No. 07-59

In The Supreme Court of the United States

KAREN JO BARROW,

Petitioner,

v.

GREENVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY

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PETITIONER'S REPLY TO RESPONDENT'S STATEMENT OF CASE

Respondent admits that Superintendent Smith "did not *recommend* Barrow for the job because her children went to private school," Respondent's Brief at 1 (emphasis added) and that "Barrow had 'no future' at GISD as long as her children did not attend GISD schools." *Id.* Respondent also admits that Barrow's suit was based on Superintendent Smith "refusing to consider, interview, or recommend her to the GISD Board of Trustees unless she enrolled her children in public school." *Id.* at 2.

Despite these clear admissions that the action of Superintendent under review was his refusal to "recommend" Barrow for the job "because her children went to private school," and in an attempt to avoid the clear conflict among the circuits, Respondent spends the vast majority of its Brief arguing that the GISD Board maintained the right to "make all final decisions with respect to the selection of personnel." *Id.* at 5. Clearly, they did not. They did not review, nor did they have the authority under Texas law to review – at all – the Superintendent's decision to *refuse* an applicant the "recommendation." App. 6.

Under Texas law, if an applicant wants to pursue employment with the school district, the applicant must first be interviewed by the Superintendent. Then the Superintendent makes a final decision regarding whom to recommend. *See* App. 6; Tex. Educ. Code § 11.163(a)-(b). Finally, the Board of Trustees votes on that recommended applicant – up or down. *See id.* The Board **cannot** vote to approve some other applicant who was not "recommended" by the Superintendent. *See id.* In addition, the Superintendent does not present a slate of applicants. Only one applicant is recommended. If the Superintendent refuses to recommend an applicant to the Board, that applicant cannot be considered by the Board. And because, as the Fifth Circuit stated, this sole authority to recommend comes from the Texas legislature, not the Board of Trustees, the Board is powerless to override the Superintendent's denial of a recommendation even if the applicant files a grievance with

the board. Thus, Respondent's argument that the "board retained 'meaningful review' [to] make all final decisions with respect to selection of personnel," *id.* at 5, is untenable and is merely a desolate attempt to obfuscate the conflict among the circuits.

The Texas Education Code delegates the sole, final and unreviewable discretion to school Superintendents to **deny** a job recommendation, and, under Texas law, school boards lack any authority to review those decisions. *See* Tex. Educ. Code §§ 11.163(a)(1), 11.201(a), and 11.201(d); App. 1-2. It matters not that the board may review a recommendation that **is** made. Barrow's quest for the job ended when Superintendent Smith **denied** her the "recommendation," and Texas law does not provide for any review of that decision.

The Fifth Circuit clearly held that because the school board retains the power under Texas law to enact policies to restrict discrimination by the Superintendent, even if the power is never used, the board is in general the policymaker for the district. This is consistent with the Fourth Circuit approach criticized by Judge Luttig and at odds with the Third, Sixth, Tenth and Eleventh Circuits.

PETITIONER'S RESPONSE TO RESPONDENT'S REASONS FOR DENYING THE PETITION

Respondent's arguments for denying the Petition are based on the erroneous premise that the Texas Education Code grants school boards the right to review decisions of school Superintendents *denying* applicants the "recommendation." That is simply not true.

There are very clear distinctions among the approaches of the Third, Fourth, Fifth, Sixth, Tenth and Eleventh Circuits as outlined in the Petition. In sum, the Fourth and Fifth Circuit's hold that if a government official's decision may be prescriptively constrained by the policy of a board or other official, whether or not any policy to constrain the discrimination is actually implemented prior to the act of the official, such theoretical power is enough to hold that the government official is not the final

policymaker. *See* App. 7; *Riddick v. School Bd.*, 238 F.3d 518, 527 (4th Cir. 2000) (Luttig, J., dissenting) ("the majority mistakenly concludes that a statutorily designated policymaker who retains but pro forma final review authority, is, and can be, the only final policymaker for purposes of municipal liability under section 1983").

In the Fifth and Fourth Circuits, no actual review of the decision is required to avoid § 1983 liability and the Fifth Circuit so stated very explicitly. App. 8-9 n. 17 ("a person is not a policymaker when he makes a decision simply because that decision is unreviewable"). The Third and Sixth Circuits hold that a government official's act binds the governmental entity, i.e. the government official is a policymaker, when the official's act is "unreviewable."[1] The Tenth and Eleventh Circuits require not only reviewability, but "meaningful review" to avoid liability.[2]

Respondent's arguments avoid addressing this conflict and instead retreat to Respondent's erroneous position that the Texas Education Code provides for "review" of a school Superintendent's denial of the "recommendation" because "the school board itself reviewed a recommendation, so it was clearly meaningful and not merely hypothetical." Respondent's Brief at 13. This misses the mark. The board did review a recommendation of another applicant, but the board did not and could not review the denial of the recommendation to Ms. Barrow.

Respondent actually makes the case for granting review on pages 14 and 15 of its brief. Respondent states:

> The GISD's board had meaningful review because they had the power to reject what was merely a recommendation; had the GISD timely known that patronage was being considered to make the recommendations, it could have rejected the

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[1] *Kneipp v. Tedder*, 95 F.3d 1199, 1213 (3rd Cir. 1996); *Waters v. City of Morristown*, 242 F.3d 353, 362 (6th Cir. 2001).

[2] *Randle v. City of Aurora*, 69 F.3d 441, 448-49 (10th Cir. 1995); *Holloman v. Harland*, 370 F.3d 1252, 1292 (11th Cir. 2004).

> Superintendent's practice and reprimanded him, and then directed him to bring forth recommendations without patronage considerations.

Respondent's Brief, pp. 14-15. Respondent, however, did not do this when Ms. Barrow filed her charge with EEOC, when she filed suit, or even to this day. That is the point of conflict. The Fifth and Fourth Circuits hold that the theoretical power to proscribe conduct in the future, even if the power is never used, is enough to hold that the official is not a final policymaker.

Such theoretical power, when it is not exercised in a case, is consistent with the Tenth's holding that "our decisions also underscore that any review procedure or constraints must be *meaningful* – as opposed to merely hypothetical – in order to strip an official of 'final policy-making' authority" (emphasis in original)[3] and that "[f]or all intents and purposes the Chief's discipline decisions are final, and any meaningful administrative review [by the City Council or City Manager] is illusory."[4] And, equally conflicting, the Eleventh Circuit's application of the "meaningful review" standard in *Holloman v. Harland*, 370 F.3d 1252, 1293 (11th Cir. 2004) ("While the student handbook set out an [sic] formal multi-step appellate process that was theoretically available on paper, Holloman could not, as a practical matter, take advantage of it.") is unexplained by Respondent.

Nor does Respondent even attempt to explain how the Fifth and Fourth Circuits are consistent with the approach in the Sixth Circuit which holds that "[t]he authority to exercise discretion while performing particular functions does not make a municipal employee a final policymaker *unless the official's decisions are final and unreviewable and are not constrained by the official policies of superior officials*." *Waters v. City of Morristown*, 242 F.3d 353, 362 (6th Cir. 2001) (emphasis added). In this case the Fifth

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[3] *Randle*, 69 F.3d 441, 449 (10th Cir. 1995).

[4] *Flanagan v. Munger*, 890 F.2d 1557, 1569 (10th Cir. 1989).

Circuit said "a person is not a policymaker when he makes a decision simply because that decision is unreviewable." App. 8-9 n. 17. Dr. Smith's decision to deny the recommendation to Ms. Barrow was unreviewable as a matter of law. His decision was not actually restrained by any policy on the issue of private school choice. At best, Respondent could have enacted a policy to proscribe such discrimination based upon private school choice in the future. Respondent even failed to do that. Under Respondent's approach, a superintendent could deny every African-American candidate a recommendation. The school district, as long as it had the theoretical power to act, even if it refused to do so, would remain unaccountable.[5]

CONCLUSION

The conflicting approaches and standards used by the circuits to determine when a decision by a public official is a decision of the municipality so that § 1983 liability attaches cannot be ignored. The federal circuits are using different criteria to determine culpability in this important area of the law. The Petitioner's Petition should be granted in order to resolve the conflict and apply the rule of law in a consistent manner.

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[5] GISD suggests in its Response that Barrow's recovery against Dr. Smith in his individual capacity is a full recovery. This is not true. First, Barrow's recovery against Dr. Smith is currently pending on appeal to the Fifth Circuit. Second, there remains an additional independent recovery for Barrow against GISD. Finally, because the court did not allow Ms. Barrow to proceed against GISD on this issue, costs – $14,492.65 – were assessed against Ms. Barrow, a public school employee. App. 13.

Respectfully submitted,

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