No. 07-___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Several lower courts have recognized a "consent once removed" exception to the Fourth Amendment warrant requirement. Does this exception authorize police officers to enter a home without a warrant immediately after an undercover informant buys drugs inside (as the Sixth and Seventh Circuits have held), or does the warrantless entry in such circumstances violate the Fourth Amendment (as the Tenth Circuit held below)?

(2) Did the Tenth Circuit properly deny qualified immunity when the only decisions directly on point had all upheld similar warrantless entries?

PARTIES TO THE PROCEEDING

Petitioners are five individual law enforcement officers: Cordell Pearson, Marty Gleave, Dwight Jenkins, Clark Thomas, and Jeffrey Whatcott. Respondent is Afton Callahan, an individual.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is published at 494 F.3d 891. It is reprinted in the Appendix at Pet. App. 1.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on July 16, 2007. The Tenth Circuit denied a petition for rehearing on September 6, 2007. Pet. App. 60. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States 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 states 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT

This is a Fourth Amendment case involving an undercover drug buy. On March 19, 2002, confidential informant Brian Bartholomew contacted agents of the Central Utah Narcotics Task Force to inform them that he had arranged to purchase narcotics from respondent Afton Callahan later that day at Callahan's trailer home. Members of the Task Force provided Bartholomew with a hidden microphone and transmitter and drove him to Callahan's home. The agents instructed Bartholomew to purchase the narcotics from Callahan and then to give the agents a prearranged signal when the purchase was complete.

Bartholomew knocked on the door and was invited inside by Callahan's daughter. After Bartholomew stepped inside, Callahan sold Bartholomew

a bag of methamphetamine for $100. When Bartholomew gave the prearranged signal, members of the Task Force entered Callahan's home. Upon entering, the officers personally observed Callahan holding a plastic bag later confirmed to contain methamphetamine. A search of the home pursuant to Callahan's consent revealed evidence that Callahan had been possessing and distributing methamphetamine from his home. At no time did the police obtain a warrant.

Callahan was charged in Utah state court with possession and distribution of methamphetamine. The state trial court ruled that the evidence of narcotics was admissible because exigent circumstances permitted the warrantless entry into Callahan's home. Callahan entered a conditional guilty plea allowing him to challenge the trial court's Fourth Amendment ruling. On appeal, the State agreed that exigent circumstances did not exist and instead argued that the evidence should be admitted under the inevitable discovery doctrine. The Utah Court of Appeals ruled that the inevitable discovery doctrine was inapplicable and remanded with instructions to grant Callahan's motion to suppress. *State v. Callahan*, 93 P.3d 103, 107 (Ut. App. 2004).

Callahan then filed a civil suit in the United States District Court for the District of Utah against the five individual officers who participated in the search of his home, the Central Utah Narcotics Task Force, and the several Counties that participate in the Task Force. Callahan alleged a violation of his Fourth Amendment rights and asserted a claim

under 42 U.S.C. § 1983. District Judge Paul G. Cassell granted the defendants-petitioners' motion for summary judgment and found that the defendants were entitled to qualified immunity. Pet. App. 31.

According to Judge Cassell, the constitutionality of the warrantless entry depended on whether the Supreme Court would eventually accept the "consent once removed" exception to the warrant requirement already adopted by the Sixth, Seventh, and Ninth Circuits. Pet. App. 52-53. "Ultimately the Supreme Court will have to finally resolve the question of whether the doctrine is consistent with the Fourth Amendment[,]" Judge Cassell explained. Pet. App. 53. "[I]f confronted with a case squarely presenting the 'consent-once-removed' doctrine, the Supreme Court might well" disagree with those circuits and find that no such exception exists. Pet. App. 52.

Instead of resolving the constitutionality of the entry, Judge Cassell assumed that the Supreme Court would eventually reject the "consent once removed" doctrine and instead focused on whether the search had violated Callahan's "clearly established" rights. Pet. App. 53. Judge Cassell reasoned that the caselaw from the Sixth, Seventh, and Ninth Circuits recognizing a "consent once removed" exception prevented the warrantless entry from violating a clearly established right:

> [O]n the specifics of this case, the officers had a reasonable argument that the "consent-once-removed" doctrine justified their actions. Indeed, it is clear that in [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 then granted summary judgment in favor of the entity defendants under the principles of *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 680, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Pet. App. 57-58.

A divided Tenth Circuit reversed in a decision by Judge Murguia, sitting by designation. Pet. App. 2.[1] Judge Murguia ruled that the "consent once removed" doctrine did not apply because the initial entry was made by a confidential informant instead of an undercover police officer. Pet. App. 14. The entry would have been constitutional if the initial entry had been made by a police officer because "the consent granted to the hypothetical police officer would have covered additional backup officers." Pet. App. 12. However, the "distinct obligations and powers" of confidential informants made the exception

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[1] Callahan's appeal before the Tenth Circuit did not address the liability of the entity defendants, and those issues are therefore not before the Court. The only remaining defendants are the petitioners, the five individual law enforcement officers involved in the search of Callahan's home.

inapplicable when an informant had made the initial entry into the home instead of a police officer. Pet. App. 13.

The panel next concluded that the warrantless entry had violated Callahan's clearly established constitutional rights so that no qualified immunity defense applied. The panel defined the relevant constitutional right as "the right to be free in one's home from unreasonable searches and arrests." Pet. App. 15. According to Judge Murguia, it was clearly established in the Tenth Circuit that "the only two exceptions to the warrant requirement are consent and exigent circumstances." Pet. App. 17. Thus, a reasonable officer in the Tenth Circuit would realize it was improper to rely on the "consent once removed" exception recognized in other circuits. Pet. App. 17.

Judge Kelly dissented. Pet. App. 18. Judge Kelly agreed with the Sixth and Seventh Circuit cases expressly recognizing the "consent once removed" exception when the initial entry was made by an informant. According to Judge Kelly, distinguishing entry by an informant from entry by an undercover officer was unprincipled and "create[d] odd results." Pet. App. 25. Judge Kelly also concluded that the officers should be entitled to qualified immunity:

> [B]ecause neither the Supreme Court nor the Tenth Circuit has heretofore addressed the propriety of the consent once removed doctrine as applied to confidential informants, and the clear weight of authority from other circuits strongly suggested that the Task

> Force's actions in this case were legal, I would hold that the right at issue was not clearly established and would affirm the grant of qualified immunity.

Pet. App. 29.

The Tenth Circuit denied a Petition for Rehearing on September 6, 2007. Pet. App. 60.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE CIRCUITS OVER THE "CONSENT ONCE REMOVED" DOCTRINE OF FOURTH AMENDMENT LAW.

Over the last twenty-five years, lower courts have recognized a "consent once removed" exception to the Fourth Amendment warrant requirement.[2] The exception allows narcotics investigators to make a warrantless entry into a home after an undercover agent personally observes narcotics inside the home. The doctrine applies when "the agent (or informant)

[2] The Sixth, Seventh, Ninth, and Tenth Circuits have recognized the doctrine in some form, as have the Supreme Courts of New Jersey and Wisconsin. *See, e.g., United States v. Romero*, 452 F.3d 610 (6th Cir. 2006); *United States v. Akinsanya*, 53 F.3d 852 (7th Cir. 1995); *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996); *Callahan v. Millard County*, 494 F.3d 891 (10th Cir. 2007); *State v. Henry*, 627 A.2d 125 (N.J. 1993); *State v. Johnston*, 518 N.W.2d 759 (Wis. 1994).

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). Four federal circuits and two state supreme courts have expressly recognized the "consent once removed" doctrine at least in some form. The Supreme Court has never recognized or even addressed this exception.

The Court should grant certiorari in this case to resolve the split among the circuits over use of this exception when the undercover individual is an informant instead of a law enforcement officer. The Sixth Circuit and Seventh Circuit both have expressly held that the "consent once removed" doctrine permits a warrantless entry into the home when the undercover individual is an informant. In *United States v. Paul*, 808 F.2d 645, 648 (7th Cir. 1986), Judge Posner concluded that the doctrine "extends to the case where the initial, consensual entry is by a confidential informant." An undercover agent could enter with consent and then summon other officers, and it made "no difference" that the person was an informant instead of a law enforcement officer. *Id.* The Seventh Circuit reaffirmed the principle in *United States v. Jachimko*, 19 F.3d 296 (7th Cir. 1994) and *United States v. Akinsanya*, 53 F.3d 852 (7th Cir. 1995).

The Sixth Circuit adopted the Seventh Circuit's approach in *United States v. Yoon*, 398 F.3d 802 (6th

Cir. 2005). *Yoon* noted that in a prior case, the Sixth Circuit had recognized the "consent once removed" doctrine in a case involving undercover agents and informants together. *See id.* at 807-08 (citing *United States v. Pollard*, 215 F.3d 643 (6th Cir. 2000)). The *Yoon* Court decided to "extend that concept to cases in which a confidential informant enters a residence alone, observes contraband in plain view, and immediately summons government agents to effectuate the arrest." *Id.* at 807. The Sixth Circuit thus embraced the rule of the Seventh Circuit: "This Court agrees with and adopts the sound reasoning of the Seventh Circuit in *Paul, Jachimko,* and *Akinsanya.*" *Id.* at 807.

The Tenth Circuit decision below expressly disagreed with these rulings. Judge Murguia's majority opinion concluded that the distinction between government agents and informants was critical and that the "consent once removed" doctrine could not apply when the undercover entry was made by an informant. Judge Murguia characterized the Seventh Circuit and Sixth Circuit decisions applying the doctrine to undercover informants as "unconvincing." Pet. App. 12. According to Judge Murguia, the distinctions between the "obligations and powers" of private persons and the police "must also be reflected in a distinction between inviting a citizen who may be an informant into one's house and inviting the police into one's house." Pet. App. 13. Thus in the Tenth Circuit the "consent once removed" doctrine can be

used when the undercover individual is a police officer but not when he is a confidential informant.

This Court should grant certiorari to resolve the clear split in the circuits. The division between the Sixth and Seventh Circuits on one hand and the Tenth Circuit on the other leaves the "consent once removed" doctrine in a state of considerable uncertainty. There are obvious reasons for police to use informants to set up and execute undercover drug buys. Undercover individuals must trick sellers of narcotics into believing that they are legitimate buyers rather than police officers or their agents. This is often easier for informants than police officers because informants can be members of the community already widely known as past purchasers of narcotics. *See generally* Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 651-54 (2004) (describing common uses of informants). The lower court disagreement on the use of the "consent once removed" exception in this setting creates great uncertainty as to the legality of this important law enforcement technique.

The circuit split is particularly important because the "consent once removed" doctrine has long been plagued by legal confusion and uncertainty. Judges have disagreed about its conceptual basis and whether it should exist at all. Some courts have justified the doctrine on the ground that a person's privacy interest is "fatally compromised when the owner admits a confidential informant and proudly

displays contraband to him." *Paul*, 808 F.2d at 648 (Posner, J.). Other courts have grounded the rule in general reasonableness. *State v. Henry*, 627 A.2d 125, 132 (N.J. 1993) (concluding that a consent-once-removed entry was "reasonable" in light of all of the circumstances). Judge Cornelia Kennedy has argued that the exception is best understood as "a combination of a sort of 'quasi exigent circumstances and consent.'" *Yoon*, 398 F.3d at 809, n.2 (Kennedy, J., concurring). On the other hand, Judge Nathaniel Jones has reasoned that the "consent once removed" exception should not exist at all and has no place in Fourth Amendment law. *See United States v. Pollard*, 215 F.3d 643, 649 (6th Cir. 2000) (Jones, J., dissenting) (contending that the doctrine "represents an unjustified extension of our traditional exigent circumstances jurisprudence.")

Lower court confusion is understandable because the Supreme Court has never addressed the constitutionality of "consent once removed" searches. The doctrine has developed in the lower courts for over two decades without this Court's review. As then-Judge (now Professor) Paul Cassell stated when this case was before the district court, "[u]ltimately the Supreme Court will have to finally resolve the question of whether the doctrine is consistent with the Fourth Amendment." Pet. App. 53. That time should be now. Supreme Court review is needed to address the confusion and to provide the police with clear legal guidance.

Further percolation of this issue is unnecessary for two reasons. First, lower courts have debated the merits of the exception extensively for more than two decades. The resulting opinions explore the doctrine from many different perspectives at considerable length, taking different views on whether the doctrine should exist and how broadly it should extend. *See United States v. Romero*, 452 F.3d 610 (6th Cir. 2006); *United States v. Yoon*, 398 F.3d 802 (6th Cir. 2005); *United States v. Pollard*, 215 F.3d 643 (6th Cir. 2000); *United States v. Akinsanya*, 53 F.3d 852 (7th Cir. 1995); *United States v. Jachimko*, 19 F.3d 296 (7th Cir. 1993); *United States v. Diaz*, 814 F.2d 454 (7th Cir. 1987); *United States v. Paul*, 808 F.2d 645 (7th Cir. 1986); *United States v. Janik*, 723 F.2d 537 (7th Cir. 1983); *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996); *Callahan v. Millard County*, 494 F.3d 891 (10th Cir. 2007); *United States v. Samet*, 794 F.Supp. 178 (E.D.Va. 1992); *United States v. Herrera-Corral*, 2002 WL 69491 (N.D.Ill. 2002); *United States v. McCalla*, 1996 WL 699629 (N.D.Ill. 1996); *United States v. Anhalt*, 814 F.Supp. 750 (N.D.Ill. 1993) (rev'd by *United States v. Jachimko*, 19 F.3d 296 (7th Cir. 1993)); *United States v. Santiago*, 1993 WL 75140 (N.D.Ill. 1993); *Callahan v. Millard County*, 2006 WL 1409130 (D. Utah 2006); *State v. Henry*, 627 A.2d 125 (N.J. 1993); *State v. Johnston*, 518 N.W.2d 759 (Wis. 1994); *Brown v. United States*, 932 A.2d 521, n.8 (D.C. App. 2007); *Smith v. State*, 857 A.2d 1224 (Md. App. 2004); *State v. Penalber*, 898 A.2d 538 (N.J. Super. 2006); *Commonwealth v. Moye*, 586 A.2d 406 (Pa. Super. 1990); *State v. Heriot*, 2005 WL 1131731 (Ohio

App. 2005) (unpublished); *People v. Finley*, 687 N.E.2d 1154 (Ill. App. 1997); *People v. Galdine*, 571 N.E.2d 182 (Ill. App. 1991); *Williams v. State*, 937 S.W.2d 23 (Tex. App. 1st Dist. 1996); *People v. Cespedes*, 191 Cal.App. 3d 768 (Cal. App. 4th Dist. 1987).

Further percolation is also unnecessary because the Tenth Circuit's decision may have a substantial chilling effect. Undercover drug buys are necessarily planned out ahead of time; officers choose when and how they occur. Such techniques are unusually sensitive to adverse legal rulings. A court decision from one circuit expressly rejecting a particular technique is unusually likely to be noted by those in other circuits who are in charge of planning investigations. That possibility is particularly significant when the adverse ruling not only rejects the legality of the technique but also denies qualified immunity to the officers involved. In such circumstances, an adverse ruling may overdeter police; one decision may strongly discourage police departments in other circuits from relying on the technique (thus avoiding legal challenges to it) in future investigations. The potential chilling effect of the Tenth Circuit's decision makes this case the best vehicle for settling the legality of the "consent once removed" doctrine.

II. THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE TENTH CIRCUIT'S DENIAL OF QUALIFIED IMMUNITY AND THEREBY RESOLVE THE THREE-WAY DISAGREEMENT IN THE LOWER COURTS AS TO PROPER SOURCES OF CLEARLY ESTABLISHED LAW.

An improper denial of qualified immunity provides an independent basis for certiorari because a misapplication of qualified immunity standards creates the functional equivalent of a circuit split. An improper denial of qualified immunity in the Fourth Amendment context overdeters the police from going close to the line of legality; the threat of liability forces the police to change their practices much like a decision altering substantive Fourth Amendment law. The Court has recognized this principle by repeatedly granting certiorari to review denials of qualified immunity absent any claim of disagreement among the circuits. *See, e.g., Scott v. Harris*, 127 S.Ct. 468, 166 L.Ed.2d 333 (2006) (granting certiorari to review denial of qualified immunity in a Fourth Amendment case); *Brosseau v. Haugen*, 543 U.S. 194, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (granting certiorari and summarily reversing Fourth Amendment decision that had denied qualified immunity); *Groh v. Ramirez*, 537 U.S. 1231, 123 S.Ct. 1354, 155 L.Ed.2d 195 (2003) (granting certiorari in Fourth Amendment qualified immunity decision to review Ninth Circuit decision denying qualified immunity).

The Tenth Circuit's denial of qualified immunity calls out for this Court's review exactly as did the circuit court decisions in *Scott*, *Brosseau*, and *Groh*. The Tenth Circuit below made precisely the same conceptual error as did the lower courts in those cases: It defined the "clearly established" constitutional right in the most abstract way possible. As this Court explained in *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987), allowing plaintiffs to allege violations of "extremely abstract rights" would effectively "convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability[.]" In clear disregard of this guidance, the Tenth Circuit chose the most abstract level of generality possible by merely restating the language of the Fourth Amendment. According to the panel majority below, "the relevant right is the right to be free in one's home from unreasonable searches and arrests." Pet. App. 15.

Remarkably, the Tenth Circuit's qualified immunity analysis included no specific application to the facts of the case. The panel ruled that qualified immunity was improper simply because "warrantless entries into a home are per se unreasonable unless they satisfy the established exceptions." *Id.* Because the "consent once removed" doctrine had not been "established" by either the Supreme Court or the Tenth Circuit, it was necessarily "clearly established" that it had no application to the facts of this case.

This was clearly incorrect, as Judge Kelly explained in his dissent:

> Properly characterized, the right at issue in this case is not simply the right to be free from unreasonable searches and seizures. Instead, it 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. As the district court observed, no Supreme Court or Tenth Circuit decision has ever granted or even discussed that right.

Pet. App. 27 (Kelly, J., dissenting).

Given the precedents that existed in March 2002, when the entry occurred, a reasonable officer would have concluded that the petitioners' conduct was constitutional. Although the Supreme Court and the Tenth Circuit had never addressed the "consent once removed" doctrine, every court to have addressed the issue had recognized the exception. Three federal circuits already had embraced it, and Judge Posner had held that it explicitly covered cases when the initial entry was made by a confidential informant. *See United States v. Paul*, 808 F.2d 645, 648 (7th Cir. 1986). No case had rejected the doctrine in a case with similar facts. Indeed, not long after the warrantless entry in this case, a journal article expressly instructed officers that the doctrine *permitted* searches when the initial consent was obtained by an informant.

Hendrie, *Consent Once Removed*, FEDERAL BUREAU OF INVESTIGATION LAW ENFORCEMENT BULLETIN, February 2003, 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.")

As Judge Cassell and Judge Kelly both recognized, the petitioners were properly entitled to qualified immunity in these circumstances. The panel's error is sufficiently plain that it stands alone as a basis for granting the petition. *See* Krumholz, *Divided Tenth Circuit Panel Gets One Wrong, Horribly Wrong*, ROCKY MOUNTAIN APPELLATE BLOG, July 2007, available at http://rockymtnappellateblog.typepad.com/rocky_mountain_appellate_/2007/07/index.html (describing the panel's qualified immunity analysis as a "stunningly bad" and "utterly indefensible" decision that "completely guts qualified immunity").

Granting certiorari would also permit the Court to address the three-way division among the Courts of Appeals on whether and how decisions outside the home circuit create "clearly established" law. The problem is an important one: When applying the qualified immunity test, to what extent should the state of the law be informed by decisions other than those of the Supreme Court and the home circuit? Should the law of other circuits, state supreme courts, federal district courts, and lower state courts factor into whether the law is "clearly established?" Or are these decisions irrelevant? The question has obvious importance in this case because qualified

immunity relies in part on the caselaw outside the Tenth Circuit that expressly upheld the constitutionality of the technique used by the Task Force.

Although the Supreme Court has provided occasional guidance on how to determine clearly established law,[3] the circuits have divided on the meaning of that guidance and have adopted a wide range of different legal tests in response to it. For example, the Tenth Circuit below recognized the Circuit's usual rule that "for a right to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Cortez v. McCauley*, 478 F.3d 1108, 1114-15 (10th Cir. 2007) (cited in *Callahan*, 494 F.3d at 899).[4]

The Seventh Circuit and the Ninth Circuit take a roughly similar approach. In those circuits, courts can consider all relevant caselaw whether from another circuit, a state court, or a district court. *See, e.g.*, *Tekle ex rel. Tekle v. United States*, 457 F.3d 1088, 1096 (9th Cir. 2006) ("In the absence of binding precedent, we look to whatever decisional law is

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[3] *See Grayden v. Rhodes*, 345 F.3d 1225, 1251 n.4 (11th Cir. 2003) (summarizing the Supreme Court's guidance).

[4] The proper test in the Tenth Circuit is somewhat unclear because different panels have expressed the test differently. For a thorough discussion of Tenth Circuit caselaw, *see Prison Legal News, Inc. v. Simmons*, 401 F.Supp.2d 1181, 1189-92 (D. Kan. 2005).

available to ascertain whether the law is clearly established for qualified immunity purposes, including decisions of state courts, other circuits, and district courts."); *Jacobs v. City of Chicago*, 215 F.3d 758, 767 (7th Cir. 2000) (Courts "broaden our survey to include all relevant caselaw in order to determine whether there was such a clear trend in the caselaw that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time.")

In the Eleventh Circuit, by contrast, the only source of law that is relevant beyond the Supreme Court and the home circuit is the state Supreme Court in the state where the event occurred. Courts looking for "clearly established" law do not consider the law of other circuits or other state courts. *See Marsh v. Butler County*, 268 F.3d 1014, 1032 n.10 (11th Cir. 2001) (en banc) ("When case law is needed to 'clearly establish' the law applicable to the pertinent circumstances, we look to decisions of the U.S. Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state. . . . Each jurisdiction has its own body of law, and splits between jurisdictions on matters of law are not uncommon. We do not expect public officials to sort out the law of every jurisdiction in the country.") *See also Thomas ex rel. Thomas v. Roberts*, 323 F.3d 950, 955 (11th Cir. 2003).

The Second Circuit takes yet another approach. In the Second Circuit, the only sources that can create "clearly established" law are the U.S. Supreme

Court and the Second Circuit. Decisions by other circuits, state courts, and federal district courts are irrelevant to whether the law is "clearly established." *See Pabon v. Wright*, 459 F.3d 241, 255 (2d Cir. 2006) ("When neither the Supreme Court nor this court has recognized a right, the law of our sister circuits and the holdings of district courts cannot act to render that right clearly established within the Second Circuit."). *See also Anderson v. Recore*, 317 F.3d 194, 197 (2d Cir. 2003); *Young v. County of Fulton*, 160 F.3d 899, 903 (2d Cir. 1998).

This disagreement among the circuits has real and important consequences. Fourth Amendment caselaw develops in a case-by-case fashion, and the relevance of the first lower court decisions to the outcomes of later qualified immunity defenses is a very important question in practice. When a lower court approves a new investigative technique, police officers in other circuits may reasonably attempt to rely on that precedent. On the other hand, when a lower court rules that a practice is illegal, plaintiffs around the country may reasonably attempt to rely on it in civil cases against the police.

Given the current lower court disagreement, however, the strength of any qualified immunity defense may hinge on where the lawsuit is filed. The initial decision may be relevant to a qualified immunity defense in the Seventh, Ninth, and Tenth Circuits; irrelevant in the Second Circuit; and relevant in the Eleventh Circuit only if it is a decision of the state Supreme Court in that state. This area

demands uniformity, and a grant of certiorari in this case could provide the Court with an excellent vehicle to address this issue.

In sum, the Court should grant the petition to resolve the circuit split on the "consent once removed" exception; to correct the Tenth Circuit's improper denial of qualified immunity; and to address the disagreement in the circuits as to how courts determine clearly established law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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