No. _____

In The Supreme Court of the United States

CITY OF SPARKS, ELI MAILE, and BRIAN SULLIVAN,

Petitioners,

v.

ROSA ESTER BRIZUELA, Individually and as the Appointed Special Administrator of the Estate of ROLANDO ANTONIO BRIZUELA, ROLAND BRIZUELA, and MORGAN BRIZUELA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

These are the questions presented:

1. Did the Ninth Circuit err by holding that the community-owned areas in front of a multi-family dwelling constituted curtilage, contrary to its own precedent, the precedent of the Second, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, as well as the precedent of many state-level supreme courts?

2. Alternatively, is the law clearly established that the community-owned areas in front of a multi-family dwelling constitute curtilage, despite this split of authority?

PARTIES TO THE PROCEEDING

Petitioners are the City of Sparks, Eli Maile, and Brian Sullivan. Petitioners were the defendants in the district court and appellants in the Ninth Circuit.

Respondents are Rosa Brizuela, individually, and as the appointed special administrator of the estate of Rolando Antonio Brizuela, Roland Brizuela, and Morgan Brizuela. Respondents were the plaintiffs in the district court and appellees in the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, there are no parent or publicly held companies involved in this proceeding.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *City of Sparks v. Rosa Brizuela*, No. 22-16357 (9th Cir.) (order denying rehearing en banc, filed November 13, 2023);
- *City of Sparks v. Rosa Brizuela*, No. 22-16357 (9th Cir.) (memorandum dismissing in part, affirming in part, reversing in part, and remanding, filed August 21, 2023); and
- *Rosa Brizuela v. City of Sparks*, No. 3:19-CV-00692-MMD-VPC (D. Nev.) (order denying defendants' motion for partial judgment on the

STATEMENT OF RELATED PROCEEDINGS – Continued

> pleadings; granting plaintiffs' motion for partial summary judgment; and granting in part and denying in part defendants' motion for summary judgment, filed August 10, 2022).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

This case demonstrates the continued inability of the Ninth Circuit to follow this Court's directives, as the Ninth Circuit once again applied law at a high level of generality during its qualified immunity analysis by applying curtilage precedent of single-family homes to a case involving a fourplex unit.

The Ninth Circuit's decision in this case implicates the important and recurring Fourth Amendment legal issue of whether the common areas in front of a multi-family dwelling can be considered curtilage. The Ninth Circuit answered "yes" in the context of this officer-involved shooting, upheld the grant of summary judgment in favor of the plaintiffs, and denied qualified immunity to the officers. However, the Ninth Circuit's decision in this case adds to a Circuit split on this issue. It conflicts with its own precedent, precedent from other Circuits, and precedent from state-level supreme courts, all on this same issue.

The resolution of this question is vitally important to the citizens living in the 43.9 million multi-family residences—about 31.4% of the Nation's housing[1]—and the law enforcement officers charged with keeping them safe. At minimum, the far-reaching confusion in the lower courts demonstrates that the law in this area was not clearly established and, viewed at the proper

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[1] *See* National Association of Home Builders, *Multifamily Homes: Types and Trends* (last accessed January 24, 2024) *available at* https://www.nahb.org/other/consumer-resources/types-of-home-construction/multifamily.

level of generality, the officers in this case were entitled to qualified immunity.

OPINIONS BELOW

The district court's August 10, 2022 order denying Petitioners' motion for partial judgment on the pleadings, granting Respondents' motion for partial summary judgment, and granting in part and denying in part Petitioners' motion for summary judgment is not published and is reproduced in the Appendix ("App.") at pages 8 to 116. The Ninth Circuit's August 21, 2023 Memorandum dismissing in part, affirming in part, reversing in part, and remanding is not published and is reproduced in the Appendix at pages 1 to 7. The Ninth Circuit's November 8, 2023 Order denying Petitioners' petition for rehearing en banc is not published and is reproduced in the Appendix at page 117.

BASIS FOR JURISDICTION IN THIS COURT

This Court has jurisdiction to review the Ninth Circuit's August 21, 2023 decision on writ of certiorari under 28 U.S.C. § 1254(1). The Ninth Circuit denied Petitioners' timely petition for rehearing en banc on November 8, 2023. This petition is timely filed pursuant to Supreme Court Rules 13.1 and 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution and 42 U.S.C. § 1983 are reproduced in the Appendix at page 118.

STATEMENT OF THE CASE

This matter pertains to a fatal officer-involved shooting that occurred as officers were investigating crimes committed against a 16-year-old juvenile, wherein Rolando Brizuela punched the juvenile in the face and stole his skateboard. As the two officers attempted to speak with the Mr. Brizuela near his residence, he retrieved and brandished a firearm, resulting in the officers' responsive shooting.

The shooting occurred at a common-interest community which consists of "40 fourplexes comprising 160 individual lots that are arranged around three streets . . . [and] [i]nterspersed between the fourplexes are six defined common areas, lettered A through F." App. 12. The fourplex unit that Mr. Brizuela owned was located within "Common Area A" and was the front-right unit of the fourplex, facing the street. App. 12. Mr. Brizuela owned only the structure itself—which included the residence and an attached enclosed patio—but he did not own the front yard, the concrete walkway leading from the sidewalk to the unit, or the concrete pad leading up to the front door of the unit. App. 12-13. There were no enclosures, fences, signs, or

outdoor furniture leading up to or near the front door of the unit. App. 12-13. Those areas were part of the community's Common Area A. App. 12. Pursuant to the Covenants, Conditions, and Restrictions, "Every owner shall have a right and easement of enjoyment in and to the Common Area. . . ." App. 13.

After the officers had gathered preliminary information about the incident that occurred between Mr. Brizuela and the 16-year-old juvenile victim—which included two initial encounters with Mr. Brizuela on the sidewalk, speaking with three neighbors, and interviewing the juvenile victim—they approached Mr. Brizuela's residence. App. 16-23. Mr. Brizuela was initially in his enclosed front patio with the gate closed, with his head visible to the officers as he watched the officers approach his unit. App. 23. As the officers walked up the walkway, Mr. Brizuela opened the gate, stepped out onto the concrete pad in front of his unit, and then abruptly turned and retreated back into his enclosed patio and closed the gate. App. 23.

One officer then stepped onto the concrete pad in front of the unit's door, adjacent to the enclosed patio, and the other officer stood nearby. App. 24-25. Mr. Brizuela then retrieved a firearm. App. 25. The officers repeatedly yelled at Mr. Brizuela to put the firearm down, but those commands were ignored. App. 26. One officer testified that he saw Mr. Brizuela rack the slide of the firearm, and the other officer testified that he heard Mr. Brizuela rack the slide of the firearm. App. 26. Both officers testified that Mr. Brizuela began raising the firearm toward them, which prompted them to

shoot. App. 27. The handgun was found under Mr. Brizuela's torso. App. 28-29.

Plaintiffs sued, alleging twelve claims: (1) unreasonable search and seizure; (2) excessive force; (3) substantive due process; (4) deprivation of familial relations and the right of association; (5) interference with the right to bear arms; (6) false arrest and false imprisonment; (7) battery; (8) negligence; (9) disability discrimination under the Americans with Disabilities Act; (10) wrongful death; (11) municipal liability for unconstitutional custom, policy, or practice (asserted as the administrator); and (12) municipal liability for unconstitutional custom, policy, or practice (asserted by the family on their own behalf). App. 33-34.

Of relevance, the officers filed a motion for summary judgment asserting qualified immunity on the claims of unlawful search and seizure and excessive force. App. 8-9; 45. The plaintiffs filed for summary judgment as to liability on the unlawful search and seizure claim. App. 45. The district court granted summary judgment in favor of plaintiffs as to liability on the unlawful search and seizure claim and denied qualified immunity to the officers on both Fourth Amendment claims. App. 45.

The district court found that the concrete pad in front of Mr. Brizuela's fourplex unit constituted curtilage as a matter of law. App. 52-53. The Ninth Circuit upheld this grant of summary judgment in plaintiffs' favor and denial of qualified immunity to the officers, relying upon *Florida v. Jardines*, 569 U.S. 1 (2013) and

United States v. Lundin, 817 F.3d 1151 (9th Cir. 2016). App. 3. Neither of these cases involved a multi-family dwelling; rather, both cases involved single-family residences.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision in this case deepens a split in authority over the important and recurring Fourth Amendment question about whether a property owner has a reasonable expectation of privacy in the area in front of their multi-family dwelling, which is designated a common area and is owned by the community. The Circuits and state courts are in sharp disagreement. Alternatively, given the split in authority detailed below, it is apparent that this legal concept is not clearly established for qualified immunity purposes.

I. Courts Are Split Over Whether There is a Reasonable Expectation of Privacy in the Areas Adjacent to a Multi-Family Dwelling.

The Fourth Amendment "protects the curtilage of a house." *United States v. Dunn*, 480 U.S. 294, 300 (1987). "[T]he extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself," including (1) "the proximity of the area claimed to be curtilage to the home," (2) "whether the area is included within an enclosure

surrounding the home," (3) "the nature of the uses to which the area is put," and (4) "the steps taken by the resident to protect the area from observation by people passing by." *Id*.

"[T]he person who claims the protection of the Amendment [must have] a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). "There is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas*, 439 U.S. at 143 n.12.

There are disagreements and inconsistent rulings within and between the Circuits and state-level supreme courts as to the parameters of curtilage as it applies to multi-family dwellings.

(a) The First, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits, and numerous state-level supreme courts have held there is a reasonable expectation of privacy in the common areas or areas adjacent to a multi-family dwelling.

In this case, the Ninth Circuit held that the community-owned concrete pad in front of this multi-family dwelling constituted curtilage. In *United States v. Fluker*, 543 F.2d 709, 716 (9th Cir. 1976), the Ninth Circuit held that a tenant has an expectation of privacy in the inner entryway of a multi-family dwelling, where the entryway provided access to the first and second floor, and the exterior door was usually kept locked, but was open the day of the officers' arrival.

The Sixth Circuit has held that there is an expectation of privacy for tenants in the common areas of their apartment building, at least when the building is locked. *See United States v. King*, 227 F.3d 732, 754 (6th Cir. 2000) (basement area of two-family duplex); *United States v. Carriger*, 541 F.2d 545, 547 (6th Cir. 1976) (interior stairway of a locked apartment building).

Likewise, the Eighth Circuit held that the unenclosed area in front of an apartment, and specifically the area within six to ten inches of an apartment's exterior window which was six feet away from the walkway and was partially covered by a bush and a grill, constituted curtilage. *United States v. Burston*, 806 F.3d 1123, 1129 (8th Cir. 2015); *see also United States*

v. Hopkins, 824 F.3d 726, 732 (8th Cir. 2016) (finding the area six-to-eight inches immediately in front of a townhome's front door was curtilage); *United States v. Burston*, 806 F.3d 1123, 1128 (8th Cir. 2015) (finding the grassy area within six-to-ten inches of the apartment constituted curtilage where the occupant made personal use of the area by setting up a cooking grill, and a bush was planted in front of the window).

The First, Fourth, and Fifth Circuits have rendered analogous holdings. *See United States v. Bain*, 874 F.3d 1, 15 (1st Cir. 2017) (holding the lock on the front door of a condominium unit constitutes curtilage); *United States v. Jackson*, 728 F.3d 367, 374 (4th Cir. 2013) (holding the back concrete patio behind a first-floor apartment constituted curtilage, but the area beyond the patio, including the two-to-three feet of grass leading to the common sidewalk, did not); *Fixel v. Wainwright*, 492 F.2d 480, 484 (5th Cir. 1974) (holding a reasonable expectation of privacy exists in a fenced-in backyard area of a multi-unit building where the backyard was "completely removed from the street and surrounded by a chain link fence").

Numerous state courts of last resort have reached similar conclusions. The Supreme Court of Illinois held that a third-floor landing outside an apartment door within a locked apartment building constituted curtilage. *People v. Burns*, 2016 IL 118973, ¶ 114, 50 N.E.3d 610, 637 (Ill. 2016). Dissenting Judge Thomas disagreed with the finding of curtilage because "[u]nlike in *Jardines*, the area in question here did not belong to defendant, nor did she have exclusive control over it. . . .

Everyone understands that tenants of an apartment building do not own or possess the common areas." *Id*. (Thomas, J., dissenting); *see, e.g.*, *Espinoza v. State*, 454 S.E.2d 765, 768 (Ga. 1995) (finding a reasonable expectation of privacy in the bushes to the left of the driveway of a duplex); *Commonwealth v. Leslie*, 76 N.E.3d 978, 986 (Mass. 2017) (holding the porch and side yard in a three-family home constituted curtilage, where the porch was connected to the home and obstructed from view by recycling bin, and the side yard was enclosed by a fence); *State v. Rendon*, 477 S.W.3d 805, 808 (Tex. Crim. App. 2015) (holding the second floor landing in front of an apartment door constituted curtilage).

(b) The Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, and numerous state-level supreme courts have held the opposite—that there is no expectation of privacy in common areas or areas adjacent to multi-family dwellings.

On the other hand, various state courts and Circuits have also held the opposite, at times contrary to their own precedent. The First Circuit has plainly stated that the concept of curtilage as it applies to multi-family dwellings "is necessarily much more limited than in the case of a rural dwelling subject to one owner's control." *United States v. Cruz Pagan*, 537 F.2d 554, 558 (1st Cir. 1976) (citations omitted) (holding the

underground condominium parking garage did not constitute curtilage).[2]

The Second Circuit has explicitly stated "[i]t is doubtful that the curtilage concept has much applicability to multi-family dwellings." *United States v. Arboleda*, 633 F.2d 985, 992 (2d Cir. 1980). The Second Circuit has held that there was no expectation of privacy in the fenced-in rear yard of a multi-family three-unit apartment building which was accessible to the other tenants of the building. *United States v. Fields*, 113 F.3d 313, 321 (2d Cir. 1997); *see also United States v. Arboleda*, 633 F.2d 985, 992 (2d Cir. 1980) (holding there is no expectation of privacy to the ledge outside a second-story apartment near a fire escape); *United States v. Holland*, 755 F.2d 253, 257 (2d Cir. 1985) (finding the entry way of a two-story building with a locked exterior door and inner hallway did not constitute curtilage because the area was not subject to the occupant's exclusive control).

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[2] *See also United States v. Reilly*, 76 F.3d 1271, 1277 (2d Cir. 1996); *United States v. Acosta*, 965 F.2d 1248, 1256 (3d Cir. 1992); *United States v. Redmon*, 138 F.3d 1109, 1128 (7th Cir. 1998) (Evans, J., concurring); *State v. Harnisch*, 931 P.2d 1359, 1364 n.3 (Nev. 1997); *State v. Williams*, 2015 ND 103, ¶ 21, 862 N.W.2d 831, 837 (ND 2015); *Espinoza v. State*, 454 S.E.2d 765, 768 (Ga. 1995); *Bayshore v. State*, 432 S.E.2d 251, 252 (Ga. 1993); *Commonwealth v. Thomas*, 267 N.E.2d 489, 491 (Mass. 1971); *State v. Nguyen*, 2013 ND 252, ¶ 13, 841 N.W.2d 676, 682 (ND 2013); *State v. Benton*, 536 A.2d 572, 575 (Conn. 1988); *State v. Krech*, 403 N.W.2d 634, 637 (Minn. 1987); Wayne R. LaFave, *Search and Seizure: A Treatise On The Fourth Amendment*, § 2.3(c) (6th ed. 2022 update) ("[T]he concept of 'curtilage' appears to have little of anything to do with multiple-unit structures.") (citations omitted).

The Third Circuit held that tenants did not have a reasonable expectation of privacy in either the hallway or the fenced-in backyard of their three-story apartment building, where the yard was used by the landlord and the tenants only had limited use. *United States v. Acosta*, 965 F.2d 1248, 1252 (3d Cir. 1992). The Third Circuit noted:

> [T]enants generally have neither the authority nor the investment incentive to take steps to protect a yard from view by doing such things as erecting a solid fence or planting trees and shrubbery. Instead, the tenant generally takes the property as he finds it, with or without fencing or other types of obstructions in place. In this context, the *Dunn* factors are not as useful analytically as in other settings.

Id. at 1256. The Eighth Circuit held that the fenced-in back yard of a multi-family apartment building and the stairs leading to the basement did not constitute curtilage because the areas were accessible by all tenants, visible to the public, the gate was open, and there was a lack of signage. *United States v. Brooks*, 645 F.3d 971, 976 (8th Cir. 2011); *see also United States v. Lloyd*, 36 F.3d 761, 763 (8th Cir. 1994) (holding it was not a search to look through open door of apartment from the interior hallway where the exterior door was unlocked); *United States v. Mendoza*, 281 F.3d 712, 715 (8th Cir. 2002) (finding no expectation of privacy in the front exterior door or interior vestibule of a two-story duplex).

The Ninth Circuit previously held that the "common stairways and common porches of a multi-tenanted apartment house" do not constitute curtilage. *United States v. Freeman*, 426 F.2d 1351, 1353 (9th Cir. 1970) (involving a two-story sixteen-unit apartment building where access was granted to the second floor via open stairways and open walkways). The Ninth Circuit "join[ed] the First, Second, and Eighth Circuits which have rejected this rationale [of the Sixth Circuit] and held an apartment dweller has no reasonable expectation of privacy in the common areas of the building." *United States v. Nohara*, 3 F.3d 1239, 1242 (9th Cir. 1993) (citations omitted) (holding tenant had no reasonable expectation of privacy in hall of high-rise apartment building).

The Tenth Circuit's decision in *Reeves v. Churchich*, 484 F.3d 1244 (10th Cir. 2007) is an illustration. In *Reeves*, the Tenth Circuit held that there is no reasonable expectation of privacy in the unenclosed front yard of a duplex where the yard was open to public view and there was no evidence that the occupant had the right to exclude anyone from the area. *Id.* at 1254. Further, in *United States v. Maestas*, 639 F.3d 1032, 1037 (10th Cir. 2011), the Tenth Circuit held there is no expectation of privacy in the garbage storage area which abuts one unit of the triplex, even where it is enclosed by a fence and largely shielded

from observation, because the area was used by other tenants and accessible by the landlord.[3]

The Eleventh Circuit held that the driveway was not a part of a one-story duplex's curtilage because the front yard was unfenced, the driveway ran straight from the street to the duplex between the two front doors, it appeared to be common to the two units, and the driveway was not gated or enclosed. *United States v. Stephen*, 823 F. App'x 751, 755 (11th Cir. 2020); *see also United States v. Miravalles*, 280 F.3d 1328, 1333 (11th Cir. 2002) (finding no reasonable expectation of privacy in common areas of high-rise apartment building because the building's front door lock was inoperable).

Similarly, the Fifth, Sixth, and Seventh Circuits have held there is no expectation of privacy in areas adjacent to multi-family dwellings. *See United States v. Thomas*, 120 F.3d 564, 571 (5th Cir. 1997) (area between privacy fence and apartment building when the gate was left open); *United States v. Dillard*, 438 F.3d 675, 682 (6th Cir. 2006) (two-story duplex's common hallway and stairway leading to the upstairs unit when the exterior door was unlocked and ajar); *United States v. James*, 40 F.3d 850, 862 (7th Cir. 1994), *cert. granted, judgment vacated to address new law on a separate issue*, 516 U.S. 1022 (1995), *and modified*, 79 F.3d

[3] The Tenth Circuit has gone so far as holding that the side yard area of a single-family residence was not within curtilage of their home, even though it was immediately adjacent to house and enclosed on three sides. *United States v. Cousins*, 455 F.3d 1116, 1124 (10th Cir. 2006).

553 (7th Cir. 1996) (unenclosed walkway along the side of a duplex that led to the rear side door); *United States v. Redmon*, 138 F.3d 1109, 1128 (7th Cir. 1998) (garbage cans placed next to the attached garage of an eight-unit townhouse); *United States v. Villegas*, 495 F.3d 761, 767 (7th Cir. 2007) (common hallway of a duplex where the exterior door was unlocked); *Harney v. City of Chicago*, 702 F.3d 916, 925 (7th Cir. 2012) (walkway adjacent to condominium building inside a gate which restricted the area from public view).

Likewise, various state courts of last resort have held there is no expectation of privacy in areas adjacent to multi-family dwellings. *See People v. Shorty*, 731 P.2d 679, 681 (Colo. 1987) (area underneath a doormat in front of basement apartment door); *People v. Becker*, 533 P.2d 494, 496 (Colo. 1975) (unenclosed area in front of apartment window, which was contiguous to all the units); *State v. Hook*, 587 P.2d 1224, 1225-26 (Haw. 1978) (walkway between duplex buildings); *Hardister v. State*, 849 N.E.2d 563, 571 (Ind. 2006) (unenclosed backyard of duplex and walkway that ran through the backyard); *Kendall v. State*, 849 N.E.2d 1109, 1110 (Ind. 2006) (same); *State v. Krech*, 403 N.W.2d 634, 637 (Minn. 1987) (backyard of a two-story duplex); *State v. Milton*, 821 N.W.2d 789, 800 (Minn. 2012) (external landing and adjacent steps to the upper-level duplex unit); *State v. Edstrom*, 916 N.W.2d 512, 520 (Minn. 2018) (unenclosed area immediately adjacent to apartment door); *State v. Nguyen*, 2013 ND 252, ¶ 13, 841 N.W.2d 676, 682 (ND 2013) (hallway outside an apartment); *State v. Williams*, 2015 ND 103,

¶ 23, 862 N.W.2d 831, 837 (ND 2015) (hallway outside a condominium unit); *State v. Gates*, 249 A.3d 445, 452 (N.H. 2020) (apartment building vestibule on the tenant's family farm, where the building was located in the back corner of a large farm, there were no gates or signage, the exterior door was unlocked); *People v. Funches*, 679 N.E.2d 635, 636 (N.Y. 1997) (fire escape of a multi-story apartment building); *Watkins v. State*, 59 Wis.2d 514, 208 N.W.2d 449 (1973) (per curiam) (storage room in apartment building basement); *State v. Dumstrey*, 2016 WI 3, 366 Wis.2d 64, 873 N.W.2d 502 (Wis. 2016) (underground parking garage of apartment building).

It is clear that the applicability of curtilage to multi-family dwellings is unsettled, at best. This inconsistency in precedent has been recognized by academics.[4] The uncertainty surrounding what constitutes the curtilage in the multi-family dwelling context presents an important federal question to this Court. The lack of clarity in this area has significant implications for the many citizens living in multi-family dwellings as well as police officers charged with protecting the

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[4] *See* Wayne R. LaFave, *Search and Seizure: A Treatise On The Fourth Amendment*, § 2.3(c) & § 2.3(b) (6th ed. 2022 update) (acknowledging the contrary authority on curtilage as it applies to multiple-unit structures); Carol A. Chase, *Cops, Canines, and Curtilage: What Jardines Teaches and What It Leaves Unanswered*, 52 Hous. L. Rev. 1289, 1309 (2015); Jeremy J. Justice, *Do Residents of Multi-Unit Dwellings Have Fourth Amendment Protections in Their Locked Common Area After Florida v. Jardines Established the Customary Invitation Standard?*, 62 Wayne L. Rev. 305, 322 (2017).

public in those spaces. As a result, this Court's review is vital on this issue.

II. This Split in Authority Shows that the Law was not Clearly Established and the Ninth Circuit Applied Precedent at an Impermissibly High Level of Generality.

No case from this Court has ever held that the common areas in front of a multi-family dwelling constitute curtilage.[5] The conflicting positions among the Circuits and state courts demonstrates that the law was not clearly established.

Indeed, the law has not even been clearly established within the Ninth Circuit's precedent. Contrary to its decision in this case, the Ninth Circuit has held elsewhere that there is no reasonable expectation of privacy in the common areas of multi-tenant buildings. *See United States v. Freeman*, 426 F.2d 1351, 1353 (9th Cir. 1970); *United States v. Nohara*, 3 F.3d 1239, 1242 (9th Cir. 1993).

Here, the Ninth Circuit did not address or reconcile the clashing cases within its own Circuit and those within the other Circuits. Rather, it solely relied upon *Florida v. Jardines*, 569 U.S. 1 (2013) and *United States v. Lundin*, 817 F.3d 1151 (9th Cir. 2016). However, both of those cases are easily distinguishable because they

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[5] *See Chris Dutra v. Kim Jackson*, 2023 WL 6690620 (U.S.) (No. 23-377) (presenting question about whether this Court's precedents are the only source of clearly established law for purposes of qualified immunity).

involve single-family residences—not multi-family dwellings. App. 3.

At the very least, the law is not clearly established that the community-owned concrete pad in front of a multi-family dwelling constitutes curtilage. The Ninth Circuit's decision conflicts with its own precedent, precedent from other Circuits, and precedent from many state-level supreme courts on this issue. Additionally, there is a split in authority as to how the concept of curtilage applies to multi-family dwellings. Neither plaintiffs nor the district court nor the Ninth Circuit provided any factually analogous Supreme Court case or a consensus of cases establishing that every reasonable officer should know that the area in front of a multi-family dwelling constitutes curtilage. Accordingly, the law cannot be said to be clearly established and the officers in this case were entitled to qualified immunity.

In sum, the lower courts in this case failed to appropriately conduct the qualified immunity analysis when they applied precedent of single-family residences to the facts of this case, which involved a multi-family dwelling—another example of the Ninth Circuit impermissibly defining clearly established law at a high level of generality—despite the plethora of case law provided by the officers demonstrating that the concept of curtilage as it applies to multi-family dwellings is not clearly established. This case presents an opportunity for this Court to address the parameters of curtilage as it applies to multi-family dwellings, such as this fourplex unit, which is affecting millions

of residents and law enforcement officers across the nation.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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