

No. 19-20429

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**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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J.W.; LORI WASHINGTON, A/N/F/J.W.,  
*Plaintiffs-Appellees,*

v.

ELVIN PALEY  
*Defendant-Appellant.*

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On Appeal from the United States District Court  
for the Southern District of Texas

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**Brief of the American Civil Liberties Union, the American Civil Liberties  
Union of Texas, the Juvenile and Children's Advocacy Project, the Texas  
NAACP State Conference, the Mississippi NAACP State Conference, the  
Louisiana NAACP State Conference, and the Southern Poverty Law  
Center**

***As Amici Curiae* Supporting Appellees' Petition for Rehearing *En Banc***

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**STATEMENT OF INTERESTED PARTIES**

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

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**TABLE OF CONTENTS**

STATEMENT OF INTERESTED PARTIES ..... i

TABLE OF AUTHORITIES ..... iii

STATEMENT OF INTEREST OF AMICI CURIAE.....1

Introduction .....3

Argument.....4

    I. Police presence in schools and use of force against schoolchildren has sharply increased.....4

    II. Schools lack resources that would create positive educational outcomes. ....6

    III. Increased police presence in schools has led to negative educational outcomes for children. ....8

    IV. Students of color, and students with disabilities, experience higher rates of police interaction and use of force in schools.....9

    V. The Panel erroneously construed the use of force as school discipline evaluated under the Substantive Due Process Clause to the exclusion of a Fourth Amendment claim. ....11

        a. Case law addressing school discipline is inapplicable to police use of force. ....12

        b. The Fourth Amendment governs use of force claims. ....13

Conclusion .....14

CERTIFICATE OF COMPLIANCE.....17

CERTIFICATE OF SERVICE .....18

**TABLE OF AUTHORITIES**

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*Curran v. Aleshire*, 800 F.3d 656 (5th Cir. 2015) .....13

*E.W. ex rel. T.W. v. Dolgos*, 884 F.3d 172 (4th Cir. 2018).....14

*Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990) .....12

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**STATEMENT OF INTEREST OF AMICI CURIAE**

**The American Civil Liberties Union (ACLU)** is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation’s civil rights laws. In support of these principles, the ACLU has appeared both as direct counsel and as amicus curiae in numerous cases concerning the rights of students. *E.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Goss v. Lopez*, 419 U.S. 565(1975); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038 (2021).

**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.

**The Juvenile and Children’s Advocacy Project (“JCAP”)** is a non-profit legal organization and clinical program based at the University of Houston Law Center. JCAP’s mission is to provide education, advocacy, and legal services on behalf of socially and economically disadvantaged youth in Texas.

**The Louisiana, Mississippi, and Texas State Conferences of the National Association for the Advancement of Colored People (“NAACP”)** are nonprofit civil rights organizations that advocate for political, social, economic, and educational equality. The Louisiana, Mississippi, and Texas State Conferences of the NAACP have been at the forefront of every major step toward desegregating each of their respective state’s schools. They have fought for more than a century to ensure the rights of children and access to quality education in Louisiana, Mississippi, and Texas.

**The Southern Poverty Law Center (“SPLC”)** is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. It has long advocated for the safety of children in public schools across



the South. As part of that work, it has advocated for legislation, engaged in public education, and litigated cases against the use of excessive force by school police.

### **Introduction**

Since the 1970s, police presence in United States' public schools has dramatically increased. Today, more than 50% of public schools have police officers. Police are trained in combat techniques and most carry physical restraints and weapons, including guns, aerosol sprays, and tasers—training and tools designed to pursue and restrain criminal suspects. Greater police presence in schools is predictably linked with increased use of force against children—with negative outcomes that disproportionately affect children of color and children with disabilities. At the same time, millions of children attend schools that lack counselors, nurses, psychologists and teachers trained to foster positive educational outcomes.

Given this situation, it is critical that this Court restore clarity regarding the Fourth Amendment's application to the use of force against schoolchildren. It is correct, both as a matter of doctrine and sound policy, that Fourth Amendment protections are available to children who are subjected to excessive force in schools.

## Argument

### **I. Police presence in schools and use of force against schoolchildren has sharply increased.**

“School-based policing is the fastest-growing area of law enforcement.”<sup>1</sup>

The percentage of public schools with police presence jumped from 1% in 1975<sup>2</sup> to over 50% in 2018.<sup>3</sup> Police in schools are often referred to as “school resource officers” (“SROs”). SROs are “law enforcement officer[s] with sworn authority” and “are deployed” and employed by a police department.<sup>4</sup>

With increased police presence, arrests of schoolchildren have increased.<sup>5</sup>

From the 2015–16 school year to the 2017–18 school year, the rate of school-based referrals to law enforcement increased by 12%, and the rate of school-based arrests

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<sup>1</sup> NASRO, *About NASRO*, <https://www.nasro.org/main/about-nasro> (last visited Aug. 20, 2021).

<sup>2</sup> Chongmin Na & Denise Gottfredson, *Police Officers in Schools: Effects on School Crime and the Processing of Offending Behaviors*, 30 *Just. Q.* 619, 620 (2013), <https://doi.org/10.1080/07418825.2011.615754>.

<sup>3</sup> Melissa Diliberti et al., National Center for Educational Statistics, *Crime, Violence, Discipline, and Safety in U.S. Public Schools: Findings from the School Survey on Crime and Safety: 2017–18*, at 18 (2019), <https://nces.ed.gov/pubs2019/2019061.pdf>.

<sup>4</sup> *About NASRO*, *supra* note 1.

<sup>5</sup> See, e.g., Emily G. Owens, *Testing the School-to-Prison Pipeline*, 36 *J. Pol’y Analysis & Mgmt.* 11 (2017), <https://doi.org/10.1002/pam.21954>; Emily M. Homer & Benjamin W. Fisher, *Police in Schools and Student Arrest Rates Across the United States: Examining Differences by Race, Ethnicity, and Gender*, 19 *J. Sch. Violence* 192 (2018), <https://doi.org/10.1080/15388220.2019.1604377>.

increased by 5%.<sup>6</sup> Nationwide data analyzed by the ACLU shows that schools with police reported 3.5 times as many arrests as schools without.<sup>7</sup> Students are often arrested for adolescent behavior that would not be criminalized absent police presence.<sup>8</sup> For example, schools with police have nearly five times the rate of arrests for disorderly conduct as schools without.<sup>9</sup>

Most police in schools are armed. In the 2017–18 school year, of the over 42,000 schools with police,<sup>10</sup> 91.2% had officers who carried “physical restraints,” including handcuffs and tasers, 91.1% had officers who carried a firearm, and 70.4% had officers who carried chemical aerosol sprays.<sup>11</sup>

Police routinely use both physical force and weapons against students—in fact, police are more likely to use force in interactions with youth than with adults.<sup>12</sup> For example, in 2018, a middle school student in Louisiana was picked

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<sup>6</sup> U.S. Educ. Dep’t, Off. for Civ. Rts., *Civil Rights Data Collection, 2017-18 State and National Estimations* (Jun. 2021), <https://ocrdata.ed.gov/estimations/2017-2018>.

<sup>7</sup> Amir Whitaker et al., ACLU, *Cops and No Counselors* 23 (2019), <https://www.aclu.org/report/cops-and-no-counselors>.

<sup>8</sup> Megan French-Marcelin & Sarah Hinger, ACLU, *Bullies in Blue: The Origins and Consequences of School Policing* 13 (2017), <https://www.aclu.org/report/bullies-blue-origins-and-consequences-school-policing>.

<sup>9</sup> Justice Policy Institute, *Education Under Arrest: The Case Against Police in Schools* 13–16 (2011), [https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/educationunderarrest\\_fullreport.pdf](https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf).

<sup>10</sup> Diliberti et al., *supra* note 3, at 19.

<sup>11</sup> *Id.*

<sup>12</sup> French-Marcelin & Hinger, *supra* note 8, at 22.

up, slammed down twice, repeatedly punched, and placed in a headlock by a SRO, after using a cellphone.<sup>13</sup> Reports of police use of force include punching, kicking,<sup>14</sup> chokeholds, pepper spray, tasers, and use of batons on students.<sup>15</sup>

For many students, like J.W., these interactions can result in serious, long-term injury and trauma, and can entirely compromise a student's future. For example, in 2019, an officer at a Del Valle, Texas High School placed a student in a headlock and tased him after the student tried to break up a fight.<sup>16</sup> Beyond the physical injuries he sustained, the student was arrested and expelled from school, jeopardizing his college chances despite his 4.0 grade average.<sup>17</sup>

## **II. Schools lack resources that would create positive educational outcomes.**

Many schools have police, but no mental health providers. Counselors, nurses, social workers, and psychologists improve school safety and “play a critical

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<sup>13</sup> David J. Mitchell, *Leaked Video: Brusly Officer Slams Middle School Student Twice; Police Chief Shocked*, Advocate (Nov. 14, 2018, 6:05 PM), [https://www.theadvocate.com/baton\\_rouge/news/crime\\_police/article\\_61780be0-e867-11e8-a178-472292a1bc31.html](https://www.theadvocate.com/baton_rouge/news/crime_police/article_61780be0-e867-11e8-a178-472292a1bc31.html).

<sup>14</sup> French-Marcelin & Hinger, *supra* note 8, at 23.

<sup>15</sup> See, e.g., Rebecca Klein, *When You Have Police in Schools, Kids End Up Getting Pepper-Sprayed*, Huffpost (Oct. 5, 2015, 4:45 PM), [http://www.huffingtonpost.com/entry/school-pepper-spray\\_us\\_561057f5e4b0dd85030c53c0](http://www.huffingtonpost.com/entry/school-pepper-spray_us_561057f5e4b0dd85030c53c0); Rebecca Klein, *Set to Stun*, Huffpost (Aug. 11, 2016, 9:01 AM), <http://data.huffingtonpost.com/2016/school-police/tasers>.

<sup>16</sup> Bridget Spencer, *Video Shows Student Being Tased at a High School*, Fox 7 Austin (Feb. 15, 2019), <https://www.fox7austin.com/news/video-shows-student-being-tased-at-a-high-school>.

<sup>17</sup> *Id.*

role in supporting youth and addressing barriers to school success.”<sup>18</sup> Data suggests that “1 in 10 youth will be impacted by their mental health needs enough to require additional supports from schools.”<sup>19</sup> But according to 2015–16 U.S. Department of Education national data, among schools with police, 1.7 million students lack counselors, 3 million lack nurses, 6 million lack psychologists, and 10 million lack social workers.<sup>20</sup> In Texas, 43% of students attended schools with police while 41% of students lacked a psychologist, nurse, social worker, or counselor.<sup>21</sup>

School-based mental health providers are “trained to address students’ needs,” including those related to poverty, mental or behavioral health, and homelessness and provide “prevention and intervention programs in areas like substance abuse, bullying, [and] anger management.”<sup>22</sup> Schools that employ mental health providers see improved attendance rates, lower rates of discipline, improved academic achievement and career preparation, and improved graduation rates.”<sup>23</sup> As discussed below, the opposite is true in schools that rely on police.

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<sup>18</sup>Whitaker et al., *supra* note 7, at 10.

<sup>19</sup> *Id.* at 6.

<sup>20</sup> *Id.* at 18.

<sup>21</sup> *Id.* at 19.

<sup>22</sup> *Id.* at 6, 10–11.

<sup>23</sup> *Id.* at 4.

### **III. Increased police presence in schools has led to negative educational outcomes for children.**

When schools lack professionals trained to respond to schoolchildren's developmental needs, police are more likely to intervene. But unlike trained mental health staff, school police are "first and foremost, engaged in law enforcement."<sup>24</sup> One survey of SROs found that they view law enforcement as an officer's primary responsibility and "describe their role at schools as focused on disorder and rowdiness."<sup>25</sup>

Increased reliance on police has led to "a dramatic increase in contact with law enforcement," "an increase in student referrals to [non-school based] police, an increase in student arrests," and "inappropriate use of force."<sup>26</sup> Contact with police interrupts students' education, often permanently. An arrest or citation in school often leads to mandatory court proceedings requiring students to miss class, causing them to fall further behind.<sup>27</sup> Studies show that a "first-time arrest during high school nearly doubles the odds of high school dropout, while a court

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<sup>24</sup> Office of Community Oriented Policing Services, Dep't of Justice, *Supporting Safe Schools: What is a School Resource Officer?*, <https://cops.usdoj.gov/supportingsafeschools>.

<sup>25</sup> French-Marcelin & Hinger, *supra* note 8, at 13.

<sup>26</sup> Whitaker et al., *supra* note 7, at 7; *see also* Justice Policy Institute, *supra* note 9, at 13.

<sup>27</sup> Aaron Kupchik, *Things Are Tough All Over: Race, Ethnicity, Class and School Discipline*, 11 *Punishment & Soc'y* 291, 307 (2009), <https://www.suspensionstories.com/wp-content/uploads/2010/10/things-are-tough-all-over.pdf>.

appearance nearly quadruples the[se] odds.”<sup>28</sup> A 2018 Texas study found that “exposure to a three-year federal grant for [SROs] decreases high school graduation rates by approximately 2.5[%] and college enrollment rates by [4%].”<sup>29</sup>

#### **IV. Students of color, and students with disabilities, experience higher rates of police interaction and use of force in schools.**

Students of color are consistently over-policed in schools, without evidence that they are more likely to engage in misconduct than their white peers.<sup>30</sup> They are more likely to attend a school with police, to be referred to law enforcement, and to be arrested at school.<sup>31</sup> They are also more likely to have “tough security measures like metal detectors, random ‘contraband’ sweeps, security guards, and security cameras,” regardless of actual rates of misconduct in the school.<sup>32</sup>

In 2010, Texas Appleseed published a report exposing the racial disparity in school-based arrests of students in seven out of ten Texas school districts that

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<sup>28</sup> Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 Just. Q. 462, 473 (2006), [https://www.masslegalservices.org/system/files/library/H.S.ed\\_and\\_arrest\\_-\\_ct\\_involvement\\_study\\_by\\_Sweeten.pdf](https://www.masslegalservices.org/system/files/library/H.S.ed_and_arrest_-_ct_involvement_study_by_Sweeten.pdf).

<sup>29</sup> Emily K. Weisburst, *Patrolling Public Schools: The Impact of Funding for School Police on Student Discipline and Long-term Education Outcomes*, 38 J. Pol’y Analysis & Mgmt. 338, 339 (2018), <https://onlinelibrary.wiley.com/doi/epdf/10.1002/pam.22116>.

<sup>30</sup> French-Marcelin & Hinger, *supra* note 8, at 22.

<sup>31</sup> Whitaker et al., *supra* note 7, at 7.

<sup>32</sup> *Id.*

gathered relevant data.<sup>33</sup> For example, in the San Antonio Independent School District (“ISD”), Black students represented 8% of the student body but 25% of arrests.<sup>34</sup> Similarly, Black students represented 11% of the East Central ISD, but 21% of arrests.<sup>35</sup>

Racial disparities are also seen in the use of force by police in schools. Texas Appleseed reported that in the Austin ISD, of the 403 use of force cases reported from 2004–08, 36% involved use of force against Black students, though they comprised about 12% of the student body. Black students were also targeted in 31% of the incidents where police used pepper spray, 75% of the incidents where police used a baton or impact weapon, and 29% of incidents where police used a taser.<sup>36</sup> Hispanic students comprised 58% of the school population, but 65% of incidents involving pepper spray.<sup>37</sup> In the Houston ISD, from 2006–07, Black students comprised about 29% of the student body but 78% of students subjected to use of force.<sup>38</sup>

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<sup>33</sup> Deborah Fowler et al., Texas Appleseed, *Texas’ School-to-Prison Pipeline: Ticketing, Arrest & Use of Force in Schools* 111 (2010), [https://www.njjn.org/uploads/digital-library/Texas-School-Prison-Pipeline\\_Ticketing\\_Booklet\\_Texas-Appleseed\\_Dec2010.pdf](https://www.njjn.org/uploads/digital-library/Texas-School-Prison-Pipeline_Ticketing_Booklet_Texas-Appleseed_Dec2010.pdf).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 134.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*



The racial disparities in use of force on schoolchildren appear to have increased over time. An investigation of the use of force from 2015–19, in the Austin ISD,<sup>39</sup> found that Black children comprised 7% of the student body, but were targeted in 30% of the SRO use of force cases.<sup>40</sup> During that time, white students made up 29% of the student population but were involved in only about 11% of these cases.<sup>41</sup>

Students with disabilities also experience a disproportionate rate of police contact. Despite comprising 13% of student enrollment, students with disabilities represented over 26% of students referred to police and about 26% of students with school-related arrests.<sup>42</sup>

**V. The Panel erroneously construed the use of force as school discipline evaluated under the Substantive Due Process Clause to the exclusion of a Fourth Amendment claim.**

The vast increase in police presence and use of force in schools, combined with evidence that force is disproportionately used against children of color and children with disabilities, highlights the critical importance of robust Fourth Amendment protections in schools.

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<sup>39</sup> Erin Cargile, *Austin ISD PD 'Use of Force' Data Reveals Divide Between Black and White Students*, KXAN (Sept. 1, 2020, 11:43 AM), <https://www.kxan.com/investigations/austin-isd-pd-use-of-force-data-reveals-divide-between-black-and-white-students/>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Civil Rights Data Collection*, *supra* note 6.

**a. Case law addressing school discipline is inapplicable to police use of force.**

The Panel erroneously relied on a factually and legally distinct case addressing school discipline to dismiss J.W.’s Fourth Amendment claim of excessive force by an SRO. *J.W. v. Paley*, No. 19-20429, 2021 WL 2587555, at \*2 (5th Cir. June 23, 2021). SROs are police officers and their use of force against schoolchildren cannot be characterized as “school discipline” analyzed under the Substantive Due Process Clause.

*Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990), relied upon by the Panel, does not support dismissal of J.W.’s Fourth Amendment claim. *Fee* involved a Fourteenth Amendment Substantive Due Process challenge to disciplinary action taken by a principal. The case did not involve a Fourth Amendment claim or police use of force, and is inapposite. Furthermore, the Texas Education Code directs SROs to “perform law enforcement duties for the school district”<sup>43</sup> and prohibits SROs from involvement in “routine student discipline or school administrative tasks” or having “contact with students unrelated to [] law enforcement duties.”<sup>44</sup> Even Defendant-SRO stated that SROs do not discipline and that tasing is a law enforcement—not a disciplinary or pedagogical—function. *See* ROA.635-36.

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<sup>43</sup> TX EDUC. CODE § 37.081(d-1).

<sup>44</sup> *Id.* at (d-2).

**b. The Fourth Amendment governs use of force claims.**

Even assuming the Panel’s decision to deny J.W.’s substantive due process claim was proper—and, for the reasons Appellees assert, it was not—the Panel erred in failing to independently evaluate J.W.’s claims under the Fourth Amendment. It is well-settled that the Fourth Amendment protects students against use of excessive force. *See Curran v. Aleshire*, 800 F.3d 656, 661 (2015); *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079 (5th Cir. 1995).

In *Graham v. Connor*, the Supreme Court held that “*all* claims that law enforcement officials have used excessive force” are properly analyzed under the Fourth Amendment’s “objective reasonableness” standard. 490 U.S. 386, 395 (1989) (emphasis original). This clear holding was correctly adopted as binding precedent in the Fifth Circuit, including in cases involving students. In *Curran*, the Fifth Circuit squarely held that *Graham* protects students against excessive force in schools. 800 F.3d at 661. Similarly, in *Keim v. City of El Paso*, the Court held that an excessive force claim brought against two school security guards— including a school police officer—was “properly analyzed under the Fourth Amendment” *Graham* standard. 162 F.3d 1159, 1998 WL 792699, at \*1, \*4 n.4 (5th Cir. 1998) (per curiam) (unpublished); *see also Hassan*, 55 F.3d at 1079 (the Fourth Amendment “right extends to seizures by or at the direction of school officials”).

The Panel’s decision in this case, which contravenes Supreme Court and binding Fifth Circuit precedent, makes Fourth Amendment protections unavailable to schoolchildren. This decision creates a troubling and incorrect result where children are denied protection from harm at the hands of police because they are in school. Binding Fifth Circuit decisions and other federal court decisions have rightly declined to diminish protections for schoolchildren. *See, e.g., E.W. ex rel. T.W. v. Dolgos*, 884 F.3d 172, 176 (4th Cir. 2018) (applying *Graham* to SRO handcuffing a schoolchild); *M.D. ex rel. Daniels v. Smith*, 504 F. Supp. 2d 1238, 1248–50 (M.D. Ala. 2007), *aff’d*, 278 F. App’x 987 (11th Cir. 2008) (applying *Graham* where deputy sheriff slammed a student’s head into a car); *Williams v. Morgan*, 652 F. App’x 365, 374 (6th Cir. 2016) (applying *Graham* where SRO broke student’s arm); *Hawker v. Sandy City Corp.*, 591 F. App’x 669, 670, 674–75 (10th Cir. 2014) (applying *Graham* where officer used a twist-lock on a 9-year-old student’s arm).

### **Conclusion**

Given the increase in police use of force against schoolchildren, and the Panel’s departure from binding Supreme Court and Fifth Circuit precedent, it is critical that this Court restore clarity regarding application of the Fourth Amendment’s “objective reasonableness” standard to the use of force against

schoolchildren. As a matter of doctrine and public policy, Fourth Amendment protections must be available to schoolchildren. This Court should grant rehearing *en banc* and affirm the district court.

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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

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 2,560 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: August 23, 2021

/s/ Andre Segura  
Andre Segura

**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 August 23, 2021. Service on all counsel of record for all parties will be accomplished electronically through the CM/ECF system.

Dated: August 23, 2021

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