No. 07-1125

# In the Supreme Court of the United States

LISA RYAN FITZGERALD AND ROBERT FITZGERALD,

*Petitioners*,

v.

BARNSTABLE SCHOOL COMMITTEE AND RUSSELL DEVER,

*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit**

## REPLY BRIEF FOR PETITIONERS


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## REPLY BRIEF FOR PETITIONERS

The brief in opposition reveals the areas of common ground between the parties. Respondents do not deny that that the circuits are in conflict on a recurring question of considerable importance: whether Title IX's implied right of action precludes constitutional gender discrimination claims against educational institutions brought under 42 U.S.C. § 1983. Respondents also do not deny that there are circumstances when constitutional claims of gender discrimination may succeed even though a cause of action will not lie under Title IX. And respondents appear to recognize that the question whether Title IX precludes constitutional claims in such circumstances warrants this Court's consideration. In nevertheless opposing review here, they advance only a single set of arguments: that this case is not a suitable vehicle with which to address the question presented because (1) petitioners' constitutional claims were not adequately preserved below and (2) the First Circuit did not actually preclude use of Section 1983 to advance all gender discrimination claims against educational institutions.

These contentions are wrong. So far as preservation of the issue presented here is concerned, the simple and dispositive answer is that the First Circuit *actually decided* the preclusion question; indeed, the court's rejection of petitioners' constitutional claims was based *solely* on its holding that those claims are foreclosed by Title IX. Pet. App. 24a. And respondents' assertion that we have overstated the scope of the First Circuit's holding also is answered by the plain language of the decision below, which held flatly that "Congress saw Title IX as the sole means of vindicating the constitutional right to be

free of gender discrimination perpetrated by educational institutions." *Ibid*. Because that decision departs from the holdings of other courts of appeals, frustrates federal anti-discrimination policy, and misconstrues both Section 1983 and Title IX, further review is warranted.

1. There is no denying that the courts of appeals are divided on the question presented here or that the issue is a significant one that is frequently litigated. As we show in the petition (at 11-17), if this case had arisen in the Sixth, Eighth, or Tenth Circuits, petitioners' Section 1983 claims would not have been precluded and would have proceeded to an adjudication on the merits. In contrast, the Second, Third, Seventh, and now the First Circuits have held in identical circumstances that Title IX *does* preclude Section 1983 gender discrimination claims against educational institutions. Respondents, while arguing that the Court should wait for some other vehicle with which to resolve this conflict, appear to recognize that the question accordingly does warrant review.

2. In opposing review in this case notwithstanding the conflict and the importance of the issue, respondents' principal contention is that "[p]etitioners failed to properly preserve any Section 1983 constitutional claims for consideration by this Court." Opp. 11. See *id.* at 12-22. But that argument is insubstantial. The court below brushed aside respondents' waiver argument and *decided the case on preclusion grounds*, holding that petitioners' Section 1983 constitutional claims should be dismissed because they are "precluded by Title IX's remedial scheme." Pet. App. 25a. The ruling of the district court similarly rested *solely* on that court's determination that the

"Title IX claim is preemptive of a Section 1983 claim." *Id.* at 60a. Respondents themselves concede that "the district court and the First Circuit chose to dismiss the Section 1983 constitutional claims based on Title IX preemption" and did not address the merits of the claims. Opp. 21 n.10.[1] It therefore is not surprising that at least one other court has cited the First Circuit's decision in this case as evidence of the circuit "split on the question of whether Title IX bars constitutional [Section] 1983 claims." *Genshaw* v. *Del Norte County Unified Sch. Dist.*, No. 07-3009, 2008 WL 1777668, at *12 (N.D. Cal. Apr. 18, 2008) (citing to and disagreeing with the First Circuit's preclusion analysis in the context of Title VI).

This Court "may address a question properly presented in a petition for certiorari if it was 'pressed [in] *or passed on*' by the Court of Appeals." *United States* v. *Wells*, 519 U.S. 482, 488 (1997) (quoting *United States* v. *Williams*, 504 U.S. 36, 42 (1992) (emphasis added)). Accordingly, there can be no dispute that the issue raised in the petition has been effectively preserved for review.

3. Given the procedural posture of the case and the First Circuit's actual holding, respondents' lengthy attempt to demonstrate that petitioners failed to assert or preserve any constitutional claim, or that petitioners' constitutional claims inevitably would fail as "procedurally deficient" (Opp. 2), are beside

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[1] Not only do respondents recognize that the lower courts did not address the merits of the constitutional claims, they also suggest that the lower courts committed error in failing to do so. Opp. 21 n.10 ("[T]he 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.").

the point. As respondents readily concede, no court has ever considered—much less ruled on—the merits of petitioners' Section 1983 claims. And it is only *after* reversal of the First Circuit's preclusion holding by this Court that it would be appropriate for the district court to consider, in the first instance, the merits of petitioners' constitutional claims.

It may be worth adding, however, that respondents' challenge to the adequacy of petitioners' factual allegations (and respondents' hints that review is unwarranted because petitioners could not ultimately prevail on the merits even if they are successful in this Court) is incorrect on its own terms. As we showed in the petition (at 8-9), dismissal of the constitutional claims on the pleadings precluded petitioners from elaborating upon or developing factual support for those claims in discovery; it is especially misleading for respondents to criticize petitioners for failing to explore the details of their constitutional claims before the First Circuit (Opp. 20-21) when the question before that court on appeal was simply whether all constitutional claims are precluded.

Having said that, however, the complaint *does* "allege 'a plausible entitlement to relief'" *Chmielinski* v. *Massachusetts*, 513 F.3d 309 (1st Cir. 2008) (citing *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955, 1967 (2007)) and *does* provide "'plausible grounds' [to believe] that 'discovery will reveal evidence' to support the plaintiff's allegations." *Gann* v. *Cline*, 519 F.3d 1090, 1092 (10th Cir. 2008) (citing *Twombly*, 127 S. Ct. at 1965). Petitioners alleged that the "school's policy," and the failure of the school to redress its policy upon notice that students were suffering sex discrimination, was the cause of their daughter's sexual harassment. Compl. & Jury Demand ¶¶ 23,

24, 35-38, *Fitzgerald* v. *Barnstable Sch. Comm.*, No. 02-10604-REK (D. Mass. Apr. 2, 2002). They also alleged that respondents engaged in a "pattern and practice" of violating the "civil rights" of their students (*id.* ¶ 48) and that the response by the school to sexual harassment allegations made by petitioners' daughter was discriminatory. *Id.* ¶¶ 58-60. This states a plausible basis for relief and, given the extreme abuse petitioners' daughter suffered, reasonable grounds for believing that discovery will reveal evidence supporting these allegations of constitutional violations. Indeed, material already in the record suggests that such allegations could be proven through evidence gathered in discovery. See, *e.g.*, Dep. of Russell J. Dever, at 17-18, *Fitzgerald* v. *Barnstable Sch. Comm.*, No. 02-10604-REK (D. Mass. Jan. 27, 2006) (school policy did not treat sexual harassment as a form of discrimination); *id.* at 27-29 (school policy did not consider alleged harasser's past disciplinary record); *id.* at 53-55 (school policy was to not disclose past incidents of harassment in order to prevent embarrassment of the students involved). Upon remand, petitioners would be permitted to take discovery tailored to their pattern and practice theories. Whether consideration of the merits of those claims is permissible is, of course, precisely the question now before this Court.

4. Respondents are also wrong to suggest that the petition misstates the scope of the First Circuit's decision. Opp. 22. We do not contend, as respondents put it, that the First Circuit "adopted a *per se* rule that Title IX *always* preempts concurrent Section 1983 claims" (*id.* at 23 (emphases in original)); we recognize that the First Circuit may allow a Section 1983 action when a plaintiff "alleges that an *individual defendant* is guilty of committing an inde-

pendent wrong, *separate and apart from the wrong asserted against the educational institution*." Pet. App. 24a (emphasis added). See also Pet. 19 n.7 (quoting same). But the court below *did* hold, expressly and unequivocally, that Title IX precludes all Section 1983 sex discrimination claims "brought against the educational institution itself or the flesh-and-blood decisionmakers who conceived and carried out the institution's response." Pet. App. 24a. See Pet. 10, 21; see also *Genshaw,* 2008 WL 1777668, at *12 (citing decision below for the proposition that "constitutional [Section] 1983 claims" are "subsumed by Title IX"). *This* rule *is* absolute: *all* Section 1983 gender discrimination claims against a school—or a school's "decisionmaker"—are "precluded by Title IX," regardless of the facts alleged. Pet. App. 25a.

This is the very issue over which the circuits disagree. It is undisputed that petitioners' constitutional claims against respondents would have proceeded to the merits in the Sixth, Eighth, and Tenth Circuits. Pet. 12-14. But in the First, Second, Third, and Seventh Circuits, the exact same claims are precluded by Title IX. *Id*. at 14-15. Far from asking this Court for an "advisory opinion" (Opp. 24), petitioners urge the Court to reject the First Circuit's explicit holding that Title IX is "the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions." Pet. App. 24a.[2]

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[2] Respondents hypothesize the type of Section 1983 action they imagine the First Circuit would allow to proceed. Opp. 24-25. But their hypothetical case involves allegations against an individual for actions that are *not* attributable to the school. Respondents do not deny that the First Circuit's rule precludes all constitutional actions for gender discrimination against schools

In fact, this case is an ideal vehicle to resolve the question presented. No alternative holdings were issued by the lower court and no rulings were made with respect to the merits. The only claims petitioners now advance are constitutional claims that differ from their Title IX allegations. This case therefore presents the legal question in its cleanest and starkest form: whether Title IX forecloses *all* constitutional claims of gender discrimination against educational institutions. Because that issue is a significant one that plainly warrants this Court's attention, further review is appropriate.

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(or school officials effectuating school policy), even when such claims could not succeed under Title IX—an outcome that indeed is "perverse." *Id*. at 25. The First Circuit's holding plainly is not limited to Section 1983 claims that are identical to those asserted under Title IX; if it were, there would have been no reason for the court to issue its Section 1983 preclusion ruling after rejecting petitioners' Title IX claim.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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