

**No. 16-3014**

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**In the United States Court of Appeals for the Tenth Circuit**

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ADLYNN K. HARTE ET AL.,  
*Plaintiffs-Appellants,*

v.

THE BOARD OF COMMISSIONERS OF THE COUNTY OF JOHNSON, KANSAS, ET AL.,  
*Defendants-Appellees,*

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On Appeal from the United States District Court  
for the District of Kansas, Judge John W. Lungstrum  
No. 2:13-cv-02586

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**JOHNSON COUNTY APPELLEES' RESPONSE IN OPPOSITION TO  
THE CATO INSTITUTE'S MOTION FOR LEAVE TO FILE BRIEF AS  
*AMICUS CURIAE***

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## **SUMMARY**

This case involves a narrow dispute about the validity of a particular narcotics search warrant and the reasonableness of its subsequent execution over four years ago. The Cato Institute (“Cato”), a libertarian think tank, apparently has broad policy concerns about drug laws and law enforcement’s efforts to enforce them. There are no drug laws or broad policies at issue in this case. It is about well settled law on the fourth amendment and qualified immunity. Cato’s boilerplate argument about the rise of the use of SWAT teams in America is inapposite because it is uncontroverted that there was no SWAT team or anything similar involved in this search. Additionally, Cato’s arguments that the deputies “broke the house” are factually unsupported—even Cato admits that Mr. Harte opened the door and no forced entry or property damage took place. Additionally, there is no record evidence that reasonably supports the claim that deputies searched in places beyond the scope of the warrant. Finally, the Tenth Circuit’s case law on the use of SWAT teams to serve a narcotics warrant is not only perfectly clear, those cases are entirely inapposite because they all involved SWAT teams (and none justify reversal based on the facts of this case). The Cato Institute’s motion for leave should be denied.

## **LEGAL STANDARDS**

Because the Johnson County Appellees did not consent, Federal Rule of Appellate Procedure 29 requires leave of the Court for Cato to file its *amicus* brief. The Tenth Circuit grants leave to file *amicus* briefs only when movants have an adequate interest and present useful arguments. *Hydro Resources, Inc. v. U.S. E.P.A.*, 608 F.3d 1131, 1143 n.7 (10th Cir. 2010). Additionally, the Court should not grant leave to file arguments, like Cato's, that would needlessly delay and complicate the proceedings. *Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist. No. 1*, 222 F.3d 208, 209 (5th Cir. 2000).

The Court should also deny Cato leave because the Hartes are already adequately represented by six attorneys on appeal, and Cato's arguments are largely redundant. *See Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997). Additionally, Cato has no "unique information or perspective that can help the court beyond the help that the lawyers for the parties are [un]able to provide." *Id.* They also do not raise any issues not already raised in the Hartes' brief. *Tyler v. City of Manhattan*, 118 F.3d 1400, 1404 (10th Cir. 1997) (leave may be granted when *amicus* raises issues not raised by a party).

## **ARGUMENTS**

### **1. The Harte search was not a "military-style raid"**

Cato begins its brief with a copy-and-paste, boilerplate outline of

questionable national statistics on the increase in “SWAT teams” and “paramilitary raids” nationally. Cato Br. 3–7; *see Cato’s Motion for Leave to File Amicus Brief on Petition for Writ of Cert.* to the U.S. Supreme Court in Case no. 15-193 (petition denied). However, these statistics have no bearing on this appeal.

The Hartes have already admitted that they misrepresented to the media and Kansas legislators that the Johnson County Sheriff’s Office (“JCSO”) used a SWAT team to conduct the search of their home on April 20, 2012. Dkt. 286, p. 42.<sup>1</sup> The JCSO does not even have a SWAT team. *Id.* The deputies in fact arrived in unmarked cars and most wore t-shirts and carried only pistols—there were no flashbangs, helmets, night vision goggles, rams knocking down doors, laser sights, or armored vehicles. Dkt. 340, p. 34 (court’s order). Rather, Mr. Harte opened the front door, and the house was cleared in a matter of minutes without incident. *Id.* The Hartes also admit no officer pointed a gun at anyone, damaged any of their property, put anyone in handcuffs, or used any unprofessional language. *Id.* at 35.

The truth is that felony narcotics search warrants like this one are often executed with little information about the occupants and result in dangerous standoffs. *See, e.g., United States v. Fuqua*, No. 14-5099, 2016 WL 285052, at \*1 (6th Cir. Jan. 25, 2016) (officers shot at by occupant during search for marijuana

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<sup>1</sup> The Johnson County Defendants have not yet filed their supplemental appendix, thus record references are to the district court’s docket entries.

use and distribution). In this case, even the Hartes had a cache of more than a dozen firearms and similar weapons, including an assault rifle, in their home with which they could have easily killed deputies, occupants, and neighbors. Dkt. 286, p. 44. Thus, Cato's statistics are not only irrelevant to the search team in this case but are factually unsupported by the record on appeal.

**2. Fourth Amendment permits the search team's tactics**

a. The deputies' entry did not violate any Fourth Amendment law

There is no question that protecting the sanctity of the home is among the Fourth Amendment's chief concerns. Cato admits that the deputies knocked and announced. Cato Br. at 8. However, it contends that the rule extends beyond Mr. Harte opening the front door to include the manner in which they entered the home afterward. *Id.* at 8–9. Specifically, Cato contends the deputies' entry still constituted "breaking" the home, despite zero evidence of forced entry or property damage. *Id.*

There is no support in this circuit (or any other) for that proposition and thus this argument is unhelpful to resolve this case. *See Hudson v. Michigan*, 547 U.S. 586, 589 (2006) ("The knock-and-announce rule gives individuals the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry.") (internal quotes omitted) (emphasis added). In fact, Cato's

reliance on *Semayne's Case*, 5 Co. Rep., at 91b, 77 Eng. Rep., at 195, is misplaced, as the U.S. Supreme Court in *Wilson v. Arkansas*, 514 U.S. 927, 935 (1995) noted that as of the time of the *Semayne* decision the knock-and-announce rule “had not been extended conclusively to the context of felony arrests.” There is no question that the deputies reasonably believed that the search of the Harte residence could uncover evidence of a felony. *See, e.g.*, K.S.A. § 21-5705(d)(7)(A) (level 3 felony for cultivating more than four marijuana plants).

b. The deputies did not act as if they had a general warrant

There is also no dispute that general warrants are prohibited. However, the only record evidence indicates the search was appropriate. Both the Hartes and Cato rely on the same quotes as evidence that the deputies’ search somehow exceeded the scope of the warrant. *See* Cato Br. at 20; Appellants’ Br. at 1. However, the law is clear that deputies must “flagrantly disregard the scope of the warrant” in order to unlawfully “expand it into an impermissible general search.” *United States v. One Hundred Forty-Nine Thousand Four Hundred Forty-Two & 43/100 Dollars (\$149,442.43) in U.S. Currency*, 965 F.2d 868, 875 (10th Cir. 1992). Deputies are allowed to look for evidence of any criminal activity so long as they are reasonably within the warrant’s plain-language limitations. *Horton v. California*, 496 U.S. 128, 137 (1990); *see also United States v. Ewain*, 88 F.3d

689, 695 (9th Cir. 1996) (“it no longer matters that the invited-along officer was looking for what he found, which thing was not described in the warrant. What matters is whether the officers looked in places or in ways not permitted by the warrant.”). Neither Cato nor Hartes have identified any record evidence demonstrating any deputy actually looked in an unreasonable location where evidence of marijuana cultivation, use, or distribution could not be found (i.e. a deputy rummaging through mail from their bank or the IRS).

Additionally, the quote about the canine is taken out of context. Deputy Cossairt actually stated that his primary concern was having the dog search the area in which two deputies thought they smelled marijuana and that additional searching would be acceptable to him, even if *the handler* was only interested in the dog’s experience. Dkt. 336, p. 46. Thus, this quote does not even support Cato’s position. Even if it did, it is illogical to argue that the use of a drug dog in any manner during a search for marijuana would exceed the scope of a warrant expressly authorizing the search for marijuana in any form. Thus, these arguments about the scope of the warrant are unhelpful as well.

**3. Tenth Circuit’s case law does not need clarification and this case would not provide that clarification regardless**

Cato contends that the Tenth Circuit should create a direct cause of action against the municipality to challenge any policy or policy-maker decision that

authorizes use of a SWAT-style team for a narcotics search warrant. Cato Br. at 23–28. The major flaw with this argument is that every case Cato cites actually involved a SWAT team. As already addressed, the JCSO does not have a SWAT team and its closest thing to a SWAT team, its “SERT” (Special Emergency Response Team) was serving a different search warrant. Dkt. 286, p. 42. “SWAT-style” and “paramilitary” are inartful, undefined terms Cato uses to obscure the point, but it is clear that this search is considerably less than those cases Cato wishes to “clarify.”

Additionally, there is no evidence that the dress, gear, and number of deputies used was pursuant to any formal JCSO policy or a decision by a final policy-maker, as required under *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). Rather, the only evidence is that then-Lieutenant Pfannenstiel made those decisions, and he does not qualify as a final policy maker. *Diversified Educ. Training And Mfg. Co. v. City Of Wichita*, 473 F. Supp. 2d 1140, 1147 (D. Kan. 2007) (citing *Randle v. City of Aurora*, 69 F.3d 441, 448 (10th Cir.1995)) (a final policy maker is one whose decision cannot be reviewed). Thus, this argument is futile because the municipality cannot be liable under *Monell*, and, even if there was an individual capacity claim against Pfannenstiel, he would be entitled to qualified immunity because the law was not clearly established.

*Courtney v. Oklahoma ex rel. Dep't of Public Safety*, 722 F.3d 1216, 1222 (10th Cir. 2013) (describing qualified immunity prong II). Thus, this case is not only too dissimilar, it would not even permit the clarity *Cato* claims is needed.

### **CONCLUSION**

*Cato*'s brief is based on boilerplate studies, inapplicable law, unsupported or erroneous facts, and no genuine interest in the protection of residences. Thus, it would not help this Court adjudicate this appeal; it is simply a lame attempt to morph this case into *Cato*'s libertarian mantra. Therefore, the Court should deny *Cato* leave to file its brief.

Respectfully Submitted,

FERREE, BUNN, RUNDBERG  
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### **CERTIFICATE OF COMPLIANCE WITH RULE 32(A)**

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the above and foregoing response complies with the typeface, type-style, and page limitations of Fed. R. App. P. 27(d)(1)(E) and (d)(2).

s/ Lawrence L. Ferree, III  
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Dated: April 25, 2016

**CERTIFICATE OF COMPLIANCE WITH  
GEN. ORDER OF MARCH 18, 2009**

Pursuant to the Court's *General Order on Electronic Filing* dated March 18, 2009, I hereby certify:

(1) The above and foregoing response complies with the privacy and redaction requirements of Fed. R. App. P. 25(a)(5) and Fed R. Civ. P. 5.2;

(2) The paper copies of the above and foregoing response submitted to the Court are exactly the same as the electronic copy submitted via the Court's CM/ECF system; and

(3) The electronic copy of the above and foregoing response has been scanned for viruses with the GFI Software Inc., VIPRE antivirus program, Business version 9.3.6000, virus definition file dated 4/25/16, engine version 3.9.2671.2 – 3.0; and according to the program, is free of viruses.

s/ Lawrence L. Ferree, III  
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Dated: April 25, 2016

**CERTIFICATE OF SERVICE**

Pursuant to Fed. R. App. P. 25(c), 10<sup>th</sup> Cir. Rule 25.4 and the Court's *General Order on Electronic Filing* dated March 18, 2009, I hereby certify:

An electronic copy of the above and foregoing response was furnished on the same date, through the Court's CM/ECF system, to:

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