No. 07-692

In The
Supreme Court of the United States

KEVIN DALE, *et al.*,

Petitioners,

v.

WHITE COUNTY, GEORGIA SCHOOL DISTRICT, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION OF RESPONDENTS WHITE COUNTY, GEORGIA SCHOOL DISTRICT, DONNA ALLEGOOD AND ROGER FITZPATRICK

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QUESTIONS PRESENTED

1. Whether the Court should grant the writ when Petitioners did not brief, raise or argue below the issues for which they now seek review, namely:

   a. Petitioners relied almost exclusively on Eleventh Circuit authority in arguing their claims under Title IX, 20 U.S.C. § 1681(a), and 42 U.S.C. § 1983 in the District Court and the Eleventh Circuit, including the submission of a petition for rehearing en banc;

   b. Petitioners did not at any time question the soundness or applicability of Eleventh Circuit precedent to rule on their deliberate indifference claims under Title IX and section 1983; and

   c. Petitioners did not otherwise argue that Eleventh Circuit precedent used to determine their deliberate indifference claims under Title IX and section 1983 was in conflict with the decisions of this Court or with the precedent of any other circuit.

2. Whether compelling reasons exist for the Court to grant the writ to resolve what Petitioners claim is a conflict among the circuits concerning the formulation of the deliberate indifference standard under Title IX and section 1983 when:

   a. The Eleventh Circuit correctly held that Respondents did not act with deliberate indifference based on the precedent of that circuit and the decisions of this Court;

QUESTIONS PRESENTED – Continued

b. Petitioners ask the Court to apply a formulation of the deliberate indifference standard under Title IX and section 1983 that sounds in negligence and thus is inconsistent with the decisions of this Court; and

c. The ruling of the Eleventh Circuit finding that the Respondents did not act with deliberate indifference under Title IX and section 1983 would be the same under the deliberate indifference standard as it is formulated by any circuit.

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INTRODUCTION

Respondents submit this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.[1] This case presents issues of entity liability under Title IX, 20 U.S.C. § 1681(a), and supervisory liability under 42 U.S.C. § 1983. The Title IX claim is against Respondent White County School District (WCSD) and the section 1983 claim is against Respondents Allegood and Fitzpatrick individually. Because of Respondent Allegood's position as principal and Fitzpatrick's position as assistant principal of the elementary school where the alleged sexual abuse occurred,[2] WCSD's liability under Title IX rests on the same facts that determine Allegood's and Fitzpatrick's personal liability under section 1983. At no point below did Petitioners argue that the "deliberate indifference" standard under Title IX and section 1983 differed in any respect pertinent to this case.

Respondents acknowledge that this Court has jurisdiction over the Petition but believe that the Court should deny the writ for two fundamental reasons. First, Petitioners have never raised in the

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[1] The Brief is timely filed. Respondents were given an extension of time to file this Brief in Opposition until January 25, 2008.

[2] This assumes that Allegood is an "appropriate person" to receive reports under Title IX, as required by this Court's decision in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

courts below the questions for which they now seek review. Second, the Eleventh Circuit correctly ruled that the District Court should have granted Respondents' motion for summary judgment. Under no extant formulation of the "deliberate indifference" standard would Petitioners' evidence authorize a jury to return a verdict against Respondents under either section 1983 or Title IX.

STATEMENT OF THE CASE

Petitioners' portrayal of the proceedings below repackages the case in two principal respects. First, their description of the evidence relating to "deliberate indifference" sanitizes the facts, mainly by omission. A more complete understanding of the *undisputed* evidence tells a different story and explains why the Eleventh Circuit reversed the District Court's denial of Respondents' summary judgment motion. Second, Petitioners ask the Court to treat this case as an "excellent vehicle" for resolving "inter-circuit" conflicts in the law under both Title IX and section 1983. Petition at 10, 29 and 39. Yet they fail to disclose important details about how counsel for Petitioners actually litigated the case below. As will be shown, these details substantially undermine Petitioners' "excellent vehicle" argument.

A. Petitioners' Evidence of Notice and Deliberate Indifference

School officials are an important line of protection against child abuse in Georgia.[3] Since 1965 when Georgia enacted a child abuse reporting statute,[4] school teachers and administrators have been subject to the reporting requirements of the statute[5] and are subject to criminal penalty for failing to report child abuse.[6] They are given immunity from civil liability for making even an erroneous report of child abuse as long as the report is made in good faith.[7] The records the WCSD has retained since 1999 show that the School District has reported 362 cases of possible child abuse. R3-110-Attach. #1-¶ 5.[8] All have involved child abuse inflicted outside the school setting. But for the intervention of school administrators and teachers, these children might not have been protected. No school official in the School District has ever been prosecuted for failure to report child abuse as required under the Georgia mandatory reporting statute. R3-110-Attach. #1-¶ 6. Since 1965, the WCSD

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[3] Unlike law enforcement and prison officials, they are not in an adversarial relationship with the children in their charge.

[4] O.C.G.A. § 19-7-5.

[5] O.C.G.A. § 19-7-5(c)(1).

[6] O.C.G.A. § 19-7-5(h) (misdemeanor violation).

[7] O.C.G.A. § 19-7-5(f).

[8] Citations to "R" are to the record on appeal in the Eleventh Circuit. Citations to "App." are to Respondents' Appendix to this Brief. And citations to "Pet. App." are to Petitioners' Appendix.

has had only two instances in which a school official has been accused of sexual misconduct involving a student. Both cases were investigated by the Professional Standards Commission (PSC)[9] and could not be substantiated. R3-110-Attach. #1-¶ 4. This history stands unchallenged by Petitioners.

White County, Georgia is a small county located in the northeast part of the state.[10] Two elementary schools serve the entire county. Respondents Allegood and Fitzpatrick are both veteran public school teachers and administrators. Allegood became principal of White County Elementary School in 2000 and opened Mount Yonah Elementary School in 2003. R5-145-10. By that time, she had over thirty years of experience in elementary education as a teacher and administrator. R5-145-10-13, Exh. 42. Fitzpatrick began teaching in White County in 1984 as a middle school teacher and athletic coach. He became assistant principal at White County Elementary School in 1998. R5-154-6-10. Other than the present case, Petitioners introduced no evidence that Allegood or Fitzpatrick had failed to respond appropriately to any allegation of child abuse at any time throughout their long careers.[11] In fact, Wilson was the only teacher

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[9] O.C.G.A. § 20-2-982 *et seq.*

[10] Based on the 2000 census, the population was slightly less than 20,000. *See* http://quickfacts.census.gov/qfd/states/13/13311.html

[11] Unless, that is, one includes as evidence of an "inappropriate" response to allegations of "child abuse" Petitioners'

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with whom Allegood has worked who has been accused of sexually molesting students. R5-145-27.

Respondents did not know about the alleged sexual touching of A.C. and M.D. prior to September 29, 2003, a fact that Petitioners acknowledge. R5-168-86, 179; R5-163-65. Although A.C. and M.D. testified that sexual touching occurred, Respondents do not concede that it did.[12] They made this clear at least three times below.[13] The District Court understood Respondents' position and, for purposes of ruling on

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utterly absurd assertion that Allegood instructed a teacher to speak first to the parents of a second grade student who was masturbating in class rather than immediately report the conduct to DFACS. It is noteworthy, too, that 52 of the 362 reports of child abuse in the WCSD came from Mount Yonah and the school's counselor had 278 contacts with DFACS since 2000. R3-110-Attach. #1-¶ 5.

[12] Respondents contend that there is reason to doubt the allegations for a number of reasons, not the least of which are the nature of the alleged touching and the circumstances in which it presumably occurred – information Petitioners do not provide this Court. A.C. and M.D. allege that Wilson touched their fully clothed breasts and buttocks either in the classroom or while walking in the hall – *always* in the presence of other students, *never* when they were *alone* with him. R5-168-68,193; R5-163-61,64,151,160,167-69,174-77; R5-166-154-55. Yet no students in the class and no students or teachers in the hall ever reported observing this conduct.

[13] Respondents do not understand why Petitioners continue to state otherwise. Petition at 3 ("There is no dispute that the girls were molested by Wilson."). *See* R3-110, Attach. #4, n.3; Brief of Appellants before the Eleventh Circuit, n.3; Reply Brief of Appellants before the Eleventh Circuit, n.2.

their summary judgment motion, *assumed* the allegations of sexual abuse to be true.[14]

In the District Court, Petitioners introduced ten incidents purporting to prove notice and deliberate indifference on the part of Respondents. This evidence, they argued, entitled them to a jury trial on both the Title IX and section 1983 counts. Yet counsel of record before this Court has pared down the Petitioners' original list of "notice" incidents from ten to seven.[15] The omitted incidents seriously undermine the sexual abuse narrative central to Petitioners' "cumulative effect" theory of deliberate indifference.

None of the omitted incidents has anything to do with female students, sexually inappropriate

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[14] Pet. App. at 28.

[15] The three "notice" incidents omitted from Petitioners' discussion here are:

(a) "A teacher was alone with Wilson in his classroom reviewing a lesson plan when Wilson touched her forearm and told her how lucky her husband was. The comment made her uncomfortable."

(b) "The parents of D.C. (who had no knowledge of the other complaints about Wilson) requested that *he* be removed from Wilson's class and had D.C.'s doctor provide a letter to Ms. Allegood asking for his removal because of the headaches D.C. was experiencing in the class." (italics supplied).

(c) "A teacher reported a concern that Wilson was allowing the children in his class to name a mini-society the 'bikini bottom' society." R4-130-3-5.

touching or with sex more generally.[16] Also, none of the incident reporters characterized these incidents at the time as having a sexual component. Nevertheless, Petitioners have repeatedly faulted Respondents for failing to see something that no one else saw. If the logic of Petitioners' "cumulative effect" standard[17] is applied with consistency, Petitioners must take the "bitter with the sweet."[18] When opposing a motion for summary judgment, the non-moving party is entitled to have the evidence in the record viewed in its most favorable light. But this means *all* the evidence in the record; the non-moving party does not get to pick and choose which evidence the court should consider when the non-movant's own evidence contradicts its case. Here as will be seen, the most favorable view that can be taken of the evidence in this record is less favorable to the Petitioners' position than would have

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[16] Despite the sexually suggestive connotation of "bikini bottom," it actually is of benign origin. "Bikini Bottom" is where Sponge Bob Square Pants, a cartoon character popular with third grade school children, lives. Apparently, counsel for Petitioners below were a bit behind the popular culture curve when they put this on their list of ten incidents giving notice of sexually inappropriate conduct on someone's part.

[17] Petitioners quote the District Court approvingly: "The cumulative effect of these complaints *should* have placed Allegood on notice that Wilson was engaging in sexually inappropriate conduct with his students." (emphasis added) (Pet. at 7; Pet. App. at 26). In a closely related setting, this Court has characterized this language as a description of a negligence standard. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642 (1999), discussed *infra* at 24-25.

[18] *Arnett v. Kennedy*, 416 U.S. 134, 154 (1974) (Rehnquist, J.).

been true if they had never introduced it in the first place.

The seven "notice" incidents that Petitioners rely upon here are juxtaposed for discussion in a sequence that artificially suggests a "cumulative" relationship among the incidents over a two-year period. They do not discuss these "notice" incidents in chronological order or place them on a timeline showing the temporal gaps between them, the significant variation in the substance of the reports, the identity of the reporters or the fact that, with one exception to be discussed, not one of the reporters of these seven *at the time* characterized the teacher's actions as having a sexual component.[19] Petitioners here and below employ language such as "crotch" and "stroking" to sensationalize an incident when the reporter did not use the words or subscribe to the connotation at the time.[20] Petitioners' calculated generalizations also

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[19] One first year teacher, Deborah Anderson, reported four of the ten incidents, some that year, others not until she was interviewed by the GBI during its investigation of Petitioners' allegations. She was regularly in Wilson's classroom during the 2001-2002 school year. App. at 2 & 3.

[20] For example, Anderson stated, "I never used the word 'stroking.' It's just not a word I would use. . . . He would play with their hair . . . Just like little girls do. Just playing and rubbing his fingers through their hair." In response to the question, "did that make you uncomfortable?" Anderson said, "No, *not at the time*," only after the "allegations came out." R5-158-46-47 (emphasis added). Similarly, Anderson did not use the word "crotch" when describing to the GBI how the children laid their heads on his outstretched leg as he held a book and read to

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obscure hearsay and competency objections to evidence offered in support of at least three "notice" incidents.[21] Finally, Petitioners assail Respondents for failing to investigate these "notice" incidents, yet they do not tender a shred of evidence showing what a competent investigation of even one of these incidents would have revealed. Without such proof, as will be discussed, Petitioners have no evidence of causation.

Respondents here will discuss only two of Petitioners' seven incidents. Petitioners apparently regard these two as their most compelling. The remaining five incidents are so trivial that the "facts" surrounding them are set forth in a chart in the Respondents' Appendix at 1-4.

The H.C. incident is the centerpiece of Petitioners' deliberate indifference argument. It is also the *only* incident that involved any allegation of "sexually

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them in the presence of his paraprofessional. R5-158-45,118-120, 122. These were two of the incidents Anderson did not report to anyone except the GBI well after the fact.

[21] With respect to J.P. crying in the bathroom, all of the testimony about what allegedly happened is hearsay. The same is true of the unidentified child who went to the school nurse with a scratch. There is no evidence identifying the child, explaining how the child came to be scratched or revealing who, if anyone, asked her not to tell. R5-148-55-56, 87-89. Finally, the witness who testified about how Wilson allegedly leaned over a student did not see it happen. The Good Touch/Bad Touch teacher who actually observed it was not deposed or asked to describe what she saw.

inappropriate" touching. It occurred in November of 2002 and, chronologically, was the last in time of Petitioners' original ten notice incidents, nearly a year before Petitioners' allegations. The Georgia Department of Family and Children Services (DFACS), one of the agencies in the Georgia mandatory reporting statute with jurisdiction to investigate child abuse, investigated this incident.[22] DFACS deemed H.C.'s allegations to be "unsubstantiated," "closed" the case and noted in its records that the "[m]other said she felt confident that nothing happened as did father." R3-117.[23] Thus, Allegood's notice consisted of information that Wilson had *not*, in fact, touched H.C. in a sexually inappropriate way.[24] Amazingly, Petitioners did not

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[22] Petitioners suggest that Allegood failed to report the H.C. allegation to DFACS, without disclosing to the Court that H.C.'s parent told Allegood it had been reported to DFACS that day and the investigator was at the school just hours later. R3-117; R5-145-70. Both Petitioners and the District Court also criticize Allegood for not conducting her own investigation, ignoring the undisputed evidence that DFACS considers it "inappropriate for school employees to conduct their own investigation as that could interfere with the investigation DFACS or law enforcement is conducting." R5-138-Attach. #2-¶ 7.

[23] The Petition states that DFACS made no "substantial finding" in an effort to suggest that the conclusion was equivocal. Pet. at 5. But this is a quote, not from the DFACS records, but from Allegood's deposition, where the context clearly indicates she meant DFACS found nothing of substance or made no "substantive" finding.

[24] Petitioners state that Allegood was told that Wilson touched H.C.'s "upper thigh." Pet. at 4. The only possible source for this suggestive characterization would be Allegood's deposition. Allegood's exact words were that the touching, if it

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offer any evidence – whether by deposition, sworn statement or affidavit – from H.C.'s parents or from H.C. herself about what happened in Wilson's class.[25] Nor did Petitioners offer evidence from any parent in H.C.'s class or from teachers regularly in or near H.C.'s classroom.[26]

Respondent Allegood and the WCSD superintendent were notified of the DFACS conclusion. Even before the investigation was completed, on the very day H.C.'s parents made the allegation, Allegood removed H.C. from Wilson's class and admonished Wilson not to touch a student in any way that could be "misperceived." R3-110-Attach. # 6; R5-145-72-73, 78. This information was disclosed in Respondents'

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occurred, was of H.C.'s "leg," "knee" or "thigh." R5-145-60-83, 184-85, Exh. 43. She never used the adjective "upper" that Petitioners add to the story for effect.

[25] Petitioners apparently believe the inclusion of the H.C. incident in the indictment of Wilson is such evidence. Of course, it is not. Moreover, there is no way to find out what the grand jury was told about the DFACS finding, if anything, especially the statement of agreement attributed to H.C.'s mother. In Georgia, grand jury testimony is not only secret, as is true in other states, but grand jury proceedings are not even transcribed.

[26] Petitioners may complain that the District Court restricted their ability to obtain this evidence by "bifurcating" discovery and refusing to permit them to depose students. But the Court did no such thing as it stated in its Order denying summary judgment. Pet. App. at 19. Instead, it imposed a thirty-day deadline on Respondents to file the motion for summary judgment and urged the parties to avoid deposing students unless required on the issue of actual notice. R6-118-46-47.

interrogatory responses below. But when Petitioners deposed Allegood, they did not ask her whether she disciplined Wilson in any way concerning H.C.'s allegations.

Petitioners suggest that Allegood should have reported the "unsubstantiated" allegations against Wilson to the Georgia Professional Standards Commission (PSC). Pet. at 5. Petitioners, however, offered no evidence below showing what another investigation of the H.C. allegations would have revealed. Nor did they produce a single witness – from the PSC or otherwise – supporting their claim that the "unsubstantiated" H.C. incident should have been reported to the Commission.

Similar shortcomings apply to a mother's foot and shoulder massage allegations. Petitioners had every incentive to find a competent witness to establish that Wilson had a practice of getting students to engage in such massages with each other and with him. Even the most casual observer would find this activity to be unusual and noteworthy in the school setting. If the practice existed as alleged, surely Petitioners could have found at least one witness with personal knowledge. The massages allegedly occurred in the classroom with all the students in the class present. Two of Petitioners' witnesses – Deborah Anderson and Maxine Potschka – spent considerable time in Wilson's classroom. Potschka was Wilson's paraprofessional for two years and was in the classroom on a daily basis. She considered him a "fantastic teacher," "one of the best

teachers she had ever seen," and testified that she had "never seen Wilson do anything that I thought was inappropriate and I always felt welcome in his class." R4-160. Neither Anderson nor Potschka substantiated the foot and shoulder massage allegations.

Allegood acknowledged in her deposition that she had no recollection of the mother's foot and shoulder massage complaint and neither did Fitzpatrick. R5-145-114-115; R5-154-67-72. If the mother made the complaint, it is perhaps understandable that they might not remember it. The mother had no first hand knowledge of the foot and shoulder massages and, in any event, admitted never using the word "sexual" to describe them. R5-152-21, 85. The mother also had an undisputed penchant for the bizarre.[27] Allegood and Fitzpatrick simply may have dismissed the mother's report as too far-fetched to require investigation. Essentially, Petitioners want to fault them for not investigating something that never happened as far as the record in this case reflects.

Overall, Petitioners' proof in response to Respondents' motion for summary judgment not only fails to establish notice of any sexually inappropriate conduct on the teacher's part, it also fails to establish that the underlying incidents allegedly giving such notice actually happened. In addition, Petitioners' proof fails utterly to demonstrate what a better investigation of these incidents would have revealed and, thus, they

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[27] *See* App. at 2.

literally have no competent evidence of causation in this record.

Nearly a year after H.C.'s allegation, on September 29, 2003, A.C. and her parents reported to Allegood and Fitzpatrick that Wilson was touching her inappropriately in the classroom. R5-167-55. Allegood and Fitzpatrick met with Wilson that day and then again with A.C. and her parents. R5-145-132; R5-154-23-24. Allegood offered to transfer A.C. from the classroom, but A.C. and her parents decided she would remain in Wilson's class.[28] R5-145-134; R5-154-22, 25,27; R5-162-63,66; R5-164-32,63-64. However, that evening A.C. told her best friend, M.D., about her allegations and M.D. then told her mother that Wilson had been touching her as well. R5-168-38,119; R5-163-58,116-117; R5-166-44. After M.D.'s parents called the sheriff's department, the two families and the girls met together with the deputy that evening. R5-167-73; R5-162-32-34; R5-166-50-52. The following day, September 30th, neither A.C. nor M.D. attended school. R5-163-125. Instead, M.D. and her parents reported her allegations to Allegood. R5-163-121-22. Both girls were transferred out of his class, and a full time paraprofessional was placed in the class for two

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[28] Without citation to the record, the District Court stated that Allegood "told" A.C. she must be mistaken about Wilson. In fact, according to A.C., Allegood **asked** her whether she could have been mistaken, hardly a surprising question in light of the vague description A.C. gave of the circumstances of the alleged touching. [A.C. stated at her deposition, "I can remember Ms. Allegood saying are you sure you're not mistaken." R5-168-109].

days while the superintendent worked with the sheriff's department to investigate the allegations. R5-167-81; R5-155-37,53. On October 2nd, the superintendent told Wilson not to return to school. R5-155-55-58. While the criminal investigation proceeded, the School District initiated the formal process of terminating Wilson's contract. In lieu of a hearing under Georgia's Fair Dismissal Act, O.C.G.A. § 20-2-940 *et seq.*, Wilson submitted his resignation. R5-155-83. He never returned to school after October 2nd, and once A.C. and M.D. reported his conduct to Allegood, neither they, nor any other students, were harmed by Wilson. R5-155-83; R5-163-126; R5-168-146-7,179.

B. Case Actually Litigated Below

Petitioners' argument for certiorari rests on a claimed inter-circuit conflict concerning the formulation of the "deliberate indifference" standard under both Title IX and section 1983. The Eleventh Circuit, they assert, is out of step with the law in other circuits. They urge the Court to use this case as a "vehicle" to clarify the law and to announce a version of the deliberate indifference standard less rigorous than the Eleventh Circuit's. But, as will be shown, counsel for Petitioners below *never* advanced these arguments. Petitioners' filings included a brief in opposition to Respondents' motion for summary judgment in the District Court and five submissions in the Eleventh Circuit: (a) two briefs addressing the court's interlocutory jurisdiction, (b) a brief on the merits, (c) a notice of supplementary authority and

(d) a petition for rehearing en banc. Not once in these submissions did Petitioners compose a sentence questioning Eleventh Circuit precedent. Indeed, Petitioners embraced Eleventh Circuit authority enthusiastically, uncritically and almost exclusively in arguing that they had satisfied the "deliberate indifference" standard under Title IX and section 1983.[29]

A breakdown of Petitioners' deliberate indifference arguments below follows:

1. In the District Court, Petitioners relied exclusively on and did not challenge either this Court's decision in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), or Eleventh Circuit authority in addressing Title IX liability.[30]

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[29] As a rough measure of the extensiveness of the repackaging of this case, consider the pattern among the 106 cases cited and discussed in the Petition. Leaving aside nine Supreme Court cases and ten cases from the Eleventh Circuit, Petitioners cite eighty-seven cases. Eighty-five are federal circuit court opinions and two are federal district court opinions. All are from outside the Eleventh Circuit. Interestingly, counsel for Petitioners below cited only one of those eighty-seven cases and that was for a proposition unrelated to the deliberate indifference standard. *See Doe v. Claiborne County, Tennessee*, 103 F.3d 495, 506 (6th Cir. 1996) (one of six cases cited in footnote two of Petitioners' Brief in the District Court; for the proposition that student has "liberty interest . . . in freedom from bodily injury" that cannot be violated by public school teacher).

[30] *Sauls v. Pierce County Sch. Dist.*, 399 F.3d 1279 (11th Cir. 2005); *Davis v. Dekalb County Sch. Dist.*, 233 F.3d 1367 (11th Cir. 2000); *Floyd v. Waiters*, 171 F.3d 1264 (11th Cir. 1999); *Floyd v. Waiters*, 133 F.3d 786 (11th Cir. 1998).

R4-130-6-14. Petitioners did not cite a single case involving the application of the deliberate indifference standard to supervisory liability claims under section 1983, arguing instead that Allegood and Fitzpatrick were not entitled to qualified immunity simply because the constitutional right to "bodily integrity" was clearly established; they did not discuss the application of the "deliberate indifference" standard to Respondents individually at all. R4-130-20-22.

2. In the Eleventh Circuit, Petitioners changed course somewhat. They argued that Allegood and Fitzpatrick were not entitled to qualified immunity on the supervisory liability claim because (a) the right to "bodily integrity" was clearly established, and (b) Petitioners had submitted evidence of "actual notice" and "deliberate indifference." In support of the latter point, they relied on the same Title IX cases they had cited from this Court and the Eleventh Circuit in the District Court and one new one.[31] These citations were accompanied by virtually no discussion, much less criticism, of the

[31] *Williams v. Bd. of Regents*, 441 F.3d 1287 (11th Cir. 2006). They also cited an Eleventh Circuit case addressing the supervisory liability standard, *Braddy v. Fla. Dep't of Labor & Empl. Sec.*, 133 F.3d 797 (11th Cir. 1998), in their quotation from the District Court's opinion. But they did not discuss it, apply it, or criticize it.

Eleventh Circuit's formulation of the deliberate indifference standard. They simply insisted that their evidence met the standard. Their Title IX discussion focused only on whether Allegood was an "appropriate person" to receive notice under *Gebser*, referring back to their argument on section 1983 qualified immunity and supervisory liability on the issues of actual notice and deliberate indifference.

3. On the eve of oral argument, Petitioners filed a notice of supplemental authority, all cases from the Eleventh Circuit. One of the cases was *Williams v. Bd. of Regents*, 477 F.3d 1282 (11th Cir. 2007), denying a motion to dismiss Title IX claims on the grounds that the allegations were sufficient to demonstrate deliberate indifference.[32] Again, Petitioners did not express any misgiving about the soundness of Eleventh Circuit precedent or show any interest in precedent from other circuits.

4. Petitioners next filed a Petition for Rehearing en banc. The main objection to the panel opinion was the Eleventh Circuit's lack of jurisdiction to consider Respondents' qualified immunity appeal. Petitioners also complained that the

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[32] The panel vacated its earlier decision in 2006, *infra* at n.31, and substituted the above-cited opinion.

panel's application of the Eleventh Circuit's deliberate indifference standard was too demanding. The only case cited for this proposition was another Eleventh Circuit case: *Mathews v. Crosby*, 480 F.3d 1265 (11th Cir. 2007), *cert. denied*, 2008 U.S. LEXIS 183 (U.S. Jan. 7, 2008), a case permitting a supervisory liability claim to go to trial. *Mathews* belies Petitioners' assertion that the Eleventh Circuit's standard is so strict that it has never been met in the last decade. Pet. at 24. At no point, in this Petition for Rehearing en banc, or in any other submission, did Petitioners ask the Eleventh Circuit to consider an alternative formulation of the deliberate indifference standard from another Circuit.

REASONS FOR DENYING THE WRIT

A. Questions for Which Review Is Sought Not Preserved Below

In determining whether to grant the writ, this Court "ordinarily will not decide questions not raised or litigated in the lower courts." *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987). *Kibbe* was a section 1983 case involving *Monell* liability. The Court granted certiorari to review the City of Springfield's argument that plaintiff had to show more than negligence or gross negligence to establish municipal

liability. In Kibbe's brief on the merits, the following argument appears:

> Having consistently maintained in the District Court and Court of Appeals that municipal liability could be based on inadequate training and supervision, and having previously embraced a gross negligence standard, petitioner in this Court denounces the lower courts for applying those very principles. Petitioner's eleventh hour reversal of its position may be a deft response to the failure of its evidentiary arguments, but both Rule 51 and the established practice of this Court preclude a petitioner from relying here on contentions which it never preserved or raised below.[33]

The Court dismissed the writ as improvidently granted. It was persuaded by Kibbe's argument and by a similar argument in the ACLU's amicus brief opposing certiorari.[34] The Court made two points pertinent to the present case. First, the City of Springfield did not properly object to a jury charge at the trial level and did not argue for a "higher

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[33] *City of Springfield v. Kibbe*, No. 85-1217 Brief for Respondent, 1986 U.S. S.Ct. Briefs LEXIS 511 at 22-23. One of the co-authors of the language in the *Kibbe* brief is Counsel of Record in the petition for certiorari now under review. He did not appear in the case below.

[34] *City of Springfield v. Kibbe*, No. 85-1217 Amicus Curiae of the American Civil Liberties Union and Civil Liberties Union of Massachusetts, 1986 U.S. S.Ct. Briefs LEXIS 514 at 6-11.

standard than gross negligence in the Court of Appeals." 480 U.S. at 258. Second, petitioner informed the Court of "no special circumstances explaining its failure to preserve this question," 480 U.S. at 259-60. The Court concluded that the case was an "inappropriate vehicle for resolving the inadequate training question. . . ." 480 U.S. at 259.[35]

The reasoning and principles described in *Kibbe* speak directly to the present Petition. Petitioners claim that (a) the courts of appeals are seriously fragmented in their approach both to supervisory liability under section 1983 and to entity liability under Title IX and (b) the Eleventh Circuit formulation of the deliberate indifference standard is one of the most restrictive of all. They insist that "this case is an excellent vehicle for addressing the standard for supervisory liability in a section 1983 case" and that lower court misinterpretation of *Gebser* makes review of the Title IX ruling in this case a matter of urgency. Pet. at 28, 37. They ask the Court to address what they describe as inter-circuit splits and to reformulate

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[35] Although the Court has the power to rule on issues not presented in the lower courts, there are few instances where the Court has chosen to take such a path. When the Court has done so, one of the key considerations is whether the respondent has affirmatively argued either in its brief in opposition or its brief on the merits the failure to preserve. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 814 n.2 (1985) (failure to preserve not argued); *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (failure to preserve not argued). Here, as in *Kibbe*, Respondents make the failure to preserve argument at the earliest opportunity to do so.

the deliberate indifference standard under Title IX and section 1983.[36] But Petitioners accepted Eleventh Circuit precedent totally until they lost on appeal. Now they "denounce" the precedent they once warmly embraced, using arguments that no judge below has had the opportunity to consider. A more complete and "deft" reversal of course is difficult to imagine. Based on the reasoning in *Kibbe*, the writ should be denied.

B. Petitioners' Inter-Circuit Split Is "More Semantic Than Real":[37] the Eleventh Circuit's Decision Is Correct Under *Any* Formulation of the "Deliberate Indifference" Standard

Petitioners' description of the case below incorrectly characterizes the ruling of the District Court and distorts the Eleventh Circuit's formulation of the deliberate indifference standard. The District Court erred because it applied a negligence standard to hold that Petitioners were entitled to go to trial on their Title IX and section 1983 claims. Petitioners' inter-circuit conflict argument is immaterial to this case. On the facts presented below, Petitioners' claims could not survive a motion for summary judgment

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[36] Indeed, as discussed *infra* at 30-33, Petitioners are, in essence, asking the Court to abandon the deliberate indifference standard and substitute a negligence standard of liability.

[37] *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 151 (2000).

under the deliberate indifference standard of any circuit. Even if some circuit courts, including the Eleventh Circuit, apply an unduly rigorous version of the deliberate indifference standard under Title IX and section 1983, this case is not the "excellent vehicle" for changing or clarifying the law that Petitioners suggest. To the contrary, Petitioners ask this Court to grant the writ to address an argument never made below when its ultimate conclusion would have to be that the Eleventh Circuit ruled correctly. The Court does not sit to render such advisory opinions.[38]

1. Deliberate Indifference Distinguished from Negligence

The decisions of this Court make clear that under Title IX and section 1983 there is no vicarious or respondeat superior liability[39] and no liability based

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[38] *Clinton v. Jones*, 520 U.S. 681, 700 n.33 (1997) ("[T]he judicial power to decide cases and controversies does not include the provision of purely advisory opinions. . . .").

[39] *Gebser v. Lago Vista Indep. Sch. Dist.*, *supra*; *Bd. of Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403 (1997) ("We also recognized that a municipality may not be held liable under § 1983 solely because it employs a tortfeasor. . . . We have consistently refused to hold municipalities liable under a theory of *respondeat superior*."); *City of Canton v. Harris*, 489 U.S. 378, 392 (1989) ("[P]ermitting cases against cities . . . to go forward under § 1983 on a lesser standard of fault [than deliberate indifference] would result in *de facto respondeat superior* liability.").

on negligence.[40] They also make clear that deliberate indifference is a more rigorous standard of culpability than negligence.[41] This Court has carefully differentiated between deliberate indifference and negligence in several distinct but closely relating settings. For example, this Court, referring to its decision in *Gebser* observed:

> [W]e rejected the use of agency principles to impute liability to the district for the misconduct of its teachers. . . . Likewise, we declined the invitation to impose liability *under what amounted to a negligence standard – holding the district liable for its failure to react to teacher-student harassment of which it knew or should have known.* . . . Rather, we concluded that the district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX by

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[40] *Daniels v. Williams*, 474 U.S. 327, 330-31 & n.3 (1986) ("[W]e agree and overrule *Parratt* to the extent that it states that mere lack of due care by a state official may 'deprive' an individual of life, liberty, or property under the Fourteenth Amendment."); *but see Graham v. Connor,* 490 U.S. 386, 395, 397 (1989) ("Today we make explicit . . . that *all* claims [of] excessive force . . . in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . " and "the 'reasonableness' inquiry in an excessive force case is an objective one . . . without regard to their underlying intent or motivation.") (in original).

[41] *Farmer v. Brennan*, 511 U.S. 825, 835 (1994) ("[D]eliberate indifference describes a state of mind more blameworthy than negligence.").

> remaining deliberately indifferent to acts of teacher-student harassment of which it had *actual knowledge*. (citations omitted) (italics supplied).

Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 642 (1999). *Gebser*, it will be recalled, equated "constructive notice" with "knew or 'should have known'" terminology commonly associated with negligence based tort liability. 524 U.S. at 282.[42]

A similar delineation exists in this Court's *Monell* decisions. For example, in *Bd. of Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997), the Court noted:

> Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, *rigorous* standards of culpability and causation must be applied to insure that the municipality is not held liable solely for the actions of its employee.

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[42] A recent Georgia example of this "knew or should have known" terminology appears in a case involving a negligent hiring claim against a security company whose employee kidnapped a homeowner. *See Underberg v. Southern Alarm, Inc.*, 284 Ga. App. 108, 110, 643 S.E.2d 374, 377 (2007) ("The question is not only whether Southern Alarm owed a duty to Fields but whether it breached that duty. These are questions of fact that a jury must resolve. 'The appropriate standard of care in a negligent hiring/retention action is whether the employer knew *or should have known* the employee was not suited for the particular employment.' ") (citations omitted; emphasis in original).

Id. at 405 (italics supplied). It went on to declare that to hold a municipality liable under section 1983, the plaintiff "must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or *obvious* consequences. . . . A showing of *simple* or even *heightened negligence* will not suffice." *Id.* at 407 (italics supplied). The majority used the phrase *plainly obvious* eight times to emphasize the degree to which the evidence must point compellingly to a "risk that a violation of a particular constitutional or statutory right will follow. . . ." *Id.* at 411. In other words, a *Monell* defendant may be held liable under *Brown* when the evidence so strongly points towards culpable knowledge that a reasonable jury could infer deliberate indifference to constitutional harm notwithstanding a defendant's denials. In the criminal and increasingly in the civil setting, if a case reaches the jury, this circumstance is addressed through the use of willful blindness or conscious avoidance instructions.[43]

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[43] *United States v. Etheredge*, 2007 WL 3052856 (4th Cir. Oct. 19, 2007) ("The jury could infer that Etheredge 'deliberate[ly] ignor[ed]' the illegal source of Nicholson's income and the illegal nature of the transactions designed to conceal that income in which Etheredge himself participated. Moreover, the district court properly instructed the jury not to infer 'guilty knowledge from a mere showing of careless disregard or mistake.' . . . [T]he court did not abuse its discretion in instructing on willful blindness." *United States v. Carlo*, 507 F.3d 799, 802-03 (2nd Cir. 2007) ("Carlo's objection to the conscious avoidance instruction is similarly without merit . . . We find that the government introduced evidence that Carlo was aware of a high probability that

(Continued on following page)

This is well-traveled ground as *Farmer v. Brennan*, 511 U.S. 825 (1994) recognizes. In *Farmer*, the plaintiff asserted an Eighth Amendment inhumane prison conditions claim under *Bivens*. The Court analyzed the difference between objective and subjective versions of the deliberate indifference standard, noting at the outset "deliberate indifference describes a state of mind more blameworthy than negligence." *Id.* at 835. Comparing the two versions, it deemed the deliberate indifference standard under *Monell* to be objective because liability could be based on the *obviousness* of "an unjustifiably high risk of harm." *Id.* at 836. An objective standard made sense because of the "conceptual difficulty" of imputing a subjective state of mind to a governmental entity. *Id.* at 841. At least for Eighth Amendment purposes, a subjective version of deliberate indifference was found to be appropriate because the subjective standard applied to a person capable of a discernible mental state. Accordingly, the Court ruled that a prison official cannot be found liable "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial

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the information about credit enhancement that he received from his contacts in Europe (which he then repeated to the developers) was false, and if he did not actually know that the information was false, it was only because he deliberately avoided confirming his suspicion."); *see, e.g., Microsoft Corp. v. Rechanik*, 2007 WL 2859800 *2 (7th Cir. Oct. 2, 2007) (standard applied in the civil setting).

risk of serious harm exists, and he must also draw the inference." *Id.* at 837.

Responding to the argument that a purely subjective version of deliberate indifference would give prison officials freedom to "ignore the obvious," the Court in *Farmer* sought to allay the concern. It recognized that there would be cases on the boundary between deliberate indifference and negligence. In such cases, the risk of harm would have to be "obvious" in a rigorous sense to permit a jury to draw the inference of culpable knowledge. To constitute such obviousness, the Court explained that the substantial risk of harm – inmate on inmate attacks in *Farmer* – would have to be "longstanding, pervasive, well-documented." *Id.* at 843. The Court's emphasis on the repetition, duration and scope of this evidence seems calculated to insure that the boundary line cases that reach the jury – as a class – are as close to the actual knowledge end of the culpability continuum as possible. The focus then is on what was in the defendant's mind as a matter of historical fact, not on what the jury believes a reasonable person *should* have known. *Id.* at 842-43 (italics supplied). As will be seen, the language of differentiation in *Farmer* strongly resembles language used by the Eleventh Circuit below. This language is missing almost entirely from the District Court's opinion.

2. The District Court Below Applied a Negligence Standard

In holding that Petitioners' case was sufficient to withstand Respondents' summary judgment motion, the Court was conclusory in its treatment of the evidence:

> If each [of the ten] incident[s] were considered separately as it was reported, these incidents may not have risen to the level of actual notice under *Gebser*. However, the cumulative effect of these complaints *should have placed Allegood on notice* that Wilson was engaging in sexually inappropriate conduct with his students. Pet. App. at 26 (italics supplied).

At that juncture, Respondents' lack of "actual notice" should have been dispositive of both the Title IX and section 1983 claims.

Instead, using the language of negligence disavowed in *Gebser* and *Davis*, the District Court resurrected the case for Petitioners. It held that the "cumulative effect" of the complaints "should have placed" Allegood (and Fitzpatrick)[44] "on notice that Wilson was engaging in sexually inappropriate conduct with his students." Pet. App. at 26. The Court ruled that this crucial, though erroneous, finding satisfied the requirements of both Title IX and section

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[44] The District Court treated Allegood and Fitzpatrick as equally culpable even though the evidence relating to Fitzpatrick was much weaker both qualitatively and quantitatively.

1983 supervisory liability. This finding, however, had nothing to do with the Respondents' actual mental state, but rather reflected what the Court thought they should have known based on the reasonable person standard. That is not the law in the Eleventh Circuit, nor is it the law in this Court. Conspicuously missing from the District Court's opinion is any discussion of whether Petitioners' evidence was so "plainly obvious" in pointing toward sexually inappropriate conduct that a jury could conclude that the Respondents had actual notice of the risk even though they denied it.[45]

3. The Eleventh Circuit Properly Reversed the District Court

Respondents did not then and do not now believe that Petitioners' evidence came close to meeting that standard and the Eleventh Circuit agreed.

> The facts alleged do not show either defendant (1) had notice Wilson was a threat to students through a history of widespread abuse of students by Wilson, (2) knew Wilson would abuse students and failed to stop him, or (3) instituted an improper custom or policy

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[45] The District Court did use the words, "a history of widespread abuse," without any analysis to conclude summarily that "as discussed above," the evidence indicates that Respondents were on notice that "Wilson was sexually abusing his students. . . ." Pet. App. at 31.

> that resulted in deliberate indifference to students' constitutional rights.

Pet. App. at 6.

Contrary to Petitioners' assertion, the Eleventh Circuit did not require proof that Respondents had actual notice of prior unconstitutional acts on the part of Wilson before a duty to investigate arose. The court only required notice of a "threat to students" or a "need to correct unconstitutional conduct" through evidence of a compelling nature. Pet. App. at 5 and 6. The court also wrote of finding liability if the "supervisor knew that subordinates would act unlawfully and failed to stop them from doing so." Pet. App. at 5. This language is considerably less restrictive than Petitioners' acknowledge. Petitioners state categorically that "[n]o Eleventh Circuit decision in the last decade has found the evidence sufficient to satisfy" its "extremely rigorous" formulation of the deliberate indifference standard. That statement is wrong. Petitioners below cited and relied on two cases in which the plaintiffs' cases met the Eleventh Circuit's deliberate indifference standard.[46]

Given the thousands of supervisory liability cases litigated over the years, it is not surprising that Petitioners might find variations in the formulation

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[46] *Mathews v. Crosby*, 480 F.3d 1265 (11th Cir. 2007), *cert. denied*, 2008 U.S. LEXIS 183 (Jan. 7, 2008) (section 1983) and *Williams v. Bd. of Regents*, 441 F.2d 1287 (11th Cir. 2006) (Title IX); *see also, Valdez v. Crosby*, 450 F.3d 1231 (11th Cir. 2006).

of the deliberate indifference standard. Opinion writing is an art, not a science. But the best test here is whether, amidst the welter of circuit court decisions they cite, Petitioners can find just one from any circuit that *plainly and obviously* would conflict with the result reached by the Eleventh Circuit below. They have not cited one thus far, and Respondents do not believe such a case exists. Imposing civil liability on a supervisor or a governmental entity for the criminal act of a subordinate should not be a routine matter. What Petitioners really want from this Court is not a clarification of the deliberate indifference standard but a dilution of it to the point that it is the functional equivalent of negligence.[47] In short, they want civil rights liability to mirror state tort law much more closely.[48] Even if this case were properly positioned for review, Petitioners want the Court to change the direction of the law as it has developed in

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[47] As the Court no doubt understands, the key to litigating civil rights cases for plaintiffs is getting to the jury. Settlement leverage would increase substantially under the Petitioners' watered-down version of the deliberate indifference standard. Petitioners' argument cuts against the grain of this Court's rulings differentiating between deliberate indifference and negligence.

[48] Why else would Petitioners refer to "tort principles that were well established when section 1983 was enacted?" Pet. at 29. Or use an example from tort law favoring the imposition of liability when the owner of a "car or a pet" posing a "substantial risk" to third parties fails to take "reasonable steps to prevent" injuries? Pet. at 29.

section 1983 and Title IX cases over the past fifteen years.

4. Petitioners' Solution to the Alleged Judicial "Deliberate Indifference" Muddle

Petitioners are highly critical of the language they have culled from the eighty-seven decisions that form the basis of their inter-circuit argument for the writ. On reading the Petitioners' proposed solutions, however, it is difficult to grasp how this newly minted language represents an improvement.

Under section 1983, the supervisory liability standard would be as follows:

> A supervisor who is *on notice* that a subordinate under his or her control poses a *substantial risk* of engaging in unconstitutional conduct, and who fails to take *reasonable* steps to prevent that conduct, can fairly be said to have caused the constitutional violation. Pet. at 29 (italics supplied).

Under Title IX, Petitioners propose a dramatic change to the deliberate indifference standard as articulated in *Gebser* and *Davis*. Petitioners would "clarify" the actual notice requirement by imposing liability whenever notice of misconduct is "sufficient to alert school authorities to the *possibility*" that a "teacher *might* engage in more serious abuse." Pet. 36-37 (italics supplied).

With all due respect, Petitioners propose one set of legal generalities to replace those currently in use in circuit court opinions across the country. There is nothing in the Petition to suggest that substantive outcomes in Title IX and supervisory liability cases vary in substantive result from circuit to circuit because of these language variations. Petitioners, however, assume, but do not show, that these variations matter greatly. Petitioners further assume – wrongly in Respondents' view – that their proposals will promote substantive legal uniformity over time under both Title IX and section 1983. That is a hope based on an assumption. If this Court were to adopt Petitioners' reformulation of the deliberate indifference standard, one consequence can be foretold. The change will shift the liability standard in Title IX and section 1983 cases far closer to the negligence standard repeatedly disavowed by this Court.