No. 20-20225

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

T.O., *a child*; TERENCE OUTLEY; DARREZZETT CRAIG

Plaintiffs-Appellants,

v.

FORT BEND INDEPENDENT SCHOOL DISTRICT; ANGELA ABBOTT, *a teacher*

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas, Houston Division.

BRIEF OF DISABILITY RIGHTS TEXAS, COUNCIL OF PARENT ATTORNEY AND ADVOCATES, TEXAS APPLESEED, THE NATIONAL CENTER FOR YOUTH LAW, THE NATIONAL DISABILITY RIGHTS NETWORK, AND THE AMERICAN CIVIL LIBERTIES UNION OF TEXAS AS AMICI CURIAE IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

T.O., a child; TERENCE OUTLEY; DARREZZETT CRAIG v. FORT BEND INDEPENDENT SCHOOL DISTRICT; ANGELA ABBOT, *a teacher*

Pursuant to Fifth Circuit Rule 29.2 and Rule 28.2.1, amici curiae make the following supplemental statement of interested parties to fully disclose all those with an interest in this brief.

Amici Curiae

Disability Rights Texas
Council of Parent Attorneys and Advocates
Texas Appleseed
The National Center for Youth Law
The National Disability Rights Network
The American Civil Liberties Union of Texas

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IDENTITY AND INTEREST OF AMICI CURIAE

Disability Rights Texas (DRTx) is the federally-designated legal protection and advocacy agency for people with disabilities in Texas. Council of Parent Attorneys and Advocates (COPAA) is a national not-for-profit organization for parents of children with disabilities, their attorneys, and advocates. Both DRTx and COPAA advocate for and support individuals with disabilities, their parents, and advocates in efforts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504), and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, et seq. (ADA).

The Panel's decision and Judge Wiener's concurrence compels amici to offer their perspective as to why this Court should reconsider *Ingraham* and *Fee*. DRTx and COPAA are joined by several additional organizations identified in Appendix A of this brief that share their commitment to protect the rights of those with disabilities.

INTRODUCTION

Decades ago, when students first sought federal redress for their injuries from corporal punishment, judges in this Circuit turned their claims aside. They worried that federal courts would become the venue for a flood of lawsuits adjudicating whether "in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks." *Ingraham v. Wright*, 525 F.2d 909, 917 (5th Cir. 1976) (en banc). To avoid entangling courts into whether "five, ten, or twenty swats invoke[] the Fourteenth Amendment," *Fee v. Herndon*, 900 F.2d 804, 809 (5th Cir. 1990), this Court instead chose to rely on Texas's "civil and criminal laws" to "proscribe educators from abusing their charges." *Id.* at 810.

In the years since those decisions, as schools have become better equipped and teachers more professionalized than ever, that kind of corporal punishment has appropriately faded away to some degree—used today only in a few school districts, with declining frequency. *See, e.g.,* Elizabeth T. Gershoff & Sarah A. Font, *Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy*, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5766273/ (noting decline of corporal punishment from "4% of all schoolchildren in 1978 to less than .5% today"). As a result, the feared wave of lawsuits disputing the exact quantum of punishments will never materialize. But what this Court could not have anticipated

is how *Fee* and *Ingraham* have shielded from constitutional scrutiny disturbing instances of violence against schoolchildren, as occurred in this case. Here, T.O., a first-grader with a disability, was thrown to the ground and then put into a choke hold for several minutes; the panel's decision would shield from inquiry those who harmed him.

T.O. is neither the first nor the last student to face this kind of violence. When inadequately trained teachers resort to unnecessary and unreasonable force to restrain or control students with disabilities, students may suffer permanent injuries, both physical and psychological, and sometimes death. Many students subjected to unreasonable force suffer from post-traumatic stress disorder (PTSD).

Amici write to provide the Court two pieces of information within their unique knowledge. *First*, Amici will explain the serious consequences that the absence of constitutional remedies for these rare, but entirely devastating, incidences imposes on local students. The Fifth Circuit stands alone among all other parts of the country in denying these children a remedy for what can be serious injuries at the hands of these trusted adults.

Second, Amici will explain—from their deep experience of serving families of children with disabilities and other challenges—that the state remedies this Court relied on in *Fee* and *Ingraham* to save children from abuse do not really exist. While inadequate state remedies can never create a constitutional right where it does not

otherwise exist, the fact that most students who face violence from school staff have no adequate remedy should be considered by this Court.

ARGUMENT

I. The Court's rule has serious consequences for students with disabilities in the Fifth Circuit.

Both *Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990) and *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976), *aff'd on other grounds*, 430 U.S. 651 (1977)—this Circuit's foundational decisions on student's Constitutional rights in the face of corporal punishment—held that federal substantive due process guarantees were not implicated by the intentional application of corporal punishment to enforce discipline at school.

That is not what this case is about. The question presented here concerns not student discipline as it was understood when *Fee* and *Ingraham* were decided, but violence against children caused by teachers' failure to appropriately and safely address children's behavior. These acts can include isolating children against their will, putting children in physical restraints, or, as in this case, a choke hold. Yet, under this Court's law, these acts of violence, because they are alleged to have some connection to school discipline, are also covered by *Fee* and *Ingraham.* Teachers who are not adequately trained in de-escalation techniques and other ways to address student behavior, or who ignore their training, have responded to student behavior

with excessive violence, particularly against students with disabilities. It is simply a fact that, in recent years, teachers and other educational professionals have used restraints and violence in ways that are apparently immunized against constitutional attack. This cannot have been what this Court meant to exclude from remedy in *Fee* and *Ingraham*. Yet, those cases are routinely applied to acts of school violence like those presented here, so long as the school claims the acts have some kind of disciplinary component.

A recent tragic case makes the point: just this year, a Fort Worth student diagnosed with autism died after he was restrained at school. *See* Silas Allen, FORT WORTH STAR-TELEGRAM, *Fort Worth student with autism died after being restrained at school. What happened?* (June 16, 2021), https://www.msn.com/en-us/news/crime/fort-worth-student-with-autism-died-after-being-restrained-at-school-what-happened/ar-AAL6EN0?ocid=uxbndlbing. Far from obtaining any judicial remedy, the family has still not even been told how their child died, or why he was subjected to the treatment that he was. *Id.* News reports show that the *same school* has just in the last few weeks been accused of abusing *another child,* with a teacher allegedly throwing a nine-year-old child against a fence before slamming her to the ground. *See* C.L. Lynch, NEUROCLASTIC BLOG, *Texas School still practicing illegal restraints after killing young autistic man*,

https://neuroclastic.com/2021/06/23/xavier-hernandez-fort-worth-autism-restraint-death/.

Students with disabilities are disproportionately harmed because they all too often experience unnecessary restraints and other forms of educational violence. *Fee* and *Ingraham* have immunized school staff who brutalize students, thus unwittingly making our most vulnerable students susceptible to injury and assault. "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." DISABILITY RIGHTS TEX., *Harmful Restraint of Students with Disabilities in Texas Schools* (Dec. 7, 2020), at 9, *available at* https://media.disabilityrightstx.org/wp-content/uploads/2020/12/07130335/DRTx-Restraint-Report-FINAL-Dec-7-2020-2.pdf. (DRTx Report). In recent reports, Amici have detailed incident after incident where children have been restrained, isolated, or physically assaulted in Texas and elsewhere. *Id.; see also* COUNCIL OF PARENT ATTORNEYS & ADVOCATES, *The Crisis of Trauma and Abuse in our Nation's Schools* (2020), at 21-31 *available at* https://cdn.ymaws.com/www.copaa.org/resource/resmgr/docs/2020_docs/restraint_and_seclusion_pape.pdf.

This educational violence also has a disparate racial impact. Children with a classification of emotional disturbance are by far more likely to experience violence

at school. Studies show that schools are more likely to identify Black students as having an emotional disturbance. DRTx Report at 12 (*citing* Nicole M. Oelrich, *A new IDEA: ending racial disparity in the identification of students with emotional disturbance*, 57 S.D. L. REV. 9, 14 (2012)). And, consequently, Black students are most often treated violently while they are trying to learn. This deeply unfortunate circumstance only makes it more important that students facing the worst abuse are given *some* remedy for their grievous mental and physical injuries.

II. The educational landscape has changed since *Fee* and *Ingraham*, and that framework for school discipline and violence is no longer appropriate.

Since this Court's decisions in *Fee* and *Ingraham*, there has been enormous progress in developing appropriate techniques for addressing behaviors of students with disabilities. Indeed, state and federal law has evolved to include systems for planning and tracking student progress and recognizing student rights in light of these developments.

Ingraham was decided before Congress enacted the Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975) (now known as the IDEA), and both *Fee* and *Ingraham* were decided before Congress's major legislation reauthorizing and modifying the IDEA in ways that reflect Congress's overarching desire to expand the educational rights of children with disabilities. *See* Individuals with Disabilities Education Improvement Act of 2004, Pub L. No. 108-

446, 118 Stat. 2647; Individuals with Disabilities Education Act Amendments of 1997, Pub L. No. 105-17, 111 Stat. 37. Functional behavior analysis and positive behavior supports are now routinely recognized as important tools in providing appropriate behaviors supports to students with challenging behaviors. These developments make clearer that excessive violence against students with disabilities is unacceptable, and this Court should recognize that excessive violence violates students' substantive due process rights.

As Judge Wiener's concurrence notes, the availability of post-deprivation state remedies should not eliminate substantive due process claims. Slip op. at 16–17. But even when the *Fee* premise of post-deprivation state remedies is considered, Texas provides only an empty promise of state civil and criminal remedies.

A. Texas criminal law is inadequate.

To begin, criminal law is not an adequate remedy to resolve these instances where children are injured in schools in the first place, because that system is punitive, not remedial. While criminal law can create some disincentive for unconstitutional behavior, these systems provide insufficient remedy for the harm suffered by student victims. Additionally, although there is a constitutional right to restitution under Texas law, restitution is otherwise permissive and can only cover "expenses"; this is by no means a full amount of compensatory damages. *Compare* TEX. CONST., art I, § 30, *with* TEX. CODE CRIM. PROC. § 42.037(a), (b)(2). Further, a

victim seeking restitution "does not have standing to participate as a party in a criminal proceeding or to contest the disposition of any charge," so the criminal process does not allow injured students to prosecute this supposed remedy in the first place. *See* TEX. CONST., art I, § 30(e).

Moreover, although teachers might theoretically be prosecuted for constitutionally excessive punishment (i.e., aggravated assault), such prosecution does not happen in practice. There is no evidence that even a handful of regular arrests or indictments are made for the teachers who inflict excessive punishment against their students. One reason is that state statute specifically allows educators to use force so long as "the actor reasonably believes the force is necessary to further [a] special purpose or to maintain discipline in a group," and educators are rarely found to violate this allowance, especially under criminal law's beyond-a-reasonable-doubt standard. *See* TEX. PENAL CODE § 9.62. In fact, of all the reported criminal cases citing Section 9.62 since the statute was passed in 1973, only one court upheld a teacher's conviction. *See generally Smith v. State*, 133 S.W.3d 665 (Tex. App.—Corpus Christi–Edinburg 2003, pet. ref'd). With a criminal process that is virtually nonexistent in the face of an almost unbeatable statutory defense for teachers, the criminal law surely is an inadequate remedy.

B. Texas civil law is inadequate.

Texas's civil common law occasionally provides *a* compensatory remedy (unlike the criminal process), but that remedy—to whatever extent it existed at the time of *Ingraham* and *Fee*—has been rendered inadequate by legislative edict. In 2003, the Texas Legislature passed numerous restrictions on lawsuits against teachers that were not already barred by the education-immunity statute. *See* Act of May 29, 2003, 78th Leg., R.S., ch. 1197, 2003 Tex. Gen. Laws 3404. These include a notice-of-claim requirement, an administrative-exhaustion requirement, a damages limitation, alternative dispute resolution, and attorney's fees for some prevailing educators. *Id.* These provisions destroy any "adequacy" of a common law remedy when taken together, but several of these provisions also render the remedy inadequate when standing alone.

First, suit may not be filed against a Texas professional school employee without first exhausting "the remedies provided by the school district for resolving the complaint." TEX. EDUC. CODE § 22.0514. This creates a uniquely burdensome process that unreasonably elongates the remedy process (especially for students with disabilities who may find these processes difficult to navigate), which doubly violates this circuit's standards for adequate due process. *See Patsy v. Fla. Int'l Univ.*, 634 F.2d 900, 912 (5th Cir. 1981), *rev'd on other grounds*, 457 U.S. 496 (1982) (explaining that for a remedy to be adequate, "relief must be available within

a reasonable period of time," through "fair[] and not unduly burdensome" procedures). This is particularly burdensome because there is no universal administrative process; each district creates its own administrative procedures. *See* TEX. EDUC. AGENCY, *Review Process for Local Grievance Process*, https://tea.texas.gov/sites/default/files/Local%20Grievance%20Process.pdf (citing TEX. EDUC. CODE § 11.1511). Additionally, these are usually multi-tiered processes, and each district otherwise has broad discretion in how to shape their procedures. *Id.* That means there are over 1,200 different administrative processes from which an unconstitutionally punished student must intuit a process to follow before even beginning a lawsuit. *See* Tex. Educ. Agency, *Overview of Texas Schools*, https://tea.texas.gov/texas-schools/general-information/overview-of-texas-schools (last visited July 14, 2021) (noting 1,247 school districts). These administrative procedures are further limited by law, because the Legislature *also* added a provision that teachers are immune from most disciplinary proceedings involving use of force. *See* TEX. EDUC. CODE § 22.0512. This web of limited but mandatory administrative procedures, standing alone, is so burdensome, time consuming, and incapable of fully protecting Texas students as to destroy the adequacy of the common law remedy. *See Patsy*, 634 F.2d at 912.

If a student gets beyond the administrative remedies and other pre-suit hoops in suing a Texas teacher in tort for their unconstitutional injuries, there is yet another

inadequacy: the damages limitation. Texas law now limits damages in such suits to $100,000. TEX. EDUC. CODE § 22.0515. For those students who suffer the gravest harms from violence by school staff, like death or permanent psychological injury, this limits them to only a portion of the damages that would make them whole. *See, e.g.*, Thomas H. Cohen, *Tort Bench and Jury Trials in State Courts, 2005*, BUREAU OF JUSTICE STATISTICS BULLETIN (Nov. 2009), at App'x Tbl. 2, *available at* https://bjs.ojp.gov/content/pub/pdf/tbjtsc05.pdf (reporting that the median damages awarded fifteen years ago to successful individual plaintiffs who sued individual and government defendants in non-automobile tort suits was $71,000 and $78,000, respectively). This directly contravenes Supreme Court precedent, which requires an adequate remedy to "fully compensate[]" a plaintiff for their loss. *Parratt v. Taylor*, 451 U.S. 527, 544 (1981). To be sure, cases with large recoveries will be rare. Outside cases involving death and serious injury, large non-pecuniary damages are hard to prove. But the possibility of a sufficient recovery to compensate the child should be *available* for the exceptional case. In short, even if the common law remedy were once adequate, it no longer is. This Court should therefore reconsider *Fee* and *Ingraham* to allow an adequate remedy in federal court for a student's federal constitutional violation.

CONCLUSION

The Panel's judgment should be vacated and the case submitted to the en banc Court to reconsider *Fee* and *Ingraham*.

Dated: July 22, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Fed. R. App. P. 32(g), counsel for Amici Curiae hereby certify as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains 2,572 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirement 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, including serifs, using Microsoft 2010 in Times New Roman 14-point font.

Dated: July 22, 2021

/s/ Raffi Melkonian
Raffi Melkonian

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system on July 22, 2021.

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

Dated: July 22, 2021

/s/ Raffi Melkonian
Raffi Melkonian

APPENDIX A
Statements of Amici Curiae

The following organizations respectfully submit this brief as amici curiae in support of petitioners–appellants.

Disability Rights Texas (DRTx) is the federally-designated legal protection and advocacy agency for people with disabilities in Texas. DRTx's mission is to help people with disabilities understand and exercise their rights under the law and ensure their full and equal participation in society. DRTx accomplishes its mission by providing direct legal assistance to people with disabilities, protecting the rights of people with disabilities through the courts and justice system, and educating and informing policy makers about issues that impact the rights and services for people with disabilities.

Council of Parent Attorneys and Advocates (COPAA) is a national not-for-profit organization for parents of children with disabilities, their attorneys, and advocates. COPAA provides resources, training, and information for parents, advocates, and attorneys to assist in obtaining the free appropriate public education such children are entitled to under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq. COPAA also supports individuals with disabilities, their parents, and advocates in efforts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504), and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, et seq. (ADA).

Texas Appleseed is a public interest justice center that is based in Austin and works with base-building organizations across the state of Texas. Using data-driven research and local community partnerships, Texas Appleseed advocates for changes to laws and policies that disproportionately burden historically underserved Texans. For more than 15 years, Texas Appleseed has built significant expertise in the fight to dismantle the school-to-prison pipeline; Texas Appleseed has published numerous reports that highlight how centuries-long draconian educational practices, exclusionary discipline, and school policing detrimentally affect Black & Brown children, LGBTQ young people, and kids with disabilities.

The National Center for Youth Law (NCYL) is a private, non-profit law firm that helps children achieve their potential by transforming the public agencies that serve them. For 50 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities they need to become self-sufficient adults. One of NCYL's priorities is to improve student educational outcomes by protecting students' legal rights at school and ensuring that students have access to appropriate education services. NCYL provides representation to children and youth in cases that have broad impact. NCYL has represented many students in litigation and class administrative complaints to ensure their access to adequate, appropriate and non-discriminatory education as well as many children in foster care to remedy violations of their substantive due process rights.

The National Disability Rights Network (NDRN) is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

The American Civil Liberties Union Foundation of Texas ("ACLU of Texas") is a nonpartisan organization with approximately 45,000 members across the State. Founded in 1938, the ACLU of Texas is headquartered in Houston and is one of the largest ACLU affiliates in the nation. The ACLU of Texas is the State's foremost defender of the civil liberties and civil rights of all Texans as guaranteed by the U.S. Constitution and our nation's civil rights laws and has long advocated for the protection of students' rights in schools.