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 United States District Court
for the Southern District of Texas

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS–APPELLEES' PETITION FOR REHEARING OR REHEARING *EN BANC*

Elizabeth B. Wydra
Brianne J. Gorod
Brian R. Frazelle
Dayna J. Zolle
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
dayna@theusconstitution.org

Counsel for Amicus Curiae

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, besides those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: August 23, 2021

/s/ Dayna J. Zolle
Dayna J. Zolle

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution applies as robustly as its text and history require and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

To prevent a high schooler from walking out of the school building, School Police Officer Elvin Paley repeatedly tasered him, even after the student fell to the ground and stopped moving. ROA.2116. As both the Supreme Court and this Court have repeatedly held, officers like Paley are subject to the Fourth Amendment's prohibition on unreasonable seizures, including seizures made with "excessive force." *Curran v. Aleshire*, 800 F.3d 656, 664 (5th Cir. 2015). Inexplicably, however, the panel in this case concluded that this Court's precedent is "inconsistent," declaring that there is no "clearly established Fourth Amendment

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. All parties have consented to the filing of this brief.

right against school officials' use of excessive force" and granting qualified immunity to Paley on that basis. Slip op. 7.

That decision is wrong. The Supreme Court established decades ago that public school officials are bound by the Fourth Amendment's limit on unreasonable seizures, and that a seizure made with excessive force violates the Amendment. This Court has ruled accordingly ever since, notwithstanding the panel's misreading of a single unpublished opinion.

The panel was also wrong to suggest that allowing Fourth Amendment excessive force claims against school officials undermines this Court's restrictions on substantive due process challenges to corporal punishment. Seizures and corporal punishment are not the same—each can exist without the other. And when a seizure is involved, Supreme Court precedent is clear: it must be evaluated under the Fourth Amendment.

ARGUMENT

I. It Has Long Been Clearly Established that the Fourth Amendment Prohibits Public School Officials from Using Excessive Force to Seize Students.

Officer Paley did not need "to predict the future course of constitutional law," *Wilson v. Layne*, 526 U.S. 603, 617 (1999) (quotation marks omitted), to know he was subject to Fourth Amendment limits on the use of force when physically restraining students. It has long been "beyond debate," *Ashcroft v. al-Kidd*, 563 U.S.

731, 741 (2011), that the Fourth Amendment's "constitutional guarantee" extends to "seizures by state officers, including public school officials," *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) (citation omitted), and that seizures conducted with excessive force are "unreasonable" under the Amendment.

Indeed, more than thirty years before Paley seized Plaintiff J.W., the Supreme Court squarely addressed "what limits, if any, the Fourth Amendment places on the activities of school authorities." *New Jersey v. T.L.O.*, 469 U.S. 325, 332 (1985). At the time, it was already "indisputable . . . that the Fourteenth Amendment protects the rights of students against encroachment by public school officials." *Id.* at 334. But some courts had held that those officials were "not subject to the constraints of the Fourth Amendment" because they essentially stand in for parents. *Id.* at 332 n.2. Rejecting that argument, the Supreme Court foreclosed the notion "that school officials are exempt from the dictates of the Fourth Amendment." *Id.* at 336.

Fourth Amendment standards are simply "different" in public schools than elsewhere, the Court has explained, because "the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Bd. of Educ. v. Earls*, 536 U.S. 822, 829-30 (2002) (quoting *Vernonia*, 515 U.S. at 656). But it is clear that school officials are governed by the Fourth Amendment's "prohibition on unreasonable searches *and seizures*," which "creates . . . rights enforceable against them." *T.L.O.*, 469 U.S. at 333-34 (emphasis added).

While the Supreme Court's school cases have involved searches, rather than seizures, the Court has unequivocally stated that the Amendment regulates "searches *and seizures* by . . . public school officials." *Vernonia*, 515 U.S. at 652 (emphasis added) (citation omitted). The text of the Amendment permits no other result. It does not create two "companion right[s]," slip op. 5, potentially governing different officials. Rather, it guarantees a single, unified right: "[t]he right" of the people "to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV. That language cannot be read—and never has been read—as protecting against unreasonable searches by one range of officers and unreasonable seizures by a different range of officers.

An "excessive force" claim, moreover, is simply a claim that an officer carried out an unreasonable seizure. In assessing reasonableness, "[t]he manner in which [a] seizure . . . [is] conducted is, of course, as vital a part of the inquiry as whether [it is] warranted at all." *Terry v. Ohio*, 392 U.S. 1, 28 (1968). Because it is "plain" that "reasonableness depends on not only when a seizure is made, but also how it is carried out," the Court held long ago that excessive force can make an otherwise valid seizure unreasonable. *Tennessee v. Garner*, 471 U.S. 1, 8 (1985); *see Scott v. Harris*, 550 U.S. 372, 382 (2007) ("*Garner* was simply an application of the Fourth Amendment's 'reasonableness' test."); *Graham v. Connor*, 490 U.S. 386, 395 (1989) (extending "*Garner*'s analysis" to "*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").

Consistent with Supreme Court precedent, this Court has repeatedly held that the "fourth amendment right to be free from an unreasonable seizure . . . . extends to seizures by . . . school officials," *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079 (5th Cir. 1995), and prohibits those officials from using "excessive force," *Curran*, 800 F.3d at 664. *See* Pet. for Rehearing 3-7. And notably, this Court has acknowledged that Supreme Court precedent compels those results. *See Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 621-22 (5th Cir. 2004) (citing *T.L.O.* for students' "constitutional right under the Fourth and Fourteenth Amendments to be free from unreasonable . . . seizures"); *Milligan v. City of Slidell*, 226 F.3d 652, 655 (5th Cir. 2000) (applying Fourth Amendment standards "directed" by *Vernonia*); *Hassan*, 55 F.3d at 1080 n.16 (citing the Supreme Court's "command" to "examine *all* of the circumstances in the context of school . . . seizures").

This Court has not been "inconsistent," therefore, about whether students have a Fourth Amendment right to be free of excessive force at the hands of school officials. Slip op. 6. The panel's reliance on *Flores v. School Board of DeSoto Parish*, 116 F. App'x 504 (5th Cir. 2004), for this supposed inconsistency is wrong many times over.

First, the Supreme Court's precedent—which establishes that school officials

may not unreasonably seize students and that excessive force is unreasonable—is "controlling authority," *Wilson*, 526 U.S. at 617, regardless of whether this Court's own decisions have clearly established the same rule.

Second, a single unpublished opinion, which is "not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case," 5th Cir. R. 47.5.4, cannot override consistent Circuit precedent to the contrary in multiple published decisions issued before and after that opinion (much less Supreme Court precedent).

Third, the panel misconstrued *Flores*, which did not purport to foreclose all Fourth Amendment excessive force claims by students. *Flores* asked whether "a teacher's momentary use of force" against a student "gives rise to a Fourth Amendment seizure *violation*." 116 F. App'x at 509 (emphasis added). While the opinion includes a broad assertion that "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," its actual holding involved a determination that "the momentary 'seizure' complained of in this case is not the type of detention or physical restraint normally associated with Fourth Amendment claims." *Id.* at 510; *see id.* at 509 n.17 (distinguishing *Hassan* because "that case involved a literal seizure"). The Court thus "decline[d] to recognize *plaintiff's* claim under the Fourth Amendment." *Id.* at 510 (emphasis added).

In sum, when Officer Paley tasered J.W., it was clearly established that the Fourth Amendment prohibited him from using excessive force to seize students. As the next section explains, it was equally well established that Paley's conduct was a "seizure."

II. Acquiring Control over Someone by Physically Subduing That Person Is a Seizure.

A "Fourth Amendment seizure" occurs "when there is a governmental termination of freedom of movement through means intentionally applied." *Scott*, 550 U.S. at 381 (quoting *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989)); *accord County of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998). Thus, "[w]henever an officer restrains the freedom of a person to walk away, he has seized that person." *Brower*, 489 U.S. at 595 (quoting *Garner*, 471 U.S. at 7).

For example, a seizure occurs when an officer apprehends a person by shooting him. *Garner*, 471 U.S. at 7. So too when a police roadblock successfully stops a fleeing driver, *Brower*, 489 U.S. at 599, or when an officer "terminate[s] [a] car chase by ramming his bumper into [the suspect's] vehicle," *Scott*, 550 U.S. at 381. Seizures can even occur "without the use of physical force" if there is "actual submission" to an officer's show of authority. *Brendlin v. California*, 551 U.S. 249, 254 (2007). In short, whenever an officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen . . . a 'seizure' has occurred." *Terry*, 392 U.S. at 19 n.16.

Those standards are plainly met when an officer acquires control over someone by tasering that person. Like a gun, a taser is capable of terminating a person's freedom of movement—indeed, that's what it is for. When an officer successfully uses a taser for that purpose, a seizure has occurred. *See Brower*, 489 U.S. at 599 ("We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.").

Unsurprisingly, this Court's decisions leave no doubt that tasering a person into submission is a Fourth Amendment seizure. *See Orr v. Copeland*, 844 F.3d 484, 492 (5th Cir. 2016); *Carroll v. Ellington*, 800 F.3d 154, 176 (5th Cir. 2015); *Poole v. City of Shreveport*, 691 F.3d 624, 629 (5th Cir. 2012).

III. Seizures Are Not the Same as Corporal Punishment, and When a Seizure Is Challenged It Must Be Evaluated Under the Fourth Amendment.

The panel suggested that allowing Fourth Amendment claims for "excessive disciplinary force" would "eviscerate this circuit's rule against prohibiting substantive due process claims based on the same conduct." Slip op. 6 (quoting *Flores*, 116 F. App'x at 510 (quotation marks omitted)). But corporal punishment and Fourth Amendment seizures are not "the same conduct." *Id.* Seizures do not necessarily involve corporal punishment, and corporal punishment does not necessarily involve a seizure.

When school authorities "decide to punish a child for misconduct" by

"inflicting appreciable physical pain," that is "corporal punishment." *Ingraham v. Wright*, 430 U.S. 651, 674 (1977). But "restraining" a child is different. *Id.* Physical restraint is not necessarily designed to punish, and it does not necessarily involve inflicting pain. Even when physical restraint and corporal punishment are used together, they are distinct. *See id.* at 676 (discussing the "deliberate infliction of corporal punishment on a child *who is restrained for that purpose*" (emphasis added)). That is why school policies can "forbid[] corporal punishment but allow[] teachers to restrain students physically in order to protect the students, others, or property from physical harm." *Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010, 1013 (7th Cir. 1995).

In other words, corporal punishment (excessive or otherwise) can be inflicted without a seizure. For example, "the paddling of recalcitrant students does not constitute a fourth amendment search or seizure." *Fee v. Herndon*, 900 F.2d 804, 810 (5th Cir. 1990). Nor is such punishment always accompanied by a seizure. *See Cunningham v. Beavers*, 858 F.2d 269, 271 (5th Cir. 1988) (principal saw students misbehaving in hallway and "gave each child two swats on the buttocks with a wooden paddle"); *Woodard v. Los Fresnos Indep. Sch. Dist.*, 732 F.2d 1243, 1244 (5th Cir. 1984) ("student requested that, instead of being suspended, she be disciplined by three strikes with a paddle"); *Neal v. Fulton Cnty. Bd. of Educ.*, 229 F.3d 1069, 1071 (11th Cir. 2000) (teacher hit student "as a form of punishment"

without seizing him).

Conversely, students can be physically seized for reasons other than punishment, as when a student is forcibly removed from a classroom to stop his "disruptive" behavior from interrupting the class. *Campbell v. McAlister*, 162 F.3d 94, 1 (5th Cir. 1998) (per curiam). Or when a student is "taken to a closed office in which he felt constrained to remain" for the purpose of questioning. *Edwards v. Rees*, 883 F.2d 882, 884 (10th Cir. 1989). Or when a student who "was not being punished, but was the subject of an instructional technique," is tied to a chair. *Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303, 305 (5th Cir. 1987).

Because seizures are distinct from corporal punishment, permitting Fourth Amendment challenges to seizures that involve excessive force does not erase this Court's limits on substantive due process claims arising from punishment. *See Doe v. Haw. Dep't of Educ.*, 334 F.3d 906, 909 (9th Cir. 2003) ("We recognize that it may be possible for a school official to use excessive force against a student without seizing . . . the student, and that the Fourth Amendment would not apply to such conduct.").

Sometimes an official's conduct might qualify as both corporal punishment and a seizure. If so, it *must* be evaluated under the Fourth Amendment—and only that Amendment. Supreme Court precedent "requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth . . . Amendment,

the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *Lewis*, 523 U.S. at 843 (quotation marks omitted). Thus, when someone claims that "officials used excessive force in the course of making . . . [a] 'seizure' of his person," that claim is "properly analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather than under a substantive due process standard." *Graham*, 490 U.S. at 388.

The panel had things backwards, therefore, when it suggested that Fourth Amendment scrutiny of seizures by school officials must yield to the application of substantive due process standards. When a claim involves a seizure, as this one does, "it is the Fourth Amendment, and not substantive due process, under which [that] claim must be judged." *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (plurality op.); *see Lewis*, 523 U.S. at 842-43 (when officers injure people while apprehending them, "any liability must turn on an application of the reasonableness standard governing searches and seizures"). The panel erred in concluding otherwise.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

/s/ Dayna J. Zolle
Elizabeth B. Wydra
Brianne J. Gorod
Brian R. Frazelle
Dayna J. Zolle
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
dayna@theusconstitution.org

Counsel for Amicus Curiae

Dated: August 23, 2021

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on August 23, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 23rd day of August, 2021.

/s/ Dayna J. Zolle
Dayna J. Zolle

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because it contains 2,587 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 23rd day of August, 2021.

/s/ Dayna J. Zolle
Dayna J. Zolle

Counsel for Amicus Curiae