No. 14-____

IN THE

Supreme Court of the United States

MATTHEW D. NGUYEN,

Petitioner,

v.

STATE OF NORTH DAKOTA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether or under what circumstances police officers conduct a search within the meaning of the Fourth Amendment when they trespass in common areas of locked apartment buildings to look for evidence of criminal activity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Matthew D. Nguyen respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of North Dakota in Case No. 2014 ND 211.

OPINIONS BELOW

The final decision of the Supreme Court of North Dakota (Pet. App. 1a) is reported at 2014 WL 6872760. An earlier opinion of the Supreme Court of North Dakota (Pet. App. 3a) is published at 841 N.W.2d 676. The relevant trial court proceedings and order are unpublished.

JURISDICTION

The Supreme Court of North Dakota issued its opinion on November 26, 2014. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment of the U.S. Constitution 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 OF THE CASE

This case presents a pressing issue concerning the scope of police investigatory powers under the Fourth Amendment.

A. Factual Background

1. The Fargo Police Department, like many law enforcement agencies around the country, uses drug-detection dogs to enforce narcotics laws. Fargo detectives collect information from patrol officers, informants, and anonymous tipsters about suspected drug crimes in apartment buildings throughout the city, recording the address and circumstances of each report on a centrally maintained list. Supp. Tr. 11-12 (Apr. 29, 2013). On designated days, officers from the department investigate "the different addresses that had been placed on this list," often sweeping nearly a dozen buildings in a single session. *Id.* 11, 63. Officers sweep both privately owned multifamily residences and subsidized public housing developments with drug-detection dogs. *Id.* 28; Kevin Wallevand, *Fargo Housing Authority to Begin Drug Sweeps on Properties*, WDAY News (Mar. 26, 2012).[1]

To perform the dog-sniff sweeps, Fargo officers follow a standard procedure. Working in pairs, the first officer approaches the building and attempts to gain entry by obtaining consent from a tenant, following a resident inside, or catching the door as a resident or guest exits, while his partner remains out of sight with the dog. Supp. Tr. 17-19. If necessary,

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[1] http://www.wday.com/content/fargo-housing-authority-begin-drug-sweeps-properties.

officers will "pr[y] locks open" to get into buildings. *Id.* 67. Once inside, the officer signals his partner and the drug-detection dog and ushers them into the building in a "secretive manner." *Id.* 18, 63-64. To maintain their "undercover status," both officers dress in plain clothes so as not to alert the residents of the building to their status. *Id.* 56. The team then sweeps the drug-detection dog in the hallway or at the threshold of an apartment indicated in a tip, and may also sweep additional hallways of the building without any "suggestion or indication" or "intelligence" that criminal activity had occurred there. *Id.* 65-66. If the dog "alert[s]" to the presence of a controlled substance by demonstrating a behavior like lying or sitting down, *id.* 15, officers will then use that information to obtain a warrant for a more extensive search of the indicated apartment, Pet. App. 5a.

2. On November 8, 2012, the Fargo Police Department received a tip about an odor of marijuana in the second floor hallway of a private apartment building located at 2599 Villa Drive South. Pet. App. 4a. Officers visited the building but could not determine from which apartment the odor emanated, so the building was added to the list of residences to investigate later. *Id.*

A week or so later, petitioner moved into Unit 214 at 2599 Villa Drive South, taking up residence in a spare room in the apartment.[2] Pet. App. 5a.

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[2] Petitioner was not a leaseholder in the apartment. But that fact is irrelevant; even guests who stay in another's dwelling for only one night have Fourth Amendment rights on

Roughly three weeks later (and a full month after receiving the original tip), officers took a drug-detection dog – a seventy-five pound Belgian Malinois – to visit numerous buildings on their list of suspected locations, including the building at 2599 Villa Drive South. Supp. Tr. 11-12, 53. Both main entrances to the apartment building are locked at all times, and tenants must use keys to enter the building. Pet. App. 4a. On that day, the officers did not receive permission from the building's owners to enter the building, nor did any tenant allow them into the building. Supp. Tr. 72. Instead, the officers "gained access by catching the door before it closed when an unidentified female was either entering or leaving." Pet. App. 5a.

Once inside, the officers had the dog "sniff through the entire third floor." Supp. Tr. 66. Finding no evidence of contraband there, the officers then took the dog to the second floor. *Id.* 57-58. Although neither of the officers could smell marijuana in the hallway, *id.* 61-62, the dog alerted to the presence of contraband outside of petitioner's apartment, Pet. App. 5a.

The next day, the officers used this information to apply for a search warrant for petitioner's apartment. Pet. App. 5a. No evidence in the warrant application, beyond the dog's positive alert outside

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par with leaseholders. *Minnesota v. Olson*, 495 U.S. 91 (1990); *see also Minnesota v. Carter*, 525 U.S. 83, 96 (1998) (Scalia, J., concurring) (residents in a dwelling enjoy traditional Fourth Amendment protections "when they merely occupy [an apartment] rent free – *so long as they actually live there*").

the apartment doorway, tied the presence of drugs to petitioner's unit. Police Rep. 16-17. The magistrate approved the warrant, and police executed it on December 12, 2012. Pet. App. 5a. The officers seized approximately one-half pound of marijuana, various drug paraphernalia, and roughly $2,500 in cash from petitioner's apartment. *Id.*

B. Proceedings Below

1. The State charged petitioner with possession of marijuana with intent to deliver and possession of drug paraphernalia. Pet. App. 5a. He moved to suppress the evidence seized from his apartment, arguing that the dog sniff used to secure the search warrant was an unreasonable search under the Fourth Amendment. *Id.*

The trial court granted petitioner's motion. Pet. App. 5a. Citing this Court's decision in *Florida v. Jardines*, 133 S. Ct. 1409 (2013), the trial court concluded that the dog sniff "was an unreasonable search under federal law" using either a property- or privacy-based rubric. Trial Ct. Op. 6-8 (May 14, 2013). As to the former, the court first concluded that "by letting themselves in . . . [without] consent of any person in a position to grant the necessary license," the officers were trespassers inside the building. *Id.* 7. Thus, although the court noted that *Jardines* involved a single-family home rather than an apartment building, it concluded that the officers' conduct in this case likewise was an impermissible intrusion on private property. *Id.* 8. As for the privacy-based rationale, the court concluded that "the hallways and stairwells inside a secure apartment complex" give rise to a reasonable expectation of privacy. *Id.* Noting that "such spaces are specifically

designed and intended to exclude uninvited members of the general public," the trial court held that "a reasonable expectation of privacy attaches to the protected and enclosed common areas leading to [petitioner's] home." *Id.*

2. The State filed an interlocutory appeal, and the Supreme Court of North Dakota reversed. Pet. App. 4a. The court began by acknowledging that federal courts of appeals and state courts of last resort are split over whether the police conduct a search when they enter the common areas of locked apartment buildings to look for evidence of crime. *Id.* 7a-9a. The court then sided with those courts that have held that such conduct does not constitute a search, even when the police bring a drug-sniffing dog to detect the contents of individual apartment units.

In the court's view, because petitioner "could not bar entry to the apartment building," he could have no reasonable expectation of privacy in the building's common areas. Pet. App. 10a. The court thus concluded that the fact that "the law enforcement officers were technical trespassers in the common hallways is of no consequence because [petitioner] had no reasonable expectation" of privacy in that space. *Id.* As to the officers' use of a narcotics dog outside of petitioner's apartment, the court held that it was not a search because, in its view, modern apartment dwellers have no equivalent of the curtilage that traditionally provides a buffer for homes from government intrusion. *Id.* 12a.

3. On remand, petitioner pled guilty to the prosecution's charges, while reserving the right to appeal the North Dakota Supreme Court's Fourth

Amendment holding. The trial court sentenced him to an initial term of eighteen months of probation, with the possibility of further punishment depending on petitioner's performance during that term.

4. Petitioner appealed back to the North Dakota Supreme Court, renewing his Fourth Amendment claim. The court summarily affirmed. Pet. App. 1a.

REASONS FOR GRANTING THE WRIT

For many years, courts and commentators have recognized "a split among the authorities as to the effect of an unauthorized police entry into the locked common area of a multi-unit apartment building." *Commonwealth v. Dora*, 781 N.E.2d 62, 67 (Mass. App. Ct. 2003); *accord State v. Talley*, 307 S.W.3d 723, 731-32 (Tenn. 2010) (same); *see also State v. Davis*, 711 N.W.2d 841, 845-46 (Minn. Ct. App. 2006) (contrasting holdings of various circuits); *Commonwealth v. Reed*, 851 A.2d 958, 961 (Pa. Super. Ct. 2004) (same); 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, 274-75 (2002) (discussing the "circuit split"). Many other courts have recognized that the conflict runs even deeper when the police not only enter such locked common areas without permission to do so, but bring along dogs to conduct sniffs outside the doors of individual apartments to detect drugs inside those dwellings. *See, e.g.*, *United States v. Brock*, 417 F.3d 692, 696-97 (7th Cir. 2005). Yet this Court has never been presented with a petition for certiorari cleanly presenting the issue whether, or under what circumstances, the police conduct a search when they

trespass in the common areas of a locked apartment building.[3]

This case, in which the North Dakota Supreme Court squarely held that the police do not conduct a search when they trespass in the common areas of a

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[3] This Court has twice been presented with petitions for certiorari attempting to raise this issue, but both cases suffered from serious vehicle impediments. In one case, the defendant asked this Court to review the Third Circuit's holding in *United States v. Correa*, 653 F.3d 187 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1856 (2012), that officers did not conduct a search when they entered the hallway of a locked apartment building to arrest him. But as the Government noted in its brief in opposition, the officers in that case had a warrant, so the Third Circuit's holding did not actually implicate the conflict at issue here. Br. in Opp. 10, *Correa v. United States*, 132 S. Ct. 1856 (No. 11-7205). In the second case, the defendant asked this Court to review the Seventh Circuit's holding that he lacked a reasonable expectation of privacy in the hallway of a duplex. Pet. for Cert. ii, *Villegas v. United States*, 552 U.S. 1102 (2008) (No. 07-686). But "on the day in question," the "doors were open" and "unlocked." *United States v. Villegas*, 495 F.3d 761, 767 (7th Cir. 2007), *cert. denied*, 552 U.S. 1102 (2008). Furthermore, even if the officers had violated the Fourth Amendment by entering the hallway in that case, the evidence they obtained still would not have been suppressed "because there was probable cause for his arrest." *Id.* at 769-70. Finally, neither of the two cases involved the additional action of conducting a dog sniff to ascertain the contents of the inside of an apartment.

The defendant in one other case discussed in this petition, *United States v. Scott*, 610 F.3d 1009, (8th Cir. 2010), *cert. denied*, 131 S. Ct. 964 (2011), petitioned this Court for review. The petition for certiorari presented only an Eighth Amendment issue, however; it did not raise the question presented here. *See* Pet. for Cert. ii, *Scott v. United States*, 131 S. Ct. 964 (2011) (No. 10-7745).

locked apartment, presents an ideal opportunity to take up this important issue. Furthermore, the North Dakota Supreme Court's holding is incorrect. Whether viewed as turning on property-law concepts or reasonable expectations of privacy, the police conduct a search when they enter hallways of locked apartment buildings without permission to look for evidence of crime.

I. The Question Presented Is One Of National Importance.

Over the years, this Court has issued several decisions concerning the Fourth Amendment protections that Americans enjoy with respect to intrusions on property adjacent to single-family dwellings. *See, e.g.*, *United States v. Dunn*, 480 U.S. 294 (1987) (land on private ranch); *California v. Ciraolo*, 476 U.S. 207 (1986) (backyard of house); *Oliver v. United States*, 466 U.S. 170 (1984) ("open fields" connected to single-family dwelling). Most recently, this Court held that the police conduct a search when they bring a drug-sniffing dog to the front porch of a home. *See Florida v. Jardines*, 133 S. Ct. 1409 (2013). But this Court has not addressed whether apartment-dwellers enjoy equivalent Fourth Amendment protections in the spaces immediately adjacent to their homes. For two reasons, it is vital that this Court do so.

1. Many Americans live in apartment buildings and multi-residence settings. The U.S. Census Bureau recently found that buildings with two or more residential units constitute roughly 25% of the country's housing stock, and that upwards of 23 million residential units – housing approximately 35 million Americans – are located in buildings with five

or more residences. U.S. Census Bureau, *2012 American Community Survey*[4]; National Multifamily Housing Council, *Quick Facts: Resident Demographics* (Oct. 2013).[5] In urban areas, the percentage of apartment dwellers can be dramatically higher. In New York City, for example, apartments make up 50% of the city's housing, and in Washington, D.C., and Los Angeles, four in ten residences are part of multifamily buildings. National Multifamily Housing Council, *Quick Facts: Resident Demographics* (Oct. 2013).

The issue whether apartment dwellers have Fourth Amendment rights on par with homeowners will become more important as greater percentages of Americans transition into urban, multifamily dwellings. *See* Conor Dougherty, *New-Home Building Is Shifting to Apartments*, Wall St. J. (Mar. 9, 2014) (describing shift away from free-standing houses toward multifamily buildings that has pushed rental building construction to highest level in forty years); U.S. Census Bureau News Release CB12-50, *Growth in Urban Population Outpaces Rest of Nation, Census Bureau Reports* (Mar. 26, 2012) (capturing accelerating growth of the nation's urban areas, which are more likely to include multifamily housing).

2. Apartment dwellers and law enforcement officials alike have a particular interest in a ruling from this Court on the constitutionality of the kind of

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[4] http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_1YR_DP04&prodType=table.

[5] http://www.nmhc.org/Content.aspx?id=4708.

warrantless dog sweeps currently practiced with regularity by the Fargo Police Department and approved by the North Dakota Supreme Court's ruling. Without guidance from this Court, an apartment dweller "cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *New York v. Belton*, 453 U.S. 454, 459-60 (1981).

Residents of multifamily buildings need to know the scope and limitations of their constitutional rights, and how, if at all, those rights differ from those this Court held in *Jardines* belong to residents of detached, single-family homes. *See, e.g.*, 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 (2011) (comparing the protections afforded to curtilage in suburban and rural areas with the circumscribed protections granted in urban settings); 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, 277 (2002) (arguing that the lack of Fourth Amendment rights of apartment dwellers in several circuits "threatens the privacy and security of a large portion of the American population").

Law enforcement interests likewise have a significant stake in the issue, as drug-detection dogs country-wide "perform a crucial service" in combatting illegal narcotics, Br. for National Police Canine Ass'n, et al. as Amici Curiae in Support of Petitioner at 1, *Florida v. Jardines,* 133 S. Ct. 1409

(2013) (No. 11-564). Training and keeping a drug-detection dog is a significant investment for law enforcement agencies, especially given their limited budgets. *See, e.g.*, Idaho State Police, *Canine Drug Program Cost Analysis* (2004) (estimating the cost of acquiring, training, and outfitting one canine to be nearly $24,000).[6] In order for these agencies to optimally allocate their limited resources, they must understand the circumstances in which they may lawfully deploy such dogs.

II. Federal Courts Of Appeals And State High Courts Are Sharply Divided Over The Issue.

The North Dakota Supreme Court's decision in this case further entrenches the deep conflict over whether, or under what circumstances, the police conduct a search when they enter the common areas of locked apartment buildings without permission to look for evidence of crime.

A. Two Federal Appellate Courts And One State High Court Hold That The Officers' Conduct In This Case Constitutes A Search Under The Fourth Amendment.

1. The Sixth Circuit has long held that an "officer's entry into [a] locked apartment building without permission" constitutes a search. *United States v. Carriger*, 541 F.2d 545, 550 (6th Cir. 1976). In *Carriger*, an officer investigating suspected narcotics trafficking entered the defendant's locked

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[6] http://www.isp.idaho.gov/pgr/Research/documents/k9s.pdf.

apartment building without permission. *Id.* at 548. The court concluded that though a tenant "expects other tenants and invited guests to enter in the common areas of the building," he "does not expect trespassers," and thus, the officer's "illegal entry" constituted a search. *Id.* at 550-51.

The Sixth Circuit has repeatedly reaffirmed its holding in *Carriger*. As recently as 2012, the Sixth Circuit ruled that an officer's trespass into a defendant's building to conduct a dog sniff outside his apartment door constituted a "[s]earch of [the defendant's] [a]partment." *United States v. Mohammed*, 501 Fed. App'x 431, 434-35 (6th Cir. 2012); *see also United States v. Dillard*, 438 F.3d 675, 683 (6th Cir. 2006) (recognizing that *Carriger* "remain[s] controlling in this circuit" but finding it distinguishable because the defendant's building was not locked, reducing the expectation of privacy); *United States v. Heath*, 259 F.3d 522, 534 (6th Cir. 2001) (finding *Carriger* applicable when officers "entered a locked building without utilizing the proper procedure" and holding that the "ensuing search was violative of defendants' subjective expectation of privacy").

2. Two other courts have held that even if trespassing into a locked apartment building is not itself a search under the Fourth Amendment, officers' use of a drug-detection dog in a common hallway to investigate the contents of residents' apartments is a search.

Based upon the "heightened expectation of privacy inside [a] dwelling," the Second Circuit holds that a canine sniff in the hallway outside the defendant's door "constitute[s] a search." *United*

States v. Thomas, 757 F.2d 1359, 1367 (2d Cir. 1985). The Second Circuit has explained that though a dog sniff may be relatively unintrusive, it nonetheless "remains a way of detecting the contents of a private, enclosed space," allowing officers to "obtain information about what is inside a dwelling that they could not derive from the use of their own senses." *Id.*

The Second Circuit recently reaffirmed that the "critical consideration" under its precedent is whether the officers use a canine at an apartment door to detect the "presence of narcotics located *inside the . . . home*." *United States v. Hayes*, 551 F.3d 138, 145 (2d Cir. 2008) (emphasis in original). And district courts continue to note that "*Thomas* remains the law in this circuit." *United States v. Hogan*, 122 F. Supp. 2d 358, 369 (E.D.N.Y. 2000); *see also United States v. Parrilla*, 2014 WL 2111680, at *7 (S.D.N.Y. May 13, 2014) (confirming that *Thomas* continues to control dog sniffs outside residences).

The Supreme Court of Nebraska reached a similar result in *State v. Ortiz*, 600 N.W.2d 805 (Neb. 1999), ruling that officers' use of a drug-detection dog in the shared hallway outside the defendant's apartment door was a search. *Id.* at 820. Without delineating exactly how "privacy interests may extend in a limited manner beyond the four walls" of an apartment, the court held that "using a canine to sniff for illegal drugs in a hallway outside [the defendant's] apartment" undoubtedly constituted an "intrusion . . . subject to the Fourth Amendment." *Id.* at 817, 820. The dog's alert at the defendant's door, the court explained, constituted "an investigative technique" enabling officers to "obtain information

regarding the contents of a place that has traditionally been accorded a heightened expectation of privacy." *Id.*[7]

B. Three Federal Courts Of Appeals And One State High Court Hold That The Conduct In This Case Is Not A Search.

The North Dakota Supreme Court held here that neither the police entry nor the dog sniff constituted a search under the Fourth Amendment. Pet. App. 9a-12a. The court first rejected the Sixth Circuit's reasoning in *Carriger* and ruled that because apartment dwellers cannot exclude other tenants or their guests from their buildings' common areas, police officers do not intrude on any reasonable expectation of privacy when they enter such areas to look for evidence of crime. In the court's view, the fact that such common areas are secured behind locked doors – thus rendering the officers "trespassers" – is "of no consequence." *Id.* 10a. According to the court, locks are "designed to provide security . . . rather than . . . privacy." *Id.* 9a.

The North Dakota Supreme Court then held that the dog sniff at petitioner's apartment door "was not a search under the Fourth Amendment" either. Pet. App. 12a. The court acknowledged that a dog sniff at the front door of a single-family dwelling constitutes

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[7] Several lower courts likewise have held that a dog sniff at the threshold of an apartment is a search under the Fourth Amendment. *See, e.g.*, *State v. Kono*, 2014 WL 7462049, at *5 (Conn. Super. Ct. Nov. 18, 2014) (holding that the "use of a drug detection dog situated in a common hallway outside the front door to a condominium" constitutes a search).

a search because "[t]he Fourth Amendment protects the curtilage of a house." *Id.* 11a (internal quotation marks omitted); *see also Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013). But "[h]aving determined that, unlike the area immediately surrounding a home, a party does not have a legitimate expectation of privacy in the common hallways and shared spaces of an apartment building," Pet. App. 12a, the North Dakota Supreme Court determined that "the use of a drug-sniffing dog in the common hallway of a secure apartment building" does not constitute "a search subject to the Fourth Amendment," *id.* 11a.

The Seventh Circuit likewise holds that police entry into locked apartment buildings is not a search, even if the purpose is to conduct a dog sniff. *See United States v. Concepcion*, 942 F.2d 1170 (7th Cir. 1991). A "tenant has no reasonable expectation of privacy in the common areas of an apartment building," even if the building is locked, the court held, because other tenants use the same space and can "admit as many guests as they please[]." *Id.* at 1172. Although one judge in that circuit has since registered her disagreement with this view, *United States v. Villegas*, 495 F.3d 761, 771-72 (7th Cir. 2007) (Rovner, J., concurring in part and in the judgment), *cert. denied*, 552 U.S. 1102 (2008), the Seventh Circuit has continued to rely on this reasoning in the decades since. *See, e.g.*, *Harney v. City of Chicago*, 702 F.3d 916, 925 (7th Cir. 2012); *Villegas*, 495 F.3d at 767-69.

The Seventh Circuit has also concluded that dog sniffs conducted in common areas of shared residential spaces to detect the contents of more private areas do not constitute searches for Fourth

Amendment purposes. *See United States v. Brock*, 417 F.3d 692 (7th Cir. 2005) (dog sniff outside the locked door of a bedroom in a shared residence was not a search); *Villegas*, 495 F.3d at 772 (Rovner, J., concurring in part and in the judgment) ("[B]y declaring that residents have absolutely no expectation of privacy in such areas, we are necessarily saying that the police are free to enter these areas without the consent of any resident of the building and once there walk drug-sniffing dogs up and down hallways, eavesdrop outside individual unit doorways, and so forth.").

Under Eighth Circuit law, the police may also trespass in the common areas of locked apartment buildings and conduct dog sniffs at apartment doors without executing a Fourth Amendment search. The Eighth Circuit has expressly rejected the Sixth Circuit's rule in *Carriger*, holding that police do not conduct a search when they "trespass" in hallways or other common areas of locked apartment buildings because such areas are "available for the use of residents and their guests, the landlord and his agents, and others having legitimate reasons to be on the premises." *United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977); *accord United States v. McGrane*, 746 F.2d 632 (8th Cir. 1984); *United States v. Luschen*, 614 F.2d 1164 (8th Cir. 1980). Although at least one Eighth Circuit judge has voiced a strong dissent, the court has continued to reaffirm this reasoning. *Compare United States v. Roby*, 122 F.3d 1120, 1127 (8th Cir. 1997) (Heaney, J., dissenting) ("I do not believe that the Fourth Amendment protects only those persons who can afford to live in a single-family residence with no surrounding common space."), *with United States v. McCaster*, 193 F.3d

930 (8th Cir. 1999) (no expectation of privacy in shared area in residential building).

The Eighth Circuit also has held that dog sniffs at the threshold of apartment doors are not Fourth Amendment searches, regardless of any heightened privacy interests that might exist in residential spaces. *United States v. Scott*, 610 F.3d 1009, 1016 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 964 (2011).

The Ninth Circuit has reached the same conclusions as have the Seventh and Eighth Circuits. In *United States v. Nohara*, 3 F.3d 1239 (9th Cir. 1993), the court concluded that police could sneak into a "high security" building, outfitted with around-the-clock security guards, television monitoring, and restricted elevator access, to investigate a tip without conducting a search under the Fourth Amendment: "[W]e join the . . . Circuits which have rejected [*Carriger*'s] rationale and held an apartment dweller has no reasonable expectation of privacy in the common areas of the building whether the officer trespasses or not." *Nohara*, 3 F.3d at 1240, 1242.

The Ninth Circuit has also rejected the Second Circuit's reasoning in *Thomas*, describing it as "rightly criticized" and "incorrect." *United States v. Lingenfelter*, 997 F.2d 632, 638 (9th Cir. 1993); *see also United States v. Griesemer*, 1993 WL 394868, at *2 (9th Cir. 1993) (dog sniff at front door of dwelling that was "residential in character" not a search).

Finally, two other federal courts of appeals have issued holdings in harmony – if not strictly on all fours – with the North Dakota Supreme Court's view. Although the Third Circuit has not considered a case involving a dog sniff at an apartment door, it has

rejected *Carriger*'s reasoning and stated without qualification that tenants have no expectation of privacy in common areas of secured apartment complexes. *See United States v. Correa*, 653 F.3d 187, 190-91 & n.4 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1856 (2012). The First Circuit has not considered a case dealing with a locked apartment building or a dog sniff, but it has similarly held with categorical-sounding language that tenants "cannot have a reasonable expectation of privacy" in a "well travelled common area of an apartment house." *United States v. Cruz Pagan*, 537 F.2d 554, 558 (1st Cir. 1976); *see also United States v. Hawkins*, 139 F.3d 29, 32 (1st Cir. 1998) ("It is now beyond cavil in this circuit that a tenant lacks a reasonable expectation of privacy in the common areas of an apartment building.").

C. The Court Should Resolve This Conflict Now.

The conflict over the meaning of the Fourth Amendment in this context is incapable of resolution without this Court's intervention.

1. There is no reason to believe that the Sixth Circuit, the Second Circuit, or the Nebraska Supreme Court will reconsider their views that the conduct at issue here constitutes a search.

The Sixth Circuit has acknowledged that its "sister circuits explicitly reject holdings – never overruled in this circuit – recognizing a reasonable expectation of privacy in common areas of multi-occupancy buildings." *Dillard*, 438 F.3d at 683. It also has noted that "[t]he United States believes that *Carriger* and *Heath* were incorrectly decided." *Mohammed*, 501 Fed. App'x at 435 (internal

quotation marks omitted). But that court has repeatedly "decline[d] to disturb [its] well-settled law" on this issue. *Id.* Indeed, when the United States sought *en banc* review in *Heath*, asserting that the question was one of "exceptional importance," Pet. for Reh'g En Banc at 2, *United States v. Heath* (6th Cir. Sept. 27, 2001), the court nonetheless denied the petition without a single judge voting to grant it. Order Den. Pet. for Reh'g En Banc, *United States v. Heath*, No. 99-6550 (6th Cir. Nov. 23, 2001).

Nor is there any reason to believe that the Second Circuit or the Nebraska Supreme Court will reconsider their holdings. To the contrary, this Court's decision in *Jardines* reinforces those holdings that dog sniffs at the front doors of dwellings are different from sniffs of luggage or cars.

2. Courts on the other side of the split are equally entrenched in their views. In the decision below, the North Dakota Supreme Court expressly recognized the circuit split, considered *Jardines*, and chose to diverge from the Sixth Circuit's view on this issue – as well as the views of the Second Circuit and Nebraska Supreme Court.

Although the relevant Seventh, Eighth, and Ninth Circuit law pre-dates *Jardines*, there is no reason to believe that decision will cause them to change their views. As the North Dakota Supreme Court stressed, this Court in *Jardines* "did not determine if the officer had violated Jardines' reasonable expectation of privacy." Pet. App. 11a. And although *Jardines* held that a search occurred because the officers violated the homeowner's property rights, the Seventh and Eighth Circuits

have held that apartment dwellers lack any comparable property rights in the common areas of their buildings. *See, e.g.*, *Harney*, 702 F.3d at 924-25 (noting that shared nature of gated condominium yard undermined its characterization as curtilage); *United States v. Brooks*, 645 F.3d 971, 975 (8th Cir. 2011) (holding that back staircase of duplex was "not curtilage" because it "leads to the basement of the multi-family dwelling, in which there is a common area shared by all tenants"); *see also Cruz Pagan*, 537 F.2d at 558 (noting that "in a modern urban multifamily apartment house . . . a tenant's 'dwelling' cannot reasonably be said to extend beyond his own apartment and perhaps any separate areas subject to his exclusive control") (internal quotation marks omitted).

Accordingly, district courts in these circuits are holding fast to their circuit precedent notwithstanding *Jardines*. *See, e.g.*, *United States v. Correa*, 2014 WL 1018236, at *5 (N.D. Ill. Mar. 14, 2014) ("[N]one of [*Jardines*'] concerns are implicated because, as *Concepcion* instructs, an apartment building is a different animal than is a home. There is no curtilage. There is no constitutionally protected extension of the apartment into the building."); *United States v. Mathews*, 2013 WL 5781566, at *3 (D. Minn. Oct. 25, 2013) ("The holding in *Jardines* . . . did not expand Fourth Amendment coverage to common areas outside of an apartment").

III. This Case Is An Excellent Vehicle For Addressing The Question Presented.

For two reasons, this case is an ideal vehicle for addressing the Fourth Amendment rights of those who live in locked apartment complexes.

1. The operative facts are reflected in an unusually well-developed record, including thorough photographs of the building and testimony by a private investigator describing the attributes and purposes of the building's security measures. These important facts are not in dispute. Pet. App. 4a. The North Dakota Supreme Court confirmed that 1) the door to the apartment building was locked; 2) the officers did not obtain permission from the owner of the building or any other tenant to enter; and as a result, 3) the officers were "technical trespassers in the common hallways" while gathering evidence. *Id.* 4a-5a, 10a. Moreover, at the suppression hearing the officers admitted that they could not themselves smell marijuana in the hallway when conducting the dog sniff. Supp. Tr. 61-62. For this reason, the Court will be able to consider the constitutional implications of both the officers' presence and their use of an extra-sensory investigatory tool while in the hallway.

2. The question presented is also outcome determinative. Had the North Dakota Supreme Court ruled the other way on the question presented, every piece of evidence the State had against Mr. Nguyen would have been suppressed. *See* Supp. Tr. 7 (Judge Corwin: "So if the [dog sniff] is thrown out . . . does that at that point result in the suppression of everything the State has?" State's Attorney: "I believe so, Your Honor, yes.").

IV. The North Dakota Supreme Court Erred In Holding That The Conduct Here Is Not A Search.

The North Dakota Supreme Court held that the officers in this case did not conduct a search because tenants have neither property rights in common areas of locked apartment buildings nor any reasonable expectation of privacy in such areas. Pet. App. 7a-10a. This reasoning fails to properly account for the difference between guests invited onto private property and trespassers. Thus, even though the residents of locked apartment buildings must accept that others may lawfully enter the premises, background concepts of property and privacy law protect them from unlawful trespassers, as the police officers were here. When the police bring a dog to inspect not only common areas but also to sniff into individual apartments to perceive their contents, the government's intrusion is even more severe.

A. Police Entry Into A Locked Hallway Of An Apartment Building Constitutes A Search.

Whether viewed in terms of property rights or reasonable expectations of privacy, the police conduct a search when they trespass in a common area inside of a locked apartment building to look for evidence of crime.

1. The Fourth Amendment "embod[ies] a particular concern for government trespass." *United States v. Jones*, 132 S. Ct. 945, 950 (2012); *see also Minnesota v. Carter*, 525 U.S. 83, 94 (1998) (Scalia, J., concurring) (noting that "English and early American law of arrest and trespass . . . underlay the

Fourth Amendment"). When the police commit a trespass, they generally conduct a search.

It is unclear whether officers trespass against not only the landlord but also residents of a locked apartment building when they enter without permission; there is a split of authority among lower courts about the nature of property interests in common hallways of apartment buildings.[8] But there is no need to dwell on that specific question. 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 United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974) (Fourth Amendment rights do not strictly "rest upon the law of property, with its attendant historical and legal refinements"); *Silverman v. United States*, 365 U.S. 505, 511 (1961) (same). Thus, for example, this Court has held that police officers conduct searches against guests in apartments, *see Jones v. United States*, 362 U.S. 257 (1960), and homes, *see Minnesota v. Olson*, 495 U.S. 91 (1990), when officers enter without permission, "despite the fact that [the guests] have no legal interest in the premises" and the owners have

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[8] *Compare, e.g.*, *City of Seattle v. McCready*, 877 P.2d 686, 690 (Wash. 1994) (holding that "the authority over common areas is more properly characterized as common to both tenant and landlord, rather than exclusive to the landlord alone"), *with Aberdeen Apartments v. Cary Campbell Realty Alliance*, 820 N.E.2d 158, 165 (Ind. Ct. App. 2005) (holding that "a landlord retains exclusive possession of the common areas of an apartment complex").

"untrammeled power to admit" anyone they wish, *id.* at 99.

In all of these cases, the critical question is whether the police intrude upon a person's place of repose from outsiders – a place that those who do not live are not allowed to invade without permission. *See Carter*, 525 U.S. at 95-97 (Scalia, J., concurring). If so, there is no need to "pause to consider whether or not there was a technical trespass [against the defendant] under the local property law"; the police conduct a search. *Silverman*, 365 U.S. at 511.

That test is satisfied here. Although invited guests (and other tenants) may enter in the common areas of a locked apartment building, residents are entitled to be free of trespassers in those areas. As Justice Jackson, joined by Justice Frankfurter, recognized many years before this Court developed its "reasonable expectation of privacy" analysis, even if an apartment dweller "has no right to exclude from the common hallways those who enter lawfully, [he] 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); *see also Carter*, 525 U.S. at 95-97 (Scalia, J., concurring) (noting that the Fourth Amendment's "text and tradition," wholly apart from the modern reasonable expectation of privacy test, confer protection against trespass in one's dwelling even when one does not own it).

2. Even if property-law principles alone do not dictate that entering locked apartment buildings without permission constitutes a search, this Court's reasonable-expectation-of-privacy test demonstrates

that it does. *See Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013) (noting that property-rights analysis and "reasonable expectation of privacy analysis" are independent ways of showing that a search occurred); *Carter*, 525 U.S. at 101 (Kennedy, J., concurring) (declaring that when police invade an individual's reasonable expectation of privacy, they conduct a search "even in the absence of any property right to exclude others").

While officers do not impinge upon a reasonable expectation of privacy when they do "'no more than any private citizen might do,'" *Jardines*, 133 S. Ct. at 1416 (quoting *Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011)), the police do impinge upon such an expectation when they engage in conduct that citizens do not expect of others. In *Bond v. United States*, 529 U.S. 334 (2000), for example, the Government argued that an officer's "physical manipulation" of the defendant's luggage in a bus's overhead bin was not a search because any member of the public could have handled the luggage. *Id.* at 337-38. The Court rejected the argument, holding that 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 Randolph*, 547 U.S. at 113 (holding that police entry over the objections of one tenant was a search because a visitor "standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out'"); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979) (holding that official's conduct in

alleged adult bookstore was a search because he acted "not as a customer").

The North Dakota Supreme Court erred under this framework because the officers engaged in conduct not only that tenants do not expect of other citizens, but conduct that would expose civilians to prosecution for criminal trespass. As the Sixth Circuit reasoned in *Carriger*, though a tenant "expects other tenants and invited guests to enter in the common areas of the building," he "does not expect trespassers" behind locked doors. 541 F.2d 545, 551 (6th Cir. 1976); *see also* 5 Wayne LaFave, *Search and Seizure* § 2.3(f), at 790 (2012) (noting that "tenants in [a multi-unit building] may have a collective expectation of privacy vis-a-vis the general public in their corridors and hallways because of the manner in which the building is secured"). Here, the tenants at 2599 Villa Drive South had such an expectation: The apartment building in this case provided tenants with a building manual that requires residents to verify the identity of anyone attempting to enter and to refuse access to anyone not authorized to enter. Supp. Tr. 28-29. In fact, the actions of the officers in this case, had they not been police officers, likely would have amounted to a crime in North Dakota. The state's criminal trespass law makes it a misdemeanor to "[e]nter[] or remain[] in any place so enclosed as manifestly to exclude intruders . . . knowing that [one] is not licensed or privileged" to enter or remain. N.D. Cent. Code § 12.1-22-03(2). When the place is a "dwelling" or "highly secured premises," the crime constitutes a felony. *Id.* § 12.1-22-03(1).

The North Dakota Supreme Court resisted this analysis, stressing that "[o]ther tenants of [an] apartment building ha[ve] the ability to let in visitors, delivery persons, or other members of the public," regardless of any particular resident's wishes. Pet. App. 10a. Even when the doors to a building are locked, therefore, the North Dakota Supreme Court asserted that the locks are "designed to provide security . . . rather than . . . privacy." *Id.* 9a.

This reasoning is too clever by half. This Court has never required that someone exercise exclusive control of an area to enjoy a reasonable expectation of privacy. Thus, it is beyond dispute that someone "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." *O'Connor v. Ortega*, 480 U.S. 709, 730 (1987) (Scalia, J., concurring in the judgment); *see also Fernandez v. California*, 134 S. Ct. 1126 (2014) (one tenant can invite visitors into the home despite other tenants' previous objections); *United States v. Villegas*, 495 F.3d 761, 772 (7th Cir. 2007) (Rovner, J., concurring in part and in the judgment) ("We do not say that cohabiting adults have no reasonable expectation of privacy in their shared residence although both have access to some if not all of the premises and either one may admit others; rather, we recognize that each has a cognizable privacy interest for Fourth Amendment purposes and that a police officer normally cannot enter without the consent of at least one resident."). So too here. The mere fact that other tenants may give outsiders permission to enter common areas of

locked apartment buildings does not deprive a resident of a reasonable expectation of privacy against trespassers – that is, those who lack any permission at all.

B. At The Very Least, Officers Conduct A Search When They Use A Dog In The Hallway To Obtain Information About The Interior Of A Tenant's Home.

Even if officers do not conduct a search merely by trespassing in common areas of a locked apartment building, they surely do so when they stand outside the door of an individual unit with a drug dog to investigate what is inside that dwelling.

1. As a matter of property rights, the scope of police authority to invade private property depends on "background social norms." *Jardines*, 133 S. Ct. at 1416. And whatever privileges members of the public (and thus the police) may have to roam common areas, there is no customary license to "introduc[e] a trained police dog to explore the area around the home" – even an apartment home – "in hopes of discovering incriminating evidence." *Id.*

The North Dakota Supreme Court pushed aside this reality on the ground that, in contrast to the front porch of a single-family home, "the common hallway is not an area within the curtilage [of a resident's] apartment." Pet. App. 12a. But this reasoning elevates form over substance. The Fourth Amendment does not protect any property right in curtilage as such. *See Oliver v. United States*, 466 U.S. 170, 176-77 (1984). Rather, this Court imported the concept of curtilage into Fourth Amendment jurisprudence to protect against police incursion into

spaces near a dwelling where officers could learn intimate details about the interior of "a man's home." *See id.* at 178-80 (internal quotation marks omitted). The areas outside apartments, as much as a front porch, are spaces where law enforcement can learn details about a home. *See Carter*, 525 U.S. at 104 (Breyer, J., concurring in the judgment) (assuming that apartment units have the equivalent of curtilage); *see also State v. Ortiz*, 600 N.W.2d 805, 820 (Neb. 1999) (dog sniff on an apartment's stoop constituted a search because it allowed officers to "obtain information regarding the contents of a place that has traditionally been accorded a heightened expectation of privacy").

2. The argument that a police trespass into a locked apartment hallway impinges a reasonable expectation of privacy are likewise stronger when police use a drug-sniffing dog inside that hallway to investigate the interior of a tenant's home. As Justice Kagan and two other Justices recognized in their concurrence in *Jardines*, use of a drug-sniffing dog on the threshold of a dwelling constitutes a search because it employs "a 'device . . . not in general public use' . . . to 'explore details of the home' . . . that [officers] would not otherwise have discovered without entering the premises." 133 S. Ct. at 1419 (Kagan, J., concurring). Thus, even if an apartment resident may expect fellow tenants and their invited guests – or even the occasional trespasser – to roam the building's hallways, he does not expect that those in the building will act "in an exploratory manner" toward the contents of his home. *Bond*, 529 U.S. at 339.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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February 11, 2015