No. _____

IN THE
Supreme Court of the United States

DEWAYNE LEWIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Since at least 1964, this Court has recognized that hotel guests are entitled to the same Fourth Amendment protections against unreasonable searches and seizures as homeowners. *Stoner v. California,* 376 U.S. 483, 490 (1964). In 2013, this Court held that a police officer violates the Fourth Amendment when he conducts a dog sniff investigation on the front porch of a single-family home without first obtaining a warrant. *Florida v. Jardines*, 569 U.S. 1, 11 (2013).

When Dewayne Lewis was a motel guest, police officers warrantlessly used a drug sniffing dog to investigate the contents of his room from a publicly-accessible hallway. Despite the outcome suggested by *Stoner* and *Jardines*, the Seventh Circuit held that the investigation did not violate his Fourth Amendment rights because Lewis was a motel guest and the hallway where the officer stood was accessible to the public. *United States v. Lewis*, 38 F.4th 527, 536 (7th Cir. 2022).

The question presented is:

Does warrantless use of a drug detection dog constitute an unreasonable search when the officer and dog are standing in the common area of a multiunit living space to detect the presence of drugs inside private living space?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

DIRECTLY RELATED CASES

United States v. Lewis

No. 21-1614, U.S. Court of Appeals for the Seventh Circuit. Judgment entered June 21, 2022. Opinion published at 38 F.4th 527. Rehearing denied on November 9, 2022 (docket entry 75).

No. 15-cr-10, U.S. District Court for the Northern District of Indiana. Final Judgment in a Criminal Case entered on April 5, 2021.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dewayne Lewis respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

DECISIONS BELOW

The Seventh Circuit's decision is published at 38 F.4th 527 and is included as Appendix A. The July 10, 2017, Opinion and Order of the United States District Court for the Northern District of Indiana denying Petitioner's motion to suppress is unpublished, though available on Westlaw at 2017 WL 2928199, and is included as Appendix B. The Seventh Circuit's decision denying Petitioner's request for rehearing is also unpublished, though available on Westlaw at 2022 WL 16838819, and is included as Appendix C.

JURISDICTION

The Seventh Circuit entered judgment on June 21, 2022. Pet. App. 1a. Mr. Lewis filed a petition for rehearing en banc, which was denied on November 9, 2022. Pet. App. 49a. This petition is filed within 90 days of the that order. S. Ct. R. 13. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Mr. Lewis was convicted after a bench trial of possession with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 841(a)(1). Title 21 U.S.C. § 841(a)(1) provides:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

Mr. Lewis filed a motion to suppress the cocaine found in his motel room, arguing that it violated his right to privacy conferred by the Fourth Amendment to the United States Constitution. The Amendment 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 Warrats 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.

INTRODUCTION

In *Florida v. Jardines*, this Court held that a police officer does not have a license to walk onto a homeowner's front porch and investigate the home and its immediate surroundings with a dog sniff. 569 U.S. 1, 11 (2013). The Court reasoned that, by virtue of having the dog on the resident's property, the officer was trespassing, rendering the search unreasonable. *Id.* While "[o]ne virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy," subsequent decisions by both federal and state courts have demonstrated that the property-rights rationale becomes murky when applied to residences other than single family homes. *Id.* While the facts in *Jardines* may have been an easy case with a straightforward answer, courts are faced with increasingly difficult questions surrounding the Fourth Amendment protections to be afforded to people living in

multiunit buildings, particularly properties whose front doors open into common areas more or less accessible to the public.

As courts across the country have struggled to apply *Jardines*, two major areas of disagreement have arisen: 1) how to analyze the property interests of people who reside in non-single-family housing units, and 2) when and why a detection dog constitutes a search. The Seventh Circuit's decision in *Lewis* is emblematic of these struggles. Though it previously held that an apartment was afforded the same protections as a single family home despite the apartment lacking external "curtilage," it held in *Lewis* that a hotel room does *not* benefit from such protections. Compare *United States v. Whitaker*, 820 F.3d 849, 853–54 (7th Cir. 2016) with *United States v. Lewis*, 38 F.4d 527, 536 (7th Cir. 2022). *Lewis* created confusion within the Seventh Circuit and highlighted the splits that have arisen among the Circuit courts nation-wide. In doing so, it muddled guidance to law enforcement officers.

Considering that both the number of renters[1] and the dependence on detection dogs have increased in recent years,[2] it is more important than ever to bring clarity to these issues. As the Seventh Circuit itself previously noted, distinguishing between those whose residences open into a common area and those whose residences open into a front yard would be "troubling because it would apportion Fourth Amendment protections on grounds that correlate with income,

[1] See, Cilluffo, Anthony, et al., *More U.S. households are renting than at any point in 50 years*, July 19, 2017, *available at* https://www.pewresearch.org/fact-tank/2017/07/19/more-u-s-households-are-renting-than-at-any-point-in-50-years/.
[2] See Smith, Peter Andrey, *The Sniff Test*, October 14, 2021, *available at* https://www.science.org/content/article/should-dog-s-sniff-be-enough-convict-person-murder

race, and ethnicity." *Whitaker*, 820 F.3d at 854. Nevertheless, the Court's opinion in *Lewis* chips away at the uniform application of *Jardines* to all types of residences.

STATEMENT OF THE CASE

I. A warrantless dog sniff

While investigating a drug trafficking operation whose leader had fled to Mexico, the FBI obtained a cell phone number for an individual referred to as "Nap" by monitoring texts between known participants in the operation. *Lewis*, 38 F.4th at 530-31. From a confidential informant, officers knew "Nap" drove a black Mercedes SUV. *Id.* at 530. Officers determined the phone was registered to a Dewayne Lewis, and suspected that "Nap" lived in Indianapolis, Indiana. *Id.* at 531. A search revealed a Dewayne Lewis born in 1977, with a prior drug conviction, who was also wanted on an outstanding warrant. *Id.* A cooperating witness incorrectly identified a picture of this Lewis as "Nap." *Id.* Officers applied for and received authorization to track the cell phone based, in part, on the 1977 Lewis's status as a fugitive. *Id.*

On February 3, 2015, Sprint's data showed that the phone was within a 1,099-meter radius of Greenwood, a suburb of Indianapolis. *Id.* Relying on the data, officers checked parking lots across Greenwood for a black Mercedes SUV. *Id.* at 532. Sometime after 2:00 p.m., officers checked a police database and discovered that defendant Lewis lived in Greenwood and had two cars registered to him: a black Mercedes SUV and a white Cadillac Escalade. *Id.* They realized, at that time, that there was a discrepancy in the birth year—defendant Lewis was born in 1974, he was not the man with the outstanding warrant. *Id.* Officers zeroed in on the Red Roof Inn in Greenwood, and shortly after 3:00 p.m., observed a white Cadillac

Escalade, registered to defendant Lewis, arrive in the parking lot. *Id.* A woman resembling Lewis's wife took a duffel bag out of the car, brought it to Room 211, and left fewer than five minutes later. *Id.* Room 211 was located on the second floor of the hotel and was accessible via an exterior hallway and staircase leading directly to the parking lot. *Id.* At 3:35 p.m., officers knocked on the door, and no one answered. *Id.* Six minutes later, without obtaining a warrant, "a K-9 handler walked a trained drug-detection dog up the exterior staircase and along the second-floor hallway;" the dog alerted at Room 211. *Id.* Officers then obtained a search warrant based on the alert. *Id.* Upon searching the room, officers located "Lewis, $2 million in cash, and 19.8 kilograms of cocaine in duct-taped packages." *Id.* Mr. Lewis later confessed to his role in the conspiracy. *Id.*

II. Proceedings in the District Court

After indictment on charges of possession with intent to distribute five kilograms or more of cocaine, Mr. Lewis moved to suppress the evidence resulting from the dog sniff. *Id.* at 530, 532. After a two-day hearing, the magistrate judge recommended that the district court suppress all evidence from the hotel room and Mr. Lewis's confession, on the ground that the dog sniff violated the Fourth Amendment. *Id.* at 532-33. The district judge, however, rejected that recommendation and ruled that there was no violation, because the hallway of the Red Roof Inn was not curtilage. *Id.* Mr. Lewis was convicted after a bench trial and filed a timely notice of appeal. *Id.*

III. The Seventh Circuit's Decision Below

The Seventh Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. §§ 1291 and 1294. On appeal, Mr. Lewis argued in part that the district court erred in denying his motion to suppress. *Id.* The court affirmed, reasoning in part that the exterior hallway of the Red Roof Inn is not curtilage, so no physical trespass had occurred. *Id.* at 535. The court also concluded that any subjective expectation of privacy Mr. Lewis may have had in his hotel room was not reasonable as applied to the dog sniff of the exterior hallway, holding that this hallway was "much closer to the public settings in *Caballes* and *Place* than the front porch in *Jardines*." *Id.* at 535-36. A petition for rehearing en banc was denied. Pet. App. 49a.

REASONS FOR GRANTING THE PETITION

I. Courts across the country are split as to the proper way to apply a property rights analysis to multiunit living spaces.

Though this Court has clearly stated that, "[n]o less than a tenant of a house . . . a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures," the practical implementation of this principle is sometimes enigmatic. *Stoner,* 376 U.S. at 490. Because *Jardines* is premised on a property theory of the Fourth Amendment, it is primarily concerned with the ground on which the officer and dog are standing, rather than the property interest inside the residence that is being searched. 569 U.S. at 11. Despite *Stoner* and its progeny, when officers are investigating residences but standing on public or semi-public ground, courts struggle to apply *Jardines*.

For example, the Seventh and Eighth Circuits have come to diametrically opposed conclusions on what happens when police investigate residences with detection dogs from common areas. On one end of the spectrum, the Eighth Circuit has used a *Dunn* analysis to label common areas that anyone can use "curtilage." See, e.g., *United States v. Hopkins*, 824 F.3d 726, 732 (8th Cir. 2016); see also *United States v. Dunn*, 480 U.S. 294, 301 (1987) (establishing a four-factor balancing test to determine what area outside the home is curtilage). On the other, the Seventh Circuit in *Lewis* has turned its back on almost a century of precedent by holding that not only is the area surrounding hotels not protected by the Fourth Amendment, but even inside, the temporary residents are not afforded the same protection as homeowners. *Lewis*, 38 F.4th at 536.

A. The Eighth Circuit is joined by some states in applying *Dunn* to grant Fourth Amendment protection to common areas.

Over the past decade, courts have applied *Jardines* to rental and shared properties without direct guidance from this Court. The results have varied widely. Some courts have extended the curtilage analysis *Jardines* to common spaces by saying that the area immediately outside an apartment door is "curtilage," or "part of the home itself for Fourth Amendment purposes." *Oliver v. United States,* 466 U.S. 170, 180 (1984). For example, the Eighth Circuit has designated as "curtilage" both a shared walkway and stoop outside of a townhouse, *United States v. Hopkins*, 824 F.3d 726, 732 (8th Cir. 2016), and a shared yard outside of the window of an apartment, *United States v. Burston*, 806 F.3d 1123, 1127 (8th Cir. 2015). These areas have historically not been considered curtilage because the townhouse and

apartment occupants do not have the ability to exclude people from those places. See, e.g., *United States v. Arboleda*, 633 F.2d 985, 992 (2d Cir. 1980) (stating an apartment renter's "'dwelling' cannot reasonably be said to extend beyond his own apartment and perhaps any separate areas subject to his exclusive control").

In *United States v. Dunn*, this Court laid out the four-factor balancing test to determine when the space outside a residence is protected "curtilage" for purposes of Fourth Amendment protection:

> (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.

480 U.S. 294, 301 (1987). While the area surrounding an apartment is close in proximity, neither an open apartment yard nor the front door of a townhouse can be considered enclosed or protected from view due to the resident's actions. Even "the nature" of the area is that it is public.

Further deepening the confusion in the Eighth Circuit is its decision in *United States v. Scott*, holding that a dog sniff in a shared apartment hallway does not constitute a search, as "the police were lawfully present in the common hallway." 610 F.3d 1009, 1015 (8th Cir. 2010). If officers are, indeed, lawfully present in an apartment hallway, why would their presence in the yard outside the window in *Burston* and on the shared stoop in *Hopkins* be unlawful? Though *Scott* predated *Jardines*, the circuit has "neither expressly overruled *Scott* nor explained how *Jardines* applies to apartment doors in a common hallway." *United States v. Perez*, 46 F.4th 691, 697–98 (8th Cir. 2022). It appears to be waiting on further

guidance before doing so. In the meantime, officers must be left to determine on their own whether a given common area is more similar to an apartment hallway or to the yard of an apartment building and the shared stoop of a townhouse before deciding whether they must seek a warrant to conduct a dog sniff investigation.

State courts have also grappled with questions of dog sniffs outside apartments as it relates to both the Fourth Amendment and their respective state constitutions. For instance, the Supreme Court of Illinois held that a landing outside of an apartment is treated as curtilage where the building was locked and the landing in question was, therefore, not open to the general public. *People v. Burns*, 50 N.E. 3d 610, 620-22 (Ill. 2016). In doing so, the court distinguished this case from "situations that involve police conduct in common areas readily accessible to the public," suggesting that if the apartment building was unlocked, the answer would be different. *Id.* The Supreme Court of Nebraska also held that a warrantless dog sniff conducted in an apartment hallway violated the apartment dweller's Fourth Amendment right to privacy. *State v. Ortiz*, 600 N.W. 2d 805, 820 (Neb. 1999). Instead of relying on a property interest in the hallway, however, the court cited to *Katz v. United States* for the idea that the occupant sought to protect the belongings *inside* the apartment and the drug detection dog significantly enhanced the officers' sense of smell, allowing them to "obtain information regarding the contents of a place that has traditionally been accorded a heightened expectation of privacy:" the home. *Id.* at 819-20, citing *Katz v. United States*, 389 U.S. 347 (1967). This analysis suggests that the privacy right does not, in fact, turn on a locked

entry to the apartment building or whether the hallway is accessible to the public. Finally, the Appellate Court of Maryland held that neither *Katz* nor a curtilage analysis affords Fourth Amendment protection to an apartment hallway, even where the building was equipped with a lock and buzzer system. *Lindsey* v. *State*, 127 A.3d 627, 642-44 (Md. App. 2015).

The variation in these decisions underscores the need for clarity from this Court. The Fifth Circuit's decision in *United States v. Holley* exemplifies the confusion courts are feeling on these issues:

> Prior to *Jardines*, thirteen different federal and state judges (including three members of this Court) concluded that a dog sniff of a garage door did not violate the Fourth Amendment. . . . Indeed, even now, it is unclear whether a dog sniff of a garage door is unconstitutional. The dissent urges that *Florida v. Jardines* and *Kyllo v. United States* inexorably lead to this conclusion. But the dissent ignores cases holding that a driveway is not part of the home's curtilage and a dog is not the type of "sense-enhancing" tool discussed in *Kyllo*.

United States v. Holley, 831 F.3d 322, 327 (5th Cir. 2016). Consistency and guidance are needed on these matters. If it is not provided, courts are likely to continue to produce contradictory and confusing results.

B. The Seventh Circuit's opinion threatens renters' Fourth Amendment protection in their homes.

Diametrically opposed to the Eighth Circuit analysis that common areas outside rental units may be treated as "part of the home itself for Fourth Amendment purposes," *Oliver,* 466 U.S. at 180, is the Seventh Circuit's *Lewis* opinion. Not only does the Seventh Circuit grant no Fourth Amendment protection in the area outside of a motel room, but states that hotel guests do not even have the same Fourth Amendment protection of the interior of the room. Contrary to over

70 years of this Court's precedent, see *Johnson v. United States*, 333 U.S. 10, 15 (1948), *Lewis* held that:

> A hotel guest has a reasonable expectation, for example, that there is not a hidden camera in her room. But that does not mean an expectation of privacy that is reasonable in a home (i.e., to be free of warrantless dog sniffs) is necessarily reasonable in a hotel room.

Lewis, 38 F.4th at 536. The Seventh Circuit has thus abridged hotel guests' rights to be free from unreasonable searches because "hotel guests have only a limited right to exclude hotel staff from a room," and because they are "mere guest[s]," not residents. *Id.*

Time and again, this Court has reaffirmed that temporary guests have the same Fourth Amendment protection as homeowners:

> From the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside. We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings. It is for this reason that, 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.

Minnesota v. Olson, 495 U.S. 91, 99 (1990). The holding in *Lewis* prompts more questions than it answers. For example, how long must someone stay at a hotel or motel before being considered a resident? If the home in *Jardines* had been filled with short-term Airbnb renters and the homeowners had license to enter, would the outcome have been different? Is a guest at someone's apartment now subject to a different level of protection than the person who signed the lease? Are officers permitted to conduct a warrantless dog sniff in curtilage if they have reason to

believe a guest is the one concealing drugs? In the midst of these inconsistent holdings, how are police supposed to know where they are allowed to be and what they are allowed to do?

Clarity is needed on these issues. Both the Eighth and Seventh Circuits are attempting to color in a grey area of jurisprudence by issuing these decisions. The *Lewis* decision could lead to expanding the existing Fourth Amendment grey area and limiting the Fourth Amendment protection explicitly identified by this Court. *Lewis* should not remain good law.

II. Courts are also split regarding the nature of detection dog investigations in multiunit residences.

In addition to the confusion over how to analyze property rights in shared living spaces, ambiguities have arisen in the case law regarding the nature of the detection dog itself. *Jardines* uses a property analysis to determine that while an officer has an implied license to "knock and talk" at the front door of a residence, that license does not extend to investigations involving detection dogs. *Jardines*, 569 U.S. at 10. Though application of the limited *Jardines* rule is clear enough as to single family homes (officer + dog + curtilage = search), wider application becomes complicated. An officer knocking on the door alone does not constitute a search but an officer with a dog constitutes an "unlicensed physical intrusion," as there is no implied license "to do *that*." *Id.* at 8–9 (emphasis in original). Courts have split in attempting to answer the following: If an officer using a detection dog on curtilage to investigate the contents of a residence constitutes a search, is an officer using a

detection dog still a search where he is investigating the contents of a residence but standing on publicly accessible land (not curtilage)?

The Seventh Circuit, within the span of a single decade, has arrived at two seemingly opposite conclusions. In 2016, it held that an apartment dweller's privacy interest in the interior of the apartment precluded a warrantless search using a sophisticated sensing device such as a drug detection dog. *United States v. Whitaker*, 820 F.3d 849, 853 (7th Cir. 2016), citing *Kyllo v. United States*, 533 U.S. 27 (2001). The *Whitaker* court specifically noted that, "the fact that this was a search of a home distinguishes this case from dog sniffs in public places," and considered the defendant's lack of a reasonable expectation of complete privacy *in the hallway* of no moment. *Id.* Only 6 years later, in *Lewis,* the court seemingly did an about-face, holding that the hallway of a motel was analogous to a public place, and there was, therefore, no reasonable expectation to be free from dog sniffs *into the adjacent rooms*. *Lewis*, 38 F.4th at 535-36, citing *United States v. Place*, 462 U.S. 696 (1983). This contradiction is emblematic of the confusion that exists in courts across the country; courts are split as to how to view detection dog investigations seeking to "peer" within a residence when the officer is not standing on curtilage.

A. In *Lewis*, the Seventh Circuit joins other courts in applying *Place*'s rationale to searches of residences, standing in sharp contrast to *Jardines*.

United States v. Place involves use of a detective dog to investigate a suspect's luggage at an airport. 462 U.S. 696 (1983). In that case, the Court held that there was no search because "the sniff discloses only the presence or absence of narcotics, a contraband item." *Id.* at 707. This Court later extended this reasoning,

holding that a dog sniff conducted "during a lawful traffic stop, generally does not implicate legitimate privacy interests." *Illinois v. Caballes*, 543 U.S. 405, 409 (2005). In *Lewis*, the Seventh Circuit has taken these cases and applied them to searches of temporary residences, ignoring the distinguishing fact that that these searches involved quintessentially public locations: "inspection of luggage in an airport . . . and canine inspection of an automobile during a lawful traffic stop," rather than a location traditionally afforded the highest Fourth Amendment protection. *Jardines*, 569 U.S. at 10. In *Lewis*, the court stated: "Even assuming that Lewis had a subjective expectation of privacy [in his hotel room], the Supreme Court's decisions in *Caballes* and *Place* demonstrate that his expectation was not reasonable." *Lewis*, 38 F.4th at 535.

Though the Seventh Circuit is in the minority, other courts have also used this Court's holding in *Place* to say that a residence which opens into a common area does not have protection from warrantless dog searches. For instance, the Supreme Court of Minnesota held that, "while [the defendant's] expectation of privacy inside his apartment may be greater than the expectation of privacy inside a storage unit," reasonable suspicion was all that was required to conduct the dog sniff outside either location. *State v. Davis*, 732 N.W. 2d 173, 180 (Minn. 2007). Additionally, the Supreme Court of North Dakota, also citing to *Place*, held that "the likelihood that the use of a drug-sniffing dog in the common hallway of a secure apartment building will actually compromise any legitimate interest in privacy is too remote to characterize the use of the drug-sniffing dog as a search subject to the

Fourth Amendment." *State v. Nguyen*, 841 N.W. 2d 676, 681-82 (N.D. 2013). Likewise, the United States District Court for the District of Colorado, denying a motion to suppress the warrantless dog sniff of an apartment, stated: "To the extent a dog can detect a scent, therefore, it does not detect anything that would have been unknowable without physical intrusion . . . [it] does not reveal any details at all, but informs the police instead merely of a reasonable chance of finding contraband they have yet to put their hands on." *United States v. Broadway*, 580 F. Supp. 2d 1179, 1191 (D. Colo. 2008).

Such application of *Place*'s rationale to investigations of residences simply cannot be reconciled with *Jardines*. If a drug-sniffing dog is always an unobtrusive way to detect only contraband, then it could not be considered a search in *Jardines*. The distinguishing factor is that privacy in the home, unlike in luggage or vehicles, has been "the very essence of constitutional liberty and security" since the beginning of common law, and has always been afforded the highest Fourth Amendment protection. *Boyd v. United States*, 116 U.S. 616, 630 (1886). The other side of this circuit split offers a more reasonable and workable answer to the question of when an officer using a detection dog constitutes a search.

B. Application of *Kyllo* to detection dogs is a logical way to reconcile *Jardines* with *Place*.

In her *Jardines* concurrence, Justice Kagan proposes a solution to the detection dog problem. She explains that use of a highly trained drug-sniffing dog constituted a search because trained dogs are "device[s] . . . not in general public use" and are comparable to a "super-high-powered binoculars" used to "peer through

your windows, into your home's furthest corners." *Jardines*, 569 U.S. at 14 (Kagan, J., concurring), quoting *Kyllo*, 533 U.S. at 40. This reasoning would bring drug detection dogs within the scope of *Kyllo*'s holding that using technology not in general use to gather information that "would previously have been unknowable without physical intrusion . . . is presumptively unreasonable without a warrant." *Kyllo*, 533 U.S. at 40.

Courts around the country have used the logic found in this concurrence to state that the relevant privacy interest is the interest in privacy *inside* the residence, even though the officer and hound may have been standing outside, in a public area as they searched. For instance, in a case decided before *Kyllo*, the Second Circuit held that a dog sniff outside an apartment was a search because the defendant had a "heightened expectation of privacy *inside* his dwelling." *United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985) (emphasis added). The Supreme Court of New York similarly compared detection dogs sniffing odors emanating from inside an apartment to "sound waves which were harnessed by the electronic surveillance equipment" in holding that the use of a trained canine outside the apartment was a search requiring a warrant. *People v. Dunn*, 564 N.E.2d 1054, 1058 (N.Y. 1990). The Supreme Court of Connecticut, after a survey of how courts have treated dog sniffs throughout the country, stated that federal precedent, including *Kyllo* and *Jardines*, provided support for the defendant's claim that the state constitution had been violated by a warrantless search conducted in the hallway of a multiunit apartment building. *State v. Kono*, 152 A.3d 1, 10-16

(Conn. 2016); see also *Kono*, 152 A.3d at 33 (Zarella, J., concurring) (concluding that "the dog sniff of the defendant's condominium unit … was a search under the fourth amendment"). All of these cases focus on the privacy interest that exists inside the apartment, regardless of where the officer and dog were standing when the investigation occurred, and recognize that the dog effectively penetrated into the apartment's interior as it sniffed.

The Seventh Circuit ostensibly agrees with this logic. In *Whitaker*, the court held that "Whitaker's lack of a reasonable expectation of complete privacy in the hallway does not also mean that he had no reasonable expectation of privacy against persons in the hallway snooping *into* his apartment using sensitive devices not available to the general public." 820 F.3d at 853 (emphasis added). Accordingly, it established a warrant requirement for the use of a drug detection dog in the hallway of an apartment building. *Id.* However, unlike the Supreme Court of Connecticut, which later extended the warrant requirement to the exterior door of a motel room, the Seventh Circuit drew a seemingly arbitrary line between motels and apartments, holding that no such protection was afforded to a motel room. Compare *State v. Correa*, 264 A.3d 894, 926 (Conn. 2021) with *Lewis*, 38 F.4th at 535.

Analyzing dog sniffs under the *Kyllo* framework and applying Fourth Amendment protection broadly to residences (whether permanent or temporary) would provide clarity for law enforcement and shore up Fourth Amendment protection for millions of Americans. First, the rationale of *Kyllo* could clear up

ambiguities in applying *Jardines*. *Kyllo* allows for officers to gather sensory evidence during a "knock and talk" without a warrant, see *California v. Ciraolo,* 476 U.S. 207, 213 (1986) (holding that "officers [need not] shield their eyes when passing by a home on public thoroughfares"), but a warrant would be required to use a specially-trained dog, as it is a "device . . . not in general public use," *Kyllo*, 533 U.S. at 40. Second, the *Kyllo* framework could resolve the identified splits between federal circuits and state courts. There would be no need resort to the Eighth Circuit's approach of shoehorning shared premises surrounding multiunit living spaces into the *Dunn* factors to provide apartment dwellers the same Fourth Amendment protection enjoyed by occupants of single-family homes. Adopting *Kyllo* would preclude *Place* from confusingly being applied to residences instead of personal property. This approach would promote consistency; as the privacy interests *inside* a residence would be the determining factor, this Court's prior jurisprudence extending Fourth Amendment protections to guests and hotel occupants would apply to this Fourth Amendment question in the same way it applies to all other Fourth Amendment issues. See *Stoner,* 376 U.S. at 490. Finally, this Court could provide a rule precluding discriminatory outcomes opened up by decisions such as *Lewis*. See *infra*, Section III.

III. This is an important issue bearing on the constitutional protections afforded to millions of Americans.

Over 46 million American households rent, including the majority of both African American and Hispanic households.[3] What's more, the per capita percentage of renters as of 2017 is at a height not seen since 1965.[4] Many of these renters have residences which open up into common areas. The statistics are similar when looking at the racial and socioeconomic divide between occupants of single-unit detached housing and those living in multiunit housing. *Whitaker*, 820 F.3d at 854 (summarizing the US Census Bureau data for 2013). Occupants of each of these households are in danger of losing their fundamental right of being free from warrantless searches. As Justice Ginsberg pointed out during oral argument in *Jardines*, if warrants are not required for this type of search, the police could then "go into a neighborhood that's known to be a drug dealing neighborhood . . . just go down the street, have the dog sniff in front of every door, or go into an apartment building?" Transcript of Oral Argument, *Florida v. Jardines*, No. 11-564, at 5.[5] Indeed, these concerns have pushed multiple courts away from a pure property-rights analysis. See *Kono*, 152 A.3d at 8 (noting the trial court had expressed concern about allowing "law enforcement to troll through the hallways and apartment buildings, including public housing projects, with drug sniffing dogs to

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[3] Desilver, Drew, *As national eviction ban expires, a look at who rents and who owns in the U.S.*, August 2, 2021, *available at* https://www.pewresearch.org/fact-tank/2021/08/02/as-national-eviction-ban-expires-a-look-at-who-rents-and-who-owns-in-the-u-s/

[4] Cilluffo, Anthony, et al., *More U.S. households are renting than at any point in 50 years*, July 19, 2017, *available at* https://www.pewresearch.org/fact-tank/2017/07/19/more-u-s-households-are-renting-than-at-any-point-in-50-years/

[5] *Available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2012/11-564.pdf

search for contraband within individual apartments"). As the Seventh Circuit itself recognized, allowing police dogs to sniff the doors of multifamily dwelling units but not freestanding homes would be deeply "troubling because it would apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity." *Whitaker*, 820 F.3d at 854.

This is not a far-fetched idea. The number of detection dogs of all types has steadily increased over the past decades. Between 1989 and 2010, the number of dogs in police departments increased from 2,000 to as many as 50,000. Peter Andrey Smith, *The Sniff Test*, Science.Org.[6] Not only are there more dogs in use than ever, but the reliance on their findings has increased. Cadaver dogs have been used as *de facto* expert witnesses with a sniff powerful enough to secure a murder conviction without any other connection to physical evidence. *Id.* (referencing the trial of Mark Redwine). Moreover, reliance has been seen as reasonable even when a detection dog's accuracy is only marginally better than that of a coin flip. For instance, in *United States v. Bentley*, the Seventh Circuit found probable cause was established by an alert where a drug sniffing dog alerted in 93% of searches but was only accurate 59.3% of the time. 795 F.3d 630, 635 (7th Cir. 2015).

Given the growing prevalence of this investigative technique and the competing interests of police work and individuals' privacy in their living space, as well as the variety of outcomes arrived at by courts across the country, this

[6] *Available at* https://www.science.org/content/article/should-dog-s-sniff-be-enough-convict-person-murder

important issue should be addressed by this Court to provide guidance and clarity to courts and law enforcement officers nationwide.

IV. This case presents a good opportunity for this Court to clarify many of the Fourth Amendment's greatest ambiguities as it relates to dog sniff investigations, and to solidify the privacy rights of all Americans, regardless of their personal economic situation.

This case represents an ideal vehicle for review, for several reasons. First, the issue was fully presented and before the Seventh Circuit. The Seventh Circuit clearly held that the occupant of a motel room was *not* afforded the same Fourth Amendment protections as that of a single-family home or of an apartment. In doing so, the court exposed multiple points of confusion on application of *Jardines* that have arisen in courts around the country. There are no alternative holdings or additional explanations from the Seventh Circuit that would impede this Court's ability to squarely address and answer the questions presented. The issues before this Court extend not only to multiunit permanent dwelling locations such as apartment buildings, but to the rights afforded to guests in homes and in more temporary dwelling places such as hotels and motels.

Second, there is no chance that the case will become moot. The dog sniff in this case led to discovery of the drugs Mr. Lewis was charged with possessing. If this Court agrees with Mr. Lewis, this evidence would be suppressed and there is a substantial chance he would no longer face prosecution on these charges.

Third, the issues here are purely legal questions related to the scope of Fourth Amendment protection afforded to occupants of multi-unit dwellings and hotels or motels as it relates to dog sniff investigations. The issue is worthy of

resolution, as courts across the country are struggling to articulate a coherent rationale for when a warrant will be required.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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