No. 21-1403

In the Supreme Court of the United States

TRAVIS MORSE, *individually and in his official capacity as a Police Officer for the Town of Orono, Maine*; CHRISTOPHER GRAY, *individually and in his official capacity as a Police Officer for the Town of Orono, Maine*,

Petitioners,

v.

CHRISTOPHER FRENCH,

Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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August 19, 2022

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INTRODUCTION

This Court's qualified immunity precedent is "the best attainable accommodation of competing values." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). In the Fourth Amendment context, this Court has made clear that the standard of clearly established law providing an officer with notice that their conduct may subject them to liability is particularly exacting. *Jardines* did not provide Officers Morse and Gray with fair warning that their conduct exceeded the scope of the knock and talk exception to the warrant requirement in violation of the Fourth Amendment. Review is therefore warranted to compel the First Circuit to adhere to the careful balance of competing interests struck by this Court's qualified immunity precedent.

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO COMPEL COMPLIANCE WITH ITS DECISIONS REQUIRING COURTS TO GRANT QUALIFIED IMMUNITY WHERE THE LAW IS NOT CLEARLY ESTABLISHED.

Respondent Christopher French, echoing the panel majority, cites *Florida v. Jardines*, 569 U.S. 1 (2013), as the sole case rendering the law clearly established with respect to the circumstances confronted by Officers Morse and Gray. But as noted in the Petition, *Jardines* is nothing like the case at bar. For one, in contrast to the present case, *Jardines* did not involve an officer's attempt to conduct a knock and talk to speak with a burglary suspect who had just been seen

returning to his building located at 13 Park Street[1] from the victim's residence; *Jardines* involved a search using a trained, drug-detecting police K-9 on the porch of a residential home, where the dog's alert signaled the presence of drugs, which in turn was used to secure a warrant to search the residence for drugs. *Id.* at 1.

Rather than address these material factual differences head on, French, like the panel majority, focuses on the general discussion in *Jardines* regarding the social license implied from the "habits of the country." (BIO 11-13.) Yet, this is the type of generalized statement of the law—removed from specific facts—that this Court has repeatedly rejected. *See* (Pet. 16-18.) It is one thing for French to argue, and the panel majority to conclude, that the reasoning of *Jardines* prohibited the knock and talk activity of Officers Morse and Gray, but it is an entirely different matter to conclude that no reasonable officers facing the same situation in September 2016 could have failed to appreciate that the Fourth Amendment

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[1] Contrary to French's criticism of the Officers' Petition, echoing the panel majority, *see* (BIO 6, n. 5 (citing A. 9)), the summary judgment record supports the Officers' contention that 13 Park Street was "more akin to an apartment building" than a single-family home. The panel majority repeatedly referred to French's residence as an "apartment." and further acknowledged that the property was occupied by three adult males, and French had his own room. (A. 5, 9.) French's brief also ignores Officer Morse's familiarity with 13 Park Street from his prior interactions with French. *See* (A. 42); *see also* (A. 56) (Lynch, J., dissenting, stating that, in looking at post-*Jardines*' federal circuit court rulings on knock and talks, "a visitor, knowing that this was a multi-tenant unit and precisely where French's room was, could quite reasonably go to his window to knock rather than use the door.").

prohibited their knock and talk conduct given the circumstances they confronted. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 367 (2001) (O'Connor, J., dissenting) ("[T]he standard of reasonableness for a search or seizure under the Fourth Amendment is distinct from the standard of reasonableness for qualified immunity purposes."). Put simply, *Jardines* did not provide Officers Morse and Gray with fair warning that their conduct clearly exceeded the knock and talk exception to the warrant requirement.

Even if *Jardines* was meant to send a signal to law enforcement officers regarding the limitations of knock and talks, respectfully, that signal was not clear enough. This is amply demonstrated by the cases decided after *Jardines*. But French simply ignores the post-*Jardines* cases and their impact on the state of the law regarding knock and talks as of September 2016. French's complete failure to address *United States v. Walker*, 799 F.3d 1361 (11th Cir. 2015), and the other post-*Jardines* cases cited in the petition, *see* (Pet. 24-29), and his wholesale dismissal of *Carroll v. Carmen,* 574 U.S. 13 (2014), *see* (Pet. 21-22 (echoing the panel majority's refusal to consider *Carroll*)), does not detract from their impact on the legal landscape and, in turn, law enforcement officers' reasonable understanding (or misunderstanding) of the scope of a permissible knock and talk.

Instead of confronting the post-*Jardines* cases, French focuses on Officer Morse and Gray's failure to "be alert to and compliant with indications by French or any of the other occupants that the social license had been revoked." (BIO 14.) French argues, without citation, that an occupant "need do nothing more than not respond" to revoke the implied license and that it "expires of its own accord." (BIO 13.) *Jardines*,

however, did not discuss the revocation of the implied social license. As acknowledged by French, *Jardines* merely explained that the 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." *Jardines*, 569 U.S. at 8. This was the extent of the discussion of the terms of the implied social license. *Jardines* did not expound upon revocation. And as noted in the Petition, post-*Jardines* circuit decisions have declined to place a time limit on how long officers may knock or how many knocks they may attempt, which undermines French's contention that *Jardines* established that the implied license is automatically and immediately revoked when an occupant does not respond to a knock. *See* (Pet. 27-28.); *see also J.K. v. State*, 8 N.E.3d 222, 231-33 (Ind. Ct. App. 2014) (noting that there was "little binding authority" regarding whether officers' "continually knocking for approximately one hour without an answer from an occupant exceeded their implied invitation to knock and talk").

Like the panel majority, French also argues that Officers Morse and Gray are belatedly "urg[ing] exigent circumstances on this Court" as "justification for their repeated and insistent 'knock and talk' attempts." (BIO 19.) But that contention ignores the point actually made in the Petition and acknowledged by this Court and federal appellate courts: that there is often overlap between the various exceptions to the warrant requirement and their underlying legal principles. (Pet. 32-33.) A reasonable officer confronting the situation here could have considered the totality of the circumstances in light of the entire legal landscape and reasonably could have

misunderstood exactly what the law allowed. *See Anderson v. Creighton*, 483 U.S. 635, 644 (1987) ("We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment" and officers "whose judgments in making these difficult determinations are objectively legally reasonable" are entitled to qualified immunity.).

Unlike *Jardines*, which involved nothing more than a "tip that marijuana was being grown in" the defendant's house, 569 U.S. at 3, Officers Morse and Gray were responding to "an urgent and potentially dangerous situation." (A. 41.) And while this Court in *Jardines* held that the "[o]ne virtue of Fourth Amendment's property-rights baseline is that it keeps easy cases easy," 569 U.S. at 11, there was nothing "easy" about the situation that Officers Morse and Gray found themselves in on September 14, 2016.

Similarly, to the extent that officers' conduct is considered from a traditional property-rights perspective, *see id.* at 11, property law recognizes numerous circumstances that justify variation in the scope, or the outright abrogation, of an implied license to enter another's property. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 205-206 (Am. L. Inst. 1979). Circumstances justifying entry at common law may include "making a reasonable effort to defuse a potentially dangerous dispute," *Clark v. City of Montgomery*, 497 So.2d 1140, 1142 (Ala. Ct. Crim. App. 1986), or investigating the possibility "that people may be in danger," *State v. Pannell*, 330 S.E.2d 844, 847 (W. Va. 1985). No such justifications or variations were implicated in *Jardines*, rendering it

an ill-fitting precedent for the officers' conduct in this case.

French's contention that review is not warranted ignores the legal landscape as of September 2016 and the current state of the law. Lower federal courts continue to acknowledge that *Jardines* did not clearly establish the parameters of the knock and talk. For example, in *Lozano v. Doe 1*, the court considered whether *Jardines* clearly prohibited a knock and talk where two deputies entered an enclosed property through a wooden door marked with a "No Trespassing/Beware of Dog" sign and ultimately arrested the homeowner for a noise ordinance violation. No. 5:20-cv-00684-SVW, 2022 WL 2383893 at **1-3 (C.D. Cal. Mar. 18, 2022). The court concluded that a jury could find that the deputies exceeded the scope of a valid knock and talk in violation of the homeowner's Fourth Amendment right. *Id.* at *7. However, the court concluded that the deputies were entitled to qualified immunity because the law was not clearly established as of November 2019, explaining:

> Consider *Jardines* itself. Despite its salient discussions of the limits of knock-and-talk authority, *Jardines* was a Fourth Amendment search case involving a drug-detecting dog no less—not a seizure case like this one with any remotely similar facts. 569 U.S. at 9 n.4, 133 S.Ct. 1409. It is also not obvious what was "clearly established" in *Jardines*, on its own terms, for qualified immunity purposes. In a recent First Circuit decision, for example, the panel majority described *Jardines* as clearly

> establishing that "the scope of the knock and talk exception to the warrant requirement is controlled by the implied license to enter the curtilage." *French v. Merrill*, 15 F.4th 116, 132-33 (1st Cir. 2021). That reading, incidentally, tracks the Court's own reasoning here. But the dissent in *French* construed *Jardines* much more narrowly, limited to its facts, prohibiting only the use of a drug-sniffing dog to gather information while on curtilage before speaking to the property owner first. *See id.* at 134, 142. "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson* [*v. Layne*], 526 U.S. [603,] 618.

Id. at *9.[2] *Lozano* acknowledged the unfairness in holding officers liable for money damages when circuit judges disagree on the meaning of *Jardines*. The same is true here.

French praises the panel majority for demonstrating "that it fully understood *Jardines'* clear guidance on

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[2] Similarly, courts have disagreed about whether *Jardines* bars officers from conducting a nighttime knock-and-talk. *Compare People v. Frederick*, 895 N.W.2d 541, 546 (Mich. 2017) (interpreting *Jardines* as prohibiting a nighttime knock and talk as outside the scope of the implied social license) *with Saal v. Commonwealth*, 848 S.E.2d 612, 618 (Va. 2020) (refusing to read *Jardines* as an absolute prohibition on nighttime knock and talks and finding multiple knock and talks, including at side door, after midnight reasonable).

these points both in the abstract and as applied to the conduct at issue." (BIO 14.) But that completely misses the point. The correct inquiry for purposes of qualified immunity is not whether a majority of federal judges understood this Court's discussion of the implied social license, nor whether the First Circuit properly found a constitutional violation. Rather, the correct inquiry is whether *Jardines* was "clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply" and that the "legal principle clearly prohibit the officer's conduct in the particular circumstances before him." *D.C. v. Wesby*, 583 U.S. ____, ____, 138 S. Ct. 577, 590 (2018). For the reasons discussed above and in the Petition, *Jardines* does not meet that standard, and the First Circuit's qualified immunity analysis is therefore in direct contravention with this Court's careful balancing of interests as articulated in its qualified immunity decisions.

II. *JARDINES'* DISCUSSION OF THE HABITS OF THE COUNTRY UNDERPINNING THE IMPLIED SOCIAL LICENSE DID NOT CLEARLY ESTABLISH THE PERMISSIBLE SCOPE OF A KNOCK AND TALK.

Instead of addressing the post-*Jardines* cases and focusing on the state of the law as of September 2016, French instead unnecessarily revisits the history of the implied social license, with the scope, he emphasizes, being "delimited by the habits of the country." (BIO 13.) While the cases French cites—*McKee*, *Martin*, and *Breard*— recognize the historical context for the implied social license, they do nothing to define or elaborate on its parameters for purposes of law enforcement officers conducting knock and

talks. French, as he must, readily acknowledges that these cases are entirely out of context.

In *McKee v. Gratz*, 260 U.S. 127 (1922), the Court recognized that, in Missouri, a license to remove mussels from another's land could be implied from "the limit of statutory prohibitions to enclosed and cultivated land and private ponds." *Id.* at 136-37. The Court looked to the practice that had prevailed in the region and determined that whether those who took the mussels were entitled to rely upon local practice for their considerable and systemic work were questions for a jury. *Id.* at 136–37. *McKee*, therefore, did not articulate the scope of the implied social license that allows removal of mussels in Missouri.

In *Martin v. City of Struthers, Ohio*, 319 U.S. 141 (1943), this Court considered the intersection of the freedom of speech and a local ordinance that criminalized certain soliciting behavior. In the context of reviewing a criminal conviction, this Court invalidated an ordinance that criminalized solicitors of private residences holding that the ordinance was in conflict with the freedom of speech and press. *Id.* at 149. The Court explained that the problem of dealing with criminals posing as canvassers or those

> in defiance of the previously expressed will of the occupant . . . must be worked out by each community for itself with due respect for the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributers from the home.

Id. at 148-49. The Court left it to the local community to define the parameters of the implied social license so long as First Amendment rights were respected.

Breard v. City of Alexandria, La., 341 U.S. 622 (1951), *abrogated by Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980), involved an ordinance making it a crime for solicitors, peddlers, and merchants to go in or upon private residences without having been requested or invited to do so. *Id.* at 624. This Court upheld the ordinance as a reasonable municipal regulation and declined to find that it burdened or impeded interstate commerce as in excess of the city's regulatory powers. *See id.* at 640-45. Significantly, in *Breard*, this Court recognized that

> Changing living conditions or variations in the experiences or habits of different communities may well call for different legislative regulations as to methods and manners of doing business. Powers of municipalities are subject to control by the states. Their judgment of local needs is made from a more intimate knowledge of local conditions than that of any other legislative body.

Id. 640–41.

McKee, *Martin,* and *Breard* establish the history of the implied social license, but significantly, these cases also recognize that the "habits of the country" are informed by local customs, which indisputably vary from place to place and from time to time. This undermines French's contention that the "habits of the country" are sufficiently clear in defining the scope of the knock and talk exception to the warrant

requirement. This Court has never accepted that the "search and seizure protections of the Fourth Amendment are so variable." *Whren v. United States*, 517 U.S. 806, 815 (1996) (recognizing that police enforcement practices vary by locality and therefore relying on local police regulations to invalidate arrest would result in inconsistent application of the Fourth Amendment protections). If the habits of the country are sufficient to define the exception, then what is permissible in Missouri may vary from what is permitted in Maine. This is an untenable result under the U.S. Constitution. Accordingly, a passing discussion of the "habits of the country" is not sufficiently clear to have put every reasonable officer on notice that Officers Morse and Gray's conduct, under the circumstances they confronted, clearly violated the knock and talk exception to the warrant requirement under the Fourth Amendment.

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The qualified immunity inquiry espoused by French and the panel majority cannot be reconciled with the decisions of this Court concerning the degree of specificity required to notify officers that particular conduct is unconstitutional. Nor can it be reconciled with the decisions of lower courts recognizing the open questions and uncertainty related to the scope of a permissible knock and talk. French, like the panel majority, either flatly ignores or dismisses the post-*Jardines* decisions and instead relies on a general proposition of law extrapolated from the habits of the country. French and the panel majority should have identified existing precedent that placed the constitutional question beyond debate under the specific facts of this case. Had it followed this Court's precedent, the First Circuit should have granted

qualified immunity to the officers. This Court should, thus, grant review to compel the First Circuit to adhere to this Court's qualified immunity precedent.

CONCLUSION

For the foregoing reasons, Petitioners Morse and Gray respectfully submit that the petition for writ of certiorari be granted.

Respectfully submitted.

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