No. 07-751

IN THE
Supreme Court of the United States

CORDELL PEARSON, MARTY GLEAVE,
DWIGHT JENKINS, CLARK THOMAS,
AND JEFFREY WHATCOTT,
Petitioners,

v.

AFTON CALLAHAN,
Respondent.

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

BRIEF OF RESPONDENT

James K. Slavens
P.O. Box 752
Fillmore, Utah 84631
(435) 743-4225

Robert A. Long, Jr.
Counsel of Record
Theodore P. Metzler, Jr.
Covington & Burling LLP
1201 Pennsylvania Ave. N.W.
Washington, D.C. 20004
(202) 662-6000

August 2008

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether police officers may enter a home without a warrant on the ground that, by consenting to the entry of a confidential informant into the home, the owner has consented to entry by the police.

2. Whether Petitioners are entitled to qualified immunity from liability under 42 U.S.C. § 1983.

3. Whether the Court's decision in *Saucier* v. *Katz*, 533 U.S. 194 (2001), should be overruled.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

Page(s)

CONSTITUTIONAL PROVISIONS

STATUTES & RULES OF COURT

OTHER

BRIEF OF RESPONDENT

Petitioners are police officers who entered Respondent's home without a warrant and in the absence of exigent circumstances. Petitioners contend that Respondent effectively consented to the police entry by inviting a confidential informant to enter the home. This "consent-once-removed" theory is contrary to the Court's precedents limiting warrantless entry into the home and defining the scope of consent searches. The theory also violates the widely shared social understanding that inviting a single person to enter one's home does not constitute consent for others to enter.

Petitioners do not seriously contend that Respondent actually consented to the officers' entry into his home. Instead, they offer a hodgepodge of invalid arguments in support of their warrantless entry. Petitioners' argument that Respondent had no reasonable expectation of privacy inside his home goes much too far, and would effectively eliminate the need for a warrant when a confidential informant observes contraband in a suspect's home. Nor was Petitioners' entry incident to a lawful arrest. Absent exigent circumstances (which concededly did not exist here), police must obtain a warrant before entering a home to make an arrest.

Mr. Callahan's right to be free from Petitioners' search was clearly established at the time of the Petitioners' entry. Although one court of appeals had approved police officers' warrantless entry into a home based upon an informant's consensual entry, that view was not adopted by this Court or the circuit in which this case arose, and

numerous other courts had held warrantless entries unconstitutional in similar circumstances. Under our federal system, courts of appeals independently decide questions of law, including whether a given right is clearly established. To hold otherwise would give the first court of appeals presented with a novel theory like "consent once removed" the power to confer nationwide immunity to law enforcement officers who violate constitutional rights.

STATEMENT

On March 19, 2002, Petitioners, members of the Central Utah Narcotics Task Force, engaged a confidential informant in a plan to raid Respondent Afton Callahan's home on suspicion of dealing methamphetamine. Pet. App. 2. The informant agreed to help the Task Force after being charged with possession of methamphetamine. J.A. 112. Mr. Callahan resided in Fillmore, Utah, a small city approximately 150 miles south of Salt Lake City. Mr. Callahan's home was located approximately 2.2 miles from the courthouse and the Millard County Sheriff's Department. *See* J.A. 60.

The informant's first contact with police on the day of the raid was at approximately 11:00 a.m. J.A. 49-50, 114. The informant told Petitioner Jeffrey Whatcott that he had agreed to purchase methamphetamine from Mr. Callahan later in the day. Whatcott instructed the informant to confirm

that Mr. Callahan had methamphetamine and then contact the police again.[1] Pet. Br. 5-6.

Between approximately 5:30 p.m. and 8:00 p.m., the informant split a 12-pack of beer with a friend, drinking "six to eight" of the beers himself. J.A. 143-44. The informant and his friend went to Mr. Callahan's residence at approximately 8:30 p.m. and allegedly confirmed that Mr. Callahan had methamphetamine to sell. J.A. 115-17. The informant admitted that he "tasted" or "used" methamphetamine during that visit. J.A. 145, 147-48. The informant left the residence and contacted Petitioners, informing them that he "had a deal going down" and that he "needed them to come over and set it up."[2] J.A. 118.

At around 9:00 p.m., the informant met with Petitioners at the sheriff's office in Fillmore. J.A. 53. He told the officers he had been drinking but did not mention his drug use. Pet. App. 3. Petitioners spent the next two hours with the informant preparing to execute the raid on Mr. Callahan's home. Pet. Br. 7; J.A. 121. The officers made the informant drink

---

[1] Because this case arises from a grant of summary judgment in Petitioners' favor, the Court must view the facts in the light most favorable to Mr. Callahan. Although Petitioners acknowledge that this standard applies (Pet. Br. 5 n.2), their Statement of Facts nevertheless improperly asserts the truth of Petitioners' version of the events. *See*, *e.g.*, *id.* & accompanying text.

[2] Petitioners' description of the informant's first visit to Mr. Callahan's home (Pet. Br. 6-7), does not describe the facts in the light most favorable to Mr. Callahan. Mr. Callahan testified that he did not sell the informant methamphetamine, although two other individuals may have done so. *See* J.A. 379-81.

"five, or six, seven, eight cups of coffee" because he was intoxicated. J.A. 119. They equipped him with a wire so that the officers could monitor the events inside Mr. Callahan's home. J.A. 120. The officers also gave him a hundred-dollar bill that they had photocopied to make the planned purchase. J.A. 121. The informant told the officers that he would "play the drums to give them a key to come in." J.A. 120. During the two hours of preparation, Petitioners did not seek to obtain a warrant to search Mr. Callahan's residence. J.A. 89, 258.

At approximately 11:00 p.m., Petitioners drove the informant the two miles from the sheriff's office to Mr. Callahan's residence and dropped the informant off within walking distance. The informant entered the residence while Officer Whatcott monitored the transmission from the informant's wire and the other officers waited for Whatcott's signal to enter. J.A. 188.

The transmission from the informant's wire was not clear. J.A. 332. Officer Whatcott testified that it "sounded like two or three individuals in the house," but that he "could not distinguish who was who." J.A. 64. There was "either a stereo or TV playing," which the equipment "pick[s] up . . . real well," but he "could hear conversation in between." *Id.* He heard conversation about "the purchase price of a C-note, which is slang for a 100-dollar bill," and other conversation that he could not recall or "couldn't distinguish." *Id.* Eventually, he heard the informant say "that he would like to play the drums that were on the porch." J.A. 64-65. Upon hearing this statement, Whatcott "advised the other officers the deal had been made and they could enter the

residence." *Id.* There was no indication that anyone was in danger, that evidence was about to be destroyed, or that Mr. Callahan was aware of police surveillance.

The officers immediately entered Mr. Callahan's home and ordered the informant, Mr. Callahan, and another individual to the floor. J.A. 190-91, 266. One officer testified that he saw Mr. Callahan "drop something" that he said looked like a bag of methamphetamine that the officers later discovered. J.A. 266-67. Upon searching Mr. Callahan, the officers discovered the hundred-dollar bill they had given to the informant. J.A. 244-45. Mr. Callahan consented to a subsequent search of his home, during which the officers discovered syringes. J.A. 196.

The State Court Proceedings. Mr. Callahan was charged with possession and distribution of methamphetamine. At trial, Officer Jenkins agreed that the officers had "some basis to get a search warrant" before going to Mr. Callahan's house because the informant "had seen the baggies of methamphetamine." J.A. 217. Officer Jenkins also testified that he believed the "legal basis" to enter Mr. Callahan's home was "to secure the persons in the residence at that time. Because we had just purchased methamphetamine, we knew that there was a large quantity of methamphetamine, and we can secure that residence with those people, and either obtain a search warrant from that point or from permission to search." J.A. 216. Officer Pearson testified that he considered getting a warrant, but that the officers "did not have enough time to do it." J.A. 245-46. Officer Pearson also

testified that he believed exigent circumstances justified the entry. J.A. 257. Officer Whatcott testified that there was no attempt to get a search warrant. J.A. 89. None of the officers asserted that their entry was justified by consent or "consent once removed."

Mr. Callahan objected to the introduction of the evidence found inside his home on the ground that the officers' entry and search violated the Fourth Amendment. *See* J.A. 295-297. The prosecutor argued that the officers' entry was justified by exigent circumstances because there was "credible evidence that there [were] controlled substances in the house," that there was "an actual distribution," and "there was more in the house being held for distribution." J.A. 299-300. In response, Mr. Callahan's attorney noted that the first contact with the informant was 12 hours before the entry to Mr. Callahan's home, that the officers were with the informant for two hours after he had observed the methamphetamine, that there are magistrates available in Fillmore, and that a telephone search warrant was also available. J.A. 300.

The court held that the officers had probable cause to make an arrest for distribution because "a felony was committed within their presence" through hearing the informant's signal, and that the entry to the home was proper because there were exigent circumstances. J.A. 301-302. Mr. Callahan then entered into a plea agreement under which he

reserved the right to appeal the denial of his suppression motion.[3]

On appeal, the State conceded "that the trial court erred in finding that the entry was justified by exigent circumstances." J.A. 334. The Utah Court of Appeals agreed that the "Task Force entry was not justified under the doctrine of exigent circumstances." *Id.* n.2. The court stated that "the presence of narcotics, or the possibility of additional drug sales" did not justify finding exigent circumstances where there was "no threat to person or evidence, and nothing in the record suggests that Callahan knew or had reason to suspect, that he was being monitored" by police. *Id.*

The appellate court rejected the State's alternative argument that "Task Force officers inevitably would have discovered the evidence found in the [informant's] pocket." J.A. 335. The court observed that "the argument that if we hadn't done it wrong, we would have done it right, is far from compelling." J.A. 337 (internal quotation marks omitted). Because the Task Force adopted "a plan that included an illegal entry from the outset," the court concluded that no "independent legal avenue for discovery was ever available." J.A. 338 (internal quotation marks and emphasis omitted).

---

[3] Utah permits such conditional pleas. *See* Utah R. Crim. P. 11(j); *Utah* v. *Sery*, 758 P.2d 935, 937-38 (Utah Ct. App. 1988). "A defendant who prevails on appeal shall be allowed to withdraw the plea." Utah R. Crim P. 11(j). Mr. Callahan withdrew his plea following his successful appeal, and the matter was dismissed.

The District Court's Judgment. Mr. Callahan then brought this suit for damages under 42 U.S.C. § 1983, alleging that Petitioners' warrantless entry and search of his home violated his rights under the Fourth and Fourteenth Amendments. Pet. App. 4-5. On cross-motions for summary judgment, Petitioners argued that the search was justified by the "consent-once-removed" theory and three additional grounds. Pet. App. 40.

The district court observed that Petitioners' "strongest argument appears to be the doctrine of 'consent-once-removed.'" *Id.* at 47. According to the court, the doctrine applies if an "'undercover agent or informant (1) entered at the express invitation of someone with authority to consent; (2) at that point established the existence of probable cause to effectuate an arrest or search and (3) immediately summoned help from other officers.'" *Id.* at 47-48 (quoting *United States* v. *Pollard*, 215 F.3d 643, 648 (6th Cir. 2000)).

The court "wonder[ed] about the grounding of this doctrine," commenting that "[i]t seems a bit of a stretch to call the kind of police entry that occurred here 'consensual.'" *Id.* at 52. The court assumed that Petitioners violated the Fourth Amendment, but held they were entitled to qualified immunity because in light of authority from other circuits, the illegality of the consent-once-removed theory was not clearly established. *Id.* at 55.

The Court Of Appeals' Opinion. Mr. Callahan appealed the district court's judgment to the Tenth Circuit, which reversed. Pet. App. 1-18. In their brief to the Tenth Circuit, Petitioners relied solely on the consent-once-removed theory.

Petitioners argued that the court of appeals "should adopt the consent once removed doctrine;" and if it did not, that they were "entitled to qualified immunity because any right violated was not clearly established." Appellee's Br. at 14, 16. They did not assert that exigent circumstances or any other basis existed for affirming the district court's decision. *See id.* at 7-19; Pet. App. 10-11, 17.

The Tenth Circuit held that Petitioners violated Respondent's Fourth Amendment rights. Pet. App. 8-18. The court noted that "[c]ourts continually have viewed the warrantless entry into a house as presumptively unreasonable" because "'the home is entitled to the greatest Fourth Amendment protection.'" *Id.* at 8 (quoting *United States* v. *Najar*, 451 F.3d 710, 712-13 (10th Cir. 2006)). The presumption of unreasonableness can be overcome only when the entry falls within one of a few "'carefully defined exceptions based on the presence of "exigent circumstances."'" Pet. App. 9 (quoting *United States* v. *Walker*, 474 F.3d 1249, 1252 (10th Cir. 2007)).

The court stated that its precedent would support holding that the Fourth Amendment permits officers' warrantless entry to assist an *undercover officer* who has been previously admitted, but found "the distinctions between an officer and an informant to be significant." *Id.* at 11. The court concluded that by "entering Mr. Callahan's home based on the invitation of an informant and without a warrant, direct consent, or other exigent circumstances, [Petitioners] violated Mr. Callahan's constitutional rights under the Fourth Amendment." *Id.* at 14.

The court of appeals further held that the Fourth Amendment right violated by Petitioners was clearly established. *Id.* at 14-15. The court quoted this Court's statement that "[n]o reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional." *Id.* at 15-16 (quoting *Groh* v. *Ramirez*, 540 U.S. 551, 564 (2004)). Officers who seek "to craft a new exception" to "that fundamental tenet" "cannot reasonably have relied on an expectation that [the Court] would do so." *Id.* at 109 (quoting *Groh*, 540 U.S. at 564). The court also held that under Tenth Circuit precedent, "warrantless entries into a home are *per se* unreasonable unless they satisfy the established exceptions." *Id.* at 16. The officers could not come within the consent exception because "a mere transient guest, without a 'substantial interest in or common authority over the property,' cannot consent to the entry of others." *Id.* (quoting *United States* v. *Falcon*, 766 F.2d 1469, 1474 (10th Cir. 1985)).

The court acknowledged that the Seventh Circuit had held differently, but stated, "The precedent of one circuit cannot rebut that the 'clearly established weight of authority' is as the Tenth Circuit and the Supreme Court have addressed it." Pet. App. 17. Because "the officers knew (1) they had no warrant; (2) Mr. Callahan had not consented to their entry; and (3) his consent to the entry of an informant could not reasonably be interpreted to extend to them, . . . 'reasonable officers could not have believed that' their warrantless entry" was

lawful. *Id.* (quoting *Wilson* v. *Lane*, 526 U.S. 603, 615 (1999)).

The Tenth Circuit denied rehearing en banc. Pet. App. 60. In its order granting certiorari, this Court directed the parties to brief and argue the additional question, "Whether the Court's decision in *Saucier* v. *Katz*, 533 U.S. 194 (2001) should be overruled." J.A. 395.

SUMMARY OF THE ARGUMENT

1. Petitioners violated the Fourth Amendment by entering Mr. Callahan's home without a warrant. Physical entry into the home is the "chief evil" against which the Fourth Amendment is directed. A warrantless home entry is presumptively unreasonable unless it falls into one of the carefully drawn and jealously guarded exceptions to the warrant requirement. This Court has approved warrantless entry into the home only when supported by consent or exigent circumstances, neither of which was present here.

a. The consent exception does not support Petitioners' entry. In applying the consent exception, courts look to "widely shared social expectations." It is widely understood that an invitation to enter one's home extends only to the person invited, and not to others who may be lurking outside. A reasonable person would understand that an invitation to enter a private home is limited to the person who receives the invitation.

b. Petitioners do not seriously argue that Mr. Callahan consented to their entry into his home. Instead, they argue that, by consenting to an informant's entry, Mr. Callahan waived his

expectation that others would not enter without his consent. This Court has held that an informant may reveal *information* to the police that was revealed to the informant inside a home, but the Court has never approved a warrantless home entry based simply on an informant's prior entry. Similarly, this Court's cases allowing the police to recreate a "private search" in limited circumstances have never been applied to permit a warrantless home entry.

If adopted, Petitioners' arguments would justify warrantless police entry into the home whenever an individual has been invited inside, because anything the invitee sees would no longer be subject to an expectation of privacy, and the police would simply be "recreating" a private search by the invitee.

c. Petitioners' argument that the search is justified as incident to their arrest of Mr. Callahan is unpersuasive. A search incident to arrest is justified by the exigencies inherent in the arrest procedure. None of those exigencies exist when a confidential informant inside the premises signals to officers outside that an illegal transaction has occurred. When the suspect is unaware of police presence, there is no concern that evidence will be destroyed, the suspect will flee, or for officer safety.

Moreover, an arrest is a Fourth Amendment seizure, and in order to be seized an individual must reasonably believe that he is not free to leave. When a person is unaware of any police presence or signal, he cannot reasonably believe he is not free to leave and therefore is not seized within the meaning of the Fourth Amendment.

When an undercover officer, rather than an informant, is invited into a home, the entry does not require the police to use the coercive power of the state. When an officer is legally inside the home, other officers may be justified in entering to assist the officer in completing an arrest under an exigent circumstances theory. Petitioners and their amici agree that informants should not attempt to make arrests. Moreover, the authority to make a citizens' arrest is a matter of state law, and the Court has held that the reasonableness of a search under the Fourth Amendment should not depend upon state law that varies from state to state.

d. There is no legitimate law enforcement need for a consent-once-removed doctrine. Police officers can readily obtain a warrant or anticipatory warrant before or after they send a "wired" informant into a home, and can also rely on the exigent circumstances exception in appropriate cases. The only interest furthered by the consent-once-removed procedure is expediency, which the Court repeatedly has held to be inadequate in home invasion cases.

2. Petitioners are not entitled to qualified immunity. Their conduct violated the clearly established law of this Court and the Tenth Circuit, under which a warrantless police entry to the home, even when police have probable cause to make an arrest, has long been held *per se* unreasonable unless it is supported by consent or exigent circumstances.

Petitioners mischaracterize the state of the law at the time of the raid. They assert that three federal circuits and two state supreme courts had approved the consent-once-removed theory, but most of these cases involved consensual entry by

undercover police officers. Only one circuit had extended the theory to a case like this one, involving an informant. On the other side of the ledger, one of the state supreme courts expressly *rejected* consent once removed as a general principle, and at least three federal circuits and one state supreme court had held that warrantless police entry following an informant's entry and signal to police violates the Fourth Amendment. When courts have approved such entries, it has generally been based on exigent circumstances, which concededly were not present here.

Decisions by a single out-of-circuit court cannot provide officers with a safe harbor from liability under § 1983. The decisions of this Court and the Tenth Circuit, as well as the great weight of authority from other courts, show that the right to be free from the warrantless search conducted by Petitioners was clearly established.

3. Because the constitutional issue in this case is relatively straightforward, the Court may wish to reconsider whether this is an appropriate case to reexamine *Saucier* v. *Katz*. If the Court reaches the *Saucier* question, it should retain *Saucier*'s mandatory two-step analysis.

Saucier is a recent precedent of this Court, and it has not proved to be unworkable. The reasons that the court adopted the two-step analysis still apply. Answering the constitutional question promotes development of the law. If given the option to avoid answering a constitutional question, experience shows that courts will avail themselves of that option in a significant number of cases.

The Court should not adopt one rule for Fourth Amendment issues and another for other constitutional issues. Abandoning *Saucier* in Fourth Amendment cases would encourage a post-hoc search for justifications for unconstitutional behavior. Moreover, Fourth Amendment rulings may be better reasoned in the qualified immunity context precisely because they are not burdened by the exclusionary rule. Finally, as the Solicitor General notes, *Saucier*'s two-step analysis serves to maintain analytical clarity in Fourth Amendment cases.

ARGUMENT

I. Petitioners' Warrantless Entry Into Respondent's Home Violated The Fourth Amendment.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This Court has long recognized that "physical entry of the home" is the "chief evil against which the wording of the Fourth Amendment is directed." *Payton* v. *New York*, 445 U.S. 573, 585 (1980). It is therefore a "'basic principle of Fourth Amendment law'" that warrantless entry into the home is "'presumptively unreasonable.'" *Groh*, 540 U.S. at 559 (quoting *Payton*, 445 U.S. at 586). *See also Georgia* v. *Randolph*, 547 U.S. 103, 109 (2006) (absent an exception, warrantless entry into the home is "unreasonable *per se*"). Exceptions to the principle that warrantless entries into the home are unreasonable are "jealously and carefully drawn." *Randolph*, 547 U.S. at 109; *see also*, *e.g.*, *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001). "[A]bsent

exigent circumstances or consent, an entry into a private dwelling to conduct a search or effect an arrest is unreasonable without a warrant." *Steagald* v. *United States*, 451 U.S. 204, 214 n.7 (1981).

The presumption against warrantless entry into the home applies "even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within." *Payton*, 445 U.S. at 587-88. Similarly, police officers must obtain a warrant to arrest an individual in the home, even if they have probable cause for the arrest. *Payton*, 445 U.S. at 601-02; *Kirk* v. *Louisiana*, 536 U.S. 635 (2002) (per curiam) (warrantless entry, arrest and search based on probable cause to arrest "plainly violates" *Payton*.). The Court has explained that "the reasons for upholding warrantless arrests in a public place do not apply to warrantless invasions of the privacy of the home." *Payton*, 445 U.S. at 576.

Petitioners do not contend that Mr. Callahan expressly consented to their entry into his home, or that exigent circumstances justified the entry. Instead, Petitioners urge the Court to expand the scope of the consent exception (or recognize a new exception) to allow warrantless searches based on a "consent-once-removed" theory. Under this Court's decisions, it is Petitioners' burden to show "'an exceptional situation' as to justify creating a new exception to the warrant requirement." *Mincey* v. *Arizona*, 437 U.S. 385, 391 (1978) (quoting *Vale* v. *Louisiana*, 399 U.S. 30, 34 (1970)). Petitioners have not come close to meeting that heavy burden in this case.

A. Consent Does Not Justify A Warrantless Police Entry Following An Invited Informant's Signal.

"The constant element in assessing Fourth Amendment reasonableness in the consent cases" is "the great significance given to widely shared social expectations." *Randolph*, 547 U.S. at 111. The consent-once-removed theory violates widely shared social expectations because it is generally understood that an invitation for one individual to enter a home does not extend to other individuals.

"When the police are relying upon consent as the basis for their warrantless search, they have no more authority than they have apparently been given by the consent." 4 LaFave, Search & Seizure § 8.1(c) at 19 (4th ed. 2004); *see also United States* v. *Mendoza-Gonzalez*, 318 F.3d 663, 666-667 (5th Cir. 2003) (quoting LaFave). "It is thus important to take account of any express or implied limitations or qualifications attending that consent which establish the permissible scope of the search in terms of such matters as time, duration, area, or intensity." *Id.*; *United States* v. *Pikyavit*, 527 F.3d 1126, 1131 (10th Cir. 2008) (quoting LaFave); *United States* v. *Iribe*, 11 F.3d 1553 (10th Cir. 1993) (consent to search house did not extend to detached padlocked garage).

Here, the scope of Mr. Callahan's consent is limited by the ordinary social expectation that a person who invites an individual into his home does not expect the invitation to extend to anyone but the person invited. The Court has long looked to such ordinary social expectations to determine the reasonableness of one's expectation to privacy. *See, e.g.*, *Randolph*, 547 U.S. at 111; *Minnesota* v. *Olson*,

495 U.S. 91, 98 (1990) (noting "the everyday expectations of privacy that we all share"). Because Mr. Callahan consented only to the entry of the confidential informant, his consent did not give the Petitioners authority to enter.[4]

The social expectations are the same when viewed from the perspective of the uninvited person. No reasonable person would enter another's home simply because a friend, co-worker, or other acquaintance had been admitted. *Cf. Randolph*, 547 U.S. at 113 ("no sensible person would go inside" at one occupant's invitation "when a fellow tenant stood there saying, 'stay out.'"). Thus, a police officer working with a confidential informant who is admitted consensually has "no better claim to reasonableness in entering than the officer would have in the absence of any consent at all." *Id.* at 114.

Indeed, Petitioners expressly concede that the informant had no authority to permit police to enter. Pet. Br. at 39, 41; s*ee also United States* v. *Matlock*, 415 U.S. 164 (1974); *United States* v. *Falcon*, 766 F.2d 1469, 1474 (10th Cir. 1985). "[N]either state-law property rights, nor common contractual arrangements, nor any other source points to a common understanding of authority to admit third parties generally without the consent of a person

---

[4] The expectation that a person may not exceed the scope of consent to enter a premises has long been reflected in the law of property. *See* Thomas W. Waterman, A Treatise on the Law of Trespass in the Twofold Aspect of the Wrong and the Remedy §§492-94, 790 (1875) (When a person enters property based on lawful process or consent, but subsequently exceeds the scope of his authority, he is liable for trespass.).

occupying the premises." *Randolph*, 547 U.S. at 112. Accordingly, consent to the entry of an informant cannot reasonably be construed as consent to the entry of additional police officers who were not invited to enter.

The scope of consent is judged from the perspective of "'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida* v. *Jimeno*, 500 U.S. 248, 250 (1991). When an informant or an undercover officer is admitted to a residence, a "typical reasonable person" would not understand the invitation to that person would justify the subsequent entry of five additional unknown individuals who were not invited. The expectation is the same whether the invitee is an informant or an undercover police officer.[5]

To hold otherwise would be fundamentally contrary to the Court's recent decision in *Georgia* v. *Randolph*. There, the Court held that police may not enter a home without a warrant with the consent of one occupant but over the objection of another occupant. 547 U.S. at 120. An informant, like the cotenant in *Randolph*, can "deliver evidence to the police" that they may then use to obtain a warrant. *Id.* at 116. Reliance on that "information instead of

---

[5] Although *consent* does not justify the subsequent entry of police, for the reasons explained in part I.C below, an exigent-circumstances or search-incident-to-arrest rationale may justify a different result when an undercover officer rather than an informant is inside the house.

disputed consent accords with the law's general partiality toward 'police action taken under a warrant [as against] searches and seizures without one.'" *Id.* at 117 (alteration in original) (quoting *United States* v. *Ventresca*, 380 U.S. 102, 107 (1965)).

B. Inviting A Guest Into The Home Does Not Waive The Occupant's Reasonable Expectations Of Privacy.

Although Petitioners rely on a "consent-once-removed" theory, they do not seriously contend that Respondent actually consented to their entry into his home. Instead, they contend that, by consenting to the informant's entry, Respondent lost any reasonable expectation that he could exclude police officers. Petitioners' argument is contrary to "the everyday expectations of privacy that we all share." *Minnesota* v. *Olson*, 495 U.S. 91, 98 (1990).

Visiting the home of another "serves functions recognized as valuable by society." *Id.* We visit the homes of family members, neighbors, co-workers, acquaintances, and friends for a variety of purposes: to socialize, share a meal, watch a sporting event, worship, meet a candidate for public office, celebrate a holiday, commiserate or mourn events large and small, seek or give advice, help another in need, or simply to spend time in the company of our fellows. Some home visits involve a charitable donation, a campaign contribution, a personal loan, or the purchase of goods or services. Those visits are no less valuable to society because they have a financial or commercial aspect. A person who invites another into his home to conduct business or a financial transaction does not surrender the reasonable

expectation that the invitation extends only to those invited.

This result is consistent with ordinary social expectations. Individuals use their homes to engage in commercial activities of many kinds: selling Girl Scout cookies, hosting Tupperware parties, or selling products offered by Amway, Avon, or Mary Kay, to name just a few examples. By engaging in these activities, individuals do not transform their homes into public places that anyone may enter. They retain a reasonable expectation that uninvited individuals will not enter their home. Although selling Tupperware is legal and selling controlled substances is not, the Court has recognized that the Fourth Amendment's protection of the home is not overcome by a showing that illicit activity was occurring inside. *See, e.g.*, *United States* v. *Jacobsen*, 466 U.S. 109, 114 & n.9 (1984) (collecting cases).

1. The Court's Informant Cases Do Not Support Petitioners' Argument. In support of the assertion that, by inviting a confidential informant into his home, Mr. Callahan "surrendered his usual Fourth Amendment protection in the area of his home that he displayed to" the informant, Pet. Br. 22, Petitioners cite *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966), and Justice White's plurality opinion in *United States* v. *White*, 401 U.S. 745 (1971). Pet. Br. 21. Neither case stands for that proposition or anything close to it.

In *Hoffa*, the Court held that the Fourth Amendment does not protect an individual's "misplaced confidence that [an informant] would not reveal his wrongdoing." 385 U.S. at 302. In *White*, Justice White opined that "one contemplating illegal

activities must realize and risk that his companions may be reporting to the police." 401 U.S. at 752. The proposition that an informant may "reveal" or "report" information to the police is quite different from the proposition that admitting one person into a home destroys the occupant's expectation that he may refuse to admit others.

Both *Hoffa* and *White* involved the use at trial of information gathered by the confidential informant; neither case involved entry to a home. *Id.* at 746-47 (recorded information from wired informant); *Hoffa*, 385 U.S. at 296 (informant's testimony of defendant's incriminating statements). *Hoffa* and *White* would support the admission of the informant's testimony and Petitioners' recording of the events inside Mr. Callahan's home, but they do not justify Petitioners' warrantless entry. The risk that the informant would "expose what he observed to the police," Pet. Br. 22, did not reasonably include the risk that the informant would summon officers to enter Mr. Callahan's home. Petitioners themselves expressly concede that the informant was *not* authorized to admit the officers to the residence. *Id.* at 39, 41.

Petitioners also cite *Lewis* v. *United States*, 385 U.S. 206 (1966), but that case is also readily distinguishable. *Lewis* involved the use at trial of narcotics purchased by an undercover officer from the defendant in the defendant's home. *Id.* at 207-08. the Court held that the Fourth Amendment does not prohibit an undercover officer from obtaining entry to a suspect's home "by misrepresenting his identity and stating his willingness to purchase narcotics." *Id.* at 206-07. The Court held that "the

deceptions of the agent" were not unconstitutional because to hold otherwise "would come near to a rule that the use of undercover agents in any manner is virtually unconstitutional *per se*." *Id.* at 210. The Court explained that the undercover officer's misrepresentation did not become unconstitutional merely because it occurred inside a home: "[W]hen, as here, the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, *that business* is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street." *Id.* at 211 (emphasis added).

Lewis did not adopt a rule that selling narcotics from a home destroys the occupant's interest in privacy of the home. To the contrary, the Court stated that when the defendant conducts an illegal business out of his home, "[a] government agent, in the same manner as a private person, *may accept an invitation* to do business and may enter upon the premises for the very purposes contemplated by the occupant." *Id.* (emphasis added). *Lewis* thus stands for the proposition that the Fourth Amendment does not protect a defendant against his own invitation to do business simply because the business is conducted in his home. It does not stand for the quite different proposition that admitting a person into a home for a business purpose destroys all expectation of privacy in the home such that police may subsequently enter with impunity. Similarly, Justice Brennan's concurring opinion in *Lewis*, which stated that a person can "waive the right to privacy . . . to the extent that he opens his home to the transaction of business and

invites anyone willing to enter to come in to trade with him," *id.* at 213, recognized that a waiver occurs only "to the extent" the home is open to all comers. In *Lewis*, as in this case, the business was not open to all comers, but instead required "an invitation" to enter. *Id.* at 211. Mr. Callahan's invitation extended only to the informant; not to the police officers outside the house.

2. Petitioners' Entry Is Not Justified As Recreating A Private Search. Petitioners' argument (Pet. Br. 26-28) that their entry recreated a "private search" conducted by the informant is untenable. While the Court has held that police may seize and open a package that was previously opened by employees of a private carrier where "it was apparent" that the package "contained contraband and little else," *Jacobsen*, 466 U.S. at 121-22, the Court has never applied the "private search" doctrine to allow police to enter a home without a warrant on the theory that someone else has already seen what's inside. Accepting that proposition would, among other things, effectively overrule this Court's decision in *Randolph*. Under Petitioners' theory, in *Randolph* there would have been no expectation of privacy preventing the police from following one occupant of a premises inside (with her consent) to view contraband over the objection of another occupant because they would simply have been "recreating" the occupant's "private search."

C. "Consent Once Removed" Cannot Be Justified As A Search Incident To Arrest.

1. A Warrantless Home Entry Is Not Justified By Police Officers' Intent To Arrest The Suspect Once Inside. In order to arrest a suspect inside a residence, police must first have a legal basis to be inside. Petitioners' entry into Mr. Callahan's home cannot be justified as incident to the arrest they intended to make once they entered. The reasonableness of a "search incident to arrest" depends on the exigencies inherent in the arrest procedure. During the course of a lawful arrest, "it is reasonable for the arresting officer to search the person arrested in order to remove any weapons." *Chimel* v. *California*, 395 U.S. 752, 762-63 (1969). It is also reasonable "to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Id.* at 763. The arresting officer may also search "the area into which an arrestee might reach in order to grab a weapon or evidentiary items." *Id.* Thus, to protect the arresting officers' safety and prevent the destruction of evidence, an arrest permits officers to search the individual and the area "'within his immediate control.'" *Id.* Similarly, police may perform a "protective sweep" of the premises for officer safety if the officer has reason to believe "that the area swept harbored an individual posing a danger to the officer or others." *Maryland* v. *Buie*, 494 U.S. 325, 327 (1990).

The exigencies of the arrest procedure are not present when a confidential informant *inside* a home signals to officers *outside* the home that a drug deal

has been completed. Most fundamentally, the suspect is unaware that he is about to be arrested, so the concern that "[t]here is no way for an officer to predict reliably how a particular subject will react to arrest," and "the possibility that an arrested person will attempt to escape" are not present. *Washington* v. *Chrisman*, 455 U.S. 1, 7 (1982). A suspect likewise has no reason to seek out a weapon or destroy evidence. Nor is there any concern for officer safety. Police outside the home have nothing to fear from a suspect inside the home who is unaware of their presence. The rationale for the "incident to arrest" exception therefore does not justify the warrantless entry of police officers into a suspect's home after receiving the confidential informant's signal.

Furthermore, police officers are not permitted to rely on exigent circumstances where, as here, the officers plan the arrest in advance. "[E]xigent circumstances justifying warrantless entry should be determined 'by distinguishing the truly "planned" arrest from the arrest which is made in the course of an ongoing investigation in the field.'" *Alexander* v. *San Francisco*, 29 F.3d 1355, 1375 (9th Cir. 1994) (quoting 2 LaFave, Search & Seizure, § 6.1(f) at 600-02 (2d ed. 1987)); 3 LaFave § 6.1(f) at 318-319 (4th ed.). When police officers with probable cause plan a warrantless arrest in advance, "whatever exigencies [that] thereafter arose were foreseeable at the time the arrest decision was made, when a warrant could have readily been obtained." 3 LaFave § 6.1(f) at 319.

Petitioners are wrong to suggest that they entered Mr. Callahan's home "to protect the safety of the state actors and to protect the integrity of the

arrests." Pet. Br. 30. Nobody was in danger when the officers heard the informant say he wanted to play the drums on Mr. Callahan's porch. There was no concern that Mr. Callahan or others in the premises might destroy evidence, and no indication anyone other than the informant knew that Petitioners were waiting outside. Moreover, to the extent the Petitioners now suggest there was some danger or exigent circumstance that justified their entry, they expressly waived that argument in the court of appeals. *See* Pet. App. 10-11, 17; *Glover* v. *United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below.").[6]

The Court's decision in *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980), does not support Petitioners' argument. In *Rawlings*, unlike in this case, the officers were lawfully inside a residence pursuant to an arrest warrant, and had also obtained a search warrant. *Id.* at 100-01. The defendant admitted ownership of a "sizeable quantity of drugs" after police gave him *Miranda* warnings. *Id.* at 101, 111. In those circumstances, the Court held that a search of the defendant's person immediately preceding his arrest was justified as incident to that arrest. *Id.* at 111. *Rawlings* recognizes that a search incident to arrest need not always be conducted after the formal arrest. It does not authorize police officers to enter a residence to make a warrantless arrest.[7] *See also*

---

[6] In the court of appeals Petitioners made no argument based on the search-incident-to-arrest doctrine.

[7] Petitioners' assertion that allowing warrantless home entry as incident to the arrest inside the home will result in *less* invasive (...continued)

Johnson v. *United States*, 333 U.S. 10 (1948) (warrantless hotel room entry and search not justified as incident to arrest of person found inside).

2. A Confidential Informant's Signal Does Not Commence An Arrest. Petitioners attempt to force this case into the "incident to arrest" category by asserting that the informant "put the arrest in motion." Pet. Br. 29. Petitioners contend that the informant's signal commenced their arrest of Mr. Callahan, and their entry was justified to maintain control of the arrest and to ensure their safety and the informant's safety. *Id.* at 29-32.

This argument is fatally flawed because while there can be a Fourth Amendment seizure without an arrest, *Terry* v. *Ohio*, 392 U.S. 1, 16 (1968), there can be no arrest without a seizure. At the time of the informant's signal, Mr. Callahan was not seized.

"[A]n arrest is a Fourth Amendment seizure." 3 LaFave § 5.1(a), at 5; *see also, e.g.*, *United States* v. *Cooper*, 43 F.3d 140, 146 (5th Cir. 1995) ("[A]rrest [is] plainly a Fourth Amendment 'seizure.'"). A person is "'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States* v. *Mendenhall*, 446

---

searches is detached from reality. Pet. Br. 32-34. Petitioners argue that a search pursuant to a warrant would be more intrusive, but it is unrealistic to expect that police arresting an individual for dealing narcotics would not thereafter seek a warrant (or consent) to search the home for contraband. A police officer who failed to do so would be derelict in his duty.

U.S. 544, 554-55 (1980) (opinion of Stewart, J.); *INS* v. *Delgado*, 466 U.S. 210, 215 (1984) (same); *Florida* v. *Royer*, 460 U.S. 491, 502 (1983) (same).

Here, Mr. Callahan was not "seized" by the informant's statement that he wanted to play the drums. A reasonable person in Mr. Callahan's circumstances would have no idea that there even was a police presence, and would have no reason to believe that he was not free to leave. Neither Petitioners nor the informant claimed at trial that the informant's actions were part of the arrest. To the contrary, police "arrested" the informant along with Mr. Callahan. J.A. 31. Mr. Callahan was not "seized" within the meaning of the Fourth Amendment by any action of the informant.

Petitioners' reliance on *Washington* v. *Chrisman* is thus misplaced. In *Chrisman*, "the officer had placed [the suspect] under lawful arrest, and therefore was authorized to accompany him to his room for the purpose of obtaining identification." 455 U.S. at 6. Here there was no seizure. Mr. Callahan cannot reasonably be said to have been under arrest, and Petitioners were not permitted to enter his premises on the theory that they were protecting the safety of the arrest.

3. Confidential Informants Are Not Equivalent To Police Officers. Courts may reach a different result when an undercover police officer, rather than an informant, enters a home with the occupant's consent. The primary difference between the two types of cases is that in one situation the police are all *outside* the home, while in the other a police officer is properly *inside* the home. In the latter situation, the officer is in a place he is legally

entitled to be when probable cause is established, and therefore is permitted to arrest the suspect without a warrant.

Petitioners argue that the informant was an "agent of the state" and that there is no relevant distinction between police officers and informants. Pet. Br. 35-39. But there are important differences between officers and informants. Unlike informants, the "law enforcement officer [is] 'engaged in the often competitive enterprise of ferreting out crime.'" *Nat'l Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 667 (1989) (quoting *Johnson* v. *United States*, 333 U.S. 10, 14 (1948)). The warrant requirement serves "to interpose a neutral magistrate between the citizen and the *law enforcement officer*." *Id.* When a police officer is admitted by consent, the need for the coercive power of the state to intrude upon the suspect's privacy is obviated. The same is not true when a an informant is admitted.[8]

The distinction between police officers and informants is not dissolved by the theoretical possibility of a citizen's arrest. As the court of appeals noted, a citizen's power to arrest "does not grant the citizen all of the powers and obligations of the police as agents of the state." Pet. App. 12 (collecting cases). Moreover, as Petitioners acknowledge, the power of citizens to effect an arrest is a matter of state law. Pet. Br. 36-37. State law

---

[8] Although Petitioners assert (Pet. Br. 38-39) that a distinction between officers and informants would lead to difficult line drawing problems, it is not difficult to distinguish police officers from informants.

concerning whether, and in what circumstances, a citizen may make an arrest varies considerably. *See, e.g.* N.C. Gen. Stat. §§ 15A-404, -405 (prohibiting citizen's arrest in almost all circumstances); Mont. Code Ann., § 46-6-502 ("existing circumstances" must "require the person's immediate arrest"); *see generally* M. Cherif Bassiouni, Citizen's Arrest: The Law of Arrest, Search, and Seizure for Private Citizens and Private Police 13-14, 17-22 (1977). In analyzing the States' citizen's arrest laws, Professor Bassiouni found it "noteworthy that, while the privilege of a citizen to arrest another varies from state to state, the duty and power of peace officers is generally the same in all states." *Id.* at 20.

Given the variations in state law, the reasonableness of a police entry cannot rely on the power of a private citizen to make an arrest inside the home. As this Court recently noted, the reasonableness of a search "has never 'depend[ed] on the law of the particular State in which the search occurs.'" *Virginia* v. *Moore*, 128 S. Ct. 1598, 1604 (2008) (quoting *California* v. *Greenwood*, 486 U.S. 35, 43 (1988)).

Moreover, Petitioners and the government agree that informants should not attempt to make a citizen's arrest when working with police. Pet. Br. 38; U.S. Br. 17. Police are trained and experienced in conducting such arrests safely, while informants typically are not. If even Petitioners do not think it would be reasonable for the informant to effect the arrest, it follows that a police entry grounded on the theoretical possibility of such an arrest is likewise unreasonable.

D. "Consent Once Removed" Serves No Legitimate Law Enforcement Need.

The "consent once removed" theory serves no legitimate law enforcement need. Police officers using an informant to make a controlled buy inside a home may make use of several reasonable options that do not involve a warrantless entry to the home.

1. "Consent Once Removed" Is Not Necessary Because Police Can Obtain A Warrant Or An Anticipatory Warrant. The purpose of the warrant requirement is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search. *Steagald*, 451 U.S. at 212. "[A]bsent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals." *McDonald* v. *United States*, 335 U.S. 451, 455-56 (1948).

When police decide to make a "controlled buy," they frequently have sufficient information to support an application for a search warrant. Police officers expend considerable effort to gather a team to perform the raid, prepare and wire the informant, and make the other preparations necessary for the raid. It takes relatively little additional effort to obtain a warrant before the raid.

In this case, Petitioners first learned that a drug transaction might occur on the day of the raid twelve hours before they entered Mr. Callahan's home. J.A. 49-50. At that point they could have alerted a magistrate that they might need a warrant at some point that evening. Petitioners learned from the informant that he had confirmed that there was methamphetamine for sale 2 1/2 hours before they executed the raid. J.A. 118. Even without having contacted a magistrate earlier, one of the five individuals participating in the raid could have obtained a search warrant or an anticipatory warrant within that period. Indeed, one of the Petitioners admitted that because the informant had seen the methamphetamine, they could have obtained a warrant. J.A. 217. With a warrant or anticipatory warrant in hand, Petitioners could have conducted the raid exactly as they did, executing the warrant after receiving the signal from the informant.

Even if the police failed to get a warrant before sending in the informant, they could have waited until the informant emerged, and then obtained a warrant. As argued by counsel in the trial court, the City of Fillmore has magistrates, and the option of a telephone warrant was also available. J.A. 300. Had Petitioners followed this course, they would still have been permitted by this Court's and the Tenth Circuit's cases to enter without a warrant if any unexpected exigent circumstances had arisen. No such exigency arose here.

Given the ready availability of a warrant, the only interest furthered by allowing a warrantless entry on a confidential informant's signal absent any

exigency is expediency, which this Court has rejected. "A generalized interest in expedient law enforcement cannot, without more, justify a warrantless search." *Randolph*, 547 U.S. at 116 n.5; *see also Coolidge* v. *New Hampshire*, 403 U.S. 443, 481 (1971) (The warrant requirement "is not an inconvenience to be somehow 'weighed' against the claims of police efficiency").

2. Petitioners' Arguments Would Authorize Warrantless Searches Beyond The Limits Of The "Consent-Once-Removed" Theory. Petitioners' arguments sweep well beyond the limits of the consent-once-removed theory. If accepted by this Court, they would justify warrantless entry into the home in numerous situations in which it has long been understood that a warrant is required.

Courts that have recognized a consent-once-removed theory have required that an undercover agent or informant must have "(1) entered at the express invitation of someone with authority to consent; (2) at that point established the existence of probable cause to effectuate an arrest or search and (3) immediately summoned help from other officers." *E.g.*, *United States* v. *Akinsanya*, 53 F.3d 852, 856 (7th Cir. 1995). If Petitioners were correct that a suspect who admits an informant "to engage in an illegal narcotics purchase" thereby "surrender[s] his usual Fourth Amendment protection in the area of his home that he display[s]" to the informant, Pet. Br. 22, there would be no need for the informant to establish the existence of probable cause before the police entered. Police do not need probable cause to view that to which there is no legitimate privacy

right. *See* e.g., *California* v. *Greenwood*, 486 U.S. 35, 41 (1988) (garbage); *New York* v. *Class*, 475 U.S. 106, 114 (1986) (vehicle identification number); *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (inspection of pervasively regulated industry). Similarly, if Petitioners were correct that a police entry following a consensual informant entry is akin to recreating a private search, Pet. Br. 26-27, the "reenactment" would not require that the informant establish probable cause before the police entered.

Moreover, neither argument justifies the requirement that the informant "immediately" summon additional police officers after establishing probable cause. To the contrary, under Petitioners' theory, the suspect loses his expectation of privacy in every area in which the informant is permitted to enter and in everything that the informant views.

More generally, Petitioners contend that the officers' entry in this case was not a search within the meaning of the Fourth Amendment because Mr. Callahan had no reasonable expectation of privacy in the areas of his home that the informant viewed after his consensual entry. Under that view, inviting another into one's home waives the interest of privacy in every area the invitee goes and in everything he sees. An invitation would thereby reduce the expectation of privacy inside the home to that of garbage set out on the street. *Cf. Greenwood*, 486 U.S. at 41.

Petitioners' "private search" rationale leads to the same result. Under that rationale, letting anyone into a home necessarily lets everyone into the home. Even limiting Petitioners' arguments to the "home business" setting would upset the

expectations of great numbers of individuals who engage in some form of business or commercial activity from their homes.

Adopting Petitioners' arguments would "create a significant potential for abuse." *Steagald*, 451 U.S. at 215. Well-meaning officers, "armed with" consent-once-removed, could justify warrantless home entries based on prior informant entries without the neutral decision of a magistrate that probable cause is present, or could use consent-once-removed "as the pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place." *Id.* Under Petitioners' view, information from an informant that would justify a magistrate to issue a warrant would now give reason to enter without a warrant.

II. Petitioners Are Not Entitled To Qualified Immunity.

The qualified immunity doctrine protects officials performing discretionary functions from liability for civil damages so long as the official's actions do not violate clearly established rights at the time of the act. *See Anderson* v. *Creighton*, 483 U.S. 635 (1987); *Dixon* v. *Richer*, 922 F.2d 1456 (10th Cir. 1991). The "threshold question" in resolving a claim of qualified immunity is: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Scott* v. *Harris*, 127 S. Ct. 1769, 1774 (2007) (quoting *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001)). For the reasons set forth in Part I of this brief, Petitioners' conduct violated Fourth Amendment rights.

Where a constitutional violation is shown, "the next, sequential step is to ask whether the right was clearly established . . . in light of the specific context of the case." *Scott*, 127 S. Ct. at 1774 (quoting *Saucier*, 533 U.S. at 201). In deciding whether officers have violated clearly established rights, the Court looks to "the 'objective legal reasonableness'" of the defendants' action, "assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson*, 483 U.S. at 639 (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818-19 (1982) (citation omitted)). "Whether an asserted federal right was clearly established at a particular time" for qualified immunity purposes "presents a question of law." *Elder* v. *Holloway*, 510 U.S. 510, 516 (1994).

Under the Tenth Circuit's precedent, a § 1983 plaintiff need not engage in "a scavenger hunt for prior cases with precisely the same facts." *Pierce* v. *Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004). "[T]he more relevant inquiry" is "whether the law put officials on fair notice that the described conduct was unconstitutional." *Id.* "[Q]ualified immunity will not be granted if government defendants fail to make 'reasonable applications of the prevailing law to their own circumstances.'" *Id.* (quoting *Currier* v. *Doran*, 242 F.3d 905, 923 (10th Cir. 2001)). To determine whether the law is clearly established, the Tenth Circuit looks to this Court's and its own decisions, and also considers whether "'the clearly established weight of authority from other courts [has] found the law to be as the plaintiff maintains.'" *Cortez* v. *McCauley*, 478 F.3d 1108, 1114-1115 (10th Cir. 2007) (quoting *Medina* v. *Denver*, 960 F.2d 1493,

1498 (10th Cir. 1992)); *see also Murrell* v. *Sch. Dist. No. 1*, 186 F.3d 1238, 1251 (10th Cir. 1999).

A. Petitioners' Qualified Immunity Claim Rests On A Mischaracterization Of The Law.

In arguing for qualified immunity, Petitioners seriously mischaracterize the state of the law at the time of their entry into Respondent's home. While Petitioners do not contend that any decision of the Tenth Circuit or this Court justified their warrantless entry, they assert that "three federal circuits and two state supreme courts" had approved the consent-once-removed theory, and that "it appears that every Fourth Amendment decision that considered the lawfulness of follow-up entries in undercover buy investigations had permitted the officers' entries without a warrant." Pet. Br. 42, 44. The first assertion is misleading; the second is false.

At the time of Petitioners' raid, only the Seventh Circuit—not "three federal circuits and two state supreme courts"—had applied the "consent-once-removed" theory to an informant who signaled the existence of probable cause to police outside the premises. *See* Pet. 8-9. The other cases cited by Petitioners all involved undercover police officers who were admitted to the home. *See United States* v. *Pollard*, 215 F.3d 643, 646 (6th Cir. 2000); *United States* v. *Bramble*, 103 F.3d 1475 (9th Cir. 1996); *New Jersey* v. *Henry*, 627 A.2d 125 (N.J. 1993). While Petitioners assert that it makes no difference whether it is a police officer or an informant who is admitted, this Court's Fourth Amendment cases have often looked to whether the police officer is in a place he is legally entitled to be. *See, e.g.*, *Minnesota*

v. *Dickerson*, 508 U.S. 366, 375 (1993) (whether police are "lawfully in a position from which they view an object"); *Lopez* v. *United States*, 373 U.S. 427, 438-39 (1963) (undercover officer's recording of conversation permitted because he was on the premises "with the [defendant's] assent").

Moreover, in one of the state cases that Petitioners cite, the Wisconsin Supreme Court expressly declined to adopt the "consent-once-removed" doctrine as formulated by the Seventh Circuit. *Wisconsin* v. *Johnson*, 518 N.W.2d 759, 815 n.6 (Wis. 1994). The court specifically limited its holding to "allowing back-up or assistance once an officer lawfully on the scene has established probable cause for immediate arrest or seizure and requests back-up or assistance." *Id.* [9]

Petitioners' additional assertion (Pet. Br. 42) that "every Fourth Amendment decision that considered the lawfulness of follow-up entries in undercover buy investigations had permitted the officers' entries without a warrant" is simply untrue. Courts have repeatedly held that police entries in the circumstances of this case are illegal, with or without expressly discussing whether "consent" justified the entry. Indeed, at least three circuits and one state supreme court had held similar entries were unconstitutional.

---

[9] The other state case cited by Petitioners has been described by a leading commentator as an "extreme and highly questionable" application of the consent-once-removed theory. 3 LaFave § 6.1(c) at 291 n.114.

In *United States* v. *Santa*, DEA agents entered an apartment "[w]ithin thirty seconds" of a confidential informant's signal that he had seen heroin after being consensually admitted to the apartment for a heroin deal. 236 F.3d 662, 666 (11th Cir. 2000). The Eleventh Circuit concluded that the entry violated the Fourth Amendment because there were no exigent circumstances and the defendant's subsequent consent was tainted by the illegal entry. *Id.* at 676-78.

Similarly, in *United States* v. *Templeman*, officers immediately rushed a suspect's trailer after receiving a signal that suspect had opened a package of narcotics delivered by a wired informant. 938 F.2d 122, 123 (8th Cir. 1991). The Eighth Circuit held that the entry was illegal because there were no exigent circumstances that would have prevented the officers from obtaining a warrant. *Id.* at 123-24.

In *United States* v. *Beltran*, the First Circuit, in an opinion by then-Chief Judge Breyer, held that police violated the Fourth Amendment when they "immediately entered" an apartment after an informant was invited in, saw cocaine, went outside and alerted the police. 917 F.2d 641, 642 (1st Cir. 1991). In *Beltran*, as here, there were no exigent circumstances and the police had probable cause to obtain a warrant for several hours before the planned sale. *See id.*

In *Carranza* v. *Georgia*, officers made a warrantless entry after hearing a wired informant's signal that a transaction (there for falsified documents) had been completed. 467 S.E.2d 315, 316 (Ga. 1996). The Supreme Court of Georgia held that officers may enter the home without a warrant

only where the entry "is by consent or where there are exigent circumstances." *Id.* at 318. There was no suggestion that the defendant's consent to the informant's entry somehow justified the additional entry of police officers. *See also Hawkins* v. *Indiana*, 626 N.E.2d 436, 438-40 (Ind. 1993) (warrantless entry following wired informant's controlled buy violated Fourth Amendment).

Other courts have explicitly rejected the consent-once-removed theory without calling it by that name: "[B]y allowing the informant into his apartment, defendant did not consent to a police entry." *New York* v. *Soto*, 96 A.D.2d 741, 742 (N.Y. App. Div. 1983); *Youtz* v. *Alabama*, 494 So. 2d 189, 195-98 (Ala. Crim. App. 1986) (same, quoting *Soto*). These and other state courts have held that a warrantless home entry following a consensual informant's entry violates the Fourth Amendment.[10] The *Youtz* court even cited *United States* v. *Janik*, 723 F.2d 537 (7th Cir. 1983) an early Seventh Circuit consent-once-removed case. 494 So. 2d at 194.[11]

---

[10] *E.g.*, *Tennessee* v. *Graybeal*, 1995 Tenn. Crim. App. LEXIS 517 (Tenn. Crim. App. June 28, 1995); *Youtz*, 494 So. 2d at 195-98; *Soto*, 96 A.D.2d at 742; *North Carolina* v. *Yananokwiak*, 309 S.E.2d 560 (N.C. Ct. App. 1983); *Ohio* v. *Hurt*, 1981 Ohio App. LEXIS 12981 (Ohio Ct. App. Feb. 9, 1981); *Massachusetts* v. *Perez*, 13 Mass. L. Rep. 196 (Mass. Super. Ct. 2001).

[11] When courts have approved warrantless entries in similar circumstances, they have generally based their rulings on the presence of unexpected or exigent circumstances, not consent. *See United States* v. *Parra*, 2 F.3d 1058, 1064 (10th Cir. 1993) (suspected drug dealer unexpectedly left the hotel room); *United States* v. *Palumbo*, 735 F.2d 1095, 1096-97 (8th Cir. 1984) (defendant was overheard saying he needed to enter room where backup police were hiding); *United States* v. *Williams*, (...continued)

Petitioners are also incorrect in asserting that Professor LaFave's treatise supports the consent-once-removed theory as applied to confidential informants. Pet. Br. 45-46. The treatise states that courts have held that "no warrant is needed where the arrest is made within premises to which an undercover *police officer* gained admittance by indicating his interest in participating therein in criminal activity," but that statement applies to the entry of police officers, not confidential informants. 3 LaFave, § 6.1(c) at 290 & n.114 (emphasis added). A footnote following that passage acknowledges "some authority" for the consent-once-removed theory, mentioning both informants and officers, but the *very next sentence* in the text expressly rejects the premise of the consent-once-removed theory as applied to informants: "But the mere fact that a wired informant is inside the house, so that the police outside are able to hear the offense occurring . . . does not excuse the *Payton* warrant requirement." *Id.* at 290-91 & n. 117.[12]

---

633 F.2d 742, 743-44 (8th Cir. 1980) (defendant unexpectedly chose different location for the drug purchase); *Verez* v. *Virginia*, 337 S.E.2d 749, 753 (Va. 1985) (suspect was known to be armed and violent); *Cates* v. *Georgia*, 501 S.E.2d 262, 263-64 (Ga. Ct. App. 1998) (drug dealer unexpectedly raised window blinds and could see officers outside); *California* v. *Valencia*, 191 Cal. App. 3d 1483, 1486-87 (Cal. Ct. App. 1987) (defendant unexpectedly chose different location for the drug purchase). There was no comparable exigency in this case.

[12] Petitioners cite to the 1996 Third Edition of Professor LaFave's treatise, which does not contain this sentence, Pet. Br. 46, though the sentence was included in supplements to the Third Edition and the Fourth Edition. *E.g.*, 3 LaFave, Search & Seizure 2004 Pocket Part 72-73 (2003).

In sum, Petitioners mischaracterize the state of the law by asserting that at the time of the raid the consent-once-removed theory as applied to informants was "a reasonably settled doctrine" and "part of the general backdrop of Fourth Amendment rules." Pet. Br. 45.

B. Petitioners Violated Clearly Established Fourth Amendment Rights.

In entering Respondent's home, Petitioners knowingly crossed the "firm line" that this Court has drawn "at the entrance to the house." *Payton*, 445 U.S. at 590. This Court repeatedly has confirmed that warrantless entry into the home without consent or exigent circumstances is "presumptively unreasonable" and "unreasonable *per se*." *E.g.*, *Groh*, 540 U.S. at 559 (quoting *Payton*, 445 U.S. at 586); *Randolph*, 547 U.S. at 16. This Court's decisions clearly instruct police officers not to enter a home absent a warrant, consent, or exigent circumstances. Indeed, "[l]aw enforcement officers are trained in the academy that there are only three legal ways to enter a person's home: with consent, with a warrant or with exigent circumstances." Brian Batterton, *Consent, Exigent Circumstances, and Warrantless Home Entry*, The Public Agency Training Counsel, http://www.patc.com/weeklyarticles/print/consent, exigent-circumstances,warrantless-home-entry.pdf (2008).

The Tenth Circuit has been equally clear, confirming the "'basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable,'" and that "absent consent or exigent

circumstances, police may not enter a citizen's residence without a warrant." *United States* v. *Scroger*, 98 F.3d 1256, 1259 (10th Cir. 1996) (quoting *Payton*, 445 U.S. at 573, 590); *see also*, *e.g.*, *United States* v. *Wicks*, 995 F.2d 964, 969 (10th Cir. 1993) ("Even with probable cause, absent consent or exigent circumstances police officers may not enter a dwelling to make an arrest."); *United States* v. *Anderson*, 981 F.2d 1560, 1567 (10th Cir. 1992) ("[P]olice may enter a home without a warrant only when exigent circumstances are present."). The Tenth Circuit had rejected qualified immunity when officers violated this principle. *E.g.*, *Howard* v. *Dickerson*, 34 F.3d 978, 981-82 (10th Cir. 1994) (warrantless home arrest for misdemeanor). The court had also held that "qualified immunity does not protect official conduct simply because the Supreme Court has never held the exact conduct at issue unlawful." *Anaya* v. *Crossroads Managed Care Sys.*, 195 F.3d 584, 594 (10th Cir. 1999). Rather, "*the shield of qualified immunity is pierced if in light of pre-existing law, the unlawfulness of the conduct is apparent to the officer*." *Id.* (quoting *Lawmaster* v. *Ward*, 125 F.3d 1341, 1350 (10th Cir. 1997) (emphasis supplied)).

Petitioners take issue (Pet. Br. 49) with the court of appeals' statement that "the relevant right" in this case "is the right to be free in one's home from unreasonable searches and arrests." Pet. App. 15. But the court's analysis shows that it appropriately defined the contours of the constitutional right at issue. The court explained that under this Court's decisions and its own precedents, "warrantless entries into a home are *per se* unreasonable unless

they satisfy the established exceptions," and that "'absent a warrant or exigent circumstances, police could not enter a home to make an arrest.'" Pet. App. 15 (quoting *Wilson*, 526 U.S. at 610-11). The court then stated the facts that led to its conclusion that Petitioners violated a clearly established right. Petitioners knew that "(1) they had no warrant; (2) Mr. Callahan had not consented to their entry; and (3) his consent to the entry of an informant could not reasonably be interpreted to extend to them." Pet. App. 17. Although Petitioners had probable cause to believe that a drug transaction had just occurred, an entry based only on probable cause to arrest "plainly violates" *Payton*. *Kirk*, 536 U.S. at 635-36.

None of Petitioners' arguments for the consent-once-removed theory suffices to meet Petitioners' heavy burden to show "'an exceptional situation' as to justify creating a new exception to the warrant requirement."[13] *Mincey* v. *Arizona*, 437 U.S. 385, 391 (1978) (quoting *Vale* v. *Louisiana*, 399 U.S. 30, 34 (1970)). Quite the opposite, Petitioners' theories, if accepted, would upset ordinary expectations and sanction unprecedented invasions of privacy.

It may be clearly established that a police practice is unconstitutional even if *no* court has ever issued a decision to that effect. *Hope* v. *Pelzer*, 536

---

[13] Though Petitioners have now retreated from asserting that consent once removed is an "exception" to the warrant requirement, *see* Pet. Br. 50, the Petition in this case used that term in the Question Presented and throughout the brief. *E.g.*, Pet. i, 6, 7, 8, 10, 11, 12.

U.S. 730, 739 (2002). Here, as shown above, numerous courts had held that warrantless entry into the home following an informant's entry and signal is unconstitutional.

Petitioners' qualified immunity argument ultimately reduces to the fact that the Seventh Circuit had approved warrantless entry in similar circumstances. Of course, "the decisions of one circuit are not binding on other circuits." *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981); *see also* 18 Moore's Federal Practice § 134.02[1][c] (3d ed. 2007) (same). Moreover, as this Court has observed, "there is usually a case somewhere that provides comfort for just about any claim." *Wilkie* v. *Robbins*, 127 S.Ct. 2588, 2606 (2007). As the Seventh Circuit itself has recognized, police officers are not entitled to a safe harbor from liability under § 1983 whenever such a case exists: "[W]e do not think that it can be the law of official immunity that one contrary decision at either the federal court of appeals or the state supreme court level (or, for that matter, two or more decisions by the same federal court of appeals or state supreme court) provides an automatic safe harbor." *Burgess* v. *Lowery*, 201 F.3d 942, 946 (7th Cir. 2000) (Posner, J.).

The arguments set out in Part I above demonstrate that the Seventh Circuit's decisions on the "consent-once-removed" theory are not only incorrect but clearly incorrect. The concept of consent, as defined by the decisions of this Court and the Tenth Circuit, cannot be stretched to include "consent-once-removed." Moreover, the decisions of this Court and the Tenth Circuit clearly establish

that warrantless entry into the home, absent consent or exigent circumstances, violates the Fourth Amendment even when police have probable cause to arrest. Accordingly, the Tenth Circuit correctly held that Petitioners' entry violated clearly-established Fourth Amendment rights.

Petitioners' reliance on *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), is thus misplaced. Pet. Br. 51-54. *Mitchell* involved a domestic wiretap for national security, which "Justice Departments of six successive administrations had considered" constitutional at the time of the events in question. 472 U.S. at 534. And "[o]nly three years earlier, this Court had expressly left open the possibility that this view was correct." *Id.* When the Court decided the constitutionality of the procedure, it recognized that the similar wiretaps had long been used "without guidance from the Congress or a definitive decision of this Court." *Id.* (quoting *United States* v. *United States Dist. Court*, 407 U.S. 297, 299 (1972)). Unlike *Mitchell*, where the question was truly open at the time of the wiretap, here the precedents of this Court and the Tenth Circuit had made clear on several occasions that warrantless entry absent consent or exigent circumstances violates the Fourth Amendment even when police have probable cause to arrest the person inside. Those precedents were supported by numerous other courts that had held warrantless entries under like facts unconstitutional.

This is not a case in which police were "expected to predict the future course of constitutional law." *Wilson* v. *Layne*, 526 U.S. 603, 617-618 (1999) (quoting *Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978)). This Court has long

established a presumption against warrantless home entry without consent or exigent circumstances. Numerous federal and state courts had held searches under these circumstances unconstitutional, and many others had upheld such searches only on the basis of exigent circumstances. The great weight of authority clearly established that there is no exception to the warrant requirement in these circumstances.

Petitioners do not assert that they actually relied on the Seventh Circuit's decisions (or any decisions) concerning the consent-once-removed theory. Indeed, Petitioners never mentioned the consent-once-removed theory in state court. This Court has said that qualified immunity should be granted where the official "claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819 (1982). As the court of appeals held, "[a]lthough other circuits might disagree, Tenth Circuit law governed the reasonableness of the officer's beliefs in this case." Pet. App. 18. It makes little sense to extend qualified immunity to police officers who knew the relevant legal standard, and did not rely on an invalid precedent that was not adopted by the courts of their own federal district, circuit, or State.

III. *Saucier* v. *Katz* Should Not Be Overruled.

In its order granting certiorari, the Court directed the parties to brief the question "[w]hether the Court's decision in *Saucier* v. *Katz*, 533 U.S. 194

(2001), should be overruled."[14] In Respondent's view, the Court should not overrule its decision in *Saucier*. No matter how the Court resolves that question, it should decide both the Fourth Amendment and qualified immunity questions in this case in Mr. Callahan's favor.

As an initial matter, the Court may wish to reconsider whether this is an appropriate case for reconsidering *Saucier*. In *Scott* v. *Harris*, the Court concluded: "We need not address the wisdom of *Saucier* in this case, however, because the constitutional question with which we are presented is . . . easily decided." 127 S. Ct. 1769, 1774 n.4 (2007). Here, the constitutional question is relatively straightforward and is ripe for decision by this Court.

Reconsidering *Saucier* would not change the outcome of this case. The court of appeals (unlike the district court) adhered to this Court's directive in *Saucier* by deciding the constitutionality of the Petitioners' warrantless entry before deciding the qualified immunity question. *See* Pet. App. 8-18. Because the court of appeals has decided both the threshold constitutional issue and the qualified immunity issue, a decision by this Court overruling or modifying the *Saucier* framework will not change the outcome of this case.

---

[14] Respondent, like Petitioners and their amici, assumes that the Court intended the parties to address whether *Saucier*'s mandatory two-step qualified immunity inquiry should be retained.

Moreover, the Fourth Amendment issue merits this Court's attention. There is a split of authority on the "consent once removed" theory between the Tenth Circuit on the one hand and the Sixth and Seventh Circuits on the other. *See United States* v. *Paul*, 808 F.2d 645, 648 (7th Cir. 1986); *United States* v. *Yoon*, 398 F.3d 802, 806-08 (6th Cir. 2005). Declining to resolve the Fourth Amendment question on which this Court granted review would leave unresolved a disagreement among the circuits on a significant Fourth Amendment issue.

Overturning or modifying *Saucier*, so that lower courts could avoid constitutional questions by moving directly to the question of whether the asserted right is "clearly established," would have some advantages. It would save judicial resources and avoid potential error when the immunity issue is particularly clear or the constitutional question is particularly complex. *See, e.g.*, *Brosseau* v. *Haugen*, 543 U.S. 194, 201-02 (2004) (Breyer, J., concurring); *see also* Michael L. Wells, *The "Order-of-Battle" in Constitutional Litigation*, 60 S.M.U. L. Rev. 1539, 1545–46 (2007). But those advantages cannot be gained in this case. The Tenth Circuit has already decided both the Fourth Amendment question and the qualified immunity question, and both those questions are relatively straightforward and ripe for this Court's review.

1. The Reasons The Court Articulated For The *Saucier* Rule Still Apply. In *Siegert* v. *Gilley*, the Court stated that "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of

whether the plaintiff has asserted a violation of a constitutional right at all." 500 U.S. 226, 232 (1991). Deciding this question "permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits." *Id.*

In the wake of *Siegert*, lower courts disagreed as to whether the Court's decision required the constitutional question be answered first. *See* Paul Hughes, *Not A Failed Experiment:* Wilson-Saucier *Sequencing and the Articulation of Constitutional Rights*, 80 U. Colo. L. Rev. ___ (forthcoming 2009), draft at 10-13 & nn.39-56, available at http://ssrn.com/abstract=1202194 (collecting cases). In 1998, the Court stated that "the better approach" is "to determine first whether the plaintiff has alleged a deprivation of a constitutional right," and only then "ask whether the right allegedly implicated was clearly established." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 841 n.5 (1998). The following Term, the Court stated that "[a] court evaluating a claim of qualified immunity 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.'" *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999) (quoting *Conn* v. *Gabbert*, 526 U.S. 286, 290 (1999)). The Court stated that deciding the constitutional question first "promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public." *Id.*

In *Saucier*, the Court further explained the reasons for deciding the constitutional question first:

> In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.

533 U.S. at 201. This reasoning retains its validity. Most importantly, deciding the constitutional question first promotes the development of the law and the elaboration of constitutional rights. Without *Saucier*'s order of decisionmaking, rights that arise only in the civil context might never become sufficiently established to permit liability. Public officials would then have potentially limitless "free bites" in which their unconstitutional conduct will be uncorrected, contrary to the purpose of civil liability under § 1983.

2. Abrogating *Saucier* Would Stunt The Elaboration Of The Law. The Court recently explained that although *Saucier*'s order of decisionmaking contradicts the Court's "'policy of

avoiding unnecessary adjudication of constitutional issues,'" it is "'necessary to set forth principles which will become the basis for a [future] holding that a right is clearly established.'" *Scott* v. *Harris*, 127 S. Ct. 1769, 1774 (2007) (citations omitted; brackets added in original).

Absent *Saucier*'s directive, the "clearly established" requirement would retard constitutional development because lower courts are reluctant to issue constitutional holdings unless required to do so. *See* John M.M. Greabe, Mirabile Dictum*!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 Notre Dame L. Rev. 403, 410-11 (1999). "The danger is that district judges may exercise their discretion in a way that does not give the proper weight to [elaboration of constitutional law], by putting their own interest in clearing their dockets as efficiently as possible ahead of the Court's policy of elaborating constitutional norms." Wells, 60 S.M.U. L. Rev. at 1566.

While a flexible approach that "would *permit* the lower federal courts to decide the merits first," may seem attractive, experience has shown that they are reluctant to do so unless required." Sam Kamin, *An Article III Defense of Merits-First Decisionmaking*, 15 Geo. Mason L. Rev. ___ (forthcoming 2008), draft at 18, available at http://ssrn.com/abstract=1156421; Greabe, 74 Notre Dame L. Rev. at 410 n.35 (estimating that courts bypassed the merits in 51 of 79 recent qualified immunity cases in which no direct precedent prohibited the conduct at issue). The "clearly established" requirement will often be the path of least resistance for lower courts; permitting evasion

for the sake of efficiency would deprive the law of the case-to-case elaboration central to the Court's concerns in *Saucier*. *See* 533 U.S. at 201.

A study of the circuit court cases raising qualified immunity defenses showed that the percentage of courts articulating constitutional rights rose from 74 percent before *Saucier* and *Wilson* (when many courts held that the order of decisionmaking was not mandatory) to 99 percent in 2005, four years after *Saucier*. Hughes, 80 U. Colo. L. Rev at ___, draft at 2. In cases in which the court granted qualified immunity, the increase was even more dramatic, from 65 percent before *Saucier* to 98 percent afterward. *Id.* The Hughes study demonstrates that courts are likely to avoid deciding the constitutional question in a significant percentage of cases if they are permitted to do so, and thus the Court's decision to make the *Saucier* rule mandatory rather than advisory was justified.

3. *Saucier* Is A Recent Precedent Of This Court That Has Not Shown Itself To Be Unworkable. The Court has stated that "*[s]tare decisis* reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 127 S. Ct. 2705, 2720 (2007). While *stare decisis* is not mandatory for procedural and evidentiary rules that do not incur reliance, it is still the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles" and "contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). The Court is not constrained to

follow precedent when the governing decision is "unworkable or badly reasoned," *id.*, but adhering to precedent "is usually the wise policy." *Burnet* v. *Coronado Oil & Gas Co.,* 285 U.S. 393 (1932) (Brandeis, J., dissenting).

The *Saucier* order-of-battle is not "unworkable or badly reasoned." For the reasons stated above, it promotes the development of the law. Leaving constitutional questions open is particularly undesirable in § 1983 claims, where constitutional avoidance may preclude recovery even for recurring violations. And while a mandatory test imposes costs on lower courts, the resulting constitutional holdings provide clear guideposts for public officials to act within the boundaries of the law.

4. Petitioners' Suggested Modification Of The *Saucier* Rule Should Be Rejected. Petitioners' suggestion that the *Saucier* rule should be abrogated in Fourth Amendment cases is not workable. Pet. Br. 57-60. This case illustrates why: Petitioners raised the "consent once removed" theory only as a defense to civil liability, after the state courts held that they unlawfully entered Mr. Callahan's home without a warrant, consent, or exigent circumstances. If the Court were to hold that the lower courts need not decide whether a constitutional violation was alleged before moving on to the question of whether the right at issue was clearly established, it would encourage similar post-hoc rationalization and a search for "a case somewhere that provides comfort for" their actions. *Wilkie*, 127 S.Ct. at 2606. When police officers assert a novel theory, courts burdened by crowded dockets may well take the easier course and find the theory

has not conclusively been rejected, rather than engage in measured analysis that, as here, reveals the theory to be full of holes.

The Solicitor General agrees that "[t]he value of clarifying the applicable law is greatest" when resolving a Fourth Amendment question like the one here. U.S. Br. 24-25. The government notes that the rule has the "additional advantage" of maintaining analytical clarity in Fourth Amendment cases, in which the constitutional standard depends on the reasonableness of the officers' conduct. *Id.* at 26. If courts look solely to the "objective legal reasonableness" of officers' actions, they may conflate the Fourth Amendment and qualified immunity questions. *Id.* at 26-27.

Contrary to Petitioners' argument, *Saucier* may well produce *better* decisions on Fourth Amendment law "in civil rights cases, where the exclusionary rule does not hang over the judge's head like the sword of Damocles." Greabe, 74 Notre Dame L. Rev. at 433, citing Akhil Reed Amar, *Fourth Amendment First Principles*, 108 Harv. L. Rev. 757, 812 (1994). *Saucier* usefully encourages development of Fourth Amendment law away from the exclusionary rule's thumb on the scales.

Accordingly, the Court should decline to overrule the *Saucier* order of decisionmaking.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

James K. Slavens
P.O. Box 752
Fillmore, Utah 84631
(435) 743-4225

Robert A. Long, Jr.
Counsel of Record
Theodore P. Metzler, Jr.
Covington & Burling LLP
1201 Pennsylvania Ave. N.W.
Washington, D.C. 20004
(202) 662-6000

August 2008

Counsel for Respondent