No. 07-751

IN THE
Supreme Court of the United States

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

v.

AFTON CALLAHAN,
Respondent.

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

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

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

2. Whether the Fourth Amendment's prohibition of warrantless entry into a home is clearly established, such that officers who violate that right are not entitled to qualified immunity.

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The opinion of the court of appeals, Pet. App. 1-30, is reported at 494 F.3d 891. The district court's order, Pet. App. 30-59, is unreported.

STATEMENT

On March 19, 2002, Petitioners, members of the Central Utah Narcotics Task Force, engaged a confidential informant in a plan to raid Respondent's home on suspicion of dealing methamphetamine. Pet. App. 2. The informant agreed to help the Task Force after being charged with possession of methamphetamine. *Id.* Before meeting with Petitioners, the informant drank "between six to eight beers in three hours," and "ingested or tasted" methamphetamine. *Id.* Petitioners learned that the informant "had been drinking heavily" and was intoxicated, *id.* at 33, and were "concerned about his competency." *Id.* at 3. Petitioners nevertheless proceeded with the plan after giving the informant coffee. *Id.* Petitioners "wired the confidential informant, gave him a marked $100 bill, and worked out a signal for him to give the officers" after completing a purchase of methamphetamine. *Id.* The informant went to Respondent's home, and once inside gave "a variation" of the agreed-upon signal. *Id.* The informant did not indicate that he or anyone was in danger, nor did he indicate that drugs were about to be destroyed. *See id.*

Petitioners then entered Respondent's home without a warrant, ordered Respondent and other individuals to the floor, and conducted a protective sweep of the home. *Id.* at 3-4. As a result of the search of Respondent and his home, Petitioners

found evidence of a drug sale and possession. *Id.* at 4.

Based on the evidence discovered as a result of the warrantless entry and search of Respondent's home, Respondent was charged with possession and distribution of methamphetamine. *Id.* Respondent objected to the introduction of that evidence, but the trial court found that exigent circumstance justified the warrantless entry. *Id.* On appeal, the Utah Court of Appeals reversed, holding (in accordance with the Utah Attorney General's concession) that there were no exigent circumstances, and rejecting the state's "inevitable discovery" argument. *Id.*

Respondent then brought a suit for damages under 42 U.S.C. § 1983, alleging that Petitioners' warrantless entry and search of his home violated his rights under the Fourth and Fourteenth Amendments. *Id.* at 4-5. On cross-motions for summary judgment, the district court commented that "[i]t seems a bit of a stretch to call the kind of police entry that occurred here 'consensual.'" Pet. App. 52. The court did not decide whether the search violated the Fourth Amendment; instead, it assumed that Petitioners violated Respondent's constitutional rights. *Id.* The court held Petitioners were entitled to qualified immunity because Respondent's rights were not clearly established.

The Tenth Circuit reversed. Pet. App. 1-18. The court of appeals held that Petitioners violated Respondent's clearly established rights under the Fourth Amendment. *Id.* at 8-18. The court noted that "[c]ourts continually have viewed the warrantless entry into a house as presumptively unreasonable" because "'the home is entitled to the

greatest Fourth Amendment protection.'" *Id.* at 8, quoting *United States* v. *Najar*, 451 F.3d 710, 712-13 (10th Cir. 2006).

The court of appeals held that this presumption of unreasonableness can be overcome only when the search falls within one of a few "carefully defined" exceptions based on the presence of exigent circumstances. Pet. App. 9, quoting *United States* v. *Walker*, 474 F.3d 1249, 1252 (10th Cir. 2007). Petitioners did not advance a theory of exigent circumstances, but instead asked the court to approve an extension of the so-called "consent-once-removed" doctrine. *Id.* at 10.

Some courts have held that the Fourth Amendment does not forbid officers from entering a residence without a warrant to assist an undercover officer who has been admitted to the home "at the express invitation of someone with authority to consent." *Id.* at 11. The Tenth Circuit held that "no extension" of its law "would be necessary" to approve such a search. "[T]he consent granted to the hypothetical undercover officer would have covered additional backup officers without any need for additional exceptions to the warrant requirement." *Id.* at 12.

In contrast, the court held, a finding that an invited *civilian* informant has the authority to summon a police officer to enter the home without a warrant "would require an expansion of the consent exception" because "the person with authority to consent never consented to the entry of police into the house." *Id.* The court of appeals rejected Petitioners' argument that the power of citizens to effect a "citizen's arrest" could justify extending

consent from an undercover informant to police. *Id.* at 12-13. The court also rejected Petitioners' policy argument that requiring a warrant would "jeopardize personal safety" of officers and "cause delays." *Id.* at 13. The court found these arguments contrary to the nature of exigent circumstances exceptions, which forbid police from manipulation of the circumstances creating the exigency. *Id.* The court also held that Petitioners' expediency argument would be contrary to this Court's recent holding that "[a] generalized interest in expedient law enforcement cannot, without more, justify a warrantless search." *Id.* at 13-14, quoting *Georgia* v. *Randolph*, 547 U.S. 103 (2006). Accordingly, the court held that by "entering Mr. Callahan's home based on the invitation of an informant and without a warrant, direct consent, or other exigent circumstances, [Petitioners] violated Mr. Callahan's constitutional rights under the Fourth Amendment." *Id.* at 14.

The court of appeals held that Respondent's constitutional right to be free from warrantless search and arrest in his home was clearly established. *Id.* at 14-15. The court quoted this Court's decision in *Groh* v. *Ramirez* that "[n]o reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional." *Id.* at 15-16, quoting *Groh*, 540 U.S. 551, 564 (2004). Officers who seek "to craft a new exception" to "that fundamental tenet" "cannot reasonably have relied on an expectation that [the Court] would do so." *Id.* at 16, quoting *Groh*, 540 at 564. The court also held

that under Tenth Circuit precedent, "warrantless entries into a home are per se unreasonable unless they satisfy the established exceptions." *Id.* at 16. The officers could not come within the consent exception because under the court's cases, "a mere transient guest, without a 'substantial interest in or common authority over the property,' cannot consent to the entry of others." *Id.*, quoting *United States* v. *Falcon*, 766 F.2d 1469, 1474 (10th Cir. 1985).

REASONS FOR DENYING THE PETITION

Petitioners contend that a new exception to the constitutional warrant requirement should be established for circumstances in which a confidential informant is allowed to enter a home and subsequently summons police after viewing evidence that would establish probable cause to make an arrest. The court of appeals' decision declining to craft the requested exception is correct. The court applied this Court's and its own long standing precedents that when police enter a home without a warrant, the entry is presumptively unreasonable unless it falls within one of a few carefully defined exceptions. The right to be free from such an entry is clearly established, and is no less so simply because Petitioners argue that a new exception should be added to the list. No further review is warranted in this case.

While the Tenth Circuit declined to hold, as two other circuits have, that the so-called "consent once removed" doctrine justifies a warrantless entry in these circumstances, the other circuits' decisions do not warrant the Court's review here. This is not a criminal case directly addressing the question of whether the evidence seized under these

circumstances should be suppressed. The legality of the search was decided in the state courts: it was held to be illegal.

This is a Section 1983 case seeking damages for that illegal search. The only issue presented here is whether Petitioners were entitled to qualified immunity. The constitutional right to be free of warrantless entry by police into one's home was firmly and clearly entrenched at the time Petitioners made their warrantless entry. Petitioners seek to establish a new exception to that right based upon the "consent-once-removed" theory. Petitioners improperly attempt to rely on authority from the sole circuit (outside the Tenth Circuit) that had found such an exception at the time of their warrantless entry as a basis for entering Respondent's home without a warrant or exigent circumstances.

In the time *since* the warrantless entry in this case, only two additional courts of appeals have addressed the consent-once-removed theory as applied to non-police confidential informants.

Petitioners' second asserted "division in authority" (Pet. 14-19) on the sources of law that a court of appeals considers to determine whether rights are clearly established, does not warrant this Court's review either. The difference among the courts of appeals on this question is slight and makes no difference in this case because Petitioners would not have prevailed under any of the asserted standards.

1. The asserted circuit split does not merit this Court's review. Only three circuits have addressed whether the doctrine of "consent once

removed" allows a confidential informant's signal to justify a warrantless entry into a private home.

Petitioners attempt to portray the theory as far more developed than it is by listing courts that have recognized the doctrine "in some form," and providing a lengthy string of citations to cases purportedly discussing the "consent once removed" theory. *See* Pet. 7 n.2, 12-13. An examination of those cases, however, shows that almost none of them contribute to the asserted division of authority. To begin with, Petitioners' citation to courts that have adopted "some form" of the consent-once-removed theory includes cases that involved only a police officer's call for assistance, *not* a confidential informants'; Petitioners' lengthy string cite, Pet. 12-13, includes similar cases.[1] While Petitioners cite a total of 15 decisions from the three circuits that *have* addressed the issue (including district court decisions) many of those cases involved police officers, not confidential informants. *Id.* at 12-13. The rest of the cited cases use the term "consent once removed," but not to refer to either an officer's or an informant's signal for assistance. Those cases involve a variety of tangential issues, such as whether an undercover officer who was allowed to enter a private residence may leave and then reenter without a warrant (sometimes with backup) to effect

[1] *United States* v. *Bramble*, 103 F.3d 1475 (9th Cir. 1996); *Wisconsin* v. *Johnston*, 518 N.W.2d 759 (Wis. 1994); *New Jersey* v. *Henry*, 627 A.2d 125 (N.J. 1993); *United States* v. *Samet*, 794 F. Supp. 178 (E.D. Va. 1992).

the arrest,[2] whether entry is justified when an informant leaves the residence and provides evidence to officers,[3] or even more remote factual situations.[4]

In sum, while many cases have discussed the admissibility of evidence under the Fourth Amendment using the words, "consent once removed," only three courts of appeals have addressed the issue here: the propriety of a warrantless entry into a private home on the signal of a confidential informant. Review of that issue in this case should be denied to allow the issue to develop further in the courts of appeals.

2. The petition does not merit this Court's review because this case arose on the denial of qualified immunity. The state court here held that the Petitioner' warrantless entry into Respondent's home was illegal and that decision is no longer subject to review. Pet. App. 4. The decisions of the state court and the court of appeals were based on the well grounded Fourth Amendment principle that

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[2] *New Jersey* v. *Penalber*, 898 A.2d 538 (N.J. Super. Ct. App. Div. 2006); *Ohio* v. *Heriot*, No. CA 2004-06-071, 2005 WL 1131731 (Ohio Ct. App. May 16, 2005); *Williams* v. *Texas*, 937 S.W.2d 23 (Tex. App. 1996); *Commonwealth* v. *Moye*, 586 A.2d 406 (Pa. Super. Ct. 1990); *People* v. *Cespedes*, 191 Cal. App. 3d 768 (Cal. App. 1987).

[3] *Illinois* v. *Finley*, 687 N.E.2d 1154 (Ill. App. Ct. 1997); *see also Illinois* v. *Galdine*, 571 N.E.2d 182 (Ill. App. Ct. 1991) (entry into office).

[4] *See Smith* v. *Maryland*, 857 A.2d 1224 (Md. Ct. Spec. App. 2004) (defendant arrested on sidewalk; officers entered residence with key to search for evidence); *Brown* v. *United States*, 932 A.2d 521, 527 n.8 (D.C. 2007) (noting in footnote that neither party had raised consent once removed).

protects individuals from warrantless entry into their private residence.

To be entitled to qualified immunity, Petitioners must establish an exception to that right. Such exceptions are "'jealously and carefully drawn'" by this Court. *Georgia* v. *Randolph*, 547 U.S. 103, 109 (2006) (quoting *Jones* v. *United States*, 357 U.S. 493, 499 (1958)). The exception that Petitioners seek here had, at the time of their warrantless entry into Respondent's home, been approved by only one court of appeals. Pet. 16. Neither this Court nor the Tenth Circuit had addressed the question, much less approved of it. The question of whether it would have been "clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001), therefore, depends on whether Petitioners could have reasonably believed in good faith that the Tenth Circuit or this Court would adopt a new exception based on the consent-once-removed theory as applied to confidential informants.

This Court has already held that officers *cannot* rely on the expectation that the Court would craft such a new exception. In *Groh* v. *Ramirez*, the Court considered an officer's argument that he was entitled to qualified immunity for a search conducted pursuant to facially invalid warrant because the search met the Constitution's particularity requirement for other reasons. 540 U.S. at 560. The Court stated that "[n]o reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional." *Id.* at 564. The Court noted that

the officer sought a "new exception" to that principle. The court held: "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 same is true here. When Petitioners entered Respondent's home, no case from this Court (or from the Tenth Circuit, any state's highest court, or from any other circuit save one) had ever approved a warrantless entry based on the signal of a confidential informant. Petitioners could not reasonably rely on the expectation that the courts would establish such an exception.

Petitioners attempt to circumvent *Groh* by positing that the "right" that must be clearly established for purposes of qualified immunity is limited to the precise circumstances of this case, *i.e.*, "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." Pet. 16 (quoting Pet. App. 27 (Kelly, J., dissenting). But this Court has held that courts need not have previously found the particular practice at issue to be unlawful in order to find that it violated clearly established law. *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002) ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful.").

Petitioners' assertion that police might be unwilling to engage in drug buys using confidential informants if certiorari is denied (Pet. 13) is unwarranted. Police have ample tools (including anticipatory warrants) to effectively conduct

investigations using confidential informants without effecting warrantless entries into suspects' homes. *See United States* v. *Grubbs*, 547 U.S. 90, 95 (2006) (holding that anticipatory warrants are constitutional). In addition, police would still be authorized to enter, even without a warrant, if exigent circumstances were present.

3. The court of appeals was correct to hold that the Fourth Amendment does not permit police to enter a home without a warrant when a confidential informant has signaled the existence of probable cause.

The search at issue in this case involves "physical entry of the home," which this Court has described as "the chief evil against which the wording of the Fourth Amendment is directed." *Payton* v. *New York*, 445 U.S. 573, 585 (1980). "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. With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001).

The Court has approved only very few, well-defined exceptions, for exigent circumstances or consent, to the presumption that warrantless entry into a home is unconstitutional. *See, e.g.*, *Minnesota* v. *Olson*, 495 U.S. 91, 100 (1990) (the "correct standard" is that "warrantless intrusion may be justified by hot pursuit of a fleeing felon, or imminent destruction of evidence, or the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the

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

As the Utah Attorney General conceded, this case did not present any exigent circumstances. Pet. App. 4. There was no danger to the informant or anyone else in Respondent's home, nor was there any indication that evidence was about to be destroyed. While the informant viewed evidence sufficient to establish probable cause, and communicated that to Petitioners, probable cause alone does *not* justify a warrantless entry to effect an arrest. *Payton*, 445 U.S. at 602-03. The text of the Fourth Amendment makes clear that both probable cause *and* a warrant on oath or affirmation are required. U.S. Const. amend. IV. *See also Coolidge* v. *N.H.*, 403 U.S. 443, 480 (1971) ("If we were to agree . . . that the police may, whenever they have probable cause, make a warrantless entry for the purpose of making an arrest, . . . then by the same logic any search or seizure could be carried out without a warrant, and we would simply have read the Fourth Amendment out of the Constitution."). Petitioners could easily have obtained a warrant here.

As the court of appeals held, the fact that police were summoned by a confidential informant rather than a fellow officer makes an important difference. *See* Pet. App. 11. A police officer who witnesses a felony being committed in his presence may arrest an individual without a warrant, even in the suspect's home, if the officer was legally in the home because he was admitted by consent. *See id.* at

12. That arresting officer may immediately face the practical problem of taking control of the crime scene, which he may be unable to do without the assistance of other officers. For example, a single undercover officer may be outnumbered by the others present, he may not know whether or how many other people are present but unseen, he may be unarmed, or the suspects may resist. These circumstances could justify calling for the assistance of other officers. Those officers may not need a warrant because the suspect has already consented to the presence of a police officer; to require separate consent or a warrant for the assisting officers could hamper the original officer's ability to effectively perform a lawful police function.

Even if an undercover officer's call for assistance could present circumstances that would vitiate the need for a warrant, the same cannot be said of a confidential informant. While citizens may have a theoretical right to effect a "citizen's arrest" in certain states, there was no allegation that the informant here (or in any case cited by Petitioners) intended to do so. In addition, as the Tenth Circuit held, "[t]hat a citizen has the power to arrest does not grant the citizen all of the powers and obligations of the police as agents of the state." Pet. App. 12 (collecting cases). And there is little reason to believe that when undercover informants cooperate with police they would be likely to attempt the arrest themselves. Accordingly, the host of problems that could create an exigency that justifies a police officer summoning backup do not apply to a confidential informant.

Nor does "consent" justify this entry. While consent is an exception to the Fourth Amendment's prohibition on warrantless entry to a person's home, *Illinois* v. *Rodriguez*, 497 U.S. 177, 181 (1990), the consent exception is "'jealously and carefully drawn.'" *Georgia* v. *Randolph*, 547 U.S. 103, 109 (2006) (quoting *Jones* v. *United States*, 357 U.S. 493, 499 (1958)). Respondent's consent to the entry of the informant did not constitute consent to the entry of police. To be sure, any individual takes the risk that someone he admits to his home may be a police officer or an undercover informant, but it is the *police* that the Fourth Amendment requires to obtain a warrant or consent before entering. The statement of a civilian that sees contraband after wandering in to a residence through an open door may be the basis of a warrant to search that residence even though his entry was illegal, but the same would not be true of a police officer who entered a residence without authority. *Compare, e.g., Walter* v. *United States*, 447 U.S. 649, 656 (1980) ("It has, of course, been settled since *Burdeau* v. *McDowell*, 256 U.S. 465 [(1921)], that wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and that such private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully.") *with, e.g., Soldal* v. *Cook County*, 506 U.S. 56, 66 n.10 (1992) ("[I]f the police officers' presence in the home itself entailed a violation of the Fourth Amendment, no amount of probable cause to believe that an item in plain view constitutes incriminating evidence will justify its seizure."). Accordingly, allowing an individual who *is not* a police officer to enter one's home is not consent to a warrantless entry by

individuals who *are* police officers. At a minimum, consent to the entry of police must involve consent to the entry an individual who is a police officer.

4. The asserted "three way disagreement in the lower courts" on the sources of clearly established law does not merit this Court's review. Pet. 14. Petitioners argue that the courts of appeals apply three different approaches to this question, but the asserted differences are inconsequential, and Petitioners would not have prevailed on any of the approaches articulated in the petition.

Petitioners do not even argue that there is a circuit split on the proper sources of "clearly established law." The only difference between the three asserted approaches appears to be whether, when there is no decision on point from this Court or the court of appeals deciding the case, the court of appeals chooses to look to state law or out-of-circuit federal law. Pet. 18-20. Petitioners argue that some courts look outside their own circuit to determine whether the law is clearly established, while the Second and Eleventh Circuits do not. *Id.* The only asserted difference between those two courts is that the Eleventh would consider authority from the highest court in the state where the activity occurred, while the Second would look only to federal law. *Id.* at 19-20.

These relatively minor variations may have little impact on the decision of actual cases, and in any event are consistent with basic principles of what authority is binding and persuasive to federal courts. Petitioners have not cited any case in which the decision to consider (or not) out-of-circuit or state authority made a difference to any court's decision

that the law was or was not clearly established. *See* Pet. 20-21. Furthermore, it is fundamental that the federal courts of appeals are bound only by this Court's decisions and their own prior decisions (and not even the latter when sitting en banc). The courts of appeals may look to other circuits, lower courts, and state courts as persuasive authority, but are free to disagree with how the question before them has been answered by those courts. In this regard, the question of what constitutes clearly established law is no different from any other question of law. To the extent some courts have said that they will consider a slightly broader range of authority than other courts, their exercise of discretion does not require review by this Court.

This is particularly true here, where Petitioners could not prevail under any of the approaches articulated in the Petition. This case arose in a court that applies the most expansive of the three asserted approaches, considering the "weight of authority from other courts" outside the Tenth Circuit. *Cortez* v. *McCauley*, 478 F.3d 1108, 114-15 (10th Cir. 2007). As Petitioners admit, at the time of the warrantless entry here, only one other circuit had addressed the question of whether a confidential informant may consent to a warrantless police entry. Pet. 16, citing *United States* v. *Paul*, 808 F.2d 645, 648 (7th Cir. 1986). One circuit's approval of an exception to the warrant requirement does not undermine the longstanding right to be free from warrantless police entry into a private residence. Accordingly, the "weight of authority from other courts" did *not* establish that the asserted

exception to the warrant requirement was valid. *Cortez*, 478 F.3d at 114-15.

Petitioners would have fared even worse under the asserted approaches of the Eleventh or Second Circuits. Because those courts do not consider the authority of other circuits, they would not have considered even the one court that had held favorably to Petitioners' position. *See* Pet. 19-20. Notably, Petitioners do not argue either that adopting a different standard would have changed the outcome of this case or that it would have been decided any differently in another court of appeals. *See id.* at 20-21. Accordingly, this case would be a poor vehicle to decide what sources the courts of appeals should consider when determining whether the law is clearly established.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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