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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Respondents concede that the federal courts of appeals are deeply divided on how students may bring claims for violations of their federal constitutional right against excessive force by public-school officials. They also concede that the Fifth Circuit stands alone in foreclosing any federal constitutional claim where a state-law remedy is available and the excessive force purportedly served a disciplinary or pedagogical purpose.

Despite this circuit split, Respondents contend the petition should be denied because qualified immunity supposedly prevents this Court from reaching the constitutional issue. Respondents are incorrect. Qualified immunity does not apply here because this Court and the Fifth Circuit have provided clear notice that the Constitution protects students from excessive force by public-school officials. Respondent Abbott cannot credibly contend that there was inadequate notice that assaulting and choking first-grader T.O. would violate his constitutional rights. And even if qualified immunity principles were relevant, they would not preclude this Court's review. This Court's resolution of the circuit conflict would be warranted to confirm the legal standards governing public-school officials.

Respondents also attempt to defend the merits of the Fifth Circuit's outlier approach, but two of the three Fifth Circuit judges on the panel below would not defend that approach. They issued a specially concurring opinion emphasizing that, although they were

bound by circuit precedent, that precedent is "completely out of step with every other circuit court and clear directives from the Supreme Court." Pet. App. 16a-17a (Wiener, J., joined by Costa, J., specially concurring).

Absent this Court's review, the conflict between the Fifth Circuit and every other circuit will persist, and the scope of a student's right to pursue a public education free from unconstitutional force by school employees will continue to turn on the school's location.

ARGUMENT

I. Respondents Concede There Is a Deep Circuit Split on How Students Can Protect Their Constitutional Right Against Excessive Force.

Respondents concede that a circuit split exists regarding how students should bring claims to protect their constitutional right against excessive force by public-school employees. Br. in Opp. i ("federal courts of appeal disagree on whether and how" such claims may be brought); *id.* at 24-25 (listing various student excessive-force questions on which "federal courts of appeal disagree").

Respondents likewise admit that among the courts of appeals, *only* the Fifth Circuit categorically rejects excessive-force claims by students where state-law remedies are available and the force purportedly served a disciplinary or pedagogical purpose. *Id.* at 18. Respondents acknowledge that the Fifth Circuit's

"unique approach"—which shuts the federal courthouse doors on meritorious constitutional claims—is an outlier. *Id.*

The split, Respondents explain, exists because "the Fifth Circuit's underlying *law* is different" from that of all other circuits. *Id.* at 19. Respondents' attempt to defend that outlier legal approach is wholly unpersuasive. *See* Part III *infra*. It is also irrelevant, because the Court's review is warranted to resolve the deep circuit split on the important and recurring questions presented here.

II. The Fifth Circuit's Erroneous Qualified Immunity Analysis Reinforces the Need for Review By This Court.

Respondents' main argument is that review should be denied because qualified immunity bars Petitioners' constitutional claims regardless of their merit. That argument fails twice over: qualified immunity does not bar Petitioners' claims, and even if those principles were relevant, they would not preclude this Court's review.

A. Respondents incorrectly assert that qualified immunity precludes review because T.O. had no clearly established right to be free from excessive force. *See* Br. in Opp. 2-3, 14-18.[1]

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[1] Respondents incorrectly contend (at 14) that Petitioners do not dispute Abbott's entitlement to qualified immunity on Petitioners' Fourteenth Amendment claim. The Petition specifically addressed the Fifth Circuit's qualified immunity ruling that addressed only the Fourth Amendment, Pet. App. 8a, but did not limit Petitioners' own argument to the Fourth Amendment

The constitutional right of students to be free from excessive force has been clearly established for decades, including in the Fifth Circuit. Respondents acknowledge that "the Fifth Circuit has long held that a school official's use of excessive force as an instructional technique *is* subject to constitutional scrutiny." Br. in Opp. i. Consistent with that principle, the Fifth Circuit declared that "by now, 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 v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 875 (5th Cir. 2000)).[2]

More than forty years ago, this Court held that students have a "constitutionally protected liberty interest" that is implicated whenever "school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain." *Ingraham v. Wright*, 430 U.S. 651, 672, 674 (1977). The Court addressed the issue in the context of procedural due process, but courts have relied on that

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claim, making clear that "Abbott is … not entitled to qualified immunity" no matter "which specific constitutional Amendment applies, because her actions would violate any applicable constitutional standard." Pet. 3, 22, 29.

[2] Respondents mischaracterize (at 18 n.9) *Moore*. *Moore* explicitly recognized that "[c]orporal punishment in public schools 'is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning,'" *id.* at 875 (quoting *Fee v. Herndon*, 900 F.2d 804, 808 (5th Cir. 1990), but the Fifth Circuit held the specific conduct at issue did not implicate the right because it was "intended as a disciplinary measure" and state law afforded "adequate" alternate remedies, *id.*

decision to recognize a clearly established substantive due process right for students not to be subject to excessive force. *See, e.g.*, *Meeker v. Edmundson*, 415 F.3d 317, 323 (4th Cir. 2005).

The Fifth Circuit itself has allowed some substantive due process claims under the Fourteenth Amendment to proceed against school officials when they arbitrarily use force against students. *See, e.g.*, *Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303, 304-06 (5th Cir. 1987) (rejecting teacher's assertion of qualified immunity because "[c]orporal punishment is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning" (citation omitted)); *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 451 (5th Cir. 1994) (finding substantive due process violation based on teacher's abuse of student, and reading *Jefferson* to establish for purposes of qualified immunity that "the Constitution protects a schoolchild against being tied to a chair or against arbitrary paddlings").[3]

The Fifth Circuit also has recognized Fourth Amendment claims of unconstitutional excessive force brought by students. *See Curran v. Aleshire*, 800 F.3d

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[3] The opinion below attempted to distinguish *Jefferson*, but *Jefferson* and the precedent on which it relied—not any subsequent gloss on *Jefferson* that post-dates the conduct at issue—is what matters for qualified immunity here. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982) (question is whether law was "clearly established at the time an action occurred"). Moreover, Petitioners' case was rejected on a motion to dismiss despite the complaint's allegations that Abbott's conduct had no disciplinary purpose, which must be taken as true at this juncture. *See infra* at 6-7.

656 (5th Cir. 2015); *Keim v. City of El Paso,* No. 98-50265, 1998 WL 792699, at *1 (5th Cir. Nov. 2, 1998) (per curiam) (unpublished). Respondents try to explain away these cases (at 16) as involving "school officials employed in a law enforcement capacity," but neither decision contains any such limitation. The decisions reconfirmed (before the conduct at issue here) that a public-school official violates the constitutional rights of a student by physically assaulting a student with unreasonable force. *See Curran,* 800 F.3d at 658 (throwing student against a wall); *Keim,* 1998 WL 792699, at *1 (grabbing student's arm and beating student with fists).

The case law thus clearly established T.O.'s constitutional right to be free of excessive force by public-school officials. The precedent need not be factually identical to a subsequent case to preclude qualified immunity. This Court repeatedly has rejected the notion that immunity bars a claim "unless the very action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (precedent "does not require a case directly on point for a right to be clearly established").

When a constitutional violation is "obvious," even precedent establishing the right at a "general level" suffices. *White v. Pauly*, 137 S. Ct. 548, 552 (2017). That principle is particularly relevant where, as here, the court rejects a claim on a motion to dismiss when all well-pleaded allegations must be taken as true. *See* Pet. App. 21a, 23a.

Here, the district court recognized the complaint's allegations that the teacher who kept a "choke hold on T.O. ... weighed 260 lbs., [and T.O.] was a first grader who weighed 55 lbs." Pet. App. 25a-26a. Moreover, the complaint repeatedly alleges that Abbott "maliciously" used excessive force against T.O. without any "pedagogical, disciplinary or other legitimate purpose." *Id.* at 41a, 47a; *see also id.* at 46a. The complaint further alleges that the violent conduct against T.O. flouted his school-approved Behavioral Intervention Plan, and that T.O.'s school behavioral aide asked Abbott to stop choking T.O., but Abbott continued for "several minutes" after T.O. "was visibly foaming at the mouth." *Id.* at 41a, 44a-46a. The lack of any legitimate purpose is further reinforced by allegations that Abbott was not T.O.'s classroom teacher, but rather was a fourth-grade teacher who happened upon T.O. while walking down the hallway and intervened even though T.O. was accompanied by a behavioral aide. *Id.* at 44a-46a. Those allegations more than sufficed to allege an "obvious" constitutional violation.

Respondents attempt to deny this clearly established right by relying chiefly on cases where the Fifth Circuit barred students' excessive-force claims not because there was no constitutional violation, but because (in the Fifth Circuit's erroneous view) there were adequate state remedies to address the violation. In *Fee v. Herndon*, for example, the Fifth Circuit held that due process was "inoperative" for such claims "where states affirmatively impose reasonable limitations upon corporal punishment and provide adequate criminal or civil remedies for departures from such laws." 900 F.2d 804, 806 (5th Cir. 1990). Other Fifth

Circuit cases have applied the same rationale. *See, e.g.*, *Ingraham v. Wright*, 525 F.2d 909, 917 (5th Cir. 1976); *Cunningham v. Beavers*, 858 F.2d 269, 272 (5th Cir. 1988); *Moore*, 233 F.3d at 875.

Contrary to Respondents' assertions (at 17-18), those cases do not create a rule that students lack a constitutional *right* to be free from excessive force by school officials. Instead, they confirm that school officials are subject to liability under federal law for violations of that right *unless* state law fails to provide adequate remedies.[4] State actors are therefore on notice that excessive force against students is unlawful, *see Hope v. Pelzer*, 536 U.S. 730, 739-41 (2002), and notice about which "forum" will adjudicate that issue is not required, *Fee*, 900 F.2d at 809; *see also* Pet. App. 11a (acknowledging that "[b]y now, every school teacher ... must know that inflicting pain on a student ... violates that student's constitutional right to bodily integrity" (quoting *Moore*, 233 F.3d at 871, 875)).

Respondents contend that notice was required that Abbott's conduct violated the Fourth Amendment specifically. Br. in Opp. 16. But as demonstrated above, that approach is incorrect, and it is the subject of a second, related circuit split. *See* Pet. 22-32. The "salient question" for qualified immunity is whether a state actor had "fair warning" at the time of the misconduct that the actions violated the Constitution. *Hope*, 536 U.S. at 739-41; *see also Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020).

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[4] For example, if Texas repealed the state-law remedies the Fifth Circuit cited, school officials would be subject to constitutional excessive-force claims.

The Fifth Circuit's inconsistencies about *which* constitutional provision should govern a particular type of excessive force claim do not affect whether the school official was on notice that the conduct was unconstitutional. In any event, Petitioners' complaint includes claims under both the Fourth and Fourteenth Amendments, Pet. App. 41a, 49a, as recognized by both lower courts, Pet. App. 1a, 3a, 5a, 24a, 30a. The excessive force at issue involved restraint and assault and is adequate to state a claim under both provisions.

B. Respondents are incorrect to argue (at 3-4, 26-27) that qualified immunity prevents the Court from resolving the constitutional question. The Court has recognized that a "regular policy of avoidance" in the qualified immunity context would "threaten[] to leave standards of official conduct permanently in limbo." *Camreta v. Greene*, 563 U.S. 692, 706 (2011). Thus, the Court may "reac[h] beyond an immunity defense to decide a constitutional issue." *Id.* at 708.

In *Camreta*, the Court granted review of a Fourth Amendment issue even though, unlike here, no party disputed that qualified immunity applied. *Id.* at 697-700. The Court refused to allow qualified immunity to "frustrate 'the development of constitutional precedent' and the promotion of law-abiding behavior." *Id.* at 706 (quoting *Pearson v. Callahan*, 555 U.S. 223, 237 (2009)). The Court explained that it may decide *either* the constitutional question *or* the immunity question first—and it is "often beneficial" to begin with the former. *See Pearson,* 555 U.S. at 236. That approach "promotes the development of constitutional precedent," *id.*, and "clarif[ies] the legal standards

governing public officials," *Camreta*, 563 U.S. at 707; *cf. Zadeh v. Robinson*, 928 F.3d 457, 478-81 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part) (describing how addressing the question of immunity first creates a "Catch-22" where a plaintiff can never vindicate obvious constitutional violations, leading to "constitutional stagnation").

The need for clarification is especially great here because students' excessive-force claims "do not frequently arise in cases" against non-individual state actors where no qualified immunity could be raised. *Pearson*, 555 U.S. at 236. Indeed, Respondents have not identified any such case.

III. The Decision Below Is Incorrect and Fails to Protect the Constitutional Rights of Students.

Respondents acknowledge (at 33) that this Court has found "post-deprivation remedies" to be "irrelevant to a substantive due process analysis," but they nevertheless contend that the Fifth Circuit's approach is correct because students' constitutional rights are "limited" in the public-school setting. That argument fails as well.

This Court has held that students retain their constitutional rights when they attend school. *See, e.g.*, *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); *Ingraham*, 430 U.S. at 674.[5] And the

[5] Respondents invoke *in loco parentis* to suggest that the Constitution should not apply in schools, but the Court has rejected

Court has specifically rejected the basis of the Fifth Circuit's outlier view—that those constitutional rights must give way when state-law remedies are available. *Zinermon v. Burch*, 494 U.S. 113, 125-26 (2009); *see also Knick v. Township of Scott*, 139 S.Ct. 2162, 2172-73 (2019).

Petitioners do not argue, and no circuit has held, that every interaction between a school official and a child that includes some degree of physical interaction is appropriate for federal judicial intervention. *See, e.g.*, *Wallace by Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010, 1011, 1016 (7th Cir. 1995) (affirming summary judgment for teacher on student's Fourth and Fourteenth Amendment claims where teacher's actions in grasping a student's wrist and elbow to escort her out of classroom were not unreasonable). Petitioners' contention here is consistent with what nearly all circuits have held: that the Constitution protects students from excessive use of force by public-school officials.

Respondents are also incorrect to assert (at 24, 27-34) that only the Fifth Circuit's approach avoids "constitutionaliz[ing] state law tort claims." The Fourth Amendment prohibits "unreasonable seizures," and the Fourteenth Amendment protects against deprivation of "life, liberty, or property." Petitioners seek to remedy a violation of those rights, not state tort law.

A claim for violation of a constitutional right often may be cognizable under state tort or criminal law. *See City of Monterey v. Del Monte Dunes at Monterey,*

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that approach multiple times. *See, e.g.*, *Redding*, 557 U.S. at 367-77; *T.L.O.*, 469 U.S. at 334-37.

Ltd., 526 U.S. 687, 709 (1999) ("[C]laims brought pursuant to § 1983 sound in tort."). But that does not preclude students from vindicating violations of their constitutional rights. To hold otherwise would eviscerate well-established constitutional rights and remedies.

Respondents seek to trivialize the interests at stake in this case. The facts here do not involve merely claims of a "sensitive nature," Br. in Opp. 26, nor do they concern the number of "licks" necessary to "instil[l] notions of responsibility and decorum into the mischievous heads of school children," *Ingraham*, 525 F.2d at 917. Rather, Abbott threw T.O. to the floor and held him by his throat in a chokehold for several minutes, refusing to release him even after he began to foam at the mouth. Pet. App. 44a, 46a.

The Fifth Circuit's failure to apply clearly established constitutional law, in conflict with all other circuits, regularly prevents students in similarly egregious cases from seeking constitutional relief. *See, e.g.*, *Flores v. Sch. Bd. of Desoto Par.*, 116 F. App'x 504, 506 (5th Cir. 2004) (unpublished) (dismissing constitutional claim where teacher threatened student, threw him against wall, and choked him); *Marquez v. Garnett*, 567 F. App'x 214, 215, 218 (5th Cir. 2014) (unpublished) (dismissing constitutional claim where school aide grabbed, shoved, and kicked student with disabilities for sliding compact disc across table). These outcomes illustrate the significant effect of the Fifth Circuit's outlier approach and the recurring nature of the issues presented here.

CONCLUSION

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

Respectfully submitted,

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