NO. 19-20429

United States Court of Appeals
For The Fifth Circuit

J.W.; LORI WASHINGTON, A/N/F J.W.,

Plaintiffs—Appellees,

versus

ELVIN PALEY,

Defendant—Appellant.

On Appeal from the United States District Court
for the Southern District of Texas
No. 4:18-CV-1848

AMICUS CURIAE BRIEF OF INSTITUTE FOR JUSTICE IN SUPPORT OF PLAINTIFFS—APPELLEES

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those listed in the parties' briefs, have an interest in the outcome of this case.

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Undersigned counsel further certifies, pursuant to Federal Rule of Appellate Procedure 26.1(a), that *amicus curiae* is not a publicly held corporation, does not have any parent corporation, and that no publicly held corporation owns ten percent or more of its stock.

Date: August 23, 2021

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice ("IJ") is a nonprofit legal center dedicated to defending the foundations of free society. Because qualified immunity and related doctrines limit access to federal courts and drastically hinder enforcement of these rights, IJ litigates government immunity and accountability cases nationwide, including in this court.

SUMMARY OF ARGUMENT

In addition to the reasons presented in Appellees' Petition, en banc review is necessary to reconcile the court's internally inconsistent approach to clearly established law with the Supreme Court's decisions in *Hope v. Pelzer*, *Taylor v. Riojas*, and *McCoy v. Alamu*. Further, en banc intervention is necessary to clarify the Fourth Amendment's application to excessive uses of force by school officials, an issue of exceptional importance.

The *Hope* Court explained that qualified immunity entitles an official to "fair warning" that his conduct is unconstitutional and clarified that

[1] No party's counsel authored any portion of this brief. No party or person—other than *amicus*—contributed money intended to fund preparing or submitting this brief. Both parties have consented to the filing of this brief. *See* Mot. for Leave to File.

warning can be supplied by various sources, including obviousness. In the past year, the Supreme Court formally applied an "obviousness test" for finding clearly established law in a pair of cases summarily reversing this court: *Taylor v. Riojas* and *McCoy v. Alamu*. Yet, here, the panel failed to apply the Supreme Court's guidance, instead requiring factual symmetry for a law to be clearly established. In so doing, and in declining to address both parts of the qualified-immunity analysis, this court has created an infinite cycle of accountability avoidance in the corporal punishment context, which calls for en banc intervention.

ARGUMENT

This court has long recognized "that children do not shed their constitutional rights at the schoolhouse door."[2] Yet the panel here holds just the opposite, absolving school officials from liability for excessive uses of force and effectively stripping students of their Fourth Amendment protections. In doing so, the panel has ignored Supreme Court precedent

[2] *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1080 (5th Cir. 1995) (internal quotation omitted); *see also Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

and contradicted this court's practice of addressing both prongs of the qualified immunity analysis. En banc review is necessary to fully incorporate the obviousness test, as set forth in *Hope*, *Taylor*, and *McCoy*, into this court's jurisprudence and to clearly establish students' constitutional rights.

I. Obviousness is an Equal Source of Clearly Established Law.

Nearly twenty years ago, the Supreme Court sought to remove the "rigid gloss" that tainted the qualified immunity standard.[3] In *Hope*, the Court acknowledged that courts often require a previous case with "materially similar" facts to find a law clearly established.[4] And then it rejected this requirement.[5] The question, the Court explained, is not whether the "very action in question has previously been held unlawful"; it's whether the official had "fair warning that their alleged [behavior] was unconstitutional."[6] And in some situations, "a general constitutional rule

[3] *Hope*, 536 U.S. at 739.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 739–41.

already identified in the decisional law may apply with obvious clarity to the specific conduct in question."[7] In other words, there is another avenue for clearly established law: obviousness.[8] For the *Hope* Court, various sources of law—general principles, the reasoning of prior cases, and agency guidance—made it obviously clear that the Constitution forbids fixing a prisoner to a hitching post for hours without reprieve.[9]

In the past year, two cases from this court captured the Supreme Court's attention and garnered summary reversals for their failure to heed *Hope*'s instructions. First, in *Taylor*, the Court reaffirmed that analogous precedent was not necessary to provide fair warning that it is unconstitutional to force a prisoner to sleep in a cell teeming with excrement; it was obvious that the "conditions of confinement offended the

[7] *Id.* at 741 (cleaned up).

[8] *See id.*; *see also Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) ("[I]n an obvious case, [general] standards can 'clearly establish' the answer, even without a body of relevant case law."); *Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020) (per curiam); *McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (mem.).

[9] *Hope*, at 741–44 (explaining the violation was so obvious that general Eighth Amendment principles arguably gave fair warning, and then providing additional reasons for why the law was clearly established).

Constitution."[10] Then, in *McCoy*, the Court instructed this court to reconsider its grant of qualified immunity to an official who pepper-sprayed a prisoner in the face "for no reason at all."[11] Together, these reversals reaffirm that qualified immunity will not shield government officials who engage in obviously unconstitutional conduct.

Hope, *Taylor*, and *McCoy* present three different factual scenarios with one thing in common—unquestionable unconstitutionality.[12] Although "[t]he unconstitutionality of outrageous conduct obviously will be unconstitutional,"[13] as shown through these cases, the obviousness test is not synonymous with an outrage test. "[E]ven as to action less than an outrage," the Supreme Court has explained, "officials can still be on notice that their conduct violates established law."[14]

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[10] 141 S. Ct. at 53–54.

[11] *McCoy v. Alamu*, 950 F.3d 226, 229 (5th Cir. 2020), *rev'd*, 141 S. Ct. at 1354.

[12] Although each case concerns prison officials' conduct, obviousness is not limited to this context. The unfortunate reality is that courts are most likely to encounter obvious cases in the prison context because this is where "government's power," and therefore the potential for abuse, "is at its apex." *Johnson v. California*, 543 U.S. 499, 511 (2005). A similar power dynamic exists within the hallways of schools.

[13] *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009).

[14] *Id.* at 377–78 (internal quotation omitted).

Hope and its progeny clarify that it's not enough to ask whether analogous precedent put an official on notice. Courts must also provide a careful, principled analysis of whether other sources make a constitutional right so obvious that any reasonable officer would have fair warning that his behavior offended the Constitution. And they must do so in every case. Anything less risks "the danger of a rigid, overreliance on factual similarity."[15]

II. En Banc Review is Necessary to Align this Court's Application of the Clearly Established Test with Supreme Court Precedent.

Revealing this court's "rigid, overreliance on factual similarity" and demonstrating that it has yet to fully incorporate the Supreme Court's rulings, the panel here did not consider *Hope* or its progeny. Instead, the panel held that, due to its perceived discrepancy as to whether students may raise Fourth Amendment claims against school resource officers,[16] the court

[15] *Hope*, 536 U.S. at 742.

[16] As Appellee's Petition aptly explains, *Flores v. School Board of DeSoto Parish*, 116 F. App'x 504 (5th Cir. 2004) (unpublished), could not have created a discrepancy with *Hassan v. Lubbock Independent School District*, 55 F.3d 1075 (5th Cir. 1995), or *Curran v. Aleshire*, 800 F.3d 656 (5th Cir. 2015), because: (1) *Flores* is an unpublished, nonprecedential opinion that cannot overrule *Hassan*, and (2) *Curran* is subsequent, intervening precedent that has binding authority over *Flores*. *See generally* Appellee's Pet. for Reh'g En Banc at 9–10.

did not have "either the 'controlling authority' or 'consensus of cases of persuasive authority' needed to show a right is clearly established."[17]

Assuming that the panel is correct, and no factually analogous case clearly establishes a student's right to be free from excessive force, the panel's analysis is still lacking. As the Supreme Court explained in *Hope* and reaffirmed in *Taylor*, the key question is whether the official had fair warning that his behavior violated the Constitution. And fair warning does not require factually analogous precedent. To the contrary, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful."[18] Yet, the panel did not consider either general principles of Fourth Amendment law or cases interpreting them outside of the school context.

A quick review of the law reveals the obviousness of the resource officer's constitutional violation here. First, in *Graham v. Connor*, the

[17] Panel Op. at 6 (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)).

[18] *Hope*, 536 U.S. at 741 (internal quotation omitted) (alteration in original).

Supreme Court established that the constitutionality of a use of force depends on: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to individuals' safety; and (3) whether the suspect is actively resisting arrest.[19] Second, this court has repeatedly recognized that using force against a non-resisting suspect, including tasing him, violates clearly established law.[20] Third, the Supreme Court has held that the Fourth Amendment restrains all governmental action, including the actions of school officials.[21] Based on these unequivocal principles, it belies reason to suggest that a school official—much less a school resource officer—lacked fair warning that drive stunning a non-criminal, non-resisting, non-threatening student offends the Constitution. It's obvious.

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[19] 490 U.S. 386, 396 (1989).

[20] *See, e.g.*, *Joseph v. Bartlett*, 981 F.3d 319, 338–42 (5th Cir. 2020) (collecting cases and explaining that, as early as 2013, it was clearly established that officials "engage in excessive force when they physically strike a suspect who is not resisting arrest).

[21] *New Jersey v. T.L.O.*, 469 U.S. 325, 333–37 (1985) (rejecting the State's argument that the Fourth Amendment does not apply to school officials and explaining that "the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon government action—that is, upon the activities of sovereign authority" (internal quotation omitted)); *see also T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 413 (5th Cir. 2021) ("The Fourth Amendment is applicable in a school context.").

The Supreme Court's summary reversals in *Taylor* and *McCoy* signal the importance of the obviousness test and the fair warning requirement set forth in *Hope*.[22] En banc review is necessary to repair the panel's failure to heed this guidance and align this court's law with that of the High Court.

III. En Banc Review is Necessary to Clarify this Court's Approach to Corporal Punishment Cases.

Putting aside whether the law was clearly established in this case, one thing is certain: this court is unclear on how to approach cases involving corporal punishment, resulting in an endless cycle of accountability avoidance. En banc intervention is necessary to break this pattern.

Under the panel's reasoning in this case, a student's right against excessive force is not clearly established because there are competing cases as to whether such a right exists.[23] Despite this discrepancy, and the panel's authority to resolve it, the panel declined to determine whether a Fourth

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[22] *See Ramirez v. Guadarrama*, 2 F. 4th 506, 514 (5th Cir. 2021) (mem.) (Oldham, J., concurring) (noting that "summary reversals can constitute sharp rebukes" and observing that the reversals in *Taylor* and *McCoy* "are particularly remarkable").

[23] Panel Op. at 6; *see also T.O.*, 2 F.4th at 413 ("The Fourth Amendment is applicable in a school context. In this circuit, however, claims involving corporal punishment are generally analyzed under the Fourteenth Amendment.").

Amendment right exists,[24] just as this court declined to do in *T.O. v. Fort Bend Independent School District* the week prior.[25] This problem is further exacerbated by this court's continued reliance on *Fee v. Herndon*[26] and its progeny, which preclude Fourteenth Amendment substantive due process claims for excessive force and confusingly suggest that if a Fourteenth Amendment claim cannot lie, neither can a Fourth Amendment claim.[27] Therefore, the law remains unestablished. Without clearly established law, the courthouse doors will remain closed to those whose Fourth Amendment rights were violated at the schoolhouse doors, just as they were in this case and *T.O.*

The panel here is correct that it can choose to skip the first step of the qualified immunity analysis, but that does not mean it should.[28] In

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[24] Panel Op. at 4 ("We resolve this case on the second ground.").

[25] *See* 2 F.4th 407 at 415.

[26] 900 F.2d 804 (5th Cir. 1990).

[27] *See* Panel Op. at 6–7 (suggesting that *Curran*'s recognition of "a student's Fourth Amendment claim was at odds with *Fee*"); *see also generally* Pet. for Reh'g En Banc, *T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407 (5th Cir. 2021) (No. 20-20225).

[28] *See Pearson v. Callahan*, 555 U.S. 223, 236–42 (2009) (discussing the pros and cons of addressing both steps of the qualified immunity analysis).

acknowledging the circuit courts' discretion, the Supreme Court observed that first addressing whether a constitutional right exists is "often beneficial," particularly in "cases in which there would be little if any conservation of judicial resources to be had by beginning and ending with a discussion of the 'clearly established' prong."[29] That is the situation here. Contrary to conserving judicial resources, this court's numerous leapfrogs over the constitutional question—which defies the court's normal practice[30]—have in fact expended additional resources. Instead of being able to point to a clear answer, panels repeatedly wade through the murky waters of this court's corporal punishment precedent just to answer prong two.

Not only will resolving this constitutional question, which has divided the court for more than twenty years, preserve judicial resources, doing so is also free from the costs that might counsel skipping over prong one. Most

[29] *Id.* at 236.

[30] *Joseph*, 981 F.3d at 331 ("While we have discretion to leapfrog the merits and go straight to whether the alleged violation offended clearly established law, we think it better to address both steps in order to provide clarity and guidance for officers and courts."); *see also id.* at n.40 (explaining the value this court places on "addressing the constitutional merits to develop robust case law on the scope of constitutional rights").

importantly, a decision about the Fourth Amendment's applicability to students will meaningfully contribute to the development of constitutional law.[31] The current confusion is not a trifling issue. Millions of students attend public schools across Texas, Mississippi, and Louisiana, and in the last two months alone, this court has considered at least three cases involving excessive uses of force against students with disabilities. Here, an officer tased a non-resisting student;[32] in *T.O.*, a teacher threw a first grader to the floor and held him in a choke hold "for several minutes";[33] and in *Phillips ex. rel. J.H. v. Prator*, a school deputy tased a student and left him in a pool of his own urine for thirteen minutes.[34] Under this court's current corporal punishment jurisprudence, none of these students possess an enforceable right against such abuses.

[31] *See id.*

[32] Panel Op. at 3.

[33] 2 F.4th at 412.

[34] --- F. App'x ---, 2021 WL 3376524, at *2 (5th Cir. Aug. 3, 2021).

Schools are not Constitution-free zones. The en banc court can, and should, break this cycle of accountability avoidance by providing the clarity that previous panels have declined to offer.

CONCLUSION

En banc intervention is necessary to align this court's jurisprudence with the dictates of *Hope*, *Taylor*, and *McCoy* and to clarify that the Fourth Amendment protects students against excessive uses of force.

Dated: August 23, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2021, I caused the foregoing Brief of *Amicus Curiae* Institute for Justice in Support of Plaintiffs-Appellees to be filed electronically with the Clerk of the Court using the Court's CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

Dated: August 23, 2021

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation in Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 2,524 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fifth Circuit Rule 32.2.

2. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Palatino Linotype font.

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