

No. 07-751

IN THE
Supreme Court of the United States

CORDELL PEARSON, *et al.*,
Petitioners,
v.
AFTON CALLAHAN,
Respondent.

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

**BRIEF OF AMICI CURIAE
NATIONAL POLICE ACCOUNTABILITY PROJECT
AND ASSOCIATION OF AMERICAN JUSTICE
IN SUPPORT OF RESPONDENT**

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QUESTION PRESENTED

Whether the Court should overrule *Saucier v. Katz*, 533 U.S. 194 (2001), or continue its two-step process that allows for clear constitutional lines to be drawn and prevents the development of sub-constitutional norms?

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**BRIEF OF AMICI CURIAE
NATIONAL POLICE ACCOUNTABILITY
PROJECT AND ASSOCIATION OF
AMERICAN JUSTICE ¹**

National Police Accountability Project (NPAP) and Association of American Justice (AAJ) submit this brief as amici curiae for respondent under Sup. Ct. R. 37 to address the issue raised sua sponte by the Court in its order granting certiorari. Amici argue that the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001), should *not* be overruled.

While amici are highly critical of qualified immunity – a judicially fashioned doctrine unsupported by the text of 42 U.S.C. § 1983 or the constitutional provisions Congress enacted the statute to enforce – they urge that the Court maintain *Saucier's* two-step process so that constitutional standards continue to be defined in civil-rights cases, and sub-constitutional standards do not become ensconced in constitutional law.

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

I. INTERESTS OF AMICI CURIAE

NPAP was founded in 1999 by members of the National Lawyers Guild to combat police misconduct, and presently has more than four hundred attorney members throughout the United States. NPAP provides training and support for attorneys and other legal workers, public education and information on issues relating to police misconduct for the general public, and information and resources for non-profit and community groups involved with victims of police misconduct. NPAP also supports legislative reform efforts aimed at increasing police accountability, and appears as amicus curiae in cases, such as this one, which present issues of particular importance for lawyers who represent plaintiffs in police misconduct actions.

AAJ is a voluntary, nation-wide association of trial lawyers who primarily represent plaintiffs in personal injury, civil rights, employment rights, and consumer litigation. AAJ's 50,000 attorney members are committed to upholding the civil and constitutional rights of Americans by preserving access to the courts to enforce those rights. AAJ believes that legal redress for the violation of constitutional rights not only compensates the victims of illegal conduct, but deters the violations of constitutional rights by public officials.

NPAP and AAJ members frequently prosecute claims against state and federal law enforcement officers under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and therefore regularly litigate claims of qualified immunity.

II. THE JUDICIALLY CREATED QUALIFIED IMMUNITY DEFENSE MUST BE BALANCED AGAINST THE CONGRESSIONAL INTENT TO ENFORCE CONSTITUTIONAL RIGHTS THROUGH CIVIL LITIGATION.

In *Monroe v. Pape*, 365 U.S. 167 (1961), this Court held that private persons can bring 42 U.S.C. § 1983 civil actions for money damages against law enforcement officers who deprive them of constitutional rights, recognizing that the statute’s “purpose is plain from the title of the legislation, ‘An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.’” *Id.* at 171. *Monroe v. Pape* “presented no question of immunity, however, and none was decided” until six years later, when the Court determined that common-law qualified immunity shielded officers from liability “if they acted in good faith and with probable cause,” *Pierson v. Ray*, 386 U.S. 547, 555-56 (1967).²

Over the past forty years, the Court has wrestled to accommodate these competing interests. “The resolution of immunity questions inherently requires a balance between the evils inevitable in any available

2. The *Pierson* Court based its ruling in part on the glib observation that “a policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.” 386 U.S. at 555. In fact, regardless of qualified immunity the law enforcement officer is not liable for an arrest “when he has probable cause” because in such a case there is no deprivation of a constitutional right within the meaning of section 1983.

alternative. In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees.” *Harlow v. Fitzgerald*, 457 U.S. 800, 813-14 (1982) (citing *Butz v. Economou*, 438 U.S. 478, 506 (1978)). “At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty – at a cost not only to the defendant officials, but to society as a whole.” *Id.* at 814.

In *Harlow*, the Court refined the balance by shifting the focus of the qualified immunity inquiry from the subjective motivations of the public official – whether actions were undertaken in “good faith” – to “the objective reasonableness of an official’s conduct, as measured by reference to clearly established law.” *Id.* at 818. “If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.” *Id.* at 818-19.

The *Harlow* rule proved easier to state than to apply in practice. Because “qualified immunity is intended to provide government officials with the ability ‘reasonably [to] anticipate when their conduct may give rise to liability for damages,’” *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)) (brackets in original), it “depends substantially upon the level of generality at which the relevant ‘legal rule’ is to be identified.” *Id.* at 639. Accordingly, to defeat a claim of qualified immunity “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an

official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent.” *Id.* at 640 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 535, n.12 (1985)).

Attorneys associated with amici frequently litigate damage claims for Fourth-Amendment and other constitutional deprivations arising under myriad circumstances. Because a statute or precedent squarely on all fours is rarely available, litigation has proliferated in the lower courts over the applicable “level of generality” and the degree of clarity required for the “contours of the right” to be “apparent” for qualified immunity purposes. In the experience of amici’s lawyer members throughout the United States, these determinations of whether official conduct in a particular case transgressed establish law vary widely among district judges, and renders police misconduct litigation both more burdensome and less predictable than it should be.

Perhaps more importantly, the mushrooming of the qualified immunity defense, and its focus on “clearly established law” threatens to overshadow core constitutional questions in any given litigation and frustrate the Congressional intent underlying section 1983 by obscuring rather than clarifying constitutional lines. Even more unfortunate, this judicially created doctrine has the effect of retarding the law’s development, and even institutionalizing sub-constitutional conduct.

To a not insignificant extent, the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001), has mitigated these problems by directing lower courts to first determine whether constitutional violations occurred before deciding whether the applicable law was clearly established for qualified immunity purposes. For the reasons set forth in the following sections, preservation of this two-step process is essential to furthering the Congressional intent underlying section 1983, and to prevent civil-rights lawsuits from undermining rather than enforcing constitutional standards.

Accordingly, amici curiae NPAP and AAJ respectfully urge that the Court retain *Saucier's* order-of-decision mandate and affirm the Tenth Circuit's decision in this case.

III. SAUCIER SHOULD NOT BE OVERRULED BECAUSE MERITS-FIRST ADJUDICATION CLARIFIES FEDERAL LAW AND PROMOTES ITS DEVELOPMENT.

A. Without Merits-First Adjudication Qualified Immunity Can Become a Permanent Impediment to the Enforcement of Constitutional Rights.

At its best, qualified immunity favors later plaintiffs over earlier ones. Absent proof linking a constitutional deprivation to a public entity's policy, practice or custom, qualified immunity can erect a barrier that makes it nearly impossible for plaintiffs pressing novel but meritorious constitutional claims to prevail.³ "Once a rule has become well-established, however, it is not only easier for later plaintiffs to show a violation, it is also harder for later defendants to assert qualified immunity. As a result, [later] plaintiffs will have a greater opportunity actually to recover for their injuries." John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 Yale L. J. 87, 90 (1999). That ability of later plaintiffs to recover when their constitutional rights are violated depends critically,

3. "Policy, practice or custom" section 1983 claims directly against entities pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978), are not subject to the qualified immunity defense. *Owen v. City of Independence*, 445 U.S. 622, 652 n.36 (1980) (The "threat of liability against the city ought to increase the attentiveness with which officials at the higher levels of government supervise the conduct of their subordinates.") Expanding entity liability to allow for vicarious liability would magnify section 1983 enforcement power without increasing the liability exposure of public officials.

however, on an actual adjudication of the constitutional question raised in earlier cases; without such adjudication on the merits, later plaintiffs are left in no better position than earlier ones, and qualified immunity can serve as a permanent impediment to clarifying constitutional boundaries.

As this Court has repeatedly acknowledged, a merits-first order-of-decisionmaking allows federal courts to perform their important function of announcing what the law is. *See, e.g., Saucier*, 533 U.S. at 201 (“This is the process for the law’s elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry.”); *Scott v. Harris*, 127 S. Ct. 1769, 1774 (2007) (“Although this ordering contradicts ‘[o]ur policy of avoiding unnecessary adjudication of constitutional issues’ we have said that such a departure from practice is ‘necessary to set forth principles which will become the basis for a [future] holding that a right is clearly established.’”) (citations omitted).

The *Saucier* rule, as *Scott* rightly noted, privileges the federal courts’ role in announcing norms and clarifying murky areas of law over the prudential desire to avoid unnecessary constitutional adjudication. *See, e.g., Morse v. Frederic*, 127 S. Ct. 2618, 2641 (2007) (“often the rule violates the longstanding principle that courts should ‘not . . . pass on questions of constitutionality . . . unless such adjudication is unavoidable.’”) (Breyer J., dissenting) (quoting *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)). While prudential considerations generally suggest that constitutional adjudication be avoided when a case can be resolved on other grounds,

such considerations ought to give way when other important goals are furthered by reaching the merits. In the context of qualified immunity, deciding the merits is necessary to implement the Congressional intent underlying section 1983, while still respecting the judicially crafted policy of protecting public officials from undue exposure to personal liability.

When a court considers the question of qualified immunity without considering the substantive question presented, by contrast, the law is denied clarity. *See, e.g., 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.”); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 Virginia L. Rev. 1, 49 (2002)

[I]f the entitlement to qualified immunity were determined before the merits of the underlying case, difficult issues and close cases would almost never be decided on the merits in damages actions. To say that a case is close is to say that the law is not well established; to say that the law is not well-established is to say that the defendant is entitled to qualified immunity; to say that the defendant is entitled to qualified immunity is to say that the Court need not resolve the merits of the close case. This nearly circular analysis could serve to stagnate the substance of constitutional law almost indefinitely.

John M.M. Greabe, *Mirable Dictum!: The Case for “Unnecessary” Constitutional Rulings in Civil Rights*

Damages Actions, 74 Notre Dame L. Rev. 403, 410 (1999)

The requirement that the allegedly violated right be clearly established at the time of the action in question tends, if not to ‘freeze’ constitutional law, then at least to retard its growth through civil rights damages actions. The corpus of constitutional law grows only when courts address novel constitutional questions, yet a novel claim, by definition, seeks to establish a right that is not already ‘clearly established.’

If the defense of qualified immunity is consistently considered before the merits of a civil rights claim, close cases remain close cases indefinitely and later plaintiffs find themselves no better off than earlier ones. The law remains unsettled, while public officials, as well as the bench and bar, float adrift of clear constitutional standards.

The problem that avoiding constitutional clarity poses may be seen clearly in two recent First Amendment cases from the courts of appeals. In *Purtell v. Mason*, 527 F.3d 615 (7th Cir. 2008), the question was whether insults between neighbors that arguably inflicted emotional injury amounted to “fighting words” and justified an arrest, even though they would not provoke an immediate breach of the peace. The officer was entitled to qualified immunity because he could not have predicted the outcome in this case of the jurisprudence that has followed *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). If the court had not

addressed the constitutional issue first, however, the fact that the insults did not amount to fighting words would never have been clarified. Similarly, in *Fogel v. Collins*, 531 F.3d 824 (9th Cir. 2008), an officer who arrested the plaintiff based on provocative statements emblazoned on his van was entitled to qualified immunity because the court held he was not on notice that the language was protected by the First Amendment. The court's opinion elucidated that the statements were political hyperbole rather than threats, an important decision that would not have been made if the lower court had contented itself with merely announcing that the law was not clearly established. These recent cases are typical of problems that are encountered weekly in the lower federal courts, and where constitutional clarity is of overwhelming importance both to law enforcement officers and the population at large.

When courts bypass the merits and decide cases solely on the basis of whether the applicable law was clearly established, the resulting lack of clarity regarding the substance of constitutional law serves no one's interest. When the law is unclear public officials are denied the information they need to comport their conduct to the law. *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998)

[I]f the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals. An immunity

determination, with nothing more, provides no clear standard, constitutional or nonconstitutional.

It is essential to understand the effect the decision in this case will have on police training, which is crucial to the ability of a police department to insure that its line officers obey the Constitution. Deciding cases by asking only whether the law was previously clearly established blurs the line between constitutional and unconstitutional police methods and makes the job of training officers considerably more difficult. If repeated qualified immunity decisions postpone indefinitely the resolution of whether particular conduct violates the Constitution, training officers are unable to give clear direction and instruction to patrol officers about what the Constitution requires. What they can say is that “you can’t get in trouble whatever you do in this situation, because the constitutional law is unclear.” This is in fact the advice that officers will receive more and more if the Court overrules the *Saucier* requirement that the constitutional issue be resolved first.

Granting qualified immunity merely tells a defendant what he or she can get away with; determining the merits of a constitutional claim clarifies standards, gives public officials an opportunity to comply, makes case outcomes more predictable for counsel, and simplifies later adjudications.

B. Merits-First Adjudication Is Crucial in Those Cases That Are Difficult to Litigate Outside of Section 1983 Damages Actions

The law-obscuring effect that would flow from abandoning *Saucier*'s merits-first adjudication is particularly problematic in those cases where the right at issue cannot be litigated in other contexts. It is unlikely, for example, that an excessive force claim can be litigated in any context other than a damages action against individual officers: standing requirements often prevent an individual from seeking injunctive relief against the use of a particular law enforcement tactic; this Court's *Monell* jurisprudence may make a civil suit against the municipality unlikely to succeed; Fourth-Amendment claims cannot be made in petitions for a writ of habeas corpus; and often a search or seizure accomplished with excessive force does not produce fruits to be challenged in a suppression hearing prior to trial. See *County of Sacramento v. Lewis*, 523 U.S. at 842 n.5 (finding that, if a court dismisses a claim on qualified immunity, resolution of the substantive issue "would require the issue to arise in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion in a criminal proceeding"). In other words, there are some claims that, if they are not adjudicated in the context of a money damages action against an individual officer, cannot be adjudicated at all. In these areas, a retreat from merits-first adjudication can truly lead to an ossification of constitutional law.

It is for this reason that petitioners and at least one of their amici have acknowledged that, should this Court choose to weaken *Saucier*'s mandate in some cases, merits-first adjudication would still be appropriate in those cases that would be difficult or impossible to litigate elsewhere. Brief of Petitioner at 58 (suggesting that “[i]n Fourth Amendment cases, the *Saucier* order should be limited to claims that do not involve alleged fruits of the poisonous tree and therefore will not arise in the context of motions to suppress.”) (citations omitted); Brief of Amicus Curiae National Association of Counties, et al., at 26

Constitutional principles will 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 [of] evidence under the exclusionary rule, or attacking a municipal custom, policy, or practice, there are substantial limitations on those remedies.

Although amici NPAP and AAJ believe that *Saucier*'s order-of-decisionmaking should be retained intact for all civil rights cases – in part because damages are a preferred remedy over suppression – it respectfully requests that the Court retain the order-of-decisionmaking at least in those actions, such as excessive force cases, where there are not other contexts available for litigation of the issues.

C. Absent *Saucier*, Lower Courts Will Generally Resolve the Qualified Immunity Question Without Resolving the Merits.

Pre-*Saucier* experience demonstrated that when lower federal courts had the choice whether to adjudicate the merits of a plaintiff's constitutional claim or the defense of qualified immunity, they often chose to resolve the qualified immunity question first, leaving the constitutional question unresolved and the law obscured. See John M. M. Greabe, *Mirable Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 *Notre Dame L. Rev.* 403, 410 (1999) ("It . . . should not be surprising that the cases are legion where courts, in their decision-making discretion, have bypassed pleaded constitutional claims of first impression by assuming arguendo that the claims are viable and then dismissing them on qualified immunity grounds."); Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of Saucier v. Katz*, __ *George Mason L. Rev.* __ (forthcoming 2008)

It is easy to see why judges would prefer to decide the remedial question first. It is . . . quite often easier to resolve the remedial question than the merits question. The downside, of course, is that such an order-of-decisionmaking privileges dispute resolution over norm announcement and risks denying deserving plaintiffs a remedy indefinitely.

In this case, notwithstanding *Saucier's* mandate, the district court simply assumed a constitutional violation without resolving that issue. *Callahan v. Millard County*, 2006 WL 1409130 (D. Utah 2006) at *8

Ultimately the Supreme Court will have to finally resolve the question of whether the [consent-once-removed] doctrine is consistent with the Fourth Amendment. For purposes of resolving this case, the simplest approach is to assume that the Supreme Court will ultimately reject the doctrine and find that searches such as the one in this case are not reasonable under the Fourth Amendment.

History demonstrates that without *Saucier's* mandate, more and more courts are likely to resolve cases as the district court did here, deciding qualified immunity question first without reaching the merits of a plaintiff's civil-rights claim. Given the choice, lower courts will likely choose the "easier" qualified immunity question rather than the more complicated substantive question. *See, e.g., County of Sacramento v. Lewis*, 523 U.S. at 841 n.5

The District Court granted summary judgment to Smith on the basis of qualified immunity, assuming without deciding that a substantive due process violation took place but holding that the law was not clearly established in 1990 so as to justify imposition of § 1983 liability. We do not analyze this case in a similar fashion because, as we have held, the 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.

Empirical evidence indicates that this Court's doctrine has a powerful effect on the willingness of lower federal courts to evaluate the merits of a civil rights claim. In his study of order of decisionmaking in civil rights, one commentator examined cases from three distinct periods: before the Court initially recommended the merits-first order of decision-making in *Siegert v. Gilley*, 500 U.S. 226, 232-33 (1991), between *Siegert* and *Saucier*, and after the mandate of the merits-first approach in *Saucier*. Paul Hughes, *Not a Failed Experiment: Wilson-Saucier Sequencing and the Articulation of Constitutional Rights*, University of Colorado Law Review, Vol. 80, February 2009, Available at SSRN: <http://ssrn.com/abstract=1156421>. He found a large difference in how often circuit courts reached the merits of a plaintiff's constitutional claims during each period. For example, in those cases in which the Court ultimately granted qualified immunity to the defendant, courts reached the merits in just over 40% of cases before *Siegert*, in 65% of cases between *Siegert* and *Saucier* and in 98% of cases decided since *Saucier*. *Id.* at 20. In other words, the effect of this Court's precedents on lower court adjudication of the merits of civil rights cases is clear: *Siegert* and *Saucier* have lead to significantly more adjudication of constitutional rights and thus to greater clarity in the substance of those rights.

This study demonstrates that lower courts have had little difficulty applying *Saucier*. If the Court were to retreat from its *Saucier* mandate, there is every reason

to believe that substantially less guidance would be provided to public officials regarding what the law expects of them and deserving plaintiffs would find it significantly more difficult to receive redress for their constitutional harms.

D. Introducing Flexibility with Regard to Order of Decisionmaking Will Needlessly Complicate Civil-Rights Litigation.

Justice Breyer has suggested permitting lower courts some flexibility with regard to the order of decisionmaking. *See Scott v. Harris*, 127 S. Ct. 1769, 1780 (2007) (“[W]e should overrule the requirement, announced in *Saucier v. Katz*, that lower courts must first decide the ‘constitutional question’ before they turn to the ‘qualified immunity question.’ Instead, lower courts should be free to decide the two questions in whatever order makes sense in the context of a particular case.”) (Breyer, J., concurring) (citations omitted). Amici respectfully submit that such flexibility in this area will in practice further complicate adjudications under Section 1983 and *Bivens* without realizing any corresponding benefit.

Rather than focusing on Section 1983’s central inquiry – has a person acting under color of state law violated any constitutional right of another person? – flexibility in ordering will add yet another layer to the current two-step approach to adjudicating civil rights claims. Adding this meta-issue will only add to the already inordinate complexity, expense, and delay of litigating these cases. The current rule has the strong benefit of clarity; the merits of a civil rights claim should

resolved prior to considering the defense of qualified immunity. Only in this manner can the law develop clear standards and implement the Congressional intent underlying section 1983.

IV. ABANDONING SAUCIER'S TWO-STEP APPROACH WILL INSTITUTIONALIZE SUB-CONSTITUTIONAL STANDARDS IN PLACE OF THE APPROPRIATE ONES.

Qualified immunity doctrine does more than deprive victims of compensation for proven constitutional violations. It operates to establish sub-constitutional standards for future governmental conduct. This tendency is particularly true for police practices that affect many individuals. In *Anderson v. Creighton*, 483 U.S. at 640-41, the Court ruled that an officer can act in an objectively reasonable fashion while violating the Fourth Amendment's prohibition of "unreasonable searches and seizures." The Court noted that determinations of probable cause are often quite difficult and that officials should be held liable in damages only where their conduct was clearly proscribed. *Id.*

In the wake of *Anderson*, a number of circuits have routinely employed the concept of "arguable probable cause" for civil-rights cases based on wrongful search or arrest. *See, e.g., Mendenhall v. Riser*, 213 F.3d 226, 231 (5th Cir. 2000) ("[S]ubjective intent, motive, or even outright animus are irrelevant in a determination of qualified immunity based on arguable probable cause to arrest"); *Wollin v. Gondert*, 192 F.3d 616, 621 (7th Cir. 1999) (discussing "arguable probable cause" in the context of a qualified immunity defense). Given the fact

that probable cause can be established on facts that show only a “fair probability” of criminal conduct (a “practical, nontechnical conception”), *Illinois v. Gates*, 462 U.S. 213, 231 (1983), to permit “arguable” probable cause to justify an arrest or search is to reduce the Fourth Amendment’s core protection to a very low level indeed.

The same problem arises in cases alleging excessive force. In *Saucier*, the Court determined that “[t]he inquiries for qualified immunity and excessive force remain distinct.” 533 U.S. at 204. Thus an officer who reasonably, but mistakenly, believed the circumstances justified using more force than was objectively reasonable under the circumstances is entitled to immunity. Given the tension in the standard articulated by the Court, it is not surprising that lower courts have struggled in their application of qualified immunity in the use-of-force context. *See, e.g., McCormick v. City of Fort Lauderdale*, 333 F.3d 1234, 1245 n.16 (11th Cir. 2003) (per curiam) (ruling that law was not clearly established that surprise use of pepper spray on a violent felony suspect violated Constitution); *Curley v. Klem*, 298 F.3d 271, 282 (3d Cir. 2002) (stating that historical facts had to be resolved by jury before determination of objective reasonableness could be made as to officer’s shooting of another officer mistaken for suspect); *Ewolski v. City of Brunswick*, 287 F.3d 492, 505 (6th Cir. 2002) (“Even if genuine issues of material fact did exist as to whether a reasonable officer would have perceived an immediate threat . . . we would still find summary judgment to be appropriate on the basis of the ‘clearly established’ prong of the qualified immunity test.”).

Under these cases and over time, officers will more frequently apply the lesser protection of the immunity doctrine in their street-level decisions to arrest, search, investigate, and use force. After all, if courts demand only “arguable probable cause” for a search or arrest and permit “reasonable” uses of unreasonable force, officers will face no legal sanction when applying these sub-constitutional standards. As Professor Levinson observed:

[O]ne might doubt the extent to which governmental officials whose behavior is governed by constitutional law care much about constitutional rights except as predictors of legal risk, which is a function of remedies – especially in the context of criminal justice where there are strong normative reasons for pushing against constitutional limits.

Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum. L. Rev. 867, 911 (1999).

The *Saucier* approach protects against the development of sub-constitutional standards. Qualified immunity protects officers from liability for a specific type of unconstitutional conduct only once: with the right defined by the Court, a circuit, or even a district court, an officer can no longer claim that it was not clearly established. *E.g.*, *Wilson v. Layne*, 526 U.S. 603, 617-18 (1999) (granting qualified immunity while establishing police cannot bring media along on the execution of search warrants); *see also, e.g.*, *Robinson v. Solano County*, 278 F.3d 1007, 1015-16 (9th Cir. 2002) (en banc) (granting qualified immunity while also

establishing that “pointing a gun to the head of an apparently unarmed suspect during an investigation can be a violation of the Fourth Amendment”).

The Court has fashioned the qualified immunity defense to prevent what it has perceived as the over-deterrence of public officials who, faced with the exposure to civil liability for constitutional violations, might steer clear of the constitutional line and fail to fully enforce the law. The *Saucier* two-step approach continues protection of the officer, but provides at least some assurance against repeated constitutional violations.

CONCLUSION

For the foregoing reasons this Court’s decision in *Saucier v Katz* should not be overruled. The decision of the United States Court of Appeals for the Tenth Circuit should be affirmed.

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