No. _____

IN THE

Supreme Court of the United States

T.O., A CHILD; TERRENCE OUTLEY; DARREZETT CRAIG,
Petitioners,

v.

FORT BEND INDEPENDENT SCHOOL DISTRICT AND ANGELA ABBOTT,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The federal courts of appeals are divided on when and how public school students may assert federal constitutional claims alleging use of excessive force by school officials. In conflict with all other circuits, the Fifth Circuit forecloses any federal constitutional claim where state-law remedies are available and the official had a purportedly pedagogical purpose for using force. Other courts of appeals permit students to plead excessive-force claims, but are deeply divided on whether those claims arise under the Fourth or Fourteenth Amendment, or whether the standard varies depending on the factual circumstances. The circuits are also split on whether school officials are entitled to qualified immunity merely because courts disagree as to which constitutional provision is violated by a teacher's excessive force. The decision below—in which the Fifth Circuit affirmed dismissal of claims alleging that a teacher choked a first-grade student until he foamed at the mouth—implicates both circuit splits. The questions presented are:

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

2. Whether a public school official who violates a clearly established constitutional right of a student is nonetheless entitled to qualified immunity from suit because courts have analyzed different excessive-force violations under different constitutional provisions.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

The names of all parties are contained in the caption of the case. Petitioners are individuals, and there is no corporate ownership to disclose.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner T.O. and his parents, Terrence Outley and Darrezett Craig, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's March 24, 2020 order granting defendants' motion to dismiss (Pet. App. 21a–22a), and the magistrate judge's January 29, 2020 memorandum and recommendation (Pet. App. 23a–38a) are unreported. The Fifth Circuit's opinion (Pet. App. 1a–20a) is reported at 2 F.4th 407 (2021). Its order denying rehearing en banc (Pet. App. 39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 2021. A timely petition for rehearing was denied on September 15, 2021. On November 22, 2021, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including January 13, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States 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 United States 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.

INTRODUCTION

With the exception of the Fifth Circuit, the federal courts of appeals have uniformly held that public school students may plead a violation of their constitutional rights when a school official uses excessive force against them. Those courts disagree, however, on whether the student's claims arise under the Fourth or Fourteenth Amendment, and in some of those courts, student excessive-force claims might be analyzed under either Amendment depending on the factual circumstances. In contrast, the Fifth Circuit has foreclosed any constitutional excessive-force claim—regardless of the amount of force or severity of resulting injuries—where the official had a purportedly pedagogical purpose and state-law remedies are available. The decision below, in the words of the concurring opinion, demonstrates that the circuit is "completely out of step with every other circuit court and clear directives from the Supreme Court," entrenching a "lopsided circuit split." Pet. App. 16a–17a (Wiener, J., joined by Costa, J., specially concurring).

The decision below also creates a circuit split on the related question whether disagreement regarding the constitutional basis for students' excessive-force claims mandates that the claims be barred by qualified immunity. Despite acknowledging that students have a clear constitutional right to be free from excessive force, the Fifth Circuit affirmed dismissal of Petitioners' Fourth Amendment claim on the ground that its circuit precedent does not clearly establish that the right arises under the Fourth Amendment. The Ninth Circuit has rejected that proposition, holding that "[r]egardless of the appropriate 'home' for [a student's] right to be free from excessive force, there [is] a clearly established right to be free from such force," and any "possible uncertainty as to the appropriate test does not immunize [a state official's] actions from liability."[1] Three other courts of appeals have adopted the same reasoning in other contexts.[2]

Petitioners pleaded both Fourth and Fourteenth Amendment claims, and at least one (if not both) of those claims would have been allowed to proceed in any other circuit based on the allegations here. Petitioners allege that a teacher put T.O., a first-grade student who was in a special education program, in a chokehold without cause. Petitioners also allege that the teacher—who had no role in providing T.O.'s instruction but rather encountered him in a school hallway—threw T.O. to the ground, grabbed him by

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[1] *P.B. v. Koch*, 96 F.3d 1298, 1303 n.4 (9th Cir. 1996).

[2] *Edrei v. Maguire*, 892 F.3d 525, 542 (2d Cir. 2018); *Reed v. Palmer*, 906 F.3d 540, 549 (7th Cir. 2018); *Lynch v. Barrett*, 703 F.3d 1153, 1155 (10th Cir. 2013).

the throat, and held him down in a chokehold for several minutes until T.O. began foaming at the mouth. The teacher kept T.O. pinned to the ground even after she was told by a behavioral aide, who was with T.O. pursuant to the school's Behavioral Intervention Plan for T.O., that the teacher's actions were contrary to that Plan.

The Fifth Circuit's rejection of Petitioners' constitutional claims presents important and recurring issues of federal law that warrant this Court's review. The lower courts' diverging approaches have significant practical effects for students due to the meaningfully different standards applied under Fourth and Fourteenth Amendments. As courts have recognized, that difference "may be determinative" in many cases. *Gottlieb ex rel. Calabria v. Laurel Highlands Sch. Dist.*, 272 F.3d 168, 172 (3d Cir. 2001). This Court should resolve the questions presented and ensure that public school students can enforce their federal constitutional right to be free from the use of excessive force by school officials.

STATEMENT OF THE CASE

1. Petitioner T.O. was a first-grade student in a special education program at Hunters Glen Elementary School, within the Fort Bend Independent School District in Texas. As alleged in the complaint, which is taken as true at the motion-to-dismiss stage, T.O. was seven years' old and had been diagnosed with Attention Deficit Hyperactivity Disorder and Oppositional Defiant Disorder, disabilities that result in certain recognized behaviors. Pet. App. 44a. To accommodate T.O.'s disabilities and address behaviors

associated with his diagnoses, Respondent Fort Bend Independent School District adopted a Behavioral Intervention Plan. The school's Plan required, among other things, that if T.O.'s disability-related behaviors prevented his participation in class, he would be removed to a quiet place and accompanied by a behavioral aide until he was calm enough to return to the classroom. Pet. App. 44a.

Accordingly, when T.O. was unable to participate in class one day in 2017, his first-grade teacher and a behavioral aide took T.O. to a hallway to help him calm down. Respondent Abbott, a fourth-grade teacher, happened to be walking by at the time. Pet. App. 45a. Although she was not T.O.'s teacher or otherwise involved in T.O.'s Behavioral Intervention Plan, and although a behavioral aide was present and implementing the Plan, Abbott decided to interfere. She stood in the doorway of T.O.'s classroom and yelled at T.O.—actions that were inconsistent with and frustrated implementation of T.O.'s Behavioral Intervention Plan. In doing so, Abbott disregarded the behavioral aide's explanations that the situation was under control. Pet. App. 45a.

T.O. then attempted to reenter the classroom, ineffectually pushing and hitting Abbott's leg once when she would not budge. Pet. App. 45a–46a. Although fifty-five pound T.O.'s actions could not have posed a threat to Abbott, a full-grown adult, she responded by grabbing the seven-year-old's neck, throwing him to the floor, and holding him by his throat in a chokehold for several minutes while yelling that "he had hit the wrong one" and "to keep his hands to himself." Pet. App. 46a.

Even after T.O. began to foam at the mouth and the behavioral aide asked Abbott to "release him" and explained that T.O. "needed air," Abbott continued to strangle T.O. Pet. App. 46a. Abbott did not stop for several minutes. After another witness arrived, Abbott released T.O. Thereafter, T.O. went to the school nurse, who observed bruising on T.O.'s neck. Pet. App. 48a.

2. T.O. and his parents filed a complaint against the school district and Abbott in the U.S. District Court for the Southern District of Texas. Pet. App. 40a. Among other claims, Petitioners sought relief against Abbott under 42 U.S.C. § 1983 for her violation of T.O.'s rights—including separate claims for excessive force under the Fourth and Fourteenth Amendments to the U.S. Constitution. Pet. App. 49a.

3. The district court granted Respondents' motion to dismiss the complaint, adopting the recommendation of a magistrate judge. Pet. App. 21a–22a.

The magistrate judge relied on Fifth Circuit law governing school officials' use of physical force against students in public schools. *See* Pet. App. 31a–34a. Under that precedent, if a court determines that a public school official uses excessive force against a student for an ostensibly "disciplinary" or "pedagogical" purpose and "the state provides an adequate remedy," the student "cannot state a claim for denial of substantive due process." *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 874 (5th Cir. 2000) (citing *Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990)).

Applying that rule, the magistrate judge determined that "Abbott's actions were taken in pursuit of

a legitimate pedagogical purpose" and stated that Texas "provides 'adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions.'" Pet. App. 34a (quoting *Moore*, 233 F.3d at 875). Accordingly, the magistrate judge concluded that, regardless of whether Abbott's actions were unreasonable, "Plaintiffs' claims are subject to dismissal under binding Fifth Circuit precedent." Pet. App. 34a (citing *Moore*, 233 F.3d at 875). Because the magistrate judge found that T.O. could not state a substantive due process claim alleging that Abbott used excessive force, she stated that T.O. did not "overcome" Abbott's invocation of qualified immunity. Pet. App. 34a. The district court adopted this rationale without modification. Pet. App. 21a–22a.

4. The court of appeals affirmed. Pet. App. 2a. The court held that "as long as a state provides an adequate remedy, a public school student cannot state a claim for denial of substantive due process through excessive corporal punishment." Pet. App. 5a–6a (quoting *Moore*, 233 F.3d at 874). The court reasoned that, by providing presumably adequate post-punishment remedies, the state has "'provided all the process constitutionally due' and thus cannot 'act "arbitrarily," a necessary predicate for substantive due process relief.'" Pet. App. 6a (quoting *Fee*, 900 F.2d at 808). The court noted it had barred similar claims in other cases—including when "a police officer slammed a student to the ground and dragged him along the floor after the student disrupted class"; when a teacher "threw [a student] against a wal[l] and choked him after the student questioned the teacher's directive"; and "when an aide grabbed, shoved, and kicked a disabled student for sliding a compact disc across a

table"—because each official's conduct "occurred in a disciplinary, pedagogical setting" and there were state-law remedies available. Pet. App. 6a–7a.

The court of appeals also affirmed dismissal of Petitioners' Fourth Amendment claim. The court recognized the federal constitutional right of a student to be free from excessive force imposed by school officials, specifically noting that "every school teacher must know that inflicting pain on a student . . . violates that student's constitutional right to bodily integrity." Pet. App. 9a. The court nonetheless granted qualified immunity to Abbott based on its view that its circuit precedent had not "conclusively determined" that the "use of force by a teacher against a student constitutes *a Fourth Amendment seizure*." Pet. App. 9a (emphasis added).

The court noted that it had "properly analyzed" excessive-force claims against school officials under the Fourth Amendment in previous cases, but observed that injuries like the ones T.O. alleged have been assessed as Fourteenth Amendment substantive due process claims, as well. Pet. App. 9a. The court then decided that "[i]n light of this inconsistency in [its] caselaw" about how it had assessed the constitutional nature of the different claims, the court could not "say that it was clearly established, at the time of the incident, that Abbott's actions were illegal under the Fourth Amendment." Pet. App. 9a.

6. Two of the judges on the panel specially concurred, urging reconsideration of the Fifth Circuit's jurisprudence. The concurrence described its circuit case law as "not only unjust, but [] completely out of

step with every other circuit court and clear directives from the Supreme Court." Pet. App. 16a (Wiener, J., joined by Costa, J., specially concurring).

The concurrence described the Fifth Circuit's rule as creating a "lopsided circuit split" and an "error" in need of fixing. Pet. App. 17a, 20a. It explained that the Fifth Circuit is "isolated in [its] position," because all other circuits that have addressed the issue have held that public school officials' use of excessive force "implicate[s] constitutional rights regardless of the availability of state remedies." Pet. App. 17a. The concurrence also observed that the Fifth Circuit's rule precluding Fourteenth Amendment substantive due process claims where state-law remedies exist "flies in the face of the many decisions by our colleagues in other circuits and those sitting on the highest court of this land." Pet. App. 20a.

The concurrence emphasized that this Court has made clear that "the availability of state remedies *does not* replace a cause of action under § 1983," and that the existence of state remedies is relevant only to procedural due process claims. Pet. App. 18a; *see Zinermon v. Burch*, 494 U.S. 113 (1990); *Parratt v. Taylor*, 451 U.S. 527 (1981); *Hudson v. Palmer*, 468 U.S. 517 (1984). A substantive due process violation, such as the one alleged by T.O., is "fundamentally different" from a procedural due process violation and accordingly, "the availability of alternative state created remedies [is] wholly irrelevant." Pet. App. 18a.

The concurrence also highlighted the disagreement among courts of appeals regarding which constitutional rights are violated when public school

officials use excessive force against students. Some courts evaluate student excessive-force claims under the Fourth Amendment, while others assess them under the substantive due process protections provided by the Fourteenth Amendment. Pet. App. 16a n.2.

7. T.O. timely petitioned for rehearing *en banc* on July 20, 2021. The Fifth Circuit denied the rehearing petition on September 15, 2021. Pet. App. 39a.

REASONS FOR GRANTING THE PETITION

This case presents recurring issues regarding public school students' ability to vindicate their constitutional right to be free from excessive force by state school officials. The courts of appeals have taken three diverging approaches to such claims.

The Fifth Circuit stands alone in holding that public school officials who use excessive force against students are completely insulated from constitutional scrutiny, so long as there is some purportedly "pedagogical" or "disciplinary" purpose for the use of force, if state law provides a cause of action against the school official. The Fifth Circuit adheres to that position irrespective of the severity of the force used against the child, the age of the child, or the unreasonableness of the school official's conduct.

Moreover, in direct contrast to the Ninth Circuit, the Fifth Circuit further immunizes school officials from liability for using excessive force against students through its qualified immunity precedent. As the decision below recognizes, "every school teacher . . . must know that inflicting pain on a student . . . violates that student's constitutional right to bodily

integrity." Pet. App. 11a. Nevertheless, the Fifth Circuit granted Abbott qualified immunity because its prior decisions addressed students' excessive-force claims under both the Fourth and Fourteenth Amendments. Based on this difference regarding the *legal framework* (but not the *existence*) of the constitutional right, the Fifth Circuit held that school officials are entitled to qualified immunity.

In stark contrast, two other courts of appeals have held that students may assert excessive-force claims under the Fourth Amendment's guarantee against unreasonable seizures. And six other courts instead have allowed students to bring substantive due process claims under the Fourteenth Amendment.

Without this Court's guidance, public school students subjected to excessive force will continue to be denied a federal constitutional cause of action in the Fifth Circuit. And courts within the Fifth Circuit will continue to immunize school officials from liability, despite the demonstrably unconstitutional nature of their conduct. The questions presented are recurring, important, and—as reflected by the Fifth Circuit's denial of rehearing—capable of resolution only through this Court's review.

I. The Fifth Circuit's Test for Analyzing Students' Excessive-Force Claims Conflicts with Decisions of This Court and Other Circuits and Is Incorrect.

Every circuit except for the Fifth Circuit permits public school students to bring constitutional claims challenging excessive force in a purportedly pedagogical or disciplinary setting—whether under the

Fourth Amendment or the Fourteenth Amendment—regardless of whether there is a state-law remedy. Those other circuits disagree, however, as to which constitutional provision appropriately protects the right to be free from excessive force. This Court's interest in maintaining the uniformity of federal law strongly supports granting review here to resolve these conflicts.

A. The Courts of Appeals Are Deeply Divided on How Students Should Frame Constitutional Excessive-Force Claims.

1. This Court explained in *Graham v. Connor,* 490 U.S. 386 (1989), that when a particular constitutional provision "provides an explicit textual source of constitutional protection" against government misconduct, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Id.* at 395. *Graham* thus held that "claims that *law enforcement officers* have used excessive force—deadly or not—in *the course of an arrest, investigatory stop, or other 'seizure' of a free citizen* should be analyzed under the Fourth Amendment." *Id.* (emphasis added).

At least two courts of appeals have relied on *Graham* to hold that the Fourth Amendment also applies to student excessive-force claims that amount to seizures. For example, in *Wallace ex rel. Wallace v. Batavia School District 101*, the Seventh Circuit held that school teachers and officials are not "shield[ed] . . . from the application of the Fourth Amendment" merely because they are not "acting on

behalf of the police." 68 F.3d 1010, 1013 (7th Cir. 1995). The court explained that, when confronted with students' excessive-force claims—including when the teacher had an allegedly disciplinary purpose—courts must ask "whether under the circumstances presented and known the seizure was objectively unreasonable." *Id.* at 1014–15 (citing *Graham*, 490 U.S. at 399). The Seventh Circuit reasoned that this analysis affords "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." *Id.* at 1014.

Similarly, in light of *Graham*, the Ninth Circuit revised its test for student excessive force cases to include a Fourth Amendment analysis. *See Preschooler II v. Clark Cnty. Sch. Bd. of Trustees*, 479 F.3d 1175, 1182 (9th Cir. 2007) (citing *Graham*, 490 U.S. at 394). In *Preschooler II,* the Ninth Circuit explained that courts analyzing a student's excessive-force claim "begin with the principle 'that excess force by a school official against a student violates the student's constitutional rights.'" 479 F.3d at 1180 (quoting *P.B. v. Koch*, 96 F.3d 1298, 1302–03 (9th Cir. 1996)) (alterations omitted). And, in light of *Graham*, "[t]he consequences of a teacher's force against a student at school are generally analyzed under the 'reasonableness' rubric of the Fourth Amendment." *Id.*

Some courts, however, have recognized that when the official conduct at issue does not amount to a seizure, but nonetheless constitutes excessive force, a

student's claim "might be more appropriately analyzed under the Due Process Clause of the Fourteenth Amendment than under the Fourth Amendment." *Doe ex rel. Doe v. Hawaii Dep't of Educ.*, 334 F.3d 906, 909 (9th Cir. 2003); *see United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997). For example, the Third Circuit explained that that when an assistant principal "pushed [a high school student's] shoulder with his hand," the student "did not experience the type of detention or physical restraint that we require to effectuate a seizure." *Gottlieb*, 272 F.3d at 171–72. The court therefore analyzed the student's claim under the Fourteenth Amendment instead of the Fourth. *Id.* at 172–73.

At least six other circuits routinely analyze public-school excessive-force claims under the Fourteenth Amendment substantive due process standard, rather than under the Fourth Amendment. *See, e.g.*, *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 252–53 (2d Cir. 2001); *Hall v. Tawney,* 621 F.2d 607, 613 (4th Cir. 1980); *Saylor v. Bd. of Educ. of Harlan Cnty.*, 118 F.3d 507, 514–16 (6th Cir. 1997); *London v. Dirs. of DeWitt Pub. Schs.,* 194 F.3d 873, 877 (8th Cir. 1999); *Muskrat v. Deer Creek Pub. Schs.*, 715 F.3d 775, 791–92 (10th Cir. 2013); *Neal ex rel. Neal v. Fulton Cnty. Bd. of Educ.*, 229 F.3d 1069, 1075 (11th Cir. 2000).

Under the dominant Fourth Circuit test, courts evaluating student Fourteenth Amendment claims consider whether (1) "the force was 'disproportionate to the need presented'"; (2) "the force was 'inspired by malice or sadism rather than a merely careless or unwise excess of zeal'"; (3) "the force inflicted 'severe'

injury"; and (4) the "force imposed 'amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.'" *Meeker v. Edmundson*, 415 F.3d 317, 321 (4th Cir. 2005) (quoting *Hall,* 621 F.2d at 613). That analysis includes consideration of whether the school official's conduct was "a good faith effort to maintain discipline," as opposed to a "malicious or sadistic" act "for the very purpose of causing harm." *Wise v. Pea Ridge Sch. Dist.*, 855 F.2d 560, 564 (8th Cir. 1988); *see also Johnson*, 239 F.3d at 253; *Domingo v. Kowalski*, 810 F.3d 403, 411–12 (6th Cir. 2016); *Muskrat*, 715 F.3d at 787.

Notably, these courts apply the Fourteenth Amendment's due process analysis even when the excessive force used against the student restricts that student's liberty such that the use of force constitutes a "seizure." For example, in *Johnson v. Newburgh Enlarged School District*, the Second Circuit ruled in favor of a student and denied qualified immunity, applying the Fourteenth Amendment to the student's claim that a teacher "grabbed [him] by the throat," "lifted him off the ground by the neck," "dragged him across the gym floor," and "rammed [his] forehead into a metal fuse box." 239 F.3d at 249. Despite the restraint imposed, the Second Circuit explained that it was analyzing the student's constitutional rights in the "non-seizure" context and therefore applied the Fourteenth Amendment. *Id.* at 251; *see also Domingo*, 810 F.3d at 411–12 (applying Fourteenth Amendment to claims that students with disabilities were "strapped to a gurney," "gagged," and "strapped to the toilet" with a belt for twenty to thirty minutes).

2. The Fifth Circuit stands alone. It forecloses any federal constitutional challenge by a student to a public school official's use of excessive force where the official had a purportedly pedagogical purpose and state-law remedies are available.

Under Fifth Circuit precedent, if the "offending conduct occurred in a disciplinary, pedagogical setting," Pet. App. 6a, and "if the forum state affords adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions" of the school official, then the student cannot bring a federal claim to vindicate his substantive due process rights. Pet. App. 3a n.1 (quoting *Fee*, 900 F.2d at 808 (emphasis omitted)). And a student cannot bring an excessive-force claim under the Fourth Amendment because that would "'eviscerate this circuit's rule . . . prohibiting substantive due process claims' stemming from the same injuries." Pet. App. 9a (quoting *Flores v. Sch. Bd. of DeSoto Parish*, 116 F. App'x 504, 510 (5th Cir. 2004)).

In so holding, where state law provides a cause of action for a student who was subjected to excessive force by a public school official, the plaintiff-student's federal constitutional claim is rejected as a matter of law when the school official's use of force was purportedly "pedagogical" or "disciplinary." The Fifth Circuit has reasoned that, "where states affirmatively impose reasonable limitations upon corporal punishment and provide adequate criminal or civil remedies for departures from such laws," those states "do not, by definition, act 'arbitrarily,' a necessary prerequisite for substantive due process relief." *Id.*; *see also Moore,* 233 F.3d at 874; *Cunningham v. Beavers*, 858 F.2d

269, 272 (5th Cir. 1988); *Woodard v. Los Fresnos Indep. Sch. Dist.*, 732 F.2d 1243, 1245–46 (5th Cir. 1984); *Coleman v. Franklin Parish Sch. Bd.*, 702 F.2d 74, 76 (5th Cir. 1983); *Ingraham v. Wright*, 525 F.2d 909, 917 (5th Cir. 1976).

Not only is the Fifth Circuit's approach markedly different from the tests applied in other circuits, but several of those courts have explicitly rejected the Fifth Circuit's reasoning. *See P.B.,* 96 F.3d at 1302 n.3 (citing *Fee*, 900 F.2d at 808); *Wood v. Ostrander*, 879 F.2d 583, 588–89 (9th Cir. 1989); *Hall*, 621 F.2d at 612; *see also Neal*, 229 F.3d at 1075 n.2.

As the Fourth Circuit explained, substantive constitutional relief "does not depend upon the unavailability of state remedies"; it "is supplementary to them. Federal and state rights may of course exist in parallel, and federal courts may not avoid the obligation to define and vindicate the federal constitutional right merely because of a coincidence of related rights and remedies in the federal and state systems." *Hall*, 621 F.2d at 612. In coming to this conclusion, the Fourth Circuit explicitly rejected the Fifth Circuit's contrary reasoning in *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976), which forms the basis for the Fifth Circuit's anomalous rule.

3. This three-way split among the circuits is intractable. Those circuits still using the Fourteenth Amendment analysis have reaffirmed their approach since this Court's decision in *Graham*, despite *Graham*'s directive to apply the Fourth Amendment where it "provides an explicit textual source of constitutional protection against this sort of physically

intrusive governmental conduct," rather than applying "the more generalized notion of 'substantive due process.'" 490 U.S. at 395; *see, e.g.*, *Golden ex rel. Bach v. Anders,* 324 F.3d 650, 654 (8th Cir. 2003) (reaffirming pre-*Graham* Eighth Circuit precedent holding that plaintiffs can assert excessive-force claims on substantive due process grounds); *Johnson*, 239 F.3d at 253; *Meeker*, 415 F.3d at 323–24; *Domingo*, 810 F.3d at 410–11; *Muskrat*, 715 F.3d at 791; *Neal*, 229 F.3d at 1074.

In addition, a majority of the Fifth Circuit panel below acknowledged that their court is "isolated in its position," Pet. App. 16a (Wiener, J., joined by Costa, J., specially concurring), but the court has consistently refused to correct course. Despite "the clarity of hindsight and thirty years of watching this rule being applied to the detriment of public school students" since *Fee v. Herndon*, the Fifth Circuit has chosen not to revisit its outlier rule. Pet. App. 20a (Wiener, J., joined by Costa, J., specially concurring). Nor has the court lacked opportunities to do so. *See Moore,* 233 F.3d at 880 (Wiener, J., specially concurring) ("I respectfully but earnestly suggest that now is the time for this court, sitting en banc, to re-examine its position. Can we be the only circuit that is 'in step' and all the rest out of step? We should not demur in our own housekeeping chores and merely leave to the Supreme Court the job of eliminating the existing split between this one circuit and all the rest that have announced an opposite position on the subject."). The Fifth Circuit's continued unwillingness to "fix the error," *see* Pet. App. 20a, together with the broader

disagreement regarding the proper framework for analyzing students' excessive-force claims, warrants this Court's intervention.

B. The Fifth Circuit's Rule Is Incorrect and Contrary to This Court's Precedent.

Under *Graham*, the Fourth Amendment reasonableness analysis should govern student excessive-force claims against public school officials when the official's conduct amounts to a "seizure." *See* 490 U.S. at 395. This Court has already held that the Fourth Amendment protection against unreasonable searches applies in schools. *See New Jersey v. T.L.O.*, 469 U.S. 325, 334–37 (1985); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 367–77 (2009). The same should be true for the Fourth Amendment protection against seizures. *See* Pet. App. 49a. In instances where excessive force is alleged, but a seizure is not at issue, analysis under the Fourteenth Amendment may be appropriate.

In any event, the Fifth Circuit rule, which effectively makes dispositive any possible purported "disciplinary" or "pedagogical" nature of a school official's use of force because the forum state provides students a state-law remedy, is misguided. Under either the Fourth Amendment reasonableness test or Fourteenth Amendment standard, a school official's disciplinary or pedagogical purpose may be one of many factors the court considers—as every other circuit to have considered the issue has held. *See, e.g.*, *Golden*, 324 F.3d at 654 (considering "whether the punishment was administered in a good faith effort to

maintain discipline or maliciously and sadistically for the very purpose of causing harm" under the Fourteenth Amendment); *Wallace*, 68 F.3d at 1014 (under the Fourth Amendment, "in seeking to maintain order and discipline, a teacher or administrator is simply constrained to taking reasonable action to achieve those goals").

By treating a teacher's purported disciplinary purpose as foreclosing students' excessive-force claims, the Fifth Circuit test leads to absurd results. In addition to any disciplinary or pedagogical purpose, factors such as the age of the child and the degree of force used are relevant and should be considered. For example, a teacher might reasonably exert force against an eighteen-year-old student when breaking up a fight in a high school hallway, even though it would be unreasonable to use the same amount of force against a five-year-old student squabbling over toys on the playground. In the Fifth Circuit, courts would not consider the students' ages before dismissing both cases on the theory that neither teacher's act was "arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning." Pet. App. 7a. Indeed, T.O. has alleged that Abbott did not act with a legitimate pedagogical purpose because she was not T.O.'s teacher, merely encountered him in the hallway, and nonetheless choked him, thereby interfering with the behavioral aide who was implementing the Behavioral Intervention Plan. Pet. App. 45a–46a. The Fifth Circuit nonetheless upheld dismissal of the complaint after concluding that "the setting was pedagogical," even if Abbott's actions were "ill-advised" and "inappropriate." Pet. App. 8a.

The Fifth Circuit rule also conflicts with this Court's precedent in *Zinermon v. Burch*, 494 U.S. 113 (1990), by conflating the requirements for substantive and procedural due process claims.

In *Zinermon*, this Court outlined three types of claims that a plaintiff may bring under § 1983: (1) a violation of one of the protections defined in the Bill of Rights; (2) a violation of the Due Process Clause's substantive protections against arbitrary and wrongful government action; and (3) a violation of the Due Process Clause's guarantee of fair procedure. *Id.* at 125. The Court explained that for the first two types of claims, "the constitutional violation actionable under § 1983 is complete when the wrongful action is taken." *Id.* A plaintiff therefore "may invoke § 1983 *regardless of any state-tort remedy* that might be available to compensate him for the deprivation of these rights." *Id.* (emphasis added). Only for the third type of due process claim—procedural due process—is the existence of state remedies relevant. *Id.* at 125–26.

That framework makes sense. Procedural due process protects individuals from deprivations of constitutionally protected interests "*without due process of law*." *Id.* at 125 (emphasis in original). A procedural due process violation therefore does not exist until a state has failed or refused to provide the plaintiff with process: notice and "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *see also Goss v. Lopez*, 419 U.S. 565, 579 (1975) (students facing "interference with a protected

property interest must be given some kind of notice and afforded some kind of hearing").

By contrast, substantive due process claims target the *deprivation itself—not* the state's failure to provide an opportunity to contest it. A substantive due process violation therefore might happen regardless of any state-court notice or hearing about the issue. State-law remedies are irrelevant, because they cannot cure that the federal-law deprivation occurred. *Zinermon,* 494 U.S. at 126. The Fifth Circuit's contrary ruling should be reversed.

II. The Fifth Circuit's Qualified Immunity Test Conflicts with Decisions of Other Circuits and Is Incorrect.

The courts of appeals have taken different views on which constitutional Amendment, and accordingly which substantive test, should be applied in the public school excessive-force context. That disagreement also gives rise to a second circuit split: the Fifth Circuit cites this mixed precedent as justification for granting school officials qualified immunity, while the Ninth Circuit has rejected that view and ruled that a widely recognized right is clearly established even if there is disagreement regarding which constitutional provision the claim arises from. Three other circuits have adhered to the Ninth Circuit's approach in other contexts. This Court should grant certiorari to resolve this split and prevent lower courts from expanding qualified immunity beyond its proper domain and creating additional barriers to the protection of federal constitutional rights.

A. The Courts of Appeals Are Split on Whether Qualified Immunity Applies Where the Right at Issue Is Clearly Established, But There Is Disagreement Regarding Which Constitutional Provision Supports the Claim.

1. In this case, the Fifth Circuit granted qualified immunity on Petitioners' Fourth Amendment claim despite conceding that "every school teacher . . . must know that inflicting pain on a student . . . violates that student's constitutional right to bodily integrity.'" Pet. App. 11a (quoting *Moore*, 233 F.3d at 875) (alterations in original). This outcome was warranted, the court held, because there was "inconsistency in [the circuit's] caselaw" about whether the right was cognizable under the Fourth or Fourteenth Amendments. Pet. App. 9a. The Fifth Circuit thus dismissed Petitioners' well-pleaded claim for violation of a longstanding and widely recognized constitutional right based on purported uncertainty regarding which constitutional right supported the claim.

2. In contrast, the Ninth Circuit—in another case regarding a public school student's right to be free of excessive force—has reached the opposite conclusion, and three other circuits have followed the Ninth Circuit's approach in other contexts. In these circuits, ambiguity regarding the specific test for analyzing a constitutional claim does not require a court to find the right underlying that claim not "clearly established." Rather, so long as a reasonable state official would know that his actions deprive another of a constitutional right, qualified immunity is unavailable.

In *P.B. v. Koch*, a student excessive-force case, the Ninth Circuit explained that it was unnecessary to "resolve the question of whether the Fourth Amendment, rather than the Due Process Clause, protects a student from the use of excessive force by a school official" to deny qualified immunity. 96 F.3d 1298, 1303 n.4 (9th Cir. 1996). Rather, the Ninth Circuit explained, a student's right to be free from excessive force in school is clearly established "[r]egardless of the appropriate 'home' for plaintiffs' right." *Id.* Even though "there is possible uncertainty as to the appropriate test," that uncertainty "does not immunize [a school official's] actions from liability." *Id.*; *see also Palmer v. Sanderson,* 9 F.3d 1433, 1436 n.2 (9th Cir. 1993) ("[T]he fact that excessive force claims were occasionally analyzed under the due process clause before 1989 does not mean that the Fourth Amendment's application to these situations was not clearly established.").

The Second Circuit has adopted similar reasoning in an excessive-force case outside the school context. In *Edrei v. Maguire,* the Second Circuit concluded that previous Fourth Amendment case law "clearly established" a non-violent protestor's right under the Fourteenth Amendment to be free from pain and serious injury during officer attempts at crowd control. 829 F.3d 525, 540 (2d Cir. 2018). Police officers had used acoustic weapon technology to disperse a crowd of non-violent protestors, and the Second Circuit denied qualified immunity as to the protestors' Fourteenth Amendment excessive-force claims. The court cited, in particular, two of its prior cases that gave the officers "fair warning that the prohibition on excessive force applies to protestors. This is true even

though both those cases arose under the Fourth Amendment." *Id.* at 542. In so holding, the Second Circuit rejected the contention that Fourth Amendment cases could not "clearly establish" Fourteenth Amendment rights, noting that such a rule would be "inconsistent with the practice of the Supreme Court and this Circuit, both of which cross-pollinate between Fourth, Eighth, and Fourteenth Amendment contexts." *Id.* at 542 n.5.

Similarly, the Seventh Circuit has denied qualified immunity to state officials, despite the fact that "Supreme Court precedent is not clear about whether state juvenile detention facility conditions should be judged under the Eighth Amendment's Cruel and Unusual Punishment Clause or the Fourteenth Amendment's Due Process Clause." *Reed v. Palmer*, 906 F.3d 540, 549 (7th Cir. 2018). Rather than concluding that this mixed precedent doomed the plaintiffs' claims, the Seventh Circuit held that "[c]aselaw clearly establishes that such conduct could violate the Fourteenth and/or the Eighth Amendment," and accordingly, the defendant was not entitled to qualified immunity. *Id.* at 550–51.

The Tenth Circuit has also rejected the position that ambiguity about the framing of a claim is determinative of whether the underlying right is "clearly established." In *Lynch v. Barrett*, a plaintiff alleged that he had been beaten by police and that officers engaged in a cover up, "violat[ing] his constitutional right to court access by refusing to disclose who exercised excessive force against him." 703 F.3d 1153, 1155 (10th Cir. 2013). The Tenth Circuit explained that while the "precise source of the constitutional

right to court access remains ambiguous, the existence of such right, generally speaking, is quite clear." *Id.* at 1161. The Tenth Circuit specified that the "clearly established" inquiry is not concerned with this ambiguity about the right's source; instead, courts must determine whether "the scope of the right encompasses the facts presented, 'such that a reasonable officer could not have believed that his actions were consistent with that right.'" *Id.* (quoting *Wilson v. Layne*, 528 U.S. 603, 617 (1999) (alterations omitted)).

3. In many circuits, courts deciding whether a state official is entitled to qualified immunity need not even identify the source of the constitutional right at issue, because the "clearly established" inquiry focuses on whether a state actor has notice that his *conduct* is impermissible. Properly understood, that inquiry does not require an officer to conduct any legal analysis.

For example, the Second Circuit has explained that courts conducting a qualified immunity analysis "must consider 'not what a lawyer would learn or intuit from researching case law, but what a reasonable person in [the government actor's position] should know' about the appropriateness of his conduct." *Johnson*, 239 F.3d at 251 (quoting *Young v. County of Fulton*, 160 F.3d 899, 903 (2d Cir. 1998)). The Ninth Circuit has similarly explained that "the qualified immunity regime of clearly established law should not be held to allow section 1983 defendants to interpose lawyerly distinctions that defy common sense in order to distinguish away clearly established law." *Wood,* 879 F.2d at 587, *cert. denied*, 498 U.S. 938 (1990); *see*

also Ward v. County of San Diego, 791 F.2d 1329, 1332 (9th Cir. 1986) (government officials need not conduct "the kind of legal scholarship normally associated with law professors and academicians"); *Chapman v. Nichols*, 989 F.2d 393, 397 (10th Cir. 1993) ("[C]ourts do not require of most government officials the kind of legal scholarship normally associated with law professors . . . . A reasonable person standard adheres at all times." (quoting *Ward*, 791 F.2d at 1332) (alterations omitted)).

The stark difference between the Fifth Circuit's test and the approach employed by other circuits was dispositive here. Had Petitioners' Fourth Amendment claim been adjudicated in the other circuits surveyed above, Abbott would not have been entitled to qualified immunity, and Petitioners would have had the opportunity to prove that Abbott unreasonably seized T.O. by placing him in a chokehold until he foamed at the mouth.

B. The Fifth Circuit's Decision Is Incorrect and Contrary to This Court's Precedent.

This Court has repeatedly emphasized that "qualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)). A constitutional right is therefore "clearly established" for qualified immunity purposes when it is "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 482 U.S. 635, 640 (1987). The

"salient question" is whether a state actor had "fair notice" or "fair warning" at the time of his misconduct that his actions violated the Constitution. *Hope*, 536 U.S. at 739–41; *see Kisela v. Hughes,* 138 S. Ct. 1148, 1152–54 (2018); *Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020).

Thus, this Court's precedent makes clear that the paramount inquiry in determining whether a right is "clearly established" is whether a reasonable official has fair and clear warning that his conduct is prohibited by the Constitution. Doctrinal debates about the particular source of that warning play no role in the analysis.

The Fifth Circuit's holding contravenes this Court's instruction. A state actor need not be able to identify which provision of federal law prohibits certain conduct for the prohibition to be "clearly established"; rather, the question is whether the unconstitutionality of a state actor's conduct was "beyond debate" such that every reasonable state actor had sufficient notice that his *actions* violated the Constitution. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *Anderson,* 483 U.S. at 640. Regardless under which provision of the Constitution a claim should be brought to vindicate a right, so long as a reasonable actor is on notice that his *conduct* would violate that right, qualified immunity is unavailable. *See Taylor,* 141 S. Ct. at 54 n.2 (reversing grant of qualified immunity, despite Fifth Circuit's invocation of "ambiguity in the caselaw," because the "egregious facts of this case . . . offended the Constitution").

No government official could reasonably think that the Constitution permits throwing a first-grader to the ground and choking him until he foams at the mouth. That is particularly the case given Petitioners' well-pleaded allegations that the person who committed these acts (i) was not T.O.'s teacher, (ii) intervened in a manner that conflicted with and frustrated the school's Behavioral Intervention Plan for T.O., and (iii) disregarded clear instructions to stop from the school behavioral aide charged with carrying out that Plan. Abbott is also not entitled to qualified immunity regardless of any uncertainty about which specific constitutional Amendment applies, because her actions would violate any applicable constitutional standard.[3]

III. This Case Involves Recurring Issues of Exceptional Importance and Warrants Review by This Court.

Due to inconsistency among courts of appeals, whether students who are victims of excessive force by public school officials may vindicate their constitutional right depends on which circuit's law applies to their claims. This case presents an opportunity for

[3] The court of appeals also noted that, "for more than thirty years, the law of this circuit has clearly protected disciplinary corporal punishment from constitutional scrutiny." Pet. App. 11a. In other words, the Fifth Circuit concluded that qualified immunity was appropriate because T.O. could not state a federal cause of action under its precedent, even though Abbott's action may have violated the "student's constitutional right to bodily integrity." *Id.* But "[i]n evaluating whether qualified immunity exists, . . . it is the plaintiff's constitutional *right* that must be clearly established, not a plaintiff's access to a monetary *remedy*." *Owens v. Balt. City State's Attorneys Office*, 767 F.3d 379, 389 (4th Cir. 2014), *cert. denied*, 575 U.S. 983 (2015).

the Court to correct that inconsistency in the law and to ensure that all students, no matter where they live, can vindicate their rights, which is especially critical to their physical well-being as minors as well as their pursuit of education free from violence.

The Fifth Circuit's rule effectively precludes any constitutional relief for public school students when school officials use force against them in an ostensibly "disciplinary" setting, because every state within the Fifth Circuit has statutes in place similar to those that the decision below relied upon to preclude Petitioners' claims. *See* Pet. App. 9a n.28 (citing Tex. Penal Code § 9.62, Tex. Educ. Code § 22.051(a)); Miss. Rev. Stat. § 37-11-57; La. Rev. Stat. § 17:416.1.

In fact, the Fifth Circuit has held that all three states within its jurisdiction provide plaintiffs with causes of action to address school officials' use of force, effectively insulating public school teachers' conduct from scrutiny in the federal courts and preventing students from vindicating their constitutional rights.[4] *See* Pet. App. 8a–9a; *Flores*, 116 F. App'x at 509–11 ("We have previously held that the State of Louisiana affords students an adequate remedy through its tort

[4] Although the Fifth Circuit has held that state-law remedies available to plaintiffs bringing student-teacher excessive-force claims are adequate, this conclusion is outdated and no longer accurate. In Texas, for example, criminal law remedies are "virtually nonexistent in the face of an almost unbeatable statutory defense for teachers," and civil law remedies are inadequate due to a statutory damages cap and burdensome exhaustion requirements. Brief of Disability Rights Texas et al. as Amici Curiae in Support of Appellants' Petition for Rehearing En Banc at 8–11, *T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407 (5th Cir. 2021) (No. 20-20225), 2021 WL 3205852, at *8–11.

law and statutory provisions . . . . We therefore hold that plaintiff has not stated a substantive due process claim."); *Clayton ex rel. Hamilton v. Tate Cnty. Sch. Dist.*, 560 F. App'x 293, 297 (5th Cir. 2014) ("[T]his court has specifically held that post-deprivation state-law remedies available in Mississippi provide an adequate remedy, barring a student subject to corporal punishment from asserting a substantive due process claim.").

District courts throughout the Fifth Circuit routinely dismiss students' federal constitutional claims of excessive force under the Fifth Circuit's anomalous rule. *See E.H. ex rel. Abron v. Barrilleaux,* 519 F. Supp. 3d 328, 342 (E.D. La. 2021) ("[B]ecause Plaintiff has a remedy or remedies at state law, Fifth Circuit precedent mandates the dismissal of Plaintiff's federal Section 1983 claim."); *Poleceno v. Dallas Indep. Sch. Dist.*, No. 3:19-cv-1284, 2019 WL 2568681, at *3 (N.D. Tex. June 21, 2019) (dismissing plaintiff's § 1983 claims because statutory and common-law state remedies "are adequate" and thus, "under Fifth Circuit precedent . . . Texas law preclude[s] Plaintiff from prevailing on a substantive due process claim"); *Bell v. W. Line Sch. Dist.*, No. 4:07-cv-004, 2007 WL 2302143, at *3–4 (N.D. Miss. Aug. 7, 2007) (concluding that Mississippi "provides adequate post-punishment remedies to a student alleging to have been subject to excessive corporal punishment" and dismissing plaintiff's § 1983 claims).

This Court should resolve the split exacerbated by the Fifth Circuit's error, which, as Judge Wiener acknowledged, is "completely out of step with every

other circuit court and clear directives from the Supreme Court," and "flies in the face of the many decisions by our colleagues in other circuits and those sitting on the highest court of this land." Pet. App. 16a, 20a (Wiener, J. , joined by Costa, J., specially concurring). The Fifth Circuit's denial of rehearing—despite the express call of two of its judges for reconsideration of the anomalous *Fee* rule, *see* Pet. App. 16a–20a—demonstrates that this Court's intervention is necessary to resolve the issue.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for a writ of certiorari.

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