No. 17-321

In the Supreme Court of the United States

JAMES ROBERT CHRISTENSEN, JR.,
Petitioner,

v.

TENNESSEE,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee

BRIEF IN OPPOSITION

Herbert H. Slatery III
Attorney General and Reporter
State of Tennessee

Andrée S. Blumstein
Solicitor General

Sarah K. Campbell
Special Assistant to the Solicitor General and the Attorney General
Counsel of Record

Jonathan David Shaub
Assistant Solicitor General

Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 532-6026
sarah.campbell@ag.tn.gov

Counsel for Respondent

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether the posting of a "No Trespassing" sign on private property is sufficient to revoke a law enforcement officer's implicit license to enter the property to conduct a "knock and talk."

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INTRODUCTION

Petitioner contends that the question presented warrants review because, in the wake of this Court's decision in *Florida v. Jardines*, 569 U.S. 1 (2013), federal and state courts have disagreed about whether the posting of a "No Trespassing" sign is sufficient to revoke the implicit license of a law enforcement officer to approach the front door of a home and knock. But only one federal court of appeals and one state court of last resort have addressed that precise question—the Tenth Circuit in *United States v. Carloss*, 818 F.3d 988 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 231 (2016), and the Tennessee Supreme Court in this case. And those two decisions are in complete accord. Both the Tenth Circuit and the Tennessee Supreme Court agree that whether the implicit license to conduct a "knock and talk" has been revoked requires an examination of the totality of the circumstances, in which the presence of a "No Trespassing" sign is a relevant, but not dispositive, factor. *See Carloss*, 818 F.3d at 994-97; Pet. App. 14-34. That approach is entirely consistent with a long line of this Court's Fourth Amendment precedents.

In an attempt to manufacture disagreement among the lower courts, petitioner relies on federal and state court decisions that predate this Court's decision in *Jardines*, that evaluate "No Trespassing" signs only under the distinct "reasonable expectation of privacy" test from *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring), or that were decided under state constitutional provisions. But those decisions do not implicate the question presented. And, in any event, the analysis of those cases does not

conflict with that of the Tennessee Supreme Court. There is simply no division of authority that warrants this Court's review.

Even if the question presented were otherwise worthy of certiorari, this case is not an appropriate vehicle by which to address it. Among other obstacles to review, this case involves factual disputes regarding the number and visibility of the "No Trespassing" signs on petitioner's property, an unresolved, antecedent legal issue about whether the area where the signs were located was within the curtilage of petitioner's residence, and an alternative ground for affirmance that was not addressed by the Tennessee Supreme Court. If the Court is interested in considering the question presented, these obstacles make this case a poor candidate in which to do so. Moreover, the Court may wish to await a vehicle in which the question presented is not limited to the property-based, implicit-license analysis.

Nor is there any reason for this Court to review the Tennessee Supreme Court's fact-based conclusion that the "No Trespassing" signs at issue in this case were insufficient to revoke the implicit license. The "No Trespassing" signs on petitioner's rural property were located in tall grass near the beginning of an unobstructed driveway that was sixty to seventy yards from his trailer. The signs included additional warnings against hunting and fishing and were accompanied by signs prohibiting spraying and warning individuals to keep off the grass. Viewed in context, petitioner's "No Trespassing" signs conveyed to a reasonable passerby only that unauthorized use of his property was prohibited; they did not revoke the

implicit license to approach the front door for the legitimate purpose of speaking to the home's occupant.

For all of these reasons, the petition should be denied.

STATEMENT OF THE CASE

A Tennessee jury convicted petitioner James Robert Christensen, Jr., of promoting the manufacture of methamphetamine, initiating the manufacture of methamphetamine, resisting arrest, and two counts of possessing a firearm during the commission of a dangerous felony. Pet. App. 3, 12. Before trial, petitioner moved to suppress evidence that law enforcement officers had seized from his residence after entering his property without a warrant to conduct a knock and talk. Pet. App. 3. Petitioner argued that the officers' warrantless entry onto his property violated the Fourth Amendment because he had placed "No Trespassing" signs on his property. Pet. App. 3. The Tennessee Supreme Court affirmed petitioner's convictions on appeal, holding that the officers did not violate petitioner's Fourth Amendment rights when they "drove down [his] unobstructed driveway past 'No Trespassing' signs and approached his residence" to conduct a knock and talk. Pet. App. 37.

A. Factual Background

On August 3, 2013, narcotics investigators Michael Green and Brent Chunn learned that an individual who was suspected of manufacturing methamphetamine, Mariah Davis, had purchased pseudoephedrine at a local grocery store. Pet. App. 4. The investigators had also received a tip from an informant that Davis's boyfriend, Cody Gatlin, was

manufacturing methamphetamine. Pet. App. 4. Based on that information, the investigators drove to a residence belonging to Gatlin's father to speak with Davis and Gatlin. Pet. App. 4. The investigators did not obtain any warrants. Pet. App. 3.

When the investigators arrived at the residence, they spoke first to Davis. Pet. App. 4-5. Gatlin was not at the residence when investigators arrived; he was at petitioner's residence next door, about forty or fifty feet away. Pet. App. 5. When Gatlin eventually walked over from petitioner's residence, the investigators observed petitioner looking "out [his] screen door over to where [they] were." Pet. App. 5 (alterations in original). Gatlin told the investigators that he had taken the pseudoephedrine next door to petitioner, who was in the process of using it to make methamphetamine. Pet. App. 5.

After learning that methamphetamine was being manufactured next door, the investigators backed out of the driveway and drove thirty or forty feet to the beginning of petitioner's gravel driveway. Pet. App. 5. Petitioner's driveway was about sixty to seventy yards long and was surrounded by very tall grass. Pet. App. 5. Investigator Green, who is over six feet tall, estimated that the grass "c[a]me up probably to [his] chin." Pet. App. 5. The driveway was not blocked by a gate or any other physical obstructions. Pet. App. 12.[1]

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[1] The petition states that petitioner's "property consists of more than three acres of land," Pet. 28, but the record is silent regarding the size of the property.

Several signs were mounted on a post in the tall grass alongside the beginning of petitioner's driveway. The sign mounted near the top of the post read, in all capital letters, "no trespassing[,] hunting[,] or fishing." Pet. App. 60. Directly below was a sign that read "organic farm[,] do not spray." R., Vol. 2, Ex. 2.[2] And below that were signs that read "water lines[,] septic lines[,] small trees + plant seedlings[,] so keep off the grass." R., Vol. 2, Ex. 2. Investigator Green recalled seeing the sign warning against spraying, but neither he nor Investigator Chunn saw the "No Trespassing" sign. Pet. App. 5. A video camera located on the dash of the investigators' car recorded the following image of the post and signs:

[2] Citations to "R." are to the record on appeal.

R., Vol. 3, Ex. 12; *see also* R., Vol. 2, Ex. 1; Pet. App. 59.[3]

No other "No Trespassing" signs were visible on the video recorded by the investigators' dash camera, and the investigators did not recall seeing any other signs as they entered petitioner's property on August 3, 2013. Pet. App. 55-56, 75 n.5. Petitioner testified at trial, however, that he had "four or five" such signs on his property. Pet. App. 10. And a local resident recalled seeing several "No Trespassing" signs when she passed by petitioner's property on July 13, 2013, while "witnessing" with her church. Pet. App. 10. A photograph was admitted into evidence showing four signs located on the edge of petitioner's property, near the roadway, but that photograph was taken at a later date when snow, rather than tall grass, covered the property. R., Vol. 2, Ex. 3; R., Vol. 4 at 59-60. The photograph depicts two signs that read, "private property[,] no trespassing," one sign that reads "organic farm[,] do not spray" in English and Spanish, and another sign that is illegible. R., Vol. 2, Ex. 3.

Two trailers were located at the end of the driveway, one occupied by petitioner and the other by petitioner's mother. R., Vol. 4 at 9. The investigators parked their car about fifteen to twenty yards from petitioner's trailer and walked through the yard and up some steps to the front door. R., Vol. 4 at 9-11. As the investigators approached, petitioner opened the door and came out to meet them. Pet. App. 5-6.

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[3] A clearer photograph of the signs, taken at a later date when the tall grass was no longer present, was also admitted into evidence. R., Vol. 2, Ex. 2; R., Vol. 3, Ex. 13; R., Vol. 4 at 25-29, 58-59.

When petitioner opened the door, the investigators smelled an overwhelming odor associated with the manufacture of methamphetamine. Pet. App. 6. From his training in methamphetamine production, Investigator Green knew that active methamphetamine labs are volatile and can ignite quickly. Pet. App. 6. Although the investigators lacked a search warrant and had been unable to obtain petitioner's consent to enter his trailer, they forced their way into the residence to dismantle the active methamphetamine lab and prevent it from exploding. Pet. App. 6-7. While Investigator Chunn entered the trailer, Investigator Green struggled with petitioner and eventually handcuffed him. Pet. App. 7. At some point after Investigator Green began trying to detain petitioner, petitioner told him to get off his property. Pet. App. 7.[4]

Investigator Green eventually located the active methamphetamine lab in petitioner's freezer and brought it outside, where the investigators had to relieve pressure from the lab to prevent it from exploding. Pet. App. 8. Investigator Green discovered three firearms in the trailer—a loaded sawed-off shotgun right inside the door and a loaded shotgun and unloaded pistol on the couch. Pet. App. 8. The investigators also discovered ten inactive methamphetamine labs and various ingredients used to manufacture methamphetamine. Pet. App. 9.

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[4] Petitioner testified that he told the investigators to leave his property as they approached his front door, but neither investigator recalled him telling them to leave at that point. Pet. App. 7, 61.

B. Procedural Background

A Tennessee grand jury indicted petitioner on one count of resisting arrest, Tenn. Code Ann. § 39-16-602; one count of promoting the manufacture of methamphetamine, *id.* § 39-17-433; one count of initiating the manufacture of methamphetamine, *id.* § 39-17-435; and two counts of possessing a firearm during the commission of a dangerous felony, *id.* § 39-17-1324. Pet. App. 3; R., Vol. 1 at 2-3. Before trial, petitioner moved to suppress the evidence against him on the ground that it was obtained in violation of the Fourth Amendment to the U.S. Constitution and article I, section 7, of the Tennessee Constitution.[5] Pet. App. 3. Petitioner argued that the investigators' initial warrantless entry onto his property to conduct a knock and talk was unlawful in light of the "No Trespassing" signs that were posted near his driveway. Pet. App. 3.

The trial court denied the motion to suppress. Pet. App. 3. The trial court found that, before the investigators entered petitioner's property, they "knew of the purchase and possession of materials used to manufacture meth and [had been] told the materials were delivered to [petitioner's] home next door and that an active meth lab was in progress." Pet. App. 98. This knowledge, the trial court reasoned, gave the investigators "authority to investigate despite the no trespassing sign." Pet. App. 98. The trial court did not make any express findings regarding the number of

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[5] The Tennessee Supreme Court has held that article I, section 7, of the Tennessee Constitution is "identical in intent and purpose with the Fourth Amendment." *Sneed v. State*, 423 S.W.2d 857, 860 (1968).

"No Trespassing" signs on petitioner's property or whether those signs were visible when the investigators approached petitioner's residence. The court simply concluded that, "[w]hile the no trespassing sign evinced an expectation of privacy, it was not a bar from the officers[']investigating an ongoing dangerous highly combustible activity." Pet. App. 97. The trial court further concluded that, once the investigators "approached the trailer and smelled the strong odor of an active meth cook," exigent circumstances justified the warrantless search of petitioner's residence. Pet. App. 98. Petitioner proceeded to trial and was convicted as charged. Pet. App. 12. The trial court sentenced him to an effective sentence of three years' incarceration, followed by eight years of probation. Pet. App. 12.

On direct appeal, a divided panel of the Tennessee Court of Criminal Appeals affirmed the trial court's denial of petitioner's motion to suppress. Pet. App. 12. The majority "examine[d] the totality of the circumstances . . . to determine whether [petitioner] revoked the implied invitation of the front door" and concluded that "a small sign reading 'no trespassing[,] hunting[,] or fishing,' posted in a field next to [petitioner's] driveway that is difficult to see when driving down the driveway" was insufficient "to revoke the implied invitation." Pet. App. 69, 75-77.[6] The majority reasoned that, especially when located on a rural property, a "No Trespassing" sign is "generally

[6] The court acknowledged testimony that there were multiple "No Trespassing" signs on the property but concluded that the other signs were "not visible to someone approaching the house using the driveway, as the officers did in this case." Pet. App. 75 n.5.

intended to prevent people from unauthorized use of the property, not to prevent a casual visitor from approaching the residence." Pet. App. 76-77.

With respect to the investigators' subsequent search of petitioner's residence, the majority held that the active methamphetamine lab gave investigators probable cause and exigent circumstances to enter petitioner's residence and remain there until the lab was dismantled and that evidence other than the active lab was properly seized under the plain view doctrine. Pet. App. 77-80. The majority did not address the State's argument that the exigent circumstances exception also justified the investigators' initial entry onto petitioner's property.

Judge Williams concurred in part and dissented in part. Pet. App. 84. He "agreed with the majority that the totality of the circumstances in this case should be examined" but disagreed with the majority's application of that standard. Pet. App. 85. Judge Williams found that there were "nine signs on [petitioner's] property"—two at the edge of the property near the roadway that read "private property" in large letters and "no trespassing" in small letters and that were "easily visible to passersby"; the signs on the post beside the driveway that were visible on the investigators' dash camera; a sign near the roadway that read "do not spray"; and another sign on a tree that could not "be read on this record." Pet. App. 88-89 & n.2. In Judge Williams's view, a "simple ['No Trespassing'] sign, whether purchased or homemade, is a clear expression of one's intention to exclude others" and was therefore sufficient to create a legitimate expectation of privacy. Pet. App. 90. Judge

Williams would have rejected the State's argument that "exigent circumstances existed to allow the initial entry onto the defendant's property." Pet. App. 85 n.1.

The Tennessee Supreme Court granted petitioner permission to appeal on the suppression issue and requested briefing on "(1) the effect, if any, of the 'unlicensed physical intrusion' definition of a search as articulated in *Florida v. Jardines*, [569 U.S. 1] (2013); and (2) if the officers' entry into the curtilage of [petitioner's] home constituted a search, whether it was supported by probable cause and the existence of exigent circumstances." Pet. App. 12. In a divided opinion, the Tennessee Supreme Court affirmed the denial of the motion to suppress. Pet. App. 1-2. As an initial matter, the majority "assume[d], without deciding, that [petitioner's] driveway was part of the curtilage," because whether the driveway was within the curtilage did not impact its resolution of the issue before it—"whether Investigators Green and Chunn engaged in an unconstitutional intrusion onto [petitioner's] property when they drove down [his] unobstructed driveway near which were posted 'No Trespassing' signs." Pet. App. 14, 16.

Turning to that issue, the majority explained that a "so-called 'knock-and-talk' is not a 'search' as that term is understood within the context of the Fourth Amendment, at least if the intrusion is conducted within the scope of the implicit license recognized by the [U.S.] Supreme Court in *Jardines*." Pet. App. 18. But the majority acknowledged that, because "'the knocker on the front door is treated as an *invitation or license* to attempt an entry,' . . . a homeowner may take actions to *revoke* or otherwise limit that invitation or

license." Pet. App. 20 (emphasis in original) (quoting *Jardines*, 569 U.S. at 8). Whether the investigators' initial entry on petitioner's property was a search thus turned on "whether posting 'No Trespassing' signs near an unobstructed driveway is an express order sufficient to revoke or limit" the invitation or license. Pet. App. 21.

The majority examined decisions from other jurisdictions that had considered the impact of "No Trespassing" signs on the validity of knock and talks and found that "[m]ost jurisdictions that have considered the issue appear to [have held] that 'No Trespassing' signs, in and of themselves, will not invalidate a knock-and-talk." Pet. App. 23. The majority determined that the appropriate inquiry was whether "under the totality of the circumstances," an "objectively reasonable person [would] conclude that entry onto [petitioner's] driveway was categorically barred." Pet. App. 29. The majority emphasized that its "approach recognize[d] the possibility that a sign, under the right circumstances, *could* be sufficient to revoke the implied license" and that it was therefore "not adopting a per se rule." Pet. App. 29 n.9.

Under the circumstances of petitioner's case, however, the majority concluded that the "No Trespassing" signs near petitioner's unobstructed driveway were insufficient to revoke the implicit license to conduct a knock and talk. Pet. App. 33. The majority reasoned that the "No Trespassing" signs "simply ma[d]e explicit what the law already recognizes: that persons entering onto another person's land must have a legitimate reason for doing so or risk being held civilly or perhaps even criminally,

liable for trespass." Pet. App. 31. But "[o]fficers engaging in legitimate police business will conclude, correctly, that they are not engaging in a 'trespass' when they approach a front door to conduct a knock-and-talk." Pet. App. 32.

The majority also considered whether the investigators' entry onto petitioner's property amounted to a search under "the 'reasonable expectation of privacy' test set forth in *Katz v. United States*, 389 U.S. 347 (1967)." Pet. App. 34. "Even if [petitioner] had an actual, subjective expectation that his signs would keep all persons from entering his property under all circumstances," the majority explained, "a reasonable member of society would not view that expectation as reasonable and justifiable." Pet. App. 36. Instead, "a reasonable member of society would view [petitioner's] 'No Trespassing' signs as simply forbidding any unauthorized or illegitimate entry onto his property." Pet. App. 36. Because any subjective expectation of privacy petitioner had was unreasonable, he was not entitled to relief on that basis either. Pet. App. 36.

The majority found it unnecessary to determine whether the investigators' initial entry onto petitioner's property was supported by probable cause and the existence of exigent circumstances. Pet. App. 37. And because petitioner's counsel had conceded at oral argument that the search was "supported by exigent circumstances and probable cause," the majority also declined to address the constitutionality of the investigators' subsequent search of petitioner's residence. Pet. App. 37 n.12.

Justice Lee dissented. Pet. App. 38. Justice Lee acknowledged that whether a particular "No Trespassing" sign is sufficient to revoke the implied license "depend[s] on the circumstances." Pet. App. 46. In her assessment, however, petitioner had "sufficiently revoked the public's implied license to enter his property by posting multiple 'No Trespassing' and 'Private Property' signs near the entrance to his driveway." Pet. App. 41. She found that the signs "were clearly visible to anyone approaching [petitioner's] driveway from the main road" and that, "[e]ven in the absence of a fence or other physical barrier, the signs effectively communicated [his] intent to protect his privacy and exclude others from approaching his home." Pet. App. 45-46. Justice Lee also would have found a Fourth Amendment violation under the reasonable expectation of privacy test. Pet. App. 49-50.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Among the Federal Courts of Appeals or State Courts of Last Resort on the Question Presented.

Federal courts of appeals and state courts of last resort are not divided on the Fourth Amendment question decided by the Tennessee Supreme Court. With respect to law enforcement officers' "implicit license" to "approach a home and knock," *Florida v. Jardines*, 569 U.S. 1, 8 (2013), courts agree that (1) an individual has the ability to revoke the officers' implicit license and (2) whether revocation has occurred depends on the specific facts of the case.

Petitioner asserts that "federal circuits and state courts alike are split on whether a 'No Trespassing' sign is sufficient to revoke the government's implied license to enter property." Pet. 10. Not so. Only one federal appellate court has addressed the issue, *see United States v. Carloss*, 818 F.3d 988 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 231 (2016), and the Tennessee Supreme Court expressly relied on and agreed with that court's approach, Pet. App. 26-30. The state court decisions on which petitioner relies do not support his assertion either. They do not address the question presented at all, let alone in a manner contrary to the Tenth Circuit or the Tennessee Supreme Court. To the extent that state and federal courts have addressed related issues under the Fourth Amendment and counterpart state constitutional provisions, moreover, they have applied the same fact-dependent, totality-of-the-circumstances approach that the Tennessee Supreme Court adopted, in which the presence or

absence of a "No Trespassing" sign is relevant but not dispositive. Certiorari is thus not warranted.

A. The Tennessee Supreme Court's Decision Does Not Conflict with Any Federal Court Decision.

Petitioner relies on three federal court decisions in the hope of establishing that "[f]ederal circuits are fraught with inconsistencies" about this issue. Pet 20. Only two address the question presented, however, and one of those is an unpublished district court decision. And the only potential "inconsistenc[y]" in these opinions arises out of petitioner's forced, out-of-context construction of a single dictum in the district court decision.

Petitioner first discusses the Tenth Circuit's opinion in *Carloss*, quoting at length from the dissenting opinion. Pet. 21-23; *see also id.* 10-11 & n.1. As for the majority opinion, though, petitioner admits that the "analysis of th[at] case is substantially similar to the underlying case that serves as the basis for th[e] Petition." Pet. 21. On that score, at least, petitioner is correct. The Tenth Circuit concluded in *Carloss* that "the presence of a 'No Trespassing' sign is not alone sufficient to convey to an objective officer, or member of the public, that he cannot go to the front door and knock." 818 F.3d at 995. The Tennessee Supreme Court reached the identical conclusion. *See* Pet. App. 29-30 & n.9.

Petitioner next cites an unpublished district court decision, *Bush v. County of San Diego*, No. 3:15-cv-00686, 2016 WL 6070174 (S.D. Cal. Oct. 17, 2016), as evidence of the "fraught" division among the "[f]ederal

circuits." Pet. 20, 23. In *Bush*, a civil action, a district court concluded that officers' attempt to conduct a knock and talk violated the Fourth Amendment because the homeowner had revoked the implicit license to enter the curtilage. *Id.* at *4. In support of this finding, the court noted that the property in question was "encircled by a barbed chain link fence" with a "closed front gate" that included "two ominous signs reading 'NO TRESPASSING' and ['] ***BEWARE*** OF DOG.'" *Id.* Accordingly, the court reasoned that "[n]o reasonable person could have stood at the front gate, in plain view of such signage, and concluded they had an implied invitation to enter." *Id.* Given these circumstances, "[t]he 'NO TRESPASSING sign alone explicitly communicate[d] that no such invitation exist[ed]." *Id.*

Petitioner characterizes the *Bush* decision as holding that "the presence of No Trespassing signs, in and of themselves, are [sic] sufficient to revoke the public's license to enter property." Pet. 23. Read in context, however, the district court in *Bush* is discussing the *particular* "No Trespassing" sign at issue—posted on the closed gate of a barbed-wire fence that encircled the property. The district court's fact-specific conclusion that a reasonable person would understand the fence and signs to mean the implicit license to enter the property had been revoked applies the same test as and is entirely consistent with the Tennessee Supreme Court's decision. Pet. App. 29-33.

In discussing the purported disagreement among the federal circuits, petitioner also discusses at length the Sixth Circuit's unpublished opinion in *United States v. Hopper*, 58 Fed. Appx. 619 (6th Cir. 2003).

Pet. 24-25. But *Hopper*, decided before this Court's decision in *Jardines*, does not address the question presented, which is limited to whether a "No Trespassing" sign is sufficient to revoke an officer's implicit license to conduct a knock and talk. Pet. i. *Hopper* addressed the distinct question whether the defendant "ha[d] a constitutionally protected, reasonable expectation of privacy," 58 Fed. Appx. at 623, the second issue decided by the Tennessee Supreme Court, but one that was not included in the question presented, Pet. i; Pet. App. 35.

Moreover, the Sixth Circuit's analysis of the individual's reasonable expectation of privacy in *Hopper* parallels the Tennessee Supreme Court's analysis of both that issue and whether the implicit license to approach petitioner's residence had been revoked. The Sixth Circuit concluded in *Hopper* that a "No Trespassing" sign alone was not sufficient to make entry into the curtilage presumptively unreasonable under the *Katz* test. 58 Fed. Appx. at 624.[7] The Tennessee Supreme Court agrees. *See* Pet. App. 35-36. And the Sixth Circuit, like the Tennessee Supreme Court, suggested that a "No Trespassing" sign plus "additional measures to protect the area from outside interference" may lead to a different outcome. *See id.*

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[7] Although not cited by petitioner, the Eighth Circuit's decision in *United States v. Bearden*, 780 F.3d 887 (8th Cir. 2015), is also consistent with the Tennessee Supreme Court's decision. In *Bearden*, the Eighth Circuit concluded that officers did not need a warrant or exigent circumstances to conduct a knock and talk after entering into the curtilage of a home through an open gate marked "No Trespassing." *Id.* at 893-94.

at 624 (distinguishing *United States v. Depew*, 8 F.3d 1424 (9th Cir. 1993)); *compare* Pet. App. 29-36 & n.9.

These three federal cases relied on by the petitioner[8]—two court of appeals decisions that are in total harmony with the decision below and one unpublished district court decision that applies the same test and looks to the same facts as the Tennessee Supreme Court—do not establish "fraught" disagreement or inconsistency, certainly not among the "[f]ederal circuits." Pet. 20. At most, an ambiguous dictum in an unpublished district court decision could be construed to be in tension with the Tennessee Supreme Court's ruling only by disregarding context and the facts of that case. Regardless, any conflict with an unpublished district court decision would not warrant this Court's review. *See* Sup. Ct. Rule 10(b).

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[8] In a footnote, petitioner also cites the Ninth Circuit's decision in *Davis v. United States*, 327 F.2d 301 (9th Cir. 1964), contending that it announced a rule of law "directly on point with the issues of the instant Petition." Pet. 23 n.2. But *Davis*, which was decided before this Court's decision in *Katz*, merely establishes the principle that a person in possession of property may revoke officers' implicit license to enter it by "express orders." 327 F.3d at 303. The Tennessee Supreme Court agreed with that principle and cited *Davis* positively. *See* Pet. App. 17, 20-21, 29 n.2. As petitioner admits, *Davis* has nothing to say about the presence of a "No Trespassing" sign, which is the specific issue presented by the petition. Pet. 23 n.9; Pet. i.

B. The Tennessee Supreme Court's Decision Does Not Conflict with Any Decision of a State Court of Last Resort.

Petitioner also asserts that "there is marked dissimilarity among courts of last resort across the country" on the question presented. Pet. 15. The dissimilarities on which petitioner relies, however, are dissimilarities in *facts* and in *state* constitutional interpretation, not "dissimilarity" about the protections of the U.S. Constitution. Other state courts of last resort have not had an opportunity to address the question presented. And their analyses of related issues under the Fourth Amendment or state constitutional provisions apply the same constitutional principles underlying the Tennessee Supreme Court's decision.

The principal case on which petitioner relies to establish conflict is the Louisiana Supreme Court's decision in *State v. Roubique*, 421 So. 2d 859 (La. 1982). Petitioner argues that "[t]his case stands for the proposition that a No Trespassing sign, in and of itself, is sufficient to revoke the public's implied license to enter property." Pet. 16. But there are at least four problems with that characterization.

First, *Roubique* does not address the question presented. Contrary to petitioner's suggestion, the *Roubique* court never addressed "the public's implied license"; it considered only "whether [the defendant] had a reasonable expectation of privacy in the driveway to his trailer." 421 So. 2d at 862.

Second, it is not clear that *Roubique* is still good law. *Roubique* predates this Court's decision in *Oliver*

v. United States, 466 U.S. 170 (1984), which held that "No Trespassing" signs posted at regular intervals and a locked gate were not sufficient to establish a constitutionally protected privacy interest in a highly secluded area on the petitioner's property but outside the curtilage of the home, *id.* at 173-74, 180-84. Contrary to the rule that later would be established in *Oliver*, the *Roubique* court analyzed the privacy implications of the "No Trespassing" signs and other circumstances of the property without distinguishing between curtilage and open fields or determining if the officer entered the curtilage. *See* 421 So. 2d at 861-62. The rule established in *Oliver* thus casts serious doubt on the continuing validity of the analysis in *Roubique*.

Third, contrary to this Court's precedent, the *Roubique* court applied the *Katz* test by looking at only *subjective* intent, finding it sufficient to establish a Fourth Amendment violation that "[t]he sign at the road's entrance [wa]s ample evidence of [the defendant's] intent to preserve his privacy." 421 So. 2d at 862; *contra Kyllo v. United States*, 533 U.S. 27, 33 (2001) ("[A] Fourth Amendment search does not occur . . . unless the individual manifested a subjective expectation of privacy . . . *and society is willing to recognize that expectation as reasonable*." (emphasis added) (internal quotation marks and alterations omitted)). To the extent an individual's reasonable expectation of privacy is relevant to the question of implicit license, only the *objective* inquiry could be relevant: whether society regards a "No Trespassing" sign as sufficient to revoke the implicit license to enter the protected area and knock. The subjective component—the only component analyzed in *Roubique*—is irrelevant to the question of implicit

license. *Roubique* thus has nothing to say about the question presented.

Fourth, *Roubique* did not, as petitioner suggests, hold that a "No Trespassing" sign is sufficient in and of itself to establish an expectation of privacy. Instead, the court relied on both the presence of the sign and the fact that the individual's "trailer was isolated" and "barely visible from the road," to determine that the individual "had a reasonable expectation of privacy in the premises." 421 So. 2d at 862.

Roubique does not appear to have been cited by a court in Louisiana for the stark proposition petitioner ascribes to it or applied in that manner. And given the numerous developments in this Court's Fourth Amendment jurisprudence since 1982—including its decisions in *Oliver* and *Jardines*, the latter of which forms a significant part of the basis for the petition, *see* Pet. 8-9—Louisiana should be given the chance to examine *Roubique* in light of current precedent before any perceived conflict that decision creates would warrant this Court's attention.

The other state cases on which petitioner relies likewise do not establish any "marked dissimilarity" among state courts of last resort. Most importantly, several of the cases interpret *state* constitutional provisions, not the Fourth Amendment, and some do so in a manner expressly contradicting this Court's Fourth Amendment jurisprudence. For example, the Oregon Supreme Court's decision in *State v. Dixson*, 766 P.2d 1015 (Or. 1988) (en banc), which petitioner discusses at length, Pet. 18-19, interprets article I, section 9, of the *Oregon* Constitution, not the Fourth Amendment, 766 P.2d at 1024. And, like several other

state court decisions cited by the petitioner and the majority below, *Dixson* interprets its state constitutional provision in a manner at odds with this Court's decision in *Oliver*. *See id.* (rejecting *Oliver*'s "[r]eliance on the common-law concept of curtilage to justify excluding land outside the curtilage from constitutional protection"); *see also State v. Hubbel*, 951 P.2d 971, 976-77 (Mont. 1997) (noting that, in interpreting the Montana Constitution, the court had "declined to follow" *Oliver*'s distinction between curtilage and open fields); *People v. Scott*, 593 N.E.2d 1328, 1337-38 (N.Y. 1992) (detailing reasons that "require [the Court] to reject *Oliver* and to turn instead to our State Constitution for the protection of our citizens' rights").[9] Such "conflict," to the extent any exists, results from our federal system of government and cannot be resolved by this Court. *See Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940).

Finally, petitioner relies on state cases that do not address the question presented but apply the *Katz* test in distinct factual circumstances. And they apply the *Katz* test in a manner entirely consistent with the Tennessee Supreme Court's analysis of the revocation of the public's implicit license. Most prominently, the petition discusses the North Dakota Supreme Court's decision in *State v. Kochel*, 744 N.W.2d 771

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[9] Petitioner also cites in passing an unpublished decision by the Washington Court of Appeals in *State v. Kuchera*, Nos. 27375-6-II, 27376-4-II, 2002 WL 31439839 (Wash. Ct. App. Nov. 1, 2002). Pet. 15. That decision also involves a state constitutional provision, and its analysis mirrors that of the Tennessee Supreme Court. *Id.* at *5 ("The presence of no-trespassing signs is not dispositive of the establishment of privacy, but is a factor to be considered[.]").

(N.D. 2008). In *Kochel*, the court determined that the defendant had a reasonable expectation of privacy in an addition to his mobile home that was "fully enclosed by wooden walls complete with a door and a window," in part because the individual had posted a "No Trespassing" sign on the steps leading to the door. 744 N.W.2d at 774. Considering the sign, as well as the "size of the room, presence of a window and carpeting, and presence of personal property," the court concluded that the addition was an "integral part of [the] home to which an objective expectation of privacy should extend." *Id.* at 775. *Kochel* thus based its determination on the specific facts of the case, and nothing in its analysis conflicts with the Tennessee Supreme Court's similarly fact-based decision on the implicit license issue. In fact, in a later case, the Supreme Court of North Dakota clarified that "No Trespassing" signs posted around a property were *not* sufficient to establish "a reasonable expectation of privacy in the entrance" of the property. *See State v. Mittleider*, 809 N.W.2d 303, 308 (N.D. 2011).

The only other cases cited by petitioner are fact-dependent decisions by intermediate state appellate courts. Even if these cases were in conflict with the Tennessee Supreme Court's decision, certiorari would not be warranted because they do not represent the final word by the state court of last resort. *See* Sup. Ct. R. 10(b).

In any event, they do not conflict. Two of the cases do not involve "No Trespassing" signs at all but mention them only in passing dicta. *See Cooksey v. State*, 350 S.W.3d 177, 184 (Tex. Ct. App. 2011); *Powell v. State*, 120 So. 3d 577, 580, 584 (Fla. Dist. Ct.

App. 2013). In *Cooksey*, the Texas Court of Appeals identified "posting 'no trespassing' signs" and "erecting a locked gate" as examples of ways a homeowner could "manifest an intention to restrict access" and thereby revoke the implied authorization to enter the property. 350 S.W.3d at 184. But that court did not hold that a "No Trespassing" sign would always be sufficient to do so. The *Powell* dictum states that "homeowners who post 'No Trespassing' or 'No Soliciting' signs effectively negate a license to enter the posted property." 120 So. 3d at 584 (citing Florida's trespass statute). But even courts within Florida recognize that this "sentence in *Powell* . . . does not control the outcome" in a case that actually involves a sign because *"Powell* wasn't a sign case." *State v. Crowley*, --- S.3d ----, 2017 WL 4318598, at *3 (Fla. Dist. Ct. App. Sept. 29, 2017). This Court should not give the *Powell* dictum more weight than Florida courts give it. Moreover, neither dictum forecloses those courts—and certainly not the court of last resort in those states—from adopting the test applied by the Tennessee Supreme Court, in which "No Trespassing" signs may be relevant as part of the totality of the circumstances but are not dispositive.[10]

[10] Petitioner also cites *Jones v. State*, in which the Maryland Court of Special Appeals held, consistent with the Tennessee Supreme Court, that a "No Trespassing" sign does not "prevent visitors with a legitimate purpose from walking to the front door, including police officers in furtherance of an investigation." 943 A.2d 1, 12 (Md. Ct. Spec. App. 2008).

The cases cited by petitioner thus do not support his claim that "federal circuits and state courts alike are split on whether a 'No Trespassing' sign is sufficient to revoke the government's implied license to enter property." Pet. 10. The Tennessee Supreme Court held that "No Trespassing" signs, in and of themselves, "are rarely going to be sufficient to revoke the implied license allowing persons to approach a front door and knock." Pet. App. 30. Petitioner has cited no case, and certainly no decision by a federal court of appeals or state court of last resort, that holds otherwise. In fact, the vast majority of the cases cited in the petition do not address the question presented at all but address either a state constitutional provision or the distinct question whether, in a specific factual context that includes a "No Trespassing" sign, an individual has established a reasonable expectation of privacy. The reasoning of the cases on which petitioner relies, moreover, demonstrates not "dissimilarity" but rather almost complete agreement. *See Jones*, 943 A.2d at 12 (noting that "courts have been very consistent in concluding that no trespassing signs, in and of themselves" do not establish a reasonable expectation of privacy but "may be considered as part of the totality of the circumstances"). Certiorari is thus not warranted.

II. This Case Is Not an Appropriate Vehicle To Resolve the Question Presented.

Petitioner contends that this case "presents an ideal opportunity" for this Court to resolve the question presented, Pet. 26, but he is mistaken. Even if the question presented otherwise warranted this Court's review, the petition should still be denied because this

case is not an appropriate vehicle to resolve that question.

First, there are disputed factual questions that would impede this Court's resolution of the issue presented. The trial court denied petitioner's motion to suppress without making any factual findings regarding the number of "No Trespassing" signs on petitioner's property or their visibility when the investigators entered the property on August 3, 2013. Pet. App. 92-98. In the Court of Criminal Appeals, the majority found that the signs other than the one alongside the driveway were not visible to the investigators, Pet. App. 75 n.5, while the dissent found that the two "Private Property" signs near the roadway were "easily visible to passersby." Pet. App. 88. In the Tennessee Supreme Court, the majority recounted the conflicting evidence presented regarding the visibility of petitioner's signs, *see* Pet. App. 5, 10, but did not make any express findings about the precise number or visibility of the signs. Instead, in framing the issue as whether posting "No Trespassing" *signs* was sufficient to revoke the implied license, the majority seemed to assume that petitioner had more than one visible sign on his property. Pet App. 14, 21, 33. The dissent, meanwhile, stated that the two "Private Property" signs near the roadway were "clearly visible to anyone approaching [petitioner's] driveway from the main road." Pet. App. 45. If this Court is interested in addressing the question presented, it would be prudent to await a case in which clear factual findings have already been made by the lower courts.

Second, this case presents an unresolved antecedent legal question—namely, whether the area in which

petitioner's "No Trespassing" signs were located was part of the curtilage of his residence. The Tennessee Supreme Court assumed, without deciding, that petitioner's "driveway was part of the curtilage," but acknowledged that "[t]here is no bright-line rule delineating the inclusion or exclusion of a given driveway within a house's curtilage for Fourth Amendment purposes." Pet. App. 15-16. Other courts that have considered the effect of "No Trespassing" signs on officers' ability to conduct a knock and talk have examined whether the signs were on the curtilage. For example, the Tenth Circuit in *Carloss* found that "No Trespassing" signs located in "unenclosed front and side yards and along the driveway of the house" were in "open fields" and therefore "would not have conveyed to an objective officer, or member of the public, that he could not walk up to the porch and knock on the front door and attempt to contact the occupants." 818 F.3d at 995.

To evaluate properly whether the signs in this case precluded the investigators from approaching petitioner's property without a warrant, this Court may first need to determine whether the area near the roadway and at the top of petitioner's driveway where the signs were placed was part of petitioner's curtilage. As the Tennessee Supreme Court recognized, that question is not governed by a "bright-line rule," Pet. App. 15, but instead requires a fact-intensive inquiry. *See United States v. Dunn*, 480 U.S. 294, 301 (1987); *United States v. Brown*, 510 F.3d 57, 65 (1st Cir. 2007). But "it is not th[is] Court's usual practice to adjudicate either legal or predicate factual questions in the first instance." *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1653 (2016); *see also Dep't of Transp. v. Ass'n*

of Am. R.R., 135 S. Ct. 1225, 1234 (2015) ("[O]urs is a court of final review and not first view." (internal quotation marks omitted)). There is no reason to depart from that usual practice in this case.

Third, the issue presented is not dispositive of petitioner's suppression motion. Because the Tennessee Supreme Court concluded that the investigators' entry onto petitioner's property was a permissible knock and talk, it did not address the State's alternative argument that, even if the entry was a search, it was justified by probable cause and exigent circumstances. Pet. App. 37. If this Court were to grant certiorari and reverse, that issue would remain for the Tennessee Supreme Court on remand and may provide an alternative ground to affirm petitioner's convictions.

Finally, although the Tennessee Supreme Court expressly considered and rejected petitioner's argument that his "No Trespassing" signs also gave rise to a reasonable expectation of privacy that precluded officers from conducting a knock and talk, *see* Pet. App. 34-37, petitioner has not sought certiorari on that distinct question. Petitioner's "framing of the question presented has significant consequences, however, because under this Court's Rule 14.1(a), '[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court.'" *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 535 (1992) (quoting Sup. Ct. R. 14.1(a)). Thus, if the Court is interested in addressing the effect of a "No Trespassing" sign on the ability of officers to conduct a knock and talk, it should await a vehicle in which the question presented is not limited to the property-based understanding of the

Fourth Amendment. This Court has explained that the property-based approach is an alternative to, not a substitute for, the *Katz* reasonable-expectations test. *Jardines*, 569 U.S. at 11.

III. The Tennessee Supreme Court's Decision Is Correct.

The Tennessee Supreme Court concluded that "under the totality of the circumstances, the Defendant's 'No Trespassing' signs posted near his unobstructed driveway were not sufficient to revoke the implied license referred to in *Jardines*." Pet. App. 33. Both the Tennessee Supreme Court's adoption of a standard that examines the totality of the circumstances and its application of that standard to the specific facts of this case were correct and do not warrant this Court's review. This Court has long recognized that an analysis that looks to the totality of the circumstances is appropriate in the context of the Fourth Amendment. *See United States v. Knights*, 534 U.S. 112, 118 (2001) (noting the Court's "general Fourth Amendment approach of 'examining the totality of the circumstances'" (quoting *Ohio v. Robinette*, 519 U.S. 33, 39 (1996))). And that approach is particularly appropriate here in light of the inherent ambiguity of "No Trespassing" signs, as the facts of this case well illustrate.

The standard applied by the Tennessee Supreme Court is entirely consistent with this Court's Fourth Amendment precedents, which frequently consider the totality of the circumstances in determining whether a Fourth Amendment violation has occurred. *See, e.g.*, *Cnty. of L.A. v. Mendez*, 137 S. Ct. 1539, 1546 (2017) (whether force used in making a seizure is excessive

depends on totality of circumstances); *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186 (2016) (whether consent to search is voluntary depends on totality of circumstances); *Missouri v. McNeely*, 569 U.S. 141, 151 (2013) (whether exigency exists depends on totality of circumstances); *Samson v. California*, 547 U.S. 843, 852 (2006) (whether parolee has reasonable expectation of privacy depends on "totality of the circumstances pertaining to petitioner's status"); *Illinois v. Gates*¸ 462 U.S. 230-32 & n.7 (1983) (whether probable cause existed depends on totality of circumstances). The *per se* rule urged by petitioner—that "No Trespassing" signs *always*, no matter their context, revoke the public's implicit license to knock on the front door of a home, Pet. 27, 29, would directly contravene that longstanding approach.

Indeed, context is critical in determining the meaning conveyed by a "No Trespassing" sign because a "No Trespassing" sign, standing alone, does not unambiguously convey to passersby that they may not enter the property for the entirely legitimate purpose of knocking on the front door and speaking to the home's occupant. To the contrary, a "No Trespassing" sign simply conveys to an outside individual that "trespass" is not allowed. But "[o]fficers engaging in legitimate police business will conclude, correctly, that they are not engaging in a 'trespass' when they approach a front door to conduct a knock-and-talk." Pet. App. 32. As Chief Judge Tymkovich explained in his concurring opinion in *Carloss*, "I doubt a reasonable, lawful visitor would believe that 'No Trespassing' eliminated th[e] presumption [that a visitor to a residential neighborhood can enter the front porch curtilage to knock] in every instance." 818 F.3d

at 999. Even Justice Lee's dissenting opinion rightly recognized that whether a "No Trespassing" sign would be sufficient to revoke the implicit license would "depend[] on the circumstances," Pet. App. 46, including the sign's "word[ing] and place[ment]," Pet. App. 43 n.7.

The facts of this case make that principle particularly clear. Construed in the light most favorable to the State, the record shows that petitioner had only one "No Trespassing" sign that may have been visible to the investigators. *See State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996) (the prevailing party on a motion to suppress is "entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence").[11] That sign was located in tall grass near the beginning of an unobstructed driveway that was sixty to seventy yards long. It read, "no trespassing[,] hunting[,] or fishing" and was surrounded by signs telling passersby not to spray because organic farming was taking place on the property and to keep off the grass. Pet. App. 5; R., Vol. 2, Ex. 2.

In these circumstances, the "No Trespassing" sign did not unambiguously communicate to members of the public that they were not permitted to approach the front door for the legitimate purpose of contacting

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[11] Petitioner claims that the "record reflects that [he] had at least two 'No Trespassing' signs and one 'Private Property' sign located in his driveway and elsewhere on his property," Pet. 3-4, but that characterization of the record fails to construe the evidence in the light most favorable to the State.

petitioner. Rather, the most reasonable understanding of petitioner's admonition against trespassing, accompanied as it was by warnings against hunting and fishing and additional warnings related to farming activities being conducted on the property, is that it was "intended to prevent unauthorized use of petitioner's land, not to keep out the casual visitor who wishes only to approach the residence to contact its occupant." Pet. App. 75-76; *see also Carloss*, 818 F.3d at 996 (reasoning that a sign forbidding trespassing, hunting, fishing, and trapping "references activities that ordinarily do not take place within a home or its curtilage" and thus was not "directed to people who desire to approach and speak directly with the occupants of the home in the ordinary course of societally accepted discourse").

The location of the sign in tall grass alongside the beginning of petitioner's unobstructed driveway, at least sixty to seventy yards from his residence, reinforces this conclusion. A sign located on a fence or other barrier blocking the driveway, or near the path that would be used to approach the front door of the residence, would more clearly communicate to members of the public that they are not welcome, even for the legitimate purpose of contacting petitioner.

Even assuming that petitioner's other "No Trespassing" signs were visible to the investigators at the time they visited petitioner's residence, they do not change the analysis or compel a different conclusion. At most, petitioner had two other "No Trespassing" signs at the edge of his property near the roadway that read "private property[,] no trespassing." R., Vol. 2, Ex. 3. Those signs were near a third sign that read

"organic farm[,]no spraying." R., Vol. 2, Ex. 3. Like petitioner's sign beside the driveway, these signs are most reasonably understood to prevent unauthorized use of petitioner's property, not entry onto the property for a legitimate purpose. And because these signs are located even farther from the driveway and residence than the other sign, they are even less likely to communicate to passersby that they are not welcome to approach the front door.

Consistent with the approach of other jurisdictions and this Court's precedent, the Tennessee Supreme Court considered the totality of the circumstances and determined that petitioner's "No Trespassing" signs did not revoke the investigators' implicit license to enter his property to conduct a knock and talk. Contrary to petitioner's assertions, the inquiry does not end at the words "No Trespassing." The Tennessee Supreme Court correctly recognized that. And this Court's review of its fact-based decision is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Herbert H. Slatery III
Attorney General and Reporter
State of Tennessee

Andrée S. Blumstein
Solicitor General

Sarah K. Campbell
Special Assistant to the Solicitor General and the Attorney General
Counsel of Record

Jonathan David Shaub
Assistant Solicitor General

Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 532-6026
sarah.campbell@ag.tn.gov

Counsel for Respondent