# First Among Equals: How the Curtilage Doctrine Bars a *Terry* Stop and Frisk Inside the Curtilage After *Jardines* and *Collins*

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*Abstract*

*History and tradition confirm that the curtilage's heightened protections are a Fourth Amendment fixture. In* Collins v. Virginia*, the Supreme Court reaffirmed that understanding and relieved the tension between two strands of Fourth Amendment caselaw: the curtilage doctrine and the automobile exception. The Court decided the automobile exception did not authorize warrantless entry into a person's curtilage because extending the rule would detach the rationale from its original justifications. The curtilage, like a home, garners the highest Fourth Amendment protection. So when an officer trespasses onto the curtilage, the privacy intrusion is far greater than the intrusion arising from a roadside vehicle search. There is a "separate and substantial" privacy intrusion, said Justice Sotomayor, that the automobile exception never considered—an intrusion far greater than what the exception ever anticipated. The Court's holding reflects what* Jardines *and earlier cases made clear: the curtilage is like the home for Fourth*

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*Amendment purposes, and absent consent or exigent circumstances, entering the curtilage without a warrant violates the Fourth Amendment.*

*This Article addresses an issue* Collins *and* Jardines *left open: whether the* Terry *exception authorizes warrantless entry into the curtilage. It does not.* Terry*'s rationale carefully balanced the public interest—specifically, the interest in officer safety and crime prevention—against the minimal intrusion arising from a brief stop and frisk. It never considered the curtilage's "separate and substantial" privacy interest. Extending* Terry *would unmoor the rationale from its underpinnings because that substantial privacy intrusion is far greater than the minimal intrusion* Terry *considered. Plus,* Terry*'s progeny never authorized warrantless entry into a home. There was always an independent, legal basis granting entry. Thus, officers may not conduct a stop and frisk inside the curtilage, unless there is an independent, legal basis for entering—like a warrant, consent, or exigent circumstances.*

> *We are in great danger of falling into the trap I just warned against: thinking that anything that improves America's security . . . is wise policy. That makes a terrified prudence the only virtue we recognize; it sacrifices courage and dignity to a mean and cowardly prejudice . . . .*[1]

## I. INTRODUCTION

The curtilage is "first among equals."[2] History and tradition tells us that homes rest at the core of the Fourth Amendment and receive the highest constitutional protection. Since 2012, the Supreme Court began recalibrating its Fourth Amendment analysis and started refocusing on property principles like "trespass" and "curtilage."[3] This

1. RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE? 51 (3d prtg. 2008).

2. *See* Florida v. Jardines, 569 U.S. 1, 6 (2013); *see also* Collins v. Virginia, 138 S. Ct. 1663, 1681 (2018).

3. *See, e.g.*, United States v. Jones, 565 U.S. 400, 404–05 (2012) (resurrecting the common-law, trespassory test); *Jardines*, 569 U.S. at 6, 11 (holding that

doctrinal twist signaled a shift in our Fourth Amendment jurisprudence, with scholars noting that the Roberts court revitalized the Amendment's warrant requirement.[4] In doing so, it reconfirmed that the curtilage—those "places immediately surrounding and associated with the home,"[5] like a side yard,[6] front porch,[7] or covered garage[8]—enjoys the same Fourth Amendment protection as a home.[9]

During this shift, the Court decided *Collins v. Virginia*. In *Collins*, the Court confronted an issue arising between two lines of Fourth Amendment doctrine: the curtilage doctrine and the automobile exception.[10] The question there was whether the automobile exception authorized warrantless entry into a home's curtilage.[11] It did not. Using the common-law trespassory test,[12] Justice Sotomayor, who authored the majority opinion, believed it was "an easy case."[13] Without a warrant, consent, or exigent circumstances, trespassing onto the curtilage and gathering evidence was a Fourth Amendment "search."[14]

trespassing onto someone's front porch is a "search"); Byrd v. United States, 138 S. Ct. 1518, 1531 (2018) (Thomas, J., concurring) (arguing the Court should use a property-based analysis when it determines whether someone has Fourth Amendment standing); Carpenter v. United States, 138 S. Ct. 2206, 2272 (2018) (Gorsuch, J., dissenting) (arguing the court should discard the reasonable-expectation-of-privacy test and apply property principles in the standing context).

4. *See* Benjamin J. Priester, *A Warrant Requirement Resurgence? The Fourth Amendment in the Robert's Court*, 93 SAINT JOHN'S L. REV. 89, 97, 101 (2019) (arguing the Roberts Court began reemphasizing the warrant requirement, particularly in the context of curtilage).

5. *Jardines*, 569 U.S. at 5–7.

6. *See id.* (discussing that the side yard is likely curtilage).

7. *See id.* (holding that the front porch is curtilage).

8. *See* Collins v. Virginia, 138 S. Ct. 1663, 1671 (2018) (holding that a carport abutting from the house was curtilage).

9. *See* Oliver v. United States, 466 U.S. 170, 180 (1984); *Jardines*, 569 U.S. at 6; *Collins*, 138 S. Ct. at 1670.

10. *See Collins*, 138 S. Ct. at 1669–70; *see also* Leading Case, *Fourth Amendment—Search and Seizure—Automobile Exception*—Collins v. Virginia, 132 HARV. L. REV. 357, 360 (2018).

11. *See Collins*, 138 S. Ct. at 1669.

12. *See id.* at 1670 (citing *Jardines*, 569 U.S. at 11); *see also* United States v. Jones, 565 U.S. 400, 406 n.3 (2012).

13. *Collins*, 138 S. Ct. at 1671.

14. *See id*. at 1670 (citing *Jardines*, 569 U.S. at 11).

Extending the automobile exception to allow entry would unmoor the exception from its underpinnings[15] and belie our history of treating the curtilage like a home for Fourth Amendment purposes.[16] Justice Thomas's concurrence likewise endorsed the curtilage doctrine and its "originalist" foundations, while Justice Alito—*Collins*'s lone dissenter—even believed the "home" encompassed the curtilage.[17] This decision reaffirmed what *Jardines* made clear: the curtilage doctrine is a Fourth Amendment fixture,[18] and the Court will not add to its list of warrant exceptions. *Jardines* and *Collins* described a muscular doctrine, one offering broad and sturdy constitutional protections to the home and curtilage.[19]

But a question remains open: whether the *Terry* exception grants officers warrantless entry into the curtilage. A well-defined split has developed among federal and state courts,[20] so this Article canvases the case law and tries offering an answer. It argues the curtilage

15. *See id.* at 1671.

16. *See* Oliver v. United States, 466 U.S. 170, 180 (1984); *Jardines*, 569 U.S. at 6; *Collins*, 138 S. Ct. at 1670.

17. *Collins*, 138 S. Ct. at 1676 (Thomas, J., concurring); *see also id.* at 1681 (Alito, J., concurring).

18. *See* Chad Flanders, Collins *and the Invention of Curtilage*, 22 U. PA. J. CONST. L. 755, 757 (2020).

19. *See* Kathryn E. Fifield, Note, *Let this* Jardines *Grow: The Case for Curtilage Protection in Common Areas*, 2017 WIS. L. REV. 148, 172 (arguing the trespass test *Jardines* articulated is highly protective since it weds privacy and property concepts together); Flanders, *supra* note 18 at 757 (discussing how *Collins* unanimously decided that the curtilage doctrine is a Fourth Amendment fixture). Specifically, Professor Flanders acknowledges that *Collins* firmly establishes the curtilage doctrine in our Fourth Amendment jurisprudence. That said, he argues the curtilage doctrine insufficiently protects people's privacy and is unsupported by Fourth Amendment History. *See id.* at 757–63.

20. *See* United States v. Richmond, 924 F.3d 404, 408 (7th Cir. 2019) (allowing a *Terry* stop and frisk inside the curtilage); Reid v. State, 113 N.E.3d 290, 302 (Ind. Ct. App. 2018) (allowing a *Terry* stop and frisk inside the curtilage). *But see* United States v. Alexander, 888 F.3d 628, 629–31 (2d Cir. 2018) (citing the holding in *Jardines* that the Fourth Amendment bars a stop and frisk inside the curtilage); United States v. Perea-Rey, 680 F.3d 1179, 1182 (9th Cir. 2012) (citing the holding in *United States v. Jones*, 565 U.S. 400, 401 (2012), that the Fourth Amendment bars a stop and frisk inside the curtilage); State v. Davis, 849 S.E.2d 207, 212 (Ga. Ct. App. 2020) (holding that officers may not stop someone inside their curtilage without a warrant after *Jardines* and *Collins*).

doctrine bars a *Terry* stop-and-frisk inside someone's curtilage after *Jardines* and *Collins*; the history of the Fourth Amendment supports, and the rationale of *Jardines* and *Collins* demands, that conclusion. *Terry*'s rationale balanced the public's safety interest against the minimal privacy intrusion that flows from a stop-and-frisk.[21] It never contemplated the curtilage's "separate and substantial"[22] privacy interest, which makes the intrusion far greater than what *Terry*'s rationale considered. Plus, *Terry* alone never authorized warrantless entry into a home.[23] Even when the Court extended *Terry* in *Maryland v. Buie* and endorsed warrantless house frisks, officers had an independent, legal basis for entering: a warrant.[24] Discarding that independent-basis requirement would thus redefine the *Terry* rule and ignore the Fourth Amendment's history of treating the curtilage like a home.

This Article's scope is limited. First, I do not look at how courts applied *Terry* inside the curtilage before *Jones*, *Jardines*, or *Collins*. Second, I do not offer a new framework for deciding what areas fall inside the curtilage's scope. Nor do I offer critiques about the curtilage doctrine.[25] Rather, I argue the curtilage doctrine precludes a stop-and-frisk inside the curtilage, unless officers have an independent, legal basis for entering—like a warrant, consent, or exigent circumstances. Since there is little scholarship on this issue, this Article tries filling that void.[26] Although some scholars have maligned the Court's

21. *See* Terry v. Ohio, 392 U.S. 1, 24–26 (1968).

22. *Collins*, 138 S. Ct. at 1672; *see also Terry*, 392 U.S. at 6–8 (considering a stop and frisk occurring on a public street).

23. *See generally Terry*, 392 U.S. at 1.

24. *See* Maryland v. Buie, 494 U.S. 325, 332–34 (1990) (extending *Terry* to homes).

25. *See* Flanders, *supra* note 18, at 757–63 (arguing the curtilage doctrine rests upon a misunderstanding of text and history); *see also* Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 945–52 (2010) (arguing that housing exceptionalism gives inadequate protections for those areas outside the home and the curtilage context).

26. *See* Fifield, *supra* note 19, at 172 (arguing *Jardines* bars searches of common areas); *see also* Arnold H. Loewy, United States v. Jones*: Return to Trespass—Good News or Bad*, 82 MISS. L. REV. 879, 883–84 (2013) (arguing the common-law trespassory test provides a "substantial" upgrade); Flanders, *supra* note 18, at 757 (arguing that while the Court has firmly established the curtilage doctrine, the doctrine's foundations are shaky and at odds with Fourth Amendment history); Quiwana N.

common-law trespass rubric,[27] property-based principles have filled gaps *Katz* left open.[28]

Part I offers a brief history of the curtilage doctrine, beginning with the Supreme Court's decision in *Oliver v. United States.* It then discusses the Court's most recent property-based cases, *Jones*, *Jardines*, and *Collins*. Part II examines *Terry* and *Terry*'s progeny, focusing on the justifications and principles creating the stop-and-frisk doctrine. Part III looks at the split that developed between state and federal courts. While these lower court rulings display how courts are thinking about this issue, the analyses are underdeveloped. But they offer a way forward. Finally, Part IV argues the curtilage doctrine precludes a stop and frisk inside the curtilage because the privacy intrusion is far greater than what the *Terry* doctrine ever anticipated. If officers want to stop and frisk someone inside their curtilage, they need an independent, legal basis for doing so (i.e., a warrant, consent, or exigent circumstances). Then using hypotheticals, I show how eliminating *Terry* from the curtilage context does not create a more dangerous society.

## II. THE CURTILAGE: FIRST AMONG EQUALS

Curtilage is like the home: It garners robust constitutional protection. The Supreme Court reaffirmed this understanding and recognized that the curtilage doctrine is a mainstay in our Fourth Amendment

Chaney, United States v. Carloss: *An Unclear and Dangerous Threat to Fourth Amendment Protections of the Home and Curtilage*, 95 DENV. L. REV. 519, 520–21 (2019) (arguing that officers must have reasonable suspicion to conduct a "knock-and-talk."); Tanner M. Russo, *Garbage Pulls Under the Physical Trespass Test*, 105 VA. L. REV. 1217, 1221 (2019) (arguing that the trespass test offers constitutional protection to garbage pulls).

27. *See* David C. Roth, Florida v. Jardines: *Trespassing on the Reasonable Expectation of Privacy*, 91 DENV. U. L. REV. 551, 553 (2014) (arguing that "the *Jardines* decision threatens to diminish Fourth Amendment protections"); Flanders, *supra* note 18, at 757, 762 (arguing the doctrine's foundations are shaky, at odds with Fourth Amendment history, and provides inadequate protections); Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE. L.J. 946, 1014 n.299 (2016) (arguing the trespass test may not be long lived).

28. *See* Fifield, *supra* note 19, at 172 (arguing that *Jardines* offers protection to areas *Katz* left uncovered, particularly in the area of shared spaces).

jurisprudence. In two parts, this section examines the curtilage doctrine's contours: Section A offers a brief history of the doctrine and explores how caselaw developed our current curtilage protections. Section B examines the Court's most recent curtilage decisions—*Jardines* and *Collins.*

### *A. Curtilage: A History*

The Fourth Amendment's text and history teach that it protects the curtilage, or those private places immediately surrounding a home. Enshrined in the Bill of Rights is the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[29] The Amendment's text reflects a "close connection" to property, as it protects a person's papers, effects, and houses from unwarranted police intrusion.[30] These protections, though, do not prohibit all police intrusions onto private property.[31] Open fields—such as hundreds of acres of ranch property—receive no constitutional safe harbor.[32] But the home is "first among equals"[33] and rests on a different constitutional footing than other areas; people may always retreat into their houses and "be free from . . . governmental intrusion."[34] In fact, these enhanced safeguards do not simply stop at the front door: They extend beyond the walls of a home and cover those intimate areas "associated with the sanctity of a man's home and the privacies of [his]

29. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

30. United States v. Jones, 565 U.S. 400, 405 (2012).

31. Florida v. Jardines, 569 U.S. 1, 6 (2013).

32. *Id.*; s*ee* United States v. Dunn, 480 U.S. 294, 304 (1987) (holding almost 200 acres of ranch property encircled by a perimeter fence was an "open field" and thus received no constitutional protection); *see also* California v. Ciraolo, 476 U.S. 207, 213–14 (1986) (concluding that public spaces don't receive Fourth Amendment protection).

33. *Jardines*, 569 U.S. at 6.

34. *Id.*

life."[35] Before the Founding, Blackstone recognized that the "house protects and privileges all it's [sic] branches and appurtenants, if within the curtilage or homestall."[36] Or said differently, like the home, the curtilage is first among equals and enjoys the highest Fourth Amendment protection.

Despite focusing on the reasonable-expectation-of-privacy test during the latter half of the twentieth century, the Court still bounded the Fourth Amendment's protections with property concepts—concepts like "curtilage" and "open fields."[37] In *Oliver v. United States*, for example, officers entered the defendant's property without a warrant and discovered marijuana.[38] The question there was whether officers entered onto the defendant's curtilage or an open field.[39] That was because, as the majority recognized, the "special protection accorded the Fourth Amendment . . . is not extended to the open fields."[40] Open fields do not encompass the intimate areas contemplated by the Amendment.[41] Plus, the common-law distinction between these two areas also implied that curtilage, not open fields, garnered constitutional cover.[42] Citing *Hester v. United States*, the Court defined curtilage as "the land immediately surrounding and associated with the home."[43] That area, unlike open fields, receives the same robust protection as a home.[44]

35. Oliver v. United States, 466 U.S. 170, 180 (1984); *see also Jardines*, 569 U.S. at 6–7 (citing *Oliver*, 466 U.S. at 180).

36. *Blackstone's Commentaries on the Laws of England, Book the Fourth: Chapter the Sixteenth: Of Offenses Against the Habitations of Individuals*, YALE L. SCH.: LILLIAN GOLDMAN L. LIBR. (2008), https://avalon.law.yale.edu/18th_century/blackstone_bk4ch16.asp.

37. *See* Flanders, *supra* note 18, at 772–73; *Dunn*, 480 U.S. at 300; *see also Oliver*, 466 U.S. at 180; *Ciraolo*, 476 U.S. at 213–14.

38. *See Oliver*, 466 U.S. at 173–74.

39. *See id.* at 176–77.

40. *Id.* at 176 (citing Hester v. United States, 265 U.S. 57, 59 (1924)).

41. *Id.*

42. *Id.* at 180.

43. *Id.*

44. *Id.*

The Court kept using *Oliver*'s holding to strengthen the doctrine's roots.[45] The first case, *California v. Ciraolo*, addressed whether officers flying over someone's curtilage and taking aerial photos of a fenced-in backyard was an unreasonable search.[46] Because a fence kept officers from seeing inside Ciraolo's backyard, they flew over his property and took photographs.[47] The photos revealed marijuana plants growing inside the backyard.[48] The Court reaffirmed *Oliver*'s central lesson, holding that the curtilage receives the same protection as a home,[49] but the police surveillance there was "reasonable" since officers never gathered their information by unlawfully trespassing onto that constitutionally protected area.[50] They instead made their observations from public airspace, an area receiving no constitutional protection.[51]

The second case, *United States v. Dunn*, decided whether a barn and its surrounding area fell inside the curtilage's umbrella.[52] Dunn had a fenced-in backyard, but behind the fencing sat two barns—one of which officers searched after getting a search warrant.[53] The basis for the search warrant was the officer's observations; they crossed onto the defendant's property, shined a flashlight into the barn, and saw contraband.[54] The Court decided the barn and surrounding land was "open fields"—not curtilage.[55] To reach that holding, it considered certain factors like proximity to a home, how the area is used, whether the area is enclosed, and what steps were taken to hide the area from public view.[56] The barn there sat fifty to sixty yards away from Dunn's house; it sat outside Dunn's fenced-in backyard; intel showed Dunn using the barn for drug manufacturing, nothing intimate, and Dunn took no

45. *See* California v. Ciraolo, 476 U.S. 207, 213–14 (1986); *see also* United States v. Dunn, 480 U.S. 294, 300 (1987).

46. *Ciraolo*, 476 U.S. at 209–10.

47. *Id.*

48. *Id*.

49. *See id.* at 212–14 (The fenced-in backyard was deemed curtilage).

50. *Id.* at 213.

51. *Id.*

52. United States v. Dunn, 480 U.S. 294, 299–300 (1987).

53. *Id.* at 297–98.

54. *Id.*

55. *Id.* at 301.

56. *Id.*

precautions to hide the barn from public view.[57] The facts showed it was not "so intimately tied to the home itself that it should be placed under the home's umbrella."[58] The barn was thus "open fields" and deserved no constitutional protection. But the Court clarified that, even if the barn were curtilage, officers made their observations—by shining a flashlight into a window of the barn—while standing in open fields.[59] Like *Ciraolo*, because officers never gathered their information by trespassing onto a constitutionally protected area, there was no Fourth Amendment "search."[60]

In short, those cases teach that the curtilage receives constitutional protection, while "open fields" and "public places" do not.[61] Scholars have, indeed, criticized the curtilage doctrine.[62] But against that legal backdrop the Court decided *Jardines* and *Collins*, where it reaffirmed the understanding that entering a home's curtilage without a warrant is a Fourth Amendment "search."

### *B. Recent Curtilage and Trespass Cases: Jones, Jardines, and*

57. *Id.* at 302–03.

58. *Id.* at 301.

59. *Id.* at 297–98, 304–05.

60. *See id.* at 304–05.

61. *See* California v. Ciraolo, 476 U.S. 207, 213–14 (1986); *Dunn*, 480 U.S. at 300.

62. *See* Flanders, *supra* note 18, at 757. Professor Flanders argues the curtilage doctrine is detached from text and history. *See id.* at 757–58. The curtilage, from his view, was not supposed to receive the same protections as the home. *See id.* He argues the curtilage doctrine is simply a repackaged version of the reasonable-expectation-of-privacy test. *Id.* That is because, to decide if a place qualifies as curtilage, the court first determines whether a person reasonably expects a place to be "curtilage." *Id*. This misunderstanding of the curtilage doctrine began with *Oliver* and *Dunn*, and then *Jardines* and *Collins* only compounded the issues. *See id.* at 761–62. So Professor Flanders offers a new insight: argue the curtilage is an "effect" within the meaning of the Fourth Amendment. *See id.* at 791; *see also* Stern, *supra* note 25, at 945. Professor Stern argues that housing exceptionalism—in other words, treating the home and areas intimately associated with the home differently—is the reason there are lesser constitutional protections in places outside the residential context. *See id.* at 938.

*Collins*

*Jardines* and *Collins* followed that history faithfully; those holdings underscored the curtilage's heightened protection and barred warrantless searches inside that protected area.[63] But as a primer to those cases, the Court made an interesting pivot: resurrecting the common-law trespassory test in *United States v. Jones*.[64]

1. Resurrection—*United States v. Jones*

In *United States v. Jones*, the Court held that trespassing onto a person's effect was an unreasonable search under the Fourth Amendment. The Government physically occupied a person's property by fastening a GPS onto the defendant's car to gather information.[65] Though not a curtilage case, Justice Scalia, who authored the majority opinion, resurrected the test used in *Jardines* and *Collins*: the common-law, property-based trespassory test.[66] The Government argued there was no constitutional problem since it believed the defendant lacked a reasonable expectation of privacy.[67] The majority disagreed.[68] Starting at the Amendment's text and history, the Court explained it "reflects [a] close connection to property . . . ."[69] It was doubtless, according to Justice Scalia, "*a physical intrusion* would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."[70] Thus, placing a GPS onto a car without a warrant was an unconstitutional "search."[71] The Court carefully explained that the common-law trespassory test was supplementing, not replacing, *Katz*'s

63. *See* Collins v. Virginia, 138 S. Ct. 1663, 1670 (2018); Florida v. Jardines, 569 U.S. 1, 6 (2013).

64. United States v. Jones, 565 U.S. 405, 406 n.3 (2012).

65. *See id.* at 403.

66. *See id.* at 406 n.3.

67. *Id.* at 406.

68. *See id.*

69. *Id.* at 405.

70. *Id.* at 404–05 (emphasis added).

71. *See id.*

reasonable-expectation-of-privacy analysis.[72] But under those facts, the Court felt its property-based rubric resolved the case.[73]

### 2. Searching the Curtilage—*Florida v. Jardines*

*Florida v. Jardines*, again written by Justice Scalia, reflects the Court's continued fidelity to property norms like trespass and curtilage. There, it decided that bringing a drug-sniffing dog onto a porch and letting it signal for drugs was an unconstitutional search of the curtilage.[74] Justice Scalia's opinion proceeded in two parts: First, the Court asked whether the search occurred inside a constitutionally protected area.[75] It reaffirmed the understanding that places "immediately surrounding and associated with the home" garner the same Fourth Amendment protection as the home itself.[76] A front porch fell under that protective umbrella.[77] Tracking *Jones*'s reasoning, the Court made clear that physically entering this area and "gathering information" through a dog sniff was constitutionally suspect.[78]

Having decided the porch was curtilage, it next decided there was no "implied license" granting entry.[79] The Court recognized that

72. *See id.* at 409 ("[T]he reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.").

73. *See id.* at 406 n.3 ("Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred."). Justice Thomas and Justice Gorsuch also believe the Court should apply property-based principles in other Fourth Amendment contexts—like standing and the third-party doctrine. *See* Byrd v. United States, 138 S. Ct. 1518, 1531 (2018) (Thomas, J., concurring); Carpenter v. United States, 138 S. Ct. 2206, 2272 (2018) (Gorsuch, J., dissenting). In *Byrd*, for instance, Justice Thomas, who ultimately concurred in judgment, expressed doubts about *Katz*'s continued viability—even in the standing context. *See Byrd*, 138 S. Ct. at 1531. Justice Thomas surmised that Fourth Amendment standing could turn on whether someone has a sufficient property interest in the area searched. *See id.* Similarly, in *Carpenter v. United States*, Justice Gorsuch argued that applying property principles—like bailment—should be applied in the context of the third-party doctrine. *See Carpenter*, 138 S. Ct. at 2272.

74. *See* Florida v. Jardines, 569 U.S. 1, 12 (2013).

75. *See id.* at 6.

76. *Id.* (quoting Oliver v. United States, 466 U.S. 170, 180 (1984)).

77. *See id.* at 7.

78. *See id.* at 5–6.

79. *Id.* at 10–11.

"[a] license may be implied from the *habits of the country*,"[80] but it is limited "not only to a *particular area*, but also to a *specific purpose*."[81] Letting a police-trained drug dog "explore the area around the home in hopes of discovering incriminating evidence"[82] exceeded society's express or implied license to enter a person's curtilage.[83] A door-to-door salesperson, an Amazon delivery woman, or an Uber Eats delivery driver pose no constitutional problem since they "knock promptly, wait briefly to be received, and then (absent an invitation to linger longer) leave."[84] That custom, though, does not invite people to pillage through bushes or snoop through windows for incriminating evidence. So the State's argument that *Jardines* had no privacy expectations fell flat.[85] *Katz*'s formulation was no longer the exclusive metric, making it unnecessary to even consider *Jardine*'s privacy expectations.[86] The Court, as it did in *Jones*, emphasized that gathering evidence by physically intruding on a constitutionally protected area is a "search."[87]

The majority also emphasized that it was not limiting its holding to the "particular instrument" used during a search.[88] The dissent tried recasting the holding, arguing that the analysis turned on what officers used while searching, such as a dog.[89] But that reasoning was inapt. It

80. *Id.* at 8 (quoting McKee v. Gratz, 260 U. S. 127, 136 (1922)) (emphasis added); *see also id.* at 7 n.1 (acknowledging that the implied license allows officers to approach a home and knock in hopes of talking with the person inside).

81. *Id.* at 9 (emphasis added).

82. *Id.*

83. *Id.* ("But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*.").

84. *Id.* at 8.

85. *See id.* at 10–11.

86. *See id.* at 11 ("The *Katz* reasonable expectations test 'has been *added to*, not *substituted for*,' the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas.").

87. *Id.* at 10–11.

88. *See id.* at 9 n.3.

89. *See id.* at 23 (Alito, J., dissenting).

was the "behavior,"[90] not the instrument, that was problematic.[91] What a person is *doing* is what the implied license focused on and letting a police-trained dog sniff a porch exceeded that license.

3. The Curtilage and Automobile Exception—*Collins v. Virginia*

The second curtilage case, *Collins v. Virginia*, disavowed an officer's warrantless search of an "effect" inside the curtilage. Cops there entered a partially covered garage and searched for a motorcycle.[92] This time, however, the Court addressed a new wrinkle: the automobile exception.[93] This exception greenlights a warrantless vehicle search when officers have probable cause that a vehicle contains contraband.[94] The core reasons for this carve out are a car's "ready mobility"[95] and "pervasive regulation"[96] under state law—which, as a result, lessens the privacy interest. But a car is different from a house.

Before reaching the primary question, the Court addressed a threshold issue: whether a partially enclosed garage fell inside the curtilage.[97] Justice Sotomayor, writing for the majority, described the garage as "abut[ting]"[98] from the home and linked directly to it by a side door.[99] This enclosed garage was thus an "area adjacent to the home and 'to which the activity of home life extends.'"[100] Because of that, entering the garage to search a motorcycle was constitutionally suspect.

The Court then turned towards the automobile exception, where it ultimately decided the exception was inapplicable.[101] The Court held

90. *Id*. at 9 n.3.

91. *Id.* (discussing the alarm a typical person would experience after finding someone "snooping about [their] porch *with or without* a dog").

92. *See* Collins v. Virginia, 138 S. Ct. 1663, 1668 (2018).

93. *See id.* at 1669, 1673–75.

94. *Id.* at 1669.

95. *Id.* (quoting California v. Carney, 471 U.S. 386, 390 (1985)).

96. *Id.*at 1670 (quoting *Carney*, 471 U.S. at 392).

97. *See id.* at 1670–71.

98. *Id.* at 1671 ("When Officer Rhodes searched the motorcycle, it was parked inside this partially enclosed top portion of the driveway that abuts the house.").

99. *Id.* at 1670–71.

100. *Id.* at 1671.

101. *See id.* However, Justice Alito disagreed, believing the search was reasonable. *See id.* at 1680 (Alito, J., dissenting). He implored the majority to recognize

that the "automobile exception is not a categorical one that permits the warrantless search of a vehicle anytime, anywhere, including in a home or curtilage."[102] It emphasized the "automobile exception extend[ed] no further than the automobile itself."[103] Extending the rule beyond the car "to permit police to invade any space outside an automobile even if the Fourth Amendment protects that space"[104] would "untether" the exception from its underlying justifications.[105] Unlike a routine roadside stop, there was a "separate and substantial"[106] Fourth Amendment interest beyond the car: the curtilage.[107]

The facts in *Collins* echoed *Payton v. New York*, a case holding that officers cannot arrest someone inside a home without a warrant—unless, of course, there is consent or exigent circumstances.[108] This was because arresting a person inside their house "involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home."[109] That meant two privacy interests were at play: someone's body and someone's home. Likewise, searching a motorcycle inside a garage invaded not only the "Fourth Amendment interest in the vehicle but also . . . the sanctity of the curtilage."[110] That intrusion was far greater than what the exception ever considered. The automobile exception only balanced someone's Fourth Amendment interest inside their car against the Government's interest in conducting a safe,

that the Fourth Amendment's "hallmark is reasonableness." *Id.* at 1681. From his view, the Court should ask whether the privacy interest is great and whether the car is any less mobile. Under his analysis, both answers were "emphatically" no. *See id.* at 1682. Officers simply walked into the driveway and searched a publicly visible motorcycle—that violated no privacy interest. *See id.* at 1682–83.

102. *Id.* at 1667.

103. *Id.* at 1671.

104. *Id.*

105. *Id.* ("Expanding the scope of the automobile exception in this way would both undervalue the core Fourth Amendment protection afforded to the home and its curtilage and '"untether"' the automobile exception '"from the justifications underlying"' it.").

106. *Id.* at 1672.

107. *See id.*

108. *Id.*; *see also* Payton v. New York, 445 U.S. 573, 576, 587–90 (1980).

109. *Collins*, 138 S. Ct. at 1672 (quoting *Payton*, 445 U.S. at 588–89).

110. *Id.*

expedient car search on a public street;[111] it never contemplated the curtilage's "separate and substantial" privacy interest.[112] Thus, because the house and curtilage carry higher Fourth Amendment protection, and because the exception's rationale never addressed a situation with a substantial privacy interest, it was inapplicable.

Virginia presented two arguments that the Court rejected: a categorical[113] argument and then a "limited"[114] categorical argument. Virginia first believed *United States v. Scher* and *Pennsylvania v. Labron* created a categorical exception—one allowing warrantless car searches inside a home or curtilage.[115] In *Scher*, an informant told officers the defendant was transporting illegal contraband.[116] Officers identified his car and followed him to his house.[117] Scher pulled into the driveway, and officers approached.[118] Scher admitted his car contained illegal booze, so officers found the contraband inside his trunk and arrested him.[119] But *Sher* was distinguishable. While acknowledging *Scher*'s "imprecise" reasoning, Justice Sotomayor noted it was a hot-pursuit case—even though the *Scher* court never explicitly ruled on those grounds.[120] Unlike in *Collins*, officers there "'could have stopped' and searched the car 'just before [petitioner] entered the garage.'"[121] Hot-pursuit cases have held that someone cannot "defeat an arrest that began in a public place"[122] by "escaping to a private

111. *Id.*

112. *Id.*

113. *Id.* at 1673.

114. *Id* at 1674.

115. *See id.* at 1673–74; s*ee also* Scher v. United States, 305 U.S. 251 (1938) (holding a warrantless search of a car in a garage was valid); Pennsylvania v. Labron, 518 U.S. 938 (1996) (holding that warrantless searches of stationary automobiles were constitutional).

116. *Scher*, 305 U.S. at 253.

117. *Id.*

118. *Id.*

119. *Id.* at 253–54.

120. *See Collins*, 138 S. Ct. at 1674.

121. *Id.* at 1674 (quoting *Scher*, 305 U.S. at 254–55).

122. United States v. Santana, 427 U.S. 38, 43 (1976).

place."[123] So that characterization seems plausible when reading it against the Court's hot-pursuit background.[124]

*Pennsylvania v. Labron* fared no better because its holding was also unsound. There, searching a truck parked at a farmhouse was authorized under the automobile exception.[125] But the *Labron* court never determined whether the truck was inside the curtilage.[126] Nor was it clear that the defendant even had standing—or as Sotomayor phrased it, "any Fourth Amendment interest"[127]—to challenge the officers' curtilage search.[128]

Second, Virginia asked that the Court create an exception allowing warrantless entry when officers are not entering "the physical threshold of a house or a similar fixed, enclosed structure inside the curtilage like a garage."[129] Areas beyond the home or an enclosed structure, from Virginia's view, rested on a different constitutional footing and should receive different Fourth Amendment protection. But the Court rejected that proposed rule on three grounds: history, workability, and equal protection. Historically, the Court has long decided that the curtilage is the same as the home for Fourth Amendment purposes.[130] Public visibility is different than allowing officers—without a warrant—to enter the curtilage and "obtain information not otherwise accessible."[131] The majority also believed injecting this new rule into Fourth Amendment jurisprudence would only create further confusion.[132] And finally, it said endorsing such a rule would treat people differently based on their financial means.[133] In Sotomayor's words, it would "grant constitutional rights to persons with the

123. *Id.* at 43.

124. *See id*.

125. *See* Pennsylvania v. Labron, 518 U.S. 938, 940 (1996).

126. *See id.* at 939–40.

127. Collins v. Virginia, 138 S. Ct. 1663, 1674 (2018).

128. *Id.*

129. *Id.*

130. *See id.* at 1674–75.

131. *Id.* at 1675.

132. *See id.* at 1674–75 ("Requiring officers to make 'case-by-case curtilage determinations,' Virginia reasons, unnecessarily complicates matters and 'raises the potential for confusion and . . . error.'").

133. *See id*. at 1675.

financial means to afford residences with garages in which to store their vehicles but deprive those persons without such resources of any individualized consideration."[134]

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In sum, these cases distilled two straightforward Fourth Amendment principles: (1) The curtilage (like the home) remains first among equals and receives heightened constitutional protection. And (2) officers cannot—absent a warrant, consent, or exigent circumstances—trespass onto someone's curtilage for investigative purposes.

## III. A BRIEF BUT MINIMAL INTRUSION: THE *TERRY* EXCEPTION

While the home and curtilage garner great Fourth Amendment protection, there are exceptions obviating the Amendment's warrant mandate—one of which is the *Terry* exception, an exception derived from *Terry v. Ohio*.[135] Officers may, without a warrant, stop and frisk a person, a car, or a home when they reasonably believe danger is afoot.[136] The rule rests on a policy-based rationale: it involves a minimal privacy intrusion while the protection it offers is of great public interest. But the contours, and chief markers, of the stop-and-frisk exception warrant further discussion. This section has three subparts, with each examining specific cases. Section *A* discusses *Terry v. Ohio*. Section *B* looks at *Michigan v. Long*, which established vehicle frisks. And then Section *C* discusses *Michigan v. Summers* and *Maryland v. Buie*, the cases extending the stop-and-frisk exception to encompass homes.

### *A. The Genesis—Terry v. Ohio*

In *Terry*, the Court found officers may briefly stop and frisk someone—without a warrant—if they have reasonable suspicion a person is armed and dangerous.[137] One afternoon, a plainclothes officer

134. *Id.*

135. *See* Terry v. Ohio, 392 U.S. 1 (1968).

136. *See Terry*, 392 U.S. at 27; Michigan v. Long, 463 U.S. 1032, 1034–35 (1983); Michigan v. Summers, 452 U.S. 692, 704–05 (1981); Maryland v. Buie, 494 U.S. 325, 327 (1990).

137. *Terry*, 392 U.S. at 7–8.

watched a pair of men peer inside a shop window.[138] The two men strolled back and forth, looking through the shop windows at least a "dozen" times.[139] Growing suspicious, the officer stopped the men and patted down their clothing.[140] A gun was found.[141]

The Court recognized the Constitution's protections extend beyond someone's home: "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[142] And a "careful exploration of the outer surfaces of a person's clothing all over his or her body" is also a "search" under the Fourth Amendment.[143] In short, brief stops or slight frisks trigger constitutional scrutiny, but the issue in *Terry* was whether this conduct was reasonable.[144] Striking a balance between the public and private interests, *Terry*'s majority believed an officer's physical safety and crime prevention justified the "brief" privacy intrusion.[145] To justify a stop, officers must have reasonable suspicion that someone is conducting criminal activity; to justify a frisk, officers must have reasonable suspicion that someone is armed and dangerous.[146] The Court later extended this rationale to completed crimes.[147] So now, when officers have reasonable suspicion that a dangerous person is carrying out criminal activity, or reasonable suspicion that a dangerous person already committed a crime, they may briefly detain and frisk them.

138. *Id.* at 6.

139. *Id.*

140. *See id.* at 6–7.

141. *Id.* at 7.

142. *Id.* at 16.

143. *Id.*

144. *See id.* at 20–26.

145. *See id.* at 26.

146. *See id.* at 25–27.

147. *See* United States v. Hensley, 469 U.S. 221, 237 (1985) (Brennan, J., concurring).

### *B. Frisking Vehicles—Michigan v. Long*

*Michigan v. Long* extended the stop-and-frisk exception to encompass vehicles stopped on public streets.[148] Tracking *Terry*'s logic, the Court decided that officer protection—particularly because they investigate car occupants at "close range"—justifies a limited car search when officers reasonably believe a person is "armed and presently dangerous."[149] Officers, there, stopped Long's car because he was driving erratically.[150] Long labored under a suspected illegal substance and disobeyed officers' commands.[151] Seeing a knife alongside an object protruding from the armrest, one officer searched the passenger compartment and found marijuana inside a small pouch.[152]

That cursory search was reasonable and thus passed constitutional muster. The Court emphasized that "roadside encounters between police and suspects are especially hazardous,"[153] with statistics revealing that roadside stops present a higher risk of murder, shootings, and other dangers.[154] It based the holding on *New York v. Belton*, a

148. *See* Michigan v. Long, 463 U.S. 1032, 1034–35. Justice Brennan dissented. Specifically, he lamented the majority for distorting *Terry*'s reasoning and expanding it beyond what the Court originally intended. *See id.* at 1060 (Brennan, J., dissenting). *Terry*'s core holding, from his view, allowed a "*limited* search for weapons"—mainly, touching and only entering pockets after feeling something—when officers reasonably suspected someone was dangerous. *See id.* at 1056 (emphasis added). But here the majority believed an "area search" comported with *Terry*'s holding. And, too, relying on *Belton* was fundamentally inapposite since the search was incident to a valid arrest whereas, in this case, the stop and frisk was based upon something far less: reasonable suspicion. *See id.* at 1057. Justice Brennan emphatically noted this "flouts" *Terry*'s carefully crafted boundary persevering a frisk's purpose (i.e., safety and crime prevention), while also respecting its intrusiveness. *See id.* at 1060. Yet an "area search" for weapons meant officers may search anywhere, including containers or areas where guns might be hidden—that, at a minimum, is far more intrusive than patting down someone's outer clothing. *See id.* at 1060–62.

149. *Id.* at 1046–47.

150. *Id.* at 1035.

151. *Id.* at 1036.

152. *Id.*

153. *Id.* at 1049.

154. *See id.* at 1048 n.13 (citing Allen P. Bristow, *Police Officer Shootings—A Tactical Evaluation*, 54 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 93 (1963)).

search-incident-to-arrest case.[155] Objects inside the car are within "the area into which an arrestee might reach in order to grab a weapon."[156] So under the *Terry* and *Belton* line of cases, a frisk of the passenger compartment is allowed when there is reasonable suspicion that an occupant is dangerous or a car contains weapons.[157]

### *C. Frisking a House—Michigan v. Summers and Maryland v. Buie*

Two *Terry*-related decisions also negotiated the friction between the stop-and-frisk exception and the home. A central lesson from these cases is that, while the Court extended the exception to cover homes, officers had an independent, legal basis for entering. The *Terry* rule, by itself, never granted entry.

*Michigan v. Summers* held a *Terry* "stop" inside a home passed constitutional scrutiny.[158] While executing a search warrant, officers stopped Summers on the steps of his home and made him stay on the premises.[159] Officers soon discovered drugs inside the house and arrested Summers, who also had drugs inside his pocket.[160] Because officers only had a search warrant, and because they lacked probable cause to arrest Summers before searching the house, the search-incident-to-arrest doctrine was unavailable.[161] So Summers challenged that initial seizure.[162] The Court, again balancing the various public and private interests, decided preventing a "risk of harm to the

155. *See id.* at 1048–49 (citing New York v. Belton, 453 U.S. 454, 460 (1981)).

156. *Id.* at 1049 (quoting Chimel v. California, 395 U.S. 752, 763 (1969)).

157. *Id.*

158. *See* Michigan v. Summers, 452 U.S. 692, 705 (1981). Joined by Justices Marshall and Brennan, Justice Stewart dissented. They primarily focused on a salient feature of *Terry*'s original holding: brevity. *See id.* at 706–08 (Stewart, J., dissenting). *Terry* allowed a brief stop. Terry v. Ohio, 392 U.S. 1, 26 (1968). But under the *Summers* majority's logic, officers may detain someone for several hours, making them "a prisoner in [their] own home for a potentially very long period of time." *Summers*, 452 U.S. at 711. This unmoored the rule from its original justifications and would foster misuse. *See id*. at 711–12.

159. *Summers*, 452 U.S. at 693.

160. *Id.*

161. *See id.* at 694–95.

162. *Id.* at 694.

officers"[163] and facilitating an "orderly completion of the search"[164] outweighed this "incremental" privacy intrusion.[165] Sure, the "stop" occurred inside a home, a place where Fourth Amendment protections are most robust. But the Court highlighted that "police had obtained a [*search*] *warrant* to search [the defendant's] house."[166] A neutral magistrate already believed the home contained contraband, so the stop was less intrusive than the search itself.[167] Having a search warrant—or an independent, legal basis—softened the privacy intrusion. Plus, the Court believed it was unlikely officers would exploit these brief detentions to gain information since, after all, what they seek will likely be found through the search warrant—not the stop.[168] But unlike *Terry*, the Court disposed of the reasonable-suspicion requirement.[169] Officers no longer needed individualized suspicion that crime was afoot because having a search warrant "provide[d] an objective justification for the detention."[170] Or said differently, being on the premises was enough to warrant the stop.[171]

Next, *Maryland v. Buie* decided "protective sweeps" inside a home passed Fourth Amendment scrutiny.[172] In *Buie*, officers executed an arrest warrant at Buie's house, believing he was the primary suspect

163. *Id.* at 702–03.

164. *Id.* at 703.

165. *Id.* at 703, 705.

166. *Id.* at 701 (emphasis added).

167. *See id.*

168. *Id.*

169. *See id.* at 703–04.

170. *Id. But see* Ybarra v. Illinois, 444 U.S. 85, 92–93 (1979) (holding that officers must have reasonable suspicion to frisk third-party occupants when executing a search warrant inside a tavern).

171. *See Summers*, 452 U.S. at 703.

172. Maryland v. Buie, 494 U.S. 325, 327–28 (1990). Justice Brennan dissented (again), arguing two points. He initially pressed the majority's point that homes were more dangerous than public streets, asserting nothing indicated "planned home arrests approache[d] the danger of unavoidable 'on-the-beat' confrontations." *Id.* at 340 (Brennan, J. dissenting). And then, believing these frisks—inside a home—are minimally intrusive "markedly undervalue[d]" *Terry*'s nature and scope. *Id.* at 341. This sweep would allow officers to view personal belongings inside rooms, closets, attics, and the like. *See id.* at 342. Peeping through closets, viewing potentially intimate belongings, is far more intrusive than canvassing a car or patting down someone's clothing. *See id.*

in an armed robbery.[173] Buie, who was hiding inside the basement, came upstairs and surrendered.[174] Afterward, officers entered the basement and seized a running suit that was laying on a stack of clothing.[175] Having apprehended Buie before entering the basement, Buie argued searching his basement was an unconstitutional search.[176]

The Court, using *Terry* and *Long*'s reasoning, concluded the sweep was reasonable; it again used a policy-based rationale to reach its conclusion: an officer's safety outweighs the minimal privacy intrusion flowing from an in-home arrest.[177] In-home arrests, from the Court's view, were on a different footing than roadside stops since arrestees are on their home "turf."[178] That disadvantage increased an officer's risk of harm.[179] Plus, like in *Summers*, the privacy instruction was softened since officers had an independent basis for entering the house: an arrest warrant.[180] The Court, indeed, limited the sweep of the exception by holding that officers may only inspect places where people will hide,[181] so small drawers, purses, and satchels are off limits.[182]

In short, *Buie* explains that officers may search areas immediately adjoining the arrest location without probable cause or reasonable suspicion—outside that, though, they need reasonable suspicion a dangerous confederate is nearby.[183]

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Caselaw tells us that the *Terry* exception is no less a constitutional force than the curtilage doctrine. But in each *Terry*-related fact pattern the privacy invasion was somehow lessened, while *Jardines* and *Collins* stressed that, when officers enter the curtilage for investigative purposes, there is a "separate and substantial" privacy interest at

173. *See Buie*, 494 U.S. at 328.
174. *Id.*
175. *Id.*
176. *See id.*
177. *See id.* at 333.
178. *Id.*
179. *Id.*
180. *See id.* at 332–33.
181. *See id.* at 334.
182. *See id.*
183. *See id.* at 333.

issue. Not only is there a privacy interest in someone's car or someone's body, there is also a substantial interest in the curtilage itself. That intrusion is greater than what the *Terry* doctrine considered. So, the question arises: do *Jardines* and *Collins* bar *Terry* stops and frisks inside a person's curtilage? There is a growing tension between these two doctrines and the lower courts have provided only slight relief.

## IV. GROWING TENSION: THE CURTILAGE DOCTRINE AND THE *TERRY* STOP AND FRISK

Courts have grappled with the tension between these two doctrines and a noticeable split has developed.[184] Some federal circuits believe *Jones*, *Jardines*, and *Collins* preclude a stop and frisk inside the curtilage, while others believe these cases are inapplicable because they never contemplated officer safety—a hallmark of *Terry*'s rationale. This section explores how those lower courts have reached their respective holdings. And though some courts use the curtilage doctrine to bar stops and frisks, the analyses are far from complete. Still, they offer a starting point.

### *A. Circuits and States Barring Terry Stop and Frisks Inside the Curtilage*

The Second Circuit, in *United States v. Alexander*, embraced the view that *Jardines* precludes a stop and frisk inside the curtilage.[185] There, officers approached a group of people talking outside a home;[186] one couple sat inside a car parked along the sidewalk, while another couple stood inside their yard.[187] Officers noticed furtive movements

184. *Compare* United States v. Richmond, 924 F.3d 404, 417 (7th Cir. 2019) (allowing a *Terry* stop and frisk inside the curtilage), *with* United States v. Alexander, 888 F.3d 628, 634 (2d Cir. 2018) (holding that *Jardines* bars a stop and frisk inside the curtilage), *and* United States v. Perea-Ray, 680 F.3d 1179, 1185 (holding that *Jones* bars a stop and frisk inside the curtilage), *and* State v. Davis, 849 S.E.2d 207, 211–13 (Ga. Ct. App 2020) (holding that officers may not stop someone inside their curtilage without a warrant after *Jardines* and *Collins).*

185. *See Alexander*, 888 F.3d at 637.

186. *Id.* at 630.

187. *Id.*

inside the car, so they removed the occupants and discovered drugs.[188] The man inside the yard, Alexander, told officers he was taking his belongings—specifically, a backpack and vodka bottle—to the backyard.[189] Afterward, an officer traversed Alexander's driveway, entered his backyard, then grabbed the backpack and found a gun inside.[190] Under the Second Circuit's view, that was an unconstitutional search since it occurred inside the curtilage.[191]

The Government never raised a *Terry* argument. It instead argued the area searched was open fields and thus received no Fourth Amendment protection.[192] But the court determined the driveway and backyard were curtilage, holding that, after *Jardines*, officers cannot search this area for incriminating evidence—even if it were publicly visible.[193] "[P]ublic visibility or public access"[194] no longer moves an area beyond the Fourth Amendment's protection.[195] Officers could have conducted a knock and talk, or they could have watched from the street and gotten a warrant, but entering and searching was not allowed.[196]

Judge Hellerstein's concurrence, however, argued that *Terry* offered a safe harbor.[197] He first limited *Jardines* to its facts.[198] Then, he bifurcated what areas of the curtilage officers may search—or frisk—

188. *Id.*

189. *Id.*

190. *Id.*

191. *See id.* at 637. The Second Circuit employed the *Dunn* factors and analogized the facts with those in *Jardines*, explaining that the area searched—a driveway and backyard—was akin to a front porch. *See id.* at 632–35. It abutted from the home and was an area where intimate life extended.

192. *See id.* at 635.

193. *See id.* at 636–37.

194. *Id.* at 632.

195. *See id.*

196. *See, e.g.*, California v. Ciraolo, 476 U.S. 207, 213–14 (1986) (public spaces don't receive Fourth Amendment protection); United States v. Dunn, 480 U.S. 294, 300 (1987) (open fields receive no constitutional protection); *see also* United States v. Knotts, 460 U.S. 276, 282 (1983) (observations from a public place pose no constitutional problem).

197. *See Alexander*, 888 F.3d at 638 (Hellerstein, J., concurring).

198. *See id.* at 639–40.

when they reasonably suspect that crime is afoot.[199] If it is an area "next to a home, or allows entry into the home,"[200] like the porch in *Jardines*, then the curtilage doctrine bars an investigative search.[201] But if it is an area "far enough away" and resembles "open field[s] and curtilage," then officers may enter.[202] In his mind the curtilage's protections were not absolute.[203] Semiprivate areas not threatening the privacy of the home—those "grey" areas of curtilage, as he called them—should be subject to the *Terry* rule.[204] Thus, places like a backyard, an open garage, or a driveway might fall into that category.[205] Since neighbors freely enter driveways and backyards, an officer can also stop and frisk someone when there is reasonable suspicion to do so.[206]

The majority disagreed. Citing *Jardines*, it emphasized the *Terry* exception was "foreclosed by governing precedent"[207]—though its analysis of this issue was perfunctory. Still, it reasoned that because warrantless house frisks were impermissible, and because *Jardines* held that curtilage receives the same protection as homes, *Terry* was inapplicable unless there was an independent basis granting entry.[208]

The Ninth Circuit adopted a similar understanding and held that *Terry* was inapplicable inside a person's curtilage.[209] Of importance here is *United States v. Perea-Rey*. There, officers watched someone

199. *See id.* at 640; *see also* State v. Bovat, 224 A.3d 103, 109 (Vt. 2019) (holding that officers may, under the implied license, investigate the semi-private areas of a home's curtilage).

200. *Alexander*, 888 F.3d at 639 (Hellerstein, J., concurring).

201. *Id.* at 639–40.

202. *Id.*

203. *See id.* at 639–40; *see also* Stern, *supra* note 25, at 948–50 (noting that "[a]reas of curtilage less likely to be implicated in intimate life, such as storage outbuildings, garages, and garbage within the curtilage could be subject to a reduced standard of reasonable suspicion" and recognizing that such reform may be "quietly beginning" based on "[t]he narrowing of curtilage protection" in the lower courts).

204. *See Alexander*, 888 F.3d at 639.

205. *See id.* at 639–40.

206. *Id*.

207. *Id.* at 637 (citing Florida v. Jardines, 569 U.S. 1, 6 (2013)).

208. *See id.*

209. *See* United States v. Perea-Rey, 680 F.3d 1179, 1189 (9th Cir. 2012); United States v. Struckman, 603 F.3d 731, 738 (9th Cir. 2010).

hop over the United States border and enter a taxi.[210] They then followed the taxi to Perea-Rey's home.[211] The person exited the taxi and entered Perea-Rey's carport—officers followed.[212] Once inside, officers seized the occupant and ordered everyone out of the house.[213] The Government eventually charged Perea-Rey with harboring undocumented immigrants.[214] While neither *Jardines* nor *Collins* guided the court's analysis, *Jones* offered a guidepost.[215] Using the common-law trespassory test, as in *Jones*, the court recognized that "[w]arrantless trespasses by the government into the home or its curtilage are Fourth Amendment searches."[216] Physically entering the defendant's carport without a warrant was thus unconstitutional.[217] And although agents could see inside the carport, "a warrant is required to *enter*"[218] someone's curtilage.[219] Agents conducted, from the majority's view, a *Terry* stop.[220] Like the Second Circuit, it decided that since stops and frisks do not apply inside homes without a warrant, they also do not apply inside the curtilage.[221] But the court's opinion on this issue is shallow and never explained why *Terry* was inapplicable.[222] It never

210. *Perea-Rey*, 680 F.3d at 1182.

211. *Id.*

212. *Id.* at 1183.

213. *Id.*

214. *Id.*

215. *See id.* at 1184.

216. *Id.* at 1185 (citing United States v. Jones, 565 U.S. 400, 405 (2012)).

217. *Id.* at 1186. To reach that conclusion, the court determined Perea-Rey's carport was curtilage and applied *Dunn*: First, the carport was directly adjacent to the home itself—satisfying the proximity factor. *Id.* at 1184. Second, it satisfied the enclosure factors since it was not only enclosed by walls and a roof, but also an iron gate. *Id.* Third, the carport stored personal belongings, such as his tools and a car. *Id.* at 1185.

218. *Id.* at 1186 (emphasis added).

219. *See id.*

220. *Id.* at 1188.

221. *See id.* (citing United States v. Struckman, 603 F.3d 73, 738 (9th Cir. 2010)).

222. *See id.*; *see also* United States v. Washington, 387 F.3d 1060, 1067–68 (9th Cir. 2004). The Ninth Circuit, in a case decided before either *Jones* or *Jardines*, surmised that "*Terry*'s twin rationales" are inapplicable inside the home. *Id.* at 1067. Yet the court never reached the question because it decided the case on other Fourth Amendment grounds. *See id.* at 1068.

highlighted the separate and substantial privacy interests at issue when an officer trespasses onto the curtilage to conduct a stop and frisk: the body *and* the curtilage.

At any rate, the Government tried sidestepping that hurdle and cabined its argument under the "knock and talk exception,"[223] asserting that it permitted warrantless frisks.[224] But broadening that exception to encompass *Terry* would "swallow the rule that the curtilage is the home for Fourth Amendment purposes."[225] So under the Ninth Circuit's view, *Terry* frisks exceed society's implied license—or, as Justice Scalia put it, society does not invite officers "to do *that.*"[226]

Judge Hamilton's concurrence in *United States v. Palomino-Chavez* also reflects the view that the curtilage doctrine bars stops and frisks.[227] There, the Seventh Circuit never reached the issue explored by this paper since it decided officers had no reasonable suspicion to enter the curtilage.[228] In fact, as explained below, the Seventh Circuit allows stops and frisks inside the curtilage. But Judge Hamilton adopted a different understanding. In *Palomino-Chavez,* officers tailed the defendant's van to his house.[229] They entered his property, walking up his driveway and towards the garage.[230] Seeing Palomino-Chavez in a hammock, officers then grabbed and frisked him near his garage.[231] An honest reading of *Jardines* and *Collins*, from Judge Hamilton's view, confirmed that this police activity violated the Fourth

223. *Perea-Rey*, 680 F.3d at 1187.

224. *See id.*

225. *Id.* at 1189.

226. *See id.*; *see also* Florida v. Jardines, 569 U.S. 1, 9 (2013) ("But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*."). The Sixth Circuit also decided that the knock-and-talk exception does not permit a stop and frisk. Watson v. Pearson, 928 F.3d 507, 512–13 (6th Cir. 2019) (discussing the limit *Jardines* placed on knock and talks); *see also* United States v. Mills, 372 F. Supp. 3d 517, 530–31 (E.D. Mich. 2019).

227. *See* United States v. Palomino-Chavez, 761 Fed. Appx. 637, 645–46 (7th Cir. 2019) (Hamilton, J., concurring).

228. *See id.* at 643–44.

229. *Id.* at 639.

230. *Id.* at 640.

231. *Id.*

Amendment.[232] He asserted that *Jardines* "reinforced much broader protections for curtilage."[233] He, of course, recognized that officers may approach a front door to conduct a "knock-and-talk," but society's implied license allowed no more than that.[234] If anything, from his view the officers "went even further"[235] than they did in *Jardines*[236] because, rather than knock, they walked into Palomino-Chavez's private driveway and conducted a *Terry* frisk.[237] He noted a "driveway to the rear, more private area of a residence is protected as part of the curtilage even when it is visible from public streets."[238] So entering that private area to gather evidence was impermissible—even if there were reasonable suspicion.[239]

The Sixth Circuit's exact position on this issue remains unclear, though cases suggest that it, too, believes the curtilage doctrine bars stops and frisks.[240] In *Morgan v. Fairfield County*, for instance, the court found reasonable suspicion does not authorize warrantless entry into the curtilage.[241] Officers there tried executing a "knock and talk"[242] after getting a tip that the plaintiffs were growing marijuana and manufacturing methamphetamine.[243] On scene, four officers surrounded the home while a fifth officer approached the door and knocked.[244] During a door-side chat with plaintiff Graf, an officer stationed inside the backyard saw marijuana plants through a window.[245] Officers intruded upon her curtilage—thus, violating her rights—when they

232. *See id.* at 645.

233. *Id.* at 647.

234. *See id.* at 646.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *See* Morgan v. Fairfield Cty., 903 F.3d 553, 565 (6th Cir. 2018).

241. *See id.* at 565. Ultimately, the Sixth Circuit granted officers qualified immunity after they entered Morgan's curtilage—despite lacking a warrant, consent, or exigent circumstances—because the law was not "clearly established." *See id*. at 564–65.

242. *See id.* at 558.

243. *See id*.

244. *See id.* at 558–59.

245. *See id.* at 559.

created a perimeter around her house.[246] That exceeded the conduct *Jardines* described because it went beyond "knock[ing] promptly, wait[ing] briefly to be received," and then leaving absent an invitation to stay.[247]

The plaintiffs still failed under the "clearly established law" portion of the analysis—among other things, because past holdings incorrectly applied the knock-and-talk exception, which made the law unclear.[248] But under the court's reading of *Jardines* and *Collins*, "outside of the same implied invitation extended to all guests,"[249] cops need to either get a warrant or satisfy a warrant exception. True, it never explicitly discusses the *Terry* exception or reasonable suspicion. But the court cites a case—specifically, *Rogers v. Pendleton*—for the understanding that reasonable suspicion does not authorize warrantless entry into the curtilage.[250] So a fair reading of *Morgan* shows how the Sixth Circuit might view this issue: that *Terry* alone does not authorize entry into someone's curtilage.[251]

Georgia also reflects the view adopted by the federal circuits.[252] *State v. Davis*, a Court of Appeals of Georgia case, offered a well-rounded discussion about the *Terry* and curtilage doctrines. Officers there responded to a call about an armed robbery.[253] Witnesses said a man dressed in black robbed the victim for various belongings, including an iPhone, and then sped off in a white truck.[254] Officers canvassed the surrounding area, even using the "Find My" iPhone app to try locating the victim's phone.[255] The "pings" from the app eventually led officers to a house nearby.[256] An officer saw a white truck parked in the driveway, so he approached.[257] Seeing a man inside the truck, the

246. *See id.* at 561–62.
247. *See id.* at 563 (citing Florida v. Jardines, 569 U.S. 1, 8 (2013)).
248. *See id.* at 564–65.
249. *See id* at 565.
250. *Id.* (citing Rogers v. Pendleton, 249 F.3d 279, 289–90 (4th Cir. 2001)).
251. *See id.*
252. *See* State v. Davis, 849 S.E.2d 207, 211–13 (Ga. Ct. App 2020).
253. *See id.* at 209–10.
254. *See id.* at 210.
255. *Id.*
256. *Id.*
257. *See id*.

officer pulled defendant Davis from the truck and placed him inside his patrol car.[258] The officer frisked Davis's truck, finding a firearm and other objects.[259] From the court's view, officers conducted (at least) a "second-tier" stop, which had to be based on reasonable suspicion.[260] But the *Terry* rule would not prove enough. The court illuminated the curtilage's separate and substantial privacy interest, explaining—by analogizing with *Collins*—that entering the curtilage and searching invades not only the person's or the effect's Fourth Amendment interest, but also the "sanctity of the curtilage."[261] And then, relying on *Jardines*, it emphasized that society's implied license did not "permit [officers] to traverse his driveway for the purpose of forcibly removing him from his truck to detain him."[262] Or put plainly, the implied-license rule does not give officers authority to enter and conduct a stop and frisk. The bottom line is that *Davis*'s holding followed the Fourth Amendment's tradition of treating the curtilage like a home and embraced the rationale *Jardines* and *Collins* established.

### *B. Circuits and States Greenlighting Terry Stop and Frisks Inside the Curtilage*

The Seventh Circuit reached a different holding, as it decided *Terry* granted officers entry into the curtilage.[263] In *United States v.*

258. *Id.*

259. *Id.*

260. *See id.* at 211 (citing State v. Preston, 824 S.E.2d 582, 586–87 (Ga. Ct. App 2019)). The court discussed the tiered stops—with a second tier needing reasonable suspicion (like *Terry*), and a third tier needing probable cause. *Id.* The State conceded that it was more than a first-tier encounter—the court agreed. *Id.* Ultimately, though, the court never decided whether there was reasonable suspicion to enter because, even if they have probable cause, officers may not enter the curtilage to conduct a search (or a frisk) without a warrant.

261. *Id.* at 212.

262. *Id.* at 212.

263. *See* United States v. Richmond, 924 F.3d 404, 415–16 (7th Cir. 2019) (allowing a *Terry* stop and frisk inside the curtilage, stating that "police may conduct an area search strictly limited to that which is necessary for the discovery of weapons if the officer has a reasonable and articulable suspicion that the subject whose suspicious behavior he is investigating at close range may be able to gain access to a weapon to harm the officers or others nearby"); United States v. Pace, 898 F.2d 1218, 1223 (7th Cir. 1990); *see also* Warren v. State, 73 N.E.3d 203, 208 n.1 (Ind. Ct. App. 2017)

*Richmond*, the court grappled with the growing tension between the *Terry* and curtilage doctrines[264] and held that officer safety supersedes a person's privacy interest. The facts in *Richmond* were straightforward: Officers, patrolling a crime-riddled neighborhood, saw a man walking with a bulge in his pocket.[265] He quickly walked away, so officers followed him onto a home's front porch where they found a firearm behind the front screen door.[266] Following *Terry*, *Buie*, and *Long*, the court believed frisking a porch for weapons was reasonable since limited "area searches" are allowed when officers suspect a weapon is nearby.[267] *Jardines* and *Collins* erected no bar because these cases did not consider "protective searches to neutralize the threat of a weapon in a suspect's immediate area of control."[268] In other words, neither case addressed officer safety, making them distinguishable.

Yet the majority's reasoning ignored a central lesson from the *Terry* the line of cases: the privacy intrusion was somehow lessened—either because the frisk occurred on a public street, or because the officers were executing a warrant.[269] Judge Wood dissented, arguing *Jardines* and *Collins* barred curtilage frisks.[270] First, she determined the porch—like in *Jardines*—was curtilage, a constitutionally protected area receiving the same protection as a home.[271] Second, she emphasized that looking behind a screen door "cannot be saved by the implicit license to approach the door, any more than that license saved the dog-sniff in *Jardines*."[272] There is quite simply no license to frisk

(stating that *Terry* would authorize warrantless entry in some cases, specifically the court in *Hardister* rejected the proposition that "police may never invade the curtilage of a residence without probable cause and a warrant or exigent circumstances" (citing Hardister v. State, 849 N.E.2d 563, 570–71 (Ind. 2006))).

264. *See Richmond*, 924 F.3d at 414–16.

265. *See id.* at 408–09.

266. *Id.* at 409.

267. *See id.* at 414, 418–19.

268. *Id.* at 415.

269. *See* Terry v. Ohio, 392 U.S. 1, 6–8 (1968) (public street); Michigan v. Long, 463 U.S. 1032, 1035–36 (1983) (public street); Michigan v. Summers, 452 U.S. 692, 703 (1981) (executing a search warrant); Maryland v. Bouie, 494 U.S. 325, 332–33 (executing an arrest warrant).

270. *See Richmond*, 924 F.3d at 421–22 (Wood, J., dissenting).

271. *See id.* at 421.

272. *Id.* at 422.

someone's porch. And third, while analyzing *Collins*'s reasoning, she recognized that—absent exigent circumstances, of course—the Supreme Court already "declined to expand the scope of other exceptions to the warrant requirement to permit warrantless entry into the home."[273] Allowing warrantless entry into the curtilage, under the *Terry* rule, strayed from the caselaw and Fourth Amendment history.

To be fair, Judge Wood noted that the hot-pursuit exigency might have granted the officers entry under different facts. She explained that nothing in our hot-pursuit caselaw clashes with *Jardines* or *Collins*—both doctrines, in fact, dovetail with each other.[274] But unlike in hot-pursuit cases, there was no probable cause the defendant committed a violent crime in a public place; nor was there a "hot pursuit."[275] Simply put, the trappings of a hot-pursuit case were missing and so the curtilage doctrine controlled the outcome.

The Court of Appeals of Indiana likewise upheld a *Terry* stop inside the curtilage.[276] In *Reid v. State*, an officer, there, responded to a call about a potentially drunk driver.[277] He arrived at the house, found a woman staggering in her driveway, smelled alcohol, and saw a damaged car.[278] The officer detained Reid, removing her from the curtilage, and made her perform a field sobriety test at his patrol car—she failed.[279] After administering a breath test on a portable breathalyzer, the officer read her implied consent.[280] After refusing a blood test, officers arrested Reid and took her for a blood draw when they got a search warrant.[281]

The court upheld the initial seizure—and entry into the driveway—on *Terry* grounds.[282] Oddly enough, though, Reid only argued there was no reasonable suspicion to detain her; she never raised a

273. *Id.* (quoting Collins v. Virginia, 138 S. Ct. 1663, 1672 (2018)).
274. *See id.* at 423.
275. *See id.*
276. Reid v. State, 113 N.E.3d 290, 293 (Ind. Ct. App. 2018).
277. *See id.* at 293–94.
278. *See id.* at 294.
279. *See id.* at 296.
280. *Id.*
281. *See id.*
282. *See id.* at 299.

curtilage argument.[283] The court's blinkered analysis never even touched on *Jardines* or *Collins*, which the Supreme Court decided just months before hearing this case.[284] It indeed discussed the "implied license" and made clear that "police [may] enter areas of curtilage impliedly open to use by the public to conduct legitimate business."[285] Though a correct statement of the implied-license rule, the court ignored the thrust of the license. Justice Scalia pointed out that "the background social norms that invite a person to the front door do not invite him there to search";[286] it is limited to a specific area and specific purpose.[287] Letting an officer enter the driveway to talk with Reid is one thing, but stopping her and instructing that she do a field sobriety test is another thing entirely: The officer is gathering evidence, something no neighbor would do.[288] Still, the *Reid* court believed the stop was reasonable, saying the facts taken "with reasonable inferences arising from such facts would cause an ordinarily prudent person to believe that criminal activity may be afoot."[289] Thus, an honest reading of the case reveals that, under the Indiana court's view, the *Terry* exception authorizes warrantless entry into the curtilage.

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In sum, this section looked at how courts addressed the tension between *Terry* and the curtilage doctrine, following the Supreme Court's decisions in *Jardines* and *Collins*. Some circuits, like the Seventh, believed *Terry* granted entry since neither *Jardines* nor *Collins* addressed officer safety. Then, the other courts—like the Second and Ninth Circuits, or like Judges Wood and Hamilton—believed the curtilage doctrine bars a stop and frisk.

283. *See id.*
284. *See id.* at 298–300.
285. *Id.* at 298 (quoting Hardister v. State, 849 N.E.2d 563, 570 (Ind. 2006)).
286. Florida v. Jardines, 569 U.S. 1, 9 (2013).
287. *Id.*
288. *See id.*
289. *Reid*, 113 N.E.3d at 299.

## V. *JONES*, *JARDINES*, AND *COLLINS*'S ANSWER

The rationales espoused by *Jones*, *Jardines*, and *Collins* (plus, the well-reasoned lower-court holdings) answer the question posed here. Each case, admittedly, deals with an officer searching someone's property, rather than a person themselves.[290] And as the Seventh Circuit noted, these decisions never contemplate officer safety since the residents of the home were absent.[291] But the curtilage doctrine makes this question a "straightforward one."[292] If officers trespass onto a constitutionally protected area, and if there is no implied license granting entry, then a Fourth Amendment "search" occurs.[293] Beyond consent or exigent circumstances, the Court will not expand warrant exceptions to allow entry into the home or curtilage—especially, when the rationales are unsupported.[294] *Terry* is no different.

### *A. Society's Implied License Does Not Encompass Terry Stop and Frisks*

Entering the curtilage without a warrant, consent, or exigent circumstances poses constitutional problems.[295] Although defining curtilage is a case-by-case question, the Supreme Court and lower courts determined that a porch, a carport, a partially enclosed garage, and a backyard meet the curtilage requirements.[296] Officers may—of course, under society's implied license—enter and conduct a knock and talk. Or they may speak with an occupant since that is "no more than

290. *See* United States v. Jones, 565 U.S. 400, 404 (2012) (searching a car); *Jardines*, 569 U.S. at 6 (searching a porch); Collins v. Virginia, 138 S. Ct. 1663, 1663 (2018) (searching a car inside the curtilage).

291. *See* United States v. Richmond, 924 F.3d 404, 415 (7th Cir. 2019).

292. *Jardines*, 569 U.S. at 5.

293. *See id.* at 5–10; *see also* Leading Case, *supra* note 10, at 360.

294. *See Collins*, 138 S. Ct. 1670–72.

295. *See Jones*, 565 U.S. at 411 (resurrecting the common-law trespassory test used in curtilage cases); *Jardines*, 569 U.S. at 6 (searching a porch); *Collins*, 138 S. Ct. at 1663 (searching a car inside the curtilage).

296. *See Jardines*, 569 U.S. at 6 (porch); United States v. Perea-Rey, 680 F.3d 1179, 1182 (9th Cir. 2012) (a carport or garage); *Collins*, 138 S. Ct. at 1663 (partially enclosed garage); United States v. Alexander, 888 F.3d 628, 629–30 (2nd Cir. 2018) (backyard and back of driveway).

any citizen might do."[297] But society's license is limited in "area"[298] and "*purpose*."[299] Physically entering the curtilage to "gather[] information"[300] exceeds that license.[301]

Lower-court decisions pointed out that frisking the curtilage, or a person or an effect inside the curtilage, is foreclosed by *Jardines* and *Collins.*[302] Justice Scalia, after all, mused that people would find it alarming to see a "stranger snooping about" on their porch.[303] Writing from the Court's denial of certiorari in *State v. Bovat*, Justice Gorsuch also explained neither the implied license nor the Fourth Amendment "tolerates" a "meandering search."[304] Same too with a cop stopping and frisking a person or an effect.[305] A resident would probably not let a neighbor or delivery man conduct a stop, pat down their clothing, or search their backpack. Officers are entering this constitutionally protected area to do exactly what the Court cautioned against in *Jardines*

297. *See Jardines*, 569 U.S. at 8; *see also* Kentucky v. King, 563 U.S. 452, 469 (2011).

298. *Jardines*, 569 U.S. at 9.

299. *Id.* (emphasis added).

300. *See id.* at 5–6.

301. *See id.*

302. *See* United States v. Alexander, 888 F.3d 628, 629–30 (2d Cir. 2018) (holding that *Jardines* bars a stop and frisk inside the curtilage); United States v. Perea-Rey, 680 F.3d 1179, 1182 (9th Cir. 2012) (holding that *Jones* bars a stop and frisk inside the curtilage); State v. Davis, 849 S.E.2d 207, 212–13 (Ga. Ct. App. 2020) (holding that officers may not stop someone inside their curtilage without a warrant after *Jardines* and *Collins*).

303. *See Jardines*, 569 U.S. at 9 n.3, 9–10.

304. Bovat v. Vermont, 141 S. Ct. 22, 24 (2020). The Vermont Supreme Court, in *State v. Bovat*, upheld a curtilage search under the knock-and-talk license and the plain-view exception. *See* State v. Bovat, 224 A.3d 103, 103–09 (Vt. 2019). The court decided a curtilage search was reasonable because of the plain-view exception. *See id.* at 107–08. Without referencing *Jardines* or *Collins*, it decided there was no unlawful trespass since a warden was performing a knock and talk—despite never reaching the front door or speaking with a resident before searching the garage. *See id.* at 108.

305. *See* Collins v. Virginia, 138 S. Ct. 1663, 1672 (2018) (frisking a car); *Alexander*, 888 F.3d at 628, 629–30 (frisking a motorcycle); *Davis*, 849 S.E.2d 207, 209 (frisking a car and stopping a person).

and *Collins*: "*gather*[] information."[306] And gathering information exceeds what society allows.

### *B. The Curtilage Doctrine Bars Curtilage Frisks When They Do Not Come with a Warrant, Consent, or Exigent Circumstances.*

*Terry*'s rationale also makes a curtilage frisk no more reasonable than *Jardines*' dog sniff. *Terry* and *Buie* authorized house frisks for safety reasons, something the Court's recent curtilage cases never contemplated.[307] And, of course, officers should have the means to protect themselves during civilian-to-officer encounters. But the *Buie* Court based its holding on the minimal privacy intrusion. Because officers in *Buie* were executing an arrest warrant, and thus had lawful access to the home, the privacy intrusion was softened.[308] *Terry*'s rationale—alone—never granted officers entry, as frisking the house for confederates merely served a complementary function.[309] But absent a warrant, the privacy interest remains substantial, making the intrusion much greater than what *Buie* or *Terry* contemplated. Plus, a house frisk was limited to places where confederates may hide—small places like drawers, purses, pants pockets, and other areas were off limits.

The *Collins* majority also emphasized that it repeatedly declines to expand other warrant exceptions to allow warrantless entry into the home.[310] The automobile exception, for example, does not authorize warrantless entry into the home or curtilage since the "rationales underlying the automobile exception are specific to the nature of a vehicle."[311] The plain-view exception does not authorize entry into a home since it also requires an independent basis for entering the premises.[312]

306. *See Jardines*, 569 U.S. at 5–6 (emphasis added).

307. *See* United States v. Richmond, 924 F.3d 404, 415 (7th Cir. 2019) (discussing how *Jardines* and *Collins* never considered officer safety).

308. *See* Maryland v. Buie, 494 U.S. 325, 332–33 (1990) (executing an arrest warrant).

309. *See id.*

310. *See Collins*, 138 S. Ct. at 1671; *see also* Caniglia v. Strom, 141 S. Ct. 1596, 1600 (2021) (quoting *Collins*, 138 S. Ct. at 1672) (reaffirming that the Court "has repeatedly 'declined to expand the scope of . . . exceptions to the warrant requirement to permit warrantless entry into the home.'"); Leading Case, *supra* note 19, at 360.

311. *Collins*, 138 S. Ct. at 1671.

312. *See* Sodal v. Cook County, 506 U.S. 56, 66 (1992).

A plain-view seizure, in fact, is unconstitutional if it is "effectuated 'by unlawful trespass.'"[313] The *Buie*-frisk exception is no different, especially since *Buie* alone never allowed warrantless entry into the house.[314]

### *C. Stopping and Frisking Persons and Effects Inside the Curtilage: The "Separate and Substantial Interests" are not Contemplated by Terry's Rationale*

*Collins* addressed a situation in which an officer searched an "effect" inside the curtilage. By not extending the automobile exception, *Collins* explained that the exception never considered the "separate and substantial" Fourth Amendment interest inside someone's curtilage. Or, said differently, searching a car inside the curtilage invades not only the car's privacy interest, but also the curtilage's heightened privacy interest. That invasion, at bottom, was far beyond what the automobile exception considered. That same issue arises in the *Terry* context.

#### 1. Stopping and Frisking Persons Inside the Curtilage

Physically entering the curtilage to stop and frisk a person fails under constitutional scrutiny because it intrudes upon the privacy interests of a person *and* the curtilage.[315] *Payton v. New York*—a case the *Collins* majority used—reflects that reasoning; it explained that executing a warrantless, in-home arrest "'involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home.'"[316] *Collins* reflects a similar understanding. *Collins* made clear that searching a car inside the curtilage "involves not only the invasion of the . . . interest in the vehicle but also an invasion of the sanctity of

313. *Id.* at 1672 (quoting *Sodal*, 506 U.S. at 66).

314. *Buie*, 494 U.S. at 332–33 (executing an arrest warrant).

315. *See Collins*, 138 S. Ct. at 1672 (discussing how trespassing on the curtilage and searching a car infringes on the car's and curtilage's privacy interest); *see also* Payton v. New York, 445 U.S. 573, 587–90 (discussing how conducting a warrantless arrest inside a home infringes upon the body's privacy interest and the home's privacy interest).

316. *Id.* (quoting *Payton*, 445 U.S. at 588–89).

the curtilage."[317] In both cases, there were "separate and substantial" privacy interests at issue.[318] That same problem arises when officers enter someone's curtilage, having only reasonable suspicion, to stop and frisk a resident; it infringes not only on the body's interest, but also the curtilage's separate and substantial interest.

It follows, then, that the rationales *Terry* and *Summers* established do not support extending our stop-and-frisk doctrine to authorize warrantless entry into a person's curtilage—mainly, because the privacy invasion is greater than what either case considered. In *Terry*, the intrusion was minimal since it was brief and occurred on a public street, a place where privacy expectations are lessened.[319] And in *Summers*, the intrusion was minimal since a magistrate "authorized a substantial invasion of the privacy of the persons who resided there" when he issued a warrant.[320] There was, in short, an independent basis for being inside the home. But without that independent, legal basis, the privacy invasion is substantial because this activity intrudes on the body's interest and the curtilage's "separate and substantial" interest.

### 2. Frisking Effects Inside the Curtilage

Frisking an "effect" suffers a similar fate. And again, neither *Terry*'s nor *Long*'s rationales addressed situations with substantial privacy intrusions. *Long* considered the constitutionality of a roadside vehicle frisk, rather than a curtilage frisk.[321] Statistics also illustrated the dangers posed by roadside encounters.[322] So given a person's diminished privacy interest on public streets, and given the safety issues inherent to roadside stops, these frisks were reasonable under the Fourth Amendment.[323] That is different than frisking something inside

317. *Id.* (quoting *Payton*, 445 U.S. at 588–89)

318. *Id.* (quoting *Payton*, 445 U.S. at 588–89) (a car's and curtilage's privacy interest); *see also Payton*, 445 U.S. at 587–90 (the body's and home's privacy interest).

319. *See* Terry v. Ohio, 392 U.S. 1, 6–8 (1968) (public street).

320. Michigan v. Summers, 452 U.S. 692, 701 (1981) (executing a search warrant).

321. *See* Michigan v. Long, 463 U.S. 1032, 1035–36 (1983).

322. *See id.* at 1048 n.13.

323. *See id.* at 1051–52.

a home's curtilage. When *Collins* analyzed the automobile exception, it explained that entering someone's curtilage to frisk a car—or another effect—intrudes upon the Fourth Amendment interest in that effect, plus the curtilage's "separate and substantial" interest.[324] So allowing an officer's warrantless entry under *Terry*'s auspices would, simply put, untether the exception from its original justifications.

### *D. Limiting the Curtilage's Protections Does Not Square with Collins*

Some have argued that certain curtilage areas should receive different constitutional protection than the home.[325] Judge Hellerstein and the state of Virginia in *Collins* described areas falling into this new category.[326] For instance, under Virginia's approach, the home's threshold and other enclosed areas abutting from the home should keep receiving heightened protections—but visible areas should not.[327] Judge Hellerstein offered a similar argument, believing certain "grey areas" of curtilage bearing traits of—both—curtilage and open fields should receive lesser protection.[328]

Yet Justice Sotomayor underscored the issues that would arise: First, that new rule deviates from the Fourth Amendment's history about the curtilage's protections, which have long been the same as the

324. *See* Collins v. Virginia, 138 S. Ct. 1663, 1672 (2018) (discussing how trespassing on the curtilage and searching a car infringes on the car's and curtilage's privacy interest).

325. *See id.* at 1674 (noting that Virginia argued areas not abutting or attached to the home receive lesser protections); United States v. Alexander, 888 F.3d 628, 638 (2018) (Hellerstein, J., concurring) (arguing certain "grey areas" of curtilage receive lesser protections); *see also* Stern, *supra* note 25, at 948–50 (arguing that areas not implicating the intimacy of a home should receive lesser Fourth Amendment protection).

326. *See Collins*, 138 S. Ct. at 1674 (explaining that Virginia believed the areas disconnected from the home should receive lesser constitutional protection); *Alexander*, 888 F.3d at 638 (Hellerstein, J., concurring) (arguing "if the area is far enough away not to threaten privacy within the home, it has elements both of "open field" and curtilage," then it should receive thinner protections).

327. *See Collins*, 138 S. Ct. at 1674–75.

328. *See Alexander*, 888 F.3d at 638.

home.[329] Second, creating an exception to the curtilage's bright-line protection would only create further confusion.[330] And third, it poses equal protection problems.[331] That exception affords greater constitutional protection to those having the financial means to have a garage or other enclosed space.[332] Trailer parks and government housing, for example, would be more susceptible to police skullduggery.

Not only does that treat certain homes and thus certain wealth classes differently, as Sotomayor emphasized,[333] it also exacerbates a problem legal scholars have highlighted: racism.[334] Scholar David Harris noted that *Terry* stops and frisks are disproportionately carried out on African and Hispanic Americans.[335] Limiting curtilage protections to only enclosed areas, areas abutting from the home, or "grey areas," fractures the Fourth Amendment's protections along racial and financial lines.[336] Engrafting that distinction, in short, would pose thorny constitutional and real-world issues.

### *E. Other Constitutional Modes of Preserving the Fourth Amendment's Values and Protecting Public and Officer Safety: The Exigency Doctrine*

*Collins* carefully noted that other warrant exceptions might authorize entry into the curtilage.[337] After all, the Court has long recognized five such exceptions—one is "consent" and the four others are

329. *See Collins,* 138 S. Ct. at 1674–75.

330. *See id.* at 1675.

331. *See id.*

332. *See id.*

333. *See id; see also* Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA L. REV. 391, 401, 405 (2003); William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1270–73 (1999).

334. *See* Davis A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 679 (1994); Omar Saleem, *The Age of Unreason*: *The Impact of Reasonableness*, *Increased Police Force, and Color-blindness on* Terry *"Stop and Frisk"*, 50 OKLA. L. REV. 451, 490 (1997); Tracey Maclin, Terry v. Ohio's *Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1273–75 (1998).

335. *See* Harris, *supra* note 334, at 679.

336. *See Collins*, 138 S. Ct. at 1675.

337. *See id*.

"exigent circumstances."[338] The exigency doctrine shows fidelity to the Fourth Amendment's history and the probable-cause requirement, while respecting those interests *Terry* preserves. Generally, the doctrine requires two things: probable cause and "genuine exigency."[339] Law enforcement needs might be "so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment."[340] This doctrine protects officers and others from immediate danger. Plus, it also provides a flexible exception that allows officers to make split-second decisions while executing their duties. Because *Terry*'s rationale is based on identical justifications (i.e., safety and a need for workable rules), the hot-pursuit and emergency-aid[341] exigencies seem most plausible.

The hot-pursuit exception allows warrantless entry into a home if officers have probable cause to arrest a fleeing suspect. "Hot pursuit" means a chase on the public streets, though it need not extend for miles or resemble a Bond film.[342] Even if a suspect enters a home, the Supreme Court made clear that a suspect cannot "defeat an arrest"[343] that started in a public place by entering a private one.[344] For instance, following a drug-dealer into a home after watching her conduct a drug sale on the street was reasonable since the crime was committed in public.[345] Caselaw teaches that officers may enter a home without a

338. *See id.*; *see also* Leading Case, *supra* note 10, at 360.

339. Kentucky v. King, 563 U.S. 452, 466 (2011).

340. *See id.* (quoting Mincey v. Arizona, 437 U.S. 385, 394 (1978)).

341. *See* Gregory T. Helding, *Stop Hammering Fourth Amendment Rights: Reshaping the Community Caretaking Exception with the Physical Intrusion Standard*, 97 MARQ. L. REV. 123, 135–37 (2013). Some scholars have argued that the emergency-aid exception falls under the caretaking exception, rather than the exigency category. *See id.* Yet the Supreme Court, in *Brigham v. Stuart*, explained that emergency aid falls inside the exigency category. *See* Brigham City v. Stuart, 547 U.S. 398, 403–04 (2006); *see also* Caniglia v. Strom, 141 S. Ct. 1096, 1598 (2018) (holding that there is no stand-alone caretaking exception).

342. *See* United States v. Santana, 427 U.S. 38, 42–44 (1976).

343. *Id.* at 43 (noting that a suspect cannot "defeat an arrest which has been set in motion in a public place by escaping to a private place").

344. *See id.*

345. *See id.* at 40–41.

warrant when they are pursuing a fleeing suspect.[346] This rule does not require that officers stop at the front door and let a someone evade capture.

Next, the emergency-aid exception allows warrantless entry to protect someone against "imminent injury"[347] or render "immediate aid."[348] Officers need only illustrate an objectively reasonable basis—not probable cause—for believing someone faces immediate danger.[349] For example, entering a house after seeing a fight occur was reasonable under the emergency-aid exception.[350] Likewise, entering a house after seeing blood, damaged property, and someone hysterically throwing objects was reasonable under the emergency-aid exception.[351] The Supreme Court's holdings reflect the view that officers may enter a house without a warrant if someone faces imminent or immediate harm; the rule does not make officers standby while people die or endure physical suffering.

In sum, these exigency exceptions protect the same interests as *Terry*: safety and a need for flexible rules.[352] Hot pursuit requires

346. *See id.* at 43 (fleeing felon); *see also* Lange v. California, 141 S. Ct. 2011, 2038 (2021). *Lange v. California* extended the hot-pursuit rule to misdemeanor crimes. Unlike felonies, the Court stopped short of creating a categorical rule granting officers entry in all misdemeanor cases. The Court explained, "[W]hen a minor offense alone is involved, police officers do not usually face the kind of emergency that can justify a warrantless home entry." *Id.* at 2020. But in most cases, a fleeing misdemeanant will give officers the power to enter a home. *See id.* at 2024.

347. *See* Brigham City v. Stuart, 547 U.S. 398, 403 (2006); *see also* Michigan v. Fisher, 558 U.S. 45, 47 (2009) (per curiam).

348. *See* Mincey v. Arizona, 437 U.S. 385, 393–94 (1978); *Stuart*, 547 U.S. at 404.

349. *See* Alexander C. Ellmen, *The Emergency Aid Doctrine and 911 Hang-Ups: The Modern General Warrant*, 68 VAND. L. REV. 919, 926–28 (2015). Alexander C. Ellmen explained the Court did not say what constitutes an objectively reasonable basis in emergency situations—the standard is unclear. *See id.* at 926. But he noted the officers—and the Court when reaching its conclusion—relied upon "contemporaneous and particularized" evidence in *Brigham* and *Fisher*. *See id.*

350. *See Stuart*, 547 U.S. at 406.

351. *See Fisher*, 558 U.S. at 45–47.

352. *See Stuart*, 547 U.S. at 403 ("One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury. 'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.'").

probable cause that a crime was committed and a fleeing suspect; then emergency aid requires someone face *immediate* injury—not speculative or future injury. The section below applies the exigency doctrine to the *Terry*-based fact patterns discussed above.

### 1. Replacing *Terry* with the Exigency Doctrine

First, take the facts from the Seventh Circuit's *Richmond* decision. Officers were patrolling a crime-riddled neighborhood and noticed a man walking with a bulge in his pocket.[353] He quickly walked away, so officers followed him onto a home's front porch where they found a firearm behind the screen door.[354] Those facts showed no more than reasonable suspicion.[355] But under the curtilage doctrine, that porch frisk was unreasonable since officers trespassed onto the curtilage—the porch—and began gathering information by peeking around the screen door. *Jardines* recognized that society does not invite officers to search their porch.[356] Plus, unlike *Buie* and *Summers*, there was no accompanying search or arrest warrant to soften the privacy intrusion.[357] That warrantless trespass thus violated the curtilage's separate and substantial privacy interest.[358]

Sure, like any neighbor, officers could enter the porch to speak with Richmond. They could have even asked for consent to search the porch. Or they could have gathered more information before entering. And sure, officer, and public safety is important. But had officers watched the defendant sell drugs, point a gun at someone, or commit

353. *See* United States v. Richmond, 924 F.3d 404, 408–10 (7th Cir. 2019).

354. *Id.* at 409.

355. *See id.* at 411–13, 416.

356. *See* Florida v. Jardines, 569 U.S. 1, 9 (2013); *see also Richmond*, 924 F.3d at 421–22 (Wood, J., dissenting).

357. *See* Michigan v. Summers, 452 U.S. 692, 703 (1981) (executing a search warrant); Maryland v. Buie, 494 U.S. 325, 332–33 (1990) (executing an arrest warrant).

358. Again, in *Terry* and its progeny, the privacy intrusion was somehow mitigated because the stop and frisks either occurred on a public street or were accompanied by a warrant. *See* Terry v. Ohio, 392 U.S. 1, 6–8 (1968) (stop and frisk on public street); Michigan v. Long, 463 U.S. 1032, 1035–36 (1983) (stopping a car on a public street); *Summers*, 452 U.S. at 703 (executing a search warrant); *Buie*, 494 U.S. at 332–33 (executing an arrest warrant).

another felony, they could have pursued Richmond onto the porch with no constitutional issues—among other things, because of the hot-pursuit exigency.[359] Again, when officers have probable cause that someone committed a crime in a public space, they cannot evade capture by slipping into a private space.[360] Then officers could have searched the immediate area around Richmond under the search-incident-to-arrest exception.[361] Judge Wood's *Richmond* dissent even said hot pursuit might give the Government meaningful support under different facts.[362] The tenants of hot pursuit were simply missing since officers lacked probable cause to believe that Richmond committed a crime.[363] Or had officers watched Richmond enter the house and begin posing an "immediate" threat to occupants, they could have swiftly entered.[364]

Second, take *Alexander*'s facts: After finding drugs inside a car and seeing suspicious behavior outside a home, officers entered Alexander's backyard and searched his backpack.[365] That was an unconstitutional search of the curtilage. It was reasonable, of course, to stop and frisk the car occupants on a public sidewalk.[366] But entering the back yard—with only reasonable suspicion—was problematic.[367] Not only did it violate the privacy interest in Alexander's backpack; it also violated the curtilage's substantial privacy interest. If officers saw Alexander hand a car occupant drugs, then they could have pursued him

359. *See* United States v. Santana, 427 U.S. 38, 42–43 (1976) (holding that the warrantless entry and arrest was justified because police were in hot pursuit, and officers had probable cause to believe that the Defendant sold drugs).

360. *See id.*; *Warrantless Searches and Seizures*, 37 GEO. L.J. ANN. REV. CRIM. PROC. 39, 78–79 (2008).

361. Chimel v. California, 395 U.S. 752, 763 (1969) (officers may search areas within arm's reach); New York v. Belton, 453 U.S. 454, 460 (1981) (officers can search within the arm's reach inside the car).

362. *See* United States v. Richmond, 924 F.3d 404, 423 (2019) (Wood, J., dissenting) (citing *Santana*, 427 U.S. at 42–43).

363. *See id.* Citing *Santana*, Judge Wood explained that "the district court found, and the Supreme Court confirmed, that the police had 'strong probable cause' that defendant Santana had just participated in an illegal sale of narcotics." *See id.*

364. *See* Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (occupant in immediate danger); Michigan v. Fisher, 558 U.S. 45, 49 (occupant in immediate danger).

365. *See* United States v. Alexander, 888 F.3d 628, 630 (2018).

366. *See* Terry v. Ohio, 392 U.S. 1, 6–8 (1968) (stop and frisk on public street).

367. *See Alexander*, 888 F.3d at 637.

into his backyard because he would be a fleeing suspect.[368] They could have then searched his backpack under the search-incident-to-arrest doctrine.[369] Or they could have simply used their observations to get a search warrant.[370]

Third, another example is *United States v. Struckman*.[371] Officers received a call from Wendy Grimes.[372] She saw a man, who was wearing a leather jacket, throw a red backpack over her neighbors' fence and climb over.[373] Her neighbors were gone.[374] Next, officers arrived and detained Struckman.[375] They frisked his body, where they found a loaded magazine.[376] Then they frisked his backpack and found a gun inside.[377] The Ninth Circuit overruled the district court, who believed *Terry* granted entry into someone's curtilage when officers have reasonable suspicion.[378] Even though there was reasonable suspicion, the court believed that "[reasonable suspicion] alone cannot excuse a warrantless arrest inside a private home or its curtilage."[379] So again, a warrantless trespass onto the curtilage was unconstitutional—despite there being reasonable suspicion to stop and frisk Struckman.

Officers could have tried gaining consent, tried getting a search warrant, or tried relying on exigency. Hot pursuit was off the table since officers never chased Struckman after receiving the 911 call.[380] Plus, there was no evidence Struckman fled or threatened anyone's

368. *See* United States v. Santana, 427 U.S. 38, 42–43 (1976) (officers watched the defendant sell drugs on a public stoop).

369. *See* Chimel v. California, 395 U.S. 752, 763 (1969) (officers may search areas within arm's reach).

370. *See* California v. Ciraolo, 476 U.S. 207, 213–14 (1986) (observations from public spaces pose no constitutional problem).

371. *See* United States v. Struckman, 603 F.3d 731, 747 (9th Cir. 2010).

372. *Id.* at 736.

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.* at 737.

377. *Id.*

378. *See id.* at 738.

379. *Id.* at 743.

380. *See id.* at 744 ("There was no chase here—no 'pursuit' of Struckman, hot or cold. Struckman was already inside the backyard when the police officers arrived at the house.").

safety.[381] The Government argued that taking off his jacket suggested Struckman was either trying to fight or flee.[382] But from the Court's view, that was not enough to show flight or threats.[383] At most, Struckman committed a misdemeanor trespass which weighed against finding exigency—particularly, since misdemeanors are not inherently dangerous.[384] Thus, on those facts there was no exigency. But *Stuart* and *Fisher* offer a measuring stick: had officers found the house in disarray,[385] heard screaming, suspected violence on another occupant,[386] or seen Struckman brandishing or even shooting his firearm, then warrantless entry would have passed constitutional muster.[387] The Supreme Court, after all, held, "[O]fficers may enter a home without a warrant to . . . protect an occupant from imminent injury."[388] Nothing in the Fourth Amendment requires officers to wait until an occupant is "unconscious" or worse.[389] But because no "genuine" threat existed, it was unreasonable.[390]

Finally, take the facts from *Reid*: An officer there responded to a call about a DUI. When he arrived, he saw a woman staggering, a broken bumper, and smelled alcohol.[391] Those facts, of course, meet the reasonable-suspicion threshold. And society's implied license let the officer walk into the driveway and start talking with Reid—neighbors, after all, may enter to chat with a resident.[392] But the officer

381. *See id.* ("Likewise, contrary to the government's suggestion that the general public was in danger, the record contains no evidence that anyone other than the officers and Struckman was near the fully enclosed backyard, let alone put in danger by the occurrences therein. Nor was the police officers' entry into the backyard necessary to prevent harm to themselves.").

382. *Id.*

383. *Id.*

384. *See id.* at 744–45.

385. *See* Brigham City v. Stuart, 547 U.S. 398, 401 (2006); Michigan v. Fisher, 558 U.S. 45, 45–46 (2009).

386. *See Stuart*, 547 U.S. at 401 (occupant in immediate danger); *Fisher*, 558 U.S. at 45–46 (occupant in immediate danger).

387. *See Stuart*, 547 U.S. at 403–04; *Fisher*, 558 U.S. at 47.

388. *See Stuart*, 547 U.S. at 403.

389. *Id.* at 406.

390. United States v. Struckman, 603 F.3d 731, 744–45 (9th Cir. 2010).

391. Reid v. State, 113 N.E.3d 290, 299 (Ind. Ct. App. 2018).

392. *See id.* at 298.

hardly stayed inside that license when he detained her, brought her to his patrol car, and asked that she do the field-sobriety test.[393] Ultimately, the *Reid* court should have held that the implied license does not allow a warrantless *Terry* stop.

Consent or exigent circumstances, though, may have changed the calculus on a different day. Neither hot pursuit nor immediate aid would save the seizure—the officer was not pursuing Reid, and there was no evidence that someone was facing immediate injury.[394] The Court, indeed, has held that the metabolization of alcohol in the blood—alone—does not present an exigency justifying a warrantless, in-home arrest;[395] it is instead only a factor courts consider under the totality of the circumstances.[396] Reid's alcohol metabolization alone is not enough. In fact, the Supreme Court found in *Welsh v. Wisconsin*—and then reaffirmed in *Lange v. California*—that officers may not enter a home without a warrant simply because the "driver's blood-alcohol level might have dissipated."[397] Even in the DUI context, the Court draws a firm line between other areas and the home, saying "the contours" of the exigency doctrine are "jealously and carefully drawn" because our Fourth Amendment historically gives the home "special protection";[398] exigent circumstances in "the context of home entry should *rarely* be sanctioned," especially when it involves misdemeanors.[399] Because Reid, a misdemeanant, was conscious and uninjured, and

393. *See id.* at 295–96.

394. Lange v. California, 141 S. Ct. 2011, 2017 (2021) (a hot pursuit case, as officers chased the defendant into his garage and started doing field sobriety); *see* Michigan v. Fisher, 558 U.S. 45, 45–47 (2009).

395. *See* Missouri v. McNeely, 569 U.S. 141, 145 (2013) (holding that metabolization of blood does not categorically create exigent circumstances). *But see* Mitchell v. Wisconsin, 139 S. Ct. 2525, 2531 (2019) (holding exigent circumstances allows a warrantless blood draw when officers have probable cause an unconscious driver is under the influence).

396. *See McNeely*, 569 U.S. at 145.

397. Welsh v. Wisconsin, 466 U.S. 740, 754 (1984) ("[A] warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant."); *see also Lange*, 141 S. Ct. at 2020 (citing *Welsh*, 466 U.S. at 754).

398. *Lange*, 141 S. Ct at 2018–19 (quoting Georgia v. Randolph, 547 U.S. 103, 109, 115 (2006)).

399. *Id.* at 2020 (emphasis added).

because there was no pursuit, there was no genuine exigency authorizing the warrantless entry.

In short, barring a *Terry* stop and frisk inside the curtilage does not create a more perilous society. No officer must watch a murder or violent crime unfold before entering someone's garage, side yard, or vegetable garden. As Chief Justice Roberts aptly phrased it, "an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided."[400] When officers genuinely suspect someone needs "immediate aid"[401] or someone faces "imminent injury,"[402] the Fourth Amendment embraces a safety valve: the exigency doctrine.[403] Or if officers have probable cause to arrest a fleeing felon, warrantless entry is also reasonable.[404] Those exigency exceptions preserve the Amendment's history and protect its values, while also protecting society's needs.

## VI. CONCLUSION

Despite arguing the curtilage doctrine bars *Terry* stops and frisks inside the curtilage, I do not raise foundational questions about how courts demarcate the curtilage's boundaries. Meaning, I do not offer a new framework for determining whether something is open fields or curtilage for Fourth Amendment purposes. *Jardines* and *Collins,* after all, only decided a front porch and a covered garage abutting from a house were curtilage. How far these protections extend is unknown. We do not know if places like the entrance of a driveway, or portions of a front yard that border a public sidewalk, fall under its protective umbrella.[405] Thus, there is still work left.

400. Brigham City v. Stuart, 547 U.S. 398, 406 (2006).

401. Michigan v. Fisher, 558 U.S. 45, 47 (2009) (quoting Mincey v. Arizona, 437 U.S. 385, 394 (1978)).

402. *Stuart*, 547 U.S. at 403 (citing *Mincey*, 437 U.S. at 392).

403. *See id.*

404. *See* United States v. Santana, 427 U.S. 38, 42–43 (1976) (chasing a drug-dealer into a home after watching her sell narcotics).

405. *See* United States v. Beene, 818 F.3d 157, 163 (5th Cir. 2016) (holding that the driveway is not curtilage). *But see* State v. Davis, 849 S.E.2d 207, 211–13 (Ga. Ct. App 2020) (finding the driveway was curtilage).

Rather, I offer a more modest argument: The reasoning *Jones*, *Jardines*, and *Collins* employed bars *Terry* stops and frisks inside areas *qualifying* as curtilage. The reasons justifying a stop and frisk on the streets, or while executing a warrant, are unsupported when an officer—with no independent, legal basis—enters the constitutionally protected curtilage and begins gathering evidence. The Supreme Court should eventually intervene and address this issue, as the split among the circuits and states will only grow wider without its intervention. Allowing this police activity ignores the central lessons of *Jardines* and *Collins* and unmoors the *Terry* exception from its original justifications. *Terry* by itself never authorized warrantless entry into the home. The curtilage is no different. If officers want to stop and frisk a person or an effect inside the curtilage, officers need an independent basis for doing so—like a warrant, consent, or exigent circumstances. Exigent circumstances protect the same interests as *Terry*: safety and an officer's need for workable rules. But also, it shows a strong fidelity to the Fourth Amendment's history, tradition, and values. So while the *Terry* doctrine is entrenched in our constitutional jurisprudence, it is doubtful that the Founders would let a cop mosey into their garden without a warrant to lift their wig or frisk their frock coat.