CONSTITUTIONAL LAW — CORPORAL PUNISHMENT — FIFTH CIRCUIT DECLINES TO EXTEND FOURTH AMENDMENT TO BAR CORPORAL PUNISHMENT IN PUBLIC SCHOOLS. — *T.O. v. Fort Bend Independent School District*, 2 F.4th 407 (5th Cir. 2021), *reh'g en banc denied*, No. 20-20225 (5th Cir. Sept. 15, 2021).

"The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class . . . ."[1] Instead, "schools must teach by example."[2] One reason, then, that students do not "shed their constitutional rights . . . at the schoolhouse gate"[3] is so that they may learn what those rights are.[4] In the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, one of those rights is to be free from excessive corporal punishment.[5] But in the Fifth Circuit — which has jurisdiction over the three states that account for more than one-third of all incidents of corporal punishment nationwide[6] — students have few federal constitutional protections against in-school physical abuse.[7] Recently, in *T.O. v. Fort Bend Independent School District*,[8] the Fifth Circuit refused to change course, granting qualified immunity to a public school teacher who held a first-grade student with special needs in a chokehold.[9] While the panel relied on Fifth Circuit precedent to hold that the teacher's conduct did not constitute a Fourteenth Amendment violation, the court declined to answer whether it constituted a Fourth Amendment violation.[10] This decision was a missed opportunity to define the contours of students' constitutional rights and protect those who face corporal punishment.

In early 2017, T.O., a first grader in a special education program at Hunters Glen Elementary School, was restrained in a chokehold by

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1 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

2 *Id.*

3 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

4 *See* JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 12 (2018).

5 *See* Lewis M. Wasserman, *Corporal Punishment in K–12 Public School Settings: Reconsideration of Its Constitutional Dimensions Thirty Years After* Ingraham v. Wright, 26 TOURO L. REV. 1029, 1043–57 (2011).

6 *See* Elizabeth T. Gershoff & Sarah A. Font, *Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy*, SOC. POL'Y REP., Autumn 2016, at 1, 8 tbl.3 (providing statistics for Louisiana, Mississippi, and Texas). In 2011 and 2012, more than 66,000 public school students in these states were subjected to corporal punishment. *See id.*

7 *See* Fee v. Herndon, 900 F.2d 804, 808 (5th Cir. 1990).

8 2 F.4th 407 (5th Cir. 2021).

9 *See id.* at 416.

10 *See id.* at 415.

Angela Abbott, a fourth-grade math teacher.[11] After exhibiting behavior "characteristic of his diagnoses," T.O. had been sent into the hall with his behavioral aide "until he could calm down and return to his classroom."[12] When Abbott, who "happened to be walking down the hall,"[13] offered her assistance, T.O.'s aide reassured her that "the situation was okay."[14] Abbott, however, opted to "take charge and handle the situation."[15] She decided to "st[and] in front of the door" and "physically block[] T.O." from reentering the classroom.[16] In response, T.O. tried to push Abbott out of the way, "hitting her right leg" in the process.[17] Abbott then threw T.O. to the floor and grabbed him by the throat.[18] She choked him for several minutes, even as he "foam[ed] at the mouth," only releasing him when the behavioral aide asked her to.[19] T.O. visited the school's nurse, who observed "bruising and redness" on his neck.[20] The school district investigated the incident, but Abbott was never fired or disciplined.[21]

Two years later, T.O. and his parents filed suit against both Abbott and the school district, alleging that Abbott violated T.O.'s Fourth, Fifth, and Fourteenth Amendment rights.[22] Abbott and the school district moved to dismiss all claims.[23] Magistrate Judge Stacy recommended that their motion be granted.[24] She concluded that Abbott was entitled to qualified immunity because her use of force was not a Fourteenth Amendment substantive due process violation as Texas provides "adequate post-punishment civil or criminal remedies for the

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[11] Amended Complaint ¶¶ 2, 15, T.O. v. Fort Bend Indep. Sch. Dist., No. 19-CV-331 (S.D. Tex. Mar. 24, 2020). T.O. was placed in the special education program after being diagnosed with Attention Deficit Hyperactivity Disorder and Oppositional Defiant Disorder. *See id.*

[12] *Id.* ¶ 19. In light of T.O.'s neurodivergencies, the school district had adopted a Behavioral Intervention Plan and assigned him a behavioral aide to ensure he could "resume educational activities with minimal interruption" if he misbehaved. *Id.* ¶ 16.

[13] *T.O.*, 2 F.4th at 412.

[14] Amended Complaint, *supra* note 11, ¶ 21.

[15] *Id.* ¶ 20 (internal quotation marks omitted).

[16] *Id.* ¶ 21.

[17] *Id.*

[18] *Id.* ¶ 22.

[19] *Id.* ¶ 24.

[20] *Id.* ¶ 37; *see id.* ¶ 25.

[21] *Id.* ¶¶ 38–39.

[22] *See id.* ¶ 6, 40–41. In addition, T.O. and his parents alleged that the school district discriminated against him in violation of federal disability law. *Id.* ¶ 1 (citing Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended in scattered sections of 42 and 47 U.S.C.); Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.)).

[23] T.O. v. Fort Bend Indep. Sch. Dist., No. H-19-0331, 2020 WL 1442470, at *1 (S.D. Tex. Jan. 29, 2020).

[24] *Id.*

student to vindicate legal transgressions."[25] The district court adopted Magistrate Judge Stacy's recommendations in full.[26]

The Fifth Circuit affirmed.[27] Writing for the panel, Judge Wiener[28] held that Abbott was entitled to qualified immunity.[29] He first considered the substantive due process claim. In *Fee v. Herndon*,[30] the Fifth Circuit's leading case on the issue, the court ruled that "corporal punishment in public schools '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.'"[31] However, when a state provides alternative post-punishment remedies, this satisfies the student's constitutional process rights, meaning there can be no claim that the state was acting arbitrarily.[32] Judge Wiener concluded that the Texas remedies were adequate and thus that there was no arbitrary state action depriving T.O. of substantive due process.[33] Next, he held that because Abbott's discipline occurred in a pedagogical setting, it could not be considered "wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning,"[34] which could warrant a "deviation from *Fee*."[35]

Judge Wiener also dismissed T.O.'s Fourth Amendment claim of unreasonable seizure.[36] To do so, he relied on the "clearly established" prong of qualified immunity,[37] which asks whether the conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[38] As the court "ha[d] not conclusively determined whether the momentary use of force by a teacher against a

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[25] *Id.* at *5. Magistrate Judge Stacy recommended dismissal of the statutory claims on the basis that the amended complaint "failed to allege sufficient facts" to support that T.O. was disciplined *because of* his disability. *Id.* at *6.

[26] T.O. v. Fort Bend Indep. Sch. Dist., No. 19-CV-331, 2020 WL 1445701, at *1 (S.D. Tex. Mar. 24, 2020). In a footnote, the district court denied T.O. and his parents leave to amend their complaint a second time, finding that it "would not cure the deficiencies" identified by Magistrate Judge Stacy. *Id.* at *1 n.1.

[27] *T.O.*, 2 F.4th at 412.

[28] Judge Wiener was joined by Judge Costa and Judge Willett.

[29] *See T.O.*, 2 F.4th at 416.

[30] 900 F.2d 804 (5th Cir. 1990).

[31] *Id.* at 808 (quoting Woodard v. Los Fresnos Indep. Sch. Dist., 732 F.2d 1243, 1246 (5th Cir. 1984)).

[32] *Id.*

[33] *T.O.*, 2 F.4th at 415. Judge Wiener noted subsequent Supreme Court precedent that may call *Fee* into question. *Id.* at 416. However, he distinguished those cases and observed that even if they did apply in this context and overruled *Fee*, T.O.'s Fourteenth Amendment substantive due process claim would still fail due to qualified immunity, as the illegality of Abbott's behavior would have needed to be "clearly established" at the time of the incident. *Id.*

[34] *Id.* at 414 (citing *Woodard*, 732 F.2d at 1246).

[35] *Id.* at 415.

[36] *Id.*

[37] *Id.*

[38] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

student constitutes a Fourth Amendment seizure," there was no clearly established right at the relevant time — that is, when Abbott placed T.O. in a chokehold.[39] As evidence of the inconsistency in relevant case law, Judge Wiener compared an unpublished Fifth Circuit opinion that *rejected* Fourth Amendment claims against a teacher[40] with other Fifth Circuit opinions that held that "claims of excessive force and unlawful arrest against other school officials '*are* properly analyzed under the Fourth Amendment.'"[41] Ultimately, Judge Wiener did not reach the question whether Abbott's actions violated the Fourth Amendment.[42]

Notably, Judge Wiener also specially concurred,[43] writing that he was constrained in his panel decision on the Fourteenth Amendment substantive due process claim by binding circuit precedent that "is not only unjust, but is completely out of step with every other circuit court and clear directives from the Supreme Court."[44] Specifically, he questioned *Fee*'s interpretation of *Ingraham v. Wright*[45] — a case in which the Supreme Court held that the use of corporal punishment in schools does not violate procedural due process rights when state laws provide adequate post-deprivation remedies.[46] He pointed out that, unlike every other circuit, the Fifth Circuit has "appl[ied] *Ingraham*'s procedural due process reasoning to substantive due process claims."[47] Judge Wiener also noted subsequent Supreme Court precedents that call into question *Fee*'s understanding of *Ingraham*,[48] writing that "the Supreme Court has made it clear that the availability of state remedies *does not* replace a cause of action under § 1983."[49] He urged the Fifth Circuit to reconsider the rule from *Fee* that "injuries resulting from corporal punishment do not violate the Fourteenth Amendment as long as the forum state provides adequate alternative remedies."[50]

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[39] *T.O.*, 2 F.4th at 415.

[40] *Id.* (citing Flores v. Sch. Bd. of DeSoto Par., 116 F. App'x 504, 510 (5th Cir. 2004)).

[41] *Id.* (emphasis added) (quoting Keim v. City of El Paso, 162 F.3d 1159, 1998 WL 792699, at *1, *4 n.4 (5th Cir. Nov. 2, 1998) (per curiam)); *see also id.* at 415 n.30 (citing Curran v. Aleshire, 800 F.3d 656, 661 (5th Cir. 2015)).

[42] *See id.* at 415 n.30. In addition, the Fifth Circuit rejected T.O.'s federal statutory claims as fatally lacking sufficient "factual allegations," *id.* at 417, and his attempt to file a second amended complaint as without "good cause," *id.* at 418. The Fifth Circuit later rejected a petition to rehear the case en banc. *See* Order at 1, T.O. v. Fort Bend Indep. Sch. Dist., No. 20-20225 (5th Cir. Sept. 15, 2021).

[43] Judge Wiener was joined by Judge Costa.

[44] *T.O.*, 2 F.4th at 419 (Wiener, J., specially concurring).

[45] 430 U.S. 651 (1977).

[46] *Id.* at 683.

[47] *T.O.*, 2 F.4th at 419 (Wiener, J., specially concurring).

[48] *Id.* at 420 (citing Parratt v. Taylor, 451 U.S. 527 (1981), *overruled on other grounds by* Daniels v. Williams, 474 U.S. 327 (1986); Hudson v. Palmer, 468 U.S. 517 (1984); Zinermon v. Burch, 494 U.S. 113 (1990)).

[49] *Id.*

[50] *Id.* at 419.

While precedent prevented the Fifth Circuit from upholding T.O.'s substantive due process claim, the panel need not have stopped there. If it had decided on the merits whether Abbott violated T.O.'s Fourth Amendment right against unreasonable seizure, it could have established important precedent and helped to define the contours of public school children's constitutional rights. Since *Ingraham*, the Fifth Circuit has been the lone outlier in essentially refusing to recognize any remedy for excessive corporal punishment.[51] But the Fifth Circuit had discretion to reach T.O.'s well-grounded claim. In conducting qualified immunity analyses, courts may choose to address whether a constitutional violation occurred, even if the right is not clearly established.[52] Doing so here would have been particularly beneficial given the Fifth Circuit's geographic reach.

Public school students across circuits have argued that corporal punishment violates their Fourth, Eighth, and Fourteenth Amendment rights.[53] While the Supreme Court in *Ingraham* foreclosed students' ability to bring Eighth Amendment claims[54] and Fourteenth Amendment procedural due process claims,[55] the Court left unanswered whether Fourteenth Amendment substantive due process claims and Fourth Amendment claims are cognizable.[56] This silence on the availability of these two constitutional avenues has left lower courts split on the application of the Fourteenth and Fourth Amendments to corporal punishment in public schools.[57] The majority of circuits hold that excessive corporal punishment can violate one's substantive due process rights, regardless of the availability of adequate state law remedies.[58] Alternatively, the Seventh and Ninth Circuits use a Fourth Amendment analysis, contending that corporal punishment may amount to a seizure.[59] As such, the Fifth Circuit finds itself in complete isolation with its "State Remedy Rule"[60] that forecloses all substantive due process

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[51] *Id.*

[52] *See* Pearson v. Callahan, 555 U.S. 223, 236 (2009).

[53] *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 653 (1977) (Eighth and Fourteenth Amendment claims); Doe *ex rel.* Doe v. State of Haw. Dep't of Educ., 334 F.3d 906, 908 (9th Cir. 2003) (Fourth and Fourteenth Amendment claims).

[54] *See Ingraham*, 430 U.S. at 671.

[55] *See id.* at 682.

[56] *Id.* at 679 n.47, 673 n.42.

[57] Wasserman, *supra* note 5, at 1098–99.

[58] The Second, Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits do not look to the availability of adequate state law remedies. *See id.* at 1043–57. Circuits using this reasoning largely follow the Fourth Circuit's analysis in *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980), which required students to show that the corporal punishment "shock[ed] the conscience" to prevail on a substantive due process claim. *Id.* at 613; *see also* Wasserman, *supra* note 5, at 1043–57.

[59] Wasserman, *supra* note 5, at 1060–66.

[60] Gregory T. Gledhill, *Up a Creek . . . But Not Without a Paddle: Public School Corporal Punishment in the Fifth Circuit*, 13 GEO. MASON U. C.R. L.J. 121, 143–44 (2003).

claims when the state affords adequate civil or criminal remedies. A Fourth Amendment analysis, then, would remove the Fifth Circuit from its isolation among the circuits that Judge Wiener lamented[61] and align the Fifth Circuit with the Seventh and Ninth Circuits.

The panel was free to answer the Fourth Amendment question here. Although the Supreme Court permits lower courts presented with a qualified immunity defense to skip the constitutional question and proceed straight to the "clearly established" inquiry, it emphasized in *Pearson v. Callahan*[62] that answering the merits question is "often beneficial."[63] The Court has left no clear rules for when lower courts *should* do so, but it has provided some guidance for when doing so may *not* be necessary — namely, when the inquiry would be so fact specific that it would not be helpful for future cases, when the issue will soon be decided by a higher court or by the court of appeals en banc, when the decision involves interpretation of state law, or when the factual basis for the plaintiff's claim is not fully developed.[64] There is little consistency in how lower courts choose to use their discretion, but when courts post-*Pearson* have decided to skip the constitutional question, they often cite the *Pearson* considerations as their rationale.[65] However, critics have noted that skipping the question risks constitutional stagnation, as forgoing the question because the right is not clearly established ensures that right will "*never* be clearly established."[66]

Answering the constitutional question in this instance would have been "beneficial" for many of the same reasons that other courts have given when exercising their discretion. Lower courts have done so in order to provide guidance in cases addressing constitutional questions that are often resolved by qualified immunity,[67] in cases of "first impression,"[68] in cases where the constitutional violation was clear,[69] and in cases where it was important to advance the development of the law.[70] The Fifth Circuit should have answered the constitutional question posed in T.O.'s case because school officials are considered government

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[61] Judge Wiener expressed this sentiment in both *T.O.*, 2 F.4th at 421 (Weiner, J., specially concurring); and *Moore v. Willis Independent School District*, 233 F.3d 871, 880 (5th Cir. 2000) (Wiener, J., specially concurring).

[62] 555 U.S. 223 (2009).

[63] *Id.* at 236.

[64] *Id.* at 237–40.

[65] *See* Ted Sampsell-Jones & Jenna Yauch, *Measuring* Pearson *in the Circuits*, 80 FORDHAM L. REV. 623, 631–32 (2011).

[66] *See, e.g.*, Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 4 (2015).

[67] al-Kidd v. Ashcroft, 580 F.3d 949, 964 (9th Cir. 2009), *rev'd*, 563 U.S. 731 (2011).

[68] Sampsell-Jones & Yauch, *supra* note 65, at 631.

[69] Karen M. Blum, *Qualified Immunity: Further Developments in the Post-*Pearson *Era*, 27 TOURO L. REV. 243, 245 (2011).

[70] Sampsell-Jones & Yauch, *supra* note 65, at 631.

officials protected by qualified immunity,[71] Abbott's actions likely constituted a violation of T.O.'s Fourth Amendment rights, and deciding this question on the merits would have advanced the development of law in an area that is of unique importance. Notably, several courts have chosen to answer the constitutional questions in cases involving students in school, and a number of these cases specifically address Fourth Amendment violations, evidencing the recognized need for constitutional clarity in this context.[72]

The Court's Fourth Amendment jurisprudence fits T.O.'s injury like a glove. There are two steps to this analysis. First, corporal punishment — at least, under the facts of this case — constitutes a "seizure." Just last Term, in *Torres v. Madrid*,[73] the Court reiterated that when a government official "use[s] . . . force with intent to restrain," the Fourth Amendment applies to their conduct.[74] Second, public school teachers are not immune from Fourth Amendment claims.[75] In fact, the Court has been especially attentive to the power differentials of the classroom environment, requiring lower courts to consider "the age and sex of the student and the nature of the infraction" in determining the appropriateness of a search.[76] In light of the Court's broad definition of seizure and the constitutional status of public schools, it is at least plausible that Abbott's chokehold (a "47-year-old, 260 pound" teacher pinning down a "seven-year-old, 55 pound first-grader"[77]) violated the Fourth Amendment.[78]

Answering the constitutional question would clarify the law in an area that demands it. Judge Wiener pointed out in his special concurrence that there is a real lack of clarity regarding students' substantive due process rights in this area, and he admitted that the circuit's precedents on this issue were "wrongly decided."[79] Ignoring the Fourth Amendment claim only makes more unclear the state of students' constitutional right to be free from physical abuse in school. The Court has emphasized in other contexts "the heightened . . . stakes involved" in

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[71] Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 235 (2006). In addition, "[t]he Court's recent qualified immunity holdings do not bode well for student plaintiffs in constitutional cases." Wasserman, *supra* note 5, at 1087 (citation omitted).

[72] *See, e.g.*, Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 368 (2009); Doe *ex rel.* Johnson v. S.C. Dep't of Soc. Servs., 597 F.3d 163, 175 (4th Cir. 2010); Greene v. Camreta, 588 F.3d 1011, 1015–16 (9th Cir. 2009), *vacated in part*, 563 U.S. 692 (2011).

[73] 141 S. Ct. 989 (2021).

[74] *Id.* at 998 (emphasis omitted).

[75] New Jersey v. T.L.O., 469 U.S. 325, 336–37 (1985).

[76] *Id.* at 342.

[77] Amended Complaint, *supra* note 11, ¶ 2.

[78] Indeed, the Ninth Circuit seems to subscribe to this view. *See* Preschooler II v. Clark Cnty. Sch. Bd. of Trs., 479 F.3d 1175, 1182 (9th Cir. 2007).

[79] *T.O.*, 2 F.4th at 421.

cases regarding students' constitutional rights, and that such "a constitutional deprivation . . . harms people in their most vulnerable, formative years."[80] Not reaching the merits of the Fourth Amendment claim delays vindication of students' constitutional rights.

Answering the question in the Fifth Circuit is especially pressing in light of the fact that states in the Fifth Circuit account for more than one-third of all corporal punishment in the United States.[81] Additionally, the practice has a disparate impact on students with special needs and students of color.[82] An amicus brief filed in *T.O.* cites the case of a student diagnosed with autism in Fort Worth who *died* after he was restrained in school.[83] At the time the brief was filed, the child's parents had neither obtained any judicial relief nor "been told how their child died, or why he was subjected to the treatment that he was."[84] Cases like this, and like T.O.'s, are not rare in the Fifth Circuit,[85] and the disparate impact of this treatment on vulnerable populations highlights the need for judicial remedy, lest school officials continue to violate students' Fourth Amendment rights without any repercussions.

In *T.O. v. Fort Bend Independent School District*, the Fifth Circuit equivocated — to the detriment of vulnerable public school students across the South. Although Judge Wiener lamented the court's faulty *Fourteenth* Amendment substantive due process precedent,[86] he missed an opportunity to create favorable *Fourth* Amendment precedent. Already, the consequences are being felt. Just six days after its decision in *T.O.*, the Fifth Circuit granted qualified immunity to a school resource officer who tased a special education student.[87] The student brought a Fourth Amendment claim, but the court concluded that the right was not clearly established — citing *T.O.*[88] Constitutional stagnation is not at risk. It is at work. And until the Fifth Circuit offers a fix, it is children like T.O. who will suffer, taught by example that their rights are, indeed, "mere platitudes."[89]

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[80] DRIVER, *supra* note 4, at 249.

[81] *See* Gershoff & Font, *supra* note 6, at 8 tbl.3.

[82] "Students with disabilities represent approximately 9.8% of [Texas's] school population, but they experienced 91% of restraints in Texas's public schools during the 2018–2019 school year." Brief of Disability Rights Texas et al. as Amici Curiae in Support of Appellants' Petition for Rehearing En Banc at 6, T.O. v. Fort Bend Indep. Sch. Dist., No. 20-20225 (5th Cir. Sept. 15, 2021) (quoting DISABILITY RTS. TEX., HARMFUL RESTRAINT OF STUDENTS WITH DISABILITIES IN TEXAS SCHOOLS 9 (2020)); *see also id.* at 6–7 (noting disparities for Black students).

[83] *Id.* at 5 (citing Silas Allen, *Fort Worth Student with Autism Died After Being Restrained at School. What Happened?*, FORT WORTH STAR-TELEGRAM (Aug. 11, 2020, 4:52 PM), https://www.star-telegram.com/news/local/education/article251748788.html [https://perma.cc/H2GA-AJY8]).

[84] *Id.*

[85] *See* Gershoff & Font, *supra* note 6, at 8 tbl.3.

[86] *T.O.*, 2 F.4th at 421.

[87] J.W. v. Paley, 860 F. App'x 926, 930 (5th Cir. 2021) (per curiam).

[88] *Id.* (citing *T.O.*, 2 F.4th at 412–15).

[89] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).