STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Richland County
Honorable Alison Renee Lee, Circuit Court Judge
Appellate Case No. 2013-000086

THE STATE,

Respondent,

vs.

RUSHAN COUNTS,

Petitioner.

RESPONDENT'S PETITION FOR REHEARING

By customs and practices that have long been followed in our country and that are deeply ingrained in our daily interactions with one another, the citizens of the United States – and, more specifically, South Carolina – have extended an implicit license to their fellow citizens to approach their homes, knock on their doors, wait to be received, attempt to speak with them, and then depart absent some invitation to stay longer. Florida v. Jardines, __ U.S. __, 133 S. Ct. 1409, 1415 (2013). That implicit license has historically been extended to all manner of visitors and has granted door-to-door salesmen, service providers, evangelicals, neighbors, and anyone else who might wish to do so an equal opportunity by which they can attempt to make contact with the residents of a home regardless of their particular, individualized motives for doing so. See id. at 1417, n. 4 (recognizing "*all are invited*" to approach a home to speak with an occupant pursuant to the implicit license). Thus, even though every homeowner might not need – or even

have the remotest desire – to buy a new vacuum cleaner or box of cookies, obtain assistance with the maintenance of their yard, speak to a stranger who wants to discuss religion or some other topic, or lend a cup of sugar, a citizen of this state and country can permissibly approach a home and knock on the door in an effort to talk to someone inside solely by virtue of the implicit license derived from long-standing customs and practices. Id. at 1415.

Significantly, prior to this Court's decision in the petitioner's case, law enforcement officers in South Carolina were fully entitled to avail themselves of that implicit license and, just like everyone else, were permitted to approach a home to speak with someone residing inside regardless of their purpose for doing so. See State v. Wright, 391 S.C. 436, 706 S.E.2d 324 (2011) (instructing a law enforcement officer may lawfully go to a person's home and door to interview that person and citing to a decades-old case in support of that proposition); see also Jardines, 133 S. Ct. at 1415 ("[A] police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.' " (citation omitted)). However, in affirming Petitioner Rushan Counts's conviction, a majority of this Court announced a new rule radically altering the ability of law enforcement officers in South Carolina to approach a citizen's home and, in effect, revoking the implicit license granted to those officers not by the judiciary or legislature but by the customs and practices of our citizenry. Respectfully, this new per se rule, which would require law enforcement officers to have reasonable suspicion of criminal activity before approaching a targeted residence and knocking on the door, is inconsistent and incompatible with the existing laws of our state and nation and, if allowed to stand, will place an unnecessary and detrimental burden on the ability of our law enforcement officers to effectively carry out their duties to the citizens of South Carolina. For

those reasons and the reasons that follow, the State urges this Court to grant rehearing and reconsider its decision in Counts's case.

First and foremost, this Court's decision warrants rehearing and reconsideration because the majority's interpretation of Article I, Section 10 of the South Carolina Constitution is wholly at odds with what our citizens have deemed to be reasonable in our state and country by virtue of their own entrenched customs and practices. Specifically, in announcing its new per se rule, a majority of this Court determined our state constitution's prohibition against "unreasonable invasions of privacy" necessitates the enunciation of its rule requiring a law enforcement officer to have some threshold evidentiary basis to approach a private residence. S.C. Const. art. I, § 10. However, by the very customs and practices followed by our citizenry throughout the history of our state and nation for a period extending back long before the events of Counts's case occurred, the people of South Carolina have unmistakably demonstrated through the manner in which they conduct their daily affairs they do not consider it to be unreasonable for any person, including a law enforcement officer, to approach their front doors and knock in an effort to speak with them at their homes regardless of the person's basis for doing so.

Thus, to the extent such an act constitutes an invasion of privacy, our citizens' customs and practices implicitly sanction the limited encroachment into privacy that occurs when a person knocks on a home's door and attempts to speak with an occupant, and the fact our citizens have fully sanctioned such intrusions throughout our state's history, including at the time of the adoption of the version of our state constitution containing the "unreasonable invasions of privacy" provision in 1971, demonstrates conclusively such intrusions are reasonable in South Carolina. Cf. Payton v. New York, 445 U.S. 573, 591 (2001) ("An examination of the common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not

entirely dispositive, consideration of what the Framers of the Amendment might have thought to be reasonable."). As a result, the limited encroachment into privacy implicated by a "knock-and-talk" – even when the "knock-and-talk" is conducted by a law enforcement officer – simply cannot constitute an unreasonable invasion of privacy under our state constitution, particularly when the express language of the relevant constitutional provision prohibits only **unreasonable** invasion of privacy while allowing for invasions that are reasonable and particularly when the question of reasonableness is viewed from the correct, objective standpoint of an average, innocent homeowner. See Florida v. Bostick, 501 U.S. 429, 438 (1991) (explaining an analysis of the reasonableness of a particular law enforcement officer's conduct "presupposes an *innocent* person"); see also State v. Sullivan, 281 S.C. 522, 524, 316 S.E.2d 404, 406 (1984) ("Not all searches are prohibited; only those which are unreasonable are not permitted.").

Because our citizens – as opposed to their elected representatives or the courts – have deemed a knock at their doors to be a reasonable, acceptable, and even welcome intrusion into the otherwise sacrosanct privacy of their homes, the majority's decision, which would hold a law enforcement officer cannot reasonably approach a home to speak with an occupant about a criminal investigation absent suspicion of criminal activity despite the existence of the implicit license permitting the officer to do just that, misapprehends and misapplies Article I, Section 10 of the South Carolina Constitution. Beyond that, the majority's decision would deny the citizens of our state the dignity, respect, and personal agency to which they are entitled by altering and, in some cases, revoking a license the citizens themselves chose to extend regardless of whether they have demonstrated any desire for that license to be altered or revoked through their own actions. Cf. United States v. Drayton, 536 U.S. 194, 207 (2002) ("In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police

officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding.").

Furthermore, based on the majority's reliance on our state constitution to alter the implicit license, our citizens would be left with little – and, perhaps, no – recourse to restore the license they were previously able to offer through their customs and practices aside from the onerous process of amending the state constitution, which, if done, could potentially deprive them of the protections the "unreasonable invasions of privacy" prohibition was actually intended to afford. See S.C. Const. art. XVI, § 1 (instructing the state constitution can only be amended if an amendment is approved first by two-thirds of the members of the General Assembly, then by a majority of the electorate during the next general election, and finally by a majority of the General Assembly during the next legislative term). Therefore, this Court should rehear Counts's case and reconsider its decision, which deprives our citizens of their control over an implicit license they chose to grant and deems as unreasonable something our citizens have historically shown they consider to be reasonable on a daily basis.

Additionally, this Court's decision necessitates rehearing and reconsideration in light of the basis upon which it appears to have been rendered. Critically, in announcing its new per se rule requiring officers to have some evidentiary basis in order to approach a home and knock on the door, this Court appears to have found its new rule to be warranted not by what the two officers who approached Counts's door actually did in Counts's case but by "the potential for abuse" that arguably exists if law enforcement officers in general are permitted to avail themselves of the implicit license unabated. Specifically, a majority of this Court determined its new rule is needed because, without it, law enforcement officers could allegedly conduct

indiscriminate "knock-and-talks" in a particular neighborhood in hopes of finding contraband without first obtaining a warrant. Importantly though, Counts's case – the case currently before this Court – does not involve an indiscriminate or abusive use of the implicit license historically available to every citizen in South Carolina, including our law enforcement officers. Instead, Counts's case involves a situation where two officers wishing to speak to Counts about citizen complaints they had received regarding serious criminal activity approached Counts's door in uniform in the middle of the day, knocked on it, identified themselves, displayed themselves to Counts through a peephole when asked to do so, and waited patiently for Counts to open the door without doing anything to force him to open it or to even suggest he was under any obligation to do so. Significantly, those actions were and are entirely consistent with what our citizenry has historically considered to be reasonable and in no way could be considered to constitute an abusive or unreasonable invasion of privacy. See Jardines, 133 S. Ct. at 1415 ("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. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters."). As a result, Counts's case has not yet presented this Court with circumstances that warrant the enunciation of a new rule that would radically and fundamentally change – and, in some circumstances, revoke – the deeply-ingrained implicit license that is a customary component of our citizens' daily interactions with one another.

In fact, demonstrating the lack of a current need for the new per se rule articulated by the majority in Counts's case, our courts to date have faced very few cases involving a "knock-and-talk" issue and **none** involving an abusive or indiscriminate use of the implicit license permitting

an approach of a home and a knock at a door despite the fact our law enforcement officers have historically been able to avail themselves of that implicit license for countless years leading up to the decision in Counts's case. As a result, the radical change in the law the majority's new rule would precipitate is unnecessary at the present time, particularly when viewing the entirely reasonable and uncontroversial actions of the officers involved in Counts's case. See Atwater v. City of Lago Vista, 532 U.S. 318, 353-354 (2001) (holding, in a case in which a suggestion was made that a rule allowing for warrantless arrests for even very minor criminal offenses could be abused, "the development of a new and distinct body of constitutional law" was not needed in light of the fact our country was not being confronted with an epidemic of abusive, unnecessary arrests for minor offenses at that time[1]); cf. Michigan v. Chesternut, 486 U.S. 567, 572-573 (1988) ("Rather than adopting either rule proposed by the parties and determining that an investigatory pursuit is or is not *necessarily* a seizure under the Fourth Amendment, we adhere to our traditional contextual approach, and determine only that, in this particular case, the police conduct in question did not amount to a seizure.").

Moreover, a decision to the contrary would be particularly troubling in light of the fact appellate courts are inherently reactive rather than proactive and are generally bound to limit their rulings to the facts and issues properly before them. See Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 331, n. 4, 730 S.E.2d 282, 286 (2012) ("For as former Chief Judge Alex Sanders famously wrote, '[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.' " (citation omitted and

[1] It is particularly notable our country is **still** not being confronted with a rash of abusive and unnecessary arrests for minor offenses almost fifteen years after the United States Supreme Court issued its decision in Atwater despite the fact that decision allows for a warrantless arrest regardless of the nature of the underlying offense so long as probable cause exists to justify the arrest. See Atwater, 532 U.S. at 354 ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."). Thus, the restraint exercised by majority in Atwater has been well validated.

brackets in original)); see also Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp., 349 S.C. 251, 261, 562 S.E.2d 633, 639 (2002) (declining to answer certified questions where the questions assumed a dispute that might never arise); Sangamo Weston, Inc. v. Nat'l Sur. Corp., 307 S.C. 143, 148, 414 S.E.2d 127, 130 (1992) ("This court will not issue advisory opinions and cannot alter precedent based on questions presented in the abstract."). Therefore, this Court should grant rehearing in Counts's case and reconsider the current need for the majority's new rule that would radically alter the longstanding implicit license granted by our citizenry.

Furthermore, this Court's decision warrants reconsideration because the majority's new rule by its very nature is inconsistent and incompatible with our constitutional precedent. Specifically, in deciding Counts's case, the majority rejected the argument the implicit license was sufficient under our state constitution to permit the law enforcement officers in Counts's case to conduct a "knock-and-talk" at his door while articulating a new rule that would permit law enforcement officers in the future to approach a home to conduct such a "knock-and-talk" if – and only if – they possessed reasonable suspicion of criminal activity. However, that new rule is fundamentally flawed because possessing reasonable suspicion would not be constitutionally sufficient to permit a law enforcement officer to intrude upon the curtilage of a person's home pursuant to our state and federal constitutions absent the implicit license, which, if applicable, would permit such an intrusion **regardless** of whether the officer possessed any level of suspicion. That is true because, notwithstanding the implicit license, a person is generally not entitled or permitted to enter the curtilage of another person's home. See Jardines, 133 S. Ct. at 1415 (explaining the law since the founding of our country precludes someone from entering another person's private property without that person's express or implicit permission to do so). Thus, absent the implicit license, a law enforcement officer cannot permissibly approach a

person's door without a warrant unless some exception to the warrant requirement is applicable. See Jardines, 133 S. Ct. at 1414-1415 (instructing an officer's warrantless entry into the curtilage of a residence would be constitutionally improper unless the entry was licensed); see also State v. Robinson, 410 S.C. 519, 526-527, 765 S.E.2d 564, 568 (2014) (recognizing warrantless searches and seizures that take place in the curtilage of a residence are presumptively unreasonable unless a recognized exception to the warrant requirement is applicable). As a result, the majority's new rule, which would permit an approach to a home to knock on the door based upon reasonable suspicion as opposed to the implicit license, runs contrary to our existing constitutional precedent and warrants rehearing and reconsideration under the circumstances.

In addition to that very significant incompatibility with our constitutional precedent, the fact the majority's new rule is a per se one as opposed to one dependent on the unique circumstances of a particular case runs contrary to existing state and federal case law that has historically and consistently addressed constitutional issues by applying a totality-of-the-circumstances analysis to determine whether a constitutional violation has occurred under a particular, individualized set of facts. See Sullivan, 281 S.C. at 524, 316 S.E.2d at 406 (explaining the question of whether a particular action by law enforcement is unreasonable under the South Carolina Constitution necessarily depends on the nature of the action and the particular circumstances of each case); see also Drayton, 536 U.S. at 201 (instructing per se rules are, for the most part, inappropriate in a Fourth Amendment context and explaining an individualized totality-of-the-circumstances analysis is preferable in regard to each case); cf. Chesternut, 486 U.S. at 572 ("[A]ny assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account all of the circumstances surrounding the incident in each individual case." (citations and internal quotation marks omitted)). Likewise, based on

the statements in the majority's opinion that appear to suggest an officer could constitutionally conduct a "knock-and-talk" so long as he or she was doing so to check on an occupant's welfare, the majority's new rule appears to be focused on an officer's subjective intentions, which have historically and consistently been rejected as an appropriate consideration in favor of consideration of solely objective factors. See Brighton City, Utah v. Stuart, 547 U.S. 398, 404 (2006) ("An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.' The officer's subjective motivation is irrelevant." (citations omitted and brackets in original)); Horton v. California, 496 U.S. 128, 138 (1990) ("[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."); see also State v. Provet, 405 S.C. 101, 108, 747 S.E.2d 453, 458 (2013) ("The test whether reasonable suspicion exists is an objective assessment of the circumstances; the officer's subjective motivations are irrelevant."). Accordingly, based on the fact the majority's new rule is inconsistent with existing state and federal constitutional precedent, this Court should rehear Count's case and reconsider its decision announcing a new incompatible constitutional rule, which would significantly alter long-standing customs and practices in our state.

Finally, this Court's decision should be reconsidered because the majority's new rule could lead to numerous practical problems when applied. Significantly, one such problem is the new per se rule could lead to inconsistent and problematic results depending on the circumstances involved. For example, take a situation involving a concerned citizen who believes his neighbor has harmed his spouse. If that citizen was to anonymously – out of fear of retaliation – call law enforcement and generally ask for someone to perform a welfare check at

his neighbor's residence without revealing his concerns about spousal abuse, the majority's new rule would allow for officers to respond to the neighbor's home, knock on the door in an effort to conduct a welfare check, speak with an occupant, and act immediately if exigent circumstances developed when the neighbor opened the door – all without violating the neighbor's constitutional rights. However, if that same citizen was to anonymously – again out of fear of retaliation, which is a common motivation for anonymous citizen complaints – call law enforcement and report he was concerned his neighbor had committed a crime against his spouse, the majority's new rule would **not** allow for officers to respond to the neighbor's home to investigate the tip unless they were able to somehow sufficiently corroborate the tip to the extent they possessed reasonable suspicion, and, if they proceeded to the neighbor's door without developing such suspicion, the officers would have violated the neighbor's constitutional rights, rendering any evidence discovered after the neighbor opened the door inadmissible during trial. See Alabama v. White, 496 U.S. 325, 329 (1990) (recognizing an anonymous tip will seldom be sufficient to establish even reasonable suspicion).

Critically, in both situations, the officers would have made the exact same limited encroachment into the privacy of the neighbor that, absent the majority's new rule, would have been permitted by the implicit license granted by our citizens through their customs and practices. See Kentucky v. King, ___ U.S. ___, 131 S. Ct. 1849, 1862 (2011) ("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak."). However, only the officers responding to the specific report of criminal activity would have violated the neighbor's constitutional rights pursuant to the

majority's new rule while the evidence discovered in response to the anonymous request for a welfare check would be admissible against the neighbor.[2] Such an inconsistent and perverse result demonstrates the fundamental flaws inherent in the majority's new rule and illustrates why consideration of whether an officer approaching a home to conduct a "knock-and-talk" has complied with the implicit license should be the appropriate measure for determining whether the invasion into privacy involved in such an approach is reasonable or not.

Similarly, the majority's new rule would have significant practical consequences on the ability of our law enforcement officers to effectively serve and protect the areas in which they work. Specifically, the majority's new rule would prohibit officers from canvassing an area immediately surrounding a crime scene to see if there might be any witnesses inside nearby homes capable of providing information about the crime because the officers in such circumstances would rarely, if ever, possess reasonable suspicion in regard to those nearby homes, which they would be approaching solely for investigative purposes. Likewise, officers would likely be prohibited from engaging in community policing activities that would involve them introducing themselves in person to the people who live in the areas they police even though such activities are invaluable towards ensuring trust and cooperation between law enforcement and ordinary citizens. Perhaps most troubling, the majority's new rule would further prevent officers from acting in circumstances potentially posing a great risk to ordinary, law-abiding citizens if they were unable to develop reasonable suspicion to do so.

As an example, a concerned citizen fearing retaliation might someday anonymously alert the authorities of an unstable methamphetamine laboratory being operated in a crowded

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[2] Notably, in both situations, the neighbor would likely feel equally aggrieved when caught in a criminal act regardless of whether the officers were complying with the majority's new rule, which is precisely why the test for reasonableness has historically been an objective one focusing on what is reasonable from the prospective of an ordinary, innocent individual. See Drayton, 536 U.S. at 202 (explaining the test for reasonableness is objective and presupposes an innocent person).

apartment complex. Pursuant to the majority's new rule, our law enforcement officers would be required to limit their response to taking steps to corroborate the anonymous tip regarding the dangerous drug lab before acting, and, if they were unable to do so, they would be required to stand aside and react only if and when the unstable drug lab exploded in deadly fashion whereas, prior to the majority's new rule, they could have simply knocked on the door of the apartment pursuant to the implicit license and quickly confirmed or dispelled the suspicions raised by the tip if an occupant inside chose to answer the door. See generally Adams v. Williams, 407 U.S. 143, 145 (1972) ("The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape."). Accordingly, for those reasons coupled with all the other identified reasons, this Court should rehear Counts's case and reconsider its decision, which has the potential to hinder the effectiveness of our law enforcement officers and undermine the safety of the citizens of our state.

Conclusion

At some point, there may come a time when law enforcement officers in South Carolina validate the majority's fears and begin using "knock-and-talks" in an abusive, indiscriminate manner. Respectfully though, that time has not yet arrived, and nothing the officers in Counts's case did by approaching his home and knocking on his door could be considered to constitute an unreasonable invasion of privacy in violation of his rights under either the state or federal constitution. Accordingly, Counts's case respectfully does not warrant the enunciation of the new rule contained in the majority's decision that is inconsistent with our prior constitutional precedent and that would radically alter the implicit license derived from our citizens' longstanding customs and practices, which, by their very nature, are not amenable to alteration

by a court ruling regardless of whether those customs and practices can be abused by law enforcement officers in the future. Cf. Bostick, 501 U.S. at 439 ("This Court . . . is not empowered to suspend constitutional guarantees so that the Government may more effectively wage a 'war on drugs.' . . . By the same token, this Court is not empowered to forbid law enforcement practices simply because it considers them distasteful."). For the foregoing reasons coupled with the arguments raised in the Brief of Respondent and during oral argument, the State respectfully urges this Court to rehearing this matter pursuant to Rule 221, SCACR, reconsider its decision, vacate its previous opinion, and affirm Counts's conviction and sentence without adopting a new rule that would fundamentally change the implicit license granted by our citizenry and that would place unnecessary obstacles in front of law enforcement officers attempting to carry out their duties to the citizens of our state.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

By: _____
Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

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PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Respondent's Petition for Rehearing on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Carmen V. Ganjehsani, Esquire
Richardson Plowden & Robinson, P.A.
1900 Barnwell Street
Columbia, SC 29201

Dayne C. Phillips, Esquire
407 ½ West Main Street
Lexington, SC 29072

Laura R. Baer, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 29th day of July, 2015.

Anne Mueller

ANNE A. MUELLER
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727