

No. 21-1014

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 REHEARING

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Pursuant to Rule 44.2 of this Court, T.O., *et al.* (“Petitioners”) respectfully petition for a rehearing of the denial of certiorari in this case. Petitioners do not seek a full rehearing of the petition for certiorari. Rather, Petitioners seek rehearing for the limited purpose of vacating and remanding the judgement of Fifth Circuit because *Fee v. Herndon*, 900 F.2d 804, 808 (5th Cir. 1990) is inconsistent with the precedent of this Court and in light of this Court’s decision in *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. ___, 2022 WL 2276808 (2022).

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PREAMBLE

Petitioners sought certiorari because the Fifth Circuit is at odds with every other circuit and the precedent of this Court in that the Fifth Circuit alone refuses to consider any constitutional claims of excessive force in the context of school corporal punishment. Petitioners also sought resolution of the split among the circuits as to whether it is appropriate to analyze excessive force claims in the context of school corporal punishment under the Fourth Amendment.

Fee v. Herndon, 900 F.2d 804, 808 (5th Cir. 1990), which is the basis for the Fifth Circuit’s unvacated opinion, is inconsistent with the well-founded decisions of this Court. The Fifth Circuit has consistently declined to correct the error during the intervening decades. Several recent law review articles have noted

the need to overrule *Fee* to ensure the uniform application of the law, among other considerations.

The unvacated Fifth Circuit opinion in this case is now being interpreted by District Courts in the Fifth Circuit to bar all excessive force claims by students. District Courts have relied on the unvacated Fifth Circuit opinion in this case as holding that state post violation remedies negate any constitutional violation caused by a state actor using excessive force against a child in the school corporal punishment context.

On June 24, 2022, this Court issued an opinion in *Dobbs v. Jackson Women's Health Org.*, 19-1392, 2022 WL 2276808 (U.S. June 24, 2022). This Court's opinion in *Dobbs* casts doubt on the continuing reliance by most circuits, including the Fifth Circuit, on the substantive due process rights included in liberty interests protected by the Fourteenth Amendment to address student excessive force claims in the context of school corporal punishment. This case presents an ideal opportunity for the Court to clarify whether students may bring claims under the Fourth Amendment for excessive corporal punishment. Without such clarification, students in the majority of the circuits may be denied constitutional protection from abuses of governmental authority in the corporal punishment context because of uncertainty about the continuing validity of such claims following *Dobbs*.

Remanding this case to the Fifth Circuit with instructions that *Fee* is overruled and that the Fifth Circuit should determine whether it is appropriate to

analyze cases like the present case under the Fourth Amendment in light of *Dobbs*, would permit students living in the Texas to assert the same constitutional rights that are available in other states.

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GROUNDS FOR REHEARING

- A. Allowing *Fee v. Herndon*, 900 F.2d 804, 808 (5th Cir. 1990) to stand as good law despite its plain error perpetuates the arbitrarily unequal treatment of student’s rights and deprives students in the Fifth Circuit of the ability to assert their constitutional right to be free from excessive force at the hands of school officials.**

Petitioners request that this Court summarily vacate and remand this case to the Fifth Circuit on the grounds that *Fee v. Herndon* was wrongly decided. With the erroneous holdings of *Fee* overruled, the Fifth Circuit will be free to decide the legal framework that is appropriate for claims of excessive force in the public school context.

The importance of overruling *Fee* and the panel opinion in this case has been addressed by a number of recent law review articles. As stated in the Harvard Law Review, the Fifth Circuit’s outlier status is particularly important because, “[S]tates in the Fifth Circuit account for more than one-third of all corporal

punishment in the United States.”¹ Another article recognized that, “[T]he T.O. decision highlights the unsustainable nature of a circuit split on the method of review for academic corporal punishment claims.”² The consequences of allowing the panel opinion in this case to stand was further highlighted in another law review article: “As the law currently stands, the Fifth Circuit has indicated that no punishment, even death, will trigger a due process claim if the punishment is disciplinary and alternative state remedies are available for recovery.”³

The current consequences of allowing the unvacated Fifth Circuit opinion and *Fee* to stand is also

¹ *Constitutional Law—Corporal Punishment—Fifth Circuit Declines to Extend Fourth Amendment to Bar Corporal Punishment in Public Schools.—T.O. v. Fort Bend Independent School District*, 2 F.4th 407 (5th Cir. 2021), *Reh’g En Banc Denied*, No. 20-20225 (5th Cir. Sept. 15, 2021) (citing Elizabeth T. Gershoff & Sarah A. Font, *Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy*, SOC. POLY REP., Autumn 2016, at 1, 8 tbl.3 (providing statistics for Louisiana, Mississippi, and Texas)).

² Jessica Whelan, *Granting A Hall Pass to Public School Educators: How the Fifth Circuit’s Decision in T.O. v. Fort Bend Independent School District Highlights the Inadequate Constitutional Curriculum for Academic Corporal Punishment*, 67 Vill. L. Rev. 201, 238 (2022).

³ Smriti Aveeka Vats, *T.O. v. Fort Bend Independent School District: Fifth Circuit Flouts Supreme Court Precedent in School Discipline Cases*, 96 Tul. L. Rev. 787, 797–98 (2022). This is inconsistent with this Court’s hypothetical guidance in *Fry v. Napoleon Community Schools*, 137 S.Ct. 743, 756 n. 9 (2017) that “a child could file the same kind of suit against an official at another public facility for inflicting such physical abuse—as could an adult subject to similar treatment by a school official.”

illustrated by the denial of excessive force claims citing the unvacated Fifth Circuit opinion in this case. A Texas District Court dismissed a suit against school officials accused of breaking the arm of child with cerebral paralysis based on the unvacated Fifth Circuit opinion in this case. *Chavez v. Brownsville Indep. Sch. Dist.*, 1:18-CV-173, 2021 WL 6927722, at *1 (S.D. Tex. Nov. 29, 2021). Another District Court relied on the unvacated Fifth Circuit opinion in this case to dismiss a claim against school officials for twice slapping a child with autism because the child engaged in behaviors admittedly consistent with that condition. *S.B. by and through S.B. v. Jefferson Par. Pub. Sch. System*, CV 21-217, 2021 WL 7703488, at *3 (E.D. La. Oct. 15, 2021).

To avoid this ongoing deprivation of a remedy for constitutional violations by state actors, this Court should vacate the opinion below and overrule *Fee* on the well-established principle that claims under 42 U.S.C. 1983 are not cured or mooted by post violation compensatory remedies under state law. As Justice Roberts stated in *Knick v. Township of Scott, Pennsylvania*, 139 S.Ct. 2162, 2172 (2019), “The availability of a subsequent compensation remedy . . . no more means there never was a constitutional violation in the first place than the availability of a damages action renders negligent conduct compliant with the duty of care.” *Fee* erroneously confuses the analysis applicable to substantive due process rights with the analysis applicable to procedural due process rights in direct

contradiction of *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

In light of these subsequent developments and the Fifth Circuit's decades long refusal to overrule *Fee*, Petitioners respectfully asks this Court to vacate the panel opinion below, overrule *Fee*, and remand to the Fifth Circuit to reconsider in light of this Court's decision to overrule *Fee*.

B. This case presents an ideal opportunity for the Court to ensure that students are able to assert their constitutional right to be free from excessive force under the Fourth Amendment even where substantive due process protections of the Fourteenth Amendment are unavailable under the substantive due process standards recently announced by this Court in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. ___, 2022 WL 2276808 (2022).

This Court's June 24, 2022 decision in *Dobbs v. Jackson Women's Health Organization* emphasizes that "the Court has long asked whether the right is deeply rooted in [our] history and tradition and whether it is essential to our Nation's scheme of ordered liberty."⁴ To answer this question, this Court performed a detailed analysis of whether the right to

⁴ *Dobbs*, 19-1392, 2022 WL 2276808, at *10 (internal quotes and citations omitted).

abortion in particular is deeply rooted in our history separate and apart from a more generalized right to privacy. This emphasis combined with the complicated history of corporal punishment in public schools raises questions about the continuing applicability of the liberty interest protected by the Fourteenth Amendment. This aligns with this Court's holding in *Graham v. Connor*, 490 U.S. 386, 393 (1989) that a court should determine whether a specific constitutional provision applies before analyzing excessive force claims under the substantive due process rights of the Fourteenth Amendment.

The majority of circuits, including the Fifth Circuit, permit suits based on substantive due process under the Fourteenth Amendment without reference to the protections available under the Fourth Amendment or any other constitutional provision. The application of substantive due process in these circuits may need to be reevaluated in light of *Dobbs*.

In the unvacated Fifth Circuit opinion, the panel dismissed Petitioners' Fourth Amendment claims based on the purported lack of Fifth Circuit precedent establishing that the Fourth Amendment could apply to excessive force claims in the corporal punishment context. In so doing, the Fifth Circuit failed to establish whether Fourth Amendment claims might be valid in the Fifth Circuit. This means that students have no constitutional remedy in the Fifth Circuit when they are subjected to excessive force by state employees in schools. If claims are brought under the Fourteenth

Amendment they will be dismissed based on the unvacated Fifth Circuit opinion and *Fee*. If Fourth Amendment claims are brought, they are dismissed based on qualified immunity because the Fifth Circuit has determined in the opinion below that the applicability of the Fourth Amendment has not been clearly established.

The Court should therefore vacate and remand this case to the Fifth Circuit for reconsideration of whether in light of this Court's subsequent opinion in *Dobbs*, substantive due process remains applicable to claims of excessive force in the corporal punishment context and whether the Fourth Amendment applies to such claims.



CONCLUSION

For the above reasons, T.O., *et al.* respectfully request that this Court grant rehearing for the limited purpose of vacating the opinion of the Court of Appeals

for the Fifth Circuit and remanding for reconsideration in light of subsequent precedent of this Court.

Respectfully submitted,

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I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

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