No. 07-1125

IN THE

# Supreme Court of the United States

LISA FITZGERALD, *et vir.*,

*Petitioners,*

*v.*

BARNSTABLE SCHOOL COMMITTEE, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENTS BARNSTABLE SCHOOL COMMITTEE AND DR. RUSSELL DEVER

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## QUESTIONS PRESENTED

I. Whether the Petitioners' failure to assert and/or preserve for appeal a viable Section 1983 constitutional claim makes this case an inappropriate vehicle for resolving the question presented: whether Title IX precludes Section 1983 constitutional claims to remedy sex discrimination in education.

II. Whether the Petitioners fail to present compelling reasons to grant the petition where, in overstating the First Circuit's ruling below, they present an overly broad, hypothetical legal question explicitly not reached below.

III. Whether the First Circuit's decision that Title IX preempts the Petitioners' Section 1983 student-on-student sexual harassment claims based on equal protection because those claims, as presented in this case, are "virtually identical" to their Title IX student-on-student sexual harassment claim is correct and should be left undisturbed.

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## INTRODUCTION

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 ("Title IX") broadly prohibits sex discrimination by educational institutions receiving federal funds.[1] In furtherance of its aims, Title IX allows private actions for damages against such educational institutions for their allegedly discriminatory programs and activities, *see Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979); *Franklin v. Gwinnett County Public Sch.*, 503 U.S. 60 (1992), and in certain situations arising out of sexual harassment of students by third parties – that is, by teachers (*see Gebser v. Lago Vista Independent Sch. Dist.*, 524 U.S. 274 (1998)), and by other students (*see Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)).

42 U.S.C. § 1983 ("Section 1983") allows private actions to enforce federal constitutional and statutory rights.[2] As such, Section 1983 may be used to challenge

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[1] In relevant part, Title IX provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

[2] In relevant part, Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

(Cont'd)

governmental violations of the Fourteenth Amendment's guarantee of equal protection, which requires similar treatment of all persons similarly situated. *Forrester v. White*, 484 U.S. 219 (1988).

The Petitioners ask this Court to review this case and declare that Title IX is not the exclusive remedy for sex discrimination in education and that equal protection-based claims brought under Section 1983 – even where those claims are factually identical to a concurrent Title IX claim – should be allowed to proceed. Regardless of the merits of this position, the Petitioners' failure to assert and/or preserve for appeal any cognizable Section 1983 claim based on the constitution makes this case an inappropriate vehicle for examining this issue. The Court's review would have no practical effect as the Petitioners' Section 1983 claims inevitably fail as procedurally deficient. The Court should therefore deny certiorari.

Certiorari is also inappropriate because the Petitioners, by greatly overstating the First Circuit's holding, argue for this Court's review of a much broader legal question than that determined below. The First Circuit concluded that the Petitioners' Section 1983

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> 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. . . .

42 U.S.C. § 1983.



claims for student-on-student sexual harassment based on the equal protection clause were, as presented in this case, "virtually identical" to their concurrent Title IX claim for student-on-student sexual harassment, and that, based on its comprehensive remedial scheme, Title IX preempted the duplicative Section 1983 claims. In so holding, the First Circuit explicitly stated that Title IX *does not* preempt all concurrent Section 1983 constitutional claims arising out of sex discrimination in education. Thus, in asking the Court to broadly conclude that Title IX *never* precludes Section 1983 constitutional claims, the Petitioners essentially seek an improper advisory opinion on a legal conclusion not made below.

In any event, the First Circuit's decision was correct and should not be disturbed. Based on the facts and claims presented, the First Circuit's case-specific approach to Title IX preemption is particularly rational and appropriate. More importantly for purposes of this case, the First Circuit's careful ruling does not, as the Petitioners contend, preclude otherwise meritorious Section 1983 constitutional claims from proceeding. For these reasons, certiorari should be denied.

## STATEMENT OF THE CASE

### I. Underlying Facts

This case arises out of the Petitioners' allegation that their kindergartener daughter was sexually harassed by another student – an eight-year-old boy – on the school bus. App. at 2a-4a.[3] Specifically, on the

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[3] Citations herein to "App." refer to the appropriate page number of the Appendix to the Petition.

morning of February 14, 2001, Jacqueline Fitzgerald informed her parents that each time she wore a dress to school — typically, two to three times a week — a fellow student on her school bus would cause her to lift her skirt. *Id.* at 2a. The Petitioners called the principal of Jacqueline's school, Frederick Scully, to report the allegations. *Id.*

That morning, Scully and Lynda Day, the school's prevention specialist responsible for responding to reports of inappropriate student behavior, met with the Petitioners. *Id.* at 2a. Because Scully and Day were unable to identify the alleged perpetrator from Jacqueline's sketchy account, they arranged – over the next two days – for her to surreptitiously observe students disembarking the school bus. *Id.* at 2a-3a.

After Jacqueline finally tentatively identified the perpetrator as Briton Oleson, a third-grader, both Scully and Day questioned Briton, who steadfastly denied the allegations. *Id.* at 3a. Day then interviewed the bus driver and a majority of the students who regularly rode the bus, but was unable to corroborate Jacqueline's version of the relevant events. *Id.*

Shortly thereafter, the Petitioners informed Scully that Jacqueline was now alleging that, in addition to causing her to lift her dress, Briton had insisted that she pull down her underpants and spread her legs. *Id.* at 3a. Scully immediately held another meeting with the Petitioners to discuss this new claim, re-interrogated Briton and followed up on the interviews that Day had conducted. *Id.*



By this time, the local police department had launched a concurrent investigation, handled by a detective specializing in juvenile matters, Reid Hall. Among other things, Hall questioned both Jacqueline and Briton. *Id.* Hall found Briton to be credible, and the police department ultimately determined that there was insufficient evidence to proceed criminally against him. *Id.* Relying in part on this decision and in part on the results of the school's own comprehensive investigation, Scully concluded that there existed insufficient evidence to discipline Briton. *Id.*

Since their initial complaint, the Petitioners had been driving Jacqueline to and from school. *Id.* In late February, and despite its continuing inability to substantiate Jacqueline's claims, the school offered to place Jacqueline on a different bus or, alternatively, to maintain rows of empty seats between the kindergarten students and the older pupils on the original bus. *Id.* at 3a-4a. The Petitioners rejected these suggestions, instead insisting on a series of other demands, including placing a monitor on the bus and transferring Briton to a different bus. *Id.* at 4a. The school system's superintendent, Russell Dever, declined to implement these demands. *Id.* Dever's refusal to accede to the Petitioners' demands is the sole factual predicate for his inclusion as a party to this lawsuit. *Id.* at 23a, 25a; Complaint and Jury Demand at ¶¶ 33-38, *Fitzgerald v. Barnstable Sch. Comm.*, No. 02-10604 (D. Mass. Apr. 2, 2002).

Given the Petitioners' decision to remove Jacqueline from the school bus, there were no incidents aboard the bus after February 14, 2001. App. at 4a. Nevertheless,

Jacqueline claims to have been periodically distressed when seeing Briton in the school hallways and, during the next school year, when a gym teacher with no knowledge of the Petitioners' allegations urged students, including Jacqueline, to "high-five" Briton in a mixed-grade gym class. *Id.* As he had with all of the previous reports from Petitioners, Scully acknowledged and addressed each of these incidents immediately upon his receipt of notice thereof. *Id.*

## II. Procedural Background

On or about April 3, 2002, the Petitioners filed suit, alleging claims under: 1) Title IX against the School Committee; 2) Section 1983 against the School Committee and Superintendent Dever; 3) and state law against both Respondents. Complaint and Jury Demand at ¶¶ 51-69, *Fitzgerald v. Barnstable Sch. Comm.*, No. 02-10604 (D. Mass. Apr. 2, 2002). By Order dated September 9, 2004, the District Court dismissed all claims but the Title IX claim against the School Committee. App. at 43a-61a. Following discovery, the District Court, by Memorandum and Order dated October 17, 2006, granted summary judgment in the School Committee's favor on the Title IX claim. *Id.* at 26a-41a.

On appeal, the Court of Appeals for the First Circuit affirmed the District Court's decisions.[4] *Id.* at 1a-25a. The First Circuit first held that the School Committee

[4] As the Petitioners did not pursue their dismissed state law claims on appeal, the First Circuit's decision addressed only the Title IX claim and the Section 1983 claims.



was entitled to summary judgment on the Title IX claim because the Petitioners had failed to show one of the necessary elements for a viable claim of student-on-student sexual harassment under Title IX – that school officials' responses to the Petitioners' claims of sexual harassment were deliberately indifferent, that is, clearly unreasonable. *Id.* at 10a-16a.

Indeed, far from clearly unreasonable, the First Circuit found the Respondents' response to be affirmatively reasonable:

> [t]he school reacted promptly to the complaint; commenced a full-scale investigation; and pursued the investigation diligently. As the scenario unfolded, school officials paid close attention to new information, emerging developments, and the parents' concerns. Given its inability to corroborate Jacqueline's allegations and the termination of the police investigation with no recommendation for further action, the defendants' refusal to institute disciplinary measures against Briton was reasonable.

*Id.* at 12a. Similarly, the Court of Appeals found that school officials' offer of remedial measures – allowing Jacqueline to ride a different bus or rows of empty seats between kindergarteners and other students – was "suitable." *Id.* at 13a.

Significantly, the Petitioners do not seek review of the First Circuit's affirmance of summary judgment in the School Committee's favor on the Title IX claim. Thus, the First Circuit's factual findings set forth above are irrevocably established and cannot be challenged.

The First Circuit next upheld the District Court's dismissal of the Petitioners' claims under Section 1983 against the School Committee and Superintendent Dever. *Id.* at 16a-23a. In addressing the Petitioners' Section 1983 claim based on statutory rights – that is, on Title IX – the Court of Appeals invoked the well-established rule of *Middlesex County Sewer. Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 19-21 (1981), that Section 1983 cannot be used to enforce a statutory right when that statute's remedial scheme is sufficiently comprehensive as to demonstrate Congress's intent to limit the available remedies to those provided by the statute itself. *Id.* at 17a-20a. Emphasizing that this Court has found Section 1983 available to redress deprivations of federal statutory rights only where the underlying statute allows for no private right of action, the First Circuit concluded that Title IX's comprehensive remedial scheme, including an implied private right of action offering a full panoply of injunctive and monetary relief, precludes parallel Title IX-based actions under Section 1983, whether brought against educational institutions or their individual employees. *Id.* at 19a-20a. The Petitioners do not challenge the First Circuit's ruling affirming the dismissal of their Section 1983 statutory claims.

As to the Petitioners' putative Section 1983 claims based on the equal protection clause of the constitution,



the First Circuit – without addressing the Respondents' arguments that no equal protection claim was properly alleged or preserved for appeal – held that any such claim, based on the facts presented in this case, was also preempted by Title IX. *Id.* at 23a-25a. The Court of Appeals relied largely on *Smith v. Robinson*, 468 U.S. 992 (1984), which held that Congress intended the Education of the Handicapped Act, 20 U.S.C. § 1400 *et seq.* ("EHA"), to be the "exclusive avenue" through which plaintiffs could assert due process and equal protection claims "virtually identical" to their EHA statutory claims. *Smith*, 468 U.S. at 1009.

Finding the similarities between the Section 1983 claims at issue in *Smith* and in this case "striking," the First Circuit determined that the Petitioners' Title IX claim for student-on-student sexual harassment was "virtually identical" to their Section 1983 equal protection claims for student-on-student sexual harassment. Id. at 23a. In this regard, the Petitioners offered no theory of liability under the equal protection clause other than the Respondents' purported failure to take adequate actions to prevent and/or to remediate the student-on-student sexual harassment about which Jacqueline complained. *Id.*

The First Circuit next found that, based on the comprehensiveness of Title IX's remedial scheme, including its implied private right of action, Congress intended that Title IX preclude virtually identical constitutional claims of gender discrimination in education. *Id.* at 23a-24a. Based on *Smith*, which concluded that a comprehensive remedial scheme precludes Section 1983 actions despite the absence of

any private rights of action against individual state actors, 468 U.S. at 1009, the Court of Appeals found Title IX's preemptive force applied to claims brought against both the School Committee and Superintendent Dever individually. App. at 20a, 24a.

Significantly for this Petition, the First Circuit emphasized that its ruling, based on the claims presented in this case, does not imply that a plaintiff may *never* bring a Section 1983 constitutional claim concurrently with a Title IX claim. *Id.* The Court of Appeals recognized that, for example, a hypothetical plaintiff could sue an individual school employee who is himself alleged to be immediately responsible for the injury – be it based on equal protection, due process or some other constitutional theory. *Id.* Such a claim would not be preempted because it would not be virtually identical to the concurrent Title IX claim, which would necessarily be based on the institution's knowledge of and response to the injury. *Id.*

Thus, the First Circuit held that Title IX preempted the Petitioners' putative Section 1983 student-on-student sexual harassment claims based on the equal protection clause, as those claims were presented in this case. This is the sole ruling challenged by the Petition. Petition at 1.



## REASONS FOR DENYING THE PETITION

### I. The Petitioners' Failure To Assert And/Or Preserve For Appeal Any Section 1983 Constitutional Claim Against Either Respondent Precludes Certiorari.

As a general rule, the Court will not grant certiorari to decide an issue that is not properly preserved in the proceedings below, irrespective of its general significance or novelty. *See Howell v. Mississippi*, 543 U.S. 440, 443-44 (2005) (dismissing certiorari as improvidently granted due to petitioner's failure below to properly present claim as one arising under federal law); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.13 (1976) (barring respondents from raising claim they had neither raised below nor amended their complaint to include).

Here, the Petitioners failed to properly preserve any Section 1983 constitutional claims for consideration by this Court. Not only did the Petitioners fail to adequately allege such a claim, they repeatedly responded to the Respondents' arguments regarding these deficiencies in only the most perfunctory, undeveloped manner. Therefore, there is no Section 1983 constitutional claim preserved for appeal and the Court should reject the Petitioners' *post hoc* attempts to argue their legal merits here. Certiorari should be denied.

### A. Because Petitioners Failed To Allege Or Demonstrate An Injury Caused By A Municipal Custom Or Policy, There Exists No Viable Section 1983 Claim Against The School Committee.

It is well-settled that municipal governmental entities such as the School Committee cannot be held liable for claims under Section 1983 – whether based on the constitution or federal statute – solely on a respondeat superior theory. *Monell v. Department of Social Serv.*, 436 U.S. 658, 690-95 (1978). Instead, to survive dismissal, a complaint stating a Section 1983 claim against a municipality must allege the existence of an official "custom" (a practice, although not formally approved by an appropriate decision maker, so widespread as to have the force of law) or "policy" (a decision of an official who possesses final authority to establish municipal policy with respect to the action ordered) that caused the plaintiff's injury.[5] *Id.* at 90-95; *Board of County Commissioners v. Brown*, 520 U.S. 397, 403 (1997) ("we have required a plaintiff seeking to impose liability on a municipality . . . to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury").

Even where a complaint facially alleges a custom or policy, specifically alleging an isolated incident involving the plaintiff will not be adequate. *Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649, 653 (8th Cir. 1998). Rather, to state a viable Section 1983 claim against a municipality, the complaint must allege a specific pattern or chain of incidents that would support the general allegation of a custom or policy. *Strauss v. City of Chicago*, 760 F.2d 765, 766-77 (7th Cir. 1985).

[5] The "custom/policy" test distinguishes the acts of a municipality from those of its employees and holds the municipality liable only for those acts for which it is actually responsible. *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986).



Here, the Petitioners' complaint neither invokes the terms "custom" or "policy" nor alleges any pattern or chain of incidents that would support a custom or policy. Complaint, *passim*, *Fitzgerald v. Barnstable Sch. Comm.*, No. 02-10604 (D. Mass. Apr. 2, 2002). Instead, the Petitioners merely allege that the various actions (or inactions) of various school officials in the wake of Jacqueline's specific harassment allegations were inadequate. *Id.* Therefore, there exists no viable Section 1983 claim against the School Committee and the Petition should be denied. *See, e.g., Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001) (affirming dismissal of Section 1983 claim where complaint fails to make even "bare allegation" of an official policy or custom).

Beyond their failure to properly plead a Section 1983 claim against the School Committee, the Petitioners affirmatively waived any such claim. In response to the Respondents' Fed. R. Civ. P. 12(b)(6) motion to dismiss the Section 1983 claims as deficiently pled, the Petitioners proffered a single argument section entitled "Plaintiffs State a Viable Claim *Against Dever* Under 42 U.S.C. Section 1983." Plaintiffs' Opposition to Defendants' Motion to Dismiss at 13, *Fitzgerald v. Barnstable Sch. Comm.*, No. 02-10604 (D. Mass. Aug. 16, 2004), (emphasis supplied). This was no mere

scrivener's error, given that the Opposition completely ignored the custom/policy issue, with the arguable exception of a two-sentence reference to the School Committee's alleged failure to adopt a sexual discrimination policy, to adequately train and educate staff and/or students, and its deliberate indifference to Jacqueline. *Id.* at 16.

This passing reference is woefully inadequate to support a Section 1983 against the School Committee. For starters, it not only impermissibly asserts facts not contained in the complaint, it states bald (not to mention incorrect) legal conclusions. *See, e.g., Schneider v. California Dep't of Corrections*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (court may not look to additional facts alleged in opposition to motion to dismiss when deciding 12(b)(6) motion); *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1216 (1st Cir. 1996) ("a court must take all well-pleaded facts as true, but it need not credit a complaint's 'bald assertions' or legal conclusions").

Perhaps more importantly, the Petitioners plainly failed to offer any factually supported, reasonably developed argument against dismissal of the Section 1983 claim on the custom/policy issue, and, as such, that claim was waived. *See, e.g., Mote v. Aetna Life Ins. Co.*, 502 F.3d 601, 608 n.4 (7th Cir. 2007) ("if a party fails to press an argument before the district court, he waives the right to present that argument on appeal"); *B&T Masonry Constr. Co., Inc. v. Public Service Mut. Ins. Co.*, 382 F.3d 36, 40 (1st Cir. 2004) ("[t]o preserve a point for appeal, some developed argumentation must be put forward in the nisi prius court . . . ."); *United States v. Elder*, 90 F.3d 1110, 1118 (6th Cir. 1996) ("issues adverted



to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived"). Indeed, despite the fact that the Respondents again noted their pleading's deficiencies on the custom/policy issue in a reply to the opposition,[6] the Petitioners neither filed a sur-reply nor moved to amend their complaint to include such allegations.

As further evidence of waiver, the Petitioners failed to support the viability of their Section 1983 claim against the School Committee in their opening First Circuit brief.[7] Therein, they devoted a *single sentence* to the entire subject, baldly contending that Superintendent Dever's purported refusal to accede to the Petitioners' remedial demands was a "final decision" that "bound" the School Committee such that both could be held liable under Section 1983. Brief for Plaintiffs-Appellant at 53, *Fitzgerald v. Barnstable Sch. Comm.*, No. 06-2596 (1st Cir. Feb. 20, 2007).

This cursory comment is wholly insufficient to present the developed argumentation necessary to preserve an issue on appeal. *See United States v. Williams*, 504 U.S. 36, 40 (1992) (recognizing long-standing rule that, in order to be reviewable on appeal,

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[6] Defendants' Reply to Plaintiffs' Opposition to Motion to Dismiss at 4-6, *Fitzgerald v. Barnstable Sch. Comm.*, No. 02-10604 (D. Mass. Aug. 20, 2004).

[7] Ignoring the custom policy issue, the Petitioners focused on their argument that Title IX should not preempt their Section 1983 claims against Dever. Brief for Plaintiffs-Appellant at 51-63, *Fitzgerald v. Barnstable Sch. Comm.*, No. 06-2596 (1st Cir. Feb. 20, 2007).

claim, issue or argument must have been "pressed or passed upon below"); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (argument deemed waived where inadequately presented on appeal and where proponent failed to show it was presented below so as to preserve the issue for appeal); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1110, n.1 (9th Cir. 2000) (en banc) ("issues which are not specifically and distinctly argued and raised in a party's opening brief are waived").

Furthermore, Superintendent Dever's purported authority to "bind" the School Committee in some unspecified way (a "fact" nowhere found on the record because it is not generally true) is irrelevant to the real issue – that is, whether Dever acted pursuant to an official custom or policy as this Court defines those terms.[8] *See Monell*, 436 U.S. at 690-95. Indeed, the undisputed evidence established that Jacqueline's student-on-student sexual harassment allegation was

[8] That the Petitioners attempted – in a First Circuit reply brief – to finally offer something more than the most perfunctory argument in support of their Section 1983 claim against the School Committee is of no moment. *See, e.g., Jackson v. United States*, 976 F.2d 679, 680 n.1 (11th Cir. 1992) (per curiam) (arguments first raised in reply brief not preserved for appeal). In any event, the new argument the Petitioners pursued in the reply – that Dever was vested with non-specific "final decision making authority" and that his decision to deny the Petitioners the relief they sought was a "final decision" – is, once again, not only factually incorrect, it is legally insufficient to show a custom or policy with the force of law. *See* Reply Brief for Plaintiffs-Appellants at 23-28, *Fitzgerald v. Barnstable Sch. Comm.*, No. 06-2596 (1st Cir. May 17, 2007).



the first ever received by school officials and that Dever's response to the Petitioners' isolated complaint affected Jacqueline alone. These facts – not to mention the First Circuit's ultimate conclusion that Dever's actions were reasonable – affirmatively preclude any possible finding that a custom or policy caused the alleged injury. *See, e.g., Smith v. Chicago Sch. Reform Bd. of Trustees*, 165 F.3d 1142, 1149 (7th Cir. 1999) (allegations that school board failed to suppress discriminatory conduct affecting single teacher cannot reasonably be described as a pro-discrimination custom or policy with force of law).

In short, in failing to allege or show an injury based on a custom or policy, the Petitioners have failed to preserve for appeal any Section 1983 constitutional claim against the School Committee. Certiorari to decide Title IX's preemptive effect on such a claim is therefore wholly inappropriate.

### B. Because Petitioners Failed To Allege Or Demonstrate Any Equal Protection Violation, There Exists No Viable Section 1983 Claim Against Either Respondent.

Beyond their failure to assert a custom or policy, the Petitioners' putative Section 1983 constitutional claims are more broadly deficient for failing to allege a viable equal protection claim against either the School Committee or Superintendent Dever. The equal protection clause requires similar treatment of all persons similarly situated. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). A party who wishes to make out an equal protection claim must

prove the existence of purposeful discrimination motivating the alleged state action. *Washington v. Davis*, 426 U.S. 229, 246-50 (1976).

In the context of student-on-student sexual harassment in the education setting, purposeful discrimination implies that a school decision maker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on the identifiable group. *Nabozny v. Podlesny*, 92 F.3d 446, 454 (7th Cir. 1996). *Accord, Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000) (rejecting student-on-student sexual harassment claim based on equal protection clause because "there was no evidence of gender animus, nor is there even evidence of a systemwide disparate impact in punishments between genders"); *Doe v. Londonderry Sch,. Dist.*, 970 F. Supp. 64, 77 (D.N.H. 1997) ("To prevail on an equal protection claim, the plaintiffs must show that the [school district] treated Jane's complaints differently than the complaints of boys") (citing *Soto v. Flores*, 103 F.3d 1056, 1067 (1st Cir. 1997)).

As the Respondents have argued throughout this case, the Petitioners failed to allege any viable equal protection claim based on Jacqueline's complaint of student-on-student sexual harassment. As the Petitioners acknowledge (Petition at 7), the only complaint allegation that even arguably implicates equal protection states:

> 62. Plaintiff Jacqueline Fitzgerald has a clearly established right under state and federal statutory and constitutional law to equal access to all benefits and privileges of a public education, and a right to be free from sexual harassment in school.



Complaint and Jury Demand at ¶ 62, *Fitzgerald v. Barnstable Sch. Comm.*, No. 02-10604 (D. Mass. Apr. 2, 2002).

This language, especially in the context of a lawsuit based on third party, student-on-student sexual harassment, does not allege a cognizable Section 1983 claim based on equal protection. Even under the most liberal pleading standards, there is no basis for concluding that the Petitioners were even attempting to allege differential treatment of a protected class to which Jacqueline belongs. *See Lynch v. Hubbard*, Nos. 99-1614, 99-1936, 2000 U.S. App. LEXIS 33999 at *2 (1st Cir. Dec. 12, 2000) (summarily affirming dismissal of equal protection claim "inasmuch as plaintiff has not alleged any differential treatment of a protected class to which he belongs"). *See also, Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002) ("The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action").

Indeed, in response to the Respondents' argument before the district court on this very point, the Petitioners failed to address the issue in any substantive way. Instead, the Petitioners cursorily (and incorrectly) claimed that their complaint's invocation of the term "sexual harassment" was sufficient in and of itself to

state an equal protection claim and that in this context they need not show selective treatment based on sex. *See* Plaintiffs' Opposition to Defendants' Motion to Dismiss at 16-18, *Fitzgerald v. Barnstable Sch. Comm.*, No. 02-10604 (D. Mass. Aug. 16, 2004). Although this argument might have some sway if an individual school official were alleged to have been the sexual harasser (*see, e.g., Delgado v. Stegall*, 367 F.3d 668, 674 (7th Cir. 2004)), it has no merit here, where Dever (and the School Committee) is accused only of failing to take adequate actions to prevent and/or remediate third party harassment. App. at 23a.

Moreover, the Petitioners did not address their equal protection claim's deficiencies in their opening First Circuit brief. *See* Brief for Plaintiffs-Appellant, *passim*, *Fitzgerald v. Barnstable Sch. Comm.*, No. 06-2596 (1st Cir. Feb. 20, 2007). In fact, it is only before this Court that Petitioners, for the first time, finally even attempt to proffer a legitimate equal protection theory. Petition at 22-23. The Petitioners now posit, for example, that they might be able to show an equal protection violation if the School Committee "treated sexual harassment of boys differently than sexual harassment of girls, or if it treated bullying of boys differently than harassment of girls." *Id.* at 22. Similarly, the Petitioners speculate that they could show an equal protection violation if the School Committee "consistently took a more favorable view of the credibility of male harassers than of female victims or otherwise treated male harassers more favorably than female victims in investigating allegations of harassment." *Id.* at 23.



Of course, these are the very factual allegations and legal arguments the Petitioners could have and should have asserted in the district court – not to mention the First Circuit – in defense of their putative Section 1983 constitutional claims. They did not.[9] Rather, the Petitioners presented no arguments supporting differential treatment, nor did they move to amend their complaint to include such allegations. It goes without saying that a party cannot raise entirely new theories in support of long-dismissed claims in a petition for certiorari.[10] *See Howell*, 543 U.S. at 443-44; *Ernst & Ernst*, 425 U.S. at 194 n.13.

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[9] Despite the Petitioners' claim that they were "barred . . . from asserting and pressing such claims" before the district court (Petition at 23), they were in no way barred. In fact, the Petitioners fully pursued differential treatment theories in discovery, where it was established – among many other things unhelpful to an equal protection claim – that Jacqueline's was the first and only complaint of student-on-student sexual harassment Principal Scully or Superintended Dever had ever received. Dep. of Frederick J. Scully at 22, 119, *Fitzgerald v. Barnstable Sch. Comm.*, No. 02-10604 (D. Mass Dec. 21, 2005); Dep. of Russell J. Dever, Ed.D., at 76, *Fitzgerald v. Barnstable Sch. Comm.*, No. 02-10604 (D. Mass Jan. 27, 2006).

[10] That the district court and the First Circuit chose to dismiss the Section 1983 constitutional claims based on Title IX preemption rather than on the Petitioners' failure to assert or support such claims makes no difference. While the lower courts arguably ran afoul of the longstanding admonition that courts should avoid reaching questions of constitutional import in advance of the necessity of deciding them, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988), the fact remains that the Petitioners have no viable Section 1983 constitutional claim on which certiorari can be based.

In short, the Petitioners' purported Section 1983 claims based on equal protection – the sole claims on which this Petition is based – are irreparably defective and not preserved for appeal. Certiorari should be denied.

## II. In Overstating The First Circuit's Ruling Below, The Petitioners Present An Overly Broad Legal Question For This Court's Consideration Explicitly Not Reached Below.

In addition to the Petitioners' failure to preserve their Section 1983 constitutional claims for appeal, this case is also a poor vehicle for reaching the question presented regarding those claims because that question, as framed by Petitioners, is based on a gross overstatement of the First Circuit's decision below. As described above, the First Circuit, based largely on *Smith v. Robinson*, 468 U.S. 992 (1984), held only that the Petitioners' putative Section 1983 equal protection claims for student-on-student sexual harassment, as presented here, were "virtually identical" to their Title IX claim for student-on-student sexual harassment and that, based on the comprehensiveness of Title IX's remedial scheme, Congress intended that Title IX provide the exclusive remedy for such claims. App. at 23a-24a. Critically, the First Circuit then emphasized:

> Our holding on this point should not be read to imply that a plaintiff may *never* bring a constitutionally-based Section 1983 action against an employee of an educational institution concurrently with the prosecution of a Title IX action. For example, when a plaintiff sues an individual who is himself alleged to be immediately responsible for the injury, such an action may lie regardless of whether the claim sounds in equal protection or some other constitutional theory. This is as it should be: when a plaintiff alleges that an individual defendant is guilty of committing an independent wrong, separate and apart from the wrong asserted against the educational institution, a claim premised on that independent wrong would not be "virtually identical" to the main claim.



*Id.* at 24a-25a (emphasis in original and citation omitted).

Despite this carefully calibrated ruling, the Petitioners attempt to portray the First Circuit as having adopted a *per se* rule that Title IX *always* preempts concurrent Section 1983 claims. *See, e.g.*, Petition at 2 ("while some circuits permit [ ] plaintiffs to vindicate both statutory rights created by Title IX (by bringing an action directly under that statute) and their constitutional rights (by bringing suit under Section 1983), other courts, like the First Circuit in this case, do not"); 10 ("the court believed that Title IX forecloses use of Section 1983 to assert *any* constitutional claims alleging sex discrimination by federally funded educational institutions") (emphasis in original); 21 ("In holding that Title IX is the only remedy for sex discrimination perpetrated by federally funded institutions, the decision of the court below (and of the other circuits with which it agrees) leave no way to challenge an entire category of constitutional violations").

Based upon this overly broad characterization of the First Circuit's holding, the Petitioners present a hypothetical question – "[w]hether Title IX's implied right of action precludes Section 1983 constitutional claims to remedy sex discrimination in education by federally funded educational issues." Petition at 1. Consequently, the Petitioners advocate in favor of an excessively expansive ruling by this Court: that Title IX *never* precludes Section 1983 constitutional claims. Petition at 23-30.

Of course, the First Circuit made no such *per se* ruling and instead offered a measured preemption analysis based on the facts and claims actually presented in each case. Were it to assess the propriety of the First Circuit's ruling, this Court would therefore not be required to decide Title IX's preclusive effect in the stark, all-or-nothing way the Petitioners indicate. In seeking a such a sweeping ruling, the Petitioners are in essence asking this Court for an impermissible advisory opinion on a legal conclusion not made below. *See Massachusetts v. EPA*, __ U.S. __, 127 S. Ct. 1438, 1452 (2007) (noting that no justiciable controversy exists when parties ask for an advisory opinion), citing *Hayburn's Case*, 2 U.S. 409 (1792).

Moreover, despite the Petitioners' claims to the contrary, the First Circuit's ruling does not preclude "otherwise meritorious" Section 1983 constitutional claims from proceeding. For example, were a school official to consistently take a more favorable view of the credibility of male harassers than of female victims (*see* Petition at 23), a Section 1983 equal protection claim based thereon presumably would not be preempted: it



would be based on facts (gender-specific treatment in a particular school official's sexual harassment investigations) not "virtually identical" to a concurrent Title IX claim (the school's actual knowledge of and deliberate indifference to specific acts of harassment). *See* App. at 24a-25a. Thus, the First Circuit's test for Title IX preemption simply does not have the "perverse" preclusive effect the Petitioners ascribe to it. Petition at 10-11.

In this case, of course, not only did the Petitioners fail to allege or pursue any viable equal protection theory, the unchallengeable fact that school officials acted reasonably precludes any such theory. The Petition therefore amounts to little more than an attempted end run around the Petitioners' procedural errors and the established evidence of record – an end run that, even were it allowed, would be an entirely empty gesture. Under these circumstances, certiorari is most inappropriate and should be denied.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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