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' PETITIONS FOR REHEARING AND REHEARING EN BANC

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MISCELLANEOUS:

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This case involves two questions of exceptional importance:

1. Whether the definition of "program" that Congress adopted in the Civil Rights Restoration Act of 1987 applies to the discriminatory effects regulations that federal agencies have promulgated under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq. (Title VI).

2. Whether the National Collegiate Athletic Association (NCAA) is subject to the requirements of Title VI because its member colleges and universities have ceded controlling authority to the NCAA over their intercollegiate athletics programs.

IDENTITY AND INTEREST OF THE AMICUS CURIAE

Pursuant to 42 U.S.C. 2000d-1, numerous federal agencies have promulgated regulations to implement Title VI, which prohibits

discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assistance. 42 U.S.C. 2000d. Those regulations prohibit, among other forms of discrimination, the use of criteria that have unjustified discriminatory effects. See, e.g., 34 C.F.R. 100.3(b)(2) (Department of Education); 45 C.F.R. 80.3(b)(2) (Department of Health and Human Services (HHS)). The Department of Justice coordinates federal agencies' enforcement of Title VI, Exec. Order No. 12,250 (45 Fed. Reg. 72,995 (1980)), and has authority to enforce Title VI in federal court. 42 U.S.C. 2000d-1.

The panel in this case held that the Title VI discriminatory effects regulations are "program specific" — in other words, that they apply only to the particular program receiving federal financial assistance, rather than to all the operations of an entity covered by Title VI. Cureton v. NCAA, No. 99-1222 (3d Cir. Dec. 22, 1999), slip op. 15. That holding conflicts with federal agencies' long-standing interpretation of the Title VI regulations and, if allowed to stand, will seriously impede the federal government's enforcement of those regulations.

Moreover, the United States has a direct interest in ensuring that the NCAA is subject to Title VI's anti-discrimination provisions. HHS provides financial assistance to the National Youth Sports Program (NYSP) Fund, an entity that the district court found to be controlled by the NCAA. See id., slip op. 9. Federal agencies also provide financial assistance to the colleges and universities that are members of the NCAA. See ibid. Because of

this interest, the United States filed an amicus brief at the panel level supporting appellees. The United States also filed an amicus brief in NCAA v. Smith, 119 S. Ct. 924 (1999), which argued that the NCAA could be a recipient of federal financial assistance through a grant from HHS and 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.

ARGUMENT

II. THE BROAD DEFINITION OF "PROGRAM" THAT CONGRESS ADOPTED IN THE CIVIL RIGHTS RESTORATION ACT OF 1987 APPLIES TO THE TITLE VI DISCRIMINATORY EFFECTS REGULATIONS

The panel erroneously held that Title VI's discriminatory effects regulations are subject to the "program specific" limitation adopted by Grove City College v. Bell, 465 U.S. 555 (1984) — in other words, that those regulations apply only to the particular program receiving federal financial assistance, rather than to all the operations of an entity that receives federal funds. See Cureton, slip op. 15. That holding directly conflicts with the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (Restoration Act), which was designed to overturn Grove City's "program specific" limitation. As we explain below, both the language and legislative history of the Restoration Act confirm that Congress intended the statute's broad definition of "program" to apply to all Title VI regulations, including those prohibiting unjustified discriminatory effects.

The impact of the panel's erroneous decision is far-reaching. This Court recently observed that "[a]t least 40 federal agencies" have adopted discriminatory effects regulations under Title VI. Powell v. Ridge, 189 F.3d 387, 393, cert. denied, 120 S. Ct. 579 (1999). The panel's decision drastically limits the coverage of those regulations and thus significantly impedes the ability of the federal government and private victims of discrimination to obtain relief for conduct that has unjustified discriminatory effects on the basis of race, color, or national origin.

Moreover, the panel apparently was under the misimpression that Congress had never considered whether to expand the coverage of the discriminatory effects regulations beyond the "program specific" limitation imposed by Grove City. See Cureton, slip op. 16. That incorrect understanding was undoubtedly attributable to the lack of thorough briefing of the issue, which received only cursory mention in the briefs at the panel level. Rehearing is thus warranted to ensure that the Court has the benefit of complete information about Congress's intent before deciding such a significant issue.

A. Congressional Intent

Congress enacted the Restoration Act to overturn the Supreme Court's holding in Grove City. In that case, the Supreme Court interpreted the phrase "program or activity" in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq. (a statute patterned after Title VI) to limit the coverage of Title IX to only those portions of an entity receiving federal funds. In response,

the Restoration Act amended Title VI, Title IX, and analogous statutes to define "program or activity" to include "all of the operations of" an entity, "any part of which is extended Federal financial assistance." Pub. L. No. 100-259, § 6, 102 Stat. 31, codified at 42 U.S.C. 2000d-4a.

The language and legislative history of the Restoration Act make clear that the statute's broad definition of "program" applies to all Title VI regulations, including the discriminatory effects regulations. The Restoration Act states that its purpose is "to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered." Pub. L. No. 100-259, § 2(2), 102 Stat. 28 (emphasis added). This reference to "executive branch interpretation" indicates that Congress intended its overruling of Grove City to apply not only to Title VI itself but also to the administrative regulations interpreting the statute.

The legislative history confirms this interpretation. A Senate committee report found "overwhelming" evidence that for nearly two decades prior to Grove City, both Republican and Democratic administrations had interpreted Title VI, Title IX, and their implementing regulations as having "the institution wide coverage that Congress intended." S. Rep. No. 64, 100th Cong., 1st Sess. 10 (1987); accord id. at 3, 7-9. For example, the report emphasized that a former cabinet secretary had testified that coverage of Title IX "was exceedingly broad and that this broad coverage was reflected in the Title IX regulations promulgated

during his tenure." Id. at 9. The report confirmed that the purpose of the Restoration Act was "to reaffirm" these "pre-Grove City College * * * executive branch interpretations." Id. at 2. Similarly, the House Judiciary Committee recognized that "[f]rom the outset," the "Title VI enforcement regulations" provided "broad coverage" and were "intended to apply to the entity which has received federal funds, not just to previously identified particular programs for which funds are earmarked." H.R. Rep. No. 829, Pt. 1, 98th Cong., 2d Sess. 23-24 (1984).

Individual members of Congress also expressed their understanding that prior administrations had interpreted the regulations as having institution-wide coverage. For example, Senator Packwood, a key sponsor of the legislation, explained that "[p]rior to the Grove City case, everyone * * * thought that the title IX regulations meant institutionwide coverage." 134 Cong. Rec. 247 (1988). See also id. at 342 (Sen. Packwood). Senator Helms noted that the Department of Health, Education, and Welfare (HEW) "in the mid-1970's promulgated and began attempting to enforce regulations which as interpreted by the Department imposed institution-wide coverage." Id. at 4235. In debating an earlier version of the legislation, Representative Panetta (a former HEW official with responsibility for enforcing Title VI) explained:

> The regulations which we used to implement and enforce title VI were incontrovertibly clear in their broad application of the statute not only to particular programs, but to all practices and programs in an institution seeking Federal aid. * * * However, in its recent decision in Grove City College against Bell, the Supreme Court saw fit to ignore clear congressional intent as well as the precedent set by previous regulations and court rulings.

130 Cong. Rec. 18,837 (1984). Similarly, Representative Fish explained that Grove City "read the term 'program or activity' in a very narrow manner. This interpretation was contrary to the implementing regulations * * *." Id. at 18,516; accord id. at 18,534 (Rep. Fauntroy) (Grove City "is in direct contradiction to previous * * * executive branch regulations").

During the debates, members of Congress emphasized that the legislation would expand the coverage of the regulations — including the discriminatory effects regulations — beyond the "program specific" limitation imposed by Grove City. Senator Hatch explained that the legislation provided "expanded coverage" of "agency disparate impact regulations implementing Title VI." 134 Cong. Rec. 4257 (1988); accord id. at 4231, 4252, 4259 (Sen. Hatch). A member of the House observed that the legislation would bring about an "extension of the effects test." Id. at 4784 (Rep. Boulter); see also id. at 4767 (Rep. McEwen); id. at 4246 (Sen. Symms). Senator Thurmond explained that "[i]t is no secret that in moving from program-specific to institution-wide coverage, as [the bill] proposes, regulations will gain broader application." Id. at 249.[1/]

Congress as a whole undoubtedly shared this understanding of the legislation's effect. Among the examples provided in the

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[1/] Accord id. at 344 (Sen. Hatch) (bill "expands the scope of title IX and thereby expands the scope of the existing regulations"); S. Rep. No. 64, supra, at 37 (minority views) (bill "would impose [a Title IX] regulation more broadly"); 130 Cong. Rec. 18,535 (1984) (Rep. Ford) (legislation would restore the previous administrations' interpretation of the regulations).

Senate Report of pending administrative cases that were not being addressed on the merits because of Grove City, but for which the Act would restore coverage, was a case involving the discriminatory effects of certain educational practices. See S. Rep. No. 64, supra, at 13. Moreover, when Congress enacted the Restoration Act it was well aware of the Title VI effects regulations, which the Supreme Court had already held valid in Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983). See, e.g., H.R. Rep. No. 829, Pt. 1, supra, at 24 (discussing Guardians). Senator Kennedy, a primary sponsor of the legislation, explained that "title VI regulations use an effect standard to determine violations and that the Federal courts have upheld the use of an effect standard." 134 Cong. Rec. 229 (1988). See also 130 Cong. Rec. 27,935 (1984) (Sen. Kennedy) (judicial decisions approving discriminatory effects regulations "will remain in effect after enactment of this bill").

The executive branch expressed the same understanding of the legislation to Congress. The Department of Justice explained that the proposed Restoration Act would provide "expanded federal jurisdiction" over claims arising "under Federal regulations which forbid conduct [that] falls with a disproportionate impact on particular groups." 134 Cong. Rec. 4237-4238 (1988) (quoting Department letter). A memorandum from the Office of Management and Budget submitted during the congressional hearings explained that as a result of the proposed legislation, regulatory "standards such as the 'effects test' would become applicable to all of a recipient's programs and activities, not just those receiving

Federal funds." Civil Rights Act of 1984: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 529 (1984).

During numerous congressional hearings, witnesses repeatedly emphasized that the proposed legislation would expand coverage of the discriminatory effects regulations beyond the "program specific" limitation imposed by Grove City. Harvard law professor Charles Fried, for example, explained:

> What this would do would be to put under an effects-test type of regulation all sorts of activities which are not presently covered. * * * By sweeping aside the programs specificity language of the present Title VI, the [C]ongress would be subjecting every single state and local government activity to * * * expanded antidiscrimination scrutiny under an effects test.

Civil Rights Act of 1984: Hearing Before the Senate Comm. on Labor & Human Resources, Pt. 2, 98th Cong., 2d Sess. 28, 35 (1984); see also Civil Rights Restoration Act of 1987: Hearings Before the Senate Comm. on Labor & Human Resources, 100th Cong., 1st Sess. 640-641 (1987) (Prof. John Garvey) (bill would expand coverage of "regulations forbidding disparate effects on protected groups").

The legislative history further indicates that Congress intended that the Restoration Act's definition of "program" would take effect immediately, by its own force, and would apply to the Title VI regulations and to pending administrative proceedings without the need for federal agencies to amend their existing regulations. The Senate Report explained that the Restoration Act "requires no new regulations." S. Rep. No. 64, supra, at 32. See also id. at 11 ("other cases" currently at the administrative level

were "still * * * in jeopardy" but would be saved by the Restoration Act).

It defies logic to believe that Congress, in enacting the Restoration Act, intended to await federal agency adoption of new implementing regulations before the statutory definition of "program" could take effect. Congress enacted the Restoration Act over the veto of President Reagan, 102 Stat. 32, whom proponents of the legislation viewed as hostile to the goals of the legislation.[2/] Indeed, the Restoration Act was designed to overturn a narrow interpretation of "program" pressed by the Reagan administration in the Grove City case — an interpretation that proponents of the legislation viewed as a sharp break with the position of earlier administrations. See 134 Cong. Rec. 121 (1988) (Sen. Packwood) ("For almost 20 years prior to the Grove City case most people assumed that program or activity meant an institutionwide effect. * * * However, the Reagan administration's Justice Department argued that program or activity * * * meant just the program or activity that actually received the money. That is the first time that argument had been made."). Accord id. at 106 (Sen. Weicker); id. at 4777 (Rep. Ackerman); id. at 2958 (Rep. Ford); see also

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[2/] See, e.g., 134 Cong. Rec. 340 (1988) (Sen. Weicker) ("[T]his Justice Department[] has been opposed to the Civil Rights Restoration Act since the matter was first raised. * * * So, clearly, this administration * * * is going to do everything it can to impede the progress of the Civil Rights Restoration Act or, indeed, if it does progress, to so shape it to the inclinations of this Justice Department and this administration."); id. at 4225 (Sen. Kennedy) ("[I]t is important to remember that, for the past 4 years, this administration has vigorously opposed any meaningful reversal of the Grove City decision.").

Grove City, 465 U.S. at 562 n.10 (noting change in administration's position). Given this context in which the Restoration Act was enacted and the specific statements in the legislative history, Congress could not have intended the statute's broad definition of "program" to remain dormant until the administration promulgated new regulations.

This legislative history shows that Congress intended to restore what it understood to be the institution-wide coverage of the Title VI regulations that had prevailed for years prior to Grove City. It is immaterial whether this Court believes that Congress properly interpreted the language of the regulations as providing institution-wide coverage. Whether Congress's understanding of the regulations' meaning "was in some ultimate sense incorrect is not what is important in determining the legislative intent." Brown v. GSA, 425 U.S. 820, 828 (1976). In determining congressional intent in enacting the Restoration Act, "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was." Ibid.

B. Agencies' Post-Restoration Act Interpretation Of The Title VI Regulations

Consistent with that congressional intent, federal agencies have interpreted the coverage of the Title VI regulations, including the discriminatory effects regulations, to reach those programs that fall within the broad statutory definition of "program." See 42 U.S.C. 2000d-4a. HHS, for example, has issued "letters of findings" applying the Restoration Act's definition of

"program" in cases alleging violations of the discriminatory effects regulations. (Examples of such letters are reproduced in the addendum to this brief.) The Civil Rights Division of the Department of Justice, which has responsibility for coordinating executive branch enforcement of Title VI, has emphasized that the Restoration Act was designed to restore "the broad interpretation of coverage" reflected in the "original regulations implementing Title VI"; thus, federal agencies "should consistently apply the Act's definition to all of the activities of a recipient," and "should review their own compliance programs to ensure that decisions regarding jurisdiction currently reflect the Restoration Act's definition of program or activity." 9 Civil Rights Forum No. 1, at 3 (Spring 1995) (excerpts in addendum). The Division has taken the same position in various documents that provide policy guidance to agencies in enforcing Title VI.[3/]

Given Congress's clear intent in enacting the Restoration Act, it would be unreasonable for federal agencies to adopt any other interpretation of their Title VI regulations. Administrative agencies may not, by regulation or otherwise, unreasonably narrow the broad coverage mandated by Congress. See Office Employees Int'l Union Local No. 11 v. NLRB, 353 U.S. 313, 319-320 (1957) ("We do not, therefore, believe that it was within the Board's discretion to remove unions as employers from the coverage of the

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[3/] See Memo. from Acting AAG, Civil Rights Div., "Enforcement of Title VI of the Civil Rights Act of 1964 and Related Statutes in Block Grant-Type Programs" 5 (Jan. 28, 1999); Dep't of Justice, Title VI Investigation Procedures Manual 30 (1998); id. App., Tab 28, at 3-4. Excerpts of these documents are in the addendum.

Act after Congress had specifically included them therein. * * * To do so would but grant to the Board the congressional power of repeal."). The "agency power to make rules that affect substantial individual rights and obligations carries with it the responsibility * * * to remain consistent with the governing legislation * * *." Morton v. Ruiz, 415 U.S. 199, 232 (1974) (emphasis added). Consequently, when an administrative agency promulgates a regulation to interpret a statute, but then Congress subsequently amends that statute, the amended statutory provisions automatically supersede any inconsistencies in the regulation. Zarr v. Barlow, 800 F.2d 1484, 1488-1491 (9th Cir. 1986); Ann Jackson Family Found. v. Commissioner, 15 F.3d 917, 920-922 (9th Cir. 1994); Horner v. Acosta, 803 F.2d 687, 695 (Fed. Cir. 1986); Horner v. Jeffrey, 823 F.2d 1521, 1530-1531 (Fed. Cir. 1987).

II. THE PANEL ERRED IN HOLDING THAT THE NCAA HAD NOT BEEN CEDED CONTROLLING AUTHORITY OVER THE INTERCOLLEGIATE ATHLETIC PROGRAMS OF ITS MEMBERS

As we explained in our amicus brief at the panel level, 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 themselves directly receive federal financial assistance.[4/] Although the panel assumed that an entity might be subject to liability under a "controlling authority" theory under some circumstances, Cureton, slip op. 20, it nonetheless concluded, on this record, that the NCAA did not

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[4/] The United States relied on the same theory in NCAA v. Smith, 119 S. Ct. 924 (1999), in arguing that the NCAA could be subject to Title IX.

have controlling authority over the athletic programs of its member universities. That conclusion was erroneous. As Judge McKee stated in his partial dissent, id. at 26-33, the record contains sufficient evidence to allow a factfinder to reasonably conclude "that the member institutions have ceded control over their intercollegiate programs to the NCAA." Id. at 33.

Because of the NCAA's unique role in intercollegiate athletics, the panel's holding will inevitably thwart Title VI's central purposes — "to avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices." Cannon v. University of Chicago, 441 U.S. 677, 704 (1979). 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." Cureton v. NCAA, 37 F. Supp. 2d 687, 695 (E.D. Pa. 1999). Out of the necessity for a supervising authority comes the NCAA's power to establish the rules governing eligibility for intercollegiate athletics at member schools. See 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 withdrew from the NCAA in order to 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 also deprive innocent third parties of intercollegiate athletic opportunities. Those harsh consequences may be avoided if victims of the NCAA's discrimination may seek relief against the NCAA directly.

Finally, because of the NCAA's unique power, 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.

CONCLUSION

The petitions for rehearing and rehearing en banc should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2000, two copies of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES' PETITIONS FOR REHEARING AND REHEARING EN BANC were served by Federal Express, next business-day delivery, on each of the following counsel of record:

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