

No. 23-40532

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**In the United States Court of Appeals  
for the Fifth Circuit**

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NAJVA FARSHID, ON BEHALF OF HER CHILD, E.K., A MINOR,

*Plaintiff-Appellant,*

v.

ALLEN INDEPENDENT SCHOOL DISTRICT, THROUGH ITS BOARD OF TRUSTEES; JULIE YOUNG, IN HER OFFICIAL AND INDIVIDUAL CAPACITY; TERREVA BRYANT, IN HER OFFICIAL AND INDIVIDUAL CAPACITY; CRYSTAL BUNCH, IN HER OFFICIAL AND INDIVIDUAL CAPACITY; DOUG WILHELM, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY; DOE DEFENDANTS 1-20, INCLUSIVELY,

*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the Eastern District of Texas, Sherman Division

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**BRIEF OF APPELLANT**

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**CERTIFICATE OF INTERESTED PERSONS**

Appellant certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

**1) Plaintiff-Appellant:**

Najva Farshid, on behalf of her child, E.K., a minor

**2) Defendants-Appellees:**

Allen Independent School District, through its Board of Trustees; Julie Young, in her official and individual capacity; Terreva Bryant, in her official and individual capacity; Crystal Bunch, in her official and individual capacity; Doug Wilhelm, in his official and individual capacity; DOE Defendants 1-20, inclusively

**3) Counsel for Plaintiff-Appellant:**

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*/s/ Keith Altman*  
\_\_\_\_\_  
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**STATEMENT REGARDING ORAL ARGUMENT**

Plaintiff-Appellant requests oral argument as they believe it could significantly aid the decisional process in this case.

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## **JURISDICTIONAL STATEMENT**

The District Court maintained subject matter jurisdiction under 28 U.S.C. §1331<sup>1</sup>, which provides district courts with jurisdiction over civil actions arising under the United States Constitution or laws of the United States. In accordance with 28 U.S.C. §1367<sup>2</sup>, the District Court also maintained supplemental jurisdiction over Plaintiff's state law claims.

This Honorable Court maintains jurisdiction to hear the present appeal under 28 U.S.C. §1291<sup>3</sup>. Farshid timely appealed by filing a notice of appeal within 30 days of the District Court's Order dated August 18, 2023.<sup>4</sup>

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<sup>1</sup> 28 U.S.C. §1331; ROA.109

<sup>2</sup> 28 U.S.C. §1367; ROA.109

<sup>3</sup> 28 U.S.C. §1291

<sup>4</sup> ROA.387



**ISSUES PRESENTED**

1. Whether a public-school student is barred from bringing an excessive-force claim alleging a violation of her federal constitutional rights whenever the school official has a disciplinary purpose for using force and a state-law claim is authorized?

**STATEMENT OF THE CASE**

Plaintiff E.K. was a student at Ford Middle School within the Allen Independent School District.<sup>5</sup> On October 5, 2020, Defendant Bunch entered E.K.’s science classroom to observe her on request of Defendants Young and Bryant. E.K. was pulled out of class in front of her peers.<sup>6</sup> E.K., having done nothing wrong to warrant being removed from class, attempted to talk to Assistant Principal Amy Sanford but Defendants Young and Bryant forcibly stopped her attempts to reach Ms. Sanford’s office.<sup>7</sup> Defendants Young and Bryant forcefully grabbed E.K. by the arms and lifted her up off the ground, forcing her into another room while stating “you either walk by yourself or get assisted.”<sup>8</sup> E.K. told Defendants Young and Bryant that the grip hurt her and that she would comply, but Defendants Young and Bryant did not remove their grip.<sup>9</sup> E.K. cried out for help stating to Defendants Young and Bryant “you’re hurting me”.<sup>10</sup>

Once in the separate room, E.K. tried to use her mobile phone to call her aunt for help but Defendants Young and Bryant yanked the phone away from her.<sup>11</sup> E.K. begged to be able to call her mother or aunt but was denied every time.<sup>12</sup> E.K. was

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<sup>5</sup> ROA.109

<sup>6</sup> ROA.110

<sup>7</sup> ROA.110-111

<sup>8</sup> ROA.111

<sup>9</sup> ROA.111

<sup>10</sup> ROA.111

<sup>11</sup> ROA.111

<sup>12</sup> ROA.111-113

desperate and scared and tried to retrieve her phone to call for help.<sup>13</sup> Defendants Young and Bryant wrestled E.K. to the ground by pinning their knees into E.K.'s back causing intense pain and seized her phone.<sup>14</sup> E.K. was scared and injured and tried to call 911 on her Apple watch several times.<sup>15</sup> When Defendants Young and Bryant noticed E.K. attempting to call 911 on her Apple watch, they physically tore her watch from her body.<sup>16</sup> E.K. begged Defendants Young and Bryant to be allowed to call her mother or aunt.<sup>17</sup> In response Defendants Young and Bryant told E.K. to stop resisting, pushed her against the wall, pulled her arms back, and held their knees to E.K.'s back.<sup>18</sup> E.K. cried out in pain and asked Defendants Young and Bryant to please let her go.<sup>19</sup> Defendants Young and Bryant then pinned E.K. face-down to the ground with her arms pulled back.<sup>20</sup> E.K. struggled to breathe and began vomiting. E.K. was wearing her COVID-19 mask throughout the whole ordeal, which caused vomit to go up her nose and lead to further physical distress as she struggled to

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<sup>13</sup> ROA.111

<sup>14</sup> ROA.111

<sup>15</sup> ROA.111

<sup>16</sup> ROA.112

<sup>17</sup> ROA.112

<sup>18</sup> ROA.112

<sup>19</sup> ROA.112

<sup>20</sup> ROA.112

breathe.<sup>21</sup> E.K. felt as though she was suffocating.<sup>22</sup> E.K. developed hemorrhages under both eyes, arm scratches, bruising, chest pain and back/spinal pain.<sup>23</sup>

Plaintiff filed a complaint against the school district and individual employees for violation of Plaintiff's constitutional rights as well as state law tort claims.<sup>24</sup>

Defendants sought dismissal of all claims, asserting among other things, that Plaintiff failed to state a claim for substantive due process.<sup>25</sup> On August 18, 2023, the District Court entered an Order granting Defendants motion to dismiss.<sup>26</sup> The District Court Judge relied on Fifth Circuit law governing school officials' use of physical force against students in public schools; providing that the District Court is bound by Fifth Circuit precedent unless or until it is overturned.

### **SUMMARY OF THE ARGUMENT**

With the exception of the Fifth Circuit, the Federal Courts have consistently held that public school students hold a constitutional right to be free from excessive force. The Fifth Circuit has disallowed a constitutional excessive force claim when the official had a disciplinary reason for the use of force and where state law remedies are available. The extent of the corporal punishment inflicted on the student, the extent of the injuries sustained and the motive behind the punishment

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<sup>21</sup> ROA.112

<sup>22</sup> ROA.112

<sup>23</sup> ROA.113

<sup>24</sup> ROA.107-131

<sup>25</sup> ROA.147-338

<sup>26</sup> ROA.370

fail to be taken into consideration to the detriment of the Plaintiff and all students residing in the geographical bounds of the Fifth Circuit.

## ARGUMENT

### **I. Standard of Review**

The denial of a motion to dismiss is subject to de novo review.<sup>27</sup>

### **II. Corporal Punishment under the Fourteenth Amendment**

It is well established that persons have a fourteenth amendment liberty interest in freedom from bodily injury.<sup>28</sup>

To state a cause of action under § 1983 for violation of the Due Process Clause, Plaintiffs "must show that they have asserted a recognized "liberty or property" interest within the purview of the Fourteenth Amendment, and that they were intentionally or recklessly deprived of that interest, even temporarily, under color of state law."<sup>29</sup> This circuit held as early as 1981 that "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."<sup>30</sup>

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<sup>27</sup> *Innova Hosp. San Antonio, L.P. v. Blue Cross & Blue Shield of Ga., Inc.*, 892 F.3d 719, 726 (5th Cir. 2018)

<sup>28</sup> *Davidson v. Cannon*, 474 U.S. 344, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986); *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986); *Ingraham v. Wright*, 430 U.S. 651, 673-74, 51 L. Ed. 2d 711, 97 S. Ct. 1401 (1977)

<sup>29</sup> *Griffith v. Johnston*, 899 F.2d 1427, 1435 (5th Cir.1990), *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 450 (5th Cir. 1994)

<sup>30</sup> *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir.1981), *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 450-51 (5th Cir. 1994)

The propensity of an adult in an authority position to abuse a child is horrific. A child being stripped of their constitutional rights at the door of the schoolhouse is absurd. School-aged children are being beaten, choked and unable to breathe as a result of punishment issued at the hands of those who are meant to nurture and allow our children to flourish academically. The students residing in the geographical bounds of the Fifth Circuit are denied their constitutional rights when they walk in that schoolhouse door. Every other student in the United States is provided their constitutional rights to be free from corporal punishment. It is time that the students of the Fifth Circuit are afforded this right as well.

Under Fifth Circuit precedent, reasonable corporal punishment is not at odds with the fourteenth amendment and does not constitute arbitrary state action.<sup>31</sup> Consistently with this precedent, Texas has authorized educators to impose a reasonable measure of corporal punishment upon students when necessary to maintain school discipline, and the state affords students post-punishment criminal or civil remedies if teachers are unfaithful to this obligation.<sup>32</sup> In *Fee*, the court offered no opinion as to the severity of the student's injuries sustained, only that since Texas has civil and criminal laws in place to proscribe educators from abusing their charges, and further provides adequate post-punishment relief in favor of

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<sup>31</sup> *Fee v. Herndon*, 900 F.2d 804, 810 (5th Cir. 1990)

<sup>32</sup> *Id.*

students, no substantive due process concerns are implicated because no arbitrary state action exists.<sup>33</sup>

The Fifth Circuit does not deny that a student maintains a liberty interest in their right to bodily integrity.<sup>34</sup> However, no protections are put in place to remedy violations of those rights. Why must we enshrine public-school employees' ability to inflict corporal punishment on a child. Who are we protecting? And why?

In *Moore*, Circuit Court Judge Weiner provided a telling view. When the Supreme Court affirmed *Ingraham v. Wright*, a school paddling case and our leading corporal punishment decision, the Court ruled that subjecting students to corporal punishment without prior notice and a hearing did not violate procedural due process.<sup>35</sup> The Court had limited its grant of certiorari in *Ingraham*, however, to two questions: whether there was a procedural due process violation and whether corporal punishment at school represented cruel and unusual punishment.<sup>36</sup> In so doing, the Court declined to review a third question that we had answered in the negative in *Ingraham*: Can severe corporal punishment constitute a substantive due process violation?<sup>37</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 875 (5th Cir. 2000)

<sup>35</sup> *Id.* (dissenting)

<sup>36</sup> *Id.* (dissenting)

<sup>37</sup> *Id.* (dissenting)

Judge Wiener went on to provide that although it focused on procedural requirements, the Court in *Ingraham* did hold that corporal punishment implicates Fourteenth Amendment liberty interests. The Court also observed that "there can be no deprivation of substantive rights as long as disciplinary corporal punishment is within the limits of the common-law privilege."<sup>38</sup>

*Ingraham* did not proclaim that an adequate remedy provided by state law or procedure constitutes a *per se* bar to a student's ability to state a substantive due process claim based on excessive corporal punishment.<sup>39</sup> Judge Wiener notes that decisions have been laid down that were founded on the part of the *Ingraham* decision that was not reviewed by the Supreme Court.

The adequacies of the state remedies have never been addressed. Texas school districts generally do have state-law governmental immunity from tort claims brought by injured students.<sup>40</sup> If all Defendants in these types of cases prove to be immune from liability under Texas law, does the state really provide a remedy to injured students at all, much less an adequate one?<sup>41</sup> The answer to this question is no. No remedy to injured students, much less an adequate one, exists. The present case highlights the inadequacy.

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<sup>38</sup> *Id.* (dissenting)

<sup>39</sup> *Id.* (dissenting)

<sup>40</sup> *Id.* (dissenting)

<sup>41</sup> *Id.* (dissenting)



Judge Wiener strongly suggested that the Fifth Circuit reexamine its position on corporal punishment stating that the chore should not be left to the Supreme Court to eliminate the existing split between the Fifth Circuit and all the rest.

Provisions under Texas law are inadequate at best as a result of immunity. Under Texas law, the doctrine of sovereign immunity protects the State from lawsuits and liability for monetary damages.<sup>42</sup> Likewise, the State's political subdivisions, including municipalities and school districts, are protected by the doctrine of governmental immunity.<sup>43</sup> The sole exception and waiver of liability laid out in the Texas Tort Claim Act ("TTCA") applies only to cases in which injury occurred as a result of operating a motor vehicle.<sup>44</sup>

The TTCA also provides that "[t]he filing of a suit . . . against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter."<sup>45</sup>

In reaching its position, the Fifth Circuit reasoned that, while corporal punishment may violate a student's substantive due process rights when it is "arbitrary, capricious, or wholly unrelated to the legitimate goal of maintaining an

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<sup>42</sup> *City of El Paso v. Heinrich*, 284 S.W.3d 366, 370 (Tex. 2009)

<sup>43</sup> *Mission Consol. Indep. Sch. Dist. v. Garcia*, 253 S.W.3d 653, 655 (Tex. 2008)

<sup>44</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 101.051; *LTTs Charter Sch., Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 88 n.4 (Tex. 2011)

<sup>45</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 101.106(a)

atmosphere conducive to learning," if a state provides remedies for mistreatment of students by educators, that state by definition does not act arbitrarily.<sup>46</sup> No such safeguards exist for the students.

E.K. was foreclosed in seeking redress under the state law remedies, that the Fifth Circuit points injured school children back to, on account of immunity. As a result of the case law precedent in the Fifth Circuit, E.K. and other students are left in harm's way when they walk through the school doors with no redress, no protection, and no way to hold those that sought to harm them responsible. The danger this creates cannot be discredited.

### **III. Corporal Punishment is a Substantive Due Process Violation under the Fourteenth Amendment.**

Corporal punishment of a student-plaintiff in every other federal circuit in the United States gives rise to a viable constitutional law claim.

The First Circuit, citing *Ingraham*, concluded that corporal punishment of a student inflicted by a public-school teacher violates substantive due process.<sup>47</sup>

At some point of excessiveness or brutality, a public-school child's substantive due process rights are violated by beatings administered by government-paid school officials.<sup>48</sup> We accept and agree with the Fourth Circuit's definition of the

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<sup>46</sup> *Fee v. Herndon*, 900 F.2d 804, 810 (5th Cir. 1990)

<sup>47</sup> *Pandolfi de Rinaldis v. Varela Llavona*, 62 F. Supp. 2d 426, 433 (D.P.R. 1999)

<sup>48</sup> *Id.*

constitutional tort: "the right to be free of state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience of a court...".<sup>49</sup> As in the cognate police brutality cases, the substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience."<sup>50</sup>

We believe the necessary inference from the Supreme Court's *Ingraham* decision is that excessive corporal punishment less offensive than the definition quoted above does not rise to the level of a constitutional substantive due process violation.<sup>51</sup>

The Second Circuit has recognized that "[t]he substantive component of due process encompasses, among other things, an individual's right to bodily integrity free from unjustifiable government interference."<sup>52</sup> Our Circuit has likewise suggested that children in the custody of the state may also have a substantive due

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*; citing *Garcia v. Miera*, 817 F.2d 650, 655-56 (10th Cir. 1987)

<sup>52</sup> *Votta ex rel. R.V. & J.V. v. Castellani*, 600 F. App'x 16, 18 (2d Cir. 2015)

process right "to be free from unreasonable and unnecessary intrusions into their emotional well-being."<sup>53</sup>

In *Smith v. Half Hollow Hills Central School District*, this Court considered the dismissal of a complaint alleging that a school instructor had slapped the Plaintiff in the face full force, allegedly causing the student both great physical pain and severe emotional pain for which he underwent psychotherapy.<sup>54</sup> The substantive due process claim was dismissed because the specific conduct in question was insufficient to shock the conscience, but the court refused to adopt a per se rule that a single slap from a teacher could never be sufficiently brutal to shock the conscience.<sup>55</sup> *Smith* stands in contrast to *Johnson v. Newburgh Enlarged School District*, in which we denied qualified immunity to a Defendant because his alleged conduct violated a student's clearly established substantive due process right to bodily integrity.<sup>56</sup> Rather than a single slap, that conduct entailed a teacher choking, dragging, punching, and slamming the head of the student.<sup>57</sup> We found that sustained assault "conscience-shocking because it constitutes conduct (1) maliciously and sadistically employed in the absence of a discernible government interest and (2) of a kind likely to produce substantial injury."<sup>58</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> *Smith v. Half Hollow Hills Cent. Sch. Dist.*, 298 F.3d 168 (2d Cir. 2002)

<sup>55</sup> *Id.*

<sup>56</sup> *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246 (2d Cir. 2001)

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 252, *Votta v. Castellani*, 600 F. App'x 16, 18-19 (2d Cir. 2015).

"For state action to be taken in violation of the requirements of substantive due process, the denial must have occurred under circumstances warranting the labels 'arbitrary' and 'outrageous.'" <sup>59</sup> "Numerous cases in a variety of contexts recognize [substantive due process] as a last line of defense against those literally outrageous abuses of official power whose very variety makes formulation of a more precise standard impossible." <sup>60</sup>

The Third Circuit concluded that corporal punishment of a student inflicted by a public-school teacher violates substantive due process. <sup>61</sup> *Metzger*, citing both *Hall* and *Ingraham*, provided a decision to discipline a student, if accomplished through excessive force and appreciable physical pain, may constitute an invasion of the child's Fifth Amendment liberty interest in his personal security and a violation of substantive due process prohibited by the Fourteenth Amendment. <sup>62</sup> In *Metzger*, the Third Circuit noted that "[a] decision to discipline a student, if accomplished through excessive force and appreciable physical pain, may constitute an invasion of the child's Fifth Amendment liberty interest in his personal security and a violation of substantive due process prohibited by the Fourteenth Amendment." <sup>63</sup>

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<sup>59</sup> *Natale v. Town of Ridgefield*, 170 F.3d 258, 262 (2d Cir. 1999)

<sup>60</sup> *Id.* citing *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980).

<sup>61</sup> *Metzger v. Osbeck*, 841 F.2d 518, 520 (3d Cir. 1988)

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

The Fourth Circuit supplies the case law that remains at the forefront of corporal punishment for school children. A Plaintiff has a substantive due process claim against both the individual who directly inflicted the corporal punishment but also any individual who "authorized" any partition of the corporal punishment that should be administered.<sup>64</sup> *Hall* thus teaches that even allegations that a school official "authorized" (rather than instituted or encouraged) malicious corporal punishment suffice to state a claim against that official for a constitutional violation.<sup>65</sup>

As the Fourth Circuit reasoned in *Hall*, an exercise of corporal punishment is "so brutal, demeaning and harmful as literally to shock the conscience of the court."<sup>66</sup> A student's substantive due process rights are implicated just as they would be in other settings.<sup>67</sup>

The Sixth Circuit concluded that corporal punishment of a student inflicted by a public-school teacher violates substantive due process. The threshold question in a § 1983 claim is whether the Plaintiff has been deprived of a right "secured by the

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<sup>64</sup> *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980)

<sup>65</sup> *Meeker v. Edmundson*, 415 F.3d 317, 322-23 (4th Cir. 2005)

<sup>66</sup> *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980)

<sup>67</sup> *Id.*

Constitution and laws."<sup>68</sup> Like all individuals, public school students have a Fourteenth Amendment liberty interest in freedom from bodily injury.<sup>69</sup>

To demonstrate the use of corporal punishment at school violated a student's substantive due process rights, a Plaintiff is required to prove that "the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience."<sup>70</sup> Not all punishment will result in a constitutional violation.<sup>71</sup> Even though it was made for no legitimate purpose, a teacher's single slap of a student did not result in physical injury and did not rise to the level of a substantive due process violation.<sup>72</sup>

In a case similar to that of E.K., *Webb*, Plaintiff brought forward a valid substantive due process claim when a student alleged that the high school principal broke down a student's door, threw the student into a wall, threw her onto the floor, and slapped her.<sup>73</sup> A substitute teacher grabbed an elementary student, slammed her head into the blackboard, threw her on the ground, and choked her for a full minute

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<sup>68</sup> *Lillard v. Shelby Cty. Bd. Of Educ.*, 76 F.3d 716, 724 (6th Cir. 1996), quoting *Baker v. McCollan*, 443 U.S. 137, 140, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979)

<sup>69</sup> *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987)

<sup>70</sup> *Id.*; *Ellis ex rel. Pendergrass v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 699 (6th Cir. 2006)

<sup>71</sup> *Lillard v. Shelby Cty. Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996)

<sup>72</sup> *Id.*

<sup>73</sup> *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987)

for forgetting to bring a pencil to class, after which the student exhibited petechiae, neck contusions, and symptoms of post-traumatic stress disorder, could meet the "shocks the conscience" standard.<sup>74</sup>

While not necessarily "excessive" under the existing law, we note that current data, and indeed the modern trend, strongly suggest that the use of corporal punishment in schools is counterproductive.<sup>75</sup> "Social science research has established positive correlations between corporal punishment and subsequent antisocial, violent, and criminal behavior by children subjected to it."<sup>76</sup> This fact is apparently recognized by the majority of states, which have banned paddling in public schools.<sup>77</sup>

The Seventh Circuit has held that corporal punishment is a violation of the Fourth Amendment. However, the Court specifically states that "Fourteenth Amendment due process analysis obviously differs in some respects from Fourth Amendment analysis. However, . . . we believe both interests can be treated together because, under both standards, the court must engage in the same balance of interests."<sup>78</sup>

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<sup>74</sup> *Ellis ex rel. Pendergrass v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 699 (6th Cir. 2006)

<sup>75</sup> Deana Pollard Sacks, *State Actors Beating Children: A Call for Judicial Relief*, 42 U.C. Davis L. Rev. 1165, 1200 (2009)

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*; *Nolan v. Memphis City Sch.*, 589 F.3d 257, 268 n.1 (6th Cir. 2009)

<sup>78</sup> *Darryl H. v. Coler*, 801 F.2d 893, 901 n.7 (7th Cir. 1986)



The Eighth Circuit concludes that at some point the administration of corporal punishment may violate a student's liberty interest in his personal security and substantive due process rights. A substantive due process claim in the context of disciplinary corporal punishment is to be considered under the following test: 1) the need for the application of corporal punishment; 2) the relationship between the need and the amount of punishment administered; 3) the extent of injury inflicted; and 4) whether the punishment was administered in a good faith effort to maintain discipline or maliciously and sadistically for the very purpose of causing harm.<sup>79</sup> "It is well established that not every violation of state tort or criminal assault laws committed by a state official results in a constitutional violation cognizable under § 1983."<sup>80</sup> Something more is required to find a violation of the student's substantive due process rights.<sup>81</sup> Minor discomfort and hurt feelings do not make a federal case.<sup>82</sup> The conduct must be shocking to the conscience and amount to a severe invasion of the student's personal security and autonomy.<sup>83</sup>

The Ninth Circuit concludes that excessive and unreasonable corporal punishment of public-school students violates the students' constitutional rights. "Children sent to public school are lawfully confined to the classroom, arbitrary

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<sup>79</sup> *Wise v. Pea Ridge Sch. Dist.*, 855 F.2d 560, 564-65 (8th Cir. 1988)

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

corporal punishment represents an invasion of personal security to which their parents do not consent when entrusting the educational mission to the State."<sup>84</sup>

Following *Ingraham*, the Supreme Court determined that allegations of excessive force in § 1983 actions should be analyzed under a more specific constitutional provision, rather than through generalized notions of substantive due process.<sup>85</sup> As a consequence, we now typically analyze excessive force allegations against public school students under the Fourth Amendment.<sup>86</sup> [We] have recognized the movement away from substantive due process and toward the Fourth Amendment....It is clear that the Fourth Amendment applies in the school environment."<sup>87</sup>

In light of the clear constitutional prohibition of excessive physical abuse of schoolchildren, and the heightened protections for disabled pupils, no reasonable special education teacher would believe that it is lawful to force a seriously disabled four-year-old child to beat himself or to violently throw or slam him. Existing law plainly prohibits excessive hitting, dragging, or throwing of public-school children.<sup>88</sup>

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<sup>84</sup> *Sandin v. Conner*, 515 U.S. 472, 485, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995)

<sup>85</sup> *Preschooler II v. Clark Cty. Sch. Bd. of Trs.*, 479 F.3d 1175, 1181-82 (9th Cir. 2007), citing *Graham v. Connor*, 490 U.S. 386, 394, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* citing *Doe v. Haw. Dep't of Educ.*, 334 F.3d 906 (9th Cir. 2003)

<sup>88</sup> *Id.*

The Tenth Circuit concludes that corporal punishment is a violation of a student's constitutional rights. The due process clause of the Fourteenth Amendment prohibits "executive abuse of power . . . which shocks the conscience."<sup>89</sup> In *Garcia*, we held that a form of the shocks-the-conscience test applies to school-inflicted corporal punishment: [T]he substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.<sup>90</sup> We now apply this standard to all school discipline cases, not just those based on corporal punishment.<sup>91 92</sup>

The Eleventh Circuit has concluded that a student-plaintiff can allege excessive corporal punishment as a violation of their rights under the Fourth Amendment Due Process Clause. A student-plaintiff alleging excessive corporal punishment can *in certain circumstances* assert a cause of action for a violation of his rights under the Fourteenth Amendment's Due Process Clause.<sup>93</sup>

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<sup>89</sup> *Cnty. of Sacramento v. Lewis*, 523 U.S. 833(1998)

<sup>90</sup> *Garcia v. Miera*, 817 F.2d 650 (10th Cir. 1987), quoting *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980)

<sup>91</sup> *Harris v. Robinson*, 273 F.3d 927 (10th Cir. 2001)

<sup>92</sup> *Muskrat v. Deer Creek Pub. Schs*, 715 F.3d 775, 786-87 (10th Cir. 2013)

<sup>93</sup> *Neal v. Fulton Cty. Bd. of Educ.*, 229 F.3d 1069, 1074-76 (11th Cir. 2000)

The substantive component of the Due Process Clause "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'"<sup>94</sup> "The substantive component of the due process clause is violated by [state conduct] when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'"<sup>95</sup> The concept of conscience-shocking duplicates no traditional category of common law fault, but "points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability."<sup>96</sup> That is to say, "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level."<sup>97</sup>

Although the Supreme Court in *Ingraham* declined to review the petitioner's argument that excessive corporal punishment violated substantive due process, the Court strongly suggested a favorable view of that position. The Court explained that "corporal punishment in public schools implicates a constitutionally protected liberty interest."<sup>98</sup> It also explained that "where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment

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<sup>94</sup> *Collins v. City of Harker Heights*, 503 U.S. 115, 112 S. Ct. 1061 (1992), quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 665, 88 L. Ed. 2d 662, 668 (1986)

<sup>95</sup> *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708 (1998)

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Ingraham v. Wright*, 430 U.S. 651, 97 S. Ct. 1401 (1977)

liberty interests are implicated."<sup>99</sup> Most notably, in the course of deciding that state law remedies were adequate to protect against deprivations without procedural due process, the Court observed "there can be no deprivation of substantive rights *as long as* disciplinary corporal punishment is within the limits of the common-law privilege [to use reasonable force in disciplining children]."<sup>100</sup>

The cases identify several factors to be considered in determining whether a student-plaintiff's allegations of excessive corporal punishment rise to the level of arbitrary and conscience-shocking behavior. Consistent with the cases we hold that, at a minimum, the Plaintiff must allege facts demonstrating that (1) a school official intentionally used an amount of force that was obviously excessive under the circumstances, and (2) the force used presented a reasonably foreseeable risk of serious bodily injury.<sup>101</sup> In determining whether the amount of force used is obviously excessive, we consider the totality of the circumstances.<sup>102</sup> In particular, we examine: (1) the need for the application of corporal punishment, (2) the relationship between the need and amount of punishment administered, and (3) the extent of the injury inflicted.<sup>103</sup>

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Neal v. Fulton Cty. Bd. of Educ.*, 229 F.3d 1069, 1074-76 (11th Cir. 2000)

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

**IV. The Fifth Circuit Should Recognize Corporal Punishment as a Substantive Due Process Violation under the Fourteenth Amendment.**

The Fifth Circuit's rule effectively precludes any constitutional relief for public school students when school officials use force against them in a disciplinary setting as every state within the Fifth Circuit has statutes in place to preclude such claims.<sup>104</sup> As such, District Courts are required to follow Fifth Circuit precedent and routinely dismiss students' federal constitutional claims of excessive force under the Fifth Circuit's current guidance. This honorable court should rectify the inconsistency among the Federal Courts of Appeals. Students in the Fifth Circuit should be deemed to maintain their constitutional rights when entering the school doors for their mandatory public education.

**CONCLUSION**

This Court should issue a ruling consistent with First Circuit, Second Circuit, Third Circuit, Fourth Circuit, Sixth Circuit, Seventh Circuit, Eighth Circuit, Ninth Circuit, Tenth Circuit and Eleventh Circuit finding that corporal punishment injuries can give rise to a substantive due process claim. Plaintiff's claim should be remanded to the District Court for further proceedings consistent with this Honorable Court's ruling.

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<sup>104</sup> Tex. Penal Code § 9.62, Tex. Educ. Code § 22.051(a); Miss. Rev. Stat. § 37-11-57; La. Rev. Stat. § 17:416.1

Dated: November 13, 2023

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that the foregoing instrument has been served via the Court's ECF filing system in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure, on November 13, 2023, on all registered counsel of record, and has been transmitted to the Clerk of the Court.

/s/ Keith Altman  
Keith Altman, Esq.

**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(A)(7)(B) because:

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Dated: November 13, 2023

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