No. 18-5509

IN THE SUPREME COURT OF THE UNITED STATES

RANDY DAVID MAKELL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

MICHAEL A. ROTKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a drug-detection dog's sniff outside the front door of petitioner's apartment violated petitioner's reasonable expectations of privacy.

2. Whether the hallway outside petitioner's apartment door, which was located next to a "big exit door," C.A. App. 144, constituted "curtilage" of petitioner's apartment.

IN THE SUPREME COURT OF THE UNITED STATES

No. 18-5509

RANDY DAVID MAKELL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the Federal Reporter but is reprinted at 721 Fed. Appx. 307.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2018. The petition for a writ of certiorari was filed on August 6, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Maryland, petitioner was convicted of possession with intent to distribute phencyclidine, in violation of 21 U.S.C. 841(a)(1), and possession of a firearm in furtherance of a drug-trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A)(i). C.A. App. 232. He was sentenced to 97 months of imprisonment, to be followed by three years of supervised release. Id. at 233-234. The court of appeals affirmed. Pet. App. 1-2.

1. a. In August 2013, a confidential source told Sergeant Kyle Jernigan of the Prince George's County Police Department that someone named "Burger" who lived in a high-rise apartment building on Kennebec Street in Oxon, Maryland, was selling phencyclidine in Oxon Hill's Glassmanor area. C.A. App. 29. When shown a photograph of petitioner, the source identified him as "Burger." Ibid.

In September 2014, another police officer arrested a man in the Glassmanor area in possession of two vials of phencyclidine. C.A. App. 29. The man stated that he had purchased the drugs from someone named "Randy" who lived in an apartment at 1101 Kennebec Street in Oxon Hill. Ibid. The man's description of "Randy" matched petitioner. Ibid. In addition, the man reported that "Randy" drove a Cadillac with the Virginia registration WMX-8556.

Ibid. Sergeant Jernigan observed petitioner driving the same vehicle on several occasions. Ibid.

The police learned that petitioner lived in Apartment 412 on the fourth floor of the 1101 Kennebec Street apartment building, which was at least six stories high. C.A. App. 97, 114. Some Prince George's County police officers resided in the same building, and additional officers worked there part-time. Id. at 98. The building's two entrances were secured by a key-code system that residents and guests used to access the building, and a common hallway provided access to at least six apartments on the fourth floor, including petitioner's unit. Id. at 97, 99, 106-107, 163. The door to petitioner's apartment was at one end of the common hallway, directly across from the entrance to another apartment and next to an exit door leading to a shared stairwell to which all building residents and guests had access. Id. at 99-101, 166-168. Petitioner's door was recessed approximately one to two feet into the wall of the hallway, leaving a space in front of petitioner's door that was large enough to accommodate a doormat. Id. at 109, 166-167.

The building's managers gave Sergeant Jernigan and other local police officers authority to enter the building and to access its common areas to enforce state and local law. C.A. App. 98, 116. On March 27, 2015, Sergeant Jernigan directed two fellow officers to bring a drug-detection dog to the building's fourth

floor to conduct a "canine scan" along that floor's common hallway. Id. at 30, 99, 103, 106. The two officers were not in uniform, and when they encountered petitioner in the hallway, they identified themselves as bedbug inspectors and their drug-detection dog, Antra, as a bedbug-detection dog. Id. at 108. Petitioner told the officers that he lived in Apartment 412, and the officers saw him use a key to enter that unit. Id. at 29-30. The officers then took Antra, who was trained to detect the odor of controlled substances, to each door in the common hallway, and Antra "alerted" to the scent of illegal drugs in front of petitioner's door. Id. at 30, 103, 110-111.

b. On April 2, 2015, Sergeant Jernigan applied for a warrant to search petitioner's apartment. C.A. App. 28-34. In the affidavit supporting the warrant, Sergeant Jernigan recounted the reports he had received regarding petitioner's drug-distribution activities and explained how his fellow officers had confirmed that Apartment 412 was petitioner's current residence. Id. at 29-30. The affidavit also set forth the results of a criminal-history check on petitioner, which revealed past convictions for drug distribution and possession, among other charges. Id. at 30-31. The affidavit also described how Antra had alerted to the presence of drugs outside petitioner's apartment door. Id. at 30. A judge issued the requested search warrant. Id. at 26-27.

When Sergeant Jernigan and other officers executed the search warrant on April 7, 2015, petitioner was at home and told the officers, "[Y]ou found the mother lo[de]. I'm going to jail for forever." C.A. App. 103-104. During the search, the officers recovered plastic bottles containing phencyclidine, drug paraphernalia, a loaded handgun, and ammunition. Presentence Investigation Report (PSR) ¶ 8.

2. A federal grand jury in the District of Maryland returned an indictment charging petitioner with possession of phencyclidine with intent to distribute, in violation of 21 U.S.C. 841(a)(1); possession of a firearm by a felon, in violation of 18 U.S.C. 922(g); and possession of a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). C.A. App. 8-10.

Petitioner filed a motion to suppress the evidence obtained through the search of his apartment, arguing in part that the police conducted an illegal warrantless search when Antra detected the scent of drugs emanating from petitioner's apartment door. C.A. App. 13-23. Citing Florida v. Jardines, 569 U.S. 1 (2013), which involved officers' use of a trained drug-sniffing police dog on the porch of a home, id. at 3, petitioner contended that the canine-detection team violated his Fourth Amendment rights on the theory that the recessed hallway area in front of his door was "curtilage" that the officers had physically entered for the

purpose of allowing Antra to detect the odor of drugs emanating from the apartment. C.A. App. 18-21, 138-139. Petitioner further argued that the police violated his "reasonable expectation of privacy" in "the area searched." Id. at 21-22. Following an evidentiary hearing at which Sergeant Jernigan and petitioner testified, see id. at 95-123, the district court denied the suppression motion, id. at 141-145, 170.

The district court found that the common hallway outside petitioner's apartment, including "the very slight indentation" of hallway outside his door, was not curtilage. C.A. App. 142; see id. at 142-145. Although the court acknowledged that the apartment building's key-code access system "reduc[ed] the traffic of unauthorized or unwanted people in the corridors of the apartment building," id. at 142, the court found that "a large number of people" used the fourth-floor hallway, including residents, guests of residents, police officers who lived in the building, "delivery people," and the building's management, id. at 144. The court further noted that the building's management "welcome[d]" the police into the building "to keep crime low." Ibid. And the court rejected petitioner's contention that "the very slight indentation" of hallway outside petitioner's door distinguished it from the remainder of the hallway, id. at 143-145. The court observed that the indentation was "a minor architectural feature" whose purpose was to enable "access[]" to the "big exit door" next

to petitioner's apartment. Id. at 144-145. Because petitioner's door was perpendicular to that "major door to a stairway," the court found that people were passing by petitioner's door "all the time." Id. at 142-143.

The district court accordingly determined that the dog sniff of petitioner's door did not occur "within anything that would qualify as curtilage" and thus did not constitute an improper Fourth Amendment search. C.A. App. 145. The court further determined that "the search was conducted by the officers in good faith" and that the good-faith exception applied. Ibid. And although the court said that it would not decide "whether the remaining information in the search warrant application is sufficient" to establish probable cause, the court stated, "I think it is." Id. at 142.

Following the district court's ruling, petitioner pleaded guilty to possession of phencyclidine with intent to distribute and possession of a firearm in furtherance of a drug-trafficking crime, reserving his right to appeal the denial of his suppression motion. C.A. App. 173, 176; see id. at 8-10. The court sentenced petitioner to 97 months of imprisonment, to be followed by three years of supervised release. Id. at 233-234.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1-2.

Like the district court, the court of appeals rejected petitioner's contention that law-enforcement officers entered "the curtilage of his apartment" when they approached the apartment's threshold and allowed a drug-detecting dog to sniff petitioner's door. Pet. App. 1; see id. at 2. The court explained that, to determine whether an area is curtilage, it considered the area's proximity to the home, whether the area was within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps the resident had taken to protect the area from observation by passersby. Id. at 2. Applying those factors in petitioner's case, the court found that "the common hallway of the apartment building, including the area in front of [petitioner's] door, was not within the curtilage of his apartment." Ibid.

The court of appeals also rejected petitioner's contention that the dog sniff infringed his reasonable expectation of privacy. Pet. App. 2. Petitioner had argued -- for the first time[1] -- that the dog sniff constituted a Fourth Amendment search under Kyllo v. United States, 533 U.S. 27 (2001), which holds that such a search occurs when the government "uses a device that is not in general public use[] to explore details of the home that would previously have been unknowable without physical intrusion." Id. at 40; see Pet. C.A. Br. 18-29. The court, however, determined that the dog

[1] The government did not argue below that the plain-error standard should apply, see Gov't C.A. Br. 8, and the court of appeals did not apply that standard, Pet. App. 1.

sniff "'compromise[d] no legitimate privacy interest'" because it "disclosed only the presence of illegal narcotics," and "'any interest in possessing contraband cannot be deemed legitimate.'" Pet. App. 2 (quoting Illinois v. Caballes, 543 U.S. 405, 408 (2005)).

Because its determination of those issues resolved petitioner's appeal, the court of appeals did not address the government's contention that the warrant affidavit would have established probable cause to search petitioner's apartment even without the dog-sniff evidence. See Gov't C.A. Br. 41-48. The court also did not address the government's contention that the good-faith exception to the exclusionary rule should apply because the officers reasonably relied on binding precedent that authorized the dog sniff. See id. at 48-53.

ARGUMENT

The court of appeals correctly rejected petitioner's contention (Pet. 10-15, 20-24) that a drug-detection dog's sniff outside his apartment infringed his reasonable expectation privacy, and petitioner's failure to develop an adequate record below makes his case an unsuitable vehicle for resolving any disagreement regarding that question. The court also correctly rejected petitioner's contention (Pet. 16-20, 24-26) that the officers trespassed on his curtilage, and petitioner identifies no clear conflict between that factbound determination and the

decision of any other court of appeals or state court of last resort. In addition, petitioner could not benefit from a decision in his favor on either question presented because, as the district court recognized, the relevant evidence was admissible pursuant to the good-faith exception to the exclusionary rule. Further review is unwarranted.

1. The court of appeals correctly determined that the dog sniff outside petitioner's apartment door did not infringe petitioner's reasonable expectations of privacy.

a. This Court has repeatedly recognized that a sniff by a drug-detection dog does not infringe a legitimate privacy interest so as to qualify as a search under the Fourth Amendment. This Court first addressed the legality of a canine sniff for narcotics in United States v. Place, 462 U.S. 696, 707 (1983), which considered whether a dog sniff of luggage at an airport constituted a Fourth Amendment search. The Court found that it did not, reasoning that a "canine sniff is sui generis" because it "discloses only the presence or absence of narcotics, a contraband item." Ibid. Thus, the Court concluded, even though "the sniff tells the authorities something about the contents of the luggage," the information obtained is so limited that it does not infringe a protected privacy interest. Ibid.; see also City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000) (applying the same reasoning to a canine sniff of a car at a drug-interdiction checkpoint).

In Illinois v. Caballes, 543 U.S. 405 (2005), the Court again determined that a sniff by a trained drug-detection dog does not intrude on any legitimate privacy interest, holding that the Fourth Amendment permits police to use a narcotics-detection dog to sniff a vehicle during a valid traffic stop. Id. at 407-409. The Court explained that "any interest in possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct that only reveals the possession of contraband 'compromises no legitimate privacy interest.'" Id. at 408 (quoting United States v. Jacobsen, 466 U.S. 109, 123 (1984)). The Court found this conclusion "entirely consistent" with Kyllo v. United States, 533 U.S. 27 (2001), where the Court held that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. Caballes, 543 U.S. at 409. The device in Kyllo, the Court explained, "was capable of detecting lawful activity -- in that case, intimate details in a home, such as 'at what hour each night the lady of the house takes her daily sauna and bath.'" Id. at 409-410 (quoting Kyllo, 533 U.S. at 38). In contrast, the Court stated, "[a] dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." Id. at 410.

Petitioner does not dispute that the dog sniff outside his apartment door revealed only the presence of illegal drugs. Thus,

as the court of appeals correctly recognized, a straightforward application of this Court's precedent demonstrates that the dog sniff did not infringe petitioner's reasonable expectation of privacy. See Pet. App. 2 (citing Caballes, 543 U.S. at 410).

b. Petitioner provides no sound basis for his contention (Pet. 11-15) that the reasoning of Place and Caballes should not apply to the dog sniff outside his apartment, and that he has a reasonable expectation of privacy in odors emanating from his apartment into the common hallway outside. Petitioner does not explain why Antra, the drug-detection dog who sniffed his door, either constitutes "a device that is not in general public use" or enabled the government "to explore details of the home that would previously have been unknowable without physical intrusion." Kyllo, 533 U.S. at 14; see Pet. 13-14. And although petitioner discusses at greater length his concerns about "the fallibility of drug dogs," Pet. 14-15, his failure to raise those concerns in the district court means that here, as in Caballes, "the record contains no evidence or findings that support his argument" that "error rates, particularly the existence of false positives, call into question the premise that drug-detection dogs alert only to contraband." 543 U.S. at 409. Furthermore, like the respondent in Caballes, petitioner "does not suggest that an erroneous alert, in and of itself, reveals any legitimate private information." Ibid. In any event, petitioner did not challenge the reliability

of drug-detection dogs in his opening brief in the court of appeals, raising that issue for the first time in his reply, see Pet. C.A. Br. 12-48; Pet. C.A. Reply Br. 16-17, and the court of appeals did not address it. Pet. App. 1-2. Accordingly, that issue is not properly presented for review in this Court. See United States v. Williams, 504 U.S. 36, 41 (1992) (noting this Court's "traditional rule" precluding review of issues that were "not pressed or passed upon below") (citation omitted); see also Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

This Court's opinion in Florida v. Jardines, 569 U.S. 1 (2013), does not support petitioner's legitimate expectation-of-privacy argument. In Jardines, the Court held that police officers conducted a Fourth Amendment search when they took a drug-sniffing dog to the front porch of a suspect's residence, and the dog moved to the base of the front door and alerted to the presence of drugs inside the residence. Id. at 4, 11-12. The Court concluded that the officers' actions amounted to a Fourth Amendment search because they had trespassed on a constitutionally protected area (the front porch) and exceeded the scope of any consent or implied societal license to approach the front door by bringing a drug-sniffing dog along to explore the area in the hope of obtaining evidence of a crime. Id. at 7-9. Because that physical intrusion was "enough to establish that a search occurred," the Court had no need to

"decide whether the officers' investigation of Jardines' home violated his expectation of privacy." Id. at 11. Petitioner instead relies on (Pet. 11) a three-Justice concurrence expressing the view that such a violation occurred, Jardines, 569 U.S. at 12-16 (Kagan, J., concurring). But four dissenting Justices (the only others to address the issue) saw "no basis for concluding that the occupants of a dwelling have a reasonable expectation of privacy in odors that emanate from the dwelling and reach spots where members of the public may lawfully stand." Id. at 24 (Alito, J., dissenting).

c. Petitioner contends (Pet. 21-24) that the lower courts are divided over whether a dog sniff outside an apartment door infringes the apartment dweller's reasonable expectation of privacy. To the extent that petitioner bases that contention on his assertion that the court of appeals below "has conflicting case law on the application of the reasonable expectation of privacy doctrine to searches by drug dogs," Pet. 21, any intracircuit conflict would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Petitioner also has identified no division among state courts of last resort regarding the Fourth Amendment reasonable-expectation-of-privacy analysis for dog sniffs of apartment doors.

Although petitioner contends that three state courts have held that such dog sniffs infringe a reasonable expectation of privacy, only one of the courts he identifies is a state court of last resort, and that court concluded that it "need not decide whether a canine sniff of an apartment door inside a multiunit building violates the fourth amendment" because it instead resolved that case "under the state constitution." State v. Kono, 152 A.3d 1, 16 (Conn. 2016). The other two state courts petitioner identifies are intermediate courts, rather than courts of last resort, and one has already been reversed in relevant part, while the other addressed a dog sniff outside a house, rather than an apartment. See State v. Edstrom, 901 N.W.2d 455, 461-463 (Minn. Ct. App. 2017), rev'd in part, 916 N.W.2d 512 (Minn. 2018); 916 N.W.2d at 523 ("[W]e reverse the court of appeals' conclusion that the narcotics-dog sniff violated Edstrom's reasonable expectation of privacy and therefore was unlawful under the Fourth Amendment."); State v. Rabb, 920 So. 2d 1175, 1182 (D. Ct. Fla.) ("The question * * * in this case is whether a dog sniff at the exterior of a house is a search under the Fourth Amendment."), review denied, 933 So. 2d 522 (Fla.), cert. denied, 549 U.S. 1052 (2006).

As petitioner notes, two circuits have held that a sniff by a drug-detection dog outside an apartment door infringes the apartment dweller's reasonable expectation of privacy. See United States v. Whitaker, 820 F.3d 849, 852-853 (7th Cir. 2015); United

States v. Thomas, 757 F.2d 1359, 1366-1367 (2d Cir. 1985), cert. denied, 474 U.S. 819 (1986). But petitioner's failure to develop a record below makes his case a poor vehicle for resolving any disagreement among the courts of appeals. As previously noted, he presented no evidence about the error rate of either Antra or drug dogs more generally that might support his concerns about false alerts. In addition, because petitioner did not make his Kyllo argument in the district court proceedings, he presented no evidence that a drug-detection dog constitutes "sense-enhancing technology * * * not in general public use" that reveals "information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area." Kyllo, 533 U.S. at 34 (citation and internal quotation marks omitted); see C.A. App. 21-22, 123-135, 138-139. Nor does petitioner now explain how the use of a dog to detect a particular scent constitutes a new "technology" that is "not in general public use." Kyllo, 533 U.S. at 34; see Jardines, 569 U.S. at 25 (Alito, J., dissenting) ("A dog * * * is not a new form of 'technology' or a 'device[,]' * * * [a]nd * * * the use of dogs' acute sense of smell in law enforcement dates back many centuries.").

2. Petitioner separately contends (Pet. 16-20, 24-26) that the canine-detection team conducted a warrantless Fourth Amendment search under Jardines on the theory that they trespassed on an

area that should be deemed the curtilage of his apartment when Antra sniffed petitioner's door. The court of appeals correctly rejected that factbound claim, which does not warrant this Court's review.

a. The lower courts correctly determined that petitioner does not have a constitutionally protected interest in the hallway outside his apartment. This Court has set forth four factors to determine whether an area adjacent to a home is "curtilage": (1) proximity to the home; (2) whether the area is included within an enclosure surrounding a home; (3) the nature and uses of the area; and (4) steps taken by the resident to protect the area from observation. United States v. Dunn, 480 U.S. 294, 301 (1987).

Those factors make clear that the area in front of petitioner's apartment door is not curtilage of petitioner's apartment. Although that space was next to petitioner's apartment, it was not enclosed, was a common hallway that anyone in the building was free to enter, and was not protected in any way from observation. The district court accordingly found that "a large number of people" used the hallway outside petitioner's apartment and that people passed by petitioner's door "all the time" because petitioner's door was next to a "major door to a stairway." C.A. App. 142-144. Indeed, the purpose of the indentation in front of petitioner's door was to allow people using the hallway to access the exit. Id. at 144-145.

b. The lower courts' factbound application of the curtilage factors set forth by this Court to the area outside petitioner's door does not warrant this Court's review.

The lower courts' determination does not conflict with Jardines or Collins v. Virginia, 138 S. Ct. 1663 (2018), neither of which addressed the constitutional status of an apartment building's common areas. See Jardines, 569 U.S. at 7 (determining that front porch of house is curtilage); Collins, 138 S. Ct. at 1670-1671 (determining that partially enclosed section of driveway abutting a house is curtilage). Petitioner contends (Pet. 24-26) that the court of appeals' opinion conflicts with two state court decisions that each found that an area outside an apartment door constituted curtilage.[2] But neither decision addressed facts analogous to those in petitioner's case. In each of those state cases, the defendant lived in one of two units on the top floor of an apartment building and shared a landing with only one other apartment. See State v. Rendon, 477 S.W.3d 805, 806-807 (Tex. Crim. App. 2015) (defendant lived on second floor of four-unit apartment building); People v. Burns, 50 N.E.3d 610, 613 (Ill. 2016) (defendant lived on third floor of 12-unit apartment building). Accordingly, only a limited number of people generally

[2] Although petitioner notes several courts of appeals' decisions addressing the constitutional status of other areas, he acknowledges that those decisions do not "directly address[] the question of whether a doorway to an apartment constitutes the apartment's curtilage." Pet. 24; see Pet. 24 n.2.

entered those landings -- specifically, the inhabitants of the two apartments and their visitors. See Rendon, 477 S.W.3d at 810; Burns, 50 N.E.3d at 621.

In contrast, petitioner shared a common hallway with at least five other apartments, and because his apartment was located next to a "major door to a stairway," people passed by his apartment door "all the time." C.A. App. 142-143; see id. at 97, 99, 106-107, 163. In light of those factual differences, it is in no way clear that the state courts petitioner cites would conclude that the area outside his apartment door constitutes curtilage. See Rendon, 477 S.W.3d at 810 ("We * * * narrowly hold that the curtilage extended to appellee's front-door threshold located in a semi-private upstairs landing."); Burns, 50 N.E.3d at 621 (finding that the landing outside the defendant's apartment was curtilage because, inter alia, it was "an area with limited access" whose use was "generally limited" to the defendant, the other tenant on the floors, and their invitees).

3. In any event, this case is not a suitable vehicle for addressing either of the questions presented because, as the district court correctly determined, see C.A. App. 145, suppression of evidence resulting from the dog sniff of petitioner's apartment door is unwarranted under the good-faith exception to the exclusionary rule.

The exclusionary rule is a "judicially created remedy" designed to "safeguard Fourth Amendment rights generally through its deterrent effect." United States v. Leon, 468 U.S. 897, 906 (1984) (citation omitted). This Court has emphasized, however, that suppression is an "extreme sanction," id. at 916, because the "exclusion of relevant incriminating evidence always entails" "grave" societal costs, Hudson v. Michigan, 547 U.S. 586, 595 (2006). Most obviously, it allows "guilty and possibly dangerous defendants [to] go free -- something that 'offends basic concepts of the criminal justice system.'" Herring v. United States, 555 U.S. 135, 141 (2009) (quoting Leon, 468 U.S. at 908).

This Court has thus held that, "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Herring, 555 U.S. at 144. Suppression may be warranted "[w]hen the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights." Davis v. United States, 564 U.S. 229, 238 (2011) (citation omitted). "But when the police act with an objectively reasonable good-faith belief that their conduct is lawful, * * * the deterrence rationale loses much of its force, and exclusion cannot pay its way." Ibid. (citations and internal quotation marks omitted). Reliance on

binding appellate precedent can establish the applicability of the good-faith exception. Id. at 239-241.

As the government argued in the court of appeals, and as the district court held below, those familiar principles confirm that suppression would not be appropriate here even if the dog sniff in this case were held to violate the Fourth Amendment. Gov't C.A. Br. 48-53; C.A. App. 145. More than a decade before the dog sniff in this case, the Maryland Court of Appeals -- that state's court of last resort -- held that "a dog sniff of the exterior of a residence is not a search under the Fourth Amendment" as long as the dog and police were "lawfully * * * present at the site of the sniff." Fitzgerald v. State, 864 A.2d 1006, 1017 (2004). The Maryland police officers and dog in this case were lawfully present outside petitioner's apartment with the authorization of building management, and it was reasonable for those officers to rely on that that precedent from their state's high court. Under the circumstances, petitioner cannot contend that the officers displayed anything approaching the sort of "'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights" that is required to justify the high costs of suppression. Davis, 564 U.S. at 238 (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

MICHAEL A. ROTKER
Attorney

NOVEMBER 2018