No. 25-774

In the Supreme Court of the United States

ERIC TYRELL JOHNSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether police conduct a Fourth Amendment search when they use a drug-detection canine to sniff the door of an apartment home in a multi-unit building to determine whether there is contraband inside.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999 and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

Cato's interest in this case arises from its mission to support the rights that the Constitution guarantees to all citizens. *Amicus* has a particular interest in this case as it concerns the continuing vitality of the Fourth Amendment and meaningful restraints on the exercise of government power.

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[1] Rule 37 statement: All parties were timely notified before the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

In March 2019, law enforcement officers—accompanied by a drug-detection dog—entered the locked hallway of a multi-unit apartment building. Petitioner Eric Johnson was one of the building's tenants. Without Johnson's knowledge, and without a warrant, the dog sniffed the lower seam of Johnson's front door and then gave an alert signaling the presence of narcotics. Cert. Pet. 5–7.

The dog's alert gave officers probable cause to obtain a warrant and conduct a comprehensive search of Johnson's home, which led to his being charged with drug and firearm offenses. Johnson moved to suppress the evidence. The district court denied the motion, and Johnson was convicted following a jury trial. *Id.* at 7–8. On appeal, he argued that the sniff of his front door constituted an impermissible, warrantless search. The Fourth Circuit disagreed for two reasons. First, it held that drug-detection dogs are unique in that they can only detect contraband, and because there is no reasonable expectation of privacy in contraband, a dog sniff cannot qualify as a search. Pet. App. 9a–10a. Second, it distinguished the recessed alcove outside the front door of Johnson's apartment home from the front porch of a single-family home, holding that the curtilage doctrine does not afford Fourth Amendment protections to the former. *Id.* at 11a–13a.

The decision below erred in both of its holdings. Although this Court has held that drug-dog sniffs are *sui generis*, it has never gone so far as to apply this reasoning to excuse warrantless searches of the curtilage. Moreover, the Court's precedent concerning dog sniffs ignores the role these play in triggering comprehensive searches. That precedent is also undermined by

recent evidence showing that the infallible drug-detection dog is a myth. Dog sniffs should be treated like other Fourth Amendment intrusions—especially in the area immediately surrounding the home, "where privacy expectations are most heightened." *Florida v. Jardines*, 569 U.S. 1, 7 (2013) (citations omitted).

Further, the decision below impermissibly curtails constitutional protections in the domestic setting where they matter most. "[W]hen it comes to the Fourth Amendment, the home is first among equals," including the curtilage. *Id.* at 6. This Court has repeatedly explained the importance of Fourth Amendment protections for both the home and the area "immediately surrounding and associated with" it. *Id.* (citation omitted). The fact that other tenants have access to a common hallway—one steadfastly locked against outsiders who might seek to enter—does not remove the privacy afforded to the curtilage. Indeed, this Court recognized as much in *Jardines* when it held that a person's Fourth Amendment interests are intruded upon when police officers approach the front door of a home in order "to engage in canine forensic investigation." *Id.* at 9.

Such an intrusion exceeds the social norms that have shaped this Court's decisions about the scope of the Fourth Amendment. Apartment-building hallways, like homes, are not open to the public. And though tenants do not have an absolute right of exclusion over the hallways around their apartment homes, the same is true for homeowners. One may conceivably hold a social license to dawdle indefinitely on a public sidewalk, but there is emphatically no right to linger uninvited beside a stranger's front door.

That holds true whether that door leads into a free-standing house or one of the millions of homes located within multi-unit apartment buildings. The Fourth Circuit's opinion would deny equal curtilage protections to anyone whose home happens to share halls and walls with others.

This Court should grant review and reverse.

ARGUMENT

I. EXTENDING *PLACE* AND *CABALLES* TO APARTMENT HALLWAYS WOULD WEAKEN FOURTH AMENDMENT PROTECTIONS FOR THE HOME.

The Fourth Amendment protects the people's right "to be secure in their . . . houses, . . . against unreasonable searches and seizures." U.S. CONST. amend. IV. Despite this command, the Fourth Circuit held that dog sniffs at the front door of an apartment home escape Fourth Amendment scrutiny because they "can reveal only the presence of contraband, and there is no reasonable expectation of privacy in contraband." Pet. App. 10a. It is true that in *United States v. Place,* 462 U.S. 696 (1983) and *Illinois v. Caballes*, 543 U.S. 405 (2005), this Court declared dog sniffs "*sui generis*," *Place*, 462 U.S. at 706, on the theory that they detect only contraband—nothing else. But it has never extended *Place* and *Caballes* to the home context, and in the years since those decisions, judges and scholars have recognized the untenability of those decisions' assumptions about drug-detection dogs.

The Court first identified drug-detection dogs as *sui generis* in *Place*, where it determined whether the seizure of luggage for inspection by canines violated the Fourth Amendment. The Court held that the

deployment of such dogs is not a search because they can only detect the presence or absence of contraband. *Id.* at 707. In *Caballes*, the Court reiterated that "the use of a well-trained narcotics-detection dog—one that does not expose noncontraband items that otherwise would remain hidden from public view—during a lawful traffic stop, generally does not implicate legitimate privacy interests," and thus is not a search. 543 U.S. at 409 (internal citation and quotation marks omitted). The *Caballes* Court distinguished drug-detection dogs from the thermal-imaging device at issue in *Kyllo v. United States*, 533 U.S. 27 (2001), deeming it critical that the technology in *Kyllo* "was capable of detecting lawful activity," whereas a drug-dog's sniff "reveals no information other than the location of a substance that no individual has any right to possess." *Caballes*, 543 U.S. at 410.

Place and *Caballes* held that drug-detection dogs cannot implicate legitimate privacy interests because a dog's sniff "reveals no information other than the location of a substance that no individual has any right to possess." *Id.* at 409–10. But this overlooks the legal significance of a positive alert: it suffices as probable cause for fuller searches of private places. When a dog alerts—accurately or not—officers *ipso facto* obtain probable cause to conduct a comprehensive search. *Florida v. Harris*, 568 U.S. 237, 248 (2013) ("If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause."); *see also* Radley Balko, *The Supreme Court's 'alternative facts' about drug-sniffing dogs*, WASH. POST (Feb. 4, 2019) (saying courts treat drug-detection dogs as "furry generators of

probable cause").[2] The dog sniff is in fact a "limited search" intended "to reveal undisclosed facts about private enclosures, to be used to justify a further and complete search of the enclosed area." *Caballes*, 543 U.S. at 413 (Souter, J., dissenting).

That begs the question of just how accurate sniffs are. There is a problem of false positives: drug dogs apparently detect drugs with some frequency even when these are not, in fact, present. "The infallible dog . . . is a creature of legal fiction." *Id.* at 411. "Multiple analyses of drug-dog alerts have consistently shown alarmingly high error rates—with some close to and exceeding 50 percent." Balko, *supra*. False alerts occur for a variety of reasons. Drug-detection dogs may detect latent drug residue on cash, but "[t]he fact of contamination, alone, is virtually meaningless and gives no hint of when or how the cash became so contaminated" because "it is well-established than an extremely high percentage of all cash in circulation . . . is contaminated with drug-residue."[3] They may alert to odors from previous occupants of a vehicle.[4] They may alert to the odor from a legal substance, like hemp, which smells identical to marijuana; the Tennessee Bureau

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[2] Available at https://tinyurl.com/yfr4n53d.

[3] *Muhammed v. DEA*, 92 F.3d 648, 653 (8th Cir. 1996); *see also People v. Eighteen Thousand Dollars*, 471 N.W.2d 628 (Mich. Ct. App. 1991) (rejecting the forfeiture of $18,000 where a drug dog alerted to the presence of narcotics but only cash was found and the defendant could prove that she had just withdrawn the cash from her bank).

[4] *See, e.g.*, *People v. Stribling*, 228 N.E.3d 766, 773 (Ill. App. Ct. 2022) (holding that the smell of marijuana alone cannot establish probable cause where someone other than the defendant "had smoked in the vehicle 'a long time ago'" because "the smell of burnt cannabis may have lingered" in a car or on clothing).

of Investigation's crime lab has found that drug-detection dogs cannot distinguish between the two substances.[5] Handlers may intentionally cue the dog to alert.[6] The dog may alert because it knows it will be rewarded.[7] One researcher believes that dogs' "innate sense of loyalty . . . can override their sense of smell." Daryl James, *The Police Dog Who Cried Drugs at Every Traffic Stop*, REASON (May 13, 2021, 7:00 AM).[8] A study from the University of California, Davis found that a drug dog is more likely to alert when its handler believes drugs will be found—even when no drugs are actually present. *Id.* "Essentially, intelligent animals pick up subtle cues from their handlers and respond." *Id.*

Consider the case of Karma, a drug-detection dog from Republic, Washington. For the two years Karma worked with police, he signaled "the presence of drugs 100 percent of the time during roadside sniffs outside vehicles," but drugs were found just 29 percent of the time. *Id.* Karma is not an outlier: "Studies suggest drug dogs are wrong up to 80% of the time . . . ." Darpana Sheth & Daryl James, *Profit-minded police*

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[5] Cynthia Sherwood et al., *Even Dogs Can't Smell the Difference*, 55 TENN. BAR J. 14 (Dec. 2019), https://tinyurl.com/yh3bvev8.

[6] Balko, *supra* ("I've asked dog trainers to look at videos of roadside searches . . . and, on more than one occasion, they said they saw clear indications that a dog was being cued to alert.").

[7] *Id.* (discussing a case where a drug dog alerted "93 out of every 100 times it sniffed" and the handler "admitted that he rewarded the dog with a treat *only when it alerted*").

[8] Available at https://tinyurl.com/3dd68e9h.

exploit K-9 partners, THE SALT LAKE TRIB. (May 15, 2020, 2:39 PM).[9]

In short, the premise underlying *Place* and *Caballes*—drug-detection dogs reveal nothing but contraband in which a person has no legitimate privacy interest—is false. As a matter of law, dog alerts end up exposing private areas, and as a matter of fact, they often occur even where there is no contraband. Yet the Fourth Circuit chose to extend *Place* and *Caballes* to the home, finding that "a dog sniff is not a search—period." Pet. App. 10a. Without intervention by this Court, nothing will stop law enforcement from routinely using dog sniffs as the key to unlock Americans' apartment homes. These decisions should not be unleashed for the home setting.

II. SOCIAL NORMS INFORM THE SCOPE OF THE FOURTH AMENDMENT.

In order to execute a dog sniff of an apartment home's door, officers must intrude upon the sanctuary afforded by the curtilage—which means intruding upon the right of the people to be secure in their property. *See United States v. Jones*, 565 U.S. 400, 405 (2012). In defining the scope of Fourth Amendment property interests, this Court frequently turns to social norms and expectations. *Jardines*, 596 U.S. at 9 (relying on "background social norms that invite a visitor to the front door"); *Caniglia v. Strom*, 593 U.S. 194, 198 (2021) (analyzing what "a private citizen might have had authority to do if petitioner's wife had approached a neighbor for assistance instead of police"); *Case v. Montana*, No. 24-624, 2026 U.S. LEXIS 432, at *23 (U.S. Jan. 14, 2026) (Gorsuch, J.,

[9] Available at https://tinyurl.com/h72kkw88.

concurring) (under the Fourth Amendment, "officers generally enjoy the same legal privileges as private citizens").

In *Jardines*, this Court held that police officers violated the Fourth Amendment when they brought a drug-detection dog to inspect the porch of a detached single-family home. 569 U.S. at 11–12. Writing for the majority, Justice Scalia explained that the front porch is considered the curtilage and thus entitled to the same protections as the home itself. *Id.* at 6. Notably, the majority did not rely on either the expectation-of-privacy framework that originated in *Katz v. United States,* 389 U.S. 347 (1967), or the four curtilage factors set forth in *United States v. Dunn*, 480 U.S. 294, 301 (1987). Rather, the majority held that police had trespassed on the curtilage by looking to social norms reflected in property law. *Jardines*, 569 U.S. at 6–7. Social norms establish that visitors have an "implicit license" to "approach the home by the front path" and "knock promptly." *Id.* at 8. But the implied license permits nothing more, and "absent invitation to linger longer," the visitor must "leave." *Id.* (parentheticals removed). *Jardines* explained that government officials can do "no more than any private citizen might do," absent a warrant or emergency. *Id.* (citation omitted); *see also* William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1825–26 (2016) ("Fourth Amendment protection . . . is warranted when government officials either violate generally applicable law or avail themselves of a governmental exemption from it."). Because the police transgressed "the background social norms that invite a visitor to the front door" by bringing a drug-detection dog onto the porch, they violated the Fourth Amendment. *Jardines*, 569 U.S. at 9.

Jardines followed a long line of Fourth Amendment precedent relying on social norms. In *O'Connor v. Ortega*, the Court recognized that a government employee has a Fourth Amendment interest in his office, even though "others—such as fellow employees, supervisors, consensual visitors, and the general public—may have frequent access" to it. 480 U.S. 709, 717 (1987) (plurality op.). A plurality of this Court found the office to be a private place "'based upon societal expectations that have deep roots in the history of the [Fourth] Amendment.'" *Id.* at 716 (quoting *Oliver v. United States*, 466 U.S. 170, 178 n.8 (1984)).

The Court looked to social norms again in *Bond v. United States*, 529 U.S. 334 (2000), which held that a search occurred when a border patrol agent squeezed the defendant's luggage in a bus's overhead bin. Although "a bus passenger clearly expects that his bag may be handled," he "does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner." *Id.* at 338–39; *see also Carpenter v. United States*, 585 U.S. 296, 394–95 (2018) (Gorsuch, J., dissenting) (criticizing the Court's decisions in *Florida v. Riley*, 488 U.S. 445 (1989) (helicopter surveillance above a home) and *California v. Greenwood*, 486 U.S. 35 (1988) (collection and examination of a person's sealed garbage bags) for ignoring "evidence of the people's habits and reasonable expectations of privacy"); *Case*, 2026 U.S. LEXIS 432, at *23–24 (Gorsuch, J., concurring) (considering the emergency aid exception in the light of the common law and social norms, and explaining that "officers lacking a valid warrant" may do what any private citizen might do—but "no more" (citation omitted)).

For people living in apartment homes, the hallway is "intimately linked to the home both physically and psychologically." *Jardines*, 569 U.S. at 7. A hallway in an enclosed, multi-unit apartment building "is not a public place." *People v. Killebrew*, 256 N.W.2d 581, 583 (Mich. Ct. App. 1977). "It 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.* For many, the locked apartment building offers a respite from the outside world. It excludes all but a small number of neighbors, invitees, and staff. *Cf. O'Connor*, 480 U.S. at 730 (Scalia, J., concurring in the judgment) ("It is privacy that is protected by the Fourth Amendment, not solitude. A man enjoys Fourth Amendment protection in his home, for example, even though his wife and children have the run of the place—and indeed, even though his landlord has the right to conduct unannounced inspections at any time.").

The fact that the landlord, rather than a tenant, has the legal right to exclude trespassers from the common areas of an apartment building does not indicate otherwise. This Court has long held that Fourth Amendment rights, even when approached from a property-rights perspective, are "not synonymous with a technical property interest." *Georgia v. Randolph*, 547 U.S. 103, 110 (2006); *see also Byrd v. United States*, 584 U.S. 395, 404 (2018) ("[I]t is by now well established that a person need not always have a recognized common-law property interest in the place searched to be able to claim a reasonable expectation of privacy in it."); *Silverman v. United States*, 385 U.S. 505, 511 (1961) ("[W]e need not pause to consider whether or not there was a technical trespass under the local property law . . . ."). Rather, the question is

whether law enforcement officers exceeded the implied social license afforded to outsiders while on the property. *Jardines*, 569 U.S. at 8–9. Accessing a locked apartment-building hallway and deploying drug-detection dogs to sniff under doorways in the hunt for probable cause to enter homes transgresses social norms.

III. A CRABBED UNDERSTANDING OF THE NATURE OF THE CURTILAGE WILL ERODE RIGHTS AND ENABLE ABUSES OF GOVERNMENT AUTHORITY.

Denying people living in apartment homes the full-fledged protection of the curtilage would impact millions of Americans. In this case, the police obtained a warrant based on the dog alert, broke in Johnson's front door with a battering ram before 5 o'clock in the morning, and comprehensively searched his home. *Id.* at 7. All of this would have been plainly unconstitutional under *Jardines* had the dog sniff occurred instead at the front door of a single-family home.

The damage caused by a limited curtilage doctrine is not evenly distributed. Poor, black, Hispanic, and disabled Americans are disproportionately likely to live in apartment homes. REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2024 at 63, BD. OF GOVS. OF FED. RSRV. SYS. (May 2025) [hereinafter FED. RSRV. REP.];[10] *see also United States v. Pineda-Moreno*, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, C.J., dissenting from den'l of reh'g en banc) (arguing that the loss of curtilage protections may not affect the "very rich," "but the vast majority of the 60 million people living in the Ninth Circuit will see their privacy

[10] Available at https://tinyurl.com/mrmwbbyr.

materially diminished"); *United States v. Redmon*, 138 F.3d 1109, 1132 (7th Cir. 1998) (en banc) (Posner, C.J., dissenting) (criticizing a definition of the curtilage that would reserve it to "farmers and to wealthy suburbanites and exurbanites."). Those with relatively high incomes are more likely to live in single-unit, detached homes. FED. RSRV. REP., *supra*, at 63; 2023 PROFILE OF OWNERS AND RENTERS, U.S. CENSUS BUR. (Oct. 30, 2024) (finding that 83.7% of homeowners reside in detached homes, while 61% of renters live in buildings with two or more apartments).[11] Poorer citizens are already more likely to interact with police, and they should not have to do so shielded by even fewer Fourth Amendment protections than other Americans can take for granted. Sean M. Lewis, Note, *The Fourth Amendment in the Hallway: Do Tenants Have a Constitutionally Protected Privacy Interest in the Locked Common Areas of Their Apartment Buildings?*, 101 MICH. L. REV. 273, 306 n.229 (2002) ("Poor tenants, especially minorities, are much more likely to live in neighborhoods subject to close police scrutiny and are, therefore, more likely to feel the sting of unbridled police discretion.").

Additional arbitrariness also looms from an unduly narrow definition of the curtilage. The Eighth Circuit held that the area outside one apartment home's door constituted the curtilage because it faced the open air and "the walkway leading up to it was 'common' only to [the tenant] and his immediate neighbor." *United States v. Hopkins*, 824 F.3d 726, 732 (8th Cir. 2016). But in another case where a shared hallway led to the tenant's apartment home, the same court held that no Fourth Amendment protection existed. *United States*

[11] Available at https://tinyurl.com/mryabuj7.

v. Scott, 610 F.3d 1009, 1015–16 (8th Cir. 2010). Architecture-based adjudication leaves some Americans with "little to no space designated as curtilage" based on nothing more than accidents of building design. Amelia L. Diedrich, Note, *Secure in Their Yards?: Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment*, 39 HASTINGS CONST. L.Q. 297, 315 (2011).

Homes under a common roof should enjoy the same Fourth Amendment protections as those beneath their own eaves. And the people who live within apartment homes, whether due to the accidents of life or the realities of need, are no less entitled to constitutional privacy than are householders.

CONCLUSION

For these reasons and those described by Johnson, this Court should grant the petition.

Respectfully submitted,

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