SUPREME COURT OF THE UNITED STATES

ROCHELLE BROSSEAU *v.* KENNETH J. HAUGEN

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

No. 03–1261. Decided December 13, 2004

JUSTICE BREYER, with whom JUSTICE SCALIA and JUSTICE GINSBURG join, concurring.

I join the Court's opinion but write separately to express my concern about the matter to which the Court refers in footnote 3, namely, the way in which lower courts are required to evaluate claims of qualified immunity under the Court's decision in *Saucier* v. *Katz*, 533 U. S. 194, 201 (2001). As the Court notes, *ante*, at ___, (slip op., at 4), *Saucier* requires lower courts to decide (1) the constitutional question prior to deciding (2) the qualified immunity question. I am concerned that the current rule rigidly requires courts unnecessarily to decide difficult constitutional questions when there is available an easier basis for the decision (*e.g.,* qualified immunity) that will satisfactorily resolve the case before the court. Indeed when courts' dockets are crowded, a rigid "order of battle" makes little administrative sense and can sometimes lead to a constitutional decision that is effectively insulated from review, see *Bunting* v. *Mellen*, 541 U. S. 1019, 1025 (2004) (SCALIA, J., dissenting from denial of certiorari). For these reasons, I think we should reconsider this issue.