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 FOR THE NATIONAL CAMPAIGN TO RESTORE CIVIL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amicus curiae the National Campaign to Restore Civil Rights will address the following question, which the Court instructed the parties to brief and argue:

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

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the National Campaign to Restore Civil Rights is a collection of more than one hundred civil rights organizations and numerous individuals who came together to ensure that the courts protect and preserve justice, fairness, and opportunity. *Amicus* believes that the judiciary is the branch of government that the founders of this nation intended to safeguard individual rights and liberties. The founders recognized that an independent and vigorous judiciary is a necessary predicate for a true democracy. The judiciary is often the last resort for people in the United States whose rights have been violated by the actions of government officials.

Amicus is concerned about judicial doctrines, such as qualified immunity, that can leave some victims of unconstitutional conduct without a remedy. If this Court were to overrule *Saucier v. Katz*, 533 U.S. 194 (2001), it would become even more difficult for victims to obtain relief despite having suffered a violation of their constitutional rights.

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[1] Letters from all parties consenting to the filing of this brief are being filed with the Clerk of this Court along with this brief, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, or its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court should not overrule *Saucier v. Katz*, 533 U.S. 194 (2001). As it stands, the qualified immunity doctrine already imposes significant costs on a victim of unconstitutional government conduct because it prevents that person from obtaining relief against the wrongdoer. There is a substantial debate about whether that cost to such victims is justified by the supposed benefits to the government and its agents of being immune from actions for compensatory relief when their conduct exceeds constitutional limits. This case does not, however, require the Court to revisit the underlying question whether the balance struck by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), is still appropriate. But this case should not result in a shift in that balance to weigh more heavily in favor of government officials to the detriment of even more victims of unconstitutional conduct. And that would be the result of overruling *Saucier*.

A. *Saucier*'s two-step approach to qualified immunity means that, where a person brings a suit against government officials alleging that those officials violated his constitutional rights, the court will determine, as a threshold matter, whether the allegations state a constitutional violation. If the court determines that the allegations do not violate the Constitution, that case is dismissed. If the court determines that the allegations do state a constitutional violation, the court still will dismiss the suit at the second step of the analysis if it

determines that the right violated was not clearly established.

Because the court makes an initial determination that there was a constitutional violation, that ruling contributes to the development of constitutional law so that, in the future, it will be clearly established that the official conduct in question is unconstitutional. That means that if another person's constitutional rights are violated by the same type of government conduct, that victim can seek relief against the officials and not be barred by qualified immunity because the unlawfulness of the conduct will be clearly established.

There are numerous examples in the case law of a constitutional ruling at the first step of *Saucier* ensuring that a future victim of the same type of unconstitutional government conduct was able to proceed with his suit specifically because the earlier constitutional ruling meant that the unconstitutionality of the conduct was clearly established.

These case examples serve as concrete evidence of what is at stake in this case. If the Court were to overrule *Saucier*, courts confronted with allegations of unconstitutional conduct against government officials would regularly dismiss such cases based on determinations that, even if there were a constitutional violation, the law was not clearly established. That means that when the next victim of the same type of official conduct brings suit, that case also would be dismissed in the same manner

because there would be no prior adjudication of the allegations to clearly establish that the conduct was unconstitutional. That approach would multiply the number of victims denied a remedy against government officials who violated their constitutional rights.

B. The current approach to qualified immunity under *Saucier* deters future constitutional violations because a threshold determination that there was a constitutional violation often prompts revision to government policies directing officials to conform their conduct to constitutional standards.

Again, there are examples of case law that has led to just such changes in official policy due to a determination at the first step of *Saucier* that certain official conduct is unconstitutional. These examples are more concrete evidence of the benefits of *Saucier* that would be lost if it were overruled.

Moreover, the determination by the courts at the first step of *Saucier* benefits government officials when the determination is to the contrary, *i.e.* where the court finds the allegations do not state a constitutional violation. In such instances, government officials are confident that they may continue to engage in conduct that they have determined best furthers the government's interests, without fear of future constitutional litigation. The *Saucier* approach also redounds to the benefit of the judiciary by reducing the number of subsequent actions challenging the same or similar conduct as

unconstitutional after that conduct has been deemed lawful by a court.

C. The Court should decline expansion of the qualified immunity doctrine particularly because of the weak empirical basis for the assumptions underlying the doctrine.

Moreover, neither petitioners nor their *amici* have identified an alternative approach to qualified immunity that would better serve the Court's goals of ensuring the development of the law and providing certainty for individuals and government officials. Elimination of *Saucier* from Fourth Amendment cases is not warranted and would increase the already high costs associated with granting government officials qualified immunity.

The suggestion that *Saucier* be applied as a discretionary matter ignores the failures of such an approach in the past. The mandatory nature of *Saucier* ensures that, although there will be no remedies against officials who violate the constitutional rights of individuals where the law is unclear, the law will not remain unclear forever. This Court should reaffirm its holding in *Saucier* in order to prevent a broader application of qualified immunity, and to maintain the balance struck by this doctrine.

ARGUMENT

SAUCIER V. KATZ SHOULD NOT BE OVERRULED BECAUSE ITS TWO-STEP APPROACH REDUCES THE COSTS TO INDIVIDUALS AND SOCIETY OF THE QUALIFIED IMMUNITY DOCTRINE

A. *Saucier*'s Two-Step Approach Means That, Where The Same Or Substantially Similar Unconstitutional Conduct Persists, Suits By Future Victims Will Not Be Barred By Qualified Immunity

In *Saucier v. Katz,* 533 U.S. 194 (2001), this Court set forth a two-step analysis for courts to follow in cases alleging unconstitutional conduct by government officials. Under *Saucier*, "the first inquiry must be whether a constitutional right would have been violated on the facts alleged." *Id*. at 200. If a constitutional violation has been alleged, then "the next, sequential step is to ask whether the right was clearly established * * * in light of the specific context of the case, not as a broad general proposition." *Id.* at 201. If the law was not "clearly established" at the time of the alleged unconstitutional conduct, the court is instructed to grant qualified immunity to the defendant officials and to deny the plaintiff recovery from the officials for the injuries inflicted by their unconstitutional conduct. *Ibid.*

1. *Saucier* protects individuals whose constitutional rights have been violated because it causes development of the law governing the constitutionality of government conduct. That means

that if the same type of unconstitutional conduct by a government official occurs again, the law will be clearly established and the suit will not be barred by qualified immunity. *See Scott v. Harris*, 127 S. Ct. 1769, 1774 (2007) (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.'" (quoting *Saucier*, 533 U.S. at 201)). Consequently, although the first victim to bring a suit against such unconstitutional conduct is barred from a remedy against the wrongdoer, subsequent victims of the same type of conduct will not be barred.

2. There are numerous concrete examples of such instances where a constitutional ruling at the first step of *Saucier* has demonstrably benefited subsequent victims of similar unconstitutional conduct. Below we describe some of the numerous cases in which victims of unconstitutional official conduct were able to overcome claims of qualified immunity through reliance on earlier judicial determinations made at the first step of *Saucier* to demonstrate that the law on the unconstitutionality of the conduct was clearly established. These cases are good examples of constitutional violations that may well have gone unremedied if the two-step approach in *Saucier* were abandoned.

a. In *Roska v. Peterson*, 328 F.3d 1230 (10th Cir. 2003), the plaintiff brought a Section 1983 action against social workers who allegedly entered the plaintiff's home and seized her child without a warrant or exigent circumstances in violation of the

plaintiff's Fourth Amendment rights. Under the first step of *Saucier*, the Tenth Circuit clarified rulings from several older cases and declared "henceforth, the law is clearly established that, absent probable cause and a warrant or exigent circumstances, social workers may not enter an individual's home for the purpose of taking a child into protective custody." *Id.* at 1250 n.23. Under the second step of *Saucier*, however, the Court held that, based on the facts of the case and the doctrinal ambiguity at the time of the challenged actions, the state social workers were entitled to qualified immunity. *Id.* at 1250 & n.23. Thus, that plaintiff was denied the right to seek a remedy based on allegations that stated a constitutional violation, but the court's ruling on the unconstitutionality of the conduct would allow plaintiffs in later cases were able to vindicate their rights.

In a subsequent case, *Turner v. Houseman*, 268 Fed. Appx. 785, 788 (10th Cir. 2008), the Tenth Circuit rejected a social worker's claim of qualified immunity for entering the plaintiff's house to remove his child without a warrant or exigent circumstances. The court held that *Roska* removed any doubt that such conduct constituted a violation of the Fourth Amendment.

b. In *Beard v. Whitmore Lake School District*, 402 F.3d 598 (6th Cir. 2005), high school students brought a Section 1983 action against teachers who allegedly conducted strip searches in the school locker rooms and the police officer who instructed the

teachers to search the female students. Applying the *Saucier* two-step approach, the Sixth Circuit first held that the nonconsensual strip searches on a substantial number of high school students without individualized suspicion to find missing money were unreasonable and violated the Fourth Amendment. *Id*. at 605. Under the second step of *Saucier* the Sixth Circuit granted qualified immunity to the teachers and police officer, however, because the searches did not violate clearly established law. *Id*. at 608.

In a subsequent case, *Brannum v. Overton County School Board*, 516 F.3d 489 (6th Cir. 2008), middle school students brought a Section 1983 action against school officials who installed video cameras in the school locker rooms and thus could view the students nude. The Sixth Circuit rejected the school officials' claims of qualified immunity, holding that the video cameras installed in school locker rooms were similar enough to the searches that *Beard* had clearly established as violating the Fourth Amendment that their unconstitutionality was clearly established. *Id*. at 494.

c. In *Gregorich v. Lund*, 54 F.3d 410 (7th Cir. 1995), a former employee brought a Section 1983 action against his former supervisor, alleging that the employee had been terminated for engaging in union organizing activities. Applying the two-step approach that would later be mandated by *Saucier*, the Seventh Circuit first held that union organizing is a matter of public concern that is protected under the First Amendment. Under the second step, however,

the Seventh Circuit granted the supervisor qualified immunity because it was not clearly established that he could not terminate an employee for attempting to unionize. *Id*. at 418.

In a subsequent case, *Stagman v. Ryan*, No. 96-C-8012, 1997 WL 223074, at *6 (N.D. Ill. 1997), *aff'd*, 176 F.3d 986 (7th Cir.), *cert. denied*, 528 U.S. 986 (1999), a former employee brought a Section 1983 action against officials in the Illinois Attorney General's Office who allegedly terminated the employee in retaliation for the employee encouraging fellow union members to reject a proposed plan. The United States District Court for the Northern District of Illinois rejected the officials' claims of qualified immunity. The court held that *Gregorich* clearly established that union organizing is a matter of public concern protected under the First Amendment. *Ibid*.

d. In *Kuha v. City of Minnetonka,* 328 F.3d 427, *aff'd on reh'g*, 365 F.3d 590 (2003), the Eighth Circuit held at the first step of its *Saucier* analysis that an officer's failure to warn a criminal suspect that the officer is about to release a bite-and-hold trained animal violated the Fourth Amendment, but held that the right was not clearly established.

In a subsequent case, *Kruse v. Jackson*, No. 05-CV-2123, 2006 WL 3758204 (D. Minn. Dec. 20, 2006), the United States District Court for the District of Minnesota denied qualified immunity to a police officer sued for an injury based on the same

conduct. The district court based its determination that the law was clearly established on the Eighth Circuit's initial holding in *Kuha*. *Id*. at *5.

e. In *Robinson v. Solano County*, 278 F.3d 1007 (9th Cir. 2002) (en banc), a plaintiff brought a Section 1983 action against police officers seeking damages for allegedly using excessive force when the officers, from point blank range, aimed their guns at the plaintiff's head even though the plaintiff was plainly unarmed. The Court found that the plaintiff had alleged a violation of his Fourth Amendment rights, but that in 1995 (when the misconduct occurred) the Circuits were still struggling to apply the new objective reasonableness standard from *Graham v. Connor*, 490 U.S. 386 (1989), to excessive force claims involving the use of guns by police officers. Therefore the law was not clearly established at the time and the officer defendants were entitled to qualified immunity. *Robinson*, 278 F.3d at 1015-1016.

In a subsequent case, *Hepner v. Balaam*, No. 3:03-CV-0681, 2007 WL 2033367, at *6 (D. Nev. July 10, 2007), the United States District Court for the District of Nevada refused to grant qualified immunity to a sheriff who drew his weapon during a traffic stop. The court reasoned that "the Ninth Circuit's opinion in *Robinson* * * * clearly established in 2003 that pointing weapons at unarmed suspects after determining that they were not armed would violate[ ] the suspects' constitutional rights."

Similarly, in *Hopkins v. Bonvicino*, No. C-05-02932, 2006 WL 3785640 (N.D. Cal. Dec. 21, 2006), the United States District Court for the Northern District of California rejected police officers' claims of qualified immunity for allegedly pointing their guns at an individual suspected of driving while drunk who was complying with the police officers' instructions. The district court determined that given the holding in *Robinson,* the law was clearly established at the time of the suspect's arrest. *Id*. at *5.

f. In *Cruz v. Kauai County*, 279 F.3d 1064, 1066 (9th Cir.), *cert. denied*, 537 U.S. 1053 (2002), the plaintiff brought a Section 1983 action against a prosecutor seeking damages for the prosecutor's alleged violation of plaintiff's Fourth Amendment rights when the prosecutor recklessly, without further factual investigation, swore to the truth of facts contained in an affidavit submitted in support of a motion to revoke plaintiff's bail. The facts were obtained from plaintiff's ex-wife who was involved in a bitter child custody dispute with the plaintiff. *Ibid.* Under the first step of *Saucier*, the Ninth Circuit held that there was a Fourth Amendment right "not to have a prosecutor, in order to obtain a bail revocation, personally attest to a false statement of a biased source with no investigation of the statement's truth or falsity." *Id.* at 1069. But then, under the second step of *Saucier*, the Ninth Circuit granted the prosecutor's claim of qualified immunity, holding that this right was not clearly established at the time of the prosecutor's conduct. *Ibid.*

In a subsequent case, *Brown v. Nisley*, No. CV-03-1713, 2004 WL 1202815 (D. Or. May 10, 2004), *adopted by* 2004 WL 1687868 (D. Or. July 26, 2004), the plaintiff brought a Section 1983 action against a prosecutor seeking damages for violating her Fourth Amendment rights when the prosecutor appended a corrections facility's letter to his own affidavit submitted in support of a motion for a no-bail arrest warrant for plaintiff without having investigated the truth of the corrections facility's assertions that plaintiff had failed to serve her sentence. The United States District Court for the District of Oregon rejected the prosecutor's claim of qualified immunity, holding that "[a]lthough the prosecutor in *Cruz* was able to obtain qualified immunity because the right to be free from such prosecutorial conduct was not clearly established at the time, *Cruz* clearly established this right in all subsequent cases." *Id.* at *13.

These examples demonstrate the reality of men, women, and children who were allowed to seek a remedy for a government official's violation of their constitutional rights because *Saucier* compelled earlier courts to clearly establish constitutional rights before addressing qualified immunity.

B. *Saucier* Allows Governments To Adopt Policies That Direct Their Officials To Conform Their Conduct To Established Constitutional Standards And Thus Discourages Unconstitutional Conduct

1. The *Saucier* approach also benefits the public more broadly because it puts government entities on notice of what constitutes unconstitutional conduct and what does not. When a court rules that the allegations in a case establish a constitutional violation, that ruling allows local governments to incorporate the standard into their policies and procedures. Those standards can then prevent future recurrence of the same unconstitutional conduct. And that is true regardless of how the second step regarding the applicability of qualified immunity is resolved in the case.

At the same time, a court ruling that certain conduct is not unconstitutional also benefits the public. It permits government entities to engage in conduct that they determine will benefit the public, without fear of future constitutional litigation.

This certainty redounds to the benefit of the judiciary as well by reducing the number of subsequent actions challenging the same or similar conduct as unconstitutional. In addition, it permits courts to swiftly dispose of unmeritorious challenges to such conduct.

By contrast, if the question of the constitutionality of the alleged conduct is avoided, "standards of

official conduct would tend to remain uncertain, to the detriment both of officials and individuals." *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998).

2. The impact on government policies by court rulings at the first step of the *Saucier* analysis can be best appreciated through a few concrete examples.

a. In *Wilson v. Layne,* 526 U.S. 603 (1999), this Court held that it is a violation of the Fourth Amendment for police officers to bring members of the media or other third parties into a home during the execution of a warrant. The Court also affirmed the court of appeals' grant of qualified immunity to the individual officer who had been sued in that case because the law was not clearly established at the time of the alleged conduct. *Id*. at 614-615.

One of petitioners' own *amici* explains that "[o]nce this Court had condemned the practice [in *Wilson*], * * * 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." National Ass'n of Counties, *et al.* Br. as *Amici Curiae*, at 24.

This Court's ruling on the constitutional issue in *Wilson* has been formally incorporated in the training materials of several States. For example, the Georgia Association of Chiefs of Police *Sample Law Enforcement Policy Manual* references this Court's decision in *Wilson* and suggests that ride-along policies must include language that prohibits participants from

entering a person's home unless granted express permission by the homeowner. *See* Georgia Ass'n of Chiefs of Police, *Sample Law Enforcement Operations Manual*, (revised March 2007), *available at* http://www.gachiefs.com/DeptResrcs_SamplePolicy Manual.htm (follow "Chapter 16—Patrol Function" at 50).

The *Model Policies for Law Enforcement in Maryland* expressly recommends that law enforcement agencies examine their policies with respect to civilian ride-alongs in light of *Wilson*. *See* Maryland Police and Correctional Training Commissions, *Model Policies for Law Enforcement in Maryland*, at 39 (November 2003), *available at* http://www.mdle.net/modelpolicies05.pdf.

An instructor at the FBI Academy published an article to recommend that "[l]aw enforcement agencies should carefully craft media policies that follow the parameters established by the Supreme Court in *Wilson* * * * [and] should provide training designed to alert officers to the potential personal liability of exceeding those parameters." Kimberly A. Crawford, *Media Ride-Alongs: Fourth Amendment Constraints*, 69 FBI Law Enforcement Bulletin 28 (July 2000), *available at* www.fbi.gov/publications/leb/2000/jul00leb.pdf.

b. In *McClish v. Nugent*, 483 F.3d 1231 (11th Cir. 2007), a plaintiff brought a Section 1983 action against a police deputy for conducting a warrantless arrest of the plaintiff at his home by knocking and

then, after plaintiff opened the door, reaching through the open doorway without warning and grabbing plaintiff as he stood fully within the confines of his home. *Id*. at 1234-1236. The Eleventh Circuit held, at the first stop of its *Saucier* analysis, that such warrantless arrest violates the Fourth Amendment. The court affirmed the district court's grant of qualified immunity in that case, however, because the law was not clearly established at the time of the alleged conduct. *Id.* at 1248-1249.

In response, police officers in Georgia are now "trained on this point" of law and, "by following their training, they will safeguard the constitutional rights of individuals." Dawn M. Diedrich, *"Rigid Order of Battle": A Police Training Perspective on the Qualified Immunity Analysis*, The Police Chief (July 2008), *available at* http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display&issue_id=72008&category_ID=3. The Deputy Director of Legal Services for the Georgia Bureau of Investigation explained that "[f]or a police trainer, [*McClish*] gives clear guidance to officers and is actually a primer for Fourth Amendment issues relating to entry into a home." *Ibid*.

c. And yet a third concrete example of *Saucier*'s positive impact on governmental policies is *Kuha v. City of Minnetonka,* 328 F.3d 427, *aff'd on reh'g*, 365 F.3d 590 (2003). As noted above, in *Kuha*, the Eighth Circuit held that the failure of police officers to warn a criminal suspect that they were about to release of a bite-and-hold trained animal violated the Fourth

Amendment. That decision was subsequently cited in a policy manual used to train law enforcement personnel as an example of how the failure to warn before releasing a dangerous animal was unconstitutional. *See* Ken Wallentine*, Street Legal: A Guide to Pretrial Criminal Procedure for Police, Prosecutors and Defenders* 270 (2007).

C. The Alternatives Proposed By Petitioners And Their *Amici* Would Increase The Already High Costs Associated With Granting Government Officials Qualified Immunity

Petitioners have not identified an alternative approach to *Saucier* that would better serve the Court's goals to ensure the development of the law and provide certainty for individuals and government officials, nor have their *amici*.

1. The qualified immunity doctrine already imposes significant costs on victims of unconstitutional conduct that weigh against overruling *Saucier*

The doctrine of qualified immunity already substantially limits the availability of remedies for persons injured by official conduct. This is a significant social cost, as "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury." *Marbury v. Madison*,

5 U.S. 137, 163 (1803). As long as this Court maintains that government officials are entitled to qualified immunity where the law is not "clearly established," it should not allow courts to further extend this immunity by leaving the law unclear.

A continued mandate for courts to follow the *Saucier* two-step analysis is necessary to maintain the balance struck by the qualified immunity doctrine "between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt v. Cole*, 504 U.S. 158, 167 (1992) (Kennedy, J., concurring); *see Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Indeed, in an appropriate case, it may be time to reassess the balance of competing values underlying qualified immunity. Qualified immunity has no anchor in the text of Section 1983. *See Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) ("on its face" Section 1983 "admits of no immunities"). To the contrary, the creation of a federal common law of qualified immunity appears to be in significant tension with the statutory command in 42 U.S.C. § 1988(a) that state law fill any "gaps" not addressed by the text of Section 1983. *See Moor v. County of Alameda*, 411 U.S. 693, 702-706 (1973). Exercising judicial authority to create a federal common law of immunity from Section 1983 claims also is in tension with the intent of the Reconstruction Era Congress that enacted Section 1983 in 1871, which was skeptical of the federal courts' support for the goals of

reconstruction. *See* 2 Charles Warren, *The Supreme Court in United States History* 428-434, 447-454, 466-468, 474-477 (rev. ed. 1926).

Even if Congress had intended well-established common law immunities to be available to government officials in Section 1983 actions, the Court abandoned the common law in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and now relies on a standard under which it is easier for a government official to prevail than it was under common law. The Court did so by adopting a purely objective inquiry into whether an official violated clearly established law and rejecting liability even if a plaintiff can show that the government official acted with a malicious intention to deprive that individual of his or her constitutional rights. *See Anderson v. Creighton*, 483 U.S. 635, 645 (1987); *Wyatt*, 504 U.S. at 170 (Kennedy, J., concurring) ("in the context of qualified immunity for public officials * * * we have diverged to a substantial degree from the historical standards").

Furthermore, the assumptions underlying modern qualified immunity have little if any empirical basis and therefore offer weak foundations for such a broad defense. First, the primary assumption justifying qualified immunity is that government officials sued in their individual capacities pay any damage award out of their own pockets and thus potentially be overdeterred by the threat of a damages action. But indemnification of the official by his employer is, in the words of *amicus*

National Association of Counties "common in public employment." National Ass'n of Counties, *et al.* Br. as *Amici Curiae*, at 21; *see also Board of County Comm'rs of Bryan County, Okla. v. Brown,* 520 U.S. 397, 436 (1997) (Breyer, J., concurring); *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 850 (7th Cir. 1990) (Posner, J.) ("The [over-deterrence] justification becomes strained, however, when, as is increasingly common, the governmental entity indemnifies its employees for damages and other expenses that they incur in defending against suits that complain about their performance of official duties.").

A second assumption underlying qualified immunity is that it would be unfair to hold a government official liable in the absence of clear notice that his or her conduct is unconstitutional. The nearly universal indemnification of public officials also puts to rest this concern, however, because the money does not come from the pocketbook of the individual official. In any event, this is a virtually universal aspect of common law torts–defendants often will not know that their conduct is tortious until a jury makes that determination.

A third assumption underlying qualified immunity is that it is necessary to avoid the burdens of defending a civil rights damages action, such as the expenses of litigation and diversion of official energy from pressing public issues. But that offers weak support for such a broad qualified immunity doctrine. That is because the burdens are generally the same to the individual official whether he is sued in his

individual capacity or whether his employer is sued for the official's conduct. *See* Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and The Role of Facts in Constitutional Law*, 47 Am. U. L. Rev. 1, 25 (1997).

Until a case raises the question regarding the underlying balance struck by this Court in *Harlow*, this balance should not be pushed more heavily in favor of government officials to the detriment of remedying constitutional violations. Yet this is precisely the result of overruling *Saucier* or, as we show below, modifying it as proposed by petitioners or their *amici*. If *Saucier* were overruled, qualified immunity would not only continue to award government officials "one liability-free violation of the Constitution," it also would pave the way for "multiple bites of a constitutionally forbidden fruit." *Garcia by Garcia v. Miera*, 817 F.2d 650, 656-657 n.8 (10th Cir. 1987) (citation omitted), *cert. denied*, 485 U.S. 959 (1988).

2. The need for continued development of constitutional jurisprudence in Fourth Amendment cases, as shown by the case law, demonstrates that *Saucier* should not be abandoned in that area

Petitioners wrongly contend (Pet. Br. 57-58) that this Court should not apply the two-step approach of *Saucier* in civil cases seeking relief for Fourth Amendment violations because the adjudication of

Fourth Amendment claims in criminal cases is sufficient to generate clearly established law.

Several of the examples discussed in Parts A and B, *supra*, involved allegations of Fourth Amendment violations. If the approach required by *Saucier* had not been applied, it would not have been just the first victim who was barred relief by qualified immunity. The victims in all the subsequent cases also would have been barred relief because there would have been no clearly established law on the unconstitutionality of the challenged conduct.

Further, as the United States argues as *amicus curiae*, the need to avoid doctrinal confusion regarding the relationship between the Fourth Amendment's reasonableness standard and the qualified immunity standard makes it inappropriate to exclude claims under the Fourth Amendment from *Saucier*'s two-step approach. *See* United States Br. as *Amicus Curiae*, at 26-27.

3. Making *Saucier* discretionary ignores the failure of the earlier experience with such an approach

Petitioners' *amici* suggest revival of a system of unconstrained discretion about whether a court will address the merits of a claim of unconstitutional official conduct or, instead, address qualified immunity as a threshold question. The United States suggests that the lower courts should have "broad discretion" to decide whether to address whether a

constitutional right has been alleged prior to addressing whether the right has been clearly established. United States Br. as *Amicus Curiae*, at 30. The *amicus* brief filed by Illinois and several other States urges that lower courts be granted the "discretion to deviate from the *Saucier* rule" and allowed the "flexibility" to "resolve cases solely on the second, 'clearly established' step of the inquiry where efficiency, inadequate argument, or some other factor makes it sensible to do so," Illinois, *et al*. Br. as *Amici Curiae*, at 27, 25, which amounts to the same uncabined discretion suggested by the United States.[2]

The findings of an empirical study of the three time periods during which this Court gave differing guidance to the lower courts on sequencing the analysis of the constitutional question and the "clearly established" step shows the problem with *amici*'s

[2] *Amicus* Texas Association of School Boards appears to propose that the current *Saucier* two-step approach be replaced by a system where the lower court should be required to determine the merits of the constitutional issue first only if the defendant will win. *See* Texas Ass'n of School Board Br. as *Amicus Curiae*, at 2-3. That proposal would constitute a one-way ratchet that would generate determinations about what government officials may do, but would not provide any guidance about what the officials are constitutionally prohibited from doing. This would further exacerbate the burdens of existing uncertainty about constitutional rights, which "will not be spread evenly across plaintiffs and defendants alike, but will systematically disfavor the constitutional claimant." Michael L. Wells, *The "Order-of-Battle" in Constitutional Litigation*, 60 S.M.U. L. Rev. 1539, 1559 (2007).

proposal. *See* Paul Hughes, *Not a Failed Experiment:* Wilson-Saucier *Sequencing & the Articulation of Constitutional Rights*, 80 U. Colo. L. Rev. (forthcoming 2009), *available at* http://ssrn.com/abstract=1218582.

This Court initially followed a hands-off approach, and provided no guidance for the lower courts on how to approach a qualified immunity case. *See id*. at 8-9. Subsequently, in cases such as *Siegert v. Gilley*, 500 U.S. 226 (1991), this Court was understood to hold that the preferred approach was for a court to first rule on whether the alleged conduct stated a constitutional violation. *See* Hughes, *supra*, at 9-10. Finally, in *Saucier*, the Court held 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 (emphasis added).

A study comparing reported qualified immunity decisions in the federal courts of appeals during each of these three time periods shows that *Saucier*'s mandatory guidance dramatically increased the likelihood that a court granting qualified immunity would follow the merits-first approach and clarify the constitutional issue. Hughes, *supra*, at 20. In 1988, 59% of the reported qualified immunity opinions in the courts of appeals that resulted in dismissal of plaintiff's constitutional claim failed to address whether the plaintiff had established a constitutional violation. *Id.* at 24. In 1995, the courts of appeals in 35% of such cases failed to analyze the constitutional issue. *Ibid.* This pattern changed dramatically

following *Saucier*. In 2005, courts in only 2% of such cases failed to address the constitutional issue. *Ibid.*

This research suggests that *Saucier*'s mandatory sequencing has resulted in significantly greater constitutional refinement, and that any deviation from this mandate would greatly diminish courts' willingness to address constitutional issues. Thus, it demonstrates that it is the mandatory nature of *Saucier* that is key to preventing victims of repeated constitutional violations of the same or similar nature from all being barred from suit by qualified immunity.

A mandatory merits-first approach to qualified immunity analysis ensures that, although there will be no remedies against officials who violate the constitutional rights of individuals where the law is unclear, the law will not remain unclear forever. This Court should reaffirm its holding in *Saucier* in order to prevent a broader application of qualified immunity, and to maintain the balance struck by this doctrine.

CONCLUSION

For the reasons set forth above, and in the brief of respondent on the merits, the Court should not overrule *Saucier v. Katz*, 533 U.S. 194 (2001), and the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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