IN THE

Supreme Court of the United States

NO. 07-751

CORDELL PEARSON, *et al.*,
Petitioners,

v.

AFTON CALLAHAN,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
For the Tenth Circuit

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

INTEREST OF *AMICUS CURIAE*

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

mitted to preserving fairness within America's criminal justice system.

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

STATEMENT

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

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

That day, Bartholomew finished work around 5 p.m. and then drank "between six and eight" beers. J.A. 115. At around 8:00 or 8:30 p.m., Bartholomew and a friend went to Callahan's home. J.A. 116. According to Bartholomew, Callahan showed him the drugs and offered to sell him as much as he wanted. J.A. 117. After "tasting" the methamphetamine, Bartholomew agreed to purchase a baggie for $100; Bartholomew said he would return with the money later. J.A. 117, 145.

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

Some Task Force officers went to Callahan's home to "look[] for places they could get into the trailer * * * as quickly as possible after the deal was done." J.A. 56. The other officers stayed behind. Whatcott photocopied and marked a $100 bill and gave it to Bartholomew to purchase the drugs. J.A. 58. The officers searched Bartholomew to confirm he was not carrying any contraband himself. J.A. 153. And they "wired" Bartholomew with a transmitter so that the officers could monitor and record the controlled buy from outside the house. J.A. 119. Finally, Bartholomew told the officers that he would "play the drums to give them a key to come in" when the deal was done. J.A. 120. At around 11:00 p.m.—at least two hours after Bartholomew arrived at the Sheriff's office, J.A. 61,—petitioners Thomas and Jenkins (also detectives with the Task Force) drove Bartholomew to a location near Callahan's home. J.A. 184. Bartholomew went inside the home, bought

methamphetamine, and told Callahan that he wanted to "play the drums that were on the porch." J.A. 64-65. At that point, several members of the Task Force stormed Callahan's home, *ibid.*, ordering Callahan, Bartholomew, and the home's two other occupants to lie down on the ground, J.A. 190-191, 266. When the officers searched Callahan, they found the $100 bill they had given Bartholomew. A later search of the home revealed additional baggies of methamphetamine, J.A. 70-71, as well as syringes, J.A. 196.

At no point during the day—or in the two hours the Task Force was assembled at the Sheriff's office to plan the operation—did any member of the Task Force seek a warrant. J.A. 89.

2. After his arrest, Callahan was charged with possessing methamphetamine with intent to distribute it. Before trial, he moved to suppress the evidence discovered as a result of petitioners' warrantless entry. The trial court denied the motion, finding that "exigent circumstances" justified the officers' warrantless entry into the home. J.A. 302. Callahan then pled guilty to one count, reserving his right to appeal the trial court's ruling on the motion to suppress. J.A. 304-12.

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

3. Callahan then brought this action under 42 U.S.C. § 1983 in the United States District Court for the District of Utah. Pet. App. 39-40. The district court granted summary judgment for petitioners, focusing on "consent once removed" as their "strongest argument." Pet. App. 47. The district court described that doctrine as validating warrantless entry into the home where an undercover agent or informant enters with consent, establishes probable cause, and summons help from other officers. *Ibid.* While noting that the doctrine had been adopted by three circuits, the district court "wonder[ed]" about its validity. *Id.* at 52. "[I]t seems a bit of a stretch," the court observed, "to call the entry of multiple officers 'consensual'" where, as here, the homeowner merely invited a single individual into his home. *Ibid.* Although the district court assumed that there was a constitutional violation for purposes of its analysis, the court ruled for the petitioners on qualified immunity. *Id.* at 53. The invalidity of entry under the consent-once-removed doctrine, the court declared, was not "clearly established" under these facts at the time the officers acted. *Id.* at 55.

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

The court of appeals noted that it had authorized warrantless entry by additional officers to assist an undercover officer in making an arrest, but refused to extend that holding to permit petitioners' warrantless

entry. *Id.* at 11. "[T]he person with authority to consent never consented to the entry of police into the house." *Id.* at 12. Further, the court of appeals rejected petitioners' claim of qualified immunity, noting that "the Supreme Court and the Tenth Circuit have clearly established that to allow police entry into a home, the only two exceptions to the warrant requirement are consent and exigent circumstances." *Id.* at 17. Here, neither of those exceptions even arguably validated warrantless entry. *Ibid.*

Judge Kelly dissented. In his view, by admitting Bartholomew into his home, Callahan assumed the risk that Bartholomew would report what he saw inside the home to police. Thus, according to Judge Kelly, "the marginal risk" that Bartholomew would "invite law enforcement officials to assist in an on-the-spot arrest is too slight to bring the requirement of obtaining a warrant into play." Pet. App. 22-23. Judge Kelly also rejected the majority's distinction between consent granted to a confidential informant and that granted to a government agent. *Id.* at 23. In any event, Judge Kelly would have granted qualified immunity, holding that "the right at issue was not clearly established" when petitioners conducted their search. *Id.* at 29.

SUMMARY OF ARGUMENT

[To follow]

ARGUMENT

For petitioners, most everything leading up to their arrest of respondent Callahan went as planned. The morning of the arrest, a confidential informant told the officers that Callahan was distributing methamphetamine. J.A. 113-14. That evening, the officers arranged for the informant to make a controlled buy at Callahan's home. Some members of the Task Force surveyed Callahan's home to "look[] for places they could get into the

trailer * * * as quickly as possible after the deal was done." J.A. 56. Other officers stayed back at the station, wired the informant with a remote listening device, J.A. 54, searched the informant for contraband, J.A. 183, and gave him a $100 bill, after photocopying it for identification, so he could make the drug purchase, J.A. 58. Officers drove the informant to Callahan's neighborhood and waited as Callahan's daughter let the informant into the home. J.A. 61-65, 123. When the informant gave a signal that the transaction was complete, officers stormed Callahan's home, arrested those present, and searched the premises. J.A. 65-66, 195, 266.

It was a textbook operation, with a textbook mistake—the officers entered Callahan's home without a warrant. J.A. 89. "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton* v. *New York*, 445 U.S. 573, 586 (1980). Here, petitioners' plan from "the outset" called for them to enter Callahan's home. J.A. 338. In this Court, petitioners do not contend that there was even an arguable exigency (such as imminent destruction of evidence or an unanticipated need to assist the confidential informant) that would have permitted warrantless entry. Nor do they claim that Callahan voluntarily allowed them inside.

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

in his home gives the police a free pass to raid the home without a warrant.

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

I. The Warrantless Police Entry Violated the Fourth Amendment

A. The Notion of "Consent Once Removed" Cannot Be Reconciled With Our Legal Tradition or Shared Values

It is well-established that citizens can voluntarily allow law enforcement officers to enter their homes, and that the police may conduct "a valid warrantless entry and search of premises" when the homeowner actually consents. *Georgia* v. *Randolph*, 547 U.S. 103, 106 (2006). Invoking "consent-once-removed," petitioners and their *amici* urge that, when a citizen allows a single informant to enter his home, that somehow licenses others—including multiple armed police officers—to enter as well.

Pet. Br. 20-28; U.S. Br. 12-18.[2] Petitioners and their *amici* offer a grab-bag of rationalizations for that result. They posit that, when a homeowner invites an informant into his home, he "waives" his Fourth Amendment objection to the subsequent entry of multiple police officers. Pet. Br. 20-21, 23-24, 39-41. Alternately, they rely on this Court's statement that, for an officer's observation to be a "search" within the meaning of the Fourth Amendment, it must infringe on an expectation of privacy that society respects "as objectively reasonable." *California* v. *Greenwood*, 486 U.S. 35, 39 (1988). Once Callahan invited the informant to enter his home and revealed the contents of his home to the informant, petitioners claim, Callahan ceased to have a legitimate expectation of privacy that might be offended when armed officers later barged inside. Pet. Br. 17, 25-28; see also U.S. Br. 14-16.

Those theories make no sense. An expectation of privacy is "reasonable" or "legitimate" where it "has a 'source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" *Minnesota* v. *Carter*, 525 U.S. 83, 88 (1998) (quoting *Rakas* v. *Illinois*, 439 U.S. 128, 143-44 (1978)). For centuries, "concepts of real or personal property law" and the "understandings recognized and permitted by society" have made it clear that consent to the entry of a single individual does not authorize the entry of anyone (or everyone) else who wishes to come inside. The law

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

and social custom alike studiously respect and enforced the expectation that, when a citizen invites another into his home, that invitation extends only to the person invited.

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

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

That principle—that a license to enter the home cannot be transferred or expanded—has deep roots. In the 19th century, even members of the household could not extend their license to exercise dominion over the property absent express permission from the head of the household. Thus, a "wife, when she is not the general agent of her husband, nor specifically authorized to act in

the particular instance, cannot grant a valid license to a stranger to enter on her husband's land, and remove property therefrom." 2 T. Waterman, *A Treatise on the Law of Trespass* 184 (1875). Blackstone's *Commentaries* similarly reflected the fact that, even where the homeowner licensed certain individuals to enter, they could not extend that license to others. For that reason, the common law at that time deemed a thief guilty of burglary—for "breaking and entering"—even if he was freely admitted into the home by someone with license to be there, such as a servant. See 4 William Blackstone, *Commentaries* *226-*227; see also 3 J. Chitty, *A Practical Treatise on the Criminal Law* 1093 (1816).

The notion that an invitation to enter the home does not extend beyond the invitee himself pervades the law today. See, *e.g.*, Restatement (Second) of Torts § 892A cmt. e (1979) ("[O]ne who consents that another may walk across his land does not, without more, consent that the other may drive an automobile across it * * * or that a third person may walk across it along with the other."). Thus, this Court has held that, while hotel guests implicitly consent to hotel staff members entering their rooms, that consent does not permit those staff members to allow entry by government agents. *Stoner* v. *California*, 376 U.S. 483, 489 (1964). Likewise, while a landlord may have a clear right to enter a tenant's home, the landlord may not extend his right by admitting law enforcement. *Chapman* v. *United States*, 365 U.S. 610, 616 (1961). And this Court has made clear that even an overnight guest in the home of another cannot license others to enter. Overnight guests who "have no legal interest in the premises" do "not have the legal authority to determine who may or may not enter the household." *Minnesota* v. *Olson*, 495 U.S. 91, 99 (1990). *A fortiori* the presence of a temporary visitor for a few minutes cannot "determine who may or may not enter the household."

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

That legal tradition reflects the longstanding custom that the home remains a private and inviolate refuge from the outside world—protected against entry by the uninvited—even when we exercise the longstanding and socially valuable tradition of welcoming selected guests or visitors inside. Because the home is private, permission to enter is "so much a matter of personal trust and confidence that it does not extend to any one but the licensee, and is not capable of being assigned or transferred by the person to whom it is granted." C. Boone, *A Manual of the Law of Real Property* 149 (1883). For similar reasons, even legally *sanctioned* entries pursuant to a warrant cannot be extended to include additional individuals who are not involved in the warrant's execution.[3]

The notion underlying consent-once-removed—that admitting a single individual into the home somehow makes it permissible for others to enter or otherwise

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[3] As this Court observed: "It is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant * * * ." *Wilson* v. *Layne*, 526 U.S. 603, 614 (1999); see also *Prahl* v. *Brosamle*, 295 N.W.2d 768, 782 (Wis. Ct. App. 1980) ("[The officer] had no authority to extend a consent to [a reporter] to enter the land of another."), abrogated in part not relevant here by *Wilson, supra.*

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

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

In determining the lawfulness of police entry, this Court also considers our shared social expectations. "The constant element in assessing Fourth Amendment reasonableness in the consent cases," the Court has explained, "is the great significance given to widely shared social expectations * * * ." *Randolph*, 547 U.S. at 111. Here, those social expectations are clear: Inviting another into your home—whether a friend or informant—does not eliminate your expectation that your home will remain private and secure against uninvited and unwelcome entry by others.

To the extent that commonsense observation requires documentation, it is easily found. One of the leading guides to social comportment explains that an "invitation is intended only for the person to whom it is addressed." Peggy Post, *Everyday Etiquette* 111 (1999); see Judith Martin, *Miss Manner's Guide to Excruciatingly Correct*

Behavior 403-04, 566 (2005); Peggy Post, *Emily Post's Entertaining* 14 (1998). That limitation on the scope of social invitation ordinarily excludes even uninvited significant others and children. See Post, *Everyday Etiquette*, *supra*, 111. While hosts often attempt to accommodate the wishes of their guests, it remains their absolute prerogative to decline to entertain the uninvited. See Post, *Entertaining*, *supra*, at 14. This Court has recognized that as well. Hosts, this Court has observed, "have the authority to exclude despite the wishes of the guest." *Olson*, 495 U.S. at 99.

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

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

Focusing narrowly on privacy, the United States defends consent-once-removed by urging that, once the informant was inside Callahan's home, the entry of

additional officers caused no additional harm. "[T]he entry of additional officers," the United States asserts, "works no constitutionally significant incremental interference with the resident's privacy interests." U.S. Br. 13; see also Pet. Br. 20-28.[4] The premise of that argument is that, once the informant viewed the contents of Callahan's home, the entry of additional law enforcement officers "revealed no private information that could not equally have been revealed through Bartholomew's recounting of his observations." U.S. Br. 16.

That argument proceeds from the erroneous premise that the Fourth Amendment's protections are limited to the right to keep the contents of one's home "secret" or free from view. For centuries, however, the common law and the Fourth Amendment have protected the far broader interest of personal security and freedom from unwanted physical intrusion into the home. But even if one were to erroneously define "privacy" so narrowly as to embrace only freedom from unwanted viewing or observation, longstanding social custom and our shared values—to say nothing of common sense—all make clear that there is an enormous difference between the intrusion on that interest that is occasioned when a single, invited guest enters the home and the intrusion that occurs when numerous others barge in uninvited.

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[4] To the extent the United States assumes that the additional officers entered "to assist in effecting an arrest," U.S. Br. 13, its analysis rests on a false premise. There is no evidence that the informant in this case sought to conduct an arrest and required police assistance in doing so. J.A. 126. To the contrary, when the police entered, they seized the informant—ordering him to the ground with the others. *Ibid.* See also p. __, n. __, *infra*.

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

The United States' position rests in the first instance on a false premise—that the Fourth Amendment protects only an individual's "expectation of privacy" in the sense of freedom from observation. But the Fourth Amendment protects more than that. It also protects "privacy" in the sense of security, seclusion, and freedom from physical invasion in the home. This Court's decision in *Payton* could not be more clear: Warrantless "*physical entry* of the home" was "the chief evil against which the wording of the Fourth Amendment is directed." *Payton*, 445 U.S. at 585 (emphasis added). Similarly, in *Silverman* v. *United States*, 365 U.S. 505 (1961), the Court held that the police violated the Fourth Amendment when they inserted a listening device into the home, holding that the "actual intrusion into a constitutionally protected area" itself violated the Fourth Amendment. *Id.* at 511. As this Court later explained, "[i]n *Silverman*, * * * we made clear that *any physical invasion* of the structure of the home, 'by *even a fraction of an inch*,' was too much." *Kyllo* v. *United States*, 533 U.S. 27, 39 (2001) (emphasis added). A citizen who chooses to live in a glass house, for example, might expose the contents of the house to public view. But that surely does not mean government agents could enter that structure at will. The sanctity of the home against physical intrusion has never been a function of its opacity.

In fact, this Court's early Fourth Amendment cases, like early English cases, focused *exclusively* on physical intrusion—not visual observation. See *Kyllo*, 533 U.S. at 31-32. That is consistent with the Fourth Amendment's roots in the protection of private property. D. Yeager, *Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. Crim. L.

& Criminology 249, 284 (1993). One of the core attributes of private property includes the owner's right to exclude (and conversely to admit) others as he sees fit. "One of the main rights attaching to property is the right to exclude others * * * ." *Rakas*, 439 U.S. at 144 n.12 (citation omitted). Homeowners therefore have long had the near-absolute right to determine who may and may not enter their home. Consent to enter is personal, specific, and non-transferable precisely because a homeowner has the right to decide not only how many people may enter the home but also who enters the home.

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

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

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

Consequently, this Court's cases referring to the Fourth Amendment's protection of "privacy" cannot be

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

2. *Observation of the Inside of the Home By Additional Officers Also Materially Invades Privacy Rights*

Even if "privacy" is viewed narrowly as freedom from unwanted observation, the United States' position still fails. There is an enormous difference between having one's home viewed by a single visitor, who may describe what he saw to others (including the police), and having the home's interior viewed directly by others (including the police) who enter uninvited. We all invite others into our home despite the risk that those inside may describe its contents to others. But that hardly means that, in so doing, we license the world to enter and look for itself. To the contrary, the very reason invitations and licenses to enter are not transferable or expandable is that having

different or additional people view the contents of your home is quite different from having the invitee merely describe things to others. See pp. _ - _, *supra*.

Thus, "[o]ne contemplating illegal activities must realize and risk that his companions may be reporting to the police." *United States* v. *White*, 401 U.S. 745, 752 (1971). But the risk of "reporting to the police" translates to the possibility of probable cause and issuance of a warrant. It does not translate into free license for a warrantless entry. For the same reason, petitioners' reliance on *Lewis* v. *United States*, 385 U.S. 206 (1966), see Pet. Br. 22-26, is fundamentally misplaced. In that case, Lewis voluntarily admitted an undercover officer into his home and sold him drugs. 385 U.S. at 207. Several months later, the police arrested and charged Lewis, and Lewis sought to exclude evidence obtained by an undercover officer when he was inside Lewis's home with Lewis's consent. *Id.* at 208. This Court held that, by selling drugs from his home, Lewis "ran the risk" the buyer would be "reporting to the police" or that the buyer was himself an undercover agent. But nothing in *Lewis* suggests that, by running that risk, the homeowner licensed *other* government agents to enter uninvited, or forfeited the protection of the warrant requirement if those agents sought entry.

For similar reasons, the United States' reliance on *Illinois* v. *Andreas*, 483 U.S. 765 (1983), and *United States* v. *Jacobsen*, 466 U.S. 109 (1984), is misplaced. U.S. Br. 14-16. Both *Andreas* and *Jacobsen* involved warrantless reexaminations of *packages* that the owner had entrusted to another and that had previously been opened and searched by private parties *outside the home*. Thus, neither of those cases involved an uninvited physical invasion of the home. It might be that, when we send our possessions outside the home, we ordinarily expect that they may be inspected by others—potentially

by many others if suspicion is aroused—without our consent. For example, in *Andreas*, this Court stated that "[c]ommon carriers have a common-law right to inspect * * * based on their duty to refrain from carrying contraband." 463 U.S. at 769. But our legal and social expectations for the home are wholly different. With respect to the home, the fact that one person has been invited inside has never been thought to allow others to enter. Nor is there any legal or social basis for suggesting that law enforcement can enter the home uninvited and without a warrant if they are merely "reenacting," U.S. Br. 14-16; Pet. Br. 26-28, a private party's prior invited entry.

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

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

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

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

C. The Balance of Private and Law Enforcement Interests Tilts Decidedly Against Consent-Once-Removed

Sometimes, "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979); see also *Camara* v. *Municipal Court*, 387 U.S. 523, 536-37 (1967). Here, that balance weighs strongly in favor of preserving the warrant requirement.

The individual's Fourth Amendment's interests are of the highest order here. The "sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976). The warrant requirement serves a critical role in preserving that sanctity.

"When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent." *United States* v. *Jackson*, 333 U.S. 10, 14 (1948).

By contrast, consent-once-removed serves virtually no legitimate law enforcement interest not already served by existing law. Law enforcement officers who wish to enter the home immediately after a controlled buy, like the one at issue here, often will have ample opportunity and sufficient cause to obtain an ordinary warrant. Here, for example, the officers learned in the middle of the morning that Callahan would be selling drugs from his home later that night. J.A. 114. Hours before the controlled buy, the informant visited Callahan's home, confirmed that Callahan had methamphetamine for sale, "tasted" the drugs, and advised the officers that the drugs were there and available for his purchase. J.A. 80-81, 115-18, 145. While the officers spent the next two hours preparing a controlled buy inside the home—wiring the informant with listening equipment, casing the home to identify the best points of entry, and arranging for the informant to signal them when the buy was complete—they never attempted to get a warrant. J.A. 55, 121, 117-19. Given the amount of time the officers had—and the information available to them—they had no legitimate excuse for failing to do so.[5]

Even if probable cause were lacking before the buy occurred, the officers had multiple options available.

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[5] Probable cause exists where "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois* v. *Gates*, 462 U.S. 213, 214 (1983). Here, the officers thought they had probable cause, or were at least close to it. J.A. 257 ("I thought we were slim. We probably could have wrote a warrant, maybe and maybe not."). Indeed, they so believed even though they had not sufficiently interviewed their informant to realize that he had actually sampled the methamphetamine to verify its identity.

They could have sought an "anticipatory warrant" to validate entry once the controlled buy occurred. When police officers do not yet have probable cause, but believe that specific, future event will give them probable cause, they may seek an "anticipatory" warrant that becomes effective if and when that anticipated event occurs. See generally 2 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 3.7(c), at __ (4th ed. 2004). Here, the officers at least had probable cause to believe that a controlled buy would take place. Their suspicions were sufficient to justify the efforts of multiple officers for several hours to the operation. Nothing prevented them from seeking an anticipatory warrant that specified the controlled buy as the "triggering" event.[6]

Alternatively, the officers could have continued their surveillance of Callahan's home after the controlled buy occurred, sought an expeditious "telephonic warrant," and entered once they received that.[7] And if Callahan had attempted to leave the home before the officers obtained that warrant, they could have detained Callahan outside the home and secured the premises until the warrant was issued. *Illinois* v. *McArthur*, 531 U.S. 326, 331-32 (2001). There is no reason petitioners could not have obtained a telephonic warrant either after the buy occurred, or at some point during the two hours they were at the Sheriff's office preparing the operation.

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[6] See *State* v. *Womack*, 967 P.2d 536, 539-40 (Utah Ct. App. 1998) (recognizing constitutionality of anticipatory warrant in controlled delivery context); see also *United States* v. *Grubbs*, 547 U.S. 90, 95 (2006) (recognizing anticipatory warrants are constitutionally permissible and noting every circuit to consider the issue had so held as well); *United States* v. *Loy*, 191 F.3d 360, 364 (3rd Cir. 1999).

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

Invoking officer safety, the United States observes that "the government has a substantial interest in ensuring that sufficient law enforcement personnel are present to perform [an] arrest effectively and without undue risk of violent reaction." U.S. Br. 13. But nothing in the warrant requirement precludes that need from being met. Where the police decide ahead of time to arrest the suspect in the home—as was the case here[8]—the police can obtain a warrant or anticipatory warrant to validate the entry of sufficient officers to effect the arrest safely.

To the extent the officers do not plan to enter but unanticipated circumstances make an immediate, in-the-home arrest necessary, the "exigent circumstances" doctrine amply meets any conceivable law enforcement need. Where "a risk of danger to the police" arises unexpectedly, additional officers may enter an individual's home to protect officer or informant safety without a warrant. See *Olson*, 495 U.S. at 100.[9]

Petitioners, however, long ago abandoned any suggestion that exigency justified entry, see p. __, *supra*, and with reason: The operation went pretty much as

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

[9] That does not mean that police can plan an operation so as to make exigency a self-fulfilling prophecy. See Pet. App. 10 (noting exigent circumstances "may not be subject to police manipulation or abuse") (internal quotation marks omitted); *United States* v. *Gomez-Moreno*, 479 F.3d 350, 356-57 (5th Cir. 2007). But the unanticipated exigencies that sometimes arise during unpredictable law enforcement operations are all properly addressed under the exigent circumstances doctrine.

planned. The informant made the controlled buy without Callahan learning that he was an informant. No one detected the surveillance. And no exigency placed the informant at risk or made an immediate in-the-home arrest necessary. The police simply decided to raid a suspect's home without bothering to get a warrant. Under the circumstances, consent-once-removed does no more than validate precisely what this Court has long condemned—entry into the home without a warrant or exigent circumstances justifying entry. "If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required." *Johnson* v. *United States*, 333 U.S. 10, 15 (1948).

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

The warrant requirement also serves law enforcement needs. Where officers obtain a warrant, any evidence found during the search will be admissible so long as the

officers exercised objective "good faith in conducting the search," even if probable cause turned out to be absent. *United States* v. *Leon*, 468 U.S. 897, 922 (1984) (internal quotation marks omitted). Petitioners and their *amici* omit the benefit that warrants confer on the police from their analysis entirely.

II. Petitioners Are Not Entitled To Qualified Immunity

The warrantless raid on Callahan's home here was not merely unlawful. It was indefensible. The warrant requirement has been around for decades. Petitioners do not claim that anything unexpected created an exigent need to enter. To the contrary, the officers planned to enter the home from the outset. See p. __ n.__, *supra*. Nor could any reasonable officer believe that Callahan, by allowing the informant into his home, impliedly consented to petitioners' entry, waived his Fourth Amendment rights as to their entry, or otherwise gave up his reasonable expectation of privacy and security in his home. To the contrary, our legal and social traditions have long made it clear that inviting another into your home licenses entry of person so invited; the law has vigorously protected the homeowner's expectation of privacy against entry by those he has not invited inside. See pp. __-__, *supra.* Courts have routinely recognized that the presence of the informant in the home does not license officers to make a warrantless entry.[10] Because no objectively reasonable officer confronting the situation

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[10] See, *e.g.*, *United States* v. *Santa*, 236 F.3d 662 (11th Cir. 2000); *United States* v. *Templeman*, 938 F.2d 122 (8th Cir. 1991); *United States* v. *Beltran*, 917 F.2d 641 (1st Cir. 1990); *Youtz* v. *State*, 494 So.2d 189 (Ala. Crim. App. 1986); *Carranza* v. *State*, 467 S.E.2d 315 (Ga. 1996); *Hawkins* v. *State*, 626 N.E.2d 436 (Ind. 1993); *Commonwealth* v. *Perez*, 13 Mass. L. Rptr. 296 (Mass. Super. Ct. 2001); *People* v. *Soto*, 96 A.D.2d 741 (N.Y. App. Div. 1983); *State* v. *Yananokwiak*, 309 S.E.2d 560 (N.C. Ct. App. 1983).

before petitioners could have believed that warrantless entry was lawful under the circumstances, see *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987), qualified immunity was properly denied.

Petitioners thus err in referring to consent-once-removed as a "reasonably settled doctrine that formed part of the general backdrop of the Fourth Amendment rules." Pet. Br. 44-48.[11] Besides, endorsement by a court or two is not itself sufficient to defeat qualified immunity. Courts are not merely capable of error; they are also capable of unreasonable error. *Williams* v. *Taylor*, 529 U.S. 362, 378-379 (2000) (explaining the difference between error and decisions that are "unreasonable"). And this Court has denied qualified immunity in cases like *Hope* v. *Pelzer*, 536 U.S. 730 (2002), and *Groh* v. *Ramirez*, 540 U.S. 551 (2004), notwithstanding the claim that lower courts had permitted the conduct at issue in the past. 529 U.S. at 756-57 (Thomas, J., dissenting); 540 U.S. at 571-77 (Thomas, J., dissenting).

In any event, the standard for consent-once-removed has always required, as one of three preconditions, that the informant in the home "immediately summon help" to effectuate an arrest. See, *e.g.*, *Diaz*, 814 F.2d at 459. Here, that never occurred. In fact, the informant had no

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[11] While petitioners assert that LaFave has "noted the doctrine * * * as a legal basis for entry," Pet. Br. 45, they cite the portion of LaFave's treatise that explains that, if an individual consents to the entry of an undercover officer, the consent for *that entry* is valid even though the officer concealed his true identity. One edition of LaFave characterizes the cases supporting consent-once-removed as "extreme and highly questionable," 3 LaFave, *Search and Seizure* § 6.1(c), at 247 n.100 (3d ed. 1996) (footnotes omitted), and the most recent edition rejects it: "[T]he mere fact that a wired informant is inside the house * * * does not excuse the *Payton* warrant requirement." 3 LaFave, *Search and Seizure* § 6.1(c), at 291 (4th ed. 2004).

intention of conducting the arrest; the police had planned to do that from the outset. See p. __, n.__, *supra*. The informant in fact was on his way out the door when the officers stormed into the home. J.A. 165 ("As soon as I tried to get out, the door come swinging open. That's when all the deputies ran in."). Because no reasonable officer could have believed the pre-requisites for consent-once-removed had been met here—even if one incorrectly assumes the doctrine's validity—qualified immunity was inappropriate.

III. The Court Should Release the Lower Courts from *Saucier*'s Rigid "Order of Battle"

Finally, this Court has requested briefing on whether to overrule *Saucier* v. *Katz*, 533 U.S. 194, 207 (2001). That decision required lower courts to decide qualified immunity in two steps—by first deciding whether the allegations established a constitutional violation at all, and then deciding whether the officer violated "clearly established" law. The Court should modify the *Saucier* approach, but not abandon it entirely. In many cases, that two-step approach serves important functions. But it should not be rigidly required where it is unworkable or requires courts to pass on issues that are not necessary to their decisions.

Saucier's mandatory two-step approach is often useful to ensure proper application of qualified immunity principles. The first step in deciding whether or not the law was "clearly established" is to determine the constitutional violation alleged—*i.e.*, to identify the precise conduct, and the attendant circumstances, giving rise to the alleged constitutional violation. Only when that is done can courts go on to decide whether an objectively reasonable officer in those circumstances could have thought his conduct lawful. Requiring courts to decide whether there was a constitutional violation at all under the specific facts is a useful way of ensuring that qualified

immunity is properly applied in an appropriately fact- and context-specific way. *Saucier*, 533 U.S. at 201-02; *Anderson*, 483 U.S. at 640-41. The two-step analysis, moreover, often makes the court's reasoning clearer. It thus helps courts fulfill their duty to "say what the law is," *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803). Given this Court's unique role of providing uniform, nationwide guidance for all courts to follow, this Court's use of the two-step approach is often particularly useful.

Correspondingly, however, this Court often departs from the two-step process where it would interfere with that function. See, *e.g.*, *Brosseau* v. *Haugen*, 543 U.S. 194, 198 n.3 (2004) (bypassing the constitutional question "to correct a clear misapprehension of the qualified immunity standard"); *Saucier*, 533 U.S. at 207 (answering only the question of qualified immunity that had divided lower courts). Rigid adherence in the lower federal courts is similarly inappropriate, albeit for different reasons. Litigating constitutional issues can be very burdensome. Qualified immunity, however, is "an *immunity from suit*, rather than a mere defense to liability," *Saucier*, 533 U.S. at 200-01 (internal quotations and citations omitted). As a result, the two-step approach will sometimes disserve the purpose of qualified immunity if it forces the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily. Likewise, requiring resolution of those issues may contravene longstanding principles of judicial restraint. Courts ordinarily should not decide "questions of constitutionality" that are "avoidable," *Scott* v. *Harris*, 127 S. Ct. 1769, 1780 (2007) (Breyer, J., concurring) (citing *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944)); nor should they

generate analysis that appears unnecessary to the case's resolution.[12]

Sometimes the two-step approach is deemed necessary for the elaboration of principles of criminal procedure. *Saucier*, 533 U.S. at 201. Given this Court's unique role of ensuring that federal and constitutional law is uniform throughout the land—and that no one receives a different brand of federal justice based on the happenstance of geography—this Court will often be justified in resolving divisions of authority on constitutional questions before addressing whether the law was clearly established. But lower federal courts need not be dragooned into doing likewise in every case. Before *Saucier*, federal courts regularly decided constitutional issues just as they do today—through motions to suppress, suits against municipalities, and requests for injunctive relief, to name a few. There is thus little reason to enforce a rigid rule requiring them to do so in § 1983 suits as well.

In this case, however, this Court should exercise its own discretion to apply *Saucier*'s two-step approach. The validity of consent-once-removed as a justification for warrantless entry is squarely before the Court. The issue is important. And it has been the source of much confusion. Analyzing the validity of that doctrine in the first instance, moreover, casts significant light on the qualified immunity analysis. Admitting a single guest into the home has never been thought to somehow waive or defeat a homeowner's expectation that his home will be free from physical intrusion by the uninvited. The contrary notion is so clearly contradicted by centuries of

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[12] See *Ex parte Randolph*, 20 F.Cas. 242, 254 (C.C.Va. 1833) (Marshall, J.); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

legal tradition and social norms that no objectively reasonable officer would have entertained it.

CONCLUSION

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

Respectfully submitted.

BARBARA BERGMAN
CO-CHAIR, AMICUS COMMITTEE
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1660 L St., NW, 12th Floor
Washington, DC 20036
(202) 872-8600

JEFFREY A. LAMKEN
Counsel of Record
JENNIFER E. OWENS
MARTIN V. TOTARO
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave., NW
Washington, D.C. 20004-2400
(202) 639-7700

Counsel for Amicus Curiae

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