No. 07-751

IN THE
Supreme Court of the United States

CORDELL PEARSON, MARTY GLEAVE, DWIGHT JENKINS, CLARK THOMAS, AND JEFFREY WRIGHT,
Petitioners,

v.

AFTON CALLAHAN,
Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether police officers are liable in damages for violating the Fourth Amendment's prohibition on unreasonable search and seizure when they arrest an individual inside his residence and conduct a search incident to arrest, after an informant, who had been invited into the residence by the arrestee for the purpose of purchasing a controlled substance, gave a prearranged signal to the officers indicating that he had just completed the illegal transaction.

2. Whether this Court should overrule its decision in *Saucier v. Katz*, 533 U.S. 194 (2001), recognizing the defense of qualified immunity in cases seeking damages for an allegedly unreasonable search and seizure, and directing courts to consider the merits of the plaintiff's constitutional claim before turning to a proffered immunity defense.

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INTEREST OF THE *AMICI CURIAE*

Amici represent state and local governments and officials throughout the United States.[1] State and local governments are deeply involved in enforcement of the drug laws. For that reason, they have a substantial interest in opposing rules of law – like the one adopted by the court of appeals in this case – that impose unnecessary obstacles to law enforcement without meaningfully advancing privacy interests.

In addition, state and local governments and officials are frequently involved in litigation seeking damages for an alleged "deprivation of . . . rights, privileges and immunities secured by the Constitution and laws," 42 U.S.C. § 1983. This litigation has significant implications for the public fisc. Even when civil rights plaintiffs name only state and local employees as defendants, their employer usually bears the financial burden of defending the litigation and paying an adverse judgment.

Amici acknowledge the value of civil rights litigation in creating a financial incentive for public employers to take care that their employees comply with applicable constitutional standards. When, however, public employees make reasonable but ultimately erroneous judgments about the legality of their conduct, the doctrine of qualified immunity properly shields the taxpaying public from the finan-

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

cial consequences of liability in the absence of meaningful culpability.

STATEMENT

The Central Utah Narcotics Task Force is charged with investigating illegal drug use and sales. Pet. App. 31. On March 19, 2002, Brian Bartholomew, who became an informant for the Task Force after having been charged with the unlawful possession of methamphetamine, informed Officer Jeffrey Whatcott that respondent Afton Callahan had arranged to sell Bartholomew methamphetamine later that day. Pet. App. 2, 31-32.

That evening, Bartholomew had between six and eight beers before arriving at respondent's residence at about 8:00 P.M. Pet. App. 2, 32. Once there, Bartholomew went inside and confirmed that respondent had methamphetamine available for sale, sampling the merchandise. Pet. App. 2, 32. Bartholomew then told respondent that he needed to obtain money to make his purchase, and left. Pet. App. 2-3, 32.

Bartholomew met with members of the Task Force at about 9:00 P.M., and told them that he would be able to buy a gram of methamphetamine for $100. Pet. App. 32-33. During the meeting, the officers learned that Bartholomew had been drinking and he appeared intoxicated, although Bartholomew did not disclose that he had also ingested methamphetamine. Pet. App. 3, 33. The officers supplied Bartholomew with coffee, and after concluding that he was capable of completing the planned purchase, they searched him, determined that he had no controlled substances on his person, gave him a marked $100 bill and a concealed electronic transmitter to monitor his conversations, and agreed on a signal

that he would give after completing the purchase. Pet. App. 3, 33.

The officers drove Bartholomew to respondent's trailer home, and respondent's daughter let him inside. Pet. App. 3, 33. Respondent then retrieved a large bag containing methamphetamine from his freezer and some small bags, and sold Bartholomew a gram of methamphetamine, which he put in one of the small bags. Pet. App. 3, 34. Bartholomew gave the arrest signal to the officers, who were monitoring the conversation and then entered the trailer through a porch door. Pet. App. 3, 34-35. In the enclosed porch, the officers encountered Bartholomew, respondent, and two other persons, and saw respondent drop a plastic bag which they later determined contained methamphetamine. Pet. App. 3, 35. The officers then conducted a protective sweep of the premises. Pet. App. 4, 35-36. In addition to the bag of methamphetamine, the officers recovered the marked bill from respondent, a small bag containing methamphetamine from Bartholomew, and found drug syringes in the residence. Pet. App. 4, 36.

Respondent was charged with the unlawful possession and distribution of methamphetamine. Pet. App. 4, 37. The trial court concluded that the warrantless arrest and search was supported by exigent circumstances, but the Utah Court of Appeals disagreed and vacated respondent's conviction. *See State v. Callahan*, 93 P.3d 103 (Utah Ct. App. 2004). Respondent then brought this section 1983 damages action. Pet. App. 4-5, 39.

In granting the officers' motion for summary judgment, the district court noted that other courts had adopted the "consent-once-removed" doctrine, which permits a warrantless entry by police officers

into a home when consent to enter has already been granted to an undercover officer or informant who has observed contraband in plain view. Pet. App. 47-51. The district court believed, however, that this doctrine was in tension with the intervening decision in *Georgia v. Randolph*, 547 U.S. 103 (2006). The court concluded that "the simplest approach is to assume that the Supreme Court will ultimately reject the [consent-once-removed] doctrine and find that searches such as the one in this case are not reasonable under the Fourth Amendment." Pet. App. 53. The court then held at that the officers were entitled to qualified immunity because they could have reasonably believed that the consent-once-removed doctrine authorized their conduct. Pet. App. 53-56.

A divided court of appeals reversed. The majority rejected the consent-once-removed doctrine because "the person with authority to consent never consented to the entry of police into the house." Pet. App. 12. The majority also held that the officers were not entitled to qualified immunity because their actions did not fit into any established exception to the warrant requirement. Pet. App. 15-18. Judge Kelly dissented, reasoning that once a homeowner admits an undercover agent or informant who observes contraband in plain view, "any previously existent legitimate expectation of privacy is abandoned." Pet. App. 24. Judge Kelly also would have affirmed on qualified immunity grounds because three circuits had recognized the "consent-once-removed" doctrine prior to the search at issue. Pet. App. 28-29.

SUMMARY OF ARGUMENT

1. There is no dispute in this litigation about whether the officers had probable cause to arrest

respondent. Moreover, under the circumstances, it was virtually certain that contraband was to be found in the residence. Still, the court of appeals believed that even after Bartholomew had given the arrest signal, the Fourth Amendment obligated the officers to leave the area, prepare a warrant application, present it to a judicial officer, and only then enter the residence by executing the warrant. Such extraordinary inefficiency in law enforcement under circumstances in which criminal drugs are virtually certain to be found in a residence – at least if the authorities enter with alacrity – is not mandated by the Fourth Amendment.

The Fourth Amendment's text does not require a warrant before the authorities enter a home; it requires only that such warrantless searches be reasonable. To be sure, it is frequently reasonable in the constitutional sense to require a warrant prior to entry of a home, but this is not invariably so.

To assess reasonableness, the Court weighs the extent to which a search or seizure intrudes on legitimate expectations of privacy against the legitimate governmental interests at stake. When an undercover officer or informant has entered a residence with the owner's consent and observed contraband in plain view, the privacy interests of the owner have already been compromised. Conversely, the governmental interests in an immediate arrest are compelling. When the presence of contraband is virtually certain, requiring the police to leave, obtain a warrant, and only later return to execute the warrant, hoping that the contraband and offender remain inside, injects needless inefficiency into the enforcement of the drug laws.

2. At a minimum, the officers were entitled to qualified immunity, which shields officials from suit unless they violate clearly established law. The court of appeals' majority acknowledged that prior to the search at least one other circuit had squarely held that a warrantless entry under circumstances indistinguishable from those present here comports with the Fourth Amendment; the dissent identified three circuits that had sanctioned such an entry. Given these contrasting judicial views, it is obvious that the officers violated no clearly established constitutional rule.

3. This Court has invited reconsideration of the question whether the decision in *Saucier v. Katz*, 533 U.S. 194 (2001), which directs courts to consider the merits of a Fourth Amendment claim before addressing a defense of qualified immunity. At first blush, it may seem anomalous that the defense of qualified immunity, which asks whether a public official sued for the performance of his official duties acted reasonably, should apply to a case alleging unreasonable search and seizure – both the merits and immunity might seem to turn on the same standard of reasonableness. It might also seem that deciding the merits of a constitutional claim before considering an immunity defense results in unnecessary constitutional adjudication. These seeming anomalies, however, are amply justified by the purposes of qualified immunity. Qualified immunity is recognized because it prevents the threat of liability from inducing public employees to exercise excessive caution when performing their duties. *Saucier v. Katz* is faithful to this objective.

Qualified immunity is properly applied to Fourth Amendment litigation because the burden of liability

is not fairly imposed when law enforcement officials violate no clearly established right, but merely fail to anticipate the manner in which Fourth Amendment law will evolve. When, moreover, courts consider the merits of a constitutional claim before reaching an immunity defense, they are able to articulate evolving constitutional standards, thereby obligating States and municipalities and their officials to hew to those standards in the future. If courts frequently declined to reach the merits prior to considering immunity, the development of constitutional law might be unduly inhibited as cases presenting novel constitutional issues were rejected not because of the claim's merits, but because no clearly established right had been violated. A rule that gave courts broad discretion to bypass the merits, moreover, would make litigation more complex and unpredictable, leading to precisely the kind of burdensome and expensive litigation that qualified immunity is intended to preclude. Only on a showing of unusually powerful prudential considerations should a court bypass the merits and go straight to a proffered immunity defense.

ARGUMENT

Under the approach to qualified immunity that this Court has taken for nearly two decades, the judgment below should not stand. The conduct of the police officers was consistent with the Fourth Amendment, and in any event was shielded by qualified immunity. The Court, however, has invited reconsideration of whether this approach to immunity should be repudiated, and *Saucier v. Katz*, 533 U.S. 194 (2001), overruled.

Radical restructuring of the law of qualified immunity is unwarranted and inconsistent with the

policies articulated in the Court's qualified immunity jurisprudence. The Court's approach in *Saucier* ensures that qualified immunity does not stifle the development of constitutional law, while shielding the taxpayers from the type of financial burden that this Court has held is not properly imposed in section 1983 litigation.

I. THE OFFICERS ARE NOT LIABLE FOR AN UNREASONABLE SEARCH AND SEIZURE BY ENTERING RESPONDENT'S HOME AFTER THE INFORMANT HAD CONFIRMED THAT IT CONTAINED CONTRABAND.

Under either substantive Fourth Amendment law or the defense of qualified immunity, the officers are not liable for entering respondent's residence once Bartholomew had confirmed that he had just purchased contraband there.

A. The Officers' Conduct Did Not Violate the Fourth Amendment's Prohibition On Unreasonable Search and Seizure.

The Fourth Amendment contains specific rules governing warrants, but the only requirement governing warrantless search and seizure is that it be reasonable:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The Fourth Amendment's special focus on warrants was no accident. Because of the broad and generally unreviewable authority that warrants conferred on those who executed them, warrants were of special concern to the Framers, while warrantless search and seizure, in contrast, could be assessed on an individualized basis for reasonableness. *See*, *e.g.*, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 669-71 (1995) (O'Connor, J., dissenting); *California v. Acevedo*, 500 U.S. 565, 581-82 (1991) (Scalia, J., concurring in the judgment); *United States v. Leon*, 468 U.S. 897, 970-72 (1984) (Stevens, J., dissenting). Thus, when it comes to warrantless search and seizure, "[t]he touchstone of the Fourth Amendment is reasonableness." *United States v. Knights*, 534 U.S. 112, 118 (2001). *Accord*, *e.g.*, *Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977).

When assessing reasonableness, the Court "look[s] to the statutes and the common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve." *Virginia v. Moore*, 128 S. Ct. 1598, 1602 (2008). *Accord*, *e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001); *Wyoming v. Houghten*, 526 U.S. 295, 299 (1999); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). In this case, however, framing-era practice provides little guidance. There is no claim that the officers lacked probable cause to arrest respondent on a felony charge of unlawful distribution of methamphetamine at the time they entered the trailer.[2] This

[2] Distribution and possession with intent to distribute of a schedule II controlled substance is a felony under Utah law. *See* Utah Stat. § 58-37-8(1). Methamphetamine is a schedule II

Court has previously surveyed framing-era law and found that it supplies no clear guidance on whether a warrant was required to arrest an individual in his residence when there is probable cause to believe that he had committed a felony. *See Payton v. New York*, 445 U.S. 573, 592-98 (1980).[3]

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controlled substance. *See id.* § 58-37-4(b)(iii)(B). Respondent's failure to contest the existence of probable cause to arrest is understandable. It has long been settled that "[p]robable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (parentheses in original) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)). It is equally settled that information from an informant that a suspect will engage in unlawful activity, once fairly corroborated by subsequent investigation, supplies probable cause. *See*, *e.g.*, *Illinois v. Gates*, 462 U.S. 213, 241-45 (1983). In *Draper v. United States*, 358 U.S. 307 (1958), for example, an informant told a federal agent that Draper would arrive in Chicago on a train from Denver on one of two days with heroin in his possession. *See id.* at 309. The Court held that once the agent observed a man matching Draper's description emerge from the Denver train, there was probable cause to arrest and conduct a search incident to arrest. *See id.* at 312-14. With such corroboration, even information from an informant that lacks a history of providing reliable information will supply probable cause. *See Gates*, 462 U.S. at 243-44. In this case, given the information that Bartholomew had provided, the fact that he had been searched for drugs before entering the trailer and been given a marked bill, and then had given the arrest signal, knowing that the officers would instantly be in a position to verify whether he had in fact purchased methamphetamine, the officers plainly had probable cause to arrest respondent.

[3] The dissenters in *Payton* argued that there was no requirement for a warrant to make a felony arrest in the arrestee's home in framing-era jurisprudence. *See* 445 U.S. at 604-

"When history has not provided a conclusive answer, we have analyzed a search or seizure . . . 'by assessing, on the one hand, the degree to which it intrudes on an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Moore*, 128 S. Ct. at 1604 (quoting *Houghton*, 526 U.S. at 300). *Accord*, *e.g.*, *Atwater*, 532 U.S. at 346; *Acton*, 515 U.S. at 652-53. In light of the substantial privacy interests at stake, this Court has treated warrantless entry into the home as presumptively unreasonable. *See*, *e.g.*, *Payton*, 445 U.S. at 585-90. This rule, however, is not without qualification.

One instance in which the Fourth Amendment does not require a warrant is when an agent or informant is invited inside, even when acting in an undercover capacity. In *Lewis v. United States*, 385 U.S. 206 (1967), for example, Lewis invited an undercover agent into his home for the purpose of selling him marijuana. *See id.* at 207-08. While acknowledging that "the home is accorded the full range of Fourth Amendment protections," the Court nevertheless rejected Lewis's Fourth Amendment claim: "[W]hen, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street." *Id.* at 211.

Similarly, in *Hoffa v. United States*, 385 U.S. 293 (1966), the Court found that an undercover government informant's participation in conversations about a jury tampering scheme in Hoffa's hotel suite

14 (White, J., dissenting). On that view, one could make short work of respondent's Fourth Amendment claim.

did not violate the Fourth Amendment because "no interest legitimately protected by the Fourth Amendment is involved" when it comes to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Id.* at 302. Indeed, "[i]t is well settled that when an individual voluntarily reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities . . . ." *United States v. Jacobsen*, 466 U.S. 109, 117 (1984). An undercover agent or informant may even conceal a transmitter or recording device on his person because such a procedure compromises no interest protected by the Fourth Amendment. *See*, *e.g.*, *United States v. White*, 401 U.S. 745, 748-54 (1971) (plurality opinion) (transmitter); *Lopez v. United States*, 373 U.S. 427, 438-39 (1963) (recorder); *On Lee v. United States*, 343 U.S. 747, 753-54 (1952) (transmitter).

Thus, by virtue of Bartholomew's entirely proper conduct, by the time the officers entered respondent's home, respondent had effectively disclosed not only to Bartholomew but to the officers as well that he was using his home to sell contraband. In these circumstances, it is hard to understand how respondent's privacy interests would have been advanced by requiring the officers to leave, obtain a warrant, and then return – respondent had already compromised his privacy interests through his dealings with Bartholomew, and it is virtually certain that a warrant would issue under the circumstances.

When expectations of privacy ordinarily protected by the Fourth Amendment have already been compromised, the rationale for the warrant requirement disappears. In *Texas v. Brown*, 460 U.S. 730 (1983), for example, three Members of the Court

opined that when a police officer during a traffic stop observed a balloon in a vehicle under circumstances that made it virtually certain that the balloon contained contraband, no warrant was required to open the balloon. *See id.* at 750-51 (Stevens, J., concurring in the judgment). No other member of the Court expressed a different view; the other Justices found it unnecessary to consider whether a warrant was required to open the balloon. *See id.* at 743-44 (plurality opinion); *id.* at 746-47 (Powell, J., concurring in the judgment).[4]

Conversely, the governmental interests supporting a warrantless entry and immediate arrest here are substantial. Requiring officers to leave the premises, obtain a warrant, and then execute it, hoping that both the contraband and the suspect remain on the premises, injects needless inefficiency into law enforcement. Efficiency, moreover, is of no small concern to those involved in law enforcement. There is convincing evidence, for example, that increasing the size of the police force produces reductions in crime. *See* Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime*, 87 Am. Econ. Rev. 270 (1997); Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime: Reply*, 92 Am. Econ. Rev. 1244 (2002). Many state and local governments, however, lack the resources to increase the size of their police forces, and must instead look to achiev-

[4] When *Brown* was decided, the Fourth Amendment was thought to require a warrant to open a closed container even when found in a vehicle when the only location within the vehicle in which there was probable cause to believe contraband was present is the container. *See United States v. Ross*, 456 U.S. 798 (1982). This rule was later repudiated in *Acevedo*. *See* 500 U.S. at 579-80.

ing greater efficiency. But needless administrative hurdles to the enforcement of the drug laws are a substantial barrier to such efficiencies.[5]

What is more, imposing a warrant requirement in these circumstances would actually increase the likelihood that an informant like Bartholomew might mislead the officers about what had happened inside – a possibility that was minimized by an immediate entry that enabled the officers to confirm that Bartholomew had just bought methamphetamine. There is surely a substantial law enforcement interest in an immediate entry as a safeguard against unreliable informants.

When expectations of privacy have already been compromised and the law enforcement interests supporting an immediate search and seizure are great, the Fourth Amendment's requirement of reasonable-

[5] The officers could have impounded the trailer and, had they coaxed respondent and the other occupants outside, detained them pending the issuance of a warrant. *See Illinois v. MacArthur*, 531 U.S. 326, 331-34 (2001). An effort to coax the occupants outside, however, might merely have alerted them to the investigation and risked the destruction of evidence, and, in any event, impoundment and detention would have required an even greater commitment of police resources. The officers might also have sought an anticipatory warrant before arriving at the trailer, although it is unclear whether such a warrant would have issued. An anticipatory warrant is proper only when "there is probable cause to believe the triggering condition *will occur*." *United States v. Grubb*, 547 U.S. 90, 97 (2006) (emphasis in original). Until the transmitted arrest signal, it is unclear that the officers had probable cause to believe respondent would violate the law, especially considering Bartholomew's evident intoxication and lack of a prior history of reliability. *See supra* note 3. In any event, requiring an anticipatory warrant in these circumstances would again inject needless inefficiency in the law.

ness does not require a warrant. In *Jacobsen*, for example, the employees of a private freight service observed a white powdery substance inside a damaged package. *See* 466 U.S. at 111. While acknowledging that "[l]etters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable," *id.* at 114 (footnote omitted), the Court held that the agents did not need a warrant to reopen the package: "The advantage the Government gained thereby was merely avoiding the risk of a flaw in the employees' recollection, rather than in further infringing respondents' privacy." *Id.* at 119. *Cf. Lopez*, 373 U.S. at 439 ("Stripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment.").

Here as well, it was virtually certain that the trailer contained contraband. Given the information Bartholomew had provided, the corroborating transmission from within the trailer, and Bartholomew's knowledge that within moments the Task Force would be in a position to see for themselves, respondent's rapidly vanishing expectation of privacy with respect to the contraband in plain view in his residence surely pales in comparison to the law enforcement interests in making an immediate arrest and search incident to that arrest.[6] Accordingly, the

[6] Because, as we explain above, there was probable cause to arrest respondent, the Fourth Amendment also permitted a search of respondent and the immediately surrounding area, *see Chimel v. California*, 395 U.S. 752, 762-63 (1969), a protective sweep of the residence, *see Maryland v. Buie*, 494 U.S. 325, 334-

officers' warrantless entry comported with the Fourth Amendment.

Our submission does not rest on any notion of respondent's consent to the officers' entry. The scope and validity of consent is judged by the ordinary social understandings that surround entry into the residence of another. *See Randolph*, 547 U.S. at 113-17. While respondent consented to Bartholomew's entry into his home, we do not claim that it is commonly understood that consent to an invited guest's entry implies a corresponding consent to anyone else the guest may summon, including the authorities. But, as Judge Kelly noted in his dissenting opinion below, "[t]he name 'consent once removed' is something of a misnomer . . . ." Pet. App. 22. The officers' entry into respondent's trailer was not based on his consent, but rather was constitutionally reasonable in light of what respondent had already disclosed to Bartholomew and, through him, to the Task Force itself, coupled with the governmental interests supporting respondent's immediate arrest.

To be sure, the arrest and ensuing search and seizure occurred in respondent's home, but "the Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). Once respondent had effectively announced to the Task Force that he was dealing methamphetamine from his home, his remaining privacy interests were not sufficiently substantial to require the officers to

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37 (1990), and seizure of contraband and other evidence of a crime in plain view, *see Horton v. California*, 496 U.S. 128, 133-42 (1990). To the extent that respondent claims the officers exceeded the permissible scope of these doctrines, such a claim would presumably remain open on remand from this Court's decision.

refrain from making an immediate arrest and search incident thereto in order to comply with the constitutional requirement of reasonableness.

B. The Officers Are Entitled to Qualified Immunity.

The doctrine of qualified immunity shields public officials from damages liability unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *Accord*, *e.g.*, *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Anderson v. Creighton*, 483 U.S. 635, 638-40 (1983). Thus, "[q]ualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brousseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam).

In this case, as the court of appeals' majority acknowledged, at the time of respondent's arrest, the Seventh Circuit had already approved of the "consent-once-removed" doctrine on facts indistinguishable to those present here. *See* Pet. App. 16-17. Judge Kelly, in dissent, counted three circuits that had approved the doctrine in terms that arguably reached this case, and added that no court, including the Tenth Circuit, had condemned the doctrine. *See id.* at 28-29. In the face of what was, at worst, conflicting authority, qualified immunity is surely available.

In *Wilson v. Layne*, for example, after holding that the Fourth Amendment's prohibition on unreasonable search and seizure forbids authorities from bringing media representatives with them into an

arrestee's home when executing an arrest warrant, *see* 526 U.S. at 609-14, this Court then held that the officers were entitled to qualified immunity because, at the time of the search and even later, courts had disagreed about the constitutionality of the practice. *See id.* at 615-18. The Court observed: "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Id.* at 618. The same is true here.

For its part, the court of appeals' majority contended that the general rule requiring a warrant was well settled, and neither it nor this Court had yet articulated an exception to the warrant requirement applicable to this case. *See* Pet. App. 15-18. This view is little different from the approach this Court rejected in *Anderson v. Creighton*. In that case, the court of appeals denied qualified immunity for a warrantless entry that a federal agent believed was justified by exigent circumstances on the ground that the requirement of a warrant absent exigent circumstances to enter a home had been clearly established. *See* 483 U.S. at 637-38. This Court disagreed: "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. Here, similarly, the officers could have reasonably believed that their conduct fell into another exception to the warrant requirement for which there was reasonable support in the law.

The court of appeals' majority also relied on *Groh v. Ramirez*, 540 U.S. 551 (2004), in which federal

agents executed a search warrant that did not specify the items they were authorized to seize, and later argued that they could have reasonably relied on the specification in the warrant application to comply with the Fourth Amendment's particularity requirement. *See id.* at 554-56. This Court denied the agents qualified immunity because the warrant made no effort to comply with the express particularity requirement of the Fourth Amendment's Warrant Clause. *See id.* at 563-65. Here, however, the Fourth Amendment's more general reasonableness requirement is at issue, and unless our submission above (or the view of at least the Seventh Circuit) is thought utterly absurd, an officer could reasonably have thought the conduct at issue was constitutional.

II. QUALIFIED IMMUNITY IS PROPERLY APPLIED TO FOURTH AMENDMENT CLAIMS AND SHOULD ORDINARILY BE REACHED AFTER CONSIDERATION OF THEIR MERITS.

When it granted certiorari, the Court asked the parties to consider whether the decision in *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled. This question raises at least two distinct issues.

On the one hand, the Court could revisit the contention of the principal separate opinion in *Saucier* that qualified immunity should not be applied to claims of unreasonable search and seizure because the immunity inquiry duplicates the substantive constitutional standard of reasonableness. *See id.* at 213-14 (Ginsburg, J., concurring in the judgment). On the other, the Court might reconsider its direction to lower courts in *Saucier* that the merits of the constitutional claim should be considered before turning to a proffered immunity defense. *See id.* at

200-01. A number of Justices have expressed concern that this approach results in unnecessary constitutional adjudication, and may as a practical matter insulate a lower court's decision on the merits from this Court's review. *See*, *e.g.*, *Morse v. Frederick*, 127 S. Ct. 2618, 2641-42 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part); *Scott v. Harris*, 127 S. Ct. 1769, 1780 (2007) (Breyer, J., concurring); *Brousseau*, 543 U.S. at 201-02 (Breyer, J., concurring); *County of Sacramento v. Lewis*, 523 U.S. 833, 859 (1998) (Stevens, J., concurring in the judgment).

Considered in light of the purposes of qualified immunity, these criticisms of *Saucier* are wanting in the vast majority of cases. Accordingly, we turn first to the policies underlying qualified immunity, and then consider the attacks on *Saucier* in light of them.

A. Qualified Immunity Protects Governmental Defendants Against the Threat of Overdeterrence and Unwarranted Invasions of the Public Fisc.

In *Pierson v. Ray*, 386 U.S. 547 (1967), the Court explained that when section 1983 was enacted, the common law recognized an immunity from liability when police reasonably and in good faith believe that their actions are lawful, and for that reason held that a similarly qualified immunity should be recognized under section 1983. *See id.* at 553-55. Subsequently, however, this historical approach was overtaken by a functional one; in *Harlow*, the Court repudiated the good faith prong of the common law immunity defense on the ground that it failed to protect public officials from the chilling effect of burdensome litigation and unanticipated liability. *See* 457 U.S. at 814-

20. Thus, immunity is now governed by functional considerations. *See Anderson*, 483 U.S. at 644-46.

To be sure, it is rarely the threat of personal liability that inhibits public employees in the performance of their duties. As Justice Breyer has observed, most public officials are indemnified for their legal costs. *See Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 436 (1997) (dissenting opinion). Indeed, by statute, policy, or collective bargaining agreement, indemnification is common in public employment. *See*, *e.g.*, Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. Pa. J. Const. L. 797, 812, 819-20 (2007). This should be unsurprising; labor economics teaches that employers must offer sufficient compensation to account for the risk of liability that employees face and are likely to choose indemnification as the most efficient means of doing so. *See*, *e.g.*, Alan O. Sykes, *The Economics of Vicarious Liability*, 93 Yale L.J. 1231, 1239-43 (1984). The ubiquity of indemnification, however, does not mean that the Court is wrong to believe that absent qualified immunity, damages awards have the potential to inhibit public officials in the performance of their duties.

As the Court has observed, public employers operate within a system of political accountability rather than the type of competitive market that gives private employers an incentive to make cost-justified investments in liability reduction. *See Richardson v. McKnight*, 521 U.S. 399, 409-11 (1997). Still, public employers are sensitive to the threat of liability because damages awards impose a political cost by forcing public employers to divert scarce public resources from what they are likely to regard as politically op-

timal uses. *See* Rosenthal, *supra* at 831-43. Thus, public employers have a political incentive to take care that their employees do not court liability for which they will be indemnified.

Qualified immunity, in turn, minimizes the risk that the threat of liability will pressure on public employers to exercise excessive caution in the training and supervision of their employees. When the law is unsettled, additional training and supervision is likely to be of marginal utility, and unlimited liability would create an anomalous incentive for public employers to train their employees to avoid any legal risk – precisely the type of overdeterrence that qualified immunity aims to prevent. Qualified immunity eliminates this anomaly by confining liability to violations of clearly established rights – the kind of violations that a public employer should be encouraged to anticipate and prevent. *See* John C. Jeffries, *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 Mich. L. Rev. 82, 93-103 (1989); Rosenthal, *supra* at 856-60. By operating in this fashion, qualified immunity also achieves another of the policies that this Court has identified in section 1983 – the congressional objective of limiting liability so as not to burden the taxpayers with financial consequences of every legal wrong committed by a public employee. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-95 (1978). Proposals for reform in qualified immunity should be assessed in light of these objectives; as the Court has repeatedly cautioned, qualified immunity doctrine should be fashioned in light of the functional objectives of the immunity. *See*, *e.g.*, *Richardson*, 521 U.S. at 407-08; *Wyatt v. Cole*, 504 U.S. 158, 167-68 (1992); *Forrester v. White*, 484 U.S. 219, 223-24 (1988); *Mitchell v. Forsythe*, 472 U.S. 511, 525-26 (1985).

B. Qualified Immunity Is Properly Applied to Allegations of Unreasonable Search and Seizure.

This Court has twice rejected arguments that qualified immunity is inappropriate in cases alleging unreasonable search and seizure. *See Saucier*, 533 U.S. at 203-07; *Anderson*, 483 U.S. at 643-44. This conclusion is faithful to the character of qualified immunity.

Fourth Amendment law is not merely an undifferentiated command of "reasonableness." As courts elaborate on the constitutional standard of reasonableness, the standard acquires greater clarity; as the Court has explained, "the legal rules for probable cause and reasonable suspicion acquire content only through application." *Ornelas v. United States*, 517 U.S. 690, 697 (1996). For this reason, in *Ornelas*, the Court held that determinations of probable cause and reasonable suspicion should be subject to independent appellate review "to unify precedent and . . . come closer to providing law enforcement officials with a defined 'set of rules . . . .'" *Id.* at 697-98 (quoting *New York v. Belton*, 453 U.S. 454, 458 (1981)).

Accordingly, what may seem reasonable in the abstract will change after an authoritative ruling on point. In many cases, "because the mosaic which is analyzed for a reasonable-suspicion or probable-cause inquiry is multifaceted, 'one determination will seldom be a useful precedent for another.'" *Ornelas*, 517 U.S. at 698 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 n.11 (1983)). In such cases, "law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determina-

tions in other areas of law." *Anderson*, 483 U.S. at 644. But sometimes, prior law may make the constitutionality of a contemplated search clear one way or another. *See Ornelas*, 517 U.S. at 698. As we explain above, qualified immunity properly places the burden on public employers to train their employees to respect these clearly established rights, without imposing liability when the constitutional standard of reasonableness, at least on a particular set of facts, has yet to be authoritatively explicated.

In *Wilson v. Layne*, for example, as the Court acknowledged, there was some support for the view that permitting the media to accompany officers executing warrants was constitutionally reasonable because it might enhance the deterrent effect of such operations and public confidence in the authorities. *See* 526 U.S. at 612-13. Once this Court had condemned the practice, however, public employers were on notice that they must train their employees to respect this now-established right to be free from what this Court had held was an unreasonable search. As we explain above, qualified immunity properly permits liability after such an authoritative elaboration on the constitutional standard of reasonableness. Prior to an authoritative adjudication, however, the constitutional standard of reasonableness will often be unclear, and for that reason, an award of damages will be unjustified. Thus, the defense of qualified immunity is properly recognized on allegations of a constitutionally unreasonable search or seizure for cases in which the constitutional standard of reasonableness remains in doubt to minimize the threat of overdeterrence that public employers would otherwise confront.

C. A Court Should Ordinarily Consider the Merits Before Reaching a Qualified Immunity Defense.

In a line of cases predating *Saucier* by a decade, involving a wide variety of constitutional claims, this Court has indicated that a court should consider the merits before turning to the immunity defense. *See*, *e.g.*, *Scott*, 127 S. Ct. at 1774 (Fourth Amendment claim based on high-speed police pursuit); *Hope v. Pelzer*, 536 U.S. 730, 736 (2002) (cruel and unusual punishment claim based on prison discipline); *Conn v. Gabbert*, 526 U.S. 286, 290 (1999) (due process claim based on search of attorney); *County of Sacramento v. Lewis*, 523 U.S. at 841 n.3 (due process claim based on high-speech police pursuit); *Siegert v. Gilley*, 500 U.S. 226, 232-33 (1991) (First Amendment retaliation claim). Before *Saucier*, however, the Court had described beginning with the merits as "the better approach," *County of Sacramento v. Lewis*, 523 U.S. at 841 n.5, while in *Saucier*, the Court stated more categorically that "the first inquiry must be whether a constitutional right would have been violated on the facts alleged . . . ." 533 U.S. at 200.

Although consideration of the merits of a constitutional claim in a case in which an immunity defense proves dispositive might seem to be unnecessary constitutional adjudication, the admonition against unnecessary constitutional adjudication is a consideration of prudence, not an inflexible command. *See*, *e.g.*, *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 7-8 (1993). Two prudential considerations militate in favor of consideration of merits in qualified immunity litigation.

First, the nature of the immunity defense means that it is frequently difficult to avoid constitutional

adjudication even on the question of immunity. After all, "even a finding of qualified immunity requires some determination about the state of constitutional law at the time the officer acted." *County of Sacramento v. Lewis*, 523 U.S. at 841 n.5. Second, if courts routinely confined themselves to the question whether the defendants violated clearly established rights, "standards of official conduct would tend to remain uncertain, to the detriment of both officials and individuals." *Id.* Thus, consideration of the merits "is 'necessary to set forth principles which will become the basis for a [future] holding that a right is clearly established.'" *Scott*, 127 S. Ct. at 1774 (quoting *Saucier*, 533 U.S. at 201) (brackets in original)).[7]

These prudential considerations are weighty. Constitutional principles might never be clarified if every novel claim were met with the answer that it involved no violation of clearly established right. While some novel claims might be vindicated in cases seeking injunctive relief or suppression evidence under the exclusionary rule, or attacking a municipal custom, policy, or practice, there are substantial limitations on those remedies.

Injunctive relief, for example, is only proper when the plaintiff faces a credible threat of future injury from a challenged practice. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101-10 (1983). As for the

[7] This is also the primary ground advanced by the academic defenders of the merits-first approach. *See*, *e.g.*, John M.M. Greabe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 Notre Dame L. Rev. 403, 411-18 (1999); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 Va. L. Rev. 1, 42-50 (2002); Michael L. Wells, *The Order of Battle in Constitutional Litigation*, 60 S.M.U. L. Rev. 1539, 1554-68 (2007).

exclusionary rule, it applies only to the admission of evidence in criminal litigation. *See*, *e.g.*, *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357 (1998). It offers no remedy for constitutional violations that do not produce evidence that the prosecution seeks to have admitted in a criminal case. For example, *Siegert v. Gilley*, in which the Court first articulated the merits-first rule, involved a claim of defamation in retaliation for the exercise of First Amendment rights – a situation in which the exclusionary rule could offer the plaintiff nothing.

Moreover, even in criminal litigation involving the admissibility of evidence, when a court has authorized the recovery of evidence in a search warrant, exclusion of the evidence is considered an improper remedy even when the warrant is executed unconstitutionally. *See Hudson v. Michigan*, 547 U.S. 586, 590-99 (2006). Thus, given the limitations on the exclusionary remedy and the availability of a qualified immunity defense, it was only the merits-first rule that enabled the Court to resolve the constitutionality of media members accompanying officers who execute a warrant in *Wilson v. Layne*. As the Court has itself observed, often "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 457 U.S. at 814.

In addition, although qualified immunity is not available in a damages action attacking a municipal custom, policy, or practice, *see Owen v. City of Independence*, 445 U.S. 622 (1980), in such cases "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." *Brown*, 520 U.S. at 405. Accordingly, in many cases it will

be difficult for plaintiffs to adduce the necessary proof for policy claims. What is more, such claims are unavailable against States, which cannot be sued under section 1983. *See Will v. Michigan Department of State Police*, 491 U.S. 58, 65-71 (1989).

As we explain above, the purpose of qualified immunity is to preclude liability that could overdeter public officials and unjustifiably invade the public fisc, not to retard to development of constitutional law. The merits-first approach achieves the benefits of immunity without the cost of retarding the development of the law. As for the concern that merits rulings may be insulated from review by a successful immunity defense, if a merits holding of a lower court threatens to cause substantial disruption in the law, this Court surely remains free to grant review. *See Bunting v. Mellen*, 541 U.S. 1019, 1025 (2004) (Scalia, J., dissenting from denial of certiorari) ("The perception of unreviewability undermines adherence to the sequencing rule we . . . created" in *Saucier*.).

To be sure, the Court could relax the merits-first rule by affording lower courts discretion to bypass the merits in cases where development of applicable legal standards appears unnecessary. Such an approach, however, would make section 1983 litigation even more complex as the parties find it necessary to join issue on whether a decision on the merits is appropriate in addition to the other issues in the litigation. In such a regime, the plaintiff will still, of necessity, argue that the constitutional right it presses not only exists, but also overcomes a proffered immunity defense, making constitutional adjudication unavoidable. In *amici*'s experience, defense counsel will be reluctant to ignore the plaintiff's submission on this issue, and the defense will therefore litigate

not only the merits and immunity, but also the question whether the merits should be reached. Thus, relaxation of the merits-first rule would undermine the core objective of qualified immunity by making immunity litigation even more expensive and time-consuming for public officials. Equally unfortunate, the stack of briefs facing courts would become ever thicker and more complicated, as a new cottage industry of litigation develops over the standards for deciding whether to reach the merits in a given case.[8]

Moreover, to the extent that a rule permitting courts to bypass the merits makes it more difficult for civil rights plaintiffs to pursue novel claims, they will have greater reason to press custom, policy, or practice claims against local governments – claims as to which there is no qualified immunity. While policy claims may be straightforward when a statute or formal policy is challenged as unconstitutional, many

[8] Petitioners suggest that it may be unnecessary to reach the merits in cases in which an exclusionary remedy would be available in related criminal litigation since the law can still develop through motions to suppress evidence. *See* Pet. Br. 58-60. As the division on the Court in *Hudson* makes evident, however, it will sometimes be difficult to tell whether exclusion would have been a proper remedy in a related criminal case, both because of uncertainty about the scope of the exclusionary rule and the other limitations on that remedy which, as this Court has observed, mean that a Fourth Amendment violation does not necessarily imply the invalidity of a conviction. *See Heck v. Humphrey*, 512 U.S. 477, 487 n.7 (1994). Thus, when a criminal case was never brought, or dismissed without adjudication, it may be impossible to tell whether exclusion would have been an available remedy. The same is true of cases resolved by guilty pleas, which ordinarily will not bar a subsequent section 1983 action. *See Haring v. Prosise*, 462 U.S. 306, 316 (1983). Thus, petitioners' approach could also inject many complications into section 1983 litigation.

cases involve instead allegations that policymakers have exhibited deliberate indifference to the misconduct of public employees. *See*, *e.g.*, *City of Canton v. Harris*, 489 U.S. 378 (1989). This type of claim, involving examination of how allegations of misconduct have been handled by policymakers over many years, is often enormously intrusive, time-consuming, and expensive to defend, even if the defense proves successful. Thus, local governments come under enormous pressure to settle these cases. The financial burden of a rule that would encourage plaintiffs to pursue such litigation as an alternative to actions against individual officials, accordingly, would again undermine the policies at the core of qualified immunity.

Finally, the merits-first rule has the virtue of logical coherence. After all, "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' . . . is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert*, 500 U.S. at 232. Nor is it unusual to consider the merits before turning to the question whether a remedy may be had; this is the routine practice, for example, when undertaking harmless error analysis. As this Court has explained: "Harmless error analysis is triggered only *after* the reviewing court discovers that an error has been committed." *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993) (emphasis in original). Thus, the Court will routinely decide a constitutional question even as it acknowledges that the constitutional error it has identified may well prove harmless. *See*, *e.g.*, *Carella v. California*, 491 U.S. 263, 265-66 (1989) (per curiam); *Pope v. Illinois*, 481 U.S. 497, 501-04 (1987).

For all these reasons, prudential considerations ordinarily favor the merits-first rule. To be sure, there will be some cases in which countervailing prudential considerations should permit courts to forego a consideration of the merits, such as when the record is sufficiently developed to permit resolution of immunity but not the merits, or when the merits pose some other extraordinary complication. None of the Court's precedents expressly consider such a situation; and in such a case, the prudential argument for an immediate immunity decision that will spare public officials the burden of litigation they are destined to win is powerful. In other cases, it will be patent that the action is barred by qualified immunity because the plaintiff is so obviously endeavoring to establish a new legal right. It has long been settled that federal courts lack jurisdiction to decide claims that are "so attenuated and unsubstantial as to be absolutely devoid of merit." *Hagans v. Lavine*, 415 U.S. 528, 536 (1974). Under this rule, plaintiffs with nothing but a frivolous claim for damages effectively seek an advisory opinion, and their cases are properly rejected without consideration of the merits.[9] Ab-

[9] One commentator has argued that the merits-first approach violates the constitutional ban on advisory opinions. *See* Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. Rev. 847, 895-921 (2005). This view is difficult to defend. Absent a wholly frivolous request for damages, it cannot be fairly said that civil rights plaintiffs confronting even a strong qualified immunity defense seek only an advisory opinion; they are instead litigating a necessary step to their entitlement to damages. The Court quickly rejected a similar claim as it recognized a good-faith exception to the exclusionary rule while permitting the lower courts to consider the merits of a Fourth Amendment claim prior to the remedial question:

> Defendants seeking suppression of the fruits of allegedly unconstitutional searches or seizures undoubtedly

sent a wholly frivolous claim for damages or particularly powerful prudential arguments against reaching the merits, however, the merits-first approach properly advances the policies underlying the defense of qualified immunity.

This case plainly cannot be regarded as frivolous; after all, this is a case that the court of appeals thought not merely substantial, but actually meritorious. As we explain above, that judgment should not stand, but the court of appeals' decision to reach the merits prior to the immunity defense reflects a sound regard for the proper development of constitutional law.

> raise live controversies which Art. III [of the Constitution] empowers federal courts to adjudicate. As cases addressing questions of good-faith immunity under 42 U.S.C. § 1983, and cases involving the harmless error doctrine make clear, courts have considerable discretion in conforming their decisionmaking processes to the exigencies of particular cases.
>
> 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. Indeed, it frequently will be difficult to determine whether the officers acted reasonably without resolving the Fourth Amendment issue.

Leon, 468 U.S. at 924-25 (footnotes and internal citations omitted). For additional discussion, see Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1733, 1797-806 (1991); Greabe, *supra* note 8, at 418-26.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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