No. 07-1089

In The
Supreme Court of the United States

DR. HERMAN SMITH,

Petitioner,

v.

KAREN JO BARROW,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND IN SUPPORT OF PETITIONER

LISA A. BROWN
Counsel of Record
BRACEWELL & GIULIANI LLP
711 Louisiana, Suite 2300
Houston, Texas 77002
(713) 223-2300

ERIN GLENN BUSBY
411 Highland
Houston, Texas 77009

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF AMICUS CURIAE[1]

The Texas Association of School Boards (TASB) established the Legal Assistance Fund (LAF) under a Trust Agreement 26 years ago. The purpose of the LAF is to assist parties whose positions are aligned with the interests of Texas school districts by advocating through litigation for issues or causes that generally affect or will affect the public schools of Texas. Nearly 800 of the state's 1,036 public school districts are members of the LAF.

A Board of Trustees governs the LAF. The Board has nine members from three different entities: (1) TASB; (2) the Texas Association of School Administrators (TASA); and (3) the Texas Council of School Attorneys (TCSA).

TASB is a Texas non-profit corporation whose voluntary membership consists of the 1,036 school boards in the State. TASB's members are responsible for governing Texas public schools. TASB's mission is to promote educational excellence for Texas school children through advocacy, visionary leadership, and high quality services to school districts. Through a contract with the LAF, TASB provides administrative

---

[1] The parties were notified more than ten days before the due date of the amicus' intent to file. The parties have given written consent to the filing of this brief. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the amicus curiae and their counsel made any monetary contribution to the preparation or submission of this brief.

services to the LAF. TASB also serves as the contract administrator for the TASB Risk Management Fund (RMF), a separate legal entity which was created as an administrative agency of cooperating local governments under the Texas Interlocal Cooperation Act. The RMF's general objectives are to formulate, develop, and administer, on behalf of RMF members, a program of collective self-funding of risk and benefits. A board operates the RMF on a non-profit basis. The RMF was not involved in the drafting or funding of this *amicus curiae* brief.

TASA represents the state's school superintendents and other administrators responsible for carrying out the education policies adopted by their boards of trustees. TASA's mission is to promote, provide, and develop leadership that champions educational excellence.

The TCSA is a council associated with TASB. TCSA's purpose is to improve the quality and effectiveness of legal services to school districts throughout the state of Texas.

SUMMARY

The Court should grant the writ to resolve the conflict in the lower courts over two important questions: the proper level of scrutiny to be applied to parental rights claims and the proper method of addressing the defense of qualified immunity at a

trial on the merits following a pretrial denial of immunity at the summary judgment stage.

School officials on a daily basis must make a wide range of policy decisions that affect the parental rights of school employees and parents of students. Depending on the circuit and the policy at issue, however, schools may face rational basis scrutiny, strict scrutiny, or something in between for review of these decisions. The lack of a uniform approach to addressing parental rights claims in the courts of appeals has injected confusion and uncertainty into many areas of school administration.

In this case, the court below acknowledged precedents favoring rational basis review of the employment policy at issue, but it ultimately applied heightened scrutiny, if not strict scrutiny. Citing its own past decisions, the court held that the policy would be permissible only if the school could show that it was necessary to prevent a material and substantial disruption of the school's educational mission. The Fifth Circuit's formulation of heightened scrutiny is not drawn from this Court's parental rights cases, but, rather, was imported from this Court's and the Fifth Circuit's free speech precedents.

Given the frequency of parental rights challenges against schools, the need for guidance from the Court is acute. If the standard will differ in different contexts, as the lower court held, then these boundaries must be appropriately defined. Such guidance will assist school officials in making constitutionally

sound decisions regarding a broad range of school policies.

This case also presents an important question regarding the proper handling of qualified immunity at trial following an unfavorable ruling at the motion for summary judgment stage. The Fifth Circuit held that, because of an adverse pretrial ruling, the superintendent was precluded from asserting immunity at trial. This holding is out of step with other circuits, which generally agree that immunity does not vanish from the case after an adverse pretrial determination. An unfavorable qualified immunity ruling at the summary judgment stage merely means that the official must stand trial; it does not mean that the official has forfeited his immunity from paying damages. Other courts agree that the district court still may grant immunity at the close of plaintiff's evidence or after the jury has rendered factual findings. The Fifth Circuit's "law of the case" ruling is inconsistent with these other appellate decisions and severely undermines the purpose of qualified immunity.

This Court's decision in *Behrens v. Pelletier*, 516 U.S. 299 (1996), demonstrates that an unfavorable pretrial determination regarding immunity will not prevent the public official from asserting the defense at later stages of the litigation. In *Behrens*, the Court held that a public official who unsuccessfully appeals the denial of a motion to dismiss is entitled to take a second interlocutory appeal following the denial of a subsequent motion for summary judgment. This case

represents the next logical step after *Behrens*. While *Behrens* concerned a motion for summary judgment filed after an unsuccessful motion to dismiss, *Barrow* concerns a trial on the merits after an unsuccessful motion for summary judgment. Just as the immunity analysis may be "different on summary judgment than on an earlier motion to dismiss," 516 U.S. at 309, the immunity analysis may be different at trial than on an earlier motion for summary judgment. This Court should grant the writ and clarify the process for handling qualified immunity at trial after an unfavorable immunity ruling at the summary judgment stage.

ARGUMENT

I. The Court should grant the writ to resolve the conflict over the proper level of scrutiny to be applied to parental rights claims.

The decision by the court of appeals below added complexity and confusion to an area of the law – the treatment of parental rights – in which schools already face uncertainty. The court of appeals' application of heightened scrutiny to a parental rights claim not combined with a free exercise claim not only conflicts with standards applied by other circuits, it creates tension with the treatment of other intimate association claims in the same context.

A. The conflict in the lower courts regarding the proper level of scrutiny leaves schools without guidance in implementing a broad range of policies.

The lower courts have not adopted a uniform approach to addressing parental rights claims. They have applied standards varying from rational basis scrutiny, to a heightened or intermediate scrutiny, to strict scrutiny. Consequently, schools lack certainty about the level of scrutiny that will be given to their policies when a parental rights challenge is made.

This uncertainty and lack of uniformity is a matter of great importance to schools and parents. Disputes over parental rights arise in many contexts and are a source of considerable litigation against the public schools. Parents have challenged policies touching on all aspects of school management, including regulations and policies affecting home-school and private school students[2] and respecting such matters

---

[2] *See, e.g., Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15 (1st Cir. 2004) (parents of disabled child who attended private religious school challenged provision of greater special education services to public school students than to private school students); *Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338 (3d Cir. 2004) (parents challenged school district's refusal to permit girl enrolled in cyber charter school to participate in interscholastic basketball); *Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036 (9th Cir. 2000) (parents challenged school district's refusal to provide speech therapy services to home-school students); *Swanson v. Guthrie Indep. Sch. Dist. No. 1-L*, 135 F.3d 694 (10th Cir. 1998) (parents challenged district's policy not to allow home-school student to attend public school part-time).

as health education, community service requirements, and school dress codes.[3]

Schools need guidance from the Court on what scrutiny should be applied to these school regulations. Such guidance will assist school officials in making constitutionally sound decisions, which in turn will aid in reducing costly litigation involving disputes over parental rights claims and the related issue of whether a school official is entitled to qualified immunity from a parental rights claim.

In this case, an applicant for an administrative position claimed that her parental rights were infringed by a policy requiring her to enroll her children

---

[3] *See, e.g., Parker v. Hurley,* 514 F.3d 87 (1st Cir. 2008) (parent challenged curriculum); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159 (3d Cir. 2005) (parent challenged administration of student questionnaire that sought personal information used to plan student-related community activities); *Leebaert v. Harrington*, 332 F.3d 134 (2d Cir. 2003) (parent challenged school's requirement that his son attend a mandatory health course); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001) (parent challenged school uniform policy); *Blau v. Fort Thomas Public Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005) (parent challenged dress code); *Herndon v. Chapel-Hill Carrboro City Bd. of Educ.*, 89 F.3d 174 (4th Cir. 1996) (parent challenged requirement that students perform 50 hours of community service); *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454 (2d Cir. 1996) (parent challenged community service program); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197 (9th Cir. 2005) (parent challenged administration of a survey including questions on sexual subjects); *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995) (parents challenged students' compelled attendance at AIDS awareness assembly).

in public school. *Barrow v. Greenville Indep. Sch. Dist.* (*Barrow III*), 2007 WL 3085028 (5th Cir., Oct. 23, 2007). In reviewing this claim, the court acknowledged precedents favoring rational basis review, but it ultimately applied heightened scrutiny, if not strict scrutiny. Following *Brantley v. Surles*, 718 F.2d 1354 (5th Cir. 1983), and *Fyfe v. Curlee*, 902 F.2d 401 (5th Cir. 1990), the court of appeals held that the school's actions would be permissible only if Barrow's sending her children to a private school "materially and substantially" impeded the operation or effectiveness of the educational program. 332 F.3d at 848. While this does not meet all the requirements of strict scrutiny, it is clearly more stringent than requiring that a policy rationally further a legitimate state objective.

The Fifth Circuit's formulation of intermediate scrutiny is not drawn from any of this Court's parental rights cases. The *Brantley* court imported the "material and substantial" interference standard from this Court's and Fifth Circuit precedents regarding the exercise of free speech rights by school employees and students. *See Brantley*, 718 F.3d 1354, 1359 (*citing Pickering v. Bd. of Educ.,* 391 U.S. 563 (1968), *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969), and *Van Ooteghem v. Gray*, 628 F.2d 488 (5th Cir. 1980)). While describing this Court's precedents

in *Pierce*, *Meyer*, and *Yoder*[4] as recognizing a right to familial privacy, the *Brantley* court failed to examine what level of scrutiny was employed in those cases. Perhaps it is for this reason that the Fifth Circuit in *Barrow III* "acknowledge[d] that it is possible to argue that . . . only rational basis – and not strict scrutiny – should be applied in evaluating a state action that imposes requirements on parental decisions regarding education." *Barrow III*, 2007 WL 3085028 at 7.

The Fifth Circuit has in fact previously applied a less stringent standard when assessing a parental rights claim. In *Littlefield v. Forney Independent School District*, 268 F.3d 275 (5th Cir. 2001), which involved a challenge to a school uniform policy, the court stated that rational basis is the proper level of scrutiny "in the public school context."[5] This decision is consistent with the analysis of several other circuits. *See, e.g., Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 461-462 (2d Cir. 1996) (holding that rational basis review applies when "parents seek for secular

---

[4] *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

[5] The court also applied what appears to have been rational basis review in a case involving a university coach who was terminated when his son decided to enroll at a rival college. In *Kipps v. Callier*, 197 F.3d 765, 769 (5th Cir. 1999), the court held that the school's concerns about a negative impact on "alumni relations and recruiting efforts" were objectively reasonable and, thus, the defendants were immune from the coach's claims. *Kipps* did not require proof of a material and substantial disruption.

reasons to exempt their child from an educational requirement and the basis is a claimed right to direct the 'upbringing' of their child").

The court below attempted to distinguish parental rights cases dealing with issues such as school curriculum on the ground that those cases relate "to what goes on at the public school" while a school's decision not to promote a teacher does not "*in any way* relate to what occurs" at school. *Barrow III*, 2007 WL 3085028 at 7 (emphasis added). The court's assertion that personnel decisions do not relate "in any way" to what occurs at school is out of touch with the reality of school management. A successful school administrator wears many hats: educator, counselor, disciplinarian, public relations manager, and community leader. Amici's collective experience is that the selection of assistant principals, principals, and superintendents and the assignment of specific personnel to particular campuses unquestionably impacts what occurs at any given school. The ability of a district to transform a struggling school into a successful one very often hinges on the right combination of personnel on the campus. This is particularly true in small, one-high-school districts such as Greenville ISD, but it also is true in urban areas where convincing parents to support a troubled campus is paramount among the administrator's duties.

In addition, courts have applied rational basis review to parents' claims that regulation of matters outside the public schools infringed their right to

direct their children's education. For example, in *Murphy v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988), the Eighth Circuit held that the Arkansas Home School Act (in particular the Act's requirements that parents file information with the school district and submit children to standardized testing) was subject only to rational basis review. *See also Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036 (9th Cir. 2000) (school district's provision of speech therapy services only to students who attended a school, *i.e.*, were not homeschooled, was subject only to rational basis review).

The application of rational basis scrutiny to parental rights claims concerning education is consistent with this Court's precedents. This Court stated in *Meyer v. Nebraska*, 262 U.S. 390 (1923), that parental rights may not be infringed "by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." *Id.* at 399-400; *see also Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (parental rights "may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state"). The Court echoed the language of rational basis scrutiny in *Runyon v. McCrary*, 427 U.S. 160 (1976), holding that there is no right to a private education that is "unfettered by reasonable regulation." *Id.* at 177.

Some circuit courts, however, have applied more stringent standards to parental rights claims on the

basis that they implicate "fundamental rights." *See, e.g., Doe v. Heck*, 327 F.3d 492, 519 (7th Cir. 2003) ("after *Troxel*, it is not entirely clear what level of scrutiny is to be applied" in familial relations cases; "What is evident, however, is that courts are to use some form of heightened scrutiny in analyzing these claims."); *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000) (stating that "[t]he primacy of the parents' authority must be recognized and should yield only where the school's action is tied to a compelling interest."). These decisions follow this Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), in which the plurality opinion referred to parental rights as "fundamental liberty interests" and in which Justice Thomas's opinion treated parental rights as "fundamental rights."

Depending on the circuit and on the policy at issue, schools may face rational basis scrutiny, strict scrutiny, or something in between. If, as the lower court held, the standard will differ in different contexts, then those boundaries should be precisely defined. The Court should grant the petition to resolve these conflicts and to provide greater certainty to school officials whose jobs routinely require them to make decisions that affect school employees, students, and parents.

B. The court of appeals' decision creates an inconsistency with the treatment of other family rights in the same context.

The court's decision below also creates an anomaly in the permissible regulation of school employees. While *Barrow* requires heightened scrutiny of policies affecting the parent-child relationship, courts have applied rational basis scrutiny to policies affecting other rights of intimate association. For example, courts have applied rational basis scrutiny to anti-nepotism policies that affect the right to marry. *Montgomery v. Carr*, 101 F.3d 1117, 1125 (6th Cir. 1996) (upholding rule that prevented two married teachers from working at the same campus); *Waters v. Gaston County*, 57 F.3d 422, 426 (4th Cir. 1995) (upholding rule that barred spouses from working in the same county department). Courts have also applied rational basis review to decisions to fire an employee based on a romantic relationship with another married employee. *Beecham v. Henderson County*, 422 F.3d 372 (6th Cir. 2005). This Court should explain why – if such is the case – it is necessary to apply differing levels of scrutiny to these similar situations.

When rational basis applies, as it does in the anti-nepotism cases, school officials are not required to prove the occurrence of an actual campus disruption in order to justify the employment regulation. *See, e.g., Montgomery*, 101 F.3d at 1130-32 (rejecting plaintiff's argument that the free speech disruption

standard should apply to challenge of nepotism rule; free speech claims required a higher level of scrutiny). Instead, they are required to show only that the policy is rationally related to a legitimate government interest. *Id.*

A school official who must show a "material and substantial" interference with an educational program bears a heavy burden. In *Fyfe*, one of the cases relied on by the court below, a boycott of local businesses had been threatened if any of the school district's employees enrolled their children in segregated private schools. *Fyfe v. Curlee*, 902 F.2d at 405. Even in the face of such a threat, the court held that the school district must show an actual relationship between the plaintiff's enrollment of her daughter in a segregated private school and the boycott to establish "material and substantial interference with the school system's operations and effectiveness." *Id.* Such a stringent requirement is inconsistent with general rules regarding schools' ability to manage their campuses and intrudes upon their authority to do so. *See also Waters v. Churchill*, 511 U.S. 661, 671-72, 673 (1994) (plurality) (acknowledging that the Court has "consistently given greater deference to government predictions of harm" when the government is regulating its employees rather than the public at large); *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (government employees must accept certain limitations of their freedom).

II. Smith's right to present a qualified immunity defense at trial should not have been foreclosed by the denial of his summary judgment or by the Fifth Circuit's erroneous application of law of the case.

A. A school official's immunity defense does not vanish from the case after an unsuccessful motion for summary judgment; the Fifth Circuit's ruling to the contrary is out of step with other circuits.

The Fifth Circuit erred when it held that Smith could not assert a qualified immunity defense at trial following the denial of immunity on the first appeal. Although there is a split among the circuit courts on the precise *process* for addressing immunity once the case has returned to the district court, other circuit courts agree that the defense does not vanish on remand.[6] This Court should grant the petition to provide guidance to the lower courts on the important

---

[6] A recent decision from the Third Circuit catalogs the split, which centers on whether there is a role for the jury in deciding factual issues germane to immunity. *See Curley v. Klem*, 499 F.3d 199, 208 (3d Cir. 2007) (because immunity disputes often involves mixed questions of fact and law, "one is left to ask who should answer them" – the judge or the jury). The Third Circuit noted that the First, Fourth, Seventh, and Eleventh Circuits have approached the matter differently from the courts in the Fifth, Sixth, Ninth, and Tenth Circuits. *Id.* In *Curley*, the court ultimately held that it was proper for the trial court to ask the jury a specific question as to whether the officer's mistake was reasonable. *Id.* at 215.

question of the proper handling of immunity during a trial on the merits.

In this case, contrary to the practice in other circuits, the district court felt so constrained by the appellate ruling in *Barrow I* that it rejected Smith's contention that immunity remained a viable defense, and it denied him an opportunity to present evidence in support of it at trial.[7] The Fifth Circuit affirmed, citing the doctrine of the law of the case. The Fifth Circuit's application of law of the case is at odds with other circuit courts and improperly insulated from review an incorrect ruling on substantive constitutional law – a ruling that is binding on thousands of school employees.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court recognized the important role of immunity in protecting public officials from the disruption and costs associated with litigation. Qualified immunity shields a public officer from suit when he or she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances that the officer confronted. *See Saucier v. Katz*, 533 U.S. 194, 200-201 (2001). The Court has defined a two-part process for evaluating

---

[7] The district court concluded that *Barrow I* "certainly settled the issue of Dr. Smith's non-entitlement to immunity" and that Smith's contention that he was allowed to assert immunity at trial "cannot withstand scrutiny." (App. 143.) Smith's arguments were "foreclosed" by the law of the case. (App. 144.)

claims of immunity. The first step is to determine whether the plaintiff has actually articulated a violation of the Constitution. *Saucier*, 522 U.S. at 201 (stating that the court must evaluate whether, "in the light most favorable to the party asserting the injury," the party has alleged facts showing that the officer violated a constitutional right). If the plaintiff has alleged a constitutional violation, then the court must ask whether the right was clearly established at the time of the official's conduct. *Saucier*, 533 U.S. at 201; *Brosseau v. Hagen*, 534 U.S. 194, 198 (2004) (reasonableness is judged against the backdrop of the law at the time of the conduct). If the law at the time of the conduct did not clearly establish that the officer's conduct would violate the Constitution, "the officer should not be subject to liability or, indeed, even the burdens of litigation." *Brosseau*, 534 U.S. at 198.

The immunity defense is so important that the Court has authorized public officials to file more than one interlocutory appeal of lower court rulings denying immunity. In *Behrens v. Pelletier*, 516 U.S. 299 (1996), the Court specifically rejected the argument that a defendant who unsuccessfully appeals the denial of a motion to dismiss is precluded from filing a second appeal after the denial of a subsequent motion for summary judgment. *Behrens* demonstrates that an unfavorable pretrial determination regarding immunity will not prevent the public official from asserting the defense at later stages of the litigation. The Court recognized that the immunity analysis

"will be different on summary judgment than on an earlier motion to dismiss," when the parties are limited to an assessment of the conduct as alleged in the plaintiff's complaint. *Id.* at 309.

This case represents the next logical step after *Behrens*. While *Behrens* concerned the presentation of immunity via a motion for summary judgment filed after an unsuccessful motion to dismiss, *Barrow* concerns the presentation of immunity at trial following an unsuccessful motion for summary judgment. Just as the immunity analysis may be "different on summary judgment than on an earlier motion to dismiss," *id.* at 309, the immunity analysis may be different at trial than at the summary judgment stage.

When the defense of immunity is presented in a motion for summary judgment,[8] the trial court is obligated to view all of the evidence in the light most favorable to the non-movant. *See Scott v. Harris*, 127 S.Ct. 1769, 1774 (2007) ("As this case was decided on summary judgment, there have not yet been factual findings by a judge or jury," thus courts must "view the facts and draw reasonable inferences 'in the light most favorable to the party opposing'" the motion). At trial, of course, the jury is "not required to view the facts in the light most favorable to [the plaintiff]." *Willingham v. Crooke*, 412 F.3d 553 (4th Cir. 2005). Thus, the qualified immunity defense remains viable

[8] Fed. R. Civ. Pro. 56.

upon remand. *Id.* at 559. For example, in *Willingham*, on a subsequent appeal after a trial on the merits, the court rejected the plaintiff's argument that the ruling in the first appeal definitively disposed of the qualified immunity issue because the evidence at summary judgment was essentially the same as the evidence produced at trial. "[I]n affirming the denial of summary judgment we decided only that the forecasted evidence, when viewed in the light most favorable to Willingham, established a violation of clearly established law." *Id.*

In *Barrow I*, in rejecting Smith's immunity defense, the Fifth Circuit acknowledged that its analysis required it to view the facts in the light most favorable to Barrow. 332 F.3d at 846. *Barrow I*, thus, did not conclusively decide immunity for all purposes. An unfavorable immunity ruling on appeal merely means that the public official must stand trial; it does not mean that the official has forfeited his immunity from paying damages. Upon remand, the trial court must evaluate whether the evidence *at trial* demonstrates that the defendant actually violated a clearly established constitutional right in an objectively unreasonable manner. Depending on the facts presented at trial, the trial court still may grant immunity at the close of the plaintiff's evidence or after the jury has rendered factual findings. *See, e.g., Curley v. Klem*, 499 F.3d 199 n. 12 (3d Cir. 2007) (concluding that neither the jury nor the district court was bound "by our earlier statements involving a hypothetical

set of facts favoring [the plaintiff], since the facts and inferences actually found by the jury were clearly different than those which we were required to posit in *Curley I* when considering the summary judgment order"); *Stephenson v. Doe*, 332 F.3d 68, 80-81 (2d Cir. 2003) (recommending the use of special interrogatories to decide the facts while requiring the district court "to make the ultimate legal determination of whether qualified immunity attaches on those facts").

The Fifth Circuit's ruling disallowing the defense of immunity at trial is at odds with other circuits and is contrary to the public policy that informs the Court's immunity jurisprudence. This Court should grant the petition to clarify the process that the lower courts must use when addressing the defense of qualified immunity following an appellate denial of immunity.

B. The Fifth Circuit's law of the case ruling is inconsistent with other appellate decisions and undermines the purpose of qualified immunity.

In *Barrow III*, the court of appeals acknowledged that Smith's rational basis argument had merit, particularly in light of the jury's rejection of Barrow's

religion claim, but it refused to revisit the issue of immunity, claiming law of the case.[9]

Law of the case is an "amorphous concept" that directs a court's discretion but "does not limit the tribunal's power." *Arizona v. California*, 460 U.S. 605, 618 (1983). The doctrine of law of the case does not apply if the prior decision is "clearly erroneous and would work a manifest injustice." *Id.* Appellate courts appropriately have rejected law of the case arguments in immunity cases where the evidence at trial was different than the evidence presented at summary judgment.[10]

---

[9] *See, e.g., Barrow III,* 2007 WL 3085028 at 7 (acknowledging "that it is possible to argue" that only rational basis should apply) and at 8 ("*Yoder* arguably supports Smith's contention that heightened scrutiny is appropriate only where the state action also adversely affects free exercise of religion, which the jury verdict in this case makes clear is no longer at issue").

[10] *See, e.g., Hamilton v. Leavy*, 322 F.3d 776 (3d Cir. 2003) (court of appeals was not bound by the denial of qualified immunity in the first appeal because new evidence was introduced upon remand; "[t]his exception to the law of the case doctrine makes sense because when the record contains new evidence, 'the question has not really been decided earlier and is posed for the first time' "); *Vaughn v. Ruoff*, 304 F.3d 793 (8th Cir. 2002) (earlier panel opinion denying qualified immunity in parental rights case was not binding in subsequent appeal; the opinion on the first appeal was prompted by the court's duty to give all reasonable inferences to the plaintiffs and did not foreclose some other analysis "when all the evidence was in"); *Oladeinde v. City of Birmingham*, 230 F.3d 1275 (11th Cir. 2000) (law of the case did not apply to third appeal in First Amendment case where prior panel did not explain its decision and

(Continued on following page)

During the first appeal, the court assumed that Barrow's evidence supported a free exercise claim and a parental rights claim, and it treated these claims in tandem. The jury, however, ultimately found that Barrow's evidence in fact did not support a free exercise claim. This fact alone demonstrates that the landscape of the case had changed between *Barrow I* and *Barrow III*.

The court during the first appeal also concluded, *based on the summary judgment record then available*, that Smith had not produced evidence demonstrating that Barrow's enrollment of her children in private school "would negatively impair district operations." *Barrow*, 332 F.3d at 848. Setting aside for a moment the Fifth Circuit's errors in imposing a burdensome disruption standard on Smith's decision, Smith should have been permitted to introduce evidence regarding the negative impact on district operations. The district court, however, refused to recognize the viability of immunity on remand and disallowed much of Smith's evidence. (R. 4603.) The

---

where evidence at trial was different); *Wilson v. Morgan*, 477 F.3d 326 (6th Cir. 2007) (holding that earlier denial of qualified immunity was not law of the case as to the issue of probable cause; "[n]othing in our prior decision precluded the magistrate judge from considering the probable cause question because it was unclear at that time which officers knew what information"); *Wysong v. City of Heath*, 2008 WL 185798 (6th Cir., Jan. 22, 2008) (unpublished) (holding that court of appeals was not bound by first denial of qualified immunity where substantially new evidence was introduced after remand).

excluded evidence included testimony from Barrow herself that individuals in the community reasonably could view a senior administrator's decision to enroll her children in private school as a vote of no-confidence in the public schools. (R. 4603, 4622-4623.) This testimony, from Barrow's 2005 deposition, was not part of the 2003 appeal. (R. 4622-4623.)

Against this backdrop – a summary judgment standard that favored Barrow's view of the evidence during the first appeal, the district court's improper determination that qualified immunity had vanished from the case after remand, and the jury's subsequent rejection of Barrow's religion claims – the *Barrow III* court erred when it applied the law of the case to block reconsideration of Smith's immunity defense to the parental rights claim.

The doctrine of law of the case was "understandably crafted with the course of ordinary litigation in mind." *Arizona*, 460 U.S. at 618. Because of their decisive role in defining the parameters of clearly established law, immunity appeals are not ordinary litigation. A major purpose of declaring constitutional rules within an immunity appeal is to provide guidance to other government officials who will be affected by the ruling. *See Wilson v. Layne*, 526 U.S. 603, 609 (1999) (deciding the constitutional question first "promotes clarity in the legal standards for official conduct"); *see also Scott v. Harris,* 127 S.Ct. 1769, 1774 (2007) (stating that, in an immunity appeal, it may be necessary to "set forth principles which become the basis for a [future] holding that a

right is clearly established") (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). This purpose is not served when a court of appeals applies law of the case to refuse to consider an immunity defense in light of all the facts of the case.

This Court should grant the petition and clarify the process for handling immunity at trial after the denial of summary judgment.

CONCLUSION

The petition for writ of certiorari should be granted, and the judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

LISA A. BROWN
Counsel of Record
BRACEWELL & GIULIANI LLP
711 Louisiana, Suite 2300
Houston, Texas 77002
(713) 223-2300

ERIN GLENN BUSBY
411 Highland
Houston, Texas 77009