No. 18-1219

In the Supreme Court of the United States

ILLINOIS,
PETITIONER,

v.

DERRICK BONILLA,
RESPONDENT.

On Petition for a Writ of Certiorari to the Illinois Supreme Court

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent's brief in opposition fails to undermine the compelling reasons to grant certiorari presented in the petition and the brief of amici curiae. *Florida v. Jardines*, 569 U.S. 1 (2013), holds that a dog sniff on the front porch of a house is a Fourth Amendment search because it is an unlicensed intrusion into the home's curtilage. *Id.* at 5. Respondent does not dispute that numerous lower courts disagree with the Illinois Supreme Court's holding that *Jardines* applies to dog sniffs conducted in a common hallway of a multi-unit dwelling. And despite his focus on immaterial factual differences, decisions from the State Supreme Courts cannot be distinguished.

Nor does respondent dispute that jurisdictions are split regarding whether the good-faith exception to the exclusionary rule applies to pre-*Jardines* dog sniffs. However, he is mistaken in asserting that this issue is "no longer" important, and in failing to recognize that the conflict also impacts post-*Jardines* dog sniffs.

Moreover, this case presents an ideal vehicle to resolve these important issues. Contrary to respondent's representation that this case turned on a "deferential state-law standard of review," the Illinois Supreme Court reviewed the legal questions presented de novo. And because the parties stipulated to all material facts, respondent is wrong when he argues that the questions presented cannot be resolved without factual development. Finally,

respondent can be prosecuted for his past illegal conduct despite any future change in Illinois law.

I. This Court Should Resolve the Split Regarding Whether Dog Sniffs in Multi-Unit Dwelling Common Areas Are Fourth Amendment Searches Under *Jardines*.

As the petition demonstrated, the decision below widened a deepening split over whether a dog sniff in a common hallway of a multi-unit dwelling is a Fourth Amendment search under *Jardines*. See Pet. at 6–9.

Respondent does not dispute that the decision below conflicts with published decisions from three state appellate courts (Arizona, Maryland, and Virginia) and one federal district court (Massachusetts), as well as unpublished decisions from multiple federal circuit and district courts (the Fourth Circuit, Maryland, Massachusetts, Minnesota, and the Northern District of Indiana). See Pet. at 7–9. These cases flatly contradict respondent's contentions that (a) lower courts are "coalescing" around a rule consistent with the Illinois Supreme Court's rule, and (b) more time is needed to establish a well-developed conflict. See Opp. at 11.

And respondent's focus on immaterial factual differences fails to undermine the conflict between the Illinois Supreme Court's decision and decisions of the Minnesota and North Dakota Supreme Courts. Respondent notes that in *State v. Edstrom*, 916 N.W.2d 512 (Minn. 2018), cert. denied Feb. 25, 2019, No. 18-6715, the building was not open to the public at large but was open to the police, who had an access key. Opp. at 9-10; see also *Edstrom*, 916 N.W.2d at

516 n.3 (most apartment buildings in the city provided such access keys). In the Illinois decision below, the building was unlocked and open to police *and* the public. App. at 3a. Respondent's conjecture that a Minnesota court would on this basis distinguish *Edstrom* and hold that a Fourth Amendment search occurred under the circumstances presented here is without support or logic.

A hallway accessible to the public *in addition to* the police is even less like curtilage, an area that harbors "the intimate activity associated with the sanctity of [one's] home and the privacies of life." *United States v. Dunn*, 480 U.S. 294, 300 (1987). Moreover, this factual difference is immaterial to the Illinois Supreme Court's analysis, because that court would hold that the dog sniff occurred in the curtilage to respondent's apartment regardless of whether the building's outer door was locked or unlocked. See App. at 12a.

Respondent also argues that the ruling below does not conflict with *State v. Nguyen*, 841 N.W.2d 676 (N.D. 2013), because it conflicts only with the portion of the decision that "disposed of" "the curtilage issue." Opp. at 8. Respondent does not dispute that *Nguyen* involved a dog sniff in a common-area hallway outside an apartment door; found the concept of curtilage "significantly modified when applied to a multifamily dwelling"; and held that the dog sniff was not a Fourth Amendment search under *Jardines* because "the common hallway is not an area within the curtilage of Nguyen's apartment." 841 N.W.2d at 678–79, 682. The only legitimate conclusion is that *Nguyen* conflicts with this case.

Respondent acknowledges that the North Dakota Supreme Court concluded that a hallway in a multi-unit dwelling was not curtilage in *State v. Williams*, 862 N.W.2d 831 (N.D. 2015). See Opp. at 8–9. Noting that the North Dakota Supreme Court used the phrase "reasonable expectation of privacy" when addressing whether common hallways in multi-unit dwellings were the curtilage of adjoining units, respondent asserts that *Williams* does not conflict because the trial court here was persuaded by the argument advanced in the *Jardines* concurrence that the dog sniff was a search under the reasonable expectation of privacy analysis as well as the property-based inquiry. Opp. at 9. Even if the trial court's statement were relevant (and it is not, because it is the Illinois Supreme Court's decision from which certiorari is sought), it would still conflict with the North Dakota Supreme Court's separate finding that no reasonable expectation of privacy exists in common hallways. See *Williams*, 862 N.W.2d at 835.

Finally, while *State v. Mouser*, 119 A.3d 870 (N.H. 2015), involved a parking area behind a multifamily dwelling, the factors relied on by the New Hampshire Supreme Court in determining that the area was not curtilage apply to hallways too: it was available for shared benefit and not used for private activities. *Id.* at 25.

In short, the decision below conflicts not only with decisions of the intermediate appellate and trial courts that respondent does not attempt to distinguish, but also with *Nguyen* and *Williams* (and the principles of *Mouser*). Indeed, the dissenting Illinois Supreme Court Justices emphasized that the

rule adopted by the majority below conflicts with those cases. See *People v. Burns*, 50 N.E.3d 610, 637–39 (Ill. 2016) (Thomas, J., dissenting) (discussing conflict with *Nguyen* and *Williams*); App. at 35a–36a (adopting *Burns* dissent).

Thus, there is a clear conflict between these decisions, on the one hand, and the decision of the Illinois Supreme Court below and decisions of the Seventh and Eighth Circuits (which respondent acknowledges are aligned with the decision below), on the other. See Opp. at 11 (citing *United States v. Whitaker*, 820 F.3d 849, 852–54 (7th Cir. 2016); *United States v. Hopkins*, 824 F.3d 726, 731–32 (8th Cir. 2016); *United States v. Burston*, 806 F.3d 1123, 1126–28 (8th Cir. 2015)). Indeed, law professors specializing in Fourth Amendment issues urged this Court to grant certiorari in *Edstrom* because they recognized the split in authority is ripe for this Court's intervention. See Brief of Amici Curiae Fourth Amendment Scholars in Support of Petitioner, *Edstrom v. Minnesota*, No. 18-6715. Certiorari is appropriate to resolve this important and recurring issue.

II. This Court Should Resolve the Split Over Whether the Good-Faith Exception to the Exclusionary Rule Applies to Dog Sniffs in Building Common Areas.

Because the "sole purpose" of the exclusionary rule "is to deter future Fourth Amendment violations," evidence obtained in "reasonable reliance on binding precedent" can be admitted under the good-faith exception. *Davis v. United States*, 564 U.S.

229, 237, 241 (2011). The petition established that just as lower courts are divided over whether a dog sniff in a common area is a Fourth Amendment search, they are also divided over whether the good-faith exception applies to dog sniffs conducted outside apartments and other residences. Pet. at 12–17.

Respondent does not dispute that lower courts are split regarding whether evidence must be excluded when the dog sniff occurred prior to *Jardines*. See Opp. at 18–19. The Seventh, Eighth, and Tenth Circuits, the Wisconsin Supreme Court, and various state courts of appeal and federal district courts have applied the good-faith exception, while the Illinois Supreme Court and the Fourth Circuit have declined to do so. See Pet. at 14–17.

Instead, respondent argues that the issue is "no longer" important because it is unlikely that "many" cases involving pre-*Jardines* dog sniffs are still on direct appeal. Opp. at 19. Respondent is incorrect. If, as the Illinois Supreme Court held, the good-faith exception is unavailable in the present circumstances, the same reasoning would preclude its application in all other cases involving the resolution of contested legal questions.

Further, respondent's argument rests on the faulty assumption that *Jardines* resolved the issue. Instead, lower courts disagree on how *Jardines* applies to multi-unit dwellings. See Part I, supra. If this Court finds that dog sniffs in common areas are Fourth Amendment searches, then whether the good-faith exception applies to such police conduct would impact numerous cases involving post-*Jardines* dog

sniffs, including those currently on direct appeal, at trial, and in pre-trial proceedings.

Finally, there is a split of opinion regarding whether the good-faith exception applies to post-*Jardines* dog sniffs. The Illinois Supreme Court and the Seventh Circuit in *Whitaker* held that it does not. But, as even respondent acknowledges, the Eighth Circuit applied the good-faith exception to a post-*Jardines* dog sniff in *Hopkins*. Opp. at 20. According to respondent, *Hopkins* is "very different" from this case. *Ibid*. But pages earlier, respondent argued that *Hopkins* was *similar* to this case, characterizing *Hopkins* as having sided with the Illinois Supreme Court by holding that "the use of a drug-sniffing dog at the threshold of an apartment is a search under *Jardines*." *Id.* at 11. Respondent's initial position is correct: the cases are similar in all material respects. Whether the common area from which the dog sniffed the apartment was an indoor hallway (as in the case below and *Whitaker*) or an outdoor walkway (as in *Hopkins*) did not impact whether either a Fourth Amendment search occurred or the good-faith exception applied.

In the end, respondent cannot deny that a conflict exists on the question whether, if a dog sniff in an apartment building's common area is, in fact, a Fourth Amendment search, the good-faith exception to the exclusionary rule applies. Respondent's effort to set cases involving pre-*Jardines* dog sniffs to one side is unsuccessful and does not address the cases involving post-*Jardines* dog sniffs. This Court should grant certiorari to resolve this question once and for all.

III. This Case Is an Ideal Vehicle for Resolving These Important and Recurring Questions.

Respondent identifies four supposed vehicle problems to this Court's review of the questions presented. See Opp. at 11-16. But none of these obstacles exist.

First, respondent incorrectly asserts that this Court's review would not be de novo because the court below applied a "deferential state-law standard of review." Opp. at 12. To the contrary, the Illinois Supreme Court left no doubt that it reviewed "de novo" the legal question presented—that is, "whether the warrantless use of a drug-detection dog at the threshold of an apartment door, located on the third floor of an unlocked apartment building containing four apartments on each floor, violated defendant's fourth amendment rights." App. at 6a.

True, the Illinois Supreme Court noted that because the record contained neither the search warrant nor the affidavit, it would resolve any factual disputes against the State. App. at 6a (citing *Foutch v. O'Bryant*, 459 N.E.2d 958, 959 (Ill. 1984)); see also *Foutch*, 459 N.E.2d at 959 (noting that basis of trial court's order denying motion to vacate was not in the record and there was no "agreed statement of facts"). But because the parties stipulated to the facts, App. at 5a, there were no factual disputes to resolve. The court instead reviewed de novo the legal question presented as it applied to the stipulated facts.

Second, in an about-face from his position throughout this litigation, respondent argues that

unresolved facts preclude this Court from deciding whether an apartment building's common-area hallway is a unit's curtilage. Opp. at 12–15. However, in arguing his motion to suppress before the state trial court, respondent declined to call a single witness or present any evidence. App. at 3a. His argument was that any dog sniff outside an apartment door is a Fourth Amendment search of that unit—full stop. And the Illinois Supreme Court agreed. App. at 13a.

Thus, the stipulated facts allow this Court to address the pure question of law respondent presented to the state courts: when officers enter an unlocked outer door of a multi-unit dwelling with a drug detection dog, is a dog sniff in the hallway outside an apartment door an unlicensed intrusion into that unit's curtilage under *Jardines*. Because no additional facts need to be developed to decide whether the dog sniff here occurred in the curtilage, this Court should decline respondent's invitation to wait for another case to address this issue.

Third, respondent speculates that a decision by this Court "will not affect the outcome" because the Illinois Supreme Court would "almost certainly" find that the dog sniff violated his reasonable expectation of privacy. Opp. at 15. This argument assumes that the rule of *Kyllo v. United States*, 533 U.S. 27 (2001), —that officers conduct a search when they use a thermal imaging device to detect heat emanating from a home—applies to dog sniffs; to the contrary, this Court declined to extend *Kyllo* to dog sniffs in *Illinois v. Caballes*, 543 U.S. 405 (2005). See *id.* at 409–10; see also *Jardines*, 569 U.S. at 25 (Alito, J., dissenting) (explaining that *Caballes* rejected

applying *Kyllo* to dog sniffs). It is thus far from "obvious," Opp. at 15, that the Illinois Supreme Court would ignore *Caballes* and other authority holding that dog sniffs do not implicate legitimate privacy interests. See also *United States v. Place*, 462 U.S. 696, 707 (1983) (dog sniff of luggage at airport "did not constitute a 'search' within the meaning of the Fourth Amendment"); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (no Fourth Amendment search when officers conducted dog sniff of automobile at highway checkpoint because sniff "is not designed to disclose any information other than the presence or absence of narcotics").

Fourth, respondent posits that "it is very unlikely" that his prosecution will go forward because of changes in Illinois law governing cannabis possession. Again, respondent is incorrect. His conduct was illegal at the time, and the legislation anticipates that prosecution for past violations will continue. See H.B. 1438, amendment to 20 ILCS 2630/5.2(i)(6) (setting forth factors trial court should consider if a defendant petitions to dismiss charges or expunge records when prosecution is pending when legislation becomes effective). Finally, it is far from clear that the crime respondent was charged with—possession with intent to deliver rather than simple possession—would be affected by the legislation. See H.B. 1438, Article 10, Section 10-5(a) (beginning January 1, 2020, "possession . . . for personal use" of small amounts of cannabis will not be a criminal offense). Thus, this case remains an ideal vehicle for resolving the questions presented in the certiorari petition.

IV. This Court Should Reverse the Illinois Supreme Court's Judgment.

The petition demonstrated that the Illinois Supreme Court erred in concluding that the dog sniff conducted outside of respondent's apartment door was a Fourth Amendment search under *Jardines*, both because he had no possessory interest in the hallway and because that hallway did not qualify as curtilage under the analysis set forth in *Dunn*. See Pet. at 19. Respondent counters with a policy argument that the rule established by the court below is necessary to prevent officers from standing with "a team of" dogs outside apartment doors "all day and night," to the particular detriment of poor, non-white citizens. Opp. at 17. If respondent were correct, that would counsel in *favor* of granting review; as explained above, see Part I, supra, the Illinois Supreme Court's rule is in the distinct minority, meaning that, on respondent's theory, much of the country is under a "police state." Opp. at 17.

But respondent is not correct. Areas that are not curtilage can still be private property, and officers may not "camp out" in unlocked hallways any more than they could in shared basements, an area that petitioner concedes is not curtilage, Opp. at 11, or open fields. See also *Jardines*, 569 U.S. at 19 (Alito, J., dissenting) (discussing "spatial and temporal limits" of license to enter private property). And there are practical obstacles to respondent's parade of horribles: if there are no illegal drugs in an apartment to detect, stationing a team of dogs outside the apartment would accomplish nothing other than to waste law enforcement resources.

As for respondent's concerns about disparate treatment, even he recognizes that tony apartments in places like Manhattan are found in multi-unit dwellings, while free-standing houses in other areas may be less expensive. See Opp. at 14. Thus, that a multi-unit dwelling hallway is not curtilage reflects its function, not its financial value or its occupant's financial status or race.

Lastly, responding to petitioner's argument that the Illinois Supreme Court erred in refusing to apply the good-faith exception to the exclusionary rule, respondent parrots that court's holding that the exception could apply only if prior precedent "specifically authoriz[ed]" a dog sniff at the threshold of a residence. Opp. at 21. Once again, respondent is incorrect. The officers here could have reasonably relied on cases holding that (a) dog sniffs in places other than homes are not Fourth Amendment searches, and (b) an apartment building's residents have no reasonable expectation of privacy in the building's unlocked common areas. See Pet. at 19–20. The officers here did not act culpably by entering a location in which respondent enjoyed no reasonable expectation of privacy and engaging in activity that was not a Fourth Amendment search. Accordingly, the Illinois Supreme Court erred in excluding the evidence in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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