No. _____

In The
Supreme Court of the United States

S.B., *on behalf of her minor daughter*, S.B.,

Petitioner,

v.

JEFFERSON PARISH SCHOOL BOARD, ET AL.,

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

1. Is unconstitutionally excessive corporal punishment by a public-school employee cognizable under § 1983 (as nine circuits hold), or is it not (as only the Fifth Circuit holds)?

2. Should an excessive corporal punishment claim against a public-school employee proceed under the Fourteenth Amendment's shocks-the-conscience standard (as the Second, Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits hold) or the Fourth Amendment's unreasonable-seizure standard (as the Seventh and Ninth Circuits hold)?

Parties to the Proceeding

Petitioner S.B., on behalf of her minor daughter S.B., was the plaintiff in the district court and the appellant in the Fifth Circuit.

Respondent Jefferson Parish School Board was a municipal defendant in the district court and an appellee in the Fifth Circuit.

Respondents Christi Rome, Janine Rowell, and Lesley Nick were individual defendants in the district court and appellees in the Fifth Circuit.

Related Proceedings

This case arises from the following proceedings:

- *S.B., on behalf of her minor daughter, S.B.* v. *Jefferson Parish School Board, et al.*, No. 22-30139, 5th Cir. (June 26, 2023) (denying rehearing en banc);

- *S.B., on behalf of her minor daughter, S.B.* v. *Jefferson Parish School Board, et al.*, No. 22-30139, 5th Cir. (May 30, 2023) (affirming dismissal of plaintiff's claims);

- *S.B., on behalf of her minor daughter, S.B.* v. *Jefferson Parish School Board, et al.*, No. 2:21-cv-217, E.D. La. (Feb. 17, 2022) (final judgment); and

- *S.B., on behalf of her minor daughter, S.B.* v. *Jefferson Parish School Board, et al.*, No.

2:21-cv-217, E.D. La. (Oct. 15, 2021) (dismissing plaintiff's claims).

There are no other proceedings directly related to this case under Supreme Court Rule 14.1(b)(iii).

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Petition for a Writ of Certiorari

Petitioner S.B., on behalf of her minor daughter S.B., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Opinions Below

The opinion of the court of appeals is unpublished but available at 2023 WL 3723625 and reprinted in petitioner's Appendix (App.) at 1a. The decision of the district court is unpublished but available at 2021 WL 7703488 and reprinted at App. 19a. The unpublished order of the court of appeals denying en banc rehearing is reprinted at App. 35a.

Jurisdiction

The court of appeals issued its opinion on May 30, 2023. App. 1a. The court of appeals denied a timely petition for rehearing en banc on June 26, 2023. App. 35a. Pursuant to an extension of time granted by Justice Alito on September 8, 2023, petitioner timely files this petition and invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

Constitutional and Statutory Provisions

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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."

The Fourth Amendment to the United States Constitution provides: "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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

42 U.S.C. 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Statement

This case concerns three instances of unlawful corporal punishment inflicted by two different public-school employees on S.B., an eleven-year-old girl with nonverbal autism. The question is whether that violence is at all constitutionally cognizable under 42 U.S.C. 1983, and if so, under what constitutional standard it should be assessed. Relying on an outlier Fifth Circuit rule, the courts below concluded that disciplinary violence (very broadly interpreted) against schoolchildren is not constitutionally actionable at all.

The Fifth Circuit admittedly "protect[s] disciplinary corporal punishment from constitutional scrutiny." In that, it is alone. All nine other circuits to reach the issue disagree with this elimination of students' rights. But those nine are split as to which constitutional provision governs the merits (the Fourteenth Amendment or the Fourth Amendment).

This Court should resolve both splits: whether students' excessive violence claims are cognizable, and under what legal standard. This petition seeks the Court's resolution of the legal standards, but not a resolution of this case. Application of the correct standard should be addressed in the first instance on remand, as no court has yet assessed the propriety of the violence inflicted on S.B.

1. S.B. is a public-school student in Jefferson Parish, Louisiana. She has nonverbal autism, which sometimes causes her to exhibit inappropriate behavior. During the events of this case, she was

eleven years old and attending elementary school. App. 40a, 42a.

Because of her disability, S.B. is shadowed at school by a special needs paraprofessional (SNP), who helps teachers ensure compliance with S.B.'s individualized education plan. She also receives applied behavioral analysis (ABA) therapy from a behavioral technician. App. 42a.

Louisiana law expressly prohibits corporal punishment of students with disabilities. La. Rev. Stat. § 17:416.1(B)(1). Its Children's Code deems such corporal punishment "abuse" and imposes "mandatory reporter" obligations on certain individuals, including respondent Christi Rome, S.B.'s school principal. App. 41a.

2. Respondent Janine Rowell was S.B.'s special-education teacher. But she demonstrated little to no patience for S.B. or her needs. Rowell regularly screamed at, ignored, and refused to help S.B. with her schoolwork. Worse, she hit S.B. several times on multiple occasions. App. 43a, 47a.

One afternoon, S.B. was receiving ABA therapy from her behavioral technician. S.B. refused to stand up to pick up puzzle pieces, the technician approached to help S.B. up, and S.B. kicked toward her. S.B. did not make contact with the technician, but Rowell intervened and began slapping S.B.'s wrists while shouting "No, ma'am! No kicking!" App. 43a–44a.

Neither of the SNPs who witnessed this instance of Rowell's violence against S.B. intervened or reported it, but the behavioral technician's manager

made it known to Principal Rome. Contrary to guidelines, Rome did not remove Rowell from the classroom or report the incident. Only when S.B.'s mother intervened was the incident investigated. Even then, Rome and the responding officer impeded her efforts to file a police report. App. 44a–46a.

The investigation revealed that one of the SNPs also saw Rowell slapping S.B.'s wrists two weeks prior (and failed to report it then too). Rowell was not reprimanded or fired when these two instances of violence against S.B. came to light, just transferred to another school in another parish. App. 44a–47a.[1]

3. When S.B. returned to school later that year (after Covid-19 interruptions), she was subjected to a third known instance of violence. Respondent Lesley Nick was S.B.'s SNP. One morning, S.B. was working on spelling with her ABA therapist, with Nick helping. At one point, S.B. pinched Nick's neck. Nick then grabbed S.B.'s hand and slapped the top of it, while saying "We do not pinch our friends." App. 48a.

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[1] At her new school, Rowell proceeded to inflict more violence on children with autism. For that, she recently pleaded guilty to two counts of simple battery and was sentenced to six months' probation. See https://tinyurl.com/5455w85b. But Rowell faced no consequences for her abuse of S.B. A lawsuit pending against the St. Tammany Parish School Board details the circumstances of Rowell's conviction. It arises from physical and verbal abuse of seven- and eight-year-old siblings with autism, including pushing them into tables, slapping them, calling them "filthy little thing" and other insults, and segregating them from non-disabled children. See Complaint, *Doe* v. *St. Tammany Parish Sch. Bd.*, No. 2:23-cv-1170 (E.D. La. Apr. 5, 2023).

The special-education teacher who saw Nick's violence immediately reported it to Principal Rome. This time, Rome called S.B.'s mother and removed Nick from the classroom. But, like with Rowell's unlawful violence, Rome did not report Nick's unlawful violence to any authorities. Like Rowell, Nick was not reprimanded or fired for her violence, just transferred to another school. App. 48a–49a.

All three known instances of violence against S.B. (twice by respondent Rowell and once by respondent Nick) violated Louisiana's prohibition against corporal punishment for students with disabilities. App. 41a. Given S.B.'s cognitive and verbal disabilities, the violence she suffered would have gone totally unreported absent observation and reporting by third-party adults—which is far from given, as Rowell's multiple instances of initially unreported violence against S.B. illustrate. App. 44a, 47a.

4. S.B., by her mother, brought this suit against the Jefferson Parish School Board, Rome, Rowell, and Nick in the Eastern District of Louisiana, which had jurisdiction over the constitutional § 1983 claims that are at issue in this Court under 28 U.S.C. 1331 and 1343. She brought claims under the Rehabilitation Act, the Americans with Disabilities Act, the Individuals with Disabilities Education Act, state discrimination laws, state tort laws, and various federal constitutional provisions, including Fourteenth Amendment substantive due process, Fourth Amendment excessive force, and Fourteenth Amendment equal protection. App. 51a–60a.

The district court dismissed all of S.B's claims, App. 19a–33a, and the Fifth Circuit affirmed, App. 1a–18a. S.B. seeks this Court's review only of her substantive due process and Fourth Amendment excessive force claims.

The panel had to summarily dismiss S.B.'s substantive due process claim because, in conflict with nine other circuits and this Court's precedent, the Fifth Circuit says substantive due process claims are not cognizable in this context (and only this context) if a potential state remedial procedure exists. App. 11a–13a. With corporal punishment claims also denied Fourth Amendment scrutiny, the Fifth Circuit alone "protect[s] disciplinary corporal punishment from constitutional scrutiny." *T.O.* v. *Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 416 (5th Cir. 2021).

The panel recounted a partial list of egregious violence the Fifth Circuit's rules have immunized from all constitutional scrutiny. App. 11a–12a. And it recognized that other circuits and judges within the circuit have "scrutinized" and disagreed with the Fifth Circuit's rules. App. 13a. Finally, the panel acknowledged S.B.'s argument that the circuit's manner of immunizing these claims from constitutional scrutiny is contrary to this Court's precedent, under which it is "established that a plaintiff can utilize § 1983 without regard to any state-tort remedy that may exist." App. 13a. But, "bound by [circuit] precedent," the panel affirmed dismissal. App. 13a.

S.B. petitioned for rehearing en banc of the Fifth Circuit's outlier substantive due process rule and its

attendant protection of force and violence against schoolchildren from all constitutional scrutiny. The petition was denied, App. 35a–36a—as others have been on this issue, despite multiple calls over the years for the full circuit to revisit it. *E.g.*, *T.O.*, 2 F.4th at 419–421 (Wiener & Costa, JJ., specially concurring) (calling for reconsideration en banc, which was then denied). This petition for a writ of certiorari timely follows.

Reasons for Granting the Petition

The circuits are avowedly split on both questions presented. First, is unconstitutionally excessive corporal punishment by a public-school employee cognizable under § 1983? To that, only the Fifth Circuit says no, with nine circuits disagreeing. Second, should such a claim proceed under the Fourteenth Amendment or the Fourth Amendment? Seven circuits say the Fourteenth Amendment, while two say the Fourth Amendment.

This Court should resolve both circuit splits because geography currently dictates (1) whether S.B.'s claim is constitutionally cognizable at all and (2) if so, under which of two very different constitutional standards. If S.B. brought her claim in nine other circuits, it would be assessed on the merits, but not in the Fifth Circuit—which admittedly "protect[s] disciplinary corporal punishment from constitutional scrutiny." In seven other circuits, the claim would proceed under the Fourteenth Amendment's substantive due process shocks-the-conscience standard; yet in two circuits, the claim would proceed under the Fourth Amendment's

unreasonable-seizure standard. Such geographically disparate treatment of the same claim warrants this Court's intervention and guidance, especially because the court below is the only one that eliminates constitutional scrutiny of school violence altogether, in a way that clearly contravenes this Court's precedent regarding both students' rights and the relationship between § 1983 and potential state remedial procedures.

1. The Fifth Circuit is alone in holding that a § 1983 claim for unconstitutionally excessive corporal punishment (very broadly defined) is not cognizable at all. The circuit takes these claims, and these claims alone, outside the Fourteenth Amendment's purview by misapplying a procedural due process rule to substantive due process claims.

This Court said unambiguously in *Zinermon* v. *Burch*, 494 U.S. 113 (1990), that only a procedural due process claim can be affected by potential state remedial procedures; a substantive due process claim cannot. Despite that clear rule, the Fifth Circuit makes substantive due process claims contingent on the unavailability of potential state remedial procedures when it comes to corporal punishment. Because every state has some sort of remedial procedure (whether realistically available or not), constitutional § 1983 claims in this context are categorically off the table. Or, as the Fifth Circuit puts it, that court "protect[s] disciplinary corporal punishment from constitutional scrutiny."

The Fifth Circuit's rule is in acknowledged conflict with all nine other circuits to address corporal

punishment under § 1983, including five that expressly reject the Fifth Circuit's substantive due process analysis. Yet the circuit refuses to revisit its rule en banc, including in this case, despite multiple calls to do so for its irreconcilability with this Court's precedent.

The Fifth Circuit's elimination of all constitutional scrutiny of violence against students also conflicts with the text, history, and purpose of both the Due Process Clause and § 1983. As recognized by this Court, students have a historically grounded right to freedom from excessive violence and to redress for that right's violation. The Fifth Circuit's elimination of those rights warrants this Court's intervention and reversal.

2. A second, related circuit split also needs this Court's resolution. While nine circuits rightly reject the Fifth Circuit's elimination of all constitutional scrutiny of corporal punishment, those nine are divided as to the governing constitutional provision. In the Second, Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits, students' claims proceed under the Fourteenth Amendment's substantive due process shocks-the-conscience standard. But in the Seventh and Ninth Circuits, their claims proceed under the Fourth Amendment's unreasonable-seizure standard.

Of course, the choice of standard can be outcome-determinative—the majority side's substantive due process standard is much more onerous. And, as the Ninth Circuit explained when it updated its jurisprudence in this area to join the Fourth

Amendment side of the split, this Court's precedent indicates that the Fourth Amendment should govern these claims of excessive force, as it does in other contexts. So this Court should resolve this important and acknowledged split too.

* * *

Geography should not dictate whether federal claims are cognizable or under what standard. But for students' claims of unconstitutionally excessive violence, geography is central. This Court should grant this petition to make clear that public-school employees' violence is cognizable under § 1983 and resolve whether such claims arise under the Fourteenth Amendment or the Fourth Amendment. The circuits are irreconcilably split over both of these important federal questions.

I. The circuits are split, nine to one, as to whether unconstitutionally excessive corporal punishment by a public-school employee is cognizable under § 1983.

If S.B. alleged excessive corporal punishment by a public-school employee in nine other circuits, the propriety of that violence would be assessed on the merits. But because S.B. happens to live in one of the three states of the Fifth Circuit, her claims of excessive violence are not cognizable under § 1983 at all. The Fifth Circuit is alone in eliminating public school students' constitutional right to freedom from excessive violence at school. And it gets there in clear contravention of this Court's precedent, as pointed out by Fifth Circuit judges who have unsuccessfully

called for en banc reconsideration multiple times. That circuit's elimination of all constitutional scrutiny in this context is not only foreclosed by this Court's precedent, but also conflicts with the text, history, and purpose of both the Due Process Clause and § 1983.

A. The Fifth Circuit alone "protect[s] disciplinary corporal punishment from constitutional scrutiny," in a manner irreconcilable with this Court's precedent.

It is "indisputable * * * that the Fourteenth Amendment protects the rights of students against encroachment by public school officials." *New Jersey* v. *T.L.O.*, 469 U.S. 325, 334 (1985). But in the Fifth Circuit, that guarantee has been eliminated when it comes to students' fundamental right to freedom from excessive violence. In the Fifth Circuit alone, "for more than thirty years, the law of [that] circuit has clearly protected disciplinary corporal punishment from constitutional scrutiny." *T.O.* v. *Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 416 (5th Cir. 2021). No matter how egregious or unwarranted the violence, it will not be heard.

That categorical elimination of § 1983 claims in this context is the result of an outlier substantive due process rule that every other circuit rejects. The Fifth Circuit has erroneously imported a procedural due process rule into the substantive realm by making school violence claims contingent on the unavailability of potential state remedial procedures. As noted by the panel below (but to no effect), that

rule directly contravenes this Court's unambiguous precedent. See *Zinermon* v. *Burch*, 494 U.S. 113, 124–126 (1990). Indeed, the Fifth Circuit itself rejects the rule in other contexts. But despite multiple calls for en banc reconsideration, the court keeps declining to revisit its error, including in this case. The result is an elimination of constitutional scrutiny that cannot be squared with constitutional precedent, the text and purpose of § 1983, or historical practice.

1. In the Fifth Circuit, corporal punishment "does not constitute a fourth amendment * * * seizure." *Fee* v. *Herndon*, 900 F.2d 804, 810 (5th Cir. 1990).[2] So, as long as a school employee's force or violence is ostensibly or arguably inflicted for "proper control, training, or education," that force or violence is subject only to a substantive due process inquiry under the Fourteenth Amendment. *J.W.* v. *Paley*, 81 F.4th 440, 452–453 (5th Cir. 2023) (citation omitted). But in the Fifth Circuit, that inquiry does not actually happen; such claims are immunized from all constitutional scrutiny. Section 1983 is eliminated in this context, no matter how unreasonable or conscience-shocking the violence.[3]

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[2] As explained in part II below, the Seventh and Ninth Circuits disagree with the Fifth Circuit on this.

[3] Indeed, the circuit declines to reconsider the Fourth Amendment's application to this context based only on the odd reasoning that doing so would "'eviscerate [the] circuit's rule * * * prohibiting substantive due process claims' stemming from the same injuries." *T.O.*, 2 F.4th at 415 (citation omitted). Why that due process rule should have any effect on the meaning of the Fourth Amendment was never explained, except to

Typically, a substantive due process inquiry asks whether the offending conduct "shocks the conscience." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 846 (1998). But not in the Fifth Circuit, when it comes to excessive force or violence at school. "[F]or more than thirty years, the law of [that] circuit has clearly protected disciplinary corporal punishment from constitutional scrutiny." *T.O.*, 2 F.4th at 416. That protection is based on an outlier rule, under which excessive corporal punishment is not cognizable via substantive due process if state law "impose[s] reasonable limitations upon corporal punishment and provide[s] adequate criminal or civil remedies for departures from such laws." *Fee*, 900 F.2d at 806.

As detailed later in this part, the imposition of that rule outside of procedural due process claims is irreconcilable with this Court's precedent and rightly rejected by every other circuit to address it (including the Fifth Circuit in other contexts). But the rule is also suspect on its own terms. "[A] careful reading of the cases that make up this line of decisions reveals that [the Fifth Circuit has] never closely examined the adequacy of those state remedies, instead simply dismissing § 1983 claims against school districts and individual defendants alike, regardless of whether they might be immune from suit" in state court. *Moore* v. *Willis Indep. Sch. Dist.*, 233 F.3d 871, 878 (5th Cir. 2000) (Wiener, J., specially concurring).

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knowingly maintain the circuit's outlier elimination of all constitutional scrutiny of excessive violence at school.

Unsurprisingly, none of the circuit's three states have flunked the Fifth Circuit's perfunctory inquiry into the adequacy of potential state remedies.[4] So the Fifth Circuit has eliminated all constitutional scrutiny of punitive force or violence by public-school employees in Louisiana, Mississippi, and Texas. *T.O.*, 2 F.4th at 414 ("Based on the foregoing, we have consistently dismissed substantive due process claims when the offending conduct occurred in a disciplinary, pedagogical context.").

As partially recounted by the panel below, App. 11a–12a, the Fifth Circuit has eliminated from all constitutional scrutiny not only the violence inflicted here on S.B., but a litany of other egregious harms to public-school students, including when:

- a school resource officer "repeatedly" tased a student with disabilities to keep him from going through a door, including "after [the student] had ceased struggling," causing urination, defecation, vomiting, and PTSD;[5]

- a teacher seized a first-grader's neck, threw him to the floor, and held him in a chokehold

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[4] See App. 13a (Louisiana law meets the standard); *T.O.*, 2 F.4th at 415 (Texas law meets the standard); *Scott* v. *Smith*, 214 F.3d 1349, 2000 WL 633583 (5th Cir. 2000) (Mississippi law meets the standard); but see *T.O.*, 2 F.4th at 421 n.14 (Wiener & Costa, JJ., specially concurring) (doubting adequacy of Texas remedies).

[5] *J.W.*, 81 F.4th at 451–452.

for several minutes, releasing the child for air only because an aide intervened;[6]

- a police officer slammed a kindergartener to the ground and dragged him along the floor after the student disrupted class;[7]

- a teacher threatened a special-education student, twice threw him against a wall, and choked him after the student non-disruptively questioned the teacher's directive, with the school subsequently bringing expulsion proceedings against the student and refusing to let him call any witnesses;[8]

- an aide grabbed, shoved, and "repeatedly kicked" a "severely autistic, physically disabled, and unable to speak" seven-year-old student for sliding a compact disc across a table, impeding the child's development and causing PTSD;[9]

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[6] *T.O.*, 2 F.4th at 412; see *id.* at 419–421 (Judges Wiener and Costa calling for en banc reconsideration of the Fifth Circuit's rule, with the subsequent petition denied).

[7] *Campbell* v. *McAlister*, 162 F.3d 94, 1998 WL 770706, at *1 (5th Cir. 1998).

[8] *Flores* v. *Sch. Bd. of DeSoto Parish*, 116 Fed. Appx. 504, 506–507 (5th Cir. 2004).

[9] *Marquez* v. *Garnett*, 567 Fed. Appx. 214, 215 (5th Cir. 2014).

- a principal beat a special-education student with a paddle for disrupting class, resulting in the student's hospitalization;[10]

- a principal hit a student with a wooden paddle for skipping class;[11] and

- a teacher forced a student to perform excessive physical exercise as punishment for talking to a friend, resulting in hospitalization and three weeks of missed school.[12]

Like S.B.'s, none of these other disturbing claims of unconstitutional force or violence could be assessed for their excessiveness under § 1983 in the Fifth Circuit.[13]

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[10] *Fee*, 900 F.2d at 806–807.

[11] *Serafin* v. *Sch. of Excellence in Educ.*, 252 Fed. Appx. 684, 685 (5th Cir. 2007).

[12] *Moore*, 233 F.3d at 873; see *id.* at 876–880 (Judge Wiener calling for en banc reconsideration of the Fifth Circuit's rule, with the subsequent petition denied).

[13] The Fifth Circuit has distinguished the non-cognizability of these corporal punishment claims from different claims arising in the school setting—exceptions that prove how corporal punishment claims are, true to *T.O.*'s word, "protected * * * from constitutional scrutiny." See 2 F.4th at 414–416 (distinguishing non-corporal-punishment claims); *J.W.*, 81 F.4th at 452–453 (same).

Importantly, as explained at length in *J.W.*—and illustrated by the examples listed above—what constitutes corporal punishment with an ostensibly pedagogical purpose is very broadly interpreted. 81 F.4th at 452–454. By contrast, the exceptions are very narrow: claims of sexual molestation, the tying of a student to a chair for two days not as punishment but

2. The Fifth Circuit is alone in closing the courthouse doors to claims of unconstitutionally excessive violence at school. Five other circuits "have scrutinized" and expressly rejected the Fifth Circuit's substantive due process rule. App. 13a (citing disagreement by the Ninth and Eleventh Circuits); *Hall* v. *Tawney*, 621 F.2d 607, 614 (4th Cir. 1980) (expressly rejecting the Fifth Circuit's rule and holding that excessive corporal punishment is cognizable under substantive due process); *Saylor* v. *Bd. of Educ. of Harlan Cnty.*, 118 F.3d 507, 514 (6th Cir. 1997) (same); *Garcia by Garcia* v. *Miera*, 817 F.2d 650, 654–655 (10th Cir. 1987) (same).

As detailed in part II below, a total of nine circuits—every other one to address this issue—assess students' claims on the merits under § 1983. They all disagree with the Fifth Circuit's "protect[ion of] disciplinary corporal punishment from constitutional scrutiny." *T.O.*, 2 F.4th at 416.

3. Other circuits' rejection of the Fifth Circuit's substantive due process rule and its closing of the courthouse doors makes sense. It is irreconcilable

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an experimental instructional technique, a sheriff deputy's slamming a handcuffed student's head into a wall, and a student's physical detention in a room without force or violence. See *Doe* v. *Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994) (en banc); *Jefferson* v. *Ysleta Indep. Sch. Dist.*, 817 F.2d 303 (5th Cir. 1987); *Curran* v. *Aleshire*, 800 F.3d 656 (5th Cir. 2015); *Hassan* v. *Lubbock Indep. Sch. Dist.*, 55 F.3d 1075 (5th Cir. 1995).

In short, there is no question that the Fifth Circuit means what it says: Corporal punishment (very broadly defined) is categorically exempt from constitutional scrutiny under § 1983.

with this Court's precedent, under which (1) students have a fundamental right to bodily liberty and (2) the availability of state procedures may be relevant to a procedural due process claim, but not a substantive due process claim.

The Fifth Circuit conceived its outlier conception of substantive due process, under which the cognizability of substantive § 1983 claims is contingent on the unavailability of state procedures, in *Ingraham* v. *Wright*, 525 F.2d 909 (5th Cir. 1976) (en banc). On review, this Court rejected a procedural due process challenge to corporal punishment on similar reasoning, but it declined to review the Fifth Circuit's application of that reasoning to substantive due process claims. *Ingraham* v. *Wright*, 430 U.S. 651, 659 n.12, 672 (1977). This Court, however, made clear that students have a "constitutionally protected liberty interest" in "freedom from bodily restraint and punishment." *Id.* at 674. Relying on that historically informed conception of students' right to bodily liberty, the Tenth Circuit explained—in direct disagreement with the Fifth Circuit—that this Court's *Ingraham* "language plainly indicates that the infliction of corporal punishment can affect a fundamental right susceptible to substantive due process protection." *Garcia*, 817 F.2d at 654.

While this Court did not reach the Fifth Circuit's substantive due process rule in *Ingraham*, it rejected the rule years later. According to this Court, a substantive due process violation (i.e., an individual instance of allegedly conscience-shocking conduct) "is complete when the wrongful action is taken," so a plaintiff "may invoke § 1983 regardless of any state-

tort remedy that might be available to compensate him for the deprivation of these rights." *Zinermon*, 494 U.S. at 125. "In other words, while a procedural due process violation may be eliminated by an adequate, state-provided, post-deprivation process, a substantive due process violation occurs at the moment of the deprivation itself, making the availability of alternative remedies wholly irrelevant." *T.O.*, 2 F.4th at 420 (Wiener & Costa, JJ., specially concurring).

That is why "all other circuits have declined to apply [the Fifth Circuit's] procedural due process reasoning to substantive due process claims, instead concluding that under particular circumstances, excessive corporal punishment can violate substantive due process rights * * * regardless of the availability of alternative remedies." *Id.* at 419 (Wiener & Costa, JJ., specially concurring).

Indeed, even the Fifth Circuit recognizes that state procedures are irrelevant to a substantive due process inquiry in other contexts—but it continues misapplying the rule as to corporal punishment alone. *E.g.*, *Cozzo* v. *Tangipahoa Parish Council*, 279 F.3d 273, 290–291 (5th Cir. 2002) (collecting circuit cases).

4. The panel below noted S.B.'s argument "that the Supreme Court has established that a plaintiff can utilize § 1983 without regard to any state-tort remedy that may exist." App. 13a. But the panel said it was bound by circuit precedent to keep applying what so many circuits and judges have repeatedly explained is the wrong rule—and bound to summarily dismiss S.B.'s claims. App. 13a; see *T.O.*, 2 F.4th at 419

(Wiener & Costa, JJ., specially concurring) (explaining the Fifth Circuit's outlier status and its inconsistency with *Zinermon*, and urging en banc reconsideration, with subsequent en banc petition denied); *Moore*, 233 F.3d at 876–880 (Wiener, J., specially concurring) (same); *Ingraham*, 525 F.2d at 920–921, 924–926 (Godbold, Brown, Rives, Goldberg, & Ainsworth, JJ., dissenting) (dissenting, in two opinions, from the Fifth Circuit's adoption of this misconception of substantive due process).

Despite repeated acknowledgement that the Fifth Circuit rule contravenes Supreme Court precedent and splits from every other circuit to address it, the Fifth Circuit keeps declining calls and petitions to revisit the mistake it made decades ago, including in this case. App. 35a–36a. This Court should finally "resolve this dramatically lopsided circuit split." *T.O.*, 2 F.4th at 420 (Wiener & Costa, JJ., specially concurring).

B. The Fifth Circuit's elimination of constitutional scrutiny of students' claims is inconsistent with the text, history, and purpose of both the Due Process Clause and § 1983.

As detailed above, the Fifth Circuit's outlier substantive due process rule makes it an outlier in a second way too: Because it also rejects the Fourth Amendment's application to corporal punishment, the Fifth Circuit is the only one that forecloses all constitutional scrutiny of punitive force or violence inflicted on public-school students. Resolution of this split—and rejection of these outlier rules—is

important because the Fifth Circuit's elimination of all constitutional scrutiny in this context conflicts with the text, history, and purpose of both the Due Process Clause and § 1983. As this Court's cases recognize, and as § 1983 guarantees, students have historically had the right to sue for excessive physical violence.

1. Start with the Due Process Clause. "Among the historic liberties" it protects is "a right to be free from and to obtain judicial relief, for unjustified intrusions on personal security." *Ingraham*, 430 U.S. at 673. Those liberties extend to students' "freedom from bodily restraint and punishment." *Id.* at 674. To be sure, "the child's liberty interest in avoiding corporal punishment while in the care of public school authorities is subject to historical limitations." *Id.* at 675. But crucially, one of those historical limitations is the right to be free from "excessive physical punishment." *Safford Unified Sch. Dist. No. 1* v. *Redding*, 557 U.S. 364, 399 n.7 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part) (citation omitted). Yet the Fifth Circuit forecloses all inquiry into whether those limitations have been exceeded—in contravention of the aforementioned historical rights to bodily security and judicial relief. It does so in direct conflict with the reasoning of the Tenth Circuit (and the holdings of eight others). See *Garcia*, 817 F.2d at 654.

2. Similar concerns arise under § 1983. Its text is clear that "[e]very person" who, under color of law, deprives any "other person" of a constitutional right "shall be liable." 42 U.S.C. 1983. That unambiguous language—which obviously covers public-school

employees and students—is not a mistake. "[T]he central objective of the Reconstruction-Era civil rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief. Thus, § 1983 provides a uniquely federal remedy against incursions . . . upon rights secured by the Constitution and laws of the Nation * * * and is to be accorded a sweep as broad as its language." *Hardin* v. *Straub*, 490 U.S. 536, 539 n.5 (1989) (citations and quotation marks omitted).

Eliminating those uniquely federal rights and remedies in the public-school setting, as the Fifth Circuit alone has done, cannot be squared with the statute's text, history, or purpose. That is why this Court "has made it clear that the availability of state remedies *does not* replace a cause of action under § 1983." *T.O.*, 2 F.4th at 420 (Wiener & Costa, JJ., specially concurring) (collecting cases). Indeed, "[i]t is of course settled that relief under § 1983 does not depend upon the availability of state remedies, but is supplementary to them." *Hall*, 621 F.2d at 612. As the Fourth Circuit explained when it expressly rejected the Fifth Circuit's elimination of constitutional scrutiny in this context based on this Court's well-settled precedent: "Federal and state remedies 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." *Id.* (citations omitted).[14]

* * *

The Fifth Circuit alone has created a regime in which no amount of disciplinary force or violence is too much under the Constitution. No other circuit has eliminated constitutional scrutiny of students' right to bodily security—they all assess the propriety of the force or violence alleged. And for good reason: The Fifth Circuit's regime is irreconcilable with this

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[14] An additional note on § 1983. As explained by Justice Thomas, state common law historically recognized students' right to be free from "excessive physical punishment." *Safford Unified*, 557 U.S. at 399 n.7 (Thomas, J., concurring in the judgment in part and dissenting in part). But even if state common law did not guarantee or vindicate students' right to bodily security in this way, § 1983 as originally passed and understood would guarantee it—as long as some constitutional provision is implicated (as at least one of the Fourteenth Amendment's guarantee of bodily liberty or the Fourth Amendment's guarantee against unreasonable seizures surely is). See *Rogers* v. *Jarrett*, 63 F.4th 971, 979–980 (5th Cir. 2023) (Willett, J., concurring) ("The language that Congress passed makes clear that § 1983 claims are viable notwithstanding 'any such law, statute, ordinance, regulation, custom, or usage of the State to [the] contrary.' * * * Rights-violating state actors are liable—period—*notwithstanding* any state law to the contrary.") (citing Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201 (2023)).

In other words, the historical record reveals that Congress was clear in passing § 1983 that state law cannot eliminate constitutional rights or remedies. So the Fifth Circuit has erred both in its elimination of constitutional scrutiny here and in its method of doing so (i.e., making substantive constitutional rights contingent on potential state procedures).

Court's precedent, and it conflicts with the text, history, and purpose of both the Due Process Clause and § 1983.

Against this backdrop, Fifth Circuit Judge Wiener has unsurprisingly refused to mince words: "I remain firm in my conviction that *Fee* and [the Fifth Circuit's decision in] *Ingraham* were wrongly decided—a conviction that has only grown stronger with the clarity of hindsight and thirty years of watching this rule being applied to the detriment of public school students in Texas, Mississippi, and Louisiana. This rule flies in the face of the many decisions by our colleagues in other circuits and those sitting on the highest court of this land. Let us fix the error before the Supreme Court decides to fix it for us." *T.O.*, 2 F.4th at 421 (Wiener & Costa, JJ., specially concurring).

With that court declining to fix the error, here and in prior cases, the time is ripe for this Court to fix it for them—and for the millions of children in Louisiana, Mississippi, and Texas whose constitutional rights the Fifth Circuit leaves unguarded.

Indeed, as detailed above, the Fifth Circuit's importation of a procedural due process rule to a substantive due process analysis, and its resulting elimination of all constitutional scrutiny in this context, is "obviously wrong and squarely foreclosed by [this Court's] precedent," warranting summary reversal. *Shoop* v. *Cassano*, 142 S. Ct. 2051, 2057 (2022) (Thomas & Alito, JJ., dissenting from denial of certiorari). The Fifth Circuit's rule is squarely

foreclosed by this Court's decisions in *Ingraham* v. *Wright*, which explains that students have a fundamental right to bodily liberty, and in *Zinermon* v. *Burch*, which explains that potential state remedies cannot bar the vindication of that fundamental right via substantive due process. Moreover, the Fifth Circuit's rule is unique among its sister circuits, rejected by even that circuit in other contexts, and cannot be squared with history or the text of § 1983. Under these circumstances, summary reversal as to the first question presented is appropriate.

But the Court should not stop there. As explained in the next part, while nine other circuits agree that excessive corporal punishment in school is cognizable under § 1983, they are split over whether such claims sound in substantive due process or the Fourth Amendment—two very different standards. The judiciary, parents, students, and school employees will benefit from knowing the answer. The Fifth Circuit in particular should know what brush to paint with when it turns to a fresh canvas in this context and applies the correct legal standards in the first instance.

II. The circuits are also split as to whether excessive corporal punishment claims should proceed under the Fourteenth Amendment or the Fourth Amendment.

In addition to reversing the Fifth Circuit's elimination of all constitutional scrutiny of corporal punishment, this Court should also resolve a second, inextricably linked circuit split: whether such claims

should be assessed under substantive due process or the Fourth Amendment.

While the other nine circuits to address the issue are united in rejecting the Fifth Circuit's elimination of all constitutional scrutiny in this context, those circuits disagree which constitutional provision such claims should proceed under. In the Second, Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits, the claims proceed under the Fourteenth Amendment's substantive due process guarantee and its shocks-the-conscience standard. Meanwhile, in the Seventh and Ninth Circuits, the claims proceed under the Fourth Amendment's protection against unreasonable seizures.

Of course, the majority side's shocks-the-conscience standard is more onerous than the minority's reasonableness standard, so the split can be outcome-determinative. And the Ninth Circuit has persuasively explained why this Court's precedent compelled it to join the Fourth Amendment side of the split. This Court should resolve the divide so that geography determines neither the cognizability (per the split discussed in part I, above) nor the viability (per the split discussed here) of claims like S.B.'s.

A. In seven circuits, students' claims proceed under the Fourteenth Amendment, while in two circuits they proceed under the Fourth Amendment.

As outlined by Fifth Circuit Judge Wiener, the nine other circuits to address excessive corporal

punishment are united in their rejection of the Fifth Circuit's elimination of all constitutional scrutiny of these claims. But those nine are divided as to whether the claims should proceed to a merits analysis under substantive due process's shocks-the-conscience standard or under the Fourth Amendment's unreasonable-seizure standard. See *T.O.*, 2 F.4th at 419 & nn.2–3 (Wiener & Costa, JJ., specially concurring).

Seven circuits agree with the Fifth Circuit that corporal punishment "does not constitute a fourth amendment * * * seizure," *Fee*, 900 F.2d at 810. But, unlike the Fifth Circuit, those seven proceed to assess corporal punishment claims on the merits via substantive due process's shocks-the-conscience standard. See *Smith ex rel. Smith* v. *Half Hollow Hills Cent. Sch. Dist.*, 298 F.3d 168, 172–173 (2d Cir. 2002); *Gottlieb ex rel. Calabria* v. *Laurel Highlands Sch. Dist.*, 272 F.3d 168, 172–173 (3d Cir. 2001); *Hall* v. *Tawney*, 621 F.2d 607, 613–614 (4th Cir. 1980); *Saylor* v. *Bd. of Educ. of Harlan Cnty.*, 118 F.3d 507, 514 (6th Cir. 1997); *Wise* v. *Pea Ridge Sch. Dist.*, 855 F.2d 560, 564 (8th Cir. 1988); *Garcia by Garcia* v. *Miera*, 817 F.2d 650, 654–656 (10th Cir. 1987); *Neal ex rel. Neal* v. *Fulton Cnty. Bd. of Educ.*, 229 F.3d 1069, 1075–1076 (11th Cir. 2000).

Two circuits, meanwhile, hold that corporal punishment is a Fourth Amendment seizure, so they review excessiveness under a standard of objective reasonableness in full context, including the vulnerabilities of the child, the school setting, and the need to maintain safety there. See *Wallace by Wallace* v. *Batavia Sch. Dist. 101*, 68 F.3d 1010, 1014–1016

(7th Cir. 1995); *Preschooler II* v. *Clark Cnty. Sch. Bd. of Trs.*, 479 F.3d 1175, 1182 (9th Cir. 2007).

These are, of course, quite different standards. The majority side's shocks-the-conscience standard is more onerous than the minority's reasonableness standard. As explained next, the difference can often be outcome-determinative, and this Court's precedent indicates that the majority side's standard is the wrong one. So review is warranted.

B. The constitutional standard can be outcome-determinative, and this Court's precedent indicates that the Fourth Amendment should govern these claims of excessive force.

1. As recognized in this context, "the Fourth Amendment invokes [a] less stringent reasonableness standard" than substantive due process's shocks-the-conscience standard. *Gottlieb*, 272 F.3d at 171. The latter standard requires much more than objective line-drawing between degrees of violence against a particular student in a particular circumstance, but rather "intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience of a court." *Hall*, 621 F.2d at 613; *Garcia*, 817 F.2d at 655.

By contrast, a Fourth Amendment claim in this context asks if the force or violence used was objectively unreasonable under the circumstances, taking into account the student's age, capacity, disability, and vulnerability, as well as the school setting and any legitimate educational or safety

objectives. *Preschooler II*, 479 F.3d at 1180–1181; *Doe ex rel. Doe* v. *Haw. Dep't of Educ.*, 334 F.3d 906, 909 (9th Cir. 2003); *Wallace*, 68 F.3d at 1014–1015.

Unsurprisingly, the difference between these standards can be outcome-determinative.

In the Ninth Circuit, for example, Fourth Amendment claims were found viable for each of the following acts by public-school employees: (1) the defendant "grabbed" a young, nonverbal child's "hands and slapped him repeatedly * * * hitting his head and face";[15] and (2) to discipline a second-grader for fighting and then refusing to stand still for a timeout punishment, the defendant taped the child's head to a tree for five minutes.[16]

By contrast: (1) in the Second Circuit, "[s]triking a student without any pedagogical or disciplinary justification * * * is undeniably wrong" but does not shock the conscience;[17] (2) in the Sixth Circuit, "it is simply inconceivable that a single slap could shock the conscience";[18] (3) in the Eighth Circuit, wooden paddling of two sixth-graders for continuing to play a game after being told to stop could not shock the conscience;[19] and (4) in the Tenth Circuit, an "unprovoked" "pop" to the cheek of an intellectually

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[15] *Preschooler II*, 479 F.3d at 1178.

[16] *Doe*, 334 F.3d at 907–908.

[17] *Smith*, 298 F.3d at 173.

[18] *Lillard* v. *Shelby Cnty. Bd. of Educ.*, 76 F.3d 716, 726 (6th Cir. 1996).

[19] *Wise*, 855 F.2d at 564.

disabled elementary school student could not shock the conscience, nor could a hard slap on the arm inflicted for no apparent reason.[20]

At least some of these incidents—particularly the unprovoked ones—would be viable under a Fourth Amendment reasonableness standard (as would S.B.'s); conversely, none of the Ninth Circuit instances described above would be viable under the other circuits' conception of the shocks-the-conscience standard (and S.B.'s would be in doubt).[21]

(Worth recalling is that in the Fifth Circuit alone, no level of conscience-shocking violence is cognizable in this context, as detailed in part I above. So even "the utter destruction of an eye" caused by "intentionally [striking a student] in the head with [a weapon]" would not be assessed for its excessiveness in the Fifth Circuit, let alone held unconstitutional, as it easily was under the Eleventh Circuit's shocks-the-conscience standard. See *Neal*, 229 F.3d at 1076.)

In short, these federal claims are not getting uniform treatment nationwide, even in the circuits that rightly reject the Fifth Circuit's elimination of all constitutional scrutiny.

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[20] *Muskrat* v. *Deer Creek Pub. Schs.*, 715 F.3d 775, 781, 787 (10th Cir. 2013).

[21] By applying these rules to dismiss claims of unprovoked violence, these cases illustrate not only how onerous the shocks-the-conscience standard is, but also show that other circuits interpret what constitutes corporal "punishment" as broadly as the Fifth Circuit does, with little to no care for what purpose the violence actually serves before dismissing it. See note 13, *supra*.

2. With geography dictating students' right to be free from excessive or unnecessary violence, a fresh look is warranted. Most circuits are squarely on the shocks-the-conscience side of this split—and therefore take accountability off the table for a litany of unprovoked or excessive violence against young, disabled, and vulnerable children. In light of this, the Ninth Circuit's decampment to the unreasonable-seizure side of the split based on an assessment of this Court's precedent merits close attention.

As the Ninth Circuit explained in updating its jurisprudence in this context, other circuits' continued application of substantive due process to claims of excessive corporal punishment is at odds with this Court's precedent. That precedent: (1) says "to analyze § 1983 claims under more specific constitutional provisions, when applicable, rather than generalized notions of due process," (2) compels "the movement away from substantive due process and toward the Fourth Amendment outside the criminal context as well," and (3) makes "clear that the Fourth Amendment applies in the school environment." *Doe*, 334 F.3d at 908–909 (citations omitted).

The Ninth Circuit's analysis is right. There is no reason the Fourth Amendment—which protects "against unreasonable searches and seizures"—should protect against unreasonable searches in public schools, as established by *T.L.O.*, but not unreasonable seizures there. As we know, even the momentary application of physical force with the intent to restrain is a Fourth Amendment seizure. *Torres* v. *Madrid*, 141 S. Ct. 989, 994 (2021). And the

Fourth Amendment's unreasonable-seizure standard governs such applications of physical force or violence outside the prison setting. *Graham* v. *Connor*, 490 U.S. 386, 395 (1989); cf. *Hudson* v. *McMillian*, 503 U.S. 1 (1992) (Eighth Amendment governs excessive force in prison). Public school should not be the only other place that is different. As *T.L.O.* and its extension to this context by the Seventh and Ninth Circuits demonstrate, the Fourth Amendment's reasonableness inquiry can fully account for any special considerations or legitimate safety-keeping functions in the school setting. *T.L.O.*, 469 U.S. at 340–343; *Doe*, 334 F.3d at 909; *Wallace*, 68 F.3d at 1013–1015.

Finally, "this Court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police," but applies it generally to "governmental action." *T.L.O.*, 469 U.S. at 335 (citation omitted). "Accordingly, [this Court has] held the Fourth Amendment applicable to the activities of civil as well as criminal authorities." *Id.* (collecting cases). Indeed, "it would be 'anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.'" *Id.* (quoting *Camara* v. *Municipal Court*, 387 U.S. 523, 530 (1967)).

In short, this Court's precedent indicates that the Fourth Amendment should govern claims of excessive corporal punishment or violence by public-school employees. But only two circuits currently recognize that. Most circuits continue to assess such claims under the less specific constitutional rubric of

substantive due process—a relic of an era when the Fourth Amendment was sometimes atextually miscast as guarding only or primarily against "intrusions on privacy in the course of criminal investigations." *Ingraham*, 430 U.S. at 673 n.42.[22]

To be sure, the Fourth Amendment and substantive due process are not mutually exclusive—a single act of violence could be both an unreasonable seizure and a conscience-shocking deprivation of liberty. But most circuits continue to assess students' claims under only the more onerous standard. Because the difference between the standards can often be outcome-determinative, the lower courts need guidance as to whether they should recalibrate

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[22] Further illustrating the majority side's flawed and outdated approach: Relying on *T.L.O.*, circuits on the shocks-the-conscience side of the split acknowledge that the Fourth Amendment governs claims of unreasonable detainment or handcuffing in the school setting, but not claims of excessive force, violence, or corporal punishment there. See *Shuman ex rel. Shertzer* v. *Penn Manor Sch. Dist.*, 422 F.3d 141, 147–149 (3d Cir. 2005); *Wofford* v. *Evans*, 390 F.3d 318, 325–327 (4th Cir. 2004); *Hassan* v. *Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079–1080 (5th Cir. 1995); *Crochran through Shields* v. *Columbus City Schs.*, 748 Fed. Appx. 682, 685–686 (6th Cir. 2018); *Doe* v. *Aberdeen Sch. Dist.*, 42 F.4th 883, 890–891 (8th Cir. 2022); *Edwards for and in behalf of Edwards* v. *Rees*, 883 F.2d 882, 883–885 (10th Cir. 1989).

So in these circuits, different types of seizures are subject to different constitutional standards—with the most violent seizures the most difficult to vindicate under § 1983 because they continue to be subjected to an anachronistic substantive due process shocks-the-conscience standard.

their jurisprudence, as the Ninth Circuit did pursuant to this Court's precedent.

3. The Fifth Circuit, in particular, will benefit from such clarity as it goes back to the drawing board upon reversal of its elimination of all constitutional claims in this context (as discussed in part I, above). That circuit deserves to know whether it erred not only by eliminating substantive due process claims arising from excessive corporal punishment, but also whether it (and seven other circuits) erred in holding that excessive force in corporal punishment is outside the Fourth Amendment's purview. And it should apply the correct standard in the first instance.

If the Court declines to reach the second question presented, it should still summarily reverse or grant plenary review as to question one. As detailed in part I above, it is beyond debate that public-school students have a historically founded fundamental liberty interest in freedom from excessive violence, that the substance of that constitutional guarantee is not contingent on potential state procedures, and that § 1983's promise of the right to seek vindication of that constitutional guarantee cannot be judicially eliminated, as it has been in the Fifth Circuit alone.

III. This case is the right vehicle to address these important issues, on which the circuits are divided.

1. S.B.'s case is the right vehicle to decide both questions presented. There is no need for percolation—ten circuits have weighed in, and they are entrenched in their positions. Indeed, they have

been for decades. The Fifth Circuit has no appetite to revisit its outlier substantive due process rule or its elimination of § 1983 in this context, having applied it unwaveringly for decades and denied en banc rehearing in this case and others, despite clear and acknowledged conflict with so many other circuits and with this Court's precedent.

Importantly, S.B.'s claims depend entirely on whether the Fifth Circuit can continue to eliminate all constitutional scrutiny of corporal punishment. In addition to that issue of cognizability under the first question presented, the facts here make the second question presented a pressing one too: The constitutional standard is likely to determine the viability of S.B.'s claims on remand (certainly viable under the Seventh and Ninth Circuits' unreasonable-seizure standard, yet precarious under the majority of circuits' shocks-the-conscience standard). This case is a stark example of geography dictating constitutional rights in multiple ways.

2. In candor to the Court, there is a potential vehicle concern, but it is easily assuaged. While S.B. pleaded a Fourth Amendment excessive force claim, App. 56a, she did not press it below. Of course, this Court generally does not consider issues not pressed or passed upon below, but whether to do so is a "prudential" decision. *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992). Here, any Fourth Amendment arguments would have been futile in the lower courts, as the Fifth Circuit says unequivocally that corporal punishment "does not constitute a fourth amendment * * * seizure." *Fee*, 900 F.2d at 810. Indeed, the circuit has recently declined multiple times to reconsider

that holding, reasoning that to do so would "'eviscerate [the] circuit's rule * * * prohibiting substantive due process claims' stemming from the same injuries." *T.O.*, 2 F.4th at 415 (citation omitted). The circuit is as dug-in on the second question presented as it is on the first.

In similar circumstances of clear futility, this Court has not hesitated to reach an issue that was unargued below. *Youakim* v. *Miller*, 425 U.S. 231, 235 (1976) ("Had appellants relied on the Supremacy Clause issue as a separate ground for decision it would appear that the claim would have been rejected by the District Court. In light of these circumstances, the case is at most only marginally subject to the rule that this Court will not consider issues 'not pressed or passed upon' in the court below."). For the same reason, this Court need not hesitate to reach this petition's well-developed Fourth Amendment question here.

In short, the Court can and should decide both questions presented because the circuits are avowedly split as to both the cognizability and the viability of claims like S.B.'s and those of so many other children subjected to state violence at school.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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