No. 07-_____ 07-692 NOV 21 2007

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) In an action for damages under Title IX, the plaintiff must demonstrate that the defendant had "actual notice" of discrimination. *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 292 (1998). Does "actual notice" mean:

(a) notice that a violation of the plaintiff's Title IX rights is occurring, or

(b) notice of a substantial risk that the plaintiff's Title IX rights are being or will be violated?

(2) In an action under 42 U.S.C. § 1983, in what circumstances may a supervisor be held liable for constitutional violations engaged in by his or her subordinate?

LIST OF PARTIES

The petitioners are (1) Kevin Dale, individually and as the next friend, natural parent and natural guardian of M.D., a minor child, (2) Abby Dale, individually and as the next friend, natural parent and natural guardian of M.D., a minor child, (3) Bryan Carlyle, individually and as the next friend, natural parent and natural guardian of A.C., a minor child, and (4) Lisa J. Carlyle, individually and as the next friend, natural parent and natural guardian of A.C., a minor child.

The respondents are the White County, Georgia School District, Donna Allegood, and Roger Fitzpatrick.

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STATUTES:

PETITION FOR WRIT OF CERTIORARI

Petitioners Kevin Dale, *et al.*, respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on June 27, 2007.[1]

OPINIONS BELOW

The February 28, 2006, order of the District Court, which is not officially reported, is set forth at pp. 9-52 of the Appendix. The June 27, 2007 opinion of the Court of Appeals, which is unofficially reported at 2007 WL 1828943, is set forth at pp. 1-8 of the Appendix. The August 24, 2007 order of the Court of Appeals denying rehearing and rehearing en banc, which is not officially reported, is set forth at pp. 55-56 of the Appendix. The May 29, 2006, order of the Court of Appeals denying petitioners' motion to dismiss for lack of jurisdiction is set forth at pp. 53-54 of the Appendix.

[1] A related case arising out of the same events is the subject of a separate petition for certiorari. *Dale v. Stephens County Board of Education*, No. 07-___.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on June 27, 2007. A timely petition for rehearing was denied on August 24, 2007. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), provides in pertinent part:

> No person . . . shall, on the basis of sex, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Section 1983 of 42 U.S.C. provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In September 2003 M.D. and A.C., then ten years old, were sexually molested by their fifth grade teacher, Joey Wilson. Petitioners, the parents of the two young girls, brought this action against the local school district and against the principal (Donna Allegood) and assistant principal (Roger Fitzpatrick) of the elementary school.[2] The plaintiffs alleged that the defendants had for two years largely ignored repeated complaints and warnings about sexually inappropriate conduct by Wilson directed at his young female students. The action sought relief against the school district under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, and relief against the individual defendants under 42 U.S.C. § 1983.

There is no dispute that the girls were molested by Wilson. The only question is whether the respondent school board and the respondent principal and vice-principal can be held liable for the resulting injuries. The Eleventh Circuit held that the school board was not liable under Title IX, and that the individual respondents could not be held liable in an action under section 1983. The decision of the Eleventh Circuit rests on legal standards that sharply

[2] The teacher, who was indicted and arrested for child molestation, died within a month of the molestation of M.D. and A.C.

conflict with the standards in nine circuits and which warrant review by this Court.

The Prior Complaints and Warnings

After a period of discovery, the defendants moved for summary judgment. The facts regarding the prior complaints and warnings are very much in dispute. The district court opinion sets out the facts in the light most favorable to the plaintiffs. (App. 11-18).

The plaintiffs adduced evidence that the defendants[3] had on at least seven occasions received complaints, warnings or reports of sexually inappropriate conduct by Wilson. All of this misconduct was directed at third grade girls, who would have been 8 or 9 years old at the time.[4]

The parents of one girl complained to Allegood that Wilson had improperly touched the upper thigh of their daughter H.C., and asked that she be transferred to a different teacher. (App. 15; R5-145-72).[5] Neither Allegood nor any other official of the school

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[3] All of the incidents in question were assertedly reported to Allegood. Only some of those matters were also reported to Fitzpatrick. Neither court below believed that those differences affected Fitzpatrick's potential liability.

[4] During his first two years at the elementary school, Wilson had taught the third grade. In September 2003, when he molested M.D. and A.C., Wilson was teaching (and the girls were in) the fifth grade.

[5] Citations to "R" are to the record on appeal in the Eleventh Circuit.

district investigated that incident or inquired whether other children might have had related problem with Wilson. None of the defendants reported the complaint to law enforcement officials or to the Georgia Professional Standards Commission, which licenses teachers. The child's parents themselves contacted a state agency, but it made "no substantial findings" before closing its inquiry. (App. 15). Eleventh months later, after M.D. and A.C. had also been molested, Wilson was indicted for molesting H.C.

Another parent, the mother of A.A., complained to the defendants that Wilson had directed the girls in his third grade class to remove their shoes so he could massage their feet, and had had the girls massage his feet and his shoulders. (App. 15 n.4; R5-152-19). The defendants did not investigate this complaint and took no action in response to it.

A different third grade girl, J.P., complained to a teacher that Wilson was touching her, playing with her hair, and giving her hugs. Both that teacher and the school counselor reported the problem to principal Allegood. (App. 14; R5-158-57). The defendants did not investigate this complaint and took no action in response to it.

A teacher warned the defendants that she had personally witnessed Wilson playing with and rubbing his fingers through the hair of girls in his third grade class. (App. 15 n.4; R5-158-46, 70). The defendants did not investigate this complaint and took no action in response to it.

An official from White County Mental Health, who was at the school to teach children a cautionary "Good Touch/Bad Touch" program, warned the school counselor that she was concerned about the manner in which Wilson was leaning over one of the girls. The counselor conveyed that warning to Principal Allegood. (App. 15 n.4). The defendants did not investigate this warning and took no action in response to it.

A teacher complained to Allegood that she had seen Wilson seated on the floor with third grade girls lying on Wilson's legs and crotch area. Although Allegood had personally witnessed this behavior, she did not investigate the matter and took no action in response to it. (App. 15 n.4; R5-160-par. 3-4; R5-158-45, 170-76).

A child in Wilson's third grade class went to the school nurse about a scratch on her neck, and, according to the Georgia Bureau of Investigations file, told that nurse that Wilson had instructed her not to reveal how the scratch had occurred. The nurse warned Principal Allegood about Wilson's action, but the defendants did not investigate the matter and took no action in response to it. (R5-148-55).

Finally, in September of 2003, Wilson molested M.D. and A.C. Wilson touched and cupped their breasts while in class, and rested his hand on their bottoms. Wilson particularly cupped the girls' breasts when they raised their hands to ask a question. (App. 16-17; R5-163-122; R5-168-66).

When the Carlyles learned about this misconduct from their daughter A.C., they had two meetings with Allegood; Allegood told the victim, A.C., that she must be mistaken about Wilson. (App. 16). Later that day A.C. told her friend and classmate M.D. about the meetings with Allegood. M.D. then told her mother that Wilson had been touching her own breasts and bottom, and that he had made a comment that her shirt showed off her curves. (App. 16). M.D.'s parents immediately called the sheriff's department. Within a week, Wilson was indicted on ten counts of child molestation, including the acts against A.C., M.D., H.C., and two other minors. Three weeks after the indictments, school officials formally suspended Wilson and initiated the process of terminating his contract. In lieu of terminating Wilson's contract, the school board permitted Wilson to resign. (App. 18).

In light of this evidence of unsuccessful earlier complaints, reports and warnings about Wilson's conduct, the district court denied the defendant's motion for summary judgment. The district judge concluded that "the cumulative effect of these complaints should have placed Allegood on notice that Wilson was engaging in sexually inappropriate conduct with his students." (App. 26). "[T]he court finds that [the plaintiffs] have established that Allegood, a supervisor with authority to take corrective action, was placed on notice of Wilson's bad conduct and failed to adequately respond." (App. 27). "[T]he evidence presented by plaintiffs indicates that Allegood was on notice that Wilson was sexually abusing his

students and that her inadequate response constituted deliberate indifference to plaintiffs' rights." (App. 31).[6] Despite the particularly serious complaint regarding H.C.,

> [t]he school district . . . made no independent investigation to determine whether Wilson was touching other students. The district also failed to follow up with H.C. or to continue to monitor Wilson for further indiscretions. Also, there is no evidence of any investigations or corrective measure taken regarding any of the earlier complaints.

(App. 27).

The district court reasoned that these circumstances were sufficient to establish liability on the part of the defendants. Specifically, the court concluded that the complaints to Allegood were sufficient to satisfy the requirement in *Gebser v. Lago Vista Ind. School Dist.*, 524 U.S. 274 (1998), that the plaintiff in a Title IX action show that an appropriate school official had "actual notice" and was deliberately indifferent to it. (App. 22-27). That same notice, the district court held, was sufficient in an action

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[6] "Plaintiffs have presented similar evidence showing that Fitzpatrick was also on notice of Wilson's misconduct and that he likewise acted with deliberate indifference." (App. 31). "[T]hese escalating complaints alleged by plaintiffs constitute widespread abuse sufficient to notify Allegood and Fitzpatrick of the need to stop Wilson's misconduct and that Allegood and Fitzpatrick failed to do so." (App. 31).

under section 1983 to render Allegood and Fitzpatrick personally liable for having failed to take steps to investigate or control Wilson, and precluded those defendants from establishing qualified immunity. (App. 29-33).

The court of appeals reversed.[7] With regard to the Title IX, the Eleventh Circuit held that the notice requirement of *Gebser* required that the school board have "actual notice that Wilson was molesting students." (App. 7). The repeated notice provided to Allegood over a period of years regarding Wilson's misconduct did not meet that definition. Some of the abusive conduct fell short of "molesting," and even the notice regarding the touching of H.C. – conduct which led to a molesting indictment of Wilson – was not notice contemporaneous with the molestation of the plaintiff's daughters; it was only notice that Wilson *had* molested a student. That holding was consistent with the earlier Fourth Circuit interpretation of *Gebser* in *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001).

With regard to the claims against Allegood and Fitzpatrick as individuals, the court of appeals held that in an action under section 1983 a supervisor

[7] The individual defendants took an interlocutory appeal from the decision of the district court because it denied their assertion of qualified immunity. In its order filed May 23, 2006, the court of appeals concluded that it had pendent appellate jurisdiction over the related Title IX appeal of the school district. (App. 53-54).

ordinarily is liable for constitutional violations by a subordinate only if the supervisor "knew that the subordinate[ ] would act unlawfully." (App. 7). Allegood and Fitzpatrick, the Eleventh Circuit reasoned, could not be certain that Wilson was going to molest petitioner's children. Awareness of a substantial risk that a subordinate would violate the Constitution, the court of appeals held, cannot provide a basis for supervisory liability unless there is "'a history of widespread abuse' that is 'obvious, flagrant, rampant and of continued duration.'" (App. 5) (*quoting Brown v. Crawford*, 906 F.2d 667, 671 (11th Cir. 1990)). The misconduct that preceded the molestation of the plaintiffs' children was neither widespread (there was only a single molester) nor "rampant" and "of continued duration" (the inappropriate touching was intermittent), and much of the misconduct, the panel may have felt, was not bad enough to be "flagrant."

REASONS FOR GRANTING THE WRIT

I. THERE IS A WELL ESTABLISHED AND COMPLEX INTER-CIRCUIT CONFLICT REGARDING WHEN IN AN ACTION UNDER 42 U.S.C. § 1983 A SUPERVISOR MAY BE HELD LIABLE FOR A CONSTITUTIONAL VIOLATION BY HIS OR HER SUBORDINATE

This case presents one of the most important unresolved issues in federal civil rights litigation: in an action under 42 U.S.C. § 1983, when can a

supervisor be held liable for a constitutional violation committed by a subordinate? The dispute about the standard governing supervisory liability is both widespread and longstanding. There are literally thousands of decisions in the lower courts regarding this issue.[8] Every one of the geographical circuits has adopted some standard for determining supervisory liability. In most federal court of appeals there are dozens of opinions addressing this question.

This recurring question is exceptionally important. Section 1983 is the vehicle through which federal constitutional rights, and rights under many federal statutes, are enforced against state and local government officials. This Court on numerous occasions has granted certiorari to resolve questions regarding when various defendants can be held liable in section 1983 actions. The Court has addressed the liability under section 1983 of cities,[9] states,[10] local legislators,[11]

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[8] A Westlaw search for "supervisory liability" and "section 1983" lists 3792 decisions in the federal courts in which both phrases appear, none of them in this Court. This is far from a complete listing of cases on this issue, because the phrase "supervisory liability" is not utilized in all cases involving this problem, and tends to be less common in older cases. There were 815 such decisions in the year between November 17, 2006 and November 17, 2007.

[9] *E.g.*, *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978).

[10] *E.g.*, *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989).

[11] *Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

prosecutors,[12] public defenders,[13] and judges,[14] and has repeatedly considered when executive officials enjoy qualified immunity in such litigation.[15] No decision of this Court, however, has ever addressed, or provided the lower courts with guidance regarding, the issue in the instant case.

In the absence of guidance from this Court, an exceptionally complex inter-circuit conflict has emerged among the courts of appeals. There are at least half a dozen distinct standards in the circuit courts, involving overlapping differences as to (a) the type of information the supervisor had about the subordinate's actions and propensities, (b) the conclusions the supervisor had or should have drawn from that information, and (c) the intent or degree of care with which the supervisor acted or chose not to act.

A. The Standard in the First, Second, Fourth and District of Columbia Circuits: Deliberate Indifference to Notice or Constructive Knowledge of a Risk of Constitutional Violation by Subordinate

In the First, Second, Fourth, and District of Columbia Circuits, unlike the Eleventh Circuit,

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[12] *E.g.*, *Imbler v. Pachtman*, 424 U.S. 409 (1976).

[13] *Polk County v. Dodson*, 545 U.S. 312 (1981).

[14] *Stump v. Sparkman*, 435 U.S. 349 (1978).

[15] *E.g.*, *Hope v. Pelzer*, 536 U.S. 730 (2002).

supervisory liability can be based on a showing of deliberate indifference to a risk (not a certainty) of a constitutional violation by a subordinate. These circuits do not require that the supervisor actually realized that there was such a risk; in these four circuits it is sufficient that the supervisor was on notice of or had constructive knowledge of the danger. Even among the First, Second, Fourth and District of Columbia Circuits, however, there are significant differences.

In the First Circuit the key issue is not (as in the Fifth and Tenth Circuits) whether the supervisor had in fact concluded that a subordinate was likely to violate the constitution, but only whether the supervisor was on notice of facts from which that conclusion should have been drawn.

> Notice is a salient consideration in determining the existence of supervisory liability. *See Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87, 93 (1st Cir. 1994) (treating as "[a]n important factor . . . whether [the] supervisor was put on notice of behavior that was likely to result in the violation of constitutional rights"). . . . [S]upervisory liability does not require a showing that the supervisor had actual knowledge of the offending behavior; he "may be liable for the foreseeable consequences of such conduct if he would have known it but for his . . . willful blindness." *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d 576, 582 (1st Cir. 1994)

Camilo-Robles v. Hoyos, 151 F.3d 1, 7 (1st Cir. 1998). *See Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d at 93 ("notice" of "likely violation" "an important factor") (opinion joined by Breyer, J.); *Rogan v. Menino*, 175 F.3d 75, 78 (1st Cir. 1999) ("[t]o a significant extent, the existence of [supervisory liability] depends on the presence or absence of notice."); *Maldonado-Denis v. Castillo-Rodriguez*, 23 F.3d at 582 (liability may attach "[w]hen the supervisor is on notice."); *Malek v. Knightly*, 1995 WL 338178 *3 (1st Cir. June 5) ("no liability where supervisor was not provided with requisite notice of behavior which was likely to result in constitutional violation.").

In the Second Circuit a supervisor is liable for constitutional violations by a subordinate if the supervisor "knew or should have known that there was a high degree of risk" of such a constitutional violation. *Poe v. Leonard*, 282 F.3d 123, 142 (2d Cir. 2002). Risk of constitutional violation, not certainty, is the standard; it is sufficient that the "subordinate was prone to commit some unconstitutional . . . behavior." 282 F.3d at 141. The supervisor need not have actually concluded that that risk existed; he or she need only be "on notice" about the problem. 282 F.3d at 141 ("on notice," "reason to suspect"), 142 (supervisor "should have known"), 144 ("on notice," "should have been aware"). Unlike the First Circuit, which requires only proof that a constitutional violation was "likely," the Second Circuit requires a showing that there was a "high degree of risk." 282 F.3d at 140, 141. The Second Circuit standard, however, is less

demanding in one other respect; the supervisor need not have actual notice of the relevant information, only "constructive notice." "Such notice could be actual (for example, awareness of prior deprivations in a related context) or it could be constructive (for instance, notice arising from a preexisting duty)." 282 F.3d at 141; *see* 282 F.3d at 143 ("We . . . have . . . found the existence of constructive notice dispositive.").

In the Fourth Circuit supervisory liability can be based on the existence of a "pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff." This is more demanding than the First Circuit standard ("likely") and different from the Second Circuit standard ("high degree of risk"). Unlike the Third, Fifth and Tenth Circuits, the Fourth Circuit does not require actual knowledge of that risk; "constructive knowledge" will do.[16]

The District of Columbia Circuit requires a plaintiff to show that the danger of a future constitutional violation is "highly likely," clearly a more demanding standard than merely "likely." *International Action Center v. United States*, 365 F.3d 20, 25,

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[16] *Moore v. Greenwood School Dist. No. 52*, 195 Fed. Appx. 140, 144 (4th Cir. 2006) ("actual or constructive knowledge" of "a pervasive and unreasonable risk"); *Mikkelsen v. DeWitt*, 141 Fed. Appx. 88, 91 (4th Cir. 2005) (same); *Turner v. Kight*, 121 Fed. Appx. 9, 14 (4th Cir. 2005) (same); *Tigrett v. Rector and Visitors of the University of Virginia*, 290 F.3d 620, 630 (4th Cir. 2002) (same); *Cruden v. Brinkley*, 1999 WL 152597 *4 (4th Cir. 1999) (same); *Carter v. Morris*, 164 F.3d 215, 220-21 (4th Cir. 1999) (same).

26 (D.C. Cir. 2004) (opinion by Roberts, J.). The supervisor (unlike the rule in the Third, Fifth and Tenth Circuits) can be held liable based on "constructive knowledge." 365 F.3d at 28; *see* 365 F.3d at 25 (supervisor "should have been aware.") Unlike most circuits, the District of Columbia Circuit holds that knowledge (actual or constructive) of that risk must be based on a "prior history" or "pre-existing pattern" of "past transgressions," 365 F.3d at 26-27. That rule is inconsistent with the law in most circuits; in *Kahle v. Leonard*, 477 F.3d 544 (8th Cir. 2007), for example, the Eighth Circuit held a supervisor liable because he knew that a deputy sheriff posed a risk to a female inmate whom he ultimately raped, even though the deputy had no prior history of sexual or other misconduct.[17] This District of Columbia Circuit requirement is analogous to, but far less stringent than, the Eleventh Circuit five-part requirement. *See* pp. 23-25, *infra*.

B. The Standard in the Third, Fifth and Tenth Circuits: Deliberate Indifference to a Known Risk of Constitutional Violation by Subordinate

In the Third, Fifth and Tenth Circuits, the threshold standard for establishing supervisory liability is a different one; the supervisor must

[17] The supervisor knew that the deputy had visited the inmate's cell after lockdown. 477 F.3d at 552.

actually *know* that there is a substantial risk the subordinate will engage in a constitutional violation and act with deliberate difference to that risk. Where that knowledge exists, the supervisor will be liable if he or she is deliberately indifferent in responding to the problem.

In the Third, Fifth and Tenth Circuits, unlike the first of the Eleventh Circuit standards, the plaintiff need not prove the supervisor knew the subordinate "would" violate the Constitution; knowledge of a substantial risk is sufficient. *Serna v. Colorado Dept. of Corrections*, 455 F.3d 1146, 1154-55 (10th Cir. 2006) ("substantial risk"); *Estate of Davis v. City of North Richland Hills*, 406 F.3d 375, 381 (5th Cir. 2005) ("substantial risk"); *Atteberry v. Nocona General Hospital*, 430 F.3d 245, 254-55 (5th Cir. 2005) ("substantial risk of serious harm," "known and excessive risk", "significant risk"); *Brown v. Muhlenberg Township*, 269 F.3d 205, 216 (3d Cir. 2001) ("unreasonable risk"); *Johnson v. Martin*, 195 F.3d 1208, 1219 (10th Cir. 1999) ("serious risk"); *Smith v. Brenoettsy*, 158 F.3d 908, 912 (5th Cir. 1998) ("substantial risk of harm"); *Bradley v. Puckett*, 157 F.3d 1022, 1025 (5th Cir. 1998) ("substantial risk"); *Green v. Branson*, 108 F.3d 1296, 1302 (10th Cir. 1997) ("substantial risk"); *Sample v. Diecks*, 885 F.3d 1099, 1118 (3d Cir. 1989) ("unreasonable risk").

On the other hand, in these three circuits it is not sufficient to prove that a supervisor *should* have recognized the danger, or that he or she was merely "on notice" of that risk. The official must "be aware of

facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw that inference." *Smith v. Brenoettsy*, 158 F.3d at 912 (*quoting Farmer v. Brennan*, 511 U.S. 825, 837 (1994)); *Serna v. Colorado Dept. of Corrections*, 455 F.3d at 1154-55 (*quoting Verdecia v. Adams*, 327 F.3d 1171, 1175 (10th Cir. 2003)); *Brown v. Muhlenberg Township*, 269 F.3d at 216 ("plaintiff must . . . show . . . the supervisor was aware that this unreasonable risk existed."). Liability cannot be based on "an official's failure to alleviate a significant risk that he should have perceived but did not." *Atteberry v. Nocona General Hospital*, 430 F.3d at 255 (*quoting Farmer v. Brennan*, 511 U.S. 825, 838 (1994)). The existence of that knowledge can at times be inferred from the circumstances that had been made known to the supervisor. *Bradley v. Puckett*, 157 F.3d at 1025; *Woodward v. City of Worland*, 977 F.2d 1392, 1399 n.10 (10th Cir. 1992). Unlike the Eleventh Circuit, which applies its stringent five-part standard, neither the Third, Fifth or Tenth Circuits have established any particular requirement as to the type of circumstantial evidence that might prove that a supervisor was in fact aware of the risk that a subordinate might engage in a constitutional violation.

The standard for supervisory liability in the Third, Fifth and Tenth Circuits is thus more demanding than the standard in the First, Second, Fourth and District of Columbia Circuits, but less demanding

than the standard in the Sixth, Seventh and Eleventh Circuits.

C. The Seventh Circuit Standard: Knowledge and Approval of Subordinate's Action

The Seventh Circuit standard for supervisory liability is the most stringent. Decisions in that circuit require, first, that the plaintiff show that the supervisor actually *knew* that his or her subordinate was violating or had violated federal rights.[18] This knowledge requirement itself imposes major limitations on the potential liability of a supervisor. A supervisor cannot be held liable based on the known risk, however great, of a future constitutional violation. Indeed, until at least one violation has already occurred, there is not yet any violation to know about. A supervisor cannot be held liable merely because he or she should have known of the violation, but refused, for example, to inquire about what the subordinate was doing, or to look into complaints about the subordinate's conduct. If the supervisor had received information from which a reasonable person would have concluded that the subordinate was violating federal rights, the supervisor still is not liable so long as he or she, however pig-headedly, did not draw that inference.

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[18] *See* nn.19-21, *infra*.

The Seventh Circuit also requires a plaintiff to meet a second requirement; there are several distinct lines of Seventh Circuit cases which articulate this additional element somewhat differently. Several decisions require proof that the supervisor actually "approved"[19] of the unconstitutional action of his or her subordinates; these decisions insist on evidence that the supervisor had indicated that he or she regarded that action favorably. A second set of cases holds that the supervisor is liable for a known constitutional violation only if he or she "consented"[20] to that conduct. This formulation requires that the supervisor have given permission for the unconstitutional action, although not necessarily agreeing with it. A third group of decisions holds the supervisor liable if he or she both knew about the conduct and "facilitate[d] it, approve[d] it, condone[d] it, or turn[ed] a blind eye for fear of what [he or she] might see."[21]

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[19] *Sides v. City of Champaign*, 496 F.3d 820, 828 (7th Cir. 2007); *Williams v. Prison Health Services, Inc.*, 167 Fed. Appx. 555, 558 (7th Cir. 2006); *Chavez v. Cady*, 207 F.3d 901, 906 (7th Cir. 2000); *Baskin v. City of Des Plaines*, 138 F.3d 701, 705 (7th Cir. 1998).

[20] *Johnson v. Peek*, 1998 WL 764434 *3 (7th Cir. 1998); *Hadley v. Peters*, 1995 WL 675990 *9 (7th Cir. 1995); *Riggins v. Walter*, 279 F.3d 422, 426 (7th Cir. 1985); *Douglas v. Black*, 1995 WL 237027 *1 (7th Cir. 1995); *Clayton-El v. Clark*, 1994 WL 709323 *4 (7th Cir. 1994); *Walker v. Ahitow*, 1993 WL 468603 *6 (7th Cir. 1993); *Lucien v. Peters*, 1992 WL 104815 *2 (7th Cir. 1992).

[21] *Steidl v. Fermon*, 494 F.3d 623, 631 (7th Cir. 2007); *Thomas v. Knight*, 196 Fed. Appx. 424, 426 (7th Cir. 2006); *Nanda v. Moss*, 412 F.2d 836, 842 (7th Cir. 2005); *Morfin v. City*

(Continued on following page)

This is somewhat less restrictive than the approval line of Seventh Circuit cases, because a supervisor might turn a blind eye to known federal violations, not because the supervisor approved them, but only because the supervisor was simply indifferent to whether the violations were occurring, or because the supervisor – although disapproving those violations – just did not want to do anything about them.

D. The Sixth Circuit Standard: Approval of or Knowing Acquiescence in Subordinate's Action

Decisions in the Sixth Circuit use a fairly consistent formula to define when a supervisor is liable for the constitutional violations of a subordinate. The supervisor must "at least implicitly [have] authorized,

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of East Chicago, 349 F.3d 989, 1000 (7th Cir. 2003); *Hildebrandt v. Illinois Dept. of Natural Resources*, 347 F.3d 1014, 1039 (7th Cir. 2003); *Sanville v. McCaughtry*, 266 F.3d 724, 740 (7th Cir. 2001); *Chavez v. Illinois State Police*, 251 F.3d 612, 651 (7th Cir. 2001); *Adams v. Detella*, 2000 WL 1763342 *4 (7th Cir. 2000); *Jones v. Adank*, 2000 WL 868591 *3 (7th Cir. 2000); *Zentmyer v. Kendall County, Ill.*, 220 F.3d 805, 811 (7th Cir. 2000); *Reed v. McBride*, 178 F.3d 849, 852 (7th Cir. 1999); *Gossmeyer v. McDonald*, 128 F.3d 481, 495 (7th Cir. 1987); *Lanigan v. Village of East Hazel Crest, Ill.*, 110 F.3d 467, 477 (7th Cir. 1997); *Robinson v. Welborn*, 1997 WL 58868 *1 (7th Cir. 1997); *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996); *Gentry v. Duckworth*, 65 F.3d 555, 561 (7th Cir. 1995); *Kernats v. O'Sullivan*, 35 F.3d 1171, 1182 (7th Cir. 1994); *Del Raine v. Williford*, 32 F.3d 1024, 1052 (7th Cir. 1994); *Jones v. City of Chicago*, 856 F.2d 985, 991 (7th Cir. 1988).

approved, or knowingly acquiesced in the unconstitutional conduct."[22] This formula is similar to the third variant of the second part of the Seventh Circuit test. Like all versions of the Seventh Circuit standard, the Sixth Circuit standard is more stringent than the standards in the First, Second, Third, Fourth, Fifth, Tenth and District of Columbia Circuits.

E. The Eleventh Circuit Standards

As the panel decision in the instant case noted, the Eleventh Circuit limits supervisory liability to three circumstances.[23]

(1) A supervisor is liable if he or she "knew the subordinates would act unlawfully and failed to stop them from doing so." (App. 5) (*quoting Dulrymple v. Reno*, 334 F.3d 991, 996 (11th Cir. 2003). Like the Sixth or Seventh Circuits, this standard requires

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[22] *Ontha v. Rutherford County, Tennessee*, 222 Fed. Appx. 498, 504 (6th Cir. 2007); *Caudell v. City of Loveland*, 226 Fed. Appx. 479, 482 (6th Cir. 2007); *DeMerrell v. City of Cheboygan*, 206 Fed. Appx. 418, 420 (6th Cir. 2006); *Turner v. City of Taylor*, 412 F.3d 629, 643 (6th Cir. 2005); *Doe v. City of Roseville*, 296 F.3d 431, 440 (6th Cir. 2002); *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999); *Doe v. Claiborne County, Tennessee*, 103 F.3d 495, 511 (6th Cir. 1996); *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir. 1984); *Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir. 1982).

[23] Like other circuits, the Eleventh Circuit imposes liability on a supervisor who directs a subordinate to violate the Constitution. (App. 5). Such a direction is generally regarded as direct participation in the constitutional violation at issue.

knowledge of the subordinate's constitutional violation. Unlike those circuits, however, affirmative approval, authorization, consent or acquiescence is not required; if a supervisor knows that a supervisor is ongoing to violate the Constitution, the supervisor is liable for failing to stop them (or, presumably, making a reasonable effort to do so). A supervisor who makes an inadequate effort to do so is liable in the Eleventh Circuit even though he or she did not "turn a blind eye" to the problem (the Seventh Circuit standard) or "tacitly acquiesce" (the Sixth Circuit standard). This Eleventh Circuit standard, unlike the standards in a majority of circuits, requires that the supervisor *know* that a violation is actually going to occur;[24] mere knowledge of a substantial danger of unconstitutional action by a subordinate is not sufficient.

(2) A supervisor can be liable if he or she "had notice" of a "threat" of constitutional violations, but only if the notice took the form of "'a history of widespread abuse' that is 'obvious, flagrant, rampant and of continued duration.'" (App. 5) (*quoting Brown v. Crawford*, 906 F.2d 667, 671 (11th Cir. 1990)). The Eleventh Circuit has repeatedly emphasized that unless this exceptional pattern of past violations was present, liability cannot be imposed on a supervisor based on notice of a risk of constitutional violation. In this case the district court had concluded that the

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[24] *See* App. 5 (individual defendants not liable because they did not "kn[o]w Wilson would abuse students.").

individual supervisor defendants were on notice that Wilson posed a danger to his female students. (App. 31). The Eleventh Circuit did not disturb or question that finding. Rather, it held that the supervisors were not liable because the plaintiffs had failed to also show that the defendants received that "notice . . . through a history of obvious, flagrant, and widespread abuse of students by Wilson." (App. 5).

This five-part requirement – that the notice provided to a supervisor must concern prior misconduct that was "widespread," "obvious," "flagrant," "rampant," and "of continued duration" – does not exist in any other circuit. The Eleventh Circuit has repeatedly admonished that the standard is meant to be "extremely rigorous."[25] No Eleventh Circuit decision in the last decade has found the evidence sufficient to satisfy this stringent standard or permitted the imposition of liability based on notice of a danger of constitutional violations.[26] As a practical matter, in the

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[25] *West v. Tillman*, 496 F.3d 1231, 1329 (11th Cir. 2007); *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003); *Brady v. Florida Dept. of Labor and Emp. Security*, 133 F.3d 797, 802 (11th Cir. 1998).

[26] *Hicks v. Ferrero*, 2007 WL 1793446 *3 (11th Cir. 2007) (standard not met); *West v. Tillman*, 496 F.3d 1231, 1329 (11th Cir. 2007) (standard not met); *McBride v. Rivers*, 170 Fed. Appx. 648, 658 (11th Cir. 2006) (standard not met); *Gray v. Bostic*, 458 F.3d 1295, 1308 (11th Cir. 2006) (standard not met); *Sanders v. Barrett*, 2005 WL 2640979 *2 (11th Cir. 2005) (standard not met); *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003) (standard not met); *Gonzalez v. Reno*, 325 F.3d 1228, 1235 (11th Cir. 2003) (standard not met); *Hartley v. Parnell*, 193 F.3d 1263,

(Continued on following page)

Eleventh Circuit (unlike the circuits discussed below) it is virtually impossible to establish supervisory liability based on notice that a subordinate is likely to engage in a violation of constitutional rights.

(3) A supervisor will be held liable if he or she "imposed an improper custom or policy that constituted deliberate indifference to constitutional rights." (App. 5-6). This basis of liability is effectively limited to high level policymaking officials.

F. The Eighth and Ninth Circuits Apply Inconsistent Standards

The complex conflicts described above all exist *within* the Eighth and Ninth Circuits.

In *Ottoman v. City of Independence, Missouri*, 341 F.3d 751, 761 (8th Cir. 2003), the court quoted with approval the Seventh Circuit decision in *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988), requiring proof that the supervisor "kn[e]w about the conduct" of the subordinate. But in *Kahle v. Leonard*, 477 F.3d 544 (8th Cir. 2007), the Eighth Circuit disavowed any such knowledge requirement in *Ottoman*, dismissing it as "casual dicta." 477 F.3d at 552. "[The defendant supervisor] did not have to know that [the plaintiff] was being sexually assaulted, but

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1269 (11th Cir. 1999) (standard not met); *Daniel v. United States Marshall Service*, 188 Fed. Appx. 954, 963 (11th Cir. 2006) (standard not met); *Brady v. Florida Dept. of Labor and Emp. Security*, 133 F.3d 797, 802 (11th Cir. 1998) (standard not met).

only that she was at substantial *risk* of being sexually assaulted." 477 F.3d at 551 (emphasis in original).

Wever v. Lincoln County, Neb., 388 F.3d 601, 608 (8th Cir. 2004), held that supervisory liability could be based on the fact that a supervisor was "on notice" of the risk of a constitutional violation. But in *Kahle* the Eighth Circuit held to the contrary that the supervisor "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." 477 F.3d at 550.

In *Larson v. Miller*, 76 F.3d 1446, 1453 (8th Cir. 1996), the court held that supervisory liability requires proof of "a continuing, widespread, persistent pattern of unconstitutional conduct," the same standard applied to determine the existence of a custom giving rise to governmental liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). Less than a year later, however, the Eighth Circuit reversed itself and held that the *Monell* standard did *not* apply to claims against supervisors; evidence that a supervisor was "aware of a pattern of problems" is sufficient even where the pattern is not "persistent and widespread." *Andrews v. Fowler*, 98 F.3d 1069, 1078 (8th Cir. 1996). Then in *Kahle* the Eighth Circuit held that the supervisor could be liable even in the absence of any pattern of unconstitutional misconduct.

With regard to the level of risk of constitutional violation that must be shown, *White v. Holmes*, 21

F.3d 277, 280 (8th Cir. 1994), required "a pervasive and unreasonable risk of harm," *Pietrafeso v. Lawrence County, S.D.*, 452 F.3d 978, 983 (8th Cir. 2006), required a "substantial risk of serious harm," and then *Cox v. Sugg*, 484 F.3d 1062, 1066 (8th Cir. 2007), required only "a risk of constitutional harm."

Similarly, decisions in the Ninth Circuit apply several quite different standards. *See, e.g., Oona, R.S. v. McCaffrey*, 143 F.3d 473, 477 (9th Cir. 1998) ("A supervisor may be found liable under § 1983 if the supervisor is 'aware of a specific risk of harm to the plaintiff.'"); *Harry A. v. Duncan*, 234 Fed. Appx. 463, 464 (9th Cir. 2007) (supervisor will be liable if he or she has "actual knowledge (or, at least, willful blindness)" regarding a "serious risk"); *Earthly v. City of Beverly Hills*, 125 F.3d 858, 1997 WL 632594 *2 (9th Cir. 1997) ("a supervisor could not act with deliberate indifference to a plainly obvious risk of a constitutional violation"); *Edgerly v. City and County of San Francisco*, 495 F.3d 645, 660 (9th Cir. 2007) (supervisory liability based on "reckless or callous indifference to the rights of others"); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (liability only where the supervisor "knew of the violations and failed to act to prevent them.")

* * *

Decades of lower court litigation of this issue have framed a mature and complex inter-circuit conflict. The numerous of circuit court decisions have fully aired the subsidiary questions, and the

innumerable fact patterns in which the issue has arisen have brought to light the potential alternative legal standards and demonstrated the significance of each.

The instant case provides an excellent vehicle for addressing the standard for supervisory liability in a section 1983 case. This is precisely the type of case in which the differing liability standards are outcome determinative. The supervisor defendants did not have actual knowledge that Wilson was molesting the young girls in his class, and concededly could not be certain he would do so in the future. If the Court were to hold that such knowledge or certainty is required for supervisory liability, the claims against the individual defendants in this case were properly dismissed. On the other hand, a reasonable jury assuredly could conclude that those defendants had actual or constructive knowledge that Wilson had a propensity for improper sexual conduct with young girls, and therefore posed a substantial risk to the girls in his class. If this Court were to adopt the risk-based liability standard used in the majority of the courts of appeals[27], the claims against the supervisor defendants in this case would be reinstated.

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[27] As we note *supra*, decisions adopting a standard quite different from the Eleventh Circuit standard in the instant case were joined or written by the Chief Justice and Justice Breyer when they served, respectively, on the District of Columbia and First Circuits.

The Eleventh Circuit standard for supervisory liability in section 1983 cases is inconsistent with the language of section 1983 itself. Section 1983 imposes liability on a person who "causes" a deprivation of constitutional rights. 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 resulting constitutional violation. That standard is consistent with tort principles that were well established when section 1983 was enacted. An individual who is on notice that his or her property (for example, a car or a pet) poses a substantial risk to third parties is liable in tort if he or she fails to take reasonable steps to prevent those injuries. Liability standards under section 1983 are resolved in light of the prevailing tort law context in which that provision was adopted in 1871. *E.g.*, *Bogan v. Scott-Harris*, 523 U.S. 44, 49-51 (1998).

II. THERE IS A WELL ESTABLISHED INTER-CIRCUIT CONFLICT REGARDING WHAT CONSTITUTES "ACTUAL NOTICE" UNDER *GEBSER V. LAGO VISTA INDEP. SCHOOL DISTRICT*, 524 U.S. 274 (1998)

Title IX prohibits recipients of federal funds from discriminating on the basis of sex in any federally assisted education program or activity. The sexual harassment or molestation of a student by a school official in such a program or activity constitute such

forbidden discrimination. *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 281 (1998). In *Gebser* this Court addressed the standard governing when a recipient of federal funds can be held liable in damages for discrimination violative of Title IX. *Gebser* held that damages may only be awarded if a plaintiff demonstrates that the defendant had "actual notice" and acted with deliberate indifference. 524 U.S. at 292.

In the decade following *Gebser* the courts of appeals have reached sharply divergent conclusions regarding the meaning of this "actual notice" requirement. Two circuits, including the Eleventh Circuit in the instant case, hold that defendant must have had notice of the specific type of misconduct that is the basis of the damage claim; actual notice of different, perhaps less egregious, types of discrimination is insufficient. That notice, moreover, must be received at the point in time when the misconduct is actually occurring; actual notice of prior discrimination will not support a damage action. Four other circuits hold, to the contrary, that actual notice of prior, even less egregious discrimination can be sufficient under *Gebser* if that notice demonstrated the existence of a substantial risk of the abuse that was subsequently suffered by the plaintiff.

The Fourth Circuit adopted a narrow reading of the *Gebser* "actual notice" requirement in *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001). A teacher in that case had molested a sixth grade boy, whose parents brought suit under Title IX. The court of

appeals acknowledged that there was ample evidence that the elementary school principal already knew, before that child was victimized, that the teacher was a danger to the students. A former student had personally informed the principal that the teacher in question had molested him more than a decade before, and warned the principal that the teacher was a pedophile. 268 F.3d at 233. A second person told the principal that the teacher had molested an unidentified student. The teacher "frequently took male students on camping trips at which no other adults were present." 268 F.3d at 235. The teacher had been seen with the plaintiffs' son sitting in his lap in a questionable posture. 268 F.3d at 233. The Fourth Circuit agreed that this information provided ample notice that the teacher posed "an unreasonable risk" of sexual abuse to his students. 268 F.3d at 235.

The court of appeals nonetheless overturned a jury verdict against the school district under Title IX.

> Although [the principal] certainly should have been aware of the *potential* for such abuse, . . . there is no evidence in the record to support a conclusion that [the principal] was *in fact* aware that a student was being abused.

268 F.3d at 238 (emphasis in original). In the view of the Fourth Circuit, *Gebser* required proof that the responsible school official actually knew that at least some student was being molested at the point in time when the plaintiff's son was being victimized. It was insufficient under Title IX that the principal knew

that the teacher had molested other students, that the teacher at the time was acting in a suspicious manner, or that the teacher posed a serious risk to his young students.

The Eleventh Circuit in the instant case read *Gebser* in a similarly narrow manner. To satisfy the "actual notice" requirement, the court below held, plaintiffs were required to show that the school principal "had actual notice Wilson was molesting students." (App. 7). As in the Fourth Circuit, actual notice that Wilson had repeatedly engaged in objectionable conduct short of actual molestation and that Wilson posed a substantial danger to his students was deemed insufficient. The court below did not dispute the district judge's finding that the principal was "on notice that Wilson was engaging in sexually inappropriate conduct with his students." (App. 31). Rather, the Eleventh Circuit regarded that finding as legally irrelevant, because the principal was only on notice of "sexually inappropriate conduct," not of sexual molestation.

The Tenth Circuit has recognized that "[l]ower courts differ on whether notice sufficient to trigger liability may consist of prior complaints or must consist of notice regarding current harassment [or other violations] in the recipient's programs." *Escue v. Northern Oklahoma College*, 450 F.3d 1146, 1153

(10th Cir. 2006).[28] The Tenth Circuit rejected the Fourth Circuit decision in *Baynard* requiring actual knowledge of the very discriminatory act in question.

> *Gebser* . . . " . . . does not set the bar so high that a school district is not put on notice until it receives a clearly credible report of sexual abuse from the plaintiff-student." *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 62 (D. Me. 1999).

450 F.3d at 1153. The notice requirement in *Gebser* is satisfied in the Tenth Circuit when school officials have "actual knowledge of a *substantial risk* of abuse to students based on prior complaints by other students." *Id.* (*quoting Doe A. v. Green*, 298 F. Supp. 2d 1025, 1033 (D. Nev. 2004) (emphasis in *Escue*).

In *Bostic v. Smyrna School Dist.*, 418 F.3d 355 (3d Cir. 2005), the Third Circuit approved a Title IX jury instruction that embodied this substantial danger standard.

> An educational institution has "actual notice," . . . if an appropriate person at the institution has knowledge of facts sufficiently indicating substantial danger to a student so that the institution can reasonably be said to be aware of the danger.

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[28] *See Johnson v. Galen Health Institutes, Inc.*, 267 F. Supp. 2d 679, 686 (W.D. Ky. 2003) ("Lower courts have split on this question); *Doe A. v. Green*, 298 F. Supp. 2d 1025, 1033 n.2 (D. Nev. 2004) (describing Fourth Circuit decision in *Baynard* as the "minority view.")

418 F.3d at 360. The court of appeals noted that the model federal jury instruction regarding Title IX claims also provides that notice of facts "sufficiently indicating danger to students" is sufficient under *Gebser*. 418 F.3d at 316 (citing 3C Fed. Jury Prac. & Instr. § 177.36 (5th ed. 2001)).

> Although the "substantial danger" language does not appear in [*Gebser* or *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)], neither is it inconsistent with the standard set forth in those cases regarding "actual knowledge." . . . We therefore reject [the] contention that . . . the "substantial danger" language [is] no longer validly applied to Title IX.

Id.

In *Williams v. Paint Valley Local School District*, 400 F.3d 360 (6th Cir. 2005), the Sixth Circuit upheld a disputed jury instruction which stated that the school district could be held liable if it "had actual notice that [the teacher] posed a substantial risk of sexual abuse to children in the school district." 400 F.3d at 363. "The idea was to make clear that 'deliberate indifference' liability could not rest on actual or constructive knowledge of an inconsequential risk." 400 F.3d at 368. The Tenth Circuit reasoned that notice of a "substantial risk" is sufficient because that standard was used by this Court to define deliberate indifference in *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). 400 F.3d at 367-68.

In *Warren v. Reading School Dist.*, 278 F.3d 163 (3d Cir. 2002), the Third Circuit upheld a finding of actual notice under *Gebser* under circumstances all too similar to the instant case. In *Warren* the elementary school principal had earlier received, and ignored, a parent's complaint that a teacher was taking his young son to the teacher's house, lifting him "up and down," and giving him money. 278 F.3d at 166. The principal took no action. Two years later that teacher was arrested for a related form of physical contact with fourth grade male students that constituted sexual abuse; one of the victims sued under Title IX. In upholding a jury verdict against the school district under Title IX, the Third Circuit held that the earlier parental complaint – although it concerned troubling conduct that was not itself sexual abuse – would alone satisfy the *Gebser* knowledge requirement. 278 F.3d at 173. In the Fourth and Eleventh Circuits the claim in *Warren* would have been dismissed, because the principal did not actually know that the plaintiffs' son was being molested.

The Seventh Circuit has adopted an intermediate reading of *Gebser*. Ordinarily

> the plaintiff in a Title IX damages suit based on a teacher's behavior must prove actual knowledge of misconduct, not just actual knowledge of the risk of misconduct.

Delgado v. Stegall, 367 F.3d 668, 672 (7th Cir. 2004). It is not enough that "school[ ] officials know in a general sense that there is a *risk* that one or more . . .

teachers will harass a student sexually, even if no such incident has ever occurred in the school." *Id.* (emphasis in original). But notice of past behavior demonstrating a risk of sexual abuse, harassment, or other discrimination will suffice if it reveals "*so* high a risk [of such discrimination that it] would make [the recipient] reckless for having failed to take steps to prevent [subsequent misconduct]." *Id.* (emphasis in original). In the instant case a trier of fact could reasonably conclude that school officials acted recklessly when, despite receiving two years of repeated complaints and warnings about Wilson, they took no action to prevent the sexual molestation that ultimately occurred in September 2003.

This inter-circuit conflict stems in part from the language in *Gebser* itself. Although *Gebser* required "actual notice," it left unclear notice *of what*. *Gebser* refers frequently to notice of "*the* discrimination" or "*the* violation," assuming that there would be only a single type, period and victim of discrimination. 524 U.S. at 287-90 (emphasis added). Some passages simply require "notice," with no additional modifiers indicating the necessary content of the notice. 524 U.S. at 285, 287-89, 291, 292. The Court held that the notice that had been given in *Gebser* – that the teacher was making inappropriate comments in class – "was plainly insufficient to alert the principal to the possibility that [the teacher] was involved in a sexual relationship with a student." 524 U.S. at 291. What *Gebser* did not make clear was whether the actual notice requirement could indeed be satisfied by notice

of misconduct which was "[]sufficient to alert" school authorities to "the possibility" that a teacher might engage in more serious abuse.

Six circuits have already addressed this issue. The grave injuries at issue weigh heavily in favor of granting review of the question presented at this time, without awaiting further developments in the lower courts. A majority of the cases arising under *Gebser*, like *Gebser* itself, concern adult teachers engaging in sexual contacts with minor children. Too many Title IX actions, as in the instant case, involve child molestation.[29] Such abuses can cause long lasting and devastating psychological harm to the victims. The decisions in the Eleventh and Fourth Circuits permit officials in federally assisted primary and secondary schools to deliberately ignore these abuses, so long as the repeated warnings and complaints concern misconduct short of child molestation, or where, as in *Baynard*, the child molester is simply between victims. Certiorari should be granted to

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[29] *E.g.*, *Warren v. Reading School Dist.*, 278 F.3d 163, 165 n.1 (3d Cir. 2002) (teacher prosecuted for three counts of sexual abuse of fourth grade male students); *Shrum v. Kluck*, 249 F.3d 773, 776 (8th Cir. 2001) (teacher pled guilty to crime of Indecency with a Child); *R.M.R. v. Muscogee County School Dist.*, 165 F.3d 812, 814 (11th Cir. 1999) (teacher arrested for child molestation); *Davis v. DeKalb County School Dist.*, 233 F.3d 1367, 1369 (11th Cir. 2000) (teacher convicted of six counts of child molestation); *Bell v. Harge*, 81 Fed. Appx. 943, 944 (9th Cir. 2003) (teacher arrested for sexual contact with student); *Williams v. Paint Valley Local School Dist.*, 400 F.3d 360, 362 (6th Cir. 2005) (teacher assertedly molested six fourth-grade boys).

make clear that schools subject to the requirements of Title IX can be held liable if their officials act in such a willfully irresponsible manner.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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