No. _____

In the Supreme Court of the United States

FAIRFIELD COUNTY, OHIO; MIKE KIGER, STEVE DAVIS, DAVID LEVACY, DAVE PHALEN, LUKE WILLIAMS, ROD HAMLER, JOHN WILLIAMSON AND LYLE CAMPBELL,

Petitioners,

v.

NEIL MORGAN II AND ANITA GRAF,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Amendment prohibits law enforcement officers from securing the perimeter of a residence, for officer safety, when conducting a lawful "knock and talk" operation.

PARTIES TO THE PROCEEDINGS

Petitioners, Fairfield County, Ohio, Mike Kiger, Steve Davis, David Levacy, Sheriff David Phalen in their official capacity only, Luke Williams, Rod Hamler, John Williamson and Lyle Campbell, in both their individual and official capacity were the Defendants in the District Court and Appellees in the Court of Appeals.

Respondents, Neil A. Morgan II and Anita L. Graf were the Plaintiffs in the District Court and Appellants in the Court of Appeals.

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The opinion of the Court of Appeals is reported at 903 F.3d 553 and reprinted in the Appendix at App. 1 - App. 40. The order of the Court of Appeals denying rehearing en banc is unreported but reprinted in the Appendix at App. 59 - App. 60. The opinion of the District Court granting Defendants' motion for summary judgment is unreported but available at 2017 U.S. Dist. Lexis 152352 (S.D. Ohio September 19, 2017) and reprinted in the Appendix at App. 41 - App. 56.

JURISDICTION

The Sixth Circuit Court of Appeals rendered its opinion on September 6, 2018 and denied rehearing en banc on October 19, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the Constitution provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

INTRODUCTION

"Knock and talk" is an accepted law enforcement tactic employed by police to make legitimate inquiries about alleged criminal activities by knocking on people's doors and requesting to talk with them about the subject complaint. See *Kentucky v. King*, 563 U.S. 452, 469 (2011). To ensure officer safety, the Fairfield County Sheriff's Office directs officers to secure the

perimeter of a residence when conducting knock and talks. Respondents allege this officer safety practice violated their Fourth Amendment right to be free from an unreasonable search because it resulted in officers entering onto the curtilage of their property, without a warrant, when securing the perimeter of the residence. In a split decision, with a sharp dissent from Circuit Judge Thapar, the Sixth Circuit Court of Appeals reversed the District Court and found a Fourth Amendment violation.

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals in Case No. 17-4027 which found that law enforcement officers violated the Fourth Amendment when they secured the perimeter of Plaintiffs' residence, for officer safety, during a lawful "knock and talk" operation. The Court of Appeals mistakenly concluded that securing the perimeter of a residence, without more, is a "search", implicating the Fourth Amendment. While the Court correctly granted qualified immunity to the individual officers, it erroneously held that the County could be liable because its policy directed officers to secure the perimeter of a residence during a knock and talk. Petitioners respectfully petition for a writ of certiorari to correct the Sixth Circuit's error of law and resolve a matter of exceptional public importance.

Specifically, the Sixth Circuit incorrectly applied *Florida v. Jardines*, 569 U.S. 1 (2012) and *Collins v. Virginia*, 138 S. Ct. 1663 (2018) to the case at bar. As a result, the Court of Appeals decision conflicts with established Supreme Court precedent in those cases. Both of those cases involved law enforcement officers

engaging in a purposeful investigative act to "gather evidence" from a constitutionally protected area of the residence, i.e. curtilage. This Court found the Fourth Amendment applied in each case. Neither case involved a "knock and talk" or officers securing the perimeter of a residence for officer safety. In the case at bar, there was no purposeful, investigative act. Rather, officers secured the perimeter of Plaintiffs' residence during a knock and talk for officer safety, nothing more. Under this Court's holdings in *Jardines* and *Collins*, there was no Fourth Amendment search and consequently no Fourth Amendment violation. Review by this Court is necessary to secure and maintain uniformity of the court's decisions as well as resolve the following issue of exceptional importance: whether law enforcement officers may secure the perimeter of a residence, for officer safety, when conducting a lawful knock and talk operation, without violating the Fourth Amendment.

If the Court of Appeals decision stands, law enforcement officers in the Sixth Circuit could no longer conduct "knock and talks" because they could not maintain officer safety. As a result, officers would be left without an invaluable law enforcement tool in further combating the proliferation of drugs into our communities. For these reasons, Petitioners respectfully petition the Court for a writ of certiorari.

STATEMENT OF THE CASE

I. BACKGROUND

This case is about police procedure and officer safety. On June 19, 2012, the Fairfield County Sheriff's Office SCRAP Unit conducted a "knock and talk" operation at Plaintiffs' residence. SCRAP is a small specialized unit that specifically targets narcotics complaints and drug activity at the street level throughout Fairfield County. The SCRAP Unit performs important work removing drugs and unlawful firearms from the street. The program is successful. In 2012, the SCRAP Unit filed 178 felony charges, located 20 meth labs, seized 229 grams of meth, 1,499 unit doses of heroin, 593 marijuana plants and 31 pounds of marijuana packaged for sale, 13.9 grams of crack cocaine and 314 pharmaceutical pills. The Unit has had continued success.

In June, 2012, the SCRAP Unit consisted of five officers. Sergeant Rod Hamler was the Unit's supervising officer. The Unit conducts "knock and talks" in which officers go to a residence without a warrant, knock on the door, and advise the resident of the narcotics complaint. If the person is willing to discuss the complaint, officers ask for consent to search the residence. If consent is not given, officers leave without conducting a search of the residence.

Prior to conducting a knock and talk, the SCRAP Unit obtains background information on the subject of the investigation. Officers research the person's criminal history and discuss any other relevant information, such as gang affiliation. The SCRAP Unit conducts a briefing to discuss the tip received and the

person being investigated before conducting the knock and talk.

During a knock and talk, officers secure the perimeter of the residence while an officer knocks on the front door. This is basic police procedure. Officers position themselves at each corner of the residence to have eyes on the exits as well as on each other. This is done for officer safety, nothing more. Officers secure the perimeter foremost to prevent against an ambush. Because the SCRAP Unit responds to complaints of drug activity, there is an increased likelihood officers are dealing with someone with a criminal history. Therefore, officers take steps necessary to protect themselves.

Prior to June 19, 2012 The Fairfield-Hocking MCU received two tips that Neil Morgan was operating a methamphetamine lab and a marijuana grow-operation at his residence. The source indicated that children may be present at the residence. MCU gave this information to the SCRAP Unit to investigate.

After receiving MCU's intel report, The SCRAP Unit obtained background information on Morgan, including his extensive criminal history and felony drug-trafficking convictions. Officers also learned that Morgan was a member of the Avengers, an outlaw motorcycle gang with a known criminal enterprise. They also learned Morgan was possibly in possession of weapons while under disability. According to Sergeant Hamler, the information obtained on Morgan raised concerns about officer safety. Sergeant Hamler decided to secure the perimeter of the residence for officer safety because of the two tips that Morgan was operating a meth lab and given that Morgan was

allegedly a member of an outlaw motorcycle gang and known felon and was suspected of possessing weapons while under disability.

On June 19, 2012 the SCRAP Unit conducted a knock and talk at Plaintiffs' residence. Deputy Lyle Campbell approached and knocked on the front door while the other SCRAP officers took a position securing the perimeter of the residence. Deputy Luke Williams positioned himself at the right rear of the residence near a rear door to the basement. From his lawful vantage point, Deputy Williams observed 5 feet tall marijuana plants, in plain view, growing on the rear deck of the residence. Deputy Williams alerted the other officers about the marijuana plants over his radio. By this time, Ms. Graf had opened the front door and Deputy Campbell explained he was there on complaints of drug activity at the residence. When Deputy Williams radioed that he observed marijuana plants on the rear deck, the signal came through Sergeant Hamler's radio, who was standing in close proximity to Deputy Campbell and the front door. Officers cleared the residence and detained Morgan and Graf while they obtained a search warrant.

The officers obtained a search warrant from the Fairfield County Municipal Court. Officers executed the search warrant and found drugs, contraband and other incriminating evidence, including a makeshift meth lab. Plaintiffs were arrested and indicted on multiple felony drug charges. After the indictment, Plaintiffs filed motions to suppress evidence obtained by the officers. The motions asserted that the search was unreasonable in violation of the Fourth Amendment. The trial court denied the motion.

Morgan pled no contest to the charges and was convicted. Graf pled not guilty and stood trial where she was convicted by a jury. Subsequently, the Ohio 5th District Court of Appeals reversed the trial court and suppressed the evidence found at the residence. The charges against Plaintiffs were dismissed. This lawsuit followed. Plaintiffs assert that the SCRAP officers violated their Fourth Amendment right against an unreasonable search when officers secured the perimeter of their residence during the knock and talk. Plaintiffs also asserted a claim against Fairfield County under *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). The District Court granted summary judgment to Defendants on all claims.

In a split decision, the Sixth Circuit Court of Appeals affirmed summary judgment to the individual officers finding they were entitled to qualified immunity because the law was not clearly established at the time whether surrounding a residence during a knock and talk violated the Fourth Amendment. The majority concluded that the officers violated the Fourth Amendment even though they were entitled to qualified immunity. The majority also found that the County could be liable under *Monell* because the policy of securing the perimeter of a residence during a knock and talk was the cause of the Fourth Amendment violation.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's holding conflicts with established Supreme Court precedent in *Florida v. Jardines* and *Collins v. Virginia* which requires the government to engage in a purposeful investigative act to gather evidence in a constitutionally protected area to implicate the Fourth Amendment.

This case presents the question of whether securing the perimeter of a residence during a knock and talk, for officer safety, is a "search" within the meaning of the Fourth Amendment. The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The courts have interpreted this right to extend to not only the home, but to the curtilage of the home, as individuals "possess a 'reasonable expectation of privacy' in the area surrounding and appurtenant to the home." *Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 598 (6th Cir. 1998).

The threshold question in any Fourth Amendment case is whether a "search" has occurred within the meaning of the Fourth Amendment. History shows that a Fourth Amendment search meant at the founding the same as it means now: a purposeful investigative act (and nothing more). In other words, officers conduct a Fourth Amendment search when they engage in a purposeful, investigative act, in a constitutionally protected area. When the Framers used the word "search," they meant something specific: investigating a suspect's property with the goal of finding something. *See Katz v. United States*, 389 U.S. 347, 367 (Black, J.

dissenting) ("The Fourth Amendment was aimed directly at the abhorred practice of breaking in, ransacking, and searching homes and other buildings and seizing people's personal belongings…"). Take for example, the oppressive English search practices that led to the adoption of the Fourth Amendment. Writs of assistance allowed colonial customs officials to search people's homes for goods that were illegally imported. The colonies opposition to writs of assistance make clear what the founders envisioned by the term "search": looking through somebody's belongings to find evidence of something illegal. Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 Sup. Ct. Rev. 67, 72 (2012) ("Famous search and seizure cases leading up to the Fourth Amendment involved physical entries into homes [and] violent rummaging for incriminating items once inside…").

In this way, the original meaning of the term matches the ordinary one. A "search" under the Fourth Amendment is what we would intuitively think a search looks like in any other context. To search is "to look into or over carefully or thoroughly in an effort to find something." *Webster's Third New International Dictionary of the English Language* (2002); *see also 2 Noah Webster, an American Dictionary of the English Language* 66 (1828) (reprint 6th ed. 1989) ("To look over or through for the purpose of finding something; to explore; to examine by inspection; as, to search the house for a book; to search the wood for a thief.") In other words, officers conduct a search when they engage in a purposeful investigative act. Modern Fourth Amendment jurisprudence confirms this.

In *Florida v. Jardines*, this Court held that a Fourth Amendment search occurs when an officer intrudes on a constitutionally protected zone, i.e., the house or its curtilage, *to gather evidence*. *See* 569 U.S. 1, 6 (2012) (emphasis added). In *Jardines*, police took a drug-sniffing dog onto Jardines' front porch to search for evidence of drugs inside the residence. The dog gave a positive alert for narcotics. Based on the alert, the officers obtained a warrant for a search, which revealed marijuana plants inside the house. This Court found the investigation of Jardines' residence was a "search" within the meaning of the Fourth Amendment. The Court arrived at its holding by finding that officers were "gathering information" in a constitutionally protected area of Jardines' residence – the front porch. In other words, officers were conducting a purposeful, investigative act at Jardines' residence thereby implicating the Fourth Amendment.

Jardines did not involve a knock and talk, nor did officers secure the perimeter of Jardines' residence for officer safety. Rather, officers entered onto Jardines' front porch to investigate and gather evidence in the home's protected curtilage without a warrant. The case is factually distinguishable from the case at bar. The Court of Appeals reliance on *Jardines* to find that officers here engaged in a Fourth Amendment search is misplaced and inconsistent with the holding in *Jardines*. *Jardines* requires some sort of investigative act to implicate the Fourth Amendment's protections. 569 U.S. at 6. Here, there was no purposeful investigative act implicating the Fourth Amendment. Officers secure the perimeter to do one thing: ensure officer safety.

The Court of Appeals also mistakenly relied on this Court's recent decision in *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018), to find a Fourth Amendment violation. In *Collins*, this Court held that "when a law enforcement officer physically intrudes on the curtilage *to gather evidence*, a search within the meaning of the Fourth Amendment has occurred." (emphasis added); In that case, police entered a part of Collins' driveway considered curtilage to search a motorcycle parked underneath a tarp. This Court found that officers entered the curtilage to gather evidence, thus implicating the Fourth Amendment.

Collins did not involve a knock and talk, nor did it involve officers securing the perimeter of Collins' residence for officer safety. Rather, that case involved officers entering a constitutionally protected area of Collins' residence to perform a purposeful investigative act, i.e. gather evidence from a motorcycle parked underneath a tarp. As with *Jardines*, the *Collins* case is readily distinguishable on its facts. The Court of Appeals reliance on *Collins* to find that the officers here engaged in a Fourth Amendment search is misplaced and inconsistent with the *Collins* holding.

Because the SCRAP officers did not engage in any type of purposeful investigative act when securing the perimeter of Plaintiffs' residence during the knock and talk, the officers did not conduct a "search" within the meaning of the Fourth Amendment. Consequently,

there was no constitutional violation[1]. The Court of Appeals erred as a matter of law in finding a violation.

II. Fairfield County's policy of directing officers to secure the perimeter of a residence, for officer safety, when performing "knock and talks" is not facially unconstitutional.

Turning to the County's policy, the threshold question is whether the policy directed officers to violate Plaintiffs' constitutional rights. The answer is no. The Sheriff's Office policy directs officers to secure the perimeter of a residence during a knock and talk for one purpose: to ensure officer safety. Securing the perimeter of a residence during a knock and talk is basic police procedure. It is taught in the police academy and generally learned in law enforcement. Securing the perimeter is necessary to ensure officer safety. Officers secure the perimeter foremost to prevent against an ambush. According to Sergeant Hamler, "you don't know what you're walking into. We could get there, and we could start taking fire from the windows or somebody could come out blazing because if they do have an operation going on inside and they look outside and see a task force approaching their house, you know, they may think, hey, the gig's up. You don't know how they're going to react." Also, the officers position themselves near each exit to prevent someone from fleeing the residence. Often times, if

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[1] Because no individual defendant committed a constitutional violation, Fairfield County cannot be liable to Plaintiffs on their municipal liability ("*Monell*") claim. *See Scott v. Clay County*, 205 F.3d 867 (6th Cir. 2000)

someone has an active warrant, they attempt to flee when law enforcement shows up.

According to *Jardines and Collins*, to be unconstitutional, the policy must direct officers to (1) enter a constitutionally protected area and (2) to gather evidence. 569 U.S. at 9; 138 S. Ct. at 1670. The county policy directed officers to secure the perimeter of a residence during a knock and talk. However, the policy did not direct officers to gather information while there. That is a critical distinction and dispositive on the issue of municipal liability. To be considered a search under the Fourth Amendment, officers must gather information while in a protected area. Because the county policy does not direct officers to gather information or otherwise investigate while securing the perimeter of a residence during a knock and talk, the policy itself is constitutional on its face. The Sixth Circuit decision is inconsistent with *Jardines* and *Collins* in finding otherwise.

CONCLUSION

For the above reasons, Petitioners respectfully urge the Court to grant the Petition for a Writ of Certiorari.

Respectfully Submitted,

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