No. 21-_____

In the Supreme Court of the United States

T.O., A CHILD; TERRANCE OUTLEY; DARREZETT CRAIG,
Applicants,

v.

FORT BEND INDEPENDENT SCHOOL DISTRICT AND ANGELA ABBOTT,
Respondents.

APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Samuel A. Alito, Jr., Associate Justice of the United States and Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

Pursuant to Rules 13.5 and 30.2 of this Court, Applicants Terrance Outley, Darrezett King, and their minor child, T.O. (collectively, "T.O.") respectfully request that the time to file a petition for writ of certiorari in this matter be extended for 30 days to, and including, January 13, 2022. The Fifth Circuit entered its judgment and issued an opinion in support of the judgment on June 17, 2021. T.O. filed a timely Petition for Rehearing on July 15, 2021. The Fifth Circuit denied the Petition for Rehearing on September 15, 2021. Unless extended, the time for filing a petition for

writ of certiorari will expire on December 14, 2021. This Application is filed at least ten days prior to that date pursuant to Supreme Court Rule 13.5.

The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1). Attached are copies of the Court of Appeals' majority and concurring opinions (Exhibit 1) and its order denying panel rehearing and rehearing en banc (Exhibit 2).

REASONS FOR GRANTING AN EXTENSION OF TIME

1. This case concerns the Court of Appeals' erroneous conclusion that T.O., a first-grade student, cannot seek relief for federal constitutional claims in federal court alleging excessive force by a public school teacher. The case presents substantial and recurring questions, on which the federal courts of appeals are divided, including whether and under what circumstances public school students may vindicate their federal constitutional rights in federal court against public school teachers who use excessive force on them, whether such claims are based on the Fourth and/or Fourteenth Amendment, and whether teachers may invoke qualified immunity to avoid liability against claims that they used excessive force against a student.

T.O. was a seven-year-old first-grade student at a public elementary school in the Fort Bend Independent School District when he was put in a chokehold by Respondent Angela Abbott, a fourth-grade teacher who encountered him in the hallway. Consistent with his multiple diagnosed disorders, T.O. occasionally exhibits inappropriate behaviors in a classroom setting, which the school district has chosen to address through the adoption of a Behavior Intervention Plan. On January 31, 2017, Respondent Abbott saw T.O. in the hallway, where a behavioral aide was

helping T.O. calm down. Abbott, who was not T.O.'s teacher, stood between T.O. and his classroom door and yelled that he could not reenter. T.O. became upset and tried to move Abbott out of the way. In response, Abbott grabbed T.O. by the neck and threw him to the floor, where she held him in a chokehold for several minutes. T.O. began foaming at the mouth, and his behavioral aide urged Abbott to stop choking T.O. "because he needed air and [Abbott] was holding him the wrong way." *T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 412 (5th Cir. 2021); Memorandum and Recommendation, *T.O. v. Fort Bend Indep. Sch. Dist.*, No. 4:19-cv-331, 2020 WL 1442470, at *1 (S.D. Tex. Jan. 29, 2020).

T.O. sued Respondents in federal district court, seeking relief on several grounds, including under 42 U.S.C. § 1983 for violation of T.O.'s Fourth, Fifth, and Fourteenth Amendment rights to be free from excessive force imposed arbitrarily by state actors. Respondents filed a motion to dismiss, which the district court granted after concluding that T.O.'s claims "are subject to dismissal under binding Fifth Circuit precedent." *See* Order, *T.O. v. Fort Bend Indep. Sch. Dist.*, No. 4:19-cv-331, 2020 WL 1445701, at *1 (S.D. Tex. Mar. 24, 2020); Memorandum and Recommendation, *T.O. v. Fort Bend Indep. Sch. Dist.*, No. 4:19-cv-331, 2020 WL 1442470, at *5 (S.D. Tex. Jan. 29, 2020).

The Fifth Circuit affirmed. *See T.O.*, 2 F.4th at 412. In particular, the Fifth Circuit explained that although the "Fourth Amendment is applicable in a school context . . . claims involving corporal punishment are generally analyzed under the Fourteenth Amendment." *Id.* at 413. In the Fifth Circuit, however, "as long as the

state provides an adequate remedy, a public school student cannot state a claim for the denial of substantive due process through excessive corporal punishment." *Id.* at 414 (quoting *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 874 (5th Cir. 2000)). Furthermore, citing the "inconsistency in [its] case law," the Fifth Circuit held that Abbott's actions did not violate T.O.'s clearly established rights under the Fourth Amendment. *Id.* at 415. Accordingly, the Fifth Circuit affirmed dismissal of T.O.'s constitutional claims.

Judge Wiener, who authored the majority opinion, also filed a concurring opinion, joined by Judge Costa. In that concurring opinion, Judge Wiener urged the Fifth Circuit to reconsider its rule that "injuries resulting from corporal punishment do not violate the Fourteenth Amendment as long as the forum state provides adequate alternative remedies." *Id.* at 419 (Wiener, J., specially concurring). Judge Wiener explained that this rule "is completely out of step with every other circuit court and clear directives from the Supreme Court" and called on the Fifth Circuit to "fix the error before the Supreme Court decides to fix it for us." *Id.* at 419-20. T.O. petitioned the Fifth Circuit to rehear this case, but the court denied the petition.

2. T.O.'s certiorari petition will explain that Judge Wiener was correct in characterizing the Fifth Circuit's rule as creating a "dramatically lopsided circuit split." *Id.* at 420. The Fifth Circuit is the only court of appeals to hold that the availability of state-law remedies precludes aggrieved public school students from bringing an action in federal court to vindicate their federal constitutional rights when they have been harmed by excessive force by a teacher. Every other court of

appeals to consider the issue has concluded that the availability of state-law remedies does *not* preclude student plaintiffs from pressing their federal constitutional claims.[1] Moreover, there is substantial disagreement among the courts of appeals regarding analysis of these claims, with several circuits assessing them under the Fourteenth Amendment,[2] and other circuits assessing them under the Fourth Amendment.[3]

In addition, this case presents a related circuit split regarding whether a federal constitutional right that is clearly established can nonetheless be barred by qualified immunity because of ambiguity about the specific constitutional provision from which that right arises. Although the Fifth Circuit conceded that "[b]y now, every school teacher . . . must know that inflicting pain on a student . . . violates that student's constitutional right to bodily integrity," the court still held that Abbott was entitled to qualified immunity from T.O.'s constitutional claims. *T.O.*, 2 F.4th at 416 (alterations in original) (quoting *Moore*, 233 F.3d at 875). The Fifth Circuit reasoned that, due to ambiguity in its precedent surrounding the basis for this well-established constitutional right—i.e., whether that right arises from the Fourth or Fourteenth

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[1] *See Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246 (2d Cir. 2001); *Gottlieb v. Laurel Highlands Sch. Dist.*, 272 F.3d 168 (3d Cir. 2001); *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980); *Webb v. McCullough*, 828 F.2d 1151 (6th Cir. 1987); *Wise v. Pea Ridge Sch. Dist.*, 855 F.2d 560 (8th Cir. 1988); *P.B. v. Koch,* 96 F.3d 1298 (9th Cir. 1996); *Garcia by Garcia v. Miera,* 817 F.2d 650 (10th Cir. 1987); *Neal ex rel. Neal v. Fulton Cnty. Bd. of Educ.*, 229 F.3d 1069 (11th Cir. 2000).

[2] *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246 (2d Cir. 2001); *Metzger v. Osbeck*, 841 F.2d 518 (3d Cir. 1988); *Meeker v. Edmundson*, 415 F.3d 317 (4th Cir. 2005); *Saylor v. Bd. of Educ. of Harlan Cnty.*, 118 F.3d 507 (6th Cir. 1997); *London v. Dirs. of DeWitt Pub. Schs.*, 194 F.3d 873 (8th Cir. 1999); *Muskrat v. Deer Creek Public Schools*, 715 F.3d 775 (10th Cir. 2013); *Neal ex rel. Neal v. Fulton Cnty. Bd. of Educ.*, 229 F.3d 1069 (11th Cir. 2000).

[3] *Wallace by Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010 (7th Cir. 1995); *Preschooler II v. Clark Cnty. Bd. of Trustees*, 479 F.3d 1175 (9th Cir. 2007).

Amendment—qualified immunity applied. *Id.* The Fifth Circuit's conclusion is at odds with the conclusions of other courts of appeals,[4] as well as this Court's explanation of what the "clearly established right" inquiry entails.[5]

The Fifth Circuit's decision means that public school students in that Circuit who are injured by school officials' use of excessive force are unable to seek redress in federal court for violation of their federal constitutional rights. Federal courts in every state under the Fifth Circuit's jurisdiction have dismissed students' substantive due process claims,[6] citing the rule that the Fifth Circuit applied—and failed to correct—in this case. And, due to the "inconsistency" the Fifth Circuit alluded to in its own precedent, those students also are not permitted to assert excessive force claims under the Fourth Amendment. The Fifth Circuit's rule thus leaves public school students without an opportunity to pursue a constitutional remedy for the constitutional violations they experience.

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[4] *See, e.g.*, *P.B. v. Koch*, 96 F.3d 1298 (9th Cir. 1996); *see also, e.g.*, *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246 (2d Cir. 2001); *Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379, 395 (4th Cir. 2014); *Reed v. Palmer*, 906 F.3d 540 (7th Cir. 2018); *Palmer v. Sanderson,* 9 F.3d 1433 (9th Cir. 1993); *Wood v. Ostrander,* 879 F.2d 583, 587 (9th Cir. 1989); *Lynch v. Barrett*, 703 F.3d 1153 (10th Cir. 2013).

[5] *Hope v. Pelzer*, 536 U.S. 730 (2002); *Ashcroft v. al-Kidd*, 563 U.S. 731 (2014); *Mullenix v. Luna,* 577 U.S. 7, 12 (2015); *Ziglar v. Abbasi*, 137 S. Ct. 1842, 1866 (2017).

[6] *Coleman v. Franklin Parish Sch Bd.*, 702 F.2d 74 (5th Cir. 1983) (Louisiana); *Flores v. Sch. Bd. of DeSoto Parish*, 116 F. App'x 504 (5th Cir. 2004) (unpublished) (Louisiana); *Scott v. Smith*, 214 F.3d 1349 (5th Cir. 2000) (unpublished) (per curiam) (Mississippi); *Clayton ex rel. Hamilton v. Tate Cnty. Sch. Dist.*, 560 F. App'x 293 (5th Cir. 2014) (unpublished) (Mississippi).

3. T.O. respectfully requests that a 30-day extension of the time within which to file a petition for writ of certiorari be granted for good cause because it is justified for the reasons set forth below:

This case raises important questions on which the circuits are divided. Those questions include whether and under what circumstances public school students may pursue federal constitutional claims in federal court against teachers who use excessive force on them, whether such claims are based on the Fourth and/or the Fourteenth Amendment, and whether teachers may rely on qualified immunity to avoid liability when they use excessive force against students.

Undersigned counsel was recently engaged to assist Applicants in preparation of the petition for writ of certiorari. Counsel thus requires additional time to become familiar with the record of the case and the relevant legal precedent.

CONCLUSION

For the foregoing reasons, T.O.'s application for a 30-day extension to and including January 13, 2022, within which to file a petition for a writ of certiorari in this case should be granted.

Respectfully submitted,

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