

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 Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

—◆—
**BRIEF OF DISABILITY ORGANIZATIONS AS
AMICI CURIAE SUPPORTING PETITIONERS**

—◆—
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February 17, 2022

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IDENTITY AND INTEREST OF AMICI CURIAE¹

Amici advocate for and support individuals with disabilities, their parents, and advocates in efforts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504), Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, et seq. (ADA), and the Constitution. The Fifth Circuit’s decision, along with Judge Wiener’s concurrence, compel amici to offer their perspective as to why the Court should correct the Fifth Circuit’s anomalous position among the federal courts of appeals, which deprives children—especially those with disabilities—of an important way to protect their constitutional rights.

The following organizations respectfully submit this brief as amici curiae in support of petitioners–appellants.

Disability Rights Texas (DRTX), Disability Rights Louisiana (DRLA) and Disability Rights Mississippi (DRMS) are the federally-designated

¹ No counsel for any party has authored this brief in whole or in part, and no person other than the amici or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, amicus curiae Disability Rights Texas notified counsel of record of Petitioners and Respondents of its intent to file this amicus brief on February 7, 2022. All parties consent to the filing of this amicus brief.

legal protection and advocacy agencies for people with disabilities for their respective states. Each has the mission to help people with disabilities understand and exercise their rights under the law and ensure their full and equal participation in society. DRTX, DRLA, and DRMS accomplish this mission by providing direct legal assistance to people with disabilities, protecting the rights of people with disabilities through the courts and justice system, and educating and informing policy makers about issues that impact the rights and services for people with disabilities.

Council of Parent Attorneys and Advocates (COPAA) is a national not-for-profit organization for parents of children with disabilities, their attorneys, and advocates. COPAA provides resources, training, and information for parents, advocates, and attorneys to assist in obtaining the free appropriate public education such children are entitled to under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq. COPAA also supports individuals with disabilities, their parents, and advocates in efforts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504), and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, et seq. (ADA).

The Coalition of Texans with Disabilities (CTD) is a statewide, cross-disability advocacy organization founded by people with disabilities in 1978 with

a mission to ensure that people may live, learn, work, play and participate fully in their community of choice. CTD has prioritized advocating for educational services that best serve all children with disabilities. This necessarily includes providing a safe environment for children with disabilities, and the elimination of exclusionary disciplinary methods and use of force.

The National Center for Youth Law (NCYL) is a private, non-profit law firm that helps children achieve their potential by transforming the public agencies that serve them. For 50 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities they need to become self-sufficient adults. One of NCYL's priorities is to improve student educational outcomes by protecting students' legal rights at school and ensuring that students have access to appropriate education services. NCYL provides representation to children and youth in cases that have broad impact. NCYL has represented many students in litigation and class administrative complaints to ensure their access to adequate, appropriate and non-discriminatory education as well as many children in foster care to remedy violations of their substantive due process rights.

The Autism Society of Texas (AST) is a statewide organization that works to create connections, empowering everyone in the Autism community with the resources needed to live fully. Through advocacy, support, education, and community inclusion, AST works to improve the lives of all impacted by Autism.

Because students with Autism and other disabilities deserve a safe learning environment, AST advocates for the elimination of use of force and other disciplinary methods that would exclude students with Autism and disabilities from receiving the educational services they are entitled to.

Texas Appleseed is a public interest justice center that is based in Austin and works with base-building organizations across the state of Texas. Using data-driven research and local community partnerships, Texas Appleseed advocates for changes to laws and policies that disproportionately burden historically underserved Texans. For more than 15 years, Texas Appleseed has built significant expertise in the fight to dismantle the school-to-prison pipeline; Texas Appleseed has published numerous reports that highlight how centuries-long draconian educational practices, exclusionary discipline, and school policing detrimentally affect Black & Brown children, LGBTQ young people, and kids with disabilities.



INTRODUCTION AND SUMMARY OF THE ARGUMENT

In every circuit to have addressed the question—bar one—children who suffer mental and physical abuse at school have a Constitutional remedy. Courts disagree on the contours of the claims, but all agree that the courthouse door remains open in the most egregious cases—cases where children are secluded in

locked rooms, or struck, or restrained by belts or ropes, or choked. The Fifth Circuit stands alone in categorically rejecting such claims. The time has come to fix that anomaly and establish a more uniform standard for Constitutional claims arising out of school abuse.

The world has changed since the Fifth Circuit rejected children's Constitutional claims, worried that federal courts would become the venue for a flood of lawsuits adjudicating whether "in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks." *Ingraham v. Wright*, 525 F.2d 909, 917 (5th Cir. 1976) (en banc). See also *Fee v. Herndon*, 900 F.2d 804, 809 (5th Cir. 1990). Schools have become better equipped and teachers more professional. Thus, corporal punishment for misbehavior is now used only in a few school districts and with declining frequency even there. See, e.g., Elizabeth T. Gershoff & Sarah A. Font, *Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy* (2016) (noting decline of corporal punishment from "4% of all schoolchildren in 1978 to less than .5% today").²

But the threat of excess force at school has shifted, not disappeared. Today, children with disabilities far too often suffer physical and mental abuse in school. They are struck, restrained, and isolated in numbers far beyond other children. And the consequences they suffer to their physical and mental health are severe. When inadequately trained teachers resort to

² Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5766273/>.

unnecessary and unreasonable force to restrain or control students with disabilities, students may suffer permanent injuries, both physical and psychological, and sometimes death. Many students subjected to unreasonable force suffer from post-traumatic stress disorder (PTSD).

This is precisely such a case. T.O., a first-grader with a disability, was thrown to the ground by a teacher in his school, and then put into a choke hold for several minutes. T.O. began to foam at the mouth, and T.O.'s aide asked the teacher to release him. But the teacher nonetheless continued for several minutes. After finally being released, T.O. went to the school nurse, who observed bruising on T.O.'s neck. Both the physical damage T.O. suffered and the harm to his mental state were considerable. And yet T.O.'s case is only one of numerous such cases, some with even more tragic consequences.

Amici write to provide the Court with information within their unique knowledge. The absence of constitutional remedies for these rare, but devastating, incidents imposes serious consequences on many students, and makes it more likely for children to be harmed in the future. This Court should grant certiorari to bring the three Fifth Circuit states in line with all the other circuits in the country where students do have valid constitutional claims when they are physically or mentally abused at school.



ARGUMENT

I. Children with disabilities are restrained, isolated, and physically hurt in schools.

Petitioners assert that this case presents important and recurring issues of federal constitutional law. They are right. Teachers who are not adequately trained in de-escalation techniques and other ways to address student behavior, or who ignore their training, have too often responded to student behavior with physical and mechanical restraints, seclusion, and even resort to physical violence.³ This is an issue of the highest importance that deserves this Court's attention.

The numbers are shocking. About 100,000 schoolchildren are physically or mechanically restrained or put into seclusion in a single school year. U.S. Dep't of Educ., *2017–18 Civil Rights Data Collection: The Use of Restraint and Seclusion on Children with Disabilities in K-12 Schools* 6 (Oct. 2020).⁴ An astounding 78% of those restrained or secluded are children with disabilities. *Id.*

³ Seclusion does not mean a mere “time out,” where a child is asked to sit alone. Rather, the Civil Rights Data Collection survey defines seclusion as “the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving.” See U.S. Dep't of Educ., *Restraint and Seclusion: Resource Document* (2012), available at <https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>.

⁴ Available at <https://www2.ed.gov/about/offices/list/ocr/docs/restraint-and-seclusion.pdf>.

Restraint and seclusion come with severe dangers, including risk of psychological harm, loss of dignity, trauma, and even serious injury and death. Nat'l Disability Rights Network, *School is Not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools* 7–9 (Jan. 2009) [hereinafter *Investigative Report*];⁵ see also U.S. Gov't Accountability Off., *Seclusions and Restraints: Selected Cases of Death and Abuse at Public & Private Schs. and Treatment Ctrs.* (May 2009).⁶

And while corporal punishment has declined over the last 50 years, students with disabilities—like students of color—are much more likely to be corporally punished than their peers. Ctr. for Civil Rights Remedies & S. Poverty L. Ctr., *The Striking Outlier: The Persistent, Painful and Problematic Practice of Corporal Punishment in Schools* 21–24, 29–29 (2019) [hereinafter *Striking Outlier*].⁷ Children who suffer these degradations receive more than bruises. Doctors have “documented serious medical consequences,” including “severe muscle injury, extensive blood clotting (hematomas), whiplash damage, and hemorrhaging.” Human

⁵ Available at <https://www.ndrn.org/wp-content/uploads/2019/03/SR-Report2009.pdf>.

⁶ Available at <https://www.gao.gov/assets/gao-09-719t.pdf>.

⁷ Available at https://www.splcenter.org/sites/default/files/com_corporal_punishment_final_web_0.pdf.

Rights Watch, *Corporal Punishment of Students with Disabilities in US Public Schools*, at I (Aug. 10, 2009).⁸

Examples abound of restraint, seclusion, and corporal punishment gone wrong. In Michigan, a 15-year-old boy with autism died while being physically restrained by school employees who pinned him down for over an hour. *Investigative Report, supra*, at 14. A 7-year-old girl with Attention Deficit Hyperactivity Disorder in Wisconsin suffocated to death when pinned to the floor because she failed to follow time-out rules. *Id.* More recently in Connecticut, students were placed in time-out rooms so seclusive that parents dubbed them “scream rooms.” Nat’l Disability Rights Network, *School is Not Supposed to Hurt: The U.S. Dep’t of Educ. Must Do More to Protect School Children from Restraint and Seclusion* 10 (Mar. 2012).⁹ A child in Colorado was duct-taped to his wheelchair, an Iowan autistic student was tied to a lunch table, and a 9-year-old Kentuckian was restrained inside a duffel bag. *Id.* at 9, 10–13.

The Constitution should at least protect students facing the worst violence from their public schools, and it is important for this Court to guide the lower courts in how to administer that protection. Indeed, scholars as well as advocates have recently raised concerns about courts’ handling of constitutional protections for

⁸ Available at <https://www.hrw.org/report/2009/08/10/impairing-education/corporal-punishment-students-disabilities-us-public-schools>.

⁹ Available at https://www.ndrn.org/wp-content/uploads/2019/03/School_is_Not_Supposed_to_Hurt_3_v7.pdf.

those with disabilities. See Jamelia Morgan, *Disability's Fourth Amendment*, 122 COLUM. L. REV. (forthcoming 2022);¹⁰ Maryam Ahranjani, *School "Safety" Measures Jump Constitutional Guard Rails*, 44 SEA. U. L. REV. 273, 285–96 (Winter 2021); Coun. of Parent Attorneys & Advocates, *The Crisis of Trauma and Abuse in Our Nation's Schools* 7, 13–28 (2020).¹¹ And state laws on school punishment are a poor patchwork that are inadequate to protect America's children. See, e.g., *Investigative Report*, *supra*, at 10–11. Given the wide problem throughout the country, this Court should step in and clarify the protections the Constitution grants to these children.

II. The Fifth Circuit's extreme rule has serious consequences.

While the rest of the country appropriately provides students with varying forms of relief for school violence, in the Fifth Circuit government schools are wholly insulated from constitutional review. *Fee* and *Ingraham* are routinely applied to acts of school violence like those presented here to immunize schools and teachers, so long as the school claims the acts have some kind of disciplinary component.

The results of this policy are as predictable as they are sad. A recent tragic case makes the point: a Fort

¹⁰ Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3820117.

¹¹ Available at https://cdn.ymaws.com/www.copaa.org/resource/resmgr/docs/2020_docs/restraint_and_seclusion_pape.pdf.

Worth student diagnosed with autism died after he was restrained at school. *See* Silas Allen, Fort Worth Star-Telegram, *Fort Worth Student with Autism Died after being Restrained at School. What Happened?* (June 16, 2021).¹² Far from obtaining any judicial remedy, as of late last year the family still had not even been told how their child died, or why he was subjected to such treatment. *Id.* News reports show that the *same school* has just recently been accused of abusing *another child*, with a teacher alleged to have thrown a 9-year-old child against a fence before slamming her to the ground. *See* C.L. Lynch, NeuroClastic, *Justice for Xavier Hernandez: Texas School Still Practicing Illegal Restraints after Killing Young Autistic Man* (June 23, 2021).¹³

That school is no isolated outlier. A review of news over the last year shows no shortage of violence against students in the Fifth Circuit's states. *See, e.g.,* Kevin Dudley, Jr., KLFY, *Morehouse Parish School Teacher Arrested after Striking Student* (Feb. 3, 2022);¹⁴ Emily Donaldson, The Dallas Morning News, *Former Burluson Educators Arrested on Charges of*

¹² Available at <https://www.msn.com/en-us/news/crime/fort-worth-student-with-autism-died-after-being-restrained-at-school-what-happened/ar-AAL6EN0>.

¹³ <https://neuroclastic.com/xavier-hernandez-fort-worth-autism-restraint-death/>.

¹⁴ Available at <https://www.klfy.com/louisiana/morehouse-parish-school-teacher-arrested-after-striking-student/>.

Abuse of Disabled Individual (Nov. 29, 2021);¹⁵ Billy Gates, KXAN, *Affidavit: Manor HS Teacher Hit Student with Nonverbal Autism, Faces Felony Charge* (Nov. 19, 2021);¹⁶ Roland Richter, Fox 44 News, *Former Killeen ISD Teacher Arrested for Injury to a Disabled Student* (Apr. 28, 2021).¹⁷

That these terrible events disproportionately affect children with disabilities is no coincidence. As the use of corporal punishment for discipline has declined, children with disabilities are now on the front lines in the Fifth Circuit states for mental and physical abuse. “Students with disabilities represent approximately 9.8% of [Texas’s] school population,” for example, “but they experienced 91% of restraints in Texas’s public schools during the 2018-2019 school year.” Disability Rights Tex., *Harmful Restraint of Students with Disabilities in Texas Schools* 9 (Dec. 2020).¹⁸ Unsurprisingly, given the Fifth Circuit’s case law, two of the three states with the highest rates of corporal punishment against students with disabilities are states in the Fifth Circuit (Mississippi and Texas). *Striking Outlier*,

¹⁵ Available at <https://www.dallasnews.com/news/education/2021/11/29/former-burleson-educators-arrested-on-charges-of-abuse-of-disabled-individual/>.

¹⁶ Available at <https://www.kxan.com/news/local/travis-county/affidavit-manor-hs-teacher-hit-student-with-nonverbal-autism-faces-felony-charge/>.

¹⁷ Available at <https://www.fox44news.com/news/local-news/former-killeen-isd-teacher-arrested-for-injury-to-a-disabled-student/>.

¹⁸ Available at <https://media.disabilityrightstx.org/wp-content/uploads/2020/12/07130335/DRTx-Restraint-Report-FINAL-Dec-7-2020-2.pdf>.

supra, at 26. And it is likely that many incidences of restraints used against disabled children are systematically underreported. Jacqueline M. Nowicki, U.S. Gov't Accountability Off., *K-12 Education: Education Should Take Immediate Action to Address Inaccuracies in Federal Restraint and Seclusion Data* 5–6 (June 18, 2019) (listing both the Dallas and Houston Independent School Districts as among those likely underreporting incidents).¹⁹

Nor can children rely on existing state law to protect them in the final analysis. The laws of the individual Fifth Circuit states have proven inadequate. For example, the Texas Legislature has made teachers immune from most disciplinary proceedings involving use of force. *See* TEX. EDUC. CODE § 22.0512. And in Mississippi, one study has found that courts “overwhelmingly rule[] in favor of school districts and their employees” in cases alleging negligence. Sara B. Kriesel-Hall, *A Legal Analysis of Litigation Against Mississippi Educators & School Systems Under the Mississippi Tort Claims Act* 92 (May 2013).²⁰

The Fifth Circuit’s rule immunizes all of these schools and teachers from even the shadow of liability—no matter the evidence, no matter the age of the child, no matter the consequences. This is no way for

¹⁹ Available at <https://www.gao.gov/assets/gao-19-551r.pdf>.

²⁰ Available at <https://digital.library.unt.edu/ark:/67531/metadc271847/>.

the Constitution to operate. This Court should step in to clarify the law and correct this wrong.



CONCLUSION

This Court should grant the petition for writ of certiorari and reverse and remand this case.

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Dated: February 17, 2022