No. 19-6296

In The
Supreme Court of the United States

MICHAEL HOLMES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO THE UNITED STATES' BRIEF IN OPPOSITION

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REPLY ARGUMENTS

The government's Brief in Opposition (BIO) obfuscates the compelling reasons for granting Mr. Holmes's petition for a writ of certiorari. For example, this case does not bring with it the taint of muddled factual disputes; the facts here are straightforward, without complexity, and easily identified from the record-on-appeal. *See* BIO at 9. The government's response does nothing to substantively address his challenge to the lower courts' de facto application of an *ad hoc* bright-line rule, in contravention of this Court's precedent, to remedy a result (some might argue a moral answer) most befitting the prosecution. *See* BIO at 11 and 17. And finally, the BIO offers up a red herring concerning the putative application of the exclusionary rule, *see* BIO at 16, for which, this question or call for relief was never even addressed or discussed in the courts below (a Fourth Amendment violation was not found, thus, no need to discuss the exclusionary rule).

Preliminary Statement

Though Mr. Holmes appreciates and understands that he brings two separate and distinct issues to the Court for its consideration (a Fourth Amendment issue and a sentencing issue), for this Reply, he will only concentrate on the government's response to his constitutional question. By filing this Reply, Mr. Holmes neither waives any of the components of his initially filed petition for writ of certiorari, nor concedes any argument or assertion made by the government in its BIO.

This case affords the Court a wonderful opportunity to address how the Fourth Amendment properly applies to private property, the implied license to enter, and the State's ability to conduct a lawful "knock-and-talk" investigation

In *United States v. Jones*, 132 S. Ct. 945, 949 (2012), when discussing Lord Camden and the principles from *Entick v. Carrington*, 95 Eng. Rep. 807, 817 (C.P. 1765), this Court highlighted:

> "[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." *Entick, supra*, at 817.

Jones, 132 S. Ct. at 949. "Consistent with this understanding," the Court explained, "our Fourth Amendment jurisprudence was tied to common-law trespass[.]" *Id.* In the *Jones* majority opinion, Justice Scalia emphasized: "What we apply is an 18th century guarantee against unreasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted." *Id.* at 953 (emphasis in original).

"Ordinarily," however, "a police officer, like any citizen, has an implied license to approach a home, knock on the front door, and ask to speak with the occupants." *United States v. Carloss*, 818 F.3d 988, 990 (10th Cir. 2016). "This implicit license typically permits the visitor 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*, 133 S. Ct. 1409, 1415 (2013). "Thus, a police

officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" *Jardines*, 133 S. Ct. at 1416 (quoting *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011)).

But, what must a private homeowner do, objectively, to tell the world (including the State or any of its agents) that he does not want it at his front door; that he revokes any implied license to enter his property? What then?

This case, the case of Mr. Holmes, is the case in which this Court should address and answer that question, just like Justice Gorsuch asked while a Judge sitting on the Tenth Circuit Court of Appeals in *Carloss*:

> But what happens when the homeowner manifests an obvious intention to revoke the implied license to enter the curtilage and knock at the front door? . . . So that to enter the home's front porch, its constitutionally protected curtilage, visitors would have to disregard four separate and plainly visible warnings that their presence is wholly unwelcome? May officers still – under these circumstances – enter the curtilage to conduct an investigation without a warrant and absent an emergency?
>
> That's the question we're asked to address today.

Carloss, 818 F.3d at 1003-1004 (Gorsuch, J., dissenting); *see also* Doc. 90, pages 10-11 ("the question presented is whether [Mr.] Holmes expressly revoked the implied license to enter his property. If he did, detectives violated Holmes' Fourth Amendment rights by approaching his front door to conduct a knock and talk.").

The courts below said that a bright-line rule favors the prosecution. This Court's Fourth Amendment totality-of-circumstances test favors the homeowner.[1] The district court along with the appellate court's affirmance favored the prosecution and ruled against the homeowner (presently serving his 17 ½ year sentence). A bright-line rule was devised *ad hoc* so as to find no fault for what State agents did in this case; that is, they unlawfully trespassed onto the homeowner's private property to further their criminal investigation by conducting a "knock-and-talk." *See Oliver v. United States*, 104 S. Ct. 1735, 1743 (1984) ("[t]he ad hoc approach not only makes it difficult for the policeman to discern the scope of his authority, it also creates the danger that constitutional rights will be arbitrarily and inequitably enforced") (citations omitted). More particularly, Mr. Holmes fenced in his property, placed No Trespassing and Private Property signs conspicuously across the fence, tied a dog to the inner yard, sealed off his front door with an enclosed porch, did away with any doorbell, and substituted a front door knocker with burglar bars. To be sure, the district court here acceded that "[m]any of the barriers used by [the Petitioner, Mr. Holmes] might well deter Girl Scouts, trick-or-treaters or anyone who has a casual interest in visiting." Doc. 90, page 33 n.30 (district court's written order

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[1] *See generally Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996) ("We have long held that the touchstone of the Fourth Amendment is reasonableness. Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances.") (internal citation and quotation omitted).

denying Mr. Holmes's motion to suppress evidence); *see also, e.g., Jardines*, 133 S. Ct. at 1415 n.2 ("[c]omplying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters"). This Court's precedence, if anything, must support the position that Mr. Holmes did everything viable to tell the world, including law enforcement, to stay off his property. It is unreasonable to infer he meant anything less. And the Fourth Amendment proscribes exactly this government behavior, 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.

"Looking in hindsight," the district court wrote in this case, Doc. 90, page 29, "any of these factors may seem relevant in a particular case. But the problem with a case-by-case approach is that the property owner and the police should know *beforehand* what measures are sufficient to revoke the implied license to enter property." *Id.* (emphasis in original). The lower court went on to observe that "[j]ust as the Supreme Court warned in rejecting a case-by-case analysis to determine whether landowners have a legitimate expectation of privacy with regard to open fields," it concluded that "a totality of the circumstances approach to whether the property owner has revoked the implied license to enter is also problematic because police officers would have to guess before every search whether landowners had

erected fences sufficiently high or posted a sufficient number of warning signs to establish a right of privacy." *Id.* (internal citation and quotation omitted). In short, then, when asking whether Mr. Holmes did "enough to revoke the implied license to approach his front door," Doc. 90, page 31, the district court applied a bright-line rule, in contravention of this Court's precedent: "the *combination* of posting a 'No Trespassing' sign along with the physical act of closing the gate *does* serve to seal the property and manifest the resident's intent to revoke the implied license to enter." *Id.* (emphasis in original). "Thus," the court found, "a further bright line or categorical rule could perhaps be fashioned: a 'No Trespassing' sign placed on or very near a *closed* gate on a homeowner's fenced property would revoke the implied license to enter." Doc. 90, pages 32-33 (footnotes omitted) (emphasis in original). "[B]ecause Mr. Holmes left the gate partially open, his 'No Trespassing' sign is not enough to 'expressly' and unambiguously revoke the implied license." *Id.* at 33. "Thus, the knock and talk here did not violate Holmes' Fourth Amendment rights." *Id.* (footnote omitted).

Though it "often enough [ ] may be tempting for a judge to do what he thinks best for society in the moment," Justice Gorsuch acknowledged in *A Republic, If You Can Keep It* (*see Why Originalism is the Best Approach to the Constitution* and available at https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/), "to bend the law a little to an end he desires,"

we simply cannot "leave[] things to the moral imagination of judges," for that in itself "invites trouble." Justice Gorsuch, *see id.*, has framed the question thusly:

> Just consider the "reasonable expectation of privacy" test the Court invented in the 1960s to redefine what qualifies as a search for Fourth Amendment purposes. . . . [U]nder that judge-made doctrine, the Court has held . . . that a police helicopter hovering 400 feet above your home doesn't offend a "reasonable expectation of privacy." The Court has even held that the government can snoop through materials you've entrusted to the care of third parties because, in its judgment, that, too, doesn't invade a "reasonable expectation of privacy." But who really believes that? The car you let the valet park; the medical records your doctor promised to keep confidential; the emails you sent to your closest friend. You don't have a reasonable expectation of privacy against the government in any of those things? Really?

The right to privacy "is all the more critical when the property involved is a home because 'when it comes to the Fourth Amendment, the home is first among equals.'" Doc. 90, page 30 (quoting *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013)). Just as the officers did in *Jardines*, for example, law enforcement here "were gathering information in an area belonging to [Mr. Holmes] and immediately surrounding his house – in the curtilage of the house, which we have held enjoys protection as part of the home itself." *Jardines*, 133 S. Ct. at 1414.

"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.* The officers in this case never had the homeowner's permission, express or implied, to trespass onto his property and walk up to his front door. "At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and

there be free from unreasonable governmental intrusion.' This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window." *Id.* (quoting *Silverman v. United States*, 365 U.S. 505, 511, 81 S. Ct. 679 (1961)).

"So," Justice Gorsuch recited in his dissenting opinion in *United States v. Carloss*, "not only do officers need a warrant, exigent circumstances, or consent to enter a home, they also generally need one of those things to reach the home's front door in the first place." 818 F.3d 988, 1003 (10th Cir. 2016); *see also* Doc. 90, page 8 ("[w]here officers without a warrant gather information in the curtilage of the house, they engage in an unreasonable search unless their conduct is explicitly or implicitly permitted by the homeowner") (citation and footnoted omitted). "But in the constant competition between constable and quarry, officers sometimes use knock and talks in ways that test the boundaries of the consent on which they depend." *Carloss*, 818 F.3d at 1003.

This is one of those cases. And, it is what makes it an excellent vehicle in which to address, answer, and explain the question presented: what is reasonably required of a private homeowner to successfully revoke any implied license or permission to enter one's property under the Fourth Amendment?

The facts are clean in this case, straightforward, and simple. The governing legal jurisprudence is quickly identifiable and recognizable, and the record-on-appeal clearly shows where the lower courts were mistaken in their analysis, findings, and decision. *A fortiori*, the issue here has an encompassing impact on the conduct, behavior, strategic and structural investigatory decisions made by law enforcement almost every day. It's a great case by which to explain to both "constable and quarry" the boundaries, expectations, and requirements of the Fourth Amendment as applied to "knock-and-talks." Certainly, "[i]t is almost universally agreed that, in a functioning and cohesive society, maintaining positive and healthy relationships with one's neighbors [including the police] is paramount." McLanahan, Cole, Note, *United States v. Carloss: Should the Police Act Like Good Neighbors?,* 70 Okla. L. Rev. 519, 519 (Winter 2018); s*ee also, e.g., Florida v. Jardines*, 133 S. Ct. 1409 (2013); *State v. Christensen*, 517 S.W.3d 60 (Tenn. 2017); *United States v. Bearden*, 780 F.3d 887 (8th Cir. 2015); *United States v. Taylor*, 458 F.3d 1201 (11th Cir. 2006); Lanford, Rainey, Comment, *The Illusory Constitutional Protection of "No Trespassing" Signs in Tennessee*, 12 Tenn. J. L. & Pol'y 287 (Winter 2018); and Sikes, Skyler K., Note, *Get Off My Porch: United States v. Carloss and the Escalating Dangers of "Knock and Talks,"* 70 Okla. L. Rev. 493 (Winter 2018). It is important; it is worthy of this Court's weighty attention and

studied review; and it merits consideration by this Court.[2]

Mr. Holmes appreciates that Rule 10 declares "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." This case offers up those compelling reasons Rule 10 articulates. *See, e.g.,* Cordray, Margaret Meriwether and Richard, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 Wash. U. L. Rev. 389, 400-401 (2004). The case presents an important federal question that is capable of repetition nationally – "the government is directly and substantially affected by [ ] lower court decision[s] or that decisional conflicts are requiring it to operate differently in various part of the country." *Id.* at 408 (footnote omitted). The district court here expressed concern that "the police should know *beforehand* what measures are sufficient to revoke the implied license to enter property." Doc. 90, page 29 (emphasis in original). This case provides an excellent opportunity to full well address the nation's homeowners and "[t]he interests protected by the Fourth Amendment," such that police, citizens, and neighbors might know "whether the measures they have taken expressly revoke the implied license to enter their property," indeed, this case offers the chance to answer what "the police need to know before they enter whether they will be violating the Constitution if they do so." *Id.* at 30 (footnote omitted). "The Fourth Amendment is,

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[2] *See* 15 A.L.R. 6th *Construction and Application of Rule Permitting Knock and Talk Visits Under Fourth Amendment and State Constitutions* 515 (2015) (survey and collection of case law).

after all, supposed to protect the people at least as much now as it did when adopted, its ancient protections still in force whatever our current intuitions or preferences might be." *Carloss*, 818 F.3d at 1011 (Gorsuch, J., dissenting) (citation omitted).

And, "as a matter of fact, you can't help but wonder if millions of homeowners (and solicitors) might be surprised to learn that even a long line of clearly posted No Trespassing signs are insufficient to revoke the implied license to enter a home's curtilage – that No Trespassing signs have become little more than lawn art." *Id.*

This case affords the Court a wonderful opportunity to address the Nation's homeowners, as well as law enforcement, and explain how the Fourth Amendment properly applies to private property, the implied license to enter, and the State's ability to conduct a lawful "knock-and-talk" investigation. To date, the Court has not done this . . . yet. *See* Doc. 90, page 35 ("[t]hese issues will no doubt continue to be addressed by the appellate courts and likely one day the Supreme Court").

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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