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United States v. Carloss: An Unclear and Dangerous Threat to Fourth Amendment Protections of the Home and Curtilage

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UNITED STATES V. CARLOSS: AN UNCLEAR AND DANGEROUS THREAT TO FOURTH AMENDMENT PROTECTIONS OF THE HOME AND CURTILAGE

ABSTRACT

Through *United States v. Carloss*, the Tenth Circuit Court of Appeals has legitimized a belief that nothing can prevent police from approaching a home to conduct knock-and-talks. A knock-and-talk is a widely used police tactic that allows the police to knock on the door of a home to ask the inhabitant questions without a warrant or probable cause. This Comment argues that the Tenth Circuit should have considered constitutional precedent and protections regarding the home and curtilage, like Judge Gorsuch in his dissent, and the impact such an unclear ruling would have on potential abuses of power and the community. Furthermore, this Comment offers a recommendation to courts on how to evaluate knock-and-talks in a way that protects civilian liberties granted under the Constitution as well as allow police to efficiently and effectively conduct investigations without endangering officer safety.

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INTRODUCTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹

The Fourth Amendment was drafted as a direct response to the English practice of issuing general warrants which allowed officials of the Crown to conduct a broad search of the home to find evidence to incriminate suspects.² Today, the Fourth Amendment protects individuals from unreasonable searches and seizures by the government without probable cause and guarantees the “right to privacy” and protection for persons, papers, effects, homes, and curtilages.³

Though the Supreme Court has imposed “a presumptive warrant requirement for searches and seizures[,] and generally requires probable cause for a warrantless search or seizure to be ‘reasonable[,]’” there are exceptions.⁴ Through numerous cases, the Court has carved out many exceptions for purposes of law enforcement.⁵ One exception, the implied-license exception, is routinely utilized by police departments to conduct “knock-and-talks,” a tactic which involves police approaching a home and entering its curtilage, without a warrant.⁶

Throughout the country, courts have analyzed knock-and-talks differently and have come to different legal conclusions on the practice. Recently, knock-and-talks were analyzed by the Tenth Circuit Court of Appeals. Contrary to historical and constitutional reasoning, the court concluded that “No Trespassing” signs did not revoke the implied license for knock-and-talks.⁷ However, the decision was not unanimous; all three Republican-nominated judges⁸ came to different conclusions regarding

1. U.S. CONST. amend. IV.

2. SAM KAMIN & RICARDO J. BASCUAS, *INVESTIGATIVE CRIMINAL PROCEDURE* 5, 7 (2d ed. 2013).

3. *Id.* at 5–6.

4. Article, *Investigations and Police Practices*, 44 GEO. L.J. ANN. REV. CRIM. PROC. 3, 3 (2015).

5. *See, e.g.*, *Wyoming v. Houghton*, 526 U.S. 295, 307 (1999); *Minnesota v. Carter*, 525 U.S. 83, 85 (1998); *Florida v. Riley*, 488 U.S. 445, 451–52 (1989); *California v. Ciraolo*, 476 U.S. 207, 215 (1986).

6. *See, e.g.*, *Florida v. Jardines*, 569 U.S. 1, 8 (2013).

7. *United States v. Carloss*, 818 F.3d 988, 995 (10th Cir.) (“As an initial matter, just the presence of a ‘No Trespassing’ sign is not alone sufficient to convey to an objective officer, or member of the public, that he cannot go to the front door and knock.”), *cert. denied*, 137 S. Ct. 231 (2016).

8. *Senior Judge David M. Ebel*, U.S. CT. APPEALS FOR 10TH CIR., <https://www.ca10.uscourts.gov/judges/senior-judge-david-m-ebel> (last visited Nov. 9, 2017); *Chief Judge Timothy M. Tymkovich*, U.S. CT. APPEALS FOR 10TH CIR., <https://www.ca10.uscourts.gov/judges/judge-timothy-m-tymkovich> (last visited Nov. 9, 2017); *Judge Neil M. Gorsuch*, U.S. CT. APPEALS FOR 10TH CIR.,

whether the knock-and-talk constituted a search within the Fourth Amendment when “No Trespassing” signs were present.⁹ Despite the differences in opinion, the majority did not stamp out the belief that law enforcement has an irrevocable right to conduct knock-and-talks. On October 3, 2016, any hopes to correct or clarify the court’s holding faded when the United States Supreme Court denied the petition for writ of certiorari regarding the case.¹⁰

This Comment analyzes the Tenth Circuit Court of Appeals’ most recent decision on knock-and-talks, *United States v. Carloss*,¹¹ specifically the appropriate concerns addressed by newly confirmed Supreme Court Justice Gorsuch in his dissent¹² and the consequences this decision may have on the Tenth Circuit. Section II of this Comment summarizes the Fourth Amendment protections for the home and curtilage and the current jurisprudence of knock-and-talks through prior court decisions. Section III summarizes the facts and holding of the court’s decision in *Carloss*, which held that “No Trespassing” signs did not sufficiently revoke an implied license to approach the front door.¹³ Section IV focuses on reasons why the court’s decision is problematic by analyzing the court’s disregard for the constitutional protections granted to the curtilage and the potential abuse the practice of knock-and-talks may now have under the vague and unworkable ruling. Section V offers a recommendation that knock-and-talks be conducted under the same standard as stop-and-frisks to protect the privacy interest of many innocent citizens. Section VI discusses how the recommendation may have applied in *Carloss*’s case. Section VII concludes this Comment by explaining how the unfavorable ruling will erode Fourth Amendment protections.

I. BACKGROUND

A. Modern Theories of Fourth Amendment Protection

The current jurisprudence surrounding Fourth Amendment protections revolve around two theories: a property trespass theory and a reasonable expectation of privacy theory. The property trespass theory,

<https://web.archive.org/web/20170203174008/http://www.ca10.uscourts.gov:80/judges/judge-neil-m-gorsuch> (last visited Nov. 9, 2017).

9. *Carloss*, 818 F.3d at 995–96 (stating in an opinion authored by Judge Ebel that the “No Trespassing” signs in the yard and side yards could not be considered because *Carloss* did not claim they were included in the home’s curtilage and the “No Trespassing” sign on the door was ambiguous; therefore, the officers had a right to enter under the implied license and there was no constitutional intrusion); *id.* at 1001 (Tymkovich, C.J., concurring) (stating under the implied license the police may approach a door and knock as “any private citizen might do” and the subjective intent does not matter because knock-and-talks are characterized as investigations pursuant to the implicit license); *id.* at 1004 (Gorsuch, J., dissenting) (“[A] ‘search’ occurs when the government physically enters a constitutionally protected area like a home or its curtilage for investigative purposes.”).

10. *Carloss*, 137 S. Ct. at 231.

11. 818 F.3d 988 (10th Cir.), *cert. denied*, 137 S. Ct. 231 (2016).

12. *Id.* at 1003–15 (Gorsuch, J., dissenting).

13. *Id.* at 997 (majority opinion).

initially discussed by the Court in 1928, focuses on a narrow and literal text-based interpretation of “search.”¹⁴ This interpretation of the Fourth Amendment protection was overruled by *Katz v. United States*¹⁵ in 1967, in favor of a broader definition and the idea that “the Fourth Amendment protects people, not places.”¹⁶

In *Katz*, the Supreme Court held that Katz’s Fourth Amendment rights were violated when officers recorded a conversation he had while inside a telephone booth.¹⁷ The majority concluded that the police had committed an unreasonable search by evaluating if Katz had an expectation of privacy and if that expectation was reasonable.¹⁸ This rule, also known as the *Katz* rule, has been applied to limit privacy protection for activities voluntarily exposed to the public’s view¹⁹ or conducted in open fields.²⁰ The rule has also been utilized to protect a citizen’s reasonable expectation of privacy from sense-enhancing technology.²¹ In 2012, the Court set the *Katz* rule aside and reintroduced the physical property trespass theory as another avenue to Fourth Amendment protections in *United States v. Jones*.²² In *Jones*, the Court held that a search also occurs within the original meaning of the Fourth Amendment when the government obtains information by physically intruding on a person or their property.²³

B. Current Fourth Amendment Jurisprudence Regarding the Home

Currently, the Fourth Amendment protects the home against unreasonable searches and seizures because the Supreme Court has interpreted the amendment to mean that probable cause alone is not enough to justify a warrantless entry into a home.²⁴ However, this protection has two exceptions: consent and exigent circumstances.

1. Consent Exception

Under the consent exception, police may enter a home without a warrant if there is consent from the homeowner or someone with common

14. See *Olmstead v. United States*, 277 U.S. 438, 464–66 (1928).

15. 389 U.S. 347 (1967).

16. *Id.* at 351–53.

17. *Id.* at 352, 359.

18. *Id.* at 351–52.

19. *California v. Ciraolo*, 476 U.S. 207, 211–13 (1986).

20. *Oliver v. United States*, 466 U.S. 170, 178–81 (1984).

21. *Kyllo v. United States*, 533 U.S. 27, 34–35 (2001).

22. 565 U.S. 400 (2012); *id.* at 404–07.

23. *Id.* at 406–07.

24. *Payton v. New York*, 445 U.S. 573, 584–85 (1980) (“[T]he Amendment contained two separate clauses, the first protecting the basic right to be free from unreasonable searches and seizures and the second requiring that warrants be particular and supported by probable cause. . . . It is thus perfectly clear that the evil the Amendment was designed to prevent was broader than the abuse of a general warrant. Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment.”).

authority.²⁵ The idea of common authority was introduced in 1974 through *United States v. Matlock*.²⁶ In *Matlock*, the Supreme Court examined whether a person with common control of a residence could give consent to search the home against an opposing tenant who was legally removed.²⁷ The Supreme Court held that voluntary consent may be obtained from a third party who possesses common authority over or other sufficient relationship to the premises or effect sought to be inspected.²⁸ The Court defined common authority as follows:

[M]utual use of the property by persons generally having joint access for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.²⁹

Some sixteen years later, in *Illinois v. Rodriguez*,³⁰ the Supreme Court was confronted with the question of whether a warrantless search violated the Fourth Amendment when officers did not actually receive consent from someone who legitimately possessed common authority.³¹ In *Rodriguez*, when the police entered an apartment without a warrant under the mistaken belief that they had received consent from someone with common authority, the Supreme Court held that a warrantless entry into a home is valid when officers reasonably believe the person giving consent has authority to do so.³² The Court reasoned that the test was not whether the party actually had any authority over the premises, but rather whether it was reasonable to believe that consent was granted from a party with authority.³³

2. Exigent Circumstances Exception

Absent consent, the police may enter a home without a warrant in cases of exigent circumstances. The exigent circumstances exception was recognized by the Supreme Court in 1980 through *Payton v. New York*.³⁴ In *Payton*, the Court analyzed whether an illegal search and seizure took place when police entered Payton's home with probable cause but without a warrant or exigent circumstances.³⁵ The Court held that the Fourth Amendment prohibited warrantless entries into a home to search for weapons or contraband absent exigent circumstances, even when there is

25. See, e.g., *United States v. Matlock*, 415 U.S. 164, 171 (1974).

26. *Id.*

27. *Id.* at 166–67, 171–72.

28. *Id.* at 171.

29. *Id.* at 171 n.7.

30. 497 U.S. 177 (1990).

31. *Id.* at 179.

32. *Id.* at 188–89.

33. *Id.*

34. 445 U.S. 573 (1980).

35. *Id.* at 574–76.

probable cause.³⁶ The Court reasoned that the entrance to a person's home was a critical point where constitutional safeguards are heightened even when probable cause exists or when there is statutory authority permitting the searches.³⁷

Over time, the Supreme Court has identified several exigencies that may justify a warrantless search of a home. The first exception recognized by the Court is the emergency aid exception addressed in *Brigham City, Utah v. Stuart*.³⁸ The Court held that "officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."³⁹ The second exception recognized by the Court is the hot pursuit exception addressed in *United States v. Santana*.⁴⁰ In *Santana*, the Court held that police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect.⁴¹ The third exception recognized by the Court was the imminent destruction of evidence exception in *Kentucky v. King*.⁴² In *King*, the Court reaffirmed that officers may enter an apartment or home without a warrant when there is a reasonable belief that evidence is being destroyed.⁴³ The Court also concluded that officers may seize evidence in plain view so long as they did not arrive at the spot of the evidence through a violation of the Fourth Amendment.⁴⁴

C. Current Fourth Amendment Jurisprudence Regarding the Curtilage

The current Fourth Amendment jurisprudence also outlines constitutional protections for the curtilage to protect the privacy interest of citizens from intrusions by government actors without warrants or probable cause.⁴⁵ However, Supreme Court decisions pertaining to the Fourth Amendment protections of the curtilage have outlined exceptions for the warrant and probable cause requirements.⁴⁶

36. *Id.* at 587–90.

37. *Id.* at 588–90.

38. 547 U.S. 398 (2006); *id.* at 400 (addressing "whether police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury").

39. *Id.* at 403.

40. 427 U.S. 38 (1976).

41. *Id.* at 42–43.

42. 563 U.S. 452 (2011).

43. *Id.* at 460, 462.

44. *Id.* at 462–63.

45. *Oliver v. United States*, 466 U.S. 170, 180 (1984) ("The distinction implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home. At common law, the curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,' and therefore has been considered part of home itself for Fourth Amendment purposes. Thus, courts have extended Fourth Amendment protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private." (citation omitted)).

46. See *Florida v. Jardines*, 569 U.S. 1, 6–8 (2013) (citing *Kentucky v. King*, 563 U.S. 452, 469–70 (2011); *Hester v. United States*, 265 U.S. 57, 57 (1924)).

In 1984, the Court recognized the curtilage as an area protected under the Fourth Amendment through *Oliver v. United States*,⁴⁷ when upholding the actions of police officers searching an open field for evidence of a crime.⁴⁸ The Court concluded that only a home's curtilage, the area immediately surrounding or attached to the home, is protected by the Fourth Amendment because the curtilage protects intimate activities of the home.⁴⁹ In 1987, the Court clarified the extent of the curtilage protection through *United States v. Dunn*⁵⁰ by establishing four factors that should be evaluated when considering whether an area is a part of the curtilage: (1) the proximity of the area to the home, (2) whether the area is within an enclosure surrounding the home, (3) the nature and use of the area, and (4) the steps taken to protect the area from observation by a passerby.⁵¹

In 2013, through *Florida v. Jardines*,⁵² the Court formally recognized that there was an implied license for others to enter into the curtilage to knock on the door and that license also extended to police officers.⁵³ However, the Court was careful to clarify that the implied license did not allow police officers to enter the curtilage to look for evidence without consent or a warrant, concluding that the implied license depended on an officer's purpose.⁵⁴

D. Current Jurisprudence Regarding Knock-and-Talks

A knock-and-talk is a police procedure conducted for the purpose of obtaining consent to speak with a homeowner or to make a warrantless entry.⁵⁵ Current case law regarding knock-and-talks has done little to restrain this procedure because of a belief that the entire interaction is consensual and not subject to Fourth Amendment scrutiny.⁵⁶ Given the unrestrained nature of knock-and-talks, police departments throughout the nation have begun utilizing the tactic as a way around the Fourth Amendment because, once inside the home, they may gather any evidence that is in plain view.⁵⁷

The Supreme Court has discussed knock-and-talks on two occasions—once directly and once indirectly. While the Court did not directly address knock-and-talks when reaching a conclusion in *King*, the Court recognized that when officers do not have a warrant, an occupant

47. 466 U.S. 170.

48. *Id.* at 176, 179.

49. *Id.* at 180.

50. 480 U.S. 294 (1987).

51. *Id.* at 301.

52. 569 U.S. 1 (2013).

53. *Id.* at 8.

54. *Id.* at 9.

55. Ian Dooley, *Fighting for Equal Protection Under the Fourth Amendment: Why "Knock-and-Talks" Should Be Reviewed Under the Same Constitutional Standard as "Stop-and-Frisks,"* 40 NOVA L. REV. 213, 218 (2016).

56. *Id.* at 214.

57. *See id.* at 220.

has no obligation to open the door or to speak, and even if the door is opened, the occupant need not let them in.⁵⁸ Knock-and-talks were directly addressed in *Jardines*, when the Court was asked whether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog was a Fourth Amendment search requiring probable cause.⁵⁹ The Court found that the physical intrusion was not licensed by the implied consent of social norms because, unlike a knock-and-talk, the officer brought along a sense-enhancing animal to conduct a search under the pretense of a knock-and-talk.⁶⁰

Through *King* and *Jardines*, the Supreme Court has outlined guidelines which should govern the use of knock-and-talks. While both *King* and *Jardines* held that a Fourth Amendment search occurs when an officer trespasses on a constitutionally protected area for the purposes of conducting a search, *Jardines* went a little further by explaining that under an implied license, an officer can do “no more than any private citizen might do” and whether an officer has an implied license to enter the curtilage depends on the purpose for entry.⁶¹

II. UNITED STATES V. CARLOSS

A. Facts

After receiving tips that Ralph Carloss, a convicted felon, unlawfully possessed firearms and sold drugs, law enforcement officials went to the home, where Carloss resided, to investigate.⁶² The officers knocked on the front door to speak with Carloss, despite numerous professionally printed “No Trespassing” signs in the yard, along the sidewalk, and on the front door.⁶³ After the officers knocked for several minutes, Carloss emerged from the home and was questioned regarding the allegations.⁶⁴ Carloss informed the officers that he was not allowed to be around ammunition because of prior convictions and denied their subsequent request to search the home by stating that he was not the homeowner and could not give permission.⁶⁵ When Carloss entered the home to seek permission, the officers followed him in after asking if it was okay to enter and wait inside.⁶⁶ While in the home, the officers observed drug paraphernalia and what appeared to be methamphetamine in Carloss’s room.⁶⁷ Earnest Dry, the homeowner, refused to allow the officers to search without a warrant

58. *Kentucky v. King*, 563 U.S. 452, 469–70 (2011).

59. *Jardines*, 569 U.S. at 3–5.

60. *Id.* at 9.

61. *Id.* at 8, 10 (quoting *King*, 563 U.S. at 469).

62. *United States v. Carloss*, 818 F.3d 988, 990 (10th Cir.), *cert. denied*, 137 S. Ct. 231 (2016).

63. *Id.*

64. *Id.* at 990–91.

65. *Id.* at 991.

66. *See id.*

67. *Id.*

and asked them to leave.⁶⁸ The officers later obtained a warrant based on their observations while in the home and returned.⁶⁹ During the search, officers found “multiple methamphetamine labs’ and lab components, a loaded shot gun, two blasting caps, ammunition, and . . . drug paraphernalia.”⁷⁰

B. Procedural History

After the search, Dry and Carloss were arrested and charged with multiple drug and weapon offenses.⁷¹ Dry and Carloss moved to suppress the evidence found in the home by arguing that Carloss’s consent was the product of a Fourth Amendment violation.⁷² The motion was denied and Carloss accepted a conditional guilty plea which allowed him to appeal the court’s ruling on his motion to suppress the evidence found in the home.⁷³

C. Majority Opinion

The majority opinion, authored by Judge Ebel, held that the officers did not violate the Fourth Amendment, in light of the *Jardines* decision, by conducting a knock-and-talk in efforts to speak with Carloss and that Carloss voluntarily consented to the officers accompanying him into the home.⁷⁴ The majority found that, post-*Jardines*, the Tenth Circuit has upheld the constitutionality of knock-and-talks, holding that there is an implied license for members of the public, including police, to go onto the curtilage of a home to knock on the front door.⁷⁵ Additionally, whether the implied license has been revoked depends on the context in which “an officer seeking to conduct a knock-and-talk, encountered the signs and the message that those signs would have conveyed to an objective officer . . . under the circumstances.”⁷⁶

The Tenth Circuit Court of Appeals concluded that the “No Trespassing” signs placed around the home would not have conveyed to an objective officer that he could not go to the front door and knock to speak consensually with Carloss.⁷⁷ Moreover, the court refused to place a time limit on how long a person can knock before exceeding the scope of an implied license when there was no evidence that the officers knocked aggressively or demanded entry.⁷⁸ The court gave two reasons to support their finding that Carloss voluntarily consented to the officers accompanying him into the home. First, Carloss’s consent was not the

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *See id.*

73. *Id.*

74. *Id.* at 991, 994, 998.

75. *Id.* at 992.

76. *Id.* at 994.

77. *Id.* at 995.

78. *Id.* at 997–98.

product of a Fourth Amendment violation because there was no violation.⁷⁹ Second, it was unreasonable to believe that because Carloss declined to give the officers consent to search the home that he could not consent to their accompanying him into the home while he sought permission for the search.⁸⁰

D. Concurring Opinion

The concurring opinion, authored by Chief Judge Tymkovich, held that the Fourth Amendment test asks “whether police intruded without license into a constitutionally-protected area, and . . . whether they obtained information via that intrusion.”⁸¹ The question of “whether the officers had an implied license to enter the porch . . . depends on the purpose for which they entered.”⁸² The concurrence reasoned that a “mere investigatory purpose will not invalidate an otherwise licensed police entry into the curtilage in every instance” and that intent was irrelevant under the implied license.⁸³ Moreover, a homeowner has the ability to revoke the implied license by opting out of social norms and making his revocation clear to a reasonable person.⁸⁴ The concurrence concluded by stating that the court must deploy an objective test and a general rule asking “whether a reasonable person would conclude that that entry onto the curtilage . . . by police or others was categorically barred.”⁸⁵

E. Dissenting Opinion

The dissenting opinion, authored by Judge Gorsuch, addressed the implications of the court’s holding and its departure from precedent and common law.⁸⁶ The dissent first analyzed the consensual theory behind knock-and-talks and the curtilage protection.⁸⁷ The dissent reasoned that the consensual theory behind knock-and-talks and the curtilage protection were at odds with each other because, while the curtilage is protected by the Fourth Amendment and requires police to have a warrant, exigent circumstances, or consent to enter a home or to reach the front door, the government has suggested that officers enjoy an irrevocable right to enter a home’s curtilage to conduct knock-and-talks.⁸⁸ Second, the dissent examined historical evidence and the common law rule, which held that posted signs were sufficient to ward off unwanted visitors.⁸⁹ Third, the dissent concluded that the majority’s holding was unclear and would invite

79. *Id.* at 998.

80. *Id.* at 998–99.

81. *Id.* at 1001 (Tymkovich, C.J., concurring).

82. *Id.* at 1002.

83. *Id.* at 1001–02.

84. *Id.* at 999.

85. *Id.* (emphasis omitted).

86. *Id.* at 1003 (Gorsuch, J., dissenting).

87. *Id.* at 1006–07.

88. *Id.* at 1004–06.

89. *Id.* at 1009–10.

more cases because of the specificity of the analysis concerning the placement and content of a sign.⁹⁰

III. DISCUSSION

Police frequently utilize knock-and-talks to circumvent warrant requirements for purposes of obtaining information on behalf of the public good, obtaining consent to enter or search, or making a warrantless arrest.⁹¹ The Tenth Circuit Court of Appeals has set a dangerous precedent through *Carlross* by holding that an implied license had not been revoked despite the presence of “No Trespassing” signs because the decision disregards current Fourth Amendment jurisprudence and will have dangerous consequences for communities most at risk police interactions. Judge Gorsuch’s dissent addressed most of these concerns when he questioned why the majority ruled in favor of the government though they disagreed with all the reasons brought forth by the government.⁹² While the majority might not have meant to approve the government’s suggestion that it enjoys an irrevocable right to enter a home’s curtilage to conduct a knock-and-talk,⁹³ its holding only complicated the matter by focusing on the content of the “No Trespassing” signs and the lack of a fence. Moreover, the court’s failure to provide any real guidance or notice to police or citizens about when the implied license has been rescinded will ultimately lead to an abuse of the rule and police powers.

A. Disregard for Constitutional Protections and Precedent

Given the courts’ belief that knock-and-talks are consensual procedures, the tactic is not subject to Fourth Amendment scrutiny.⁹⁴ Therefore, instead of addressing whether police have a justification to knock on a private door, the current rules analyze what happens after police intrude into a private area.⁹⁵ This practice is inconsistent with the Fourth Amendment jurisprudence set in *Jones* and *Jardines*, which held that a Fourth Amendment search occurs when an officer trespasses on a constitutionally protected area for the purposes of conducting a search.⁹⁶ Though the *Jardines* Court did not directly address the lawfulness of knock-and-talks, the Court limited the use of the implied license by holding that the existence of an implied license for officers to enter the porch “depends upon the purpose for which they entered.”⁹⁷ Moreover, the Court concluded that an implied license is undermined when an officer’s

90. *Id.* at 1014.

91. Dooley, *supra* note 55, at 218.

92. *Carlross*, 818 F.3d at 1004, 1008, 1015.

93. *Id.* at 1004.

94. See Dooley, *supra* note 55, at 214.

95. *Id.* at 223–24.

96. See *Florida v. Jardines*, 569 U.S. 1, 5, 10 (2013); *United States v. Jones*, 565 U.S. 400, 407 (2012).

97. *Jardines*, 569 U.S. at 10.

behavior goes beyond what property owners would ordinarily tolerate or expect from a visitor.⁹⁸ While the limitations established in *Jardines* are consistent with the curtilage doctrine and Fourth Amendment jurisprudence, the Tenth Circuit Court of Appeals' misinterpretation of *Jardines* and disregard for the curtilage doctrine is problematic and inconsistent for a number of reasons.

First, the majority's opinion ignores historical precedent and fails to set out a clear and concise rule of when an individual has revoked the implied license.⁹⁹ Traditionally, the implied license could be revoked by express words or an act indicating an intention to revoke; there was no requirement that one show notice by word and deed.¹⁰⁰ In 1951, through *Beard v. Alexandria*,¹⁰¹ the Supreme Court recognized that a homeowner may bar visitors from entering private property to knock at the front door by "notice or order."¹⁰² Moreover, several courts have specifically held that "No Trespassing" signs can revoke the implied license to enter regardless of whether the person seeking entry is a lay person or a police officer.¹⁰³ Despite the established common law principles and case precedent regarding revocation of the implied license, the majority in *Carloss* held that signs did not revoke the license given the circumstances, while the concurrence reasoned that a "No Trespassing" sign absent a fence or obstacle does not adequately revoke the implied license.¹⁰⁴

Second, the majority's opinion strays from the current Fourth Amendment jurisprudence by failing to establish that police do not have an irrevocable right to approach a home for the purposes of conducting a knock-and-talk¹⁰⁵ and finding that *Carloss* voluntarily consented to the officers accompanying him into the home.¹⁰⁶ In 2013, the Supreme Court reaffirmed that the implied license to knock allowed an officer to do "no more than any private citizen might do."¹⁰⁷ Moreover, the Court recognized that a search occurs whenever the government physically enters a constitutionally protected area, like a home or its curtilage, to conduct a search.¹⁰⁸ Therefore, while an officer returning a lost dog or soliciting for a charity is not conducting a search within the Fourth Amendment, an officer called to investigate a crime is conducting a search

98. *Id.* at 8–9.

99. *United States v. Carloss*, 818 F.3d 988, 1008–13 (10th Cir.) (Gorsuch, J., dissenting), *cert. denied*, 137 S. Ct. 231 (2016).

100. *Id.* at 1009.

101. 341 U.S. 622 (1951).

102. *Id.* at 626, 626 n.2 (citing collected cases).

103. *Carloss*, 818 F.3d at 1010, 1010 n.10 (citing collected cases).

104. *Id.* at 990 (majority opinion); *see id.* at 1000–01 (Tymkovich, C.J., concurring).

105. *Id.* at 1004 (Gorsuch, J., dissenting) ("A homeowner may post as many 'No Trespassing' signs as she wishes. She might add a wall or a medieval-style moat, too. Maybe razor wire and battlements and mantraps besides. Even *that* isn't enough to revoke the state's right to enter.").

106. *Id.* at 998–99 (majority opinion).

107. *Florida v. Jardines*, 569 U.S. 1, 8 (2013).

108. *See id.* at 11.

within the Fourth Amendment.¹⁰⁹ However, *Carloss* threatens the guidance of this clear and concise distinction in three ways: the decision implies police have the ability to approach any home without restraint under knock-and-talks, it does not provide any guidance to citizens on how to sufficiently revoke the implied license, and it fails to provide any guidance to government officials on when they possess an implied license.¹¹⁰

Third, instead of ensuring that citizens retain the constitutional protections granted under the Fourth Amendment, *Carloss* ultimately gives government officials a way to circumvent Fourth Amendment requirements by holding that Carloss, a third party in Dry's home, had the authority to consent to officers accompanying him into the home.¹¹¹ The court failed to evaluate whether a reasonable officer would have believed that Carloss had authority to consent to the entry of another person's home. Moreover, the court failed to require the government to satisfy its burden of proving that Carloss had actual or apparent authority to consent to a search or warrantless entry of the home.¹¹² To show actual authority, the government must show that the person who consented had either mutual use of the home by virtue of joint access or control for most purposes over the home.¹¹³ To show apparent authority, the government must show the officer had a reasonable belief that the person who consented had actual authority to do so.¹¹⁴ If the court had asked for this burden to be fulfilled in *Carloss*, the government would have had great difficulty proving Carloss had actual or apparent authority to consent to entry of the home, because Carloss acknowledged and notified the officers of his limited authority in the home when they initially asked to search the home.

Fourth, the majority opinion does not provide any real guidance on the structure or use of knock-and-talks because the court engaged in a nuanced and ambiguous analysis of specific factual circumstances that only brings more questions than answers.¹¹⁵ Instead of suggesting that "No Trespassing" signs are categorically insufficient to revoke the implied license, the majority accepted the view that signs could revoke the license and argued that Carloss's signs did not revoke the license because the terms were ambiguous.¹¹⁶ The result of a holding based on a fact-specific analysis leads to a patchwork of jurisprudence, where courts focus on

109. *Carloss*, 818 F.3d at 1004 (Gorsuch, J., dissenting).

110. *See id.* at 1005, 1014.

111. *Id.* at 998 (majority opinion) (finding that "the district court did not clearly err in finding that Carloss voluntarily consented to the officers following him into the house").

112. *See United States v. Cos*, 498 F.3d 1115, 1124 (10th Cir. 2007) (stating the government has the burden of proving that the party who consented to a search had either actual or apparent authority to consent to the search).

113. *United States v. Rith*, 164 F.3d 1323, 1329–30 (10th Cir. 1999) (stating the mutual use analysis is very fact oriented while the control for most purposes could be satisfied by a presumption).

114. *Cos*, 498 F.3d at 1128.

115. *Carloss*, 818 F.3d at 1012–15 (Gorsuch, J., dissenting).

116. *Id.* at 1012.

issues like the size of shrubs, fences, or the placement of signs, instead of whether police were justified in knocking on the door.¹¹⁷ Moreover, such analysis causes the court to rarely engage in a detailed discussion of whether the government met its burden to prove if consent was given or whether the government was justified in approaching the door.¹¹⁸

B. Unclear Ruling Will Lead to Abuse of Power

While a police officer's knock on the door may not be troubling on its face, the prevalent use of the procedure can be seen as problematic if the courts and the public focused on how a lack of judicial guidance affects the coercive nature of knock-and-talks and deteriorates police and community relations. Police often utilize the knock-and-talk technique because it allows them to act without a warrant or probable cause, it is a simple and effective way of obtaining information, and it allows police to seize any evidence of a crime in the officer's plain view.¹¹⁹ Moreover, under the *Schneckloth* doctrine, a waiver for searches and seizures does not require informed consent.¹²⁰ Therefore, an individual's knowledge of the right is not taken into account when examining whether consent was voluntary, and officers have no duty to inform individuals of their right to refuse consent.¹²¹ Since the *Schneckloth* doctrine's original application, critics have complained that it creates two diverging perspectives regarding the nature of consent to search: as an honest appeal between equal consensual parties or a demand where choice is illusory given the unbalance power structure between the parties involved.¹²² Despite the differing perspectives, the Supreme Court has been hesitant to recognize the inherently coercive nature of knock-and-talks in constitutionally protected areas.¹²³ However, a number of lower courts have expressed an uneasiness with the tactic and have attempted to curb how knock-and-talks are utilized by embracing a realistic view of what happens during the encounter to protect the rights of citizens and prevent further erosion of Fourth Amendment protections.¹²⁴

117. Dooley, *supra* note 55, at 226.

118. Andrew Eppich, *Wolf at the Door: Issues of Place and Race in the Use of the "Knock and Talk" Policing Technique*, 32 B.C. J.L. & SOC. JUST. 119, 138 (2012).

119. *Id.* at 124–25.

120. *Id.* at 137.

121. *Id.* at 136.

122. *Id.* at 139.

123. *Id.* at 139–40.

124. *State v. Huddy*, 799 S.E.2d 650, 653 (N.C. Ct. App. 2017) (holding that "the State cannot rely on the knock and talk doctrine because the officer did more than merely knock and talk. The officer ran a license plate not visible from the street, walked around the house examining windows and searching for signs of a break-in, and went first to the front door (without knocking) and then to a rear door not visible from the street and located behind a closed gate"); Dana Chicklas, *Michigan Supreme Court Hears Oral Arguments in "Knock and Talk" Marijuana Butter Case*, FOX 17 W. MICH. (Mar. 9, 2017, 7:11 PM), <http://fox17online.com/2017/03/09/michigan-supreme-court-hears-oral-arguments-in-knock-and-talk-marijuana-butter-case> (hearing oral arguments on whether the timing of knock and talks play into their constitutionality and coercion of consent).

The former chief justice of the Arkansas Supreme Court, Jim Hannah, painted a vivid picture of what knock-and-talks truly entail by stating the following:

[A]sking questions is often no longer necessarily the primary purpose of a knock and talk. Often it is not one officer, but two or more who approach the door. Many times, the intent in going to a citizen's door is not to talk but to obtain consent to search. Common practice is illustrated by the testimony of one law enforcement officer who, when asked about action taken on an anonymous tip, stated, "People call in and tell us, and we go and check. And if they wanna let us in we do. Eighty percent of 'em just let us come in and look." Law enforcement utilizes the knock and talk in lieu of a warrant when they recognize that they do not have probable or reasonable cause to obtain a search warrant. This misuse of a knock and talk causes concern that the protections against warrantless searches are being eroded. The United States Court of Appeals for the Sixth Circuit stated that "when the police go to a home with the intention of searching for evidence, they may not forgo a warrant." Yet, that is the very purpose of many knock and talk encounters today.¹²⁵

Former Chief Justice Hannah's description of the reality of knock-and-talks, coupled with the lack of initiative police officers have to notify individuals of their rights under the *Schneckloth* doctrine, displays how the Supreme Court's skewed view of the tactic potentially endangers communities most at risk of facing police interaction and those who lack knowledge of their rights.

Statistics show that poor and minority communities are most at risk of facing law enforcement, less likely to have confidence in the police, and less likely to believe that the police will treat them equally with their white counterparts.¹²⁶ Those fears, beliefs, and concerns are not unfounded. American studies have found that police officers typically stereotype residents of minority communities as uncooperative, estranged, or hostile based on a belief of ecological contamination; use coercion more often in minority communities than in white communities; and engage in more misconduct in disadvantaged minority neighborhoods.¹²⁷ Despite statistics showing that police officers treat and perceive minorities differently because of their race, ethnicity, and place of residence, the Supreme Court has been unwilling to address the realities that minority communities face during interactions with the police. Rather, the Court has established standards that appear on their face to be colorblind and class blind but

125. Jim Hannah, *Forgotten Law and Judicial Duty*, 70 ALB. L. REV. 829, 837 (2007).

126. Bruce Drake, *Divide Between Blacks and Whites on Police Runs Deep*, PEW RES. CTR. (Apr. 28, 2015), <http://www.pewresearch.org/fact-tank/2015/04/28/blacks-whites-police>.

127. Ronald Weitzer & Rod K. Brunson, *Policing Different Racial Groups in the United States*, 35 CASHIERS POLITIESTUDIES 129, 135–36 (2015), <https://sociology.columbian.gwu.edu/sites/sociology.columbian.gwu.edu/files/downloads/Weitzer%20%26%20Brunson%202015%20.pdf>.

which have exceptions that solely apply to minority and poor communities.¹²⁸

By allowing police officers to circumvent the warrant requirement through knock-and-talks, the level of trust between citizens and law enforcement is reduced,¹²⁹ the chance of incidental fatality is increased,¹³⁰ and citizens are left feeling helpless and unprotected by the law and courts.¹³¹ Knock-and-talks rely heavily on the discretion of the police with little direction to guide or check their actions.¹³² Though the technique may be convenient for police to use, the technique significantly reduces the special protection of the home for minorities and the poor because of their proximity to areas that police perceive to be high crime.¹³³ Moreover, frequent use of the technique “can create the perception that one’s home . . . is constantly under siege by the police.”¹³⁴ While knock-and-talks may be successful in obtaining criminal evidence, the Court should question whether the governmental interest in the intrusion outweighs society’s right to privacy within the home and curtilage and whether guidance in the utilization of the tactic would actually result in the practice being applied equally and fairly among white and minority communities.

IV. RECOMMENDATION

Presently, Justices of the Supreme Court have adopted a false narrative surrounding knock-and-talks which views the tactic as consensual because social visitors have an implied license to approach a door and the conversational aspect of the situation discredits the possibility of coercion.¹³⁵ While *Jardines* attempted to establish guidelines for knock-

128. See, e.g., *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (utilizing a neighborhood’s crime level and the sole act of running away unprovoked in a high crime neighborhood as major justifications for reasonable suspicion).

129. Eppich, *supra* note 118, at 146–47; Kirk Mitchell, *Denver Jury Awards \$1.8 Million to Family in Wrongful Prosecution Case*, DENV. POST (Apr. 27, 2016, 1:21 AM), <http://www.denverpost.com/2014/09/26/denver-jury-awards-1-8-million-to-family-in-wrongful-prosecution-case> (discussing how officers made false charges against a family to divert attention from their own misconduct stemming from a knock-and-talk).

130. See, e.g., Henry Pierson Curtis, *Lawsuit Filed in Police “Knock-and-Talk” Killing of Orlando Teen*, ORLANDO SENTINEL (Jan. 16, 2015, 4:39 PM), <http://www.orlandosentinel.com/news/breaking-news/os-knock-and-talk-orlando-lawsuit-20150116-story.html> (discussing the wrongful-death lawsuit filed against the Orlando police for killing a teenager during a controversial knock-and-talk).

131. Mark Joseph Stern, *Appeals Court: Officer Who Shot and Killed Innocent Man in His Own Home Cannot Be Sued*, SLATE (Mar. 17, 2017, 4:31 PM), http://www.slate.com/blogs/the_slatest/2017/03/17/appeals_court_rules_officer_who_killed_man_in_his_own_home_cannot_be_sued.html (discussing the Eleventh Circuit’s holding that an officer who shot and killed innocent man in his own home during knock-and-talk could not be sued).

132. Eppich, *supra* note 118, at 148.

133. See *id.* at 147, 150.

134. *Id.* at 147.

135. *Kentucky v. King*, 563 U.S. 452, 469–70 (2011) (“When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak.”); see also *Florida v. Jardines*, 569 U.S. 1, 8 (2013) (“This implicit license typically permits the visitor to approach the home

and-talks, the confusing, circular nature of the reasoning behind the holding¹³⁶ has resulted in various conflicting decisions across the country.¹³⁷ However, one consistent factor that has progressed, despite the various results, is the false narrative surrounding knock-and-talks. Contrary to the Supreme Court's belief that knock-and-talks are not being used to solely conduct searches, some police forces have assembled knock-and-talk task forces whose sole duty is to approach a home and ask for entry.¹³⁸ Because knock-and-talks are being used as an investigatory tool by police departments across the country, courts should apply reasonable time constraints and the reasonable suspicion standard, first established in *Terry v. Ohio*,¹³⁹ to knock-and-talks when evaluating their constitutionality.

Jardines established that the implied license gave a customary invitation for visitors to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."¹⁴⁰ However, the Court did not clarify the time of day that knock-and-talks could be conducted under the implied license or discuss whether the timing of a knock-and-talk could make it coercive. This issue is currently being discussed in the Michigan Supreme Court regarding a case in which police conducted knock-and-talks at four o' clock in the morning and five thirty in the morning.¹⁴¹ When the prosecution in that case attempted to assert that, though unusual, the public may customarily expect officers at that time of morning, Michigan Supreme Court Justice, Young interjected that it is never customarily expected for armed and vested officers to arrive at a person's home in the early hours except in an emergency.¹⁴² Given the flawed belief that police are able to approach the home at any time of the day or night¹⁴³ and the fatalities involved in those decisions,¹⁴⁴ it would be best for the Court to establish a reasonable time

by the front path, knock promptly, wait briefly to be received, and then (absent an invitation to linger longer) leave.").

136. See *Jardines*, 569 U.S. at 10 ("[W]hether the officer's conduct was an objectively reasonable search . . . depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they have entered.").

137. See, e.g., *United States v. Hernandez*, 392 F. App'x 350, 353 (5th Cir. 2010) (holding that the officers' conduct during their knock-and-talk, which included banging on doors and windows and breaking the glass on Hernandez's door, then relying on her admission that an illegal alien was present as probable cause to enter, violated the Fourth Amendment); see also, e.g., *United States v. Perea-Rey*, 680 F.3d 1179, 1189 (9th Cir. 2012) (holding that the warrantless intrusion by border patrol agents violated the defendant's Fourth Amendment rights because to do otherwise would swallow the curtilage protection); *People v. Nelson*, 296 P.3d 177, 184 (Colo. App. 2012) (holding that officers may use a ruse to get a person to open the door so they can conduct a knock-and-talk).

138. Jamesa J. Drake, *Knock and Talk No More*, 67 ME. L. REV. 25, 35 (2014) (discussing how the Dallas Police Department has a "46-member knock-and-talk task force" and the Orange County Florida Sheriff's Office has an entire division dedicated to the tactic).

139. 392 U.S. 1 (1968); *id.* at 30.

140. *Jardines*, 569 U.S. at 8.

141. Chicklas, *supra* note 124.

142. *Id.*

143. See *id.*

144. See, e.g., Curtis, *supra* note 130; Stern, *supra* note 131.

period for police officers conducting knock-and-talks to approach the home. The time period in which police are allowed to conduct knock-and-talks should be similar to that of an unexpected private citizen, such as eight o' clock in the morning and six o' clock in the evening, to protect civilian rights and increase officer safety.

In addition to introducing a time constraint, the Court should evaluate knock-and-talks under *Terry*'s reasonable suspicion standard. In *Terry*, a case in which an officer stopped and searched three men after observing them walking in repeated cycles and staring into a store, the Court held that a warrantless search for weapons is reasonable when officers have a reasonable suspicion that a crime has been committed or is about to be committed.¹⁴⁵ The Court reasoned that when assessing the reasonableness of a stop, the focus should be on the governmental interest that allegedly justifies the official intrusion on constitutionally protected interests and whether the officer is able to point to a specific or articulable fact that reasonably warrants that intrusion.¹⁴⁶ The Court's reasoning showed its concern for the social implications of giving police broad discretion and the legal implications of unwarranted searches and seizures. The Supreme Court's decision in *Terry* alluded to some of the legal and social concerns that have arisen from the prevalent use of knock-and-talks across the country.¹⁴⁷ Like a stop-and-frisk, a knock-and-talk is a tactic used by police when there is not enough evidence to obtain a warrant; it involves a level of intrusion where the officer should have at least reasonable suspicion before asking about details of citizens' lives or for consent to search.¹⁴⁸ Knock-and-talks should be reviewed under *Terry*'s reasonable suspicion standard to limit the broad discretion police officers currently have and to avoid violating a person's constitutional right to be free from unreasonable police intrusion.

Similar to a stop-and-frisk, to conduct a knock-and-talk the police should be required to show reasonable suspicion under the totality of the circumstances and be able to point to specific and articulable facts to demonstrate that criminal activity was occurring.¹⁴⁹ The search should also be reasonable in its inception and as conducted.¹⁵⁰ This means that an anonymous tip should not be enough to satisfy the reasonable suspicion requirement without specific indicia of reliability¹⁵¹ because the police would have the intention to intrude on a person's privacy at the home, and

145. *Terry v. Ohio*, 392 U.S. 1, 6, 28, 30 (1968).

146. *Id.* at 20–21.

147. *Id.* at 10–12 (discussing “substantial interference with liberty and personal security by police officers whose judgment is necessarily colored,” and “exacerb[at]ing police-community tensions”).

148. Dooley, *supra* note 55, at 241.

149. *See Terry*, 392 U.S. at 21.

150. *See id.* at 19–20.

151. *Florida v. J.L.*, 529 U.S. 266, 270–71 (2000).

the home has significant constitutional protections.¹⁵² However, numerous tips from named informants or a tip from a previously used informant in the past¹⁵³ should be enough to justify the police's warrantless entry into a home's curtilage for purposes of a search or to ask questions pertaining to an individual's involvement in criminal activity. Hence, this standard would allow police to efficiently conduct knock-and-talks under a clear guideline, while protecting the fundamental civil liberties of society.

V. APPLYING THE RECOMMENDATION TO THE FACTS OF *CARLOSS*

Under the recommended standards, a knock-and-talk would be unconstitutional unless police could show that the tactic was utilized at a reasonable time and point to specific and articulable facts to show that reasonable suspicion existed under the totality of the circumstances. Thus, if the knock-and-talk is unconstitutional at inception, then any nonattenuated evidence resulting from that tactic, including consent to enter or search the home, are inadmissible against the defendant in court.

In *Carloss's* case, the police intrusion onto his curtilage may have been constitutional despite the presence of "No Trespassing" signs because police had reasonable suspicion to conduct the knock-and-talk. The police in this case were alerted to the potential criminal activity of *Carloss* through numerous tips from neighbors. Based on that information alone, the police may have had reasonable suspicion to approach *Carloss's* home to speak with him regarding the allegations if the informing neighbors were readily identifiable, could face criminal penalty for giving a false tip, or had a sufficient explanation for how they gained access to that knowledge. The only remaining questions the court would have had to address were whether *Carloss* had the authority to give consent and whether the police conducted the knock-and-talk within the established reasonable time constraint. If the court determined that *Carloss* had the authority, though limited, to consent to officers entering the home and that the knock-and-talk was conducted between 8:00 a.m. and 6:00 p.m., the results of *Carloss* would remain the same.

CONCLUSION

Through *Carloss*, the Tenth Circuit Court of Appeals set an unfavorable precedent, which fails to coincide with the special protections the Fourth Amendment grants to the home and curtilage. Both *King* and *Jardines* work together to address how police should handle knock-and-talks in a way that is consistent with the Constitution under the present jurisprudence.¹⁵⁴ Despite the guidelines laid out in *King* and *Jardines*, which attempt to control how police conduct activities in relation to

152. See discussion *supra* Section II.B.

153. See *Adams v. Williams*, 407 U.S. 143, 146–47 (1972).

154. *Florida v. Jardines*, 569 U.S. 1, 7–9 (2013); *Kentucky v. King*, 563 U.S. 452, 469–72 (2011).

searches, the ruling of *Carloss* gives police officers unrestricted access to physically intrude onto one's property in hopes of conducting a search.¹⁵⁵ This unrestricted power is not only a threat to those who have more contact with police but also a threat to the Fourth Amendment's protection of the home and curtilage. Therefore, when evaluating whether police permissibly intruded onto the curtilage without a warrant and with intention to commit a search, courts should consider whether the tactic took place at a reasonable time and whether *Terry's* reasonable suspicion standard was satisfied to protect the civil liberties and rights of society.

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155. *King*, 563 U.S. at 469–70; *see also Jardines*, 569 U.S. at 8. *But see* *United States v. Carloss*, 818 F.3d 988, 994–95 (10th Cir.), *cert. denied*, 137 S. Ct. 231 (2016).

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