No. 07-751

In the Supreme Court of the United States

CORDELL PEARSON, MARTY GLEAVE, DWIGHT JENKINS, CLARK THOMAS, AND JEFFREY WHATCOTT,

PETITIONERS,

v.

AFTON CALLAHAN,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING, AND THE COMMONWEALTH OF PUERTO RICO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MICHAEL A. SCODRO*
Solicitor General

JANE ELINOR NOTZ
Deputy Solicitor General

LISA MADIGAN
Attorney General of Illinois
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698

* Counsel of Record
[additional counsel listed on signature page]

QUESTIONS PRESENTED

This *amicus* brief will address the following questions:

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

2. Whether, at the time of the events at issue, it was "clearly established" that the Fourth Amendment prohibits police officers from entering a home after a confidential informant was admitted inside to purchase drugs, completed the purchase, and then signaled the purchase to the officers waiting outside.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page

Cases:

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

Constitutional Provision:

TABLE OF AUTHORITIES—Continued

Page

Statutes and Rule:

Miscellaneous:

INTEREST OF THE *AMICI CURIAE*

To prevail, respondent must make two showings—first, that petitioners entered respondent's home in violation of the Fourth Amendment and, second, that the right violated was "clearly established" at the time of petitioners' conduct. These elements reflect the two stages of the qualified immunity inquiry under *Saucier v. Katz*, 533 U.S. 194 (2001), which requires federal courts initially to resolve whether the plaintiff has alleged the violation of a cognizable constitutional right before determining whether that right was clearly established and, therefore, whether the defendant enjoys qualified immunity.

Amici States respectfully urge this Court to revisit and abandon *Saucier*'s rigid, two-step process for resolving qualified immunity claims. As shown below, petitioners are entitled to immunity under the second *Saucier* prong because, taking the facts in the light most favorable to respondent, petitioners' conduct did not violate any clearly established Fourth Amendment right. In cases like this one, where it is plain that the constitutional right in question was not clearly established at the time of the alleged misconduct, requiring courts to undertake the first *Saucier* inquiry and resolve the merits of the plaintiff's constitutional claim places needless burdens on courts and litigants, can require courts to make novel constitutional rulings without thorough briefing or a sufficient record, and often insulates such rulings from review.

Because state officers and employees regularly are defendants in actions brought under 42 U.S.C. § 1983, *amici* States have a strong interest in how federal

courts decide whether state defendants are protected by qualified immunity. The States also have a substantial interest in how federal courts define and develop the constitutional limits on official conduct. In this regard, *Saucier*'s strict, two-step sequence not only makes litigation more burdensome, but also increases the likelihood of erroneous constitutional pronouncements that may be immune from appellate review.

Amici States also have a substantial interest in the merits of this case and a critical stake in the lower courts' correct implementation of qualified immunity doctrine. The doctrine, which requires plaintiffs to show that their asserted constitutional rights were "clearly established," not "at a high level of generality," but "in a more particularized, and hence more relevant, sense," *Brosseau v. Haugen*, 543 U.S. 194, 198-199 (2004) (internal quotation marks omitted), was incorrectly applied by the court of appeals in this case.

STATEMENT

Because this case comes to the Court from the denial of petitioners' motion for summary judgment, all facts are taken in the light most favorable to respondent.

1. On March 19, 2002, petitioners, five law enforcement officers and members of the Central Utah Narcotics Task Force, conducted a police raid at respondent's home. Pet. App. 2. Petitioners acted on information provided by a confidential informant. *Id.* at 2-3.

The informant stated that he had negotiated with respondent to purchase a quantity of methamphetamine at respondent's home that night for $100. *Ibid.* After obtaining this information, petitioners decided to monitor the planned transaction. *Id.* at 3. Petitioners searched the informant for drugs, equipped him with a wire and transmitter, gave him a marked $100 bill, and worked out a signal for him to give petitioners when the transaction was complete. *Ibid.* Petitioners then drove the informant to respondent's home. *Ibid.*

Respondent's daughter let the informant in, and, once inside, the informant gave respondent the marked bill in exchange for a small plastic bag of methamphetamine, which respondent removed from a large plastic bag containing a number of smaller bags. *Id.* at 3, 34. The informant then signaled petitioners. *Id.* at 3. Petitioners entered the home and saw respondent drop the large plastic bag. *Ibid.* Petitioners searched the informant and respondent, and, with respondent's consent, they searched the home. *Id.* at 3-4. Petitioners found the small bag of methamphetamine in the informant's pocket. *Id.* at 4, 36. They also found the marked bill on the respondent's person and drug syringes in his home. *Id.* at 4. Petitioners did not have a search or arrest warrant. *Ibid.*

2. Based on the evidence recovered, respondent was charged with possession and distribution of methamphetamine. *Ibid.* He filed a motion to suppress this evidence, which the state trial court denied. *Id.* at 4, 37. Respondent then entered into a conditional guilty plea, reserving the right to appeal

the denial of his motion to suppress. *Id.* at 37. On appeal, the state appellate court reversed the trial court's denial of the suppression motion and reversed respondent's conviction. *Id.* at 4.

3. Respondent filed suit under 42 U.S.C. § 1983 against petitioners, the task force, and various local governments. *Id.* at 4-5, 39. Respondent alleged, in relevant part, that petitioners violated his Fourth Amendment rights when they entered his home without a warrant. *Id.* at 4-5, 40-41. After determining that neither the law of the case doctrine nor collateral estoppel precluded it from reviewing the constitutionality of petitioners' actions, the district court granted petitioners qualified immunity. *Id.* at 41-56.

4. In reaching this conclusion, the district court noted that three circuits—the Sixth, Seventh, and Ninth—have upheld an exception to the warrant requirement when an undercover officer enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, and then immediately summons other officers for assistance. *Id.* at 47-48. In addition, the Sixth and Seventh circuits have extended this "consent-once-removed" doctrine to confidential informants. *Id.* at 48-50. Neither this Court nor the Tenth Circuit had addressed the question, however. *Id.* at 52-53. Under these circumstances, the court concluded that "the simplest approach" was to assume that petitioners had violated respondent's constitutional rights. *Id.* at 53.

Thus, the district court proceeded directly to the second step of *Saucier*, asking whether respondent could demonstrate that petitioners had violated a

clearly established right. *Ibid.* "A right is 'clearly established,'" the court explained, "if Supreme Court or Tenth Circuit case law exists on point or if the 'clearly established weight of authority from other circuits' found a constitutional violation from similar actions." *Id.* at 53-54 (quoting *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1251 (10th Cir. 1999)). Because three circuits had approved of petitioners' actions, and because neither this Court nor the Tenth Circuit had disapproved of them, the court concluded that petitioners were entitled to qualified immunity. Pet. App. 55-56.

5. Over a dissent by Judge Kelly, the Court of Appeals reversed. As required by *Saucier*, the panel majority evaluated petitioners' qualified immunity claim in two stages, asking first whether the facts alleged "establish that the defendant[s] violated a constitutional right" and then examining whether "the violated right was clearly established." *Id.* at 67 (internal quotation marks and citation omitted).

The majority answered both questions in the affirmative. *Id.* at 8-18. The court did not doubt that there exists an exception to the warrant requirement when "an undercover officer * * * summon[s] backup officers within a home after that officer has been invited with consent." *Id.* at 14. Deeming the distinctions between an undercover officer and an informant "significant," however, the majority held that petitioners' conduct violated respondent's "right to be free in one's home from unreasonable searches and arrests." *Id.* at 11, 15. The majority further determined that this right was clearly established at the time of the events at issue because both this Court

and the Tenth Circuit have long held that "warrantless entries into a home are per se unreasonable unless they satisfy the established exceptions" to the warrant requirement of consent and exigent circumstances. *Id.* at 16. The majority acknowledged that, prior to these events, the Seventh Circuit had applied the consent-once-removed doctrine to a confidential informant. *Id.* at 17. The panel held, however, that "[t]he precedent of one circuit cannot rebut that the 'clearly established weight of authority' is as the Tenth Circuit and the Supreme Court have addressed it." *Ibid.*

8. In dissent, Judge Kelly rejected the panel majority's resolution of both *Saucier* questions. About the second *Saucier* inquiry, Judge Kelly described the panel's approach as "flawed" because it characterized the relevant right "in overly broad terms." *Id.* at 28. As the dissent explained, "[p]roperly characterized, the right at issue * * * is the right to be free from the warrantless entry of police officers into one's home to effectuate an arrest after one has granted voluntary, consensual entry to a confidential informant and undertaken criminal activity giving rise to probable cause." *Id.* at 27. Because, prior to the events at issue, neither this Court nor the Tenth Circuit had recognized such a right, and, moreover, "three circuits had issued opinions which could have led a reasonable officer to believe that a warrantless entry was legal in this case," the dissent concluded that the right, if it existed, was not clearly established, and petitioners therefore were entitled to qualified immunity. *Id.* at 28-29.

9. This Court granted certiorari on March 24, 2008. The Court directed the parties, in addition to the two

questions presented, to brief and argue a third question: "Whether the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled?"

SUMMARY OF ARGUMENT

This Court should overrule the strict two-step framework mandated by *Saucier* for resolving qualified immunity claims, a framework that "a majority of the Justices have questioned * * * in recent years." *Lyons v. City of Xenia*, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring); see also *Purtell v. Mason*, No. 06-3176, 2008 WL 2038893, at * 5 (7th Cir. May 14, 2008) ("This 'rigid order of battle' has been criticized on practical, procedural, and substantive grounds."). Requiring courts to decide whether a § 1983 plaintiff has stated a cognizable constitutional claim in every case before permitting analysis of whether such a claim was "clearly established" (1) imposes unnecessary burdens on courts and parties; (2) threatens to insulate many constitutional rulings from review on appeal; (3) requires courts to make constitutional pronouncements even where one or both parties have not argued the point thoroughly or the record is inadequate; and (4) is unnecessary to ensure the continued development of constitutional doctrine and, ironically, actually threatens to undermine this goal. Accordingly, *amici* States respectfully urge the Court to abandon *Saucier*'s mandatory two-step approach to qualified immunity claims.

In addition, *amici* States urge this Court to reverse the judgment below and, in so doing, to reinforce the principle—disregarded by the Court of Appeals—that government defendants lack qualified immunity only where the constitutional right at issue was "clearly

established" in a sufficiently "particularized" way. *Brosseau*, 543 U.S. at 198-199.

ARGUMENT

The qualified immunity doctrine protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Saucier v. Katz*, *supra*, this Court mandated a two-step sequence for resolving government officials' qualified immunity claims. First, a court must decide whether the plaintiff has alleged the violation of a cognizable constitutional right; second, if the plaintiff has alleged such a violation, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. 533 U.S. at 201.

Amici States argue two points here. First, *Saucier*'s rigid two-step framework causes a host of problems for courts and litigants and threatens the integrity of constitutional decisionmaking. To avoid these undesirable results, this Court should abandon the requirement that courts deploy the two-step sequence in every case. Second, with respect to the instant case, the Court of Appeals erred in holding that respondent's alleged Fourth Amendment right was "clearly established" without requiring him to make the more particularized showing that this Court's precedents demand. Under the proper standard, petitioners were entitled to qualified immunity.

I. THIS COURT SHOULD OVERRULE *SAUCIER V. KATZ*.

In a series of decisions prior to *Saucier*, this Court recommended without requiring the aforementioned two-step procedure for resolving qualified immunity claims. See, *e.g.*, *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998) ("[T]he better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all."). In *Saucier*, the Court expressly held that the two-step framework was not simply approved, but mandated for use in all qualified immunity cases: "In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence." 533 U.S. at 200. At the "threshold," the court must decide whether "the facts alleged show the officer's conduct violated a constitutional right." *Id.* at 201. "[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Ibid.*

For the following reasons, this Court should no longer mandate this two-step procedure, and instead should permit federal courts to grant qualified immunity without first deciding the merits of the plaintiff's constitutional claim.

A. The Mandatory, Two-Step Framework Has Drawn Criticism From Members Of This Court, And Lower Courts Have Sought To Limit Its Effect.

Several Members of this Court have expressed strong opposition to imposing a mandatory, two-step "order of battle" whenever a government official seeks qualified immunity. See, *e.g.*, *Bunting v. Mellen*, 541 U.S. 1019, 1019 (2004) (Stevens, J., joined by Ginsburg & Breyer, JJ., respecting denial of certiorari) (criticizing the "unwise judge-made rule under which courts must decide whether the plaintiff has alleged a constitutional violation before addressing the question whether the defendant state actor is entitled to qualified immunity"); *id.* at 1025 (Scalia, J., joined by Rehnquist, C.J., dissenting from denial of certiorari) ("We should either make clear that constitutional determinations are *not* insulated from our review * * * or else drop any pretense at requiring the ordering in every case.") (emphasis in original); *Brosseau*, 543 U.S. at 201-202 (Breyer, J., joined by Scalia & Ginsburg, JJ., concurring) (urging Court to reconsider *Saucier*'s "rigid 'order of battle,'" which "requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (*e.g.*, qualified immunity) that will satisfactorily resolve the case before the court"); see also *Siegert v. Gilley*, 500 U.S. 226, 235 (1991) (Kennedy, J., concurring in the judgment) ("If it is plain that a plaintiff's required malice allegations are insufficient but there is some doubt as to the constitutional right asserted, it seems to reverse the usual ordering of issues to tell the trial and appellate

courts that they should resolve the constitutional question first.").

In the past year alone, Justice Breyer has twice urged the Court to "end the failed *Saucier* experiment now." *Morse v. Frederick*, 127 S. Ct. 2618, 2642 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part); see also *Scott v. Harris*, 127 S. Ct. 1769, 1780 (2007) (Breyer, J., concurring). The rule of *Saucier*, he explained, is problematic for four independent reasons:

> [s]ometimes (*e.g.*, where a defendant is clearly entitled to qualified immunity) *Saucier*'s fixed order-of-battle rule wastes judicial resources in that it may require courts to answer a difficult constitutional question unnecessarily. Sometimes (*e.g.*, where the defendant loses the constitutional question but wins on qualified immunity) that order-of-battle rule may immunize an incorrect constitutional ruling from review. Sometimes * * * the order-of-battle rule will spawn constitutional rulings in areas of law so fact dependent that the result will be confusion rather than clarity. And frequently the order-of-battle rule violates that older, wiser judicial counsel "not to pass on questions of constitutionality * * * unless such adjudication is unavoidable."

Scott, 127 S. Ct. at 1780 (Breyer, J., concurring) (quoting *Spector Motor Servs., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)).

In light of these concerns, lower courts have nibbled at the rule's edges in certain defined circumstances and

even departed from the two-step protocol on more general terms. For example, several courts have identified an "exception" to the *Saucier* rule in cases where resolution of the constitutional question requires clarification of an ambiguous state statute. *Egolf v. Witmer*, No. 06-2193, 2008 WL 2151823, at * 3-4 (3d Cir. May 22, 2008); accord *Tremblay v. McClellan*, 350 F.3d 195, 200 (1st Cir. 2003); *Ehrlich v. Town of Glastonbury*, 348 F.3d 48, 57-60 (2d Cir. 2003). Justifying the decision to grant qualified immunity to the defendant without first resolving, under *Saucier*'s first prong, whether the defendant's conduct violated the constitution, these courts have explained that *Saucier*'s "underlying principle" of encouraging federal courts to decide unclear legal questions in order to clarify the law for the future "is not meaningfully advanced * * * when the definition of constitutional rights depends on a federal court's uncertain assumptions about state law." *Egolf*, 2008 WL 2151823, at * 3-4; accord *Tremblay*, 350 F.3d at 200; *Ehrlich*, 348 F.3d at 58.

Similarly, other courts have recognized that the two-step inquiry "is an uncomfortable exercise where * * * the answer [to] whether there was a violation may depend on a kaleidoscope of facts not yet fully developed," and suggested, as a result, that "[i]t may be that *Saucier* was not strictly intended to cover" this situation. *Dirrane v. Brookline Police Dep't*, 315 F.3d 65, 69-70 (1st Cir. 2002); see also *Robinette v. Jones*, 476 F.3d 585, 592 n.8 (8th Cir. 2007) (declining to follow *Saucier* because "the parties have provided very few facts to define and limit any holding" on the constitutional question).

Likewise, when presented with a constitutional question on which this Court had just granted certiorari, the Ninth Circuit elected to "bypass *Saucier*'s first step and decide only whether [the alleged right] was clearly established." *Motley v. Parks*, 432 F.3d 1072, 1078 & n.5 (9th Cir. 2005). And in an appeal where the district court granted judgment to the defendant under Fed. R. Civ. P. 50 on qualified immunity grounds while skipping the constitutional question, the Third Circuit elided the first prong, stating its belief "that the circumstances here * * * are sufficiently unlike those in *Saucier* and *Siegert* that we may proceed directly to the qualified immunity issue without ruling preliminarily on the constitutional violation claim." *Carswell v. Borough of Homestead*, 381 F.3d 235, 241 (3d Cir. 2004). Finally, in a case where "there [wa]s little chance that any unsettled constitutional issues will escape federal review for long" because the disputed constitutional right could be litigated in a related criminal proceeding, the Second Circuit moved directly to the second *Saucier* inquiry. *Koch v. Town of Brattleboro*, 287 F.3d 162, 166 (2d Cir. 2002).

Lower courts have also departed from the *Saucier* protocol on more general terms, without articulating a justification based upon the particular circumstances of the case. See, *e.g.*, *Higazy v. Templeton*, 505 F.3d 161, 179 n.19 (2d Cir. 2007) ("We do not reach the issue of whether [plaintiff's] Sixth Amendment rights were violated because principles of judicial restraint caution us to avoid reaching constitutional questions when they are unnecessary to the disposition of the case."); *Cherrington v. Skeeter*, 344 F.3d 631, 640 (6th Cir. 2003) ("[I]t ultimately is unnecessary for us to decide

whether the individual Defendants did or did not heed the Fourth Amendment command * * * because they are entitled to qualified immunity in any event."); see also *Pearson v. Ramos*, 237 F.3d 881, 884 (7th Cir. 2001) ("[w]hether this rule is absolute may be doubted"); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. Rev. 1249, 1275, 1277 (2006) (referring to *Saucier*'s mandatory two-step framework as "a new and mischievous rule" that "involves so many and such serious problems that I am not sure where to begin"). Indeed, in this very case, the district court, after discussing the complexities of the constitutional issue presented, "assume[d]" a Fourth Amendment violation and moved directly to the second *Saucier* prong. Pet. App. 53. As the dissent noted on appeal, this approach "clearly violated" *Saucier*'s command. *Id.* at 19 n.1.

The lower courts' noncompliance with *Saucier*'s mandatory framework has not escaped attention. Justice Scalia has observed that the "understandable concern" with *Saucier* "has led some courts to conclude (mistakenly) that the constitutional-question-first rule is customary, not mandatory." *Bunting*, 541 U.S. at 1024 (Scalia, J., joined by Rehnquist, C.J., dissenting from denial of certiorari) (citing cases). Shortly after that observation—and notwithstanding the caveat that the *Saucier* protocol was mandatory—the Court in *Brosseau* resolved a § 1983 damages case under *Saucier*'s second prong, without resolving under the first prong whether the plaintiff had alleged a constitutional violation. See 543 U.S. at 198. In so doing, the Court stated that it had "no occasion * * * to reconsider [its] instruction in *Saucier* * * * that lower courts decide the constitutional question prior to

deciding the qualified immunity question," explaining that it was "exercis[ing] [its] summary reversal procedure * * * simply to correct a clear misapprehension of the qualified immunity standard." *Id.* at 198 n.3. Here, by contrast, the Court granted certiorari on both prongs of the *Saucier* analysis, which makes this case an appropriate one to reassess *Saucier*'s rule that courts must address the first prong before reaching the second.

B. *Saucier* Forces Courts To Make Unnecessary Constitutional Rulings, While Insulating Many Of These Decisions From Further Review.

Requiring courts to decide the merits of a § 1983 plaintiff's constitutional claim—even where the defendant obviously enjoys qualified immunity because the constitutional right in question indisputably was not "clearly established" at the time of the alleged misconduct[1]—departs from the fundamental principle that courts should render constitutional decisions only where doing so is essential to decide the case. See *Scott*, 127 S. Ct. at 1774 (*Saucier*'s "ordering contradicts '[o]ur policy of avoiding unnecessary adjudication of constitutional issues'") (quoting *United States v. Treasury Employees*, 513 U.S. 454, 478 (1995)) (brackets in original); *Lewis*, 523 U.S. at 841 n.5

[1] For example, if the defendant's conduct had been held unconstitutional by five circuits and constitutional by five others, then the defendant indisputably would be entitled to qualified immunity under *Saucier*'s second prong despite the difficulty of resolving under the first prong whether the conduct itself was unconstitutional.

(acknowledging two-step protocol as an exception to "the generally sound rule of avoiding determination of constitutional issues"); see generally *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."); Commencement Address of Chief Justice John G. Roberts, Jr., Georgetown Law School (May 21, 2006) ("If it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more.") (webcast available at www.law.georgetown.edu. webcast/eventDetail.cfm?eventID=144).[2]

On its own, this longstanding principle of judicial restraint counsels in favor of affording courts the flexibility to resolve qualified immunity cases without first reaching the merits of the constitutional question. See *Lewis*, 523 U.S. at 859 (Stevens, J., concurring in the judgment) ("When * * * [the constitutional]

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[2] "Outside of the qualified-immunity context, [there is] just one setting in which federal courts *must* address constitutional questions before non-constitutional questions—when they adhere to the Article III requirement that they resolve jurisdictional issues before merits issues—and that issue plainly does not apply" in the qualified immunity context. *Lyons*, 417 F.3d at 581 (Sutton, J., concurring) (emphasis in original); see *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). This exception for jurisdictional questions is necessary because, "unless Article III standing is satisfied, the court has no power to rule on the other issues in the case." Leval, *supra*, at 1277 n.83.

question is both difficult and unresolved, I believe it wiser to adhere to the policy of avoiding the unnecessary adjudication of constitutional questions."). The Second Circuit cited the virtue of judicial restraint to justify exercising its "discretion to refrain" from undertaking the first step of the *Saucier* test. *Koch*, 287 F.3d at 166 ("This procedure avoids the undesirable practice of unnecessarily adjudicating constitutional matters."); see also *Purtell*, 2008 WL 2038893, at * 5 n.1 ("among other things," "[t]he 'rigid' order of the *Saucier* test * * * forces courts to resolve constitutional questions unnecessarily when there is no clearly established right").

Saucier not only requires courts to make unnecessary constitutional holdings, but also insulates many such holdings from further review. See *Brosseau*, 543 U.S. at 202 (Breyer, J., joined by Scalia & Ginsburg, JJ., concurring) (observing that two-step rule "can sometimes lead to a constitutional decision that is effectively insulated from review"). This occurs when a court holds that the defendant's conduct violated a cognizable constitutional right, but proceeds to grant judgment to the defendant because that right was not clearly established. As the prevailing party, the defendant cannot appeal or seek certiorari review from the adverse constitutional ruling. See *Horne v. Coughlin*, 191 F.3d 244, 247 (2d Cir. 1999) ("The government defendants, as the prevailing parties, will have no opportunity to appeal for review of the newly declared constitutional right in the higher courts."); *Lyons*, 417 F.3d at 582 (Sutton, J., concurring) ("[S]ome constitutional rulings effectively will be insulated from review by the *en banc* court of appeals or the Supreme Court where the appellate panel identifies a

constitutional violation but grants qualified immunity under the second inquiry."); *Vives v. City of New York*, 405 F.3d 115, 123 (2d Cir. 2005) (Cardamone, J., concurring in part, dissenting in part) (inability to appeal constitutional ruling when defendant prevails on qualified immunity "is, of course, an inescapable result of the sequential order of the *Saucier* inquiry").

The problem and its consequences are illustrated by *Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003), *cert. denied*, 541 U.S. 1019 (2004). Following the *Saucier* procedure, the Fourth Circuit first held that the Virginia Military Institute's use of the word "God" in a "Supper Roll Call" ceremony violated the Establishment Clause, but then granted the defendants qualified immunity because the law was not clearly established at the relevant time. *Id.* at 365-376. Although they had the judgment, the defendants sought certiorari review of the adverse constitutional ruling. Dissenting from the denial of certiorari, Justice Scalia, joined by Chief Justice Rehnquist, criticized "a perceived procedural tangle of the Court's own making." *Bunting*, 541 U.S. at 1022. The "tangle" arose from the Court's "'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed" below, which insulated from review adverse merits decisions that are "locked inside" favorable qualified immunity rulings. *Id.* at 1023; see also *Kalka v. Hawk*, 215 F.3d 90, 96 n.9 (D.C. Cir. 2000) (noting that "[n]ormally, a party may not appeal from a favorable judgment" and that the Supreme Court "has apparently never granted the certiorari petition of a party who prevailed in the appellate court").

In cases like *Bunting*, the "prevailing" defendant faces an unenviable choice: "comply[] with the lower court's advisory dictum without opportunity to seek appellate [or certiorari] review," or "defy[] the views of the lower court, adher[e] to practices that have been declared illegal, and thus invit[e] new suits" and potential "punitive damages." *Horne*, 191 F.3d at 247-248. This result is patently unfair to government officials and the governments they serve, for an unreviewable constitutional holding announced by a court of appeals under *Saucier*'s first prong may in the future be held to have "clearly established" the constitutional standards with which state and local officials must comply.

C. *Saucier*'s Mandatory, Two-Step Rule Burdens Courts And Litigants, And Requires Constitutional Decisionmaking Without Sufficient Argument Or Record Evidence.

"[W]hen courts' dockets are crowded, a rigid 'order of battle' makes little administrative sense." *Brosseau*, 543 U.S. at 201-202 (Breyer, J., joined by Scalia and Ginsburg, JJ., concurring). The *Saucier* rule requires courts to delve into and decide constitutional disputes in every case, even those easily resolved under the second prong for lack of any "clearly established" right. See *Scott*, 127 S. Ct. at 1774 n.4 ("There has been doubt expressed regarding the wisdom of *Saucier*'s decision to make the threshold inquiry mandatory, especially in cases where the constitutional question is relatively difficult and the qualified immunity question relatively straightforward."); see also *Horne*, 191 F.3d at 249 ("For a judiciary that is already heavily

burdened with cases it *must* decide, offering an unnecessary but simple solution to an easy problem is better justified than undertaking unnecessarily to untangle a difficult, complex issue.") (emphasis in original) (footnote omitted).

Saucier also requires defense counsel to advance potentially complex constitutional arguments on the first *Saucier* prong, even where counsel is confident of winning the case on the second prong. Adding to counsel's time, and defendant's expense, in this way undermines the very purpose behind the qualified immunity doctrine—to shield official defendants from "the burdens of litigation." *Brosseau*, 543 U.S. at 198; see also *DiMeglio v. Haines*, 45 F.3d 790, 798 (4th Cir. 1995) ("requiring that courts conduct a * * * merits review would threaten to increase the burden of defending suits for public officials whose conduct was reasonable, by expanding the number of issues officials must prepare to address, brief, and argue").

Experience teaches that some parties will rationally choose to devote little time and effort to the constitutional issue presented in step one. See *Motley*, 432 F.3d at 1077 ("The parties urge us to skip the first step of the *Saucier* analysis. They ask us to assume that the officers violated Motley's constitutional rights * * * and determine whether those rights were clearly established * * * ."); *Vives*, 405 F.3d at 118 n.7 ("We do not reach the constitutional question because we are reluctant to pass on the issue in *dicta* and because the parties did not genuinely dispute the constitutionality of [the challenged law] either in the District Court or on appeal."); *African Trade & Info. Ctr. v. Abromaitis*, 294 F.3d 355, 359 (2d Cir. 2002) (skipping to second

step of analysis because, *inter alia*, "the merits of [the constitutional] issue [were] scarcely mentioned in the briefs on appeal, let alone adequately briefed").

The reason for this is not difficult to ascertain. Individual defendants in § 1983 suits, particularly those employed by municipalities, are often represented by private counsel, who collectively and understandably have less interest in the long-term effects of an adverse constitutional ruling than in winning the case as efficiently and inexpensively as possible for their clients. See generally *Horne*, 191 F.3d at 247 ("[P]arties may do an inadequate job briefing and presenting an issue that predictably will have no effect on the outcome of the case."). For the same reason, even if it were somehow possible for prevailing defendants to appeal from an adverse constitutional ruling on *Saucier*'s first prong, see *supra* pp. 17-19, such defendants often will have no incentive to do so, and the plaintiff (having lost on the "clearly established" prong) may have no incentive to defend the lower court's constitutional decision. See Leval, *supra*, at 1279 ("Even if the defendant officer could appeal from the dictum, in many cases he would not do so. He has won the case. * * * [E]ven if the defendant did care and did appeal, at this point the plaintiff would likely have no interest in the appeal.").

For courts, too, the fact that a constitutional question has no impact on a case's outcome may detract from the quality of decisionmaking. See *Horne*, 191 F.3d at 247 ("Judges risk being insufficiently thoughtful and cautious in uttering pronouncements that play no role in their adjudication."). As Judge

Leval recently explained in concluding that "*Saucier* is a blueprint for the creation of bad constitutional law":

> [T]he fact is, in many cases neither the judge nor the defendant has any practical interest in the theoretical question of constitutionality. Both know it can have no effect on the inevitable dismissal of the case. The court's conclusion on this question will come at no price.

Leval, *supra*, at 1278-1279 (footnotes omitted).

Compounding these problems is the fact that *Saucier* compels courts to make constitutional decisions on an inadequate record. Settled precedent encourages defendants to raise qualified immunity early in litigation, including on a motion to dismiss, for "the defense is meant to give government officials a right, not merely to avoid standing trial, but also to avoid the burdens of such *pretrial* matters as discovery." *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (emphasis in original) (internal quotation marks omitted); see also *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation."). Yet raising the defense early can force courts to render highly abstract constitutional decisions "on a nonexistent factual record, even where * * * discovery would readily reveal the plaintiff's claims to be factually baseless." *Kwai Fun Wong v. United States*, 373 F.3d 952, 957 (9th Cir. 2004). A government official's decision to assert qualified immunity early in the litigation therefore may result in "the development of legal doctrine that has lost its moorings in the empirical world, and that

might never need to be determined were the case permitted to proceed." *Ibid.* As the Second Circuit noted in one such case,

> [g]iven the scant record before us (as is common in appeals from summary judgment based on qualified immunity), we are faced with three possible courses of action: (1) reach out on an inadequate record to announce a view, in dictum, on a constitutional question whose resolution is unnecessary to decide the case, (2) remand to the district court and direct the district court to require the parties to participate in further proceedings that will have no bearing on the result of their case, or (3) decline to express a view on the underlying constitutional question since we lack adequate information to do so. We think it clear that the third option is the preferable one.

Mollica v. Volker, 229 F.3d 366, 374 (2d Cir. 2000).

In sum, *Saucier* not only requires courts to abandon traditional notions of restraint and resolve constitutional questions unnecessarily, but often does so under unfavorable conditions, without adequate argument from one or both parties, without an adequate record, or without the benefit of appellate review. So, "[j]ust as the Court has been right to identify the risk that the constitutional question might infrequently, if ever, be decided, so there is a risk that constitutional questions may be prematurely and incorrectly decided in cases where they are not well presented." *Lyons*, 417 F.3d at 582 (Sutton, J., concurring) (citation omitted).

D. Requiring Courts To Decide Constitutional Claims In Every § 1983 Case Is Not Necessary To Develop The Law.

The Court justified its departure from the usual practice of avoiding non-essential constitutional rulings because "if the policy of avoidance were always followed in favor of ruling on qualified immunity * * *, standards of official conduct would tend to remain uncertain." *Lewis*, 523 U.S. at 841 n.5; see also *Saucier*, 533 U.S. at 201 ("The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."); *Wilson v. Layne*, 526 U.S. 603, 609 (1999) ("Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public."). But assuring the law's development does not require courts to make constitutional pronouncements in every case; it merely counsels against *prohibiting* courts from doing so. See *Lyons*, 417 F.3d at 581 (Sutton, J., concurring) ("All of this, however, just proves that the 'better approach' in this area is to resolve the first inquiry before the second one. It does not prove that the approach should be followed in *all* cases, and indeed a majority of the Justices have questioned the value of this strict requirement in recent years.") (citation omitted) (emphasis in original).

Abandoning *Saucier*'s mandatory, two-step "order of battle" does not mean categorically *forbidding* courts from deciding whether § 1983 plaintiffs have alleged

cognizable constitutional rights. In many cases, deciding the constitutional question first will be the preferred course. "The constitutional and non-constitutional questions in a qualified immunity case overlap, and it often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be." *Ibid.* And "[a]dressing a more concrete issue (was there a constitutional violation?) before turning to a more abstract issue (was it clearly established?) will generally present an easier mode of analysis than approaching matters the other way around." *Id.* at 583.

Introducing this flexibility would permit courts to resolve cases solely on the second, "clearly established" step of the inquiry where efficiency, inadequate argument, or some other factor makes it sensible to do so. See *Siegert*, 500 U.S. at 235 (Kennedy, J., concurring) ("The Court of Appeals adopted the altogether normal procedure of deciding the case before it on the ground that appeared to offer the most direct and appropriate resolution, and one argued by the parties."). There are a number of circumstances where such an approach would make sense:

> What of the district court that faces a complaint alleging dozens of constitutional violations? * * * What of the appellate panel facing a set of briefs in which the constitutional question is not only difficult but inadequately briefed? * * * And what of other settings: the appellate panel that cannot agree on the appropriate resolution of the constitutional question but can readily agree on the resolution of the clearly established

> question; the panel faced with a poorly presented constitutional question but an easily resolved clearly established question; the panel faced with a constitutional question that is not only difficult but highly fact specific and therefore unlikely to provide meaningful guidance in future cases; or the panel faced with a constitutional question that is essentially irrelevant to the case at hand because of significant intervening developments in the law?

Lyons, 417 F.3d at 582 (Sutton, J., concurring) (internal citation omitted).

Moreover, constitutional law does not depend for its development on cases where the defendant may seek qualified immunity. Constitutional issues arise in innumerable cases where there is no qualified immunity, such as criminal cases where the defendant seeks to suppress evidence, § 1983 cases against a municipality, or § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages. See *Lewis*, 523 U.S. at 841 n.5 (noting that qualified immunity is unavailable "in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion"); *Virgili v. Gilbert*, 272 F.3d 391, 394 (6th Cir. 2001) (relying solely on "clearly established" prong to decide in defendants' favor, and "not[ing] that ample opportunities exist to establish [the constitutional] standard via other means, for example through actions for declaratory or injunctive relief"); *Charles W. v. Maul*, 214 F.3d 350, 357 (2d Cir. 2000) ("[T]he Court should not determine the existence of the constitutional right alleged if the

question could be decided in proceedings in which qualified immunity is not a defense."); *Santamorena v. Georgia Military College*, 147 F.3d 1337, 1344 n.16 (11th Cir. 1998) ("Refraining (until truly necessary) from deciding—in qualified immunity cases—the more perplexing federal law issues will not inevitably preclude the law in due course from becoming clearly established. Suits seeking injunctions, suits against local governments, and certain criminal proceedings can settle the law."); Leval, *supra*, at 1280-1281 (even without *Saucier*'s rule, repeated conduct is "not likely to repeatedly escape review," for good-faith immunity "does not apply, for example, where an injunction is sought to prevent repetition of the conduct, * * * where the suit is against a municipality based on municipal policy," or "where suppression of evidence is sought").

In sum, there is no reason to presume that constitutional law would stand still if courts enjoyed the discretion to deviate from the *Saucier* rule in certain cases. Indeed, the Court has endorsed this very approach in other areas. For example, in *United States v. Leon*, 468 U.S. 897 (1984), the Court established a good-faith exception to the exclusionary rule that allows the introduction of evidence when an officer executes a search in reasonable reliance on a warrant found on review to have been unsupported by probable cause. See *id.* at 922-923. Addressing the concern that this rule could "preclude review of the constitutionality of the search or seizure, deny needed guidance from the courts, or freeze Fourth Amendment law in its present state," *id.* at 924, the Court reasoned:

> There is no need for courts to adopt the inflexible practice of always deciding whether

> the officers' conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated. * * * If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing will prevent reviewing courts from deciding that question before turning to the good-faith issue.

Id. at 924-925. *Leon* authorizes courts "to exercise an informed discretion" in deciding whether to resolve the constitutional issue before reaching the question of good faith, and, indeed, the Court could identify "no reason to believe that [its] Fourth Amendment jurisprudence would suffer by allowing reviewing courts to" proceed in this manner. *Id.* at 925. And there is none. Following *Leon*'s lead, courts have, where appropriate, resolved the constitutional inquiry prior to addressing the question of good faith. See, *e.g.*, *United States v. Danhauer*, 229 F.3d 1002, 1005 (10th Cir. 2000); *United States v. Hyppolite*, 65 F.3d 1151, 1158 (4th Cir. 1995); *United States v. Diaz*, 529 F. Supp. 2d 792, 793 (S.D. Tex. 2007); *United States v. Fleet Mgmt. Ltd.*, 521 F. Supp. 2d 436, 441 n.2 (E.D. Pa. 2007); *United States v. Smith*, 403 F. Supp. 2d 1061, 1064 (D. Utah 2005); *United States v. Feliz*, 20 F. Supp. 2d 97, 101 (D. Me. 1998); *United States v. Garcia*, 630 F. Supp. 142, 143 & n.3 (S.D.N.Y. 1986); *United States v. Owen*, 621 F. Supp. 1498, 1507 n.5 (D.C. Mich. 1985).

Just as Fourth Amendment jurisprudence has not stood still since the Court decided *Leon*, so, too, has the law continued to develop in other areas in which lower

courts are authorized to bypass a preliminary constitutional question. As Judge Sutton explained, although "the risk of stagnating constitutional doctrines * * * exists in other areas of law," such as the harmless error doctrine set forth in *Teague v. Lane*, 489 U.S. 288 (1989),

> the ability of courts to skip to the second inquiry (*e.g.*, to go straight to the harmlessness of the error or *Teague's* new-rule inquiry * * *) does not seem materially to have inhibited the development of constitutional law.

Lyons, 417 F.3d at 583. The same could be said of how federal courts resolve habeas cases under 28 U.S.C. § 2254(d)(1), which asks not whether the state criminal court's constitutional ruling was correct on the merits, but whether it was contrary to or an objectively unreasonable application of law clearly established by this Court's precedents. See *Carey v. Musladin*, 127 S. Ct. 649, 652-653 (2006). The same also could be said of how courts resolve ineffective assistance of counsel claims under *Strickland v. Washington*, 466 U.S. 668 (1984), which expressly allows such claims to be rejected solely under the prejudice prong without consideration of whether the attorney's performance was constitutionally inadequate. See *id.* at 697. Constitutional criminal law has continued to develop after Congress enacted § 2254(d)(1), see *Musladin*, 127 S. Ct. at 657 (Kennedy, J., concurring in the judgment) (agreeing that relief was unavailable under § 2254(d)(1) because the constitutional rule invoked by habeas petitioner "has not been clearly established by our cases to date," but urging that the rule "be explored in the court system, and then established in this

Court"), as have the standards governing the performance of defense counsel after *Strickland*. Constitutional law governing the conduct of government officials will develop as well even absent *Saucier*.

E. Abandoning The *Saucier* Rule Would Not Offend Principles Of *Stare Decisis*.

Although the Court "approach[es] the reconsideration of [its] decisions * * * with the utmost caution," "[*s*]*tare decisis* is not an inexorable command." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (internal quotation marks omitted). Revisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule, the existing rule does not achieve its own aim and causes a host of collateral problems, and the precedent has been criticized by several Members of this Court and narrowed and even disregarded by the courts of appeals.

"Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases * * * involving procedural and evidentiary rules." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Like procedural and evidentiary rules, *Saucier*'s two-step protocol does not affect the way that parties order their affairs. Abandoning *Saucier*'s categorical rule would not upset settled expectations on anyone's part. See *United States v. Gaudin*, 515 U.S. 506, 521 (1995).

Nor does this matter implicate "the general presumption that legislative changes should be left to Congress." *Khan*, 522 U.S. at 20. "[C]onsiderations of

stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). Not so here. Because the *Saucier* rule is judge-made, only this Court can change it.

Moreover, the "Court has never felt constrained to follow precedent" "when governing decisions are unworkable or are badly reasoned." *Payne*, 501 U.S. at 827 (internal quotation marks omitted). For the reasons set out above (see *supra* pp. 15-30), a mandatory, two-step rule for resolving all qualified immunity claims has had unforeseen, adverse collateral consequences, is unnecessary to advance the goal put forth as its justification, and in fact undermines that goal to a certain extent.

Finally, several Members of this Court have criticized the *Saucier* rule, and courts of appeals have sought to narrow the rule or disavow it altogether. See *supra* pp. 10-15. These factors, too, make reconsideration appropriate. See *Crawford v. Washington*, 541 U.S. 36, 60 (2004) ("Members of this Court * * * have suggested that we revise our doctrine * * * ."); *Payne*, 501 U.S. at 829-830 (overturning past decisions of the Court that had "been questioned by Members of the Court in later decisions, and [had] defied consistent application by the lower courts").

* * *

Saucier's rigid, two-step formula imposes burdens on courts and litigants, threatens to detract from the quality and coherence of constitutional decisionmaking, and is wholly unnecessary to achieve

its stated purpose. Accordingly, *amici* States respectfully urge the Court to abandon the rule as a requirement for use in every qualified immunity case.

II. THE COURT OF APPEALS' JUDGMENT SHOULD BE REVERSED ON QUALIFIED IMMUNITY GROUNDS.

In the decision below, the panel majority erred in holding that respondent's alleged constitutional right was "clearly established" and that petitioners' qualified immunity defense therefore failed. "'[C]learly established' for purposes of qualified immunity requires that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Wilson*, 526 U.S. at 614-615 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (brackets in original). This means that "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Wilson*, 526 U.S. at 615. General constitutional standards are rarely sufficient to show that a right is "clearly established"; the right must be established "in a more particularized, and hence more relevant, sense." *Brosseau*, 543 U.S. at 198-199 (2004) (internal quotation marks omitted). The panel majority violated this mandate by denying qualified immunity based on standards that both are overly general and provided no indication that petitioners' conduct violated the Fourth Amendment—to the contrary, the precedent cited by the majority suggests, if anything, that petitioners complied with the Constitution.

The majority held that "the relevant right" here "is the right to be free in one's home from unreasonable

searches and arrests." Pet. App. 15. The majority then cited three decisions of this Court, as well as Tenth Circuit cases, for the general rule that "warrantless entries into a home are per se unreasonable unless they satisfy the established exceptions" to the warrant requirement of consent and exigent circumstances. *Id.* at 15-16. Based on these propositions, the majority concluded that respondent's clearly established rights had been violated.

In reaching this conclusion, the majority erred twice. First, it improperly described the relevant right. As the dissent recognized:

> Properly characterized, the right at issue in this case is not simply the right to be free from unreasonable searches and seizures. Instead, it is the right to be free from the warrantless entry of police officers into one's home to effectuate an arrest after one has granted voluntary, consensual entry to a confidential informant and undertaken criminal activity giving rise to probable cause.

Id. at 27 (Kelly, J., dissenting).

This mischaracterization is fatal. As we have explained, the right allegedly violated must be defined with particularity to provide government officials with notice that their conduct is unlawful. Thus, while "[i]t could plausibly be asserted that any violation of the Fourth Amendment is 'clearly established,' since it is clear that the protections of the Fourth Amendment apply to the actions of police," the Court has never endorsed this approach, which does not ensure that officers receive the requisite notice before being subject

to liability. *Wilson*, 526 U.S. at 615. When the right here is appropriately characterized, it is plain that petitioners committed no violation of clearly established law. Prior to the events at issue, neither this Court nor the Tenth Circuit had discussed, much less endorsed, a right to be free from a warrantless entry by police summoned by an informant with consent to enter. See Pet. App. 27 (Kelly, J., dissenting). Given this dearth of guidance, petitioners cannot be said to have violated clearly established law.[3]

Second, even if properly considered, the broad statements of constitutional law upon which the majority relied do not support its rejection of qualified immunity. To the contrary, the majority's view that this Court and its own precedents had clearly limited the exceptions to the warrant requirement to those that are "established," *id.* at 17, undermines rather than supports its determination that petitioners

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[3] Although the Court has recognized that there exist constitutional violations so "obvious" that factually analogous cases are unnecessary, *Brousseau*, 542 U.S. at 199, this case cannot plausibly be claimed to fall into this narrow category, especially since, at the time of petitioners' conduct, every circuit to have considered the consent-once-removed doctrine had endorsed it, see *United States v. Pollard*, 215 F.3d 643, 648 (6th Cir. 2000); *United States v. Bramble*, 103 F.3d 1475, 1478 (9th Cir. 1996), and one circuit had even applied the doctrine to informants, see *United States v. Paul*, 808 F.2d 645, 647-648 (7th Cir. 1986). That other circuits had endorsed petitioners' actions confirms their entitlement to—although it is not a prerequisite for—qualified immunity.

violated clearly established law. As the majority acknowledged, *id.* at 11-12, it has long been settled that the Fourth Amendment's prohibition on warrantless entries into a home does not apply when voluntary consent has been obtained, either from the individual whose property is searched or from a third party with common authority over the premises. See, *e.g.*, *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). As its name indicates, the consent-once-removed doctrine is premised on the presence of consent for entry. Indeed, courts recognizing the doctrine—including the Tenth Circuit in its decision below—have expressly relied on the consent exception to the warrant requirement, specifically, the view that consent received by the undercover officer or informant is sufficient to authorize a search by the officers with whom the undercover officer or informant is working. See Pet. App. 11-12; *United States v. Yoon*, 398 F.3d 802, 806-808 (6th Cir. 2005); *United States v. Bramble*, 103 F.3d 1475, 1478-1479 (9th Cir. 1996); *United States v. Paul*, 808 F.2d 645, 647-648 (7th Cir. 1986); *State v. Henry*, 627 A.2d 125, 129 (N.J. 1993); *State v. Johnston*, 518 N.W.2d 759, 762-765 (Wis. 1994).

Thus, contrary to the majority's view, petitioners are not seeking "[t]he creation of an additional exception" to the warrant requirement. Pet. App. 17. As a result, this case bears no comparison to *Groh v. Ramirez*, 540 U.S. 551 (2004), on which the majority relied heavily, notwithstanding that *Groh* postdates the conduct at issue and thus is "of no use in the clearly established inquiry" because it "could not have given fair notice to [the petitioners]." *Brousseau*, 543 U.S. at 200 n.4. In *Groh*, the officer asked the Court "to craft a new exception" to the Fourth Amendment,

specifically, relief from the warrant requirement in cases where the warrant lacks particularity. 540 U.S. at 565. Here, by contrast, petitioners, and the courts that have adopted the approach they advocate, rely on the long-established rule that a warrant is unnecessary when there is consent to the search.

Had the panel adhered to settled qualified immunity standards, it would have granted qualified immunity to petitioners on the ground that respondent's alleged constitutional right was not "clearly established." Its contrary judgment should be reversed.

CONCLUSION

The Court should overrule *Saucier*, and the judgment of the court of appeals should be reversed.

Respectfully submitted.

LISA MADIGAN
Attorney General of Illinois
MICHAEL A. SCODRO*
Solicitor General
JANE ELINOR NOTZ
Deputy Solicitor General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-3698

*Counsel of Record

JUNE 2008

TROY KING
Attorney General of
Alabama
111 South Union Street
Montgomery, AL 36130

TALIS J. COLBERG
Attorney General of Alaska
P.O. Box 110300
Juneau, AK 99811

DUSTIN MCDANIEL
Attorney General of
Arkansas
323 Center Street
Little Rock, AR 72201

EDMUND G. BROWN, JR.
Attorney General of
California
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244

JOHN W. SUTHERS
Attorney General of
Colorado
1525 Sherman St., 7th Fl.
Denver, CO 80203

BILL MCCOLLUM
Attorney General of Florida
The Capitol PL-01
Tallahassee, FL 32399

THURBERT E. BAKER
Attorney General of Georgia
40 Capitol Square
Atlanta, GA 30334

MARK J. BENNETT
Attorney General of Hawaii
425 Queen Street
Honolulu, HI 96813

LAWRENCE G. WASDEN
Attorney General of Idaho
P.O. Box 83720
Boise, ID 83720

STEVE CARTER
Attorney General of
Indiana
302 W. Washington Street
Indianapolis, IN 46204

MARTHA COAKLEY
Attorney General of
Massachusetts
One Ashburton Place
Boston, MA 02108

MICHAEL A. COX
Attorney General of
Michigan
P.O. Box 30212
Lansing, MI 48909

JIM HOOD
Attorney General of
Mississippi
P.O. Box 220
Jackson, MS 39205

MIKE MCGRATH
Attorney General of
Montana
P.O. Box 201401
Helena, MT 59620

CATHERINE CORTEZ MASTO
Attorney General of Nevada
100 N. Carson Street
Carson City, NV 89701

KELLY A. AYOTTE
Attorney General of
New Hampshire
33 Capitol Street
Concord, NH 03301

ANNE MILGRAM
Attorney General of
New Jersey
Hughes Justice Complex
P.O. Box 080
25 Market Street
Trenton, NJ 08625

W.A. DREW EDMONDSON
Attorney General of
Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105

THOMAS W. CORBETT, JR.
Attorney General of
Pennsylvania
16th Floor
Strawberry Square
Harrisburg, PA 17120

ROBERTO J. SANCHEZ-RAMOS
Secretary of Justice
Commonwealth of
Puerto Rico
P.O. Box 9020192
San Juan, PR 00902

PATRICK C. LYNCH
Attorney General of
Rhode Island
150 South Main Street
Providence, RI 02903

HENRY D. MCMASTER
Attorney General of
South Carolina
P.O. Box 11549
Columbia, SC 29211

LAWRENCE E. LONG
Attorney General of
South Dakota
1302 E. Highway 14, Ste.1
Pierre, SD 57501

ROBERT E. COOPER, JR.
Attorney General of
Tennessee
P.O. Box 20207
Nashville, TN 37202

GREG ABBOTT
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711

MARK L. SHURTLEFF
Attorney General of Utah
Utah State Capitol, Ste. 230
P.O. Box 142320
Salt Lake City, UT 84114

WILLIAM H. SORRELL
Attorney General of
Vermont
109 State Street
Montpelier, VT 05609

ROBERT M. MCKENNA
Attorney General of
Washington
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504

DARRELL V. MCGRAW, JR.
Attorney General of
West Virginia
State Capitol, Room 26-E
Charleston, WV 25305

J.B. VAN HOLLEN
Attorney General of
Wisconsin
P.O. Box 7857
Madison, WI 53707

BRUCE A. SALZBURG
Attorney General of
Wyoming
123 State Capitol
Cheyenne, WY 82002