No. 122484

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	) On Appeal from the Appellate
	) Court of Illinois, Third District,
Plaintiff-Appellant,	) No. 3-16-0457
	)
	) There on Appeal from the Circuit
v.	) Court of the Fourteenth Judicial
	) Circuit, Rock Island County, Illinois,
	) No. 15 CF 225
	)
DERRICK BONILLA,	) The Honorable
	) Frank Fuhr,
Defendant-Appellee.	) Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

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POINTS AND AUTHORITIES

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ARGUMENT

A police officer entered the unlocked, outer door of defendant's pet-friendly apartment building just as any member of the public could have done. C25.[1] He led a trained K9 through the common area hallways on the second and third levels, each of which had four units, and the K9 alerted at the doorway to defendant's unit. *Id.* Based upon this alert, officers obtained a search warrant and, upon executing it, found cannabis in defendant's apartment.

The K9 alert did not violate the Fourth Amendment's property-based test because the unlocked, common area hallway was not curtilage, a part of defendant's property enjoying heightened expectations of privacy. In support of his contrary argument, defendant offers only that the common area was enclosed within the walls of the apartment building, but this lone fact is insufficient to bring the common area within the curtilage of his apartment. Moreover, the officer could in good faith enter the common area, which this Court had held enjoyed no reasonable expectation of privacy, and bring the K9 to conduct a sniff, an activity this Court and the United States Supreme Court have reaffirmed on multiple occasions does not implicate the Fourth Amendment.

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[1] "C_" refers to the common law record; and "Peo. Br. _" and "Def. Br. _" refer to the People's opening brief and defendant-appellee's brief before this Court, respectively.

I. The Common Hallway, Accessible to the General Public, Was Not Constitutionally Protected, and Bringing a Dog Into the Pet-Friendly Building Was Not Unlicensed.

A. The common area hallway behind the unlocked, outer door was not curtilage.

Under *Florida v. Jardines*, 569 U.S. 1, 5-6 (2013), government agents violate the Fourth Amendment when they engage in unlicensed, physical intrusion of a constitutionally protected area to obtain information. *Id.* at 5-6. The parties agree on the governing analytical framework, including that this property-based test is distinct from a reasonable-expectations-of-privacy analysis, *see* Def. Br. 7 (citing *Katz v. United States*, 389 U.S. 347 (1967)); that the relevant Fourth Amendment protections extend only to a home and its curtilage, an area "intimately linked to the home, both physically and psychologically, . . . where privacy expectations are most heightened," *see* Def. Br. 5 (internal quotation marks omitted); and that determining whether a part of defendant's property is curtilage is analyzed under the four-factor test set forth in *United States v. Dunn*, 480 U.S. 294, 301 (1987).

The parties have two main areas of disagreement in applying this agreed-upon analytical framework to the facts of this case, where a K9 sniff was conducted from the unlocked, common area hallway in defendant's apartment building. First, as the People's opening brief explained, Peo. Br. 7-8, defendant cannot meet *Jardines*'s property-based test for an area in which he has no possessory interest. *Jardines* articulated a "straightforward" principle: there was a Fourth Amendment violation in that case because

"officers were gathering information in an area *belonging to Jardines* and immediately surrounding his house." 569 U.S. at 5-6 (emphasis added). But the curtilage concept does not apply to an area in which the resident has no possessory interest. *See People v. Carodine*, 374 Ill. App. 3d 16, 23 (1st Dist. 2007) ("Although defendant leased the apartment in which he and his mother resided, he had no possessory interest to the common area from which the officer reached because the inhabitants of two other units had access to the common area.").

People v. Burns, 2016 IL 118973, ¶ 33, held that the common area landing at issue there could be considered "property" because "the entrances to defendant's apartment building were locked every time police attempted to enter the secured building." *See also id.* ("We emphasize that the 'common areas' of the secured apartment building were clearly not open to the general public, a fact known by the officers who entered defendant's secured apartment building in the middle of the night.").[2]

Burns showed the outer limit of what could be considered a protected property under *Jardines*. Even though Burns had no actual possessory interest in the area, and even though she could not exclude other residents

[2] The People argue neither that *Jardines* is applicable only to single-family homes, nor that the reason for this is that there is no *Katz* legitimate expectation of privacy in common areas. *Cf. Burns*, 2016 IL 118973, ¶ 32. Instead, the People argue that (1) property-based protection extends only to those areas of apartments or condominiums to which a defendant has a possessory interest, which does not include the hallway here, and (2) the hallway is not curtilage under *Dunn*.

from the area, the locked outer door excluded everyone but the residents of the six apartments, and the area was used only by her and one other unit. *Id.* ¶¶ 3, 33. This ability to exclude the general public represented a hallmark of a possessory interest. *See Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) ("The hallmark of a protected property interest is the right to exclude others. That is one of the most essential sticks in the bundle of rights that are commonly characterized as property.") (internal quotation marks omitted).

Even that lone hallmark is absent here. Defendant does not explain why this common area hallway, in which he had no possessory interest, and which was open to the public, should be considered his property under *Jardines*. This Court should reverse the appellate court's judgment on this basis alone. *See United States v. Sweeney*, 821 F.3d 893, 899 (7th Cir. 2016) ("To establish a Fourth Amendment violation under this approach, there must be some trespass upon one of the properties enumerated by the Constitution's text," and "trespass means that one enters land in the possession of the other.").

If defendant does have a possessory interest in the common hallway area, the parties agree that the four-factor *Dunn* test applies to determine if it is curtilage. But the parties' second basis for disagreement concerns *Dunn*'s application to unlocked, common areas in general and to this hallway in particular.

Curtilage "questions should be resolved with particular reference to four factors: 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." *Dunn*, 480 U.S. at 301. These "useful analytical tools . . . 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.*

To be sure, the common hallway area was proximate to defendant's apartment. But, contrary to defendant's assertion, this factor was not "essentially outcome-determinative" in *Burns*, *see* Def. Br. 9, nor should it be here.

Defendant argues that the second factor — whether the area is included within an enclosure surrounding defendant's home — indicates heightened privacy expectations because the hallway "was enclosed within the walls of the building itself." Def. Br. 10. *Burns* found that this second factor was satisfied because the door leading to the landing was locked. *See Burns*, 2016 IL 118973, ¶ 37 ("the landing to defendant's apartment is in an area located within a locked structure intended to exclude the general public."). But here, no lock excluded the general public. Moreover, defendant's test — whether the area was enclosed within the walls of the

building — would include every part of every residential building, including the retail stores and restaurants at 875 North Michigan Avenue (formerly the John Hancock Center), and parking garages underneath any large apartment building, areas in which the residents of the apartments or condominiums enjoy no heightened expectations of privacy. *See State v. Dumstrey*, 873 N.W.2d 502, 509-15 (Wis. 2016) (parking garage below apartment building was not defendant's curtilage or area with reasonable expectation of privacy).

As to the third factor — how defendant used the area — defendant argues that the area "was for ingress and egress by only Defendant and his invitees." Def. Br. 10. But there is no evidence that use of the hallway was so limited. To the contrary, the hallway was open to any resident, their invitees, or any member of the public who walked in through the unlocked, outer door. And there were twice as many apartments on that floor as in *Burns* (four vs. two). *See Burns*, 2016 IL 118973, ¶ 37 ("The third-floor landing . . . is generally limited to defendant, the tenant of unit No. 9, and their invitees."). Nor is there any evidence that defendant used the hallway for anything another than accessing his apartment, or that any other use was feasible or permitted by his lease. This use demonstrates that defendant had no heightened expectation of privacy there.

Finally, defendant asserts that the fourth factor — the steps he took to protect the area from observation by passersby — demonstrates a heightened expectation of privacy because the hallway "was not readily visible, or visible

at all, to passers-by on the street." Def. Br. 10. But the hallway was visible to any tenant of the other three apartments on the floor, their invitees, or any member of the public walking though the building's unlocked, outer door. Defendant's argument is akin to asserting that a house's front yard is protected from observation because it can be seen only from the street and not the nearby highway. No effort was made to protect the area from observation by the numerous people using the hallway every day or members of the general public who could walk by at any time.

It bears repeating that, unlike in *Burns*, the outer building door here was unlocked, a distinction this Court has clarified was critical to its holding in *Burns*. After "reiterat[ing] that the entrances to defendant's apartment building were locked every time police attempted to enter the secured building and officers entered the building with the knowledge that the building they entered was not accessible to the general public," *Burns* stated, "*[t]hus*, this case is *distinguishable* from situations that involve police conduct in common areas readily accessible to the public." *Id.* ¶ 41 (emphasis added).

The distinction between routinely locked and unlocked, outer doors makes perfect sense. A common area in an apartment building already is accessible to other residents of the building, their invitees, and the landlord. *Burns* determined that the landing could be curtilage when it was used only by the residents of two units and the stairway leading up to it was accessible

only to residents of the six apartments; that is, access to the common area outside the defendant's apartment was strictly limited. In contrast, a common area like the one at issue here, located behind a door that is always unlocked (defendant stipulated that "all doors" in the apartment complex were "unlocked and not necessarily capable of being locked" R7; *see also* SC2), and accessible to the general public, that has no limits on access, cannot be so intimately linked to the home, where privacy expectations are most heightened.

Nor is there validity to defendant's concern that it would be unworkable to consider whether an area was accessible to the general public or protected behind a locked door. Defendant proposes a hypothetical common area that generally is locked, but the lock is broken or the door temporarily propped open. Def. Br. 12. Although defendant does not articulate what it is about this scenario that is unworkable, perhaps he is concerned that an area that might generally be considered curtilage will temporarily lose its constitutionally protected status. But, as in every case, the Fourth Amendment inquiry is based on reasonableness under the totality of the circumstances known at the time. Fourth Amendment analysis is therefore sufficiently flexible to address situations in which a significant feature of the home is temporarily altered: a home that is temporarily open while its windows are being replaced, say, or that is open to the public for an open house or similar event. That such scenarios exists does not mean that

courts should find that every portion of every building enjoys Fourth Amendment protections regardless of whether it is always open to the public.

Indeed, defendant's proposal is unworkable in that it has no practicable limitations. If the area need not be behind a locked door or inaccessible to the general public, then the presence of a door at all should make no difference, nor that the area is fully enclosed. Under defendant's framework, any common area of a multi-unit dwelling, whether it excludes the public or not, should be considered curtilage, "'part of the home itself for Fourth Amendment purposes.'" *Jardines*, 133 S. Ct. at 1414 (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)). Defendant's proposal thus contravenes *Dunn* and other precedents limiting curtilage to those areas so intimately connected to homes that they share their heightened expectations of privacy. *Dunn*, 480 U.S. at 301; *see also Jardines*, 569 U.S. at 7.

Here, the common area hallway was accessible to the general public, used by residents of the several other apartments on the floor, and used by defendant only for entering and exiting his apartment. The hallway was neither defendant's property nor an area with heightened expectations of privacy, and thus not within his curtilage.

B. The K9 sniff did not exceed the licensed activity.

As defendant recognizes, even if the common area hallway was curtilage, the K9 sniff resulted in a Fourth Amendment violation only if the sniff exceeded the licensed activity. *See* Def. Br. 13; *see also Jardines*, 569

U.S. at 7 ("Since the officers' investigation took place in a constitutionally protected area, we turn to the question of whether it was accomplished through an unlicensed physical intrusion.").

Here, the door was unlocked, and members of the public or of the apartment community could freely walk through the hallway to, for instance, access the community's clubhouse or playground. It is customary to use unlocked portions of buildings during the day for all sorts of purposes, including obtaining a momentary break from the cold or pursuing the most direct route to a destination. Defendant's apartment community is pet-friendly, *see* https://www.pheasantridgeapthomes.com, and it is therefore reasonable to believe that it would be common to see people walking dogs through the hallways.

This is very different from *Burns*, where the officers "entered a locked building in the middle of the night." *Burns*, 2016 IL 118973, ¶ 43; *see also id.* ¶ 44 ("We conclude that, under *Jardines*, 569 U.S. ___, 133 S. Ct. 1409, when police entered defendant's locked apartment building at 3:20 a.m. with a drug-detection dog, their investigation took place in a constitutionally protected area."). Here, the K9 sniff took place in the middle of the day and that the officers entered through unlocked doors, as any member of the public could have done. Thus, the K9 sniff was not "accomplished through an unlicensed physical intrusion." *Jardines*, 569 U.S. at 7.

II. Defendant's New Reasonable-Expectation-of-Privacy Argument Is Unavailing.

Two tests are employed to determine whether a Fourth Amendment search occurred: (1) the property-based approach, and (2) the reasonable expectations of privacy analysis. The appellate court relied only on the property-based approach, *see* A7 ("First, as noted above, there is no need to apply the privacy-based approach here because the government gained the evidence in question by intruding onto a constitutionally protected area"), the same basis raised by defendant, *see* C26-28. For the first time, defendant now argues that the dog sniff also violated his reasonable expectation of privacy, but the claim fails because he has demonstrated neither that he had an expectation of privacy in the landing nor that any such expectation was reasonable.

Under the privacy-based test, defendant bore the "burden of establishing that [he] had a legitimate expectation of privacy" in the landing. *People v. Johnson*, 237 Ill. 2d 81, 90 (2010). The following factors are relevant to this inquiry: (1) whether the person has an ownership or possessory interest in the property; (2) whether the person has exercised prior use of the property; (3) whether the person has the ability to control or exclude others' use of the property; and (4) the person's subjective expectation of privacy. *Id.*; *see also Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (to claim protections of Fourth Amendment, "a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his

expectation is reasonable, *i.e.*, one that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society") (internal quotation marks omitted).

Here, defendant has established no legitimate expectation of privacy: he had no possessory interest in the property; he could not exclude the other tenants, the landlord, workers, or members of the public, who could enter through the unlocked front door; he used the hallway only to access his apartment; and he proffered no evidence that he subjectively expected privacy in the hallway.

Defendant primarily argues that the "privacy analysis here is indistinguishable from *Kyllo*" *v. United States*, 533 U.S. 27 (2001), which involved a thermal-imaging device that could detect lawful, intimate activity in the home. Def. Br. 15. Defendant relies on Justice Kagan's concurrence in *Jardines* that suggests *Kyllo* could apply to dog sniffs. *See* Def. Br. 3; *see also Jardines*, 133 S. Ct. at 1418 (Kagan, J., concurring). But that argument was not embraced by the majority in *Jardines* and was rejected in *Illinois v. Caballes*, 543 U.S. 405, 409-10 (2005). Instead, *Caballes* explained that a K9 sniff is considered "*sui generis*," a uniquely non-invasive technique "because it discloses only the presence or absence of narcotics, a contraband item." *Caballes*, 543 U.S. at 409 (internal quotation marks omitted). *Caballes* thus explicitly refused to apply *Kyllo* to K9 sniffs. *Id.* at 409-10; *see also Jardines*,

133 S. Ct. at 1425 (Alito, J., dissenting) (explaining that *Caballes* rejected applying *Kyllo* to dog sniffs). The Supreme Court has overruled neither *Caballes* nor its longstanding precedents regarding dog sniffs. Thus, defendant has shown neither that he had an actual expectation of privacy in the hallway nor that such an expectation would be legitimate.

Further, there was no reasonable expectation of privacy here under *People v. Smith*, 152 Ill. 2d 229 (1992). *See* Peo. Br. 14-15. *Smith* held that there was no Fourth Amendment search when officers standing in an unlocked hallway outside the defendant's apartment overheard him confess to murder because there was no reasonable expectation of privacy in the unlocked, common area. *Id.* at 240-41, 245-46. And, as discussed below, even if this Court were to now deviate from *Caballes* and *Smith*, the officers could have relied on those cases in good faith, meaning the exclusionary rule would not apply. *See infra* Section III.

III. The Officers Could Rely on Binding Precedent Holding that There Was No Reasonable Expectation of Privacy in Unlocked, Common Areas.

The parties agree that the exclusionary rule does not apply if a reasonably well-trained officer would not have known that his conduct was an illegal search in light of all the circumstances. *See* Def. Br. 16. The parties also agree that police officers may rely in good faith on binding appellate precedent. *Id.*

The People's opening brief established that the good faith exception applied because the officers here were in a location — a common area behind an unlocked door — that this Court and others had held enjoyed no reasonable expectation of privacy, and where they engaged in activity — a K9 sniff — that the United States Supreme Court and this Court had reaffirmed on multiple occasions was not a Fourth Amendment search. Peo. Br. 13-17. Officers could rely on *Smith*, which found no Fourth Amendment search when officers standing in a hallway heard defendant confessing in his apartment because there was no reasonable expectation of privacy in the unlocked, common area. 152 Ill. 2d at 245-46.

Defendant offers two reasons why the police could not rely on *Smith*, but neither theory holds water. First, he argues that this Court rejected this same argument in *Burns*. But *Burns* explained that the officers in that case could not rely on *Smith* for one reason: the common area in *Smith* was located behind an unlocked door, while the door in *Burns* was locked. *Burns*, 2016 IL 118973, ¶ 58. Defendant even cites the portion of *Burns* that distinguished *Smith* solely on that basis. *See* Def. Br. 17 ("This Court explained, 'We reject the State's argument . . . *Smith* did not hold that tenants have *no* expectation of privacy in common areas of locked apartment buildings; rather, *Smith* concerned an individual's reasonable expectation of privacy . . . in a common area of an unlocked apartment building.'") (citing *Burns*, 2016 IL 118973, ¶ 61) (emphasis in original). Moreover, *Burns* arose

out of the Fourth District, where the governing precedent announced in *People v. Trull*, 64 Ill. App. 3d 385, 387 (4th Dist. 1978), had found a reasonable expectation of privacy in common area hallways behind locked doors. *See Burns*, 2016 IL 118973, ¶ 66 ("Here, the appellate court properly determined that *Trull,* an Appellate Court, Fourth District case, was binding authority in this case.").

Here, in contrast, the outer door was unlocked and the remaining facts closely track those present in *Smith*. The area "was a common area shared by other tenants, the landlord, their social guests and other invitees"; it "was unlocked"; and it was somewhere officers had a "legal right to be." *Smith*, 152 Ill. 2d at 245-46.[3]

Second, defendant points out that, as the People already noted (*see* Peo. Br. 17), *Smith* observed that the officers there did not use "artificial means to enhance their ability" to secure the evidence. Def. Br. (quoting *Smith*, 152 Ill. 2d at 246). But the precedents of this Court and the United States Supreme Court holding that a K9 sniff does not implicate the Fourth Amendment are dispositive. *See* Peo. Br. 14-15; *Caballes*, 543 U.S. at 409; *City of Indianapolis v. Edmond*, 531 U.S. 42, 40 (2000); *United States v. Place*, 462 U.S. 696, 707 (1983); *People v. Bartelt*, 241 Ill. 2d 217, 226-27 (2011). These precedents clearly held that the K9 sniff was not an

[3] Defendant's suggestion that the officers should have relied on the *Burns* appellate court decision, Def. Br. 18, fails for the same reason: that decision relied on the fact that the door there was locked.

"enhancement" relevant to the Fourth Amendment inquiry. *People v. Bew*, 228 Ill. 2d 122, 130 (2008) ("The [Supreme] Court reaffirmed that a dog sniff is *sui generis*, as it discloses only the presence or absence of contraband.").

Defendant further asserts that the officers could not rely on these cases because they did not involve K9 sniffs of homes. Def. Br. 16-17. But, as discussed, the officers could rely on *Smith* to reasonably believe that they were permitted to be where they were. And they could rely on these cases to believe in good faith that the conduct, a K9 sniff, was not an "enhancement" under Fourth Amendment jurisprudence.

The People's opening brief also demonstrated that the officers could rely on *Carodine*, which, citing *Smith*, explained that "it has been held that where hallways and other common areas of a building are readily accessible to members of the public, that is, where nonresidents without a key can freely enter the common areas of the building, a law enforcement officer or other governmental agent does not conduct a 'search' when he enters those areas of the building." 374 Ill. App. 3d at 24 (citing *Smith*, 152 Ill. 2d at 245).

Rather than grappling with the holding, defendant attempts to distinguish *Carodine* on its facts. But the invasiveness of the police conduct in *Carodine* was, if anything, greater than that here. The officer there reached into the vent of a dryer in Carodine's apartment that could be accessed from a common area stairwell. *Id.* at 23. This binding precedent told officers that they could enter an unlocked, common area and reach into

areas of apartments accessible from there. Surely officers could rely on *Carodine* to enter an unlocked, common area and perform an activity that this Court and the United States Supreme Court had repeatedly held does not implicate the Fourth Amendment.

Defendant also points out that *Carodine* was a First District decision. Def. Br. 18. But "it is 'fundamental in Illinois that the decisions of an appellate court are binding on all circuit courts regardless of locale.'" *Bryant v. Bd. of Election Comm'rs of City of Chi.*, 224 Ill. 2d 473, 479 (2007) (quoting *People v. Harris*, 123 Ill. 2d 113, 128 (1988)). Petitioner points to no contrary precedents from the Third District regarding unlocked, common areas.

Finally, the People's opening brief demonstrated that the officers' conduct here was also specifically authorized by a decision of the Seventh Circuit Court of Appeals, *United States v. Brock*, 417 F.3d 692, 693 (7th Cir. 2005), which constitutes binding appellate precedent "for Illinois police that they [can] reasonably rel[y] upon." *People v. LeFlore*, 2015 IL 116799, ¶ 56; *see* Peo. Br. 17-18. In response, defendant suggests that there is some inconsistency between that argument and the People's assertion that the appellate court here erred in relying in the good faith analysis on *United States v. Whitaker*, 820 F.3d 849 (7th Cir. 2016). There is no contradiction. The K9 sniff here occurred in March 2015, long before *Whitaker* was issued. There is no inconsistency in asserting that the officers could rely on Seventh Circuit cases issued before they acted and were not unreasonable for failing

to anticipate future federal precedents. Further, *Whitaker* involved a locked exterior door and arose in a different jurisdiction (Wisconsin). The officers here could rely on *Brock* in addition to the cases of this Court holding that defendant enjoyed no reasonable expectation of privacy in the apartment building common area and that their conduct did not implicate the Fourth Amendment.

CONCLUSION

This Court should reverse the judgment of the appellate court.

April 18, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is eighteen pages.

/s/ Eldad Z. Malamuth
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PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On April 18, 2018, the foregoing **Reply Brief of Plaintiff-Appellant** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the e-mail addresses of the persons named below:

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Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail thirteen copies of the Brief and Appendix to the Clerk of the Supreme Court of Illinois, Supreme Court Building, 200 East Capitol Avenue, Springfield, Illinois 62701.

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