No. 18-1513

In the
Supreme Court of the United States

MICHIGAN,
Petitioner,
v.

MICHAEL FREDERICK AND TODD VAN DOORNE,
Respondents.

On Petition for Writ of Certiorari to the Michigan Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Michigan Supreme Court correctly concluded that Respondents had not issued an "implied license" for officers to invade their curtilages at 4:00 a.m. and 5:30 a.m. and knock on their doors in order to engage them in "knock and talks."

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COUNTERSTATEMENT OF THE CASE

In 2017, the unanimous Michigan Supreme Court found that police officers had conducted warrantless searches in violation of the Fourth Amendment when the officers had gone to Respondent Frederick's home around 4:00 a.m. and Respondent Van Doorne's home around 5:30 a.m. and knocked on both men's doors in order to conduct "knock and talks." Pet. App. 14. Applying *Florida v. Jardines*, 569 U.S. 1 (2013), the state high court concluded that neither Respondent had issued an implied license for members of the public to trespass onto their curtilages and knock on their doors during the wee hours of the morning. Pet. App. 18-25. Because the officers were therefore trespassing and were indisputably doing so for criminal investigatory purposes, the court held that the officers' conduct amounted to warrantless searches in violation of the Fourth Amendment. Pet. App. 25-27. The court then remanded to the lower courts for a determination as to whether the consents to search the police obtained from Respondents were attenuated from the unconstitutional invasions of their properties. Pet. App. 27-29.

On remand, the state trial court found no attenuation and therefore suppressed the evidence at issue and dismissed the criminal cases. Pet. App. 9. On appeal to the Michigan Court of Appeals, Petitioner did not contest the trial court's attenuation ruling and argued only that the Michigan Supreme Court's decision and certain decisions of this Court were incorrect. Pet. App. 7. The state appellate court affirmed the trial court's ruling, Pet. App. 1, and the

Michigan Supreme Court denied Petitioner's applications for leave to appeal. Pet. App. 106, 108.

REASONS TO DENY THE WRIT

I. There is no "confusion" after *Jardines*, much less a split among courts of last resort, that entering the curtilage and knocking on a resident's door in the middle of the night will normally exceed the implied license necessary to justify a "knock and talk."

Petitioner apparently does not like this Court's decision in *Jardines*, but it has failed to identify any reason for this Court to exercise its jurisdiction in this case, which involves nothing more than the Michigan Supreme Court's straightforward application of *Jardines*. Petitioner has not even attempted to demonstrate how that Michigan Supreme Court decision created or exacerbated a split among the circuits or state courts of last resort. Therefore, this Court should deny the petition.

In fact, all members of the *Jardines* Court recognized exactly what the Michigan Supreme Court concluded here: a police invasion of the curtilage in the middle of the night in order to engage a resident in a "knock and talk" will normally amount to a trespass because it exceeds the implied license residents give to hawkers, religious proselytizers, and other strangers to enter the curtilage and knock on the door. 569 U.S. at 20 (Alito, J., dissenting) ("Nor, as a general matter, may a visitor come to the front door in the middle of the night without an express invitation."); *id.* at 9 n.3 (majority agreeing that dissent "quite rightly" relied on

alarming nature of middle-of-the-night intrusions "to justify its no-night-visits rule").

The fact that *Jardines* did not involve a "knock and talk" is of no significance. The conduct in *Jardines* was a search because it was a trespass onto property protected by the Fourth Amendment, and that trespass was conducted for purposes of criminal investigation. 569 U.S. at 9. The Michigan Supreme Court correctly recognized exactly the same was true here. Pet. App. 25-27.[1]

Petitioner claims there is "confusion" among the lower courts as to the meaning of *Jardines* in general, but Petitioner cannot identify a single case where a federal circuit court or state court of last resort has issued a decision materially inconsistent with the Michigan Supreme Court's unanimous decision here. *United States v. Carloss*, 818 F.3d 988, 994-95 (10th Cir. 2016), simply reaffirms, consistent with *Jardines*, that an officer may knock on a front door if there is an implied license for the public to approach that front door. The Tenth Circuit found, as many courts had found before, that a "No Trespassing" sign did not revoke that implied license because members of the public could still have believed they could walk up to

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[1] Petitioner's complaint that the Michigan Supreme Court erred by considering the officers' purpose when entering Respondents' curtilages, Pet. 20-21, betrays a misunderstanding of Fourth Amendment doctrine. *See Jardines,* 569 U.S. at 10 (recognizing whether officer's conduct on porch was "an objectively reasonable search . . . depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered").

the porch and knock on the door. *Id.* at 995-97. Nothing in *Carloss* stands for the proposition that the implied license found there included visits at 4:00 a.m. or 5:30 a.m.; in fact, the *Carloss* Court noted the knock and talk encounter occurred "during daylight hours." *Id.* at 998.

Petitioner's citation of *United States v. Walker*, 799 F.3d 1361 (11th Cir. 2015), is equally unavailing because the case is plainly distinguishable. In *Walker*, the police drove by the defendant's house at 5:04 a.m., after visiting twice before, and saw a light on inside a parked vehicle in the carport. *Id.* at 1364. Believing correctly someone was in the vehicle, they approached it and asked the defendant to step out. *Id.* In upholding that action, the court certainly did not consider whether the police had an implied license to knock on the door at that hour or even whether the police approach to the car would have been reasonable had they not seen the dome light on in the parked car.

In short, Petitioner cites no cases from circuits disagreeing with the Michigan Supreme Court's approach, nor does it cite any such cases from state courts of last resort. There is simply no split of authority and no reason for this Court to exercise its jurisdiction.

CONCLUSION

This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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