NOTE

APPEALS BY PREVAILING PARTIES AFTER *CAMRETA*

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INTRODUCTION

SINCE 1934,[1] the Supreme Court has held that parties who prevail in the lower courts cannot seek review because the controversy presented lacks adversity.[2] But in 2011, the Supreme Court added an important caveat. The Court held in *Camreta v. Greene* that defendants who have been relieved of liability because of qualified immunity may nevertheless have standing to seek certiorari if the court of appeals held that their actions violated the rights of the plaintiff.[3] This holding significantly alters the threshold analysis for prevailing-party appeals, at least with respect to the jurisdiction of the Supreme Court. The Court did, however, leave unsettled many issues concerning the application of this newly announced exception to the prevailing-party rule. Perhaps the most significant issues are whether *Camreta* will govern appeals from district courts to the courts of appeals and whether it will be extended outside of the substantive context of qualified immunity.

This Note briefly examines the possibility of *Camreta*'s vertical extension to the lower courts before turning to the possibility of its horizontal extension to other substantive doctrines. It concludes that the vertical extension of *Camreta* to the lower courts is unlikely but that *Camreta* may well be extended horizontally to other substantive doctrines. Indeed, the reasoning of *Camreta* potentially reaches any case where courts have the option to dispose of a case on multiple grounds. That is, it might apply in any situation with an "order-of-battle" question, meaning those situations in which lower courts have the option to

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[1] N.Y. Tel. Co. v. Maltbie, 291 U.S. 645, 645–46 (1934) (per curiam).

[2] See Wheeler v. City of Lansing, 660 F.3d 931, 939–40 (6th Cir. 2011).

[3] Camreta v. Greene, 131 S. Ct. 2020, 2028–29 (2011) (explaining that while the practice of declining to hear prevailing-party appeals is entrenched, it is not a constitutional limitation as long as the parties continue to have a personal stake); id. at 2032–33.

decide the merits in a way that is adverse to one party but still rule in favor of that party for another reason. In the qualified immunity context, the order-of-battle question arises because the plaintiff's claim may succeed or fail on the merits, but the defendant might receive qualified immunity given either outcome. One example of another doctrinal situation with an order-of-battle question is the harmless error context. In that case, courts have to decide whether there was error in addition to whether that error is harmless, and they have the similar choice about which question to reach first (and whether to decide the "error" question at all).

In situations where there is an order-of-battle determination, some adverse merits determinations might not be able to be reviewed by the Court unless there is the *Camreta*-equivalent prevailing-party review for the specific substantive doctrine at issue. The most important substantive extensions will likely be to other doctrines similar to qualified immunity where the issue of prevailing-party appeals is likely to be recurring and widespread. This Note examines one example of a potential substantive extension: *Camreta*'s hypothetical application to the good-faith exception to the exclusionary rule. This example demonstrates how the good-faith exception to the exclusionary rule has an order-of-battle question analogous to the one posed in the qualified immunity context. Furthermore, like the constitutional tort litigation that implicates qualified immunity, the exclusionary rule operates as one of the constraints on police conduct. The good-faith exception thus makes a useful example for *Camreta*'s possible horizontal extension because it has substantive and procedural similarities and differences to qualified immunity that help define the contours of *Camreta*'s reasoning and the scope of its potential extension.

Part I of this Note details the history and effects of qualified immunity. It discusses the *Camreta* opinion in more depth and excavates the opinion's reasoning in order to determine why and how it might be extended. Specifically, it highlights two components of standing, a constitutional prong and a prudence prong, that must both be satisfied under *Camreta* to justify review. The constitutional prong asks whether jurisdiction is permissible under the case-or-controversy requirement of Article III of the Constitution, and the prudence prong is more nebulous and asks whether review is desirable. If *Camreta* is to be extended, both of these prongs must be satisfiable in other contexts. Finally, Part I examines but ultimately dismisses (in most contexts) the question of whether *Camreta* can be relied on by the lower appellate courts to justify hearing

prevailing-party appeals. Part II then turns to the possibility of *Camreta*'s applicability to new substantive doctrines. To provide an example, it discusses the history and effects of the good-faith exception to the exclusionary rule, with particular emphasis on the exception's most recent expansion in *Davis v. United States*.[4] After this introduction, it discusses the good-faith exception context's similarities and differences with qualified immunity and concludes that *Camreta* should, by its own terms, extend to good faith. Finally, Part III examines the implications of extending *Camreta* to the good-faith exception and theorizes that the effect of such extension would increase the convergence between qualified immunity and the good-faith exception as substantive doctrines, which might import some of the contradictions and tensions that plague qualified immunity into the good-faith context.

This Note's examination of *Camreta*'s ramifications treads novel territory. While scholars have analyzed the effect of the *Camreta* opinion with respect to qualified immunity,[5] none have yet explored the possibility that its reasoning could apply in other contexts. *Camreta* reflects a new form of agenda control. Any substantive extension of *Camreta* will increase the importance of this tool as a way for the Supreme Court to control its docket. This Note will thus end with the conclusion that the ways in which *Camreta* will ultimately extend reveal whether it is a tool for the Supreme Court's agenda control that can be put to more general purpose, or a doctrine that treats qualified immunity doctrine as privileged in a way that requires the additional avenue for review.

I. QUALIFIED IMMUNITY AND THE *CAMRETA* DECISION

Qualified immunity is a contentious doctrine.[6] It responds to the concern that broad liability for discretionary acts under Section 1983[7] or

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[4] 131 S. Ct. 2419, 2423–24 (2011).

[5] See, e.g., Michael T. Kirkpatrick & Joshua Matz, Avoiding Permanent Limbo: Qualified Immunity and the Elaboration of Constitutional Rights from *Saucier* to *Camreta* (and Beyond), 80 Fordham L. Rev. 643, 656–57 (2011).

[6] See, e.g., Jonathan M. Freiman, The Problem of Qualified Immunity: How Conflating Microeconomics and Law Subverts the Constitution, 34 Idaho L. Rev. 61, 89 (1997) (considering that "the havoc of qualified immunity still outweighs its charms" even assuming that officers are otherwise overdeterred); Diana Hassel, Living A Lie: The Cost of Qualified Immunity, 64 Mo. L. Rev. 123, 124 (1999) (concluding that qualified immunity is more costly than beneficial).

[7] 42 U.S.C. § 1983 (2006).

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics[8] might overly deter official conduct. Rather than repeating the numerous discussions about the costs and benefits of qualified immunity, this Part summarizes the most important features of the doctrine to provide context for *Camreta*. After first briefly defining qualified immunity and describing its effects on legal development and the problem of the order of battle, this Part summarizes *Camreta*'s facts and explores its reasoning. Finally, this Part concludes by reflecting on the tone of the *Camreta* opinion and what it may presage for merits-first adjudication more generally.

A. The History of Qualified Immunity

Qualified immunity relieves a defendant in a Section 1983 or *Bivens* action from liability where the official's "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[9] Where the defendants have qualified immunity, plaintiffs that may have prevailed on the merits of their claims will nonetheless be denied redress if the defendants were acting pursuant to "clearly established" law. This standard is what separates those official actions that receive qualified immunity from those for which officials will be held liable if the plaintiff is able to prove the merits of the claim. Despite the importance of this test for what constitutes clearly established law, one of the difficulties inherent in qualified immunity doctrine is the ongoing attempt to define exactly what it means for law to be clearly established.[10] The general rule is that in the absence of binding precedent, law is not clearly established unless there is "a robust 'consensus of cases of persuasive authority.'"[11]

The difficulty of applying this standard has implications for the broader project of this Note. Qualified immunity only matters for the purposes of prevailing-party appeals to the extent that there is an overlap between claims that would have succeeded on the merits but where the remedy is denied because of immunity. Thus, where the standard for

[8] 403 U.S. 388, 397 (1971).

[9] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[10] See John C. Jeffries, Jr., What's Wrong with Qualified Immunity?, 62 Fla. L. Rev. 851, 858–59 (2010) (describing disagreement among the circuits about what sources will clearly establish law under what circumstances).

[11] Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2084 (2011) (quoting Wilson v. Layne, 526 U.S. 603, 617 (1999)).

whether the law is clearly established is either narrower or broader, this will simultaneously change the scope of possible *Camreta*-type standing because it will change the effects of merits ruling on the availability of qualified immunity. In other words, the scope of the definition of clearly established law will determine how frequently plaintiffs will win on the merits but lose on qualified immunity, thus opening the door for defendants to seek *Camreta*-type review.

Qualified immunity not only immunizes officials from liability for some of their conduct but also affects legal development. One effect that it has is to dampen some of the incentives of plaintiffs to bring claims that might be subject to qualified immunity because of the reduced risk that they will be compensated. On the other side of the same coin, however, one counter-intuitive feature of qualified immunity is that its availability as a way of suppressing plaintiffs' remedies can facilitate legal change.[12] Courts that would be wary of announcing legal change or clarifying legal uncertainty for fear of overdeterrence may instead rule on the merits of constitutional tort cases without having to impose the costs of the new rule on an unwitting official. A reduction in the perceived costs of legal development may increase the likelihood that courts will decide to change or clarify existing doctrine.

In cases where qualified immunity is available, it is possible to resolve the immunity issue without reaching the merits question, and it is equally possible to resolve the question of whether the official's conduct violated the law before asking whether that law was clearly established. Each of these options is at least arguably flawed. Some commentators argue that if the merits decision is made first, followed by a grant of qualified immunity, this produces dicta and raises the specter that the merits ruling is nothing more than an advisory opinion.[13] However, if the qualified immunity issue is always decided first, and courts simply dispense with the merits determination, this effectively eliminates civil litigation as a context for the development of constitutional rights.[14] Which

[12] See John C. Jeffries, Jr., Disaggregating Constitutional Torts, 110 Yale L.J. 259, 271 (2000).

[13] E.g., Pierre N. Leval, Judging Under the Constitution: Dicta About Dicta, 81 N.Y.U. L. Rev. 1249, 1275–77 (2006).

[14] See Kirkpatrick & Matz, supra note 5, at 673.

of these ways of reasoning to choose in a particular case is referred to as the "order of battle" of the qualified immunity analysis.[15]

The Supreme Court has recently shifted course on what order of battle the lower courts should follow. In the 2001 opinion *Saucier v. Katz*,[16] the Court mandated that the merits question be adjudicated first in order "to prevent constitutional stagnation."[17] In the wake of *Saucier*, many judges criticized and resisted this mandate; at times, the lower courts were defiant.[18] The retreat from *Saucier* was thus not surprising.[19] Writing for the unanimous Court in *Pearson v. Callahan* in 2009, Justice Alito responded to the criticisms of *Saucier* by overruling the mandatory order of battle and instead permitting trial and appellate judges "to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."[20] The Court in *Pearson* was careful to note that merits-first adjudication was still "often beneficial" because "the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable."[21] Under *Pearson*, constitutional development remained a goal in itself, even as the mandatory order of *Saucier* was jettisoned. *Pearson* also identified some situations where merits-first adjudication might not be necessary, such as where a decision is "so factbound that the decision provides little guidance," or where the decision "rest[s] on an uncertain interpretation of state law."[22] The implication remained that in the ordinary course, merits-first adjudication was desirable.

This quick about-face indicates a deep doctrinal uncertainty about the status of merits-first adjudication.[23] The potential for merits-first adjudi-

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[15] See John C. Jeffries, Jr., Reversing the Order of Battle in Constitutional Torts, 2009 Sup. Ct. Rev. 115, 116.

[16] 533 U.S. 194, 201 (2001).

[17] Pearson v. Callahan, 555 U.S. 223, 232 (2009).

[18] See id. at 234–35 (citing cases criticizing *Saucier*'s mandatory order of battle); see also Leval, supra note 13, at 1275–79 (calling the rigid order of battle "a new and mischievous rule" and *Saucier* "a blueprint for the creation of bad constitutional law").

[19] Jeffries, supra note 15, at 115–16; see also Kirkpatrick & Matz, supra note 5, at 648–49.

[20] 555 U.S. at 236.

[21] Id.

[22] Id. at 237–38.

[23] As discussed in Section I.B, this uncertainty is only exacerbated by the addition of *Camreta*, in which the Court's tone was less approving of merits-first adjudication generally.

cation is not limited to the qualified immunity context, and this uncertainty might infuse any context where the possibility of merits-first adjudication has been illuminated. Although the order-of-battle problem has received the most attention in qualified immunity doctrine, order-of-battle issues that implicate merits-first adjudication will arise wherever remedies may be unavailable. The divorce of rights and remedies is what presents courts with the choice of whether to reach the merits of an issue notwithstanding a lack of remedy, at least where that lack of remedy is another ground on which a party before the court may prevail. Any substantive extensions of *Camreta* could put pressure on the problem of merits-first adjudication in other contexts.

Pearson's importance is undeniable, but its ultimate effect will be dictated by how lower courts use the discretion it has granted them. One possible way to add structure to the order-of-battle analyses of lower courts would be to articulate a standard governing the courts' discretion in the decision of whether to engage in merits-first adjudication,[24] although this option has not yet even been discussed by the Court. So far, at least, lower courts have apparently not used their discretion to entirely avoid merits questions. In the wake of *Pearson*, scholars examining the empirical effect of *Pearson* on merits-first adjudications have discovered that while there has been a significant minority of cases where the courts bypass the merits question, this effect has been relatively moderate.[25] The same study also compared *Saucier*-era adjudications with post-*Pearson* adjudications and found that new cases that under *Pearson* skipped the merits step would likely under the *Saucier* regime have resulted in determinations that the constitutional right had not been violated (at least assuming some continuity in the percentage of cases appropriate for each type of decision appearing before courts).[26] Overall, *Pearson* appears to have had, so far, an important but not overly restrictive effect on the development of constitutional law.

One major function of the *Camreta* opinion was that it cured one problem inherent in merits-first adjudication by lower courts: the insula-

See 131 S. Ct. at 2032 ("In general, courts should think hard, and then think hard again, before turning small cases into large ones.").

[24] See Jack M. Beermann, Qualified Immunity and Constitutional Avoidance, 2009 Sup. Ct. Rev. 139, 143 (arguing that the Court should articulate a standard guiding lower courts about when to reach the merits first).

[25] See Ted Sampsell-Jones & Jenna Yauch, Measuring *Pearson* in the Circuits, 80 Fordham L. Rev. 623, 628–29 (2011).

[26] Id. at 639.

tion of some merits determinations from Supreme Court review. If the merits question is decided on a case where qualified immunity was available, and if the losing party failed to seek review, this would potentially inoculate the merits issue presented in the case. Defendants who had lost on the merits but prevailed on qualified immunity were thought to lack a continuing stake sufficient to maintain a claim on appeal, and so they would have to depend on plaintiffs to seek review of the decision. Practically speaking, the issue might therefore never reach Supreme Court review because officials would be deterred from engaging in the conduct, and so the case in which there had been an official who was denied qualified immunity and subsequently sought review might never arise. In this way, the appellate courts that found against the officers on the merits but granted them qualified immunity would have the final word on the constitutional issue. It is also worth noting that the problem of merits insulation was identified in *Pearson* as one rationale for receding from[27] the *Saucier* mandate, because having a mandatory order of battle exacerbated the potential to inoculate issues from Supreme Court review.[28] That rationale has now been undercut since the *Camreta* decision.[29] This same issue will be important as a potential justification for extending *Camreta* to other situations where the Court might not be able to review merits determinations because of an intervening doctrine subject to an order-of-battle determination.

B. The Camreta *Opinion: Background and Reasoning*

In *Camreta*, a mother sought damages under Section 1983 for the alleged violation of her nine-year-old daughter S.G.'s Fourth Amendment rights.[30] The defendants were Camreta, a child protective services official, and Alford, a local deputy sheriff. Suspecting that S.G. had been

[27] See Bryan v. MacPherson, 630 F.3d 805, 817 (9th Cir. 2010) (identifying *Pearson* as receding from *Saucier*).

[28] *Pearson*, 555 U.S. at 240. Of course, before *Camreta*, adverse merits issues would continue to exist without the possibility of appeal even under the *Pearson* regime so long as any appellate court continued to issue merits-first decisions where they also granted qualified immunity.

[29] Of course, this does not mean we should expect a return to the *Saucier* regime. It merely paves the way for the adverse merits reasoning of appellate courts to be corrected by the Supreme Court, if necessary, and relieves one of the pressures in merits-first adjudication. The need for similar relief from this type of pressure in similar substantive contexts might be one driving force that could push toward the substantive extension of *Camreta*.

[30] *Camreta*, 131 S. Ct. at 2027.

abused by her father, the two officials interviewed her at her elementary school without either a warrant or parental consent.[31] The United States Court of Appeals for the Ninth Circuit held that while the officials could not be held liable based on qualified immunity, they had nonetheless violated the daughter's rights by seizing and questioning her without a warrant or an exception to the warrant requirement.[32] The Supreme Court ultimately vacated the merits determination on the ground that the claim had become moot.[33] In order to reach this conclusion, however, the Supreme Court first held that the merits determination was reviewable notwithstanding the grant of qualified immunity.[34]

The reasoning at the core of this decision—that the Court could hear the case in the first place—is what could be potentially extended substantively. The Court discussed both a constitutional and a prudential prong to its holding that prevailing parties could seek review of adverse merits determinations when they had been granted qualified immunity. If both of these prongs of the decision were satisfied, there is no reason why *Camreta* would need to be moored to its doctrinal origin.

1. The Court's Prevailing-Party Appeals Analysis: Constitutional and Prudential Prongs

On the constitutional side, the reasoning of *Camreta* emphasized that the standard for whether a party has standing requires only that the parties retain a "personal stake" and that this standard "often will be met when immunized officials seek to challenge a ruling that their conduct violated the Constitution."[35] More specifically, the Court reasoned that the prospective effect of the precedent on the official's conduct satisfies the personal stake requirement, as does the possibility of the non-prevailing party being subject to the same conduct by the official.[36] In this way, the Court concluded that the adversity requirement is still satisfied from a constitutional perspective in cases like *Camreta*. To a certain extent, this analysis is not entirely satisfying because it is generally not possible to claim that the future effect of a law gives you standing, as the

[31] Id.
[32] Id. One such exception would have been a parent's consent. Id.
[33] Id. at 2035–36.
[34] Id. at 2032.
[35] Id. at 2029.
[36] Id.

dissent noted.[37] Even if this is so, the constitutional prong of the standing requirement might be satisfied by the existence of the prior dispute. In this case, the desirability of prevailing-party review in a particular case based on what the Court calls a "continuing stake"[38] in the unmodified behavior should most appropriately constitute part of the prudential analysis.

Whichever way the "continuing stake" requirement is conceptualized, one might wonder why a party who chooses not to seek review is considered to have a continuing stake. For cases where the losing plaintiff does not seek review, such as those with a very low probability of reversal of the qualified immunity outcome, the *Camreta* majority assumes that plaintiffs prefer to win on the merits but still lose on qualified immunity, and that they will therefore adequately present the arguments on the merits even knowing that they have lost on qualified immunity. But this assumption may be unwarranted in some circumstances. Indeed, some commentators have wondered what would happen if that party simply declined to oppose the appeal.[39] This oddity may not cause any practical difficulties, however, and may simply remain a dormant tension in the doctrine.[40]

On the prudential side, the majority acknowledged that "[a]s a matter of practice and prudence" the Court usually does not review "statements in opinions,"[41] but that "a 'policy reason of sufficient importance to allow an appeal' . . . places qualified immunity cases in a special category when it comes to this Court's review of appeals brought by winners."[42] After *Camreta*, it is clear that the component of the threshold analysis that would normally block prevailing-party appeals where there has been a merits-first adjudication is avoidable if the Court deems it advisable.

[37] Id. at 2043 (Kennedy, J., dissenting).

[38] Id. at 2034 n.9 (majority opinion).

[39] See Kirkpatrick & Matz, supra note 5, at 667–69 (identifying potential problems for the plaintiff's lawyer's incentives); Girardeau A. Spann, Advisory Adjudication, 86 Tul. L. Rev. 1289, 1306 (2012) (wondering how the Court would have reacted had the *Camreta* plaintiff not participated). Also, given the plaintiff's success on the merits below, the likelihood of being subject to that conduct again has probably declined, weakening the theory that there remains a continuing stake.

[40] See Kirkpatrick & Matz, supra note 5, at 669. Fully exploring incentives to appeal would expand on this aspect of the Court's analysis and would affect under what circumstances these assumptions should theoretically hold.

[41] *Camreta*, 131 S. Ct. at 2030 (citing California v. Rooney, 483 U.S. 307, 311 (1987) (per curiam)).

[42] Id. (quoting Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 335 n.7 (1980)).

The opinion stated specifically that qualified immunity counted as one situation where exercising such review may be justified because of the effect on official conduct, in part because qualified immunity is self-consciously designed to have that effect and is a method for doing so that has been approved by the Court.[43] The active and approved participation of the courts in the articulation of rights is therefore one rationale for bending the prudential aspects of the jurisdictional analysis to prevent the outcomes from merits-first adjudication from evading review. *Camreta* has in this way enabled Supreme Court review of precedent adverse to the government by reforming jurisdictional principles.

2. Difficulties and Contradictions in Camreta

These two prongs of analysis shape the contours of *Camreta*'s reasoning. But *Camreta* is also interestingly contradictory in at least one respect: It was itself dismissed as moot, despite announcing this jurisdictional rule. *Camreta*, originally a Fourth Amendment opinion from the Ninth Circuit, served as the vehicle to announce that the Court allows prevailing-party appeals for qualified immunity judgments notwithstanding apparent lack of adversity, although the Court then dismissed it for mootness.[44] The opinion could have answered not only the procedural question but also the Fourth Amendment question, but the majority instead held that it had jurisdiction to hear the procedural question but lacked jurisdiction to resolve the Fourth Amendment question. There is friction in *Camreta*'s twin assertions that the Court could resolve the procedural issue of prevailing-party appeals but not the first-order merits question.[45] One would want the Court to conclude either that it had jurisdiction to hear both questions or that it lacked jurisdiction entirely. As a prudential matter, there are possible rationales for deciding one of these questions but not the other, but it is hard to imagine why the parties would have standing for the purposes of one but not the other. The net result of the Court's reasoning leaves the opinion with multiple apparent contradictions.

It is worth noting that the tensions inherent in the *Camreta* opinion itself and the doctrine it creates are important for the ultimate question of

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[43] Id.

[44] See Spann, supra note 39, at 1307–08.

[45] See *Camreta*, 131 S. Ct. at 2035–36 (vacating the decision below on mootness grounds). The opinion does not directly address the anomaly of the different treatment of the two issues. See id.

how advisable its extension will be. On one hand, one possible reason for declining to extend *Camreta* even in ways that at first blush appear logical and perhaps even required is that the opinion may itself stand on shaky footing. On the other hand, should the possible problems that have been flagged about *Camreta* not appear insurmountable, this may be a reason to have less skepticism about extending it to other substantive doctrines.

Although *Camreta* was not the first Supreme Court decision to allow prevailing parties to appeal, it broadened the ability of prevailing parties to seek review for an important class of defendants: those granted qualified immunity. The dissent opined that *Camreta* differed from and went further than two prior cases permitting prevailing-party appeals, *Electrical Fittings Corp. v. Thomas & Betts Co.*[46] and *Deposit Guaranty National Bank v. Roper*.[47] According to the dissent, those prior cases had "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."[48] *Camreta*, on the other hand, justifies review for at least some cases where the future conduct of defendants has been altered even though they obtained the judgment sought. The effect of this holding could be drastic if it meant that prevailing parties can seek review in lower courts any time their conduct has been altered by the reasoning of the opinion. The reasoning also matters for determining when parties have a continuing stake that could support *Camreta*'s substantive extension.

3. Camreta*'s Broader Implications*

Camreta might be of significantly less importance in terms of prevailing-party appeal if it presages an end to the order-of-battle question entirely. One way of reading the opinion is that *Camreta* represented not only a move towards allowing prevailing-party review in the qualified immunity context but also an increasing restrictiveness towards merits-first adjudication more generally, at least in terms of the tone of the

[46] 307 U.S. 241, 242 (1939) (allowing prevailing patent infringement defendants to appeal denial of request for declaratory judgment that the patent was invalid).

[47] 445 U.S. 326, 340 (1980) (concluding that prevailing plaintiffs could appeal an adverse class certification because "the District Court's entry of judgment in favor of named plaintiffs over their objections did not moot their private case or controversy").

[48] *Camreta*, 131 S. Ct. at 2039 (Kennedy, J., dissenting) (asserting that "[n]either [case] provides support for the rule adopted today").

opinion. For example, the Court stated: "In general, courts should think hard, and then think hard again, before turning small cases into large ones."[49] The opinion is frequently cited in lower courts not only for its resolution of the prevailing-party review problem, but also for its statements conveying a new hostility to merits-first adjudication.[50] And indeed, three of the members of the Court even expressed dissatisfaction with the continuing practice of allowing lower courts to adjudicate merits claims given a holding of qualified immunity. These three Justices have indicated that they would prefer to review (presumably to overrule) this practice. Justice Scalia stated in his opinion concurring in the judgment in *Camreta* that he would be willing to review whether "to end the extraordinary practice of ruling upon constitutional questions unnecessarily when the defendant possesses qualified immunity."[51] Justice Kennedy in dissent, joined by Justice Thomas, went further and stated: "Our qualified immunity cases should not permit plaintiffs in constitutional cases to make an end-run around established principles of justiciability."[52] The dissent further suggested that "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."[53] Justice Kennedy went on to argue that the existence of other contexts for the articulation of rights, such as Fourth Amendment suppression hearings, would contribute to legal development such that merits rulings were no longer necessary in constitutional tort cases subject to qualified immunity.[54] This new skepticism

[49] Id. at 2032 (majority opinion).

[50] See, e.g., Carty v. Rodriguez, 470 F. App'x 234, 238 (5th Cir. 2012). While scholars have studied the effect of *Pearson*, see generally Sampsell-Jones & Yauch, supra note 25, at 624, they have not yet addressed whether this new, less favorable tenor has made a difference to the probability of merits-first adjudication.

[51] *Camreta*, 131 S. Ct. at 2036 (Scalia, J., concurring).

[52] Id. at 2041 (Kennedy J., dissenting).

[53] Id. at 2043.

[54] Id. at 2043–44. These assertions are questionable. Commentators have noted the inhibition of legal development that can occur when each of the different avenues of rights development narrows. Each avenue may independently restrict remedies while creating the illusion that remedies are available to incentivize legal development in other contexts. See Justin F. Marceau, The Fourth Amendment at a Three-Way Stop, 62 Ala. L. Rev. 687, 711 (2011). Furthermore, the context of the remedy will shape the content of the right, making avenues of legal development imperfect substitutes for each other. See Nancy Leong, Making Rights, 92 B.U. L. Rev. 405, 430–38 (2012) (comparing aspects of Fourth Amendment protections that are principally litigated in the exclusive context of either civil litigation or suppression motions).

toward merits-first adjudication is most obvious in the dissent, but even the majority's tone is distinctly at odds with the more approving treatment of merits-first adjudication in Justice Alito's *Pearson* opinion.

The inconsistent nature of the Court's qualified immunity jurisprudence is highlighted by the fact that Justice Kennedy authored both *Saucier*, mandating merits-first adjudication, and the dissent in *Camreta*, urging the abolition of merits-first adjudication, a mere decade apart. For advocates of eliminating merits-first adjudication, it is worth questioning whether this recommendation extends equally to other substantive determinations with order-of-battle issues. If merits-first adjudication were to be eliminated for qualified immunity, *Camreta* would become obsolete except to the extent that it had been or could be extended to other substantive contexts. If merits-first adjudication were eliminated for qualified immunity, however, the question would also arise whether that elimination should extend to other contexts where rights are separated from remedies. If that question were answered affirmatively, or even simply if merits-first adjudication were eliminated for qualified immunity, this would put pressure on the divorce of rights and remedies and might portend change cutting back on the legal doctrines that do so. For now, the elimination of the order-of-battle problem remains in the realm of speculation. And while order-of-battle problems still exist in various substantive doctrines, the question may arise of when a party who loses on one ground but wins on another can seek review.

C. Vertical Extensibility

Camreta itself does not clarify whether lower courts can rely on it to hear prevailing-party appeals from adverse merits rulings. If *Camreta* is vertically extended, it will represent a drastic redefinition of when there is adversity between parties. Based on the language in the opinion itself, as well as its reasoning tying the extraordinary need for review to the binding effect of precedent, *Camreta* is unlikely to extend vertically.

The *Camreta* Court specifically noted that the opinion "addresses only our own authority to review cases in this procedural posture."[55] This does not necessarily mean that lower courts will be unable to rely on *Camreta*'s reasoning to expand standing for prevailing parties to appeal, but it does at least provide a hint that such an expansion might not be well received. The Court further clarified that "the considerations per-

[55] 131 S. Ct. at 2033.

suading us to permit review of petitions in this posture may not have the same force as applied to a district court decision" because "district court decisions—unlike those from the courts of appeals—do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity."[56] If that reservation constitutes the outer limits of the opinion's significance, *Camreta* will likely have effect only occasionally and only in permitting the Supreme Court to take additional cases as it desires. In effect, it would be a special jurisdictional rule that increases the scope of the Court's power to decide cases.

Whether courts of appeals will extend *Camreta* to permit prevailing-party appeals at the lower appellate level remains to be seen, but it seems unlikely to occur. How they interpret *Camreta* with respect to their jurisdiction may depend at least to some extent on the specific review procedure used by the lower courts. The case for vertical extensibility is strongest for extending *Camreta* to en banc procedures. Like Supreme Court review, these procedures are discretionary and correct binding precedential opinions.[57]

The more questionable vertical extension of *Camreta* would be to regular appellate panel review. Trial courts' opinions are not binding precedent,[58] but this does not necessarily mean that appellate courts should not rectify trial courts' incorrect legal conclusions. One of the roles of judicial review is "clarifying rights," and "[j]ust as that purpose may justify an appellate court in reaching beyond an immunity defense to decide a constitutional issue, so too that purpose may support [the Supreme] Court in reviewing the correctness of the lower court's decision."[59] This logic might mean that for the purpose of clarifying rights, just as an appellate court could reach beyond qualified immunity to address the merits, that same court could take appeals from prevailing parties.

But to the extent that the concern is about the negative effect of adverse binding precedent,[60] the non-binding nature of trial court opinions might counteract the continuing interests of officers. This is not neces-

[56] Id. at 2033 n.7.

[57] See Kirkpatrick & Matz, supra note 5, at 664–66 (arguing for the extension of *Camreta* to en banc procedures).

[58] Hart v. Massanari, 266 F.3d 1155, 1163 (9th Cir. 2001).

[59] *Camreta*, 131 S. Ct. at 2032.

[60] See id. at 2030 (discussing reasoning establishing "controlling law" as having "significant future effect on the conduct of public officials").

sarily the case; depending on the effect of trial court opinions on official conduct, that interest might persist in the lower court context.[61] If there is a continuing effect on official conduct notwithstanding the fact that the precedent is not formally binding, this may serve as sufficient continuing stake to permit appeal.[62] If the effect of trial court opinions on official conduct is less pronounced, however, that is a reason to differentiate the two situations.

While many of the principles of constitutional avoidance will be the same, there are also some different principles at work in the context of the jurisdictional analysis for appeals than for reaching the merits notwithstanding a ruling of qualified immunity in terms of what it means to have a "case or controversy."[63] As an additional note, extending *Camreta* vertically might greatly increase the number of interlocutory appeals if the adverse merits ruling could be appealed from that stage.[64] It would therefore be advisable to deny interlocutory review of prevailing-party appeals to the lower appellate courts. Overall, although there are some considerations that might tempt lower courts to rely on the reasoning, they will likely generally decline to do so.

Even if taking prevailing-party appeals in some instances seems desirable, one interpretation of the language in *Camreta* is that it suggests that the reasoning of the opinion applies only to the Supreme Court and discretionary review of petitions for certiorari. At least the Sixth Circuit seems to assume that this is the case and that the prudential standing analysis for lower courts has not changed its ability to take such appeals.[65] Although very few opinions have addressed the issue directly,

[61] See Spann, supra note 39, at 1312.

[62] Cf. *Camreta*, 131 S. Ct. at 2029 ("If the official regularly engages in that conduct as part of his job (as Camreta does), he suffers injury caused by the adverse constitutional ruling.").

[63] See generally Lea Brilmayer, The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement, 93 Harv. L. Rev. 297, 297–302 (1979) (discussing the purposes and contours of the justiciability doctrines).

[64] Interlocutory appeals can typically be taken from a denial of qualified immunity. See Mitchell v. Forsyth, 472 U.S. 511, 536 (1985). This general statement does not capture all of the nuances of when interlocutory appeal is available, however. The Supreme Court limited interlocutory review in *Johnson v. Jones*, 515 U.S. 304, 313 (1995), by denying it where the grant of qualified immunity on a motion for summary judgment "determines only a question of 'evidence sufficiency.'" The Court then rejected an extension of this rule in *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009), when it held that a denial of a motion to dismiss for failure to state a claim may nonetheless permit interlocutory appeal.

[65] See Wheeler v. City of Lansing, 660 F.3d 931, 940 (6th Cir. 2011); see also Spann, supra note 39, at 1311–12 (making the same assumption).

the cases so far demonstrate inconsistency and confusion as to whether *Camreta* will be vertically extensible.[66] The question of vertical extensibility may also be one of whether the government may cross-appeal.[67] So even if interlocutory review were denied to lower court review of adverse merits determinations for prevailing parties, the vertical extensibility of *Camreta* would remain important.

If *Camreta* does extend to lower courts, this risks destabilizing our current conception of standing analysis. For this reason, and due to the specific reservation of the issue in *Camreta* itself, it seems more likely that the lower courts will not rely on *Camreta* to hear appeals by prevailing parties, at least when it comes to ordinary appeals to a panel of judges. Where review is sought from a higher authority such as a circuit sitting en banc, however, extension of *Camreta* vertically is somewhat more likely and would have a less systemic effect on the adversity requirement.

II. THE SUBSTANTIVE EXTENSIBILITY OF *CAMRETA* TO THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE

This Part asks whether and when *Camreta* will extend substantively. After first examining how and why *Camreta* might be useful in the con-

[66] Compare City of Redding, Cal. v. FERC, 693 F.3d 828, 835 (9th Cir. 2012) (citing *Camreta* for the general proposition that prevailing parties with a continuing stake may appeal), and Miami Tribe of Okla. v. United States, 656 F.3d 1129, 1131, 1137–38 (10th Cir. 2011) (relying in part on *Camreta* to hold that the government could "challenge the district court's remand order, even though the government substantially prevailed in the district court's final judgment"), with *Wheeler*, 660 F.3d at 940 (assuming that the reservation of the issue by the Supreme Court and lack of precedential value of trial court opinions means that there is no right to appeal trial). See also Ali v. Rumsfeld, 649 F.3d 762, 773 (D.C. Cir. 2011) ("If a court decides that the defendant violated the plaintiff's constitutional right but is entitled to qualified immunity because the right was not clearly established at the time, the 'prevailing' defendant presumably would not be able to appeal the adverse constitutional holding." (citing *Camreta*, 131 S. Ct. at 2028–33)).

[67] See Hensley v. Gassman, 693 F.3d 681, 686–87, 687 n.4 (6th Cir. 2012) (citing *Wheeler*, 660 F.3d at 941) (dismissing a cross-appeal by a qualified immunity defendant from an adverse merits judgment). This issue arose even before *Camreta* was decided but was without definitive resolution. Compare Kalka v. Hawk, 215 F.3d 90, 96 (D.C. Cir. 2000) (assuming that officials in *Bivens* actions may cross-appeal the adverse merits ruling), with Horne v. Coughlin, 191 F.3d 244, 247 (2d Cir. 1999) (noting that "government defendants, as the prevailing parties, will have no opportunity to appeal for review of the newly declared constitutional right in the higher courts"). See also EEOC v. Chi. Club, 86 F.3d 1423, 1431–32 (7th Cir. 1996) (suggesting that cross-appeal is necessary when the appellee's argument to modify the reasoning of the trial court would establish adverse precedent to the appellant).

text of other doctrines, this Part delves into the good-faith exception to the exclusionary rule as one instance where *Camreta* may be applicable. It briefly covers the history of the good-faith exception before turning to how *Camreta* could substantively extend to the context of the good-faith exception.

Camreta allows the Supreme Court to review adverse merits reasoning in cases that would otherwise be insulated from review. Such insulation can occur wherever there is an order of battle with multiple grounds of disposition. For doctrines with an order-of-battle element, *Camreta* will extend substantively—if at all—in a way that is cabined by its reasoning. That reasoning is composed of two prongs: first, do the parties retain a continuing stake (the constitutional prong) and second, is there a reason to permit review from a prudential standpoint (especially if issues of importance risk evading review). Whereas the question of *Camreta*'s vertical extensibility depends on the roles of different courts, its substantive extensibility depends on whether parties that prevail under other doctrines will want to seek review of adverse merits determinations and whether the Court will want to grant such review. For example, in situations such as harmless error, future conduct will likely not be affected by the reasoning of an opinion because the error will likely continue to be harmless regardless of the merits disposition.[68] Like qualified immunity, the good-faith doctrine focuses on legal change and divorces a right from a remedy in a way that might incentivize prevailing parties who lose on the merits to seek review. It is therefore a prime candidate for the substantive extension of *Camreta*.

A. The History of the Good-Faith Exception to the Exclusionary Rule

The good-faith exception, like qualified immunity, is a doctrine that suppresses a remedy. The specific remedy at issue for the good-faith exception, the exclusionary rule, provides that evidence obtained in violation of a defendant's rights cannot be used in a later criminal proceeding against that individual. It was first extended to the states in *Mapp v. Ohio*,[69] after which it became one of the primary sources of Fourth

[68] See Sam Kamin, Harmless Error and the Rights/Remedies Split, 88 Va. L. Rev. 1, 38–39 (2002) ("[T]he temporal quality that we see in both non-retroactivity and qualified immunity is missing from harmless error, and as a result, there is very little impetus for state actors to change their behaviors over time.").

[69] 367 U.S. 643, 660 (1961).

Amendment litigation and legal articulation.[70] While the exclusionary rule has been subject to criticism both in Supreme Court opinions and from commentators,[71] it remains the default rule. The good-faith exception to the exclusionary rule operates such that under certain circumstances, where officials are said to have acted in "good faith," suppression will not be granted to the criminal defendant regardless of whether a court subsequently determines that the defendant's rights were violated by those actions.[72] "Good faith" is a term of art that applies only under specific sets of circumstances and has undergone significant expansion and development since its inception.

Applying the good-faith doctrine to deny suppression under certain circumstances is an exception from the baseline rule. If suppression is generally granted as a remedy, the good-faith exception serves to sever remedy from right under certain circumstances. This raises an order-of-battle question each time it applies. That is, the court analyzing the claim has the option to rely on the good-faith exception to deny the suppression motion even as it holds that the conduct did violate the defendant's rights. In this way, good faith resembles qualified immunity and could be one doctrine to which *Camreta* might extend.

The good-faith exception to the exclusionary rule originated in *United States v. Leon*, when the Supreme Court held that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."[73] At heart the rationale for the rule was that the Court "questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment."[74] The good-faith exception has its roots in "good faith" qualified immunity, which relieves official actors from liability in civil litigation under certain circumstances. In her analysis of the borrowing

[70] See Leong, supra note 54, at 422–23 (finding that of the 1297 published federal appellate decisions articulating a Fourth Amendment principle from 2005 through 2009, 926 were adjudicated in the context of suppression motions, 359 were adjudicated in the context of a civil § 1983 or *Bivens* action, and 12 were adjudicated in a different context).

[71] See, e.g., Hudson v. Michigan, 547 U.S. 586, 591 (2006) ("Suppression of evidence . . . has always been our last resort, not our first impulse."); Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 770, 785 (1994).

[72] See, e.g., Davis v. United States, 131 S. Ct. 2419, 2427–28 (2011).

[73] 468 U.S. 897, 922 (1984).

[74] Id. at 918.

that occurred between the qualified immunity and good-faith exception doctrines, Professor Jennifer Laurin has noted that "borrowing from the Court's relatively well-developed qualified immunity jurisprudence enhanced the legitimacy of *Leon*'s significant modification of the exclusionary rule."[75] And while she contends that the borrowing from qualified immunity was "inapt," she also notes that the borrowing process was not much remarked on at the time.[76]

Over the years, the good-faith exception has eaten away at the baseline exclusionary rule. This increased use of the exception to the exclusionary rule represents a growing gap between the Fourth Amendment rights and the remedies that will be available to criminal defendants. The order-of-battle determination is therefore of growing importance. The good-faith exception was first expanded to a variety of specific factual situations such as police reliance on unconstitutional but not patently invalid statutes[77] and police reliance on erroneous warrants due to clerical errors by court employees.[78] One of the more recent expansions of the doctrine was in *Herring v. United States*, where the good-faith exception was held to apply to a police bookkeeping error because it was a case of "isolated negligence attenuated from the arrest."[79] The Court came to this conclusion as a result of an explicit balancing between the costs and benefits of the remedy: "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system."[80] These narrower, more particularized applications of the good-faith exception imply a narrow realm in which the order-of-battle determination will operate for suppression motions. However, the most recent and likely future such expansions serve to greatly increase the importance of these issues.

The most recent expansion of the good-faith exception has increased its scope potentially dramatically. In 2011, the Court held in *Davis v. United States* that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary

[75] Jennifer E. Laurin, Trawling for *Herring*: Lessons in Doctrinal Borrowing and Convergence, 111 Colum. L. Rev. 670, 706 (2011).
[76] Id. at 704.
[77] Illinois v. Krull, 480 U.S. 340, 349–50 (1987).
[78] Arizona v. Evans, 514 U.S. 1, 15–16 (1995).
[79] 555 U.S. 135, 137 (2009).
[80] Id. at 144.

rule."[81] To many commentators, this expansion was not unexpected.[82] While the Court downplayed the importance of its new rule, stating that "[d]ecisions overruling this Court's Fourth Amendment precedents are rare,"[83] its greatest potential effect is that it permits courts to decide the good-faith issue before reaching the merits of a claim wherever there exists binding circuit precedent.

This in itself may be considered a relatively small step, and as long as *Davis* is not extended to police action where the law is unsettled, the effect of *Davis* will not be dramatic. Justice Sotomayor, in concurring, emphasized that *Davis* applied only where the law was not unsettled.[84] However, the expansion of the good-faith exception to situations where there is no binding precedent is an open question that has so far caused a split in the district courts.[85] And Justice Breyer, writing in dissent, seemed almost to assume that the expansion of *Davis* to unsettled law flowed logically from the Court's reasoning.[86] If this expansion is made, *Davis* is the first step down a pathway that will lead to qualified immunity and the good-faith exception being potentially coextensive types of determinations that will raise precisely the same order-of-battle issues. The difference will remain that they raise these identical issues in the contexts of civil litigation and suppression motions respectively.

Davis not only represents a trajectory of expansion for the good-faith exception but also a move to a culpability standard in analyzing the exclusionary rule more broadly,[87] which affects the degree to which

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[81] 131 S. Ct. at 2423–24 (2011).

[82] See, e.g., Laurin, supra note 75, at 730 (predicting *Davis*'s result); Tracey Maclin & Jennifer Rader, No More Chipping Away: The Roberts Court Uses an Axe to Take Out the Fourth Amendment Exclusionary Rule, 81 Miss. L.J. 1183, 1189 (2012) (calling *Davis* "predictable").

[83] *Davis*, 131 S. Ct. at 2433.

[84] Id. at 2436 (Sotomayor, J., concurring).

[85] See United States v. Robinson, 903 F. Supp. 2d 766, 782–83 (E.D. Mo. 2012) (discussing the brewing split in the federal district courts, which is so far relatively evenly divided, over whether the good-faith exception will extend to cases where there is no binding appellate precedent, and joining the opinions that decline to so extend *Davis*).

[86] *Davis*, 131 S. Ct. at 2439 (Breyer, J., dissenting) ("[A]n officer who conducts a search that he believes complies with the Constitution but which, it ultimately turns out, falls just outside the Fourth Amendment's bounds is no more culpable than an officer who follows erroneous 'binding precedent.'"); see also Craig M. Bradley, Is the Exclusionary Rule Dead?, 102 J. Crim. L. & Criminology 1, 11–12 (2012) (predicting that an extension of *Davis* is likely).

[87] See George M. Dery III, "This Bitter Pill": The Supreme Court's Distaste for the Exclusionary Rule in *Davis v. United States* Makes Evidence Suppression Impossible to Swallow,

Camreta could be extended to the good-faith exception because it presages increased scope for the good-faith exception. The culpability framework was enunciated in *Herring*, in which the Court stated that "[a]s laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[88] A culpability focus for the exclusionary doctrine represents a fundamental shift in the nature of the exclusionary rule as compared with the conception from *Mapp*.[89] As the dissent in *Davis* points out, the officer who erroneously resolves a close but unsettled legal question is "no more culpable" than one who follows binding circuit precedent that is later overturned.[90] The rhetoric of culpability in the most recent good faith opinions will therefore likely have ramifications for the scope of the exception. And as good faith starts to resemble qualified immunity more and more, the possibility increases that important merits determinations will be similarly insulated from review because of the order-of-battle issue in good faith.

The shift to a focus on the costs and benefits of the exclusionary rule first began in 1974, not long after *Mapp*, when the Supreme Court declined to apply the exclusionary rule to grand jury proceedings in *United States v. Calandra*.[91] As an alternative way of envisioning the remedy, the exclusionary rule could be thought of as a form of disgorgement where the government was not entitled to illegally obtained evidence, for which analysis culpability would be immaterial.[92] Rejecting this conception of the rule, the focus on culpability represents a convergence between in the doctrines of exclusion and qualified immunity.[93] This con-

23 Geo. Mason U. C.R. L.J. 1, 19 (2012) (postulating that the move to a focus on police culpability could make the good-faith exception swallow the exclusionary rule); see also *Davis*, 131 S. Ct. at 2428 (evincing the opinion that police reliance on binding circuit precedent is not culpable conduct and stating that lack of culpability "dooms Davis's claim").

[88] 555 U.S. at 144.

[89] 367 U.S. at 656 (calling the exclusionary rule "logically and constitutionally necessary" and "an essential ingredient" of Fourth Amendment rights).

[90] *Davis*, 131 S. Ct. at 2439–40 (Breyer, J., dissenting).

[91] United States v. Calandra, 414 U.S. 338, 349, 351–52 (1974); see Orin S. Kerr, Good Faith, New Law, and the Scope of the Exclusionary Rule, 99 Geo. L.J. 1077, 1081 (2011) (noting the doctrinal shift that began with *Calandra*).

[92] See Arizona v. Evans, 514 U.S. 1, 19 (1995) (Stevens, J., dissenting) ("[T]he implementation of this constitutionally mandated sanction merely places the government in the same position as if it had not conducted the illegal search and seizure in the first place.").

[93] See Laurin, supra note 75, at 727 (analogizing the debt owed by *Herring*'s culpability framework to qualified immunity doctrine).

vergence substantively increases the likelihood of *Camreta*'s applicability as a procedure.

B. Extending Camreta *to Good Faith*

The question of *Camreta*'s substantive extensibility has both positive and normative components. Whether *Camreta* extends to other doctrinal contexts is informed by whether such extension would be favorable for purposes of legal development and in light of jurisdictional principles. *Camreta* should be extended to the good-faith exception both because its reasoning at least potentially applies wherever there can be merits-first adjudication, and because its extension could solve the same types of problems in good-faith order-of-battle determinations as *Camreta* itself does for qualified immunity. Order-of-battle determinations in the good-faith exception context will be of increasing importance as the doctrine is enlarged. The convergence between the pressure that will be applied to this problem might also motivate a convergence in the jurisdictional principles (specifically, *Camreta*) that allow the Supreme Court to correct lower court mistakes that might otherwise become practically insulated from review.

1. Order of Battle in the Good-Faith Exception Context

As a theoretical matter, *Camreta* might apply in each context where there is an order-of-battle problem analogous to the one that exists for qualified immunity. The good-faith exception to the exclusionary rule is one doctrinal context in which the order of battle appears, although the problem of its order of battle is neither as controversial nor as well examined as the order of battle for qualified immunity. Other contexts with order-of-battle components include the analyses of habeas corpus,[94]

[94] Although because *Teague v. Lane*, 489 U.S. 288, 316 (1989), forecloses merits-first adjudication unless the rule would be retroactive on habeas corpus, the order-of-battle issue is presently quiescent in the vast majority of cases arising in that context. As the Court said:

> [I]mplicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to *all* defendants on collateral review through one of the two exceptions we have articulated.

Id.

harmless error,[95] and ineffective assistance of counsel.[96] There are undoubtedly others. This Note focuses on the good-faith exception to the exclusionary rule not only because there are conceptual similarities and differences between the good-faith exception and qualified immunity, but also because the suppression and constitutional tort contexts are major engines of Fourth Amendment legal development and major sources of police regulation.[97]

The order-of-battle issue in the good-faith exception context is much less well examined than the qualified immunity order of battle. Unlike for qualified immunity,[98] there has been no sustained empirical study for the order of battle that is used in deciding suppression motions.[99] Of course, the prevalence of cases where the government loses on the merits but prevails on good faith will necessarily affect the ultimate question of the degree to which *Camreta*'s potential extensibility to the good faith context will operate in practical terms. The recent developments in both qualified immunity doctrine and in the good-faith exception to the exclusionary rule have represented an overall trend toward narrowing the availability of remedies. As Professor Orin Kerr has stated of *Camreta* and *Davis*, "both reflect an optimistic view that Fourth Amendment law development is possible in a regime of zero or very limited remedies."[100] Considering that view optimistic is probably an understatement.

[95] See Kamin, supra note 68, at 53–55 (noting that the proper order of battle for harmless error is murky, although the Court has at least indicated that the existence of error is a prerequisite to declaring the error harmless).

[96] Strickland v. Washington, 466 U.S. 668, 697 (1984) ("Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

[97] Some question, however, whether constitutional regulation is the best way of regulating police conduct. See Rachel A. Harmon, The Problem of Policing, 110 Mich. L. Rev. 761, 790–92 (2012).

[98] See generally Sampsell-Jones & Yauch, supra note 25.

[99] There is no fixed order of battle when it comes to analyzing good faith in suppression motions. See Pearson v. Callahan, 555 U.S. 223, 241–42 (2009).

[100] Orin S. Kerr, Fourth Amendment Remedies and Development of the Law: A Comment on *Camreta v. Greene* and *Davis v. United States*, 2010–2011 Cato Sup. Ct. Rev. 237, 238; see also id. at 253 ("While *Camreta* discussed the needs of law development, it did so only within the confines of the Court's embrace of qualified immunity and the recent rule of *Pearson v. Callahan*. The justices' desire to allow law development within the zone of qualified immunity pushed the Court to find a way to review lower court decisions in a remedy-free zone.").

Like ineffective assistance of counsel, good faith is not subject to a mandatory order of battle.[101] It is therefore presently of the same status as qualified immunity in that the order of battle at both the trial and appellate levels is discretionary. There might be reasons to have a different order-of-battle analysis at the trial level than at the appellate level. Appellate courts that would prefer to reach the merits may have a difficult time doing so where the trial court decided that it would not consider the merits because the remedy was unavailable. And nonbinding merits determinations at the trial court level might reasonably be considered to have less potential to cause mischief if they are ill-advised or suffer from the flaws that some consider to plague advisory opinions.[102] It might be useful to mandate merits-first review for district courts but not at the appellate court level. The discretion, or lack thereof, of district court judges in order-of-battle determinations has so far mirrored that of appellate courts. *Saucier v. Katz* had mandated the order of battle for both district and appellate courts,[103] whereas *Pearson v. Callahan* provided discretion to both levels of courts.[104] Like for qualified immunity, the order of battle for the good-faith exception is presently a matter of discretion, and it likewise need not necessarily be so.[105]

The gap between rights and remedies is what creates the potential for an order-of-battle problem, and the order-of-battle problem is what raises the question of *Camreta*'s substantive extensibility. In some cases, the appropriate order in which to resolve issues is clear, and the question of prevailing-party appeals will be very unlikely to arise. To take an extreme example, consider the situation where a new claim raised in a subsequent proceeding is barred by claim preclusion. While it would be possible to first determine whether the new claim had merit before determining that no relief was warranted, this order seems unlikely, espe-

[101] See *Pearson*, 555 U.S. at 241–42 (2009) (comparing qualified immunity to both ineffective assistance of counsel claims and the good-faith exception to the exclusionary rule, neither of which has a mandatory order of battle).

[102] This will depend on exactly what harms advisory opinions are thought to have. For a general discussion of the virtues of the avoidance principle and the harms of advisory opinions, see Thomas Healy, The Rise of Unnecessary Constitutional Rulings, 83 N.C. L. Rev. 847, 922–35 (2005).

[103] 533 U.S. 194, 201, 207 (2001).

[104] 555 U.S. at 236.

[105] See Kerr, supra note 100, at 258–59 (suggesting a mandatory order of battle to apply in the context of the good-faith exception to the exclusionary rule).

cially where the preclusive effect of the earlier claim is the easiest question to resolve (as seems likely).

2. How to Decide Whether to Extend Camreta

At least two factors will influence whether *Camreta* should be extended. The first factor asks whether the remedial suppression operates for the purpose of facilitating legal change. Where it does, the extension of *Camreta* is probably justified. Though this effect was disclaimed in *Davis*,[106] the way that good faith operates to deny the retroactivity of a legal remedy[107] shows that good faith facilitates legal change, even if this effect is not exactly embraced in the Court's rhetoric in the same way that it is for qualified immunity. The second factor asks whether merits-first determinations that the prevailing party would want reviewed will arise often. Where merits-first determinations potentially insulating legal change from Supreme Court review are rare, perhaps because courts have no occasion or feel no need to reach the merits when deciding other questions, *Camreta* will not be needed.

This history of the good-faith exception shows some of the ways qualified immunity and the good-faith exception are relevantly similar for the purposes of *Camreta*'s substantive extension. Qualified immunity and the good-faith exception to the exclusionary rule are two doctrines that facilitate legal development by reducing its costs. One of the principal costs of legal change is the retroactive application of the remedies that flow from new law. There is no way to affect the past official conduct that constituted what is now known to have been a violation, so providing remedies provides no deterrent benefit but still imposes the full costs of the new law on the officials in question. By suppressing the remedial enforcement of the new legal regime to conduct that has already occurred, qualified immunity and good faith are similar in that they operate to ease judicial innovation.[108] Where the costs are backward-looking and the benefits are forward-looking (for example, because the benefits are largely based on deterring official conduct that violates individuals' rights), remedial suppression can facilitate the

[106] See 131 S. Ct. at 2432.

[107] As does qualified immunity itself, see supra note 12 and accompanying text.

[108] See John C. Jeffries, Jr., The Right-Remedy Gap in Constitutional Law, 109 Yale L.J. 87, 98–100 (1999) (discussing how gaps between rights and remedies can facilitate desirable legal change).

redefinition of the underlying rights.[109] This divorce between rights and remedies is what makes it possible for an order-of-battle issue to arise where determining that no remedy is available might obviate the need to decide the merits. Where courts instead decide the merits but in fact do end up denying a remedy, there will be no avenue of review if *Camreta* is not extended.

It is hard to determine exactly how often courts would reach adverse merits determinations that the government would want to appeal in the good faith context, especially without knowing the scope of possible future expansion. It is worth noting that in addition to the preferences of courts, this will be affected by the procedural context of the good-faith exception. There are classes of cases where the appeals courts are not going to reach the issue of good faith because the denial of a suppression motion will not be appealed (for example, pursuant to a plea agreement that waives the defendant's ability to appeal). The importance and prevalence of suppression motions makes it likely that these issues will still arise with some frequency. And criminal defendants, like qualified immunity plaintiffs, might not seek certiorari where they lost a suppression motion because of the good-faith exception to the exclusionary rule, even though the government might still want to seek review of an adverse merits determination.

To make the example of *Camreta*'s extensibility to the good-faith exception to the exclusionary rule more concrete, remember that in *Camreta* itself, S.G. stated that she had been sexually abused by her father after the questioning by the officials.[110] In fact, her father was indicted and went to trial for sexual abuse of S.G.[111] Now imagine that he sought to have the evidence of S.G.'s statements excluded on the ground that they had been illegally obtained in violation of the Fourth Amendment.[112] Suppose that the lower courts had all ruled that while the officials' ac-

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[109] See Toby J. Heytens, The Framework(s) of Legal Change, 97 Cornell L. Rev. 595, 614–16 (2012) (discussing the limitations of using remedy suppression to facilitate legal change).

[110] 131 S. Ct. at 2027.

[111] Id.

[112] Whether this argument was actually made by his defense does not matter for the example. If it had been, it probably would have failed because the father would not have had standing to suppress statements made in violation of the rights of another. To have standing under the Fourth Amendment, your rights (and not those of another) need to have been violated. See Rakas v. Illinois, 439 U.S. 128, 150 (1978). For purposes of this Note, however, it is better to ignore this additional component of Fourth Amendment doctrine.

tions did indeed violate S.G.'s rights (reaching the merits first for the order of battle), the good-faith exception to the exclusionary rule prevented suppression of that evidence because the law was unsettled. This would be one plausible interpretation of *Davis* that would mark the expansion of the good-faith exception to qualified immunity proportions. For the purposes of this example, Greene, the defendant, lost the suppression motion because of the good-faith exception to the exclusionary rule. Like in the qualified immunity context, the government may have wanted to seek review of the Fourth Amendment ruling that made it unlawful to interview S.G. at school without her parents. Absent a substantive extension of *Camreta*, there would be no avenue for the government to do so.

Camreta's extensibility will also be cabined by its logic. For justiciability purposes, setting aside issues of prudence, *Camreta* focuses on the continuing stake of the parties and provides specific formulations of what these interests may be.[113] The stake of the prevailing party on a *Camreta*-type appeal persists because "the judgment may have prospective effect on the parties" where "the official regularly engages in that conduct as part of his job."[114] In the good-faith context, either the federal or a state government will be requesting suppression. There is no literal "official" who is a named party that will "regularly engage[] in the conduct as part of his job," although police officers generally will do so and the officer on whose conduct the suppression is based will probably also do so. The application of prevailing-party standing in the good faith context, however, avoids what is in fact a fiction of *Camreta*. In *Camreta*, the continuing official conduct is a proxy for a continuing governmental interest. One could envision a limit on *Camreta*'s substantive extensibility due to the party with the continuing interest not being an officer acting in his or her official capacity because the government is not the real party in interest; instead, where the government is both the real and the nominal party in interest, the prevailing party's (the government's) continuing stake is even clearer.

The analogy cannot be made as cleanly for the continuing stake of the losing party below, although the situation is no messier in the good faith context than it already is for qualified immunity. The losing plaintiff will have a stake in the *Camreta* situation where "the person who initially

[113] *Camreta*, 131 S. Ct. at 2028–30.
[114] Id. at 2029.

brought the suit may again be subject to the challenged conduct."[115] The Court suggests that this may be the same type of propensity showing that is required for standing in the first instance.[116] This is unlikely if, as the Court states, the plaintiff "ordinarily retain[s] a stake in the outcome,"[117] and the requirement will probably be satisfied with a much lower probability of repeated exposure to the challenged conduct. The losing party below for the good-faith exception would be the criminal defendant asking for suppression, who would ordinarily seem to have no greater or lesser ability to satisfy this standard than the typical plaintiff in a Section 1983 or *Bivens* action. By this measure, the continuing stakes of the parties will be often as good and sometimes better in the good-faith exception context than in the context of qualified immunity.

3. The Role of Davis*'s Probable Expansion*

For the good-faith exception, deciding both of these factors—in this context, the degree to which it affects the articulation of Fourth Amendment law and the prevalence of merits insulation—will depend on doctrinal expansions of the exception itself post-*Davis*. As noted above, this is still an open question.[118] Assuming that the good-faith exception will expand to cover questions of police action in the face of legal uncertainty and that "the same standard of objective reasonableness"[119] will be used both for qualified immunity and good-faith determinations of remedial availability based on such action, these practical considerations are likely to cut in favor of expanding *Camreta*. These are also the considerations that constitute the prudence prong of *Camreta* itself.

The possible expansion of the good-faith exception to the qualified immunity context will determine the frequency and importance of potential prevailing-party appeals. This would bring the good-faith exception in line with the clearly established law standard of qualified immunity and would increase the scope of the order-of-battle problem. For qualified immunity, whether immunity is granted requires analysis of highly specific factual contexts to determine whether the law is clearly established and therefore whether immunity is available. The requirement that

[115] Id.
[116] See id. (citing City of L.A. v. Lyons, 461 U.S. 95, 111 (1983)).
[117] Id. at 2033.
[118] See supra note 85 and accompanying text.
[119] Malley v. Briggs, 475 U.S. 335, 344 (1986).

the law be specified with such precision is one reason why legal development is so important for qualified immunity. If the good-faith exception is expanded to the same degree, the importance of the exclusionary rule for legal articulation will be greater, not less. It will therefore become even easier to contend that the prudence prong of *Camreta* is satisfied.

4. Additional Considerations and Concerns

Four additional practical considerations might differentiate the good-faith exception and qualified immunity contexts for *Camreta* purposes. First, the procedural rules for the two types of cases differ. Second, Supreme Court review might be warranted to a greater or a lesser degree in the different contexts based on the content of the substantive doctrines and the degrees of inter-jurisdictional disuniformity. In addition, some of *Camreta*'s broader implications are specific to the context of qualified immunity and should not be read as part of the analysis of its extensibility. Finally, interlocutory review of prevailing-party appeals should almost certainly always be denied.

There is one practical limitation on prevailing-party review in the context of the good-faith exception and therefore necessarily criminal trials, although it does not directly bear on *Camreta*. Rules preventing double jeopardy might mean that there are fewer cases where the government has the opportunity to appeal an adverse merits determination. That is, where the government wins a suppression motion but loses a trial, the government will have no right to appeal. The issue will nonetheless arise where, for example, the government has reserved the right to appeal denial of a suppression motion in a plea agreement and the appellate court subsequently denies suppression on the basis of good faith while ruling against the government on the merits.

As an additional practical consideration, there are enough circuit splits grounded in the interpretation and extension of the Court's Fourth Amendment jurisprudence to make additional Supreme Court review beneficial.[120] The rarity of handing down pro-defendant rules only highlights the problem of the prevalence of circuit splits on Fourth Amendment issues, although this aspect of the problem is not likely to be

[120] See Wayne A. Logan, Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment, 65 Vand. L. Rev. 1137, 1149–50 (2012); see also id. at 1142 (discussing the practical difficulties caused by circuit splits).

solved solely by liberalizing Supreme Court review for prevailing-party appeals based on good-faith determinations.

At least some of the possible implications of the *Camreta* opinion may not be extensible out of the specific context of qualified immunity. For example, Professor Nancy Leong suggests that losing Section 1983 plaintiffs should be considered prevailing parties for the purposes of obtaining attorneys' fees thanks to *Camreta*'s reasoning.[121] There is something appealing about the issue she identifies and the result she suggests, but this is one suggestion that would be substantively limited by the doctrinal differences between qualified immunity and the good-faith exception.

Depending on whether *Camreta* is vertically extensible, there might be prudential reasons to cabin the scope of interlocutory review. Procedurally, qualified immunity and good faith are similar in that interlocutory review is available for each. In *Mitchell v. Forsyth*, the Court held that denials of qualified immunity were subject to interlocutory appeal,[122] although this general rule is subject to some nuance.[123] Likewise, interlocutory review is available, at least in federal prosecutions, for the grant of suppression motions.[124] There is a persuasive argument that prevailing-party interlocutory review is unduly burdensome. In both contexts, this is simply an argument for limiting the interpretation of the doctrines that allow for interlocutory review and not specifically for limiting *Camreta*'s extensibility.

Ultimately, *Camreta* should, by its own logic, probably extend to the context of the good-faith exception to the exclusionary rule. Whether such extension is warranted can be summarized as (1) whether *Camreta*'s constitutional prong is satisfied by the continuation of a sufficient stake in both parties, and (2) whether *Camreta*'s prudence prong is satisfied by circumstances such as a context where courts engage in self-

[121] Nancy Leong, Commentary: Allowing Appeals by Winners, SCOTUSblog (June 2, 2011, 8:41 AM), http://www.scotusblog.com/2011/06/commentary-allowing-appeals-by-winners/.

[122] 472 U.S. 511, 530 (1985).

[123] See supra note 64.

[124] 18 U.S.C. § 3731 (2006) (providing that "appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence . . . not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information"). However, this statute does not permit defendants to raise a cross-appeal based on the denial of motions to suppress. See United States v. Marasco, 487 F.3d 543, 546 (8th Cir. 2007) (citing United States v. Valle Cruz, 452 F.3d 698, 705 (8th Cir. 2006)).

conscious legal articulation. These prongs will ordinarily be satisfied where there is potential for a merits-first adjudication that will not be seen as "mere dicta" but will have future legal effect.

III. THE EFFECT OF *CAMRETA*'S EXTENSION ON THE RELATIONSHIP BETWEEN QUALIFIED IMMUNITY AND THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE

One final ramification of the extension of *Camreta*'s rule about prevailing-party appeals to the good-faith context would be a further convergence of qualified immunity and good-faith doctrines.[125] Convergence is one way of describing "the influence of constitutional tort juris-jurisprudence in shaping the exclusionary remedy."[126] This convergence is most pronounced when looking at the doctrines' effects on police officers, whose conduct is uniquely shaped by both bodies of law. From this perspective, qualified immunity and good faith are, on at least one reading of *Davis*,[127] mirror-image doctrines. Qualified immunity exempts police officers from liability where the law is unsettled, and good faith (since *Davis*) precludes suppression (which would otherwise deter the conduct such officers) where the officers acted in reliance on settled law. The key in both cases is binding circuit precedent.

There is one important way in which the application of the good-faith exception differs from the analogous qualified immunity context. For now, good faith is born only of the reliance of the government agent on state statute[128] or binding circuit precedent.[129] In cases where the law is unclear, prospective defendants currently do not bear the costs imposed by lack of clarity. In a way, this makes good faith similar to qualified

[125] The vocabulary of convergence comes from the work of Professor Laurin, supra note 75, at 674–75, who describes convergence as a "hydraulic" force that operates where courts borrow cross-substantively, as with *Leon*'s borrowing of the good-faith standard from qualified immunity and the ensuing substantive rapprochements of the two doctrines.

[126] Id. at 672.

[127] That is, that *Davis* leaves open the question of good faith for police action in the face of legal uncertainty. 131 S. Ct. 2419, 2435 (2011) (Sotomayor, J., concurring). This is the reading taken by about half of the district courts addressing the issue so far. See infra note 132. If the other half of the district courts discussing the issue are right that *Davis* has implied that good faith applies to action in the face of legal uncertainty, qualified immunity and the good-faith exception are already significantly closer in scope.

[128] See Illinois v. Krull, 480 U.S. 340, 349–50 (1987).

[129] *Davis*, 131 S. Ct. at 2435 (Sotomayor, J., concurring); see also infra note 131 (discussing the brewing district court split on whether *Davis* requires binding precedent or extends even further).

immunity in that it is the prosecution (or the plaintiff) who is disadvantaged when the law is unclear. But this also means that it is the government who is disadvantaged for good faith, whereas it is the citizen who is disadvantaged for qualified immunity. Should the good-faith exception be extended to those cases where the law has not been clearly established, thereby perfecting that aspect of the analogy to qualified immunity, this problem would be exacerbated and the issue of the order of battle to be followed in the context of the good-faith exception to the exclusionary rule should be subject to the same spotlight as the order-of-battle issue in qualified immunity cases.

True convergence would thus occur were good faith to expand to reach situations where the police officers were not acting in contravention of precedent with the same type of factual specificity as is required by qualified immunity.[130] Taking the Supreme Court rhetoric of culpability at face value, the extension of good faith to occupy essentially the same range of actions as those already covered by qualified immunity seems likely.[131] The essential move that would have to be made to achieve parity between the coverage of qualified immunity and the good-faith exception consists of an extension of *Davis* to cases where the law is unsettled. The doctrines would be parallel if the good-faith exception required the same standards for determining what law can be relied on as in the context of qualified immunity. It is possible to imagine various intermediate steps (for example, extending good faith to encompass actions if there is law in other jurisdictions authorizing them or non-binding precedent that does so). These are subsidiary questions. Even without perfect overlap in what will justify official action in the different contexts, the core extension of the good-faith exception to the exclusionary rule would be to questions of law unsettled in a given circuit. District courts since *Davis* have been splitting relatively evenly over whether it applies to limit suppression.[132] This split is likely to work

[130] Of course, it might also occur if qualified immunity were restricted such that officers were only excused from liability if they acted in reliance on binding circuit precedent. This outcome seems far less likely.

[131] See *Davis*, 131 S. Ct. at 2439–40 (Breyer, J., dissenting). But see id. at 2435 (Sotomayor, J., concurring).

[132] So far, the United States District Courts for the District of Massachusetts, the District of Hawaii, the District of Rhode Island, the District of Delaware, the Eastern District of Louisiana, and the Eastern District of Tennessee have concluded that the good-faith exception can apply notwithstanding a lack of binding appellate precedent, whereas the Eastern District of Pennsylvania, the Northern District of Mississippi, the Eastern District of Kentucky, the

its way through the appellate courts and require ultimate resolution by the Supreme Court.

This discussion of convergence focuses on the prospect of a doctrinal expansion of the good-faith exception post-*Davis*. Posing the question of *Camreta*'s extensibility puts pressure on whether the good-faith exception will focus attention on the order-of-battle issue and the need for suppression motions to continue to play a role in articulating constitutional (specifically Fourth Amendment) rights. If so, *Camreta*-type review seems almost certain. If not, the question should pass by largely unexamined.

To determine whether *Davis* should be expanded, the question arises whether the convergence of the good-faith exception with qualified immunity is and will be advantageous. On a certain level, there is an attractive parallel when the two standards match. But one thing to note about increasing the trend to make good faith more like qualified immunity is that then the good-faith exception will be plagued by some of the problems that have so far bedeviled qualified immunity. For example, "[r]equiring a plaintiff to demonstrate that the law was clearly established and that the conduct causing complaint was plainly proscribed by these legal principles immunizes serious governmental misconduct."[133] The same immunization could occur for the conduct that would normally be deterred by the exclusionary rule should suppression become likely or available only where there has been an egregious wrongdoing.[134] In addition, the proper order of battle in qualified immunity cases is a problem with no easy resolution, as evidenced by the degree to which the Court has struggled with it. This same struggle would be exacerbated were the order of battle to reach the same degree of importance in exclusionary rule cases by virtue of the application of the good-faith exception. If it did, extension of *Camreta* would release the pressure of the po-

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Eastern District of Missouri, and now also the District of Maryland have decided that *Davis* is limited to binding appellate precedent. See United States v. Lopez, No. 10-CR-67 GMS, 2013 WL 3212347, at *5 & n.17 (D. Del. June 26, 2013) (discussing the split); United States v. Ventura, No. CRIM. WDQ-10-0770, 2013 WL 1455278, at *21 (D. Md. Apr. 8, 2013); United States v. Robinson, 903 F. Supp. 2d 766, 782–84 (E.D. Mo. 2012) (discussing the split); see also United States v. Sparks, 711 F.3d 58, 64 (1st Cir. 2013) (discussing "how apposite must the relied-on precedent be" before *Davis* is triggered but concluding that binding circuit precedent authorized the actions in question).

[133] David Rudovsky, The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights, 138 U. Pa. L. Rev. 23, 77 (1989).

[134] See *Davis*, 131 S. Ct. at 2440 (Breyer, J., dissenting) (expressing fear about such a result).

tential insulation of merits-first adjudication from Supreme Court review.

CONCLUSION

Whether *Camreta* will extend to other contexts can be framed as a question of adversity: When will prevailing parties have the appropriate continuing interests in the litigation? This question operates within the analytical bounds set by the *Camreta* opinion. But whether *Camreta* should be extended should conform not only to the opinion's reasoning, but also to its unstated underpinnings by asking whether the relevant doctrine has an order-of-battle issue akin to the one that so plagues qualified immunity and whether there will be merits insulation. Because merits insulation might make courts less willing to decide merits issues (and the Supreme Court less likely to want them to), the extension of *Camreta* might have the counterintuitive effect of liberalizing the abilities of courts to decide order-of-battle questions by reaching the merits first. Of course, the ultimate effect of the behaviors of courts is very difficult to determine, and it could well have the opposite effect (if courts are less likely to want to reach merits issues on which they might be wrong).

The perhaps more important ramification of this Note's observations is the way *Camreta* sheds light on the Supreme Court's ability to control its agenda through jurisdiction. This agenda control is underscored by the Court's choice to decide *Camreta* in the first instance. If *Camreta* remains a doctrine for the Supreme Court alone, it will be one way that the Court will be able to expand its jurisdiction. This method of agenda control will only grow in importance as *Camreta* is extended substantively. How aggressively *Camreta* is extended will therefore be a function not only of how many doctrines have issues potentially insulated from review by the order of battle but also of how strongly the Court will prefer to strip away that insulation.