No. 21-130

In The Supreme Court of the United States

JACK DARRELL HEARN; DONNIE LEE MILLER; JAMES WARWICK JONES,

Petitioners,

vs.

STEVEN McCRAW, in his Official Capacity as Director of the Texas Department of Public Safety; and, SHEILA VASQUEZ, in her Official Capacity as Manager of the Texas Department of Public Safety-Sex Offender Registration Bureau,

Respondents.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

RICHARD GLADDEN
LAW OFFICE OF RICHARD GLADDEN
1204 W. University Dr., Ste. 307
Denton, Texas 76201
940/323-9300 (voice)
richscot1@hotmail.com (email)

WM. T. HABERN
Counsel of Record for Petitioners
THE HABERN LAW FIRM
P.O. Box 130744
Houston, Texas 77219
713/942-2376 (voice)
bill@paroletexas.com (email)

Counsel for Petitioners

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Under 42 U.S.C. §1983, and the Continuing Violations Doctrine, Does a "Separate Accrual Rule," or in Contrast a "Discovery of Injury Rule," Apply to a Claim which Challenges Governmental Conduct that has Occurred *Within* a Limitations Period, after a Violation has Allegedly Occurred Previously *Outside* the Limitations Period, Pursuant to the Same Policy?

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INTRODUCTION

The Petitioners were each induced to enter their negotiated pleas of guilty as the result of Texas statutory law in effect at the time of their pleas, which provided that upon their successful completion of "deferred adjudication" community supervision they would be discharged from community supervision "without a finding of guilt," and they would no longer be required to register as "sex offenders" under Texas law thereafter. Having successfully completed their terms of community supervision, Petitioners were not convicted of any offense, "sexual" or otherwise, and trial court orders to that effect are included in the record.[1] Notably, on the basis of the potential benefits he reasonably expected to receive in exchange for his agreement to plead guilty, Petitioner Miller was induced to enter his negotiated plea of guilty *after a jury had been unable to reach a finding of guilt at a trial of his case*.[2]

On May 30, 1993, Texas law was amended to expand the definition of a "reportable sex offense" to include persons placed on "deferred adjudication" community supervision for "sex offenses" allegedly committed "on or after September 1, 1993."[3] However, the Petitioners were each placed on deferred adjudicated

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[1] Petitioners' Trial Exhibits, Record on Appeal ("ROA"), ROA.968; ROA.992; and ROA.1000–ROA.1001.

[2] Petitioners' Trial Exhibits, Record on Appeal ("ROA"), ROA.942-943.

[3] *See* Act of May 30, 1993, 73rd Leg., R.S., ch. 866, §4, 1993 Tex. Gen. Laws 3420, 3420-3421.

community supervision for offenses allegedly committed prior to September 1, 1993, so this amendment to Texas law did not affect Petitioners' negotiated plea bargain agreements.[4] Nonetheless, due to an amendment to Texas law in 2005, the definition of a "reportable sex offense" under Texas law was further expanded to include Petitioners' placements on deferred adjudication community supervision; and, as previously discussed, Pet. at 4, Petitioners were then required to register as "sex offenders" for life in violation of their plea bargain agreements.[5]

ARGUMENT

I. The Supreme Court has Recently Shown an Interest in Reviewing the Circuit Split Regarding the "Separate Accrual" Doctrine Raised by the Question Presented.

During its October Term of 2020 the Supreme Court was presented with a "separate accrual" doctrine question very similar to the one presented by the instant petition. In *Independent School Dist. No. 283 v. E.M.D.H. ex rel. L.H.*, No. 20-905, the Court was asked to consider "[w]hether the continuing violation doctrine applie[d] to the two-year statutory time limit to

[4] *Ibid.*

[5] District Court's Findings of Fact and Conclusions of Law, App. 15a; Act of May 24, 2005, 79th Leg., R.S., ch. 1008, §1.01, 2005 Tex. Gen. Laws 3385, 3387, 3405 (now codified as Article 62.001(6)(A) and Article 62.101(a)(1), Texas Code of Criminal Procedure).

file an administrative complaint under the Individuals with Disabilities Education Act," 20 U.S.C. §1400, *et seq*. ("IDEA").[6] In that case, the U.S. Court of Appeals for the Eighth Circuit ruled that because "breaches of continuing or recurring obligations give rise to new claims with their own limitation periods," the appellant's claims under the IDEA were not barred by limitations. 960 F.3d 1073, 1083 (8th Cir. 2020). More specifically, the Eighth Circuit ruled that "each day" the child in question attended public school, during which the school district failed to meet its federal statutory obligation to identify the child as eligible for special education, the school district had engaged in a "separate act" that was not an ongoing "effect" arising from conduct occurring outside the limitations period for accrual purposes. Thus, according to the Eighth Circuit, this failure by the school district constituted a separate application of policy each day that commenced the accrual period anew, and the child's claims were not barred by limitations. *Id*., 960 F.3d at 1083-1084.

After its initial conference on the petition in *Independent School Dist. No. 283 v. E.M.D.H. ex rel. L.H.*, *supra*, the Supreme Court entered an order inviting the Acting Solicitor General to express the views of the United States. In his brief responsive to the Court's invitation, the Acting Solicitor General concluded "further review" by the Supreme Court was "not warranted" because the Court of Appeals' application

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[6] Petition for a Writ of Certiorari ("Question Presented"), *Independent School Dist. No. 283 v. E.M.D.H. ex rel. L.H.*, No. 20-905 (filed Dec. 31, 2020).

of the separate accrual doctrine was "correct and d[id] not conflict with any decision of this Court or another court of appeals."[7] Presumably in part on this basis, the Supreme Court denied certiorari.[8]

Although the question presented in *Independent School Dist. No. 283 v. E.M.D.H. ex rel. L.H.*, *supra*, involved application of the "separate accrual" doctrine to the IDEA, and the question presented in the present case involves application of that doctrine to 42 U.S.C. §1983 ("§1983"), what the Acting Solicitor General observed, as stated above, with respect to the IDEA, applies with equal force to application of the "separate accrual" doctrine and §1983, save for the Fifth Circuit's

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[7] Brief for the United States as Amicus Curiae, *Independent School Dist. No. 283 v. E.M.D.H. ex rel. L.H.*, 17 (No. 08-974) (filed Aug. 31, 2021).

[8] Ironically, the Hon. Neal Kumar Katyal, who filed the petition for certiorari as counsel for the Petitioner School District in *Independent School Dist. No. 283 v. E.M.D.H. ex rel. L.H.*, *supra*, was also involved in the preparation of the amicus brief of the United States, and presented oral argument while Deputy Solicitor General, in *Lewis v. City of Chicago*, 560 U.S. 205 (2010). The Petitioners herein have discussed the Supreme Court decision in *Lewis* in their petition, Pet. 9, 14-15. In *Lewis*, Mr. Katyal's position aligned with the position taken by Petitioners herein, *see Brief for the United States as Amicus Curiae Supporting Petitioners* in *Lewis v. City of Chicago*, No. 08-974. Mr. Katyal's recent departure from the views he expressed on behalf of the United States (and adopted by the Supreme Court) in *Lewis*, when later filing the petition in *Independent School Dist. No. 283 v. E.M.D.H. ex rel. L.H.*, *supra*, was premised on Mr. Katyal's conclusion that congressional intent required a different outcome. *See* Petition for a Writ of Certiorari, *Independent School Dist. No. 283 v. E.M.D.H. ex rel. L.H.*, *supra*, at 14-15 (No. 08-974).

decisional law exemplified by the present case. *See* Pet. at 14-15.

II. Because the Respondents' Arguments In Opposition to the Petition were neither Considered nor Decided by the Court of Appeals, nor Included in the Questions Presented, Respondents' Arguments are Irrelevant to the Court's Consideration of the Petition.

The Respondents' brief in opposition argues at length that this petition should not be granted on the basis of unresolved issues on the merits of Petitioners' constitutional claims. While Petitioners could match each of these arguments in this reply notwithstanding the Court's rules defining the appropriate scope and purpose of pleadings submitted at the certiorari stage; the Respondents' arguments, which were neither considered nor decided by the Court of Appeals, nor included in the questions presented, are irrelevant to the Court's consideration of the petition. *See Leatherman v. Tarrant Co. Narc. & Intel. Coordination Unit*, 507 U.S. 163, 165 n. * (1993) ("Because [the defensive issue concerning respondents' liability] was neither addressed by the Fifth Circuit nor included in the questions presented, we will not consider it.").

III. Because this Case is a Clean Vehicle to Address an Important Question, the Court Should Grant Certiorari.

Many of the policy considerations and matters of congressional intent that are fairly included in the question presented, including operation of the equitable principle of laches in the continuing violation doctrine context, have been thoroughly examined in Elad Peled, *Rethinking the Continuing Tort Violation Doctrine: The Application of Statutes of Limitations to Continuing Tort Claims*, 41 Ohio N. U. L. Rev. 343, 385 (2015). This case squarely presents the question of whether and under what circumstances the "separate accrual" doctrine should be applied to cases brought under §1983, which is an important question that has not been, but should be, directly decided by the Supreme Court. This case also fairly includes, within the question presented, whether or under what circumstances the issue of "laches" may be raised *sua sponte* by an appellate court, or raised for the first time on appeal, when an appellate court considers whether the separate accrual doctrine should be applied to cases brought under §1983.

The importance of the question presented is not diminished by the fact that the decision of the Court of Appeals below was "not published." As disclosed by the District Court's opinion in this case, District Courts within the Fifth Circuit routinely treat unpublished decisions of the Fifth Circuit as if they have precedential weight. *See* Pet. App. 21a. Given the large volume of cases brought under §1983 in U.S. District Courts

within the Fifth Circuit; and the Court of Appeals' decision in the present case; as well as the circuit split that the Fifth Circuit's decisional law continues to perpetuate; and the certainty that the Fifth Circuit's decision in this case will be applied in the future to deprive persons of the remedial relief intended by Congress under §1983; the petition should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD GLADDEN
LAW OFFICE OF
RICHARD GLADDEN
1204 W. University Dr.,
Ste. 307
Denton, Texas 76201
940/323-9300 (voice)
richscot1@hotmail.com
(email)

WM. T. HABERN
Counsel of Record
for Petitioners
THE HABERN LAW FIRM
P.O. Box 130744
Houston, Texas 77219
713/942-2376 (voice)
bill@paroletexas.com
(email)

Counsel for Petitioners