of these private institutions, beyond training talent for the nation, has been diversity; the rich variety that colleges like this lend to the American educational landscape. What an incredibly rich resource: Hundreds of institutions, each independent; each solving its problems in its own way; each a vital center of innovation and experiment; each with its own special commitment to cultural and moral values.
>
> It is this diversity that gives American higher education and American life so much of their vitality. It is this diversity that your national government is pledged to nourish and safeguard.[41]

Similarly, this Court has also recognized the importance of academic freedom, and has struck down governmental attempts to prohibit private education and to interfere unnecessarily with the autonomy and independence of private educational institutions.[42]

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with a Bachelor of Arts Degree (she was the second woman in the United States to do so) received her degree from Hillsdale in 1852.

[41] 123 Cong. Rec. E3798 (daily ed. June 15, 1977). *See also* 117 Cong. Rec. 39249 (1971) (remarks by Rep. Erlenborn); H.R. No. 554, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2462, 2590.

[42] *See Farrington v. Tokushige*, 273 U.S. 284 (1927); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Despite this consensus, governmental regulation of private university education has grown so pervasive and particular that there is a genuine concern that the diversity represented by such institutions will soon disappear as all universities are increasingly compelled to conform to a particular federal model or archetype.[43] The restriction of the Department's regulatory authority to that mandated by the Title IX legislation will promote diversity in private education, and will thereby foster the various important values such private education provides.

III. This Case Involves Critical Issues Concerning the Scope of Governmental Authority to Regulate Private Independent Colleges Which Require Resolution and Clarification by This Court.

Hillsdale submits that a detailed and careful consideration of all the issues raised by the *Grove City College* case is warranted—so that private institutions will be given clearer guidance as to the meaning of Title IX, and will have a greater ability to predict the consequences of their actions in their efforts to remain free from federal control. Specifically, in the *Grove City College* and *Hillsdale College* proceedings, the Department has changed its position concerning aspects of this legislation and its view of the proper interpretation thereof. For example, the Department no longer contends, as it did originally, that the Guaranteed Student

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[43] *See* the statements of Kingman Brewster, then President of Yale University, and of Dallin Oaks, then President of Brigham Young University, in Hearings on *Sex Discrimination Regulations Before the Subcomm. on Post-Secondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. at 231-37 (Oaks) and at 234 (Brewster), and the statement of John R. Hubbard, President of the University of Southern California, quoted in Oaks, *A Private University Looks at Government Regulation*, 4 J. of Coll. and U. Law 4, 8 (1976). *See also* G. Roche, *The Balancing Act* (1974). The author, Dr. George C. Roche, III, is President of Hillsdale College.

Loan Program is covered by Title IX. Also, by way of illustration, the Department has changed its position concerning the "program-specificity" aspect of the Title IX legislation.[44] Indeed, the Court has also recognized a certain variance in the Department's position concerning the proper interpretation of the Title IX legislation. In *North Haven Board of Education v. Bell*,[45] this Court stated:

> In construing regulations, the Court normally defers to the agency's interpretation. . . . Here, however, that interpretation has fluctuated from case to case, and even as this case has progressed. . . . Accordingly, *there is no consistent administrative interpretation of the Title IX regulations for us to evaluate.*[46]

The previous shifts in administrative and agency policy concerning the scope of Title IX and its regulations illustrate the need for a definitive and lasting resolution of this controversy by the Court. An administrative solution to the issues presented simply will not suffice, as future administrations and changing political considerations may reverse or modify any administrative victory obtained by the College. By providing final judicial clarification as to the scope of Title IX, the Court will give private educational institutions greater certainty as to the implications of their acts, and will therefore allow such institutions to exercise their aca-

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[44] Contrary to its original position in these cases, wherein the Department maintained that the entire educational institution constituted the relevant "program" under Title IX, the Department now contends that the statute and its regulations must be applied in a "program-specific" manner. In view of the conclusive decision by this Court on the "program-specificity" issue, the Department may legitimately have chosen to change its position. *See North Haven Board of Education v. Bell*, 456 U.S. 512, 534-38 (1982).

[45] 456 U.S. 512 (1982).

[46] *Id.* at 538-39 n.29 (citations omitted, emphasis added).

demic freedom to the full extent allowed by law. The public interest requires such clarification now.

CONCLUSION

Throughout the many years of the *Grove City College* and *Hillsdale College* administrative and judicial proceedings, the Colleges' actions have been motivated solely by their principled objections to excessive governmental intrusion into their private academic affairs. In neither case has there been any allegation or finding of discrimination, and the Colleges have sought only to exercise their academic freedom and autonomy without unnecessary and unlawful interference. The Department of Education, through its regulations, seeks to intrude into areas, programs and activities beyond statutory authorization. This Court should give all interested parties definitive judicial clarification that such intrusion is beyond the lawful authority of the Department and contrary to the intent of Congress.

For the reasons set forth above, Hillsdale College respectfully requests that the decision of the Third Circuit Court of Appeals in *Grove City College v. Bell* be reversed by this Court.

Respectfully submitted,

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