No. 99-1222

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TAI KWAN CURETON, LEATRICE SHAW,
ANDREA GARDNER, and ALEXANDER WESBY,
individually and on behalf of
all others similarly situated,

Plaintiffs-Appellees

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES URGING AFFIRMANCE

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IDENTITY AND INTEREST OF THE AMICUS CURIAE

The United States Department of Education extends financial assistance to educational programs and activities and is authorized by Congress to ensure compliance with Title VI, 42 U.S.C. 2000d-1, in the operation of those programs and activities. Pursuant to that authority, the Department of Education has issued regulations that define a recipient, 34 C.F.R. 100.13(i), and that prohibit use of criteria for determining the type of services, financial aid, or other benefits a recipient will provide that have a disparate impact based upon race, 34 C.F.R. 100.3(b)(2).

The United States Department of Health and Human Services (HHS) provides financial assistance to the National Youth Sports

Program Fund, an entity that the district court found to be controlled by the NCAA. HHS's regulation defining a recipient is identical to the definition in the regulation issued by the Department of Education, 45 C.F.R. 80.13(i). HHS also has a regulation that prohibits the use of criteria that have a disparate impact based upon race. 45 C.F.R. 80.3(b)(2).

The United States Department of Justice coordinates enforcement of Title VI by executive agencies. Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (1980); 28 C.F.R. 0.51. The Department of Justice also has authority to enforce Title VI in federal court upon a referral by an agency that extends federal financial assistance to a program or activity. 42 U.S.C. 2000d-1.

This appeal presents the issue whether a private individual may file a judicial action to enforce agency regulations that prohibit the use of criteria or methods of administration that have a disparate impact based upon race. Because of the inherent limitations on administrative enforcement mechanisms and on the litigation resources of the United States, the United States has an interest in ensuring that both Title VI and its implementing regulations may be enforced in federal court by private parties acting as "private attorneys general." Such private suits are critical to ensuring optimal enforcement of the mandate of Title VI and the regulations. See Cannon v. University of Chicago, 441 U.S. 677, 705-706 (1979) (permitting private citizens to sue under Title VI is "fully consistent with -- and in some cases

even necessary to -- the orderly enforcement of the statute"). The United States filed a brief as amicus curiae on that issue in Chester Residents Concerned For Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997), vacated as moot, 119 S. Ct. 22 (1998); Powell v. Ridge, No. 98-2096 (3d Cir.); and Sandoval v. Hagan, No. 98-6598 (11th Cir.).

This appeal also presents the issue whether the NCAA is subject to coverage under Title VI. The United States filed a brief as amicus curiae in NCAA v. Smith, 119 S. Ct. 924 (1999), which argued (at pp. 19-20) that the NCAA could be a recipient of federal financial assistance through a grant from the Department of Health and Human Services, and (at pp. 20-27) that it could be subject to coverage under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq., if it had been ceded control by a recipient over a program or activity receiving federal financial assistance.[1/] The district court has held that the NCAA is subject to Title VI under both of those theories, and this Court's resolution of this issue could affect the enforcement of Title VI by the United States.

STATEMENT OF THE ISSUES

The United States will address the following issues:

1. Whether there is a private right of action for a claim of discrimination based upon disparate impact under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq.

[1/] The Supreme Court's decision did not address the validity of either of these theories. NCAA v. Smith, 119 S. Ct. at 930.

2. Whether the National Collegiate Athletic Association is subject to the requirements of Title VI because it either receives federal financial assistance through another recipient or has been ceded controlling authority by a recipient over a program or activity receiving federal financial assistance.

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Below

In January 1997, plaintiffs Tai Kwan Cureton and Leatrice Shaw filed a complaint individually and on behalf of a class of African-American student-athletes claiming that the minimum standardized test scores required by the National Collegiate Athletic Association (NCAA) for freshman students to compete in intercollegiate activities and to receive athletic scholarships discriminate against them on the basis of race in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., and its implementing regulations. Cureton v. NCAA, No. 97-131 (E.D. Pa.).

The NCAA filed a motion to dismiss the complaint, arguing that (1) disparate impact discrimination is not actionable under Title VI or its implementing regulations; (2) the NCAA is not a "program or activity" within the meaning of 42 U.S.C. 2000d-4a; and (3) the NCAA is not subject to Title VI because it does not receive federal financial assistance (J.A. 33a-56a).[2/] Plaintiffs opposed the motion to dismiss and also filed a motion

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[2/] The Joint Appendix filed by the parties is cited as "J.A. ___". Unless the context makes it otherwise clear, the parties' briefs are cited as "NCAA Br. __" and "Cureton Br.__."

for partial summary judgment (J.A. 81a-132a). On October 9, 1997, the district court entered an order denying the NCAA's motion to dismiss (J.A. 701a). The court also granted in part plaintiffs' motion for partial summary judgment, holding that there is a private right of action under the Title VI regulations for a claim of discrimination based upon disparate impact (J.A. 695a-701a). The district court denied defendant's motion to certify the question for immediate appeal, pursuant to 28 U.S.C. 1292(b), stating that there is not a substantial ground for difference of opinion in light of the "overwhelming circuit law" supporting the reasoning of its decision. Cureton v. NCAA, No. 97-131, 1998 WL 726653, at *1 (E.D. Pa. Oct. 16, 1998).

The October 9, 1997, order found that "the NCAA appears to be a program or activity covered by Title VI" under the definition in 42 U.S.C. 2000d-4a(4), but found that the record was not sufficiently developed to determine whether the NCAA receives federal financial assistance (J.A. 699a-700a). The court therefore left that determination to a trial on the merits (J.A. 700a).

The parties filed cross-motions for summary judgment (J.A. 778a (NCAA); J.A. 703a-704a (plaintiffs)). On March 8, 1999, the district court granted plaintiffs' motion for summary judgment (J.A. 1156a-1157a).

The NCAA filed a timely notice of appeal on March 17, 1999 (J.A. 1250a).

B. Statement Of Facts

1. Background

The NCAA is a voluntary, unincorporated association of approximately 1,200 members, consisting of colleges and universities, conferences and associations, and other educational institutions. Cureton v. NCAA, 37 F. Supp. 2d 687, 690 (E.D. Pa. 1999). The NCAA is responsible for promulgating rules governing all aspects of intercollegiate athletics, including recruiting, eligibility of student-athletes, and academic standards. Its member institutions agree to abide by and enforce those rules. Id. at 695 & n.6; (J.A. 133a). The four-year colleges and universities that are the active members of the NCAA are divided into Divisions I, II, and III. Id. at 690. Some bylaws of the NCAA are applicable to all divisions. Each division may, however, adopt additional bylaws applicable only to that division. This case involves a bylaw that is applicable only to Division I schools. Ibid.

In response to public perception that student-athletes were inadequately prepared to succeed academically and to receive an undergraduate degree, the Division I membership adopted requirements for high school graduates seeking to participate in athletics and to receive athletically-related financial assistance during their freshman year. Proposition 48, which was implemented during the 1986-1987 academic year, required high school graduates to have a 2.0 GPA in 11 core academic courses and a minimum score of 700 on the SAT (or a composite score of 15

on the ACT) in order to participate in freshman intercollegiate athletics. 37 F. Supp. 2d at 690.

In 1992, these initial eligibility rules were modified through the adoption of Proposition 16. 37 F. Supp. 2d at 690. As fully implemented effective August 1, 1996, Proposition 16 increased the number of core courses required to 13 and introduced an initial eligibility index. Ibid. Under the index, a student-athlete could establish eligibility with a GPA of 2.0 only if combined with an SAT score of 1010 (or an ACT sum score of 86). Id. at 690-691.[3/] A student with a GPA of 2.5 or higher was required to have an SAT score of 820 (or an ACT sum score of 68). Id. at 691. Since the core GPA cutoff score of 2.0 is two standard deviations below the national mean, while the SAT/ACT cutoff score is only one standard deviation below the national mean, Proposition 16 results in a "heavier weighting of the standardized test." Ibid.

2. Federal Financial Assistance

In 1969, the NCAA began receiving federal financial assistance for the operation of the National Youth Sports Program (NYSP).[4/] From that time until 1991, the NCAA was a direct recipient of federal financial assistance from HHS to operate the

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[3/] In 1995, the College Board recentered the score scales for the SAT. After recentering, a test score of 700 on the old scale is approximately equivalent to a score of 830 on the recentered scale. Cureton v. NCAA, 37 F. Supp. 2d at 690 n.2.

[4/] Through subgrantees, the NYSP offers sports instruction and instruction in life skills, science, and math to poor and disadvantaged youths (J.A. 520a).

NYSP (J.A. 145a-146a; J.A. 511a-516a). On October 3, 1989, the NCAA created the NYSP Foundation as a nonprofit corporation under the laws of Missouri (J.A. 506a-509a). It was later renamed the NYSP fund (see J.A. 147a). The Fund was created "to insure that [the NCAA] is not a recipient or a contractor of the federal government" (J.A. 147a-148a). On August 9, 1991, the NCAA sent a letter to HHS requesting that its Fiscal Year 1991 grant application for the NYSP be amended to designate the NYSP Fund as the grantee (J.A. 151a-152a). From 1992 to the present, the federal grant has been made to the NYSP Fund. In Fiscal Year 1996, the federal grant from HHS was $11,520,000 (J.A. 74a; see also, J.A. 261a (HHS press release announcing that "$11,520,000 was awarded to the NCAA")).

Nonetheless, "Guidelines for the 1993 National Youth Sports Program," which are prepared by the NYSP Committee as a required part of the grant application process, listed the NCAA, not the Fund, as the grantee of the HHS grant (J.A. 254a-259a; see Marshall 6/30/97 Dep. at 28-30). The guidelines stated that "[t]he NCAA has been awarded a grant by the [Office of Community Services]" of HHS (J.A. 258a). The guidelines also stated that a "specified amount of funds shall be made available to participating institutions through the National Collegiate Athletic Association to conduct projects" (J.A. 257a) and invited applications to be submitted to the NCAA at its office address in

Overland Park, Kansas (J.A. 258a).[5/]

Pursuant to its Bylaws, the Fund has four directors, three of whom are NCAA officers or employees (J.A. 228a-229a).[6/] The Fund itself has no offices, no employees, and no letterhead (J.A. 143a, 161a, 196a). The Fund has never had a Board of Directors meeting, but rather has "handled its business that needed to be taken care of through * * * consent minutes" (J.A. 158a). The Fund's bank account is entitled: "The National Collegiate Athletic Association -- The [National] Summer Youth Sports Program" (J.A. 505a). The staff of the NCAA, as well as the fund, has authority to draw from the federal government's grant through that account (J.A. 156a-157a).

Through 1994, the NCAA, "d/b/a National Youth Sports Program," was the named insured on liability policies covering the activities of the NYSP (J.A. 526a-629a).[7/] The Fund's Articles of Incorporation provide that upon the dissolution of the Fund, the assets of the Fund shall be distributed exclusively

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[5/] In a document dated 2/3/95 that was attached to one of its own pleadings in the district court, the NCAA is listed as the "Applicant organization" for the NYSP grant (J.A. 310a (Assurances given in connection with grant)).

[6/] The bylaws mandate that the Executive Director and Assistant Executive Director of the NCAA, and the chairperson of the NYSP Committee of the NCAA be members of the NYSP Fund Board (J.A. 229a).

[7/] In the NCAA's 1995-1996 Annual Report, the Fund is included in the NCAA's financial statements (J.A. 517a-520a). In contrast, the NCAA Foundation is described in the Annual Report as "a separate legal entity" not included in the NCAA's financial statements (J.A. 520a).

to the NCAA, provided the NCAA continues to be an education organization within the meaning of Section 501(c)(3) of the Internal Revenue Code (J.A. 508a).

Perhaps most important, it is the NCAA's NYSP committee, and not the Fund, that makes all of the decisions about the NYSP and the use of the federal funds. For example, the NYSP committee has final approval over which colleges and universities receive subgrants to operate the NYSP's instructional and educational programs (J.A. 200a). The NCAA stipulated that once the NCAA's NYSP committee makes a decision, no further action is required to implement that decision (J.A. 209a-210a).

The NCAA's Executive Director has stated that the "NYSP is one of the NCAA's best-kept secrets, yet it is consistently one of our most successful and influential programs. Our partnership with the federal government, local civic organizations and individual colleges and universities perfectly embodies the NCAA's team spirit" (J.A. 263a).

C. The Decision Below

In granting summary judgment to the plaintiffs, the district court held that the NCAA is subject to Title VI and that Proposition 16 violates the disparate impact prohibition of the Title VI regulations (J.A. 1165a-1211a). The court's earlier partial grant of summary judgment held that plaintiffs have a private right of action to enforce the Title VI regulation prohibiting disparate impact discrimination (J.A. 699a).

1. Coverage Of NCAA Under Title VI

Plaintiffs raised several theories under which the NCAA would be subject to Title VI. First, they contended that the NCAA receives federal financial assistance indirectly through the receipt of dues from its member schools, all of whom receive federal financial assistance. The district court rejected that theory based upon the Supreme Court's decision in NCAA v. Smith, 119 S. Ct. 924, 929-930 (1999). Cureton v. NCAA, 37 F. Supp. 2d 687, 693 (E.D. Pa. 1999).

Plaintiffs also argued that the NCAA directly receives federal financial assistance through the National Youth Sports Program Fund because the Fund is nothing more than the alter ego of the NCAA. The district court found that plaintiffs "failed to sustain their heavy burden of 'piercing the corporate veil' sufficient to have the Fund construed as the NCAA's alter ego." 37 F. Supp. 2d at 694. However, the court found "overwhelming evidence" supporting the fact that "the Fund is ultimately being controlled by the NCAA," and thus concluded that plaintiffs had sustained their burden of proving that the NCAA "exercises effective control and operation of the" grant given by HHS to the Fund "to be construed as an indirect recipient of federal financial assistance." Ibid. The court found that "although the Fund is the named recipient of the block grant, it is merely a conduit through which the NCAA makes all of the decisions about the Fund and the use of the federal funds." Ibid.

Finally, the court found that plaintiffs also proved that

the NCAA is subject to suit under Title VI regardless of whether it receives federal financial assistance "because member schools (who themselves indisputably receive federal funds) have ceded controlling authority over federally funded programs to the NCAA." 37 F. Supp. 2d at 694. It found that the "member colleges and universities have granted to the NCAA the authority to promulgate rules affecting intercollegiate athletics that the members are obligated to abide by and enforce." Id. at 696. Accordingly, "because there is a nexus between the NCAA's allegedly discriminatory conduct with regards to intercollegiate athletics and the sponsorship of such programs by federal fund recipients, the NCAA is subject to Title VI for a challenge to Proposition 16." Ibid.

2. The Decision On The Merits

The district court held that the disparate impact standard developed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., in the employment context is applicable to a claim of disparate impact in educational testing. 37 F. Supp. 2d at 696-697. Applying that standard, the court held that Proposition 16 causes a racially disproportionate effect on African Americans, id. at 697-701; that Proposition 16 is not justified by any legitimate educational necessity, id. at 701-712; and that, in any event, plaintiffs had demonstrated that there are equally effective alternative practices to Proposition 16 having less adverse effect upon African Americans, id. at 713-714. Accordingly, the court granted plaintiffs' motion for

summary judgment. Id. at 714.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. This Court in Chester Residents Concerned For Quality Living v. Seif, 132 F.3d 925, 937 (1997), vacated as moot, 119 S. Ct. 22 (1998), correctly held that "private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964," and that decision should be reinstated as the law in this Circuit. The reasoning of Chester Residents is still persuasive authority. See Polychrome Int'l Corp. v. Krigger, 5 F.3d 1522, 1534 (3d Cir. 1993); Finberg v. Sullivan, 658 F.2d 93, 100 n.14 (3d Cir. 1981) (en banc). Moreover, the holding in Chester Residents was consistent with that of every other court of appeals to consider the issue. 132 F.3d at 936-937. The NCAA has presented no "compelling basis" for this Court to disregard that holding. Wagner v. PennWest Farm Credit, ACA, 109 F.3d 909, 912 (3d Cir. 1997).

2. In Part II, we argue that the NCAA is subject to coverage under Title VI both because it receives federal financial assistance indirectly through the NSYP Fund, which it controls, and because it has been ceded controlling authority over the intercollegiate athletics programs of its member colleges and universities, which receive federal financial assistance directly.

3. We do not take a position on the merits issues raised in

this appeal. Because parts of the record relating to this issue remain under seal (see NCAA Br. 8 n.3), we have not had access to the information necessary to ascertain whether the district court was correct in determining that Proposition 16's cutoff score causes a racially disproportionate effect; that the NCAA had not demonstrated that the cutoff score significantly serves the goal of raising student-athlete graduation rates; and that, in any event, the plaintiffs established the existence of alternative practices that serve the goal of raising student-athlete graduation rates and that have less of an adverse impact upon African Americans. These are highly fact-bound determinations, and we believe the parties are in the best position to assist the Court in determining whether the district court erred in any of these rulings.

We wish to point out, however, that the district court correctly held, 37 F. Supp. 2d at 696-697, and the NCAA does not dispute, that the disparate impact standards developed in employment discrimination cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., apply to claims brought pursuant to the regulations implementing Title VI. See, e.g., Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985); NAACP v. Medical Ctr., Inc., 657 F.2d 1322, 1331 (3d Cir. 1981); Larry P. v. Riles, 793 F.2d 969, 982 nn.9-10 (9th Cir. 1984). Applying these legal standards, the court held that a recipient can use a cutoff score that has a disparate impact if it is "justified by an

'educational necessity,'" 37 F. Supp. 2d at 697, and there is no "equally effective alternative practice that results in less racial disproportionality while still serving the articulated educational necessity." Ibid.[8/]

ARGUMENT

I

PRIVATE PLAINTIFFS MAY SUE TO ENFORCE THE DISPARATE IMPACT STANDARD IN AGENCY REGULATIONS IMPLEMENTING TITLE VI

Plaintiffs sought to enforce regulations of the Departments of Education and Health and Human Services promulgated under Section 602 of Title VI of the Civil Rights Act, 42 U.S.C. 2000d-1 (J.A. 28a). Those regulations prohibit a recipient of federal financial assistance from using "criteria or methods of administration which have the effect of subjecting individuals to

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[8/] The district court mentioned, but did not apply to Title VI, the 1991 amendments to Title VII that require a defendant to bear both a burden of production and persuasion on its business necessity justification. 37 F. Supp. 2d at 697. See 42 U.S.C. 2000e(m) and 2000e-2(k)(1)(A). Although the alleged discrimination in this case occurred after 1991, the court appears to have applied the previous standard, set out in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), that the defendant bears only a burden of producing evidence that the challenged employment practice has a legitimate business justification. If this Court agrees with the district court's ruling that the NCAA failed to meet its burden under Wards Cove because it "has not produced any evidence demonstrating that the cutoff score used in Proposition 16 serves, in a significant way, the goal of raising student-athlete graduation rates," 37 F. Supp. 2d at 712, it will be unnecessary for the Court to determine whether the district court erred in failing to require the NCAA to satisfy the heavier burden imposed by the Civil Rights Act of 1991. Cf. Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 n.14 (11th Cir. 1993). In any event, this Court should not resolve this important issue without the benefit of full briefing from the parties (see NCAA Br. 47 n.19, Cureton Br. 36 n.19).

discrimination because of their race." 34 C.F.R. 100.3(b)(2); 45 C.F.R. 80.3(b)(2) (emphasis added). This Court in Chester Residents Concerned For Quality Living v. Seif, 132 F.3d 925, 937 (1997), vacated as moot, 119 S. Ct. 22 (1998), held that "private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964." Although that decision is no longer binding circuit precedent, the opinion in Chester Residents retains its persuasive authority. See Polychrome Int'l Corp. v. Krigger, 5 F.3d 1522, 1534 (3d Cir. 1993); Finberg v. Sullivan, 658 F.2d 93, 100 n.14 (3d Cir. 1980) (en banc) ("Even if a decision is vacated, however, the force of its reasoning remains, and the opinion of the Court may influence resolution of future disputes."). In addition, the holding in Chester Residents was consistent with that of every other court of appeals to consider the issue. 132 F.3d at 936-937 (collecting cases from the First, Second, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits). This Court has noted that "[i]n light of such an array of precedent, [it] would require a compelling basis to hold otherwise before effecting a circuit split." Wagner v. PennWest Farm Credit, ACA, 109 F.3d 909, 912 (3d Cir. 1997).

The NCAA has provided no such "compelling basis." All of the arguments raised by the NCAA (Br. 17-25) were correctly rejected by the panel in Chester Residents and should likewise be rejected here.

The NCAA argues (Br. 20-23) that Section 602 does not permit an implied private right of action, in part because Section 602 "prohibits any enforcement of the regulations" until the federal funding agency gives the alleged violator notice and an opportunity to comply voluntarily (Br. 22) (emphasis in original). But, as the Court noted in Chester Residents, 132 F.3d at 935, "a private lawsuit also affords a fund recipient similar notice." Moreover, the requirements of Section 602 "were designed to cushion the blow of a result that private plaintiffs cannot effectuate," i.e., termination of funding. Id. at 936. The Court in Chester Residents therefore properly found that "a private right of action would be consistent with the legislative scheme of Title VI." Ibid. In addition, if the NCAA were correct in its reading of the statute, then a private right of action to enforce the prohibition on intentional discrimination (which the federal government also enforces through the procedures established in Section 602) would also be barred, a result clearly foreclosed by the Supreme Court's decision in Cannon v. University of Chicago, 441 U.S. 677 (1979).[9/]

[9/] The NCAA (Br. 18-20) attacks the district court's decision for relying on an overly broad reading of Guardians v. Civil Serv. Comm'n, 463 U.S. 582 (1975). The district court, however, issued its decision in October 1997, some two months before the decision in Chester Residents. Thus, its conclusion that the Supreme Court in Guardians had resolved the issue could not have anticipated this Court's conclusion in Chester Residents that Guardians is not dispositive, 132 F.3d at 930, and that the Supreme Court's decision in Alexander v. Choate, 496 U.S. 287 (1985), provided "no direct authority * * * that either confirms or denies the existence of a private right of action," 132 F.3d

(continued...)

The NCAA also contends (Br. 23-25) that the legislative history of Title VI does not support the implication of a private right of action for unintentional discrimination. It attempts to diminish the import of the legislative history of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), discussed by this Court in Chester Residents, noting (Br. 24) that Chester Residents relied on comments from opponents of the 1987 legislation that "do not shed light on the purpose and intent behind Title VI." But Chester Residents was following the well-accepted rule that when there is evidence that Congress understands that a private right of action was available under a statutory scheme and amends the statute without demonstrating any intent to disapprove of such suits, it has ratified that private right of action. See Herman & MacLean v. Huddleston, 459 U.S. 375, 386 (1983); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 381-382 (1982); see also Cannon, 441 U.S. at 687 n.7; Lindahl v. OPM, 470 U.S. 768, 787-788 (1985). While much of the discussion of private enforcement of the discriminatory effects regulations came from opponents to the bill, "they are nevertheless relevant and useful, especially where, as here, the proponents of the bill made no response." Arizona v. California, 373 U.S. 546, 583 n.85 (1963).

[9/](...continued)
at 931. In any event, the district court's holding that there is a private right of action to enforce the disparate impact regulation is, of course, entirely consistent with this Court's Chester Residents holding.

The NCAA has not articulated a compelling basis for this Court to discard the holding of Chester Residents and reject the result reached by the other circuits that have addressed the question. This Court should reinstate the holding of Chester Residents here.[10/]

II

THE NCAA IS SUBJECT TO THE REQUIREMENTS OF TITLE VI BECAUSE IT RECEIVES ASSISTANCE THROUGH ANOTHER RECIPIENT AND BECAUSE IT HAS BEEN CEDED CONTROLLING AUTHORITY BY A RECIPIENT OVER A PROGRAM OR ACTIVITY RECEIVING FEDERAL FINANCIAL ASSISTANCE

A. The NCAA Receives Federal Financial Assistance Through Another Recipient

The regulations of the Departments of Education and HHS define a recipient of federal financial assistance as any entity "to whom Federal financial assistance is extended, directly or through another recipient, for any program." 34 C.F.R. 100.13(i); 45 C.F.R. 80.13(i)). From 1969 through 1991, the NCAA directly received federal financial assistance for the NYSP in its own name. After passage of the Civil Rights Restoration Act, the NCAA named the NYSP Fund to be the grant recipient for federal funding in order "to insure that [the NCAA] is not a recipient or a contractor of the federal government" (J.A. 147a-148a). The evidence relied upon by the district court, some of

[10/] By the time this Court considers the issue whether there is a private right of action to enforce the disparate impact regulations under Title VI in this case, the issue may have been resolved by the panel in Powell v. Ridge, No. 98-2096 (3d Cir.), in which oral argument was held on June 9, 1999. The panel in Powell, however, does not need to reach that issue if it decides that the Title VI discriminatory effect regulations may be enforced through 42 U.S.C. 1983.

which is recited at pp. 7-10, supra, demonstrates, however, that the incorporation of the NYSP Fund was largely a formality and that the NCAA itself, through the NYSP Committee, continues to administer the grant program. The NYSP Fund as the listed grantee is itself a direct recipient of federal financial assistance subject to coverage under Title VI. But the NCAA receives federal financial assistance indirectly through its continued control of the NYSP grant, notwithstanding its attempt to distance itself from federal oversight.[11/] See Grove City College v. Bell, 465 U.S. 555, 564 (1984) (text of statute does not distinguish between direct and indirect assistance). Indeed, the Department of HHS has on two occasions (in 1994 and 1998) taken the position that the NCAA is a recipient of federal financial assistance through a Community Development Block Grant from HHS and has accepted complaints of discrimination by the NCAA for investigation (J.A. 1257a-1261a).

Based upon the "overwhelming evidence," the district court properly found that "the Fund is ultimately being controlled by the NCAA," and thus that the NCAA is the indirect recipient of

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[11/] The NCAA's assertion (Br. 32) that "[t]here is no evidence to suggest that the NCAA has diverted any federal funds to its own coffers" is beside the point. A recipient of federal financial assistance is required by law to use that assistance to fulfill the ultimate purpose of the grant, and there is no allegation here that the NCAA has not done so. The claim here is not that the NCAA has violated the law by setting up the NYSP Fund as the named grantee, but rather that it cannot escape responsibility under Title VI if it controls the administration of the grant.

federal financial assistance through the NYSP Fund. 37 F. Supp. 2d at 694.

B. The NCAA Is Subject To Title VI Because It Has Been Ceded Controlling Authority Over The Intercollegiate Athletic Programs Of Its Member Colleges And Universities, Which Receive Federal Financial Assistance

The district court found that "the NCAA is subject to suit under Title VI irrespective of whether it receives federal funds, directly or indirectly, because member schools (who themselves indisputably receive federal funds) have ceded controlling authority over federally funded programs to the NCAA." 37 F. Supp. 2d at 694. The district court did not articulate the statutory basis for this theory of coverage, but it is firmly rooted in the text of Title VI.

Title VI provides in relevant part that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. 2000d. As that statutory text makes clear, Title VI, like Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a), was not drafted "simply as a ban on discriminatory conduct by recipients of federal funds." Cannon v. University of Chicago, 441 U.S. 677, 691-692 (1979); see Chowdhury v. Reading Hosp. & Med. Ctr., 677 F.2d 317, 318, 319 n.2 (3d Cir. 1982) (language of Cannon applicable to Title VI), cert. denied, 463 U.S. 1229 (1983). Instead, the "unmistakable focus" of the statutory text

is on the protection of "the benefitted class." Cannon, 441 U.S. at 691. The text itself does not specifically identify the class of potential violators. But given the focus of the text on protection for the individual, and the absence of any language limiting the class of violators to recipients, Title VI is most naturally read as prohibiting any entity that has governing authority over a program from subjecting an individual to race-based discrimination under it.[12/]

Although recipients are the principal class of entities that may subject an individual to discrimination under a program, they are not the only ones. When a recipient cedes governing authority over a program receiving assistance to another entity, and that entity subjects an individual to discrimination under the program, that entity violates Title VI, regardless of whether it is a recipient itself.[13/]

[12/] Congress has constitutional authority to reach the conduct of anyone who threatens "the integrity and proper operation of [a] federal program." See Salinas v. United States, 118 S. Ct. 469, 475 (1997) (upholding constitutionality of a statute that prohibits the acceptance of bribes by employees of state and local agencies that receive federal funds, as applied to a case in which a county received funds for the operation of a jail, and the sheriff and deputy sheriff at the jail accepted bribes in violation of the statute). Since the NCAA's actions, if discriminatory, pose a threat to the integrity and proper operation of the federally assisted programs at member schools, Congress had constitutional authority to subject the NCAA to liability for such discrimination.

[13/] The NCAA's argues (Br. 36-37) that the Title VI disparate impact regulations, which impose obligations only on recipients, would not apply to it under this theory. If, as we contend, however, Title VI itself prohibits discrimination by an entity to which a recipient has ceded controlling authority over

(continued...)

That commonsense reading of Title VI furthers its central purposes -- "to avoid the use of federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices." Cannon, 441 U.S. at 704. Several considerations support that conclusion. First, as the district court recognized, 37 F. Supp. 2d at 695, intercollegiate athletics is unique in that it is "one of the few educational programs of a college or university that cannot be conducted without the creation of a separate entity to provide governance and administration." Out of the necessity for a supervising authority comes the NCAA's power to establish the rules, such as Proposition 16, governing eligibility for intercollegiate athletics at member schools. "By joining the NCAA, each member agrees to abide by and to enforce such rules." NCAA v. Tarkanian, 488 U.S. 179, 183 (1988). Because the NCAA has effective control over eligibility determinations for intercollegiate athletics, it is the entity most responsible for any discrimination that enters into those determinations.

If there is discrimination in the NCAA's rules, a member school may attempt to persuade the NCAA to change the rules, but if it is unsuccessful, its only option is to withdraw from the NCAA. Since the NCAA has a virtual monopoly on intercollegiate athletics, a school that has withdrawn from the NCAA in order to

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[13/](...continued)
a covered program, the regulations should be accorded a similar interpretation.

satisfy its own Title VI obligations could no longer offer intercollegiate athletic opportunities to its students. That would leave victims of discrimination without an effective remedy and deprive innocent third parties of intercollegiate athletic opportunities as well. Those harsh consequences may be avoided if victims of the NCAA's discrimination may seek relief against the NCAA directly.

Finally, because of its unique power over intercollegiate athletics, discrimination by the NCAA in the promulgation of its rules has the capacity to result in discrimination at numerous member schools simultaneously. Permitting a private right of action against the NCAA provides a mechanism for stopping discrimination at its source before it becomes entrenched at member schools.[14/]

Permitting a judicial cause of action against the NCAA is consistent with the principle that entities should not be subjected to liability under Title VI without adequate notice. See Gebser v. Lago Vista Indep. Sch. Dist., 118 S. Ct. 1989, 1997-1999 (1998). Unlike the situation in Gebser, plaintiffs do not seek to hold the NCAA liable for discrimination committed by others; rather, plaintiffs seek to hold the NCAA liable for its own alleged discrimination in the promulgation and continued use

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[14/] A member school, of course, remains liable for any discriminatory decision of the NCAA that it implements. For the reasons discussed above, however, when the NCAA is the source of the discrimination and uses its power over member schools to implement that discrimination, a remedy against the NCAA is more appropriate and efficacious than requiring a private plaintiff to bring suit against each of the member schools.

of Proposition 16. The text of the Title VI regulations provides sufficient notice to the NCAA that it had an obligation not to use its authority over a program receiving federal assistance to subject an individual to race-based discrimination under that program.[15/]

If the NCAA did not wish to subject itself to Title VI obligations on the basis of its relationship to member institutions that receive assistance, it could have refrained from exercising governing authority over intercollegiate athletics at those institutions. Once the NCAA assumed that governing role, it also assumed an obligation not to use that authority to discriminate on the basis of race against individuals seeking access to intercollegiate athletic programs at those institutions.

The NCAA argues (Br. 38-39) that it cannot be subject to Title VI coverage because it did not assume a contractual commitment not to discriminate. The text of Title VI, however, is not framed exclusively in contract terms, and a contractual commitment not to discriminate is not a precondition to application of the statute.

If a contract analogy were needed, the relevant one would be to the tort of intentional interference with a contract. Restatement (Second) of Torts § 766 (1979) (one who intentionally

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[15/] Moreover, this case involves a claim for injunctive relief only, and not money damages, so many of the "notice" concerns that played a particularly significant role in Gebser are not so compelling in this context.

and improperly interferes with the performance of a contract between another and a third person by inducing or otherwise causing the third person not to perform the contract is subject to liability to the other). When an entity that has been ceded controlling authority over a recipient requires the recipient to act in a discriminatory manner by, for example, imposing a discriminatory requirement for eligibility, it effectively causes the recipient to breach its agreement with the federal funding agency. Moreover, when an entity created by recipients makes and enforces rules for recipients, it is on ample notice that it cannot do so in a way that subjects an individual to discrimination under the programs of the recipients.

Finally, contrary to the NCAA's contention (Br. 37-39) subjecting non-recipients that have been ceded controlling authority over federally assisted programs to coverage under Title VI is not in conflict with the Supreme Court's decision in United States Department of Transportation v. Paralyzed Veterans of America, 477 U.S. 597 (1986). There is language in that opinion that supports the NCAA's argument that federal funding statutes like Title VI apply only to recipients of federal financial assistance. 477 U.S. at 605-606. The context of those statements makes clear, however, that the Court was addressing only whether coverage should extend past recipients to beneficiaries. The Court did not purport to address the entirely different question whether an entity that has been ceded controlling authority over a program receiving federal assistance

violates Title VI when it subjects an individual to discrimination under that program. Because the airlines did not have controlling authority over the federally assisted airport programs, the question at issue here was simply not presented in Paralyzed Veterans.

Equally important, the Court's crucial concern in Paralyzed Veterans was that expanding the funding statutes to reach beneficiaries of federal assistance would have resulted in "almost limitless coverage" -- a result that was clearly at odds with Congress's intent. 477 U.S. at 608-609. The situation here is fundamentally different. The class of non-recipients that has governing authority over programs receiving assistance is limited, and permitting a private right of acting against such entities when they subject persons to discrimination under those programs advances the purposes of Title VI.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed insofar as it (1) permits plaintiffs to bring an action to enforce the Title VI disparate impact regulations (2) finds that the NCAA is subject to Title VI coverage, and (3) determined that the disparate impact standards developed in employment discrimination cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., apply to claims brought pursuant to the regulations implementing Title VI and correctly articulated the legal framework within which to analyze such claims. As stated at pp. 13-14, supra, the United States does

not take a position on the essentially fact-bound merits issue because significant portions of the record on that issue are under seal and unavailable for our review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). Exclusive of the exempted portions, the brief contains 6979 words in monospaced typeface. The brief has been prepared in monospaced typeface using Wordperfect 7.0, with Courier typeface at 10 characters per inch (12-point font).

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