

526 U.S. 808 (1999)

Supreme Court, U.S.
FILED

JAN 27 1999

CLERK

No. 97-1927

In The
Supreme Court of the United States
October Term, 1998

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A.
McLEAN, RICHARD C. BRANZELL and
ROBERT PRIEKSAT

Petitioners

VS.

PAUL W. BERGER and EMMA R. BERGER,

Respondents

On Writ For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICUS CURIAE NATIONAL
ASSOCIATION OF SECURITIES AND
COMMERCIAL LAW ATTORNEYS (NASCAT)
IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Pursuant to this Court's Order dated November 9, 1998, the following questions are presented in this case:

1. Whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant?

2. Whether, if this action violates the Fourth Amendment, the officers are nonetheless entitled to defense of qualified immunity?

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BRIEF OF AMICUS CURIAE NATIONAL
ASSOCIATION OF SECURITIES AND
COMMERCIAL LAW ATTORNEYS (NASCAT)
IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE¹

The National Association of Securities and Commercial Law Attorneys (NASCAT) is an association of law firms and attorneys who primarily represent plaintiffs in civil actions brought in federal and state courts. NASCAT's members litigate cases seeking to recover damages on behalf of victims of violations of antitrust, civil rights, commercial, consumer, employee and retiree benefit, environmental, insurance and securities laws, as well as violations of federal and state constitutions. Thus, NASCAT's members represent victims of corporate and government abuse, schemes to defraud, defective products and anti-competitive conduct. In civil actions challenging such wrongdoing, NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers, modify corporate behavior and improve victims' access to justice.

NASCAT files this *amicus curiae* brief in support of Respondents and argues herein that the decision of the court below should be affirmed. Pursuant to Supreme Court Rule 37.1, NASCAT respectfully submits that this *amicus curiae* brief will bring to this Court's attention relevant matter and arguments concerning the purpose

¹ Pursuant to Supreme Court Rule 37.3(a), letters of consent to the filing of this *amicus curiae* brief received from Petitioners' and Respondents' counsel have been filed with this Court. In accordance with Supreme Court Rule 37.6, NASCAT certifies that no counsel for any party authored this brief in whole or in part and no person or entity other than *amicus curiae* made any monetary contribution to its preparation or submission.

and meaning of the Fourth Amendment by explicating the historical context of unreasonable searches and seizures known to the Framers of the Constitution. Our review of the briefs filed in this Court by Petitioners and their *amici* indicates that they have not addressed this critical issue, which this Court has repeatedly recognized must be carefully analyzed in Fourth Amendment cases.²

ARGUMENT

I. THE COURT BELOW CORRECTLY HELD THAT LAW ENFORCEMENT OFFICERS VIOLATED THE FOURTH AMENDMENT BY ALLOWING MEMBERS OF THE NEWS MEDIA TO ACCOMPANY THEM WHEN THEY EXECUTED THE WARRANT UPON RESPONDENTS' PROPERTY.

A. The Ninth Circuit's Analysis And Conclusions³

In the court below, Respondents claimed that Petitioners Kris A. McLean (an Assistant U.S. Attorney) and Rodney C. Hanlon, Joel Scrafford, Richard C. Branzwell and Robert Prieksat (special agents of the U.S. Fish and Wildlife Service) are individually liable for damages caused by their active participation in what the Ninth

² Page references to the briefs filed in this Court by Petitioners and their *amici* are stated herein as "Pet. Brief. at ___" (Brief for Petitioners), "Cable News Brief at ___" (Brief of Respondents Cable News Network, Inc., Turner Broadcasting System, Inc., Robert Rainey, Donald Hooper, and Jack Hamann in Support of Petitioners), and "ABC Brief at ___" (Brief of *Amicus Curiae* ABC, Inc. et al. in Support of Petitioners).

³ The opinion of the Ninth Circuit Court of Appeals in this case is reported as *Berger v. Hanlon*, 129 F.3d 505 (9th Cir. 1997), *cert. granted*, ___ U.S. ___, 119 S. Ct. 443 (1998), and is reproduced in the Petition for Writ of Certiorari ("Pet. App.") at pages 1a-26a.

Circuit termed the “commercial television/law enforcement enterprise” conducted at Respondents’ ranch. Pet. App. 9a [129 F.3d at 510]. Respondents contended that the resulting search violated their Fourth Amendment rights against unreasonable searches and seizures. The court below held that Respondents are correct and that the federal officers are not entitled to qualified immunity. Pet. App. 9a-13a [129 F.3d at 510-12].

In reaching those conclusions, the court below noted that “[t]his was no ordinary search.” Pet. App. 9a [129 F.3d at 510]. Rather,

[i]t was jointly planned by law enforcement officials and the media, as memorialized by a written contract, so that the officials could assist in the media obtaining material for their commercial programming. The television cameras invaded the residential property of the plaintiffs and the microphone invaded their home. This search stands out as one that at all times was intended to serve a major purpose other than law enforcement. Yet, the federal agents obtained the warrant without disclosing the contract, the planned press presence, or the media’s purpose.

Pet. App. 9a-10a [129 F.3d at 510-11] (emphasis added). After quoting the Fourth Amendment and explaining that it “protects against unreasonable searches and warrants that are obtained under false pretenses,” Pet. App. 10a [129 F.3d at 511], the Ninth Circuit emphasized that “[w]e must heed its strictures on the potential abuse of law enforcement powers.” *Id.*

The court below found support for its conclusions by surveying reported cases from the Second Circuit (*Ayeni*) and the Fourth Circuit (*Buonocore*) reaching the same

conclusion,⁴ and distinguishing cases from the Fourth, Sixth and Eighth Circuits cited by Petitioners. Pet. App. 10a-13a [129 F.3d at 511-12]. What the Ninth Circuit correctly found most significant, however, was the Fourth Circuit's statement in *Buonocore* that while it agreed with the Second Circuit's decision in *Ayeni*, "[w]e would so hold even if there were no reported authority directly on point," *Buonocore*, 65 F.3d at 356, because

the historical foundations of the Fourth Amendment . . . so plainly show[] that "[t]he right to be free from government officials facilitating a private person's general search" was " 'manifestly included' within the 'core' Fourth Amendment protection."

Pet. App. 11a [129 F.3d at 511] (emphasis added) (quoting *Buonocore*, 65 F.3d at 357).

The court below also cited and quoted from the decision of the Supreme Court of New York in *Anderson v. WROC-TV*, 441 N.Y.S.2d 220 (Sup. Ct. 1981), which stated in a case in which the media was sued for trespass:

If the news media were to succeed in compelling an uninvited and nonpermitted entry into one's private home whenever it chose to do so, this would be nothing less than a general warrant, equivalent to the writs of assistance which were so odious to the American colonists. William Pitt, later Lord Chatham, found this unchecked intrusion so offensive to a free people that he denounced it

⁴ See, e.g., *Ayeni v. Mottola*, 35 F.3d 680, 686 (2d Cir. 1994) (holding that qualified immunity does not protect federal officers where a Secret Service agent invited a TV news magazine into a private home to videotape a search); *Buonocore v. Harris*, 65 F.3d 347, 356 (4th Cir. 1995) (where a federal officer brings along an employee of a private corporation acting for the corporation's purposes, not in aid of the officer, the federal officer's conduct violates the Fourth Amendment and he is not entitled to qualified immunity).

in words which again bear repetition: "The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail – its roof may shake – the wind may blow through it – the storm may enter – the rain may enter – but the King of England cannot enter! – all his force dares not cross the threshold of the ruined tenement!"

There is no consent that I am aware of, whether created by law or by custom, which permits television cameras to enter where the sovereign may not.

441 N.Y.S. 2d at 226 (emphasis added). *See* Pet. App. 11a [129 F.3d at 511].

As set forth below, in assessing whether Petitioners' conduct violated Respondents' Fourth Amendment rights, and in determining whether Petitioners are entitled to qualified immunity in this case, this Court should – as it has traditionally done in search-and-seizure cases – examine the historical foundations of the Fourth Amendment, including the American colonists' struggle against the abuses occasioned by British Crown officers' use of general warrants and writs of assistance, and conclude that Respondents' right to be free from Petitioners' facilitating the news media's general search of their home was manifestly included within the "core" protections afforded by the Fourth Amendment. Accordingly, the decision of the court below should be affirmed.

B. In Determining Whether The Fourth Amendment Has Been Violated, This Court Traditionally Examines What Protections Against Unreasonable Searches And Seizures Were Afforded By The Common Law At The Time Of Framing The Constitution

Notwithstanding the undeniable emphasis correctly placed by the court below on the "historical foundations of the Fourth Amendment," Pet. App. 11a [129 F.3d at 511], one searches Petitioners' Brief in vain for *any* analysis of the Fourth Amendment's meaning or its historical foundations and context. *See* Pet. Brief at 10-48. (The same is true of the briefs submitted to this Court by Petitioners' *amici*. *See* Cable News Brief at 10-47; ABC Brief at 3-10.) NASCAT suggests that Petitioners' oversight of this seminal point is significant because in Fourth Amendment cases, this Court has traditionally analyzed what protections against unreasonable searches and seizures were afforded at the common law at the time of the framing of the Constitution.

As in the court below, *see* Pet. App. 10a, this Court's analysis begins with the Fourth Amendment, which 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.
