IN THE

Supreme Court of the United States

ERICH G. SORENSON,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the Massachusetts Appeals Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Like millions of other Americans, petitioner makes his home in an apartment building. The question presented is:

Whether the hallway area immediately adjacent to an apartment, in a private multi-family dwelling that is not open to the public, is part of the curtilage of the home for Fourth Amendment purposes.

RELATED PROCEEDINGS

Massachusetts Trial Court, Superior Court Department, Middlesex County:

Commonwealth v. *Sorenson*, No. 1281CR00669 (Nov. 2, 2015)

Massachusetts Appeals Court:

Commonwealth v. *Sorenson*, No. 2017-P-0909 (Apr. 30, 2018)

Commonwealth v. *Sorenson*, No. 2019-P-1170 (Nov. 16, 2020)

Massachusetts Supreme Judicial Court:

Commonwealth v. *Sorenson*, No. DAR-25608 (Nov. 3, 2017)

Commonwealth v. *Sorenson*, No. FAR-26117 (June 29, 2018)

Commonwealth v. *Sorenson*, No. FAR-27934 (Jan. 14, 2021)

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Erich G. Sorenson respectfully petitions for a writ of certiorari to review the judgment of the Massachusetts Appeals Court.

INTRODUCTION

At the "very core" of the Fourth Amendment lies the right to "be free from unreasonable governmental intrusion" in one's home. *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013) (quotation marks omitted). That right extends not just to the interior of a dwelling, but also to "the area immediately surrounding and associated" with it. *Id.* (quotation marks omitted). In that space—the "curtilage" of a home—an individual's "privacy expectations are most heightened." *Id.* at 7 (quotation marks omitted). For Fourth Amendment purposes, in other words, the curtilage *is* the home. *See id.* at 6.

The decision below endorses an exception to that "ancient and durable" protection (*id.*) for a particular type of dwelling—apartment buildings—thereby deepening a split of authority on an important question of constitutional law. Police officers arrested petitioner Erich Sorenson without a warrant just a step outside the front door of his apartment. To reach that spot, officers had to enter his private apartment building, climb two flights of stairs, and proceed to the back of the building, where they knocked on his door and asked him to step into the hallway. If Mr. Sorenson's apartment were a detached house, and the space outside his front door an open-air porch, the officers' warrantless arrest would be unconstitutional. *See id.* at 10-12; *see also* Pet. App. 14a. But because Mr. Sorenson lives in a multi-unit residence, the decision below held that the space just outside his front door is not the curtilage of his home—his doormat is, in effect, no

more private than a public sidewalk. On that basis alone, the court condoned both his arrest and the admission of its fruits at trial.

The decision below warrants this Court's review. Courts around the country are divided over the precise issue at the heart of this case: the extent to which the area immediately adjacent to an apartment in a multi-family dwelling constitutes the curtilage of the home. In some jurisdictions, those spaces are entitled to the full scope of Fourth Amendment protection. *See, e.g.*, *People* v. *Burns*, 50 N.E.3d 610 (Ill. 2016). In others, government agents may rove those areas at will. *See, e.g.*, *State* v. *Edstrom*, 916 N.W.2d 512 (Minn. 2018). Because courts cannot agree on this critical issue, the time is ripe for the Court to provide guidance—and, in particular, to resolve the square split presented here.

Review is particularly appropriate in this case because the decision below is wrong. The holding that government agents may intrude, uninvited, into the deepest corners of an apartment building—lurking outside a tenant's front door in the hopes of gathering evidence—defies traditional property-law concepts. At common law, "if the whole house [was] let in lodgings," then "the door of each apartment" was tantamount to "an outer door": It carried the same legal significance as the entry to a freestanding dwelling. 3 W. Blackstone, Commentaries on the Laws of England 288 n.3 (E. Christian ed. 1794). This Court's test for identifying the curtilage likewise demonstrates that, because of its character and proximity to the home, the area surrounding an apartment is the curtilage. *See United States* v. *Dunn*, 480 U.S. 294, 301 (1987)

(setting forth factors that define the scope of the curtilage). Recognizing an apartment's immediate surroundings as part of the curtilage is also consistent with reasonable expectations of privacy: Put simply, apartment-dwellers do not expect strangers to wander in off the street and linger outside their front doors—much less to peer through their keyholes or to rummage through personal effects left at the threshold.

Creating a categorical exception to the curtilage for apartment buildings also leads to anomalous results. Under the decision below—and those adopting the same approach—the police *may not* use a drug-sniffing dog on a detached house's exposed front porch (a porch they are otherwise entitled to visit, *see Jardines*, 569 U.S. at 8-9), but they *may* bring Fido to sniff under the door of a sixth-floor walkup inside a locked apartment building. The Fourth Amendment does not compel that odd result. And such a rule creates a troublingly two-tier system of constitutional protection—one for residents of detached housing, another for apartment-dwellers.

This is an excellent vehicle to address the question presented. The court below resolved Mr. Sorenson's case solely on the ground that the area immediately beyond his front door is, *per se*, not the curtilage of his home. In other words, that holding was outcome-determinative, and there is nothing to prevent this Court from addressing that dispositive issue. The Court should grant certiorari and reverse.

OPINIONS BELOW

The superior court's decision denying Mr. Sorenson's motion to suppress (Pet. App. 24a-29a) is un-

published. The appeals court's opinion on direct appeal (Pet. App. 20a-28a) is unpublished; it is available at 2018 WL 1998318. The superior court's decision denying Mr. Sorenson's motion for collateral review (Pet. App. 13a-19a) is unpublished. The appeals court's opinion on review of that decision (Pet. App. 2a-12a) is reported at 159 N.E.3d 750. The order of the Massachusetts Supreme Judicial Court denying discretionary review (Pet. App. 1a) is reported at 486 Mass. 1112.

JURISDICTION

The Massachusetts Appeals Court entered judgment on November 16, 2020. The Massachusetts Supreme Judicial Court denied further appellate review on January 14, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth 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 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.

STATEMENT

A. Police arrest Mr. Sorenson without a warrant just outside his apartment door.

This case arises out of the 2012 stabbing of a man named Jose Ramos Ortiz in Lowell, Massachusetts. Pet. App. 24a-25a. At the time of the stabbing, Mr.

Ortiz was in Lowell to sell drugs to a woman named Nancy DeMarco. Pet. App. 25a. The basic contours of the incident are undisputed: a man approached Mr. Ortiz and stabbed him several times while he was interacting with Ms. DeMarco. *Id.*

The Lowell Police Department came to suspect petitioner Erich Sorenson based on a witness interview. In the immediate aftermath of the crime, Mr. Ortiz told police he did not know his attacker, and he was only able to give them a general description of the assailant as "a tall, skinny, white-skinned male wearing a t-shirt." *Id.* But two days after the incident, police approached Ms. DeMarco, who identified Mr. Sorenson as the perpetrator during an unrecorded interrogation at the station house. Pet. App. 26a. Stating that "she was addicted to heroin and regularly used other drugs," Ms. DeMarco identified Mr. Ortiz as her drug dealer and "said that she had arranged to purchase drugs from him" on the evening of the stabbing. *Id.* Ms. DeMarco alleged that Mr. Sorenson stabbed Mr. Ortiz in an attempt to rob him—though her later testimony was notably inconsistent as to her involvement in the alleged scheme. *Id.*; *compare* 3 Tr. 82 (denying that she knew a robbery was going to happen), *with* 3 Tr. 81-82 (testifying that she advised Mr. Sorenson how to rob Mr. Ortiz).

Officers decided to arrest Mr. Sorenson—without a warrant. They obtained his address from Ms. DeMarco, who told the police "that he lived in 'an apartment on the third floor, in the back right-hand side'" of the building in question. Pet. App. 3a; *see also* Record Appendix in Mass. App. Ct. No. 2017-P-0909 (2017

R.A.), at 64-65.[1] Sergeant Joseph Murray drove to the address, where "he observed a 'three-story building with numerous apartments on each floor.'" Pet. App. 3a. He entered the building, went up to the top floor, and made his way to the back, knocking on the door of Mr. Sorenson's unit. 2017 R.A. 64-65; Pet. App. 3a. Mr. Sorenson's wife answered, and Sergeant Murray asked if Mr. Sorenson was home. Pet. App. 3a. Mr. Sorenson soon came to the door, and Sergeant Murray asked him to step out into the hallway. Pet. App. 3a-4a. When Mr. Sorenson complied, Sergeant Murray arrested him "immediately adjacent to the apartment." Pet. App. 2a; *see* Pet. App. 4a.

Sergeant Murray made two observations in the course of the arrest—observations that later proved key at trial. First, while handcuffing Mr. Sorenson, Sergeant Murray told him that he was being arrested in connection with "a stabbing that occurred the other night." Pet. App. 4a n.3. According to Sergeant Murray, Mr. Sorenson responded "I was here all Saturday"—even though Sergeant Murray "had not told him that the stabbing occurred on Saturday." *Id.* Second, Sergeant Murray noticed that Mr. Sorenson had a Band-Aid covering a laceration on his finger. *Id.*

[1] Some decisions below suggested that Mr. Sorenson lived at "his girlfriend's apartment." *E.g.*, Pet. App. 13a-18a, 27a n.4. But the arresting officer testified that he "knew [the other occupant of the apartment] to be Mr. Sorenson's wife." 2017 R.A. 65. And regardless of their precise relationship status, there is no record evidence to suggest that the apartment was "hers"—as opposed to his (or both of theirs). *See, e.g.*, 3 Tr. 43 (referring to "Erich's house"). In any event, the courts below proceeded on the understanding that the apartment "was Sorenson's residence at the time of the arrest." Pet. App. 13a; *see* Pet. App. 3a; *cf. Collins* v. *Virginia*, 138 S. Ct. 1663, 1668 & n.1 (2018).

That was significant, Sergeant Murray later testified, because "it's not uncommon when somebody is involved in a stabbing that they get cut themselves." *Id.*

Two days after the arrest (and four days after the stabbing), officers presented a photo array to Mr. Ortiz, who was sedated and in critical condition at the hospital. *See* 2 Tr. 110-111; 4 Tr. 20-21, 139. On the first pass through the photos, Mr. Ortiz indicated that Mr. Sorenson resembled the assailant, 4 Tr. 135, but on the second pass, he stated: "It's not him. He was much bigger," 4 Tr. 136; *see also* 2017 R.A. 105 (handwritten notes on photo array stating "not him, guy was much bigger").

B. The trial court declines to suppress the fruits of the arrest, and the appeals court holds that trial counsel waived any argument regarding the apartment's curtilage.

1. After a grand jury indicted Mr. Sorenson on two counts of assault, Mr. Sorenson's first attorney filed a one-page suppression motion, accompanied by a one-page declaration from Mr. Sorenson. The motion sought to exclude the fruits of Mr. Sorenson's arrest, asserting that the arrest violated Mr. Sorenson's Fourth Amendment rights and equivalent state-law rights. 2017 R.A. 17. The accompanying declaration recited the bare details of Mr. Sorenson's arrest—its date and location and the fact that officers had not secured a warrant. 2017 R.A. 18. The trial court held an evidentiary hearing, at which Sergeant Murray was the only witness. 2017 R.A. 50-97. At the close of the hearing, Mr. Sorenson's counsel argued that Sergeant Murray lacked probable cause at the time of the arrest. 2017 R.A. 90; *see* Pet. App. 27a-28a. The

court disagreed, and denied the suppression motion. *See* Pet. App. 28a-29a.

The Commonwealth then relied heavily on the fruits of the arrest at trial. During its closing argument, for example, the prosecution repeatedly used Mr. Sorenson's statement that he was home "all Saturday"—which allegedly preceded any mention of the day of the stabbing—to indicate consciousness of guilt. 6 Tr. 53-55. The Commonwealth also made multiple references to the alleged cut on Mr. Sorenson's finger. 6 Tr. 54-55. The jury ultimately convicted Mr. Sorenson.

2. On appeal, Mr. Sorenson—represented by new appellate counsel—argued that the trial court erred in denying the suppression motion. More specifically, he argued that the area immediately outside the front door of his apartment is the "curtilage" of his home for Fourth Amendment purposes. *See* Pet. App. 22a. That meant his arrest was unconstitutional, he explained, because the Fourth Amendment prohibits a warrantless arrest inside the home or its surrounding curtilage *even if* officers have probable cause. *See id.*

The Massachusetts Appeals Court affirmed. *See* Pet. App. 20a-23a. According to the panel, neither the trial court nor the prosecution was "on notice of the defendant's theory that he was arrested without a warrant in the curtilage of the apartment." Pet. App. 23a. For that reason, the court deemed the argument waived. *See* Pet. App. 22a-23a.

C. The trial and appeals courts reject Mr. Sorenson's ineffective-assistance claim based solely on the merits of his Fourth Amendment argument.

1. Mr. Sorenson then sought postconviction relief in the trial court. *See* Pet. App. 13a; Mass. R. Crim. P. 30(b). Represented by new postconviction counsel, his motion for a new trial explained that his trial attorney had rendered ineffective assistance in "failing to argue at a suppression hearing that his warrantless arrest was unlawful because it was made on the curtilage of his residence." Pet. App. 13a.

The court denied the motion, based solely on its view that Mr. Sorenson's Fourth Amendment claim failed on the merits. As the court acknowledged, "[i]t is settled law that, absent probable cause and exigent circumstances, police cannot arrest a person inside his residence or on the curtilage of his residence." Pet. App. 14a (citing *Florida* v. *Jardines*, 569 U.S. 1, 10 (2013); *Commonwealth* v. *Leslie*, 477 Mass. 48, 54-55 (2017)). But the court held that the space immediately outside of and adjacent to Mr. Sorenson's apartment is *not* the curtilage of the apartment for Fourth Amendment purposes.

The court reached that conclusion by applying the four-factor test set forth in *United States* v. *Dunn*, 480 U.S. 294 (1987). Under *Dunn*, the trial court explained, a court "determine[s] whether an area searched was within the home's curtilage" by examining "(i) the proximity of the area . . . to the home; (ii) whether the area is included within an enclosure surrounding the home; (iii) the nature of the uses to which the area is put; and (iv) the steps taken by the

resident to protect the area from observation by people passing by." Pet. App. 15a (quotation marks omitted). According to the trial court, "[o]nly the first *Dunn* factor . . . clearly support[ed] Sorenson's argument." Pet. App. 16a. The court deemed the second factor "a matter of interpretation"—without any further explanation of what it meant by that. *Id.* And it concluded that the third and fourth factors "overwhelmingly support[ed] the Commonwealth's argument," because the hallway of Mr. Sorenson's apartment building was open to "residents and their guests" accessing "other apartments on that floor." Pet. App. 16a-17a.

Having determined that Mr. Sorenson's Fourth Amendment claim failed on the merits, the trial court declined to address any other question, including prejudice. *See* Pet. App. 13a-14a. The court also denied Mr. Sorenson's request for an evidentiary hearing because, it said, there was "no factual dispute as to where Sorenson's arrest occurred." Pet. App. 19a.

2. The Massachusetts Appeals Court affirmed—again, based solely on its view of the merits of Mr. Sorenson's Fourth Amendment claim.[2] Pet. App. 2a-3a.

[2] Before appealing, Mr. Sorenson sought timely reconsideration of the trial court's decision. *See* Record Appendix in Mass. App. Ct. No. 2019-P-1170, at 152-157. According to the appeals court, Mr. Sorenson "appeal[ed] only from the order denying [reconsideration]." Pet. App. 3a n.2. That posture did not affect the court's review: The appeals court ultimately rested its decision on the merits of Mr. Sorenson's request for postconviction relief, noting that its "review require[d] determination whether the motion for a new trial correctly was decided" and observing that "[t]he Commonwealth d[id] not contend otherwise." *Id.*; *cf. Commonwealth*

Like the trial court, the appeals court acknowledged that the government generally may not intrude upon the curtilage of a home without a warrant. Pet. App. 6a n.4. But like the trial court, the appeals court concluded that the area immediately outside of Mr. Sorenson's door is not the curtilage of his apartment.

The appeals court's analysis mirrored that of the trial court. Applying *Dunn*, it held that the first factor "favor[ed] the defendant's position," but that "[t]he remaining three factors [did] not support extending the concept of curtilage." Pet. App. 8a. Specifically, the court observed that the hallway was not "enclosed relative to the defendant's individual apartment," that it was "used by the residents of the building (and their guests) to reach each separate unit," and that no "steps were taken to obscure the hallway from view." Pet. App. 8a-9a.

Having concluded that Mr. Sorenson's counsel did not render ineffective assistance because any "motion to suppress would not have succeeded," the court declined to reach any other issue. Pet. App. 10a.

REASONS FOR GRANTING THE WRIT

"When it comes to the Fourth Amendment, the home is first among equals." *Collins* v. *Virginia*, 138 S. Ct. 1663, 1670 (2018) (brackets omitted). That primacy extends to the curtilage, which is "part of the home itself for Fourth Amendment purposes." *Id.* In keeping with that principle, this Court has consistently accorded the highest degree of constitutional

v. *Rodriguez*, 443 Mass. 707, 708-709 (2005) (holding that an issue "raised in a motion for reconsideration may be preserved for appellate review, provided the motion for reconsideration is [timely] filed" (citation omitted)).

protection to spaces surrounding detached, single-family homes—everything from front porches and side gardens to driveways, carports, and parking patios. *See id.* at 1671, 1675. The police cannot tramp through the back yard looking for evidence without a warrant, this Court has recognized, any more than they can the back bedroom.

But courts are divided over the extent to which that same protection applies in multi-unit dwellings. In some jurisdictions, the hallway space immediately outside an apartment is—no less than the driveway leading to a freestanding cottage—off-limits to roving government agents. In other jurisdictions, the police may linger just inches beyond an apartment's front door on the theory that other tenants and their guests have the right to access the hallway, too. The decision below now deepens that split.

There is no reason to allow this discord to persist. The question presented is one of critical importance—touching on one of the Constitution's most fundamental protections—and this case provides a clean vehicle to resolve it. The Court should grant the petition.

I. The decision below deepens a split of authority on a recurring question of Fourth Amendment law.

Courts are split over the issue in this case. Two courts of last resort have squarely held that a common area immediately outside of a defendant's individual apartment is the curtilage of the home. And several other courts, while not using the term "curtilage," have effectively reached the same conclusion under a reasonable-expectations-of-privacy framework. By contrast, a number of other courts—including, now,

the court below—have declined to afford Fourth Amendment protection to "common" spaces of multi-family residences, even if just inches beyond a tenant's front door.

A. Several courts recognize that the space just outside of an apartment is entitled to the protection of the curtilage.

1. At least two courts have squarely held that the space just beyond a tenant's front door is the curtilage of the home.

In *People* v. *Burns*, 50 N.E.3d 610 (Ill. 2016), the Illinois Supreme Court held that a search on a common landing outside the defendant's apartment door violated her Fourth Amendment rights because the space was within the curtilage of her apartment. *Id.* at 613, 621. The police went to the defendant's address without a warrant; another tenant initially gave an officer access to the locked building. *Id.* at 614. Like Mr. Sorenson, the defendant in *Burns* lived on the third floor of a three-story residence with multiple units. *Id.* at 613. Applying *Jardines*, the court concluded that the landing outside the defendant's door was no different from the porch outside Mr. Jardines' house: Even though the landing was "common" space, it was "not open to the general public." *Id.* at 620. The court reached the same conclusion under the *Dunn* test: Among other things, the court noted, the landing was located inside a building, "directly outside of defendant's apartment door," and was generally used only by the tenants of the surrounding apartments and their guests. *Id.* at 621. Thus, the court concluded, the landing was the curtilage of the apartment despite its "common" status.

The Illinois Supreme Court reaffirmed and expanded *Burns* two years later in *People* v. *Bonilla*, 120 N.E.3d 930 (2018). *Bonilla* involved two key factual distinctions from *Burns*: the defendant's apartment building was unlocked rather than locked, and the officers' search took place in a common hallway rather than a common landing. *Id.* at 932-933. But the court held that those distinctions did not make a difference to its constitutional analysis. As in *Burns*, the court concluded that "[t]he common-area hallway immediately outside of defendant's apartment door is curtilage." 120 N.E.3d at 936.

The Texas Court of Criminal Appeals—the court of last resort for criminal matters in that state—reached a similar conclusion in *State* v. *Rendon*, 477 S.W.3d 805 (2015). There, the court held that a search on a common landing at the threshold of the defendant's apartment intruded into the curtilage of his home. *Id.* at 806. The building in question was a four-unit apartment complex; the defendant lived in one of the "upstairs units, which were accessible by a single staircase leading up to a landing." *Id.* Even though the space outside of his front door was only "semi-private," the court concluded that officers had entered "into [a] constitutionally protected area" and had effected "an unlicensed physical intrusion in violation of the Fourth Amendment." *Id.* at 810.

2. Several other courts, while not expressly framing their decisions in terms of a "curtilage" analysis, have held that common spaces in apartment buildings are entitled to full Fourth Amendment protection.

The Sixth Circuit, for example, has "held that a tenant in a locked apartment building has a reasonable expectation of privacy in the common areas of the

building not open to the general public." *United States* v. *Kimber*, 395 Fed. Appx. 237, 246 (2010) (brackets and quotation marks omitted). The court first announced that principle in *United States* v. *Carriger*, 541 F.2d 545 (6th Cir. 1976), in which it held that officers violated the Fourth Amendment by entering a twelve-unit apartment building, proceeding to the third floor, and observing an exchange of drugs at the door of one of the apartments. *Id.* at 547. The court has reaffirmed *Carriger* numerous times since. *See, e.g.*, *Kimber*, 395 Fed. Appx. at 245-248; *see also United States* v. *Heath*, 259 F.3d 522, 534 (6th Cir. 2001) ("[T]he most casual reading of *Carriger* reveals that *any* entry into a locked apartment building without permission, exigency or a warrant is prohibited."); *Hicks* v. *Scott*, 958 F.3d 421, 433 (6th Cir. 2020) ("It is only when a tenant should expect that members of the general public will pass through a common space—*i.e.*, persons other than the landlord, co-tenants, and their invited guests—that she loses her reasonable expectation of privacy in that space.").

Likewise, the Seventh Circuit has concluded that "police engaged in a warrantless search within the meaning of the Fourth Amendment when they had a drug-sniffing dog come to the door of [an] apartment" in a locked building. *United States* v. *Whitaker*, 820 F.3d 849, 854 (2016). The defendant's "lack of a right to exclude," the court explained, "did not mean he had no right to expect certain norms of behavior in his apartment hallway." *Id.* at 853. While "other residents and their guests (and even their dogs) can pass through the hallway[,] [t]they are not entitled . . . to set up chairs and have a party in the hallway right outside the door." *Id.* Government agents, the court held, must abide by the same limitations: Even in a

common hallway, "the fact that a police officer might lawfully walk by and hear loud voices from inside an apartment does not mean he could put a stethoscope to the door to listen to all that is happening inside." *Id.*

The Supreme Court of Nebraska reached a similar conclusion in *State* v. *Ortiz*, 600 N.W.2d 805 (1999), holding that the resident of an apartment building has a privacy interest in the common hallway outside his or her individual unit. The court "recognize[d] . . . that the authorities are split" on the question. *Id.* at 819. But, citing *Dunn* and its definition of the curtilage, the court "agree[d] with the courts which hold that there is some measure of privacy at the threshold of an apartment dwelling." *Id.* Applying that conclusion to the case before it, the court held that police officers violated the Fourth Amendment by conducting a search in the hallway outside the defendant's apartment. *See id.* at 819-820.

Similarly, in *People* v. *Killebrew*, 256 N.W.2d 581 (Mich. Ct. App. 1977), the Michigan Court of Appeals held that the "plain view" exception did not justify a search and seizure that officers carried out after observing narcotics through an open apartment door from a common hallway. *Id.* at 582-583. "Generally," the court explained, "a hallway shared by tenants in a private multiple-unit dwelling is not a public place"—rather, "[i]t is a private space intended for the use of the occupants and their guests, and an area in which the occupants have a reasonable expectation of privacy." *Id.* at 583. For that reason, "the officers were not rightfully in the hallway when they spotted the evidence," and so "the warrantless search and seizure was not justified by the plain view exception." *Id.*

Finally, the New Hampshire Supreme Court recently held that a defendant had a reasonable expectation of privacy in a common utility closet in the unlocked vestibule of his apartment building. *See State* v. *Gates*, 173 N.H. 765, 779-781 (2020). The state had argued that "any expectation of privacy in the utility closet was not objectively reasonable because the closet was not locked, the defendant did not exercise control over the closet or exclude others from it, and the closet was accessible to other tenants and the owner of the property." *Id.* at 779. The court disagreed, explaining (among other things) that the closet was not visible from the outside of the building and was generally accessed only by the building's owner, its tenants, and workers who needed to use the equipment inside. *See id.* at 779-781.

These decisions, while not couched in a discussion of the "curtilage," reach the same conclusion as the Illinois and Texas courts': Common spaces in apartments and multi-unit dwellings are entitled to the full scope of Fourth Amendment protection.

B. A number of other courts, including the court below, hold that a "common" space in an apartment building is categorically excluded from the home's curtilage.

1. Breaking with the decisions discussed above, several other courts have held that hallways and other common spaces in apartment buildings do not constitute the curtilage of the home for Fourth Amendment purposes.

In *State* v. *Edstrom*, 916 N.W.2d 512 (Minn. 2018), for example, the Minnesota Supreme Court held that no "physical intrusion on a constitutionally protected

area occurred when police conducted a narcotics-dog sniff in the hallway immediately adjacent to [the defendant's third-floor] apartment." *Id.* at 521. Like the Illinois Supreme Court in *Burns* (*see supra*, at 13), the *Edstrom* court analyzed the four *Dunn* factors to determine whether the common hallway space was entitled to Fourth Amendment protection. *See id.* at 518-519. Despite applying the same test, the court reached the opposite conclusion: "the area immediately outside Edstrom's door is not curtilage of Edstrom's home." *Id.* at 520.

Similarly, the North Dakota Supreme Court held that the police did not intrude into the curtilage of a defendant's apartment by searching the "secured, common hallways" of his locked apartment building—hallways that the court described as a "shared space" in which tenants kept "personal property, such as shoes, bikes, and door craftwork." *State* v. *Nguyen*, 841 N.W.2d 676, 678 (2013). The court cited *Dunn*, but did not take the time to assess its four factors individually, reasoning that it was "well-settled that there exists no 'generalized expectation of privacy in the common areas of an apartment building.'" *Id.* at 682 (quoting *United States* v. *Brooks*, 645 F.3d 971, 976 (8th Cir. 2011)).

Maryland's intermediate appellate court has also held that the area immediately outside of a defendant's apartment door is not the curtilage of the apartment for Fourth Amendment purposes. *See Lindsey* v. *State*, 127 A.3d 627, 641-644 (Md. Ct. Spec. App. 2015). There, the defendant's apartment building was secured by locks and a buzzer system, and the hallways of his building were typically used by tenants to keep decorations, bicycles, shoes, and other personal

possessions. *Id.* at 642. But the court concluded that the space did not satisfy the *Dunn* factors—treating the lack of "exclusive control" of the hallways as all but dispositive. *See id.* at 643.

At least two federal appeals courts have likewise held that common areas of apartment buildings cannot constitute the curtilage of an individual unit. The Fourth Circuit has applied *Dunn* to hold that "the common hallway of [an] apartment building, including the area in front of [the defendant]'s door, was not within the curtilage of his apartment." *United States* v. *Makell*, 721 Fed. Appx. 307, 308 (2018). And the Sixth Circuit has limited its holding in *Carriger* to *locked* common areas, concluding that a hallway in an *unlocked* apartment building did not constitute the curtilage of an individual apartment. *See United States* v. *Trice*, 966 F.3d 506, 513, 515 (2020). Other circuits, meanwhile, have reached similar conclusions under the reasonable-expectations-of-privacy test. *See, e.g.*, *United States* v. *Hawkins*, 139 F.3d 29, 32 (1st Cir. 1998) (holding that "a tenant lacks a reasonable expectation of privacy in the common areas of an apartment building"); *United States* v. *Barrios-Moriera*, 872 F.2d 12, 14 (2d Cir. 1989) (similar).

2. The ruling in this case joins these decisions. As discussed above (at 9-10), the court below applied *Dunn* to conclude that the area immediately outside of Mr. Sorenson's door is not the curtilage of his apartment. The court ultimately rested its decision on just two considerations: Mr. Sorenson's hallway was not "enclosed relative to [his] individual apartment," and the hallway was "open to" and "used by the residents of the building (and their guests) to reach each separate unit." Pet. App. 8a-9a.

C. This split is well-developed and entrenched.

As the decisions above show, courts around the country cannot agree on whether the space immediately outside of an apartment in a multi-unit dwelling constitutes the curtilage of the home. Further percolation will not aid the Court in addressing that disagreement: Numerous courts have had the chance to weigh in on various permutations of the question presented, and the resulting conflict transcends individual factual distinctions. To take just one example, courts are divided as to both locked *and* unlocked buildings. *See supra*, at 13-19.

Nor is this split likely to dissipate on its own. Since the Illinois Supreme Court first addressed the issue in *Burns*, for example, it has doubled-down on its position—reaffirming its initial holding and, indeed, expanding it to cover new factual circumstances. *See supra*, at 14. The Sixth Circuit stands even more resolute, having adhered to its view that the locked areas of apartment buildings are entitled to Fourth Amendment protection since 1976. *See supra*, at 15. Courts on the other side of the split have been equally steadfast—and the decision below only deepens the divide. Only this Court's intervention can resolve it.

II. This case presents a question of fundamental constitutional importance that warrants this Court's attention.

This Court's review is necessary not only because there is a conflict among the lower courts, but also because the split concerns one of the most fundamental constitutional guarantees—"[t]he right of the people to be secure in their . . . houses." As discussed above

(at 1), the privacy and sanctity of the home lies at the "very core" of the rights guaranteed by the Fourth Amendment. *Jardines*, 569 U.S. at 6 (quotation marks omitted). And the rights guaranteed by the Fourth Amendment, in turn, are among the most ancient and indispensable rights enshrined in the Constitution—often pre-dating the Founding. *See, e.g., Entick* v. *Carrington*, 95 Eng. Rep. 807, 817-818 (K.B. 1765); *see also Brinegar* v. *United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting) (explaining that the rights secured by the Fourth Amendment "belong in the catalog of indispensable freedoms"). This case thus raises an issue of critical constitutional importance.

Numerous courts have now gotten that important issue wrong. Their decisions have contradicted well-worn legal principles and incorrectly diminished the scope of the Fourth Amendment. The consequences of those decisions are significant—and troubling.

A. The rule adopted by the decision below is incorrect.

According to the decision below—and those on the same side of the split—the common area just outside of an apartment is *categorically* exempt from constituting the curtilage of the home. *See* Pet. App. 19a; *see also* Pet. App. 19a (denying an evidentiary hearing because the issue of "where Sorenson's arrest occurred" was dispositive); *infra*, at 29-30 (explaining that the court's decision did not turn on any of the particular characteristics of Mr. Sorenson's apartment building). Under the reasoning of these decisions, even if every single one of a building's tenants objects, the mere fact that the space outside of an apartment

is "common" space destroys any constitutional protection. That view conflicts with longstanding property-law principles and flies in the face of reasonable expectations of privacy.

1. An examination of traditional property-law principles refutes the rule followed by the decision below.

At common law, the door to an individual apartment in a multi-unit residence was generally treated as equivalent to the outer door of a single-family home. That equivalence extended to searches and arrests. For example, Blackstone's Commentaries observed that "[a] bailiff," "before he ha[d] made [an] arrest," could not "break open an outer door of a house." 3 W. Blackstone, Commentaries on the Law of England 288 n.3 (E. Christian ed. 1794). As applied to multi-unit houses, that meant that:

> if the whole house [was] let in lodgings, as each lodging is then considered a dwelling-house, so in that case . . . the door of each apartment would be considered an outer door, which could not be legally broken open to execute an arrest.

Id. Similarly, Lord Mansfield observed that "chambers in the inns of Court and in colleges, which have each an outer door that opens . . . upon the common staircase," effectively constitute "several houses" with "separate outer doors." *Lee* v. *Gansel*, 98 Eng. Rep. 935, 938-939 (K.B. 1774).[3] This historical recognition that an apartment door is equivalent to the outer door

[3] The common law recognized an exception to this principle for owner-occupied buildings, where the tenant "goe[s] in at the same door as the owner of the house." *Lee*, 98 Eng. Rep. at 935.

of a freestanding house is inconsistent with an apartment-only exception to the curtilage.

The four-factor *Dunn* test—which this Court has used to identify the curtilage of the home—also shows that common space immediately beyond an apartment's front door is the curtilage. No one disputes that such common spaces satisfy the first factor—"the proximity of the area" to the home, *Dunn*, 480 U.S. at 301—which "strongly supports an inference" that the space is the curtilage, *Burns*, 50 N.E.3d at 620. The other factors point in the same direction. Although described as "common" spaces, hallways like the one at issue in this case are enclosed in the most crucial respect: they are not open to the outside world. *See Dunn*, 480 U.S. at 301 (asking "whether the area is included within an enclosure surrounding the home"). Access is generally limited to tenants and their guests, and the spaces are often used as an extension of the apartment itself for the storage of personal effects and other belongings. *See id.* (asking about "the nature of the uses to which the area is put"); *see supra*, at 13, 15-16, 18 (describing such limitations on, and uses of, common hallways). Moreover, common hallways in apartment buildings typically are "not observable by people passing by" outside the building. *Burns*, 50 N.E.3d at 621 (quotation marks omitted); *see Dunn*, 480 U.S. at 301 (analyzing "the steps taken by the resident to protect the area from observation by people passing by"). In short, the four elements that this Court has used to identify the metes and bounds of the curtilage confirm that the area immediately

outside an apartment is entitled to the full scope of Fourth Amendment protection.[4]

Finally, a rule that common spaces in apartment buildings are categorically excluded from the curtilage is difficult to reconcile with this Court's application of property-law principles in *Jardines*. There, the Court recognized that officers' search was trespassory unless their conduct fell within the scope of an "implicit license" that "permits [a] visitor to approach [a] home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." 569 U.S. at 8. In other words, officers' incursion onto private property was presumptively unconstitutional, but their search could be saved by a judicially recognized license "implied from the habits of the country." *Id.* Here, however, there is no comparable implied license: The "habits of the country" do not permit members of the general public to enter the closed common areas of apartment buildings uninvited. At the very least, none of the authorities above discussed or relied on such a license. *See supra*, at 17-19.[5] For this reason, the jurisdictions that recognize

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[4] If anything, the *Dunn* test takes an artificially narrow view of the curtilage. In *Dunn* itself, the Court held that a barn's 60-yard remove from the defendant's house weighed against treating the barn as part of the curtilage. 480 U.S. at 302. But "[a]t common law the curtilage was far more expansive than the front porch, sometimes said to reach as far as an English longbow shot—some 200 yards—from the dwelling house." *United States* v. *Carloss*, 818 F.3d 988, 1005 n.1 (10th Cir. 2016) (Gorsuch, J., dissenting).

[5] Even if there were an implied license to enter apartment buildings at random, "[t]he scope of [that] license" would be "limited." *Jardines*, 569 U.S. at 9. An implied license allows the police to

an exception to the curtilage for apartment buildings have inverted traditional property-law principles, extending *more* Fourth Amendment protection to spaces that are *less* protected from public entry (*e.g.*, open-air porches and driveways of freestanding houses) and *less* Fourth Amendment protection to spaces that are *more* protected from public entry (*e.g.*, enclosed, interior hallways of apartment buildings).

2. A reasonable-expectation-of-privacy analysis accords with these well-understood property concepts. *See Jardines*, 569 U.S. at 13 (Kagan, J., concurring) ("It is not surprising that in a case involving a search of a home, property concepts and privacy concepts should . . . align.").

A common hallway in an enclosed, multi-unit apartment building "is not a public place." *Killebrew*, 256 N.W.2d at 583. Rather, "[i]t is a private space intended for the use of the occupants and their guests, and an area in which the occupants have a reasonable expectation of privacy." *Id.* Or, put more bluntly, inhabitants of apartments do not expect members of the public to wander in off the street and linger inches beyond their front doors. *Cf. Hicks*, 958 F.3d at 433. Even as to people authorized to be in the building, "the background social norms that invite a visitor to the [apartment] door do not invite him there to conduct a search"—or, in this case, an arrest. *Jardines*, 569 U.S. at 9.

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do "no more than any private citizen might do," *id.* at 8 (quotation marks omitted), and an uninvited private citizen may not rummage around tenants' front doors or detain them when they step out into the hallway.

3. Decisions holding that areas outside of individual apartments are not the curtilage of the home typically justify that conclusion on the ground that apartment hallways and landings are "common" spaces. *See supra*, at 17-19. But the fact that other tenants and their guests might sometimes pass by or through such spaces does not change the constitutional analysis: "privacy shared" is not "privacy waived for all purposes." *Georgia* v. *Randolph*, 547 U.S. 103, 115 n.4 (2006). As this Court recognized in *Jardines*, the area surrounding a freestanding home may be the curtilage even if other people have a right to access it: That everyone from "Girl Scouts [to] trick-or-treaters" can approach the front door of a detached house does not deprive the porch of its status as part of the curtilage—or grant government agents license to snoop around at will. 569 U.S. at 8. So, too, here: The area immediately outside of Mr. Sorenson's door is the curtilage of his home even though it was open to "residents and their guests" accessing "other apartments on [his] floor." Pet. App. 16a-17a.

A substantial body of this Court's precedent confirms the point. This Court has repeatedly held that an individual can have Fourth Amendment interests in places subject to common authority. A present co-tenant may object to the police's entry into the home even if another co-tenant assents to the intrusion. *See Randolph*, 547 U.S. at 114. An overnight guest has a legitimate expectation of privacy in temporary lodgings despite the host's "ultimate control of the house." *Minnesota* v. *Olson*, 495 U.S. 91, 99 (1990). And a leaseholder has the right to be free from searches of his apartment despite his landlord's consent. *Chapman* v. *United States*, 365 U.S. 610, 616-618 (1961). In other words, an apartment-dweller's "lack of a right

to exclude [does] not mean he had no right to expect certain norms of behavior in his apartment hallway." *Whitaker*, 820 F.3d at 853. "Yes, other residents and their guests . . . can pass through the hallway," but that does not mean they can "set up chairs and have a party in the hallway right outside the door"—much less that strangers can enter off the street to press their ears to doors or peer through keyholes. *Id.*

B. The rule adopted by the decision below has a wide reach and troubling consequences.

The decisions on Massachusetts' side of the split effectively create two classes of Fourth Amendment protection: one for residents of detached, single-family houses and another for residents of apartment buildings. That bifurcation is anomalous, far-reaching, and problematic.

First, the lines drawn by the decision below make little practical sense. Under well-established Fourth Amendment principles, an officer without a warrant may not invade private property to investigate a motorcycle on an open-air driveway, *see Collins*, 138 S. Ct. at 1671, or to arrest the occupant of a single-family home as he sits on an unenclosed front porch that is visible from the street, *see, e.g.*, *United States* v. *Brown*, 510 F.3d 57, 64 (1st Cir. 2007) ("The Fourth Amendment protects persons from warrantless arrest . . . [in] the curtilage of the home."); *United States* v. *Lundin*, 817 F.3d 1151, 1160 (9th Cir. 2016) ("The 'knock and talk' exception to the warrant requirement does not apply when officers encroach upon the curtilage of a home with the intent to arrest the occupant."). But, under the decision below, that same of-

ficer *may* enter an area of a private apartment building typically reserved for tenants and their guests—an enclosed landing on the third floor, an interior hallway on the sixth floor—and conduct a search or carry out an arrest. There is little to recommend that anomalous result: An open driveway or porch is hardly more private—or, in the terms of the Fourth Amendment, more a part of the "home"—than the areas of apartment buildings at issue in this case.

Second, the decision below and those on the same side of the split affect literally millions of Americans. As of 2019, the U.S. Census Bureau estimated that approximately 32 million of the nation's 122 million households—or 26%—live in structures containing two or more units. U.S. Census Bureau, 2019 American Community Survey, Households and Families, *available at* https://tinyurl.com/2019-ACS-Housing (last accessed June 11, 2021). In many areas of the country, including the county at issue in this case, that percentage is significantly greater. *See, e.g.*, U.S. Census Bureau, 2019 American Community Survey, Selected Housing Characteristics—Middlesex County, Massachusetts, *available at* https://tinyurl.com/2019-ACS-Housing-Middlesex (last accessed June 11, 2021) (showing that more than 45% of housing units in Middlesex County, Massachusetts, consist of multiple units). It is difficult to overstate the reach of the decision below.

Third, that reach will not be felt evenly. A decision creating a categorical exemption to the curtilage for apartment buildings "apportion[s] Fourth Amendment protections on grounds that correlate with income, race, and ethnicity." *Whitaker*, 820 F.3d at 854.

Data from the U.S. Census Bureau reveal, for example, that over two-thirds of white households live in one-unit, detached houses, as compared to less than half of black households. *See id.* (citing the Census Bureau's 2013 American Housing Survey). The same data show that "[t]he percentage of households that live in single-unit, detached houses consistently rises with income." *See id.*

The Constitution does not contemplate this two-tier system of protection. The Fourth Amendment reserves certain protections to "the people"—that is, "*all* members of the political community, not an unspecified subset." *District of Columbia* v. *Heller*, 554 U.S. 570, 580 (2008) (emphasis added). The Court should grant certiorari and eliminate this unwarranted bifurcation of Fourth Amendment protections.

III. This case is an ideal vehicle to address the question presented.

This case provides the Court a clear and straightforward opportunity to decide whether a common space immediately outside an apartment can constitute the curtilage of the home. The *sole* basis for the decision below was that the hallway immediately outside of Mr. Sorenson's front door "did not constitute the apartment's curtilage." Pet. App. 3a. If this Court grants certiorari, there is nothing to prevent it from reviewing that holding.

Indeed, this case is a better vehicle than most for reaching the question presented because the decision below does not rest on any case-specific holdings or facts. Although "a curtilage analysis" is sometimes described as "fact specific," Pet. App. 22a, the decision

below did not turn on any of the particulars of Mr. Sorenson's dwelling. The court did not care, for example, whether Mr. Sorenson's apartment building was locked or unlocked, or how the Lowell Police Department officers originally gained entry. Pet. App. 6a-10a. Nor did it matter to the court precisely how many apartments were in the building or where they were located. *Id.* Indeed, the trial court deemed it unnecessary to hold an evidentiary hearing to determine additional information about the characteristics of Mr. Sorenson's building. Pet. App. 19a. For the courts below, it was enough that (1) the hallway was not "enclosed relative to [Mr. Sorenson]'s individual apartment," and (2) the hallway was "open to" and "used by the residents of the building (and their guests) to reach each separate unit." Pet. App. 8a-9a. That broad-based holding makes this an ideal vehicle to address the constitutional question.

The fact that Mr. Sorenson's underlying appeal arose on a claim for ineffective assistance of counsel is no reason to deny certiorari. Again, the court of appeals denied relief based entirely on its view of the *merits* of Mr. Sorenson's Fourth Amendment claim. And this Court's resolution of the curtilage question will be dispositive of the merits: If the officers arrested Mr. Sorenson in the curtilage of his home without a warrant, the arrest was unconstitutional, but if the space was not the curtilage of his home, the arrest was valid. Pet. App. 14a ("It is settled law that, absent probable cause and exigent circumstances, police cannot arrest a person . . . on the curtilage of his residence."). Thus, in the event this Court rules in Mr. Sorenson's favor, all that will remain for remand is the question whether his trial counsel was deficient in failing to raise this meritorious Fourth Amendment

claim and whether that failure was prejudicial. This Court routinely grants certiorari to address important questions even though subsequent issues remain to be decided on remand. *See, e.g.*, *Maslenjak* v. *United States*, 137 S. Ct. 1918, 1930-1931 (2017) (holding that district court's jury instructions were erroneous but remanding for determination whether error was harmless); *Missouri* v. *Frye*, 566 U.S. 134, 151 (2012) (holding that counsel rendered deficient performance but remanding for determination of "state-law questions" relevant to prejudice).[6]

Lower courts are intractably divided over this important question of constitutional law, and this case presents an ideal opportunity for the Court to resolve it.

[6] Although the suitability of this case as a vehicle does not turn on the strength of petitioner's ineffective-assistance claim, it is worth noting that Mr. Sorenson will be able to demonstrate deficient performance and prejudice if the Court holds that officers conducted a warrantless arrest in the curtilage of his apartment. Mr. Sorenson's trial counsel submitted a barebones motion to suppress that ignored the issue of whether officers could conduct a warrantless arrest at the threshold of his apartment, and the Commonwealth made extensive use of the fruits of that warrantless arrest during its closing. *See supra*, at 7-8. Moreover, because Massachusetts applies the exclusionary rule as a matter of state law, *see Commonwealth* v. *Mauricio*, 477 Mass. 588, 596 (2017), the Fourth Amendment question presented in this case is dispositive regardless of whether the U.S. Constitution "require[s] the States to apply the exclusionary rule," *Collins*, 138 S. Ct. at 1679 (Thomas, J., concurring); *see also id.* at 1680 n.6.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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