

“KNOCK-KNOCK” . . . “WHO’S THERE?”: THE FOURTH
AMENDMENT DILEMMA POSED BY WARRANTLESS POLICE
ENCOUNTERS AT HOME

*Meg Penrose**

The poorest man may in his cottage bid defiance to all forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement.¹

INTRODUCTION

There’s a knock at your door. What do you do? If it’s the police, you may have a problem. But the problem may have nothing to do with whether you have engaged in criminal conduct or committed a civil wrong. The problem is whether you have any legal rights once you choose to open your door. That problem is exacerbated when the police surround your home and *demand* that you open your door or *coerce* you into coming outside. Under the current law, your problem is also geographically defined. If you live in certain parts of the country, you probably should not open the door. Opening your door in response to law enforcement’s armed commands may extinguish your Fourth Amendment rights. Those rights limit police behavior and usually require law enforcement to have a warrant before surrounding your

* Professor of Law, Texas A&M University School of Law. Professor Penrose volunteers as a CJA Panel Attorney for federal appeals. Inspiration for this article came from a case she worked on, *United States v. Malagerio*, 49 F.4th 911 (5th Cir. 2022). This paper additionally benefitted from comments received during the 2023 University of Louisville Criminal Procedure Discussion Forum. Professor Penrose would especially like to thank Professors Cynthia Alkon, Morgan Cloud, Brannon Denning, Islam Ehadidy, Steve Friedland, Susan Klein, Michael Losavio, Robert Mikos, Luke Milligan, Chris Roederer, and Russell Weaver.

¹ *Miller v. United States*, 357 U.S. 301, 307 (1958) (quoting comments attributed to William Pitt, Earl of Chatham, during a Parliamentary debate concerning the Cider Bill of 1763 (*inter alia*, permitting warrantless searches)). See also HENRY PETER BROUGHAM, 1 HISTORICAL SKETCHES OF STATESMEN WHO FLOURISHED IN THE TIME OF GEORGE III 52 (1839).

home and demanding you exit.² In those places, neither constitutional text nor police tactics appear to affect the outcome.³

There are few explicit rights in the United States Constitution.⁴ The right to be secure in one's home and free from unreasonable governmental interference is one of the few textually enumerated rights we have.⁵ Why, then, have some courts permitted police to game the warrant requirement and strategically circumvent our Fourth Amendment rights by ignoring law enforcement's constructive entry? This tactic allows police to game the warrant requirement and conduct unreasonable seizures at people's homes. Constructive entry is a term of art analyzing law enforcement's intentional use of coercive tactics to flush a person from the sanctity of their home or resort to deceptive practices to secure warrantless entry to the home.⁶ Most reviewing courts accept that constructive entry is, legally speaking, identical to actual entry.⁷

² See, e.g., *United States v. Malagerio*, 49 F.4th 911, 913–15 (5th Cir. 2022) (describing an administrative warrant being written out to apprehend a defendant suspected of overstaying his visa in the United States), 916–18 (analyzing “voluntariness” as applied to the defendant’s consent for agents to search his trailer). The Fifth Circuit opinion relies on *United States v. Santana*, 427 U.S. 38 (1976), a case that today is perceived more as a “hot pursuit” case because of the Supreme Court’s subsequent holding in *Payton v. New York*, 445 U.S. 573 (1980).

³ See *id.* at 914 (“An agent, having already unholstered his gun, then knocked on Malagerio’s door and told him to come out with his hands up), 915 (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011)) (holding generally, administrative warrants lack protections of a judicially approved Amend. IV warrant) (“Malagerio responded that he would be out shortly and came to the door about sixty to ninety seconds later. In the meantime, the agent on point had knocked repeatedly and ‘ordered’ Malagerio to come out. By the time Malagerio came to the door, most or all of the agents had trained their guns on him, including one shotgun.”).

⁴ Even the most explicit constitutional language has required further elucidation. See, e.g., *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (opinion of Marshall, C.J.) (arguing that, in interpreting the Necessary and Proper Clause, never forget “that it is a constitution we are expounding”).

⁵ 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. . . .”)

⁶ See *Johnson v. United States*, 333 U.S. 10, 13 (1948) (“Entry to the defendant’s living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority, rather than as an understanding and intentional waiver of a constitutional right.”). In many ways, *Johnson* was the original constructive entry case, where the Supreme Court found that officers’ warrantless search of an opium suspect following a doorway encounter was unconstitutional. Constructive entry, however, takes on a sharper focus following the Supreme Court’s decision in *Payton*, 445 U.S. at 586 (drawing a firm Fourth Amendment line at the entry to the home).

⁷ See, e.g., *United States v. Curzi*, 867 F.2d 36, 39–41 (1st Cir. 1989) (describing an order to evacuate and the “protective sweep” of a home from acting on an arrest warrant naming a third person “not reasonably thought to be in the residence” as a combined act in affirming exclusion of evidence); *Sharrar v. Felsing*, 128 F.3d 810, 819–20 (3d Cir. 1997) (finding an arrest occurred when a SWAT team surrounded a house and ordered the occupants to exit backwards, hands raised. “No

Constructive home entry, like actual entry, generally requires either a warrant or an exception to the warrant clause.⁸

In a world where police abuses of power seem more common,⁹ where are the judges—particularly the originalist judges—who strive to protect the Founder’s intentions? How is it that people living in certain states seemingly have less robust Fourth Amendment protections than others? This essay seeks to answer these questions and urges the Supreme Court to reassert its constitutional commitment to the Fourth Amendment so that all of us are, in fact, secure in our homes. The Court should accept the responsibility it has to provide uniform protection to

reasonable person would have believed that he was free to remain in the house”), *abrogated on other grounds* by *Curly v. Klem*, 499 F.3d 199, 209–11 (3d Cir. 2007); *United States v. Morgan*, 743 F.2d 1158, 1161–62, 1164–68 (6th Cir. 1984) (finding no exigent circumstances to justify a warrantless entry of a home after defendant and his friends exited, where defendant was formally arrested, handcuffed, and frisked). “[A]s soon as the police surrounded the Morgan home, and therefore, the arrest violated *Payton* because no warrant had been secured. The police show of force and authority was such that a ‘reasonable person would have believed he was not free to leave’” (quoting *United States v. Mendenhall*, 446 U.S. 544, 554–55 (1980)); *United States v. Saari*, 272 F.3d 804, 806–08, 810–11 (6th Cir. 2001) (like in *Morgan*, suppressed evidence obtained after officers arrested Defendant by ordering him outside his apartment, handcuffed him, and conducted a search over defendant’s vocal objections); *United States v. Al-Azzawy*, 784 F.2d 890, 893–95 (9th Cir. 1985) (holding exigent circumstances justified warrantless arrest and search where police had reasonable belief that explosives were inside. Arrest found where defendant was ordered to exit his trailer, raise his hands, and kneel at gunpoint); *United States v. Reeves*, 524 F.3d 1161, 1167–69 (10th Cir. 2008) (finding, despite no direct order to exit, the officers’ pounding on the door and window while identifying loudly as officers for twenty minutes was sufficiently coercive to create a “seizure” within a motel room); *United States v. Maez*, 872 F.2d 1444, 1450, 1453–56 (10th Cir. 1989) (defendants, seeing a ten-man SWAT team pointing rifles at a house, loudspeakers ordering them out from the mobile home, believed they had to exit the home and submit to the state’s show of authority; and no exigent circumstances were found, tainting the subsequent search); *United States v. Edmonson*, 791 F.2d 1512, 1515–16 (11th Cir. 1986) (finding defendant submitted to the arrest due to “a show of official authority,” and being aware that FBI agents were at his door and at the foot of the stairs, and without exigent circumstances justifying the arrest, the follow-up search of the house violated Amend. IV).

⁸ See *Saari*, 272 F.2d at 808–09; *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980).

⁹ See, e.g., Emily Washburn, *America Less Confident in Police than Ever Before: A Look at the Numbers*, FORBES (Feb. 3, 2023, 4:04 PM), <https://www.forbes.com/sites/emilywashburn/2023/02/03/america-less-confident-in-police-than-ever-before-a-look-at-the-numbers/?sh=8794b606afbd> (describing public confidence in police at historic lows following the fatal beating of Tyre Nichols); John Kelly & Mark Nichols, *We Found 85,000 Cops Who’ve Been Investigated for Misconduct. Now You Can Read Their Records*, USA TODAY (Jun. 11, 2020, 9:48 AM), <https://www.usatoday.com/in-depth/news/investigations/2019/04/24/usa-today-revealing-misconduct-records-police-cops/3223984002/> (archiving over 200,000 incidents of alleged police misconduct); William Terrill & Jason Ingram, *Citizen Complaints Against the Police: An Eight City Examination*, 19 POLICE Q. 150, 168–71 (2015) (detailing police departments’ inconsistent sustaining of citizen complaints against officers for abuses of power).

all Americans and clarify the limits on constructive entry. If the Court does not intervene, the “knock-knock” quandary raised above could make the strength of a person’s Fourth Amendment rights dependent on their willingness to ignore armed police activity outside their doorway and their fortitude to suffer the consequences of taking that risk. This should not be the case. The Founders promised us—through Constitutional text—we would be secure in our homes. Law enforcement shouldn’t be able to circumvent Constitutional text, or the warrant requirement, through constructive entry.

BACKGROUND

I. GIVING LIFE TO CONSTITUTIONAL TEXT BY PROTECTING PLACES

The Fourth Amendment protects the individual’s privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home – a zone that finds its roots in clear and specific constitutional terms: “The right of the people to be secure in their . . . houses . . . shall not be violated.”¹⁰

From the country’s founding, the Supreme Court has been entrusted with interpreting Constitutional text.¹¹ Yet, few cases reach the hallowed Supreme Court bench.¹² To help fill this void, federal circuit courts (and state supreme courts) give life to Constitutional text by demarcating the depth and breadth of our rights. We live in one nation governed by one Constitution. But unfortunately, there are instances where a person’s rights are determined by geography as much as constitutional text.¹³ The Fourth Amendment right to be secure in your home

¹⁰ *Payton v. New York*, 445 U.S. 573, 589 (1980).

¹¹ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

¹² Harvard Law Review keeps annual statistics on the number of cases filed and the number of cases accepted for review. *See, e.g., The Statistics*, 135 HARV. L. REV. 1, 498 (2021).

¹³ *See, e.g., Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 228, 2284 (2022). Now that the abortion topic is returned to the states, state law currently delineates when and whether a person may access abortion. This is also true when it comes to our Second Amendment rights. *See also, e.g., New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2156 (2022). The requirements for concealed carry, if any, are currently determined by geography rather than through a national right. While *Bruen* held that the Second Amendment includes ordinary self-defense rights, the decision still allows states to restrict who can carry guns and where guns may be carried. Much like

and free from unreasonable governmental interference should not be one of these instances where geography determines the breadth of your rights.

The majority of circuit courts accept and follow the constructive entry rule.¹⁴ Constructive entry finds that the police “enter” a home when, through force or deception, they coerce a person to exit the safety of his home.¹⁵ In constructive entry cases, courts do not require that law enforcement physically cross the threshold of the home by walking inside to find officers entered the home. Instead, constructive entry is a legal fiction, analyzing whether police tactics coerced a person from the safety of their home.¹⁶ “A consensual encounter at the doorstep may evolve into a ‘constructive entry’ when the police, while not entering the house, deploy overbearing tactics that essentially force the individual out of the house.”¹⁷ The constructive entry rule pays homage to our common law traditions and Supreme Court precedent finding that the home is sacred.¹⁸

The seminal Fourth Amendment case, *Katz v. United States*,¹⁹ famously observed that “the Fourth Amendment protects people, not places.”²⁰ This statement is not accurate. First, the Fourth Amendment protects solely one place: the home.²¹ In listing the Fourth Amendment protections, the Founders specified “persons, houses, papers, and effects.”²² One place—and only one place—was given explicit protection. This special protection reveals an unequivocal desire to protect

the Fourth Amendment, the Second Amendment provides textually grounded affirmative individual rights. The parameters of those rights, however, continue to be litigated.

¹⁴ *United States v. Curzi*, 867 F.2d 36, 42 (1st Cir. 1989); *Sharrar v. Felsing*, 128 F.3d 810, 819–20 (3d Cir. 1997), *abrogated on other grounds* by *Curly v. Klem*, 499 F.3d 199, 209–11 (3d Cir. 2007)); *United States v. Morgan*, 743 F.2d 1158, 1166–67 (6th Cir. 1984); *United States v. Saari*, 272 F.3d 804, 808–09, 812 (6th Cir. 2001); *United States v. Al-Azzawy*, 784 F.2d 890, 893 (9th Cir. 1985); *United States v. Reeves*, 524 F.3d 1161, 1167 (10th Cir. 2008); *United States v. Maez*, 872 F.2d 1444, 1449–50 (10th Cir. 1989); *United States v. Edmonson*, 791 F.2d 1512, 1514–15 (11th Cir. 1986).

¹⁵ *See, e.g., Saari*, 272 F.2d at 809; *United States v. Johnson*, 626 F.2d 753, 757 (9th Cir. 1980).

¹⁶ *See Maez*, 872 F.2d at 1451 (finding that the privacy of the home envisioned by *Payton* “is effectively invaded” where a person is coerced to leave their home). *See also Morgan*, 743 F.2d at 1164, 1166.

¹⁷ *United States v. Thomas*, 430 F.3d 274, 277 (6th Cir. 2005).

¹⁸ *See e.g., Florida v. Jardines*, 569 U.S. 1, 6–7 (2013).

¹⁹ 389 U.S. 347 (1967).

²⁰ *Id.* at 351.

²¹ *Jardines*, 569 U.S. at 8 (opinion of Scalia, J.) (referring to the home and its curtilage as “a constitutionally protected area”).

²² U.S. CONST. amend. IV.

our homes from unreasonable governmental interference.²³ This desire was predicated on the Founder's experience living in colonial America under British rule.²⁴ Resistance to the Crown's practices "established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle, and not [to] be invaded by any general authority to search and seize his goods and papers."²⁵ "[N]either history nor this Nation's experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic."²⁶

Second, although case law provides varying protections to places, the home is considered the "first among equals."²⁷ Our cars and offices remain lesser protected places, with cars even serving as an exception to the traditional warrant requirement.²⁸ The Supreme Court "since the enactment of the Fourth Amendment has stressed 'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.'"²⁹ Justice Kagan recently reminded that, as early as 1763, the common law considered a warrantless home entry to be an attack on "the liberty of the subject" that could "destroy the liberty of the kingdom."³⁰ Thus, since the Founding, the Fourth Amendment's core remains "the right of a man to retreat into his home and there be free from unreasonable governmental intrusion."³¹

²³ See *Payton v. New York*, 445 U.S. 573, 588–90 (1980) (requiring an arrest warrant to enter an individual's home even when officers have probable cause the individual has committed a felony).

²⁴ See *Weeks v. United States*, 232 U.S. 383, 389–90 (1914) (citing *Boyd v. United States*, 116 U.S. 616 (1886) (opinion of Bradley, J.), for a historical analysis regarding the sanctity of the home at common law).

²⁵ *Id.* at 390.

²⁶ *Payton*, 445 U.S. at 601.

²⁷ *Florida v. Jardines*, 569 U.S. 1, 6 (2013).

²⁸ See *e.g.*, *Carroll v. United States*, 267 U.S. 132, 153 (1925) (creating the automobile exception); *California v. Acevedo*, 500 U.S. 565, 569 (1991) (applying the automobile exception); *Oliver v. United States*, 466 U.S. 170, 181 (1984) (applying the open fields doctrine); *O'Connor v. Ortega*, 480 U.S. 709, 715–17 (1987) (plurality opinion) (discussing protections afforded an office against governmental searches); *California v. Carney*, 471 U.S. 386, 393 (1985) (finding movable recreational vehicle qualifies as a vehicle, not a home, for Fourth Amendment purposes).

²⁹ *Oliver*, 466 U.S. at 178 (1984) (quoting *Payton*, 445 U.S. at 601).

³⁰ *Lange v. California*, 141 S. Ct. 2011, 2023 (2021) (citing *Huckle v. Money*, 2 Wils. K. B. 206, 207, 95 Eng. Rep. 768, 769 (K.B. 1763)).

³¹ *United States v. Silverman*, 365 U.S. 505, 511 (1961)

Places matter. They have always mattered.³² And the home has always mattered the most.³³

Courts give life to Constitutional text, history, and precedent when they elevate the home to its proper status. The Supreme Court has regularly done so, beginning at the Founding, reasserting its commitment in 1980, and continuing through the most immediate term.³⁴ In 1980, the Supreme Court drew a firm line at the entry to the home in *Payton v. New York*.³⁵ Here, the Court reiterated the “‘basic principle of Fourth Amendment law’ that searches and seizures inside a home without a warrant are presumptively unreasonable.”³⁶ *Payton* requires that law enforcement have a warrant or exigent circumstances to enter a home to make a felony arrest.³⁷ Following *Payton*, the Supreme Court, perhaps unsurprisingly, handed down a nearly unbroken line of cases protecting individuals within their homes.³⁸ There have been rare exceptions.

One exception that pre-dates *Payton* is *Santana v. United States*.³⁹ The holding in *Santana* appears to be at odds with text, history, and existing case law.⁴⁰ Here, the Court found that an individual standing in the doorway of their home when police officers arrived was, legally speaking, in a public place.⁴¹ The police suspected Santana of possessing

³² See *Boyd v. United States*, 116 U.S. 616, 625-630 (1886) (providing a detailed history of the colonists’ concerns giving rise to the Fourth Amendment).

³³ *Silverman*, 365 U.S. at 511 (“At the very core [of the Fourth Amendment] stands the right of a man to retreat into his home and there be free from unreasonable governmental intrusion”).

³⁴ *Id.* (reminding that the “Fourth Amendment, and the personal rights which it secures have a long history”). See also, *Payton*, 445 U.S. 573; *Caniglia v. Strom*, 141 S. Ct. 1596 (2021); *Lange*, 141 S. Ct. at 2018–19.

³⁵ 445 U.S. 573, 590 (1980) (“In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.”).

³⁶ *Id.* at 586.

³⁷ *Id.* at 590–91.

³⁸ *Silverman*, 365 U.S. at 511; *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963); *Stoner v. California*, 376 U.S. 483, 489–90 (1964); *Camara v. Mun. Ct. City & Cnty. San Francisco*, 387 U.S. 523, 528–29 (1967); *Steagald v. United States*, 451 U.S. 204, 211–12 (1981); *Donovan v. Dewey*, 452 U.S. 594, 598–99 (1981); *Welsh v. Wisconsin*, 466 U.S. 740, 748–49 (1984); *Kyllo v. United States*, 533 U.S. 27, 31 (2001); *Florida v. Jardines*, 569 U.S. 1, 6 (2013); *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018); *Caniglia*, 141 S. Ct. at 1599; *Lange*, 141 S. Ct. at 2018.

³⁹ 427 U.S. 38, 42 (1976).

⁴⁰ See, e.g., *Payton*, 445 U.S. at 601 (emphasizing the history and tradition sanctifying the home “since the origins of the Republic”).

⁴¹ *Santana*, 427 U.S. at 42 (“While it may be true that under the common law of property the threshold of one’s dwelling is ‘private,’ as is the yard surrounding the house . . . under the cases interpreting the Fourth Amendment Santana was in a ‘public’ place. She was not in an area

heroin.⁴² Officers drove up to find her standing in her doorway holding a brown paper bag.⁴³ Once Santana noticed the officers, she fled inside.⁴⁴ The officers followed her inside, grabbed her, and as she tried to pull away, drugs fell out of the bag she had been holding.⁴⁵ The officers did not have a warrant.⁴⁶ They did not have consent.⁴⁷ In a rather remarkable holding, the Court found that because the officers had probable cause to arrest Santana, and because she had been standing in a public place (her doorway) when the arrest began, the arrest occurred in a public place despite the physical seizure occurring wholly inside the home.⁴⁸

The Court's reasoning would not likely hold up under modern precedent. In fact, most modern cases consider *Santana* a "hot pursuit" case rather than a public arrest case.⁴⁹ Pasting together two early precedents—one regarding open fields⁵⁰ and one permitting arrest within a public place⁵¹—*Santana* found that when you stand in your doorway you forfeit any Constitutional expectation of privacy.⁵² *Santana* considers your house's entry point a public place.⁵³ Under *Santana*, if police arrive

where she had any expectation of privacy She was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house Thus, when the police, who concededly had probable cause to do so, sought to arrest her, they merely intended to perform a function which we have approved in *Watson*." (internal citations omitted)).

⁴² *Id.* at 39–40.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 41.

⁴⁷ See *United States v. Santana*, 427 U.S. 38, 40–41 (1976).

⁴⁸ *Id.* at 42.

⁴⁹ See *Lange v. California*, 141 S. Ct. 2011, 2019 (2021) ("We upheld the warrantless entry as one involving a police 'hot pursuit,' even though the chase 'ended almost as soon as it began.'"). See also *Santana*, 427 U.S. at 43 (opinion of Rehnquist, J.) ("We thus conclude that a suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under *Watson*, by the expedient of escaping to a private place."). Much of *Santana's* discussion relies on *Warden v. Hayden*, 387 U.S. 294 (1967), to underscore that *Santana's* retreat into her home upon seeing the officers could not "thwart an otherwise proper arrest." *Santana*, 427 U.S. at 42.

⁵⁰ *Hester v. United States*, 265 U.S. 57, 59 (1924).

⁵¹ *United States v. Watson*, 423 U.S. 411, 424 (1976).

⁵² *Santana*, 427 U.S. at 42 ("She was not merely visible to the public, but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house.").

⁵³ *Id.* ("While it may be true, under the common law of property, the threshold of one's dwelling is "private," as is the yard surrounding the house, it is nonetheless clear that, under the cases interpreting the Fourth Amendment, *Santana* was in a "public" place. She was not in an area where she had any expectation of privacy.").

at your home without a warrant, knock on your door and you open that door, you have voluntarily submitted to their authority by greeting them “in public.”⁵⁴ No warrant is necessary.⁵⁵ This approach encourages officers to forego the judicial scrutiny of the warrant process and rely on homeowners’ ignorance when opening their door. Importantly, the Supreme Court has not clarified *Santana*’s holding in light of *Payton v. New York*. It should.

Payton drew a firm line at the entry to the home.⁵⁶ And what is the entrance to a house? A doorway. *Payton* calls directly into question *Santana*’s divergent interpretation of the proper Fourth Amendment characterization of entrances, which is reproduced below:

While it may be true that, under the common law of property, the threshold of one’s dwelling is “private,” as is the yard surrounding the house, it is nonetheless clear that, under the cases interpreting the Fourth Amendment, *Santana* was in a “public place.”⁵⁷

Under *Payton*, however, the Court would not consider someone to be in a public place when that person is confined within their home prior to law enforcement surrounding that home or demanding the person’s exit. Consistent with the constructive entry rule, *Payton* would require an assessment of how the officers gained entry to the home or how the officers coerced the person from the safety of their home. It would seem to run afoul of *Payton*’s unyielding regard for the home to allow officers to subvert the warrant requirement by flushing a person from the safety of their house. The constructive entry rule forbids officers from doing through force or coercion what they cannot do without first securing a warrant.

Santana’s “public place” reasoning has not aged well. It chips away at an otherwise clear line of cases that show fidelity to Constitutional text. *Santana* is only defensible, following *Payton* and its progeny, as an exigent circumstances case. It was the flight, not the doorway location,

⁵⁴ *See id.*

⁵⁵ *Id.* at 41.

⁵⁶ *Payton v. New York*, 445 U.S. 573, 590 (1980) (“In terms that apply equally to seizures of property and seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.”).

⁵⁷ *Santana*, 427 U.S. at 42.

that permitted officers to enter the home.⁵⁸ *Payton*'s holding and reasoning confirms this.⁵⁹ "It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable."⁶⁰ *Santana* was initially in public view.⁶¹ Once she noticed the officers, she retreated into her home.⁶² There is no doubt that the officers physically entered the home.⁶³ They did so, lawfully, under exigent circumstances.⁶⁴

Consistent with history, *Payton* and its progeny consider the home as the first among equals.⁶⁵ *Payton* gives life to Constitutional text by acknowledging the obvious: the Founders intended to protect our homes. And, as *Payton* acknowledged: "It is thus perfectly clear that the evil the Amendment was designed to prevent was broader than the abuse of a general warrant."⁶⁶ The Constitution's clarity in protecting our homes is textually and historically clear. Doorways are but a larger part of the home and its physical dimensions. Doorways are undoubtedly within the curtilage.⁶⁷ Surely the Founders did not expect that the mere act of opening your door meant that all the privacy afforded your home evaporated.⁶⁸ The door is the gateway to the home. It is the last space of refuge before one leaves their solitude and, after walking through the curtilage, truly reaches a public place.⁶⁹ *Payton*, not *Santana*,

⁵⁸ *See id.* at 43.

⁵⁹ It is notable that *Payton* only cites *Santana* as a "cf." in a footnote. *Payton*, 445 U.S. at 575 n.1. When differentiating "between a warrantless seizure in an open area and such a seizure on private premises," the *Payton* Court cites *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 354 (1977), not *Santana*. *Payton*, 445 U.S. at 587. Later in the opinion, the Court references *United States v. Watson*, 423 U.S. 411, 418–23 (1976), to demonstrate the common law rule permitting arrests in a public place was well-settled. *Payton*, 445 U.S. at 590. But nowhere in the opinion text does the Court reference *Santana*.

⁶⁰ *Payton*, 445 U.S. at 586.

⁶¹ *Santana*, 427 U.S. at 40.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 43.

⁶⁵ *Florida v. Jardines*, 569 U.S. 1, 6.

⁶⁶ *Payton v. New York*, 445 U.S. 573, 585 (1980).

⁶⁷ *See, e.g., United States v. Dunn*, 480 U.S. 294, 301 (1987) (explaining how to classify curtilage).

⁶⁸ *See, e.g., Weeks v. United States*, 232 U.S. 383, 389–91 (1914) (citing *Boyd v. United States*, 116 U.S. 616 (1886) (opinion of Bradley, J.)).

⁶⁹ *See Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) (quoting *California v. Ciraolo*, 476 U.S. 207, 212–13 (1986)) ("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.").

best aligns with Fourth Amendment text and values. It is no wonder that the majority of circuits accordingly look to *Payton* and its progeny when analyzing constructive entry.

II. THE MAJORITY VIEW: LIMITING UNREASONABLE GOVERNMENTAL INTRUSION

[N]either history nor this Nation’s experience requires us to disregard the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.⁷⁰

Constructive entry cases faithfully apply the Fourth Amendment. Courts that have found law enforcement’s coercive and deceptive tactics to be an affront to Fourth Amendment rights recognize that constructive entry occurs most often when officers circumvent the warrant process.⁷¹ It may be that officers are in a hurry. Or perhaps they do not quite have probable cause. But one constant in the constructive entry cases is that law enforcement acted with intent but without a warrant.⁷² Constructive entry cases properly limit unreasonable governmental interference at, and in, our homes.

In 1980, the Ninth Circuit implicitly recognized the constructive entry rule in *United States v. Johnson*.⁷³ Here, the Ninth Circuit distinguished *Santana* by noting that Johnson was inside his house when the officers arrived—not standing in public view.⁷⁴ The court, following *Payton*, explained why officers’ use of force or deception to exit a home violates the Fourth Amendment:

In this case, we are confronted with the situation where the suspect was arrested as he stood inside his home and the officers stood outside his home with drawn weapons. In these circumstances, it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home. Otherwise, arresting officers

⁷⁰ *Payton*, 445 U.S. at 601.

⁷¹ See e.g., *United States v. Morgan*, 743 F.2d 1158, 1164 (6th Cir. 1984) (“Viewed objectively, [defendant] was placed under arrest, without the issuance of a warrant, at the moment police encircled the . . . residence.”).

⁷² *Id.* at 1161. See also *United States v. Saari*, 272 F.2d 804, 808 (6th Cir. 2001).

⁷³ 626 F.2d 753 (9th Cir. 1980).

⁷⁴ *Id.* at 757.

could avoid illegal “entry” into a home simply by remaining outside the doorway and controlling the movements of suspects within through the use of weapons that greatly extend the “reach” of the arresting officers.

The *Payton* decision held that in the case of Obie Riddick the warrantless entry of the Riddick’s home by police officers to arrest Riddick was not justified when his three-year-old son opened the door and they could see him sitting in bed. We doubt the Supreme Court would have reached a different result had the police stood at the doorway and immediately placed Riddick under arrest with weapons drawn.⁷⁵

The Ninth Circuit recognized that Johnson’s exposure to the police was not truly voluntary.⁷⁶ Because constructive entry is a legal fiction, courts applying constructive entry often focus on law enforcement’s actions in securing entry to a home or in securing a person’s exit from the home.⁷⁷ The majority view consistently analyzes whether police interaction at the home is volitional in the literal sense to determine whether police have constructively entered a home in the legal sense.⁷⁸ *Johnson*’s focus—and a key consideration in constructive entry cases—is context: Why did the homeowner open his door?⁷⁹ If the door is opened in response to law enforcement’s armed commands or deceptive tactics, that act is not voluntary in a legal sense.⁸⁰ Standing in a doorway in response to police activity must be contextualized. The

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See, e.g., *id.* (“[I]t cannot be said that Johnson voluntarily exposed himself to warrantless arrest by opening his door to agents who misrepresented their identities.”); *Payton v. New York*, 445 U.S. 573, 583 (1980) (“[T]he officers’ actions were the key focus in this analysis. Yes, Johnson opened his door. But he did so under false pretenses which vitiated any consensual or volitional behavior on his part.”). See also *Payton*, 445 U.S. at 583 (“[T]he police used crowbars to break down the door . . .”); *United States v. Botero*, 589 F.2d 430, 432 (9th Cir. 1978) (“[I]n response to [the agent’s] knock, the door was opened by defendant Botero. He was placed under arrest at that time.”).

⁷⁸ See, e.g., *United States v. Al-Azzawy*, 784 F.2d 890, 894 (9th Cir. 1985); *United States v. Vaneaton*, 49 F.3d 1423, 1427 (9th Cir. 1995).

⁷⁹ *Johnson*, 626 F.2d at 757.

⁸⁰ See *id.* at 756–57. See also, *Al-Azzawy*, 784 F.2d at 893 (“[T]he police had completely surrounded appellee’s trailer with their weapons drawn and ordered him through a bullhorn to leave the trailer and drop to his knees. Appellee was not free to leave, his freedom of movement was totally restricted, and the officers’ show of force and authority was overwhelming . . . [S]ince appellee was in his trailer at the time he was surrounded by armed officers . . . [and] only emerged under circumstances of extreme coercion, the arrest occurred while he was still inside his trailer.”).

question, according to the Ninth Circuit (and majority view) is “whether [a person] ‘voluntarily exposed himself to warrantless arrest’ by freely opening the door” of his abode.⁸¹ This contextual approach guards the Founder’s views that our homes are sacred.

A consistent theme in constructive entry cases is armed law enforcement surrounding a home. In 1984, the Sixth Circuit emphasized law enforcement’s show of force in *United States v. Morgan*.⁸² Police, and several patrol cars, surrounded Morgan’s home and ordered him to come out.⁸³ Prior to their arrival, Morgan was peacefully residing inside his mother’s house.⁸⁴ Considering the police’s extensive show of force, the Sixth Circuit found that Morgan had not voluntarily exposed himself to the police by exiting the home.⁸⁵ “Although there was no direct police entry into the Morgan home prior to Morgan’s arrest, the constructive entry accomplished the same thing, namely, the arrest of Morgan.”⁸⁶ Another Sixth Circuit case explained that the key difference between a consensual, voluntary police encounter and an impermissible constructive entry “turns on the show of force exhibited by the police.”⁸⁷

The majority approach applies the traditional objective test for assessing seizure. From *Morgan*⁸⁸ to *United States v. Saari*⁸⁹ to *United States v. Edmonson*,⁹⁰ most circuit courts analyze whether a reasonable person would believe they were free to ignore the police or would believe they were required to comply. This majority view is sensible, if not intuitive. For instance, the Third Circuit found constructive entry, or an arrest *inside* the home, when a SWAT team surrounded the residence with machine guns pointed at the home’s windows and ordered

⁸¹ *Vaneaton*, 49 F.3d at 1426.

⁸² 743 F.2d 1158, 1164 (6th Cir. 1984).

⁸³ *Id.*

⁸⁴ *Id.* at 1164, 1166.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1166–67.

⁸⁷ *United States v. Thomas*, 430 F.3d 274, 277 (6th Cir. 2005).

⁸⁸ 743 F.2d 1158, 1164 (6th Cir. 1984).

⁸⁹ 272 F.3d 804, 808 (6th Cir. 2001) (applying the “reasonable person” test when officers positioned themselves in front of the only exit point, announced themselves as police, and forcefully knocked on the door).

⁹⁰ 791 F.2d 1512, 1515 (11th Cir. 1986) (finding that opening the door in response to FBI orders to do so was not “entirely dependent on the consent and cooperation of the suspect”).

the occupant outside.⁹¹ As the Third Circuit explained, “[n]o reasonable person would have believed he was free to remain in the house.”⁹²

The traditional objective seizure test should apply regardless of whether a person is “seized” by being physically restrained or seized by being essentially trapped within one’s own home. This is the approach taken by the First,⁹³ Third,⁹⁴ Sixth,⁹⁵ Tenth,⁹⁶ and Eleventh⁹⁷ Circuits. This represents roughly sixty percent of the country and its territories.⁹⁸ Constructive entry cases align with Supreme Court precedent finding that a person has been legally seized when, in light of all the circumstances, the “reasonable person” would not have believed he was free to leave.⁹⁹ The Supreme Court provided guidance on when a Fourth Amendment seizure occurs in *United States v. Mendenhall*:

Examples of circumstances that might indicate a seizure, even when the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person or citizen, or the use of language or tone of voice indicating that compliance with the officer’s request might be compelled.¹⁰⁰

The *Mendenhall* rule does not apply solely in the home. But its approach has become the governing standard for determining when a non-fleeing person has been seized.¹⁰¹ *Mendenhall*’s reasoning is

⁹¹ *Sharrar v. Felsing*, 128 F.3d 810, 819–20 (3d Cir. 1997), *abrogated on other grounds in* *Curly v. Klem*, 499 F.3d 199, 209–11 (3d Cir. 2007).

⁹² *Id.*

⁹³ *See* *United States v. Curzi*, 867 F.2d 36, 41 (1st Cir. 1989).

⁹⁴ *Sharrar*, 128 F.3d at 819–20.

⁹⁵ *United States v. Saari*, 272 F.3d 804, 808 (6th Cir. 2001); *United States v. Morgan*, 743 F.2d 1158, 1163 (6th Cir. 1984).

⁹⁶ *United States v. Reeves*, 524 F.3d 1161, 1167 (10th Cir. 2008); *United States v. Maez*, 872 F.2d 1444, 1450 (10th Cir. 1989).

⁹⁷ *United States v. Edmonson*, 791 F.2d 1512, 1514–15 (11th Cir. 1986).

⁹⁸ Geographic Boundaries of United States Courts of Appeals and United States District Courts, UNITED STATES COURTS (last visited June 2, 2023), https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf.

⁹⁹ *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). *See also* *Brendlin v. California*, 551 U.S. 249, 255 (2007).

¹⁰⁰ *Mendenhall*, 446 U.S. at 554.

¹⁰¹ *Compare Mendenhall*, 446 U.S. at 554, *with* *California v. Hodari D.*, 499 U.S. 621, 626–28 (1991) (explaining that there is a different rule to determine when a person who has fled or attempts escape has been seized under the Fourth Amendment). *Hodari D.* is an exception to the *Mendenhall* rule and applies in particularized situations.

apparent in the majority of circuits applying constructive entry. The thrust of constructive entry is that law enforcement should not be able to circumvent our textual right to be secure in our homes by flushing us outside using force, coercion, or trickery.¹⁰² The majority view follows the examples provided in *Mendenhall* to assess whether a person’s decision to open their door or exit their home resulted from the threatening presence of several officers, the display of weapons, or the use of language and actions indicating compliance is expected. “A consensual encounter at the doorstep may evolve into a ‘constructive entry’ when the police, while not entering the house, deploy overbearing tactics that essentially force the individual out of the house.”¹⁰³ This is the majority view. The Supreme Court should intervene to ensure it is the national approach. The strength of your Fourth Amendment rights should not hinge on where you live. Constitutional text, not geography, should be decisive in Fourth Amendment assessments.

ANALYSIS

I. THE SUPREME COURT SHOULD ADDRESS THE CIRCUIT SPLIT

We have said that the Fourth Amendment draws “a firm line at the entrance of the house. That line, we think, must be not only firm but also bright which requires clear specification of those methods . . . that require a warrant.”¹⁰⁴

The Supreme Court should step into the constructive entry space and formally embrace the constructive entry rule. Currently, those living outside the First,¹⁰⁵ Third,¹⁰⁶ Sixth,¹⁰⁷ Tenth,¹⁰⁸ and Eleventh¹⁰⁹

¹⁰² See *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (noting that “the Fourth Amendment draws a firm line at the entrance to the house. That line, we think, must not only be firm but also bright . . .” (internal citations omitted)).

¹⁰³ *United States v. Thomas*, 430 F.3d 274, 277 (6th Cir. 2005).

¹⁰⁴ *Kyllo*, 533 U.S. at 40.

¹⁰⁵ *United States v. Curzi*, 867 F.2d 36, 41 (1st Cir. 1989).

¹⁰⁶ *Sharrar v. Felsing*, 128 F.3d 810, 819–20 (3d Cir. 1997), *abrogated on other grounds by* *Curly v. Klem*, 499 F.3d 199, 209–11 (3d Cir. 2007)).

¹⁰⁷ *United States v. Saari*, 272 F.3d 804, 808 (6th Cir. 2001); *United States v. Morgan*, 743 F.2d 1158, 1163 (6th Cir. 1984).

¹⁰⁸ *United States v. Reeves*, 524 F.3d 1161, 1167 (10th Cir. 2008); *United States v. Maez*, 872 F.2d 1444, 1450 (10th Cir. 1989).

¹⁰⁹ *United States v. Edmonson*, 791 F.2d 1512, 1514–15 (11th Cir. 1986).

Circuits should probably not answer their door when armed police surround their home and order they exit.¹¹⁰ In circuits that do not embrace the constructive entry rule, people may not have the same protections afforded to those living in other parts of the country.¹¹¹ Without clear application of the constructive entry rule, compliance with armed commands or deceptive police tactics might come at a high constitutional price. In circuits that have not yet protected individuals against coercive or deceptive police tactics, it might not matter that armed officers surrounded your home without first securing a warrant. Without constructive entry protections, if you want to secure your Fourth Amendment rights, you must hunker down in your home and wait to see how police respond to your non-compliance with their armed demands. This is a heavy ask of any person. Most believe that if police are at your home knocking and demanding you exit, they either have the legal authority to do so or you have the legal right to challenge their tactics. This is true in the First,¹¹² Third,¹¹³ Sixth,¹¹⁴ Ninth,¹¹⁵ Tenth,¹¹⁶ and Eleventh¹¹⁷ Circuits. It did not appear to prove true in the Fifth Circuit.¹¹⁸ That needs to change.

Beyond the watered down Fourth Amendment protection, individuals living in places without the benefit of the constructive entry rule face real safety issues. Many Americans have a lawful right to own firearms.¹¹⁹ And when armed individuals surround your home, you usually have the right to protect yourself and your family. The constructive entry rule protects safety—citizen safety *and* officer safety—by shielding people inside their homes from warrantless, and often armed, encounters. This rule further protects all of us by limiting the number

¹¹⁰ See e.g., *United States v. Malagerio*, 49 F.4th 911, 914 (5th Cir. 2022).

¹¹¹ *Id.* at 913–15.

¹¹² *United States v. Curzi*, 867 F.2d 36, 39–41 (1st Cir. 1989).

¹¹³ *Sharrar v. Felsing*, 128 F.3d 810, 819–20 (3d Cir. 1997), *abrogated on other grounds by* *Curly v. Klem*, 499 F.3d 199, 209–11 (3d Cir. 2007)).

¹¹⁴ See *United States v. Saari*, 272 F.3d 804, 808 (6th Cir. 2001); *United States v. Morgan*, 743 F.2d 1158, 1163 (6th Cir. 1984).

¹¹⁵ See *United States v. Al-Azzawy*, 784 F.2d 890, 893 (9th Cir. 1985).

¹¹⁶ See *United States v. Reeves*, 524 F.3d 1161, 1167 (10th Cir. 2008); *United States v. Maez*, 872 F.2d 1444, 1450 (10th Cir. 1989).

¹¹⁷ See *United States v. Edmonson*, 791 F.2d 1512, 1514–15 (11th Cir. 1986).

¹¹⁸ See *United States v. Malagerio*, 49 F.4th 911, 916–17 (5th Cir. 2022).

¹¹⁹ See e.g., *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2156 (2022).

and nature of armed home encounters. Equally important, it aligns with the Founders’ design and Constitutional text.¹²⁰

“Opening the door to one’s house is not voluntary if ordered to do so under color of authority.”¹²¹ This finding should be noncontroversial. Under the constructive entry rule, most circuits find that officers “lack of physical entry alone is not dispositive” as to whether officers have entered a home for Fourth Amendment purposes.¹²² This is because the Supreme Court’s decisions consistently protecting our homes is part of our constitutional heritage. Text mandates this. History compels it. And case after case fortifies our right to be secure in our homes.

In 2021, Justice Kagan reiterated the Founder’s understanding of Fourth Amendment rights in *Lange v. California*.¹²³ “Like our modern precedents, the common law afforded the home strong protection from government intrusion.”¹²⁴ The majority opinion continued:

That did not mean the Crown got the message; its officers often asserted power to intrude into any home they pleased – thus adding to the colonists’ list of grievances But the law on the books offered a different model: “To enter a man’s house” without a proper warrant, Lord Chief Justice Pratt proclaimed in 1763, is to attack “the liberty of the subject” and “destroy the liberty of the kingdom.” That was the idea behind the Fourth Amendment.¹²⁵

The Supreme Court, and the Supreme Court alone, has the power to ensure our liberties are protected. It is a national issue. It is a pressing issue. The Supreme Court should take a constructive entry case to ensure that all of us receive the most robust Fourth Amendment protection available.

¹²⁰ See *United States v. Silverman*, 356 U.S. 505, 511 (1961).

¹²¹ *Reeves*, 524 F.3d at 1167.

¹²² *United States v. Maez*, 872 F.2d 1444, 1451 (10th Cir. 1989).

¹²³ *Lange v. California*, 141 S. Ct. 2011, 2022–25 (2021).

¹²⁴ *Id.* at 2022.

¹²⁵ *Id.* at 2023.

II. A CALL FOR REFORM – ENFORCE THE FOUNDERS’ DESIGN TO PROTECT OUR HOMES

The “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”¹²⁶

It would not be possible to add to the emphasis with which the framers of our Constitution and this Court have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by [the Fourth and Fifth Amendments]. The effect of the decisions cited is that such rights are declared to be indispensable to the “full enjoyment of personal security, personal liberty and private property”; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as the guaranties of the other fundamental rights of the individual citizen – the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction so as to prevent stealthy encroachment upon or “gradual depreciation” of the rights secured by them, by imperceptible practice of courts or by well intentioned, but mistakenly overzealous, executive officers.¹²⁷

The real problem with calls for police reform is not legislative inertia or qualified immunity but judicial hesitation to give full effect to constitutional text. The home sits above all other places in constitutional text.¹²⁸ It is our sacred refuge from governmental interference.¹²⁹ It is where we can retreat and find security against unreasonable searches and seizures. Following *Payton*, officers cannot cross the home’s threshold without a warrant or an exception to the warrant requirement. And in giving effect to *Payton*, officers shouldn’t be permitted to flush a person from the security of their home to circumvent the warrant requirement. To empower officers to expel a person from their home through coercion or deception because they otherwise cannot enter

¹²⁶ *United States v. U.S. Dist. Ct. for E. Dist. Mich.*, 407 U.S. 297, 313 (1972).

¹²⁷ *Gouled v. United States*, 255 U.S. 298, 303–04 (1921), *overruled on other grounds by* *Warden v. Hayden*, 387 U.S. 294 (1967).

¹²⁸ *Caniglia v. Strom*, 141 S. Ct. 1596, 1600 (2021) (“What is reasonable for vehicles is different from what is reasonable for homes.”).

¹²⁹ *See, e.g., Lange*, 141 S. Ct. at 222–23; *Stanley v. Georgia*, 394 U.S. 557, 563–65 (1969) (providing First Amendment protection to watch adult films in the privacy of one’s home).

empties the Fourth Amendment of its force and meaning. It goes directly against modern jurisprudence by “print[ing] a new permission slip for entering the home without a warrant.”¹³⁰ It elevates formalism over common sense.

Now is the time to clarify the consequences for all Americans when law enforcement surrounds our home, points guns at our doors and windows, and demand we exit. Does the Constitution protect you in this situation or does that protection depend on your response to the officers’ armed commands? If we are to remain faithful to the Fourth Amendment, we will ask what would the reasonable person do? The majority of circuit courts have found that the reasonable person would comply with law enforcement’s armed orders.¹³¹ Application of this objective test comports with traditional Fourth Amendment seizure inquiries. It places an important check on officers seeking to circumvent the warrant requirement at the most sacred of places—our homes.

The constructive entry rule is well established among a majority of circuits. A failure to formally adopt the constructive entry rule raises concerns that the Fourth Amendment’s protections will vary from state to state and circuit to circuit. It shouldn’t be this way. All of us should find full refuge in the Fourth Amendment’s textual promise that our right to be secure in our homes “shall not be violated” without officers having either a warrant or exigent circumstances.¹³² As the Court recently remarked: “The place to start is with our often-stated view of the constitutional interest at stake: the sanctity of a person’s living space.”¹³³ Can armed law enforcement force you from the sanctity of your living space without consequence? Can the police escape the ordinary requirement that they secure a warrant before entering one’s home without permission?¹³⁴

Cases will continue to rise in the minority circuits where police use force or deception to arouse a person from their home. The cases will vary from civil immigration law violations to serious crimes. But the Fourth Amendment’s protections do not vanish when the stakes are low. If anything, the Supreme Court has shown its highest fidelity to the Fourth Amendment when police aggressively seek to combat civil

¹³⁰ *Lange*, 141 S. Ct. at 2019 (indicating the Supreme Court was “not eager – more the reverse – to print a new permission slip for entering the home without a warrant”).

¹³¹ See *supra* Analysis Part I.

¹³² *Lange*, 141 S. Ct. at 2018–19.

¹³³ *Id.* at 2018.

¹³⁴ *Id.*

law offenses or minor crimes.¹³⁵ Still, *Payton* reminded that even for felonies, law enforcement may not cross the home's threshold without a warrant. The Supreme Court should accept the challenge to provide a uniform approach to *Payton* when officers, by circumventing the warrant process, seek to coerce or deceive a person from the security of their home. The constructive entry rule should be a national standard protecting all individuals, not one that varies from circuit to circuit.

CONCLUSION

Although the modern police role and modern police forces would be quite foreign to the Founders, they certainly understood the critical importance of refuge from the government. They responded to overzealous governmental officers by giving explicit constitutional protection to "persons, houses, papers, and effects."¹³⁶ The Constitution *does* protect places. It protects our homes. The Supreme Court should ensure that everyone receives the protection designed by the Founders. This protection was not intended to depend on the mischief of semantics, allowing armed officers that flush a person from their home to claim they never literally entered. Clever machinations should never defeat our constitutional rights. The constructive entry rule is intuitive. It is consistent with constitutional text, the Founder's intent, and Supreme Court precedent. It should be the law of the land and not merely a fortuitous function of address.

¹³⁵ See *Welsh v. Wisconsin*, 466 U.S. 740, 750–53 (1984) (holding a warrantless in-home arrest for a civil DWI violation to be unconstitutional).

¹³⁶ U.S. CONST. amend. IV. See also *Lange v. California*, 141 S. Ct. 2011, 2022–23 (2021) (providing historical examples).