No. 18-1078

IN THE

Supreme Court of the United States

DEPUTY JAMES DAWSON, individually and in his official capacity; SHERIFF JOHN WILSON, in his official capacity; CLARE COUNTY,

Petitioner,

v.

JOSHUA BRENNAN,

Respondent.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, as an alternative ground for affirmance, the Court should hold that Officer Dawson did not violate the Fourth Amendment when he, among other things, circled within the curtilage of Brennan's home five to ten times, banging on doors and windows and peering in, covered his security camera with police tape, damaging it, and lingered in the curtilage for an hour and a half.

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ARGUMENT

The cross-petition raises an alternative ground for affirmance that, while meritless, can be raised by the Cross-Petitioner and addressed by the Court on granting the initial petition in this case. Cross-Petitioner Dawson violated Brennan's clearly established Fourth Amendment right against a curtilage search without a warrant or other exception to the warrant requirement when he failed to simply leave after Brennan did not answer his door. All three judges on the Sixth Circuit panel agree. After that, Dawson could have sought a warrant or a change to Brennan's probation conditions. Instead, he lingered within the curtilage of Brennan's home for 90 minutes, damaging the property, circling it five to ten times, banging on doors and windows, peering into windows, and activating his lights and sirens.

As discussed in the underlying petition, the Sixth Circuit misapplied qualified immunity when it allowed Dawson to expand a narrow exception to that clearly established right far beyond the scope of the case that created the exception. The case Dawson relies on, *Hardesty* v. *Hamburg Twp.*, 461 F.3d 646 (6th Cir. 2006), only allowed officers to, in addition to knocking on the front door, go around to the back door and knock on it. This Court clearly, but not explicitly, abrogated that case in *Florida* v. *Jardines*, 569 U.S. 1, 5–6 (2013). But the Sixth Circuit, in a 2-1 decision, *still* ruled that a reasonable officer could rely on *Hardesty* to justify Dawson's conduct far in excess of the facts in *Hardesty*. That was wrong both for breathing new life into *Hardesty* and for aggressively expanding it in the mind of a "reasonable officer."

Resolving the question presented in the underlying petition necessarily encompasses determining that Dawson's conduct violated the Fourth Amendment. Thus, there is no need to grant the cross-petition even if the Court has concerns that Dawson's actions may have been constitutionally allowable. It can address that question by granting the underlying petition.

In any event, while the Sixth Circuit panel split on qualified immunity, it was correctly unified on whether Dawson violated the Fourth Amendment. Dawson does not dispute that, generally, his conduct would violate the Fourth Amendment, but he asserts that Brennan's status as a probationer changes the calculus. All three judges of the Sixth Circuit panel correctly recognized that the Court's jurisprudence is clear on this point: under the facts of this case—all known to Dawson as he invaded and lingered in Brennan's curtilage—Brennan's status as a probationer has no effect on the analysis.

The Fourth Amendment confers on every person the "right . . . to be secure in their . . . houses" and to be free from "unreasonable searches and seizures." U.S. Const. amend. IV. The constitutional text recognizes that the home is the stronghold of each American's privacy interests. *See Jardines*, 569 U.S. at 5. The right to privacy is at its pinnacle within the home and its curtilage—each person has the right to "retreat into his own home and there be free from unreasonable governmental intrusion." *Id.* at 6; *Boyd v. United States*, 116 U.S. 616, 630 (1886). The Court has recognized that a supervisee's home "like anyone else's, is protected by the Fourth Amendment's

requirement that searches be 'reasonable.'" *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987).

Ultimately, the Fourth Amendment's core guarantee is against government exercise of arbitrary power to unreasonably intrude on the privacy that each person enjoys within, and around, the home. *Id.*; *Delaware* v. *Prouse*, 440 U.S. 648, 663 (1979) (holding that to prevent the exercise of arbitrary power, officers must have reasonable, articulable suspicion that the subject has committed a violation). In most contexts, the reasonableness standard requires that officers show probable cause for a search and obtain a warrant from a judge. *See Illinois* v. *Gates*, 462 U.S. 213, 236–38 (1983). In *Griffin*, however, the Court granted the state a limited "special needs" exception, allowing them to alter—by statute—the reasonableness standard for supervisees by including a requirement that probationers consent to searches and empowering probation officers to then conduct searches based on less than the normally required probable cause. 483 U.S. at 873.

Similarly, the Court recognized that supervisees could be searched on a lesser reasonableness standard where the individual had signed and agreed to terms of supervision. *See United States* v. *Knights*, 534 U.S. 112, 121–22 (2001). This rationale is predicated on the fact that supervisees may understand what they are agreeing to by reading the text of the agreement. Supervisees demonstrate their consent to the terms by signing their agreement. Therefore, it would not be arbitrary or unreasonable for the government to alter the reasonableness standard through a valid

supervision agreement so long as the agreement to consent is clear.

As the Court noted in *Griffin*, while probationers may be subjected to a lesser constitutional standard, the state may not diminish their uniquely balanced rights by acting beyond the scope of the supervisee's consent. *See* 483 U.S. at 875, 880. Probationers retain their constitutional rights, and any limitations on those rights must be clearly stated and explicitly or implicitly agreed to by the probationer because the touchstone for allowing the warrantless searches is the probationer's consent, which was obtained in exchange for the opportunity to spend less time (or no time) within prison walls.

Here, Brennan provided no consent to search his home or its surroundings, and all three of the judges on the Sixth Circuit panel correctly recognized that. The court ruled that "Brennan's probation [status] does not undermine his unlawful search claim," Pet'r App. 13a, and that ruling is supported by the record. Indeed, it is undisputed that Brennan's probation agreement did not include a search condition allowing suspicion-less searches, even though such conditions of parole and probation are common in Michigan. Pet'r App. 3a; Br. in Opp'n 19 ("the present case does not involve an express provision allowing the search of a residence").

Dawson's assertion that the provision requiring Brennan to submit to a breath test on demand also permitted warrantless home searches is belied by the search agreement and Dawson's own statements at oral argument. *Twice*, Dawson's counsel conceded at oral argument that Dawson would not have been able

to forcibly enter the home without a warrant or a search condition present in the probation agreement. Oral Argument at 21:30 & 23:20.[1] And the agreement itself is silent on home searches, even though Michigan courts know how to—and often do—include a home search provision. *Brennan* v. *Dawson*, No. 2:16-Cv-10119, 2017 WL 3913019 (E.D. Mich. Sept. 7, 2017, ECF No. 20-3, PageID#201, ECF No. 20-1, PageID#184.

It is beyond debate that Officer Dawson violated Brennan's Fourth Amendment right against a search of the curtilage of his home without a warrant when he proceeded to walk around the home knocking on and peering in windows, activate his overhead lights and siren, use crime scene tape to disable Brennan's home security camera, and make another five to ten trips around Brennan's house knocking on and looking in doors and windows. But even if the Court determines that this issue warrants review, it is subsumed within the question presented in the underlying petition in any event, and there is no need to grant the Cross-Petition.

CONCLUSION

For the foregoing reasons, the cross-petition should be denied, the petition should be granted, the

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[1] *Brennan v. Dawson*, 752 F. App'x 276 (6th Cir. 2018) (No. 17-2210), http://www.opn.ca6.uscourts.gov/internet/court_audio/aud2.php?link=audio/08-02-2018%20-%20Thursday/17-2210%20Joshua%20Brennan%20v%20James%20Dawson%20et%20al.mp3&name=17-2210%20Joshua%20Brennan%20v%20James%20 Dawson%20et%20al

judgment below should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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