NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

PAUL MICHAEL MALAGERIO
Petitioner,

v.

UNITED STATES of AMERICA,
Respondent.

On Petition for a Writ of Certiorari from
The United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

MARY MARGARET PENROSE
Texas A&M School of Law
1515 Commerce Street
Fort Worth, TX 76102
(817) 212-4021 (phone)
(817) 212-3891 (facsimile)
megpenrose@law.tamu.edu

Attorney for Petitioner

QUESTIONS PRESENTED

1. Whether multiple armed law enforcement officers surrounding a home at daybreak, repeatedly banging on the home's only door, refusing to leave, and ordering the occupant to exit, by name and at gunpoint, constitutes a constructive entry within the home.

2. Whether a person who opens his door in response to multiple armed law enforcement officers surrounding his home at daybreak, repeatedly banging on the home's only door, refusing to leave, and ordering that person to exit, by name and at gunpoint, voluntarily appears in public pursuant to *Santana v. United States*.

3. Whether *Scott v. Harris* applies equally to evidence benefitting alleged criminal defendants and law enforcement.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, Paul Michael Malagerio, is in federal ICE custody awaiting removal from the United States after serving most of a 28 month felony sentence. Malagerio remains under supervised release pursuant to the District Court Judgment. Respondent is the United States of America.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

TABLE OF CONTENTS

APPENDIX CONTENTS:

TABLE OF AUTHORITIES

United States Supreme Court Cases:

United States Supreme Court, cont.:

Circuit Court Cases:

Circuit Court Cases, cont.:

Historical Cases:

Federal Statutes:

PETITION FOR WRIT OF CERTIORARI

Paul Michael Malagerio respectfully petitions this Court for a writ of certiorari to review the judgment entered by the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion in *United States v. Paul Michael Malagerio*, No. 21-10729, dismissing Petitioner's appeal is published at 49 F.4th 911 (5th Cir. 2022). It is attached as Appendix A. The District Court's judgment in *United States v. Paul Michael Malagerio*, 5:20-CR-00154, is attached as Appendix B. The District Court's unpublished memorandum opinion denying the Motion to Suppress is attached as Appendix C.

STATEMENT OF JURISDICTION

The Fifth Circuit's opinion was entered on September 23, 2022. Malagerio filed a timely request for rehearing En Banc. Malagerio's En Banc request was denied on October 18, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fourth Amendment to the United States Constitution

> 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.

STATEMENT OF THE CASE

This case presents significant legal questions involving a growing Circuit split: does the Fourth Amendment allow armed law enforcement officers to surround a home and demand a person exit at gunpoint without securing either a judicial warrant or relying on exigent circumstances?

This Court's Fourth Amendment jurisprudence has consistently drawn a firm line at the entry to the home. It protects the home and its curtilage from unreasonable governmental interference. This approach comports with Constitutional text and history. The right of an individual to be secure in his house is explicitly protected. Thus, this Court has consistently required either a judicially reviewed warrant or exigent circumstances to allow officers to make an in-home arrest or seizure.

This case raises the question of what it means to be seized inside the home. The majority of Circuits hold that when law enforcement compels a person to open his door by using deception or coercion, that individual has not voluntarily appeared in his doorway and has been seized inside the home. In contrast, the Fifth Circuit found that when a person opens his door – even if that action is prompted by armed law enforcement officers surrounding the only entry and exit point to his home and ordering he "come out" – that is a voluntary act occurring in public. The Fifth Circuit found that when Malagerio opened his door in response to armed commands he exit, he voluntarily appeared in a public place. This holding is at odds with the majority of Circuits that have considered the issue, Constitutional text, and history.

The Fifth Circuit erred by ignoring the Fourth Amendment's textual protection and this Court's unbroken line of modern cases providing the highest level of protection to the home. The Fifth Circuit's reliance on *Santana v. United States*, 427 U.S. 38 (1976), misapplies this Court's holding in *Santana* and overlooks *Payton v. New York*, 445 U.S. 573 (1980). The panel's published opinion ignores the plain meaning of "voluntary" and puts individuals to an impossible choice: remain holed up in your home while surrounded by armed law enforcement or waive your long-established Fourth Amendment right to be secure in your house. If police can force a person out of their home by banging on their door armed with guns but not a warrant, our long-held Fourth Amendment protections become relevant only for the most educated and tenacious among us. Worse still, it puts individuals and police at unnecessary risk for armed violence.

Here, multiple law enforcement officers made an armed daybreak arrest relying on an administrative warrant that was issued outside the judicial process. ICE officers, in violation of federal policy and training, went to Malagerio's residence using an I-200 administrative arrest warrant to enforce an alleged civil law violation – a visa overstay. There were no exigent circumstances. Malagerio had no criminal record. The officers conducting recognizance observed no guns or weapons before making the arrest. There was no evidence that Malagerio was a flight risk. This was a run of the mill civil law arrest for an alleged visa overstay. Yet, relying solely on a non-judicial administrative arrest warrant, multiple armed

law enforcement officers demanded Malagerio exit his home and submit to their authority.

The officers' forceful commands and the numerous guns pointed at the small trailer home are visible on bodycam video. This bodycam evidence shows multiple cars and officers surrounding Malagerio's home. The officers secured entry to the premises by misrepresenting their purpose. The lead officer told the ranch owner he wanted to "talk" to Malagerio. He also initially testified before the District Court that this was a "knock and talk" encounter. Video evidence shows a dramatically different event.

When Malagerio did not respond to the officer's knocking, they refused to leave. They continued to demand he come out of his home. They called out his name and ordered him to exit. The lead officer testified he grew agitated when Malagerio did not immediately exit. Once Malagerio showed his desire to remain inside, officers had no right to remain on the premises and should have left. They didn't.

ICE officers suspected that Malagerio, who was tangentially related to the Tiger King saga, had violated 18 U.S.C. § 922(g). They wanted to confirm their suspicions despite testifying they lacked probable cause. Unable to secure a judicial warrant, the officers relied on an I-200 administrative warrant that avoids judicial scrutiny. They assembled a team of 6 to 8 armed officers to arrest Malagerio at his home. They were rewarded with Malagerio's compliance to their armed demands that he "come out" of his home. Malagerio was arrested, his home searched, and 3 guns were seized. All this occurred without a judicial warrant. The officers'

suspicions were vindicated by chance – not by law and not under a proper application of the Fourth Amendment.

Malagerio was charged with violating 18 U.S.C. § 922(g). He filed a Motion to Suppress the evidence uncovered from his home. He testified he never gave officers consent to search his home. The District Court held a hearing and accepted testimony from Malagerio and some of the arresting officers. The court ultimately found that Malagerio was not arrested inside his home or within the curtilage of his home. It held that a non-judicial I-200 administrative warrant provides adequate grounds to arrest a person inside their home pursuant to *Abel v. United States*, 362 U.S. 217 (1960). Malagerio was tried and convicted by a jury. He was sentenced to 28 months in federal prison and 1 year supervised released. He appealed.

Before the Fifth Circuit Malagerio argued that *Abel v. United States* has been tacitly reversed by *Payton v. New York* and its progeny, including *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *Stoner v. California*, 376 U.S. 483 (1969). He further argued that he was forced outside his home in violation of numerous Circuits' holdings that coercion or deception constitutes a constructive entry in the home. The Fifth Circuit held oral argument. Avoiding the *Abel* question, the three judge panel relied on new reasoning to uphold the conviction. The panel's published opinion holds that Malagerio voluntarily appeared in his doorway and was arrested in a public place. *United States v. Malagerio*, 49 F.4th 911, 915 (5th Cir. 2022). The Court noted that while "it was also possible to interpret the record such that

Malagerio was seized before he got to his doorway" and within the home, it was deferring to the District Court's findings. *Id.* at 916.

Malagerio filed a Motion for En Banc review. Presenting the numerous Circuit Court decisions relying on constructive entry, Malagerio reiterated his argument that law enforcement violated his Fourth Amendment rights. The request was denied without vote or opinion.

This case challenges what happens when law enforcement, lacking probable cause, intentionally circumvent the judicial warrant requirement and force a person out of their home using armed commands. ICE officers intentionally circumvented the judicial warrant process in this case. In defiance of Department of Homeland Security policy and federal training, immigration officers went to Malagerio's home to arrest him with only an I-200 administrative warrant. Administrative warrants provide an insufficient basis to demand that a person exit their home at gunpoint.

Malagerio was seized inside his home at daybreak when 6 to 8 armed officers surrounded his home and ordered him to come out with his hands up. Under the majority view, this show of force constitutes a constructive entry and a Fourth Amendment seizure. A reasonable person would feel compelled to submit to the authority of 6 to 8 armed law enforcement officers repeatedly commanding, at daybreak, he exit his home. A reasonable person would not feel free to leave or terminate the encounter when multiple officers have guns pointed at him while giving the following commands: "Come out this way NOW!" "Come towards me," "Hands up," "Come towards me," and upon dropping his hands to adjust his shirt, a

more forceful, "HANDS UP!" Malagerio, in fact, complied with each of these commands. When the officers refused to leave, he came out of his house with his hands up. Malagerio did not voluntarily engage these officers. He testified that when they arrived, he was unsure what was happening and became terrified. When he opened his door, multiple guns were pointed at him including a shotgun.

The arresting officer gave shifting reasons for this armed daybreak encounter. First it was labeled a "knock and talk." But when Malagerio did not immediately come to the door, the officers did not leave. Further, the lead officer testified that his gun was unholstered when he first knocked on the door. This was always meant to be a show of force to compel Malagerio to leave his Fourth Amendment protected space. Finally, the lead officer explained the arrest was justified because he had an I-200 administrative warrant. But DHS policy prohibits officers from using I-200 administrative warrants to make home arrests. The arresting officers testified they knew this and confirmed they could not enter Malagerio's home without consent or exigent circumstances. The lead officer coyly explained he never physically entered the home. The officers' approach was to force Malagerio out of his home at gunpoint and try to stand on an overly legalistic interpretation of where Malagerio was seized. Unfortunately, this approach worked.

One fact has remained constant throughout these proceedings -- the officers did not have a judicial warrant permitting them to demand Malagerio exit his home. Yet they refused to leave and relied on their armed presence and forceful commands to successfully flush Malagerio from his home.

The panel's published opinion found Malagerio's compliance with the officers' armed commands was a voluntary public appearance in his doorway resulting in a constitutional public arrest. The precise language reads as follows:

> Malagerio says that he was "seized in [his] doorway." Oral Argument at 4:06–08. But "a person standing in the doorway of a house is 'in a "public" place,' and hence subject to arrest without a warrant permitting entry of the home." *Illinois v. McArthur*, 531 U.S. 326, 335, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001)(quoting *United States v. Santana*, 427 U.S. 38, 42, 96 S.Ct. 2406, 49 L.Ed2d 300 (1976).

Malagerio, 49 F.4th at 915. This finding varies from the District Court's decision which simply found that Malagerio was not arrested in his home or within the curtilage of the home. Both decisions diminish the Fourth Amendment.

By denying Malagerio's appeal, the Fifth Circuit allowed armed law enforcement to engage in Fourth Amendment gamesmanship. A heavily armed team of officers forced Malagerio from the sanctity of his home without a judicial warrant or exigent circumstances. They acted in contravention of federal policy and training. They operated outside the judicial process. The Fifth Circuit's minority view encourages law enforcement to engage in armed home encounters rather than secure a judicial warrant. It rewards risky police behavior while at the same time undermining the protections long afforded the home. The decision is not supported by Constitutional text, history, or the other Circuits. It is a dangerous outlier.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI IS APPROPRIATE IN THIS CASE BECAUSE THE FIFTH CIRCUIT'S PUBLISHED OPINION REGARDING WARRANTLESS HOME SEIZURES AND CONSTRUCTIVE ENTRY CONFLICT WITH A MAJORITY OF THE OTHER CIRCUTS THAT HAVE ADDRESSED THE ISSUE. THE FIFTH CIRCUIT'S DECISION PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT TO ENSURE CONSISTENT APPLICATION OF THE FOURTH AMENDMENT RELATING TO ARMED HOME ARRESTS.

This Court should grant this petition because the question presented is of national importance. There is a Circuit split as to whether law enforcement constructively enters a home when, relying on armed commands rather than a judicial warrant or exigent circumstances, officers coerce a person to exit the security of their home. This question captures two important Fourth Amendment issues: (1) does *Payton v. New York* and its progeny apply when multiple armed law enforcement officers surround a home and order the person to exit at gunpoint, and (2) is a person seized *inside the home* when he exits his home in response to law enforcement's armed demands he come out?

The panel's published decision exposes a Circuit split. In the Fifth Circuit, when a person opens their door following multiple law enforcement officers' armed commands to exit his home he does so voluntarily and subjects himself to a lawful public arrest. In other words, individuals whose homes are surrounded by armed law enforcement ordering the residents exit must remain holed up inside, with all the attendant risks to ignoring officers' commands, to retain any Fourth Amendment protection. The Fifth Circuit's opinion is in the clear minority

contravening decisions in the First, Third, Sixth, Ninth, Tenth, and Eleventh Circuits. These Circuit's authoritative opinions more closely align with Supreme Court precedent finding seizure occurs when there is "the threatening presence of several officers, the display of a weapon by an officer, . . . or the use of language and tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). This Court should accept this petition to resolve this critical constitutional question of constructive entry and ensure uniform application of the Fourth Amendment's right to be "secure" in one's home.

A. Seizure Requires an Objective Assessment

The majority of Circuits properly applies this Court's objective seizure test when dealing with law enforcement's coercive or deceptive tactics to induce a person outside their home. The majority view considers the variables this Court has consistently relied upon to determine seizure.

"[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would not have believed that he was free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

> Examples of circumstances that might indicate a seizure, even when the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Id.

Malagerio never tried to leave his home. It was daybreak and he had just awakened. He realized his home was surrounded. He was trapped inside as armed officers refused to leave. But rather than apply *Mendenhall*'s objective assessment focusing on the person seized, the Fifth Circuit focused on the fact that Malagerio opened his door. They turned the focus on what Malagerio did rather than keeping the focus on what a reasonable person in Malagerio's position would believe.

The majority approach among the Circuits applies the objective test to determine whether an individual is seized inside his home when law enforcement surrounds the property. The Sixth Circuit's approach in *United States v. Saari*, 272 F.2d 804 (6th Cir. 2001), is common. *Saari* found:

> Here, the officers positioned themselves in front of the only exit from Defendant's apartment with their guns draw. They knocked forcefully on the door and announced they were the police. Upon opening the door, Defendant was instructed to come outside, which he did. Under these circumstances, a reasonable person would have believed he was not free to leave.

Id. at 808.

Likewise, *United States v. Morgan*, 743 F.2d 1158 (6th Cir. 1984), explained:

> To describe the encounter between the police and [defendant] as a "brief investigatory story" ignores the facts of this case. Nine police officers and several patrol cars approached and surrounded the [defendant's] residence . . . . The police then called for [defendant] to come out of the house. These circumstances surely amount to a show of official authority such that a "reasonable person would not believe he was free to leave." Viewed objectively, [defendant] was placed under arrest, without the issuance of a [judicial] warrant, at the moment police encircled the [defendant's] residence.

Id. at 1164.

The bodycam video in this case shows multiple armed law enforcement officers surrounded Malagerio's front door. Their words conveyed a duty to comply, the classic "come out with your hands up." The tone was aggressive and urgent. The fact that law enforcement kept their guns fixed on Malagerio even as he exited reinforced the requirement to comply. A reasonable person could not have shut their door and retreated inside. A reasonable person would not have ignored the officers' armed commands to exit. Under *Mendenhall*'s objective test, Malagerio was seized inside his home before he ever opened his door.

B. The Home is Sacred

> [N]either history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.
> *Payton v. New York*, 445 U.S. at 601.

Beyond its failure to properly apply the objective seizure test, the Fifth Circuit failed to give proper deference to the location of this arrest – a man's home. For over 60 years, this Court has given the home heightened Fourth Amendment protection. *Silverman v. United States*, 365 U.S. 505, 511 (1961), *see also, Boyd v. United States*, 116 U.S. 616 (1886)(providing lengthy history of the Fourth Amendment). As *Silverman* emphasized:

> The Fourth Amendment, and the personal rights which it secures have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. *Entick v. Carrington*, 19 Howell's State Trials 1029, 1066; *Boyd v. United States*, 116 U.S. 616, 626-630.

Silverman, 365 U.S. at 511.

The Sixth Circuit, in *Saari* and *Morgan*, *supra*, found that a Fourth Amendment seizure occurs when armed officers surround a person's home. *Morgan* found that, "[v]iewed objectively, Morgan was placed under arrest . . . at the moment police encircled [his] residence." *Morgan*, 743 F.2d at 1164. Much like Morgan, Malagerio, was "responding to the coercive activity outside of the house" when he opened his front door. *Id.* at 1161. In *Morgan*, as here, "there were no exigent circumstances justifying the warrantless intrusion by the police onto the Morgan property…. Morgan's arrest was a planned occurrence. . . ." *Id.* at 1163. *See also, United States v. Curzi*, 867 F.2d 36, 40 (1st Cir. 1989). And in this case, that planned occurrence violates federal policy and flaunts Fourth Amendment text.

This case involves an executive-issued administrative warrant. These I-200 ICE warrants occur outside the judicial process and lack all the requisite protections envisioned under the Fourth Amendment. I-200 warrants allow one law enforcement officer to present his or her probable cause to another law enforcement officer without any judicial oversight. Rather than have a neutral and detached magistrate evaluate probable cause, I-200 administrative warrants leave this assessment to the individuals tasked with their enforcement.

This extra-judicial approach has long been condemned by this Court, beginning in *Johnson v. United States*, 333 U.S. 10, 13-14 (1948). *Johnson* reminds that the Fourth Amendment's "protection" consists in requiring probable cause determinations to "be drawn by a neutral and detached magistrate, instead of being

judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id.* at 14. As the testimony in this case underscores, resort to the I-200 arrest warrant occurred precisely because the ICE officers suspected – but could not prove – that Malagerio had weapons in his home. Their goal was always to get inside Malagerio's home. Their armed commands, acting without a judicially approved warrant or exigent circumstances, highlight the need for a uniform solution to ICE officers' reliance on administrative warrants at the home. If this Court declines this petition, ICE will be free to circumvent the judicial warrant requirement and pressure individuals to open their home doors at gunpoint.

Johnson upheld the home's security in the very manner Malagerio requests. *Johnson* found that the officer's warrantless entry occurred under "color of his office" rather than due to defendant's acquiescence." *Id.* "Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police state where they are the law." This Court should reaffirm *Johnson*'s textual fidelity.

Steagald v. United States, 451 U.S. 204 (1981) similarly emphasizes the importance of judicial oversight relating to home warrants.

> The purpose of a warrant is to allow a neutral and detached judicial officers to assess whether the police have probable cause to make an arrest or conduct a search. As we have often explained, the placement of this checkpoint between the Government and the citizen implicitly acknowledges that an "officer engaged in the often competitive enterprise of ferreting out crime" may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the

> contemplated action against the individual's interest in protecting his own liberty and the privacy of his home.

Id. at 212.

Rather than uphold the sanctity of the home, the Fifth Circuit's decision allows ICE officers to skirt federal procedures and exploit the warrant process. In elevating form over substance, and ignoring the textual protection afforded our houses, the Fifth Circuit's minority approach empowers law enforcement at the cost of personal liberty. The Founders feared unbridled federal power. And yet, ICE's reliance on non-judicial warrants poses a modern day threat to our homes and families. If law enforcement can surround a person's home with armed commands to exit, what security exists within the home? Surely not the security that Justice Scalia spoke of in *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013).

Malagerio pressed upon the Fifth Circuit this Court's unbroken line of cases upholding the textual protections afforded the home. For over 60 years, this Court has provided heightened protection to the home. *Silverman v. United States*, 365 U.S. 505, 511 (1961). And while *Katz* indicated the Constitution "protects people, not places," the place has always mattered. *See Katz v. United States*, 389 U.S. 347, 351 (1967). It mattered to our Founders enough to isolate the home as the only location given explicit protection. Not the office. Not our cars. Not our houses of worship. Our homes. "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his home and there be free from unreasonable governmental intrusion." *Silverman*, 365 U.S. at 511.

Under the Fifth Circuit's approach, 6 to 8 armed law enforcement officers surrounding your home at daybreak, without a judicially approved warrant or exigent circumstances, demanding you exit and refusing to leave is not "unreasonable governmental intrusion." This finding conflict with continuous Supreme Court precedent asserting that in no place "is the zone of privacy more clearly defined that when bounded by the unambiguous physical dimensions of the home." *Payton*, 445 U.S. at 589. In fact, this Court declared over 50 years ago that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297, 313 (1972). And, as Justice Scalia noted, "when it comes to the Fourth Amendment, the home is the first among equals." *Jardines*, 133 S. Ct. at 1414.

> This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.

Id.

Here, there is no doubt that armed law enforcement surrounded Malagerio's home for the purpose of forcing him outside where they could legally arrest him without a judicial warrant or exigent circumstances. They entered Malagerio's "property to observe his repose from just outside the front window" and refused to leave. They knocked and called Malagerio by name. He didn't respond. Again, they didn't leave. Instead, they knocked again, and with multiple guns pointed at the

front door, ordered Malagerio to come out. Malagerio complied with these armed demands and, as a result, was unlawfully seized before opening his front door.

The District Court found that Malagerio was not arrested in his home or within the curtilage, relying on dicta from *Abel v. United States*. The Fifth Circuit used different reasoning, finding that Malagerio voluntarily appeared in public by opening his door. Neither finding is defensible under this Court's clearly established law or the Circuit Courts' majority view. In 2021, this Court reminded that "any warrant exception permitting home entry [is] 'jealously and carefully drawn,' in keeping with the 'centuries-old-principle' that the 'home is entitled to special protection." *Lange v. California*, 141 S. Ct. 2011, 2018-2019 (2021)(internal citations omitted). In refusing to adopt a bright line rule permitting the warrantless home arrest of a fleeing misdemeanant suspect, this Court explained, "we are not eager – more the reverse – to print a new permission slip for entering the home without a [judicially approved] warrant." *Id.* at 2019.

Here, officers relied on an I-200 administrative warrant issued outside the judicial process. They knew Malagerio drove into town daily. ROA.459. Despite this, law enforcement designed this armed confrontation to occur at Malagerio's home at daybreak. ROA.461. This intentionally planned home confrontation contravenes federal policy and federal training. This Court is now able to determine whether ICE – or any law enforcement – will be legally permitted to coerce a person out of his home in an armed confrontation leaving the resident with a right "of little practical value." *Jardines*, 133 S. Ct. at 1414. The forced exit is either a constructive

entry, as the majority of Circuits hold, or it is acceptable governmental interference. Law enforcement's actions in flushing Malagerio from his home at gunpoint should find no refuge under the Fourth Amendment or before this Court.

Malagerio was seized the moment police surrounded his home just like Brendlin was seized when officers restrained his freedom of movement during a traffic stop by pulling the car over. *Brendlin v. California*, 127 S. Ct 2400, 2405 (2007). *Brendlin* holds that a person is seized by law enforcement when an officer by means of physical force or show of authority terminates or restrains a person's freedom of movement. *Id.* A seizure can occur without an actual arrest. *Terry v. Ohio*, 392 U.S. 1, 16 (1968). When 6 to 8 armed officers surrounded Malagerio's home at daybreak, guns pointed at the only entry and exit point, they restrained his freedom of movement and displayed a significant show of physical force. The bodycam video in this case displays the commands given, the tone, the directives at Malagerio personally to comply – using his first name – the forceful knocking, the refusal to leave, and the armed show of force. ROA.1149. No decision regarding the seizure or arrest can be made without referencing this video and evaluating law enforcement's actions. Malagerio testified he was terrified. ROA.553. When he opened his door, a shotgun was pointed directly at him. ROA.553-554. In all, 6 armed officers had their guns fixed on Malagerio as he was ordered to come out, put his hands up, and walk toward the arresting officer. Before Malagerio opened his front door, before he left his doorway, he was seized inside his home

C. Constructive Entry – An In-Home Seizure

Constructive in home seizures can occur even when law enforcement does not physically enter the home. "A consensual encounter at the doorstep may evolve into a 'constructive entry' when the police, while not entering the house, deploy overbearing tactics that essentially force the individual out of the house." *United States v. Thomas*, 430 F.3d 274 (6th Cir. 2005). When Malagerio opened the door due to coercive police tactics, a constructive entry occurred. "A contrary rule would undermine the Constitutional precepts emphasized in *Payton*." *Morgan*, 743 F.2d at 1166-1167.

As the Tenth Circuit found, "[o]pening the door to one's home is not voluntary if ordered to do so under color of authority." *United States v. Reeves*, 524 F.3d 1161, 1167 (10th Cir. 2008). This Court should follow the majority of Circuits in holding that "lack of physical entry alone is not dispositive." *United States v. Maez*, 872 F.2d 1444, 1451 (10th Cir. 1989). In *Maez*, a SWAT team surrounded Maez's trailer with rifles pointed at the home. Officers ordered the family out of the home. *Id.* at 1450. The court found this armed show of force tantamount to seizure. Likewise, the Ninth Circuit found that when "police had completely surrounded appellee's trailer with their weapons drawn and ordered him through a bullhorn to leave the trailer and drop to his knees," he had been seized. *United States v. Al-Azzawy*, 784 F.2d 890, 893 (9th Cir. 1985). *See also*, *United States v. Edmonson*, 791 F.2d 1512 (11th Cir. 1986)(finding seizure when FBI officers' weapons were drawn, the front of the apartment was surrounded, and agents yelled to open the door).

Malagerio was constructively seized inside his home. The Ninth Circuit's reasoning explains:

> Appellee was not free to leave, his freedom of movement was totally restricted, and the officers' show of force and authority was overwhelming. Any reasonable person would have believed he was under arrest in this circumstances. Moreover, since appellee was in his trailer at the time he was surrounded by armed officers, and since he did not voluntarily expose himself to their view or control outside his trailer but only emerged under circumstances of extreme coercion, the arrest occurred while he was still in the trailer.

Al-Azzawy, 784 F.2d at 893. Malagerio's case is indistinguishable from these cases in the Sixth, Ninth, Tenth, and Eleventh Circuits evidencing the majority view. In each, law enforcement surrounded the home, limited the resident's movement, brandished weapons, and ordered the suspect exit his home. Each found that seizure occurred inside the home when the individual's ability to leave his residence was purposely restricted by the officers' show of force.

The Sixth Circuit's decision in *Morgan* provides a convincing, and analogous, reference. As *Morgan* explained:

> [T]he record provides ample proof that "as a practical matter [Morgan] was under arrest" as soon as the police surrounded the Morgan home, and therefore, the arrest violated *Payton* because no warrant had been secured. The police show of force and authority was such that a "reasonable person would have believed he was not free to leave."

Id. at 1164. Like *Morgan*, several "police officers and several patrol cars approached and surrounded" Malagerio's home. "The police then called for [him] to come out of

the house." *Id.* Relying on *Payton*, *Morgan* found law enforcement cannot arouse or seize a person that is peacefully residing in his home. *Id.* at 1165.

Morgan emphasized preserving Fourth Amendment rights against constructive police entry:

> Applying this rule here, it is undisputed that Morgan was peacefully residing in his mother's home until he was aroused by the police activities occurring outside. Morgan was then compelled to leave the house…. [I]t cannot be said that [Morgan] voluntarily exposed himself to a warrantless arrest" by appearing at the door. On the contrary, Morgan appeared at the door *only because of* the coercive police behavior taking place outside of the home. Viewed in these terms, the arrest of Morgan occurred while he was present inside a private home. Although there was no direct police entry into the Morgan home prior to the Morgan's arrest, the constructive entry accomplished the same thing, namely, the arrest of Morgan.

Id. at 1166-1167 (emphasis in original)(internal citations omitted). Similarly, in this case, law enforcement accomplished through armed commands what the law precluded them from accomplishing by forcibly opening Malagerio's door. Force – through the display of 6 to 8 armed officers – was applied. That force motivated Malagerio compliance with the orders to exit. The armed commands drew Malagerio from the safety and privacy of his home, constituting a constructive entry.

Morgan presents the majority Circuit view that a person appearing in a doorway in response to coercive police conduct does not constitute a voluntary public appearance. *See e.g., Curzi*, 867 F.2d at 40; *United States v. Thomas*, 430 F.3d 274, 277 (6th Cir. 2005); *United States v. Reeves*, 524 F.3d 1161, 1167 (10th Cir. 2008). The key between a consensual, voluntary encounter and an impermissible

constructive entry "turns on the show of force exhibited by the police." *Thomas*, 430 F.3d at 277. The Third Circuit also found that under any of the seizure tests, "when a SWAT team surrounds a residence with machine guns pointed at the windows and the person inside is ordered to leave the house backwards with their hands raised, an arrest has undoubtedly occurred. There was a clear show of physical force and assertion of authority. No reasonable person would have believed he was fee to remain in the house. We hold under these circumstances the arrest occurred inside [the] home." *Sharrar v. Felsing*, 128 F.3d 810, 819-820 (3rd Cir. 1997)(abrogated on other grounds in *Curly v. Klem*, 499 F.3d. 199 (2007)).

The Eleventh Circuit joins the First, Third, Sixth, and Tenth Circuits in applying a constructive entry rule. When an individual complies with law enforcement's armed demands that he exit his home, his exit is not voluntary. *See United States v. Edmonson*, 791 F.2d 1512, 1515 (11th Cir. 1986)(finding that Edmonson's opening of the door in response to FBI orders that he do so was not voluntarily because "[t]he presence of a number of officers tends to suggest an undertaking which is not entirely dependent on the consent and cooperation of the suspect"). Under the facts of this case, like the Circuit cases cited herein, law enforcement can – and did -- constructively arrest Malagerio inside his home. He was seized before he even opened his door.

D. Proportionality – Home Entry for Civil Law Violations

The Panel's decision is an outlier among the Circuits. It will encourage officers to dispense with the warrant requirement and seek to coerce individuals to

open their door to benefit from the Circuit's lenient position. The Fifth Circuit's approach undermines the Framer's intent and puts at risk an unbroken line of cases upholding the sanctity of the home against government encroachment. *See e.g., Jardines*, 133 S. Ct. at 1414 (officers are prohibited from "physically entering and occupying the [curtilage] area to engage in conduct not explicitly or implicitly permitted by the homeowner"). As Justice Scalia noted, "[o]ne virtue of the Fourth Amendment property-rights baseline is that it keeps easy cases easy." *Id.* at 1417. Malagerio did not invite the officers onto his property or give them permission to approach – and remain – at his front door. They gave false reasons for entering and refused to leave. The entire chain of events leading to Malagerio opening his front door was involuntary in the legal, and literal, sense. This is an easy case.

The Fifth Circuit's opinion ignores the "familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment." *Payton*, 445 U.S. at 583. *Payton* continues:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than bounded by the unambiguous physical dimensions of an individual's home – a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated."

Id. at 589.

Last term, this Court reminded that "[w]hat is reasonable for vehicles is different from what is reasonable for homes." *Caniglia v. Strom*, 141 S. Ct. 1596, 1600 (2021). *Caniglia* did not break new ground. It re-emphasized the unbroken

line of cases providing the highest level of protection to the home. This case tests the Court's continuing resolve to provide the most ardent protection to the home.

This Court should grant the petition to ensure that the Fourth Amendment has the same force and effect in Texas as it has in other parts of the country. ICE officers cannot do in the majority of the United States what they are currently permitted to do in Texas, Louisiana, and Mississippi. Removal for an immigration violation is a civil, not criminal matter. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). The Fifth Circuit decision in this case permits armed law enforcement officers, in a run of the mill visa overstay case, to surround a home with guns drawn to enforce a civil law violation. It lacks all sense of proportionality. The officers testified there were no exigent circumstances. The officers testified they lacked probable cause to believe any criminal law had been violated. There was no urgency and no judicial permission to enter the premises. Yet law enforcement in the Fifth Circuit now have dispensation to surround a person's home at daybreak and issue armed commands that residents exit to enforce civil law violations.

The Fifth Circuit ignored these low stakes opting to empower law enforcement over Constitutional text and history. As this Court noted in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), the underlying stakes matter when making a home entry to enforce a civil law infraction. *Id.* at 748-749. Officers, fearing the loss of blood alcohol evidence, entered the home of a drunk driving suspect without a warrant. *Id.* at 743. This Court found that Wisconsin's decision to treat first time DWI offenses as a civil law infraction prohibited law enforcement from breaking the

home's threshold without first securing a judicial warrant. *Id.* at 750. And like Welsh, Malagerio was suspected of a minor infraction – a civil visa overstay subject solely to potential removal. *Arizona*, 132 S. Ct. at 2499.

> When the government's interest is only to arrest for a minor offense, [the] presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.

Welsh, 466 U.S. at 750.

ICE I-200 warrants do not comport with *Welsh*. They do not comport with *Payton*. They are not judicial warrants and, in fact, operate completely outside the judicial process. To think that an I-200 warrant empowers law enforcement to gather, surround a home, and issue armed commands that residents exit conflicts with this Court's remarkable faithfulness to Fourth Amendment text. The majority of Circuits would not permit the officers' conduct in this case. Had Malagerio simply lived in the First, Third, Sixth, Ninth, Tenth, or Eleventh Circuits – covering 29 states (or nearly 60% of the nation), Puerto Rico, the Virgin Islands, and Guam – his seizure would have been deemed unconstitutional and his Motion to Suppress granted. Unfortunately for him, and others residing in the Fifth Circuit, there is no uniform application of the constructive entry rule. Thus, Malagerio faces removal as a felon with the long-term citizenship consequences that portends. But this rule is not limited to I-200 warrants or immigration cases. Any individual in the Fifth Circuit with an alleged civil law violation could find themselves at risk of an armed standoff on their lawn and no Fourth Amendment protection. Their only recourse is

to hunker down and hope that law enforcement ultimately leaves. One's right to be secure in their Fifth Circuit home is not as robust as the right enjoyed by those living in other Circuits. This Court should accordingly GRANT the petition and resolve the Circuit split.

II. CERTIORARI IS APPROPRIATE IN THIS CASE BECAUSE THE FIFTH CIRCUIT'S PUBLISHED OPINION HOLDING THAT *SANTANA v. UNITED STATES* APPLIES WHEN ARMED LAW ENFORCEMENT OFFICERS COERCE A PERSON FROM THEIR HOME CONFLICTS WITH A MAJORITY OF THE OTHER CIRCUITS THAT HAVE ADDRESSED THE ISSUE. THE FIFTH CIRCUIT'S DECISION PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT TO ENSURE CONSISTENT APPLICATION OF THE FOURTH AMENDMENT RELATING TO DOORWAY ARRESTS.

This Court should also grant the Petition to resolve the question of whether *Santana v. United States* applies when officers use force or deception to entice a person to open their door. *Santana*, 427 U.S. 38 (1976). This Court has not provided additional guidance on doorway arrests since 1976, despite home arrest protections being expanded by *Payton* and *Welsh*. *See Welsh*, 466 U.S. 740 (1984). Modernly, most Circuit courts view *Santana* as a case involving hot pursuit rather than arrest in a public place. *C.f. United States v. Watson*, 423 U.S. 411 (1976)(warrantless arrest in a public place does not violate Fourth Amendment). Outside the Fifth Circuit, there is near unanimity in holding that law enforcement's use of force or deception negates any finding that a person voluntarily exposed themself to police in a public place by opening their door.

To the extent *Santana* fully survives *Payton*, its facts are inapplicable to this appeal. Unlike *Santana*, Malagerio was not already standing inside his doorway

when 6 to 8 armed law enforcement officers arrived at daybreak. *Santana*, 427 U.S. at 40 (arriving officers "saw Santana standing in the doorway of the house"). Instead, it was the officers' actions in surrounding Malagerio's home, pointing their guns at the only entry/exit point, their knocking on his door and calling him by name, and their refusal to leave that spurred Malagerio to open his front door. When the officers did not leave, Malagerio was given little choice but to comply.

In *United States v. Vaneaton*, 49 F.3d 1423 (9th Cir. 1995), the Ninth Circuit focused on a critical element in this petition – whether law enforcement used coercion to secure compliance with its directives. *Id.* at 1425. *Vaneaton*'s focus was not simply on whether Vaneaton was standing in his doorway – a fact the Fifth Circuit's opinion finds decisive. *Id.* at 1426. Rather, the question was "whether he 'voluntarily exposed himself to warrantless arrest' by freely opening the door of his motel room to the police." *Id.* In this way, the Ninth Circuit followed the majority approach in contextualizing *why* an individual opened their door and evaluating whether officers' actions motivated a person to leave the security of their home.

The Ninth Circuit had previously distinguished cases upholding doorway arrests. *See Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985). In finding that Al-Azzawy had been arrested "while he was still inside his trailer," the Ninth Circuit explained:

> [T]he police had completely surrounded appellee's trailer with their weapons drawn and ordered him through a bullhorn to leave the trailer and drop to his knees. Appellate was not free to leave, his freedom of movement was totally restricted, and the officers' show of force and authority was overwhelming. . . . [S]ince appellee was in his trailer at the time he was surrounded by armed officers . . . [and] only emerged under circumstances

> of extreme coercion, the arrest occurred while he was still inside his trailer.

Id. at 893.

Tenth Circuit case law is in accord. *United States v. Maez*, 872 F.2d 1444 (10th Cir. 1989). *Maez* refused to find that Maez "chose to exit his home" to be "arrested in a public place" when his trailer was surrounded by SWAT officers. *Id.* at 1450. Adopting the majority view applying *Payton*, *Maez* found that "*Payton* is violated where there is such a show of force that a defendant comes out of a home under coercion and submits to being taken into custody" *Id.* at 1451. The privacy of the home envisioned by *Payton* "is effectively invaded" where a person is coerced to leave their home." *Id. Maez* did not require an actual, physical entry because this Court "has 'refused to lock the Fourth Amendment into instances of actual physical trespass'" or intrusion. *Id.* at 1451.

Malagerio was unlawfully coerced to open his door when armed law enforcement refused to leave his home. Then, when he opened his door, he was required – at gunpoint – to leave the shelter of his doorway to be physically arrested. ROA.518. Actions taken at the barrel of a gun are far from voluntary. Malagerio's facts align with other Circuits' holdings that coercive police tactics negate a voluntary doorway appearance. Under the majority view, Malagerio was arrested inside his home or within the curtilage of his home when multiple armed officers ordered he "come out" of his home and he complied. *Santana*, at least in the majority of Circuits, is inapplicable.

The Fifth Circuit's anomalous decision allows police to circumvent the Fourth Amendment's protections in a manner other Circuits prohibit. The decision empties *Payton* of its vitality in the one area – administrative arrest warrants – that evades judicial consideration of probable cause and judicial oversight. ROA.452-453. I-200 arrest warrants are issued solely by law enforcement. These warrants avoid the judicial scrutiny expected when police enter a home. *See Payton*, 455 U.S. at 585; *Boyd*, 116 U.S. at 630. As the panel's opinion concedes, "Administrative warrants do not comply with the requirements that the Fourth Amendment places on judicial warrants." *Malagerio*, 49 F.4th at 915.

Recognizing the firm line *Payton* drew at the entrance to the home, other Circuits have distinguished *Santana* when police activity compels a person's doorway appearance. Not only are the facts readily distinguishable in this case from *Santana*, the majority view requires that a person's doorway appearance truly be voluntary. The Fifth Circuit's approach swallows over 50 years of established precedent drawing a firm line at the entry to the home. Whether police physically cross that line or order a person, at gunpoint, to cross the threshold himself, the majority view steadfastly applies the Fourth Amendment. Police should not be able to coerce a person from the security of their home without a judicially issued warrant or exigent circumstances. The Fifth Circuit's application of *Santana* to these facts is at odds with clearly established Supreme Court precedent, Constitutional text, and history. *See Boyd*, 116 U.S. at 630. It should be overturned.

The Founders feared government's ability to violate the "sanctity of a man's home and the privacies of [his] life." *Id.* The Fourth Amendment was ratified to keep the federal government, and its law enforcement officers, from doing by force what they could not do through neutral and detached judicial review. *Boyd* quoted Lord Camden's judgment in *Entick v. Carrington* at length emphasizing that "[t]he great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been take away or abridged by some public law for the good of the whole." *Id.* at 627.

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees to the sanctity of a man's home and the privacies of life. It is not the breaking of doors and the rummaging of his drawers that constitutes the essence of the offence, but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense – it is the invasion of the sacred right which underlies and constitutes the essence of Lord Camden's judgment.

Id. at 630. Based on this history, Constitutional text, and the near unanimity in the other Circuits on this issue, the Fifth Circuit decision should be reversed.

The Ninth Circuit in *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980), properly distinguished *Santana*'s facts. *Johnson* found that defendant's "initial exposure to the view and the physical control of the agents was not consensual on his part." *Id.* There, as in this case, "the coercive effect of the weapons brandished by the officers" was a critical factor. Here, the Fifth Circuit ignored both the level of force – 6 to 8 armed officers arriving at daybreak – and the

gravity of the offense, a civil visa overstay. Malagerio had never been arrested. He had no police record and no record of violence. He was met with a level of force usually reserved for criminal cases, not alleged civil law violations.

Unlike *Santana*, where officers drove up and saw Santana already standing inside the doorway, Malagerio was fully inside his home when officers arrived. *Santana*, 427 U.S. at 40. The officers, relying on an I-200 administrative warrant, designed an armed daybreak encounter and refused to leave when Malagerio did not immediately respond to their orders. ROA.497-498. The officers' armed commands and failure to leave the property is what coerced Malagerio to the doorway. This is far removed from the voluntary action, not to mention the flight, observed in *Santana*. *Id.* (noting that as the officers approached Santana's house, "Santana retreated into the vestibule of her house"). Here, Malagerio was just arising for the day and had not left the privacy and security of his home. He was not in a public place but was fully stationed in the most sacred of all Fourth Amendment spaces – his home.

The Sixth Circuit found that where "[d]efendant was summoned out of his house at the officers' command" he had not voluntarily exposed himself to the public. *Saari*, 272 F.3d at 811. In finding that Saari had been seized inside his home, the court noted "the officers here summoned Defendant to exit his home and acted with such a show of authority that Defendant reasonably believed he had no choice but to comply." *Id.* at 809. When Saari opened the door, "the officers had their weapons pointed at him and instructed him to step outside." *Id.* at 807.

Here, as in *Saari*, "the officers positioned themselves in front of the only exit from Defendant's [home] with their guns drawn." *Id.* at 808. The officers "knocked forcefully on the door and announced that they were the police." *Id.* "Defendant was instructed to come outside, which he did." *Id.* Yet the Sixth Circuit found Saari was subjected to a constructive in-home arrest because "[u]nder these circumstances, a reasonable person would have believed that he was not free to leave." *Id.* The Fifth Circuit, in contrast, found that Malagerio's compliance with armed officers' orders to open his door and come out was a volitional act.

The Fifth Circuit's decision is at odds with the majority Circuit view. Its opinion, being factually and legally similar to other Circuit's decisions, represents the unmistakable minority approach. Malagerio seeks the intervention of this Court to consider his Fourth Amendment claims and establish a national, uniform approach to armed police encounters at the home. The Fifth Circuit's published decision is an outlier regarding doorway arrests and conditions one's Fourth Amendment rights on the fortuity of their address. Those living in 29 states have robust Fourth Amendment protections against law enforcement surrounding their home and flushing them out of the security of their home. The Fifth Circuit's approach diminishes the sanctity of the home – at least in Texas, Louisiana, and Mississippi – holding that compliance with law enforcement's armed commands results in a voluntary public appearance. The uneven application of Fourth Amendment rights undermines the applicability of one Constitution for one nation.

The Fifth Circuit's elevation of *Santana* over the unbroken line of this Court's cases protecting one's home is troubling. *See Silverman*, 365 U.S. 505 (1961); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Stoner*, 376 U.S. 483 (1964), *Katz*, 389 U.S. 347 (1967), *Camera*, 387 U.S. 523 (1967), *Payton*, 445 U.S. 573 (1980), *Steagald*, 451 U.S. 204 (1981), *Donovan v. Dewey*, 452 U.S. 594 (1981), *Welsh*, 466 U.S. 740 (1984), *Kyllo*, 533 U.S. 27 (2001), *Jardines*, 133 S. Ct 1409 (2013), *Collins v. Virginia*, 138 S. Ct. 1663 (2018), *Caniglia*, 141 S. Ct. 1596 (2021), and *Lange,* 141 S. Ct. 2011 (2021). It is out of step with established precedent.

This case presents a question of exceptional national importance – when, at daybreak, multiple armed officers surround the only entry/exit point of a home, repeatedly knock on the door, refuse to leave, and continuously order a person to come out with their hands up – does compliance with these armed commands constitute a voluntary act to appear in public? The panel decision finding Malagerio voluntarily appeared in a public place by opening his door is at odds with most Circuits. It creates an incentive for officers to forego the warrant requirement and, instead, rely on a show of force directly outside the home to create a "public arrest."

The panel's decision makes the Fourth Amendment's strong protections afforded the home conditional. To retain the protections explicitly afforded the home in Constitutional text, individuals confronted with multiple armed officers demanding they exit their home must hunker down and wait out the officers' urgent pleas to "come out with your hands up." This approach renders *Payton*'s protections entirely dependent on the homeowner's response. The firm line drawn at the entry to the

home is only as firm as one's resolve to wait out officers' armed commands. This Court should weigh in on the question of what constitutes a constructive entry to ensure uniform application of the Fourth Amendment relating to doorway arrests.

III. CERTIORARI IS APPROPRIATE IN THIS CASE BECAUSE THE FIFTH CIRCUIT'S PUBLISHED OPINION IGNORED VIDEO EVIDENCE SHOWING THE INVOLUNTARY NATURE OF THIS ENCOUNTER. THE PANEL'S FAILURE TO PROPERLY CONSIDER THE BODYCAM VIDEO CONFLICTS WITH THIS COURT'S DECISION IN SCOTT v. HARRIS.

The panel's opinion ignored crucial evidence in this case, a bodycam video. This video presents the best evidence of *when* Malagerio was seized. The video proves that Malagerio's action in opening his door was coerced by armed law enforcement's urgent commands he exit. Malagerio alerted the Fifth Circuit to this evidence in his appellate briefing. *See Reply Brief*, at 4-5. He noted the District Court's reliance on this evidence. ROA.608. Still, the Fifth Circuit and District Court factual findings are at odds with the video evidence. A second by second assessment is provided in Malagerio's briefing. *See Appellant's Brief*, at 18-22.

Scott v. Harris, 127 S. Ct. 1769 (2007), governs this issue.

> There is, however, an added wrinkle in this case: existence in the record of a videotape capturing the events in question. There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened. The videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals.

Id. at 1775. Like *Scott*, the video "clearly contradicts" that Malagerio voluntarily opened his door. The armed commands drew him outside. He was *ordered* outside.

The arresting officer testified he and his officers surrounded Malagerio's home at daybreak with guns drawn to conduct a "knock and talk." ROA.496-498. The "videotape tells quite a different story," however. *Id.* at 1775. The officers refused to leave when Malagerio did not immediately answer the door. The knock and talk ended and the officers remained – ordering Malagerio to "come out."

The panel failed to properly apply *Scott*'s admonition that a court "should not [rely] on such visible fiction; it should have viewed the facts in the light depicted by the videotape." *Id.* The Fifth Circuit's application of *Santana* relied on "visible fiction." A proper application of *Scott* merits this Court's GRANT of certiorari to ensure criminal defendants receive *Scott*'s full benefit.

If this Court accepts the Fifth Circuit's approach, *Scott* becomes a protection for law enforcement and an empty promise for the accused. Judges can rely on "visible fiction" without consequence. This Court should grant the petition to ensure appellate courts apply *Scott* equally to law enforcement and criminal defendants.

CONCLUSION

This is a case about limits. Do the words "[t]he right of the people to be secure in their persons [and] houses . . . against unreasonable searches and seizures" provide limits against armed law enforcement officers surrounding a person's home and ordering them to exit in order to enforce alleged civil law violations?

This Court, quoting Judge Frank, gave an apt description of what is at stake:

> A man can still control a small part of his environment, his house;
> he can retreat thence from outsiders, secure in the knowledge
> that they cannot get at him without disobeying the Constitution.
> This is still a sizeable hunk of liberty – worth protecting from

> encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.

Silverman, 365 U.S. at 511 n.4, citing *United States v. On Lee*, 193 F.2d 306, 315-316 (2nd Cir. 1951)(Frank, dissenting).

Laws, dating back to the Romans, protected against a man being "dragged from his home by any law enforcement official." *On Lee*, 193 F.2d at 316 n19 (providing historical sources enshrining the home with special protections). The Fifth Circuit's opinion ignores Justice Scalia characterization of the home ss "the first among equals." *Jardines*, 133 S. Ct. at 1414. The home is a sacred place of respite where privacy and property rights are paramount against governmental intrusion. The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. at 313. Yet this "entry" need not be actual or physical as *Kyllo* demonstrated. Rejecting a mechanical Fourth Amendment interpretation, *Kyllo* focused on the longstanding protections afforded the home. This Court:

> has said that the Fourth Amendment draws "a firm line at the entrance to the house," *Payton*, 445 U.S., at 590. That line, we think, must be not only firm but also bright which requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude . . . that no "significant" compromise of the homeowner's privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward.

Id. That long view requires uniform protection against armed law enforcement encounters at the home. It calls on this Court to give clarity on whether a doorway

arrest always constitutes a public arrest. It requires fidelity to our history and Constitutional heritage protecting all from an overreaching federal government.

Here, ICE officials accomplished through armed coercion what they could not accomplish without a judicial warrant or exigent circumstances. They flushed Malagerio out of his trailer home at daybreak, refusing to leave when Malagerio initially ignored their knock. Malagerio never intended to engage these officers. Their persistence left him little choice. The officers were armed. They were ordering him to come out. They refused to leave. So he opened the door to find a shotgun pointed directly at him. He didn't retreat. He didn't flee. He followed the armed commands of the officers. The bodycam video shows an urgent situation. It is remarkable to find this filmed encounter would qualify as a "voluntary" exit from the shelter of one's home. This is not *Santana*. It is more akin to *Welsh*. And under this Court's governing jurisprudence, the Fifth Circuit's opinion should not stand.

This petition is not just about the limits of law enforcement in enforcing civil law immigration violations. It is about Constitutional text and the limits of circumventing the warrant requirement. It is about returning to the Founders' unyielding belief that a man's home is his castle. To deny this petition is to accept disparate levels of Fourth Amendment protection within the United States. In 29 states, the Fourth Amendment protection aligns with the Founders' view and provides a clear and firm line at the entry to the home. In others, the Fourth Amendment will be less clear and less fulsome. ICE, and other law enforcement

officers, will have permission to engage in armed home encounters rather than secure a judicial warrant for the most sacred of Fourth Amendment spaces.

The Court's decision in this case will send a message about limits. Does the Fourth Amendment limit law enforcements' actions outside the home? This Court should grant the petition to clarify whether armed officers have a lawful right to surround a person's home and demand he come out. This case presents the Court with an opportunity to ensure that all individuals have the full force of Fourth Amendment protection envisioned by the Founders and enshrined by this Court.

MARY MARGARET PENROSE
Texas A&M School of Law
1515 Commerce Street
Fort Worth, TX 76102
(817) 212-4021 (phone)
(817) 212-3891 (facsimile)
megpenrose@law.tamu.edu

Attorney for Petitioner