No. 11-564

In the Supreme Court of the United States

FLORIDA,
Petitioner,
v.
JOELIS JARDINES,
Respondent.

On Writ of Certiorari
to the Supreme Court of Florida

BRIEF OF THE STATES OF TEXAS, ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, HAWAII, IDAHO, IOWA, KANSAS, KENTUCKY, MAINE, MICHIGAN, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITIONER

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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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INTEREST OF AMICI CURIAE[1]

All States have a keen interest in combating illegal drugs, and detection dogs play a vital role in these efforts. Florida's brief is correct that the Florida Supreme Court's decision jeopardizes the States' ability to use this crucial tool to discover illegal drugs prior to their distribution. Pet. Br. 26–28. Amici States thus have a distinct interest in the correct disposition of this matter.

SUMMARY OF ARGUMENT

The use of a drug-detection dog to sniff the front door of a suspected marijuana grow house does not constitute a Fourth Amendment search. The Florida Supreme Court's decision to the contrary conflicts with the Court's decisions that have consistently upheld the use of detection dogs. And nothing in the Court's recent decision regarding GPS devices suggests a new approach to the Fourth Amendment claim in this case. The Florida Supreme Court's decision, which jeopardizes a widely used method of detecting illegal drugs, should be reversed.

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1. Consent of the parties is not required for the States to file an amicus brief. SUP. CT. R. 37.4.

ARGUMENT

I. THE DECISION BELOW JEOPARDIZES A WIDELY USED METHOD OF DETECTING ILLEGAL DRUGS THAT THE COURT HAS REPEATEDLY UPHELD.

The Court has repeatedly held that the use of a detection dog to determine whether narcotics are present does not constitute a Fourth Amendment search. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (investigation of a vehicle during a traffic stop); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (investigation of a vehicle at a drug checkpoint); *United States v. Place*, 462 U.S. 696, 707 (1983) (investigation of a traveler's luggage). The Court explained that the use of detection dogs is "much less intrusive than a typical search" and that "no other investigative procedure . . . is so limited both in the manner in which the information is obtained and in the content of the information revealed." *Place*, 462 U.S. at 707; *see also Edmond*, 531 U.S. at 40 (noting that a dog sniff of a car is "much less intrusive than a typical search") (citation omitted). Moreover, in criticizing one law enforcement agency's *failure* to use a detection dog, the Court explained that the practice is one that can *provide* the probable cause needed to justify an arrest, *Florida v. Royer*, 460 U.S. 491, 506 (1983), rather than one that *requires* probable cause.[2]

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2. This Court has recognized that a law enforcement officer's sense of smell can provide probable cause supporting the issuance of a warrant. *United States v. Ventresca*, 380 U.S. 102, 111 (1965) ("A qualified officer's detection of the smell of mash has often been held a very

Naturally, given the Court's clear guidance, state and federal officials routinely use drug-detection dogs during their investigations. For example, in Texas, the Department of Public Safety deploys more than 20 dog–handler teams across the State, and these teams routinely perform more than 1000 sniff tests annually.[3] Arizona's Department of Public Safety likewise deploys more than 25 canine teams.[4] And in 2010, the Virginia State Police Department's 18 narcotic teams led to 118 arrests and 127 drug seizures.[5] Local law enforcement

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strong factor in determining that probable cause exists so as to allow issuance of a warrant."); *Johnson v. United States*, 333 U.S. 10, 12–13 (1948) (noting that a federal agent smelling the "distinctive" and "unmistakable" odor of burning opium may be sufficient probable cause to obtain a warrant and describing that evidence as likely "to be evidence of [the] most persuasive character"). A detection dog's sense of smell should be treated no differently under the Fourth Amendment.

3. *See, e.g.*, Texas Department of Public Safety, 2001 Annual Report at 11, *available at* http://www.txdps.state.tx.us/director_staff/public_information/annrep2001.pdf; Texas Department of Public Safety, 2002 Annual Report at 9–10, *available at* http://www.txdps.state.tx.us/director_staff/public_information/annrep2002.pdf.

4. *See* Canine Unit, *available at* http://www.azdps.gov/About/Organization/Highway_Patrol/Canine/.

5. Virginia State Police, Annual Report: 2010 Facts and Figures, *available at* http://www.vsp.state.va.us/Annual_Report.shtm.

agencies also often deploy their own detection teams. And the States often coordinate with federal authorities, just as the local authorities did in this case.

The Drug Enforcement Administration (DEA) has established the Domestic Cannabis Eradication / Suppression Program (DCE/SP) to target marijuana cultivation nationwide.[6] In 2010, that program resulted in the eradication of more than 4,700 indoor grow sites in 46 States.[7] And the federal government routinely uses detection dogs during its investigations. In 2000, the Department of Justice issued a guide for selecting detection dogs. That report noted that the U.S. Customs Service alone had more than 600 canine teams in service. U.S. Department of Justice, NIJ Guide 601-00, Guide for the Selection of Drug Detectors for Law Enforcement Applications (2000) at 21.[8] The report also touted the success of the canine program, noting that in one year, 9,220 seizures of narcotics and other drugs (at an estimated value of $3.1 billion) were made as a result of detections by U.S. Customs Service canines. *Id*. at 22.

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6. Domestic Cannabis Eradication / Suppression Program, *available at* http://www.justice.gov/dea/programs/marijuana.htm.

7. 2010 Domestic Cannabis Eradication / Suppression Program Statistical Report, *available at* http://www.justice.gov/dea/programs/marijuana_seizure_results.pdf.

8. This report is available at https://ncjrs.gov/pdffiles1/nij/183260.pdf.

It is thus evident that the use of detection dogs has been a common practice for state and federal authorities for quite some time. The decision below substantially undermines these critical state and federal efforts.

As Florida's brief demonstrates, the Florida Supreme Court's decision that the use of a detection dog is a Fourth Amendment search requiring probable cause is based upon its misapplication of *Caballes*, *Edmond*, *Place*, and *Kyllo v. United States*, 533 U.S. 27 (2001). Pet. Br. 13–18. The Florida Supreme Court attempted to distinguish the Court's dog-sniff cases by stating that the "minimally intrusive" nature of the investigations in those cases does not apply to an investigation of a home. *Jardines v. State*, 73 So.3d 34, 44–45 (Fla. 2001). But an officer walking a detection dog up to the front porch of a home to determine what can be smelled in that area is not intrusive. After all, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)); *see also Florida v. Riley*, 488 U.S. 445, 449 (1989) ("[T]he police may see what may be seen from a public vantage point where [they have] a right to be.") (internal quotation omitted). The officers were unquestionably permitted to approach the front door of Jardines's residence. *See Kentucky v. King*, 131 S.Ct. 1849, 1862 (2011) (noting 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"). And while they were standing on the porch, the officers were unquestionably

permitted to use their senses in an attempt to determine whether marijuana was being grown within the house. *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.3(c), at 575–77 (4th ed. 2004); *id*. at 575–77 n.89–98 (collecting cases). This does not change merely because a detection dog also approached Jardines's front door.

The Florida Supreme Court is plainly incorrect that the sniff test conducted at Jardines's front door was a "vigorous and intensive" procedure, *Jardines*, 73 So.3d at 46, or an "intrusive procedure," *id*. at 49.[9] Contrary to the Florida Supreme Court's view, there was *no* intrusion during the front porch sniff test, much less a "substantial government intrusion into the sanctity of the home." *Id*. at 49. There was thus no basis for the Florida Supreme Court's refusal to follow *Caballes* and the Court's other dog-sniff cases.

In an attempt to bolster its dubious conclusion regarding the use of a detection dog, the Florida Supreme Court stated that the presence of additional law-enforcement officials maintaining a perimeter

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9. The Florida Supreme Court's reference to an "intrusion" into the home, *id*. at 36, demonstrates its fundamental misunderstanding of the Fourth Amendment—"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) (citation omitted). *See also Groh v. Ramirez*, 540 U.S. 551, 559 (2004) ("[S]earches and seizures *inside* a home without a warrant are presumptively unreasonable.") (emphasis added) (citation omitted).

around the house—which that court called "a sustained and coordinated effort by various law enforcement departments"—contributed to the Fourth Amendment violation. *Id*. at 48.

Contrary to the Florida Supreme Court's view that law enforcement officers maintaining a perimeter during an investigation of this sort are a "public spectacle," *id*., perimeter officers serve dual purposes. First, they provide for the safety of their fellow officers and the general public. And second, they can help ensure that evidence is not removed or destroyed. It should go without saying that officers may remain in public view while they serve these functions; officers are permitted to "freeze" the situation while other officers obtain a warrant. *See Illinois v. McArthur*, 531 U.S. 326, 337 (2001) (An officer's refusal to allow defendant to enter his trailer without a police officer until a search warrant was obtained did not violate the Fourth Amendment.); *Segura v. United States*, 468 U.S. 796, 798 (1984) (Officers may secure the premises to preserve the status quo while obtaining a warrant.).

II. The Court's Recent Decision in *United States v. Jones* Does Not Suggest a Change in the Fourth Amendment Jurisprudence With Respect to Detection Dogs.

In *United States v. Jones*, the Court held that federal authorities' attachment of a Global-Positioning System (GPS) device to a vehicle, and its use to monitor the vehicle's movements for 28 days, was a search under the Fourth Amendment. 132 S.Ct. 945, 949 (2012). In *Jones*, federal agents had obtained a warrant to install a GPS device on Jones's vehicle in

the District of Columbia and within ten days. *Id.* at 948. On the eleventh day, and while the vehicle was parked in a public parking lot in Maryland, federal agents attached the GPS. *Id.*

The Court held that the installation of the device constituted a search, explaining that "[i]t is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information." *Id.* at 949. This was critical, in the Court's view, because of the close relationship between property rights and the Fourth Amendment. Indeed, the Fourth Amendment jurisprudence was "tied to common-law trespass, at least until the latter half of the 20th century." *Id.* at 949–50 (citations omitted); *see also id.* at 950 ("[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates."); *id.* at 951 n.5 ("A trespass on 'houses' or 'effects,' or a *Katz* invasion of privacy, is not alone a search unless it is done to obtain information; *and the obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy*.") (emphasis added). And as a result, for example, the Court has held that "wiretaps attached to telephone wires on the public streets did not constitute a Fourth Amendment search because there was no entry of the houses or offices of the defendants." *Id.* at 950 (quotation omitted).

With these principles in mind, the Court explained that federal agents had "encroached on a protected area" of Jones's vehicle and "trespassorily" attached

the GPS device. *Id*. at 952. Thus, the installation of the GPS amounted to a "classic trespassory search" under the Fourth Amendment. *Id*. at 954. Jardines can make no such claim.

As noted above, the Miami-Dade Police officers and the detection dog merely approached the front door of Jardines's marijuana grow house, where they unquestionably had the right to be. *See King*, 131 S.Ct. at 1862. No trespass, and therefore no search, occurred. *See Jones*, 132 S.Ct. at 951 n.5 ("[T]he obtaining of information is not alone a search unless it is achieved by such a trespass or invasion of privacy."). Rather, the officers and the detection dog merely observed the smell of marijuana emanating from the house and onto the front porch. And "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Ciraolo*, 476 U.S. at 213 (quotation omitted).

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If the Florida Supreme Court's decision is upheld, it could have a profound chilling effect on law-enforcement efforts to combat illegal drugs. The Court should instead reverse the judgment below to ensure that detection dogs retain their proper place at the forefront of state and federal efforts against the production and distribution of illegal drugs.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted.

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