No. 11-564

In the Supreme Court of the United States

STATE OF FLORIDA, PETITIONER,

v.

JOELIS JARDINES, RESPONDENT

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE STATE OF FLORIDA

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QUESTION PRESENTED

Whether a dog sniff at the front door of a suspected grow house by a trained drug-detection dog is a Fourth Amendment search requiring probable cause?

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OPINIONS BELOW

The Florida Supreme Court's opinion is reported at *Jardines v. State*, 73 So. 3d 34 (Fla. 2011) (Pet. App. A-1–97). The Florida Supreme Court denied rehearing, in an unpublished order, on July 7, 2011. (Pet. App. A-98). The decision of the intermediate appellate court is reported at *State v. Jardines*, 9 So. 3d 1 (Fla. 3d Dist. Ct. App. 2008). (Pet. App. A-99–135). The trial court's order granting the motion to suppress is unreported. (Pet. App. A-136–139).

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Florida Supreme Court issued its decision on April 14, 2011. The State filed a motion for rehearing. The Florida Supreme Court denied rehearing on July 7, 2011. The State of Florida sought, and was granted, an extension of time to file the petition for writ of certiorari. On October 26, 2011, the State of Florida timely filed the petition. This Court granted the petition on January 6, 2012, limited to the first question presented.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

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

STATEMENT OF THE CASE

After receiving a Crime Stoppers tip that a house in south Dade County was being used as a grow house, Miami-Dade Police Detective Pedraja[1] and a drug task force, including several agents of the United States Drug Enforcement Agency (DEA), conducted surveillance at 13005 SW 257 Terrace on the morning of December 5, 2006. (J.A. at A-44, 58).

That morning the task force was joined by canine officer Detective Bartlet and his well-trained drug-detection dog, Franky. Detective Bartlet had been a canine handler for three years and trained with Franky on a weekly basis.[2] At about 7 a.m.,

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[1] Detective Pedraja, a 17 year detective with the Miami-Dade Police Department, spent the last four years investigating and unearthing marijuana cultivators in urban environments. (J.A. at A-46, 76, 82).

[2] The affidavit prepared for the search warrant reflects that Detective Bartlet and Franky have "weekly maintenance training in accord with established Miami-Dade Police Department procedures, including controlled negative testing and distractor training, as well as continuing training in basic and advanced search techniques." (J.A. at A-54). As the record makes clear, at the time Franky was a very experienced, certified drug-detection dog, having completed approximately 656 narcotics detection tasks in the field and made approximately 399 positive alerts. Franky's positive alerts assisted authorities in the seizure of almost one million grams of marijuana (936,614 grams, including both ready for sale and live growing marijuana), 13,008

Detectives Bartlet and Pedraja walked up the driveway and front walkway of the house to the front door with Franky on a leash just ahead of them. As the trio approached the door, Franky began tracking the smell of contraband. Trained to go to the strongest point of the odor or the source, Franky alerted by sitting down immediately after sniffing the base of the front door. Detective Bartlet informed Detective Pedraja of Franky's alert and then returned to the car with Franky, where he prepared training information for use in securing a search warrant. After being at the scene for approximately ten minutes, Detective Bartlet and Franky left to assist with other cases. (J.A. at A-99).

Meanwhile, Detective Pedraja knocked several times on the front door but received no response. While at the front door, Detective Pedraja personally smelled the scent of live marijuana, which confirmed Franky's earlier alert. (J.A. at A-81). He also noticed that the house's air

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grams of cocaine, 2,638 grams of heroin, and 180 grams of methamphetamine. (J.A. at A-54).

Jardines did not challenge Franky's reliability in this case. He explicitly disclaimed any challenge to this particular dog's reliability; rather, he challenged the use of dogs in general. For that reason, the Florida Supreme Court did not address reliability unlike *Harris v. State*, 71 So.3d 756 (Fla. 2011), *cert. granted*, *Florida v. Harris*, - S.Ct. - (March 26, 2012)(No. 11-817), where the issue became the credibility of the dogs credentials.

conditioner was constantly running for fifteen minutes. (J.A. at A-82–83). Detective Pedraja's suspicions stemmed from his four years of experience dealing with hydroponic grow lab cases. (J.A. at A-82). In his experience grow houses tend to run the air conditioner constantly to counteract the heat of high intensity light bulbs that are used to mimic daylight and make the marijuana plants grow more rapidly. (J.A. at A-83).

While the task force remained in place in public areas outside to secure the scene, Detective Pedraja left to obtain a search warrant. (J.A. at A-83–84). Detective Pedraja prepared and submitted an affidavit to Miami-Dade County Court Judge Sarduy (J.A. at A-44–56), containing the above information—including the fact that Franky had alerted. (J.A. at A-44–56). A search warrant was issued for the house.

The subsequent search of the house, authorized by the warrant, confirmed that it was being used as a grow house. Officers seized live marijuana plants and captured Mr. Jardines as he attempted to flee through a rear door of the house.

A. Trial proceedings

Jardines was subsequently charged with 1) trafficking in excess of 25 pounds of cannabis, a first-degree felony, and 2) grand theft for stealing over five thousand dollars of electricity from Florida Power & Light to grow the marijuana, a third-degree felony. Jardines moved to suppress the evidence seized, asserting that the dog sniff outside his house constituted an unreasonable search under the Fourth Amendment and relying on *State v. Rabb*, 920 So. 2d 1175 (Fla. 4th Dist. Ct. App. 2006), and *Kyllo v. United States*, 533 U.S. 27 (2001). (J.A. at A-57–65). Jardines also asserted that Detective Pedraja's smelling the marijuana was impermissibly tainted by the dog's prior sniff.

At the evidentiary hearing on the motion, both Detective Pedraja and Detective Bartlet testified. (J.A. at A-66–153). Detective Pedraja testified that once he approached the front door to see if anyone was home, he smelled live marijuana plants and then proceeded to secure a search warrant for the premises. And, Detective Bartlet detailed how Franky alerted to the presence of drugs immediately outside the front door of the house as he was trained to do. (J. A. at A-75–105).

The trial court granted the motion to suppress and found that "the use of a drug detector dog at the Defendant's house door constituted an unreasonable and illegal search," relying upon

State v. Rabb, which had held that a dog sniff of a house was a search. (J.A. at A-204–206).[3] In a footnote, the trial court discounted the detective personally smelling the marijuana because "this information was only confirming what the detection dog had already revealed." (J.A. at A-206 n.1). The trial court determined that the remainder of the information, including the anonymous tip and the air conditioner running constantly, was insufficient to establish probable cause to issue a search warrant for the house. (J.A. at A-205).

B. Appellate proceedings

The State appealed the trial court's suppression order to the Third District Court of Appeal. *State v. Jardines*, 9 So. 3d 1 (Fla. 3d Dist. Ct. App. 2008); (Pet.App. at A-99–135). The Third District reversed the trial court, concluding that "a canine sniff is not a Fourth Amendment search" and that "the officer and the dog were lawfully present at the defendant's front door." (Pet.App. at A-104–105). Following the reasoning of *Illinois v. Caballes*, 543 U.S. 405 (2005), the Third District

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[3] This Court twice considered petitions for certiorari in *Rabb,* first remanding for reconsideration in light of its then-recent decision in *Illinois v. Caballes*, 543 U.S. 405 (2005), *see Florida v. Rabb*, 544 U.S. 1028 (2005), then denying review after the Fourth District again held that a dog sniff of a front door of a house was a search (*State v. Rabb*, 920 So. 2d 1175, 1192 (Fla. 4th Dist. Ct. App. 2006)). *See Florida v. Rabb*, 549 U.S. 1052 (2006).

explained that because a dog sniff detects only contraband and because one does not have a "legitimate" privacy interest in contraband, a dog sniff is not a search under the Fourth Amendment. (Pet.App. at A-105).

The Third District further distinguished Jardines' facts from *Kyllo* noting that "unlike the thermal imaging device at issue in *Kyllo*, a dog is trained to detect only illegal activity or contraband. It does not indiscriminately detect legal activity." (Pet.App. at A-107). The court pointed out that a "dog's nose is not… a 'device,' nor is it improved by technology." (Pet.App. at A-107). "[D]ogs have been used to detect scents for centuries all without modification or 'improvement' to their noses." (Pet.App. at A-107). The court reaffirmed that "the officer had every right to walk to the defendant's front door." *Id.* at 7; (Pet.App. at A-112).

Jardines sought review in the Florida Supreme Court which was granted. That court reversed, concluding that the dog sniff in this case was a "substantial government intrusion into the sanctity of the home and constitutes a 'search' within the meaning of the Fourth Amendment." *Jardines v. State*, 73 So. 3d 34, 36, 49 (Fla. 2011); (Pet.App. at A-1–97). The State Supreme Court discussed this Court's decisions in *United States v. Place*, 462 U.S. 696 (1983); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); and *Illinois v. Caballes*, 543 U.S. 405 (2005), but found those decisions inapplicable because none involved a "house."

(Pet.App. at A-26–29). It relied instead on *Kyllo* and held that a dog sniff at a house must be supported by probable cause. That court's reasoning was substantially influenced by articulated concerns that the sniff in this case created an embarrassing "public spectacle" and would lead to the use of dogs in large-scale, dragnet-style sweeps. (Pet.App. at A-4, A-41). Ultimately, the court pronounced that a dog sniff of a house must be supported by probable cause. (Pet.App. at A-44–54).

Two justices dissented, concluding that "the majority's decision violates binding United States Supreme Court precedent." (Pet.App. at A-73–97, 73). Justice Polston's opinion noted that it was "undisputed that one dog and two officers were lawfully and briefly present near the front door." (Pet.App. at A-74).

> Franky the dog was lawfully present at Jardines' front door when he alerted to the presence of marijuana. And because, under the binding United States Supreme Court precedent described above, a dog sniff only reveals contraband in which there is no legitimate privacy interest, Franky's sniff cannot be considered a search violating the Fourth Amendment.

(Pet.App. at A-92). The dissent also disputed the majority's conclusion that this Court's various dog

sniff precedents do not apply if the sniff takes place in front of a house: "The United States Supreme Court did not limit its reasoning regarding dogs sniffs to locations or objects unrelated to the home." (Pet.App. at A-93). In the dissent's view, the "very limited and unique type of intrusion involved in a dog sniff is the dispositive distinction under United States Supreme Court precedent, not whether the object sniffed is luggage, an automobile, or a home." (Pet.App. at A-93). "Because the dog sniff is only capable of detecting contraband, it is only capable of detecting that which is not protected by the Fourth Amendment." (Pet.App. at A-96). Consequently, the dog sniff "cannot be considered a search under the Fourth Amendment." (Pet.App. at A-97).

The State of Florida petitioned this Court to review the Florida Supreme Court's decision in *Jardines* and this Court granted review.

SUMMARY OF THE ARGUMENT

The Florida Supreme Court misapplied the precedents of this Court in deciding that a warrant is required before a well-trained police dog may sniff for narcotics outside the front door of a house. This Court has held repeatedly that a dog's sniff is not a Fourth Amendment search. *United States v. Place*, 462 U.S. 696, 707 (1983); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000); *Illinois v. Caballes*, 543 U.S. 405 (2005).

Unlike other investigative procedures, a dog sniff is very "limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." *Place*, 462 U.S. at 707; see also *Caballes*, 543 U.S. at 409 (characterizing dog sniffs as *sui generis*). While a drug-detection dog may smell many different odors emanating from a source, it will convey only one thing: whether illegal drugs are present. Because a dog sniff reveals only the fact that contraband is present, and reveals no private facts in the process, it is not considered a Fourth Amendment search. This rule, as reaffirmed in all three Fourth Amendment dog sniff decisions cited above, should control the holding in this case.

Nothing in this Court's well-settled precedents suggests that a dog sniff is an unreasonable search just because it occurs outside a "house." There is no dispute that the sniff in this case occurred in an

area where officers were lawfully present: on the ordinary walkway to the front door that visitors, delivery-persons, mailmen, and Girl Scout cookie-sellers alike would have been expected to use. *See Kentucky v. King*, 131 S.Ct. 1849, 1862 (2011) ("officers who are not armed with a warrant [may] knock on a door, [just as] any private citizen might do"). Moreover, a dog's nose—a proven, century-old tool of law enforcement—does "not transform [this action] into an unreasonable search within the meaning of the Fourth Amendment." *United States v. Dunn*, 480 U.S. 294, 305 (1987).

The Florida Supreme Court incorrectly decided this case as an extension of *Kyllo.* *Kyllo*'s prohibition on the use of an advanced imaging device does not apply here because that device revealed intimate information about residents far beyond the mere presence of contraband. In stark contrast, a dog sniff can reveal only one thing: the presence of contraband. For this very reason, this Court in *Caballes* distinguished the *sui generis* nature of dog sniffs from the holding in *Kyllo*.

This case is critically important to the fight against illegal narcotics. Trained drug-detection dogs are an especially effective law enforcement tool because of their exceptional ability to detect the odor of contraband. By simply adhering to the bright-line rule that dog sniffs are not searches, this Court will continue to provide law enforcement a significant and useful aid in the detection of illegal narcotics.

For these reasons, this Court should reverse the Florida Supreme Court and hold that a sniff by a well-trained dog outside the front door of a house is not a Fourth Amendment search requiring probable cause.

ARGUMENT

I. A Dog Sniff Is Not A Fourth Amendment Search Requiring Probable Cause.

This Court has repeatedly said that a sniff by a trained drug-detection dog is not a Fourth Amendment search. *United States v. Place*, 462 U.S. 696, 707 (1983); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000); *Illinois v. Caballes*, 543 U.S. 405 (2005). The warrantless sniff in this case comports with others permitted by this Court in *Place, Edmond,* and *Caballes* and does not implicate the Fourth Amendment just because it occurred outside a house.

In *Place*, the Court held that a dog sniff of luggage at the airport was not a search because it is "much less intrusive than a typical search" and "discloses only the presence or absence of narcotics." 462 U.S. at 707. Characterizing dog sniffs as "*sui generis,*" the Court said they are "limited both in the manner in which the information is obtained and in the content of the

information revealed by the procedure." *Id.* A dog sniff does not expose private matters into the public sphere as would occur if an officer had manually searched the luggage. *Place*, 462 U.S. at 707.[4]

Likewise, in *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000), the Court concluded that a dog sniff of a car did not transform the seizure into a search because the sniff did not "disclose any information other than the presence or absence of narcotics." *Edmond*, just like this case, did not involve intrusion into private or intimate areas by a dog or his handler; this Court noted especially that "a dog that simply walks around a car is much less intrusive than a typical search."

More recently in *Illinois v. Caballes*, 543 U.S. 405 (2005), the Court held that a dog sniff of a car during a routine traffic stop was not a search. Caballes was stopped for speeding by a trooper. A second trooper arrived with a drug-detection dog. While the first trooper was writing a ticket, the second trooper walked the dog around the car. The dog alerted at the trunk of Caballes' car. The trooper searched the trunk and found marijuana.

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[4] A dog sniff is quite limited in manner. A dog obtains information merely by breathing near the object, not disturbing anything in the process. *Bond v. United States*, 529 U.S. 334 (2000)(holding an officer squeezing a soft canvas bag was a Fourth Amendment search).

This Court rejected the Illinois Supreme Court's conclusion that reasonable suspicion was a necessary predicate for a lawful dog sniff. *Id.* at 407. The Court again noted that dog sniffs are "*sui generis*." *Caballes*, 543 U.S. at 409. It reaffirmed that a sniff "does not compromise any legitimate interest in privacy [and] is not a search." *Id.* at 408 (citing *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)).

The *Caballes* Court reconciled its prior decision in *Kyllo v. United States*, 533 U.S. 27 (2001), which had held that thermal imaging of a grow house was a search. The Court found its result in *Caballes* "entirely consistent" with *Kyllo*, explaining:

> Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." *Id.*, at 38. The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the

> location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

Caballes, 543 U.S. at 409-10.

The *Caballes* Court did not distinguish *Kyllo* on the basis that *Kyllo* involved a home. Rather, it distinguished *Kyllo* on the basis that *Caballes* involved a dog. It was the nature of the information detected by the dog's nose, not the area being searched, that mattered. The rationale of *Place* and *Jacobsen* had "absolutely nothing to do with" the location where the dog sniff took place. *Fitzgerald v. State,* 837 A.2d 989, 1030 (Md. Ct. Spec. App. 2003), *affirmed*, *Fitzgerald v. State*, 864 A.2d 1006 (Md. 2004). As Justice Polston's dissent noted in this case, there is no language in *Place*, *Jacobsen*, *Edmond*, or *Caballes* indicating that the reasoning in those cases would change if the dog sniff occurred at a private residence. (Pet.App. at A-93).

The *Caballes* Court relied on the contraband exception to what constitutes a search first established in *Jacobsen. Caballes*, 543 U.S. at 408 (explaining that a dog sniff "only reveals the possession of contraband compromises no legitimate privacy interest."). Under this exception, any test, including a dog sniff, which merely reveals contraband, and no other private fact, compromises no legitimate privacy interest

and, therefore, is not a search. The *Jacobsen* contraband exception to a search derives from the principle that one has no legitimate interest in possessing contraband. It is not the end result that this Court is exempting from the Fourth Amendment in its exception, it is the method of finding the contraband that this Court is exempting.

While a drug-detection dog may smell many different odors emanating from the house, the dog conveys only information regarding the presence of drugs. Franky was trained to alert only to marijuana, cocaine, heroin, hashish, methamphetamine, or ecstasy. (J.A. at A-46). And, the only information that his handler received or could have received from Franky was an alert to the presence of contraband. (J.A. at A-46). When a drug-detection dog alerts, he conveys only the public fact that the house contains drugs. Anything else that the dog smells remains private. *See* Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 512-15 (2007)(characterizing *United States v. Jacobsen*, 466 U.S. 109 (1984) and *Caballes* as private facts cases). As Professor Kerr explains, "the dog sniff will never reveal a private fact: either the dog won't alert, revealing nothing, or the dog will alert to the presence of narcotics, revealing only information deemed not deserving of privacy protection in *Caballes*." *Id.* at 535. *"Caballes* thus leads to a simple rule: the Fourth Amendment does not regulate dog sniffs." *Id.*

The facts of this case hew closely to *Caballes*. Franky sniffed as the detectives lawfully approached Jardines' house along an ordinary route to his front door. The sniff in *Caballes* occurred collateral to the lawful presence of officers after stopping Caballes' vehicle. Both sniffs were made non-intrusively from areas where officers were lawfully present and both involved alerts only to contraband. Neither sniff violated reasonable expectations of privacy nor intruded into private spaces; and neither sniff revealed any private information.

Because this Court's dog sniff decisions in *Place*, *Edmond*, and *Caballes* directly address the issue here, they should have been followed by the Florida Supreme Court. The sniff in this case did not violate the Fourth Amendment.

II. A Dog Sniff Does Not Become An Unlawful Fourth Amendment Search Just Because It Occurs Outside A House.

The Florida Supreme Court erroneously extended *Kyllo* and failed to follow this Court's well-settled dog sniff cases because it considered the context of a house to be "qualitatively different." (Pet.App. at A-31). But the sniff in this case did not offend the sanctity of Jardines' house as their opinion suggests or transform the fundamentally limited

nature of Franky's sniff into an advanced, technology-laden threat akin to *Kyllo*.

A. The sniff of a drug-detection dog along the ordinary path to the front door did not violate the sanctity of Jardines' grow house.

The Florida Supreme Court concluded that the sniff in this case involved "a substantial government intrusion into the sanctity of the home." But, in reality, at the time of the sniff neither Franky nor the officers entered or intruded into the defendant's house. Franky merely sniffed along the ordinary route to the front door that visitors, delivery-persons, the mailman, Halloween trick-or-treaters, Girl Scout cookie-sellers, and police officers alike would have been expected to use. Once Franky alerted at the outside the front door, he and his handler promptly left the property without ever entering the house.

The Florida Supreme Court's reference to the "sanctity" of the home appears to confuse the modest facts of this case with a substantially different situation where a home is invaded without a warrant. "Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Michigan v. Summers*, 452 U.S. 692, 701, n.13 (1981). "[S]earches and seizures *inside* a home without a warrant are presumptively unreasonable." *Groh v. Ramirez*, 540 U.S. 551, 559 (2004)(citing *Payton v. New York*, 445 U.S. 573, 586 (1980)(emphasis

added). There was no warrantless entry into the house itself in this case. Detective Pedraja obtained a warrant from a neutral and detached magistrate prior to entering the house. All the other officers, including the DEA agents, remained outside the house in public areas until a judge authorized their entry. There was no violation of *Payton*.[5]

Here, it is "undisputed" that the trio of Franky and the detectives "were lawfully and briefly present near the front door" of Jardines' house. (Pet.App. at A-74). No serious argument exists that the Fourth Amendment proscribes officers from approaching the front door of a home. *See United States v. Santana*, 427 U.S. 38, 42 (1976)(plurality)(holding defendant standing in the doorway of her home was in a public place where she had no expectation of privacy for Fourth Amendment purposes); *United States v. Daoust*, 916 F.2d 757, 758 (1st Cir. 1990)(Breyer, C.J.)("A policeman may lawfully go to a person's home to interview him."). And, as this Court recently

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[5] The *Jacobsen* contraband exception applies only to detection methods that operate outside of the private, protected area. Here, while the protected area is the inside of the house, the sniff occurred from outside the house. If the officers had *entered* the house without a warrant, the contraband exception would not apply. *Byars v. United States*, 273 U.S. 28, 29 (1927)(observing that a "search prosecuted in violation of the Constitution is not made lawful by what it brings to light.").

observed, when "law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do." *Kentucky v. King*, 131 S.Ct 1849, 1862 (2011).[6]

In addition, even when Franky tracked odors to their strongest point at the base of Jardines' front door, he was breathing only the air *outside* the house. *United States v. Broadway*, 580 F. Supp. 2d 1179, 1191 (D. Colo. 2008)(stating that a dog does not detect anything inside a home, but merely detects the particulate odors that have escaped from a home). A nose, like an eye, "cannot by the laws of England be guilty of trespass." *Kyllo*, 533 U.S. at 32. Under the plain view doctrine, what an officer sees, hears, or smells when lawfully present at a house is not considered an unlawful search. *Horton v. California*, 496 U.S. 128, 136 (1990)(discussing the plain view exception to the warrant requirement). What a person exposes publicly "even in his own home or office, is not a subject to Fourth Amendment protection." *California v. Ciraolo*, 476 U.S. 207, 213 (1986); *Kyllo v. United States*, 533 U.S. 27, 32 (2001) (examining "the portion of a house that is in plain public view" is "no search at all."). And just as

[6] Nor did this Court's recent decision in *United States v. Jones*, 132 S.Ct. 945 (2012), reincorporating trespass into the Fourth Amendment analysis, change this observation. Under the custom exception to the common law of trespass, officers going to a front door are invitees, not trespassers. Additionally, there was no trespass into the house prior to the magistrate issuing a warrant.

evidence in the plain view of officers may be detected without a warrant, evidence in plain smell may be detected without a warrant. *Fitzgerald*, 837 A.2d at 1029 (applying the plain smell doctrine to a dog sniff).

Logically the use of a dog's nose instead of that of an officer "did not transform [the] observations into an unreasonable search within the meaning of the Fourth Amendment." *United States v. Dunn*, 480 U.S. 294, 305 (1987). Officers routinely use tools such as field glasses, flashlights, and dogs as aids to their senses. "The fact that the dog, as odor detector, is more skilled than a human does not render the dog's sniff illegal." *Fitzgerald v. State,* 837 A.2d 989, 1029 (Md. Ct. Spec. App. 2003), *affirmed*, *Fitzgerald v. State*, 864 A.2d 1006 (Md. 2004); *United States v. Reed*, 141 F.3d 644, 649 (6th Cir. 1998)); *See also* (rejecting any constitutionally meaningful distinction between the sniff of trained dog and an officer). "Historically, the law has drawn no doctrinal distinction between the human and the canine sense of smell." *Fitzgerald*, 837 A.2d at 1038.

For these reasons, the involvement of a "house" in this case does not support the Florida Supreme Court's disregard of the *Caballes* line of cases.

B. Kyllo's prohibition on the use of devices does not apply to dog sniffs.

The Florida Supreme Court's opinion in *Jardines* erroneously relied on *Kyllo*, instead of following the dog sniff analysis of *Place*, *Edmond*, and *Caballes*.

First, *Kyllo* is distinguishable from the Court's dog sniff cases because each case involves law enforcement tools of a fundamentally different nature. A thermal imager reveals private facts; a dog does not. Critical to *Kyllo* was that "the device was capable of detecting lawful activity," *Caballes*, 543 U.S. at 409. A dog sniff, in contrast to the *Kyllo* device, "reveals no information other than the location of a substance that no individual has any right to possess." *Caballes*, 543 U.S. at 410. The "*raison d'etre* for treating a dog sniff as a non-search" is the "binary nature of its inquiry." *Fitzgerald,* 837 A.2d at 1030. The *Jacobsen* exception was not at issue in *Kyllo*. *Id.* at 1036.

Second, this Court's primary concern in *Kyllo* was the government's use of high-tech devices eroding traditional protections embodied in the Fourth Amendment. The Court was concerned that technology has the ability "to shrink the realm of guaranteed privacy" and to leave a "homeowner at the mercy of advancing technology." *Kyllo*, 533 U.S. at 34-35, 28. Similar concerns regarding technology were evident in *United States v. Jones,* 132 S.Ct. 945 (2012), with respect to GPS tracking

devices. New technology provides increased convenience but "at the expense of privacy" and the "emergence of many new devices" permits easy and cheap monitoring of a person's movement in a manner that was not previously available likely due to the time and expense that would have been required. *Jones*, 132 S. Ct. at 962-964 (Alito, J., concurring).

But this case involves the very opposite end of the spectrum of law enforcement tools. Unlike the high-tech devices in *Kyllo* and *Jones*, or even the low-tech flashlight in *United States v. Dunn*, 480 U.S. 294, 305 (1987), dogs are not high-tech or "advancing" devices that threaten privacy. Indeed the investigative use of the animal sense of smell, human or canine, cannot even be defined as a technology. *Fitzgerald*, 837 A.2d at 1037. And, as the Florida intermediate appellate court observed in this case, dogs "have been used to detect scents for centuries all without modification or improvement to their noses." (Pet.App. at A-107).[7] There is nothing Orwellian about Franky. Because a dog sniff does not represent rapid technological

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[7] Dogs were used for their extraordinary sense of smell at the time the Fourth Amendment was adopted in 1791. *Jones*, 132 S. Ct. at 949, 953 (stating that the Fourth Amendment must be interpreted to "provide at a minimum the degree of protection it afforded when it was adopted"); *Kyllo*, 533 U.S. at 40. A dog "does not detect anything that 'would have been unknowable' without physical intrusion when the Fourth Amendment was adopted in 1791." *United States v. Broadway*, 580 F. Supp. 2d 1179, 1190 (D. Colo. 2008).

change and does not invade traditionally protected areas, the rationale of *Kyllo* and concerns of *Jones* are simply inapplicable.

Third, other courts have followed this Court's lead in rejecting the application of *Kyllo* to dog sniffs. Indeed, every federal court that has addressed the issue since *Caballes* has held that a dog sniff of a residence is not a search. *United States v. Scott*, 610 F.3d 1009 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 964 (2011)(holding that a dog sniff of the front door of an apartment is not a search because dog sniffs are *sui generis* and a sniff discloses only contraband, following the logic of *Caballes* and rejecting any analogy to *Kyllo*); *United States v. Brock*, 417 F.3d 692 (7th Cir. 2005)(holding that a dog sniff of a locked bedroom door in a house was not a search because it detected only the presence of contraband, rejecting any analogy to *Kyllo* and instead following the logic of *Caballes*); *United States v. Byle*, 2011 WL 1983355 (M.D. Fla. May 20, 2011)(holding a dog sniff of a window of a house is not a search and refusing to follow *Jardines* because "the Supreme Court meant what it said - a dog sniff is not a search"); *United States v. Anthony*, 2012 WL 959448 (D. N.J. March 20, 2012)(holding a dog sniff of the front door of an apartment was not a search and rejecting the reasoning of *Jardines*); *United States v. Broadway*, 580 F. Supp. 2d 1179, 1188-90 (D. Colo. 2008) (holding that "a dog sniff—even when employed outside a residence—does not constitute a 'search.'"). State courts, likewise, have

rejected the analogy between the thermal imager in *Kyllo* and a dog. *See, e.g.*, *Fitzgerald v. State*, 837 A.2d 989 (Md. Ct. Spec. App. 2003)(rejecting the assertion that a drug sniffing dog is the functional equivalent of the sense-enhancing device used in *Kyllo*).

Kyllo does not apply by its own terms. The *Kyllo* Court held that when "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search.'" *Kyllo*, 533 U.S. at 40. *Kyllo* did not and does not apply to dogs.

C. This case involves a century-old law enforcement technique that will not lead to dragnet-style sweeps.

Dogs have been used by law enforcement for over a century, *see e.g. Hodge v. State*, 13 So. 385 (Ala. 1893), and used for drug detection for over forty years. *People v. Furman*, 106 Cal. Rptr. 366, 368 (Cal. Ct. App. 1973). The majority opinion of the Florida Supreme Court expressed unfounded concerns about embarrassing, suspicionless dog sweeps of entire residential neighborhoods. (Pet.App. at A-41, n.7). The Florida Supreme Court believed that permitting a dog sniff of one house invited the "overbearing and harassing" conduct of suspicionless sweeps of entire neighborhoods based on "whim and fancy." (Pet.App. at A-4).

This Court, by contrast, has refused to base its dog sniff jurisprudence on extravagant generalizations. *Dow Chemical Co. v. United States*, 476 U.S. 227, 238 n.5 (1986)(stating that "Fourth Amendment cases must be decided on the facts of each case, not by extravagant generalizations."). Justice Ginsburg cited the prospect of such sweeps as a basis for her *Caballes* dissent. *Caballes*, 543 U.S. at 422 (Ginsburg, J., dissenting). She stated that the majority opinion had cleared "the way for suspicionless, dog-accompanied drug sweeps of parked cars along sidewalks and in parking lots." *Id.* at 422. But the majority did not share her concern. Additionally, any concern about widespread suspiciousless sweeps is an "odd" basis to distinguish *Place* or *Caballes* because such a concern would be "equally present" in those cases. *United States v. Anthony*, 2012 WL 959448 (D. N.J. March 20, 2012).

Tellingly, in the seven years since *Caballes*, dragnet-style sweeps of entire residential neighborhoods have simply not materialized. There are no reported cases of such sweeps.

The Florida Supreme Court ignored the practical limits on the ability of law enforcement to employ trained drug-detection dogs in time-consuming, random sweeps of entire neighborhoods. Dog-handler teams are not cheap and surreptitious devices that evade the ordinary checks of "limited police resources and community hostility" on

abusive law enforcement practices. *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring)(quoting *Illinois v. Lidster*, 540 U.S. 419, 426 (2004)). These ordinary constraints apply. Trained drug-detection dogs are a scarce resource that are in high demand. (J.A. at 99; Pet.App. at A-95). And, unlike the GPS device in *Jones*, neighborhood-wide sweeps with numerous dogs and their handlers would not be surreptitious. This case should not turn on extravagant hypotheticals about suspicionless dog sweeps, but on the limited nature of Franky's sniff that merely alerted his handler to the presence of contraband.

Finally, dogs are an irreplaceable tool for detecting those who grow marijuana in their bathrooms; construct meth labs in their kitchens; or hide bodies in their basements. Dogs can detect all these criminal activities merely by breathing the air outside a house just as Franky did here. The importance of these dogs and the consequences of this case for law enforcement simply cannot be overstated.

For all these reasons, this Court should adhere to its well-settled precedents by holding that a dog sniff outside the front door of a house is not a Fourth Amendment search requiring probable cause.

CONCLUSION

The Florida Supreme Court's decision should be reversed.

Respectfully submitted,

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