American Bar Association
www.supremecourtpreview.org

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

REPLY BRIEF FOR THE STATE OF FLORIDA

PAMELA JO BONDI
Attorney General of Florida
Tallahassee, Florida
Carolyn M. Snurkowski*
Associate Deputy Attorney General
*Counsel of Record
Carolyn.Snurkowski@myfloridalegal.com
Charmaine M. Millsaps
Assistant Attorney General
Timothy D. Osterhaus
Deputy Solicitor General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Telephone: (850) 414-3300
COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

I. The Dog Sniff Was Not A Fourth Amendment "Search" That Violated Jardines' Reasonable Expectations Of Privacy Because It Only Revealed Contraband...............................3

A. The Court Should Reject Jardines' Challenge To The Fourth Amendment Contraband Rule..3

B. *Amici's* New Arguments Against The Contraband Rule Were Not Argued Or Factually Developed Below And Should Be Rejected. 5

II. The Dog Sniff Did Not Convert To An Unlawful Search Or Trespass Just Because It Involved A House. 8

A. The Detector Dog Did Not Operate "Inside the Home. 8

B. The Police Officers Were Lawfully Present On Jardines' Front Porch. 9

C. The Detector Dog Was Lawfully Present With the Police Officers On Jardines' Front Porch...15

D. The Dog's Sniff On The Front Porch Does Not Present The Same Fourth Amendment Concerns As This Court Addressed In The High-Tech Device Cases. 18

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Abbott v. Weekly,
1 Lev. 176, 83 Eng. Rep. 357 (K.B. 1665) 14

Adarand Constructors, Inc. v. Mineta,
534 U.S. 103 (2001) 6

Amoco Oil Co. v. United States,
234 F.3d 1374 (Fed. Cir. 2000) 8

Bond v. United States,
529 U.S. 334 (2000) 17

California v. Ciraolo,
476 U.S. 207 (1986) 12, 17

City of Indianapolis v. Edmond,
531 U.S. 32 (2000) .... *passim*

Entick v. Carrington,
19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765) 16

Horton v. California,
496 U.S. 128 (1990) 12, 18

Illinois v. Caballes,
543 U.S. 405 (2005) .... *passim*

Illinois v. Gates,
462 U.S. 213 (1983) 8

Kentucky v. King,
131 S.Ct. 1849 (2011) 11, 13

Kyllo v. United States,
533 U.S. 27 (2001) .... *passim*

Maryland v. Macon,
472 U.S. 463 (1985) 15

McDonald v. United States,
335 U.S. 451 (1948) 14

McKee v. Gratz,
260 U.S. 127 (1922) 14

Minnesota v. Dickerson,
508 U.S. 366 (1993) 12

Rhode Island v. Innis,
446 U.S. 291 (1980) 17

Riley v. Harris,
58 N.E. 584 (Mass. 1900) 14

Texas v. Brown,
460 U.S. 730 (1983) 16

United Parcel Serv., Inc. v. Mitchell,
451 U.S. 56 (1981) 6

United States v. Daoust,
916 F.2d 757 (1st Cir. 1990) 13

United States v. Dunn,
480 U.S. 294 (1987) 16

United States v. Jacobsen,
466 U.S. 109 (1984) 3

United States v. Jones,
123 S. Ct. 945 (2012) 2, 19, 20

United States v. Karo,
468 U.S. 705 (1984) 2, 4, 19

United States v. Lee,
274 U.S. 559 (1927) 16

United States v. One Million, Thirty-Two Thousand, Nine Hundred Eighty Dollars in U.S. Currency ($1,032,980.00),
2012 WL 684757 (N.D.Ohio 2012)...................20

United States v. Place,
462 U.S. 696 (1983) .... passim

United States v. Redmon,
138 F.3d 1109 (7th Cir. 1998)..........................15

United States v. Ventresca,
380 U.S. 102 (1965) 12

Whren v. United States,
517 U.S. 806 (1996) 17

Zivotofsky ex rel. Zivotofsky v. Clinton,
132 S.Ct. 1421 (2012).......................................10

Other Authorities

Kenneth G. Furton, et al., *Identification of Odor Signature Chemicals in Cocaine Using Solid-Phase Microextraction-Gas Chromatography and Detector-Dog Response to Isolated Compounds Spiked on U.S. Paper Currency*, 40 J. Chromatographic Sci. 147 (2002) 6

Lewis R. Katz & Aaron P. Golembiewski, *Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 Neb. L. Rev. 735 7

Michael S. Macias, *The Development of an Optimized System of Narcotic and Explosive Contraband Mimics for Calibration and Training of Biological Detectors*, (May 27, 2009) (Ph.D. dissertation, Fla. Int'l Univ.) 7

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

REPLY BRIEF FOR THE STATE OF FLORIDA

Neither Respondent Jardines nor the *Amici* provide a convincing reason why the Court should abandon the basic rule that a dog sniff by a trained drug detection dog is not a Fourth Amendment search. *See 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 simple truth is that whether a dog sniff takes place outside a house, a car, or a piece of luggage, it uniquely reveals just a single bit of information—whether the odor of contraband is present. In fact, Jardines does not dispute that the sniff in this case revealed "only … unlawful activity." Resp. Br. 29. In other words, the sniff invaded no legitimate expectation of privacy.

That the context here is the front porch of a house does not merit a departure from the well-settled contraband rule. No reasonable expectation of privacy or common law trespass exists, for instance, on the ordinary path to the front door of a house. Jardines himself concedes that a broad "implied invitation" extends to salespersons, delivery persons, Girl Scout cookie sellers, and even police officers to approach the front door of a house. Resp. Br. 54. And where police may lawfully approach, knock, and interview residents at their front door, this Court has never restricted them from traditional sense-enhancing tools. Even Jardines agrees that officers may employ field glasses and flashlights. Resp. Br. 43.

Additionally, the officers' use of a common detector dog on the front porch of a house does not trigger Fourth Amendment problems akin to invading the "inside" of a house with an uncommon high-tech device. *See, e.g., United States v. Jones*, 123 S. Ct. 945 (2012); *Kyllo v. United States*, 533 U.S. 27 (2001); *United States v. Karo*, 468 U.S. 705 (1984). Law enforcement has used detector dogs for centuries past and repeatedly with this Court's blessing. With this history in view there can be no reasonable concern that upholding the sniff in this case will propel invasive technologies forward, or suddenly open the floodgates to sweeping columns of

searching dogs. In sum, nothing should keep this Court from applying the simple principle of *Place, Edmond*, and *Caballes* to uphold the dog sniff at issue here.

I. The Dog Sniff Was Not A Fourth Amendment "Search" That Violated Jardines' Reasonable Expectations Of Privacy Because It Only Revealed Contraband.

A. The Court Should Reject Jardines' Challenge To The Fourth Amendment Contraband Rule.

Jardines asserts that the detector dog sniff violated the Fourth Amendment even though it revealed details "related only to unlawful activity." Resp. Br. 29. In his view, the Fourth Amendment protects even the escaped contraband odor of his many marijuana plants because he "s[ought] to keep [it] private within the home." Resp. Br. 16, 19.

Of course, this Court has recognized an opposite principle: That individuals have no "legitimate privacy interest" in contraband because it is illegal to possess it. *United States v. Jacobsen*, 466 U.S. 109, 123 (1984); *Caballes*, 543 U.S. at 408-409 (quoting *Place*, 462 U.S. at 707 & *Jacobsen*). In fact, for nearly three decades the Court has said that dog sniffs are not a search

because they can reveal *only* the presence of illegal contraband. *Place*, 462 U.S. 696; *Edmond*, 531 U.S. 32; *Caballes*, 543 U.S. at 408-09 (characterizing dog sniffs as "*sui generis*"). Certainly the defendants in *Place*, *Edmond*, and *Caballes* had the very same goal as Jardines to conceal "details" of their contraband within their "private" luggage and cars.

Jardines' argument essentially is that 'a house is different.' Resp. Br. at 25-28. But this Court did not base its prior dog sniff decisions on the *thing* that holds or conceals illegal narcotics, but on the unique fact that dog sniffs reveal only contraband. *Place*, 462 U.S. at 707; *Edmond*, 531 U.S. at 40; *Caballes*, 543 U.S. at 408-09. The modest information gleaned from dog sniffs also separates it from the trio of cases Jardines cites for the principle that "all details in the home are held safe from prying government eyes." Resp. Br. 21. In *Karo and Hicks*, the government physically invaded the home and obtained private information—clearly a Fourth Amendment problem. And in *Kyllo* they could detect "perfectly lawful activity" going on inside the home using a high-tech imagery device on the outside. The dog sniff here—which, as discussed *infra*, was made from an area where officers had a legal right to be—has neither problem. The court should apply its dog sniff precedents to the context here because the sniff revealed only contraband (as

Respondent admits, Resp. Br. 29), without disclosing lawful goings-on inside the home, or making physical entry.

In sum, a dog sniff made outside a house should be considered no different from those in *Place*, *Edmond*, and *Caballes*; it "reveals no information other than the location of a substance that no individual has any right to possess [and] does not violate the Fourth Amendment." *Caballes, 543 U.S.* at 410.

B. *Amici's* New Arguments Against The Contraband Rule Were Not Argued Or Factually Developed Below And Should Be Rejected.

Amici make two new arguments related to the dog sniff contraband rule that should not be entertained for the first time now. First, they argue that the contraband rule does not apply to drug-detection dogs because they can alert to legal substances. Loyola Br. 18-32; NACDL Br. 11-15. Next, an *amicus* argues that dog sniffs of houses are not reliable because of the distances involved with the sniffs. Loyola Br. 32-34.

Because these arguments are presented for the first time now and without a supporting evidentiary basis, they should not be considered. This Court generally does not entertain original

claims raised by parties at this point in a case, much less *amici*. *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60, n.2 (1981) (declining to consider an *amicus'* argument "since it was not raised by either of the parties here or below"); *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam) (noting that this "is a court of final review and not first view"). Jardines did not raise these arguments in the state appellate courts, in his brief in opposition filed in this Court, or in his merits brief filed in this Court. Nor were they ruled upon by the Florida Supreme Court.

In any event, *amici's* research appears to show the opposite—that dogs do not alert to anything but drugs. *See e.g.,* Kenneth G. Furton, et al., *Identification of Odor Signature Chemicals in Cocaine Using Solid-Phase Microextraction-Gas Chromatography and Detector-Dog Response to Isolated Compounds Spiked on U.S. Paper Currency*, 40 J. Chromatographic Sci. 147, 153 (2002). Professor Furton, one of the experts relied upon by *amici*, for example, noted that perfume odors containing methyl benzoate are "quite different" and can be "readily" distinguished by drug-detection dogs. *Id.* at 154-155. *Amici* offer no persuasive reason why this logic would not extend to other substances as

well.[1] This Court should not attempt to address this new issue without a record.

Moreover, the argument that dog sniffs of houses are not reliable due to the distance involved was affirmatively waived in the state courts. When directly questioned during the oral argument in the Florida Supreme Court, counsel for Jardines stated that he was not challenging the detector dog's accuracy.[2] That is why the record is silent on this issue. *Amici* may not raise

---

[1] One *amicus* implies that heroin-detection dogs will mistakenly alert upon vinegar instead of heroin. Loyola Br. 26-29. The dissertation cited, however, states explicitly that drug-detection dogs do not alert to vinegar. Michael S. Macias, *The Development of an Optimized System of Narcotic and Explosive Contraband Mimics for Calibration and Training of Biological Detectors*, (May 27, 2009) (Ph.D. dissertation, Fla. Int'l Univ.), available at http://digitalcommons.fiu.edu/etd/123, 115-118 (stating "as expected, none of the canines (0 of 14) showed interest in pure acetic acid or pure salicylic acid samples."). Informal studies also establish that marijuana-detection dogs do not mistakenly alert to hemp. Lewis R. Katz & Aaron P. Golembiewski, *Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 Neb. L. Rev. 735, 756 n.77 (noting that the authors, who were critical of the dogs' accuracy, informally tested a drug-detection dog, which did not mistakenly alert and was rather "uninterested in hemp products").

[2] The oral argument is available online at http://wfsu.org/gavel2gavel/archives/flash/08-2101.php

an argument affirmatively waived by a party. *Cf. Amoco Oil Co. v. United States*, 234 F.3d 1374, 1378 (Fed. Cir. 2000) (observing that it is the party's case, not a joint appeal by the party and amicus; rather, the party must raise the issues it wishes the court to address); *see also Illinois v. Gates*, 462 U.S. 213, 221, 224 (1983) (refusing to consider an issue where the record was inadequate). What is more, the issue in *this* case is not about the reliability of dog sniffs, but whether a sniff outside a house violates reasonable expectations of privacy.

II. The Dog Sniff Did Not Convert To An Unlawful Search Or Trespass Just Because It Involved A House.

Jardines asserts that *Place*, *Edmond*, and *Caballes* do not apply because this case involves the revelation of "Details Inside the Home." Resp. Br. 26, 29. His argument is that dog sniffs involving a house are categorically different, even if, as he concedes, the only detail revealed by a dog sniff is "unlawful activity." *Id.* at 29.

A. The Detector Dog Did Not Operate "Inside The Home."

At the outset, it is important to clarify that even though Jardines' Brief talks of the revelation of details "inside the home" more than

a dozen times, the dog sniff in this case did not involve any physical entry into Jardines' house. Just as in *Place*, *Edmond*, and *Caballes,* where the dogs did not physically enter into private luggage or cars, this case did not involve a physical intrusion "inside the home" as Jardines' brief implies. Instead, the detector dog and his officer handler only briefly walked up to the house's front door along the customary path. The dog alerted and then left the scene with his officer-handler. The dog's alert was used thereafter as a basis for obtaining a warrant to enter the house.

Moreover, the dog sniff here revealed only the presence of contraband narcotics in the air *outside* the front door where the officer and dog were lawfully present. In this way, the sniff was "much less intrusive than a typical search" sparing the owner "the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods." *Place*, 462 U.S. at 707.

B. The Police Officers Were Lawfully Present On Jardines' Front Porch.

Jardines extends his 'house is different' argument, for the first time in this case, beyond detector dogs. He argues that observations and evidence-gathering by the police officers

themselves constitute a Fourth Amendment search if made on the front porch of a house. Resp. Br. 16, 19; *see also id.* 48 (curtilage argument). Whereas at once Jardines concedes that officers—like salespersons, delivery persons, and Girl Scouts—have an implied invitation to approach a house "to speak to an occupant" (Resp. Br. 54), he states in broad fashion that "Police Action Which Reveals Any Detail An Individual Seeks To Keep Private Within The Home Is A Fourth Amendment Search." *Id.* 16; *see also id.* 19 (asserting the same as to "government activity").

As a threshold matter, it is a new argument for Jardines to assert that the officers' visit alone, without a detector dog, constituted a Fourth Amendment search. This argument was not made in the state courts and should not be entertained now. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S.Ct. 1421, 1430 (2012) (observing that ours is "a court of final review and not first view" and that "we do not decide in the first instance issues not decided below."). His objection in the state courts was based totally on the detector dog, not the conduct of the two officers. Indeed, Jardines conceded, in his initial brief to the Florida Supreme Court, that the homeowner's implied invitation to visitors applied equally to law enforcement officers subject only to reasonable limitations such as the

hour of the day or night. IB 34-36; RB 6.[3] Jardines also conceded at the oral argument in the Florida Supreme Court that the officers going to the porch did not violate any expectation of privacy.[4] So Jardines' claim now that the officers' conduct itself was an invasion of privacy is being raised for the first time and should be rejected.

Moving on, Jardines incorrectly claims that a Fourth Amendment search occurs whenever "any detail an individual seeks to keep private" about his home is revealed. Resp. Br. 16, 19. For instance, this Court has never granted a privacy or possessory interest in odors, contraband or not, that waft outside where any invitee can smell them. *See, e.g., Kentucky v. King*, 131 S.Ct. 1849 (2011) (involving officers who happen upon a strong scent of marijuana emanating from an apartment).[5] *Ciraolo, Horton,* and *Dickerson*

---

[3] Jardines' initial brief in the Florida Supreme Court is available on at
http://www.floridasupremecourt.org/clerk/briefs/2008/2001-2200/08-2101_Ini.pdf
Jardines' reply brief in available online at http://www.floridasupremecourt.org/clerk/briefs/2008/2001-2200/08-2101_Reply2.pdf.

[4] The oral argument is available online at
http://wfsu.org/gavel2gavel/archives/flash/08-2101.php

[5] Respondent notes that the one officer who approached Jardines' front door claimed *himself* to smell the

have not been overruled; the plain view doctrine is alive and well. *See California v. Ciraolo*, 476 U.S. 207, 212 (1986) (rejecting a challenge to "the authority of government to observe his activity from any vantage point or place if the viewing is motivated by a law enforcement purpose, and not the result of a casual, accidental observation"); *Horton v. California*, 496 U.S. 128, 136 (1990) (recognizing the plain view exception to the warrant requirement but noting it is "an essential predicate" to the exception that "the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed"); *Minnesota v. Dickerson*, 508 U.S. 366, 375-377 (1993) (expanding the plain view doctrine to include its sibling the plain feel doctrine). And under its sibling 'plain smell doctrine,' what an officer-invitee smells outside a house is not a search and is properly considered as the basis for a search warrant of a house. *United States v. Ventresca*, 380 U.S. 102, 104, 111 (1965) (finding probable cause to issue a search warrant of a house based on agents smelling odor of fermenting mash when walking on a sidewalk in front of house because a "qualified officer's detection of the smell of mash has often been held a very strong factor in

---

contraband, while the other officer standing further back smelled only the mothballs lying at the base of the front porch. Resp. Br. 42 n.7; *id.* at 3.

determining that probable cause exists so as to allow issuance of a warrant.”).[6]

Furthermore, Jardines’ argument to keep officers from gathering incriminating information in areas in front of a home that are open to invitees does not comport with this Court’s decisions. *See Kentucky v. King*, 131 S.Ct 1849, 1862 (2011) (observing that 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”); *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.”). Generally on-duty officers do not make house calls to chit-chat. The expected purpose of any “knock and talk” would be to gather evidence via conversation. And there is no discernible difference between interviewing and gathering evidence from a resident. One is often merely a form of the other. So the officers’ investigative actions in walking to the door and knocking while looking, listening, feeling and smelling for criminality along the way, did not transform their lawful investigation into a search.

---

[6] The detector dog here was a qualified marijuana-detection dog just like the qualified agents in *Ventresca*. In fact, Jardines conceded in state court that Franky, the dog in this case, was a well-trained, drug-detection dog.

By the same token, Jardines is incorrect that this case involves a trespass. Resp. Br. 47. Under the custom exception to the common law of trespass, a person going to the front door is not committing trespass.[7] This is an age-old proposition. As Chief Justice Holmes explained, when sitting on the Massachusetts Supreme Court, approaching a house for the social purpose of visiting is "familiar to every one" and a "practice common in this part of the world" and therefore, "entry upon another's close, or into his house, at usual and reasonable hours, and in a customary manner, for any of the common purposes of life, cannot be regarded as a trespass." *Riley v. Harris*, 58 N.E. 584, 584 (Mass. 1900) (Holmes, C.J.). Rather, a person using the common path to the front door of a

---

[7] *Abbott v. Weekly*, 1 Lev. 176, 83 Eng. Rep. 357 (K.B. 1665) (concluding there was no trespass from dancing on the plaintiff's close based on custom because the villagers had held dances there from "time out of memory"); *McKee v. Gratz*, 260 U.S. 127, 136 (1922) (Holmes, J.)(holding that the defendants, who took mussels from a stream on the plaintiff's land, were not trespassers as a matter of law; rather, they may be licensees, noting that there were exceptions to the strict rule of the English common law as to entry upon a close based on American custom and habits.); *cf. McDonald v. United States*, 335 U.S. 451, 458 (1948) (Jackson, J., concurring) (distinguishing between officers being admitted as guests to a rooming house, who like "any other stranger, could then spy or eavesdrop on others without being trespassers" and trespassing).

house, is an invitee. *United States v. Redmon*, 138 F.3d 1109, 1130 (7th Cir. 1998) (en banc) (Posner, J., dissenting) (explaining that police officers must confine themselves to the prescribed route rather than roaming the property at will); *cf. Maryland v. Macon*, 472 U.S. 463, 470 (1985) (explaining that a government agent may enter an open business in the same manner as a private person). The officers here did not trespass by straying from the common path to the front door.[8] *See* Pet. App A31, A112 (noting that the police officers were lawfully in place).

C. The Detector Dog Was Lawfully Present With The Police Officers On Jardines' Front Porch.

Furthermore, the presence of a detector dog's nose did not transform the officers' visit into a Fourth Amendment problem. That is, first, as

---

[8] The dissenting Florida district court opinion upon which Jardines relies lists officer conduct that might violate the curtilage of a home along the common path to the front porch. Resp. Br. 58. But those observations help Jardines not one whit. The officers here did not cordon off the front porch; they did not dust for fingerprints; and they did not deploy a magnetometer or sonar. Rather, one of the two officers knocked on the front door. And approaching and knocking on the front door is not a trespass and does not violate a resident's reasonable expectation of privacy.

discussed above, the officers' investigative actions in walking to the door to knock, while making observations along the way is not a search. And, by extension, the affirmative decision to take a drug-detection dog along to assist their ability to sniff odors did not transform the investigation into a search.

Just as the officers might have used eyeglasses or a flashlight on the common path to the door, detector dogs have been used for centuries to enhance the ability of law enforcement to smell molecules in the air. *See, e.g., United States v. Dunn*, 480 U.S. 294, 305 (1987) (use of a flashlight "did not transform their observations into an unreasonable search within the meaning of the Fourth Amendment") (citing *Texas v. Brown*, 460 U.S. 730, 739-740 (1983) & *United States v. Lee*, 274 U.S. 559, 563 (1927)). Respondent himself concedes that officers may use sense-enhancing aids like field glasses and flashlights. Resp. Br. at 43. A detector dog is little different. As with the presence of the officers' own noses, the use of a dog's nose when the officers were lawfully present on the front porch does not transform this case into a Fourth Amendment problem. *See Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B.1765) (under common law a dog's nose, like a human eye, cannot be guilty of trespass); *Kyllo*,

533 U.S. at 32 (examining "the portion of a house that is in plain public view" is "no search at all.").

In addition, it is the officer's objective actions of walking to the front door and knocking on it, not their decision to bring along a detector dog, which is relevant to the Fourth Amendment analysis. *See Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (rejecting an argument that the shift in purpose from a traffic stop to a drug investigation was a search). *Bond v. United States*, 529 U.S. 334, 338, n.2 (2000) (explaining that an officer's subjective intent is "irrelevant in determining whether that officer's actions violate the Fourth Amendment ...; the issue is not his state of mind, but the objective effect of his actions"); *Whren v. United States*, 517 U.S. 806, 813 (1996) (stating that "we have been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers"); *Ciraolo*, 476 U.S. at 212 (rejecting an argument that the investigation itself amounted to a search because the flight was not a routine patrol); *Rhode Island v. Innis*, 446 U.S. 291, 301-302 (1980) (holding that a police officer's subjective intent to obtain incriminatory statements is not relevant to determining whether an interrogation has occurred). Jardines argument, that the officers' purpose in taking the dog to smell for marijuana (Resp. Br. 51) amounts to a search is incorrect and hearkens back to the inadvertence

requirement abandoned by this Court over two decades ago. *Horton*, 496 U.S. 128 (holding there is no inadvertence requirement to the plain view doctrine). The officers' decision to approach and knock on the front door with a detector dog was neither an invasion of privacy nor a trespass.

D. The Dog's Sniff On The Front Porch Does Not Present The Same Fourth Amendment Concerns As This Court Addressed In The High-Tech Device Cases.

Finally, Jardines relies heavily upon *Kyllo* and *Karo* to support his assertion that an outside sniff by a detector dog "intru[des] into the home" and constitutes a Fourth Amendment search. Resp. Br. 39. But Jardines' attempt to group this case with these other "house" cases does not tell the whole story.

In the first instance, the Court in *Caballes* found dog sniffs to be "entirely consistent" with this Court's decision in *Kyllo*. *Caballes*, 543 U.S. at 409-10. Specifically, the Court distinguished *Kyllo's* imaging device that was capable of detecting "perfectly lawful activity," from a "dog sniff … that reveals no information other than the location of a substance that no individual has any right to possess [and] does not violate the Fourth Amendment." *Id.* at 410. The "critical" distinction between the use of a dog sniff and the

use of thermal imaging technology to survey a house is in what they detect. The device in *Kyllo* was capable of detecting "intimate details" of a home, "such as at what hour each night the lady of the house takes her daily sauna and bath." *Id.* A detector dog's sniff outside the front door reveals no perfectly lawful intimate details inside the home, but only whether the odor of contraband has wafted outside.

Karo, on the other hand, involved the use of a tracking beeper device that physically invaded a home and "reveal[ed] critical fact[s] about the interior of the premises." *Id.* at 715. The Court held that government could not "obtain information that it could not have obtained by observation from outside." *Id.* In this last statement, Jardines' case is perfectly distinguished. The dog sniff here occurred outside the home in an area where the officers were permitted to be. Different from *Karo*, the dog *never* entered Jardines' house and did not reveal details about the inside of the house, but only that the air outside contained the odor of contraband.

Kyllo, Karo, and Jones v. United States also are different because they involve advanced technology and not a centuries-old, traditional

tool of law enforcement.[9] In this series of cases, this Court has been concerned about the Government's use of high-tech devices, such as the thermal imager in *Kyllo* and the GPS tracking device in *Jones*, eroding the traditional protection embodied in the Fourth Amendment. As the majority opinion in *Kyllo* noted, 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. And as the concurring opinion in *Jones* noted, "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 likely due to the time and expense that would have been required. *Jones*, 132 S. Ct. at 962-964 (Alito, J., concurring).

In contrast, dogs are not an advancing technology that would increasingly threaten privacy. While training methods may have improved over the centuries, dogs simply do not present the same concerns or potential for

[9] Dogs have been used by English constabularies to assist in police work from the time of the Middle Ages. *See United States v. One Million, Thirty-Two Thousand, Nine Hundred Eighty Dollars in U.S. Currency ($1,032,980.00)*, 2012 WL 684757, 35 (N.D.Ohio 2012).

invasiveness as do these other emerging, high-tech devices.

CONCLUSION

The Florida Supreme Court's decision should be reversed.

Respectfully submitted,

PAMELA JO BONDI
Attorney General of Florida
Carolyn M. Snurkowski*
Associate Deputy Attorney General
*Counsel of Record
Carolyn.Snurkowski@myfloridalegal.com
Charmaine M. Millsaps
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
Telephone: (850) 414-3300

COUNSEL FOR PETITIONER