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## Get Off My Porch: *United States v. Carlross* and the Escalating Dangers of “Knock and Talks”

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## NOTES

### Get Off My Porch: *United States v. Carloss* and the Escalating Dangers of “Knock and Talks”

“[E]very man’s house is his castle.”<sup>1</sup> This maxim is one of the oldest and most well-established principles in Anglo-American jurisprudence. In the United States, the maxim is embedded in the Fourth Amendment’s prohibition of unreasonable searches and seizures, despite the continuing erosion of Fourth Amendment protections in public places.<sup>2</sup> Citizens subject themselves to an ever-growing possibility of being searched when on the streets and sidewalks,<sup>3</sup> traveling through airports,<sup>4</sup> attending school,<sup>5</sup> or traveling in a car.<sup>6</sup>

Nevertheless, the home remains the last bastion of personal privacy.<sup>7</sup> But every time we open our home to guests or order a package from Amazon,

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1. See *Weeks v. United States*, 232 U.S. 383, 390 (1914), *overruled by* *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

2. Both dissenting Justices and scholars have noted the continuing erosion of protections provided by the Fourth Amendment. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543, 567 (1976) (Brennan, J., dissenting) (criticizing the “continuing evisceration of Fourth Amendment protections”); Wayne R. LaFare, *Supreme Court Report: Nine Key Decisions Expand Authority to Search and Seize*, 69 A.B.A. J. 1740, 1744 (1983); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 261 (1984); John A. Hamilton, Comment, *The United States Supreme Court’s Erosion of Fourth Amendment Rights: The Trend Continues*, 30 S.D. L. REV. 574, 574 (1985).

3. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (establishing reasonable suspicion as the standard for warrantless “stop and frisk” searches).

4. See, e.g., *United States v. Place*, 462 U.S. 696, 697 (1983) (upholding warrantless detention of luggage based only on reasonable suspicion that it contained narcotics).

5. See, e.g., *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 656–57 (1995) (permitting suspicionless drug testing of public school students who participated in school’s athletic program); *New Jersey v. T.L.O.*, 469 U.S. 325, 340–42 (1985) (applying reasonable suspicion standard to warrantless search of a student by school authorities).

6. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1049–50 (1983) (establishing reasonable suspicion standard for warrantless search of entire passenger compartment of an automobile).

7. See *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (“‘At the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’”) (citation omitted); *Payton v. New York*, 445 U.S. 573, 586 (1980) (noting that it has long been “a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable”) (internal quotation marks omitted); *Martinez-Fuerte*, 428 U.S. at 561 (“[T]he sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection.”).

we implicitly invite strangers—salesmen, girl scouts, and even police officers—to park in our driveways, walk on our sidewalks, come onto our porches, and knock on our doors, exercising an understanding that a driveway and front door present an implicit invitation to those very visitors who wish to approach.<sup>8</sup> Questions remain, however, as to how broadly courts should construe this implied license, and how a homeowner can revoke an implied invitation. Put another way, what measures are sufficient to inform the girl scout or police officer that she or he is not welcome on the property?

In *United States v. Carloss*, the Tenth Circuit construed the implied license too broadly, holding that three “No Trespassing” signs posted around the yard adjoining a house and one on the home’s front door did not adequately inform the police officers that they were no longer invited onto the property to approach the home.<sup>9</sup> Part I of this Note describes the history of “knock and talks” and their place within Fourth Amendment jurisprudence. Part II discusses *Carloss*’s facts, holding, concurrence, and dissent. Part III demonstrates the dangers and unfavorable results that stem from the Tenth Circuit’s formulation and application of its Rule.<sup>10</sup> Finally, Part IV briefly concludes.

### I. “Knock and Talks” and the Fourth Amendment

Fourth Amendment doctrine has evolved throughout the history of the Supreme Court. For example, a “search” under the Fourth Amendment was originally tethered to common-law trespass and required an actual intrusion into a constitutionally protected area.<sup>11</sup> In *Katz v. United States*, decided in 1967, the Supreme Court seemingly abandoned its trespass-based analytical framework in favor of a test centered on a person’s reasonable expectation

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8. Police use the implied license to talk with a home’s resident as an investigative tool, which is referred to as a “knock and talk.” See *United States v. Cruz-Mendez*, 467 F.3d 1260, 1264 (10th Cir. 2006).

9. 818 F.3d 988, 990 (10th Cir.), *cert. denied*, 137 S. Ct. 231 (2016). Three signs were in the yard next to the driveway leading up to the defendant’s house, and one was placed on the front door. *Id.*

10. For the purposes of this Note, the rule that the Tenth Circuit applied to determine whether the implied license had been revoked will be referred to as “the Revocation Rule,” or simply “the Rule.”

11. See *Kyllo*, 533 U.S. at 31 (“[W]ell into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass.”); see also *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (holding that a non-trespassory wiretapping was not a search).

of privacy.<sup>12</sup> But in 2012, the Court resurrected the trespass test in *United States v. Jones*, asserting that the *Katz* reasonable-expectation-of-privacy test “has been *added to*, not *substituted for*, the common-law trespassory test.”<sup>13</sup> Because two distinct tests now govern whether a Fourth Amendment violation has occurred, and courts may apply either or both, the trespass test’s resurrection has led to confusion and uncertainty. The resulting confusion is most evident when determining the government’s ability to conduct knock and talks and a citizen’s ability—or inability—to prevent them.

The Fourth Amendment expressly extends its protection against unreasonable searches and seizures to “persons, houses, papers, and effects.”<sup>14</sup> Supreme Court jurisprudence ensures that Fourth Amendment protections are strongest when the “house” is involved, because “when it comes to the Fourth Amendment, the home is first among equals.”<sup>15</sup> These protections extend to the “curtilage,” which is the “land immediately surrounding and associated with the home,” because the curtilage is “considered part of the home itself for Fourth Amendment purposes.”<sup>16</sup> Applying the reasonable-expectation-of-privacy test, the Supreme Court has explained that “[t]he protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.”<sup>17</sup> Applying the trespass-based analytical framework, the Supreme Court has determined that a search “undoubtedly occur[s]” when the government, without a warrant, obtains information “by physically intruding” within the curtilage of a house.<sup>18</sup> That is, a search

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12. *Katz v. United States*, 389 U.S. 347, 353 (1967) (overruling *Olmstead*, 277 U.S. 438). The “reasonable expectation of privacy,” or *Katz*, test was actually formulated by Justice Harlan in his concurrence. *See id.* at 361 (Harlan, J., concurring). Justice Harlan’s formulation was later adopted as the benchmark test for privacy expectations in *Smith v. Maryland*, 442 U.S. 735 (1979).

13. *United States v. Jones*, 565 U.S. 400, 409 (2012) (holding that tracking an automobile’s whereabouts using a physically mounted GPS tracker was a search within the meaning of the Fourth Amendment).

14. U.S. CONST. amend. IV.

15. *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (citation and internal quotation marks omitted).

16. *Oliver v. United States*, 466 U.S. 170, 180 (1984).

17. *California v. Ciraolo*, 476 U.S. 207, 212–13 (1986).

18. *Jardines*, 569 U.S. at 6 (applying the Fourth Amendment’s trespass-based analytical framework in determining whether a search has occurred).

occurs unless a homeowner has explicitly or implicitly sanctioned the government's physical intrusion into the constitutionally protected area.<sup>19</sup>

At English common law, a person needed the homeowner's express permission to enter a neighbor's property.<sup>20</sup> The more modern rule emanating from the Fourth Amendment, however, provides a license to enter another's property which "may be implied from the habits of the country."<sup>21</sup> An implicit license in the United States typically permits a visitor "to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave."<sup>22</sup> This implicit license to approach the front door extends to law enforcement officers, because courts consider an encounter with law enforcement to be no different than an encounter among private citizens.<sup>23</sup> Moreover, "when the police come on to private property to conduct an investigation or for some other legitimate purpose 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."<sup>24</sup> Regardless of whether the person knocking is a private citizen or a police officer, however, the homeowner has no obligation to open the door or speak to the person knocking.<sup>25</sup>

Recently, in *Florida v. Jardines*, the primary case on which the *Carloss* court relied, the Supreme Court recognized the constitutional validity of knock and talks.<sup>26</sup> There, two Drug Enforcement Administration (DEA) agents conducted a knock and talk after the Miami-Dade Police Department received a tip that someone was growing marijuana in Joelis Jardines's

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19. *See id.* Of course, there are other circumstances where warrantless searches may be permitted, like the emergency aid or exigent circumstances exceptions.

20. *Id.* at 8.

21. *Id.* (quoting *McKee v. Gratz*, 260 U.S. 127, 136 (1922)).

22. *Id.*

23. *See id.* (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011)); *United States v. Cruz-Mendez*, 467 F.3d 1260, 1264 (10th Cir. 2006) ("As commonly understood, a 'knock and talk' is a consensual encounter and therefore does not contravene the Fourth Amendment, even absent reasonable suspicion."); *Estate of Smith v. Marasco*, 318 F.3d 497, 519 (3d Cir. 2003) ("Officers are allowed to knock on a residence's door or otherwise approach the residence seeking to speak to the inhabitants just as any private citizen may.").

24. 1 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 2.3(f) (5th ed. 2016) (footnotes omitted).

25. *See King*, 563 U.S. at 469–70 ("[W]hether 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.").

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

home.<sup>27</sup> The officers approached Jardines's home with a drug-sniffing dog, which alerted the agents to the presence of contraband.<sup>28</sup> Based on the alert, the officers obtained a search warrant and subsequently found marijuana plants.<sup>29</sup> Jardines was arrested and charged with trafficking.<sup>30</sup>

The Supreme Court granted certiorari to answer whether the use of the drug-sniffing dog on Jardines's porch constituted a search within the meaning of the Fourth Amendment.<sup>31</sup> Asserting that the officers' conduct was constitutional under the reasonable-expectation-of-privacy test and relying on two similar cases, *United States v. Place*<sup>32</sup> and *Illinois v. Caballes*,<sup>33</sup> the State of Florida argued that the use of a drug-sniffing dog did not implicate any legitimate privacy interests.<sup>34</sup> In rejecting this argument, the Court limited its analysis solely to *Jones*'s trespass theory, asserting that "[w]hen 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'"<sup>35</sup> Maintaining there was "no doubt" that the officers entered the home's curtilage, resulting in an investigation within a constitutionally protected area, the Court asserted that the next question was "whether it was accomplished through an *unlicensed* physical intrusion."<sup>36</sup>

At oral argument, Florida contended Jardines had conceded in the lower courts that the officers had a right to be on his front porch.<sup>37</sup> The Supreme Court disagreed. Writing for the majority, Justice Scalia explained that using a drug dog was a "search" because the officers obtained information in a constitutionally protected area without the homeowner's explicit or implicit consent.<sup>38</sup> Justice Scalia characterized Jardines' alleged concession that the State had a right to be on his front porch as "misstat[ing] the record" and emphasized that Jardines had "conceded nothing more than the

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27. *Id.* at 3.

28. *Id.* at 4.

29. *Id.*

30. *Id.*

31. *Id.* at 5.

32. 462 U.S. 696, 698 (1983) (holding that a canine inspection of luggage in an airport did not violate the reasonable-expectation-of-privacy test).

33. 543 U.S. 405, 410 (2005) (holding that a canine inspection of an automobile during a lawful traffic stop did not violate the reasonable-expectation-of-privacy test).

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

35. *Id.* at 5 (quoting *United States v. Jones*, 565 U.S. 400, 406 n.3 (2012)).

36. *Id.* at 7 (emphasis added).

37. *Id.* at 7 n.1.

38. *Id.* at 11-12.

unsurprising proposition that the officers could have lawfully approached his home to knock on the front door in hopes of speaking with him.”<sup>39</sup> “Of course,” Justice Scalia wrote, “that is not what they did.”<sup>40</sup> Instead, the officers introduced “a trained police dog to explore the area around the home in hopes of discovering incriminating evidence.”<sup>41</sup> According to Justice Scalia, “[t]here is no customary invitation to do *that*.”<sup>42</sup>

An implied license to enter another’s property to knock on his or her door is not without limitation. Homeowners can prevent ordinary citizens and police officers alike from conducting a knock and talk by revoking the implied license. However, revocations are rare. Few citizens know that this implied license exists, and fewer still know what must be done to revoke it. Because the license arises from social custom and a “special form of consent by silence,” the homeowner bears the burden to demonstratively opt out of the habits of the country.<sup>43</sup> Generally, albeit not uniformly, courts hold that a homeowner may revoke the implied license by “clear demonstrations”<sup>44</sup> or “express orders,”<sup>45</sup> which are “obvious to the casual visitor”<sup>46</sup> and “unambiguous.”<sup>47</sup> As was the case in *Carloss*, “No Trespassing” signs are routine sources of litigation, as courts must attempt to determine whether the signs have revoked the implied license.<sup>48</sup>

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39. *Id.* at 7 n.1.

40. *Id.*

41. *Id.* at 9.

42. *Id.*

43. 1 DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 106 (2d ed. 2016) (noting that implied licenses are limited by a homeowner’s ability, “at low cost, to express . . . dissent from the custom” by posting a sign forbidding entrance to the property).

44. *E.g.*, *State v. Grice*, 767 S.E.2d 312, 319 (N.C. 2015) (noting that implied licenses “may be limited or rescinded by *clear demonstrations* by the homeowners and is already limited by our social customs”) (emphasis added).

45. *E.g.*, *Davis v. United States*, 327 F.2d 301, 303 (9th Cir. 1964) (noting that there is no rule against approaching a home to speak with the occupants “[a]bsent *express orders*”) (emphasis added).

46. *E.g.*, *State v. Christensen*, No. W2014-00931-CCA-R3-CD, 2015 WL 2330185, at \*8 (Tenn. Crim. App. May 14, 2015), *aff’d*, *State v. Christensen*, 517 S.W.3d 60 (Tenn. 2017) (noting that “revocation must be *obvious* to the casual visitor who wishes only to contact the residents of a property”) (emphasis added).

47. *E.g.*, *State v. Howard*, 315 P.3d 854, 860 (Idaho Ct. App. 2013) (emphasizing the homeowner did not revoke the implied license because the message to the public was not “unambiguous”).

48. *United States v. Carloss*, 818 F.3d 988, 994 (10th Cir. 2016).

## II. United States v. Carloss

### A. Facts

In *Carloss*, the United States prosecuted Ralph Carloss for drug and weapons offenses based on evidence obtained by two police officers as the result of a knock and talk.<sup>49</sup> A federal agent received tips that Carloss, a convicted felon, was selling methamphetamine and was in possession of a firearm.<sup>50</sup> To investigate, the federal agent and a local police investigator went to the home in which Carloss was staying to talk with him.<sup>51</sup> Although there was not a fence or any other enclosure around the house or yard, there were four “No Trespassing” signs on the property—three in the yard and one on the front door.<sup>52</sup> Despite the presence of these signs, the officers parked in the driveway, walked to the door, and knocked “for several minutes.”<sup>53</sup> Although the officers heard movement inside, no one answered the door.<sup>54</sup> A “short time later,” a woman emerged from the back door and met the two officers in the side yard.<sup>55</sup> While the officers were explaining why they were there, Carloss exited the house and joined the woman and the officers in the side yard.<sup>56</sup> After inquiring about who owned the home, the officers asked Carloss if they could search the house.<sup>57</sup> Carloss responded that he would have to go inside to get “the man of the house,”

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49. *Id.* at 990–91.

50. *Id.* at 990.

51. *Id.*

52. *Id.* All of the signs were professionally printed with either yellow or orange words on a black background. *Id.* One “No Trespassing” sign was placed on a three-foot-high wooden post adjacent to the driveway on the side farthest from the house. *Id.* There was another sign tacked to a tree in the side yard. *Id.* Both of these signs contained the words “Private Property No Trespassing.” *Id.* Additionally, there was a sign on a wooden pole in the front yard next to the driveway closest to the house, and a sign on the front door of the house. *Id.* Both of these signs contained the words “Posted Private Property Hunting, Fishing, Trapping or Trespassing for Any Purpose Is Strictly Forbidden Violators Will Be Prosecuted.” *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 990–91.

56. *Id.* at 991. The court noted that neither the woman nor Carloss pointed out the “No Trespassing” signs to the officers, nor did they ask the officers to leave the premises. *Id.*

57. *Id.*

Earnest Dry.<sup>58</sup> When the officers asked if they could accompany Carloss inside the home, he allegedly replied, “Sure.”<sup>59</sup>

Carloss and the officers entered the house and went into Carloss’s room, where the officers noticed drug paraphernalia and a white powder that appeared to be methamphetamine.<sup>60</sup> When Mr. Dry entered the room, the officers requested his permission to search the house.<sup>61</sup> After calling his attorney, Dry asked the officers to leave, and they complied with the request.<sup>62</sup> Relying on their observations of the drug paraphernalia and white powder, the officers obtained a search warrant, which led to the discovery of multiple methamphetamine labs, additional drug paraphernalia, and a loaded shotgun.<sup>63</sup> Based on this evidence, Carloss and Dry were prosecuted.<sup>64</sup> After the district court denied Carloss’s motion to suppress the evidence found in the house, Carloss conditionally pled guilty to conspiring to possess pseudoephedrine pending appeal of the district court’s denial of his motion to suppress.<sup>65</sup> Carloss was sentenced to forty-nine months in prison.<sup>66</sup>

### B. Issue

On appeal to the Tenth Circuit, Carloss contended that the search of his home was illegal because the underlying warrant was based on information the officers obtained while violating the Fourth Amendment.<sup>67</sup> According to Carloss, the violation occurred when the officers entered the curtilage of his home to conduct the knock and talk because the four “No Trespassing” signs had revoked the officers’ implied license to approach his home and knock on the door.<sup>68</sup> Additionally, Carloss argued that the officers exceeded the scope of their implied license by knocking at his door too long<sup>69</sup> and that his consent to the search was involuntary.<sup>70</sup> Thus, the Tenth Circuit was

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58. *Id.* Although Dry was identified as the owner, Dry’s mother was the actual owner. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 992.

68. *Id.* at 994.

69. *Id.* at 997–98.

70. *Id.* at 998.

faced with three issues: (1) whether the “No Trespassing” signs revoked the implied license required to conduct the knock and talk; (2) if the implied license had not been revoked, whether the officers exceeded the scope of the license; and (3) whether Carloss’s consent to the search was involuntary.<sup>71</sup>

### C. Majority Decision

In considering whether the four “No Trespassing” signs revoked the officers’ implied license, the Tenth Circuit confined its analysis to *Jones*’s resurrected trespass theory.<sup>72</sup> After expounding Tenth Circuit knock-and-talk jurisprudence, the court turned its focus to *Florida v. Jardines*,<sup>73</sup> emphasizing that the case did not alter prior law upholding knock and talks.<sup>74</sup> Basing its reasoning on the *Jardines* Court’s validation of knock and talks, the Tenth Circuit concluded that Carloss’s “No Trespassing” signs did not revoke the officers’ implied license.<sup>75</sup> In doing so, the court emphasized that a knock and talk is not a search within the meaning of the Fourth Amendment.<sup>76</sup>

The court then distinguished the case at bar from *Jardines*, asserting that *Jardines* did not actually involve a knock and talk because the “officers approached the front door of a home, not seeking a consensual knock-and-talk, but instead specifically to conduct a search from the porch.”<sup>77</sup> Unlike *Jardines*, there was “nothing in this record to suggest that the officers conducted, or intended to conduct, a search from the front porch when they went onto the front porch to knock on Carloss’s front door.”<sup>78</sup> Moreover, unlike *Jardines*, the officers did not “discover any incriminating evidence while they were on the front porch knocking.”<sup>79</sup>

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71. *See id.* at 997–98.

72. *Id.* at 992 n.2 (“Carloss expressly bases his argument solely on the trespass theory of Fourth Amendment protections and we, therefore, confine our analysis to that theory.”).

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

74. *Carloss*, 818 F.3d at 992.

75. *Id.* at 995.

76. *Id.* at 993 (quoting *Jardines*, 569 U.S. at 9 n.4) (“*Jardines* reiterated that a knock-and-talk itself is not a search for Fourth Amendment purposes: ‘[I]t is not a Fourth Amendment search to approach the home in order to speak with the occupant, because all are invited to do that. The mere purpose of discovering information in the course of engaging in that permitted conduct does not cause it to violate the Fourth Amendment.’”).

77. *Id.* at 992–93.

78. *Id.* at 993.

79. *Id.*

But the Tenth Circuit arrived at this conclusion only by finding that the implied license to access Carloss's curtilage and approach his home had not been revoked.<sup>80</sup> In rejecting Carloss's claim that the implied license had been revoked, the majority adopted a case-by-case rule (the "Revocation Rule") under which revocation "depends on the context in which a member of the public, or 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, or member of the public, under the circumstances."<sup>81</sup> Applying the Revocation Rule, the court focused on the physical placement of each of Carloss's signs. The court held that the three signs in the yard and along the driveway would not have conveyed to an objective officer that the license had been revoked, because they were located in "open fields," which are not constitutionally protected areas.<sup>82</sup> Additionally, the court held that the sign on the front door was "ambiguous" and therefore "did not clearly revoke the implied license."<sup>83</sup> Thus, the Tenth Circuit concluded that the officers did not violate the Fourth Amendment because the "objective officer" would not have understood that the implied license to conduct a knock and talk had been revoked.<sup>84</sup>

#### *D. Concurrence*

Although Chief Judge Timothy Tymkovich concurred with the majority, his analysis differed: "A Fourth Amendment physical-intrusion case poses a twofold question: (1) whether police intruded without license into a

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80. *Id.* at 997. Without finding the existence of an implied license and Carloss's lack of revocation, a search would have "undoubtedly occurred," because the officers would have been physically intruding into a constitutionally protected area in order to obtain information.

81. *Id.* at 994.

82. *Id.* at 995. Additionally, the court noted that it was Carloss's burden to establish what was included in the home's curtilage, and that Carloss did not expressly claim that these areas were part of the home's curtilage. *Id.*

83. *Id.* at 996.

84. *Id.* at 997. The Tenth Circuit also addressed Carloss's arguments that the officers exceeded the scope of their implied license by knocking at the door too long and that his consent was the product of the Fourth Amendment violation. *Id.* at 997-98. In response to his contention that the officers exceeded the scope of the implied license, the court declined "to place a specific time limit on how long a person can knock before exceeding the scope of this implied license." *Id.* at 998. In response to Carloss's contention that his consent was based off of a Fourth Amendment violation, the court held that the "district court's finding that Carloss voluntarily consented to the officers accompanying him into the house was not clearly erroneous," because "there was no such Fourth Amendment violation." *Id.* at 998-99.

constitutionally protected area, and (2) whether they obtained information via that intrusion.”<sup>85</sup> Because the homeowner bears the burden of revoking the license by showing that he has opted out of the country’s habits, Judge Tymkovich contended that the majority should have applied a different test:

[T]he court must deploy an objective test, asking whether a reasonable person would conclude that entry onto the curtilage—the front porch here—by police or others was *categorically* barred. In other words, we look to each case’s facts to determine whether the reasonable person would think the license had been revoked. And the question presented by this case is whether “No Trespassing” signs in the circumstances here communicates a categorical bar that is clear that no one would step on the front porch. In my view, this is a question of context: the time, place, manner, and circumstance of the encounter.<sup>86</sup>

Considering the context, Chief Judge Tymkovich agreed with the majority that Carlross failed to show that the implied license had been revoked, but emphasized that, in “a residential context, the intention of the homeowner who posts signs, without more, seems inadequate to revoke the license.”<sup>87</sup> Noting that it was not his view “that a ‘No Trespassing’ sign will *never* indicate the revocation of the implied license,”<sup>88</sup> Chief Judge Tymkovich offered examples of additional measures that would be sufficient to do so, suggesting that a “closed or locked gate,” a “fence,” or some “other physical obstacle,” in the “residential context” would likely be sufficient.<sup>89</sup> Here, because no additional measures clarified that the license had been revoked, the first prong was not satisfied, and therefore no Fourth Amendment violation occurred.<sup>90</sup>

#### *E. Dissent*

Judge Neil Gorsuch, now an Associate Justice of the United States Supreme Court, dissented. Judge Gorsuch noted that the government asserted two theories advocating that the officers’ conduct was constitutional, and that, despite the majority and concurrence rejecting both theories, the court chose to instead produce its own theories to resolve the

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85. *Id.* at 1001 (Tymkovich, J., concurring).

86. *Id.* at 999.

87. *Id.* at 1000.

88. *Id.*

89. *Id.*

90. *Id.* at 999–1000.

case.<sup>91</sup> The first argument advanced by the government and subsequently dismissed by the court was that police officers have “an irrevocable right to enter a home’s curtilage to conduct a knock and talk” because a knock and talk is “an investigative technique approved by the Supreme Court.”<sup>92</sup> Judge Gorsuch noted that under this theory, 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.”<sup>93</sup> Judge Gorsuch dismissed this argument, saying, “[n]ot one of the members of this court accepts it. In fact, neither of my colleagues’ opinions even dignifies it with discussion.”<sup>94</sup>

Next, Judge Gorsuch examined the government’s second argument, that “a homeowner may avoid a knock and talk *only* by hiding in the home and refusing to answer the door,” or “*maybe*, as the government seemed to concede at oral argument, by opening the door and commanding officers to leave.”<sup>95</sup> Noting that this argument was “no more persuasive than the last,” Judge Gorsuch asserted it was actually “no different from the last.”<sup>96</sup> Rejecting the government’s second argument, Judge Gorsuch asserted that a “homeowner who refuses to answer the door, or who opens it to say ‘go away,’ does so *after* the officers have already entered the home’s front porch and knocked on the door—everything the implied license permits the officers to do.”<sup>97</sup>

Judge Gorsuch then criticized the concurring opinion, arguing that it is “a pretty rare day when we pursue an argument for a party that the party has so avidly disowned.”<sup>98</sup> Additionally, he continued, the cases the concurrence cited were inapplicable because they applied only to “open fields.”<sup>99</sup> Moreover, Judge Gorsuch argued that the concurrence offered no

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91. *Id.* at 1004 (Gorsuch, J., dissenting).

92. *Id.*

93. *Id.*

94. *Id.* at 1007.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 1009 (asserting that not only did the government fail to present an argument similar to the concurrence’s theory, it expressly disavowed that theory by “telling us repeatedly that walls and fences (yes, even moats) cannot keep its agents from entering the curtilage to conduct a knock and talk”).

99. *Id.*

valid authority, resting “predominantly on certain intuitions about what ‘reasonable people’ think.”<sup>100</sup>

Turning his focus next to the majority opinion, Judge Gorsuch criticized the court’s decision to analyze the signs separately, which, in his opinion, led the court to reach the wrong conclusion.<sup>101</sup> The majority regarded the three signs in the yard incorrectly; it was in conflict with the authorities it relied on, yet “discusses none of them.”<sup>102</sup> Moreover, “the only cases it does cite stand simply for the proposition that the Fourth Amendment is inapplicable to open fields.”<sup>103</sup>

According to Judge Gorsuch, the majority also incorrectly interpreted the sign on the front door. This argument is primarily based on the conflict inherent in the court’s conclusion that the sign was “ambiguous” even though the sign’s express language forbid “TRESPASSING FOR ANY PURPOSE”—a notion that was “especially” true when considering that there was “no evidence in the record that any hunting, fishing, or trapping took place in the yard of this home in the middle of town along a paved street.”<sup>104</sup> Calling the outcome a “paradox,” Judge Gorsuch summarized the majority opinion, saying it stood for the proposition that “No Trespassing” signs revoke the license only when “they (1) are placed visibly on the curtilage itself and (2) don’t contain surplus language about hunting and trapping.”<sup>105</sup>

### III. Analysis

The Tenth Circuit’s holding in *United States v. Carloss* is problematic for two reasons. First, the court’s formulation of the Revocation Rule rests on weak authority, fails to consider the relevance of common law and statutory trespass into the curtilage of a home, and ignores considerable authority supporting a “No Trespassing” sign’s ability to revoke an implied license. Moreover, the holding may lead to a series of dangerous and unfavorable results.

Second, the Tenth Circuit improperly applied the Rule because it failed to properly consider the totality of the circumstances. The court erroneously dismissed the three signs in the yard based on their legal inability to prevent

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100. *Id.* at 1010.

101. *Id.* at 1012–13.

102. *Id.* at 1013.

103. *Id.*

104. *Id.* at 1013–14.

105. *Id.* at 1014.

trespass into “open fields,” despite the officers’ entry into the home’s curtilage, and then proceeded to dismiss the sign on the front door by determining that it was “ambiguous,” despite its express language prohibiting trespass “for any purpose.”

*A. Formulation of the Revocation Rule*

The Revocation Rule hangs its hat on weak authority, relying on two cases that have distinguishable facts and involve separate and distinct issues from *Carloss*. Both cases, *State v. Christensen*,<sup>106</sup> an unpublished Tennessee Court of Criminal Appeals decision from 2015, and *State v. Hiebert*,<sup>107</sup> an Idaho Supreme Court case from 2014, came from outside the court’s jurisdiction and are merely persuasive. The *Carloss* court’s reliance on these cases is troubling for several reasons.

For one, the court’s reliance on these cases is puzzling because neither *Christensen* nor *Hiebert* seem to persuade other jurisdictions. The Tenth Circuit is only one of three courts to cite to *Christensen* and one of three courts to cite to *Hiebert*. Moreover, in its search for authority, the Tenth Circuit limited its examination of case law to post-*Jardines* cases despite its explicit assertion that “*Jardines* did not change our prior law upholding knock-and-talks.”<sup>108</sup> Nevertheless, the court said, “*Carloss* has not cited, nor can we find, any post-*Jardines* authority holding that a resident can revoke the implied license to approach his home and knock on the front door simply by posting a ‘No Trespassing’ sign.”<sup>109</sup> It seems contradictory to say on one hand that *Jardines* did not change prior law while on the other rejecting any pre-*Jardines* authority on “No Trespassing” signs and knock and talks.

Further, both *Christensen* and *Hiebert* involve questions that are separate and distinct from those in *Carloss*. Unlike the court in *Carloss*, the courts in *both cases* limited their Fourth Amendment analysis to the reasonable-expectation-of-privacy test, which is independent of *Jones*’s trespass-based test.<sup>110</sup> The *Carloss* court relies on *Christensen*’s assertion that the “emerging rule appears to be that the implied invitation of the front door

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106. No. W2014-00931-CCA-R3-CD, 2015 WL 2330185, at \*8 (Tenn. Crim. App. May 14, 2015), *aff’d*, 517 S.W.3d 60 (Tenn. 2017).

107. 329 P.3d 1085, 1090 (Idaho Ct. App. 2014).

108. *Carloss*, 818 F.3d at 992.

109. *Id.* at 995.

110. *See id.* at 992 n.2 (“*Carloss* expressly bases his argument solely on the trespass theory of Fourth Amendment protections and we, therefore, confine our analysis to that theory.”).

can be revoked but that the revocation must be obvious to the casual visitor who wishes only to contact the residents of a property.”<sup>111</sup> But this assertion immediately follows an extensive consideration of case law supporting the proposition that the “vast majority” of cases consider “No Trespassing” signs when determining “whether a person has demonstrated a legitimate expectation of privacy.”<sup>112</sup> Notably, and unlike the Tenth Circuit, the *Christensen* court omitted any substantial consideration of *Jones* or its trespass theory.<sup>113</sup> In *Hiebert*, the court specifically addressed the defendant’s argument that officers had “violated his reasonable expectation of privacy by entering into the junk yard portion of his property.”<sup>114</sup> The *Hiebert* court also omitted any substantial consideration of *Jones* or the trespass theory, instead asserting that “there can be no reasonable expectation of privacy as to observations made” during use of an implied license.<sup>115</sup>

*Hiebert* and *Christensen* are also factually distinguishable from *Carloss*. For example, unlike *Carloss*, the defendant in *Hiebert* did not contest the police’s entry into his home or curtilage. Rather, *Hiebert* involved officers entering a junkyard which, in addition to being a residence, was open to the public for business purposes.<sup>116</sup> As the court noted, “the expectation of what an ordinary visitor (in many cases, a customer of the business) might reasonably do is expanded,” creating “an implied—if not explicit—invitation” to enter the junkyard.<sup>117</sup> Moreover, the single “No Trespassing” sign was not easily visible due to its “obscure placement” on a shed outside the curtilage, and the officers entered the property during business hours through a gate bearing an “open” sign on it.<sup>118</sup> Whatever message “No Trespassing” signs communicated under these circumstances is

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111. *Id.* at 994–95 (citing *Christensen*, 2015 WL 2330185, at \*8).

112. *Christensen*, 2015 WL 2330185, at \*7. The court cites thirteen cases, each of which considers “No Trespassing” signs in light of the reasonable-expectation-of-privacy test. *See id.*

113. The court does not cite *Jones*; admittedly, though, it refers to “the *Jardines* search test.” *See id.* at \*5, \*8 (citing *Florida v. Jardines*, 569 U.S. 1, 7–12 (2013)). But this reference was briefly discussed and subsequently dismissed after the court improperly characterized it as a test that “focuses more on trespass law than on expectation of privacy,” instead of recognizing it as a separate and distinct test. *See id.*

114. *State v. Hiebert*, 329 P.3d 1085, 1088 (Idaho Ct. App. 2014).

115. *Id.* at 1091.

116. *Id.* at 1089.

117. *Id.* at 1089–90 (emphasis added).

118. *Id.* at 1087–88, 1090–91, 1091 n.4.

substantially different than the message communicated in the present case, especially when applying a different Fourth Amendment privacy test.

In addition to these problems, the Tenth Circuit also erroneously denied the relevance of common law and statutory trespass to entry into the curtilage, instead limiting its focus to entry into open fields. According to the court, the signs leading up to Carloss's home would not have conveyed to an objective officer or member of the public that he or she could not conduct a knock and talk, because "No Trespassing" signs "will not prevent an officer from entering privately owned 'open fields.'"<sup>119</sup> The court noted that police may enter open fields even if the entry would be a trespass at common law, because "in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment."<sup>120</sup> The court also noted that police may enter open fields even if the entry might have violated Oklahoma statutory law, citing a case holding that "officers did not violate the Fourth Amendment when they made observations from a defendant's open field, even though the officers, in entering the open field, violated Okla. Stat. tit. 21, § 1835."<sup>121</sup>

Although the court was correct in its assertion that common law and statutory trespass do not prevent officers from entering open fields, it incorrectly extended this premise to the curtilage. Trespass has "little or no relevance to the applicability of the Fourth Amendment"—but only "*in the case of open fields*."<sup>122</sup> Contrary to the Tenth Circuit's holding, both common law and statutory trespass *are* relevant when officers enter the curtilage, because unlike an open field, which is not a constitutionally protected area, the front porch is afforded the most stringent Fourth Amendment protection.<sup>123</sup>

The court also ignored a considerable amount of authority supporting a "No Trespassing" sign's ability to revoke an implied license. While the Fourth Amendment does not "incorporate" state statutes,<sup>124</sup> a great deal of authority suggests that the common law at the time of the founding did not

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119. *Carloss*, 818 F.3d at 995.

120. *Id.* at 996 (quoting *Oliver v. United States*, 466 U.S. 170, 183–84).

121. *Id.* (citing *United States v. Hatfield*, 333 F.3d 1189, 1198–99 (10th Cir. 2003)).

122. *See id.* (emphasis added) (citation omitted).

123. *See Florida v. Jardines*, 569 U.S. 1, 7 (2013) (noting that the front porch of a home is "the classic exemplar" of curtilage).

124. *See Virginia v. Moore*, 553 U.S. 164, 169 (2008) ("No early case or commentary, to our knowledge, suggested the Amendment was intended to incorporate subsequently enacted statutes.").

require a homeowner to revoke a license in any particular way. Rather, “express words . . . [or] an act . . . indicating an intention to revoke” were sufficient.<sup>125</sup> Moreover, the Supreme Court has recognized that a homeowner may prevent visitors from entering his or her property to knock at the front door “by notice or order.”<sup>126</sup> In determining what kind of “notice” is sufficient for revocation of the license, the *Breard* Court cited “trespass after warning” statutes, seemingly recognizing a “No Trespassing” sign’s ability to prevent unwanted guests from approaching the home.<sup>127</sup> Additionally, most state legislatures have enacted laws providing that entry after notice—specifically “No Trespassing” signs—will support criminal trespass actions.<sup>128</sup> It is counterintuitive that police officers are permitted to conduct a knock and talk because “they do no more than any private citizen might do,”<sup>129</sup> yet a private citizen can be held *criminally* liable for the same action. This notion holds especially true when considering that a single “No Trespassing” sign does the trick when used by the government.<sup>130</sup>

The court’s Rule also leads to a series of dangerous and unfavorable results. First, the practical effect of the Tenth Circuit’s complicated context-based rule is the creation of a de facto permanent easement for police officers to approach the front door of a home to “consensually” talk with the homeowner—because most homeowners do not know an implied license exists, and fewer know how to revoke it.

The potential for a de facto permanent easement is illustrated by the arguments advanced by the government in *Carloss*. In its opening brief, the government suggested that the police have an irrevocable right to enter a

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125. 3 HERBERT THORNDIKE TIFFANY, REAL PROPERTY § 836 (Basil Jones, ed., 3d ed. 1939).

126. *Breard v. Alexandria*, 341 U.S. 622, 626 (1951) (emphasis added). Notably, *Jardines* relies on *Breard*. See *Jardines*, 569 U.S. at 8 (citing *Breard*, 341 U.S. at 626).

127. See *Breard*, 341 U.S. at 626 n.2 (citing *Martin v. City of Struthers*, 319 U.S. 141, 147 n.10 (1943)).

128. See, e.g., 21 OKLA. STAT. § 1835 (2011) (endorsing the use of “NO TRESPASSING” or “similar signs”); 3 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 21.2 (2d ed. 2003) (citing and collecting state statutes).

129. See *Kentucky v. King*, 563 U.S. 452, 469 (2011).

130. See *State v. Christensen*, No. W2014-00931-CCA-R3-CD, 2015 WL 2330185, at \*12 (Tenn. Crim. App. May 14, 2015), *aff’d*, 517 S.W.3d 60 (Tenn. 2017) (Williams, J., concurring in part and dissenting in part) (“The federal [or state] government can put up a single “No Trespassing” sign on a fence at a nuclear facility or an abandoned munitions facility, and a trespass there upon is a trespass . . . . If governments can use a single sign so effectively against citizens, why then can not citizens use a sign equally against governments?”).

home's curtilage to conduct a knock and talk.<sup>131</sup> The government asserted an additional theory, arguing that even if a license existed, a homeowner may only avoid a knock and talk by refusing to open the door or by opening the door and requesting that the officers leave.<sup>132</sup> But as Judge Gorsuch pointed out, a homeowner who refuses to open the door or asks the officers to leave “does so *after* the officers have already entered the home's front porch and knocked on the door—everything the implied license permits the officers to do.”<sup>133</sup> The government's argument implies the existence of a de facto permanent easement because, following the government's logic, a homeowner cannot revoke the license. Rather, the homeowner may merely limit it by refusing to answer the door or telling the officers to go away—but only after the officers have used the license to enter the curtilage.

Second, the Revocation Rule also creates an unworkable precedent for both police officers and homeowners. The Rule requires a court to make fact-specific, case-by-case determinations, leading to the inability of both police and citizens to know *before* an encounter whether an implied license has been revoked. This area necessitates clear rules for police to follow in order to determine whether their actions will violate the Constitution.<sup>134</sup> Under the court's case-by-case approach, police must conjecture as to the legal conclusion that a reviewing court may make before conducting a knock and talk. Specifically, police must decide whether a homeowner has taken sufficient measures to revoke the license—determinations that remain uncertain and inconsistent in courts across America—such as whether the homeowner erected a high enough fence or posted a sufficient number of “No Trespassing” signs.<sup>135</sup> As the Supreme Court has said, whether the

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131. See Brief of Plaintiff-Appellee at 12–15, *United States v. Carloss*, 818 F.3d 988 (10th Cir. 2016) (No. 13-7082) (failing to address any available method of revocation and applying the reasonable-expectation-of-privacy test).

132. *Id.* at 17-18; see *Carloss*, 818 F.3d at 1007 (Gorsuch, J., dissenting) (noting that the government “seemed to concede at oral argument” that a homeowner may be able to avoid a knock and talk by opening the door and requesting that the officers leave).

133. *Carloss*, 818 F.3d at 1007 (Gorsuch, J., dissenting).

134. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (“Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made.”).

135. *Oliver v. United States*, 466 U.S. 170, 181 (1984) (citing *New York v. Belton*, 453 U.S. 454, 458 (1981)). The *Oliver* Court asserted that case-by-case approaches to determine Fourth Amendment violations are unfavorable, because “police officers would have to guess before every search whether landowners had erected fences sufficiently high, posted a

officer's actions would be consistent with the Fourth Amendment "would turn on '[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions.'" <sup>136</sup> Thus, the Rule creates an unworkable precedent for police officers, because it makes it difficult for officers to discern the scope of their authority, creating "a danger that constitutional rights will be arbitrarily and inequitably enforced." <sup>137</sup>

Similarly, homeowners deserve to know whether the measures they have taken sufficiently revoke the implied license. <sup>138</sup> The Rule's case-by-case approach provides little of the direction or notice homeowners need in order to know whether the implied license has been revoked. If four standard, store-bought "No Trespassing" signs <sup>139</sup> are insufficient to revoke the implied license, what must a homeowner do to actually revoke the license? Judge Gorsuch snidely suggests the following sign:

THE IMPLIED LICENSE DISCUSSED BY THE UNITED STATES SUPREME COURT IN *BREARD v. ALEXANDRIA*, 341 U.S. 622 (1951) AND *FLORIDA v. JARDINES*, 133 S. Ct. 1409, 185 L.Ed.2d 495 (2013) IS HEREBY REVOKED. <sup>140</sup>

Although this sign would (hopefully) suffice, the establishment of such a high standard remains problematic. The average citizen—and arguably even the average law professor who does not specialize in the Fourth Amendment—does not have the knowledge necessary to meet this standard and revoke the license. This high standard led Judge Gorsuch to wonder whether the Rule would "do no more than invite a new cottage industry, one spitting out lawn signs with long and lawyerly (and no doubt less intuitive and commonsensical) messages instead of the tried and true 'No Trespassing.'" <sup>141</sup>

Unsurprisingly, the niche-industry Judge Gorsuch envisioned has come to fruition. Two law professors now sell "LAWn Signs," which mirror

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sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy." *Id.*

136. *Id.* (alteration in original) (quoting *Belton*, 453 U.S. at 458).

137. *See id.* at 181–82 (citation omitted).

138. *United States v. Holmes*, 143 F. Supp. 3d 1252, 1269 (M.D. Fla. 2015).

139. Again, three signs were in the yard lining the driveway leading up to the house where any visitor would see them, and one was in the middle of the front door, expressly stating "Trespassing for Any Purpose Is Strictly Forbidden." *United States v. Carloss*, 818 F.3d 988, 990 (10th Cir. 2016).

140. *Id.* at 1012.

141. *Id.*

Judge Gorsuch's suggestion and explicitly revoke the implied license.<sup>142</sup> The professors behind the signs collaboratively authored a law review article to raise awareness of the implied license and teach the average citizen how to revoke it.<sup>143</sup> The professor's "LAWn Signs" serve as further evidence that the Tenth Circuit's Rule created an unworkable precedent for homeowners who do not know whether the implied license has been revoked.

Finally, the Revocation Rule threatens to further diminish the Fourth Amendment protections afforded to the home and its curtilage. When combined with other exceptions to the Fourth Amendment's warrant requirement,<sup>144</sup> the knock and talk becomes a compelling investigative tool for police. The technique, however, has the potential to be abused, and therefore has the potential to substantially limit Fourth Amendment protections bestowed to the home. For example, because it requires no level of suspicion whatsoever, the knock and talk provides a mechanism for police to circumvent arrest and search warrant requirements.<sup>145</sup> Most often, police use knock and talks when they suspect criminal activity within a home but lack probable cause or reasonable suspicion.<sup>146</sup> As the former Chief Justice of the Arkansas Supreme Court said, "[A] knock and talk is used to obtain consent by none too subtle intimidation, which further illustrates that it is not simply being used to ask questions at the door as anyone might do."<sup>147</sup> And, as Judge Gorsuch noted, the potential for abuse is large when no level of suspicion is required: "Because everything happens with the homeowner's consent, the theory goes, a warrant isn't

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142. See FOURTH AMENDMENT SECURITY, <https://fourthamendmentsecurity.com/> (last visited Feb. 14, 2017). In addition to yard signs, the website sells other merchandise attempting to protect Fourth Amendment rights, including bumper stickers, luggage tags, and t-shirts. *Id.*

143. See Andrew Guthrie Ferguson & Stephen E. Henderson, *Lawn Signs: A Fourth Amendment for Constitutional Curmudgeons*, 13 OHIO ST. J. CRIM. L. 487, 494 (2016).

144. For example, exigent circumstances, consent, the "plain view" doctrine, and searches incident to arrest.

145. See Craig M. Bradley, "Knock and Talk" and the Fourth Amendment, 84 IND. L.J. 1099, 1104 (2009) ("Police use 'knock and talk[s]' to gain access to a home without a search warrant by getting the occupant to consent to entry and search, to arrest without a warrant, to gather further evidence of a suspected crime, or to dispel such suspicion.").

146. See *id.* (noting that a knock and talk is "a technique employed with calculation to the homes of people suspected of crimes").

147. Jim Hannah, *Forgotten Law and Judicial Duty*, 70 ALB. L. REV. 829, 837 (2007); see *Kentucky v. King*, 563 U.S. 452, 469 (2011) (justifying knock and talks because "[w]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do").

needed. . . . But in the constant competition between constable and quarry, officers sometimes use knock and talks in ways that test the boundaries of the consent on which they depend.”<sup>148</sup> Thus, knock and talks carry great potential to erode Fourth Amendment protections of the home, because homeowners do not know how to revoke the license and because the police continue to test the boundaries of consent—often without limitation.

### *B. Application of the Revocation Rule*

In its application of the Revocation Rule, the Tenth Circuit failed to sufficiently consider the totality of the circumstances. Rejecting both the government’s and Carloss’s arguments, the court advanced its own legal theory—a theory “the district court never passed upon and the government never presented.”<sup>149</sup> In doing so, the court ignored the fact that all of the elements necessary to establish a “search” were present. It was undisputed, and the government conceded, that the officers physically entered the home’s curtilage when they stepped on Carloss’s front porch, that the officers entered the curtilage to obtain information, and that the officers acted without a warrant, exigent circumstances, or the homeowner’s express consent.<sup>150</sup> Thus, the entirety of the case turned on the existence of the implied license, which in turn depended on whether Carloss sufficiently revoked his implicit consent. Without the license, the government’s physical intrusion would have amounted to a “search” within the meaning of the Fourth Amendment.<sup>151</sup> Analyzing the three signs in the yard separately from the sign on the front door, the court failed to sufficiently consider the totality of the circumstances, concluding that the signs would not have conveyed to an objective officer that the license had been revoked.<sup>152</sup> To the contrary, a proper consideration of the totality of the circumstances is more consistent with revocation.

In applying its context-based Rule, the majority conveniently compartmentalized the signs for the purpose of its analysis. The court

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148. *United States v. Carloss*, 818 F.3d 988, 1003 (10th Cir. 2016) (Gorsuch, J., dissenting).

149. *Id.* at 1013 (arguing that the majority’s theory is not “so obviously correct” that “we might confidently dispense with the adversarial process and adopt it without bothering to hear from the parties or district court”).

150. *See* Brief of Plaintiff-Appellee, *supra* note 131, at \*17.

151. *See United States v. Jones*, 565 U.S. 400, 404–05 (2012) (“The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.”).

152. *United States v. Carloss*, 818 F.3d 988, 990 (10th Cir. 2016).

considered the three signs aligning Carloss's driveway separately from the sign placed on Carloss's front door. The majority erroneously dismissed the first three "No Trespassing" signs, asserting the signs "would not have conveyed to an objective officer, or member of the public," that the license had been revoked.<sup>153</sup> The court's dismissal of these signs was improper, because it based its reasoning on the signs' location—outside the curtilage—maintaining that "No Trespassing" signs "will not prevent an officer from entering privately owned 'open fields.'"<sup>154</sup> The cases the majority cites to support this proposition, *Rieck v. Jensen*<sup>155</sup> and *Oliver v. United States*,<sup>156</sup> hold that the Fourth Amendment's protections do not extend to open fields, but they have no bearing on intrusions into the curtilage. Indeed, the cases do not address whether "No Trespassing" signs—although placed in open fields—can adequately communicate to an objective officer or member of the public that entry *into the curtilage* is prohibited.<sup>157</sup>

Next, the majority addressed the sign on the front door of the house.<sup>158</sup> Again, the court found this "No Trespassing" sign insufficient to revoke the implied license, reasoning that the sign was "ambiguous" because it prohibited activities that ordinarily do not take place within the curtilage.<sup>159</sup> Asserting that the sign "could have simply been reiterating that such recreational activities would not be allowed on the property generally,"<sup>160</sup> the court maintained that the message did not "clearly and unambiguously tell the mail carrier, pizza deliverer, or police officer that they cannot knock on the front door seeking a consensual conversation with those who live there."<sup>161</sup>

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153. *Id.* at 995.

154. *Id.* (citations omitted).

155. 651 F.3d 1188, 1189, 1191–94 (10th Cir. 2011).

156. 466 U.S. 170, 182–83 (1984).

157. In *Rieck*, the Tenth Circuit held that no Fourth Amendment violation had occurred when a deputy sheriff entered private property by opening a closed gate with a "No Trespassing" sign. 651 F.3d at 1189. But unlike the case at hand, the *Rieck* court was confronted with an officer's entry into an *open field*—not curtilage. *Id.* at 1192. Similarly, *Oliver* was not concerned with a constitutionally protected area, but merely stands for the proposition that it is "not generally true that fences or 'No Trespassing' signs effectively bar the public from viewing *open fields* in rural areas." 466 U.S. at 179 (emphasis added).

158. *Carloss*, 818 F.3d at 990. Specifically, the sign stated, "Posted Private Property Hunting, Fishing, Trapping or Trespassing for Any Purpose Is Strictly Forbidden Violators Will Be Prosecuted." *Id.*

159. *Id.* at 996.

160. *Id.* at 996–97.

161. *Id.* at 997.

The majority's determination that the sign was ambiguous is unwarranted for two reasons. First, law enforcement officials are distinguishable from mail carriers and pizza deliverers, because, unlike police officers, most mail carriers and other delivery services do not need to make use of an implied license. Instead, a homeowner expressly invites them onto the property by ordering a package or a pizza. It would have been more appropriate for the Tenth Circuit to characterize police officers as the Ninth Circuit did in *Davis v. United States*, where the court analogized police officers to pollsters or door-to-door salesmen.<sup>162</sup> Unlike mailmen or pizza deliverers, pollsters, salesmen, and police officers are virtually never expressly invited guests.

Moreover, the court cited no authority supporting its notion that revocation for one is revocation for all. A homeowner should have the ability to revoke the implied license, prohibiting entry by all unless expressly invited.<sup>163</sup> Such a revocation would only affect certain persons—those who need the implied license to enter the property—because a mailman or pizza deliverer has no need for an implied license when a homeowner has expressly invited them onto the property.

The second problem with the majority's application is that the determination that the sign was "ambiguous" directly conflicted with both the express language of and the circumstances surrounding the sign. The court maintained that the sign, on its face, did not appear to be directed at people desiring to speak with the homeowner, because the sign "referenced activities that ordinarily do not take place within a home or its curtilage—hunting, fishing, and trapping."<sup>164</sup> But these activities do not ordinarily take

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162. See 327 F.2d 301, 303 (9th Cir. 1964), *overruled by* *United States v. Perea-Rey*, 680 F.3d 1179 (9th Cir. 2012). As one court put it, "*Davis* is the seminal case announcing the rationale underlying the knock and talk doctrine." *United States v. Holmes*, 143 F. Supp. 3d 1252, 1265 n.18 (M.D. Fla. 2015); see also *Breard v. Alexandria*, 341 U.S. 622, 626 (1951) (noting that the implied license justifies ingress to the home by "solicitors, hawkers[,] and peddlers"). The same logic applies to the government's characterization, which likened police officers to "postal carriers, FedEx couriers, flower delivery persons, [and] the paperboy." See Brief of Plaintiff-Appellee, *supra* note 131, at \*19.

163. See *FOURTH AMENDMENT SECURITY*, *supra* note 142 (offering a lawn sign revoking the implied license for certain groups of people, but not others: "I hereby REVOKE ALL IMPLIED LICENSES to enter or approach my home. Girl Scouts, Delivery, and Friends: Welcome! For-Profit Solicitors: Stay Out! Law Enforcement: Stay Out!").

164. *Carloss*, 818 F.3d at 996–97.

place within the “middle” of town, either.<sup>165</sup> Moreover, the court’s conclusion is enigmatic in that it suggests that additional language (regarding hunting fishing, and trapping) detracts from a sign’s principal warning—“Trespassing for Any Purpose Is Strictly Forbidden.”<sup>166</sup>

A proper consideration of the totality of the circumstances should have indicated revocation—especially considering the number of the signs,<sup>167</sup> the fact the door knocker was replaced with a sign, and the express language on the sign within the curtilage. Moreover, the court failed to offer any evidence of the habits of the country. The court maintained that, taken together, all four signs “would not have conveyed to an objective officer that he could not go to the front door and knock.”<sup>168</sup> But despite its assertion that the license to conduct a knock and talk is “implied from the habits of the country,”<sup>169</sup> the majority failed to offer any evidence whatsoever supporting its conclusory assertions regarding what an objective officer or member of the public would have understood. Nor did the concurrence offer any evidence to support what Judge Gorsuch calls its “intuition about social customs.”<sup>170</sup> According to Judge Gorsuch, the “opposite intuition seems no less and maybe a good deal more defensible.”<sup>171</sup>

The opposite intuition is indeed more defensible, especially in light of the Supreme Court’s use of the “knocker” as a justification for knock and talks. “In accordance [with] the habits of the country, the Supreme Court has recognized that ‘the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers[,] and peddlers of all kinds.’”<sup>172</sup> But in *Carloss*, not only was the knocker absent, it was replaced with a sign prohibiting trespassing “for Any

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165. *Id.* at 990. Notably, there was no evidence in the record that any hunting, fishing, or trapping took place “in the yard of this home in the middle of town along a paved street.” *Id.* at 1014 (Gorsuch, J., dissenting).

166. *Id.* at 996–97.

167. Judge Gorsuch makes the argument that a large number of “No Trespassing” signs, “collectively and strategically placed,” should have the same effect as other additional measures, such as a fence. *Id.* at 1011 (Gorsuch, J., dissenting).

168. *Id.* at 995.

169. *Id.* at 994.

170. *Id.* at 1011 (Gorsuch, J., dissenting).

171. *Id.*

172. *United States v. Jones*, No. 4:13CR00011-003, 2013 WL 4678229, at \*6 (W.D. Va. Aug. 30, 2013) (alteration in original) (internal citation omitted) (citing *Breard v. Alexandria*, 341 U.S. 622, 626 (1951)).

*Purpose.*<sup>173</sup> Therefore, the totality of the circumstances warranted a different conclusion. To enter the home's front porch, a visitor would have to disregard four separate, explicit warnings that his or her presence was unequivocally unwelcome.

#### *IV. Conclusion*

The Tenth Circuit's holding in *Carloss* is problematic due to the court's formulation and application of the Revocation Rule. The Rule is based on weak authority, relying on dissimilar cases that applied the reasonable-expectation-of-privacy test rather than *Jones*'s trespass test. It also fails to consider the relevance of common law and statutory trespass into the curtilage, and it ignores a considerable amount of authority supporting a "No Trespassing" sign's ability to revoke an implied license. Finally, the Rule essentially creates a de facto permanent easement and sets an unworkable precedent for both police officers and homeowners.

In addition to these problems with the formulation of the Rule, the Tenth Circuit improperly applied it by failing to consider the totality of the circumstances. The court dismissed the signs in the yard by mistakenly relying on case law supporting the general rule that "No Trespassing" signs do not prevent trespass into open fields. The court dismissed the sign on the front door by finding it "ambiguous," despite its express language prohibiting trespass "for any purpose." Contrary to the court's holding, a proper consideration of the totality of the circumstances in *Carloss* indicates revocation of the implied license. In neglecting to appropriately formulate or apply the Revocation Rule, the Tenth Circuit set a dangerous precedent—escalating the dangers of knock and talks and eroding the Fourth Amendment privacy protections afforded to the home and its curtilage.

*Skyler K. Sikes*

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173. *Carloss*, 818 F.3d at 990 (emphasis added).