No. 20-1299

In The

Supreme Court of the United States

ERIC S. CLARK,

Petitioner,

v.

CITY OF WILLIAMSBURG, KANSAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION 1:

Should the court adopt the original meaning of the Fourth Amendment by holding that a search of a home(castle) is unreasonable when (i.e., in those instances for which) the implied license operates as the functional equivalent of a general warrant (i.e., acts similar to a *writ of assistance*)?

QUESTION 2:

Regardless of whether it would be a reasonable or an unreasonable search of a home, plainly, is it a "search" for Fourth Amendment analysis purposes when the government *initiates* a physical intrusion into the curtilage of a home with a purpose of seeking information?

QUESTION 3:

With the lone historical exception of performing "service" of a warrant or civil process and apart from a search being unreasonable based on expectation of privacy and apart from whether or not the government's action exceeds what the implied license permits . . .

Is it an "unreasonable" search when the government *initiates* a "physical intrusion of the curtilage of home" without a permissible warrant (i.e., a warrant that contains a particularized description) and the objectively determinable purpose is to seek information about *a violation of law*?

QUESTIONS PRESENTED – Continued

QUESTION 4:

For a First Amendment claim that an ordinance unconstitutionality infringes on the fundamental right of free speech, at the summary judgment stage, ***is it proper to dismiss*** the claim for lack of standing by drawing an inference that the ordinance does not apply to petitioner because the notice of violation issued for the enforcement action does not directly cite the specific provision(s) being enforced even when the notice references "other objects" and "several signs" (rather than specifically identifying a "cross" and other non-political signs which are restricted by the ordinance)?

PARTIES TO THE PROCEEDINGS

Petitioner was Plaintiff and Appellant below. Respondent City of Williamsburg, Kansas, was Defendant and Appellee below.

RULE 29.6 DISCLOSURE

Petitioner certifies that no corporation is involved concerning the petitioner of this case.

RELATED CASES

Clark v. City of Williamsburg, No. 2:17-cv-02002-HLT, U.S. District Court for the District of Kansas.

Clark v. City of Williamsburg, No. 19-3237, U.S. Court of Appeals for the Tenth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Eric S. Clark respectfully petitions for a writ of certiorari to review the judgment of the federal Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The February 11, 2021 "ORDER" (10th Cir. App. Dk. 010110478713) by the federal Court of Appeals for the Tenth Circuit DENYING petitioner's petition for rehearing is in the Appendix at App. 91.

The January 14, 2021 "ORDER AND JUDGMENT" (10th Cir. App. Dk. 010110465214) by the federal Court of Appeals for the Tenth Circuit AFFIRMING the judgment of the District Court is in the Appendix at App. 1.

The July 18, 2019 "JUDGMENT IN A CIVIL CASE" (Dist. Kan. Dk. 156) issued by the federal District Court pursuant to the verdict issued on July 18, 2019 and the previous order (Dist. Kan. Dk. 114) issued May 9, 2019 concerning summary judgment motions is in the Appendix at App. 87.

The May 9, 2019 "MEMORANDUM AND ORDER" (Dist. Kan. Dk. 114) issued by the federal District Court which granted the defendant's motion for summary judgment on the Fourth Amendment claim and granted petitioner's motion for summary judgment on the First Amendment claim but limiting it to a single

provision even after severance, is in the Appendix at App. 44.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c). The denial of petition for rehearing by the federal Court of Appeals for the Tenth Circuit issued on February 11, 2021 and the time to file a petition for writ of certiorari with the U.S. Supreme Court runs from that denial.

RELEVANT CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment IV:

> "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."

Constitution of the United States, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to

petition the Government for a redress of grievances."

SUMMARY OF THE ARGUMENT

FOURTH AMENDMENT

Contrary to the holding of the District Court and the Tenth Circuit in this case that "no search" occurred, for Fourth Amendment analysis purposes *it is a search* when the government *initiates* physical intrusion into the curtilage of a home with a purpose of seeking information.

As to Fourth Amendment analysis, Petitioner offers that for any claim to an unreasonable search of a home, courts should follow a two part analysis: step one being determination of whether or not a "search" occurred and; step two being a determination of its "reasonableness."

As to step one, at the very least, a search occurs when the government *initiates* physical intrusion into the curtilage of a home with a purpose of seeking information.

As to step two, a search should not only be *per se* unreasonable without a special (as opposed to general) warrant but a "warrantless search" of a home should be *categorically unreasonable* when it is *initiated* by a *physical intrusion* into the home, or curtilage of a home, with a purpose of seeking information about *a violation of law*.

In summary, with the lone historical exception of seeking information needed to serve a warrant or civil process – and separate and apart from a search being unreasonable based on expectation of privacy and separate and apart from whether or not the government's action exceeds what the implied license permits – it is an "unreasonable" search when the government *initiates* a "physical intrusion of the curtilage of home" without a permissible warrant (i.e., a warrant that contains a particularized description) *and* the objectively determinable purpose is to seek information about ***a violation of law***.

In other words, a search of the home or curtilage is categorically unreasonable in those instances for which the "implied license" would operate like a general warrant search.

FIRST AMENDMENT

The district court (and Tenth Circuit) should have drawn an inference that the use of the terms "other objects" and "several signs" in the notice of violation issued for the enforcement action encompassed provision(s) being enforced because of the "cross" and that those provisions applied to petitioner's claim.

STATEMENT OF THE CASE

On May 9, 2019, the District Court entered an order (App. 44) which granted summary judgment for

respondent on petitioner's Fourth Amendment claim and granted summary judgment for the petitioner on his First Amendment claim.

A trial for damages concerning the First Amendment claim was held, and on July 18, 2019 a "JUDGMENT IN A CIVIL CASE" (App. 87) was issued pursuant to the verdict issued on July 18, 2019 and the previous order (App. 44) issued May 9, 2019.

Petitioner then filed a notice of appeal on October 16, 2019 (App. 89).

On January 14, 2021, the Court of Appeals for the Tenth Circuit issued an order and judgment (App. 1) affirming the district court. Petitioner then filed a petition for rehearing and on February 11, 2021, the Tenth Circuit DENIED the petition for rehearing (App. 91).

Petitioner now appeals to this Supreme Court of the United States for relief.

REASON FOR GRANTING THE PETITION

THIS DISPUTE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, "CLEARLY" SETTLED BY THIS COURT.

THIS CASE IS AN IDEAL VEHICLE TO DECIDE THE QUESTIONS PRESENTED AS THE FACTS OF THE CASE ARE SIMPLE, UNDISPUTED, AND

DIRECTLY ON POINT FOR THE QUESTIONS PRESENTED.

RESOLVING THE QUESTIONS PRESENTED WILL HELP CLEAR UP CONFUSION AMONG THE COURTS (FEDERAL, STATE, AND LOCAL).

Grant this petition because, despite *Jones* and *Jardines* (*United States v. Jones*, 565 U.S. 400 (2012); *Florida v. Jardines*, 569 U.S. 1 (2013)) mixed signals (especially footnote 4 of *Jardines*) have left much confusion in the courts, including splits between circuits and between State supreme courts and even between justices on the various high courts (including this very U.S. Supreme Court) not only about whether or not a search is unreasonable but even about whether or not a "search" of the home has even occurred at all.

Answering the questions presented could eliminate much, if not all, of the confusion about when a search occurs and when a search of the home and curtilage is unreasonable under the Fourth Amendment by providing much need clarity about those "implied license" searches (i.e., so called knock and talks) which are permissible (such as some of those mentioned by the dissent in *Jardines*) from those knock and talks which are impermissible (such as an approach in order to seek information about a violation of law – the very type of searches for which the Fourth Amendment was enacted to prohibit).

The facts of this case are relatively simple. Without a warrant, the government initiated physical intrusion onto the curtilage of petitioner's home for the

purpose of seeking information about a violation of law. The government issued petitioner a notice of violation and documented its subsequent visit seeking information about the alleged violation. Thus, the issue is that, even with documentary evidence in the record that the officer entered the curtilage with the purpose of seeking information about a violation of law (Notice of Violation) and; even with evidence in the record that the officer made contact with, and spoke to, the home's occupant, the district court found that "no search" occurred and the Tenth Circuit affirmed that "no search" finding ("we conclude that no search occurred" App. 25) opining that '[i]n short, no "search" occurred for purposes of the Fourth Amendment.' App. 26.

While there can be no doubt that the Fourth Amendment prohibits unreasonable searches based on expectation of privacy and unreasonable searches based on exceeding the implied license to approach a home, those are ancillary to the primary type of searches that the historical original meaning of the Fourth Amendment was intended to prohibit as being unreasonable searches – i.e., those searches for which the government initiates a physical intrusion into the curtilage of a home with the purpose of seeking information *about violation of law*.

Answering the "questions presented" in the affirmative would not preclude searches for violations of law from being "reasonable" so long as a constitutionally permissible warrant was obtained, nor would it prevent all warrantless "searches" of a home's curtilage

(which was of concern to the dissent in *Jardines*) so long as the purpose of those searches is not that of seeking information about a *violation of law*.

Such a prohibition on searches which have the purpose of *seeking information about violation of law* would more accurately and specifically identify why, in *Jardines*, there was not only a "search" but that it was an "unreasonable" search even if a dog sniff itself is not a search and even if the government never strayed from the route of access that any visitor would customarily use. This would certainly allow for a neighbor (or even police) to bring their dog to the front porch seeking information about borrowing cup of sugar. Further, this would correct the **errant *Jardines* reasoning** (in the problematic footnote 4) that "no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search." That is errant reasoning because a neighbor who seeks information about borrowing a cup of sugar might, immediately after initiating a physical intrusion onto the curtilage, remember that they recently bought some sugar and left it in the backseat of their own car and thus depart having done nothing but conduct a search.

Likewise, under petitioner's proffered meaning of the Fourth Amendment, an officer could initiate physical intrusion onto the curtilage in an approach to a home with a lost child seeking information about the location of the parents or guardians and moments later be hailed from across the street by the parents of the child and then the officer would leave having done nothing but conduct a search (and the "implied license"

invites that entry even if the entry is short lived and the purpose of entry was a search, albeit not a search for information about a violation of law).

Even accepting that footnote 4 is valid reasoning, if "no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search," it could equally be reasoned that "no one is impliedly invited to enter the protected premises of the home *with a group of others dressed in tactical gear to surround a house.*"

Is there an implied license for a group of people operating high definition body cams (which can observe better than human eyes) to approach and knock every two hours from sunrise to sunset to not only record but to ascertain occupancy habits as well as to perform plain view and plain sight activities in hope of finding a violation of law?

In *Jardines*, the presence of a specialty dog (trained to alert to drugs, etc.) was important to the analysis because it objectively revealed the officers' true purpose: to gather evidence. And petitioner would add that the gathering of evidence was about *violation of law*.

There can be no reasonable doubt that those who drafted the Fourth Amendment would have understood that the original meaning of the Fourth Amendment would prohibit such searches, after all, the historical version of a "knock and talk" used by the Crown was to seek information, including through approaching the home to speak about any property which

would be in violation of law. Thus, even if seeking information about a *violation of law* was not prohibited by the implied license under common law, enactment of the Fourth Amendment clearly shows the original meaning of the Fourth Amendment was to prohibit such searches as were based on the conveniently worded "writs of assistance" which permitted search of any property including the curtilage to discover if it contained any goods in violation of law. These "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 v. New York*, 445 U.S. 573, 583 (1980). These "hated writs"[1] spurred colonists toward revolution.[2]

Under precedent, exceptions to the warrant requirement **should be** few, specifically established, and **well-delineated**. The implied license is not well delineated in that it overlays the Fourth Amendment's protection against general warrant type of searches for violations of law at the home. Further, exceptions to the Fourth Amendment's warrant requirement are supposed to be "jealously and carefully drawn." *Jones*

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[1] *Stanford v. Texas*, 379 U.S. 476, 484 n.13.

[2] *Stanford*, 379 U.S. at 481 ("Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists."). *See also Marcus v. Search Warrant of Property*, 367 U.S. 717, 729 ("The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.").

v. United States, 357 U.S. 493, 499 (1958). But the "implied license" as described in *Florida v. Jardines*, 569 U.S. 1 (2013), which is one such exception (sometimes referred to as a knock and talk exception), has not been so jealously guarded by the courts and is so far from being "carefully drawn" that it is an exception which has swallowed the rule (i.e., the Fourth Amendment). This Court should not allow the exception to continue in abandon to do that which the Fourth Amendment was clearly enacted to prohibit. It is a well settled principle of law that the government cannot do indirectly what it is not permitted to do directly ("*Quando aliquid prohibetur ex directo, prohibetur et per obliquum*") yet the "general warrant" type of searches, like many of today's "knock and talks" which do no more than seek to search for violations of law, are evading the Fourth Amendment by being cloaked in a "knock and talk" smokescreen. Such searches became an egregious affront to the people of the colonies and history indicates that the States would not have ratified the newly crafted Constitution had the Fourth Amendment not prohibited such searches, the Fourth Amendment requiring particularized descriptions in warrants for that type of search. Massachusetts had barred the use of general warrants in 1756 and the Virginia Declaration of Rights (1776) explicitly forbade the use of general warrants. Future President John Adams, who was present in the courtroom on February 23, 1761 when James Otis (of Massachusetts) spoke in opposition to general warrants (the court ruling against Otis) viewed these events as "the spark in which originated the American Revolution." *See* page

59 Adams, Charles Francis; Adams, John (1856). The Works of John Adams, Second President of the United States: With a Life of the Author. Further, Article XIV of the Massachusetts Declaration of Rights, written by John Adams and enacted in 1780 as part of the Massachusetts Constitution, added the requirement that all searches must be "reasonable," and likely served to influence the language of the Fourth Amendment.

This understanding of the Fourth Amendment would alleviate the concerns of the dissent in *Jardines* about "Mail carriers and persons delivering packages and flyers" and "categories of visitors whom an occupant of the dwelling is [not] likely to welcome" and law enforcement when acting as "solicitors, hawkers and peddlers of all kinds." For example, this understanding would permit a government officer to enter the curtilage seeking information about whether the occupants of a home would donate to a police defense fund even if the occupant found such an approach to be objectionable.

The only potential departure from the *Jardines* dissent being that this historical understanding would prohibit "police officers who wish to gather evidence against an occupant (by asking potentially incriminating questions)" at least, ***when*** the officer first *initiates* physical entry into the curtilage of a home ***and*** the objectively identifiable *purpose* is to seek information about ***a violation of law***. (That an officer asks for consent to search after having initiated entry into the curtilage does not alter the purpose of the current search for which the officer is engaged).

This historical meaning would not preclude asking potentially incriminating questions during a permissible search, i.e., so long as there is no objectively identifiable purpose of seeking information about a violation of law.

An officer initiating physical intrusion of the curtilage of a home seeking information about whether the occupant would donate to a police defense fund (e.g., officer acting as a solicitor) would be permissible; however, if it is objectively shown that the soliciting is merely a pretext for performing a "plain view" (smell, hearing, etc.) search, i.e., has the ulterior purpose of seeking information about a violation of law, then it would be an unreasonable search because such a pretext cannot negate the actual purpose, unlike negation of those pretext searches which occur *outside the home and its curtilage*, this is so because of the fact that the pretext search of a home initiated by entry onto the curtilage would occur at a place the officer has no right to be when the officer objectively holds that ulterior purpose of seeking information about violation of law. In that respect, initiating entry of the curtilage to seek consent to search is plainly a pretext when the very purpose of obtaining consent is to then seek information about a violation of law.

No doubt many police departments will convert their specialized 'knock and talk' UNITS from seeking consent to seeking donations, etc. The ***courts should be on guard*** for such – e.g., there is no reasonable explanation for multiple officers (often tactically armed) to approach a house, much less surround a house, when

the real purpose of the approach is to simply seek a donation.

The Michigan Supreme Court held (*see People v. Frederick*, 500 Mich. 228, 895 N.W.2d 541 (2017), 2017 WL 2407097, that "any attempt to gather information," including simply asking the occupants for consent to search, combined with a constitutional trespass, constitutes a search under the Fourth Amendment noting that "[t]he officers here plainly approached the defendants' homes for the purpose of gathering information. The fact that the officers sought to gather their information by speaking with the homeowners rather than by peering through windows or rummaging through the bushes is irrelevant. What matters is that they sought to gather information by way of a trespass on Fourth-Amendment-protected property." *Id.* at 12.

While the Michigan Supreme Court held that a *search did occur* (i.e., "purpose of gathering information") but was unreasonable, in juxtaposition to that is the Tenth Circuit holding in the present case that *no search* occurred. It seems clear use of "no search" is not simply a metaphor for saying that the implied license was not exceeded because no such curtilage analysis was performed by the majority in this Tenth Circuit case.

Most importantly, there was evidence in the record in the present case that the *purpose* of entering the curtilage was to seek information about a *violation of law* (i.e., following up on a Notice of Violation previously issued to the home's occupant). The precedent of

the Tenth Circuit allows the very *general warrant* type of search which was a primary driving factor to adopt and ratify the Fourth Amendment.

The Tenth Circuit relied on *United States v. Carloss*, 818 F.3d 988, 993 (10th Cir. 2016) which found that "*Jardines* did not restrict knock-and-talks," but that conclusion swept too broadly partly because of the vagueness of what is considered to be a "knock and talk" and that conclusion placed too much reliance on the dissent in *Jardines*, i.e., reliance on the dissent's statement that "[P]olice officers *do not engage in a search* when they approach the front door of a residence and seek to engage in what is termed a 'knock and talk,' i.e., knocking on the door and seeking to speak to an occupant for the purpose of gathering evidence.") (emphasis added)

That quip of Justice Alito in the dissent of *Jardines* that "officers do not engage in a search" is a misapprehension or else a misstatement – which would be correct if stated as "officers do not engage in [an unreasonable] search when [. . .]"

Justice GORSUCH, who was then a Circuit Judge, filed a dissenting opinion in *Carloss* specifically identifying that a "search" occurs when the intent is "to obtain information." *See* dissent at 5:

'An officer approaching your home to return your lost dog or to solicit for charity may not be conducting a "search" within the meaning of the Fourth Amendment. But one calling to investigate a crime surely is. Neither is it necessary for officers to bring with them

drug sniffing dogs or thermal imaging technology: ***they "search" a home's curtilage simply by entering that constitutionally protected place to obtain information.***' (emphasis added)

Determination of whether a search is reasonable or unreasonable can only be undertaken if *a search occurred* so this confusion has left the courts dividing even though *United States v. Jones*, 565 U.S. 400 (2012) provides seemingly clear direction by stating that '[t]he Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a ***physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted.***' (emphasis added) This Supreme Court reiterated as much in *Collins v. Virginia*, No. 16-1027, 584 U.S. ___ (2018), by specifically citing to *Jardines* and paraphrasing it as "[w]hen a law enforcement officer ***physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred.*** *Jardines*, 569 U. S., at 11. Such conduct thus is presumptively unreasonable absent a warrant." (emphasis added)

Yet, as can be seen in the present case among many others, even after *Jones* (2012), *Jardines* (2013) and *Collins* (2018), division still persists in making the "search" versus "no search" differentiation. Perhaps partly due to some circuits feeling locked into following their own circuit precedent apart from *clear* overturning by this U.S. Supreme Court and both, footnote

4 of the majority and the reasoned dissent in *Jardines*, stand as cause for much of the *cloudiness*.

The Ninth Circuit perceives the search/no search issue as being *clear* as can be seen in *United States v. Dixon*, No. 19-10112, (9th Cir. 2020) ('our decision in *Currency* is "clearly irreconcilable" with the Supreme Court's property-based Fourth Amendment jurisprudence, and it cannot stand *to the extent that it concluded that* ***no search*** *occurred* on these facts. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003)' (emphasis added).

While the Ninth Circuit may have found the "search/no search" point of law to be clear, that does not mean all points made by *Jardines* is clear to the Ninth Circuit nor that the "search/'no search" point is clear to the vast array of other Federal Circuit Courts and State High Courts, including the Tenth Circuit which has cited that *Jardines* reiterated that a knock-and-talk itself is not a search for Fourth Amendment purposes: "[I]t is not a Fourth Amendment search to approach the home in order to speak with the occupant, *because all are invited to do that*. The mere purpose of discovering information in the course of engaging in that permitted conduct does not cause it to violate the Fourth Amendment." *Id.* at 1416 n.4 (citation, internal quotation marks omitted)). 'Thus, *Jardines* left our preexisting knock-and-talk precedent undisturbed.' *Carloss* at 8 (emphasis in original). Though there was a dissent by then circuit judge Gorsuch, that *undisturbed* 'preexisting knock-and-talk precedent' includes support for a finding of "no search" by both the District

Court in this case and as affirmed by the Tenth Circuit even though the officer "***physically intrude[d] on the curtilage to gather evidence***." *Jardines*, 569 U.S., at 11. That finding by the District Court and affirmed by the Tenth Circuit (albeit over dissent) is clearly in error in that, regardless of reasonable or unreasonable, ***there was a search*** as the term "search" is understood under the historical meaning of the Fourth Amendment.

In closing the majority opinion in the present case, the Tenth Circuit stated that '[a]lthough [officer] De La Torre approached Clark and asked to consensually speak with him, Clark immediately and repeatedly yelled at De La Torre to leave his property and De La Torre complied and left. Thus, De La Torre did not complete any "knock and talk" and gathered no information.' App. 26-27.

This reasoning should be found as irrelevant because the existence of a search does not turn on whether or not the search that was *initiated* was ultimately successful or not. Does an approach onto the curtilage seeking to investigate concerning a Notice of Violation constitute "a search"? It is clear that Judge Gorsuch would have said that it does.

The only question remaining then being, is it an "unreasonable" search? And, as a "general warrant" type of search for violation of law, it was unreasonable.

At minimum, a number courts, such as the 5th, 6th, 8th, 10th and 11th circuits, and some State High Courts, help to show the lingering confusion and the

failure to account for the original meaning of the Fourth Amendment.

In *Morgan v. Fairfield County*, No. 17-4027 (6th Cir. 2018), the Sixth Circuit found that "yes, the SCRAP unit searched the property for Fourth Amendment purposes" and that "[t]he SCRAP unit was concerned about general drug activity [i.e., violation of law] at [the specific house]." But that was not thought to be cause for finding the search impermissible. Though the court did invalidate the search for exceeding the implied license, the inquiry should have ended upon finding the purpose of the search was for discovery of a violation of law at the occupant's home.

The Eleventh Circuit, in *United States v. Walker*, 799 F.3d 1361 (11th Cir. 2015), even though being post-*Jardines*, citied to pre-*Jardines* circuit cases to uphold circuit precedent that a "small departure" or "minor departure" from the ordinary route of access that any visitor would use is permissible, much like the determination in this present case by the Tenth Circuit. Specifically, in *Walker*, officers entered a carport located next to the house, not because they thought that was the ordinary route of access (which the officers had used just two hours earlier) but "because they had reason to believe the house's occupant was sitting in the car parked inside." What if the officers had reason to believe the occupant was in the backyard (like the present case) even though the only door visible from any publicly accessible place was the front door, okay to go there (even though it might just be an occupant's young daughter sunbathing in the nude by a pool)? *Cf.*

United States v. Wells, 648 F.3d 671, 679-680 (8th Cir. 2011) (police exceeded scope of their implied invitation when they bypassed the front door and proceeded directly to the backyard).

As for minor departure concerning trespass via the implied license, *cf. U.S. v. Richmond*, No. 17-40299, 5th Cir. (2019) ("relatively minor" act of tapping tires is thus a trespass.)

In addition, in *Walker* it was noted that '[t]he scope of the knock and talk exception is limited in two respects. First, it ceases where an officer's behavior "objectively reveals a purpose to conduct a search." *Id.* at 1416–17' referencing *Jardines*. Even if the *Walker* court had found that a search did occur, that part, linked to reliance on *Jardines*, is overly broad (i.e., overly limiting of the scope of the implied license) as applied to the original meaning of the Fourth Amendment in that many objectively revealed purposes of searching should be permissible (such as many of those purposes mention by the dissent in *Jardines*) as those many purposes can be exclusive of searching for *information about a violation of law.*

The term "knock and talk" is not a bright line or even a rule for that matter except to the extent it is sometimes used like a synonym for "implied license search" rule/exception. Clearly, some "knock and talk" approaches, i.e., approaches seeking information, do not violate the Fourth Amendment because of law enforcement engaging only in activities that an ordinary citizen would engage in while on someone else's

property. That said, the converse is also true, i.e., that some "knock and talks" do violate the Fourth Amendment because of law enforcement engaging in activities to which the *general warrant* prohibition of the Fourth Amendment applies. Specifically, when the activities involve *searching for information about violation of law*.

Increasingly, these general warrant type of searches (certain knock and talks) are growing in number without any check by the courts to even recognize them as searches let alone impermissible searches. That is the crux of this petition and it is of extreme importance that it be addressed because the number of innocent people killed during such searches is growing as well.

Under South Carolina's similar unreasonable search provision in its State Constitution, the Supreme Court of South Carolina held that "law enforcement must have reasonable suspicion of illegal activity before approaching the targeted residence and conducting the 'knock and talk' investigative technique." *See State v. Counts*, South Carolina Supreme Court No. 27546, filed July 8, 2015. That moves closer to the original meaning of the Fourth Amendment but is yet a step away – that is, reasonable suspicion without a warrant is not sufficient to search *within the curtilage* under the original meaning of the Fourth Amendment, rather, a warrant based on probable cause is needed (apart from the presence of any other valid exceptions such as exigency). There was a departing concurring opinion of two justices of that South Carolina court which appears to stem from the vagueness of the term

"'knock and talk' investigative technique." The South Carolina court's majority's use of 'investigative technique' seems to imply 'objective intent to obtain information' and the majority did not mention that a separate exception (exigency, etc.) might apply to some such 'knock and talks.' The departing view in that case stating the concern as "Most particularly, I would not prevent law enforcement from conducting welfare checks at residences." Under petitioners proffered view of the original meaning of the Fourth Amendment, such welfare checks would not fall under the *general warrant* prohibition against *seeking information about violation of law*, thus, it is not the "investigative technique" at issue but rather the purpose for engaging in the investigation.

As for someone bringing a dog with them onto the curtilage of a home, again, it is not the "investigative technique" at issue but rather the purpose for engaging in the investigation.

In summary, the court should adopt the historical original meaning of the Fourth Amendment as prohibiting the government from *initiating* physical intrusion into a home's curtilage with a purpose of *seeking information about a violation of law.*

And, after having adopted that historical original meaning, the Court should reverse the Tenth Circuit and the District Court. The Tenth Circuit and others of the "no search" courts would then have good reason to overrule their own similar "no search" precedents.

FIRST AMENDMENT

The District Court and the Tenth Circuit failed to apply longstanding precedent of this U.S. Supreme Court concerning summary judgment on a First Amendment claim.

In a deposition, the code enforcement officer identified a "cross" and another non-political sign as being in violation of the sign regulations and that information was noted in the summary judgment pleadings.

Petitioner being the non-movant, at the least, the district court (and Tenth Circuit) should have drawn an inference that the use of the terms "other objects" and "several signs" in the Notice of Violation issued for the enforcement action encompassed provision(s) being enforced beyond just "political" signs.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 16, 2021