No. 22-842

IN THE

Supreme Court of the United States

NATIONAL RIFLE ASSOCIATION OF AMERICA,
Petitioner,

v.

MARIA T. VULLO,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR FEDERAL COURTS AND CIVIL PROCEDURE SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENT (REGARDING JURISDICTION)

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INTEREST OF AMICI CURIAE

Amici are law professors who study federal courts and/or civil procedure and who thus collectively share an interest in the proper application and development of this Court's justiciability doctrines.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

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Amici take no position on the merits of the Second Circuit's First Amendment ruling. Rather, amici's interest in this case springs from the fact that this Court only granted review of the First Amendment holding, leaving undisturbed the holding that respondent is entitled to qualified immunity. The failure to grant review on both grounds renders the First Amendment question nonjusticiable—either because it is moot or because any decision from this Court would be an impermissible advisory opinion.

SUMMARY OF ARGUMENT

In granting review of only one of the two questions presented, the Court appears to have made a choice raising significant constitutional problems.

The Second Circuit's decision below ruled in respondent Maria Vullo's favor on two grounds: (1) her actions did not violate the First Amendment and (2) even if they did, Ms. Vullo was entitled to qualified immunity because the First Amendment rule was not clearly established. Pet.App. 26-38. In other words, "even assuming the [petitioner] plausibly alleged a First Amendment violation, Vullo would be protected by qualified immunity." Pet.App. 38. However, this Court "denied review of the qualified immunity determination." NRA Br. 15. The parties have accordingly (and properly) briefed only the First Amendment question. *See City News & Novelty, Inc.* v. *City of Waukesha*, 531 U.S. 278, 283 (2001) (petitioner precluded from raising First Amendment and evidentiary issues because Court did not grant review on those questions); *see also Caterpillar Inc.* v. *Lewis*, 519 U.S. 61, 70 n.7 (1996) ("Our order granting review did not encompass [a proposed question presented regarding a subrogation claim] and we express no opinion on it.").

The Court's decision to leave the qualified immunity ruling in place raises two justiciability issues. *First*, the First Amendment question is moot because at least petitioner lacks a cognizable interest in the outcome. The qualified immunity ruling immunizes Ms. Vullo from damages and Ms. Vullo no longer works for the New York State Department of Financial Services ("DFS"), Pet. App. 4 n.1, so a decision from this Court on the First Amendment issue will not provide her with any guidance on her official conduct, *see Camreta* v. *Greene*, 563

U.S. 692, 710 n.9 (2011) (noting that former deputy sheriff "who no longer work[ed] … in law enforcement" had "lost his interest" in resolution of case). And conjecture that Ms. Vullo might one day return to DFS or that petitioner could confront similar conduct by a different DFS official is too speculative to support jurisdiction.

Second, any ruling on the First Amendment question would violate "the oldest and most consistent thread in the federal law of justiciability[:] that the federal courts will not give advisory opinions." *Flast* v. *Cohen*, 392 U.S. 83, 96 & n.14 (1968). That is because nothing that this Court will say on the First Amendment's metes and bounds will change the ultimate outcome below so long as the qualified immunity ruling remains. To be sure, this Court's decision in *Camreta* allows a *public official* to appeal a *loss* on a constitutional question despite a win on cases involving qualified immunity. 563 U.S. at 700. But that rule does not apply here, however, because review was sought by a private party, and—in any event—Ms. Vullo no longer holds her position as Superintendent of the New York State Department of Financial Services and thus would not receive any "guid[ance]" on future conduct from this Court's decision. *See id.* at 707-708.

In light of these justiciability issues, amici respectfully submit that this Court should leave "for another day" the First Amendment question presented by the petition, *Illinois* v. *Gates*, 462 U.S. 213, 224 (1983), and dismiss this case as moot, calling for an improper advisory opinion, or simply as improvidently granted, *see, e.g.*, *Nike, Inc.* v. *Kasky*, 539 U.S. 654, 661-664 (2003) (Stevens, J., concurring).

ARGUMENT

I. THIS CASE IS MOOT BECAUSE AT LEAST PETITIONER LACKS ANY PERSONAL STAKE IN ITS OUTCOME

Article III gives this Court jurisdiction only over live "Cases" or "Controversies," meaning that at least the party seeking relief must "demonstrate a 'personal stake' in the suit." *Camreta* v. *Greene*, 563 U.S. 692, 701 (2011); *see also* U.S. Const. art. III, § 2. Mootness is evaluated not just at the time the suit is filed, but at every stage of the litigation—"the 'parties must continue to have a personal stake in the outcome of the lawsuit' to prevent the case from becoming moot." *Campbell-Ewald Co.* v. *Gomez*, 577 U.S. 153, 177 (2016), *as revised* (Feb. 9, 2016) (Roberts, C.J., dissenting) (citing *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990)). In short, "when it is impossible for a court to grant any effectual relief whatever to the prevailing party, the case is moot and the court has no power to decide it." *Uzuegbunam* v. *Preczewski*, 141 S.Ct. 792, 803 (2021) (Roberts, C.J. dissenting) (citation and quotation marks omitted).

Thus, for example, in *Arizonans for Official English* v. *Arizona*, the case became moot when the state worker who challenged a provision of the Arizona Constitution requiring the English language to be used in "'all government functions and actions'" left the State's employ. 520 U.S. 43, 48, 67-68 (1997). As soon as Ms. Yniguez "left her state job … to take up employment in the private sector where her speech was not governed by" the challenged provision, "she lacked a … vital claim for prospective relief." *Id.* at 67. Nor could she save her claim by seeking damages, as 42 U.S.C. § 1983 "creates no remedy against a State." 520 U.S. at 69.

Camreta involved a fact pattern even more comparable to this case. There, the Ninth Circuit concluded that two officials who had been found to violate the Fourth Amendment were entitled to qualified immunity. 563 U.S. at 697-698. When the case reached this Court, one of the two officials—Deputy Sheriff Alford—no longer worked for the government. *Id.* at 710 n.9. The Court accordingly concluded that because he would not participate in a similar investigation again, "he has lost his interest in the Fourth Amendment ruling." *Id.*

Deputy Alford's departure did not itself render the case moot because the second official continued to work for the State, so this Court refrained from "decid[ing] any questions that would arise if he were the only defendant." *Camreta*, 563 U.S. at 710 n.9. But as the dissenting Justices pointed out, the only logical rule to draw from the majority's footnote was that "the Court's ability to review merits decisions in qualified immunity determinations is contingent on the defendant who has been sued" and that this Court "would lack jurisdiction to review … the merits decision of the Court of Appeals if [the plaintiff] had sued only Alford." *Id.* at 724 (Kennedy & Thomas JJ., dissenting). The majority opinion did not dispute this observation.

Here—like Ms. Yniguez in *Arizonans* and Deputy Alford in *Camreta*—petitioner does not have any cognizable continued stake in the litigation. As things currently stand, Ms. Vullo cannot be held liable for damages because this Court has left in place the holding that she is entitled to qualified immunity. Petitioner has not requested any injunctive relief against Ms. Vullo in her personal capacity. *See* Pet.App. 239-240 (operative complaint requesting injunctive relief only from "the current

Superintendent of DFS (in her/his official capacity)").[3] And Ms. Vullo cannot be enjoined to behave in a certain way in an official capacity. Even at the time of the Second Circuit decision, Ms. Vullo was no longer employed as New York's Superintendent of the Department of Financial Services or even by the state government. Pet.App. 1-2, 4 n.1.[4]

That petitioner cannot receive damages or injunctive relief also explains why this Court does not have jurisdiction to issue a declaratory judgment that Ms. Vullo acted wrongfully—such a ruling would have no concrete impact on the relationship between the parties. "Remedies … ordinarily 'operate with respect to specific parties'" and in the absence of any specific party that would be affected by the ruling, "they do not simply operate on legal rules in the abstract." *California* v. *Texas*, 593 U.S. 659, 672 (2021). Put slightly differently, "[t]he declaratory judgment device does not permit litigants to invoke the power of this Court to obtain constitutional rulings in advance of necessity." *Id.* (no standing to seek declaratory relief where plaintiffs could not receive damages or an injunction).

Importantly, that petitioner might theoretically experience similar conduct from a *different* DFS official in the future does not change the mootness analysis in this

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[3] Ms. Vullo is the only defendant in this appeal, and the only live claims against her are the First Amendment claims. Pet.App. 4; *see also* NRA Br. 12 n.6; U.S. Br. 7 n.2. Notably, the claims against the current DFS superintendent in their official capacity have been dismissed, Pet.App. 93; that ruling is not challenged here.

[4] *See also* Clark, *Maria Vullo, Formerly NY's Top Financial Regulator, Launches Strategic Advisory Firm*, Law.com (July 23, 2019), https://www.law.com/newyorklawjounal/2019/07/23/maria-vullo-formerly-nys-top-financial-regulator-launches-strategic-advisory-firm/.

case. This Court confronted essentially this argument in *Camreta*, where it held that the plaintiff did not have a sufficient stake in the outcome of litigation going forward where the plaintiff merely *might* rely on the court's holding to support litigation against a different defendant. 563 U.S. at 711-712. Any other rule would vitiate the mootness doctrine, as "one can never be certain that findings made in a decision concluding one lawsuit will not some day … control the outcome of another suit." *Commodity Futures Trading Comm'n* v. *Board of Trade City of Chi.*, 701 F.2d 653, 656 (7th Cir. 1983) (Posner, J.).[5]

Finally, the government's suggestion (U.S. Br. 35 n.14) that this Court could decide the First Amendment issue and then remand for the Second Circuit to reconsider its decision on qualified immunity does not solve the jurisdictional dilemma. A ruling from this Court in 2024 regarding the First Amendment question presented cannot logically affect the Second Circuit's qualified immunity analysis regarding what the state of the law was at the time of the challenged conduct in 2017-2018. And a ruling from this Court that goes beyond the state of the law in 2024 would be inconsistent with this Court's decision not to grant review on qualified immunity. *See supra* p. 3.

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[5] Similarly, the prospect that Ms. Vullo herself might "some day" return to her prior position as Director of Financial Services is too speculative to establish jurisdiction. *See, e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 564 (1992); *see also Board of License Comm'rs Town of Tiverton* v. *Pastore*, 469 U.S. 238, 240 (1985) (per curiam) (stating that "speculative contingencies" that "might conceivably affect substantial rights of interested parties" "afford no basis for our passing on the substantive issues … in the absence of evidence that this is a prospect of immediacy and reality") (citations omitted).

To be sure, a court "can often avoid ruling on [a] plaintiff's claim that a particular [constitutional] right exists" by holding qualified immunity applies because "prior case law has not clearly settled the right." *Camreta*, 563 U.S. at 705; *see also Procunier* v. *Navarette*, 434 U.S. 555, 559 n.6 (1978) (holding official was protected by qualified immunity rather than resolving constitutional question presented). But the same approach does not work in reverse—a finding that a constitutional right exists says nothing about whether it is clearly established. This is particularly so where (as here) no prior case has decided the underlying constitutional issue at the level of granularity needed to provide the requisite notice. *See Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (per curiam) ("Because the focus is on whether the officer had fair notice that her conduct was unlawful," the applicability of qualified immunity turns on "the backdrop of the law at the time of the challenged conduct"); Cert. Opp. 13-21 (discussing the mixed First Amendment case law that existed at the time of the challenged conduct). Indeed, this Court has summarily reversed a lower court for relying on existing "general tests" to find that a right was clearly established, particularly when the constitutional result "depends very much on the facts of each case." *Brosseau*, 543 U.S. at 199, 201; *see also Ashcroft* v. *Al-Kidd*, 563 U.S. 731, 743-744 (2011) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law"). The government's suggested remand would require the Second Circuit to do precisely what cases like *Brosseau* and *Al-Kidd* instruct against—either (1) rely on general First Amendment principles that predated this Court's First Amendment decision or (2) consider the law as it stands today rather than the law at the time of the challenged conduct.

II. This Case Will Inevitably Result In An Impermissible Advisory Opinion Because It Will Have No Effect On The Relationship Between Respondent And Petitioner Regardless Of The Outcome

Since 1793—years before even *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)—this Court has declined to issue advisory opinions. *See Flast* v. *Cohen*, 392 U.S. 83, 96 n.14 (1968). This rule springs from Article III, separation-of-powers principles, and the practical concern that requests for advisory opinions "often 'are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument[.]'" *Id.* at 97. Simply put, "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971) (per curiam). Accordingly, "[t]o decide a moot case would be to give an advisory opinion." *Uzuegbunam*, 141 S.Ct. at 803 (Roberts, C.J., dissenting); *accord Moore* v. *Harper*, 600 U.S. 1, 41 (2023) (Thomas, J., dissenting) (where "question [wa]s indisputably moot," a decision on that question "[wa]s plainly advisory").[6]

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[6] Numerous Circuit-level decisions have made the same logical connection. *See Djadju* v. *Vega*, 32 F.4th 1102, 1108 (11th Cir. 2022) (stating that "[a]ny decision on the merits of a moot case or issue would be an impermissible advisory opinion"); *Lighthouse Fellowship Church* v. *Northam*, 20 F.4th 157, 162 (4th Cir. 2021) (stating that "[a] court ruling [when a case is moot] would constitute an impermissible advisory opinion") (citing *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975)); *Fialka-Feldman* v. *Oakland Univ. Bd. of Trs.*, 639 F.3d 711, 714 (6th Cir. 2011) (reasoning that a mootness determination "convert[s] any ruling on the merits into a purely advisory, dare we say academic, exercise").

Here, no matter how the Court decides the First Amendment issue, the result for the petitioner will remain the same: Ms. Vullo will neither have to pay damages nor be required to alter her actions. *See supra* pp. 6-7. At most, this Court would be rewriting the Second Circuit's reasoning while leaving its judgment in place on an alternative ground. And if "the same judgment would be rendered … after [this Court] correct[s] [the Second Circuit's] views [on the First Amendment], [this Court's] review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn*, 324 U.S. 117, 126-128 (1945); *see also S. Jackson & Son, Inc.* v. *Coffee, Sugar & Cocoa Exch. Inc.*, 24 F.3d 427, 430–432 (2d Cir. 1994) (declining to issue decision that would not "broaden or narrow any of [defendant's] rights in relation to [plaintiff]" or otherwise resolve any live "dispute between the parties").

To be sure, the *Camreta* Court indicated that a public official who has prevailed on qualified immunity grounds could permissibly challenge his or her loss on constitutional grounds. 563 U.S. at 701-708. But that holding was based on the fact that the public official petitioner still "regularly engage[d]" in the challenged conduct—meaning the "adverse constitutional ruling" required him to "either change the way he performs his duties or risk a meritorious damages action." *Id.* at 703. There is no such prospect here, as Ms. Vullo is no longer employed by the Department of Financial Services. *See supra* pp. 6-7.

More broadly, the *Camreta* Court's reasoning rested heavily on public policy concerns implicated by the defendant official (as opposed to the plaintiff) seeking review. For public officials, constitutional "rulings … have a significant future effect on the[ir] conduct … and the policies of the government units to which they

belong." 563 U.S. at 704. Review of such rulings "promote[s] clarity—and observance—of constitutional rules" for the immunized officials. *Id.* at 705. These considerations taken together "support[ed] bending our usual rule to permit consideration of immunized officials' petitions." *Id.* Nothing in *Camreta* suggests that the Court intended its decision to be anything more than an "isolated anomaly" to normal Article III and justiciability limits. *See id.* at 727 (Kennedy & Thomas, JJ., dissenting); *see also id.* at 722 (discussing how majority's rule was "in tension with conventional principles of case-or-controversy adjudication").

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While petitioner undoubtedly has a live interest in being awarded damages for a violation of its First Amendment rights, an Article III court cannot grant that relief if qualified immunity insulates respondent from liability. Accordingly, regardless of whether the analysis relies on the mootness doctrine or the prohibition against advisory opinions, the end result is the same. By granting review of only the First Amendment question and not the qualified immunity question, this Court appears to have inadvertently set itself up to rule on a proceeding where there is no live case or controversy. Not only would such a decision be wholly inconsistent with this Court's existing precedent, but it could open the floodgates to a wave of petitions asking this Court to reexamine lower courts' reasoning without changing the outcome. *Cf. Uzuegbunam*, 141 S.Ct. at 807 (Roberts, C.J., dissenting) (urging rejection of rule that would be a "major expansion of the judicial role" and make "the least dangerous branch … the least expensive source of legal advice").

Amici respectfully submit that—rather than "override jurisdictional rules that are basic to the functioning of this Court and to the necessity of avoiding advisory opinions," *Camreta*, 563 U.S. at 716 (Kennedy & Thomas, JJ., dissenting)—this Court should dismiss this case entirely and wait for one with a live case or controversy.

CONCLUSION

This case should be dismissed.[7]

Respectfully submitted.

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[7] To the extent that this Court vacates and remands this case on mootness grounds, *Camreta* suggests that this Court should "leave untouched the Court of Appeals' ruling on qualified immunity and its corresponding dismissal of [petitioner's] claim." 563 U.S. at 714 n.11.