No. 21-1403

IN THE

# Supreme Court of the United States

TRAVIS MORSE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A POLICER OFFICER FOR THE TOWN OF ORONO, MAINE, *et al.*,

*Petitioners,*

*v.*

CHRISTOPHER FRENCH,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI


BERNARD J. KUBETZ
*Counsel of Record*
TIMOTHY C. WOODCOCK
EATON PEABODY
80 Exchange Street
P.O. Box 1210
Bangor, Maine 04402
(207) 947-0111
bkubetz@eatonpeabody.com

*Counsel for Respondent Christopher French*



314149

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## TABLE OF CONTENTS

## TABLE OF CITED AUTHORITIES

*Page*

**CASES:**

*Cited Authorities*

*Page*



**STATUTES AND OTHER AUTHORITIES:**

## I. INTRODUCTION

Before the Court is the Petition for Certiorari of Officers Travis Morse and Christopher Gray of the Orono, Maine Police Department from the decision of the First Circuit Court of Appeals in *Christopher French v. Daniel Merrill, et al.* Petitioners Morse and Gray ask this Court to review the First Circuit's decision that they could not invoke qualified immunity to shield themselves from French's charge that, in the early morning hours of September 14, 2016, they violated French's Fourth Amendment rights.

The panel majority in *French v. Merrill*, correctly determined that in *Florida v. Jardines,* 569 U.S. 1 (2013) this Court had sufficiently set forth the nature and contours—that is "the terms"—of an implied social license within which law enforcement officers acting without a warrant could conduct a "knock and talk" so that, when Morse and Gray repeatedly entered Christopher French's property on September 14, 2016 and repeatedly demanded that he come to the door, they exceeded "clearly established" Fourth Amendment limitations.

The panel majority's decision was consistent with the precedents of this Court and does not provide a basis for any 'clarification' of *Jardines*. Therefore, the Petition should be denied.

## II. FACTUAL BACKGROUND

In the early morning hours of September 14, 2016, Orono police officers, Petitioners herein, Travis Morse and Christopher Gray, were notified of a possible break-in at 60 Park Street in Orono. ECF 58-3, Page ID# 1181.

At 60 Park Street, they encountered the four occupants, Samantha Nardone, Alicia McDonald, Jennifer Prince, and, Elizabeth Shorter. ECF ID #644, ¶9. Nardone informed them that at 12:30 a.m. that evening when she and McDonald had gone to bed (they shared the same room) she had placed her cell phone by her bed. ECF 58-3, Page ID# 1181-82. When she awoke at 3:00 a.m., her cell phone and her keys were missing. *Id*. EFC 58-3, Page ID 1184.

Nardone told the officers that she suspected that her former boyfriend, Christopher French, had somehow gotten into the house and stolen the cell phone and the keys, but she did not know how he could have done that. ECF 58-3, Page ID# 1182.[1]

Nardone told the officers that she and French had been dating but that she had recently terminated the

1. The dissent asserts that "[b]oth officers were familiar with the history between French and Nardone and knew that Nardone had several times in the past called the Orono Police Department because of problems with French." App. 42. This is incorrect. Before Nardone's calls in the early morning hours of September 14, 2016, there is no record that Nardone ever called the Orono Police Department regarding French. Nardone did not call the police about the February 18, 2016 incident—a neighbor made that call; not because of French, per se, but because of the general ruckus emanating from 60 Park Street. App. 4, ECF 58-2, Page ID 1170. At no point later in that day did Nardone call the police about French; rather, Officer Nathan Drost called Nardone. Joint Exhibit 35-1, 24:18-24:30. Drost's call prompted further communications with Nardone that led to French's arrest. By asserting Morse and Gray "knew" that "Nardone had several times in the past" called the police about French, the dissent credited Morse and Gray with "knowledge" of something that did not happen.

relationship and begun a more expansive dating life. *Id.* She told them that a few days earlier, French had come to 60 Park Street when she was not there and had taken her computer and her keys. *Id.* She retrieved the computer and keys from French. *Id.* . Thereafter, she had had the locks to 60 Park Street changed. App. 43, 45-46.

She told them that she and McDonald had seen French earlier on the evening of September 13 at a local Orono bar, without incident, but, after encountering him, they had decided to leave. App. 8. Much later in evening, Nardone and McDonald encountered French again.[2] This time, Nardone was driving when they encountered French who was on foot. Nardone stopped and had an exchange with French in which French accused Nardone of driving drunk, an accusation that Nardone related to Officers Morse and Gray. *Id.* Nardone and McDonald also claimed that French climbed onto Nardone's car. *Ibid*

Nardone and McDonald told Morse and Gray that because of this encounter with French, when they returned to 60 Park Street, before going to bed at 12:30 p.m., they locked all the doors and windows. App. 8, 44. Therein lay the puzzle—although Nardone suspected that French had entered the house and taken her cell phone and keys, she could not explain how he had done it. ECF ID # 643, ¶ 7.[3]

---

2. The panel majority's decision implies that this encounter occurred "when [Nardone] was driving away from the bar" (App. at 8), though not material to its decision, this is incorrect. In fact, this encounter occurred much later in the evening at an entirely different location. ECF #643, ¶ 6.

3. The dissent notes that while Officers Morse and Gray were at 60 Park Street, Nardone's roommate, Jennifer Prince,

Between 4:00 a.m. and 4:30 a.m., having checked the house and having completing this portion of their investigation, Morse and Gray returned to the department. App. 8, 46. While at the station, they attempted to determine if they could "ping" Nardone's phone to determine its location. *Id*. 46.

At 4:43 a.m., Nardone called the police to report that French had appeared at the outer (mudroom) door to 60 Park Street, but when Nardone's roommates screamed, he ran away. App. 8, 47.[4] Nardone's second call caused

---

announced that she believed that she had figured out how the intruder gained entrance to the house. She explained that she had found items on the floor of the second floor bathroom that should have been on the windowsill, suggesting that the intruder had climbed through the bathroom window and, in the process, knocked these items onto the floor. App. 46. The dissent implies that Prince's discovery answered the question of how the supposed intruder had gained entry to 60 Park Street. The dissent fails to note, however, that body camera recording of Prince's "discovery" also shows that while one of the officers left to get a camera to document the scene, Prince went back up the stairs. When she came back downstairs, the officers asked her to show the windowsill items to them so they could photograph the scene as she had discovered it, she told them that she had put all the items back on the windowsill. Joint Exhibit 35-8, 41:42, 43:35. The dissent also failed to acknowledge that the body camera record also shows that, together, Officers Morse and Gray and Nardone inspected the area underneath the second floor bathroom window, they concluded that the supposed intruder could not have gained access to 60 Park Street in that manner. Joint Exhibit 35-8, 45:49, 46:38-46:48, 46:53.

4. The dissent describes French's appearance at the mudroom doorway as "the Second Break-In to Nardone's House." App. 47. Petitioners' have adopted this characterization. Pet. 22.

Officers Morse and Gray to return to Park Street. But, because French's home at 13 Park Street was "on the way" to Nardone's residence at 60 Park Street, they first stopped at 13 Park Street. App. 47, see, also, *Id.* 9.

As this sequence shows, French's residence at 13 Park Street and Nardone's residence at 60 Park Street were close to one another. Moreover, it is apparent that, when French's appeared in the mudroom doorway of 60 Park Street, he had arrived there on foot; when Nardone's roommates screamed, he ran away in the direction of 13 Park Street. App. 8-9, 47.

In their first stop at 13 Park Street, Officers Morse and Gray intended to speak to French about his "suspected criminal activity." *Ibid.* They "decided to attempt a 'knock and talk' rather than immediately apply for a warrant." *Id.* 23. Consequently, before 5:00 a.m., they approached the French residence.

13 Park Street is "comparable to a single-family dwelling." App. 9. It has a single front entry, a single kitchen, and, in the early morning of September 16, was occupied by three adult male roommates. *Ibid.*

---

This characterization assumes that French did, in fact, break into 60 Park Street and took Nardone's cell phone and keys. Thus, the dissent assumes as a legal fact a charge that the State never proved and eventually dismissed. Moreover, French has always denied this charge including during the course of this litigation. ECF 54, Page Id# 1145-1146, ¶¶ 138-39. The dissent's tacit assertion that French did, in fact, enter 60 Park Street as charged should be rejected. Likewise, Petitioners' adoption of the dissent's characterization and implicit assertion is also wrong and should be rejected.

> "Viewed from the street, a driveway is adjacent to the residence on the right, and, on the left, a narrow strip of grass—four or five feet wide—separates the property from the neighbor's adjacent driveway." On the left side of French's residence, there is a cellar window that is low enough for a person of average height to reach he window frame."

*Ibid.*[5]

Though it was quite early in the morning when Morse and Gray approached French's residence, some lights were on. *Id.* 23. "The officers entered the property, walked onto the front porch, knocked on the front door, and announced they were police officers seeking to speak with French. No one answered and the officers left the property." *Ibid.*

Though the panel majority found Morse and Gray's first "knock and talk" acceptable, it also correctly recognized that this initial effort remained relevant to the court's determination as to whether the officer's conduct "violated clearly established law." *Ibid.* The first "knock and talk" was part of the officers' actions taken "in the

5. Petitioners assert that 13 Park Street had been "converted into a multi-unit apartment building" and was "more akin to an apartment building." Pet. at 5, citing dissent at App. 66. As Appellees in the case below, Petitioners made the same claim. Taking note of Morse and Gray's claim that 13 Park Street was "'more akin to an apartment building"—presumably compared to a single-family home," the panel majority commented, "but they fail to further explain that comparison." App. 9. With the instant Petition, that remains the case. Pet. *passim.*

aggregate" and was, therefore, part of the "totality of the circumstances." *Ibid*

After failing to elicit a response from anyone at 13 Park Street, Morse proceeded to 60 Park Street to speak to Nardone and her roommates. *Id.* 23-24. Gray remained behind to watch the French residence. *Id.* at 24. While doing so, he walked onto the driveway of the neighboring home which gave him "an unobstructed view of the narrow strip of grass, [French's] bedroom window, and the cellar window of French's home." *Ibid.* From this vantage point, he saw a young man looking out the basement window. *Ibid.* When he shined his flashlight at the window, it "caused the young man to cover the window and turn off the basement light." *Ibid.*

Having confirmed that at least one person in the house was awake and aware of the police presence, Gray "returned to the front porch of French's building and again knocked on the front door, but no one answered " *Ibid*. As Gray's incident report put it, "still no one came to the door." *Ibid.* To the contrary, Gray noticed, "[m]ore lights were quickly being turned off in the residence. Window coverings, which looked like blankets were drawn over the windows as well." *Ibid.*

Morse returned to 13 Park Street from the Nardone residence, where he and Gray were joined by Detective Fearon and Officer Orr of the Old Town Police Department. *Ibid.* Morse left the group and went up to the French home and, "peering through a drawn window covering, saw that a light remained on in the kitchen." *Id.* 24-25.[6]

6. The panel majority correctly characterized Morse's investigation of the French residence, including peering through

When Morse rejoined the group, he recommended that they return to the Orono stationhouse and apply for a search warrant. *Id.* 25. Fearon, however, proposed another "'knock and talk, to which Morse responded that he and Officer Gray 'had already knocked' and that "[he] did not think that…French would respond." *Ibid.* But, "[i]gnoring Morse's hesitation and suggestion that the officers should apply for a search warrant, the officers persisted in their efforts to get French to come out of his home." *Ibid.*

The third attempt to cause French to answer the door involved two approaches undertaken simultaneously. Gray went to the front door and began repeatedly knocking on it.[7] Gray told French to come to outside. *Ibid.*

Morse and Fearon went to the side of the French residence where [t]hey knocked forcefully on the window frame of what they believed was French's bedroom and called for French to come out and talk." *Id.*[8] As they were doing this, Fearon shined his flashlight into the bedroom. *Id.*[9] When French did not respond, Morse and Fearon

---

the window covering as separate and distinct entry into the curtilage which, together with the other entries onto made a total of four such entries. App. 26.

7. Gray was not wearing a body camera, so his repeated knocking was not captured on a video-recording until Morse and Fearon completed their knocking on French's bedroom window and returned to the front of the house. Joint Exhibit 35-11 at 22:43- 3:05, 23:45-25.41.

8. The Petition correctly notes that Morse ordered French to answer the door saying: Orono P.D., Chris,. Come to the door" and "Let's go, Chris." Pet. 7.

9. The cacophony caused by all this knocking caused a dog in the house to start barking. Id. 26. Morse and Fearon found this

returned to the front of the house where Gray was still knocking. *Id.*

Despite these combined, sustained efforts, French still would not come to the door. Yet inside 13 Park Street, the police efforts were having their intended effect. The persistence and volume of the police efforts caused French and his roommates to conclude that if they did not answer the door, the police would force their way into the house. In particular, French's roommate Corey Andrews—the dog owner—feared that if that happened, the police might end up shooting his dog. *Id.* 26. Andrews went to the door and spoke to the police who asked him to get French to come to the door. *Id.*[10]

When Andrews returned from the front door, French agreed to go to the front door, himself, because he felt as though he "had no choice." *Id.*

## III. REASONS FOR DENYING PETITION

### 1. The decision of the First Circuit Court of Appeals that Officers Morse and Gray were not entitled to Qualified Immunity was correct.

The panel majority found that Morse and Gray were not entitled to qualified immunity because "their actions as

---

amusing, speculating that they had managed to "piss off" French's roommates. Joint Exhibit 35-11 at 22:43- 3:05, 23:45-23:55.

10. The body camera recorded Andrews opening the door to the police. It is apparent that he is in his underwear, consistent with having been forced out of bed to respond to the officers knocking and calling for French. Joint Exhibit 35-11, 29:30-34.

a whole…exceeded the scope of the implicit social license that authorized their presence on French's property." *Id.* at 27. Instead, "[d]espite obvious signs that the occupants did not want to receive visitors—their refusal to answer the door upon Gray's initial knock and Gray's second knock, and their swift covering of windows and turning off lights in response to the second knock—the police doubled down on their efforts to coax French out of the home." *Ibid.*

These "clear signals" (App. 24), coupled with the officers' status as implicit social licensees, caused the panel majority to conclude that "[a]ny reasonable officer would have understood that their actions on the curtilage of French's property, exceeded the customary social license to 'approach by the front path, knock promptly, wait to be received, and then (absent an invitation to linger longer) **leave**.'" App., 27, quoting *Florida v. Jardines*, 569 U.S. 1, 8 (2013) (emphasis supplied). In reaching these conclusions, the panel majority was correct, its decision should be upheld, and, the petition for certiorari should be denied.

To begin with, it bears emphasis that there is no dispute about the constitutional right here at issue. Petitioners essentially concede that French was fully possessed of the Fourth Amendment rights that inhere in the home. As this Court put it, "…when it comes to the Fourth Amendment, the home is first among equals. 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.'" *Id.* at 6, quoting in part, *Silverman v. United States*, 365 U.S. 505, 511 (1961). Moreover, Fourth Amendment jurisprudence is equally clear that the Fourth Amendment is not confined

to the physical structure of the house but extends to the area 'immediately surrounding and associated with the home'—what our cases call the curtilage—as 'part of the home itself for Fourth Amendment purposes.'" *Id.* at 6, quoting in part, *Oliver v. United States*, 466 U.S. 170, 180 (1984).

Initially, Officers Morse and Gray sought to interview French through a "knock and talk." In so doing, they were acting pursuant to the "implicit social license" described in *Jardines*. This implied social license governed the scope of Morse and Gray's actions and, as well, their claim to qualified immunity. A word, therefore, about this implied social license is in order.

As *Jardines* explained, this implied social license is both readily recognizable and of longstanding. *Id.* at 8, citing, *Breard v. Alexandria*, 341 U.S. 622, 626 (1951) ("the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds").[11] *Jardines* also described the source and legal character of this social convention. It is "implied from the habits of

11. See also, *Martin v. City of Struthers*, 319 U.S. 141 (1943), ("For centuries it has been common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings. Whether such visiting shall be permitted has in general been deemed to depend upon the will of the master of each household, and not upon the determination of the community."); see also, *United States v. Carloss*, 818 F.3d 988, 1010, n. 8 (Gorsuch, J., dissenting), citing *Breard v. Alexandria* and *Martin v. City of Struthers*.

the country" and it is "a license." *Id.* at 8, citing, *McKee v. Gratz*, 260 U.S. 127, 136 (1922) (Holmes, J.).

With respect to the "habits of the country", *Jardines*' citation to *McKee* is telling. For *McKee* had nothing to do with the home or its curtilage; rather, it concerned the lawfulness of one person taking mussels from another person's property. In citing to *McKee*, therefore, *Jardines* was making the broader point that the "habits of the country", irrespective of the practices and customs they cover, can become a commonly accepted "license", having that limited but real legal status that is inherent in the legal concept of a license.

*Jardines*' characterization of this common practice as a "license" is equally telling. In general, a license is "[a] revocable permission to commit some act that would otherwise be unlawful; esp., an agreement (not amounting to a lease or profit a prendre) that it will be lawful for the licensee to enter the licensor's land to do some act that would otherwise be illegal." Black's Law Dictionary at 931 (7th ed. 1999).

*Jardines* thus clearly advised law enforcement officers that, when choosing to forego a warrant, they come to a home and its curtilage subject to a particular implied social license; a license that is revocable by any person lawfully possessed of or occupying the premises which may be peremptorily revoked for any reason or no reason. Having explained these legal principles, *Jardines* then described the implied license, itself, saying: "This implied license typically permits the visitor to approach the home from the front path, knock promptly, wait briefly to be received, and then (absent an invitation to linger longer) leave." *Jardines*, 569 U.S. at 8

As so described, the social license both protects and circumscribes the police, enabling an officer without a warrant to nonetheless approach a home but confining the officer to the same implied license extended to the public at large "precisely because that is '**no more** than any private citizen might do." *Jardines,* 69 U.S. at 8, quoting *Kentucky v. King,* 563 U.S. 563 U.S. 452, 469 (2011) (emphasis supplied).

But this raises the question: what cues from the owner or occupant must the licensee accept as manifesting a revocation of the implied license? *Jardines* answered that question, too: After the administration of a "prompt" knock, the licensee is allowed only a "brief[]" interval for a response. *Ibid.* Once that interval passes, "absent an invitation to linger longer", the licensee must leave. *Ibid.*

In other words, the owner or occupant need do nothing more than not respond; he or she has no obligation to send any signal to the licensee or take any overt steps to indicate an unwillingness to respond to the licensee's invitation. Failing to respond to a knock suffices to revoke the implied license. *Jardines*' description of this implied social license is readily recognizable to all. In short, the social license, though carrying distinctive, albeit limited, legal force, has a brief period of vitality. After that, it expires of its own accord.

From the foregoing it is apparent that *Jardines* informed all law enforcement, including Morse and Gray, that, if they chose to enter the curtilage of a home to talk to an occupant, they would do so pursuant to a social license, with its scope delimited by the "habits of the country" and at the sufferance of the occupant or owner.

Therefore, each time they did so, Morse and Gray knew or were held to know that they were bound by the scope of this social convention. This meant that they not only had to stay within the scope of that convention, but that they also were legally bound to be alert to and compliant with indications by French or any of the occupants that the social license had been revoked.

*Jardines* underscored its summary of the legal character of the implied license and its scope by observing that **"[c]omplying** with the terms of this traditional invitation does **not** require fine-grained legal knowledge.." (emphases supplied)—illustrating the point by noting that "[compliance with the terms of the traditional invitation] is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." *Ibid.*

This part of the opinion was manifestly admonitory. *Jardines* was advising—that is, giving "fair warning", see *United States v. Lanier*, 520 U.S. 259, 266 (1997)—to all public officials who, without a warrant, would attempt to bring the owner or occupant of a house to the door that they were doing so as mere licensees and they must be attentive to "the terms" of that license. It is evident that it is for that reason that *Jardines* followed its practical illustration—its reference to the Girl Scouts and trick-or-treaters—with a citation to and quote from *Kentucky v. King. Ibid.*

The panel majority demonstrated that it fully understood *Jardines*' clear guidance on these points both in the abstract and as applied to the conduct at issue.

Speaking in general to *Jardines*' discussion of the implied social license, the panel majority explained that

"[t]hat license…has both a physical and purpose-based limitation." App. 37, (citing *Jardines*, 569 U.S. at 9). "In other words, its scope is limited not only to a particular area but also to a specific purpose,' both of which are defined by what a homeowner might reasonably expect from a private citizen on the homeowner's curtilage." *Ibid.*

Applying *Jardines'* standards to the officers' conduct, the panel majority noted that Morse and Gray ignored, the "obvious signs that the occupants were aware of and did not want to receive the visitors—their refusal to answer the door upon Morse and Gray's initial knock and Gray's second knock, and their swift covering of windows and turning off of lights in response to the second knock." App. 27. But, as the panel majority noted, instead of heeding these cues, Morse and Gray "upped the ante" by "continuing to knock on his front door, locating and knocking on his bedroom window frame, and yelling for him to come out of his home." *Ibid.* Through this analysis, the panel majority demonstrated that Morse and Gray had exceeded both the scope of the implied social license and the "obvious signs" that French had revoked that social license.

Despite this analysis, the dissent asserted that, "[t]he majority does not argue that French revoked his implied license or that the officers reasonably should have understood him to have done so." App. 58, n. 26; see also, *Id.* 60-61. The dissent's conclusion on this point cannot be squared with the panel majority's emphasis on Morse's and Gray's failure to heed to several signals French sent that he did not wish to speak to them.

In making this assertion, the dissent seemed to say that, before Morse and Gray were required to acknowledge

that French had revoked the implied social license—or, apparently, as *Jardines* contemplated, it expired of its own accord—French had to take some affirmative action. Indeed, the dissent contended that French's failure to tell the officers to leave as excusing the officers from failing to understand that they were not well within that license as raising "yet another question about the scope of the implied license left open by *Jardines*." *Ibid.*

But, as the discussion above had demonstrated, Jardines did not leave that question unanswered. It unequivocally stated that, when a law enforcement officer arrives at a home without a warrant, the owner or occupant need not acknowledge the officer's presence in any way. Failure of the owner or occupant to respond to the officer in the "brief[]" interval the social license allows that officer is sufficient to void the implied license. By the time Morse and Gray, accompanied by Fearon, returned to the 13 Park Street, that brief interval had already expired—not one, but two times. Viewed in the "totality of the circumstances, as the panel majority viewed these event, French's failure to respond to the two earlier "knock and talks" frame the consideration of the legality of the third.

In addressing the dissent on this point, the panel majority explained that it was "not concerned with isolated facts like those presented in *Carroll* [*v. Carman*, 574 U.S. 13 (2014)] or [*United States v.*] *Walker* [,799 F.3d 1361 (11th Cir. 2015][.]" App. 39. Rather, "[w]e are concerned only with *Jardines* clear prohibition on the officers' conduct in this case which, as we have explained, plainly exceeded the implied license to enter the curtilage of French's home." *Ibid.*

In sum, the panel majority correctly concluded that the actions of Morse and Gray in the early morning of September 14, 2016 violated the scope of the implied social license to enter onto French's property for the purpose of speaking with him and violated French's clear revocation of that license. For these reasons, the Petition should be denied.

### 2. The Panel Majority correctly concluded that Morse and Gray had fair warning of the Implied Social License Governing their Knock and Talk.

Petitioners assert that the panel majority violated "this Court's directive 'not to define clearly established law at too high a level of generality.'" Pet 16, quoting, *Ashcroft v. al-Kidd*, 653 U.S. 731, 742 (2011). Petitioners assert that *Jardines*' guidance on law enforcement entries into the curtilage or approaches to the home, itself, was not sufficiently clear, asserting that, "[a]s a practical matter, *Jardines* did not address many of the factors that visitors or law enforcement may face when approaching a residence in an attempt to speak to an occupant." *Id.*, 18. Petitioners sought to illustrate this point by posing a series of hypotheticals *Jardines* left unanswered. *Id.* at 18-19.

But, even assuming for the sake of argument Petitioners' contention that neither *Jardines* nor their own experience provided them with notice that they could not repeatedly return to French's house, bang on the doors and windows, and demand that he come to the door, their claim to qualified immunity still fails. That is because Petitioners fail to address the panel majority's separate conclusion, buttressed by Morse's own admission, that by

failing to respond to their earlier knocks, by covering of the windows, and. by the turning out of lights, French had obviously and unmistakably revoked the implied social license. App. 24-25; 27.

What *Jardines* made plain to all law enforcement officers, Morse and Gray included, was that, by the "habits of the country", when they enter onto a person's property without a warrant, they do so pursuant to revocable license. Thus, all other social conventions aside, when the occupant sends "clear signals" (App. 24) or "obvious signs" (App. 27) that he does not wish to engage with the officers or that their presence is not welcome, they must leave. No fact-specific decision is required to further elucidate this patently apparent rule.

The panel majority's decision is fully consistent with the foregoing. Entwined with the panel majority's decision as set forth above was its conclusion that Morse and Gray were not entitled to qualified immunity. As the panel majority noted, the 'fair warning' of a "legal principle" to government officials "need not be derived from a case 'directly on point,' but precedent must 'place[] the statutory or constitutional question beyond debate." App. 19, quoting, *White v. Pauley*, 580 U.S. 73, 137 S.Ct. 548, 551 (2017). Thus, "general statements of the law may give ''fair and clear warning'' to officers' so long as, 'in light of preexisting law[,] the unlawfulness [of their conduct] is apparent." *Ibid.,* quoting *White,* 137 S.Ct. at 552; first quoting, *United States v. Lanier,* 520 at 271; then quoting, *Anderson v. Creighton*, 483 U.S. at 640.

For the reasons set forth above, the panel majority correctly found that Morse and Gray exceeded—repeatedly

and determinedly exceeded—the scope of the implied social license, as described in *Jardines*, governing "knock and talks" and that, that implied license was sufficiently clear that, throughout the course of their conduct, Morse and Gray had "fair warning" as to contours and substance. In addition, the panel majority also correctly determined that Morse and Gray disregarded "clear" and "obvious" signals that French had revoked the implied social license and they had "fair warning" that French could revoke that license and that he had done so. Therefore, the panel majority's conclusion that Morse and Gray were not entitled to qualified immunity for their conduct in the early morning of September 14, 2016 was well grounded and the petition should be denied.

### 3. The Panel Majority Correctly Determined that the Conduct of Officers Morse and Gray did not fall within any other Exception to the Warrant Requirement.

Petitioners acknowledge that they did not raise any exigent circumstances justification for their repeated and insistent "knock and talk" attempts. See, Pet. at 33. Even so, Petitioners seem to urge exigent circumstances on this Court. *Ibid*.[12] Petitioners may have been inspired to suggest justification by exigent circumstances by the dissent.

---

12. "In this case, Officers Morse and Gray may have concluded that the situation did not arise to the level of an exigency, but given the particular (not 'typical[],' *Jardines*, 569 U.S. at 8) circumstances confronted, they could have reasonably concluded they were permitted to perform a knock and talk near French's bedroom or knock again at the front door." see, Pet. at 33.

Although not pressed by Morse and Gray before the trial or on appeal, the dissent nonetheless concluded that exigent circumstances existed because "a reasonable officer could have thought that their conduct did not violate any constitutional rights because a knock and talk could prevent French from destroying or disposing of Nardone's phone, keys, and any other evidence of the break-in." App. 62, citing *King*. 563 U.S. at 472. In addition, the dissent posited "an imminent threat to Nardone. *Ibid.,* citing, *King* at 460.

The panel majority rejected the dissent's belated invocation of exigent circumstances. It began by noting that, "[t]he officers do not…argue on appeal—and they did not argue in their summary judgment motion below—that their actions were justified by exigent circumstances." App. 33. The panel majority went on to observe that Morse and Gray did not argue that Nardone's personal safety was at "imminent risk" or that French would destroy evidence. App. 34, n. 19.

Although, of course, the officers do not explain why did they did not argue that Nardone was at "imminent risk", aside the obvious fact that, at the time they conducted their repeated "knock and talk" events, French was clearly confined to his home, may have rested on what Nardone told them about French. In his affidavit, Morse said that Nardone told him that "she did not think that [French] was going to hurt her…" ECF Page ID # 646.

To the extent Petitioners are now claiming exigent circumstances to justify their conduct, the Petition should be denied.

### 4. Review is not Warranted to Provide Greater Clarity as to the Lawful Bounds of the Knock and Talk Exception

Petitioners assert that *Jardines* is insufficiently distinct; that it does not provide practical guidance to law enforcement officers in the field. Pet. 32-34. Petitioners contend that, "[i]n everyday life, the scope of the implied license for private citizens may vary depending on the reason for approaching the home, the time of day, the layout of the entrance, and a number of other factors." Pet. 33. Continuing with this theme, Petitioners argue that, "[i]f the implied social license is dictated bv societal norms, then a neighbor with an urgent need to talk to an occupant of a multi-unit apartment may be within the 'habits of the country' [citing *Jardines*, 569 U.S. at 8], to attempt multiple knocks, including at the occupants' bedroom, in order to get his or her attention." *Id.*

Though not overtly claiming a circuit split on this point, Petitioners cited *Carroll v. Carmen*, 574 U.S. 13 (2014) and "conflicting decisions among the circuits" as "demonstrat[ing] that, as of September 2016, there were uncertainties regarding the contours of the knock and talk exception to the warrant requirement." *Id.* at 34. Therefore, Petitioners conclude, this Court should grant certiorari to "provide clarity and consistency in the law." *Ibid*., citing *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816).

Petitioners advanced this same argument before the First Circuit Court of Appeals, and the panel majority rejected it. App. 30-32. Before doing so, the panel majority reviewed decisions of four circuit courts, including two

from the Eleventh Circuit Court of Appeals, as well as this Court's decision in *Carroll v. Carmen*, supra, concluding, "[t]hese cases do not detract from the clarity of *Jardines*' application to this case." App. 31. The panel majority then once again recounted the numerous ways in which Morse and Gray persisted in inducing French to come to the door, contrasting this with the very limited social license described in *Jardines. Id.* 31-32.

Following this, the panel majority explained, "[f]ar from engaging only in conduct that a homeowner might reasonably expect from a private citizen on their property—that is, again, approaching the door, knocking promptly, and leaving if not greeted by an occupant—the officers reentered the property four times and took aggressive actions until French came to the door so that the officers could pursue their criminal investigation." *Id.* at 32. The panel majority closed its discussion on this point by observing,, "the officers engaged in precisely the kind of warrantless and unlicensed physical intrusion on the property of another that *Jardines* clearly established as a Fourth Amendment violation." *Ibid.* The panel majority, then, more than amply answered Petitioners' contention.

Before closing on this point, and in support of the panel majority's conclusion, it is always the case that any general rule must eventually be applied in practice. The application of such rules in particular types of cases—excessive force cases are but one example—are often fact-intensive and discerning "clearly established guidance, can be difficult.

What *Jardines, Breard*, and, *Martin* recognized, however, was that the implied social license to approach a home carries with social practices that are not only well

understood, but have been practiced, as *Martin* put it, "[f]or centuries." 319 U.S. at 141. As of September 14, 2016, they were, in short, "clearly established."

The circumstances of this case do not, therefore, provide this Court with either the need nor the basis for "clarifying" what was clear to the panel majority and what should been clear to Petitioners. For these reasons, the Petition should be denied.

## IV. CONCLUSION

For the reasons set forth above, Christopher French respectfully submits that the instant Petition for Certiorari should be denied.

Respectfully submitted,

Bernard J. Kubetz
*Counsel of Record*
Timothy C. Woodcock
Eaton Peabody
80 Exchange Street
P.O. Box 1210
Bangor, Maine 04402
(207) 947-0111
bkubetz@eatonpeabody.com

*Counsel for Respondent*
*Christopher French*

Dated: July 21, 2022.