FITZGERALD v. BARNSTABLE SCHOOL COMMITTEE: ENFORCEMENT OF CONSTITUTIONAL RIGHTS

SARAH BRANSTETTER*

I. INTRODUCTION

The issue in *Fitzgerald v. Barnstable School Committee* is whether, in a suit against a public school for sex discrimination, Title IX precludes constitutional claims for Equal Protection under 42 U.S.C. § 1983. This case arose from a kindergartner's allegations that she was sexually harassed on the school bus by a third-grade student.[1] When the school responded to her claims by offering to move the plaintiff to another bus, rather than moving the third-grade student who had committed the harassment, the student and her parents sued the School Committee and the superintendent.[2] The plaintiffs state a claim against the School Committee under Title IX, an Equal Protection claim against the superintendent and the School Committee under 42 U.S.C. § 1983, and various state law claims against the superintendent and the School Committee.[3]

The district court granted the defendant's motion to dismiss the plaintiffs' section 1983 claims and state law claims,[4] but denied the defendant's motion to dismiss the Title IX claim.[5] After discovery, however, the court granted the defendant's motion for summary judgment on the Title IX claim too.[6] The plaintiff appealed the grant

* 2010 J.D. Candidate, Duke University School of Law.

1. Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 170 (1st Cir. 2007).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

of summary judgment of both the Title IX claim and the claims under section 1983.[7]

The First Circuit affirmed the district court's dismissal of the Title IX claim because the school failed to show the deliberate indifference required to sustain a sexual harassment claim under Title IX.[8] The First Circuit also affirmed the district court's decision regarding the claims under section 1983, holding that the plaintiffs' Title IX claims precluded the section 1983 claims.[9] The Supreme Court granted certiorari to decide the issue of whether claims under Title IX preclude Equal Protection claims under section 1983.[10]

II. FACTS

In February 2001, Jacqueline Fitzgerald, then a kindergarten student, told her parents that every time she wore a dress to school, an older student bullied her into lifting it while she was on the bus and that this bullying occurred two or three times each week.[11] Jacqueline eventually told her parents that the bully also had forced her to pull down her underwear and spread her legs.[12] Jacqueline's mother, Lisa Ryan Fitzgerald, immediately called the school's principal, Frederick Scully, to inform the school of Jacqueline's claims.[13] Scully and the school system's prevention specialist, Lynda Day, met with Jacqueline and her parents within hours of receiving Ms. Fitzgerald's call.[14]

Scully and Day arranged for Jacqueline to observe the children getting off the bus, and Jacqueline identified third-grader Briton Gleson as the perpetrator.[15] Day questioned Gleson, the bus driver, and most of the children who rode the bus in the morning, but Day was unable to corroborate Jacqueline's claims.[16] Principal Scully concluded that the school could not take disciplinary measures

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7. *Id.*
8. *Id.*
9. *Id.*
10. Fitzgerald v. Barnstable Sch. Comm., 128 S. Ct. 2903 (U.S. Jun 09, 2008) (NO. 07-1125) (mem.).
11. Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 169 (1st Cir. 2007).
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*

against Gleson.[17] The police conducted a simultaneous investigation and found that there was not enough evidence to proceed criminally against Gleson either.[18]

Without sufficient evidence to take disciplinary action against Gleson, the school offered to transfer Jacqueline to a different bus or to leave two empty rows of seats between the kindergartners and the older children.[19] The Fitzgeralds rejected these solutions and suggested the school instead transfer Gleson to a different bus or place a monitor on the bus to watch the children.[20] Superintendent Russell Dever rejected the Fitzgeralds' proposals.[21]

In April, 2002, the Fitzgeralds sued the Barnstable School Committee, which governed the elementary school, and Superintendent Dever in federal district court.[22] The Fitzgeralds claimed that the Barnstable School Committee violated Title IX of the Education Act Amendments of 1972, and that both the school committee and Dever denied Jacqueline constitutional rights protected by 42 U.S.C. § 1983.[23] The district court granted the defendants' motion to dismiss the section 1983 claims, and, after discovery, granted the school committee's motion for summary judgment on the Title IX claim.[24] The Fitzgeralds appealed the decision to the United States Court of Appeals for the First Circuit.[25]

III. LEGAL BACKGROUND

A. Title IX

Title IX of the Education Act Amendments of 1972 protects against sexual discrimination occurring within an educational institution that results in the denial of educational opportunities.[26] The only remedy expressly provided by the statute is the denial of federal

17. *Id.* at 170.
18. *Id.* at 169–70.
19. *Id.* at 170.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *See* 20 U.S.C. § 1681 (2000) ("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 . . . .").

funds to the educational institution.[27] There is, however, a judicially implied private right of action for individuals to sue an institution that violates the Title IX sex discrimination prohibition.[28] This judicially implied private right allows plaintiffs to seek injunctive relief and pecuniary damages.[29]

Under Title IX, educational institutions may be liable for one student's sexual harassment of another student if the plaintiff can prove that: (1) the educational institution is subject to Title IX because it receives federal funding; (2) "severe, pervasive, and objectively offensive harassment occurred"; (3) "the harassment deprived . . . [the student] of educational opportunities or benefits"; (4) "the educational institution had actual knowledge of the harassment"; and (5) the harassment occurred or was made more likely to occur because of the institution's deliberate indifference.[30] The institution's response is considered "deliberate indifference" only if the response was "clearly unreasonable in light of the known circumstances."[31]

B. 42 U.S.C. § 1983

Section 1983 protects federal statutory and constitutional rights. The statute provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . 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 . . . .[32]

Equal Protection under the Fourteenth Amendment is one of the constitutional rights protected by section 1983.[33] Section 1983, however, "cannot be used to enforce a statutory right when that statute's remedial scheme is sufficiently comprehensive as to

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27. 20 U.S.C. § 1682 (2000).

28. Cannon v. Univ. of Chi., 441 U.S. 677 (1979).

29. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992).

30. Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 176 (1st Cir. 2007)(citing Porto v. Town of Tewksbury, 488 F.3d 67, 72–73 (1st Cir. 2007)).

31. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 648 (1999).

32. 42 U.S.C. § 1983 (2000).

33. *See* Forrester v. White, 484 U.S. 219, 221 (1988) (holding that a state court judge was liable for damages under section 1983 in an Equal Protection case that arose from the state court judge's dismissal of a probation officer on account of her sex).

demonstrate Congress's intent to limit the available remedies to those provided by the statute itself."[34] The purpose behind this exception is to prevent plaintiffs from using the remedies available under section 1983 to circumvent the remedial limits that Congress has enacted in other statutes.[35] Congress indicates its intent to limit remedies to those provided by a particular statute either by express provision or by "other specific evidence from the statute itself."[36] Whether the availability of a judicially implied remedy makes a statute's remedial scheme sufficiently comprehensive is uncertain.[37]

Currently, the Supreme Court has found only one instance in which a statutory claim precludes a section 1983 constitutional claim.[38] In *Smith v. Robinson*, the Court held that, because Congress intended the Education of the Handicapped Act (EHA) to be an exclusive remedial scheme, the EHA claim precluded a section 1983 constitutional claim.[39] The Court relied on both the provisions of the EHA and its legislative history in determining that Congress intended the remedial scheme of the EHA to be exclusive.[40]

C. Court of Appeals' Circuit Split

The federal courts of appeals are split on the issue of whether a Title IX claim precludes an Equal Protection claim under 42 U.S.C. § 1983. The circuits that have held that Title IX precludes section 1983 constitutional claims have done so because they construe Title IX's

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34. *Fitzgerald*, 504 F.3d at 176 (citing Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20–21 (1981)).

35. *See id.* ("This limitation ensures that plaintiffs cannot circumvent the idiosyncratic requirements of a particular remedial scheme by bringing a separate action to support the same right under section 1983.").

36. Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418, 423 (1987).

37. *See* Cmtys. for Equity v. Mich. High Sch. Athl. Ass'n, 459 F.3d 676, 690–91 (6th Cir. 2006) (stating that only statutes that contain "an explicit private remedy . . . [are] sufficiently comprehensive for us to infer that Congress intended the remedy to be exclusive."). *But see* Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20–21 (1981) (holding that express remedies preclude suits for damages under section 1983 when sufficient express remedies exist to demonstrate that "Congress intended to foreclose implied private actions.").

38. Smith v. Robinson, 468 U.S. 992 (1984); *see also* Brief Amici Curiae of the American Civil Liberties Union and the National Women's Law Center, et al. in Support of Petitioners at 13, Fitzgerald v. Barnstable, No. 07-1125 (U.S. Aug. 29, 2008) ("Only once has the Court found any statute to preclude a plaintiff from seeking redress for constitutional violations through the traditional avenue of § 1983 and that decision, *Smith v. Robinson*, 468 U.S. 992 (1984), is readily distinguishable.") [hereinafter Brief Amici Curiae of the ACLU & NWLC].

39. *Id.* at 1013.

40. *Id.* at 1010–11.

remedial scheme as providing a complete and exclusive remedy. For example, in *Boulahanis v. Board of Regents*, a case involving the validity of a school's elimination of its men's soccer and wrestling teams, the Seventh Circuit held that Title IX preempted claims under 42 U.S.C § 1983, even in suits against individual defendants who would not be liable under Title IX.[41] This decision built on the court's previous decision in *Waid v. Merrill Area Public Schools* in which the court held that, as a general principle, Title IX claims precluded constitutional claims under 42 U.S.C § 1983.[42] The *Boulahanis* court based these holdings on its "interpretation of Title IX's statutory scheme" and its understanding that Congress intended Title IX to supersede the use of 42 U.S.C § 1983 against both institutions and individuals accused of sexual discrimination in educational settings.[43]

Similarly, in *Bruneau v. South Kortright Central School District*, a student-on-student sexual harassment case, the Second Circuit held that Title IX created a sufficient avenue for relief and therefore precluded suits under 42 U.S.C § 1983 for Equal Protection claims.[44] The Third Circuit held in *Williams v. School District of Bethlehem, Pennsylvania*, that a district court correctly dismissed a plaintiff's section 1983 constitutional claims because Title IX subsumed these claims due to its comprehensive remedial scheme.[45]

Other circuits have held that Title IX's remedial scheme is sufficiently comprehensive to demonstrate that Congress intended the scheme to be exclusive. Accordingly, these circuits have held that Title IX does not preclude section 1983 constitutional claims.

In *Kinman v. Omaha Public School District*, a case in which a teacher had a sexual relationship with a student, the Eighth Circuit held that the plaintiff could not maintain a Title IX claim against the school because the school did not react to the relationship with deliberate indifference.[46] Furthermore, the plaintiff could not maintain a Title IX claim against the teacher because Title IX does not provide for suits against individuals.[47] The court held, however, that the

41. Boulahanis v. Bd. of Regents, 198 F.3d 633, 640 (7th Cir. 1999).
42. Waid v. Merrill Area Pub. Schs., 91 F. 3d 857, 863 (7th Cir. 1996).
43. *Boulahanis*, 198 F.3d at 640.
44. Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749, 756 (2d Cir. 1998).
45. Williams v. Sch. Dist. of Bethlehem, Pa., 998 F.2d 168, 176 (3d Cir. 1993).
46. Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 611 (8th Cir. 1999).
47. *Id.*

plaintiff did have a cause of action against the teacher in his individual capacity under 42 U.S.C. § 1983.[48]

Similarly, the Tenth Circuit held in *Seamons v. Snow* that Title IX does not preempt constitutional claims under 42 U.S.C. § 1983 because plaintiffs raising section 1983 claims are exercising rights available under the constitution rather than attempting to circumvent Title IX's statutory scheme.[49] The Tenth Circuit also held that Title IX's implied judicial private right of action does not suggest a comprehensive remedial scheme.[50]

The Tenth Circuit's decision in *Seamons* relied heavily on the Sixth Circuit's decision in *Lillard v. Shelby County Board of Education*.[51] The Sixth Circuit had distinguished *Lillard* from *Smith v. Robinson* by noting that Title IX and Equal Protection claims were not virtually identical and that the legislative history did not indicate that Congress intended Title IX to supplant other available remedies.[52] The Sixth Circuit reasoned that because Congress did not intend Title IX to be an exclusive remedy, allowing constitutional remedies available under 42 U.S.C § 1983 would not amount to circumventing Title IX's remedial scheme.[53]

IV. HOLDING

In *Fitzgerald v. Barnstable*, the First Circuit held that Title IX does preclude constitutional claims under 42 U.S.C § 1983.[54] The court explained that "a sufficiently comprehensive remedial scheme . . . may preclude constitutional claims that are virtually identical to those that could be brought under . . . [a statutory] regime."[55] The court first held that the Fitzgeralds' Equal Protection claim was virtually identical to their Title IX claim, because they "offer[ed] no theory of liability under the Equal Protection Clause other than the defendants' supposed failure to take adequate actions to prevent and/or

48. *Id.*
49. Seamons v. Snow, 84 F.3d 1226, 1234 (10th Cir. 1996).
50. *Id.*
51. Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 723–24 (6th Cir. 1996).
52. *Id.* at 723.
53. *Id.*
54. Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 179 (1st Cir. 2007).
55. *Id.* (citing Smith v. Robinson, 468 U.S. 992, 1011 (1984)).

remediate the peer-on-peer harassment that Jacqueline experienced."[56]

The court then determined that Congress intended Title IX to preclude virtually identical constitutional claims, reasoning that the "comprehensiveness of Title IX's remedial scheme—especially as embodied in its implied private right of action—indicates that Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions."[57] The court drew comparisons with *Smith v. Robinson*, saying that in both cases the remedial scheme of the statute was sufficiently comprehensive to preclude constitutional claims that were virtually identical to claims brought under the statute.[58]

The court added that the holding in Fitzgerald would still allow a plaintiff to bring simultaneous Title IX and section 1983 claims against an individual defendant, but only if the plaintiff alleges that the defendant committed an "independent wrong, separate and apart from the wrong asserted against the educational institution."[59]

V. ANALYSIS

The First Circuit's decision in *Fitzgerald v. Barnstable* is problematic because it assumes that a judicially implied remedy reflects Congress's intent, it ignores the differences between *Fitzgerald* and *Smith*, and it forecloses a means of protecting constitutional rights that are otherwise unprotected.

The First Circuit held that the remedial scheme of Title IX is sufficiently comprehensive to preclude the Equal Protection claim, indicating that Congress intended Title IX to be "the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions."[60] The court emphasized that the availability of the private right of action is what makes Title IX's remedial scheme sufficiently comprehensive to indicate Congress's intent that Title IX preclude section 1983 claims.[61]

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56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 180.
60. *Id.* at 179.
61. *Id.*

This private right of action, however, was judicially implied, rather than expressly stated in the statute.[62] The First Circuit acknowledged that Congress may demonstrate its intent that a remedial scheme be exclusive by "express provision or other specific evidence from the statute itself," including legislative history.[63] The court then pointed out that the Supreme Court has held, based on the legislative history of Title IX, that Congress intended to create a private right of action.[64]

What the First Circuit missed, however, is that legislative history supporting Congress's intent to create a private right of action is not the same as legislative history supporting Congress's intent to create an exclusive remedial scheme. In order to determine Congress's intent for Title IX to be the sole means of vindicating the constitutional right to Equal Protection, the court should have considered "specific evidence" of this intent from legislative history, rather than refer to the Supreme Court's previous consideration of legislative history regarding the creation of a private right of action. In fact, the implicit nature of the remedy might suggest that Congress did not intend Title IX to be the exclusive remedial scheme, because if Congress did intend the statute to be the exclusive source of remedies, it is likely that it would state each remedy expressly.[65] By expressly stating each remedy, Congress could have avoided the risk that the judiciary would fail to imply a remedy.[66]

In the *Fitzgerald* decision, the First Circuit made frequent comparisons to *Smith v. Robinson*, noting the "striking" parallel between the two cases.[67] The EHA, however, differs from Title IX in that it expressly created an enforceable private right to an education whereas the language of Title IX created no such right.[68] Moreover, the Court in *Smith* held that "both the provisions of the [EHA] and its legislative history indicate that Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored

62. *Id.*
63. *Id.* at 177.
64. *Id.* (citing Cannon v. Univ. of Chi., 441 U.S. 677, 694–703 (1979)).
65. *See* Brief for Petitioners at 27, Fitzgerald v. Barnstable, No. 07-1125 (U.S. Mar. 3, 2008) ("[I]t is hard to imagine that Congress intended Title IX to preclude invocation of section 1983 while leaving it to the courts through the implication of a private remedy to establish the contours of and limits on the Title IX private right of action.").
66. *Id.*
67. *Fitzgerald*, 504 F.3d at 179.
68. Brief for Petitioners, *supra* note 65, at 27.

administrative and judicial mechanism set out in the statute."[69] In deciding that Title IX precludes section 1983 constitutional claims, however, the First Circuit did not consider the legislative history regarding Congress's intent to make Title IX an exclusive source of remedies, and therefore the First Circuit's reliance on *Smith* as precedent was inexact.[70]

Furthermore, although *Smith* demonstrates the Court's willingness to find that a constitutional claim is precluded by a statute with a sufficiently comprehensive remedial scheme, most precedent demonstrates the Court's reluctance to allow a later-enacted statute to disturb claims previously available under section 1983.[71] For instance, the Court has "confirmed consistently" that Title VII of the Education Act, which protects against racial discrimination in schools, does not preclude constitutional claims based on 42 U.S.C. § 1981.[72] Similarly, the Civil Rights Act of 1968, which contained fair housing provisions, "did not implicitly displace 'the property rights guaranteed by the Civil Rights Act of 1866.'"[73]

Another problem with the Fitzgerald decision is that it has the potential to preclude the protection of constitutional rights. Title IX applies only to institutions receiving federal funding, but the receipt of federal funds is voluntary, so a school could avoid Title IX liability by declining to receive funding.[74] The Equal Protection Clause, in contrast, applies to all state actors, regardless of whether they receive federal funding.[75]

Additionally, Title IX and the Equal Protection Clause do not protect exactly the same substantive rights, and thus if Title IX precludes Equal Protection claims based on section 1983, some claims covered by the Equal Protection Clause may no longer be protected.[76] For example, Title IX makes schools liable for deliberate indifference that allows sexual harassment to occur, only when that harassment

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69. *Id.* at 26 (citing Smith v. Robinson, 468 U.S. 992, 1009 (1984)).

70. *See Fitzgerald*, 504 F.3d at 179 (holding that Title IX precludes section 1983 claims) (citing Smith v. Robinson, 468 U.S. 992, 1009–11 (1984)) .

71. Brief Amici Curiae of the ACLU & NWLC, *supra* note 38, at 10.

72. *Id.* (citing Great Am. Fed. Sav. & Loan Assn. v. Novotny, 442 U.S. 366, 377 (1979); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413–17 (1968); Johnson v. Railway Express Agency, 421 U.S. 454, 457–61 (1975)).

73. *Id.* (quoting Great Am. Fed. Sav & Loan Assn. v. Novotny, 442 U.S. 366, 377 (1979)).

74. Brief Amici Curiae of the ACLU & NWLC, *supra* note 38, at 18.

75. *Id.*

76. Brief for Petitioners, *supra* note 65, at 21.

deprives victims of educational opportunities or benefits.[77] The Equal Protection Clause, on the other hand, prevents schools from engaging in sex discrimination, even if the discrimination does not deprive the victim of educational opportunities or benefits.[78]

Though the First Circuit would allow a plaintiff to bring concurrent Title IX and section 1983 constitutional claims when an individual defendant commits an "independent wrong, separate and apart from the wrong asserted against the educational institution," it would not allow concurrent Title IX and section 1983 constitutional claims based on a single incident[79] A plaintiff might have both a Title IX claim and an Equal Protection claim if, for example, a school demonstrates deliberate indifference to sexual harassment in a manner that deprives victims of educational opportunities and at the same time treats the sexual harassment of girls differently than it treats the sexual harassment of boys.[80] If a plaintiff's Title IX claim is unsuccessful, it should not deny the plaintiff the opportunity to prevail on an Equal Protection claim stemming from the same actions of the school.

VI. ARGUMENTS AND DISPOSITION

A. Strengths and Weaknesses of the Fitzgeralds' Case

The primary strength of the Fitzgeralds' case is that the private remedy offered by Title IX is judicially implied, and therefore may not reflect the intent of Congress to make Title IX an exclusive remedial scheme.[81] Because the judicially implied remedy calls into question Congress's intent, the Supreme Court may be reluctant to hold that Congress intended Title IX to preclude Equal Protection claims under section 1983.

A secondary strength of the Fitzgeralds' case is the fact that Title IX and the Equal Protection Clause do not protect identical rights, and therefore the First Circuit's rationale would deny protection of constitutional rights in certain circumstances.[82] This strengthens the

77. *Id.*
78. *Id.* at 21–22.
79. Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165, 180 (1st Cir. 2007).
80. Brief for Petitioners, *supra* note 65, at 22.
81. *Id.*
82. *Id.* at 21–22.

Fitzgeralds' case because the Supreme Court might hesitate to make a decision that would deny the protection of constitutional rights.

The primary weakness of the Fitzgeralds' case is that the First Circuit attempted to narrow the impact of its decision by saying that Title IX would not preclude all section 1983 constitutional claims.[83] If the First Circuit's decision is interpreted narrowly, as applying only to the specific set of facts set forth in this case, then the Fitzgeralds cannot claim that this decision would have the effect of denying the protection of constitutional rights. Without such policy implications, the Fitzgeralds lose some of the force of their argument.

Another weakness of the Fitzgeralds' case is that, though they have asserted that their Equal Protection claim is distinct from their Title IX claim, they did not articulate this distinction before the district court or appellate court.[84] The Fitzgeralds base their Equal Protection claim on the school's different treatment of the male harasser and the female victim, but by not articulating this distinction in earlier proceedings they may have failed to preserve their Equal Protection claim for Supreme Court review.[85] The Fitzgeralds argue, however, that because the section 1983 constitutional claim was dismissed by the district court before discovery could take place, they were not given the opportunity to demonstrate that their Title IX and section 1983 claims were distinct.[86]

B. Strengths and Weaknesses of the Barnstable School Committee's Case

The primary strength of the School Committee's case is that the First Circuit's decision can be read narrowly so as not to preclude every section 1983 constitutional claim made concurrently with a Title IX claim.[87] The potentially narrow nature of the decision allows the School Committee to assert that the First Circuit's decision would not,

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83. *Fitzgerald*, 504 F.3d at 180; Brief for Respondents Barnstable Sch. Comm. and Dr. Russell Dever at 3, Fitzgerald v. Barnstable, No. 07-1125 (U.S. May 5, 2008).

84. Brief for Respondents Barnstable Sch. Comm. and Dr. Russell Dever at 2, Fitzgerald v. Barnstable, No. 07-1125 (U.S. May 5, 2008).

85. *Id.*.

86. Reply Brief for Petitioners at 2–3, Fitzgerald v. Barnstable, No. 07-1125 (U.S. May 20, 2008).

87. *See Fitzgerald*, 504 F.3d at 180 ("[W]hen 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."); Brief for Respondents, *supra* note 83, at 3 (same).

in fact, result in the denial of constitutional rights, and that therefore the Supreme Court should not hesitate to affirm the First Circuit's decision.

The primary weakness of the School Committee's case is that the private right of action in Title IX is a judicially implied right, rather than a right expressly stated by Congress.[88] The implied nature of this remedy both casts doubt on whether Congress intended Title IX to be an exclusive remedial scheme and weakens the analogy to the precedent set in *Smith*.[89]

C. Likely Disposition

The Supreme Court will likely hold that Title IX does not preclude section 1983 constitutional claims. Apart from *Smith v. Robinson,* the Supreme Court historically has demonstrated a reluctance to allow a later-enacted statute to preclude previously available constitutional remedies, and this case is distinct from *Smith* because neither the express language nor the history of Title IX indicates that Congress intended it to be an exclusive statutory remedy.[90] Furthermore, if the Supreme Court were to hold that Title IX precludes constitutional claims based on section 1983, certain claims will no longer be available, leaving the constitutional grievances with no redress.[91]

88. Brief for Petitioners, *supra* note 65, at 22.

89. *See id.* (suggesting that because an implied remedy is construed by the judiciary rather than provided by Congress in the statute, it cannot indicate Congress's intent to create a comprehensive remedial scheme).

90. Brief Amici Curiae of the ACLU & NWLC, *supra* note 38, at 10.

91. Two examples of claims that would have no remedy are when a discriminating state institution does not receive federal funding or when discriminatory behavior does not rise to the level of depriving victims of an education. *Id.* at 18.