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Growing *Jardines*: Expanding Protections Against Warrantless Dog Sniffs to Multiunit Dwellings

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GROWING *JARDINES*:
EXPANDING PROTECTIONS AGAINST
WARRANTLESS DOG SNIFFS TO
MULTIUNIT DWELLINGS

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INTRODUCTION

Since the Supreme Court’s decision in *Florida v. Jardines*,¹ courts have been left grappling with the full extent of the additional protection afforded to residents from warrantless canine drug sniffing. *Jardines* involved the taking of a police drug dog up to the porch and front door of a single-family, detached house “via the driveway and a paved path.”² After “energetically exploring the area for the strongest point source of [an] odor” the dog alerted by sitting at “the base of the front door.”³ The Court, in holding that this warrantless activity was beyond the bounds of permitted conduct, noted that “[t]he government’s use of

1. 133 S. Ct. 1409 (2013).
2. *Id.* at 1421 (Alito, J., dissenting).
3. *Id.* at 1413.

trained police dogs to investigate the home and its immediate surroundings is a ‘search’ within the meaning of the Fourth Amendment.”⁴

The majority opinion, authored by Justice Scalia, arrived at the conclusion not through a *Katz* “reasonable expectation of privacy” analysis,⁵ but through a determination that the drug sniffing occurred in “an area belonging to Jardines and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself.”⁶ In doing so, the Court returned to an earlier conception of “constitutionally protected areas” that had been largely overshadowed since the advent of the *Katz* privacy test.⁷

Both tests remain viable approaches to determining Fourth Amendment searches,⁸ but the *Jardines* majority declined to address whether the drug sniffing was also a search under the *Katz* test.⁹ Justice Kagan authored a concurring opinion finding that the drug sniff was both a trespass and an invasion of privacy sufficient to find it a search under both *Katz* and *Kyllo v. United States*.¹⁰ Kagan maintained that she “could just as happily have decided [the case] by looking to

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4. *Id.* at 1417–18.
 5. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). In his concurring opinion, Justice Harlan expounded on the two-part rule that has been subsequently applied by lower courts as the “reasonable-expectation-of-privacy test.” *See id.* (“[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”).
 6. *Jardines*, 133 S. Ct. at 1414.
 7. *See* Carrie Leonetti, *Open Fields in the Inner City: Application of the Curtilage Doctrine to Urban and Suburban Areas*, 15 GEO. MASON U. C.R. L.J. 297, 300 (2005) (“In *Katz*, the Court signaled a sharp change in its search and seizure jurisprudence by abandoning the traditional framework of ‘constitutionally protected areas’ in favor of a privacy-based test for Fourth Amendment application.”).
 8. *See Jardines*, 133 S. Ct. at 1417 (“The *Katz* reasonable-expectations test ‘has been added to, not substituted for,’ the traditional property-based understanding of the Fourth Amendment.” (emphasis omitted) (quoting *United States v. Jones*, 132 S. Ct. 945, 952 (2012))).
 9. *Id.* (“Thus, we need not decide whether the officers’ investigation of Jardines’ home violated his expectation of privacy under *Katz*.”).
 10. 533 U.S. 27, 28 (2001) (holding that police officers’ observation of a house using thermal-imaging technology, and, more generally, “obtaining by sense-enhancing technology any information regarding the home’s interior that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area,’ constitutes a search” under the Fourth Amendment (citation omitted) (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961))).

Jardines’s privacy interests”¹¹ because a drug dog is a device “not ‘in general public use,’ [and] training it on a home violates our ‘minimal expectation of privacy’—an expectation ‘that exists, and that is acknowledged to be reasonable.’”¹² However, it “is unclear . . . whether Justices Scalia and Thomas, who did not join in the concurring opinion which does apply the *Katz* analysis, would disagree with the result reached by the concurring opinion that the conduct violates the respondent’s reasonable expectation of privacy”¹³ The lingering questions surrounding *Jardines* have left lower courts to address the full implication of the decision.

In particular, the Supreme Court left open two critical questions: “Does the Fourth Amendment protection-afforded concept of curtilage exist outside the context of a single-family dwelling”¹⁴ and, if not, does an apartment dweller have a reasonable expectation of privacy in the area just outside his door? In this most recent term, the Seventh and Eighth Circuits expanded the protections against warrantless drug dog sniffs to multiunit dwellings, but only one has answered that question in the affirmative. While both Circuits found drug sniffs of the front doors of apartments to be searches, the Eighth Circuit¹⁵ arrived at the conclusion through the *Jardines* majority’s “constitutionally protected area” analysis,¹⁶ while the Seventh Circuit¹⁷ found that such a police action violated a tenant’s reasonable expectation of privacy.¹⁸

I. *UNITED STATES V. HOPKINS*:
EXPANDING *JARDINES* PROTECTIONS THROUGH
“CONSTITUTIONALLY PROTECTED AREA” ANALYSIS

The *Jardines* majority opinion employed a two-part series of questions to identify the dog sniff as a Fourth Amendment search: (1)

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11. *Jardines*, 133 S. Ct. at 1418 (Kagan, J., concurring).
 12. *Id.* at 1419 (Kagan, J., concurring) (emphasis omitted) (quoting *Kyllo*, 533 U.S. at 34).
 13. Carol A. Chase, *Cops, Canines, and Curtilage: What Jardines Teaches and What It Leaves Unanswered*, 52 HOUS. L. REV. 1289, 1294 (2015).
 14. *Id.* at 1303; see also David C. Roth, Comment, *Florida v. Jardines: Trespassing on the Reasonable Expectation of Privacy*, 91 DENV. U. L. REV. 551, 570 (2014) (“[T]he [*Jardines*] majority’s fact-specific analysis cannot answer what would have happened had Mr. Jardines been living in an apartment when the police brought a drug-dog to his front door.”).
 15. *United States v. Hopkins*, 824 F.3d 726 (8th Cir. 2016).
 16. See *infra* Part I.
 17. *United States v. Whitaker*, 820 F.3d 849 (7th Cir. 2016).
 18. See *infra* Part II.

was the information obtained within a constitutionally protected area¹⁹ and (2) if so, was the officer given leave, explicitly or implicitly, to do so?²⁰ The majority found that the officers “were gathering information in an area belonging to Jardines and immediately surrounding his house—in the curtilage of the house . . . [a]nd they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.”²¹ Several lower courts have analyzed dog sniffs on the threshold of apartment doors by utilizing the same two-question approach highlighted in *Jardines*.

*A. Was the Information Obtained Within a
Constitutionally Protected Area?*

Following *Jardines*, lower courts have looked anew at the concept of curtilage within multiunit dwellings. Prior to *Jardines*, the “overwhelming weight of authority reject[ed] the proposition that a resident of a multi-dwelling residential building can claim curtilage protection in common areas—or even anywhere outside an individual unit.”²² Like all Fourth Amendment questions regarding searches, determining whether a search was conducted within a constitutionally protected area is a fact-specific endeavor, “requir[ing] [a] consideration of factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself.”²³ Although narrowly defined, *Hopkins* is the most recent example of a lower court finding curtilage within a multiunit dwelling and the highest court to do so to this point.²⁴

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19. *Florida v. Jardines*, 133 S. Ct. 1409, 1415 (2013) (“The front porch is the classic exemplar of an area adjacent to the home and ‘to which the activity of home life extends.’” (quoting *Oliver v. United States*, 466 U.S. 170, 182 n.12 (1984))).
 20. *Id.* (“While law enforcement officers need not ‘shield their eyes’ when passing by the home ‘on public thoroughfares,’ an officer’s leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment’s protected areas.” (citation omitted) (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986))).
 21. *Id.* at 1414.
 22. *Chase*, *supra* note 13, at 1305. One of the few exceptions in which a court did find curtilage in a multiunit dwelling can be found in *Fixel v. Wainwright*, 492 F.2d 480, 484 (5th Cir. 1974) (finding the fenced backyard of a four-unit apartment building to be curtilage).
 23. *United States v. Hopkins*, 824 F.3d 726, 731 (8th Cir. 2016) (quoting *United States v. Bausby*, 720 F.3d 652, 656 (8th Cir. 2013)).
 24. The Eighth Circuit previously found an area under an apartment’s exterior window to be protected curtilage in *United States v. Burston*, 806 F.3d 1123 (8th Cir. 2015).

Donnell Hopkins rented a townhome in Cedar Rapids, Iowa, that was part of a complex of several “rectangular buildings separated by a grid of streets and sidewalks.”²⁵ Each building has several two-story townhouses on each side with “doors . . . arranged in pairs, and walkways lead[ing] from a sidewalk in the central courtyard to a concrete slab in front of each pair of doors.”²⁶ The door to each townhouse was an exterior exit—opening directly to the outside rather than an indoor hallway common to most apartment buildings.²⁷ A Cedar Rapids officer and his K-9 partner, Marco, approached the townhouse complex at 10:00 pm on a Monday night, upon which Marco was unleashed and allowed to sniff the apartment walls, including the bottoms of the doors.²⁸ Marco sat in front of Hopkins’s apartment door, indicating “that an odor of narcotics was coming from inside.”²⁹ Marco’s indication was the basis for a search warrant that was obtained the following day—leading to Hopkins’s eventual arrest for possession with intent to distribute controlled substances.³⁰

The Eighth Circuit reviewed Hopkins’s appeal from a magistrate’s conclusion that the evidence was admissible and the district court’s denial of a motion to suppress.³¹ The court employed the *Jardines* two-step “constitutionally protected area” analysis to determine whether the dog sniff was unconstitutional.³² First, the court determined whether Hopkins’s front door and porch constituted a constitutionally protected area, or curtilage.

In determining whether the contested area was protected curtilage, the court utilized the four-factor test developed in *United States v.*

25. *Hopkins*, 824 F.3d at 729.

26. *Id.* Each pair of townhouse doors is “separated by a wall approximately one foot wide” and “has one first story window facing the courtyard.” *Id.* at 729–30.

27. *Id.* at 729.

28. *Id.* at 729–30.

29. *Id.* at 730.

30. *Id.* After further surveillance, Hopkins was arrested and a search of the townhouse revealed shoeboxes containing heroin, cocaine, and marijuana. *Id.*

31. *Id.* at 731. See *United States v. Hopkins*, No. CR14-0120, 2015 WL 4087054, at *6–7 (N.D. Iowa July 6, 2015) (finding that, though the “search warrant is invalid,” and the dog sniff is “a violation of Defendant’s Fourth Amendment rights, the *Leon* exception provides the exclusionary rule does not apply, and the evidence obtained pursuant to the warrant is nonetheless admissible”); *United States v. Leon*, 468 U.S. 897, 920–21 (1984) (holding that evidence is still admissible if “an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope,” even though the warrant was later determined to be invalid).

32. *Hopkins*, 824 F.3d at 731–33 (citing *Florida v. Jardines*, 133 S. Ct. 1409, 1415 (2013)).

Dunn.³³ In defining the extent of a home's curtilage, the *Dunn* Court advocated looking to four factors:

- [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.³⁴

The decision of the *Hopkins* court to use the *Dunn* factors in its analysis is noteworthy because the *Jardines* majority “did not apply those factors or even cite *Dunn*.”³⁵ The *Jardines* majority opinion may have omitted any reference to *Dunn* because the front porch of a single-family house was an obvious example of curtilage and “the classic exemplar of an area adjacent to the home and ‘to which the activity of home life extends.’”³⁶ Despite the *Jardines* majority's reluctance to employ the *Dunn* factors, lower courts have frequently cited and relied heavily upon those factors in determining whether curtilage exists within multiunit dwellings.

Because the *Dunn* factors were originally developed when considering the curtilage designation of a barn,³⁷ there are real questions regarding the factors' applicability to urban settings. While the curtilage boundaries of single-family detached homes may be as easily defined as the *Jardines* majority envisions,³⁸ the task is not as clear for the “majority of modern Americans . . . [who] live in urban and quasi-urban (suburban) areas.”³⁹ Lower courts look to the *Dunn* factors when grappling with whether multiunit dwellings have curtilage because “[t]he leading Supreme Court cases delineating the modern scope of the

33. 480 U.S. 294, 301 (1987).

34. *Id.*

35. *People v. Burns*, 50 N.E.3d 610, 632 (Ill. 2016).

36. *Jardines*, 133 S. Ct. at 1415 (quoting *Oliver v. United States*, 466 U.S. 170, 182 n.12).

37. *Dunn*, 480 U.S. at 302–03.

38. *Jardines*, 133 S. Ct. at 1415 (quoting *Oliver*, 466 U.S. at 182 n.12) (“While the boundaries of the curtilage are generally ‘clearly marked,’ the ‘conception defining the curtilage’ is at any rate familiar enough that it is ‘easily understood from our daily experience.’”).

39. Leonetti, *supra* note 7, at 303 (“In an urban or suburban environment, the home is generally coextensive with the entire property, in that intimate residential activities extend throughout the lot on which the dwelling is located.” (emphasis omitted)).

curtilage doctrine . . . largely leave unanswered the questions of whether curtilage exists in these urban contexts, and if so, what the scope of urban curtilage is.”⁴⁰ While many of these evaluations have yielded familiar answers—that common areas, such as apartment hallways, are not curtilage—some court applications of the *Dunn* factors have led to findings of curtilage in multiunit dwellings.

In *Lindsey v. State*,⁴¹ the Maryland Court of Special Appeals found that applying the *Dunn* factors did not reveal the area outside of an apartment door to be curtilage. Other than proximity, the *Lindsey* court concluded the other *Dunn* factors did not indicate the area was curtilage.⁴² The court held that the storing of “decorations, bicycles, and shoes” outside of the apartment “strongly suggests that [the areas] were not being used for intimate activities within one’s home.”⁴³ With regard to the fourth *Dunn* factor, the court found that “the area was observable by a passerby” and, rather than indicating any purpose to preserve privacy, the lock and buzzer system securing the doors of the apartment building “functioned as a security mechanism.”⁴⁴ Finally, the *Lindsey* court grounded much of its findings in the conception of exclusive control.⁴⁵ Unlike *Jardines*’s front porch of his single-family house, “common areas, such as the hallways of a multi-unit apartment building, are generally not areas in which a tenant is deemed to have ‘exclusive control.’”⁴⁶ The ability to exclude others, though not explicitly stated within the *Dunn* factors, has been inferred from the language of the third and fourth factors by the *Lindsey* court and several other jurisdictions.⁴⁷ The court’s citing a lack of “exclusive control” for the absence of curtilage may also be an allusion to the

40. *Id.*

41. 127 A.3d 627 (Md. Ct. Spec. App. 2015). *Lindsey* involved a warrant obtained after a positive alert from a K-9 drug dog in front of the defendant’s apartment door. *Id.* at 631.

42. *Id.* at 642 (“Although the area outside of appellant’s door was in close proximity to the apartment, appellant has not demonstrated that the circumstances before us satisfy the factors outlined in *Dunn*.”).

43. *Id.* at 643.

44. *Id.*

45. *See id.*

46. *Id.*

47. *Id.* (“Both [the third and fourth *Dunn*] factors suggest that curtilage . . . is within an area where the individual maintains some form of *exclusive control*.”).

language within *Jardines*, referring to the porch in question as “belonging to Jardines”⁴⁸ and “Jardines’s property.”⁴⁹

Such was the case in *United States v. Bain*.⁵⁰ Unlike *Lindsey*, the *Bain* court found that “several of the *Dunn* factors favor finding that the area surrounding the door” to an apartment “falls within the curtilage of the home.”⁵¹ Nevertheless, *Bain* also focused upon the concept of exclusive control, citing First Circuit precedent that, “[i]n 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*.”⁵² Because the area beyond the apartment door was open to other tenants, guests, and the landlord, the “threshold of the door . . . cannot be classified as a ‘separate area[] subject to [the tenant’s] exclusive control.’”⁵³

The dissenting opinion in *People v. Burns*⁵⁴ also relied upon the concept of exclusive control in objecting to the majority’s finding that an apartment landing constituted curtilage.⁵⁵ In addition to arguing that the *Dunn* factors militated against a finding that the apartment landing was curtilage,⁵⁶ the dissent found conclusive the fact that, “[u]nlike in *Jardines*, the area in question here did not belong to defendant, nor did she have exclusive control over it, and there was no

48. Florida v. Jardines, 133 S. Ct. 1409, 1414 (2013).

49. *Id.* at 1417.

50. 155 F. Supp. 3d 107 (D. Mass. 2015).

51. *Id.* at 119. Specifically, the court noted that the area was “in immediate proximity to the home, as close to the home as the front porch in *Jardines*,” and was in the larger enclosure of the locked building. *Id.* Unlike *Lindsey*, the *Bain* court found that pictures of the apartment landing just outside the door, which “depict[ed] items such as a set of drawers, a mat, shoes, and a decorative wreath,” indicated that the tenants “might have used this area as an extension of the home similar to a front porch.” *Id.* at 114 n.3, 120. Lastly, in contrast again to *Lindsey*, the *Bain* decision found the locking of the apartment building’s external doors to show “residents took steps to protect the area from the general public.” *Id.* at 120.

52. *Id.* at 120 (quoting *United States v. Cruz Pagan*, 537 F.2d 554, 558 (1st Cir. 1976)).

53. *Id.* (quoting *Cruz Pagan*, 537 F.2d at 558).

54. 50 N.E.3d 610 (Ill. 2016).

55. *Id.* at 636 (Thomas, J., dissenting). *Burns* involved an unwarranted drug dog sniff of a third-floor landing and apartment door. *Id.* at 614.

56. *Id.* at 639 (Thomas, J., dissenting) (“In any event, I disagree with the majority’s application of the *Dunn* factors and would reach the exact opposite conclusion, finding that all four factors weigh in favor of finding that the common landing area was not curtilage.”). The dissent also noted “the United States Supreme Court has never used the *Dunn* factors to find that an area not belonging to defendant’s home can be his curtilage.” *Id.*

trespass [by the police or K-9 drug dog] as far as defendant was concerned.”⁵⁷ Finally, the dissenting opinion in *State v. Rendon*,⁵⁸ unlike the majority opinion, cited the *Dunn* factors to argue against a finding that the area in front of an apartment door was curtilage.⁵⁹ The dissent found that only the proximity factor of *Dunn* indicated a finding of curtilage, while the defendant’s use of the space,⁶⁰ the openness of the walkway to public view⁶¹ and lack of enclosure⁶² weighed strongly against such a finding.

As evidenced by the analysis from several jurisdictions, courts have looked to the *Dunn* factors, both in the plain language of the text and the inferred reference to exclusive control, to argue against the concept of curtilage within multiunit dwellings.

Though much rarer, there are instances in which the *Dunn* factors have led to a finding of curtilage in a multiunit context. In determining whether a condominium owner’s private front porch was considered curtilage, the District of New Mexico applied the *Dunn* factors, finding that “[t]he porch is attached to his home; it is recessed and visually distinguishable from the public area of the condominium complex; and it houses furniture, which Defendant uses for normal activities of daily living, such as dining.”⁶³ Several courts have also found the *Dunn* factors support a finding of curtilage in some instances of apartment

57. *Id.* at 637.

58. 477 S.W.3d 805 (Tex. Crim. App. 2015).

59. *Id.* at 818 (Yeary, J., dissenting). *Rendon* involved a drug dog sniff of the upstairs hallway of a four-unit apartment building. *Id.* at 806–07.

60. *Id.* at 818 (finding that defendant, unlike his neighbors, did not utilize the walkways for “some limited measure of domestic intimacy (if not exactly privacy)”).

61. *Id.* (“The walkway remained fully available to public view and public access . . . [and] the fact that it led only to Appellee’s threshold does not establish the degree of intimate use and privacy necessary to equate it with the home.”).

62. *See id.* at 818 (“There was no enclosure surrounding Appellee’s front door. It was open for any passerby directly to see, and Appellee took no steps (nor is there any showing that, by the terms of his lease, he would have been permitted to take steps) to obscure the public view.”). Unlike the majority decision in *United States v. Bain*, 155 F. Supp. 3d 107 (D. Mass. 2015), which found the space in front of an apartment door to be “enclosed” by the larger apartment building, the *Rendon* dissent argued that such a space was not within any enclosure that would satisfy the *Dunn* factors.

63. *United States v. Soza*, 162 F. Supp. 3d 1137, 1150 (D.N.M. 2016). The finding of curtilage in this case may be narrow, however, because the court noted that the evidence “indicate[d] that the Defendant’s porch is more like a porch to a single family dwelling, which would typically be considered curtilage, than the common hallway of an apartment complex, which would not.” *Id.*

common areas. In *Burns*, the Illinois Supreme Court majority decision found a third-floor apartment landing to be curtilage.⁶⁴ In doing so, the court remarked that the landing, which allowed access to two apartments, satisfied the *Dunn* factors because it was in an area located within a locked structure, unobservable by and intended to exclude the general public, located directly outside of defendant's apartment door, and limited in use to the defendant and the tenant of the one other apartment on the landing.⁶⁵ In finding an apartment hallway to be curtilage, an Indiana Court of Appeals remarked, "Simply because one lives in an apartment does not mean that he or she does not at times occupy the space immediately outside of the apartment home."⁶⁶ Finally, the Eighth Circuit had previously applied the *Dunn* factors to the question of whether the portion of a wall immediately below the exterior window of a townhouse was curtilage.⁶⁷ In finding the location to be curtilage, the court noted that the area was in close proximity to the apartment, was used by the defendant for grilling, and was partially screened by a bush.⁶⁸

Not every court, however, has cited the *Dunn* factors in a finding of curtilage. As mentioned previously, the majority opinion in *Rendon* did not use the factors in concluding that a dog sniff occurred at "the threshold of appellee's apartment-home and thus was *clearly* included within the physical-intrusion theory of *Jardines*."⁶⁹ Mirroring the

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64. *People v. Burns*, 50 N.E.3d 610, 621 (Ill. 2016).
65. *Id.* at 620–21 ("The landing is a clearly marked area within a locked building with limited use and restricted access, 'familiar enough that it is 'easily understood from our daily experience.'"' (quoting *Florida v. Jardines*, 133 S. Ct. 1409, 1415 (2013))).
66. *Robertson v. State*, 740 N.E.2d 574, 576 (Ind. Ct. App. 2000), *vacated on other grounds*, 765 N.E.2d 138 (Ind. 2002) (holding that the at-issue statute's definition of dwelling did not include curtilage). In supporting its conclusion, the Indiana Court of Appeals noted that apartment dwellers "often hang decorations on outside doors and place doormats on the ground outside the door," and "place and keep personal items on their steps or porches." *Robertson*, 740 N.E.2d at 576.
67. *United States v. Burston*, 806 F.3d 1123 (8th Cir. 2015). *Burston* considered a dog sniff in the same apartment complex at issue in *Hopkins*, conducted by the very same officer and K-9 team. See *United States v. Hopkins*, 824 F.3d 726, 731 (8th Cir. 2016) ("In *Burston*, Officer Fear led Marco around the exterior walls of a different building at the Cambridge Townhomes.").
68. *Burston*, 806 F.3d at 1127 ("Consideration of the first, third, and fourth *Dunn* factors outweighs the one *Dunn* factor that arguably militates against finding the area to be part of the home's curtilage, i.e., the area was not surrounded by an enclosure.").
69. *State v. Rendon*, 477 S.W.3d 805, 808 (Tex. Crim. App. 2015) (emphasis added).

majority decision in *Jardines*, the *Rendon* court avoided the *Dunn* factors by alluding to the ease by which the question could be resolved.⁷⁰

The *Hopkins* court joined those courts finding curtilage within a multiunit dwelling by citing to the *Dunn* factors.⁷¹ The court found that proximity of the area in front of the townhouse door indicated curtilage, as did the residents' use of the space.⁷² The court, however, noted that the lack of an enclosure around the door and its openness to observation weighed against a finding of curtilage.⁷³ Nevertheless, despite the divided analysis, the court concluded that "the combination of *Dunn* factors supports a finding of curtilage."⁷⁴ The *Hopkins* holding was narrower, however, than *Burns* because of the unique facts of the case. The townhouse homes within *Hopkins* had exterior entrances with a stone slab that only Hopkins and his guests would encounter.⁷⁵ There was no interior common hallway as found within an apartment building.⁷⁶ Because of this, *Hopkins* may be less far-reaching in its impact than *Whitaker*.⁷⁷

B. If Information Was Obtained by the Drug Dog Sniff Within a Constitutionally Protected Area, Was the Officer Given Leave, Explicitly or Implicitly, to Do So?

If the warrantless drug sniff conducted by the K-9 team was conducted within a constitutionally protected area, such as curtilage, the next step in determining whether it constituted a search under the Fourth Amendment is to ascertain whether the officer was given license

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70. *Id.* at 810 ("[W]e conclude that application of the property-rights baseline renders the present case a straightforward one.").
71. *United States v. Hopkins*, 824 F.3d 726, 731 (8th Cir. 2016) ("We examine four factors in particular" (citing *United States v. Dunn*, 480 U.S. 294, 301 (1987))).
72. *Hopkins*, 824 F.3d at 732 ("[T]he areas next to the doors of these apartments and along the walls are used for grilling and storing bicycles.").
73. *Id.* ("[T]he front of the door was not enclosed by a fence or wall and was not protected from observation by visitors (though neither was the front porch in *Jardines*)." (citation omitted)).
74. *Id.* The court also noted that "[d]aily experience' also suggests that the area immediately in front of the door of the apartments in this complex is curtilage." *Id.* (citing *Florida v. Jardines*, 133 S. Ct. 1409, 1415).
75. *Id.* ("Hopkins' door faced outside, and the walkway leading up to it was 'common' only to Hopkins and his immediate neighbor. Even his neighbor would not pass within 6 to 8 inches of Hopkins' door when going to his own.").
76. *Id.* ("In our case, however, there is no 'common hallway' which all residents or guests must use to reach their units.").
77. *See infra* Part II.

to do so.⁷⁸ The license may be explicit, by way of consent, or it may be implied either in a narrow⁷⁹ or broader⁸⁰ sense. If an officer avails himself of an implied license by walking up to the door of the dwelling, he “must confine himself to the prescribed route, rather than treating the invitation as one to roam the property at will, peering into the windows of the home.”⁸¹ *Jardines* upheld the idea that a police officer may approach the door to engage a resident in discussion,⁸² however, the majority decision noted that “there is no customary invitation” to “introduc[e] a trained police dog to explore the area around the home in hopes of discovering incriminating evidence.”⁸³ *Jardines* introduced the analysis of an officer’s subjective intent in determining whether he had exceeded the implied license.⁸⁴ However, because the *Jardines*

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78. *Jardines*, 133 S. Ct. at 1415 (“Since the officers’ investigation took place in a constitutionally protected area, we turn to the question of whether it was accomplished through an unlicensed physical intrusion.”).
79. See Leonetti, *supra* note 7, at 305 (observing that courts may often use the idea of implied invitation “in the narrow sense that, by putting garbage in the place of regular collection, even if upon the curtilage, a resident has extended an implied invitation to the collectors to come get it, so that the police may also avail themselves of that invitation”).
80. See *id.* (observing that courts may also use the idea of implied invitation “in the broader sense that, merely by having a driveway, front walk, porch, etc., a resident has impliedly invited all business and social visitors to approach the home”).
81. *United States v. Redmon*, 138 F.3d 1109, 1130 (7th Cir. 1998).
82. *Jardines*, 133 S. Ct. at 1416 (“Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is ‘no more than any private citizen might do.’” (quoting *Kentucky v. King*, 563 U.S. 452, 469 (2011))); see also *United States v. Carloss*, 818 F.3d 988, 993 (10th Cir. 2016) (“*Jardines* left our preexisting knock-and-talk precedent undisturbed.”). The “knock and talk” exception, after *Jardines*, also “depends at least in part on an officer’s subjective intent” and must ordinarily conform to “normal waking hours” unless there is evidence indicating a subject “generally accepted visitors” at a late hour. *United States v. Lundin*, 817 F.3d 1151, 1159–60 (9th Cir. 2016).
83. *Jardines*, 133 S. Ct. at 1416 (“An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker.”).
84. *Id.* (“The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose Here, the background social norms that invite a visitor to the front door do not invite him to conduct a search.”). *Jardines*’s factoring in of the officer’s subjective intent goes against “nearly forty years of case law,” but a thorough examination of the ramifications of that choice is beyond the scope of this Comment. George M. Dery III, *Failing to Keep “Easy Cases Easy”*: *Florida v. Jardines Refuses to Reconcile Inconsistencies in Fourth Amendment Privacy Law by Instead Focusing on Physical Trespass*, 47 LOY. L.A. L. REV. 451, 476 (2014). Dery notes that questions of an officer’s intent arguably could be “perfectly proper areas of inquiry, but they directly conflict with the prohibition against

majority was unusually clear in stating that using a drug dog to sniff the area around a door's threshold violates the "background social norms that invite a visitor to the front door,"⁸⁵ lower courts that have found a K-9 drug sniff was conducted in constitutionally protected curtilage have similarly found that such a sniff exceeded any implied license.⁸⁶

This was the outcome in *Hopkins* once it was determined the dog had sniffed from within constitutionally protected curtilage in front of the apartment door.⁸⁷ The Eighth Circuit noted that "[t]he walkway in this case created an implied invitation for a visitor to go up and knock on one or both of the two doors, but not for an officer to approach with a trained police dog within inches of either of the doors 'in hopes of discovering incriminating evidence.'"⁸⁸ *Hopkins*, by finding a dog sniff was conducted from curtilage in excess of any implied license, represents the highest appellate expansion of the *Jardines* majority's

subjectivity that the Court has imposed on Fourth Amendment litigation." *Id.*

85. *Jardines*, 133 S. Ct. at 1416.

86. *See, e.g.*, *United States v. Burston*, 806 F.3d 1123, 1127 (8th Cir. 2015) ("[E]ven absent the intent to search . . . police officers would not have an implicit license to stand six to ten inches from the window in front of Burston's apartment."); *People v. Burns*, 50 N.E.3d 610, 622 (Ill. 2016) ("In contrast to *Jardines*, the police conduct in this case certainly exceeded the scope of the license to approach defendant's apartment door when the officers entered a locked building in the middle of the night and they remained in the building for more than 'a very short period of time,' even taking time to have the drug-detection dog conduct an open-air sweep of other apartment doors in the building, for some unknown reason." (quoting *Jardines*, 133 S. Ct. at 1423)); *State v. Rendon*, 477 S.W.3d 805, 810 (Tex. Crim. App. 2015) ("The officers' presence at that location was for the express purpose of conducting a search for illegal narcotics, which exceeded the scope of any express or implied license that is generally limited to knocking on someone's door."); *Jackson v. State*, No. 14-15-00244-CR, 2016 WL 2605784, at *6 (Tex. Ct. App. May 5, 2016) (holding that the use of a drug dog to sniff the front door of an apartment "is indistinguishable from the way that officers deployed the narcotics-detection dog in *Rendon* . . . [and] was a warrantless search in violation of the Fourth Amendment"). *Cf.*, *United States v. Iverson*, No. 14-CR-197, 2016 WL 736451, at *6 (W.D.N.Y. Feb. 25, 2016) (allowing evidence where officers had no intention of searching for narcotics and where "a canine, present in an apartment only as part of a search for a possible armed robber reported by the apartment's inhabitant, alerted for narcotics without an order to search for narcotics and while restrained on a four-foot leash near the entrance to the apartment").

87. *United States v. Hopkins*, 824 F.3d 726, 732 (8th Cir. 2016) ("We further conclude that Officer Fear had no license to have Marco enter the curtilage and sniff the door.").

88. *Id.* (citation omitted) (quoting *Jardines*, 133 S. Ct. at 1416).

“constitutionally protected area” safeguards to the front doors of multiunit dwellings.

II. *UNITED STATES V. WHITAKER*: EXPANDING *JARDINES* PROTECTIONS THROUGH JUSTICE KAGAN’S REASONABLE EXPECTATION OF PRIVACY ANALYSIS

In *United States v. Whitaker*,⁸⁹ the Seventh Circuit reached an outcome similar to *Hopkins*—an unconstitutional dog sniff in front of an apartment door—but not through the *Jardines* majority’s constitutionally-protected area analysis. Instead, the *Whitaker* court arrived at the conclusion through Justice Kagan’s concurring opinion in *Jardines*,⁹⁰ in which she argued that the dog sniff of *Jardines*’s door was a violation of his reasonable expectation of privacy under both *Katz*⁹¹ and *Kyllo*.⁹² Kagan, maintaining that *Kyllo* had already resolved this question,⁹³ noted that the police officers in *Jardines* “conducted a search because they used a ‘device . . . not in general public use’ (a trained drug-detection dog) to ‘explore the details of the home’ (the presence of certain substances) that they would not otherwise have discovered without entering the premises.”⁹⁴ *Whitaker* evaluated the legality of a dog sniff of an apartment door, not through a curtilage-based approach, but by invoking Kagan’s *Kyllo*-based concurrence.

On January 7, 2014, a Dane County Sheriff’s Deputy and his drug sniffing K-9 partner, Hunter, arrived at an apartment building in Madison, Wisconsin.⁹⁵ The dog alerted in front of *Whitaker*’s apartment and, after obtaining a warrant, the deputies arrested *Whitaker* for possession of cocaine, heroin, and marijuana.⁹⁶ *Whitaker*’s motion

89. 820 F.3d 849 (7th Cir. 2016).

90. *Jardines*, 133 S. Ct. at 1418 (Kagan, J., concurring).

91. *Katz v. United States*, 389 U.S. 347 (1967).

92. *Kyllo v. United States*, 533 U.S. 27 (2001).

93. *Kyllo*, holding that a thermal-imaging device used to detect heat emanating from a private home was an unconstitutional search, devised the rule that where “the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.” *Id.* at 40.

94. *Jardines*, 133 S. Ct. at 1419 (Kagan, J., concurring).

95. *Whitaker*, 820 F.3d at 851.

96. *Id.* *Whitaker* also was charged with weapons possession, but he “told officers about [the] handgun” and there is no indication that the K-9 sniff revealed the weapon. *Id.*

to suppress was denied by the district court,⁹⁷ and he appealed on the basis that he had an expectation of privacy in the apartment building's common hallway.⁹⁸

Whitaker's assertion of an expectation of privacy to the area in front of his door was not a strongly supported claim—in fact, “the great weight of authority is contrary to an assertion by a resident of a multi-unit dwelling that he has an expectation of privacy in a common area of that dwelling.”⁹⁹ In those cases that did find an unconstitutional dog sniff search based on a finding of curtilage, none simultaneously found a violation of the reasonable expectation of privacy.¹⁰⁰ Despite the

97. The district court adopted the Report and Recommendation of the Magistrate Judge recommending that Whitaker's motions be denied. *Id.* at 851–52.

98. *Id.* at 852.

99. Chase, *supra* note 13, at 1309. Chase notes that, as of publication in 2015, the Second, Third, Sixth, Seventh, Eighth, and Ninth Circuits “have each held that a tenant in a multi-unit dwelling has no reasonable expectation of privacy in a common hallway.” *Id.* at 1308 (collecting cases); *see also* Lindsey v. State, 127 A.3d 627, 644 (Md. App. 2015) (“[B]ecause the area outside of appellant's door was within a common area, he did not have a reasonable expectation of privacy in the same.”); State v. Craig, No. A12–2217, 2014 WL 3557885, at *4 (Minn. Ct. App. July 21, 2014) (“Our caselaw holds that residents of a multi-occupancy building do not have a reasonable expectation of privacy in common areas of the building.”); United States v. Bain, 155 F. Supp. 3d 107, 117 (D. Mass. 2015) (“[T]he court concludes that Bain has not demonstrated that he had a reasonable expectation of privacy in the areas traversed by the officers in this case.”). There are some outlying examples. *E.g.*, United States v. Fluker, 543 F.2d 709, 716 (9th Cir. 1976) (recognizing a reasonable expectation of privacy in the hallway in the corridor separating the defendant's door from the outer door of the apartment building). But these holdings were often undercut within their own circuits. *See* United States v. Nohara, 3 F.3d 1239, 1241–42 (9th Cir. 1993) (rejecting the idea of a tenant's reasonable expectation of privacy in the hallway of an apartment building).

100. United States v. Hopkins, 824 F.3d 726, 732 (8th Cir. 2016) (“[W]e need not rely on *Katz* . . . to decide our case because Marco's presence on the curtilage of Hopkins' unit may be analyzed under *Jardines*”); United States v. Burston, 806 F.3d 1123, 1126 n.4 (8th Cir. 2015) (declining to address whether Burston's reasonable expectation of privacy was violated and noting that “[t]he decision [in *Jardines*] was based on the violation of the defendant's property, not privacy, rights”); People v. Burns, 50 N.E.3d 610, 622 (Ill. 2016) (“Our application of *Jardines*, however, makes it unnecessary to address the merits of whether use of the drug-detection dog violated defendant's reasonable expectation of privacy.”). The majority opinion in *Rendon* also did not address whether the apartment owner had an expectation of privacy outside his apartment door. State v. Rendon, 477 S.W.3d 805, 811 (Tex. Crim. App. 2015) (“As was the case in *Jardines*, given our conclusion that the officers physically intruded into the curtilage of appellee's home for the purpose of gathering evidence, we need not decide whether the officers' conduct in this case also violated his expectation of privacy”). The

weight of case law pointing to the lack of any expectation of privacy in the space in front of apartment doors, the Seventh Circuit sided with Whitaker, holding that “the use of a drug-sniffing dog here clearly invaded reasonable privacy expectations”¹⁰¹

The court grounded its reasoning in the Kagan concurrence of *Jardines* as well as *Kyllo*. A dog search, the court noted, “conducted from an apartment hallway comes within” the realm of *Kyllo*’s rule.¹⁰² The K-9 unit in this case was “a sophisticated sensing device not available to the general public” and “detected something (the presence of drugs) that otherwise would have been unknowable without entering the apartment.”¹⁰³

In deciding as much, the Seventh Circuit overruled its prior precedent holding that “a tenant has no reasonable expectation of privacy in the common areas of an apartment building,” including “[t]he area outside one’s door.”¹⁰⁴ The *Whitaker* court acknowledged that a tenant does “not have a reasonable expectation of *complete* privacy in his apartment hallway.”¹⁰⁵ The court instead suggested that apartment tenants have an intermediate degree of privacy somewhere between complete secrecy and the absence of any privacy.¹⁰⁶ It went on to explain that “Whitaker’s lack of a reasonable expectation of complete privacy in the hallway does not also mean that he had no reasonable

concurring opinion, however, while noting that “it is not necessary to decide today whether the officers violated Rendon’s expectation of privacy under *Katz*,” still “[wrote] separately to call attention to Justice Kagan’s” concurrence from *Jardines*. *Id.* at 813 (Richardson, J., concurring).

101. *Whitaker*, 820 F.3d at 852.

102. *Id.* at 853.

103. *Id.* (first citing *Kyllo v. United States*, 533 U.S. 27, 35–36, 40 (2001); and then citing *Florida v. Jardines*, 133 S. Ct. 1409, 1418–19 (2013) (Kagan, J., concurring)).

104. *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991).

105. *Whitaker*, 820 F.3d at 853 (emphasis added).

106. *Id.* “Reasonable expectation of complete privacy” is a phrase that rarely appears in case law. In those instances in which it appears, it generally denotes a degree of privacy between that of complete openness to the public and utmost secrecy. *See, e.g.*, *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 817 (9th Cir. 2002) (“The California Supreme Court held that given that the workplace where this conversation took place was not generally open to the public, the plaintiff could have a reasonable expectation of privacy against a television reporter’s covert videotaping of the conversation even though the plaintiff lacked a reasonable expectation of complete privacy because he was visible and audible to other coworkers.”); *Liebeskind v. Rutgers Univ.*, No. A-0544-12T1, 2014 WL 7662032, at *8 (N.J. Super. Ct. App. Div., Jan. 22, 2015) (“[Because] Rutgers had the right to examine materials stored on workplace computers for improprieties[,] . . . plaintiff had no reasonable expectation of complete privacy.”).

expectation of privacy against persons in the hallway snooping into his apartment using sensitive devices not available to the general public.”¹⁰⁷ The court acknowledged the point relied upon by other jurisdictions to find an absence of curtilage—namely that a tenant has no right to exclude everyone from the hallway.¹⁰⁸ However, the court found that tenants have a right to “expect certain norms of behavior in [their] apartment hallway” that do not include “park[ing] a sophisticated drug-sniffing dog outside an apartment door, at least [not] without a warrant.”¹⁰⁹ This creation of an intermediate level of privacy protection by the *Whitaker* court is an important break from prior precedent and extends a “reasonable expectation of privacy” to residents of multiunit dwellings, at least as far as the hallway space immediately in front of a door.¹¹⁰

III. POST-*WHITAKER* AND *HOPKINS*: IMPLICATIONS AND ONGOING QUESTIONS

A. *Addressing the Economic and Racial Inequities Stemming from Jardines*

The *Jardines* majority’s reliance upon the conception of curtilage and the absence of case law recognizing the existence of curtilage in an

107. *Whitaker*, 820 F.3d at 853.

108. *Id.*

109. *Id.* at 853–54. The court, in providing other examples, explained that a “police officer might lawfully walk by and hear loud voices from inside an apartment[, but this] does not mean he could put a stethoscope to the door to listen to all that is happening inside.” *Id.* at 853. With that language in mind, a police officer walking by and smelling narcotics without the aid of a drug sniffing dog would not be conducting a search and would still have a lawful basis for obtaining a warrant. This is alluded to as well by the *Burns* dissenting opinion, which opined that “apartment doors that open to common areas of multiunit apartment building have less home-shielding protection by nature[,] . . . [resulting in] [o]dors, sounds, and activities [that] may be detected from the vantage point of the common areas of the apartment building where others may not be excluded.” *People v. Burns*, 50 N.E.3d 610, 641 (Ill. 2016) (Thomas, J., dissenting).

110. In the same term, the Seventh Circuit held that an apartment tenant did not have a reasonable expectation of privacy in an apartment basement space. *See United States v. Sweeney*, 821 F.3d 893, 902–03 (7th Cir. 2016) (“Here, where the basement space was shared by all of the tenants of the apartment building, there was no individualized storage space and no door or locked entry to the basement itself, it was not objectively reasonable that the space would be assumed private. . . . [There is] no similar danger of intrusion into the protected privacy of an apartment interior.” (citation omitted) (internal quotation marks omitted)).

urban context¹¹¹ led many critics to wonder whether *Jardines* would usher in growing inequity in Fourth Amendment protections. Carol Chase went so far as to claim that, under the *Jardines* majority's curtilage conception, "the Fourth Amendment may now be deemed to provide greater protection against the use of drug-detection dogs to dwellers of single-family dwellings than it does for those living in multi-unit dwellings."¹¹² While Chase acknowledged the argument that "living in close proximity to others provides less privacy in general than residing in a more isolated setting," she countered that "it is hard to imagine that those drafting the Fourth Amendment would have countenanced this type of unequal application of the protections which they found sufficiently important to guarantee by constitutional amendment."¹¹³

The potential rural-urban division created by the uneven application of *Jardines's* curtilage could not only lead to economic inequity,¹¹⁴ but racial unfairness as well.¹¹⁵ In terms of homeownership,

111. See Leonetti, *supra* note 7, at 303 ("[L]eading Supreme Court cases delineating the modern scope of the curtilage doctrine . . . largely leave unanswered the questions of whether curtilage exists in these urban contexts, and if so, what the scope of urban curtilage is."); see also Roth, *supra* note 14, at 558 ("[T]he lower courts' near unanimous conclusions have been that neither property law nor privacy rights protect residents living in multi-unit dwellings from dog sniff searches targeting their home but conducted from hallways or common areas.").

112. Chase, *supra* note 13, at 1311; see also Roth, *supra* note 14, at 553 ("Consequently, the *Jardines* decision threatens to diminish Fourth Amendment protections for those citizens who do not live in single-family detached houses.").

113. Chase, *supra* note 13, at 1311; see also State v. Craig, No. A12-2217, 2014 WL 3557885, at *4 (Minn. Ct. App. July 21, 2014) (finding residents of a multifamily residence have a diminished expectation of privacy "because common areas are 'not subject to the exclusive control of one tenant and [are] utilized by the tenants generally and the numerous visitors attracted to a multiple-occupancy building'" (quoting State v. Milton, 821 N.W.2d 789, 799 (Minn. 2012))).

114. Chase, *supra* note 13, at 1311 ("It becomes particularly disturbing once it is recognized that in many settings those who reside in multi-unit dwellings are financially less well-off than their neighbors in single-family residences."). For the second quarter of 2016, 77.8% of households with family income greater than or equal to the median family income owned a home, while only 48.0% of households with family income below the median family income owned a home. See *Residential Vacancies and Homeownership in the Second Quarter 2016*, U.S. CENSUS BUREAU 10 (July 28, 2016, 10:00 AM), <http://www.census.gov/housing/hvs/files/currenthvspress.pdf> [<https://perma.cc/7C6V-MBBA>].

115. For the second quarter of 2016, the non-Hispanic-white rate of home ownership was 71.5%, while the rate of black and Hispanic homeowners was 41.7%

there are far fewer non-white homeowners, and “minority households have gained no ground in recent years.”¹¹⁶ The possible racial and economic imbalances created by *Jardines* are alarming considering that the degree of Fourth Amendment protection could vary significantly based on whether a resident’s home was free-standing or physically connected to other dwellings.

The Seventh Circuit was acutely aware of the possible economic and racial implications of *Jardines* when deciding *Whitaker*. In justifying its finding that an apartment tenant has a reasonable expectation of privacy in the space outside the front door, the court noted that “a strict apartment versus single-family house distinction is troubling because it would apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity.”¹¹⁷ *Hopkins* avoided any such acknowledgement of broader social-equity concerns and took pains to narrow its opinion to the particular circumstances of the case rather than expanding a finding of curtilage to all apartment thresholds.¹¹⁸ The *Burns* concurrence, as well, identified the apartment-door threshold as curtilage,¹¹⁹ a finding the dissent suspected was motivated by “an egalitarian concern for creating privacy rights on par with the occupants of single-family homes regardless of the significant legal

and 45.1% respectively. See *Residential Vacancies and Homeownership in the Second Quarter 2016*, *supra* note 114, at 9.

116. Lisa Prevost, *Gap Persists in Homeownership: Low-Income and Minority Households Far Behind in Homeownership*, N.Y. TIMES (Feb. 6, 2015), http://www.nytimes.com/2015/02/08/realestate/low-income-and-minority-households-far-behind-in-homeownership.html?_r=0 [<https://perma.cc/T6LJ-SJYY>].
117. *United States v. Whitaker*, 820 F.3d 849, 854 (7th Cir. 2016) (stating that 67.8% of households composed solely of whites live in one-unit detached houses, while the percentage for black and Hispanic households was 47.2% and 52.1% respectively, based on the data available through *American Housing Survey - Table Creator*, U.S. CENSUS BUREAU, <http://sasweb.ssd.census.gov/ahs/ahstablecreator.html> [<https://perma.cc/2KG4-DCM9>] (last visited Oct. 4, 2016)).
118. *United States v. Hopkins*, 824 F.3d 726, 731–33 (8th Cir. 2016) (distinguishing its curtilage-based holding from other cases that relied on an expectation-of-privacy analysis and where there was a common hallway that all residents or guests used); see also *United States v. Brooks*, 645 F.3d 971, 975 (8th Cir. 2011) (agreeing with the district court that the backyard of tenant’s house was not curtilage); *United States v. Scott*, 610 F.3d 1009, 1016 (8th Cir. 2010) (“In similar circumstances, we have upheld the use of a drug dog to sniff the door of a hotel room from the hotel’s corridor.”); *United States v. Roby*, 122 F.3d 1120, 1125 (8th Cir. 1997) (holding that Roby had a reasonable expectation of privacy in his hotel room, but not in the hotel corridor outside the room).
119. *People v. Burns*, 50 N.E.3d 610, 635 (Ill. 2016) (Garman, C.J., concurring).

differences between the two situations.”¹²⁰ While it is true that there are real differences in the relative privacy an apartment dweller can expect, it is striking that their Fourth Amendment protection from government interference may differ so drastically from citizens in single-family detached homes—especially when, “[i]n every relevant sense,” an apartment’s “front door and landing appear indistinct from Jardines’s front door and porch.”¹²¹ The *Whitaker* opinion is evidence that courts are cognizant of the equal protection concerns voiced by critics of *Jardines*.¹²²

B. How Far Do Whitaker and Hopkins Reach (and Where Do They Go)?

Whitaker and *Hopkins* both affected multiunit-building residents, but it is unclear how far the impact of these decisions will reach.¹²³ As previously mentioned, the *Hopkins* majority narrowed the scope of the decision to the particular facts of the apartment complex in question.¹²⁴ It remains to be seen whether the Eighth Circuit will extend its finding of curtilage to traditional apartment buildings where tenants’ doors open into interior hallways. The Seventh Circuit’s finding of an apartment dweller’s reasonable expectation of privacy in the interior corridor just outside the threshold of his door ensures that, relative to *Hopkins*, the *Whitaker* decision will have a more significant impact within its jurisdiction.

Do the decisions extend beyond the reach of apartment complexes to other lodging arrangements?¹²⁵ Because the *Hopkins* holding is

120. *Id.* at 640 (Thomas, J., dissenting).

121. *Id.* at 635 (Garman, C.J., concurring).

122. *See, e.g.*, Chase, *supra* note 13, at 1311 (noting that the potentially lesser protection afforded multiunit dwellers under the Fourth Amendment is not “something that should be acceptable in a country founded upon the principle that ‘all men are created equal’” (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776))).

123. Though individual circumstances may vary based on the characteristics of the apartment building, there are over 2.5 million apartment dwellers in the Seventh Circuit. *See Quick Facts: Resident Demographics*, NAT’L MULTIFAMILY HOUS. COUNCIL, <http://www.nmhc.org/Content.aspx?id=4708> [<https://perma.cc/MW3R-N3JR>] (last updated Sept. 2015). Because the *Hopkins* holding was narrower, it is unlikely that the jurisdiction’s lower courts would find curtilage outside the front door of the majority of the Eighth Circuit’s 1.84 million apartment dwellers. *See id.*

124. *United States v. Hopkins*, 824 F.3d 726, 732 (8th Cir. 2016) (“In our case . . . there is no ‘common hallway’ which all residents or guests must use to reach their units[,] . . . [and] Hopkins’ door faced outside.”).

125. At least one court has extended protections to the hallways of rooming houses, which, unlike apartment buildings, do not have self-contained units with bedrooms, kitchens, and bathrooms. *See Logan v. Commonwealth*, 616 S.E.2d 744, 749 (Va. Ct. App. 2005) (“[I]t is not any inherent nature of a hallway that controls, but rather what the hallway links (i.e., individual self-contained

narrow, the protections at present may be limited to apartment complexes with direct exterior exits.¹²⁶ Because *Whitaker* specifically warned that “[d]istinguishing *Jardines* based on the differences between the front porch of a stand-alone house and the closed hallways of an apartment building draws arbitrary lines,” not only does the decision extend to every apartment complex, but likely includes other types of housing with similar floorplans and spatial characteristics.¹²⁷ Despite a vast number of holdings to the contrary, the *Whitaker* decision could

living units versus shared traditional living areas.” (quoting *State v. Titus*, 707 So. 2d 706, 711 (Fla. 1998))). The principle in *Logan* could conceivably be applied to “communal living” developments, which have recently taken the form of millennial villages, micro-units, and adult dormitories. *See, e.g.*, Dante Ramos, *It Takes a ‘Millennial’ Village to Get Cheap Housing in Boston*, BOSTON GLOBE (Mar. 24, 2015), <https://www.bostonglobe.com/opinion/2015/03/24/takes-millennial-village-get-cheap-housing-boston/Auwnx4NvrXtH8NJsU4BRxH/story.html> [<https://perma.cc/7RMW-TNFF>] (reporting on “millennial village” buildings where “younger workers can live in close quarters and share living space[s]” such as a kitchen and living room); Alana Semuels, *Dorms for Grownups: A Solution for Lonely Millennials?*, THE ATLANTIC (Nov. 6, 2015), <http://www.theatlantic.com/business/archive/2015/11/coliving/414531/> [<https://perma.cc/K4KM-G2PD>] (documenting a recent construction space with twenty-one micro-units which have an individual “tiny kitchen” and bathroom, but share “a chef’s kitchen, a game room, and a TV room”); Scott Van Voorhis, *Micro-Units Pop Up in Boston, Fetch High Prices*, RealEstate (Nov. 26, 2014, 10:19 AM), <http://realestate.boston.com/news/2014/11/26/micro-units-pop-up-in-boston-fetch-high-prices/> [<https://perma.cc/75ZC-BVXX>] (describing “tiny new apartments” around 400 square feet with “common space”).

126. Though not as expansive as *Whitaker*, the *Hopkins* decision could reach a large number of apartments and townhomes that have exterior entrances not along a common corridor or walkway. In addition, single-story apartments have grown in popularity and have an exterior entrance and walkway as well as a separately accessed rear patio. *See, e.g.*, REDWOOD APARTMENT HOMES, <http://www.byredwood.com/> [<https://perma.cc/V24F-WV56>] (last visited Sept. 8, 2016) (“No one lives above or below you[.]”).

127. *United States v. Whitaker*, 820 F.3d 849, 854 (7th Cir. 2016). Because the court remarks upon the futility of distinguishing *Jardines*’s protections for split-level duplexes, garden apartments, and houses that have been converted to apartments, the language indicates the court intended its ruling to have wider effect beyond traditional apartment buildings. *Id.*

also be applied to the area just outside the doors of hotels,¹²⁸ motels,¹²⁹ and condominiums,¹³⁰ though likely not to parking areas.¹³¹

C. Do Whitaker and Hopkins Conflict with Caballes and Place?

Perhaps the biggest obstacle blocking a complete embrace of the *Whitaker* and *Hopkins* holdings is reconciling those decisions with the Supreme Court's prior rulings in *United States v. Place*¹³² and *Illinois*

128. The Supreme Court has recognized Fourth Amendment protection extends to the inside of hotel and motel rooms, see *Stoner v. California*, 376 U.S. 483, 490 (1964) (“[A] guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures.”), but traditionally not to the hallway outside the room. See, e.g., *United States v. Legall*, 585 F. App'x 4 (4th Cir. 2014) (rejecting the contention, in a narcotics dog sniff outside a hotel room, that a hotel hallway is curtilage and holding that the hotel guest did not have a reasonable expectation of privacy in illegal narcotics (citing *Illinois v. Caballes*, 543 U.S. 405, 409 (2005))); *United States v. Roby*, 122 F.3d 1120, 1125 (8th Cir. 1997) (“Mr. Roby had an expectation of privacy in his Hampton Inn hotel room[,] [b]ut because the corridor outside that room is traversed by many people, his reasonable privacy expectation does not extend so far.”); *State v. Foncette*, 356 P.3d 328, 331 (Ariz. Ct. App. 2015) (declining to find dog sniff outside a hotel door was a violation because, “[a]lthough hotel guests are entitled to constitutional protection against unreasonable searches and seizures that infringe on their expectation of privacy within the room, the hallway outside Foncette’s hotel room was not a private area” (citation omitted)).

129. See, e.g., *Patel v. City of Montclair*, 798 F.3d 895, 898–99 (9th Cir. 2015) (affirming decision that officers’ entry onto the areas of the motel “open to the public did not constitute a search”); *Sanders v. Commonwealth*, 772 S.E.2d 15, 23 (Va. Ct. App. 2015) (holding that motel guest “did not have an objectively reasonable expectation of privacy in the walkways directly outside those [motel] doors or in the odors detectable by a drug dog while standing on such walkways”).

130. See, e.g., *State v. Williams*, 862 N.W.2d 831, 838 (N.D. 2015) (declining to find a search in the use of a drug dog outside a condominium door because, although “[i]t is undisputed Williams has a [possessory] property interest in the hallway [as an owner of the condo], his interest is not exclusive . . . and [he] cannot unilaterally exclude individuals”).

131. A parking space, unlike the area outside an apartment door, is unlikely to be used for “storing personal belongings in an exclusively controlled area or conducting other personal activities such as we would equate with a garage attached to a single family home.” *State v. Dumstrey*, 873 N.W.2d 502, 514–15 (Wis. 2016) (holding that tenant’s underground parking garage is not curtilage and he does not have a reasonable expectation of privacy in the garage because, if he did, “such an expectation is surely not reasonable”); *Willig v. Swarts*, No. 1:12-CV-1649, 2015 WL 5093771, at *4 (N.D.N.Y. Aug. 28, 2015) (declining to recognize an expectation of privacy in a parking lot adjacent to a business because “courts typically decline to extend the Fourth Amendment’s expectation of privacy protection beyond the home”).

132. 462 U.S. 696 (1983).

v. Caballes.¹³³ The *Place* and *Caballes* decisions declined to find a violation of the Fourth Amendment in the warrantless dog sniff of an automobile during a traffic stop¹³⁴ and the luggage of an airport traveler.¹³⁵ Both cases relied on the premise that a canine sniff is limited in the information revealed.¹³⁶ Of particular significance to those judges disinclined to find a Fourth Amendment violation in drug dog sniffs of door thresholds is Justice Stevens's attempt to reconcile *Caballes* with *Kyllo*.¹³⁷ Stevens concluded that "[t]he legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car."¹³⁸ Unlike the thermal-imaging device of *Kyllo* that "was capable of detecting lawful activity,"¹³⁹ the drug dog "does not expose noncontraband items that otherwise would remain hidden from public view."¹⁴⁰ Courts finding government overreach in the use of drug dogs on the threshold of a front door have been forced to contemplate possible inconsistencies with *Place* and *Caballes*.

This critique was present in *Jardines* itself by way of Justice Alito's dissent.¹⁴¹ In answering Justice Kagan's concurrence, Alito countered that there is "no basis for concluding that the occupants of a dwelling have a reasonable expectation of privacy in odors that emanate from

133. 543 U.S. 405 (2005).

134. *Id.* at 409 ("Accordingly, the use of a well-trained narcotics-detection dog—one that 'does not expose noncontraband items that otherwise would remain hidden from public view'—during a lawful traffic stop, generally does not implicate legitimate privacy interests." (citation omitted) (quoting *Place*, 462 U.S. at 707)).

135. *Place*, 462 U.S. at 707 (concluding that the dog sniff of "respondent's luggage, which was located in a public place, . . . did not constitute a 'search' within the meaning of the Fourth Amendment").

136. *Id.* ("We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure."); *Caballes*, 543 U.S. at 410 ("A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.").

137. *Caballes*, 543 U.S. at 409 (stating that the finding that the canine sniff of an automobile was not a Fourth Amendment violation "is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search" (citing *Kyllo v. United States*, 533 U.S. 27, 40 (2001))).

138. *Id.* at 410.

139. *Id.* at 409 (citing *Kyllo*, 533 U.S. at 38).

140. *Id.* (quoting *Place*, 462 U.S. at 707).

141. *Florida v. Jardines*, 133 S. Ct. 1409, 1420 (2013) (Alito, J., dissenting).

the dwelling and reach spots where members of the public may lawfully stand.”¹⁴² While pointing to decisions upholding a police officer’s sensing the odor of narcotics as a basis for probable cause,¹⁴³ Alito challenges Kagan’s use of *Kyllo*, remarking that “[t]his Court . . . has already rejected the argument that the use of a drug-sniffing dog is the same as the use of a thermal imaging device.”¹⁴⁴ Alito’s criticism has been echoed in a multitude of cases that considered the constitutionality of dog sniffs at the front doors of multiunit-building residents.¹⁴⁵

Hopkins does not address *Caballes* or *Place* in its finding that a dog sniff at the front door was an unlicensed search within a constitutionally protected area.¹⁴⁶ The court likely relied upon Scalia’s rebuttal to Alito in *Jardines*.¹⁴⁷ Scalia did not contest the State’s (and Alito’s dissenting) argument that a forensic narcotics dog “cannot implicate any legitimate privacy interest” because he felt it unnecessary.¹⁴⁸ Because, he reasoned, “[t]he *Katz* reasonable-expectations test ‘has been added to, not substituted for,’ the traditional property-based understanding of the Fourth Amendment . . . [it] is unnecessary to consider when the government gains evidence by physically intruding on constitutionally

142. *Id.* at 1424.

143. *Id.* at 1425 (first citing *United States v. Johns*, 469 U.S. 478, 482 (1985) (holding that officers had established probable cause after detecting the odor of marijuana); then citing *United States v. Johnston*, 497 F.2d 397, 398 (9th Cir. 1974) (holding that there is no “reasonable expectation of privacy from drug agents with inquisitive nostrils”).

144. *Id.* at 1425 (Alito, J., dissenting) (citing *Caballes*, 543 U.S. at 409–10).

145. *See, e.g.*, *Sanders v. Commonwealth*, 772 S.E.2d 15, 25 (Va. Ct. App. 2015) (“As used here, a dog ‘does not detect anything inside a [motel room], but merely detects the particulate odors that have escaped from a [motel room]. In that sense, the odors are no longer private, but instead are intermingled with the public airspace containing the incriminating odor.”); *State v. Foncette*, 356 P.3d 328, 332 (Ariz. Ct. App. 2015) (“‘[A]ny interest in possessing contraband cannot be deemed legitimate,’ and thus state actions that reveal only contraband do not compromise any privacy interest that society accepts as reasonable.” (citing *Caballes*, 543 U.S. at 408)); *United States v. Legall*, 585 F. App’x. 4, 6 (4th Cir. 2014) (“Because the drug-detecting dog disclosed only the presence of illegal narcotics, we find that the dog-sniff did not violate Legall’s legitimate expectation of privacy.”); *State v. Rendon*, 477 S.W.3d 805, 821 (Tex. Crim. App. 2015) (Yeary, J., dissenting) (“A narcotics dog is trained to alert only to the presence of illicit contraband . . . [and] [i]t does not otherwise ‘explore details of the home that would previously have been unknowable without physical intrusion[.]’” (first citing *Caballes*, 543 U.S. at 409; then quoting *Kyllo*, 533 U.S. at 40)).

146. *United States v. Hopkins*, 824 F.3d 726, 732 (8th Cir. 2016).

147. *See Jardines*, 133 S. Ct. at 1417.

148. *Id.*

protected areas.”¹⁴⁹ Because the *Jardines* Court “did not reach the expectation of privacy test,” the Eighth Circuit held that it too “need not rely on *Katz* . . . because [the dog’s] presence on the curtilage of Hopkins’ unit may be analyzed under *Jardines*[.]”¹⁵⁰ Citing the language of *Jardines*, courts that rely upon a “constitutionally protected area” analysis to find a Fourth Amendment violation in drug dog sniffs have not felt compelled to address *Caballes* and *Place*.¹⁵¹

The Seventh Circuit, in contrast, was forced to address *Place* and *Caballes* in finding a violation of Whitaker’s reasonable expectation of privacy.¹⁵² As with its central holding, the court looked to Justice Kagan’s concurrence for its rationale—because, the court finds, “this was a search of a home,” it is “distinguishe[d] . . . from dog sniffs in public places” as occurred in *Place* and *Caballes*.¹⁵³ The court echoes Kagan’s assertion that neither *Place* nor *Caballes* “implicated the Fourth Amendment’s core concern of protecting the privacy of the home.”¹⁵⁴ The language of *Caballes* could be read to differentiate its holding from *Kyllo* based on both the dog’s inability to detect lawful activity (unlike a thermal imager) and the location in which the sniff took place (a house in *Kyllo* and a roadside traffic stop in *Caballes*).¹⁵⁵ Justice Kagan and the Seventh Circuit point to the latter basis for finding that the same lawful drug sniff outside a car door could be rendered illegal when conducted outside a home’s front door.¹⁵⁶

149. *Id.* (emphasis omitted) (quoting *United States v. Jones*, 132 S. Ct. 945, 950–52 (2012)).

150. *Hopkins*, 824 F.3d at 732.

151. *See supra* note 100.

152. *United States v. Whitaker*, 820 F.3d 849, 853 (7th Cir. 2016).

153. *Id.* (citing *United States v. Place*, 462 U.S. 696 (1983); *Illinois v. Caballes*, 543 U.S. 405 (2005)).

154. *Id.*; *see also Jardines*, 133 S. Ct. at 1419 n.1 (2013) (Kagan, J., concurring) (“But *Caballes* concerned a drug-detection dog’s sniff of an automobile . . . [a]nd we have held, over and over again, that people’s expectations of privacy are much lower in their cars than in their homes.” (citation omitted)).

155. *Caballes*, 543 U.S. at 409–10.

156. An interesting alternative argument centers on a claim that a drug dog can often detect lawful substances. This question was before the Maryland Court of Appeals where the petitioner asserted that the drug dog’s “ability to detect diazepam tablets, available by prescription, as well as prohibited narcotics, expanded the scope of [the dog’s] sniff resulting in it becoming a search.” *Fitzgerald v. State*, 864 A.2d 1006, 1009 (Md. 2004). If the dog could detect a lawful substance such as prescription drugs, or for that matter electronics or legal marijuana in some states, would that undercut the *Caballes* rationale that drug dogs do “not expose noncontraband items” and therefore constitute a violation under *Kyllo*? *Caballes*, 543 U.S. at 409. Some dogs are in fact “trained to locate the odor of substances that are

CONCLUSION

Whitaker and *Hopkins* are significant expansions of the *Jardines* protection against warrantless drug dog sniffs at the threshold of a home's front door. Importantly, these decisions expanded what many had considered to be a detached-house protection to residents of multiunit buildings. While both arrived at a similar conclusion—a Fourth Amendment violation for a dog sniff conducted outside the front door—the Seventh and Eighth Circuits based their rulings on different analyses. The Eighth Circuit decided *Hopkins* under the constitutionally protected area test of the *Jardines* majority opinion, while the Seventh Circuit grounded its reasoning in *Whitaker* in the reasonable expectation of privacy test of *Katz*, *Kyllo*, and Kagan's concurrence in *Jardines*. It remains to be seen whether *Whitaker* or *Hopkins* are springboards for further extensions of protections against unwarranted dog sniffs outside homes and which underlying analysis serves as the vehicle for such expansions.

Perhaps the strongest foundation for protecting homes from unwarranted drug dog sniffs can be obtained by harmonizing the *Jardines* majority and concurring opinions. This point was elaborated upon by Chief Justice Garman of the Illinois Supreme Court in her concurring opinion in *Burns*.¹⁵⁷ *Jardines*, she writes, “does not turn on protecting a zone outside the house for activities and possessions,” but instead on “the vantage point of the officers on the curtilage and their actions in observing *Jardines*' activities within the home.”¹⁵⁸ In what she characterizes as a shield-based understanding of the principle underlying *Jardines*, Chief Justice Garman argues that “while the porch was deemed to be a ‘constitutionally protected area,’ the property-based fourth amendment interest to be vindicated was centered within the home.”¹⁵⁹

legal to possess, such as prescription drugs or alcohol” and “may alert to odors of legal substances.” See Mark E. Smith, Comment, *Going to the Dogs: Evaluating the Proper Standard for Narcotic Detector Dog Searches of Private Residences*, 46 HOUS. L. REV. 103, 122 (2009). The Maryland Court of Appeals avoided addressing the question because the petitioner did not raise the issue during the motion to suppress. *Fitzgerald*, 864 A.2d at 1018.

157. *People v. Burns*, 50 N.E.3d 610, 631 (Ill. 2016) (Garman, C.J., concurring).

158. *Id.* at 634.

159. *Id.* (emphasis omitted) (citing *Florida v. Jardines*, 133 S. Ct. at 1415). This approach, favored by Professor Orin Kerr, arguably provides the best way forward by ignoring as irrelevant “the fact that the dog was in the hallway.” Orin Kerr, *Use of a Drug-Sniffing Dog at an Apartment Door is a ‘Search,’ 7th Circuit Holds*, WASH. POST: VOLOKH CONSPIRACY (Apr. 13, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/04/13/use-of-a-drug-sniffing-dog-at-an-apartment-door-is-a-search-7th-circuit-holds/> [https://perma.cc/YXC5-UUFR]. Instead, Kerr maintains

This point dovetails well with Justice Kagan's distinguishing of *Caballes* from *Kyllo* by focusing upon the target of the search rather than the location of the searcher.¹⁶⁰ This understanding is also advanced by Judge Greene's dissenting opinion in *Fitzgerald*.¹⁶¹ In contesting the majority's concern with "whether the dog was permitted outside the object sniffed," Greene writes that "I would have no quarrel with this analysis if the scope and nature of the 'search' was an object, i.e., an automobile, piece of luggage, or the like used in transit," rather than residences.¹⁶² This focus upon the target of the search is strongly rooted in *Kyllo*,¹⁶³ reconciles *Whitaker* with *Caballes* and *Place*, and would lead to a more even application of Fourth Amendment protections to multiunit dwellings.

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that "[w]hat matters is that the dog was used to learn facts from inside the apartment that were previously unknowable without physical entry." *Id.*

160. *Jardines*, 133 S. Ct. at 1418 (2013) (Kagan, J., concurring) ("[T]hat device was aimed here at a home—the most private and inviolate (or so we expect) of all the places and things the Fourth Amendment protects."); *see also* Roth, *supra* note 14, at 568 ("Justice Kagan's opinion impliedly acknowledged the important distinction between the target of a search and the location of a search.").

161. *Fitzgerald*, 864 A.2d at 1023 (Greene, J., dissenting).

162. *Id.* at 1024.

163. *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (holding that police officers' observation of a house using thermal-imaging technology, and, more generally, "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,'" constitutes a search under the Fourth Amendment. (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961)).

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