Mark Thomson: Welcome to The ComMN Law, the best and only podcast about the Minnesota Supreme Court. My name is Mark, and I'm here with my co-host Alison. Today we're going to be talking about drug-sniffing dogs and the Fourth Amendment. But first, legal news.

Alison Key: So the first piece of legal news that I think we should talk about today is an update on the Fischbach case. So listeners of our first episode will remember that Michelle Fischbach is the President of the Senate, a position that, per the Minnesota Constitution, is then supposed to elevate to lieutenant governor when the lieutenant governor seat becomes vacant and as you know, because they appointed then Minnesota Lieutenant Governor Tina Smith to Al Franken's vacant US Senate seat, the lieutenant governor position became vacant. Then per the Constitution Michelle Fischbach was supposed to elevate to lieutenant governor. However, as we mentioned in our last episode, Fischbach does not want to leave her post in the Senate, as the balance of power in the Senate right now is based on one vote, 34-33. So she says she's serving both roles, focusing on her senatorial role. When we recorded our previous episode, a constituent of Fischbach's had sued her, saying she was violating a provision of the Minnesota Constitution that prohibits legislators from serving in more than one position of government as Fischbach was apparently trying to do. The suit, Dusosky v. Fischbach, had been filed on January 12, but then one month later on February 12, Judge Guthmann dismissed the case against Fischbach saying that at the time that the constituent Dusosky had filed the suit, the constituent hadn't actually suffered any damages at that point because the Senate wasn't in session on January 12. In fact, the judge said we don't even know at this point if Fischbach is going to be senator because everything is hypothetical at this point because the session has not started. So the suit was premature. In the dismissal, Judge Guthmann wrote, "Petitioner Dusosky demonstrates no more than a hypothetical injury because it is not known whether the defendant will take her seat, whether the defendant will cast a vote, or whether the Minnesota Senate will allow her to serve." So the ruling left open this possibility, however, have another suit once the Senate was session. So the session started on February 20, about two months ago now, and Fischbach is definitely serving as a senator and the constitution then says she is also serving as lieutenant governor. So as she's mentioned, she said she's going to focus on her senatorial role and that's what she seems to be doing, which has resulted in some brutal headlines from the press, including one from AP's Kyle Potter on March 1 that says, "Minnesota Lieutenant Governor deliberately skips duties."

Mark Thomson: Harsh.

Alison Key: So she continues to decline or refuse to attend meetings that the lieutenant governor is in charge of. A couple weird twists in this story though, that I think would be interesting to note for our listeners. One, Fischbach actually it hasn't taken the oath of office for lieutenant Governor yet and has said publicly that she's not super concerned about taking that oath. So she may never-- she may intend not to ever take that oath and that might be part of an eventual legal strategy that she is hoping to preserve, that if he doesn't take the oath she's not

actually serving two roles. But that leads to the second point, which is Dusosky, Fischbach's constituent whose original suit was dismissed on February 12, was essentially invited by Judge Guthmann in that to refile her suit once the session restarted on February 20, but has not yet refiled a suit. So people are kind of starting to wonder, where's this suit? Are we actually going to have a lawsuit on this issue or not? Because right now there's no pending litigation here. So Minnesota Lawyer's Kevin Featherly interviewed some people "in the know" about where's this lawsuit, why hasn't it been filed? And so Kevin Featherly, then talked to Ron Latz, a DFL state senator and also attorney, who provided this quote: "It's still under consideration. That's all I'm going to say on that one." And then Hamline University political science professor David Schultz, who's also an attorney, responded to Kevin Featherly's questioning saying, "Well, that's a great question. I think they might be waiting until they get to a strategic point on some critical 34-33 votes." Where that, where Fischbach's role might have changed the balance of the voting. "Because I think that given the Ramsey county opinion and given where the Supreme Court is going at this point," query what that means, "I think there are questions about standing and about whether senators and constituents can raise this issue in court. So I think they're going to wait until there's a critical 34-33 vote on something and then fight it out there. Right now I think you can argue there's no injury because she hasn't cast any votes on bills yet that can be in dispute. I think they are waiting."

Mark Thomson: A few things. One, in the dismissal order, it seemed to me like Judge Guthmann was saying, refile session starts, not refile as soon as you have some kind of a crucial 34-33 decisive vote from Fischbach, right?

Alison Key: Right. It did say right now, I don't think Guthmann wanted to opine any further besides saying we don't need to address this now because we don't know whether Fischbach is even going to take her Senate seat. We don't know whether she's going to try to play both roles, but I'm not sure he specifically said you would have to wait until the vote comes down to Fischbach's vote. But I think the point is if you're going to file litigation again, rather than suffer another loss, you want to make sure it's clear cut. But I don't know what they're thinking. So we'll have to keep you updated on the crazy swirl of constitutional-political issues around this case.

Mark Thomson: Maybe Ron Latz and David Schultz have thought about this more than I have---almost certainly yes---but I can't see why you would need some kind of decisive vote from her to have standing. I mean I get why the suit was dismissed by Guthmann because she hadn't taken the seat yet, but now that she has, she is the representative and she's supposed to be the lieutenant governor. I don't understand what the votes would have to do with it. So that's one. Two, I just want to applaud the Minnesota state courts for finding it increasingly creative and novel ways to avoid large constitutional issues.

Alison Key: To not actually weigh in.

Mark Thomson: Across the board, I hope that they throw themselves a huge party and all tell stories of the ways that they tried to dodge these suits.

Alison Key: Just let them fizzle before they have to make any decision.

Mark Thomson: I say that non ironically. This is nonsense that legislators should not be putting before the courts. I applaud the courts for their creativity.

Alison Key: And a DFL senator has actually proposed a constitutional amendment to amend the constitution to just let the governor choose the lieutenant governor and not create the succession from Senate President to lieutenant governor or senator could refuse. I don't know if the senator has ever refused before Fischbach, but even the DFL senators at this point are saying, this is ridiculous we need to have a functioning lieutenant governor and a functioning Senate. And this is obviously not working

Mark Thomson: Very silly. Next legal item. Just as serious as the last. This is from the Star Tribune a story called, "Twin City attorney sews bridge to help buxom women stand tall." This is our local gossip columnist C.J. And I'll just read you a couple sentences from the story. "Criminal defense attorney, Judy Sampson, tired of her breasts bouncing around and instead of turning to a surgeon, she went to her sewing machine. To take the bounce out of her breasts, the non-fan of the sports bra designed connecting clip called the Bra Bridge, patent pending, which launched nationally two weeks ago." So the fun thing about this story is, it is a genre of legal news stories that I have noticed only since starting this podcast, which is like attorney does fun thing again,

Alison Key: And is thus newsworthy.

Mark Thomson: Right. That's hilarious that an attorney might have fun. There's no information about what her legal career is in the article. Except for that she's a criminal defense attorney. And we're just going to play for you, this attorney actually created what she calls a rap song to accompany her product. We're going to present it without commentary.

Bra Bridge Rap: Check this out. My shoulders are slumped over. Confidence is lower. My boobs are past my rib cage. This is an outrage. The moving and the bouncing as no longer refined. Dang. This is blowing my mind. They need to be contained. OK. Maybe trained. A sports bra does the trick, but do I want them to stick? My options have run out until the bra bridge, no doubt. You got to see the difference. It's not just an inference. This is the real thing. It's as good as bling. It's the bra bridge. It's the bra bridge. You snap it on and move them one by one. My shoulders are back. Check out my rack. How did they get so plump? I'm no longer in a slump. I can do Zoomba. Boom, boom, ba boom, ba. The cleavage is here to stay. Even when I sweat, no drifting past my ribs, I get first dibs. It's the bra bridge. It's a revolution or an evolution. No matter what it is, we have the solution. Out.

Mark Thomson: Um. Wow. That is shocking. We're going to put the link to that in the show notes. There is an accompanying video. It's everything you expect it to be.

Alison Key: I actually think the product is quite interesting. Maybe I'll try it out.

Mark Thomson: Totally cool idea.

Alison Key: So moving on to another piece of legal news. As most ComMNers know, Justice Stras is now a federal judge on the Eighth Circuit. Confirmed at the end of January, I believe January 30. So his seat on the Minnesota Supreme Court is now vacant. They're sitting at six justices and that seat is awaiting a replacement. So the constitution of Minnesota permits the governor to replace any vacancies on the Minnesota Supreme Court and it does not require Senate confirmation like is required for the US Supreme Court. Gut governor Dayton, I believe like most governors before him chooses to vet applicants to the position through a special judicial selection commission that reviews applications for the position and that commission then makes recommendations to the governor and the governor chooses the nominee/appointee based on those committee's recommendation. So at the end of March, four finalists to the position were named, and I'll just walk through them briefly here for you. So the first is democratic state representative Paul Thissen. He had been, he has been a Minnesota state representative since 2003. He's previously been speaker of the house, and before that, chair of the Health and Human Services Committee. He's worked previously at Briggs and Morgan and as an appellate public defender. And was a law clerk for Judge Loken at the Eighth Circuit. The second one then is current Minnesota Court of Appeals Judge Lucinda Jessen. So before her appointment to the Court of Appeals, she was the commissioner of the Department of Human Services. She was also an associate professor at Hamline University while she was a partner at Oppenheimer, Wolff & Donnelly. So she would be a natural fit to elevate to the Minnesota Supreme Court. The third one then is a district court judge, Judge Jeffrey Brian. Before he was a district court judge. He was a US attorney and a civil litigation attorney at Robins Kaplan. And then the fourth and final nominee is Minnesota tax court chief judge Bradford Delapena. Before his appointment to the tax court, he was a solo practitioner. And then he had also previously worked in the Minnesota Attorney General's office and as an assistant state public defender. So quite a spread in the nominees from politics to current court of appeals judges to trial court judges to a tax court judge.

Mark Thomson: Yeah, that should be finished pretty soon. So it'll be interesting to see how it turns out. I'm sure the court is eager to get back to a full slate of judges.

Alison Key: Yeah. Notably absent from the list is anyone with a background resembling now Judge Stras's background from the academic world. I always kind of thought his rigor that he brought to the bench largely stemmed from his academic work because he was a professor before being appointed to the court by Governor Pawlenty, but . . . . And then this replacement will make five of the seven Minnesota Supreme Court justices Dayton appointees, so that's quite a legacy that Dayton will leave.

Mark Thomson: Yeah between, the court has a mandatory retirement age of 70, and then they've lost Judge Wright to the Minnesota district court and Judge Stras now on the Eighth Circuit, there's quite a bit of turnover. So a two term governor like Dayton doing some serious damage. In terms of other cases at the state supreme court that we were not going to cover as our case in chief today, it was pretty thin picking, but there was one that I found somewhat interesting. It's called Christensen v. Healey. It's a family court case. So here are the facts. Healey and Christensen or the parents of a child that was born in 2010. Before all these current events, Healey had sole custody of the child and Healey's residence was the child's primary residence. Christensen then moved to change the schedule to an alternating-week schedule, rather than having Healey have sole custody and that would also affect the child's primary residence because they would be split. So the District Court denied Christensen's motion and they held that Christensen failed to satisfy Minnesota Statute 518.18, which says that a change of custody order can issue only if the moving party shows that the child may be endangered. So I think no one disputes that the child wasn't endangered in this scenario. The issue that the supreme court is going to consider is whether this endangerment statute is the right standard for the kind of motion that we're looking at right now for a change to a custodial and primary residence situation or whether instead, we should apply a different statute that simply determines what the best interests of the child are. A little surprised that that's not worked out already,

Alison Key: Right. Because endangerment of a child is a pretty stringent standard and you can see a lot of instances where life changes or parental responsibilities can affect what the parents or guardians want to do for custody arrangements.

Mark Thomson: Yes. I remember from our time at the court, we didn't have a ton of family law cases, but there are a lot of family law litigation in the state and the family law bar is very eager for the state supreme court to provide some finality on stuff like this. So I'm sure it'll be appreciated.

Alison Key: And you can see why because these obviously affect children's in parents lives.

Mark Thomson: Our principal case this week, moving on, is State v. Edstrom. This is a case about the Fourth Amendment, about searches and seizures, and also about the analog to the Fourth Amendment in Minnesota, Article 1 , section 10 of the state constitution. It's also about drug-sniffing dogs. It's kind of fun. So I'll let Alison provide some factual background.

Alison Key: So the facts of this case are as follows. Edstrom, who is the respondent now at the Minnesota Supreme Court, had a felony on his record prior to the incident that led to this case. But Edstrom was the subject of an anonymous tip received by the Hopkins police saying that he was selling a "substantial amount of methamphetamine out of his apartment in Brooklyn Park." So then acting on that tip, the police then entered the common hallway area of Edstrom's apartment in Brooklyn Park, gaining access with the use of a key called a "Knox box" the landlord had installed specifically for use by law enforcement. And then law

enforcement using narcotics detection dog in the hallway outside of what they knew to be Edstrom's apartment.

Mark Thomson: And we should just be clear about what a Knox box is going forward because I didn't know at least. A Knox box is something that, from what I understand, that a landlord can agree to install on the outside up an apartment complex. And it provides a key that can be accessed only by law enforcement to the building. So it's a kind of previous agreement by the landlord to permit law enforcement to enter.

Alison Key: And the record in this case doesn't clearly state whether the tenants had agreed or even had explicit knowledge that this Knox box was there. So once law enforcement gained access to the hallway outside of Edstrom's apartment, the dog, the narcotics-detection dog that they had, sniffed multiple doors in the hallway, including Edstrom's, and then the dog gave a positive alert to indicate that it did detect drugs inside Edstrom's apartment. So using the fact that the narcotics-detection dogs sensed drugs from outside the door of Edstrom's apartment, in combination with the anonymous tip they had received, the police were then able to get a judge to issue a warrant for an unannounced search of Edstrom's apartment. So then in executing that search of Edstrom's apartment, the police then recovered 227 grams of methamphetamine; multiple firearms, shot gun shells, and rounds; and several digital scales that had methamphetamine residue on them. They also found Edstrom inside of the apartment whom they promptly arrested. So then Edstrom was subsequently charged with violating three criminal statutes. First for selling the meth, the State charged Edstrom with first degree sale of a controlled substance. Second, for possessing the meth, they charged him with first degree possession of a controlled substance. And finally, because he did have a prior felony on his record, the State charged him with possession of a firearm by an eligible person. So Edstrom, then, at his trial, claimed the evidence that law enforcement found in his apartment was actually obtained in violation of the Fourth Amendment and the analogous Minnesota provision, Article 1, section 10, because the narcotics-detecting dog was searching the area around his home without a warrant. So he claims this violated the Fourth Amendment because it was clearly curtilage of his home and an area in which he claims he had a reasonable expectation of privacy. And we'll get into what that means in a little bit.

Mark Thomson: So to just do a little basic background about the Fourth Amendment and Article 1, section 10. The Fourth Amendment to the United States Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." So we have a Supreme Court of the United States case called Katz, saying that is the protection of people and not places. At the core of the right, says another Supreme Court case, stands the "right of a man to retreat into his home and there be free from unreasonable government intrusion." So here we are talking about a person's home at the core of that right. Another case, *Jardines*, which will become relevant, it says, when it comes to the Fourth Amendment, "the home is first among equals." So, two different kinds of Fourth Amendment protection in this

area. One, it protects people from physical intrusion, so this tends to take the form of property-rights analysis. And then second, and additionally, it protects people from unreasonable government intrusion into their legitimate expectations of privacy. So we'll take these in turn, as the court tried to, with some kind of bleeding between the property and the privacy analysis. But we'll start with the physical intrusion into a constitutionally protected area. And as soon as we do that, we need to talk about curtilage. So curtilage is just a legal term about the area immediately surrounding an associated with your home. Your home itself inside is protected, but the Fourth Amendment also protects you from unwarranted searches into certain areas in addition to your home, which we associate with it. So that naturally is just going to open up a big unanswered question about what areas count. So the Supreme Court of the United States has a case called *Dunn*. It lays out a general standard that says basically the curtilage is "areas of the home that are so immediately tied to the home that they need to be placed under the umbrella of Fourth Amendment protection." That does basically nothing to help, but [*Dunn*] does lay a few factors, four of them. One, proximity to the home. Two, is the part of the home within an enclosure surrounding the home. Three, how does the homeowner use the area. And four, what are the steps taken by the resident to protect the area from observation by people passing by.

Alison Key: And I think the curtilage analysis, outlined by the *Dunn* factors, is obviously what the State and Edstrom are going to be fighting about here because law enforcement without the warrant did not go into Edstrom's apartment. They were outside the apartment. So the question becomes, is any of that area that they entered when they first went in using the Knox box and their narcotics-detection dog, the curtilage of Edstrom's apartment, which would violate his property rights.

Mark Thomson: So one recent case addressing this curtilage question at the US Supreme Court was called *Jardines*. This is from 2013. And that case concerned police officers' warrantless use a drug-sniffing dog on the front porch of a single family home. And Justice Scalia held that under a property-rights analysis not dealing with the privacy rights portion of the Fourth Amendment, that it was illegal to use a drug-sniffing dog on the porch of a single family home without a warrant. So the other case that's really on point here is a case from the Minnesota Court of Appeals in 2016 that addressed this precise question but did not get up to the state supreme court. So there, there was a dog sniff search outside residents door and secure multiunit condominium and the state court of appeals held that this did not require a warrant under the Fourth Amendment, didn't address Article 1, section 10. They went through these, *Dunn* factors, the four of them, they said this isn't an enclosed area. It's an area visible to anyone who might walk by because it's a hallway in a condominium. And so cops don't need to get a warrant before they come in.

Alison Key: I'd like to make a comment on *Luhm*, unless you have more that you want to say about it. I think it's probably important to mention here that the Minnesota Supreme Court doesn't really have much if any case law outlining this property-

rights analysis under the federal Fourth Amendment or it's analogous Minnesota state constitution. This *Luhm* case from the court of appeals is what the court of appeals relied on for the curtilage analysis and their walking through the *Dunn* factors weighed against a conclusion that the area outside of an apartment was curtilage, but at the court of appeals Edstrom does make the argument that the *Dunn* factors need to be re-envisioned in the context of an apartment building because it is enclosed from the street view, though it's not enclosed from the select few neighbors that you have and certain aspects of the fact that you're living in an apartment building obviate the need to enclose the area or take steps to secure it from viewers from the street. And Edstrom actually drops that argument by the time he gets to the supreme court, and decides not to argue that the *Dunn* factors need to be reenvisioned in the context of a multifamily dwelling. And I think that might have been a mistake for him, because I think a lot of the *Dunn* factors were clearly envisioning a single-family standalone dwelling and I think *Luhm* at the court of appeals is not only not precedential at the supreme court as it was at the court of appeals, which is why they decided not to overrule it, but it also may be open to re-interpretation.

Mark Thomson: Yeah and the court was pretty alive to the potential problems between-- the problems inherent in having one set of standards for single-family homes and another for apartments. We can play you a couple of clips on that score.

Chief Justice: Counsel, do you agree that if what happened here had happened on the front porch of a standalone house, that it would be unconstitutional?

State Counsel: It would be unconstitutional under *Jardines* given the property analysis.

Chief Justice: So why does it make sense that if it's unconstitutional to bring a dog to sniff the door of a private house, that it's constitutional to bring a dog to sniff the door of an apartment? Why does that make sense?

J. Chutich: Counsel, what troubles me here is that if we hold that an apartment uniformly lacks any Fourth Amendment curtilage, aren't we just concluding that those who live in apartments or any other form of multi-unit housing simply have fewer Fourth Amendment rights, property-based Fourth Amendment rights, within their homes than those who happen to live in a single-family home?

Alison Key: So I think Edstrom does certainly argue that the door itself to Edstrom's apartment was curtilage and the dog entered the curtilage of Edstrom's apartment when he sniffed it---or she; I don't know if Kato is a boy or a girl dog---but I do as I mentioned, think Edstrom gave up a little bit too much ground when he was willing to not argue that the common hallways could also constitute curtilage. Because as noted, some justices on the court seem really sensitive to the arbitrary distinction between multi-family dwellings and single-family dwellings. And not only do some justices on this court seem attuned to those arbitrary distinctions, but those exact concerns have also animated other courts, particularly the seven circuit has been cited by Edstrom, by specifically ruling with an eye towards the disparate impact on the poor and minorities of limiting

this curtilage analysis to single-family detached dwellings versus multi-family apartments.

Mark Thomson: Yeah, I think the State's attorney didn't have a super satisfying answer for this. He basically said, you know, these standards are going to end up being somewhat different than, you know, there are reasons why they will be different if you just apply the single-family standard two apartments. And I think he was fine with that and certain members of the court were more concerned. Another interesting angle to the curtilage argument is, like Alison said, there's a confusion about how much Edstrom is even fighting for to be the curtilage. And then, if you zoom in from there, I think there, there's confusion even about where the State felt the curtilage line is drawn and Justice Lillehaug was trying to ferret out precisely that boundary at length. So we'll play this longer clip from him.

J. Lillehaug: So tell me, what is the boundary of Mr. Edstrom's curtilage. Isn't the door at least part of the curtilage, even if the hallway is not?

State Counsel: The door is still in the common hallway. So for example, the neighbor, given the small area of the hallway, the neighbor moving in very well may be touching the door as they're trying to get the stuff into the unit. And again, whether it's the threshold of the door or the seam of the door, *Davis* did not make the case . . . .

J. Lillehaug: Okay so your position is that the outside of the door is not part of the curtilage. How about the inside of the door?

State Counsel: Yes.

J. Lillehaug: How about the area underneath the door? The crack between the door and the floor?

State Counsel: I think when you cross the threshold, that's when you start to get into the curtilage.

J. Lillehaug: So let's say instead of a dog here, the cops decided to use a sensitive device that can detect odors. A little device, like a bug, they stick it right under the door between the door at the bottom of the door and the floor. Do they need a search warrant to do that? If you get the same information that that dog would get?

State Counsel: If it's only revealing the presence or absence of narcotics. The United States Supreme Court has ruled that that's not a search under the Fourth Amendment. If it crosses the threshold, then we may be in a situation where they are violating the curtilage rights of the unit.

J. Lillehaug: So where's the threshold? Is it the area underneath the door?

State Counsel: The threshold I would contend is when you cross over into the unit itself, the door itself . . . .

J. Lillehaug: So the area underneath the door between the bottom of the door and the floor is not part of the curtilage. Is that your position?

State Counsel: That is my position.

Alison Key: I think that was very interesting both because that's classic Justice Lillehaug, trying to really ferret out where exactly the line is on the rule of law that the State is proposing here, but it's also interesting because DLL is clearly trying to define the boundaries of curtilage, and what he ends up getting the State to admit is the inside of the door is curtilage, which is not curtilage, it's inside the home. And so essentially Justice Lillehaug has forced the State to say there is not really curtilage in an apartment, multi-unit dwelling. And that's kind of an interesting admission and it's interesting that the State doesn't want to come out and say that, but instead has to just say, well the inside of the door is curtilage, which we know is just the inside of the home.

Mark Thomson: It doesn't make any sense. I think it, right, it really puts a fine point on Justice Chutich and to some extent Chief Justice Gildea's concerns about the differences between apartments and single-family homes in that not only is the, you know, there no porch for apartments, but according to the State here, there's no curtilage full-stop. Okay, so that wraps up the property analysis. A little muddled, I think, and probably a sign of what's to come. The other protections that are provided for under the Fourth Amendment are for violations have legitimate expectations of privacy. So you need to do a bunch of work to figure out what the heck out legitimate expectation of privacy is. A search is protected under the Fourth Amendment's privacy analysis if the person who has searched has, one, a subjective expectation of privacy and, two, that expectation is one that society is prepared to recognize as reasonable.

Alison Key: Yeah. So in addition to needing to have an expectation of privacy, which is a subjective component, and an expectation that's legitimate, which is the objective component, there are a couple other colorations in the law that become relevant here. One is *Illinois v. Caballes*, which was in 2005, and the relevant portion of law that came out of that United States Supreme Court case is that any interest in possessing contraband cannot be deemed a legitimate expectation of privacy. And thus governmental conduct at only reveals the possession of contraband compromises no legitimate privacy interest. So you can see where the State's going to start to rely on the fact that we're using a narcotics detection dog here to only identify contraband.

Mark Thomson: One of the State's big arguments is this is a drug-sniffing dog. It's not a camera, it's not binoculars. It's a dog that knows how to sniff drugs. This is solely a search for illegal activity. That's a pretty strong argument that gets some push back. Justice Lillehaug notes medicinal marijuana, legal in Minnesota. Certain opioids, illegal in some forms, legal if you have a prescription. So not as clean as the State may want it to be. But nonetheless, the drug-sniffing dog is a more refined search than some other types of surveillance that cops might use in these situations.

Alison Key: And I think the State also navigates that pretty well by saying, if we need to change how dogs are trained so that they can't detect marijuana, then that's something we're prepared to do to make sure that the tools we're using only detect contraband, which *Caballes* says is not a violation of the Fourth Amendment.

Mark Thomson: So I think we're going to bleed into the Minnesota constitutional analysis here at which the court doesn't always distinguish very clearly from the Fourth Amendment analysis, but you kind of have a battle between two cases. One is called *Davis* and that's from 2007. It was written by Chief Justice Lorie Gildea, which is very important. And here are the facts in *Davis*. So the cops get a tip that Davis was growing weed in his apartment. They go into the building. There's no record evidence of how the cops got in, whether they were allowed in, whether they had a key or what. They use a drug-sniffing dog, which alerts the cops to drugs at Davis's door. They get a warrant, find drugs, arrest Davis, he moves to suppress, and the Minnesota Supreme Court says the cops did not need a warrant in this situation. They needed only reasonable articulable suspicion, which they had. And they described the dog sniff at the apartment door and they had minimal intrusion. So very, very similar facts to those here with a few crucial differences. It's not clear the permission that the cops had to enter the apartment as compared to here we know that the cops got in through the Knox box, so they had it at least the permission of the building owner if not the building's tenants. And then the second distinction that tries to draw is that the opinion in *Davis* focuses on a search of the hallway. Whereas here we're talking about a search of a specific resident's door, Edstrom's door. So if that's all that Edstrom head to stand on, I think he would be screwed. But it's those things plus one other potentially big thing. So *Davis* is in 2007, Minnesota Supreme Court case almost on all fours with the facts in Edstrom. But intervening in that time is this case we mentioned *Jardines* at the United States Supreme Court in 2013. Justice Scalia decided that case on a property-rights basis, so not applicable to our privacy analysis here. However, there was a concurrence and there was also some interesting language in justice Scalia's majority opinion that maybe is relevant here. So, the concurrence by Justice Kagan. She concluded along with two other justices that the warrantless use of a drug-sniffing dog also violates privacy rights. She compared the drug sniffing dog to super high-powered binoculars and says that the dog is similar to cops' use of a device that is "not in general public use is being used to explore details of the home that would previously have been unknowable without physical intrusion." She said this kind of use of a sensitive kind of technology is how she's categorizing the dog, violates our minimum expectations of privacy. So Edstrom leans very heavily on this three-justice concurrence. And also notes that there is some stray language from Justice Scalia's property law analysis in which he says that using a drug-sniffing dog is like a visitor exploring the front path with a metal detector. So he seems, and the majority by connection, seems onboard with Justice Kagan's insight that the dog here is some kind of extra step beyond just the cops showing up to the door and maybe that's cause for concern.

Alison Key: We should also note that this line of argument that *Jardines* kind of changed the level of intrusion of a dog's name was not only persuasive, but the prevailing argument at the court of appeals which did side with Edstrom on this point because they agreed and they said, "we conclude that *Jardines* has altered the relevant Fourth Amendment analysis by reflecting a greater concern with the intrusiveness of narcotics-detection dog than was prevalent at the time of *Davis*." And so a lot of time is spent in oral argument at the supreme court on do we have to overrule *Davis*? But I think a fair reading of Edstrom's argument here is, *Davis* has already been essentially overruled by *Jardines* and now it is inapplicable. Not that the Minnesota Supreme Court has to take the step itself of overruling it.

Mark Thomson: I think that's a little . . . . I get why they want to say that. However, we're ultimately talking about a three-justice concurrence. So I think there's a fair argument that the United States Supreme Court has strongly hinted that this is the direction they will go. Although I'm sure the State would dispute that, given that I'm sure Justice Kagan wishes she had another justice and was writing a majority opinion, but she didn't. But ultimately what Edstrom is asking the state [court] to do is overrule a case from 11 years ago on the basis of a United States Supreme Court three-justice concurrence. That's a pretty tall ask. So the State comes back and relies heavily on this Knox box factor.

State Counsel: The "key" of this case is the key inside the Knox box.

Alison Key: I've listened to oral argument twice and I've audibly groaned both times I heard him say that.

Mark Thomson: I feel like the stuttering at the start of that is him just focusing everyone to really queue in because he's about to deliver a really good one. I appreciated that. So the legal relevance of that is that the State's attorney notes that some apartments in Brooklyn Park don't have Knox boxes. And that here, the property owner chose to grant police access to the building unlike other apartment buildings, so there should be a less heightened sense of privacy from the tenants. I think the inference though he doesn't say it is that if you don't want to live in an apartment building with Knox box, then you shouldn't go live in one. I'm not, as a previous tenants' attorney during law school, super sympathetic to that argument. It's not on the record whether the tenants even knew about this, let alone whether the economic reality of renting an apartment in the Twin Cities area allows you to shop around for Knox boxes. But the State does lean pretty hard on that distinction.

Alison Key: Right. And I think the only justice who really keyed into the question of whether this was an important factor in whether it negated any Fourth Amendment rights that may or may not have existed in the common hallway or immediately outside the door was Justice McKeig who asked both attorneys about the Knox box and whether that changed the analysis here.

J. McKeig: Counsel, is one of the important factors that the police had access to the key box, the Knox box?

State Counsel: That is an important factor and it's important because that puts that case squarely into the realm of *Davis*.

J. McKeig: And would we have a different scenario if they did not have access to that Knox box?

State Counsel: If they did not have access, they needed to access the building in some other way.

Alison Key: I think her line of questioning and possibly whatever thoughts she has that are animating her to ask those questions are actually kind of important. Because the State does admit that the Fourth Amendment analysis might change if the Knox box wasn't there and the police had to use some other forms of entry into the apartment. Because it gets at questions of: do the tenants know that the Knox box was there? And if they didn't, then essentially you're having a situation where the Fourth Amendment analysis here and the Fourth Amendment rights of the apartment dwellers are essentially dictated or waived, if you will, by a landlord, someone who's not subject to these searches in this case. And that isn't really addressed in the briefs or the oral argument. Maybe that's settled the Fourth Amendment law, but it's certainly a policy concern that I think the justices should have on their minds as they're working through this case.

Mark Thomson: Yeah. Justice Chutich takes a slightly different angle on it, which is about what knowledge the landlord him or herself had about what the police would do if they entered the building via the Knox box.

J. Chutich: Did they know? Did the landlord know that the police were entering the building with a dog specifically to sniff somebody's door?

State Counsel: According to the officer's testimony, they knew that the police were entering the building to conduct investigations, and they had done this in the past.

Mark Thomson: So I read that as kind of a non-answer by the State. The landlord knew that the cops wanted to come into the building because they wanted to conduct investigations. That's like a two word summary of what it is to be a police person. So I see that as a non-answer. Separately, as far as the tenants, the State makes an argument that there is a public policy interest in allowing police to conduct these searches without warrants because, you know, this person had guns, meth, et cetera. That's dangerous. You wouldn't want other tenants to get mixed up in that. Justice Chutich kind of flips that coin and says, might there be other problems for the tenants here rather than protections?

J. Chutich: Counsel, along these lines though, one of the points that you stress are the interests of the law-abiding neighbors in your brief. And this seems to me to cut

both ways because the privacy rights of the law-abiding people were certainly affected when the police allowed the dog sniffing their doors instead of the one that they had the reasonable articulable suspicion about.

Alison Key: I do think she does an effective job of kind of flipping the State's argument there on its head.

Mark Thomson: I think you can see this argument in two ways. One, you can just think about from a common sense perspective what privacy rights people should have in their apartments. That's some of what we've just been talking about. The separate more legalistic view is, is the state supreme court going to overturn a clear decision that it made 11 years ago written by the sitting Chief Justice? Because the United States Supreme Court in the interim has issued a three-justice concurrence suggesting that it may expand the Fourth Amendment in that direction. That is a tough ask. And so I think that Edstrom is smart to lean on the common sense angle of this, and not insult the court's or Justice Gildea specifically's kind of dignity and the importance of that precedent.

Alison Key: And I think we can get a sense from oral argument on where the vote might be headed in this case, given the factors that you just outlined: the clear, *Davis* precedent here and the suggestions from the Supreme Court that it might at some point in the future go in different direction. I think you definitely have at least three votes to side with the state here and reverse the court of appeals. I'm thinking of the Chief Justice, Justice Anderson, and then also Justice McKeig seemed pretty harsh on her questions to Edstrom on those points. And then the only question marks would be Justice Chutich and Justice Lillehaug who I think were certainly asking more critical questions of the State, but that certainly doesn't necessarily indicate that that's where their vote lies.

Mark Thomson: Agreed as to the result. And I think maybe there's a glimmer of hope, even if the respondent Edstrom loses here, because there's a suggestion that the state supreme court is amenable to changing this doctrine if the US Supreme Court leads the way, it's just not going to be on the basis of a three-justice concurrence.

Alison Key: I also think it's interesting that there's only five justices deciding this case. Justice Hudson recused, and good thing, too, otherwise we might be split three-three with a six-person court that we have now. But kind of interesting that the high schoolers at Anoka High School are seeing our Minnesota Supreme Court down to five justices.

Mark Thomson: Yeah. I don't think we mentioned that. So this is that road show argument by the state supreme court. They do this a few times a year, usually at a high schools. And it's super fun. We will post clips to our twitter account of the weird, back-lit framing of the lawyers and hence the sketchy audio and the slightly performative questions by certain justices, perhaps. It's a cool public service in that they do.

Alison Key: It is. And I think the backlighting is most likely so you cannot see the number of students sleeping by the end of argument.

Mark Thomson: You can, if you look closely see yawns out throughout the argument, no offense to the lawyers,

Alison Key: But it's a great, it's a great service they do to get outreach to high schoolers about the work of the Minnesota Supreme Court.

Mark Thomson: All right, Alison, what did we learn from the case today?

Alison Key: We learned today to keep your narcotics in the back of your apartment.

Mark Thomson: A tip for meth dealers everywhere.

Alison Key: Out of sniff range of the common hallway.

Mark Thomson: Thanks to joy or communications director. Check out our website, thecommnlaw.com.

Alison Key: Maybe keep the window open.

Mark Thomson: Minnesota's only---still meth advice from you---go to our website for Minnesota's only free CLE calendar.

Alison Key: Get those free CLEs!

Mark Thomson: Also check us out on Facebook, twitter @thecommnlaw. Is that right? Is there a "the"?

Alison Key: Yeah, there's a "the." We had that discussion, for long time, and decided to keep the "the."

Mark Thomson: And go to our website where you can leave us angry or positive feedback. And check out other episodes.