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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTRODUCTION

Respondent Elvin Paley's brief in opposition confirms that the question presented by the petition warrants this Court's review. Paley concedes that the courts of appeals "disagree," BIO 17, over whether to apply the Fourth or Fourteenth Amendment to school excessive-force claims. He has no answer to the argument that *Graham v. Connor*, 490 U.S. 386 (1989), and *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), compel the application of the Fourth Amendment when such claims arise out of a seizure. He does not dispute that his use of force against Jevon satisfies the definition of a seizure, *see* BIO 9, making this case an excellent vehicle to review the question presented. And he highlights myriad reasons this Court's review is necessary to clarify the constitutional rights of schoolchildren. *See* BIO 16-23.

Paley resists the Court's review based solely on vehicle arguments that are easily dismissed. The question presented was preserved below and is implicated here: The Fifth Circuit sides with the majority of circuits, which apply the Fourteenth Amendment to school excessive-force claims. Even under Paley's erroneous reading, there is still a three-way split warranting review. If this Court grants the petition and vacates the decision below, the Fifth Circuit may well reject Paley's qualified immunity defense on remand because circuit precedent plainly put Paley on notice that tasing a disabled minor past the point of incapacitation simply to keep him inside a school building violated clearly established law. And regardless of the ultimate qualified immunity analysis, this Court's re-

view is necessary to clarify the constitutional protections available to students subjected to excessive force by school officials.

The Court should grant the petition.

ARGUMENT

I. Paley Concedes that the Question Presented Warrants Review and Identifies No Reason It Should Not Be Resolved Here.

Paley agrees there is a circuit split over the question presented. *See, e.g.*, BIO i ("Petitioners correctly note that some federal courts of appeals disagree on whether public school students who assert claims alleging excessive force by school officials must do so under the Fourth or the Fourteenth Amendment…."); *see also* BIO 13-14. He recognizes lower courts need guidance on "whether or how" this Court's decision in *Graham* affects such claims. BIO 17. And he implicitly concedes that the claim here is precisely the sort of school excessive-force claim dividing the circuits—i.e., it "meets the definition of a Fourth Amendment seizure," Pet. i. *Compare* BIO 9 (acknowledging Paley "attempted to physically restrain" and "struggled to hold" Jevon "to keep him from leaving the building"), *with Torres v. Madrid*, 592 U.S. 306, 309 (2021) ("The application of physical force to the body of a person with intent to restrain is a seizure….").

Paley nonetheless urges the Court to deny the petition on the ground that the Fifth Circuit follows "a third test that rejects *constitutional* claims for excessive discipline … against teachers, if the relevant *state* laws affirmatively proscribe and remedy the use

of unreasonable force." BIO 14. According to Paley, this means that the Fifth Circuit has not had the "opportunity" to decide whether the Fourth or Fourteenth Amendment applies to school excessive-force claims. BIO 13-15. Paley is wrong on both counts.

A. Like the majority of circuits, the Fifth Circuit applies the Fourteenth Amendment to school excessive-force claims. In *Fee v. Herndon*, 900 F.2d 804, 808 (5th Cir. 1990), the court considered "whether teacher discipline can be so capricious as to violate the amorphous substantive due process guarantees inherent in the fourteenth amendment." Acknowledging that "corporal punishment in public schools 'is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning,'" the court nonetheless concluded that "injuries sustained incidentally to corporal punishment … do not implicate the due process clause *if* the forum state affords adequate post-punishment civil or criminal remedies." *Id.* (quoting *Woodard v. Los Fresnos Indep. Sch. Dist.*, 732 F.2d 1243, 1246 (5th Cir. 1984)). In such cases, the state "ha[s] provided all the process constitutionally due." *Id.*

In short, under *Fee* and its progeny, the Fifth Circuit treats school excessive-force claims as arising under the Fourteenth Amendment, but holds that such claims generally fail when the force used constitutes corporal punishment and post-hoc state remedies are available. *Compare Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303, 304-06 (5th Cir. 1987) (permitting a school excessive-force claim under the Fourteenth Amendment because the force used to restrain the

student was "not for punishment"), *with, e.g.*, *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 874-76 (5th Cir. 2000) (rejecting, under *Fee* and in light of state remedies, a substantive due process claim by a student forced to engage in excessive exercise as punishment).[1]

To be sure, there was previously uncertainty as to whether the Fifth Circuit might permit school excessive-force claims to proceed under the Fourth Amendment despite the *Fee* rule. In *Fee*, the court of appeals observed that "the paddling of recalcitrant students does not constitute a fourth amendment search or seizure." 900 F.2d at 810. In a subsequent unpublished decision, the court broadly rejected the notion of Fourth Amendment school excessive-force claims, stating that they would "eviscerate this circuit's rule … prohibiting substantive due process claims" that challenged the same conduct. *Flores*, 116 F. App'x at 510. But then, in *Curran v. Aleshire*, 800 F.3d 656, 660-64 (5th Cir. 2015), the court allowed a

[1] The Fifth Circuit defines corporal punishment, the basis for its *Fee* rule, exceptionally broadly. *See* Pet. 10-11, 18-19; *see also* IJ Amicus Br. 5-7. It has also found that post-hoc remedies for corporal punishment exist in every state in its jurisdiction, *see* Pet. App. 26a (Texas); *Flores v. Sch. Bd. of DeSoto Par.*, 116 F. App'x 504, 509-11 (5th Cir. 2004) (Louisiana); *Clayton ex rel. Hamilton v. Tate Cty. Sch. Dist.*, 560 F. App'x 293, 297 (5th Cir. 2014) (Mississippi), though it has "never closely examined the adequacy of those state remedies," *Moore*, 233 F.3d at 878 (Wiener, J., specially concurring). As a practical matter, therefore, students in the Fifth Circuit are extremely unlikely to have any constitutional remedy for excessive force.

Fourth Amendment school excessive-force claim to proceed to a jury over a qualified immunity defense.[2]

The Fifth Circuit has now resolved that uncertainty. In *T.O. v. Fort Bend Independent School District*, 2 F.4th 407, 413-15 (5th Cir. 2021), the court held that *Fee* and *Flores* foreclose the possibility of a clearly established Fourth Amendment right against school excessive force. In the decision below, the court went further: The court explained that "the defendant [in *Curran*] had not argued that a student's Fourth Amendment claim was at odds with *Fee*," and as such, the question was not before that panel. Pet. App. 39a. *Flores*, meanwhile, explicitly "rejected the notion of Fourth Amendment claims based on school discipline," and *Fee* did as well, albeit in dicta. *Id.* at 38a. Accordingly, the court held, Jevon could not show a clearly established "Fourth Amendment right against school officials' use of excessive force," rendering Paley "immune from the Fourth Amendment claim asserted in this case." *Id.* at 39a. The Fifth Circuit declined to revisit that holding en banc, *see* Pet. App. 90a, leaving in place a framework in which Fourth Amendment school excessive-force claims are foreclosed by qualified immunity under *Fee*.

The Fifth Circuit thus falls squarely on the side of circuits that misapply *Graham* by evaluating these

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[2] The court also stated in an earlier unpublished opinion that an excessive force claim against school security guards was "properly analyzed under the Fourth Amendment." *Keim v. City of El Paso*, No. 98-50265, 1998 WL 792699, at *4 n.4 (5th Cir. Nov. 2, 1998).

claims under the Fourteenth Amendment. *See generally* Pet. 2-3, 11-26. The Fifth Circuit stands alone in further holding that the availability of state remedies defeats most Fourteenth Amendment school excessive-force claims.[3] But that additional error does not take the Fifth Circuit outside the question presented, which is whether school excessive-force claims are governed by the Fourth Amendment when they involve a seizure. *See* Pet. 21-26.

Even on its own terms, Paley's contention that the Fifth Circuit follows a "third test" barring nearly *all* constitutional claims for school excessive force suggests at most that there is a three-way split warranting this Court's review, with two circuits applying the Fourth Amendment and its objective reasonableness standard; seven circuits applying the Fourteenth Amendment and its more onerous shocks-the-conscience standard; and the Fifth Circuit effectively prohibiting both types of claims. *See* BIO 13-14; *see also* Pet. 13-21. If anything, that the Fifth Circuit applies a harsher substantive due process rule makes this Court's intervention even more important, because

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[3] For good reason, "other circuits disagree with … the Fifth Circuit's approach." BIO 31. Even circuits that apply the Fourteenth Amendment to school excessive-force claims describe the Fifth Circuit as an outlier. *See, e.g.*, *Neal ex rel. Neal v. Fulton Cty. Bd. of Educ.*, 229 F.3d 1069, 1075 n.2 (11th Cir. 2000). And the Fifth Circuit itself has acknowledged that *Fee* is "at odds with the law in … other circuits." Pet. App. 36a; *see also T.O.*, 2 F.4th at 419 (Wiener, J., specially concurring) (characterizing *Fee* as "unjust" and "completely out of step with every other circuit court and clear directives from the Supreme Court").

students in the Fifth Circuit will have no constitutional recourse, no matter the severity of their injuries or how shocking the force used, so long as the use of force meets the Fifth Circuit's all-encompassing definition of corporal punishment. *See supra* note 1; *see also* Pet. 27-29.

B. Paley's claim that petitioners failed to "properly preserve" the question presented, BIO i, is false. Petitioners dedicated an entire section of their appellate brief to the argument that "Jevon's excessive-force claim must be analyzed under the Fourth Amendment, rather than a substantive due-process standard," explaining that *Graham* compelled application of the Fourth Amendment and *Fee* was no impediment to their Fourth Amendment excessive-force claim. Brief for Appellees 9-19, *J.W. v. Paley*, 860 F. App'x 926 (5th Cir. 2021) (No. 19-20429), 2019 WL 5597964.

II. Qualified Immunity Does Not Preclude This Court's Review.

Paley also argues that this Court's review is unwarranted because qualified immunity would ultimately bar petitioners' claim regardless of this Court's ruling. But if this Court reverses the decision below, the Fifth Circuit may well reject Paley's qualified immunity defense on remand. In any event, this Court's review is needed to resolve the underlying constitutional question.

A. According to Paley, qualified immunity insulates him from liability for tasing Jevon regardless of what this Court rules, because it still would not have been clearly established at the time of the incident

whether the Fourth or Fourteenth Amendment controls such claims. *See* BIO 16-23. That is not how qualified immunity works. The inquiry is whether the officer "reasonably believe[d] that his or her *conduct* complie[d] with the law," *Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (emphasis added), not whether the officer knew which constitutional provision governed the claim. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (dispositive question is "whether the violative nature of particular conduct is clearly established"); *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (qualified immunity "operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful'" (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001))). The second-prong qualified immunity inquiry in this case is therefore not whether this Court has answered myriad tangentially relevant questions about the rights of schoolchildren, as Paley suggests. Instead, it is whether Paley was on notice that his use of force—tasing an unresisting disabled minor past the point of incapacitation, simply to keep him inside a building—was unreasonable.

The Fifth Circuit never held that it was unclear under circuit precedent whether Paley's use of force against Jevon was excessive. *See* Pet. App. 39a; *see also* Pet. App. 17a (calling the tasing "arguably excessive"). Under circuit precedent at the time, it plainly was. The Fifth Circuit has explained that every school official "must know that inflicting pain on a student … violates that student's constitutional right to bodily integrity." *Moore*, 233 F.3d at 875. It has specified that force used for non-disciplinary purposes is actionable, and even corporal punishment is "not necessarily protected conduct" under its restrictive *Fee* rule

"'when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning.'" *Jefferson*, 817 F.2d at 305-06 (quoting *Woodard*, 732 F.2d at 1246). And it previously found that an officer who used force against a student who was no longer resisting had violated "clearly established law." *Curran*, 800 F.3d at 663.

Should this Court conclude that the Fourth Amendment applies to petitioners' excessive force claim, the Fifth Circuit would be well-positioned to reconsider Paley's conduct in light of its precedent and determine whether Paley had fair notice that tasing Jevon was unlawful.

Paley is also incorrect that this Court's holdings in *Ingraham v. Wright*, 430 U.S. 651 (1977), "likely begin and end the conversation of what constituted 'clearly established' law" when he tased Jevon. *See* BIO 21. This Court has issued multiple rulings relevant to this case since 1977 when *Ingraham* was decided, including *Graham* and *T.L.O. Ingraham* held only that students could not challenge corporal punishment under procedural due process or the Eighth Amendment. 430 U.S. at 671, 682. It had no reason to independently consider the applicability of the Fourth Amendment to school excessive-force claims, given that *Ingraham* preceded by more than a decade *Graham*'s clarification that seizures of non-incarcerated individuals "should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach," *Graham*, 490 U.S. at 395.

B. Regardless of the ultimate outcome of the second qualified immunity prong, this Court's review is appropriate and warranted. Courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first." *Pearson*, 555 U.S. at 236. In certain circumstances, beginning with the first prong "promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Id.* Thus, qualified immunity decisions are "in a special category" of cases in which "'policy reaso[ns] … of sufficient importance'" can support resolving underlying constitutional rights regardless of the qualified immunity outcome. *Camreta v. Greene*, 563 U.S. 692, 704 (2011) (quoting *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 336 n.7 (1980)). Such rulings, which are "self-consciously designed to" "establish[] controlling law" and "promote clarity—and observance—of constitutional rules," "have a significant future effect on the conduct of public officials." *Id.* at 704-05. Like the lower courts, this Court has "discretion" to address "each step" of the qualified immunity analysis. *al-Kidd*, 563 U.S. at 735.

The Fifth Circuit has had numerous opportunities, including in this case, to recognize the applicability of the Fourth Amendment to school excessive-force claims in light of *Graham,* and it has repeatedly declined. *See, e.g.*, Pet. App. 37a-39a; *T.O.*, 2 F.4th at 415. Where, as here, a court "fail[s] to clarify uncertain questions," "address novel claims," or "give guidance to officials about how to comply with legal requirements," this Court's intervention is necessary to

ensure that qualified immunity will not "frustrate 'the development of constitutional precedent' and the promotion of law-abiding behavior." *Camreta*, 563 U.S. at 706 (quoting *Pearson*, 555 U.S. at 237).

Indeed, by Paley's reasoning, this Court should never resolve circuit splits on constitutional issues in section 1983 damages suits where the plaintiff is the petitioner, because qualified immunity would inevitably be available to the respondent on remand. Yet this Court has repeatedly granted petitions in this posture in the face of similar arguments. *See, e.g.*, *Torres*, 592 U.S. 306; *Kingsley v. Hendrickson*, 576 U.S. 389 (2015); *cf. Nat'l Rifle Ass'n of Am. v. Vullo*, 144 S. Ct. 375 (2023).[4]

Paley suggests that this Court should wait for a case that does not involve qualified immunity to resolve the question presented here, because "[m]ost of the constitutional issues that are presented in § 1983

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[4] *See* Brief in Opposition 30, *Torres*, 592 U.S. 306 (No. 19-292), 2019 WL 6045398 ("[I]f petitioner is correct that there is a circuit split on the issue presented in this case, [respondents] are all the more entitled to qualified immunity."); Brief in Opposition 17 n.1, *Kingsley*, 576 U.S. 389 (No. 14-6368), 2014 WL 7653038 ("[E]ven if the Court were inclined to adopt an intent requirement different from that of the majority of the circuits, Petitioner in this case would not obtain a new trial because Respondents would be entitled to qualified immunity."); *cf.* Brief in Opposition 8-9, *Nat'l Rifle Ass'n of Am. v. Vullo*, No. 22-842 (U.S. June 23, 2023), 2023 WL 4237305 (arguing the "qualified immunity holding" below was "enough by itself to support the judgment," and "any consideration of the merits" would "'have no effect on the outcome of the case' as long as [that] holding remain[ed]" (quoting *Pearson*, 555 U.S. at 237)).

damages actions [] also arise in cases in which [the qualified immunity] defense is not available," BIO 24-25 (second alteration in original) (quoting *Pearson*, 555 U.S. at 242). Paley does not specify what sort of case he has in mind, but as petitioners explained and Paley does not contest, school excessive-force claims are unlikely to reach this Court other than in damages actions. *See* Pet. 31; *cf. Camreta*, 563 U.S. at 710-12. In this context, this Court's "regular policy of [constitutional] avoidance … does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo." *Camreta*, 563 U.S. at 706. Limbo is precisely where the Fifth Circuit—and the schoolchildren who reside in it—will remain unless this Court weighs in.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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