No. 11-564

IN THE SUPREME COURT OF THE UNITED STATES
October Term 2011

STATE OF FLORIDA, Petitioner,

v.

JOELIS JARDINES, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S AMENDED BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the use of a police dog to sniff for illegal drugs at the front entrance of a private residence under the circumstances of this case constituted a Fourth Amendment search?

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STATEMENT OF THE CASE

On November 3, 2006, Detective Pedraja of the Miami-Dade Police Department received an unverified "crime stoppers" tip that marijuana was being grown at the home of Joelis Jardines. One month later, on December 5, 2006, at approximately 7:00 a.m., members of the Miami-Dade Police Department, Narcotics Bureau, and agents of the Drug Enforcement Administration (DEA), United States Department of Justice, conducted a surveillance of Jardines' home. Detective Pedraja watched the home for approximately fifteen minutes. During that time, there were no vehicles in the driveway, the blinds were closed, and there was no observable activity.

After the fifteen minute period, Detective Bartelt arrived on the scene with a drug detection dog. Detective Pedraja joined Detective Bartelt and the drug detection dog and together they approached the front of Jardines' home. As Detectives Pedraja and Bartelt and the drug detection dog approached the residence, Sergeant Ramirez and Detective Donnelly of the Miami-Dade Police Department established perimeter positions around the residence and federal DEA agents assumed stand-by positions as backup units.

Detective Pedraja stayed back as Detective Bartelt and the dog proceeded to the front door of the home, because Pedraja would have probably been knocked over by the dog when the dog was spinning around trying to find the source of any odor he detected. The drug detection dog was very strongly driven and he was out in front of Detective Bartelt pulling him around very dramatically. The dog pulled

directly up the porch as he was trained to do, and immediately upon entering the alcove of the porch, he began tracking an airborne odor by bracketing and tracking back and forth to determine the strongest source of the odor, which was the base of the front door of the house. Detective Bartelt got as far back away from the dog as he could without releasing the dog's leash, as the dog was a little bit wild. The dog finally assumed a sitting position after sniffing at the base of the door.

Detective Bartelt then signaled to Detective Pedraja that the dog had given a positive alert for the odor of narcotics. After Detective Pedraja received this signal, he went to the front door of the house and also detected a smell of marijuana plants emanating from the front door. Detective Bartelt and the drug detection dog left the scene shortly after the dog alerted at the front door of the house. Detective Pedraja waited at the residence for fifteen or twenty minutes and then also left the scene to prepare a search warrant and submit it to a magistrate. Federal DEA agents remained behind to maintain surveillance of Jardines' home. Pedraja obtained a search warrant later that day and about an hour after the warrant was obtained, members of the Miami-Dade Police Department, Narcotics Bureau, and DEA agents executed the warrant by gaining entry to Jardines' home through the front door. As agents entered the front door, Jardines exited through a sliding glass door at the rear of the house. Jardines was apprehended by Special Agent Wilson of the DEA and turned over to the Miami-Dade Police Department. A search was conducted, which revealed that marijuana was being grown inside the home.

Jardines was arrested and charged with trafficking in marijuana and theft of electricity.

Jardines subsequently filed a motion to suppress the evidence seized from his house. The trial court granted the motion to suppress, ruling that pursuant to *State v. Rabb*, 920 So. 2d 1175 (Fla. Dist. Ct. App. 2006), *cert. denied*, 549 U.S. 1052 (2006), law enforcement's use of the drug detection dog at the front door of Jardines' house constituted an unreasonable and illegal search. Pet. App. 137.[1] The trial court rejected the State's argument that Detective Pedraja's later detection of the odor of marijuana at the front door constituted a valid basis for the search warrant under the independent source doctrine, based on the court's factual finding that Detective Pedraja only approached the front door to confirm what the drug detection dog had already revealed. *Id.* at 138.

The State of Florida appealed the suppression order to the Florida Third District Court of Appeal, and that court reversed the order granting the motion to suppress. *State v. Jardines*, 9 So.3d 1 (Fla. Dist Ct. App. 2008). The Third District declined to follow the decision in *Rabb*, and held that "a canine sniff is not a Fourth Amendment search." *Jardines*, 9 So.3d at 5. The Third District also held that even if the dog sniff constituted an illegal search, the evidence seized at Jardines' home would still be admissible under the inevitable discovery rule because the evidence presented at the hearing on the motion to suppress established that Detective

[1] In this Brief in Opposition, "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari filed in this case.

Pedraja had already decided to knock on Jardines' front door prior to the time of the dog sniff. *Id.* at 20-21.

On petition for discretionary review, the Florida Supreme Court quashed the decision of the Third District in *Jardines* and approved the result in *Rabb*. Pet. App. 1. The Florida Supreme Court held that "a 'sniff test' such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a 'search' within the meaning of the Fourth Amendment." *Id.* at 4. The Florida Supreme Court further held that probable cause must be established prior to conducting such a dog "sniff test" at a private residence. *Id.* at 4-5.

In determining that the use of the police dog to sniff for illegal drugs at the front entrance of Jardines' private residence constituted a Fourth Amendment search requiring probable cause, the Florida Supreme Court examined in great detail the decisions of this Court in *United States v. Place*, 462 U.S. 696 (1983), *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), *Illinois v. Caballes*, 543 U.S. 405 (2005), *United States v. Jacobsen*, 466 U.S. 109 (1984), and *Kyllo v. United States*, 533 U.S. 27 (2001). Pet. App. 14-26. The Florida Supreme Court noted that in *Place*, *Edmond*, *Caballes* and *Jacobsen*, this Court "was careful to tie its ruling to the particular facts of the case." Pet. App. 27. The Florida Supreme Court further noted that the police investigations in the four cases "were conducted in a minimally intrusive manner upon objects—luggage at an airport in *Place*, vehicles on the roadside in *Edmond* and *Caballes*, and a package in transit in *Jacobsen*—

that warrant no special protection under the Fourth Amendment." Pet. App. 28. Finally, the Florida Supreme Court pointed out that the police investigations in the four cases "were not susceptible to being employed in a discriminatory or arbitrary manner—the luggage in *Place* had been seized based on reasonable suspicion; the vehicle in *Edmond* had been seized in a dragnet-style stop; the vehicle in *Caballes* had been seized pursuant to a lawful traffic stop; and the contents of the package in *Jacobsen* had been seized after the package had been damaged in transit by a private carrier." Pet. App. 29.

The Florida Supreme Court then contrasted the nature of the police conduct in *Place, Edmond, Caballes* and *Jacobsen* with the police conduct in this case. The Florida Supreme Court noted the presence of numerous police officers surrounding Jardines' residence as the police canine handler and the drug detection dog approached the front door of the house. Pet. App. 31-32. The Florida Supreme Court quoted at length the testimony of the police canine handler at the hearing on the motion to suppress in which the officer described in great detail the "vigorous and intensive procedure" used in this case at the front door of Jardines' home. *Id.* at 32-38. Finally, the Florida Supreme Court emphasized that none of the underlying circumstances in *Place, Edmond, Caballes* and *Jacobsen* which guaranteed objective, uniform application of the police procedures are present when a police dog is allowed to sniff for illegal drugs at the front entrance of a private residence without any prior evidentiary showing of wrongdoing, as "there is simply nothing to prevent the agents from applying the procedure in an arbitrary or

discriminatory manner, or based on whim and fancy, at the home of any citizen." Pet. App. 40-41. Based on these significant differences between the police procedures in *Place*, *Edmond*, *Caballes* and *Jacobsen*, and the police procedures in this case, the Florida Supreme Court concluded that the use of the police dog to sniff for illegal drugs at the front entrance of Jardines' private residence constituted a Fourth Amendment search due to its significant intrusion into the heightened expectation of privacy an individual is guaranteed in a private home by the Fourth Amendment:

> In sum, a "sniff test" by a drug detection dog conducted at a private residence does not only reveal the presence of contraband, as was the case in the federal "sui generis" dog sniff cases discussed above, but it also constitutes an intrusive procedure that may expose the resident to public opprobrium, humiliation and embarrassment, and it raises the specter of arbitrary and discriminatory application. Given the special status accorded a citizen's home under the Fourth Amendment, we conclude that a "sniff test," such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a "search" within the meaning of the Fourth Amendment. As such, it warrants the safeguards that inhere in that amendment--specifically, the search must be preceded by an evidentiary showing of wrongdoing.

Pet. App. 42.

Finally, the Florida Supreme Court held that Detective Pedraja's later detection of the odor of marijuana at the front door did not constitute a valid basis for the search warrant, based on the specific factual findings made by the trial court that Detective Pedraja only approached the front door to confirm what the drug detection dog had already revealed. Pet. App. 54-58. The Florida Supreme Court concluded that the Third District erred in reversing the trial court's suppression

order on this basis because "the trial court's factual findings are supported by competent, substantial evidence and the trial court's ultimate ruling is supported in the law." *Id.* at 58.

REASONS FOR DENYING THE WRIT

I. The Decision Of The Florida Supreme Court Applied This Court's Well-Established Fourth Amendment Law To The Particular Facts Of This Case To Reach Its Decision That The Use Of The Police Drug Detection Dog To Sniff For Illegal Drugs At The Front Door Of Mr. Jardines' Private Home Constituted a Fourth Amendment Search.

In its decision in this case, the Florida Supreme Court carefully examined this Court's Fourth Amendment jurisprudence and concluded that application of the principles established by this Court to the particular facts of this case compelled the conclusion that the use of the police drug detection dog to sniff for illegal drugs at the front entrance of Mr. Jardines' private residence constituted a Fourth Amendment search. This fact-intensive determination by the Florida Supreme Court does not warrant review by this Court.

The Fourth Amendment to the United States Constitution guarantees that "[t]he 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, . . . and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Kyllo v.*

United States, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)). "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo*, 533 U.S. at 31.

In determining whether police conduct constitutes a Fourth Amendment search, courts have applied Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347 (1967). Justice Harlan pointed out, "As the Court's opinion states, 'the Fourth Amendment protects people, not places.' The question, however, is what protection it affords those people. Generally, as here, the answer to that question requires reference to a 'place.' " *Katz*, 389 U.S. at 361. "*Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" *California v. Ciraolo*, 476 U.S. 207, 211 (1986). "[W]herever an individual may harbor a 'reasonable expectation of privacy' he is entitled to be free from unreasonable governmental intrusion." *Terry v. Ohio*, 392 U.S. 1, 9, (1968) (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)). In upholding the enhanced aerial photography of an industrial complex in *Dow Chemical v. United States*, 476 U.S. 227, 237, n.4 (1986), this Court noted that it found "it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened," 476 U.S. at 237, n. 4 (emphasis in original).

As the Florida Supreme Court noted in its decision in this case, because the police procedure in this case did take place in an area immediately adjacent to a private home, where privacy expectations are most heightened, this Court's decision in *Kyllo* is particularly relevant to the issue of whether the use of the police drug detection dog to sniff for illegal drugs at the front entrance of Mr. Jardines' private residence constituted a Fourth Amendment search. Pet. App. 23-26. In *Kyllo,* this Court held that the use of a thermal imaging device by law enforcement officers standing outside a private home to determine the heat radiating from the external surface of the house and thereby determine the relative heat of various rooms in the house, constituted a Fourth Amendment search. This holding was based in large part on the heightened privacy expectations an individual possesses in the home:

> We have said that the Fourth Amendment draws "a firm line at the entrance to the house," *Payton*, 445 U.S., at 590, 100 S.Ct. 1371. That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no "significant" compromise of the homeowner's privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward.
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> > "The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Carroll v. United States*, 267 U.S. 132, 149, 45 S.Ct. 280, 69 L.Ed. 543 (1925).
>
> Where, as here, 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" and is presumptively unreasonable without a warrant.

Kyllo, 533 U.S. at 40.

In its decision in this case, the Florida Supreme Court applied these well-established legal principles to the particular facts of this case and determined that the use of the police drug detection dog to sniff for illegal drugs at the front entrance of Mr. Jardines' private residence constituted a Fourth Amendment search. The Florida Supreme Court recognized that police officers generally may approach the front door of a private residence without a warrant and knock on the front door in the hope that someone will open the front door and talk to the officers. Pet. App. 31. *See Kentucky v. King*, 131 S. Ct. 1849, 1862 (2011).[2] However, the Florida Supreme Court pointed out that what happened at the front door of Mr. Jardines' private residence went far beyond a simple "knock and talk" by law enforcement officers.

Members of the Miami-Dade Police Department, Narcotics Bureau, and agents of the Drug Enforcement Administration (DEA), United States Department of Justice, set up a surveillance of Jardines' home prior to the time the drug detection dog was brought to the front of Jardines' house. Pet. App. 31. As two detectives of the Miami-Dade Police Department approached the residence with the drug detection dog, two other detectives from that Department established perimeter positions around the residence and federal DEA agents assumed stand-by positions as backup units. *Id.* at 31-32. As the two Miami-Dade detectives got

[2] In its petition, the State of Florida misrepresents that the Florida Supreme Court concluded "that officers may not knock on the front door of a house lest they frighten the homeowner . . ." *See* State Pet. 23. The Florida Supreme Court expressly recognized that generally nothing prevents a police officer from walking up to the front door of a house and knocking on the door: "[P]olice generally may initiate a 'knock and talk' encounter at the front door of a private residence without any prior showing of wrongdoing . . ." Pet. App. 31.

closer to the front of the residence, one of them stayed back from the drug detection dog because he would have probably been knocked over by the dog when the dog was spinning around trying to find the source of any odor he detected. *Id.* at 38. The drug detection dog was very strongly driven and he was out in front of the police canine handler pulling him around very dramatically. *Id.* at 32. The dog pulled directly up to the porch as he was trained to do, and immediately upon entering the alcove of the porch, he began tracking an airborne odor by bracketing and tracking back and forth to determine the strongest source of the odor, which was the base of the front door of the house. *Id.* at 32-34. The police canine handler got as far back away from the dog as he could without releasing the dog's leash, as the dog was a little bit wild. *Id.* at 35-36. The dog continued bracketing and tracking back and forth at the front door of the house until the dog finally assumed a sitting position after sniffing at the base of the door. *Id.* at 36.[3]

After detailing these facts concerning the particular "sniff test" which was conducted by the law enforcement officers in this case, the Florida Supreme Court concluded that "sniff test" constituted a Fourth Amendment search due to its significant degree of intrusiveness into the heightened expectation of privacy the Fourth Amendment guarantees to an individual in a private home:

> In sum, a "sniff test" by a drug detection dog conducted at a private residence does not only reveal the presence of contraband, as was the case in the federal "sui generis" dog sniff cases discussed above, but it also constitutes an intrusive procedure that may expose the resident to public opprobrium, humiliation and embarrassment,

[3] This testimony of the police canine handler quoted in the decision of the Florida Supreme Court belies the State of Florida's claim in its petition that "Nor was there a 'vigorous search effort' at the front door; all Franky really did was breath [sic]." State Pet. 23.

> and it raises the specter of arbitrary and discriminatory application. Given the special status accorded a citizen's home under the Fourth Amendment, we conclude that a "sniff test," such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a "search" within the meaning of the Fourth Amendment. As such, it warrants the safeguards that inhere in that amendment--specifically, the search must be preceded by an evidentiary showing of wrongdoing.

Pet. App. 42.

Contrary to the claim made by the State of Florida in its petition, the Florida Supreme Court did not rely on *Kyllo* based on any similarities between the thermal imaging device in *Kyllo* and the drug detection dog used in this case. The Florida Supreme Court did not conclude that the drug detection dog in this case was advancing technology similar to the thermal imaging device in *Kyllo*. Rather, the Florida Supreme Court only relied on the principles of law in *Kyllo* concerning the heightened expectation of privacy in the home. The Florida Supreme Court held that a search occurred in this case because the particular nature of the police procedure employed, with multiple police officers conducting a surveillance of the house and then multiple police officers setting up a perimeter around the house as the dog approached the front door, in conjunction with the particular actions of the particular dog in this case[4] as it wildly bracketed back and forth in front of the door attempting to identify odors coming from inside the house through the base of the front door, infringed upon an expectation of privacy which society was not prepared

[4] In its petition, the State of Florida gives the impression that the drug detection dog in this case was a "Chocolate Labrador Retriever[]" which is a "common household pet[]." State Pet. 23. Although the decision of the Florida Supreme Court does not mention the breed of the drug detection dog used at Mr. Jardines' home, larger breeds such as German shepherds or Belgian malinois are generally used for drug detection purposes. *See* Lunney, "*Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of Canine Sniff Doctrine to Include Sniffs of the Home*" 88 Or. L. Rev. 829, 835 (2009).

to consider reasonable considering the heightened expectation of privacy an individual possesses in the home.

The State's petition asserts that the Florida Supreme Court "created a new Fourth Amendment test for whether conduct is a search based on whether the officer's conduct constitutes a 'public spectacle' and is 'dramatic government activity.'" State Pet. 24. The Florida Supreme Court did not announce any type of new test for determining whether the conduct of law enforcement officers constitutes a search. The Florida Supreme Court faithfully followed this Court's precedent in determining that the conduct of the law enforcement officers in this case constituted a Fourth Amendment search. This Court frequently examines the level of intrusiveness of a particular police procedure to determine if that procedure constitutes a Fourth Amendment search. In deciding that the dog sniff of luggage in *United States v. Place*, 462 U.S. 696 (1983) was not a search, this Court pointed out that "the manner in which information is obtained through this investigative technique is much less intrusive than a typical search." *Id.* 462 U.S. at 707. This Court also considered the level of embarrassment and inconvenience suffered by the owner of the property in determining that the dog sniff of the luggage was not a search, noting, "This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods." *Id.*

Similarly, in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), this Court focused on the minimal nature of the intrusion involved in deciding that the dog

sniff of the vehicle was not a search, pointing out, "Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is 'much less intrusive than a typical search.'" *Edmond*, 531 U.S. at 40; *see also Terry*, 392 U.S. at 19 n. 15 ("In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness"); *Ciraolo*, 476 U.S. at 213 (holding that observations made by police officers in an airplane flying over a house did not constitute a search and noting that the observations were made "in a physically nonintrusive manner").

Based on this Court's focus in *Place* and *Edmond* on the minimal nature of the intrusion and lack of embarrassment and inconvenience to the owner of the property to determine that the dog sniffs in those cases did not constitute Fourth Amendment searches, the Florida Supreme Court properly emphasized the increased level of intrusiveness and the significant level of embarrassment suffered by the owner of the home in this case as a result of the police conduct to determine that this particular dog sniff did constitute a search. The Florida Supreme Court's consideration of the exposure of the resident of a private residence to "public opprobrium, humiliation and embarrassment," Pet. App. 42, is fully consistent with this Court's consideration in *Place* of the fact that the limited nature of the police procedure in that case "ensures that the owner of the property is not subjected to

the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods." *Place*, 462 U.S. at 707.

Thus, the Florida Supreme Court's holding that the use of the police drug detection dog to sniff for illegal drugs at the front entrance of Mr. Jardines' residence constituted a Fourth Amendment search under the particular facts of this case fully comports with this Court's Fourth Amendment jurisprudence on determining whether police conduct constitutes a Fourth Amendment search.

II. The Decision Of The Florida Supreme Court Does Not Conflict With Any Decisions Of This Court Or Any Decisions Of Federal Circuit Courts of Appeal On The Issue Of Whether A Dog Sniff Constitutes a Fourth Amendment Search.

The Florida Supreme Court's fact-specific assessment of the use of the police drug detection dog in this case to sniff for illegal drugs at the front entrance of Mr. Jardines' private residence, and the court's holding based on that fact-specific assessment that the use of the dog constituted a Fourth Amendment search, does not conflict with any of the decisions cited by petitioner, and therefore no basis for this Court's exercise of its certiorari jurisdiction has been demonstrated.

A. There Is No Conflict With Supreme Court Precedent.

As noted by the Florida Supreme Court in its decision in this case, this Court has addressed the issue of "sniff tests" by drug detection dogs in three cases. Pet. App. 14. First, in *Place*, this Court addressed the issue of whether police could temporarily seize a piece of luggage at an airport and then subject the luggage to a

"sniff test" by a narcotics detection dog. After determining that the detectives' ninety-minute detention of the luggage was too lengthy to be supported under *Terry*, this Court issued the following ruling as to the "sniff test" by the drug detection dog:

> A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
>
> In these respects, the canine sniff is sui generis. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here--exposure of respondent's luggage, which was located in a public place, to a trained canine--did not constitute a "search" within the meaning of the Fourth Amendment.

Place, 462 U.S. at 707.

Next, in *Edmond*, this Court addressed the issue of a "sniff test" by a drug detection dog of the exterior of a vehicle which had been stopped at a dragnet-style drug interdiction checkpoint. This Court found that the checkpoint seizure violated the Fourth Amendment, and then stated the following concerning the canine sniff at the exterior of the vehicle:

> It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment.

> The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search. *See United States v. Place*, 462 U.S. 696, 103 S. Ct. 2637, 77 L. Ed. 2d 110 (1983). Just as in *Place*, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics. *See ibid.* Like the dog sniff in *Place*, a sniff by a dog that simply walks around a car is "much less intrusive than a typical search." *Ibid.*

Edmond, 531 U.S. at 40 (citation omitted) (quoting *Place*, 462 U.S. at 707).

Finally, in *Illinois v. Caballes*, 543 U.S. 405 (2005), this Court ruled that a "sniff test" by a drug detection dog of the exterior of a vehicle during the course of a lawful traffic stop did not constitute a Fourth Amendment search:

> Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. *Jacobsen*, 466 U.S., at 123, 80 L. Ed. 2d 85, 104 S. Ct. 1652. We have held that any interest in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that only reveals the possession of contraband "compromises no legitimate privacy interest." *Ibid.* This is because the expectation "that certain facts will not come to the attention of the authorities" is not the same as an interest in "privacy that society is prepared to consider reasonable." *Id.*, at 122, 80 L. Ed. 2d 85, 104 S. Ct. 1652 (punctuation omitted). In *United States v. Place*, 462 U.S. 696, 77 L. Ed. 2d 110, 103 S. Ct. 2637 (1983), we treated a canine sniff by a well-trained narcotics-detection dog as "sui generis" because it "discloses only the presence or absence of narcotics, a contraband item." *Id.*, at 707, 77 L. Ed. 2d 110, 103 S. Ct. 2637; *see also Indianapolis v. Edmond*, 531 U.S. 32, 40, 148 L. Ed. 2d 333, 121 S. Ct. 447 (2000). . . . .
>
> Accordingly, the use of a well-trained narcotics-detection dog--one that "does not expose noncontraband items that otherwise would remain hidden from public view," *Place*, 462 U.S., at 707, 77 L. Ed. 2d 110, 103 S. Ct. 2637 --during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement.

Caballes, 543 U.S. at 408-09.[5] This Court distinguished its decision in *Kyllo* as follows:

> This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. *Kyllo v. United States*, 533 U.S. 27, 150 L. Ed. 2d 94, 121 S. Ct. 2038 (2001). 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, 150 L. Ed. 2d 94, 121 S. Ct. 2038. 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.

As the Florida Supreme Court also noted in its decision in this case, this Court's decision in *United States v. Jacobsen*, 466 U.S. 109 (1984) is also relevant to the issue of whether a "sniff test" by a drug detection dog constitutes a Fourth Amendment search. Pet. App. 21-23. In *Jacobsen*, this Court ruled that warrantless field testing of white powder suspected to be contraband was not a search under the Fourth Amendment because it compromised no legitimate interest in privacy. *Id.* at 123. This Court stated this conclusion was "dictated" by *Place* and noted that "here, as in *Place*, the likelihood that official conduct of the kind

[5] In its petition, the State of Florida mistakenly gives the impression that this Court held in *Caballes* that a dog sniff at a house is not a search: "The Florida Supreme Court's holding that a dog sniff is a search conflicts with this Court's repeated holdings, in various contexts, that a dog sniff is not a search. It conflicts with this Court's most recent explanation in *Caballes* extending that view to houses." State Pet. 14.

disclosed by the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment." *Jacobsen*, 466 U.S. at 124.

In its decision in this case, the Florida Supreme Court examined in great detail the decisions of this Court in *Place*, *Edmond*, *Caballes*, and *Jacobsen*, and went to great lengths to explain why those decisions did not require a holding that the use of the police drug detection dog in this case to sniff for illegal drugs at the front entrance of Mr. Jardines' private residence did not constitute a Fourth Amendment search. First, the Florida Supreme Court noted that in each of the four cases, this Court's ruling that no Fourth Amendment search had taken place was expressly limited to the specific facts of the case:

> We note, however, that in each of the above cases, the United States Supreme Court was careful to tie its ruling to the particular facts of the case. *See Place*, 462 U.S. at 707 ("[W]e conclude that the particular course of investigation that the agents intended to pursue here--exposure of respondent's luggage, which was located in a public place, to a trained canine--did not constitute a "search" within the meaning of the Fourth Amendment."); *Edmond*, 531 U.S. at 40 ("The fact that officers walk a narcotics-detection dog around the exterior of each car at the Indianapolis checkpoints does not transform the seizure into a search."); *Caballes*, 543 U.S. at 409 ("In this case, the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation. Any intrusion on respondent's privacy expectations does not rise to the level of a constitutionally cognizable infringement."); *Jacobsen*, 466 U.S. at 123 ("It is probably safe to assume that virtually all of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding; in such cases, no legitimate interest has been compromised."). Nothing in the above cases indicates that the same analysis would apply to a dog "sniff test" conducted at a private residence.

Pet. App. 27-28.

Next, the Florida Supreme Court pointed out the minimally intrusive nature of the police procedures in each of the four cases:

> Significantly, all the sniff and field tests in the above cases were conducted in a minimally intrusive manner upon objects--luggage at an airport in *Place*, vehicles on the roadside in *Edmond* and *Caballes*, and a package in transit in *Jacobsen*--that warrant no special protection under the Fourth Amendment. All the tests were conducted in an impersonal manner that subjected the defendants to no untoward level of public opprobrium, humiliation or embarrassment. There was no public link between the defendants and the luggage as it was being tested in *Place* or the package as it was being tested in *Jacobsen*, and the defendants retained a degree of anonymity during the roadside testing of their vehicles in *Edmond* and *Caballes*.

Pet. App. 28-29.

Finally, the Florida Supreme Court distinguished *Place*, *Edmond*, *Caballes*, and *Jacobsen* based on the fact that the object subjected to the police procedure in each of those cases had been previously seized by police officers in an objective and nondiscriminatory manner, and not simply based on the arbitrary whim of law enforcement officers:

> Further, and more important, under the particular circumstances of each of the above cases, the tests were not susceptible to being employed in a discriminatory or arbitrary manner--the luggage in *Place* had been seized based on reasonable suspicion; the vehicle in *Edmond* had been seized in a dragnet-style stop; the vehicle in *Caballes* had been seized pursuant to a lawful traffic stop; and the contents of the package in *Jacobsen* had been seized after the package had been damaged in transit by a private carrier. All these objects were seized and tested in an objective and nondiscriminatory manner, and there was no evidence of overbearing or harassing government conduct. There was no need for Fourth Amendment protection. As explained below, however, such is not the case with respect to a dog "sniff test" conducted at a private residence.

Pet. App. 29.

The Florida Supreme Court then conducted a fact-intensive comparison between the minimally intrusive police procedures in *Place*, *Edmond*, *Caballes*, and *Jacobsen*, and the "sniff test" conducted by the police officers and the drug detection dog in this case. The Florida Supreme Court noted the surveillance of Mr. Jardines' home by multiple police officers from different police agencies prior to the time the drug detection dog was brought to the front of the house. Pet. App. 31. The Florida Supreme Court pointed out that as the two detectives of the Miami-Dade Police Department approached the residence with the drug detection dog, the remaining detectives and federal agents established perimeter positions around the residence and assumed stand-by positions as backup units. *Id.* at 31-32. The Florida Supreme Court detailed the vigorous actions of the drug detection dog as it approached the front of the house and once the dog reached the front door of the house and started tracking back and forth at the front door of the house *Id.* at 32-34. One of the detectives approaching the house had to stay well back of the dog to keep from getting knocked over, and the police dog handler got as far back away from the dog as he could without releasing the dog's leash because of the dog's wildness. *Id.* at 35-36, 38.

This fact-intensive comparison between the minimally intrusive police procedures found not to constitute Fourth Amendment searches in *Place*, *Edmond*, *Caballes*, and *Jacobsen*, and the "sniff test" conducted by the police officers and the drug detection dog in this case, was one of the major factors which led the Florida Supreme Court to find that the police procedure in this case did constitute a Fourth

Amendment search. The Florida Supreme Court also pointed out the need for Fourth Amendment protection where police officers conduct a "sniff test" using a drug detection dog at a private residence without any antecedent objective and nondiscriminatory basis for that police procedure:

> [I]f government agents can conduct a dog "sniff test" at a private residence without any prior evidentiary showing of wrongdoing, there is simply nothing to prevent the agents from applying the procedure in an arbitrary or discriminatory manner, or based on whim and fancy, at the home of any citizen. *Cf. Camara v. Mun. Court of City & Cnty. of S. F.*, 387 U.S. 523, 528, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967) ("The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."). Such an open-ended policy invites overbearing and harassing conduct.

Pet. App. 41 (footnote omitted).

The Florida Supreme Court did not in any way question this Court's repeated declarations that dog sniffs in general are "sui generis" because they only reveal the presence of contraband. Rather, after carefully comparing the nature of the police procedures in *Place*, *Edmond*, *Caballes*, and *Jacobsen*, and the "sniff test" conducted by the police officers and the drug detection dog in this case, the Florida Supreme Court concluded that the "sniff test" in this case constituted a Fourth Amendment search due to its significant degree of intrusiveness into the heightened expectation of privacy an individual is guaranteed in a private home by the Fourth Amendment:

> In sum, a "sniff test" by a drug detection dog conducted at a private residence does not only reveal the presence of contraband, as was the case in the federal "sui generis" dog sniff cases discussed above, but it also constitutes an intrusive procedure that may expose the resident to public opprobrium, humiliation and embarrassment, and it raises the specter of arbitrary and discriminatory application. Given the special status accorded a citizen's home under the Fourth

> Amendment, we conclude that a "sniff test," such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a "search" within the meaning of the Fourth Amendment. As such, it warrants the safeguards that inhere in that amendment--specifically, the search must be preceded by an evidentiary showing of wrongdoing.

Pet. App. 42.

B. There Is No Conflict With Any Decisions Of Federal Circuit Courts of Appeal.

The State of Florida claims that the decision of the Florida Supreme Court directly conflicts with the decision of the Eighth Circuit in *United States v. Scott*, 610 F.3d 1009 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 964 (2011), and the decision of the Seventh Circuit in *United States v. Brock*, 417 F.3d 692 (7th Cir. 2005). However, this claim demonstrates the State of Florida's failure to appreciate the constitutional significance of the fact that the dog sniff in this case occurred at the front door of a private residence, under factual circumstances involving a significant intrusion into the heightened expectations of privacy an individual possesses at such a private residence.

In *Scott*, the Eighth Circuit held that a dog sniff at the front door *of an apartment from a shared hallway* did not constitute a Fourth Amendment search. 610 F.3d at 1016. Acting on information supplied by a confidential informant, a single police officer brought a drug detection dog into the common hallway of Building 44 of an apartment complex. *Id* at 1011-12. The dog sniffed the door frame of the apartment from the common hallway and alerted to the odor of narcotics. *Id* at 1012. The officer then left the apartment complex and applied for a

warrant based on the dog's alert. *Id.* The Eighth Circuit held that the "sniff of the apartment door frame from a common hallway did not constitute a search subject to the Fourth Amendment." *Id.* at 1016.

Similarly, in *Brock*, the Seventh Circuit held that a dog sniff *at a bedroom door from a shared area inside the defendant's residence*, where police were legally present by consent, did not constitute a Fourth Amendment search. 417 F.3d at 697. In reaching this holding, the Seventh Circuit emphasized that its holding was dependent in large part on the particular location where the dog sniff took place, stating, "Critical to our holding that the dog sniff in this case was not a Fourth Amendment search is the fact that police were lawfully present inside the common areas of the residence with the consent of Brock's roommate." *Id.*

The dog sniff in this case did not take place at the door of an apartment from a common hallway in a large apartment complex, or at a bedroom door from a common area inside the defendant's residence, where police were legally present by consent. As emphasized by the Florida Supreme Court in its decision, the dog sniff in this case occurred at the front door of a private residence.[6] Additionally, neither *Scott* nor *Brock* involved factual circumstances such as those present in this case, where multiple police officers conducted a surveillance of the house, multiple police officers set up a perimeter around the house as the dog approached the front door, and then the dog wildly bracketed back and forth in front of the door attempting to identify odors coming from inside the house through the base of the front door.

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[6] In its decision in this case, the Florida Supreme Court expressly noted the distinction between a dog sniff conducted at a private residence and a dog sniff conducted at an apartment. Pet. App. 11 n.3.

Thus, the decision of the Florida Supreme Court in this case does not conflict with the decision of the Eighth Circuit in *Scott* or the decision of the Seventh Circuit in *Brock*. Indeed, the State's petition does not cite a single state or federal decision which holds that a dog sniff conducted at the front door of a private residence does not constitute a Fourth Amendment search. *See United State v. Reed*, 141 F.3d 644, 650 (6th Cir. 1998)(holding that sniff by dog already lawfully inside defendant's home did not constitute a search); *United States v. Roby*, 122 F.3d 1120, 1125 (8th Cir. 1997)(holding that dog sniff conducted in corridor outside defendant's hotel room was not a search); *cf. United States v. Byle*, 2011 WL 1983355 (M.D. Fla. May 20, 2011)(denying motion to suppress based on finding that officers' smelling marijuana before dog alerted at front door of private residence was sufficient probable cause to support a search warrant; distinguishing *Jardines* and disagreeing with its legal analysis). The only two state or federal decisions which do squarely decide this issue, the decision of the Florida Supreme Court in this case and the decision of the Florida Fourth District Court of Appeal in *Rabb*, both hold that a dog sniff conducted at the front door of a private residence does constitute a Fourth Amendment search. Accordingly, there is no conflict of decisions on this issue warranting review by this Court.

III. The Decision of the Florida Supreme Court Lacks Exceptional Importance.

The Florida Fourth District Court of Appeal first held that the use of a police dog in that case to sniff for illegal drugs at the front entrance of the defendant's private residence constituted a Fourth Amendment search in *State v. Rabb*, 881 So.

2d 587 (Fla. Dist Ct. App. 2004). On the State of Florida's petition for writ of certiorari, this Court granted the petition, vacated the judgment, and remanded the matter to the Fourth District for further consideration in light of this Court's 2005 decision in *Caballes*. *Florida v. Rabb*, 544 U.S. 1028 (2005). On remand, the Fourth District issued a new and more detailed opinion, again deciding that the use of the police dog in that case to sniff for illegal drugs at the front entrance of the defendant's private residence constituted a Fourth Amendment search. *State v. Rabb*, 920 So. 2d 1175 (Fla. Dist Ct. App. 2006). Review was denied by the Florida Supreme Court, *State v. Rabb*, 933 So. 2d 522 (Fla. 2006).

The State of Florida then filed a petition for writ of certiorari in this Court seeking review of the Fourth District's decision holding that the use of a police dog in that case to sniff for illegal drugs at the front entrance of the defendant's private residence constituted a Fourth Amendment search. The petition for writ of certiorari filed by the State of Florida in *Rabb* presented essentially the same question which is presented to this Court in the petition for writ of certiorari filed in this case. The State of Florida's petition for writ of certiorari in *Rabb* was denied in *Florida v. Rabb*, 549 U.S. 1052 (2006).

The decision of the Florida Supreme Court in this case approves the result of the Florida Fourth District Court of Appeal in *Rabb*, and holds that the use of a police dog to sniff for illegal drugs at the front entrance of Mr. Jardines' private residence under the circumstances of this case constituted a Fourth Amendment search requiring probable cause. Pet. App. 1. There have been no significant

developments in this area of the law since this Court's denial of certiorari in *Rabb*. This Court has not issued any additional decisions on the issue of whether the use of a police dog to sniff for illegal drugs constitutes a Fourth Amendment search. The petition for writ of certiorari filed by the State of Florida in this case does not cite a single decision from a state or federal court which holds that the use of a police dog to sniff for illegal drugs at the front entrance of a private residence does not constitute a Fourth Amendment search requiring probable cause. Thus, the constitutional landscape is essentially the same today as it was five years ago when this Court declined to address essentially the same question which the State seeks to have this Court address in its petition filed in this case.

Finally, the State of Florida's claim that the decision of the Florida Supreme Court has resulted in a crippling effect on law enforcement's ability to detect marijuana grow houses is greatly overstated. As demonstrated by the facts of this case, law enforcement officers are trained to detect the odor of marijuana using their ordinary senses. Additionally, as recognized by the decision of the Florida Supreme Court in this case, "[P]olice generally may initiate a 'knock and talk' encounter at the front door of a private residence without any prior showing of wrongdoing . . ." Pet. App. 31. Thus, nothing in the decision of the Florida Supreme Court in this case prevents law enforcement officers from approaching the front door of a house to initiate a "knock and talk" and seeking a search warrant if they

happen to smell marijuana coming from the house when the officers are at the front door.[7]

The Florida Supreme Court's decision in this case is a fact-intensive determination that the use of the police drug detection dog to sniff for illegal drugs at the front entrance of Mr. Jardines' private residence constituted a Fourth Amendment search. That determination fully comports with this Court's jurisprudence on determining whether police conduct constitutes a Fourth Amendment search. The holding of the Florida Supreme Court does not conflict with any decisions of this Court or any decisions of federal circuit courts of appeal on the issue of whether a dog sniff constitutes a Fourth Amendment search. Accordingly, certiorari review of the decision of the Florida Supreme Court is not warranted.

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[7] Contrary to the claim made by the State of Florida in its petition, the Florida Supreme Court did not rule in this case that "every time a human officer subsequently smells the same odor as the dog, the human officer's smell is always and irretrievably contaminated by the dog's original alert." State Pet. 30. The Florida Supreme Court held that Detective Pedraja's later detection of the odor of marijuana at the front door did not constitute a valid basis for the search warrant, based on the specific factual findings made by the trial court that Detective Pedraja only approached the front door to confirm what the drug detection dog had already revealed. Pet. App. 54-58. Thus, if the State of Florida had been able to factually establish that Detective Pedraja would have gone to the front door independently of the dog sniff by the drug detection dog, the independent source doctrine would have allowed Pedraja's smell of the marijuana to be considered. However, as the trial court in this case specifically found that Detective Pedraja would not have gone to the front door of the house independent of the dog sniff, the independent source doctrine has no application here.

CONCLUSION

This Court should deny the State of Florida's petition for a writ of certiorari.

Respectfully submitted,

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