No. 07-130

In The

Supreme Court of the United States

CLAYTON EDWARDS, in his individual capacity,

Petitioner,

v.

DAVID KENYON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in an action under 42 U.S.C. § 1983, alleging that Petitioner used excessive force in effectuating the arrest of the Respondent, qualified immunity was properly denied where the reviewing Court of Appeals, en banc, affirmed the District Court's denial of qualified immunity "by vote of an equally divided court" in a case involving an alleged violation of a discrete constitutional right never before recognized by this Court and specifically disclaimed by other Courts of Appeals which have considered the question?

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PETITION FOR A WRIT OF CERTIORARI

Clayton Edwards, in his individual capacity, respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The now-vacated opinion of the three-judge panel of the Court of Appeals (App., *infra*, 11-25) is reported at 462 F.3d 802. The district court order denying qualified immunity (App., *infra*, 4-10) is not reported in F.Supp.2d (2005 WL 2176937). The order and judgment of the en banc court of appeals (App., *infra*, 1-3) is not reported. The order of the en banc court of appeals denying Petitioner's motion for rehearing, with dissenting opinion (App., *infra*, 26-38), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 2007 (App. 3) and the order of the court of appeals denying Petitioner's timely motion for rehearing was entered on May 1, 2007. (App. 26-38). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by

> the Constitution and laws, shall be liable to the party injured . . .
>
> * * *

The Fourth Amendment to United States Constitution provides:

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

STATEMENT

This case, like the recent case of *Brosseau v. Haugen*, 543 U.S. 194 (2004), presents a "clear misapprehension" of the qualified immunity standard. Review by this Court is plainly warranted to correct this misapprehension. *See* App. 38 (Beam and Riley, JJ., dissenting) (We "urge Officer Edwards to seek relief through Writ of Certiorari to the United States Supreme Court.").

In this case, the Eighth Circuit Court of Appeals, ruling en banc, affirmed the denial of the Petitioner's qualified immunity defense "by vote of an equally divided court." The Petitioner respectfully contends that an alleged constitutional right cannot be "clearly established" for purposes of qualified immunity where the jurisdictional court of appeals splits evenly on the question, particularly where, as here, this Court has never recognized the alleged right and the other courts of appeals have specifically disclaimed the right. In light of the relative clarity of the resolution of the second prong of the qualified immunity test (whether the alleged right was "clearly established"), announced by this Court in *Saucier v. Katz*, 533 U.S. 194 (2001), the Petitioner respectfully suggests that the Court abandon *Saucier*'s rigid two-step framework and grant the

Petitioner qualified immunity on *Saucier*'s second prong. Alternatively, even if the Court chooses not to overrule *Saucier*'s "order of battle," qualified immunity should still be granted as Respondent has not alleged or established a constitutional violation in the first place. Finally, the Petitioner respectfully and alternatively requests that this Court exercise its supervisory and rulemaking authority by holding that the "equally divided court rule" should operate to grant qualified immunity (rather than affirming the lower court) in interlocutory appeals of the denial of qualified immunity. For all of these reasons, the Petitioner respectfully requests the Court's review in this matter.

A. Background

On September 13, 2003, Petitioner Clayton Edwards, a White County, Arkansas Deputy Sheriff, responded to a report of an altercation at a demolition derby being held at the White County fairgrounds in Searcy, Arkansas. Edwards arrived to see an irritated Stephen Kenyon, Respondent's son, being restrained by a member of a large crowd that had gathered near the derby pits. Petitioner Edwards noticed that Stephen looked as though he had been in a fight. Edwards asked what was going on, and Stephen Kenyon replied, "He hit my mother." Edwards could tell Stephen was indicating that his mother was Shirley Cox, and so Edwards went over to her. Edwards described Cox's nose as being flat against her face, and that she was bleeding profusely from her nostrils. He noted that he was among a crowd of between one-hundred and two-hundred people, and described the environment as an "atmosphere of hostility" where weapons of opportunity, such as crowbars and hammers, were readily available. At first, Cox did not respond to Edwards' questions about what had happened because she was in pain. Edwards told Cox that an ambulance was on the way. Eventually, Cox told Edwards that it was David Kenyon who

had hit her. Edwards learned that David Kenyon was Cox's ex-husband, and realized he had a domestic battery situation on his hands. (App. 12).

After learning the identity of Cox's assailant, Petitioner Edwards addressed the crowd around him and asked if there were any witnesses to the events. He also asked where David Kenyon was. *Id.* No one answered at first, but then someone called out, "There he is." The crowd parted, leaving Kenyon in the middle. Edwards and the other officers on the scene approached Kenyon, and Edwards put his hand on Kenyon's elbow and asked his name. When Kenyon answered, Edwards told him he was under arrest (The Respondent conceded on appeal that Petitioner had probable cause to arrest him for the offenses of public intoxication and domestic battery under state law). Kenyon raised his arms in an inquiring gesture and asked, "For what?" Edwards then grabbed Kenyon's wrist and took his arm behind his back. Edwards then, according to Respondent, threw Kenyon onto the hood of a nearby car and pulled Kenyon's arms up high behind his back in order to handcuff him. According to Respondent, he told Edwards that he was hurting his arms, but Edwards persisted until Kenyon was handcuffed. Kenyon resisted because his arms were in pain from the handcuffing, and the officers told Kenyon to stop resisting. Kenyon claims he suffered a torn rotator cuff, requiring surgery, and continues to have pain. (App. 12).

B. Proceedings Below

1. Respondent filed his complaint in this action in February, 2004, in the United States District Court for the Eastern District of Arkansas, alleging, under 42 U.S.C. § 1983, that his Fourth Amendment rights were violated when he was allegedly arrested without probable cause and allegedly subjected to excessive force during the course of his arrest by four deputies of the White County,

Arkansas Sheriff's Department, including Petitioner Edwards. A jury trial was held in this case from January 24-27, 2005, and all of the Respondent's claims were dismissed by the jury as against all of the Defendants except for a single claim of excessive force against Petitioner Edwards, in his individual capacity, on which the jury deadlocked. Petitioner Edwards thereafter filed a motion for summary judgment on the remaining claim and asserted, *inter alia*, the affirmative defense of qualified immunity. After a response by the Respondent, the District Court issued an order denying the Petitioner's motion for summary judgment. (App. 4-10). In its Order denying the Petitioner's motion, the District Court held that "material questions of fact" precluded summary judgment in the Defendant-Appellant's favor. *Id.* The District Court did not identify the questions of fact to which it referred nor did it cite any facts that gave rise to the purported issue(s) of fact. Perhaps most importantly, the District Court did not make a determination as to whether Respondent's allegedly violated right was "clearly established" as a matter of law because, in the words of the District Court, "it is impossible to say because a material question of fact exists." (*Id.* at App. 9).

2. Subsequent to the District Court's denial of the Petitioner's summary judgment motion and qualified immunity defense, Petitioner filed an interlocutory appeal with the Eighth Circuit Court of Appeals challenging the denial of qualified immunity. After briefing and argument, the three-judge panel issued a ruling in Petitioner's favor, reversing the District Court and granting qualified immunity and summary judgment. (App. 11-25). *Kenyon v. Edwards*, 462 F.3d 802 (8th Cir. 2006), *vacated*. The panel held (1) that the Petitioner "did not use excessive force" in arresting and handcuffing the Respondent (App. 16) and (2) that, even assuming a constitutional violation, "the state of the law at the time of this incident was [not] such that it would be clear to a reasonable officer that

Edwards' conduct was unlawful in the situation he confronted at the derby." (App. 18, citation omitted). The Honorable Circuit Judge Smith dissented from the panel's decision and asserted that the majority had not given adequate deference to the facts alleged by the Respondent and that the case law established the right asserted by the Respondent.

3. Subsequent to the panel's decision in Petitioner's favor, Respondent requested and was granted rehearing en banc, including vacation of the panel opinion. After argument, the en banc Court of Appeals issued its Order in this case, which held as follows, in its entirety: "On rehearing en banc, the district court's judgment is affirmed by vote of an equally divided court." (App. 1-2, with Judgment at App. 3).

4. Subsequent to the Court of Appeals' en banc order, the Petitioner moved for rehearing en banc and/or by the panel. The Petitioner's motion for rehearing was summarily denied. (App. 26). The Honorable Circuit Judges Beam and Riley, however, issued a thirteen page dissenting opinion in which they opposed the "equally divided" en banc affirmance of the District Court's order because the District Court had improperly "(1) failed to rule on [Petitioner's] timely motion for qualified immunity and (2) made qualified immunity a question of fact." (App. 26-27). The Honorable dissenting Judges went on to note that "the opinion and order of district court, now affirmed by the ["equally divided"] en banc panel, answered neither of the two *Saucier* questions" for qualified immunity analysis. (App. 29). The Honorable dissenting Judges also found fault with the implied/applied holding of the "equally divided" affirmance of the District Court order: "[Petitioner] Edwards is not required to be a constitutional specialist as the en banc panel now seemingly holds." (App. 33). The Honorable dissenting Judges then expounded on the

inherent problems with denying qualified immunity in light of the procedural history of this case:

> [T]he jury, upon receiving Eighth Circuit Model Jury Instruction 3.04 on the elements of excessive force, acquitted three of the four police officers and could not agree upon Officer Edwards. On appeal before the three-judge panel, two of the three United States Circuit Judges found that no constitutional violation was made out by Kenyon and that a reasonably objective police officer would not have believed he or she was violating the Constitution. When the two issues were presented to the en banc panel of twelve judges, six found either no constitutional violation or, at least, that the contours of the right were not reasonably discernible to an objective police officer confronted by this same situation. To now require Officer Edwards to go through another jury trial under these circumstances is clearly contrary to the above-cited cases and abundant other binding precedent of this circuit carefully considered by the three-judge panel majority.

(App. 34).

Based on the reasoning set forth in their dissenting opinion, the Honorable dissenting Judges concluded by "urg[ing] Officer Edwards to seek relief through Writ of Certiorari to the United States Supreme Court." (App. 38).

REASONS FOR GRANTING THE PETITION

In 2004, in the case of *Brosseau v. Haugen*, 543 U.S. 194 (2004), this Court assumed jurisdiction of a section 1983 Fourth Amendment deadly force case in order to correct what it called a "clear misapprehension" of the qualified immunity standard by the Ninth Circuit Court of Appeals. The Petitioner respectfully contends that the Eighth Circuit Court of Appeals engaged in a similarly

"clear," albeit legally distinct, "misapprehension" of the qualified immunity standard in this case. At least two Circuit Judges of the United States Court of Appeals for the Eighth Circuit also believe that review by this Court is warranted in this case, as evinced by the conclusion of their dissent from the denial of Petitioner's motion for rehearing, where they "urge[d] Officer Edwards to seek relief through Writ of Certiorari to the United States Supreme Court." (App. 38).

In his Appeal Brief, Appellee David Kenyon summarized his argument in opposition to the Appellants' request for summary judgment: "The evidence before the Court on summary judgment when viewed in a light most favorable to the Appellee, shows that Defendant Edwards pulled the Appellee's arm back in a manner that he should not have." Appellee's Brief, p. 11. The Appellee goes on to say that his arm should have been brought back at a lower angle during handcuffing. *Id.* at 12. Since there is no clearly established law that defines the appropriate angle of a criminal suspect's arm during handcuffing, however, the Appellant is entitled to qualified immunity.

This Petition arises from an interlocutory appeal in the Eighth Circuit Court of Appeals from the denial of a qualified immunity in a 42 U.S.C. § 1983 case in the District Court for the Eastern District of Arkansas. The Petitioner seeks a Writ of Certiorari in this case so that this Court can review the en banc Order of the Eighth Circuit Court of Appeals, which held as follows, in its entirety: "On rehearing en banc, the district court's judgment [denying, inter alia, the Petitioner's request for qualified immunity] is affirmed by vote of an equally divided court."

I. A purported constitutional right cannot be "clearly established," for qualified immunity purposes, where the reviewing Circuit Court of Appeals, en banc, is "equally divided" on the question, this Court has never recognized the purported right, and the other Courts of Appeals which have considered the issue have specifically disclaimed the purported right.

In resolving questions of qualified immunity, this Court has set forth a two-pronged "order of battle" that must, under current precedent, be analyzed sequentially. First, courts are required to resolve a "threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show that the officer's conduct violated a constitutional right? This must be the initial inquiry." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If, and only if, the court finds a violation of a constitutional right, "the next, sequential step is to ask whether the right was clearly established . . . in light of the specific context of the case." *Id.*; *see also Brousseau v. Haugen*, 543 U.S. 194 (2004) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) ("[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right"). If either question is answered in the negative, qualified immunity should be awarded. *Id.*

The Petitioner respectfully contends that, regardless of the resolution of the first *Saucier* question, the second prong of the *Saucier* test (requiring that the alleged right be "clearly established" as a matter of law) is manifestly unsatisfied in the instant case and that the decision by the Eighth Circuit Court of Appeals in this case to affirm the denial of qualified immunity therefore stands in direct conflict with the binding precedents of this Court (and

with the decisions of several other Courts of Appeals applying said precedents). This contention is evinced most clearly by the fact that the Eighth Circuit Court of Appeals, ruling en banc, split evenly on the question of whether the right alleged by the Respondent – the purported right of a suspect, in the course of a valid arrest pursuant to probable cause, not to have his arms taken behind his back during handcuffing in a manner he deems "unnatural" – was "clearly established."

In light of the ruling by the Court of Appeals, the Petitioner respectfully asserts what frankly seems a rather obvious proposition: That a constitutional right cannot possibly be "clearly established," in either the common or legal sense of that term, where 12 Circuit Judges are "equally divided" on the question. In short, 6 of the 12 active Members of the Eighth Circuit Court of Appeals, with the full benefits of hindsight, studied reflection, a legal education, years of legal and judicial experience, a staff of law clerks and support personnel, and collegial discussion with 11 others sharing the same advantages, voted that the right is not "clearly established." This Court has clearly held that such a disagreement (in fact, a more distant disagreement, at least numerically) between judges mandates a grant of qualified immunity to the requesting police officer: "*If judges . . . disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.*" *Wilson v. Layne*, 526 U.S. 603, 618 (1999) (emphasis added).[1]

[1] Notably, the Eighth Circuit has similarly recognized that open legal questions are not "clearly established law." *Shepard v. Ripperperger*, 57 Fed.Appx. 270, 272 (8th Cir. 2003).

In addition to the "equal division" of the en banc Court of Appeals on the question of clearly established law,[2] the favorable ruling by the three-judge panel that originally heard the case and found in favor of the Petitioner (later vacated when rehearing was granted) is also indicative of the unfounded, indeed unrecognized nature of the alleged right. *Kenyon v. Edwards*, 462 F.3d 802 (8th Cir. 2006), *vacated*.[3] The panel held that the Appellee had not established a constitutional violation and, even if he could establish such a violation, could not show that the right allegedly violated was "clearly established" as a matter of law. *Id.*

Finally, in addition to the "equal division" of the en banc Court of Appeals on the question of clearly established law and the favorable ruling of the original three-judge panel, the weight of precedent from other jurisdictions (and even from previous Eighth Circuit decisions) and lack of recognition by this Court dictates that, far from being "clearly established," the particularized right alleged by the Respondent has been specifically disclaimed in established law. *See* discussion on first prong of *Saucier* test, § III, *infra*.

The split of authority indirectly created by the Eighth Circuit's "equally divided" judgment in this case is critically

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[2] The Court of Appeals, en banc, never discussed the rationale for its decision, thus it is difficult for this Court to know precisely how the court of appeals came down on the first prong of the *Saucier* test (except that a majority did not answer the question of the existence of a constitutional violation in the negative), although presumably it came down equally divided, else it surely would have noted the difference. It is clear, however, that the Court or Appeals was "equally divided" on the second *Saucier* question regarding clearly established law.

[3] While vacated opinions carry no precedential weight, the Petitioner respectfully contends that the vacated panel opinion in this case is relevant and worthy of citation to the extent it impacts the question of the establishment and legal clarity of the Respondent's alleged right.

important as recent Supreme Court and Eighth Circuit qualified immunity jurisprudence has emphasized the requirement of precise notice and fair warning to the subject police officer that his conduct is unlawful at the time of the alleged conduct. *See Brosseau v. Haugen*, 543 U.S. 194 (2004) ("Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, *reasonably misapprehends* the law governing the circumstances she confronted") (emphasis added); *see also Smook v. Minnehaha Co.*, 475 F.3d 806, 814 (8th Cir. 2006) (Police officer granted qualified immunity where his conduct was "within the *range* of objectively reasonable determinations that an official might have reached" about the conduct) (emphasis added); *Saucier v. Katz*, 533 U.S. 194 (2001) (Qualified immunity operates "to protect officers from the sometimes hazy border between excessive and acceptable force; the qualified immunity inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition."); *Littrell v. Franklin*, 388 F.3d 578 (8th Cir. 2004). In the end, the dispositive inquiry is whether the subject officer could have or should have reasonably known that his conduct was unlawful at the time of the conduct:

> [T]here is no doubt that *Graham v. Connor* clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness, however, qualified immunity analysis requires that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer*

> *that his conduct was unlawful in the situation he confronted.*

Anderson v. Creighton, 483 U.S. 635, 640 (1987) (emphasis added, citations omitted).

In light of the equal division of the Court on the question of whether the Appellant violated the Appellee's clearly established constitutional rights (especially after a three-judge panel ruled in favor of granting qualified immunity to the Petitioner and in light of the specific repudiation of the alleged right by other jurisdictions), the Petitioner respectfully contends that there is no way he could have known that his conduct was unlawful when he acted. In short, where the Court of Appeals is still (years after the alleged conduct by the Petitioner) entirely uncertain as to whether the Petitioner's conduct violated a constitutional right and/or whether the alleged right was clearly established, it is fundamentally unfair and stands in direct conflict with the precedents of this Court and the underlying purpose for qualified immunity to expose a police officer's time, reputation, and personal assets to potential liability for "picking the losing side [or, in this case, at worst, the tying side] of the controversy."

II. The fixed "order of battle" announced in *Saucier v. Katz* should be reconsidered, overruled, and/or modified to the extent necessary to allow reviewing courts to consider the qualified immunity questions in the order that makes the most sense in the particular context of the case so that where, as here, the qualified immunity question is easily answered in the negative, the case can be readily dismissed on qualified immunity without unnecessary constitutional decisionmaking.

As discussed above, the second prong of the *Saucier* test is clearly unsatisfied in this case. In light of the

clearly negative answer to *Saucier*'s second qualified immunity question, this case provides an opportunity to reconsider the strict two-step framework mandated by *Saucier* for resolving qualified immunity claims, a framework that "a majority of the Justices have questioned in recent years." *Lyons v. City of Xenia*, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring). Requiring courts to decide whether a § 1983 plaintiff has stated a cognizable constitutional claim in every case before permitting analysis of whether such a claim was "clearly established" (1) imposes unnecessary burdens on courts and parties; (2) threatens to insulate many constitutional rulings from review on appeal; (3) requires courts to make constitutional pronouncements even where one or both parties have not argued the point thoroughly or the record is inadequate; and (4) is unnecessary to ensure the continued development of constitutional doctrine and, ironically, actually threatens to undermine this goal. Accordingly, the Petitioner respectfully urges the Court to abandon *Saucier*'s mandatory two-step approach to qualified immunity claims.

On its own, this established principle of judicial restraint counsels in favor of permitting courts the flexibility to resolve qualified immunity cases without first reaching the merits of the constitutional question. *County of Sacramento v. Lewis*, 523 U.S. 833, 859 (1998) (Stevens, J., concurring) ("[W]hen . . . [the constitutional] question is both difficult and unresolved, I believe it wiser to adhere to the policy of avoiding the unnecessary adjudication of constitutional questions."); *see also, e.g., Kalka v. Hawk*, 215 F.3d 90, 97 (D.C. Cir. 2000) (Criticizing mandatory two-step approach in part because it offends principle that "[f]ederal courts should not decide constitutional questions unless it is necessary to do so"). The practical side of this argument is that judicial restraint is usually equivalent to judicial economy: "[W]hen courts' dockets are crowded, a rigid 'order of battle' makes little administrative sense."

Brosseau v. Haugen, 543 U.S. 194, 201-202 (Breyer, J., joined by Scalia and Ginsburg, JJ., concurring); *see also*, *e.g.*, *DiMeglio v. Haines*, 45 F.3d 790, 799 (4th Cir. 1995) ("[C]ourts should be free to decide the case on the most expedient ground").

Saucier's rigid and sequential two-step framework not only requires courts to make unnecessary constitutional holdings, but also insulates many such holdings from further review. *See Brosseau v. Haugen*, 543 U.S. 194, 202 (2004) (Breyer, J., joined by Scalia and Ginsburg, JJ., concurring) (Observing that two-step rule "can sometimes lead to a constitutional decision that is effectively insulated from review"). This occurs when a court holds that the defendant's conduct violated a cognizable constitutional right, but proceeds to grant judgment to the defendant because that right was not clearly established. *See Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003), cert. denied, 541 U.S. 1019 (2004) (Dissenting from the denial of certiorari, Justice Scalia, joined by Chief Justice Rehnquist, criticized "a perceived procedural tangle of the Court's own making" that arose from the Court's "'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed" below, which insulated from review adverse merits decisions that are "locked inside" favorable qualified immunity rulings). The insulation of constitutional holdings from further review is unfair to all government officials and employees as an unreviewable constitutional holding announced by a court of appeals under *Saucier*'s first prong may in the future be held to have "clearly established" the constitutional standards with which state and local officials must comply.

Saucier also requires defense counsel to advance potentially complex constitutional arguments on the first *Saucier* prong, even where counsel is sure of winning the case on the second prong. Adding to governmental defendants' expense (and indirectly to taxpayer expense) in this

way undermines the very purpose behind the qualified immunity doctrine – to shield official defendants from "the burdens of litigation." *Brosseau*, 543 U.S. at 198; *see also DiMeglio*, 45 F.3d at 798. Experience dictates that some parties, for rational and/or pecuniary reasons, choose to devote little time and effort to the constitutional issue presented in step one. *See, e.g., African Trade and Info. Ctr. v. Abromaitis*, 294 F.3d 355, 359 (2nd Cir. 2002) (Skipping to second step of analysis because, *inter alia*, "the merits of [the constitutional] issue [were] scarcely mentioned in the briefs on appeal, let alone adequately briefed"); *Powers v. CSX Transp., Inc.*, 105 F. Supp. 2d 1295, 1308 (S.D. Ala. 2000) (Citing, among reasons for skipping first step, fact that "the parties' briefing on the constitutional and statutory issues is not merely poor but essentially non-existent," which may be the product of the parties' "enlightened self-interest").

For courts, too, the fact that a constitutional question has no impact on a case's outcome may detract from the quality of its decisionmaking. *See, e.g., Horne v. Coughlin*, 191 F.3d 244, 247 (2nd Cir. 1999) ("[J]udges risk being insufficiently thoughtful and cautious in uttering pronouncements that play no role in their adjudication."). As Judge Leval recently explained in concluding that "*Saucier* is a blueprint for the creation of bad constitutional law":

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

Leval, Judging under the Constitution: Dicta about Dicta, N.Y.U. L. Rev. 1249, 1278-1279 (2006) (footnotes omitted).

Compounding these problems is the fact that *Saucier* compels courts to make constitutional decisions on an

inadequate record. Settled precedent encourages defendants to raise qualified immunity early in litigation, including on a motion to dismiss, for "the defense is meant to give government officials a right, not merely to avoid standing trial, but also to avoid the burdens of such pretrial matters as discovery." *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (internal quotation marks omitted); *see also Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation."). Yet raising the defense early can force courts to render highly abstract constitutional decisions "on a nonexistent factual record, even where . . . discovery would readily reveal the plaintiff's claims to be factually baseless." *Kwai Fun Wong v. United States*, 373 F.3d 952, 957 (9th Cir. 2004). A government official's decision to assert qualified immunity early in the litigation therefore may result in "the development of legal doctrine that has lost its moorings in the empirical world; and that might never need to be determined were the case permitted to proceed." *Ibid.* As the Second Circuit noted in one such case:

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

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

In sum, *Saucier* not only requires courts to abandon traditional notions of restraint and resolve constitutional

questions unnecessarily, but often does so under unfavorable conditions, without adequate argument from one or both parties, without an adequate record, or without the benefit of appellate review. The Court justified its departure from the usual practice of avoiding non-essential constitutional rulings because "if the policy of avoidance were always followed in favor of ruling on qualified immunity . . . , standards of official conduct would tend to remain uncertain." *Lewis*, 523 U.S. at 841, n. 5; *see also Saucier*, 533 U.S. at 201 ("[T]he law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."). But assuring the law's development does not require courts to make constitutional pronouncements in every case; it merely counsels against prohibiting courts from doing so. Abandoning *Saucier*'s mandatory, two-step "order of battle" does not mean categorically forbidding courts from deciding whether § 1983 plaintiffs have alleged, cognizable constitutional rights. In many cases, deciding the constitutional question first will be the preferred course. "The constitutional and non-constitutional questions in a qualified immunity case overlap, and it often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be." *Ibid.* And "[A]ddressing a more concrete issue (was there a constitutional violation?) before turning to a more abstract issue (was it clearly established?) will generally present an easier mode of analysis than approaching matters the other way around." *Id.* at 583.

Introducing this flexibility would permit courts to resolve cases solely on the second, "clearly established" step of the inquiry where efficiency, inadequate argument, or some other factor makes it sensible to do so. *See Siegert v. Gilley*, 500 U.S. 226, 235 (1991) (Kennedy, J., concurring) ("[T]he Court of Appeals adopted the altogether normal

procedure of deciding the case before it on the ground that appeared to officer the most direct and appropriate resolution, and one argued by the parties."). Constitutional law does not depend for its development on cases where the defendant may seek qualified immunity. Constitutional issues arise in innumerable cases where there is no qualified immunity, such as criminal cases where the defendant seeks to suppress evidence, § 1983 cases against a municipality, or § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages. *See, e.g.*, Leval, *supra*, at 1280-1281 (Even without *Saucier*'s rule, repeated conduct is "not likely to repeatedly escape review," for good faith immunity "does not apply, for example, where an injunction is sought to prevent repetition of the conduct, . . . where the suit is against a municipality based on municipal policy," or "where suppression of evidence is sought").

Although the Court "approach[es] the reconsideration of [its] decisions . . . with the utmost caution," "[s]tare decisis is not an inexorable command." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (internal quotation marks omitted). Revisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule, the existing rule does not achieve its own aim and causes a host of collateral problems, and the precedent has been criticized by several Members of this Court, unevenly applied by the Court, and narrowed and even disregarded by the courts of appeals. *Scott v. Harris*, 127 S.Ct. 1769, 1781 (2007) (Breyer, J., concurring) ("[W]hile this Court should generally be reluctant to overturn precedents, *stare decisis* concerns are at their weakest here" . . . "The order-of-battle rule is relatively novel, it primarily affects judges, and there has been little reliance upon it.").

In the end, *Saucier*'s rigid, two-step framework for qualified immunity claims has had unforeseen, adverse

collateral consequences, is unnecessary to advance the goal put forth as its justification, and in fact undermines that goal to a certain extent. Accordingly, the Petitioner respectfully requests that the Court abandon the rule as a requirement for use in every qualified immunity case and grant the Petitioner qualified immunity on the second prong of the *Saucier* test.

III. The act of taking a suspect's arms behind his back to handcuff him, incident to a valid arrest based upon probable cause, does not violate the suspect's Fourth Amendment rights, regardless of allegations that the officer took the suspect's arms back in an "unnatural," "high," or even "painful" manner and regardless of whether the suspect suffered injury.

If the Court analyzes the Petitioner's qualified immunity defense pursuant to the current analytical framework outline in *Saucier*, the Court must decide whether the Petitioner's action in this case – taking the Respondent's arm behind his back in order to handcuff him, allegedly in an "unnatural" manner where Respondent's arm was raised too high – violated the Respondent's Fourth Amendment rights. By affirming the District Court's denial of qualified immunity in this case, the Eighth Circuit Court of Appeals effectively, albeit implicitly, held that the act of taking the Respondent's arms behind his back to handcuff him constituted such a violation (or, more accurately, that genuine issues of material fact existed with regard to the question). This ruling by the Eighth Circuit Court of Appeals creates a distinct split in the circuits since the other courts of appeals have held that the act of taking a suspect's arms behind his back to handcuff him (as opposed to "tight" handcuffing) does not violate the suspect's Fourth Amendment rights, even where the arms are taken back in an "unnatural," "high," or even "painful" manner.

This line of cases is perhaps best represented by the 2002 case of *Rodriguez v. Farrell*, 280 F.3d 1341, 1351-1353 (11th Cir. 2002), in which the Eleventh Circuit Court of Appeals took up a case with allegations that were strikingly similar to the instant case. The Eleventh Circuit held as follows, in pertinent part:

> *The evidence, in the light most favorable to plaintiff, shows that Sgt. Farrell grabbed plaintiff's arm, twisted it around plaintiff's back, jerking it up high to the shoulder and then handcuffed plaintiff as plaintiff fell to his knees screaming that Farrell was hurting him.* Plaintiff was placed in the rear of Sgt. Farrell's patrol car, kept handcuffed behind his back and transported to the police station. The handcuffs were removed minutes after arrival at the police department. *The handcuffing technique used by Sgt. Farrell is a relatively common and ordinarily accepted non-excessive way to detain an arrestee.*
>
> Plaintiff's orthopedic surgeon testified that the handcuffing was a "very serious, painful event," that resulted in the loosening of the internal surgical hardware, and caused the displacement of a key bone fragment. *The resulting complications included more than twenty-five subsequent surgeries and ultimately amputation of the arm below the elbow.*[FN19].
>
> > FN19. Given the loss of an arm, we are presented with the proverbial "hard case," that is, one in which one's natural sympathies are aroused by the plaintiff's plight. We recall Justice Jackson's warning to judges: "We agree that this is a hard case, but we cannot agree that it should be allowed to make bad law." *FCC v. WOKO, Inc.*, 329 U.S. 223, 229, 67 S.Ct. 213, 216, 91 L.Ed. 204 (1946).

Painful handcuffing, without more, is not excessive force in cases where the resulting injuries are minimal. See Nolin, 207 F.3d at 1257-58 (concluding, as a matter of law, that force used during arrest, including handcuffing, was not excessive when force and resulting injury were minimal); *Brissett v. Paul*, 141 F.3d 1157 (4th Cir.1998) (table) (concluding, as matter of law, that painful handcuffing with minimal injury not constitutional violation); *Foster v. Metropolitan Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir.1990) (same); *see also Martin v. Gentile*, 849 F.2d 863, 869-70 (4th Cir.1988) (concluding that force used, as a matter of law, was not excessive); *Silverman v. Ballantine*, 694 F.2d 1091, 1096-97 (7th Cir.1982) (same).

This case is different from Nolin because Rodriguez's earlier surgery made what otherwise would be a common non-excessive handcuffing technique (that ordinarily would be painful but cause minimal injury) a maneuver that caused severe injury and tragic results. This distinction, however, is not important legally and does not preclude a conclusion that Rodriguez has shown no constitutional violation: no evidence has been presented that Sgt. Farrell knew of plaintiff's recent elbow surgery or, more important, knew that handcuffing plaintiff would seriously aggravate plaintiff's preexisting condition. [FN 20 omitted] We do not use hindsight to judge the acts of police officers; we look at what they knew (or reasonably should have known) at the time of the act. *What would ordinarily be considered reasonable force does not become excessive force when the force aggravates (however severely) a pre-existing condition the extent of which was unknown to the officer at the time. See Silverman*, 694 F.2d at 1096-97 *(concluding that force used was not, as a matter of law, excessive even though arrestee died of heart attack during arrest).* Under the

> circumstances of this case, Sgt. Farrell's acts cannot rise to the level of a constitutional violation.

Rodriguez v. Farrell, 280 F.3d 1341, 1351-1353 (11th Cir. 2002) (emphases added).

Other cases that have held that taking an arrestee's arms behind his back to handcuff him during a valid arrest, even where the arrestee alleges and proves that such action is taken in a forceful or even painful manner, does not constitute excessive force. *See*, *e.g.*, *Brissett v. Paul*, 141 F.3d 1157 (4th Cir. 1998) (No constitutional violation despite arrestee's allegations of the handcuffing officer "holding his arms in such a way as to inflict pain"); *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 921-922 (9th Cir. 2001) (Twisting the plaintiff's left arm behind her with enough force to lift her off the ground and breaking her watch band while attempting to handcuff did not violate Fourth Amendment right where the plaintiff refused to show transit identification).

The en banc Court of Appeals did not discuss its rationale for (indirectly) denying qualified immunity in this case with regard to either prong of the *Saucier* test. The dissenting Judge in the vacated panel opinion, however, did cite several cases that purportedly stood for the proposition that "excessive force in handcuffing was clearly established" at the time of the Respondent's arrest by Petitioner. (App. 24-25). These cases, however, fail to "clearly establish" the right Plaintiff alleges in this case and reveal the reason why, as a practical matter, there can be no constitutional liability for taking an arrestee's arms behind his back at any angle. Principally, the cases cited by the Honorable dissenting Judge on the panel (presumably the same cases relied upon by the Court of Appeals en banc to deny qualified immunity to the Petitioner) are so fundamentally dissimilar to the instant case as a factual matter (or state a proposition so broad (*e.g*,

excessive force is prohibited by the Constitution)) that they could not have given the Petitioner fair notice of the purported unlawfulness of his conduct. (App. 17-19).

To the extent that the cases cited by the Honorable dissenting Judge on the panel are remotely similar to the allegations in the instant cases, they are still inapposite for qualified immunity purposes because they stand only for the proposition that, in certain circumstances involving extreme indifference to known pain and/or injury, excessively "tight" handcuffing can sometimes give rise to constitutional liability. *But see*, *e.g.*, *Crumley v. City of St. Paul, Minn.*, 324 F.3d 1003, 1008 (8th Cir. 2003) (Tight and forceful handcuffing of a suspect does not amount to excessive force); *Foster v. Metropolitan Airports Comm'n*, 914 F.2d 1076, 1082 (8th Cir. 1990) (Summary judgment in officer's favor affirmed where the Court held that a claim of nerve damage resulting from being handcuffed too tightly was not tantamount to excessive force); *Braun v. Baldwin*, 346 F.3d 761, 763 (7th Cir. 2003) (Affirming, *inter alia*, grant of summary judgment for defendants on excessive use of force claim based on tight handcuffing); *Burchett v. Kiefer*, 310 F.3d 937, 944-45 (6th Cir. 2002) (Summary judgment for officers on excessive force claim affirmed because officers removed the handcuffs once plaintiff complained they were too tight); *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2001) (Declaring that "handcuffing too tightly, without more, does not amount to excessive force"); *Carter v. Morris*, 164 F.3d 215, 219 n. 3 (4th Cir. 1999) (Finding that plaintiff's allegation that she was handcuffed too tightly was "so insubstantial that it cannot as a matter of law support her claim" of excessive force). *Greiner v. City of Champlin*, 27 F.3d 1346 (8th Cir. 1994).

The "tight" handcuffing line of cases cited by the Honorable dissenting Judge on the panel, and presumably relied upon by the en banc court of appeals, are insufficient to deny qualified immunity to the Petitioner because

they do not relate to the Respondent's allegations in this case whatsoever. In other words, there is no way the Petitioner could have received "fair notice" (in the qualified immunity sense) that he was acting unlawfully when he allegedly took the Respondent's arms behind his back in an "unnatural" manner by virtue of cases that, at most, ambiguously prohibit the excessively "tight" application of handcuffs to a suspect's wrists. Instead, this Court has repeatedly and expressly required more particularized and clear notice that would give an officer fair notice that his conduct was unlawful (at the time of the conduct). *See Saucier v. Katz*, 533 U.S. 194 (2001) (Qualified immunity operates "to protect officers from the sometimes hazy border between excessive and acceptable force." The qualified immunity inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition."); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("'[T]here is no doubt that *Graham v. Connor* clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness,' however, qualified immunity analysis requires that 'the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'"); *but see Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (Where an Eighth Amendment violation was "obvious," there need not be a "fundamentally similar" case for the right to be clearly established).

In addition to the need for "particularized" and "sufficiently clear" parameters defining the right and/or duty allegedly violated (which do not exist with regard to the

question of the appropriate angle of a suspect's arm during handcuffing, *see infra*), the Supreme Court has routinely held that mistakes in judgment by law enforcement officers, especially in the "hazy border between excessive and acceptable force," entitle the officer to the protection of qualified immunity. *Brosseau v. Haugen*, 543 U.S. 194 (2004) ("[Q]ualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted"); *Saucier v. Katz*, 533 U.S. 194, 204-207 (2001) ("[I]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense. Qualified immunity operates . . . to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful. Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution").

In this case, the Respondent asserts that his arm should have been brought back at a lower angle during handcuffing by the Petitioner, as opposed to the allegedly "unnatural" angle purportedly utilized. The Respondent has cited no law in his appellate briefings, the Honorable dissenting Judge has cited no law, and undersigned counsel has found no law imposing Fourth Amendment liability (or even denying qualified immunity, other than this case) based upon the angle of a suspect's arm during handcuffing attendant to a valid arrest. This does not end the inquiry on the first prong of *Saucier*, however, it

merely exposes the split in the circuits created by the Eighth Circuit's implied/applied ruling in this case.

With regard to the question of whether the Petitioner's conduct (as alleged by the Respondent per the standard for summary judgment), the Petitioner respectfully suggests that this Court should join the other circuits that have refused to impose Fourth Amendment liability under the theory advanced by Respondent in this case (*i.e.*, improper arm angle). In addition to the rationale set forth in those cases (*see supra*), the Petitioner respectfully suggests that practical considerations also call for this Court to join the other circuits that have refused to impose Fourth Amendment liability under Respondent's theory. First, allowing for Fourth Amendment liability where an officer allegedly took a suspect's arms behind his back at an angle the suspect found objectionable (whether styled as "unnatural," "unorthodox," "high," or otherwise improper handcuffing, the allegation is, in reality, that the officer negligently handcuffed) would inevitably lead to a flood of litigation as experience and common sense dictate that most suspects would so object. Even were the Court to attempt to fashion an appropriate standard for taking a suspect's arms behind his back, it seems hard to imagine any workable "bright lines" being drawn with regard to the angle of a suspect's arm during handcuffing (*i.e.*, how "high" is too high?). Similarly, where objective, standards and proof are easily determined in "tight" handcuffing case (was cuff digging into skin, were lacerations immediately created during the handcuffing, were wrists swelling, etc.), the standards and proof in "arm angle" cases would be entirely subjective and speculative (unless a bystander had a protractor handy). Finally, allowing for liability where the suspect suffers injury would essentially eviscerate qualified immunity in this context as the officer would never know whether his conduct was unlawful until injury and/or severity of injury was diagnosed after the fact. For all these reasons, the Petitioner respectfully requests that

this Court join the other circuits that have refused to impose Fourth Amendment liability under the theory advanced by Respondent in this case.

IV. The "equally divided court rule," which calls for affirmance of the trial court where the vote of an appellate court is evenly split, is not appropriate in the context of an interlocutory appeal of the denial of a public official's qualified immunity; rather, an equally divided appellate court vote should result in a grant of qualified immunity to the defending public official.

In light of the procedural posture of this matter at the time of the ruling by the court of appeals, Petitioner respectfully requests that this Court exercise its supervising and rulemaking authority by holding that "the vote of an equally divided Court" in this case should have resulted in a grant of the Petitioner's request for qualified immunity rather than an affirmance of the district court. The qualified immunity precedents of this court dictate that qualified immunity should be granted where the applicable law and/or standard is less than clearly established. It is hard to imagine how applicable law on a particular topic in a particular circuit could be less clear than when the Judges of that Circuit completely and uniformly disagree on the issue.

The interlocutory nature of this appeal should also provide for a distinction from the standard appeal. In the normal appeal, a final order is challenged by the appellant and the sole issue before this Court is whether the District Court erred in some procedural or substantive particular(s). In such a case, if this Court is "equally divided" en banc, the benefit of the doubt is appropriately given to the trial judge, by virtue of the "equally divided court rule," in recognition of the general deference to the trial judge's discretion, the proximity of the trial judge to the factual

determinations, and other long-standing principles of judicial deference. In an interlocutory appeal challenging a collateral order, particularly one challenging the denial of qualified immunity, however, the Petitioner respectfully contends (and submits that the precedents of this Court require) that the benefit of the doubt must be given to the subject police officer rather than the trial judge. This Court, for instance, has routinely held that mistakes in judgment by law enforcement officers, especially in the "hazy border between excessive and acceptable force," entitle the officer to the protection of qualified immunity:

> *It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.* An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. *If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.* Qualified immunity operates . . . to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful. Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution.

Saucier v. Katz, 533 U.S. 194, 204-207 (2001).

In light of the unique procedural context of this case – an equally divided Court en banc – it is certainly not a stretch to contend that any mistake by the Petitioner (if agreement with exactly half of the Members of the Eighth Circuit Court of Appeals can actually be regarded as a legal "mistake") was reasonable and that the Petitioner is therefore entitled to qualified immunity.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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