No.

IN THE

SUPREME COURT OF THE UNITED STATES

JONATHAN LINDSEY, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the government's warrantless use of a narcotics detection dog on a dwelling without curtilage violates the resident's Fourth Amendment right against unreasonable searches and seizures.

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The petitioner, Jonathan Lindsey, respectfully petitions this Court for a writ of certiorari to be granted to review the judgment of the Supreme Court of Illinois affirming his conviction.

OPINIONS BELOW

The order of the Supreme Court of Illinois denying Jonathan Lindsey's petition for rehearing is attached as Appendix A. The published opinion of the Supreme Court of Illinois affirming Jonathan Lindsey's conviction, including a dissenting opinion, is reported at 2020 IL 124289, and is attached as Appendix B. The published opinion of the Appellate Court of Illinois reversing Jonathan Lindsey's conviction, including a dissenting opinion, is reported at 2018 IL App (3d) 150877, and is attached as Appendix C.

JURISDICTION

On April 16, 2020, the Supreme Court of Illinois issued an opinion. A petition for rehearing was timely filed and denied on September 28, 2020. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a). This petition is being filed in accord with this Court's March 19, 2020, COVID-19 order extending the deadline to file any petition for a writ of certiorari to 150 days from the date of an order denying a timely petition for rehearing.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

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

U.S. Const. amend. IV.

STATEMENT OF THE CASE

Jonathan Lindsey was convicted after a stipulated bench trial of unlawful possession with intent to deliver a controlled substance while within 1000 feet of a school. Pet. App. 3a. The charge was based on evidence seized pursuant to a search warrant for Lindsey's motel room at the American Motor Inn. Pet. App. 3a. Lindsey filed a pretrial motion to suppress evidence alleging that the government's warrantless use of a narcotics detection dog on his motel room door, on which probable cause was based, was a search that violated his Fourth Amendment rights. Pet. App. 4a.

The warrant application stated the affiant police officer received information from an unidentified confidential informant at some unknown time indicating that Lindsey sold narcotics from the motel. Pet. App. 3a. Sometime before the warrant application was submitted, another officer attempted a controlled buy for an unspecified amount of narcotics from Lindsey at an unnamed location, but Lindsey did not sell anything to the officer. Pet. App. 3a.

On April 27, 2015, the affiant observed Lindsey drive away in a car, and he conducted a traffic stop because he knew Lindsey had a suspended driver's license. Pet. App. 3a. While Lindsey was arrested and transported to the police station, another officer spoke to a motel staff member and learned Lindsey was staying in room 130. Pet. App. 3a. Deputy Pena and his narcotics detection dog conducted a "free air sniff" of room 130 with a positive alert. Pet. App. 3a.

At the hearing on Lindsey's motion to suppress, an officer described the location of Lindsey's motel room, explaining that the door to the room was "set back in a little alcove and as you stepped into the alcove to the right was Room 130 and . . . across the hall to that would be Room 131." Pet. App. 27a.

Deputy Pena testified that he and his K-9 partner, Rio, conducted a dog sniff of the alcove and room 130. Pet. App. 28a. Pena described his directions to Rio to search for the odor of narcotics:

> I let him off lead and basically had him go to that side of the building actually checking for free air sniffs alongside that building. Once you reach Room 130, he changed his behavior, alerting to the odor of narcotics. In this particular instance what he did is he came up around the door handle and its seams and he—an alert would be that he would actually sit and lay down, which he did, indicating that he is in the odor of narcotics.

Pet. App. 22a, 28a. Pena also directed Rio to "show" him where the odor was coming from and Rio "got within inches" of the door (R36). Pet. App. 28a.

The circuit court found that, while Lindsey had a reasonable expectation of privacy in his motel room, it did not extend to the motel corridor, which was "a public place of accommodation." Pet. App. 5a. The court relied on *United States v. Roby*, 122 F.3d 1120 (8th Cir. 1997), which held that a dog sniff of a hotel room was not a search under the Fourth Amendment, because "there [didn't] seem to be any" Illinois case law pertaining to dog sniffs of hotels. Pet. App. 4a. The court declined to create new case law, even though the judge agreed with some of the issues raised in the *Roby* dissent. Pet. App. 29a. The court denied the motion to suppress. Pet. App. 29a.

At Lindsey's bench trial, the stipulated facts alleged that the police found heroin inside Lindsey's motel room and Lindsey admitted it was his. Pet. App. 4a. Lindsey was convicted of unlawful possession with intent to deliver a controlled substance within 1000 feet of a school and sentenced to seven years in prison. Pet. App. 5a.

On direct appeal, Lindsey argued that the circuit court erred in denying his motion to suppress because the government's conduct violated his reasonable expectation of privacy in his motel room. Pet. App. 30a. The appellate court agreed and

reversed Lindsey's conviction because the narcotics detection dog was "used to explore the details previously unknown in Lindsey's motel room, which the Supreme Court established was entitled to constitutional protections." Pet. App. 36a. Relying on *Kyllo v. United States*, 533 U.S. 27 (2001), and *United States v. Whitaker*, 820 F.3d 849 (7th Cir. 2016), the court found that, while Lindsey had a reduced expectation of privacy in the area immediately joining his room, he still had a justifiable expectation of privacy that the smell of narcotics in his room was undetectable until the officer focused the dog sniff on the door and its seams. Pet. App. 33a–36a. Thus, the dog sniff violated Lindsey's Fourth Amendment rights. Pet. App. 36a.

The appellate court further held that the good-faith exception did not apply because there was no binding precedent that Deputy Pena could have relied on to justify the warrantless use of a drug-detection dog on a residence. Pet. App. 38a. Instead, there was binding precedent for a reasonably well-trained officer to know that motel guests have the same expectation of privacy in their dwelling space as residents of a single-family home and an apartment, and that the use of sense-enhancing technology not available to the general public to obtain information about activities inside that dwelling was a search. Pet. App. 38a–40a. The court also found that the police conduct should be deterred because it was "a deliberately executed attempt to find drugs inside Lindsey's hotel room." Pet. App. 40a.

The dissenting justice opined that, even assuming the dog sniff was a search, the good faith-exception would apply because the "relevant authority" indicated a hotel tenant possessed a reduced expectation of privacy. Pet. App. 43a.

The Illinois Supreme Court granted the State of Illinois's petition for leave to appeal and reversed the judgment of the appellate court. Pet. App. 3a, 6a. The court first conducted a property-based analysis and found there was no curtilage and, thus,

no Fourth Amendment violation on that basis. Pet. App. 8a–13a. In regard to Lindsey's privacy-based argument, the majority acknowledged that Lindsey had a reasonable expectation of privacy inside his room. Pet. App. 15a. But "the only expectation of privacy that matter[ed]" was the one in the alcove because that was the place that the officer and dog searched. Pet. App. 15a–16a. Rio did not "teleport through the door" and smell the air inside the room, but smelled the air in the alcove that "'intermingled with the public airspace.'" Pet. App. 16a. The court relied on *United States v. Place*, 462 U.S. 696 (1983), and *Illinois v. Caballes*, 543 U.S. 405 (2005). Pet. App. 15a. As such, Lindsey's Fourth Amendment rights were not violated by the dog sniff. Pet. App. 17a.

The dissenting justices opined that "Supreme Court precedent leaves no question that a government agent's use of a sophisticated monitoring device to obtain information about the interior of an enclosed space in which a person has a reasonable expectation of privacy constitutes a search under the fourth amendment." Pet. App. 22a. The government's conduct violated Lindsey's reasonable expectation of privacy in his motel room because the purpose of the sniff was to discover what was inside the room and not in the alcove. Pet. App. 23a. The majority's analysis of Lindsey's privacy interest in the alcove thus was irrelevant. Pet. App. 24a. The dissent further found that a property-based analysis was unnecessary to resolution of the case. Pet. App. 24-25a.

Lindsey's timely petition for rehearing was denied. Pet. App. 2a.

REASONS FOR GRANTING CERTIORARI

I. The Illinois Supreme Court's Decision Splits from this Honorable Court's Precedent Rejecting a "Mechanical Application" of the Fourth Amendment and Holding that a Motel Guest Has the Same Reasonable Expectation of Privacy as any Other Resident in Their Dwelling.

In order to determine whether government conduct constitutes a Fourth Amendment search, this Court has applied two separate, and to some extent overlapping, analyses. U.S. Const. amend. IV. In *Florida v. Jardines*, 569 U.S. 1, 9–12 (2013), this Court held that, under the property-based analysis, a warrant is required when the government physically intrudes upon a constitutionally protected area, such as the curtilage of a home. Under the privacy-based analysis, a warrant is required when the government violates a subjective expectation of privacy that society recognizes as reasonable. *Katz v. United States*, 389 U.S. 347, 348–49, 361 (1967). The Illinois Supreme Court's decision below, holding that the government's warrantless use of a narcotics detection dog on the door of a motel dwelling was not a search under the Fourth Amendment, significantly splits from this Court's precedent in two key areas.

A. This Court Has Rejected a "Mechanical Application" of the Fourth Amendment and Held That the Government Need Not Commit a Physical Trespass to Violate a Person's Fourth Amendment Rights.

In *Katz*, this Court considered whether a person's Fourth Amendment rights could be violated when in a public space. *Katz*, 389 U.S. at 348–49. The case concerned the government's warrantless use of an eavesdropping device on the surface of a public phone booth, in order to hear the defendant's conversations conducted inside it. *Id*. The defendant asked this Court to determine whether the phone booth was a constitutionally protected area, and whether the government's physical penetration thereof was necessary to find a violation of his Fourth Amendment rights. *Id*. at 349–50. But this Court rejected that formulation of the issues, finding that Fourth

Amendment protection extends to "people, not places." *Id*. Accordingly, this Court found that what a person ". . . seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected." *Id*. (emphasis added).

Relying on *Silverman v. United States*, 365 U.S. 505 (1961), this Court repudiated the government's argument that its surveillance technique was not a Fourth Amendment search because it did not physically penetrate the phone booth. *Id*. at 352–53; *see Silverman*, 365 U.S. at 511 ("Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law."). The defendant had the expectation that what he said inside the phone booth would exclude the "uninvited ear" and remain private. *Id*. Thus, the government's conduct, ". . . in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id*. at 353, 359.

Thereafter, the analytical inquiry applied in *Katz* was characterized in the manner described in Justice Harlan's concurrence: a Fourth Amendment search occurs when the government's conduct violates a person's subjective expectation of privacy that society recognizes as reasonable, *i.e.*, reasonable expectation of privacy. *Id*. at 361 (Harlan, J., concurring); *See Smith v. Maryland*, 442 U.S. 735, 740 (1979) (adopting formulation of Justice Harlan's concurring opinion). In *Kyllo v. United States*, 533 U.S. 27, 29–30 (2001), this Court applied the *Katz* framework in consideration of whether the government's warrantless use of a thermal imaging device on a dwelling violated the defendant's reasonable expectation of privacy. The government aimed the device "at a private home on a public street," while parked in a car to detect heat inside on suspicion that the defendant was using heat to unlawfully cultivate cannabis plants. *Kyllo*, 533 U.S. at 29–30. The defendant moved to suppress the evidence on grounds

that his Fourth Amendment rights were violated by the government's conduct. *Id*. The lower court found no violation because the government did not physically penetrate the dwelling's walls and detected only heat radiating from outside the house, failing to detect any intimate details or activities inside. *Id.* at 30.

As in *Katz*, this Court rejected the contention that the government's conduct was not a search simply because the device did not physically penetrate the dwelling. *Id*. at 35. The government argued the device detected only heat radiating from the home's surface, and the dissent distinguished between "off-the-wall" observations and "through-the-wall surveillance." *Id*. But such a distinction was the same "mechanical interpretation" rejected in *Katz*, wherein the surveillance device detected only sound waves. *Id*. *Kyllo* found that reversing the *Katz* approach would "leave the homeowner at the mercy of advancing technology . . ." *Id*. In response to the government's argument that the device did not detect or reveal any private activities in private spaces, this Court reasoned that "[i]n the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes." *Id.* at 37.

Consequently, this Court held that there are limits on how the government can employ technology in conducting warrantless surveillance of a person's dwelling, emphasizing that, as to the interior of homes, "there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment." *Id*. at 34 (emphasis in original). The government's use of the thermal imaging device was a Fourth Amendment search because it utilized a device, not available to the general public, to discern details of the dwelling unknowable without physical intrusion. *Id.* at 40.

The government conduct at issue here was the same as in *Katz* and *Kyllo*. The dissenting justices in *Kyllo* foresaw that use of a narcotics detection dog (or similar mechanism) on a dwelling would be a Fourth Amendment search under the *Kyllo* majority's decision. *Kyllo,* 533 U.S. at 47–48 (Stevens, J., dissenting). The concurring justices in *Jardines* also reasoned that, like the thermal imaging technology in *Kyllo*, a narcotics detection dog is a sense-enhancing tool, not available to the general public, that violates a resident's reasonable expectation of privacy that the details of their dwelling will remain private. *Jardines*, 569 U.S. at 12–16 (Kagan, J., concurring). To find otherwise would leave motel guests at the mercy of developing technology that could allow the government to discern what was inside their rooms without physically entering them. *Kyllo,* 533 U.S. at 35–36.

Jonathan Lindsey rented a motel room for an undetermined period of time. Pet. App. 3a. Law enforcement suspected him of dealing narcotics and attempted, without success, to arrange a controlled drug buy at an unnamed location. Pet. App. 3a. They subsequently conducted surveillance of the motel and arrested Lindsey after he drove away in a car, due to the status of his suspended drivers license. Pet. App. 3a. Officers then asked motel staff what room Lindsey was staying in, after which Deputy Pena and his narcotics detection dog, Rio, conducted a "free air sniff" of the motel walkway without a warrant. Pet. App. 3a. When Pena and Rio reached the alcove that housed the closed doors to Lindsey's room and another room, Pena directed Rio to sniff Lindsey's motel room door, and Rio gave a positive alert. Pet. App. 28a. The officers then obtained a search warrant for the room, where they discovered heroin. Pet. App. 4a. Because the government used a device, not available to the public, to discern details of Lindsey's dwelling unknowable without physical intrusion, Lindsey's Fourth Amendment rights were violated when Pena directed Rio to sniff his motel room door. *Kyllo*, 533 U.S. at 40.

But the Illinois Supreme Court found that the government's conduct did not violate Lindsey's Fourth Amendment rights. Pet. App. 17a. While acknowledging Lindsey had a reasonable expectation of privacy inside his motel room, the Court found that "[t]he only expectation of privacy that matters" was the one he had in the alcove outside his room. Pet. App. 15a–16a. The "place searched" was not Lindsey's motel room, but the alcove, where Rio smelled the odor of narcotics that "intermingled with the public airspace." Pet. App. 16a. Rio did not detect the odor inside of the room because he did not "teleport through the door." Pet. App. 16a.

This application of the Fourth Amendment was precisely the kind of "mechanical interpretation" repudiated by this Court in *Katz* and *Kyllo*. *Kyllo*, 533 U.S. at 35; *Katz*, 389 U.S. at 348–49.

B. This Court's Precedent Has Long Held That Motel Guests Have a Reasonable Expectation of Privacy in Their Dwelling.

Under this Court's longstanding precedent, motel guests are entitled to the same Fourth Amendment protection against unreasonable searches and seizures as any other resident of a dwelling. *See Stoner v. California*, 376 U.S. 483, 490 (1964) ("No less than a tenant of a house, or the occupant of a room in a boarding house (citation), a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures."); *Johnson v. United States*, 333 U.S. 10, 12 (1948) (finding Fourth Amendment violation when police searched defendant's hotel room that was characterized as her "home"). In *Minnesota v. Olson*, 495 U.S. 91 (1990), this Court explicitly stated:

> . . . although we may spend all day in public places, when we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend. Society expects at least as much privacy in these places as in a telephone booth—'a temporarily private place whose momentary occupants'

> expectations of freedom from intrusion are recognized as reasonable.'

Olson, 495 U.S. at 99 (quoting *Katz*, 389 U.S., at 361 (Harlan, J., concurring)).

This Court noted in *Kyllo* that, "[w]hen the Fourth Amendment was adopted, as now, to 'search' meant '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to search the house for a book; to search the wood for a thief.'" *Kyllo*, 533 U.S. at at 32, n.1 (quoting N. Webster, An American Dictionary of the English Language 66 (1828) (reprint 6th ed. 1989)). Pena and Rio did not engage in such conduct to find narcotics in the alcove. Rio was directed to sniff the door, and his positive alert was used as probable cause to search Lindsey's room—not the other room whose entrance also was in the alcove. Pet. App. 22a, 28a. As the dissenting justices recognized, "[w]ithout question, the dog sniff collected information about the interior of defendant's motel room, a space in which the majority concedes defendant had a reasonable expectation of privacy. The dog sniff was therefore a search of the room." Pet. App. 23a. Thus, the government examined the motel door and its seams to discover narcotics *inside* the room—just as the government in *Katz* sought to discover what was said *inside* the phone booth, and in *Kyllo*, to discover the heat *inside* the house. *Kyllo*, 533 U.S. at 29–30, 35; *Katz*, 389 U.S. at 349–50, 352–53. Lindsey therefore had a reasonable expectation that what was inside his room would remain private. *Kyllo*, 533 U.S. at 34; *Katz*, 389 U.S. at 361 (Harlan, J., concurring); *Stoner*, 376 U.S. at 490. By focusing on Lindsey's privacy rights in the alcove, instead of his reasonable expectation of privacy in his motel room, the Illinois Supreme Court broke with this Court's longstanding precedent.

The Illinois Supreme Court likened the government conduct at issue here to the government conduct in *United States v. Place*, 462 U.S. 696 (1983), and *Illinois v.*

Caballes, 543 U.S. 405 (2005). Pet. App. 15a. In *Place*, this Court found that the dog sniff performed on the exterior of a suitcase in an airport was not a Fourth Amendment search because it was "much less intrusive than a typical search," and the defendant had no reasonable expectation of privacy in possessing contraband. *Place*, 462 U.S. at 707. Similarly, in *Caballes*, this Court found that the dog sniff of the exterior of the defendant's car on a public road, during a lawful traffic stop, was not a Fourth Amendment search because there was no legitimate privacy interest in narcotics. *Caballes*, 543 U.S. at 409–10. But those dog sniffs were conducted in notoriously public spaces, where a person's expectation of privacy is considerably less than in a motel room. *See*, *e.g.*, *New York v. Class*, 475 U.S. 106, 112–13 (1986) (recognizing physical characteristics of automobile and its use result in lessened expectation of privacy therein). Such analogizing leads to the inevitable conclusion that motels are *not* dwellings for Fourth Amendment purposes when the government uses a narcotics detection dog there without a warrant, but are controlled by the public dog sniffs in *Place* and *Caballes*.

The Illinois Supreme Court's focus on the alcove appears to be due, in part, to beginning its inquiry with a property-based analysis of the government's conduct that this Court applied in *Jardines*. Pet. App. 8a–13a; *see Jardines*, 569 U.S. at 9–12. There was no such trespass because the motel room did not have curtilage. Pet. App. 12a. The appellate court did not conduct a curtilage analysis because there had been no technical trespass. Instead, the appellate court followed this Court's precedent in *Katz* and *Kyllo* and assessed whether the defendant's reasonable expectation of privacy in his room had been violated. Pet. App. 33a–36a; *Kyllo*, 533 U.S. at 32–33; *Katz*, 389 U.S. at 353. Thus, the Illinois Supreme Court's inquiry resulted in a *Katz* analysis that

proceeded like a property-based inquiry in its focus on whether the government physically entered a constitutionally protected space, rather than whether the defendant's Fourth Amendment rights in his room were violated by the government's conduct.

Such an inquiry results in the conclusion that residents of dwellings without curtilage do not have Fourth Amendment protection from the government's warrantless use of certain kinds of sense-enhancing technology on their dwellings. This conclusion splits with this Court's precedent that makes no such distinction between types of dwellings, but has held that residents should not be left to the mercy of developing technology that allows the government to discern what is inside their dwellings without physically entering them. *Kyllo,* 533 U.S. at 35–36.

The Illinois Supreme Court's decision thus creates a split from this Court's precedent repudiating a "mechanical application" of the Fourth Amendment and longstanding precedent that motel guests have Fourth Amendment protection from government intrusion into their dwellings. Certiorari is appropriate to bring clarity and uniformity to these important aspects of Fourth Amendment jurisprudence.

II. This Court Should Resolve the Split Over Whether Narcotics Dog Sniffs of Dwellings Without Curtilage Are Fourth Amendment Searches.

In *Florida v. Jardines*, 569 U.S. 1, 5 (2013), this Court affirmed the Florida Supreme Court's decision that the government's warrantless use of a narcotics detection dog on the front door of a home violated the resident's Fourth Amendment rights. But *Jardines* did not affirm the lower court's application of a privacy-based approach to the question, or embrace its conclusion that the dog sniff violated the defendant's reasonable expectation of privacy in his home. *Jardines v. State*, 73 So.3d 34, 45–50, 55–56 (Fla. 2011), *aff'd sub nom*. *Jardines*, 569 U.S. at 12. The property-

based approach was applied because the government gained evidence by physically intruding into the constitutionally-protected curtilage of the home. *Jardines*, 569 U.S. at 6–12. *Jardines* thus held that when the government so intrudes, it is unnecessary to consider the privacy-based approach employed in *Katz*. *Id*. at 11. Three of the five majority justices, however, concurred that the defendant's Fourth Amendment rights also were violated under the privacy-based approach applied in *Kyllo v. United States*, 533 U.S. 27 (2001), because the dog sniff violated his reasonable expectation of privacy in his home. *Id*. at 12–16 (Kagan, J., concurring).

Jardines did not resolve *how* to assess whether a Fourth Amendment search occurs when the government conducts a warrantless dog sniff of dwellings without curtilage, usually located in multi-unit buildings. As discussed in the previous section, the analytical approach to the specific question of whether the dog sniff of a motel door should be the same as the approach to *any dwelling without curtilage* because this Court has held that a motel guest has the same Fourth Amendment rights in his dwelling as any other resident. Yet there is a split among federal circuits and state courts on the question of whether a warrantless dog sniff violates a person's reasonable expectation of privacy in such dwellings. The Illinois Supreme Court's decision below widens the split.

Twenty-four years ago, the Eighth Circuit in *United States v. Roby*, 122 F.3d 1120, 1124 (8th Cir. 1997), held that the warrantless dog sniff of the defendant's hotel room door did not violate his "legitimate expectation of privacy" in the hotel hallway. The court found the defendant's reasonable expectation of privacy in his room did not extend into the hallway because it was "traversed by many people." *Id.* at 1125. Further, while a dog is a "more skilled" odor detector than a human, the dog's detection

was akin to plain smell. *Id*. It is noteworthy that *Roby* relied, in part, on the Eighth Circuit's decision in *United States v. Pinson*, 24 F.3d 1056 (8th Cir. 1994). *See Id.* (describing *Pinson* as applying "plain feel" exception to the Fourth Amendment). The court in that case held the government's use of an infrared surveillance device on the defendant's roof was not a Fourth Amendment search. *Pinson*, 24 F.3d at 1057. *Pinson* analogized the government's use of the device to the "warrantless use of police dogs trained to sniff and identify the presence of drugs." *Id*. at 1058. The defendant did not have a reasonable expectation of privacy in the heat that was "radiating from his house into the surrounding air space." *Id*. The court further found that, "[j]ust as odor escapes a compartment or building and is detected by the sense-enhancing instrument of a canine sniff, so also does heat escape a home and is detected by the sense-enhancing infrared camera." *Id*.

Pinson, as well as *Roby*, were decided before this Court held in *Kyllo v. United States*, 533 U.S. 27, 40 (2001), that the government's warrantless use of a thermal imaging device indeed was a Fourth Amendment search because it violated the defendant's reasonable expectation of privacy in his home. *Kyllo* also held that Fourth Amendment protection in the home "has never been tied to measurement of the quality or quantity of information obtained," and that all details in the home were intimate. *Kyllo*, 533 U.S. at 37. But some state appellate courts still applied the same framework as the court did in *Roby* to warrantless dog sniffs of dwellings without curtilage. In conflict with *Kyllo*, these courts analyzed whether the defendant had a reasonable expectation of privacy in the space just outside the dwelling and in the contraband that was sought, and found no Fourth Amendment search because the defendant did not have a reasonable expectation of privacy in either. *See Sanders v. Commonwealth*, 772

S.E.2d 15, 23–25 (Va. Ct. App. 2015) (warrantless dog sniff of hotel room not a Fourth Amendment search because defendant did not have a reasonable expectation of privacy in public hotel walkway, odor "intermingled with the public airspace," and dog sniff revealed only presence or absence of contraband); *State v. Foncette*, 356 P.3d 328, 331–32 (Ariz. Ct. App. 2015) (warrantless dog sniff of hotel room not a Fourth Amendment search because defendant did not have a reasonable expectation of privacy in public walkway or in possessing contraband).

Some state Supreme Courts applied the same framework to warrantless dog sniffs of apartment doors and found no Fourth Amendment search. *See State v. Nguyen*, 841 N.W.2d 676, 681–82 (N.D. 2013) (warrantless dog sniff on apartment door not a search because defendant had no reasonable expectation of privacy in common hallways or "legitimate expectation of privacy" in government conduct that revealed only the presence of contraband); *State v. Edstrom*, 916 N.W.2d 512, 522–23 (Minn. 2018) (warrantless dog sniff of apartment door not a Fourth Amendment search because there is no legitimate privacy interest in contraband).

These cases appear to conclude that the government does not need a warrant when it uses a narcotics detection dog to detect what is inside a dwelling without curtilage.

Conversely, other federal circuits courts have found that the pertinent space to be considered is *inside* the dwelling. The Second Circuit in *United States v. Thomas*, 757 F.2d 1359, 1366–67 (2d Cir. 1985), found the dog sniff of an apartment door was a Fourth Amendment search because it violated the defendant's "legitimate expectation that the contents of his closed apartment would remain private. . . [and] could not be 'sensed' from outside his door." *Thomas* referred to the defendant's

apartment as his "dwelling place," and found that the purpose of the dog sniff was to detect "the contents of a private, enclosed space." *Id*. at 1367. The dog sniff was not just an improvement of the human sense of smell, but "a significant enhancement accomplished by a different, and far superior, sensory instrument." *Id*. The court reasoned, "It is one thing to say that a sniff in an airport is not a search, but quite another to say that a sniff can never be a search." *Id*. at 1366. While a dog sniff may be permissible in a public airport (*United States v. Place*, 462 U.S. 696, 707 (1983)), it was "intrusive when employed at a person's home." *Id*.

More recently, the Seventh Circuit in *United States v. Whitaker*, 820 F.3d 849, 851–54 (7th Cir. 2016), also found that the dog sniff of an apartment door was a Fourth Amendment search. Relying on *Kyllo*, the court found that "a dog search conducted from an apartment hallway" was controlled by the *Kyllo* "rule": the government used a sense-enhancing device, not available to the general public, to discover what was otherwise undetectable without physically entering the dwelling. *Id*. at 853. Strikingly, the court reasoned the defendant's lack of "a reasonable expectation of complete privacy" in the apartment hallway did not mean he had *no* reasonable expectation of privacy against people using the hallway to discover what was inside his dwelling by way of a device not available to the general public. *Id*. The court analogized the government's use of the trained narcotics detection dog on the door to the use of a stethoscope on the door that discerned conversations inside an apartment; such conduct was not an expected norm of behavior from anyone in the common hallway of a multi-unit dwelling and requires a warrant. *Id*. at 853–54. *Whitaker* also distinguished *Place* and *Caballes* because the dog sniffs in those cases were conducted in public and did not "implicate[] the Fourth Amendment's core concern of protecting the privacy of a home." *Id*. at 853.

These cases appear to conclude that a defendant's dwelling need not have curtilage to ensure they have Fourth Amendment protection inside their dwellings.

It is also worth noting that some courts have found the space immediately outside the doors of certain multi-unit dwellings constituted curtilage, and the government's warrantless dog sniffs there were Fourth Amendment searches. *See United States v. Hopkins*, 824 F.3d 726, 732 (8th Cir. 2016) (warrantless dog sniff was Fourth Amendment search because "area immediately in front of" defendant's door of rented townhome was curtilage where it was within a foot of townhome, used everyday by residents, and "daily experience" suggested it was curtilage despite not being enclosed or protected from observation); *People v. Bonilla*, 120 N.E.3d 930, 937–39 (Ill. 2018) (warrantless dog sniff of apartment door was Fourth Amendment search because threshold of door was the same as the front porch in *Jardines*).

It cannot be that the Fourth Amendment is applied differently across state borders, let alone in the same state. For example, the Illinois Supreme Court's decision below directs municipal and state law enforcement that warrantless dog sniffs of dwellings without curtilage are lawful under the Fourth Amendment. Pet. App. 17a. But under *Whitaker*, federal law enforcement must first obtain a warrant, or an exception to the probable cause requirement, before conducting such a dog sniff. *Whitaker*, 820 F.3d at 851–54. In order to ensure uniformity and consistency in application of the Fourth Amendment, this Court should resolve the split in authority over whether the government's warrantless use of a narcotics detection dog on dwellings without curtilage is a Fourth Amendment search.

III. This Case is an Ideal Opportunity for Resolving these Important and Recurring Questions of Fourth Amendment Jurisprudence.

This case presents an ideal opportunity for this Court to resolve the splits in authority discussed above. As the facts are not in dispute, the inquiries presented are

questions of pure law. Moreover, the case law cited in this petition demonstrates the frequent recurrence of the question of whether the government's warrantless use of a narcotics detection dog on a dwelling without curtilage is a Fourth Amendment search. This Court has the opportunity to decide whether such government conduct should be controlled by *Katz* and *Kyllo*, or by *Place* and *Caballes*.

Lindsey's motel room presents this Court with an ideal opportunity to address this question and its inherent considerations. A traditional curtilage concept and analysis do not apparently apply to motels, due to the more transient nature of motel stays. As such, the government will not likely commit a physical intrusion into such spaces when conducting a dog sniff of the dwelling.

Further, this case presents this Court with the opportunity to consider the practical effect of allowing the government to conduct warrantless dog sniffs on only certain dwellings. Relying on the Census's American Housing survey of 2013, the *Whitaker* court reported that 67.8% of White households lived in single-unit houses, followed by 52.1% of Hispanic households, and 47.2% of Black households. *United States v. Whitaker*, 820 F.3d 849, 854 (7th Cir. 2016). Additionally, 84% of single-unit households earned more than $120,000 and 40.9% earned less than $10,000. *Id.* Motels are less-stable housing where residents are more transient and have varying lengths of inhabiting the dwelling. The application of the privacy-based approach employed in *Kyllo* to such multi-unit dwellings without curtilage could avoid the potentially discriminatory effect of police use of dog sniffs only on dwellings more likely to be inhabited by low-income people of color. While such government monitoring of these spaces is both unexpected and unwarranted, under the Illinois Supreme Court's decision, it could very well become commonplace in Illinois.

The Illinois Supreme Court's decision thus creates a split from this Court's precedent repudiating a "mechanical application" of the Fourth Amendment and longstanding precedent that motel guests have Fourth Amendment protection from unreasonable searches and seizures inside their dwellings. It also widens the split between courts as to what the requisite privacy interest is in analyzing whether the government's warrantless use of a narcotics detection dog on a dwelling without curtilage violates the resident's reasonable expectation of privacy in their dwelling. Certiorari is appropriate to bring clarity and uniformity to these important aspects of Fourth Amendment jurisprudence.

CONCLUSION

For the foregoing reasons, petitioner, Jonathan Lindsey, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court.

Respectfully submitted,

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