No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

RANDY DAVID MAKELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTIONS PRESENTED FOR REVIEW

I. DOES THE USE OF A TRAINED DRUG DOG TO SNIFF THE DOORWAY OF A RESIDENCE VIOLATE THE RESIDENT'S REASONABLE EXPECTATION OF PRIVACY UNDER *KATZ V. UNITED STATES*, 389 U.S. 347 (1967)?

II. DOES THE DOORWAY OF AN APARTMENT LOCATED WITHIN AN APARTMENT BUILDING CONSTITUTE THE APARTMENT'S CURTILAGE SO THAT THE USE OF A TRAINED DRUG DOG TO SMELL THE DOORWAY FOR THE ODOR OF NARCOTICS CONSTITUTES A SEARCH UNDER *FLORIDA V. JARDINES*, 133 S.Ct. 1409 (2013)?

LIST OF PARTIES

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Petitioner, Randy David Makell, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit in *United States v. Randy David Makell*, No. 17-4106.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is found at *United States v. Makell,* 721 Fed. Appx. 307 (4th Cir. 2018). The opinion is reproduced in the Appendix.

JURISDICTION

Jurisdiction in the United States Court of Appeals for the Fourth Circuit was based on 28 U.S.C. §1291. The Fourth Circuit issued a decision in Mr. Makell's case on May 8, 2018. This Court has jurisdiction to review the Fourth's Circuit's decision pursuant to 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment of the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

I. Procedural History

On November 16, 2015, the United States charged Randy David Makell with possession with intent to distribute phencyclidine, possession of a firearm with a prior

felony conviction, and possession of a firearm in furtherance of a drug trafficking offense. J.A. at 8.[1] On January 3, 2016, Mr. Makell filed a motion to suppress evidence and on May 23, 2016, the government filed a response. J.A. at 13, 71. On July 12, 2016, the District Court, the Honorable Roger W. Titus presiding, conducted a hearing on the motion and on that same day, the court denied it. J.A. at 170. On October 21, 2016, Mr. Makell appeared in front of the Honorable Paula Xinis and entered a plea of guilty to counts one and three of the indictment: possession with intent to distribute phencyclidine and possession of a firearm in furtherance of a drug trafficking offense. J.A. at 171. With the agreement of the government, Mr. Makell preserved his right to appeal the District Court's ruling on his pre-trial motion. J.A. at 176. Mr. Makell appealed the ruling to the United States Court of Appeals for the Fourth Circuit, which affirmed his conviction on May 8, 2018. *See United States v. Makell,* 721 Fed. Appx. 307 (4th Cir. 2018).

II. Factual Background

The indictment filed against Randy Makell in November 2015 was based on evidence obtained during a search of 1101 Kennebec Street, Apartment 412, Oxon Hill, Maryland. J.A. at 8, 190-91. That search was conducted on April 7, 2015, pursuant

[1]References to "J.A." are to the Joint Appendix filed in the court below.

to a warrant issued by the Circuit Court of Prince George's County on April 2, 2015. J.A. at 25, 191.

A. The search warrant affidavit

The affidavit in support of the search warrant was written and sworn by Sergeant Kyle Jernigan. J.A. at 34. The affidavit cites four different bases for probable cause to search Apartment 412: an August 2013 tip from a confidential source; a September 2014 tip from an individual under arrest; Mr. Makell's criminal history; and a positive alert during a March 27, 2015 search by a trained drug dog. J.A. at 25-31.

The affidavit describes the dog sniff as follows: On March 27, 2015, two Prince George's County police officers observed Mr. Makell enter 1101 Kennebec Street, Apartment 412, using a key. J.A. at 29-30. Officers had a brief conversation with Mr. Makell in which he stated that he lived at that address. J.A. at 30. Later that day, one of the officers brought his "canine partner," Antra, to 1101 Kennebec Street where it "scanned multiple doors." *Id.* During the scan, Antra alerted on the door of Apartment 412. *Id.*

The affidavit describes Antra as being trained to detect the odor of controlled dangerous substances, stating that upon detection of the odor Antra's behavior will change, and she will come to a "final response of sitting or staring at the source of the odor." *Id.* The affidavit states that Antra and her handler have completed a 400-hour

drug detection canine course, an annual re-certification through the North American Police Working Dog Association, and weekly training sessions with the Prince George's County Police Department. *Id.*

B. The hearing on Mr. Makell's motion to suppress evidence

In his motion to suppress the evidence seized during the search of his apartment, Mr. Makell argued that the warrant issued by the Prince George's County Circuit Court was based on information seized in violation of the Fourth Amendment; specifically, the fact that a drug dog alerted at the door to his apartment. J.A. at 18-23. Mr. Makell asserted two theories under which the dog sniff was unlawful. First, he argued that the doorway to his apartment constituted its curtilage and that the dog sniff was a warrantless search under the trespass theory articulated by this Court in *Florida v. Jardines*, 133 S. Ct. 1409 (2013). J.A. at 18-21. Second, Mr. Makell argued that the dog sniff violated his reasonable expectation of privacy under *Katz v. United States*, 389 U.S. 347 (1967). J.A. at 21-22.

1. Testimony of Sergeant Kyle Jernigan

Sergeant Kyle Jernigan was the only witness to testify on behalf of the government. J.A. at 95. Sergeant Jernigan testified that he had determined through his investigation that Randy Makell resided at 1101 Kennebec Street, Apartment 412, Oxon Hill, Maryland. J.A. at 97. Sergeant Jernigan described the residence as an

apartment building with several floors and multiple entrances. *Id.* He testified that in 2015 there were Prince George's County police officers residing in that building. J.A. at 98. He testified that there were also Prince George's County police officers working part time in the building and that these officers, "had access to the common areas of the building to enforce the laws of Prince George's County and the State of Maryland." *Id.* Sergeant Jernigan testified that he personally had access to the building and that he received authority to enter the building from the building management. *Id.*

Sergeant Jernigan testified that he ordered a canine scan to be, "conducted on the fourth floor of the apartment building and, specifically, apartment 412." J.A. at 99. Sergeant Jernigan identified several photographs of the fourth floor of the apartment building that were admitted as government's exhibits one through five. J.A. at 99-101.

On cross-examination, Sergeant Jernigan testified that the officers who conducted the dog-sniff were posing as bed bug inspectors and that when they encountered Mr. Makell inside the building they told him they were bed bug inspectors with a trained bed bug-detecting dog. *Id.* Sergeant Jernigan testified that government's exhibit seven is an accurate depiction of Mr. Makell's doorway and the inset area between the hallway and the doorway. J.A. at 109. Sergeant Jernigan testified that the officers conducting the dog sniff took the dog to each door in the

fourth floor hallway, including the door to Mr. Makell's apartment. J.A. at 111.

2. Testimony of Randy Makell

Mr. Makell testified that he had lived in Apartment 412 of 1101 Kennebec Street for approximately three years prior to the search. J.A. at 118. He testified that the reason he selected that residence was for the security and safety of his family. J.A. at 119. Mr. Makell testified that the building did not have public access and that to enter guests have to dial a code that rings through the resident's cell phone so that the resident can buzz the guest in. *Id.* Mr. Makell testified that the only way to get in or out of his apartment was through its front door. J.A. at 120.

On cross-examination, Mr. Makell testified that there were multiple apartments on his hallway and that he did not know who was living in the apartment directly across from his at the time of the search. J.A. at 121. He testified that he did not have a fence in front of his door, or a chair or a table, or anything else between the hallway and the front door; he was not asked about the doormat depicted in government's exhibit five. J.A. at 30, 167. Mr. Makell testified that he has had people other than his immediate family visit and sometimes stay over at the apartment, but that they did not have the code to the building. J.A. at 122. He testified that he and his neighbors had the ability to give their code to other people (though he did not testify that this practice was permitted by building management). *Id.* Finally, Mr. Makell testified that

he was not aware of the presence of Prince George's County police officers in or around his building. *Id.*

3. The District Court's oral ruling

The District Court concluded that the doorway of Mr. Makell's apartment was, "not within anything that would qualify as curtilage under the *Jardines* case," and that the application for the search warrant "was fully justified by probable cause of the existence of criminal activity going on within this apartment." J.A. at 145. The court then held that, "the search was conducted by the officers in good faith and that their search would in any event be protected by *U.S. versus Leon*." *Id.* The court did not address Mr. Makell's argument that the dog sniff violated his reasonable expectation of privacy.

III. The Appellate Opinion

The Fourth Circuit Court of Appeals issued a two-page, unpublished opinion affirming the decision of the district court. *Makell,* 721 Fed. Appx. 307. The court first addressed Mr. Makell's argument that the dog sniff of his apartment door violated the Fourth Amendment under *Jardines*' property-rights analysis. *Id.* at 307-08. The court cited to the factors set forth by this Court in *United States v. Dunn*, 480 U.S. 294 (1987) and, with no analysis, held that, "the common hallway of the apartment building,

including the area in front of Makell's door, was not within the curtilage of his apartment." *Id.* at 308.

The court next addressed Mr. Makell's argument that the dog-sniff violated his reasonable expectation of privacy. *Id.* The court cited to *Illinois v. Caballes*, 543 U.S. 405, 408 (2005), for the proposition that because, "any interest in possessing contraband cannot be deemed legitimate, ... governmental conduct that only reveals the possession of contraband compromises no legitimate privacy interest." *Id.* With no additional analysis, the court held that, "[b]ecause the drug-detecting dog disclosed only the presence of illegal narcotics, we find that the dog sniff did not violate Makell's legitimate expectation of privacy." *Id.*

The Court of Appeals did not address the district court's holding that the good faith exception to the exclusionary rule under *United States v. Leon*, 486 U.S. 897 (1984) separately justified the denial of Mr. Makell's motion. Nor did the court address the government's argument that dog sniffs do not fall within this Court's holding in *Kyllo v. United States*, 533 U.S. 27 (2001) because they are not a form of modern technology.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Certiorari to Resolve an Important Question Left Open in *Florida v. Jardines*: Does the Reasonable Expectation of Privacy Doctrine Apply to Searches of Homes by Drug-detection Dogs?

In *Florida v. Jardines*, the petitioner presented this Court with two different theories in support of his assertion that bringing a drug sniffing dog onto the porch of his home without a warrant violated the Fourth Amendment. 133 S.Ct. 1409. A five-member majority of this Court chose to resolve the case via an application of the "traditional property-based understanding of the Fourth Amendment." *Id.* at 1417-18. The majority reasoned that the front porch of a home is within the home's curtilage and the officers' entrance onto the porch for the purpose of investigating the contents of the home using a drug detection dog was conduct not explicitly nor implicitly permitted by the homeowner, and thus constituted a trespass in violation of the Fourth Amendment. *Id.* at 1414-1417.

The majority noted that the property-rights approach to the Fourth Amendment is a "baseline" to which the court added the reasonable expectation of privacy approach in *Katz v. United States*, 389 U.S. 347. Because the property-rights approach led to an "easy" analysis under the facts of this case, the majority concluded that it did not need to decide whether the use of a drug dog on the porch of a home also violated Mr. Jardines' reasonable expectation of privacy under *Katz*. *Id.* at 1417.

In a concurring opinion, three members of the majority concluded that the *Katz* privacy rights analysis also invalidated the search of Mr. Jardines' porch. *Id.* at 1418-1420. The concurrence concluded that the *Katz* analysis was equally "easy" to apply under the facts of *Jardines*, which, it believed, fall squarely within this Court's holding in *Kyllo v, United States*. *Id.* at 1419-20, citing, *Kyllo*, 533 U.S. at 40. The concurrence opined that the "firm" and "bright" line rule set forth in *Kyllo* governs *Jardines* because the police officers used a trained drug-detection dog ─"a device not in general public use,"─to explore details of the home─"the presence of certain substances,"─that would have been unknowable without a physical intrusion. *Id.* at 1419.

The concurrence dismissed the dissent and the state's arguments that a search by a drug dog cannot implicate any legitimate expectation of privacy under this Court's holding *Illinois v. Caballes*, 543 U.S. 405 (2005). The concurrence explained that *Caballes* involved a drug-detection dog's sniff of an automobile during a traffic stop and that this Court has held, "over and over again, that people's expectations of privacy are much lower in their cars than in their homes." *Id.*, citations omitted.

In upholding Mr. Makell's conviction, the Fourth Circuit Court of Appeals also cited to *Caballes* for the proposition that because, "any interest in possessing contraband cannot be deemed legitimate, ... governmental conduct that only reveals the possession of contraband compromises no legitimate privacy interest." *Id.* The Court of Appeals

applied this rule to Mr. Makell's case with absolutely no analysis, despite the fact that the majority in *Jardines* expressly declined to adopt it and despite the fact that the Fourth Circuit itself has conflicting case law regarding the breadth of *Caballes*. *See infra*. at 21.

This Court's repeated elevation of the home in its Fourth Amendment jurisprudence compels an examination of whether the rule it applied in *Caballes* and in *United States v. Place*, 462 U.S. 696 (1983) (no reasonable expectation of privacy in the odor of narcotics coming from luggage located in a public place) also applies to drug dog searches of homes. In *Jardines*, this Court repeated the fundamental principle that, "[w]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable government intrusion.'" *Id.* at 1414, quoting, *Silverman v. United States*, 365 U.S. 505, 511 (1961). Recently, this Court again elevated the home over all other areas protected by the Fourth Amendment when it held that the automobile exception to the warrant requirement does not permit officers to enter the curtilage of a home to search a vehicle without a warrant. *See Collins v. Virginia*, 138 S.Ct. 1663, 1670 (2018).

In *Collins v. Virginia,* this Court explained that it has repeatedly declined to expand the scope of the exceptions to the warrant requirement to permit warrantless entry into the home. *Id.* at 1672, citations omitted. For example, warrantless arrests in public

are valid, but "absent another exception such as exigent circumstances, officers may not enter a home to make an arrest without a warrant; even when they have probable cause." *Id.*, citing *Payton v. New York*, 445 U.S. 573, 587-590 (1980).

Applying the principles of these prior cases, this Court refused to allow the automobile exception to justify a warrantless entry onto an unenclosed driveway in front of Mr. Collins' residence, even though the officer entered the driveway for the sole purpose of examining a motorcycle that the officer had probable cause to believe was contraband. *Id.* at 1668-69. This Court did not justify its holding through reference to the possibility that the officer might have observed non-contraband of a personal nature when walking onto Mr. Collins' driveway. Rather, it drew a firm line at prohibiting intrusions on the "separate and substantial Fourth Amendment interest in his home and curtilage." *Id.* at 1672. The facts of Mr. Makell's case call upon this Court to draw the same line: officers used a trained drug dog to obtain information from the inside of his home that they would not otherwise have been able to obtain without a physical intrusion; that the information revealed only the presence of contraband does not change the analysis.

Additionally, while the property-rights theory may have been easier to apply under the facts of *Jardines*, as the *Jardines* concurrence points out, the reasonable expectation of privacy theory was equally easy to apply under those facts, and it may be

even easier to apply in cases like Mr. Makell's in which the property or curtilage line is not as clear (though, as Mr. Makell argues below, it should be). Moreover, there may be other instances in which officers are lawfully present around or even inside a residence, but should not, under *Katz* or *Kyllo*, be permitted to use a drug sniffing dog to explore details of the home, including the presence of narcotics, that they could not have observed with their own senses, unaided by devices not readily available to the public. *See, e.g., United States v. Hill*, 776 F.3d 243, 248-50 (4th Cir. 2015) (concluding that the privacy interests of persons on supervised release were great enough to require a warrant supported by probable cause before law enforcement could conduct a dog sniff while lawfully inside a supervisee's residence).

Finally, the need to resolve the question left open in *Jardines* is of particular importance because of the fallibility of drug dogs. In his dissent in *Illinois v. Caballes*, Justice Souter addressed this concern, citing to a long string of cases in which courts have recognized the fallibility of drug dogs as well as a controlled study demonstrating the same. 543 U.S. at 411-13, internal citations omitted. In fact, the Fourth Circuit Court of Appeals has held that a drug-dog can provide probable cause to search a vehicle even where the dog's field performance reports showed that drugs were found only 22 out of the 85 times that it had alerted in the field. *See United States v. Green*, 740 F.3d 275, 283 (4th Cir. 2014).

While this error-rate may be acceptable where the target of a search is a vehicle, it should give this Court serious pause when considering a dog sniff as the basis for probable cause to search the interior of someone's home. This error rate means that an officer can bring a drug dog to the exterior of someone's home for any reason, and then use a positive alert to obtain a warrant to enter and search that home, when the chances of drugs being found inside are no better than those involved with a coin toss. Thus, while the information seized through the use of the drug dog is only supposed to be the presence of narcotics, there is a significant likelihood that this information will lead to an unjustified physical entry into a residence where other intimate details of the home would be revealed.

This likelihood evokes the very concern that this Court raised in *Jardines* when it noted that the "right of a man to retreat into his own home and there be free from unreasonable governmental intrusion . . . would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity…." *Jardines*, 133 S. Ct. at 1414. This Court should mitigate this important concern by extending the holding of *Katz* to drug dog searches of residences.

II. This Court Should Grant Certiorari Because the Court of Appeals Decided an Important Question of Federal Law Regarding the Curtilage of an Apartment Located Within an Apartment Building That Has Not Been, But Should Be, Settled by This Court.

The dog sniff in this case took place at the door to Mr. Makell's apartment; an apartment located within a secured, multi-unit apartment building. This Court has never addressed the issue of whether the doorway of an apartment located within an apartment building constitutes the apartment's curtilage. For many Americans, apartments located within apartment buildings are their homes. As this Court has repeatedly acknowledged, "when it comes to the Fourth Amendment, the home is first among equals." *Jardines*, 133 S. Ct. at 1414. Thus, this is an important question of federal law that this Court should address.

The same principles that animated this Court's decision to invalidate the search in *Jardines* compels a conclusion that the doorway of an apartment is the apartment's curtilage. At the outset of this Court's analysis in *Jardines*, this Court explained that the "right of a man to retreat into his own home and there be free from unreasonable governmental intrusion . . . would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity." *Id.* Yet trawling for evidence is precisely what the Fourth Circuit permitted when it held that it is lawful, under the trespass theory of the Fourth Amendment, for police officers to bring a drug detection dog to each and every apartment within an apartment building

to sniff its doorway for the odor of narcotics.

Additionally, in *Jardines,* this Court distinguished between requiring officers to "shield their eyes" when passing by the home "on public thoroughfares" and prohibiting officers from gathering information by "step[ping] off those thoroughfares and enter[ing] the Fourth Amendment's protected areas." *Id.* at 1415. Had the officers in Mr. Makell's case simply walked their drug dog down the hallway and stopped at Mr. Makell's apartment *because* the dog alerted, that would have been one thing, but instead they brought their dog to Mr. Makell's apartment door, instructed it to sniff, and *then* the dog alerted.

Moreover, the definition of curtilage relied on by this Court in *Jardines* extends easily to the doorway of an apartment within an apartment building. The primary purpose of the doorway to any home is for its residents, and their guests, to pass into and out of the home. Thus, the doorway is "intimately linked to the home, both physically and psychologically," regardless of whether that home is free-standing or contained within a multi-unit apartment building. *Id.* at 1415. And, when an officer approaches the doorway to an apartment he is entering an area "immediately surrounding and associated with the home." *Id.* at 1414. While non-residents will necessarily need to pass more closely by the entry of a home located within an apartment building than they would with a free-standing home, there is no reason for

anyone, including law enforcement, to go up to the doorway itself unless they are seeking to enter it or to speak with an occupant.

The reasoning in this Court's recent decision in *Collins v. Virginia* strengthens the case for a recognition by this Court that the doorway of an apartment falls within its curtilage. In *Collins*, the state argued that the automobile exception to the warrant requirement should apply to cars parked in unenclosed private driveways, and it encouraged this Court to draw a line between open driveways and a "fixed enclosed structure inside the curtilage like a garage." *Collins*, 138 S.Ct. at 1674, citing Brief for Respondent 46.

This Court rejected that suggestion for several reasons including its belief that the state's proposal "rests on a mistaken premise about the constitutional significance of visibility." *Id.* at 1657. This Court held that "[t]he ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant for the purpose of conducting a search to obtain information not otherwise accessible." *Id.* While doorways located within the hallways of multi-unit apartment buildings are highly visible and easily accessed by other residents of the building and their guests, if a person stood right outside of an apartment door for no reason other than to attempt to get a look inside the apartment when the door opened, that person would be invading the intimate living space of the apartment's occupants. This is the

precise type of invasion that takes place when a specially trained drug dog is permitted to smell the doorway of an apartment to detect odors from within the apartment that an officer or any other passer-by could not detect.

The *Collins* court also rejected the state's attempt to distinguish between enclosed garages and open driveways because this bright-line distinction "automatically would grant constitutional rights to those persons with the financial means to afford residences with garages in which to store their vehicles but deprive those persons without such resources of any individualized consideration as to whether the areas in which they store their vehicles qualify as curtilage. *Id.*, citing *United States v. Rose*, 456 U.S. 798, 822 (1982) ("[T]he most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion."). The holding of the Court of Appeals in Mr. Makell's case permits an even more egregious distinction between those with and without financial means: if you can afford a free-standing home, officers may not bring a drug-dog to your door to smell for narcotics; if you can only afford to live in a multi-unit dwelling, your door can be searched by a drug-dog at any time.

This distinction creates disparities in the application of the Fourth Amendment based on both class and race. The United States Census Bureau's American Housing Survey for 2015 reflects that 81% of households earning $100,000 or more live in

detached single-family homes versus only 48% of households earning under $40,000. *See* United States Census Bureau, American Housing Survey, Table Creator, https://www.census.gov/programssurveys/ahs/data/interactive/ahstablecreator.htm. Moreover, 69.26% of white households reside in single-unit detached homes, as compared to 51.13% of Hispanic households, and 47.89% of Black households. *Id.* Refusing to acknowledge that the doorway of an apartment is part of its curtilage would thus exacerbate racial and economic differences already so prevalent in our criminal justice system.

While residents of apartment buildings are forced to live with certain limits on their privacy and possessory interests, there must be some physical area that remains sacrosanct under a Fourth Amendment property-rights analysis. This Court should grant Mr. Makell's petition so that it can clarify that this physical area, at the very least, must include the doorway to a resident's apartment.

III. This Court Should Grant Certiorari Because There is a Circuit Split on the Application of the Privacy Doctrine to Residences and Conflicting Case Law Among the State Courts on Both Issues Presented.

There is conflicting case law from federal and state courts regarding both of the issues presented for this Court's consideration. This Court should grant Mr. Makell's writ of certiorari to resolves these conflicts, particularly given the importance of the legal doctrines at issue.

A. Federal courts of appeal and state courts are split on the application of the reasonable expectation of privacy doctrine to residential searches by drug dogs.

The Fourth Circuit Court of Appeals engaged in no analysis before relying on this Court's holding in *Illinois v. Caballes*, to conclude that, "[b]ecause the drug-detecting dog disclosed only the presence of illegal narcotics, we find that the dog sniff did not violate Makell's legitimate expectation of privacy." *Makell*, 721 Fed. Appx. at 308, citing, *Caballes*, 543 U.S. at 408. The Fourth Circuit issued this cursory decision despite the fact that the Fourth Circuit itself has conflicting case law on the application of the reasonable expectation of privacy doctrine to searches by drug dogs. *See Hill*, 776 F.3d at 248-251 (a dog sniff of the interior of the residence of a supervisee, conducted by an officer with permission to be inside the residence as a condition of supervision, is a search requiring probable cause and a warrant); *United States v. Whitehead*, 849 F.3d 849, 857 (4th Cir. 1988) ("[*United States v.] Place* obviously did not sanction the indiscriminate, blanket use of trained dogs in all contexts."); *but see United States v. Legall*, 585 Fed. Appx. 4 (4th Cir. 2014) (relying on *Caballes* to hold that a dog sniff of a hotel room door did not infringe on the occupant's reasonable expectation of privacy).

The Second and Seventh Circuits have held that there is a reasonable expectation of privacy in the odor of narcotics detected by drug dogs from within an apartment. Years before this Court's decision in *Caballes*, the Second Circuit distinguished *United*

States v. Place in a case involving an apartment door dog sniff. *See United States v. Thomas*, 757 F.2d. 1359 (2nd Cir. 1985). The Second Circuit explained that a practice that is not intrusive in a public airport may be intrusive when employed at a person's home and concluded that, "[i]t is one thing to say that a sniff in an airport is not a search, but quite another to say that a sniff can *never* be search." *Id.* at 1366, emphasis in original, *citing*, *Place*, 462 U.S. at 706-07. The Second Circuit relied on its own history of recognizing a heightened privacy interest in one's dwelling place and rejected the notion that the fact that dog sniffs reveal only contraband should change the analysis. *Id.* (although using a dog sniff for narcotics may be discriminating and unoffensive relative to other detection methods, and will disclose only the presence or absence of narcotics, it remains a way of detecting the contents of a private, enclosed space), citing, *Place*, 462 U.S. at 706-07. Thus, the Second Circuit concluded, because of the defendant's "heightened expectation of privacy inside of his dwelling, the canine sniff at his door constituted a search." *Id.* at 1367.

More recently, the Seventh Circuit Court of Appeals distinguished both *Place* and *Caballes*, noting that neither case "implicated the Fourth Amendment's core concern of protecting the privacy of the home." *See United States v. Whitaker*, 820 F.3d at 849, 853 (7th Cir. 2016). The Seventh Circuit held that the fact that the doorway in question was located in a hallway that was accessible to other residents of the apartment building

did not change the privacy analysis and that a defendant's "lack of a reasonable expectation of complete privacy in the hallway does not also mean that he had no reasonable expectation of privacy against persons in the hallway snooping into his apartment using sensitive devices not available to the general public." *Id.*

Multiple state courts have also concluded that the reasonable expectation of privacy analysis applies to dog searches of residences. *See State v. Edstrom*, 901 N.W. 2d 455, 461-63 (Minn. 2017) (police officers' use of a narcotics-detection dog at the door of an apartment inside a secured apartment building violates the occupants' reasonable expectation of privacy: "The Fourth Amendment would be of little practical value to apartment dwellers if we held otherwise."); *State v. Rabb*, 920 So.2d 1175 (Fla. 2006) (because of the reasonable expectation of privacy recognized by both law and society to be associated with a house, law enforcement's use of a dog sniff constitutes a search); *see also State v. Kono*, 324 Conn. 80, 121 (2016) (a dog sniff of the door of an apartment violates the occupant's reasonable expectation of privacy under the Connecticut Constitution).

On the other hand, the Eighth Circuit has relied on *Caballes* and *Place* to hold held that a dog sniff of a hotel room doorway does not compromise any legitimate expectation of privacy. *See United States v. Scott*, 610 F.3d 1009 (8th Cir. 2010). And, the Sixth Circuit relied on *Place* to hold that the use of a drug dog to sniff a dresser located

inside an apartment that officers had permission to be in did not constitute a search because it did not unreasonably intrude upon the occupant's reasonable expectation of privacy. *See United States v. Reed*, 141 F.3d 644, 649 (6th Cir. 1998). Additionally, the highest courts from two states have refused to recognize a reasonable expectation of privacy in the odor of narcotics coming from a residence. *See State v. Fitzgerald*, 384 Md. 484 (2005) (a dog sniff of the exterior of a residence is not a search); *State v. Nguyen*, 841 N.W. 2d 676 (N.D. 2013) (the likelihood that the use of a drug sniffing dog in the common hallway of a secure apartment building will actually compromise any legitimate interest in privacy is too remote to characterize it as a search).

B. State courts are split on the question of whether a doorway to an apartment constitutes the apartment's curtilage.

The Fourth Circuit appears to be the only federal circuit to have directly addressed the question of whether a doorway to an apartment constitutes the apartment's curtilage post-*Jardines*.[2] However, several state courts have answered this

[2]The Eighth Circuit had an opportunity to address this question in *United States v. Davis*, 760 F.3d 901 (8th Cir. 2014). However, the court chose to assume, without deciding, that the dog-sniff of the defendant's apartment door violated the Fourth Amendment under *Jardines*, and then held that the exclusionary rule did not apply because *United States v. Scott*, 610 F.3d 1009, which was the law in the Eighth Circuit at the time of the search, provided a good-faith basis for the officers to have executed the search. *Davis*, 760 F.3d at 904-05. However, the Eighth Circuit has also held that the area outside of an apartment's first-floor exterior window and the area immediately in front of a town home's door constitutes the curtilage of those residences under *Jardines*. *See United States v. Hopkins*, 824 F.3d 726 (8th Cir. 2016); *United States v. Burston*, 806 F.3d 1123 (8th

question, two in the negative and two in the affirmative. *See Lindsey v. State*, 226 Md. App. 253, 279-80 (2015) (area outside defendant's apartment door is not part of the apartment's curtilage); *State v. Luhm*, 880 N.W. 2d 606, 618 (Minn. 2016) (the area immediately outside the door of Luhm's condominium unit was not within the curtilage of his home); *but see State v. Rendon*, 477 S.W. 3d 805, 808 (Tex. 2015) (the officers' conduct in bringing a trained drug-detection dog up to the threshold or area immediately outside of appellee's apartment door for the purpose of conducting a canine-narcotics sniff was an "unlicensed physical intrusion" onto the curtilage of his home that constituted a search in violation of the Fourth Amendment); *People v. Burns*, 50 N.E. 3d 610, 621-22 (Ill. 2016) (landing in front of the defendant's apartment was part of the curtilage of that apartment, particularly where the apartment building was typically secured and not accessible to the public).

On both the property and the privacy rights questions, there is sufficient discord among the federal circuits and the state courts that this Court's guidance is necessary to ensure that these legal doctrines are applied fairly and uniformly. Every day law enforcement applies the Fourth Amendment in dramatically different ways depending

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Cir. 2014). And, the First Circuit has concluded that the interior of the lock of an apartment door is part of the apartment's curtilage and that inserting a key into the lock to see if it will fit constitutes a trespass under the Fourth Amendment. *See United States v. Bain*, 874 F.3d 1, 15 (1st Cir. 2017).

on the type of home in which an individual chooses, or in most cases, is forced to reside in. These differences frequently depend on the socio-economic class of the occupant and the occupant's race. However, "the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion." *Rose*, 456 U.S. at 822. Thus, this Court should grant certiorari to resolve the conflicting caselaw around these important issues.

CONCLUSION

Mr. Makell's petition raises two extremely important questions regarding this Court's Fourth Amendment jurisprudence, both of which have been answered in conflicting manners by lower federal and state courts. The first calls upon this Court to answer the question it chose not to address in *Florida v. Jardines* regarding the application of the reasonable expectation of privacy doctrine to dog sniffs of residences. This Court should resolve this issue by clarifying that the home is protected against all intrusions, even those aimed solely at the presence of contraband. The second question—whether the doorway to an apartment located within an enclosed apartment building is within the curtilage of the apartment—has never been addressed by this Court but it should be now. This Court should recognize that the doorway to an apartment is intimately linked to the home and it should eliminate the disparate application of the Fourth Amendment that the current state.

Respectfully submitted,

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/s/

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APPENDIX

United States v. Makell, 721 Fed. Appx. 307 (4th Cir. 2018)