No. 18-6715

# In The
# Supreme Court of the United States

CORTNEY JOHN EDSTROM,

*Petitioner,*

v.

STATE OF MINNESOTA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Minnesota**

## BRIEF OF *AMICI CURIAE* FOURTH AMENDMENT SCHOLARS IN SUPPORT OF PETITIONER

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## INTRODUCTION

*Amici curiae* submit this Brief in support of Petitioner, and urge the Court to grant the Petition for a Writ of Certiorari filed in this case which seeks reversal of the Minnesota Supreme Court's decision.

## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* are criminal law and criminal procedure professors who teach, study, speak, and write about the Fourth Amendment. *Amici* submit this brief in support of Petitioner's position that the Minnesota Supreme Court erred in refusing to extend Fourth Amendment protection to a warrantless drug-dog sniff of his apartment door and door seam. No other brief in this case applies the traditional Fourth Amendment analysis in considering whether the exterior side of an apartment's front door and the door's seam are part of the "house[]" or, alternatively, the house's curtilage for Fourth Amendment purposes. And that in using a sense-enhancing tool—the detection dog's nose—which physically encroached on Petitioner's door and door seam while gathering information about the home's interior, law enforcement performed a "search"

[1] The parties have consented to the filing of this brief. The parties were notified of the intention to file this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

within the original understanding of the Fourth Amendment.

## SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari filed in this case asks the Court to consider whether using a drug-sniffing dog on an apartment's front door and door seam to investigate the contents of the home is a "search" within the meaning of the Fourth Amendment. The Minnesota Supreme Court upheld the warrantless drug-dog sniff of Petitioner's apartment front door and door seam under both a traditional Fourth Amendment analysis, as well as *Katz*'s privacy-expectations test. *See State v. Edstrom*, 916 N.W.2d 512, 514, 520-21 (Minn. 2018).

Under the Fourth Amendment's traditional interpretation, the exterior side of an apartment's front door and the door's associated seam are part of the "house[]" or, alternatively, the house's curtilage for Fourth Amendment purposes. And that in using a sense-enhancing tool—the detection dog's nose—which physically encroached on Petitioner's door and door seam while gathering information about the home's interior, law enforcement performed a "search" within the original understanding of the Fourth Amendment.

To support Petitioner's traditional Fourth Amendment argument, *Amici* use property law to establish that apartment tenants retain a property interest in

the exterior side of their apartment's front door, even though that door oftentimes opens onto a common hallway. *Cf. Byrd v. United States*, 138 S. Ct. 1518, 1531 (2018) (Thomas, J., concurring).

In close-proximity sniffs, such as a drug-dog's sniff of an apartment's door and door seam, it is the location of the drug-dog's *nose*, not its feet, that must drive the Fourth Amendment's traditional analysis. *Jardines*' treatment of a home's publicly accessible curtilage should *also* control the traditional analysis of the publicly accessible part of Petitioner's apartment home—his front door and door seam. *Cf. Florida v. Jardines*, 569 U.S. 1, 8-9 (2013). Because the drug-dog's nose physically encroached on Petitioner's house or, alternatively, curtilage to gather information about his apartment's interior, police performed a warrantless search in violation of the Fourth Amendment.

## ARGUMENT

The Petition for a Writ of Certiorari filed in this case asks the Court to consider a question that is both recurring and important in the administration of criminal justice—whether using a drug-sniffing dog on an apartment's front door and door seam to investigate the contents of the home is a "search" within the meaning of the Fourth Amendment.

The Minnesota Supreme Court upheld the warrantless drug-dog sniff of Petitioner's apartment door and door seam under both the U.S. Fourth Amendment

and the Minnesota Constitution. *State v. Edstrom*, 916 N.W.2d 512, 514 (Minn. 2018). That court concluded that the drug-dog sniff at issue here violated neither the traditional Fourth Amendment analysis—holding that "the area immediately adjacent to Edstrom's apartment door is [not] part of the curtilage of his apartment, and therefore part of a constitutionally protected area," *id*. at 521—nor *Katz*'s privacy-expectations test[2]—holding that "[b]ecause the narcotics-dog sniff could identify only the presence or absence of contraband, . . . the police did not violate Edstrom's reasonable expectation of privacy." *Edstrom*, 916 N.W.2d at 522-23.

*Amici* contend that in close-proximity sniffs, such as a drug-dog's sniff of an apartment's door and door seam, it is the location of the drug-dog's *nose*, not its feet, that must drive the Fourth Amendment's traditional analysis. Here, however, in finding that the Fourth Amendment's traditional interpretation was not violated, the Minnesota Supreme Court limited its consideration to whether the area "immediately adjacent" to Petitioner's apartment door was within the apartment's curtilage. *Id.* at 517, 521 (presenting the question as "whether the area outside Edstrom's apartment door is a constitutionally protected area").

As the issue was framed, the Minnesota Supreme Court necessarily focused on the location of the dog's feet but ignored the location of law enforcement's sense-enhancing tool—the dog's nose—and the fact

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[2] *See Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

that the dog's nose was apparently "on the [apartment's] door" and door seam while conducting the drug-detection sniff. *See id.* at 525 & n.2 (Lillehaug, J., dissenting) ("The search warrant affidavit states that the dog sniff occurred 'on the door.' This statement suggests that *the dog's nose touched the door*.") (emphasis added); *see also id.* at 518 (majority opinion) (noting that Edstrom's counsel argued that the drug-dog sniff took place within Petitioner's curtilage because the detection dog "sniffed the [apartment's] door and the door seam").[3]

The Minnesota Supreme Court's loose framing of the surveilled-location question was outcome determinative in reaching its conclusion that Petitioner's apartment front door and door seam were not constitutionally protected areas. And, the court's omission of any consideration of Petitioner's property interest in his front door was equally problematic. In essence, the court assumed (without analysis of the issue) that the *potential* for public access to Petitioner's apartment door and door seam trumped his demonstrable property rights in those locations for Fourth Amendment purposes—an error that represents a fundamental misunderstanding of the Fourth Amendment's traditional analysis. In view of the importance of the issues presented, *Amici* suggest that this case presents an

[3] In contrast, the majority took the view that the record had not "precisely" described the location of the drug-dog sniff. *See id.* at 515 n.1. However, the court then described the search warrant application as stating that the detection dog alerted "at the door seam" of Petitioner's apartment. *See id.* (internal quotation marks omitted).

ideal vehicle by which to provide much needed guidance on how the Fourth Amendment's traditional approach should apply to this recurring fact situation. *Cf. Carpenter v. United States*, 138 S. Ct. 2206, 2268 (2018) (Gorsuch, J., dissenting) ("American courts are pretty rusty at applying the traditional approach to the Fourth Amendment.").

At an "irreducible constitutional minimum" under the Fourth Amendment's original meaning, the exterior side of an apartment's front door and the door's associated seam are part of the "house[]" itself or, alternately, the home's curtilage for Fourth Amendment purposes. *Cf. United States v. Jones*, 565 U.S. 400, 414 (2012) (Sotomayor, J., concurring). For an apartment, then—regardless of any *additional* areas in the common hallway onto which the apartment's front door opens that should *also* qualify as curtilage—at a bare minimum, the exterior side of Petitioner's apartment door and door seam were entitled to protection against warrantless police investigation. Therefore, law enforcement's warrantless physical encroachment onto Petitioner's house or, alternatively, curtilage while using a surveillance technique that discloses information about the home's interior violated the traditional understanding of the Fourth Amendment.

## I. Under the Traditional Analysis, the Fourth Amendment Is Violated If Police, Without a Warrant, Use a Sense-Enhancing Tool on a House's Front Door or Door Seam to Gather Information about the Home's Interior.

The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated." U.S. CONST. amend. IV. Since our nation's founding, in order for police to enter onto a person's homestead to conduct an investigation, the Fourth Amendment required law enforcement to have a warrant, consent, or exigent circumstances. *See Steagald v. United States*, 451 U.S. 204, 211-12 (1981); *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978).

The home is a constitutionally protected area for which the Court has afforded the "most stringent" Fourth Amendment protection. *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976). As the Court explained in *Kyllo v. United States*, "the Fourth Amendment draws 'a firm line at the entrance to the house' . . . [a line that] must be not only firm but also bright . . . ." 533 U.S. 27, 40 (2001) (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)). It has long been accepted that the search of a house must be performed pursuant to a search warrant supported by probable cause. *See Agnello v. United States*, 269 U.S. 20, 33 (1925) ("Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a

warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."). Additionally, an apartment is a "house[]" for Fourth Amendment purposes. *See McDonald v. United States*, 335 U.S. 451, 452, 455 (1948) (rejecting the warrantless search of a rented room in a boarding house; "We are not dealing with formalities. The presence of a search warrant serves a high function."); *cf. Carpenter*, 138 S. Ct. at 2269 ("Where houses are concerned, for example, individuals can enjoy Fourth Amendment protection without fee simple title.").

### A. Location Matters: The Fourth Amendment's Traditional Interpretation Requires Consideration of Whether Law Enforcement's Warrantless Information-Gathering Arises From a Physical Encroachment on a Constitutionally Protected Area.

Based upon the Fourth Amendment's original meaning, law enforcement's physical entry upon and occupation of a constitutionally protected area to gather information is a "search." *Jones*, 565 U.S. at 404 (majority opinion) (holding that the government's warrantless installation of a GPS-device on Jones' vehicle to monitor its movements was a "search" because the government had "physically occupied private property for the purpose of obtaining information"). In *Florida v. Jardines*, also a traditional Fourth Amendment case, without a warrant law enforcement brought a drug-sniffing dog onto the front porch of Jardines' home to

sniff at the base of his front door. 569 U.S. 1, 4-5 (2013). The resulting positive canine alert was used to obtain a search warrant for the home; with that search revealing the marijuana plants for which Jardines was arrested. *Id*. at 5.

In rejecting the warrantless drug-dog sniff, *Jardines* focused on the "officers' behavior" within Jardines' curtilage, not on the lawfulness of the canine sniff itself. *Id*. at 9 & n.3 ("It is not the dog that is the problem, but the behavior that here involved use of the dog."). *Jardines* held that by gathering information—i.e., conducting the canine sniff—while physically present in the home's curtilage, law enforcement had performed a search because the officers' investigation within the curtilage was "not explicitly or implicitly permitted by the homeowner." *Id.* at 6.

### 1. Petitioner's Apartment Front Door and Door Seam Are Integral Parts of His Apartment, and Are Therefore Part of His "House[ ]" for Fourth Amendment Purposes.

The Court has long recognized that surveillance of a home, conducted by physically intrusive means, violates the traditional understanding of the Fourth Amendment. In *Silverman v. United States*, for example, the Court rejected as violating the Fourth Amendment the government's use of a "spike mike" to eavesdrop on the conversations of the neighboring premises' occupants. 365 U.S. 505, 509-10 (1961). A

thorough examination of the spike-mike surveillance used in *Silverman* is instructive to Petitioner's case; both of these warrantless surveillance tactics involved simple contact with an appurtenant[4] of the premises—the outer surface of the heating duct in *Silverman* and the exterior side of Petitioner's front door and its door seam here—without any physical invasion of either of the premises' close.

The officers in *Silverman* used a vacant row house (with the permission of its owner) that adjoined the defendants' premises as a vantage point from which to conduct surveillance on the defendants' suspected illegal gambling operation. *Id.* at 506. From there, the officers inserted the spike mike "several inches into the party wall" between the row houses until the spike mike "made contact with a heating duct serving the house occupied by the [defendants,] thus converting their entire heating system into a conductor of sound." *Id*. at 506-07.

The D.C. Circuit Court of Appeals—which affirmed the trial court's decision to admit testimony about conversations overheard by the spike mike—considered the spike mike's location in the party wall to be, at most, a technical trespass. *See Silverman v. United States*, 275 F.2d 173, 178 (1960), *rev'd*, 365 U.S. (1961). As that court described it, the spike mike's antenna penetrated the party wall—which was thirteen to fourteen inches thick—"about half way" (or "7 1/8 inches"), which the defendants had argued meant that

[4] *See infra* note 6.

"a 'trespass' occurred by as much as 5/16ths of an inch." *See id.* The D.C. Circuit rejected the defendants' argument, however, explaining that "[w]e are unwilling to believe that the respective rights [under the Fourth Amendment] are to be measured in fractions of inches." *Id.*

*Silverman* disagreed. "Once the spike *touched* the heating duct," the heating duct itself became in essence "a giant microphone" that allowed the officers to overhear conversations that took place throughout the premises. *Silverman*, 365 U.S. at 509 (emphasis added) (quoting *Silverman*, 275 F.2d at 179) (Washington, J., dissenting)). To the *Silverman* Court, it had not mattered that there was "little direct evidence" in the case concerning precisely how far into the party wall the spike mike had extended. *See id.* (internal quotation marks omitted). It was enough that the spike mike "*made contact*" with the heating duct—which *Silverman* described as "*an integral part* of the [defendants'] premises." *See id*. at 509-10 (emphasis added); *see also United States v. Jones*, 625 F.3d 766, 770 (D.C. Cir. 2010) (Kavanaugh, J., dissenting from denial of rehearing) (observing that because police made "physical contact with the defendants' property [in *Silverman*,] . . . Fourth Amendment protection [was triggered] regardless of the precise details of state or local trespass law"), *aff'd in part*, 565 U.S. 400 (2012).

And, in a later spike-mike case, the Court relied on *Silverman* in rejecting the warrantless surveillance of the defendant's apartment, even though the spike mike in that case seemingly made no actual contact

with any part of her apartment. *See Clinton v. Virginia*, 377 U.S. 158, 158 (1964) (per curiam). In the proceedings below, the Virginia Supreme Court described the spike-mike surveillance of the defendant's apartment as follows:

> The uncontradicted evidence is that [the spike mike] was not driven into the wall [between the two apartments], but was 'stuck in' [the wall of the neighboring apartment from which the officers were conducting surveillance on Clinton's apartment]. This is the only evidence as to any penetration of the party wall and it is reasonable to assume that the penetration was very slight such as one made by a thumb tack to hold the small device in place.

*Clinton v. Commonwealth*, 130 S.E.2d 437, 442 (Va. 1963), *rev'd*, 377 U.S. 158 (1964). In a brief, per curiam opinion—which cited *Silverman*—the Court reversed the Virginia Supreme Court's decision to admit into evidence conversations overhead by warrantless use of the spike mike. *See Clinton*, 377 U.S. at 158. And, although *Clinton* did not discuss the "contact" issue, this case illustrates that the Court did not impose onerous burdens regarding proof of "contact" in earlier, traditional Fourth Amendment cases. *Cf. id.* Close proximity of the surveillance device to Clinton's apartment—without actual contact[5]—was seemingly

[5] With that said, Justice Clark—in an equally brief concurrence in *Clinton*—explained that he concurred in the decision because the Court found that the spike mike had "penetrated [Clinton's] premises *sufficiently to be an actual trespass thereof*." *See id.* at 158 (Clark, J., concurring) (emphasis added). Although

enough for the Court to require a warrant for police to conduct the surveillance. *Cf. id.*; *see also infra* Section I.A.2.

In this case, the warrantless drug-dog sniff of Petitioner's apartment violated the Fourth Amendment because it was made possible by "contact" with "an integral part" of Petitioner's apartment—the exterior side of his front door and door seam. *See Silverman*, 365 U.S. at 509-10; *Edstrom*, 916 N.W.2d at 526-27 (Lillehaug, J., dissenting) ("An apartment door and its threshold are integral parts of the apartment."). As with the location of the officers' feet in *Silverman*—which were lawfully situated in the neighboring row house during the spike mike-enabled surveillance, *see Silverman*, 365 U.S. at 506—by framing the issue as turning on, for all intents and purposes, the location of the drug-dog's feet, *see Edstrom*, 916 N.W.2d at 514, 518 (majority opinion), the Minnesota Supreme Court overlooked *Silverman* and *Clinton*, cases that directly address the sort of warrantless home surveillance that occurred here.

In regard to Petitioner's apartment door seam, *Silverman* again provides critical guidance. Making contact with the outer surface of the heating duct in *Silverman* allowed law enforcement to gather information from throughout the defendants' entire house. *See Silverman*, 365 U.S. at 509. Here, physically

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opaque, Justice Clark's concurrence supports *Amici*'s position that the Court, in the immediate aftermath of *Silverman*, did not stop to parse a defendant's "contact" facts in requiring a warrant for physically encroaching surveillance techniques directed at the home.

encroaching on the outer surface or edge of Petitioner's front door—the door's seam—also allowed law enforcement to gather information about the interior of Petitioner's home.

Based on *Silverman*, sometimes fractions of an inch do matter. *See Silverman*, 365 U.S. at 512 (refusing to reexamine *Goldman v. United States*, 316 U.S. 129 (1942)—which involved the warrantless use of a detectaphone placed against an office wall to listen to conversations taking place in the office next door—but "declin[ing] to go beyond [*Goldman*], by even a fraction of an inch"); *see also Clinton*, 377 U.S. at 158. Here, both the search warrant application and Petitioner's argument and briefing in the courts below support the view that the drug-dog in this case physically encroached on Petitioner's apartment door and door seam in performing the sniff. *See Edstrom*, 916 N.W.2d at 515 n.1, 518; *id.* at 525 & n.2 (Lillehaug, J., dissenting).

Under the Fourth Amendment's traditional analysis, the physical encroachment of the drug-dog's nose on Petitioner's apartment door and door seam to gather information about the interior of his home makes all the constitutional difference in this case. And while the drug-dog sniff here was performed without physical entry into Petitioner's home, this warrantless information-gathering technique invaded Petitioner's "indefeasible right of personal security, personal liberty, and private property . . . ." *See Boyd v. United States*, 116 U.S. 616, 630, 635 (1886) ("[I]llegitimate and unconstitutional practices get their first

footing . . . by silent approaches and slight deviations from legal modes of procedure.").

#### a. Petitioner Had a Protected Property Interest in the Surveilled Location—His Apartment's Front Door and Door Seam.

In addition to establishing that a warrantless police investigation intruded on a constitutionally protected area, a defendant must also show a property interest in the surveilled item or location. *See Byrd v. United States*, 138 S. Ct. 1518, 1531 (2018) (Thomas, J., concurring) (requiring that, on remand, Byrd establish a property interest in the rental car that police searched). Therefore, to support his traditional argument Petitioner points to property law (as well as common sense) to establish that (1) the exterior side of his apartment's front door and door seam are part of his "house[]" or, alternatively, curtilage for Fourth Amendment purposes, even though the door opens onto a common hallway, and (2) he has a property interest in the exterior side of his apartment's front door and door seam. *Cf. id.*

For example, the Washington Supreme Court, sitting en banc, has addressed this issue in the context of a First Amendment challenge to a public housing regulation that prohibited residents of a public housing project from posting expressive materials on the exterior side of their apartment doors. *See Resident Action Council v. Seattle Hous. Auth.*, 174 P.3d 84, 85-86 (Wash. 2008) (en banc). Specifically, the court

considered whether tenants have a property interest in the exterior side of their doors and determined that, under Washington property law, the exterior side of an apartment's door is part of the leased premises. *See id.* at 89 ("In the eyes and minds of tenants and the public, the outer surface of the door represents the outer boundary of the tenants' homes."). Further, tenants retained property rights in that area even though the door opened onto the apartment building's common hallway. *See id.* at 88.

The Washington Supreme Court concluded that an apartment's front door is an appurtenant[6] to the leased premises and is therefore "part of the leased premises." *Id.* at 87 ("Unlike . . . hallways and other such common areas, other tenants and the general public have no right of access to the outer surface of unit doors."). As the court explained:

> Nor does a landlord's control over a hallway, in itself, signal the landlord's intent to reserve control over an adjoining surface that is not common. It is not significant to this inquiry that the door, when closed, serves as part of the hallway. To the extent that a resident's use of his or her door does not interfere with use of the common area, *the landlord's control*

[6] The Washington Supreme Court explained the meaning of "appurtenant" as follows: "Under Washington law, as a general rule, areas that are necessary to a tenant's use of the premises, and are for the exclusive use of the tenant and tenant's invitees, pass as an appurtenant to the leased premises though not specifically mentioned or described therein." *Id*. at 87.

> *over the common area does not imply a reservation of control over the adjacent door*.

*Id.* at 88 (emphasis added); *accord Nyer v. Munoz-Mendozo*, 430 N.E.2d 1214, 1216 (Mass. 1982) (applying Massachusetts property law). The exterior side of an apartment's door is an appurtenant to (or part of) the leased premises, even though that door oftentimes opens onto a common hallway.

Here, Petitioner has established a property interest, at least for some purposes, in the exterior side of his apartment's front door. *Cf. Byrd*, 138 S. Ct. at 1531 (posing the question of "what body of law determines whether that property interest is present—modern state law, the common law of 1791, or something else?"); *Carpenter*, 138 S. Ct. at 2268, 2271 ("Nor does [the Fourth Amendment's traditional interpretation] mean protecting only the specific rights known at the founding; it means protecting their modern analogues too.").

The potential for public access to Petitioner's front door and door seam—albeit limited in this case since Petitioner's door was located "inside a locked hallway, secured against members of the public," *see Edstrom*, 916 N.W.2d at 528 (Lillehaug, J., dissenting)—does not trump Petitioner's property interest in those areas. On this point, this case is analogous to *Jardines*, where Jardines' front porch received Fourth Amendment protection even though that area was both visible and accessible to the public for certain limited purposes. *See Jardines*, 569 U.S. at 8 ("This implicit license typically permits the visitor to approach the home by the front

path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.").

Further, just as in *Jardines* the potential for public access to the searched location in *Jones*—the undercarriage of Jones' vehicle—did not defeat his traditional Fourth-Amendment protection against warrantless, physically intrusive surveillance of that area. *See Jones*, 565 U.S. at 408-09. Although Jones seemingly took no action to prevent members of the public from accessing the undercarriage of his vehicle—i.e., viewing it or even touching it, if some curious person were so inclined—the Fourth Amendment was violated when the government did that very thing by installing and then monitoring the GPS-device at issue there. *See id.* at 404-05.

Here, the exterior side of Petitioner's apartment front door and door seam were part of his home, even though those areas were accessible to the building's other occupants for certain limited purposes, such as a social visit, or even police for purposes of conducting a knock-and-talk interaction with Petitioner.[7] Therefore, *Jardines*' treatment of a home's publicly accessible curtilage should *also* control the traditional analysis of the publicly accessible part of Petitioner's apartment home—his front door and door seam. *Cf. Jardines*, 569 U.S. at 8-9; *see also Edstrom*, 916 N.W.2d at 526 ("This case is on all fours with *Jardines*.").

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[7] *See Kentucky v. King*, 563 U.S. 452, 469 (2011) ("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do.").

Additionally, the Minnesota Supreme Court erred in its conclusion that the building owner's installation of a "Knox Box"[8] somehow authorized law enforcement to do more with respect to Petitioner's apartment than simply to knock on its door to engage Petitioner in a consensual encounter. *Cf. Edstrom*, 916 N.W.2d at 520 & n.8. The caselaw is clear that landlords and hotel clerks lack the authority to authorize police to conduct a warrantless search of a rented room or apartment. *See Stoner v. California*, 376 U.S. 483, 487-88 (1964) (hotel room); *Chapman v. United States*, 365 U.S. 610, 616-17 (1961) (rented house); *McDonald*, 335 U.S. at 456 (rented room). In this case, the building owner lacked the authority—either explicitly or implicitly—to authorize the physically invasive drug-dog sniff of Petitioner's front door and door seam that occurred here.

### 2. Alternatively, Petitioner's Apartment Front Door and Door Seam Are Curtilage Areas that Are Entitled to Fourth Amendment Protection.

In addition to the home, the Fourth Amendment also protects the home's curtilage—"the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Oliver v. United States*, 466 U.S. 170, 180 (1984) (quoting

[8] A Knox Box is a locked key box that building owners may install "to facilitate law enforcement access in cases of medical emergencies" and police investigation, including "dog sniffs." *Edstrom*, 916 N.W.2d at 516 (majority opinion).

*Boyd*, 116 U.S. at 630). "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *California v. Ciraolo*, 476 U.S. 207, 213 (1986). The Court considers a home's curtilage to be "part of the home itself for Fourth Amendment purposes," and extends Fourth Amendment protection to those areas accordingly. *See Jardines*, 569 U.S. at 6; *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018). While "visual observation" of a home's curtilage from a publicly available location is permissible, warrantless information-gathering that arises through an "unlicensed physical intrusion" violates the Fourth Amendment. *See Jardines*, 569 U.S. at 7 ("[A]n officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas.").

To assert a claim for protection under the Fourth Amendment's traditional basis, Petitioner must establish that the warrantless drug-dog sniff of his apartment was made possible by physical encroachment of the drug-dog's nose on a constitutionally protected area, and that Petitioner had a property interest in the surveilled location—the exterior side of his door. *Cf. Byrd*, 138 S. Ct. at 1531; *see supra* Section I.A.1.a. On the curtilage question, while an apartment's front door and door seam are clearly "intimately linked to the home, both physically and psychologically," *see Ciraolo*, 476 U.S. at 213, these areas also harbor "intimate activity associated with the sanctity of a man's

home and the privacies of life." *See Oliver*, 466 U.S. at 180 (internal quotation marks omitted).

Although most apartments lack a front porch, apartment dwellers, of course, also receive visitors to their front doors. Here too, "background social norms" reflect that these visitors would be expected to "knock promptly [on the apartment's front door], wait briefly to be received, and then . . . leave." *See Jardines*, 569 U.S. at 8-9. Regardless of the precise location in the common hallway where the visitor stood when knocking—i.e., was the visitor standing on the apartment's doormat or instead, perhaps, an arm's length away from the apartment's door?—nothing about the "traditional invitation" described in *Jardines* suggests that the visitor could, instead of knocking, perform a "canine forensic investigation" of the apartment's front door and door seam. *Cf. id.* at 8-9. As in *Jardines*, this "unlicensed physical intrusion" upon the apartment's front door and door seam "would inspire most of us to—well, call the police." *Cf. id.* at 7, 9.

Further, the fact that an apartment's front door and door seam are, to some extent, publicly accessible areas is largely beside the point.[9] *See supra* Section

[9] *Amici* agree with Justice Lillehaug's analysis in his *Edstrom* dissent below that the curtilage question in this case should be evaluated under *Jardines*, rather than the *Dunn* factors that the Minnesota Supreme Court used in finding that Petitioner's door and door seam were not within his apartment's curtilage. *See Edstrom*, 916 N.W.2d at 526 (Lillehaug, J., dissenting); *see also id.* at 518 (majority opinion) (applying the curtilage factors set out in *United States v. Dunn*, 480 U.S. 294 (1987)). In *Dunn*, the Court was asked to determine whether a barn—located

I.A.1.a. *Amici* suggest that when considering an apartment-sniff, courts that focus their analyses on whether the officers and the drug-dog are standing in a common hallway—they often are—have done only part of the job. Courts must also consider the critically important issue of the location of the drug-dog's nose. *Jardines* used the location of the law-enforcement actors' feet to make the point that the front porch was within the home's curtilage, even though homeowners typically take no action to prevent others from observing or accessing their front porches—a potential consideration under the *Katz* test. *See Jardines*, 569 U.S. at 7-8 (noting the location of the detectives' and the drug-dog's feet, and explaining that "[t]he front porch is the classic exemplar of an area adjacent to the home and to which the activity of home life extends.") (internal quotation marks omitted). *Jardines* did not call for and did not address the additional Fourth Amendment concern raised by the location of law enforcement's sense-enhancing *tool*—the drug-dog's nose.

The remaining question, then, is whether the drug-dog's sniff in this case did that very thing—i.e.,

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some fifty yards beyond the fence that enclosed a ranch house on an isolated 198-acre tract of rural property—was part of the ranch home's curtilage for Fourth Amendment purposes. *See Dunn*, 480 U.S. at 297. *Amici* agree with the dissent below that using the *Dunn* factors in curtilage determinations involving most suburban or urban houses and apartments is problematic, and that *Jardines* provides a much better fit for addressing curtilage questions in those cases. *Cf. Collins*, 138 S. Ct. at 1671 (analyzing a curtilage question involving a suburban home under *Jardines*, without mentioning *Dunn*).

was the sniff made possible by physical encroachment of the drug-dog's nose on Petitioner's curtilage? Important here, for optimal sniff conditions it is preferred that the drug-dog's nose make contact with the sniffed item or location. On that point, the scientific literature supports our everyday experience that when a dog hones in on a scent source—even the family dog when looking for that lost french fry—the dog engages in "very close proximity" sniffing. *See, e.g.*, Gary Settles, *Sniffers: Fluid Dynamic Sampling for Olfactory Trace Detection in Nature and Homeland Security—The 2004 Freeman Scholar Lecture*, 127 J. OF FLUIDS ENG'G 189, 198-99 (2005), *available at* http://www.mne.psu.edu/psgdl/Pubs/2005-Settles-JFE.pdf (observing that a detection dog's ability to "'read' detailed olfactory 'messages' " is directly tied to "proximity sniffing" and that therefore "in order to properly interrogate chemical traces it really is necessary for a dog to poke its nose into everyone's business."); Gary S. Settles, et al., *The External Aerodynamics of Canine Olfaction, in* SENSORS AND SENSING IN BIOLOGY AND ENGINEERING 323, 323-24 (Friedrich G. Barth et al. eds., 2003) (noting that "[c]lose nostril proximity to a scent source is important," and that "the detailed spatial distribution of a scent source can only be discerned when the nostril is brought into very close proximity with it").

The record in this case supports the unsurprising notion that the drug-dog's nose made contact with Petitioner's door and door seam. *See Edstrom*, 916 N.W.2d at 515 n.1, 518 (majority opinion); *id.* at 525 & n.2 (Lillehaug, J., dissenting). On the one hand, that

physical encroachment is critically important in ensuring that the resulting canine alert is reliable. *See generally Florida v. Harris*, 568 U.S. 237 (2013) (discussing canine reliability for detecting contraband hidden in vehicles). On the other, however, the physically invasive contact that occurred in this case is the very reason that a warrant was required to perform the drug-dog sniff of Petitioner's apartment.

## II. Under the *Katz* Test, the Fourth Amendment Is Also Violated If Police, Without a Warrant, Use a Sense-Enhancing Tool on a House's Front Door or Door Seam to Gather Information about the Home's Interior.

In addition to the Fourth Amendment's traditional meaning, a "search" also occurs when the government intrudes upon a person's "constitutionally reasonable expectation of privacy." *Katz*, 389 U.S. at 360. In *Jardines*, although the majority relied on the Fourth Amendment's traditional meaning in rejecting the warrantless drug-dog sniff of Jardines' home, a three-Justice concurrence arrived at the same conclusion by applying the *Katz* test. *See* 569 U.S. at 14 (2013) (Kagan, J., concurring) ("Jardines' home was his property; it was also his most intimate and familiar space. The analysis proceeding from each of those facts, as today's decision reveals, runs mostly along the same path.").

The Minnesota Supreme Court refused to apply the *Jardines* concurrence's analysis in this case, however, concluding instead that people lack a legitimate expectation of privacy in contraband hidden inside their homes. *See Edstrom*, 916 N.W.2d at 522-23. Although the Court has said as much in cases involving drug-dog sniffs in lesser privacy contexts—like luggage- and vehicle-sniffs, *see United States v. Place*, 462 U.S. 696, 706 (1983); *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)—the Court has not suggested the same would be true for contraband hidden inside a person's home. *See United States v. Jeffers*, 342 U.S. 48, 53-54 (1951); *Johnson v. United States*, 333 U.S. 10, 14 (1948).

For this and other reasons, *Amici* argue that the *Jardines*' concurrence got it right and that therefore the outcome of the Fourth Amendment question here is the same under the *Katz* test—that a warrant was required to perform the drug-dog sniff of Petitioner's apartment because that surveillance technique revealed information about his home's interior that would not otherwise have been available without physical entry into Petitioner's home.

## CONCLUSION

For these reasons, *Amici* respectfully urge that the Petition for a Writ of Certiorari be granted, and that the decision of the Minnesota Supreme Court be reversed.

Respectfully submitted,

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