No. 82-792

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

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

v.

TERRELL H. BELL, SECRETARY OF EDUCATION, *et al.*,
Respondents.

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

BRIEF *AMICUS CURIAE* FOR THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE NATIONAL CHICANO COUNCIL OF HIGHER EDUCATION, THE HISPANIC HIGHER EDUCATION COALITION, RAZA ADMINISTRATORS AND COUNSELORS IN HIGHER EDUCATION, TEXAS ASSOCIATION OF CHICANOS IN HIGHER EDUCATION, AND THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS, IN SUPPORT OF THE JUDGMENT BELOW

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INTEREST OF *AMICUS CURIAE*

The Mexican American Legal Defense and Educational Fund (MALDEF) was established on May 1, 1968. A major purpose of the organization since its inception has

been to end discrimination against Spanish-speaking persons in education, employment, and other similar contexts. To this end, MALDEF has represented Spanish-speaking students in more than a dozen cases involving equal access to education, and has participated as an *amicus curiae* in numerous cases before this Court. *E.g.*, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). MALDEF has a strong interest in the outcome of this case because of the effect it may have on equal access to education, and because the Court's construction of Title IX will likely have an impact on the interpretation of closely related statutes, including Title VI, which directly affect the opportunities afforded by federal grantees to Mexican Americans.

The National Chicano Council on Higher Education (NCCHE) was organized in 1975 and incorporated in 1977 for the purpose of developing programs and sponsoring projects aimed at increasing the participation of Hispanics in higher education. It is comprised of a nationwide council of more than 200 individuals of Hispanic background involved as faculty and administrators in colleges and universities. In pursuit of NCCHE's goals, it has established fellowship programs, conferences, workshops, and institutes and undertaken specialized training and information dissemination on behalf of its members. In all of these activities, NCCHE has been guided by a commitment to equal access in all sectors of higher education. For this reason, NCCHE is vitally interested in this case because of its impact on access for minority students and how federal policy will affect such access.

The Hispanic Higher Education Coalition (HHEC) is a private, non-profit organization based in Washington, D.C., and composed of thirteen national Hispanic organizations. Since 1978, HHEC has been an advocate for the educational needs of the Hispanic population, especially at the postsecondary educational level. It has pursued these issues by identifying and advocating, at the federal level,

policies favorably affecting education access for Hispanic students. For this reason HHEC has an interest in federal policies aimed at ending discrimination against minority students and bringing about more minority student access.

Raza Administrators and Counselors in Higher Education (RACHE) is a California statewide organization established in 1975. RACHE is composed of faculty, staff, and other individuals working in postsecondary education institutions. RACHE's members are primarily of Hispanic descent and have extensive experience, interest, and expertise in federal policies aimed at making higher education more accessible to Mexican-American and other disadvantaged students. As such, RACHE has an organizational interest in ensuring that federal civil rights policies dealing with civil rights enforcement effectively prevent discrimination against minority students in colleges and universities.

The Texas Association of Chicanos in Higher Education (TACHE) is a Texas statewide organization of faculty and staff founded to provide a forum for dealing with issues related to Hispanics in Texas' higher education institutions. As such, TACHE has been actively involved in the problems and needs of Hispanics in higher education institutions, and has actively sought to enforce civil rights laws in Texas as they are applied to Texas' colleges and universities. For this reason TACHE has an interest in ensuring that federal civil rights enforcement will not be weakened or limited.

The League of United Latin American Citizens (LULAC) was founded in Texas in 1929 to promote the political, social, and economic rights of Hispanic people in the United States. LULAC is now the nation's oldest and largest Hispanic organization with members throughout the country working to provide equity in opportunity for all Hispanics. The League has been extensively involved in

the promotion of educational opportunities for Hispanics and has been especially active in the litigation of Hispanic desegregation cases and the development of bilingual education programs for Hispanics. In addition, LULAC has been responsible for the foundation of service centers across the United States which have recruited and counseled Hispanic students regarding higher education opportunities. For this reason LULAC is vitally interested in ensuring that civil rights policies in higher education are vigorously enforced.

MALDEF *et al.*, have obtained consent to file this brief from all parties of record, and the letters of consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Petitioner's objection to federal jurisdiction over it is a serious threat to federal civil rights enforcement in education and other fields. As the United States Commission on Civil Rights recently explained:

> The immediate issue in *Grove City* is the extent of the Education Department's authority to enforce Title IX in higher education. The case raises larger issues, however. Nearly 30 Federal agencies have Title IX enforcement responsibilities. In addition to higher education, the law covers elementary, secondary, and adult education, as well as various federally-supported training programs. Moreover, it is linked by language, legislative history, and case law to Title VI, Section 504, and the Age Discrimination Act. A whole fabric of civil rights protections thus could be affected by *Grove City*.[1]

Contrary to Grove City's contention, nothing in the language of Title IX exempts educational institutions that receive federal subsidies "indirectly" through federal grants to their students. Rather, the anti-discrimination

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[1] U.S. Comm'n on Civil Rights, *Statement of the U.S. Commission on Civil Rights on Civil Rights Enforcement in Education* 2-3 (June 14, 1983).

rule in Title IX broadly applies whenever federal funds are "receiv[ed]" and Title IX makes no distinction between federal funds "receiv[ed]" directly and those "receiv[ed]" indirectly. This plain meaning of Title IX is also reinforced by its legislative history. Title IX was modeled on Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination. As this Court has recognized, Congress intended that Title IX be "applied as Title VI had been during the preceding eight years." *Cannon v. University of Chicago*, 441 U.S. 677, 696 (1979). Under Title VI, it had been the uniform interpretation of the agency administrators, the courts, and the commentators that Title VI applied to educational institutions that receive federal funds in the form of federal grants to their students. Thus, Grove City errs in contending that it can exempt itself from Title IX's anti-discrimination rule by choosing to receive federal funds indirectly through its students.

In *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), this Court held that Title IX was program-specific, but did not decide the meaning of the "program or activity" limitation. Nor in this case need the Court reach the general question of the scope of "program or activity." At least in a case such as this, where the assistance is general, unearmarked aid that flows to the institution as a whole, the entire institution is the "education program or activity" from which discrimination is banned.

ARGUMENT

I. The National Policy Against Discrimination, as Reflected in Title IX, Applies to Any School That Receives Federal Subsidies, Whether Directly or Indirectly, Through Grants to its Students.

Title IX of the Education Amendments of 1972 [2] prohibits discrimination on the basis of sex in any education program or activity receiving federal financial assistance. Section 901(a) states 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 subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681. Title IX was expressly modeled on Title VI of the Civil Rights Act of 1964,[3] which prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. It was the intent of Congress in enacting Title IX to extend the prohibitions of Title VI to include discrimination on the basis of sex.

The language of the statute, its legislative history, and Congress' post-enactment review of administrative regulations demonstrate that Title IX prohibits discrimination in an institution that receives federal financial assistance through federal grants to its students.

A. *The Statutory Language.* The starting point for analysis must be the statutory language itself. *North Haven Board of Education v. Bell*, 456 U.S. 512, 520 (1982). Title IX sweepingly prohibits discrimination in

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[2] Pub. L. No. 92-318, 86 Stat. 235, 20 U.S.C. § 1681 *et seq.* (1976 & Supp. V 1981).

[3] Pub. L. No. 88-352, 78 Stat. 241, 252-53, 42 U.S.C. § 2000d *et seq.* (1976 & Supp. V 1981).

"any education program or activity receiving Federal financial assistance." The phrase "receiving Federal financial assistance" is not specially defined in Title IX and therefore must be given its "ordinary contemporary common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). The statute thus requires a functional determination whether federal financial assistance is "receiv[ed]," irrespective of the manner of receipt. If such federal financial assistance is received, the statutory ban on sex discrimination is applicable.

Title IX makes no distinction between "receiving" federal funds directly and "receiving" federal funds indirectly. Thus, Petitioner's proposed exemption for entities that receive "indirect" federal financial assistance finds no support in the plain language of Title IX. Nothing in Title IX suggests that the manner by which a covered entity receives federal financial assistance is in any way relevant to the applicability of the anti-discrimination rule of Title IX. "Indirect" federal aid is just as much a benefit to a recipient institution as is a direct subsidy, and an institution which accepts this benefit is prohibited from discriminating. *Cf. Bob Jones University v. United States*, 103 S. Ct. 2017, 2028 (1983) (recognizing that an indirect benefit such as a tax exemption benefits a school as much as a direct federal grant).

Grove City is, in effect, asking this Court to read into Section 901(a) an additional word exempting from Title IX all schools which do not receive "direct" federal financial assistance. But Congress did not adopt any such exemption, although it did create nine other statutory exemptions in Section 901(a).[4] Nor may this Court now read into Title IX such an exemption which Congress did not include in the statute. *United States v. Turkette*,

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[4] *See* § 901(a)(1)-(9), 20 U.S.C. § 1681(a)(1)-(9). The sixth of the nine statutory exemptions was added in 1974 and the final three exemptions in 1976. *See North Haven*, 456 U.S. at 534 n.25.

452 U.S. 576, 580-88 (1981); *Director, Office of Workers' Compensation Programs, United States Department of Labor v. Rasmussen*, 440 U.S. 29, 46-47 (1979).

Indeed, Petitioner's strained construction of Title IX to exempt recipients of "indirect" federal assistance creates an exemption which would virtually engulf the anti-discrimination rule, in contravention of the plain meaning and intent of Title IX. Given the extent to which federal assistance to higher education takes the form of indirect assistance, it strains reason to attribute to Congress an intention to exempt indirect assistance from the operation of Title IX in the absence of express language to that effect.[5] Indeed, in enacting the Education Amendments of 1972, of which Title IX was one part, Congress expressly legislated that federal financing for education would often be provided to schools through students or other intermediaries.[6] For instance, schools were given the

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[5] *The Catalog of Federal Domestic Assistance* describes numerous student aid programs. *See* Office of Management and Budget, Executive Office of the President, *1983 Catalog of Federal Domestic Assistance*. Many were already in force before enactment of Title IX, and the amount of funds involved was enormous. For example, in fiscal year 1972, $220.3 million was appropriated under the Supplemental Educational Opportunity Grant (SEOG) program alone. Staff of the Subcomm. on Postsecondary Education, 98th Cong., 1st Sess., *Report and Fiscal Year 1984 Budget Analysis of Programs Under the Jurisdiction of the Subcomm.* 31 (Comm. Print 1983). By 1982, the figure for SEOGs had grown to $355.4 million. *Id.*

[6] Expanded federal financial assistance included student grants (*see, e.g.*, § 131 of Title I, 20 U.S.C. §§ 1070 to 1070(d)-1 (amending § 401 of Title IV of the Higher Education Act of 1965)), and loans (*see, e.g.*, § 137(b) of Title I, 20 U.S.C. §§ 421-25 (amending Title IV of the Higher Education Act of 1965)), as well as grants for graduate and professional study (*see, e.g.*, § 181(a) of Title I, 20 U.S.C. §§ 1134 to 1134r (amending Title IX of the Higher Education Act of 1965)). In addition, there were new programs of direct assistance to higher educational institutions. *See, e.g.*, § 1001(a) of Title X, 20 U.S.C. §§ 1070e to 1070e-1 (amending §§ 419-420 of Title IV of the Higher Education Act of 1965). In

choice (as Grove City had with respect to federal Basic Educational Opportunity Grants (hereinafter BEOG), Pet. App. A-7) whether to receive those funds directly from the federal government and to credit eligible students for them, rather than to receive those funds from the students as tuition payments.[7]

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enacting the indirect assistance programs, Congress contemplated that the schools would ultimately receive, and thereby benefit from, the disbursement of federal monies. *See* H.R. Rep. No. 554, 92d Cong., 2d Sess. (1971), *reprinted in* 1972 U.S. Code Cong. & Ad. News 2462, 2463 ("Testimony indicated that the higher education community is now facing extraordinary change made difficult by acute financial distress. . . . Institutions of higher education have sought federal assistance to enable them to meet responsibilities of the nation. This bill . . . attempts to meet that need both by extending and amending existing categorical programs and by accepting new federal roles particularly in regard to the general support of higher education institutions.") *See also* 118 Cong. Rec. 20,312 (1972) (Statement of President Isaac K. Beckes, Vincennes University; President Arthur Hansen, Purdue University; President John Pruis, Ball State University; President Alan Rankin, Indiana State University; and President John Ryan, Indiana University, that "The bill . . . would provide substantial support for the Indiana institutions we represent, particularly in student financial assistance and in institutional grants."); *id.* at 20,315 (letter from Kingman Brewster, Jr., Yale University, stating in pertinent part that "[T]he provisions relating to student and institutional support would go a long way toward helping all universities. . . ."); 117 Cong. Rec. 29,358 (1971) (statement of Sen. Kennedy that the programs are a "significant step forward" in providing "a greater measure of support to the colleges and universities in order to help them alleviate their increasing financial burdens which have developed over the past decade.").

[7] 20 U.S.C. § 1070a(c); 34 C.F.R. §§ 690.71, 690.78, 690.91; *see* Pet. App. A-7 to A-8 & nn. 8 & 9. *See, e.g.*, 20 U.S.C. § 1070a (federal program funds disbursed to students); § 1070b (Supplemental Educational Opportunity Grant program funds disbursed to schools); § 1070c (Grants to States for State Student Incentives program funds disbursed to States); § 1070d (Special Programs for Students from Disadvantaged Backgrounds funds disbursed to higher and postsecondary institutions).

However, nothing in the language of Title IX suggests that an individual school, by choosing to receive its federal assistance through its students, could thereby exempt itself from the discrimination ban of Title IX. To assume that Congress intended that the applicability of Title IX would depend upon the form in which colleges and universities choose to receive federal assistance would elevate mere matters of accounting form over the substantive civil rights protections of Title IX.[8] It would permit institutions to participate in federal assistance programs, but to "elect out" of Title IX coverage. Such a result, which would encourage institutions to structure receipt of federal assistance through intermediaries such as students, faculty, foundations, and the like, thereby evading federal civil rights enforcement, is the precise opposite of that intended by Congress.[9]

Both the plain meaning of the statutory phrase "receiving federal financial assistance" and the absence of the word "direct" preceding that phrase compel the conclusion that no form of educational aid, provided by the Education Amendments of 1972 or other acts, is exempt from the anti-discrimination provisions of Title IX because of the indirect method by which it is disbursed. Nor is any recipient of federal funds exempt from Title IX because of its choice of the manner in which it receives federal funds. Because Petitioner's construction of Title IX necessarily assumes that Congress was unaware

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[8] *Cf. Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 602-03 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975) (Title VI).

[9] Indeed, Grove City concedes that its proposed exemption for "indirect" assistance goes too far and admits in a footnote that "[t]his is *not* to say that assistance which is provided through another recipient to an education program or activity is not within the scope of Title IX coverage." Pet. Br. at 17 n.17 (emphasis added). Having made this sweeping concession, Grove City has no principled basis to distinguish federal funds received through its students from federal funds received through other intermediaries which it concedes are subject to Title IX.

of how federal monies would be disbursed under these other provisions of the same Act, that construction flies in the face of common understanding and must be rejected. *See, e.g., Schweiker v. Hogan*, 102 S. Ct. 2597, 2608 (1982).

B. *The Legislative History.* The legislative history of Title IX also amply supports the plain meaning of the statutory terms "*receiving* Federal financial assistance" and compels the conclusion that Title IX's ban on sex discrimination applies whenever a school receives federal financial assistance from whatever source and in whatever manner. (Emphasis added.)[10]

Original Title X of H.R. 7248, 92d Cong., 1st Sess. (1971) contained, in § 1001, a prohibition of sex discrimination in federally-assisted education programs and activities identical to the current § 901(a).[11] While debate over the meaning of § 1001 was limited (117 Cong. Rec. 39,248-61), there was a stated legislative intent simply to extend the reach of Title VI of the 1964 Civil

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[10] While Title IX was enacted as part of S. 659, 92d Cong., 2d Sess. (1972), as an amendment thereto sponsored by Senator Bayh (Amendment No. 874, *reprinted in* 118 Cong. Rec. 5802, 5808 (1972)), there were earlier unsuccessful efforts to extend Title VI of the 1964 Civil Rights Act to prohibit gender discrimination. *See Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor*, 91st Cong., 2d Sess. pp. 1, 8-9 (1970) (reprinting bills). *See North Haven*, 456 U.S. at 523 n.13; *Cannon v. University of Chicago*, 441 U.S. 677, 694 n.16 (1979). In the Senate, Senator Bayh also introduced an anti-discrimination measure as an amendment to S. 659, 92d Cong., 1st Sess. (1971), the Education Amendments of 1971 (117 Cong. Rec. 30,155-57 (1971). He characterized his amendment as "identical to . . . Title VI of the 1964 Civil Rights Act—forbidding discrimination in federally assisted programs. . . ." 117 Cong. Rec. 30,156. Ruled non-germane, the amendment never came to a vote. *Id.* at 30,415; *North Haven*, 456 U.S. at 523, n.13.

[11] 117 Cong. Rec. 39,255 (1971) (reprinting § 1001); *see* H.R. Rep. No. 554, 92d Cong., 1st Sess. p. 108 (1971).

Rights Act so as to encompass gender discrimination.[12] The House debate also makes plain that Section 1001 required schools participating in federally-funded programs to pursue a gender-neutral policy.[13]

Senator Bayh offered a similar proposal as an amendment to the Senate version of the Education Amendments of 1972 (*see* note 10, *supra*), basically to "clos[e] loopholes in existing legislation relating to general education programs and employment resulting" therefrom, because of the omission from Title VI of a ban on gender discrimination. 118 Cong. Rec. 5803 (1972). While this amendment contained a variety of provisions (*see North Haven*, 456 U.S. at 524), Senator Bayh stated that "the heart of this amendment is a provision banning sex discrimination in educational programs receiving federal funds" and providing "[e]nforcement powers . . . parallel to those found in Title VI." 118 Cong. Rec. 5803; *see id.* at 5805 (reprinting Amendment No. 874).

The sponsors of Title VI, whose views merit special attention when assessing congressional intent in Title IX, *see North Haven*, 456 U.S. at 525-28, also clearly intended that discrimination be prohibited wherever federal funds are used. As Senator Pastore put it, Title VI would "prevent . . . discrimination where Federal funds are involved. . . . The title has a simple purpose —to eliminate discrimination in federally-financed programs." 110 Cong. Rec. 7054-55 (1964). Senator Hum-

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[12] *See, e.g.*, 117 Cong. Rec. 39,252 (Rep. Mink) ("This is no new precedent. It is simply an extension of existing policy [under Title VI] not to fund programs with taxpayers' funds which deny any individual equal protection of the laws."); *id.* at 39,256 (Rep. Green).

[13] Several Members, both proponents and opponents of Title IX, stated that it would apply to schools participating in federally-funded programs such as those established by H.R. 7248. *See, e.g.*, *id.* at 39,251 (Rep. Green), 39,251-52 (Rep. Mink), 39,253 (Rep. Sullivan), 39,253 (Rep. Conte), 39,254 (Rep. Wyman), 39,260 (Rep. Erlenborn).

phrey quoted from President Kennedy's message to Congress on June 19, 1963, to emphasize the broad reach of the legislation: "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in *any* fashion which encourages, entrenches, subsidizes, or results in racial discrimination." 110 Cong. Rec. 6543 (1964) (emphasis added).[14] Thus, Congress did not carve out any exception for "indirect" federal aid in enacting Title VI's prohibition of racial discrimination by those "receiving" federal financial assistance.

The courts have also long recognized that Title VI bans racial discrimination by universities that receive federal educational benefits through their students. *Bob Jones University v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975). In *Bob Jones*, 221 of 4509 students received a total of $397,800 under Veterans Administration education programs. The court correctly concluded that:

> The method of payment does not determine the result; the literal language of Section 601 requires only federal assistance—not payment—to a program or activity for Title VI to attach . . . . Whether the cash payments are made to a university and thereafter distributed to eligible veterans rather than the present mode of transmittal is irrelevant, since the payments ultimately reach the same beneficiaries and the benefit to a university would be the same in any event.

396 F. Supp. at 602, 603.[15] Because, as this Court has recognized, the drafters of Title IX explicitly assumed that

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[14] That the congressional intent, i.e., that "public funds . . . not be spent in any fashion" encompassed "indirect" federal assistance is apparent also from the statement of Congressman Winstead, in opposing Title VI, that "under this authority, this or any other administration could effectively withhold funds, under the guise of racial discrimination, from any project financed *directly* or *indirectly* by federal funds." 110 Cong. Rec. 1703 (1964).

[15] The court in *Bob Jones* also rejected the argument that Title VI was inapplicable because not all the federal aid received by

it would be interpreted "and applied as Title VI had been during the preceding eight years," *Cannon v. University of Chicago*, 441 U.S. 677, 696 (1979), Congress intended that the Title IX ban on sex discrimination apply to colleges, such as Grove City, that receive federal funds through their students.[16]

Petitioner errs in claiming that a statement of Senator Bayh "demonstrates an intent to exclude direct student aid from Title IX." Pet. Br. at 11. To the contrary, the colloquy (quoted in full at Pet. Br. at 24) demonstrates that Title IX does apply to "*all aid* that comes through the Department of Health, Education, and Welfare." Pet. Br. at 24, quoting 117 Cong. Rec. 30,408 (1971) (Sen. Bayh) (emphasis added). Senator Bayh added that when it comes to choosing *which* federal funds should be cut off, he assumed that HEW

> would be reasonable and would use only such leverage as was necessary against the institution. It is unquestionable, in my judgment, that this would not be directed at specific assistance that was being received by individual students, but would be directed at the institution, and the Secretary would be expected to use good judgment as to how much leverage to apply and where it could be applied.

Id. Thus, Senator Bayh clearly drew a distinction between the Secretary's *power* under Title VI to cut off student aid and the *desirability* of doing so where other programs could be cut off first. Contrary to Grove City's contention, Pet. Br. at 25, nowhere in this colloquy does Senator Bayh state

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students flowed through to the school. The court found that "although the VA payments are not earmarked for school-related expenditures, *e.g.*, tuition, all that is necessary for Title VI purposes is a showing that the infusion of federal money through payments to veterans assists the educational program of the approved school." *Bob Jones Univ.*, 396 F. Supp. at 603 n.22.

[16] *Accord, Iron Arrow Honor Soc'y v. Heckler*, 702 F.2d 549, 555 (5th Cir. 1983); *Hillsdale College v. HEW*, 696 F.2d 418, 430 (6th Cir. 1982), *petition for cert. pending*, No. 82-1538 (Mar. 16, 1983).

that student aid is not "Federal financial assistance". Indeed, Senator Bayh's position on this issue is exactly the opposite, as this Court recognized in *North Haven*, 456 U.S. at 524, 525, where the Court quoted Senator Bayh explaining that "[t]he amendment would cover such crucial aspects as admissions procedures, *scholarships* . . ." (118 Cong. Rec. 5803 (1972) (emphasis added)), and that "the portion of the amendment covers discrimination in all areas where abuse has been mentioned—employment . . . *scholarship aid* . . . ." (118 Cong. Rec. 5807 (1972) (emphasis added)).[17]

C. *The Post-Enactment History.* This Court has twice recognized that the post-enactment history of Title IX is of particular probative value in confirming the intent of Congress with respect to this statute.[18] The subsequent Congressional review of the administrative regulations explicitly confirms Congress' intent that Title IX prohibit discrimination by schools receiving direct or indirect federal funds.

Exercising its authority under Section 902 to promulgate regulations governing Title IX,[19] HEW issued pro-

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[17] Petitioner's reliance on Senator Bayh's 1975 appearance as a witness before the House Subcommittee on Postsecondary Education about the effect of his 1971 amendment is likewise misplaced. *See* Pet. Br. at 25. When asked a technical question about legislation of four years past, Senator Bayh replied "You know, I just don't know. I would have to look that up . . ." Pet. Br. at 25. This response has *no* probative value whatsoever as to legislative intent four years earlier.

[18] *North Haven*, 456 U.S. at 530-35; *Cannon*, 441 U.S. at 702-03; *see Bob Jones Univ.*, 103 S. Ct. at 2033; *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 103 S. Ct. 1713, 1730 (1983).

[19] "A reviewing court may not set aside the Secretary's regulations 'simply because it would have interpreted the statute in a different manner'" (*Herweg v. Ray*, 455 U.S. 265, 277 (1982), quoting *Batterton v. Francis*, 432 U.S. 416, 425 (1977)), and, instead, is limited to determining whether the regulations exceed

posed regulations in 1974[20] and, after congressional review,[21] final regulations in 1975[22] governing the operation of federally-funded education programs.[23] HEW construed the phrase "Federal financial assistance" found in Section 901(a) to include educational grants paid to students as well as grant funds paid directly to the school itself. 34 C.F.R. §§ 106.2(g)(1)(ii) & .2(h) (1981) (current version).[24]

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the agency's statutory authority and whether they are arbitrary and capricious. *Heckler v. Campbell*, 103 S. Ct. 1952, 1957 (1983); *Herweg*, 455 U.S. at 275; *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981).

[20] 39 Fed. Reg. 22,228 (1974).

[21] *See* General Education Provisions Act, § 431(d)(1), Pub. L. No. 93-380, 88 Stat. 484, 567, as amended, 20 U.S.C. § 1232(d)(1); *North Haven*, 456 U.S. at 531-32.

[22] 40 Fed. Reg. 24,128 (1975) (codified at 45 C.F.R. part 86 (1977)). These regulations were recodified on May 9, 1980, in conjunction with the establishment of the Department of Education.

[23] These regulations have since been adopted by DE. 45 Fed. Reg. 30,802 (1980) (codified at 34 C.F.R. part 106 (1980)). At the time Petitioners filed their complaint, HEW was responsible for the administration of Title IX regulations relating to the federal programs involved here. HEW's Title IX functions were transferred to DE by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668, 677-78. We refer separately to HEW and DE.

[24] 34 C.F.R. § 106.2(g)(1)(ii) defines "Federal financial assistance" to include

> [a] grant or loan of Federal financial assistance, including funds made available for . . . . [s]cholarships, 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.*

(Emphasis added). Section 106.2(h) further defines "Recipient" to mean

> any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity,

During the congressional review of HEW's proposed Title IX regulations, HEW Secretary Weinberger explicitly testified that HEW interpreted "Federal financial assistance" in Section 901(a) to mean "assistance that the Government furnishes, that goes *directly or indirectly*, to an institution as Government aid within the meaning of Title IX."[25] Both the Senate and House thereafter considered a variety of resolutions disapproving the HEW regulations, but none was passed, although Congress did enact other amendments. *North Haven*, 456 U.S. at 532-33 & nn. 22-24. Indeed, an amendment[26] that would have redefined "Federal financial assistance" as "assistance received by the institution directly from the federal government," introduced on August 27, 1976 by Senator McClure, was rejected by a vote of 30-50. *Id.* Senator Pell explained this rejection as follows:

> [w]hile these tax dollars are paid to students they flow through and ultimately go to institutions of higher education, and I do not believe that we should take the position that these Federal funds can be used for further discrimination based on sex."

122 Cong. Rec. 28,145.[27]

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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).

[25] *Sex Discrimination Regulations: Hearings Before the Subcomm. on Post Secondary Educ. of the House Comm. on Educ. and Labor*, 94th Cong., 1st Sess. p. 484 (1975) (emphasis added); *see id.* at 481-84.

[26] Amendment No. 390, 94th Cong., 2d Sess., 122 Cong. Rec. 28,144 (1976).

[27] *See also* 122 Cong. Rec. 28,145-46 (1976) (Sen. Bayh) ("[T]he inclusion of students who get Federal assistance is not unique. If we followed this route then the next step is to repeal title VI

HEW's original administrative construction, that Title IX encompasses indirect receipt of federal aid, has continued to the present and this Court should, in accordance with its practice, give "great deference to the interpretation, particularly when it is longstanding, of the agency charged with the statute's administration." *North Haven*, 456 U.S. at 522 n.12.[28] This long-standing administrative interpretation is particularly entitled to deference where, as here, it was brought to the attention of Congress, which acquiesced in that interpretation after lengthy floor debate. *North Haven*, 456 U.S. at 535. Thus, Congress' consistent rejection of the interpretation urged by Grove City, coupled with Congress' contemporaneous amendment of other portions of Title IX (*see North Haven*, 456 U.S. at 534 & n.25), manifests "a decade of acceptance" (*Bob Jones University*, 103 S. Ct. at 2036 (1983) (Powell, J., concurring)) of an unbroken administrative construction that a school's receipt of benefits from a federally-funded program carries the concomitant requirement that the school comply with the national policy against sex discrimination.[29]

. . . 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 House Committee studied this interpretation. I emphasized at that time that title IX . . . is parallel in its language and enforcement expectations with title VI . . . . The courts have held that title VI . . . does apply if a student receives Federal aid. *If a student is benefited, the school is benefited. It is not new law; it is traditional,* and I think in this instance it is a pretty fundamental tradition. . . .") (emphasis added).

[28] DE has now changed other regulations that define the statutory term "education program or activity." Because this administrative construction has been so recently changed, it is entitled to little deference. *North Haven*, 456 U.S. at 522-23 n.12.

[29] Congress has the authority to set any condition upon the receipt of federal monies so long as that condition is not itself independently unconstitutional. *E.g., Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 589-90 (1937); *cf. Community Television of S. Cal. v. Gottfried*, 103 S. Ct. 885, 893 (1983) (conditions set by federal

II. In The Particular Circumstances of This Case, The Entirety of Grove City College Is Subject to the Nondiscrimination Requirement of Title IX.

Section 901 of Title IX prohibits sex discrimination "under any education program or activity" that receives federal financial assistance. 20 U.S.C. § 1681. In *North Haven*, the Court made clear that the question whether the alleged discrimination took place "in an education program that received federal assistance" was a fact issue that turns on the particulars of a given institution's use of federal or other funds. *North Haven*, 456 U.S. at 540. For that reason, the Court thought North Haven's use of federal funds to pay salaries was pertinent, but that the question must be decided in the first instance by the district court on a more developed factual record. *Id.*

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funding agencies). And this Court has repeatedly held that Congress and federal agencies may, under the Spending Clause (U.S. Const. art. I, § 8, cl. 1), require recipients of federal funds to observe stricter standards of nondiscrimination than the Constitution itself requires. *E.g.*, *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J., announcing the judgment of the Court); *Board of Educ. v. Harris*, 444 U.S. 130, 137-38 (1979); *Lau v. Nichols*, 414 U.S. 563, 569 (1974). Since Grove City is free to terminate its participation in the Basic Educational Opportunity Grant ("BEOG") program, and thereby avoid the requirements of Section 901(a), and since its students are free to attend the College, albeit without federal financial aid, there is no constitutional violation by requiring the College to comply with the nondiscrimination requirements of Section 901(a) as a condition for its continued participation in this program. *Bob Jones Univ.*, 103 S. Ct. at 2034-35; *North Carolina ex rel. Morrow v. Califano*, 435 U.S. 962 (1978), *aff'g*, 445 F. Supp. 532, 535-36 (E.D.N.C. 1977); *Norwood v. Harrison*, 413 U.S. 455, 461-63 (1973); *see also Runyon v. McCrary*, 427 U.S. 160 (1976).

Furthermore, as the Court of Appeals held (Pet. App. A-38 to A-39), *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980), is a complete answer to petitioners' argument that DE could not terminate the school's status as a qualified educational institution without first affording a hearing on that issue to students receiving federal financial aid.

This practical approach gives meaning to the statutory terms "program or activity" consistent with the statutory purpose of preventing the use of federal funds to finance discrimination. *See Cannon*, 441 U.S. at 704. Where the factual inquiry in a particular case shows that a university used federal funds in a program or activity that discriminated, or allocated federal dollars to programs that did not discriminate and thereby freed privately obtained funds for programs that do, the court would be in a position to find that the challenged programs received the benefit of federal funds and were therefore subject to Title IX's anti-discrimination requirement.[30]

This practical construction was employed by the Court of Appeals in this case when it concluded that the coverage of Title IX "is as extensive as the program benefited by the federal funds involved." Pet. App. A-31. The Court of Appeals rightly applied that test in holding that, because

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[30] The legislative history of Title VI, which is the model for the Title IX "program or activity" language, reflects the particular attention given by Congress to *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963) (*en banc*), *cert. denied*, 376 U.S. 938 (1964). That case held that Cone Memorial Hospital's refusal to provide medical care to blacks constituted a denial of equal protection. The hospital's receipt of federal financial assistance under the Hill-Burton Act constituted sufficient "state action" to subject the institution to constitutional strictures. The *Simkins* holding applied to the entire institution tainted by the illegal discrimination, although it used its federal construction loans exclusively for the purpose of building two additions and a diagnostic treatment center. *Simkins*, 323 F.2d at 971 (Haynsworth, J., dissenting). Title VI was designed to prohibit the same instances of discrimination as would be reached under *Simkins*, *see, e.g.*, 110 Cong. Rec. 7054 (1964) (comments of Senator Pastore), a result that requires reading "program or activity" in at least some factual circumstances to refer to the entire recipient institution and not merely those particular subunits in which earmarked funds are spent. Whether *Simkins* states the currently prevailing test of "state action" does not bear on Congress' intent in 1964 as to the scope of Title VI. *Cf. North Haven*, 456 U.S. at 529; *Cannon*, 441 U.S. at 710-11.

the federal funds involved here benefit the entire college, the "program" here must be defined as the entire institution of Grove City College. *Id.* Grove City itself recognizes that if indirect grants through its students constitute "federal financial assistance," the application of Title IX in this case has "institutional scope." Pet. Br. at 11. Grove City's argument that this conclusion was rejected by the Court in *North Haven* is erroneous. In *North Haven*, the Court properly recognized that application of the terms "program or activity" is a factual question, and did not foreclose the possibility that, in some cases, the facts would require the conclusion that the institution was the "program or activity." 456 U.S. at 539-40 & n.31.[31]

Here, Grove City College receives general, unearmarked assistance in the form of federal grants to its students. These federal funds are received as tuition and go into the general coffers of the college. The institution as a whole draws from these funds, and Grove City does not contend otherwise. In these circumstances, no further factual inquiry is necessary and the only reasonable conclusion is that the entire institution is the "program or activity" subject to Title IX.[32]

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[31] Grove City seeks to draw support from the statutory definition of "educational institution" in 20 U.S.C. § 1681(c). Pet. Br. at 19. But that term is used only in a different portion of the statute and in a context not at issue here: exemptions from coverage. Thus, one cannot conclude that "program" was intended to have a contrasting meaning. On the contrary, the definition of exemptions in terms of entire institutions suggests that such institutions would otherwise be covered under § 901, and encompassed within the term "program" as used therein.

[32] Thus, this Court need not decide here whether "program" as used in § 901 always refers to the institution. This case does not present the factual situation of a targeted federal grant, such as a research grant to a specific biology laboratory within a university. Nor does this case present questions of the scope of coverage in instances such as a federal grant to only one campus of a multi-campus state university, or aid at the public elementary and sec-

Even if one assumed that federal aid specifically earmarked for a certain institutional subunit would make Title IX applicable only to that unit, the statutory language nonetheless compels the conclusion that the entire institution is covered when unearmarked general operating assistance is involved. In that case, the assistance flows to the institution as a whole. Since the "educational program" receiving assistance is the college as a whole, that is the entity required to refrain from discrimination under Title IX.[33] Indeed, *amici* are unaware of any theory advanced by Grove City College, or which could be so advanced, to support a construction of the term "program or activity" narrower than the entire institution in the context of unearmarked general operating assistance.[34]

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ondary levels where tuition assistance is not a factor and federal aid tends to be categorical. *See* Office of Management and Budget, Executive Office of the President, *1983 Catalog of Federal Domestic Assistance* 783-867.

[33] There is no reason why the term "program or activity" could not encompass a college, as well as more limited programs. But even if one took the view that only subunits could be considered "programs," the entire college would still be covered by Title IX when unearmarked funds are received. Since such funds flow to *all* subdivisions of the institution, all such "programs or activities," narrowly defined, are reached.

Of course, a theory restricting the meaning of "programs" to institutional subdivisions would be highly arbitrary. A complex institution such as a college can be subdivided at many different levels, in an infinite number of ways. There is no reliable way of identifying a particular level that would constitute the appropriate "program" under a narrow theory of that term.

[34] During the period between the enactment of Title VI and Title IX, both courts, *e.g.*, *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847 (5th Cir. 1967), *cert. denied*, 388 U.S. 911 (1967); *Gautreaux v. Chicago Hous. Auth.*, 265 F. Supp. 582 (N.D. Ill. 1967), and commentators, *see, e.g.*, Note, *School Desegregation and the Office of Education Guidelines*, 55 Geo. L.J. 325 (1966), construed Title VI as applying on an institution-wide basis. This Court has recognized that such interpretations of Title VI are highly relevant to the construction of corresponding language in

To adopt other than an institutional approach in a case involving unearmarked funds would also run counter to the statutory language in a second way. Section 901 contains a number of explicit exemptions from coverage. These include several that relate to units that do not receive earmarked federal assistance. For example, social fraternities and sororities are excluded from coverage. 20 U.S.C. § 1681(a)(6). There would be no reason to exclude explicitly such organizations if they were not otherwise within the scope of Title IX. Since the federal government does not provide earmarked aid to such social organizations, it cannot be the case that funds must be specifically allocated to particular subunits if they are to be covered. *Haffer v. Temple University*, 524 F. Supp. 531, 541 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982).

The post-enactment period offers additional relevant evidence regarding the application of Title IX to unearmarked funds.[35] The coverage of intercollegiate athletics was the subject of vigorous debate in extensive hearings in 1975. *See Hearings on Title IX Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 46, 66, 98, 304 (1975). The fact that this issue was given substantial attention lends it weight in the assessment of congressional intent. *See Bob Jones University*, 103 S. Ct. at 2032-33. Notwithstanding the heated debate, Congress did not disapprove the regulation relating to "program or activity." Furthermore, numerous attempts to amend the statute so as to exempt intercollegiate athletics failed. *See Haffer*, 524 F. Supp. at 534. The fact that there was a serious ques-

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Title IX, since Title IX's drafters intended and assumed that the statute would be "applied as Title VI had been during the preceding eight years." *Cannon*, 441 U.S. at 696. Moreover, the fact that Congress intended Title IX to incorporate the approach to "program or activity" implied in the *Bossier Parish* decision, has been confirmed by its sponsor. 121 Cong. Rec. 20,468 (1975) (Sen. Bayh).

[35] *See* pp. 15-18, *supra*.

tion as to the reach of the regulations strongly suggests that Congress understood and intended that the statutory language was broad enough to reach intercollegiate athletics. Otherwise, there would be little point to the debate over the regulations. This understanding was explicitly affirmed by the sponsor of Title IX, who testified in the hearings.[36] The fact that athletic programs were thought to be within the scope of Title IX, notwithstanding the fact that they do not receive earmarked federal aid, demonstrates the error of the theory that only subunits receiving specific grants are covered.[37]

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[36] Those [who object to regulations applying Title IX to athletics] argue that (1) the scope of Title IX is narrow and defined only to include those education programs that received direct federal financial assistance, and (2) since athletics is not an educational program in direct receipt of federal aid, Title IX cannot and should not apply.

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 programs, 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.

Hearings on Title IX Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 171 (1975) (testimony of Sen. Bayh).

[37] The wording of the funding termination provision of Title IX (§ 902) sheds additional light on the meaning of "program or activity." Congress provided that an agency would terminate funding to a "program, *or part thereof*." 20 U.S.C. § 1682 (emphasis added). The words "*or part thereof*" were not placed in the section prohibiting discrimination. If the words "program or activity" always referred to particular subunits of an institution receiving federal assistance, there would be no need to add the language "or part thereof" in order to provide the option of a limited funding termi-

Acceptance of Grove City's hypothesis that the receipt of federal funds is irrelevant unless those funds are specifically earmarked would lead to anomalous and clearly unintended gaps in the anti-discrimination rule. Under that hypothesis, a narrow grant program earmarking funds for a small part of a college would give rise to Title IX coverage, at least for that part. On the other hand, direct general funding pervading the entire college would leave the entire institution exempt, regardless of the amount of money involved. Congress cannot be presumed to have intended this illogical result if, as is the case, a reasonable alternative is available.

Grove City places great emphasis on its alleged persistent efforts to avoid any involvement with the federal government. Yet the federal assistance it receives is not limited to any narrow part or function of the institution. Rather, Grove City has accepted a subsidy flowing to the institution as a whole. It cannot accept general assistance and yet avoid Title IX coverage. Accordingly, *amici* respectfully submit that, in these circumstances, Grove City College constitutes the "program" subject to Title IX. To conclude that unearmarked assistance flowing to the institution as a whole does not bring that institution under the umbrella of Title IX would run counter to the statutory language and intent, creating an illogical and anomalous exemption that could not have been intended by Congress.

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nation. The addition of that clause indicates that Congress used specific narrowing words when it intended a narrow meaning. The absence of such words in the discrimination prohibition confirms that it should be accorded a broad reach.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the Court should affirm the decision below.

Respectfully submitted,

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