OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CHRISTINE FRANKLIN, Petitioner V.

GWINNETT COUNTY PUBLIC SCHOOLS AND

WILLIAM PRESCOTT

CASE NO: 90-918

PLACE: Washington, D.C.

DATE: December 11, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

- X

CHRISTINE FRANKLIN, :

Petitioner :

v. : No. 90-918

GWINNETT COUNTY PUBLIC SCHOOLS :

AND WILLIAM PRESCOTT :

- X

Washington, D.C.

Wednesday, December 11, 1991

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

JOEL I. KLEIN, ESQ., Washington, D.C.; on behalf of the Petitioner.

ALBERT M. PEARSON, III, ESQ., Athens, Georgia; on behalf of the Respondents.

STEPHEN L. NIGHTINGALE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 90-918, Christine Franklin v. Gwinnett County Public Schools and William Prescott.

Mr. Klein.

ORAL ARGUMENT OF JOEL I. KLEIN

ON BEHALF OF THE PETITIONER

MR. KLEIN: Mr. Chief Justice, and may it please the Court:

In 1972 Congress enacted title IX to give all individuals a right not to be discriminated against on the ground of sex by educational institutions receiving Federal funds. In 1979 this Court held in Cannon that the title IX right is judicially enforceable at the behest of an individual like petitioner whose right has been violated.

In the case presented today the question is whether the means of redressing the violation of this legally enforceable right include the normal remedy of damages. We believe damages are available here for two reasons. First, this Court's consistent rule has been to permit all traditional judicial remedies, including damages, whenever a statute contains an implied right of action.

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That's a perfectly sensible rule, I would submit, because when the Court concludes, as it did in Cannon, that there are sufficient indicia of congressional intent to support an implied right of action, the natural inference, and indeed the only plausible rule, is that the courts can use their customary remedial powers.

Second, we believe that a direct examination of congressional intent confirms the conclusion that damages are available under title IX. In 1972, when Congress expressly patterned title IX on title VI of the 1964 Civil Rights Act, title VI had been interpreted by the lower courts to include an implied right of action, and this Court's cases at that time made it absolutely clear that an implied right of action carries with it a right to pursue damages. I think it is fair to say that Congress can properly be said to have relied on these subtle principles when it enacted title IX, and that that intent should be given effect here.

Furthermore, after Cannon was decided it seems that this view of congressional intent became much clearer, as Congress has since then passed two statutes relying on and endorsing its understanding that damages are available. There's been no reason given to suggest why these long-settled and relied-on expectations should now be disturbed.

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I'd like to return, then, to the general rule which authorizes damages under an implied right of action unless there is good evidence to suggest that Congress intends otherwise. That rule has been consistently applied by this Court both before and after title IX was passed, including well into the era when the Court tightened up its criteria for implying a right of action in the first place.

In particular, in 1983 and 1984 the Court applied this rule in the Guardians and Darrone cases to hold that a back-pay remedy is available under both title VI of the 1964 Civil Rights Act and section 504 of the Rehabilitation Act of 1973.

QUESTION: Well, back pay, of course, is not the equivalent of damages.

MR. KLEIN: I agree with that, Mr. Chief Justice, but I think the principle is that in Guardians and Darrone the reason back pay was found to be available is that once the Court finds an implied right of action it infers the availability of traditional damages. So there is no doubt a difference in remedy, but I think there is not a difference in --

QUESTION: I don't see how you draw upon a case which allowed back pay as saying that therefore damages are available, unless just by a rather distant

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implication.

MR. KLEIN: Well, I think it is by implication in the sense that I think the reasoning that led the Court to think -- to conclude rather -- that damages -- that back pay is available, that same reasoning applies here. There was, for example, no direct legislative intent that the Court ruled on to say that title VI would include back pay. I mean, there was no specific or even indirect suggestion.

What the Court really concluded is that once we find sufficient indication of a right of action we presume, it's just a natural presumption, that all the remedies are available. We don't pick and choose among them.

QUESTION: This was Guardians that you're talking about now?

MR. KLEIN: This is Guardians, which I think then was --

QUESTION: I think it's very difficult to draw any very compelling inference from Guardians. The Court was split so badly.

MR. KLEIN: I think it is hard to draw it from Guardians alone. I agree with that, Mr. Chief Justice. But I think in --

QUESTION: What's the other case?

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MR. KLEIN: Darrone. The Consolidated Rail v. Darrone, which was the year after Guardians, where frankly a unanimous Court basically came together, I think, on these principles.

QUESTION: Mr. Klein, I think that our cases in Touche Ross and maybe the Sierra Club indicate that the Courts won't engraft a remedy on a statute that Congress didn't intent to provide. Do you think that notion has any applicability here?

MR. KLEIN: I don't in the following sense, Justice O'Connor. I think that Touche Ross and its progeny stand for the proposition that the Court won't imply a right of action unless it concludes that there is congressional intent to do so.

QUESTION: You think it has nothing to do with scope of the remedy?

MR. KLEIN: I don't, for the following reason. If we agree that once you imply a private right of action that must mean two things. One, Congress intended to allow a judicially enforceable right. That's what a private right, I think, means.

It also must mean the fact that it's an implied right is that Congress has left the issue to the courts, because they haven't set it out in the statute or in the legislative history. Now, what I suggest, if you knew

that much, which is I think what you know in an implied right of action case, the logical inference is that all remedies are going to be available.

QUESTION: Do you think that we have employed that notion even in statutes enacted under the Spending Clause?

MR. KLEIN: I do, because I think that notion explains the Guardians, Darrone cases, which is a Spending Clause statute.

QUESTION: Well, I thought under the Spending Clause theory we were a little more careful about binding a damages remedy if it might be beyond the scope of what we assume the States have contracted with the Federal Government to do.

MR. KLEIN: I think you have, but I think that distinction was drawn actually by Justice White in his opinion in Guardians. The point he made, I think --

QUESTION: I'm not sure that was joined by anybody.

MR. KLEIN: It was actually joined by the Chief Justice, but I think that --

QUESTION: That part was?

MR. KLEIN: I believe so, sir.

QUESTION: I was fortunate.

(Laughter.)

MR. KLEIN: I think the point that Justice White made, which it seems to me is a fair point, that if you're talking about an imply -- a damages remedy in a context where it's an unintentional violation, it's difficult, the Pennhurst concern about contractual understandings is appropriate. Now, in fact we allege, and I understand we have to prove an intentional violation.

The other point I'd like to make, Justice O'Connor, is it at least seems strange to me the notion that when Congress provides Federal funds to a program it would want a less vigorous or less comprehensive scheme of enforcement with respect to civil rights. I think in fact we ought to basically think that it would be opposite where Federal monies may be misused.

QUESTION: Well, what would you do if you were faced with an unintentional violation, so to speak? Can there be an unintentional violation of title IX?

MR. KLEIN: Of title IX? Well, I think that is a question that certainly is left open after Darrone. Darrone suggests there can be an unintentional violation. Let me say I don't think, I think you do have an issue of contract interpretation, and that seems like a reasonable issue. In other words, if the States had no reason or the private institution had no reason to think what it was doing was a violation, then you may have a question of

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whether that's sufficient intent to enforce the Spending Clause legislation against it.

But it seems a very different thing when we allege and if we prove that this is intentional. It can't be that the State here, or the school district rather, didn't know that this was a violation. In fact they didn't have in place a mechanism for students to go and complain or make known any concern about this kind of sexual harassment. They were in flat violation of the regulation. So any notion that they, so to speak, weren't contractually aware I don't think is indicated here.

QUESTION: Mr. Klein, could the petitioner have pleaded a cause of action under section 1983?

MR. KLEIN: I believe she could have, Justice Blackmun. 1983 would apply here, of course, because this was a school board. Title IX, however, is far broader in its scope and applies to private institutions as well.

And I guess one other point I'd just like to note there, Justice Blackmun, is that I think she is entitled to a claim under 1983, but I think she might run into the argument that, a Sea Clammers' type of argument that title IX has its own remedial scheme and so she might be preempted. I don't think that's a good argument, but I think it might be raised.

QUESTION: Well, wouldn't she have to show too

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that there was a policy on the part of the school board before she could sue the school board, rather than individuals who she claimed discriminated under Monell?

MR. KLEIN: Well, she would have to certainly meet the criteria under Monell, and I think we can meet those criteria in the --

QUESTION: But it's a criteria you would not have to meet under title IX.

MR. KLEIN: Well, let me say I don't think we'd have to meet it under title IX. I agree with that. But I don't know that that issue is necessarily --

QUESTION: So that if, if we upheld your position here, people who had previously sued under 1983 and had to prove a policy under Monell would be relieved of that obligation?

MR. KLEIN: I think that's right, Mr. Chief Justice, but I want to say I don't think that's surprising in the following sense. Of course, Congress has expressly abrogated the Eleventh Amendment under title IX. It hasn't done that under 1983. So I think the notion that Congress intended broader protection under title IX is at least consistent with the one action it took in that regard.

QUESTION: The Eleventh Amendment has never applied either to municipal corporations or to counties.

MR. KLEIN: That's correct, but it is applied to States.

QUESTION: Yes, but we're not talking about a State here and we're not talking about a State in the typical Monell situation. States aren't sued under section 1983.

MR. KLEIN: Right. Maybe I hadn't made myself clear, I don't believe. What I was trying to suggest is that the notion that Congress might have intended broader protections in general, not specifically with respect to municipalities, under title IX than under 1983 is consistent with the fact that under title IX they eliminated a protection conventionally available for the States. I agree that has no bearing directly on the cities.

QUESTION: Mr. Klein, what's your position on punitive damages?

MR. KLEIN: My position is that punitive damages would be allowed, but I will acknowledge, Justice Kennedy, that that doesn't follow inexorably from the conclusion that compensatory damages would be allowed. The Court, under section 1983 in cases like Facts Concert, has suggested that punitive damages are a different matter historically and otherwise with respect to municipalities. And it seems to me at least an argument could be made,

it's not an argument I would make, but an argument could be made to that effect in the subsequent case. This case, of course, only presents compensatory damages.

QUESTION: Mr. Klein, couldn't an argument be made that this isn't covered by 1983?

MR. KLEIN: Yes. That's what I suggested to --

QUESTION: Have we held -- have we held that sex discrimination is covered?

MR. KLEIN: Have you held that sex discrimination is covered under 1983? Well, I don't -- I guess what I would say is what you have held is that 1983 applies to the Constitution and the laws, and title IX is a law, and under title IX sex discrimination is barred. So my argument would be yes, it applies under 1983.

QUESTION: I see what you're saying. Through title IX --

MR. KLEIN: Through title IX. Yeah. I don't think -- well, I don't think 1983 gives you any independent rights. It's a remedial --

QUESTION: Mr. Klein, to the extent that the Eleventh Amendment waiver is at least a relevant consideration for us, is there any clear indication that the intention, the congressional intention in doing that was to open the States wide open to damage remedies as opposed to getting around a more limited Edelman and

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Jordan?

MR. KLEIN: Yes. I think there are several -- several reasons to come to that conclusion, Justice Souter, and I think they are quite strong. First of all, of course, Atascadero itself was a case involving compensatory damages and injunctive relief. Second of all, if you're only talking about an injunctive remedy it seems there'd be no reason to possibly abrogate the Eleventh Amendment.

QUESTION: Well, there wouldn't to the extent that it was merely injunction, but to the extent that equity would be awarding any monetary relief there would be a reason.

MR. KLEIN: That is correct. And then I think, to address that question specifically, the legislative history and particularly this is a statute that was introduced on the floor, an amendment introduced on the floor and Senator Cranston introduced it. And he flatly states that the purpose of this is to allow all the remedies, including damages, which we have always intended. And so I think the clear consistent view is that.

And let me suggest there's another at least inferential reason, Justice Souter, and aside from the direct evidence, which is frankly not quoted in my brief

but quoted in the brief by the civil rights groups.

But the other reason to infer that is in 1984 this Court hadn't simply upheld back pay under Darrone. It also said in Smith v. Robinson that the lower courts generally agree that damages are available under 504. So against the legal climate that Congress was arguing in, I think there's every reason to think it assumed, as the Court had indicated, that damages and back pay were available, once directly, once indirectly.

QUESTION: Okay.

MR. KLEIN: I'd like to move back just a moment, if I could, because I think this issue of direct congressional intent bears some elaboration. I would like to move back and talk first about 1972 and then about post-Cannon congressional intent. I think they're consistent, but I think there's one difference that becomes important.

Now, first of all, I think, without trying to re-argue the Cannon case, I think one or two key points bear emphasizing, and that is in 1972 when Congress enacted title IX there is no dispute it mirrored it on title VI of the 1964 Civil Rights Act. It was essentially an analog that substituted sex for race. Now, title VI -- two things had happened, however, that were key between '64 and '72. Title VI had been consistently and

frequently interpreted by the lower courts to provide a private right of action.

Now, no lower court suggested a limitation on remedy. None. At the same time between '64 and '72, this Court's cases uniformly made clear that a private, an implied right of action means a right to damages. That's what the jurisprudence was. The Court had never uncoupled the notion of an implied right of action from damages. And in the case that must be most relevant, in Sullivan v. Little Hunting Park, the Court concluded that an 1866 Civil Rights Act included an implied remedy for damages.

So it seems to me under conventional principles still applied by this Court that title IX basically has to be read as incorporating that congressional understanding.

QUESTION: Mr. Klein, was the language of section 1866 -- rather of the 1866 Civil Rights Act -- with respect to remedies the same as the language of title IX?

MR. KLEIN: No, no, it was not, Mr. Chief Justice.

QUESTION: Then why does one bear on the other?

MR. KLEIN: Because the Court's principle in several cases -- it was not just Sullivan, the 1982 case. What the Court had adopted in Borak, in Sullivan, in several other cases in this era, was if a statute

indicates an intent to protect rights we will take that intent and the courts will fully enforce them. That was the rule.

QUESTION: Well, is that rule, for example, stated in the Sullivan case?

MR. KLEIN: I believe -- I believe it's flatly stated. And the rule is, what the Court in Sullivan flatly states, is when there is a cause of action we will make available all remedies to effectuate it, and that was an implied cause of action case. 1982, of course, doesn't contain an express cause of action. So I think the law was really very settled.

Now I realize that today the law is different with respect to when you might imply a right of action. But I'm looking at Congress' intent in 1972, and I would submit to the Court that the two principles, that title VI had a private right and that a private right had never been uncoupled from a damages remedy by this Court, were clear at that point. Then I think, and in fact I think the Court in Cannon itself relied on those cases expressly in reaching the conclusion that there was an implied right of action.

But then I think we should look at post-1979, because it seems to me that whatever doubt Congress might have had about the scope of the remedies under title IX

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was cleared up in 1979 when Cannon came down because the Court then said yes, you do have a private right of action. And in 1979 there had never been a case in this Court that had uncoupled a private right of action from a damages remedy.

And I suggest that Congress has taken two actions since then that supports their understanding that damages are available and as well the view that they endorse that understanding. One is the discussion I had with Justice Souter a few moments ago about the Atascadero statute, the Remedies Equalization Act which I think is fairly read, particularly in light of its legislative history, to support damages.

And second, only last year in the Americans with Disabilities Act which Congress passed it extended section 504. Now, 504, just like title IX, is based on title VI, and this Court has held that the three statutes in terms of their remedial schemes are read in parry material. And what the Court held, what Congress did under 504 is to say -- under the Americans with Disabilities, pardon me, is to say look, we are now applying a right to programs that don't get Federal monies. That is 504 said if you get Federal monies and discriminate on handicap, you're not allowed to discriminate on handicap. Then Congress says we're going to extend that to State and local programs

that do not receive Federal monies, and in extending it it says we intend to extend the damages remedy that has been recognized under section 504. And I suggest to you again that that intent reflects a consistent understanding.

QUESTION: Where is that in your brief?

MR. KLEIN: That, unfortunately, and I apologize, Mr., Justice Scalia, that is in the brief of the amici curiae, the American Council of the Blind, and it is discussed on pages 24 through 25.

QUESTION: Does it have the text of the statute? Does the text of the statute --

MR. KLEIN: The statute, Justice Scalia, simply incorporates the remedies available under 504. It expressly does that.

QUESTION: So when you say that Congress said, you mean some of the legislative history says that?

MR. KLEIN: That's what I --

QUESTION: I wish you'd make the distinction.

MR. KLEIN: I apologize.

QUESTION: Some of us think there's a difference.

(Laughter.)

MR. KLEIN: What I meant to suggest is the statute expressly incorporates the remedies available under 504. That's all it says, and what I'm saying is

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Congress reflected its understanding that that included a damages right.

So it seems to me that we now have a 20-year relationship, basically from '72 to the present, where the Court and Congress have interacted in a way that indicates at least now that damages are under -- available under title IX, and I don't think there is any good reason to undo that understanding.

I would suggest that the contrary is actually true because in Cannon the case is almost unique in that this Court announced to Congress that it would apply the legal standards applicable in 1972 to title IX. That's what it said, and indeed I think it went on to suggest, at least in the concurring opinion, that in the future Congress ought to understand that new rules will govern new statutes. But that's a very different thing from saying that than telling Congress the 1970 rules apply to the context of this statute.

Now, despite that clear direction to Congress, the Solicitor General and the United States -- and the respondent, want to argue here that the Court should apply a completely new view of interpreting title IX. I would say in response that that -- that position is not only unfair given the history we have discussed, but it also quite frankly is wrong under modern standards of applied

right of action. That is to say I think it is fairly concluded based on Thompson v. Thompson that all nine members of the Court reaffirmed a view that Cannon's conclusion that Congress intended a private right of action, that that conclusion was supportable. In the view of two justices that was based upon the narrower title VI incorporation theory I discussed.

Only then did Justice Scalia, in a separate, in a separate concurring opinion, say he would move the law further and would eliminate implied rights of action altogether. Under that view I recognize we would not be in court. However, Justice Scalia said that's not the law. And he further said if it were to become the law it would have to be applied only prospectively to new statutes when Congress understood what the rules of the game then were.

If there are no further questions I'll reserve.

QUESTION: Very well, Mr. Klein.

Mr. Pearson, we'll hear from you now.

ORAL ARGUMENT OF ALBERT M. PEARSON, III

ON BEHALF OF THE RESPONDENTS

MR. PEARSON: Mr. Chief Justice, and may it please the Court:

Our view of the case is that the law as it stands now has developed through the sequence of cases,

Cannon, Guardians, and Darrone, to a point where at the most under title IX and similar conditional spending power statutes the relief that would be judicially available would be equitable in nature and nothing beyond that. We feel that this line between equitable and traditional damages remedies is a rational stopping point in the development of the law, and we would suggest that if -- within the context of this case, the Court hold that nothing more than equitable relief be available in the context of a judicial proceeding.

We think that the cases of this Court state the criteria for determining implied cause of action, and we argue also for remedy is governed by congressional intent. And under that method of analysis our view is no reading of the statute, no reading of the cases of this Court up until now, particularly under conditional spending power legislation, would authorize anything more than equitable relief.

QUESTION: May I ask this one question? Nobody's talked about the facts of the case at all, and I understand why your argument might have a lot of force if somebody had been denied admission to the school and then injunction could get them in the school or reinstatement of a faculty member, but what kind of -- what equitable relief would this plaintiff get?

MR. PEARSON: Well, as far as equitable relief is concerned I think that there are a number of options available to a school system. Internal discipline of any individuals who would be responsible --

QUESTION: You mean this student should bring suit or to get an order against a discharged employee to be disciplined? I don't understand --

MR. PEARSON: If necessary. Let's back up. It's a two-step process.

QUESTION: What in this particular case, what kind of equitable relief could possibly justify even filing the lawsuit?

MR. PEARSON: Well, there are two steps to the process, and I think it's important to emphasize both. The first is that the agency responsible for enforcing title IX, the Office of Civil Rights, was called into the process, and the agency in the statute does have a role in trying to achieve voluntary compliance. That language is used in the statute and that is a predicate to the use of the agency remedy of funding termination. So I don't think you can lightly disregard what the agency can do administratively.

QUESTION: No, no, I understand, but my question is devoted to a -- the plaintiff in the case and the -- I gather you assume there is an implied cause of action in

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the case.

MR. PEARSON: Yeah, we don't question that.

QUESTION: And what is the possible, even theoretical possible remedy that the individual plaintiff in this case could have available that would motivate even bringing the case? I understand you're saying --

MR. PEARSON: It goes back to the agency remedy, is that the conciliation process can produce internal changes, discipline, restorative measures, restorative --

QUESTION: But that's not responsive to my question.

MR. PEARSON: It is because it moots the equity point. If you take that action and that action is curative and restorative, the action would moot a claim for equitable relief and render unnecessary going --

QUESTION: Moot what claim for equitable -- what is the claim for equitable relief that she could ever assert?

MR. PEARSON: Well, in the context of a student who has been sexually victimized in any way one issue is whether, as a result of the misconduct, she has been fully restored to the educational status she is entitled to under title IX. Our view of the statute is that the Federal interests vindicated by title IX go to protection and securing of the status of the student in the

educational climate, and not beyond that.

QUESTION: But those are arguments for saying there's no need for a private cause of action.

MR. PEARSON: No, sir, they're not, because if the --

QUESTION: You still haven't responded to my question, what equitable relief she could get if she has a cause of action.

MR. PEARSON: If the school does not restore her to a status that she would have enjoyed but for the discrimination, then she can go into court and say they have acknowledged misconduct but they have not taken enough action to restore me to my pre-act status, and then can ask for the district judge to give additional relief, require additional corrective measures to restore the student to the pre-misconduct status.

That's the focus of title IX, that's the focus of agency oversight. And in the event that agency oversight doesn't produce sufficient correctives, Cannon allows the student to go into court and says -- say OCR, school system, they've gotten together, they haven't done enough, I disagree, will you do more. That's where equitable relief does survive.

But, I think the advantage of the title IX compliance mechanisms is that you have some way of

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resolving the issue of whether there has been a violation and what corrective measures need to be taken, and can obviate the necessity of litigation if you can find the remedy to equitable relief.

Bear in mind that if you have a damages remedy it's never moot. Voluntary compliance can be pursued to the fullest extent possible, but that doesn't moot the damages claim. And that's the differentiating factor between the kind of mechanism that we have under title IX, and the kind of enforcement mechanism that they are arguing in our view ought to be engrafted onto title IX. In some cases equitable relief will be unnecessary. The --

QUESTION: Well, this is one -- isn't this one such case on your argument? In other words, isn't your answer to Justice Stevens' question no, there is no equitable relief which she will seek?

MR. PEARSON: Well, there is none needed, but steps were taken that were --

QUESTION: Okay. But the answer is that the student would have no reason to seek equitable relief in this case.

MR. PEARSON: Not at this point, and that claim was dropped, and it was dropped by virtue of the compliance steps taken by the school system, which were

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the result of the extant enforcement mechanism. So we see the interplay between agency oversight and equitable relief to be a complementary enforcement mechanism quite rational in the way in which it operates.

QUESTION: Mr. Pearson, it seems to me you're asking us to adopt a topsy-turvy implication from the statute. In our system of laws monetary damages is the usual relief. It's equitable relief that's extraordinary. You always have -- you always have damages and the issue is do you have an equitable remedy here. You're asking us to just overturn a long historical tradition that I presume Congress has in mind when it legislates. Damages are the normal remedy. You argue about whether you have any equitable remedy.

MR. PEARSON: No. The answer is we're not asking for an inversion of the law. Take into account the defendant that is being sued in this case. It is an institutional defendant, a governmental entity, and historically, since Ex parte Young all the way up until the time Monell was decided, the only relief that could be judicially obtained against governmental entities was injunctive in nature.

QUESTION: It isn't that you wouldn't have a cause of action, it's that there was -- there was a defense. It wouldn't lie. But you had a cause of action

for equitable --

MR. PEARSON: Well, we're not disputing the existence of cause of action, but the question is is the remedy that we're talking about in the context of this case somehow an inversion of traditional, established legal priorities, and the answer is in the law, by virtue of the longstanding existence of the law of immunities, equitable relief was in fact the primary exclusive relief against immune institutions, both State by virtue of the Eleventh Amendment and governmental.

QUESTION: And is this an immune institution? If it's an immune institution you wouldn't have any problem.

MR. PEARSON: It will -- it may be immune institution; it may not be. There is an argument here in the Court today that the Monell-type standards don't apply, and I assume that they would further argue that the reasoning in Monell ought to be extended to title IX at a minimum. Now, Mr. Klein's position is we don't want Monell-type standards at all. In effect what he wants is a damage action against the institution under a statute which provides no remedy against the wrongdoers as individuals.

If you're talking about inverting priorities in terms of morals, at least 1983 provides a remedy directly

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against the individual wrongdoer, and there is a special, more particularized showing that has to be made in order to impute liability up to the institution. I think the inversion comes in their interpretation of title IX and the identity of the defendant, and then you look at who the wrongdoer is directly. And that would be, under their allegations in the case, the individuals who were involved with this student.

So I would disagree with you in the suggestion that we're inverting classical law equity relationship. Suits against governmental entities have always been treated differently because remedies at law are inadequate and therefore equitable relief has been necessary. Ex parte Young fiction was the origin of that in modern litigation, and it is carried all the way forward into the contemporary era, and in fact lots of statutes view this, I would assume, as being such a strongly held principle that they exempted local subdivisions from the scope of their laws. Title VII, for example, was -- did not cover State and local political subdivisions until it was modified in 1972.

So we feel like that if you look at the contemporary context within which title IX was enacted and at statutory antecedent, title VI, the basic law was no damages remedies against governmental defendants.

The structure of the Civil Rights Act of '64 is totally consistent with that premise. Injunctive relief -- where legal relief is available under that statute, every title, every one, nothing more than equitable relief. Every title deals with intentional discrimination. And the conjunction of title VI with those other titles, it seems to me, argues powerfully that what was contemplated under title VI was injunctive relief, and the law that was being assimilated in title IX was injunctive relief.

Look at the title VI litigation between 1964 and 1972. I tried to cite as many of the cases as I could find in my appendix. Not one case did we find where the litigants even asked for any remedy other than injunctive relief, except for the few cases that drew in the analogy of the title VI equitable relief model. And some of these cases are cases where the 1983 claim was a parallel claim, where you have a damages remedy. Nobody asked for conventional damages, and surely nobody asked for punitive damages.

It seems to me when you look at these kinds of factors the case is compelling that neither title VI, title IX, or any similar legislation has ever contemplated the sort of damages remedy.

We ask, then, that the Court affirm the ruling

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of the Eleventh Circuit.

If there are no further questions, the Solicitor General has time allocated in this case.

QUESTION: Very well, Mr. Pearson.

Mr. Nightingale.

ORAL ARGUMENT OF STEPHEN L. NIGHTINGALE

ON BEHALF OF THE UNITED STATES,

AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

MR. NIGHTINGALE: Thank you, Mr. Chief Justice, and may it please the Court:

The governing principle in this area, we submit, is that petitioner is entitled to pursue only those remedies that Congress has authorized, and in determining what Congress has intended we further submit that there is no factual or theoretical basis for presuming that Congress approaches statutory remedies on an all-or-nothing basis. In other words that it -- when it sets out to create a private remedy it conceives of remedies in units called causes of action and delegates to courts the authority to fill out those causes of action in whatever manner courts consider appropriate.

Indeed in the context relevant to this case, experience suggests precisely the opposite. There is no dispute that title IX was patterned after title VI of the Civil Rights Act of 1964. None of the titles, none of the

private rights of action created in the Civil Rights Act of 1964 provided for traditional legal damages. Title VII provided for an expressed right of action for equitable remedies including back pay. Title II provided for preventive relief. Two other titles reserved whatever remedies were available from other sources but created no private remedies. And indeed the most aggressive advocates of private remedies in 1964 in the context of title VI suggested only a provision that would have authorized private parties to seek preventive relief.

Justice Scalia, I submit that there is no basis for believing that Congress in this area conceives of the traditional legal remedy of damages as being the remedy of choice. The experience suggests that Congress has thought of equitable relief as the more likely remedy.

The Court has also abandoned, in the context of statutory remedies, the presumption that a grant of subject matter jurisdiction authorizes the courts to grant whatever remedies courts may consider appropriate to vindicate rights.

In Davis v. Passman the Court made clear that that -- that it will continue general Federal subject matter jurisdiction as a basis for conferring remedies with respect to violations of constitutional rights, but it has made clear that at the same time that with respect

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to statutes the touchstone must be congressional intent. Indeed within a period of weeks after Davis v. Passman the Court issued its opinion in Touche Ross and Redington, indicating that the question of remedies is one of statutory interpretation.

QUESTION: Is it your position then that the language relied upon by the petitioner is from our decision in Bell against Hood is limited to constitutional violations?

MR. NIGHTINGALE: It is, Your Honor. That is our position. In Davis v. Passman the Court said as much.

We're -- the petitioner suggests that title IX should be construed with respect to precedents preceding its enactment in 1972. I have a couple of points with respect to that. First of all, in Allen v. State Board of Elections, which is a case predating 1972, the Court did recognize a private right of action limited to declaratory -- declaratory judgment and injunctive relief. There was, to be sure, no request for damages in that case, but it cannot fairly be said, I think, that the Court has never considered the possibility, even before 1972, that damages necessarily accompanied any private right of action.

Secondly, last term in the Virginia Bankshares case, the Court indicated very clearly that although it would not overrule previously recognized causes of action,

that in determining their scope and in rounding them out, if you will, it would refer to the principles that have informed its decisions in recent times. In that case it was dealing with a cause of action recognized in the Borak case. Rather than take -- than consider principles that might have been in Congress' contemplation in the 1930's, it analyzed the case from the standpoint of its current jurisprudence.

Again, I think the -- I'd like to turn briefly to petitioner's reliance on the post-title IX statutes. I don't believe there is any suggestion that the private right of action that petitioner seeks was created at any time after 1972. The issue before the Court, in other words, is what Congress intended in 1972 when it enacted title IX.

The 1986 congressional action on its face doesn't tell us very much about what the 1972 Congress itself meant, and therefore we believe that it should not displace the Court's consideration and the materials that were determinative as of 1972.

Beyond that, on its face the text of the 19 -- 1986 act only says that remedies, including actions at equity and at law, will be available from State entities to the same extent as they would be applicable from private parties. The goal was to equalize remedies,

whatever they might be. The statute on its face does not recognize any particular remedy against any particular defendant.

QUESTION: This is the 1986 act you're referring to?

MR. NIGHTINGALE: Right, the Equalization Act.

QUESTION: But in this case there would clearly be a remedy against a private school here, wouldn't there, on the facts of this case?

MR. NIGHTINGALE: Not in damages, Your Honor, we submit. Our position is that the same remedies are available from all defendants under title IX, and they are limited to equitable relief.

The -- there is further the suggestion that there has been a unanimous judicial view that damages are recoverable under funding statutes. In truth there has not been anything of the sort that would justify the Court in assuming that Congress in 1986, or more recently when it passed the other statute on which my opponent relies, was ratifying a consensus here. Our brief at the petition stage sets forth the rather sharp division among the courts on this issue. After this Court's decision in Cannon, the Seventh Circuit held that damages were unavailable under title IX. There was a split among the circuits under the Handicap Act.

And in considering those cases the Court should also be aware that a number of them were decided under the Education for All Handicapped Act and sought sums that in the school committee of Burlington in this case this Court said were not damages.

So that in -- casual references in many Handicapped Act cases to awards of damages we think should be taken carefully. There is at best a split among the courts under these three related statutes, title VI, title IX, and the Rehabilitation Act on the question whether damages, traditional legal damages, are available.

Finally, as a matter of policy and in the context of this statute as a whole there is no reason, we submit, to ascribe to Congress the view that legal damages are necessary for effective enforcement of this statute. In the only express remedy for a violation of this statute --

QUESTION: When you talk about this statute are you emphasizing the fact that it's a Spending Clause statute?

MR. NIGHTINGALE: We are emphasizing the fact that the obligation is tied to receipt of Federal funds and therefore we believe it is significant, as members of the Court have suggested, that entities be aware of what sorts of obligations they are accepting.

QUESTION: Well, you're not -- I gather then that you're not proposing that we adopt a general rule that anytime we find an implied cause of action in any statute damages are not authorized unless Congress has said so expressly?

MR. NIGHTINGALE: The -- what we suggest, Your Honor, is that the Court should approach the materials relating to each statute and determine what remedies Congress has authorized. We don't believe that Congress approaches this matter from the standpoint of an all-or-nothing analysis.

Thank you very much.

QUESTION: Thank you, Mr. Nightingale.

Mr. Klein, do you have rebuttal? You have 6 minutes remaining.

REBUTTAL ARGUMENT OF JOEL I. KLEIN

ON BEHALF OF THE PETITIONER

MR. KLEIN: Thank you, Mr. Chief Justice. The first point I'd like to make is that respondent and the Solicitor General are here today asking the Court to legislate between back pay on the one hand and damages on the other. They think that it's a better means of enforcement to allow for back pay and not for damages.

I submit to the Court there is nothing in what we have talked about today, in the legislative history, in

the enactments, in this Court's decisions, that would make that distinction tenable. And the Solicitor General significantly did not tell the Court what in the legislative history, what in the statute supports back pay and not damages.

The second point that I want to emphasize is that respondent's argument about money not being available against cities and States is flatly inconsistent with the back-pay remedy. All of these arguments about immunity cannot be squared with back pay. They apply equally.

Second of all in that regard, respondent tells us there was no back pay, there was no monetary remedies against States and cities during this era. Then he says let's look at the cases from '64 to '72 under title VI. And what does he say? He said they all had 1983 actions, but he's just told us that 1983 doesn't provide damages or back pay against the cities. So these title IX claims were the ones that provided for the monetary relief.

Finally, I would submit, we have seen a fair amount of historical revisionism here. I asserted in my opening argument and I will stick by it, if you read the Court's precedents between '64 and '72, which I suggest is the critical period because that's when title VII, title VI, and title IX were passed, the one mirrored on the other, those cases say if you have an implied right of

action you have damages.

The Solicitor General says look at the Allen case. I welcome the opportunity. Allen provides -- Allen was a case involving enforcement of section V of the Voting Rights Act. All that section V provides is for preclearance. So the only possible remedy in that statute would be an order declaring or enjoining the preclearance of the statute. There could not have been damages. The other cases that I discussed uniformly accept damages.

Finally, during the period '68 -- during the period 1964 to 1972 -- again, the crucible I think we want to look at for '72 intent -- not only had Congress passed the Fair Housing Act, which included expressly a damages -- which included a damages remedy expressly under civil rights enforcement, not only had this Court come down with Little Hunting Park, Sullivan v. Little Hunting Park, which included a damages remedy under another civil rights statute, but in addition to those events the key point is that the notion that this would be an effective statute, Justice Stevens, without damages for students is an untenable one.

And the reason I say that is, look, what does respondent and the Solicitor General say? Here we have a statute that applies to schools, and they say you can get back pay under it. But who are the beneficiaries, the

primary beneficiaries? They are obviously students. That's what Congress had in mind. And for students back pay is useless.

Now, to be sure, any remedy can be mooted out, as respondent suggests, if you give people what they want. And if they gave our client the damages she is entitled to we wouldn't go to court either, but it is strange to think that Congress would have implied a remedy for back pay and not for damages under a statute where back pay is meaningless for most people.

QUESTION: Mr. Klein -- unless they had teachers -- they thought that most of the discrimination would be against teachers rather than students. I mean, that's one --

MR. KLEIN: That's a feasible hypothesis, but I think it's belied by the following, Justice Scalia, and that is of course the same year they passed 19 -- title IX they extended title VII to public and private -- to public entities including schools. So they already had the teachers covered.

QUESTION: Can I ask you, Mr. Klein, whether any of the subsequent statutes that you talk about, the ones following title IX, you cite them to show Congress' understanding of -- they imply an understanding of title IX. Is there any disposition that they provide for which

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would be altered if we did not adopt your understanding of title IX?

MR. KLEIN: I want to be careful in answering this question to you in particular because what I said before which I think is right is the Americans with Disabilities Act says that it incorporates the remedies under 504. Now, I understand that on its face that means whatever the remedies are, that's what they are. What I suggest to you is that Congress in the legislative history indicated that it understood and intended those remedies to include damages. On the face of the statute, no.

QUESTION: So if we should change and provide a lesser remedy for title IX we would also produce a lesser remedy for later enacted legislation?

MR. KLEIN: That is my -- I think that is a clear inference of what I've just said.

And the final distinction, if I might before I sit down, is let's look at the difference between a statute like title VII on the one hand and the Fair Housing Act and title IX on the other. For most employees back pay is going to be a meaningful remedy. It may not be a complete remedy, but it's going to be a remedy that's going to ensure enforcement of the statute because it's a significant one.

In Fair Housing, 4 years before title IX,

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Congress says you can get damages. And why does it say that? Because in the Fair Housing context, by the time you get an injunction, it's too late.

CHIEF JUSTICE REHNQUIST: Your time has expired, Mr. Klein.

The case is submitted.

(Whereupon, at 10:55 a.m., the case in the above-entitled matter was submitted.)

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BY Michelle Sanders

(REPORTER)