No. 18-943

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

REPLY BRIEF FOR PETITIONERS

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I. The Sixth Circuit's Holding is Inconsistent with this Court's Precedent in *Jardines* and *Collins*.

The Sixth Circuit specifically relied on *Florida v. Jardines*, 569 U.S. 1 (2012) and *Collins v. Virginia*, 138 S. Ct. 1663 (2018) to find that the County's policy of securing the perimeter of a residence during a "knock and talk" operation violated the Fourth Amendment. Alas, both *Jardines* and *Collins* involved intrusions onto a constitutionally protected area for the specific purpose of gathering evidence. That is fundamentally different than what occurred here. The County's policy was to secure the perimeter of a residence for officer safety, not to gather evidence.

The Sixth Circuit incorrectly applied *Jardines* and *Collins* 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.

A. The Fourth Amendment Requires a Purposeful Investigative Act to Constitute a Search under this Court's Precedent in *Jardines* and *Collins*.

The threshold question in any Fourth Amendment case is whether a "search" has occurred within the meaning of the Fourth Amendment. 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. The Court of Appeals erred as a matter of law in finding a violation.

B. Officer Safety is Reasonably Implicated During Knock and Talks.

Respondents completely disregard the threat officers face during a knock and talk operation and the importance the federal question poses to law enforcement. The defendant officers articulated that threat and the importance of officer safety clearly in the record below. Securing the perimeter of a residence during a knock and talk is basic police procedure. (Phalen Dep. Tr. at 16, RE 45-7, Page ID # 542). It is taught in the police academy and generally learned in law enforcement. (Williams Dep. Tr. at 9-14, RE 45-5, Page ID # 507-509; Campbell Dep. Tr. at 25, RE 45-4, Page ID # 487; Hamler Dep. Tr. at 8-12, RE 45-6, Page ID # 522-523). Sheriff Phalen previously worked for the Columbus Police Department as a lieutenant in the Narcotics Bureau. (Phalen Dep. Tr. at 7-8, RE 45-7, Page ID # 540). He testified that securing the perimeter of a residence during a knock and talk was common procedure with the Columbus Narcotics Bureau. (Phalen Dep. Tr. at 16, RE 45-7, Page ID # 542). Securing the perimeter is necessary to ensure officer safety. (Bookman Dep. Tr. at 27-28, RE 45-3, Page ID # 470; Campbell Dep. Tr. at 18-20, 25-26, RE 45-4, Page ID # 486, 487-488; Williams Dep. Tr. at 15-

16, RE 45-5, Page ID # 509; Hamler Dep. Tr. at 20-22, 25-26, RE 45-6, Page ID # 525-527; Phalen Dep. Tr. at 16-17, RE 45-7, Page ID # 542). Officer safety is the ultimate priority. (Hamler Dep. Tr. at 11-12, RE 45-6, Page ID # 523). Officers secure the perimeter foremost to prevent against an ambush. (Campbell Dep. Tr. at 19-20, RE 45-4, Page ID # 486). According to Sgt. Hamler, "you don't know what you're walking into." (Hamler Dep. Tr. at 25-26, RE 45-6, Page ID # 526-527). "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." (Hamler Dep. Tr. at 26, RE 45-6, Page ID # 527). Also, officers position themselves near each exit to prevent someone from fleeing the residence. (Campbell Dep. Tr. at 20-21, RE 45-4, Page ID # 486). Often times, if someone has an active warrant, they attempt to flee when law enforcement shows up. (Id.).

Because the SCRAP Unit responds to complaints of drug activity, there is an increased likelihood officers are dealing with someone with a criminal history. (Campbell Dep Tr. at 19, RE 45-4, Page ID # 486). Courts have routinely found that drugs and firearms are related. Firearms are commonly regarded as "tools of the drug trade". See, e.g., *$110,873.00 in U.S. Currency,* 159 Fed. Appx. 649, 652 (6th Cir. 2005). "Common "tools of the trade" include firearms, digital scales, baggies, cutting equipment, and other drug-related paraphernalia. *Id.* Firearms "are 'tools of the trade' in drug transactions," *United States v. Hardin,*

248 F.3d 489, 499 (6th Cir. 2001); *United States. v. Shields*, 664 F.3d 1040, 1046 (6th Cir. 2011); *See also United States v. Winder,* 557 F.3d 1129 (10th Cir. 2009); *United States v. Maddox,* 388 F.3d 1356, 1366 n. 6 (10th Cir. 2004) (it is reasonable for police to "suspect that 'drug dealers commonly keep firearms on their premises as tools of the trade' "); *United States v. Nicholson,* 983 F.2d 983 (10th Cir. 1993) ("Drug traffickers may carry weapons to protect their merchandise, their cash receipts, and to intimidate prospective purchasers). In addition to the meth lab and marijuana found at Plaintiffs' residence, there was cash, firearms and other contraband discovered. (Plaintiff's Dep. Ex E, RE 45-11, Page ID # 569-570).

Prior to the knock and talk, the SCRAP Unit obtained background information on Morgan, including his extensive criminal history and felony drug-trafficking convictions. (Hamler Dep. Tr. at 24-25, RE 45-6, Page ID # 526). Officers also learned Morgan was a member of the Avengers, an outlaw motorcycle gang. (Campbell Dep. Tr. at 69-70, RE 45-4, Page ID # 498-499; Hamler Dep. Tr. at 24-25, RE 45-6, Page ID # 526). In addition, they learned Morgan was possibly in possession of weapons while under disability. Sergeant Hamler testified that the information obtained about Morgan raised concerns about officer safety. (Hamler Dep. Tr. 25, RE 45-6, Page ID # 526). Sergeant Hamler secured 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.

In June, 2012, the policy of the Fairfield County Sheriff's Office was to secure the perimeter of a residence during a knock and talk to ensure officer safety. (Phalen Dep. Tr. at 15, RE 45-7, Page ID # 542). The procedure was tactically safe, sound and lawful. Even Morgan admits that officer safety is important when officers are responding to complaints of illegal activity. (Morgan Dep. Tr. at 74, RE 45-1, Page ID # 380). If law enforcement officers could not secure the perimeter of a residence during a knock and talk, officer safety would be placed at a heightened risk. The SCRAP Unit performs important work removing drugs and unlawful firearms from the street. The program is successful. (Hamler Dep. Tr. at 13, RE 45-6, Page ID # 523; Plaintiff's Dep Ex. A, RE 45-8, Page ID # 552-555). 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 packaged for sale, 13.9 grams of crack cocaine and 314 pharmaceutical pills. (Plaintiff's Dep. Ex. A, RE 45-8, Page ID # 555). The SCRAP Unit has had continued success. (Plaintiff's Dep. Ex. A, RE 45-8, Page ID # 552-555). If officers could not maintain their safety by being permitted to secure the perimeter of a residence while investigating narcotics complaints, officers could no longer perform knock and talk operations – thus eliminating the SCRAP unit. Crime would increase and Fairfield County and its residents would be less safe.

CONCLUSION

Petitioners respectfully urge the Court to grant the Petition for a Writ of Certiorari to review the Sixth Circuit's conflicting holding with this Court's established precedent and address a federal question of exceptional importance.

Respectfully Submitted,

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