

No. 07-751

In The
Supreme Court of the United States

—◆—
CORDELL PEARSON, ET AL.,

Petitioners,

vs.

AFTON CALLAHAN,

Respondent.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit**

—◆—
**BRIEF OF *AMICUS CURIAE*
TEXAS ASSOCIATION OF SCHOOL BOARDS
IN SUPPORT OF NEITHER PARTY**

—◆—
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QUESTION PRESENTED

Whether the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001) should be overruled?

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BRIEF OF *AMICUS CURIAE*
TEXAS ASSOCIATION OF SCHOOL BOARDS

Texas Association of School Boards Legal Assistance Fund (“TASB Fund”) appears as *amicus curiae* under SUP. CT. R. 37 to address the procedural issue raised *sua sponte* by the Court in its order granting certiorari, namely, whether the Court’s decision in *Saucier v. Katz*, 533 U.S. 194 (2001) should be overruled. TASB Fund supports neither party in this proceeding.

I.

Interest of *Amicus Curiae*

TASB Fund is funding the preparation of this amicus brief.¹ Nearly 800 public school districts in Texas are members of the TASB Fund, which advocates the positions of local school districts in litigation with potential state-wide impact. TASB Fund is governed by three organizations: the Texas Association of School Boards, Inc. (“TASB”), the Texas Association of School Administrators (“TASA”), and the Texas Council of School Attorneys (“TSA”). TASB is a non-profit corporation whose members are the

¹ Counsel for the parties did not author any part of this brief, and no party, other than TASB Fund, made any monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and the letters of consent of both Petitioners and Respondent have been filed with the Court pursuant to Rule 37.2(a).

approximately 1,036 public school boards of the State of Texas. The members of TASB are responsible for the governance of the public schools of Texas. *See* TEX. EDUC. CODE ANN. § 11.151(b) & (d). TASB represents the State’s school superintendents and other administrators responsible for carrying out educational policies adopted by their respective local school boards. TSA is composed of attorneys who collectively represent more than 90 percent of the school districts in Texas.

II.

Summary of Argument

Saucier v. Katz, 533 U.S. 194, 201 (2001) requires lower courts to decide the merits issue (prong one of the qualified immunity analysis) before deciding whether the defendant officer acted with objective good faith (prong two). TASB Fund urges this Court to overrule *Saucier*’s “rigid ‘order-of-battle rule.’” *Scott v. Harris*, 550 U.S. ___, ___, 127 S. Ct. 1769, (2007) (Breyer, J., concurring). Only where it is clear on the face of the pleadings that no valid claim can be stated (as was the case in *Siegert v. Gilley*, 500 U.S. 226 (1991)), or where the summary judgment proof establishes that the plaintiff cannot prevail on the merits (as contemplated by *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)), should the courts be required to address the merits prong first and thereby protect the defendant official from unnecessary or overly broad discovery. On the other hand, *Saucier* should be

overruled to the extent it requires in split-prong rulings, *i.e.*, where the defendant loses on the merits but nonetheless prevails on the issue of good faith – because such defendant has no incentive to appeal. Erroneous merits rulings are thus insulated from review and chill borderline but legal official conduct.

III.

Argument

A. *Saucier's* Prospectivism Clashes With The Rationale For Immunity From Suit.

Prior to *Saucier*, a merits-first order of adjudicating an official's entitlement to qualified immunity was the preferred one; *Saucier* made it mandatory – whether “the facts alleged show the officer's conduct violated a constitutional right . . . *must* be the initial inquiry.” 533 U.S. at 201 (emphasis added). By requiring courts to decide first whether the complaint states a valid claim, *Saucier* thus provides a “process for the law's elaboration.” *Id.* Careful definition of the underlying right is valuable, regardless of whether necessary to decide the case at bar, because it guides future conduct. As this Court has stated elsewhere, “if the policy of [merits] avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals.” *County of Sacramento v. Lewis*, 523 U.S. 833, 842 n.5 (1998).

On the other hand, qualified immunity's purpose is not to develop constitutional law prospectively; it exists as a defense from suit for all but the most seriously incompetent actors and allows officials who act in good faith to extricate themselves from litigation "at the earliest possible stage." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam). The *Saucier* Court relied on *Siegert v. Gilley*, 500 U.S. 226 (1991), for the proposition that a merits determination "must be the initial inquiry." *Saucier*, 533 U.S. at 202. *Siegert*, however, did not reach the merits first in order to warn future actors that Gilley's conduct was illegal. Consistent with the purpose of immunity from suit, *Siegert* instead requires the lower courts to dismiss a case on the pleadings and disallow discovery when the face of the complaint clearly fails to state a claim. *Siegert's* application of the two-prong test can thus be seen as clarification on the discussion regarding that test in *Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982), where the Court observed that a ruling on *either* the merits prong or the objective-good-faith prong serves to facilitate summary resolution: "On summary judgment, the judge *may* determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred." *Harlow*, 457 U.S. at 818 (emphasis added).

Accordingly, TASB Fund agrees with Justice Stevens's concurrence in *Lewis*:

When defendants in a § 1983 action argue in the alternative (a) that they did not violate

the Constitution, and (b) that in any event they are entitled to qualified immunity because the constitutional right was not clearly established, the opinion in *Siegert v. Gilley*, 500 U.S. 226 (1991), tells us that we should address the constitutional question at the outset. That is sound advice when the answer to the constitutional question is clear. When, however, the question is both difficult and unresolved, I believe it wiser to adhere to the policy of avoiding the unnecessary adjudication of constitutional questions.

Lewis, 523 U.S. at 859 (Stevens, J., concurring in the judgment). *Siegert* “should not be read,” as Justice Breyer has added, “to deny lower courts the flexibility, in appropriate cases, to decide § 1983 claims on the basis of qualified immunity, and thereby avoid wrestling with constitutional issues that are either difficult or poorly presented.” *Id.* at 858-59 (Breyer, J., concurring).

B. The Unreviewability Problem In Split-Prong Outcomes.

As pointed out most recently by Justice Breyer in *Morse v. Frederick*, ___ U.S. ___, 127 S. Ct. 2618 (2007), various commentators, judges, and even several members of this Court have criticized and in some cases have called for the abandonment of *Saucier*’s “rigid order-of-battle rule.” *Id.* at 2642-43 (Breyer, J., concurring in part and dissenting) (citing authorities). His criticisms are many: “Sometimes the

rule will require lower courts unnecessarily to answer difficult constitutional questions, thereby wasting judicial resources. Sometimes it will require them to resolve constitutional issues that are poorly presented. Sometimes the rule will immunize an incorrect constitutional holding from further review. And often the rule violates the longstanding principle that courts should ‘not . . . pass on questions of constitutionality . . . unless such adjudication is unavoidable.’” *Id.* at 2641 (quoting *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)).

TASB Fund’s concern is the unreviewability problem. *Saucier* results in split-prong rulings in which the ruling against the official on the merits is “effectively insulated from review.” *Brosseau v. Haugen*, 543 U.S. 194, 202 (2004) (Breyer, J., concurring). “When a party loses on the first (interpretive) prong but nonetheless prevails on the second (notice) prong, he has no incentive to appeal.” Sampsell-Jones, *Reviewing Saucier, Prospective Interpretations of Criminal Law*, 14 GEO. MASON L. REV. 725, 762-63 (Spring 2007).

As a hypothetical example, we can envision a school official being sued for refusing to fund a football program. We will assume further that the trial court holds that students have a constitutional right to play football, but that this particular official is immune because the law was not clearly established when the school official withheld funding. Because the school official will have “won” the case because he

acted in good faith – he obtained a judgment in his favor – he has no incentive to appeal the portion of the opinion that recognizes the new constitutional right. The problem, of course, is that if the decision on the merits prong is incorrect, it is nevertheless binding on everyone else; it becomes the “clearly established law” of the circuit.

Another danger with *Saucier* is that infirm constitutional rulings will occur in the context of an interlocutory appeal of summary adjudications, such as denial of a motion to dismiss. This results in constitutional rules being established in cases with little or no evidentiary record. Accordingly “[j]ust as the Court has been right to identify the risk that the constitutional question might infrequently, if ever, be decided, *see Lewis*, 523 U.S. at 842 n.5, so there is a risk that constitutional questions may be prematurely and incorrectly decided in cases where they are not well presented.” *Lyons v. Xenia*, 417 F.3d 565, 582 (6th Cir. 2005) (Sutton, J., concurring).

In such incorrectly decided split-prong cases, the erroneous or overly broad merits ruling will deter vigorous enforcement of the laws – a result contrary to the purpose of qualified immunity. As the Second Circuit has written in this regard:

If those government actors defer to the courts’ declarations and modify their procedures accordingly, new constitutional rights will have effectively been established by the dicta of lower courts without the defendants having the right to appellate review. Only by

defying the views of the lower court, adhering to practices that have been declared illegal, and thus inviting new suits will the state officials be able to ensure appellate review of lower court declarations of the unconstitutionality of official conduct. Thus, officials may often be placed in the untenable position of complying with the lower court's advisory dictum without opportunity to seek appellate review, or appearing to defy the lower court's assertion and thus exposing themselves to a risk of punitive damages.

Horne v. Coughlin, 191 F.3d 244, 247-48 (2d Cir. 1999).

IV.

Conclusion

TASB Fund urges the Court to overrule *Saucier's* order-of-battle rule in split-prong situations, where the merits ruling against a defendant official is likely to be immunized from review. *Saucier* should be upheld only to the extent a merits ruling for or against the official is clear. In other words, in overruling *Saucier*, the Court should preserve *Siegert's* order-of-battle. An official deserves to be exonerated on the merits if it is clear that official did no wrong. A ruling on the merits ends any case that might have been brought against the employing entity too, and thus promotes the values of official immunity from suit by premitting any need for the plaintiff to take

witness discovery from the official that might have been brought against his employer.

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