No. 24-___

In the Supreme Court of the United States

CRYSTAL AYON A/N/F OF M.R.A.,
A MINOR CHILD,

Petitioner,

v.

AUSTIN INDEPENDENT SCHOOL DISTRICT,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a public school district acts with deliberate indifference to its students being assaulted inside its school buses after it installed video cameras in all district buses in response to a prior incident of a student being sexually assaulted by a bus driver, but intentionally enacts a policy in which (i) the video cameras at its campuses and facilities are continually live monitored, but (ii) the bus cameras are not monitored and the footage is only reviewed unless and until a report of misconduct is made, thereby causing the sexual assault of M.R.A. by a different bus driver, who testified that he would not have committed the assaults had he known someone was watching the cameras.

RELATED PROCEEDINGS

Ayon v. Austin Indep. Sch. Dist., *et al.*, No. 1:22-cv-00209, United States District Court for the Western District of Texas. Judgment entered February 5, 2024.

Ayon v. Austin Indep. Sch. Dist., *et al*, No. 24-50267, United States Court of Appeals for the Fifth Circuit. Judgment entered February 20, 2025.

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PETITION FOR WRIT OF CERTIORARI

Crystal Ayon, as Next Friend of M.R.A., a Minor Child, respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's unpublished opinion (Pet. App. 1a-12a) is available at 2025 WL 560228. The unpublished order and opinion of the U.S. District Court for the Western District of Texas (Pet. App. (Pet. App. 13a-31a) is available at 2024 WL 1572408.

JURISDICTION

The Fifth Circuit issued its opinion (Pet. App. 1a-12a) on February 20, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983

> 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 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. . . .

20 U.S.C. § 1681

> 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.

STATEMENT OF THE CASE

I. Statutory Background

"[T]o establish municipal liability under § 1983, a plaintiff must show that: (1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right." *Groden v. City of Dallas, Tex.*, 826 F.3d 280, 283 (5th Cir. 2016). The "official policy" may be written or may be an unwritten "custom or usage" if "sufficiently permanent and well settled." *Monell v. Dep't of Soc. Services of City of New York*, 436 U.S. 658, 691 (1978). Official policy "usually exists in the form of written policy statements, ordinances, or regulations, but it may also arise in the form of a widespread practice that is so common and well-settled as to constitute a custom that fairly represents municipal policy." *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 847 (5th Cir. 2009).

Where the policy is not "unconstitutional on its face," a plaintiff must show that it is adopted "with deliberate indifference to the known or obvious fact that such constitutional violations would result." *Piotrowski v. City of Houston*, 237 F.3d 567, 579 (5th Cir. 2001). In addition, the failure to adopt a policy can be deliberately indifferent when it is obvious that the likely consequences of not adopting a policy will be a deprivation of constitutional rights. *Porter v. Epps*, 659 F.3d 440, 446 (5th Cir. 2011); *Brumfield v. Hollins*, 551 F.3d 322, 328 (5th Cir. 2008).

"Deliberate indifference is a degree of culpability beyond mere negligence or even gross negligence; it must amount to an intentional choice, not merely an unintentionally negligent oversight." *James v. Harris Cnty.*, 577 F.3d 612, 617–18 (5th Cir. 2009). With respect to sexual assaults of students, a school district can be held liable under Section 1983 for supervisory failures resulting in the molestation of the student if those failures "manifested a deliberate indifference to the welfare of the school children." *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 454 (5th Cir. 1994).

The "right to be free of state-occasioned damage to a person's bodily integrity is protected by the Fourteenth Amendment guarantee of due process" and applies to state actors inflicting physical injuries. *Id.* at 450–51. A student who is sexually assaulted at a public school is "deprived of a liberty interest recognized under the substantive due process component of the Fourteenth Amendment" because "[i]t is incontrovertible that bodily integrity is necessarily violated when a state actor sexually abuses a schoolchild and that such misconduct deprives the child of rights vouchsafed by the Fourteenth Amendment." *Id.* at 451–52.

To establish a pre-assault claim under Title IX, a plaintiff must show that: "(1) a school maintained a policy of deliberate indifference to reports of sexual misconduct, (2) which created a heightened risk of sexual harassment that was known or obvious (3) in a context subject to the school's control, and (4) as a result, the plaintiff suffered

harassment that was 'so severe, pervasive, and objectively offensive that it can be said to [have] deprive[d] the [plaintiff] of access to the educational opportunities or benefits provided by the school.'" *Karasek v. Regents of Univ. of California*, 956 F.3d 1093, 1112 (9th Cir. 2020) (quoting *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999)); *see also Doe on behalf of Doe #2 v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 35 F.4th 459, 465 (6th Cir. 2022) (following *Karasek's* "heightened risk" standard, reversing summary judgment in favor of defendant school district and observing that "[w]e adopt this test for a student alleging that a school's deliberate indifference before she was harassed caused the harassment"). "The heightened risk must be known or obvious even if the school did not have actual knowledge of a particularized risk." *Karasek*, 956 F.3d at 1113).

II. Factual Background

Because the district court dismissed Ayon's claims on summary judgment, what follows are "the plaintiff's version of the facts." *Scott v. Harris*, 550 U.S. 372, 378 (2007).

From 2015 to 2016, a six-year-old child was repeatedly sexually assaulted on an Austin Independent School District ("AISD") school bus by an AISD bus driver. Pet. App. 9a, 20a-21a. As a result, AISD thereafter installed cameras in every AISD school bus. *Id.* As discussed below, when AISD chose to install video cameras in its school buses, it was required to do so in a manner that

was not consciously indifferent to the risk of constitutional violations to its students.

Ayon is the mother of M.R.A, a minor child, who in 2018 was a five-year old special education student at Uphaus Early Childhood Center within AISD. M.R.A. would ride to and from school on a school bus designated to transport special needs students. Pet. App. 2a-3a, 14a-15a. Cesar Maldonado was the AISD bus driver that drove M.R.A. to and from school every school day. *Id*. Beginning around March 1, 2018, Maldonado engaged in a series of sexual assaults of M.R.A. on the school bus. *Id*.

Although M.R.A.'s school bus was equipped with video cameras that recorded the activities of the students, the bus monitor, and the bus driver, no one from AISD was watching to prevent or stop these repeated attacks. Pet. App. 3a, 19a. No one was watching because AISD's official policy was to leave all video footage from school buses unreviewed unless and until an incident was reported, which in this case required the wherewithal of a five-year-old special needs student to summon the courage to speak out. *Id*.

After M.R.A. reported the assaults to her mother, AISD's police department conducted an investigation and eventually observed several instances of sexual assaults committed by Maldonado against M.R.A. on various dates and times, including on May 17, 21, and 23, 2018. Pet. App. 15a. Other assaults were not able to be

reviewed and verified because the camera hard drives are only able to capture about three weeks of footage before they are recorded over. Pet. App. 3a.

This policy of not reviewing bus video footage unless and until a report is made was a conscious and intentional choice on the part of AISD because AISD was already live monitoring cameras for schools, athletic venues, support facilities, and transportation department buildings of 137 AISD campuses in a 24/7 staffed video room. Pet. App. 9a.

In other words, AISD could have chosen to live monitor both the campus and bus videos, but the only cameras that AISD consciously chose not to live monitor were the school bus cameras. This juxtaposition makes evident the conscious indifference at play in this case: one group of students who may be assaulted on an AISD campus versus in an AISD school bus is the difference between someone monitoring the video footage and possibly being able to intervene and stop an assault versus the latter group who no one, unfortunately, is monitoring and no help will be on the way. AISD is clearly deliberately indifferent to the second group who ride AISD school buses. AISD either knows, or it is obvious, that students are at risk for being assaulted. That is precisely why cameras were installed and are monitored in all of AISD's campus buildings.

At all times relevant to this action, and on all occasions of Maldonado's sexual assaults of M.R.A, the designated school bus personnel also included a bus monitor, Rogelia Lopez. Pet. App. 2a-3a, 14a-15a, 24a-25a. As bus monitor, one of Lopez's "essential functions" was to "report problems or concerns to the proper authority." *Id*. Lopez should have been able to prevent Maldonado's sexual assaults of M.R.A. but did not because of another AISD policy, that only required one adult on a school bus at a time and, thus, allowed bus monitors to leave the bus and leave students alone with bus drivers in another instance of deliberate indifference. *Id*. Due to this deliberately indifferent oversight, and with no bus monitor required at all times, Maldonado was able to molest M.R.A continuously.

The totality of the AISD's video monitoring policy combined with its bus monitor policy created a situation in which, at minimum, a fact issue exists regarding whether the district was deliberately indifferent to its students riding buses being assaulted.

III. Procedural History

Petitioner sued AISD, Maldonado, and other AISD officials under Section 1983 and Title IX, alleging, among other things, that AISD's video monitoring and bus monitoring policies violated both statutes because they were applied in a deliberately indifferent manner as to the constitutional rights of their students, thereby causing the sexual

assaults of M.R.A. The district court had federal question jurisdiction, pursuant to 28 U.S.C. § 1331, over Ayon's lawsuit because her claims arose under 42 U.S.C. § 1983 and Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681, *et seq*.

The district court: (i) entered judgment against Maldonado after he failed to appear; (ii) dismissed the remaining individual defendants due to qualified immunity; and (iii) relevant to this appeal, granted summary judgment to AISD on the basis that there was no genuine issue of material fact on the issue of deliberate indifference.[1] Pet. App. 4a.

Petitioner appealed. The Fifth Circuit affirmed, limiting its ruling on the issue of deliberate indifference regarding both the Section 1983 and Title IX claims. Pet. App. 2a-12a. The Fifth Circuit reasoned, erroneously and in conclusory fashion, that Petitioner produced no evidence that: (1) AISD knew sexual predators were driving their buses; (2) AISD bus drivers knew cameras were not monitored; and (3) AISD should have known students on a special-education bus suffer a unique risk of constitutional violation without a bus monitor on board at all times. Pet. App. 6a. Although Ayon presented such evidence to the Fifth Circuit, the

[1] The district court also committed reversible error regarding legal issues underlying Petitioner's Title IX claims that the Fifth Circuit did not reach because it found that no fact issue existed regarding deliberate indifference. Petitioner's Title IX issues were supported by an Amicus Curiae brief on the part of Public Justice.

court of appeals nevertheless proceeded to rely upon AISD's evidence while almost completely ignoring Ayon's evidence.

REASONS TO GRANT THE PETITION

While Petitioner recognizes that: (i) the legal standards regarding summary judgment and deliberate indifference are well established; (ii) no circuit split exists regarding these standards; and (iii) pursuant to Supreme Court Rule 10, a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law," this Court should nevertheless grant this petition for writ of certiorari for multiple reasons.

First, the issue presented here is extremely important, recurring, and involves redressing an extreme amount of harm. Despite no circuit split to resolve, this case presents the Court with an opportunity to redress the extreme amount of harm done to M.R.A., while also addressing the broader, important issues regarding public school security in this country.

Second, the Fifth Circuit's opinion below directly conflicts with this Court's opinion in *Tolan v. Cotton*, 527 U.S. 650 (2014), where, despite no circuit split to resolve, this Court granted certiorari and vacated a Fifth Circuit decision that misapplied the standard of reviewing summary judgment in a case involving not only a police

officer shooting an unarmed young man standing in his family's driveway after he was falsely accused of stealing a car, but also broader issues regarding qualified immunity.

Third, the Fifth Circuit's decision is wrong because, *inter alia*, it wholly failed to view the summary judgment evidence in the light most favorable to Ayon, failed to credit evidence that contradicted some of its key factual conclusions, and improperly weighed the evidence and resolved disputed issues in favor of AISD, the moving party.

I. The question presented is recurring, important, and involves redressing an extreme amount of harm.

This case involves legal and policy issues well beyond the specific facts and circumstances underlying this appeal, which not only involves the repeated sexual assault of a public school student by a school district employee, but it also directly implicates the parameters by which public schools in this country use video technology to protect students from various types of physical harm.

And the stakes are high. Where, as here, a public school district responds to an incident of a sexual assault on a school bus by installing video cameras in the buses, but fails to monitor the video footage and thereby relegates the cameras to mere window dressing or scarecrows, the result is that more students will be assaulted, including the numerous sexual assaults of M.R.A.

So despite no circuit split to resolve, this case presents the Court with an opportunity to redress the extreme amount of harm done to M.R.A. at the micro level, while also addressing the broader, important issues regarding public school security at the macro level.

In this regard, this case is highly analogous to *Tolan v. Cotton*, 527 U.S. 650 (2014), discussed in more detail below. There, despite no circuit split to resolve, this Court granted certiorari and vacated a Fifth Circuit decision that misapplied the standard of reviewing summary judgment in a case involving not only a police officer shooting an unarmed young man standing in his family's driveway after he was falsely accused of stealing a car, but also broader issues regarding qualified immunity.

Thus, while such review is not the typical practice before this Court, this Court should follow *Tolan*, and grant certiorari in this case because the Fifth Circuit's opinions in *Tolan* and this case are not typical and implicate important legal issues with significant consequences.

II. The Fifth Circuit's decision below directly conflicts with this Court's decision in *Tolan v. Cotton*.

Tolan v. Cotton, 527 U.S. 650 (2014) is controlling, analogous, and instructive.[2] There, Tolan, a then 23-year-old African-American male was shot multiple times in the driveway of his family's home in Bellaire, Texas by a Bellaire police officer, Cotton, who claimed that the family's car in the driveway that Tolan had been driving with his cousin was stolen, which it was not. *Id.* at 651-54.

After Tolan and his cousin exited the vehicle, the initial officer on the scene, Edwards, exited his cruiser, drew his service pistol, and ordered Tolan and his cousin to the ground *Id*. at 652. Tolan replied that the car was his but complied with Edwards' demand to lie face down on the ground. *Id*.

Hearing the commotion, Tolan's parents exited the front door of the house in their pajamas. *Id*. After Edwards told Tolan's parents that he believed Tolan and his cousin had stolen the vehicle, Tolan's parents attempted to explain to Edwards that Tolan was their son who lived at their house and that the car was theirs. *Id*. While Tolan and his cousin continued to lie on the ground in silence, Edwards called for backup. *Id*.

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[2] Petitioner notes that the author of the Fifth Circuit's opinion below was also on the Fifth Circuit's panel in *Tolan*.

Soon thereafter, Cotton arrived at the scene and immediately drew his pistol. *Id*. Cotton ordered Tolan's mother to stand against the family's garage door. *Id*. In response, Tolan's mother asked, "Are you kidding me? We've lived here 15 years. We've never had anything like this happen before." *Id*. at 652-53. The parties disagreed about what happened next, but some degree of physical confrontation between Cotton and Tolan's mother caused Tolan to tell Cotton to get his hands off his mother. *Id*. at 653. The parties agreed that immediately thereafter Cotton fired three shots at Tolan. One of the bullets entered Tolan's chest, collapsing his right lung and piercing his liver, causing life-altering injuries, and ending his budding professional baseball career. *Id*. at 653-54.

Tolan filed suit against Cotton under Section 1983 for the use of excessive force in violation of the Fourth Amendment. *Id*. at 654. After Cotton moved for summary judgment on his qualified immunity defense, the district court granted summary judgment, but rather than ruling on the qualified immunity defense, it ruled that Cotton's use of force was not unreasonable and therefore did not violate the Fourth Amendment. *Id*.

The Fifth Circuit affirmed but on a different basis. *Id*. It declined to decide whether Cotton's actions violated the Fourth Amendment and, instead, held that even if Cotton's conduct did violate the Fourth Amendment, Cotton was entitled to qualified immunity because he did not violate a clearly established right. *Id*.

The Fifth Circuit "reasoned that Tolan failed to overcome the qualified-immunity bar because an objectively reasonable officer in Sergeant Cotton's position could have believed that Tolan presented an immediate threat to the safety of the officers.'" *Id.* at 654-55. In support of this conclusion, the Fifth Circuit relied on four disputed facts: (i) at the time of the shooting, the Tolan's front porch was "dimly lit," (ii) Tolan's mother "refused orders to remain quiet and calm," (iii) Tolan was "shouting" at and "verbally threatening" Cotton, and (iv) Tolan was "moving to intervene in" Cotton's handling of his mother. *Id.* at 655-59.

Although each of these facts was disputed, with Tolan and Cotton each producing conflicting evidence, this Court held that the Fifth Circuit improperly accepted Cotton's evidence, which was in the form of his and Edwards' testimony, and discounted or disregarded Tolan's evidence:

> In holding that Cotton's actions did not violate clearly established law, the Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case. By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly weighed the evidence and resolved disputed issues in favor of the moving party.

…

Considered together, these facts lead to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed to properly acknowledge key evidence offered by the party opposing that motion…. [W]e intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents....

The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.

> Applying that principle here, the court should have acknowledged and credited Tolan's evidence with regard to the lighting, his mother's demeanor, whether he shouted words that were an overt threat, and his positioning during the shooting….We instead vacate the Fifth Circuit's judgment so that the court can determine whether, when Tolan's evidence is properly credited and factual inferences are reasonably drawn in his favor, Cotton's actions violated clearly established law.

Id. at 657 & 659-60 (internal quotations and citations omitted).

As discussed below, the Fifth Circuit here similarly failed to apply the well-established standards for reviewing summary judgments.

III. The decision below is wrong.

The Fifth Circuit wholly failed to view the summary judgment evidence in the light most favorable to Ayon, failed to credit evidence that contradicted some of its key factual conclusions, and improperly weighed the evidence and resolved disputed issues in favor of AISD, the moving party. Indeed, an objective reading of the Fifth Circuit's opinion shows that it is replete with instances of the court weighing evidence, taking AISD's evidence as true rather than Ayon's, and resolving

disputed issues in favor of AISD instead of Ayon. In fact, as was the case in *Tolan*, the Fifth Circuit's opinion here reads as if AISD was the non-moving party.

The vast majority of the time that Ayon's evidence is mentioned, it is either merely for the sake of argument or weighed against AISD's evidence and ultimately disregarded. And a significant amount of the evidence that Ayon presented to the Fifth Circuit below is completely ignored and not even mentioned at all, while the court heavily relied upon deposition testimony and other evidence presented by AISD in its briefing.

First, the evidence shows that AISD's justification for its failure to live monitor the bus video footage, which was relied upon by both the district court and the Fifth Circuit in holding that there was no genuine issue of material fact regarding conscious indifference, was not credible because it changed over time and conflicted with other evidence, indicating that it was mere pretext. Soon after AISD installed the bus cameras, AISD's director of transportation, Kris Hafezizadeh, publicly announced at a 2016 press conference, "We want to know what goes on inside of our buses."[3] This statement implies that some kind of monitoring will be occurring because to know what

[3] Kevin Schwaller, Board approves new cameras for AISD school buses, KXAN Austin (2016), https://www.kxan.com/news/board-approves-new-cameras-for-aisd-school-buses/amp/ (last visited Apr. 28, 2025); ROA.2194.

is going on inside of a bus, one would have to monitor the video footage.

AISD's next attempt at justifying its video monitoring policy was after Ayon filed her lawsuit. AISD's interrogatory responses, verified under oath by Hafezizadeh, stated that the reason why it does not monitor the bus video footage is because it, essentially, claims that it is too much work, as there are 340 bus routes per day, in addition to thousands of additional field trips. Pet. App. 19a, 21a. AISD said nothing in response to this interrogatory that the cameras were intended to be used as a deterrent.

This justification for not conducting any live or routine monitoring due to the large number of bus routes and field trips is undermined by the fact that AISD has the capability to live-monitor video feeds from all AISD schools, athletic venues, support facilities, and transportation department buildings of all 137 AISD campuses, and such video can be viewed, downloaded, and saved by AISDPD personnel from their workstations and AISD school personnel. Pet. App. 9a.[4]

It was not until Hafezizadeh was deposed in this case that AISD contended for the first time that the bus cameras are merely to serve as a deterrent. Pet. App. 21a. But if AISD truly believed that cameras were actually effective as deterrents why wouldn't it adopt the same policy at all of its

[4] *See also* ROA.3117, 3259-62, 3267-3268.

campuses and facilities instead of incurring the time and expense of live monitoring, which it has done for many years prior to the installation of the bus cameras?

So AISD changed its position regarding the bus cameras from (i) "we want to know what's going on inside of our buses," to (ii) we cannot monitor the video footage because it is too much work, to (iii) the cameras serve as mere deterrents. Notably, only Hafezizadeh's first statement was made to the public. These inconsistent statements by AISD and Hafezizadeh not only undermine their credibility, but they also create fact issues warranting a jury to assess their credibility, as well as the legitimacy of AISD's eleventh hour deterrence justification for the bus cameras that was made for the first time almost two years after Ayon filed this lawsuit. The Fifth Circuit mentioned none of these issues.

And these conflicting justifications were further undermined by Petitioner's security expert, who testified that: (1) cameras themselves are not an effective deterrent, and (b) it would be feasible to monitor school bus footage for buses carrying elementary aged children, that it is "absolutely" possible for one person to live-monitor hundreds of buses.[5] This expert testimony was uncontroverted, as AISD offered no competing expert testimony, and, instead, unsuccessfully attempted to exclude this Ayon's security expert. Nevertheless, neither

[5] ROA.2109, 2110, 2272, 2294, 2276, 2278.

the district court nor the Fifth Circuit mentioned or addressed this uncontroverted expert testimony.

Thus, despite AISD's and Hafezizadeh's clearly inconsistent explanations regarding the video monitoring policy and the substantial evidence contradicting these explanations, the district court improperly chose to believe Hafezizadeh and heavily discount, if not completely ignore, Ayon's evidence undermining AISD's justifications for its consciously indifferent policies, which constitutes reversible error. *Roe v. Cypress-Fairbanks Indep. Sch. Dist.*, 53 F.4th 334, 345 (5th Cir. 2022) (observing that "a reasonable jury could simply not believe the [d]istrict's side of the story" and reversing the district court's conclusion that the school district was not deliberately indifferent).

Of course, the most direct evidence that AISD's bus cameras are not deterrents comes from Maldonado, who admitted to assaulting M.R.A. on numerous occasions and admitted under oath that if he knew someone was watching the bus cameras, he "never would have done it." Pet. App. 22a n.3.[6] The Fifth Circuit made no mention of this admission.

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[6] While the district court improperly weighed this admission against other testimony to ultimately disregard it, it is well established that the trier of fact is better equipped to assess a witness's credibility than a district court judge relying on a deposition transcript. *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1265-66 (5th Cir. 1991).

And while the Fifth Circuit heavily relied upon the specious premise that this was an isolated incident and that no other students had been assaulted on school buses, according to the AISD police officer who investigated this case, students continue to be at risk on school buses, as there was a fall 2022 investigation regarding a student's assault on a school bus, and there had "probably been more" since August of 2022.[7] The Fifth Circuit also made no mention of this evidence that was presented below.

Regarding whether the risk of M.R.A. being sexually assaulted on an AISD bus should have been "obvious" to the district, the Fifth Circuit held that it was not because there was only one "substantiated other incident" of a student being sexually assaulted on an AISD bus in 2015. Pet. App. 8a-9a. This conclusion is erroneous in multiple ways. First, this "single" incident was actually a multitude of assaults occurring over the course of a full year.

Second, whether the single incident exception[8] is applied or not, AISD installed the video cameras

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[7] ROA.3117-18, 3178, 3180.

[8] The single incident exception "recognizes that in a limited set of cases, a plaintiff, unable to show a pattern of constitutional violations, may establish deliberate indifference by 'showing a single incident with proof of the possibility of recurring situations that present an obvious potential for violation of constitutional rights.'" *Burge v. St. Tammany Par.*, 336 F.3d 363, 372-73 (5th Cir. 2003) (quoting *McClendon v. City of Columbia*, 258 F.3d 432, 442 (5th Cir. 2001)).

on all of its buses precisely because a student was sexually assaulted on a bus by a bus driver. If it were not obvious that students could be assaulted on buses why, after the "single" incident of a student being repeatedly assaulted over the course of a year, did AISD install cameras on all of its buses and why did its director of transportation announce at a press conference that AISD wants to know what is going on inside of its buses? If AISD truly believed that the 2015 series of assaults was an isolated incident, it would have done neither of these two things. At minimum, a jury should decide whether AISD's reaction to the 2015 assaults of installing cameras in all buses and publicly declaring it wants to know what's going on inside its buses proves that AISD either knew, or that it was obvious, that its students were at risk of being assaulted on its buses.

Viewing Ayon's evidence in the light most favorable to her, a reasonable jury could believe that, given its live monitoring at all 137 campuses, AISD knows that cameras don't work as deterrents (as Plaintiff's expert testified) and never actually made the policy decision of deterrence in the first place. The jury could also believe the deterrent justification was pretextual and concocted to justify AISD's deliberately indifferent policies at some point between the time that Hafezizadeh verified his interrogatory responses and when he was deposed, which is the sole evidence that the district court relied upon in its belief that AISD adopted a policy of deterrence. There was no other evidence of this claim. There was no controverting

expert testimony from AISD in the summary judgment record indicating that cameras are effective deterrents on school buses, no board meeting minutes where deterrence is discussed, or anything else.

A reasonable jury could also believe that, given AISD's video monitoring at its 137 campuses, the time and expense of monitoring the bus cameras would not be unreasonably burdensome to AISD, as Plaintiff's expert also testified. Thus, the evidence above establishes that, at minimum, fact issues exist regarding whether either of the propositions in AISD's purported cost benefit analysis are even true or to be believed.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari.

Respectfully submitted,

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May 21, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED FEBRUARY 20, 2025

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24-50267

CRYSTAL AYON, MOTHER OF M.R.A.,
A MINOR CHILD,

Plaintiff–Appellant,

v.

AUSTIN INDEPENDENT SCHOOL DISTRICT; CESAR MALDONADO, INDIVIDUALLY; ROGELIA LOPEZ, INDIVIDUALLY; CLAUDIA SANTAMARIA, INDIVIDUALLY; ALEX PHILLIPS, DETECTIVE, AUSTIN INDEPENDENT SCHOOL DISTRICT POLICE DEPARTMENT; ASHLEY GONZALEZ, POLICE CHIEF, AUSTIN INDEPENDENT SCHOOL DISTRICT POLICE DEPARTMENT,

Defendants–Appellees.

Filed February 20, 2025

OPINION

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:21-CV-209

Appendix A

Before ELROD, *Chief Judge*, and JONES and STEWART, *Circuit Judges*.

EDITH H. JONES:[1]

Cesar Maldonado repeatedly molested M.R.A. on the special-education school bus that he drove for Austin Independent School District ("AISD"). He is now serving a twenty-year prison sentence after pleading guilty to related charges. Crystal Ayon is the mother of M.R.A. She sued AISD and several of its employees under 42 U.S.C. § 1983 and Title IX, alleging that their deliberate indifference enabled the sexual assaults. The district court entered judgment against Maldonado after he failed to appear, dismissed the remaining individual defendants due to qualified immunity, and granted summary judgment to AISD on the basis that there was insufficient evidence of deliberate indifference. Ayon argues in this limited appeal that there is a genuine dispute whether AISD acted with deliberate indifference. We AFFIRM.

I.

M.R.A. is a minor with special needs related to a speech impediment. Starting in 2018, when M.R.A. was five years old, she attended a special-education program at Uphaus Early Childhood Center ("Uphaus") in AISD. She rode a bus specifically reserved for special-education

1. Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

students. Cesar Maldonado was the bus driver. Regalia Lopez was the bus monitor. Somewhere between 18,000 and 19,000 children depend on AISD buses for their commute. AISD buses service several hundred regular routes. They also are used for transporting students to approximately 8,000 athletic events and field trips each year.

On May 25, 2018, shortly after she arrived home from school, M.R.A. revealed to her mother, Ayon, that Maldonado had touched her private parts on several occasions when she rode the bus. Ayon immediately shared this information with the bus monitor. The next week, Ayon informed an Uphaus administrator, who promptly relayed the information to AISD police.

Maldonado was placed on administrative leave while AISD police investigated the allegations. Camera footage pulled from the bus confirmed that Maldonado had assaulted M.R.A. multiple times in the preceding weeks. Each of the documented incidents occurred in the morning, in the time between when Maldonado arrived at Uphaus and when school staff retrieved the students from the bus.

AISD did not review the camera footage until after it received the report. Nor did it employ anyone to regularly monitor camera footage from its buses. The cameras installed in AISD buses do not support live monitoring. And data storage limits only allowed AISD to review video footage within about three weeks of recording.

AISD police interviewed the bus monitor, who maintained that she had never witnessed Maldonado touch M.R.A. or received any complaints about Maldonado. AISD protocol permitted bus monitors to get off the bus at times (e.g., for a water or restroom break) so long as another adult remained on the bus with the children. Maldonado later confessed that he had inappropriately touched M.R.A. on multiple occasions when the bus monitor was absent. AISD police arrested Maldonado, who was immediately fired, then prosecuted, convicted and sentenced to prison.

Ayon sued Maldonado, AISD, and several AISD employees in their individual capacities. The district court granted a motion to dismiss the employees on qualified-immunity grounds. Maldonado failed to appear, and the district court entered default judgment against him for $5,000,000. Those decisions are not at issue.

Ayon appeals the district court's grant of summary judgment to AISD on the Section 1983 and Title IX claims. She contends that on the Section 1983 claim, there was sufficient risk of constitutional violations to raise a question of material fact whether AISD acted with deliberate indifference. She makes a similar argument under Title IX.

II.

"This court reviews a grant of summary judgment de novo, applying the same standard as the district court." *Luminant Mining Co. v. PakeyBey*, 14 F.4th 375, 379 (5th Cir. 2021) (internal quotation marks and citation omitted).

Summary judgment is warranted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Davidson v. Fairchild Controls Corp.*, 882 F.3d 180, 184 (5th Cir. 2018) (quoting Fed. R. Civ. P. 56(a)). The movant may satisfy its burden by pointing to an absence of evidence to support the nonmovant's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986). The nonmovant must then set forth specific facts that show a genuine issue for trial. "[T]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan v. Cotton*, 572 U.S. 650, 651, 134 S. Ct. 1861, 1863 (2014) (internal quotation marks omitted) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986)). But the nonmovant cannot prevail by relying on "conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence." *Freeman v. Tex. Dep't of Crim. Just.*, 369 F.3d 854, 860 (5th Cir. 2004) (citation omitted).

III.

A.

To avoid summary judgment for AISD on her Section 1983 claim, Ayon must produce sufficient evidence to justify a reasonable jury finding that: (1) an official policy (2) promulgated by AISD (3) was the moving force behind the violation of a constitutional right.[2] *Groden v.*

2. Case law establishes that a student who is sexually assaulted at a public school is "deprived of a liberty interest recognized under the substantive due process component of the Fourteenth Amendment." *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 451 (5th Cir. 1994).

City of Dallas, 826 F.3d 280, 283 (5th Cir. 2016). Because the relevant AISD policies are not unconstitutional on their face, Ayon must also produce evidence that tends to show they were adopted "with deliberate indifference to the known or obvious consequences that constitutional violations would result." *Piotrowski v. City of Houston*, 237 F.3d 567, 579 (5th Cir. 2001) (internal quotation marks omitted) (quoting *Bd. of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown*, 520 U.S. 397, 407, 109 S. Ct. 1382, 1390 (1997)). This latter requirement proves fatal for her claim.

Ayon contends that the relevant question is whether, under the totality of the circumstances,

> it would be obvious that the [video camera and bus monitor policies] would cause constitutional violations to AISD students where (i) a sexual predator is driving a bus with video cameras that he knows are not monitored and capturing footage that no one will watch unless a report is made; (ii) the passengers are vulnerable special needs elementary students who require a bus monitor; and (iii) the only adult eyes watching the sexual predator, the bus monitor, is allowed to leave the bus at any given time.

But Ayon produced no evidence in the district court to prove that (1) AISD knew sexual predators were driving school buses; (2) AISD bus drivers knew cameras were not monitored; or (3) AISD should have known students on a special-education bus suffer a unique risk of constitutional violation without a bus monitor on board at all times. Evidence in the record contradicts all three assumptions.

First, AISD representatives testified in depositions that AISD conducts background checks, collects fingerprints, and requires drug testing for bus driver applicants, which undermines claims that AISD knew it employed sexual predators. Second, AISD bus drivers are not told, during training or in their procedure manual, whether cameras are monitored, and this undermines claims that AISD bus drivers knew that cameras are not regularly monitored. Third, none of the previous sexual assault incidents that occurred in AISD involved a bus driver exploiting bus monitor rules on buses for special-education students, which undermines claims that AISD should have known about a unique risk to these students.

Shed of these unfounded assumptions, the proper inquiry is whether it would be obvious to AISD that the combined policies would cause constitutional violations to students where (1) AISD checks to ensure its drivers are not known sexual predators; (2) AISD buses are fitted with video cameras and drivers are not told about monitoring procedures; (3) AISD has never had a reported incident involving a special-education student; and (4) bus monitors are allowed to leave the bus only for short breaks. Ayon has failed to produce sufficient evidence for a reasonable jury to conclude that the potential for constitutional violations was "obvious" in the light of these facts.

Deliberate indifference is a "degree of culpability beyond mere negligence or even gross negligence; it must amount to an intentional choice, not merely an unintentionally negligent oversight." *James v. Harris County*, 577 F.3d 612, 617-18 (5th Cir. 2009) (internal

quotation marks omitted) (quoting *Rhyne v. Henderson County*, 973 F.2d 386, 392 (5th Cir. 1992)). Sufficient proof that constitutional violations were obvious "generally requires that a plaintiff demonstrate at least a pattern of similar violations." *Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 309 (5th Cir. 2004) (quoting *Burge v. St. Tammany Par.*, 336 F.3d 363, 370 (5th Cir. 2003)).

Ayon relies in part on deposition testimony in which the chief of police for AISD was asked, "Students being exposed to sexual predators is a risk to the district. Fair?" He replied, "Yeah. It's a risk, period. Yeah." He was also asked, "Do you think relying on a special needs child to make a report is an effective way of preventing abuse of special needs children?" He replied, "No." But this exchange does not suggest that the risk of constitutional violations on AISD buses was "obvious." The admission that sexual predators are "a risk" to students says nothing of the obviousness of that risk. And the admission that relying on a special needs child to make a report is an ineffective way to prevent abuse is insignificant because AISD did more to prevent abuse by installing cameras on its buses. It cannot be inferred from this exchange that AISD perceived an "obvious" risk to special-education students.

Nor was there a sufficient pattern of previous incidents to make such a risk objectively "obvious." AISD produced the police reports from every incident involving allegations of sexual misconduct on a bus since 2013. Reports were produced for ten alleged employee-student incidents and

seven student-student incidents. Only twice were charges brought for employee-student misconduct. Charges were substantiated and led to an arrest in one case, and in the other case the charges were determined to be unfounded and dismissed. The one substantiated incident—a 2015 series of assaults by a bus driver—occurred before AISD installed cameras on its buses. The district court correctly concluded that this "single prior substantiated incident" was insufficient to establish the obviousness that constitutional violations would occur.

Ayon submitted evidence of nine prior sexual assaults on AISD property—including the same 2015 series of assaults. Seven of those incidents did not occur on a bus, but occurred in school facilities, where live monitoring cameras are installed. If anything, those incidents undercut her argument that monitoring bus cameras would have prevented the sexual assault from occurring here. Five of those incidents involved student-student issues. And camera policies were not alleged to have played a role in any of the nine incidents. This is plainly insufficient to establish a pattern that would make constitutional violations under AISD's camera policies "obvious." *Valle v. City of Houston*, 613 F.3d 536, 548 (5th Cir. 2010).

In short: Ayon identifies just one arguably similar violation from a five-year period in a school district that comprises 72,000 students, 116 schools, and 10,000 employees. No other student was injured like M.R.A. after AISD installed cameras on its buses. Finding liability on these facts would be equivalent to imposing "liab[ility]

on the theory of respondeat superior, which is expressly prohibited by *Monell*." *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 852 (5th Cir. 2009) (citing *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037-38 (1978)). *See also Est. of Davis ex rel. McCully v. City of N. Richland Hills*, 406 F.3d 375, 383 (5th Cir. 2005) (requiring "notice of a pattern of similar violations" (emphasis removed)); *Yara v. Perryton Indep. Sch. Dist.*, 560 F. App'x 356, 359 (5th Cir. 2014) (holding that in the absence of similar injuries resulting from the same policy or activity a school district could not "have reasonably predicted physical injuries like [those incurred by the plaintiff] would [have] occur[ed]"). Accordingly, Ayon has failed to establish a genuine dispute whether AISD's policies made constitutional violations "obvious."[3]

3. Ayon also argues that AISD had sufficient notice because of the "single-incident exception," which recognizes that "in a limited set of cases" the plaintiff "may establish deliberate indifference by showing a single incident with proof of the possibility of recurring situations that present an obvious potential for violation of constitutional rights." *Burge*, 336 F.3d at 372-73 (internal quotation marks omitted). Ayon relies on the 2015 series of sexual assaults to argue it was "obvious" a constitutional violation would result from AISD policies. This argument fails for at least two reasons. First, Ayon only raised this argument below in the context of her Section 1983 failure-to-train claim, which she forfeited on appeal. *See Am. Precision Ammunition, L.L.C. v. City of Mineral Wells*, 90 F.4th 820, 827 n.6 (5th Cir. 2024) (citation omitted). Second, the 2015 series of sexual assaults—which occurred on a bus without cameras—could not have made it "obvious" that a constitutional violation would occur in the different context where a bus monitor is allowed to temporarily leave a bus installed with unmonitored cameras.

B.

"Title IX prohibits sex discrimination by recipients of federal education funding." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173, 125 S. Ct. 1497, 1503 (2005). It provides that "[n]o person . . . 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). Ayon argues that AISD violated Title IX because it maintained a policy of deliberate indifference to reports of sexual misconduct, which created a "heightened risk" of sexual harassment that was "known or obvious." The district court held that Title IX heightened-risk claims are not cognizable in cases of employee-to-student harassment. This court need not consider whether that is a correct statement of the law because a heightened-risk claim in this case would suffer the same flaw as Ayon's Section 1983 claim: insufficient evidence that constitutional violations were "obvious" in the light of AISD policies.

Ayon would fare no better even if she asserted a traditional Title IX claim. Plaintiffs in this circuit have a traditional Title IX claim where an "appropriate person" had "'actual knowledge' of the discrimination" and responded with "deliberate indifference" despite being provided "an opportunity for voluntary compliance." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 289-90, 118 S. Ct. 1989, 1999 (1998). Such claims presuppose that "an official who is advised of a Title IX violation refuses to take corrective action." *Id.* at 290, 118 S. Ct. at

1999. They are "based on allegations that the defendants failed to address sexually hostile environments after receiving reports of sexual assault." *Doe v. Tex. A&M Univ.*, 634 F. Supp. 3d 365, 376 (S.D. Tex. 2022) (collecting cases).

AISD received a credible report in 2015 of an employee-student sexual assault on a school bus, and it took prompt corrective action by installing cameras on its entire bus fleet. Here, Maldonado was immediately suspended, investigated, fired, and then arrested, charged, and incarcerated. These facts exemplify anything but "fail[ing] to address sexually hostile environments," especially in the light of circuit precedent, which holds that a police investigation after a report of sexual misconduct tends to negate the possibility of deliberate indifference. *See, e.g., I.F. v. Lewisville Indep. Sch. Dist.*, 915 F.3d 360, 376 (5th Cir. 2019) (finding no deliberate indifference to sexual assault where school district police department launched an investigation and interviewed students). Ayon therefore cannot state a traditional Title IX claim.

IV.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED FEBRUARY 5, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
AUSTIN DIVISION

1:21-CV-209-RP

CRYSTAL AYON, MOTHER OF M.R.A.,
A MINOR CHILD,

Plaintiff,

v.

AUSTIN INDEPENDENT SCHOOL DISTRICT
AND CESAR MALDONADO,

Defendants.

Filed February 5, 2024

ORDER

Before the Court is Defendant Austin Independent School District's ("AISD") Motion for Summary Judgment. (Dkt. 89). Plaintiff Crystan Ayon ("Plaintiff"), mother of M.R.A., a minor child, filed a response, (Dkt. 96). Having considered the parties' submissions, the record, and the applicable law, the Court will grant the motion for summary judgment.

Appendix B

I. BACKGROUND

M.R.A., a minor, attended Uphaus Early Childhood Center ("Uphaus") in AISD starting in 2018. (2d. Am. Compl., Dkt. 45, at 4). M.R.A. was five years old at the time and a student in the special education program at Uphaus. (*Id.*). She rode a bus designed for special education students to travel to and from school every day, driven by Cesar Maldonaldo ("Maldonaldo"), an AISD employee.[1] Another AISD employee, Regalia Lopez, ("Lopez"), would sit on the bus and monitor the students. (Mot. Summ. J., Dkt. 89, at 1). In the months preceding May 2018, Plaintiff noticed several times that her child's bus was late coming home from school. (Ayon Depo, Dkt. 96-1, at 6). She attempted to report the tardiness to AISD officials but did not receive a definite answer on why the bus would arrive late. (*Id.*).

From March 1, 2018 to May 25, 2018, Maldonado engaged in a series of sexual assaults of M.R.A. on the school bus. (Pl.'s Resp., Dkt. 96, at 2). When M.R.A. arrived home from school on Friday, May 25, 2018, she told her mother, Plaintiff Crystal Ayon, that Cesar Maldonaldo had touched her private parts. (*Id.*). Plaintiff called Lopez and reported the outcry to her. She also reported it to Uphaus's assistant principal on Tuesday (Monday was a holiday). (*Id.*). The assistant principal contacted AISD's police department, who met with M.R.A.'s parents. (*Id.*).

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1. Maldonado is also a Defendant in this case. He has not made any appearance, and the motion for summary judgment is filed only on behalf of AISD.

Maldonaldo was then placed on administrative leave while AISD police investigated the allegations. (Mot. Summ. J., Dkt. 89, at 2). Review of the camera footage on the bus showed that Maldonaldo had sexually assaulted M.R.A. multiple times when Lopez was off the bus. (*Id.*). Prior to Plaintiff's outcry, the videos had not been reviewed. (Pl.'s Resp., Dkt. 96, at 4). Although AISD captured video footage onboard its buses, it did not have an employee regularly monitor the live video feed. (*Id.*). AISD also failed to retain video footage from before May 2018. (Pl.'s Resp., Dkt. 96, at 3-5).

On July 9, 2018, AISD police interviewed Lopez, who reported that she had never witnessed Maldonaldo touch M.R.A. and had never received any complaints about Maldonado. (Report, Dkt. 90-1, at 41). AISD policy allowed bus monitors to exit the bus at times (for example, to use the restroom or get water) as long as one adult remained on the bus with the children. (Hafezizadeh Depo., Dkt. 96-2, at 18, 23). AISD police also interviewed Maldonaldo, who initially denied the claims against him. (Mot. Summ. J., Dkt. 89, at 9). However, he later told AISD police that he had touched M.R.A.'s genitals through her clothing multiple times, each of which occurred when Lopez was not on the bus. (Pl.'s Resp., Dkt. 96, at 4-5). AISD Police arrested Maldonaldo, and AISD terminated his employment the same day. (Mot. Summ. J., Dkt. 89, at 2). Maldonaldo was criminally convicted and is currently incarcerated. (*Id.*).

Plaintiff filed suit on March 4, 2021, against Maldonaldo, AISD, and several AISD employees. (Compl., Dkt. 1). On

May 6, 2021, the AISD employees and AISD moved to dismiss Plaintiff's complaint. (Mot. Dismiss, Dkt. 27). The Court granted the motion in part, dismissing the individual employees but allowing the claims against AISD to proceed. (*Id.*). Plaintiff then filed an amended complaint, alleging a violation of 42 U.S.C. § 1983 for failure to train, failure to adopt, and deliberate indifference, as well as a violation of Title IX against AISD. (2d Am. Compl., Dkt. 45, at 24-33). On September 8, 2023, AISD filed the instant motion for summary judgment.

II. LEGAL STANDARDS

Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "A fact is material if its resolution in favor of one party might affect the outcome of the lawsuit under governing law." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 326 (5th Cir. 2009) (quotations and footnote omitted). When reviewing a summary judgment motion, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255. Further, a court may not make credibility determinations or weigh the evidence in ruling on a motion for summary judgment. *Reeves v. Sanderson*

Plumbing Prods., Inc., 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007). Furthermore, the nonmovant is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006). Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.* After the nonmovant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the nonmovant, summary judgment will be granted. *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000).

III. DISCUSSION

AISD's motion raises three questions: (1) did AISD adopt a policy of deliberate indifference or fail to adopt a policy due to deliberate indifference that was the moving

force behind Plaintiff's constitutional injury, (2) did AISD fail to adequately train or supervise its employees, and (3) does Plaintiff plead a valid Title IX heightened risk claim? The Court will address each in turn.

A. Deliberate Indifference

Plaintiff brings a Section 1983 claim against AISD pursuant to the Supreme Court's decision in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Municipal liability under Section 1983 requires proof of three elements: (1) a policymaker; (2) an official policy or custom; and (3) a violation of constitutional rights whose "moving force" is the policy or custom. *See Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003). An official policy "usually exists in the form of written policy statements, ordinances, or regulations, but it may also arise in the form of a widespread practice that is 'so common and well-settled as to constitute a custom that fairly represents municipal policy.'" *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 847 (5th Cir. 2009) (internal quotations omitted). Where, as here, the policy is not "unconstitutional on its face," a plaintiff must show that it is adopted "with deliberate indifference to the known or obvious fact that such constitutional violations would result." *Piotrowski v. City of Houston*, 237 F.3d 567, 579 (5th Cir. 2001).

Mere negligence is not enough to show deliberate indifference. *James v. Harris Cnty.*, 577 F.3d 612, 617 (5th Cir. 2009). Rather, the policy "must amount to an intentional choice, not merely an unintentionally negligent

oversight." *Id.* The failure to adopt a policy can be deliberately indifferent when it is obvious that the likely consequences of not adopting a policy will be a deprivation of constitutional rights. *Rhyne v. Henderson Cnty.*, 973 F.2d 386, 392 (5th Cir. 1992).

1. Video Monitoring Policy

Here, Plaintiff contends that two AISD policies were the moving force behind her constitutional violations.[2] First, Plaintiff argues that AISD was deliberately indifferent to potential sexual assaults on buses because it only reviewed security footage *after* incidents were reported. (Pl.'s Resp., Dkt. 96, at 12-14). Plaintiff contends that AISD's intentional decision not to actively monitor school bus video footage amounts to indifference towards misconduct that may occur on the bus. (*Id.*). AISD argues that live or active monitoring would be impractical, and that their security choices speak to negligence rather than deliberate indifference. (Mot. Summ. J., Dkt. 89, at 3-11). Ultimately, the Court agrees with AISD—while Plaintiff's claim may show that AISD was potentially negligent in monitoring bus videos, she fails to show that its policy constituted deliberate indifference.

Deliberate indifference requires that the constitutional violation be "known or obvious." *Piotrowski*, 237 F.3d

2. AISD contests whether the video monitoring policy (or "custom") qualifies as a policy/custom for *Monell* liability. Because it finds that the policy does not amount to deliberate indifference, the Court assumes without deciding that it did qualify as a policy or custom.

at 579. Plaintiff argues that past incidents of sexual misconduct should have made the constitutional violations "obvious" to AISD. (Pl.'s Resp., Dkt. 96, at 15-16; Supp. Resp., Dkt. 105, at 3-4). But prior indications "require[] similarity and specificity; '[p]rior indications cannot simply be for any and all "bad" or unwise acts, but rather must point to the specific violation in question.'" *Peterson*, 588 F.3d at 851 (quoting *Estate of Davis ex rel. McCully v. City of N. Richland Hills*, 406 F.3d 375, 383 (5th Cir. 2005)). To show that AISD acted with deliberate indifference, Plaintiff must present "evidence that the type of constitutional violations . . . occurred" in the past because of the same policies. *Yara v. Perryton Indep. Sch. Dist.*, 560 F. App'x. 356, 359 (5th Cir. 2014) (unpublished).

Plaintiff points to several instances of AISD employees who sexually assaulted students. (Pl.'s Resp., Dkt. 96, at 6-7). The three most relevant instances are (1) in 2013, an AISD teacher molested children in his classroom; (2) in 2015, an AISD bus driver sexually assaulted a student over the course of a year; and (3) in 2017, a teacher sexually assaulted a pre-K student. (*Id.*). These three incidents, heinous as they are, do not show that AISD knew that its video monitoring policy would allow repeated sexual assaults on a bus. Of the three, only one incident involved a bus driver, and it was the same incident that led AISD to install cameras on its school buses. The parties identify only one other incident of inappropriate touching by an AISD bus employee, but the charges in that case were dismissed. (Mot. Summ. J., Dkt. 89, at 10). The single prior substantiated incident does not show a widespread pattern of inappropriate sexual conduct by an AISD bus

driver. *See Ratliff v. Aransas Cnty., Tex.*, 948 F.3d 281, 285 (5th Cir. 2020) (noting that constitutional violation must be "so persistent and widespread as to practically have the force of law.")).

Nor did AISD ignore the potential for similar constitutional violations. After the sexual assault of a student on a bus in 2015, AISD installed cameras on every bus to protect its students. (Hafezizadeh Depo., Dkt. 96-2, at 30). The goal of the cameras was to deter crime and record events to be used to respond to complaints. (*Id.* at 30-31). AISD responded to a prior constitutional violation in a way that was designed to deter future instances. *See Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 384 (5th Cir. 2000) ("[O]fficials may avoid liability under a deliberate indifference standard by responding reasonably to a risk of harm, 'even if the harm ultimately was not averted.'") (quoting *Farmer v. Brennan*, 511 U.S. 825, 844, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)). That response, even if ineffective, does not show that AISD deliberately adopted an ineffective approach.

In particular, Plaintiff faults AISD for choosing to record footage rather than monitor it live. (Pl.'s Resp., Dkt. 96, at 14-15). In response to an interrogatory, AISD stated that it does not monitor the camera footage regularly because there are 340 bus routes per day, in addition to 8,000 field trips per year. (Interrog. Answer, Dkt. 96-7). Plaintiff disputes this, suggesting that AISD can monitor live video feed but chooses not to. (Supp. Resp., Dkt. 105, at 2-3). Even accepting that AISD has the capacity to monitor live video feeds, the choice to retroactively

review video footage instead does not amount to deliberate indifference. AISD adopted a policy of deterrence rather than live capture, and that deterrent ultimately proved ineffective. But AISD's policy choice speaks to the cost of extra security measures against the risk of harm. Even accepting that AISD made the wrong choice, the improper balancing of risks and costs constitutes negligence, not deliberate indifference.

Of course, a policy choice may be deliberately indifferent if it is known or obvious that a constitutional violation will occur. *Piotrowski*, 237 F.3d at 579. Plaintiff argues that "it is obvious that the likely consequences of not reviewing the video footage will be a deprivation of constitutional rights." (Pl.'s Resp., Dkt. 96, at 15).[3] With the benefit of hindsight, it is clear that actively monitoring bus video feeds could have prevented subsequent assaults. But there is no indication that AISD knew repeated violations would occur on a bus without active video monitoring—as opposed to a bus with active video monitoring. AISD believed its cameras would deter these constitutional violations, and whether this belief was unsound, it does not mean AISD ignored the risks of those violations

3. Maldonaldo offered ambiguous testimony on this point. When asked if he would have committed the assault if he knew someone was watching the cameras, he said he "would never have done it." (Maldonaldo Depo, Dkt. 96-6, at 10). But the statement appears within a much broader context of Maldonaldo generally expressing regret for his conduct, saying "I am very regretful of what I did, so no, I wouldn't have done it." (*Id.*). But Maldonaldo later clarified that he "wouldn't know if [anyone was] looking at [bus videos] or not, I would not know." (*Id.* at 17)

occurring. *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 659 (5th Cir. 1997) ("[T]he district can escape liability if it can show . . . that it knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent.") (cleaned up). Plaintiff identifies only one other incident of an AISD employee sexually assaulting a student on a bus, and AISD responded to that incident by installing the video cameras. Even if AISD could have taken more care to regularly monitor videos, there is no evidence to suggest they knew a constitutional violation would occur by failing to actively monitor the videos. "[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as deliberate indifference." *Thompson v. Texas Dept. of Crim. J.*, 67 F.4th 275, 283-84 (5th Cir. 2023) (internal quotations omitted). AISD could have adopted stronger security measures to protect M.R.A., but this failure sounds in negligence rather than deliberate indifference.

In sum, AISD's use of security cameras on its buses shows that it took steps to protect children from being harmed on those buses. A policy that required active monitoring of the video feeds undoubtedly would have done more to ensure the children's safety, but a policy does not rise to the level of deliberate indifference simply because it was not deployed to maximum efficacy. *Johnson v. Dallas Indep. Sch. Dist.*, 38 F.3d 198, 202 (5th Cir. 1994) ("Even if the deployment of such security measures was haphazard or negligent, it may not be inferred that the conduct of the defendants rose to the level of deliberate

indifference.").[4] Because the constitutional violation was not known or obvious, and AISD responded to past violations by increasing bus security, there is no indication it adopted the bus video policy with deliberate indifference. Accordingly, the Court will grant summary judgment for AISD on that ground.

2. Bus Monitor Policy

Plaintiff next focuses on the "bus monitor" policy that allowed students to be alone with only one bus driver on a school bus.[5] Here, Plaintiff faults AISD for allowing the bus monitor to leave the bus to use the restroom or take a break. (Pl.'s Resp., Dkt. 96, at 8-9). Plaintiff states, "Based on the previous assaults, AISD knew of the consequences of leaving its students alone, unmonitored, and unsupervised. Thus, the predictable consequence of leaving a student alone, unmonitored, and unsupervised with an AISD employee enabled M.R.A.'s assaults." (*Id.* at 9). Here again, Plaintiff's claim fails to identify a past incident where the bus monitor policy led to a similar constitutional violation. No other incidents involving the sexual assault of a minor appear to have exploited the bus monitor policy as Maldonaldo did. The claim thus fails

4. Plaintiff seeks to distinguish this quote from *Johnson* on the grounds that it dealt with technical difficulties, but that argument is unconvincing. *Johnson* does not state this limitation, and there is no reason to believe that the deliberate indifference standard should vary based upon whether humans or technological security measures were in place. *Johnson*, 38 F.3d at 202.

5. The Court again assumes without deciding that this qualifies as a "policy" for *Monell* liability.

as a matter of law because AISD lacked the requisite awareness that the policy could lead to constitutional violations. *See James*, 577 F.3d at 617; *Johnson*, 38 F.3d at 202.

It is true that a different bus monitor policy—one which forced two adults to be on the bus at all times—could have prevented the assault. But the analysis that AISD made, weighing the ability of its bus monitors to take breaks or to hire another monitor against the risk of assault, again speaks to negligence rather than knowing indifference. *See Garcia v. City of Lubbock, Texas*, No. 5:20-CV-053-H, 2020 U.S. Dist. LEXIS 246834, 2020 WL 7979186, at *3 (N.D. Tex. Sept. 9, 2020) ("Deliberate indifference cannot be inferred from a negligent or grossly negligent response to a substantial risk of serious harm."). At most, Plaintiff shows that AISD should have been aware that its bus monitoring policy increased the risk of inappropriate conduct. (Pl.'s Resp., Dkt. 96, at 8-9). But this does not meet the "stringent test" of municipal liability, which requires more than a "a showing of simple or even heightened negligence." *Piotrowski*, 237 F.3d at 579. Accordingly, the bus monitor policy was not adopted with deliberate indifference.

B. Failure to Train

Plaintiff also includes a claim for AISD's alleged failure to train its employees. Specifically, she argues that AISD failed to train its bus monitors, in this case Lopez, to look for and be aware of the possibility of sexual assault. (2d. Am. Compl., Dkt. 45, at 30). To establish liability under

Section 1983 based on the failure to train or supervise, a plaintiff must show that (1) the municipality's training procedures were inadequate, (2) the municipality was deliberately indifferent in adopting its training policy, and (3) the inadequate training policy directly caused the violations in question. *Zarnow v. City of Wichita Falls, Tex.*, 614 F.3d 161, 170 (5th Cir. 2010).

As this Court has already held, there was not a sufficient pattern of constitutional violations involving bus drivers who sexually assaulted students to put AISD on notice for the purpose of deliberate indifference. In the parties' briefing, there are only two prior reports of employee-to-student sexual assault involving bus drivers, one of which was proven. This single incident is not enough to show a pattern of constitutional violations. *Peterson*, 588 F.3d at 851; *Pineda v. City of Houston*, 291 F.3d 325, 329 (5th Cir. 2002) (holding that 11 incidents of warrantless entry did not support a pattern of unconstitutional warrantless entry).

Failure to train claims can include a "single-incident exception" where a plaintiff shows the risk of a "constitutional violation would be 'obvious' or 'a highly predictable consequence' of a municipality's failure to train." *Degollado v. Solis*, 617 F. Supp. 3d 668, 679 (S.D. Tex. 2022) (citing *City of Canton v. Harris*, 489 U.S. 378, 390, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)). However, this exception is narrow and "generally reserved for when an employee has received no training at all." *Littell v. Houston Indep. Sch. Dist.*, 894 F.3d 616, 624 n.5 (5th Cir. 2018). For a constitutional violation, the Fifth Circuit has

affirmed that plaintiffs "cannot avail themselves of [the single-incident exception]" if "they do not allege that there was 'no training whatsoever.'" *Hutcheson v. Dallas Cnty., Texas*, 994 F.3d 477, 483 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 564, 211 L. Ed. 2d 352 (2021) (citing *Peña v. City of Rio Grande City*, 879 F.3d 613, 623 (5th Cir. 2018)). Here, Plaintiff does not allege that Lopez received no training at all. (*See* Pl.'s Resp., Dkt. 96, at 18 ("Despite her testimony that she did receive some training, a fact issue exists regarding the adequacy of that training. . . . ")). Because there was no obvious need to train bus monitors not to leave bus drivers alone, and Lopez received some level of training, the Court will grant summary judgment on the failure to train claim.

C. Title IX

Beyond § Section 1983 liability, Plaintiff also pleads a violation of Title IX, alleging that M.R.A. was subjected to a hostile educational environment. (2d. Am. Compl., Dkt. 45, at 31). To establish a pre-assault claim under Title IX, a plaintiff must show that: "(1) a school maintained a policy of deliberate indifference to reports of sexual misconduct, (2) which created a heightened risk of sexual harassment that was known or obvious (3) in a context subject to the school's control, and (4) as a result, the plaintiff suffered harassment that was 'so severe, pervasive, and objectively offensive that it can be said to [have] deprive[d] the [plaintiff] of access to the educational opportunities or benefits provided by the school.'" *Karasek v. Regents of Univ. of California*, 956 F.3d 1093, 1112 (9th Cir. 2020) (quoting *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629,

650, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999)). Under this standard, the elements of a Title IX claim closely mirror those for municipal liability. (Order, Dkt. 31, at 10).

At the outset, this claim fails because the "heightened risk" standard is limited "to contexts in which students committed sexual assault on other students, circumstances not present here." *Poloceno v. Dallas Indep. Sch. Dist.*, 826 F. App'x. 359, 363 (5th Cir. 2020) (unpublished). Moreover, there is no evidence that AISD failed to address previous incidents of sexual assault. *See Doe v. Texas A&M Univ.*, 634 F. Supp. 3d 365, 376 (S.D. Tex. 2022) (citations omitted) ("Cases within the Fifth Circuit that have recognized Title IX pre-assault claims are based on allegations that the defendants failed to address sexually hostile environments after receiving reports of sexual assault."). Here, AISD received one credible report of sexual assault on a school bus in the preceding years and took corrective action. The bus driver was charged and incarcerated, and AISD installed video cameras on its buses. There is no evidence that AISD failed to respond or address prior incidents of sexual assault.

For the same reasons that Plaintiff fails to show deliberate indifference regarding municipal liability, their deliberate indifference claim fails for Title IX. To establish liability for sexual abuse under Title IX, Plaintiff must show that a school official with authority to address the harassment had actual knowledge of the harassment or that there was a substantial risk that harassment would occur, and the school was deliberately indifferent to such harassment. *Gebser*, 524 U.S. at 281. "[W]hen a teacher

sexually abuses a student, the student cannot recover from the school district under Title IX unless the school district actually knew that there was a substantial risk that sexual abuse would occur." *Rosa H.*, 106 F.3d at 652-53. Plaintiff contends that "AISD should have known of the assaults but knowingly refused to acquire such knowledge." (Pl.s' Resp., Dkt. 96, at 20). Again, however, AISD adopted its video monitoring policy because it determined that live monitoring would not be feasible—not because it was indifferent to misconduct on its buses. Nor were the consequences of AISD's decision so obvious as to impose liability. AISD knew of only one prior relevant incident and had since installed security cameras to deter future violations. As previously stated, AISD did not promulgate its policies with deliberate indifference to the possibility of such assaults occurring. *See infra* Section III.A. Because AISD did not know of Maldonaldo's misconduct, had taken steps to protect students, and investigated the incident promptly after it was reported, AISD was not deliberately indifferent under Title IX.

Plaintiff also appears to allege that AISD violated Title IX after the assaults because they did not have a Title IX investigator look into the incident, but instead relied on AISD police. (Pl.'s Resp., Dkt. 96, at 20-21). But a Title IX "recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances." 34 C.F.R. § 106.44. When a school district allows police to handle the investigation instead of a dedicated Title IX investigator because of the serious risk that criminal actions have occurred, the response is not clearly unreasonable. *I.F. v. Lewisville*

Indep. Sch. Dist., 915 F.3d 360, 376 (5th Cir. 2019); *see also Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291-92, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998) (noting that a school district's "failure to comply with [Title IX] regulations . . . does not establish the requisite . . . deliberate indifference.").

Finally, Plaintiff faults AISD for failing to take "prompt and responsive" actions from the video camera footage. (Pl.'s Resp., Dkt. 96, at 21). Again, because AISD was not deliberately indifferent, Plaintiff must show actual knowledge. *Gebser*, 524 U.S. at 281. Plaintiff's argument appears to be that, because AISD could have known about the assaults if it monitored the video footage live, then it failed to respond promptly to when it should have known of the assaults. (Pl.'s Resp., Dkt. 96, at 21). But even accepting that AISD *should* have known, this kind of constructive knowledge is insufficient to show actual knowledge. *See M.E. v. Alvin Indep. Sch. Dist.*, 840 F. App'x. 773, 775 (5th Cir. 2020) (Title IX's knowledge requirement "cannot be satisfied by showing that the school district should have known there was a substantial risk of abuse."). Once AISD officials did gain actual knowledge, the school district acted promptly and suspended Maldonaldo. (Mot. Summ. J., Dkt. 89, at 16). AISD could have done more to monitor live video camera footage, but that omission cannot substitute for actual knowledge of the sexual assault. Accordingly, the Court will grant summary judgment on Plaintiff's Title IX claims.

IV. CONCLUSION

For the reasons stated above, **IT IS ORDERED** that AISD's Motion for Summary Judgment, (Dkt. 89), is **GRANTED**. AISD is entitled to summary judgment as to all of Plaintiff's claims against it and **DISMISSED** as a Defendant in this case.

IT IS FURTHER ORDERED that Plaintiff shall move for Clerk's Entry of Default against Defendant Maldonaldo on or before **February 14, 2024**. Plaintiff shall file a motion for default judgment against Maldonaldo on or before **February 28, 2024**.

SIGNED on February 5, 2024,

/s/ Robert Pitman
ROBERT PITMAN
UNITED STATES DISTRICT JUDGE