No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is 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.

PARTIES TO THE PROCEEDING

Petitioners Jevon Washington and Lori Washington were plaintiffs in the district court. They were appellees in the first appeal to the Fifth Circuit and appellants in the second appeal to the Fifth Circuit.

Respondent Elvin Paley was a defendant in the district court, the appellant in the first appeal to the Fifth Circuit, and an appellee in the second appeal to the Fifth Circuit.

The Katy Independent School District was a defendant in the district court and an appellee in the second appeal to the Fifth Circuit.

RELATED PROCEEDINGS

J.W. v. Paley, No. 21-20671 (5th Cir.) (judgment entered Aug. 28, 2023)

J.W. v. Paley, No. 19-20429 (5th Cir.) (judgment entered June 23, 2021)

J.W. v. Paley, No. 18-CV-1848 (S.D. Tex.) (motion for summary judgment granted in part and denied in part June 5, 2019)

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INTRODUCTION

Petitioner Jevon Washington has significant intellectual disabilities that affect "his daily functioning," including "his ability to communicate" and "control his emotions." When Jevon was a 17-year-old high school student, he became upset one day after being bullied by a classmate. As he often did after being harassed at school, Jevon tried to walk off his negative emotions. As he approached an exit to the school, he was intercepted by a number of school officials, including respondent Elvin Paley, a school police officer. After Jevon explained the situation and repeatedly told staff that they were "making it worse" by keeping him enclosed in a small entryway, he attempted to open the door and leave the building. Paley then charged toward Jevon, put him in a chokehold, and tased him. Jevon screamed and fell to his knees, but Paley continued to deploy his taser well after Jevon was prone on the ground, unable to move. Paley later explained that his motivation in tasing Jevon was to prevent him from exiting the school building.

In short, this is a case is about an intellectually disabled minor who was gratuitously tased by a school police officer, even after he was incapacitated on the ground and had defecated and urinated on himself, with the professed purpose of restraining him—a quintessential example of excessive force in violation of the Fourth Amendment's protection against unreasonable seizures. In the Fifth Circuit, however, the Constitution provides no protection for students who are subjected to unlawful excessive force, regardless of the seriousness of the injuries to the student or the

wrongfulness of the conduct: The court of appeals refuses to apply the Fourth Amendment to claims that a school official has violently seized a student, and its precedent effectively forecloses Fourteenth Amendment substantive due process claims to victims of excessive force in schools.

The decision below further entrenches a circuit split regarding which constitutional provision applies to claims that a school official has used excessive force against a student in the context of a seizure. The Seventh and Ninth Circuits have recognized that the Fourth Amendment's objective reasonableness standard governs such claims. By contrast, the Second, Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits have evaluated factually analogous cases under the Fourteenth Amendment's much more onerous shocks-the-conscience standard. The Fifth Circuit alone rejects Fourth Amendment claims for excessive force by students while also barring Fourteenth Amendment substantive due process claims for the same conduct. This Court's intervention is needed to resolve this deep divide.

The Court's review is especially warranted because the position taken by the majority of circuits conflicts with this Court's precedent in *Graham v. Connor*, 490 U.S. 386 (1989), which held that seizures by government officials of individuals who are not incarcerated "should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Id.* at 394-95. Instead of beginning their analysis "by identifying the specific constitutional right allegedly infringed by the challenged application of force," *id.*

at 394, the majority of circuits default to analyzing claims involving excessive force against schoolchildren as Fourteenth Amendment substantive due process claims, regardless of whether they occur in the context of seizures. Thus, the majority of courts of appeals erroneously treat a category of violent seizures as outside the Fourth Amendment simply because they happen at school, between school officials and students. This error is particularly striking because these circuits offer no justification for why the Fourth Amendment should protect against unreasonable searches in schools, *see New Jersey v. T.L.O.*, 469 U.S. 325, 335-37 (1985), but not unreasonable and violent seizures in the same context.

The question presented is exceptionally important. Given the significant disparity between the Fourth Amendment's "less stringent" objective reasonableness standard and the Fourteenth Amendment's shocks-the-conscience standard, which requires a showing of subjective malicious or sadistic intent, the standard applied is often "determinative." *Gottlieb ex rel. Calabria v. Laurel Highlands Sch. Dist.*, 272 F.3d 168, 171 (3d Cir. 2001). As the number of school resource officers increases, so too does the potential for violent police–student interactions. These interactions are essentially indistinguishable from seizures by law enforcement officers that occur outside of school. It is essential to recognize that the Fourth Amendment applies to these interactions and other similar seizures by school officials. And the question presented is squarely implicated in this case, in which a law enforcement officer violently seized a student by tasing him to prevent him from leaving the school building.

This Court should grant the petition to resolve the circuit split and clarify that excessive-force claims that occur in the context of seizures by school officials are governed by the Fourth Amendment.

OPINIONS AND ORDERS BELOW

The opinions of the court of appeals are reported at *J.W. v. Paley*, 81 F.4th 440 (5th Cir. 2023), and *J.W. v. Paley*, 860 F. App'x 926 (5th Cir. 2021). Pet. App. 1a-39a. The opinion of the district court granting in part and denying in part respondent's motion for summary judgment is reported at *Washington ex rel. J.W. v. Katy Indep. Sch. Dist.*, 390 F. Supp. 3d 822 (S.D. Tex. 2019). Pet. App. 40a-87a. The orders of the court of appeals denying rehearing en banc are unreported. *See* Pet. App. 88a-90a.

JURISDICTION

The Fifth Circuit entered judgment on August 28, 2023. Pet. App. 1a. The Fifth Circuit denied petitioners' petition for rehearing en banc on October 10, 2023. Pet. App. 88a-89a. On January 4, 2024, and January 25, 2024, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including February 7, 2024, and February 21, 2024, respectively. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause ….

The Fourteenth Amendment to the U.S. Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Factual Background

In November 2016, petitioner Jevon Washington was 17 years old and a student at Mayde Creek High School in the Katy Independent School District. Pet. App. 2a.[1] Jevon has been diagnosed with significant intellectual disabilities and emotional disturbance that affect "his daily functioning," including "his ability to communicate" and "control his emotions." *Id.* Although Jevon "communicates well when he is

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[1] Because this case turns on events that occurred when Jevon was a minor, the case caption and initial district court filings referred to him by his initials, J.W., to protect his identity. Now that his name has been disclosed in filings and media coverage of this case, this petition refers to him by his full name.

calm," he "often becomes upset and is unable to effectively communicate his needs when harassed by other students." ROA.1552 (No. 21-20671). He has been bullied by his peers throughout his life because of his disabilities. *Id.* at 1551-52.

On the day of the incident at issue in this case, Jevon became agitated after one of his classmates began bullying him for his disabilities. Pet. App. 2a-3a. As was his practice and in compliance with his academic accommodations, Jevon removed himself from the upsetting situation and went to what he called his "chill out" classroom to calm down; finding it occupied, he proceeded toward an exit to the building. *Id.* at 3a. Before he could leave, however, Jevon was stopped in a small entryway between two sets of doors by two school officials, a security guard, and a school police officer. *Id.* Shortly thereafter, they were joined by respondent, school police officer Elvin Paley, who had heard a request for assistance over the school radio. *Id.* Paley knew Jevon received special education services and understood that he was "probably a special needs student." *Id.*; ROA.636 (No. 21-20671). Paley had also witnessed Jevon during prior mental health crises. *See* Pet. App. 3a.

Paley's body camera captured most of the subsequent events.[2] *Id.* Jevon's anxiety worsened, and he

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[2] The bodycam footage was submitted to the district court as Exhibit G to the defendants' summary judgment motion. This brief cites the footage as "Video," followed by a pincite to the recording timestamps. Because the recording does not appear to be accessible via CM/ECF, petitioners have provided it to the Clerk's Office via thumb drive.

began pacing, telling the school officials that their behavior was "making it worse," and asking if he could leave the building to "cool down." *Id.* at 3a-4a, 42a; Video 12:44:58-12:45:02. Instead of letting him walk outside and calm down, the officials interrogated Jevon about why he wanted to leave the building and refused to let him out. Pet. App. 3a-4a; Video 12:45:10-12:45:50. Eventually Jevon pushed on the door in an attempt to get out of the building, and the nearest staff member pushed back against the door to keep Jevon inside; the district court observed from the body camera footage that "it does not appear that [Jevon] pushe[d] the staff member." Pet. App. 43a.

Within five seconds, Paley surged toward Jevon; his camera went dark as he pressed against Jevon's body. *Id.* at 4a, 34a, 43a. During the period for which no video footage is available, Paley put Jevon in a chokehold. *Id.* at 77a. The bodycam audio recording reflects Paley and another school employee repeatedly shouting at Jevon to "calm down" and Paley threatening to tase him. *Id.* at 4a. Less than a minute later, Paley backed up and fired his taser; Jevon "immediately scream[ed] and f[ell] to his knees." *Id.* at 4a, 34a-35a, 44a; Video 12:46:37. Despite Jevon's incapacitation and lack of resistance, Paley used a form of continuous tasing called "drive stunning" on Jevon for a total of about 20 seconds. Pet. App. 4a; Video 12:46:36-12:46:56. Paley yelled at Jevon to put his hands behind his back; Jevon responded, "I can't," but Paley continued to tase him. Video 12:46:45-12:46:56.

The district court found that the "use of the taser on [Jevon's] upper back continue[d] after [Jevon was] lying face down on the ground and not struggling."

Pet. App. 44a; *see also id.* at 4a (same). While Jevon lay on the ground, unmoving and breathing heavily, Paley pointed his taser at Jevon's head and yelled, "I did not want to tase you, but you do not run shit around here." *Id.* at 19a, 30a, 44a-45a; Video 12:47:50. Paley and another officer then handcuffed Jevon, despite his cries that he was unable to breathe and feared he was going to die. Pet. App. 5a, 45a. Subsequent bodycam footage showed Paley describing his behavior: "[He] still tried to get out the door. I got tired of wrestling with him so I popped him." *Id.* at 19a, 30a, 44a-45a; Video 13:10:25-13:10:31.

The tasing caused Jevon to urinate, defecate, and vomit on himself. Pet. App. 5a, 45a. Paramedics later removed a taser prong embedded in his chest. *Id.* at 45a. Jevon's mother, Lori Washington, kept Jevon home for several months after the incident, a decision supported by Jevon's medical providers, because of "fear for his safety while at school" and because the tasing caused Jevon "intense anxiety and PTSD." *Id.* at 47a.

Prior Proceedings

Jevon and his mother, petitioners here, sued Paley and Katy Independent School District, asserting in relevant part claims pursuant to 42 U.S.C. § 1983 for excessive force under the Fourth Amendment and for violation of Jevon's right to bodily integrity under the Fourteenth Amendment. Defendants moved jointly for summary judgment. They argued that Paley was entitled to qualified immunity for the Fourth Amendment claim. They further argued that petitioners' Fourteenth Amendment claim was precluded by the

Fifth Circuit's decision in *Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990), which held that "injuries sustained incidentally to corporal punishment, irrespective of the severity of these injuries or the sensitivity of the student, do not implicate [substantive] due process … if the forum state affords adequate post-punishment civil or criminal remedies." *Id.* at 808 (emphasis omitted).

The district court denied defendants' motion for summary judgment with respect to the Fourth Amendment excessive-force claim against Paley. It held that genuine disputes of fact—including whether Jevon initially pushed a staff member to get outside—were material to determining whether the tasing was objectively unreasonable and, thus, whether qualified immunity applied. Pet. App. 75a-79a. But the court granted the motion as to petitioners' Fourteenth Amendment claim, agreeing with defendants that this claim was barred by *Fee*. *Id.* at 80a-82a.

Paley filed an interlocutory appeal from the district court's denial of qualified immunity on petitioners' Fourth Amendment claim. A panel of the Fifth Circuit reversed in an unpublished decision. The panel acknowledged that this Court has directed that "courts should ground claims in textually specific constitutional rights rather than in the 'more generalized notion of substantive due process,'" *id.* at 37a (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998)), and that "the Fourth Amendment's companion right to be free from unreasonable searches applies in schools," *id.* It nonetheless concluded that, because of a lack of clear consensus within its own prior decisions, the application of the Fourth Amendment

to claims of excessive force occurring in schools was not clearly established. In particular, it noted an unpublished decision's reasoning "that allowing a Fourth Amendment challenge to a teacher's choking a student would 'eviscerate this circuit's rule [in *Fee*] … prohibiting substantive due process claims' based on the same conduct." *Id.* at 38a (quoting *Flores v. Sch. Bd. of DeSoto Par.*, 116 F. App'x 504, 510 (5th Cir. 2004)). It also recognized that *Fee* itself had stated in dicta that corporal punishment "does not constitute a [F]ourth [A]mendment search or seizure." *Id.* (alterations in original) (quoting *Fee*, 900 F.2d at 810). The panel therefore granted qualified immunity to Paley. *Id.* at 39a. Petitioners sought panel rehearing and rehearing en banc; both petitions were denied. *Id.* at 90a.

Because the Fourth Amendment claim was the only one to survive summary judgment before the district court, the Fifth Circuit's decision disposing of that claim rendered a final order the district court's decision granting summary judgment to defendants on petitioners' Fourteenth Amendment claim. Petitioners accordingly filed a timely notice of appeal from the district court's order that had otherwise granted defendants' motion for summary judgment.

In its decision on this second appeal, the Fifth Circuit called the case "disturbing" and Paley's use of his taser "arguably excessive" and an example of "poor judgment," *id.* at 2a, 18a, 20a, but nonetheless affirmed in relevant part. It rejected petitioners' contention that the *Fee* bar on substantive due process claims did not apply because the tasing could not be properly characterized as "corporal punishment." *Id.*

at 22a-26a. Setting aside this Court's description of corporal punishment as the use of "reasonable but not excessive force to *discipline* a child," *id.* at 22a (emphasis added) (quoting *Ingraham v. Wright*, 430 U.S. 651, 661 (1977)), the panel determined that the tasing was corporal punishment even though Paley was not "'punishing'" Jevon, on the theory that Paley was "trying to restrain him for the pedagogical purpose of maintaining order," *id.* at 23a-24a. The panel therefore held that petitioners' substantive due process claim was foreclosed by *Fee*. *Id.* at 21a-26a. Petitioners once more sought panel rehearing and rehearing en banc; both petitions were again denied.[3] *Id.* at 88a-89a.

REASONS FOR GRANTING THE PETITION

It is "beyond dispute" that the Fourth Amendment "prohibits unreasonable searches and seizures by state officers" in both criminal and civil contexts. *New Jersey v. T.L.O.*, 469 U.S. 325, 334-35 (1985) (quoting *Elkins v. United States*, 364 U.S. 206, 213 (1960)). The

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[3] Petitioners also asserted claims under the Americans with Disabilities Act (ADA) and the Rehabilitation Act against the school district. The district court ruled that petitioners had failed to properly exhaust those claims pursuant to the exhaustion requirement of the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(*l*), Pet. App. 58a-64a, and rejected petitioners' claims on the merits, ECF No. 50. The court of appeals reversed the district court's exhaustion holding in light of this Court's decision in *Luna Perez v. Sturgis Public Schools*, 143 S. Ct. 859 (2023). *See* Pet. App. 8a-12a. On the merits, over a dissent from Judge Graves, it affirmed the district court's conclusion that petitioners failed to state claims for disability discrimination. *Id.* at 12a-20a, 28a-31a.

"basic purpose" of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Mun. Ct. of City & Cty. of S.F.*, 387 U.S. 523, 528 (1967). Although "the evil toward which the Fourth Amendment was primarily directed" was the use of general warrants or writs of assistance to authorize searches, "this Court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police." *T.L.O.*, 469 U.S. at 335. Rather, this Court "has long spoken of the Fourth Amendment's strictures as restraints imposed upon 'governmental action'—that is, 'upon the activities of sovereign authority.'" *Id.* (quoting *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921)). The Fourth Amendment right is therefore "applicable to the activities of civil as well as criminal authorities," including school officials, who "act in furtherance of publicly mandated educational and disciplinary policies." *Id.* at 335-36.

Thus, when considering an excessive-force claim alleged against a school resource officer or other school official, like any government official, the "analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *Graham v. Connor*, 490 U.S. 386, 394 (1989). This rule is "grounded in the notion that the specific constitutional provisions provide more guidance to judicial decisionmakers than the more open-ended concept of substantive due process." *Doe ex rel. Doe v. Haw. Dep't of Educ.*, 334 F.3d 906, 908 (9th Cir. 2003). "In most instances" that do not arise under the Eighth Amendment, the "primary source[] of consti-

tutional protection against physically abusive governmental conduct" is the Fourth Amendment. *Graham*, 490 U.S. at 394. When a claim alleges that government officials have used excessive force in the course of a "'seizure' of a free citizen," it "should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Id.* at 395; *see also United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) ("[I]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.").

For this reason, two circuits have correctly held that claims that a student has been subjected to excessive force during a seizure in a public school should be evaluated under the Fourth Amendment's objective reasonableness standard. By contrast, seven other circuits have analyzed analogous claims under the Fourteenth Amendment's more burdensome shocks-the-conscience standard. It is exceptionally important that this Court clarify that the Fourth Amendment continues to apply to violent seizures of schoolchildren, and this case presents an ideal vehicle in which to do so.

I. The Circuits Are in Disarray as to Whether School Excessive-Force Claims Should Proceed Under the Fourth or Fourteenth Amendment.

The courts of appeals are deeply divided over whether the Fourth or the Fourteenth Amendment

governs claims that a school official has used excessive force against a student. As a result, the majority and minority circuits apply different substantive tests when evaluating school excessive-force claims, one test significantly more onerous than the other. This intractable split has persisted for more than 20 years, and this Court's intervention is required to resolve it.

Two circuits correctly hold that the Fourth Amendment governs school excessive-force claims that amount to seizures. *See Wallace ex rel. Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010, 1013-15 (7th Cir. 1995) (Fourth Amendment applied but was not violated when a teacher injured a student by pulling her wrist and elbow to prevent a fight and expedite the student's removal from class); *Preschooler II v. Clark Cty. Sch. Bd. of Trs.*, 479 F.3d 1175, 1178, 1180 (9th Cir. 2007) (teacher violated "the Fourth Amendment's prohibition of the use of excessive force against public schoolchildren" when she "grabbed [plaintiff's] hands and slapped him repeatedly …, hitting his head and face," and "body slammed [him] into a chair"). These circuits follow this Court's guidance that school officials are not "exempt from the dictates of the Fourth Amendment," *T.L.O.*, 469 U.S. at 336, and that the Fourth Amendment "must be the guide for analyzing" claims that excessive force was used in the course of a seizure, *Graham*, 490 U.S. at 395. Thus, where the force was used during a seizure, the Seventh and Ninth Circuits have determined that "claims of excessive force by a school official generally should be decided under the Constitution's Fourth Amendment … in light of [*Graham*'s] direction to analyze § 1983 claims under more specific constitutional provisions, when applicable." *Doe*, 334 F.3d at 907, 909.

In these circuits, courts ask whether the seizing official's conduct was objectively reasonable under the circumstances in deciding whether the force used was permissible. *See Wallace*, 68 F.3d at 1013-15; *Preschooler II*, 479 F.3d at 1180-81; *Doe*, 334 F.3d at 909.

The Third Circuit, by contrast, has held that school excessive-force claims "invoke[] principles of substantive due process" rather than the Fourth Amendment. *Gottlieb ex rel. Calabria v. Laurel Highlands Sch. Dist.*, 272 F.3d 168, 172 (3d Cir. 2001). This is because, in its view, the "principal concern" of the Fourth Amendment "is with intrusions on privacy." *Id.* (quoting *Ingraham v. Wright*, 430 U.S. 651, 674 (1977)). By contrast, students in public schools already have had their liberty curtailed by compelled attendance and "are subject to the ordering and direction of teachers and administrators." *Id.* at 171 (quoting *Wallace*, 68 F.3d at 1013). Thus, their excessive-force claims are analogous to those arising in "conditions of ongoing custody following" the "curtailment of liberty." *Id.* at 172.

Six other circuits have similarly analyzed school excessive-force claims under the Fourteenth Amendment's "more generalized notion of 'substantive due process,'" *Graham*, 490 U.S. at 395, requiring student plaintiffs to show that the force used "shocks the conscience." *See, e.g.*, *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 252 (2d Cir. 2001); *Hall v. Tawney*, 621 F.2d 607, 611-13 (4th Cir. 1980); *Webb v. McCullough*, 828 F.2d 1151, 1158-59 (6th Cir. 1987); *Golden ex rel. Bach v. Anders*, 324 F.3d 650, 652-54 (8th Cir. 2003); *Muskrat v. Deer Creek Pub. Schs.*, 715 F.3d 775, 786-87 (10th Cir. 2013); *T.W. ex rel. Wilson*

v. Sch. Bd. of Seminole Cty., 610 F.3d 588, 598-99 (11th Cir. 2010). These courts have persisted in doing so even in the wake of *Graham*'s directive that courts should apply the Fourth Amendment where it "provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct," 490 U.S. at 395. *See, e.g.*, *Johnson*, 239 F.3d at 252-53; *Gottlieb*, 272 F.3d at 171-72; *Meeker v. Edmundson*, 415 F.3d 317, 320-21 (4th Cir. 2005); *Domingo v. Kowalski*, 810 F.3d 403, 411-14 (6th Cir. 2016); *Golden*, 324 F.3d at 652-54; *Muskrat*, 715 F.3d at 791-92; *Neal ex rel. Neal v. Fulton Cty. Bd. of Educ.*, 229 F.3d 1069, 1074-76 (11th Cir. 2000).

In applying the Fourteenth Amendment to school excessive-force claims, these circuits apply a much more demanding standard: whether the force "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 power literally shocking to the conscience." *Hall*, 621 F.2d at 613 (citing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)); *accord Muskrat*, 715 F.3d at 787; *Garcia ex rel. Garcia v. Miera*, 817 F.2d 650, 655 & n.7 (10th Cir. 1987). The *Glick* analysis applied in these cases includes consideration of whether the school official's conduct was "a good faith effort to maintain or restore discipline," as opposed to a "malicious[] or sadistic[]" act "for the very purpose of causing harm." *Glick*, 481 F.2d at 1033; *accord Johnson*, 239 F.3d at 251-52; *Gottlieb*, 272 F.3d at 172-73; *Domingo*, 810 F.3d at 411, 414; *London v. Dirs. of DeWitt Pub. Schs.*, 194 F.3d 873, 876 (8th Cir. 1999); *see Neal*, 229 F.3d at 1075-76 & n.3.

These circuits evaluate school excessive-force claims under a substantive due process framework even in the context of a restriction of liberty that would properly be categorized as a "seizure." *See generally 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…."). For example, in *Johnson*, the Second Circuit applied a Fourteenth Amendment due process analysis to a student's claim that his gym teacher "grabbed [him] by the throat," "lifted him off the ground by his neck," "dragged him across the gym floor," "choked [the student] and slammed the back of [his] head against the bleachers four times," and then "rammed [the student's] head into a metal fuse box located on the gym wall and punched him in the face," all while "prevent[ing]" the student "from escaping by placing one of his arms across the boy's chest." 239 F.3d at 249. Despite the objective facts showing the teacher used force with intent to restrain the student, the court characterized the student's claim as implicating the "right to be free from the use of excessive force in the *non-seizure* … context," *id.* at 251 (emphasis added) (internal quotation marks omitted) (quoting *Rodriguez v. Phillips*, 66 F.3d 470, 476 (2d Cir. 1995)), and applied the *Glick* factors to evaluate whether the teacher's conduct "shock[ed] the conscience," *id.* at 251-52; *cf. id.* at 252 (noting that *Glick* was partially abrogated by *Graham*).

Similarly, in *T.W.*, the Eleventh Circuit evaluated a teacher's use of force against a student under the Fourteenth Amendment, even though the alleged force sought to "physically restrain[]" the student. *See* 610 F.3d at 592, 598-603. On one occasion, the teacher

"put [the student] on the floor with his face to the ground, straddled him so that her pelvic area was on top of his buttocks …, pulled his arms behind his back," and "told [him] that she would release him when he followed her commands." *Id.* at 595. On another, she "forced [him] to the floor," "pulled his right leg up against the back of his left leg," and held him there "for two to three minutes" until he calmed down. *Id.* On yet another occasion, she "pushed [the student's] arms down to prevent him from scratching" himself; "pulled [him] up from his chair" when he began to protest, and then "forced [him] against the table, held his arms behind his back, and placed her weight against his back to hold him in that position … for about three minutes" until he agreed to do his work; and ultimately "led [him] into [a] cool down room," "shut the door," and allegedly "twisted [his] arm and shoved him against [a] wall." *Id.* at 595-96.

The Fifth Circuit is an outlier. While it acknowledges that the Fourth Amendment applies to searches in the school context, it rejects the Seventh and Ninth Circuits' application of the Fourth Amendment to school excessive-force claims, based on its rule that "claims involving corporal punishment are generally analyzed under the Fourteenth Amendment." *T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 413 (5th Cir. 2021) (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995), *T.L.O.*, 469 U.S. at 336, and *Campbell v. McAlister*, 162 F.3d 94, 1998 WL 770706 (5th Cir. 1998) (unpublished)). And it defines "corporal punishment" exceptionally broadly, extending even to cases that do not involve "punishment" at all. *See* Pet. App. 23a-24a (characterizing Paley's efforts "to assert control over Jevon by restraining him with

the taser" as "corporal punishment" on the ground that Paley deployed his taser "for the pedagogical purpose of maintaining order," even if he was "not necessarily 'punishing' Jevon"). This expansive view of "corporal punishment"—extending beyond "punishment" itself to efforts to "assert control" over a student "by restraining him," *id.*—means that most cases involving force against a student will automatically be characterized as corporal punishment and placed in the Fourteenth Amendment bucket. Indeed, in granting qualified immunity on petitioners' Fourth Amendment claim against Paley for tasing Jevon, the court of appeals relied on its dicta in *Fee* that corporal punishment "does not constitute a [F]ourth [A]mendment search or seizure." *Id.* at 38a (alterations in original) (quoting *Fee v. Herndon*, 900 F.2d 804, 810 (5th Cir. 1990)).

But the Fifth Circuit does not follow the majority approach of analyzing school excessive-force claims for whether they shock the conscience under the Fourteenth Amendment. Instead, the Fifth Circuit also has a categorical bar against such substantive due process claims, based on its longstanding *Fee* rule prohibiting Fourteenth Amendment claims for corporal punishment, broadly defined. *See id.* at 21a-26a. Under this reasoning, students in the Fifth Circuit who have been subjected to excessive force by school officials have *no* constitutional recourse, even under the higher shocks-the-conscience standard, so long as *some* post hoc state remedy exists. *See Fee*, 900 F.2d at 808, 810 (providing that "injuries sustained incidentally to corporal punishment, irrespective of the severity of these injuries or the sensitivity of the stu-

dent, do not implicate the due process clause if the forum state affords adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions" (emphasis omitted)).

Thus, the Fifth Circuit has effectively shut down review of these school excessive-force claims under a Fourth Amendment standard, given its rule that "claims involving corporal punishment are generally analyzed under the Fourteenth Amendment," *T.O.*, 2 F.4th at 413, and its broad definition of corporal punishment. *Cf. Camreta v. Greene*, 563 U.S. 692, 705-06 (2011) (in qualified immunity cases, because "a court can enter judgment without ever ruling on the … constitutional claim," "standards of official conduct" may remain "permanently in limbo"). Indeed, the court of appeals expressed concern that permitting a Fourth Amendment claim under these circumstances would "'eviscerate [its] rule against … substantive due process claims' based on the same conduct." Pet. App. 38a (quoting *Flores v. Sch. Bd. of DeSoto Par.*, 116 F. App'x 504, 510 (5th Cir. 2004)). Besides getting the *Graham* analysis precisely backward by privileging the substantive due process claim over the "explicit textual source of constitutional protection against … physically intrusive governmental conduct," 490 U.S. at 395, that concern is likely to recur in every case involving force against a student.

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More than 20 years have passed since the circuits first divided on the proper constitutional standard to apply to school excessive-force claims. As a result, seven circuits apply a "shocks the conscience" test to

such claims, while two other circuits evaluate them for objective reasonableness. The circuits applying the Fourteenth Amendment standard have affirmed their approach even in the wake of *Graham*'s clear instruction to the contrary, entrenching the split and revealing the necessity of this Court's intervention.

II. The Fourth Amendment Should Govern Claims that School Officials Have Used Excessive Force Against Students in the Context of Seizures.

The question presented also warrants this Court's review because the majority rule conflicts with this Court's precedent.

1. As set forth above, *supra*, at 11-13, the Fourth Amendment governs "the activities of civil as well as criminal authorities," including school officials, who "act in furtherance of publicly mandated educational and disciplinary policies." *T.L.O.*, 469 U.S. at 335-36. In evaluating a claim by a student that a school official has used excessive force, the "analysis begins" by determining whether a "'seizure' of a free citizen" has occurred. *See Graham*, 490 U.S. at 394-95. If so, the claim "should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Id.* at 395.

This is why the Seventh and Ninth Circuits have concluded that the "Fourth Amendment right to be free from an unreasonable seizure 'extends to seizures by or at the direction of school officials.'" *Doe*, 334 F.3d at 909 (quoting *Hassan v. Lubbock Indep. Sch. Dist.*,

55 F.3d 1075, 1079 (5th Cir 1995)). This is true regardless of whether school teachers and administrators are "acting on behalf of the police" when they use force against a student. *Wallace*, 68 F.3d at 1013. These courts have recognized that "a school administrator performing an administrative function by disciplining [a student] and maintaining order in the school" can nonetheless fall "within the scope of the Fourth Amendment." *Doe*, 334 F.3d at 909; *see also Wallace*, 68 F.3d at 1013 ("This action of classroom control can be characterized as an administrative function designed to effectuate school policies and standards."). They have therefore rejected the notion, espoused by the circuits that apply the Fourteenth Amendment to these claims, that force that is used in a school disciplinary context somehow falls categorically outside the purview of the Fourth Amendment. *Cf. T.L.O.*, 469 U.S. at 335-36 (Fourth Amendment covers school officials who "act in furtherance of publicly mandated educational *and disciplinary* policies" (emphasis added)).

The circuits applying the Fourteenth Amendment to school excessive-force claims do so based on an erroneous premise: that any use of force against a student is properly characterized as corporal punishment and therefore must be treated as a substantive due process claim. But they are misconstruing *Graham*, which requires courts to first look to whether a "seizure" has occurred and, if so, to analyze the claim under the Fourth Amendment. 490 U.S. at 394-95. Many uses of excessive force against schoolchildren could be characterized as corporal punishment, but *Graham* teaches that the threshold and dispositive question for determining which constitutional right to

apply is whether force arises in the context of a seizure—meaning a use of physical force with intent to restrain, *see Torres*, 592 U.S. at 309. Thus, as the Seventh and Ninth Circuits have held, claims of school excessive force that *can* be evaluated as unreasonable seizures under the Fourth Amendment *must* be so analyzed. Only in a context in which "a school official … use[d] excessive force against a student without seizing or searching the student" might the claim be "more appropriately analyzed under the ... Fourteenth Amendment." *Doe*, 334 F.3d at 909.

That does not mean that the circuits applying the Fourth Amendment to school excessive-force cases fail to take into account the nature of the school context in assessing the reasonableness of the school official's conduct. As the Seventh Circuit stated in *Wallace*, "in the context of a public school, a teacher or administrator who seizes a student does so in violation of the Fourth Amendment only when the restriction of liberty is unreasonable under the circumstances then existing and apparent." 68 F.3d at 1014; *accord Doe*, 334 F.3d at 909; *see also Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015) ("[O]bjective reasonableness turns on the 'facts and circumstances of each particular case.'" (quoting *Graham*, 490 U.S. at 396)). This requires school officials to limit their use of force to "reasonable action[s]" to achieve the goals of "maintain[ing] order and discipline," and "afford[s] teachers and administrators an acceptable range of action for dealing with disruptive students while still protecting students against the potentially excessive use of state power." *Wallace*, 68 F.3d at 1014. Factors courts have considered in assessing the objective rea-

sonableness of the use of force against a student include whether the student posed a danger to anyone or was being disruptive in the classroom and whether the student was particularly vulnerable to the form of force used, *see Preschooler II*, 479 F.3d at 1180, as well as the "educational objectives" the official was trying to achieve, *see Doe*, 334 F.3d at 909.[4]

2. In addition to being inconsistent with this Court's precedent, the application of the Fourteenth Amendment in this context makes no sense.

It is atextual and incoherent to carve out "unreasonable seizures" involving excessive force alone from the purview of the Fourth Amendment in schools, subjecting only the most violent forms of seizures to the higher shocks-the-conscience standard while evaluating searches and nonviolent seizures for reasonableness. The circuits that treat school excessive-force claims as arising under the Fourteenth Amendment offer no justification for why the Fourth Amendment, which protects against unreasonable searches and seizures, should protect against unreasonable

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[4] The circuits applying the Fourth Amendment to school-related seizures incorporate the school context into the analysis in another way. With respect to "show of authority" seizures that do not involve force, *see Torres*, 592 U.S. at 322, these courts recognize that compulsory education by definition "deprives [students] of a level of freedom of mobility," *Wallace*, 68 F.3d at 1013. Because they are "deprived of liberty to some degree from the moment [they] enter[] school, … no one could suggest a constitutional infringement based on that basic deprivation." *Id.* Instead, a curtailment of liberty that exceeds the restrictions imposed by compulsory attendance and is outside the bounds of "reasonable action" is required to state a constitutional claim. *Id.* at 1013-14.

searches in schools, *see T.L.O.*, 469 U.S. at 335-37, but not unreasonable *seizures* in the same context. And several circuits on the majority side apply the Fourth Amendment to seizures that do not implicate a use of force. *See, e.g.*, *Shuman ex rel. Shertzer v. Penn Manor Sch. Dist.*, 422 F.3d 141, 147 (3d Cir. 2005); *Hassan*, 55 F.3d at 1079-80; *Doe v. Aberdeen Sch. Dist.*, 42 F.4th 883, 890-92 (8th Cir. 2022); *C.N. v. Willmar Pub. Schs., Indep. Sch. Dist. No. 347*, 591 F.3d 624, 632-34 (8th Cir. 2010). Yet they refuse to do so when excessive force is implicated.

These courts similarly do not explain why it is appropriate to require children who have been subjected to force at school to meet a standard comparable to the one that governs excessive force against convicted prisoners, which "ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm,'" *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) (quoting *Glick*, 481 F.2d at 1033). As set forth above, *supra*, at 16, the factors for evaluating a school excessive-force claim under the shocks-the-conscience standard similarly include "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Metzger ex rel. Metzger v. Osbeck*, 841 F.2d 518, 520 (3d Cir. 1988) (quoting *Glick*, 481 F.2d at 1033); *see also, e.g.*, *Hall*, 621 F.2d at 613; *Neal*, 229 F.3d at 1075-76 & n.3; *cf. Golden*, 324 F.3d at 654 (a school official's

conduct is not "conscience-shocking unless he maliciously and sadistically injured" a student).[5] Just as "the nature of the claims" of convicted prisoners and schoolchildren subjected to excessive force differ, *cf. Kingsley*, 576 U.S. at 400, so too should the analysis of those claims differ.

III. The Question Presented Is Exceptionally Important, and This Case Is an Excellent Vehicle for Resolving It.

This Court's intervention is needed to ensure that children are able to vindicate their constitutional rights and to learn in environments free from violence. Under the current state of the law, whether a student who is subjected to excessive force has a constitutional claim turns on which circuit the force occurs in. And given the significant disparity between the Fourth Amendment's "less stringent" objective reasonableness standard and the Fourteenth Amendment's shocks-the-conscience standard, which requires a showing of subjective malicious or sadistic intent, the standard applied is often "determinative."

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[5] The *Glick* factors applied by these circuits to school excessive-force claims are the same factors the Supreme Court found inapplicable to the plaintiff's excessive-force claim in *Graham*, a police brutality case. *See* 490 U.S. at 397 (holding that because the excessive-force claim involved a seizure, it arose under the Fourth Amendment and the court of appeals "erred in analyzing it under the four-part *Johnson v. Glick* test"); *see also Golden*, 324 F.3d at 653 n.2 (noting that although "[t]he vast majority of federal courts applied the *Glick* factors to all excessive-force claims against government officials" prior to *Graham*, "the Supreme Court has since rejected the blanket application of the *Glick* factors to excessive-force claims").

Gottlieb, 272 F.3d at 171. "Whatever the empirical correlations between 'malicious and sadistic' behavior and objective unreasonableness," inquiring into malice or sadism "puts in issue the subjective motivations of the individual officers, which … has no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment." *Graham*, 490 U.S. at 397. Indeed, in most traditional excessive-force cases involving law enforcement, an objectively unreasonable use of force will not involve malice or sadism. *See, e.g.*, *Tennessee v. Garner*, 471 U.S. 1, 21 (1985).

This is a recurring and increasingly pressing issue implicating the safety of thousands of schoolchildren. As the number of police officers in schools rises,[6] so too does the risk of potentially violent interactions between those officers and students, interactions that closely resemble violent seizures by law enforcement outside the school context. It is essential to recognize that the Fourth Amendment applies to these quintessential law enforcement encounters. The harms inherent in these violent seizures particularly affect disabled students like Jevon, who are disproportionately likely to be subjected to restraint and force in school:

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[6] *See, e.g.*, Nat'l Ctr. for Educ. Stats., *Digest of Education Statistics: Table 233.70 Percentage of Public Schools with Security Staff Present at Least Once a Week, and Percentage with Security Staff Routinely Carrying a Firearm, by Selected School Characteristics: 2005-06 Through 2017-18* (2019), https://nces.ed.gov/programs/digest/d19/tables/dt19_233.70.asp; Nat'l Ass'n of Sch. Res. Officers, *About NASRO*, https://www.nasro.org/main/about-nasro (last visited Feb. 18, 2024) ("School-based policing is the fastest-growing area of law enforcement.").

Although students with disabilities served by the Individuals with Disabilities Education Act represent only 14 percent of the nationwide K–12 student population, they account for 22 percent of school-related arrests and referrals to law enforcement, as well as 32 percent of students subjected to mechanical restraint and 81 percent of students subjected to physical restraint.[7]

The availability of Fourth Amendment excessive-force claims is especially important to schoolchildren in the Fifth Circuit. That court has effectively precluded any constitutional relief for public school students when school officials use force against them in an even arguably "disciplinary" context. *See Fee*, 900 F.2d at 808, 810. Under *Fee*, "no student injury inflicted under the banner of discipline—regardless of how shocking or severe—can be the result of arbitrary action as long as relevant state laws are in place" within the Fifth Circuit. *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 879-80 (5th Cir. 2000) (Wiener, J., specially concurring). This is so even for uses of force that have only the most tenuous connection to pedagogy and have no disciplinary or punitive purpose, such as the tasing at issue here. Without this Court's intervention, students in the Fifth Circuit will have no constitutional recourse if school officials subject them to unreasonable force, falling afoul of this

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[7] U.S. Dep't of Ed., Office for Civ. Rights, *A First Look: Students' Access to Educational Opportunities in U.S. Public Schools* 16, 20 (Nov. 2023), https://www2.ed.gov/about/offices/list/ocr/docs/crdc-educational-opportunities-report.pdf.

Court's reminder that 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).

This case is an excellent vehicle for resolving this important issue, because under a proper application of the Fourth Amendment reasonableness standard, petitioners would prevail. As this Court recently explained, "[t]he application of physical force to the body of a person with intent to restrain is a seizure…." *Torres*, 592 U.S. at 309; *see also Garner*, 471 U.S. at 7 (a seizure occurs "[w]henever an officer restrains the freedom of a person to walk away"). Here, it is undisputed that Paley tased Jevon to restrain him from leaving the school building—a quintessential Fourth Amendment seizure. *See* Pet. App. 23a-24a (acknowledging Paley's characterization of his own actions as an attempt "to assert control over Jevon by restraining him with [a] taser"); ROA.637 (No. 21-20671) (Paley explaining he was attempting to "physically restrain" Jevon); *see also id.* at 608 (respondents arguing that Paley's purpose in "physically restrain[ing] and tas[ing]" Jevon was "trying to stop [Jevon] from leaving the school building").

That seizure was objectively unreasonable "under the circumstances then existing and apparent." *Wallace*, 68 F.3d at 1014. Jevon was not posing a danger to anyone or being disruptive to the classroom environment, and he was particularly vulnerable to the force used given his significant intellectual and emotional disabilities. *See Preschooler II*, 479 F.3d at 1180. The tasing also was not intended to serve any "educational objectives." *Doe*, 334 F.3d at 909. Nor

has Paley argued to the contrary. Throughout this litigation, Paley's justification for tasing Jevon has been that he was motivated by "a desire to keep Jevon safe inside the school because of the vulnerabilities caused by his disability." *See* Pet. App. 18a. And Paley's own contemporaneous statements were that he tased Jevon because the latter "still tried to get out the door" and Paley "got tired of wrestling with [Jevon] so [he] popped him." *Id.* at 19a, 30a; Video 12:47:50, 13:10:25-13:10:31. Paley has never indicated, either at the time of the tasing or in the years of litigation since, that he reasonably perceived it to be necessary to restrain Jevon because Jevon's behavior caused danger to anyone or disruption to the educational environment—much less that it was necessary to tase Jevon in order to achieve such restraint and paradoxically keep Jevon "safe." Because the force used "bears no reasonable relation to the need," *Preschooler II*, 479 F.3d at 1180 (quoting *P.B. v. Koch*, 96 F.3d 1298, 1304 (9th Cir. 1996)), the use of a taser to keep Jevon inside the school building was objectively unreasonable, *see id.*; *see also Doe*, 334 F.3d at 909; *Wallace*, 68 F.3d at 1015.

That the court of appeals concluded that it was not "clearly established," under the second prong of the qualified immunity analysis, whether the Fourth Amendment applies to seizures in schools is no obstacle to this Court's review. This Court has granted certiorari to review the merits of underlying constitutional claims even where there was a question whether the clearly established prong would nonetheless entitle the defendant to qualified immunity. *See, e.g.*, *Nat'l Rifle Ass'n of Am. v. Vullo*, No. 22-842, 144 S. Ct. 375 (2023) (mem.); *Torres*, 592 U.S. at 325. That

is because this Court has "discretion to correct … errors at each step" of the qualified immunity analysis. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). This is consistent with this Court's treatment of constitutional rulings in qualified immunity cases as "designed … with this Court's permission, to promote clarity—and observance—of constitutional rules." *Camreta*, 563 U.S. at 705. Review is particularly warranted in this case, where it is unlikely that nonmonetary damages will be available to remedy the kinds of constitutional harms that arise in school excessive-force cases, since students will typically graduate before injunctive relief claims can be resolved. *See id.* at 706 n.5 (noting that "some kinds of constitutional questions do not often come up in" settings that might "break the repetitive cycle of qualified immunity defenses" whereby the underlying constitutional question is never decided).

Moreover, here, the uncertainty on which the court of appeals relied had only to do with the applicability of the Fourth Amendment to in-school seizures, not whether the underlying conduct implicated a clearly established constitutional harm. Should this Court grant review of this petition, the guidance it provides to the court of appeals regarding the applicability of the Fourth Amendment in the school context could well warrant vacatur of the decision below and a revisiting of the Fifth Circuit's prong-two analysis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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