No. SJC-13171

Commonwealth of Massachusetts

Supreme Judicial Court

COMMONWEALTH

vs.

CHRISTOPHER D. DEJESUS

ON FURTHER APPELLATE REVIEW OF A JUDGMENT OF
THE BRISTOL COUNTY SUPERIOR COURT

BRIEF FOR THE COMMITTEE FOR PUBLIC COUNSEL SERVICES AND THE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE & JUSTICE AS AMICI CURIAE IN SUPPORT OF THE DEFENDANT AND REVERSAL

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November 15, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES OF COURT

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

Suppose a stumped homicide detective, desperate for a lead, turns to a well-regarded psychic. The soothsayer, after consulting his scrying stone, points to the basement of a house in a residential neighborhood. Police descend on the house, gaining access to the cellar through an unsecured bulkhead door, and ransack the basement. They rifle through drawers, open every container, and even knock holes in the drywall. Have the police conducted a search?

To ask the question is to answer it. Yet the Appeals Court insists that it depends on how many units are packed into the house's aboveground stories. In a single-family house, common sense reigns; but if it's a duplex, there was no search at all!

It is important to bear in mind the practical effect of such a rule. If a police activity is not deemed a "search," it is not governed by the Fourth Amendment; there is no requirement that it be "reasonable." It can be undertaken for any reason (including a confluence of mystic omens), or for no reason at all. According to the Appeals Court, the private yards, porches, and basements of multifamily houses are functionally no different than City Hall Plaza; the police may patrol them at will. If it strikes their fancy, they can even post a round-the-clock guard in the common stairwell of every triple-decker in Roxbury. Such a rule opens the door to arbitrary police invasions of the homes of all residents of multifamily houses—residents who, it bears noting, are disproportionately poor and people of color.

This cannot be the law. And indeed, this Court has squarely rejected the premise on which the Appeals Court's analysis rests: that whether a police intrusion into a multifamily house is governed by

the Fourth Amendment "turns on the defendant's exclusive control or expectation of privacy in the area searched." *Commonwealth v. Leslie*, 477 Mass. 48, 54 (2017). But this is already the second time since *Leslie* was decided that this Court has granted further review of an Appeals Court decision embracing that faulty premise. *See Commonwealth v. Fredericq*, 93 Mass.App.Ct. 19, 30-31 (2018) ("police were permitted to search [common areas] without the defendant's consent and without a warrant"), *S.C.*, 482 Mass. 70, 80 n.7 (2019) (resting on other grounds and thus not addressing "whether the Appeals Court's legal analysis was consistent with … *Leslie*").

This keeps happening because that pernicious premise was endorsed by a line of Massachusetts cases stretching back half a century. Though this Court's analysis in *Leslie* is irreconcilable with those cases, the *Leslie* opinion did not explicitly overrule (or even cite) them. The time has come to do so. Otherwise, lower courts will continue to rely on those cases to divest some citizens of the rights enjoyed by their by-and-large richer, whiter neighbors. Those rights are fundamental to a free society, and apportioning them unevenly "on grounds that correlate with income, race, and ethnicity," *Leslie*, *supra*, "would be contrary to the history and spirit" of the Declaration of Rights. *Commonwealth v. Mora*, 485 Mass. 360, 367 (2020).

ISSUE PRESENTED

Whether residents of Massachusetts who live in apartments and condominiums are entitled to the same level of constitutional protection against government intrusions into their yards, porches, basements, and other areas appurtenant to their homes as those who can afford to live in single-family houses.

INTEREST OF AMICI CURIAE[1]

The Committee for Public Counsel Services (CPCS), Massachusetts's public defender agency, is statutorily mandated to provide counsel to indigent defendants in criminal proceedings. Because the rule embraced by the Appeals Court in this case unjustifiably apportions constitutional protections against unreasonable search and seizure unequally along class lines, CPCS's clients are systematically disadvantaged by that rule.

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School strives through research-based solutions and remedies to ensure that all members of society have equal access to the opportunities, responsibilities, and privileges of membership in the United States. Founded by Charles J. Ogletree, Jr., and following the model laid out by Charles Hamilton Houston in bringing social science research to bear on issues of racial discrimination and subordination in the law, the Institute acts as a bridge between scholarship, law, policy, and practice, using a "Community Justice" model. The preventable effects of the decision below disparately deny core Fourth Amendment protections to people of color, who are more likely to live in multi-unit dwellings and to be exposed to police contact because of decades-old patterns of government-sanctioned ra-

[1] Pursuant to Mass. R.A.P. 17(c)(5), *amici* declare that no party or party's counsel authored this brief in whole or in part; no person or entity other than *amici* contributed money to fund the preparation or submission of this brief; and counsel have not represented any party to this case, or any party in a case or legal transaction at issue in the present appeal. The Charles Hamilton Houston Institute is a subsidiary of Harvard University, a 501(c)(3) organization.

cial discrimination in housing with persistent modern effects. The Institute does not represent the official views of Harvard University.

Background

This case is before the Court on further appellate review of Christopher DeJesus's 2019 conviction for unlawful firearm possession. The gun he was convicted of possessing was found in the basement of a three-family house after police saw a Snapchat video showing him and his friends posing with guns in that same basement. The police entry into the basement was made without a warrant and without the consent of any of the house's occupants. Mr. DeJesus moved to suppress the gun, arguing that the warrantless entry into the basement was unlawful. That motion was denied, and the Appeals Court affirmed.

That court first held that Mr. DeJesus had no standing to challenge the police entry into the house, in part because "[t]he search was conducted in the basement of a home that [he] concedes he does not own or occupy." *Commonwealth v. DeJesus*, 99 Mass.App.Ct. 275, 279-280 (2021). Notwithstanding its commonsense acknowledgment that a "search was conducted in the basement," the court went on to hold that no "search in the constitutional sense had taken place." *Id.* at 280. This counterintuitive holding was reached by reasoning that because the house's tenants all had access to the basement, *none* of them reasonably could expect privacy there. *Id.* at 281. Thus, according to the Appeals Court, the search was not a search. Although the court did not say so, this holding necessarily would prevent *anyone* from challenging a warrantless police entry into the basement, including the house's landlord and tenants.

SUMMARY OF THE ARGUMENT

The Appeals Court arrived at its holding that residents of multifamily dwellings have no expectation of privacy in their homes' common areas, and therefore may never challenge police searches of those areas, by following a line of Massachusetts cases beginning with *Commonwealth v. Thomas*, 358 Mass. 771 (1971). *See* 99 Mass.App. Ct. at 281, *citing, e.g.*, *Commonwealth v. Montanez*, 410 Mass. 290, 302 (1991) (following *Thomas*), *and Commonwealth v. Dora*, 57 Mass.App. Ct. 141, 145 (2003) (following *Thomas*). Specifically, the key to that holding was that the basement "was readily available to use by all tenants in the building, ... and none exerted exclusive control." *Id.* According to the Appeals Court, this absence of exclusive control "place[s the basement] beyond any constitutionally protected privacy zone." *Id.*, *quoting Dora*, 57 Mass.App.Ct. at 145. *See Dora*, *supra*, *quoting Thomas*, 358 Mass. at 774-775 (apartment "tenant's 'dwelling' cannot reasonably be said to extend beyond his own apartment and perhaps any separate areas subject to his exclusive control").

But four years ago, this Court specifically "reject[ed] the ... argument that in cases involving a search in a multifamily home, the validity of the search turns on [anyone's] exclusive control or expectation of privacy in the area searched." *Leslie*, 477 Mass. at 54. The Appeals Court's analysis—which makes no mention of *Leslie*—is thus, at the very least, incomplete. As the United States Supreme Court has recently explained in *Florida v. Jardines*, 569 U.S. 1 (2013), and *Collins v. Virginia*, 138 S.Ct. 1663 (2018), even if none of the house's residents could reasonably expect privacy in their basement, the police search of it still required either a warrant or valid

consent so long as the basement was within a "constitutionally protected area"—specifically, a "house." *Infra*, at 14-21.

The Appeals Court's confusion may be at least partly forgiven. Its analysis was correct under *Thomas*, and this Court's opinion in *Leslie* did not explicitly reject the line of cases to which *Thomas* gave rise. But the fact remains that *Thomas* was wrongly decided, and its reasoning is irreconcilable with this Court's more recent caselaw. Moreover, *Jardines* and *Collins* have made clear that the entire analytical foundation on which the *Thomas* line of cases rests is erroneous. *Infra*, at 21-24.

To prevent lower courts from continuing to fall prey to this error, which the Appeals Court has now committed at least twice in the four years since *Leslie* was decided, this Court should expressly overrule *Thomas* and hold that those common areas of multifamily houses that are not open to the general public are parts of the homes of all residents who share them. As a result, police, like the general public, may not enter those areas without some legal justification (such as a warrant or valid consent). *Infra*, at 29-34. Such a holding will avoid an unintentional but inevitable and indefensible consequence of the rule set out in *Thomas* and followed here by the Appeals Court: the inequitable distribution of constitutional rights to wealthy white homeowners that are denied to poor and minority residents of Massachusetts. *Infra*, at 24-29.

ARGUMENT

I. Mr. DeJesus has automatic standing to challenge the search that uncovered the gun he was charged with possessing.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Analysis of a claimed violation of this right proceeds in several steps, each tethered to a particular fragment of constitutional text:

(1) Did the State conduct a "search" or a "seizure"?

(2) Was it a search or seizure of something protected by the constitution, *i.e.*, a "person," "house," "paper," or "effect"?

(3) Does the defendant have standing to object, *i.e.*, was the thing searched or seized "theirs"?

(4) Was the State's conduct "unreasonable"?

If the answer to all four questions is "yes," the defendant's Fourth Amendment right has been violated.

This brief focuses primarily on the first two questions, because the Appeals Court's opinion, by answering them in the negative, effectively divests every occupant of a multifamily dwelling of a substantial portion of their security in their home. If the police entry into the basement here was not a "search in the constitutional sense," 99 Mass.App.Ct. at 280, then police are free to storm through that basement again any time, "without a warrant and without probable cause, as often as they wish." *Commonwealth v. Porter P.*, 456 Mass. 254, 259 (2010). "In such a society, the traditional security of the home would be of little worth," at least for the residents of Massachusetts's hundreds of thousands of multifamily homes. *Mora*, 485 Mass. at 372. *See Jardines*, 569 U.S. at 6 (Fourth Amendment "right

would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity"). Indeed, arbitrary police intrusions into the common areas of a person's home pose a much greater and more direct threat to that security than the pole camera surveillance at issue in *Mora*.

But the Appeals Court began its analysis with a discussion of Mr. DeJesus's standing, and a few words are warranted on that topic. "Standing" is shorthand for the requirement that to challenge a search, a defendant must have a "cognizable Fourth Amendment interest" in the place searched. *Byrd v. United States*, 138 S.Ct. 1518, 1530 (2018). Mr. DeJesus cannot claim such an interest under Federal law because he does not contend that the house searched was "his" in any meaningful sense. *See United States v. Salvucci*, 448 U.S. 83, 92 (1980). But under art. 14, a defendant has "automatic standing" to contest the legality of any search and seizure of evidence whose possession is an element of the crime with which he is charged. *Commonwealth v. Mubdi*, 456 Mass. 385, 391-394 (2010), *citing Commonwealth v. Amendola*, 406 Mass. 592 (1990).

The automatic standing rule effectively allows a defendant to assert someone else's constitutional claim (or at least to be relieved of showing that it is his own claim he is asserting). If the government accuses someone of illegally possessing something, it must establish that the contraband was *lawfully* discovered—not merely that its discovery did not violate the *defendant's* rights. *See id.* at 393 (defendant must show that "*someone's*" art. 14 interests were violated, but not necessarily his own). Thus, where a defendant is charged with a possessory offense, he need only show that "there was a search in

the constitutional sense," *id.*—*i.e.*, a governmental intrusion requiring some form of justification. If so, he is entitled to be heard to argue that the justification was lacking before he may be convicted. *See Jones v. United States*, 362 U.S. 257, 265 n.1 (1960) ("The Government must, in any case, not permit a conviction to be obtained on the basis of possession, without the merits of a duly made motion to suppress having been considered").

This Court has retained the automatic standing rule under art. 14 in part because it is "unfair to place the defendant in the difficult position ... of needing to explain his relationship to the place searched in order to establish his standing to challenge the constitutionality of the search, when that incriminating information may be used to impeach him if he were to testify at trial." *Mubdi*, 456 Mass. at 392 n.7. *See Jones*, 362 U.S. at 262 (court should not encourage defendant to "perjure himself if he seeks to establish 'standing' while maintaining a defense to the charge of possession"). An allegation in the charging document that the defendant possessed the item seized at the time of the search thus obviates any need for defense evidence on standing. *See Commonwealth v. Frazier*, 410 Mass. 235, 244 n.3 (1991) ("Whether a defendant has standing under *Amendola* depends on allegations made by the Commonwealth").

The Appeals Court held that Mr. DeJesus did not have automatic standing because he possessed the firearm during the filming of the Snapchat video rather than during the unlawful search. *DeJesus*, 99 Mass.App.Ct. at 279. But the indictment alleges that he possessed a firearm on July 26, 2018 (R17). This is the date of the search, not the date on which the Snapchat video was filmed (R25; Tr.32-33).

The Appeals Court's reliance on the jury instructions at trial to reach a contrary conclusion, *id.* at 279 n.8, was misplaced. *See Commonwealth v. Johnson*, 481 Mass. 710, 726 n.14 (2019). In addition to the standing conferred by Mr. DeJesus's presence on the premises at the time the search was conducted (discussed at pages 26-28 of his brief), the Commonwealth's own allegations at the motion to suppress sufficed to establish his standing. *See Frazier*, *supra*.

II. To prevent an invidious distribution of constitutional rights to the wealthy that are denied to the poor, this Court must reject the Appeals Court's analysis of the common areas of multifamily dwellings and overrule the cases on which it relied.

Just because Mr. DeJesus has standing, of course, does not mean that the police conduct he challenged was governed by the Fourth Amendment and art. 14. Those provisions apply only if the entry into the shared basement of the building was a "search" of something protected by the constitution—specifically, a "house." The balance of this brief explains how the Appeals Court reached the counterintuitive conclusion that it was not, and why that conclusion must be forcefully repudiated by this Court.

A. *The Appeals Court's analysis rests on an outdated and incorrect understanding of the Fourth Amendment*.

For many years, courts largely equated a constitutional "search" with an "unauthorized physical encroachment" on someone's property. *See, e.g.*, *Silverman v. United States*, 365 U.S. 505, 510 (1961). But in an era of electronic surveillance, a "physical encroachment" is not always necessary to impinge upon the interests protected by the Fourth Amendment. In recognition of this fact, the Supreme Court held a half-century ago that "the reach of that Amendment cannot

turn [solely] upon the presence or absence of a physical intrusion into any given enclosure." *Katz v. United States*, 389 U.S. 347, 353 (1967). Instead, the State will be deemed to have conducted a "search" of a "person" any time it intrudes upon that person's "reasonable expectation of privacy." *Id.* at 360 (Harlan, J., concurring).

In the decades following *Katz*, the "reasonable expectation of privacy" test became the primary focus of the Fourth Amendment inquiry. The first three of the four questions set forth above—(1) was there a search (2) of a constitutionally protected area (3) in which the defendant has a sufficient interest?—tended to collapse into the single inquiry of whether police had invaded the defendant's reasonable expectation of privacy. If not, then the police action was deemed not a "search in the constitutional sense," and thus did not implicate the Fourth Amendment at all. *See, e.g.*, *Montanez*, 410 Mass. at 300-303 (concluding, citing *Thomas*, that "the officers' search" was not a "search in the constitutional sense"). This was the paradigm under which *Thomas* was decided, and, in following *Thomas*, the paradigm the Appeals Court followed in this case.

1. *Residents of multifamily houses do not waive their privacy by sharing it with each other.*

It is worth noting at the outset that *Thomas*'s analysis of the privacy interests of apartment tenants is open to serious question even on its own terms. That case held that because Mr. Thomas shared his basement with his building's other tenants, "he had no right to privacy" there. 358 Mass. at 774. But this Court and the Supreme Court have both rejected any "easy assumption that privacy shared with another individual is privacy waived for all purposes including

warrantless searches by the police." *Georgia v. Randolph*, 547 U.S. 103, 115 n.4 (2006). *See, e.g.*, *Minnesota v. Olson*, 495 U.S. 91, 99 (1990) (houseguests reasonably expect privacy "despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household"); *Porter P.*, 456 Mass. at 260-261 (shelter resident reasonably expects privacy notwithstanding access to his room by shelter staff).[2]

From a standpoint of reasonable expectations, it is not at all obvious why the common basement of a three-family house should be treated any differently than the common living room of a three-bedroom apartment (particularly one shared by unrelated roommates). While someone who shares accommodations with others assumes the risk that those people may admit unwelcome visitors (including police), he does not thereby sacrifice his expectation of privacy in his home—even the parts of his home he shares with others. *See Randolph*, 547 U.S. at 116-117.

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[2] *Accord, e.g.*, *Fixel v. Wainwright*, 492 F.2d 480, 484 (5th Cir. 1974) ("Contemporary concepts of living such as multi-unit dwellings must not dilute [the] right to privacy any more than is absolutely required"); *State v. Reddick*, 207 Conn. 323, 333 (1988) (tenants reasonably expect privacy in shared basement); *State v. DiBartolo*, 276 So.2d 291, 294 (La. 1973) (tenants *may* reasonably expect privacy in common areas); *Garrison v. State*, 28 Md.App. 257, 275 (1975) (same); *People v. Killebrew*, 76 Mich.App. 215, 218 (1977) (same); *State v. Ortiz*, 257 Neb. 784, 800 (1999) (same); *State v. Talley*, 307 S.W.3d 723, 734 (Tenn. 2010) (same); *Reardon v. Wroan*, 811 F.2d 1025, 1027 n.2 (7th Cir. 1987) (fraternity members reasonably expect privacy in common areas of fraternity house); *State v. Reining*, 2011-Ohio-1545, ¶22 (2011) (same); *Milam v. Commonwealth*, 483 S.W.3d 347, 351 (Ky. 2015) (same); *State v. Houvener*, 145 Wash.App. 408, 416-417 (2008) (students reasonably expect privacy in dormitory common areas).

2. *"Reasonable expectations of privacy" are not the sole measure of Fourth Amendment protections.*

In any event, the Supreme Court has recently warned that a narrow focus on "reasonable expectations of privacy" risks losing sight of "an irreducible constitutional minimum: When the Government physically invades [private] property to gather information, a search occurs." *United States v. Jones*, 565 U.S. 400, 414 (2012) (Sotomayor, J., concurring). Although the *Katz* test "may add to the baseline, it does not subtract anything from the Amendment's protections when the government *does* engage in a physical intrusion of a constitutionally protected area." *Jardines*, 569 U.S. at 5 (cleaned up) (holding warrantless dog sniff on house's front porch unconstitutional regardless of whether it intrudes on homeowner's reasonable expectation of privacy). *See also Collins*, 138 S.Ct. at 1671 (holding warrantless intrusion to top of driveway to inspect motorcycle unconstitutional notwithstanding its visibility from street).

Jones, *Jardines*, and *Collins* make clear that any "physical encroachment" on a place or thing that is made in "an attempt to find something or to obtain information" is a "search," regardless of whether it invades *anyone's* reasonable expectation of privacy. *Jones*, 565 U.S. at 408 n.5. Thus, even granting the questionable assumption that tenants of multifamily houses cannot reasonably expect privacy in their homes' common areas, it still does not follow that a police search of those areas is not a "search." *Contra Montanez*, *supra*.

Of course, the mere fact that a "search" has occurred does not necessarily mean the Fourth Amendment is implicated. That amendment concerns itself only with searches of "persons, houses,

papers, and effects." The next question thus is whether the search occurred in a "constitutionally protected area." *Jardines*, 569 U.S. at 7. The Supreme Court characterized *Jardines* as an "easy case" on this question. *Id.* at 11. This case should be easier still. Unlike in *Jardines*, here the police physically entered a private house. A multifamily house does not stop being a "house" when the second family moves in. *See Opinion of the Justices*, 429 Mass. 1201, 1205 (1999) ("every word and phrase in the Constitution was intended and has meaning, and such words and phrases ... must be given their ordinary meaning"); Webster's Third New International Dictionary 1096 (1981) (defining "house" as "a structure intended or used for human habitation").

The simplest path forward in this case would therefore be for this Court to straightforwardly hold what is obvious to any layperson—that the police in this case conducted a "search" of a "house."

3. *This Court's cases holding that the curtilage of a home does not include areas open to public view and through which visitors regularly pass are no longer good law.*

Should the Court eschew this straightforward "plain meaning" analysis, the question becomes whether the yard and basement invaded by police in this case are constitutionally protected because they lie within the curtilage of the house's apartments. The constitution's protection of the home extends in full measure to the curtilage—"the area around the home to which the activity of home life extends." *Leslie*, 477 Mass. at 56 (cleaned up). The Supreme Court has said that this concept is "familiar enough that it is easily understood from our daily experience." *Jardines*, 569 U.S. at 7 (cleaned up). In *Jardines* and *Collins*, the Court quickly and easily concluded that a

house's front porch and a partially enclosed portion of a driveway were within the curtilage, without any significant analysis. *See Jardines*, 569 U.S. at 7; *Collins*, 138 S.Ct. at 1671.

There is no reason why the "curtilage" concept should be any less "easily understood" in the context of the three-family house in this case than the single-family houses in *Jardines* and *Collins*. Apartment residents are just as entitled to the enjoyment of their porches, yards, and other areas appurtenant to their homes, as residents of single-family houses. Indeed, the First Circuit recently concluded that the front porch and side yard of a residence "more akin to an apartment building" were within the curtilage without seeing a need for any more analysis than the Supreme Court conducted in *Jardines*. *See French v. Merrill*, 15 F.4th 116, 122 (1st Cir. 2021).

But Massachusetts courts have struggled to consistently apply the curtilage concept to multifamily dwellings. This is due in large part to the type of narrow focus on "expectations of privacy" lately warned against by the Supreme Court. *Thomas* and the cases that followed it simply conflated the question of whether a particular area was within a home's curtilage with the question of whether the home's residents could reasonably expect privacy there. *See, e.g.*, *Commonwealth v. McCarthy*, 428 Mass. 871, 876 (1999) ("Because the defendant had no reasonable expectation of privacy in the [area, it] was not within the curtilage of the defendant's apartment").

That conflation is no longer defensible. It is now plain that this Court was simply mistaken in its longstanding holding that "an area is not within the curtilage if it is open to public view, and is one which visitors and tenants on the property would pass on their way

to the front door." *Id.* at 875 (cleaned up). *Compare id.* ("screened-in porch of a private residence may not be curtilage if it is one that a visitor would naturally expect to pass through when approaching a home"), *with Jardines*, 569 U.S. at 7, 9 n.3 (porch on path "used to approach a front door" is "classic exemplar" of curtilage). *Compare also Commonwealth v. Simmons*, 392 Mass. 45, 49 (1984) (police intrusion to top of driveway to inspect vehicle not a "search" because defendant could not reasonably expect privacy where vehicle was visible from street), *with Collins*, 138 S.Ct. at 1671 (police intrusion to top of driveway to inspect vehicle *was* a "search" of defendant's curtilage, notwithstanding vehicle's visibility from street).

Simply put, if an area is "intimately linked to the home," *Collins*, 138 S.Ct. at 1670, the police may not enter it without some form of legal justification, no matter how unreasonable it would be for the home's residents to expect privacy there. *See id.* at 1675.

4. *To prevent the sort of confusion exemplified by the Appeals Court's opinion below, this Court should explicitly overrule the* Thomas *line of cases*.

This Court at least implicitly recognized some of the above principles in *Leslie*, *supra*. *Leslie*'s reasoning is wholly incompatible with *Thomas*. *Compare* 477 Mass. at 56 ("Although there is no evidence of [the defendant's] exclusive use of the porch and side yard, that fact is not dispositive"), *with* 358 Mass. at 775 ("a tenant's 'dwelling' cannot reasonably be said to extend beyond his own apartment and perhaps any separate areas subject to his exclusive control"). But *Leslie* did not explicitly overrule *Thomas* or any of the cases that have followed it. It is time to do so. These cases were wrongly decid-

ed and have been thoroughly undermined by subsequent legal developments. This Court should repudiate them to prevent police and judges from continuing to rely on their erroneous reasoning.

A key factor in determining whether a precedent should be overruled is "the quality of its reasoning." *Knick v. Scott*, 139 S.Ct. 2162, 2178 (2019). As explained above, *Thomas* is poorly reasoned and incorrect even on its own terms. Its analysis is conclusory, inconsistent with prior and subsequent Supreme Court precedent, and fails to account for the reality of life in modern urban homes.

More importantly, *Jardines*, *Collins*, and *Leslie* have completely eroded the foundation on which cases like *Thomas*, *Simmons*, *Montanez*, and *Dora* rest. *Cf. Knick*, *supra*. It is inarguable after *Jardines* and *Collins* that a resident's lack of a reasonable expectation of privacy in an area does not prevent that area from being within the curtilage of his home. And *Leslie*, along with the First Circuit's recent decision in *French v. Merrill*, *supra*, leave no doubt that this principle applies with equal force to multifamily homes.

In other words, the cases relied on by the Appeals Court here have effectively *already* been overruled. The problem is that they have been overruled *sub silentio*, leaving two incompatible but apparently equally valid modes of analysis for searches of multifamily houses. This Court should now make clear that *Jardines*, *Collins*, and *Leslie* are good law, and *Thomas* and its progeny are not.

B. *To provide equal rights to all Massachusetts residents regardless of race or class, this Court must adopt a rule that protects the sanctity of urban homes to the same degree as suburban and rural ones*.

It is particularly urgent to set clear standards in this area because of *who* the residents of multifamily houses are. As this Court has acknowledged, "a strict apartment versus single-family house distinction ... would apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity." *Leslie*, 477 Mass. at 54 (cleaned up). The class and racial implications of the rule embraced by the Appeals Court in this case make it especially appropriate for this Court to unambiguously reject that rule and craft a new one that protects all homes equally.

1. *The incorrect rule applied by the Appeals Court in this case creates unjustifiable racial, ethnic, and class disparities in Fourth Amendment protections*.

It is vital not to lose sight of the practical effect of the Appeals Court's rule. If a police entry into the common areas of a multifamily house is not a "search," there is no requirement for it to be "reasonable." The police may freely enter and ransack those areas whenever they please, for any reason or for no reason at all. Such a rule opens the door to arbitrary police invasions of the homes of all residents of multifamily buildings.

Residents of single-family houses, however, will never be at the mercy of the State in this way. Their porches, yards, and driveways are secure from unwarranted police entry, even if not from public observation. *See Collins*, 138 S.Ct. at 1675. As to their basements, attics, halls, and stairwells, no question is even presented; they are

within the walls and thus *obviously* part of the "house." Under such a rule, residents of single-family houses receive substantially more constitutional protection of their homes than everyone else.

Census data reveal that in Greater Boston's Metropolitan Statistical Area, white residents are more than twice as likely to live in single-family houses as Black or Hispanic residents, and households with an annual income of at least $120,000 are more than twice as likely to occupy such houses as those making less than $50,000.[3] The median annual income of households living in single-family houses is around $115,000. By comparison, the median household income of the region overall is around $87,000, and that of households living in large apartment buildings is under $50,000.

The racial disparity in this data is not purely derivative of the class disparity. "Poor blacks are more likely [than poor whites] to live in cities, surrounded by other poor blacks. If the law is tilted against the urban poor, it is bound to have a racial tilt as well." Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 G.W. L. Rev. 1265, 1272-1273 (1999). Nor is this mere happenstance. The concentration of minorities in urban centers has historical roots in invidious discrimination, including racially restrictive covenants in the (predominantly single-family) suburbs to which white families fled in the mid-twentieth century, as well as discriminatory practices by mortgage lenders and real estate agents. *See generally* Klarman, Unfinished Business: Racial Equality in American History 247 (2007).

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[3] Data drawn from the U.S. Census Bureau's 2019 American Housing Survey. More detail is provided in an addendum to this brief.

Consistent with this reality, census data show that 33% of white households living *beneath* the poverty line occupy single-family houses, as compared with 34% of Black and 32% of Hispanic households with income of *more than twice* the poverty level. That is, despite the strong overall relationship between income and access to single-family housing, the proportion of *high-income* minorities who live in such houses is comparable to the proportion of *low-income* whites who do. There is simply no avoiding the conclusion that under the Appeals Court's rule, Fourth Amendment rights accrue disproportionately to white people, especially wealthy white people.

2. *A traditional understanding of the Fourth Amendment and a proper understanding of art. 14 require a rule that respects the dignity of the urban poor notwithstanding their relative lack of privacy*.

Were Fourth Amendment protection tied strictly to "reasonable expectations of privacy," that outcome might, in principle, be defensible. "[P]rivacy can be bought, so that people who have money have more of it than people who don't." Stuntz, *supra*, at 1267. So if Fourth Amendment rights were defined solely by privacy, it would perhaps be lamentable but inevitable that "people who have money have more Fourth Amendment protection than people who don't." *Id.*

But privacy does not exclusively define Fourth Amendment rights; under the traditional understanding rejuvenated by *Jardines*, that Amendment protects more generally against invasions of the "sanctity of a man's home." *Boyd v. United States*, 116 U.S. 616, 630 (1886). In a just society, the poor are entitled to the same "sanctity" in their homes as the rich. *See Porter P.*, 456 Mass. at 261 (juvenile's

"home" entitled to protection "regardless of whether [he] resided in a palatial mansion or a single room in a transitional shelter").

The fundamental principles of due process and equal protection inherent in the Massachusetts Declaration of Rights make it imperative that this Court afford the same rights to all, insofar as practicable. *See generally Bogni v. Perotti*, 224 Mass. 152, 156 (1916). Our Commonwealth's promise of "equal justice" is suspect if the rich can buy rights that are withheld from the poor. And the equality of the law is truly illusory if the extent of constitutional protection afforded to a home is affected, even indirectly, by the color of its occupants' skin. It would be especially inappropriate for this Court to blind itself to the racial disparities created by *Thomas* and its progeny given its recent pledge to "look afresh at what we are doing ... to ensure that the justice provided to African-Americans is the same that is provided to white Americans." Letter from the Seven Justices of the Supreme Judicial Court (June 3, 2020).

If the Fourth Amendment and art. 14 protect the front porch of a single-family house from unwarranted police intrusion notwithstanding its owner's lack of any expectation of privacy there, they must also protect a porch—or a basement—shared by several families. Any other holding "would be contrary to the history and spirit of art. 14." *Mora*, 485 Mass. at 367 ("We will not undermine these long-held egalitarian principles by making the protections of art. 14 contingent upon an individual's ability to afford to install fortifications and a moat around his or her castle"). *Accord Collins*, 138 S.Ct. at 1675 (rejecting rule that "would grant constitutional rights [only] to

those persons with the financial means to afford residences with garages in which to store their vehicles").

C. *This Court should hold that common areas of multifamily houses that are not open to the general public are also not open to warrantless police intrusion*.

The proper resolution of the question presented in this case is to establish a bright line rule that gives the same protection to all residents regardless of race or class: any police intrusion upon someone's home that would exceed the scope of access permitted to the general public is a search requiring a warrant, no matter how many families share that home. Not only would this rule provide equal protection to all the Commonwealth's residents, but it also would bring the law regarding multifamily houses into line with our constitutions' text and purpose.

1. *The* Dunn *factors do not make sense in urban settings, and attempts to apply them there risk entrenching the racial and class disparities discussed above*.

In *Leslie*, this Court allowed that at least some common areas of multifamily buildings may be within their residents' curtilage. 477 Mass. at 57. Relying on a case where the Supreme Court was called on to determine whether a barn sixty yards away from a house on a 198-acre ranch was within the rancher's curtilage or instead in an "open field," this Court applied a four-factor test to examine the front porch and side yard of a three-family house in Dorchester. *Id.* at 55-57, *citing United States v. Dunn*, 480 U.S. 294 (1987).

There is a serious mismatch between the *Dunn* test and the urban environment. By way of comparison, all of Beacon Hill (including Boston Common and the Public Garden) could have fit comfort-

ably within Mr. Dunn's perimeter fence, and the entire Fall River lot on which the house in this case stands could have fit *between* his house and the barn he claimed lay within its curtilage.

The Supreme Court appears to recognize that the *Dunn* factors are out of place in urban settings; its recent cases analyzing curtilage in residential areas have not even mentioned them. *See Jardines*, 569 U.S. at 7; *Collins*, 138 S.Ct. at 1671. *See also French*, 15 F.4th at 126 (concluding that apartment building's front porch and side yard were within curtilage without analyzing *Dunn* factors). Eschewing mechanical analysis of the *Dunn* factors in contexts far removed from rural "open fields" is also fully consistent with *Dunn* itself; that case specifically said that the factors were only "useful analytical tools … 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." 480 U.S. at 301.

Moreover, because the *Dunn* test incorporates privacy-focused factors like the area's "protect[ion] from observation," it risks replicating on a smaller scale the disparate impacts noted above. Even within the context of multifamily dwellings, the rich can afford fences, doormen, and other features that enhance their privacy.

Such disparities can be largely avoided by recognizing that "the sanctity of a man's home," *Boyd*, 116 U.S. at 630, is no less sacred to a man who shares part of his home with his neighbors. That they may not keep things private from *one another* should not deprive them *all* of privacy from the world at large, and from the State in particular. Rather than continuing to rely on a misplaced four-factor test that

has been applied inconsistently and may entrench class and racial disparities, this Court should simply recognize that parts of a house shared by multiple occupants are still part of that "house."

2. *An intrusion into the common areas of a multifamily house implicates the rights of all the house's tenants because it is an invasion of the sanctity of their homes.*

As *Jardines* made clear, police are permitted to enter areas around a home where visitors generally pass, not because such areas are not part of the "house" or its curtilage, but because an "implicit license" exists for members of the public "to approach the home by the front path, wait briefly to be received, and then (absent invitation to linger longer) leave." 569 U.S. at 8. "Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do." *Id.*

But there is no implicit license for private citizens to snoop around someone's front porch or inspect a motorcycle at the top of their driveway. *Jardines*, 569 U.S. at 9 n.3. *Collins*, 138 S.Ct. at 1675. And there is *certainly* no implicit license for members of the public to enter a three-family house without invitation and rummage through its basement. Even if we cannot reasonably expect privacy in those spaces from the house's other occupants, such behavior by a stranger "would inspire most of us to—well, call the police." *Jardines*, 569 U.S. at 9. And for Fourth Amendment purposes, the State stands in the shoes of a "stranger" to our homes, not a neighbor or co-tenant. *See id.* at 9 n.3.

The simple fact is that areas shared in common by the residents of multiple units may nevertheless be "intimately tied to the

home[s]," *Collins*, 138 S.Ct. at 1670, of *all* those residents.[4] The fundamental principles underlying this conclusion, although eclipsed for decades by *Katz*'s preeminence, are hardly novel. The Supreme Court explained well over a century ago that the Fourth Amendment protects against "all invasions ... of the sanctity of a man's home and the privacies of his life." *Boyd*, 116 U.S. at 630. "[T]he essence of the offense ... is the invasion of his indefeasible right of personal security, personal liberty, and private property." *Id.*

That an unauthorized intrusion into non-public common areas of a multifamily dwelling has long been understood as an "invasion" of "the sanctity of [the] home" is clear from *McDonald v. United States*, 335 U.S. 451 (1948). There, police broke into a rooming house, stood on a chair in the hall outside the defendant's apartment, and saw him engaged in criminal conduct through a transom window above his door. *Id.* at 452-453. The Government in *McDonald* advanced essentially the position later embraced by this Court in *Thomas*: that because the officers technically trespassed only against the rooming house's landlady, the defendant's Fourth Amendment rights had not been violated. *Id.* at 454. The Supreme Court rejected this argument, concluding that the police had unlawfully "violate[d] the privacy of the home" without a warrant. *Id.* at 456.

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[4] *Accord, e.g.*, *People v. Burns*, 401 Ill.Dec. 468, 478 (2016) (locked common areas are curtilage of all tenants); *Espinoza v. State*, 265 Ga. 171, 174 (1995) ("different apartments in multi-unit buildings may share curtilage"); *Reddick*, 207 Conn. at 332-333 (shared basement is curtilage of all tenants); *Garrison*, 28 Md.App. at 274 (same).

In a concurring opinion, Justice Jackson explained that "each tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building." *Id.* at 458 (Jackson, J., concurring). A tenant assumes the risk that police, "[l]ike any other stranger," may be lawfully "admitted as guests of another tenant" and observe something incriminating. *Id.* But if the police unlawfully enter *without* invitation, they violate *every* tenant's constitutionally protected interest in the integrity of the building that is their home. *Id.*

The force of this logic, at least to anyone who has shared their living space, is unassailable. My basement is no less mine because I share it with other tenants, and someone who breaks into it has violated "the sanctity of [my] home" and my "indefeasible right of personal security," *Boyd*, 116 U.S. at 630, even if he learns nothing about me that my neighbors don't already know. But following the seminal statement of the "reasonable expectation of privacy" test in *Katz*, many courts lost sight of this reality, holding instead that where residents of a multifamily building could not reasonably expect privacy from *each other*, they could also expect no privacy from the State. *See, e.g.*, *Dora*, 57 Mass.App.Ct. at 148 ("An expectation of privacy necessarily implies an expectation that one will be free of *any* intrusion, not merely unwarranted intrusions"). *But see, e.g.*, *Randolph*, 547 U.S. at 112 ("a hotel guest customarily has no reason to expect the manager to allow anyone but his own employees into his room"); *Porter P.*, 456 Mass. at 261 (shelter resident reasonably expected privacy in his room "regardless of whether [shelter staff] could enter").

Such analysis is mistaken. "The *Katz* reasonable-expectations test has been *added to*, not *substituted for*, the traditional property-based understanding of the Fourth Amendment." *Jardines*, 569 U.S. at 11 (cleaned up). And that traditional understanding included the point made by Justice Jackson in *McDonald*: an apartment tenant "expects other tenants and invited guests to enter in the common areas of the building, but he does not expect trespassers." *United States v. Carriger*, 541 F.2d 545, 551 (6th Cir. 1976), *citing McDonald*.

Properly construed, the Supreme Court's cases set down "an inflexible rule that, unless the case involves a recognized exception to the warrant requirement, the Fourth Amendment bars a police officer from simply walking into a home and searching for evidence of criminal conduct," regardless of whether the home is a stately mansion or a ramshackle tenement. *Titus v. State*, 696 So.2d 1257, 1261-1262 (Fla. App. 1997), *aff'd*, 707 So.2d 706 (Fla. 1998) (following *McDonald* to hold warrantless entry into common areas of rooming house unconstitutional). Where common areas are "for the tenants only and those guests they either invited or suffered," the police, just like the general public, may not enter those areas uninvited. *Titus*, 696 So.2d at 1264. If they do, they have intruded upon "the sanctity of [the] home," *Boyd*, 116 U.S. at 630, of every tenant of the building, each of whom rightfully may expect, pursuant to the "background social norms" that define the Fourth Amendment's scope, *Jardines*, 569 U.S. at 9, that only tenants and their guests will enter there. *See generally Titus*, 696 So.2d at 1259-1264. *Accord McDonald*, 335 U.S. at 458 (Jackson, J., concurring); *Carriger*, 541 F.2d at 551.

Conclusion

"For the tenement dweller, the difference between observation by neighbors and visitors who ordinarily use the common hallways and observation by policemen who come into the hallways to 'check up' or 'look around' is the difference between all the privacy that his condition allows and none. Is that small difference too unimportant to claim fourth amendment protection?" 1 LaFave, Search & Seizure §2.3(c) (5th ed. 2012), *quoting* Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 404 (1974).

Amici submit that it is not. We therefore urge this Court to draw a bright line: Where the common areas of a multifamily dwelling are not open to the general public, they are also not open to police without a warrant. In addition to protecting the homes of the poor in a manner similar to those of the wealthy, this rule has the virtues of simplicity, administrability, and doctrinal coherence; the police may freely enter wherever the general public may, and not where they may not. *See Jardines*, 569 U.S. at 8 (absent a warrant, police may do "no more than any private citizen might do").

Respectfully submitted,

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November 15, 2021

ADDENDUM

AMERICAN HOUSING SURVEY DATA

Information about the American Housing Survey can be found at *https://www.census.gov/programs-surveys/ahs.html.* The data in this brief is localized to the Boston-Cambridge-Newton MA-NH Metropolitan Statistical Area. This region, which contains the Massachusetts counties of Suffolk, Essex, Middlesex, Norfolk, and Plymouth, and the New Hampshire counties of Rockingham and Strafford, is the most relevant for which detailed demographic data is available. The relevant data can be retrieved by visiting the American Housing Survey Table Creator at *https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html*, and selecting the following options: Area – Boston; Year – 2019; Table – Household Demographics; Variable 1 – Units by Structure Type; Variable 2 – Poverty Level. Relevant portions of that table are produced on the following page.

The data show that there are an estimated 1.884 million households in the region, of which 988,500 (52%) occupy detached single-family houses. The region contains 1,394,100 households occupied by white non-Hispanic residents (74% of all households in the region); 165,500 occupied by Black residents (9% of all households); and 191,500 occupied by Hispanic or Latino residents (10% of all households). Of the white households, 61% (851,600) live in single-family houses (accounting for 86% of all single-family houses in the region). This compares with 26% (43,400) of Black households (4% of all single-family houses), and 21% (39,900) of Hispanic or Latino households (4% of all single-family houses).

Of the white non-Hispanic households, around 8% (111,200) have income below the poverty level, as compared with 23% (38,100) of Black households and 24% (46,100) of Hispanic households. Even within that poverty-level income range, 37,100 (33%) of the white households occupy single-family houses. By comparison, 1,147,600 (82%) of the white households; 96,700 (58%) of the Black households; and 113,100 (59%) of the Hispanic households have income of more than twice the poverty level. At this higher income level, 66% (752,100) of the white households occupy detached single-family houses, as compared with only 34% (33,300) of the Black households and 32% (36,100) of the Hispanic households.

2019 Boston - Household Demographics - All Occupied Units
Boston-Cambridge-Newton, MA-NH MSA (2013 OMB definition)

Variable 1: Units by Structure Type, Variable 2: Poverty Level

[Estimates and Margins of Error in thousands of housing units, except as indicated.
Medians are rounded to four significant digits as part of disclosure avoidance protocol. Margin of Error is calculated at the 90% confidence interval. Weighting consistent with Census 2010.
Blank cells represent zero; Z rounds to zero; '.' Represents not applicable or no cases in sample; S represents estimates that did not meet publication standards or withheld to avoid disclosure]
Subject Definitions

Characteristics	Total Housing Units						Single-Family Detached Housing Units					
		Poverty Level						Poverty Level				
	Total	Less than 50 percent	50 to 99 percent	100 to 149 percent	150 to 199 percent	200 percent or more	Total	Less than 50 percent	50 to 99 percent	100 to 149 percent	150 to 199 percent	200 percent or more
	Estimate	Estimate	Estimate	Estimate	Estimate	Estimate	Estimate	Estimate	Estimate	Estimate	Estimate	Estimate
Total	1,884.2	125.4	86.2	103.6	106.5	1,462.6	988.5	20.4	20.3	33.9	41.6	872.1
HOUSEHOLDER CHARACTERISTICS												
Race and Hispanic Origin												
White alone	1,549.2	89.2	59.4	78.9	82.0	1,239.7	887.9	17.8	20.3	30.2	34.7	784.9
Non-Hispanic	1,394.1	63.8	47.4	64.0	71.3	1,147.6	851.6	17.8	19.3	27.8	34.7	752.1
Hispanic	155.1	25.4	12.0	S	S	92.1	36.3	.	S	S	.	32.9
Black alone	165.5	22.7	15.4	17.5	13.1	96.7	43.4	S	.	S	S	33.3
Non-Hispanic	150.3	19.7	12.0	15.0	13.1	90.5	43.4	S	.	S	S	33.3
Hispanic	S	S	S	S	.	S	.	.	.	.	.	.
American Indian or Alaska Native alone	S	S	S	S	S	S	S	S	.	.	.	S
Asian alone	132.9	S	S	S	S	102.0	45.3	.	.	S	S	42.4
Asian Indian only	33.9	S	S	.	S	27.8	S	.	.	.	.	S
Chinese only	54.1	S	S	S	S	37.0	16.3	.	.	.	.	16.3
Filipino only	S	.	.	.	.	S	S	.	.	.	.	S
Japanese only	S	.	.	.	.	S	S	.	.	.	.	S
Korean only	S	.	.	S	.	S	S	.	.	S	.	.
Vietnamese only	S	.	S	S	S	S	S	.	.	.	.	S
Some other Asian group only	24.3	S	S	.	S	20.7	S	.	.	.	S	S
Two or more Asian groups	.	.	.	.	.	.	.	.	.	.	.	.
Pacific Islander alone[1]	S	.	S	.	.	S	.	.	.	.	.	.
Native Hawaiian only	.	.	.	.	.	.	.	.	.	.	.	.
Guamanian or Chamorro only	.	.	.	.	.	.	.	.	.	.	.	.
Samoan only	.	.	.	.	.	.	.	.	.	.	.	.
Some other Pacific Islander group only	S	.	S	.	.	S	.	.	.	.	.	.
Two or more Pacific Islander groups	.	.	.	.	.	.	.	.	.	.	.	.
Two or more races	24.5	S	S	S	S	16.6	S	.	.	.	.	S
Hispanic or Latino (any race)[2]	191.5	29.3	16.8	20.1	S	113.1	39.9	S	S	S	.	36.1
Mexican	S	S	S	.	.	S	S	.	.	.	.	S
Puerto Rican	54.6	S	S	S	S	27.8	S	.	S	S	.	S
Cuban	S	.	.	.	S	S	S	.	.	.	.	S
Central American	19.1	S	S	S	S	S	S	.	.	.	.	S
South American	38.3	S	S	.	S	25.5	S	.	.	.	.	S
Other Hispanic	64.0	S	S	S	S	37.9	S	S	.	.	.	S

[1] Native Hawaiian and Other Pacific Islander.
[2] Because Hispanics may be any race, data can overlap slightly with other groups. Most Hispanics report themselves as White, but some report themselves as Black or in other categories.
[3] Use caution when comparing to 2017 because 2017 was restricted to householders between the ages of 16 and 54, whereas 2019 is restricted to householders 16 years of age or older.

[4] Figures do not add to total because the total was estimated using the full sample, whereas the other estimates shown in the table use only half of the sample; see Accuracy of the Data for details.
[5] Includes only households where the householder is coupled with another household member.
[6] Figures may not add to total because more than one category may apply to a unit.

Source: U.S. Census Bureau, American Housing Survey.
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Certificate of Compliance

I hereby certify that this brief complies with rules 17 and 20 of the Massachusetts Rules of Appellate Procedure. The brief is set in 14-point Athelas and contains 7,466 non-excluded words, as determined through use of the "Word Count" feature in Microsoft Word for Office 365.

/s/ Patrick Levin
Patrick Levin

Certificate of Service

I hereby certify that in the matter of Commonwealth *vs.* Christopher DeJesus, Supreme Judicial Court No. SJC-13171, I have today served the Brief of the Committee for Public Counsel Services and the Charles Hamilton Houston Institute as *amici curiae* on all parties to this case by directing copies through the electronic filing service provider to:

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November 15, 2021