No. 19-20429

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J.W.; LORI WASHINGTON, A/N/F J.W.,

Plaintiffs-Appellees,

v.

ELVIN PALEY,

Defendant-Appellant.

On Appeal from the U.S. District Court
for the Southern District of Texas

BRIEF FOR APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

J.W., et al. v. Paley, No. 19-20429

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary in this interlocutory appeal. The legal principles that govern the outcome of this appeal are straightforward and, as explained below, many of Officer Paley's arguments fall outside the scope of this Court's jurisdiction.

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STATEMENT OF JURISDICTION

Plaintiffs Jevon Washington and his mother, Lori Washington, filed this civil-rights lawsuit after Jevon was tased and handcuffed by a school resource officer at his Texas high school.[1] They invoked the district court's original jurisdiction under 28 U.S.C. § 1331, § 1343, and § 1415(*l*). On June 5, 2019, the district court issued an order denying Defendant Elvin Paley's motion for summary judgment on Plaintiffs' claim for excessive force under the Fourth Amendment. ROA.2113-50. Specifically, the district court held that Paley was not entitled to qualified immunity with respect to that claim because the record contained genuine disputes of material fact. *Id.* On June 20, Paley filed a timely notice of appeal from that order. ROA.2151; Fed. R. App. P. 4(a).

As explained below, this Court has jurisdiction under 28 U.S.C. § 1291 to review any legal issues raised in this interlocutory appeal. It does not, however, have jurisdiction to review whether the factual disputes identified by the district court are genuine. *See infra* Argument Pt. II.

STATEMENT OF THE ISSUES

1. Whether this Court's decision in *Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990)—which governs substantive due-process challenges to the use of corporal

[1] Because this case turns on events that occurred when Jevon was a minor, the case caption and initial district-court filings referred to him by his initials, J.W., in order to protect his identity. Now that his name has been disclosed in subsequent filings and media coverage of this case, this brief refers to him by his full name.

punishment—bars a student from bringing a Fourth Amendment claim for excessive force against a school police officer.

2. Whether the summary-judgment record in this case contains material factual disputes that preclude a court from granting qualified immunity to Officer Paley with respect to Jevon's Fourth Amendment claim.

STATEMENT OF THE CASE

A. Factual Background

This case arises from an incident that occurred in November 2016, when Jevon Washington was a senior at Mayde Creek High School. ROA.1527. Jevon, who was seventeen at the time, had been diagnosed as emotionally disturbed and intellectually disabled. ROA.1548-49. Throughout his life, his peers have bullied him because of his disability. ROA.1548-49.

The day of the incident thus began like many other days—with one of Jevon's fellow students mocking him. ROA.1556. The student and Jevon had been playing cards when the student called Jevon "stupid" and "retarded," upsetting Jevon and prompting him to look for a quiet space to calm down. ROA.1556. As was his practice when he became stressed, Jevon sought out an empty classroom—he called it his "chill out room"—to pace around and catch his breath. ROA.1556. But, on that day, another student was already in Jevon's usual "chill out room," so Jevon continued down the hallway toward one of the building's exits. ROA.1556. That's when Jevon's day turned from frustrating to tragic.

As Jevon approached the building's exit, he was met by a school security guard, John Oglesby, and a school resource officer, Officer Angelina Molina, who began questioning him about where he was going. ROA.1481. They were soon joined by an athletic coach, who happened to be in the hallway, and one of the school's assistant principals, who had been summoned there by the security staff. ROA.1469, ROA.1481. A second school resource officer, Defendant Elvin Paley, joined the group moments later, after hearing a request for assistance come over the school radio. ROA.633. Thus, within only a few minutes, Jevon had gone from seeking out a quiet place to calm down to suddenly finding himself surrounded by a group of police officers and school administrators in a confined space. ROA.1556.

Jevon felt his anxiety worsen. ROA.1556. He asked the school officials—one of whom, Oglesby, was now blocking the exit doors—if he could leave the building to go "cool down." ROA.1556. But the officials kept asking him why he wanted to leave, even after he explained how he was feeling. ROA.1556. The questions only deepened his sense of anxiety. ROA.1556. Eventually, Jevon decided to remove himself from the situation and began "calmly walk[ing] toward the door." ROA.1556.

What happened next is hotly disputed. Jevon states in his declaration that he "did not touch anyone" as he attempted to open the door to leave but that, as he did so, Oglesby (the security guard) "initiated physical contact with [him] and for no apparent reason attempted to block [him] from exiting the building." ROA.1556-57. At that point, Officer Paley "briskly" approached him, put him in a chokehold, and

began tasing him. ROA.1557. According to Jevon, Officer Paley continued to tase him even as he screamed out in pain and even after he had fallen to the ground. ROA.1557. Jevon states that Officer Paley tased him six to eight times in total, using so much force that it caused Jevon to urinate and defecate on himself. ROA.1557-58. The officers then placed Jevon in handcuffs. ROA.1558. As Jevon lay prone on the ground struggling to catch his breath, Officer Paley stood directly over him, pointed the taser at his head, and shouted, "I did not want to tase you but you don't run sh*t here!" ROA.1558. Paramedics later removed one of the taser's prongs from Jevon's body, where it had become embedded in his skin. ROA.1559.

Officer Paley recorded much of this encounter with his body-worn camera, but the footage is often shaky and contains a gap at a key point in the interaction. *See* Dist. Ct. ECF No. 28-10 (Video).[2] Specifically, the footage goes dark for just over thirty seconds, beginning when Officer Paley first makes physical contact with Jevon (at which point the camera's lens becomes blocked as a result of their close proximity to each other). *See* Video 12:45:59-12:46:35. When the footage becomes clear again, it shows Officer Paley stepping away from Jevon and firing the taser into Jevon's upper torso at close range, as Jevon falls to his knees and screams. Video 12:46:35-

[2] The body-cam footage was originally submitted to the district court as Exhibit G to Officer Paley's summary-judgment motion. *See* ROA.1482 (original cover page for Exhibit G). This brief cites the footage simply as "Video," followed by a pincite to the relevant timestamps in the recording. Although the recording does not appear to be accessible via the CM/ECF system, copies of the recording may be provided to the Court upon request.

12:46:41. The footage shows Officer Paley continuing to tase Jevon while he is on his knees—applying the taser at that point directly to Jevon's body—as Jevon continues to scream. Video 12:46:40-12:46:43.

Eventually, Jevon collapses onto the ground, falling flat on his side and stomach, as Officer Paley continues to tase him. Video 12:46:43-12:46:44. As Jevon writhes on the ground in pain—still screaming—Officer Paley continues to apply the taser to Jevon's back and yells at Jevon to "put [his] hands behind [his] back." Video 12:46:45-12:46:56. Jevon immediately responds, "I can't!," but Officer Paley continues to tase him. Video 12:46:49-12:46:51.

Although the police report from the incident states that the taser was deployed for a total of nineteen seconds, ROA.846, the body-cam footage makes it difficult to discern exactly when Officer Paley first deploys the taser. *See* Video 12:46:25-12:46:56. The footage also fails to clearly capture the first thirty-or-so seconds of physical contact between Officer Paley and Jevon. *See* Video 12:45:59-12:46:35. Jevon states that, during that period, he was placed in a "chokehold," ROA.1557, while Officer Paley asserts that he was "try[ing] to use soft or hard hand techniques and physically restrain [Jevon]," ROA.634.

After the incident, Officer Paley called the local district attorney's office to recommend that Jevon be charged with "resisting arrest," but the office declined to press any charges. ROA.635. As an assistant district attorney told Officer Paley, "the facts did not meet the elements of resisting arrest." ROA.635.

B. Procedural Background

Jevon and his mother, Lori Washington, filed this civil-rights suit on his behalf in 2018. ROA.2. In their complaint, they asserted claims against Defendant Katy Independent School District for violations of the Fourteenth Amendment, the Rehabilitation Act, and the Americans with Disabilities Act. *See* ROA.163-64, ROA.167-70. They also asserted claims under 42 U.S.C. § 1983 against Officer Paley for violations of the Fourth and Fourteenth Amendments. ROA.164-67. After brief discovery, the school district and Officer Paley moved jointly for summary judgment on all claims. ROA.5.

In June 2019, the district court issued an order granting their motion in part and denying it in part. *See* ROA.2113-50. The court awarded summary judgment to Defendants on all claims except for the Fourth Amendment claim against Officer Paley. ROA.2149-50. Officer Paley had moved for summary judgment on that claim on qualified-immunity grounds, arguing that the evidentiary record did not show that he used excessive force in violation of Jevon's "clearly established" Fourth Amendment rights. *See* ROA.2135. The district court, however, rejected that argument. It held that the parties' conflicting accounts of the tasing incident reflected "genuine factual disputes material to determining if a reasonable officer in Officer Paley's position would have used the amount or type of force he used." ROA.2150; *see also* ROA.2141-43 (identifying various factual disputes that "preclude summary judgment" on the qualified-immunity issue).

SUMMARY OF ARGUMENT

Officer Elvin Paley claims that he tased Jevon Washington, a seventeen year-old special-needs student, because Jevon actively resisted Officer Paley's initial attempts to subdue him by other means. Jevon, in contrast, claims that he did not actively resist Officer Paley's initial attempt to subdue him and that Officer Paley lacked valid reasons for tasing him. The district court here determined that evidentiary conflicts precluded her from resolving that material dispute on summary judgment. That determination was proper and Officer Paley has identified no valid grounds for overturning it on appeal.

I. Officer Paley contends that the district court should have dismissed Jevon's excessive-force claim under this Court's decision in *Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990). *Fee* precludes schoolchildren from bringing a substantive due-process challenge to a school official's use of corporal-punishment if the child lives in a state that provides other remedies for such conduct. Nothing in *Fee*, however, precludes schoolchildren from bringing claims under the Fourth Amendment to challenge unreasonable seizures, as Jevon has done here. Indeed, the Supreme Court expressly held in *Graham v. Connor*, 490 U.S. 386 (1989), that claims challenging an officer's use of force during a Fourth Amendment seizure should be reviewed under the test of "objective reasonableness," rather than under a substantive due-process standard. Consistent with that directive, this Court has applied *Graham*'s reasonableness standard to excessive-force claims brought by schoolchildren against

school police officers. The district court properly relied on that precedent in rejecting Officer Paley's contention that *Fee* requires dismissal of Jevon's excessive-force claim here.

II. The district court also properly rejected Officer Paley's assertion that the evidentiary record in this case conclusively shows that he did not violate Jevon's "clearly established" Fourth Amendment rights. This Court has repeatedly recognized that the Fourth Amendment prohibits a law-enforcement officer from tasing someone who does not pose an imminent safety risk and is not actively resisting arrest. And the Court has specifically held that those same protections apply to the use of force on schoolchildren. As the district court rightly recognized, the summary-judgment record in this case contains ample evidence that Officer Paley violated Jevon's rights under those precedents—particularly in his continued use of the taser after Jevon fell to the ground. That evidence (even if it conflicts with other evidence in the record) precludes summary judgment here.

STANDARD OF REVIEW

A district court's denial of summary judgment on the issue of qualified immunity is "immediately appealable 'to the extent it turns on an issue of law.'" *Winfrey v. Pikett*, 872 F.3d 640, 643 (5th Cir. 2017) (citations omitted). "Within this limited appellate jurisdiction, '[t]his court reviews a district court's denial of a motion for summary judgment on the basis of qualified immunity in a § 1983 suit de novo.'" *Id.* (citations and quotation marks omitted; alteration in original).

ARGUMENT

I. The district court correctly held that *Fee v. Herndon* does not bar Jevon's excessive-force claim.

"Qualified immunity shields federal and state officials from money damages unless a plaintiff [shows] (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).

Here, Officer Paley contends that the district court applied the wrong legal standard in assessing whether he violated Jevon's "clearly established" rights. Specifically, he asserts that the district court erred by analyzing Jevon's excessive-force claim under the Fourth Amendment's "objective reasonableness" standard. Instead, he argues, the court should have analyzed that claim under *Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990), which governs substantive due-process challenges to the use of corporal punishment. As explained below, Paley's contention that *Fee* applies here is contrary to both precedent and logic.

A. Jevon's excessive-force claim must be analyzed under the Fourth Amendment, rather than a substantive due-process standard.

The Supreme Court's decision in *Graham v. Connor*, 490 U.S. 386 (1989), forecloses Officer Paley's argument that Jevon's excessive-force claim is subject to *Fee*'s substantive due-process analysis. In *Graham*, the plaintiff sought damages under § 1983 "for injuries allegedly sustained when law enforcement officers used physical force against him during the course of an investigatory stop." *Id.* at 388. The Fourth

Circuit ruled in favor of the officers, applying the then-prevailing "substantive due-process" standard that courts of that era used to evaluate all excessive-force claims. *Id.* at 390-92. The Supreme Court, however, vacated that ruling. *Id.* at 388. Rejecting the Fourth Circuit's approach, the Court held that the plaintiff's excessive-force claim was "properly analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather than under a substantive due process standard." *Id.*

In reaching that conclusion, the Court explained that its analysis of any excessive-force claim "begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." 490 U.S. at 394. "In most instances," the Court noted, "that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct." *Id.* "The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized 'excessive force' standard." *Id.* A claim that arises in the context of a law-enforcement seizure, the Court continued, is "most properly characterized as one invoking the protections of the Fourth Amendment." *Id.*

To illustrate how this analysis works in practice, the Court pointed to its earlier decision in *Tennessee v. Garner*, 471 U.S. 1 (1985). In *Garner*, the Court had considered "the constitutionality of the use of deadly force to prevent the escape of an apparently

unarmed suspected felon." *Id.* at 3. Although the plaintiff had raised claims under both the Fourth Amendment and the Due Process Clause, the Court resolved the case under the Fourth Amendment. *See id.* at 6 n.7, 7-9. That provision controlled, the Court reasoned, because "there [is] no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Id.* at 7.

Graham therefore "ma[d]e explicit what was implicit in *Garner*'s analysis": that "*all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham*, 490 U.S. at 395 (emphasis in original); *see also id.* ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.").

The district court here followed the exact approach that the Supreme Court laid out in *Graham*. It began its analysis of Jevon's excessive-force claim "by identifying the specific constitutional right allegedly infringed by the challenged application of force." 490 U.S. at 394; *see* ROA.2120 (citing the complaint provisions that explicitly invoked the Fourth Amendment). Next, it confirmed that the claim arose under the Fourth Amendment, recognizing that the claim turned on Officer

Paley's use of force "in the course of an arrest, investigatory stop, or other 'seizure.'" 490 U.S. at 395; *see* ROA.2133.[3] Finally, the court assessed the "validity of the claim" by applying the Fourth Amendment's "'reasonableness' standard," rather than the "'substantive due process' approach" urged by Officer Paley. 490 U.S. at 394-95; *see* ROA.2133. The court's choice of that standard was thus firmly rooted in Supreme Court precedent.

B. *Fee v. Herndon* does not govern—let alone preclude—Jevon's excessive-force claim.

Despite *Graham*'s clear instructions, Officer Paley asserts that Jevon's excessive-force claim should be analyzed under the substantive due-process standard set forth in *Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990). *See* Paley Br. 13. He makes no attempt to reconcile that argument with *Graham*'s explicit statement that "*all* claims that law enforcement officers have used excessive force . . . in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'objective reasonableness' standard, rather than under a 'substantive due process' approach." 490 U.S. at 395 (emphasis in original). Moreover, he mischaracterizes the holding of *Fee* itself.

[3] As explained further below, there is no dispute that Officer Paley executed a Fourth Amendment "seizure" here when he used force to restrain Jevon. *See infra* Pt. I.B; *see also Graham*, 490 U.S. at 395 n.10 ("A 'seizure' triggering the Fourth Amendment's protections occurs only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.'" (citation omitted)).

In *Fee*, the parents of a Texas special-education student brought a § 1983 claim against school officials who had beaten their son with a paddle for disrupting class. 900 F.2d at 806-07. The parents argued "that the fourteenth amendment's substantive due process guarantee operates to ban excessive corporal punishment in public schools." *Id.* at 805-06. This Court, however, rejected that argument, holding that "*reasonable* corporal punishment is not at odds with the fourteenth amendment." *Id.* at 808 (emphasis in original). The Court further held that corporal-punishment injuries—even severe ones—"do not implicate the due process clause *if* the forum state affords adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions." *Id.* (emphasis in original). Thus, the Court concluded, "because Texas provide[d] adequate state criminal and tort remedies for any excessive punishment [of students]," the parents' substantive due-process claim failed. *Id.* at 808-09.

Fee focused exclusively on the corporal-punishment issue and did not address excessive-force claims arising under the Fourth Amendment (like the claim at issue here). Indeed, contrary to Officer Paley's repeated characterizations of the case, *see* Paley Br. 13-14, the plaintiffs in *Fee* never even raised a Fourth Amendment claim.[4] What's more, this Court explicitly declined to consider any Fourth Amendment cases

[4] Although the parents did assert an excessive-force claim under *state tort* law, this Court never discussed the merits of that claim and, in any event, that claim survived this Court's review. *See Fee*, 900 F.2d at 811 (stating that "an excessive-force cause of action with respect to the school's principal remains").

(such as *Graham*) in its analysis of the due-process issue. *See Fee*, 900 F.2d at 810. The Court reasoned that such precedents were inapposite in the corporal-punishment context because "the paddling of recalcitrant students does not constitute a fourth amendment search or seizure." *Id.*

Here, in contrast, there is no dispute that Officer Paley executed a Fourth Amendment "seizure." As the Supreme Court has explained, "[w]henever an officer restrains the freedom of a person to walk away, he has seized that person" under the Fourth Amendment. *Garner*, 471 U.S. at 7; *see also Keller v. Fleming*, 930 F.3d 746, 752 (5th Cir. 2019) ("A person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained." (citation omitted)). Officer Paley's use of a taser to stop Jevon from leaving the building plainly constitutes a Fourth Amendment seizure. *See, e.g.*, *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 665 (10th Cir. 2010) ("Although Tasers may not constitute deadly force, their use unquestionably 'seizes' the victim in an abrupt and violent manner."). And, even setting aside the tasing itself, Officer Paley stated in his declaration that he intended to "physically restrain" Jevon. ROA.634-35. Jevon's declaration, meanwhile, confirms that the restraint had its intended effect. *See* ROA.1558 (Jevon Decl.) ("I was under the clear and reasonable impression that I was under arrest."). Taken together, this evidence establishes that Jevon was subject to a Fourth Amendment "seizure" and underscores *Fee*'s inapplicability to his excessive-force claim.

Nevertheless, Officer Paley maintains that district court should have analyzed (and dismissed) that claim under *Fee*. He points to the fact that the district court relied on *Fee* in dismissing Jevon's due-process claim, arguing that the court's refusal to apply *Fee* to the Fourth Amendment claim was "internally inconsistent." Paley Br. 15. But there's nothing inconsistent about the district court's approach, which merely acknowledged the obvious: "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands." *Soldal v. Cook County*, 506 U.S. 56, 70 (1992) (reversing lower court for improperly construing the plaintiff's allegations of due-process and Fourth Amendment violations as raising only a due-process claim). "Where such multiple violations are alleged, [courts] are not in the habit of identifying as a preliminary matter the claim's 'dominant' character." *Id.* Rather, they must "examine each constitutional provision in turn," *id.*—just as the district court did here.

C. *Fee* is inapplicable to all Fourth Amendment claims, regardless of whether they are brought against police officers or school officials.

Officer Paley claims that the district court refused to apply *Fee* because he is a police officer and not a school official. *See, e.g.*, Paley Br. 19 ("It is impossible to see how the lower court here could have concluded that *Fee* did not apply to Paley because he was a police office[r.]"). As an initial matter, the district court did not decline to apply *Fee* merely "because Officer Paley is a police officer." But even if it had, that still would not provide a basis for reversal. After all, *Graham*'s logic renders

Fee inapplicable to "*all*" excessive-force claims arising under the Fourth Amendment—regardless of whether the claim is brought against a police officer, public-school employee, or some other government official. 490 U.S. at 395. And, furthermore, numerous courts—including this one—have made clear that claims arising from a school police officer's use of force in seizing a student are properly analyzed under the Fourth Amendment.[5]

In *Curran v. Aleshire*, for instance, this Court applied the Fourth Amendment's "reasonableness" standard to a student's claim that a school resource officer used excessive force in escorting her to the principal's office. 800 F.3d 656, 661 (5th Cir. 2015) (affirming district court's denial of qualified immunity). The Court's opinion in *Curran* makes no mention of *Fee* and nowhere suggests that the student's claim should be construed as a substantive due-process claim. Although Office Paley claims that "we don't know why the Court did not discuss the [*Fee*] issue" in *Curran*, Paley Br. 20, the logic of the Court's opinion was hardly mysterious: the student's claim was subject to a Fourth Amendment analysis because it arose out of a Fourth Amendment seizure. *See* 800 F.3d at 659. The same logic governs here.

[5] *See, e.g.*, *E.W. ex rel. T.W. v. Dolgos*, 884 F.3d 172, 179 (4th Cir. 2018) (applying Fourth Amendment's "reasonableness" standard to a middle schooler's excessive-force claim against a school resource officer); *A.M. v. Holmes*, 830 F.3d 1123, 1151 (10th Cir. 2016) (same); *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1304 (11th Cir. 2006) ("[W]e apply the [Fourth Amendment's] reasonableness standard . . . to school seizures by law enforcement officers.").

Officer Paley argues that *Curran* is distinguishable because the officer in that case was employed by the local police department, while Officer Paley is employed by the school district. *See* Paley Br. 17 (urging this Court to adopt a "principled line . . . between school district employees and non-school district employees" for the purposes of applying *Fee*). But that distinction is irrelevant. Again, the key factor in determining whether to analyze an excessive-force claim under the "objective reasonableness" test or some other test is whether the force at issue was used "in the course of an arrest, investigatory stop, or other 'seizure.'" *Graham*, 490 U.S. at 395. The answer to that question does not turn on which government agency cuts the defendant's paychecks. And forcing courts to consider the defendant's employer would only complicate the *Graham* inquiry in ways untethered to the Supreme Court's logic in *Graham* itself. Courts already have all of the doctrinal tools they need to determine whether or not a person has been "seized" for Fourth Amendment purposes (i.e., the threshold question under *Graham*). There is no reason to muddy that analysis.[6]

[6] In addition, to the extent that any of Officer Paley's *Fee* arguments turn on the application of different constitutional standards for school police officers and municipal officers, those arguments are waived. *See* ROA.2132 (Dist. Ct. Op.) ("Neither party has argued that the standards for police officers in municipal police departments do not apply to a school district's police force.").

D. All of the cases Officer Paley cites are inapposite.

Officer Paley contends that "[t]he *Fee* doctrine has been applied by this Court in numerous cases." Paley Br. 14. But all three of the cases he cites applied *Fee* to dismiss substantive due-process claims—*not* Fourth Amendment claims.

In fact, two of the cases he cites did not involve any Fourth Amendment claims at all (much like *Fee* itself). *See Serafin v. School of Excellence in Educ.*, 252 F. App'x 684, 685 (5th Cir. 2007) (noting that the plaintiff "alleg[ed] that her due process and equal protection rights were violated" and "also raised several independent state law claims"); *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 872 (5th Cir. 2000) (noting that the plaintiffs asserted "a constitutional claim of deprivation of substantive due process under the Fifth or Fourteenth Amendments to the U.S. Constitution," as well as state-law claims).

And the third case he cites, *Campbell v. McAlister*, is similarly unavailing. No. 97-20675, 1998 WL 770706 (5th Cir. Oct. 20, 1998) (per curiam).[7] In *Campbell*, the plaintiffs alleged that a police officer had violated their son's rights under both the Fourth Amendment and the Due Process Clause by slamming the child to the ground while removing him from his kindergarten class. *Id.* at *1. Not surprisingly, this

[7] Officer Paley's brief neglects to note that the opinion in *Campbell* is unpublished and non-precedential. Although the outcome of the case was reported at 162 F.3d 94 (under the single word: "Affirmed."), the opinion itself was not. Indeed, the opinion explicitly states that it "should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4." *See* 1998 WL 770706, at *1 n.*.

Court examined each of the claims separately, applying *Graham* to the Fourth Amendment claim and applying *Fee* to the substantive due-process claim. *See id.* at *3-*5; *see also* Paley Br. 18 (acknowledging that *Campbell* "does appear to first analyze the excessive force claim on the merits" under the Fourth Amendment before turning to any discussion of *Fee*). The district court followed the exact same approach in this case. Thus, *Campbell* offers no help to Officer Paley and, instead, reaffirms that his aggressive reading of *Fee* is erroneous.

II. The district court correctly held that Officer Paley is not entitled to qualified immunity on the current factual record.

"Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quotation marks omitted). "For a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (citation omitted).

Here, Officer Paley asserts that he did not violate Jevon's "clearly established" rights under the Fourth Amendment. *See* Paley Br. 25-35. His argument, however, disregards clear precedents holding that the Fourth Amendment bars police officers from tasing suspects who are not actively resisting arrest. Moreover, he fails to grapple with several of the factual disputes that the district court identified here, including whether Jevon was "actively resisting" when Officer Paley tased him. Those

unresolved fact questions precluded the district court from granting summary judgment to him on his qualified-immunity defense and, as explained below, this Court has limited jurisdiction to revisit those questions on appeal. For all of these reasons, this Court should affirm the denial of qualified immunity here.

A. The use of a taser on someone who is not "actively resisting" arrest violates that person's clearly established Fourth Amendment rights.

As previously explained, claims that an officer used excessive force in the course of a Fourth Amendment seizure are reviewed under the "objective reasonableness" test set forth in *Graham v. Connor*, 490 U.S. 386 (1989). *See supra* Part I.A. In applying that test, a court must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396 (citation and quotation marks omitted). That balancing "requires careful attention to the facts and circumstances of each particular case." *Id.* In particular, courts must examine "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id.*

This Court has relied on these factors in holding that the Fourth Amendment generally bars an officer from physically overpowering someone whom he stopped for a minor violation if that person presents no imminent flight or safety risk and displays only passive resistance. *See Deville v. Marcantel*, 567 F.3d 156, 167-69 (5th Cir. 2009);

accord Hanks v. Rogers, 853 F.3d 738, 747 (5th Cir. 2017) (collecting cases to show that "clearly established law [as of February 2013] demonstrated that an officer violates the Fourth Amendment if he abruptly resorts to overwhelming physical force rather than continuing verbal negotiations with an individual who poses no immediate threat or flight risk, who engages in, at most, passive resistance, and whom the officer stopped for a minor traffic violation"). Consistent with that principle, this Court has explicitly held that "a constitutional violation occurs when an officer tases, strikes, or violently slams an arrestee who is not actively resisting arrest." *Darden v. City of Fort Worth*, 880 F.3d 722, 731 (5th Cir. 2018). Officers whom commit such a violation are not entitled to qualified immunity.

In *Newman v. Guedry*, for instance, this Court denied qualified immunity to a police officer who had tased a suspect during a traffic stop. 703 F.3d 757 (5th Cir. 2012). The Court based its decision on evidence that the suspect had not "attempt[ed] to flee" and that the suspect's "behavior did not rise to the level of 'active resistance.'" *Id.* at 763; *see also id.* at 764 ("None of the *Graham* factors justifies Guedry's tasering Newman."). Although the record contained some evidence that the suspect struggled with him during their encounter, the Court held that this evidence was disputed, thus precluding the officer from obtaining summary judgment on the qualified-immunity issue. *See id.* at 762 ("Contrary to the officers' contentions, however, the 'undisputed' facts do not demonstrate that Newman resisted search and arrest.").

One year after it decided *Newman*, this Court denied qualified immunity to another officer accused of tasing someone who was not actively resisting arrest. In *Ramirez v. Martinez*, 716 F.3d 369 (5th Cir. 2013), the plaintiff brought an excessive-force claim against a sheriff's deputy who had tased him twice—once when the plaintiff "pulled his arm away" from the deputy and once after the deputy had placed him in handcuffs. *Id.* at 372-73. This Court held that *both* uses of the taser were objectively unreasonable under *Graham*, reasoning that the plaintiff's "only resistance" during the entire encounter "was pulling his arm out of [the deputy]'s grasp." *Id.* at 378; *see also id.* ("Pulling his arm out of [the deputy]'s grasp, without more, is insufficient to find an immediate threat to the safety of the officers.").[8] Notably, the Court in *Ramirez* also held that "the law on the use of tasers was clearly established" at the time of the incident, citing its earlier decision in *Newman* and rejecting the deputy's claim that the right at issue was unsettled. *Id.* at 379.

Finally, in *Darden*, this Court denied qualified immunity to yet another officer who had tased someone who was "not actively resisting arrest." 880 F.3d at 731. As in both *Newman* and *Ramirez*, the Court in *Darden* held that it was objectively unreasonable, under the *Graham* factors, for an officer to tase a suspect who was behaving in a mostly compliant manner. *Id.* *Darden* is especially instructive as it

[8] The Court's repeated assertion that the plaintiff's arm-pulling gesture did not justify the deputy's initial taser use plainly undermines Officer Paley's effort to recast *Ramirez* as a case "involv[ing] a suspect who was tased *after* he was handcuffed and lying face-down on the ground." Paley Br. 40-41 (emphasis added).

involved the use of a taser during the execution of a no-knock warrant at a private residence, where police suspected drugs were being sold. *See id.* at 725. Thus, the danger facing the officer—as well as the "severity of the crime at issue"—was considerably higher than it was in either *Newman* or *Ramirez*. *See id.* at 729 (noting that "severity of the crime at issue weighs in favor of the officers" because drug crimes are "serious offenses"). Nevertheless, this Court held that the officer had violated the same "constitutional right" that it had recognized in the earlier cases. *See id.* at 731 (citing *Newman* and *Ramirez*, among other cases). Although *Darden* was decided after the incident that gave rise to the present lawsuit, *see* Paley Br. 39 n.4, the Court's opinion made clear that it was not recognizing a *new* right in that case. In fact, the Court expressly held that "the right at issue was clearly established at the time of [the defendant]'s alleged misconduct" *in 2013*—a full three years before Officer Paley tased Jevon. 880 F.3d at 731.

Newman, *Ramirez*, and *Darden* thus cast significant doubt on Officer Paley's qualified-immunity defense here. Although Officer Paley attempts to distinguish the three cases, his efforts to differentiate them only underscore their relevance to the present case. For instance, he argues that the plaintiffs in the three cases "had stopped resisting" and that "there was a significant temporal gap before the use of the force at issue." Paley Br. 42. But none of the three cases turned on the "temporal gap" between the plaintiff's alleged resistance and the officer's use of force. Rather, in all three cases, the Court's decision rested on evidence that the plaintiffs did not

actively resist. *See Newman*, 703 F.3d at 763 ("Newman's behavior did not rise to the level of 'active resistance.'"); *Ramirez*, 716 F.3d at 378 ("[T]he only resistance [the plaintiff] offered was pulling his arm out of [the defendant]'s grasp."); *Darden*, 880 F.3d at 731 ("[E]yewitnesses claim that Darden put his hands in the air when the officers entered the residence, complied with the officers' commands, and did not resist arrest."). Although the evidence in each case was disputed, those disputes sufficed to preclude summary judgment on the qualified-immunity issue. So, too, here: just like in those cases, the district court identified factual disputes as to whether Jevon "actively resisted" Officer Paley's seizure attempt. *See* ROA.2141-43. Those disputes preclude summary judgment here.

In any event, Officer Paley's "temporal gap" distinction also fails for a separate reason: namely, that the sequence and timing of events in *Newman*, *Ramirez*, and *Darden* mirror the sequence and timing of events here. In each of the three cases, the officer tased the plaintiff within moments of encountering him and only seconds after the officer's purported basis for the tasing arose. *See, e.g.*, *Ramirez*, 716 F.3d at 372 (noting that the officer "immediately tased" the plaintiff after the plaintiff pulled his arm away from the officer); *accord Trammell v. Fruge*, 868 F.3d 332, 342 (5th Cir. 2017) (finding officer's conduct objectively unreasonable where "only three seconds elapsed between [the officer]'s initial request that [the plaintiff] place his hands behind his back and when [a group of officers] tackled [the plaintiff]"). Given that Officer

Paley's encounter with Jevon was similarly brief, his "temporal gap" argument does not aid him in evading the implications of the three cases here.

Newman, *Ramirez*, and *Darden* also belie Officer Paley's claim that this Court "rarely rule[s] that the use of tasers by police officers constitute[s] excessive force." Paley Br. 26. Several of this Court's unpublished decisions further illustrate the folly of that argument.[9] Regardless, even if this Court's case law on the use of tasers were less robust, that still would not assist Officer Paley here: indeed, this Court rejected an identical argument in *Newman*, explaining that the "[l]awfulness of force . . . does not depend on the precise instrument used to apply it." 703 F.3d at 763 (rejecting officer's argument that "there was then no binding caselaw on the appropriate use of tasers" at the time of his challenged conduct); *see also Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (noting that "in an obvious case . . . [the *Graham* factors] can 'clearly establish' the answer, even without a body of relevant case law").

Nor can Officer Paley find any support in the fact that *Newman*, *Ramirez*, and *Darden* all involved the use of tasers outside of the school setting. After all, "[c]ourts

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[9] *See, e.g.*, *Anderson v. McCaleb*, 480 F. App'x 768, 773 (5th Cir. 2012) (per curiam) (noting that the officer "should have known that he could not continue to shock [the plaintiff] with the taser after he was no longer resisting arrest"); *Massey v. Wharton*, 477 F. App'x 256, 263 (5th Cir. 2012) (per curiam) (stating that "no reasonable officer would believe the force used [including the use of a taser] . . . to be reasonable" where none of the *Graham* factors are present); *Autin v. City of Baytown*, 174 F. App'x 183, 186 (5th Cir. 2005) (per curiam) (stating that nothing "would have indicated to a reasonable officer that repeatedly tasing a woman while forcing her to the ground was lawful conduct" where none of the *Graham* factors justified the use of force).

have found that officers should exercise *more* restraint when dealing with student misbehavior in the school context." *E.W. ex rel. T.W. v. Dolgos*, 884 F.3d 172, 183 (4th Cir. 2018) (emphasis added) (applying *Graham* to student's excessive force claim against a school resource officer); *see also, e.g.*, *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1306 (11th Cir. 2006) ("[T]he handcuffing was excessively intrusive given Gray's young age . . . ."). The controlled setting of the school environment combined with the youth and inexperience of most students militates against treating them like adults in the use-of-force context. *Cf. J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011) (explaining, in Fifth Amendment context, that "children cannot be viewed simply as miniature adults"); *Graham v. Florida*, 560 U.S. 48, 76 (2010) (explaining, in Eighth Amendment context, that "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed").

In fact, this Court has recognized that the exact same Fourth Amendment protections recognized in *Newman*, *Ramirez*, and *Darden* apply with equal force in the school setting. In *Curran v. Aleshire*, 800 F.3d 656 (5th Cir. 2015), this Court denied qualified immunity to a school resource officer accused of using excessive force (though not a taser) in escorting a student to the principal's office. *See id.* at 657-58. The Court reasoned that the officer could not obtain summary judgment on the qualified-immunity issue in light of various "disputed fact issues includ[ing] whether [the student] was resisting, threatening others, or attempting to escape when [the officer] used force against her." *Id.* at 659. Thus, *Curran* confirms that students, like

other citizens, enjoy the same Fourth Amendment right as adults not to be beaten or tased when they are not actively resisting. *See id.* at 663; *accord Geist v. Ammary*, 40 F. Supp. 3d 467, 485 (E.D. Pa. 2014) (denying qualified immunity to school resource officer who tased a high-school student). Furthermore, *Curran* confirms that this right was "clearly established" *before* the events that gave rise to the present case. *See* 800 F.3d at 663 ("We therefore find no legal error in the district court's conclusion that slamming a student's head into a wall after her resistance had ceased is a violation of clearly established law.").

Officer Paley's efforts to rely on cases granting qualified immunity to officers accused of excessive taser use are unavailing. *See* Paley Br. 27-28. All of the cases he cites involved suspects who—unlike Jevon—were *actively resisting* arrest. *See, e.g.*, *Poole v. City of Shreveport*, 691 F.3d 624, 629 (5th Cir. 2012) ("Because Poole, upon refusing to turn around and be handcuffed, posed an 'immediate threat to the safety of the officers' and '*actively resist[ed]*' the officers' instructions, the use of force was not 'clearly excessive.'" (emphasis added; citations omitted)). Furthermore, some of the cases address the state of the law only as to periods well before *Newman*, *Ramirez*, *Darden*, *Curran*, and other key decisions were ever decided. *See, e.g.*, *Carroll v. Ellington*, 800 F.3d 154, 175 (5th Cir. 2015) (identifying the state of the law "as of October 2006"). In short, Officer Paley's cited authorities do not even purport to address the "clearly established" rights at issue in this case.

B. Factual disputes preclude Officer Paley from obtaining summary judgment on his qualified-immunity defense.

The defendant in a qualified-immunity case "may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995). Thus, "[w]here the district court has denied summary judgment on the ground that material issues of fact exist as to the plaintiff's claims, this [C]ourt lacks jurisdiction to review the court's determination that a genuine fact issue exists." *Freeman v. Gore*, 483 F.3d 404, 410 (5th Cir. 2007). Put differently, this Court "can review the *materiality* of any factual disputes" in the present appeal "but not their *genuineness*." *Kinney v. Weaver*, 367 F.3d 337, 347 (5th Cir. 2004) (en banc) (citation omitted; emphasis in original).

The district court in this case identified several factual disputes that are material to Officer Paley's qualified-immunity defense. As the court explained, the record is rife with conflicting accounts of the encounter between Jevon and Officer Paley. Those conflicts reflect "genuine factual disputes material to deciding whether the tasing itself, its length, and its intensity, were objectively reasonable." ROA.2141. They also highlight the parties' disagreement over whether Jevon "pushed against a staff member or a security guard when trying to go through the door." ROA.2143. Perhaps most importantly, the conflicting evidence reveals factual disputes about whether "the force used was needed to keep [Jevon] in the building" and whether the

"continued use of the taser, including the 'drive stun' technique, after [Jevon] fell to his knees was reasonable." ROA.2143.

These disputes make it impossible to conclude, as a matter of law, that Officer Paley's conduct did not violate Jevon's clearly established rights under the Fourth Amendment. As noted above, this Court has repeatedly held that "a constitutional violation occurs when an officer tases, strikes, or violently slams an arrestee *who is not actively resisting arrest*." *Darden*, 880 F.3d at 731 (emphasis added). The disputes over whether Jevon pushed a staff member on his way toward the door, ROA.2143, and what transpired during the thirty-plus seconds that Officer Paley's body-worn camera was obscured, ROA.2116, are directly relevant to whether Jevon was "actively resisting" the officers' efforts to subdue him.

The inconclusive body-cam footage, in particular, "underscores factual disputes that are material to determining whether Officer Paley's tasing was reasonable." ROA.2143. In *Newman*, *Ramirez*, *Darden*, and *Curran*, this Court cited inconclusive footage of the relevant incidents to illustrate the extent of the underlying factual dispute in each case. *See, e.g.*, *Darden*, 880 F.3d at 730 ("[T]he videos do not favor one account over the other and do not provide the clarity necessary to resolve the factual dispute presented by the parties' conflicting accounts."); *Ramirez*, 716 F.3d at 374 ("The contents of the video are too uncertain to discount Ramirez's version of the events."). That logic carries even more weight here, given that the footage corroborates key facts in Jevon's account. Those facts include (among others) Officer

Paley's continued use of the taser after Jevon falls to his knees, Officer Paley's continued use of the taser after Jevon falls from his knees to the ground, Officer Paley's continued use of the taser after Jevon tells Officer Paley that he is unable to put his hands behind his back, the speed with which Officer Paley resorts to firing his taser, and Officer Paley's continued pointing of the taser at Jevon's head (and shouting) as Jevon lays prone and handcuffed on the ground.

The district court also identified disputes surrounding the timing, length, and intensity of Officer Paley's application of the taser. ROA.2141. These details are material under *Graham*'s "objective reasonableness" test because they speak directly to "the relationship between the need and the amount of force used." *Darden*, 880 F.3d at 729 (quotation marks and citation omitted); *see generally Graham*, 490 U.S. at 396 ("[T]he Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." (citations omitted)). The length and timing of the force are also critically important to this analysis, given that "an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased." *Lytle v. Bexar County*, 560 F.3d 404, 413 (5th Cir. 2009).

The summary-judgment record reveals factual disputes as to whether Jevon posed an "immediate threat to the safety of the officers or others." *Graham*, 490 U.S. at 396. In addition to the dispute over whether Jevon "pushed a staff member, so as

to justify the taser use," ROA.2141, the record reveals conflicting rationales for Officer Paley's use of force. Indeed, Officer Paley's own explanations for his conduct have shifted over time. In his declaration, he identified two separate justifications for trying to physically restrain Jevon: (1) protecting John Oglesby (the security guard) from Jevon and (2) preventing Jevon from leaving campus, where he could potentially become a danger to himself. ROA.633-34. In his opening brief, however, Officer Paley seems to abandon the first justification (protecting Oglesby) and rely exclusively on the second (keeping Jevon on campus). *See* Paley Br. 36 ("Paley did not move in because [Jevon] was 'assaulting' Oglesby, but because he was trying to leave the building, and outside they would lose all control over him."). That shift in rationales is obviously material under *Graham*'s "immediate safety threat" factor. *See Trevino v. Trujillo*, 756 F. App'x 355, 358-59 (5th Cir. 2018) (dismissing qualified-immunity appeal where a "jury could thus find that [police officer] could not reasonably perceive an immediate threat").

In any event, both of Officer Paley's stated justifications for his use of the taser conflict with other evidence in the record. His body-cam footage, in particular, casts doubt on his claim that he only ever acted with Jevon's best interests at heart: it shows him standing over Jevon—as Jevon lay prone and handcuffed on the ground—while pointing a taser at Jevon's head and shouting, "You don't run sh*t here, you

understand?" Video, 12:47:45–12:48:05.[10] That footage (along with other evidence in the record) raises a factual question as to whether Officer Paley tased Jevon to protect a school official, prevent Jevon from leaving campus, or simply assert dominance over a teenager. Resolving that dispute—and all of the others the district court identified—ultimately "requires the input of a jury." *Lytle*, 560 F.3d at 411.

C. This Court lacks jurisdiction over Officer Paley's remaining arguments.

All of Officer Paley's remaining arguments rely exclusively on his own evidence and his own version of the facts. He argues, for instance, that "the use of the taser was one nineteen-second application, and the court is literally second-guessing whether Paley should have taken his finger off the trigger at ten seconds, or maybe fifteen seconds, instead of going the full nineteen seconds." Paley Br. 42. But the "length" and "intensity" of the tasing are in dispute here, as the district court observed (and as explained above). *See* ROA.2141. Thus, in order to adopt Officer Paley's "no second-guessing" argument, a court would have to first disregard Jevon's evidence and accept Officer Paley's version of events. *See, e.g.*, ROA.1557 (Jevon Decl.) (asserting that Officer Paley tased him "six to eight times" and continued until

[10] Although *Graham*'s reasonableness test obviously focuses on "objective" factors, the Court made clear that a fact finder may consider evidence of an officer's "subjective" motives "in assessing the credibility of [the] officer's account of the circumstances." *See* 490 U.S. at 399 n.12 ("[I]n assessing the credibility of an officer's account of the circumstances that prompted the use of force, a factfinder may consider, along with other factors, evidence that the officer may have harbored ill-will toward the citizen.").

a "female staff member told SRO Paley to stop"); Video 12:46:41-12:46:56 (capturing footage of Officer Paley tasing Jevon after Jevon has fallen to his knees and after Jevon has fallen flat on the ground).

This Court lacks jurisdiction to consider such arguments. As the Court has explained, "a defendant challenging the denial of a motion for summary judgment on the basis of qualified immunity must be prepared to concede the best view of the facts to the plaintiff and discuss only the legal issues raised by the appeal." *Good v. Curtis*, 601 F.3d 393, 398 (5th Cir. 2010) (citation and quotation marks omitted). Officer Paley's unwillingness to abide by that requirement deprives this Court of jurisdiction over his remaining arguments.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellees respectfully ask this Court to affirm the district court's summary-judgment order and to remand this case for trial on their Fourth Amendment claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Nicolas Y. Riley
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains **8,550 words**, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in **14-point Garamond font**, a proportionally spaced typeface, using **Microsoft Word 2016**.

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