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 FOR PETITIONERS


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## QUESTIONS PRESENTED

1. Whether the Fourth Amendment is violated when police officers enter a home after a confidential informant has been admitted inside to purchase drugs, the informant completes the purchase, and he then signals the purchase to the officers waiting outside.

2. Whether the officers are entitled to qualified immunity.

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

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is *Callahan v. Millard County*, 494 F.3d 891 (10th Cir. 2007). It appears in the Petition Appendix beginning at Pet. App. 1. The opinion of the United States District Court for the District of Utah is *Callahan v. Millard County*, 2006 WL 1409130 (D. Utah 2006). It appears in the Petition Appendix beginning at Pet. App. 30.

## JURISDICTION

This Court has jurisdiction according to 28 U.S.C. § 1254(1). The Tenth Circuit entered judgment on July 16, 2007. Pet. App. 1. The petitioners filed a timely petition for rehearing en banc that was denied by an order of the Tenth Circuit on September 6, 2007. Pet. App. 6. The petitioners filed a petition for a writ of certiorari on December 4, 2007, and the Court granted the petition on March 24, 2008. *Pearson v. Callahan*, 128 S.Ct. 1702 (2008).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent seeks damages under 42 U.S.C. § 1983 for an alleged violation of his Fourth Amendment rights. The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

## STATEMENT OF THE CASE

This case involves an undercover drug buy monitored by the petitioners, five police officers, that occurred at the home of the respondent, Afton Callahan. The officers are all members of the Central Utah Narcotics Task Force, a multijurisdictional group formed to pool law enforcement resources in areas of central Utah. The Commander of the Task Force is Cordell Pearson, who at the time of the arrest in this case had seventeen years of experience as a narcotics

officer in Las Vegas and seven years as the elected Sheriff of Piute County before accepting the position as Task Force Commander. The other members of the Task Force are Detective Jeffrey Whatcott, who had about twenty years of experience at the Millard County Sheriff's Office; Sherriff Marty Gleave, the elected Sheriff of Piute County; and Task Force Detectives Clark Thomas and Dwight Jenkins.

In the late 1990s, the state of Utah suffered a dramatic rise in the illegal use of methamphetamine, a Schedule II narcotic under the Controlled Substances Act of 1970.[1] The Task Force focused its efforts on interrupting the methamphetamine market in central Utah using confidential informants. J.A. 248-49. Confidential informants typically are individuals who have been arrested for drug crimes and volunteer to help the police in exchange for leniency at sentencing. J.A. 47-48. Investigators rely on confidential informants to identify those involved in the drug trade and to arrange undercover purchases that the police can monitor. The Task Force relied particularly heavily on confidential informants in part because individual members of the Task Force were known to those in the local drug trade. J.A. 47.

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[1] *See* Paul Pringle, *An Unlikely Battlefield in the Drug War: Salt Lake City Confronts Meth Labs, Trafficking Rise*, DALLAS MORNING NEWS, July 9, 2000, at Page A1.

This case involves a particular confidential informant, 24-year-old Brian Bartholomew. In January 2002, Bartholomew was arrested on methamphetamine possession charges in his hometown of Fillmore, Utah. Fillmore is a small town located about a two-hour drive from Salt Lake City; according to the 2000 Census, the population of Fillmore was 2,253. After his arrest, Bartholomew asked detectives if he could become a confidential informant to try to work off the criminal charges against him. J.A. 48, 112. The detectives put Bartholomew in contact with the Task Force, and specifically with petitioner Detective Whatcott. The Task Force accepted Bartholomew as an informant on the condition that he would cease all narcotics use and that he would report to Whatcott if he gained any information about pending drug crimes. J.A. 49, 80.

Bartholomew signed papers formally registering as a confidential informant for the Task Force. At that time, officers asked Bartholomew to name individuals that he might help the Task Force target in future cases. Bartholomew named the respondent, Afton Callahan, as a possible target. J.A. 114-15, 165-66. Callahan lived just down the road from Bartholomew, and he was on parole following his imprisonment on drug charges from 1998 to 2000. J.A. 117, 285, 391-94. The record suggests that Bartholomew and Callahan were longtime acquaintances but did not know each other well. J.A. 110-11, 364-65.

The events leading to this litigation happened a few weeks after Bartholomew signed up as a

confidential informant. On March 19, 2002, at about 10am, Bartholomew took a break from work to buy a Pepsi at a nearby gas station. Callahan happened to be at the gas station at that time, and the two saw each other and started up a conversation. Callahan told Bartholomew that he would be traveling to Salt Lake City that day and that he would have methamphetamine when he returned. J.A. 114, 365-67.[2] Bartholomew inquired about buying some of Callahan's methamphetamine, and Callahan responded that Bartholomew could "stop by" his home that night when he was back from Salt Lake City. J.A. 140.

Bartholomew left the gas station and immediately contacted Detective Whatcott. Bartholomew told Whatcott of his arrangement with Callahan, and Whatcott instructed Bartholomew to wait until Callahan returned in the evening and to first confirm

[2] For the purposes of summary judgment, the record in this case includes a trial transcript from the state trial in 2002 as well as a 2006 deposition of Afton Callahan. Contested facts must be construed in favor of Callahan, the nonmoving party. *See Hope v. Pelzer*, 536 U.S. 730, 733 n.1 (2002). In the 2002 criminal trial, Bartholomew testified that Callahan had stated that he was "going north and he may be bringing some drugs back," and that "he would be back later" and that Bartholomew could "stop by." He also agreed with counsel's statement that he had "asked [Callahan] if [he] could get some drugs, and [Callahan] really put [Bartholomew] off." J.A. 140. In the 2006 deposition Callahan denied that he had told Bartholomew that the reason he was going to Salt Lake City was to purchase drugs, and he also denied himself purchasing drugs in Salt Lake City on that day. *See* J.A. 366.

that Callahan had returned from Salt Lake City with the methamphetamine. Bartholomew returned to work. After work ended at about 5pm, Bartholomew and a friend met for a few hours and split a 12-pack of Bud Light. J.A. 81, 115, 143-44. At about 8pm, Bartholomew went to Callahan's home to confirm that Callahan had methamphetamine to sell.[3] Callahan lived in a single-wide trailer located in the Chalk Creek Trailer Park in Fillmore, just down the street from Bartholomew's house. J.A. 313 (photographs of the Callahan residence). Callahan was inside the trailer along with his daughter and two social guests, brothers Adam and Mick Evans. J.A. 367-68.

Bartholomew entered the trailer and asked Callahan if he could purchase methamphetamine. Callahan was already under the influence of methamphetamine himself, as he had ingested some about two hours earlier. J.A. 74, 91, 377-78. Callahan reached into his freezer and pulled out 5 or 6 baggies of meth. J.A. 117. Bartholomew asked Callahan how much he would sell, and Callahan responded that he would sell Bartholomew as much as Bartholomew wanted.[4] Bartholomew replied that he didn't have

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[3] Bartholomew's friend, Jared Nez, also accompanied Bartholomew to Callahan's trailer. Nez did not know that Bartholomew was working with the Task Force, and he was dropped off after the first visit to the trailer that night. J.A. 117-19.

[4] In the 2006 deposition Callahan denied personally selling drugs to Bartholomew that night, J.A. 368, although he testified that he believed that Bartholomew had purchased drugs from the Evans brothers in the first visit to Callahan's home, J.A.

(Continued on following page)

enough cash with him, but that he would go get money and return later in the evening to make a purchase. J.A. 117. Unbeknownst to the members of the Task Force, and in violation of his agreement with them, Bartholomew also ingested a "taste" of the meth before departing Callahan's trailer. J.A. 145. Bartholomew departed Callahan's trailer at about 9pm.

Bartholomew called Detective Whatcott again and confirmed to him that Callahan had methamphetamine to sell. Whatcott contacted the other members of the Task Force and asked them to meet with Bartholomew immediately in the public safety building in the Millard County Sherriff's Office. From about 9pm to 11pm, members of the Task Force met with Bartholomew and arranged to monitor an undercover buy. Bartholomew was given a "wire," an electronic microphone, so the members of the Task Force could overhear what Bartholomew was saying. Bartholomew was also given a marked $100 bill that he could use to buy meth from Callahan, and he was searched to ensure that he was not in possession of

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370. Callahan also agreed that "Bartholomew showed up the first time [and] inquired about purchasing drugs" and that Bartholomew also said that his cousin wanted to get some drugs. J.A. 370. Although contested facts must be construed in Callahan's favor at summary judgment, these facts are not in conflict with Bartholomew's testimony about his first visit to Callahan's home that night. Further, as explained in footnote 6, infra, the principle of judicial estoppel prohibits Callahan from denying that he distributed methamphetamine.

illegal substances. Finally, members of the Task Force provided Bartholomew with coffee and asked Bartholomew if he was in the physical condition needed to perform as required. Bartholomew indicated that he was.

The officers devised the following plan. First, Bartholomew would go back to Callahan's home and be admitted inside under the guise of returning to purchase the drugs. Second, after the purchase was complete and Bartholomew was ready to leave, he would signal that he had purchased the drugs from Callahan by talking about "playing the drums," a reference to the drum kit located in the enclosed 8'x10' wooden porch area at the entrance to Callahan's trailer. J.A. 55, 61, 65, 120, 126, 302. Third, Detective Whatcott would monitor the wire from his squad car nearby: he would give the "go" sign to Jenkins and Thomas when he heard Bartholomew give the signal. At that point the officers would enter the trailer and catch Callahan and others involved in the act. The officers would pretend that they did not know Bartholomew and would treat him like a suspect in order to hide his cooperation with the police. J.A. 68-69.

At about 11pm, the five members of the Task Force went with Bartholomew to Callahan's home. Detectives Jenkins and Thomas dropped off Bartholomew about 150 yards from the trailer so the officers would not be spotted. They watched as Bartholomew walked over to the trailer. Bartholomew knocked on the door, and Callahan's daughter let him

in before herself leaving the trailer. J.A. 123. Jenkins and Thomas moved their squad car to within about 15 to 20 yards of the trailer and waited for Detective Whatcott to give the "go" sign. J.A. 185-88. After entering the trailer, Bartholomew found Callahan together with the two Evans brothers in the living room area of the trailer. Bartholomew told the group that he was there to "party it up." He also told them about his recent drug arrest. J.A. 124.

After talking with the group for a few minutes, Bartholomew asked Callahan if he could buy some meth. Bartholomew purchased the meth with the $100 bill, and he then began to walk to the door on his way out to leave the trailer. At that point, Bartholomew gave the prearranged signal: he told Callahan that the wanted to "play the drums" that were in the enclosed porch area. Callahan responded that it was too late, as playing the drums would wake up the neighbors. J.A. 126. Detective Whatcott was listening on the wire and he heard Bartholomew give the signal. Whatcott gave Jenkins and Thomas the "go" sign to enter the trailer.

Thomas and Jenkins entered first from the wooden porch area attached to the front of the trailer, and the other officers followed after them. Upon entering, the officers ordered the individuals inside the trailer on to the ground. At about that time, a Task Force member observed Callahan drop a plastic bag later found to contain methamphetamine. J.A. 266. When Callahan, the Evans brothers, and Bartholomew were secure on the ground, the officers

conducted a protective sweep to determine if any others were present and might pose a threat. A search of the individuals revealed the methamphetamine Bartholomew had purchased in his possession as well as the $100 marked bill in Callahan's possession. Officers also found syringes inside the trailer, as well as additional meth inside Adam Evans' belt buckle.

Callahan and Adam Evans were each charged with methamphetamine-related crimes. Evans pled guilty to simple possession of methamphetamine, and Callahan went to trial on methamphetamine distribution charges on August 5, 2002. J.A. 22-312 (trial transcript). Bartholomew and the officers testified against Callahan. During the trial, Callahan moved to suppress the evidence seized in his home on two grounds. First, he argued that Bartholomew was too intoxicated to serve as a reliable informant. Second, he argued that the officers' entry into his home was unconstitutional because the officers lacked probable cause. The trial judge denied the motions, holding that the first issue went to the weight of the evidence and that exigent circumstances justified the officers' entry. J.A. 5-21, 295-302, 324-29.

Following the close of the evidence, Callahan pled guilty to felony distribution of methamphetamine. J.A. 303-12. The trial court sentenced Callahan to serve a minimum of five years in prison. J.A. 314-23. The plea agreement permitted Callahan to appeal the trial court's Fourth Amendment ruling, however, and on appeal Callahan renewed his claim that the entry violated the Fourth Amendment. In its brief to

the Utah Court of Appeals, the government abandoned its earlier exigent circumstances defense of the officers' entry and instead argued that the evidence should be admissible under the inevitable discovery exception. The Utah Court of Appeals ruled that the inevitable discovery doctrine did not apply and remanded with instructions to grant Callahan's motion to suppress. *State v. Callahan*, 93 P.3d 103, 107 (Utah Ct. App. 2004).

Callahan then filed a civil suit in the United States District Court for the District of Utah against the Task Force, the several Counties that participated in it, and the individual officers. Callahan alleged a violation of his Fourth Amendment rights, actionable under 42 U.S.C. § 1983, together with various state law claims. District Judge Paul Cassell granted the defendants' motion for summary judgment on the federal claim and then declined to exercise supplemental jurisdiction over the state claims. *Callahan v. Millard County*, 2006 WL 1409130 (D. Utah 2006), Pet. App. 30.

According to Judge Cassell, the strongest claim that the officers' entry was constitutional came from the circuit court opinions recognizing the doctrine of "consent once removed." Pet. App. 47. This doctrine permits police officers to enter a home without a warrant 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." *United States v. Pollard*, 215 F.3d 643, 648 (6th Cir. 2000). Judge Cassell noted that three circuits had already embraced the "consent once removed" doctrine: the Sixth Circuit, the Seventh Circuit, and the Ninth Circuit. Pet. App. 48. Two of those circuits (the Sixth and the Seventh) had specifically agreed that the doctrine applied when the initial entry was made by a confidential informant instead of an undercover police officer. Pet. App. 48-50. No courts had rejected the doctrine.

Judge Cassell reasoned that in light of the circuit court precedents accepting the doctrine of "consent once removed," the "simplest approach" to resolve Callahan's civil lawsuit was to assume that the entry was unconstitutional and instead decide the case on qualified immunity grounds. Pet. App. 53. The entry into Callahan's trailer involved facts "essentially identical" to the facts of cases from the Seventh Circuit and the Sixth Circuit applying the "consent once removed" doctrine. Pet. App. 51. Regardless of whether the entry was constitutional, the officers were entitled to qualified immunity because the caselaw on the "consent once removed" doctrine effectively prevented the officers' conduct from violating clearly established law:

> [I]n [the] Sixth, Seventh and Ninth Circuits their actions would have been fully consistent with the Constitution. Put another way, unless and until the Tenth Circuit or the Supreme Court rejects the "consent-once-removed" doctrine, a police officer in Utah

> relying on the doctrine (in a case where the doctrine factually applies) has not violated a clearly established right.

Pet. App. 55-56. Judge Cassell also granted summary judgment to the counties and the Task Force under the principles of *Monell v. Dep't of Social Services of City of New York*, 436 U.S. 658 (1978). Pet. App. 57-58.[5]

A divided Tenth Circuit reversed in an opinion by Judge Murguia, sitting by designation. *Callahan v. Millard County*, 494 F.3d 891 (10th Cir. 2007), Pet. App. 1. According to the majority, the officers' entry into Callahan's trailer violated the Fourth Amendment because it went beyond the scope of consent that Callahan had granted when he had admitted Bartholomew inside. "Had the person inside Mr. Callahan's home been an undercover officer," the majority reasoned, the officers' entry would have been constitutional: "Mr. Callahan would have consented to opening his home to the police," and his consent to the entry of an undercover officer would have included consent to the entry of the Task Force officers waiting outside. *Id.* at 896. However, Callahan had not consented to the entry of police because Bartholomew was a confidential informant rather than an undercover police officer. Further, the "distinct obligations and powers" of police officers and informants

[5] The liability of the counties and the Task Force as an entity are not before the Court. The only remaining claims are against the Petitioners as individual officers.

required "a distinction between inviting a citizen who may be an informant into one's house and inviting the police into one's house." *Id.* at 897. Because Callahan had invited an informant inside his home rather than an undercover police officer, the officers' subsequent entry violated the Fourth Amendment. *Id.* at 898.

The majority next ruled that the officers were not entitled to qualified immunity because they had violated Callahan's clearly established constitutional right. Specifically, the officers had violated the clearly established right "to be free in one's home from unreasonable searches and arrests." *Callahan*, 494 F.3d at 898. According to the majority, "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 899. Because the officers' entry did not fit either exception, it was clearly established that the entry violated the Fourth Amendment. The Seventh Circuit's decision holding that such warrantless entries complied with the Constitution was irrelevant: "The creation of an additional exception by another circuit would not make the right defined by our holdings any less clear. . . . 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." *Id.*

Judge Paul Kelly dissented on both the Fourth Amendment question and qualified immunity. *See Callahan*, 494 F.3d at 899-903 (Kelly, J., dissenting).

On the Fourth Amendment issue, Judge Kelly began by agreeing with the panel majority that the officers could have entered if the undercover individual had been a law enforcement officer. However, Judge Kelly disagreed with the majority's conclusion that Bartholomew's status as a confidential informant made a difference:

> So long as an invitation to enter is extended to a government agent (even unknowingly), the pertinent issue is not the type of government agent allowed in, but the consequence of that invitation, combined with the subsequent sale of narcotics, on a resident's reasonable expectation of privacy. And the only principled resolution of that issue is to hold that, no matter what type of government agent is allowed in, any previously existent legitimate expectation of privacy is abandoned.

*Id.* at 902 (Kelly, J., dissenting). Judge Kelly was similarly unpersuaded by the majority's reliance on the different "powers and obligations" of undercover officers and informants. Such differences were more elusive and difficult to apply than the majority suggested. *Id.*

Next, Judge Kelly concluded that there was "no doubt" that the officers were entitled to qualified immunity because "the right at issue was not clearly established at the time the Task Force acted." *Id.* at 903 (Kelly, J., dissenting). The majority had misconstrued the relevant right, Judge Kelly argued:

properly understood, the relevant right was "the right to be free from the warrantless entry of police officers into one's home to effectuate an arrest after one has granted voluntary, consensual entry to a confidential informant and undertaken criminal activity giving rise to probable cause." *Id*. Because "no Supreme Court or Tenth Circuit decision has ever granted or even discussed that right," the majority should have looked at the law of other circuits. *Id.* And looking to the other circuits revealed that the officers reasonably believed their conduct was constitutional: "the clear weight of authority from other circuits strongly suggested that the Task Force's actions in this case were legal[.]" *Id.* at 904 (Kelly, J., dissenting).

The Tenth Circuit denied the officers' petition for rehearing, Pet. App. 60, and the Court granted certiorari on whether the entry violated the Fourth Amendment and whether the officers were entitled to qualified immunity. *Pearson v. Callahan*, 128 S.Ct. 1702 (2008). The Court's order granting the petition also directed the parties to brief and argue the following question: "Whether the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled?" *Id.*

## SUMMARY OF ARGUMENT

The entry of additional officers into Callahan's trailer did not violate the Fourth Amendment because Callahan had already admitted a government agent

into his home to sell him illegal drugs. By inviting Bartholomew into his home so Bartholomew could purchase methamphetamine, Callahan surrendered his expectation of privacy in what he intentionally revealed. A person who admits an informant into his home and displays evidence of his crime assumes the risk that the informant will share what he has learned with the police. In that setting, the officers did not infringe any additional expectation of privacy when they entered to see what Bartholomew had seen. The officers' entry did not reveal any new information. What was private before remained private. What was exposed before remained exposed. No additional expectation of privacy was infringed, and therefore no Fourth Amendment search occurred and no warrant was required.

Even if the officers' entry was a Fourth Amendment search, the entry was constitutionally reasonable because it was incident to Callahan's arrest. The officers and Bartholomew devised a plan to arrest Callahan at the appropriate time; Bartholomew triggered the process when he gave the prearranged signal, and the officers entered incident to the arrest to carry it out. The officers' entry was a reasonable way to protect Bartholomew's safety and to protect the integrity of the arrests that occurred inside. Although Bartholomew had the constitutional and statutory authority to arrest Callahan himself, the compelling interest of safety and the need to deter the escape of the subjects required several officers to enter to make the arrests. No one person could have

carried out the multiple arrests safely and effectively. The officers' assistance was necessary to complete the arrests that Bartholomew had triggered and therefore fits within the well-established incident-to-arrest exception to the warrant requirement.

If the Court concludes that the officers' entry violated the Fourth Amendment, the Court should nonetheless hold that the officers are entitled to qualified immunity because the entry did not violate clearly established law. When the entry occurred in 2002, several circuit courts and state supreme courts had already embraced a "consent once removed" doctrine that explicitly allowed the officers' entry without a warrant. No court had rejected the "consent once removed" cases, and those cases had become part of the background of Fourth Amendment rules viewed as settled law in treatises and among law enforcement.

The officers were entitled to rely on that caselaw even though their own federal circuit had not yet ruled on "consent once removed" entries. The principles of qualified immunity shield officers from personal liability when an officer reasonably believes that his conduct complied with the law. Police officers are not legal scholars, and they are entitled to rely on existing lower court cases without facing personal liability for their assessments of what the Fourth Amendment permits. The weight of caselaw on "consent once removed" entries at the very least created a legitimate question as to whether the officers' entry

was constitutional. It therefore triggered qualified immunity.

Finally, the Court should limit or overrule *Saucier v. Katz*, 533 U.S. 194 (2001), in the Fourth Amendment setting. The goal of ordering decision-making in qualified immunity cases should be to best accommodate two important but sometimes competing interests: first, fostering the clarity of the law; and second, avoiding unnecessary constitutional rulings that can burden the courts and create precedents of uneven quality. The existing *Saucier* rule does not satisfy this goal, as the one-size-fits-all rule does not recognize the diverse types of constitutional tort cases. Two alternative rules would be preferable to the existing *Saucier* rule. First, the Court could rule that *Saucier* need not be followed in Fourth Amendment claims. Second, the Court could hold that the existing *Saucier* rule should be limited to Fourth Amendment claims that do not involve fruits of the poisonous tree and therefore will not be addressed under the exclusionary rule.

## ARGUMENT

### I. THE OFFICERS DID NOT VIOLATE THE FOURTH AMENDMENT.

#### A. The entry of additional agents into Callahan's home did not infringe any additional expectation of privacy because Callahan had already admitted a government agent into his home to sell him illegal drugs.

This case involves the relationship between two basic principles of the Fourth Amendment's prohibition on unreasonable searches and seizures. The first principle is the Fourth Amendment's protection of the home; the second principle is the waiver of rights when a person knowingly exposes evidence of crime to a government agent. On one hand, protecting the privacy of the home is one of the central purposes of the Fourth Amendment. "At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). Fourth Amendment protections reach their peak inside the home. "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home." *Payton v. New York,* 445 U.S. 573, 589 (1980).

On the other hand, this Court has frequently recognized that a suspect waives his Fourth Amendment protection when he knowingly shares evidence of crime with an undercover agent or confidential informant. A person engaged in criminal activity must assume the risk that his confidant is an informant; the Fourth Amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa v. United States*, 385 U.S. 293, 302 (1966). *See also United States v. Miller,* 425 U.S. 435, 443 (1976). As Justice Powell explained in *United States v. White*, 401 U.S. 745, 752 (1971), "one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end, or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his."

Under these principles, Callahan enjoyed full Fourth Amendment protection in his home before he invited Bartholomew inside to purchase methamphetamine. It is irrelevant that Callahan's home was a modest trailer with a rickety wooden porch. Under our Constitution, "the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion." *United States v. Ross*, 456 U.S. 798, 822 (1982). If Callahan had not encountered Bartholomew at the gas station that morning – or if Callahan had said "no" when Bartholomew asked if he could come to Callahan's home

to buy methamphetamine – Callahan would have retained all of his Fourth Amendment rights in his home. In those circumstances, the Fourth Amendment would have prohibited the officers' entry without a warrant or exigent circumstances. *See Payton, supra*.

The critical fact that makes this case different is that Callahan did in fact invite Bartholomew to enter his home to purchase illegal drugs inside. By permitting Bartholomew inside the home to engage in an illegal narcotics purchase, Callahan surrendered his usual Fourth Amendment protection in the area of his home that he displayed to Bartholomew. Callahan assumed the risk that Bartholomew was an agent of the government who would in turn expose what he observed to the police. In these circumstances, the fact that additional officers entered into the home to see what Bartholomew had already seen did not violate any legitimate privacy right.

The Court established this principle most clearly in *Lewis v. United States,* 385 U.S. 206 (1966). In *Lewis*, an undercover federal agent telephoned Lewis at home and explained that he wished to purchase marijuana. Lewis replied that he could "take care" of the caller and invited the caller to his home to sell him the narcotics. The agent entered the home, purchased marijuana for $50, and then left. After Lewis was arrested for the sale, he argued unsuccessfully that the undercover agent's warrantless entry into the home had violated the Fourth Amendment. This Court disagreed on the ground that admitting

the undercover agent into his home to purchase narcotics waived the defendant's Fourth Amendment rights in the area he exposed:

> Without question, the home is accorded the full range of Fourth Amendment protections. But when, 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 (internal citations omitted).

By "opening his home" to the sale of narcotics, Lewis had "[broken] the seal of sanctity and waive[d] his right to privacy in the premises." *Id.* at 213 (Brennan, J., concurring). Of course, the waiver was limited to the area that Lewis had actually exposed to the undercover agent; the fact that an agent had been admitted to one area of the home did not waive privacy rights in areas of the home that remained hidden. *See id*. at 213 (Brennan, J., concurring). *See also Gouled v. United States*, 255 U.S. 298, 306 (1921) (holding that when an undercover government agent is admitted by stealth, "any search and seizure subsequently and secretly made in [the target's] absence, falls within the scope of the prohibition of the Fourth Amendment"). But Lewis's Fourth Amendment rights in the area exposed to the undercover agent were waived during the period the agent was inside the home. *Lewis,* 385 U.S. at 213 (Brennan, J., concurring).

The principle of *Lewis* governs here. Callahan turned his home into a commercial center when he invited Bartholomew to enter for the purpose of transacting unlawful business inside. At that point, Callahan's trailer was "entitled to no greater sanctity than . . . a store, a garage, a car, or . . . the street." *Lewis*, 385 U.S. at 211. *See also United States v. Paul*, 808 F.2d 645, 648 (7th Cir. 1986) (Posner, J.) ("[T]he interest in the privacy of the home . . . has been fatally compromised when the owner admits a confidential informant and proudly displays contraband to him."). Bartholomew's intentions were clear. Callahan knew this was no mere social visit. J.A. 368-71. And Callahan did in fact distribute the methamphetamine to Bartholomew, as he admitted when he pled guilty to the crime of distributing methamphetamine in his 2002 state trial. J.A. 303-12.[6]

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[6] Callahan pled guilty to distributing methamphetamine in 2002. J.A. 303-12. That guilty plea is part of the record for summary judgment. *Hope*, 536 U.S. at 733 n.1. In his 2006 affidavit, however, Callahan denied selling any methamphetamine on that day. J.A. 379. Callahan acknowledged that he knew Bartholomew wanted to buy drugs and that Bartholomew did buy drugs when inside Callahan's home, but he denied observing the transaction himself. J.A. 376-80.

It is unclear whether Callahan's statements in his 2006 deposition directly contradict his 2002 guilty plea. However, to the extent Callahan's statements in 2002 and 2006 are inconsistent, the principle of judicial estoppel prohibits Callahan from taking a contrary position in 2006. *See New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001); 18 MOORE'S FEDERAL

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In these circumstances, petitioners' entry into Callahan's home did not invade any legitimate privacy interest. Before the officers' entry, an agent of the state was present inside the home. That agent was broadcasting the sound inside the trailer to the officers waiting outside. The officers' entry into the trailer merely added to the number of government agents there. Critically, the officers' entrance did not expose any additional area of the inside of the home to government observation. What was private before remained private. What was exposed before remained exposed. The fact that the officers entered the home did not violate any additional privacy interest that was not already waived by Callahan's admission of Bartholomew inside the home to sell him illegal narcotics. No warrant was necessary in these circumstances.

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PRACTICE § 134.30, p. 134-62 (3d ed. 2000). Callahan cannot plead guilty to receive the benefits of a plea agreement in a criminal case and then bring a lawsuit against the officers in which he denies the essential facts that supported his guilty plea. "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee*, 156 U.S. 680, 689 (1895).

Notably, the officers took careful steps to confirm that Bartholomew had in fact been admitted inside the home to purchase narcotics. Before entering Callahan's home, the officers gave Bartholomew a "wire" so they could listen in on what transpired inside. They listened in as Bartholomew made small talk, purchased the meth, and then gave the prearranged signal by talking about "playing the drums." By that point, there could be little question that Callahan had in fact "converted [his home] into a commercial center to which outsiders are invited for purposes of transacting unlawful business." *Lewis*, 385 U.S. at 211. *Cf. Minnesota v. Carter*, 525 U.S. 83, 90 (1998) ("Property used for commercial purposes is treated differently for Fourth Amendment purposes than residential property."); *Maryland v. Macon*, 472 U.S. 463, 469 (1985) (same). Callahan was no doubt surprised when the officers entered. However, the entry after Bartholomew gave the prearranged signal violated no expectation of privacy "that society is prepared to accept . . . as objectively reasonable." *California v. Greenwood*, 486 U.S. 35, 40 (1988).

The Fourth Amendment rules that permit government reenactment of private searches reaffirm these principles. When a private person not regulated by the Fourth Amendment conducts a search, the exposure by the private person frustrates the defendant's Fourth Amendment expectation of privacy against government observation. *See United States v. Jacobsen*, 466 U.S. 109, 117-22 (1984). "Once frustration of the original expectation of privacy occurs,"

what was exposed to the private party "no longer support[s] any expectation of privacy." *Id*. at 117, 120, n.17. *See also Walter v. United States*, 447 U.S. 649, 657 (1980) (Opinion of Stevens, J.). At that stage, government agents can reenact the prior search so long as they limit themselves to the areas and the information already observed by the private party. Any "additional invasions" by the government are "tested by the degree to which they exceeded the scope of the private search," and "the Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated." *Jacobsen,* 466 U.S. at 115, 117.

The same principle applies to the officers' entry into Callahan's trailer. In the private search cases, the initial entry does not trigger the Fourth Amendment because private actors are not regulated by the Fourth Amendment; in the current case, the initial entry did not trigger the Fourth Amendment because Bartholomew was an invited guest. In both cases, the same rules govern the subsequent reenactment of the search by the police. Bartholomew's initial entry frustrated Callahan's reasonable expectation of privacy much like a private search. So long as Bartholomew was inside the home, the officers could enter Callahan's trailer just as Bartholomew had entered. Testing the officers' "additional invasion . . . by the degree to which they exceeded the scope" of the earlier entry reveals that no additional exposure occurred. *Jacobsen*, 466 U.S. at 115. Because the

officers' entry into the home recreated Bartholomew's entry, it did not obtain "information with respect to which the expectation of privacy has not already been frustrated" and did not invade any legitimate expectation of privacy. *Id.* at 117.

### B. If the officers' entry was a Fourth Amendment search, it was a reasonable search because it assisted in and was incident to Callahan's arrest for distributing methamphetamine.

Alternatively, if the officers' entry violated Callahan's reasonable expectation of privacy and was therefore a Fourth Amendment search, it was a reasonable search and thus a constitutional one. The execution of a valid arrest under the Fourth Amendment renders some searches and seizures constitutionally reasonable. Those powers exist to help "disarm the suspect in order to take him into custody" and "to preserve evidence for later use at trial," *Knowles v. Iowa*, 525 U.S. 113, 116 (1998), as well as more generally "to ensure . . . the integrity of the arrest," *Washington v. Chrisman*, 455 U.S. 1, 7 (1982). The power to search incident to arrest usually is exercised after the arrest, but the same power exists before the arrest when probable cause has been established and the arrest is imminent. *See Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980) ("Where the formal arrest followed quickly on the heels of the

challenged search . . . , we do not believe it particularly important that the search preceded the arrest rather than vice versa.").

The authority of the police to ensure the safety and integrity of an arrest permitted the officers to enter Callahan's home in the circumstances of this case. At the moment the officers entered, an agent of the state inside Callahan's home had personally observed Callahan distributing methamphetamine. The Fourth Amendment permits an agent of the state to make an arrest if he has probable cause to believe that even a minor crime has been committed in his presence. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). Bartholomew was an agent of the state working under a formal contract with the Task Force, J.A. 49, and he plainly had probable cause to make an arrest after he made his purchase. Under his arrangement with the officers, Bartholomew did not try to arrest Callahan himself. Instead, he put the arrest in motion by giving the signal to the officers waiting outside. The officers then entered to do the job of executing the arrest while Bartholomew pretended to be a target rather than a government agent.

The officers' entry into Callahan's home is analogous to the warrantless home entry approved by this Court in *Washington v. Chrisman*, 455 U.S. 1 (1982). In *Chrisman*, a police officer at Washington State University observed a student leaving a university dormitory with a bottle of gin. The officer suspected that the student was too young to legally possess alcohol, so he stopped the student and asked him for

ID. The student responded that his ID was in his dorm room, and he asked the officer if the officer would wait while the student retrieved it. The officer declined the request and explained to the student that he would have to accompany the student to the dorm room. *See id.* at 3. When the officer and the student arrived at the dorm room, the officer entered and seized narcotics in plain view inside the room.

The Court held that the officer's unconsented entry into the dorm room was constitutionally reasonable. According to the Court, the officer had placed the student under lawful arrest, and the lawful arrest gave the officer the power to follow the student inside his home "literally at [the student]'s elbow at all times." *Chrisman*, 455 U.S. at 6. This rule followed both from the need to protect officer safety and to "protect . . . the integrity of the arrest." *Id.* at 7. The Court explained that "[t]here is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger. Moreover, the possibility that an arrested person will attempt to escape if not properly supervised is obvious." *Id.* Given these "compelling" interests, an officer's entry into the home of a person following his arrest was "not an impermissible invasion of the privacy or personal liberty of an individual who has been arrested." *Id.*

The same principles permitted the officers to enter Callahan's home. As in *Chrisman*, the officers entered the home both to protect the safety of state actors and to protect the integrity of the arrests. It

would have been foolhardy to ask Bartholomew (or a single undercover officer making the purchase) to make the arrests himself after the undercover purchase. Making an arrest is a "dangerous and difficult process," *Maryland v. Garrison*, 480 U.S. 79, 87 (1987), and the interest in safety is compelling. The individual or individuals being arrested may try to resist or escape. Further, a person making an arrest will not know if there are other co-conspirators in the home who can harm him during the arrest. As the Court recognized in *Maryland v. Buie*, 494 U.S. 325 (1990), officers have a strong interest in "taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack. The risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter." *Id*. at 333. That concern is particularly clear in a case such as this: the officers arrested several individuals, not just one. One individual could not make all of those arrests safely and effectively on his own.

Finally, there were obvious reasons for Bartholomew not to participate in the arrests directly and to leave that entirely to the officers. Bartholomew had no training in making arrests. It would have been strange to ask him to participate in the arrests with several highly trained and experienced officers present. Second, it was important to the investigation to keep Bartholomew's status as an

informant a secret for as long as possible. As soon as an informant's status is revealed, the informant is no longer effective and can sometimes face threats from those engaged in criminal activity. For that reason, the officers' plan included pretending to arrest Bartholomew when they actually arrested Callahan and others participating in narcotics offenses inside Callahan's trailer. J.A. 65-66, 68-69. In those circumstances it was reasonable for Bartholomew to put the arrest in motion and for the officers to then enter the home incident to arrest and make the arrests themselves.

The constitutional reasonableness of the officers' entry is bolstered by the reality that permitting police to enter without a warrant in these circumstances will lead to less invasive searches than would occur if police obtained a warrant. If police officers are not permitted to enter without a warrant to assist in the arrest in these cases, the most likely alternative would be for officers to obtain an anticipatory search warrant under *United States v. Grubbs*, 547 U.S. 90 (2006).[7] The anticipatory search warrant presumably

[7] An anticipatory search warrant is "a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place." 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.7(c), p. 398 (4th ed. 2004). Such warrants "require the magistrate to determine (1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will be* on the described premises (3) when the warrant is executed." *Grubbs*, 547 U.S. at 96.

would be triggered when the informant gives the signal; at that point the officers would enter the home under the warrant. Although obtaining an anticipatory search warrant to justify entry is clearly constitutional, it will lead to significantly more invasive searches. The execution of a search warrant for narcotics is tremendously invasive. The warrant lets the officers search anywhere in the home for drugs, and drugs can be located anywhere. When officers execute a warrant for narcotics, interiors can be turned upside down. Cabinets and drawers are emptied, and furniture is often ripped open and sometimes broken. Although a particularized warrant will not permit a general search on its face, the reality that drugs can be stored nearly anywhere means that the resulting search will look a great deal like a search under a general warrant in practice.

In contrast, officers cannot conduct such invasive searches when they enter without a warrant to assist with an arrest. Upon entering without a warrant, the officers have no general authority to search the home. *See Chimel v. California*, 395 U.S. 752, 764-65 (1969). Rather, they can only conduct specific types of searches and seizures pursuant to carefully delineated exceptions to the warrant requirement. The officers can conduct a protective sweep under *Maryland v. Buie*, 494 U.S. 325 (1990); they can also conduct a search incident to arrest of the "grabbable area" around the suspect under *Chimel*; and they can inquire as to whether the target will consent to a search. However, they cannot exceed these powers

and search more broadly without a warrant.[8] Further, there is no room for error in the warrantless context: if the police erroneously search more than the law allows, no "good faith" rule will apply that limits the scope of suppression of evidence. *But see United States v. Leon*, 468 U.S. 897 (1984) (adopting a good faith exception for searches pursuant to warrants). These limitations on warrantless searches will tend to produce significantly less invasive searches if the police can enter without a warrant to assist with arrests than if they enter based on the authority of an anticipatory search warrant.[9]

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[8] The government may also have greater powers to search in cases, including this one, where the target is already under judicial supervision and has yielded some or all of his Fourth Amendment rights pursuant to a parole agreement. *See* J.A. 391-94 (Parole Agreement). *Samson v. California*, 547 U.S. 843 (2006), establishes that a search condition agreed to by a parolee is an important factor in the totality of the circumstances of whether a search of a parolee is reasonable. *See also United States v. Knights*, 534 U.S. 112, 118 (2001) (permitting warrantless search of a probationer's apartment).

[9] Alternatively, the police could attempt to obtain an anticipatory arrest warrant instead of an anticipatory search warrant. The *Grubbs* case does not address whether the Fourth Amendment permits anticipatory arrest warrants, but it seems at least possible that such warrants could exist. If such warrants are permitted, however, their availability would not lead to less invasive searches because any rational officer would also obtain an anticipatory search warrant.

This is true for three reasons. First, if some kind of warrant is required, a search warrant may be needed in addition to an arrest warrant under *Steagald v. United States*, 451 U.S. 204 (1981). Second, in the case of a planned undercover drug buy,

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### C. The Tenth Circuit's distinction between police officers and informants is unpersuasive and should be rejected.

The Tenth Circuit held that the law must recognize a distinction between police entry following an undercover entrance by a police officer versus entry following an undercover entrance by an informant. *Callahan*, 494 F.3d at 896-97. The panel based this distinction on two apparent grounds. First, the Tenth Circuit contended that the scope of a suspect's consent is different if he admits an undercover officer than if he admits an informant. Second, the Tenth Circuit reasoned that the police had "distinct obligations and powers," that required distinct rules.

Neither argument is persuasive. The scope of consent cannot provide a basis to distinguish between officers and informants because the suspect always will be unaware of the difference. When a drug dealer admits a potential buyer inside his home, he will not know whether he has admitted a real customer, a confidential informant, an undercover police officer, or a TV reporter working on a story. He will hope the person he admits is simply a drug user looking for a

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officers will be able to establish probable cause to search the location much more easily than they can establish probable cause to arrest specific people. The fact that an illegal transaction occurred will be easy to prove, whereas a specific person's involvement in the buy may be significantly more difficult to show. Finally, officers presumably will want to give themselves more authority rather than less.

fix. But he cannot know for sure. In light of that uncertainty, it would be quite odd if the status of the undercover, learned *ex post*, somehow defined the scope of his consent and therefore the rights of officers waiting outside to enter. The Court held in *Florida v. Jimeno,* 500 U.S. 248, 251 (1991), that "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?" The employment status of an undercover operative has no role in this inquiry.

Second, the Tenth Circuit's reliance on the distinction between the "powers and obligations" of police and informants has no basis in history, current Fourth Amendment doctrine, or common sense. As a matter of history, the distinction between professional officers and private citizens acting for the police is a modern concept; professional police were not known until the 19th Century. *See Crawford v. Washington*, 541 U.S. 36, 53 (2004) (citing 1 JAMES F. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 194-200 (1883)). At common law, before the creation of professional police forces, private citizens frequently played an active role in making arrests and conducting investigations. *See generally* M. CHERIF BASSIOUNI, CITIZEN'S ARREST: THE LAW OF ARREST, SEARCH, AND SEIZURE FOR PRIVATE CITIZENS AND PRIVATE POLICE 6-13 (1977) (detailing the powers and obligations of

private citizens to make arrests and participate in investigations under the English common law).

Many of those powers exist today in the United States, although they are exercised less often than in the past. By 1976, thirty-one states had enacted legislation permitting citizen's arrests; most of the statutes permit a private citizen to make an arrest for a felony or for any other crime committed in his or her presence. *Id*. at 14-15, 87-95. Utah is one such state: Utah Code Ann. § 77-7-3 (2003) provides that "[a] private person may arrest another: (1) For a public offense committed or attempted in his presence; or (2) When a felony has been committed and he has reasonable cause to believe the person arrested has committed it." Under Utah's statute, as under the law of most states, an informant such as Bartholomew has the same power to arrest a suspect for a crime committed in his presence as does a professional police officer.

Second, any alleged differences between the "powers and obligations" of informants and undercover officers are creatures of state law that are irrelevant to Fourth Amendment reasonableness under *Virginia v. Moore*, 128 S.Ct. 1598 (2008). In *Moore*, Virginia police officers arrested the defendant for driving on a suspended license and then found crack cocaine on his person following a search incident to arrest. The defendant argued that the arrest was constitutionally unreasonable because it was in violation of state law that prohibited arrests for this particular misdemeanor crime. *See id.* at 1605-06.

The Court held that state law obligations placed on professional police officers had no significance under the Fourth Amendment: "A State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional." *Id*. at 1606. Under that reasoning, any differences in the "powers and obligations" of the police and informants are matters of state law that have no relevance under the Fourth Amendment.

Third, creating a legal distinction between an initial entry by an undercover officer and one by a confidential informant defies common sense. An agent of the state is an agent of the state, regardless of whether that agent is working with the government pursuant to an informant contract or an employment contract. As far as counsel is aware, no relevant case has suggested the distinction. Fourth Amendment decisions have traditionally treated the two as the same. *Compare Lewis v. United States,* 385 U.S. 206 (1966) (entry by undercover agent) with *Hoffa v. United States*, 385 U.S. 293 (1966) (entry by informant, handed down the same day as *Lewis*). If anything it makes more sense for the police to enter to assist after they send in an informant. An informant lacks formal training and is less able to handle law enforcement duties on his own.

Finally, if a line must be drawn between the police and informants, exactly where will it be

drawn? Is it sufficient if the officer gives the informant a shiny badge that says "police officer"? Is it sufficient if the officer announces that he is "deputizing" the informant? Do informants need training at the police academy, and if so, for how long? No clear lines exist, making the distinction a poor choice for a Fourth Amendment rule. For all of these reasons, the Tenth Circuit's distinction between the rules for entry in cases involving informants and police officers should be rejected.

### D. *Georgia v. Randolph* is not relevant because Bartholomew clearly lacked "common authority" over Callahan's house and could not provide third-party consent to search.

In his opinion for the District Court, Judge Cassell suggested that the Court's recent opinion in *Georgia v. Randolph*, 547 U.S. 103 (2006), might signal that the Court "may not be receptive" to authorizing the officers' entry into Callahan's home. Pet. App. 52. However, *Randolph* presents a very different question. Properly understood, *Randolph* is not relevant to this case because the officers' entry was permitted under the specific, time-sensitive doctrines of waiver and search incident to arrest rather than the general principle of third-party consent.

*Randolph* involved the third-party consent doctrine, a Fourth Amendment rule that permits individuals with "common authority" over property

shared with a target to consent to a police search designed to uncover the target's incriminating evidence. *United States v. Matlock*, 415 U.S. 164, 171 (1974). The *Matlock* Court explained: "The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Id*. at n.7.

In *Georgia v. Randolph*, 547 U.S. 103 (2006), the Court applied this doctrine in a case involving a wife's consent to search a home in the presence of her nonconsenting husband. The Court held that it was not reasonable to rely on the wife's permission to enter in light of the "physically present inhabitant's express refusal of consent." *Id.* at 123. If the husband had been absent, the wife's consent would have permitted the officers' entry; it would have been reasonable to rely on her consent in that case. *See id.* at 122. However, the husband's presence required a different result: "widely shared social expectations" established that it was unreasonable to enter a home when one occupant urges the entry and the other occupant is present and rejects permission for it. *Id.* at 111-16.

*Randolph* is not relevant in this case because Bartholomew clearly lacked common authority to consent to a government search of Callahan's trailer. Unlike Mr. and Mrs. Randolph, Callahan and Bartholomew were not on equal footing. Bartholomew was just a customer, not a resident. He was not a "co-inhabitant" who had "mutual use of the property . . . generally . . . for most purposes," *Matlock*, 415 U.S. at 171 n.7, but rather a undercover informant who had only a temporary presence inside the home for the period of his entry to buy methamphetamine. That temporary presence could not establish common authority, because common authority necessarily requires a long-term relationship between the third party and the property. As a result, it does not matter whether Callahan was present at the door at the time of the officers' entry or whether Callahan tried to object. Nor does the Court need to consider "widely shared social expectations" among drug dealers and their customers during an illegal sale.

In fact, Bartholomew lacked any Fourth Amendment rights *at all* in Callahan's home, much less common authority to consent to a government search of the home. Under *Minnesota v. Carter*, 525 U.S. 83 (1998), an individual who enters a home as a guest to engage in narcotics dealing has no Fourth Amendment rights in the home. Because Bartholomew had no Fourth Amendment rights in the home, it would not have been reasonable for the officers to rely on Bartholomew's willingness to waive those rights to justify their entry.

## II. THE OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE IT WAS NOT CLEARLY ESTABLISHED THAT THEIR ENTRY VIOLATED THE FOURTH AMENDMENT.

If the Court holds that the officers' entry violated the Fourth Amendment, the Court should nonetheless reverse the Tenth Circuit because the officers are entitled to qualified immunity. At the time of the officers' entry, existing caselaw indicated that the entry was constitutional. Several circuits had adopted a test that rendered the entry constitutional, and Judge Posner's decision for the Seventh Circuit in *United States v. Paul*, 808 F.2d 645 (7th Cir. 1986), had embraced this test for cases using informants. As far as counsel is aware, no court had taken a different view; 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. As a result, the entry into Callahan's home did not violate a clearly established right and the officers are entitled to qualified immunity.

An officer conducting a search is entitled to qualified immunity if "a reasonable officer could have believed" that the search was lawful "in light of clearly established law and the information the searching officers possessed." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). This inquiry turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Wilson v. Layne*, 526

U.S. 603, 614 (1999). The Court has stressed that "[t]he operation of this standard . . . depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Anderson,* 483 U.S. at 639. If the relevant right that is "clearly established" is merely the right to be free from unreasonable searches and seizures – that is, the Fourth Amendment itself, stated at the most general level – then qualified immunity becomes meaningless. *Id.* Greater specificity is required: "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id*. at 640 (internal citations omitted). In other words, "the unlawfulness must be apparent." *Id.*

The officers are entitled to qualified immunity under this standard. Taken at a proper level of generality, the question is whether an officer could reasonably believe that he could lawfully enter without a warrant when a suspect had admitted a confidential informant into his home to purchase illegal drugs, the informant had purchased drugs, and the informant had then signaled the completion of the purchase to the officers waiting outside. *Accord Callahan*, 494 F.3d at 903 (Kelly, J., dissenting) ("Properly characterized, the right at issue . . . is the right to be free from the warrantless entry of police officers into one's home to effectuate an arrest after one has granted voluntary, consensual entry to a confidential informant and undertaken criminal activity giving rise to probable cause.").

The answer to that question is "yes." At the time the arrest in this case occurred, a body of caselaw had developed in the lower courts grouped together as the doctrine of "consent once removed." This doctrine had been considered by three federal circuits and two state supreme courts starting in the early 1980s, and it had been accepted by every one of those courts and rejected by none. *See, e.g., United States v. Janik*, 723 F.2d 537 (7th Cir. 1983); *United States v. Bramble,* 103 F.3d 1475 (9th Cir. 1996); *United States v. Pollard*, 215 F.3d 643 (6th Cir. 2000); *State v. Henry*, 627 A.2d 125 (N.J. 1993); *State v. Johnston*, 518 N.W.2d 759 (Wis. 1994). The doctrine was generally stated as a three element test:

> The doctrine of "consent once removed" is applicable where the undercover agent or government 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.

*United States v. Akinsanya*, 53 F.3d 852, 856 (7th Cir. 1995).

This formulation seems to have first appeared in *United States v. Diaz*, 814 F.2d 454, 459 (7th Cir. 1987), intended as a summary of prior Seventh Circuit cases permitting what Judge Flaum called "second entry." The earlier Seventh Circuit cases had in turn relied on two different sources of authority. *United States v. White*, 660 F.2d 1178, 1883 (7th Cir.

1981), had relied on the Supreme Court's decision in *Lewis v. United States*. On the other hand, *United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983), appears to have been based on the power to search incident to arrest. The dual theories underlying the Seventh Circuit's "second entry" cases are understandable: as explained in Section I of this brief, the officers' entry in such cases can be justified on either theory and leads to essentially the same result. Although the history of the development of the so-called "consent once removed" doctrine is not entirely clear, it appears to have developed as a three-element test in an effort to summarize Seventh Circuit precedents that were based both on *Lewis* and on search incident to arrest. The test then spread to other courts.

By the time the search in this case occurred in 2002, the many cases announcing and applying the "consent once removed" doctrine had crystallized into a reasonably settled doctrine that formed part of the general backdrop of Fourth Amendment rules. By 1996, Professor LaFave's influential Fourth Amendment treatise noted the doctrine in a discussion of the legal basis for entry into a home to make an arrest:

> [I]t has frequently been 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. That result is not surprising, as it squares with analogous Supreme Court and

> lower court decisions on the use of undercover agents.

3 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.1(c) at 246-47 (3d ed. 1996). The first sentence above was followed by a footnote exploring the "consent once removed" cases specifically, citing the string of Seventh Circuit cases as "some authority" for the doctrine and excerpting the discussion from *Diaz*. *Id*. at n.100. The second sentence was followed by a footnote referring to the Section of LaFave's treatise on undercover agents that featured an extensive discussion of *Lewis v. United States*. *See id.* at § 8.2(m).

The cases on "consent once removed" were also sufficiently established that they were the subject of a law journal article that aimed to give legal guidance to law enforcement officers and that likely was written at about the same time as the entry into Callahan's trailer. *See* Edward M. Hendrie, *Consent Once Removed*, FBI LAW ENFORCEMENT BULLETIN 24-32 (February 2003), available at http://www.fbi.gov/publications/leb/2003/feb03leb.pdf. Notably, neither Professor LaFave nor the Hendrie article suggested at the time that the "consent once removed" doctrine was something questionable or odd. To the contrary, Professor LaFave described the results in those cases as "not surprising," and noted that such outcomes "square[] with analogous Supreme Court and lower court decisions on the use of undercover agents." LAFAVE, *supra*, at § 6.1(c) (1996 ed.).

Further, there was no indication in 2002 that the doctrine might not apply when the initial entry was made by a confidential informant rather than an undercover officer. To the contrary, that distinction had been rejected by an early circuit court case that directly raised the issue, *United States v. Paul*, 808 F.2d 645 (7th Cir. 1986), authored by Judge Richard Posner. Judge Posner concluded that it made no difference that an initial entry is made by a confidential informant:

> We think the principle extends to the case where the initial, consensual entry is by a confidential informant. The interest that the *Payton* decision protects is the interest in the privacy of the home, and has been fatally compromised when the owner admits a confidential informant and proudly displays contraband to him. It makes no difference that the owner does not know he is dealing with an informant.

*Paul*, 808 F.2d at 648. The conclusion in *Paul* was then incorporated into the Seventh Circuit's standard formulation of the exception the next year in *Diaz*, *see Diaz*, 814 F.2d at 459, which was then widely copied in other Seventh Circuit cases. By 2002, when the entry into Callahan's house occurred, the authorities relied on *Paul* much like the other cases. *See* Hendrie, *Consent Once Removed*, at 24-25 ("There is no requirement that the person obtaining the original consent be an officer of the law. The person obtaining consent could be an informant."); LAFAVE, *supra*, at § 6.1(c) n.100 (1996 ed.) (citing *Paul*).

In light of these cases, the officers were not violating clearly established law when they entered Callahan's trailer without a warrant on March 19, 2002. Circuit court precedents going back almost twenty years had concluded that such entries were constitutional. Those precedents had not been rejected in the intervening years. To the contrary, other courts and commentators had accepted those decisions when they arose. In that setting, it was reasonable for an officer to rely on the existing cases and authorities to conclude that a warrantless entry was constitutional.

The fact that the Tenth Circuit had not yet considered the "consent once removed" doctrine does not mean the officers' reliance on existing caselaw was any less reasonable. Police officers are not legal scholars. An officer in Fillmore, Utah (population 2,253) should not have to second-guess the legal analysis of Richard Posner. Nor should he have to wonder whether there are difficult Fourth Amendment issues that Professor LaFave's treatise has overlooked. Police officers cannot be expected to predict that the federal circuit in which they work will create a circuit split – or that if a split is created the Supreme Court will take the case and reject the lower court's caselaw.

The Tenth Circuit's contrary analysis provides a textbook example of how not to analyze qualified immunity. The Tenth Circuit committed the fundamental error of construing the relevant right as broadly as possible: "In this case, the relevant right

is the right to be free in one's home from unreasonable searches and arrests." *Callahan*, 494 F.3d at 898. As explained in *Anderson v. Creighton*, 483 U.S. 635, 639 (1987), discussed *supra*, this is plainly incorrect. Next, the Tenth Circuit stated that the Supreme Court had already adopted a position that there can be only two exceptions to the warrant requirement for home searches: "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." *Callahan*, 494 F.3d at 898.

The Tenth Circuit's claim that only two exceptions to the warrant requirement allow entry into a home is based on a misreading of the relevant caselaw. There are several more such exceptions – the total number is unclear – and more importantly, their contours are often undefined. As Justice Thomas noted after reviewing the Court's decisions on exceptions to the warrant requirement, "our cases stand for the illuminating proposition that warrantless searches are *per se* unreasonable, except, of course, when they are not." *Groh v. Ramirez*, 540 U.S. 551, 572-73 (2004) (Thomas, J., dissenting). Even the Tenth Circuit case cited by the *Callahan* majority noted three exceptions, not two. *Franz v. Lytle*, 997 F.2d 784, 788 (10th Cir. 1993). The Supreme Court had recognized still more exceptions in the home context, such as entries incident to a lawful arrest in *Washington v. Chrisman*, 455 U.S. 1 (1982), and warrantless entries into the apartments of probationers in *United States v.*

*Knights*, 534 U.S. 112 (2001). The Court has also permitted warrantless home entries on a waiver theory that does not require an exception to the warrant requirement because no reasonable expectation of privacy has been violated. *See, e.g., United States v. White*, 401 U.S. 745, 752 (1971). The Tenth Circuit's claim that warrantless home entries must either be justified by consent or exigent circumstances or else not at all is simply incorrect.

More fundamentally, the Tenth Circuit's formulation improperly looks at legal categories instead of the objective reasonableness of an application of law to a set of facts. The proper question asks whether the illegality of the officers' entry was clearly established, not the precise number of exceptions to the warrant requirement that courts can catalog in the abstract. The officers' entry in this case fits readily under both the Supreme Court's preexisting reasonable expectation of privacy cases and its search incident to arrest cases. *See* pages 20 to 39, *supra*. No new exception to the warrant requirement is needed. But what matters is whether the illegality of the entry was apparent, not whether the Court categorizes the entry under an existing doctrine or a new one.

*Groh v. Ramirez*, 540 U.S. 551 (2004), provides no support for the view that the officers do not deserve qualified immunity. In *Groh*, the officers obtained and executed a faulty warrant that failed to describe the property to be seized. When the homeowner sued the police for executing the illegal warrant, the officers claimed that they were entitled to

qualified immunity because they could have reasonably believed that their entrance pursuant to a faulty warrant was constitutional. The Court disagreed, noting that there was no basis in existing caselaw for thinking that the search pursuant to a faulty warrant nonetheless satisfied the Fourth Amendment: "Because not a word in any of our cases would suggest to a reasonable officer that this case fits within any exception to that fundamental tenet, petitioner is asking us, in effect, to craft a new exception. Absent any support for such an exception in our cases, he cannot reasonably have relied on an expectation that we would do so." *Id.* at 565.

The result in *Groh* has been criticized,[10] but properly understood *Groh* stands for a simple and even obvious proposition: it is not reasonable for the police to believe that a warrantless search of a home satisfied the Fourth Amendment if there is no legal support for that view. That reading is confirmed by the Court's contrasting decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). In *Mitchell*, Attorney General John Mitchell authorized a warrantless wiretap of a radical domestic group from late November 1970 until early January 1971. Mitchell relied on the untested theory that the Fourth Amendment recognized an exception for domestic security wiretapping. Two years later, in *United States v. United States*

[10] *See* 1 W. LaFave, Search and Seizure, § 1.3(f) (4th ed. 2004) (2007 Supp.) (describing the qualified immunity analysis in *Groh* as "flat-out wrong").

*District Court for Eastern Dist. of Mich., Southern Division*, 407 U.S. 297 (1972), a case widely known as the *Keith* case, the Supreme Court rejected the Attorney General's theory and held that such monitoring required a warrant. Forsyth then sued Mitchell, and the issue before the Court was (among other things) whether Attorney General Mitchell was entitled to qualified immunity for authorizing the illegal wiretap.

This Court concluded that the Attorney General was entitled to qualified immunity because then-existing precedents and authorities left unclear whether a domestic security exception existed. *See Mitchell*, 472 U.S. at 530-35. To reach this conclusion, the opinion began by surveying the evolution of general Fourth Amendment doctrine. *See id.* at 530-32. The opinion then discussed three district court decisions handed down from July 1969 through September 1970 that had adopted the Attorney General's position to varying degrees. *Id.* at 533. After surveying this landscape, the Court concluded that the Attorney General had not acted unreasonably in concluding in late 1970 that the domestic security exception did in fact exist and that the monitoring was therefore legal:

> [T]o say that the principle *Keith* affirmed had already been "clearly established" is to give that phrase a meaning that it cannot easily bear. The legality of the warrantless domestic security wiretap Mitchell authorized in November 1970, was, at that time, an open question, and *Harlow* teaches that

> officials performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted.

*Mitchell*, 472 U.S. at 534-35. In a footnote, the Court added:

> We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances. But in cases where there is a legitimate question whether an exception to the warrant requirement exists, it cannot be said that a warrantless search violates clearly established law.

*Id*. at 535, n.12.

The *Mitchell* Court looked carefully at the entirety of the caselaw on the specific issue that the Attorney General decided. It looked at all courts, including individual district courts. It then considered whether the Attorney General acted unreasonably in assessing the legality of the warrantless wiretap. The same approach should be followed in this case, and it leads to the conclusion that the officers acted reasonably in believing that their entry satisfied the Fourth Amendment. Unlike in *Groh*, there was a great deal of support for the view that the officers' entry satisfied the Fourth Amendment. That support included Supreme Court cases like *Lewis* and *Chrisman* as well as lower court cases on "consent

once removed" such as Judge Posner's decision in *Paul*. The weight of caselaw made the legality of the entry at the very least a "legitimate question," *Mitchell*, 472 U.S. at 535, n.12, and therefore triggers the doctrine of qualified immunity.

*Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam), provides a helpful example of how lower court cases outside an officers' home circuit can inform the scope of qualified immunity. Puyallup, Washington police officer Rochelle Brosseau shot Kenneth Haugen in the back as he attempted to flee. Haugen sued Officer Brosseau, and the Ninth Circuit concluded that Brosseau had violated Haugen's clearly established constitutional rights. The Supreme Court summarily reversed in a *per curiam* opinion. The Court began by looking at the relevant Supreme Court opinions, but concluded that those opinions provided only general guidance. *See id*. at 199. The Court then looked to lower court opinions, canvassing decisions from the Sixth Circuit, the Seventh Circuit, and the Eighth Circuit. Those lower court decisions did not clearly establish that Brosseau had violated Haugen's rights, the Court concluded: "These three cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that Brosseau's actions fell in the hazy border between excessive and acceptable force." *Id.* at 201 (internal quotation omitted).

If circuit court decisions from other circuits were relevant in *Brosseau*, then surely they are relevant in this case. If anything, the officers' entitlement to qualified immunity is clearer here than in the *per curiam* opinion in *Brosseau*. The circuit court opinions in this case do not depend on the facts of each case, and they do squarely govern the case here. Those cases indicate that the officers' entry satisfied the Fourth Amendment. If this Court disagrees, then the officers are entitled to qualified immunity.

## III. IN THE FOURTH AMENDMENT SETTING, *SAUCIER V. KATZ* SHOULD BE LIMITED OR OVERRULED

The Court's order granting the petition directed the parties to brief and argue the following question: "Whether the Court's decision in *Saucier v. Katz*, 533 U.S. 194 (2001), should be overruled?" *Pearson v. Callahan*, 128 S.Ct. 1702 (2008). In *Saucier*, this Court formalized its rule on the order of decision-making in constitutional tort cases that combine constitutional questions and qualified immunity claims. The *Saucier* rule is that "the first inquiry must be whether a constitutional right would have been violated on the facts alleged," and that "if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201.

The petitioners respectfully submit that the one-size-fits-all rule of *Saucier* is well-intentioned but overbroad. The rule should be narrowed. The difficult question is precisely how: changing the law under *Saucier* requires replacing it with an alternative. The petitioners submit that the Court should approach the question cautiously, and that in this case the Court should only resolve the 'order of battle' for Fourth Amendment claims. Specifically, the petitioners submit two alternative rules that would be superior to the status quo in Fourth Amendment cases. The first proposed rule would abandon *Saucier* in Fourth Amendment civil suits. The second proposed rule would limit the *Saucier* order to Fourth Amendment claims that do not involve fruit of the poisonous tree. *See generally Wong Sun v. United States*, 371 U.S. 471 (1963).

At the broadest level, the order of decision-making in qualified immunity cases requires the Court to accommodate two important but often competing interests. The first interest is the clarity of the law. Constitutional law often develops in a case-by-case fashion, and that law may be unclear if courts repeatedly resolve civil disputes without first reaching the merits. This was the primary concern underlying the Court's opinion in *Saucier*. *See Saucier*, 533 U.S. at 201 ("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."). On the other hand, the second interest is

avoiding unnecessary constitutional rulings that burden the courts and may create precedents of uneven quality that are difficult to review. That is the primary concern voiced by *Saucier's* critics. *See, e.g.,* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275-81 (2006).

Counsel submits that *Saucier's* primary weakness is that it accommodates these two interests with a single one-size-fits-all rule for all constitutional torts. In every case, in every area, the same order must be followed. But different areas of law and different types of claims implicate these concerns in different ways. Some areas of law are generally murky, while others are often relatively clear. Some areas are frequently litigated, and others reach the courts only rarely. Some areas of law arise in many different types of cases, while others arise only in civil suits protected by qualified immunity. The best way to accommodate the basic interests raised by the 'order of battle' varies in different types of cases. As a result, a more finely-grained approach would be superior to *Saucier's* one-size-fits-all rule.

Counsel respectfully submits that two alternative approaches would be superior to *Saucier*. First, the Court could rule that the *Saucier* order is not required in Fourth Amendment cases, leaving open for now the question of whether it should be retained in other types of constitutional tort suits. The reason is that civil litigation has only a minor role in developing Fourth Amendment law. Fourth Amendment

decisions arise with tremendous frequency in the context of motions to suppress in criminal cases. Under *Gideon v. Wainright*, 372 U.S. 335 (1963), and its progeny, every criminal defendant who faces jail time will be represented by an attorney; under *Mapp v. Ohio*, 367 U.S. 643 (1961), the Fourth Amendment exclusionary rule is available both in federal and state court. The combination of *Gideon* and *Mapp* ensures that the Courts encounter a vast number of Fourth Amendment claims in criminal cases that develop the law outside of civil suits. If the Court wishes to select a single rule to govern whether the *Saucier* order is required in Fourth Amendment cases, the better rule should be that it is not.

Alternatively, the Court should consider a second proposal that is more finely-grained. In Fourth Amendment cases, the *Saucier* order should be limited to claims that do not involve alleged fruits of the poisonous tree, *Wong Sun v. United States*, 371 U.S. 471 (1963), and therefore will not arise in the context of motions to suppress. This approach recognizes that all Fourth Amendment claims are not created equal: some claims arise often in motions to suppress but others do not. The most important example of important claims that rarely arise in suppression cases involves excessive force claims. Excessive force claims are premised on the view that an unnecessary use of force by the police against a citizen constitutes an unreasonable seizure of his person in violation of the Fourth Amendment. *See generally Graham v. Connor*, 490 U.S. 386 (1989). Such claims rarely if ever arise

in criminal cases: because an officer's use of excessive force does not ordinarily lead to the discovery of evidence, a defendant cannot claim that the evidence was a "fruit" of the excessive use of force.

In the Fourth Amendment area, the *Saucier* rule is quite important to the development of the law in areas that do not arise in motions to suppress. The example of excessive force – the cause of action in *Saucier* itself – is instructive. Because the use of the Fourth Amendment to adjudicate excessive force claims is a recent development, *see Graham*, 490 U.S. at 392, the relevant legal standards governing excessive force have often remained unclear. Before *Saucier*, it was easy and common for judges to take the short cut of resolving excessive force claims by relying on the qualified immunity prong in a way that left the law just as murky as it had been before. *Cf. Saucier*, 533 U.S. at 206 (noting the "hazy border between excessive and acceptable force"). A difficult Fourth Amendment issue would normally coincide with a simple qualified immunity question, giving courts an incentive to resolve difficult excessive force claims without directly addressing the Fourth Amendment line. *Saucier* has helped settle the law by requiring courts to clarify the legal standards governing excessive force.

A new rule limiting *Saucier* to claims that do not involve fruits of the poisonous tree would require courts to consider whether the challenged act was the proximate cause of the discovery of criminal evidence. In cases where the challenged act did not lead to the

discovery of evidence, courts would still be required to follow the *Saucier* order. For example, courts would be required to apply *Saucier* in cases raising excessive force claims; traffic stops that did not lead to the discovery of evidence; arrests not based on probable cause; failure to provide a hearing within a reasonable period of time after arrests under *Gerstein v. Pugh*, 420 U.S. 103 (1975); knock-and-announce violations, *see Hudson v. Michigan*, 547 U.S. 586 (2006); and other similar claims. On the other hand, courts could go straight to a qualified immunity analysis if the challenged act revealed evidence of criminal activity and could therefore be adjudicated in a motion to suppress.

Under either of these proposed tests, the Court would not be required to apply the *Saucier* order to resolve the officers' entry into Callahan's home. Under the first test, *Saucier* would not apply because Callahan brought his claim under the Fourth Amendment. Under the second, more specific test, *Saucier* would not apply because the officers' entry led to the discovery of criminal evidence including methamphetamine and syringes.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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