No. 17-249

IN THE

Supreme Court of the United States

AMY YOUNG and JOHN SCOTT, as Co-Personal Representatives of the Estate of Andrew Lee Scott, deceased, and MIRANDA MAUCK, individually,
Petitioners,

v.

GARY S. BORDERS, in his official capacity as Sheriff of Lake County Florida, and RICHARD SYLVESTER, in his individual capacity,
Respondents.

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

MOTION FOR LEAVE TO FILE AND BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2(b), The Rutherford Institute respectfully moves for leave to file the attached brief as *amicus curiae* supporting the Petitioners. All parties were provided with timely notice of *amicus*' intent to file as required by Rule 37.2(a). Counsel of record for the Petitioners granted consent to the filing of this *amicus curiae* brief. Counsel of record for the Respondents denied consent to the filing of this *amicus curiae* brief.

The interest of *amicus* arises from its commitment to protecting the civil rights and liberties of all persons and defending advancing the laws and Constitution of the United States as a bulwark against abuses of government power. The Rutherford The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues.

The instant case involves the most serious application of government power against one of its citizens—the use of deadly force. *Amicus*, through the attached brief, seeks to illuminate the facts and law regarding the knock and talk police practice that led to the needless death of the Petitioners' decedent,

and to urge this Court to address the standards applicable to this tactic.

Amicus has no direct interest, financial or otherwise, in the outcome of this case, and is concerned solely about the legal, social and policy issues raised by this case and the judgment below.

For the foregoing reasons, *amicus* respectfully requests that they be allowed to file the attached brief.

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Eleventh Circuit correctly hold—in conflict with established rule in this Court and other circuits that knock-and-talks must be consensual and not for objectively revealed purposes of a search and seizure—that the government's warrantless intrusion, after midnight, in darkness, with guns drawn, onto the curtilage and past the privacy fence to look into the windows of the citizens' home and to surround the only entrance/exit door, repeatedly pound on the door, without—by their own admission—probable cause or exigency, was constitutional under the knock-and-talk exception to the Fourth Amendment's warrant requirement?

2. Does the Eleventh Circuit's holding—that use of deadly force immediately on a citizen bearing his firearm in his home is reasonable—impermissibly tramples on the Second Amendment guarantee of individuals' rights to possess and bear Arms in their homes, and conflicts with the established rule in this Court and in other circuits that objective reasonableness must be viewed, not from the officers' subjective beliefs, but in context of the totality of the circumstances and the officers' Fourth Amendment conduct proximately causing the excessive force?

3. Did the Eleventh Circuit correctly grant qualified immunity on summary judgment—in conflict with the established rule in this Court and other circuits—by restricting its analysis to the two seconds in which the officers repeatedly shot

a citizen standing inside his home in disregard of the officers' warrantless Fourth Amendment conduct preceding the shooting, and by viewing all conflicts in the reasonableness of the government's search, seizure, and excessive force according to the government's version of events?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Rutherford Institute is an international non-profit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues.

Amicus is interested in this case because of its commitment to fighting and speaking out against the encroachment upon rights under U.S. Const. amend. IV, resulting from increasingly intrusive and aggressive law enforcement practices, from surveillance of cell phones to the employment of violence against innocent citizens. This case involves a police tactic that has become increasingly pervasive and dangerous: the "knock and talk." Petitioners' decedent, Andrew Lee Scott, was needlessly gunned down by police as a result of a knock and talk that went far beyond the bounds of reasonableness that ultimately restrains all police actions that intrude upon the privacy and security of persons that the

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for the parties were timely notified of *amicus'* intent to file this brief in support of Petitioners. *Amicus* requested consent to the filing of this brief from both parties. The Petitioners granted consent, but the Respondents denied consent, and so a motion for leave to file this brief is included with this brief. Pursuant to Supreme Court Rule 37.6, *amicus* hereby states that no counsel for either party authored any part of this brief or made a monetary contribution funding the preparation or submission of this brief.

Fourth Amendment is meant to protect. *Amicus* urges this Court to review the instant case and establish that police use of the knock and talk is not limitless and that there is accountability when the tactic is used in such a dangerous way as to cause severe injury and loss of life.

SUMMARY OF ARGUMENT

Andrew Lee Scott was shot and killed by a police officer while in his home as a result of the police execution of a "knock and talk," a police investigation tactic that involves law enforcement officers appearing at a residence without warning. The use of knock and talks by police has become widespread and the manner of its use increasingly aggressive. As the instant case shows, this has resulted in an unnecessary risk of violence to citizens.

The knock and talk at issue in this case was an unreasonable intrusion into the security and sanctity of Andrew Scott's home that violated the Fourth Amendment. The authority of police to conduct a knock and talk is premised upon the implied license of members of the public to approach a residence, knock on the door and summon residence occupants. However, this Court's precedent makes clear that this implied license has limits and when those limits are transgressed, the Fourth Amendment is violated. In this case, the knock and talk was executed in flagrant disregard of the customs and norms that define the implied license. Police approached Scott's residence at an unreasonable time, without announcing their identity and in an aggressive manner that is wholly inconsistent with

the purpose underlying the implied license. It was an unreasonable, warrantless intrusion that violated the Fourth Amendment and for which the Respondents should be held responsible.

ARGUMENT

I. THE KNOCK AND TALK EXECUTED BY POLICE IN THIS CASE, AND INCREASINGLY BY POLICE NATIONWIDE, VIOLATED THE FOURTH AMENDMENT

A. Police Exceeded the Limits of the Implied License of Visitors to Approach a Home by Conducting the Knock and Talk During the Early Morning, by Stealth, and In an Aggressive Manner

It is by now well-established that the Fourth Amendment's guarantee to the people that they have a right "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures" is most compelling when the privacy and security of a person's home is at issue. More than a century ago, this "Court stated in resounding terms that the principles reflected in the Amendment 'reached farther than the concrete form' of the specific cases that gave it birth, and 'apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life.'" *Payton v. New York*, 445 U.S. 573, 585 (1979) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). At the very core of the Fourth Amendment stands the right of a man or woman to retreat into

their home and there be free from unreasonable government intrusions. *Kyllo v. United States*, 533 U.S. 27, 31 (2001).

This fundamental protection of privacy and security extends not simply to the interior of a residence, but to the areas immediately surrounding a home. Thus, the curtilage, meaning the areas immediately adjacent to a home, is also protected by the Fourth Amendment from unreasonable government intrusions. This is so because at common law the curtilage is deemed an area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life, and so is considered part of home itself for Fourth Amendment purposes. *Oliver v. United States*, 466 U.S. 170, 180 (1984). "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

There is little doubt that Respondent Sylvester and the other officers engaged in the fatal encounter with Andrew Scott intruded on the curtilage of Scott's home and a private area protected by the Fourth Amendment. Respondent Sylvester knocked on Scott's door and so was immediately adjacent to the entrance to the residence.[2] Pet. App. 12. Other

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[2] Respondent Sylvester admits he was close enough to the entrance to the apartment that Scott could point a gun in his face, Pet. App. 14, although whether Scott ever raised his gun is disputed and, for purposes of summary judg-

officers were standing next to the apartment building between the windows to Scott's apartment and surrounding the entrance to Scott's apartment in "tactical" positions. Pet. App. 12. These officers were plainly in an area immediately surrounding Scott's home and so were within the curtilage. Although Scott's home was an apartment, not a detached dwelling, the area is still considered curtilage and an area protected by the Fourth Amendment. *See United States v. Burston*, 806 F.3d 1123, 1127 (8th Cir. 2015) (police investigative activities, including use of a drug-sniffing dog, in the area directly adjacent to the defendant's apartment, which was one of eight attached apartment units, intruded into constitutionally-protected curtilage of the apartment); *see also* Jamesa J. Drake, *Knock and Talk No More*, 67 Me. L. Rev. 25, 30 (2014) (the small patch of property immediately in front of an apartment door is unambiguously within the ambit of robust Fourth Amendment protection).

This intrusion was made as Sylvester and the other officers were engaged in the now ubiquitous police tactic known as a "knock and talk." A "knock and talk" involves law enforcement officers appearing at a residence without warning and without invitation, knocking on the door with the expectation that an occupant will answer and allow a search of the interior of the home. It has a prominent place in today's legal lexicon and police have "found the knock and talk an increasingly attractive investigative tool and published cases approving knock and

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ment, it must be assumed that Scott never raised or pointed his firearm.

talk have grown legion." *United States v. Carloss*, 818 F.3d 988, 1003 (10th Cir. 2016) (Gorsuch, J., dissenting).

Although police used the knock and talk for many years, two of this Court's recent decisions led to widespread and uncritical judicial acceptance of the practice. In *Kentucky v. King*, 131 S. Ct. 1849 (2011), this Court ruled that police could enter a home to prevent the destruction of evidence under the exigent circumstances exception to the Fourth Amendment notwithstanding that their actions in knocking on the door of the home may have caused the exigency. "When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private person may do." *Id.* at 1862.

Thereafter, in *Florida v. Jardines*, 133 S. Ct. 1409 (2013), this Court considered whether deploying a trained police dog on the front porch of a residence to see if the dog would alert to the presence of drugs constituted an illegal search. After determining that the porch was part of the curtilage and a constitutionally-protected area, the Court considered whether police entry upon this area itself violated the Fourth Amendment and concluded it did not, determining that (absent other circumstances) there exists an implied license to approach a residence and knock on the door to summon the occupants. "This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* at 1415. Citing *King*, the Court ruled that police may approach a

home and knock precisely because that is no more than what any private citizen might do. *Id.* at 1416.

However, *Jardines* went on to hold that the police there had exceeded the scope of the implied license to enter the curtilage by bringing the trained police dog into this constitutionally-protected area for the purpose of conducting a criminal investigation:

> The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose. . . . Here, background social norms that invite a visitor to the front door do not invite him there to conduct a search.

Id. at 1416. The opinion goes on to note that "no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search." *Id.* at 1416, n. 4.

Thus, the scope of the "implied license" allowing police to enter upon the curtilage of a home to execute a knock and talk is crucial in determining whether the conduct of police violated the Fourth Amendment. While police entering on curtilage to solicit for charity may not be conducting a search, "one calling to investigate a crime surely is." The legality of the police conduct "hinges on the existence of *implied* consent permitting the officers to enter the home's curtilage." *Carloss*, 818 F.3d at 1004, 1005 (Gorsuch, J., dissenting) (emphasis in original). To the extent police exceed the "implied license" to approach and knock on the door of a resi-

dence, they violate the constitution. *United States v. Lundin*, 817 F.3d 1151, 1158-59 (9th Cir. 2016).

It is the gross abuse of the implied license by the police in the conduct of the knock and talk at issue in the instant case that demands this Court's attention and requires review and reversal of the judgment below. Whether police entry upon curtilage to conduct a knock and talk was constitutional depends on the "background social norms" defining the scope of the "customary invitation" to members of the public to approach and knock on the door of a residence. *Jardines*, 133 S. Ct. at 1416. "The scope of [an allowable knock and talk] is coterminous with this implicit license. Stated otherwise, to qualify for the exception, the government must demonstrate that the officers conformed to 'the habits of the country,' . . ., by doing 'no more than any private citizen might do[.]'" *Lundin*, 817 F.3d at 1159 (quoting *McKee v. Gratz*, 260 U.S. 127, 136 (1922) (Holmes, J.), and *King*, 131 U.S. at 1862). The police in this case flagrantly exceeded the implied license in the manner in which they conducted the knock and talk at Andrew Scott's residence, violating his Fourth Amendment rights and resulting in the unjustified shooting.

The police violated the norms and customs that define the implied license in at least three ways:

Time of Approach—The record reflects that Respondent Sylvester and the other police knocked on Scott's door at 1:30 a.m., Pet. App. 11, during the wee hours of the morning and a time that by custom

and according to social norms visitors would not be welcome uninvited. While temporal restrictions on the implied license were not discussed in the *Jardines* majority opinion, the dissenters recognized that late-night/early-morning visits are beyond the pale:

> Nor, as a general matter, may a visitor come to the front door in the middle of the night without an express invitation. See *State v. Cada*, 129 Idaho 224, 233, 923 P.2d 469, 478 (App. 1996) ("Furtive intrusion late at night or in the predawn hours is not conduct that is expected from ordinary visitors. Indeed, if observed by a resident of the premises, it could be a cause for great alarm").

Jardines, 133 S. Ct. at 1422 (Alito, J., dissenting). This view was implicitly endorsed by the *Jardines* majority. *Jardines*, 133 S. Ct. at 1416, n. 3.

The same view was recently relied upon by the Michigan Supreme Court in a unanimous ruling that an early-morning knock and talk violated the Fourth Amendment. In *People v. Frederick*, 895 N.W.2d 541 (2017), the court suppressed evidence obtained by police after they conducted two separate knock and talks at the homes of police officers at 4:00 and 5:30 a.m. The court left little doubt that the timing of the knock and talks brought them outside the implied license recognized in *Jardines*:

> Just as there is no implied license to bring a drug-sniffing dog to someone's front porch, there is generally no implied license to knock at someone's door in the middle of the night. . . . This custom was apparent to the investigating officers in this case. KANET officers testified candidly that it would be inappropriate for Girl Scouts or other visitors to knock on the door in the middle of the night, but evidently the officers believed that they were not bound by these customs. But a knock and talk is not considered a governmental intrusion precisely because its contours are defined by what *anyone* may do. When the officers stray beyond what any private citizen might do, they have strayed beyond the bounds of a permissible knock and talk; in other words, the officers are trespassing. . . . And, as any Girl Scout knows, the "background social norms that invite a visitor to the front door, . . ., typically do not extend to a visit in the middle of the night.

Frederick, 895 N.W.2d at 546-47. *See also Lundin*, 817 F.3d at 1159 (knock and talk conducted at 4:00 a.m. exceeded the scope of the customary license to approach a home and knock).

The knock and talk at issue in the instant case was clearly outside of societal norms for home

visitation. As such, it was a trespass that violated the Fourth Amendment.

Excessive Show of Force—Just as society's customs and norms do not include an implied invitation to visitors to conduct a search, use a metal detector, or deploy a bloodhound, so also is there no implicit license to brandish weapons and engage in SWAT team tactics in connection with a "visit" to a residence. Yet that is exactly how the police "visit" in this case was accomplished, with the officers drawing weapons and occupying tactical positions meant to intimidate and coerce any occupant who appeared at the door. Pet.App. 12. "The purpose of a 'knock and talk' is not to create a show of force, nor to make demands on occupants, nor to raid a residence. Instead, the purpose of a 'knock and talk' approach is to make investigation." *United States v. Gomez-Moreno*, 479 F.3d 350, 356 (5th Cir. 2007); *accord People v. Kofron*, 16 N.E.3d 371, 382 (Ill. App. 2014).

Failure to Announce—While the District Court sought to blame Scott for his own death by pointing to his decision to pick up a firearm before answering the door, Pet. App. 58-59, blame is more readily ascribed to the police officers who could have prevented the shooting by simply announcing their identity and purpose. As this Court has pointed out:

> [U]nless police officers identify themselves loudly enough, occupants may not know who is at their doorstep. Officers are permitted—indeed, encouraged—to identify themselves to citizens, and "in many circumstances this

> is cause for assurance, not discomfort." *United States v. Drayton*, 536 U. S. 194, 204 (2002). Citizens who are startled by an unexpected knock on the door or by the sight of unknown persons in plain clothes on their doorstep may be relieved to learn that these persons are police officers. Others may appreciate the opportunity to make an informed decision about whether to answer the door to the police.

King, 131 S. Ct. at 1861.

Considering the time the police executed the knock and talk and the fact that they banged loudly and violently on Scott's door,[3] they should have announced that they were police and the purpose of their visit. It is only reasonable to assume that a late-night, uninvited visit accompanied by violent knocking on a door would frighten occupants. Visitors, particularly police, should expect this and attempt to allay fears by calling out their identity and purpose. Even to the extent an early-morning, uninvited visit could be deemed within societal norms, doing so in an anonymous and aggressive manner

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[3] Although the District Court's ruling indicates that Respondent Sylvester knocked in a "normal manner," Pet. App. 12, it also acknowledged that several other witnesses, including impartial witnesses, described the knocking as "very loud." Pet. App. 13, n. 11. Again, because the case was resolved against Petitioners on summary judgment, the facts should have been viewed in a light most favorable to them.

must be considered outside of any implied license to enter on the curtilage of the property.

There can be little doubt that the knock and talk conducted by Respondent Sylvester and the other police police which led to death of Andrew Scott was done in a way that exceeded the implied license recognized in *Jardines*. Early-morning, unannounced visits by armed and uniformed officer deployed in tactical positions are in no way consistent with social norms and customs regarding home visits. As in *Jardines*, the officers' intrusion into the curtilage to investigate a crime was a search in violation of the Fourth Amendment, *Carloss*, 818 F.3d at 1004 (Gorsuch, J., dissenting), and the Respondents should be held accountable for the harm caused by that violation.

B. The Increasing Use and Abuse of the Knock and Talk Tactic by Police Requires This Court's Attention

Review of the instant case is needed not only to provide justice to the Petitioners for the unnecessary shooting of Andrew Scott, but in order to provide law enforcement and courts necessary guidance limiting the manner in which knock and talks are conducted. Evidence indicates that the use of knock and talks has become a standard police tactic for obtaining evidence when a warrant is unavailable. Police tactics are also becoming more aggressive and violent, which will only lead to more tragic shootings like the one that killed Andrew Scott.

While there are no available statistics on how prevalent "knock and talks" are, the growing number of court decisions involving this tactic demonstrate that it has become a widespread and common tool of police. *Carloss*, 818 F.3d at 1003 (Gorsuch, J., dissenting). Some police departments have found knock and talks so effective that they have established task forces dedicated to the practice. In 2013, Dallas, Texas, established a knock and talk task force that was comprised of 46 officers dedicated to conducting knock and talks.[4] And Orange County, Florida, has "Squad 5," an entire division of its sheriff's office tasked with conducting "knock and talks." As far back as 2003, Squad 5 was conducting 300 "knock and talks" per month.[5] Knock and talks are also employed more frequently against minority populations,[6] and are particularly prevalent in "over-policed" neighborhoods which receive disproportionate attention from police.[7]

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[4] Tristan Hallman, "Dallas police are finding drug house by walking up and asking," *Dallas News* (August 2013), http://www.dallasnews.com/news/crime/2013/08/25/dallas-police-are-finding-drug-houses-by-walking-up-and-asking.

[5] William Dean Hinton, "Knock and Talk," *Orlando Weekly* (January 9, 2003), http://www.orlandoweekly.com/orlando/knock-and-talk/Content?oid=2260977.

[6] Ian Dooley, *Fighting for Equal Protection Under the Fourth Amendment: Why "Knock-and-Talks" Should Be Reviewed Under the Same Constitutional Standard As "Stop-and-Frisks",* 40 Nova L. Rev. 213, 214 (Spring 2016).

[7] Steven Hale, "Police knock-and-talks are legal in theory. But what do they look like in practice?" *Nashville Scene* (May 12, 2016), http://www.nashvillescene.com/news/article/13064118/police-knockandtalks-are-legal-in-theory-but-what-do-they-look-like-in-practice.

Although a "knock and talk" is often likened to a visit to a home no different from the when Girl Scouts come knocking at one's door to sell cookies, *Jardines*, 133 S. Ct. at 1422 (2013) (Alito, J., dissenting), in practice they are often executed like a SWAT team raid. Multiple police come to the door, often in tactical gear with sidearms prominently displayed and sometimes drawn, demonstrating overwhelming force.[8] One former state supreme court judge described a typical "knock and talk":

> Law enforcement typically arrives late at night.... Law enforcement may arrive either by driving up to the dwelling with multiple cars so that many bright headlights hit the house, or by stealth, walking through the property to arrive at the door without warning. Multiple officers may arrive for the knock and talk.

Jim Hannah, *Forgotten Law and Judicial Duty*, 70 Alb. L. Rev. 829, 837 (2007).

The procedures employed are calculated to maximize the surprise of and coercion upon the occupants of the home. These constitutionally dubious tactics are highly threatening confrontations meant to intimidate individuals into allowing police access to a home, which then paves the way for a warrantless search of the home and property.

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[8] *Id.*

Because of the manner in which police execute this tactic, there is a high and unnecessary risk of violence. As one expert in the field pointed out, late night or early morning encounters between police and homeowners are "inherently dangerous."[9] Sadly, Andrew Scott's shooting is not an isolated occurrence, as attested by other incidents:

- Police were sued for killing nineteen-year old Karvas Gamble, Jr., in the course of a knock and talk at a church where Gamble was working. According to the complaint filed in the lawsuit, eight police officers, acting on a confidential tip concerning marijuana, went to the church in the evening and surrounded it. As the officer peered into the windows, they saw two persons working at a computer and Gamble, who was committing no crime and was unarmed. The lawsuit alleged that when Gamble turned toward a window, he was shot by one of the officers and died. Although no criminal charges were brought against the officers, a grand jury concluded that the shooting of Gamble "should not have happened."[10] The police and city eventually settled the

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[9] Henry Pierson Curtis, "Cops' 'knock-and-talk' tactic draws flak after near-fatal shooting," *Orlando Sentinel* (Oct. 2, 2010), http://articles.orlandosentinel.com/2010-10-02/news/os-knock-and-talk-procedures-20100922_1_officers-show-doorstep-tactic.

[10] Henry Pierson Curtis, "Lawsuit filed in police 'knock-and-talk' killing of Orlando teen," *Orlando Sentinel* (Jan. 16, 2015), http://www.orlandosentinel.com/news/breaking-news/os-knock-and-talk-orlando-lawsuit-20150116-story.html.

wrongful death and excessive force lawsuit filed against them.

- Carl Dykes was shot in the face by a county deputy who pounded on Dykes' door in the middle of the night without identifying himself. Because of reports that inmates had escaped from a local jail, Dykes brought a shotgun with him when he answered the door.[11]

CONCLUSION

For the reasons set forth above and those set forth in the Petition for Writ of Certiorari, *amicus* urges this Court to review the instant case and establish that police use of the knock and talk is not limitless and that there is accountability when the tactic is used in such a dangerous way as to cause severe injury and loss of life.

Respectfully submitted,

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[11] Henry Pierson Curtis, "Cops' 'knock-and-talk' tactic draws flak after near-fatal shooting," *Orlando Sentinel* (Oct. 2, 2010), http://articles.orlandosentinel.com/2010-10-02/news/os-knock-and-talk-procedures-20100922_1_officers-show-doorstep-tactic.