

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner v. R.M. SMITH.
CASE NO: 98-84 C.Z
PLACE: Washington, D.C.
DATE: Wednesday, January 20, 1999
PAGES: 1-59

REVISED

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 NATIONAL COLLEGIATE ATHLETIC :
4 ASSOCIATION, :
5 Petitioner :
6 v. : No. 98-84
7 R.M. SMITH. :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, January 20, 1999

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:12 a.m.

14 APPEARANCES:

15 JOHN G. ROBERTS, JR., ESQ., Washington, D.C.; on behalf of
16 the Petitioner.

17 CARTER G. PHILLIPS, Washington, D.C.; on behalf of the
18 Respondent.

19 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
20 Department of Justice, Washington, D.C.; for the
21 United States, as amicus curiae, supporting the
22 Respondent.

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1 PROCEEDINGS

2 (10:12 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 98-84, National Collegiate Athletic Association
5 v. R.M. Smith.

6 Mr. Roberts.

7 ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

8 ON BEHALF OF THE PETITIONER

9 MR. ROBERTS: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 This case is here from the Third Circuit which
12 held that the NCAA would be covered by title IX if it
13 received dues from member institutions which receive
14 Federal financial assistance. That decision is wrong and
15 should be reversed.

16 It's wrong because this Court has held that for
17 an entity to be covered by title IX, or any of the other
18 statutes with the same Federal funding trigger, the entity
19 must itself be a recipient of Federal financial
20 assistance.

21 The Court said just that in the Paralyzed
22 Veterans case. Quote, Congress limited the scope of the
23 law to those who actually receive Federal financial
24 assistance. End quote. Later in the same opinion, the
25 Court said that these laws, quoting again, require us to

1 identify the recipient of the Federal assistance. End
2 quote.

3 And it also explained why that is so.

4 QUESTION: But we've also said that it can be --
5 it can indirectly be a recipient.

6 MR. ROBERTS: In the Grove City case, Your
7 Honor, but the test is the same. Whether a direct
8 recipient or an indirect recipient, the entity must be the
9 intended recipient under the grant statute or program.
10 And the reason for that is clear, the condition -- the
11 prohibition on discrimination is imposed as a condition on
12 the receipt of funds. So, it is limited to those who
13 accept the funds and thereby agree to the condition.

14 That is consistent with the Court's decision
15 last term in Gebser which reaffirmed that construction and
16 the rationale. The discriminatory acts of the school
17 employee in that case did not automatically trigger a
18 damage action under title IX because title IX's coverage
19 is limited to recipients. The recipient was the school
20 district, not the employee, and therefore the question was
21 what did the school district know and what did the school
22 district do or not do.

23 QUESTION: Does Paralyzed Veterans modify the
24 regulation that's involved in this case, 34 C.F.R. -- what
25 106.h?

1 MR. ROBERTS: 106.2(h). I think it can be read
2 -- the regulation could be read -- consistent with
3 Paralyzed Veterans. As even the Solicitor General
4 acknowledges, all of the regulations impose obligations
5 only on recipients. And the regulation doesn't say, as
6 the Third Circuit thought, that it was enough that you
7 operate an educational program or activity.

8 QUESTION: Was it directly or through another
9 recipient?

10 MR. ROBERTS: Directly or through, a reference
11 to the holding in Grove City that you can be an indirect
12 recipient. But the test is still the same. Whether
13 indirect or direct, are you the intended recipient?

14 What the Court said in Paralyzed Veterans is to
15 find the recipient, you have to look to the --

16 QUESTION: How do you smuggle in intended
17 recipient? I mean, sometimes you say recipient, and then
18 -- and then you say intended recipient. Do our opinions
19 say intended recipient?

20 MR. ROBERTS: Well, Grove City is the case that
21 I'm -- I'm thinking of, and there what the Court -- the
22 checks were made out to the students. But the statute
23 that gave the money said this is to provide assistance to
24 institutions of higher education. The money could only be
25 spent on tuition at those institutions of higher

1 education.

2 QUESTION: Well, if we didn't have Paralyzed
3 Veterans or Grove -- the Grove case, would you read the
4 regulation naturally your way so that there has to be an
5 intent?

6 MR. ROBERTS: Well, I think --

7 QUESTION: I don't see where you get that from
8 the face of the regulation if we talk just about that. I
9 recognize you have the gloss of the case.

10 MR. ROBERTS: Yes. The regulation says that the
11 receipt can be indirect, but it is still -- you still have
12 to be a recipient. And it is not enough simply to trace
13 the money. And because you are paid by a recipient of
14 Federal funds, that doesn't mean that you are also a
15 recipient of Federal funds.

16 QUESTION: I don't understand that. You're --
17 you're not a recipient unless you're an intended
18 recipient. A direct recipient is a recipient, but an
19 indirect recipient is not a recipient unless he's an
20 intended recipient.

21 MR. ROBERTS: Well, what the -- what the
22 Court --

23 QUESTION: Does the word recipient has -- have
24 some -- some connotation of intent in it?

25 MR. ROBERTS: Well, you have to -- you'd be the

1 recipient of the Federal grant. What the Court said in
2 Paralyzed Veterans in the easy case, if the grant statute
3 extends money, quote, then the recipient is the entity
4 that receives the money.

5 QUESTION: Suppose I'm giving -- I'm given
6 money. I'm given food stamps. And I can spend them
7 anywhere I want and I spend them at a particular grocery
8 store. Wouldn't it be proper English to say the grocery
9 store was an indirect recipient of the -- of the food
10 stamps?

11 MR. ROBERTS: The key is whether there is a
12 Spending Clause contract between the recipient and the
13 Federal Government whereby the recipient agrees to accept
14 the conditions, the prohibitions on discrimination, in
15 exchange for accepting the Federal funds.

16 QUESTION: Well, was there a contract in Grove
17 City?

18 MR. ROBERTS: There was, yes.

19 QUESTION: With the institution?

20 MR. ROBERTS: With the institution. That's what
21 the case was about.

22 QUESTION: I thought it was simply the -- I
23 thought -- I guess I stand corrected. I thought Grove
24 City rested on the fact that the Government intended the
25 institution to get the money, and it was, in effect, the

1 -- the specific intent to have the money end up with X
2 that made X liable --

3 MR. ROBERTS: What the -- what was the issue in
4 the case was whether the university had to execute the --
5 the contract that the Government gave it. That's what --
6 what the litigation was over, and the Court said yes.

7 And it said yes because in deciding who the
8 recipient is, you look to what the statute says, and here
9 it said this is for institutions of higher education.
10 This is all the money could be spent on. So, the fact --

11 QUESTION: It's basically the intent in
12 appropriating the money that's the criterion.

13 MR. ROBERTS: In the underlying grant statute,
14 as the Court said in Paralyzed Veterans, and in all of the
15 briefs filed on the respondent's side of this case, you
16 will not find analysis of an underlying grant statute that
17 says, this is to extend financial assistance to the NCAA.
18 That's the key element that is called for by this Court's
19 decision and it's missing from all the arguments on the
20 other side because there is no grant statute that extends
21 Federal financial assistance to the NCAA.

22 Now, the --

23 QUESTION: Mr. Roberts, what there is is a
24 significant difference between the relationship of the
25 airport in Paralyzed Veterans. The airport was not made

1 up of the recipients in the way that the NCAA's membership
2 is largely recipients. So, whatever Paralyzed Veterans
3 said, it didn't have that picture in view, that is, an
4 entity composed largely of constituents that are -- are
5 subject to title IX as direct recipients.

6 MR. ROBERTS: The -- the NCAA is an association
7 of its members, and most of its members, as Your Honor
8 points out, do receive Federal financial assistance. But
9 the association does not, and the -- the colleges as a
10 collective group, with respect to their intercollegiate
11 athletic activities, does not receive Federal financial
12 assistance. The individual colleges do and they remain
13 responsible and covered under title IX. But the NCAA does
14 not.

15 And the Third Circuit's reasoning that they're
16 somehow covered simply because the members pay dues
17 presents the exact problem the Court was concerned about
18 in Paralyzed Veterans, that if you depart from the
19 Spending Clause contract, the entity that has accepted the
20 condition because it has accepted the funds, then you --
21 once you sever title IX from those moorings in the
22 Spending Clause, it has almost limitless coverage because
23 you --

24 QUESTION: Suppose -- suppose you had a Federal
25 program that grants monies to colleges and for -- for a

1 specific program, the study of science in a particular
2 area. And a hundred percent of the colleges that receive
3 the money put a hundred percent of the money into an
4 association that's somewhat like the NCAA. Would that
5 association be covered?

6 MR. ROBERTS: No, because again that's the --
7 the lesson of Paralyzed Veterans. You don't just follow
8 the money or follow the Federal financial assistance to an
9 ultimate beneficiary. The colleges would remain liable
10 for any discriminatory acts of theirs, but the separate
11 entity that they formed would only be covered if that
12 entity accepted Federal financial assistance and thereby
13 accepted the Spending Clause condition that goes along
14 with the assistance.

15 QUESTION: Mr. Roberts, there is some argument
16 on the other side that, well, all this doesn't matter
17 anyway because the NCAA gets money from the National Youth
18 Sports Program fund as a direct recipient. Now, do we
19 deal with that question here or what?

20 MR. ROBERTS: It was --

21 QUESTION: And is that -- is that a federally
22 constituted fund?

23 MR. ROBERTS: The issue of the National Youth
24 Sports Program was not addressed either by the district
25 court or by the Third Circuit below, and I don't think

1 that this Court should address it, at least not in the --
2 in the first instance. It wasn't -- presumably wasn't
3 addressed by the Third Circuit because it wasn't raised
4 before the district court.

5 QUESTION: What do you mean it wasn't raised?
6 Was evidence concerning it --

7 MR. ROBERTS: The only evidence --

8 QUESTION: -- in the record?

9 MR. ROBERTS: The only evidence in the record
10 concerning the National Youth Sports Program was an
11 affidavit filed by an NCAA officer that establishes that
12 it's a separate Missouri corporation. It's not the NCAA,
13 and that the NCAA receives no money from the NYSP. That's
14 the only evidence of record in this case concerning that
15 -- that fund.

16 QUESTION: The evidence was also that it was
17 once the NCAA directly and then it was set up as a
18 separate fund, but when the program was new, the money
19 went directly to the NCAA, didn't it?

20 MR. ROBERTS: Yes, and then -- then a separate
21 corporation was established to administer the grant, not
22 the NCAA, which makes perfect sense because what the
23 National Youth Sports Program does is not -- doesn't
24 concern intercollegiate athletics. It's not something
25 that's part of -- central to the NCAA's mission.

1 QUESTION: Was there evidence that this
2 organization does receive Federal -- Federal funding?

3 MR. ROBERTS: The National Youth Sports Program
4 receives Federal funding, yes.

5 QUESTION: I know it does. Was there evidence
6 -- I'm trying to see whether --

7 MR. ROBERTS: Yes.

8 QUESTION: There was evidence in the record.

9 MR. ROBERTS: In -- yes, I believe in the
10 affidavit they explained that this was a Federal funding
11 recipient. But it's not the NCAA and the NCAA does not
12 receive any of the money from the National Youth Sports
13 Program.

14 QUESTION: Anyway, that was not explored below.

15 MR. ROBERTS: It was never addressed by either
16 court below, and the fact that it wasn't has led to some
17 confusion as to exactly what the claim is. It's not clear
18 whether the claim is sort of a veil-piercing claim that
19 somehow the NYSP is the NCAA, which the allegations
20 certainly don't support because that issue goes to
21 observance of corporate formalities and the like, and
22 there's no suggestion that that hasn't occurred. Or is
23 the allegation simply that the NCAA is an indirect
24 recipient through the NYSP, which would raise the same
25 issues as the dues. There's no suggestion that the money

1 that's extended to the NYSP is intended to be received or
2 extended to the NCAA.

3 QUESTION: Well, there's a -- more of a question
4 of the separateness of the two when it's just the NCAA and
5 the NYSP than when you have --

6 MR. ROBERTS: And those claims --

7 QUESTION: -- hundreds of colleges and
8 universities.

9 MR. ROBERTS: And those -- as I say, those
10 claims have never been tested in either court below
11 because they weren't raised.

12 QUESTION: And the -- and the court below didn't
13 test either the theory that there was a joint venture
14 among the colleges and universities to -- to confer on the
15 NCAA the authority for operating the schools'
16 intercollegiate programs.

17 MR. ROBERTS: Well, the Third Circuit referred
18 to the NCAA as something of a surrogate for the schools in
19 -- in this regard. But here again -- and the Government's
20 own regulation establishes that -- it's not enough that
21 you're involved somehow in operating an educational
22 program or activity. Countless non-recipients do that in
23 schools across the country. You must also be -- and the
24 regulation says this -- an entity to whom Federal
25 financial assistance is extended. So, the fact that the

1 NCAA may play some role in intercollegiate athletics and
2 that intercollegiate athletics may be a program or
3 activity of the colleges and universities, not of the
4 NCAA, because to be a program or activity under the
5 statute, you must receive Federal financial assistance --

6 QUESTION: Mr. Roberts, there's one aspect of
7 this case. Is the NCAA a 501(c)(3) organization?

8 MR. ROBERTS: It is tax exempt, yes. I'm not
9 quite sure whether it's --

10 QUESTION: Well, my question is -- is whether,
11 independent of title IX -- under the Fifth and Fourteenth
12 Amendment and the Bob Jones decision, isn't the NCAA under
13 an obligation not to discriminate in order to retain its
14 tax exempt status?

15 MR. ROBERTS: Oh, well, first of all, it's
16 important to appreciate the NCAA firmly endorses and
17 embraces the principles of title IX, believes it does not
18 violate that in any way, and conducts its activities to
19 promote gender equity.

20 Now, the position -- the question of whether the
21 tax exempt status is -- is -- can be brought into question
22 because of its activities is -- is a separate one and it's
23 distinct. But under the Bob Jones case, yes, that to the
24 extent the -- the organization, any tax exempt
25 organization, engages in these sorts of discriminatory

1 activities, that can be called into question, but --

2 QUESTION: But here it was just title -- that
3 title IX was the only --

4 MR. ROBERTS: Title IX was the only -- the only
5 issue that the Third Circuit addressed --

6 QUESTION: And the allegation is that somehow
7 the waivers were granted on a -- on the basis of gender
8 discrimination?

9 MR. ROBERTS: Well, the --

10 QUESTION: Is that -- is that the nub of the
11 allegation?

12 MR. ROBERTS: The allegation is that waivers
13 were given disproportionately to one gender as opposed to
14 another, which we of course dispute on the merits, but the
15 merits are not before the Court because the NCAA is not a
16 Federal funding recipient.

17 This, by the way, used to be the position of the
18 Government. When the HEW issued regulations in 1975, it
19 told the colleges in the area of intercollegiate athletics
20 that you have the obligation not to discriminate, and they
21 issued a regulation that said, and you're not -- that
22 obligation isn't obviated or alleviated by any athletic
23 association rule.

24 And the colleges squawked about that and they
25 said, well, you know, what -- if there's an association

1 rule that says one thing and title IX says the other, that
2 doesn't seem right. And HEW stuck to its guns and it
3 said, look, you are the members of this association. If
4 they have a rule that causes you problems complying with
5 title IX, change the rule.

6 And then when the NCAA challenged these
7 regulations, the agency and the Justice Department alleged
8 that we had no standing because title IX did not apply to
9 us, the regulations didn't apply to us, because they
10 didn't apply, as their brief put it, to a private athletic
11 association.

12 QUESTION: I can understand --

13 QUESTION: Your view is that --

14 QUESTION: Excuse me. I can understand that
15 position on the merits if it's a rule that's being
16 challenged, but here it's the enforcement of a rule of
17 discriminatory policy in granting or refusing waivers.
18 What can a school do about it in order to avoid a charge
19 of discrimination?

20 MR. ROBERTS: Well, first of all, it shouldn't
21 make a difference what the -- what type of rule it is. I
22 mean, the NCAA is --

23 QUESTION: Well, except there was a rule that on
24 its face said only women -- only men can play volleyball
25 or something like that. The rule would clearly know it

1 should not follow such -- the school would clearly know it
2 should not follow that rule. But if the rule is facially
3 neutral and the claim is that somebody over whom the
4 school has no control is -- is operating in a
5 discriminatory way, what is the school supposed to do?

6 MR. ROBERTS: Well, first of all, whether the
7 NCAA is covered to not shouldn't depend on what type of
8 rule it is. But in that situation, it's really just an
9 evidentiary matter. If the allegation is everybody else
10 gets waivers from this rule, that's something that can be
11 investigated by the school. It's the school's
12 responsibility because the school is engaging in the -- in
13 the activity that's covered by title IX.

14 The one thing, of course, that HEW would have
15 said in response to the school's objection if it were true
16 is, well, don't worry. The association is covered too and
17 it will be -- and it will be sued. It did not say that.
18 And the Justice Department and the agency sued because we
19 were not covered when we tried to challenge the
20 regulations.

21 Now, 20 years later, they come in with a new
22 theory that says, don't -- don't look at recipient, which
23 has been the cornerstone of the Court's title IX
24 jurisprudence. Don't look at who the recipient is. Just
25 ask yourself whether this entity has ceded authority or

1 effective control, a much more amorphous inquiry that
2 departs from the bright line recipient test and also rips
3 title IX --

4 QUESTION: Was that theory the one relied on by
5 the Third Circuit?

6 MR. ROBERTS: No, I don't believe so, Your
7 Honor. The Third Circuit said that the NCAA was covered
8 because the dues -- the members were covered and they paid
9 dues and it sort of followed the money chain and that was
10 sufficient.

11 The ceded authority or effective control theory
12 is a -- is a new theory, and it's one that shouldn't be
13 adopted, particularly with respect to a threshold
14 determination of coverage. That should be a bright line
15 rule, as it is under this Court's decision, are you a
16 recipient, instead of an amorphous, multi-factored test
17 that would ask who's in control and who's not in control.

18 And that test also does not limit the universe
19 of those covered in the way that this Court in Paralyzed
20 Veterans indicated was necessary because any time you have
21 an intercollegiate athletic event, there are lots of
22 different entities in charge of different aspects, some
23 connected with the college, some not connected with the
24 college, some that are a Federal funds recipient, and some
25 -- some that are not: the entity that -- that might rent

1 out the auditorium, vendors who might provide services, in
2 some cases other organizations that are setting rules,
3 like the United States Golf Association would be setting
4 the rules for a golf tournament. All of those entities
5 have some sort of authority or effective control over the
6 activity, but that shouldn't make them covered by title IX
7 when they are not recipients of the Federal financial
8 assistance.

9 QUESTION: To specify the case I'm thinking of,
10 imagine a university that has lots of different rules,
11 teaching rules, tenure rules, curriculum rules, dozens of
12 them, many of which they think are important. Five
13 universities have such rules. The five get together and
14 they say, well, what we'll do is have a modern languages
15 association and they will be the enforcer of the rules and
16 the creator.

17 Now, your view is that even though the modern
18 language association, say, is doing just what the
19 universities used to do, it can't be sued.

20 MR. ROBERTS: It cannot be sued unless --

21 QUESTION: But -- but how -- but there is a
22 remedy nonetheless. You sue the university.

23 MR. ROBERTS: Of course.

24 QUESTION: And in any case in which you could
25 have sued the university, had the modern languages

1 association not been in existence, but the university
2 would have done that, you still can sue them. And you
3 just order them to make certain that -- not follow the --
4 the -- the association rule. Is that the idea?

5 MR. ROBERTS: Just -- just what HEW said when it
6 issued its regulations. It's no defense that an athletic
7 association, or in your case the modern languages
8 association, has a rule and you're just obeying that rule.

9 QUESTION: All right. So, it's -- that means
10 it's not a defense. That means you have to pretend that
11 it's the school's rule, and the fact that it's very tough
12 for the school to get everybody together and make these
13 changes, et cetera, is totally beside the point. Is that
14 your view?

15 MR. ROBERTS: Whoever is implementing the -- the
16 discrimination and is the recipient, in your hypothetical
17 the colleges and universities, can be sued for that
18 discrimination. The entity that is in your hypothetical
19 setting the -- the rules unless --

20 QUESTION: And then policing them.

21 MR. ROBERTS: Unless it is itself a recipient of
22 Federal financial assistance, it's not covered by title
23 IX. Now, this is -- it's not --

24 QUESTION: I don't quite see how the university
25 gets -- gets stuck here. As far as the university is

1 concerned, it pursuant to the rules has denied a waiver in
2 circumstances where denial would be perfectly appropriate.
3 As far as what the university has done, the university
4 hasn't discriminated at all.

5 MR. ROBERTS: Well, if the university is --

6 QUESTION: The only thing that makes the waiver
7 -- the denial of the waiver bad is that this other
8 organization has granted waivers in other universities in
9 other contexts. How -- how do you pin this on the -- on
10 the university?

11 MR. ROBERTS: Because the university is the
12 entity that is operating the covered program or activity
13 and the fact that it may be -- is complying with a
14 discriminatory rule is no defense and the fact that it is
15 complying with -- and applying a rule --

16 QUESTION: But it hasn't done anything except
17 deny a waiver under circumstances that are totally
18 reasonable, and it -- it hasn't granted any waivers to any
19 of its students under any of its programs. It's only the
20 granting of waivers by the NCAA to other students in other
21 programs that makes the thing look discriminatory.

22 MR. ROBERTS: Well, and it's just an evidentiary
23 question to know that. If you have a rule that's being
24 applied in a discriminatory manner, you're not free to
25 say, well, I'm just going to apply the rule regardless of

1 the fact that others are not applying the rule.

2 QUESTION: But the university is not applying
3 the rule in a discriminatory manner. It's the non-
4 recipient that is applying the rule in a discriminatory
5 manner.

6 MR. ROBERTS: By not -- if everyone else is
7 granting waivers and this is something the university
8 knows, its decision not to grant a waiver would be
9 applying the rule in a discriminatory manner. It's --
10 it's an evidentiary question to find out how it's been
11 applied before. The fact that it may be --

12 QUESTION: But -- no. I'm sorry. Finish the
13 sentence.

14 MR. ROBERTS: I was just going to say the fact
15 that it may be easier to get the information from one
16 entity as opposed to another doesn't mean that title IX
17 coverage extends to an entity that has not accepted
18 Federal funds.

19 QUESTION: I was going to say, isn't the theory,
20 though -- as Justice Scalia's question points out, the
21 theory is not merely, I guess, that the university has --
22 has sort of voluntarily ceded authority to administer the
23 rule. It has sort of ceded authority or, rather, it in
24 effect has made itself part of a larger scheme, and if it
25 has voluntarily made itself part of the larger scheme that

1 discriminates, you tag the university with the
2 discrimination. Isn't -- isn't that the theory?

3 MR. ROBERTS: Well, the university is covered by
4 -- if it makes a decision that we're going to apply the
5 rules of the XYZ organization and the XYZ organization is
6 known to always apply discriminatory rules, it can't
7 insulate itself from that. It is -- it is responsible for
8 its own actions.

9 QUESTION: Right, but when -- when it does that,
10 it's doing something more than saying we will cede the
11 decision to apply our rules to this other body. It is
12 really saying we are joining a -- that body's regime of
13 law in place of our rules. That's what it's really doing.

14 MR. ROBERTS: But -- but -- but the important
15 thing is that the university retains control over the
16 ultimate decision. This Court addressed that in the -- in
17 the context of State action in the Tarkanian case.

18 QUESTION: It does so because it can always defy
19 the organization.

20 MR. ROBERTS: Yes.

21 QUESTION: But until it defies it, it in effect
22 is placing itself in a different regime.

23 MR. ROBERTS: Yes, and -- and it's no defense to
24 whatever discrimination is alleged to say, well, we're
25 just following somebody else's rule.

1 QUESTION: It sounds like it would produce a
2 bigger mess for these organizations than if you sued them
3 directly. You'd have universities all over the place just
4 not carrying out the rules lest they be sued.

5 MR. ROBERTS: Well, and what tends -- tends to
6 happen is exactly what HEW said should happen back in
7 1975, which is you or the University are covered. You're
8 the members. If this rule is causing you problems, change
9 the rule. That's what tends to happen as a matter of
10 practice.

11 QUESTION: Are we supposed to reach this
12 argument in your view in this case, this -- this issue of
13 ceding authority and that they're covered because it's the
14 ceding of authority, et cetera?

15 MR. ROBERTS: Well, I don't think it's necessary
16 to reach it to reverse the Third Circuit's decision
17 because that was based on the payment of dues.

18 QUESTION: No, no, no. I mean, it's a defense
19 of the Third Circuit's decision.

20 MR. ROBERTS: But -- but if the Court reaches
21 it, it seems to me that it ought to be clear that this is
22 a departure from what has been the unifying thread in this
23 Court's title IX decisions, which is that coverage is
24 limited to a recipient, not to someone who has ceded
25 authority, effective control, something like that, but the

1 recipient itself.

2 QUESTION: Mr. Roberts, apart from that -- that
3 rather glancing statement that -- that you quoted from the
4 Third Circuit opinion, was this issue really explored in
5 front of the Third Circuit?

6 MR. ROBERTS: No, not the effective control or
7 ceded authority.

8 QUESTION: Mr. Roberts, what do you think we
9 should do with the case if we agree with you that the
10 Third Circuit reasoning was wrong, but we're not sure
11 about whether they should have been allowed to file an
12 amended complaint?

13 MR. ROBERTS: Well, in that case, Your Honor, I
14 think the decision -- judgment should be reversed and the
15 case should be remanded for further proceedings, including
16 to allow the Third Circuit in the first instance to decide
17 which arguments have been preserved, which arguments have
18 been waived.

19 QUESTION: Did you argue before the Third
20 Circuit that the amendment to the pleading was inadequate?

21 MR. ROBERTS: Well, the amendment to the
22 pleading was -- was really beside the point because the
23 district court, at page 31a of the petition appendix,
24 treated the claim as if it had been made, that the NCAA
25 was an indirect recipient. It posed the question that the

1 district court and the Third Circuit addressed which is
2 what's -- what do you have to show to establish that. So,
3 that it seems to me is a -- is a red herring because the
4 district court treated her original complaint as if it had
5 alleged the NCAA was a recipient because of these
6 connections.

7 Thank you, Your Honor.

8 QUESTION: Thank you, Mr. Roberts.

9 Mr. Phillips, we'll hear from you.

10 ORAL ARGUMENT OF CARTER G. PHILLIPS

11 ON BEHALF OF THE RESPONDENT

12 MR. PHILLIPS: Thank you, Mr. Chief Justice, and
13 may it please the Court:

14 I guess I'd like to start essentially where Mr.
15 Roberts ended which is an examination of what is at a
16 minimum the appropriate course for this Court to follow
17 with respect to the unusual posture of this case.

18 This case, as you know, was brought by a pro se
19 litigant to file the complaint. The complaint was
20 immediately dismissed on the grounds that the NCAA is in
21 some sense not subject to title IX or at least not on the
22 basis of the allegations in that complaint.

23 And she amended her complaint, and in the
24 amended complaint, she alleges quite plainly at paragraph
25 65, which since the amended complaint was only added to

1 the record afterwards, it's unfortunately not in the joint
2 appendix, but it has been lodged, the NCAA is a recipient
3 of Federal funds because it is an entity which receives
4 Federal financial assistance through another recipient and
5 operates an educational program or activity which receives
6 or benefits from such assistance.

7 And it seems quite plain to me that if you give
8 any kind of a liberal interpretation to the pleadings of a
9 pro se litigant in the context of that case, that that
10 allegation has raised a whole slew of theories as to why
11 the NCAA ought to be regarded at a minimum as a recipient,
12 either direct or indirect.

13 QUESTION: Was the pro se litigant a lawyer?

14 MR. PHILLIPS: At the time of the complaint, no,
15 Your Honor. She was not.

16 QUESTION: She'd been to law school?

17 MR. PHILLIPS: She was in law school at the
18 time.

19 And as a consequence of that, then it seems to
20 me that we look at the -- at the National Youth Sports
21 Program issue that's been posed in this case. And the
22 suggestion that somehow there is anything that this Court
23 should do other than allow that matter to go back to the
24 Third Circuit seems to me largely fanciful because it is
25 clear that Ms. Smith raised that argument explicitly in

1 her brief in the Third Circuit, contrary to the argument
2 made by petitioner in its opening brief.

3 QUESTION: Did the court of appeals consider it?

4 MR. PHILLIPS: I don't know whether it
5 considered it. It didn't address it explicitly, Mr. Chief
6 Justice. On the other hand, it had an alternative theory
7 in mind that was perfectly sufficient on which to send the
8 matter back. And remember, we're talking about sending it
9 back to allow her to amend the complaint and then to
10 proceed with discovery into a wide range of issues,
11 including the nature of the National Youth Sports Program
12 and the nature of the relationship between the NCAA and
13 all of its member institutions. So, it's not surprising
14 that the Third Circuit wouldn't reach out for alternative
15 grounds for reaching essentially a result that just moves
16 this litigation from square one to a baby step --

17 QUESTION: Yes, but our practice is that we --
18 we simply don't deal with issues that haven't been dealt
19 with by the court of appeals, as you know from recent
20 experience.

21 MR. PHILLIPS: As I know all too well, Mr. Chief
22 Justice. I appreciate that.

23 (Laughter.)

24 MR. PHILLIPS: On the other hand, it is -- but
25 the one thing that's absolutely important in the process

1 is to recognize that the issue, as it appears on the
2 record before this Court at this time, was squarely
3 presented below. It is squarely accepted as a legitimate
4 basis for going forward at the -- at the complaint stage,
5 remembering that there are two Federal district courts
6 that not only have upheld this theory at the complaint
7 stage, but have held that if you get into the evidence and
8 you find out the nature of the relationship between the
9 NCAA and this source of Federal funding, you'll ultimately
10 think that there is an ultimate question of fact that must
11 go to a trier of fact with respect to the coverage of the
12 NCAA as an -- as a recipient under the statute. So --

13 QUESTION: Is it clear --

14 MR. PHILLIPS: -- it's preserved.

15 QUESTION: Is it clear or is it sort of unclear
16 from the record whether the theory of coverage under the
17 proposed amendment of the complaint is sort of a veil-
18 piercing theory that a subsidiary should be treated like
19 the parent, or on the other hand, that it's a theory
20 similar to the one of the Third Circuit here that they
21 manage the program -- or they control the program --

22 MR. PHILLIPS: It is not clear from the
23 complaint --

24 QUESTION: It is not.

25 MR. PHILLIPS: -- exactly which way, but I think

1 it could be read, frankly, to embrace both --

2 QUESTION: Both.

3 MR. PHILLIPS: -- of those theories as -- in
4 terms of how it was developed and certainly in terms of
5 how it's been argued from henceforth.

6 And if the theory is you go back and amend the
7 complaint, it seems quite clear that both of those
8 alternative rationales should be available to her and we
9 should be allowed to engage in discovery along those
10 lines.

11 QUESTION: It isn't just a question of whether
12 -- whether the rationale is available. It's a question of
13 whether she had any factual allegations that would support
14 all of the rationales. What -- what factual allegations
15 were there? Or -- or -- or is the -- is the pro se
16 litigant to be excused from the necessity of supporting
17 the allegations with some factual allegations?

18 MR. PHILLIPS: Well, there are two answers to
19 that.

20 First of all, there is a statement and an
21 affidavit in response to the initial complaint that does,
22 in fact, identify this program as an entity that receives
23 Federal funds.

24 QUESTION: That's a conclusion. That's
25 conclusory. That's no facts at all that would support any

1 theory that -- that you're asserting here.

2 MR. PHILLIPS: Right. Well, my alternative
3 argument is that even a pro se plaintiff is allowed to
4 make the basic claim that somebody is a recipient because
5 they received money from some other entity.

6 QUESTION: You can make as many claims as you'd
7 like, but when there's a motion to dismiss, it seems to me
8 you have to come up with factual allegations that will
9 support the theory that's -- that's in your complaint --

10 MR. PHILLIPS: Well --

11 QUESTION: -- and not just a conclusory
12 statement that, for whatever of various reasons, this
13 entity is a recipient.

14 MR. PHILLIPS: But, Justice Scalia, the issue
15 now comes to the Court on a remand for -- for leave to
16 file an amended complaint and which we all know, to a
17 moral certainty, the facts that will support the amendment
18 of the complaint and allow this case to go forward at this
19 stage in the litigation. That's all.

20 QUESTION: Well, it -- do we do that when
21 there's been a motion for summary judgment and the motion
22 has been granted? Do we say, well, they didn't come
23 forward with the facts, but we all know that the facts are
24 there, so we'll send it back and let them come forward
25 with the facts?

1 MR. PHILLIPS: You might --

2 QUESTION: How many swings do you get at this

3 thing?

4 MR. PHILLIPS: You -- well, you get at least one

5 more swing I hope.

6 But basically, Justice Scalia, that's not the

7 posture of the case. The Third Circuit has already set

8 aside the district court's dismissal and did so on the

9 grounds that the -- that the district court abused its

10 discretion under rule 15. And let's be clear about that.

11 That issue was not presented by the NCAA. They didn't

12 raise that issue. They didn't have any quarrel with the

13 idea of rule 15.

14 QUESTION: Was it -- was it a 12(b)(6) or -- did

15 the district court go on 12(b)(6) or 56? Was it summary

16 judgment?

17 MR. PHILLIPS: 12(b)(6). It was a motion --

18 QUESTION: All right. So, there is no motion

19 for summary judgment, so she needn't have come forth.

20 MR. PHILLIPS: Exactly.

21 QUESTION: There is no need to come --

22 MR. PHILLIPS: That -- that -- my view is that

23 the allegations are sufficient to -- to get past the rule

24 12(b)(6) motion, Justice Scalia.

25 But -- but certainly in the posture of a case

1 where it's been sent back for allowing an amendment to the
2 complaint at this stage --

3 QUESTION: Well, it's not really quite that
4 easy. I sympathize with your position, but if we should
5 conclude -- I'm not saying we would -- that the reason
6 that they gave for sending it back is erroneous, then
7 we're asked is there another reason which would justify
8 the same judgment, that it was not an -- that it was an
9 abuse of discretion to deny leave to amend.

10 Then the question, it seems to me, arises is
11 that decision to be made on the basis of what she alleged
12 in her amended pleading or can she also rely on an
13 affidavit that's filed later before the court of appeals
14 that the district court never had a chance to --

15 MR. PHILLIPS: Well, no, the affidavit was
16 before the district court.

17 QUESTION: Oh, was it? Oh, I misunderstood.
18 Okay.

19 MR. PHILLIPS: So, I mean, that's -- that's part
20 of the overall record that was before the court of appeal,
21 and the issue was clearly raised. And it seems to me at
22 the very outset of the litigation, you --

23 QUESTION: If -- if it's a motion to dismiss,
24 why was there an affidavit in there anyway? You think of
25 that as appearing at the summary judgment stage rather

1 than on a motion to dismiss.

2 MR. PHILLIPS: Mr. Chief Justice, you're going
3 to have to ask Mr. Roberts the rationale for the NCAA
4 putting the -- putting the affidavit before.

5 QUESTION: The affidavit was filed by the
6 defendant.

7 MR. PHILLIPS: Yes, Your Honor. So -- but the
8 basic point here is -- remains, at least in my judgment at
9 this stage as the case comes to this Court, the proper
10 course at a minimum to follow is to send it back to allow
11 the proceedings to go on with respect to the relationship
12 between the NCAA and the National Youth Sports Program.

13 Now I'd like to address what I think is the more
14 central legal issue in this case, at least in my judgment.
15 And you will notice that in Mr. Roberts' analysis of this
16 case, he spends very little time focusing on the statutory
17 language, jumping ahead instead to -- to decisions of this
18 Court. I'd like to go back to the statutory language
19 because I don't believe, frankly, that you need to be an
20 actual Federal fund recipient under section 901(a) in an
21 action brought as a private right of action against a
22 defendant who is clearly a wrongdoer in the context of the
23 allegations of this complaint.

24 This Court held in Gwinnett that -- the rule has
25 been around for at least a hundred years, and perhaps even

1 longer, going back to Blackstone -- that all wrongdoers
2 can be held liable on damages for the wrongs that they do.
3 And they should be -- and they should realize that they're
4 put on notice, that when they engage in actions that
5 violate statutes, that the person who's been injured by
6 that, and particularly the person who was in the special
7 class of people to be protected, is allowed to come
8 forward and seek damages for that particular injury.

9 And it seems to me that the language of 901(a),
10 which says that no one shall be excluded from
11 participation in a federally funded activity on the basis
12 of sex, specifically, explicitly, and completely covers
13 the situation posed by --

14 QUESTION: Well, it says under any -- any
15 education program or activity receiving Federal financial
16 assistance.

17 MR. PHILLIPS: That's correct, Justice O'Connor.

18 QUESTION: And the argument is that NCAA doesn't
19 receive Federal financial assistance.

20 MR. PHILLIPS: That's correct, but --

21 QUESTION: And they certainly don't directly.

22 MR. PHILLIPS: Well, depending --

23 QUESTION: They don't.

24 MR. PHILLIPS: Depending on how you view the --
25 the sports program.

1 QUESTION: Well, I mean by virtue of the
2 membership dues --

3 MR. PHILLIPS: Right, not through the membership
4 dues.

5 On the other hand, Justice O'Connor, recognize
6 that the language does not define the class of defendants.
7 It says you can't be excluded from a program or activity,
8 and there's no question that playing volleyball at the
9 intercollegiate level is a program or activity that is
10 federally funded within the meaning of the statute.

11 QUESTION: So, if I'm a parent and -- and I
12 don't want my daughter to participate in -- in gym -- I
13 for some reason don't think girls should play athletics.
14 That's my -- my parental view. I'm guilty of violating
15 this provision if I -- if I stop the -- the child from
16 going to gym in school. Right?

17 MR. PHILLIPS: No, of course, not.

18 QUESTION: Why not?

19 MR. PHILLIPS: Because at a minimum it seems to
20 me --

21 QUESTION: You're talking about a program. A
22 person has been discriminated against under the program,
23 prevented from participating in -- in one of the school
24 functions.

25 MR. PHILLIPS: It doesn't work so that if you

1 open the door to -- to an entity that has been ceded
2 control and authority over the operation of the program as
3 opposed to over the operation of the participants in the
4 program --

5 QUESTION: So, you're limiting your principle
6 then. You're -- you're no longer relying on the plain
7 language of the statute. You're saying there have to be
8 some conditions made to --

9 MR. PHILLIPS: No. What I am saying is, is that
10 the plain language of the statute doesn't permit the NCAA
11 or this Court to limit the scope of 901(a)'s protections
12 solely to those who actually receive Federal funds.

13 QUESTION: Only parents. Only parents. It
14 permits them to limit it.

15 QUESTION: What about a schoolyard bully?

16 MR. PHILLIPS: I'm sure there will be others as
17 well.

18 QUESTION: What about a schoolyard bully who
19 prevents the program from really operating?

20 MR. PHILLIPS: I think --

21 QUESTION: Under the Blackstone theory that you
22 -- that you cite, I -- I take it other students could sue
23 the bully.

24 MR. PHILLIPS: I think that the genius of this
25 Court's decision last term in Gebser is in its holding

1 that once the Court determines that basic liability
2 coverage applies -- and Gebser was clearly a Federal fund
3 recipient and it did apply -- and it found right that the
4 NCAA ought to be subject to 901(a) liability in the first
5 instance, the question then becomes how do you structure
6 the rules of liability in a way that is consistent with
7 Congress' overall intent.

8 And my feeling about the bully and the problem
9 that he poses, one, the regulations focus very much more
10 on entity and controlling operations. And the Court can
11 certainly limit liability consistent with that.

12 Second of all, the legislative history of title
13 VI and the legislative history of the Civil Rights
14 Restoration Act spends a great deal of time focusing on
15 concerns about extending liability to individuals. That's
16 why they didn't have ultimate beneficiaries be subject to
17 liability under that -- under those statutes. And
18 therefore, it's reasonable to confine the scope of the 901
19 remedy to people who -- to things that are not
20 individuals.

21 QUESTION: Well --

22 MR. PHILLIPS: But, of course, that's not posed
23 by this case, but clearly that's -- that's the way --

24 QUESTION: Our decision in Paralyzed Veterans
25 construed the statutory language, and you know, perhaps a

1 broader construction might have been permissible, but it
2 put a definitive construction on the language.

3 MR. PHILLIPS: I -- I would argue, Mr. Chief
4 Justice, that Paralyzed Veterans construed the language in
5 section 902(1) which is targeted specifically at Federal
6 fund recipients. And that's a very important distinction
7 between these two provisions. The private right of action
8 case -- cases come out of 901(a). The Federal regulatory
9 cases and -- and Paralyzed Veterans on at least two
10 separate occasions specifically identifies the scope of
11 what it's aimed at at the Federal regulatory authority,
12 and that comes from 902(1).

13 QUESTION: Mr. Phillips, I understand your
14 plain-language argument, and I think it's quite
15 persuasive. But -- but this -- this problem concerns me.
16 Under your construction of the statute, if I understand it
17 correctly, the scope of the private remedy is broader than
18 the scope of the remedy available to the United States.

19 MR. PHILLIPS: It could potentially be broader.
20 There is --

21 QUESTION: But within this very case.

22 MR. PHILLIPS: Well, it may not -- yes, in the
23 sense that --

24 QUESTION: Because they can't cut off funds to
25 the NCAA if the NCAA doesn't get any funds.

1 MR. PHILLIPS: Clearly the 10-point fund
2 termination provision would not be available. Whether
3 it's possible that the other enforcement mechanisms of
4 902(2) could be brought to bear it seems to me an open
5 question that's not really posed here. So, it may be that
6 you could eventually bring them in sync. In the short
7 run, absent regulations, you're right --

8 QUESTION: But it does seem anomalous to say
9 that a -- a -- an implicit remedy, a private cause of
10 action, is broader than the -- than the statutory express
11 remedy.

12 MR. PHILLIPS: I think the answer to that has to
13 be that the purpose of adopting and why Congress did adopt
14 an explicit -- or not an explicit -- an implicit private
15 right of action was to ensure enforcement, recognizing
16 that there would be situations where the most effective
17 enforcement would come at the hands of the person who was
18 directly affected. And if that requires going beyond the
19 immediate Federal fund recipients, that's fine.

20 And there's one other rationale for that.

21 QUESTION: Could I ask before you get to one
22 other rationale?

23 MR. PHILLIPS: Okay.

24 QUESTION: As I understand it, this -- this
25 means that -- that even though the implementing agency

1 issues regulations which the university complies with, the
2 university may, nonetheless, be liable to private suits
3 because private individuals are not governed by these
4 regulations.

5 MR. PHILLIPS: I -- I -- it's hard for me to
6 imagine a situation in which you comply with those -- with
7 those and that that interpretation is consistent with
8 Chevron --

9 QUESTION: Oh, I can imagine lots of situations.

10 MR. PHILLIPS: -- where you could then construe
11 the statute in a way that would be different from that.

12 QUESTION: In the -- in the earlier situation
13 where -- where the agency was not taking the position that
14 the NCAA was covered but was taking the opposite position,
15 that would have been exactly that case. Despite the fact
16 that the agency takes one position, a private individual
17 gets the law interpreted by a court in a -- in a -- in a
18 different fashion insofar as it applies to private
19 individuals.

20 MR. PHILLIPS: No, but that's because -- Justice
21 Scalia, that's the distinction between 901 and 902, and
22 what you're saying is that when we -- when we use the
23 entire regulatory enforcement powers of 902 -- and let's
24 be clear, that was the second point I was trying to make,
25 Justice Stevens. It's one thing to say we're not going

1 allow you to intentionally intrude into the operation and
2 program and to exclude someone on the basis of their sex
3 and -- and we're going to provide a direct remedy to that
4 problem. But it's a vastly different thing to say that
5 we're going to impose the entire regulatory regime of the
6 Federal Government on you in circumstances where you
7 didn't voluntarily accept the Federal funding under a
8 particular set of circumstances.

9 QUESTION: I missed your -- I missed --

10 MR. PHILLIPS: That's why -- that's to me why
11 they shouldn't necessarily be congruent.

12 QUESTION: I missed your basic distinction. You
13 were saying that people can be liable under the act who
14 don't receive Federal funds if those people themselves
15 deprive a person of a right to participate in a program by
16 an institution that does.

17 MR. PHILLIPS: In some circumstances.

18 QUESTION: All right. Now, what circumstances?
19 You seem to me to be saying that it was not the case that
20 an individual could, that it was the case an entity could.

21 MR. PHILLIPS: Right.

22 QUESTION: Well, if that's so, it -- I mean,
23 that doesn't seem -- I can't figure that one out. I mean,
24 a thief who stole books from the women's dormitory
25 couldn't because it's a thief, but the electricity company

1 that cut off the electricity to the women's dormitory so
2 they couldn't participate would? I mean, there must be
3 some limiting principle in that.

4 MR. PHILLIPS: No, no, and there is -- there are
5 two principles.

6 QUESTION: It can't be that one.

7 MR. PHILLIPS: No, no. I'm sorry about that,
8 Justice Breyer. There are two principles at stake here.
9 One deals with the question of whether individuals
10 necessarily go along if you bring organizations in, and I
11 was suggesting that I think you can make distinctions
12 there. The second one is that -- the basic theory of the
13 brief, which is that it's only in situations in which the
14 defendant has been ceded control and authority to make the
15 final exclusionary decision.

16 QUESTION: That's what -- it's a kind of control
17 theory. It's a kind of --

18 MR. PHILLIPS: I didn't mean to exclude that. I
19 was --

20 QUESTION: It's a kind of delegation of control
21 theory.

22 MR. PHILLIPS: It's a delegation of control
23 theory.

24 QUESTION: And is that -- to what extent was
25 that delegation of control theory, which is I think a very

1 interesting theory -- to what extent has that been
2 explored below or in other courts?

3 MR. PHILLIPS: Below not at all, but I think
4 it's important to realize that this is an invited answer
5 by the respondents in this case. If you look at the
6 question presented in the cert petition, it's -- it was
7 initially a fairly narrow question. If you look at the
8 NCAA's first five pages of its argument, the argument
9 says, this statute is strictly limited to Federal fund
10 recipients and no one else. And -- and therefore we
11 responded to the NCAA's effort to expand the scope of the
12 argument. I think it's subsumed within the question
13 presented, to be sure, and we joined issue with them, and
14 they've joined issue with us back. So, I think the issue
15 is squarely presented by the circumstances of this
16 particular case.

17 QUESTION: Mr. Phillips, as far as organizations
18 are concerned and the conceding control for the operation,
19 the petitioner's brief included an -- an appendix with
20 lots of academic type organizations. And what is your
21 counsel with respect to that list? Are they all like the
22 NAAC -- NCAA? Are some of them like it? How many of
23 those dozens of organizations would be covered?

24 MR. PHILLIPS: Well, this brings us back to the
25 same basic problem that I had at the outset, which is

1 let's remember the posture of this case. This is on a
2 motion to dismiss at the very earliest stages of the
3 litigation.

4 What we're saying is that as a legal theory, you
5 can't stop at the Federal fund recipient. You have to go
6 beyond that, and in order to figure out, one, where you go
7 beyond that and whether that's a legitimate basis for
8 imposing liability in this circumstance and how it would
9 apply elsewhere, we need the discovery to understand the
10 relationship between these -- between the members and
11 their organization. And then I'll be in a position
12 frankly to be able to answer the question about how other
13 organizations --

14 QUESTION: But on the Third Circuit's theory,
15 they're -- they're all covered now because they all -- all
16 get dues from recipients.

17 MR. PHILLIPS: Right, and we don't -- and we do
18 not embrace the broadest view inside the Third Circuit's
19 analysis. I don't think -- and I don't think the Court
20 needs to go there in order to allow what I think is
21 ultimately the right answer here, which is to permit this
22 case to go beyond the complaint stage to allow us the
23 opportunity to engage in the kind of discovery and to
24 flush out the legal theories that have been presented to
25 this Court.

1 QUESTION: I had one question about bringing in
2 the schools themselves. There's no limitation problem
3 because they were -- that was proposed at an earlier stage
4 at the time --

5 MR. PHILLIPS: Well, we have -- we have -- the
6 complaint does add the schools. I think the schools have
7 raised a statute of limitations issue, but obviously it
8 hasn't gone anywhere given the posture of the case.

9 If there are no other questions, I urge
10 affirmance and cede the podium to Mr. Kneedler.

11 QUESTION: Thank you, Mr. Phillips.

12 Mr. Kneedler, we'll hear from you.

13 ORAL ARGUMENT OF EDWIN S. KNEEDLER

14 FOR THE UNITED STATES, AS AMICUS CURIAE,

15 SUPPORTING THE RESPONDENT

16 MR. KNEEDLER: Mr. Chief Justice, and may it
17 please the Court:

18 The Third Circuit decided this case, at least as
19 petitioner understands it, on a theory that someone in the
20 position of the NCAA can be subject to suit under title IX
21 solely on the ground that it is a mere beneficiary of the
22 program and on that ground alone.

23 We agree with petitioner that that reading -- if
24 that is what the Third Circuit meant to hold, that that is
25 incorrect, and that that is inconsistent with the decision

1 in Paralyzed Veterans.

2 All that this Court needs to decide is that that
3 particular theory was incorrect and it could remand for
4 consideration of alternative theories. For example, the
5 petition in this case presents the question on the
6 assumption that petitioner is not a recipient, but is --
7 does its receipt of payments -- does the receipt of
8 payments by a non-recipient essentially on the benefit
9 theory subject it to liability?

10 The question -- the question of, however, of
11 whether the NCAA is a recipient, either because the
12 colleges operate programs and pay dues which pass on some
13 of the Federal financial assistance, or alternatively,
14 because of the Health and Human Services grant that is --
15 that is made to the National Youth Sports Program,
16 operated and administered according to the NCAA's own
17 constitution by a committee of the NCAA, whether either of
18 those theories of being a recipient subjects it to
19 coverage is not, I think, within the question presented
20 and could properly be considered on remand.

21 The other question of whether the NCAA is
22 subject to suit under title IX, because it has been ceded
23 controlling authority over the operation of the program in
24 certain particulars, was I think fairly raised in the
25 court of appeals on pages 5, 9, and 22 of the respondent's

1 brief, but that too was not addressed by the court of
2 appeals and could be considered on remand.

3 I think it's important, though, in leaving these
4 questions open for the court of appeals, for this Court
5 not to rule out the possibility or not to foreclose as a
6 matter of law any of these various theories because this
7 case is at a very preliminary stage, and the court -- the
8 district court --

9 QUESTION: But, Mr. Kneedler, it is true, isn't
10 it, I think that the briefs have adequately argued out the
11 question whether the NC -- the association's control over
12 the program is sufficient to subject it to liability.

13 MR. KNEEDLER: Yes. There's no doubt -- there's
14 no doubt that that has been briefed. My -- my only -- my
15 only point was this Court does not need to resolve that
16 question because it was not addressed by the Third
17 Circuit. My only point was that --

18 QUESTION: Well, I understand we don't have to.

19 MR. KNEEDLER: Right.

20 QUESTION: But don't you think we should?

21 MR. KNEEDLER: Well, I think it might be --
22 the --

23 QUESTION: I mean, that's really the issue in
24 the case right now.

25 MR. KNEEDLER: Well, the -- the -- the only

1 legal issue in the case would be are -- is it -- is there
2 a categorical rule that can a non-recipient never be held
3 liable under title IX. If that -- if that -- only that
4 question I think is presented, but I do think -- on this
5 record because this comes up in a motion to dismiss, but I
6 think that may be a question in which the Court might be
7 informed by a fully developed record when that situation
8 comes up in terms of knowing the -- more facts about the
9 relationship between the NCAA and the -- and the member
10 institutions.

11 In fact --

12 QUESTION: Do we have record -- do we have
13 anything in the record that would answer that question?
14 For example, I -- maybe I wasn't paying attention because
15 I didn't think it was important to me, but do I -- do I
16 know from the record -- should I know from the record
17 exactly what would happen if either of these colleges defy
18 the NCAA? Can I tell that from the record?

19 MR. KNEEDLER: I -- not definitively because --

20 QUESTION: Then I guess --

21 MR. KNEEDLER: -- the member institutions --

22 QUESTION: -- that would go to the question of
23 what -- what degree of control there was.

24 MR. KNEEDLER: Right. The member -- the member
25 institutions, as this Court pointed out in -- in both of

1 its prior cases involving the NCAA, are bound to implement
2 that the individual follow the rules of the NCAA and to
3 implement the determinations of eligibility in particular
4 cases. And there's no reason to think that the member
5 institutions wouldn't be required to do that, which is
6 precisely why we believe that they -- that the NCAA has
7 been ceded controlling authority over particular
8 participation --

9 QUESTION: Well, except -- may I just ask one?

10 QUESTION: Sure.

11 QUESTION: Except we have a regulation in front
12 of us under which presumably there shouldn't be any
13 discrimination, but the claim is that the regulation is
14 not being administered according to -- to a -- by a
15 neutral application of its terms. And I suppose there --
16 there may, indeed, be rules governing the relationship
17 between a college and the -- the NCAA and they not be
18 administered according to their -- neutrally according to
19 their terms. And so, it seems to me that it would be wise
20 to -- to have an opportunity to find that out and have a
21 record so indicating -- indicating that opportunity before
22 we get into it.

23 MR. KNEEDLER: Right. No, I -- I agree with
24 that. I -- I -- I would like to address, though, the --
25 the argument to the extent this Court is --

1 QUESTION: Before you do that, I don't agree
2 with it, and -- and explain to me how knowing the facts
3 which establish the ceding of control will help us decide
4 the question whether the ceding of control violates title
5 IX or not.

6 MR. KNEEDLER: Well, I -- I think knowing --

7 QUESTION: I mean, all of these facts to go to
8 whether in fact control has been ceded. Let's stipulate
9 total control has been ceded.

10 MR. KNEEDLER: Well, I think -- I think knowing
11 exactly what that means, that's descriptive, but knowing
12 exactly how that operates --

13 QUESTION: What it means is that total control
14 has been ceded. What -- what could it mean beyond that?

15 MR. KNEEDLER: Well, it -- looked at in that
16 way --

17 QUESTION: I really don't see how we -- how we
18 need more facts to decide that -- that quite clear
19 question of law.

20 MR. KNEEDLER: Well, there -- there are two
21 questions here. One is -- one is the prudential
22 consideration with respect to the development of facts,
23 and another is the fact that this issue was not addressed
24 by the court of appeals on -- on the law. And this Court
25 doesn't -- as the Chief Justice pointed out, does not

1 normally address legal issues that were not resolved
2 below.

3 But let me -- let me address the -- the legal
4 issue on the premise that the Court might choose to
5 address it.

6 QUESTION: Well, I mean, it would depend on
7 whether you address it what your answer is. I guess in
8 those circumstances, no matter what I guess you could
9 address it, but if it's a more complicated question than
10 that, maybe you should get the facts.

11 MR. KNEEDLER: Right. No, I agree with that.
12 But -- but on -- if -- if the Court is disposed to
13 consider whether the absolute rule that -- that the NCAA
14 seems to be arguing for here, I think it's important to --

15 QUESTION: Exactly. They're arguing the
16 absolute rule.

17 MR. KNEEDLER: Right. And I think it's
18 important -- I think it's important to consider, as Mr.
19 Phillips pointed out, that -- that the operative provision
20 under which this Court found the private right of action
21 identifies the class of protected persons, but does not
22 identify a class of defendants. So, I -- I think the
23 categorical rule is not supported by the very provision
24 under which the right of action has been implied.

25 That is not to say, however, that everybody who

1 may have some effect -- discriminatory impact on -- on the
2 program is covered, and it's important to look --

3 QUESTION: Well, but that -- that produces
4 difficulties of its own, Mr. Kneedler, since this is a
5 Spending Clause program. And the commitments of the
6 States and so forth are supposed to be clearly spelled
7 out. And if we have this kind of amorphous thing, it
8 might be, but it might not be, that itself tends to run
9 afoul of Spending Clause decisions.

10 MR. KNEEDLER: Well, it -- I think in this -- in
11 this case in particular it does not because what section
12 901 says is that there shall be no discrimination in a
13 program receiving Federal assistance, not a program
14 operated by a recipient, but a program that receives
15 Federal financial assistance. There's no doubt that the
16 intercollegiate athletic programs of all -- of probably
17 the vast majority of the NCAA's member institutions
18 receive Federal financial assistance.

19 The question -- and ordinarily, if you look at
20 1687, it refers to the operations of a -- of a program or
21 activity. The question then I think is who operates it.
22 Ordinarily it's the recipient, but where the recipient has
23 basically ceded control to what is, in effect, a super
24 board of trustees for purposes of establishing rules or
25 making individual determinations for the college that are

1 binding on the college, it seems to me a straightforward
2 application of -- of section 901 and looking at 1687 in
3 terms of who operates the program.

4 QUESTION: It seems to me, Mr. Kneedler, no --
5 no total answer to the point the Chief Justice was making
6 to the point that the rule you urge will create confusion.
7 It seems to me no answer to say, well, its application
8 will be clear in the present case. I mean, we're adopting
9 a rule that will apply to hundreds of thousands of other
10 cases, and it doesn't give me great comfort to know that,
11 well, it's easy to say how it applies here.

12 MR. KNEEDLER: Well, I -- our -- our position
13 here is solely where the -- where, in effect, the board of
14 trustees, which would otherwise have final decision making
15 authority for the recipient, turns that final decision
16 making authority over to what is, in effect, a superior
17 governing authority.

18 QUESTION: But if -- if you're right that that
19 would impose liability on the superior governing
20 authority, would the school itself still be liable?

21 MR. KNEEDLER: Yes, and under the title IX
22 regulations, that makes that clear.

23 I'd like to just for a moment address another
24 point that -- that Mr. Roberts made with respect to the
25 recipient theory and whether the NCAA is an intended

1 recipient. The question is not whether Congress intended
2 the NCAA as an entity to receive Federal funds. The
3 question -- the -- and I think, Justice Scalia, you're
4 right. Intent is really not the right question.

5 The question is whether the program being
6 operated is of the type that the Federal grant program was
7 intended to fund. And -- and the question then is whether
8 the -- whether the program is the sort of thing that was
9 intended to be funded. As the Court said, the college
10 program in Grove City was what was intended to be funded.

11 There's no doubt here that intercollegiate
12 athletics are part of a college program. The question
13 would be whether the various Federal programs that might
14 or might not be involved in this case -- and again,
15 there's been no exploration on that -- extend funding to
16 the whole college, including its athletic department, and
17 then whether the payment of dues is essentially the
18 transmittal of that Federal financial assistance.

19 But the question is not whether a particular
20 entity was intended to have that -- to receive that. The
21 regulation that we cite in our brief with respect to
22 transferees and successors -- and there's another
23 regulation in the title IX regulations that refers to
24 contractors -- shows that aid can be passed on.

25 QUESTION: Thank you. Thank you, Mr. Kneedler.

1 Mr. Roberts, you have 3 minutes remaining.

2 REBUTTAL ARGUMENT OF JOHN G. ROBERTS, JR.

3 ON BEHALF OF THE PETITIONER

4 MR. ROBERTS: Thank you, Your Honor.

5 First, I'd like to agree with both of my
6 brothers that the Third Circuit decision was wrong. It
7 was wrong because title IX, as Spending Clause
8 legislation, is limited to recipients, and the effort to
9 rely on the dues or some surrogate relationship severs
10 title IX from its rooting in the Spending Clause and the
11 limitation to recipients.

12 The argument that was raised that the statutory
13 language doesn't carry any such limitation was the precise
14 argument that was raised last term in Gebser, and it was
15 rejected in Gebser. If it's enough to be subject to
16 discrimination under a program, the student in Gebser
17 certainly was, but that was not enough because title IX is
18 limited to recipients. And so, the question is what does
19 a recipient know about what was going on and what did the
20 recipient do or not do.

21 Now, so far as the new alternative arguments are
22 made, it is important to recognize that -- that in our
23 view they have not been properly preserved. The NYSP
24 argument, for example, was not mentioned before the
25 district court by the plaintiff. The court said, assuming

1 your complaint is amended --

2 QUESTION: But, Mr. Roberts, given the pro se
3 litigant, given the large discretion that the district
4 judge has on complaint amendments, should we be the one to
5 decide whether the amendment of the complaint is too late
6 and given cases like Conley against Gibson where this
7 Court has said -- instructed lower courts, be generous to
8 pro se litigants as far as amendment is concerned?

9 MR. ROBERTS: But they have to allege facts.
10 The way it works is you allege facts and then you test
11 those against the legal standard --

12 QUESTION: Well, I don't know. If you look at
13 the forms at the end of the Federal rules, is negligently
14 drove a fact? Is money having received a fact? I mean,
15 those forms are very skimpy.

16 MR. ROBERTS: And what happened is the district
17 court said on this motion to dismiss, we have to test and
18 see what the standards are to establish that someone is an
19 indirect recipient. What -- what do you have in mind?
20 What are you talking about --

21 QUESTION: You could ask for a more definite
22 statement. They -- they alleged NCAA is a Federal fund
23 recipient. Okay. Usually before you cut off a
24 plaintiff's head, you give them a chance to flesh out an
25 allegation.

1 MR. ROBERTS: Well, and she was afforded that
2 opportunity. The district court basically said what is it
3 that you're talking about when you say, and if the answer
4 is dues, which is what the answer that was given, then
5 that's not enough and the complaint should be dismissed.

6 QUESTION: Mr. Roberts, may I ask you what your
7 view is on the question whether we should decide the
8 delegation of a control over a program issue?

9 MR. ROBERTS: I think the reason the Third
10 Circuit is wrong is because the NCAA is not a recipient.
11 That is an argument that would rely on extending title IX
12 to non-recipients.

13 QUESTION: My -- my -- the question is whether
14 you think we ought to decide this other theory, you
15 know --

16 MR. ROBERTS: I think the Court should decide
17 the question whether having so-called effective control or
18 ceded authority is enough to subject you to coverage under
19 title IX when you're not a recipient.

20 QUESTION: How do we get that in the question?
21 The question says because it receives payments from
22 entities that do so. It has nothing to do with receiving
23 payments. Control or not control or delegation would be
24 identical whether they happen to charge dues or whether
25 they don't charge dues.

1 MR. ROBERTS: Well, because the reason the dues
2 are not sufficient is because you have to be a recipient
3 which was the argument we raised, and their answer was,
4 no, you don't. It's enough --

5 QUESTION: That's the end of that. You have --
6 I'm --

7 QUESTION: Thank you, Mr. Roberts.

8 MR. ROBERTS: Thank you.

9 CHIEF JUSTICE REHNQUIST: The case is submitted.

10 (Whereupon, at 11:12 a.m., the case in the
11 above-entitled matter was submitted.)
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CERTIFICATION

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The United States in the Matter of:

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Petitioner v. R.M. SMITH.
CASE NO: 98-84

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BY: *Jonathan M. May*
(REPORTER)