IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 19-20429

JW; LORI WASHINGTON, a/n/f J.W.,
Plaintiffs-Appellees,

v.

ELVIN PALEY,
Defendant - Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

REPLY BRIEF OF APPELLANT ELVIN PALEY

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I.
ARGUMENT AND AUTHORITIES

A. J.W.'s argument that *Fee v. Herndon* does not apply to Officer Paley because excessive force claims should be analyzed under the Fourth Amendment has already been rejected by this Court in the public school context.

Largely ignoring the issue that bothered the court below, which was whether *Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990) should apply to Officer Paley in the first place because he is a police officer,[1] J.W. argues on appeal that *Fee* and its progeny do not apply to Officer Paley because J.W.'s excessive force claim should be analyzed under the Fourth Amendment, and not under a Fourteenth Amendment substantive due process standard. (*See* Response Brief, pp. 9-18.) J.W. relies largely on *Graham v. Connor*, 490 U.S. 386 (1989), which he ultimately concludes stands for the proposition 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." (Response Brief, p. 11 (*citing Graham*, 490 U.S. at 395)).

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[1] J.W. suggests that "the district court did not decline to apply *Fee* merely 'because Officer Paley is a police officer'." (Response Brief, p. 15.) However, the court below stated that "Less clear is *Fee*'s application to excessive-force claims against police officers for injuring students on school grounds." (ROA.2132.) The court then analyzed a handful of cases that involved claims against school district police officers, and concluded that "*Fee* does not foreclose Ms. Washington's § 1983 excessive-force claim against Officer Paley." (ROA.2133.) Given that the only cases discussed by the Court involved police officers, it is fair to say that that was what concerned the court below.

The problem with this argument is that it has already been foreclosed by this Court, at least in the context of public school discipline. In *Campbell v. McAlister*, 162 F.3d 94 (5th Cir. 1998) – which involved an allegation that McAlister, a police officer, removed a student from his classroom by "slam[ming] [Dennis] to the floor" and "dragg[ing] [him] along the ground to the principal's office," *id*. at *1 – the lower court specifically considered whether such claims should be brought under the Fourth or Fourteenth Amendments:

> As to McAlister individually, who claimed qualified immunity, the [district] court examined the merits of whether his conduct violated the Fourth or Fourteenth Amendments. Based on our cases applying a substantive due process standard to corporal punishment in schools, it concluded that the Fourteenth Amendment was the proper mode of analyzing the excessive force allegations in this case, not the Fourth Amendment. Applying a substantive due process analysis, the court pointed out that the State of Texas provided adequate post-deprivation civil and criminal remedies for the mistreatment of students by school officials. Thus, it concluded, the Fourteenth Amendment claim failed as a matter of law.

Id. at *2. This Court agreed with that analysis. Disagreeing with J.W.'s position that *Graham* requires a single standard for all excessive force cases, this Court noted that "[t]he Supreme Court has rejected the 'notion that all excessive force claims brought under § 1983 are governed by a single generic standard'." *Id*. (*citing Graham*, 490 U.S. at 393.) This Court then held that "[t]he proper analysis 'begins by identifying the specific constitutional right allegedly infringed by the challenged application of force," and that "[w]hether the right has been violated 'must then be

judged by reference to the specific constitutional standard which governs that right'." *Id*. (*citing Graham*, 490 U.S. at 394.)

Acknowledging that "[t]he Supreme Court has not yet addressed whether the use of excessive force by public officials against students implicates a specific constitutional right," *id*. at *3, this Court concluded that "[s]ince our en banc decision in *Ingraham v. Wright*…, we have consistently applied a substantive due process analysis to claims of excessive force in the context of corporal punishment at public schools." *Id*. at *2. This Court quoted the Supreme Court's decision in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995), for the proposition that "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Id*. at *4.

This Court returned to the same issue in *Flores v. School Bd. of DeSoto Parish*, 116 Fed.Appx. 504 (5th Cir. 2004), which, while admittedly not a school district police officer case, involved excessive force claims brought against public school officials under a number of theories. In an effort to get around *Fee* and *Moore*, "plaintiff insists that Wysinger's acts should not be characterized as corporal punishment but rather as an excessive force violation of her son's Fourth Amendment rights *and* substantive due process interest in his bodily integrity." *Id*. at 509 (emphasis added). In deciding whether a Fourth Amendment excessive force

claim was proper in the public-school context, this Court looked to several cases from outside the circuit and concluded:

> These courts cited the unique constitutional position of public school students, whose movements and location are subject to close control by schools and teachers, in finding that students charging excessive use of force by a teacher must bring claims for violations of the Fourteenth Amendment rather than the Fourth Amendment.

Id. at 510. Turning back to how the Supreme Court and this Court have analyzed these issues in the public-school context, this Court ruled that an excessive force claim under the Fourth Amendment was improper under the circumstances:

> The Supreme Court and this circuit have likewise recognized that preservation of order in the schools allows for closer supervision and control of school children than would otherwise be permitted under the Fourth Amendment. Further, ***permitting students to bring excessive force claims under the Fourth Amendment would eviscerate this circuit's rule against prohibiting substantive due process claims on the part of schoolchildren for excessive corporal punishment.*** Given this prohibition against constitutional claims for corporal punishment, the special constitutional status of schoolchildren, and the fact that the momentary "seizure" complained of in this case is not the type of detention or physical restraint normally associated with Fourth Amendment claims, we decline to recognize plaintiff's claim under the Fourth Amendment.

Id. at 510 (emphasis added).

So J.W. is incorrect, and excessive force claims in the school context should not be analyzed under the general standards set forth in *Graham* for police officers, but rather under the Fourteenth Amendment substantive due process standards approved for use against public school officials by this Court in cases ranging from

Fee to *Flores*…which means the *Fee* doctrine would apply to claims of excessive force in the school context. The only question that remains—given that the court below found that the incident between Officer Paley and J.W. was discipline for purposes of *Fee* (*see* ROA.2145-46), a conclusion that J.W does not challenge on appeal—is whether the *Fee* doctrine applies to police officers. J.W. does not really address this issue on appeal, other than to point (as did the court below) to this Court's decision in *Curran v. Aleshire*, 800 F.3d 656, 661 (5th Cir. 2015), which did not address *Fee* or its progeny in a case involving claims against a school resource officer. However, as noted in the Appellant's Brief, it appears from the district court opinion that the officer did not raise the *Fee* doctrine. *See Curran v. Aleshire*, 67 F. Supp. 3d 741, 748 (E.D. La. 2014) (listing the three arguments raised by the officer in his motion for summary judgment as to the excessive force claim). At best, we don't really know why the *Curran* Court did not discuss the issue. J.W. thinks it is "hardly mysterious" that *Fee* was not discussed, because "the student's claim was subject to a Fourth Amendment analysis because it arose out of a Fourth Amendment seizure" (Response Brief, p. 16) – but that seems to contradict this Court's decisions in *Campbell* and *Flores* discussed above.

Ultimately the conclusion that can probably be best drawn from the cases cited by both Officer Paley and J.W. is that this is a complicated issue that could probably use revisiting by the Court. What does seem clear is that there is not existing

precedent that would place the constitutional question of whether *Fee v. Herndon* prohibits excessive force claims against school district police officers "beyond debate." *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (*en banc*) (quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 131 S.Ct. 2074, 2083 (2011)). The focus in such cases should not be on the technicalities of how a party has pled the claim, but on the underlying factual dispute between the parties. As this Court noted in *Fee*:

> It is an overstatement to suggest that students can suffer extreme injury at the hands of educators without recourse. Admittedly, under *Cunningham* their choice of forum may be restricted to state courts. However, it is important to note that the *Cunningham* rule has been crafted to operate in the narrow context of student discipline administered within the public schools of states that authorize only reasonable discipline and, further, provide post-punishment relief for departures from its law. The inquiry, predictably, would differ in states that authorize neither.

Fee, 900 F.2d at 809. As the *Moore* Court found, "Texas law provides for liability of a school employee who is negligent or uses excessive force in disciplining students when such acts result in a student's bodily injury." *Moore v. Willis ISD*, 233 F.3d 871, 875(5th Cir. 2000). However a party tries to craft his or her cause of action, it is clear from Fifth Circuit caselaw that excessive force claims against school officials arising out of disciplinary situations are restricted to state courts. At the very least, the law on this issue does not "so clearly and unambiguously prohibit[] [the official's] conduct [such that] *every* reasonable official would understand that what he is doing violates [the law]." *Id*. As such, Officer Paley was entitled to

qualified immunity from the excessive force claim against him.

B. J.W.'s argument regarding excessive force fails to establish that every reasonable officer in this factual context would have known that he or she could not use the taser in the same manner as Officer Paley.

J.W.s excessive force argument relies heavily on labels and conclusions, while ignoring many of the undisputed facts behind those labels. *See*, *e.g.*, *Pickle v. Wal-Mart Stores, Inc.*, 384 F. App'x 428, 429 (5th Cir. 2010) ("Conclusory allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation do not adequately substitute for specific facts showing a genuine issue for trial.") J.W. frequently points to caselaw that states at a high level of generality[2] that the Fourth Amendment bars police officers from tasing suspects "who are not actively resisting arrest," (Response Brief, p. 19), but fails to examine what "actively resisting arrest" actually means, especially in a case like this, where the lower court found that "[t]he record shows that J.W. refused to follow school staff members' and officers' instructions, was agitated and insistent on leaving, and that Officer Paley gave warnings before using the taser…." (ROA.2141.) While the judge did go on to state that "it is disputed that [J.W.] pushed a staff member, so as to justify the taser use," this is not a *material* fact dispute, for two reasons. First, the goal of the Katy ISD staff was to keep J.W. inside the building. (*See* ROA.633-34

[2] "We have repeatedly told courts ... not to define clearly established law at a high level of generality." *Mullenix v. Luna,* 136 S.Ct. 305, 308 (2015) (citing *al–Kidd,* 131 S.Ct. at 742).

("I felt it was very important to keep him in the building and on campus, because with his special needs, I believed that he would be a danger to himself if he was allowed to just leave the building and walk home."); ROA.1469 ("As a special needs student, I felt that it was important that we not allow J.W. to leave the building, because we would lose all control over him, and he might get injured.")) Paley did not initiate contact with J.W. because he was "assaulting" Ogelsby,[3] but because J.W. was trying to leave the building – which it is undisputed he was trying to do – which could have resulted in harm to J.W. Any contact he made with Ogelsby simply explained the timing of Paley's actions, and therefore was not *material* to the question of whether Paley needed to try to physically restrain J.W. to stop him from leaving the building.

Second, J.W. continues to ignore the fact that Paley moved in initially not to tase J.W., but "to try to use soft or hard hand techniques and physically restrain him, which are the next steps on our use of force continuum, since verbal commands had not worked." (ROA.634, ¶ 6.) It was only after the situation escalated because J.W. was resisting Paley that he made the decision to resort to the next step on the use of

[3] J.W. claims that Officer Paley's explanations for his conduct have "shifted over time," because Paley supposedly states in his declaration that he wanted to "protect[] John Ogelsby", but then abandons that justification in his Brief. (*See* Response Brief, p. 31.) This is simply a strained reading of Paley's declaration, and ignores the fact that right after Paley states that he moved in when he saw J.W. make contact with Ogelsby, it was to "attempt[] to hold J.W. in the doorway, to keep him from leaving the building." (ROA.634, ¶ 6.)

force continuum, which was the taser. Any argument that J.W. posed no immediate threat or was not a flight risk ignores the undisputed evidence below that he was trying to leave the building, which the KISD staff were trying to stop. And although J.W. claims that he only wanted to leave the building to "go cool down," he ignores the fact that he repeatedly can be heard on the video starting around 12:45:13 telling Ogelsby that he wanted to "walk home." If Katy ISD officials had allowed J.W. to walk home and he had been injured, they would have faced significant legal liability for his injuries.

Ultimately, the only factually similar cases that J.W. points to that he claims "cast significant doubt on Officer Paley's qualified-immunity defense" (Response Brief, p. 23), are *Newman*, *Ramirez*, and *Darden*,[4] and Officer Paley has already addressed those cases at length in his main brief. (*See* Appellant's Brief, pp. 39-42.) J.W. argues that none of these cases turned on the "temporal gap" between the plaintiff's resistance and the officer's use of force, but rather "the Court's decision rested on evidence that the plaintiffs did not actively resist." (Response Brief, p. 24.) Right – because there was a gap in time between when the plaintiffs stopped resisting and the officer used the taser. The *Ramirez* court specifically distinguished the situation before it from that in *Poole*, noting that "we recently held the use of a

[4] *Newman v. Guedry*, 703 F.3d 757 (5th Cir. 2012); *Ramirez v. Martinez*, 716 F.3d 369 (5th Cir. 2013); *Darden v. City of Fort Worth*, 880 F.3d 722 (5th Cir. 2018).

taser was not excessive where the arrestee was resisting arrest and the officers ceased use of the taser once the arrestee was handcuffed and subdued." *Ramirez*, 716 F.3d at 378 (citing *Poole v. City of Shreveport*, 691 F.3d 624, 626 (5th Cir. 2012).

J.W. also claims that Officer Paley cannot find support in *Newman*, *Ramirez*, and *Darden*, because they involved the use of tasers outside of a school setting, and cites instead to cases such as *Gray v. Bostic*, 458 F.3d 1295 (11th Cir. 2006) and *E.W. v. Dolgos*, 884 F.3d 172 (4th Cir. 2018). (Response Brief, p. 26.) But *Gray* involved an officer who handcuffed a nine-year girl who had threatened to hit her coach, not because the officer had any real belief she intended to hit the man, but "to impress upon her the serious nature of committing crimes that can lead to arrest, detention or incarceration." *Id*. at 1301. *E.W.* involved "a compliant ten-year-old being handcuffed on school grounds because she hit another student during a fight several days prior," *E.W.*, 884 F.3d at 180, and while the court ultimately found that the handcuffing was unreasonable, it concluded that the student's rights were not clearly established, since cases such as *Graham* are "cast at a high level of generality," *and* do not "create clearly established law outside 'an obvious case.'" *Id*. at 186 (citations omitted). Given the factual differences,[5] neither of these cases would provide much guidance to an officer in Paley's position, either.

[5] "Although a case *directly* on point is not necessary, there must be adequate authority at a sufficiently high level of specificity to put a reasonable official on notice that his conduct is definitively unlawful. Abstract or general statements of legal principle untethered to analogous or

Ultimately the main problem with J.W.'s Brief is that like the court's decision below, it at best pays lip service to the qualified immunity "clearly established" standard, and in reality focuses on whether Officer Paley used excessive force in the first place. As Judge Jones noted recently:

> Characterizing this case as a "no threat" or "obvious" Fourth Amendment violation is wrong for additional reasons. Whether, under the material undisputed facts, Cole presented "no threat" to a reasonable police officer is the relevant issue to assess a Fourth Amendment violation. But the immunity question, which the majority elides, is whether *every* reasonable officer in this factual context would have known he could not use deadly force. The majority's analysis conflates these inquiries.

Cole v. Hunter, ___ F.3d ___, 2019 WL 3938014 at *15 (5th Cir. Aug. 20, 2019) (Jones, J., dissenting). Therefore, the fact that J.W. identifies three non-school taser cases (*Newman*, *Ramirez*, and *Darden*) where qualified immunity was not granted, and the same non-taser, school officer excessive force case (*Curran*) that the court discussed below, does not resolve the qualified immunity issue of "whether *every* reasonable officer in this factual context would have known he could not use [taser] force."

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near-analogous facts are not sufficient to establish a right "clearly" in a given context; rather, the inquiry must focus on whether a right is clearly established as to the specific facts of the case." *Vincent v. City of Sulphur*, 805 F.3d 543, 547 (5th Cir. 2015) (citations omitted).

J.W. argues that the Court should not adopt "Officer Paley's 'no second-guessing' argument," (Response Brief, p. 32), but that is actually the Supreme Court's standard:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. ... With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "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, 490 U.S. at 396, 109 S. Ct. at 1872 (quoting *Johnson v. Glick*, 481 F.2d. 1028, 1033 (2d Cir. 1973)). J.W. argues that the Court should consider his version of the facts – that he was tased "six to eight" times for an undefined amount of time[6] – and not the "one time for nineteen seconds" that the taser download record shows the taser was used (*see* ROA.846), or the two times that the lower court suggested the taser was used. (ROA.2142.) Whether this is a *material* fact issue as to the reasonableness of the force used is somewhat of a red herring with regards to the issue of qualified immunity. Given that the video brackets the time of the incident, any disagreement between the parties as to time cannot be more than a couple seconds. Whether Officer Paley pressed the button "six to eight" times (J.W.) or once (taser report) during that roughly nineteen seconds period, existing precedent

[6] J.W. claims that he was tased until a "female staff member told SRO Paley to stop", (Response Brief, pp. 32-33), but he offers no suggestion as to how long that may have been. Given the speed with which the incident happened, that period of time may have been shorter than the nineteen seconds that the taser report says the device was used.

simply does not place the reasonableness of the force "beyond debate." *Morgan*, 659 F.3d at 371. Officer Paley was therefore entitled to qualified immunity below.

C. Disability Rights' Amicus Brief raises a number of generic concerns about SROs in Texas that have no basis in fact in this case, and overstates the weight that a court should give to a potentially violent student's status of having a disability.

In the Amicus Brief filed by Disability Rights Texas, while they certainly raise some good issues in the abstract, a number of their arguments appear to be aimed more at what they see as problems in the public school system generally, and not at what they believe the Katy Independent School District – or, more appropriately, Office Paley – did wrong in this case. Any discussion of greater societal issues like the "school-to-prison" pipeline debate or the asserted greater frequency with which disabled students are suspended or expelled from school (*see* Amicus Brief, pp. 4-6) are misplaced, since Amicus makes no real effort to tie them to what actually happened in this case.

For example, Amicus argues that "disciplinary measures used against [children with disabilities] are often more severe than those used on non-disabled students." (Amicus Brief, p. 2.) However, Judge Rosenthal found below that "[t]he amended complaint does not allege, and the summary judgment does not support an inference, that Officer Paley's refusal to let J.W. leave the building, the tasing, or the use of handcuffs was motivated by animus based on J.W.'s status as a member

of a protected class." (ROA.2147.) Officer Paley has used his taser on one other student (*see* ROA.809, ¶ 6), but there is no evidence that that student was disabled. (*See* ROA.1422-ROA.1442). In the three year period (January 1, 2014 to December 31, 2016) leading up to the November 30, 2016 incident between Officer Paley and J.W., there were only two other incidents that involved KISD officers actually tasing someone (*see* ROA.809, ¶ 5), and there is no evidence that any of the students involved in those incidents were disabled. (See ROA.1388-ROA.142.) Therefore, to suggest or insinuate that disabled students may have been disciplined more frequently or more severely in Katy ISD in the manner at issue in this case is simply not borne out by any evidence.

Amicus also states:

> School Resource Officers, like Officer Paley in this case, play a unique role as law enforcement officers placed in a school setting. However, they often lack the training needed to interact with students with disabilities. Such training is critical to ensure that officers exercise restraint and de-escalate, rather than aggravate, situations.

(Amicus Brief, p. 2.) Pages 7-10 of the Amicus Brief repeats the argument that "SROs are also rarely trained in how to de-escalate the behaviors of students with disabilities…." (Amicus Brief, p 8.) However, these arguments completely ignore that fact that the issue of training was briefed extensively below in connection with the school district's *Monell* defense (*see* ROA.625-627), and that the evidence showed that Katy ISD offered relevant training that Officer Paley had in fact taken.

Katy ISD trained all of its officers on the use of force generally, the use of tasers specifically, and how to deal with persons suffering from some form of mental disability. (*See* ROA.848-ROA.1387.) The School-Based Law Enforcement "(LE") Training is a 20-hour course that includes 4-hour segments on the following topics:

> **Section One:** Child and Adolescent Development and Psychology (4 Hours)
> **Section Two:** Mental Health Crisis Intervention (4 Hours)
> **Section Three:** De-escalation Techniques and Techniques for Limiting the Use of Force (4 Hours)
> **Section Four:** Mental and Behavioral Health Needs of Children with Disabilities or Special Needs (4 Hours)
> **Section Five:** Positive Behavioral Interventions (4 Hours)

(ROA.1010-ROA.1387.) All of these topics are obviously highly relevant to the issues confronting Officer Paley in his dealings with J.W. As can be seen from Paley's training records, Paley had the taser training on August 18, 2016 (about 3 months before the incident with J.W.), another 2 hour Use of Force training on June 29, 2016 (about 5 months before the incident), and the School-Based LE Training on March 16, 2016 (about 8 months before the incident). (*See* ROA.638-644.) The Plaintiffs below actually dropped their Section 1983 failure to train claim against the District at the summary judgment hearing (ROA.2147), presumably because they knew they had no evidence to support it. Any suggestion by the amicus that Katy ISD did not properly train its police offices generally, or Officer Paley specifically, is simply not borne out by, and in fact is contradicted by, the undisputed evidence in this case.

The Amicus goes on to suggest that "SROs should exercise restraint and should have a well-defined, limited role when interacting with students." (Amicus Brief, p. 10.) Again, this argument completely ignores what actually happened below. Paley testified that "as the police officer, I was there as a last resort," (ROA.634, ¶ 5), and that that was how he was trained:

> Our training also stresses that in school situations we are often there to assist the school staff as a last resort, which is different from normal police situations (where we are taught to take charge of the scene), and so we try to incorporate the school staff into any response we may make. Our training also encourages us to defer to the special education staff, since they have greater knowledge of a student's specific situation and condition.

(ROA.635-36, ¶ 16.) Therefore, Paley testified, "I stood off to the side to let the school staff try to deescalate the situation." (ROA.634, ¶ 5.) The Amicus states that "SROs should use law enforcement actions, to include the use of force, only as a last resort, namely… when necessary to protect students and staff from a threat of immediate harm." (Amicus Brief, p. 11.) But again, that is what the evidence shows everyone was doing: both Officer Paley and Assistant Principal Majewski testified that they believed there was a possibility of imminent, serious physical harm to J.W. if they simply let him leave the building, particularly if he got hit by a car. (*See* ROA.634, ¶ 4; ROA.1469, ¶ 4.)

All of this leads to the most egregious mis-insinuation that Amicus makes, several times, in their brief: the idea that neither the school staff in general nor

Officer Paley specifically allowed J.W. to "de-escalate," and that Paley used the taser without first trying less intrusive measures to calm J.W. down. (*See* Amicus Brief, p. 14 ("Instead of being permitted to de-escalate, he was met with force, and tased by Officer Paley…."); p. 17 ("…disciplinary measures should have been aimed at assisting him in de-escalating stressful situations.")). This is simply not what happened, if you look at the facts and not at conclusory labels. The evidence below showed that dealing with J.W. was a team effort, and it is very clear that the team took multiple and rising steps to address his behavior. As noted above, Paley testified that "as the police officer, I was there as a last resort," (ROA.634, ¶ 5), and that he therefore stood off to the side to let school officials try to calm J.W. down first. (ROA.634, ¶ 5.) It was clear from Paley's testimony, Assistant Principal Majewski's testimony, and the video itself that the entire team of adults was working together to try and de-escalate the situation and get J.W. to stay inside the school and go back to his classroom.

It is easy to focus solely on the moment when Paley decided to pull the trigger on the taser – but this ignores the fact that multiple adults had been working to de-escalate the situation, that they had allowed J.W. to walk the halls, and they had tried to talk to him and get him to calm down. It was only when he suddenly moved to push his way out the door that Officer Paley – the self-described "last resort" – felt that he had to move in, but Paley testified "I did not intend to use my taser on J.W.,

but to try to use soft or hard hand techniques and physically restrain him, which are the next steps on our use of force continuum, since verbal commands had not worked." (ROA.634, ¶ 6.) It was only after it became clear that three grown adults could not restrain J.W. that Paley felt he had to resort to the next step on the use of force continuum, which was the taser. While the parties have repeatedly tried to make what happened to J.W. seem more sinister by focusing solely on what Paley did, and specifically on his decision to use his taser, you cannot ignore what other school employees had been doing to try to de-escalate the situation, which unfortunately did not work, and on Paley's own attempt to follow the use of force continuum.

Amicus also repeats a number of allegations that appear to have come from the Plaintiffs' various complaints that were filed below, but that did not fully bear out once evidence was produced on summary judgment. Amicus suggests that J.W. had a history of being bullied, and that it was "bullying" that led him to leave the classroom on the date in question. However, the word "bullied" tends to connotate ongoing harassment based on an imbalance of power (*see* TEX. EDUC. CODE § 7.0832(a)(1)(A)), but other than the single incident on November 30, 2016 in

which another student called J.W. a name,[7] there was no evidence of any other specific "bullying" that may have occurred.[8]

Amicus also suggests that walking outside was an accommodation suggested by the school staff (Amicus Brief, p. 17), but that is also not true. The Plaintiffs below also tried to convince the court that J.W.'s special education plans required the school staff to allow him to walk around the halls and maybe even leave campus to cool off, but none of the evidence they submitted supported their allegations. They pointed below to numerous pages from J.W.'s special education documents (*see* ROA.1527, ¶ 12), but at most those documents talk about allowing J.W. to "step away" from incidents; they do not go so far as to allow him to wander the halls at will, and they certainly did not allow him to go outside and leave campus.

The central purpose of Disability Rights' amicus brief appears to be to urge the Court to consider J.W.'s disability not just as a factor in considering whether the

[7] The evidence showed that on the day in question, J.W. and another student had finished their assignment in class and were playing a card game. (ROA.1465.) The students were bickering with each other, and the classroom aide told the students that if they weren't going to play nice, she was going to take up their cards. (*Id.*) The other student told J.W., "yeah, quit being stupid," and that triggered J.W., who became very angry, got up, and left the classroom. (*Id.*) However, there was never any evidence that the use of the word "stupid" was part of ongoing bullying against J.W., by that student or anyone else.

[8] Likewise, J.W. starts his Brief with "The day of the incident thus began like many other days—with one of [J.W.]'s fellow students mocking him," citing to ROA.1556, which is J.W.'s declaration. But J.W. doesn't say anything in his declaration about "many other days," or any incidents of "bullying" other than the one student calling him the names that led to the November 30, 2016 incident.

amount of force used by Officer Paley was reasonable, but indeed as a "central aspect" of that analysis. (*See* Amicus Brief, p. 14.) This, however, overstates what even the cases cited by Amicus suggest. In *Bates v. Chesterfield County, Va*., 216 F.3d 367 (4th Cir. 2000), a non-school excessive force case brought by an autistic teenager (*see* Amicus Brief, p. 15), the Court stated:

> [I]n examining a claim of excessive force, a court must ask whether the officers' conduct was "'objectively reasonable' in light of the facts and circumstances confronting them." Just like any other relevant personal characteristic—height, strength, aggressiveness—a detainee's known or evident disability is part of the Fourth Amendment circumstantial calculus.

Id. at 373 (internal citation omitted). So while the *Bates* Court notes that a disability is "just like any other relevant personal characteristic," it also suggests three other characteristics that should be considered: height, strength, and aggressiveness. Those characteristics mitigate in favor of Officer Paley in this case, and distinguish several of the other cases cited by the Amicus. Here, it is undisputed that J.W. was 17 years old, was 6'2", and weighed 250 pounds. (ROA.634, ¶ 7.) Contrary to the insinuations in the various briefs that Officer Paley must have been familiar with both J.W. generally, and his disability conditions specifically, he was not:

> Prior to November 30, 2016, I had had no direct interactions with J.W. However, I had witnessed him leave class, curse at teachers, and punch the concrete hallway walls, and I had heard that he had thrown furniture. I knew that he was probably a special needs student because he was in the PASS group, but I did not know anything about his specific disability or limitations.

(ROA.633, ¶ 2.) So, unlike in many of the cases cited by the Amicus, where the school staff were dealing with much younger, smaller children, or students with whom they were much more familiar,[9] Officer Paley was dealing with a very large near-adult, with whom he was only vaguely familiar but who he perceived, based on his limited past observations and what he had heard, to at least be potentially violent. (ROA.633, ¶ 3 ("I concluded that J.W. was a potentially dangerous individual, because of what I knew about his past behavior, his size, and what I witnessed his state of agitation to be.")

As such, this case actually is very similar to *Bates*. *Bates* also involved a 17-year-old autistic young man (Bates), who police officers approached in a neighborhood after being warned that he was acting strange. *See id.* at 369 ("I don't know if this boy is on drugs or drunk but he is acting weird or crazy and just went running through the woods.") Much like here, the officers initially approached Bates to calm him down, he started resisting when the officers first laid hands on him, and

[9] For example, in *K.G. by & through Gosch v. Sergeant Bluff-Luton Cmty. Sch. Dist.*, 244 F. Supp. 3d 904 (N.D. Iowa 2017), the autistic student was seven years old, and the staff in question were her regular special education teachers who would have been very aware of her condition. *Id.* at 910. Likewise, *M.S. ex rel. Soltys v. Seminole Cty. Sch. Bd.*, 636 F. Supp. 2d 1317 (M.D. Fla. 2009) involved an extended pattern of abuse by the special education staff responsible for the student. *James v. Frederick Cty. Pub. Sch.*, 441 F. Supp. 2d 755 (D. Md. 2006) involved an 8-year old boy who had been upset but was not threatening anyone, and who had calmed down before he was handcuffed. *Moretta v. Abbott*, 280 F. App'x 823 (11th Cir. 2008) involved a 6–year old, 53–pound child who was tased after police officers found him standing holding a small piece of glass, but who apparently was not threatening to harm anyone with it.

the physical confrontation rapidly escalated from there. At some point, people who knew Bates showed up and told the officers he was autistic. However, when Bates' parents showed up, Bates "spun around" to face his stepfather, and the police grabbed him by the neck and threw him to the ground. Bates claimed that the officers were "beating" on him as he struggled to get away. *Id*. at 370. In the lawsuit, Bates tried to make his mental disability a central factor, but the Court rejected the idea that it changed the analysis:

> [I]n the midst of a rapidly escalating situation, the officers cannot be faulted for failing to diagnose Bates' autism. Indeed, the volatile nature of a situation may make a pause for psychiatric diagnosis impractical and even dangerous.
>
> Even after the officers were informed of Bates' autism, the force used by the officers was reasonable in light of all the circumstances. For example, the police reacted with force when, in Bates' own words, he "spun around" to face his stepfather. In light of Bates' previous resistance to police —his scratching, spitting, biting, and kicking—the officers acted reasonably by forcibly restraining him. Knowledge of a person's disability simply cannot foreclose officers from protecting themselves, the disabled person, and the general public when faced with threatening conduct by the disabled individual. We do not underestimate the difficulties that an autistic individual may face in dealing with law enforcement officers. At the same time, that fact cannot set aside an officer's responsibility to uphold the law and ensure public safety.

Id. at 372. The Court concluded that the officers had not used excessive force to restrain Bates, even in light of his autism. Likewise here, while Officer Paley knew vaguely that J.W. was disabled in some way, he could not allow that vague knowledge to prevent him from using the amount of force that he deemed

reasonable—first by attempting to physically retrain J.W., and then, regrettably, by tasing him—to keep J.W. from leaving the protections of the school building and potentially endangering himself even more.

II.
CONCLUSION AND PRAYER

For the reasons stated above and in the Brief of Appellant Elvin Paley, Officer Paley respectfully requests that this Court grant his appeal; reverse the relevant rulings of the court below and render him qualified immunity; grant Officer Paley his costs of appeal; and grant Officer Paley such relief, both at law and in equity, to which he has shown himself justly entitled.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing document has been forwarded to counsel on November 13, 2019, by electronic service, and addressed as follows:

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REVISED CERTIFICATE OF COMPLIANCE

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