No. 14-212

In the Supreme Court of the United States

JEREMY CARROLL, PETITIONER

v.

ANDREW CARMAN AND KAREN CARMAN

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND TWENTY OTHER STATES IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment requires a police officer who approaches a residence to conduct a "knock and talk" to go to the "front door" of the residence, even where it reasonably appears that some other entrance is also customarily used by visitors.

2. Whether the Court of Appeals erred in holding that its new "front door" rule was "clearly established" for purposes of qualified immunity.

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INTEREST OF *AMICI CURIAE* AND SUMMARY OF ARGUMENT

In its decision below, the Third Circuit held a police officer civilly liable for conducting a "knock and talk" interview at a door of a residence that he reasonably believed was a customary entryway for visitors. As the chief law enforcement officers of their respective states, the State Attorneys General have a vital interest in ensuring that police officers investigating criminal activity retain the tools necessary to serve the important public interest in truth gathering, while honoring the Fourth Amendment's protections.[1] The State Attorneys General also have a crucial interest in ensuring that those same officers are not subjected to civil liability for their reasonable, good-faith judgments about what the law requires.

The question here is whether the Fourth Amendment requires a police officer conducting a "knock and talk" to go to the "front door" of a residence, even where it reasonably appears that some other entrance is also customarily used by visitors. The Third Circuit answered in the affirmative, in conflict with decisions by the Second, Sixth, Seventh, and Ninth Circuits, as well as by the New Jersey and Indiana Supreme Courts.

The answer directly affects the daily activities of thousands of police officers across the 50 States who routinely and legitimately seek to engage in

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[1] In Louisiana, the Attorney General does not have original criminal jurisdiction, but prosecutes when called upon to do so by a district attorney.

consensual encounters with individuals in the course of investigating crime. Officers conducting a "knock and talk" with an individual at a place of residence do not operate in a simplistic, cookie-cutter world in which each residence looks alike and where a bright-line rule tells the officers which door to approach. Instead, these officers face a myriad of unique environments that require them to rely on their reasonable judgment to assess how the Fourth Amendment applies.

The Third Circuit's decision requiring an officer conducting a "knock and talk" to use "the front door," when a jury found that he had acted reasonably in approaching what he believed was a customary entrance, creates confusion and uncertainty for officers where a residence has no clear front door, or where it appears that visitors customarily use multiple entrances. Though it hampers officers' ability to make quick decisions in unique settings, the Third Circuit's decision adds nothing to the protections of the Fourth Amendment.

This issue requires this Court's review. The Third Circuit's decision contradicts decisions by other federal and state appellate courts on the same matter, and the constitutionality of a "knock and talk" cannot depend on the jurisdiction in which it occurred. The decision also contravenes this Court's Fourth Amendment jurisprudence in several important respects. Finally, if this Court decides to consider the merits of the Third Circuit's new "knock and talk" rule, its holding that its new rule was "clearly established" for purposes of § 1983 liability is a serious error that also merits this Court's review.

STATEMENT OF FACTS

On July 3, 2009, Trooper Jeremy Carroll received a call that a person of interest may be located at 101 Raspberry Path in Dingman's Ferry, the residence of Andrew and Karen Carman. Pet. App. 3a. Trooper Carroll and Trooper Brian Roberts drove separately to the house, to see if they could make contact with the individual. The troopers had no warrant and had never been to the property. *Id*. at 3a–4a.

The Carmans' house was located on a corner lot, with a street running along the front of the house and a street running along the left of the house, as viewed from the front. *Id*. at 4a. There was no parking area in the front; instead, numerous cars were parked to the left of the house in a graveled area that adjoined the back yard. *Id*. There was no barrier between the parking area and the back yard. *Id*. at 29a. Troopers Carroll and Roberts parked in the graveled area, with the other cars. *Id*. at 4a.

Upon exiting their vehicles, the troopers were in the back of the Carmans' property, facing the back of the house. *Id*. at 4a, 30a–31a. Due to the layout of the property and parking area, Trooper Carroll thought the sliding door attached to the back deck "looked like a customary entryway" for visitors arriving by car. *Id*. at 4a. The troopers approached the back deck to conduct a "knock and talk." *Id*. at 5a, 29a. As they approached, Mr. Carman came out of the back door and aggressively demanded to know who the troopers were. *Id*. at 5a. After a minor scuffle, the troopers determined that Mr. Carman was not the individual for whom they were looking, but that Mr. Carman knew the person of interest. *Id*.

at 23a. The troopers obtained consent from Ms. Carman to search the house for that individual, but found no one. *Id.* at 5a. The Carmans did not ask the troopers to leave after the search, but instead talked with them for another twenty to thirty minutes. COA App. 86–87. Mr. Carman testified at trial that he was not upset that the troopers had approached his back door. COA App. 35–36.

The Carmans subsequently brought suit against Trooper Carroll under 42 U.S.C. § 1983, claiming among other things that his entry onto their property constituted an unlawful search under the Fourth Amendment. Pet. App. 5a–6a. The suit presented the question whether Trooper Carroll's approaching the back door constituted a lawful "knock and talk," which permits an officer without a warrant to knock at a resident's door and ask to speak with the inhabitants, just as any private citizen might, provided the officer restricts his or her movements to places where visitors could be expected to go. The district court denied the Carmans' motion for summary judgment on that question, finding among other things that it lacked sufficient information to decide as a matter of law whether the rear porch door was an entrance customarily used by visitors. *Id.* at 28a–31a. The district court instructed the jury on the "knock and talk" doctrine, including that the officer must restrict his or her movements to places where visitors could be expected to go. COA App. 156–57. The jury returned a verdict in Trooper Carroll's favor, Pet. App. 7a, thereby necessarily concluding that his approach was reasonable.

On appeal, the Third Circuit rejected the jury's implicit finding that Trooper Carroll had acted reasonably, ruling that the Fourth Amendment required him to conduct his "knock and talk" at the Carmans' front door. *Id.* 9a–12a. The Court recognized that "there may be some instances in which the front door is not the entrance used by visitors," but found that "this is not one such instance," *id.* at 9a n.6, noting elsewhere in its opinion the Carmans' testimony that visitors customarily used the front door, *id.* at 4a. The Court went on to hold that: the officer conducting a "knock and talk" "must" start at the front door, *id.* at 10a; "Carroll cannot avail himself of the 'knock and talk' exception . . . because he entered the back of the Carmans' property without approaching the front door first," *id.* at 11a; and "[b]ecause Carroll did not knock on the Carmans' front door, . . . his intrusion cannot be justified as a 'knock and talk,' " *id.* at 11a.

The Third Circuit remanded with instructions to enter judgment against Trooper Carroll, holding that he was not entitled to qualified immunity because the Court's front-door rule was clearly established by *Estate of Smith* v. *Marasco*, 318 F.3d 497 (3d Cir. 2003). Pet. App. 14a.

ARGUMENT

The Court of Appeals held a police officer civilly liable for not using the front door of a residence to conduct a "knock and talk," despite the jury's verdict that he reasonably approached a door that he believed was a customary entryway for visitors. This holding conflicts with that of other federal and state appellate courts, and is inconsistent with this Court's Fourth Amendment jurisprudence. Moreover, the Third Circuit's holding that its front door rule was "clearly established" for purposes of § 1983 liability is a substantial error that merits this Court's review.

I. The Third Circuit's decision conflicts with the holdings of other federal and state appellate courts.

In ruling that the Fourth Amendment required Trooper Carroll to approach the front door of the Carmans' residence to conduct a "knock and talk," the Third Circuit necessarily rejected the jury's finding that the trooper had reasonably approached the back entrance, which he believed to be a customary entryway. The Court of Appeals' holding, at best, reflects a ruling that, as a matter of law, there can be only one customary entrance to each residence. While the Carmans' brief in opposition suggests that footnote six of the opinion qualifies that categorical rule, the court's application of the rule contains no qualifying language and permits no exceptions. The court categorically instructed that a "knock and talk" "must begin at the front door"; held that Trooper Carroll did not meet the requirements "because he entered the back of the Carmans' property without approaching the front door first";

and ordered the district court to impose damages on an officer for approaching a door the jury found was reasonable for him to use. Pet. App. 10a–11a, 14a. Indeed, no responsible police chief would permit an officer to approach customary entrances other than the front door in light of the Third Circuit's opinion—footnote six notwithstanding. On any reading, the decision contradicts the holdings of four other federal Courts of Appeals, which have rejected attempts by residents to limit police officers to the "front door," or to only one of multiple customary entryways.

In *United States* v. *James*, 40 F.3d 850 (7th Cir. 1994), vacated on other grounds, 516 U.S. 1022 (1995), officers conducting a "knock and talk" used a paved walkway along the side of a duplex to approach a rear side door. *Id.* at 862. The passage and rear side door were accessible to the general public and were not blocked off by a gate or fence. *Id.* The rear side door was commonly used for entering the duplex from the nearby alley. *Id.* On appeal, James argued that "police officers seeking to interview a person are always required to knock on the front door of a residence before they may approach any other public means of access to the dwelling." *Id.* at 862 n.4. The Seventh Circuit rejected this argument, holding that "where the back door of a residence is readily accessible to the general public, the Fourth Amendment is not implicated when police officers approach that door in the reasonable belief that it is a principal means of access to the dwelling." *Id.* at 862.

Likewise, there were two entryways to the Titemore residence in *United States* v. *Titemore*: a

porch with a sliding door on the east side of the house, and a door with a motion light, doorbell, and welcome mat on the west side. 335 F. Supp. 2d 502, 504 (D. Vt. 2004); 437 F.3d 251, 253 (2d Cir. 2006). Although there was no walkway to the east-side sliding door, the trooper chose to walk across the lawn and approach that door because he saw Titemore watching television inside. 335 F. Supp. 2d at 505; 437 F.3d at 254. Titemore argued on appeal that the trooper had violated the Fourth Amendment by walking across his lawn to question him at a side porch. The Second Circuit rejected this argument, explaining that the trooper had "approached a principal entrance to the home using a route that other visitors could be expected to take[.]" 437 F.3d at 252. The court held that Titemore had no reasonable expectation of privacy in his side porch, where the porch faced a road and "constitute[d] part of a principal entryway" that was visible to and used by the public, and no fence enclosed the porch and lawn area. *Id*. at 259.

The Sixth Circuit has also upheld officers' exclusive use of a back door in *United States* v. *Thomas*, 430 F.3d 274 (6th Cir 2006). In *Thomas*, two officers knocked on the back door of Thomas's home. *Id*. at 276. The Sixth Circuit rejected his argument that the officers violated his Fourth Amendment rights by approaching the rear door, explaining that "the rear deck was adjacent to the driveway" and "was customarily used as the entrance to the house"; thus, the police had breached no reasonable expectation of privacy. *Id*. at 280.

The Ninth Circuit similarly ruled in *United States* v. *Garcia* that "[i]f the front and back of a residence are readily accessible from a public place, like the driveway and parking area here, the Fourth Amendment is not implicated when officers go to the back door reasonably believing it is used as a principal entrance to the dwelling." 997 F.2d 1273, 1279–80 (9th Cir. 1993).

Police officers conducting "knock and talks" in New Jersey will have to follow the Third Circuit's more stringent front-door/one-entrance rule, even though the New Jersey Supreme Court has held it permissible for officers to use customary entrances other than the front door. In *State of New Jersey* v. *Domicz*, 907 A.2d 395 (N.J. 2006), two officers knocked on Domicz's back door after passing through a gate that separated the driveway from the rear of the residence. *Id*. at 398. On appeal, the Appellate Division remanded, instructing the trial court to reconsider whether the warrantless intrusion into Domicz's back yard transgressed his reasonable expectation of privacy. *State* v. *Domicz*, 873 A.2d 630, 652 (N.J. App. Div. 2005). The Supreme Court of New Jersey reversed. 907 A.2d 395 (N.J. 2006). Noting the officer's testimony—which the trial court had found credible—that the position of the parked cars in the defendant's driveway had led the officers to believe that the back door was used by residents and visitors, the court explained that where an officer "reasonably believes that the door is used by visitors, he is not unconstitutionally trespassing on the property." *Id*. at 405.

The Supreme Court of Indiana likewise upheld a back-door "knock and talk" in *Trimble* v. *State of Indiana*, 842 N.E.2d 798 (Ind. 2006). In *Trimble*, an officer "pulled into Trimble's driveway, which wrapped around the back of Trimble's house, and parked his car behind the house." *Id.* at 801. On appeal, the Indiana Court of Appeals held that the officer's warrantless search of a dog house in the back yard, after knocking on the back door, violated the Fourth Amendment. *Id.* The Supreme Court of Indiana reversed, holding that the officer's entry into Trimble's back yard was a route "that any visitor was invited to take." *Id.* at 802. The court further held that "[w]hich areas of a given piece of real estate may reasonably be viewed as open to visitors is fact-specific." *Id.*

If Trooper Carroll had approached the Carmans' back door in the Second, Sixth, Seventh, or Ninth Circuits, or in New Jersey or Indiana, he would not have been liable to the Carmans for damages. But the constitutionality of a "knock and talk" cannot depend on the jurisdiction in which it occurred. This Court should grant certiorari and resolve this important conflict in Fourth Amendment law, which affects thousands of state and federal police officers.

II. The Third Circuit's decision is inconsistent with this Court's Fourth Amendment jurisprudence.

The Third Circuit's decision also contravenes this Court's Fourth Amendment jurisprudence in several important respects.

The "knock and talk" is a long-recognized police tool that furthers the public's interest in information-gathering, while respecting the property interests, reasonable expectations of privacy, and freedom of movement that the Fourth Amendment protects. As courts have traditionally defined it, the "knock and talk" is a legitimate investigative technique aimed at achieving a person's consent to questioning or a search. See *United States* v. *Thomas*, 430 F.3d 274, 277 (6th Cir. 2005).

This Court has long held that consensual encounters between police and suspects or witnesses are excluded from the Fourth Amendment's prohibitions, explaining that "even when officers have no basis for suspecting a particular individual," they may question that individual and request to search his or her property "as long as the police do not convey a message that compliance with their requests is required[.]" *Florida* v. *Bostick*, 501 U.S. 429, 434–35 (1991). The "knock and talk" doctrine allows officers to approach a home and knock, "precisely because that is no more than any private citizen might do," *Florida* v. *Jardines*, 133 S. Ct. 1409, 1415–16 (2013) (internal citations and quotations omitted), and "the occupant has no obligation to open the door or to speak," *Kentucky* v. *King*, 131 S. Ct. 1849, 1862 (2011).

At the same time as it promotes the public's interest in consensual information-gathering, the "knock and talk" doctrine respects the many important protections of the Fourth Amendment, as expressed in this Court's jurisprudence. First, it respects a resident's freedom from physical intrusion

into constitutionally protected areas. The Fourth Amendment " 'indicates with some precision the places and things encompassed by its protections': persons, houses, papers, and effects." *Jardines*, 133 S. Ct. at 1414 (quoting *Oliver* v. *United States*, 466 U.S. 170, 176 (1984)). Included within the zone of protected spaces is the curtilage of a home. But the curtilage is not wholly off-limits to a warrantless police officer: the officer may approach a residence via the curtilage in an attempt to speak with the resident if the officer follows a path for which he is deemed to have a license under traditional trespass principles. See *Jardines*, 133 S. Ct. at 1415. A license "may be implied from the habits of the country" and is defined, in part, by what a private citizen may be expected to do. *Id*. at 1415–16. Determining the existence and scope of a license requires examination of all the surrounding circumstances. Restatement (Second) of Torts § 330, cmt. e (2014) (defining licensees).

When the police "come on to private property to conduct an investigation . . . and restrict their movements to places visitors could be expected to go (*e.g.*, walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment." Wayne R. LaFave, 1 Search and Seizure § 2.3(f) (5th ed. 2013). See also *Jardines*, 133 S. Ct. at 1416; *Estate of Smith* v. *Marasco*, 318 F.3d 497, 519 (3d Cir. 2003). Thus, the "knock and talk" respects a resident's property rights by limiting a police officer's movements to customary entry routes, where visitors have an implied license to go.

The "knock and talk" also respects a resident's reasonable expectations of privacy. A "search" within the meaning of the Fourth Amendment occurs when police infringe on a subjective expectation of privacy that society is prepared to recognize as reasonable. *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *Smith* v. *Maryland*, 442 U.S. 735, 740–41 (1979). The curtilage of a home represents the extent of the area surrounding a home that is capable of being recognized as private under the objective component of the reasonable-expectation-of-privacy test. *Oliver*, 466 U.S. at 178–80. Nevertheless, " '[w]hat a person knowingly exposes to the public, even in his own home . . . , is not a subject of Fourth Amendment protection.' " *California* v. *Ciraolo*, 476 U.S. 207, 213 (1986) (quoting *Katz*, 389 U.S. at 351). The portion of the curtilage that is used as a normal route of access for anyone visiting the premises is "only a semi-private area," and thus "observations made from such vantage points are not covered by the Fourth Amendment." LaFave, 1 Search and Seizure § 2.3(f), at 559 (citing *United States* v. *Magana*, 512 F.2d 1169, 1171 (9th Cir. 1975)). By limiting a "knock and talk" to customary entryways, the doctrine conforms to a resident's reasonable expectations of privacy. It treats the police like any other citizen.

The Third Circuit's requirement that Officer Carroll use the front door muddies this straightforward jurisprudence. By requiring an officer facing multiple customary entryways to knock only at the front door, or to divine which of the apparently customary entryways is "the" primary entryway, the Court of Appeals has created a bright-

line rule that impedes legitimate information-gathering while furthering none of the interests the Fourth Amendment protects. The new rule does not protect property rights any more than restricting "knock and talks" to any customary entryway, nor does it provide more robust protection of a resident's expectations of privacy. Knocking at a back door—so long as it is an entryway that visitors could be expected to use—does not constitute a trespass or disrupt a resident's reasonable expectations of privacy. See *Thomas*, 430 F.3d at 280; *Titemore*, 437 F.3d at 259; *James*, 40 F.3d at 862; *Garcia*, 997 F.2d at 1279–80; *Domicz*, 907 A.2d at 405; *Trimble*, 842 N.E.2d at 801–02. For the same reasons, the Third Circuit's decision also does not provide greater safeguards against non-consensual searches. *Thomas*, 430 F.3d at 277–79.

Instead of furthering the Fourth Amendment's protections, the Third Circuit's decision creates uncertainty and confusion both for police officers and for the courts. Police officers, instead of using their best judgment to decide where visitors may reasonably be expected to approach a residence, are now forced to use the "front door" in every instance (assuming there is one), or risk choosing a door that may turn out not to be "the" primary customary entrance, as later determined by a court or jury. Courts and juries similarly would be faced with this muddy determination, when they could instead be asking simply whether the door the officer used was a door that visitors could be expected to use. Cf. *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 350 (2001) (disfavoring rules that create judicial second-guessing and do not aid administrability).

What is more, the Third Circuit's decision contravenes this Court's jurisprudence on the ultimate touchstone of the Fourth Amendment: reasonableness. *King*, 131 S. Ct. at 1856. The animating principle behind the Fourth Amendment is whether an individual has been subjected to an unreasonable search or seizure, reasonableness being determined by the totality of the circumstances facing the officer. *Samson* v. *California*, 547 U.S. 843, 848 (2006). This Court has long held that "[t]here is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." *Go-Bart Importing Co.* v. *U.S.*, 282 U.S. 344, 357 (1931). Courts must accordingly assess reasonableness in a fact-sensitive, case-by-case manner. See *Ker* v. *California*, 374 U.S. 23, 33 (1963); *Oliver* v. *United States*, 466 U.S. 170, 177 (1984).

Reasonableness jurisprudence recognizes that police often must make quick decisions in a variety of unique and unexpected circumstances. For that reason, this Court has emphasized that flexibility is inherent in the Fourth Amendment and has refused to reduce the reasonableness standard to rigid, mechanical rules or "Procrustean application." *Ker*, 374 U.S. at 33; see also *United States* v. *Drayton*, 536 U.S. 194, 201 (2002); *Wilson* v. *Arkansas*, 514 U.S. 927, 934 (1995); *Florida* v. *Bostick*, 501 U.S. 429, 435–37 (1991); *Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 229 (1973); *United States* v. *Mendoza*, 281 F.3d 712, 717 (8th Cir. 2002) ("[I]t belies common sense to think officers should be forced to comply with formalistic rules when the circumstances direct otherwise.").

But a rigid, Procrustean rule is exactly what the Third Circuit has created by restricting Officer Carroll to "the front door" when another entrance also reasonably appeared to be one where visitors may go. To be sure, bright-line rules are appropriate in some Fourth Amendment settings. But a rigid front-door rule—or a "one customary entrance" rule—fails to track the concerns underlying the Fourth Amendment, and accordingly is ill-suited for such a purpose.

This Court's decision in *Florida* v. *Jardines*, 133 S. Ct. 1409 (2013), is not to the contrary. In *Jardines*, this Court confronted the question whether the Fourth Amendment permits warrantless police officers to use drug-sniffing dogs on a homeowner's porch to investigate the contents of the home, *id*. at 1413, and held that it does not, *id*. at 1417–18. In the course of its opinion, this Court referred to the property-law principle that "the knocker on the front door is treated as an invitation or license to attempt an entry," *id*. at 1415–16, citing "background social norms that invite a visitor to the front door," *id*. at 1416. But this Court did not consider or address whether visitors—and thus police officers—are permitted to approach *only* the front door, or whether a residence could have more than one entrance that visitors could properly approach.

In contrast, the majority and dissent appeared to agree that the contours of permissible visitor and police behavior are defined in reference to what would be customary of ordinary citizens. See *id*. at 1415–16 ("Thus, a police officer not armed with a warrant may approach a home and knock, precisely

because that is 'no more than any private citizen might do.' "); *id*. at 1415 n.2 ("With this much, the dissent seems to agree—it would inquire into 'the appearance of things,' what is 'typica[l]' for a visitor, what might cause 'alarm' to a 'resident of the premises,' what is 'expected' of 'ordinary visitors,' and what would be expected from a 'reasonably respectful citizen[.]' These are good questions." (internal citations omitted)). Thus, the analysis in *Jardines* is consistent with a legal standard that allows police officers the same authority as what is "expected" of "ordinary visitors" in approaching an entryway other than the front door.

The Third Circuit's bright-line rule is unwarranted and inconsistent with this Court's jurisprudence and the decisions of sister courts. The traditional, more flexible "knock and talk" rule, by restricting police officers to customary entryways, as determined by reasonable belief and the totality of the circumstances, capably protects a resident's property, privacy, and freedom rights. Mandating that those officers go to "the front door," or divine which of multiple customary entryways is "the" primary entryway, does not increase the resident's protections, but instead creates unnecessary guesswork for police and courts in dealing with a "relatively simple" concept of the Fourth Amendment. Cf. *Atwater*, 532 U.S. at 347 (disfavoring creation of guesswork for police); *Oliver*, 466 U.S. at 181–82 (same); *United States* v. *Arvizu*, 534 U.S. 266, 274 (2002) (disfavoring rigid rules that "create[] unnecessary difficulty in dealing with . . . relatively simple concepts embodied in the Fourth

Amendment"). This Court should grant certiorari and resolve this question.

It is important to note that, even interpreting the Third Circuit's opinion as advocated by the Carmans in their brief in opposition, the decision still creates a rule that conflicts with the jurisprudence of this Court and the other courts of appeal. In rejecting the jury's finding that Trooper Carroll reasonably approached the back entrance, apparently based on the Carmans' testimony that visitors customarily used the front door, Pet. App. 4a, the Third Circuit has effectively held Trooper Carroll responsible for having actual knowledge of which entrance is the Carmans' customary entrance. That has never been the law. Instead, the question this Court and lower courts have asked for decades in applying the Fourth Amendment is whether an officer's actions were objectively reasonable under the circumstances. See *King*, 131 S. Ct. at 1859. Here, a jury found that his actions were. Whether by limiting Trooper Carroll to the front door, limiting him to only one of multiple customary entryways, or limiting him to the door of the inhabitants' subsequently expressed choosing, the Third Circuit has contravened decades of American jurisprudence and, in so doing, has required a well-intentioned police officer to pay damages for the court's mistake. This Court should intervene.

III. The Third Circuit's holding that its new rule was "clearly established" for purposes of qualified immunity is an important error that merits this Court's review.

If this Court decides to consider the merits of the Third Circuit's new take on the "knock and talk" rule, the Court of Appeals' holding that its new rule was "clearly established" for purposes of § 1983 liability is a serious error that also merits review.

The Third Circuit held that its new rule was "clearly established" based on its earlier decision in *Estate of Smith* v. *Marasco*, 318 F.3d 497 (3d Cir. 2003). Pet. App. 12a–13a. But *Estate of Smith* did not require officers conducting "knock and talks" to use the front door, and indeed did not directly address that question, or the question whether a residence can have more than one customary entrance. Instead, the court explained that officers conducting a "knock and talk" "are allowed to knock on a residence's door or otherwise approach the residence . . . just as any private citizen may," assuming they "restrict their movements to places visitors could be expected to go." *Id*. at 519. The court ultimately remanded the case for further fact finding, explaining that factual questions remained as to whether the officers' entry of Smith's back yard—in that case, after not receiving an answer at the front door—was reasonable under the circumstances. *Id*. at 521. Specifically, the Court of Appeals noted that the trial court failed to consider "the layout of the property or the position of the officers on that property"; "whether the officers followed a path or other apparently open route that would be suggestive of reasonableness"; whether the

officers knew ahead of time that Smith lacked a back door; or whether the officers spent an unwarranted amount of time in the back yard. *Id*. at 521.

Nowhere in *Estate of Smith* did the Third Circuit clearly mandate that officers conducting a "knock and talk" must use the front door or divine one exclusive customary entrance to the residence. Indeed, as Pennsylvania notes in its petition for certiorari, district courts in the Third Circuit did not interpret *Estate of Smith* as issuing such a mandate. See, e.g., *Lease* v. *Tyler*, 2008 WL 2673381, *6 (M.D. Pa. 2008) (holding that an officer did not violate the Fourth Amendment when he approached a "common entrance" on the side of an apartment building).

Nor was there a "robust 'consensus of cases of persuasive authority' "such that a reasonable officer could not have believed that his actions were lawful. See *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (quoting *Wilson* v. *Layne*, 526 U.S. 603, 617 (1999)). Not only was the Third Circuit's new front-door rule not "clearly established" within the Third Circuit, but as discussed in Section I of this brief, four federal courts of appeals and two state supreme courts have reached contrary results, rejecting attempts by residents to limit police officers to the "front door," or to only one of multiple customary entryways. A police officer should not be held liable on the premise that the law is clearly established if highly educated and legally trained judges cannot agree what the law is. See, e.g., *Stanton* v. *Sims*, 134 S. Ct. 3, 7 (2013) (law not clearly established where decisions of this Court and federal circuit in question were equivocal, distinguishable, or had granted qualified immunity,

and the federal and state courts of last resort around the nation were divided).

The Third Circuit's new front-door rule was not "clearly established," and therefore Officer Carroll was entitled to qualified immunity. Qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2085 (2011). "When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.' " *Id*. (quoting *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986)). A government official's conduct violates clearly established law "when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.' " *Id*. at 2083 (citing *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)). "[E]xisting precedent must have placed the statutory or constitutional question beyond debate." *Id*. That was not the case here, where *Estate of Smith* did not address the issue at hand, where even subsequent courts did not interpret it as doing so, and where courts around the nation reached a contrary result. The Third Circuit's holding that Officer Carroll could be subjected to civil liability for approaching a back entrance that he thought was a customary entryway—which approach the jury found reasonable—is a significant error that merits review and reversal by this Court.

CONCLUSION

By holding that an officer who faced multiple customary entryways must begin a "knock and talk" at the front door, or must divine which of multiple customary entryways is "the" exclusive customary entrance, the Third Circuit's decision conflicts with the holdings of other federal and state appellate courts, and is inconsistent with this Court's Fourth Amendment jurisprudence. Moreover, the Third Circuit's holding that its rule was "clearly established" for purposes of qualified immunity is a serious error that merits this Court's review.

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