

No. 23-440

**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*

***Amicus Curiae* Brief of Professor Sarah A. Font
and a Dozen Child Welfare and Education
Organizations in Support of Petitioner**

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INTEREST OF AMICI CURIAE¹

Professor Sarah A. Font is a tenured professor at Pennsylvania State University in the Department of Sociology and Criminology and the School of Public Policy. She is the co-author of the 2016 article *Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy* and is an expert on the role of state and federal entities in protecting children from abuse and neglect in the United States.

Center for the Rights of Abused Children works in legislatures and courtrooms nationwide to protect the constitutional rights of abused children, each of whom deserve a safe and loving home. In furtherance of its mission to protect children, change laws, and inspire others, the Center has shepherded dozens of reforms through state legislatures to improve child welfare and educational systems. The Center's *pro bono* children's law clinic provides free legal assistance to thousands of children and families annually, including direct representation and legal trainings. This case is of special importance to the Center for the Rights of Abused Children, as it implicates a core mission of the organization—to strengthen children's constitutional right to be safe from physical abuse.

¹ No part of this amicus curiae brief was authored by counsel for the parties and no counsel or party to the proceedings made a monetary contribution to fund the preparation or submission of this brief. All counsel of record received timely notice of the intent to file this brief in support of Petitioner.

The **American Professional Society on the Abuse of Children** (APSAC) is a nonprofit, national organization focused on meeting the needs of professionals engaged in all aspects of services for maltreated children and their families. Especially important to APSAC is the dissemination of state-of-the-art practice in all professional disciplines related to child abuse and neglect. APSAC's mission is to improve society's response to the abuse and neglect of children so that all maltreated or at-risk children and their families have access to the highest level of professional commitment and service. This case is of interest to APSAC because of its commitment to educating the public about child abuse and neglect, preventing child maltreatment, and eliminating its recurrence.

Child Advocates, Inc. is an Indiana nonprofit organization committed to serving children and youth statewide who have experienced abuse and neglect, mental health issues, and educational concerns. Through multiple programs it champions and advocates for justice in child welfare, racial equity in all communities, and mental health wellness to build a better future for every child. Child Advocates is committed to listening to children and being their voice, standing up for their liberties, and working tirelessly to keep them safe and secure with an opportunity to thrive. Through our Educational Liaison Program, families request assistance navigating the complex educational system to ensure children receive the education and treatment legally mandated. Through its Direct Representation Program, attorneys protect the rights and interests of older youth in the child welfare system by being the only statewide organization to provide attorneys to foster youth. Ensuring that all children are able to

learn in an environment free from abuse is critical to their well-being, and is basic care owed to each child.

Children’s Advocacy Institute (CAI), founded at the University of San Diego School of Law in 1989, is an academic, research, and advocacy nonprofit organization working to improve outcomes for children and youth, with special emphasis on improving the child protection and foster care systems. In its academic component, CAI trains law students and attorneys to be effective child advocates, while its research and advocacy programs engage in impact litigation; regulatory, administrative, and legislative advocacy; and public education.

Children’s Law Center, Inc. (CLC), also known as Northern Kentucky Children’s Law Center, is a unique nonprofit law firm that protects the rights of youth—so they can grow up in safe, healthy ways. Through direct legal assistance (reaching about 400 young people annually), policy reform, and community education, CLC advocates for youth in the education system, child welfare system, and justice system. CLC serves Kentucky and Ohio, while collaborating with regional and national organizations on a variety of youth-law topics. Founded in 1989, CLC has a longstanding project helping students ensure access to education regardless of ethnicity, race, gender, sexual orientation, economic status, or disability. One of CLC’s core values is that children should have educational programming with appropriate developmental, social, behavioral, and academic supports.

Empower Mississippi gives voice and hope to those most impacted by public policy decisions by working with citizens, lawmakers, and issue experts

to identify the most pressing challenges, conduct real world research, and craft workable solutions for the people of Mississippi. Founded in 2014 as an independent, nonprofit advocacy organization, Empower Mississippi believes every child deserves a quality education that works for them and prepares them for success in life. Children also deserve the full protection of the U.S. Constitution. Empower Mississippi also believe that constitutional rights do not come with geographical restrictions and this case presents an opportunity to ensure that Mississippi's schoolchildren possess the same rights under the U.S. Constitution as do children who live outside of the Fifth Circuit.

The Gault Center, formerly the National Juvenile Defender Center, was created to promote justice for all children by ensuring excellence in the defense of youth in delinquency proceedings. Through systemic reform efforts, the Gault Center seeks to disrupt the harmful impacts of the legal system on children, families, and communities; decriminalize adolescence, particularly where youth of color are treated disparately; and ensure the constitutional protections of counsel for all young people. Recognizing that legal-system-involved youth have high exposure to trauma and Adverse Childhood Experiences, including physical and emotional abuse and neglect, the Gault Center's support for increased constitutional protections for youth extends beyond the delinquency system. The Gault Center advocates to disrupt the school-to-prison pipeline and address racial disparities in school discipline, and is committed to promoting racial justice, eliminating racial and ethnic disparities, and advocating for

comprehensive state and federal constitutional protections of all youth. The Gault Center (as the National Juvenile Defender Center) has participated as *amicus curiae* before the United States Supreme Court and federal and state courts across the country.

Human Rights for Kids (HRFK) is a nonprofit organization dedicated to the promotion and protection of the human rights of children. It incorporates research and public education, coalition building and grassroots mobilization, as well as policy advocacy and strategic litigation, to advance critical human rights on behalf of children. A central focus of its work is advocating in state legislatures and courts for comprehensive reforms for children consistent with the U.N. Convention on the Rights of the Child and the International Covenant on Civil and Political Rights. This case is of interest to HRFK as corporal punishment, particularly when used against children with disabilities, is a form of “cruel, inhuman, and degrading treatment or punishment” prohibited under international human rights law.

Lawyers For Children (LFC) is a nonprofit legal corporation dedicated to protecting the rights of individual children in New York and compelling system-wide child welfare reform throughout the country. Since 1984, LFC has provided free legal and social work services to children in more than 30,000 court proceedings involving voluntary foster care, abuse, neglect, termination of parental rights, adoption, guardianship, custody, visitation, and juvenile justice. In addition, LFC has appeared as *amicus curiae* in countless matters involving the rights of children in state and federal courts, has

participated in numerous class action suits seeking to enforce the rights of children, and has advocated for legislative and regulatory changes to improve the lives of children. LFC's Education Advocacy Project, directed by an attorney and master's-level social worker, helps to address the need for specialized advocacy for the educational needs of our clients. LFC's interest in this case is born of the understanding that children in foster care—arguably some of the most vulnerable students—are subject to discipline in school at significantly higher rates than other children.

The **Legal Aid Society of Palm Beach County, Inc.** (LASPBC) is a nonprofit legal organization founded in 1949 to represent indigent clients in civil matters. LASPBC's Education Advocacy Project has litigated educational cases for over twenty years, including constitutional civil rights matters regarding educational access for youth held in solitary confinement, excessive and disparate school discipline, and access to educational services for English Language Learner students. Advocating for the rights of students in public schools, particularly those marginalized due to fewer economic resources, foster care status, housing insecurity, disability, and racial or ethnic background underscores the work of LASPBC's Education Advocacy Project. These vulnerable students also face more frequent and severe disciplinary actions from the public-school systems, which is relevant to the scenarios in the instant case.

The **National Center for Lesbian Rights** (NCLR) is a national nonprofit legal organization

dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, transgender, and queer people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBTQ+ people and their families in cases across the country involving constitutional and civil rights. As a feminist-founded organization, NCLR champions reproductive justice, which includes bodily autonomy and the right to parent one's children in safe communities, free from unwarranted state intrusion. Many LGBTQ+ people also are people of color, people living in poverty, people with disabilities, and other multiple minorities. LGBTQ+ minors and the children of LGBTQ+ parents are overrepresented in the foster care and juvenile justice systems. Children of color, poor children, children with disabilities, and system-involved youth are disproportionately subjected to physical abuse in educational settings at the hands of state actors.

The Sayra and Neil Meyerhoff Center for Families Children and the Courts (CFCC) envisions communities where children and families thrive without unnecessary involvement in the legal system. Located inside the University of Baltimore School of Law, CFCC works alongside schools, parents, legislators, and community leaders to eliminate barriers to student success and family well-being. Through its Tackling Chronic Absenteeism Project (formerly known as the “Truancy Court Program”), CFCC provides a safe, restorative, and supportive community for elementary, middle, and high school students in six Baltimore City Public

Schools. CFCC identifies any material, educational, social, or legal supports the students or their families need so that they can achieve consistent attendance and academic success. Because CFCC respects children's right to be free of abuse, believes in the power of restorative practices, and has witnessed how children's problematic behaviors are often an expression of their unmet needs, CFCC opposes any use of corporal discipline by schools.

SUMMARY OF THE ARGUMENT

The devastating real-world consequences of the Fifth Circuit’s refusal to allow children to vindicate their federal constitutional right to be free from physical violence at the hands of public-school officials are shockingly evident: half of all reported instances of corporal punishment in the United States occur in that circuit. Notably, the Fifth Circuit—and only the Fifth Circuit—refuses to protect the constitutional rights of vulnerable children, such as the young girl with nonverbal autism at the center of this case who was physically abused by her public-school aides.² Under the Fifth Circuit’s precedent, federal constitutional remedies are not available to child victims of physical violence perpetrated by public-school employees if a state remedy is available. *Fee v. Herndon*, 900 F.2d 804, 806 (5th Cir. 1990). Certiorari is necessary to correct this geographic inequity and is clearly warranted for the following three reasons.

First, according to U.S. Department of Education data, of the reported number of children subjected to corporal punishment in American public schools, *half* of those children live in the Fifth Circuit.

² This brief uses the terms “physical abuse,” “physical violence,” and “corporal punishment” synonymously. The term “corporal punishment,” used by school districts throughout the nation, “is defined as the use of physical force with the intention of causing a child to experience pain so as to correct their misbehavior.” Elizabeth T. Gershoff and Sarah A. Font, *Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy*, Soc. Pol’y Rep., Vol. 30, No. 1, 3 (2106). The use of physical force, by a state actor acting under color of state law, to intentionally cause a schoolchild to experience pain—for any purpose—is the very definition of physical abuse.

U.S. Dept. of Educ., Civil Rights Data Collection, *2017-2018 State and Nat'l Estimations*, <https://ocrdata.ed.gov/estimations/2017-2018>. Moreover, the Fifth Circuit is the only circuit to deny children who have been physically abused by a public-school employee the right to file a federal lawsuit to vindicate their constitutional right to bodily integrity. A child's ability to enforce the U.S. Constitution should not depend on where that child lives.

Second, the Fifth Circuit's refusal to recognize a child's right to pursue federal constitutional claims, when physically abused by a state actor, conflicts with this Court's controlling decisions regarding the availability of federal remedies to vindicate substantive constitutional rights. Decades ago, the Fifth Circuit erroneously imported this Court's precedents regarding the availability of state remedies when determining whether *procedural* due process has been satisfied into its analysis of *substantive* due process claims brought by children who have been physically abused by public-school officials. As a result, the Fifth Circuit holds that the existence of a state remedy precludes any substantive due process claim brought by a child for physical violence inflicted by a public-school employee. But this Court has since made it clear that the availability of state remedies does not preclude a plaintiff from pursuing a federal claim when state actors violate an individual's substantive constitutional rights. Because the lynchpin of the Fifth Circuit's reasoning has been removed by this Court's decisions, the Fifth Circuit's anomalous precedent must be overruled.

Third, this Court should take this opportunity to settle the split that exists between the Ninth and Seventh Circuits on one hand, and the Second, Third,

Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits on the other, as to whether a child's claim for physical abuse at the hands of a public-school official should proceed under the Fourth Amendment's prohibition against unreasonable seizures or the Fourteenth Amendment's doctrine of substantive due process. The resolution of this question in favor of the Fourth Amendment is essential so that the Fifth Circuit can proceed, in the first instance upon remand, with Petitioner's claim under the more specific constitutional provision.

Allowing school officials to inflict physical harm on public-school children as a disciplinary measure, without recourse to federal courts, undermines the constitutional rights of children who are living in the Fifth Circuit. This Court should grant certiorari and bring the Fifth Circuit into line with every other circuit court of appeals by holding that the U.S. Constitution protects the right of all public-school students—wherever they may live—to be free from physical abuse inflicted by teachers and school staff, regardless of the availability of state remedies.

ARGUMENT

Fully half of the children in this country who are subject to corporal punishment by public school administrators reside in the Fifth Circuit. Notably, the Fifth Circuit alone precludes these children from seeking to vindicate their federal constitutional right to be safe in their persons because of the existence of state remedies. Nine circuits have come to the opposite conclusion and thus refuse to immunize government officials from federal constitutional accountability. The Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, consistent with decisions of this Court, allow children to pursue constitutional claims in federal court to vindicate their constitutional rights.

As a result of the Fifth Circuit's outlier precedent, Petitioner's complaint—which alleges her nonverbal autistic daughter was unconstitutionally struck by two different school aides as a means of disciplining her for behaviors that were entirely consistent with her autism—was dismissed for failure to state a claim. Petitioner's daughter deserves her day in court. This Court should grant the petition for a writ of certiorari, reverse the Fifth Circuit's nonconforming caselaw, and clarify that Petitioner's claims on remand should proceed under the Fourth Amendment's protections against unreasonable physical violence. It is time for this Court to end the Fifth Circuit's tragic legacy of violence and abuse against public-school children.

I. Half of the children in the U.S. who are corporally punished by public-school officials live in the Fifth Circuit. Notably, that circuit stands alone in its refusal to allow children to assert constitutional claims against their abusers.

According to the most recent publicly available data, of the total number of children subjected to corporal punishment in public schools, *half* of those children live in the Fifth Circuit. U.S. Dept. of Educ., Civil Rights Data Collection, *2017-2018 State and Nat'l Estimations*, <https://ocrdata.ed.gov/estimations/2017-2018>. Put another way, the three states that comprise the Fifth Circuit account for 50% of all reported instances of corporal punishment in the nineteen states that report using physical pain to discipline students. *Id.* Education should never leave bruises on children, but the Fifth Circuit's refusal to protect children's rights to safety and bodily integrity has led to a disproportionate share of corporal punishment occurring in the public schools located in Texas, Mississippi, and Louisiana.

The 2017-2018 data accords with a detailed analysis of 2011-2012 corporal abuse data, co-authored by Prof. Sarah A. Font, which found that, of the total number of reported incidents of corporal punishment for the earlier period studied, the states comprising the Fifth Circuit accounted for over 40% of all instances of school officials using physical violence as a means of school discipline. Elizabeth T. Gershoff and Sarah A. Font, *Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy*, Soc. Pol'y Rep., Vol. 30, No. 1, 8 (2016).

“Mississippi schools corporally punish the greatest proportion of their children” and Mississippi has “the largest total number of children” who are corporally punished in school. *Id.* Approximately half of all students in Mississippi attend school in a district that physically abuses children as a means of school discipline. *Id.* at 7 (noting that 85% of school districts in Mississippi use corporal punishment). “Texas corporally punishes the second largest number of children,” *id.* at 8, and Texas and Louisiana are the two states with the most widespread use of the intentional infliction of physical pain to discipline schoolchildren. *Id.* at 7.

Children with special needs—like the young girl with autism central to this case—minority children, and boys suffer disproportionately in schools in the Fifth Circuit. Children with disabilities are over 50% more likely to experience corporal punishment than their peers without disabilities in 35% of Louisiana’s school districts and in 46% of Mississippi school districts. *Id.* at 12. In Mississippi, Black children “are at least 51% more likely to be corporally punished than White children in over half of school districts, while in one fifth of [its] districts, Black children are over 5 times [400%] more likely to be corporally punished.” *Id.* at 10. While in Louisiana, Black children “were more than 3 times as likely to receive corporal punishment in school as White children.” *Id.* And in Mississippi, “boys are substantially more likely to be corporally punished than girls in more than three quarters of the school districts.” *Id.* Unmoored from the protections found in our federal Constitution, the Fifth Circuit’s peculiar precedent fosters a public-school environment where physical abuse of and discrimination against children can fester and grow.

The Fifth Circuit is totally “isolated” in its position that public-school students cannot assert federal constitutional claims against school officials who physically abuse them, so long as the state affords such children a post-deprivation remedy.³ *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 876-77 (5th Cir. 2000) (Wiener, J., specially concurring). The Fifth Circuit’s “rule is not only unjust, but is completely out of step with every other circuit court.” *T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 419 (5th Cir. 2021) (Wiener & Costa, JJ., specially concurring). Nine other circuits allow for a federal constitutional remedy when a student is the victim of physical abuse at the hands of a public-school official—regardless of the availability of state remedies.⁴ Petitioner’s daughter deserves her day in

³ The Fifth Circuit has determined that each state in its jurisdiction provides a state remedy for students who have been physically abused by public-school teachers. *Moore*, 233 F.3d at 875-76 (concluding Texas affords students state remedies); *Scott v. Smith*, 214 F.3d 1349, 2000 WL 633583, *1 (5th Cir. 2000) (concluding Mississippi affords students state remedies); Pet. App. 13a (concluding Louisiana affords students state remedies).

⁴ See *Smith v. Half Hollow Hills Cent. Sch. Dist.*, 298 F.3d 168 (2d Cir. 2002); *Metzger ex rel. Metzger v. Osbeck*, 841 F.2d 518 (3d Cir. 1988); *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980); *Saylor v. Bd. of Educ. of Harlan Cty., Ky.*, 118 F.3d 507 (6th Cir. 1997); *Wallace ex rel. Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010 (7th Cir. 1995); *London v. Dirs. of DeWitt Pub. Schs.*, 194 F.3d 873 (8th Cir. 1999); *P.B. v. Koch*, 96 F.3d 1298 (9th Cir. 1996); *Garcia ex rel. Garcia v. Miera*, 817 F.2d 650 (10th Cir. 1987); and *Neal ex rel. Neal v. Fulton Cty. Bd. of Educ.*, 229 F.3d 1069 (11th Cir. 2000). In the Seventh and Ninth Circuits, claims against public school officials for physical abuse proceed under the Fourth Amendment’s prohibition against unreasonable seizures. In the remaining circuits, they proceed under the Fourteenth Amendment’s substantive due process doctrine. *Infra* n.6.

court and should have the opportunity to prove that she was subject to an unconstitutional level of physical violence outside the bounds of what courts countenance as acceptable corporal punishment.

As young children, we learned from Laura Numeroff's *If You Give a Mouse a Cookie* that even small decisions can lead to unexpected, and sometimes even disastrous, consequences. The effects of the Fifth Circuit's decision to remove the constitutional shield from children in public schools are playing out in front of our eyes, with Mississippi, Louisiana, and Texas schools accounting for over half of all instances of reported corporal punishment in the nation.

* * *

Certiorari is necessary not only to address the asymmetrical Circuit split but to restore the Constitution to its rightful place as a shield capable of safeguarding *all* schoolchildren from physical abuse by the very public-school officials who are trusted to educate and protect them. The Fifth Circuit's incongruous precedent cries out for correction by this Court.

II. The Fifth Circuit's peculiar precedent precluding constitutional claims against public-school officials who physically abuse children also conflicts with this Court's jurisprudence.

The Fifth Circuit's discordant holding stems from its misapplication of this Court's *procedural* due process decision in *Ingraham v. Wright*, a case involving the use of corporal punishment by public-school officials to discipline public-school children. 430

U.S. 651 (1977).⁵ *Ingraham* rightly concluded that the use of corporal punishment implicates children’s important and protected liberty interests. *Id.* at 674. *Ingraham* stopped short, however, of deciding whether students had a substantive due process right to be free from excessive physical violence. *Id.* at 659 n.12. Instead, having concluded that an important liberty interest was at stake, *Ingraham* limited its scope to determining what *process* was due to children who had been restrained by school authorities for the purpose of using deliberate physical force to inflict pain upon those children as a means of discipline. Thus, in *Ingraham*, this Court “held that *procedural* due process rights were not violated by corporal punishment if alternative [state] remedies existed.” *T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 419 (5th Cir. 2021) (Wiener & Costa, JJ., specially concurring) (emphasis added).

However, as Fifth Circuit Judge Wiener—who has twice written special concurrences calling for the Fifth Circuit to reconsider its deviant precedent—

⁵ Corporal punishment is a relic of the past that has no place in modern American classrooms. Though this Court does not need to do so to rule for Petitioner in this case, *Ingraham* should be overruled to the extent it countenances corporal punishment as a means of public-school discipline. While *Ingraham* does hold, rightly, that “the child’s liberty interest in avoiding corporal punishment while in the care of public school authorities” is “rooted in history,” 430 U.S. at 675, *Ingraham* also concluded that same history permits “reasonable” corporal punishment to occur in public schools. *Id.* at 676. This Court should one day hold that inflicting pain on a student as a means of public-school discipline can never be reasonable. As explained in Part III, however, if *Ingraham* persists, claims for excessive corporal punishment by public-school officials should proceed under the Fourth Amendment’s reasonableness standard instead of the Fourteenth Amendment’s “shocks the conscience” standard.

said, “I find more significant that which the Court [in *Ingraham*] did *not* hold: It did *not* proclaim that an adequate remedy provided by state law or procedure constitutes a *per se* bar to a student’s ability to state a substantive due process claim based on excessive corporal punishment.” *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 877 (5th Cir. 2000) (Wiener, J., specially concurring). Moreover, “subsequent writings” by this Court “highlight a major problem” in the Fifth Circuit’s reasoning. *T.O.*, 2 F.4th at 420 (Wiener & Costa, JJ., specially concurring).

Specifically, this Court has since held that a “plaintiff . . . may invoke [a federal court’s jurisdiction under] § 1983 *regardless* of any state-tort remedy that might be available.” *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (emphasis added). Section 1983, while not an independent source of substantive rights, imposes liability when government officials acting under color of state law violate an individual’s constitutional rights. *Baker v. McCollan*, 443 U.S. 137, 146 (1979). Under *Zinermon*, “overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983,” 494 U.S. at 124, because “the constitutional violation actionable under § 1983 is complete when the wrongful action is taken.” *Id.* 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). Indeed, the Panel itself recognized that its precedent is contrary to this Court’s decisions, noting this Court

has “established that a plaintiff can utilize § 1983 without regard to any state-tort remedy that may exist.” Pet. App. 13a n.3.

The Fifth Circuit alone refuses to acknowledge that students who are physically abused in their public school by an adult administering discipline “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. It is past time for this Court to bring the Fifth Circuit into line so that public-school children in Mississippi, Louisiana, and Texas are protected by the U.S. Constitution, just like the rest of our nation’s schoolchildren.

* * *

At a minimum, this Court should overrule the Fifth Circuit’s precedent and ensure all circuits institute the current majority rule. Namely, that the Fourteenth Amendment’s guarantee of substantive due process prohibits excessive corporal punishment in public schools.

III. This Court should resolve another circuit split by holding that children’s constitutional claims against public-school officials who physically abuse them arise principally from the Fourth Amendment’s prohibition against unreasonable seizures.

The dramatically lopsided split between the Fifth Circuit and the other nine circuits as to the availability of a federal remedy under § 1983 for claims of physical abuse by public school officials is not the only circuit split that needs to be resolved.

There is also a split between the Seventh and Ninth Circuits and the remaining seven circuits as to whether a child's right to be free from physical abuse inflicted by public-school employees is protected by the Fourth Amendment's prohibition against unreasonable seizures or the Fourteenth Amendment's doctrine of substantive due process.⁶ Thus, as Petitioner notes, even in those circuits where students have a constitutionally cognizable injury, there is no uniform treatment of their claims. Pet. at 31. This Court should, therefore, grant Petitioner's writ of certiorari as to this question and side with the Seventh and Ninth Circuits.

In the seven circuits where claims proceed under the Fourteenth Amendment, plaintiffs must show that the physical abuse inflicted upon the student "shocks the conscience." *E.g.*, *Garcia*, 817 F.2d at 654 (holding that liability for corporal punishment

⁶ See *Doe ex rel. Doe v. Haw. Dept. of Educ.*, 334 F.3d 906, 907 (9th Cir. 2003) (holding that corporal punishment claims arising from a public school context should "proceed under the Fourth Amendment, in light of the Supreme Court's direction to analyze § 1983 claims under more specific constitutional provisions, when applicable, rather than generalized notions of due process"); *Wallace ex rel. Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010, 1016 (7th Cir. 1995) (same). *Contra Smith v. Half Hollow Hills Cent. Sch. Dist.*, 298 F.3d 168, 172-73 (2d Cir. 2002) (analyzing student's claim for excessive corporal punishment under the Fourteenth Amendment's substantive due process doctrine); *Metzger v. Osbeck*, 841 F.2d 518, 520 (3d Cir. 1988) (same); *Hall v. Tawney*, 621 F.2d 607, 612 (4th Cir. 1980) (same); *Saylor v. Bd. of Educ. of Harlan Cty., Ky.*, 118 F.3d 507, 514 (6th Cir. 1997) (same); *London v. Dirs. of DeWitt Pub. Schs.*, 194 F.3d 873, 876 (8th Cir. 1999) (same); *Garcia ex rel. Garcia v. Miera*, 817 F.2d 650, 654 (10th Cir. 1987) (same); *Neal ex rel. Neal v. Fulton Cty. Bd. of Educ.*, 229 F.3d 1069, 1074 (11th Cir. 2000) (same).

attaches only when the physical discipline is so grossly excessive as to be shocking to the conscience). It may be that any use of physical violence by a public-school official against a nonverbal autistic child shocks the conscience—especially violence used to retaliate against that child for behaviors known to be caused by her autism—but this Court must set a standard that is protective of all children in public schools, not just children with disabilities.

Claims under the Fourth Amendment proceed under an “objective reasonableness” standard. *Graham v. Connor*, 490 U.S. 386, 388 (1989). “[I]n the school context, the reasonableness of the seizure must be considered in light of the educational objectives” school officials were trying to achieve. *Doe*, 334 F.3d at 909. The Fourth Amendment’s reasonableness standard is clearly more protective of children’s rights. Unreasonable physical violence against children should not be immune from constitutional scrutiny simply because the abuse does not “shock the conscience.” Considering the violence against children in public schools that the Fifth Circuit has tolerated to date,⁷ it seems our collective consciences are too

⁷ Pet. App. 11a-12a (“Under this line of cases, our court has ‘dismissed substantive due process claims (1) when a student was instructed to perform excessive physical exercise as a punishment for talking to a friend; (2) when a police officer slammed a student to the ground and dragged him along the floor after the student disrupted class; (3) when a teacher threatened a student, threw him against a wall, and choked him after the student questioned the teacher’s directive; (4) when an aide grabbed, shoved, and kicked a disabled student for sliding a compact disc across a table; and (5) when a principal hit a student with a wooden paddle for skipping class.’ *T.O.*, 2 F.4th at 414 (collecting cases).”).

anaesthetized to continue using that test as a means of keeping children safe in their public schools.

There is no doubt the Fourth Amendment applies to “the actions of public school officials,” *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985), and that “[t]he application of physical force to the body of a person with intent to restrain is a seizure.” *Torres v. Madrid*, 592 U.S. ___, ___, 141 S. Ct. 989, 994 (2021). Given the clear application of the Fourth Amendment to claims for physical abuse inflicted by public school employees, children’s constitutional claims should proceed principally under the Fourth Amendment. As this Court held in *Graham*, “[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive government conduct, that Amendment, not the more generalized notion of ‘substantive due process,’ must be the guide for analyzing these claims.” 490 U.S. at 395.

CONCLUSION

To correct the disproportionate geographic injustices that have left public-school children living in the Fifth Circuit without any meaningful constitutional protection, this Court should grant the petition for a writ of certiorari, overrule the Fifth Circuit’s precedent, and clarify that the Fourth Amendment is the proper provision under which to analyze children’s claims for excessive physical violence at the hands of public-school officials.

Respectfully submitted,

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