No. 19-1301

IN THE
Supreme Court of the United States

CLYDE S. BOVAT,
Petitioner,
v.
STATE OF VERMONT,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Vermont

REPLY BRIEF IN SUPPORT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTRODUCTION

The Vermont Supreme Court's decision in this case turned the implied knock-and-talk license into an express enter-and-investigate license. It deemed all "access routes" to a home that a visitor *might* use to be "semiprivate areas" and held that law enforcement has "a legitimate right to be" in those areas "to conduct an investigation." Pet. App. 10a–11a. This is, as Chief Justice Reiber recognized in dissent, "a bright-line rule" that permits officers to hunt around these areas to conduct an investigation, rather than to contact a resident. *Id.* at 14a. The decision guts Fourth Amendment protections for the home and its curtilage, areas that, when it comes to that amendment, the Constitution makes "first among equals." *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013).

The decision bears all the hallmarks of a candidate for this Court's review. It created a three-way split among state high courts and federal courts of appeals. Pet. 12–13. It flatly defies this Court's decisions in *Jardines* and *Collins* v. *Virginia*, 138 S. Ct. 1663 (2018). Pet. 25–29. And as a diverse group of amici confirm, by empowering law enforcement to invade the curtilage at will, the decision exacerbates a disturbing trend of eroding Fourth Amendment protections for the home. *See* Pet. 19–23; Br. of Inst. for Justice at 18–20; Br. of Nat'l Ass'n for Public Def. at 10–13; Br. of The Rutherford Inst. and Restore the Fourth, Inc. at 11–16.

Nothing in the brief in opposition counsels against this Court's review. Respondent argues the Vermont Supreme Court did not hold what it clearly did. Respondent dismisses the undisputed split as irrelevant. It misreads *Jardines* as a fact-bound case that governs only where officers bring along a drug-sniffing dog. And it claims the record lacks what it is full of: evidence that the game wardens far exceeded the implied knock-and-talk license here.

This Court should grant the petition and reverse the judgment of the Supreme Court of Vermont.

ARGUMENT

I. The Vermont Supreme Court Adopted A Clear Rule That Is Clearly Wrong.

1. The Vermont Supreme Court held that game wardens occupied a "lawful vantage point" when they stood on Bovat's driveway, in front of his garage, and peered in through a small window. Pet. App. 12a. It did so by identifying a "significant difference" be-

tween "private" and "semiprivate" areas within the curtilage. *Id.* at 10a (quoting *State* v. *Libbey*, 577 A.2d 279, 280 (Vt. 1990)). Officers are "entitled" to enter "semiprivate" areas "like driveways or walkways" that "are normal access routes for anyone visiting the premises." *Id.* (internal quotation marks omitted). And once they enter, they can "conduct an investigation" within the curtilage, as long as they "restrict their movement to" those areas. *Id.* at 10a–11a.

As the dissenting Justices recognized, the Vermont Supreme Court adopted a categorical rule. It understood that, "[w]here, as here, * * * officers make observations from within the curtilage," they must "have lawfully intruded into the * * * curtilage to the point of observation." *Id.* at 18a (Reiber, C.J., dissenting). But the majority, for the first time, "*categorically* allow[ed]" officers to lawfully enter what it deemed "semiprivate areas," like "a person's driveway," to conduct "legitimate police business," such as looking for evidence. *Id.* at 20a. The consequence of this rule is clear: Officers may "freely wander and observe while on a person's driveway" and other access routes on the property. *Id.* at 14a.

Respondent says the Vermont Supreme Court's rule "is not so broad," but it offers no explanation why—none. Opp. 5. It appears to rely on the majority's reference to "legitimate police business." *Id.* (quoting Pet. App. 10a). But that only proves the *breadth* of the Vermont Supreme Court's rule: That business includes "conduct[ing] an investigation," such as "visual[ly] inspecti[ng]" whatever can be seen from any point within a semiprivate area. Pet. App.

10a–11a. Nowhere in the three paragraphs setting out the holding that the wardens were "entitled" to be on Bovat's driveway did the Vermont Supreme Court tie that entitlement to an attempt to reach Bovat's front door to speak to a resident, that is, to the basis for the implied knock-and-talk license. *Id.* at 9a–11a.

2. Respondent does not dispute that the Vermont Supreme Court's decision created a three-headed split over the scope of the implied knock-and-talk license. Most courts hold that an officer's presence is licensed if, upon entering the curtilage, he approaches the front door to speak to a resident. Pet. 13–17. Adopting a broader view, a few courts hold that an officer remains within the license when he approaches another area upon entering the curtilage if he reasonably believes he will find a resident to speak to there. *Id.* at 17–18. The Vermont Supreme Court is alone in holding that an officer is within the license so long as he remains on an access path that *some* visitor trying to speak to a resident *might* use to approach the home. *Id.* at 18–19.

Respondent argues that because the Vermont Supreme Court is an outlier, that makes this split less significant. Not so. This Court often grants review where the petition implicates a three-way (or more) split and the decision below adopts an outlier position. *See, e.g.*, Pet. for Certiorari at 10–19, *Ford Motor Co.* v. *Bandemer*, 140 S. Ct. 916 (2020) (No. 19-369) (alleging a four-way split among 24 courts with the decision below reflecting the position of six); Pet. for Certiorari at 25, *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090 (2016) (No. 15-138)

(alleging a "three-way split" with "the Second Circuit taking the most radically expansive view"); *cf.* Pet. for Certiorari at 25–26 & n.5, *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015) (No. 13-502) (alleging a three-way split with one outlier circuit).

As the amici confirm, the question presented here is "significant," despite Respondent's contrary view. Opp. 7. The Vermont Supreme Court's bright-line rule "upended the property-rights baseline of the Fourth Amendment" set out in *Jardines* and *United States* v. *Jones*, 565 U.S. 400 (2012). Br. of Inst. for Justice at 12. Its decision "is likely to exacerbate a trend under which police *claim* substantial authority to enter private property pursuant to the knock-and-talk doctrine." Br. of The Rutherford Inst. and Restore the Fourth, Inc. at 11. That trend is eroding Fourth Amendment protection for the very areas that our Constitution affords the most protection. *See Collins*, 138 S. Ct. at 1672–73 (describing "the core Fourth Amendment protection the Constitution extends to the house and its curtilage"). And that erosion disproportionately affects poor and minority communities, those already vulnerable to intrusive policing. Br. of Nat'l Ass'n for Public Def. at 14–15.

3. The Vermont Supreme Court's outlier status, in any event, reinforces that summary reversal is also appropriate. Its bright-line rule conflicts with this Court's precedents several times over. This is precisely the kind of decision that warrants this Court's exercise of its supervisory authority. *See* Pet. 25.

The Vermont Supreme Court's rule flouts *Jardines*. The Fourth "Amendment establishes a simple baseline" of protection. *Jardines*, 569 U.S. at 5. If an

officer "obtains information by physically intruding" on the curtilage, "a search * * * has undoubtedly occurred." *Id.* (internal quotation marks omitted). Without a warrant, that search is unconstitutional, unless the officer has license to be on the property. *See id.* at 7. When it comes to the implied knock-and-talk license—the only potential license here—*Jardines* held that while a "knocker on the front door" may invite a visitor (officers included) to approach the front door by the front path, knock, and leave if there is no answer, it does "not invite him there to conduct a search." *Id.* at 8–9 (internal quotation marks omitted); *see also United States* v. *Carloss*, 818 F.3d 988, 1004 (10th Cir. 2016) (Gorsuch, J., dissenting) (An officer "calling to investigate a crime surely is" conducting a Fourth Amendment search.). Yet the Vermont Supreme Court's rule permits officers to do just what *Jardines* held that no visitor has license to do: enter the curtilage and linger there to investigate. *See* Br. of Inst. for Justice at 10–11, 14–17; Br. of The Rutherford Inst. and Restore the Fourth, Inc. at 9–11.

The invalidity of the Vermont Supreme Court's rule cannot have escaped it, for this Court explicitly rejected that rule in *Jardines*. Pet. 25–29. There, the dissent suggested a rule that would let officers "do whatever they want by way of gathering evidence * * * so long as they stick to the path * * * typically used to approach a front door." *Jardines*, 569 U.S. at 9 n.3 (internal quotation marks omitted). This Court rejected that rule: "That is not the law * * * ." *Id.* Yet that is now the law in Vermont and will be unless this Court steps in.

Making matters worse, the Vermont Supreme Court reached its rule only by ranking areas within the curtilage as *Collins* warns courts not to. Pet. 27–28. There, this Court emphasized the age-old rule that "curtilage is afforded constitutional protection" and rejected a contrary rule under which "certain types of curtilage would receive Fourth Amendment protection only for some purposes but not for others." *Collins*, 138 S. Ct. at 1674–75. Yet the Vermont Supreme Court's rule does just that: divides the curtilage into private areas, which receive full protection, and semiprivate areas, which receive less. *See supra* pp. 2–3.

To all of this, Respondent says only that there is no conflict with *Jardines* because that case involved a drug-sniffing dog, and this case does not. Opp. 8. Continuing the trend in this case, *Jardines* itself forecloses this argument. *See Jardines*, 569 U.S. at 9 n.3 ("It is not the dog that is the problem * * * ."). That is because "a typical person would find it a cause for great alarm * * * to find a stranger snooping about his front porch *with or without* a dog." *Id.* (internal quotation marks omitted). The holding in *Jardines* rests instead on the *snooping*—the very activity the Vermont Supreme Court's bright-line rule authorizes.

II. There Is No Vehicle Issue.

Respondent offers a series of objections to this Court's review. Nearly all rest on a misrepresentation of the record. This attempt at misdirection provides no basis for declining review.

1. To start, Respondent is simply mistaken to claim the petition acknowledged that "the record is

silent" on how the wardens made their way to the area of the driveway just in front of the small window in Bovat's garage door. Opp. 10; *see id.* at 12–13 (arguing that Bovat did not introduce sufficient evidence of the Fourth Amendment violation). The trial court did not make "*findings*" about the warden's actions within the curtilage. Pet. 24 (emphasis added) (internal quotation marks omitted). There is a simple reason why: Like the Vermont Supreme Court, it viewed the wardens' presence in a "semiprivate" area as dispositive of the Fourth Amendment question. Pet. App. 37a–38a. Under that legal rule, there was no need for further factual findings.

In contrast to the trial court's findings, the *record* is not at all silent on this front. Pet. 24–25 (explaining why the question presented is outcome determinative). One warden testified that the wardens knew that Bovat was out of town and went to his home "because [they] were interested in the * * * black truck" he owned. Pet. App. 65a. They were already almost "one hundred percent sure" it was at his home. *Id.* at 58a. The warden also testified that when they arrived, they did not see the truck parked in the driveway, so they "went * * * up to the window of one of the garage bays so [they] could look in." *Id.* at 60a. Bovat's wife testified that she watched the wardens walk around the driveway and garage for about fifteen minutes from her kitchen window. *Id.* at 32a. *After* looking into the garage, the wardens sought her consent to search inside. *See id.* at 62a ("We were looking for consent to get into the garage. And what our objective was * * * the hair and blood that we saw * * * to obtain DNA samples * * * .").

The record amply shows that the wardens' "behavior objectively reveals a purpose to conduct a search." *Jardines*, 569 U.S. at 10.

Respondent is similarly wrong to claim the dissenting Justices "recognized the paucity of the evidence." Opp. 11. They did no such thing. These Justices explained that "[a]ccording to this evidence, the game wardens went to [Bovat's] property for the purpose of conducting a search for the truck." Pet. App. 27a (Reiber, C.J., dissenting). The wardens conducted that search "before contacting anyone at the property." *Id.* To do so, "they walked away from the home, directly to the small window in the garage door, which was located far back from the public road, and peered in from a vantage point necessarily close to the window." *Id.* Far from thinking the record too thin, the dissenting Justices would have found it sufficient to "hold that the trial court erred in denying [Bovat's] motion to suppress." *Id.* at 29a.

2. Respondent makes two attempts to kick up factual dust where there is none.

It first suggests that one warden testified that he went to the door of Bovat's home when he entered the property. Opp. 9. But the warden testified that he did not "remember" whether he went to the garage to look for the truck first, or to the house. Pet. App. 66a. He said that *normally* the time between when officers enter a property and contact a resident "would have been very quick." *Id.* The rest of his testimony confirms that the wardens acted differently here. They knew Bovat was not home because his other truck was not in the driveway and knew that his wife likely was home because her vehicle was in

the driveway. *Id.* at 60a. Yet one warden confirmed that they did not contact Bovat's wife until after they had looked into the garage when he testified that the purpose of the contact was to obtain consent to enter the garage and collect samples to "confirm" that the deer hair and blood they had seen inside "matched" samples wardens had collected earlier. *Id.* at 62a.

Respondent also suggests that the evidence shows the wardens might have parked directly in front of the garage door and thus might have been unable to avoid looking in the small window the size of a sheet of paper. Opp. 1, 11.[1] It does not. Bovat's brother traveled to his home after Bovat's niece called him "real upset" and saying there were game wardens at Bovat's house. Supp. Pet. App. 2a-3a. When he arrived, he testified that one warden's car was "the first truck parked to the right of the big overhea[d] door." *Id.* at 2a, 4a. His testimony supports a conclusion that the wardens walked *left*, *away* from their vehicle and from the house, to look into the garage. *See* Pet. App. 53a (showing the garage to the left of the house, separated by a stretch of driveway wide enough for three vehicles).

These would-be factual issues are, in any event, no barrier to review here. This Court need not reach them to address the question presented. And the normal course is to leave them for resolution on remand. *See, e.g.*, *Kentucky* v. *King*, 563 U.S. 452,

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[1] Respondent relies on material from the suppression hearing transcript not included in the petition appendix. That material is reproduced in a supplemental appendix.

471 (2011); *Kirk* v. *Louisiana*, 536 U.S. 635, 638 (2002); *Flippo* v. *W. Virginia*, 528 U.S. 11, 14–15 (1999).

3. All of this takes care of Respondent's attempt to reframe the question presented. Despite elsewhere arguing that "the record is silent" as to the wardens' actions, Opp. 10, and without acknowledging the weight of the evidence otherwise, Respondent claims the wardens "at most * * * deviate[d] slightly from the most direct route from their vehicle to the front door of the home." *Id.* at 5. It argues that there is no conflict over whether such minor deviations amount to a Fourth Amendment violation. *Id.* at 5–7 (citing seven cases: five trial or intermediate-court decisions, four unpublished opinions, and three issued before *Jardines*).

Whether that conflict exists or not has nothing to do with this petition. The Vermont Supreme Court did not hold that the game wardens were lawfully present on Bovat's driveway in front of the small garage door window because they reached that area on their way to the front door. It treated how the wardens came to be in that spot as *irrelevant* because the wardens were "entitled" to be there "to conduct an investigation." Pet. App. 10a–11a (internal quotation marks omitted). That is the holding that split from the approach of other courts when defining the scope of the knock-and-talk license. That is the holding that cannot be squared with this Court's clear precedents. And that is the holding this Court should review.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should grant the petition and summarily reverse the decision of the Vermont Supreme Court.

Respectfully submitted,

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JULY 2020

SUPPLEMENTAL APPENDIX

APPENDIX F

IN THE VERMONT SUPERIOR COURT
CHITTENDEN COUNTY CRIMINAL DIVISION

STATE OF VERMONT,

Plaintiff,

- against -

CLYDE S. BOVAT,

Defendant.

Case No. 373-2-18 Cncr

Burlington, Vermont

June 11, 2018
10:44 AM

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE DAVID FENSTER,
SUPERIOR COURT JUDGE

APPEARANCES:

Kelton D. Olney, Esq.
Attorney for the State

Samantha V. Lednicky, Esq.
Frank J. Twarog, Esq.
Attorney for the Defendant

PROCEEDINGS

* * *

[Testimony of Gerald Bovat, pp. 58:22-62:2]

* * *

Q. You're Gerald Bovat; is that right?

A. Yes.

Q. Where do you live?

A. I live in Johnson, Vermont.

Q. Okay. How far is it from Johnson to St. George?

A. Probably an hour, about an hour.

Q. All right. Do you recall last Thanksgiving, day after Thanksgiving of 2017?

A. Yes, I do.

Q. Where were you?

A. I was in Johnson.

Q. Okay. Did anything happen to cause you to travel to St. George?

A. Yeah. My niece called me and said that there was game wardens in Clyde's dooryard and wanted to know if I knew of anything that was going on

about it. And I said no, I didn't. And she seemed to be real upset so I said I'm on my way down.

Q. Okay. So you traveled yourself?

A. Yes. By myself.

Q. When you arrived, what did you see?

A. Pardon?

Q. When you arrived at Clyde's, what did you see?

A. When I arrived, I slowed up and I looked in the yard and saw the game warden trucks in the yard and I drove by, went down the end of the road, turn around and came back up by and drove over in the entrance of the trailer park and parked over there and observed what was going on.

Q. All right.

MR. TWAROG: Judge, may I approach the witness, please?

THE COURT: You may.

MR. TWAROG: Thank you.

Q. I'm going to show you a document that's marked as Defendant's Exhibit I and ask if you can describe -- if you recognize what's in that image?

A. Yeah. This is Clyde's house and that's the garage.

Q. You're pointing on the left side of that page; is that correct?

A. Yes.

Q. What's on the right side of the page?

A. On the right side is the trailer park which I entered and came in down in here and parked and observing Clyde's dooryard and house.

Q. Okay. Ask you please, Gerald, you could circle on that page where you were when you parked in the trailer park?

A. Well, I could show you exactly but I don't know about these pictures. But I was about in this area right in here.

Q. Okay.

A. So that --

Q. From your vantage point where you were in the trailer park, could you see the front of his garage?

A. I could see the front of the garage. Yes.

Q. Okay. What did you see going on when you were in the trailer park?

A. I saw the game wardens trucks parked there and the game wardens walking around the yard, looking in the windows. And at one point, it looked like they had a deer hide they were holding up from the back of the truck. I don't know where it came from, but -- and they -- looks like they put it in the back of his truck and got up there and they -- looks like they spread it out in the back of his truck.

Q. And when you're describing his truck, are you talking about a wardens truck?

A. A wardens truck, game wardens truck.

Q. Okay.

A. It would be the first truck parked to the right of the big overheard door.

Q. Okay. After you made this observation, did you go to the house?

A. I drove down there.

Q. And what happened?

A. And I asked them what was going on. And they said that there was a fish and game violation.

Q. Okay.

A. And --

Q. Anything else they tell you?

A. And it was a crime scene that nobody was allowed on -- around the garage or in the garage.

Q. Okay. Was there a discussion about a warrant?

A. They were -- they were obtaining a warrant.

* * *