

Oklahoma Law Review

Volume 70 | Number 2

2018

***United States v. Carloss*: Should the Police Act like Good Neighbors?**

Cole McLanahan

Follow this and additional works at: <https://digitalcommons.law.ou.edu/olr>



Part of the [Constitutional Law Commons](#), [Criminal Procedure Commons](#), [Fourth Amendment Commons](#), and the [Privacy Law Commons](#)

Recommended Citation

Cole McLanahan, *United States v. Carloss: Should the Police Act like Good Neighbors?*, 70 OKLA. L. REV. 519 (2018),
<https://digitalcommons.law.ou.edu/olr/vol70/iss2/6>

This Note is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

United States v. Carloss: Should the Police Act like Good Neighbors?

I. Introduction

It is almost universally agreed that, in a functioning and cohesive society, maintaining positive and healthy relationships with one's neighbors is paramount.¹ But what does "being a good neighbor" actually mean? As most would understand it, neighborly behavior could include greeting and waving, having the occasional chat, maintaining the home's exterior, and keeping noises and disturbances to a minimum and confined to particular times. While these actions are certainly "neighborly," maybe the most important way to maintain good relations with one's neighbor is by respecting his or her privacy and property. Indeed, as Robert Frost once quipped, "Good fences make good neighbors."² But, what happens when you need to speak to your neighbor? Should you be allowed to approach their home to knock and speak with them? If your neighbor doesn't answer the door immediately, how long can you wait for an answer before leaving? While the answers to these questions have day-to-day societal implications, they likewise have significant legal consequences, particularly in the law enforcement context. The answers to these questions set the constitutional boundaries for proper police procedure—limits which, at times, may conflict with the necessary investigatory powers granted to law enforcement in order to protect and serve society.

The Tenth Circuit grappled with these issues and questions in its recent decision in *United States v. Carloss*.³ In the case, the court was asked to determine whether a defendant's Fourth Amendment rights were violated as a result of a police "knock and talk" encounter at his residence.⁴

1. For example, the Emily Post Institute, founded by the eponymous writer famous for her articles and books on etiquette, devotes a section of its website to neighborly manners. See *Living with Neighbors*, EMILY POST INST. (June 4, 2017, 10:04 PM), <http://emilypost.com/advice-type/living-with-neighbors/>.

2. Robert Frost, *Mending Wall*, in THE POETRY OF ROBERT FROST: THE COLLECTED POEMS, COMPLETE AND UNABRIDGED 33, 33 (Edward Connery Lathem ed., 1979). Ironically, users of this oft-quoted line may well be distorting the deeper meaning of Frost's poem. (The author of this Note recognizes that he is now guilty of this very thing as well). But, discussing the true meaning of the twentieth-century poem, regardless of the elegance of Frost's words, is not the crux of this Note and seems best saved for another time and place.

3. 818 F.3d 988 (10th Cir. 2016).

4. *Id.* at 990. A "knock and talk," discussed in greater detail below, is essentially "a procedure used by law enforcement officers, under which they approach the door of a residence seeking to speak to the inhabitants, typically to obtain more information regarding

Specifically, the court addressed: (1) whether the posted “No Trespassing” signs on the residential property where the defendant was living revoked the implied license to approach the home and knock on the front door; and (2) whether law enforcement agents lingered too long on the front porch of the residence, thereby exceeding the implied license to come briefly onto the “curtilage”⁵ of the home.⁶

The Tenth Circuit decided the first issue in *Carloss* using a fairly novel approach, but, in doing so, effectively muddied existing case law and failed to properly apply its own rule. And, when faced with the novel legal question embodied in the second issue, the court failed to create an ascertainable framework for addressing the issue in future cases. Thus, this Note will cover: in Part II, a brief summary of *Carloss*; in Part III, the state of the law regarding the pertinent legal issues prior to *Carloss*; in Part IV, the relevant analysis and holdings of the Tenth Circuit; in Part V, a discussion of the Tenth Circuit’s *Carloss* analysis, potential problems with its ruling, and suggested solutions for the issues raised in *Carloss* moving forward; and in Part VI, a brief conclusion.

II. Summary of *United States v. Carloss*

A. Facts and Procedural History

In *Carloss*, an agent for the Bureau of Alcohol, Tobacco, and Firearms (ATF) received several tips that Ralph Carloss, a convicted felon, was unlawfully in possession of a firearm and was selling methamphetamine out

a criminal investigation or to obtain consent to search where probable cause is lacking.” Fern L. Kletter, Annotation, *Construction and Application of Rule Permitting Knock and Talk Visits Under Fourth Amendment and State Constitutions*, 15 A.L.R. 6th 515 (2006).

5. Justice Scalia defined “curtilage” as “the area ‘immediately surrounding and associated with the home.’” *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (quoting *Oliver v. United States*, 466 U.S. 170 (1984)). In *Oliver*, Justice Powell explained that the concept of the “curtilage” has its roots in common law and warrants the same “Fourth Amendment protections that attach to the home.” 466 U.S. at 180. Interestingly, another court noted that the early definition of “curtilage” included “any building or structure within a bowshot of the manor house” but that the modern view on curtilage is not one of “proximity” but one of “intimacy, personal autonomy, and privacy” that are “associated with the home.” *United States v. Rogers*, No. CRIM.03-10313-RGS, 2005 WL 478001, at *6 (D. Mass. Mar. 1, 2005).

6. *Carloss*, 818 F.3d at 990. The Tenth Circuit additionally addressed whether the district court erred in finding that Carloss consented to the police officers entering the home, ultimately concluding that the district court did not clearly err in determining that Carloss consented to the officers entering his home. *Id.* at 998. However, because this issue is not the focus of this Note, it will not be discussed further.

of a home Carloss shared with another person.⁷ Based on these tips, the ATF agent, accompanied by an investigator from the local police department, traveled to Carloss's residence one afternoon to investigate.⁸ In the front and side yards and on the front door of the residence, four "No Trespassing" signs were posted.⁹ Specifically, there was a "No Trespassing" sign "on an approximately three-foot-high wooden post located beside the driveway, on the side farthest from the house," another "tacked to a tree in the side yard," a third "on a wooden pole in the front yard along the side of the driveway closest to the house," and a fourth "on the front door of the house."¹⁰ Although the officers parked in the driveway and walked to the front door, the officers testified that they failed to notice any of the signs on the day in question.¹¹ The district court noted, however, that the signs were indeed present but that no fence or other means of enclosure of any sort surrounded the home.¹²

Approaching the home to speak with Carloss, the officers knocked on the door for "several minutes," but no one answered.¹³ The officers did, however, testify to hearing movement inside the house.¹⁴ "A short time later," Heather Wilson, an occupant of the house during the police visit, exited the rear of the house and began speaking with the officers in the home's side yard.¹⁵ At this point, Carloss also exited via the back door to speak with the officers in the side yard; at no point, however, did Wilson or Carloss refer to the "No Trespassing" signs, nor did they ask the officers to leave.¹⁶ When the officers requested to search the home, Carloss informed them that he would have to ask the owner, identified as Earnest Dry, the home's other resident.¹⁷ As Carloss began to enter the house to discuss the situation with Dry, the officers "asked if they could go in with Carloss," to which Carloss replied "sure."¹⁸ Carloss and the officers then entered the back door and crossed a "mud" or storage room before entering Carloss's room; in Carloss's room, officers identified "drug paraphernalia and a white

7. *Id.* at 990-91.

8. *Id.* at 990.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 990-91.

16. *Id.* at 991.

17. *Id.*

18. *Id.*

powder residue that appeared to be methamphetamine.”¹⁹ Dry and a third person, Katy Homberger, entered Carloss’s room.²⁰ Dry then phoned his attorney; when informed that the officers did not have a search warrant, Dry told the officers that they did not have permission to search the house and asked them to leave.²¹

The officers then left the home and subsequently applied for—and were granted—a search warrant based on the evidence seen in Carloss’s room.²² Upon returning with the warrant, the officers discovered multiple methamphetamine labs, lab components, a loaded shotgun, two blasting caps, ammunition, and other drug paraphernalia.²³ After unsuccessfully moving to suppress the evidence discovered during the search, Carloss entered a conditional guilty plea to the charge of conspiring to possess pseudoephedrine, reserving the right to appeal the denial of his motion to suppress to the Tenth Circuit.²⁴

B. Issues and Holdings

Pertinent to this Note, the Tenth Circuit identified two issues raised by Carloss on appeal.²⁵ First, Carloss argued that the presence of the “No Trespassing” signs on the property revoked law enforcement’s customary implied license to approach the home to conduct a knock and talk.²⁶ Second, Carloss argued that, even if the implied license was not revoked by the “No Trespassing” signs, the officers nonetheless exceeded the implied license by remaining on the front porch for too long.²⁷

On the first issue, the Tenth Circuit ruled that “the officers did not conduct a search when they went onto the front porch to knock on Carloss’s front door,” because the officers enjoyed an implied license “to go onto the curtilage of Carloss’s home in order to knock on the front door” and the

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. As noted *supra* note 6, a third issue, whether Carloss gave “free and voluntary consent to entry,” is not discussed in this Note. See Opening Brief of Defendant/Appellant at 11, *United States v. Carloss*, 818 F.3d 988 (10th Cir. 2016) (No. 13-7082), 2014 WL 580562, at *7.

26. *Carloss*, 818 F.3d at 994. This is important because, if the “No Trespassing” signs revoked the implied license to approach the home, the conduct of the officers would have amounted to an unconstitutional, warrantless search.

27. *Id.* at 997-98.

“implied license at Carloss’s home had not been revoked” by the “No Trespassing” signs.²⁸ As for the second issue, the court ruled that “[u]nder [the] circumstances, we cannot say that the officers exceeded the implied license they had to approach the home and knock” as they “were no doubt encouraged to remain a bit longer, hoping someone would respond to their knock, because they heard movement inside the house and [because they] received no request from inside the house to depart.”²⁹ The Tenth Circuit therefore affirmed the district court’s decision to deny Carloss’s motion to suppress the evidence discovered during the search.³⁰

III. The State of the Law Before United States v. Carloss

A. The Implied License to Engage in a “Knock and Talk”

Beginning in the mid-twentieth century, policing tactics expanded at an increasingly rapid pace, driven both by technology and by the Supreme Court’s growing deference to law enforcement.³¹ One tactic to emerge out of this era of expansion was the knock and talk. Essentially, a knock and talk is “a procedure used by law enforcement officers, under which they approach the door of a residence seeking to speak to the inhabitants, typically to obtain more information regarding a criminal investigation or to obtain consent to search where probable cause is lacking.”³² Although it is undoubted that law enforcement officers have long used this strategy in order to gather criminal investigative information, only within the last fifty years has the constitutionality of the knock and talk been specifically examined by American courts.

28. *Id.* at 993-95.

29. *Id.* at 998.

30. *Id.* at 999.

31. *See, e.g.*, *Missouri v. McNeely*, 569 U.S. 141, 156 (2013) (holding that police officers may, if based on exigency and the “totality of the circumstances,” obtain a blood sample from a suspected drunk driver without a warrant); *Florida v. Riley*, 488 U.S. 445, 450-52 (1989) (finding that an officer’s helicopter-aided observations into the constitutionally protected area surrounding the defendant’s home without a warrant did not constitute a search); *Smith v. Maryland*, 442 U.S. 735, 742-44 (1979) (holding that the installation of a pen register, without a warrant, to record the numbers dialed by the defendant did not violate the Fourth Amendment); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (finding that a police officer may stop and “frisk” a person if the officer has “reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime”).

32. Kletter, *supra* note 4.

While not expressly using the phrase “knock and talk,” *Davis v. United States*³³ is nonetheless commonly cited as the starting point for modern-day knock and talk jurisprudence.³⁴ In *Davis*, United States Customs agents and Los Angeles Police Department officers approached the home of A.D. Davis in order to investigate him for suspicion of marijuana distribution.³⁵ After approaching the home and knocking on the door, the officers were greeted by Davis’s eight-year-old daughter, who allowed the officers to enter the home.³⁶ Once inside the house, the officers discovered marijuana and arrested Davis, who was in bed at the time; all of the investigation occurred without a warrant.³⁷ After the trial court denied Davis’s motion to suppress the marijuana evidence, leading to Davis’s conviction, Davis appealed the decision to the Ninth Circuit.³⁸

In affirming the decision of the trial court and Davis’s conviction, the Ninth Circuit noted, in an oft-quoted passage, that:

Absent express orders from the [resident], there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's “castle” with the honest intent of asking questions of the occupant thereof—whether the questioner be a pollster, a salesman, or an officer of the law.³⁹

In affirming Davis’s conviction, the court justified the conduct of the officers in a variety of ways, including noting that “[t]he time of day, coupled with the openness of the officers’ approach” ruled out the possible danger of persons approaching a home unannounced, and that the officers did not engage in any “peeping Tom”-type invasion of privacy.⁴⁰ Implicit in the court’s decision, though, was the concept of a particular societal norm, namely, that it is generally considered acceptable to approach the front door of a neighbor. Whether police may likewise approach a home as part of

33. 327 F.2d 301 (9th Cir. 1964).

34. See *United States v. Holmes*, No. 3:14-cr-21-J-32PDB, 2014 WL 10679855, at *5 (M.D. Fla. Aug. 8, 2014) (noting that *Davis v. United States* is the “oft-cited rationale for sanctioning the ‘knock and talk’”).

35. *Davis*, 327 F.2d at 302.

36. *Id.*

37. *Id.*

38. *Id.* at 302-03.

39. *Id.* at 303.

40. *Id.* at 304.

routine investigation became an increasingly important point of contention in later decisions addressing the constitutionality of the knock and talk.

While numerous lower courts have considered the validity of knock and talks since *Davis*,⁴¹ the Supreme Court took nearly fifty years to provide any insight into the constitutionality of the policing tactic, finally discussing the legality of the knock and talk in a 2011 case, *Kentucky v. King*.⁴² In *King*, police officers in Lexington, Kentucky, set up a controlled buy of crack cocaine from a known drug dealer outside of his apartment building.⁴³ After completing the sale, uniformed officers were radioed to apprehend the dealer before he entered his apartment; however, before the officers could reach him, the dealer entered an unknown apartment at the end of a breezeway.⁴⁴ Smelling marijuana emanating from one of the two apartments at the end of the breezeway, the officers “banged on the [identified] apartment door ‘as loud as [they] could’ and announced, ‘‘This is the police.’’”⁴⁵ Fearing the destruction of evidence, based on sounds of “things . . . being moved inside the apartment,” one of the officers kicked in the door and found three people: the respondent King, King’s girlfriend, and a friend of King’s who was smoking marijuana.⁴⁶ During a protective sweep of the apartment, the officers also found marijuana and powder cocaine within the apartment.⁴⁷ The drug dealer sought initially was later located in the second apartment (the one not entered by the police).⁴⁸ King’s subsequent motion to suppress the evidence of the drugs located in his apartment was denied by the trial court, and he was convicted of drug

41. *E.g.*, *United States v. Taylor*, 458 F.3d 1201, 1204 (11th Cir. 2006) (finding that the officer’s knock and talk to investigate suspicious 911 calls was not prohibited by the Fourth Amendment); *United States v. Jones*, 239 F.3d 716, 720 (5th Cir. 2001) (“Federal courts have recognized the ‘knock and talk’ strategy as a reasonable investigative tool”); *United States v. Cormier*, 220 F.3d 1103, 1109 (9th Cir. 2000) (holding that “no suspicion needed to be shown in order to justify the ‘knock and talk’”).

42. 563 U.S. 452 (2011). It should be noted that, prior to *King*, Justice Rehnquist once discussed knock and talks as a policing tactic in his dissent from *Dunaway v. New York*: “[There is not] anything in the Fourth Amendment that prevents the police from knocking on the door of a person’s house and when the person answers the door, inquiring whether he is willing to answer questions that they wish to put to him.” 442 U.S. 200, 222 (1979) (Rehnquist, J., dissenting).

43. *King*, 563 U.S. at 455.

44. *Id.* at 456.

45. *Id.* (alteration in original).

46. *Id.* at 456-57.

47. *Id.* at 457.

48. *Id.*

trafficking.⁴⁹ The trial court's decision was affirmed by the Kentucky Court of Appeals; the verdict, however, was later reversed by the Kentucky Supreme Court.⁵⁰ The State then appealed the decision to the United States Supreme Court.⁵¹

Although the Supreme Court primarily focused on other topics, a single section within the *King* decision, only three paragraphs in length, became the Court's first tacit acceptance of the knock and talk as a valid policing tactic. Importantly, the Court stated, "When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do."⁵² The Court further explained that the subject of an attempted knock and talk is under no obligation to actually speak with the police officers, noting that "whether the person who knocks on the door . . . is a police officer or a private citizen, the occupant has no obligation to open the door or to speak."⁵³ The Court further found that "even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time."⁵⁴

Despite the brevity of its knock and talk discussion, critical for our discussion is the fact that, like the Ninth Circuit in *Davis*, the Supreme Court rooted its decision in societal norms. As stated previously, the Supreme Court accepted knock and talks because knocking on the front door of a home is "no more than any private citizen might do."⁵⁵ The Supreme Court, like other courts before it, recognized that in a functioning society, various persons—whether they be neighbors, Girl Scouts, or the police—may have legitimate reasons for approaching a person's home to speak with its occupants.

This principle was resolutely confirmed in *Florida v. Jardines*,⁵⁶ as the Supreme Court directly addressed the concept of the knock and talk. In *Jardines*, detectives from the Miami-Dade Police Department (MDPD), in conjunction with agents from the federal Drug Enforcement Administration, set up a surveillance operation on Jardines's home, based

49. *Id.*

50. *Id.* at 457-58.

51. *Id.* at 458.

52. *Id.* at 469.

53. *Id.* at 469-70.

54. *Id.* at 470.

55. *Id.* at 469.

56. 569 U.S. 1 (2013).

on an unverified tip that Jardines was growing marijuana within the home.⁵⁷ After examining the house to determine if anyone was inside,⁵⁸ two detectives from the MDPD approached the home with a drug-sniffing dog, who alerted the detectives to the presence of narcotics within the home by sniffing at the base of the home's front door.⁵⁹ Armed with this information, one of the MDPD detectives applied for and received a warrant to search the home; upon execution of the warrant, several marijuana plants were recovered.⁶⁰ At trial, Jardines moved to suppress the evidence of the plants, which the trial court granted; however, the Florida District Court of Appeal reversed.⁶¹ On discretionary review, the Florida Supreme Court quashed the appellate court's decision, instead reinstating the decision of the trial court; the United States Supreme Court granted certiorari on the limited question of "whether the officers' behavior was a search within the meaning of the Fourth Amendment."⁶²

Before reaching its holding in the case, the Supreme Court first noted that the home is "first among equals" when it comes to Fourth Amendment protections and that it is the "right of [every] man to retreat into his own home and there be free from unreasonable governmental intrusion."⁶³ The Court noted that this level of protection extends to the home's curtilage as well because the curtilage "enjoys protection as part of the home itself."⁶⁴ Finally, the Court noted that "[t]his right would be of little practical value if the State's agents could stand [on] a home's porch . . . and trawl for evidence with impunity."⁶⁵

After establishing the level of protection afforded the home and its curtilage, the Court directly addressed the concept of the knock and talk, stating that "[w]e have . . . 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.'"⁶⁶ And, in a

57. *Id.* at 3.

58. It should be noted here that, although the *Jardines* opinion discusses the legitimacy of the knock and talk as a policing tactic, the law enforcement officers never actually conducted a knock and talk in the case.

59. *Jardines*, 569 U.S. at 4.

60. *Id.*

61. *Id.* at 5.

62. *Id.*

63. *Id.* at 6 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

64. *Id.*

65. *Id.*

66. *Id.* at 8 (quoting *Breard v. Alexandria*, 341 U.S. 622, 626 (1951)).

passage that has been cited by nearly every knock and talk case since the publishing of *Jardines*, the Court held:

This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. . . . 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.”⁶⁷

The Court then gave contours to its newly stated rule, noting that “[t]he scope of a license [to approach]—express or implied—is limited not only to a particular area but also to a specific purpose.”⁶⁸ Further, the Court wrote that “[t]o find a visitor knocking on the door is routine (even if sometimes unwelcome)” but that “to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden . . . would inspire most of us to—well, call the police.”⁶⁹ Based on this, the Court held that “[t]he government’s use of trained police dogs to investigate the home and its immediate surroundings is a ‘search’ within the meaning of the Fourth Amendment” and affirmed the Supreme Court of Florida’s decision to suppress the information gathered from the search of *Jardines*’s home.⁷⁰

Echoing both *Davis* and *King*, the Supreme Court explained the rationale for its new rule by relying on societal norms, finding that “the background social norms that invite a visitor to the front door do not invite him there to conduct a search.”⁷¹ Importantly, the Court expanded on the basis for the implied license to approach the home, tying this societal norm to our concepts of property rights and trespass.⁷² Thus, the Court found no reason to address whether the detectives’ conduct failed the reasonable expectation of privacy test established in *Katz v. United States*⁷³ because “[o]ne virtue

67. *Id.* (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011)).

68. *Id.* at 9.

69. *Id.*

70. *Id.* at 11-12.

71. *Id.* at 9.

72. *Id.* at 11.

73. In his landmark concurrence (later adopted by the majority in *Smith v. Maryland*, 442 U.S. 735 (1979)), Justice Harlan explained what became known as the *Katz*, or “reasonable expectation of privacy,” test: “My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” *Katz v. United States*, 389 U.S. 347, 361

of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred."⁷⁴

Thus, post-*Jardines*, the following axioms have emerged: (1) police officers have an implied license to approach the front of a home to conduct a knock and talk; (2) the occupant of the home is under no duty to answer the door or to answer any questions posed by the officers; (3) the implied license to approach is rooted in societal norms (that is, rooted in our conceptions of privacy, property rights and trespass); and (4) based on these societal norms, the implied license is limited both to a particular area and for a specific purpose. The *exact* limitations on this implied license, however, remain unclear.

B. "No Trespassing" Signs and the Revocation of the Implied License to Approach

Because the *Jardines* Court left the exact scope of the limitations on the implied license unclear (perhaps by design), significant gray areas still exist within the law as to the precise boundaries of the license implied in *Jardines*. In particular, the effect of "No Trespassing" signs on the implied license to approach a home is one such issue that remains unresolved.

1. "No Trespassing" Signs and the Supreme Court

Before discussing the state of the law concerning the nexus between "No Trespassing" signs, the implied license, and knock and talks, it is prudent to examine the current state of Supreme Court law concerning "No Trespassing" signs. Thus far, the Supreme Court has twice discussed "No Trespassing" signs or other similar measures, both, importantly, outside the context of knock and talks. First, in *Breard v. City of Alexandria*,⁷⁵ a 1951 case examining the constitutionality of a city ordinance prohibiting door-to-door solicitation, the Supreme Court found that "[i]t is true that the knocker

(1967) (Harlan, J., concurring). The case law surrounding the *Katz* test is long, complicated, ever-evolving, and best left for another day.

74. *Jardines*, 569 U.S. at 11. Interestingly (and perhaps to maintain the importance of the *Katz* test in future Fourth Amendment cases), Justice Kagan, joined by Justices Ginsburg and Sotomayor, wrote a concurring opinion, noting that the case could have been decided on either trespassory or privacy grounds: "Was this activity a trespass? Yes, as the Court holds today. Was it also an invasion of privacy? Yes, that as well." *Id.* at 13 (Kagan, J., concurring).

75. 341 U.S. 622 (1951), *abrogated on other grounds by* *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980).

on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home When such visitors are barred from premises by notice or order, however, subsequent trespasses have been punished.”⁷⁶ Second, in *Oliver v. United States*,⁷⁷ the Supreme Court in 1984 held that, under the *Katz* test, officers may inspect open fields without a warrant, even in the presence of “No Trespassing” signs and other measures taken to prevent ingress into the open field, because such measures do not create a legitimate expectation of privacy in the traditionally “unprotected” open field domain.⁷⁸

While these cases seem to be instructive with respect to how the Supreme Court might view “No Trespassing” signs and other similar measures post-*Jardines*, any insight to be gained from either *Breard* or *Oliver* is problematic. In *Breard* and similar cases, the police are generally given deference by the courts to perform acts beyond what a private citizen could do, so that they may be able to do their job.⁷⁹ Although *Breard* endorsed the notion that notice could bar someone from entering the land of another, as *Oliver* and the majority in *Carloss* pointed out, state law is not always dispositive of “reasonableness” notions under the Fourth Amendment; instead “in asking whether the officers’ actions . . . were reasonable, we should look to the particular circumstances before us, and not state statutes that may allow for trespass actions.”⁸⁰ As such, *Breard*’s support for punishment of subsequent trespasses after notice may not hold in the law enforcement context.

Second, *Oliver* (decided in 1984) was decided before the revival of the trespassory test within Fourth Amendment jurisprudence. Prior to *Katz*, it was generally understood that no Fourth Amendment violation occurred without some physical intrusion into a constitutionally protected area.⁸¹

76. *Id.* at 626. As noted *supra* note 66, the *Jardines* court cited part of this passage in its justification for confirming the implicit license to approach a home.

77. 466 U.S. 170 (1984).

78. *Id.* at 182-83.

79. See, for example, the cases noted *supra* note 31.

80. *United States v. Carloss*, 818 F.3d 988, 1001 (10th Cir. 2016). The *Oliver* Court also reached this conclusion: “Nor is the government’s intrusion upon an open field a ‘search’ in the constitutional sense because that intrusion is a trespass at common law. The existence of a property right is but one element in determining whether expectations of privacy are legitimate.” *Oliver*, 466 U.S. at 183.

81. *E.g.*, *Olmstead v. United States*, 277 U.S. 438, 463-64 (1928) (finding that no Fourth Amendment violation occurred as a result of listening to private conversations held within the defendant’s home and office because “[t]here was no entry of the houses or offices”).

Katz, as it has been commonly understood, rejected a property-based approach espoused by prior courts in favor of the reasonable expectation of privacy test, stating that “the Fourth Amendment protects people, not places.”⁸² However, in *United States v. Jones*, Justice Scalia revived the trespassory test for Fourth Amendment purposes, stating that the “*Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.”⁸³ Given that *Jardines* was decided shortly after *Jones* and relied on common law property rights and trespass notions, the Court may be signaling a trend towards reliance on the trespassory test, which could potentially end in a situation where certain trespasses create Fourth Amendment violations, if such trespasses were to occur within a constitutionally protected area.⁸⁴

Two principles could potentially be gleaned from *Breard*, *Oliver*, and related Supreme Court decisions surrounding trespass and the Fourth Amendment, however. First, while *Breard* suggests that notice can bar someone from entering the land of another, the same principle may not hold for law enforcement. And second, the Supreme Court’s revival of and trend towards the trespassory test could perhaps affect whether law enforcement may trespass onto the land of another without violating the Fourth Amendment. These two principles appear to exist in tension, an issue ripe for consideration by future courts. As it stands now, however, it is unclear how the Supreme Court will view “No Trespassing” signs in the Fourth Amendment “curtilage” and “open fields” context, given current precedent and the recent ideological shift.

2. “No Trespassing Signs,” the Implied License, and Federal and State Courts

American courts have varied greatly on what effect, if any, “No Trespassing” signs have on the implied license given to police to approach a home in order to conduct a knock and talk. Before understanding how various courts have treated “No Trespassing” signs, though, the cases must first be divided into two camps: cases involving only No Trespassing signs (“Group 1” cases) and cases involving “No Trespassing” signs in addition

82. *Katz v. United States*, 389 U.S. 347, 351-53 (1967).

83. 565 U.S. 400, 409 (2012).

84. It should be noted here that, under *Jones*, a “trespass” is not a statutory trespass; instead a trespass (and search) occurs when law enforcement encroaches on a constitutionally protected area, such as the curtilage of a home. *See id.* at 405-06. As such, *Oliver*’s holding may well still be in effect, because the *Oliver* Court did not view open fields as constitutionally protected. *See Oliver*, 466 U.S. at 182-83.

to other privacy measures (“Group 2” cases). Additionally, the cases involving only “No Trespassing” signs can be divided into two sub-groups: cases finding a revocation of the implied license (“Group 1A” cases) and those holding that the implied license still existed (“Group 1B” cases). This Note will tackle each group individually in order to provide clarity on the state of the law. Additionally, this categorization will make it easier both to establish where *United States v. Carloss* fits within current case law and to discuss how the Tenth Circuit’s approach compares to that of other courts in similar situations.

Unlike the other groups, Group 1A cases, in which “No Trespassing” signs alone served to revoke the implied license to approach a home to conduct a “knock and talk,” are less common. But, like other cases involving “No Trespassing” signs and the implied license to approach, the court’s reasoning is rooted in the privacy expectations of the home’s occupant—namely, that “No Trespassing” signs express a desire for privacy that revokes the implied license.⁸⁵ However, the viability of the logic of Group 1A cases has been called into question post-*Jardines*. Indeed, as noted in *Carloss*, the Tenth Circuit could not 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.”⁸⁶ This is not to say that the logic is dead altogether, though, because *Jardines* never addressed “No Trespassing” signs, instead focusing on protecting the sanctity of the home and the constraints of the knock and talk—something lower courts have already considered for many years.

Like Group 1A cases, the Group 1B line of cases, holding that “No Trespassing” signs do not revoke the implied license to approach the home, appears to follow a clear theme. In these cases, the courts have almost universally held that the homeowner’s Fourth Amendment rights had not been violated because the homeowner had not exhibited a clear expectation of privacy (or, at least a clear enough expression to revoke the implied license) through the use of the “No Trespassing” signs.⁸⁷ Unlike Group 1A

85. *E.g.*, *State v. Roubique*, 421 So. 2d 859, 862 (La. 1982) (noting that the “sign at the road’s entrance is ample evidence of [the defendant’s] intent to preserve his privacy” and that the policer officer “invaded [the defendant’s] constitutionally protected right to privacy when he entered the posted property”); *State v. Blackwell*, No. E2009-00043-CCA-R3-CD, 2010 WL 454864, at *7 (Tenn. Crim. App. Feb. 10, 2010) (holding that “the presence of the ‘No Trespassing’ sign evinced an actual subjective expectation of privacy and a revocation of the ‘implied invitation’ of the front door”).

86. *United States v. Carloss*, 818 F.3d 988, 995 (10th Cir. 2016).

87. *E.g.*, *State v. Hornback*, 871 P.2d 1075, 1078 (Wash. Ct. App. 1994) (agreeing with the trial court’s decision that the presence of “No Trespassing” signs “was not dispositive of

cases, however, several post-*Jardines* courts have agreed that “No Trespassing” signs did not revoke the implied license to approach the home.⁸⁸ Although decided pre-*Jardines*, the Sixth Circuit’s 2003 decision in *United States v. Hopper*⁸⁹ nicely illustrates the reasoning of Group 1B cases.

In *Hopper*, law enforcement officers suspected Jeffrey Hopper and his partner of conducting a large-scale marijuana growing operation.⁹⁰ After executing a search warrant on the residence of Hopper’s partner and discovering growing paraphernalia, the officers proceeded to Hopper’s residence in order to obtain consent to search his home, which had three “No Trespassing” signs posted within visual distance of the home.⁹¹ When several attempts to search the property failed, Hopper’s wife eventually consented to a search of the home, which resulted in the discovery of 350 marijuana plants, weapons, and cash.⁹² After his motion to suppress such evidence was denied, Hopper entered a conditional guilty plea, reserving the right to appeal the motion to suppress.⁹³

In affirming the trial court’s decision, the Sixth Circuit found, inter alia, that, based on the four factor test outlined in *United States v. Dunn*,⁹⁴ the “No Trespassing” signs alone did not create a constitutionally protected

the constitutional issue”); *Wysong v. State*, 614 So. 2d 670, 671 (Fla. Dist. Ct. App. 1993) (holding that “No Trespassing” signs do not “establish a zone of privacy” because “‘No Trespassing’ signs do not render a doorway to be a constitutionally protected area”).

88. *E.g.*, *Davis v. City of Milwaukee*, No. 13-CV-982-JPS, 2015 WL 5010459, at *13 (E.D. Wis. Aug. 21, 2015) (holding that “signs stating ‘Private Property’ or ‘No Trespassing’ do not, by themselves, create an impenetrable privacy zone”); *United States v. Jones*, No. 4:13cr00011-003, 2013 WL 4678229, at *9 (W.D. Va. Aug. 30, 2013) (holding that the existence of “No Trespassing” signs are “evidence of the owner’s desire for privacy, but they do not expand his rights under the Fourth Amendment”).

89. 58 F. App’x 619 (6th Cir. 2003).

90. *Id.* at 621.

91. *Id.*

92. *Id.* at 621-22.

93. *Id.* at 622.

94. 480 U.S. 294, 301 (1987).

[W]e believe that curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

Id. Under the prevailing understanding, the *Dunn* test creates a division between constitutionally protected curtilage and “open fields,” which the *Oliver* Court found were not afforded protection from warrantless searches.

curtilage area around Hopper's home.⁹⁵ Additionally, the court noted that even if the area around Hopper's home was protected curtilage under the *Dunn* test, "the actions of the police . . . would not have violated the Fourth Amendment because law enforcement officials may encroach upon the curtilage of a home for the purpose of asking questions of the occupants," seemingly creating an ironclad license to approach that a homeowner cannot revoke.⁹⁶

Because of the variability of the circumstances of each case, Group 2 courts, in examining situations concerning "No Trespassing" signs and additional privacy measures (such as fences, gates, and other efforts used by homeowners to enhance privacy), have generally taken a case-by-case approach to determine whether the implied license had been revoked. Some courts have ruled that the implied license had been revoked,⁹⁷ others have ruled the opposite.⁹⁸ However, as one court noted, patterns have emerged, shedding light onto where courts have generally fallen in Group 2 cases:

Some categorical rules apply in the "knock and talk" context: it would not be okay to conduct one at a house with a high perimeter fence and a locked gate, with a solid wall and a closed entry, or with a resident shouting, "stay off my property" But circumstances shy of those have led courts to take a case-by-case approach . . . that considers the many variables that officers confront when conducting a "knock and talk."⁹⁹

In weighing these "many variables" with which officers can be confronted, some courts have made use of the *Dunn* test, discussed first in the context of *Hopper*, *supra*, to determine whether the implied license has been revoked.¹⁰⁰ *Madruga v. County of Riverside*¹⁰¹ illustrates an application of the *Dunn* test in this context.

95. *Hopper*, 58 F. App'x at 623.

96. *Id.*

97. *E.g.*, *Edens v. Kennedy*, 112 F. App'x 870, 875 (4th Cir. 2004) (holding that enclosing a home with a fence, locked gates, and "No Trespassing" signs would create an "elevated expectation of privacy").

98. *E.g.*, *Allender v. Huesman*, No. IP01-1718-C-T/K, 2003 WL 23142184, at *4-5 (S.D. Ind. Apr. 14, 2003) (finding that a wooden rail, wire fence, and "No Trespassing" signs did not create a constitutionally protected area).

99. *United States v. Holmes*, No. 3:14-cr-21-J-32PDB, 2014 WL 10679855, at *8 (M.D. Fla. Aug. 8, 2014).

100. *See, e.g.*, *United States v. Moffitt*, 233 F. App'x 409, 411-12 (5th Cir. 2007); *United States v. Depew*, 8 F.3d 1424, 1427-28 (9th Cir. 1993) (overruled on different grounds);

In *Madruga*, the plaintiff, Michael Madruga, sued the county in which his home was located, the county sheriff's department, and several officers after an early morning warrantless entry onto his property by the officers in question. The officers visited Madruga's property in order to investigate a car accident in which Madruga was involved earlier that day.¹⁰² Madruga's home was surrounded by a tall, cinder-block fence, with two gates that were closed but unlocked, and two signs proclaiming the presence of a guard dog.¹⁰³ On the night in question, one officer from the sheriff's department entered Madruga's property without a warrant after 1:00 a.m. to speak with him.¹⁰⁴ Madruga declined to speak with the police, but Madruga's wife allowed the officer into the home, where a struggle ensued, leading to Madruga's arrest.¹⁰⁵

Using the four factors outlined in *Dunn*, the court concluded that the front courtyard was part of the curtilage of Madruga's home and was therefore constitutionally protected.¹⁰⁶ Additionally, the court noted that while "[t]he knock and talk rule is grounded on the understanding that the curtilage . . . is open to the public to use," that "assumption may prove untrue, specifically when a homeowner has taken additional measures to impede or otherwise block access to the front door by the viewing public."¹⁰⁷ As such, "it should have . . . been clear to [the officer] that the generally understood implied invitation to walk up to the front of the home and talk to the home's occupants was revoked."¹⁰⁸

As demonstrated in *Madruga*, the *Dunn* curtilage test may provide a path through the thicket created by these "No Trespassing" sign cases. As noted previously, the *Dunn* test separates constitutionally protected "curtilage"

United States v. Rodriguez, No. 1:08cr32-SPM, 2009 WL 762203, at *5-8 (N.D. Fla. Mar. 18, 2009).

101. 431 F. Supp. 2d 1049 (C.D. Cal. 2005).

102. *Id.* at 1051-52.

103. *Id.* at 1052-53. It should be noted that, while Madruga's two signs were not specifically "No Trespassing" signs, they, like "No Trespassing" signs, aimed to communicate the same message on some level: namely, uninvited visitors are generally not welcome.

104. *Id.* at 1052-54.

105. *Id.* at 1054.

106. *Id.* at 1056.

107. *Id.* at 1059-60 (citations omitted). Although some courts have addressed time of day when discussing the implied license, the *Madruga* court did not make mention of the fact that the officers approached Madruga's home after midnight in their analysis, which seems odd given the court's clear frustration with the conduct of the officers.

108. *Id.* at 1058.

from open fields, which are not afforded Fourth Amendment protections.¹⁰⁹ While not explicitly stated by the *Madruga* court, the decision seemed to indicate that “No Trespassing” or similar signs either on or in constitutionally protected curtilage can serve to revoke the implied license to approach the home.¹¹⁰ While the *Hopper* court did not reach this same result, it reached its conclusion by essentially giving the police an unfettered right to encroach on the curtilage, stating that law enforcement can always approach to conduct a knock and talk, going further than other courts have with respect to law enforcement.¹¹¹ As such, the *Dunn* test may prove to be an effective tool to determine whether “No Trespassing” signs serve to revoke the implied license.

Although American courts are decidedly mixed on the effect of “No Trespassing” signs (and other privacy-enhancing measures) and the implied license to approach a home to conduct a knock and talk, two patterns have thus far emerged. First, whether revoking the implied license or not, courts have consistently looked to a defendant’s expectation of privacy in order to gauge the impact of the signs. And second, the *Dunn* test has frequently been employed in cases to help determine what areas of a person’s property should be afforded Fourth Amendment protections.

C. Waiting to Be Received and Revocation of the Implied License to Approach

As stated previously, almost every knock and talk case post-*Jardines* has quoted the case’s central principle: “This implicit license [to approach a home] typically permits the visitor to approach the home by the front path, knock promptly, *wait briefly to be received*, and then (*absent invitation to linger longer*) leave.”¹¹² Implicit in this principle is the proposition that the police, like any other individual in society, may not linger on a person’s front porch indefinitely in order to attempt to speak with the occupants. Indeed, the *King* Court seemed to reach this same conclusion, stating that “[w]hen the police knock on a door but the occupants choose not to respond

109. See *supra* note 94.

110. See *Madruga*, 431 F. Supp. 2d at 1059-60 (noting that while an officer may generally cross the curtilage to conduct a knock and talk, “privacy enhancement made to the curtilage by the homeowner would serve to apprise the officer . . . that access to the home’s front door would require the homeowner’s pre-approval”).

111. *United States v. Hopper*, 58 F. App’x 619, 623 (6th Cir. 2003).

112. *Florida v. Jardines*, 569 U.S. 1, 8 (2013) (emphasis added).

or to speak, ‘the investigation will have reached a conspicuously low point.’”¹¹³

However, unlike the volumes of case law surrounding the approach of the home by law enforcement, there has been noticeably little litigation on how long the police can remain on a person’s front porch before the limited implied license has expired, perhaps due to the relative newness of the *Jardines* decision, perhaps due to the unusual circumstances that would be required for the issue to even arise in the first place. Regardless, there appears to be only one case (prior to *Carloss*) that considered how long the police can constitutionally remain at a home.

That case, *J.K. v. State*,¹¹⁴ decided by the Court of Appeals of Indiana, involved the prosecution of J.K., a juvenile at the time, for “illegal possession of alcohol, illegal consumption of alcohol, and aiding illegal consumption of alcohol.”¹¹⁵ In the early morning hours, the Pulaski County Sheriff’s Department received a complaint alleging that a group “of juveniles were pushing a shopping cart through the neighborhood, making noise, and causing dogs to bark.”¹¹⁶ Two local police officers and a reserve deputy from the sheriff’s department arrived at J.K.’s residence at approximately 1:11 a.m. and observed several cars parked outside the residence, including a pickup truck with a shopping cart in the bed (which the police believed was stolen from a local store).¹¹⁷ As one officer approached the front door, the other two officers moved through the back yard of the home to prevent any juveniles from fleeing the scene; one of the officers in the back yard observed empty alcohol containers in the home’s kitchen.¹¹⁸ The first officer knocked on the front door but received no answer.¹¹⁹ After receiving no answer from inside the home, the officers stayed on the front porch and at the back door for approximately one hour, yelling to the occupants inside.¹²⁰

After approximately one hour had passed, a tow truck arrived, called by the police to tow the truck holding the shopping cart.¹²¹ At this point, the juvenile owner of the truck exited the home and was told to retrieve the

113. *Kentucky v. King*, 563 U.S. 452, 470 (2011) (citation omitted).

114. 8 N.E.3d 222 (Ind. Ct. App. 2014).

115. *Id.* at 226-27.

116. *Id.* at 227.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

owner of the house (J.K.).¹²² J.K., who was on the phone with his mother, came outside the house; the officers spoke to both J.K. and his mother before entering the home, without a warrant, to search the residence, where they discovered signs of underage drinking.¹²³

Approximately three months after the incident in question, the State filed a delinquency petition against J.K.¹²⁴ In response, J.K. filed a motion to suppress the evidence discovered during the search, which was denied by the trial court.¹²⁵ The trial court then found J.K. to be a delinquent child, and J.K. appealed to the Court of Appeals of Indiana.¹²⁶ Although the court discussed many issues in the case (including standard of review, the officer's entry into the back yard, exigent circumstances, and the search of the home),¹²⁷ the court's discussion of the knock and talk conducted by the officers is most pertinent to the matter at hand.

In determining whether the officer's initial attempt at a knock and talk was unconstitutional, the court applied the main principle from *Jardines*,¹²⁸ noting that "[t]his statement implies that a failure to leave after a brief period exceeds the implied invitation to enter one's curtilage and would violate the Fourth Amendment."¹²⁹ The court further stated that an occupant of a home is under no obligation to answer the door (quoting *King*) and that if "residents exercise this right [to not answer the door], officers generally must leave and secure a warrant if they want to pursue the matter."¹³⁰ After establishing this foundation, the court concluded "that the officers' conduct was an unconstitutional search in violation of the Fourth Amendment" because "[t]he officers' actions . . . extended well beyond the implied invitation to approach a citizen's front door."¹³¹ The court further admonished the officers' conduct, stating:

If three men with guns and flashlights were to surround the average person's home in the wee hours of the morning, knock

122. *Id.* at 227-28.

123. *Id.* at 228.

124. *Id.*

125. *Id.*

126. *Id.*

127. *See generally id.* at 228-31, 236-39.

128. As a reminder: "This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Florida v. Jardines*, 569 U.S. 1, 8 (2013).

129. *J.K.*, 8 N.E.3d at 232.

130. *Id.* (quoting *Hardister v. State*, 849 N.E.2d 563, 570 (Ind. 2006)).

131. *Id.*

for over forty-five minutes, and yell inside demanding the occupants open the door, this situation would—like the Court noted in *Jardines*—inspire that homeowner to call the police.¹³²

Significantly, the court noted that the length of time the officers were at the home was, in and of itself, unconstitutional: “Setting aside the officers’ conduct . . . , the length of time the officers remained there would alone constitute a violation of the Fourth Amendment” because the “investigation [had] reached a ‘conspicuously low point.’”¹³³

Although *J.K.* thus far appears to be the only case dealing with the time limit imposed on implied license and how long the police can remain inside the curtilage before violating the Fourth Amendment, a few key principles can be gleaned from the court’s decision. First, the implied license is limited by both conduct (as was the case in *Jardines*) and time. And second, the implied license can be exceeded by an extended time alone, even absent inappropriate or aggressive officer conduct, although the exact requisite amount of time remains unclear.

D. Summary—Where the Law Stands Before Carloss

At this point, a brief summary of the state of the law prior to *Carloss* may be useful, before diving into the reasoning and rationale offered by the Tenth Circuit in reaching its decision. First, the Supreme Court (and a large swath of lower courts) has recognized an implied license given to law enforcement to approach a home in order to conduct a knock and talk, and this implied license derives authority from societal norms. Second, the Supreme Court has thus far offered little guidance on the issue of “No Trespassing” signs for Fourth Amendment purposes. Third, while lower courts have taken varied approaches with respect to the effect of “No Trespassing” signs on the implied license to approach a home, such signs may often serve to revoke the implied license, and the *Dunn* test has proved especially helpful in this area. And finally, almost no courts have explored the revocation of the implied license based on the “linger” prong of the *Jardines* rule, but it remains clear that some threshold exists beyond which the implied license granted to approach and remain briefly would be exceeded.

132. *Id.*

133. *Id.* at 232-33 (quoting *Kentucky v. King*, 563 U.S. 452, 470 (2011)).

IV. The Reasoning of the Carloss Court

This Note turns now to the reasoning and analysis underlying the Tenth Circuit's decision in *Carloss*. The majority opinion, written by Judge Ebel and joined by Chief Judge Tymkovich, emphasizes the decision by beginning with the rule, followed with an analysis, and concluded first that the "officers [in the case] did not violate the Fourth Amendment by going to the front door and knocking, seeking to speak with Carloss," before diving into the reasoning for its decision.¹³⁴ In doing so, the court outlined several principles that have already been covered in this Note, notably that: (1) police officers have the right to conduct a knock and talk under the Fourth Amendment; (2) *Jardines* reaffirmed prior Tenth Circuit law upholding knock and talks; and (3) the constitutionality of the knock and talk is rooted in the implied license "for members of the public to go onto the curtilage of [a] home in order to knock on the front door."¹³⁵

The court spent the bulk of its decision, though, explaining why the "No Trespassing" signs on Carloss's property did not revoke the implied license. Citing two state cases (neither of which fall within the Tenth Circuit's jurisdiction) as support, the court first stated the rule on which it based its decision: "Whether ['No Trespassing' signs revoke the implied license] 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."¹³⁶

Before applying its newly formulated rule to Carloss's case, the court stated that "just the presence of a 'No Trespassing' sign is not alone sufficient to convey to an objective officer . . . that he cannot go to the front door and knock," thus rejecting the "talismanic quality Carloss attributes to them."¹³⁷ In this respect, the Tenth Circuit appears to side with Group 1B courts (discussed *supra* Part III), which held that "No Trespassing" signs alone do not revoke the implied license. However, based on its previously stated rule, the Tenth Circuit seemed to indicate that "No Trespassing" signs could revoke the implied license if an objective observer (whether it be a member of the public at large or a law enforcement official) would

134. United States v. Carloss, 818 F.3d 988, 991 (10th Cir. 2016).

135. *Id.* at 992-94.

136. *Id.* at 994.

137. *Id.* at 995.

believe that the implied license had been revoked—a point that Judge Gorsuch made clear in his dissent.¹³⁸

Next, the court pointed out that all but one of the “No Trespassing” signs were in the unenclosed front and side yards and along the driveway—areas the Tenth Circuit had already determined were “open fields” and not protected curtilage, because, citing prior Tenth Circuit decisions, “Carloss [did] not expressly claim that these areas were part of the home’s curtilage—and it was Carloss’s burden to establish what was included in the home’s curtilage.”¹³⁹ Indeed, in both his opening brief and in his response brief, Carloss made no argument that the front and side yards were protected curtilage—only that the front porch constituted protected curtilage.¹⁴⁰

Based on the determination that neither the front nor side yards were “curtilage,” but instead were “open fields,” the court concluded that the signs in the yard “would not have conveyed to an objective officer, or member of the public, that he could not walk up to the porch and knock on the front door and attempt to contact the occupants” because “[i]t is well-established that ‘No Trespassing’ signs will not prevent an officer from entering privately owned ‘open fields.’”¹⁴¹ The court found this to be true “even though the officers’ entry into the yard might be considered a trespass at common law . . . or might have violated Oklahoma statutory law.”¹⁴²

Finally, the court concluded that the sign on the front door “was ambiguous and did not clearly revoke the implied license extended to members of the public, including police officers, to enter the home’s curtilage and knock on the front door.”¹⁴³ The court reasoned that “on its

138. “The sole controlling opinion in this case doesn’t suggest that No Trespassing signs are categorically insufficient to revoke the implied license but suggests only that homeowners should be more punctilious with their choice and placement of signs than the homeowner here.” *Id.* at 1014 (Gorsuch, J., dissenting).

139. *Id.* at 995 (majority opinion).

140. See Opening Brief of Defendant/Appellant, *supra* note 25, at 14-18, 2014 WL 580562, at *10-14; Reply Brief of Defendant/Appellant at 2, *United States v. Carloss*, 818 F.3d 988 (2016) (No. 13-7082), 2014 WL 1512694, at *2.

141. *Carloss*, 818 F.3d at 995-96 (citing *Florida v. Jardines*, 569 U.S. 1, 6 (2013), and *Oliver v. United States*, 466 U.S. 170, 182 (1984)).

142. *Id.* at 996.

143. *Id.* The “ambiguous” sign stated: “Posted Private Property Hunting, Fishing, Trapping or Trespassing for Any Purpose Is Strictly Forbidden Violators Will Be Prosecuted.” *Id.* Of note, it appears that the court tacitly accepts Carloss’s argument that the front porch of the house was protected curtilage. See *id.* (noting that on the front door “No

face, this sign does not appear to be directed to people who desire to approach and speak directly with the occupants of the home in the ordinary course of societally accepted discourse” and instead “could have simply been reiterating that such recreational activities would not be allowed on the property generally.”¹⁴⁴ As such, “[t]he message here does 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.”¹⁴⁵ Because both the yard signs and the sign on the front door would not lead an objective observer to conclude that the implied license had been revoked, the Tenth Circuit ruled that “the officers did not violate the Fourth Amendment when they went onto the porch and knocked on the front door of the house in which Carloss lived.”¹⁴⁶

Unlike its robust discussion of the implied license revocation issue, the *Carloss* court spent comparatively little time discussing Carloss’s contention that the officers exceeded their implied license by lingering too long on the porch waiting for a response from inside. In fact, the court took only one paragraph to dismiss Carloss’s claim. In doing so, the Tenth Circuit cited the *Jardines* rule before declining “to place a specific time limit on how long a person can knock before exceeding the scope of [the] implied license.”¹⁴⁷ Instead, the court simply concluded that the officers did not exceed the implied license, because they only knocked for “‘several minutes’ or ‘a minute or two,’” they were “no doubt encouraged to remain a bit longer . . . because they heard movement inside the house and received no request from inside the house to depart,” and there was “no suggestion that the officers knocked aggressively or demanded entry.”¹⁴⁸

V. Analysis of the Court’s Decision

A. The Court’s Revocation Analysis: Potential Problems

Although the Tenth Circuit took a fairly novel approach to discussing and deciding the revocation issue in *Carloss*, there are two potential problems with its ruling. First, its ruling may create headaches for law enforcement and for the judiciary in future cases, since the rule seems to

Trespassing” sign did not revoke the implied license “to enter the home’s curtilage and knock on the front door”).

144. *Id.* at 996-97.

145. *Id.* at 997.

146. *Id.*

147. *Id.* at 998.

148. *Id.*

circumvent the more bright-line standards developed by other courts to address “No Trespassing” signs and revocation of the implied license. And second, the court may have failed to apply its own rule correctly, instead creating different rules to apply for law enforcement and average citizens.

1. The Carloss Rule: Muddying the Waters

In *Carloss*, the Tenth Circuit took a creative approach to deciding the case: instead of relying on a bright-line rule as had been standard in past Group 1 cases,¹⁴⁹ the *Carloss* court adopted a flexible standard, allowing for more case-by-case, ad hoc adjudication. This rule, premised on an objective observer’s perception, rejects a categorical formulation in dealing with “No Trespassing” signs and the implied license to approach.

Whether eschewing a bright-line rule in favor of a more flexible standard is wise is a source for debate, however. Indeed, the *Oliver* Court seemed to favor a categorical approach (at least in the context of open fields), stating that “a case-by-case approach [would not] provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment.”¹⁵⁰ This is because the “lawfulness of a search 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” and “[t]he ad hoc approach not only makes it difficult for the policeman to discern the scope of his authority; it also creates a danger that constitutional rights will be arbitrarily and inequitably enforced.”¹⁵¹ The same analysis used by the *Oliver* Court can likewise apply to *Carloss*—the Tenth Circuit’s flexible, context-based standard leaves wide room for interpretation, potentially further confusing the already murky Fourth Amendment protections offered to the home.

But, while a case-by-case approach has its drawbacks, it also offers some benefits, namely, the same flexibility that has the potential to create difficulties for law enforcement also encourages a fresh and individualized examination of each case before the court. For example, while one house may only have a small “No Trespassing” sign near the driveway, another house, like the one in *Carloss*, may have multiple signs clearly visible to any observer. A categorical approach would treat both of these houses the same; a case-by-case approach, on the other hand, would examine each case

149. As a reminder, Group 1 cases are cases involving only “No Trespassing” signs, as opposed to Group 2 cases, in which “No Trespassing” signs plus other privacy measures were present.

150. *Oliver v. United States*, 466 U.S. 170, 181 (1984).

151. *Id.* at 181-82 (citation omitted).

independently on its facts to determine if the homeowner had sufficiently relayed his or her expectation of privacy, thereby revoking the implied license. While such an approach may make it difficult for law enforcement to decipher privacy rights on the fly, it also acknowledges the practical reality that most situations implicating Fourth Amendment rights are different and factually unique.

Regardless of the merits of a categorical or case-by-case approach, a potentially larger problem exists with *Carloss*'s new rule: taken together with past case law, the Tenth Circuit has cast uncertainty on the status of prior Group 1 cases. Using past cases as a guide, Fourth Amendment cases involving "No Trespassing" signs have generally been examined under the following framework. Cases are first divided into Group 1 or Group 2; for Group 1 cases, a bright-line rule exists, stating that either "No Trespassing" signs revoke or do not revoke the implied license.¹⁵² For Group 2, a case-by-case approach has been used, and the *Dunn* test has often been the starting point to differentiate "No Trespassing" signs on protected curtilage (and often revoking the implied license) from signs in unprotected open fields. The benefits of such a framework should be apparent: easier Group 1 cases are dispensed with by a bright-line rule, while the more difficult Group 2 cases are left to a more nuanced and complex analysis. And, years of prior case law remain in play to provide helpful guideposts for future decisions.

However, the Tenth Circuit may have recognized the problem with a simple bright-line rule for Group 1 cases. Namely, what happens when "No Trespassing" signs exist both in open fields and on protected curtilage, as was the case in *Carloss*? Cases in which "No Trespassing" signs exist only in open fields should be straightforward—under *Oliver*, no constitutional protection will be afforded the open field, and therefore no revocation of the implied license would occur. The more difficult question of how to address "No Trespassing" signs on the curtilage, however, remains in play. Courts could, as the *Hopper* court seemed to do, grant an unfettered license to approach the home, even in the presence of enhanced privacy measures, such as "No Trespassing" signs, designed to revoke that very license. However, as Judge Gorsuch pointed out in his dissent, this could be difficult for the average citizen to accept: "[Y]ou can't help but wonder if millions of homeowners . . . might be surprised to learn that even a long line of clearly posted No Trespassing signs are insufficient to revoke the

152. This bright-line rule can, and should, make use of the *Dunn* test, as was done in *Hopper*, by stating that "No Trespassing" signs alone do (or do not) create a constitutionally protected curtilage zone.

implied license to enter a home's curtilage—that No Trespassing signs have become little more than lawn art.”¹⁵³

Instead, the Tenth Circuit has adopted a pragmatic, context-based rule, potentially to address these very complexities. As its rule states, revocation of the implied license hinges on whether an “objective officer, or member of the public” would believe the license had been revoked, given “the context in which . . . [they] encountered the signs and the message that those signs would have conveyed.”¹⁵⁴ While this rule works in the context of Group 2 cases, such a rule could easily incorporate the *Dunn* test within its framework; doing so may more accurately reflect the complexities of these cases. However, the Tenth Circuit’s rule might relegate Group 1 cases to the status of unpersuasive precedent at best, meaning cases that in the past fit comfortably within Group 1 no longer have much case law upon which to rely.

The Tenth Circuit tacitly acknowledged this: the court rejected Carloss’s argument that “No Trespassing” signs have “the talismanic quality” of revoking the implied license, citing to several post-*Jardines* cases, while also asserting that “Carloss has not cited, nor can we find, any post-*Jardines* authority holding that a resident can revoke the implied license . . . simply by posting a ‘No Trespassing’ sign.”¹⁵⁵ It seems, therefore, that the Tenth Circuit has signaled that the authority of pre-*Jardines* “No Trespassing” sign cases may no longer carry much weight, further complicating the already-muddied waters created by its new rule. Future cases will most likely need to clarify this position.

2. Did the Tenth Circuit Fail to Correctly Apply Its Own Rule?

On its face, the Tenth Circuit’s decision appears to be sound: the “No Trespassing” signs in the front and side yards are in unprotected open fields, rendering them ineffective, and the sign on the front door (part of the protected curtilage) was ambiguous because it included additional language that confused its message to an objective observer. However, one major problem exists with this ruling. Namely, the Tenth Circuit considered the

153. *Carloss*, 818 F.3d at 1011 (Gorsuch, J., dissenting).

154. *Id.* at 994 (majority opinion).

155. *Id.* at 995. While this statement is true on its face, the problem with its rationale is that *Jardines* did not radically alter Fourth Amendment jurisprudence; instead, more than anything it formalized law that the lower courts had already been using for years. Several cases, including some that have already been cited, do hold that “No Trespassing” signs can revoke the implied license. While the number of these cases is small, it seems disingenuous to draw a hard cutoff line at *Jardines* when *Jardines* did not fundamentally alter the law.

“No Trespassing” signs independently of each other, failing to consider the message the signs conveyed as a whole.

In its ruling, the court separated and treated independently the different “No Trespassing” signs: the signs in the “open fields” of the front and side yards, and the sign on the front door.¹⁵⁶ But the court’s own rule draws no such distinction, relying solely on how a member of the public who encounters those signs *in context* would perceive them, and what message the signs would convey to an objective officer or member of the public *under the circumstances*.¹⁵⁷ Even the concurrence indicated that context and circumstances are important—while noting that “nothing aside from their numerosity makes the ‘No Trespassing’ signs . . . particularly distinctive,” Chief Judge Tymkovich acknowledged that “context matters.”¹⁵⁸

The problem with this line of logic, and the similar logic offered in the majority opinion, is that numerosity and placement of “No Trespassing” signs are part of the context in which an objective observer would view the signs. In this case, four signs were posted on the property, two of which were near the driveway, one in the side yard, and one on the front door of the home.¹⁵⁹ A person approaching the home would not view the signs independently of each other, nor would they fail to understand the clear intentions of a homeowner who posts four separate “No Trespassing” signs on his property, three of which would be viewed by anyone approaching the home via the driveway.¹⁶⁰ As Judge Gorsuch’s dissent pointed out, “We do seem to invite quite a paradox when we suggest the first three signs are irrelevant to curtilage because they were not posted on curtilage and yet treat the final sign as irrelevant to curtilage even though it was.”¹⁶¹ Viewed in context and under the circumstances, the message conveyed by the multiple signs, regardless of their location in the “open fields” of the front and side yards or in the home’s front porch curtilage, seems to be clear: uninvited visitors are not welcome.¹⁶² On this basis, a case could be made

156. *See id.* at 995-97.

157. *Id.* at 994.

158. *Id.* at 1000 (Tymkovich, J., concurring).

159. *Id.* at 990 (majority opinion).

160. Curiously, the officers in *Carloss* approached the house via the driveway and yet claimed to not remembering seeing the “No Trespassing” signs. *Id.* This claim by the officers is dubious at best—the trial court found the signs were there on the day in question and the government did not contest the point on appeal. *Id.*

161. *Id.* at 1014 (Gorsuch, J., dissenting).

162. In its decision, the Tenth Circuit takes pains to draw no distinction between members of the public and law enforcement. *See, e.g., id.* at 994 (majority opinion) (“Whether that is so depends on the context in which a member of the public, or an officer

that the Tenth Circuit failed to apply its own rule correctly to Carloss's case.

B. The Court's Lingering Analysis: A Missed Opportunity

As stated previously, almost no case law exists on the “lingering” argument offered by Carloss, and the Tenth Circuit's discussion and analysis of this issue is threadbare at best, amounting to one single paragraph of text. This seems to be a missed opportunity for the court to shape the discussion around an emerging issue of law. As the *Jardines* rule stated, “Th[e] implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.”¹⁶³

The rule therefore can be divided into two parts: the “approach” prong and the “linger” prong. The approach prong has a wealth of prior case law discussing its scope, and seems to be the more straightforward prong: an implied license exists to approach the home, up to and until that license is revoked.¹⁶⁴ The linger prong, on the other hand, has comparably little relevant case law, and appears to operate much more in the gray. For example, one examining the linger prong may ask: How long can one stay on another's front porch before the license is exceeded? Does time of day matter? Should the intent of the visitor (peaceful, confrontational, etc.) affect the timeframe? How do noises or responses coming from inside the home alter the analysis? Should the presence of an urgent matter impact the

seeking to conduct a knock-and-talk, encountered the signs”); *id.* at 995 (“As an initial matter, just the presence of a ‘No Trespassing’ sign is not alone sufficient to convey to an objective officer, or member of the public, that he cannot go to the front door and knock.”); *id.* at 996 (“But that sign was ambiguous and did not clearly revoke the implied license extended to members of the public, including police officers, to enter the home's curtilage”); *id.* at 997 (“The message here does 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.”). However, a case can be made that, while a reasonable member of the public would view the signs as revoking the implied license, law enforcement officers may view the signs differently, especially considering their job duties and in acknowledgement that both common law and statutory trespass rules generally do not apply to officers with regard to open fields. *Id.* at 996. Viewed in this light, it begs the question of whether different rules should, or already do, in fact exist for the police.

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

164. While there is certainly more at play here (as the preceding case law and discussion should make abundantly clear), it is true that intuitively most members of society know that they can approach the front door of neighbor, unless or until that neighbor tells them to “get lost.” *Jardines*, *King*, and *Davis* base their holding on this very principle.

formulation? Unfortunately, the court largely leaves these questions unanswered. While it does seem raise a few of these potential questions,¹⁶⁵ it offers no analytical framework for how to answer them.

C. Workable Solutions

1. Shaping *Carloss*'s Revocation Analysis

As noted, the *Carloss* rule for the revocation analysis is a fairly novel attempt to solve the dilemma over whether “No Trespassing” signs revoke law enforcement’s implied license to conduct knock and talks. While the flexible, case-by-case approach creates some problems, the largest of which is the difficulty for law enforcement to make on-the-spot decisions, this approach is likely still superior to a categorical, bright-line rule, because it acknowledges the obvious: individual cases require individual treatment and cannot always be fitted into simple, one-size-fits-all groups. However, because there is very little case law that uses a context-based approach,¹⁶⁶ the Tenth Circuit should take steps to clarify and shape the *Carloss* rule, for the sake of lower courts, members of the public who wish to preserve their privacy, and, ultimately, for law enforcement.

As the dissent suggests, the majority “strongly impl[ies] that No Trespassing signs *will* do their job as long as they (1) are placed visibly on the curtilage itself and (2) don’t contain surplus language about hunting and trapping.”¹⁶⁷ Although this may prove to be a rather narrow needle to thread (thereby inviting “a new chapter of cases forced to make fine judgments about the placement and contents of signs”¹⁶⁸), it does offer some parameters for how “No Trespassing” signs could revoke the implied license. As such, the Tenth Circuit should strive to enumerate more precisely the standard for how revocation might properly occur.

It appears that one such way would be placement of an unambiguous “No Trespassing” sign on a home’s curtilage.¹⁶⁹ Under such a scenario, however, defining and distinguishing what property is considered curtilage

165. See *Carloss*, 818 F.3d at 998 (declining to “place a specific time limit on how long a person can knock” and noting that the officers “were no doubt encouraged to remain a bit longer . . . because they heard movement inside the house” and that there was “no suggestion that the officers knocked aggressively or demanded entry”).

166. As mentioned previously, the Tenth Circuit only cites two state court cases, one out of Tennessee and one out of Idaho, in support of its context-based rule. *Id.* at 994-95.

167. *Id.* at 1014 (Gorsuch, J., dissenting).

168. *Id.*

169. As illustrated in the analysis of Group 2 cases, other courts have already reached this conclusion.

becomes a paramount concern. Here, the *Dunn* test provides an excellent guide for courts to distinguish between open fields and the home's curtilage. As in *Carloss*, using the four factors of the test¹⁷⁰ generally suggests that unenclosed front and side yards be treated as unprotected open fields—at least, under the Tenth Circuit's precedent.¹⁷¹ Although this creates other problems, namely that it could lead courts to look at signs independently of each other (as the Tenth Circuit did in *Carloss*) instead of in total (as the language of the *Carloss* rule would suggest), the rule at least helps to provide a demarcation for when a "No Trespassing" sign adequately revokes the implied license.

The *Carloss* decision also made clear that the language of any "No Trespassing" sign should be unambiguous. Although the dissent cast doubt on the majority's assertion that the sign on Carloss's front door was ambiguous,¹⁷² the majority made clear that the sign's ambiguity prevented it from revoking the implied license. However, other signs could offer the same gist as Carloss's without using the same words: "Keep Off"; "No Solicitation"; "Do Not Enter"; "Uninvited Visitors Not Welcome"; or, as the dissent flippantly offered: "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."¹⁷³ While this last example is very clearly meant to be unambiguous, it seems probable that most people unfamiliar with legal technicalities would have no idea what an "implied license" is, and certainly would not know what those Supreme Court cases discussed. If a large majority of society undoubtedly would not understand even Judge Gorsuch's sign, is that sign also therefore ambiguous? Likewise, every other example provided above offers at least some level of ambiguity. As it stands now, it is unclear

170. See *supra* note 94.

171. See *Reeves v. Churchich*, 484 F.3d 1244, 1254-55 (10th Cir. 2007) (concluding that the front yard of a duplex was not part of the home's curtilage); *United States v. Cousins*, 455 F.3d 1116, 1122 (10th Cir. 2006) (concluding that the side yard of a home was not part of the home's curtilage).

172. *Carloss*, 818 F.3d at 1013-14 (Gorsuch, J., dissenting)
I would have thought it equally (or maybe even a good deal more) likely that a reasonable person—considering whether to enter a stranger's front porch and staring at a large 'PRIVATE PROPERTY' sign forbidding 'TRESPASSING FOR ANY PURPOSE'—would take it as directed at him and his activities rather than as directed only at someone interested in hunting or fishing somewhere else on the property.
Id.

173. *Id.* at 1012.

whether any of these signs, or even a simple “No Trespassing” sign without extra language, would be clear enough to revoke the implied license. Therefore, in future decisions, the Tenth Circuit should offer some guidelines as to what language would be clear enough for a neutral, objective observer.

2. *A Framework for Future Linger Analysis*

Because the court gave such little treatment to it, the linger prong of the *Jardines* rule remains largely undefined and unresolved. However, *Carloss, J.K.*, and other knock and talk decisions offer some clues as to how a linger prong framework could look.

For starters, any framework should be rooted in the *Katz* test: whether “a person ha[s] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”¹⁷⁴ This starting point is important for two reasons: first, the *Katz* test has provided the foundation for Fourth Amendment analysis for fifty years; and second, the *Katz* test incorporates societal norms into its second prong—and past cases have shown that societal norms serve as the backbone of the implied license.

From there, several relevant factors can be drawn from cases to determine whether the implied license has been exceeded by lingering too long: length of time,¹⁷⁵ time of day,¹⁷⁶ officer conduct,¹⁷⁷ indications that

174. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

175. *See J.K. v. State*, 8 N.E.3d 222, 232-33 (Ind. Ct. App. 2014) (noting that the “length of time the officers remained [at the house] would alone constitute a violation of the Fourth Amendment”); *cf. Carloss*, 818 F.3d at 998 (declining to “place a specific time limit on how long a person can knock before exceeding the scope of [the] implied license”).

176. *See Davis v. United States*, 327 F.2d 301, 303-04 (9th Cir. 1964) (noting the right “for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man’s ‘castle’ with the honest intent of asking questions of the occupant thereof” and that “[t]he *time of day* . . . rule[d] out the possible dangers to [the residents] which might have resulted from a similar unannounced call in the dead of night”) (emphasis added); *J.K.*, 8 N.E.3d at 232 (finding that the “officers’ conduct . . . went far beyond anything that would ordinarily be expected to occur on one’s doorstep” in part because the encounter occurred around 1:00 a.m.).

177. *See Florida v. Jardines*, 569 U.S. 1, 9 (2013) (“To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden . . . would inspire most of us to—well, call the police.”); *Carloss*, 818 F.3d at 998 (“There is no suggestion that the officers knocked aggressively or demanded entry.”); *J.K.*, 8 N.E.3d at 232 (“If three men with guns and flashlights were to surround the average person’s home in the wee hours of the morning . . . and yell inside demanding the occupants open the door, this situation

the resident is home,¹⁷⁸ and whether pressing or urgent circumstances exist.¹⁷⁹ From these potential factors, a rule could be formulated to provide guidance for courts to examine the linger prong of the *Jardines* rule. This rule might tentatively be stated as follows: “Whether a law enforcement official has exceeded the implied license to approach a home to conduct a ‘knock and talk’ by lingering within the home’s protected curtilage for too long is determined by considering: (1) the length of time the officers spent within the protected curtilage; (2) the time of day at which the attempted ‘knock and talk’ occurred; (3) the conduct and actions of the officers during the attempted ‘knock and talk;’ (4) the presence of any indication, or lack thereof, that the resident was home at the time of the attempted ‘knock and talk;’ and (5) whether pressing or urgent circumstances existed.” While this rule is neither perfect nor all-inclusive, and while courts might consider other factors not listed here, such a rule could potentially work as a useful tool for evaluating issues raised under the linger prong of *Jardines*.

VI. Conclusion

Without a doubt, the interplay between the Fourth Amendment, the implied license to conduct a knock and talk, “No Trespassing” signs, and

would . . . inspire the homeowner to call the police.”); *cf.* *United States v. Quintero*, 648 F.3d 660, 670 (8th Cir. 2011) (noting that a “coercive atmosphere . . . coupled with the officers’ misrepresentations,” demonstrated that consent to enter the defendant’s home was involuntary).

178. *See Carloss*, 818 F.3d at 998 (“The officers were no doubt encouraged to remain a bit longer . . . because they heard movement inside the house”); *cf.* *Kentucky v. King*, 563 U.S. 452, 470 (2011) (“When the police knock on a door but the occupants choose not to respond or to speak, ‘the investigation will have reached a conspicuously low point’”).

179. Generally, “exigent circumstances” provide law enforcement officers with great leeway upon which to investigate crimes and/or enter the home without a warrant. *See, e.g., Carloss*, 818 F.3d at 1002 (Tymkovich, J., concurring) (noting that “police can always enter a home if an emergency or other exigent circumstance has provided sufficient justification to enter”); *cf.* *McDonald v. United States*, 335 U.S. 451, 455 (1948) (“Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police.”). However, to be clear, the use of “pressing or urgent” circumstances as a potential factor to consider in any linger analysis, as it is used in this Note, signifies some level below “exigency” or “emergency,” due to the broad leeway courts grant under the guise of “exigencies” and the significant case law surrounding such circumstances. That being said, the presence of “pressing or urgent” circumstances seems to be a reasonable factor to consider. For example, if the barn of one’s neighbor was on fire, it seems eminently reasonable that a person could linger on that neighbor’s front porch beyond what would normally be deemed socially acceptable, if only to notify the neighbor of the “urgent” situation.

how long a police officer can linger on a front porch represents a complex and developing area of law. However, as past cases show, any decision concerning these issues, especially under the guise of the knock and talk, must be grounded in an understanding of societal norms. *United States v. Carloss* embodies all of these complexities and tensions. The Tenth Circuit, in deciding the daunting issue of whether the “No Trespassing” signs revoked the implied license, chose a fairly novel approach, eschewing past court decisions in favor of a case-by-case, context-based approach. However, this approach has at least two major problems. First, the court further muddied the already-confusing waters surrounding “No Trespassing” signs and the implied license, without providing any guidance for future cases. And second, the court failed to correctly apply its own rule, by looking at the “No Trespassing” signs as two independent groups instead of in totality. Lastly, the court declined to provide a framework to address future “lingering” issues, offering instead only a bare-bones, conclusory explanation for its decision.

Other knock and talk (and Fourth Amendment) cases, however, can provide helpful guides on how to interpret and expand on the Tenth Circuit’s decision moving forward. In particular, the linger issue provides an opportunity for courts to explore the boundaries set by the Supreme Court in *Florida v. Jardines*, and in particular, what extent of police intrusion into a home’s curtilage is societally acceptable. But, until such issues are addressed, *United States v. Carloss* will need to be looked at for what it is: a flawed decision in which the Tenth Circuit failed to satisfactorily resolve whether law enforcement, like the rest of society, are required to be “good neighbors.”

Cole McLanahan