No. 23-931

In the
Supreme Court of the United States

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

Petitioners,

v.

ELVIN PALEY,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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 to the United States Constitution. This case, however, does not properly preserve or present that split in circuits, because the Fifth Circuit uses a third standard altogether, premised on *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976), *aff'd*, 430 U.S. 651 (1977) and *Fee v. Herndon*, 900 F.2d 804 (5th Cir.), *cert. denied*, 498 U.S. 908 (1990). As such, this is not the proper case to resolve the Petitioners' hypothetical (to this case) split in circuits.

Contrary to Petitioners' suggestions, the Fifth Circuit does not broadly foreclose federal constitutional claims by students involving the use of excessive force. The Fifth Circuit has long held that a school official's use of excessive force *is* subject to constitutional scrutiny when force is used as an instructional technique, *see Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303 (5th Cir. 1987), as well as when a student is "the subject of a 'random, malicious, and unprovoked attack'…." *T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 414 (5th Cir. 2021)).

The Fifth Circuit's reluctance to constitutionalize excessive force claims is much narrower than Petitioners suggest and is limited only to claims arising out of disciplinary corporal punishment, and only where state law both prohibits and provides a remedy for the use of unreasonable force. Although other circuits may grapple with which constitutional provisions might apply in this context, the Fifth Circuit for decades has consistently rejected these types of claims

under federal law against teachers, regardless of the Amendment invoked.

The questions presented are:

1. Whether granting the Petition would violate long-standing principles of constitutional avoidance, given that this case does not properly present the split in circuits emphasized by the Petitioners, and any ruling on the merits would not change the outcome of J.W.'s claims in light of Officer Elvin Paley's continued entitlement to qualified immunity?

2. Whether excessive student discipline claims should be constitutionalized, even where state law adequately addresses the use of excessive force by school officials?

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INTRODUCTION

The notion that students who attend public schools within the Fifth Circuit have no legal recourse for excessive discipline-related injuries is a myth that has been perpetuated, and rejected, for almost thirty-five years:

> It is an overstatement to suggest that students can suffer extreme injury at the hands of educators without recourse. Admittedly, [] their choice of forum may be restricted to state courts. However, it is important to note that the [Fifth Circuit's] rule has been crafted to operate in the narrow context of student discipline administered within the public schools of states that authorize only reasonable discipline and, further, provide post-punishment relief for departures from its law.

Fee v. Herndon, 900 F.2d 804, 809 (5th Cir.), *cert. denied*, 498 U.S. 908 (1990). The rationale for restricting excessive student discipline claims to state courts is rooted in the fundamental tenet that the United States Constitution "deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. 327, 332 (1986). Simply put, the Fifth Circuit finds "no constitutional warrant to usurp classroom discipline where states [] have taken affirmative steps to protect their students from overzealous disciplinarians." *Fee*, 900 F.2d at 809.

Petitioners ultimately seek to invalidate the Fifth Circuit's position and replace it with one of two standards that the Fifth Circuit has never considered, but

accomplishing their goal will not change the outcome of this case. Since *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976) (en banc), *aff'd*, 430 U.S. 651 (1977), the Fifth Circuit has consistently rejected excessive discipline claims against school employees—regardless of the constitutional provisions invoked—if the forum state's laws affirmatively proscribe and remedy the use of unreasonable force. *Id.* at 913–20 (rejecting claims under Eighth and Fourteenth Amendments);[1] *Fee*, 900 F.2d at 809–10 (same; also finding that "the paddling of recalcitrant students does not constitute a [F]ourth [A]mendment search or seizure"); *see also, e.g., Flores v. Sch. Bd. of DeSoto Parish*, 116 Fed. App'x 504, 510–11 (5th Cir. 2004) (unpublished) (rejecting claims under Fourth and Fourteenth Amendments, and stating that "the momentary 'seizure' complained of in this case is not the type of detention or physical restraint normally associated with Fourth Amendment claims").

Petitioners, and other circuits, may disagree with the Fifth Circuit's decision not to have student discipline "shaped by the individual predilections of federal jurists rather than by state lawmakers and local officials," *Fee*, 900 F.2d at 809, but the courts below correctly applied well-settled law within the Fifth Cir-

[1] In *Ingraham*, the Fifth Circuit held that excessive student discipline does not implicate the Eighth Amendment's prohibition on cruel and unusual punishment and does not violate the Fourteenth Amendment's substantive or procedural due process protections. This Court granted certiorari as to the questions of cruel and unusual punishment and procedural due process—and affirmed the Fifth Circuit's rulings on those issues, 430 U.S. at 683—but denied review as to whether excessive discipline implicates substantive due process rights. *Id.* at 659 & n.12.

cuit when deciding that J.W. failed to allege a violation of any clearly established constitutional right, and therefore failed to overcome Officer Paley's assertion of qualified immunity. *See* Pet. App. 26a ("under *Fee*, claims for excessive corporal punishment are precluded if the forum state provides adequate post-punishment civil or criminal remedies. Texas provides such remedies.") and at 33a ("That divide in our authority is the antithesis of clearly established law supporting the existence of Fourth Amendment claims in this context. As a result, the defendant prevails on his qualified immunity defense.") And because the qualified immunity analysis is permanently tethered to the law in effect at the time of the conduct at issue, *see Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982), any subsequent decision to overturn that law cannot be used to retroactively deprive Paley of his entitlement to qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985) ("The District Court's conclusion that Mitchell is not immune because he gambled and lost on the resolution of this open question departs from the principles of *Harlow*. Such hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected.").

By nevertheless asking the Court to consider the merits of their claims, Petitioners ask the Court to violate fundamental principles of constitutional jurisprudence. This Court has long-recognized the rule that courts should avoid deciding "principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *Webster v. Reprod. Health Svcs.*, 492 U.S. 490, 507 (1989). In particular, courts should not decide constitutional issues unless they are "unavoidable" or "absolutely necessary" to the outcome of a case. *Spector Motor Svc. v. McLaughlin*, 323

U.S. 101, 105 (1944); *Burton v. United States*, 196 U.S. 283, 294 (1904). These canons of constitutional avoidance and judicial restraint apply in qualified immunity cases. *See Pearson v. Callahan*, 555 U.S. 223, 241 (2009) (requiring courts to first decide whether the plaintiff has alleged the violation of a constitutional right before deciding whether that right was clearly established "departs from the general rule of constitutional avoidance and runs counter to the older, wiser judicial counsel not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.") (discussing *Saucier v. Katz*, 533 U.S. 194 (2001)) (internal citations and quotations omitted); *but see Camreta v. Greene*, 563 U.S. 692, 705–09 (2011) (stating that, in certain circumstances, the "regular policy of avoidance sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo").[2]

Here, deciding whether or to what extent excessive corporal punishment violates the Constitution – and under which Amendment – is neither unavoidable nor absolutely necessary because, no matter what the Court decides, Paley – the only party still at issue for allegedly violating J.W.'s constitutional rights – will

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[2] In *Camreta*, government officials appealed the Ninth Circuit's ruling that they violated the Constitution by interviewing a girl at school about sexual abuse allegations without first obtaining a warrant or parental consent, even though they prevailed on their qualified immunity defense because the constitutional right was not clearly established. 563 U.S. at 697–98. After discussing scenarios in which it might be appropriate to "avoid avoidance" in favor of "the development of constitutional precedent," the Court ultimately vacated, on mootness grounds, the Ninth Circuit's decision relating to the merits of the plaintiff's Fourth Amendment claim. *Id.* at 710–14.

still be entitled to qualified immunity under then-existing Fifth Circuit law, and the outcome of this case will not change. Granting the Petition would therefore run counter to the "older, wiser" doctrines of constitutional avoidance and judicial restraint. *See Camreta*, 563 U.S. at 714 (Scalia, J., concurring) ("The parties have not asked us to [end the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity], but I would be willing to consider it in the appropriate case."); *id.* at 729–30 (Kennedy, J., joined by Thomas, J., dissenting) ("The Court should not superintend the judicial decisionmaking process in qualified immunity cases under special rules, lest it make the judicial process more complex for civil rights suits than for other litigation. It follows, however, that the Court should provide no special permission to reach the merits. If qualified immunity cases were treated like other cases raising constitutional questions, settled principles of constitutional avoidance would apply.").

Even if this case falls within the narrow category of situations that might justify "avoiding avoidance," the tension between the Petition and traditional constitutional principles does not end there. The Constitution "does not purport to supplant traditional tort law." *Daniels*, 474 U.S. at 332. States like Texas, Louisiana, and Mississippi "do[] not allow teachers to abuse students with impunity and provide[] civil and criminal relief against educators who breach statutory and common law standards of misconduct." *See Fee*, 900 F.2d at 809. In other words, these "states that affirmatively proscribe and remedy mistreatment of students by educators do not, by definition, act 'arbitrarily,' a necessary predicate for substantive

due process relief." *Id.* at 808. The Fifth Circuit's position that it would therefore be a "misuse of [its] judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks," *Ingraham*, 525 F.2d at 917, is consistent with this Court's historic reluctance to expand amorphous concepts such as substantive due process. *See, e.g., Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841 (1998); *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 128–29 (1992).

Although excessive student discipline should neither be tolerated nor condoned, the Fifth Circuit has appropriately recognized that "the Constitution is not a criminal or civil code to be invoked invariably for the crimes or torts of state educators who act in contravention of the very laws designed to thwart abusive disciplinarians." *Fee*, 900 F.2d at 808. The Court usually declines invitations to constitutionalize state law tort claims, particularly when, as here, the relationship between the parties is primarily governed at the state or local level:

> The reasoning in those cases [rejecting the imposition of constitutional duties analogous to those traditionally imposed by state tort law] applies with special force to claims asserted against public employers because state law, rather than the Federal Constitution, generally governs the substance of the employment relationship . . . Decisions concerning the [administration of government programs] involve a host of policy choices that must be made by locally elected representatives, rather than by

> federal judges []. The Due Process Clause is not a guarantee against incorrect or ill-advised personnel decisions. Nor does it guarantee municipal employees a workplace that is free of unreasonable risks of harm.

Collins, 503 U.S. at 128–29 (internal citations and quotations omitted). This case warrants the same level of deference to state and local officials. *Compare id. with Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999) ("[C]ourts should refrain from second-guessing the disciplinary decisions made by school administrators.") *and Epperson v. State of Ark.*, 393 U.S. 97, 104 (1968) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."); *see also Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools . . ..").

The Court should deny the Petition.

STATEMENT OF THE CASE

This case arises in part from allegations of excessive corporal punishment, which, in the Fifth Circuit, implicate narrow legal standards regarding the applicability of federal constitutional protections. The courts below relied on these well-established legal

principles in dismissing Petitioners' claims against Officer Paley based on qualified immunity.

I. Factual Background

In November 2016, J.W. was a 17-year-old special education student at Mayde Creek High School, who classified for special education as emotionally disturbed and as intellectually disabled. Pet. App. 2a. J.W. is very large (the police report lists him as 6'2" and 250 pounds). *Id.*

On the day of the incident, J.W. and another student had finished their assignment and were playing a card game. Pet. App. 3a. J.W. became angry at the other student, punched him in the chest, and stormed out of the classroom. *Id.* The teacher alerted an assistant principal by email that J.W. had left class and was on the loose in the school. Pet. App. 41a.

J.W. went to a "chill out" classroom that he used to cool down, but when he got there another student was already in the room, which made him even more frustrated. Pet. App. 3a. J.W. grabbed a student desk and threw it across the room. *Id.* The PASS teacher tried unsuccessfully to calm J.W. down, but he kicked the door and walked down the hallway. Pet. App. 3a, 42a. J.W. finally stopped in a doorway leading outside. *Id.*

Several staff members worked to keep J.W. inside the school. Pet. App. 3a, 42a-43a. Katy ISD officials involved felt that it was very important to keep J.W. inside the school building, so that he would not get injured if he left the building. Pet. App. 43a. Katy ISD

Officer Elvin Paley, who had heard the call for security assistance over the radio, arrived shortly thereafter. Pet. App. 32a, 43a.

J.W. continued to pace in front of the door, "looking agitated and occasionally raising his voice." Pet. App. 3a-4a, 43a. A security guard blocked the door, attempting to orally de-escalate the situation. Pet. App. 4a. J.W. became more agitated and responded with profanities. Pet. App. 4a. J.W. then tried to open the outside door, and a struggle ensued to try to keep J.W. inside the building. *Id.*

Officer Paley then moved in and attempted to physically restrain J.W. in the doorway, to keep him from leaving the building. Pet. App. 4a, 43a. Paley instructed J.W. to "calm down" several times, and warned J.W. that he was going to have to tase him. Pet. App. 4a. The security guard and a female resource officer struggled to hold J.W. and prevent him from leaving the building. Pet. App. 4a. Officer Paley told the others to let J.W. go, and as he tried to exit the building Officer Paley employed his taser. *Id.* After J.W. screamed and fell to his knees, Paley used the "drive stun" method and held the taser to J.W.'s body. Pet. App. 4a, 44a. The district court noted that Paley testified that he used the drive stun method because the first time did not have enough effect. Pet. App. 45a. J.W. did vomit and defecate on himself. Pet. App. 5a. Officer Paley commanded J.W. to put his hands behind his back, and another officer handcuffed him. *Id.*

Paley called for emergency medical services and had school officials call the school nurse. Pet. App. 5a,

45a. The nurse treated J.W. *Id.* EMS arrived approximately 15 minutes after the tasing. Pet. App. 46a. School officials were eventually able to reach J.W.'s mother (whose phone was not accepting new messages, and whose emergency contact number did not work). *Id.* After this incident, J.W.'s mother understandably kept him home from school for a period of time. Pet. App. 5a. In a separate case brought by the Petitioners primarily under the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, *et seq.,* the district court found that "the district sought to address J.W.'s absenteeism but was limited by the lack of responses from Ms. Washington and her failure to get the district information from J.W.'s outside health care providers." *Washington ex rel. J.W. v. Katy Indep. Sch. Dist.*, 2022 WL 61160, at *7 (S.D. Tex. Jan. 6, 2022).

II. Relevant Procedural History

Petitioner Lori Washington, on behalf of her son J.W., brought suit against the Katy Independent School District and Respondent KISD Officer Elvin Paley, over the incident that occurred at Mayde Creek High School on or about November 30, 2016. As a result of that incident, Petitioners filed suit on June 5, 2018, asserting numerous claims against the District and Paley. Of relevance to this appeal, Petitioners asserted claims under the Fourth and Fourteenth Amendments to the United States Constitution, based on an excessive force theory arising out of Paley's use of the taser on J.W. Pet. App. 48a-49a.

Katy ISD and Paley moved for summary judgment on all claims. Pet. App. 40a. The district court granted the motion as to all claims except the Fourth

Amendment excessive force claim against Officer Paley. Pet. App. 41a, 64a-79a. The district court specifically noted that "*Fee* does not foreclose Ms. Washington's § 1983 excessive force claim against Officer Paley." Pet. App. 66a. The district court granted summary judgment under *Fee* to the District and Officer Paley on the Fourteenth Amendment substantive and procedural due process claims, ruling that "injuries sustained incidentally to corporal punishment, irrespective of the severity of these injuries or the sensitivity of the student, 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." Pet. App. 81a (quoting *Campbell v. McAlister*, 162 F.3d 94, 1998 WL 770706, at *5 (5th Cir. 1998) (unpublished) and *Fee,* 900 F.2d at 809).

Paley took an interlocutory appeal of the denial of his qualified immunity. A panel of the Fifth Circuit reversed the denial of Paley's qualified immunity on the Fourth Amendment excessive force claim, and rendered a decision in his favor. Pet. App. 32a. The Court ruled that "[t]he upshot is that our law is, at best for Paley, inconsistent on whether a student has a Fourth Amendment right to be free of excessive disciplinary force applied by school officials. That does not make for either the 'controlling authority' or 'consensus of cases of persuasive authority' needed to show a right is clearly established." Pet. App. 39a (citation omitted). Petitioners sought panel and *en banc* review of that decision, but the Court denied those requests. Pet. App. 90a. Petitioners did not appeal the Fifth Circuit's ruling on the Fourth Amendment issue at that time

Since the resolution of the qualified immunity appeal effectively rendered the original summary judgment order final as to the claims on which Judge Rosenthal had *granted* summary judgment, the Petitioners filed a timely Notice of Appeal. The Fifth Circuit affirmed the district court's ruling on the Fourteenth Amendment substantive due process claim, again primarily under *Fee*. Pet. App. 2a. The Court rejected the Petitioners' argument that the tasing incident could not be properly characterized as "corporal punishment," noting that this Court has defined "corporal punishment" as the use of "reasonable but not excessive force to discipline a child" that a teacher or administrator "reasonably believes to be necessary for the (the child's) proper control, training, or education." Pet. App. 21a-22a (quoting *Ingraham v. Wright*, 430 U.S. 651, 661 (1977)). The Court rejected the argument that corporal punishment is limited to "punishment" or "discipline," agreeing with Officer Paley's focus on the term "control" from *Wright*, and holding that he engaged in corporal punishment by "attempting to assert control over [J.W.] by restraining him with the taser." Pet. App. 23a. The Court held that Paley was entitled to summary judgment on the Fourteenth Amendment claim:

> In each case this restraint was used for a legitimate pedagogical purpose—either transporting a disruptive student to the principal's office to limit disruption or keeping a disruptive student inside the school due to safety concerns. While the force used in each case may have been excessive, the purpose of such force was "rationally related to legitimate school interests in maintaining order."

Pet App. 25a (quoting *Campbell,* 1998 WL 770706 at *5). Petitioners again sought panel and *en banc* rehearing, and both requests were again denied. Pet. App. 88a-89a.

REASONS FOR DENYING THE PETITION

I. Long-standing principles of Constitutional Avoidance and Judicial Restraint prohibit consideration of Petitioners' claims, particularly given that this case does not properly present the split in circuits emphasized by Petitioners.

Resolving the constitutional questions raised in the Petition will not alter the outcome of this case, because J.W. only asserted constitutional claims against Officer Paley, and Paley remains entitled to qualified immunity under the Fifth Circuit law in effect as of November 30, 2016. Petitioners seek to circumvent well-settled rules of constitutional avoidance and judicial restraint by raising a circuit split that does not exist in this case. But the faithful application of traditional constitutional principles is both warranted and appropriate. The Petition should be denied.

A. The test used by the Fifth Circuit to resolve this case is not either of the two standards that the Petitioners are urging this Court to choose between.

The split in circuits that the Petitioners urge this Court to resolve is not a split that involves this case specifically, or the Fifth Circuit generally, since the Fifth Circuit uses a third test altogether. The Fifth Circuit has not formally had the opportunity in this case to determine whether the Fourth or the Four-

teenth Amendment would apply to a claim of excessive force by a student against school officials, since the Fifth Circuit has for over four decades followed a third test that rejects *constitutional* claims for excessive discipline claims against teachers, if the relevant *state* laws affirmatively proscribe and remedy the use of unreasonable force. *Ingraham*, 525 F.2d at 913–20 (rejecting claims under Eighth and Fourteenth Amendments); *Fee*, 900 F.2d at 809–10 (finding that "the paddling of recalcitrant students does not constitute a [F]ourth [A]mendment search or seizure").

While the Petitioners spend some time attacking the Fifth Circuit's test, they do so only vaguely and generally, and they instead focus primarily on the split between the two circuits using the Fourth Amendment (Seventh and Ninth Circuits), and the seven circuits using the Fourteenth Amendment (Second, Third, Fourth, Sixth, Eighth, Tenth and Eleventh Circuits), to address the use of excessive force by school officials against students. *See* Petition, 14-16. This case, however, is an inappropriate vehicle for resolving a split that does not exist in this case. *See Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 5 (2023) (dismissing appeal as moot, despite a "circuit split [that] is very much alive", after Petitioner voluntarily dismissed underlying lawsuit, such that circuit split was no longer relevant to that particular case).

J.W.'s two briefs in the Fifth Circuit never clearly presented that court with the opportunity to consider whether the Fourth or the Fourteenth Amendments should apply to claims by public school students alleging excessive force by school officials. *See Neely v. Martin K. Eby Const. Co.*, 386 U.S. 317, 330 (1967)

(“Under these circumstances, we see no cause for deviating from our normal policy of not considering issues which have not been presented to the Court of Appeals….”) The first brief simply argued that the tasing incident was an unreasonable use of force under the Fourth Amendment, and the second brief argued that Plaintiffs had a viable substantive due process claim because the tasing was not “corporal punishment”, and called generally for *Fee* to be overturned. But neither brief asked the Fifth Circuit to decide between the Fourth or the Fourteenth Amendments as a vehicle for bringing claims against school officials alleging excessive force. As this Court noted in a previous case:

> Given the unique features of VMI, we do not know how the Fourth Circuit would resolve a case involving prayer at a state university, or, indeed, how the Sixth or Seventh Circuits would analyze the supper prayer at issue in this case. Thus, while the importance of this case might have justified a decision to grant, it is not accurate to suggest that a conflict of authority would have mandated such a decision.

Bunting v. Mellen, 541 U.S. 1019, 1021–22 (2004) (Stevens, J., respecting denial of certiorari).

Likewise here, this Court does not know how the Fifth Circuit would come down on the split between the Fourth and Fourteenth Amendments, if forced to choose between those two options. As a practical matter, if the Court were to grant review in this case, and the school district was to attempt to defend the Fifth Circuit’s opinion and its position on this issue, the

school district would not be taking a position on the issue that the Petitioners clearly want this court to resolve. To the extent Petitioners argue that the procedural posture of this case and the Fifth Circuit's reliance on *Fee* prevented them (or discouraged them) from arguing the distinction between the Fourth and Fourteenth Amendments, that is the point: this is the wrong case to resolve that split.

B. This Court has not clearly established the open question of whether excessive corporal punishment violates the Constitution.

Although Petitioners advocate for J.W.'s situation to be analyzed under the Fourth Amendment's "objective reasonableness" standard, they admit that a significant majority of circuits have found that the Fourteenth Amendment's "shocks-the-conscience" standard is the appropriate test for evaluating excessive force claims brought by students. *See* Petition, 2, 14-16. The overall level of ambiguity in this area of the law is the very antithesis of "clearly established." When this Court spoke to the application of the Fourth Amendment to corporal punishment claims in 1977, it seemed to downplay that Amendment. *See Ingraham*, 430 U.S. at 673 n.42 ("[T]he principal concern of [the Fourth] Amendment's prohibition against unreasonable searches and seizures is with intrusions on privacy in the course of criminal investigations. Petitioners do not contend that the Fourth Amendment applies, according to its terms, to corporal punishment in public school.") (internal citations omitted); *id at* 679 n.47 ("We have no occasion in this case [] to decide whether or under what circumstances corporal punishment of a public school child may give

rise to an independent federal cause of action to vindicate substantive rights under the Due Process Clause."). This lack of guidance is significant to the question of qualified immunity.

Although as Petitioners note, the Court held in *Graham v. Connor*, 490 U.S. 386 (1989), that "*all* claims that law enforcement officers have used excessive force [] in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its reasonableness standard," *id.* at 395, the courts of appeal disagree on whether or how that ruling impacts excessive discipline claims against school officials. *See* Petition 14–16. This confusion is not surprising. Over twenty-five years after *Graham*, this Court cautioned that *Graham* does not constitute "clearly established" law as to every possible scenario in which officers may be required to use excessive force. *See City & Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 613-14 (2015) ("*Graham* holds only that the objective reasonableness test applies to excessive-force claims under the Fourth Amendment. That is far too general a proposition to control this case.") (internal citations and quotations omitted).

The fact that this is a case involving students and set in a school also complicates the application of *Graham*. While students, generally, do not shed their constitutional rights at the schoolhouse gate, *see Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 506 (1969), this Court routinely acknowledges that their rights are limited to those appropriate for students in the public school setting. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655–56 (1995). So, when and to what extent do constitutional protections apply to students once they walk through that schoolhouse

gate? The answer to this highly-debated question is a treasured favorite of many lawyers: "It depends."

When this Court first held that the Fourth Amendment applies to searches conducted in public schools, it simultaneously eliminated the traditional warrant and probable cause requirements, citing the unique educational environment that justified a more lenient standard:

> Just as we have in other cases dispensed with the warrant requirement when the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search, we hold today that school officials need not obtain a warrant before searching a student who is under their authority. . . [And] the accommodation of the privacy interests of school children with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause . . . Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.

New Jersey v. T.L.O., 469 U.S. 325, 340-41 (1985) (internal citations and quotations omitted);[3] *see Vernonia Sch. Dist. 47J*, 515 U.S. at 655–56 (emphasizing that "the nature of [school officials'] power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults," and holding that "Fourth Amendment rights, no less than First and Fourteenth Amendment rights,

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[3] The claims in *T.L.O.* did not involve allegations of excessive force, so the Court did not squarely address that issue.

are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children").

In evaluating the Fourth Amendment claims at issue in *T.L.O.*, Justice Powell, in particular, stressed the importance of limiting constitutional protections in the public school setting:

> The primary duty of school officials and teachers, as the Court states, is the education and training of young people. A State has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern. For me, it would be unreasonable and at odds with history to argue that the full panoply of constitutional rules applies with the same force and effect in the schoolhouse as it does in the enforcement of criminal laws.

T.L.O., 469 U.S. at 350 (Powell, J., joined by O'Connor, J., concurring).

Although *T.L.O.* rejected arguments that school officials act solely *in loco parentis* when dealing with students, such that the Fourth Amendment would not apply in public schools, *id.* at 339–40, the Court has relied on the doctrine in other contexts to significantly curtail students' constitutional rights. For example, in *Mahanoy Area School District v. B.L.*, 594 U.S. 180

(2021), the Court stressed the doctrine's significance in student free speech cases:

> [W]e have also made clear that courts must apply the First Amendment "in light of the special characteristics of the school environment." One such characteristic, which we have stressed, is the fact that schools at times stand *in loco parentis*, *i.e.,* in the place of parents.

Id. at 187 (internal citations and quotations omitted); *see also id.* at 216 (the doctrine of *in loco parentis* "freed schools from the constraints the Fourteenth Amendment placed on other government actors. '[N]o one doubted the government's ability to educate and discipline children as private schools did," including "through strict discipline ... for behavior the school considered disrespectful or wrong'.") (quoting *Morse v. Frederick*, 551 U.S. 393, 420 (2007)) (Thomas, J., concurring). *See also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (allowing educators to exercise editorial control over student speech in school-sponsored activities "is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683–84 (1986) (discussing cases that "recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech," and finding that the "determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board" rather than the federal courts).

The Court has also recognized that the *in loco parentis* doctrine generally encompasses student discipline, *Mahanoy*, 594 U.S. at 189-90, though members of the Court have disagreed on the extent to which it should be applied. *See*, *e.g.*, *Safford Unified Sch. Dist. v. Redding*, 557 U.S. 364, 382–83 (2009) (Thomas, J., concurring in part and dissenting in part) ("The majority imposes a vague and amorphous standard on school administrators. It also grants judges sweeping authority to second-guess the measures that these officials take to maintain discipline in their schools and ensure the health and safety of the students in their charge. This deep intrusion into the administration of public schools exemplifies why the Court should return to the common-law doctrine of *in loco parentis* under which the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order.") (internal citations and quotations omitted).

With respect to corporal punishment in public schools, this Court has held that students are *not* entitled to procedural due process under the Fourteenth Amendment before corporal punishment is imposed, and that excessive corporal punishment does *not* implicate the Eighth Amendment's prohibition on cruel and unusual punishment. *Ingraham*, 430 U.S. at 683. Setting aside the conflicting opinions across the "deeply divided" federal courts of appeal, this Court's rulings in *Ingraham* likely begin and end the conversation of what constituted "clearly established" law in this particular context at the time Officer Paley acted.

Unfortunately, cases involving the applicability of other constitutional rights in the public school setting

provide little to no guidance on whether or to what extent courts should recognize excessive force claims under the Fourth and/or Fourteenth Amendments. For example, does the doctrine of *in loco parentis* diminish a student's substantive rights with respect to excessive corporal punishment? If so, to what extent? Also, to what degree does a school official's use of excessive force deprive a student of a constitutionally-protected liberty or privacy interest, given that it occurs in a school environment where students' liberty and privacy are already curtailed and are otherwise distinguishable from rights that may exist beyond the schoolhouse gate? And if state and local officials have already developed legal frameworks for determining whether a specific use of force was reasonable under the circumstances, and for remedying the use of unreasonable force, what, if any, is the proper role of the federal courts in deciding (or second-guessing) these issues?

This Court has not directly addressed these questions, and the federal courts of appeal disagree on how they should be answered. "Where no controlling authority specifically prohibits a defendant's conduct, and when the federal circuit courts are split on the issue, the law cannot be said to be clearly established." *Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011), *cert. denied*, 567 U.S. 905 (2012) (citing *Wilson v. Layne*, 526 U.S. 603, 617–18 (1999)); *see also Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) ("The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established."); *Redding*, 557 U.S. at 378–79 ("*T.L.O.* directed school officials to limit the intrusiveness of a search, 'in light of the age

and sex of the student and the nature of the infraction' . . . But we realize that the lower courts have reached divergent conclusions regarding how the *T.L.O.* standard applies to [strip] searches"). As this Court has explained:

> [I]f judges thus disagree on a constitutional question, it is unfair to subject [governing officials] to money damages for picking the losing side of the controversy.

Wilson, 526 U.S. at 618.

It would be particularly unfair to subject Officer Paley to liability when this Court has never addressed whether excessive corporal punishment implicates substantive due process or the Fourth Amendment; when the Fifth Circuit, as a whole, has for nearly 50 years remained steadfast in its belief that excessive student discipline does not violate the Constitution; and when the qualified immunity analysis in excessive force cases, in general, is highly particularized and fact-specific. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) ("Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue.") (internal citations and quotations omitted).

So, the question then becomes: what, if anything, should the Court do with Petitioners' claims?

C. Deciding the constitutionality of excessive corporal punishment is neither unavoidable nor absolutely necessary to the outcome of this case and should therefore be avoided.

After detailing the open questions of law relative to excessive discipline claims, the temptation to decide them once and for all may be overwhelming. But this case is not the proper vehicle for that endeavor. Because Officer Paley remains entitled to qualified immunity, no matter the ultimate outcome of this case, deciding the merits of J.W.'s claims would "depart[] from the general rule of constitutional avoidance and run[] counter to the older, wiser judicial counsel not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Pearson*, 555 U.S. at 241 (internal citations and quotations omitted); *see also Spector Motor Svc.*, 323 U.S. at 105 ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality [] unless such adjudication is unavoidable."); *Burton*, 196 U.S. at 294 ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.").

Fidelity to these time-honored principles is warranted, notwithstanding the sensitive nature of J.W.'s claims. As this Court has previously noted, there are numerous avenues for resolving constitutional questions that do not betray foundational rules of constitutional jurisprudence:

> [T]he development of constitutional law is by no means entirely dependent on cases in which the defendant may seek qualified immunity. Most

> of the constitutional issues that are presented in § 1983 damages actions [] also arise in cases in which that defense is not available . . ..

Pearson, 555 U.S. at 242; *see also Camreta*, 563 U.S. at 727–28 (discussing constitutional cases in which qualified immunity does not apply). To the extent the Court is inclined to resolve the constitutionality of excessive student discipline, it should do so in a case where its ruling will have an impact on the claims at issue. In the meantime, students within the Fifth Circuit will continue to be protected from unreasonable student discipline under applicable state law, and they will continue to have the opportunity to seek legal recourse against overzealous disciplinarians, albeit in state civil and criminal courts.[4]

The Petition should be denied.

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[4] Although Petitioners continue to suggest that "corporal punishment" must consist of "discipline," Petition, 11, or "punishment," *id*. at 18, they completely ignore what the Court below acknowledged: that in *Ingraham* this Court defined corporal punishment to include "controlling" a student: "[t]he basic doctrine has not changed. The prevalent rule in this country today privileges such force as a teacher or administrator 'reasonably believes to be necessary for (the child's) proper control, training, or education.'" *Ingraham v. Wright*, 430 U.S. 651, 661 (1977) (quoting Restatement (Second) of Torts s 147(2) (1965); see id., s 153(2)); *see also* Pet. App. 23a-24a. And as the district court noted, Petitioners themselves conceded in their amended complaint that "restraints may be a form of discipline." Pet. App. 82a.

II. The Fifth Circuit's test for analyzing excessive corporal punishment claims is consistent with this Court's historic reluctance to constitutionalize state law tort claims.

Great efforts have been made to cast the Fifth Circuit's handling of excessive student discipline claims as absurd or clearly erroneous, but the court's approach is not devoid of legal or historical support. As detailed above, the Constitution "does not purport to supplant traditional tort law," and the Fourteenth Amendment was never intended to be a "font of tort law to be superimposed upon whatever systems may already be administered by the States." *Daniels*, 474 U.S. at 332; *see also Davis*, 424 U.S. at 701 ("We have noted the constitutional shoals that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law; A fortiori, the procedural guarantees of the Due Process Clause cannot be the source for such law."). These core constitutional principles are what shaped the Fifth Circuit's test.

In *Ingraham*, the Fifth Circuit initially considered whether allowing corporal punishment in schools is arbitrary, capricious, or unrelated to legitimate educational goals. After deciding that it is not, the court "refused to look at each individual instance of punishment to determine if it has been administered arbitrarily or capriciously." 525 F.2d at 917. Why?

> We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have

> been a more appropriate punishment than ten licks.

Id. And, even though one of the students alleged that two assistant principals "held [him] in a prone position while [the principal] administered twenty blows," causing him to "suffer[] a painful bruise that required the prescription of cold compresses, a laxative, sleeping and pain-killing pills and ten days of rest at home," *id.* at 911, the court declined to find a substantive due process violation:

> We emphasize that it is not this court's duty to judge the wisdom of particular school regulations governing matters of internal discipline. Only if the regulation bears no reasonable relation to the legitimate end of maintaining an atmosphere conducive to learning can it be held to violate the substantive provision of the due process laws.

Id. at 917.

To be clear, the court did not condone state-sanctioned child abuse—it simply disagreed with the plaintiffs' assertion that allegations of excessive corporal punishment implicate the Constitution:

> We do not mean to imply by our holding that we condone child abuse, either in home or the schools. We abhor any exercise of discipline which could result in serious or permanent injury to the child. Indeed, if the force used by defendant teachers in disciplining plaintiff was as severe as plaintiffs allege, a Florida state court could find defendants civilly and crimi-

> nally liable . . . The basis of such actions is, however, tort and criminal law, not federal constitutional law . . .
>
> In short, scrutiny of the propriety of physical force used by a school teacher upon his or her student should be the function of a state court, with its particular expertise in tort and criminal law questions. . ..

Id. at 915. As previously noted, this Court affirmed the Fifth Circuit's rejection of the plaintiffs' Eighth Amendment and Fourteenth Amendment procedural due process claims but declined to review the substantive due process question. *Ingraham*, 430 U.S. at 683.

Several years later, the Fifth Circuit reaffirmed *Ingraham* and its progeny in *Fee*:

> Our precedents dictate that injuries sustained incidentally to corporal punishment, irrespective of the severity of these injuries or the sensitivity of the student, 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. The rationale, quite simply, is that such states have provided all the process constitutionally due. Specifically, states that affirmatively proscribe and remedy mistreatment of students by educators do not, by definition, act "arbitrarily," a necessary predicate for substantive due process relief.

Fee, 900 F.2d at 808; *see also id.* at 809 ("Texas does not allow teachers to abuse students with impunity and provides civil and criminal relief against educators who breach statutory and common law standards

of conduct.").[5] The court reiterated its reluctance to constitutionalize state law tort claims, as well as its continued unwillingness to intrude upon areas traditionally governed by state and local officials:

> [T]he Constitution is not a criminal or civil code to be invoked invariably for the crimes or torts of state educators who act in contravention of the very laws designed to thwart abusive disciplinarians.
>
> . . .
>
> This circuit has consistently avoided any inquiry into whether five, ten, or twenty swats invokes the [F]ourteenth [A]mendment. Thus, we have avoided having student discipline, a matter of public policy, shaped by the individual predilections of federal jurists rather than by state lawmakers and local officials. We find no constitutional warrant to usurp classroom discipline where states, like Texas, have taken affirmative steps to protect their students from overzealous disciplinarians.

Id. at 808–09 (internal citations omitted).

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[5] TEX. EDUC. CODE § 22.0511(a) (providing that professional immunity does not apply to "excessive force in the discipline of students or negligence resulting in bodily injury to students"); TEX. PENAL CODE § 9.62 (authorizing educators to use only force that "the actor reasonably believes [] is necessary to . . . maintain discipline in a group"); *id at* §§ 22.01 & 22.04 (defining criminal offenses of assault and injury to a child).

The court also directly addressed—and rejected—the criticism that its rulings made students vulnerable to extreme abuse and deprived them of their chosen remedy:

> The Fees admonish this circuit for adhering to an "overly rigid" rule, one that allegedly does not contemplate egregious cases of student discipline, such as physical disfigurement or, as here, severe emotional injury. They underscore their displeasure with *Cunningham* and other precedent by suggesting that teachers could mutilate or torture students in the pursuit of discipline without federal constitutional relief.
>
> We reject these emotionally charged criticisms as misplaced. The plaintiffs do not, and in fact cannot, claim that they lack adequate post-punishment remedies at the state level, under the facts as alleged in this case. The fact that they perceive federal damage recovery to be potentially more generous . . . is irrelevant to our inquiry and does not make state relief inadequate.
>
> It is an overstatement to suggest that students can suffer extreme injury at the hands of educators without recourse. Admittedly, under *Cunningham* their choice of forum may be restricted to state courts. However, it is important to note that the *Cunningham* rule has been crafted to operate in the narrow context of student discipline administered within the public schools of states that authorize only reasonable discipline and, further, provide post-punishment relief for departures from its law. The

> inquiry, predictably, would differ in states that authorize neither.

Id. at 809. And, the court rejected the plaintiffs' attempt to undermine its precedent with cases involving constitutional rights applicable in a prison setting, stating: "[T]he *Ingraham* Court has already rejected the application of the [E]ighth [A]mendment to student punishment, and the paddling of recalcitrant students does not constitute a [F]ourth [A]mendment search or seizure." *Id.* at 810; *see also Flores*, 116 Fed. App'x at 509–10 (rejecting discipline-related Fourth Amendment claim).

The logic underlying the Fifth Circuit's rulings—*i.e.*, its overall reluctance to constitutionalize state law torts or interfere in the daily operations of public schools—has been echoed by members of the Court throughout this Nation's history. *See*, *e.g.*, *Redding*, 557 U.S. at 382–83; *Lewis*, 523 U.S. at 841; *Collins*, 503 U.S. at 128–29; *T.L.O.*, 469 U.S. at 340; *Milliken*, 418 U.S. at 741–42; *Epperson*, 393 U.S. at 104.

Notably, although other circuits disagree with *Ingraham* and *Fee*, the Fifth Circuit's approach does not directly conflict with any decision from this Court. Admittedly, the Court has held in other distinct contexts that post-deprivation remedies are irrelevant to a substantive due process analysis—*see*, *e.g.*, *Zinermon v. Burch*, 494 U.S. 113 (1990) (involving a state mental health treatment facility) and *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019) (involving a Fifth Amendment takings claim)—but, as detailed above, the Court has also routinely held that students' constitutional rights are limited in the public school setting, assuming they apply at all. In fact, the Court has already foreclosed two avenues of constitutional

relief in the specific context of disciplinary corporal punishment. *Ingraham*, 430 U.S. at 672, 682 (holding that the Eighth Amendment does not apply to disciplinary corporal punishment and that the Fourteenth Amendment does not require notice and a hearing prior to the imposition of corporal punishment, as authorized and limited by state law).

As discussed above, the federal constitutional rights of students in the public school setting are often limited, including under the Fourth Amendment. *T.L.O.*, 469 U.S. at 340-41; *Acton*, 515 U.S. at 655–56. Where a State both prohibits and remedies the use of unreasonable force against students, student disciplinary issues should be shaped by state lawmakers and local officials, rather than "the individual predilections of federal jurists."

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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