SUPREME COURT OF THE UNITED STATES

Nos. 09–1454 and 09–1478

BOB CAMRETA, PETITIONER
09–1454 *v.*
SARAH GREENE, PERSONALLY AND AS NEXT FRIEND OF S. G., A MINOR, AND K. G., A MINOR

JAMES ALFORD, DEPUTY SHERIFF, DESCHUTES COUNTY, OREGON, PETITIONER
09–1478 *v.*
SARAH GREENE, PERSONALLY AND AS NEXT FRIEND OF S. G., A MINOR, AND K. G., A MINOR

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 26, 2011]

JUSTICE KENNEDY, with whom JUSTICE THOMAS joins, dissenting.

Today's decision results from what is emerging as a rather troubling consequence from the reasoning of our recent qualified immunity cases. The Court is correct to note the problem presented when, on the one hand, its precedents permit or invite courts to rule on the merits of a constitutional claim even when qualified immunity disposes of the matter; and, on the other hand, jurisdictional principles prevent us from reviewing those invited rulings. It does seem that clarification is required. In my view, however, the correct solution is not to override jurisdictional rules that are basic to the functioning of the Court and to the necessity of avoiding advisory opinions. Dictum, though not precedent, may have its utility; but it ought not to be treated as a judgment standing on its own.

So, while acknowledging the problem the Court confronts, my concern with the rule adopted for this case calls for this respectful dissent.

I

The Court acknowledges our "settled refusal to entertain an appeal," including a petition for certiorari, "by a party on an issue as to which he prevailed." *Ante*, at 8 (internal quotation marks omitted). At the outset, however, it is important to state this rule more fully to show its foundational character. A party that has already obtained the judgment it requested may not seek review to challenge the reasoning of a judicial decision. As we have said on many occasions, "This Court reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U. S. 307, 311 (1987) *(per curiam)* (internal quotation marks omitted); see also *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842, and n. 8 (1984) (collecting cases). The rule has been noted and followed since the early years of this Court. "The question before an appellate Court is, was the *judgment* correct, not the *ground* on which the judgment professes to proceed." *McClung* v. *Silliman*, 6 Wheat. 598, 603 (1821).

The rule against hearing appeals or accepting petitions for certiorari by prevailing parties is related to the Article III prohibition against issuing advisory opinions. This principle underlies, for example, the settled rule against hearing cases involving a disputed judgment based on grounds of state law. As Justice Jackson explained for the Court: "[O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn*, 324 U. S. 117, 125–126 (1945). This point has been repeated with force and

clarity. See, *e.g.*, *Michigan* v. *Long*, 463 U. S. 1032, 1041–1042 (1983). The "'judicial Power' is one to render dispositive judgments," not advisory opinions. *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 219 (1995) (internal quotation marks omitted).

The rule against hearing appeals by prevailing parties applies in countless situations, many involving government parties. Deficient performance may not yield prejudice under *Strickland* v. *Washington*, 466 U. S. 668 (1984). A defective warrant may be entitled to good-faith reliance under *United States* v. *Leon*, 468 U. S. 897 (1984). An unreasonable search may be cured through the inevitable discovery doctrine of *Nix* v. *Williams*, 467 U. S. 431 (1984). In these and myriad other situations, an error is identified, but that conclusion does not affect the ultimate judgment entered. In all these contexts, it is established that the prevailing party may not appeal. This conclusion holds true even though a statement on the merits can have adverse consequences for the prevailing party. "The Court of Appeal's use of analysis that may have been adverse to the State's long-term interests does not allow the State to claim status as a losing party for purposes of this Court's review." *Rooney*, *supra*, at 311.

The Court nonetheless holds that defendants who prevail in the Courts of Appeals based on qualified immunity may still obtain review in this Court. This point is put in perspective by the fact that the Court today, in an altogether unprecedented disposition, says that it vacates not a judgment but rather "part of the Ninth Circuit's opinion." *Ante*, at 2. The Court's conclusion is unsettling in its implications. Even on the Court's reading of our cases, the almost invariable rule is that prevailing parties are not permitted to obtain a writ of certiorari. Cf. *Kalka* v. *Hawk*, 215 F. 3d 90, 96, n. 9 (CADC 2000) (concluding that the Supreme Court "has apparently never granted the certiorari petition of a party who prevailed in the appel-

late court"). After today, however, it will be common for prevailing parties to seek certiorari based on the Court's newfound exception. And that will be so even though the "admonition" against reviewing mere statements in opinions "has special force when the statements raise constitutional questions, for it is our settled practice to avoid the unnecessary decision of such issues." *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 734 (1978).

The Court defends its holding with citations to just two of our cases. *Ante*, at 6. Neither provides support for the Court's result.

The first case is *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U. S. 241 (1939). There, a plaintiff alleged the infringement of two patent claims. The District Court found the plaintiff's first claim valid but not infringed and the second claim invalid. Rather than issuing a judgment "dismissing the bill without more," the District Court instead "entered a decree adjudging claim 1 valid" and "dismissing the bill for failure to prove infringement." *Id.*, at 241–242. The District Court thus issued a formal judgment regarding the validity of the first claim. The defendant appealed to dispute that claim's validity. This Court noted, without qualification, that a party "may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree." *Id.*, at 242. "But," this Court went on to explain, "here the decree itself purports to adjudge the validity of claim 1, and though the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of one of the issues litigated." *Ibid.* In other words, the District Court had entered an unnecessary legal conclusion into the terms of the judgment itself, making it possible, for example, that the decree would have estoppel effect as to an issue whose resolution was unnecessary to the proper judgment of dismissal. *Electrical Fittings* therefore concluded that

"the petitioners were entitled to have this portion of the decree eliminated." *Ibid.* The sole relief provided was an order for the "reformation of the decree." *Ibid.* That result accords with, indeed flows from, the settled rule that this Court reviews only judgments, not statements in opinions.

The second case is *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U. S. 326 (1980). In that case plaintiffs attempted to bring a class action against a bank. After the District Court denied class certification, the defendant tendered to the plaintiffs the maximum value that they could recover as individuals. Of course, that offer did not amount to "all that ha[d] been requested in the complaint"—namely, "relief for the class." *Id.*, at 341 (Rehnquist, J., concurring). It is therefore no surprise that the plaintiffs responded with "a counteroffer of judgment in which they attempted to reserve the right to appeal the adverse class certification ruling." *Id.*, at 329 (opinion of the Court). But that proposal was denied. "Based on the bank's offer, the District Court entered judgment in respondents' favor, over their objection." *Id.*, at 330. The District Court thus issued a judgment other than the one the plaintiffs had sought. The would-be class plaintiffs appealed, and this Court later granted certiorari. The Court held that appeal was not barred by the prevailing-party rule: "We view the denial of class certification as an example of a procedural ruling, collateral to the merits of a litigation, that is appealable after the entry of final judgment." *Id.*, at 336. As the Court explained, the plaintiffs had obtained only a judgment in their individual capacities. Yet the plaintiffs had "asserted as their personal stake in the appeal their desire to shift to successful class litigants a portion of those fees and expenses that have been incurred in this litigation." *Id.*, at 334, n. 6; see also *id.*, at 336. Because the purported prevailing parties were injured by their failure to obtain the class-based

judgment they had sought, the Court held there was "jurisdiction to entertain the appeal only to review the asserted procedural error, not for the purpose of passing on the merits." *Ibid*. The Court was clear that the District Court's denial of class certification had a direct effect on the judgment: "As in *Electrical Fittings*," the purported prevailing parties "were entitled to have [a] portion of the District Court's judgment reviewed." *Ibid*.

Neither *Electrical Fittings* nor *Deposit Guaranty* provides support for the rule adopted today. Those decisions instead held that, in the unusual circumstances presented, particular parties who at first appeared to have prevailed below had in fact failed to obtain the judgments they had sought. This Court therefore had jurisdiction, including of course jurisdiction under Article III, to provide relief for the harm caused by the adverse judgments entered below. The parties seeking appeal in *Electrical Fittings* and *Deposit Guaranty* might be compared with plaintiffs who have requested $1,000 in relief but obtained only $500. Such parties have prevailed in part, but have not "receive[d] all that [they] ha[d] sought." *Deposit Guaranty*, *supra*, at 333. In contrast the Court appears to assume that the petitioners in the present case are true prevailing parties. They have obtained from the Court of Appeals the only formal judgment they requested: denial of respondent's claim for damages.

The Court points to policy concerns as the basis for its willingness to hear appeals by prevailing parties. *Ante*, at 8–10. But those concerns are unwarranted. In only one dissenting opinion has it been suggested that certiorari should be granted to reach a merits determination "locked inside" a favorable qualified immunity ruling. *Bunting* v. *Mellen*, 541 U. S. 1019, 1024 (2004) (SCALIA, J., dissenting from denial of certiorari). That dissenting opinion was issued in response to the rule that constitutional issues should be decided in every case involving qualified immu-

nity. *Id.*, at 1025. Yet that mandated rule of decision has now been disapproved, so the dissent's argument is no longer applicable. See *Pearson* v. *Callahan*, 555 U. S. 223 (2009). Indeed, the Court today suggests that it still would not allow review of the merits even in the case that provoked the dissent. Unlike petitioner Camreta, the petitioner in *Bunting* had left the Government's employ before filing a petition for certiorari and so lacked standing to obtain review in this Court. Compare 541 U. S., at 1025, n., with *id.*, at 1021 (Stevens, J., respecting denial of certiorari), and *ante*, at 14–15, and n. 9.

The instant case thus appears to be the first in which the Court's new exception to the prevailing party rule might have been applied. And even here that exception is neither necessary nor sufficient for the merits to be adjudicated by this Court. The Fourth Amendment question decided below is bound to arise again in future cases. Indeed, the reasoning of the decision below implicates a number of decisions in other Courts of Appeals. Cf. 588 F. 3d 1011, 1026, n. 11 (CA9 2009) (collecting cases). Yet today's decision does not supply the Courts of Appeals with guidance as to these merits issues. The Court instead vacates part of the reasoning of the decision below, thereby leaving other decisions intact and unreviewed. The Court thus resolves difficult constitutional issues and provides an unprecedented answer to "an important question of judicial policy," all to no end. *Ante*, at 7.

The Court errs in reading *Electrical Fittings* and *Deposit Guaranty* to permit review and, indeed, the provision of relief disconnected from any judgment. The result is an erroneous and unbounded exception to an essential principle of judicial restraint. Parties who have obtained all requested relief may not seek review here.

II

As today's decision illustrates, our recent qualified im-

munity cases tend to produce decisions that are in tension with conventional principles of case-or-controversy adjudication. This Court has given the Courts of Appeals "permission" to find constitutional violations when ordering dismissal or summary judgment based on qualified immunity. *Ante*, at 9; see *Pearson*, *supra*. This invitation, as the Court is correct to note, was intended to produce binding constitutional holdings on the merits. *Ante*, at 10–11. The goal was to make dictum precedent, in order to hasten the gradual process of constitutional interpretation and alter the behavior of government defendants. *Ibid*. The present case brings the difficulties of that objective into perspective. In express reliance on the permission granted in *Pearson*, the Court of Appeals went out of its way to announce what may be an erroneous interpretation of the Constitution; and, under our case law, the Ninth Circuit must give that dictum legal effect as precedent in future cases.

In this way unnecessary merits decisions in qualified immunity cases could come to resemble declaratory judgments or injunctions. Indeed the United States as *amicus curiae* contends that the merits decision below "has an effect similar to an injunction or a declaratory judgment against the government as a whole." Brief for United States as *Amicus Curiae* 13. Today's opinion adopts that view, providing as relief the vacatur of "part of the Ninth Circuit's opinion"—namely, the part of the opinion that rules on the constitutional merits. *Ante*, at 2. For the first time, *obiter dictum* is treated not just as precedent for future cases but as a judgment in its own right.

The Court of Appeals in this case did not in fact issue a declaratory judgment or injunction embodying a determination on the merits, and it does not appear that a judgment of that kind could have issued. Plaintiffs must establish standing as to each form of relief they request, yet the plaintiff in this case had no separate interest in

obtaining a declaratory judgment. See *Los Angeles* v. *Lyons*, 461 U. S. 95, 103–105 (1983) (citing *Ashcroft* v. *Mattis*, 431 U. S. 171 (1977) *(per curiam); Golden* v. *Zwickler*, 394 U. S. 103 (1969)); see also *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U. S. 118, 127 (2007). There was no likelihood that S. G., the plaintiff's daughter, would again be subjected to interrogation while at school, much less that she would be interrogated by petitioner-defendant Camreta, so S. G. would seem to have had no greater stake in obtaining a declaratory judgment than the plaintiff in *Lyons* had in obtaining an injunction. See 461 U. S., at 104 (noting the "actual controversy that must exist for a declaratory judgment to be entered"). Our qualified immunity cases should not permit plaintiffs in constitutional cases to make an end-run around established principles of justiciability. In treating dictum as though it were a declaratory judgment or an injunction, the Court appears to approve the issuance of such judgments outside the bounds of Article III jurisdiction.

The Court creates an exception to the prevailing party rule in order to solve the difficulties created by our qualified immunity jurisprudence, but the Court's solution creates new problems. Sometimes defendants in qualified immunity cases have no particular interest in disputing the constitutional merits. Acknowledging as much, the Court notes that petitioner Alford no longer works for the government and so "has lost his interest in the Fourth Amendment ruling." *Ante*, at 14, n. 9. In concluding that Alford lacks Article III standing, the Court suggests that it would lack jurisdiction to review and perhaps even to vacate the merits decision of the Court of Appeals if respondent had sued only Alford. *Ibid.;* cf. *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 72–73 (1997) (discussing standing to obtain review in this Court as well as this Court's jurisdiction to vacate judgments issued without jurisdiction). That suggestion is disconcerting.

Under today's decision, it appears that the Court's ability to review merits determinations in qualified immunity cases is contingent on the defendant who has been sued. A defendant who has left the government's employ or otherwise lacks an interest in disputing the merits will be unable to obtain further review. See *ante*, at 14, n. 9 (discussing Article III limits on relief in this Court)*; ante*, at 17, n. 10 (discussing limitations on this Court's equitable vacatur authority).

The Court today avoids this difficulty by concluding that petitioner Camreta has suffered an Article III injury. *Ante*, at 7; cf. *ante*, at 15, n. 9 ("[W]e do not decide any questions that would arise if [Alford] were the only defendant"). But the Court can reach that conclusion only because, "as part of his job," Camreta "regularly engages" in conduct made unlawful by the reasoning of the Court of Appeals. *Ante*, at 7. As discussed below, this conclusion is doubtful. See *infra*, at 11–13. In any event the Court's standing analysis will be inapplicable in most qualified immunity cases. Cf. *ante*, at 6 (asserting that the "Article III standard often will be met"). When an officer is sued for taking an extraordinary action, such as using excessive force during a high-speed car chase, there is little possibility that a constitutional decision on the merits will again influence that officer's conduct. The officer, like petitioner Alford or the petitioner in *Bunting*, would have no interest in litigating the merits in the Court of Appeals and, under the Court's rule, would seem unable to obtain review of a merits ruling by petitioning for certiorari. See *ante*, at 5–7; *ante*, at 14, n. 9, *ante*, at 17, n. 10; see also *Lyons*, *supra*, at 103–105. This problem will arise with great frequency in qualified immunity cases. Once again, the decision today allows plaintiffs to obtain binding constitutional determinations on the merits that lie beyond this Court's jurisdiction to review. The Court thus fails to solve the problem it identifies.

III

It is most doubtful that Article III permits appeals by any officer to whom the reasoning of a judicial decision might be applied in a later suit. Yet that appears to be the implication of the Court's holding. The favorable judgment of the Court of Appeals did not in itself cause petitioner Camreta to suffer an Article III injury entitling him to appeal. Cf. *supra*, at 1–7 (discussing *Electrical Fittings* and *Deposit Guaranty*); *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 619 (1989) (finding an Article III controversy where petitioner challenged "a final judgment altering tangible legal rights"). On the contrary, Camreta has been injured by the decision below to no greater extent than have hundreds of other government officers who might argue that they too have been affected by the unnecessary statements made by the Court of Appeals. The Court notes as a limit on its authority to entertain appeals from prevailing parties certain statutory directives, directives that can be interpreted or shaped to allow expanded powers of review. *Ante*, at 4. But even if Congress were to give explicit permission for certiorari petitions to be filed by "any person" instead of by "any party," 28 U. S. C. §1254(1), the constitutional definition of a case or controversy would still constrain this Court's jurisdiction.

The Court's analysis appears to rest on the premise that the reasoning of the decision below in itself causes Camreta injury. Until today, however, precedential reasoning of general applicability divorced from a particular adverse judgment was not thought to yield "standing to appeal." *Parr* v. *United States*, 351 U. S. 513, 516, 517 (1956) (opinion for the Court by Harlan, J.). That is why "[o]nly one injured by the judgment sought to be reviewed can appeal." *Id.*, at 516; see also *supra*, at 1–6; *e.g.*, *Chathas* v. *Local 134 IBEW*, 233 F. 3d 508, 512 (CA7 2000) (Posner, J.) ("Adverse dicta are not appealable rulings. They can cause harm, but not the sort of harm that the courts . . .

deem to create a genuine controversy within the meaning of Article III of the Constitution. Judgments are appealable; opinions are not" (citations omitted)); *Sea-Land Serv., Inc.* v. *Department of Transp.*, 137 F. 3d 640, 648 (CADC 1998) (Williams, J.) ("[M]ere precedential effect within an agency is not, alone, enough to create Article III standing, no matter how foreseeable the future litigation" (citing *Radiofone, Inc.* v. *FCC*, 759 F. 2d 936, 938 (CADC 1985) (opinion of Scalia, J.))); *id.*, at 939 (explaining that standing must "arise from the particular activity which the agency adjudication has approved . . . and not from the mere precedential effect of the agency's rationale in later adjudications"); *Oxford Shipping Co.,* v. *New Hampshire Trading Corp.*, 697 F. 2d 1, 7 (CA1 1982) (Breyer, J.) ("Since the judgment appealed from was in [a party's] favor, and since the statement made was in no sense necessary to that judgment, the statement was dictum. There is no known basis for an appeal from a dictum"). It is revealing that the Court creates an exception to the prevailing party rule while making clear that the Courts of Appeals are not to follow suit, in any context. See *ante*, at 13–14.

The conclusion that precedent of general applicability cannot in itself create standing to sue or appeal flows from basic principles. Camreta's asserted injury is caused not by the Court of Appeals or by respondent but rather by "the independent action of some third party not before the court"—that is, by the still-unidentified private plaintiffs whose lawsuits Camreta hopes to avoid. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992) (internal quotation marks omitted). This circumstance distinguishes the present case from requests for declaratory or injunctive relief filed against officeholders who threaten legal enforcement. An inert rule of law does not cause particular, concrete injury; only the specific threat of its enforcement can do so. That is why the proper defendant

in a suit for prospective relief is the party prepared to enforce the relevant legal rule against the plaintiff. See *MedImmune, Inc.*, 549 U. S., at 127 (explaining that declaratory relief requires a controversy "between parties having adverse legal interests, of sufficient immediacy and reality" (internal quotation marks omitted)); *Babbitt* v. *Farm Workers*, 442 U. S. 289, 298–299 (1979) ("A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement"). Without an adverse judgment from which to appeal, Camreta has in effect filed a new declaratory judgment action in this Court against the Court of Appeals. This is no more consistent with Article III than filing a declaratory judgment action against this Court for its issuance of an adverse precedent or against Congress in response to its enactment of an unconstitutional law.

IV

If today's decision proves to be more than an isolated anomaly, the Court might find it necessary to reconsider its special permission that the Courts of Appeals may issue unnecessary merits determinations in qualified immunity cases with binding precedential effect.

Other dynamics permit the law of the Constitution to be elaborated within the conventional framework of a case or controversy. "[T]he development of constitutional law is by no means entirely dependent on cases in which the defendant may seek qualified immunity." *Pearson*, 555 U. S., at 242–243. For example, qualified immunity does not bar Fourth and Fifth Amendment suppression challenges. See, *e.g.*, *Kentucky* v. *King*, *ante*, p. ___. Nor does it prevent invocation of the Constitution as a defense against criminal prosecution, civil suit, or cruel and unusual punishment. See, *e.g.*, *Snyder* v. *Phelps*, 562 U. S. ___ (2011); *Graham* v. *Florida*, 560 U. S. ___ (2010); *Law-*

rence v. *Texas*, 539 U. S. 558 (2003). Nor is qualified immunity available in constitutional suits against municipalities—as this very case illustrates. *Ante*, at 15–16. Our cases make clear, moreover, that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope* v. *Pelzer*, 536 U. S. 730, 741 (2002). That rule permits clearly established violations to be found when extreme though unheard-of actions violate the Constitution. See, *e.g.*, *ibid.* Furthermore, constitutional plaintiffs may seek declaratory or injunctive relief pursuant to standard principles of justiciability. Those plaintiffs do not need *Pearson*'s special rule. See, *e.g.*, *Citizens United* v. *Federal Election Comm'n*, 558 U. S. ___ (2010); *McDonald* v. *Chicago*, 561 U. S. ___ (2010). In any event, some incremental advance in the law occurs even when clearly established violations are found. It is an inevitable aspect of judicial decisionmaking that the resolution of one legal question or factual dispute casts light on the next.

It would be preferable at least to explore refinements to our qualified immunity jurisprudence before altering basic principles of jurisdiction. For instance, the objectives of qualified immunity might be satisfied if there were no bar to reaching the merits and issuing judgment when requested damages are nominal and substantial attorney's fees are waived or not allowed. Cf. *Farrar* v. *Hobby*, 506 U. S. 103, 112–115 (1992) (discussing unavailability of attorney's fees where nominal damages are only relief); *Hewitt* v. *Helms*, 482 U. S. 755, 761–763 (1987); *Harlow* v. *Fitzgerald*, 457 U. S. 800, 819, n. 34 (1982); *Carey* v. *Piphus*, 435 U. S. 247, 266 (1978) (discussing the propriety of providing nominal damages as relief).

The desire to resolve more constitutional questions ought not lead to altering our jurisdictional rules. That is the precise object that our legal tradition tells us we should resist. Haste to resolve constitutional issues has

never been thought advisable. We instead have encouraged the Courts of Appeals to follow "that older, wiser judicial counsel not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Scott* v. *Harris*, 550 U. S. 372, 388 (2007) (BREYER, J., concurring) (internal quotation marks omitted); see generally *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). Experience teaches that there is no persuasive reason to reverse normal principles of judicial review in qualified immunity cases. Compare, *e.g.*, *Pearson*, *supra*, at 236, and *Siegert* v. *Gilley*, 500 U. S. 226, 235 (1991) (KENNEDY, J., concurring in judgment) ("[I]t seems to reverse the usual ordering of issues to tell the trial and appellate courts that they should resolve the constitutional question first"), with *id.*, at 232 (opinion of the Court), and *Saucier* v. *Katz*, 533 U. S. 194, 201 (2001). Yet this Court's "puzzling misadventure in constitutional dictum" still has not come to an end. Leval, Judging Under the Constitution: Dicta About Dicta, 81 N. Y. U. L. Rev. 1249, 1275 (2006).

There will be instances where courts discuss the merits in qualified immunity cases. It is sometimes a better analytic approach and a preferred allocation of judicial time and resources to dismiss a claim on the merits rather than to dismiss based on qualified immunity. And "[i]t often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be." *Pearson*, *supra*, at 236 (internal quotation marks omitted). This Court should not superintend the judicial decisionmaking process in qualified immunity cases under special rules, lest it make the judicial process more complex for civil rights suits than for other litigation. It follows, however, that the Court should provide no special permission to reach the merits. If qualified immunity cases were treated like other cases raising constitutional questions, settled principles of con-

stitutional avoidance would apply. So would conventional rules regarding dictum and holding. Judicial observations made in the course of explaining a case might give important instruction and be relevant when assessing a later claim of qualified immunity. Cf. *Wilkinson* v. *Russell*, 182 F. 3d 89, 112, and n. 3 (CA2 1999) (Calabresi, J., concurring). But as dicta those remarks would not establish law and would not qualify as binding precedent. See *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 67 (1996).

* * *

The distance our qualified immunity jurisprudence has taken us from foundational principles is made all the more apparent by today's decision. The Court must construe two of its precedents in so broad a manner that they are taken out of their proper and logical confines. To vacate the reasoning of the decision below, the Court accepts that *obiter dictum* is not just binding precedent but a judgment susceptible to plenary review. I would dismiss this case and note that our jurisdictional rule against hearing appeals by prevailing parties precludes petitioners' attempt to obtain review of judicial reasoning disconnected from a judgment.