No. 18-1219

In the Supreme Court of the United States

ILLINOIS,

Petitioner,

v.

DERRICK BONILLA,

Respondent.

On Petition for a Writ of Certiorari to the Illinois Supreme Court

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Illinois Supreme Court correctly held, under a deferential state-law standard of review necessitated by the state's failure to provide an adequate record on appeal, that a warrantless dog sniff at the threshold of respondent's apartment for the purpose of detecting otherwise undetectable material inside the apartment was a search under the Fourth Amendment.

II. Whether the good-faith exception to the exclusionary rule applies to the dog sniff that took place in this case.

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Here's When Marijuana Will Be Legal in Illinois, and Answers to Other Burning Questions About Recreational Weed, Chicago Tribune, June 3, 2019 16

STATEMENT

Because the state failed to provide a complete record on appeal to the Illinois Supreme Court, Pet. App. 5a, the record contains only scant information about the facts of this case. Here is what the record reflects.

The East Moline Police Department received a tip that Derrick Bonilla was selling drugs from his apartment. *Id.* at 3a. An officer named Genisio—we don't know his first name—brought a drug-sniffing dog to the apartment building. *Id.* The building had three floors, with four apartments on each floor. *Id.* The exterior door to the building was unlocked. *Id.* Genisio walked the dog past the thresholds of each of the apartments on the second and third floors. *Id.* When the dog reached Bonilla's door, it signaled the presence of drugs. *Id.*

The police obtained a search warrant based on the dog sniff. *Id.* There is no evidence in the record as to the scope of the warrant, because the state failed to include the warrant in the record, and because the state also failed to include the affidavit the police submitted to obtain the warrant. *Id.* at 5a.

The police searched Bonilla's apartment and found approximately 17 grams of cannabis, a bit more than half an ounce. Bonilla was arrested and charged with unlawful possession of cannabis with intent to deliver. *Id.* at 3a.

The trial court granted Bonilla's motion to suppress. *Id.* at 56a-57a. The court relied on two independent grounds for its decision—first, that the dog sniff constituted an invasion of Bonilla's reasonable expectation of privacy under *Kyllo v. United States*,

533 U.S. 27 (2001), and second, that the dog sniff took place in the curtilage of Bonilla's apartment under *Florida v. Jardines*, 569 U.S. 1 (2013). As the court explained,

> whether you are doing it as a privacy interest under Kylo [sic] or a curtilage property interest under Jardines, I think it would just be unfair to say you can't come up on a person who lives in a single family residence and sniff his door but you can go into someone's hallway and sniff their door if they happen to live in an apartment. That's a distinction with an unfair difference. So I'm granting the motion.

Pet. App. 57a.

The state appealed. The state's brief in the Appellate Court of Illinois focused almost exclusively on whether Bonilla had a reasonable expectation of privacy in the area just outside of his apartment. The brief contained only a single point heading, which argued the privacy issue but not the curtilage issue: "The trial judge erred in granting the defendant's motion to quash warrant and suppress evidence, where the use of a drug-sniffing canine in the common area of a hallway of an unlocked apartment building did not violate any reasonable expectation of privacy of defendant." State Ct. App. Br. ii. The brief included only one "Issue Presented for Review," which was worded identically but in question form. *Id.* at 1. The brief' did mention *Jardines*, but only in the middle of an argument that the search did not violate Bonilla's reasonable expectation of privacy. *Id.* at 10-11. The state's reply brief did not mention *Jardines* at all.

The Appellate Court of Illinois affirmed. Pet. App. 37a-55a. The court concluded that the dog sniff took place in the curtilage of Bonilla's apartment. *Id.* at 47a-50a. "At the very core of the fourth amendment is the right of a person to retreat into his or her own home and there to be free from unreasonable governmental intrusion," the court explained. *Id.* at 47a. "In providing that protection, the fourth amendment does not differentiate as to the type of home involved." *Id.* at 47a-48a. To have a different rule for apartments and single-family homes, the court observed, "would be to draw an arbitrary line that would apportion fourth amendment protections on grounds that correlate with income, race, and ethnicity." *Id.* at 48a.

The Appellate Court cautioned "that our ruling here is limited to the facts of this particular case and should not in any way be construed to mean that all apartment common areas constitute curtilage for the purposes of the fourth amendment." *Id.* at 49a.

Because the Appellate Court affirmed the trial court's decision that the dog sniff took place in the curtilage of Bonilla's apartment, the court did not reach the alternative ground for the trial court's decision, that the dog sniff interfered with Bonilla's reasonable expectation of privacy. *Id.* at 50a ("[T]here is no need to apply the privacy-based approach here because the government gained the evidence in question by intruding onto a constitutionally protected area.").

The Appellate Court also held that the good-faith exception to the exclusionary rule did not apply, because at the time of the search, the court had already held, in a different case, that a dog sniff at the

threshold of an apartment constituted a search because it took place in the curtilage of the apartment. *Id.* at 51a (citing *People v. Burns*, 25 N.E. 3d 1244 (Ill. App. Ct. 2015), *aff'd*, 50 N.E.3d 610 (Ill. 2016)).

Justice Wright dissented. Pet. App. 52a. She concluded that the dog sniff took place in an area that was not curtilage. *Id.* at 55a. Justice Wright did not address the alternative privacy basis of the trial court's holding.

The Illinois Supreme Court affirmed. *Id.* at 1a-36a.

Before reaching the merits, the Illinois Supreme Court castigated the state for failing to provide an adequate record on appeal. *Id.* at 5a-6a. As the court explained, "the State, as the appellant, has the burden of presenting a record sufficient to support its claim of error, and any insufficiencies must be resolved against it." *Id.* at 5a. "Obviously, our legal analysis on a motion to suppress is heavily dependent on the specific facts of each case, and we admonish the State for not providing this court with a complete record in this appeal." *Id.* The court found it "inconceivable that the State would expect this court to review the propriety of the trial court's ruling on defendant's motion to suppress evidence without providing a copy of the documents that were considered by the trial court in making its ruling." *Id.* at 5a-6a.

Because of the state's failure to provide a complete record, the Illinois Supreme Court noted, state law required it to review the trial court's decision deferentially. *Id.* at 5a-6a. Under this deferential standard of review, "any doubts that may arise from the

incompleteness of the record will be resolved against the State, as the appellant." *Id.* at 6a (citing *Foutch v. O'Bryant*, 459 N.E.2d 958, 959 (Ill. 1984) ("[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis.").

Applying this deferential standard, the Illinois Supreme Court held that "the threshold of the door to defendant's apartment falls within the curtilage of the home." Pet. App. 13a. The court added that a contrary holding would mean "that those who live in apartments have less property-based fourth amendment protection *within* their homes than those who live in detached housing." *Id.* (citation and quotation marks omitted). Because the court affirmed the decision of both courts below that the dog sniff took place within the curtilage of Bonilla's apartment, the court did not reach the trial court's alternative holding that the dog sniff invaded Bonilla's reasonable expectation of privacy.

The Illinois Supreme Court also held that the good-faith exception to the exclusionary rule did not apply, for the same reason as the Appellate Court—that at the time of the search, Illinois appellate precedent made clear that a dog sniff at the threshold of an apartment took place in the curtilage of the apartment. *Id.* at 17a-25a.

Chief Justice Karmeier and Justice Thomas dissented. *Id.* at 26a-36a. In their view, the dog sniff took place in an area that was not curtilage. *Id.*

REASONS FOR DENYING THE PETITION

I. The Court should deny certiorari on Question I.

The Court should deny certiorari on Illinois's first question presented. There is no conflict among the federal courts of appeals and state supreme courts. This case would be a dreadful vehicle for addressing the issue. And the decision below is correct.

A. There is no conflict among the federal courts of appeals and state supreme courts.

There is no conflict among the federal courts of appeals and state supreme courts. Illinois cites several cases that are allegedly contrary to the decision below, Pet. 6-8, but nearly all of them were decided by state intermediate appellate courts or federal district courts. The two cases decided by federal courts of appeals are unpublished, non-precedential opinions. When these are eliminated, we are left with three state supreme court decisions. Each is readily distinguishable.

Before discussing these three cases, it bears emphasizing that in our case the Illinois Supreme Court did *not* hold that all common areas in an apartment building are curtilage. Even if we set aside the deferential standard of review the Illinois Supreme Court employed, the court made clear that the case concerned only "the threshold of the door to defendant's apartment," Pet. App. 13a, and not other common areas such as lobbies, basements, parking lots, or hallways. The Appellate Court likewise explained that "our ruling here is limited to the facts of this particular case and should not in any way be

construed to mean that all apartment common areas constitute curtilage for the purposes of the fourth amendment." *Id.* at 49a.

The state has thus inaccurately framed its first question presented. This case raises no broad issue about dog sniffs in "the common area of an apartment building," Pet. i, a term encompassing a heterogenous collection of physical spaces—laundry rooms, parking garages, lobbies, mail vestibules, and the like. This case is merely about dog sniffs at the threshold of the door to an apartment. The lower courts in Illinois have already made this distinction. *See People v. Thomas*, --- N.E.3d ---, 2019 WL 2160149, *6-7 (Ill. App. Ct. 2019) (distinguishing the Illinois Supreme Court's decision below on this ground and holding that the lobby of an apartment building is *not* curtilage).

The three state supreme court cases alleged to conflict with the decision below are *State v. Nguyen*, 841 N.W.2d 676 (N.D. 2013), *State v. Edstrom*, 916 N.W.2d 512 (Minn. 2018), and *State v. Mouser*, 119 A.3d 870 (N.H. 2015). In fact, there is no conflict.

1. *State v. Nguyen*, 841 N.W.2d 676 (N.D. 2013), is devoted almost entirely to a determination that the defendant lacked a reasonable expectation of privacy in the hallway outside his apartment. The court began by identifying its task: "To determine whether a legitimate expectation of privacy exists." *Id.* at 680. The court reasoned that "[t]he locked and secured entrance of Nguyen's apartment building was designed to provide security for the tenants of the apartment building rather than to provide privacy in the common hallways." *Id.* at 681. The court thus

concluded that "Nguyen had no reasonable expectation that the common hallways of the apartment building would be free from any intrusion." *Id.*

Only then, near the very end of its opinion, did the North Dakota Supreme Court turn to the curtilage issue, which it disposed of in two brisk paragraphs. *Id.* at 682. Even there, the court based its decision on the defendant's lack of a reasonable expectation of privacy in the hallway, by holding that the hallway outside his apartment was not curtilage *because* he lacked a reasonable expectation of privacy in the hallway. This is the full text of the court's reasoning: "Having determined that, unlike the area immediately surrounding a home, a party does not have a legitimate expectation of privacy in the common hallways and shared spaces of an apartment building, we conclude the common hallway is not an area within the curtilage of Nguyen's apartment." *Id.* The holding of *Nguyen*, in the brief passage that addresses curtilage, is that the common area of an apartment building is not within an apartment's curtilage where the apartment-dweller lacks a reasonable expectation of privacy in that common area.

The North Dakota Supreme Court reaffirmed this holding two years later. In *State v. Williams*, 862 N.W.2d 831, 834 (N.D. 2015), the court took note of *United States v. Dunn*, 480 U.S. 294, 301 (1987), in which this Court listed several factors that should be considered in determining whether an area is within the curtilage of a home. The North Dakota Supreme Court rejected the use of these factors for multi-unit dwellings. Instead, the court substituted its test from *Nguyen*, under which the common area of a multi-unit dwelling will be classified as curtilage on-

ly if there is a reasonable expectation of privacy in that common area. *Williams*, 862 N.W.2d at 834 ("Because this case involves a multi-unit dwelling and a common area, an analysis of the *Dunn* factors, alone, is insufficient to determine whether the drug sniff was a search; a reasonable expectation of privacy analysis must also be conducted."). The court concluded that the hallway at issue was not curtilage, because "an individual's expectation of privacy is diminished in the common areas of a multi-family dwelling." *Id.* at 835.

In our case, by contrast, the trial court found that Derrick Bonilla affirmatively *had* a reasonable expectation of privacy in the area right outside the door of his apartment. Pet. App. 57a. This finding was not disturbed by either of the appellate courts below. On the reasoning of *Nguyen*, therefore, the area just outside Bonilla's door *would* be curtilage. At the very least, the decision below does not conflict with *Nguyen*.

2. *State v. Edstrom*, 916 N.W.2d 512 (Minn. 2018), is likewise distinguishable. In *Edstrom*, the owner of the apartment building gave the police access to the building and permission to conduct dog sniffs in the hallways. *Id.* at 516. The Minnesota Supreme Court relied heavily on this fact in concluding that a dog sniff in the hallway did not constitute a search. "The record shows that the police have a key to the building and the owner's consent to enter the building's common areas for any law-enforcement-related purpose, including narcotics-dog sniffs," the court emphasized. *Id.* at 520. "While the building may not have been open to the public at large, it was certain-

ly open to the police." *Id.* The court thus concluded that the hallway outside the defendant's door "is not analogous to the front porch in *Jardines* because it is located in an internal, common hallway that … the police jointly use and access with Edstrom." *Id.*

Our case is different from *Edstrom*, because nothing in the record suggests that Derrick Bonilla or his landlord voluntarily shared the area outside his front door with police officers or drug-sniffing dogs. As far as we know from the sparse record, no one ever gave the police consent to enter the building or to bring a drug-sniffing dog to the threshold of Bonilla's apartment. Indeed, *Jardines* itself would have come out differently if Mr. Jardines or his landlord had granted permission to the police to conduct dog sniffs on his porch. *Jardines*, 569 U.S. at 7-9. Had our case arisen in Minnesota, a court could easily distinguish *Edstrom*.

3. Finally, Illinois cites *State v. Mouser*, 119 A.3d 870 (N.H. 2015), as ostensibly in conflict with the decision below. As Illinois concedes, however, *Mouser* merely held that the unenclosed parking lot behind an apartment building was not part of the curtilage. *Id.* at 875. *See also United States v. Jones*, 893 F.3d 66, 72 (2d Cir. 2018) (likewise holding that an unenclosed parking lot is not curtilage); *United States v. Sweeney*, 821 F.3d 893, 901 (7th Cir. 2016) (same for a shared basement). Our case involves the threshold of an apartment door, not a parking lot or a basement.

The decision below thus does not conflict with any decision of a state supreme court or any precedential decision of a federal court of appeals. In fact, only

two federal courts of appeals have addressed this issue in published opinions, and both have agreed with the Illinois Supreme Court that the use of a drug-sniffing dog at the threshold of an apartment is a search under *Jardines*. *See United States v. Whitaker*, 820 F.3d 849, 852-54 (7th Cir. 2016); *United States v. Hopkins*, 824 F.3d 726, 732-33 (8th Cir. 2016); *United States v. Burston*, 806 F.3d 1123, 1127-28 (8th Cir. 2015); *see also United States v. Jackson*, 728 F.3d 367, 374 (4th Cir. 2013) (dicta) ("[T]he apartment's curtilage extended to the end of its back patio.").

The absence of a mature lower-court conflict is surely due to the fact that only a few years have elapsed since the Court decided *Jardines*. It normally takes time for a conflict to rise to the level of state supreme courts and federal courts of appeals. If this issue is important, it will arise repeatedly, and with time there may be a need for this Court to intervene. So far, however, the lower courts are generally coalescing around a sensible distinction. The police may conduct uninvited dog sniffs in common areas not immediately adjacent to individual units, such as shared basements and parking lots, where many people share the same space. But they may not conduct uninvited dog sniffs at the threshold of a unit, where a resident does not reasonably expect anyone but himself to be present except for very short periods of time and for certain narrow purposes, such as when guests ring the doorbell.

B. This case would be an awful vehicle.

It would be hard to invent a worse vehicle than this case for resolving the question Illinois mistaken-

ly believes is presented. For four reasons, just about any other case would be a better vehicle.

1. First, this case does not come to the Court in a *de novo* posture. The Illinois Supreme Court applied a highly deferential state-law standard of review, under which "any doubts that may arise from the incompleteness of the record will be resolved against the State." Pet. App. 6a. The court cited *Foutch v. O'Bryant*, 459 N.E.2d 958, 959 (Ill. 1984), which further explains that in the absence of an adequate record on appeal, "it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." As a matter of Illinois law, the question the Illinois Supreme Court actually decided was whether the state had provided an appellate record adequate to overcome the presumption of correctness accorded the trial court's determination that this particular dog sniff took place in curtilage.

If this issue is important, it will come to the Court in future cases lacking this impediment to *de novo* review. Any such case would be a better vehicle than this one.

2. Second, the sparseness of the factual record makes this a singularly poor case for determining which parts of a multi-unit dwelling are curtilage. Whether an area is curtilage is a fact-intensive inquiry, involving factors that include "the proximity of the area claimed to be curtilage," "whether the area is included within an enclosure," "the nature of the uses to which the area is put," and "the steps taken by the resident to protect the area from observation." *United States v. Dunn*, 480 U.S. 294, 301

(1987). The record in this case includes virtually no facts bearing on the last three of these four factors.

We do have facts about "the proximity of the area claimed to be curtilage." This dog sniff could not have been any closer to Bonilla's apartment. It took place right at the threshold, the area immediately outside Bonilla's door. This factor supports the state courts' finding that the sniff took place within the curtilage.

But we know almost nothing about the facts that would be necessary for an evaluation of the other three factors.

● The record includes almost no information about "whether the area is included within an enclosure." Multi-unit dwellings are not all identical. They range from two-unit duplexes to immense apartment buildings. Some have separate enclosed entryways serving a few units; others have long hallways shared by many units. All we know from the record is that this building had four units on each of its three floors. We know nothing about the physical layout of the building.

● The record contains no facts relevant to "the nature of the uses to which the area is put." It is common knowledge that in some multi-unit dwellings, residents use the area just outside their front doors as extensions of their units. They hang their coats and leave their shoes. They place artwork on the wall. They store their bicycles, umbrellas, and barbecues. In short, they treat the area outside the front door as an extra room. *See, e.g.*, *Hopkins*, 824 F.3d at 732 (finding that this area was within an apartment's curtilage based in part on evidence that it was "used for grilling and storing bicycles"). In other

buildings, residents do nothing of the kind. Moreover, some small multi-unit dwellings are shared by extended family members or close friends who treat their combined units, including the spaces between the units, as a single home. Other multi-unit dwellings are inhabited by strangers who want nothing to do with each other. The record includes no information about how the residents of Derrick Bonilla's building used their space.

- The record says nothing about "the steps taken by the resident to protect the area from observation." Is the area just outside Bonilla's third-floor apartment visible from the street? From the staircase? How close must one get to the apartment before one can see the door? We have no idea, because the state failed to make an adequate record.

The record is devoid of most of the facts the Court would need to consider in order to determine whether the dog sniff in this case took place within the curtilage. That is important, because there is no such thing as a generic apartment building. Multi-unit dwellings come in a vast range of shapes and sizes, from co-ops and condos on the Upper East Side of Manhattan to low-income housing projects in poor neighborhoods, from tiny duplexes to thousand-unit mega-buildings. It would be impossible to formulate a one-size-fits-all curtilage rule for all of them. Such a rule would simply be unworkable. And "common areas" come in a great variety of forms. Some, like parking garages serving huge complexes, are used by many people; some, like hallways in small buildings, are used by only a few; and some, like the area just outside the door of an individual unit, may be used by only a single person. It would be impossible to

formulate a one-size-fits-all curtilage rule for all the "common areas" in a multi-unit dwelling. A court needs *facts* to decide whether a particular area is curtilage. But the facts are exceptionally scanty in this case, because the state failed to provide an adequate record on appeal.

If this issue is important, it will come to the Court again, in cases with properly developed records. Any of these cases would be a better vehicle than this one.

3. Third, a decision in this case will not affect the outcome, because the decision below rested on two independent grounds. The trial court held that the dog sniff took place in the curtilage of Bonilla's apartment *and* that the dog sniff constituted an invasion of his reasonable expectation of privacy under *Kyllo v. United States*, 533 U.S. 27 (2001). Pet. App. 57a. This latter holding was not addressed by either of the state appellate courts, because they both affirmed on the curtilage issue.

If this Court grants certiorari and reverses, on remand the Illinois Supreme Court will almost certainly agree with the trial court on the privacy issue, because it will be applying the same deferential state-law standard of review it applied below. Even if it were reviewing the issue *de novo*, it would agree with the trial court. Because the dog was sniffing into Bonilla's apartment, the relevant question would be whether Bonilla had a reasonable expectation of privacy inside his apartment. *Cf. Jardines*, 569 U.S. at 12-13 (Kagan, J., concurring); *Kyllo*, 533 U.S. at 33-40. He obviously did. The outcome of this case will not change, no matter what this Court decides.

If the curtilage issue is important, it will come to the Court in future cases in which the Court's decision will be outcome-determinative. Any of these cases would be a better vehicle than this one.

4. Finally, regardless of the Fourth Amendment issues, it is very unlikely that Derrick Bonilla will ever be prosecuted for the offense alleged in this case, the possession of half an ounce of cannabis. Illinois is about to legalize cannabis.

On May 31, the Illinois General Assembly approved House Bill 1438, the Cannabis Regulation and Tax Act.[1] The Governor has announced that he intends to sign the bill into law. Under the law, Illinois residents will be allowed to possess up to 30 grams, nearly double the amount that Derrick Bonilla was charged with possessing. Past convictions for possessing cannabis up to that amount will be expunged. *Here's When Marijuana Will Be Legal in Illinois, and Answers to Other Burning Questions About Recreational Weed*, Chicago Tribune, June 3, 2019.[2]

If the curtilage issue is important, it will come to the Court in future cases involving offenses that will stay in the statute books long enough for the Court's decision to make a difference. Any of these cases would be a better vehicle than this one.

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[1] The text of House Bill 1438 is available at http://ilga.gov/legislation/101/HB/10100HB1438sam002.htm.

[2] https://www.chicagotribune.com/news/breaking/ct-met-cb-legal-marijuana-illinois-20190531-story.html.

C. The decision below is correct.

Certiorari is also unwarranted because the decision below is correct. Under the deferential state-law standard of review used by the Illinois Supreme Court, the court correctly held that the state failed to provide a record adequate for determining that the trial court erred in finding that the dog sniff took place in the curtilage of Bonilla's apartment.

The decision below would also have been correct had the court been reviewing the issue *de novo*. Under the state's theory, the police could station a team of drug-sniffing dogs right outside the door of any apartment or condominium unit, permanently. The dogs could press their noses up against the door and sniff for 24 hours a day, 365 days a year. That would be lawful, according to Illinois. Indeed, police officers could permanently stand inches away from the door of any unit in any multi-unit dwelling in the country, listening all day and night to what takes place inside. That too would be lawful under the state's theory. This is a recipe for a police state.

Moreover, under the state's theory, people who live in apartments and condos would get less Fourth Amendment protection—*inside* their homes—than people who live in stand-alone houses. The state's theory would authorize the police to monitor the inside of apartments and condos in ways they could not monitor the inside of houses. The poor would get less Fourth Amendment protection than the rich, the young less than the old, the non-white less than the white.

The Court's cases point in the opposite direction. The threshold of the door to a unit in a multi-unit dwelling is much more like the places the Court has

found to be within the curtilage of a home than like the places the Court has found to be beyond the curtilage. It is much more like a driveway, *Collins v. Virginia*, 138 S. Ct. 1663, 1671 (2018); a porch, *Jardines*, 569 U.S. at 7; a back yard, *California v. Ciraolo*, 476 U.S. 207, 213 (1986); and a greenhouse, *Florida v. Riley*, 488 U.S. 445, 450 (1989) (plurality opinion); than it is like a public street, *California v. Greenwood*, 486 U.S. 35, 37 (1988); or an open field, *Oliver v. United States*, 466 U.S. 170, 180 (1984). Any member of the public can walk down the street or through an open field, but it would be universally understood as extreme effrontery to enter, without permission, a multi-unit dwelling where one does not reside and stand within inches of the door of one of the units, attempting to ascertain what is going on inside.

II. The Court should deny certiorari on Question II.

The Court should deny certiorari on Illinois's second question presented. All but two of the lower court cases cited by the state involve dog sniffs that took place before the Court decided *Jardines*. Any conflict among the lower courts at that time was due to the fact that before *Jardines* some jurisdictions permitted *Jardines*-style dog sniffs while others did not, so different jurisdictions had different appellate precedent on which officers could rely. Moreover, whether the good-faith exception excuses a pre-*Jardines* dog sniff is no longer an important question now that *Jardines* has been decided.

Only two of the lower court cases cited by the state involve post-*Jardines* dog sniffs, and these cas-

es do not conflict with the decision below. The decision below is correct in any event, because at the time of the dog sniff in this case, Illinois precedent clearly held that the sniff was a search.

A. All but two of the lower-court cases alleged to be in conflict involve dog sniffs conducted before *Jardines*.

Nearly all the lower-court cases Illinois claims to be in conflict, Pet. 14-17, involve dog sniffs that took place before this Court decided *Jardines*. At that time, the lower courts were divided over the issue the Court resolved in *Jardines*. Some jurisdictions allowed *Jardines*-style dog sniffs, while others did not. Presumably that is why the Court granted certiorari in *Jardines*.

Because different jurisdictions had different appellate precedent on the lawfulness of these dog sniffs, it is hardly surprising that officers in some jurisdictions could rely in good faith on local appellate precedent, while others could not. If there was a lower-court conflict at the time on the good-faith exception, it is a conflict the Court put to rest in *Jardines*.

In any event, the applicability of the good-faith exception to pre-*Jardines* dog sniffs is no longer an important question. There can no longer be many cases still on direct appeal involving dog sniffs that took place before *Jardines*. And there won't be any more in the future.

B. There is no lower-court conflict as to the applicability of the good-faith exception to dog sniffs conducted after *Jardines*.

Illinois does cite two cases involving dog sniffs that took place after *Jardines*, but neither of these cases conflicts with the decision below.

In *United States v. Hopkins*, 824 F.3d 726, 733 (8th Cir. 2016), the officer made a good-faith mistake about the location of the dog sniff. He and the dog were standing outdoors, on a walkway the officer reasonably believed was part of the public sidewalk. *Id.* In fact, it was a walkway within the curtilage of the ground-floor apartments. *Id.* at 732. The Eighth Circuit held that these facts fell within the good-faith exception because, in light of the officer's understandable mistake, he "had an objectively reasonable belief that *Jardines* did not apply." *Id.* at 733. Our case is very different. The officer in our case knew very well that the threshold to Bonilla's third-floor apartment was not a public sidewalk. Had he believed it was, his belief would not have been reasonable. The Eighth Circuit did not hold that the good-faith exception excuses *all* dog sniffs in multi-unit dwellings. Its narrow fact-specific holding is entirely consistent with the decision below.

In *United States v. Whitaker*, 820 F.3d 849, 854-55 (7th Cir. 2016), the other case cited by Illinois that involves a post-*Jardines* dog sniff, the Seventh Circuit held that the good-faith exception could not excuse the sniff.

In short, there is no lower-court conflict as to the applicability of the good-faith exception to dog sniffs that took place after this Court decided *Jardines*.

C. The decision below is correct.

Finally, the decision below is clearly correct. At the time of the dog sniff in this case, Illinois appellate precedent prohibited warrantless dog sniffs at the thresholds of apartments. Pet. App. 23a (citing *People v. Burns*, 25 N.E.3d 1244 (Ill. App. Ct. 2015), *aff'd*, 50 N.E.3d 610 (Ill. 2016)). As the Illinois Supreme Court correctly held, "[t]he State does not cite any binding appellate decision, state or federal, that was available at the time of the search, specifically authorizing the warrantless use of a drug-detection dog at the threshold of an apartment door or any other home." Pet. App. 24a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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