No. 23-846

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The concept of curtilage as it applies to single-family residences is well-established by this Court's precedents. However, courts are split over whether there is a reasonable expectation of privacy in the areas adjacent to multi-family dwellings. That is the vital distinction the Respondents fail to grasp. The question presented to this Court is whether the law is clearly established for qualified immunity purposes that the concrete walkway and pad leading up to the front door of this fourplex unit constituted curtilage in light of the plethora of contradictory precedent set forth in this Petition.

In determining whether to grant certiorari, this Court considers whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important manner" or "has decided an important federal question in a way that conflicts with a decision by a state court of last resort," as well as whether "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." U.S. Sup. Ct. R. 10.

All of these considerations are present in this case—the important and recurring Fourth Amendment legal issue of curtilage as it applies to multi-family dwellings has resulted in contradictory case law throughout and within the various United States Court of Appeals and several state-level supreme courts. At a minimum, the extensive confusion in the various federal and state courts demonstrates that the law in this area is not clearly

established and, viewed at the proper level of generality, the officers in this case were entitled to qualified immunity.

I. The Majority of Respondents' Factual Recitation is Irrelevant to the Curtilage Analysis.

It is undisputed that the Brizuelas' residence was within the Yorkshire Manor common-interest community, which consisted of 40 fourplexes and six common areas which were designated for recreational use by all the homeowners of the community. App 12-13. The common areas were subject to "a blanket easement for drainage and utilities," and were maintained by the community association. App. 12-13; 51-52. The Brizuelas owned only the structure itself—which included the residence and an attached enclosed patio—but they 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.

As the Officers approached, Mr. Brizuela was initially in his enclosed front patio with the gate closed, and he then opened the gate, stepped out onto the concrete pad in front of his unit before abruptly turning and retreating back into his enclosed patio and closing the gate. App. 23. At the time of the shooting, the Officers stood on the concrete walkway and concrete pad in front of the unit, and Mr. Brizuela was in his enclosed patio. App. 23-24.

These are the relevant facts pertaining to the curtilage analysis. The vast majority of Respondents' biased factual recitation is irrelevant to the curtilage

analysis and need not be addressed.[1] What is relevant to this analysis is solely the facts that pertain to the factors set forth in *United States v. Dunn*, 480 U.S. 294 (1987).[2]

II. Land Ownership is Relevant as to Mr. Brizuela's Lack of a Subjective Expectation of Privacy.

Contrary to Respondents' assertions, land ownership and/or occupation is absolutely relevant to the Fourth Amendment reasonable expectation of privacy analysis. "[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.

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1. Respondents assert that this incident occurred on July 17, 2017. *See* Resp. Brief at 5. That is incorrect; this incident occurred on July 17, 2018. App. 8.

2. "[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." *Dunn*, 480 U.S. at 300.

Thus, it is Respondents who must establish that Mr. Brizuela had a legitimate expectation of privacy in the area in question. It is Respondents who must establish both that Mr. Brizuela had a subjective expectation of privacy in the area he knew he did not own and knew was part of the common area of the community, and that his purported expectation of privacy is one society is prepared to recognize as reasonable. The established and undisputed fact that the Brizuelas only owned the structure itself and that the area in front of their unit was part of the common area that every member of that 40 fourplex common-interest community has "a right and easement of enjoyment in and to" (App. 13) is absolutely relevant as to whether Mr. Brizuela had a subjective expectation of privacy—it is the first prong of the *Katz* test. Respondents cannot meet this prong because Mr. Brizuela could not have had a subjective expectation of privacy in that area, given the established ownership and permitted usage of the area in question.

Regardless of whether lawyers, police officers, or the Brizuelas call this concrete pad the "front porch" is not determinative as to whether this area legally constitutes curtilage, or whether it is a common area subject to a community-wide easement.

Respondents' legal recitation as to the distinction between ownership and occupation is inapposite, as evidenced by their inapplicable discussion of hotel rooms and overnight guests. The Brizuelas were not the occupants of the fourplex unit—they were the owners. The Brizuelas did not have the right to exclusively occupy the area in question because they did not own it; they had a community-wide easement and right of enjoyment to

that area, just as all the other owners or occupants of the remaining 159 units did.

III. The Officers' Subjective Beliefs are Wholly Irrelevant to a Fourth Amendment Objective Reasonableness Analysis.

Respondents assert that the two Officers in this case believed the area in front of Mr. Brizuela's unit constituted curtilage, and therefore that must be the law. However, this argument is a red herring because the subjective beliefs of the officers are entirely irrelevant to a Fourth Amendment analysis as to the reasonableness of their conduct.

"Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Ohio v. Robinette*, 519 U.S. 33, 38 (1996) (cleaned up). "To determine whether an officer had probable cause for an arrest, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause." *O'Doan v. Sanford*, 991 F.3d 1027, 1039 (9th Cir. 2021) (cleaned up). A claim that law enforcement officials used excessive force is "properly analyzed under the Fourth Amendment's 'objective reasonableness.'" *Graham v. Connor*, 490 U.S. 386, 388 (1989). In Fourth Amendment cases, the inquiry is not into the officers' thought process—rather, "[w]e are happy to allow the videotape"—or, in this case, the undisputed physical layout and ownership of this area—"to speak for itself." *Scott v. Harris*, 550 U.S. 372, 379, n.5 (2007).

IV. Courts are Split Over Whether There is a Reasonable Expectation of Privacy in The Areas Adjacent to a Multi-Family Dwelling.

Respondents' Brief asserts that the Ninth Circuit decision in this case does not conflict with the decision of any court of appeals' decision, but then provides a scant amount of analysis to support that incorrect assertion. Petitioners cited to 33 cases for the proposition that the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, and numerous state-level supreme courts have held that there is no expectation of privacy in common areas or areas adjacent to multi-family dwellings.

Respondents' Brief only mentions five of those 33 cited cases. Of note, Respondents do not address the cited precedent out of the Tenth Circuit—and neither did the lower courts in this case—*Reeves v. Churchich*, 484 F.3d 1244 (10th Cir. 2007) and *United States v. Maestas*, 639 F.3d 1032 (10th Cir. 2011). *Reeves* is directly on point and establishes definitively that the law on this matter is not clearly established for purposes of qualified immunity. 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. Specifically, the officer was standing in the front yard and inserted the barrel of his rifle into the barred bedroom window. *Id*. at 1253.

Further, in *Maestas*, 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 available for use by other tenants and accessible by the landlord—just like the common area in this case, which was for the use and enjoyment of all owners within the community and was maintained by the community. *Maestas*, 639 F.3d at 1037; App. 12-13; 51-52.

This Tenth Circuit precedent alone merits this Court's consideration of this Fourth Amendment issue and warrants a finding of qualified immunity in this case.

Notably—and contrary to Respondents' assertions—several of the cases cited by Petitioners in this section explicitly pertain to areas that were only utilized by the owners and/or occupants, as opposed to instances of "shared usage," which is the erroneous distinction upon which Respondents' Brief is premised. *See People v. Shorty*, 731 P.2d 679, 681 (Colo. 1987) (area underneath a doormat directly in front of the apartment door); *United States v. Lloyd*, 36 F.3d 761, 763 (8th Cir. 1994) (the open door of an apartment from the interior hallway); *Reeves v. Churchich*, 484 F.3d 1244, 1254 (10th Cir. 2007) (bedroom window of lower-level duplex unit); *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).

Additionally, several of the remaining cases cited by Petitioners are unclear as to the level of exclusive use by the owners and/or occupants—again contrary to Respondents' blanket assertions that all the cases pertain to areas of shared usage—as evidenced by the Respondents' lack of analysis of the cited cases.

Not only did Respondents and the lower courts fail to even address this case law, but there has been no attempt made to materially distinguish this case law from the facts of this case, as is required to deny qualified immunity. Instead, Respondents and the lower courts rely entirely upon *Florida v. Jardines*, 569 U.S. 1 (2013), *United States v. Lundin*, 817 F.3d 1151 (9th Cir. 2016), and *Collins v. Virginia*, 584 U.S. 586 (2018).[3] All of these cases are easily distinguishable, as they discuss curtilage involving a single-family residence—not a unit within a fourplex wherein the association owns the area in front of the unit.

Respondents attempt to brush off the 33 cases cited by Petitioners by claiming that all those cases predate *Jardines*. As an initial matter, that is incorrect.[4] But more importantly, that is irrelevant because *Jardines* does not address multi-family dwellings.

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3. Respondents contend that the fact that the Ninth Circuit's decision in this case was 3-0 somehow gives the unpublished decision more weight. However, this fact does not support Respondents' contention that there is no split of authority amongst and within various courts—it simply indicates that the three judges on this panel (of the approximate 52 judges in the Ninth Circuit) disagreed with Petitioners and the vast amount of contrary case law presented in the briefing. Nor does this diminish this Court's supervisory authority. Further, this Court routinely overturns decisions issued out of the Ninth Circuit. *See*, *e.g.*, *Kisela v. Hughes*, 584 U.S. 100 (2018); *City & County of San Francisco v. Sheehan*, 575 U.S. 600 (2015); *Rivas-Villegas v. Cortesluna*, 595 U.S. 1 (2021).

4. *See State v. Nguyen*, 2013 ND 252, 841 N.W.2d 676; *State v. Williams*, 2015 ND 103, 862 N.W.2d 831; *State v. Dumstrey*, 2016 WI 3, 366 Wis. 2d 64, 873 N.W.2d 502; *State v. Edstrom*, 916 N.W.2d 512 (Minn. 2018); *State v. Gates*, 249 A.3d 445 (N.H. 2020); *United States v. Stephen*, 823 F. App'x 751 (11th Cir. 2020).

Under an appropriate qualified immunity analysis, the precedent of *Jardines*, *Lundin*, and *Collins* cannot be applied to deny qualified immunity in a case involving a fourplex as opposed to a single-family residence. "A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (citation omitted). "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." *Id.* (citation omitted). "Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* at 12 (citation omitted).

This Court has consistently recognized the importance of qualified immunity and has "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) (cleaned up); *see also City & County of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015); *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6 (2021).

Jardines establishes that in a case involving a single-family residence, "[t]he front porch is the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.'" *Jardines*, 569 U.S. at 7. However, *Jardines* does not clearly establish what constitutes curtilage in a case involving a fourplex. This Court did not dictate in *Jardines* that all areas leading up to any front porches of any type of residence or dwelling constitutes curtilage. Under the qualified immunity analysis, it is untenable and indefensible to assert that the type of dwelling is not pertinent to the curtilage analysis.

Respondents rely heavily upon the assertion that the concrete walkway and pad in this case led only to the front door of the Brizuelas' unit. Petitioners agree with this factual premise; however, Petitioners disagree as to whether this is relevant or determinative to the analysis of whether there is a split in authority. This argument by Respondents is already a consideration as part of the multi-factor legal analysis of curtilage under *Dunn*, in that courts must consider the proximity of the area and the uses of the area. This distinction made by Respondents—the gravamen of their entire argument—is unnecessary as it is already a part of the curtilage analysis.

The Ninth Circuit's decision in this case and the Tenth Circuit precedent discussed above by themselves establish this split in authority as it relates to multi-family dwellings. The various other contradictory precedent between and within the Circuits and several state courts set forth in this Petition make it apparent.

V. The Split in Authority Shows that the Law Was Not Clearly Established and the Ninth Circuit Applied Precedent at an Impermissibly High Level of Generality.

The defense of qualified immunity "is meant to give government officials a right, not merely to avoid 'standing trial,' but also to avoid the burdens of . . . 'pretrial matters . . . [which] can be peculiarly disruptive of effective government.'" *Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (citation omitted). This Court has "repeatedly . . . stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (citations omitted). "The entitlement

is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

No case from this Court has ever held that the areas in front of or adjacent to a multi-family dwelling constitute curtilage as a matter of law. Neither Respondents 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. This case presents an opportunity for this Court to address the parameters of curtilage as it applies to multi-family dwellings.

CONCLUSION

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

Respectfully submitted,

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