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 Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Joint Opposition of Respondents, Jefferson Parish School Board, Christi Rome, Janine Rowell, and Lesley Nick to Petition for a Writ of Certiorari

Randall L. Kleinman
Counsel of Record
Law Offices of Randall L. Kleinman, LLC
1100 Poydras St., Suite 2005
New Orleans, LA 70139
(504) 539-7100
randall.kleinman@rlkleinmanlaw.com
Counsel for Lesley Nick

Olden C. Toups, Jr.
Grant & Barrow, PLC
238 Huey P. Long Ave.
Gretna, LA 70053
(504) 368-7888
otoups@grantbarrow.com
Counsel for Jefferson Parish School Board and Christi Rome

Alan J. Yacoubian
Johnson Yacoubian and Paysse
701 Poydras St., Suite 4700
New Orleans, LA 70139
(504) 528-3001
ajy@jyplawfirm.com
Counsel for Janine Rowell

QUESTIONS PRESENTED

1. Do the Respondents' actions, which do not shock the conscience for Fourteenth Amendment substantive Due Process purposes, nor constitute an unreasonable seizure under the Fourth Amendment, justify setting aside principles of constitutional avoidance and judicial restraint such that a grant of certiorari is appropriate?

2. Does this case present "most exceptional" circumstances which would justify deviating from the Court's well-established rule that it will not consider issues not raised in the Courts below?

3. Is this case, involving minor incidents not likely to raise a cognizable injury under *any* constitutional standard, constitute the proper case for effecting a sea change in constitutional law regarding school punishment cases?

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STATEMENT OF THE CASE

Petitioner voluntarily dismissed her original Complaint before Answers were filed, thus preserving her right to file a First Amended Complaint without leave of Court. The First Amended Complaint she thereafter filed made claim against Respondents under the substantive Due Process and Equal Protection components of the Fourteenth Amendment as well as under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132. In addition, she made a variety of State-law claims. See, Petition, App. E.

Respondents' Motions to Dismiss the First Amended Complaint were granted by the District Court and affirmed by the Fifth Circuit. Both courts relied on *Fee v. Herndon*, 900 F.2d 804 (5th Cir.), cert. denied, 498 U.S. 908 (1990), holding that claims under the Fourteenth Amendment's substantive Due Process component will be dismissed if the corporal punishment alleged by a student has a pedagogical purpose and the state provides the student with a remedy.

Petitioner now seeks a ruling from the Court proclaiming that all school corporal punishment matters must be considered under the Fourth Amendment's 'seizure' clause. The problem is that Petitioner never sought Fourth Amendment relief from the District Court or the Fifth Circuit. She did not preserve her appellate rights, despite an opportunity to do so. To the extent that she seeks substantive Due Process relief, she does not allege facts which would

support such relief.[1] Thus, it is difficult to see why this Court should grant the Petition.

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[1] The following factual allegations statement of the case is taken directly from Petitioner's First Amended Complaint. See, Pet. App. E, pp. 43a-49a.

> Petitioner, S. B., is an autistic eleven-year old girl, who was allegedly slapped by two teachers at her public school. On February 7, 2020, S. B. was in her classroom receiving therapy from a behavioral technician. She was sitting on the floor but refused to clean up some puzzle pieces. The behavioral technician approached her in an effort to help her, but S. B. kicked at her without making contact. Respondent, Janine Rowell intervened, slapping S. B.'s wrists, saying "No, ma'am! No kicking!" However, one of the witnesses stated that she saw Rowell grab plaintiff's wrists and use a stern voice but did not witness any slapping. Another witness saw Rowell slap S. B.'s wrists. The witness also stated that she saw Rowell slap S. B.'s wrists two weeks before.
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> Sometime in November 2020, Respondent, Lesley Nick, was an SNP [special needs paraprofessional] assigned to shadow S. B. during the morning of November 18, 2020. S. B. was working with her ABA therapist on spelling. Nick was assisting S. B. in choosing the correct letters. At some point, S. B. reached out and pinched Nick's neck. In response, Nick grabbed S.B.'s hand and slapped the top of it, saying "We do not pinch our friends."

Petitioner herself does not allege that the incidents shock the conscience for purposes of the substantive component of the Fourteenth Amendment's Due Process clause. See, *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998), holding that a substantive Due Process remedy is available in cases involving only "…the most egregious official conduct…" *Id.* (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992)).

The incidents alleged by Petitioner fail to shock the conscience for purposes of the substantive component of the Due Process clause of the Fourteenth Amendment. *See*, *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998), holding that a substantive Due Process remedy is available in cases involving only "…the most egregious official conduct…" *Id.* (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992)).[2]

Petitioner appears to have abandoned her claim under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132. She has also abandoned her Equal Protection and State-law claims.

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[2] The Second, Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits have used the "shocking to the conscience" test in analyzing substantive Due Process claims involving school discipline. *See T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cnty., Fla.*, 610 F.3d 588 (11th Cir. 2010); *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246 (2nd Cir. 2001); *Saylor v. Bd. Of Education of Harlan County*, 118 F.3d 507 (6th Cir. 1997); *Wise v. Pea Ridge School Dist.*, 855 F.2d 560 (8th Cir. 1988); *Metzger ex rel. Metzger v. Osbeck*, 841 F.2d 518 (3d Cir. 1988); *Garcia ex rel. Garcia v. Miera*, 817 F.2d 650 (10th Cir. 1987); and *Hall v. Tawney,* 621 F.2d 607, 613 (4th Cir. 1980).

The Seventh and Ninth Circuits use a Fourth Amendment analysis in which the focus is whether the seizure of the student's body is objectively unreasonable. *See, Wallace by Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010, 1016 (7th Cir. 1995) and *Preschooler II v. Clark Cnty. Sch. Bd. of Tr.*, 479 F.3d 1175, 1182 (9th Cir. 2007).

Although Petitioner seeks Fourth Amendment relief in this Court, she admits in her Petition (albeit in an offhand way) that she never sought it in the courts below. See, Pet., pp. 36-37. To the extent that Petitioner seeks to overturn the Fifth Circuit's decision in *Fee v. Herndon*, 900 F. 2nd 804 (5th Cir. 1990), cert. denied 498 U. S. 908 (1990), the de minimis nature of the incidents she describes show that she has failed to allege a right to substantive Due Process relief under the Fourteenth Amendment. Accordingly, Respondents contend that under no conceivable constitutional standard has Petitioner set forth a cognizable claim for relief. The Petition should accordingly be denied.

REASONS FOR NOT GRANTING THE PETITION

A. SUMMARY OF ARGUMENT

Respondents, the Jefferson Parish School Board and Christi Rome, Janine Rowell, and Lesley Nick, jointly urge the Court to deny the Petition for a Writ of Certiorari sought by Petitioner, S. B. on behalf of her daughter, S. B.

First, the facts alleged by Petitioner do not suggest a constitutional tort under *any* prevalent standard. There is accordingly no reason to question the dismissal of the Petitioner's case. Second, Petitioner is barred from seeking Fourth Amendment relief because she never sought such relief in the courts below.

Given its shortcomings, this case does not present the proper vehicle for the far-ranging change in the law advocated by Petitioner.

B. PRINCIPLES OF CONSTITUTIONAL AVOIDANCE FAVOR DENIAL OF CERTIORARI

1. The facts

Petitioner's factual allegations are set forth in her First Amended Complaint, which may be found at Pet. App. E, pp. 43a-49a. As the Court will see, Petitioner alleges injuries which are not constitutionally cognizable:

S. B., an autistic eleven-year old girl, was slapped by two teachers at her public school. Respondent, Janine Rowell, one of her teachers, demonstrated little or no patience with S. B. On occasion, she would scream at S. B.

On February 7, 2020, S. B. was in her classroom receiving therapy from a behavioral technician. She was sitting on the floor but refused to clean up some puzzle pieces. The behavioral technician approached her in an effort to help her, but S. B. kicked at her without making contact. Rowell intervened, slapping S. B.'s wrists, saying "No, ma'am! No kicking!" However, one of the witnesses stated that she saw Rowell grab plaintiff's wrists and use a stern voice but did not witness any slapping. Another witness saw Rowell slap S. B.'s wrists. The witness also stated that she saw Rowell slap S. B.'s wrists two weeks before.

Sometime in November 2020, Respondent, Lesley Nick, was an SNP[3] assigned to shadow S. B. during the morning of November 18, 2020. S. B. was working with

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[3] SNP is an acronym for Special Needs Paraprofessional.

her ABA[4] therapist on spelling. Nick was assisting S. B. in choosing the correct letters. At some point, S. B. reached out and pinched Nick's neck. Ms. Nick responded by grabbing S. B.'s hand, slapping the top of it, and stating that "We do not pinch our friends."

In short, the First Amended Complaint alleges, perhaps, three incidents. They all involve slapping S. B.'s hands. All involve reactions to kicking or neck-pinching on S. B.'s part. However, Petitioner's own pleadings suggest that one of the incidents may not have occurred.[5]

These minor incidents do not justify the granting of certiorari.

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[4] ABA is an acronym for Applied Behavioral Analysis.

[5] Respondent, Janine Rowell, submits that the Court should disregard the content of footnote 1 of the Petition because it raises completely new factual allegations against her which are not part of the record which forms the basis of the decision upon which certiorari is sought. Petitioner makes conclusory and inflammatory allegations that Rowell discriminated against *other children* at *a different job,* more than *three years* after the alleged February 7, 2020 incident at Schneckenberger Elementary. Respondent, Janine Rowell, respectfully submits that the allegations should not be considered because they were never made in Petitioner's various complaints. Moreover, the Petition does not list any issue relative to footnote 1 in its list of questions presented for review. Accordingly, all such issues are not properly before this Court. Moreover, they are not relevant to the incidents subject of the Petition, which are said to have occurred exclusively while Rowell was employed by the Jefferson Parish School Board, not elsewhere.

2. The facts suggest no cognizable injury under the Fourth or Fourteenth Amendments

Despite numerous opportunities to do so, the Court has not yet decided whether excessive student discipline violates the Fourth Amendment or the Fourteenth Amendment's substantive Due Process component.[6] Should certiorari be granted, the Court would face the thorny question of whether either or both apply.

But this case does not involve excessive student discipline in the first place. No Fourth or Fourteenth Amendment action accordingly exists which this Court should consider. There being no actionable constitutional tort alleged by Petitioner, this matter falls squarely within the Court's reluctance to decide cases which do not require reliance on the Constitution for resolution. It should decline to grant certiorari on grounds of constitutional avoidance.[7]

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[6] The Court has not taken up a school punishment case in which allegations of a constitutional injury were made since it decided *Ingraham v. Wright*, 430 U.S. 651 (1977), in which it held that the Eighth Amendment's 'cruel and unusual' punishment clause does not apply to school corporal punishment cases. Further, it held that the plaintiff in such a case is not entitled to procedural Due Process before the punishment takes place.

[7] Justice Brandeis summarized the doctrine in his concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) by describing seven rules. The third, judicial minimalism, is relevant here. Courts should decide questions of constitutional law narrowly. Quoting *Liverpool, N.Y. and Phila. S. S. Co. v. Emigration Comm'rs*, 113 U.S. 33, 39 (1885), Justice

The incidents can fairly be described as de minimis. They do not shock the conscience. Thus, they do not trigger the substantive Due Process component of the Fourteenth Amendment. See, *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998), holding that a substantive Due Process remedy is available in cases involving only "…the most egregious official conduct…". See, e.g., *Minnis ex rel. Doe v. Sumner Cnty. Bd. of Educ.,* 804 F.Supp.2d 641, 648-49 (M.D. Tenn. 2011) (where teacher grabbed student's arm to keep him from running wildly in classroom, bruises to student's arm did not shock the conscience). See, also, *Lillard v. Shelby Cty. Bd. of Educ.,* 76 F.3d 716, 725-726 (6th Cir. 1996), holding that a single slap, which did not result in physical injury even if given for no legitimate purpose, does not give rise to a substantive Due Process violation.

Apart from the fact that a Fourth Amendment claim was never made in the Courts below, see *infra*, Petitioner's Fourth Amendment claim is unavailing for a similar reason: a constitutional tort under the Fourth Amendment requires more than a minimal injury. "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Graham v. Connor*, 490 U.S. 386 at 396 (1989), quoting *Johnson v. Glick,* 481 F.2d 1028 at 1033 (2nd Cir. 1973). It is well established that the Fourth Amendment is not implicated if the constitutional injury is minor, as is

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Brandeis stated: "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"

the case here. "There is, of course, a de minimis level of imposition with which the Constitution is not concerned." *Ingraham v. Wright*, 430 U.S. 651, 674.

In this case involving de minimis injuries, Petitioner seeks to overturn decades of substantive Due Process law developed by the Circuits concerning school punishment matters. She would have most of the Circuits abandon their substantive Due Process approach to adopt the Ninth and Seventh Circuits' minority Fourth Amendment view. The Fifth Circuit's approach would be discarded altogether. If successful, a dramatic sea change in an important arena would result – in a case in which no constitutional violation appears to exist.

Deciding the constitutional merits of Petitioner's de minimis injury would require the Court to "depart[] from the general rule of constitutional avoidance and run[] counter to the older, wiser judicial counsel not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Pearson v. Callahan*, 555 U.S. 223, 241 (2009) (internal citations and quotations omitted).

There are numerous reasons why constitutional avoidance is appropriate here. But the de minimis nature of the claimed injury is not the only one. The Court has traditionally been reluctant to use constitutional grounds to create tort remedies. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 701 (1999): "We have noted the constitutional shoals that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law;" If the Court were to adopt the Fourth Amendment standard

advocated by Petitioner, it would indeed be adding to a body of general federal tort law.

3. The Fifth Circuit's decision in *Fee v. Herndon* is not an outlier as it is consistent with this Court's decision in *Ingraham v. Wright*

In *Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990), cert. denied, 498 U.S. 908 (1990), the Fifth Circuit adopted a rule of deference to state law if the corporal punishment has a pedagogical purpose and the state provides the student with a remedy. It indeed dismisses substantive Due Process claims if those circumstances are met. This approach has been followed by the Fifth Circuit despite many opportunities, which include this case, to reverse course.

The Fifth Circuit's approach parallels this Court's historical reluctance to find a constitutional tort in the school punishment arena. See, *Ingraham v. Wright*, 430 U.S. 651 at 659 (1976) (footnotes and internal citations omitted):

> "The use of corporal punishment in this country as a means of disciplining school children dates back to the colonial period. It has survived the transformation of primary and secondary education from the colonials' reliance on optional private arrangements to our present system of compulsory education and dependence on public schools. Despite the general abandonment of corporal punishment as a means of punishing criminal offenders, the

practice continues to play a role in the public education of school children in most parts of the country. Professional and public opinion is sharply divided on the practice, and has been for more than a century. Yet we can discern no trend toward its elimination.

At common law a single principle has governed the use of corporal punishment since before the American Revolution: Teachers may impose reasonable but not excessive force to discipline a child. Blackstone catalogued among the "absolute rights of individuals" the right "to security from the corporal insults of menaces, assaults, beating, and wounding," 1 W. Blackstone, Commentaries * 134, but he did not regard it a "corporal insult" for a teacher to inflict "moderate correction" on a child in his care. To the extent that force was "necessary to answer the purposes for which (the teacher) is employed," Blackstone viewed it as "justifiable or lawful." Id., at * 453; 3 id., at * 120. The basic doctrine has not changed. The prevalent rule in this country today privileges such force as a teacher or administrator "reasonably believes to be necessary for (the child's) proper control, training, or education." Restatement (Second) of Torts § 147(2) (1965); see id., § 153(2). To the extent that the force is excessive or unreasonable, the educator in virtually all States is subject to possible civil and criminal liability."

The Fifth Circuit in *Fee* did not condone child abuse, as Petitioner all but claims in her Petition. Rather, *Fee* disagreed with the plaintiffs' contention that allegations of excessive corporal punishment inevitably implicate the Constitution. As stated by the Fifth Circuit in *Fee v. Herndon*, 900 F.2d 804, at 915:

> "We abhor any exercise of discipline which could result in serious or permanent injury to the child. Indeed, if the force used by defendant teachers in disciplining plaintiff was as severe as plaintiffs allege, a Florida state court could find defendants civilly and criminally liable... The basis of such actions is, however, tort and criminal law, not federal constitutional law... In short, scrutiny of the propriety of physical force used by a school teacher upon his or her student should be the function of a state court, with its particular expertise in tort and criminal law questions..."

The constitutional rights of public school students have been limited by the school's legitimate interest in maintaining an environment in which learning can take place. See, e.g., *New Jersey v. T. L. O.*, 469 U.S. 325 (1985) and *Ingraham v. Wright*, 430 U.S. 651 (1976). See, also, *Goss v. Lopez*, 419 U.S. 565, 580 (1975): "The difficulty is that our schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action."

Petitioner argues, erroneously, that the Fifth Circuit is guilty of engaging in the "elimination of all

constitutional scrutiny" of school corporal punishment. Pet., pp. 3 and 10. According to Petitioner, Section 1983 is "eliminated" in this context. See, Pet., p. 13. Petitioner comes dangerously close to suggesting that the Fifth Circuit is a renegade Circuit, not just an outlier but a dangerous outlier. This is strong language and a very serious claim.

Petitioner's overheated rhetoric is superficial and wrong.

Petitioner would have the Court conclude that the Fifth Circuit has completely extinguished public school students' constitutional rights, a proposition which borders on the laughable. See, *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079 (5th Cir. 1995), in which the Fifth Circuit considered an excessive detention claim made by a student who was detained in a room by law enforcement authorities at the direction of school officials. The incident took place during a school tour of a jail. The Court noted that student's Fourth Amendment "right extends to seizures by or at the direction of school officials." *Hassan, supra,* 55 F.3d at 1079. See, also, *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 445 (5th Cir. 1994) (en banc) and *Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303, 305-06 (5th Cir. 1987).

Contrary to Petitioner's arguments, the Fifth Circuit does indeed afford school punishment plaintiffs a federal forum *if* a substantive Due Process violation is described in a Complaint which does not implicate a pedagogical function. This approach is consistent with this Court's reasoning set forth in *Ingraham v. Wright*, 430 U.S. 651 (1976). And, as shown by *Hassan*, supra,

the Fifth Circuit's approach to Fourth Amendment claims is an evolving one.

C. PETITIONER MAKES ARGUMENTS WHICH SHE HAS NEVER RAISED AND HAVE NOT BEEN PRESERVED FOR APPEAL

1. No 'exceptional circumstances' exist for ignoring this Court's precedent regarding matters not preserved for appeal

Although Petitioner seeks Fourth Amendment relief, she candidly admits, albeit in two short paragraphs found at the very end of the Petition, that she has never made a Fourth Amendment argument. Pet., pp. 36-37. Thus, her Petition runs headlong into the Court's rule that unasserted claims are not reviewable, except under exceptional circumstances.

The requirement that issues must be preserved for appeal is not a new rule: "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927).

Petitioner describes the Court's refusal to take up unpreserved issues not as mandatory but as "prudential," a characterization which is only minimally correct. The Court, however, has held in numerous cases that "most exceptional circumstances" must also be present. Petitioner did not mention this aspect of the Court's jurisprudence for an obvious reason: No exceptional circumstances exist here. Despite her neglect in describing the correct standard, she points to no miscarriage of justice that might result should the Court decline to hear her case.

Petitioner misunderstands the role of the federal courts. See, e.g., *Carducci v. Regan*, 230 U.S. App. D.C. 80, 714 F.2d 171, 177 (CADC 1983) (Scalia, J.) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them").

The rule precluding review of unasserted issues is supported by significant policy considerations. The rule eases appellate review by having the district court first consider the issue, then the court of appeals. Second, it ensures fairness to litigants by preventing surprises appearing on appeal. See, *Rice v. Jefferson Pilot Fin. Ins. Co.,* 578 F.3d 450, 454 (6th Cir.2009). In addition, the record may develop differently in response to a different theory of the case.

Undaunted, Petitioner completely ignores the requirement that "exceptional circumstances" must exist for this Court to deviate from its rule that only issues preserved for appeal will be reviewed. See, *Duignan*, *supra.* She cites no such exceptional circumstance but instead relies on *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992), to suggest that the decision to grant certiorari is merely "prudential."

Petitioner's reliance on *Yee* is misplaced. Not only did the Court in *Yee* decline to consider the unpreserved issue, but it emphasized that the cases in which a deviation from the rule took place are rare. See, *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 32 (1993), discussing *Yee*

and this Court's Rule 14.1(a), as follows (footnote omitted):

> Rule 14.1(a), of course, is prudential; it "does not limit our power to decide important questions not raised by the parties." *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 320, n. 6 (1971). A prudential rule, however, is more than a precatory admonition. As we have stated on numerous occasions, we will disregard Rule 14.1(a) and consider issues not raised in the petition "only in the most exceptional cases." *Yee*, *supra*, at 535 (quoting *Stone v. Powell*, 428 U.S. 465, 481, n. 15 (1976)); see also *Berkemer v. McCarty*, 468 U.S. 420, 443, n. 38 (1984) ("Absent unusual circumstances, . . . we are chary of considering issues not presented in petitions for certiorari")."

In *Izumi*, *supra*, at 510 U.S. 33, the Court listed cases in which it found that the requisite "exceptional circumstances" existed, as follows:

> We have made exceptions to Rule 14.1(a) in cases where we have overruled one of our prior decisions even though neither party requested it. See, *e. g.*, *Blonder-Tongue*, *supra*, at 319-321. We have also decided a case on nonconstitutional grounds even though the petition for certiorari presented only a constitutional question. See, *e.g.*, *Boynton v. Virginia*, 364 U.S. 454, 457 (1960); *Neese v. Southern R. Co.*, 350 U.S. 77, 78 (1955). We must also notice the possible absence of jurisdiction because we are obligated to do so

> even when the issue is not raised by a party. See, *e.g.*, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 398 (1979); *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976). And we may, pursuant to this Court's Rule 24.1(a), "consider a plain error not among the questions presented but evident from the record and otherwise within [our] jurisdiction to decide." See, *e. g.*, *Wood v. Georgia*, 450 U.S. 261, 265, n. 5 (1981); see generally R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice § 6.26 (6th ed. 1986) (discussing Rule 14.1(a) and its exceptions).

The Petition fails to present a single "exceptional circumstance" justifying deviation from the rule that unasserted rights will not be considered by this Court. To say that Petitioner has not met her burden is an understatement. Not a single valid reason is offered for deviating from the requirement that appellate issues must be preserved if they are to be reviewed.

Petitioner's reliance on *Youakim v. Miller*, 425 U.S. 231 (1976) is similarly misplaced. She fails to describe the case's unique procedural posture, which is highly relevant to her alleged futility argument.

In *Youakim*, the Court initially granted certiorari. The case appeared to involve a conflict between Illinois law and the Social Security Act. This of course implicated the Supremacy Clause. However, the Complaint did not make any Supremacy Clause claims. This Court noted that the Department of Health, Education, and Welfare had issued a directive which created a conflict between Illinois and federal law.

Moreover, the Solicitor General filed a statement indicating that he also believed that Illinois and federal law were in conflict. None of these post-writ developments were anticipated by the parties. The District Court had noted that Illinois and federal law were similar *before* the post-writ unanticipated developments took place. Thus, the Court vacated and remanded for a finding regarding the Supremacy Clause issue, an issue which gained traction after the case reached this Court. See, *Youakim*, *supra*, 425 U.S. at 236, holding that "the claim should be aired first in the District Court."

Youakim is a far cry from this case. It involved issues of federalism, statutory construction, and unanticipated developments. The *Youakim* Court, moreover, vacated and remanded to allow the District Court to consider the issue in the first instance. It did not make the kind of sweeping change in the law that Petitioner seeks here. Thus, *Youakim* indeed presented "exceptional circumstances." No such circumstances are present or alleged here.

2. Futility

Petitioner also argues that to have relied on the Fourth Amendment in the district court and the Fifth Circuit would have been futile because the Fifth Circuit does not recognize Fourth Amendment claims in the school punishment context. She cites *Fee v. Herndon*, 900 F. 2nd 804, 810 (5th Cir. 1990) in support of the proposition.

Petitioner's citation of *Fee v. Herndon* in support of her futility argument would have been difficult to rebut if the Fifth Circuit's jurisprudence had not advanced in the 33 years since *Fee* was decided. But it has advanced, and it renders her futility argument inapposite.

In *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079 (5th Cir. 1995), the Fifth Circuit considered a case dealing with a student's claim of excessive detention[8] at the direction of school officials. The Court noted that the Fourth Amendment "right extends to seizures by or at the direction of school officials." *Hassan, supra,* 55 F.3d at 1079.

Three years later, in *Keim v. City of El Paso,* 162 F.3d 1159, 1998 WL 792699, at *1, *4 n.4 (5th Cir. 1998) (per curiam) (unpublished and not binding), the Fifth Circuit held that an excessive force claim brought against two school security guards was "properly analyzed under the Fourth Amendment." *Keim v. City of El Paso*, 162 F.3d 1159, 1998 WL 792699, at *1, *4 n.4 (5th Cir. 1998) (per curiam) (unpublished and not binding). See, also, *Campbell v. McAlister*, 162 F.3d 94, 1998 WL 770706, at *3 (5th Cir. 1998) (per curiam) (unpublished) (not deciding whether the Fourth or Fourteenth Amendment applied but noting that *Graham v. Connor,* 490 U.S. 386 (1989), indicates that claims challenging governmental forces should "be confined to the Fourth Amendment alone"). Most

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[8] The student was held in a room while his school was touring a jail. He was detained by correctional officers at the direction of school officials.

recently, a published decision held that factual disputes required trial of a Fourth Amendment excessive force claim brought against a school resource officer who slammed a student into a wall. *Curran v. Aleshire*, 800 F.3d 656 (5th Cir. 2015).

Admittedly, the cited decisions run headlong into the admonition found in *Fee v. Herndon*, 900 F.2d 804 at 810 (5th Cir. 1990) that "the paddling of recalcitrant students does not constitute a [F]ourth [A]mendment search or seizure." But, as noted above, there is sufficient contrary authority to suggest that making a Fourth Amendment claim may not have been an exercise in futility.

CONCLUSION

Respondents jointly pray that the Petition for a Writ of Certiorari to the Fifth Circuit Court of Appeals be denied.

Respectfully Submitted,

Randall L. Kleinman
Counsel of Record
Law Offices of Randall L. Kleinman, LLC
1100 Poydras Street, Suite 2005
New Orleans, LA 70139
Tel: (504) 539-7100
Fax: (504) 539-7102
Email: randall.kleinman@rlkleinmanlaw.com
Counsel for Lesley Nick

Olden C. Toups, Jr.
Attorney at Law
Grant & Barrow, PLC
238 Huey P. Long Avenue
Gretna, LA 70053
Tel: (504) 368-7888
Fax: (504) 368-7263
Email: otoups@grantbarrow.com
Counsel for Jefferson Parish School Board and Christi Rome

Alan J. Yacoubian
Johnson Yacoubian and Paysse
701 Poydras Street, Suite 4700
New Orleans, LA 70139
Tel: (504) 528-3001
Fax: (504) 589-9669
Email: ajy@jyplawfirm.com
Counsel for Janine Rowell