No. 14-973

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

BRIEF IN OPPOSITION

Birch P. Burdick
State's Attorney
Gary E. Euren
Assistant State's Attorney
Counsel of Record
211 S. 9TH St.
Fargo, North Dakota 58103
(701) 241-5850
eureng@casscountynd.gov

QUESTION PRESENTED

Whether, or under what circumstances, police officers conduct a search within the meaning of the Fourth Amendment when they enter the common areas of a secure apartment building without permission and with a trained drug dog to look for evidence of criminal activity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATEMENT OF THE CASE

1. On November 8, 2012, the Fargo Police Department (FPD) dispatched law enforcement officers to investigate the report of the smell of marijuana on the second floor by a tenant in an apartment building located at 2599 Villa Drive. Supp. Tr. 30 (April 29, 2013). The officers could not pinpoint the source of the smell so they placed the address and information on a list kept by the FPD for further follow-up by narcotics officers. *Id.* at 11-12.

Just over a month later, a narcotics officer (Aberle) and a K-9 unit (Officer Vinson and a trained drug dog, Earl) began checking the addresses on the list. *Id.* at 13. Earl is trained to detect marijuana, cocaine, and other illegal drugs by sniffing. *Id.* at 54. He is certified through the United States Canine Association. *Id.* at 52. They checked between six and ten buildings that day, including 2599 Villa Drive. *Id.* at 17, 63. The officers were in plain clothes to avoid arousing suspicion and not alert anyone who might have drugs in their apartment. *Id.* at 56. To gain access, Officer Aberle approached the building and grabbed the door before it closed as a woman either entered or left. *Id.* at 13. Officer Aberle then signaled Officer Vinson to come to the building, and they entered with Earl. *Id.* at 13, 57.

They split into two groups, with Officer Aberle walking through the building separately from Officer Vinson and Earl. *Id.* at 13. Because there was a lot of foot traffic on the first floor, Officer Vinson and Earl went to the third floor — again to avoid tipping possible possessors of drugs that they were police officers. *Id.* at 57. They walked down the hallway and Earl conducted sniffs. *Id.* at 66. After Earl did not alert on

third floor, they proceeded to the second floor, where Earl alerted on the second or third door they encountered. *Id.* at 60. It was a door identified in November as having an odor of marijuana coming from it. *Id.*

The officers used this information to obtain a search warrant which was executed a few days later. Pet. App. 5a. The police seized about one-half pound of marijuana, items of paraphernalia, and $2,433 in cash attributed to Nguyen. Nguyen was charged with possession of marijuana with intent to deliver and possession of marijuana paraphernalia. He moved to suppress the evidence and, after a hearing, the trial court granted the motion. *Id.*

2. The North Dakota Supreme Court reversed and remanded, holding that the officers did not conduct a search within the meaning of the Fourth Amendment. Pet. App. 3a-13a. The court first applied the reasonable-expectation-of-privacy test set forth in *Katz v. United States*, 389 U.S. 347 (1967), and ruled that Nguyen had no expectation of privacy in the hallways of the apartment building. *Id.* at 7a-11a. The court reasoned 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 hallway." *Id.* at 9a-10a. Indeed, "[t]he common hallways of Nguyen's apartment building were available for the use of tenants and their guests, the landlord and his agents, and others having a legitimate reason to be on the premises. . . . Nguyen could not have excluded individuals from the common hallway." *Id.* at 10a. The court therefore joined the six federal courts of appeal and five state appellate courts which had held that apart-

ment dwellers lack a reasonable expectation of privacy in the common areas, with only the Sixth Circuit holding a different view. *Id.* at 8a-9a.

Nor does the result change, held the North Dakota Supreme Court, because the officers used a drug-sniffing dog. The court relied on this Court's decisions holding that a dog sniff "'discloses only the presence or absence of narcotics,'" and individuals lack a legitimate expectation of privacy in contraband. *Id.* at 10a-11a (quoting *United States v. Jacobsen*, 466 U.S. 109, 124 (1984)). The court also pointed to this Court's conclusion in *Illinois v. Caballes*, 543 U.S. 405 (2005), that dog sniffs, unlike the thermal-imaging devices at issue in *Kyllo v. United States*, 533 U.S. 27 (2001), are not "'capable of detecting lawful activity' such as the 'intimate details' occurring in the home." *Id.* at 11a (quoting *Caballes*, 543 U.S. at 409-10).

The North Dakota Supreme Court next held that the officers did not conduct a search here under the property-based analysis used in *United States v. Jones*, 132 S. Ct. 945 (2012), and *Florida v. Jardines*, 133 S. Ct. 1409 (2013). Pet. App. 11a-13a. The court explained that a search does not occur under that analysis if the officers do not enter the curtilage of a person's property. And under the four-factor test announced in *United States v. Dunn*, 480 U.S. 294, 300 (1987), "the common hallway is not an area within the curtilage of Nguyen's apartment." Pet. App. 12a. That test's factors "bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself." *Id.* at 11-12a (internal quotation marks omitted). The court concluded that the common hallway does not pass that test because

"a party does not have a reasonable expectation of privacy in the common hallways and shared spaces of an apartment building." *Id*. at 12a.

3. Nguyen then entered conditional pleas of guilty for the purpose of appealing, first to the North Dakota Supreme Court and then to this Court, if the North Dakota Supreme Court reaffirmed its initial decision. The North Dakota Supreme Court did reaffirm its initial decision on November 26, 2014. Pet. App. 1a. Nguyen's petition followed.

REASONS FOR DENYING THE PETITION

The petition presents two interrelated issues: whether officers' entry without permission into the common areas of a secure apartment building to investigate criminal activity is a search within the meaning of the Fourth Amendment; and whether use of a drug-sniffing dog outside an apartment is a search. Neither issue warrants this Court's review.

1. Almost 40 years ago, the Sixth Circuit held that officers conducted a search by entering the common hallway of a secure apartment building. Since then, no other federal court of appeals or state high court has interpreted the Fourth Amendment that way. This conflict has existed since 1977, when the Eighth Circuit rejected the Sixth Circuit's approach, and is now lopsided as five federal courts of appeal and four state appellate courts agree that officers do not conduct a search when they enter a common hallway. Nothing has changed to suddenly warrant this Court's intervention.

2. This Court addressed drug-sniffing dogs less than two years ago in *Florida v. Jardines*, where it held that law enforcement officers conducted a "search" within the meaning of the Fourth Amendment when they used a drug-sniffing dog on a homeowner's front porch. 133 S. Ct. at 1417-18. Because "[t]he front porch is the classic exemplar" of curtilage, the officers "physically intrud[ed]" on the homeowner's property to investigate a crime and thereby conducted a search. *Id*. at 1415, 1417-18. That decision did not address whether officers conduct a search when they use a drug-sniffing dog outside the premises of someone who is *not* a homeowner, such as an apartment dweller.

Since *Jardines*, only one state high court or federal court of appeals has squarely addressed that issue — the North Dakota Supreme Court in this case. Petitioners urge this Court to review that decision, but this Court should follow its ordinary course and allow additional appellate courts to assess the import of *Jardines*. Nor is this an issue that frequently arose even before *Jardines*. Few appellate courts had addressed whether dog sniffs outside of apartments are searches; and the only federal court of appeals to hold that a dog sniff outside an apartment is a search was issued prior to *Caballes*.

I. There Is Not A Certworthy Conflict Among The Lower Courts On The Issues Presented.

A. Police officers' entry into common areas of apartments.

The overwhelming majority of courts that have addressed the issue have held that police officers do not

conduct a search within the meaning of the Fourth Amendment when, without permission, they enter a secured apartment building to investigate criminal activity. Six federal courts of appeal have reached that conclusion. *See United States v. Holland*, 755 F.2d 253 (2nd Cir. 1985); *United States v. Correa*, 653 F.3d 187 (3rd Cir. 2011); *United States v. Concepcion*, 942 F.2d 1170, 1172-73 (7th Cir. 1991); *United States v. Eisler*, 567, 816 F.2d 814 (8th Cir. 1977); *United States v. Brooks*, 645 F.3d 971 (8th Cir. 2011); *United States v. Nohara*, 3 F.3d 1239 (9th Cir. 1993); *see also United States v. Miravalles*, 280 F.3d 1328 (11th Cir. 2002) (reaching same conclusion, but involving front door that had "an undependable lock that was inoperable on the day in question").

Several state appellate courts have also held that officers do not conduct a search in that situation. *See State v. Talley*, 307 S.W.3d 723, 732 (Tenn. 2010); *People v. Lyles*, 772 N.E.2d 962 (Ill. App. Ct. 2002); *Commonwealth v. Dora*, 781 N.E.2d 62 (Mass. App. Ct. 2003); *State v. Davis*, 711 N.W.2d 841 (Minn. App. Ct. 2006).

In the face of that authority, Nguyen points only to decisions by the Sixth Circuit, starting with *United States v. Carriger*, 541 F.2d 545 (6th Cir. 1976). Pet. 12-13. That decision, of course, preceded many important and relevant Fourth Amendment decisions by this Court, including:

- *United States v. Dunn*, 480 U.S. 294 (1987), which set forth the modern test for determining what areas constitute curtilage;
- *Rakas v. Illinois*, 439 U.S. 128, 134 (1978), which confirmed that a person's Fourth Amendment

rights may be infringed only if *his* premises or property were searched;

- *Rawlings v. Kentucky*, 448 U.S. 98, 105 (1980), which held that factors in the reasonable-expectation-of-privacy inquiry include whether the defendant "ha[d] any right to exclude other persons from access" to the property.

When the Sixth Circuit addressed this issue almost 30 years later in *United States v. Dillard*, 438 F.3d 675, 683 (6th Cir. 2006), *cert. denied*, 127 S.Ct. 291 (2006), it acknowledged that four circuits had expressly rejected *Carriger* and that its approach was "outside the mainstream." *Id*. at 683. And while the court again applied *Carriger* as circuit precedent in an unpublished decision in 2012, *United States v. Mohammed*, 501 Fed. App'x. 431, 434-35, *cert. denied*, 133 S.Ct. 2044 (2013), the court has never addressed the issue en banc — because none of the parties in any of these cases sought en banc review of *Carriger*. The Sixth Circuit may well reconsider the issue in a future case when en banc review is sought.

The Eighth Circuit rejected *Carriger* in 1977; the Seventh Circuit rejected it in 1991; the Ninth Circuit rejected it in 1993. In short, this conflict, such as it is, has existed for decades. For all Nguyen's talk of how many Americans live in apartment buildings (Pet. 9-10), that is hardly a new phenomenon. Police occasionally enter the common areas of apartment buildings to investigate criminal activity, just as they long have done. And the courts around the nation — apart from the outlier Sixth Circuit — have long agreed that officers are not engaging in a "search" when they do so. There is no pressing need for this Court to intervene now.

B. Dog sniffs outside apartments.

If appellate decisions are any indication, law enforcement officers rarely use drug-sniffing dogs outside apartments. Nguyen cites only five cases in which appellate courts addressed that situation. Pet. 13-19. How the Fourth Amendment applies to dog sniffs outside apartments does not appear to be the "vital" issue Nguyen claims (Pet. 9) it is.

That only one of those cases — the North Dakota Supreme Court decision here — was decided after this Court's most recent pronouncement on dog sniffs, *Florida v. Jardines*, further militates against this Court's review. *Jardines* held that a dog sniff on the front porch of a home constituted a search because it "took place in a constitutionally protected area" (the curtilage of the home) and "was accomplished through an unlicensed physical intrusion." 133 S. Ct. at 1415-16. How that reasoning applies to a dog sniff outside an apartment depends on (among other things) whether the common areas constitute the curtilage of an apartment. *See* §II, *infra*. Yet only the North Dakota Supreme Court has so far applied *Jardines* to the apartment context.

This Court usually waits for multiple lower courts to address issues left unanswered in its decisions. *See Arizona v. Evans*, 514 U.S. 1, 24 n.1 (1995) (Ginsburg, J., dissenting) ("We have in many instances recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court."). There is no reason for the Court to depart from that practice here.

To be sure, some courts had previously addressed the issue under the *Katz* reasonable-expectation-of-privacy test, and the Court in *Jardines* did not resolve how that test applies to dog sniffs outside homes, let alone apartments. But seven Justices expressed their views on the issue, *see id.* at 1418-20 (Kagan, J., concurring); *id.* at 1420-26 (Alito, J., dissenting). Those Justices' reasoning could well affect how lower courts analyze the issue.

Moreover, even before *Jardines*, the conflict among the appellate courts was more apparent than real. Most of the courts had held that a dog sniff outside an apartment is not a search. *See United States v. Scott*, 610 F.3d 1009, 1016 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 964 (2011); *Fitzgerald v. State*, 864 A.2d 1006 (Md. Ct. App. 2004); *People v. Dunn*, 564 N.E.2d 1054 (N.Y. Ct. App. 1990); *Stabler v. State*, 990 So. 2d 1258 (Fla. Dist. Ct. App. 2008).

The only appellate court on the other side is the Second Circuit, but its principal decision — *United States v. Thomas*, 757 F.2d 1359 (2nd Cir. 1985) — did not cite *Jacobsen* and was issued long before *Caballes*. *Thomas* reasoned that police cannot use a dog to "obtain information about what is inside a dwelling that they could not derive from the use of their own senses." 757 F.2d at 1367. But *Caballes* strongly suggests that reasoning is flawed. It distinguished *Kyllo* not on the ground that *Kyllo* involved a home, but on the ground that the thermal-imaging device at issue there "was capable of detecting lawful activity," including "intimate details," whereas a "dog sniff . . . reveals no information other than the location of a substance that no individual has any right to possess." *Caballes*, 543 U.S. at 409-410.

For now, *Thomas* remains circuit precedent in the Second Circuit and therefore must be followed by panels of the court — as occurred in *United States v. Hayes*, 551 F.3d 138, 144-45 (2nd Cir. 2008) (distinguishing *Thomas* on other grounds). But the Second Circuit may well revisit the issue en banc in a future case, to address whether *Caballes* mandates a different result. Future en banc review of this issue is all the more likely given how many other courts have expressly criticized *Thomas*. *See, e.g.*, *United States v. Colyer*, 878 F.2d 469, 475 (D.C. Cir. 1989); *United States v. Reed*, 141 F.3d 644, 649-50 (6th Cir. 1998); *United States v. Brock*, 417 F.3d 692, 696-97 (7th Cir. 2005); *United States v. Lingenfelter*, 997 F.2d 632, 638 (9th Cir. 1993); *United States v. Hogan*, 122 F.Supp. 2d 358, 369 (E.D.N.Y. 2000) (noting that "*Thomas* appears never to have been followed by any court outside the Circuit and has been criticized by several other Circuit Courts," and that its reasoning "appears to be at odds with *Place* and *Jacobsen*").

This shallow, shaky conflict is not deepened by *State v. Ortiz*, 600 N.W.2d 805 (Neb. 1999), upon which Nguyen relies. Pet. 14-15. As Justice Connolly stated in his concurring opinion, the *Ortiz* majority "never addresses whether they consider the canine sniff conducted at the threshold of Ortiz' apartment to be a search. Rather, the majority states that Ortiz had some expectation of privacy in the hallway and applies a reasonable suspicion standard to determine whether the sniff was reasonable." *Ortiz*, 600 N.W.2d at 827. The majority followed that approach based on its mistaken belief that *Place* approved the admission of evidence gained by the use of a canine sniff if the canine sniff evidence was obtained based on a reasonable, articulable suspicion. *Id*. at 815.

All told, the question of whether dog sniffs outside of apartments are searches (1) rarely arises, (2) depends in part on the application of a decision by this Court (*Jardines*) that only one lower court has applied in this context, and (3) has little disagreement among the lower courts. This Court's intervention is not warranted.

II. The North Dakota Supreme Court Correctly Held That The Officers Did Not Conduct A Search.

The North Dakota Supreme Court held that law enforcement's use of a drug-sniffing dog in the common hallway outside Nguyen's apartment was not a search under either a property-rights or reasonable-expectation-of-privacy theory. Pet. App. 10a-13a. The court was right on both counts. There was no search under a property-rights theory because Nguyen had no property interest in the common hallway. And even if he did have a property interest in the common hallway, that area was not part of the curtilage of his home and thus was not entitled to Fourth Amendment protection. Likewise, there was no search under a reasonable-expectation-of-privacy theory because the common hallway was widely accessible to, and used by, others. The dog sniff changes nothing because use of a drug-sniffing dog does not infringe on any Fourth-Amendment privacy interest. The judgment below was therefore correct.

A. There was no search under a property-rights theory.

1. A Fourth Amendment search occurs when the government gains information by physically intruding on a constitutionally protected area in way that would

constitute a common-law trespass. *Jardines*, 133 S. Ct. at 1414; *Jones*, 132 S. Ct. at 949. *Jardines* involved a "straightforward" application of that test to a dog sniff because Jardines's front porch was the "classic exemplar" of curtilage, and the government physically intruded into that "constitutionally protected area" without license. *Jardines*, 133 S. Ct. at 1415-16. This case involves an equally straightforward application of that test, only with the opposite result.

As an initial matter, Nguyen was a mere tenant of the apartment building, meaning he retained no property or possessory interest in the common hallway. He therefore cannot claim that the police committed a trespass against any of *his* property rights.[1] And because Nguyen cannot claim that any of his property rights were violated by the officers' entry into the common area, he has no Fourth Amendment interest to assert. As this Court explained in *Rakas v. Illinois*, 439 U.S. 128, 134 (1978), "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search

---

[1] *See Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053, 1060 (D.C. 2014) ("the mere fact that a tenant may have the 'authority' to permit access into the common areas does not confer onto the tenant a legally recognized possessory interest in those areas" sufficient to maintain a claim for trespass); *Aberdeen Apartments v. Cary Campbell Realty Alliance, Inc.*, 820 N.E.2d 158, 164 (Ind. Ct.App. 2005) (holding that landlord "retains exclusive possession of the common areas of an apartment complex" and can therefore bring a claim for trespass); *Stanley v. Town Square Co-op.*, 512 N.W.2d 51, 54 (Mich. App. Ct. 1994); *Motchan v. STL Cablevision, Inc.*, 796 S.W.2d 896, 899 (Mo. Ct. App. 1990).

of a third person's premises or property has not had any of his Fourth Amendment rights infringed."

Even if Nguyen retained some possessory interest over the common area, he still would not prevail on a property-rights theory because "[t]he Fourth Amendment does not . . . prevent all investigations conducted on private property." *Jardines*, 133 S. Ct. at 1414. Instead, Fourth Amendment protection is limited to the curtilage — the area around the home that is "'intimately linked to the home, both physically and psychologically,' and is where 'privacy expectations are most heightened.'" *Id.*, at 1415. (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)). As the North Dakota Supreme Court correctly held (Pet. App. 11a-12a), the common hallway of an apartment building is not part of the curtilage, *i.e.*, it is not an area that "enjoys protection as part of the home itself." *Jardines*, 133 S. Ct. at 1414.

The extent of a home's curtilage is determined by reference to (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." *Dunn*, 480 U.S. at 300. The latter two factors cut strongly against Nguyen's claim. The common hallway was a "shared space," in which tenants kept "personal property, such as shoes, bikes, and door craftwork." Pet. App. 5a. And Nguyen did not and could not have taken any steps to "protect the area from observation by people passing by." Although the building was locked to the general public, other tenants and their guests could access the common hallway; Nguyen could do nothing to protect

that area from their view. He thus could not have exercised the type of control over use or observation of the area that would make it part of the curtilage.

Although the first two factors might ostensibly cut in favor of Nguyen, they carry little weight when applied to a multi-family dwelling such as his apartment. As the Third Circuit has explained, "although the *Dunn* factors also apply to determine extent-of-curtilage questions in urban areas, certain factors may be less determinative in a city setting because of the physical differences in the properties." *United States v. Acosta*, 965 F.2d 1248, 1256 (3rd Cir. 1992). The hallway outside Nguyen's apartment was undoubtedly proximate to his home, but, owing to the nature of an apartment building, it was also proximate to the homes of all the surrounding tenants and was equally accessible to them and their guests. Pet. App. at 4a-5a. Likewise, Nguyen's apartment was enclosed within a locked building, but other tenants and their guests could freely access that enclosed area. *Id.* Nguyen could therefore not reasonably expect that either the proximity of the common hallway to his apartment or its enclosure within the building where he resided meant that it "should be treated as the home itself." *Dunn*, 480 U.S. at 301.

Nguyen's arguments to the contrary are unpersuasive. He argues (Pet. 25) that "the critical question is whether the police intrude upon a person's place of repose from outsiders," but the answer to that question confirms that there was no search. A common hallway accessible by other tenants and their guests, and in which other tenants keep "shoes, bikes, and door craftwork" (Pet. App. 5a), can hardly be considered a

"place of repose" deserving of the same Fourth Amendment protection as the home itself.

Nor, contrary to Nguyen's assertion (Pet. 29), was the North Dakota Supreme Court's conclusion that the common hallway was not part of the curtilage an "elevat[ion] of form over substance." As *Jardines* confirms, whether police enter into the curtilage makes all the difference, as that is the area which receives Fourth Amendment protection. 133 S. Ct. at 1414-15. The North Dakota Supreme Court had it exactly right when it looked to whether the common hallway was part of the curtilage.

By contrast, Nguyen relies on cases that have no relevance to the issue. He cites (Pet. 24-25) *Minnesota v. Olson*, 495 U.S. 91 (1990), and *Jones v. United States*, 362 U.S. 257 (1960), but those cases involved police searches *inside* apartments and homes. Their outcomes rested on the notion that a guest's Fourth Amendment interest in his host's home is based on "the everyday expectations of privacy that we all share" when staying as overnight guests. *Olson*, 495 U.S. at 98; *see Minnesota v. Carter*, 525 U.S. 83, 89 (1998).[2] Whether Nguyen had an "everyday expectation of privacy" in the common area of his apartment is relevant to the reasonable-expectation-of-privacy

---

[2] *Jones* has largely been overruled. In *Minnesota v. Carter*, 525 U.S. 83, 89-90 (1998), the Court stated that "while the holding of *Jones*—that a search of the apartment violated the defendant's Fourth Amendment rights—is still valid, its statement that 'anyone legitimately on the premises where a search occurs may challenge its legality,' was expressly repudiated in *Rakas v. Illinois*, 439 U.S. 128 (1978)" (citation omitted).

test (which, as explained *infra*, he likewise fails to satisfy), but has no bearing on the outcome of the property-rights test. The latter test depends only on whether the government committed an unlicensed physical intrusion into a constitutionally protected area. Because no such intrusion occurred here, there was no search under that test.

2. The officers' use of a drug-sniffing dog does not affect this conclusion. Nguyen argues that even if police may "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." Pet. 29 (quoting *Jardines*, 133 S. Ct. at 1416). The absence of a "customary license" to use a drug sniffing dog, however, only matters when police intrude into a constitutionally protected area. *See Jardines*, 133 S. Ct. at 1415. For the reasons explained above, police did not intrude into such an area here.

B. There was no search under the *Katz* test.

1. Nguyen also lacked a reasonable expectation of privacy in the common areas of his apartment building. Among the considerations relevant to determining whether someone has a reasonable expectation of privacy are whether the party has a possessory interest in the place searched, whether the party can exclude others from that place, and whether the party took precautions to maintain privacy. *Rawlings v. Kentucky*, 448 U.S. 98, 104-05 (1980). These factors support the North Dakota Supreme Court's ruling.

As discussed, Nguyen and his co-tenants had no possessory interest in the common hallways of the

building; the apartment *owner* retained the possessory interest. Nguyen could not exclude others from the hallway, which is traversed by other tenants, their guests, workmen, and others. And Nguyen lacked the ability to take precautions to maintain privacy in the common hallway. While he had a key to the common area, so did the other tenants, the fire department, and the apartment management. Pet. App. 4a-5a.

In short, the common area remains just that—common. Society cannot reasonably recognize an expectation of privacy in areas where so many may tread at their leisure.

Nguyen's arguments to the contrary attempt to conflate the property-rights test (which he also fails) with the *Katz* test. He relies on cases involving either the physical manipulation of personal property, *Bond v. United States*, 529 U.S. 334, 337-38 (2000); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979), or the physical entry into the interior of personal space, *Georgia v. Randolph*, 547 U.S. 103, 113 (2006) (entering a home); *O'Conner v. Ortega*, 480 U.S. 709, 730 (1987) (entering an office and searching a desk and filing cabinet). The officers did neither here. They did not physically inspect anything; and they did not physically enter the interior of Nguyen's personal space. *See Concepcion*, 942 F.2d at 1172 ("The area outside one's [apartment] door lacks anything like the privacy of the area inside.").

Finally, contrary to Nguyen's assertion (Pet. 28), the North Dakota Supreme Court did not require "exclusive control" for a reasonable expectation of privacy. Rather, that court correctly held that when an individual has, essentially, *no* control over who enters

an area, that individual cannot have a reasonable expectation of privacy in that area. Pet. App. 8a-10a.

2. As with the property-rights analysis, the officers' use of a drug-sniffing dog does not change the result. As this Court has held several times, individuals lack a legitimate expectation of privacy in contraband; and dog sniffs disclose only the presence of contraband. *See, e.g., Caballes*, 543 U.S. at 408-09; *Jacobsen*, 466 U.S. at 123-24; *Place*, 462 U.S. at 707. For that reason, the "*sui generis*" dog sniff does not infringe on reasonable expectations of privacy. *Caballes*, 543 U.S. at 409.

As explained by *Caballes*, this analysis is "entirely consistent" with this Court's reasoning in *Kyllo*. "[C]ritical" to that decision "was the fact that the [thermal-imaging] device was capable of detecting lawful activity," including "intimate details in a home." *Caballes*, 543 U.S. at 409-10. Drug-detection dogs lack those capabilities. They do not reveal "intimate details" or even "lawful activity" of any sort. *Id.* at 408-09. When law enforcement uses a technique "that reveals no information other than the location of a substance that no individual has any right to possess," the dictates of *Caballes* — not those of *Kyllo* — control. *Id.* at 410. In sum, the dog sniff here was not a search within the meaning of the Fourth Amendment.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should not be granted.

Respectfully submitted,

Gary E. Euren
Counsel of Record
Assistant Cass County
State's Attorney
211 S. 9th St.
Fargo, ND 58108
(701) 241-5850
eureng@casscountynd.gov