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 Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether police officers may invoke "consent-once-removed" to enter an individual's home without a warrant after an undercover informant buys drugs inside?

2. Whether the officers who effected a warrantless entry in this case are entitled to qualified immunity?

3. Whether *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001) should be overruled?

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BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF CRIMINAL
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SUPPORTING RESPONDENT

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit professional bar association working in the interest of criminal defense attorneys and their clients. NACDL was founded to ensure justice and due process for persons accused of crimes and other misconduct. NACDL has more than 12,800 members—joined by 94 affiliate organizations with 35,000 members—including criminal defense lawyers, active U.S. military defense counsel, and law professors committed

to preserving fairness within America's criminal justice system.

This case concerns whether multiple officers may enter the home without a warrant simply because the homeowner allowed a single informant into the home for a drug transaction. NACDL has a strong interest in ensuring proper application of Fourth Amendment principles in this context and in ensuring that the law accords appropriate respect for an individual's authority to exclude uninvited intrusion into the home. NACDL has appeared as *amicus curiae* in numerous Fourth Amendment cases in this Court. See, *e.g., Georgia* v. *Randolph*, 547 U.S. 103 (2006); *Muehler* v. *Mena*, 544 U.S. 93 (2005); *Devenpeck* v. *Alford*, 543 U.S. 146 (2004); *Kyllo* v. *United States*, 533 U.S. 27 (2001).[1]

STATEMENT

1. The morning of March 19, 2002, Brian Bartholomew—a confidential informant working for the Central Utah Narcotics Task Force ("Task Force")—learned that respondent Afton Callahan was going to have methamphetamine for sale in his home that night. J.A. 114. Accordingly, at 10:30 a.m., Bartholomew called petitioner Detective Jeffrey Whatcott to apprise him of that information. *Ibid.* Whatcott told Bartholomew to confirm that Callahan had methamphetamine for sale and get back to him. Pet. Br. 5-6.

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[1] This *amicus* brief is filed with the consent of the parties, and letters of consent are being filed with the Clerk of the Court in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, the *amicus* submitting this brief and its counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amicus* paid for or made a monetary contribution toward the preparation and submission of this brief.

That day, Bartholomew finished work at around 5 p.m. and then drank "between six and eight" beers. J.A. 115. Shortly after 8:00 p.m., Bartholomew and a friend went to Callahan's home. J.A. 115-117. According to Bartholomew, Callahan showed him the methamphetamine and offered to sell him as much as he wanted. J.A. 117. After "tasting" the drugs, Bartholomew agreed to purchase a baggie for $100; Bartholomew said he would return with the money later. J.A. 117, 145.

Bartholomew then called petitioner Detective Dwight Jenkins to tell him he "had a deal going down." J.A. 118. At around 9:00 p.m., Bartholomew rode with Detective Whatcott to the Sheriff's office, where the Task Force was gathering. J.A. 52-53, 119. Although Bartholomew had been drinking heavily, the Task Force decided to go forward with a controlled buy after giving Bartholomew "six, seven, eight cups of coffee." J.A. 55, 119.

Some Task Force officers surveyed Callahan's home to determine the best points of entry. J.A. 56. Back at the Sheriff's office, Whatcott photocopied a $100 bill for identification, and then gave the bill to Bartholomew to purchase the drugs. J.A. 55, 58. Other officers searched Bartholomew to confirm that he was not carrying any contraband himself and "wired" him with a transmitter so that the officers could monitor and record the controlled buy from outside the house. J.A. 54, 153. Finally, Bartholomew told the officers that he would "play the drums" as a signal for them "to come in" when the deal was done. J.A. 120.

At around 11:00 p.m.—two hours after Bartholomew arrived at the Sheriff's office—petitioners Thomas and Jenkins (also Task Force members) drove Bartholomew to a location near Callahan's home. J.A. 61, 184. While officers monitored everything from outside, Bartholomew went inside the home, bought methamphetamine, and told Callahan that he wanted to "play the drums that

were on the porch." J.A. 64-65. At that point, several members of the Task Force stormed Callahan's home, ordering Callahan, Bartholomew, and the home's two other occupants to lie down on the ground. J.A. 189-191, 266. When the officers searched Callahan, they found the $100 bill they had given Bartholomew. J.A. 243-244. A later search of the home revealed additional baggies of methamphetamine and syringes. J.A. 70-71, 196.

At no point during the day—or in the two hours the Task Force used to plan the operation—did any member of the Task Force seek a warrant. J.A. 89.

2. Callahan was charged with possessing methamphetamine with intent to distribute it. Before trial, he moved to suppress the evidence discovered as a result of petitioners' warrantless entry into his home. J.A. 295-296. The trial court denied the motion, ruling that "exigent circumstances" justified the officers' warrantless entry. J.A. 302. Callahan then pled guilty to one count, reserving his right to appeal the trial court's ruling on the motion to suppress. J.A. 304-312.

On appeal, the State conceded that no exigent circumstances existed, arguing instead that the evidence was admissible under the inevitable discovery doctrine. J.A. 334-335. The Utah Court of Appeals agreed that "the Task Force entry was not justified under the doctrine of exigent circumstances," J.A. 334 n.2, and rejected the State's inevitable discovery argument as well, J.A. 339. "In view of the Task Force's adoption of a plan that included an illegal entry from the outset, we cannot, with any confidence, conclude that an independent, legal avenue for discovery was *ever* available." J.A. 338 (internal quotation marks omitted).

3. Callahan then brought this action under 42 U.S.C. § 1983 in the United States District Court for the District of Utah. Pet. App. 39-40. The district court granted

summary judgment for petitioners, focusing on "consent once removed" as petitioners' "strongest argument." *Id.* at 47. The district court described that doctrine as validating warrantless entry into the home where an undercover agent or informant enters with consent, establishes probable cause, and immediately summons help. *Id.* at 47-48. While noting that the doctrine had been adopted by three circuits, the district court "wonder[ed]" about its validity. *Id.* at 52. "[I]t seems a bit of a stretch," the court observed, to call the entry of multiple officers "'consensual'" where, as here, the homeowner merely invited a single individual into his home. *Ibid.* Although the district court assumed a constitutional violation for purposes of its analysis, the court granted petitioners qualified immunity. *Id.* at 53. The invalidity of entry under the consent-once-removed doctrine, the court declared, was not "clearly established" under these facts at the time the officers acted. *Id.* at 55-56.

4. The court of appeals reversed. Pet. App. 1-18. Turning first to whether there was a constitutional violation, the court of appeals emphasized that, in view of the home's centrality to privacy and personal security, courts "continually have viewed the warrantless entry into the home as presumptively unreasonable." *Id.* at 8. This particular entry, the court of appeals held, did not fall within the "carefully defined set of exceptions" to the warrant requirement. *Id.* at 9 (internal quotation marks omitted).

The court of appeals noted that it had previously authorized warrantless entry by additional officers to assist an undercover officer in making an arrest, but refused to extend that holding to permit petitioners' warrantless entry. Pet. App. 11. "[T]he person with authority to consent never consented to the entry of police into the house." *Id.* at 12. The court of appeals also rejected petitioners' claim of qualified immunity, noting that "the

Supreme Court and the Tenth Circuit have clearly established that to allow police entry into a home, the only two exceptions to the warrant requirement are consent and exigent circumstances." *Id.* at 17. Here, neither of those exceptions even arguably validated warrantless entry. *Ibid.*

Judge Kelly dissented. Judge Kelly would have held that the warrantless entry did not violate the Fourth Amendment. Pet. App. 26. Alternatively, Judge Kelly would have granted qualified immunity, holding that "the right at issue was not clearly established" when petitioners conducted their search. *Id.* at 29.

SUMMARY OF ARGUMENT

I. This Court has long required that, absent exigency or consent, officers obtain a warrant before entering the home. Callahan's decision to admit a confidential informant into his home did not excuse petitioners from getting a warrant before barging inside.

A. In deciding whether an intrusion violates the Fourth Amendment, this Court determines whether the affected individual had a "reasonable expectation of privacy" by examining sources such as tort law, property law, and shared social understandings. Those sources all make clear that, when a homeowner invites a single individual into the home, that does not represent consent for uninvited visitors to enter as well. The law and society have long respected and vigorously enforced the expectation that—because an invitation to enter the home extends only to the person who receives it, and the invitation cannot be transferred or extended—the home remains immune from entry by anyone who has not been invited inside.

B. The United States errs in urging that the uninvited entry of additional officers into the home does not meaningfully intrude on privacy if a government infor-

mant is already in the home. Uninvited "*physical entry of the home* is the chief evil against which * * * the Fourth Amendment is directed." *Payton* v. *New York*, 445 U.S. 573, 585 (1980) (emphasis added) (internal quotation marks and citation omitted). The entry of multiple police officers into the home, without invitation and without a warrant, unquestionably represents a meaningful intrusion on Fourth Amendment rights. The history of the Fourth Amendment makes that clear. In terms of privacy, there is an enormous difference between an invitee entering the home (potentially recounting his observations to others) and multiple others storming in uninvited.

C. The defense of consent-once-removed offered here does not make sense in light of that doctrine's supposed boundaries. If allowing an informant into the home "waived" the homeowner's Fourth Amendment rights or so diminished his privacy expectations as to allow entry by others, there would be no reason for the doctrine to require probable cause, or to require a request for assistance from the informant. Entry would be lawful without those elements based on the informant's presence alone.

II. Qualified immunity was properly denied. Petitioners' planned warrantless entry into Callahan's home was unlawful under settled principles and clearly contrary to centuries of legal and social tradition. No reasonable officer could have thought otherwise. Even accepting *arguendo* the consent-once-removed doctrine, that doctrine requires a request for assistance by the informant inside the home. No such request was issued here.

III. The Court should modify the two-step inquiry mandated by *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001). The first step, determining whether a constitutional violation occurred under the facts of the case, often clarifies and guides the later inquiry into whether the law was

"clearly established." But lower courts should not be required to complete the first step in every case, where doing so would be unworkable, inefficient, or contrary to the purposes of qualified immunity. Because this Court has a unique duty to issue thorough opinions that offer guidance and enhance consistency in the law, this Court should often utilize *Saucier*'s two-step approach in formulating its opinions. Following that two-step approach is particularly appropriate in this case.

ARGUMENT

For petitioners, most everything leading up to their arrest of respondent Callahan went as planned. The morning of the day of arrest, a confidential informant told Detective Whatcott that Callahan would be distributing methamphetamine. J.A. 114. That night, the officers arranged for the informant to make a controlled buy at Callahan's home. Some members of the Task Force surveyed Callahan's home to "look[] for places they could get into the trailer * * * as quickly as possible after the deal was done." J.A. 56. Meanwhile, at the Sheriff's office, other officers wired the informant with a remote listening device, J.A. 54, searched him for contraband, J.A. 183, and gave him a $100 bill (after photocopying it for identification) so he could make the drug purchase, J.A. 58. Task Force members then drove the informant to Callahan's neighborhood and waited as Callahan's daughter let the informant into the home. J.A. 184-185. When the informant gave a signal that the deal was done, officers stormed Callahan's home, arrested those present, and searched the premises. J.A. 65-66, 195.

It was a textbook operation, with a textbook mistake—the officers entered Callahan's home without a warrant. J.A. 89. "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton* v.

New York, 445 U.S. 573, 586 (1980) (citation omitted). Here, petitioners' plan from "the outset" called for them to enter Callahan's home. J.A. 338. In this Court, petitioners do not contend that there was even an arguable exigency that would have permitted warrantless entry. Nor do they claim that Callahan voluntarily allowed them inside.

Instead, petitioners and their *amici* contend that it was permissible for officers to storm into Callahan's home without a warrant because Callahan had voluntarily allowed *the confidential informant* to enter. Invoking the so-called "consent-once-removed" doctrine, they urge that, by inviting one informant inside, Callahan also unwittingly consented to (or forfeited any protection *vis-à-vis*) the later entry of multiple, armed police officers. In essence, they claim that a homeowner's decision to license a single individual to join him in his home gives the police a free pass to raid the home without a warrant.

That theory cannot be reconciled with the longstanding legal and social understandings this Court consults when deciding Fourth Amendment issues. From Blackstone to Emily Post, from historical tort principles to the basics of property law, it has long been understood that consenting to a single person's entry is not—and cannot—be taken as consent for others to enter as well. In society and the law alike, a license to enter has always been of such a personal nature that it cannot be transferred to another, much less expanded to include a band of unlicensed, uninvited, and unwelcome guests. Nowhere is that principle more dearly held and rigorously enforced than when it comes to the most private of sanctuaries—the home. The law and social custom thus have long respected and enforced the homeowner's expectation that, even where he invites guests into the home, the sanctity of his home will not be physically invaded by those he has not invited.

I. The Warrantless Police Entry Violated The Fourth Amendment

A. The Notion Of "Consent-Once-Removed" Cannot Be Reconciled With Our Legal Tradition Or Shared Values

It is well established that law enforcement officers may conduct "a valid warrantless entry and search of premises" when the homeowner actually consents to their entry. *Georgia* v. *Randolph*, 547 U.S. 103, 106 (2006). Invoking "consent-once-removed," petitioners and their *amici* urge that, when a citizen consents to a single informant's entry into his home, that somehow licenses multiple officers to force their way inside later on. Pet. Br. 20-28; U.S. Br. 12-18.[2] Petitioners and their *amici* offer a grab-bag of rationalizations for that result. Petitioners posit that, when a homeowner invites an informant into his home, he "waives" his Fourth Amendment objection to the subsequent entry of multiple police officers. Pet. Br. 20-24, 39-41. Alternately, they rely on this Court's statement that, for an officer's observation to be a "search" within the meaning of the Fourth Amendment, it must infringe on an expectation of privacy that society respects "as objectively reasonable." *California* v. *Greenwood*, 486 U.S. 35, 40 (1988); Pet. Br. 26. Once Callahan invited the informant to enter his home and revealed its contents to the informant, petitioners claim, Callahan ceased to have a legitimate expectation of privacy that might be offended when armed officers later barged inside. Pet. Br. 17, 25-28; see also U.S. Br. 14-16.

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[2] The question presented in the petition for a writ of certiorari specifically invited this Court to address the so-called "'consent once removed' exception to the Fourth Amendment warrant requirement." Pet. i. While petitioners drop any reference to that concept in the reformulated question in their brief, Pet. Br. i, this Court granted review of the questions presented in the petition.

Those theories make no sense. An expectation of privacy is "reasonable" or "legitimate" where it "has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" *Minnesota* v. *Carter*, 525 U.S. 83, 88 (1998) (quoting *Rakas* v. *Illinois*, 439 U.S. 128, 143-144 (1978)). For centuries, "concepts of real or personal property law" and the "understandings that are recognized and permitted by society" have made it clear that consent to the entry of a single individual does not authorize the entry of anyone (or everyone) else who wishes to come inside. The law and social custom alike studiously respect and enforce the expectation that, when a citizen invites another into his home, that invitation extends only to the person invited.

1. *More Than A Century Of Legal Tradition Confirms That Consent To One Person's Entry Does Not License Others To Enter*

The law has long been clear: Inviting a guest into one's home does not license the uninvited to enter as well. For over a century, American legal treatises have recognized that "a mere licence * * * is personal to the grantor, and cannot be assigned * * * ." 1 H. Roscoe, *A Treatise on the Law of Actions Relating to Real Property* 687 (1825). A license to enter property could not "be assigned without the consent of the licenser." C. Tiedeman, *An Elementary Treatise on the American Law of Real Property* 497 (1884). Since an invitee's or licensee's right to be present in the home cannot be transferred to allow another to enter, surely it cannot be *expanded* to permit (or taken as automatically permitting) *myriad others* to enter. "Permission to dump 'a few stones' upon property is not a permission to cover it with boulders." W. Keeton *et al.*, *Prosser and Keeton on the Law of Torts* § 18, at 118 (5th ed. 1984). Likewise, granting an invitee permis-

sion to come inside does not permit him to bring the United States cavalry with him—much less for the cavalry to enter on its own.

That principle—that a license to enter the home cannot be transferred or expanded—has deep roots. In the 19th century, even members of the household could not extend their license to exercise dominion over the property absent express permission from the head of the household. One treatise of that era thus declared that a "wife, when she is not the general agent of her husband, nor specifically authorized to act in the particular instance, cannot grant a valid license to a stranger to enter on her husband's land, and remove property therefrom * * * ." 2 T. Waterman, *A Treatise on the Law of Trespass* 184 (1875). Blackstone's *Commentaries* similarly reflected the fact that, even where the homeowner licensed certain individuals to enter, they could not extend that license to others. For that reason, the common law at that time deemed a thief guilty of burglary—for "breaking and entering"—even if he was freely admitted into the home by someone with license to be there, such as a servant. See 4 William Blackstone, *Commentaries* *226-*227; see also 3 J. Chitty, *A Practical Treatise on the Criminal Law* 1093 (1816).

The notion that an invitation to enter the home does not extend beyond the invitee himself pervades the law today. See, *e.g.*, *Restatement (Second) of Torts* § 892A cmt. e (1979) ("[O]ne who consents that another may walk across his land does not, without more, consent that * * * a third person may walk across it along with the other."). Thus, this Court has held that, while hotel guests implicitly consent to hotel staff members entering their rooms, that consent does not permit those staff members to allow entry by government agents. *Stoner* v. *California*, 376 U.S. 483, 489-490 (1964). Likewise, while a landlord may have a clear right to enter a tenant's home,

the landlord may not extend his right by admitting law enforcement. *Chapman* v. *United States*, 365 U.S. 610, 617 (1961). And this Court has made clear that overnight guests who "have no legal interest in the premises" do "not have the legal authority to determine who may or may not enter the household." *Minnesota* v. *Olson*, 495 U.S. 91, 99 (1990). *A fortiori* the presence of a temporary visitor for a few minutes cannot "determine who may or may not enter the household."

The law thus has long respected and protected the homeowner's expectation that his abode will be free from intrusion by anyone except those he has specifically invited to enter. Those invited inside may be invitees or licensees. But anyone else is a trespasser—or potentially worse—despite the presence of invitees inside. 2 Waterman, *supra*, at 183 ("To constitute a license which amounts to a defense to an action of trespass, where authority to enter is not given by law, there must have been a permission to enter upon the premises.").

That legal tradition reflects the longstanding custom that the home remains a private and inviolate refuge from the outside world—protected against entry by the uninvited—even when we exercise the longstanding and socially valuable tradition of welcoming selected guests or visitors inside. Because the home is private, permission to enter is "so much a matter of personal trust and confidence that it does not extend to any one but the licensee, and is not capable of being assigned or transferred by the person to whom it is granted." C. Boone, *A Manual of the Law of Real Property* 149 (1883). For similar reasons, even legally *sanctioned* entries pursuant to a warrant cannot be extended to include additional

individuals who are not involved in the warrant's execution.[3]

The notion underlying consent-once-removed—that admitting a single individual into the home somehow makes it permissible for others to enter or otherwise eliminates privacy expectations against entry of the uninvited—is thus utterly at war with centuries of legal tradition. An invitation to enter addressed to one person has long been strictly limited to that person; it neither extends nor can be transferred to others. Admitting a guest into the home thus has never been thought to "waive" the homeowners' expectation that others will not invade his home uninvited. Likewise, the law has protected our shared social expectation that, even when we invite a guest into our home, the home remains otherwise private and protected from invasion by those whom we have not invited inside. Given those clear social and legal traditions, the uninvited entry here cannot be deemed "reasonable."

2. *Shared Social Norms And Commonsense Confirm That A Homeowner's Consent To One Person's Entry Does Not Destroy His Legitimate Privacy Expectations*

In determining the lawfulness of police entry, this Court also considers our shared social expectations. "The constant element in assessing Fourth Amendment reasonableness in the consent cases," the Court has explained, "is the great significance given to widely shared social expectations * * * ." *Randolph*, 547 U.S. at 111. Here, those social expectations are clear: Inviting another into your home—whether a friend or informant—

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[3] As this Court observed: "[I]t is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant * * * ." *Wilson* v. *Layne*, 526 U.S. 603, 614 (1999).

does not eliminate your expectation that your home will remain private and secure against uninvited and unwelcome entry by others.

To the extent that commonsense observation requires documentation, it is easily found. Addressing a variety of contexts, the leading guides to social comportment explain that, "[i]n social life, only those who are invited are invited * * * ." J. Martin, *Miss Manners: A Citizen's Guide to Civility*, 324 (1996); see also P. Post, *Everyday Etiquette* 111 (1999) ("[An] invitation is intended only for the person to whom it is addressed."); J. Martin, *Miss Manners' Guide to Excruciatingly Correct Behavior* 403-404, 566 (2005). That limitation on the scope of invitation ordinarily excludes even uninvited significant others and children. See Post, *Everyday Etiquette*, *supra*, at 111. While hosts often attempt to accommodate the wishes of their guests, it remains their absolute prerogative to decline to entertain the uninvited. See P. Post, *Emily Post's Entertaining* 14 (1998). As this Court has observed, hosts "have the authority to exclude despite the wishes of the guest." *Olson*, 495 U.S. at 99.

That is not a fancy principle of etiquette but a bedrock social rule. When a homeowner invites a guest into his home, he does not expect others (whether the guest's associates or total strangers) to barge in at will. He understands that only the guest will enter. Likewise, the guest naturally understands that an invitation to enter the home extends to him and him alone—and not to undisclosed associates who may arrive later. A contrary rule would destroy the valuable and longstanding tradition of entertaining guests in the home. Few would invite others into their homes if the necessary consequence were that strangers could enter uninvited. Here, Callahan may have invited the informant into his home. But our shared social traditions make clear that, in so doing, Callahan did not create an open-ended license for, or

surrender his privacy interests in the home with respect to, entry by others.

B. The Entry Of Police Officers Into The Home Materially Interferes With Protected Fourth Amendment Interests

Focusing on an unduly narrow notion of privacy, the United States defends consent-once-removed by urging that, once the informant is inside the home, "the entry of additional officers * * * works no constitutionally significant incremental interference with the resident's privacy interests." U.S. Br. 13; see also Pet. Br. 20-28.[4] The United States thus contends that, once the informant viewed the contents of Callahan's home, the entry of additional law enforcement officers "revealed no private information that could not equally have been revealed through Bartholomew's recounting of his observations." U.S. Br. 16.

That argument proceeds from the erroneous premise that the Fourth Amendment's privacy protections are limited to the right to keep the contents of one's home "secret" or free from view. For centuries, however, the common law and the Fourth Amendment have protected the far broader interest of personal security and freedom from unwanted physical intrusion into the home. But even if one were to erroneously define "privacy" so narrowly as to embrace only freedom from unwanted observation, longstanding social custom and our shared values—to say nothing of commonsense—all make clear

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[4] To the extent the United States assumes that the additional officers entered to assist the informant in "perform[ing] the arrest effectively," U.S. Br. 13, its analysis rests on a false premise. There is no evidence that the informant in this case ever sought to conduct an arrest. J.A. 126; see also pp. 25 n.7, 28, *infra*. To the contrary, when the police entered, they seized the informant—ordering him to the ground with the others. J.A. 126.

that there is an enormous difference between the intrusion that is occasioned when a single, invited guest tells others of the home's contents and the intrusion that occurs when numerous others barge in uninvited to see for themselves.

1. *The Fourth Amendment Protects Freedom From Uninvited Physical Intrusion Into The Home*

The United States' position rests in the first instance on a false premise—that the Fourth Amendment protects only an individual's "expectation of privacy" in the sense of freedom from observation. The Fourth Amendment protects more than that. It also protects "privacy" in the sense of security, seclusion, and freedom from physical invasion in the home. This Court's decision in *Payton* could not be more clear: Warrantless "*physical entry* of the home" was "the chief evil against which the wording of the Fourth Amendment is directed." *Payton*, 445 U.S. at 585 (emphasis added) (internal quotation marks and citation omitted). Similarly, in *Silverman* v. *United States*, 365 U.S. 505 (1961), the Court held that the police violated the Fourth Amendment when they inserted a listening device into the home, holding that the "actual intrusion into a constitutionally protected area" itself violated the Fourth Amendment. *Id.* at 512. As this Court later explained, "[i]n *Silverman*, * * * we made clear that *any physical invasion* of the structure of the home, 'by *even a fraction of an inch*,' was too much." *Kyllo* v. *United States*, 533 U.S. 27, 39 (2001) (emphasis added). A citizen who chooses to live in a glass house, for example, might expose its contents to public view. But that surely does not mean government agents could enter that structure at will. The sanctity of the home against physical intrusion has never been a function of its opacity.

In fact, this Court's early Fourth Amendment cases, like early English cases, focused *exclusively* on physical intrusion—not visual observation. See *Kyllo*, 533 U.S. at 31-32. That is consistent with the Fourth Amendment's roots in the protection of private property. D. Yeager, *Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. Crim. L. & Criminology 249, 284 (1993). One of the core attributes of private property includes the owner's "right to exclude" (and conversely to admit) others as he chooses. *Rakas*, 439 U.S. at 143 n.12. Homeowners therefore have long had the near-absolute right to determine both who and how many may enter the home. Consent to enter is personal, specific, and non-transferable precisely because that effectuates the homeowner's fundamental right to decide who can—and who cannot—enter the home.

The Framers understood that tradition, adopting the Fourth Amendment against the backdrop of the famous observation in *Semayne's Case*, 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194 (K.B. 1604), that the "house of every one is as his castle and fortress," as well as the statement attributed to William Pitt (Earl of Chatham):

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

Miller v. *United States*, 357 U.S. 301, 307 (1958). While this Court has since appropriately expanded the Fourth Amendment's reach to encompass intrusions beyond physical invasions, see *Kyllo*, 533 U.S. at 32, the Court has never abandoned protecting the home against physical entry, much less downgraded the home's threshold to a permeable membrane incapable of resisting uninvited,

warrantless entry whenever the owner has allowed a guest (even an informant) inside.

This Court's cases referring to the Fourth Amendment's protection of "privacy" thus do not limit that protection to unwarranted *viewing* of the inside of the home. The word "privacy" encompasses not merely freedom from unwarranted observation, but also "[t]he state of being free from *unsanctioned intrusion*." *The American Heritage Dictionary of the English Language* 1396 (4th ed. 2000) (emphasis added). "Privacy" means the "[s]tate of being apart from *the company or observation* of others." *Webster's New Int'l Dictionary* 1969 (2d ed. 1954) (emphasis added). Because the Fourth Amendment protects the citizen's right to keep his home free of uninvited physical invasion, "the entry of additional officers" into the home, U.S. Br. 13, most assuredly works a "constitutionally significant incremental interference with the resident's privacy interests," *ibid.* Virtually everyone understands that there is an extraordinary difference between entertaining a single guest (even an informant) in the home, and having multiple armed officers barge into the premises uninvited. The law and social tradition alike have long recognized that distinction. There is no basis for departing from it here.

2. *Observation Of The Inside Of The Home By Additional Officers Materially Invades Other Privacy Rights*

Even if "privacy" is viewed narrowly as freedom from unwanted observation, the United States' position still fails. There is an enormous difference between having one's home viewed by a single visitor, who may describe what he saw to others (including the police), and having the home's interior viewed directly by others (including the police) who enter uninvited. We all invite others into our homes despite the risk that those inside may describe

its contents to others. But that hardly means that, in so doing, we license the world to enter and look for itself. To the contrary, the very reason invitations and licenses to enter are not transferable or expandable is that having different or additional people view the contents of your home is quite different from having an invitee later describe things to others. See pp. 11-16, *supra*.

Thus, "[o]ne contemplating illegal activities must realize and risk that his companions may be reporting to the police." *United States* v. *White*, 401 U.S. 745, 752 (1971) (plurality opinion). But the risk of "reporting to the police" translates to the possibility of probable cause and issuance of a warrant. It does not translate into free license for the uninvited to make a warrantless entry. For the same reason, petitioners' reliance on *Lewis* v. *United States*, 385 U.S. 206 (1966), see Pet. Br. 22-26, is fundamentally misplaced. In that case, Lewis voluntarily admitted an undercover officer into his home and sold him drugs. 385 U.S. at 207. Several months later, after the police arrested and charged Lewis, Lewis sought to exclude evidence obtained by the undercover officer when he was inside Lewis's home with Lewis's consent. *Id.* at 208. This Court held that, by selling drugs from his home, Lewis ran the risk that the buyer would be reporting to the police or that the buyer was himself an undercover agent. But nothing in *Lewis* suggests that, by running that risk, the homeowner also licensed *other*, uninvited government agents to enter without a warrant.

For similar reasons, the United States' reliance on *Illinois* v. *Andreas*, 463 U.S. 765 (1983), and *United States* v. *Jacobsen*, 466 U.S. 109 (1984), is misplaced. U.S. Br. 14-16. Both *Andreas* and *Jacobsen* involved warrantless reexaminations of *packages* that the owner had entrusted to another and that had previously been opened and searched by private parties *outside the home*. Neither of those cases involved an uninvited physical in-

vasion of the home. It might be that, when we send our possessions outside the home, we ordinarily expect that they may be inspected by others without our consent. For example, in *Andreas*, this Court stated that "[c]ommon carriers have a common law right to inspect * * * based on their duty to refrain from carrying contraband." 463 U.S. at 769 n.1. But our legal and social expectations for the home are wholly different. In the home, the fact that one person has been invited inside has never been thought to allow others to enter. Nor is there any legal or social basis for suggesting that law enforcement can enter the home uninvited and without a warrant if they are merely "reenacting," U.S. Br. 14-16; Pet. Br. 26-28, an invited guest's prior entry.

3. *Petitioners' Defense Of Consent-Once-Removed Proves Too Much*

Consent-once-removed also does not make sense in its own right. That purported exception to the warrant requirement applies "only where *the agent (or informant) entered at the express invitation* of someone with authority to consent, at that point established the existence of *probable cause* * * *, and *immediately summoned help* from other officers." *United States* v. *Diaz*, 814 F.2d 454, 459 (7th Cir. 1987) (emphasis added). But, if the arguments advanced by petitioners and the United States in support of the theory are valid, most of those putative preconditions would be irrelevant.

For example, petitioners and the United States defend petitioners' warrantless entry by declaring that Callahan's decision to expose the contents of his home to Bartholomew, who turned out to be an informant, somehow "waived" his Fourth Amendment rights, see p. 10, *supra*, or so diminished his privacy expectations that the later entry by multiple officers "work[ed] no constitutionally significant incremental interference with [those]

privacy interests," U.S. Br. 13. If those arguments were correct, there would be no reason to require "probable cause" as a precondition to police entry. If Fourth Amendment rights have been waived, or there is no "search" within the meaning of the Fourth Amendment, probable cause is not required. See, *e.g.*, *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219 (1973) (probable cause unnecessary for "a search that is conducted pursuant to consent"); *Florida* v. *Riley*, 488 U.S. 445, 452 (1989) (no probable cause needed for aerial surveillance because it is not a "search"); *id.* at 456 (Brennan, J., dissenting). Nor would there be any need for the informant to "immediately summon[] help" from other officers. Absent a valid expectation of privacy, the officers would be free to enter whether summoned or not. The consent-once-removed doctrine therefore must be seen for what it is—an unjustified assault on the warrant requirement itself.

C. The Balance Of Private And Law Enforcement Interests Tilts Decidedly Against Consent-Once-Removed

Sometimes, "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979). Here, that balance weighs strongly in favor of preserving the warrant requirement.

The individual's Fourth Amendment interests are of the highest order here. The "sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976). The warrant requirement serves a critical role in preserving that sanctity. "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial

officer, not by a policeman or Government enforcement agent." *United States* v. *Jackson*, 333 U.S. 10, 14 (1948).

By contrast, consent-once-removed serves no legitimate law enforcement interest not already served by existing law. Law enforcement officers who wish to enter the home immediately after a controlled buy, like the one at issue here, often will have ample opportunity and sufficient cause to obtain an ordinary warrant. Here, for example, the officers learned in the middle of the morning that Callahan would be selling drugs from his home later that night. J.A. 114. Hours before the controlled buy, the informant visited Callahan's home, confirmed that Callahan had methamphetamine for sale, "tasted" the drugs, and advised the officers that the drugs were there and available for purchase. J.A. 115-118, 145. While the officers spent the next two hours preparing a controlled buy inside the home—wiring the informant with listening equipment, casing the home to identify the best points of entry, and arranging for the informant to signal them when the buy was complete—they never attempted to get a warrant. J.A. 54-56, 89, 245. Given the amount of time the officers had—and the information available to them—they had no legitimate excuse for failing to do so.[5]

Even if probable cause were lacking before the buy occurred, the officers had multiple options available. They could have sought an "anticipatory warrant" to validate entry once the controlled buy occurred. When

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[5] Probable cause exists where "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983). Here, the officers thought they had probable cause, or were at least close to it, even before they learned that the informant had sampled Callahan's wares to verify that it was indeed methamphetamine. J.A. 257 ("I thought we were slim. We probably could have wrote a warrant, maybe, and maybe not.").

police officers do not yet have probable cause, but believe that a specific, future event will give them probable cause, they may seek an "anticipatory" warrant that becomes effective if and when that anticipated event occurs. See generally 2 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.7(c), at 400 (4th ed. 2004). Here, the officers at least had probable cause to believe that a controlled buy would take place. Their suspicions were sufficient to justify the efforts of multiple officers for several hours to effect the operation. Nothing prevented them from seeking an anticipatory warrant that identified the controlled buy as the "triggering" event. See *State* v. *Womack*, 967 P.2d 536, 539-540 (Utah Ct. App. 1998); *United States* v. *Hugoboom*, 112 F.3d 1081, 1085-1086 (10th Cir. 1997); see also *United States* v. *Grubbs*, 547 U.S. 90, 95-97 (2006).

Alternatively, the officers could have continued their surveillance of Callahan's home after the controlled buy, sought an expeditious "telephonic warrant," and entered once they received the warrant.[6] And if Callahan had attempted to leave the home before the officers obtained that warrant, they could have detained Callahan outside the home and secured the premises until the warrant was issued. *Illinois* v. *McArthur*, 531 U.S. 326, 331-332 (2001). There is no reason petitioners could not have obtained a telephonic warrant either after the buy occurred, or at some point during the two hours they were at the Sheriff's office preparing the operation.

Invoking officer safety, the United States observes that "the government has a substantial interest in ensuring that sufficient law-enforcement personnel are

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[6] See Utah R. Crim. P. 40(l) (originally enacted as Utah Code Ann. § 77-23-204(2) (2002)) (authorizing telephonic warrants). The Federal Rules of Criminal Procedure likewise permit the issuance of telephonic warrants. See Fed. R. Crim. P. 41(d)(3).

present to perform [an] arrest effectively and without undue risk of violent resistance." U.S. Br. 13. But nothing in the warrant requirement precludes that need from being met. Where the police decide ahead of time to arrest the suspect in the home—as was the case here[7]—the police can obtain a warrant or anticipatory warrant to validate the entry of sufficient officers to effect the arrest safely.

To the extent the officers do not plan to enter but unanticipated circumstances make an immediate, in-the-home arrest necessary, the "exigent circumstances" doctrine meets any conceivable law enforcement need. Where "the risk of danger to the police" arises unexpectedly, additional officers may enter an individual's home to protect officer or informant safety without a warrant. See *Olson*, 495 U.S. at 100.[8] But petitioners do not argue that exigency justified entry, and with reason: The operation went pretty much as planned. The informant made the controlled buy without Callahan learning that he was an informant. No one detected the surveillance. And no exigency placed the informant at risk or made an immediate in-the-home arrest necessary. The police simply decided to raid a suspect's home without bothering to get a warrant. Under the circumstances,

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[7] As the Utah court of appeals observed, the "Task Force[] adopt[ed] * * * a plan that included * * * entry from the outset." J.A. 338. That was why the officers had surveyed the property to determine the best entry points before the buy took place. J.A. 56; p. 8, *supra*; see J.A. 188 ("[W]e'd be close so that we could enter the residence, that was the decision that the commander had made prior to going there.").

[8] That does not mean that police can plan an operation so as to make exigency a self-fulfilling prophecy. See Pet. App. 10 (noting exigent circumstances "may not be subject to police manipulation or abuse") (internal quotation marks omitted); *United States* v. *Gomez-Moreno*, 479 F.3d 350, 356-357 (5th Cir. 2007).

consent-once-removed does no more than validate precisely what this Court has long condemned—entry into the home without a warrant or exigent circumstances. "If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required." *Johnson* v. *United States,* 333 U.S. 10, 15 (1948).

Perhaps recognizing as much, petitioners attempt to turn the absence of a warrant from vice into virtue, stating that "warrantless searches will tend to produce significantly less invasive searches" than searches based on "authority of an anticipatory search warrant." Pet. Br. 34. But the warrant is not a mere formality to be avoided when possible. It is a critical protection for the sanctity of the home. Accordingly, "[a]bsent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police." *McDonald* v. *United States*, 335 U.S. 451, 455 (1948).[9] This Court "cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." *Id.* at 456. "A generalized interest in expedient law enforcement cannot, without more, justify a warrantless search." *Randolph*, 547 U.S. at 116 n.5.

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[9] The warrant requirement also serves law enforcement needs. Where officers obtain a warrant, evidence found during the search will be admissible so long as the officers exercised objective good faith in conducting the search, even if probable cause turned out to be absent. *United States* v. *Leon*, 468 U.S. 897, 922 (1984). Petitioners and their *amici* ignore that benefit to officers in their analysis.

II. Qualified Immunity Is Unavailable Here

The warrantless raid on Callahan's home here was not merely unlawful. It was indefensible. The requirement that officers obtain a warrant before entering the home has been a fixture for decades. Petitioners do not claim that anything unexpected created an exigent need to enter. To the contrary, the officers planned to enter the home from the outset. See pp. 8, 25 n.7, *supra*. Nor could any reasonable officer believe that Callahan, by allowing the informant into his home, impliedly consented to petitioners' entry, waived his Fourth Amendment rights as to their entry, or otherwise gave up his reasonable expectation of privacy and security in his home. Our legal and social traditions have long made it clear that inviting another into your home licenses only the entry of the person so invited; the law has vigorously protected the homeowner's expectation of privacy against entry by those he has not invited inside. See pp. 11-16, *supra*.

In considering facts similar to those here, courts employing a traditional Fourth Amendment analysis have routinely held warrantless home searches unconstitutional absent consent or exigency.[10] Because no objectively reasonable officer confronting the situation before petitioners could have believed that warrantless entry was lawful under the circumstances, qualified immunity was properly denied. *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987); *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) ("The relevant dispositive inquiry * * * is whether it

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[10] See, *e.g.*, *United States* v. *Santa*, 236 F.3d 662 (11th Cir. 2000); *United States* v. *Templeman*, 938 F.2d 122 (8th Cir. 1991); *United States* v. *Beltran*, 917 F.2d 641 (1st Cir. 1990); *Carranza* v. *State*, 467 S.E.2d 315 (Ga. 1996); *Hawkins* v. *State*, 626 N.E.2d 436 (Ind. 1993); *Youtz* v. *State*, 494 So.2d 189 (Ala. Crim. App. 1986); *People* v. *Soto*, 96 A.D.2d 741 (N.Y. App. Div. 1983); *State* v. *Yananokwiak*, 309 S.E.2d 560 (N.C. Ct. App. 1983).

would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.").

Petitioners nonetheless urge that qualified immunity is available because a few cases have recognized consent-once-removed. Pet. Br. 44-48. But endorsement by a court or two is not itself sufficient to defeat qualified immunity. Courts are not merely capable of error; they are also capable of unreasonable error. *Williams* v. *Taylor*, 529 U.S. 362, 377-378 (2000) (explaining the difference between error and decisions that are "unreasonable"). And this Court has denied qualified immunity in cases like *Hope* v. *Pelzer*, 536 U.S. 730 (2002), notwithstanding the fact that lower courts had permitted the conduct at issue in the past, *id.* at 756-757 (Thomas, J., dissenting) (collecting cases).

In any event, the putative standard for consent-once-removed requires, as one of three preconditions, that the informant in the home "immediately summon[] help" to effectuate an arrest. See, *e.g.*, *Diaz*, 814 F.2d at 459. Here, that never occurred. In fact, the informant was not, and had no intention of, conducting the arrest; the police had planned to do that from the outset. See p. 25 n.7, *supra*. The informant in fact was on his way out the door when the officers stormed the home. J.A. 165 ("As soon as I tried to get out, the door come swinging open. That's when all the deputies ran in."). Because no reasonable officer could have believed the preconditions for consent-once-removed had been met here—even if one incorrectly assumes the doctrine's validity—qualified immunity was inappropriate.

III. The Court Should Release The Lower Courts From *Saucier*'s Rigid "Order Of Battle"

Finally, this Court has requested briefing on whether to overrule *Saucier* v. *Katz*, *supra*. That decision requires lower courts to decide qualified immunity in two

steps—by first deciding whether the allegations established a constitutional violation at all, and then deciding whether the officer violated "clearly established" law. The Court should modify the *Saucier* approach, but not abandon it entirely. In many cases, that two-step approach serves important functions. But it should not be rigidly required where it is unworkable or requires courts to pass on issues that are not necessary to their decisions.

Saucier's mandatory two-step approach is often useful to ensure proper application of qualified immunity principles. The first step in deciding whether or not the law was "clearly established" is to determine the constitutional violation alleged—*i.e.*, to identify the precise conduct, and the attendant circumstances, giving rise to the alleged constitutional violation. Only when that is done can courts go on to decide whether an objectively reasonable officer in those circumstances could have thought his conduct lawful. Requiring courts to decide whether there was a constitutional violation at all under the specific facts thus is a useful way of ensuring that qualified immunity is properly applied in an appropriately fact- and context-specific way. *Saucier*, 533 U.S. at 201-202; *Anderson*, 483 U.S. at 640-641. The two-step analysis, moreover, often makes a court's reasoning clearer. It thus helps courts fulfill their duty to "say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177, 2 L. Ed. 60 (1803). Given this Court's unique role of providing uniform, nationwide guidance for all courts to follow, this Court's use of the two-step approach is often particularly useful.

Correspondingly, however, this Court often departs from the two-step process where it would interfere with that function. See, *e.g.*, *Brosseau* v. *Haugen*, 543 U.S. 194, 198 n.3 (2004) (per curiam) (bypassing the constitutional question "to correct a clear misapprehension of the

qualified immunity standard"); *Saucier*, 533 U.S. at 207 (similar). Rigid adherence in the lower federal courts is also inappropriate, albeit for different reasons. Litigating constitutional issues can be burdensome. Qualified immunity, however, is "an *immunity from suit*, rather than a mere defense to liability." *Saucier*, 533 U.S. at 200-201 (internal quotation marks and citations omitted). As a result, the two-step approach will sometimes disserve the purpose of qualified immunity if it forces the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily. Likewise, requiring resolution of those issues may contravene longstanding principles of judicial restraint. Courts ordinarily should not decide "questions of constitutionality * * * unless such adjudication is unavoidable," *Scott* v. *Harris*, 127 S. Ct. 1769, 1780 (2007) (Breyer, J., concurring) (quoting *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944)); nor should they generate analysis that appears unnecessary to the case's resolution.[11]

Sometimes the two-step approach is deemed necessary for the elaboration of principles of criminal procedure. *Saucier*, 533 U.S. at 201. Given this Court's unique role of ensuring that federal and constitutional law is uniform throughout the land—and that no one receives a different brand of federal justice based on the happenstance of geography—this Court will often be justified in resolving divisions of authority on constitutional questions before addressing whether the law was clearly established. But lower federal courts need not be dragooned into doing likewise in every case. Before

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[11] See *Ex parte Randolph*, 20 F.Cas. 242, 254 (Marshall, Circuit Justice, C.C.D. Va. 1833); *Ashwander* v. *Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

Saucier, federal courts regularly decided constitutional issues just as they do today—through motions to suppress, suits against municipalities, and requests for injunctive relief, to name a few. There is thus little reason to enforce a rigid rule requiring them to do so in § 1983 suits as well.

In this case, this Court should exercise its own discretion to apply *Saucier*'s two-step approach. The validity of consent-once-removed as a justification for warrantless entry is important and squarely before the Court. Analyzing the validity of that doctrine in the first instance, moreover, casts significant light on the qualified immunity analysis. Admitting a single guest into the home has never been thought to somehow waive or defeat a homeowner's expectation that his home will be free from physical intrusion by the uninvited. The contrary notion is so clearly contradicted by centuries of legal tradition and social norms that no objectively reasonable officer would have entertained it.

CONCLUSION

For the foregoing reasons and those stated in respondent's brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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