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NO. 82-792

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

GROVE CITY COLLEGE, PETITIONER

v.

TERREL H. BELL, ET AL.

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

Brief of the Honorable Claudine C. Schneider, Gary Ackerman, Michael A. Andrews, Anthony C. Beilenson, William S. Broomfield, Sala Burton, Rod Chandler, Barber B. Conable, Jr., Alan Cranston, George W. Crockett Jr., Norman F. D'Amours, Robert W. Davis, Bob Dole, Byron L. Dorgan, Don Edwards, Cooper Evans, Lane Evans, Walter E. Fauntroy, Vic Fazio, Geraldine A. Ferraro, Barney Frank, Dan Glickman, William H. Gray III, Bill Green, James M. Jeffords, Nancy L. Johnson, Marcy Kaptur, Barbara B. Kennelly, William Lehman, Mickey Leland, Mel Levine, John R. McKernan, Jr., Stewart B. McKinney, Buddy MacKay, Lynn Martin, Barbara A. Mikulski, Norman Y. Mineta, Bruce A. Morrison, Mary Rose Oakar, James R Olin, Bob Packwood, Claude Pepper, Edward R. Roybal, Patricia Schroeder, Paul Simon, Olympia J. Snowe, Estaban Edward Torres, James Weaver, Ted Weiss, Howard Wolpe of the United State Congress, as Amici Curiae.

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Brief of Amici Curiae

INTEREST OF THE AMICI CURIAE

This brief is submitted on behalf of current Members of the United States Congress. As Members of Congress, Amici have a compelling interest in the proper construction of statutes, and leave to file is frequently granted congressional Amici, particularly where, as here, legislative history must be examined extensively. E.g., Myers v. United States, 272 U.S. 52 (1926). Because the intent of Congress in

enacting Title IX of the Education Amendments of 1972 was to eliminate sex discrimination from all aspects of American education, Amici submit the following brief in support of the positions taken by respondent in the court below.[1]

The Amici are members of both sexes, both houses of Congress, both political parties and all parts of the political spectrum. A number of the Amici were in the Congress when Title IX was passed. Many Amici are members of the Congressional Caucus for Women's Issues, a bipartisan organization which has an enduring interest in issues specifically affecting women. Others are members of the Congressional Black and Hispanic Caucuses, who are particularly concerned about the implications that the Court's interpretation

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[1] The parties' letters of consent are being lodged with the Clerk pursuant to Rule 36.1.

of Title IX in this case will have for enforcement of Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race in language that is parallel to the language of Title IX.

All of the Amici are co-sponsors of one of two identical bills, S. 149, 98th Cong., 1st Sess. (1983), and H.Res. 190, 98th Cong., 1st Sess. (1983), which reaffirm the congressional intention that Title IX and the regulations issued pursuant to it

> should not be amended or altered in any manner which will lessen the comprehensive coverage of such statute in eliminating gender discrimination throughout the American educational system.

H. Res. 190, which is co-sponsored by 225 members of the House of Representatives, was reported favorably to the House by the Education and Labor Committee on August 5, 1983.

STATEMENT

Petitioner is a college which receives no direct federal funding. Grove City College v. Bell, 687 F.2d 684, 689 (3d Cir. 1982). However, one hundred forty of Petitioner's approximately twenty two hundred students are eligible to receive Basic Educational Opportunity Grants (BEOG's) appropriated by Congress and allocated by the Department of Education pursuant to 20 U.S.C. §1070a (1976 and Supp. 1981), and three hundred forty-two students have obtained Guaranteed Student Loans (GSL's). Id. at 388. In July 1976, the Department of Health, Education and Welfare began efforts to obtain an Assurance of Compliance from Petitioner as a means of ensuring its compliance with Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, §§901-907, 86 Stat. 373-75. Petitioner refused to file the Assurance on

the basis that it received no federal financial assistance. 687 F.2d at 689.

In the administrative proceedings brought by the Department to terminate grants and loans to students attending the college, an administrative law judge concluded that Petitioner was a recipient of federal financial assistance. He decided further that BEOG's and GSL's could be terminated because of Petitioner's refusal to execute an Assurance of Compliance pursuant to Title IX. An order prohibiting the payment of BEOG's and GSL's to students attending Petitioner was entered. Id.

Petitioner and four student recipients of BEOG's and GSL's sued the Department to declare void the termination of BEOG and GSL assistance and to enjoin the Department from requiring Petitioner to file an Assurance of Compliance as a condition of preserving its eligibility in the BEOG and GSL programs. The complaint also sought a declaration that

the Title IX regulations promulgated by the Department either exceeded the Department's authority or were unconstitutional as applied to Petitioner. Id.

The district court rejected Petitioner's contention that BEOG's and GSL's do not constitute federal financial assistance to the college within the purview of Title IX. However, it granted much of the relief sought by Petitioner because it concluded that the Department could not terminate BEOG's and GSL's based on Petitioner's refusal to execute an Assurance of Compliance. Id.

The court of appeals reversed with respect to BEOG's.[2] The court held that under Title IX the Department was authorized to construe the phrase "federal financial

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[2]No appeal was taken with respect to the GSL's.

assistance" to include educational grants paid to students. Thus, institutions that received aid only indirectly, that is, through the tuition paid by students, properly were found to be within the purview of Title IX. 34 C.F.R. §§106.2(g)(1)(ii), 106.2(h)(1982). 687 F.2d at 691.

The court began its analysis by stating that the language of section 901(a) "extends Title IX's coverage to

> 'any educational program or activity receiving Federal financial assistance....' Hence, by its all inclusive terminology the statute appears to encompass <u>all</u> forms of federal aid to education, direct or indirect (citation omitted).

<u>Id.</u> Relying on this Court's decision in <u>North Haven Board of Education v. Bell</u>, 456 U.S. 512, 520 (1982), the court rejected the narrow reading of Title IX urged by Petitioner on the ground that a broad reading of the statute is required by its remedial purpose of eliminating sex discrimination from American education. 687

F.2d at 691.

The court pointed out that the legislative history of Title IX reveals that it was patterned after Title VI of the Civil Rights Act of 1964, which proscribes discrimination by reason of race, color, religion, or national origin. The drafters of Title IX intended that Title IX would be interpreted and applied as Title VI had been. Id. Like Title VI, therefore, Title IX prohibits the use of federal money "in any fashion" which would subsidize discrimination on the basis of sex, irrespective of whether the use is direct or indirect. The court stressed that during the floor debates on Title IX, which comprise the most authoritative source of its legislative history, Senators Bayh and McGovern specifically described one purpose of Title IX as prohibiting the use of federal money by institutions receiving aid

under the provisions of S. 659, the bill that established the BEOG program as well as Title IX. Id. at 692.

The court also found support for its conclusion in the post-enactment history of Title IX. The Department's regulations were submitted to Congress for review pursuant to Section 431(d)(1) of the General Education Act, Pub. L. 93-380, 88 Stat. 567 (1974), (codified as amended, 20 U.S.C. § 1232[d][1][1976 and Supp. 1981]). During the hearings on the regulations, then HEW Secretary Weinberger specifically advised the House Committee of the Department's interpretation that Title IX coverage extends to indirect recipients of aid. A number of resolutions were introduced to reverse this interpretation specifically as well as to reject the entire set of regulations. None passed. The Department's interpretation was the subject of Congressional debate again in 1976 when

Senator McClure proposed an amendment to Title IX to limit its coverage to institutions receiving aid "directly from the federal government." 122 Cong. Rec. 28,144 (1976). The debate on this resolution made clear that the Department's interpretation of Title IX as requiring comprehensive coverage of recipients of any type of federal funding correctly reflected the intention of Congress in passing Title IX. The McClure amendment was defeated. 687 F.2d at 695.

As its final basis for deciding that Title IX's coverage extends to institutions such as Petitioner, the court pointed to the decision in Bob Jones University v. Johnson, 396 F.Supp. 597 (D.S.C. 1974), aff'd mem., 529 F.2d 514 (4th Cir. 1975), in which the University was found subject to Title VI solely on the basis that some of its students received Veterans Administration

educational benefits. In light of the clear congressional intention that Title IX follow in the path of Title VI, this precedent could not be ignored.

Having concluded that the receipt by students of BEOG's rendered the college subject to Title IX, the court next considered the extent of the coverage. It again determined that the broad remedial purposes of Title IX to prevent sex discrimination in education require a comprehensive approach to interpretations of the statute. Accordingly, it concluded that the "program-specific" language of Title IX means that where students receive federal aid, the entire College is benefitted. Therefore, the entire institution constitutes the "program" to which Title IX applies. 687 F.2d at 697-700.

The court noted that to hold otherwise would have the absurd result of subjecting a college that receives earmarked federal

funding for a particular program to a greater degree of federal scrutiny than would be true for a college that receives indirect federal funding which the college is then free to use to the benefit of any part of its program. The court discussed the legislative controversy over whether Title IX applies to the type of athletic program that is typical in American educational institutions, that is, one that receives no earmarked federal funding. Congress defeated numerous attempts to amend Title IX to exclude athletic programs from Title IX coverage, while at the same time amending it to exclude from coverage social fraternities and sororities. The court concluded from this congressional activity that Congress believed that programs not receiving earmarked federal aid were nonetheless covered by Title IX so long as the institution sponsoring them received

some form of federal funding. Otherwise, it would have been futile even to consider whether to exclude from coverage activities such as athletics and social fraternities and sororities which typically receive no earmarked federal funds. Id. at 699-700.

Finally, the court noted that effective enforcement of Title IX would be impossible unless enforcement efforts could be directed against an entire institution which is receiving indirect or non-earmarked aid from the federal government. Id. at 700.

SUMMARY OF ARGUMENT

Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a), provides in pertinent part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving

Federal financial assistance...." Congress intended this language to be applied comprehensively to prohibit gender discrimination in all aspects of the American educational system, to include entire institutions where students receive federally funded tuition assistance.

The broad intention of the Congress was expressed initially in the broad language used in Title IX. During the initial Title IX debates, furthermore, numerous members of Congress manifested their expectation that Title IX would apply to institutions whose students receive BEOG's, a program established by Title I of the bill.

The Title IX regulations promulgated by the Department of Health, Education, and Welfare, interpreting the Act as covering an entire institution where students receive federally-funded tuition assistance, are consistent with the broad Congressional intention. Congress has been made aware

that Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., after which Title IX was patterned, has been interpreted consistently with the HEW regulations. The regulations have been subjected to a comprehensive congressional review, both on the floor and in committee hearings. Numerous bills have been introduced with the purpose of overruling the Department's interpretation. None has been enacted.

Resolutions introduced this session in both the Senate and the House of Representatives restate the unaltered Congressional intention that Title IX and its regulations not be "amended or altered in any manner which will lessen the comprehensive coverage of such statute in eliminating gender discrimination throughout the American educational system." S. 149, 98th Cong., 1st Sess. (1983); H.Res. 190, 98th Cong., 1st Sess. (1983).

ARGUMENT

Congress Intended That Title IX be Applied Comprehensively to Prevent Sex Discrimination in Education

From the time it first considered Title IX, Congress has viewed the statute as a broad prohibition on sex discrimination in education. The intervening decade has seen no change in the Congressional intention that the statute be interpreted and applied comprehensively to eliminate all gender discrimination from educational institutions that receive federal funding, whether that funding be "direct" or "indirect," to all or some of the recipient's programs. See, e.g., S. 149; H.Res. 190, supra.

When he first introduced the bill in the Senate, Senator Bayh focused on the broad purpose which was to be served by Title IX: the elimination of sex discrimination from American education. He

said:

> [A]s we seek to help those who have been the victims of economic discrimination, let us not forget those Americans who have been subject to other, more subtle but still pernicious forms of discrimination. As we turn our attention to these provisions of the Higher Education Act, let us ensure that no American will be denied access to higher education because of race, color, religion, national origin, or sex. Today, I am submitting an amendment to this bill which will guarantee that women, too, enjoy the educational opportunity every American deserves.

117 Cong. Rec. 30,155 (Aug. 5, 1971).

Representative Edith Green, who chaired the hearings that preceded the introduction of Title IX, emphasized the broad purpose of Title IX in the debate on the bill in the House:

> The purpose of Title [IX] is to end discrimination in all institutions of higher education...across the board....

117 Cong. Rec. 39,256 (Nov. 4, 1971).

This Court consistently has interpreted the language of Title IX in light of the

broad Congressional intent. Thus, in Cannon v. University of Chicago, 441 U.S. 677 (1979), the Court identified the Congressional purposes as follows:

> First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on the two statutes [Title VI and Title IX].

Id. at 704. In order to serve the second purpose, this Court found that Title IX created a private right of action to remedy sex discrimination in education. Id. at 705-706.

More recently, in North Haven Board of Education v. Bell, 456 U.S. 512 (1982), this Court upheld the Title IX regulations prohibiting federally funded education programs from discriminating against employees on the basis of gender. The Court reiterated that:

> There is no doubt that "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language (citations omitted)."

Id. at 521.

The question in this case is whether Congress intended that Title IX be given the comprehensive interpretation necessary to eliminate sex discrimination from educational institutions. The answer clearly is yes, irrespective of whether an institution receives direct or indirect aid to all or some of its programs.

In its decision in the case before this Court, the Third Circuit correctly determined that Congress intended that Title IX apply comprehensively to prevent sex discrimination:

> [W]e believe that Congress intended that full scope be given to the non-discriminatory purpose that Title IX was enacted to achieve....

Grove City, supra, at 697. As the court stressed, the language of Title IX is the

primary evidence of Congress's intent that Title IX apply comprehensively to proscribe sex discrimination in education:

> [B]y its all inclusive terminology the statute appears to encompass all forms of federal aid to education, direct or indirect.

Id. at 691.

The 1971 and 1972 debates on the legislation that ultimately became Title IX are replete with evidence that Congress intended that the words of the statute be given their broadest application. Its intention included coverage of institutions receiving funds both directly and indirectly.

Title IX was part of the Education Amendments of 1972, which also served to establish the Basic Education Opportunity Grant program. Pub. L. 92-318, 86 Stat. 235. In their debates on the bills that were the basis for the Act, S. 659 and H.R. 7248, both proponents and opponents of Title

IX demonstrated their awareness of this connection and their understanding that passage of Title IX would subject institutions whose students received BEOG's to the coverage of Title IX. Senator McGovern stated the connection quite specifically:

> I urge the passage of [Senator Bayh's] amendment to assure that no funds from S. 659, the Omnibus Education Amendments Act of 1971, be extended to any institution that practices biased admissions or educational practices.

117 Cong. Rec. 30,158-159 (1971). Senator Bayh argued that only the passage of Title IX could ensure that the "hundreds of millions of dollars" of educational expenditures authorized by the remainder of the bill would be applied equitably to all citizens, whether male or female. 117 Cong. Rec 30,412 (1971).

In the House, opponents of Title IX argued that the increases in aid to higher

education included in the bill should not be accompanied by an increase the federal control that would accompany Title IX. Representative Cleveland pointed out, for example:

> It is worthy of note that this provision which meddles in the internal operation of our colleges and universities comes in the same bill that is providing billions of dollars for the higher educational institutions. I cannot help but remember some years ago when we were debating whether to establish Federal programs to aid education, a major concern of many of us was whether the Federal aid would be accompanied by Federal interference. Today the chickens are coming home to roost.

117 Cong. Rec. 39,255 (1971).

Representative Steiger stated his reluctance to vote for a bill that provided student aid while tying it to federal control:

> [U]nder the bill, under the titles which we have gone over before, we have in effect allowed the local financial assistance officers to have a rather broad sweep of powers in their right to pick and choose those who should receive aid which could work against low-income students, but in this one we

> now are going to say that it is the Federal policy that you cannot discriminate because of sex. This dichotomy confuses me on one hand we grant latitude and autonomy while on the other limiting autonomy.

117 Cong. Rec. 39,257 (1971).

Thus it was clear to the members of Congress voting on Title IX that one program that would be affected by the new prohibition on gender discrimination was the Basic Education Opportunity Grant program being established by the same Act, the Education Amendments Act of 1972, supra. Armed with this knowledge, they voted in favor of Title IX, a clear indication of the intent of Congress that educational institutions such as Petitioner are subject to Title IX when its students receive BEOG's.[3]

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[3]The Education Amendments Act of 1972 as passed includes one other provision prohibiting discrimination on the basis of sex: Title IV, relating to the Student Loan Marketing Association. Pub. L. 92-318, 86 Stat. 235, at 265-170 (1972). Unlike the other titles in the Act, Title IV applies to

As this Court has noted, any interpretation of Title IX must take into account Title VI of the Civil Rights Act of 1964, after which it was patterned. Cannon v. University of Chicago, supra; North Haven Board of Education v. Bell, supra. Congress consistently has viewed both Titles as complementary and comprehensive bars to discrimination; they share parallel prohibitions and enforcement mechanisms. Id. As Senator Bayh stated on reintroducing Title IX in 1972:

> Central to my amendment are sections 1001-1005, which would prohibit discrimination on the basis of sex in federally funded education programs.

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[3](continued) private lending institutions rather than to educational institutions. It is worthy of note that, although Title IV contains aspecific prohibition against gender discrimination, none of the Titles applicable to educational institutions contains such a specific prohibition. It is fair to conclude that Congress saw no need to include a specific prohibition against gender discrimination in any part of the bill applicable to educational institutions, such as the BEOG program, because it was assumed that Title IX would apply.

> Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI.

118 Cong. Rec. 5,807 (1972). The same history was explained to the House of Representatives by Representative Mink:

> [Representative Erlenborn] states that it would be a dangerous precedent to empower the Federal Government to cut off funds from colleges and universities if they adopted discriminatory admissions policies. This precedent was established with the passage of the Civil Rights Act of 1964...I doubt whether we have to tell this House that funds have been stopped in accordance with powers already granted the Federal Government under that Act. This is no new precedent. It is simply an extension of an existing policy not to fund programs with taxpayers' funds which deny any individual equal protection of the laws.

117 Cong. Rec. 39,251-252 (1971).

In the case of Bob Jones University v. Johnson, 396 F.Supp. 597 (D.S.C. 1974),

aff'd mem., 529 F.2d 514 (4th Cir. 1975), Title VI was held applicable to an educational institution which received federal dollars only through the tuition of students receiving Veterans Administration educational benefits under the GI Bill. Just as in the case before the Court, the institution argued that it could not be required to sign an Assurance of Compliance because it received no direct federal funding. Senator Bayh anticipated the court's decision during the initial Title IX debates. He noted that Title IX would authorize the Secretary of Health, Education, and Welfare to cut off all HEW funds to an offending institution, including aid to individual students, if the Secretary determined that would be the best course of action. 117 Cong. Rec. 30,408 (1971). Senator Bayh clearly was assuming that in a case such as the one before this Court, Title IX would apply to the institution due

to the receipt of funds by its students.

After the decision in Bob Jones, Senator McClure proposed an amendment to Title IX to limit its applicability to institutions that receive federal funding "directly from the federal government." Amend. 390, 122 Cong. Rec. 28,144 (1976). In the debate, Senator Bayh brought the Bob Jones case to the attention of the Senate. He noted that one result of the McClure amendment would be that Title VI would apply more broadly than Title IX. He argued that Congress had intended the opposite result: that both Titles apply equally broadly to eliminate discrimination in education. He concluded that the interpretation of Title VI in Bob Jones was precisely what Congress intended for Title IX.

> The matter before us or the specific vehicle which brings colleges under the regulations; namely, the receipt of direct or indirect Federal

> financial assistance directly to the university, but the inclusion of students who get Federal assistance is not unique. If we followed this route [passing the McClure amendment to limit applicability of Title IX to institutions receiving direct financial aid] then the next step is to repeal title VI of the Civil Rights Act because the court has held in other civil rights matters that if a student gets assistance from the Federal Government the university itself is assisted.
>
> The case of Bob Jones against Johnson is a specific case in question....
>
> The House committee studied this interpretation [that of the Bob Jones court]...It is not new law; it is traditional, and I think in this instance it is a pretty fundamental tradition, that we treat all institutions alike as far as requiring them to meet a standard of educational opportunity equal for all of their students.

122 Cong. Rec. 28,145 (1976).

Senator Pell reiterated that the court in Bob Jones correctly interpreted Title IX because the opposite interpretation would effectively exclude from coverage institutions whose students receive BEOG's:

> While these dollars are paid to students they flow through and ultimately go to institutions of higher

> education, and I do not believe we should take the position that these Federal funds can be used for further discrimination based on sex.

122 Cong. Rec. 28,145 (1976). The McClure amendment was defeated. 122 Cong. Rec. 28,147 (1976).

The defeat of the McClure amendment is further evidence that Congress has never abandoned its initial intentions with respect to Title IX. Congress understood that, under the language of Title IX and in light of the history of Title VI, indirect aid recipients would be prohibited by Title IX from engaging in sex discrimination. After the Bob Jones court reaffirmed this understanding, the Senate declined Senator McClure's invitation to amend Title IX to limit its applicability. Even before the Bob Jones decision, bills to limit Title IX to institutions receiving direct federal funding failed in both the House and the Senate. See, e.g., S. 2146, 94th Cong.,

1st Sess., 121 Cong. Rec. 23,845-847 (1975); H.R. Con. Res. 330, 121 Cong. Rec. 21,687 (1975); H.R. Con. Res. 329, 121 Cong. Rec. 21,687 (1975); H.R. Con. Res. 310, 121 Cong. Rec. 19,209 (1975); S. Con. Res. 46, 121 Cong. Rec. 17,300 (1975). This clear and continuing evidence of the support of the Congress for applying Title IX to indirect federal funding recipients cannot be ignored.

The Third Circuit decided in this case that the program run by Petitioner which is subject to Title IX is the entire institution. Grove City College v. Bell, supra, 687 F.2d at 700; see Haffer v. Temple University, 688 F.2d 14 (3d Cir. 1982). This interpretation of Title IX's "program or activity" language is fully consistent with the intent of Congress that all aspects of an integrated institution are within the coverage of Title IX. During the initial Title IX debates, Representative Green was

asked essentially the same question by Representative Steiger:

> Mr. Steiger of Wisconsin....In title [IX] [another member] asked relating to a program or activities receiving Federal financial assistance, and under the "program or activity" one could not discriminate. That is not to be read, am I correct, that it is limited in terms of its application, that is, title [IX], to only programs that are federally financed? For example, are we saying that if in the English department they receive no funds from the Federal Government that therefore that program is exempt?
> Mrs. Green of Oregon. If the gentleman will yield, the answer is in the affirmative. Enforcement is limited to each entity or institution and to each program and activity. Discrimination would cut off all program funds within an institution.
> Mr. Steiger of Wisconsin. So that the effect of title [IX] is to, in effect, go across the board in terms of the cutting off of funds to an institution that would discriminate, is that correct?
> Mrs. Green of Oregon. The purpose of title [IX] is to end discrimination, yes, across the board...

117 Cong. Rec. 39,256 (1971)(emphasis added).

It would be ironic indeed if Petitioner could use its students' federally funded

tuition fees to pay the salaries of faculty and staff who may suffer gender discrimination in employment, contrary to the dictates of North Haven, while an educational institution that receives the same number of federally-supplied dollars through a direct grant could be prohibited from discriminating. The Congressional intent to avoid this result by means of comprehensive application of Title IX is seen nowhere more clearly than in the Congressional response to the argument that athletic programs in educational institutions are not covered by Title IX. In its initial Title IX regulations, the Department of Health, Education, and Welfare took the position that Congress intended athletic programs to be covered. 34 C.F.R. §106.41 (1980). Since athletic programs typically receive no earmarked federal funding, the basis for the regulation lies

in the role of athletics as a part of the total educational program of institutions receiving federal funding: discrimination in one part of an educational program cannot avoid infection the rest of the educational programs of the institution. In colleges such as Petitioner's, for example, any discrimination which may exist in one part of an integrated educational program cannot avoid infecting the other educational programs in the institution in which the federally-aided students may participate.

Hearings were held on HEW's Title IX regulations before the House Subcommittee on Postsecondary Education of the Committee on Education and Labor. Sex Discrimination Regulations: Hearings before the Subcommittee on Post-secondary Education of the Committee on Education and Labor of the House of Representatives, 94th Congress, 1st Sess., June 17, 20, 23, 24, 25, 26,1975(hereinafter "Postsecondary Hearings"). Chairman O'Hara

of the Subcommittee opened the hearings with the statement that their sole purpose was to review the regulations

> to see if they are consistent with the law and with the intent of the Congress in enacting the law. We are not meeting to decide whether or not there should be a title IX but solely to see if the regulation writers have read it and understood it the way the lawmakers intended it to be read and understood.

Id. at 1.

The Department's decision that title IX applies to athletic programs was the most controversial topic aired during the hearings. Secretary Weinberger explained that the decision to include athletic programs within the coverage of Title IX was based on the clear analogy between Title IX and Title VI of the Civil Rights Act of 1964. Since recipients of general, nonearmarked federal funds are subject to the strictures of Title VI in appropriate circumstances, they are also subject to the same extent to Title IX.

> [I]f the Federal funds go to an institution which has educational programs, then the institution is covered throughout its activities. That essentially was the ruling with respect to similar language in title VI, and that is why we used this interpretation in title IX.

Id. at 485.

Witnesses on both sides of the issue testified that athletic programs could be covered by Title IX only because the sponsoring institutions receive Federal aid; the athletic programs themselves receive virtually no earmarked federal funding. For example, Representative O'Hara asked the president of the American Football Coaches Association:

> Mr. O'Hara....You make the point that you don't believe that the intercollegiate athletic programs of an institution of higher education could be considered an education program or activity receiving Federal financial assistance?
> Mr. Royal. Yes, sir.
> Mr. O'Hara. In other words, under your interpretation, then, one would have to look at the particular activity of the institution to determine whether or not it was subject to the provisions of title IX and it is your belief that in

> the case of your activity it is not subject to the provisions of title IX? Mr. Royal. That is correct. We do not receive Federal funds to support our athletic programs.

Id. at 49. See, e.g., Id. at 90 (statement of Kathy Kelly, President, U.S. National Student Association); Id. at 98-99 (statement of John Fuzak, President, National Collegiate Athletic Association); Id. at 232-233 (statement of Dallin H. Oakes, President of Brigham Young University and Director and Secretary of the American Association of Presidents of Independent Colleges and Universities); Id. at 284-285 (statement of Norma Raffel, Head of the Education Committee of the Women's Equity Action League); Id. at 324 (statement of Dr. Bernice Sandler, Director, Project of the Status and Education of Women, Association of American Colleges).

Witnesses including members of Congress advised the Committee of their opinion that it was within the contemplation of Congress

to include athletic programs within the coverage of Title IX because athletic programs are integral parts of the programs offered by the educational institutions. Discrimination in one part of the institution cannot be severed from the rest. Furthermore, they noted, where a recipient receives the benefits of federal funding for one program, money will be freed for use in other programs of an integrated institution. See, e.g., Id. at 165-67 (statement of Representative Mink; Id. at 169-71 (statement of Senator Bayh); Id. at 199 (statement of Representative McKinney); Id. at 202 (statement of Representative Abzug); Id. at 324 (statement of Dr. Bernice Sandler); Id. at 217-18 (statement of Holly Knox). A good example of how an aid recipient may benefit from the resources that are freed by federal funding is present in the case at bar. If one hundred-forty of

Petitioner's students were not receiving BEOG's, they would need scholarship assistance to attend Petitioner's college. Petitioner need not provide the scholarships because the federal government is providing the students with assistance. Accordingly, Petitioner is free to use these resources on some other aspect of its program, such as athletics, if it should so choose.

Chief among the congressional witnesses was Senator Bayh, who had authored and introduced Title IX in the Senate. He summed up the testimony of many of the other witnesses:

> This objection to the coverage of programs which receive indirect benefits from Federal support--such as athletics--is directly at odds with the congressional intent to provide coverage for exactly such types of clear discrimination. For example, although Federal money does not go directly to the football program, Federal aid to any of the school system's programs frees other money for use in athletics.
>
> Without Federal aid a school would have to reduce program offerings or use its resources more efficiently. Title

> IX refers to Federal financial assistance. If Federal aid benefits a discriminatory program by freeing funds for that program, the aid assists it, and I think that is rather clear.

Id. at 175.

Some members of the Committee were explicit in their acceptance of the Bayh testimony. Representative Chisholm, for example, said that athletic programs receiving indirect aid "must follow the guidelines." Id. at 65; see Id. at 153. Representative Buchanan asked why Title VI should apply to athletics if Title IX does not. "Should you say you don't have to have blacks on your football team or your basketball team because they are not specifically federally funded?" Id. at 95.

The Committee heard repeated, clear and unequivocal testimony that, unless amended, Title IX properly is interpreted as covering programs such as athletics in integrated institutions. Nonetheless, the members of the Subcommittee recommended no changes in

the Act. In light of the Committee's original intention to review the regulations to determine their consistency with the intent of Congress in enacting Title IX, the Committee's silence can only be interpreted as a decision by the Committee that the writers of the regulations did indeed correctly understand the intent of the Congress.

When the issue came to the floor of the House and the Senate, Congress followed the lead of the Committee. Efforts to disapprove the Title IX regulations in whole or in part have failed repeatedly. See Grove City College v. Bell, supra, 687 F.2d at 699. As this Court noted in North Haven, where the postenactment history of Title IX shows that Congress was made aware of the Department's interpretation of the Act and of the controversy surrounding that interpretation, the failure of Congress to

disapprove the regulations "lends weight to the argument" that the the Department's interpretation correctly reflects the intent of Congress. 456 U.S. at 534. Here, just as in North Haven, Congress was asked to disapprove the Department's regulations on the coverage of athletic activities and, after fully informing itself of the Department's interpretation of the Act and the controversy surrounding that interpretation, Congress refused to reverse the Department's decision.

In short, Petitioner's argument that Congress never intended Title IX's prohibition on sex discrimination to cover an entire institution where students are receiving federal assistance is not a new argument. It was made before the Congressional subcommittee charged with reviewing the regulations that interpreted Title IX. That subcommittee recommended no changes in the regulations and no changes in

the statute. Furthermore, despite the fact that it has amended Title IX in other respects, Congress has never given serious consideration to any amendment that would alter this aspect of the Department's interpretation of Title IX.[4] This clear evidence of Congressional intent cannot be ignored. See Cannon University of Chicago, supra, 441 U.S. at 687, n. 7.

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[4]In fact, the opposite is true. One major amendment to Title IX serves to ratify the argument that Congress intended that Title IX apply to all parts of an integrated educational institution. Congress exempted social fraternities and sororities from Title IX. Pub. L. 93-568, §3(a), 88 Stat. 1862. Senator Bayh argued in favor of the amendment on the ground that Congress never intended social fraternities and sororities to be covered by Title IX. Without the amendment, he noted, they would be covered because they receive relatively low rent from educational institutions. 120 Cong. Rec. 39,992 (1974). Like athletics, however, they receive virtually no earmarked federal funding. Unless Congress believed that all parts of an integrated educational institution were covered by Title IX, therefore, passage of this amendment would have been unnecessary.

Title IX, like Title VI, is "program-specific." What that term means in this case is clear: the entire college operated by evidence of Congressional intent cannot be Petitioner is covered by Title IX. As the Fifth Circuit said in Board of Public Instruction of Taylor County, Florida v. Finch, 414 F.2d 1068(5th Cir. 1969),Title VI extends to the specific program receiving federal funding and to any program "infected by" the discrimination of the receiving institution. The sponsor of Title VI, Senator Humphrey, described its purpose as the total elimination of racial discrimination from programs funded directly by Federal grants and from programs affected by such grants. 110 Cong. Rec. 6,543 and 6,545 (1964). He noted that the limiting "program or activity" language in Title VI must be seen in light of this purpose: a means for insuring that Title VI's coverage is directed at the program with the racially

discriminatory impact, not at the program that has no such impact:

> Title VI does not confer a 'shotgun' authority to cut off all Federal aid to a State. Any nondiscrimination requirement an agency adopts must be supportable as tending to end racial discrimination with respect to the particular program or activity to which it applies. Funds can be cut off only on an express finding that the particular recipient has failed to comply with that requirement. Thus, Title VI does not authorize any cutoff or limitation of highway funds, for example, by reason of school segregation. And it does not authorize a cutoff, or other compliance action, on a statewide basis unless the State itself is engaging in discrimination on a statewide basis. For example, in the case of grants to impacted area schools, separate compliance action would have to be taken with respect to each school district receiving a grant.

110 Cong. Rec. 6544 (1964).

It should be noted that the smallest unit mentioned by Senator Humphrey is a school district, not an individual school: any discrimination occuring in a unit of that size must have an impact on or "infect," in the term of the Finch court,

every school and program in the district. The clear analogy in this case is the entire institution run by Petitioner, not any smaller administrative or academic unit. Students paying tuition to Petitioner, it must be assumed, may take any course in the catalogue, use any auxiliary facility, study in any library, live in any dormitory, etc. To make any unit smaller than the entire institution subject to Title IX would be to exclude from coverage numerous aspects of student life in which federally-funded tuition-paying students may face or be affected by gender discrimination. Such an impact on or infection of the student's environment would not be permitted under Title VI. Likewise, it cannot be permitted under Title IX.[5]

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[5]The impracticality of applying Title IX to subdivided parts of colleges such as Petitioner's also suggests that Congress did not intend that result. As Representative

The congressional intent that Title IX be applied comprehensively is reiterated in S. 149 and H.Res. 190, supra, both introduced this session. The hundreds of co-sponsors of these bills are of both sexes,

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[5](Continued) Mink testified during the Postsecondary Hearings,

> It is difficult to trace the Federal dollar precisely. A narrow interpretation of title IX would render the law meaningless and virtually impossible either to enforce or to administer. For example, the slide projector in one classroom might be purchased with title I ESEA money, while the slide projector in the adjacent room was not. It surely is not the intent of Congress to prohibit sex--or race or national origin--discrimination in the room with the title I projector, while allowing it in the adjacent room. Surely we do not want HEW investigators to be charged with tracing exactly which classes used the federally funded slide projector.
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> Also, if this narrow interpretation of the scope of coverage were accepted for title IX, it might well be the wedge in the door for cutting back protection of racial and ethnic minorities under title VI of the 1964 Civil Rights Act. Such a narrow interpretation could open the floodgates for reversing 11 years of progress under title VI.

Postsecondary Hearings at 166; see Id. at 198 (Statement of Representative McKinney).

both parties, and both houses. They all share the common understanding that eliminating gender discrimination from the American educational environment is crucial to the future of American democracy and to the ability of women to achieve equity in the marketplace. The Resolution expresses their belief that:

> [T]itle IX of the Education Amendments of 1972 and regulations issued pursuant to such title should not be amended or altered in any manner which will lessen the comprehensive coverage of such statute in eliminating gender discrimination throughout the American educational system.

Id.

The amici curiae strongly urge this Court to reject Petitioner's effort to limit the protections afforded by Title IX just as Congress has rejected it: only a broad and comprehensive application of Title IX comports with the intention of Congress.

CONCLUSION

Where an institution such as Petitioner receives the general benefit of federally-subsidized tuition payments, it cannot avoid the imposition of Title IX's prohibition against gender discrimination by contending that the prohibition applies only to those expenditures that are directly traced to a federal dollar that was given to the institution for a specific purpose. If Title IX applied only to the traceable federal dollar received by indirect aid recipients such as Petitioner, the funding termination sanction would be effectively nullified: the Department would be unable to show that the gender discrimination occurred in the one percent of teacher salaries or the three percent of library construction paid for by federal dollars. To impute such an intention to Congress is contrary to the overwhelming evidence that

Congress intended that the broad remedial purposes of Title IX be served by interpretations of the statute favoring comprehensive application.

The amici curiae urge this Court to give full weight to the intent of the Congress that Title IX be applied comprehensively and in a manner designed to eliminate gender discrimination from the American educational system. Institutions such as Petitioner cannot be allowed to avoid the strictures of Title IX and, by so doing, preclude American women from obtaining the education that is the backbone of American democracy and crucial to their efforts to obtain equality in this society.

Respectfully submitted.

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