
FOURTH AMENDMENT PROTECTIONS IN COMMON AREAS OF
APARTMENT BUILDINGS: HOW THE *WHITAKER* HOLDING
CONTRIBUTES TO THE CIRCUIT SPLIT

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There is a long-standing circuit split regarding whether tenants of apartment buildings have Fourth Amendment protections, or a reasonable expectation of privacy, in apartment common areas. The recent Seventh Circuit case, United States v. Whitaker, developed an innovative and nuanced approach to contribute to the current circuit divide, and it was the first to hold that defendants have different degrees of privacy in common areas of apartments. This Note argues that the holding is a step in the right direction. Specifically, it argues that tenants should have a recognized reasonable expectation of privacy in common areas of apartment buildings. The Fourth Amendment should apply in these areas to provide tenants with the same constitutional protections as homeowners.

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I. INTRODUCTION

In Madison, Wisconsin, a confidential informant met with law enforcement officers to report drug dealing out of Apartment 204 at 6902 Stockbridge Drive.¹ The alleged drug dealer drove a black Cadillac Escalade, carried a handgun in his waistband, and went by the name Ruthie Whitaker.² The unnamed informant told the officers that Whitaker had “a lot of h,” which is street-lingo for heroine.³ After receiving the confidential tip and an additional anonymous tip, the Sheriff’s Deputy met with the property manager of 6902 Stockbridge Drive and obtained consent to conduct a K9 search of the apartment complex.⁴ Two deputies, along with their drug-sniffing K9 helper, “Hunter,” went to the apartment complex and entered the second floor of the building, which was locked.⁵ There were approximately seven or eight apartment units on the floor.⁶ Hunter did not initially alert the deputies at Apartment 204, although he “showed extreme interest” in the unit.⁷ Only on the secondary sniff did Hunter alert the deputies at Apartment 204,⁸ and the officers afterward obtained a search warrant.⁹

The search warrant led the officers to find marijuana, heroin, and cocaine in Whitaker’s apartment unit.¹⁰ Whitaker also admitted to having a handgun and consented to the officer’s re-entry to retrieve the weapon.¹¹ Whitaker filed a motion to suppress the drug evidence found during the search, but the District Court denied the motion, holding “that [Whitaker] had no expectation of privacy in the apartment building’s common hallway.”¹²

Courts are currently divided on whether apartment tenants, such as Ruthie Whitaker, have a reasonable expectation of privacy in the common areas.¹³

1. United States v. Whitaker, 820 F.3d 849, 851 (7th Cir. 2016).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 852.

13. See Curtis H. Seal, United States v. Mathews: *Does a Dog Sniff in Common Areas of an Apartment Building Constitute a Search Subject to the Fourth Amendment?*, 39 AM. J. TRIAL ADVOC. 397, 413–14 (2015); Orin Kerr, *Use of a Drug-Sniffing Dog at an Apartment Door is a ‘Search,’ 7th Circuit Holds*, WASH. POST (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/?utm_term=.d09ab71fd395.

Currently, at least six circuits have ruled on the issue,¹⁴ and five are in agreement that tenants do not have a reasonable expectation of privacy in common areas.¹⁵ Tenants in these five circuits generally have no Fourth Amendment protections in the common areas of the apartment building in which they live.¹⁶

Ruthie Whitaker appealed his case.¹⁷ Two years later, the Seventh Circuit reconsidered the issue of privacy expectations in common areas of apartment buildings in *United States v. Whitaker*.¹⁸ The Seventh Circuit added a “new twist”¹⁹ to the already complicated and unsettled issue of privacy expectations in apartment buildings; in April 2016, the court held that while there is no *general* expectation of privacy in common areas, the use of a drug-sniffing dog in the hallway at a tenant’s door constituted a “search” under the Fourth Amendment.²⁰

Part II of this Note discusses the Fourth Amendment generally and outlines how various Fourth Amendment tests have been inconsistently applied to common areas of apartments, leading to the circuit split. Part III of this Note further develops the recent Seventh Circuit case, *United States v. Whitaker*, where the court developed an innovative and nuanced approach to contribute to the current circuit divide. This Note ultimately argues that the holding is a step in the right direction.

Next, Part IV of this Note recommends that lower courts use the reasoning set forth in *Whitaker* to extend Fourth Amendment protections to common areas of apartments.²¹ First, courts should hold that common areas of apartments are similar to the curtilage area of the home. The *Whitaker* holding provides a way for courts to afford greater constitutional protections to apartment dwellers by providing for different degrees of privacy in common areas of apartments, depending on the nature of the area.²² Next, lower courts should follow *Whitaker’s* lead and find that drug-sniffing dogs implicate the Fourth Amendment in common areas of apartments because drug-sniffing dogs are sensory-enhancing devices not in common use.²³ Analogizing drug-sniffing dogs to sensory-enhancing devices is the most effective way to extend to apartment tenants the same Fourth Amendment protections that the Supreme Court afforded to homeowners in *Jardines*.²⁴

14. See Kerr, *supra* note 13.

15. See *id.*

16. See generally Katz v. United States, 389 U.S. 347 (1967) (holding that the Fourth Amendment applies when defendants have an objectively reasonable expectation of privacy).

17. United States v. Whitaker, 820 F.3d 849, 851–52 (7th Cir. 2016).

18. *Id.* at 849.

19. Kerr, *supra* note 13.

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

21. *Id.*

22. *Id.*

23. *Id.*

24. See Florida v. Jardines, 569 U.S. 1, 11 (2013).

II. BACKGROUND

The Fourth Amendment of the United States Constitution, which has been extended to the states via the Fourteenth Amendment's Due Process Clause,²⁵ provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.²⁶

The Supreme Court has laid out a basic framework in determining if the Fourth Amendment applies in a given situation—commonly referred to as the *Katz* privacy test—but this test has proven difficult to apply in various settings.²⁷ The *Katz* privacy test is not easily applied to common areas of apartment buildings, which has led to the current circuit split. Circuit courts disagree whether tenants of an apartment have a reasonable expectation of privacy in the common area of an apartment and, thus, are not in agreement about whether the Fourth Amendment applies in these settings. The problem is further intensified by courts' willingness to revert to the "trespass" analysis of the Fourth Amendment.

A. *Katz Test*

The Fourth Amendment does not apply unless a "search" or a "seizure" by a federal or state governmental actor occurs.²⁸ Until 1967, the definition of a "search" under the Fourth Amendment was closely linked to the common-law concept of trespass.²⁹ This changed in 1967 when the Supreme Court issued a new rule in *Katz v. United States* ("the *Katz test*").³⁰ The *Katz* Court declared that the Fourth Amendment "protects people, not places," and noted that the inquiry cannot look solely to whether a physical intrusion has occurred.³¹ The Court then declared a two-part test to determine if a search was within the realm of the Fourth Amendment: 1) Did the defendant have a subjective expectation of privacy? and 2) Is society prepared to accept this expectation as reasonable?³² If the defendant had a subjective expectation of privacy that society is prepared to accept as reasonable, then a "search" within the meaning of the Fourth Amendment has occurred.³³ In *Katz*, the Court found that the Fourth

25. See U.S. CONST. amend. XIV, § 1.

26. U.S. CONST. amend. IV.

27. *Katz v. United States*, 389 U.S. 347, 361 (1967).

28. See *id.* at 350.

29. See ROBERT M. BLOOM & MARK S. BRODIN, CRIMINAL PROCEDURE: THE CONSTITUTION AND THE POLICE 21–22 (7th ed. 2013).

30. *Katz*, 389 U.S. at 347.

31. *Id.* at 351, 353.

32. *Id.* at 361.

33. *Id.* But see Orin S. Kerr, *Katz Has Only One Step: The Irrelevance of Substantive Expectations*, 82 U. CHI. L. REV. 113, 114 (2015).

Amendment was implicated and that a “search” occurred when the government listened in on Katz’s telephone call from a phone booth.³⁴ It did not matter that a technical trespass did not occur; what mattered was that Katz had a subjective expectation of privacy in the phone booth, and this was a reasonable expectation that society is prepared to accept.

The location of the search is highly relevant to the inquiry of whether the Fourth Amendment is implicated because the location is connected to the individual’s subjective expectation of privacy.³⁵ Individuals have the greatest expectation of privacy in their home.³⁶ They also generally have a reasonable expectation of privacy in the “curtilage” of their home, which is afforded substantial Fourth Amendment protections.³⁷ The curtilage is the area that “an individual reasonably may expect . . . should be treated as the home itself.”³⁸ The Supreme Court has outlined four factors that bear consideration in determining if an area is the curtilage: 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.”³⁹ Importantly, these are non-exclusive factors, and ultimately, the weight they afford depends on the circumstances in any given case.⁴⁰

Whether an “enhancement device” was used to conduct the search is also relevant to an individual’s expectation of privacy.⁴¹ Activity that can be observed by a bystander with a “naked eye” generally has no Fourth Amendment protection because a defendant does not have an expectation of privacy—at least not a reasonable one—when the activity can be observed by passersby.⁴² Devices that enhance naked-eye observations do not implicate the Fourth Amendment when “the device merely enhances sensory perception and facilitates surveillance that otherwise would be possible without the enhancement.”⁴³ Devices such as video cameras,⁴⁴ aerial cameras,⁴⁵ and flashlights⁴⁶ do not implicate the Fourth Amendment.

34. *Id.* at 353.

35. BLOOM & BRODIN, *supra* note 29, at 24.

36. *Id.*

37. *Id.*

38. *United States v. Dunn*, 480 U.S. 294, 300 (1987).

39. *Id.* at 301.

40. *Id.* The Court stated:

We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a “correct” answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home’s “umbrella” of Fourth Amendment protection.

Id.

41. *See* BLOOM & BRODIN, *supra* note 29, at 24–28.

42. *See California v. Ciraolo*, 476 U.S. 207, 215 (1986) (holding that the defendant did not have a reasonable expectation of privacy growing marijuana in the backyard of his home, although curtilage, when it was observed from an airplane 1,000 feet above).

43. *See* BLOOM & BRODIN, *supra* note 29, at 26.

44. *See United States v. McIver*, 186 F.3d 1119, 1125 (9th Cir. 1999).

The nature of the device must also be taken into consideration with the location of the search. As noted earlier, some areas are afforded more protection than others. In *Kyllo v. United States*, the Supreme Court held that a search occurred when agents used a thermal-imaging device to scan the outside of the defendant's home.⁴⁷ The agents suspected that the defendant was growing marijuana in his home, a process that would require the defendant to use high-intensity lamps.⁴⁸ The agents used the thermal-imaging device to determine if the amount of heat coming from the home was consistent with the heat generated by such lamps.⁴⁹ In holding that this was a search, the Court relied heavily on the fact that the home is the most protected area under the Fourth Amendment⁵⁰ and noted that "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—at least where (as here) the technology in question is not in general public use."⁵¹

The Court rejected the government's argument that the use of the device was not a search because it merely detected heat radiating off the house and could not detect private, intimate details of the home.⁵² The Court noted that just as a thermal imager captures only heat emanating from a house . . . a powerful directional microphone picks up only sound emanating from a house We rejected such a mechanical interpretation of the Fourth Amendment in *Katz*, where the eavesdropping device picked up only sound waves that reached the exterior of the phone booth. Reversing that approach would leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home.⁵³

45. See *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986); BLOOM & BRODIN, *supra* note 29, at 24.

46. See *United States v. Dunn*, 480 U.S. 294, 305 (1987); BLOOM & BRODIN, *supra* note 29, at 26.

47. *Kyllo v. United States*, 533 U.S. 27, 34–35 (2001).

48. *Id.* at 29.

49. *Id.*

50. *Id.* at 34. The Court stated:

[I]n the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment.

Id. (emphasis omitted).

51. *Id.* (citing *Silverman v. United States*, 365 U.S. 505, 512 (1961)).

52. *Id.* at 35–37.

53. *Id.* at 35–36.

B. Trespass Test

Despite the popularity of the *Katz* test, the Court has not entirely abandoned the original trespass doctrine in Fourth Amendment cases. Importantly, the *Katz* test has not been applied by the Court in every instance since the test was created. In 2013, the Court declined to apply the *Katz* test in a revolutionary case, *Florida v. Jardines*.⁵⁴ In *Jardines*, a drug-sniffing dog detected contraband outside of the defendant's home, which the Court referred to as the curtilage of the home.⁵⁵ While the police had an implied right to "knock and talk" on the defendant's front door, the police did not have an implied right to bring a drug-sniffing dog to the defendant's curtilage for the purposes of detecting criminal activity.⁵⁶ The Court reverted back to the traditional trespass notion of the Fourth Amendment, stating that

we need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*. One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred.⁵⁷

The *Jardines* Court explicitly declined to declare that the drug-detecting dog outside the curtilage of the home was the same as the thermal-imaging device in *Kyllo*.⁵⁸ The *Jardines* Court noted that the *Kyllo* decision "is best understood as a decision about the use of new technology." The *Kyllo* decision involved "'sense-enhancing technology' that was 'not in general public use.'"⁵⁹ The drug-sniffing dog in *Jardines*, the Court contrasted, "is not a new form of 'technology' or a 'device.' And . . . the use of dogs' acute sense of smell in law enforcement dates back many centuries."⁶⁰

Justice Kagan, in a concurring opinion, reached the same result as the majority in *Jardines*, but instead relied on *Kyllo* and *Katz*, arguing that a drug-sniffing dog is similar to a thermal-imaging device that violated an individual's reasonable expectation of privacy in the home.⁶¹ Justice Kagan argued that it did not matter if the use of a drug-detection dog went back centuries or if untrained dogs are common pets.⁶²

54. *Florida v. Jardines*, 569 U.S. 1, 11 (2013).

55. *Id.* at 3–6.

56. *Id.* at 8–10.

57. *Id.* at 10–11.

58. *Id.* at 25 (Alito, J., dissenting) ("This Court, however, has already rejected the argument that the use of a drug-sniffing dog is the same as the use of a thermal imaging device."); *cf.* *Kyllo v. United States*, 533 U.S. 27, 48 (2001).

59. *Jardines*, 569 U.S. at 25 (Alito, J., dissenting) (quoting *Kyllo v. United States*, 533 U.S. 27, 34–35 (2001)).

60. *Id.* at 25.

61. *Id.* at 14 (Kagan, J., concurring) ("Jardines' home was . . . his most intimate and familiar space If we had decided this case on privacy grounds, we would have realized that [*Kyllo*] already resolved it.")

62. *See id.* at 14–15.

Like . . . binoculars, a drug-detection dog is a specialized device for discovering objects not in plain view (or plain smell). And . . . that 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. Was this activity a trespass? Yes, as the Court holds today. Was it also an invasion of privacy? Yes, that as well.⁶³

The majority and concurring opinions in *Jardines* agreed that the use of a drug-sniffing dog around the home could implicate the Fourth Amendment.⁶⁴ They disagreed, however, if the proper analysis was the common-law trespass analysis, the *Kyllo* device analysis, or the *Katz* privacy analysis.⁶⁵

C. Drug-Sniffing Dogs

The *Jardines* majority opinion declined to hold that a drug-sniffing dog is the same as a “sense-enhancing” device, at least in the same sense as the thermal-imaging device in *Kyllo*.⁶⁶ What mattered was that the dog-sniff occurred outside the *home*, on the curtilage, and constituted a trespass. In determining whether a drug-sniffing dog implicates the Fourth Amendment, the location of the dog-sniff seems to matter greatly. In contexts other than the home, the Supreme Court and lower courts have a long history of upholding dog-sniffs as not violating the Fourth Amendment.

Drug-sniffing dogs used in public places tend to not implicate the Fourth Amendment. For example, the Supreme Court has held that the use of a drug-sniffing dog did not implicate the Fourth Amendment when used at an airport,⁶⁷ when used outside of an automobile during a routine traffic stop,⁶⁸ or when used at a narcotics detection stop.⁶⁹ Circuit courts have held that the Fourth Amendment is not implicated by the use of drug-sniffing dogs outside of a defendant’s sleeper unit,⁷⁰ outside of a warehouse,⁷¹ or outside of a commercial building.⁷² Applying the *Katz* test in these cases, a drug-sniffing dog did not violate the defendant’s reasonable expectation of privacy.⁷³

63. *Id.* at 13.

64. *See id.*

65. *Id.* at 14–15.

66. *Id.*

67. *See United States v. Place*, 462 U.S. 696, 698 (1983).

68. *Illinois v. Caballes*, 543 U.S. 405, 410 (2005).

69. *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000).

70. *See United States v. Colyer*, 878 F.2d 469, 483 (D.C. Cir. 1989).

71. *See United States v. Lingenfelter*, 997 F.2d 632, 640 (9th Cir. 1993).

72. *See United States v. Parrilla*, No. 13 CR 360 AJN, 2014 WL 2111680, at *8 (S.D.N.Y. May 13, 2014).

The Court . . . declines to extend the special privacy protections afforded to the home to a place of business. While it is well-established that the Fourth Amendment protects commercial premises as well as dwellings from unreasonable searches and seizures . . . a reasonable “expectation of privacy in commercial premises . . . is different from and . . . less than a similar expectation in an individual’s home.”

Id. (quoting *New York v. Burger*, 482 U.S. 691, 700 (1987)).

73. *See Katz v. United States*, 389 U.S. 347, 351 (1967).

Courts have been less consistent about whether drug-sniffing dogs used in or around apartment buildings violate the Fourth Amendment; after the *Jardines* decision, the issue has been further complicated. Prior to *Jardines*, many courts did not consider a dog-sniff in or near an apartment a Fourth Amendment violation,⁷⁴ and other courts disagreed.⁷⁵ For example, in *United States v. Thomas*,⁷⁶ the Second Circuit found that the defendant's Fourth Amendment rights were violated when a dog sniffed outside the defendant's apartment, relying in part on the *Katz* reasonable-expectation-of-privacy test.⁷⁷ The court compared the dog to a sensory enhancement device, although the opinion was written sixteen years before the *Kyllo* decision, stating that

[w]ith a trained dog police may obtain information about what is inside a dwelling that they could not derive from the use of their own senses. Consequently, the officers' use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument.⁷⁸

The *Thomas* court also relied heavily on the fact that the defendant was at his place of dwelling.⁷⁹ Although the dog-sniff technically occurred outside the defendant's apartment door,⁸⁰ the court never said that the defendant had a reasonable expectation in the *common* area of the apartment generally, but that "[h]ere the defendant had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be 'sensed' from outside his door."⁸¹

D. Common Areas of Apartments: The Circuit Split

While the bulk of cases involving drug-sniffing dogs rely on the *Katz* test, the *Jardines* Court relied on the trespass doctrine.⁸² The *Jardines* Court never declared how its holding would apply to apartment buildings.⁸³ When it comes to common areas of apartments, which is arguably the same as the "curtilage"

74. See e.g., *United States v. Reed*, 141 F.3d 644, 649 (6th Cir. 1998) (holding that a dog-sniff did not constitute a "search" inside defendant's apartment, or "flat," when the police were lawfully inside the apartment).

75. See e.g., *United States v. Scott*, 610 F.3d 1009, 1016 (8th Cir. 2010); *United States v. Thomas*, 757 F.2d 1359, 1367 (2d Cir. 1985).

76. 757 F.2d 1359, 1366 (2d Cir. 1985).

77. *Id.* at 1366. The court stated:

It is one thing to say that a sniff in an airport is not a search, but quite another to say that a sniff can *never* be a search. The question always to be asked is whether the use of a trained dog intrudes on a legitimate expectation of privacy.

Id.

78. *Id.* at 1367.

79. *Id.* ("Because of defendant Wheelings' heightened expectation of privacy inside his dwelling, the canine sniff at his door constituted a search.")

80. *Id.*

81. *Id.*

82. See *Florida v. Jardines*, 569 U.S. 1, 11 (2013).

83. See *id.*

of the home, the *Jardines* decision complicates the analysis: if police illegally enter an apartment common area with a drug-sniffing dog, the police are not trespassing on the *tenants'* property but are trespassing on the owner or landlord's property.⁸⁴

To complicate the issue more, courts disagree whether tenants have a reasonable expectation of privacy in the common areas of apartments.⁸⁵ This makes applying the *Katz* test, at least uniformly, also problematic. Prior to *Jardines*, five circuit courts held that defendants do not have a reasonable expectation of privacy in common areas of apartment buildings.⁸⁶ Before the *Jardines* decision, only one circuit court held that defendants have a reasonable expectation of privacy in common areas of apartments.⁸⁷

1. *No Reasonable Expectation of Privacy*

Most courts agree that defendants have no reasonable expectation of privacy in common areas of apartments.⁸⁸ This means that defendants have no Fourth Amendment protections in areas in which they live and conduct activity.⁸⁹

In *United States v. Eisler*,⁹⁰ the Eighth Circuit found that a tenant did not have a reasonable expectation of privacy in a common area of the apartment when an officer listened in on the tenant's conversation and overheard the defendant discussing heroine distribution.⁹¹ The officer did not have permission from the landlord to be in the apartment building and did not have a warrant.⁹² The *Eisler* court relied on *Katz*, and noted that "we are not persuaded that the dispositive question is whether [the officer's] entry [into the apartment building] was a technical trespass Rather, the essential inquiry is whether appellants had a reasonable expectation of privacy in the hallway of the apartment building. We hold that they did not."⁹³ More recently, but before the *Jardines* holding, the Eighth Circuit made it clear in two cases—*Brooks* and *McCaster*—that the court's previous holding that tenants do not have a reasonable expectation of privacy in "common" areas of apartments still stood.⁹⁴

84. See *Aberdeen Apartments v. Cary Campbell Realty All., Inc.*, 820 N.E.2d 158, 165–66 (Ind. Ct. App. 2005) ("Regardless of whether or not a landlord has exclusive possession over common areas . . . he or she has a sufficient possessory interest in the common areas of an apartment complex to bring an action for trespass.")

85. See Seal, *supra* note 13, at 412–13.

86. See Kerr, *supra* note 13 ("Five of the six circuits that have decided the issue have concluded that tenants do not have a reasonable expectation of privacy in the common areas of their apartment building.") (quoting *United States v. Miravalles*, 280 F.3d 1328, 1331 (11th Cir. 2002)).

87. *Id.*

88. Seal, *supra* note 13, at 415.

89. See *Katz v. United States*, 389 U.S. 347, 359 (1967).

90. *United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977).

91. *Id.* at 815–16.

92. *Id.*

93. *Id.* at 816.

94. See *United States v. Brooks*, 645 F.3d 971, 976 (8th Cir. 2011); *United States v. McCaster*, 193 F.3d 930, 933 (8th Cir. 1999); see also *United States v. Eisler*, 567 F.2d 814, 815–16 (8th Cir. 1977) (finding the tenant did not have a reasonable expectation in the common area of the apartment after an officer listened in on

In *Nohara*, the Ninth Circuit agreed.⁹⁵ The DEA agent was with an individual who had previously bought methamphetamine from the defendant (the seller), and the defendant buzzed the buyer into the building, unaware that the buyer was with the officer.⁹⁶ A security guard let the DEA agent and buyer pass through another entrance, and when the buyer knocked on the defendant's door, the DEA agent stood to the side.⁹⁷ The defendant opened the door, and the agent peeked around the corner and saw the drugs in plain-view.⁹⁸ The Ninth Circuit refused to suppress the evidence because the defendant "did not have a reasonable expectation of privacy in the hallway outside his apartment."⁹⁹ The court distinguished a previous Ninth Circuit case, *United States v. Fluker*, where the court had held that a defendant "had a reasonable expectation of privacy in the corridor area separating the door of his apartment from the outer doorway of the apartment building."¹⁰⁰ In *Fluker*, the court "relied on the fact that the appellant lived in one of only two basement apartments as opposed to a multi-unit complex."¹⁰¹ Here, the defendant lived in an apartment with twenty-seven floors and seven apartments on each floor.¹⁰²

The Seventh Circuit decision in *United States v. Concepcion* likewise held that there is no reasonable expectation of privacy in the common areas of apartments.¹⁰³ Thus, the Fourth Amendment did not apply. In that case, the defendant was arrested outside his apartment, and his belongings were confiscated including his keys.¹⁰⁴ The officers knew the apartment that the defendant lived in and used his keys to unlock the outer door of the main apartment building.¹⁰⁵ The officers then began to open the defendant's apartment door, but stopped and asked for the defendant's consent before fully opening it.¹⁰⁶ The defendant consented, but then later argued that this consent was only the result of an already unlawful search of the common area of the apartment.¹⁰⁷ While the court expressed reservations about the lawfulness of using the defendant's

the tenant's conversation discussing distribution of heroin and the officer did not have permission from the landlord to be in the apartment building and did not have a warrant). The *Eisler* court relied on *Katz* and noted that "we are not persuaded that the dispositive question is whether [the officer's] entry [into the apartment building] was a technical trespass Rather, the essential inquiry is whether appellants had a reasonable expectation of privacy in the hallway of the apartment building. We hold that they did not." *Eisler*, 567 F.2d at 816.

95. *United States v. Nohara*, 3 F.3d 1239, 1240–41 (9th Cir. 1993).

96. *Id.* at 1240.

97. *Id.*

98. *Id.*

99. *Id.* at 1241.

100. *Id.* at 1242; *see also* *United States v. Fluker*, 543 F.2d 709, 716–17 (9th Cir. 1976) (holding that under the narrow facts of that case, "appellant . . . had a reasonable expectation of privacy as to the hallway separating his apartment door from the outer, locked door").

101. *Nohara*, 3 F.3d at 1242 (citing *United States v. Fluker*, 543 F.2d 709, 716 (9th Cir. 1976)).

102. *Id.* at 1240.

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

104. *Id.* at 1171.

105. *Id.*

106. *Id.*

107. *Id.*

key to open the door,¹⁰⁸ the court ultimately found that the defendant did not have a reasonable expectation of privacy in the common area, noting that the defendant

had no expectation that goings-on in the common areas would remain his secret. Indeed, it is odd to think of an expectation of “privacy” in the entrances to a building. The vestibule and other common areas are used by postal carriers, custodians, and peddlers. The area outside one’s door lacks anything like the privacy of the area inside.¹⁰⁹

While the court did not explicitly cite or mention *Katz*, the court relied exclusively on the defendant’s expectation of privacy.¹¹⁰

In *United States v. Barrios-Moriera*, the Second Circuit followed suit and held that the defendant did not have a reasonable expectation of privacy in the common area of his apartment after a police officer followed the defendant into his apartment and saw cocaine.¹¹¹ The officer suspected that the defendant was involved in a recent drug-related homicide¹¹² and entered the main area of the apartment as soon as the door was opened, knowing that the door would lock.¹¹³ Relying on *Katz*, the court found that the defendant did not have a reasonable expectation of privacy in the common hallway, stating that “[t]he intrusion here was not into appellant’s home, where—absent a warrant issued upon probable cause or exigent circumstances—such an intrusion is presumptively unreasonable.”¹¹⁴

The First Circuit likewise held that defendants do not have a reasonable expectation of privacy in common areas of apartments.¹¹⁵ The officers had a warrant to search the defendant’s apartment but entered the underground parking garage, where they then detected a strong marijuana odor coming from the defendants’ van.¹¹⁶ Once the van began to drive away, the defendants were pulled over and arrested.¹¹⁷ The defendants argued that “their fourth amendment rights were violated when the two agents entered the underground garage without a warrant.”¹¹⁸ Relying on *Katz*, the court held that “a person cannot

108. *Id.* at 1172–73. The court stated:

Because the agents obtain information from the inside of the lock, which is both used frequently by the owner and not open to public view, it seems irresistible that inserting and turning the key is a “search” Although the owner of a lock has a privacy interest in a keyhole—enough to make the inspection of that lock a “search”—the privacy interest is so small that the officers do not need probable cause to inspect it. Because agents are entitled to learn a suspect’s address without probable cause, the use of the key to accomplish that objective did not violate the fourth amendment.

Id.

109. *Id.* at 1172.

110. *Id.*

111. 872 F.2d 12, 14 (2d Cir. 1989), *abrogated by* *Horton v. California*, 496 U.S. 128, 141–42 (1990) (“[T]he police entry was into a common hallway, an area where there is no legitimate expectation of privacy.”).

112. *Id.* at 15.

113. *Id.* at 14.

114. *Id.*

115. *United States v. Cruz Pagan*, 537 F.2d 554, 558 (1st Cir. 1976).

116. *Id.* at 557.

117. *Id.*

118. *Id.*

have a reasonable expectation of privacy . . . in such a well travelled common area of an apartment house or condominium. Whether or not the agents' entry was a technical trespass is not the relevant inquiry."¹¹⁹

2. Reasonable Expectation of Privacy

The Sixth Circuit stands alone on this issue.¹²⁰ In *United States v. Carriger*, the Sixth Circuit, in contrast to the previous five circuits, found that the defendant had a reasonable expectation of privacy in the common area of his apartment.¹²¹ In that case, the police suspected that the defendant was engaging in a drug deal.¹²² The apartment was a twelve-unit building with an entrance that automatically locked, so the police were only able to enter the building if someone opened the door or let them in.¹²³ The police slipped in the building as workmen were exiting.¹²⁴ The court, citing *Katz*, examined whether a tenant has a reasonable expectation of privacy in the common area of an apartment for the first time.¹²⁵ Interestingly, the court seemed to rely more on the trespass analysis than on the privacy analysis, declaring that the *Katz* privacy test expanded the Fourth Amendment and that property concepts regarding the home were still relevant.¹²⁶ The court noted that "trespassing is one form of intrusion by the Government that may violate a person's reasonable expectation of privacy,"¹²⁷ and "it is helpful to rely on property concepts simply because they assist in establishing the perimeters of the Fourth Amendment guarantees as they relate to the home."¹²⁸ While the court did not declare a broad policy that all tenants always have a reasonable expectation of privacy in common areas of apartments, the court held that when "an officer enters a locked building, without authority or invitation, the evidence gained as a result of his presence in the

119. *Id.* at 558.

120. *See Seal, supra* note 13, at 412–14.

121. *United States v. Carriger*, 541 F.2d 545, 552 (6th Cir. 1976).

122. *Id.* at 548.

123. *Id.*

124. *Id.*

125. *Id.* at 549 (citing *Katz v. United States*, 389 U.S. 347, 353 (1967)). The court stated:

Our Circuit has not yet considered the issue whether a tenant in an apartment building has a reasonable expectation of privacy in the common areas of the building not open to the general public. . . . [W]e believe [the issue] must be evaluated in light of *Katz* and in light of the particular circumstances of this case.

Id.

126. *Id.* at 549–50. The court stated:

We believe that the Supreme Court's determination that the "trespass" doctrine could "no longer be regarded as controlling" was intended to expand the protection afforded by the Fourth Amendment. Certainly, that was the effect in *Katz* where the Court found an illegal search and seizure even though no trespass was committed by FBI agents. Accordingly, we are of the view that *Katz*, considered with the case law before it, should be read as holding that trespassing is one form of intrusion by the Government that may violate a person's reasonable expectation of privacy. Although we do not hold today that any evidence gained as a result of a federal agent's trespass constitutes an illegal search and seizure, we believe it is helpful to rely on property concepts "simply because they assist in establishing the perimeters of the Fourth Amendment as they relate to the home."

Id.

127. *Id.* at 549.

128. *Id.*

common areas of the building must be suppressed.”¹²⁹ Tenants have a reasonable expectation of privacy from trespassers in common areas,¹³⁰ as “[a] tenant expects other tenants and invited guests to enter in the common areas of the building, but he does not [expect] trespassers.”¹³¹

More recently, the Sixth Circuit clarified that the *Carriger* holding applied only to locked apartment buildings when it found that a tenant did not have a reasonable expectation of privacy in a common area if both doors to the duplex floor are unlocked and opened.¹³² In that case, the defendant’s girlfriend let the police in and consented to a search of the defendant’s apartment after the police entered the building and knocked on the defendant’s apartment door.¹³³ The defendant “did not have a reasonable expectation of privacy in the common hallway and stairway of his duplex that were unlocked and open to the public.”¹³⁴ The court relied on *Katz* and listed four factors to consider in determining if a privacy expectation is reasonable:

- (1) Whether the defendant was legitimately on the premises;
- (2) his proprietary or possessory interest in the place to be searched or the item to be seized;
- (3) whether he had the right to exclude others from the place in question; and
- (4) whether he had taken normal precautions to maintain his privacy.¹³⁵

The court noted that while the defendant here did in fact have a possessory interest in the duplex’s common hallway and stairway, he made no effort to maintain that privacy by leaving the common doors unlocked.¹³⁶

The Sixth Circuit carefully distinguished *Carriger*, and the analysis boiled down to whether the main door to the apartment building is locked.¹³⁷ The court noted that “[o]bviously the expectation of privacy in a locked building is greater than in an unlocked building.”¹³⁸ The reason for the distinction is that “in locked common areas . . . a ‘tenant expects other tenants and invited guests to enter in the common areas of the building, but he does not expect trespassers.’”¹³⁹

Most decisions involving common areas of apartments were decided before the *Jardines* opinion was issued. Since *Jardines*, courts are more willing to find a Fourth Amendment violation in common areas if the police use a drug-

129. *Id.* at 552.

130. *Id.* at 551 (“Whether the officer entered forcibly through a landlady’s window or by guile through a normally locked entrance door, there can be no difference in the tenant’s subjective expectation of privacy, and no difference in the degree of privacy that the Fourth Amendment protects.”).

131. *Id.*

132. *United States v. Dillard*, 438 F.3d 675, 683 (6th Cir. 2006).

133. *Id.* at 677.

134. *Id.* at 682.

135. *Id.*

136. *Id.* (“By not locking the duplex’s doors, [defendant] did nothing to indicate to the officers that they were not welcome in the common areas.”).

137. *Id.* at 683 (“*Carriger* is distinguishable because in that case the defendant’s building was locked.”).

138. *Id.*

139. *Id.* (citing *United States v. Carriger*, 541 F.2d 545, 551 (6th Cir. 1976)).

sniffing dog,¹⁴⁰ but several courts have heard cases recently and still adamantly hold that there is no general expectation of privacy in common areas of apartments.¹⁴¹

III. ANALYSIS

It is not clear that there will soon be a consensus among the circuit courts on the proper approach to Fourth Amendment issues in common areas of apartment buildings. Drug-sniffing dogs in common areas of apartments further complicate matters. Indeed, since the *Jardines* opinion was issued, courts have further complicated the analysis by confusing the trespass doctrine into the mix¹⁴²—a doctrine that has rarely been applied to common areas of apartments.¹⁴³ Some courts still rely on *Katz*.¹⁴⁴ Others rely on a mixture of both approaches.¹⁴⁵

In *Whitaker*, the court recently found that a drug-sniffing dog used in an apartment hallway violated the *Katz* privacy test.¹⁴⁶ But the court did not rely solely on *Katz* to find that defendants have *some* expectation of privacy in common areas of apartments; the court also relied on *Kyllo* and held that drug-sniffing dogs used in apartments, like thermal-imaging devices, implicate the Fourth Amendment because dogs are a “device” not in common use.¹⁴⁷

Recall that the Supreme Court majority opinion in *Jardines* explicitly declined to hold that drug-sniffing dogs constitute a device not in common use.¹⁴⁸ Because the *Jardines* holding does not roll over neatly to apartment settings, courts have struggled with applying a consistent approach to cases involving drug-sniffing dogs in common areas of apartments,¹⁴⁹ and they have even struggled in cases that do not involve a dog.¹⁵⁰ On the one hand, courts recognize that individuals that rent apartments should be afforded the same Fourth Amendment protections as homeowners.¹⁵¹ On the other hand, courts are reluctant to rely on the trespass approach used in *Jardines*, and they recognize that many apartment cases do not involve an actual trespass against the tenant.¹⁵² To resolve this inherent conflict, some courts have recently relied on *Jardines* to find Fourth Amendment violations in common areas of apartments without

140. See, e.g., *Gutierrez v. City of East Chicago*, No. 2:16-CV-111-JVB-PRC, 2016 WL 5819818, at *13 (N.D. Ind. Sept. 6, 2016), *report and recommendation adopted*, No. 2:16-CV-111 JVB, 2016 WL 5816804 (N.D. Ind. Oct. 5, 2016).

141. See, e.g., *United States v. Burston*, 806 F.3d 1123, 1129 (8th Cir. 2015).

142. *State v. Nguyen*, 841 N.W.2d 676, 681 (N.D. 2013).

143. Most courts have relied on the *Katz* test for common areas of apartments. The Sixth Circuit mentioned trespass in *United States v. Carriger*, 541 F.2d 545, 550 (6th Cir. 1976).

144. *Id.* at 552.

145. See *United States v. Sweeney*, 821 F.3d 893, 899–903 (7th Cir. 2016).

146. See *United States v. Whitaker*, 820 F.3d 849, 852 (7th Cir. 2016).

147. *Id.* at 853.

148. *Florida v. Jardines*, 569 U.S. 1, 11 (2013).

149. See, e.g., *United States v. Hopkins*, 824 F.3d 726, 732 (8th Cir. 2016).

150. See, e.g., *United States v. Sweeney*, 821 F.3d 893, 902 (7th Cir. 2016).

151. *Id.* at 898.

152. *Id.* at 900.

ever referring to an actual “trespass.”¹⁵³ Applying *Jardines* to apartments has proven difficult, however, because courts refuse to equate the common area of apartments with the curtilage of the home.¹⁵⁴ This is likely to set a confusing precedent given the already complicated circuit split on common areas of apartments.

Part III of this Note looks at some of the most recent circuit court and district court opinions involving alleged Fourth Amendment violations in common areas of apartment buildings, comparing the different approaches used by various lower courts with the *Whitaker* approach. Thus, the analysis begins with the *Whitaker* case.¹⁵⁵ This is a good starting point not only because it is recent, but because it provides a fresh and unprecedented approach.¹⁵⁶ Additionally, the case touches on a number of relevant issues to this Note: common areas of apartments, drug-sniffing dogs, privacy expectations, and sensory-enhancement devices.¹⁵⁷

The trespass approach is inherently unable to afford the same protections to apartment renters as it does to homeowners. Relying on the curtilage protections in apartment settings has provided apartment dwellers with minimal protections. This calls for a more uniform, consistent approach that the *Katz* test is better suited to govern.¹⁵⁸ But to afford apartment renters the same protections as homeowners, the *Katz* approach may require courts to take a second look at existing precedent and find that—at least in some common areas of the apartment—tenants have a reasonable expectation of privacy.

A. *United States v. Whitaker: A Nuanced Approach and a Step in the Right Direction*

The recent Seventh Circuit decision, *United States v. Whitaker*, takes a nuanced approach to applying Fourth Amendment protections to common areas of apartments.¹⁵⁹ The Seventh Circuit is one of the circuits that has previously held that tenants do not have a reasonable expectation of privacy in apartment common areas.¹⁶⁰ In *Whitaker*, however, the court took a more nuanced approach and found that tenants have *some* level of privacy in common areas, at least when drug-sniffing dogs are involved.¹⁶¹ The court reasoned, however, that there is still not a reasonable expectation of privacy *generally* in apartment common areas.¹⁶² Importantly, “*Whitaker* did not have a reasonable expectation of *complete* privacy in his apartment hallway.”¹⁶³ This was a substantial

153. *See generally* *United States v. Burston*, 806 F.3d 1123 (8th Cir. 2015).

154. *Id.* at 1129.

155. *See generally* *United States v. Whitaker*, 820 F.3d 849 (7th Cir. 2016).

156. *See id.* at 854.

157. *Id.* at 851.

158. *See Katz v. United States*, 389 U.S. 347, 353 (1967).

159. *Whitaker*, 820 F.3d at 854.

160. *See United States v. Concepcion*, 942 F.2d 1170, 1171–72 (7th Cir. 1991).

161. *See Kerr*, *supra* note 13.

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

163. *Id.* (emphasis added).

step for the Seventh Circuit, which had previously maintained that tenants enjoyed no Fourth Amendment protections in common areas.¹⁶⁴

The court also found that the dog was a “super-sensitive instrument” that failed the *Kyllo* test because it is not in common use¹⁶⁵ and relied on Justice Kagan’s concurring opinion in *Jardines*.¹⁶⁶ “[V]iewed through a privacy lens, *Jardines* was controlled by *Kyllo*, which held that police officers conducted a search by using a thermal-imaging device to detect heat emanating from within the home, even without trespassing on the property.”¹⁶⁷ The *Whitaker* court compared the use of a drug-sniffing dog to the thermal-imaging device in *Kyllo*, noting that “[a] trained drug-sniffing dog is a sophisticated sensing device not available to the general public.”¹⁶⁸ Thus, the use of a dog to sniff inside a defendant’s apartment “clearly invaded reasonable privacy expectations.”¹⁶⁹

The *Whitaker* holding is unique. First, the holding directly compares a drug-sniffing dog to the thermal-imaging device in *Kyllo*,¹⁷⁰ despite the Supreme Court majority opinion in *Jardines* suggesting otherwise.¹⁷¹ Next, the *Whitaker* opinion, relying partly on *Katz*, suggests that there are different *degrees* of privacy in common areas of apartment buildings.¹⁷² This is unique to Fourth Amendment precedent involving common areas of apartments, which have typically been more all-or-nothing in assessing privacy expectations.¹⁷³ Finally, the *Whitaker* court refused to draw lines between the curtilage of a home and the outside area of an apartment, instead calling the distinction “arbitrary.”¹⁷⁴

B. *Arbitrary Lines: Apartments Are Homes*

The *Whitaker* court declined to distinguish between the front porch of a house (as was the case in *Jardines*) and closed hallways of an apartment to avoid drawing “arbitrary lines.”¹⁷⁵ Interestingly, the court referred to *Whitaker*’s apartment as a “home,” noting that “the fact that this was a search of a home distinguishes this case from dog sniffs in public places”¹⁷⁶

164. *See Concepcion*, 942 F.2d at 1172.

165. *See Whitaker*, 820 F.3d at 853.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 852.

170. *Id.* at 853.

171. *See Florida v. Jardines*, 569 U.S. 1, 11 (2013).

172. *Whitaker*, 820 F.3d at 853 (“*Whitaker* did not have a reasonable expectation of complete privacy in his apartment hallway.”).

173. *See Seal*, *supra* note 13, at 413–14.

174. *Whitaker*, 820 F.3d at 854.

175. *Id.* (“Distinguishing *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.”).

176. *Id.* at 853.

The difference between an apartment and a house is not always clear; for example, split-level duplexes could fall into either category.¹⁷⁷ Because the Supreme Court has already held that drug-sniffing dogs in the curtilage of a *house* implicate the Fourth Amendment, the *Whitaker* court reasoned that this should carry over to apartment buildings.¹⁷⁸ Applying greater Fourth Amendment protections to houses “would apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity.”¹⁷⁹ The *Whitaker* court noted:

For example . . . 67.8% of house-holds composed solely of whites live in one-unit detached houses. For households solely composed of blacks, that number dropped to 47.2%. And for Hispanic households, that number was 52.1%. The percentage of households that live in single-unit, detached houses consistently rises with income. At the low end, 40.9% of households that earned less than \$10,000 lived in single-unit, detached houses, and, at the high end, 84% of households that earned more than \$120,000 did so.¹⁸⁰

The *Whitaker* court was correct to equate the home with an apartment.¹⁸¹ Unequal protection on the basis of housing is a real concern.¹⁸² Distinctions between houses and apartments under the Fourth Amendment have profound effects, given that roughly 17% of Americans live in apartments or condos,¹⁸³ and certain states have an even higher percentage of their population residing in apartment complexes.¹⁸⁴ This amounts for roughly eighteen million of the total households in the United States.¹⁸⁵

Lower courts, which maintain that there is no reasonable expectation of privacy in common apartment areas, arguably afford less protections to apartment dwellers than homeowners. Courts have also somewhat arbitrarily distinguished between apartments based on the number of units in the apartment and on the size of the apartment.¹⁸⁶ Generally, larger apartments with more units are afforded less Fourth Amendment protections in common areas because the

177. *Id.* at 854 (“[T]here is the middle ground between traditional apartment buildings and single-family houses. How would courts treat a split-level duplex?”).

178. *Id.*

179. *Id.* (“[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.”).

180. *Id.* (citing *American Housing Survey, Table Creator*, U.S. CENSUS BUREAU).

181. *Id.*

182. Eric Connon, *Growing Jardines: Expanding Protections Against Warrantless Dog Sniffs to Multiunit Dwellings*, 67 CASE W. RES. L. REV. 309, 327 (2016) (“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.”).

183. Charlotte O’Malley, *80 Percent of Americans Prefer Single-Family Homeownership*, BUILDER (Aug. 13, 2013), http://www.builderonline.com/money/economics/80-percent-of-americans-prefer-single-family-homeownership_o (“[T]wo in 10 Americans (17 percent) live in an apartment or condo.”).

184. *Quick Facts: Resident Demographics*, NAT’L MULTIFAMILY HOUSING COUNCIL [hereinafter *Quick Facts*], http://www.nmhc.org/Content.aspx?id=4708#Apt_House_Income (last visited Apr. 3, 2018). In 2015, these states included New York (24.23%), California (17.21%), North Dakota (15.82%), Nevada (15.36%), and Maryland (14.48%). *Id.* In the District of Columbia, 34.83% of the population lived in an apartment in 2015. *Id.*

185. *Id.*

186. *See, e.g., State v. Nguyen*, 841 N.W.2d 676, 682 (N.D. 2013).

common areas are open to more people.¹⁸⁷ This is concerning considering that the number of larger, multi-unit apartment buildings are increasing,¹⁸⁸ and that apartments with five or more units account for roughly 17% of housing.¹⁸⁹

Most concerning is that the population of apartment renters consists disproportionately of those with lower incomes,¹⁹⁰ so distinctions inevitably hurt the lower-class and afford them with less protections.¹⁹¹ Apartments are usually less expensive to rent than houses and are substantially less expensive than paying for a mortgage. In 2016, almost six million households in the United States living in apartments had a combined income of less than \$20,000.¹⁹² The median household income for apartment renters in 2016 was \$34,661.¹⁹³ Almost half of these households are single individuals, and only 20% are married couples with or without children.¹⁹⁴ Given that apartments tend to attract those with lower incomes, a Fourth Amendment analysis that distinguishes between apartments and homes will likely have a greater effect on those with a lower income. Those with lower incomes will be afforded less protections than those that have the benefit of owning or renting a home.

C. *The Trespass Approach to Common Areas Is Under-Inclusive*

Differences in housing should not mean differences in constitutional protections. The narrow holding of the *Jardines* majority, relying on the trespass approach,¹⁹⁵ is inherently unable to provide apartment dwellers with the same protections as homeowners. First, a trespass suggests that one has the ability to exclude another from an area; many apartment renters are not legally able to do so in common areas (or the “curtilage”) of their apartment.¹⁹⁶ Next, even though courts are willing to afford Fourth Amendment protections to the common areas of an apartment in cases involving drug-sniffing dogs,¹⁹⁷ analogizing the curtilage in *Jardines* to areas in apartments is difficult because of the inherent differences in structure.¹⁹⁸ Given the narrowness of the *Dunn* factors, these factors rarely weigh in favor of finding that a particular area of an apartment

187. *Id.*

188. *Historical Census of Housing Tables*, U.S. CENSUS BUREAU, <https://www.census.gov/hhes/www/housing/census/historic/units.html> (last visited Apr. 3, 2018) (“Units in larger apartment buildings of 5 or more units increased dramatically from 1960 (11 percent) to 1990 (18 percent).”).

189. *Id.*

190. JOINT CTR. HOUSING STUD. HARV. U., AMERICAN’S RENTAL HOUSING: EVOLVING MARKETS AND NEEDS 4 (2013), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs_americas_rental_housing_2013_1_0.pdf (“[R]ental housing is concentrated in low-income communities.”).

191. *Id.* at 6.

192. *Quick Facts*, *supra* note 184.

193. *Id.*

194. *Id.*

195. *Florida v. Jardines*, 569 U.S. 1, 11–12 (2013).

196. *See, e.g., United States v. Sweeney*, 821 F.3d 893, 900 (7th Cir. 2016).

197. *United States v. Burston*, 806 F.3d 1123, 1127 (8th Cir. 2015).

198. *See, e.g., United States v. Davis*, 760 F.3d 901, 902 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 996 (2015) (relying on *Jardines* but not discussing curtilage).

constitutes the curtilage.¹⁹⁹ Courts distinguish between the common area and the curtilage and still afford substantially less protections to common areas.

Unlike the Court in *Jardines*, *Whitaker* did not rely much on trespass to find a search, despite alluding to the similarities between the curtilage of the home and the common area outside an apartment door.²⁰⁰ This is likely because the manager of the apartment consented to the K9 sniff.²⁰¹ Equally likely, though, is the fact that, even without the manager's consent, the police were not technically trespassing on the *renter's* property while in the hallway of the building. If the court would have relied solely on trespass, as *Jardines* did, *Whitaker* would not have had standing to raise a Fourth Amendment claim.²⁰²

The recent case *United States v. Sweeney* is illustrative.²⁰³ The defendant moved for a motion to suppress a handgun that was found in the basement of his apartment complex, which was considered a common area by the landlord for all tenants to use.²⁰⁴ Faced with the recent *Jardines* holding and the even more recent *Whitaker* holding, the court admitted that “[a]pplying the Fourth Amendment to various common spaces in apartment buildings has been a source of considerable controversy. In cases decided before *Jardines*, we held that warrantless police intrusions into shared spaces in apartment buildings much like the basement here did not violate the Fourth Amendment rights of tenants.”²⁰⁵ The court continued, “[m]ore recently, based on the intervening Supreme Court decision in *Jardines*, we have held that bringing a police dog to sniff for drugs outside an apartment door amounts to a search of the apartment interior that requires a warrant.”²⁰⁶

The Seventh Circuit then analyzed the facts of the case under the two existing approaches, stating that “[w]e focus our attention on *Jardines*, where the majority and concurring opinions reflect two principal approaches to the Fourth Amendment's protection.”²⁰⁷ The first approach outlined by the court focused on trespass and on the common law of property (the majority approach in *Jardines*); the second approach focused on the *Katz* reasonable expectation of privacy test (the concurring approach in *Jardines*).²⁰⁸

Analyzing the first approach, the court discussed at length the meaning of trespass at common law and current understandings of trespass in the context of the Fourth Amendment.²⁰⁹ In attempting to draw a line in a somewhat unsettled

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

200. *United States v. Whitaker*, 820 F.3d 849, 854 (7th Cir. 2016).

201. *Id.* at 850.

202. For a defendant to have standing to bring a Fourth Amendment claim, the defendant's Fourth Amendment right must have been violated. If the trespass, or Fourth Amendment violation, occurred against someone else, a defendant may not challenge the admissibility of the evidence. See *Rakas v. Illinois*, 439 U.S. 128 (1978).

203. *United States v. Sweeney*, 821 F.3d 893, 900 (7th Cir. 2016).

204. *Id.* at 903.

205. *Id.* at 898–99 (citing *Whitaker*, 820 F.3d at 853–54).

206. *Id.* at 899.

207. *Id.*

208. *Id.*

209. *Id.*

area, the court held that “to prove a claim of trespass, one must have possession of the property in question and the ability to exclude others from entrance onto or interference with that property.”²¹⁰ Under this definition, the defendant’s Fourth Amendment rights were not violated. He could not show that the police trespassed because he did not have exclusive control over the basement area of the apartment, he could not exclude others from that area, and he could not claim a property interest in that area.²¹¹ Even if a *non*-resident were in the basement area, “Sweeney himself could not sue the intruder for civil trespass on his property.”²¹²

Furthermore, even if a trespass against Sweeney did occur when the police entered the basement, the court emphasized that not all trespasses constitute a Fourth Amendment violation.²¹³ For a violation to occur, “the trespass must occur on a ‘constitutionally protected area,’ . . . [including] the home, which extends to the ‘curtilage’ of the home as well.”²¹⁴ Considering the four *Dunn* factors,²¹⁵ the court reasoned that the basement was not part of Sweeney’s curtilage to his apartment, although it declined to extend its holding to categorically declare that basements of multi-unit residential dwellings are never considered the curtilage.²¹⁶

The *Sweeney* court outlines two steps that must be met for a successful Fourth Amendment claim under the trespass approach: first, a trespass must have actually occurred; second, the trespass must have occurred in a constitutionally protected area, such as in the home or in the curtilage.²¹⁷ For apartment tenants, the first step can never be met here—at least not in the technical sense—because “to prove a claim of trespass, one must have possession of the property in question and the ability to exclude others from entrance onto or interference with that property.”²¹⁸ In any given “common” area of an apartment unit—even the hallway that leads to one’s door—a tenant does not have the right to exclude, to claim a property interest, or to bring a civil suit against even a non-resident for trespass.²¹⁹

210. *Id.* at 900.

211. *Id.*

212. *Id.*

213. *Id.* (“Not all trespasses by law enforcement are violations of the Fourth Amendment.”).

214. *Id.* (internal quotations omitted).

215. The Supreme Court has outlined four factors that courts consider in determining if an area is part of the curtilage. *See* *United States v. Dunn*, 480 U.S. 294, 301 (1987). The four factors are the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

Id.

216. *Sweeney*, 821 F.3d at 901 (“It is not necessary to decide categorically here that the basement of a multi-unit residential building is or is not always the curtilage of individual units. It is enough to say that it was not in this case. Curtilage is a common-law concept often defined in abstract terms.”).

217. *Id.* at 899 (“To establish a Fourth Amendment violation under this approach, there must be some trespass upon one of the protected properties enumerated by the Constitution’s text.”).

218. *Id.* at 900.

219. *See* *Aberdeen Apartments v. Cary Campbell Realty All., Inc.*, 820 N.E.2d 158, 165–66 (Ind. Ct. App. 2005) (“Regardless of whether or not a landlord has exclusive possession over common areas . . . he or she has

Because of this inherent tension, a strict following of the *Jardines* analysis may leave apartment tenants with bare minimum Fourth Amendment protections and far less protections than homeowners currently receive under the Fourth Amendment in the curtilage of their home.

Consider another recent case, this time involving a state court that refused to extend the *Jardines* holding to the common area of an apartment.²²⁰ In *State v. Nguyen*, the police received a call from a tenant claiming to smell marijuana on the defendant's apartment floor.²²¹ The units of the apartment were attached to a common hallway space that tenants generally shared.²²² Personal property, including bikes and shoes, were left in this area.²²³ The hallways were secured, and the two entrances to the apartment building were locked at all times.²²⁴ After receiving the tip, the police—who were not in uniform—were only able to enter the apartment building after catching the main door when another tenant opened it to leave or enter.²²⁵

The court acknowledged that the officers “were technical trespassers in the common hallways,”²²⁶ although it is unclear if the court was referring to a trespass against the landlord or against the tenant. Importantly, the defendant could not prevent other tenants or their guests from entering the building, nor could he keep others from the common hallway.²²⁷ But despite the clear trespass to the property, the court found that there was no Fourth Amendment violation, noting that trespass in the common hallways “is of no consequence because [the defendant] had no reasonable expectation that the common hallways of the apartment building would be free from any intrusion.”²²⁸ The court distinguished *Jardines* from the facts, noting that “the common hallway is not an area within the curtilage of [the defendant's] apartment,” because “unlike the area immediately surrounding a *home*, a party does not have a legitimate expectation of privacy in the common hallways.”²²⁹

Thus, even when courts acknowledge that a trespass occurred, the trespass approach—on its own—is not sufficient to provide apartment dwellers with ad-

a sufficient possessory interest in the common areas of an apartment complex to bring an action for trespass.”); *Motchan v. STL Cablevision, Inc.*, 796 S.W.2d 896, 900 (Mo. Ct. App. 1990). The court stated:

It follows that a tenant does not have control of the common areas and thus does not possess them. We conclude that a landlord, who retains control of common areas in a multi-tenant building, also retains possession of those areas so as to support an action for trespass to the common areas.

Motchan, 796 S.W.2d at 900.

220. See, e.g., *State v. Nguyen*, 841 N.W.2d 676, 682 (N.D. 2013) (rejecting the defendant's argument that the *Jardines* holding should apply to drug-sniffing dogs in common areas of apartments).

221. *Id.* at 678.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 678–79.

226. *Id.* at 681.

227. *Id.*

228. *Id.*

229. *Id.* at 682 (emphasis added).

equate protections.²³⁰ The common area must still be regarded as a constitutionally protected area, such as the curtilage of the home.²³¹

D. Common Areas as Curtilage

Notice how, in *Nguyen*, the court declined to label the immediate area outside of the defendant's apartment door as the curtilage, despite the area being used regularly, and despite the entrance being locked.²³² Thus, the dog-sniff was constitutional.²³³ Recently, some courts have taken different approaches.²³⁴ Courts are increasingly referring to areas directly outside apartment units as the "curtilage" of the home in cases involving drug-sniffing dogs—much like the area outside the house in *Jardines* was considered the curtilage.²³⁵ But courts have had difficulty drawing a fine line between the curtilage and the common area,²³⁶ especially ones that have previously held that common areas are not protected under the Fourth Amendment. Additionally, courts afford common areas and the curtilage of apartments substantially different protections, depending on the classification.²³⁷

The Eighth Circuit is a good example of a court that has long held that there are no Fourth-Amendment protections in common areas,²³⁸ and it has grappled with the issue of curtilage and drug-sniffing dogs in apartments. In 2014, the court invalidated a dog-sniff that occurred outdoors next to an apartment building under *Jardines*,²³⁹ while declining to overrule its previous holding that there is no reasonable expectation of privacy in apartment common areas. In that case, the apartment had four doors that opened directly to each apartment from the outside, and the drug dog alerted officers to the defendant's unit.²⁴⁰ The constitutional violation was based on *Jardines*, but the court never held that the area was the "curtilage" of the apartment and never declared that an actual trespass occurred.²⁴¹

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 681–82.

234. Connon, *supra* note 182, at 312.

235. *Id.* ("Following *Jardines*, lower courts have looked anew at the concept of curtilage within multiunit dwellings.")

236. *See e.g.*, *Espinoza v. State*, 454 S.E.2d 765, 768–69 (1995) ("'[C]ommon area curtilage' . . . is a misnomer . . . [I]t is confusing to combine the concepts of 'common area' and 'curtilage' in deciding whether a particular area adjoining an apartment building is entitled to protection . . .").

237. *Id.* at 768.

244. *United States v. Davis*, 760 F.3d 901, 904 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 996 (2015).

239. *Id.* at 902.

240. *Id.*

241. The court also never reasoned that the dog was an enhancement device like the device in *Kyllo*, never referenced *Katz*, and never mentioned that the individual had a reasonable expectation of privacy in the common area of the apartment. *Id.* The court simply noted that *Jardines* applied without much further explanation. *Id.*

The Eighth Circuit decided another similar case a year later in *United States v. Burston*.²⁴² The *Burston* court, like the *Davis* court, relied exclusively on *Jardines*,²⁴³ but this time found that the dog-sniff occurred in the curtilage of the apartment.²⁴⁴ The dog-sniff occurred six to ten inches away from the defendant's apartment window, and the court considered this area to be the "curtilage" because it was in "close proximity" to the defendant's apartment, the defendant utilized the area by placing a grill there, and a bush in the area partially blocked the defendant's window—which suggested that steps were taken to protect the defendant's privacy.²⁴⁵ Importantly, the court declared that this area was not a "common area" of the apartment.²⁴⁶ The court stated that the area outside Burston's window was actually "an *uncommon* area" because "[n]o common walkway leads to Burston's window. The bush and the grill in front of the window prevent the area from being used as a *common* area."²⁴⁷

In May 2016, the Eighth Circuit again relied on *Jardines* to find that a drug-sniff outside of the defendant's apartment front door was the curtilage and thus violated the Fourth Amendment.²⁴⁸ The defendant's apartment door faced outside, and "there [was] no 'common hallway' which all residents or guests must use to reach their units [T]he walkway leading up to it was 'common' only to Hopkins and his immediate neighbor."²⁴⁹ Again, the court explicitly refused to overrule its previous holding that there is no "generalized expectation of privacy in the common areas of an apartment building."²⁵⁰ The area was the curtilage, not the common area of the apartment.

These cases highlight that the protections afforded to apartment dwellers under the curtilage analysis are limited and are more likely to apply when the

242. 806 F.3d 1123, 1124 (8th Cir. 2015).

243. *Id.* at 1126; *see also* Florida v. Jardines, 569 U.S. 1, 8 (2013). The *Burston* court never explicitly referred to the police conduct as a "trespass," although the *Jardines* case was reasoned primarily on trespass notions of the Fourth Amendment. *Id.* Interestingly, the court only mentioned *Katz* in a footnote. *Burston*, 806 F.3d at 1127, n.4. The footnote stated: "[t]he Supreme Court in *Jardines* did not decide whether the officers' investigation of [the defendant's] home violated his expectation of privacy under [*Katz*]. The [*Jardines*] decision was based on the violation of the defendant's property, not privacy, rights." *Id.* (citations omitted). The *Burston* court also never mentioned *Kyllo* or enhancement devices when referring to the drug-sniffing dog. *Id.*

244. *Burston*, 806 F.3d at 1127 ("[T]he factors discussed in *Dunn* support a finding of curtilage. First, the area sniffed was in close proximity to Burston's apartment—six to ten inches. That area is 'immediately surrounding' his residence.").

245. *Id.* The court stated:

First, the area sniffed was in close proximity to Burston's apartment—six to ten inches. That area is "immediately surrounding" his residence Second, the record contains photographic evidence that Burston made personal use of the area by setting up a cooking grill between the door and his window. Third, there was a bush planted in the area in front of the window, which partially covered the window.

Id.

246. *Id.* at 1129.

247. *Id.* (emphasis in original).

248. *United States v. Hopkins*, 824 F.3d 726, 732 (8th Cir. 2016) ("[W]e need not rely on *Katz* . . . to decide our case because [the dog's] presence on the curtilage of Hopkins' unit may be analyzed under *Jardines* . . .").

249. *Id.*

250. *Id.* (quoting *United States v. Brooks*, 645 F.3d 971, 976 (8th Cir. 2011)); *see also* *United States v. McCaster*, 193 F.3d 930, 933 (8th Cir. 1999).

defendant's window or door lead directly outside.²⁵¹ As such, apartments that have the make-up of a house are afforded greater protections than those that do not.²⁵² This seemingly random distinction does little to help the problem addressed earlier regarding artificial distinctions in Fourth Amendment protections.²⁵³

Recall that the Supreme Court put forth four factors that courts should consider to determine if an area is the curtilage: 1) the proximity to the home, 2) the enclosure surrounding the home, 3) the uses of the area, and 4) any steps the resident takes to maintain privacy.²⁵⁴ These factors may be too narrow for apartment settings and may be more applicable to single-unit homes.²⁵⁵ Importantly, the *Dunn* factors are non-mandatory factors that should be weighed depending on the nature of the case,²⁵⁶ nevertheless, lower courts have imposed *additional* requirements, such as whether the tenant has the ability to exclude others from the premises, in determining if an area in an apartment constitutes the curtilage.²⁵⁷ This has made it far more difficult to find that a common area is the curtilage of a tenant's home.²⁵⁸ This is not what the *Dunn* court required to find curtilage, and this approach almost certainly affords renters less protections than homeowners in the same way that the trespass approach discussed above does.²⁵⁹

Despite strong arguments that common areas of apartments are essentially the same as the curtilage of the home, courts almost exclusively distinguish between the curtilage and common areas; common areas are afforded substantially less protection under the Fourth Amendment because the overwhelming majority of federal circuit courts still declare that apartment tenants do not have a reasonable expectation of privacy in common areas.²⁶⁰ Further, the curtilage protections, when they do actually apply, do not necessarily extend to all common areas.²⁶¹ Until and unless circuit courts reverse their outdated holdings that categorically declare common areas unprotected under the Fourth Amendment, the distinction between the common area of apartments and the curtilage of the home provides an arbitrary barrier to consistent Fourth Amendment protections.

251. Connon, *supra* note 182, at 328–29 (“Because the *Hopkins* holding is narrow, the protections at present may be limited to apartment complexes with direct exterior exits.”).

252. *See id.*

253. *See infra* Section III.C.

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

255. 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, 298 (2005) (arguing that the curtilage factors should be expanded to extend the curtilage to apartment settings).

256. *Dunn*, 480 U.S. at 301.

257. Connon, *supra* note 182, at 315 (“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 . . . several . . . jurisdictions.”).

258. *Id.* at 328–29.

259. *See infra* Section III.C.

260. *See Seal, supra* note 13, at 413–14 (collecting cases).

261. *See, e.g., Espinoza v. State*, 265 Ga. 171, 174 (1995) (discussing different protections for curtilage and common areas in apartments).

E. *The Effects of Whitaker*

The *Whitaker* case provides a sound starting point, but arguably does not go far enough.²⁶² Common areas of apartments are still not protected to the extent that the curtilage of a home is protected.²⁶³ But at least when it comes to drug-sniffing dogs, the court has taken a step in the right direction for protecting apartment tenants by holding that tenants have *some* expectation of privacy in common areas.

Because the *Whitaker* holding is so recent, little is known about what the holding means for the future of the Fourth Amendment in common areas. It is possible that other courts will follow suit and overturn their long-standing categorical exclusion of Fourth Amendment protections in common areas of apartments. The *Whitaker* holding provides a unique solution to common areas by offering an alternative to the strict, black-and-white, all-or-nothing approach used by most courts that declare there is no expectation of privacy in common areas.²⁶⁴

What is clear, however, is that the *Whitaker* holding does not provide coverage for all common areas of apartments. The few Seventh Circuit decisions that have since been issued illustrate this point, and suggest that the *Whitaker* holding may exclusively apply to cases involving drug-sniffing dogs. The Northern District of Indiana recently relied on the *Whitaker* holding to find that the use of a drug-sniffing dog violated an apartment renter's constitutional right when the City of Chicago had a written policy to conduct dog-sniffs of apartments it rented.²⁶⁵ The court ruled this as unconstitutional and declared that "[u]nder *Whitaker*, the constitutional violation occurs as soon as Defendants walk the drug-sniffing dog past the tenant's door."²⁶⁶

In contrast, the *Sweeney* court, as discussed earlier in this Note, did not extend the *Whitaker* holding to the basement of an apartment that was for the common use of tenants when the police found a weapon.²⁶⁷ Notably, the case

262. See Jeremy J. Justice, *Do Residents of Multi-Unit Dwellings Have Fourth Amendment Protections in Their Locked Common Area After Florida v. Jardines Established the Customary Invitation Standard?*, 62 WAYNE L. REV. 305, 345 (2017) ("[P]ublic policy suggests that, with the trend of Americans choosing to live in urban settings, the diminished expectation of privacy standard set forth in those circuits that have not held for common area protections should be expanded to match current societal norms.").

263. See, e.g., *Espinoza*, 265 Ga. at 174.

264. Cannon, *supra* note 182, at 324.

265. *Gutierrez v. City of East Chicago*, No. 2:16-CV-111-JVB-PRC, 2016 WL 5819818, at *36-37 (N.D. Ind. Sept. 6, 2016), report and recommendation adopted, No. 2:16-CV-111 JVB, 2016 WL 5816804 (N.D. Ind. Oct. 5, 2016) (finding that drug-sniffing dog outside apartment violated Fourth Amendment and relying on *Whitaker* holding). The court stated:

ECHA, with the participation of the City of East Chicago, has made the warrantless searches at issue in *Whitaker* part of its written policy, and Defendants have undertaken unconstitutional searches of each of ECHA's approximately 800 tenants' apartments at least once a year. Plaintiff was subjected to such a search on February 5, 2016. Plaintiff states that she felt coerced to allow the second search for fear of being arrested if she withheld consent. Under *Whitaker*, the constitutional violation occurs as soon as Defendants walk the drug-sniffing dog past the tenant's door.

Id.

266. *Id.* at 37.

267. *United States v. Sweeney*, 821 F.3d 893, 903 (7th Cir. 2016).

did not involve a drug-sniffing dog.²⁶⁸ When the court looked to the *Katz* test, it found that Sweeney had no objectively reasonable expectation of privacy in the basement of the apartment building.²⁶⁹ The court found it irrelevant as to whether the exterior door to the building was locked; the fact that multiple tenants could enter the area meant that the space could not be assumed private.²⁷⁰ The court carefully noted, however, that this

does not mean that law enforcement can freely use common spaces in apartment buildings to intrude into the privacy of apartment interiors We held [in *Whitaker*] that the dog-sniff at the entrance was a search of the apartment itself and subject to the Fourth Amendment warrant requirement, just as the use of other sense-enhancing technology would be.²⁷¹

F. Drug Dogs as Devices Not in Common Use

The *Whitaker* court, in finding that a drug-sniffing dog in the common area of the apartment implicated the Fourth Amendment, referred to the dog as a “sense-enhancing technology” that implicates the Fourth Amendment because it provides insight into the activities of the home that could not be known otherwise.²⁷² Thus, the dog was considered a device that was not in common use like the device in *Kyllo*.²⁷³ Recall that this was essentially the same reasoning that the concurrence took in *Jardines* and that was rejected by the majority.²⁷⁴

Although this approach was rejected in *Jardines*, equating a drug-sniffing dog with the device in *Kyllo* would produce the most consistent results for Fourth Amendment cases involving drug-sniffing dogs in apartments. As demonstrated, not all courts have extended the *Jardines* opinion to apartments because the trespass and curtilage analysis do not necessarily transfer neatly to the apartment context. This is because renters do not have the ability to exclude others under the trespass approach and because the curtilage factors are not always applicable to apartment common areas. This Note has also demonstrated that the common *Katz* test as applied to common areas of apartments produces inconsistent results amongst circuits and is generally under-inclusive.

The *Whitaker* court was amongst the first and only to rely on the *Jardines* concurrence and equate a drug-sniffing dog with the device in *Kyllo* to find that a Fourth Amendment violation occurred when a drug-sniffing dog entered an apartment building.²⁷⁵ This is the most effective way to apply the protections afforded to the curtilage of the home to the common areas of apartments with

268. *Id.* at 898.

269. *Id.* at 902.

270. *Id.* at 902–03.

271. *Id.* at 903.

272. *Id.*

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

274. *Florida v. Jardines*, 569 U.S. 1, 22–23 (2013).

275. The *Hopkins* and *Burston* courts, for example, never mentioned enhancement devices when finding that a dog-sniff was unconstitutional under *Jardines*. See generally *United States v. Hopkins*, 824 F.3d 726 (8th Cir. 2016); *United States v. Burston*, 806 F.3d 1123 (8th Cir. 2015).

respect to drug-sniffing dogs because the other approaches, while helpful, necessarily fall short of providing equal and consistent Fourth Amendment protections.

Importantly, equating a drug-sniffing dog with the device in *Kyllo*²⁷⁶—as the court in *Whitaker* and the concurrence in *Jardines* did—does not risk overturning long-standing precedent that has upheld dog-sniffs in public places and automobiles. Importantly, the *Kyllo*-device analysis applies exclusively to *homes*; that is, *Kyllo* held that sense-enhancing technology that is not in public use and that provides insight into the activities of the *home* is unconstitutional.²⁷⁷ Extending this to drug-sniffing dogs would not frustrate the use of these dogs in other contexts; rather, it would provide equal protections for tenants of apartments as it does for homes, and it would only apply to cases involving drug-sniffing dogs that detect activities in the home. Indeed, the *Whitaker* court acknowledged that “the fact that [the] search [was] of a home distinguishes this case from dog sniffs in public places”²⁷⁸

IV. RECOMMENDATION

The Supreme Court decision in *Jardines* does not provide lower courts with a clear guideline on how to approach Fourth Amendment claims involving drug-sniffing dogs in common areas of apartments. In reverting to the trespass approach to analyze Fourth Amendment claims in apartment common areas, courts have overwhelmingly relied on *Jardines* without always explicitly referencing trespass or declaring that a trespass occurred.²⁷⁹ The trespass approach has also resulted in some courts refusing to apply the *Jardines* holding to apartment units.²⁸⁰

The trespass analysis to the Fourth Amendment does not transfer neatly to common areas of apartments because tenants cannot always meet the requirements to show that a trespass—at least in its literal sense—took place. In any given common area of an apartment unit—even the hallway that leads to one’s door—a tenant does not have the right to exclude, to claim a property interest, or to bring a civil suit against even a non-resident for trespass.²⁸¹ Because renters are not owners of common areas of apartments, police are not technically trespassing on the *renter’s* property if they enter without consent. Police are technically trespassing on the apartment owner’s property.

Because of this inherent tension, a strict following of the *Jardines* majority opinion leaves apartment tenants with bare-minimum Fourth Amendment protections, and far less protections than homeowners currently receive under the Fourth Amendment in the curtilage of their home. A different approach is

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

277. *Id.* at 34–35.

278. *Whitaker*, 820 F.3d at 853 (“Indeed, the fact that this was a search of a home distinguishes this case from dog sniffs in public places”).

279. Justice, *supra* note 262, at 335–36.

280. See, e.g., *State v. Nguyen*, 841 N.W.2d 676, 681 (N.D. 2013).

281. *United States v. Sweeney*, 821 F.3d 893, 900 (7th Cir. 2016).

required, and the *Whitaker* holding provides a strong starting point: first, the lower courts should move away from their strict categorical approach to always excluding common areas of apartments from Fourth Amendment protections. The *Whitaker* court demonstrates that, at least in some circumstances, tenants have a reasonable expectation of privacy in common areas. Next, by equating drug-sniffing dogs to the device in *Kyllo*, the *Whitaker* court brilliantly found a way to apply the *Jardines* holding to apartments in a way that puts apartments on the same level of protection as houses but also that does not overturn the legality of drug-sniffs in other contexts outside the home.²⁸² Other courts should follow suit.

The overwhelming majority of federal circuit courts still hold that tenants do not have a reasonable expectation of privacy in apartments.²⁸³ Courts should first address the long overdue issue regarding whether a tenant has a reasonable expectation of privacy in the common area of an apartment building. Not until these precedents are replaced with the more common notion of “curtilage” will the *Katz* test be more successful in protecting tenants of apartments. The *Whitaker* approach was useful in suggesting that there are different degrees of privacy in common areas of apartment buildings.²⁸⁴ By taking a more nuanced approach, rather than approaching privacy interests as “black and white,” or existing or not existing, courts can grant tenants the protections afforded to homeowners without categorically declaring that all apartment common areas implicate the Fourth Amendment.

The lower courts should also adopt the *Whitaker* holding and Justice Kagan’s concurrence in *Jardines*. These opinions equate a drug-sniffing dog with the sense-enhancing device in *Kyllo*.²⁸⁵ This allows the *Jardines* opinion to extend to apartments, unlike the trespass and curtilage approach, which has been inconsistently applied. This will allow courts and police to abide by a bright-line rule concerning the legality of drug-sniffing dogs near homes, rather than rely on confusing and conflicting precedent about the legality of the location of the dog-sniff.

V. CONCLUSION

The long-standing circuit split regarding whether a tenant has a reasonable expectation of privacy in common areas of apartments provides tenants across the nation with inconsistent and unequal constitutional protections. Indeed, the divide has only widened since the *Jardines* opinion was issued because lower courts were not provided with a clear guideline on how to apply the *Jardines* opinion to common areas of apartments. The courts should follow the lead in *Whitaker* and apply the same protections that *Jardines* afforded homeowners to renters by equating a drug-sniffing dog with the sense-

282. See *Whitaker*, 820 F.3d at 853.

283. See *Kyllo*, 533 at 34–35; Seal, *supra* note 13, at 398.

284. *Whitaker*, 820 F.3d at 854.

285. *Id.* at 853.

enhancing device in *Kyllo*.²⁸⁶ This approach naturally lends itself to providing all homes—apartments, houses, and everything in between—the same protections.

The *Whitaker* court developed a nuanced alternative approach to privacy expectations in common areas of apartments, and was the first court to suggest that there are different *degrees* of privacy in common areas.²⁸⁷ As a functional matter, apartment common areas serve the same purpose as the “curtilage areas” of homes and deserve the same protections. The *Whitaker* holding provides a sound starting point. Courts that are hesitant to find Fourth Amendment protections in *all* common areas of apartments could develop a similar approach, which would help eliminate some of the artificial distinctions between apartments and houses that has resulted in unequal constitutional protections.

286. *Id.*

287. *Id.* at 854.