No. 18-943

In the Supreme Court of the United States

FAIRFIELD COUNTY, OHIO; MIKE KIGER; STEVE DAVIS; DAVID LEVACY; DAVE PHELAN; 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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Fourth Amendment is violated by a policy which requires, before a knock-and-talk is initiated, an intrusion on curtilage for officer safety whenever the view of a residence's back and sides from its perimeter is obscured?

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INTRODUCTION

No compelling reason supports granting certiorari to answer Petitioners' misstated question. Before and after the Sixth Circuit's decision, officers have been permitted to secure the perimeter of a residence's curtilage, whether for officer safety, flight risk, destruction of evidence, or other purposes, including facilitating a search, when conducting a knock-and-talk. Permitting a law enforcement officer to intrude on the curtilage before a knock-and-talk begins whenever the back or sides of a residence are not visible from its perimeter was and remains palpably inconsistent with the Fourth Amendment and the implied consent of a knock-and-talk.

Petitioners have failed to identify any division among the federal or state courts. They have concocted a departure from this Court's authority and exaggerated the impact on law enforcement. They have not suggested that parallel situations have arisen, let alone arise frequently. Instead, intrusions on curtilage for officer safety before a knock-and-talk begins appear to be exceedingly uncommon.

Their petition boils down to asking this Court to correct what they misperceive as error in the Sixth Circuit's decision. Not only was the Sixth Circuit decision correct, but this case is also a singularly misfit vehicle for considering whether to inject an express purpose to search into Fourth Amendment law. The case reached the Sixth Circuit on appeal from summary judgment, and genuine issues of material fact preclude simple characterization of the officers' subjective purpose.

The irrefutable fact is that the Fairfield County SCRAP unit executed a knock-and-talk for an investigative purpose. Thus, this is hardly a "clean" case where the officers' intrusion on the curtilage was unrelated to an investigative purpose. Rather, the intrusion was premised on an investigation.

Despite the absence of a specific threat to officer safety and ***before*** a unit officer even approached the front door, unit officers crossed the perimeter of the private property, intruded on the backyard curtilage, and approached a sheltered rear deck. From that vantage point, they had a plain view of marijuana plants.

That vantage point was, however, well within the perimeter of the residence. They intruded on the fundamental locus of Fourth Amendment protection under both privacy-focused and property-centered theories. The officers' actions offend the vision of the Fourth Amendment explicitly espoused by the majority, concurrence, and dissent in *Florida v. Jardines*, 569 U.S. 1 (2013). This was not merely an approach to the front door, but a trespass which involved crossing the perimeter of the property, encircling the home, and peering into the rear porch from well inside the curtilage.

Petitioners seek to immunize that intrusion from Fourth Amendment limits. Contradicting a search warrant affidavit stating the purpose for the intrusion was to prevent flight, they now claim that the intrusion was for officer safety. The Sixth Circuit properly rejected both isolation of the intrusion from the investigative knock-and-talk and this attempt to remove Fourth Amendment limits whenever a purpose

for an intrusion other than a search may be asserted. That rejection kept faith with the concept of privacy enshrined in the Fourth Amendment; the impropriety of converting exigent circumstances into a free pass from any Fourth Amendment limit; and the impracticality of focusing on an officer's subjective intent. The rejection properly refused to broaden the knock-and-talk exception beyond a resident's implied consent to approach the front door or its equivalent.

RELEVANT CONSTITUTIONAL PROVISION

U.S. Const. amend. 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."

COUNTERSTATEMENT OF THE CASE

This case involves an intrusion on Respondents' curtilage, the backyard of their residence, after officers crossed the residence's perimeter and approached the rear porch because the back of the residence was not visible from that perimeter. They did so before their knock-and-talk began. As the officers approached a rear porch they saw in plain view marijuana plants.

Established Fourth Amendment Principles

A plain view depends on lawful access to the view. *Collins v. Virginia*, 138 S. Ct. 1663, 1672 (2018) ("[A]n officer must have a lawful right of access to any contraband he discovers in plain view in order to seize it without a warrant[.]"). Unlike a search pursuant to

a warrant, a warrantless search is, "in the main, *per se* unreasonable" under the Fourth Amendment. *Kentucky v. King*, 563 U.S. 452, 474 (2011) (internal quotation marks omitted). For centuries, the home "has been regarded as entitled to special protection," and "[h]ome intrusions ... are indeed the chief evil against which the Fourth Amendment is directed." *Id.* at 474–75 (internal alterations and quotation marks omitted).

The area immediately surrounding the home is the curtilage. *United States v. Dunn*, 480 U.S. 294, 300 (1987). The curtilage is entitled to the same Fourth Amendment protection as "that covering the interior of a structure." *Dow Chem. Co. v. United States*, 476 U.S. 227, 235 (1986). The "centrally relevant consideration" for identifying a curtilage is whether the area "is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Dunn*, 480 U.S. at 301.

A knock-and-talk is an investigative tool which satisfies the Fourth Amendment because officers have an implied license to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Florida v. Jardines*, 569 U.S. 1, 8 (2013). *Accord King*, 563 U.S. at 469 ("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do.").

A knock-and-talk does not involve a back yard intrusion and approach to the rear porch. *Jardines*, 569 U.S. at 4 ("the dog approached Jardines' front porch"); *Id.* at 12 (Kagan, J., concurring, joined by Ginsburg, J. and Sotomayor, J.) ("[a] stranger comes to

the front door of your home"); *Id.* at 18 (Alito, J., dissenting, joined by Roberts, C.J., Kennedy, J., and Breyer, J.) ("walking down the driveway and front path to the front door"). This Court has been unanimous on the principle that the implied license justifying a knock-and-talk "[o]f course . . . has certain spatial and temporal limits." *Id.* at 19 ("A visitor must stick to the path that is typically used to approach a front door, such as a paved walkway. A visitor cannot traipse through the garden, meander into the backyard, or take other circuitous detours that veer from the pathway that a visitor would customarily use.").

Suspicion Aroused

Before June 19, 2012, anonymous tips had been received by the Fairfield-Hocking County Major Crimes Unit about drug activity at 795 Blue Valley Rd. in Lancaster, Ohio, where Mr. Morgan and Ms. Graf (hereinafter "Respondents") lived. (Ans., ¶¶ 19; 20, R. 3, Page Id 27-38) The Unit had "prior contact" there and "some familiarity" with the residents. (*Id.* at ¶¶ 19; 24).

Despite Petitioners' insinuation that Mr. Morgan was a motorcycle-riding outlaw, the "prior contact" was an uneventful knock-and-talk where officers were permitted inside the residence and no evidence leading to prosecution was gathered. On this later occasion, the "Deputies did not believe the two anonymous tips alone gave them probable cause to enter the residence[.]" (*Id.* at ¶ 21). Nor did they "secure a search warrant prior to arriving at" the residence. (*Id.* at ¶ 23).

Perimeter and Curtilage

The residence is situated on a lot of approximately one acre, with the property sloping downhill from the roadway. (Suppression Hearing, R. 43-1, Page Id 170). At the suppression hearing in the Fairfield County Court of Common Pleas, photographs of the residence were introduced into evidence. (Supp. Hearing Transcript, Ex. B-K, R. 43-2, Page Id 290-299). Exhibits B and C at the suppression hearing show the front of the residence. (*Id*. at 290-291). This is the north side of the residence which faces Blue Valley Road. (*Id.*) A posted "No Trespassing" sign can be seen in the front window of the residence. (*Id.* at 292-293) (another "No Trespassing" sign was placed on a vehicle in the driveway, *State v. Morgan*, 5th Dist. Fairfield No. 13–CA–30, 2014-Ohio-1900, ¶ 12). Exhibit H to the suppression hearing shows the west side and rear of the house, while Exhibit I shows the east side and rear of the house. (*Id.* at 296-297).

The pictures establish that the marijuana plants on the rear deck are not visible from the roadway or perimeter of the residence. The raised deck containing the marijuana plants was attached to the rear of the house close to the rear left (southeast) corner. As can be seen from Exhibit I, both the position of the house and a small privacy fence at the east side of the raised deck prevents visibility from the east. As can be seen in Exhibit C and Exhibit H, visibility of the deck from the road to the west of the residence is prevented by the house itself. (*Id*. at 291, 296).

The lack of visibility from the perimeter is confirmed by the Suppression Hearing Testimony of Deputy Lyle Campbell (Supp. Hearing Trans., R.43-1,

Page Id 184). The pictures also explain why Deputy Williams was unable to observe the plants until he came around the rear right (southwest) corner of the residence. A property line 300 feet to the west of the house is covered by trees: "We have pine trees that separates the property there, and they're huge pine trees." (Morgan Dep. at 85-86, R. 45-1, Page Id 383). Trees on that side of the house "would grow 80 feet tall, and, heck, they might be as big around as this table, if not more." (*Id.*)

Intrusion Policy

The intrusion on Respondents' curtilage was done pursuant to the County Sheriff's policy. In the summer of 2012, the policy of the Fairfield County Sheriff's Office was to secure the perimeter of a residence during knock and talks to ensure officer safety. (Phalen Dep. Tr. at 15-17, R.45-7, Page Id 542). That policy is implemented ***before*** the officer starts knocking at the front door and involves entering the curtilage, including the back yard. (*Id*.)

"[P]rior to arriving," the five "Deputies coordinated their approach." (Ans., ¶ 29, R. 3, Page Id 30) They "agreed" that "Deputy Campbell would approach the front door, knock on it, and ask to speak with the occupants, while the other officers would secure the perimeter of the property for officer safety." (*Id.)* Then, "Deputy Williams and other officers secured the perimeter." (*Id.* at ¶ 32). In fact, though, a contemporaneous affidavit the Unit relied upon to obtain a search warrant after Respondents insisted on one demonstrates a different purpose. The affidavit was executed by a police officer who participated in the search and was a member of the Unit: "Affiant and

other officers went to the back yard to make sure no one fled the rear of the residence." (Memo Opp SJ, Ex. 1, R. 46-1, Page Id 629). Officer safety was not mentioned. The previous knock-and-talk at the house had been accomplished without incident -- no threat to officer safety or flight had occurred. (Suppression Hearing, R. 43-1, Page Id 160).

The Sheriff admitted that securing the perimeter could, depending on the configuration of the property, require entering the curtilage: "Q. Do you know if during that time officers in the Fairfield County Sheriff's Department ever made such an entry onto premises for purposes of officer safety? A. Yes. Q. What do you know about that? A. Well, I know that there are certainly times when our SCRAP team would go out and do knock and talks, that they would secure properties." (Phalen Dep. at 13-14, R. 45-7, Page Id 541). This policy was consistent with how Sheriff Phelan had been trained: "And even when I was with the Columbus Narcotics Bureau, if we did knock and talks, we always covered the back of the property." (*Id.* at 16). "So historically, I can't think of a time they didn't do, at least to my personal knowledge, that they didn't check the back or secure the back of properties when they did these." (*Id.* at 16-17).

The Sheriff then clarified his testimony in an exchange with counsel: "Q. I'm going to parse that out a little bit. So when we say secure the back of the property, ***does that include actually sending an officer onto the back of the property***? A. ***Yes***." (*Id.* at 17) (emphasis added). The testimony continued: "Q. So as of the summer of 2012, that was policy when knock and talks were conducted for the Sheriff's

Department? A. That's correct. Q. Was that for every knock and talk? A. Well, yes, I assume. They should have." (*Id.* at 17).

Intruding on the Curtilage

Upon reaching the premises on Blue Valley road, the Unit's Deputies parked in front of the residence, off the roadway in a common driveway area. (Suppression Hearing Transcript, R. 43-1, Page Id 169-170) According to the testimony of Deputy Williams, there is a great big hill that goes down to the front of the residence and then continues down the side and rear of the residence. (*Id.* at 190).

After parking, the Deputies immediately took up their predetermined positions around the premises. (*Id.* at 159). Deputy Campbell parked and approached the front door of the residence which is visible from Blue Valley Road. (*Id.* at 161). Deputy Williams proceeded from the vehicle he had parked on top of the hill down the right (west) side of the residence, along with Officer Bookman. (*Id.* at 190, 211). Deputy Williamson proceeded down the left (east) side of the house. (*Id.* at 202). Sgt. Hamler proceeded to the corner of the front and left side of the residence. (*Id.* at 224). Deputy Campbell knocked on the front door. (*Id.* at 163). When the door was opened by Ms. Graf, he asked her if he could come in and speak to her. (*Id.* at 164). She stated that she needed to secure her dog and closed the door. (*Id.*)

Deputy Williams had proceeded into the curtilage and down the right side of the house. (*Id.* at 203). As he came around the corner of the rear of the residence in its backyard and approached the home, Deputy

Williams looked up and saw what he recognized as seven marijuana plants on top of the home's second story back porch. (*Id.* at 205-206). Officer Bookman, who was with Deputy Williams, also did not observe the plants until he got to the back of the house. (*Id.* at 233).

Their testimony at the suppression hearing and trial thus confirmed that the back porch and the marijuana plants were not visible from the roadway or property perimeter. (Suppress Hearing Trans., 35, R. 43-1, Page Id 184). A picture of the marijuana plants on the porch was attached as Exhibits J and K to the suppression hearing. (Suppress Hearing Exs. J; K, R. 43-2, Page Id 298,299).

Immediately after he observed the marijuana plants, Deputy Williams broadcast on his radio that he had observed marijuana plants. (Suppress Hearing Exs. J; K, R. 43-2, Page Id 214). Sgt. Hamler, who had taken up a position at the corner of the left (east) and front sides of the house, heard the radio transmission and informed Deputy Campbell that marijuana had been observed on the back deck. (*Id.* at 164). Once he heard this, Deputy Campbell started knocking on the door again, identifying himself, and saying "Anita, you need to come out here and talk to me." (*Id.* at 181). Fearing that evidence was being destroyed, he increased his knocking and yelling and then entered the home. (*Id.* at 181).

According to Deputy Campbell and Sgt. Hamler, this warrantless entry was justified by Deputy Williams' plain sight view of the marijuana plants on the back porch. (*Id.* at 264-265, 180-181). But for Deputy Williams' viewing of the marijuana plants, had

Ms. Graf not returned to the door the officers would have just left the property. (*Id.* at 189).

After Mr. Morgan and Ms. Graf were cleared from the home, a search warrant was sought. The affidavit submitted by Officer Bookman, who accompanied Deputy Williamson to secure the search warrant, described the entry unto the Residents' curtilage: "Officers from the SCRAP Unit, including Affiant, went to the Morgan residence at 795 Blue Valley Road, SE, to investigate. While officers knocked on the front door, to speak with the residents, ***Affiant and other officers went to the back yard*** to make sure no one fled the rear of the residence. Affiant and other officers observed in plain view on a non-enclosed, open balcony on the second floor, several readily identifiable Marijuana plants in black pots." (Memo Opp SJ, Ex. 1, R. 46-1, Page Id 629,630) (emphasis added). Based on this physical and testimonial evidence, *State v. Morgan*, 5th Dist. Fairfield No. 13–CA–30, 2014-Ohio-1900, and *State v. Graf*, 5th Dist. Fairfield No. 13-CA-59, 2014-Ohio-3603, reversed denial of Respondents' motion to suppress.

Impact on Law Enforcement

Petitioners submit, unaccompanied by citation to any testimony or document, that the SCRAP Unit will no longer be able to operate unless permitted before initiating a knock-and-talk to intrude on curtilages whenever its view of a residence from the perimeter is obscured. Given the state appellate court's reversal of Petitioners' convictions, the SCRAP Unit must have already stopped routinely intruding on curtilages in order to avoid suppression of evidence acquired during a knock-and-talk.

Yet, the Unit is going strong. *Felony filings rise in Fairfield County to battle drug epidemic*, https://www.10tv.com/article/felony-filings-rise-fairfield-county-battle-drug epidemic (June 14, 2018) ("The Fairfield County prosecutor says his office is filing more felony cases than ever before. Last year, there were 834 cases filed in the courts. That's a 54 percent increase from the year before. * * * [A commander identified] three major components . . . (1) SCRAPS, which stands for Street Crime Reduction and Apprehension Program . . . the SCRAPS team checks out 8-10 anonymous complaints a week."); https://www.facebook.com/pg/FCSO23/about/ (Official Facebook page of Fairfield County Sheriff's Office listing SCRAP telephone number, accessed January 17, 2018).

REASONS FOR DENYING CERTIORARI

Certiorari is unwarranted because there is neither a split among the federal or state courts nor a departure from this Court's precedent; the case is a singularly misfit vehicle for considering whether to inject an express purpose to search into Fourth Amendment law because at this interlocutory stage genuine issues of material fact preclude simple characterization of the officers' subjective purpose; the federal question lacks importance because law enforcement is not being hampered and the question seldom arises; the Petitioners' Question Presented misstates the Sixth Circuit holding and the facts before the Court; and only a contrived, rather than an actual, conflict arises with the Framers' intent. Affirmatively answering Petitioners' Question Presented would actually require overruling established precedent.

Consequently, no compelling reasons exist in this case to grant the petition for a writ of certiorari. Sup. Ct. Rule 10; 15(2).

1. Petitioners have not identified a split in authority. The Sixth Circuit's holding is consistent with this Court's precedent as well as other federal and state court precedent. Petitioners argue that the Sixth Circuit has deviated from precedent of this Court conditioning Fourth Amendment coverage of an intrusion on an officer's express purpose to search. Their argument posits that *Jardines* and *Collins* held the Fourth Amendment applies only to intrusions where the officer's expressly stated purpose is to search, rather than to do anything else, including protect officer safety. This argument mischaracterizes those holdings.

a. Neither *Jardines* nor *Collins* addresses a colorable alternative purpose to a search. These decisions do not immunize from Fourth Amendment limits an intrusion before initiation of a knock-and-talk, itself an investigative tool. Both *Jardines* and *Collins* involved intrusions committed to gather evidence. That fact hardly converts into a holding the notion that, absent an express purpose to gather evidence, the Fourth Amendment does not limit an intrusion.

b. *Collins* did not involve a purpose other than a search. *Collins* presented the question of "whether the automobile exception to the Fourth Amendment permits a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein." 138 S. Ct. at 1668. The holding was: "When a law enforcement officer

physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred." *Id.* at 1670. Petitioners distort that holding into requiring an express purpose: "Unless an intrusion is expressly to gather evidence, no search within the meaning of the Fourth Amendment has occurred." *Collins* did not so hold, and the Sixth Circuit decision does not, therefore, conflict with *Collins*.

c. *Jardines* did not involve a purpose other than a search. *Jardines* presented the question of "whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' within the meaning of the Fourth Amendment." 569 U.S. at 3. There, "[t]he officers were gathering information in an area belonging to Jardines and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner." *Id.* at 5-6. Their method was "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence." *Id.* at 9. A search within the meaning of the Fourth Amendment was found. Petitioners distort that holding into one requiring an express purpose: "Unless physically entering and occupying the curtilage is expressly to gather information or discover incriminating evidence, no search within the meaning of the Fourth Amendment has occurred." *Jardines* did not so hold, and the Sixth Circuit decision does not, therefore, conflict with *Jardines*.

d. Petitioners' approach would overrule *Terry v. Ohio*, 392 U.S. 1 (1968). The stop-and-frisk there was justified by officer safety. "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." *Adams v. Williams,* 407 U.S. 143, 146 (1972). The Fourth Amendment was nevertheless applied and held to require that "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. To avoid the Fourth Amendment entirely, the officers argued in *Terry* that their only purpose was officer safety, and they were investigating rather than gathering evidence. The Court spurned that argument: "There is some suggestion in the use of such terms as 'stop' and 'frisk' that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a 'search' or 'seizure' within the meaning of the Constitution. We emphatically reject this notion." *Id.* at 16 (footnote omitted). Petitioners seek to put an intrusion motivated by officer safety "outside the purview of the Fourth Amendment." A stop-and-frisk would, therefore, no longer require "specific and articulable facts" about the threat to officer safety. *Terry* has effectively controlled officers' conduct for decades and reversing it to excise the Fourth Amendment from analysis of any intrusion justified by officer safety is unwarranted.

2. This case is a singularly misfit vehicle for considering whether to inject an express purpose to search into Fourth Amendment law. Genuine issues of material fact preclude simple characterization of the

officers' subjective purpose. Summary judgment was granted to the officers and County by the District Court, and the Sixth Circuit reversed and remanded for further proceedings. A trial has not yet occurred, a jury has not made findings of fact, a judge has not reviewed those findings, and an appellate court has not considered them.

a. The purpose initially articulated under oath by the officers for intruding on the curtilage was to prevent flight. As the prosecution proceeded, the officers changed that purpose to protecting their safety. Ultimately, Petitioners seek a broader holding than their Question Presented. Whether officer safety, flight prevention, preservation of evidence, or another exigent circumstance, the broader holding would be that, unless the express purpose of officers is to search, the Fourth Amendment does not apply regardless of any intrusion on a residence or curtilage.

b. Officer safety was not reasonably implicated. This was the ***second*** knock-and-talk at the residence. The first ended months before with a limited search and was uneventful. No violence or threat of violence; no intrusion on the curtilage; and no felony charges. At the prior knock-and-talk the officers had the same information: Mr. Morgan was a motorcycle-riding outlaw engaged in drug activity. They lacked any reason to suspect that the second knock-and-talk would be violent, especially with the presence of a five-member armed law enforcement team.

c. The intrusion did not promote officer safety. The record does not support any claim that threats to officer safety at the front door could be observed by intruding on the backyard curtilage and approaching

the elevated rear deck. Surrounding the perimeter was not, however, as good an investigative option as intrusion on Respondents' rural land because only from inside the curtilage could activities, including marijuana plants growing on a back porch, be observed. Realistically, an officer in the backyard is far better situated to prevent flight than to defend an officer under attack at the front door.

d. Proving purpose depends on the officer's subjective intent or motive. A concocted assertion of officer safety would no more satisfy the Fourth Amendment than a traffic stop without any colorable traffic violation. *Cf. Whren v. United States*, 517 U.S. 806 (1996) (Fourth Amendment permitted Vice Squad officers in an unmarked car, wearing plain clothes, and driving in neighborhood inundated with drug activity to pull over a vehicle for failure to use a turn signal and then observe a passenger holding two large plastic bags of crack cocaine). An officer's "subjective motives" can seldom be "neatly unraveled." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 405 (2006). The mischief in a holding which invites suppression hearings on whether an officer's articulated purpose other than to search was a mere pretext is pellucid. Unlike the objective pretext analysis under *Whren* of whether a colorable traffic violation occurred, a subjective pretext analysis is unavoidable under Petitioners' approach. *Cf. Cty. of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539, 1548 (2017) ("[W]hile the reasonableness of a search or seizure is almost always based on objective factors, the provocation rule looks to the subjective intent of the officers who carried out the seizure.") (citation omitted).

e. The Fourth Amendment does not require an express motive or purpose to search. The language of the Fourth Amendment protects the right of individuals to be free from "unreasonable searches." Petitioners extrapolate from the word "searches" that the Fourth Amendment applies only to conduct by officers done with the express motive or purpose to search. But the Fourth Amendment emphasizes the right of individuals to be secure in their houses against unreasonable searches. It focuses on the intrusion, not the mental state of the officers intruding. Nothing in the Fourth Amendment precludes or suggests that an intrusion on a house, including its curtilage, by officers about to conduct an investigative knock-and-talk is beyond its concern with "unreasonable searches" so long as the officers mouth a non-search motive or purpose for the intrusion.

f. Unlike an interlocutory appeal, a trial verdict and appellate decision would present a record on what happened and why. *See, e.g., Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944 (2012) (Alito, J., concurring in denial of certiorari) ("The current petitions come to us in an interlocutory posture. * * * Because no final judgment has been rendered and it remains unclear precisely what action the Federal Government will be required to take, I agree with the Court's decision to deny the petitions for certiorari."); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Bhd. Of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 327–28 (1967) (*per*

curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court.").

3. Petitioners' claim that floodgates will open and prevent effective law enforcement grossly exaggerates the importance of the federal question. The SCRAP Unit remains viable even though the Ohio Court of Appeals for Fairfield County excluded evidence seized at Respondents' residence and thus deterred future intrusions on a curtilage for officer safety before a knock-and-talk was initiated. Petitioners have not claimed that automatic intrusion on curtilages before a knock-and-talk begins regularly occurs.

a. The floodgates threat is an empty one on its own terms. Using the positioning of the Unit Officers around the perimeter and inside the curtilage of Respondents' residence as an example makes it clear that officer safety will not be appreciably enhanced in dangerous knocks-and-talks by intruding on the rear curtilage. If a violent, armed drug dealer shoots the officer at the front door, those officers in the back yard are not in a position to protect the knocker-and-talker.

b. The floodgates threat is not plausible. The SCRAP Unit is affected by the Sixth Circuit ruling only when the perimeter of a targeted property blocks a clear view of the residence. Petitioners have not even suggested that fencing, trees, hills, and other opaque barriers around the entire perimeter of a residence and curtilage are commonplace.

c. The floodgates threat is mitigated by the exigent circumstance for officer safety. When specific and articulable facts demonstrate the existence of an objectively reasonable threat of imminent harm, the

Fourth Amendment permits an intrusion to protect officer safety. This exigent circumstance was not invoked to justify the intrusion on Respondents' curtilage before the knock-and-talk was initiated. The officers conceded that they lacked probable cause to enter the residence, they did not initially seek a search warrant, and their uneventful prior knock-and-talk minimized any fear of a violent response to the later knock-and-talk.

d. The lack of conflicting federal or state court decisions indicates that an important federal question is not presented. Petitioners have failed to cite a split or even a focus in federal or state courts on whether the Fourth Amendment applies when officers intrude on a curtilage to protect officer safety before initiating a knock-and-talk. Nor have they cited such a split or focus on whether an express purpose to search is a condition of Fourth Amendment coverage. Perhaps the Sixth Circuit's holding will generate such a conflict, but that prediction is purely speculative. If ever a split occurs, lower courts would generate a variety of circumstances and views and thereby place this Court in a better position to then resolve it.

4. Petitioners' Question Presented misstates the issue which this case would bring to the Court. A critical constitutional difference exists between surrounding a resident's perimeter during a knock-and-talk and, whenever the back and sides of a residence are obscured, intruding on its curtilage before the knock-and-talk is initiated.

a. A perimeter is the outer boundary of a residence and its curtilage. The perimeter thus differs from the residence and its curtilage. No court has rejected the

fact that the officers intruded on Respondents' curtilage.

b. The counterstatement of the Question Presented captures the holding in the Sixth Circuit on the indisputable facts. The County's policy was to intrude on curtilages before initiating a knock-and-talk whenever remaining at the perimeter was anticipated to block a clear view of the residence. As applied to Respondents' residence and every residence with a similar curtilage, that policy required, before a knock-and-talk began, the officers to walk as far into the curtilage as necessary to see the back and sides of a residence clearly.

c. Facial constitutionality does not salvage as-applied unconstitutionality. Petitioners pursue a fallacy that, because surrounding the perimeter does not always involve intrusion on the curtilage, a policy causing occasional intrusions on the curtilage is constitutional. As applied, the County knock-and-talk policy violates the Fourth Amendment because it not only fails to carve out an exception for a curtilage, but it also ensures that, for every residence where the back door or other areas are not visible from outside the curtilage, an intrusion will be made as a matter of course.

d. An intrusion across the perimeter, into a residence's back yard, and approaching a rear porch exceeds the implied license which justifies a knock-and-talk. Rather than "stick to the path that is typically used to approach a front door," the officers decided ***before*** the knock-and-talk began to "meander into the back yard" thereby exceeding an implied license. *Jardines*, 569 U.S. at 19 (Alito, J., dissenting). The

Counterstatement of the Question Presented reflects that Petitioners' approach ignores the "spatial . . . limits," *Id.*, on the implied license.

5. The Framers' intent is consistent with the Sixth Circuit holding. Stretching to find a conflict, Petitioners invoke the undoubted revulsion of the Framers against general searches and writs of assistance. That history convinced the Framers of the need for the Fourth Amendment to prevent unreasonable governmental intrusion on either private property or reasonable expectations of privacy.

a. The Framers sought to protect residential privacy. In 1761, James Otis argued the *Paxton's Case* or *Writs of Assistance* case, for five hours in the Superior Court of Massachusetts, and a young John Adams witnessed and recorded that argument. Otis' opening was succinct: "One of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle." Writs of Assistance Case - Further Readings - Otis, Law, Court, and Massachusetts - JRank Articles http://law.jrank.org/pages/11407/Writs-Assistance-Case.html#ixzz5ShZecodq *See also Entick v. Carrington,* 95 Eng. Rep. 807, 817 (C.P. 1765) ("[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law."). Otis would no doubt have disapproved of a British Captain who justified his troops entering a residence or its curtilage

for officer safety in anticipation of resistance to an investigation.

b. The modern dictionary definitions of "search" on which Petitioners rely encompass the investigative function of a knock-and-talk. A law enforcement officer comes to the front door to inquire, hoping to either secure consent for entry or observe an exigent circumstance, such as plain view of criminal activity or destruction of evidence. *See, e.g., King* (exigent circumstance in response to knock-and-talk).

c. A knock-and-talk seeks to secure information about criminal activity. A knock-and-talk is hardly a social visit or an effort to sell tickets to a police athletic league fundraiser. Its purpose is to investigate, albeit based on the implied consent from a resident to approach a front door or its equivalent. *Cf. Schneckloth v. Bustamonte,* 412 U.S. 218, 228, 231–32 (1973) ("Consent searches are part of the standard investigatory techniques of law enforcement agencies" and "a constitutionally permissible and wholly legitimate aspect of effective police activity."). While some would deem implied consent sufficient to remove a knock-and-talk from the technical meaning of "search," the "purpose of gathering evidence" remains. *See Jardines*, 569 U.S. at 21 (Alito, J., dissenting) ("[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."). The Fourth Amendment applies to police efforts to gather evidence. Implied consent satisfies the Fourth

Amendment; it does not circumvent the Fourth Amendment.

d. The Constitution deserves an interpretation sufficient to achieve the purpose of the provision being interpreted. "Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government." *United States v. Classic*, 313 U.S. 299, 316 (1941). "The 'basic purpose of this Amendment,' our cases have recognized, 'is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (quoting *Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523, 528 (1967)). The Amendment seeks to secure "the privacies of life" against "arbitrary power," *Boyd v. United States,* 116 U.S. 616, 630 (1886), and "place obstacles in the way of a too permeating police surveillance." *United States v. Di Re,* 332 U.S. 581, 595 (1948). Armed officers intruding on a curtilage before a knock-and-talk is initiated and walking through a backyard to the rear deck of a residence thwart achievement of those purposes.

e. A search by any other name endangers the core purpose of the Fourth Amendment. Egregious general searches and writs of assistance were a catalyst, but not the only abuse. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) ("It is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified:

to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting."). Intrusion before a knock-and-talk is initiated to protect officer safety is an intrusion covered by the Fourth Amendment even if less egregious than general searches and writs of assistance. *See Terry*, 392 U.S. at 19 ("'Search' and 'seizure' are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'") (internal quotation marks in original).

f. Petitioners obtained information of criminal activity by intruding on Respondents' curtilage. When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." *United States v. Jones*, 565 U.S. 400, 406 n. 3 (2012). *Accord Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018). Even Petitioners recognize, Petition at 13, this point: "To be considered a search under the Fourth Amendment, officers must gather information while in a protected area." That is precisely what the officers did. They purportedly sought to gather information about officer safety. That the marijuana plants came into their plain view was unrelated to officer safety. *Minnesota v. Dickerson,* 508 U.S. 366, 367 (1993). A plain view depends on lawful access to the view. *Collins*, 138 S. Ct. at 1672. The Fourth Amendment prohibited the officers from gathering information of

criminal activity by a warrantless intrusion which exceeded its initial justification and provided a plain view from a position the officers had no lawful right to access.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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