No. 18-1219

In the Supreme Court of the United States

ILLINOIS,
Petitioner,
v.
DERRICK BONILLA,
Respondents.

On Petition for Writ of Certiorari to the Illinois Supreme Court

BRIEF OF *AMICI CURIAE* STATES OF UTAH, ARKANSAS, GEORGIA, HAWAII, KANSAS, KENTUCKY, LOUISIANA, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, AND TEXAS SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

States promote public safety by investigating crime and convicting criminals. The Fourth Amendment and other constitutional requirements guide the States' actions in discharging those sovereign duties. States can best comply with those requirements when court decisions interpreting them provide clear rules to follow.

That clarity is lacking here. Lower-court decisions squarely conflict on how the Fourth Amendment applies to dog sniffs in the common areas of multi-unit residential dwellings. Those conflicting decisions undermine the States' ability to investigate crime and enforce their laws, thereby harming public safety. The States need this Court's clear direction on this question to guide their law-enforcement efforts.

SUMMARY OF ARGUMENT

The Fourth Amendment protects "the right of the people to be secure in their . . . houses" from unreasonable searches and seizures. U.S. Const. amend. IV. The "chief evil against which the wording of the Fourth Amendment is directed" is the "physical entry of the home." *Payton v. United States*, 445 U.S. 573, 585 (1980) (quotation and citation omitted).

Each home's interior receives identical Fourth Amendment protection, be that home a house, *Payton*, 445 U.S. at 590; a rented premises, like an apartment,

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[1] Counsel of record for all parties received notice at least ten days before this *amicus curiae* brief was due of the State's intent to file it. S. Ct. R. 37.2.

Chapman v. United States, 365 U.S. 610, 617–18 (1961); or a hotel, *Stoner v. California*, 376 U.S. 483, 490 (1964). Neither does the Fourth Amendment distinguish between permanent residents and overnight guests. *Minnesota v. Olson*, 495 U.S. 91, 98–99 (1990). In short, "the Fourth Amendment has drawn a firm line at the entrance" of a home—regardless of its type—and "that threshold may not reasonably be crossed without a warrant." *Payton*, 445 U.S. at 590. That is why "searches and seizures *inside* a home without a warrant are presumptively unreasonable." *Id.* at 586 (emphasis added).

The extent to which the Fourth Amendment protects areas *outside* the home, however, depends on whether the area is within the curtilage—"the land immediately surrounding and associated with the home" to which private life extends, and which is "considered part of the home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180 (1984).

Six years ago, this Court held that the front porch of a detached single-family home is a "classic exemplar" of curtilage, making a warrantless drug-detection-dog's sniff on the porch an unreasonable Fourth Amendment search. *Florida v. Jardines*, 569 U.S. 1, 7, 11–12 (2013). Since *Jardines*, lower courts have split over whether common areas in multi-unit dwellings should be treated as curtilage like the front porch of a single-family home. Here, the Illinois Supreme Court concluded that it should—joining the distinct minority position. This square split on this important question warrants plenary review.

On the merits, this Court should adopt the majority position. That position adheres more faithfully to the curtilage doctrine's common-law roots and to this Court's cases applying the doctrine to areas surrounding single-family homes. Succinctly stated, common areas of multi-unit dwellings are not curtilage because they do not shelter "intimate activity associated with the sanctity of a man's home and the privacies of life." *Oliver*, 466 U.S. at 180 (internal quotation omitted).

This Court should grant certiorari and reiterate that curtilage includes only those areas sheltering the intimate and private activities of a person's home. Under any reasonable application of that rule, a common hallway in a multi-unit dwelling is not one of those places.

ARGUMENT

I. LOWER COURTS ARE SQUARELY SPLIT ON WHETHER COMMON AREAS OF MULTI-UNIT DWELLINGS ARE CURTILAGE.

Before *Jardines*, lower courts had almost unanimously agreed that common areas in multi-unit dwellings were not within an apartment's curtilage. *See* Carol A. Chase, *Cops, Canines, and Curtilage: What Jardines Teaches and What It Leaves Unanswered*, 52 Hous. L. Rev. 1289, 1303–05 (2015) (noting that "the overwhelming weight of [pre-*Jardines*] authority reject[ed] the proposition that a resident of a multi-dwelling residential building can claim curtilage protection in common areas—or even anywhere outside an individual unit").

Those decisions relied largely on *United States v. Dunn*, 480 U.S. 294, 300–01 (1987), which held that the central consideration in answering the question of curtilage is "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Dunn* held that factors relevant to that consideration include (1) "the proximity of the area claimed to be curtilage to the home," (2) "whether the area is included within an enclosure surrounding the home," (3) "the nature of the uses to which the area is put," and (4) "the steps taken by the resident to protect the area from observation by people passing by." *Id.* at 301.

Because the majority opinion in *Jardines* did not consider the *Dunn* factors, it offered no clues as to how its holding—that the front porch of a house is curtilage—should be applied to multi-unit dwellings, which do not have front porches. But Justice Alito's dissenting opinion suggested that common areas of multi-unit dwellings are not curtilage, stating that the Court's holding "does not apply when a dog alerts . . . in the corridor of a building to which the dog and handler have been lawfully admitted." *Jardines*, 569 U.S. at 26 (Alito, J., dissenting); *see also id.* (suggesting it would be erroneous to hold that a dog alert "in the corridor of an apartment building" is a search).

Given the *Jardines* majority's lack of guidance, most lower courts have since followed the dissent's lead, holding that common areas of multi-unit dwellings are not like the front porch of a single-family home and therefore are not curtilage. *See, e.g.*, *State v. Edstrom*,

916 N.W.2d 512, 517–21 (Minn. 2018) (common-area interior hallway "immediately outside Edstrom's door" in locked apartment building where police were invited to enter "is not curtilage"), *cert. denied*, No. 18-6715 (Feb. 25, 2019); *United States v. Jones*, 893 F.3d 66, 72 (2d Cir. 2018) (shared parking lot of multi-unit dwelling not within curtilage of defendant's apartment); *United States v. Makell*, 721 F. App'x 307, 308 (4th Cir. 2018) (per curiam) ("[C]ommon hallway of the apartment building, including the area in front of Makell's door, was not within the curtilage of his apartment."), *cert. denied*, No. 18-5509 (Dec. 10, 2018); *Seay v. United States*, No. 14-0614, 2018 WL 1583555, at *4–5 (D. Md. Apr. 2, 2018) (common hallway in apartment not curtilage), *appeal dismissed*, 739 F. App'x 193 (4th Cir. 2018); *United States v. Bain*, 155 F. Supp. 3d 107, 118–20 (D. Mass. 2015) (area in front of door of apartment is not curtilage), *aff'd* 874 F.3d 1 (1st Cir. 2017), *cert. denied*, No. 17-7494 (Apr. 23, 2018); *United States v. Sweeney*, 821 F.3d 893, 901 (7th Cir. 2016) (common area in basement was not curtilage); *State v. Luhm*, 880 N.W.2d 606, 615–18 (Minn. Ct. App. 2016) (interior hallway of condominium building not curtilage); *State v. Mouser*, 119 A.3d 870, 875 (N.H. 2015) (shared parking area behind multi-unit dwelling not curtilage); *State v. Williams*, 2015 ND 103, ¶ 24, 862 N.W.2d 831, 837–38 (N.D. 2015) (common hallway in condominium building not curtilage); *Lindsey v. State*, 127 A.3d 627, 642–43 (Md. Ct. Spec. App. 2015) (common area outside door not curtilage); *State v. Dumstrey*, 859 N.W.2d 138, 142–46 (Wisc. Ct. App. 2014) (secured shared parking garage not curtilage); *State v. Nguyen*, 841 N.W.2d 676, 682 (N.D. 2013) ("secured common hallway" not curtilage);

United States v. Jackson, 728 F.3d 367, 373–74 (4th Cir. 2013) (two-to-three foot strip of grass between private patio and common sidewalk, as well as sidewalk itself, were not curtilage).

Those holdings adhere to the pre-*Jardines* majority position, noted above, that common areas of multi-unit dwellings are not curtilage. *See e.g.*, *United States v. Brooks*, 645 F.3d 971, 975–76 (8th Cir. 2011) (stairway leading to common area not curtilage); *Reeves v. Churchich*, 484 F.3d 1244, 1254–55 (10th Cir. 2007) (shared front yard of duplex not curtilage); *United States v. Cruz Pagan,* 537 F.2d 554, 558 (1st Cir.1976) (common area in basement of apartment building not curtilage); *People v. Becker,* 533 P.2d 494, 495–96 (1975) (common area in front of apartments, and not fenced in, not part of curtilage of particular apartment); *United States v. Miguel,* 340 F.2d 812, 814 (2d Cir. 1965) (lobby of multi-unit apartment building not within curtilage of defendant's apartment), *cert. denied*, 382 U.S. 859 (1965).

But in the decision below, the Illinois Supreme Court took a different tack. It joined the minority position by holding that "[t]he common-area hallway immediately outside of [respondent]'s apartment door" in an unlocked multi-unit apartment building "is curtilage." *People v. Bonilla*, 2018 IL 122484, ¶ 25, __ N.E.3d __ (Ill. 2018). *See also, e.g.*, *United States v. Hopkins*, 824 F.3d 726, 732 (8th Cir. 2016) (area "six to eight" inches from townhome-apartment front door on development's central courtyard walkway was curtilage); *United States v. Burston*, 806 F.3d 1123, 1126–28 (8th Cir. 2015) (area "six to ten inches" outside

apartment window adjacent to shrubbery that partially covered window was curtilage); *State v. Rendon*, 477 S.W.3d 805, 810 (Tex. Crim. App. 2015) ("narrowly hold[ing] that the curtilage extended to appellee's front-door threshold located in a[n] . . . upstairs landing" shared by two apartments); *Bunn v. State*, 265 S.E.2d 88, 89–91 (Ga. Ct. App. 1980) ("immediate vicinity of defendant's patio at the rear of his apartment" was curtilage).

In short, *Jardines*'s definition of "curtilage" for single-family dwellings has created a deepening split over how that holding applies to multi-unit dwellings. The Court should grant certiorari to resolve the split on this question critical to States' law-enforcement efforts.

II. THE ILLINOIS SUPREME COURT'S DECISION IS INCORRECT.

The Illinois Supreme Court's holding erroneously extends curtilage protection to the common areas of multi-unit dwellings. That holding breaks from the reasoning underlying settled Fourth Amendment jurisprudence.

A. The Curtilage Doctrine Arises from a Landowner's Historical Common-Law Property Rights to Privacy and to Exclude Others.

The curtilage doctrine stems from the common law, which defined curtilage as "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Oliver*, 466 U.S. at 180 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). Curtilage is treated as "part of [the] home

itself," *id.*, because it is "an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened," *California v. Ciraolo*, 476 U.S. 207, 213 (1986); *accord* 4 W. Blackstone, Commentaries on the Laws of England in Four Books 225 (observing that "the capital house protects and privileges all its branches and appurtenants, if within the curtilage or home-stall").

Because those inquiries vary by property, curtilage analysis is not a "finely tuned formula that . . . yields a 'correct' answer to all extent-of-curtilage questions." *Dunn*, 480 U.S. at 301. Rather, courts have traditionally discerned the boundaries of curtilage "by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private." *Oliver*, 466 U.S. at 180.

Even so, this Court's decisions give some jurisprudential landmarks. Most recently, *Jardines* held (without considering *Dunn*) that the front porch of a single-family home is a "classic exemplar" of curtilage—"an area adjacent to the home and 'to which the activity of home life extends.'" *Jardines*, 569 U.S. at 6–7 (quoting *Oliver*, 466 U.S. at 182 n.12). Other specific areas that the Court has found to be within the curtilage—and upon which the public does not traditionally tread—include a house's "side garden" and the "property . . . just outside the front window," *id.* at 7; a "partially enclosed top portion of [a] driveway that abuts the house," *Collins v. Virginia*, 138 S. Ct. 1663, 1670–71 (2018); and the backyard of a suburban house enclosed by a fence, *Ciraolo*, 476 U.S. at 209,

213; *see also Florida v. Riley*, 488 U.S. 445, 448, 450 (1989) (greenhouse located 10 to 20 feet behind a mobile home enclosed with the mobile home by a wire fence "was within the curtilage").

Consistent with those conclusions, the Court has excluded other areas around a home from the boundaries of curtilage. For example, the curtilage does not extend to the curb of a public street in front of a single-family home. *California v. Greenwood*, 486 U.S. 35, 37 (1988). Nor does it encompass "open fields," *Oliver*, 466 U.S. at 178–79, or an unenclosed, openly visible barn located sixty yards away from the house, *Dunn*, 480 U.S. at 301–03.

Those holdings and the stated factors guide law enforcement and lower courts in determining the boundaries of curtilage for single-family homes. To be sure, some grey areas may still exist, but this Court's decisions suggest that most of the property immediately surrounding a single-family home—especially when enclosed—is within the curtilage.

B. Given the Curtilage Doctrine's Common-Law Roots, Individual Members of This Court Have Concluded that Curtilage Protections Do Not Apply to Common Areas of Multi-Unit Dwellings.

The Court's majority opinions do not appear to address the scope of curtilage protections for multi-unit dwellings, but individual Justices have analyzed this issue in separate opinions. Each of those opinions supports the conclusion that the curtilage does not

extend to common areas open to others, such as a hallway in a multi-unit dwelling.

In *McDonald v. United States*, 335 U.S. 451, 454–56 (1948), the Court held that law enforcement's warrantless entry into the rented room of a rooming house was not justified. Justice Jackson's concurrence observed that had the officers "been admitted as guests of another tenant or . . . by an obliging landlady or doorman, they would have been legally in the hallways," and "[l]ike any other stranger they could then spy or eavesdrop on others without being trespassers" because tenants in a building have "no right to exclude from the common hallways those who enter lawfully." *Id.* at 458 (Jackson, J., concurring). The dissent similarly concluded that "tenants or occupants of a room" have "no right to object to the presence of officers in the hall of the rooming house." *Id.* at 462 (Burton, J., dissenting).

In *California v. Rooney*, 483 U.S. 307, 308 (1987), the Court dismissed as improvidently granted a petition presenting the question of whether a warrantless search of a communal trash bin located in an apartment building's basement was an unreasonable Fourth Amendment search. But three Justices dissented. They would have reached the issue, and agreed with the State that the trash bin was "not within the curtilage of [the] apartment" because it was in an area "open to the public, and . . . the officers committed no trespass and were not invading any private zone when they approached the trash bin." *Id.* at 319 (White, J., dissenting).

In *Minnesota v. Carter*, 525 U.S. 83, 85, 89–91 (1998), the Court held that the defendants, who were only temporary guests in an apartment for a purely commercial transaction (packaging cocaine), could not claim the Fourth Amendment's protection in the apartment. Justice Breyer agreed with the dissent that even transient house guests could claim the Fourth Amendment's protection of the home. *Id.* at 103 (Breyer, J., concurring in judgment). But he concurred in the judgment rejecting the defendants' complaint that a search warrant was improperly based on an officer's observations made by looking through the blinds of a ground-floor apartment that fronted a public street. *Id.* at 104–05. He explained that because the officer "stood outside the apartment's 'curtilage'"—in "a place used by the public and from which one could see through the window into the kitchen"—his observation through the blinds was not a search. *Id.* at 104.

Those opinions show how differences between the areas "immediately surrounding" single-family homes, and the common areas outside the individual units in multi-unit dwellings, significantly affect the curtilage analysis.

C. Curtilage Principles Do Not Create Fourth Amendment Protections for Common Areas of Multi-Unit Dwellings.

Common areas of multi-unit dwellings are not like the curtilage of single-family homes, either in their design or in the amount of privacy they provide to their occupants. As a result, "the concept of 'curtilage' has little if any application to . . . multiple-unit dwellings." 1 Wayne R. LaFave, Search and Seizure § 2.2(g), at 50

(5th ed. Supp. 2015). That conclusion follows from four straightforward premises.

First, common areas of multi-unit dwellings do not fit within the "Fourth Amendment's property-rights baseline." *Jardines*, 569 U.S. at 11. This Court's curtilage cases all involve property to which the householder can refuse entry. *See id.* at 5–6, 11 (officers intruded on "Jardines' property" and conducted sniff on front porch, an area "belonging to Jardines"); *see also Collins*, 138 S. Ct. at 1670–71 & 1673 n.3 (private driveway of residential property); *Riley*, 488 U.S. at 448 (private rural property surrounding mobile home); *Ciraolo*, 476 U.S. at 209, 211 (private suburban backyard enclosed with a fence); *Dunn*, 480 U.S. at 297 (barn on private ranch property); *Oliver*, 466 U.S. at 173–74 (open fields on privately owned farmland).

In contrast, tenants of multi-unit dwellings do not have exclusive possession over the building's common areas. Rather, those areas are like "public thoroughfares" open to all the residents who share the hallway, to the landlord, to all their invitees, and to anyone else passing through. *See Carter*, 525 U.S. at 104–05 (Breyer, J., concurring in the judgment) (area just outside apartment window was public space outside curtilage); *Rooney*, 483 U.S. at 319 (White, J., dissenting) (trash bins in area "open to the public" not within curtilage); *Bonilla*, 2018 IL 122484, ¶ 58 ("The hallway is simply a publicly accessible means of ingress and egress for defendant, all the other residents, and anyone else who cares to come or go through the building's unlocked doors.") (Karmeier, C.J.,

dissenting); *Cf. Commonwealth v. Thomas*, 267 N.E.2d 489, 491 (1971) ("[A] tenant's 'dwelling' cannot reasonably be said to extend beyond his own apartment and perhaps any separate areas subject to his exclusive control.").

Second, common areas do not allow for "intimate activity associated with the sanctity of a man's home and the privacies of life." *Oliver*, 466 U.S. at 180 (internal quotation omitted). This element—the "central component" of the curtilage inquiry, *Dunn*, 480 U.S. at 300—is lacking in common areas. Apartment dwellers do not engage in private home-life activities in such open and public spaces where any resident or the public at large is generally free to enter. Apartment dwellers do not have or expect privacy protection in common areas. *See Carter*, 525 U.S. at 105 (Breyer, J., concurring in the judgment); *State v. Williams*, 2015 ND 103, ¶ 17, 862 N.W.2d 831 ("The very nature of a multi-family dwelling reduces one's expectation of privacy simply from the fact that one's neighbor also may use or occupy the common, or shared, areas."). Simply put, like open fields, common areas "do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance." *Oliver*, 466 U.S. at 179.

Third, common areas fail as curtilage under the *Dunn* factors. *See Dunn*, 480 U.S. at 301. Common areas are not within an enclosure separating the home from the property of others or from public space, are not used for "intimate activities of the home," and are not protected from observation. *Id.* at 301–03. These areas may be proximate to an apartment, but they are

also proximate to *several other* apartments, making it unlikely that proximity itself weighs in favor of finding that the area is "so intimately tied to" any one home. *See id.* at 301–02.

Fourth, other than the apartment's door itself, no clearly marked boundaries separate possible curtilage from non-curtilage, or the curtilage of one multi-unit dweller from his neighbor's. Under this Court's precedents, curtilage boundaries are "clearly marked" and "easily understood from our daily experience." *Oliver*, 466 U.S. at 182, n.12. Multi-unit dwellings typically do not have these easily distinguishable boundaries. Nor are there generally front porches, side gardens, or driveways. *See Collins*, 138 S. Ct. at 1671. Some individual areas outside the walls of an apartment—a private balcony or patio—may be clearly separate from common areas. But a hallway like the one here—common space shared by several apartments and freely traversed by residents and non-residents alike—provides no clearly marked curtilage boundaries. *See Bonilla*, 2018 IL 122484, ¶ 3.

III. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

The straightforward, undisputed fact pattern here makes this an excellent vehicle for addressing the scope of curtilage protections for multi-unit dwellings.

Respondent lived in a prototypical multi-unit apartment building with interior "common area hallway[s]" extending in front of "four apartments on each floor." *Bonilla*, 2018 IL 122484, ¶¶ 3, 12. "The exterior doors to the apartment building were not

locked." *Id.* ¶ 3. After receiving a tip that respondent was selling drugs from his apartment, officers led a drug-detection dog through the common hallways on the second and third floors with the dog alerting only at respondent's apartment door. *Id.* Police then obtained a warrant to search respondent's apartment, found cannabis in it, and arrested respondent and charged him with possession with intent to distribute. *Id.*

The trial court granted respondent's motion to suppress, concluding that it would be "unfair" to treat people who live in multi-unit dwellings differently than people who live in single-family homes. *Id.* ¶ 4. The court of appeals affirmed, holding the area was curtilage under *Jardines*. *Id.* ¶ 6.

The Illinois Supreme Court affirmed. *Id.* ¶ 51. It specifically held that the "common-area hallway immediately outside of [respondent's] apartment door is curtilage," and that the dog-sniff violated respondent's Fourth Amendment rights in that protected space. *Id.* ¶¶ 25, 32, 51.

In short, the undisputed facts cleanly present important questions of federal law. No vehicle problems should preclude the Court from reaching or resolving them. And in doing so, the Court will provide critical guidance on important Fourth Amendment questions that implicate the States' core sovereign law-enforcement functions.

CONCLUSION

The Court should grant the petition and reverse the Illinois Supreme Court's judgment.

Respectfully submitted.

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