No. _____

In The
Supreme Court of the United States

CONSTANCE WESTFALL,

Petitioner,

v.

JOSE LUNA, NATHANIEL ANDERSON,
and VENESSA TREVINO,

Respondents.

**On Petition For A Writ Of Certiorari
To The U.S. Court Of Appeals
For The Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "knock-and-talk" exception to the Fourth Amendment's protection against unlawful entry onto a person's property permits police officers to enter a person's property at 2:15 a.m., without a warrant, search and sniff around the curtilage of the home, bang loudly and repeatedly on the person's front door—and have dispatch call the person's home phone and order the person's 14-year-old son to "go answer the door"—until someone finally answers the door at 2:24 a.m.

2. Whether a person's "consent" to search their home, given after an unlawful knock-and-talk and in response to a coercive interrogation—with no intervening circumstances—can constitute "an independent act of free will."

PARTIES TO THE PROCEEDINGS

Petitioner Constance Westfall ("Mrs. Westfall") was the plaintiff in the U.S. District Court and the appellant in the U.S. Court of Appeals.

Respondents Jose Luna, Nathaniel Anderson, and Venessa Trevino—all police officers for the Southlake Police Department—were defendants in the U.S. District Court and appellees in the U.S. Court of Appeals.

RELATED PROCEEDINGS

The Fifth Circuit's decision in Mrs. Westfall's prior appeal can be found at *Westfall v. Luna*, 903 F.3d 534 (5th Cir. 2018) (*per curiam*). There are no other related proceedings.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner Constance Westfall respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's revised opinion in this appeal can be found at *Westfall v. Luna*, 2022 WL 3334535 (5th Cir. Aug. 12, 2022) (*per curiam*), and is reprinted at App. 1a–19a.

The Fifth Circuit's initial opinion in this appeal can be found at *Westfall v. Luna*, 2022 WL 797410 (5th Cir. Mar. 15, 2022) (*per curiam*), and is reprinted at App. 20a–34a.

The district court's order denying Mrs. Westfall's postjudgment motions is reprinted at App. 35a–72a.

The Fifth Circuit's opinion in Mrs. Westfall's prior appeal can be found at *Westfall v. Luna*, 903 F.3d 534 (5th Cir. 2018) (*per curiam*).

JURISDICTION

The Fifth Circuit denied a timely petition for rehearing on January 23, 2023. App. 73a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

INTRODUCTION

The Fourth Amendment generally protects homeowners against a police officer's warrantless entry onto their property. *Florida v. Jardines*, 569 U.S. 1, 11 (2013) ("When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred.").

In recognizing the "knock-and-talk" exception to the Fourth Amendment's protection against warrantless entry, the Court has held that this "limited" exception is based on the homeowner's "implied" consent, and is governed by "the habits of the country" and "background social norms"—meaning officers can do "no more than any private citizen might do": *i.e.*, they can "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* at 8–9.

Notably, at common law, searches of a dwelling were forbidden between dusk and dawn unless there was a showing of necessity. See Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L.Rev. 925, 971 (1997). And in *Jardines*,

the Court unanimously acknowledged a "no-night-visits rule." 569 U.S. at 9 n.3 (citing dissent's "no-night-visits rule" approvingly); *id.* 19–20 (Alito, J., dissenting) (stating officers cannot "come to the front door in the middle of the night").

Consistent with this "no-night-visits rule," most circuits have held that visits after 11:00 p.m. and before 6:00 a.m. are outside the limited scope of a lawful knock-and-talk. *E.g.*, *French v. Merrill*, 15 F.4th 116, 126–136 (1st Cir. 2021) (*Jardines* "clearly established" that 5:00-a.m. visit and repeated efforts to elicit response from plaintiff were unlawful); *U.S. v. Jerez*, 108 F.3d 684, 690–692 (7th Cir. 1997) (post-11:00-p.m. visit); *U.S. v. Wells*, 648 F.3d 671, 680 (8th Cir. 2011) (4:00-a.m. visit); *U.S. v. Lundin*, 817 F.3d 1151, 1159–1160 (9th Cir. 2016) (4:00-a.m. visit); *U.S. v. Reeves*, 524 F.3d 1161, 1167–1169, 1174 (10th Cir. 2008) (3:00-a.m. visit).

Even the Fifth Circuit itself has previously recognized that nighttime knock-and-talks are unlawful. *Arnold v. Williams*, 979 F.3d 262, 267–268 (5th Cir. 2020) (2:00-a.m. visit was "trespassory search" under *Jardines*); *Fontenot v. Cormier*, 56 F.3d 669, 675 (5th Cir. 1995) (2:30-a.m. visit).

Nevertheless, some confusion remains. In 2014—not long after *Jardines* was decided—the U.S. District Court for the Middle District of Florida granted officers qualified immunity, holding that the officers' 1:30-a.m. visit was a lawful knock-and-talk. *Young v. Borders*, No. 5:13-cv-113-Oc-22PRL, 2014 WL 1144072,

at *8–12 (Sept. 18, 2014). A panel of the Eleventh Circuit summarily affirmed the district court's grant of qualified immunity without opining on the knock-and-talk issue. 620 Fed. App'x 889 (2015). Several judges dissented from the denial of rehearing en banc—insisting that the 1:30-a.m. visit was clearly outside the scope of a lawful knock-and-talk. 850 F.3d 1274, 1295–1299 (2017) (JJ. Martin, Wilson, Rosenbaum & Jill Pryor, dissenting from denial of rehearing). But the majority voted against rehearing, and two judges concurred—insisting that qualified immunity was warranted because a no-night-visits rule had not been "clearly established." *Id.* at 1285–1287 (JJ. Hull & Tjoflat, concurring in denial of rehearing).

Such confusion over the lawfulness of a nighttime knock-and-talk likewise persists in the state courts, even post-*Jardines*. See, *e.g.*, *People v. Frederick*, 886 N.W.2d 1, 13–14 (Mich. App. 2015) (condoning 4:00-a.m. visit and asserting *Jardines* did not establish "no-night-visits rule"), 17–21 (Servitto, J., dissenting) (stating *Jardines* and other cases have established "no-night-visits rule").

In 2020 the Court considered a petition for a writ of certiorari to the Vermont Supreme Court, and Justice Gorsuch noted that, in *Jardines*, the Court had unanimously recognized the "limited scope" of a lawful knock-and-talk. *Bovat v. Vermont*, 141 S.Ct. 22, 22 (2020) (Gorsuch, J., joined by JJ. Sotomayor & Kagan, in statement respecting the denial of certiorari). But Justice Gorsuch also noted that "with the rise of the knock-and-talk have come more and more cases

testing the boundaries of the consent on which they depend." *Ibid.* *Bovat* did not involve a nighttime visit, so Justice Gorsuch had no reason to note the Court's unanimous approval of a "no-night-visits rule." But he did emphasize that the Court had "unanimously agreed" that "officers may not abuse the limited scope of this license by snooping around the premises on their way to the front door"—and that such conduct clearly constitutes "an unlawful trespass" and "an unreasonable search in violation of the Fourth Amendment." *Id.* at 22–23 (chastising the Vermont Supreme Court for condoning such conduct without reference to *Jardines*).

Yet even after *Jardines* and *Bovat*, the Fifth Circuit still has not received the message. Here, officers went to the Westfalls' home at 2:15 a.m. without a warrant. And between bouts of pounding on the door, they searched and sniffed around the curtilage of the Westfalls' home—smelling for marijuana and shining their flashlights into the Westfalls' sideyard and backyard. The officers admitted that they did not think Mrs. Westfall was going to answer, but they continued banging so hard on the Westfalls' front door that one officer worried they might break the glass. The officers then had dispatch call the Westfalls' home phone, and when the Westfalls' 14-year-old son answered, dispatch ordered him to "go answer the door"—thereby coercing him to answer the door at 2:24 a.m.

Such conduct is clearly outside the "limited scope" of a lawful knock-and-talk under *Jardines*. But instead of following *Jardines* (and other prior decisions) to rule

that the officers' intrusive and coercive nighttime visit was unconstitutional, the Fifth Circuit ignored key facts and split with *Jardines*, split with the decisions of other circuits—and even split with its own precedent (see *Arnold*, *supra*)—to hold that "the lateness" of the 2:15-a.m. visit "did not render the officers' knock-and-talk unlawful *per se*." App. 9a–10a. The Fifth Circuit acknowledged that the timing of the visit "transgress[ed] background social norms." App. 10a. But instead of following *Jardines* to hold that a knock-and-talk is governed by these social norms, the Fifth Circuit held that case-specific "circumstances" could justify the officers' conduct. App. 10a.

By relying on case-specific "circumstances" to justify the officers' conduct, the Fifth Circuit's opinion exacerbates the growing confusion over what exactly is permitted in a lawful knock-and-talk. The Fifth Circuit's reliance on "circumstances" conflates the knock-and-talk exception with the exigent-circumstances exception—and thereby enables officers to do more than any private citizen might do, while still under the guise of a simple "knock-and-talk."[1]

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[1] This was not a mere mistake of terminology, where the Fifth Circuit could have blessed the officers' conduct under the exigent-circumstances exception but mistakenly blessed it under the knock-and-talk exception. In a prior appeal, a prior panel had held that the officers had forfeited any reliance on exigent circumstances—and that their 2:00-a.m. conduct could be justified *only* if it fell within the limited scope of a lawful knock-and-talk. *Westfall v. Luna*, 903 F.3d 534, 544–546 & n.4 (5th Cir. 2018). The subsequent panel's reliance on "circumstances" is therefore an

And although the Fifth Circuit's opinion represents the first time in history that a federal appellate court has held that a nighttime knock-and-talk is constitutionally permissible, the Fifth Circuit designated its opinion as "not for publication"—and denied Mrs. Westfall's motion to publish. The only possible explanation for refusing to publish this opinion is that, by doing so, the Fifth Circuit hopes to evade this Court's review. *Cf. Plumley v. Austin*, 135 S.Ct. 828, 831 (2015) (JJ. Thomas & Scalia, dissenting from denial of cert) ("It is hard to imagine a reason that the Court of Appeals would not have published this opinion. . . ."); *Smith v. U.S.*, 502 U.S. 1017, 1019–1020 & n.* (1991) (JJ. Blackmun, O'Connor & Souter, dissenting from denial of cert) ("Nonpublication must not be a convenient means to prevent review."); see Erica S. Weisgerber, *Unpublished Opinions: A Convenient Means to an Unconstitutional End*, 97 Geo. L.J. 621 (2009).

The Court should grant review to clarify the law that governs a police officer's knock-and-talk, and to instruct the lower courts to stop allowing police officers to abuse this limited license. This case presents an opportunity to clarify (i) that a lawful "knock-and-talk" and "exigent circumstances" are two distinct exceptions to Fourth Amendment protection that should not be conflated; and (ii) that under the "no-night-visits rule," warrantless visits after 11:00 p.m. and before 6:00 a.m. are outside the scope of a lawful knock-and-talk. (See Part 1, *infra*.) Moreover, this case also

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impermissible broadening of the limited scope of a lawful knock-and-talk.

presents an opportunity to clarify (iii) that a person cannot validly "consent" to a search of their home within minutes of a coercive and unlawful knock-and-talk, with no intervening circumstances. (See Part 2, *infra*.)

STATEMENT OF THE CASE

A. The officers enter the Westfalls' property at 2:15 a.m. without a warrant, and coerce the Westfalls into coming outside.

The following facts were admitted or undisputed at trial. Around 2:00 a.m., officers received a call from a young woman reporting a "trespass" by two 14-year-old boys. The boys came to visit the young woman's brother, who wasn't home. The young woman said the boys were looking for a marijuana grinder and had left and gone to the house next door (the Westfalls' home).

Officer Trevino spoke with the young woman, with her mother, and with her mother's boyfriend. They laughed about the young woman's effort to get her younger brother and his friends in trouble—and Officer Trevino offered to go next door and give the boys a "scare."[2]

[2] The Fifth Circuit's opinion omits this undisputed fact, which reveals an improper purpose for entering the Westfalls' property. See *Jardines*, 569 U.S. at 9 (stating scope of lawful knock-and-talk is "limited . . . to a specific purpose").

Officers Anderson and Trevino entered the Westfalls' property at approximately 2:15 a.m., without a warrant. Officer Trevino knocked loudly at the front door and "continued to beat on the door" until Mrs. Westfall awoke and "finally came" to the door. The officers asked Mrs. Westfall to get her son. And the officers testified that Mrs. Westfall "slammed" the door—and that they believed she would not return. But instead of leaving to get a warrant, the officers knocked again—more forcefully—trying to get Mrs. Westfall "to come back."

Between bouts of knocking, the officers also walked the curtilage of the home. They sniffed around the curtilage—intentionally smelling for marijuana—and they shined their flashlights into the sideyard and backyard.[3]

Officer Luna arrived at 2:22 a.m. and started pounding on the Westfalls' door. He pounded so hard on the glass that Officer Anderson thought it would break. The officers then had dispatch call the Westfalls' home phone—twice. The Westfalls' 14-year-old son answered the second time, and dispatch ordered him to "go answer the door."

At 2:24 a.m., in compliance with the order given over the phone, the Westfalls' son (and his friend) answered the door, and Officer Anderson ordered the boys

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[3] The Fifth Circuit's opinion omits these undisputed facts, which represent an unconstitutional search under *Jardines*. See 569 U.S. at 6–10.

to come outside. At that point, Mr. and Mrs. Westfall also came outside.

B. The officers interrogate the Westfalls outside in the cold, and threaten to keep them outside in the cold "forever" if they do not permit a search of their home.

It was "about 44 degrees" and the boys were in shorts and barefoot. The officers interrogated the boys for several minutes, frequently yelling at them, until they admitted they had marijuana upstairs. During this interrogation, Mrs. Westfall became visibly upset. At 2:32 a.m., Officer Luna threatened to keep the Westfalls outside "forever," waiting for a warrant, if they did not permit retrieval of the marijuana.[4]

Officer Anderson told Mr. Westfall: "[W]e know there are illegal drugs upstairs"; "with your permission . . . we need to go upstairs and confiscate those drugs." Mrs. Westfall told her son to "go get it," referring to the marijuana. Then Officer Anderson told Mr. Westfall: "Come on, sir, I want you up here." So Mr. Westfall followed his son inside—and Officer Anderson followed

[4] The Fifth Circuit's opinion omits the details of this interrogation and omits Officer Luna's threat, which reveals the coercive nature of the officers' conduct—undermining any notion that Mrs. Westfall's "consent" to search the home was "an independent act of free will." (See Part 2, below.)

the two of them, entering the Westfalls' home at 2:33 a.m.[5]

C. When Mrs. Westfall tries to reenter her own home, Officer Luna takes her down, causing serious injury.

After Officer Anderson entered the house, the door shut. Mrs. Westfall then started to go inside, but Officer Luna said: "You're not going anywhere. You slammed the door in our face." Mrs. Westfall said she was going into her own home, and she reached for the doorknob. Officer Luna then grabbed Mrs. Westfall and took her down—onto the brick porch—pinning her for roughly five minutes. Mrs. Westfall repeatedly screamed "You're hurting me," and Officer Luna threatened to "tase" her.

Eventually, Officer Anderson came back outside. The Officers arrested Mrs. Westfall for "interfering" with their search of the home. Mrs. Westfall was taken to the hospital, where staff noted abrasions and bruises, bloody urine, and an increased heart rate. And an MRI revealed a herniated disc at L5-S1. (Mrs.

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[5] The Fifth Circuit's opinion suggests that the Westfalls "consented" to the search of their home either when Mrs. Westfall told her son to "go get it" or when Mr. Westfall "nodded and went into the house" after Officer Anderson said, "I want you up here." See App. 8a–9a. But the Fifth Circuit had already held in the prior appeal that Mr. Westfall's "obedience" in response to Officer Anderson's command "could not reasonably be understood as consent." *Westfall*, 903 F.3d at 546 n.6. So Mrs. Westfall's instruction *to her son* to "go get it" was the only alleged "consent" on which the officers could rely.

Westfall has since undergone extensive treatment for her injuries.)

Later, the charges were dropped.

D. Mrs. Westfall sues the officers for false arrest and the district court grants qualified immunity—but the Fifth Circuit reverses, holding the district court failed to determine whether the officers' pre-consent conduct was unlawful.

Petitioner Constance (Mrs.) Westfall sued Respondents, Officers Luna, Anderson, and Trevino, for false arrest. And in response to the officers' motion for summary judgment, Mrs. Westfall argued that the warrantless 2:15-a.m. entry onto and search of her property—and the intrusive and coercive conduct at her door—exceeded the scope of a lawful knock-and-talk and therefore invalidated any subsequent "consent" to search the home. In reply, the officers embraced the characterization of their conduct as an attempted knock-and-talk, and simply argued that it was a "reasonable investigative tactic."

The district court granted qualified immunity, ruling the officers could reasonably believe they had consent to search the home. But the court did not analyze the lawfulness of the officers' pre-consent conduct.

Mrs. Westfall appealed and argued that the officers' initial conduct was outside the scope of a lawful knock-and-talk, and therefore invalidated any

subsequent "consent" to search the home—making Mrs. Westfall's subsequent arrest unlawful. In response, the officers again did not dispute the characterization of their initial conduct as an attempted knock-and-talk, arguing only that it was "reasonable."

The Fifth Circuit reversed the district court's grant of qualified immunity, holding Mrs. Westfall's arrest could be lawful only if the officers were "exercising lawful authority" when they searched the home. Thus, the lawfulness of the arrest depended on the lawfulness of the search of the home. And there were fact questions "as to whether a reasonable officer could conclude that they were . . . exercising lawful authority when they searched [Mrs.] Westfall's home," because there were fact questions as to whether the nature of the officers' initial conduct "affect[ed] the consent that was allegedly given." In short: everything depended on whether the officers' initial conduct constituted a lawful knock-and-talk. *Westfall v. Luna*, 903 F.3d 534, 543–546 (5th Cir. 2018).[6]

The Fifth Circuit therefore directed the district court to determine, on remand, (i) whether the officers' initial conduct constituted a lawful knock-and-talk and—if the initial conduct was unlawful—(ii) whether the alleged "consent" was "an independent act of free

[6] The Fifth Circuit held in the prior appeal that the officers had forfeited any reliance on "exigent circumstances" because they had failed to raise this defense prior to oral argument. *Westfall*, 903 F.3d at 544 n.4.

will." *Ibid.* Only then could the court determine whether the subsequent arrest was lawful.

E. On remand, the district court again fails to determine whether the officers' initial conduct was unlawful, and instead enters the same judgment that had been reversed in the prior appeal.

On remand, the officers did not dispute the facts related to their initial conduct. (See Parts A–B, *supra*.) Instead, they argued for the first time that their initial approach was "not a knock-and-talk" but instead an "active investigation"—suggesting to the jury that their conduct was not constrained by the same law that constrains a knock-and-talk. Mrs. Westfall objected multiple times to this new argument, but the district court allowed it.

After the jury heard the evidence and the district court's instruction on the law that governs a knock-and-talk, they retired for deliberation. But soon they sent a note asking for clarification on the law that governs an "active investigation." This note clearly demonstrated that the officers' new argument had confused the jury. But instead of clarifying that the officers' conduct had to conform with the law that governs a knock-and-talk, the district court simply referred the jury back to the charge.

With no clarifying instruction, the jury returned a verdict for the officers—finding Mrs. Westfall's rights had not been violated, despite the clearly established

law governing a knock-and-talk, and despite the officers' undisputedly coercive 2:00-a.m. conduct.

Mrs. Westfall moved for judgment as a matter of law—or for a new trial—arguing that, following the Fifth Circuit's mandate from the prior appeal, the undisputed evidence showed that the officers' initial conduct was unlawful. But the district court denied Mrs. Westfall's postjudgment motions, and—in direct contradiction of the Fifth Circuit's mandate—ruled that the officers' initial conduct could be retroactively justified by the subsequent "consent" to search the Westfalls' home. App. 47a–51a. In other words, the district court essentially reinstated the consent-based judgment that the Fifth Circuit had previously reversed.

F. Mrs. Westfall appeals again, but a new panel at the Fifth Circuit ignores several undisputed facts and ignores the prior panel's ruling that the officers had forfeited reliance on "exigent circumstances."

In her second appeal, Mrs. Westfall again argued that the officers' initial conduct constituted an unlawful knock-and-talk, and that the district court had violated the Fifth Circuit's mandate—and had enabled jury nullification—by allowing the officers to argue on remand that their initial conduct was "not a knock-and-talk" but instead an "active investigation."

Despite the prior panel's focus on the officers' initial conduct (see *Westfall*, 903 F.3d at 543–546)—and despite Mrs. Westfalls' continued focus on the officers'

initial conduct—a new panel at the Fifth Circuit issued an unpublished opinion that almost completely ignored the officers' initial conduct. See App. 22a–23a (glossing over officers' initial conduct in three paragraphs). And despite the prior panel's mandate that the district court should determine on remand whether the officers' initial conduct constituted a lawful knock-and-talk (see *Westfall*, 903 F.3d at 543–546), the new panel's opinion declared that "[t]he categorization of this encounter as a knock-and-talk was not part of this court's mandate on remand," and that the officers were therefore allowed to argue on remand that their initial approach was "not a knock-and-talk." App. 32a–33a.

Mrs. Westfall petitioned for rehearing en banc, arguing that the new panel's opinion impermissibly overruled the prior panel's opinion—and conflicted with the prior opinions of the Fifth Circuit and other circuits regarding a party's ability to raise new arguments on remand. And in response, the new panel withdrew its initial opinion and replaced it with a revised opinion.

The new panel's revised opinion provides a more thorough statement of the facts—but still ignores some of the key facts that demonstrate the unlawfulness of the officers' initial conduct. (See Parts A–B & nn.2–4, *supra*.) And the revised opinion holds (i) that the "lateness" of the officers' 2:15-a.m. visit "did not render the officers' knock-and-talk unlawful *per se*"; (ii) that the jury could find the officers' pre-consent conduct was "reasonable" under the "circumstances"; and (iii) that, even if the officers' pre-consent conduct "crossed the

line," the jury nevertheless could find that "Mr. and Mrs. Westfalls' subsequent consents were 'independent acts of free will.' " App. 9a–16a.

Mrs. Westfall again petitioned for rehearing en banc, arguing (i) that the constitutionality of the officers' undisputed conduct was not up to the jury, and that the officers' pre-consent conduct was unconstitutional as a matter of law; (ii) that—given the undisputed facts—the validity of the Westfalls' alleged "consent" was likewise not up to the jury, and that the alleged "consent" was not an "independent act of free will" as a matter of law; and (iii) that the Fifth Circuit had violated precedent by constructing and relying on multiple arguments that the officers had either failed to raise or expressly disclaimed.

But the Fifth Circuit denied rehearing. App. 73a. And when Mrs. Westfall asked the Fifth Circuit to publish its opinion—as the first appellate opinion in history to uphold the constitutionality of a 2:00-a.m. knock-and-talk—the Fifth Circuit denied that motion.

REASONS TO GRANT THE PETITION

There is confusion among state courts and federal circuit courts regarding the lawfulness of a nighttime knock-and-talk. (See cases cited, *supra*.) And the Fifth Circuit's opinion exacerbates this confusion. In *Jardines*, this Court unanimously acknowledged a "no-night-visits" rule. 569 U.S. at 9 n.3 (citing dissent's "no-night-visits rule" approvingly); *id.* at 19–20 (Alito, J.,

dissenting) (stating officers cannot "come to the front door in the middle of the night"). But the Eleventh Circuit has signaled that this rule has not been "clearly established." See *Young*, 850 F.3d at 1285–1287. And the Fifth Circuit's opinion expressly holds that the "lateness" of the officers' 2:15-a.m. visit "did not render the officers' knock-and-talk unlawful *per se*"—and that, contrary to the no-night-visits rule articulated in *Jardines*, a 2:15-a.m. visit by officers may be constitutionally permissible. App. 9a–10a.

Furthermore, although *Jardines* clearly held that searching (and sniffing) around the curtilage of a person's home is outside the limited scope of a lawful knock-and-talk, the Fifth Circuit's opinion holds that, in this case, the officers' searching (and sniffing) around the curtilage of the Westfalls' home was "reasonable"—in clear contradiction of the limits imposed by *Jardines*. See 569 U.S. at 8–10; see also *Bovat*, 141 S.Ct. at 22 (stating this conduct is clearly "an unlawful trespass" and "violation of the Fourth Amendment" under *Jardines*).

Further still, in *Jardines* the Court unanimously held that the limited scope of a lawful knock-and-talk is governed by "background social norms" and customs. 569 U.S. at 8–9; *id.* at 19–20 (Alito, J., dissenting); see *Bovat*, 141 S.Ct. at 22 (noting Court "unanimously agreed" that lawfulness of knock-and-talk is determined by what any "visitor" might "customarily" do). But the Fifth Circuit's opinion expressly rejects reliance on "background social norms" and instead justifies the late-night timing of the officers' visit by citing

case-specific "circumstances." App. 10a. By doing so, the Fifth Circuit's opinion contradicts *Jardines* and conflates the "knock-and-talk" exception with the "exigent circumstances" exception—thereby injecting more confusion into the law.

Finally, this Court and other circuits have held (i) that a person cannot validly consent to a search following an officer's unconstitutional conduct unless that consent is an "independent act of free will"—and (ii) that this requires both temporal distance and "intervening circumstances" between the constitutional violation and the given consent. See, *e.g.*, *Taylor v. Alabama*, 457 U.S. 687, 690–693 (1982) (applying factors first laid out in *Brown v. Illinois*, 422 U.S. 590, 598, 603–605 (1975)). No prior case has been found in which a federal appellate court has held that an alleged consent given within 20 minutes of a coercive constitutional violation—with no intervening circumstances—can be considered an "independent act of free will." Yet here, the Fifth Circuit has held that—even if the officers' pre-consent conduct "crossed the line," and even if "it is undisputed that the consents granted . . . were close in time to the [unlawful] knock-and-talk"—a jury nevertheless could find that the Westfalls' alleged "consent" to search their home was "an independent act of free will." App. 11a–17a. This not only conflicts with precedent but also creates additional confusion over whether the validity of consent is an issue for the court or for the jury to decide.

This case presents an opportunity to resolve the confusion over these important constitutional issues.

For these reasons, expounded upon below, the Court should grant this petition.

1. The Court should clarify that the limited scope of a lawful knock-and-talk is governed by social norms, and that visits after 11:00 p.m. and before 6:00 a.m. are outside the limited scope of a lawful knock-and-talk.

The Court has already held that the "implicit license" to conduct a knock-and-talk is governed by "background social norms." *Jardines*, 569 U.S. at 8–10. And within the context of applying "background social norms," both this Court and the circuit courts have previously indicated that nighttime knock-and-talks are outside the limited scope of a lawful knock-and-talk. *Id.* at 9 n.3 (citing "no-night-visits rule"); *e.g.*, *French*, 15 F.4th at 126–136 (*Jardines* "clearly established" that 5:00-a.m. visit and repeated efforts to elicit response from plaintiff were unlawful); *Arnold*, 979 F.3d at 267–268 (2:00-a.m. visit was "trespassory search" under *Jardines*); *Lundin*, 817 F.3d at 1159–1160 (4:00-a.m. visit); *Wells*, 648 F.3d at 680 (4:00-a.m. visit); *Reeves*, 524 F.3d at 1167–1169, 1174 (3:00-a.m. visit); *Jerez*, 108 F.3d at 690–692 (post-11:00-p.m. visit); *Fontenot*, 56 F.3d at 675 (2:30-a.m. visit).

But—even in the face of all this precedent—both the Eleventh Circuit and the Fifth Circuit have exhibited confusion over whether a nighttime knock-and-talk is permissible. See *Young*, 850 F.3d at 1285–1287;

App. 9a–11a. Some states have likewise exhibited confusion. *E.g.*, *Frederick*, 886 N.W.2d at 13–14 (condoning 4:00-a.m. visit and asserting *Jardines* did not establish "no-night-visits rule"), 17–21 (Servitto, J., dissenting) (stating *Jardines* and other cases have established "no-night-visits rule"). And now the Fifth Circuit has injected more confusion into the law by holding that—even if it runs afoul of "background social norms"—a nighttime knock-and-talk may be justified by case-specific "circumstances." App. 9a–10a.

The Court should grant review to clarify that (1) the "knock-and-talk" exception is distinct from the "exigent circumstances" exception and is governed not by case-specific circumstances but instead by background social norms; and (2) a visit between 11:00 p.m. and 6:00 a.m. violates social norms and is outside the limited scope of a lawful knock-and-talk.

1.1. The Court should clarify that a knock-and-talk is governed by "background social norms" and not by case-specific "circumstances."

The "knock-and-talk" exception to the Fourth Amendment's protection against unlawful entry is drawn from "the habits of the country," which allow "solicitors, hawkers, and peddlers of all kinds" to approach a person's front door. *Jardines*, 569 U.S. at 8. Thus, "the background social norms that invite a visitor to the front door" create an "implicit license" for police officers to do likewise; but the scope of this license

"is limited not only to a particular area but also to a specific purpose"; according to "the habits of the country" and "background social norms," a visitor may "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave"; and under the knock-and-talk exception to the Fourth Amendment, this is all that a police officer may do—because, under the "limited" license governed by "background social norms," a police officer may do "no more than any private citizen might do." *Id.* at 8–9.

In some cases, of course, police officers are permitted to do more than what "any private citizen might do." For example, a police officer may have license to enter property to prevent the destruction of evidence. But this license is drawn not from "background social norms" but from "exigent circumstances," which provide a separate exception to the Fourth Amendment's protection against unlawful entry. See *Kentucky v. King*, 563 U.S. 452 (2011).

The fact-bound "exigent circumstances" exception and the norm-bound "knock-and-talk" exception are two *separate* licenses for officers to enter a person's property—and these two separate licenses should not be confused or conflated, lest the Fourth Amendment's protections be further eroded. See *Missouri v. McNeely*, 569 U.S. 141, 150 n.3 (2013) (recognizing distinction between categorical exceptions and case-specific exceptions). "Social norms do not allow for knocking at a stranger's door at 2:00 a.m., so the knock-and-talk exception is categorically unavailable at 2:00 a.m. Only

an emergency can justify a 2:00-a.m. visit, and emergencies are determined case by case, under the exigent-circumstances exception."

Here, a prior panel of the Fifth Circuit had already held that the officers who entered the Westfalls' property without a warrant had forfeited any reliance on "exigent circumstances" because they did not raise this defense until after oral argument. *Westfall*, 903 F.3d at 544 n.4. Consequently, the prior panel held that the officers' warrantless 2:15-a.m. entry could be justified only if it fell within the limited scope of a lawful knock-and-talk. *Id.* at 544–546.

But now a new panel of the Fifth Circuit has held that—even though the officers' 2:15-a.m. visit "transgress[ed] background social norms"—the officers' 2:15-a.m. entry onto the Westfalls' property can nevertheless be justified, "[u]nder the circumstances," because "this case involved a 911 call alleging trespass" and "the trespassers were believed to be in the Westfall residence." App. 10a.

These case-specific "circumstances" are not a proper basis for permitting a knock-and-talk. A knock-and-talk is governed by "background social norms"—and in conducting a lawful knock-and-talk police officers may do "no more than any private citizen might do." *Jardines*, 569 U.S. at 8–9. Private citizens cannot respond to 911 calls, nor can they enter a person's property to pursue alleged trespassers at 2:00 a.m. Such case-specific "circumstances" may justify a police officer's entry onto property under the

exigent-circumstances exception. But they are not the proper basis for a lawful knock-and-talk.

The Fifth Circuit's opinion constitutes an application of the "exigent circumstances" exception, masquerading as an application of the "knock-and-talk" exception—and the result is a confusing distortion of what officers are permitted to do within the limited scope of a lawful knock-and-talk. In other words, by conflating the knock-and-talk exception with the exigent-circumstances exception, and by holding that the officers' conduct constituted a lawful knock-and-talk, the Fifth Circuit flouted the limitations imposed by *Jardines* and eroded the protections provided by the Fourth Amendment.

To preserve the Fourth Amendment's protections and to prevent the Fifth Circuit's opinion from injecting more confusion into the law, the Court should grant review and clarify that the knock-and-talk exception is distinct from the exigent-circumstances exception, and is based on "background social norms" rather than case-specific "circumstances." *Cf. McNeely*, 569 U.S. at 150 n.3.

1.2. The Court should clearly establish that nighttime knock-and-talks are unconstitutional.

By declaring that "the lateness of the hour did not render the officers' knock-and-talk unlawful *per se*" (App. 9a–10a), and then holding that the officers' 2:15-a.m. visit constituted a lawful knock-and-talk, the

Fifth Circuit's opinion exacerbates the confusion—previously exhibited by the Eleventh Circuit and some state courts—over whether a "no-night-visits rule" has been clearly established. See *Young*, 850 F.3d at 1285–1287, 1295–1299; *Frederick*, 886 N.W.2d at 13–14, 17–21.

To support its holding, the Fifth Circuit quotes its own prior opinion in *U.S. v. Staggers*, 961 F.3d 745, 759 (5th Cir. 2020), which states: "That the officers arrived in the early morning does not necessarily render the knock-and-talk coercive or unreasonable." App. 10a. But *Staggers* involved a 6:00-a.m. knock-and-talk. A 6:00-a.m. visit is early—but it is not remotely comparable to a 2:15-a.m. visit, and it still conforms with the "no-night-visits rule" articulated in *Jardines*. See also Maclin, *The Complexity of the Fourth Amendment*, 77 B.U. L.Rev. at 971 (stating that, at common law, searches of dwellings between dusk and dawn were forbidden). Instead of following the "no-night-visits rule" articulated in *Jardines*, or following the many other prior federal appellate decisions indicating that a visit before 6:00 a.m. is unlawful (see cases cited, *supra*—including the Fifth Circuit's own prior decision in *Arnold*, 979 F.3d at 267–268), the Fifth Circuit stretched *Staggers* to support its conclusion.

To enforce the limitations imposed by *Jardines* and the Fourth Amendment, the Court should grant review and clearly establish that nighttime visits are outside the limited scope of a lawful knock-and-talk.

2. The Court should clarify that "consent" supposedly given within minutes of an officer's intrusive and coercive unconstitutional conduct—without intervening circumstances—cannot be construed as "an independent act of free will."

Consent provides another exception to the Fourth Amendment's general prohibition against warrantless searches. And when consent was allegedly given after an officer's unconstitutional conduct, courts have applied the *Brown* test to determine whether the alleged consent was an "independent act of free will." The *Brown* test considers (1) the "temporal proximity" of the unlawful conduct and the alleged consent; (2) the existence of "intervening circumstances"; and (3) the "purpose and flagrancy" of the officer's unlawful conduct. 422 U.S. at 598, 603–605.

Notably, the Court has indicated that applying the *Brown* test to determine whether an alleged consent was an "independent act of free will" is a legal issue for courts to decide. See, *e.g.*, *Taylor*, 457 U.S. at 690–693 (applying *Brown* factors as matter of law); *Brown*, 422 U.S. at 603–605 (applying factors after rejecting need for "further factual findings"); see also, *e.g.*, *U.S. v. Mendez*, 885 F.3d 899, 909–910 (5th Cir. 2018) (noting "court must consider each factor and determine the cumulative effect of all factors in each case").

Here, it is undisputed that the officers entered the Westfalls' property at 2:15 a.m., and that—at 2:32 a.m.—Officer Luna threatened to keep the Westfalls

outside in the cold "forever," if they did not permit the retrieval of the marijuana from upstairs. Officer Anderson then told Mr. Westfall: "Come on, sir, I want you up here." At that point, the Westfalls supposedly "consented" to a search of their home, and Officer Anderson entered the Westfalls' home at 2:33 a.m. (See Parts A–B, *supra*.)

If the officers' 2:15-a.m. visit—and their intrusive search of the Westfalls' property—was unconstitutional (see Part 1, *supra*), then it is indisputable that the temporal proximity of the officers' constitutional violation and the Westfalls' alleged consent was as little as one minute (the time between Officer Luna's coercive threat and the alleged consent) and no more than 18 minutes (the time between the officers' entry onto the property and the alleged consent). And it is indisputable that there were no "intervening circumstances" between the officers' unlawful conduct and the Westfalls' alleged "consent" to search their home.

In *Brown*, the Court held that an alleged confession was not an "independent act of free will" because it was given "less than two hours" after an unlawful arrest, with "no intervening event of significance whatsoever." 422 U.S. at 604–605. And no prior decision has been found in which a federal appellate court has held that an alleged consent was an "independent act of free will," when given less than 20 minutes after a constitutional violation, with no intervening circumstances.

Nevertheless, here, the Fifth Circuit has held that, even if the officers' pre-consent conduct "crossed the

line," the jury could have found that the Westfalls' alleged consent—given just 1–18 minutes after the officers' intrusive and coercive conduct—was an "independent act of free will." App. 11a–17a.

The Fifth Circuit's decision conflicts with precedent—both (i) in its application of the *Brown* factors and its substantive determination that valid consent can be given within less than 20 minutes of a constitutional violation, and (ii) in its procedural determination that such constitutional questions can be resolved by a jury. Moreover, in leaving this question to the jury, the Fifth Circuit ignored what transpired at the district court—where the officers were permitted to tell the jury repeatedly that their nighttime visit was "not a knock-and-talk," thereby enabling the jury to conclude (incorrectly) that there was no constitutional violation in the first place. (See Part E, *supra*.)

To clarify the law that governs an alleged consent given in the wake of a constitutional violation, the Court should grant review and hold (i) that such constitutional questions are legal issues for the courts to decide, and (ii) that valid consent cannot be given within minutes of a constitutional violation, with no intervening circumstances.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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