UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL BRAY; JAYNE BRAY, individually and natural parents and guardians on behalf of AB, IB, MB,	:	**CASE NO. 12-4476**
EPIPHANY BRAY; BESEDA BRAY; PERSEVERANCE BRAY	:	
Plaintiffs-Appellants	:	**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO (Case No. 2:10-cv-054)**
vs.	:	
PLANNED PARENTHOOD COLUMBIA WILLAMETTE, INC., et al.	:	
Defendants	:	
and	:	
CHRIS RILEY, JOEL KIMMET	:	
Defendants-Appellees		

PETITION FOR REHEARING EN BANC

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure, Appellants Michael Bray, Jayne Bray, Epiphany Bray, Beseda Bray, Perseverance Bray, Alethea Bray and Isaac Bray (collectively "Appellants" or "Bray Family") hereby move for rehearing en banc relative to the *Opinion* and *Judgment* entered in this appeal on March 21, 2014. The required statement under FRAP 35(b) and a supporting memorandum follows.

REQUIRED STATEMENT FOR EN BANC DETERMINATION
FRAP 35(b)

The Panel decision conflicts with decisions from the United States Court of Appeals for the Sixth Circuit. This proceeding also involves a question of exceptional importance relating to the application of qualified immunity in cases where the Court has found that fundamental constitutional values have been violated by state actors.

The panel's qualified immunity analysis in this case departs from other precedent in this circuit involving cases where (i) no fact-specific precedent existed, but (ii) fundamental constitutional values were violated by state actors. The panel *Opinion* creates even more confusion in the already-too-elastic field of qualified immunity analysis, depriving law enforcement officials of necessary guidance for their conduct and depriving Section 1983 plaintiffs of any coherent basis for evaluating claims where police conduct is outrageous but unprecedented.

Understanding that en banc determination is disfavored, FRAP 35(a), the Bray Family respectfully submits that qualified immunity in the Fourth Amendment context of *warrantless* searches and seizures is getting less predictable with time and is an exceptionally important issue to clarify in this Circuit. When, as here, a panel sees fit to analogize law enforcement conduct to the Red Guard in Communist China, a conclusion by that same panel that the conduct was objectively reasonable under the Fourth Amendment converts qualified immunity principles to an unknowable mystery. This court should clarify in some regard that when police violate the "heartland of the constitutional guarantee" there is no place for qualified immunity.

MEMORANDUM

A. Statement of Relevant Facts.

The statement of facts most relevant to the warrantless search of the Bray home and the warrantless seizure of Mr. Bray, as pled in the First Amended Complaint, are set forth in pages 5-6 of the Panel *Opinion*. They are summarized briefly here.

On October 1, 2007, United States Marshalls Chris Riley and Joel Kimmet (Appellees) arrived at the Bray home to execute on a civil judgment that had been rendered in the United States District Court for the District of Oregon and later became the subject of a collection action in the United States District Court for the Southern District of Ohio, Case No. 2:10-CV-054. A writ of execution was issued in the Southern District of Ohio authorizing the marshals to seize a limited number of household items from the Bray home, including Mr. Bray's computer and writings. Prior to arriving at the Bray household, the marshals conspired with attorneys for the judgment debtor ("Planned Parenthood") to plan the raid of the Bray household. Going well beyond the scope of the writ, the marshals (armed and in flak jackets) detained Mr. Bray on a living room sofa for nearly 4 hours while they searched the entire Bray household and removed from the Bray home many items that were not included in the writ of execution. While the writ authorized a representative of Planned Parenthood to be present at the marshals' request "to assist in the identification of property subject to seizure," *Opinion* at 5, the marshals permitted attorneys and other yet-to-be identified agents of Planned Parenthood to roam

throughout and videotape the entire house and property. The marshals and Planned Parenthood searched through all of the papers and personal effects of Mr. Bray, including family photo items. Having been deprived of the opportunity of discovery, the Bray family has no way of knowing what the marshals or Planned Parenthood did or viewed in the home away from Mr. Bray's line of vision.

When Mrs. Bray and two of the Bray children arrived home during the course of the raid, their freedom of movement was also restricted and two teenage daughters were accompanied by the defendant marshals even when the sought to change their clothing or prepare lunch. The district court had not issued, and the marshals had not sought, any warrant for the detention of Mr. Bray or for a search of the Bray home.

B. Observations in the Panel Opinion.

The panel characterized the Marshals' raid of the Bray home with stinging language rarely employed in Fourth Amendment cases and never yet employed, to the Brays' knowledge, in a case where qualified immunity was awarded to state or federal actors. "If the facts alleged in the complaint are true, this case involves an incident that is more like home raids by Red Guards during China's Cultural Revolution than like we should expect in the United States of America. . . . [I]t is contrary to our fundamental norms. . . ." *Opinion* at 1.

Consistent with those observations, the panel noted that "[a]t the [Fourth] Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *Opinion* at 9. "The Fourth Amendment has drawn a firm line at the entrance of the house, and a search or seizure

in the home without a warrant is presumptively unreasonable." *Id.* "In this case, the unauthorized filming of the Brays' home was particularly unreasonable because the raid was unannounced and the filming occurred within the home itself. Moreover, because of the location and nature of the filming, the use of the camera posed a heightened risk of intimidating the family and capturing its intimate, unguarded moments." *Opinion* at 10.

The panel furthered observed "that the ostensible goal of the raid (identifying valuable goods to satisfy a monetary judgment) served as a pretext for intimidating the Brays and identifying disfavored books and papers for confiscation." *Opinion* at 10. The panel concluded that "[i]n light of concerns about free speech and the sanctity of the home and for the more specific reasons identified above, the marshals' alleged actions in executing the writ were unreasonable, and they violated the Bray's rights under the Fourth Amendment." *Opinion* at 11.

C. The Clarity of the Fourth Amendment's Protection of the Home.

The Fourth Amendment values violated by the marshals in this case are among the most clearly defined principles in American constitutional law. Unlike most of the cases cited by the panel in support of its grant of immunity, this case involves violations of home and personal privacy resulting from the *warrantless* and *uninvited* presence of government officials.

The essential purpose of the proscriptions of the Fourth Amendment is to impose a standard of reasonableness upon the exercise of discretion by government

officials to safeguard the privacy and security of individuals against arbitrary invasions. *Delaware v. Prouse*, 440 U.S. 648, 655-54 (1979). In *Welsh v. Wisconsin*, 466 U.S. 740, 748-49 (1984), the Supreme Court addressed the limits on warrantless entries and searches of the home:

> It is axiomatic that 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. 297, 313, 92 S.Ct. 2125, 2134, 32 L.Ed.2d 752 (1972). And a principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest. See *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 368-369, 92 L.Ed. 436 (1948). It is not surprising, therefore, that the Court has recognized, as "a 'basic principle of Fourth Amendment law[,]' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S., at 586, 100 S.Ct., at 1380. See *Coolidge v. New Hampshire*, 403 U.S. 443, 474-475, 91 S.Ct. 2022, 2042-2043, 29 L.Ed.2d 564 (1971) ("a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable, unless the police can show ... the presence of 'exigent circumstances' ").

The *Welsh* Court further explained:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences 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.... The right of officers to thrust themselves into a home is ... a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Welsh, at 748, n. 10 (citing *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)).[1]

As the Bray Family observed in its appeal brief, in light of the advance planning that obviously occurred to coordinate and conduct the raid, and in light of the fear that Mr. Bray obviously struck in the heart of *someone*, one wonders why the marshals did not simply seek a search warrant or some other order of the court expansive enough to protect them from any *perceived* security threat. The marshals' failure to do so was an unauthorized deviation from the orders contained in the Writ of Execution and a violation of core Fourth Amendment values.

D. Grounds For Rehearing En Banc.

In *Anderson v. Creighton*, 483, U.S. 635, 643-44 (1987), the Supreme Court explained the anomaly inherent in a finding that law enforcement conduct can be "unreasonable" for Fourth Amendment purposes but "objectively reasonable" for qualified immunity purposes. The Bray family understands and accepts the distinguishing principle, but they challenge the *Opinion* in this case because Sixth Circuit precedent in other qualified immunity cases supports the challenge.

According to Sixth Circuit case law, but in a very undefined way, there is unreasonableness and then there is *unreasonableness*. When the conduct of government officials has been deemed sufficiently egregious in other cases, even when the constitutional values are not nearly so well defined as the Fourth

[1] Plaintiffs are mindful that the Writ of Execution gave the Marshals the right to enter the Bray home, and the Fourth Amendment claims are not based on unlawful entry. The Fourth Amendment was violated when the Marshals exceeded the scope of the writ by arresting Mr. Bray and by searching the entire Bray home without a warrant.

Amendment values in this case, the Sixth Circuit has consistently found "clearly established statutory or constitutional rights which a reasonable person would have known," *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), in the absence of fact-specific precedent.

For example, in *Stemler v. City of Florence*, 126 F.3d 856, 866 (6th Cir. 1997), confronted with vagaries of a substantive due process claim, the court denied qualified immunity to police officers in a factually unique setting, explaining:

> The fact that the law may have been unclear, or even hotly disputed, at the margins does not afford state actors immunity from suit where their actions violate the **heartland of the constitutional guarantee**, as that guarantee was understood at the time of the violation.

Stemler at 867 (bold emphasis supplied).

Subsequent Sixth Circuit cases articulate the same principle. "[O]fficials can still be on notice that their conduct violates clearly established law even in novel factual circumstances….Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary for such a finding." *Hope v. Peltzer*, 436 U.S. 730, 741 (2002); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 902 (6th Cir. 2004).

In *Brannum v. Overton County School Board*, 516 F.3d 491 (6th Cir. 2008), this court stated that "some personal liberties are so fundamental to human dignity as to need no specific explication in our Constitution in order to insure their protection against government invasion." Brannum involved the placement of video cameras in boys and girls locker rooms at a middle school, ostensibly for security reasons. The

cameras recorded the students changing clothes. Absent fact-specific precedent, the court determined that "[t]hese notions of personal privacy are 'clearly established' in that they inhere in all of us." *Id*. at 499.

In *McBride v. Village of Michiana*, 100 F.3d 457 (6th Cir. 1996), a First Amendment retaliation claim brought by a journalist against officials in local government, the court rejected as "unjustified" the defendants' "dogmatic claim" that they were entitled to qualified immunity because there was no Supreme Court or Sixth Circuit authority on point:

> The easiest cases don't even arise. There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in those circumstances.

Id. at 460 (citing *K.H. Through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Circuit 1990)).

The panel Opinion in this case is more troubling still because of how little support it receives from the authority it cited in support of its grant of immunity. *Messerschmidt v. Millender*, 132 S.Ct. 1235 (2012), involved a challenge to the sufficiency of a warrant obtained to search a home. *Reichle v. Howards*, 132 S.Ct. 2088 (2013), involved the arrest of a man at a shopping mall where former Vice President Cheney was greeting the public. *Bailey v. United States*, 133 S.Ct. 1031 (2013), involved a motion to suppress evidence obtained after police detained the defendant a mile away from a home that was being search pursuant to a search warrant.

The panel also referenced *Michigan v. Summers*, 452 U.S. 692 (1981), *Opinion* at 11, a case discussed prominently in the *Bailey*. In particular, Bailey discussed the three important law enforcement interests identified in Summers to justify the detention of an occupant on the premises during the execution of a search warrant: officer safety, facilitating the completion of the search, and preventing flight. *Bailey* at 1038. However, the Bray panel rejected security or safety concerns as a reasonable basis for Mr. Bray's detention, *Opinion* at 9, Mr. Bray (and his counsel) could have facilitated the search had they been allowed to participate, *First Amended Complaint*, Paragraph 4.10, and "flight" by Mr. Bray was a non-issue by anyone's account. *Bailey* and *Summers* therefore cut against the grant of immunity for Mr. Bray's detention.

The panel offered four cases in support of the theory that the marshals in this case may have reasonably believed that it was lawful to allow Planned Parenthood agents to videotape the Bray home. Three of the cases are inapposite and would provide no reasonable basis for believing that videotaping the Bray home was permissible or reasonable during a non-consensual raid. *U.S. v. Davis*, 326 F.3d 361 (2nd Cir. 2003), *U.S. v. Wahchumwah*, 710 F.3d 862 (9th Cir. 2013), and *U.S. v. Brathwaite*, 458 F.3d 376 (5th Cir 2006), all involved surreptitious videotaping by government agents who had been invited into the defendants' homes or meetings under friendly pretexts. In *Marks v. Clarke*, 102 F.3d 1012 (9th Cir. 1996), the court

merely made the observation that the videotaping by one police officer "was indisputably performed for legitimate law enforcement purposes." Id. at 1032.[2]

Taken collectively, it is difficult to comprehend how any of the factually inapposite cases cited by the panel to justify the grant of qualified immunity could have reasonably inspired the marshals to believe that the warrantless arrest of Mr. Bray and the warrantless search/videotaping of the Bray home was anything but an assault on core Fourth Amendment values.

CONCLUSION

For all of the foregoing reasons, the Bray Family respectfully submits that this Petition for Rehearing En Banc should be granted.

Respectfully submitted,

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[2] Ironically, that same officer was denied immunity because further fact development could have exposed him to liability "for participating in a search that commenced without a warrant…." 102 F.3d at 1033.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April 2014 I filed this Petition for Rehearing En Banc electronically so that it will be served on counsel for all parties via the Court's electronic filing system. Parties may access this filing through the Court's system.

_/s/ Thomas W. Condit_____
Thomas W. Condit, Attorney