No. _____

In The
Supreme Court of the United States

LYNN SWANSON, ET AL.,

Conditional Cross-Petitioners,

v.

DOUG MORGAN, ET AL.,

Conditional Cross-Respondents.

On Conditional Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in this qualified immunity appeal from a motion to dismiss, the Fifth Circuit's discussion of the merits of the underlying Constitutional issues should be vacated because the Fifth Circuit correctly held that the law was not clearly established, the parties do not have a continuing interest in the legal issues at stake, and the Fifth Circuit's discussion of the Constitutional issue constitutes an impermissible advisory opinion.

PARTIES TO THE PROCEEDINGS

The following parties, the conditional cross-petitioners, participated in the proceedings below as defendants-appellants: Lynn Swanson, in her individual capacity and as Principal of Thomas Elementary School, and Jackie Bomchill, individually and as Principal of Rasor Elementary School.

The following parties, the conditional cross-respondents, participated in the proceedings below as plaintiffs-appellees: Jonathan Morgan, by and through his parents and legal guardians Doug and Robin Morgan; Doug Morgan, individually; Robin Morgan, individually; Michael and Kevin Shell, by and through their parents and legal guardians, Jim and Sunny Shell; Michaela, Malcolm and Bailey Wade, by and through their parent and legal guardian, Christine Wade; Stephanie Versher, by and through her parent and legal guardian, Sherrie Versher; and Sherrie Versher, individually.

The following additional parties participated in the proceedings before the district court: Plano Independent School District; Lisa Long, in her individual capacity and as Principal of Wells Elementary School; Suzie Snyder, individually; John Beasley, individually; Carole Greisdorf, individually and as the Assistant Superintendent of Plano Independent School District; and Doug Otto, individually and as the Superintendent of Plano Independent School District.

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OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Fifth Circuit is reported at 659 F.3d 359 and appears at App. 1 to petitioners' petition for writ of certiorari (all appendix citations are to petitioners' appendix in No. 11-804). The opinion of the Fifth Circuit panel is reported at 627 F.3d 170 and appears at App. 130. The panel opinion made minor changes and superseded the initial opinion of the panel, which is reported at 620 F.3d 877. The report and recommendation of the magistrate judge to deny respondent Swanson's first motion to dismiss, together with the order of the district court adopting it, is unreported but appears at App. 175. The report and recommendation of the magistrate judge to deny respondents Bomchill's and Swanson's motion to dismiss based on qualified immunity, together with the order of the district court adopting it, is reported at 612 F. Supp. 2d 750 and appears at App. 158.

JURISDICTION

The Fifth Circuit issued its en banc decision on September 27, 2011. Petitioners filed their petition for writ of certiorari on December 22, 2011, and it was docketed on December 27, 2011. This Court has jurisdiction under 28 U.S.C. section 1254(1) and Supreme Court Rule 12.5, which permits the filing of a conditional cross-petition for writ of certiorari within 30 days after a case has been placed on the docket.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

42 U.S.C. Section 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of

> Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

This is an interlocutory appeal from the denial by the district court of a motion to dismiss based on qualified immunity. App. 3-4. On December 15, 2004, petitioners brought suit alleging that Plano Independent School District ("the school district") and some of its employees, including conditional cross-petitioners Swanson and Bomchill, had violated petitioners' free speech rights. App. 178. Petitioners allege that they had a free speech right under the First Amendment to pass out various non-curricular, religious materials to their elementary-school classmates at school during the school day and that the school district and its employees violated petitioners' rights by preventing them from distributing those materials. App. 3. The underlying Constitutional issue in this case, as the Fifth Circuit pointed out, relates to the application of the First Amendment to the distribution of written religious materials by elementary school students at school. App. 1-2; *see also* App. 27 ("Neither the Supreme Court nor this Court has explained whether *Tinker* or *Hazelwood* governs students' dissemination of written religious materials in public elementary schools.").

The incidents relating to Swanson and Bomchill involved petitioners Jonathan Morgan and Stephanie Versher and occurred during the 2003-2004 school year. App. 261-297 and 305-320. Swanson was the principal of Thomas Elementary School, where Jonathan Morgan was in third grade. App. 233. Bomchill was the principal of Rasor Elementary School, where Stephanie Versher was in fifth grade. App. 4 and 315.

Due to the passage of time and other intervening events, Jonathan Morgan and Stephanie Versher are no longer in need of any protection from the challenged practice because neither of them is in elementary school and Stephanie is no longer a student with the school district, nor even in a school within the Fifth Circuit. Since the Vershers have moved to Georgia, Stephanie is no longer a student with Plano Independent School District, and, moreover, she should have graduated from high school in the Spring of 2011. App. 221 ("Sherrie Versher now resides in the State of Georgia."); App. 224 ("The Versher Plaintiffs . . . are not presently attending school in the PISD."); App. 236 ("Sherrie Versher and Stephanie Versher formerly resided in an area that is encompassed by the PISD."). Jonathan Morgan is at least 16 years old, is no longer in elementary school and should be graduating from high school during the 2012-2013 school year. App. 233 ("During the academic year 2003-2004, Jonathan Morgan was a third grade student enrolled at Thomas [Elementary School]."); App. 232 ("In December of 2003, Jonathan Morgan was 8 years old."). Similarly, Bomchill is no longer in a position to affect

petitioners' claimed rights or to be affected by the Fifth Circuit's decision because she is no longer the principal of Rasor Elementary School and is not employed by Plano Independent School District. App. 4 ("former principal of Rasor Elementary School").

Swanson and Bomchill filed a motion to dismiss based on qualified immunity. App. 160. The magistrate judge issued a report and recommendation, recommending that the motion to dismiss be denied. *Id.* Swanson and Bomchill timely objected to the magistrate's report and recommendation, but the district court nevertheless adopted the report and recommendation without alteration. App. 158. Swanson and Bomchill filed an interlocutory appeal to the United States Court of Appeals for the Fifth Circuit. App. 4. A panel of the Fifth Circuit affirmed the decision of the district court denying qualified immunity. App. 130. Swanson and Bomchill filed a timely petition for rehearing en banc, which was granted by the Fifth Circuit. App. 156. The Fifth Circuit issued its en banc decision granting qualified immunity to Swanson and Bomchill. App. 1.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit, in its en banc decision, joined every federal appellate court that has addressed cases like the one at bar and granted qualified immunity to cross-petitioners, two elementary school principals. App. 17 ("[N]o federal court of appeals has

ever denied qualified immunity to an educator in this area."). A separate majority of the Fifth Circuit, however, issued an impermissible advisory opinion or "preliminary" adjudication maintaining that the facts as alleged in petitioners' complaint would state a claim upon which relief could be granted. App. 2 (separate majority represents opinion of the court on the Constitutionality of the alleged conduct); App. 86-93, 98-109 (Elrod, J., writing for separate majority in Parts III A, C and D of her opinion). The separate majority opinion addressing the Constitutionality of cross-petitioners' alleged conduct is an unreviewable decision, the issuance of which directly conflicts with this Court's recent decision in *Camreta v. Greene*, No. 09-1454, 131 S. Ct. 2020 (May 26, 2011). This Court held in *Camreta* that when, as here, the public officials are entitled to qualified immunity because the law was not clearly established and subsequent events have rendered it impossible for the plaintiffs to be subject to the same alleged public action, the underlying Constitutional question is moot and lower courts may not issue what amounts to an advisory opinion. *Id.* at 2033-36.

The case at bar relates to the application of the free speech clause in the elementary school context, but, as in *Camreta*, the passage of time and distance has moved the plaintiffs beyond the reach of any restrictions that might be imposed on elementary school students and has, consequently, rendered the Fifth Circuit's Constitutional ruling unreviewable. *See id.* at 2034. In addition, as Judges King, Davis and Garza

pointed out in their concurring opinions, the case at bar, in its current procedural posture, provides a particularly poor vehicle for determining the scope and application of the free speech clause in elementary schools because of numerous factual issues that are unclear or in dispute. App. 61-63. The better procedure, and the one required by *Camreta*, was for the Fifth Circuit to reserve judgment on the Constitutionality of the alleged conduct until such time as it was appropriate to make a ruling on that issue. In keeping with this Court's holding in *Camreta*, the Fifth Circuit's decision on the Constitutionality of cross-petitioners' alleged conduct should be vacated. *Camreta*, 131 S. Ct. at 2035.

I. This Court recently emphasized that, in deciding qualified immunity cases, lower courts may not address the merits of the underlying Constitutional question when the law was not clearly established and the Constitutional question is moot.

Lower courts should not address the merits of underlying Constitutional issues in qualified immunity cases when the law was not clearly established and the Constitutional question is moot as to the parties to the appeal. *Camreta*, 131 S. Ct. at 2035-36; *see also id.* at 2036 (Scalia, J., concurring) (would be willing to consider ending the extraordinary practice of ruling on Constitutional questions unnecessarily when the defendant possesses qualified immunity); *Id.* at 2043 (Kennedy, J., dissenting) (same). This Court's

prohibition on considering Constitutional questions that are moot, aside from being an aspect of the Constitutional restriction on this Court's jurisdiction to "cases and controversies," fulfills the "longstanding principle of judicial restraint [that requires] courts [to] avoid reaching constitutional questions in advance of the necessity of deciding them." *Id.* at 2031 (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988)).

In *Camreta*, an Oregon child protective services worker and a county deputy sheriff interviewed a girl at her elementary school about allegations that her father had sexually abused her. *Id.* at 2026. The girl's mother subsequently sued the government officials on the child's behalf for damages pursuant to 42 U.S.C. section 1983, claiming that the interview violated the Fourth Amendment. *Id.* The United States Court of Appeals for the Ninth Circuit held that the interview violated the Fourth Amendment, but also held that the public officials were entitled to qualified immunity because the Constitutional right at issue was not clearly established under existing law. *Id.* The two officials sought review in this Court of the Ninth Circuit's ruling on the Fourth Amendment. *Id.* While this Court held that government officials who prevail on grounds of qualified immunity may obtain review of a court of appeals' decision that their conduct violated the Constitution, this Court concluded that the *Camreta* case could not be reviewed because it had become moot over the course of time. *Id.* Instead, the portions of the Ninth Circuit's opinion relating to

the alleged violation of the Fourth Amendment were vacated. *Id.* at 2026-27.

This Court explained in *Camreta* that, while parties to a suit might normally retain an interest or stake in the outcome of the case during the pendency of an appeal, circumstances can change such that the case becomes moot. *Id.* at 2033-34. In *Camreta*, which centered on the application of Fourth Amendment protections to a minor in school, the following factors, along with the grant of qualified immunity, had mooted the plaintiff's stake in the case: (1) the plaintiff, S.G., had moved to Florida and had no intention of relocating back to Oregon; and (2) S.G. was only months away from her 18th birthday and "presumably, from her high school graduation." *Id.* at 2034.

> S.G. therefore cannot be affected by the Court of Appeals' ruling; she faces not the slightest possibility of being seized in a school in the Ninth Circuit's jurisdiction as part of a child abuse investigation.

Id. In addition, this Court noted that one of the defendants (the county deputy sheriff) no longer had an interest because he no longer worked for the county or in law enforcement, but did not address the effect that this factor would have on the case because the other defendant retained an on-going interest. *Id.* at 2034 n.9.

In other words, *Camreta* was moot because (1) the plaintiff was no longer a student within the Ninth Circuit or in the same school district and, (2) moreover,

because the plaintiff was no longer within the class of individuals for whom the relevant Constitutional issue (application of the Fourth Amendment to a student) could arise. *Id.* at 2034. Because subsequent events had made it absolutely clear that the allegedly wrongful behavior could not be reasonably expected to recur, the Court had no live controversy to review. *Id.* "Time and distance combined have stymied our ability to consider this petition." *Id.*

II. The Fifth Circuit violated this Court's precedent by issuing an unreviewable decision on the Constitutionality of cross-petitioners' alleged conduct.

This Court's decision in *Camreta*, issued shortly before the Fifth Circuit issued its en banc decision in the case at bar, should have meant that the Fifth Circuit was prevented from ruling on the Constitutionality of cross-petitioners' alleged conduct. However, the Fifth Circuit instead issued an unreviewable decision holding that cross-petitioners' alleged conduct violated the First Amendment.

This Court explained in *Camreta* that when subsequent events make it clear that the allegedly wrongful behavior could not reasonably be expected to recur, there is no live controversy to review and the public officials are deprived of their appeal rights. *Id.* at 2034; *Id.* at 2035 ("In this case, the happenstance of S.G.'s moving across country and becoming an adult has deprived Camreta of his appeal rights. Mootness

has frustrated his ability to challenge the Court of Appeals' ruling that he must obtain a warrant before interviewing a suspected child abuse victim at school."). Under such circumstances, the parties no longer "retain a stake in the outcome." *Id.* at 2033.

The parties in the case at bar no longer retain the necessary "stake" in the outcome of the case for much the same reasons that this Court considered in *Camreta*. *See id.* While the case at bar relates to the application of the free speech clause to elementary school students, the plaintiffs are no longer in elementary school. App. 1, 232-33 and 315. In addition, the Vershers (the only plaintiffs with claims against Bomchill) no longer reside within the school district, nor even within the Fifth Circuit. *See* App. 221, 224, and 236. Finally, Bomchill is no longer employed by the school district. App. 4.

In light of *Camreta*, the interests of the plaintiffs in the Constitutional rights of elementary school students have become moot.

III. The Fifth Circuit's discussion of the merits of the underlying Constitutional issue in this case should be vacated so that no party is harmed by the lower court's advisory opinion.

The Fifth Circuit's discussion of the merits of petitioners' Constitutional claim should be vacated in accordance with this Court's recent instructions in

Camreta. When a civil suit becomes moot pending appeal, it is this Court's established practice to vacate the judgment below. *Id.* The equitable remedy of vacatur ensures that those who have been prevented from obtaining the review to which they are entitled are not treated as if there had been a review. *Id.* Vacatur prevents an unreviewable decision (unreviewable because moot) "from spawning any legal consequences," so that no party is harmed by what this Court has called a "preliminary" adjudication. *Id.* (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40-41 (1950)).

The portions of the Fifth Circuit's decision on the Constitutionality of Swanson's and Bomchill's alleged conduct was improper for the reasons set forth in this Court's recent decision in *Camreta*. In addition, the Fifth Circuit's violation of *Camreta* is a clear violation, on nearly identical legal circumstances, and warrants summary disposition via the equitable remedy of vacatur.

CONCLUSION

The conditional cross-petition for writ of certiorari should be granted and the portions of the Fifth Circuit's opinion addressing the Constitutionality of Swanson's and Bomchill's alleged conduct should be summarily vacated.

Respectfully submitted,

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