No. 14-973

IN THE

Supreme Court of the United States

MATTHEW D. NGUYEN,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Dakota

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BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association focused on securing justice and due process for the criminally accused and fostering the integrity of the criminal defense system. With nationwide membership of approximately 10,000—including private practitioners, public defenders, judges, and professors—NACDL works to promote the proper, efficient, and just administration of criminal law. NACDL is recognized as an affiliated organization with full representation in the American Bar Association House of Delegates.

The National Association for Public Defense ("NAPD") is an association of professionals dedicated to securing the right to counsel and promoting equal access to justice in America's criminal courts. NAPD brings together a wide range of professionals who play critical roles in representing the accused. NAPD's approximately 7,000 members include social workers, paralegals, legislative advocates, financial professionals, and administrative personnel, just to name a few categories.

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[1] As required by this Court's Rule 37.2(a), the parties received timely notice of *amici*'s intent to file this brief. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici curiae*, their members, or their counsel, has made a monetary contribution to this brief's preparation or submission. See S. Ct. Rule 37.6. Both parties have consented to the filing of this brief; copies of those consents are being filed with the Clerk.

The decision below threatens the Fourth Amendment rights of millions of American city-dwellers. Because the protections at issue in this case are of central importance to criminal defendants, *amici* have a strong interest in contributing their insights and expertise. More particularly, *amici* are deeply concerned by the elimination of Fourth Amendment protections for tens of millions of Americans who—by need or by choice—live in multi-family dwellings and who have taken clear steps to establish their privacy against intrusion.

SUMMARY OF ARGUMENT

I. The question presented is of tremendous doctrinal and practical importance. It implicates a central privacy interest: the right to be secure from warrantless law enforcement intrusions within one's home. The home has long received heightened protection under the Fourth Amendment. The decision below undermines that principle and adds uncertainty regarding the scope of that protection. This Court's guidance is also warranted because of the invasive nature of the conduct—a physical trespass into a locked dwelling and the use of enhanced sensory equipment to collect otherwise unobtainable information. This Court's review is necessary to ensure that the ingenuity of law enforcement's use of sense-enhancing technology cannot subvert established Fourth Amendment principles.

II. This Court's review is also warranted because the decision below is erroneous. The state supreme court's decision rests on a flawed understanding of both the nature of common property and the relationship between security and privacy interests.

And it conflicts with this Court's precedents—such as *Jardines* and *Oliver*—that extend Fourth Amendment protection to the home and its curtilage. Like the front porch of a detached dwelling, the hallway of a secured apartment building is an area where residents justifiably expect privacy from *all* uninvited guests—law enforcement personnel included.

ARGUMENT

I. The Question Presented Is Important Because It Implicates Core Privacy Interests And Intrusive Law Enforcement Conduct

A. The question presented is important because it involves a fundamental privacy interest: The right to be secure from warrantless law enforcement intrusions in one's own place of residence. As this Court has explained time and again, the home occupies "the very core of the Fourth Amendment." *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman* v. *United States*, 365 U.S. 505, 511 (1961)). Nowhere else is "the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home," *Payton* v. *New York*, 445 U.S. 573, 589 (1980), for "[i]n the home, * * * *all* details are intimate details." *Kyllo* 533 U.S. at 37. Indeed, activities in the home enjoy protections more extensive than those in virtually any other context. See, *e.g.*, *ibid* (explaining that an industrial complex does not enjoy the "Fourth Amendment sanctity of the home").

More particularly, this Court has long cautioned that warrantless law enforcement action in that sphere must be closely circumscribed. For starters,

warrantless entry into the home is "presumptively unreasonable." *Groh* v. *Ramirez*, 540 U.S. 551, 559 (2004) (quoting *Payton*, 445 U.S. at 586). And the umbrella of the Constitution's protections extends to areas outside the literal dimensions of the house, including locations where "intimate activity associated with the sanctity of man's home" occurs. *Oliver* v. *United States*, 466 U.S. 170, 180 (1984) (internal quotation marks omitted). Of special relevance here is the requirement that observation of the home must be effected in a "physically nonintrusive manner," lest it constitute a search. *Florida* v. *Jardines*, 133 S. Ct. 1409, 1415 (2013) (quoting *California* v. *Ciraolo*, 476 U.S. 207, 213 (1986) (internal quotation marks omitted)).

While this Court unflinchingly treats the home as special, the opinion below highlights the lack of clarity over how far that protection extends. Indeed, as petitioner documents, there is substantial uncertainty among federal and state courts, which confusion alone warrants this Court's review. Pet. 12. We will not retread that ground here, except to underscore the destabilizing effect the decision below may have even on Fourth Amendment principles thought to be settled. Here, police officers actually entered the defendant's locked apartment building, Pet. 3-4—physically intrusive behavior by any definition. Yet, the decision below sanctioned this technique, in spite of this Court's admonition that surveillance of the home must be "physically nonintrusive." *Jardines,* 133 S. Ct. at 1415. That ruling calls into question whether a person may still "retreat into his own home and there be free from unreasonable governmental intrusion." *Kyllo*, 533 U.S. at 31.

B. The question presented is also important because it involves *especially* invasive conduct—a physical trespass into a locked dwelling and the use of enhanced sensory equipment to collect otherwise unobtainable information. As noted above, this Court has long held that police may not enter a person's home without a warrant and must be particularly careful not to violate reasonable expectations of privacy in the home and its immediate surroundings. This Court also has repeatedly treated police deployment of techniques or devices that detect waves or particles, invisible to human senses and emanating from within the home, as evidence of a presumptively "unreasonable" search. See, *e.g.*, *Kyllo*, 533 U.S. at 40 ("Where, as here, the Government uses [thermal imaging] to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance * * * is presumptively unreasonable without a warrant."); see also *United States* v. *Karo*, 468 U.S. 705 (1984) (holding that beeper-assisted surveillance of personal property inside a home without a warrant is unreasonable). The technique approved here should have triggered close scrutiny under both *Kyllo* and *Karo*.

Canine sweeps, like the thermal imaging in *Kyllo* and the beeper surveillance in *Karo*, circumvent barriers that are designed to maintain privacy. Dogs specially bred and trained for extra-sensory detection allow law-enforcement officers to gather information coming from the interior of a home that is inaccessible with the human senses. Dogs have more than two hundred million olfactory receptors, as compared to the five million in humans. Julio E. Correa, *The Dog's Sense of Smell*, Alabama A&M and Auburn Universities UNP-0066 (2011), at 1,

available at http://tinyurl.com/CatoJardines7. This enables them to sense airborne particulates and odors at much lower concentrations than can humans. See *ibid*. When a government agent guides a drug-sniffing dog in a sweep of an apartment building, she thus uses the dog to extract information she otherwise could not know. In the present case, for example, the police deployed this sense-enhancing tool to gather information that was otherwise concealed within a home; neither of the officers could smell marijuana in the hallway when the dog alerted them to its presence inside. Pet. 4. Thus, like the use of extra-sensory technology in *Kyllo* and *Karo*, the use of a drug-sniffing dog raises fundamental Fourth Amendment concerns that deserve this Court's review.

Indeed, this Court has repeatedly been called upon to review the use of sense-enhancing investigative techniques. In the nearly five decades since this Court's landmark decision in *Katz* v. *United States*, 389 U.S. 347 (1967), a variety of new law enforcement technologies have merited this Court's consideration. See, *e.g.*, *Kyllo*, 533 U.S. 27 (thermal imaging); *Karo*, 468 U.S. 705 (beepers); *United States* v. *Jones*, 132 S. Ct. 945 (2012) (GPS tracking). This Court has also reviewed new applications of familiar technologies, ensuring that the ingenuity of law enforcement cannot subvert established Fourth Amendment doctrine. See, *e.g.*, *Florida* v. *Riley*, 488 U.S. 445 (1989) (re-evaluating, after *Ciraolo*, 476 U.S. 207, the government's use of aerial observation). Indeed, *Jardines* was such a case. The government's chosen sense-enhancing instrument in that case—drug-sniffing dogs—was not new, but its application was. The same is true here.

The extended use of the dog here only magnifies the need for this Court's intervention. As the Court has recognized, context is key to determining whether the use of sense-enhancing tools works more than a "minimal intrusion." *United States* v. *Place*, 462 U.S. 696, 698 (1983). In the context of a brief airport detention, *i.e.*, an encounter in a public setting removed from a person's dwelling, *id.* at 698–699, the intrusion is relatively minimal. But the *Place* court's tolerance of drug-sniffing dogs does not control "where more substantial invasions of constitutionally protected interests are involved." *United States* v. *Jacobsen*, 466 U.S. 109, 125 n.28 (1984). For example, the use of drug-sniffing dogs at a traffic stop may become unlawful where the stop is "prolonged beyond the time reasonably required" by the circumstances of the situation. *Illinois* v. *Caballes*, 543 U.S. 405, 407 (2005). In short, "[i]t is not the dog that is the problem, but the behavior that * * * involve[s] use of the dog." *Jardines,* 133 S. Ct. at 1416 n.3. As long as drug-sniffing dogs are used as a common law enforcement tool, this Court must continue to guard against their use becoming unreasonable. Moreover, this case does not present the use of a dog at a mere checkpoint or other public space, but rather in a sweep of indefinite duration in a private building where the object was to search until contraband was found. Pet. 4.

This case also presents an important opportunity to clarify the limits on law enforcement officers' use of sense-enhancing devices generally. "The ultimate threat of unregulated modern technology could be a stifling police presence which affects the innocent and guilty alike." ABA Standards for Criminal Justice, Commentary to Standard 2-9.1(b) (3d ed. 2001). The decision below—although ostensibly

addressing only the facts before the court—will be viewed as sanctioning the use of other devices that effectively penetrate an apartment-dweller's walls, so long as the officer is standing in the hallway. Through-the-wall surveillance of concealed property "present[s] far too serious a threat to privacy interests" to escape this Court's review. *Karo*, 468 U.S. at 716.

II. The Decision Below Is Wrong

This Court's review is also warranted because the decision below is erroneous—and, more particularly, wrong in important ways that conflict with basic concepts of property, privacy, and this Court's precedents. At a fundamental level, the decision below rests on the false premise that neighbors do not cooperate for a common purpose and thus lack privacy interests in common areas. It also draws a stark—but flawed—distinction between "security" interests and privacy interests under the Fourth Amendment. The decision likewise renders *Jardines* a dead letter for a vast swath of Americans, denying urban apartment dwellers protections guaranteed to their counterparts who live in suburban or rural detached homes.

A. The decision below rests on a fundamentally flawed conception of common property. In the North Dakota Supreme Court's view, a neighbor's authority to invite visitors into common areas converts the presence of *uninvited* "technical trespassers" into something of "no consequence." Pet. App. 10a. Focusing exclusively on petitioner's lack of a personal right to exclude *all* others from common areas, the decision below concluded that petitioner must lack a reasonable expectation of privacy in those spaces. *Ibid.* Not so.

Modern property ownership is commonly marked by cooperation among multiple stakeholders. See Gregory S. Alexander, *Governance Property*, 160 U. Pa. L. Rev. 1853, 1859 (2012) (identifying "community, cooperation, trust, and honesty" as virtues that modern property arrangements advance). This is true at all levels, from the single-family household—in which rights are shared among and between family members—to suburban homeowners' associations—in which many families join together to manage common areas. That is not to say that an individual enjoys full Fourth Amendment protection in *any* common area, but neither is the reverse true, that Fourth Amendment privacy interests are incompatible with shared spaces. Simply put, a defining characteristic of modern property ownership is often *not* presumed conflict and absolute exclusion, but cooperation and mutual benefit. Indeed, cooperation and trust were on full display in this case, in which tenants in petitioner's building were comfortable leaving their personal effects in the building's shared spaces. Pet. App. 5a.

Viewed in this light, the decision below proceeds from a false premise. As Justice Jackson once observed, "each tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry." *McDonald* v. *United States*, 335 U.S. 451, 458 (1948) (Jackson, J., concurring). Here, in an attempt to secure each tenant's right against unlawful entry, the apartment community implemented a collective response: installing a lock on the front door, such that only tenants and their guests could enter. Distrust of trespassers is not

evidence that the tenants should distrust one another or one another's invited guests.

B. The decision below also rests on a related and equally fundamental error—namely, that "[t]he locked and secured entrance of Nguyen's apartment building was designed to provide security for the tenants of the apartment building rather than to provide privacy in the common hallways." Pet. App. 9a–10a. Notably, the North Dakota Supreme Court cited no authority for this proposition, and for good reason: It is not supported by this Court's jurisprudence. If closing a door to a public telephone booth evinces an expectation of privacy in the communications that originate from within, *Katz* v. *United States*, 389 U.S. 347, 351–352 (1967), then locking a door to a dwelling likewise demonstrates strong privacy expectations. The fact that locking a door can *also* indicate a desire for security does not foreclose a simultaneous desire to establish privacy. Quite the opposite: Were the lock aimed only at physical security, it is hard to imagine why police would be excluded, as they were in this case. Pet. 4 (noting the undisputed fact that the police officers did not have permission from the owner or any tenant to enter).

Likewise, the officers' reliance on deceptive and furtive conduct confirms that they were intruding not simply on a "secure" area, but also one in which residents expected privacy. If the locked door was intended to solely promote security interests, why were officers in plain clothes rather than in uniform? Pet. 3. Surely residents seeking only security would welcome a uniformed police presence. And why not identify themselves as police officers to an exiting resident and ask for permission to enter, rather than sneaking in before the door closed? *Id.* at 4. The

simplest answer is also the correct one: The door was locked not only to keep wrongdoers out, but also to exclude *all* uninvited persons. That is the hallmark of privacy.

This Court has long recognized that access or information gained through deception is subject to Fourth Amendment scrutiny. In *Gouled* v. *United States*, 255 U.S. 298 (1921), for example, this Court held that the search of a suspect's personal effects conducted by the suspect's acquaintance on behalf of the government was an impermissible search, despite the fact that entry into the suspect's home had been freely granted. The conduct of the search, the Court recognized, went beyond the license that the suspect granted. See *id.* at 305–306. Although this Court has found that deceptive entry may be justified in "a place of business with the consent, if not by the implied invitation, of the petitioner," *On Lee* v. *United States*, 343 U.S. 747, 751–52 (1952), it has never held that officers may enter a locked, multi-family residence without knowledge of—much less permission from—the building's owner or any of its residents. Cf. *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966) ("It is obvious that the petitioner was not relying on the security of his hotel suite when he made the incriminating statements[.] * * * [The informant] did not enter the suite by force or by stealth.").

Even if the officers had gained some implied license to enter from one of the residents, that license could not possibly extend to bringing in a drug dog to sweep the building. Rather, "[t]he scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose," and "the background social norms that invite a visitor" into an apartment building "do not invite

him there to conduct a search." *Jardines*, 133 S. Ct. at 1416 (2013). There is nothing to suggest that background social norms would license a plain-clothed police officer to roam the halls of an apartment building with a drug-sniffing dog. Indeed, as this Court noted in *Jardines*, "no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search." *Id.* at 1416 n.4.

C. The rule established by the decision below threatens to make this Court's holding in *Jardines* a virtual dead letter in America's cities, where as many as fifty percent of residents live in apartments. National Multifamily Housing Council, Quick Facts: Resident Demographics (Oct. 2013). Just as the homeowner in *Jardines* had a right to prevent police from bringing a drug dog onto his porch, "each tenant of a building * * * [has] a personal and constitutionally protected interest in the integrity and security of the entire building." *McDonald*, 335 U.S. at 458 (Jackson, J., concurring). In this case, the tenants asserted that interest by locking their building and preventing uninvited strangers from prowling its common hallways.

As described more fully above, "when it comes to the Fourth Amendment, the home is first among equals." *Jardines*, 133 S. Ct. at 1414. *Jardines* held that, when a home is involved, the scope of the Fourth Amendment is limited by the implied license granted by a resident to members of the public that allows them to approach the home. *Id.* at 1415-16. And this Court has repeatedly recognized that there is nothing special about a stand-alone house that merits diminished protection when one's home (even if it is a home only for the night) happens instead to be part of a complex or building made up of the

homes of others. See, *e.g.*, *Stoner* v. *California*, 376 U.S. 483, 484 (1964) (recognizing Fourth Amendment privacy interests in hotel rooms); *Ker* v. *California*, 374 U.S. 23 (1963) (same for apartments).

Critically, this Court has also extended protection to the common areas in multi-resident buildings. For instance, in *McDonald* the Court held that an officer cannot stand on a chair in the common hallway of a boarding house in order to peer through the windows and into a resident's room. 335 U.S. at 453. Although the officers in that case had a proper license to enter the building, see *ibid*, conducting the search of the individual's room from the common hallway nonetheless violated the Fourth Amendment. As this Court reaffirmed in *Jardines*, "the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window." 133 S. Ct. at 1414. Here, police lacked even a license to enter to the hallway; to the contrary, they gained access only as trespassers.

D. Finally and in any event, internal hallways in a secured apartment building should be treated as curtilage. This Court regards curtilage—that is, "the area immediately surrounding [the] home"—as "part of the home itself for Fourth Amendment purposes." *California* v. *Ciraolo*, 476 U.S. 207, 220-221 (1986) (quotation marks and citation omitted). In considering "whether [an area] is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection," four factors are relevant: proximity to the home; inclusion within an enclosure; the nature of the area's use; and the steps taken to prevent

observation. *United States* v. *Dunn*, 480 U.S. 294, 301 (1987).

The first factor is easily established. The hall immediately outside an apartment door is undoubtedly in close "proximity" to the home. This area—used for entry to and egress from the dwelling—is closely analogous to the front porch of a stand-alone home, which the Court in *Jardines* recognized as curtilage, 133 S. Ct. at 1415.

The second and third *Dunn* factors also show that hallways immediately outside an apartment are curtilage. Although in a traditional sense such hallways are not "included within an enclosure surrounding the home," *Dunn*, 480 U.S. at 301, given the fact that the hallways themselves are secured—as well as the doors to the entire building—they are firmly enclosed. There is little difference between a fence around a suburban dwelling and apartment walls; indeed, apartment walls are *more* protective, since they are almost invariably opaque and enclosed on all sides. And the "the nature of the uses to which the area is put," *ibid*, also indicates that hallways are entitled to Fourth Amendment protection. The hallways contain personal property—such as shoes, bikes, and door craftwork, Pet. App. 5a—similar to the items that might be found on the front porch inside the curtilage of a stand-alone home.

Finally, the residents of Nguyen's apartment complex indisputably took substantial "steps * * * to protect the area"—that is, the hallway itself—"from observation by people passing by." *Dunn*, 480 U.S. at 301. Access to the apartment building is restricted: All entrances are locked at all times and guests can access the building only if a tenant opens the door. Pet. App. 4a. The hallways of the apartment

building are themselves inaccessible to the public; in this case, the police gained entrance only by "catching the door" when a tenant left the building. *Id.* at 5a. Thus, the tenants of the building—through a system of restrictions and locks—protected their hallways from observation by the public, allowing only other tenants and their approved guests to traverse the halls.

Accordingly, the hallways of a secured apartment building are entitled to the Fourth Amendment protections guaranteed to the home. The tens of millions of Americans who live in multi-family dwellings deserve the same guarantees of privacy as those who live in detached homes. At a minimum, they deserve to know whether a locked entrance to a shared dwelling establishes Fourth Amendment privacy interests.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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