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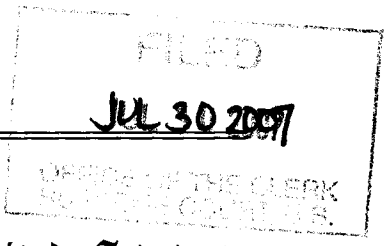

In The
Supreme Court of the United States

KAREN JO BARROW,

Petitioner,

v.

GREENVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.,

Respondent.

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

RESPONDENT GREENVILLE INDEPENDENT SCHOOL DISTRICT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state law that designates the Superintendent as the sole authority to *make recommendations* for personnel employment to the school board of trustees, which also grants the board of trustees the right to accept or reject the Superintendent's recommendations, makes the Superintendent a policymaker under 42 U.S.C. § 1983.

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BRIEF FOR RESPONDENT GREENVILLE INDEPENDENT SCHOOL DISTRICT IN OPPOSITION

STATEMENT OF THE CASE

In July of 1998, Petitioner Karen Jo Barrow ("Barrow" or "Petitioner") was employed as a teacher with the Greenville Independent School District ("GISD"). (Pet. App. 2).[1] At that time, GISD had an assistant principal vacancy at the Greenville Middle School. Contrary to the Petition for writ of certiorari ("Petition"), Barrow never applied for the position of assistant principal, but her name was raised by the Superintendent's Council as a possible candidate for consideration for the position. (Pet. App. 2). Even though Barrow had not applied, a senior school official asked Barrow if she would consider transferring her children from private school to the GISD, and she declined. (Pet. App. 2).

Nonetheless, Barrow's name was placed in a pool of applicants. (Pet. App. 2). Following a meeting of the Superintendent's Council, the Assistant Superintendent, at Superintendent Smith's ("Superintendent") direction, spoke with Barrow and confirmed her children attended private school. He asked her if she would consider transferring her children to the GISD; Barrow declined. (Pet. App. 2). After another candidate was selected, the Superintendent told Barrow and her husband that he did not recommend Barrow for the job because her children went to private school; he also stated that Barrow had "no

[1] Petitioner's Appendix 1-11 is *Barrow v. Greenville Indep. Sch. Dist.*, 332 F.3d 844 (5th Cir. 2003), and is referred to herein either using the Appendix or the name "*Barrow*."

future" at GISD as long as her children did not attend GISD schools.[2] (Pet. App. 2). The candidate the GISD board selected to fill the assistant principal vacancy also did not send her child to GISD or another public school. (Pet. App. 120-121).

Barrow filed suit against GISD and the Superintendent alleging, *inter alia*, that the Superintendent violated Barrow's constitutional rights by refusing to consider, interview, or recommend her to the GISD Board of Trustees unless she enrolled her children in public school. (Pet. App. 88-89). GISD moved for summary judgment, which the District Court granted in-part and denied in-part, holding in relevant part that the Superintendent was not a policymaker for § 1983. (Pet. App. 3).

The remaining claims against GISD and the Superintendent were tried to a jury, which found against the Superintendent and for the GISD. (Pet. App. 3). The Superintendent was ordered to pay Barrow about $35,000 in damages and $650,000 in fees and costs. (Pet. App. 3-4). Barrow appealed the District Court's granting of summary judgment that the Superintendent was not a "policymaker," as well as, her disparate impact claim. (Pet. App. 4). The Fifth Circuit affirmed the District Court's grant of summary judgment to GISD on Barrow's § 1983 claim for which Barrow now petitions this Court for writ of certiorari. (Pet. App. 9).

Petitioner Barrow makes several misstatements of fact in her Petition. The Superintendent did not tell the

[2] The Fifth Circuit recognized that "GISD disputes many of these facts, but on a motion for summary judgment we resolve disputed facts in favor of the non-moving party, here Barrow." (Pet. App. 2, n. 1).

selected candidate that "the only reason Barrow was not recommended was where she chose to educate her children"; Petitioner fails to even cite to the record where this alleged statement was made. (Pet. 4). Contrary to the misleading nature of the Petition, the only claim Barrow asserted was that she was not considered for the assistant principal vacancy because she sent her children to *private school* as opposed to public school. There was no evidence that religion or the "religious" nature of the private school was considered or related to anyone's actions. (Pet. 3; Pet. App. 2). Every court along with the jury found that the issue involved public versus private school, and that religion was not a factor or even a consideration in this situation. (Pet. App. 3; 10; 16; 17; 20).

In the response to the Equal Opportunity Commission ("EEOC"), the GISD stated that the Board's policy for hiring personnel applied objective criteria that did not include where candidates educate their children (Pet. App. 119); stated Barrow was not selected because it considered applicants first and an applicant was selected (Pet. App. 120); and that many administrators, including the selected candidate, educated their children in non-public schools (Pet. App. 120-121; *see also* 108).

Barrow further mischaracterizes the facts and misleads the Court when she states "Smith violated Barrow's constitutional rights by refusing to recommend her for the promotion position solely because she chose private, religious education for her children." (Pet. 4; Pet. App. 88-89). The Fifth Circuit even found that there "is strong suggestion here that, to the extent there was a Board policy, it opposed patronage," noting that a patronage policy was rejected by the school board, and that the GISD

board had general anti-discrimination policies. (Pet. App. 8, n. 16).

Barrow misstates the facts and state law when she claims that:

> [D]espite the fact that under Texas State law Smith, as the Superintendent, was delegated the sole, final and unreviewable discretion to deny a recommendation to a job applicant seeking a promotion, and once his decision is made, the GISD school board lacks any authority to reverse the decision or influence Smith's recommendation in any way.

(Pet. 5). Moreover, contrary to Barrow's claim, the Fifth Circuit did not hold that "a final decisionmaker is not a final policymaker even if his decision is not contrary to any other existing policy and his decision is unreviewable," and it is unclear where Barrow cites to make such an accusation. (Pet. at 5). These misstatements of fact and misapplications of law are addressed more completely in GISD's Reasons for Denying the Petition.

REASONS FOR DENYING THE PETITION

1. Texas law designates the Superintendent as the sole authority to *make recommendations* for personnel employment to the school board and grants the school board the right to accept or reject the Superintendent's recommendations, leaving the school board the sole policymaker under 42 U.S.C. § 1983.

Petitioner Barrow's premise that a Superintendent's recommendation is without meaningful review and that

the Superintendent is a final authorized decisionmaker under state law is **faulty** and flatly wrong. Under Texas law the superintendent has:

> [S]ole authority to make recommendations to the board regarding the selection of all personnel . . . except that the board may delegate final authority for those decisions to the superintendent . . . [t]he board of trustees may accept or reject the superintendent's recommendation regarding the selection of district personnel. If the board rejects the superintendent's recommendation, the superintendent shall make alternative recommendations until the board accepts a recommendation.

Tex. Educ. Code § 11.163(a)-(b) (Vernon 1995). (Pet. App. 6).[3] The GISD board retained "meaningful review" when it maintained the right to make all final decisions with respect to selection of personnel. The Fifth Circuit correctly held that selecting who will be *recommended* is not a final policymaking decision, as the board of trustees retained the right to reject the recommendation.

In this circumstance, the GISD board undeniably intended to retain policymaking authority with regard to the selection of personnel and not delegate it to the Superintendent. GISD did not delegate "final authority for those decisions to the superintendent," as permitted by Texas law. *See* Tex. Educ. Code § 11.163(a)(1) (Vernon 1995). A recommendation is nothing more than a professional suggestion – the school board retained full authority to

[3] Barrow does not claim that GISD delegated final authority for selecting personnel; she claims only that the recommendation itself was solely vested in the superintendent's discretion.

reject the Superintendent's recommendation and make the final decision.

At all times the GISD board retained the right to review and reject the Superintendent's recommendation for any reason, including a misapplication of the board's policies for selection of personnel had such an issue been timely raised. Barrow had the right to raise such an issue through the local grievance policy if she had chosen to do so. *See* Tex. Gov't Code § 617.005 (Vernon 1993).[4] The GISD board retained the right to reject the recommendation and could have even fired the Superintendent. (Pet. App. 6).

2. *Monell* was correctly applied by the Fifth Circuit.

The Fifth Circuit's decision does not conflict with other Circuits, and the only way Petitioner Barrow draws such a conclusion is by misapplying *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978). Barrow cites to *Monell* claiming that the Fifth Circuit limited governmental liability, and that in particular, the GISD can never be held liable for the Superintendent's "acts and edicts" because the Fifth Circuit found he is not a policymaker. Barrow fails to acknowledge that while the District Court and the Fifth Circuit found the Superintendent was not a policymaker, the District Court did not dismiss, and there was a jury trial to determine whether or not the

[4] "This chapter does not impair the right of public employees to present grievances concerning their wages, hours of employment, or conditions of work either individually or through a representative that does not claim the right to strike."

GISD had a *custom or practice* of discriminating against persons based upon where their children attended school. The Superintendent himself stood trial for liability for his actions. (Pet. App. 96-98).

Barrow wants to read and to analyze *Monell* in a vacuum by focusing solely on the policymaker provision to claim that the Fifth Circuit abrogated Barrow's opportunity to hold GISD liable by finding that the Superintendent was not a policymaker. (Pet. App. 7-8). Barrow claims that the Fifth Circuit's approach will "discourage representative democracy" and give elected officials the "incentive to delegate decisions to bureaucrats and never adopt policies constraining them in any way." (Pet. 6). Quite the opposite is the effect of the Fifth Circuit's application of *Monell* and *Praprotnick.*[5] If a party can show that the school board has attempted to insulate itself from liability from constitutional violations, then liability may lie with the school district if a widespread practice exists. *Praprotnick*, 485 U.S. at 127. The District Court permitted Barrow the opportunity to hold the governmental entity liable for a custom or widespread practice, but the evidence at trial was overwhelming that it was neither GISD's custom nor practice to discriminate based upon where an employee or candidate for employment enrolled his or her children for school. (Pet. App. 3; 6-7 n. 14; 96-97).

[5] *City of St. Louis v. Praprotnick*, 485 U.S. 112 (1988).

3. There is no split among the Circuits in applying *Praprotnick* or *Jett*.[6]

Barrow states that the "question in this case is whether an official is a final policymaker on a particular issue if his or her decision on a particular issue is unreviewable or not subject to meaningful review and does not conflict with any other existing policy." (Pet. App. 8). Such a question is not present and does not arise here because the Superintendent's decision was reviewable and his decision conflicted with the GISD board's employment policies, customs and practices.[7] A *recommendation* is not a *decision*; it has no force and effect. Looking at the Petition's analogy makes it easy to recognize that having the sole authority to make a *recommendation* cannot and should not create liability (it also exemplifies why Petitioner Barrow's argument of no liability is completely flawed):

> Presume a superintendent decided he would never recommend an African American for the position of principal. The school board would review the superintendent's recommendation, and if the school board felt a particular candidate (that happened to be African American) was the best candidate for the position, the board could reject every recommendation by the superintendent until the desired candidate was recommended. Moreover, if it was a custom or practice of the superintendent to never recommend an African American for the position, that

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[6] *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989).

[7] The GISD board did not choose to delegate such authority as permitted under Texas Education Code § 11.163(a)(1).

> would become a custom or practice imputed on the school district, and the school district would be liable under § 1983.
>
> However, to impose liability on a school district based upon a solitary *recommendation* goes too far. Presume that a school board rejects the superintendent's initial recommendation because they wanted the African American candidate, and the school board eventually selects and hires the African American candidate. Will the school district still be liable because the superintendent initially did not recommend the African American candidate? If the superintendent is a policymaker, then every time he makes a *recommendation* the school district would be liable, even though the school board rejected the recommendation and the final decision was to hire the African American candidate. That is why *Monell* and *Jett* limit § 1983 liability to policymakers – because a school district should not be held liable for a *recommendation* – the school district should only be liable when the recommendation is the result of an unconstitutional custom or practice of discrimination.

Barrow speciously wordsmiths the Superintendent's "recommendation" as a "*denial* of the recommendation," thereby claiming it was unreviewable. (Pet. 10). Barrow states "GISD does not dispute that Smith's *denial* of the recommendation to Barrow was not subject to review by the GISD Board of Trustees, or anyone else, and the Fifth Circuit so held." (Pet. 10, citing Pet. App. 6) (emphasis in original). GISD does dispute such a claim, and the Fifth Circuit never said anything of the sort. While the Superintendent was free to make any recommendation he chose, the Board was free to reject it, and Petitioner Barrow was

free to grieve it, which she failed to do. Barrow's conclusion that "the Board of Trustees is prohibited from interfering with or directing the Superintendent regarding the decision of who to recommend" is without citation and authority. (Pet. 10). In fact, Texas law grants school boards the authority to create employment policies. Tex. Educ. Code §§ 11.163, 11.202(c), 11.151(b), (d) (Vernon 1995). The school board specifically rejected a proposed patronage policy, placing the Superintendent on notice that the school board would not consider such a factor in personnel employment. (Pet. App. 8).

Barrow mischaracterizes and disingenuously misleads the Court when she declares that:

> GISD took the position before the EEOC that [Superintendent] Smith's discrimination against Barrow's choice of education for her children did not violate school district policy and indeed it was GISD's policy concerning the "needs of the district" that led Smith to use Barrow's educational choices for her children as a motivating factor regarding refusing her the "recommendation."

(Pet. 10, citing App. 119). What the GISD's EEOC response actually said was that under the GISD's Policy "a host of issues may be considered . . . including education, training, certification, experience, recommendations and references, suitability for the position and professional competence, *and the needs of the District*." (Pet. App. 119) (emphasis added). The GISD's EEOC response goes on to discuss what Superintendent Smith thought . . . *not what the board thought* . . . and that patronage "would not be a controlling consideration." *Id.* This is a far cry from Barrow's dramatic claim that GISD took the position before

the EEOC that the Superintendent's act was in compliance with GISD's policy.

Without explanation why, Barrow concludes that in the "Third, Sixth, Tenth, and Eleventh Circuits Barrow's claim against GISD would succeed." (Pet. 11). The only cases Barrow's Petition mentioned from those respected Circuits are either wholly distinguishable or consistent with the Fifth Circuit; none of the decisions are contrary.

Kneipp v. Tedder, 95 F.3d 1199 (3rd Cir. 1996), was a state-created danger case, where the police left an inebriated man alone near an embankment (which he fell off), and the Third Circuit found that the District Court must consider whether such a police decision created liability due to the training for handling intoxicated persons. *Id.* at 1213. The Court did not find the officers were policymakers, and in fact examined the custom and policy, and said the individuals would stand trial (as the District Court did in *Barrow*). *Kneipp*, 95 F.3d at 1213-1214.

Even more consistent with the Fifth Circuit's decision is the additional Third Circuit case Barrow cites, *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3rd Cir. 1990). *Andrews* held that:

> When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with *their* policies.

Id. at 1481 (emphasis in original). The GISD had anti-discrimination personnel policies (Pet. App. 8, n. 16), and GISD reviewed the Superintendent's recommendation. Had Petitioner Barrow timely raised the issue at the time the alleged injury arose and claimed an unlawful practice, or even filed a grievance, the GISD board might have rejected the recommendation.

The Sixth Circuit's decision in *Waters v. City of Morristown*, 242 F.3d 353 (6th Cir. 2001) was completely consistent with the Fifth Circuit's precedent. In *Waters*, the Sixth Circuit noted that a policymaker's decisions must be final and unreviewable and not constrained by the official policies of superior officials. *Id.* at 362. Substituting the facts of this case into the *Waters*' analysis would lead to the same conclusion found by the Fifth Circuit.

After arriving at the baseless conclusion that the Third and Sixth Circuits would have found differently than the Fifth Circuit in *Barrow*, Petitioner Barrow then proclaims that the Fifth Circuit's decision basically gives governmental entities a "get out of jail free" card by encouraging them to never pass policies. (Pet. 14, 15). To begin with, GISD *had policies* (even Petitioner Barrow cited to them in her Petition). (Pet. 10, Pet. App. 119). The *lack* of policies would lead to the opposite conclusion. It is more likely a court would conclude that a school board delegated policymaking authority to subordinates by having *less* policy guidance; customs and practice would give rise to even more liability. To the contrary, the *more* policies a district has, the *less* likely they will have liability, because the policymaker might insulate the district through multitudes of policies and prohibitions or processes.

In *Randle v. City of Aurora*, 69 F.3d 441 (10th Cir. 1995), the Tenth Circuit cited several examples of schools not being liable because the school board was the final policymaker. *Id.* at 448-449. However, unlike in *Barrow*, the City Council in *Randle* did not have evidence in the record suggesting the City Council involved itself in the hiring or promotion decisions affecting the plaintiff. *Id.* at 450. Petitioner Barrow indicates the review must be "meaningful" instead of "hypothetical" – in *Barrow* the school board itself reviewed the recommendation, so it was clearly meaningful and not merely hypothetical.

The second Tenth Circuit case Petitioner Barrow cites is *Flanagan v. Munger*, 890 F.2d 1557 (10th Cir. 1989). *Flanagan* involved a police captain's discipline of his officers and the fact that the City Council and City Manager rarely if ever reviewed his decisions. *Id.* at 1569. In *Flanagan*, there was no established procedure for reviewing the police captain's decisions. *Id. Flanagan* is wholly distinguishable from the matter at bar because the Superintendent in *Barrow* made recommendations; the school board then reviewed and made the decisions. The *Barrow* facts would lead to the same result in the Tenth Circuit. *See Ware v. Unified Sch. Dist.*, 902 F.2d 815, 818 (10th Cir. 1990) ("Delegation does not occur when a subordinate's decisions are constrained by policies not of his making or when those decisions are subject to review by the authorized policymaker").

Finally, Petitioner Barrow cites to *Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004). Barrow misapplies *Holloman*'s "meaningful review" standard to conclude that it would result in a different outcome for the *Barrow* case. *See id.* at 1292. *Holloman* involved a student that was paddled for allegedly disrupting the pledge during

school. Finding that the paddling was a *fait accompli* by the time the school board heard it under its appeal procedures, the Eleventh Circuit found that was not "meaningful review." *Id.* at 1293. This is not analogous because the GISD board was the one that awarded the position of assistant principal, whereas the principal in *Holloman* not only determined the discipline *but carried it out*, and the limited involvement by the school board was well after-the-fact. A fairer reading of *Holloman* would include the language where it states "A member or employee of a governing body is a final policy maker only if his decisions have legal effect without further action by the governing body . . . and if the governing body lacks the power to reverse the member or employee's decision. . . ." *Id.* at 1292, citations omitted. Following that language from *Holloman* one must assume the school board's right to review, reject or accept the Superintendent's recommendation indicates the governing body has such power.

Petitioner Barrow tries to make hay of the fact that the Eleventh Circuit differentiated *Holloman* from *Denno v. School Board*, 218 F.3d 1267, 1277 (11th Cir. 2000), which held that the principal was not a policymaker because there was meaningful review, whereas in *Holloman* the principal was a policymaker because there was no meaningful review. (Pet. 16-17). It is confusing as to how Petitioner Barrow could find this to be favorable to her own argument. Unlike the principal in *Holloman* whose discipline had no meaningful review because the corporal punishment to the student had been inflicted, *Barrow* involved "finality" and "action" only when the GISD board considered the recommendation. 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 Superintendent's practice and reprimanded him, and then directed him to bring forth recommendations without patronage considerations. Prior to that meaningful review, the action complained of – the selection of an assistant principal – had not taken place. Clearly, *Barrow*'s timing and meaningful review is more consistent with the second Eleventh Circuit case Petitioner Barrow cited, *Denno*, 218 F.3d at 1277, where a student's suspension had the opportunity for meaningful review before the action became final – similar to the selection of a new assistant principal to fill the vacancy at Greenville Middle School. *See Holloman*, 370 F.3d at 1293.

Petitioner Barrow cites the above cases, yet never explains why or how they are inconsistent with *Barrow*. She just concludes that there are "remarkable" conflicts and she declares that she would have prevailed in the other Circuits. The Circuits all appear to be consistent, and Petitioner Barrow has not yet cited one among the "literally more than a thousand" cases since 2000 that indicate confusion and the need for further guidance, let alone a case whose analysis where she would have actually prevailed. (Pet. 7).

Lastly, Petitioner Barrow cites to the Fourth Circuit decision in *Riddick v. School Board*, 238 F.3d 528 (4th Cir. 2000), whose ruling was consistent with *Barrow*, claiming that the dissenting opinion by Judge Luttig, if followed, would change the outcome of *Barrow*. (Pet. at 11-12). However, it is more likely that the facts in *Barrow* would have resulted in a unanimous opinion before the Fourth Circuit. The majority in *Riddick* would have still found that the GISD board was the policymaker, as in *Riddick*. Judge Luttig discounted the majority's opinion because he

did not believe they should have limited the term "policy-maker" to the school board when the board retained only "pro forma final review authority" – that is significantly different than the facts here, where the GISD board actually made the final decision. *Id.* at 525-526. In *Riddick,* it was not a school administrator making a recommendation to the school board – Judge Luttig found that the school board had effectively delegated its authority to its subordinates. *Id.* at 527. There is no evidence or even allegation that GISD delegated its authority to select the assistant principal in this case. Moreover, Judge Luttig's main focus in his dissent centered on what he believed to be the "deliberate indifference" by the school board, a factor that was not present in *Barrow.*

Petitioner Barrow tosses around doomsday scenarios right and left, such as without policies "there will be no means under the Fifth Circuit's approach for any person whose rights are violated to seek a judicial remedy." (Pet. at 18-19). Aside from the fact that Petitioner Barrow received a full trial on the issues of "custom and policy," it seems insincere to cry "no remedy" when she was awarded $35,000 in damages plus $650,000 in fees and costs against the Superintendent for the alleged unlawful conduct. Petitioner Barrow dramatically emphasizes over and over again that a *lack of policies* could lead to chaos and anarchy, forgetting that GISD had anti-discrimination. Nothing in the law prohibited Petitioner Barrow from grieving an unlawful practice and the GISD board from considering the grievance on hiring practices, and possibly granting the grievance and directing the superintendent to recommend the most qualified candidate without consideration of where that person's children attended school; compliance with federal law always supersedes state law.

4. Barrow was made whole by the Court's decision against the Superintendent.

Barrow's argument that she was denied some type of right to bring a claim is not simply belied by the fact that she had the opportunity for a trial on the issues of custom and practice against GISD, but she also brought suit against the individual she claimed actually discriminated against her, the Superintendent, where she received a judgment for over $35,000 in compensatory and punitive damages. (Pet. App. 12-13). Even if this Court were to grant the Petition and overrule the Fifth Circuit's decision, *arguendo*, Barrow could not earn *greater* compensatory damages. *See E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002). Moreover, the GISD is immune from punitive damages. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981). Thus, granting the petition for writ of certiorari will have no true effect on the outcome of this case. Barrow was protected from alleged unlawful discrimination in this situation by having the right to bring her claim against the Superintendent himself, the alleged bad actor.

This Court has noted previously that the best § 1983 deterrence against government employees discriminating is not by maintaining liability on the government, but rather the malicious employee:

> By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations. In our view, this provides sufficient protection against the prospect that a public official may commit recurrent constitutional violations by reason of his office. The

> Court previously has found, with respect to such violations, that a damages remedy recoverable against individuals is more effective as a deterrent than the threat of damages against a government employer.

City of Newport, 453 U.S. at 269-270 (citations omitted).

CONCLUSION

Liability under § 1983 is well established by this Court and consistently applied by the various Circuits. Not one Circuit would have ruled differently than the Fifth Circuit in the *Barrow* case based upon the facts and evidence. The people are protected by § 1983 through *Monell* and its progeny because the government is held liable for its policies, customs and practices, the actions of its policymakers, as well as personal liability for unlawful acts by the actors themselves.

For the foregoing reasons, Respondent GISD asks this Court to deny Petitioner's Petition for writ of certiorari.

Respectfully submitted,

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