No. 18-1519

In the Supreme Court of the United States

JASON CORREA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether law-enforcement officers conducted an unreasonable search in violation of the Fourth Amendment when they used a garage-door opener and key fob lawfully seized during an arrest to identify the condominium unit affiliated with the seized items.

2. Whether petitioner had an individualized constitutionally protected interest in the common lobby area of a 10-floor condominium building.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Ill.):

United States v. *Correa et al.*, No. 11-cr-750 (May 26, 2016)

United States Court of Appeals (7th Cir.):

United States v. *Correa*, No. 16-2316 (Nov. 5, 2018)

United States v. *Melero*, No. 16-2467 (Nov. 5, 2018)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-31) is published at 908 F.3d 208. The order of the district court (Pet. App. 82-101) denying a suppression motion is not published in the Federal Supplement but is available at 2013 WL 5663804. Orders of the district court denying motions to reconsider (Pet. App. 53-66, 67-81) are not published in the Federal Supplement but are available at 2015 WL 300463 and 2014 WL 1018236, respectively.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 2018. A petition for rehearing was denied on January 4, 2019 (Pet. App. 102-103). On April 2, 2019, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including June 3, 2019, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Illinois, petitioner was convicted on two counts of possession with intent to distribute controlled substances, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A). Pet. App. 33. The district court sentenced him to 120 months of imprisonment, to be followed by five years of supervised release. *Id.* at 34-35. The court of appeals affirmed. *Id.* at 1-31.

1. In October 2011, a confidential informant notified Drug Enforcement Administration (DEA) agents that he had obtained $500,000 in cash from two unidentified men. Pet. App. 2. The agents tailed the men to a house a few miles away, which they put under surveillance. *Ibid.* The agents later followed one of the men to a grocery store, where he met with petitioner and gave petitioner a multicolored bag. *Id.* at 2-3. Petitioner put the bag into his Jeep and drove away. *Id.* at 3.

The DEA agents, along with local police officers working as part of a task force, followed petitioner and stopped him for a traffic violation. Pet. App. 3. Petitioner denied having anything illegal in his vehicle and consented to a search. *Id.* at 3-4. Officers located the multicolored bag, inside of which they observed cocaine. *Id.* at 4. They also found a bag on the front passenger seat that contained four garage-door openers, three sets of keys, and four cell phones. *Ibid.* The officers arrested petitioner. *Ibid.*

During the traffic stop, DEA Special Agent Thomas Asselborn took the garage-door openers and keys. Pet. App. 4. He drove to the building where the cash exchange had occurred and pushed the buttons on the

garage-door openers, but no doors opened. *Ibid.* He then activated the openers in the vicinity of other buildings in the area. *Ibid.* A garage door opened at a "multi-story condominium building at 1819 South Michigan Avenue." *Ibid.*; see *id.* at 72 (describing the building as a "10-floor, 60-80 unit condo building"). Agent Asselborn called other members of the task force to the building but did not enter the garage. *Id.* at 5.

When other officers arrived at the building, they used a key fob from the bag found in petitioner's vehicle to unlock and enter the lobby. Pet. App. 5. Once inside, they tested keys found in the bag on mailboxes in a common area. *Ibid.* One of the keys opened the mailbox for Unit 702. *Ibid.* The officers then contacted petitioner, who consented to a search of that unit. *Ibid.* Inside the unit, officers found a handgun, cocaine, heroin, marijuana, ecstasy, methamphetamine, and equipment for weighing and packaging drugs. *Ibid.*

2. A federal grand jury indicted petitioner on two counts of possession with intent to distribute controlled substances, in violation of 21 U.S.C. 841(a)(1); and one count of possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A). Indictment 1, 3-4.

a. Petitioner moved to suppress the evidence discovered during the traffic stop and subsequent investigation, but the district court denied his motion. Pet. App. 82-101. The court first determined that the traffic stop was lawful based on the officers' reasonable suspicion that petitioner was engaged in drug trafficking. *Id.* at 90-91. The court observed that the traffic stop could also have been justified by petitioner's traffic violation, but declined to reach that issue. *Id.* at 89-90. The court then reasoned that the search of petitioner's vehicle and

seizure of the garage-door openers and keys found inside were lawful because petitioner had consented and because the officers had probable cause to "search the entire car and seize all evidence of a crime" once they found the cocaine. *Id.* at 94; see *id.* at 91-95.

The district court also determined that Agent Asselborn had not violated the Fourth Amendment in activating the garage-door openers and keys to locate petitioner's condominium. Pet. App. 95-97. The court relied on *United States* v. *Concepcion*, 942 F.2d 1170 (7th Cir. 1991), in which DEA agents similarly located a defendant's apartment using keys lawfully seized during an arrest. *Id.* at 1171. Specifically, the agents in *Concepcion* used the keys to open the locked door to the common area of an apartment building, and then tested the keys on apartment doors until they found the unit that the keys unlocked, which the defendant then gave consent to search. *Ibid.*

The Seventh Circuit in *Concepcion* had determined that the agents' use of a key to enter the apartment building was not a search within the meaning of the Fourth Amendment because the defendant had no individualized constitutionally protected interest in the common area. 942 F.2d at 1172. The court concluded that the agents' use of a key to unlock the apartment door was a search because it revealed information about "who has access to the space beyond," *ibid.*, but found that the search was reasonable because the privacy interest in a keyhole is very slight and the information the agents received about where the defendant lived "could have [been] ascertained in many other ways"—for example, by looking up his address in a phone book or drivers' license database, asking the building landlord, or following him to the apartment, *id.* at 1173.

The district court here similarly determined that Agent Asselborn's activation of the garage-door openers and use of the keys in identifying petitioner's condominium did not violate the Fourth Amendment. Pet. App. 95-96. The court explained that, if the garage was "common to other residents of the building," petitioner would have had no reasonable expectation of privacy in it, and the agent's activation of the garage-door opener would "not [have been] a search at all." *Id.* at 97. The court additionally reasoned that even if the garage was "private to" petitioner (which he had not suggested), using the garage-door opener in identifying the garage associated with petitioner created only a minimal privacy intrusion of the kind at issue in *Concepcion*. *Ibid.* The court then observed that using the key fob to enter the lobby and testing the keys on the common-area mailboxes to locate petitioner's unit were likewise permissible under *Concepcion*. *Id.* at 96-97. And the search of petitioner's condominium unit itself was justified by petitioner's consent. *Id.* at 97-100.

b. Petitioner filed a motion to reconsider, which the district court denied. Pet. App. 67-81. The court rejected petitioner's argument that this Court's decision in *United States* v. *Jones*, 565 U.S. 400 (2012), required agents to obtain a warrant before using "the assistance of * * * technology to hunt for [petitioner's] building." Pet. App. 73. The district court observed that *Jones* involved a warrantless installation of government technology (a GPS tracker) on the defendant's property without his consent, followed by continuous monitoring of his movements for 28 days. *Ibid.* In contrast, the court explained, the agents here obtained the property (the garage-door openers and keys) through a lawful seizure after they had discovered evidence of crime, and

they used the property to learn only the fact of petitioner's address, which they could have obtained in many other ways without a warrant. *Id.* at 73-78.

The district court also rejected petitioner's reliance on *Florida* v. *Jardines*, 569 U.S. 1 (2013), in which this Court held that police officers had engaged in a search by bringing a drug-sniffing dog onto the porch of a home. Pet. App. 78. The district court explained that the common area of an "apartment building is a different animal than is a home," given a resident's "greatly reduced" expectations of privacy in common areas shared with many other residents and visitors. *Ibid.*

c. Petitioner filed a second motion to reconsider after this Court's decision in *Riley* v. *California*, 573 U.S. 373 (2014), which held that officers may not search digital data in a cellular phone under the search-incident-to-arrest doctrine. Pet. App. 54. The district court denied the motion, reasoning that, whatever the scope of *Riley*, suppression of the evidence would not be appropriate in this case because the agents were entitled to rely in good faith on *Concepcion*. See *id.* at 64-65 (citing *Davis* v. *United States*, 564 U.S. 229 (2011)).

d. Petitioner entered a conditional guilty plea to the controlled-substance counts. Pet. App. 32-33. The government dismissed the firearm count. *Id.* at 33. The district court sentenced petitioner to 120 months of imprisonment, to be followed by five years of supervised release. *Id.* at 34-35.

3. The court of appeals affirmed. Pet. App. 1-31.

a. Like the district court, the court of appeals analyzed each step in the investigation, beginning with the traffic stop, and determined that "the officers did not violate the Fourth Amendment at any step." Pet. App. 7. The court of appeals found that the traffic stop was

lawful based on petitioner's traffic violation, *id.* at 7-9; the vehicle search was lawful based on petitioner's consent, *id.* at 9-10; and the seizure of the garage-door openers and keys was lawful because, after the officers found drugs in the car, "they reasonably inferred that the multiple garage door openers, sets of keys, and cell phones could well be evidence of criminal activity," *id.* at 11. The court declined to decide whether the traffic stop was also justified by reasonable suspicion that petitioner was engaged in drug trafficking. *Id.* at 8.

The court of appeals then determined that "using the garage door openers to locate [petitioner's apartment] building was a search, but the search was reasonable." Pet. App. 13. In the court's view, Agent Asselborn "searched" the garage-door openers "by pushing the buttons, which interrogated the code generated by the opener." *Id.* at 15. The court determined, however, that the search was reasonable because it disclosed "only an address"—a piece of information in which petitioner "had no reasonable expectation of privacy" and which officers routinely obtain without a warrant through the booking process or other permissible means. *Id.* at 17.

The court of appeals also rejected petitioner's argument that *Riley*'s "holding prohibiting warrantless searches of cell phones seized incident to arrest should be read more broadly to apply to searches of 'non-contraband electronic items that * * * can lead to privately held information in the home or about the home.'" Pet. App. 19. The court explained that "[g]arage door openers do not implicate" the privacy concerns at stake in *Riley*, which arose from the immense quantity of personal information kept in cell phones. *Ibid.* The court not only found that *Riley* was not controlling in this context, but observed that "*Riley* helps to explain why

Agent Asselborn's searches did not violate the Fourth Amendment." *Ibid.* In requiring a warrant to search a cell phone incident to arrest, *Riley* did "not condemn" the well-established practice of "searching an arrestee's wallet or address book," which courts have long upheld as lawful. *Id.* at 20; see *id.* at 18-19.

The court of appeals similarly determined that using the key fob to open the locked door to the lobby of the condominium building and testing the keys on the mailboxes in the common area were reasonable searches. Pet. App. 21-25. In the court's view, those investigative actions were searches because the officers "learned something from using the fob and the mailbox key," but the searches were reasonable "[f]or the reasons discussed regarding the search of the garage door opener"—namely, they revealed only that petitioner was affiliated with a particular address. *Id.* at 22.

Finally, the court stressed that the officers did not use the garage-door opener, the key fob, or the keys to access petitioner's condominium itself; that search was based on petitioner's consent. Pet. App. 23.

b. Judge Ripple joined the majority opinion and also issued a separate concurrence. Pet. App. 26-31. He agreed with the majority that petitioner had not met "his burden of demonstrating that the analysis here reflects inadequately his cognizable property and privacy rights." *Id.* at 26. Judge Ripple also agreed with the district court that "the officers can rely on the good faith exception to the exclusionary rule" given the on-point circuit precedent. *Ibid.* Judge Ripple added, however, that this case "should prompt [the court] to consider whether [its] present case law reflects adequately the new realities of property ownership and privacy in an urban setting." *Ibid.*; see *id.* at 27-31.

ARGUMENT

Petitioner contends (Pet. 6) that this Court should grant review to hold that warrantless searches "of and with electronic devices recovered from arrestees" violate the Fourth Amendment, and that "secured common areas of multi-unit residential buildings are constitutionally protected areas under the Fourth Amendment" that require a warrant for entry. The court of appeals correctly rejected those sweeping arguments, and its decision does not conflict with any decision of this Court or another court of appeals. Moreover, this case would be an unsuitable vehicle for review because the good-faith exception to the exclusionary rule would prevent suppression of the evidence in any event. The petition for a writ of certiorari should accordingly be denied.

1. As relevant here, the Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. Amend. IV. To show that a law-enforcement action violated that prohibition, a defendant accordingly must show that (a) the action was a "search[]," and (b) the search was "unreasonable." *Ibid.*; see, *e.g.*, *Carpenter* v. *United States*, 138 S. Ct. 2206, 2215 n.2 (2018); Pet. App. 13. Here, it is questionable whether Agent Asselborn's use of the garage-door openers and key fob to determine petitioner's address constituted a search. But even if it did, the court of appeals correctly determined that the search was reasonable. Pet. App. 16-21.

a. Absent the existence of recognized property rights capable of invasion through "physical intrusion," *Florida* v. *Jardines*, 569 U.S. 1, 5 (2013) (citation omitted), the touchstone of a Fourth Amendment search is an affirmative showing that the defendant had a "legitimate expectation of privacy in the invaded place," *Minnesota* v. *Olson*, 495 U.S. 91, 95 (1990) (citation omitted).

The court of appeals found no property interest that would justify treating the officers' activation of the garage-door openers and use of the key fob found in his car as a search, Pet. App. 15, and petitioner does not meaningfully contest that issue. Petitioner no longer disputes that the officers lawfully seized the garage-door openers and key fob during a vehicle search justified both by his consent and by the officers' probable cause to search for evidence of crime once they discovered cocaine in the Jeep. *Id.* at 9-12. The government therefore did not "trespass" on petitioner's property, and any Fourth Amendment "search" that occurred must have been grounded in a violation of his privacy expectations. *United States* v. *Jones*, 565 U.S. 400, 411 (2012); see Pet. App. 15.

The court of appeals went on to conclude that "Agent Asselborn searched" the garage-door openers "by pushing the buttons, which interrogated the code generated by the opener with each push of the button." Pet. App. 15; see *id.* at 22 (similar for key fob). That conclusion is questionable. Indeed, while the court recognized that petitioner's "reasonable expectation of privacy" was the only possible foundation for concluding that the agent "searched" the garage-door openers, *id.* at 15, the court never explained how petitioner had any expectation of privacy in a garage-door opener that provided access to the "shared parking facility" of a 10-floor condominium building, *ibid.*, or a key fob that opened only the "lobby * * * common area" of that building, *id.* at 22. The court cited (*id.* at 15-16, 22) its decision in *United States* v. *Concepcion*, 942 F.2d 1170 (7th Cir. 1991), in which it had taken the view that police insertion of a key into a lock constituted a (reasonable) search, *id.* at 1171-1172. But *Concepcion* involved the lock on a defendant's

personal apartment, where expectations of privacy are greater than in a shared garage or common lobby area. *Ibid.* And even then, *Concepcion* acknowledged that other courts of appeals have concluded that the insertion of a key into a lock does not constitute a search. *Id.* at 1172; see *United States* v. *Cowan*, 674 F.3d 947, 955-956 (8th Cir.) (collecting such decisions), cert. denied, 568 U.S. 922 (2012).

Petitioner suggests (Pet. 11) that garage-door openers and lobby key fobs "are the veritable keys to the castle." But they are not, unless a person's castle is defined to include a parking garage and lobby shared with dozens of other tenants. Nor (as discussed further below) does the "electronic" nature of garage-door openers and key fobs have any talismanic significance in the Fourth Amendment analysis. Pet. 11-12. This Court has held (and reiterated) that use of electronic beepers to track a suspect's location—which provides information well beyond the identity of the particular building garage or lobby he can open—is *not* a search. *United States* v. *Knotts*, 460 U.S. 276, 281 (1983); see *Carpenter*, 138 S. Ct. at 2215, 2218 (reiterating the holding of *Knotts*); *Jones*, 565 U.S. at 408-409 (same).

Indeed, by definition, the *only* information a garage-door opener or lobby key fob can reveal is a suspect's connection to a particular address. But the court of appeals itself explained that "an address" is information over which petitioner "had no reasonable expectation of privacy." Pet. App. 17. The court of appeals' own logic thus suggests that using the garage-door opener and key fob to associate petitioner with a particular building was not a search. Cf. *United States* v. *Place*, 462 U.S. 696, 707 (1983) (explaining that a sniff by a dog that can

only detect contraband—in which no reasonable expectation of privacy exists—is not a search).

b. In any event, even if Agent Asselborn's use of the garage-door openers and key fob was a search, the court of appeals correctly determined that the search was reasonable. Pet. App. 16-21; see *Riley* v. *California*, 573 U.S. 373, 381 (2014) (explaining that the "touchstone of the Fourth Amendment is reasonableness") (citation and internal quotation marks omitted).

In *Riley* v. *California*, *supra*, the Court declined to adopt a "mechanical" rule under which officers could automatically search the "digital content on cell phones" seized from any arrestee. 573 U.S. at 386. The Court observed, without disapproval, that lower courts "have approved searches of a variety of personal items carried by an arrestee," including—of particular relevance here—a "billfold" or "address book." *Id.* at 392; see *id.* at 405 n.* (Alito, J., concurring in part and concurring in the judgment) (collecting additional cases); U.S. Br. at 27 n.7, *United States* v. *Wurie*, 573 U.S. 373 (2014) (No. 13-212) (same). But the Court explained that cell phones, "which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy, * * * differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." *Riley*, 573 U.S. at 385, 393.

The Court observed that among "the most notable distinguishing features" is cell phones' "immense storage capacity." *Riley*, 573 U.S. at 393. Indeed, the court explained, "[t]he term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used

as a telephone," and "could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." *Ibid.* Because cell phones "implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse," the Court "decline[d]" to allow "searches of data on cell phones" whenever they are seized from an arrestee, and "h[e]ld instead that officers must generally secure a warrant before conducting such a search." *Id.* at 386, 393.

As the court of appeals correctly recognized, the Court's reasoning in *Riley* does not suggest unreasonableness in activating garage-door openers and key fobs, which by definition reveal only a person's connection to a particular address, and are far more similar to wallets and address books than to cell phones. Pet. App. 19-20. Remote garage-door openers have existed since the 1940s; electronic key fobs date to the early 1980s. See Overhead Door Co. of Cent. Jersey, *Residential Automatic Garage Door Openers—A Brief History* (Nov. 7, 2017), https://www.overheaddoorco.com/blog/residential-automatic-garage-door-openers-a-brief-history; Kiely Kuligowski, *Key Fobs 101: What Small Businesses Need to Know*, *Business News Daily* (Mar. 25, 2019), https://www.businessnewsdaily.com/11343-key-fob-electronic-door-locks.html. No one would mistake "the humble garage opener remote or key fob at issue here," Pet. 8, for "minicomputers that * * * could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers," *Riley*, 573 U.S. at 386. Far from exposing the "vast store of sensitive information on a cell phone," the "rudimentary" technology at issue in garage-door

openers and key fobs reveals only information that arrestees have no reasonable expectation of keeping private. *Carpenter*, 138 S. Ct. at 2214-2215; cf. *Knotts*, 460 U.S. at 281. The court of appeals thus correctly determined that any search of those items conducted by the agents was reasonable. Pet. App. 19-21.

c. Petitioner contends that this Court should "use this case" to provide "[l]ower federal courts and state courts [with] guidance" on how *Riley* might apply to searches involving lawfully sized "electronic devices"—namely that "warrantless searches of and with [such] electronic devices" are categorically "not permitted." Pet. 6; see Pet. 8-9. That contention lacks merit.

As an initial matter, petitioner provides no support for the assertion (Pet. 6) that lower courts need "guidance" in this context. Indeed, petitioner fails to cite even a single court of appeals or state court decision struggling with this issue, let alone one that conflicts with the decision below. He states (Pet. 12) that this Court should adopt a blanket rule extending *Riley* to all electronic devices to "*prevent* inconsistent application of *Riley* over different Circuits and different types of electronic devices." *Ibid.* (emphasis added). But this Court does not typically intervene to provide such guidance until after the courts of appeals have had a chance to consider and apply this Court's decisions and have entered their own decisions that conflict with one another. See Sup. Ct. R. 10(a).

Moreover, the courts of appeals that have analyzed claims analogous to petitioner's after *Riley* have declined to find Fourth Amendment violations. See, *e.g.*, *United States* v. *Williams*, 773 F.3d 98, 105 (D.C. Cir. 2014) ("Neither this circuit nor any other has held that an officer's warrantless activation of a key fob to locate

the vehicle to which it corresponds constitutes a search, let alone an unconstitutional one."), cert. denied, 135 S. Ct. 2336 (2015); *United States* v. *Dasinger*, 650 Fed. Appx. 664, 672 (11th Cir. 2016) (per curiam) (similar). And no court has taken any position that approaches petitioner's suggestion of a categorical rule requiring a warrant for "*all* electronic devices recovered from arrestees." Pet. 9 (emphasis added). Nor does anything in the Fourth Amendment or this Court's cases interpreting it suggest such a bright-line distinction. See, *e.g.*, *Carpenter*, 138 S. Ct. at 2215 (holding that obtaining long-term cell site location information requires a warrant, but "rudimentary tracking facilitated by [an electronic] beeper" does not); *Jones*, 565 U.S. at 411 (stating that "[s]ituations involving merely the transmission of electronic signals without trespass would remain subject to [a reasonable-expectation-of-privacy] analysis," without suggesting any categorical answer) (emphasis omitted). In short, no sound basis for this Court's intervention exists.

2. Certiorari is similarly unwarranted on petitioner's contention (Pet. 12-16) that all residents of a multi-unit residential building automatically have a constitutionally protected interest in its common areas, such that agents need a warrant to enter.

As the court of appeals correctly explained, whether petitioner had a reasonable expectation of privacy in the common areas of his 10-floor, 60-80 unit condominium building is not a "difficult question." Pet. App. 14. The common areas of a large residential building like the one at issue here are shared by dozens, if not hundreds, of residents, guests, employees, and other visitors every day. No one could reasonably expect privacy in such a setting. See, *e.g.*, *Concepcion*, 942 F.2d at 1172 ("[I]t 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.").

Accordingly, all but one of the courts of appeals that have addressed the issue have determined that a resident does not have a reasonable expectation of privacy in the common areas of a multi-unit residential building. See, *e.g.*, *United States* v. *Hawkins*, 139 F.3d 29, 32 (1st Cir.), cert. denied, 525 U.S. 1029 (1998); *United States* v. *Barrios-Moriera*, 872 F.2d 12, 14 (2d Cir.), cert. denied, 493 U.S. 953 (1989); *Concepcion*, 942 F.2d at 1172; *United States* v. *McGrane*, 746 F.2d 632, 634 (8th Cir. 1984); *United States* v. *Nohara*, 3 F.3d 1239, 1242 (9th Cir. 1993); *United States* v. *Maestas*, 639 F.3d 1032, 1039-1040 (10th Cir. 2011); *United States* v. *Miravalles*, 280 F.3d 1328, 1333 (11th Cir. 2002); *United States* v. *Anderson*, 533 F.2d 1210, 1214 (D.C. Cir. 1976); see also Pet. App. 26 & n.1 (Ripple, J., concurring) (citing cases).

The lone possible exception, which petitioner mentions only in passing (Pet. 12 n.1), is the Sixth Circuit, which concluded more than 40 years ago that police violated the Fourth Amendment when they entered the locked lobby of the apartment building as workmen opened the door to leave. *United States* v. *Carriger*, 541 F.2d 545, 547-550 (1976). But petitioner does not rely on that decision, and even the Sixth Circuit has taken the view that *Carriger* lies "outside the mainstream" and should not be "extend[ed] * * * to cases that are reasonably distinguishable." *United States* v. *Dillard*, 438 F.3d 675, 683, cert. denied, 549 U.S. 925

(2006). This case is at least "reasonably distinguishable" *ibid.*, because the agents here used a key fob that they had validly seized from petitioner pursuant to a consensual search of his vehicle, see Pet. App. 11-12.

Petitioner's assertion (Pet. 13-16) of a privacy interest in the common areas of a multi-unit building rests exclusively on this Court's decision in *Florida* v. *Jardines*, *supra*. There, the Court held that law-enforcement officers needed a warrant to bring a drug-sniffing dog onto the defendant's front porch—"an area belonging to [the defendant] and immediately surrounding his house * * * , which [the Court has] held enjoys protection as part of the home itself." 569 U.S. at 5-6. In sharp contrast to *Jardines*, the common area of the condominium building in this case was not "an area belonging" to petitioner, nor was it "immediately surrounding" his residence. *Ibid.*; see Pet. App. 15 (noting that any trespass in the common area "would have been against the building's owner, not" petitioner). To the contrary, the lobby was seven floors below petitioner's residential unit, and petitioner makes no meaningful claim that "the activity of home life extends" to that area in the way that it might on a home's front porch. *Jardines*, 569 U.S. at 7 (citation omitted). Nor would any such claim be supported by "ancient and durable" expectations of privacy. *Id.* at 6. If anything, the traditional expectation is that a multi-unit building's common areas are not private. See *Concepcion*, 942 F.2d at 1172. To the extent that particular facts might justify a different conclusion in a specific case, those facts are not presented here. Cf. Pet. App. 28-31 (Ripple, J., concurring) (discussing distinctive fact patterns).

3. Finally, certiorari is unwarranted for the additional reason that petitioner could not prevail even if

this Court were to accept his contention. As both the district court and Judge Ripple's concurrence explained, Pet. App. 26, 64-65, the agents were entitled to rely at the time of the investigation at issue here on the Seventh Circuit's decision in *Concepcion*, *supra*, which held that DEA agents did not violate the Fourth Amendment when they used a defendant's keys to enter the lobby of his apartment building and to determine which apartment belonged to the defendant, 942 F.2d at 1171-1173. This Court has squarely held that suppression of evidence is unwarranted where officers conduct a search in reasonable reliance on such binding appellate precedent. See *Davis* v. *United States*, 564 U.S. 229, 232 (2011). At a minimum, therefore, the Court should wait to review the question presented until it arises in a case in which the Court's decision would affect the ultimate disposition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2019