No. 18-____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

Cortney John Edstrom, *Petitioner,*

v.

State of Minnesota, *Respondent.*

Petition for a Writ of Certiorari to the
Supreme Court of the State of Minnesota

PETITION FOR A WRIT OF CERTIORARI

CATHRYN MIDDLEBROOK
Chief Appellate Public Defender
(Counsel of record)

STAN KEILLOR
Special Assistant State Public Defender

Office of the Minnesota Appellate Public Defender
540 Fairview Avenue North, Suite 300
St. Paul, Minnesota 55104
(651) 201-6700
Email: Cathryn.Middlebrook@pubdef.state.mn.us

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

Page

CASES FROM OTHER STATES

CONSTITUTIONAL AUTHORITIES

SECONDARY AUTHORITIES

QUESTIONS PRESENTED

Does an apartment-dweller have a reasonable expectation of privacy in the area immediately outside his front door that is violated when police bring a drug-detection dog there without a warrant to sniff for a controlled substance?

Does the holding of *Illinois v. Caballes*, 543 U.S. 405, 125 S. Ct. 834 (2005), that a drug-detection-dog sniff is not a "search" for Fourth Amendment purposes apply to the sniff of the front door of an apartment?

Is the area immediately outside the front door of an apartment within the apartment's curtilage so that police cannot physically intrude there with a drug-detection dog without having a warrant supported by probable cause?

No. 18-_____

IN THE
SUPREME COURT OF THE UNITED STATES

CORTNEY JOHN EDSTROM,
PETITIONER,

V.

STATE OF MINNESOTA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Cortney John Edstrom respectfully petitions for a writ of certiorari to review the judgment of the Minnesota Supreme Court.

OPINIONS BELOW

The final decision of the Supreme Court of Minnesota (Pet. App. A) is reported at 916 N.W.2d 512 (Minn. 2018). An earlier opinion of the Minnesota Court of Appeals (Pet. App. B.) is published at 901 N.W.2d 455 (Minn. App. 2017). The relevant trial court proceedings and order are unpublished.

JURISDICTION

The Supreme Court of Minnesota issued its decision on August 15, 2018. Pet. App. A. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment of the U.S. 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

This case presents pressing Fourth Amendment issues concerning drug-detection dog sniffs at apartment doorways in locked buildings.

A. Factual Background

1. In late September or early October of 2015, Drug Task Force officers received a tip that petitioner was selling methamphetamine in an apartment in Brooklyn Park, Minnesota. Search Warrant App., Appendix C, at 2. The confidential informant (CI) told police that petitioner, who lived on the third floor of the apartment building, was selling a substantial amount of methamphetamine out of the apartment, and described his automobile. *Id.* Police corroborated petitioner's connection to an apartment on the third floor, Apartment 305, the presence outside of an automobile matching the CI's description, and the CI's claim that petitioner was a convicted felon. *Id.* at 2-3.

Sergeant Erik Husevold of the Drug Task Force recruited a canine officer and his drug-sniffing dog, "Kato." They gained entry to the locked building using a key in the entryway that police could access. Pretrial T. (Apr. 19, 2016), Appendix E, at 7. Once inside, the officers had "Kato" "sniff[] other doors" before going to apartment 305, where "Kato" sniffed at the door seam and alerted for the presence of drugs. *Id.* at 10.

2. Based on the CI's tip and this positive alert, Sergeant. Husevold obtained a warrant to search the apartment. The warrant application cited few corroborative facts. App. D. at 2-3. Police did not conduct a controlled buy or surveillance of the building or hallway for short-term traffic indicative of drug dealing. Neither did the warrant application state that the CI had provided reliable information in the past or that he had personal knowledge that petitioner was selling methamphetamine in the apartment. *See* App. D. The application stated that Kato "provided a positive alert for narcotics *at the door seam* of apartment 305." *Id.* at 3 (emphasis added). When police executed the warrant, they found petitioner and another person in Apartment 305, and seized suspected methamphetamine and firearms.

B. Proceedings Below

1. Petitioner filed a motion to suppress "any evidence obtained from an illegal dog sniff and subsequent tainted warrant." Mar. 31, 2016 Notice of Motion and Motion to Suppress Evidence, at 1. Defense counsel argued that the "warrantless dog sniff of the apartment" was a search under the Fourth Amendment, as well as the state constitution, and was not supported by reasonable suspicion, probable cause, or any exception to the warrant requirement. Mar. 31, 2016 Memorandum in Support of Motion to Suppress, at 4.

At the pretrial suppression hearing, defense counsel argued, among other issues, that "Kato" sniffed "at the seams of the door," and that petitioner had a reasonable expectation of privacy with respect to that location. App. E., at 24. Based on the argument and testimony from Sgt. Husevold, the district court denied the suppression motion orally on the record. App. C., at 30-32.

In denying the motion from the bench, the district court stated, "I am unaware of any case law that holds a dog sniff at the apartment door is impermissible." *Id.* at 31. The court distinguished the facts from those in *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409 (2013), finding that the hallway outside the apartment was not within the curtilage, *id.*, and that petitioner lacked a reasonable expectation of privacy in it, noting that the hallway "was accessible to all of the residents, all of their guests, and anyone else who has entered the building legitimately, including in this case law enforcement." *Id.* at 32. Petitioner appealed, and the court of appeals reversed, holding that a dog sniff at the apartment door "implicates a legitimate expectation of privacy" and requires "a warrant or an exception to the warrant requirement." 901 N.W.2d at 457. The court of appeals agreed with the district court that the dog sniff did not occur within the curtilage of the apartment. *Id.* at 461.

3. The State of Minnesota filed a petition for further review with the Minnesota Supreme Court, which granted the petition. In a 3-2 decision, the Minnesota Supreme Court on August 15, 2018, reversed the Minnesota Court of Appeals. The court held that the "hallway immediately adjacent to [petitioner's] apartment door," 916 N.W.2d at 517, was not "curtilage" protected by the Fourth Amendment and that petitioner had no reasonable expectation of privacy there that could be violated by a canine sniff, which could reveal only the presence or absence of contraband. *Id.* at 521-23. The Court also held that although a search had occurred for purposes of the Minnesota Constitution, it was supported by articulable suspicion, which was all the state constitution required. *Id.* at 524. In dissent, Justice Lillehaug, joined by Justice Chutich, concluded that the apartment-doorway area was within the curtilage, and that "the court's narrow reading of *Jardines*

undermines the rights of Minnesotans who live in multi-unit dwellings," who are disproportionately poor and from racial or ethnic minorities. *Id.* at 528.

REASONS FOR GRANTING THE PETITION

I. The Writ Should Issue Because Withholding the *Florida v. Jardines* Protection Against Doorway Detection-Dog Drug Sniffs from Apartment Dwellers Presents an Issue of Public Importance.

The Minnesota Supreme Court in this case rejected petitioner's argument that a dog sniff at the door to an apartment in a locked building is as much a search under the Fourth Amendment as was the dog sniff at the front door of a private home in *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409 (2013). The question whether there is a tenable Fourth Amendment distinction between a police-dog sniff at the door of an apartment and one at the front door of a house raises important issues given the nature of multi-unit buildings and the economic and racial characteristics of those who reside in them.

Many of "the people," U.S. Const. Amend. IV, cannot afford to live in a detached single-family house. As the dissent below noted, a distinction between detached dwellings and apartments "would apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity." *Edstrom*, 916 N.W.2d at 528 (Lillehaug, J., dissenting) (quoting *United States v. Whitaker*, 820 F.3d 849, 854 (7th Cir. 2016)). In 2013, 67.8 % of households composed solely of whites lived in single-unit, detached homes. *Whitaker*, 820 F.3d at 854. Only 47.2% of households composed solely of blacks, and 52.1% of Hispanic households did. *Id.* As to family income, only 40.9% of households earning less than $10,000 lived in single-unit, detached homes, while 84% of those earning more than

$120,000 did. *Id.*; *see also* Andrea J. Boyack, "Equitably Housing (Almost) Half a Nation of Renters," 65 Buff. L. Rev. 109, 113 (2017) ("Minority households and low-income households are disproportionately renter households.").

For sixty years, this Court has treated an apartment as a "house" for Fourth Amendment purposes. *See Miller v. United States*, 357 U.S. 301, 306-07, 78 S. Ct. 1190, 1194 (1958) (applying to an apartment the common law limit on "the authority of law officers to break the door of a house to effect an arrest"). The locked apartment building is the gated community of the under-privileged. The Minnesota Supreme Court's opinion, however, effectively deems their expectation of privacy in their doorway unreasonable even though the gate excludes virtually all unwanted visitors. *See* 916 N.W.2d at 519 (citing prior decision holding common area of multi-unit building was not curtilage because "utilized by tenants generally" and their visitors) (citation omitted).

Just last Term, this Court expressed concern about drawing Fourth Amendment lines that ultimately coincide with those dividing rich and poor. In *Collins v. Virginia*, ___ U.S. ___, 138 S. Ct. 1663 (2018), this Court, in rejecting a rule restricting warrantless searches of automobiles parked outside the home only if they were parked in a "fixed, enclosed structure," noted that the rule proposed by the government

> would [automatically] 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. at ___, 138 S. Ct. at 1675. The Minnesota Supreme Court decision creates a distinction that similarly correlates significantly with income. *See* Carol A. Chase, "Cops, Canines and Curtilage: What *Jardines* Teaches and What It Leaves Unanswered," 52 Hous. L. Rev. 1289, 1303 (2015) (opining that limiting protection of *Jardines* to single-family homes is disturbing "once it is recognized that in many settings those who reside in multi-unit dwellings are financially less well-off than their neighbors in single-family residences"); *see also* Christopher Slobogin, "The Poverty Exception to the Fourth Amendment," 55 Fla. L. Rev. 391, 401 (2003) (noting cases "that lead to the conclusion that Fourth Amendment protection varies depending on the extent to which one can afford accoutrements of wealth such as a freestanding home, fences, lawns, heavy curtains, and vision- and sound-proof doors and walls").

The Minnesota Supreme Court's decision would also restrict the Fourth Amendment rights of those who can and do choose to live in multi-unit residences[1] in order to be more sequestered from the traffic of everyday life. Some may have chosen an animal-free environment. *See* Constance Rosenblum, "Bark if You're Legal," Mar. 31, 2010 N. Y. Times ("Buildings have rules about pets for many reasons. The very young and the very old may be frightened of animals, especially those that look menacing.") Such residents might be startled to learn that their secure, pet-free building provides less

[1] For simplicity, all multi-unit residences will be referred to as "apartments," although many condominiums and cooperatives would be included within the Minnesota Supreme Court's holding.

constitutional protection against police animals than homeowners enjoy whose porches may be visited daily by civilian dogs.

Justice Scalia's majority opinion in *Jardines* describes how the canine-unit officer in that case "had the dog on a six-foot leash, owing in part to the dog's 'wild nature,' . . . and tendency to dart around erratically while searching." *Id.* at 3, 133 S. Ct. at 1413. The officer stood back "so he would not 'get knocked over' when the dog was 'spinning around trying to find the source.'" *Id.* The Minnesota Supreme Court's decision here would allow this jarring sight in the confined space of an apartment hallway whose residents may have chosen the building for its secure and cloistered nature or even because it is pet-free. *See generally* David Favre and Peter L. Borchelt, *Animal Law and Dog Behavior* 82 (Lawyers & Judges Pub. Co. 1999) (noting frequency with which neighbor complaints alert landlords to no-pet violations).

The Minnesota Supreme Court's opinion allows such drug-detection dog sniffs in multi-unit residences based only on articulable suspicion, which is considerably lower than the search-warrant-supported-by-probable-cause standard applied in *Jardines* to detached dwellings. And the court's requirement of articulable suspicion rested on the Minnesota Constitution, leaving apartment doorways subject to suspicion-less searches for Fourth Amendment purposes.

The articulable suspicion standard requires only a "particularized and objective basis for suspecting" a person of criminal activity. *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 695 (1981). It may require only a "moderate chance of finding evidence of wrongdoing." *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 371,

129 S. Ct. 2633, 2639 (2009) (describing articulable-suspicion standard as applied to school searches). And for many low-income apartment dwellers, the location of their building in a "high crime area" may go far toward satisfying this articulable suspicion standard. *See Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 676 (2000) (holding person's presence in high-crime area does not by itself create articulable suspicion but is a "relevant contextual consideration[]").

There are significant splits in authority on all three questions presented here. And this Court last Term decided more than one case raising multiple Fourth Amendment issues. *See Collins v. Virginia*, ___ U.S. ___, ___, 138 S. Ct. 1663, 1669 (2018) (noting case raised curtilage issues as well as the scope of the automobile exception); *see also Carpenter v. United States*, ___ U.S. ___, ___, 138 S. Ct. 2206, 2214-15 (2018) ("requests for cell-site records lie at the intersection of two lines of cases"). This Court has not treated the multi-pronged nature of an issue as an impediment to review.

II. The Writ Should Issue Because There is a Split in the Circuits on Whether Apartment Dwellers Have a Reasonable Expectation of Privacy in Locked Common Hallways.

The Minnesota Supreme Court, having chosen to apply the *Caballes* exception holding a drug-dog sniff is not a search, did not address the privacy-rights issue, but the Minnesota Court of Appeals earlier held that the canine sniff at his apartment door "violated [petitioner's] legitimate expectation of privacy." 901 N.W.2d at 462.

There is a longstanding split of authority on whether apartment dwellers have a reasonable expectation of privacy in the common hallways of their building. *See* Sean M.

Lewis, Note, "The Fourth Amendment in the Hallway: Do Tenants Have a Constitutionally Protected Privacy Interest in the Locked Common Areas of Their Apartment Buildings," 101 Mich. L. Rev. 273, 274-75 (2002) (describing 4-1 circuit split, first arising in 1976). The Sixth Circuit continues to adhere to its 1976 decision that there is such an expectation of privacy. *See United States v. Dillard*, 438 F.3d 675, 683 (6th Cir. 2006); *United States v. Carriger*, 541 F.2d 545, 552 (6th Cir. 1976). Five other circuits disagree. *See e.g. United States v. Nohara*, 3 F.3d 1239, 1242 (9th Cir. 1993) ("we join the First, Second, and Eighth Circuits, which have rejected [the *Carriger*] rationale and held an apartment dweller has no reasonable expectation of privacy in the common areas of the building"); *United States v. Correa*, 653 F.3d 187, 190-91 (3rd Cir. 2011) (joining other circuit courts in "holding that a resident lacks an objectively reasonable expectation of privacy in the common areas of a multi-unit apartment building with a locked exterior door").

The Seventh Circuit in its *Whitaker* decision has joined the Sixth Circuit's position, at least with respect to canine sniffs. *Whitaker* holds that although the apartment dweller lacks "a reasonable expectation of complete privacy in the hallway," he has a reasonable expectation "of privacy against persons in the hallway snooping into his apartment using sensitive devices not available to the general public." *United States v. Whitaker*, 820 F.3d 849, 853 (7th Cir. 2016).

This divided legal landscape, and *Whitaker*'s attempt to bridge the divide, has even been discussed in the daily press. *See* Orin Kerr, "Use of a drug-sniffing dog at an apartment door is a 'search,' 7th Circuit holds," Apr. 13, 2016 Wash. Post.

> Courts are divided on whether a tenant who lives in an apartment building has Fourth Amendment rights in the common areas of the building. On Tuesday, the 7th Circuit handed down a new twist on the problem.

Id. Legal commentators have recognized the split and urged this Court to resolve it:

> As the weight of the precedent on each side of the divide continues to grow, there is an increasing need for the Supreme Court to resolve this important Fourth Amendment issue.

Lewis, 101 Mich. L. Rev. at 275.

This circuit split reflects a fundamental divergence of views. The majority position denies that society should recognize as reasonable an apartment dweller's expectation of privacy in a hallway to which fellow tenants and a few others have access. *See United States v. Eisler*, 567 F.3d 814, 816 (8th Cir. 1977) ("The common hallways of [the] apartment building were available for the use of other residents and their guests, the landlord and his agents, and others having legitimate reasons to be on the premises."). The Sixth Circuit's position is that lack of general public access, not the rights of "other tenants and invited guests" to enter the hallway, is controlling. *See Carriger*, 541 F.2d at 551. These approaches are mutually exclusive. *See United States v. Villegas*, 495 F.3d 761, 771 (7th Cir. 2007) (Rovner, J., dissenting) ("But the relevant question, it seems to me, is not whether the hallway is accessible to other residents and their invitees, but whether the hallway is accessible to the public at large."); *cf. Whitaker*, 820 F.3d at 853 (holding resident had "right to expect certain norms of behavior in his apartment hallway" even from

"other residents and their guests"). The only compromise that has been offered is a vague totality-of-the-circumstances test. *See United States v. Miravalles*, 280 F.3d 1328, 1332-33 (11th Cir. 2002) (recognizing several factors and holding there was no reasonable expectation of privacy in 14-floor high-rise when lock on outside door was not working); *State v. Talley*, 307 S.W.3d 723, 734 (Tenn. 2010) (applying totality-of-the circumstances test).

Justice Kagan's concurrence in *Jardines* recognized that a drug-detection dog sniff at the front door of a residence violates a reasonable expectation of privacy. 569 U.S. at 13, 133 S. Ct. at 1418-19 (stating that a privacy-based decision "would have determined that police officers invade those shared expectations [of privacy] when they use trained canine assistants to reveal within the confines of a home what they could not have otherwise found there"). In *Whitaker*, the Seventh Circuit applied this reasoning to the canine sniff of the front door of an apartment. 820 F.3d at 852 ("The use of a drug-sniffing dog here clearly invaded reasonable privacy expectations, as explained in Justice Kagan's concurrence in *Jardines*.").

The Minnesota Supreme Court's decision, while based on a holding that the hallway was not "curtilage," indirectly supports the majority position in the circuit split by describing "curtilage" in terms of the expectation of privacy. *See Edstrom*, 916 N.W.2d at 518 (stating that curtilage determination is made based on factors "that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private") (citation omitted), 519 (citing other courts' holdings rejecting claims of curtilage "because the apartment resident does not have an expectation of privacy in the

area outside the apartment"). The court thereby departs in large degree from *Whitaker* and the other courts applying Justice Kagan's privacy-rights *Jardines* concurrence to apartment doorways. For example, the Connecticut Supreme Court has followed *Whitaker*'s finding of a reasonable expectation of privacy in *State v. Kono*, 152 A.3d 1 (Conn. 2016). Although *Kono* ultimately decided the apartment-doorway dog-sniff issue based on a state constitutional analysis, it did so in reliance on *Whitaker* and on Justice Kagan's concurrence in *Jardines*. *See id.* at 22 (agreeing with *Whitaker* expectation-of-privacy analysis), 23 ("we believe that Justice Kagan's concurrence in *Jardines* properly applies this principle [of heightened privacy interests in the home]" to a canine sniff of a residence).

Furthermore, the Minnesota Supreme Court's opinion shares the same focus on access by other tenants as the majority in this circuit split. *See* 516 N.W.2d at 519 ("other tenants and the police walk in and use this area jointly with [petitioner]"). Thus, while avoiding mention of the circuit split, the court essentially took sides in it. And in applying the *Caballes* "sui generis" exception for canine sniffs to the doorway of a residence, *id.* at 522, the court took sides in another split of authority.

III. The Writ Should Issue Because There is a Split in Authority on Whether the *Caballes* Holding That a Dog Sniff is Not a Search Applies to the Door of a Residence.

The exception relied on by the Minnesota Supreme Court – that a canine sniff is not a "search" for purposes of the Fourth Amendment – originated in luggage- and vehicle-sniffs and should have no application to a dwelling. *Cf. Illinois v. Caballes*, 543 U.S. 405, 408-09, 125 S. Ct. 834, 837-38 (2005) (recognizing "sui generis" exception for dog sniff

of stopped motor vehicle); *United States v. Place*, 462 U.S. 696, 707, 103 S. Ct. 2637, 2644-45 (1983) (same for dog sniff of luggage seized at airport). The *Caballes* exception relies on the premise that a dog sniff can detect only illegal drugs, in which there is no legitimate expectation of privacy. 543 U.S. at 408-09, 125 S. Ct. at 837-38.

In applying the *Caballes* exception to a residential doorway, the Minnesota Supreme Court ruled contrary to authority in other jurisdictions and despite this Court's avoidance of the exception in the residential context in *Jardines*, in which both the majority opinion and the concurrence described the drug-dog sniff in terms emphasizing its intrusiveness. *See Jardines*, 569 U.S. at 9, 133 S. Ct. at 1416 (comparing narcotics dog to a "metal detector" and a "bloodhound"); *cf. id.* at 12, 133 S. Ct. at 1418 (Kagan, J., concurring) (comparing narcotics dog to "super-high-powered binoculars").

The Minnesota Supreme Court held here that "[b]ecause the narcotics-dog sniff could identify only the presence or absence of contraband, we hold that under *Caballes* and *Place*, . . . no search occurred." 916 N.W.2d at 523. The court stated that although the dog sniff occurred at the door to a residence, "[w]e are not persuaded that we should depart from the reasoning of *Place* and *Caballes*." *Id.* at 522.

The privacy of the home, however, stands at the "very core" of the Fourth Amendment's protections. *Jardines*, 569 U.S. at 6, 133 S. Ct. at 1414 (citation omitted). Other courts have held that the *Caballes* exception cannot be applied to the dog sniff of an apartment home. *See United States v. Whitaker*, 820 F.3d at 853 (holding that "the fact that this was a search of a home distinguishes this case from dog sniffs in public places in [*Place*] and [*Caballes*]"); *People v. Burns*, 50 N.E.3d 610, 625 (Ill. 2016) (holding police

could not have in good faith relied on the *Caballes* exception as applying to a dog sniff of the front door of an apartment); *State v. Kono*, 152 A.3d 1, 17-18 (Conn. 2016) (rejecting state's reliance on pre- *Jardines* cases to support application of *Caballes* exception to an apartment residence and finding more persuasive reasoning is to the contrary); *Florida v. Rabb*, 920 So.2d 1175, 1189 (Fla. Dist. Ct. App. 4th Dist. 2006) ("If the Fourth Amendment has any meaning at all, a dog sniff at the exterior of a house should not be permitted to uncloak this remaining bastion of privacy."), *review denied* 933 So.2d 522 (Fla. 2006), and *cert. denied* 127 S. Ct. 665 (2006); *but see State v. Nguyen*, 841 N.W.2d 671, 681-82 (N.D. 2013) (applying *Caballes* exception to sniff "in the common hallway of a secure apartment building"). In line with the majority position, the Fifth Circuit has carefully limited the *Caballes* exception to dog sniffs conducted in a "public place." *United States v. Beene*, 818 F.3d 157, 163 (5th Cir. 2016) (discussing *Caballes* and *Jardines* and concluding "a dog sniff in a public place is not a search").

Even without this preponderance of contrary authority, the Minnesota Supreme Court's expansion of the *Caballes* exception would be cast in doubt by this Court's several opinions in *Florida v. Jardines*.

Faced with a canine sniff at the doorway to a private home, the *Jardines* majority's property-rights-based opinion avoided any substantive discussion of the *Caballes* exception. *See Jardines*, 569 U.S. at 11, 133 S. Ct. at 1417 (declining government's invitation to decide whether a dog sniff of a front door, given the *Place* and *Caballes* decisions, would have violated a reasonable expectation of privacy under *Katz*). The *Jardines* majority described the intrusiveness of the drug-detection dog sniff in terms very

similar to those in the concurrence's expectation-of-privacy analysis. *Cf. id.* at 7-9, 133 S. Ct. at 1416 (comparing drug-sniffing canine to a "metal detector" and a "bloodhound") *with id.* at 12, 133 S. Ct. at 1418 (Kagan, J., concurring) (comparing drug-sniffing dogs to "super-high-powered binoculars"). And, despite the majority's stated preference for an "easy case," *id.* at 11, 133 S. Ct. at 1417, its property-rights analysis appears longer and more intricate than a *Caballes* analysis would have been. The majority relied on a finding that the canine officers exceeded the scope of the customary license to approach the front door, which in turn required emphasizing the intrusive nature of the drug-detection dog sniff. *Id.* at 7-9, 133 S. Ct. at 1416-17. This analysis appears easier only in that it could readily command a majority. Notably, the *Jardines* dissent made only passing reference to the *Caballes* exception. *Id.* at 24, 133 S. Ct. at 1424 (Alito, J., dissenting) (mentioning *Caballes* but emphasizing that contraband odors were emanating into the street). Justice Kagan's concurrence, while rejecting the government's *Caballes* argument, did so in a footnote. *Id.* at 14, n. 1, 133 S. Ct. at 1419, n. 1.

The *Jardines* treatment of *Caballes* is noteworthy because the lower court had explicitly rejected the application of the *Caballes* exception to the home, thus squarely presenting the issue for this Court's review. *See Jardines v. State*, 73 So.3d 34, 49 (Fla. 2011) (stating a dog sniff "conducted at a private residence does not *only* reveal the presence of contraband, as was the case in the [*Caballes*] 'sui generis' dog sniff cases discussed above, but it also constitutes an intrusive procedure that may expose the resident to public opprobrium, humiliation and embarrassment"), *aff'd on other grounds sub nom. Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409 (2013).

The Minnesota Supreme Court's opinion treats *olfactory* intrusiveness as alone relevant, regardless of the *physical and psychological* intrusiveness involved or the exalted Fourth Amendment status of the home at which the sniff is directed. *See* 916 N.W.2d at 522 ("In *Caballes*, the Court made clear that a narcotics dog is not the super-sensitive instrument the Court was concerned with in *Kyllo* because such a dog discloses only illegal activity"); *cf. Jardines*, 569 U.S. at 9, 133 S.Ct. at 1416 ("To find a visitor . . . exploring the front path" with a "metal detector" or a "bloodhound" "would inspire most of us . . . to call the police"). That opinion not only ignores this Court's language dwelling on the physical and psychological intrusiveness of the dog sniff in *Jardines*, but also represents an unwarranted extension of *Place* and *Caballes*, in which the luggage had already been seized and the motor vehicle stopped, so that physical and psychological intrusiveness had already been considered as a matter of Fourth Amendment *seizure* law. *See Caballes*, 543 U.S. at 409, 125 S. Ct. at 838 ("In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation."); *Place*, 462 U.S. at 708, 103 S. Ct. at 2645 (noting that detaining traveler's luggage "intrudes on both his possessory interest in his luggage . . . and his liberty interest" in proceeding on his way).

The gulf between the Minnesota Supreme Court's opinion here and the contrary authority is wide. Both the opinion here and the North Dakota Supreme Court's opinion in *Nguyen* cling to the *Caballes* premise that a dog sniff discloses only illegal activity. *See* 916 N.W.2d at 522 ("narcotics-dog sniffs, because they cannot disclose illegal activity, do not implicate a [reasonable] expectation of privacy"); *Nguyen*, 841 N.W.2d at 681 ("There is no legitimate interest in privately possessing marijuana."). The contrary authority

adheres to the Fourth Amendment primacy of the home, as a *location* to be distinguished from the dog sniffs in *Place* and *Caballes*. *See Whitaker*, 820 F.3d at 853 ("Neither [*Place* nor *Caballes*] implicated the Fourth Amendment's core concern of protecting the privacy of the home."). Neither side of this debate confronts the other's logic.

The Minnesota Supreme Court examined the olfactory intrusiveness of the drug-detection dog without acknowledging in its analysis that the apartment served as a *home*. *See* 916 N.W.2d at 523 ("Because the narcotics-dog sniff could identify only the presence or absence of contraband, we hold that under *Caballes* and *Place*, . . . no search occurred."). The logic of the Minnesota Supreme Court's *Fourth Amendment* holding here is that *no* level of suspicion is required for any narcotics-dog sniff at the door of a residence. *See Edstrom*, 916 N.W.2d at 522 (holding that narcotics-dog sniffs, "because they cannot disclose lawful activity," "are not searches.").[2] This holding is at odds with contrary authority, with the treatment of the *Caballes* exception in *Jardines*, and with this Court's historical understanding of Fourth Amendment protection of the home. *See Miller v. United States*, 357 U.S. at 313, 78 S. Ct. at 1198 ("Every householder, the good and the

[2] Minnesota had previously required articulable suspicion for detection-dog drug sniffs at apartment doorways and at non-residential locations under the state constitution. *See State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007) (holding dog sniff outside apartment doorway requires articulable suspicion under Minnesota Constitution); *State v. Wiegand*, 645 N.W.2d 125, 133, 135 (Minn. 2002) (holding dog sniff of stopped automobile is not search requiring probable cause, citing *Place*, but under the Minnesota Constitution, does require articulable suspicion). The Minnesota Supreme Court followed this case law in holding that articulable suspicion was required under the state constitution. 916 N.W.2d at 524.

bad, *the guilty and the innocent*, is entitled to the protection designed to secure the common interest against invasion of the house.") (emphasis added).

IV. The Writ Should Issue Because There is Also a Split of Authority on Whether an Apartment Doorway is Within the Curtilage of that Residence Such That a Drug-Detection Dog's Sniff in that Area Physically Intrudes on a Constitutionally Protected Area.

The Minnesota Supreme Court held that the common hallway outside petitioner's apartment was not within the curtilage of his residence and thus falls outside the *Jardines* majority's property-rights approach. *Edstrom*, 916 N.W.2d at 521. The court applied the *Dunn* factors traditionally used in distinguishing areas associated with the home from the "open fields." *See id.* at 518 (citing *United States v. Dunn*, 480 U.S. 284, 301, 107 S. Ct. 1134 (1987)).

The extent of the area entitled to the "umbrella" protection of the home is generally, although not always, determined by applying the four *Dunn* factors. *See Collins v. Virginia*, ___ U.S. at ___, 138 S. Ct. at 1670-71. But two of these factors – whether the area is fenced with the house and whether any steps have been taken to obscure the area from passersby, *see Dunn*, 480 U.S. at 301, 107 S. Ct. at 1139 – are ill-suited to the apartment context. Given that the apartment building walls off the whole interior, exterior fencing would be redundant, and those walls, provided by the landlord, obviate any need for the apartment resident to screen off his doorway from "passersby." Nevertheless, the Minnesota Supreme Court here looked to whether petitioner had provided *interior*

"fenc[ing]" or "enclose[ure]" or taken steps to "obscure the area" from his co-tenants. 916 N.W.2d at 518-19.

The Illinois Supreme Court has held, contrary to this reasoning, that an apartment doorway is within the curtilage. *See People v. Burns*, 50 N.E.3d at 621-22 (holding interior landing in front of apartment door was curtilage); *see also State v. Kono*, 152 A.3d at 17 (concluding "better reasoned federal case law" under both *Katz* privacy doctrine and "the principles of curtilage" supports conclusion that apartment-door dog sniff was a search); *State v. Rendon*, 477 S.W.3d 805, 808 (Tex. Crim. App. 2015) ("the dog sniff here occurred at the threshold of appellee's apartment-home and thus was clearly included within the physical-intrusion theory of *Jardines*"); *but see State v. Nguyen*, 841 N.W.2d at 681 (holding common area adjacent to apartment door is not curtilage).

There is "considerable pre-*Jardines* authority to the effect that the concept of 'curtilage' has little if any application to . . . multiple-unit dwellings . . . ." 1 Wayne R. LaFave, *Search and Seizure* § 2.2(g), at 81 (5th Ed. Supp. Oct. 2017). But in *Jardines* and other recent cases this Court has moved to re-invigorate the property-rights baseline of Fourth Amendment protections. *See Jardines*, 569 U.S. at 6, 133 S. Ct. at 1414 ("but though *Katz* may add to the baseline, it does not subtract anything from the [Fourth] Amendment's protections" against physical intrusion on constitutionally protected areas); *United States v. Jones*, 565 U.S. 400, 405, 132 S. Ct. 945, 949 (2012) ("The text of the Fourth Amendment reflects its close connection to property").

The property-rights concept of "curtilage" offers an alternative to the uncertainties of the *Katz* reasonable-expectation-of-privacy test when tethered only to social norms. *See*

Jardines, 569 U.S. at 11, 133 S. Ct. at 1417 (finding it unnecessary to decide whether *Katz* was violated because Fourth Amendment "property rights baseline . . . keeps easy cases easy"); *cf. Carpenter v. United States*, ___ U.S. ___, ___, 138 S. Ct. 2208, 2265 (2018) (Gorsuch, J., dissenting) ("In fact, we still don't even know what [*Katz*'s] "reasonable expectation of privacy" test *is*."). The classification of an apartment doorway as "curtilage" depends on analogy *to* rather than application *of* the positive law of property. But Justice Scalia's resort to property law in *Jardines* was also by analogy, and not by actual application of the Florida law of trespass. William Baude and James Y. Stern, "The Positive Law Model of the Fourth Amendment," 129 Harv. L. Rev. 1821, 1835 (2016) ("Justice Scalia wasn't interested in property law as actual *law* but rather as a source of analogies."). Similarly, the argument for an apartment-doorway "curtilage" is by way of analogy to the front door of a detached dwelling, and not a direct appeal to the common law concept of "curtilage." But the analogy between an apartment doorway and the door to a house is compelling, as most courts have found.

The ultimate property-rights question is whether an apartment tenant's right to "retreat into his own home" would "be of little practical value" if police could "trawl for evidence" on his doorstep. *Jardines*, 569 U.S. at 6, 133 S. Ct. at 1414. The Seventh Circuit in *Whitaker* opined that one's fellow tenants should not be free "to set up chairs and have a party in the hall right outside the door." 820 F.3d at 853. And a tenant's right to retreat into his apartment would "be of little practical value" if a neighbor could camp on his doorway for any length of time and for any purpose other than to respectfully request entry.

Thus, the property-rights issue of apartment-doorway curtilage is compelling and exhibits another split of authority that warrants this Court's review.

V. This Case is an Excellent Vehicle for Addressing the Questions Presented.

For several reasons, this is an ideal case in which to address the Fourth Amendment protections of apartment dwellers against apartment-doorway detection-dog drug sniffs.

First, the relevant facts were fully developed in the pretrial record. Police obtained the search warrant based in large part on the dog sniff's corroboration of the confidential informant's tip. The state has not argued that police possessed probable cause to obtain the search warrant without the canine sniff. *See Edstrom*, 916 N.W.2d at 514 (framing issue on appeal). And petitioner has not argued that without it police lacked reasonable suspicion. It is undisputed that the door to enter the apartment building was locked. Police obtained entry by means of a key located for their use in a lockbox, but there is no dispute that the apartment was not accessible to the general public. The facts provide no ready escape from the legal issues framed above.[3] Regardless of the lack of precision in describing the dog's proximity to the door, *id.* at 515, n. 1, the majority adopted the search

[3] This Court has before it a petition for a writ of certiorari to the Fourth Circuit raising some of the same issues. *Makell v. United States*, No. 18-5509 (filed Aug. 6, 2018). But the Fourth Circuit's opinion in *Makell* is an unpublished per curiam decision, following nonoral consideration, with minimal discussion of the curtilage and *Caballes*-exception theories on which it relies. *See United States v. Makell*, 721 Fed. Appx. 307 (4th Cir. May 8, 2018). It adds nothing to the existing debates on those issues, and has unusual facts, in that police conducted part-time patrols in the apartment building and were "posing as bed bug inspectors" on the day of the dog-sniff, Pet. for Cert., at 6, unlike the straightforward and commonplace facts presented here.

warrant affidavit's statement that the dog sniffed the "door seam," *id.* at 515, which the dissent also accepted. *Id.* at 525, n. 2. Lastly, the court noted aspects of petitioner's doorway that weighed against a finding of curtilage. *Id.* at 518. But it would be unusual for an apartment doorway to be "fenced or otherwise enclosed with the home." *Id.*

Secondly, the Minnesota Supreme Court's discussion of the Minnesota Constitution's prohibition against unreasonable searches and seizures does not establish independent and adequate state grounds for its decision. *See generally Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553 (1991) (stating that Supreme Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment"). The Minnesota state constitution cannot provide less protection than the probable-cause standard for which petitioner argued under the Fourth Amendment. *See generally Benton v. Maryland*, 395 U.S. 784, 795, 89 S. Ct. 2056, 2063 (1969). Thus, this case necessarily raises Fourth Amendment issues.

Lastly, the legality of the door-seam dog-sniff is dispositive because suppression of the methamphetamine and firearms evidence would require dismissal of the case. And the issue was framed from the beginning of the case in the defense suppression motion, based on facts that are straightforward, undisputed, and commonplace.

CONCLUSION

Detection-dog drug sniffs at apartment doorways present issues of national importance affectin all residents of multi-unit dwellings. There is a pronounced circuit split of authority on whether apartment dwellers have a reasonable expectation of privacy

in locked common hallways. And there is a split of authority on whether the *Caballes* exception for drug-dog sniffs would apply to such a sniff of a residence, as well as a state-court split on whether apartment doorways are within the "curtilage" so as to have Fourth Amendment protection from physical intrusion by the detection dog and canine officer.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

OFFICE OF THE MINNESOTA
APPELLATE PUBLIC DEFENDER

CATHRYN MIDDLEBROOK
Chief Appellate Public Defender

STAN KEILLOR
Special Assistant State Public Defender

540 Fairview Avenue North
Suite 300
St. Paul, MN 55104
(651) 201-6700
Cathryn.Middlebrook@pubdef.state.mn.us

ATTORNEYS FOR PETITIONER