

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

MICHAEL CHRISTOPHER FREDERICK,

Defendant-Appellant.

Supreme Court No. 153115
Court of Appeals No. 323642
Kent Circuit Court No. 14-3216FH

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee,

v

TODD RANDOLPH VAN DOORNE

Defendant-Appellant.

Supreme Court No. 153117
Court of Appeals No. 323643
Kent Circuit Court No. 14-3215FH

**BRIEF OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN
AND CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN**

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Dated: July 28, 2016

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INTEREST OF *AMICI CURIAE*

The **American Civil Liberties Union of Michigan** (ACLU) is the Michigan affiliate of a nationwide nonpartisan organization of over 500,000 members dedicated to protecting the rights guaranteed by the Constitution. The ACLU has long been committed to protecting the right to privacy guaranteed by the Fourth Amendment and the Michigan Constitution, and regularly files *amicus curiae* briefs on constitutional questions pending before this and other courts.

Criminal Defense Attorneys of Michigan (CDAM) is a statewide, nonprofit organization of public defenders, contract defenders and private attorneys. Since its founding in 1976, CDAM has provided continuing legal education for criminal defense lawyers. It has served as *amicus curiae* in many cases of significance to the criminal jurisprudence of this state, and appreciates this Court's invitation to continue that tradition in this case.

The ACLU and CDAM filed a joint *amicus curiae* brief this term in *People v Radandt* (Docket No. 150906), in which a similar Fourth Amendment issue was raised.

STATEMENT OF QUESTION ADDRESSED BY *AMICI CURIAE*

Is there an “implied license,” within the meaning of *Florida v Jardines*, to enter into a stranger’s curtilage in the middle of the night and ring the doorbell and/or knock on the door until someone comes to the door?

The Michigan Court of Appeals answered, “Yes.”

Amici Curiae answer, “No.”

ARGUMENT¹

There Is No “Implied License” To Enter Into a Stranger’s Curtilage In the Middle of the Night In Order To Knock On the Door and Speak With the Residents.

Amici request that this Court grant leave to appeal from or, better yet, summarily reverse the published decision of the Court of Appeals, which contains a gross misapplication of *Florida v Jardines*, ___ US ___; 133 S Ct 1409; 185 L Ed 2d 495 (2013). Even though all nine members of the *Jardines* Court made it abundantly clear that there is no “implied license” for the sort of warrantless, middle-of-the-night intrusion on the sanctity of the home that occurred here, the Court of Appeals held that there was such a license. The majority thus not only misapplied the Fourth Amendment but the law of property as well.

Here, exactly as in *Jardines*, it is undisputed, and indisputable, that the police entered into the defendants’ curtilage, a constitutionally protected area, and engaged in conduct with the objectively apparent intent to obtain evidence for use in criminal prosecutions. *Id.* at 1414. Therefore, as in *Jardines*, the only remaining question is whether the entry into the curtilage and the conduct there were “explicitly or implicitly permitted by the homeowner.” *Id.*

The Court in *Jardines* recognized that there is an implicit license for “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.” *Id.* at 1415. But, the Court concluded, there was no such implicit license for a visitor to bring a dog into the curtilage to sniff the area around the home. *Id.* at 1416. As Justice Scalia put it for the Court, if one were to look out and see someone engaging in such conduct without permission, that “would inspire most of us to—well, call the police.” *Id.*

In his dissent for four members of the Court, Justice Alito vigorously disagreed that the

¹ *Amici* accept the Statement of Facts set forth in the appellants’ briefs.

presence or conduct of the dog exceeded the implied license of a visitor to enter a curtilage and approach the front door. *Id.* at 1423-24 (Alito, J, dissenting). But Justice Alito explicitly agreed that the implied license for visitors to come to the front door does not extend to the wee hours: **“Nor, as a general matter, may a visitor come to the front door in the middle of the night without an express invitation.”** *Id.* at 1422 (citing *State v Cada*, 129 Idaho 224; 923 P2d 469, 478 (1996)) (emphasis added). And the majority expressly agreed with Justice Alito’s invocation of the social expectation that visitors do not come to our homes in the middle of the night without an invitation: “We think a typical person would find it ‘cause for great alarm’ **(the kind of reaction the dissent quite rightly relies upon to justify its no-night-visits rule)** to find a stranger snooping about his front porch **with or without** a dog.” *Id.* at 1416 n 3 (first emphasis added, second in original; internal citation and quotation marks omitted).

There was thus no dispute on the *Jardines* Court that an uninvited visitor approaching and knocking on the front door in the middle of the night exceeds the implied license that justifies the “knock and talk” technique during the day. Cf *Kentucky v King*, 563 US 452, 469; 131 S Ct 1849; 179 L Ed 2d 865 (2011) (approving police technique of approaching door and knocking where “any private citizen” might do same thing).²

The implied license enquiry is not difficult to apply in general, and it should not have been so difficult for the Court of Appeals to apply in this case. As the majority in *Jardines* put it,

² Indeed, even when the intruder is a police officer and the entry is fully justified by a search warrant, federal authority has long recognized that the time of day still matters. See Fed R Crim P 41(3)(2)(A)(ii) (requiring federal search warrants be executed “during the daytime, unless the judge for good cause expressly authorizes execution at another time”); see also *Jones v United States*, 357 US 493, 498; 78 S Ct 1253; 2 L Ed 2d 1514 (1958) (suppressing evidence obtained from nighttime entry where officers had obtained warrant to search in daytime and observing “it is difficult to imagine a more severe intrusion of privacy than the nighttime intrusion into a private home that occurred in this instance”).

the scope of the license “does not require fine-grained legal knowledge; it is generally managed without incident by the Nation’s Girl Scouts and trick-or-treaters.” *Jardines*, 133 S Ct at 1415 (footnote omitted).

Using experience and common sense, all nine members of the *Jardines* Court recognized that it would be unthinkable for Girl Scouts, trick-or-treaters, insurance salesmen, political campaigners, religious proselytizers, or anyone else not expressly invited to march up to a stranger’s door in the middle of the night and ring the doorbell. Virtually all Americans would be alarmed to be awakened by such strangers ringing the doorbell or pounding on the front door at such an hour. Most of us would call the police, while others would “greet” such uninvited visitors with extremely angry (and often unprintable) words. Indeed, in many cases the “greeters” would undoubtedly be armed. See *McDonald v City of Chicago*, 561 US 742; 130 S Ct 3020; 177 L Ed 2d 894 (2010) (recognizing Second Amendment includes personal right to keep arms for home defense).

If there is any doubt as to whether there is an “implied license” for strangers to enter one’s curtilage and knock on the door in the middle of the night, this Court need only ask what would (and should) happen to such uninvited visitors. Many of them would be arrested for trespassing and/or disturbing the peace, while the remainder would be emphatically ordered off of the property, perhaps at gunpoint.

In short, the argument that there is an “implied license” for strangers to make middle-of-the-night intrusions into one’s curtilage is risible. It is not at all surprising that every court to consider such an argument since *Jardines* has rejected it, with the exception of our Court of Appeals. See, e.g., *People v Burns*, 25 NE3d 1244, 1254 (Ill App, 2015) (holding police exceeded “implicit license” both by having dog sniff outside defendant’s apartment door and by

doing so “in the middle of the night”); *United States v Lundin*, 47 F Supp 3d 1003, 1013 (ND Cal, 2014) (granting motion to suppress evidence derived from “knock and talk” conducted at defendant’s home at 4:00 a.m., “a time at which most residents do not extend an implied license for strangers to visit”); *Kelley v State*, 34 P3d 1012, 1015 (Alaska App, 2015) (suppressing evidence derived from warrantless entry into defendant’s curtilage at 12:30 a.m. in the absence of “any evidence that Kelley impliedly consented to the arrival of visitors after midnight”); *Commonwealth v Ousley*, 393 SW3d 15, 30 (Ky, 2013) (suppressing evidence derived from warrantless entry of defendant’s curtilage and search of his trash in part because entry occurred after midnight because “just as the police may invade the curtilage without a warrant only to the extent that the public may do so, they may also invade the curtilage only *when* the public may do so” (emphasis in original)).

The only two examples the Court of Appeals majority could come up with to justify its conclusion that there is an “implied license” for strangers to come into the curtilage in the middle of the night actually prove the opposite. As the majority explained, an implied license “may well extend to a midnight visitor seeking emergency assistance, or to a pre-dawn visitor delivering the newspaper.” Court of Appeals slip op at 14 (footnote omitted).

Both of these examples completely fail to prove the Court of Appeals majority’s point. When one contracts to have a morning newspaper delivered to one’s front porch, one *expressly* licenses the delivery person must come onto the front porch to leave the paper there before the sun rises. The notion that contracting to have a delivery person leave a newspaper on one’s porch at 5:00 a.m. somehow implicitly licenses any random stranger to enter the curtilage and knock on the door in the middle of the night is nothing short of bizarre.

As for the middle-of-the-night emergency visitor, there is no license, implied or express,

for that person to enter the curtilage; instead, that person has a *legal justification* (i.e., the necessity defense) for what would otherwise be a criminal trespass. See *People v Hubbard*, 115 Mich App 73, 77; 320 NW2d 294 (1982) (“[I]n an appropriate factual situation, a defense of necessity may be interposed to a criminal trespass action.”); *Commonwealth v Magadini*, 474 Mass 593; 52 NE3d 1041 (2016) (holding that homeless man made sufficient showing of imminent danger from extreme cold so jury should have been instructed on necessity defense to criminal trespass charges even though defendant had no express or implied license to intrude and had been served with a “no trespass order”).

By the Court of Appeals majority’s logic, because someone being chased down the street by a gunman might justifiably escape the dire emergency by running into the curtilage (or even into the house itself), then the owner of the house has somehow issued an “implied license” for anyone to enter the curtilage (or the house itself) at any time of the day or night. It is difficult to describe that logic as anything but absurd.

CONCLUSION

Contrary to the Court of Appeals majority’s view, Michigan homeowners do not issue “implied licenses” for strangers to invade their curtilage and knock on their door or ring their doorbells in the middle of the night. This Court should therefore grant the defendants’ applications for leave to appeal or summarily reverse the decision below.

Respectfully submitted,

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Dated: July 28, 2016