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In The
Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO,
SERGEANT JEFF BARRY,
OFFICER MICHELLE LIDDICOET, and ALEX FAGAN,

Petitioners,

v.

RODEL RODIS,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. 18 U.S.C. section 472 makes it illegal to pass a counterfeit bill “with intent to defraud.” Is probable cause to arrest an individual for a suspected violation of this statute established once the individual attempts to pass a counterfeit bill, as the Eleventh and Fifth Circuits have concluded, or must the arresting officer develop additional, independent evidence of “intent to defraud,” above and beyond the intent inferred from the passing of the counterfeit bill, before arresting the suspect, as the Ninth Circuit held in the case below?

2. Did the Ninth Circuit err in denying qualified immunity to officers who arrested a suspect for violation of 18 U.S.C. section 472, based on their reasonable belief that he had attempted to pass a counterfeit bill, where the only cases on point at the time of the arrest had concluded that an attempt to pass a counterfeit bill – even without additional evidence of intent – was sufficient to establish probable cause and where no court had ever held that additional evidence of intent was required? (A similar question relating to qualified immunity is pending before the Court in *Pearson v. Callahan*, No. 07-751.)

3. Should *Saucier v. Katz*, 533 U.S. 194 (2001), be overruled? (This question is pending before the Court in *Pearson v. Callahan*, No. 07-751.)

PARTIES TO THE PROCEEDING

Petitioners are two individual law enforcement officers (Sergeant Jeff Barry and Officer Michelle Liddicoet), the City and County of San Francisco (a California municipal corporation), and former Chief of Police Alex Fagan, sued in his official capacity only.

Respondent is Rodel Rodis, an individual.

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OPINIONS/ORDERS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, dated August 28, 2007, is published at 499 F.3d 1094 and is reprinted in the Appendix at Pet. App. 1.

The order of the United States District Court for the Northern District of California, dated March 22, 2005, can be found at 2004 WL 3246273 (N.D. Cal.), and is reprinted in the Appendix at Pet. App. 33.

The order of the court of appeals, dated September 10, 2007, extending the deadline to petition for rehearing and rehearing en banc is reprinted in the Appendix at Pet. App. 50.

The order of the court of appeals, dated February 6, 2008, denying petitioners' request for rehearing and rehearing en banc is reprinted in the Appendix at Pet. App. 51.

**JURISDICTIONAL STATEMENT**

Petitioners seek review of the August 28, 2007, opinion of the court of appeals affirming the district court's denial of qualified immunity to petitioners Sergeant Jeff Barry and Officer Michelle Liddicoet. After obtaining an extension of the deadline to petition for rehearing and rehearing en banc, petitioners filed the petition on October 12, 2007. The court of appeals denied the petition on February 6, 2008.

The statutory basis for this Court's jurisdiction is 28 U.S.C. section 1254. The court of appeals derived jurisdiction from 28 U.S.C. section 1291, because an order denying qualified immunity is an appealable collateral order. *See Behrens v. Pelletier*, 516 U.S. 299 (1996); *Mitchell v. Forsyth*, 472 U.S. 511 (1985). The district court derived jurisdiction from 28 U.S.C. section 1331, because Rodis alleged that his federal constitutional rights had been violated by petitioners' actions and raised a claim under 42 U.S.C. section 1983.

◆

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution states:

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

42 U.S.C. section 1983 states in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person

within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

18 U.S.C. section 472 states:

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined under this title or imprisoned not more than 20 years, or both.

STATEMENT

In the decision below, a divided panel of the Ninth Circuit held that an officer may not arrest an individual on suspicion of passing a counterfeit bill unless the officer has evidence of "intent to defraud" above and beyond the intent inferred from the passing of the bill. This holding creates a split with the Eleventh and Fifth Circuits, both of which have made clear that an attempt to pass a counterfeit bill is

sufficient to establish probable cause to arrest. See *United States v. Everett*, 719 F.2d 1119, 1120 (11th Cir. 1983) (“While intent is an element of the crime which must be proved at trial, it is not necessary in order to establish probable cause to arrest. The passing of a counterfeit note coupled with an identification of the person who passed the note furnishes probable cause to arrest the individual identified as passing the note.”); *United States v. Hernandez*, 825 F.2d 846, 849 (5th Cir. 1987) (“Generally, probable cause to arrest for the offense of passing a counterfeit note is established by circumstances showing the passing of a counterfeit note coupled with an identification of the individual who passed the note.”). This circuit split is of great consequence because it will impede the ability of law enforcement agencies to enforce the federal counterfeiting statute effectively and uniformly. The Court should grant certiorari to resolve the split and correct the Ninth Circuit’s error.

The Ninth Circuit also erred in denying qualified immunity to the arresting officers. Every decision in existence at the time of the arrest had held or implied that officers may arrest an individual on suspicion of passing a counterfeit bill when the individual attempts to pass the bill, and that no additional evidence of intent to defraud is required to establish probable cause. Yet, despite that case law, the Ninth Circuit held that the officers had violated Rodis’s clearly established right not to be arrested without additional evidence of intent. It did so by defining the right at the highest level of generality possible, in

direct contravention of this Court's prior rulings in *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001), and *Brosseau v. Haugen*, 543 U.S. 194 (2004). As such, the Ninth Circuit's error is identical to that of the Tenth Circuit in *Pearson v. Callahan*, No. 07-751, in which the Court recently granted certiorari.

If the only error in the decision below were the denial of qualified immunity, petitioners would request that the Court hold the petition for a decision in *Pearson*. However, because the Ninth Circuit's ruling also creates a certworthy split on the probable cause requirement for 18 U.S.C. section 472, petitioners respectfully request that the Court grant certiorari in this case, and calendar it for argument with *Pearson* so that the Court may address the overlapping qualified immunity issue simultaneously. An additional benefit to calendaring the petition for argument with *Pearson* is that the City and County of San Francisco, which is annually named along with its law enforcement officers in dozens of lawsuits that implicate qualified immunity, can provide the Court with guidance on the third question presented in *Pearson* and in this petition: whether *Saucier* should be overruled. The City's experience suggests that although the Court should overrule *Saucier* to the extent it requires courts to adjudicate the underlying constitutional issue before turning to qualified immunity, the Court should not preclude lower courts from doing so, because the simultaneous resolution of both issues often promotes judicial economy and allows municipalities to avoid the unnecessary expense of litigating

constitutional and state-law claims that are clearly meritless.

* * *

1. On February 17, 2003, respondent Rodel Rodis attempted to make a purchase at a Walgreens drugstore in San Francisco with a \$100 bill. The cashier suspected the bill was counterfeit because of its odd texture and reported her suspicion to the store manager. The manager, who handles multiple \$100 bills every day, examined the bill, compared it to another \$100 bill, observed that the bill lacked a magnetic strip and watermark, and therefore agreed with the clerk's suspicion that the bill was counterfeit.

The manager then called 911 to summon the police and informed the 911 dispatcher that he suspected the bill was counterfeit. Several San Francisco police officers – including Sergeant Jeff Barry, Officer Michelle Liddicoet, Officer James Nguyen, and Officer Barbara Dullea – arrived at the scene in response to that dispatch. The officers arrested Rodis, basing probable cause on several facts. First, the officers independently examined the bill by touching it and inspecting it visually. Second, the Walgreens employees, experienced in handling currency, communicated their suspicions about the genuineness of the bill. Officer Nguyen spoke with the manager and cashier, who expressed their belief that the bill was counterfeit. The cashier informed Officer Nguyen that Rodis had used the \$100 bill to pay for a few small items.

The manager told Officer Nguyen he had compared the bill to another \$100 bill from the same year.

Based on these facts, the officers determined the bill likely was counterfeit and decided to investigate further by contacting the United States Secret Service for guidance. The San Francisco Police Department has access to a Secret Service hotline for such inquiries, and officers are trained to contact the Secret Service to confirm the authenticity or lack thereof of suspect bills.

The officers conducted this portion of their investigation from the police station. Conducting such an investigation at the Walgreens store was impractical because the Walgreens office was very small and cramped. In addition, conducting the investigation at the police station would be more effective and less embarrassing for Rodis, given the potential delay in hearing back from the Secret Service. Under standard procedures governing arrests, the officers handcuffed Rodis and transported him to the police station.

After arriving at the station, Officer Nguyen called and left a message for the Secret Service and received a return call from an agent twenty or thirty minutes later. After interviewing Officer Nguyen about the bill, the Secret Service agent informed Officer Nguyen that the bill likely was genuine. Upon learning this information, the officers immediately released Rodis, removed his handcuffs, and drove him back to the Walgreens store in the front seat of the

police car. The officers returned the \$100 bill to Rodis. The entire incident lasted approximately one hour.

2. On October 1, 2003, Rodis filed suit in the Superior Court of California for the County of San Francisco, against Defendants City and County of San Francisco, then-Chief of Police Alex Fagan (in his official capacity only), Sergeant Barry, and Officer Liddicoet. The complaint alleged a cause of action under 42 U.S.C. section 1983, for violation of Rodis's Fourth Amendment rights, and state-law claims as well. After the City was served, it removed the case to the United States District Court for the Northern District of California.

Petitioners moved for summary judgment, and on March 22, 2005, the district court granted the motion in part and denied it in part. Pertinent here, the district court held that Rodis had a viable claim against the individual officers for violation of his rights under the Fourth Amendment and further held that those rights were clearly established at the time of the arrest. The district court thus denied the officers' request for qualified immunity. Pet. App. 33-49.

Petitioners appealed the denial of qualified immunity, and on August 28, 2007, a divided three-judge panel of the Ninth Circuit affirmed the denial. The majority opinion, written by Judge Dorothy Nelson (and joined by District Judge Cormac Carney, sitting by designation), held that even though there was probable cause to believe Rodis had attempted to

pass a counterfeit bill, the officers violated his clearly established rights by arresting him without additional, independent evidence that he had intended to defraud Walgreens:

[A]rresting Rodis without *any* evidence he intended to use the bill to defraud the store or that he knew (or believed) the bill was fake was a violation of his Fourth Amendment rights. Further, it was clearly established at the time of the arrest that Defendants' conduct was unlawful.

Pet. App. 7-8.

In concluding the officers lacked probable cause to arrest, the majority stressed that to *obtain a conviction at trial*, the government must independently prove intent to defraud. Pet. App. 9-10. The majority acknowledged the general rule that officers need not have probable cause as to each element of a crime to effect a legal arrest, Pet. App. 11, but then held that "at least *some* evidence of Rodis's alleged intent to defraud would have been required to establish probable cause." Pet. App. 10 n.2; *see also* Pet. App. 13.¹

Turning to the qualified immunity question, the majority concluded that the requirement that officers

¹ The majority placed special emphasis on one factor that "decreased the probability that Rodis violated section 472," namely, that the officers knew that he had high social standing in the community and that he was an attorney and an elected member of the San Francisco Community College Board. Pet. App. 12-13.

develop additional evidence of intent before making a counterfeiting arrest was clearly established at the time of Rodis's arrest. The majority did not cite any cases to support the conclusion that the law was clearly established at the time. Instead, it relied on the "fluidity" of the probable cause analysis:

[I]t was well established at the time of Rodis's arrest that "probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." . . . Based on the totality of the circumstances, no prudent officer reasonably could have concluded there was a fair probability that Rodis violated § 472 or any other offense.

Pet. App. 15-16 (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)).

The majority acknowledged the existence of cases in the Ninth Circuit and elsewhere that explicitly or implicitly had validated counterfeiting arrests without evidence of intent beyond the intent inferred from the act of passing a counterfeit bill. But, it rejected those cases as being either insufficiently specific, too short, too old, or not binding because they were from other circuits. Thus, according to the majority, the cases did not undermine the conclusion that the intent requirement for counterfeiting arrests was clearly established at the time of the arrest. Pet. App. 16-17 & n.5.

3. Judge Consuelo Callahan dissented from the panel decision. Judge Callahan first reasoned that the officers had probable cause because they had a basis for believing that the odd bill was counterfeit, based on the reports from Walgreens staff and the officers' own examination of the bill. Pet. App. 20-21. Judge Callahan noted that by requiring additional evidence of intent to sustain a counterfeiting arrest, "the majority opinion improperly imposes the government's burden of proof at trial on the probable cause inquiry." Pet. App. 22-23.

Judge Callahan described the problems with requiring officers to have additional evidence of intent before effecting a legal counterfeiting arrest:

Imposing a requirement that asks officers to read criminals' minds to discern their subjective knowledge and intent is not practical or grounded in reality. Intent to defraud is often established through evidence concerning knowledge such as additional counterfeit bills, reproduction equipment, plates, ledgers, and other evidence that officers would no longer be able to gather incident to arrest or through a search warrant.

Pet. App. 26.

Judge Callahan then disagreed with Judge Nelson's conclusion that the requirement of additional evidence of intent was clearly established at the time of Rodis's arrest:

The majority cites to no case specifically requiring that officers have explicit evidence of a suspect's subjective intent to defraud before they have probable cause to arrest on suspicion of violating 18 U.S.C. § 472. This lack of precedent to support the majority's approach is telling. . . . In my view, the case law allowing officers to infer the intent to defraud from the attempted passing of the counterfeit note is sufficient to establish probable cause was the clearly established law prior to this decision. We cannot expect the officers to anticipate the majority's ruling that they should have had explicit and conclusive evidence of the suspect's subjective intent to defraud prior to arrest, because it is found nowhere else in any federal court's jurisprudence concerning probable cause to arrest under 18 U.S.C. § 472.

Pet. App. 31-32.

4. The Ninth Circuit denied petitioners' timely Petition for Rehearing and Rehearing En Banc on February 6, 2008. Pet. App. 51-52.



REASONS FOR GRANTING THE PETITION**I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE CIRCUITS OVER WHETHER INDEPENDENT EVIDENCE OF INTENT TO DEFRAUD, BEYOND THE ATTEMPT TO PASS THE COUNTERFEIT BILL ITSELF, IS REQUIRED TO SUPPORT PROBABLE CAUSE TO ARREST AN INDIVIDUAL FOR SUSPECTED VIOLATION OF 18 U.S.C. SECTION 472.**

The Court should grant certiorari to resolve the circuit split that the Ninth Circuit created by holding that petitioners lacked probable cause to arrest Rodis because of the lack of evidence of intent to defraud beyond the act itself of passing a counterfeit bill. The Ninth Circuit's holding is categorical in nature: "Without at least some evidence regarding the knowledge or intent elements of the crime, probable cause is necessarily lacking." Pet. App. 13. Thus, if the Ninth Circuit's ruling stands, additional evidence of knowledge or intent will be required in every counterfeiting arrest in the western United States for probable cause to exist.

This rule is inconsistent with the rule in other circuits. The Fifth and Eleventh Circuits have concluded that evidence of intent to defraud, beyond the intent inferred from the act of passing the bill, is not required to have probable cause to arrest for attempting to pass a counterfeit bill. See *Everett*, 719 F.2d at 1120 ("While intent is an element of the crime which

must be proved at trial, it is not necessary in order to establish probable cause to arrest. The passing of a counterfeit note coupled with an identification of the person who passed the note furnishes probable cause to arrest the individual identified as passing the note.”); *Hernandez*, 825 F.2d at 849 (“Generally, probable cause to arrest for the offense of passing a counterfeit note is established by circumstances showing the passing of a counterfeit note coupled with an identification of the individual who passed the note.”); *United States v. Allison*, 616 F.2d 779, 782 (5th Cir. 1980) (“Although mere possession of counterfeit money is not a crime, when possession is coupled with reliable information that the possessor has attempted to pass the bill as genuine, the officer in the field is justified in concluding that an offense has been committed.”). Indeed, the approach of the majority below is arguably inconsistent with the Ninth Circuit’s own past rulings, which have strongly implied that evidence of intent beyond the passing of the bill is not required for counterfeiting arrests. See *United States v. Ford*, 461 F.2d 534 (9th Cir. 1972); *United States v. Blum*, 432 F.2d 250 (9th Cir. 1970); cf. *Bates v. United States*, 352 F.2d 399 (9th Cir. 1965) (relating to 18 U.S.C. section 474, which has intent language identical to section 472).²

² In concluding that there was no evidence of intent to defraud in this case, the majority assumed that the act of passing a counterfeit bill has no evidentiary bearing on whether the individual possessed such an intent. This assumption, in

(Continued on following page)

The decision below is also in tension with this Court's holding that an officer is not required to investigate every claim of innocence and every potential defense "such as lack of requisite intent" before making an arrest. See *Baker v. McCollan*, 443 U.S. 137, 145-46 (1979); see also *United States v. Mayo*, 394 F.3d 1271, 1276 (9th Cir. 2005) (affirming probable cause for crime requiring intent to defraud and reasoning: "Although Mayo told the officers that he was buying the car and did not realize that the sticker was on the license plate, the officers did not have to accept Mayo's version of the facts. The standard for probable cause is not so demanding."); *Marks v. Carmody*, 234 F.3d 1006, 1009 (7th Cir. 2000) ("The fact that Marks had alerted the officers to possible defenses he might have had to the crime does not change this result [i.e., a finding of probable cause]. . . . [The officers did not] need to accept as established the evidence Marks had proffered that tended to show that he did not act with the requisite

itself, is erroneous. Just as a factfinder may infer from the fact that a person is driving a stolen vehicle that he did, in fact, steal the vehicle, a factfinder may infer from the fact that a person attempted to pass a counterfeit bill that he intended to defraud the person to whom he passed the bill. This error, however, is beside the point for purposes of this petition for certiorari. The bottom line is that the Ninth Circuit held that an officer needs something more than the act of passing a counterfeit bill before he or she may arrest a suspect, while the rule in the Eleventh and Fifth Circuits is that the act of passing the bill alone is sufficient to establish probable cause.

intent to defraud the Bechars. Issues of mental state and credibility are for judges and juries to decide.”).

The Ninth Circuit’s new rule creates significant practical problems for enforcement of the counterfeiting laws. While *convictions* for passing counterfeit currency may require independent proof of intent, it makes sense to permit officers to make counterfeiting *arrests* without proof of intent beyond the act of passing the counterfeit currency. Requiring such additional proof of intent before arrest would impede the effective enforcement of the counterfeiting laws. Intent is difficult to ascertain, especially during the short periods of time that officers have to make arrest decisions based on limited information. Accordingly, the Ninth Circuit’s approach will provide criminals with an easy way to game the system, secure in the knowledge that they cannot be arrested unless officers have probable cause – independent of the passing of the bill – to believe that they intended to defraud. Criminals will be able take simple steps to undermine any conclusion on the scene that they intended to defraud and thus defeat probable cause, even if they unquestionably passed counterfeit currency. Judge Callahan described this problem in her dissent:

Applying the majority’s newly announced standard will also result in absurd results. If a suspect simply says that he does not know if the bill is real or fake, or if he carries around a real bill and offers to substitute it for the counterfeit one, officers may not

arrest him to investigate the probable unlawful conduct. In the case of a clever criminal who is skilled at lying, officers would be powerless to arrest the suspect even when he attempts to pass a clearly counterfeit bill, if the suspect verbally disavows knowledge or intent and pays with a legitimate bill. A criminal could test the counterfeit detection skills of clerks, bartenders, and other consumers at will without fear of arrest.

Pet. App. 26.

The circuit split created by the decision below, if left unresolved, will be particularly harmful because enforcement of the federal counterfeiting laws will be uneven, with law enforcement officers in the Ninth Circuit being significantly limited in their ability to conduct counterfeiting investigations and to arrest suspects who have passed counterfeit currency. Uneven enforcement of the counterfeiting laws could have significant ramifications for the ability of the government to ensure the integrity of the currency and would particularly hamper multi-state investigations of counterfeiting operations, because authorities would have to apply different investigatory and arrest standards in different circuits, even as part of a single investigation.

Additional percolation among the courts of appeals is unnecessary in light of the significance of the issue and the obviousness of the error committed by the majority below. The probable cause requirement for counterfeiting arrests has been agreed upon in

almost forty years' worth of case law on this issue. The Ninth Circuit's brand new approach – that “[w]ithout at least some evidence regarding the knowledge or intent elements of the crime, probable cause is necessarily lacking,” Pet. App. 13 – creates significant uncertainty, will deter officers from aggressively enforcing federal counterfeiting laws, and therefore merits immediate review by this Court to resolve the conflict.

II. THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE NINTH CIRCUIT'S ERRONEOUS DENIAL OF QUALIFIED IMMUNITY.

In denying the officers qualified immunity, the majority below did not cite a single case that has ever held that officers must have evidence of intent, above and beyond the passing of the bill, in order to arrest for passing counterfeit currency. The majority noted the existence of cases that have held or strongly implied that further evidence of intent was *not* required, but the majority rejected those cases because they were either too vague, too old, too short, or not binding because they were out of circuit. These cases included Ninth Circuit authority, as well as authority from other circuits. See *Hernandez*, 825 F.2d at 849; *Everett*, 719 F.2d 1119; *Allison*, 616 F.2d at 782; *Ford*, 461 F.2d 534; *Blum*, 432 F.2d 250; *Bates*, 352 F.2d 399.

The court then reasoned that despite the lack of any precedent holding that officers needed evidence of intent beyond the passing of the bill in order to arrest, qualified immunity did not apply because “it was well established at the time of Rodis’s arrest that probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules.” Pet. App. 15 (quotations omitted).

This rationale – that because it was clearly established that probable cause is a “fluid concept,” it was therefore clearly established that evidence of intent beyond the passing of the bill was required to arrest for passing counterfeit currency – is exactly the kind of reasoning that this Court repeatedly has forbade, namely, denying qualified immunity because a broad principle of law was clearly established:

[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. Yet that is not enough. Rather, we emphasized . . . 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.

Saucier, 533 U.S. at 201-02 (citation and quotations omitted).

This Court recently reiterated *Saucier's* admonition in summarily reversing a misapplication of qualified immunity by the Ninth Circuit that was very similar to the majority's ruling in this case. In *Brosseau*, the Court stressed the importance of focusing on the specific factual context in assessing whether a right is clearly established, as opposed to finding a right clearly established based on a general principle, in that case the principle that excessive force is impermissible. 543 U.S. at 198 (stating that assessment of whether conduct violates clearly established law "must be undertaken in light of the specific context of the case, not as a broad general proposition") (citation omitted). In finding qualified immunity in *Brosseau*, the Court canvassed the law in contextually similar cases to determine whether the cases clearly established that the conduct was prohibited. The Court concluded that the cases, taken together, did not clearly establish the conduct's illegality. *See id.* at 200-01.

In this case, the Ninth Circuit disregarded *Brosseau* and *Saucier's* articulation of what "clearly established" means and defined the concept at such a high level that it is hard to imagine how any officer

being sued for false arrest would be able to claim qualified immunity. The Ninth Circuit's holding, in essence, was that because probable cause is based on the totality of the circumstances and incapable of precise definition, an officer is always on notice that for any given set of facts, a judge may decide that the circumstances did not give rise to probable cause. The officer, of course, has no way of predicting what a judge or panel of judges will do, but because the officer knows that a judge may decide that the arrest is illegal, the officer is not immune.

The Court recently granted certiorari in *Pearson v. Callahan*, No. 07-751, on this same issue. In *Pearson*, the Tenth Circuit denied qualified immunity to officers on a Fourth Amendment search issue even though no court had ever held that the type of search they had conducted was illegal. As in this case, the Tenth Circuit denied qualified immunity by defining the constitutional right at the highest level of generality possible, rather than with reference to contextually similar cases, and held that because those broad principles were clearly established qualified immunity did not apply. And, as in this case, the Tenth Circuit denied qualified immunity even though the only case law on point at the time of the arrest cut in favor of the officers' actions.

If the only error by the majority below were on qualified immunity, petitioners would simply request that the Court hold the petition for a decision in *Pearson*. However, because the decision below also creates a split on the probable cause requirement for

a violation of 18 U.S.C. section 472, petitioners respectfully request that the Court grant the petition and calendar the case for argument with *Pearson*, so that the Court may consider the qualified immunity issues presented by both cases concurrently, while considering the underlying constitutional questions separately. Furthermore, as discussed below, petitioners believe that the City and County of San Francisco's participation would assist the Court in its consideration of the third question presented in *Pearson* and this petition, namely, whether *Saucier* should be overruled.³

III. THE COURT SHOULD GRANT CERTIORARI TO RECEIVE THE CITY'S INPUT ON WHETHER, AND THE EXTENT TO WHICH, SAUCIER V. KATZ SHOULD BE OVERRULED.

In granting certiorari in *Pearson v. Callahan*, No. 07-751, the Court asked the parties to address whether *Saucier* should be overruled. This case presents a vehicle for addressing that question as well. Moreover, the City and County of San Francisco – which along with its law enforcement officers is

³ If, in the alternative, the Court opts to hold this petition for a decision in *Pearson*, the result of a reversal of the Tenth Circuit in *Pearson* very well could be to summarily reverse the decision below in this matter (rather than to grant, vacate and remand), given that the qualified immunity issues presented by the two cases are virtually identical.

named in approximately thirty-five section 1983 cases per year, which routinely litigates qualified immunity in the district court and court of appeals, and which is keenly aware of the practical advantages and disadvantages of the *Saucier* rule – is in an ideal position to brief and evaluate the key issues that the Court will face in deciding the future of *Saucier*.

The City's experience suggests that although the Court should overrule *Saucier* to the extent it *requires* courts of appeals, on interlocutory qualified immunity review, to decide substantive constitutional issues before turning to the question of qualified immunity, the Court should not *preclude* courts of appeals from doing so in certain cases. Allowing courts of appeals discretion to apply the *Saucier* two-step process can be particularly useful in cases where an interlocutory appellate ruling eliminating a non-meritorious federal constitutional claim against officers will also result in the elimination of equally non-meritorious *Monell* and state-law claims that would otherwise, on remand, proceed through lengthy, unnecessary, and expensive litigation. Permitting courts of appeals to turn first to the underlying constitutional issue allows for more efficient disposition of entire cases that clearly have no merit, rather than issuing an initial ruling on qualified immunity that forces parties, on remand, to litigate further federal and state claims related to the alleged constitutional violation.

This case highlights some of the potential disadvantages of categorically discarding the current two-step analysis under *Saucier* altogether. Imagine first that, instead of ruling in Rodis's favor, the Ninth Circuit had ruled in favor of the officers on the qualified immunity question *without* addressing the underlying constitutional issue. Such a ruling would have left numerous claims for the district court to adjudicate on remand, and would have wasted judicial and litigant resources as the parties litigated a meritless claim.

For example, Rodis made a section 1983 claim against municipal defendants, specifically, the City and County of San Francisco and its Chief of Police, under *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). Such a claim cannot be disposed of pursuant to a claim of qualified immunity, which is a defense available only to individual defendants. See *Owen v. City of Independence, Mo.*, 445 U.S. 622, 650 (1980). However, if the court of appeals, on interlocutory appeal, were to conclude that no constitutional violation had occurred, the *Monell* claim automatically would be disposed of because a constitutional violation is an indispensable predicate to a *Monell* claim. See *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). While the claim also could be disposed of by a showing that there was no municipal policy that was the moving force behind the violation, see *Monell*, 436 U.S. 658, it would be more efficient for such a claim to be disposed of on the basis that there was no underlying constitutional violation. Thus, to the

extent that individual defendants challenge a denial of qualified immunity as part of an interlocutory appeal, a reviewing court proceeding according to *Saucier's* two-step analysis might rule on this possibly dispositive issue – i.e., the lack of a constitutional violation – and thus avoid an unnecessary trial on municipal liability under *Monell*. Litigating a *Monell* claim can consume enormous judicial and municipal resources, both in discovery and trial, given the focus of such a claim on systemic and long-term policies, practices, and customs of frequently large municipal entities. Avoiding unnecessary discovery and trial in non-meritorious *Monell* claims thus would be a positive result.

Likewise, Rodis asserted state-law claims for false arrest and battery against petitioners. These claims, too, could be efficiently dismissed where a court proceeding according to the *Saucier* two-step analysis determined that there was no constitutional violation, in light of the frequent overlap of elements between federal constitutional claims and state-law claims. For example, in California, as in various other states, false arrest claims against officers and battery claims arising from officers' allegedly unlawful use of force are governed by the same standards as under federal law: for a false arrest claim, a plaintiff must establish that the officer lacked probable cause, and for a battery claim, a plaintiff must prove that the force used was objectively unreasonable. See *Edson v. City of Anaheim*, 74 Cal. Rptr. 2d 614, 617 (Cal. App. 1998) (battery); *White v. Martin*, 30 Cal. Rptr. 367,

368 (Cal. App. 1963) (false arrest); *see also VanVorous v. Burmeister*, 687 N.W.2d 132, 142-43 (Mich. App. 2004); *Williams v. City of Jacksonville*, 599 S.E.2d 422, 428-31 (N.C. App. 2004); *Tom v. Volda*, 654 N.E.2d 776, 784-85 (Ind. App. 1995).

However, qualified immunity may or may not be a defense to state-law claims. *Compare* Cal. Penal Code § 847(b)(1) (providing immunity from false arrest claims where “[t]he arrest was lawful, or the peace officer, at the time of the arrest, had reasonable cause to believe the arrest was lawful.”); *George v. City of Long Beach*, 973 F.2d 706, 710 (9th Cir. 1992); *and Salazar v. Burrech*, 47 F. Supp. 2d 1105, 1116 n.11 (C.D. Cal. 1999), *with Venegas v. County of Los Angeles*, 63 Cal. Rptr. 3d 741, 751 (Cal. App. 2007) (no qualified immunity for state civil rights statute claims); *and Asgari v. City of Los Angeles*, 937 P.2d 273, 280-81 (Cal. 1997) (noting differences between federal and California immunities). Thus, a decision that skipped the first *Saucier* step would not dispose of state-law claims in various states even if it was clear that no constitutional violation – and hence no state-law tort – had occurred. Such a result could lead to unnecessary and wasteful litigation of non-meritorious state-law claims.

In contrast, had the Ninth Circuit decided the case in favor of the officers after applying *Saucier*’s two-step approach and concluded that no constitutional violation had occurred, such a ruling would have disposed of Rodis’s additional claims – his *Monell* claim for municipal liability and his state-law

claims. It would be of great benefit to district courts – and to cash-strapped municipalities that are often forced to defend unmeritorious civil-rights and state-law claims in long, drawn-out litigation – to allow courts of appeals the discretion to decide the underlying constitutional question in some qualified immunity cases, particularly those where the constitutional claim is clearly lacking in merit and where a ruling on the constitutional claim could eliminate non-meritorious *Monell* and state-law claims. Petitioners respectfully submit that, given the City and County of San Francisco's experience in this and many other section 1983 cases, petitioners' participation on this issue would assist the Court in its evaluation of the extent to which it should overrule *Saucier*.

◆

CONCLUSION

For the foregoing reasons, the Court should grant the petition and calendar the case for argument with *Pearson*.

Respectfully submitted,

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