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 AMICUS CURIAE OF THE ACLU IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil-rights laws. Since its founding in 1920, the protection of Fourth Amendment rights and the vindication of constitutional rights more generally have been a central concern of the ACLU, which has appeared before this Court in numerous Fourth Amendment and qualified-immunity cases, both as direct counsel and as *amicus curiae*. Because this case addresses important questions concerning both the Fourth Amendment and the ability to assert viable constitutional claims, proper resolution of the Fourth Amendment and qualified-immunity issues is a matter of substantial concern to the ACLU and its members.

STATEMENT OF THE CASE

The Central Utah Narcotics Task Force arrested Brian Bartholomew in January 2002 for controlled-substances violations. JA 48. In exchange for

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[1] Pursuant to Rule 37.3, letters of consent from the parties have been submitted to the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that 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 *amicus curiae,* its members or its counsel made a monetary contribution to its preparation or submission.

leniency, he agreed to become an informant for the Task Force. JA 49.

On March 19, 2002, Bartholomew asked an acquaintance, Respondent Afton Callahan, whether he had any drugs for sale. JA 140. Respondent said he was going to acquire methamphetamine from a third person later that day, and that Bartholomew could in turn purchase the drugs from him. JA 114, 140. After drinking six to eight beers, Bartholomew went to Respondent's home and confirmed that Respondent had indeed procured the drugs. JA 115-18. While there, Bartholomew ingested methamphetamine. JA 166-67, 171.

Bartholomew then drove to meet a Task Force officer, Jeffrey Whatcott, and told him that Respondent was prepared to sell drugs. The Task Force gave Bartholomew a $100 bill to purchase methamphetamine, equipped him with a transmitter, and drove him to a site near Respondent's home. JA 54-55, 184, 243-44. Bartholomew then walked the rest of the way to the residence. JA 185.

Bartholomew entered Respondent's home and exchanged the $100 bill for methamphetamine. JA 64, 123, 125, 186. Although the Task Force officers who were waiting outside the home could not hear the entire transaction or account for everyone in the home, they did hear Bartholomew give what they believed to be a prearranged signal, after which they entered the residence and arrested Respondent and two other men who were present. JA 64-65, 79, 244-45, 265-66.

Throughout the transaction, the officers did not fear for the safety of Bartholomew or anyone else in the home. Nor did they profess any concern that the occupants of the residence would dispose of the drugs in an attempt to hide the contraband. Yet, they made no attempt to obtain an arrest warrant. JA 89-90.

Respondent was charged with methamphetamine possession and distribution, among other offenses. JA 314-16. Before trial he moved to suppress the evidence seized in his home and dismiss the charges because the officers unconstitutionally entered his home without a warrant. During trial Respondent renewed the motion, which the court denied. JA 295-96, 301-02.

After the close of evidence but before the case was submitted to the jury, Respondent pled guilty to distribution of methamphetamine, conditioned upon the State dismissing the remaining charges and allowing Respondent to appeal the denial of his suppression motion. JA 303-04. On appeal, the Utah Court of Appeals concluded that the warrantless entry violated the Fourth Amendment. It reversed the conviction and remanded the case with directions to grant Respondent's motion to suppress. JA 334-39. The trial court then granted Respondent's motion and dismissed the charges against him.

Respondent commenced this civil action in federal district court, seeking damages for the violation of the Fourth Amendment's warrant requirement. JA 340-54. The district court granted Petitioners' motion for summary judgment on

Respondent's claims under 42 U.S.C. § 1983. Pet. App. 30.

Respondent appealed, and the Tenth Circuit reversed the district court's order. The court of appeals rejected the extension of the "consent-once-removed" doctrine to citizen informants—as contrasted to undercover police officers—holding that the officers' warrantless entry violated Callahan's constitutional rights. It further held that those rights were clearly established at the time of the search, since the only recognized exceptions to the Fourth Amendment's warrant requirement did not permit police officers to enter a home without a warrant based on an informant's participation in a drug transaction within the residence. Pet. App. 1.

SUMMARY OF ARGUMENT

1. Searches and seizures inside a home without a warrant are presumptively unreasonable. Even when police officers have probable cause to believe a crime is occurring inside a suspect's home, absent exigency or other limited exceptions not applicable here, they must obtain a warrant before entering to arrest or search. Though Petitioners attempt to cloak the search here in the mantle of "consent," in fact they urge this Court significantly to expand the established parameters of the jealously and carefully drawn consent exception to the warrant requirement.

The consent-once-removed doctrine rests on a legal fiction developed for undercover police officers. But the decision to apply it to undercover police officers cannot be separated from the special status

the police occupy in our criminal justice system. Police officers are deemed to share collective knowledge about their investigations. They are expected to act in good faith. They are expected to exercise good judgment, based on extensive training and experience, about whether probable cause exists. They are expected to be truthful. They are expected to act safely and not to endanger others recklessly.

Informants, on the other hand, are not trained police officers. To the contrary, the vast majority of informants are criminals promised leniency if they provide incriminating information. They are assumed to have selfish motivations. They have a proven track record of unreliability. Their willingness to falsely accuse others in order to curry favor with the police has been thoroughly documented by both case law and academic studies. Informants are not sworn to uphold the law. Even when acting as agents of the police, they are not provided any special law enforcement powers or authority beyond those possessed by ordinary citizens and bystander-witnesses. They are not trained to recognize dangerous situations, into which officers too often step when they enter a home without a warrant upon the word of an informant.

The police already have ample tools under existing law to respond to any exigent circumstances that may arise during a drug enforcement operation, including the potential use of anticipatory warrants, without the need to create a new exception to the warrant requirement. The surprise forced entry of a home to make an arrest is one of the most dangerous of all interactions between police and citizens, often leading to tragic consequences. Extending the

consent-once-removed doctrine as urged by Petitioners will entrust too much of this crucial decision-making process to criminals turned informants.

2. The Court has also instructed the parties to brief whether *Saucier v. Katz,* 533 U.S. 194 (2001), should be overruled. We believe it should not. The problem that *Saucier* was designed to address has not disappeared. Qualified immunity is intended to shield public officials from personal liability if the law they are alleged to have violated was not clearly established at the time that they acted. But granting qualified immunity on that basis alone, without also clarifying what the law in fact requires, perpetuates a state of legal ambiguity that has two unfortunate consequences. First, it makes it more difficult for conscientious public officials to conform their behavior to the law. Second, it diminishes the likelihood that future plaintiffs will be compensated for the constitutional injuries they suffer. *Saucier* therefore directs courts to clarify the relevant constitutional rule before deciding whether it was clearly established.

When followed, this two-step process has achieved its stated purpose. Assertions that it violates the rule against advisory opinions or is inconsistent with the doctrine of constitutional avoidance have already been considered and properly rejected by this Court. The various exceptions that critics now urge to the *Saucier* rule, including a wholesale exception in Fourth Amendment cases, would effectively restore the law of qualified immunity to the unsatisfactory state that existed prior to *Saucier*. At a minimum, any relaxation of

the *Saucier* rule should be limited to narrowly defined circumstances that will maintain the essential holding of *Saucier* in most cases. For example, the law-clarifying function of *Saucier* might not be undermined if its sequencing requirements were relaxed when the constitutional claim presented in the case turns on an unresolved question of state law.

ARGUMENT

I. THIS COURT SHOULD NOT ADOPT THE CONSENT-ONCE-REMOVED DOCTRINE TO VALIDATE A WARRANTLESS ENTRY UNDERTAKEN AT THE PROMPTING OF AN UNTRAINED, UNSWORN, AND UNRELIABLE INFORMANT

A. Warrantless Entry Of The Home Is Presumptively Unreasonable, And The Limited Exceptions To The Warrant Requirement Must Serve "Compelling" Law-Enforcement Needs

The "chief evil" that the Fourth Amendment proscribes is the government's warrantless entry of the home. *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972); *see also, e.g.*, *Payton v. New York*, 445 U.S. 573, 586 (1980) (holding that the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest). Searches and seizures inside a home without a warrant are presumptively unreasonable. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). The ultimate sanctuary for privacy, the home is the last

place where an individual expects to confront the State, and, "[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United States*, 533 U.S. 27, 31 (2001). New exceptions to the warrant requirement are recognized only when necessary to serve "compelling" law enforcement needs. *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978). Petitioners thus have the "burden . . . to show the existence of such an exceptional situation as to justify creating a new exception to the warrant requirement." *Id.* at 391-392.

B. No Compelling Law Enforcement Need Justifies Adoption of the Consent-Once-Removed Exception for Informants

The consent exception to the warrant requirement is "jealously and carefully drawn." *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (quoting *Jones v. United States*, 357 U.S. 493, 499 (1958)). As Justice Stevens noted in his concurring opinion in *Randolph*:

> At least since 1604 it has been settled that in the absence of exigent circumstances, a government agent has no right to enter a "house" or "castle" unless authorized to do so by a valid warrant. *See Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B.). Every occupant of the home has a right—protected by the common law for centuries and by the Fourth Amendment since 1791—to refuse

> entry. When an occupant gives his or her consent to enter, he or she is waiving a valuable constitutional right.

Id. at 123-124 (Stevens, J., concurring).

A new doctrine significantly expanding the consent exception to the warrant requirement should not be constructed on the shaky foundation of notoriously unreliable criminals-turned-informants. Nor should such a significant new exception to the warrant requirement be created when, as here, established law provides police with ample flexibility to respond to exigent circumstances and to the special requirements of undercover drug enforcement operations.

Police may already enter homes in hot pursuit of a fleeing felon, to prevent the imminent destruction of evidence, to prevent a suspect's escape, or when police officers or other people inside or outside the home are in danger. *Minnesota v. Olson*, 495 U.S. 91, 100 (1990). Moreover, as Petitioners acknowledge, police using an informant to elicit illegal information or behavior that police expect to provide probable cause may obtain an anticipatory warrant. "The anticipatory search warrant presumably would be triggered when the informant gives the signal; at that point the officers would enter the home under the warrant." Pet. Br. 32-33, citing *United States v. Grubbs*, 547 U.S. 90 (2006).

C. Occupants Do Not Abandon Their Expectation Of Privacy Simply By Engaging In Illegal Activity In The Home, Even In The Presence Of Others

The core of Petitioners' argument is that police may enter a suspect's home without a warrant if the suspect has consented to the entry of an undercover informant in front of whom he then engages in illegal activity. Petitioners suggest this is so because the suspect has, under such circumstances, surrendered all expectation of privacy in the home. Pet. Br. 17. This Court has rejected previous attempts to bootstrap illegal activity into a forfeiture of Fourth Amendment rights. In *Mincey v. Arizona*, the State argued that by shooting a police officer the suspect had "forfeited any reasonable expectation of privacy in his apartment." 437 U.S. at 391. This Court forcefully rejected the argument, noting that "this reasoning would impermissibly convict the suspect even before the evidence against him was gathered." *Id.* Similarly, in *Michigan v. Tyler*, 436 U.S. 499, 505-06 (1978), this Court rejected the argument that by committing arson a defendant had abandoned any expectation of privacy in the burned home. "It is, of course, impossible to justify a warrantless search on the ground of abandonment by arson when that arson has not yet been proved, and a conviction cannot be used *ex post facto* to validate the introduction of evidence used to secure that same conviction." *See also Kyllo*, 533 U.S. 27 (warrant required to conduct search of home, even where officers received reliable information that specific and illegal commercial activity was transpiring within the home); *United States v. Karo*, 468 U.S.

705 (1984) (warrant required to monitor electronic pager in home, even though the home was used for commercial cocaine distribution). *See generally Payton*, 445 U.S. at 587-88 ("[A]bsent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within.")

Nor is the expectation of privacy fatally compromised merely by the presence of another person invited into the home who observes illegal activity. This is illustrated by the following hypothetical: If Respondent had invited a neighbor into his home and then engaged in illegal activity in the neighbor's presence, the neighbor would be deemed an ordinary bystander-witness to a crime. If the neighbor had called police from inside the home and reported the ongoing illegal activity, police would, absent exigency, have been required to obtain a warrant to enter the home to search or arrest. Even if the neighbor's report were enough to constitute probable cause, a warrant would still be necessary. *See*, *e.g.*, *United States v. McCraw*, 920 F.2d 224 (4th Cir. 1990) (corroborated tip from witness involved in drug transaction created probable cause, but warrantless home entry violated *Payton*); *United States v. Edmondson*, 791 F.2d 1512 (11th Cir. 1986) (although statements from witnesses, combined with other evidence, created probable cause, warrantless entry violated *Payton*); *United States v. Charles*, 290 F. Supp. 2d 610 (D.V.I. 1999) (information from tipster, corroborated by officers, constituted probable cause, but warrantless

entry without exigent circumstances contravened Fourth Amendment).

Consent-once-removed, then, cannot validate a warrantless entry whenever a suspect consents to someone entering his home and then engages in illegal activity; for purposes of the warrant requirement, the *status* of the person to whom the illegal activity is revealed matters.

D. The Rationale For Applying The Consent-Once-Removed Doctrine to Undercover Police Officers, Even If Valid, Does Not Apply To Unreliable And Untrained Informants

Amicus assumes for the sake of argument that if Bartholomew had been an undercover police officer, Respondent's voluntary relinquishment of his privacy—i.e. consent—could constitutionally be deemed "transferred" to other officers waiting outside. The central question presented by this case is whether a non-police-officer undercover informant ought to be treated the same as a police officer for purposes of transferring consent in this manner. Petitioners assert that the answer is yes, because "[a]n agent of the state is an agent of the state, regardless of whether that agent is working with the government pursuant to an informant contract or an employment contract." Pet. Br. 38. However, the cases petitioners cite for this sweeping proposition are inapposite. None involved a warrantless entry by police officers based upon previous consent given to a non-police-officer informant. *Hoffa v. United States*, 385 U.S. 293 (1966), *Lewis v. United States*, 385 U.S. 206 (1966), *United States v. Miller,* 425 U.S.

435, 443 (1976), and *United States v. White*, 401 U.S. 745, 752 (1971). All involve the conceptually distinct question whether evidence and information voluntarily provided by defendants to undercover informants is admissible at trial. Petitioners' argument suggests that the *Hoffa* line of cases should be expanded to permit police to *raid* a home *without a warrant* the moment the informant has elicited incriminating evidence. The implications of that argument for the Fourth Amendment's protection of the home are staggering—and dangerous, not only to citizens' privacy expectations, but also to public safety.

This Court should reject Petitioners' agency argument. The Government is not deemed categorically liable for all actions of its non-police-officer informants. *See*, *e.g.*, *Ghandi v. Police Dept. of City of Detroit*, 823 F.2d 959, 963-964 (6th Cir. 1987) (no *per se* agency rule). Similarly, this Court should not categorically deem all informants equivalent to police officers for purposes of applying the consent-once-removed doctrine. The question of whether an informant should be treated like a police officer for purposes of the consent-once-removed doctrine cannot be answered simply by asserting that the informant was acting as a state agent. Instead, the Court should look behind the state agent label to the reasons consent might properly be transferred from one police officer to others, and determine whether those reasons are equally applicable to informants.

1. Informants Cannot Be Deemed To Share "Collective Knowledge" With Police Officers

The concept of "collective knowledge" has been used to justify the consent-once-removed doctrine where an undercover police officer invited inside the home gains probable cause to arrest and then summons other officers waiting outside. *See United States v. Yoon*, 398 F.3d 802, 812-13 (Gilman, J., dissenting). Courts routinely impute collective knowledge regarding criminal investigations to law-enforcement officers. *See, e.g.*, *Illinois v. Andreas*, 463 U.S. 765, 771 n.5 (1983); *United States v. Blair*, 524 F.3d 740, 751 (6th Cir. 2008); *United States v. Banks*, 514 F.3d 769, 776 (8th Cir. 2008). To extend the collective-knowledge rationale to the relationship between informants and police officers, however, would ignore the lack of information sharing between informants and officers, the mutual skepticism with which the two groups view each other, and widespread deceit by informants.

Law enforcement officials' willingness to freely exchange information among each other is conspicuously absent with informants. *See, e.g.*, Stephen S. Trott, Lecture on the Use of a Criminal As a Witness: A Special Problem 23 (Oct. 2007), *at* http://72.3.233.244/pdfs/drugpolicy/informant_trott_outline.pdf (advising prosecutors to "not let down your guard and share the kind of information with [an informant] you might share with a friend or colleague"). Police officers do not freely share information with ordinary bystander-witnesses, and their reticence is even more pronounced with informants.

Police mistrust of informants is well-placed. Informants are notoriously unreliable. *See, e.g.*, Report of the 1989-90 Los Angeles County Grand Jury 16 (1990) (reporting "repeated instances of [informants committing] perjury and providing false information to law enforcement," even when under oath), *cited in United States v. Bernal-Obeso*, 989 F.2d 331, 334 (9th Cir. 1993); Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 107 (2006). Many informants, including Mr. Bartholomew, have considerable criminal records and face the prospect of additional criminal charges. Informants have every reason to curry favor with law-enforcement officers by telling the officers what they would like to hear. *See, e.g.*, Mark Curriden, *The Informant Trap: Secret Threat to Justice*, Nat'l L.J., Feb. 20, 1995, at A1 (quoting Judge Stephen Trott as explaining that informants will lie, commit perjury, and manufacture evidence in order to "get out of trouble with the law"). Some, like Mr. Bartholomew, are under the influence of alcohol or other drugs at the time that they provide information to law-enforcement officers, further undermining their reliability. *See* JA 118-19, 166-67, 171 (noting that Bartholomew had consumed six to eight beers and ingested methamphetamine prior to engaging in the drug transaction with Respondent). It is no wonder that federal jury instructions, including the pattern jury instruction on informants, often warn jurors to review informant testimony with "greater care" because informants have a "motive to falsify." Edward J. Devitt et al., *Federal Jury Practice and Instructions* 476-509 (4th ed. 1992).

A study about informants conducted by the *Pittsburgh Post-Gazette* found: "The reporters discovered so many examples of lying informants that they concluded, 'Perjury has become the coin of the realm in federal law enforcement. People's homes are invaded because of lies. People are arrested because of lies. People go to prison because of lies.'" Jim Redden, Snitch Culture: How Citizens Are Turned into the Eyes and Ears of the State 23 (2000) (quoting Bill Moushey, *Win At All Costs: Calculated Abuses*, Pittsburgh Post-Gazette, Dec. 7, 1998). It is by now a sad, well-recognized fact that informants commonly falsify accusations and other evidence. *See generally* Editorial, *The Informant Trap*, Nat 'l L.J., Mar. 6, 1995, at A18 ("Informants increasingly will do anything—lie, entrap, fabricate evidence—to win their freedom . . . ."); Natapoff, *supra*; *United States v. Calandrella*, 605 F.2d 236, 246 (6th Cir. 1979) ("The danger of [a law enforcement official's] having falsified his information is simply not as great as with an unnamed criminal informer who may be seeking favorable treatment from the government or revenge against the suspect.").[2]

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[2] This is true even when the informant is "wired." *See*, *e.g.*, Mark Curriden, The Informant Trap: Postal Agents Stamped By Scandal, Nat'l L.J., Feb. 27, 1995, at A1. Postal inspectors "wired" informants and sent them to conduct specific drug transactions, which the informants purportedly recorded on cassettes that they subsequently provided to the inspectors. *Id.* However, the informants did not in fact consummate a drug transaction, and instead recorded a feigned transaction with their friends, who impersonated the targets of the investigation. *Id.* Similar circumstances have led to false arrests in Boston, Chicago, Indianapolis, Los Angeles, Minneapolis, Toledo, and

The justifications for imputing collective knowledge among police officers are simply not applicable to informants.

2. Informants Lack The Training, Judgment And Trustworthiness Of Undercover Law Enforcement Officers

Informants differ in other ways relevant to whether they should be treated like police officers for purposes of the consent-once-removed doctrine. With a demonstrated history of false accusations and other outright lies, informants cannot be analogized to sworn police officers when assessing whether to accept their assertions that a home's occupant consented to their entry, or whether to treat their accusations as sufficient to circumvent the warrant requirement. Informants usually have criminal convictions or charges pending against them and for good reasons are not entrusted with the considerable authority granted to police officers. Informants, after all, find themselves in their position not because the government believes they can reliably enforce the law, but often for precisely the opposite reason: they have previously violated the law.

Moreover, informants undergo none of the training that law-enforcement officers receive and thus are typically unschooled in the law and law enforcement techniques. Police officers receive extensive instruction and pass rigorous tests. They

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West Palm Beach. *Id*. Moreover, as demonstrated in this case, law-enforcement officers often cannot hear much of the conversation through a transmitting or recording device, leading the officers to speculate about the activities of the informant and others. *See* JA 64-65, 79.

must complete field and classroom trainings, as well as satisfy background checks, prior to taking their oath of office. After their training, officers are vested with enormous power and discretion. The State provides them with a firearm and handcuffs, grants them access to otherwise private databases to aid in criminal investigations, and presents them with a badge and uniform. Officers have the ability—sometimes the obligation—to execute warrants, pursue suspects in high-speed chases, use weapons and in some circumstances lethal force against citizens. Not surprisingly, the State accords none of these powers to informants.

The dissent below—like other courts that have applied the consent-once-removed doctrine when informants are invited into a home—does point to one law-enforcement-like power that informants possess in the State of Utah: the authority to effectuate a "citizen's arrest." 494 F.3d at 902. *But see Yoon*, 398 F.3d at 814 (Gilman, J., dissenting) (noting courts' "unwarranted assertion" that a citizen-arrest power could "give the police permission to burst into the home without a warrant in order to assist in the arrest"). But the citizen's-arrest authority is just that: a power that *all* citizens possess. *See* Utah Code Ann. § 77-7-3 (2008). Police receiving a phone call from a citizen who had just witnessed a crime in someone else's home would need either exigent circumstances or a warrant to enter that home, even if entering to "assist" that citizen in effecting a citizen's arrest. The same must be true of a informant. The ability to effectuate a citizen's arrest does not distinguish the informant from any other citizen or bystander-witness.

3. The Demonstrated Dangerousness Of Police Reliance On Informants Counsels Against Establishing A New Exception To The Warrant Requirement Grounded On Such Reliance.

"The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause." *Wong Sun v. United States*, 371 U.S. 471, 481-482 (1963). The warrant requirement is especially critical to protect the public from the tragic consequences that can result from surprised forced entries into the home. An informant working for the police to reduce his own criminal liability has a strong incentive to deliver arrests to his police handlers and, thus, to encourage the police to enter and search if the informant believes drugs may be in a house. This strong self-interest, coupled with a lack of training in the technicalities of probable cause jurisprudence, make an informant much more likely to lie, or simply to err on the side of prematurely or incorrectly signaling police to enter a suspect's home to search for drugs.

Even without the consent-once-removed exception to the warrant requirement, examples abound of tragic consequences resulting from police raiding houses with warrants obtained in reliance on informants. *See generally* Radley Balko, Cato Inst., The Rise of Paramilitary Raids in America (2006).

Removing judicial oversight and encouraging *warrantless* raids on the word of informants will only increase the already significant public harms associated with undercover informants, illustrated by the following examples:

a. Armed with an inaccurate statement from an informant that drugs were being dealt from Ana Roman's New York City home, police officers stormed the house in 1996 and found nothing more than 70-year-old Ana, her husband, and their adult son. Ana's husband had a heart attack upon seeing the officers' assault rifles trained on them, and died shortly thereafter of heart failure. *Id.* at 48.

b. An informant gave Boston police incorrect information, leading to a 1994 SWAT team raid of the apartment of Rev. Accelyne Williams, a 75-year-old retired minister. He died of a heart attack after the police raided his home. *Id.* at 22.

c. Jerome County, Idaho, sheriff's deputies James Moulson and Philip Anderson are among the many police officers who have died due to informant malfeasance. Acting on an informant's accusation that George Timothy Williams was one of the nation's largest distributors of marijuana, officers raided Williams' home one evening in 2001 to arrest him. A gunfight ensued, killing Moulson, Anderson and Williams. Only later was it revealed that the informant had fabricated the story and that the house contained less than four grams of marijuana. *Id.* at 69.

d.. What the police later described as "mis-communication with an informant" led to a raid on the Bronx home of Ellis Elliot in 1998. When they

broke down his door, Elliot thought he was being attacked and fired his gun. The police fired back, missing him, but apparently fearing for their safety dragged him naked out of his home. Police later admitted their error. *Id.* at 45-46.

e. In May 1999, police stormed the Durham, North Carolina, home of 73-year-old Catherine Capps. Police say they obtained a warrant for the home after a informant bought crack cocaine there. Capps had poor vision, was deaf, and according to her family, "could not even cook an egg without being extremely out of breath." Capps later died from health maladies her family says she incurred during the raid. She was never charged. *Id*. at 59-60.

Given these dangers, this Court should decline Petitioners' invitation to expand the "jealously and carefully drawn" consent exception to the warrant requirement, which would only encourage even more police reliance upon, and less judicial oversight of, informants.

II. *SAUCIER*'S TWO-STEP RULE FOR RESOLVING QUALIFIED IMMUNITY CLAIMS IS CRITICAL FOR CLARIFYING CONSTITUTIONAL RIGHTS AND SHOULD BE RETAINED

The two-step rule announced in *Saucier* was not developed in a vacuum. Rather, it responded to a troubling pattern that had developed in addressing qualified immunity claims. With disturbing frequency, such claims were upheld on the basis that the defendant's conduct did not violate a clearly

established right without determining whether any rights had actually been violated.

This unresolved ambiguity produced two unfortunate results. First, it failed to provide government officials with the legal guidance they need, and ideally should want, to perform their duties in a constitutional manner. Second, by perpetuating a state of legal ambiguity, it diminished the chance that victims of unconstitutional state action could recover damages for their injury in subsequent actions.

Saucier remedied both problems by insisting that courts presented with a qualified immunity claim initially determine if there has been a constitutional violation on the facts alleged before deciding whether that right was clearly established. The admonitory language of *Saucier* followed the Court's earlier, hortatory observation that it was generally "desirab[le]" to resolve the constitutional question first when ruling on qualified immunity. *See Siegert v. Gilley,* 500 U.S. 226, 233 (1991).

Although *Saucier* has been criticized as inflexible, it has largely accomplished its intended purpose. In our view, therefore, its "essential holding . . . should be retained and once again reaffirmed." *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 845-46 (1992)(joint opinion). If this Court decides to modify *Saucier,* any exceptions to its rule should be carefully defined and narrowly circumscribed.

A. *Saucier* Serves Important Goals That Should Not Be Abandoned

By having courts decide what the law requires before deciding whether that requirement was clearly established at the time defendants acted, *Saucier* "promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public." *Wilson v. Layne*, 526 U.S. 603, 609 (1999). Public officials who can reasonably claim that they were uncertain of their legal obligations remain entitled to qualified immunity. But *Saucier* simultaneously ensures that the grant of immunity does not short circuit a salutary "process for the law's elaboration from case to case," *Saucier*, 533 U.S. at 201.

Saucier thus shields public officials from liability from damages when they act in a context where the rules are unclear, while placing them on notice that they will be held accountable for future violations of rights that have been clearly announced. *Saucier thereby* helps to ensure that the qualified immunity inquiry promotes rather than frustrates the deterrent function of § 1983. *See Owen v. City of Independence*, 445 U.S. 622, 651 (1980) (stating that "§ 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well."); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) (explaining that "the deterrence of future

abuses of power by persons acting under color of state law is an important purpose of § 1983").[3]

Returning to a pre-*Saucier* regime would once again transform qualified immunity from a rule that gives officers "one liability-free violation of the Constitution" to a rule that allows for "multiple bites of a constitutionally forbidden fruit." *Garcia by Garcia v. Miera*, 817 F.2d 650, 656 n.8 (10th Cir. 1987) (internal quotation marks omitted), *cert. denied*, 485 U.S. 959 (1988). This is because "[a]n immunity determination, with nothing more, provides no clear standard, constitutional or nonconstitutional," *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998). As a result, unconstitutional conduct could proliferate yet escape review as defendants rely on the absence of clearly established rights to avoid liability. *See Joyce v. Town of Tewksbury*, 112 F.3d 19, 26 (1st Cir. 1997) (Selya, J., dissenting) ("[W]e will be seen as sanctioning that which we are unwilling to condemn."). This ongoing uncertainty will inevitably deter future victims from seeking redress for similar constitutional injuries. *See Owen*, 445 U.S. at 651 n.33 (noting "the deleterious effect of freezing constitutional law in its current state of development" if individuals were to lose incentive to seek vindication of constitutional rights).

To be sure, some constitutional rights can be clarified and become clearly established in contexts

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[3] The same considerations apply here, and elsewhere throughout this brief, to the cognate right to sue federal officials for constitutional torts under *Bivens v. Six Unknown Named Agents,* 403 U.S. 388 (1971).

where qualified immunity does not apply, such as suppression motions, actions for injunctive relief, or suits against municipalities. But, as this Court has recognized, "these avenues would not necessarily be open" to many litigants. *County of Sacramento*, 523 U.S. at 841 n.5. Suppression motions provide a vehicle for clarifying only a narrow subset of constitutional rights relevant to criminal defendants.[4] Injunctive relief may be unavailable because a government policy, no matter how clearly unconstitutional, cannot be enjoined where it is unlikely to be applied to the same person again. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (rejecting standing for injunctive relief where plaintiff is not "likely to suffer future injury from the use of chokeholds by police officers"). Sovereign immunity and the Eleventh Amendment prohibit individuals from collecting damages from the federal or state governments directly for constitutional violations. *Hans v. Louisiana*, 134 U.S. 1, 21 (1890) (extending the Eleventh Amendment to bar suits by citizens against their own states unless the state

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[4] Even then, suppression motions are unavailable in deportation proceedings, *INS v. Lopez-Mendoza,* 468 U.S. 1032 (1984), and are unavailing in criminal proceedings if the officer acted in good faith reliance on a judicial warrant, *United States v. Leon,* 468 U.S. 897 (1984). The law-clarifying function of the courts is further undermined if the exclusionary rule is limited because of the theoretical possibility of a damages claim, *see Hudson v. Michigan,* 547 U.S. 586, 597 (2006), and damages claims are limited by the assumption that Fourth Amendment rights can be clarified through a suppression motion. Individuals who have been treated unconstitutionally by the state should not be abandoned between this Scylla and Charybdis.

consents). And, while municipalities are not protected by qualified immunity, *see Owen v. City of Independence,* 445 U.S. 622 (1980), they can only be sued for damages where plaintiffs can prove the existence of an unconstitutional policy or custom. *Monell v. Dep't of Social Services*, 436 U.S. 658, 694 (1978).

Damages lawsuits against individual officers are therefore "a key forum for refining constitutional law." Pamela Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 Fordham L. Rev. 1913, 1918-1921 (2007). *See also Butz v. Economou*, 438 U.S. 478, 505-06 (1978) (rejecting the claim of absolute immunity by executive officials and recognizing that a damages action against officials can be an "important means of vindicating constitutional guarantees"). Indeed, a § 1983 damages suit against individuals is often the *only* avenue for clarifying many constitutional rights. *See* Michael L. Wells, *The "Order-of-Battle" in Constitutional Litigation*, 60 S.M.U. L. Rev. 1539, 1560-61 (2007). *See also* U.S. Br. at 25 n.1 (noting that for "excessive-force cases under the Fourth Amendment, Section 1983 or *Bivens* actions may provide the only realistic avenue of fashioning clear constitutional rules for officers in the field").

The United States suggests that this Court should relax *Saucier*'s sequencing requirement because it "runs counter to the usual rule that courts possess broad discretion in choosing among potentially dispositive grounds for decision." U.S. Br. at 30. It is a suggestion that largely disregards history. The Court's dissatisfaction with that approach, and its manifest failure to clarify

important but unresolved constitutional rights, is what led to *Saucier* in the first place.

Even after this Court encouraged (without ordering) an initial determination of the constitutional claim in *Siegert v. Gilley*, 500 U.S. at 232, lower courts frequently granted qualified immunity without resolving the underlying constitutional issue. *See* John M.M. Graebe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 Notre Dame L. Rev. 403, 410 n.35 (1999) (finding that courts skipped the constitutional question in 51 of 79 representative qualified immunity cases decided around 1997 in which the defendant won on the immunity issue).[5] In *Wilson v. Layne*, for example, the Court of Appeals had refused to decide the constitutionality of media ride-alongs, 526 U.S. at 608, although such ride-alongs had become "a common police practice," *id.* at 616. Had this Court not intervened and held the practice to be

[5] The problem was even more severe prior to *Siegert*. *See* Karen M. Blum, *Qualified Immunity: A User's Manual*, 26 Ind. L. Rev. 187, 193-94 (1993) (noting that pre-*Siegert*, "courts could and would avoid deciding the issue of whether particular conduct violated constitutional law," and this "frequently resulted in cases disposed of on qualified immunity grounds, with no resolution of the underlying constitutional claim"); David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. Pa. L. Rev. 23, 53 (1989) (describing pre-*Siegert* cases in which merits bypass resulted in leaving officials "hanging over a constitutional abyss").

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unconstitutional, the lower court decision would have left officers free to continue with the practice

Despite the contention of some of its critics, *Saucier* does not violate the rule against advisory opinons. As Justice Scalia explained: "Th[e] constitutional determination is *not* mere dictum in the ordinary sense, since the whole reason we require it to be set forth (despite the availability of qualified immunity) is to clarify the law and thus make unavailable repeated claims of qualified immunity in future cases." *Bunting v. Mellen,* 541 U.S. 1019, 1023-24 (2004)(Scalia, J., dissenting from the denial of *certiorari*).

Likewise, the doctrine of constitutional avoidance does not dictate a departure from the *Saucier* rule. The doctrine of constitutional avoidance is not jurisdictional but prudential, *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 341 (1936)(Brandeis, J., concurring), and "does not readily fit" the qualified immunity context. *County of Sacramento,* 523 U.S. at 841 n.5. Applied to qualified immunity determinations, the doctrine of constitutional avoidance would do more than overrule *Saucier,* it would virtually require courts to proceed immediately to step two – the "clearly established inquiry" – in every instance. That is because "a determination of whether a right is clearly established will *always* require no more, and will often require less, analysis than is required to decide whether the allegedly violated constitutional right actually exists in the first place." *Spivey v. Elliott*, 41 F.3d 1497, 1499 (11th Cir. 1995) (emphasis added). This Court, however, has already considered and rejected that approach. "If 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." *County of Sacramento,* 523 U.S. at 841 n.5.

Finally, critics of *Saucier* argue that the rule is unfair because government defendants who lose on step one but prevail on step two will be left with a constitutional ruling that they are unable to appeal. The force of that concern diminishes on close examination, however, and is ultimately outweighed by the benefits of a clear constitutional ruling, both for the parties and for society as a whole.

As an initial matter, the concern disappears entirely if the plaintiff appeals the qualified immunity decision in defendant's favor since both stages of the *Saucier* inquiry will then be before the reviewing court. *See Hope v. Pelzer*, 536 U.S. 730, 736 (2002) (reviewing the constitutional issue that the plaintiff had won in the lower court); *Vives v. City of New York*, 405 F.3d 115, 123 (2d Cir. 2005) (Cardamone, J., concurring) (noting that "the Supreme Court will have ample opportunity to review our constitutional decision if plaintiff appeals our decision").

Furthermore, the problem will only arise with respect to defendants who seek to appeal a merits determination by the Court of Appeals to this Court. An unappealable district court merits determination does not raise the same problem because district court opinions are not binding precedent and do not

qualify as "clearly established" law for qualified immunity purposes in most circuits. *See Kalka*, 215 F.3d at 100 (Tatel, J., concurring); *see also Thompson v. Keohane*, 516 U.S. 99, 115 n.14 (1995) ("In other contexts, we have similarly concluded that the likely absence of precedential value cuts against requiring plenary appellate review of a district court's determination.").

If this Court wishes to grant *certiorari* to review a constitutional issue that is appealed by the defendant who has prevailed on qualified immunity based on the "clearly established" test, it can invoke an exception to its general practice of denying *certiorari* petitions filed by prevailing parties. *See Bunting*, 541 U.S. at 1023-24 (Scalia, J., dissenting from the denial of *certiorari*). *See also* Nat'l Assoc. of Counties Br. at 28 ("[I]f a merits holding of a lower court threatens to cause substantial disruption of the law, this Court surely remains free to grant review."). Although this Court rarely hears appeals by parties prevailing below, the *certiorari* statute does not preclude the Court from hearing such a case. *See Bunting,* 541 U.S. at 1023; Timothy S. Bishop, *et. al.*, *Supreme Court Practice* 87 (9th ed. 2007) (noting that the language of the *certiorari* statute, using "any party," 28 U.S.C. § 1254(1), is "broad enough to encompass the successful or prevailing party before the court of appeals"). Indeed, this Court "ha[s] in the past entertained two appeals on collateral issues by parties who won below." *Bunting*, 541 U.S. at 1024. *See Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 334 (1980) ("In an appropriate case, appeal may be permitted from an adverse ruling collateral to the

judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Article III"); *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939) (allowing party to appeal a decree in his favor where the decree adjudged one of the issues against the interests of the party).

More traditionally, if the underlying constitutional ruling is a close or controversial one, it is likely to provoke a circuit conflict that is grounds for review under this Court's normal rules. In short, the unappealability problem arises infrequently and is resolvable by this Court when it arises.

B. Any Modification Of The *Saucier* Rule Should Only Permit Exceptions In A Narrow And Defined Set Of Circumstances

Even if this Court decides to relax the strict application of *Saucier,* it should establish a strong presumption in favor of first resolving the constitutional issue when adjudicating qualified immunity claims, and should narrowly define the circumstances in which that presumption may be overcome.[6] The broad exceptions advocated by Petitioners and their *amici* would undermine what *Saucier* was intended to achieve and restore the legal confusion that *Saucier* was designed to end.

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[6] The United States appears to agree on this point, stating that lower courts should be permitted to "skip the first step of the inquiry when considerations of sound judicial administration weigh *heavily* in favor of deciding the case under the second step." U.S. Br. at 8 (emphasis added).

1. Courts should not deviate from *Saucier* because a case is fact-intensive

Some lower courts have favored deviating from *Saucier* when the case is fact-intensive on the theory that constitutional determinations in such cases require fact-gathering that is inappropriate at the qualified immunity stage. *See, e.g.*, *Kalka v. Hawk*, 215 F.3d 90, 97 (D.C. Cir. 2000). It is a false conclusion resting on a false premise. The constitutional determination in the qualified immunity inquiry, like the "clearly established" prong of the test, does not require courts to conduct discovery or other fact-finding. Because a qualified immunity defense is typically raised through a motion to dismiss, the constitutional question is whether "the plaintiff has *alleged* the deprivation of an actual constitutional right." *Wilson*, 526 U.S. at 609 (quoting *Conn v. Gabbert*, 526 U.S. 286, 290 (1999)) (emphasis added); *Kalka*, 215 F.3d at 101 (Tatel, J., concurring). This is a purely legal question. *Siegert*, 500 U.S. at 232.[7]

Assuming facts for the constitutional inquiry required by step one of the *Saucier* rule is no different than assuming the same set of facts for the "clearly established" inquiry required by step two. It is impossible to know whether a right was "clearly established" without measuring that right against an assumed set of facts. Nor is it different than adjudicating any other motion to dismiss, which

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[7] If the qualified immunity claim is brought at the summary judgment stage, the proper standard is to view the facts "in the light most favorable to . . . the nonmoving party." *See Hope v. Pelzer*, 536 U.S. at 733 n.1.

requires courts to "assume the truth of the material facts as alleged in the complaint." *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 325 (1991).

The United States suggests that clarifying the applicable law is less important when the underlying constitutional right depends on a "totality-of-the-circumstances" analysis. U.S. Br. 25. However, the rights-clarifying function of *Saucier* is well-served even when the constitutional right is fact-dependent. Fact-intensive claims, such as Fourth Amendment excessive force claims and First Amendment claims of public employees, require fact-specific precedent to overcome a claim of immunity. *See Bartlett v. Fisher*, 972 F.2d 911, 918 n.3 (8th Cir. 1992) ("Factually analogous cases are highly relevant to the qualified immunity inquiry when the constitutional right in question is subject to a balancing test."); Anne Gasperini DeMarco, The Qualified Immunity Quagmire in Public Employees' Section 1983 Free Speech Cases, 25 Rev. Litig. 349, 362-370 (2006) (describing the problems arising from determining clearly established rights in fact-specific balancing tests). Thus, not only does the merits determination serve its purpose, but it fills a particularly necessary role of constitutional elaboration in fact-intensive cases.

2. Courts Should Not Deviate From *Saucier* Because A Defendant Chooses Not To Contest The Constitutional Issue

Amici State of Illinois, *et al.*, suggest that *Saucier* should be abandoned because "some parties will rationally choose to devote little time and effort

to the constitutional issue." Illinois Br. at 20. This is a bootstrap argument. Defendants are less likely to ignore the constitutional issue if they understand clearly that it is a necessary first step in the qualified immunity determination. And, defendants who make the tactical decision to place all their eggs in the "clearly established" basket of step two, do so understanding the risk that the court will decide the constitutional issue despite their choice to ignore it or give it short shrift.

A court's constitutional decision-making may be better informed if it has the benefit of zealous advocacy by both sides. But the advantages of clarifying the law do not disappear merely because defendants choose not to defend their position vigorously.[8] In any event, courts can order supplemental briefing, which is the posture of course in which the *Saucier* issue is now before this Court. J.A. 395.

More fundamentally, conscientious government officials should want to know the constitutional boundaries of their behavior. The desire to maintain a state of continued ambiguity may serve the interests of individual officials in avoiding personal liability but the government's larger interest is in understanding and following the law. *See* Graebe,

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[8] When appropriate, this Court has decided important issues of constitutional law *sua sponte*, *e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and has explicitly endorsed *sua sponte* decisions when parties have been given "ample opportunity to address the issue." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) (affirming the Court of Appeals' decision to consider the validity of a law even when parties did not contest the issue).

supra, at 495 (the clarification of constitutional standards might be "a matter of institutional concern to the government unit that employs the defendant").

3. Courts Should Not Deviate From *Saucier* Whenever Fourth Amendment Rights Are At Stake

Petitioners ask this Court to "limit or overrule *Saucier* . . . in the Fourth Amendment setting." Pet. Br. at 19. They first propose that this Court eliminate *Saucier*'s mandatory order of analysis for all Fourth Amendment claims. *Id.* Petitioners suggest that because criminal defendants are constitutionally entitled to an attorney, they file motions to suppress with "tremendous frequency," eliminating the need for courts to clarify Fourth Amendment law in damages actions against governmental actors. Pet. Br. at 57-58. This both understates the constraints on the exclusionary rule, *see* n.4, *supra,* and overstates the reach of suppression motions. As even Petitioners acknowledge, for example, excessive use of force claims "rarely if ever arise in criminal cases: because an officer's use of excessive force does not ordinarily lead to the discovery of evidence, a defendant cannot claim that the evidence was a 'fruit' of the excessive use of force." Def. Br. at 58-59. *See also* U.S. Br. 25 n.1 (observing that in "excessive-force cases under the Fourth Amendment, Section 1983 or *Bivens* actions may provide the only realistic avenue of fashioning clear constitutional rules for officers in the field").

Alternatively, Petitioners propose that "the existing *Saucier* rule should be limited to Fourth

Amendment claims that do not involve fruits of the poisonous tree and therefore will not be addressed under the exclusionary rule." Pet. Br. at 19. That argument also proves too much. If charges are dropped or the defendant is acquitted based on a successful motion to suppress, as in this case, the underlying constitutional claim has already been addressed in one proceeding and there is no reason not to consider it again in a civil damages action. Certainly, the rule of constitutional avoidance no longer applies at that point.

Conversely, a defendant who is convicted following an unsuccessful suppression motion is barred from seeking civil damages until the conviction is overturned *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994) (limiting damages actions that would imply the invalidity of a conviction or sentence to those where plaintiff can "prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus."). If there is no § 1983 action, *Saucier* cannot be invoked.

4. A Narrow Exception To *Saucier* May Make Sense When Federal Courts Are Required To Interpret Uncertain State Law As A Predicate To Any Constitutional Ruling

Saucier is designed to encourage clarification of the law when important constitutional rights are at stake. In some circumstances, however, the existence *vel non* of a federal constitutional right

turns on an unresolved question of state law. *See, e.g.*, *Tremblay v. McClellan*, 350 F.3d 195, 199-200 (1st Cir. 2003) (resolving the constitutional issue required an interpretation of the state protective custody statute); *Ehrlich v. Town of Glastonbury*, 348 F.3d 48, 57-58 (2d Cir. 2003) (resolving the Fourth Amendment claim depended on the state law right power of the conservator); *Santana v. Calderon*, 342 F.3d 18, 29-30 (1st Cir. 2003) (deciding the constitutional issue required unresolved issue of whether an employee had property interest in continued employment under Puerto Rico commonwealth law). Under these circumstances, the rights-clarifying benefit of *Saucier* is at its lowest because the constitutional decision only provisionally clarifies the law and is subject to reversal as a result of subsequent state proceedings. *See Ehrlich*, 348 F.3d at 57-58. While we do not believe that any modification of *Saucier* is necessary, a modification of this sort at least preserves *Saucier's* essential and still valuable purpose intact.

CONCLUSION

For the reasons stated herein, this Court should refuse to extend the doctrine of consent-once-removed to informants and should reaffirm the "essential holding" of *Saucier v. Katz, supra.* The judgment below should therefore be affirmed.

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