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

PETITION FOR REHEARING OR REHEARING EN BANC

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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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Defendant-Appellant:

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CIRCUIT RULE 35(b)(1) STATEMENT

The panel decision warrants rehearing en banc because it directly conflicts with this Court's decisions in *Curran v. Aleshire*, 800 F.3d 656 (5th Cir. 2015), and *Hassan v. Lubbock Independent School District*, 55 F.3d 1075 (5th Cir. 1995), and deepens the already-vast disparity between the Fifth Circuit and other federal courts of appeals regarding the availability of constitutional relief for schoolchildren subjected to excessive force by school officers. En banc review is needed to restore the uniformity of this Court's decisions and align it with its sister circuits.

Moreover, this petition presents a question of exceptional importance. As the number of police officers in schools has risen significantly, so have instances of excessive force, making it crucial that this Court restore clarity regarding the Fourth Amendment's application to the use of force to restrain students. This is especially true because in this Circuit, the Fourth Amendment is the only avenue for students to vindicate their federal constitutional rights when they are subjected to excessive force. *See Fee v. Herndon*, 900 F.2d 804, 810 (5th Cir. 1990) (foreclosing most school-related substantive due process claims). If the panel's decision stands, schoolchildren in this Circuit will have *no* constitutional protection from the use of unreasonable force by school officers, no matter how excessive.

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STATEMENT OF THE ISSUE

This proceeding presents the following issue of exceptional importance:

> Whether it is clearly established in this Circuit that the Fourth Amendment governs school officers' use of physical force to restrain or attempt to restrain students.

STATEMENT OF FACTS AND PROCEEDINGS

In November 2016, Jevon, a 17-year-old student with emotional disturbance and intellectual disabilities that impact "his daily functioning, including his ability to communicate [and] control his emotions," became agitated after a classmate bullied him. ROA.2113-14. In compliance with his academic accommodations, Jevon went to a "chill out" classroom to calm down; finding it occupied, he proceeded toward the school exit. ROA.14; ROA.2114. Before he could leave the building, Jevon was stopped in a small entryway by two school administrators, a security guard, and the individual defendant, School Police Officer Elvin Paley. ROA.2114-15.

Paley's body camera captured most of the subsequent events. Jevon began pacing and explaining that he wanted to calm down outside. ROA.2115. He pushed the door, and the nearest staff member pushed back against the door to keep Jevon inside; the district court observed from the body camera footage that "it does not appear that [Jevon] pushe[d] the staff member." ROA.2115. Within five seconds, Paley surged toward Jevon; his bodycam went dark as he pressed against Jevon's body. ROA.2116. The bodycam audio recording reflects Paley and another school employee repeatedly urging Jevon to "calm down" and someone threatening to tase

Jevon. ROA.2116. Less than a minute later, Paley backed up and fired his taser; Jevon "immediately scream[ed] and f[ell] to his knees." ROA.2116; Video 12:46:37. Despite Jevon's incapacitation and lack of resistance, Paley began "drive stunning"[1] Jevon, causing him to fall fully to the ground. ROA.2116; Video 12:46:41-12:46:56.

The district court found that the "use of the taser on [Jevon's] upper back continue[d] after [Jevon] [was] lying face down on the ground and not struggling." ROA.2116. While Jevon lay on the ground unmoving and breathing heavily, Paley pointed his taser at Jevon's head and yelled, "I did not want to tase you, but you do not run shit around here." ROA.2116; Video 12:47:50. Subsequent bodycam footage showed Paley describing his behavior: "He still tried to get out the door. I got tired of wrestling with him so I popped him." Video 13:10:30-13:10:32. The tasing caused Jevon to urinate and defecate on himself and to fear that he was going to die, and paramedics later removed a taser prong embedded in his chest. ROA.2117. Jevon missed several months of school following the incident: His mother kept him home because she "fear[ed] for his safety" at school and because the tasing caused Jevon "intense anxiety and PTSD." ROA.2118.

Jevon sued Paley and the school district, asserting in relevant part a § 1983 claim for excessive force under the Fourth Amendment as to both the initial and the continued use of the taser. Paley moved for summary judgment on qualified

[1] Drive stunning involves continually tasing a person without deploying the prongs. ROA.2116.

immunity grounds. The district court denied the motion with respect to the excessive force claim, holding that genuine disputes of fact—including whether Jevon initially pushed a staff member to get outside—were material to determining whether the tasing was objectively unreasonable and, thus, whether qualified immunity applied.[2] ROA.2141-43.

A panel of this Court reversed in an unpublished decision, holding that it is not clearly established whether the Fourth Amendment applies in schools and granting Paley qualified immunity. Panel Op. 2.

ARGUMENT

I. The panel decision conflicts with Circuit precedent.

It has long been clearly established in this Circuit that the Fourth Amendment protects students from excessive force when physically restrained by school officials. *See Curran*, 800 F.3d at 661; *Hassan*, 55 F.3d at 1079. The panel decision not only deviates from this precedent, but it also *un*-establishes this protection for schoolchildren, eliminating the only avenue in this Circuit for constitutional relief from excessive force in schools. If the panel's decision stands, the Fifth Circuit will

[2] The district court dismissed Jevon's Fourteenth Amendment substantive due process claim because *Fee* precludes such claims in school settings. 900 F.2d at 810. This interlocutory appeal challenged only the district court's denial of qualified immunity to Paley on Jevon's Fourth Amendment claim, so the Fourteenth Amendment claim is not currently at issue.

be the only federal jurisdiction where students are deprived of constitutional protection from excessive force in school.

A. This Circuit has repeatedly recognized that students have a Fourth Amendment right to be free from excessive force when seized by school officials.

The Fourth Amendment prohibits "unreasonable searches and seizures" by government officials. U.S. Const. amend. iv. A seizure occurs "[w]henever an officer restrains the freedom of a person to walk away." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). Claims that a government actor used excessive force when attempting to physically restrain someone are "properly analyzed under the Fourth Amendment's 'objective reasonableness' standard." *Graham v. Connor*, 490 U.S. 386, 388 (1989). Relevant to this case, this Court has recognized that tasing an unresisting suspect is objectively unreasonable, in clear violation of the Fourth Amendment's prohibition on excessive force. *See, e.g.*, *Ramirez v. Martinez*, 716 F.3d 369, 378-79 (5th Cir. 2013); *Newman v. Guedry*, 703 F.3d 757, 763 (5th Cir. 2012); *Massey v. Wharton*, 477 F. App'x 256, 263 (5th Cir. 2012) (unpublished). Here, it is undisputed that Paley tased Jevon to restrain him from walking away—a quintessential Fourth Amendment seizure. *See Garner*, 471 U.S. at 7; ROA.605, ROA.616 (Defendants' acknowledgment that Paley "physically restrained and tased" Jevon while assisting a colleague who was "trying to stop J.W. from leaving the school building" and therefore Jevon's claim that a "law enforcement officer" "used excessive force in the course of an arrest" should be

"analyzed under the Fourth Amendment and its 'reasonableness' standard"); ROA.634-35 (Paley explaining he was attempting to "physically restrain" Jevon).[3]

When the events in this case occurred, it was also clearly established in this Circuit that the Fourth Amendment applies to excessive force claims arising out of attempts by school officers to physically restrain students. Most notably, more than a year earlier, this Court held in *Curran* that, if a fact-finder concluded that a school police officer had slammed an unresisting student's head against the wall while restraining her, the officer would have "violate[d] clearly established law." 800 F.3d at 660-61.

In *Curran*, the officer was called to respond to a student who refused to follow directions. The student alleged that the officer grabbed her by her lanyard, threw her headfirst against a wall, and handcuffed her; the officer then began to escort her down the hall but slammed her into a wall during the walk. *Id.* at 658. The parties disputed whether the student resisted the officer during his uses of force: The officer claimed the student attempted to escape and he "plac[ed] her" against the wall "to regain control," while the student claimed she was fully compliant and did not provoke him. *Id.* (alteration in original).

[3] The panel characterized Paley's behavior as a form of "school discipline," Panel Op. 6, but Paley acknowledged that school resource officers do not discipline students and that tasing is a law enforcement—not a disciplinary or pedagogical—function. *See* ROA.635-36.

In response to the student's § 1983 suit, the officer asserted qualified immunity, arguing that none of the disputed facts were material to whether his actions were objectively unreasonable and thus violated clearly established law. *See id.* at 659-60. This Court disagreed, holding that "[a] suspect's active resistance is a key factor in the Fourth Amendment's 'objective reasonableness' test" and that "the force calculus changes substantially once that resistance ends." *Id.* at 661 (quoting *Graham*, 490 U.S. at 396). The Court therefore concluded that "if enough time elapsed between the [student's] battery and the use of force that a reasonable officer would have realized [the student] was no longer resisting," and the student was neither endangering bystanders nor causing the officer to fear for his safety, the student could "conclusively defeat qualified immunity." *Id.* at 661-62.

In short, *Curran* explicitly held that seizures committed by school officers are governed by the Fourth Amendment, consistent with Circuit precedent recognizing the Fourth Amendment's application to seizures of students. *See, e.g.*, *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 621-22 (5th Cir. 2004) ("Students have a constitutional right under the Fourth and Fourteenth Amendments to be free from unreasonable searches and seizures while on school premises."); *Hassan*, 55 F.3d at 1079 ("[The] fourth amendment right to be free from an unreasonable seizure … extends to seizures by or at the direction of school officials…."); *Keim v. City of El Paso*, 162 F.3d 1159, 1998 WL 792699, at *1, *4 n.4 (5th Cir. 1998) (per curiam) (unpublished) (high schooler's excessive-force claim against school security guards—

including a school police officer—was "properly analyzed under the Fourth Amendment").

Curran precludes Paley's invocation of qualified immunity. As in *Curran*, here there is evidence that, if accepted by a factfinder, would clearly establish the officer's use of force as objectively unreasonable, overcoming qualified immunity. Specifically, the district court found that though there was no dispute that "Paley did not stop using the taser when J.W. stopped resisting," there was a genuine dispute of fact regarding whether Jevon "pushed a staff member, so as to justify the taser use" in the first instance. ROA.2141; Video 12:45:54. Accordingly, the district court appropriately concluded that this conflicting evidence made it improper to resolve at summary judgment whether "it was objectively reasonable to believe that the force used was needed to keep J.W. in the building and … whether Officer Paley's continued use of the taser … after J.W. fell to his knees was reasonable," ROA.2143. Qualified immunity is thus unavailable because resolution of material disputed facts could render Paley's conduct objectively unreasonable based on clearly established precedent.[4]

[4] That *Curran* did not involve a taser does not alter the qualified immunity analysis. *See Newman*, 703 F.3d at 763-64 (footnote omitted) ("Lawfulness of force … does not depend on the precise instrument used to apply it. Qualified immunity will not protect officers who apply excessive and unreasonable force merely because their means of applying it are novel.").

B. The panel's reasons for deviating from *Curran* and *Hassan* are contrary to Supreme Court and Circuit precedent.

The reasons the panel offered for granting Paley qualified immunity are unsustainable.

As an initial matter, the panel erroneously disregarded *Curran* on the theory that, in that case, "the officer's failure to assert immunity on the grounds that students cannot bring Fourth Amendment excessive force claims meant the question was not squarely before the court." Panel Op. 6-7. There was no such "failure," however: *Curran* dealt squarely with the officer's assertion of qualified immunity and concluded that the plaintiff could "conclusively defeat qualified immunity" if disputed facts were resolved in her favor. Moreover, even if the officer in *Curran* did not develop his arguments as robustly as Paley did here, that would not authorize the panel to set aside *Curran*'s explicit holding that the right of schoolchildren to be free from excessive force was clearly established. *See Soc'y of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1211 (5th Cir. 1991) ("In this circuit, one panel may not overrule the decision, right or wrong, of a prior panel in the absence of an intervening contrary or superseding decision by the court en banc or the Supreme Court.").[5]

The panel also erroneously disregarded this Court's holding in *Hassan* that the Fourth Amendment "right to be free from an unreasonable seizure … extends to

[5] As will be discussed, at 10-11, the panel's statement that the recognition of a Fourth Amendment right in *Curran* was "at odds with" *Fee* inverts the constitutional analysis.

seizures by or at the direction of school officials." 55 F.3d at 1079. The panel acknowledged that *Hassan* provides "support … for [Jevon's] Fourth Amendment claim," but made no attempt to reconcile *Hassan* with its holding that it is not clearly established in this Circuit that students have a "Fourth Amendment right to be free of excessive … force applied by school officials." Panel Op. 5–6. This omission is particularly notable because *other* circuits have cited *Hassan* for the proposition that the Fifth Circuit has "recognized that the Fourth Amendment governs a teacher's seizure of a student." *Doe ex rel. Doe v. Hawaii Dep't of Educ.*, 334 F.3d 906, 909 (9th Cir. 2003); *see also Shuman ex rel. Shertzer v. Penn Manor Sch. Dist.*, 422 F.3d 141, 148 (3d Cir. 2005); *Wofford v. Evans*, 390 F.3d 318, 326 (4th Cir. 2004); *Wallace by Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010, 1012 (7th Cir. 1995); *Shade v. City of Farmington*, 309 F.3d 1054, 1061 (8th Cir. 2002).

Instead of following binding precedent clearly establishing the Fourth Amendment right at issue, the panel pointed to two cases purportedly creating "inconsisten[cy]" in this Court's case law regarding whether "a student has a Fourth Amendment right to be free of excessive … force applied by school officials." Panel Op. 6. The panel's reliance on these cases was misplaced.

First, the panel identified *Flores v. School Board of DeSoto Parish*, 116 F. App'x 504 (5th Cir. 2004) (unpublished), as "reject[ing] the notion of Fourth Amendment claims based on school discipline." Panel Op. 6. But "[u]npublished opinions … are not precedent." *Mason v. Faul*, 929 F.3d 762, 765 (5th Cir. 2019) (alteration in original)

(quoting 5th Cir. R. 47.5.4). And even if *Flores* might once have been considered "persuasive authority" on the existence of the Fourth Amendment right asserted, *Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006), that could no longer be the case after this Court held, in the published *Curran* decision in 2015, that the right was clearly established. The subsequent published opinion resolving the question controls.

More fundamentally, the basis for the panel's reliance on *Flores* was flawed. The panel recited the reasoning in *Flores* that "allowing a Fourth Amendment challenge to a teacher's choking a student would 'eviscerate this circuit's rule against prohibiting substantive due process claims' based on the same conduct." Panel Op. 6 (quoting *Flores*, 116 F. App'x at 510). This gets the analysis precisely backward. As the Supreme Court explained in *Graham*, "*all* claims that law enforcement officers have used excessive force … in the course of an arrest … or other 'seizure'" must be "analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a substantive due process approach." 490 U.S. at 395; *see also Cty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) ("Substantive due process analysis is therefore inappropriate … if [the] claim is 'covered by' the Fourth Amendment."). "Because the Fourth Amendment provides an explicit textual source of constitutional protection against … physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Graham*, 490 U.S. at 395. Where, as here, there is a valid

Fourth Amendment claim based on the deployment of excessive force during a seizure, *see supra* at 4-5, no recourse to substantive due process—and thus no recourse to this Court's rule "prohibiting" such claims, Panel Op. 6—is warranted. The textually explicit Fourth Amendment right prevails, as the panel elsewhere acknowledged, *see* Panel Op. 5 (citing *Lewis*, 523 U.S. at 842, and *Graham*, 490 U.S. at 395).[6]

Second, and even further afield, the panel relied on a "comment" in *Fee v. Herndon* "that 'the paddling of recalcitrant students does not constitute a [F]ourth [A]mendment search or seizure'"—even "though [*Fee*] did not involve a Fourth Amendment claim." Panel Op. 6 (alterations in original) (quoting *Fee*, 900 F.2d at 810). This rationale is flawed for several reasons. Most obviously, and dispositively, the notion that the paddling of students may not give rise to a Fourth Amendment search or seizure has no bearing the undisputed seizure by a police officer that occurred here. And the panel's approach is inconsistent with qualified immunity doctrine, which prohibits courts from defining the "qualified immunity inquiry at a high level of generality" and instead requires them to consider "whether the violative nature of *particular* conduct is clearly established … in light of the specific context of the case.'" *Mullenix v. Luna*, 577 U.S. 7, 12, 16 (2015) (internal quotation marks

[6] Unlike this case, *Flores* involved a teacher's use of "disciplinary" force against a student in detention. *Flores*, 116 F. App'x at 506-10 (force was "not the type of … physical restraint normally associated with Fourth Amendment claims").

omitted) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011), and *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)). Where a right is clearly established with particularity, stray comments about whether such a right would exist in unrelated contexts have no bearing on the qualified immunity analysis. Finally, as the panel itself appeared to recognize, that "comment" from the *Fee* panel was dicta unrelated to its holding.[7]

Neither case cited by the panel offered any reason to deviate from *Curran*'s and *Hassan*'s holdings that students have a clearly established Fourth Amendment right to be free from excessive force.

C. No other circuit has suggested uncertainty about the Fourth Amendment's application to excessive force by school officers.

Significantly, absent rehearing or rehearing en banc to correct the panel's errors, this Circuit will stand alone among the circuits in precluding constitutional relief for students subjected to excessive force by school police officers. Every circuit

[7] Although *Fee*'s viability is not presented in this appeal, *see* supra n.2, Jevon reserves the right to challenge *Fee* at the appropriate stage in the litigation. Substantive due process claims asserted by students should not be foreclosed purely because state-law remedies exist. *See*, *e.g.*, *T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 420 (5th Cir. 2021) (Wiener, J., specially concurring) ("[A] substantive due process violation occurs at the moment of the deprivation itself, making the availability of alternative remedies wholly irrelevant."). An en banc petition in the *T.O.* case is currently pending, raising two exceptionally important questions: whether this Court should reconsider its outlier approach to substantive due process claims and whether it should permit Fourth Amendment claims against teachers. Pet. for Reh'g En Banc, *T.O.*, No. 20-20255 (5th Cir. July 15, 2021). This petition raises the distinct but related question of the application to the Fourth Amendment to school officers who use excessive force when seizing students.

to consider the question has applied the Fourth Amendment to excessive force claims against law enforcement actors stationed at schools. *See, e.g.*, *E.W. ex rel. T.W. v. Dolgos*, 884 F.3d 172, 179 (4th Cir. 2018); *Neague v. Cynkar*, 258 F.3d 504, 507 (6th Cir. 2001); *K.W.P. v. Kansas City Pub. Schs.*, 931 F.3d 813, 826 (8th Cir. 2019); *C.B. v. City of Sonora*, 769 F.3d 1005, 1030 (9th Cir. 2014) (en banc); *A.M. ex rel. F.M. v. Holmes*, 830 F.3d 1123, 1151 (10th Cir. 2016); *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1304 (11th Cir. 2006). And many circuits recognize excessive force claims against a range of school officials, including administrators and teachers, under a Fourth Amendment reasonableness standard. *See, e.g.*, *E.C. ex rel. R.C. v. Cty. of Suffolk*, 514 F. App'x 28, 30 (2d Cir. 2013) (unpublished); *Shuman*, 422 F.3d at 148; *Wofford*, 390 F.3d at 326; *Wallace*, 68 F.3d at 1014; *Doe*, 334 F.3d at 909.

II. The issue presented is exceptionally important.

In addition to creating an intra-circuit conflict and deepening inter-circuit disparity in the treatment of school excessive force claims, the issue presented is exceptionally important because the panel's decision insulates school officers from claims that they used unreasonable force restraining students, no matter how excessive or violent their conduct. Although the Supreme Court has insisted that students do not "shed their constitutional rights ... at the schoolhouse gate," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), the panel's decision makes it unclear in the Fifth Circuit whether students have *any* federal constitutional rights when they are subjected to violence by the very school officials, administrators, and

officers tasked with their care. Absent resolution by this Court en banc, the law will cease to be "clearly established" regarding whether school police officers' use of force against schoolchildren is governed by the Fourth Amendment. This Court should intervene to "promote[] the development of constitutional precedent," *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), and clarify that school officials may not use excessive force with impunity. *Cf. Lewis*, 523 U.S. at 841 n.5.

Allowing repeated violations of the Constitution is itself cause for concern. At stake here, though, is also the safety of thousands of schoolchildren. As the number of police officers in schools rises,[8] so too do potentially violent interactions between students and those officers. Cases in this Circuit reveal the substantial harm that uses of violent or excessive force by school officers may inflict on schoolchildren. *See, e.g.*, Panel Op. 3 (detailing the effects of tasing on a student with intellectual and emotional disabilities); *Acosta v. McMillan*, No. 13-CV-1016, 2014 WL 12479281, at *1 (W.D. Tex. Apr. 2, 2014) (tasing by school officer caused "brain injury requiring immediate surgery"). This Court should grant rehearing or rehearing en banc to

[8] *See, e.g.*, Nat'l Ctr. for Educ. Stats., *Percentage of Public Schools with Security Staff Present at Least Once a Week, and Percentage with Security Staff Routinely Carrying a Firearm, by Selected School Characteristics: 2005-06 Through 2017-18* (Aug. 2019), https://nces.ed.gov/programs/digest/d19/tables/dt19_233.70.asp; Texas Sch. Safety Ctr., *A Brief History of School-Based Law Enforcement* (Feb. 2016), https://txssc.txstate.edu/topics/law-enforcement/articles/brief-history; Nat'l Ass'n of Sch. Res. Officers, *About NASRO* (last visited August 15, 2021), https://www.nasro.org/main/about-nasro ("School-based policing is the fastest-growing area of law enforcement.").

restore clarity to the Fourth Amendment's application to school officers when they use excessive force to seize students.

CONCLUSION

For the foregoing reasons, this Court should grant rehearing or rehearing en banc and affirm the district court.

Respectfully submitted,

/s/Elizabeth R. Cruikshank

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August 16, 2021

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2021, 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/ Elizabeth R. Cruikshank
Elizabeth R. Cruikshank

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 35(b)(2) because this brief contains **3,869 words**, excluding the parts of the brief exempted by Rule 32(f).

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 for Mac 2016**.

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Dated: August 16, 2021

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 23, 2021
Lyle W. Cayce
Clerk

No. 19-20429

J. W.; Lori Washington, a/n/f J.W.,

Plaintiffs—Appellees,

versus

Elvin Paley,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:18-CV-1848

Before King, Jones, and Costa, *Circuit Judges*.

Per Curiam:*

This is a suit against a school resource officer for tasing a special education student who was trying to leave the school after engaging in disruptive behavior. The district court denied summary judgment based on its conclusion that the facts, taken in the light most favorable to the plaintiff, supported a finding of excessive force under a Fourth Amendment analysis.

* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

Although some of our cases have applied the Fourth Amendment to school official's use of force, other cases have held that such claims cannot be brought. That divide in our authority is the antithesis of clearly established law supporting the existence of Fourth Amendment claims in this context. As a result, the defendant prevails on his qualified immunity defense.

I.

When the events at issue in this case took place, J.W. was a 17-year-old special education student at Mayde Creek High.[1] One day he got into an argument with another student over a card game. He cursed, yelled, and punched the other student before storming out of a classroom and into a hallway. J.W. went to a "chill out" classroom he would go to when he was upset, but another student was already there. He threw a desk across the room, kicked a door, and yelled that he hated the school. J.W. then headed toward doors leading out of the school.

School officials who saw J.W.'s outbursts notified Assistant Principal Denise Majewski, who in turn asked school resource officer Elvin Paley for help keeping J.W. inside the building. When Paley arrived at the exit, a security guard, another school resource officer, a school coach, and Majewski were already there.

The district court summarized what happened next as revealed by Paley's bodycam:

> The recording shows J.W. pacing in front of the door leading outside the school building and complaining to the school staff member blocking the door that he wants to leave so he could walk home and calm down. He is not yelling at the staff

[1] Given the summary judgment posture, the facts that follow are taken in the light most favorable to the plaintiff.

> members, but the video recording shows him looking agitated and occasionally raising his voice. The recording then shows J.W. starting to push the door open. The staff member pushes back on the door to keep J.W. inside, but it does not appear that J.W. pushes the staff member, as the Katy School District contends. Within about five seconds of J.W. pushing on the door, Officer Paley moves toward J.W. and the staff member. Officer Paley's body camera then becomes dark as he pushes up against J.W.'s body. Both Officer Paley and the staff member tell J.W. to "calm down" several times. A male voice threatens J.W. with tasing. About 20 seconds later, the male voice says, "You are not going to get through this door, just relax." J.W. then begins screaming.
>
> The video becomes clear again as Officer Paley moves away from J.W. The recording shows two individuals holding J.W. Approximately 10 seconds after Officer Paley tells J.W. to relax, Officer Paley tells the individuals holding J.W. to "let him go," and fires the taser. J.W. immediately screams and falls to his knees. About 5 seconds later, the video recording shows Officer Paley beginning to "drive stun" J.W. near his bottom right torso, and then on J.W.'s upper back. "Drive stun" means to hold the taser against the body without deploying the prongs. J.W., still on his knees, then falls to the ground completely. The taser is used on J.W. for approximately 15 seconds. This use of the taser on J.W.'s upper back continues after J.W. is lying face down on the ground and not struggling.

School officials called emergency medical services and the school nurse. Eventually, J.W. was taken to a hospital. J.W. missed several months of school after the incident. J.W. contends he suffers from severe anxiety and posttraumatic stress disorder as a result of the tasing.

J.W. and his mother brought various claims against Paley and Katy Independent School District. The defendants moved for summary

judgment, which the district court granted on all claims except for a section 1983 claim against Paley alleging excessive force under the Fourth Amendment right.

Paley filed this interlocutory appeal, which is allowed for denials of qualified immunity that turn "on an issue of law." *Kinney v. Weaver*, 367 F.3d 337, 346 (5th Cir. 2004) (en banc).

II.

A plaintiff can overcome an official's qualified immunity if he can show "(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." *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (en banc) (citation omitted). Courts can choose which of these elements to address first. *Id.* We resolve this case on the second ground because our law does not clearly establish a student's Fourth Amendment claim against school officials.

We start with an issue on which our law is quite clear even if it is at odds with the law in in other circuits: students cannot assert substantive due process claims against school officials based on disciplinary actions. *See Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990). Although recognizing that corporal punishment "is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning,'" *id.* at 808 (citation omitted), we held that such punishment does "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.* Because we concluded that Texas does provide remedies for excessive corporal punishment, we dismissed a student's substantive due process claim challenging a principals' paddling. *Id.* at 810. *Fee* has been criticized, *Moore v. Willis Indep. Sch. Dist.*,

233 F.3d 871, 876–80 (5th Cir. 2000) (Wiener, J., specially concurring); *Neal ex rel. Neal v. Fulton Cnty. Bd. of Educ.*, 229 F.3d 1069, 1075 n.2 (11th Cir. 2000) but remans binding in our circuit, *T.O. v. Fort Bend Ind. Sch. Dist.*, -- F.3d --, 2021 WL 2461233, at *2-3 (June 17, 2021).

What about the Fourth Amendment right J.W. asserts? Perhaps the rejection of a substantive due process right does not also doom the more specific right to be free from unreasonable seizures. After all, the Supreme Court has emphasized that courts should ground claims in textually specific constitutional rights rather than in the "the more generalized notion of substantive due process." *See Cty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998); *see also Graham v. Connor*, 490 U.S. 386, 395 (1989) ("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."). And the Fourth Amendment's companion right to be free from unreasonable searches applies in schools, though its protections are lessened to account for pedagogical interests. *See Veronia Sch. Dist. 47 v. Acton*, 515 U.S. 646 (1995).[2]

J.W. can find some support in our caselaw for his Fourth Amendment claim. In a case dealing with a student's claim of excessive detention (though not excessive force), we said that the Fourth Amendment "right extends to seizures by or at the direction of school officials." *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079 (5th Cir. 1995). An unpublished, and thus nonbinding, opinion later held that a claim of excessive force brought against

[2] At least two courts of appeals allow Fourth Amendment claims challenging excessive discipline of students. *See Preschooler II v. Clark Cnty. Sch. Bd. of Tr.*, 479 F.3d 1175, 1182 (9th Cir. 2007); *Wallace by Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010, 1016 (7th Cir. 1995).

two school security guards was "properly analyzed under the Fourth Amendment." *Keim v. City of El Paso*, 162 F.3d 1159, 1998 WL 792699, at *1, *4 n.4 (5th Cir. 1998) (per curiam) (unpublished); *see also Campbell v. McAlister*, 162 F.3d 94, 1998 WL 770706, at *3 (5th Cir. 1998) (per curiam) (unpublished) (not deciding whether the Fourth or Fourteenth Amendment applied but noting that *Graham v. Connor* indicates that claims challenging governmental forces should "be confined to the Fourth Amendment alone"). Most recently, a published decision held that factual disputes required trial of a Fourth Amendment excessive force claim brought against a school resource officer who slammed a student into a wall. *Curran v. Aleshire*, 800 F.3d 656 (5th Cir. 2015).

The problem for J.W. is that at least one decision from our court, albeit an unpublished one, rejected the notion of Fourth Amendment claims based on school discipline. We reasoned that allowing a Fourth Amendment challenge to a teacher's choking a student would "eviscerate this circuit's rule against prohibiting substantive due process claims" based on the same conduct. *Flores v. Sch. Bd. of DeSoto Par.*, 116 F. App'x 504, 510 (5th Cir. 2004) (unpublished). The even bigger obstacle to J.W.'s claim may be *Fee*'s comment, though the case did not involve a Fourth Amendment claim, that "the paddling of recalcitrant students does not constitute a [F]ourth [A]mendment search or seizure." 900 F.2d at 810.

The upshot is that our law is, at best for Paley, inconsistent on whether a student has a Fourth Amendment right to be free of excessive disciplinary force applied by school officials. That does not make for either the "controlling authority" or "consensus of cases of persuasive authority" needed to show a right is clearly established. *Wilson v. Layne*, 526 U.S. 603, 617 (1999). The best case for J.W., and the one the district court understandably relied on, is *Curran*. Although that case did allow a Fourth Amendment claim against a school resource officer to get past summary

judgment, the defendant had not argued that a student's Fourth Amendment claim was at odds with *Fee*. As qualified immunity is an affirmative defense, *Pasco ex rel. Pasco v. Knoblauch*, 566 F.3d 572, 577 (5th Cir. 2009), the officer's failure to assert immunity on the grounds that students cannot bring Fourth Amendment excessive force claims meant the question was not squarely before the court.

Citing many of the cases we have just discussed, our court recently held that a plaintiff could not identify a clearly established Fourth Amendment right against school officials' use of excessive force. *See T.O.*, 2021 WL 2461233, at * 4. That conclusion renders Paley immune from the Fourth Amendment claim asserted in this case.

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The denial of summary judgment is REVERSED and judgment is RENDERED in favor of Paley.