No. 20-1747

IN THE

Supreme Court of the United States

ERICH G. SORENSON,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MASSACHUSETTS APPEALS COURT

BRIEF FOR AMICI CURIAE THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE, THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, AND THE NYU CENTER ON RACE, INEQUALITY, AND THE LAW IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School strives through research-based solutions and remedies to ensure that all members of society have equal access to the opportunities, responsibilities, and privileges of membership in the United States. Following the model laid out by Charles Hamilton Houston in bringing social science research to bear on issues of racial discrimination and subordination in the law, the Institute acts as a bridge between scholarship, law, policy, and practice, using a "Community Justice" model.

The Fred T. Korematsu Center for Law and Equality is a nonprofit organization based at the Seattle University School of Law that works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu, who defied military orders during World War II that ultimately led to the unlawful incarceration of 120,000 Japanese Americans, the Korematsu Center has a special interest in ensuring that individuals' civil rights are not infringed by government action.

The Center on Race, Inequality, and the Law at New York University School of Law was created to confront the laws, policies, and practices that lead to the oppression and marginalization of people of color across the United States. A top priority of the Center

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of amici's intent to file this brief at least 10 days prior to its due date. The parties have consented to the filing of this brief.

is reform of the criminal legal system to eliminate racial inequality in all its forms. The Center fulfills its mission through public education, research, advocacy, and litigation.[2]

Amici are interested in—and concerned about—the decision below because it further entrenches a longstanding split of authority that erodes the constitutional rights of large swaths of U.S. residents. More particularly, the decision's preventable and uneven effects disparately deny core Fourth Amendment protections to people of color, who are more likely to live in multi-unit dwellings and to be exposed to police contact because of decades-old patterns of racial discrimination—patterns with persistent modern effects.

INTRODUCTION AND SUMMARY OF ARGUMENT

At the "very core" of the Fourth Amendment is a person's "'right … to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013). The conflict among lower courts at issue here, as with other splits of authority, arbitrarily conditions that core constitutional right on the jurisdiction in which an individual lives. But it also does more than that: It conditions a person's rights on what specific *kind of home* she occupies. And that, in turn, has the effect of unequally distributing Fourth Amendment protections to individuals of different races, ages, and income levels, among other characteristics. Because people of color, urban residents, immigrants, young people, and people with fewer financial resources disproportionately live in multi-unit dwellings, those individuals bear the brunt of

[2] None of the amici organizations represents the official views of the university with which it is affiliated.

rules denying the curtilage designation to areas immediately adjacent to apartments in such dwellings. And because most if not all individuals will fall into one of those categories at some point in their lives, those uneven effects are far-reaching.

While all those disparities are troubling, the racial disparities are of greatest concern to amici, because they result from decades of government action (and inaction) that have disproportionately clustered people of color in high-density, poorer urban neighborhoods. Moreover, those neighborhoods are already more heavily policed—i.e., police presence is higher, police intervention occurs more frequently, and police tactics are more invasive than in predominantly white neighborhoods. Thus, rulings like the one below disproportionately affect people of color twice over: Not only are they more likely to live in multi-family dwellings, but they are also more likely to be subject to police action in the first place. This Court should grant review to ensure that core Fourth Amendment protections are not denied to those very communities that need them the most.

Further, the dense, urban neighborhoods that house many of today's multi-family dwellings bear little resemblance to the rural settings in which this Court's curtilage jurisprudence originated. One of those seminal curtilage cases, *United States* v. *Dunn*, 480 U.S. 294 (1987), articulated factors that courts (including the courts on either side of the split here) have applied inconsistently in urban settings. This Court's guidance is needed to clarify whether and how the *Dunn* framework applies in urban contexts like the one at issue in this case. The Court's intervention is also warranted to reject the apparent view of the court below that something approaching *absolute* privacy or exclusivity is

required under that framework before an individual can enjoy Fourth Amendment protection at the threshold of her home. As a matter of both precedent and principle, that cannot be right: Neither property nor privacy interests evaporate the moment a space is shared for certain limited purposes.

In short, this Court should grant certiorari to make clear that under the Fourth Amendment, a "home is a home," whether it is a "vast estate secluded from the public" or a "high-rise apartment in the middle of a busy city." *State* v. *Rendon*, 477 S.W.3d 805, 812 (Tex. Crim. App. 2015) (Richardson, J., concurring). If, as this Court has said, "[t]he most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion," *Collins* v. *Virginia*, 138 S. Ct. 1663, 1675 (2018), the ruling below should not stand.

ARGUMENT

I. THE ENTRENCHED SPLIT AT ISSUE HERE RESULTS IN ARBITRARY RACIAL, ETHNIC, CLASS-BASED, AND GEOGRAPHIC DISPARITIES IN FOURTH AMENDMENT PROTECTION

The rule upheld by the court below and jurisdictions like it—that areas immediately adjacent to apartments in multi-family dwellings are not curtilage—has far-reaching effects: More than a quarter of all households nationwide (31.5 million) occupy multi-unit dwellings. *See* U.S. Census Bureau, *Households and Families: 2019 American Community Survey*, https://tinyurl.com/censusdata-household. Those 31.5 million households, moreover, are disproportionately composed of people of color, immigrants, urban dwellers, people of lower socio-economic status, young

people, and people who rent as opposed to own their homes. Because all these individuals are more likely to live in multi-unit buildings, they are heavily affected by rules that deny the curtilage designation to areas immediately adjacent to apartments in multi-unit dwellings. This Court should thus grant review to ensure that core "Fourth Amendment protections" are not "apportion[ed] … on grounds that correlate with income, race," and similar factors, *United States* v. *Whitaker*, 820 F.3d 849, 854 (7th Cir. 2016).

1. People of color and immigrants are far more likely than whites and non-immigrants to live in multi-unit dwellings. The racial disparity is greatest among Black households. As of 2019, while only 24% of white households live in multi-unit buildings, 41% of Black households do. U.S. Census Bureau, *American Housing Survey Table Creator*, https://tinyurl.com/census data-race. But the imbalance exists across other racial and ethnic groups too: For example, 36% of Hispanic-origin and Asian-origin households live in multi-unit buildings. *Id.*; *see also Whitaker*, 820 F.3d at 854 (noting similar disparities based on 2013 data). Similarly, "immigrant-headed households are more likely than households with a U.S.-born head to rent their homes (49[%] versus 33[%]), and are more likely to live in apartment buildings and smaller housing units." Bipartisan Policy Center, *Immigration and Housing: Supply, Demand, and Characteristics* 1 (Sept. 15, 2014), https://tinyurl.com/bipartisanpolicyreport.

Moreover, homeownership rates among people of color are particularly low in several of the jurisdictions where the Fourth Amendment's curtilage protections are currently reserved only for those who live in a single-family home. (Homeownership rates—though not a perfect proxy—are relevant because of all owner-

occupied housing units, 89% are single-family homes, while most renters live in multi-family dwellings. *See* U.S. Census Bureau, *American Housing Survey Table Creator*, https://tinyurl.com/censusdata-tenure.) In Minnesota, for example—where apartment hallways are unprotected from drug-sniffing dogs, *see State* v. *Edstrom*, 916 N.W.2d 512, 521 (Minn. 2018)—only 25% of Black households (as compared to 76% of white households) are homeowners. *See* National Association of Realtors Research Group, *2021 Snapshot of Race and Home Buying in America* 8-9 (Feb. 2021), https://tinyurl.com/nar-snapshot. And in North Dakota—where a "secured, common hallway[]" in a locked apartment building is not considered curtilage, *see State* v. *Nguyen*, 841 N.W.2d 676, 678 (N.D. 2013)—only 5% of Black households (as compared to 66% of white households) own a home. *See 2021 Snapshot* 8-9. Given these disparities—which, as discussed *infra*, result from decades of discriminatory housing policies and practices—households of color, and in particular Black households, are disproportionately affected by any rule denying apartment dwellers protection from police action at their front doors.

2. Residents of multi-family dwellings are also (unsurprisingly) disproportionately concentrated in cities. While 26% of all U.S. households occupy multi-unit dwellings, *see* U.S. Census Bureau, *Households and Families: 2019 American Community Survey*, https://tinyurl.com/censusdata-household, that percentage rises to 40% or more in five of the country's largest cities—New York City, Los Angeles, Miami, Boston, and San Francisco. *See* U.S. Census Bureau, *American Housing Survey Table Creator*, https://tinyurl.com/censusdata-metro. By comparison, 78% of adults in rural areas live in single-family homes. *See* U.S. Census

Bureau, *New Census Data Show Differences Between Urban and Rural Populations* (Dec. 8, 2016), https://tinyurl.com/census-urbanrural. Moreover, the concentration of urban dwellers in multi-unit buildings is likely to increase as many cities prioritize high-density development over single-family homes. *See* Badger & Bui, *Cities Start To Question An American Ideal: A House With A Yard On Every Lot*, N.Y. Times (June 18, 2019) (explaining that several states and cities have contemplated ending single-family zoning), https://tinyurl.com/NYT-citiesquestionideal. As housing densities increase, without this Court's intervention more and more urban dwellers will be left without Fourth Amendment protection at the threshold to their homes, leaving them prone to the kinds of law-enforcement abuses that have plagued low-income communities of color for decades.

3. Those of lower socioeconomic status are also disproportionately likely to live in multi-unit dwellings. Given the costs associated with single-family residences, it is little surprise that 40% of households earning under $30,000 per year live in multi-unit dwellings, as compared to just 13.5% of households earning $100,000 or more per year. *See* U.S. Census Bureau, *American Housing Survey Table Creator*, https://tinyurl.com/censusdata-income; *see also Whitaker*, 820 F.3d at 854 (noting that, as of 2013, 40.9% of households earning less than $10,000 per year lived in detached, single-family homes compared to 84% of those earning more than $120,000 per year).[3]

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[3] The categories described above are, of course, interconnected: People of color (and immigrants, who are often people of color) are more likely to live in urban environments and to experience poverty. *See* Joint Center for Housing Studies of Harvard

Those same costs also drive many young people to multi-unit buildings. Given their generally lower levels of wealth, the vast majority of young adults are unable to purchase single-family homes, *see* Joint Center for Housing Studies of Harvard University, *America's Rental Housing – Meeting Challenges, Building on Opportunities* 15 (2011), https://tinyurl.com/Harvard JCHS-Rentals—a trend that is likely to continue, given that housing prices in nearly 90% of metropolitan areas have increased by more than 10% over the past year, *see* Friedman, *U.S. Home Prices Surge, Scaring Off Some Potential Buyers*, Wall St. J. (May 11, 2021), https://www.wsj.com/articles/u-s-home-prices-surge-higher-pricing-out-many-buyers-11620748183. And even renting a single-family home can be significantly more expensive than renting an apartment in a multi-family dwelling. *See* Joint Center for Housing Studies of Harvard University, *America's Rental Housing 2020*, at 17 (reporting higher rents for single-family homes than for apartments in midsized or small multi-family units), https://tinyurl.com/HarvardJCHS.

University, *America's Rental Housing – Meeting Challenges, Building on Opportunities* 15-16 (2011) ("minorities of all family types are much more likely to live in center cities than whites"), https://tinyurl.com/HarvardJCHS-Rentals; Parker et al., *Demographic and Economic Trends in Urban, Suburban, and Rural Communities* (May 22, 2018) (53% of urban counties "are majority nonwhite," versus only about one-in-ten suburban and rural counties, and "immigrants tend to be concentrated in big metropolitan areas"), https://tinyurl.com/pewdemographictrends; Kaiser Family Foundation, *Poverty Rate by Race/Ethnicity* (showing poverty rates of 9%, 17% and 21% for white, Hispanic, and Black families, respectively), https://tinyurl.com/KaiserFamilyFoundationData; OECD, *Indicators of Immigrant Integration 2015*, at 161, 164 (immigrants in the United States are significantly more likely than non-immigrants to live in households that fall "below the national poverty threshold"), https://tinyurl.com/OECDindicators.

Indeed, 63% of all householders under age 25 live in buildings with two or more units. *See* U.S. Census Bureau, *American Housing Survey Table Creator*, https://tinyurl.com/censusdata-householderage.[4]

The rule adopted in the decision below is thus far reaching. Though it disproportionately affects some, it touches—even if only temporarily—upon the lives of a vast number of Americans as they move through life's stages. At some point, most people will likely live in a multi-unit building with a front door that opens not to their own private stoop, porch, or sidewalk, but to a shared space such as a hallway. Depending on the jurisdiction in which one lives, that hallway might as well be an "open field" or public park for Fourth Amendment purposes—open to constant patrolling by police for any or no reason at all. Such a rule cannot be squared with this Court's instruction that "the sanctity of private dwellings" must be "afforded the most stringent Fourth Amendment protection." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976).

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[4] While people with fewer resources (including young people) are likelier to live in multi-family dwellings, higher-income renter-ship has grown significantly in recent years, with the number of renter households earning at least $75,000 increasing by 45% between 2010 and 2018. *See* Joint Center for Housing Studies of Harvard University, *America's Rental Housing 2020*, at 8-11, https://tinyurl.com/HarvardJCHS. Given that most renters occupy multi-unit dwellings, *see supra* pp. 5-6, those data suggest that wealthier individuals may increasingly be affected by rulings like the one below. Indeed, homeownership is becoming an attribute of only the wealthiest Americans: In that same eight-year window, 2.2 million of the 2.8 million new homeowners earned $200,000 or more. *America's Rental Housing 2020*, at 10.

II. THE RACIAL DISPARITIES CREATED BY THE RULING BELOW STEM FROM PAST DISCRIMINATION AND EXACERBATE PERSISTENT INEQUALITIES IN HOUSING AND POLICING

As the discussion above makes clear, the decision below undermines the Fourth Amendment's core protection of privacy at home; its burdens fall on a particular class of individuals (residents of multi-family dwellings); and that class is disproportionately composed of people of color, immigrants, urban residents, young people, and individuals with fewer financial resources. While all these disparities are problematic, the racial disparities are the most grievous and of greatest concern to amici, for two reasons: First, they are not the product of mere happenstance or personal preference. Rather, they are the result of decades of discriminatory policies—including ones this Court has recognized as unlawful—that have disproportionately channeled people of color into urban, multi-family dwellings. And second, rulings like the one below provide less Fourth Amendment protection to communities (low-income, urban neighborhoods predominantly populated by people of color) that are already more heavily policed—and therefore more in need of the Amendment's safeguards. This Court's intervention is warranted to ensure that Fourth Amendment doctrine does not further exacerbate those existing inequalities, such that "people of color are burdened more by, and benefit less from, the Fourth Amendment than whites," Carbado, *(e)racing the Fourth Amendment*, 100 Mich. L. Rev. 946, 969 (2002).

1. For decades, discriminatory business practices and government programs have enforced segregated housing throughout the country and denied people of color access to capital and wealth, contributing to a

landscape in which people of color disproportionately live in urban, multi-family dwellings.

In the mid-twentieth century, for example, "[r]apid urbanization, concomitant with the rise of suburban developments accessible by car, led many white families to leave the inner cities." *Texas Dep't of Hous. & Cmty. Affs.* v. *Inclusive Communities Project, Inc.*, 576 U.S. 519, 528 (2015). But people of color were prevented from participating in this move to single-family, suburban homeownership—"sometimes with governmental support, to encourage and maintain the separation of the races"—through the use of racially restrictive covenants, discriminatory lending practices, and discriminatory tactics by real-estate agents. *Id.* at 529; *see also* Klarman, *Unfinished Business: Racial Equality in American History* 247 (2007) ("as whites have fled cities for surrounding suburbs … systemic racial discrimination in housing markets has generally prevented blacks from following").

Federal policy encouraged that selective exodus by (among other things) offering federally guaranteed mortgages to white families relocating to the suburbs—on terms so favorable that "monthly carrying charges were often less, for comparable rooms and square footage, than rents in the public projects" in cities. Rothstein, *Race and Public Housing: Revisiting the Federal Role*, 21 Poverty & Race Res. Action Council 1, 2 (2012). "[B]lack families," however, "were mostly excluded" from those programs. *Id.* For years, the Federal Housing Administration also "'encouraged the use of restrictive covenants banning African Americans from'" new suburban developments. Powell, *The Race and Class Nexus*, 25 J. L. & Inequality 355, 391 (2007). Some estimate that such covenants were "in place in more than half of all new subdivisions built in the

United States until 1948," when this Court declared them unenforceable. *Id.* at 391-392; *see Shelley* v. *Kraemer*, 334 U.S. 1 (1948). By the 1960s, these and other "policies, practices, and prejudices had created many predominantly black inner cities surrounded by mostly white suburbs," *Texas Dep't of Hous. Affs.*, 576 U.S. at 529, thus effectively ensuring that more families of color would live in high-density dwellings.

Meanwhile, "[a]s whites fled cities, public housing units were filled with lower-income African Americans." Rothstein, 21 Poverty & Race Res. Action Council at 2. Those units were concentrated in low-income urban areas—often as "clusters of high-rise towers," Fagan et al., *Race and Selective Enforcement in Public Housing*, 9 J. Empirical Legal Studies 697, 698 (2012)—rather than built "at low density … outside the central cities," Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 225-227 (1987). That was in part because New Deal-era policies establishing public-housing programs allowed municipalities "discretion on where and when to build public housing"; any "suburb that did not wish to tarnish its exclusive image" could simply decline to participate. *Id.* at 225. One historian accordingly observed that "[t]he result, if not the intent, of the public housing program of the United States was to segregate the races, to concentrate the disadvantaged in inner cities, and to reinforce the image of suburbia as a place of refuge for the problems of race, crime, and poverty." *Id.* at 219; *see also* Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. Rev. 650, 670-671 (2020) ("An agglomeration of legal, policy, and industry-created innovations—redlining; blockbusting; exclusionary zoning; restrictive covenants; residential steering by landlords and realtors; the construction of segregated, public housing; and racial violence—locked

Black Americans into the most dispossessed and exploited communities.").

The "vestiges" of residential segregation "remain today, intertwined with the country's economic and social life." *Texas Dep't of Hous. Affs.*, 576 U.S. at 528. Even after "numerous anti-discrimination statutes, Supreme Court decisions, and fair housing legislation," Powell, 25 J. L. & Inequality at 393, discriminatory practices still reinforce that divide: Black homeseekers continue to be "steer[ed]" to "predominantly African American neighborhoods," Trifun, *Residential Segregation after the Fair Housing Act*, 36 Hum. Rts. 14, 14 (2009), and people of color "are told about and shown fewer homes and apartments than whites," HUD, *Housing Discrimination Against Racial and Ethnic Minorities 2012*, at xi (June 2013). They also still face discrimination in mortgage lending and home appraisals. *See* Schwemm & Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 Harv. C.R.-C.L. L. Rev. 375, 392 (2010); Perry et al., *The Devaluation of Assets in Black Neighborhoods* 5, 15 (Nov. 2018), https://tinyurl.com/DevaluationOfAssets.

These policies and practices have contributed significantly to the demographic patterns described above, in which people of color are disproportionately likely to live in high-density, urban neighborhoods "characterized by concentrated poverty," Klarman, *Unfinished Business* 251, rather than in single-family suburban or rural homes. And as a result, people of color are disproportionately impacted by rulings denying curtilage protection to common areas in multi-family dwellings.

2. Those same neighborhoods, moreover, tend to be more aggressively policed—a reality that only

compounds the disproportionate racial impact of rulings like the one below. In Black and Latinx neighborhoods, police engage in "high rates of investigative stops both of pedestrians and vehicles" and "arrests for minor misdemeanors"—rates "higher than the local crime or social conditions would predict." Fagan, *Policing and Segregation*, The Dream Revisited: NYU Furman Center (July 2017), https://tinyurl.com/PolicingAndSegregation; *see also* Simmons, *Future of the Fourth Amendment: The Problem with Privacy, Poverty and Policing*, 14 U. Md. L.J. Race, Religion, Gender & Class 240, 242-243, 254-258, 265-266 (2014) (aggressive policing tactics, such as "pre-textual traffic stops" and "aggressive stop and frisk policies," are employed predominantly "in economically depressed, traditionally disadvantaged, and overwhelmingly minority areas"); Bell, 95 N.Y.U. L. Rev. at 728 (Black and Latinx neighborhoods, especially in urban areas, "are characterized by heavy police presence"). Some data show, moreover, that this "increased risk of unwanted police contact" does not produce any "greater efficiency in crime detection that might benefit" communities of color. Fagan & Ash, *New Policing, New Segregation*, 106 Geo. L.J. Online 33, 92 (2007) (discussing patterns in New York City).

This kind of aggressive, disproportionate policing in communities of color is a longstanding phenomenon and directly implicates the degree to which people of color can enjoy the privacy of their own homes. For example, a broad array of aggressive policing practices render public-housing residents—who are "largely black and brown"—"uniquely vulnerable to police surveillance and control." Karteron, *When Stop and Frisk Comes Home*, 69 Case W. Res. L. Rev. 669, 673, 680-695 (2019). Indeed, research has indicated that police

disproportionately patrol public-housing units "based on the racial composition of the site, particularly the black population," rather than on crime rates or other factors. Fagan, 9 J. Empirical Legal Studies at 698 (reporting results of a study of New York City housing projects). Likewise, police commonly use the "knock and talk" technique—asking permission to search a home, for example, and thereby gaining warrantless entry—in public-housing units and other apartment complexes populated by people of color. Eppich, Note, *Wolf at the Door*, 32 Bos. Coll. J. L. & Soc. Just. 119, 124, 130-133, 147-149 (2012); *see* Dooley, *Fighting for Equal Protection Under the Fourth Amendment*, 40 Nova L. Rev. 213, 227-228 (2016). Indeed, that practice is "easier to implement" in such buildings because they are less likely to have recognized curtilage areas. Eppich, 32 Bos. Coll. J. L. & Soc. Just. at 124.

Decisions limiting curtilage protection in multi-family dwellings thus not only disproportionately impact those communities where police presence is *already* heightened, but they may also spur *further* police activity in those communities—precisely because they make searches and arrests easier to conduct there. *See generally* Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 Geo. Wash. L. Rev. 1265 (1999) (proposing that the lower cost of policing "poor urban, mostly black neighborhoods," *id.* at 1286-1287, increases police action in those places). This Court's review is warranted to ensure that Fourth Amendment protections are not denied to those individuals who need them the most.

III. THIS COURT'S GUIDANCE IS NEEDED TO CLARIFY THE PROPER TEST FOR EVALUATING CURTILAGE QUESTIONS IN URBAN ENVIRONMENTS

In categorically determining that the space immediately adjacent to an apartment in a multi-family dwelling is not curtilage, the Massachusetts Appeals Court here—like other courts on its side of the split—gave short shrift to important property and privacy interests. That result stems, in part, from the lower court's unduly restrictive application of a framework that this Court developed in *Dunn*, which involved a rural setting bearing little resemblance to today's urban neighborhoods. Granting certiorari in this case would provide much-needed guidance as to whether and how that framework should apply to curtilage determinations like the one at issue here. The Court should grant review to clarify the appropriate analysis and repudiate the view that the privacy of a particular space or portion of a dwelling must be virtually absolute to warrant Fourth Amendment protection.

1. This Court's curtilage jurisprudence arose from cases in rural settings, far removed from the urban environments in which the vast majority of Americans live today. *See* U.S. Census Bureau, *Urban Areas Facts* (more than 80% of the U.S. population lived in areas designated urban as of 2010), https://tinyurl.com/census-urbanfacts. Nearly a century ago, for example, the Court "first enunciated" the "open fields" doctrine, which permits police officers to "enter and search a field without a warrant." *Oliver* v. *United States*, 466 U.S. 170, 173 (1984) (describing *Hester* v. *United States*, 265 U.S. 57 (1924)). Years later, the Court reaffirmed this rule by approving a warrantless search of a farm and woods, while indicating that the rule would be

different in the "area immediately surrounding the home"—the curtilage. *Oliver*, 466 U.S. at 178-181.

United States v. *Dunn*, which fleshed out the distinction between the curtilage and "open fields," likewise considered a rural environment—specifically, a barn situated 60 yards from a home on a 198-acre ranch property. *See* 480 U.S. 294, 296-297, 302 (1987). In addressing the question, the Court laid out four factors aimed at assessing whether an area qualifies as curtilage, including: "[1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by." *Id.* at 301.

Questions have arisen as to how *Dunn*'s analysis should apply outside the rural context. Some have suggested that its four factors are less "likely to be determinative" when the area at issue is not "'rural and remote from public view,'" 1 LaFave, *Search & Seizure* § 2.4(a) n.43 (6th ed. 2020) (quoting *United States* v. *Swepston*, 987 F.2d 1510, 1514 (10th Cir. 1993)), and that they make "the most sense in the least urban settings," Leonetti, *Open Fields in the Inner City*, 15 Geo. Mason U. C.R. L.J. 297, 303 (2005); *see id.* at 302 (arguing that curtilage doctrine has been "far from consistently applied," in part because it "arose historically in the context of rural areas"). *Dunn*'s second and fourth factors have proven particularly nettlesome in non-rural settings, where it may be "impossible, or at least highly impracticable, to screen one's home and yard from view," *Horton* v. *United States*, 541 A.2d 604, 608 (D.C. 1988). As Judge Posner observed, if areas adjacent to the home in urban areas are *not* within the curtilage—because, for example, they are not shielded

from access or view by an "enclosure"—then "attached houses, row houses, and other cramped urban dwellings have no curtilage (beyond the house itself); curtilage is confined to farmers and to wealthy suburbanites and exurbanites." *United States* v. *Redmon*, 138 F.3d 1109, 1130, 1132 (7th Cir. 1998) (Posner, J., dissenting). Such a "dichotomy in Fourth Amendment protection," one court observed, "[s]urely … cannot be … justified." *Commonwealth* v. *Ousley*, 393 S.W.3d 15, 28 (Ky. 2013).

Similar questions persist in the context of common spaces in multi-unit apartment dwellings. In particular, lower courts have diverged as to *whose* view or access is to be shielded under *Dunn*'s factors. Some courts ask whether an area is shielded from *public* access or view; thus, a space immediately outside an apartment door in an enclosed, multi-family dwelling qualifies as curtilage because (among other things) "the general public" cannot access or see it. *People* v. *Burns*, 50 N.E.3d 610, 620-621 (Ill. 2016). Others, like the court below, suggest that an area must be shielded from *all* passersby; it must be "enclosed relative to the defendant's *individual apartment*" and not "open to" or "used by" other building residents. Pet. App. 8a-9a (emphasis added); *see Edstrom*, 916 N.W.2d at 518-519 (area not "physically separate[d] … from the rest of the hallway"). And still other judges have "question[ed] whether the *Dunn* factors are relevant" *at all* in a case like this one, observing that this Court's more recent curtilage cases—*Florida* v. *Jardines* and *Collins* v. *Virginia*—nowhere applied those factors. *Edstrom*, 916 N.W.2d at 526-528 (Lillehaug, J., dissenting); *see also State* v. *Rendon*, 477 S.W.3d 805, 810 (Tex. Crim. App. 2015) (evaluating the question without invoking *Dunn*'s factors).

Jardines and *Collins* cast particular doubt on the continued relevance of *Dunn's* second and fourth factors, at least in cases that—unlike *Dunn* itself—address whether areas *immediately adjacent* to an *urban or suburban* home qualify as curtilage. In *Jardines*, for example, the Court concluded that the front porch of a home in a "heavily populated urban setting," Helm, Note, *A Huff and a Puff Is No Longer Enough*, 9 Liberty U. L. Rev. 1, 33 (2014), was curtilage, even though there was "no indication the front door and porch … were anything other than physically open to the world," *Burns*, 50 N.E.3d at 635 (Garman, C.J., concurring). Indeed, the porch was readily accessible to the public—i.e., to "visitors knocking on the door." *Florida* v. *Jardines*, 569 U.S. 1, 9 (2013); *see also* Fitfield, Note, *Let This* Jardines *Grow*, 2017 Wis. L. Rev. 147, 173 (2017) (arguing that *Jardines* is "premised on the reality that residents of any type of home may not always have the power, right, or ability to exclude others from the area immediately surrounding their home, yet that space is nonetheless protected as curtilage").

In *Collins*, the Court reached a similar conclusion with respect to a driveway "immediately surrounding [a] home" in a "residential suburban neighborhood," *Collins* v. *Commonwealth*, 790 S.E.2d 611, 623 n.4 (Va. 2016) (Mims, J., dissenting), *rev'd*, 138 S. Ct. 1663 (2018); *see Collins*, 138 S. Ct. at 1670-1671. Specifically, the Court rejected the view that curtilage "into which an officer can see from the street" is any "less entitled to protection from trespass and a warrantless search than a fully enclosed" space. *Collins*, 138 S. Ct. at 1675. A contrary conclusion, the Court observed, would reserve constitutional rights for "those persons with the financial means" to wall off their property from view,

violating the rule that "[t]he most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion." *Id.*

This Court's guidance is therefore needed to clarify whether and how the *Dunn* factors should apply in analyzing curtilage questions in urban settings like the one at issue in this case.

2. The Court should also reject the Massachusetts Appeals Court's particular application of the *Dunn* factors here. As noted, the court concluded that the hallway outside petitioner's apartment door was not curtilage under *Dunn* because it was not "enclosed relative to [his] individual apartment," and was "open to" and "used by the residents of the building (and their guests) to reach each separate unit." Pet. App. 8a-9a. That adopts too narrow a view of the kinds of property and privacy interests the Fourth Amendment protects.

Specifically, the decision below not only conflicts with the approach taken in *Jardines* and *Collins*—which, as noted, together made clear that curtilage can include areas that others can view and access—but it also improperly "denigrate[s] the importance of degrees of privacy." 1 LaFave, *Search & Seizure* § 2.3(c) (quoting Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 404 (1974)); *see Dunn*, 480 U.S. at 300 (asking whether area harbors "activity associated with the … home and the privacies of life"). As this Court has put it, "privacy shared" is not "privacy waived for all purposes." *Georgia* v. *Randolph*, 547 U.S. 103, 115 n.4 (2006). "For the tenement dweller," unable to retreat to a home that is fully removed from neighboring eyes and ears, "the difference between observation by neighbors … and observation by policemen who come into the hallways to 'check up'

or 'look around' is the difference between all the privacy that his condition allows and none." 1 LaFave, *Search & Seizure* § 2.3(c) (quoting Amsterdam, 58 Minn. L. Rev. at 404). A tenant's privacy interest immediately outside her apartment thus remains meaningful even though it is not absolute.

Moreover, tenants in multi-unit apartment buildings often shape their behavior around shared privacy expectations. They may "rely on the privacy and security of locked common doors" to protect against unauthorized entrants, even as they recognize that neighbors and visitors will enter the building. Lewis, Note, *The Fourth Amendment in the Hallway*, 101 Mich. L. Rev. 273, 306-307 (2002). Consequently, tenants may be "apt to leave their doors ajar, to deposit various private items in designated storage areas, or to leave items stored at the end of hallways or stairwells." *Id.* And they may "participate in intimate activities associated with the privacy of a home that extend beyond the doors of their apartments into the common property of the building, such as barbequing on a back patio or sunbathing on a roof deck." Leonetti, 15 Geo. Mason U. C.R. L.J. at 318. Such realities matter: As *Dunn* itself explains, its four factors are applicable "only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." 480 U.S. at 301. Spaces need not be virtually exclusive to be so "tied" to the home, and this Court should grant review to say so.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted.

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