No. 23-931

In The
Supreme Court of the United States

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

Petitioners,

v.

ELVIN PALEY,

Respondent.

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

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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Question Presented

Whether a claim that a school official has used excessive force against a student that meets the definition of a Fourth Amendment seizure should be evaluated under the Fourth Amendment's objective reasonableness standard or the Fourteenth Amendment's shocks-the-conscience standard.

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Interest of Amicus Curiae[1]

The Institute for Justice is a nonprofit public interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty. Central to that mission is promoting accountability for constitutional violations by government actors. The Institute for Justice pursues those goals in part through its Project on Immunity and Accountability, which argues against the imposition of immunity and other doctrines that inhibit the vindication of constitutional rights. The Institute for Justice has recently argued before this Court regarding issues of constitutional accountability in *Brownback v. King* (19-546), *Devillier v. Texas* (22-913), and *Gonzalez v. Trevino* (22-1025).

The Institute for Justice has also petitioned for certiorari on issues similar to those presented in this case (*S.B. v. Jefferson Parish School Board* (23-440)) and filed an amicus curiae brief in support of petitioner in the proceedings below. The issue presented here—whether public-school officials can be held constitutionally liable under 42 U.S.C. § 1983 for violence against schoolchildren—is important, recurring, splits the circuits, and requires the Court's intervention, particularly because the Fifth Circuit eliminates all constitutional scrutiny of such violence.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus curiae or its counsel made a monetary contribution to fund the preparation or submission of this brief. Amicus curiae noticed all parties of its intent to file this brief ten days before its filing.

Summary of Argument

The petition identifies an entrenched, eight-to-two circuit split as to whether the Fourth Amendment's protection against unreasonable seizures covers a student's claim of excessive force by a public-school official. The petition also explains that the Fifth Circuit is alone in further "protect[ing]" such violence from *all* "constitutional scrutiny." This Court's intervention is needed to undo the Fifth Circuit's elimination of all accountability for this form of state violence and to correct the majority of circuits' atextual elimination of the Fourth Amendment in this context. This case is the ideal vehicle to do so because all the issues were fully assessed below, the circuits are entrenched in their positions, and the Fifth Circuit keeps declining to update its jurisprudence in this recurring context of accountability-free violence against schoolchildren.

Argument

I. The Fifth Circuit's elimination of all constitutional scrutiny of state violence against schoolchildren warrants review and reversal; it cannot be squared with the Constitution, § 1983, or historical common-law practice.

As detailed in the petition, ten circuits have staked a position on the question presented: how to assess public-school students' claims of unconstitutionally excessive force. The circuits are split, and they are entrenched. Only two circuits assess such claims under the Fourth Amendment's reasonableness

standard—under which nearly all other claims of excessive force are assessed outside the prison context. Seven other circuits assess such claims under substantive due process's shocks-the-conscience standard. The Fifth Circuit, meanwhile, eliminates *all* constitutional scrutiny of such claims, even though constitutional text covers such claims, the text of 42 U.S.C. § 1983 clearly applies, and such violence has historically been subject to judicial review for reasonableness. Because the Fifth Circuit regularly declines to course-correct on these issues en banc, schoolchildren in Texas, Louisiana, and Mississippi are susceptible to egregious and gratuitous state violence without any constitutional scrutiny. The Court should grant the petition, undo the Fifth Circuit's elimination of all constitutional accountability in this context, and hold that the Fourth Amendment covers such seizures.

1. The Fifth Circuit holds that corporal punishment "does not constitute a fourth amendment . . . seizure." *Fee v. Herndon*, 900 F.2d 804, 810 (5th Cir. 1990). And, as exemplified by this case, it defines "corporal punishment" capaciously, to include just about every act of violence in the public-school context, as long as it is arguably or ostensibly inflicted for "proper control, training, or education," and regardless of whether inflicted by an educator or a law enforcement officer. *J.W. v. Paley*, 81 F.4th 440, 452–53 (5th Cir. 2023).

The Fifth Circuit goes on to hold that as long as a state provides some hypothetical remedy for excessive violence in that capaciously-defined "corporal punishment" context, substantive due process does

not provide a constitutional remedy either. *Id.* at 452–54. That rule does not account for whether any state remedy is *actually* available.[2] More fundamentally, the rule squarely conflicts with this Court's holding in *Zinermon v. Burch*, which made clear that the availability of a state remedy has no bearing on the cognizability or viability of any substantive due process claim (as distinct from some procedural due process claims). 494 U.S. 113, 124–26 (1990). Even though the Fifth Circuit's contrary holding has been rejected by every other circuit, and even though Fifth Circuit judges have pointed out its conflict with *Zinermon*, that court keeps declining to bring its precedent current, including in this case. *E.g.*, Pet. App. 88a, 90a; *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 876–80 (5th Cir. 2000) (Judge Weiner calling for en banc reconsideration of the Fifth Circuit rule, with the subsequent en banc petition denied); *T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 419–21 (5th Cir. 2021) (same); *S.B. v. Jefferson Parish Sch. Bd.*, 2023 WL 3723625, at *5 (5th Cir. May 30, 2023) (recognizing the conflict, as noted by other courts and members of the Fifth Circuit, with the subsequent en banc petition denied).

Similarly, the Fifth Circuit declines to bring its Fourth Amendment jurisprudence current. Even though this Court explained in *Torres v. Madrid* that

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[2] *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 878 (5th Cir. 2000) (Wiener, J., specially concurring) ("[A] careful reading of the cases that make up this line of decisions reveals that [the Fifth Circuit has] never closely examined the adequacy of those state remedies, instead simply dismissing § 1983 claims against school districts and individual defendants alike, regardless of whether they might be immune from suit" in state court.).

a Fourth Amendment "seizure" is simply the "application of physical force to the body of a person with intent to restrain," 592 U.S. 306, 309 (2021), the Fifth Circuit continues adhering to the notion that such conduct is not a "seizure" when done in the public-school context—solely on the odd reasoning that to update its Fourth Amendment jurisprudence would "'eviscerate this circuit's rule . . . prohibiting substantive due process claims' stemming from the same injuries." *T.O.*, 2 F.4th at 415 (citation omitted).

In short, the Fifth Circuit (1) capaciously defines "disciplinary corporal punishment" to include just about all violence—no matter how gratuitous—inflicted by state actors on schoolchildren; (2) admittedly "protect[s] [that capaciously-defined] disciplinary corporal punishment from constitutional scrutiny," entirely eliminating the protections of both the Fourth Amendment and substantive due process in this context, *id.* at 416; and (3) keeps declining invitations to undo any of that (including in this case), even though both its Fourth Amendment and its substantive due process rules conflict with this Court's precedents and with other circuits, as detailed in the petition.

The upshot: The Fifth Circuit has eliminated all forms of constitutional scrutiny, *let alone accountability*, for excessive state violence against public-school students. By refusing to assess violence by public-school officials under any standard, the Fifth Circuit has deemed constitutional a litany of egregious violence against vulnerable youth. That includes this case, where the Fifth Circuit held that no constitutional protection attached when a school

resource officer "repeatedly" tased a student with disabilities, including "after [the student] had ceased struggling," causing urination, defecation, vomiting, and PTSD. *J.W.*, 81 F.4th at 451–52. The same lack of any constitutional scrutiny has held in other cases of gratuitous or excessive violence, including when:

- a teacher seized a first-grader's neck, threw him to the floor, and held him in a chokehold for several minutes, releasing the child for air only because an aide intervened;[3]

- a police officer slammed a kindergartener to the ground and dragged him along the floor after the student disrupted class;[4]

- a teacher threatened a special-education student, twice threw him against a wall, and choked him after the student non-disruptively questioned the teacher's directive, with the school subsequently bringing expulsion proceedings against the student and refusing to let him call any witnesses;[5]

- an aide grabbed, shoved, and "repeatedly kicked" a "severely autistic, physically

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[3] *T.O.*, 2 F.4th at 412; *see id.* at 419–21 (Judges Wiener and Costa calling for en banc reconsideration, with the subsequent petition denied).

[4] *Campbell v. McAlister*, 1998 WL 770706, at *1 (5th Cir. 1998).

[5] *Flores v. Sch. Bd. of DeSoto Parish*, 116 F. App'x 504, 506–07 (5th Cir. 2004).

disabled, and unable to speak" seven-year-old student for sliding a compact disc across a table, impeding the child's development and causing PTSD;[6]

- a principal beat a special-education student with a paddle for disrupting class, resulting in the student's hospitalization;[7]

- a principal hit a student with a wooden paddle for skipping class;[8] and

- a teacher forced a student to perform excessive physical exercise as punishment for talking to a friend, resulting in hospitalization and three weeks of missed school.[9]

2. That elimination of constitutional scrutiny of state violence requires this Court's intervention. It leaves a category of state actors—those who happen to work in a school setting, in any capacity—wholly unaccountable for excessive force or violence against vulnerable children.[10] And it does so in violation of

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[6] *Marquez v. Garnett*, 567 F. App'x 214, 215 (5th Cir. 2014).

[7] *Fee*, 900 F.2d at 806–07.

[8] *Serafin v. Sch. of Excellence in Educ.*, 252 F. App'x 684, 685 (5th Cir. 2007).

[9] *Moore*, 233 F.3d at 873; *see id.* at 876–80 (Judge Weiner calling for en banc reconsideration, with the subsequent petition denied).

[10] The fact that the violence must ostensibly be for "proper control, training, or education" before being exempt from constitutional scrutiny is no limiting principle, as this case and

the text of the Constitution, the text of § 1983, and historical common-law practice.

First, just like in other contexts, a public-school official's "application of physical force to the body of a person with intent to restrain" is a "seizure." *Torres*, 592 U.S. at 309. So the text of the Fourth Amendment plainly covers the use of force in that context, which means it must be assessed under that Amendment's "unreasonable seizure" standard, for the reasons the petition explains at length. Petition at 21–26. Simply put, the Fourth Amendment "provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct." *Graham v. Connor*, 490 U.S. 386, 395 (1989). That is not, of course, mutually exclusive of substantive due process's simultaneous reach and protection in this area—as the same act of violence can be both an unreasonable seizure and a conscience-shocking deprivation of liberty. The Court can decide at the merits stage whether one or both of those constitutional provisions govern—a question that divides the circuits, and on which the petition seeks an answer (persuasively explaining that, at minimum, the Fourth Amendment applies). But granting the petition is all the more crucial because the Fifth Circuit eliminates *both* sources of well-established constitutional protection.

Second, the Fifth Circuit's elimination of constitutional scrutiny in this context violates § 1983. The statute is clear that "[e]very person" who, "under

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the litany of other unscrutinized gratuitous violence detailed above make clear.

color of" law, deprives any "other person" of "rights . . . secured by the Constitution" "shall be liable." That unambiguous language obviously applies here: (1) *every person under color of law* covers public-school employees; (2) *other person* covers public-school students; and (3) *rights secured by the Constitution* covers the right to be free from excessive bodily violence, under the Fourth Amendment, substantive due process, or both. That broad language is no mistake, and the Fifth Circuit's elimination of constitutional accountability violates it. "[T]he central objective of the Reconstruction-Era civil rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief. Thus, § 1983 provides a uniquely federal remedy against incursions . . . upon rights secured by the Constitution and laws of the Nation . . . and is to be accorded a sweep as broad as its language." *Hardin v. Straub*, 490 U.S. 536, 539 n.5 (1989) (citations and quotation marks omitted).

Finally, the Fifth Circuit's elimination of all constitutional scrutiny in this context cannot be squared with students' historical common-law "right to be free from and to obtain judicial relief[] for unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 673 (1977); *see Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 399 n.7 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part) (schoolchildren have historically had the right to be free from "excessive physical punishment"). Indeed, after canvassing Blackstone, other commentators, and state laws and practices, this Court found a

"common-law test of reasonableness" in this context. *Ingraham*, 430 U.S. at 663. That further suggests that the Fourth Amendment's own reasonableness standard strikes the correct balance of protecting students from violence while also attending to the needs and realities of the school setting. *See* Petition at 23–24 (discussing the Seventh and Ninth Circuits' well-calibrated reasonableness standards in this context).

Moreover, the government-compulsory nature of public schooling in the modern era augurs toward a robustly protective constitutional standard. "In constitutional cases, . . . the substantive heart of the case is the special power of the government to do harm," which should be taken into account when calibrating constitutional standards in general and vis-à-vis the common law. Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 Chi.-Kent L. Rev. 661, 669 (1997). It is axiomatic that public-school students do not "shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). And for good reason: "That [public schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). The Court should treat that concern just as vitally when it comes to the literal strangling of schoolchildren—which the Fifth Circuit has inexplicably placed outside the

Constitution's purview. *See* notes 3 and 5 and accompanying text, *supra*.

II. This case is the ideal vehicle to review and undo the Fifth Circuit's elimination of all constitutional scrutiny in this context, and to resolve the entrenched circuit split as to the governing constitutional standard.

This Court's intervention is necessary, both to undo the Fifth Circuit's elimination of all constitutional scrutiny of violence against schoolchildren and to resolve the entrenched circuit split as to whether the Fourth Amendment covers such claims. This case is the ideal vehicle to do so.

Ten courts of appeals are entrenched in their positions, and have been for decades. As detailed in the petition, only two heed the Court's admonitions and recognize that the Fourth Amendment's text should, outside the prison context, govern claims of excessive force. And the Fifth Circuit is undeniably dug-in on its particularly aggressive elimination of accountability in this context—acknowledging that it alone "protect[s]" such violence from all "constitutional scrutiny." *T.O.*, 2 F.4th at 416. Indeed, despite multiple calls from judges of that court, it regularly denies petitions to revisit these issues en banc—even in the face of case after case leaving outrageous violence against children constitutionally non-cognizable. *See* notes 3–9 and accompanying text, *supra*.

To be sure, this Court has denied petitions raising similar issues before. *See S.B. v. Jefferson Parish Sch. Bd.* (23-440); *T.O. v. Fort Bend Indep. Sch. Dist.* (21-1014). But the problem is recurring, and the issues are vital; they will not go away. And this case is the ideal vehicle to address them. Whatever procedural or circumstantial reasons may have inhibited this Court's review of these issues in the past, they are absent here. The issues are undeniably well-preserved and fully analyzed,[11] and this case involves egregious violence by a police officer against a vulnerable youth. The Fifth Circuit assessed, in depth, whether to continue deeming school-violence claims outside the Fourth Amendment's reach (yes) and whether to maintain that circuit's expansive elimination of all constitutional scrutiny in that context (yes). Both of those inquiries accounted for but rejected petitioner's arguments that the lack of any pedagogical function and the fact that a police officer inflicted the violence in a non-classroom setting should affect the analysis. And J.W. suffered egregious, gratuitous violence—tasing to the point of defecation, even after fully subdued—throwing into sharp contrast the disastrous effects of eliminating students' (historically grounded) constitutional and § 1983 rights.

Yet the Fifth Circuit again declined to revisit these issues en banc, to the decades-long "detriment of public school students in Texas, Mississippi, and Louisiana." *T.O.*, 2 F.4th at 421 (Wiener, J., with

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[11] *Cf. S.B.* (23-440) (where the Fourth Amendment was pleaded but unargued at the Fifth Circuit, due to that court's entrenched position eliminating such scrutiny in this context).

Costa, J., specially concurring). This Court should intervene.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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