No. 11-564

IN THE
Supreme Court of the United States

STATE OF FLORIDA,
Petitioner,
v.
JOELIS JARDINES,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF OF AMICI CURIAE THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amicus curiae the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, professional bar association representing public defenders and private criminal defense lawyers across the nation. Founded in 1958, NACDL has a direct national membership of more than 10,000 attorneys and more than 28,000 affiliate members from all fifty states.

Amicus curiae the Florida Association of Criminal Defense Lawyers ("FACDL") is NACDL's Florida affiliate, comprising more than 1,700 members. FACDL is the only statewide organization in Florida dedicated to the criminal defense attorney.

Amici's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice and the defense of individual liberties. Most significantly for purposes of this case, amici have a strong interest in ensuring that the Fourth Amendment remains a robust protection against unreasonable encroachments on individual privacy.

Amici submit this brief not to repeat respondent's arguments, but to offer an alternative analysis. Specifically, amici urge this Court to recognize that law enforcement's use of dogs to discover the otherwise private attributes of our "persons, houses, papers, and ef-

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[1] Letters consenting to the filing of this amicus brief have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

fects" is not wholly outside the scope of the Fourth Amendment; that dogs are not binary "contraband detectors" that reveal only the presence or absence of illegal drugs; and that, because it reveals intimate details of the home, a dog sniff of a house is a search within the meaning of the Fourth Amendment. Once dog sniffs are recognized as searches, this Court can directly address the central question the Fourth Amendment poses: whether such a search is "unreasonable" in light of the place being searched, the intrusiveness of the search, and the law-enforcement objective the search serves. The answer to that question may differ in circumstances different than those present here—such as sniffs of vehicles or luggage following a valid Fourth Amendment seizure. But the original understanding of the Fourth Amendment and this Court's precedent make plain that suspicionless prying into the home to ascertain what is concealed there, by any means, is unconstitutional.

SUMMARY OF ARGUMENT

This case presents the question whether law enforcement's use of a narcotics-detection dog to sniff a house, in order to discover whether the house contains evidence of wrongdoing that would otherwise remain concealed, is a "search" within the meaning of the Fourth Amendment. As demonstrated below, the answer is yes.

The State's (and its amici's) contrary argument is simple: A dog sniff, it contends, can reveal only the presence or absence of illegal drugs. Because, it posits, no one has a legitimate privacy interest in contraband, a dog sniff invades no legitimate privacy interest and thus is not a search. In fact, according to the State, the Fourth Amendment simply says nothing whatever

about the use of dogs to discover what is otherwise concealed. And it makes no difference, the State claims, whether law enforcement is using the dog to obtain information about the interior of luggage, of an automobile, or of a home: There is no privacy interest at stake and no search, period.

That argument rests on a mistaken premise. Dogs are not binary contraband detectors that indicate only the presence of illegal drugs or their absence. Indeed, dogs often do not detect contraband, *per se*, at all. Rather, a dog generally detects chemicals that may be present in either licit or illicit substances. Like the thermal imager in *Kyllo* v. *United States*, 533 U.S. 27 (2001), a dog sniff thus reveals details about the interior of the home beyond the mere presence or absence of contraband. And because "[i]n the home, … *all* details are intimate details," *id.* at 37, a suspicionless dog sniff of a house violates the privacy right at the heart of the Fourth Amendment.

The State also fails to recognize the special status of the home under the Fourth Amendment. As this Court has repeatedly recognized, "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" is "[a]t the very core" of that Amendment. *Silverman* v. *United States*, 365 U.S. 505, 511 (1961); *see also Kyllo*, 533 U.S. at 31. Intrusions that might be reasonable in another context may thus offend the Fourth Amendment when directed at a home.

The State would have this Court treat all law-enforcement use of dogs as beyond the Fourth Amendment's scope. An approach more faithful to the text and purpose of the Fourth Amendment, and more consistent with what we know about narcotics-detection

dogs, would recognize that dog sniffs *can* intrude on protected privacy interests and proceed to analyze whether such an intrusion is "unreasonable." Unlike the previous cases in which this Court has addressed dog sniffs, here a dog was used to obtain private information about the interior of a home, an area "held safe from prying government eyes." *Kyllo*, 533 U.S. at 37. Absent exigent circumstances, such a suspicionless search of the home is inherently unreasonable.

Finally, permitting suspicionless dog sniffs of the home is likely to lead to serious encroachments on Fourth Amendment protections over time. The government has developed various methods of prying into a house without effecting physical entry. A dog sniff is one of them. Placing such information-gathering techniques outside the Fourth Amendment's scope permits the government to "shrink the realm of guaranteed privacy," *Kyllo*, 533 U.S. at 34, without any judicial check at all. And allowing suspicionless dog sniffs of houses would permit indiscriminate sweeps of residential neighborhoods, a practice that some law-enforcement officials have already begun to employ.

ARGUMENT

I. A DOG SNIFF OF THE HOME IS A FOURTH AMENDMENT SEARCH

A. This Court Has Long Recognized A Heightened Expectation Of Privacy In The Home

Since the Founding, "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion" has stood at "the very core" of the Fourth Amendment. *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001) (internal quotation marks omitted). It has been "understood since the beginnings of the

Republic" that "privacy and security in the home are central to the Fourth Amendment's guarantees." *Hudson* v. *Michigan*, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring in part and concurring in the judgment); *see also Wilson* v. *Layne*, 526 U.S. 603, 610 (1999) ("The Fourth Amendment embodies th[e] centuries-old principle of respect for the privacy of the home[.]"); *Payton* v. *New York*, 445 U.S. 573, 601 (1980) (recognizing the Court's "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic"). In short, "it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people." *Minnesota* v. *Carter*, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring).

Repetition can make such statements sound like pious platitudes. But they merely acknowledge our homes' central role in our physical, social, and emotional existence. Houses provide shelter not only from the elements but also from other people, except for those we invite in. They are the spaces in which our private lives take place. And they enable us to escape the government surveillance that is increasingly common outside the home. As the Founders recognized, we reasonably expect that anything inside the home and shielded from public view is presumptively immune from government scrutiny. For those reasons, "the sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976).

Put another way, the Fourth Amendment draws "a firm line at the entrance to the house," *Payton*, 445 U.S. at 590—a line that "must be not only firm but also bright," *Kyllo*, 533 U.S. at 40. Accordingly, while "physical entry of the home is the chief evil against

which … the Fourth Amendment is directed," *Payton*, 445 U.S. at 585 (internal quotation marks omitted), this Court has not permitted the government to evade the Fourth Amendment's protections by intrusions into the home that do not require physical entry. Although observing items in plain view from a public location is not a search, when "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Kyllo*, 533 U.S. at 40. That rule is necessary to "assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Id.* at 34.

Thus, in *Kyllo*, this Court held that the warrantless use of a thermal-imaging device to detect heat emanating from a home was an unlawful search. That was true even though the device did not physically penetrate the house or reveal any detail more specific than the amount of heat escaping from the house. 533 U.S. at 34-36. And it was true even though, arguably, "no 'significant' compromise of the homeowner's privacy ha[d] occurred," *id.* at 40, because in the home, "*all* details are intimate details," *id.* at 37; *see also id.* at 38.

Similarly, in *United States* v. *Karo*, 468 U.S. 705, 714 (1984), this Court held that warrantless monitoring of a beeper in a can of ether in a private residence was an unlawful search because it revealed information about the home not otherwise obtainable without entering the home. Acknowledging that the "monitoring of an electronic device such as a beeper is, of course, less intrusive than a full-scale search," the Court emphasized that such monitoring is nonetheless a Fourth Amendment search because it "reveal[s] a critical fact

about the interior of the premises that the Government is extremely interested in knowing." *Id.* at 715. And such "[s]earches … inside a home without a warrant are presumptively unreasonable absent exigent circumstances." *Id.* at 714-715.

Underscoring the special status of homes under the Fourth Amendment, this Court has acknowledged that non-physical intrusions that may be reasonable in contexts outside the home can be unreasonable searches, and thus can violate the Fourth Amendment, when directed at the home. For instance, although this Court held in *Karo* that using a beeper to trace a container of ether to a private residence violated the Fourth Amendment, it also held that using the same beeper to locate the ether at a commercial warehouse was not an "illegal search" because the same expectation of privacy did not attach. 468 U.S. at 721.

The Court in *Karo* also distinguished *United States* v. *Knotts*, 460 U.S. 276 (1983), which held that the use of a beeper to monitor a drum of chloroform in an automobile was not a Fourth Amendment search. Explaining that "[o]ne has a lesser expectation of privacy in a motor vehicle," *Knotts* held that no Fourth Amendment violation occurred because the monitoring of the beeper "amounted principally to the following of an automobile on public streets and highways." *Id.* at 281 (internal quotation marks omitted). And although the chloroform came to rest outside a cabin, "there [was] no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin." *Id.* at 285. The Court reasoned that while "the owner of the cabin and surrounding premises … undoubtedly had the traditional expectation of privacy within a dwelling place insofar as the cabin was

concerned[,] … no such expectation of privacy extended to the visual observation" of the automobile. *Id.* at 282.

This Court drew a similar distinction in *Dow Chemical Co.* v. *United States*, 476 U.S. 227, 236-237 (1986), holding that using a powerful camera to take aerial photos of a large, "elaborately secured" industrial complex was not a Fourth Amendment search. Citing the diminished expectation of privacy in commercial property, *id.* at 237-238, this Court found "it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened," *id.* at 237 n.4.

Jardines, then, had a greater expectation of privacy than the defendants in this Court's previous dog-sniff cases, which involved property seized in public places that "do[] not share the Fourth Amendment sanctity of the home." *Kyllo*, 533 U.S. at 37; *see Illinois* v. *Caballes*, 543 U.S. 405, 408 (2005) (sniff of vehicle during traffic stop); *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 40 (2000) (sniff of vehicles at roadway checkpoint); *United States* v. *Place*, 462 U.S. 696, 707 (1983) (sniff of luggage in airport). The dog sniff here was intended to, and did, discover otherwise private information about the inside of Jardines's home—a place that, above all others, the Fourth Amendment guards against governmental intrusion.

B. Dog Sniffs Can Reveal More Than The Mere Presence Or Absence Of Contraband

The dog sniff in this case not only was directed at Jardines's home, where privacy interests are strongest, but also was capable of detecting intimate details of the home. It was thus the same kind of non-physical intrusion into the home that *Kyllo* and *Karo* held is barred

by the Fourth Amendment absent a warrant supported by probable cause.

1. To support their contrary argument, the State and the United States rely on this Court's statement in *Caballes* that "governmental conduct that *only* reveals the possession of contraband compromises no legitimate privacy interest." 543 U.S. at 408.[2] This reasoning depends on a critical factual premise: that the nar-

[2] Although amici do not challenge that reasoning here, it is in considerable tension with this Court's previous Fourth Amendment jurisprudence. The privacy interest at stake in cases like this one is not an interest in hiding the possession of contraband, but an interest in shielding the private interior of the home, whatever it contains, absent probable cause for a search. The notion that the Fourth Amendment is not implicated by "governmental conduct that only reveals the possession of contraband" runs counter to the established principle that "[t]he protection of the Fourth Amendment extends to all equally—to those justly suspected or accused, as well as to the innocent." *Agnello* v. *United States*, 269 U.S. 20, 32 (1925). Likewise, "[t]hose suspected of drug offenses are no less entitled to [Fourth Amendment] protection than those suspected of nondrug offenses." *Karo*, 468 U.S. at 717. And a warrantless search that reveals evidence of a crime—including contraband drugs—does not thereby become constitutional. *See, e.g.*, *Kyllo*, 533 U.S. at 40; *McDonald* v. *United States*, 335 U.S. 451, 455-456 (1948) (fact that officers found illegal gambling operation in home did not absolve officers from obligation to obtain a search warrant before entering the home); *see also Henry* v. *United States*, 361 U.S. 98, 104 (1959) (arrest without probable cause "is not justified by what the subsequent search discloses," even where it discloses contraband). A police officer who opened a private locker, say, without suspicion of wrongdoing and found *only* contraband inside would not be able to claim that his actions were proper. As this Court has recognized, "there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Arizona* v. *Hicks*, 480 U.S. 321, 329 (1987).

cotics-detection dog reveals the presence or absence of contraband and nothing else. *Place*, 462 U.S. at 707. But that premise—the accuracy of which this Court has never squarely addressed—is wrong.

This Court first addressed dog sniffs in *Place*, in which police seized and detained a traveler's luggage at an airport, based on reasonable suspicion that it contained illegal drugs, so that it could be sniffed by a narcotics-detection dog. 462 U.S. at 697-698. The Court invalidated the seizure on the ground that the detention was too lengthy to be justified on reasonable suspicion alone. *Id.* at 709. The Court addressed the dog sniff in dicta, even though the issue had not been raised by the parties, noting that the dog sniff "is much less intrusive than a typical search" and "discloses only the presence or absence of narcotics, a contraband item." *Id.* at 707. For those reasons, the Court concluded that "the canine sniff is *sui generis*" and that it was not a search under the Fourth Amendment. *Id.*

Similarly, in *Edmond*, this Court invalidated a highway checkpoint using narcotics-detection dogs to sniff cars, on the ground that finding illegal drugs was insufficient justification for suspicionless seizures. In dicta, the Court again stated that the dog sniff did not "transform the seizure into a search" because it was "not designed to disclose any information other than the presence or absence of narcotics." 531 U.S. at 40.

Finally, in *Caballes*, this Court held that reasonable suspicion was not required for a dog sniff of a car that had been lawfully seized. Noting that Caballes had conceded that properly conducted dog sniffs are likely to reveal only the presence of contraband, and that he did not suggest that even erroneous dog sniffs revealed any private information, the Court concluded that "the

use of a well-trained narcotics-detection dog—one that 'does not expose noncontraband items that otherwise would remain hidden from public view'—during a lawful traffic stop, generally does not implicate legitimate privacy interests." 543 U.S. at 409 (citation omitted).[3]

The question whether dog sniffs truly reveal only the presence or absence of contraband was not squarely joined in any of the three cases. *Place* and *Edmond* addressed the issue only in dicta, and *Caballes* indicated that the issue was not meaningfully contested. This case thus provides an appropriate opportunity for this Court to consider the question.

2. The State's and its amici's primary argument turns on the premise that "a dog sniff reveals only the fact that contraband is present." Pet. Br. 11. But it offers no evidence whatever to support that claim. In fact, studies show that narcotics-detection dogs—even "well-trained" dogs—are not binary contraband detectors. Empirical evidence from real-world settings indicates that a high proportion of dog alerts to illegal narcotics are false alerts, prompted by some factor *other* than the actual presence of the contraband purportedly detected. *See, e.g.*, NSW Ombudsman, *Review of the Police Powers (Drug Detection Dogs) Act 2001*, at 29-30

[3] The State and United States also rely on *United States* v. *Jacobsen*, 466 U.S. 109 (1984). But *Jacobsen* addressed an entirely different question: whether it is a "search" to test a substance rightfully in the government's possession to determine whether it is cocaine. As described in *Jacobsen*, such a test truly is binary, revealing only whether the substance is cocaine or something other than cocaine. *Id.* at 122. Moreover, investigating a substance lawfully in the government's possession cannot be compared to prying into the otherwise concealed and private interior of a home.

& fig. 5 (2006) (approximately 74% of 10,211 alerts were false alerts);[4] Hinkel & Mahr, *Drug-sniffing dogs in traffic stops often wrong*, Chi. Trib., Jan. 26, 2011, at C1 (approximately 56% of alerts from 2007 to 2009 for several suburban police departments were false alerts); *Merrett* v. *Moore*, 58 F.3d 1547, 1549 (11th Cir. 1995) (approximately 96% of 28 alerts were false alerts); *Doe ex rel. Doe* v. *Renfrow*, 475 F. Supp. 1012, 1017 (N.D. Ind. 1979) (approximately 66% of 50 alerts were false alerts). Such false alerts frequently arise because narcotics-detection dogs can, and often do, alert to the presence of substances other than the contraband they were purportedly trained to detect. In other words, when a narcotics-detection dog alerts, there is a substantial probability that it reveals not the presence of contraband, but rather information about *legitimate* items or activity.[5]

Such false alerts can reveal legitimate private information about the home because dogs often identify narcotics by detecting the scent of a "contaminant or by-product in the drug" whose odor is more easily perceived than that of the pure form of the drug itself. Lunney, *Has the Fourth Amendment Gone to the Dogs?*, 88 Or. L. Rev. 829, 838 (2009). Indeed, "detection dogs may not be able to detect the so-called ultrapure forms of drugs, such as cocaine and heroin, because of the extremely low vapor pressure of the un-

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[4] *Available at* http://www.ombo.nsw.gov.au/publication/PDF/other%20reports/ReviewPolicePowers_DrugDetectionDogs_Jun06.pdf.

[5] The evidence regarding the high likelihood of false alerts by narcotics-detection dogs and the causes of those false alerts is described more fully in amici's brief in *Florida* v. *Harris*, No. 11-817.

adulterated drug." *Id.* Instead, "studies with narcotics detector dogs have shown that dogs alert to volatile odor chemicals *associated with* drugs rather [than] the parent drug itself." Lorenzo et al., *Laboratory and Field Experiments Used to Identify* Canis lupus *var.* familiaris *Active Odor Signature Chemicals from Drugs, Explosives, and Humans*, 376 Analytical & Bioanalytical Chemistry 1212, 1213 (2003) (emphasis added).

Accordingly, dogs trained to detect drugs like cocaine, heroin, and ecstasy may also alert to a host of household items that contain the same "signature" odors, even when no illegal narcotics are present. For example, field studies have shown that "drug detector dogs alert to the common volatile cocaine byproduct methyl benzoate rather than to … cocaine itself." 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, 155 (2002). Methyl benzoate is "the dominant odor chemical signature for cocaine." Macias et al., *A Comparison of Real Versus Simulated Contraband VOCs for Reliable Detector Dog Training Utilizing SPME-GC-MS*, 40 Am. Lab. 16, 16 (2008). Although methyl benzoate is frequently found in street cocaine, it is not contraband. Indeed, the FDA has approved its use as a synthetic flavoring substance, and it can be found in a number of common household items, including perfume, solvents, and insecticide. Lunney, *supra*, at 838-839. Methyl benzoate alone can prompt an alert by a narcotics-detection dog, even

when no cocaine or other contraband is present.[6] Furton et al., *supra*, at 153 tbl. IV; *see also id.* at 154-155 (explaining that dogs failed to alert to pharmaceutical-grade cocaine, which has minimal levels of methyl benzoate).

Similarly, acetic acid, the "dominant odor compound in heroin samples," may prompt dogs to alert to foods and prescription drugs. Macias et al., *supra*, at 16. Acetic acid is the primary ingredient in vinegar; it is also used in pickles and some glues. Katz & Golembiewski, *Curbing the Dog*, 85 Neb. L. Rev. 735, 755 (2007). Prescription drugs can also give off the odor of acetic acid through the process of hydrolysis when exposed to air. *Id.*

Piperonal, the "dominant odor used by" detection dogs in alerting to the drug MDMA, also known as ecstasy, can also lead to false alerts. Lorenzo, *supra*, at 1223. Piperonal is a "[f]lavouring agent in cherry and vanilla flavours" and is used in perfume and mosquito repellent. United Nations Office on Drugs and Crime, Regional Office for South Asia, *Precursor Control at a Glance* 19 (2006).[7] Experiments show that narcotics-detection dogs will readily alert to samples of piperonal that do not contain MDMA or other illegal narcotics. Lorenzo, *supra*, at 1220 tbl. 3.

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[6] For example, a detection dog appears to have alerted to methyl benzoate in a bottle of perfume in a student's purse in *Horton ex rel. Horton* v. *Goose Creek Independent School District*, 690 F.2d 470, 474 (5th Cir. 1982).

[7] *Available at* http://www.unodc.org/documents/southasia//reports/Precusor_Control_at_a_Glance.pdf.

These findings contradict the assumption that narcotics-detection dogs are binary contraband detectors. An alert by a narcotics-detection dog can reveal, among other things, that the homeowners possess perfume, vinegar, insecticide, pickles, or other household items. By disclosing information about these licit items in the home, a dog alert can reveal information entirely unrelated to the presence of contraband.

As discussed above, this Court has made clear that any police activity revealing details of the home that could not otherwise be known absent physical intrusion is a search under the Fourth Amendment. *See Kyllo*, 533 U.S. at 40; *Karo*, 468 U.S. at 715. Accordingly, because dog sniffs reveal more details about the home than the mere presence or absence of contraband, they are not exempt from the strictures of the Fourth Amendment.

3. The State's and its amici's remaining arguments fare no better. First, the United States contends (at 16 n.4) that a narcotics-detection dog's erroneous alert reveals no legitimate private information because "it means only that the dog has communicated wrong information about contraband." That is simply not so. While multiple factors could result in an erroneous alert, one common reason for an erroneous alert, as described above, is that the dog has detected the odor of a legal substance—such as the lady of the house's perfume, *cf. Kyllo*, 533 U.S. at 38. Such an alert reveals details of the interior of a home unknowable by other means, absent physical entry. That is precisely what the Fourth Amendment guards against.

Of course, a dog cannot communicate to its handler whether it has detected cocaine or perfume; at most, the handler will learn from an alert that one of many

items, some legitimate and some contraband, may be present. But "[t]he Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained." *Kyllo*, 533 U.S. at 37. Indeed, the thermal imager whose use was held a search in *Kyllo* was a "crude" technology that revealed only "the relative heat of various rooms in the home." *Id.* at 35 n.2, 36. But it was immaterial whether this information was "particularly private or important"; use of the thermal imager was an intrusion barred by the Fourth Amendment because it revealed "information regarding the interior of the home." *Id.* at 35 n.2; *see also Karo*, 468 U.S. at 715 (use of beeper to determine that container of ether was inside home was Fourth Amendment search); *Arizona* v. *Hicks*, 480 U.S. 321, 325 (1987) ("It matters not that the search uncover[s] nothing of great personal value .... A search is a search, even if it happens to disclose nothing but the bottom of a turntable.").

Likewise, here, the dog sniff may reveal only the potential presence of certain chemicals within the home. But if the relative warmth of various rooms in a home, the presence of ether in a home, and the serial numbers on the bottom of a turntable inside a home are protected by the Fourth Amendment—and they are—so is the information revealed by the dog sniff. Such details regarding the interior of the home are by definition "intimate details" subject to Fourth Amendment protection "because the entire area is held safe from prying government eyes." *Kyllo*, 533 U.S. at 37.

Similarly, the United States contends (at 27) that the dog sniff in this case did not violate the Fourth Amendment because the Florida Supreme Court "did not find that the dog detected any substance other than contraband narcotics." But it is irrelevant that some

fraction of detection dogs' alerts will accurately detect illegal narcotics. "[N]o police officer would be able to know *in advance* whether" a dog sniff "picks up 'intimate' details"—in which there is undoubtedly a reasonable expectation of privacy—or contraband, and an officer "thus would be unable to know in advance whether [a particular dog sniff] is constitutional." *Kyllo*, 533 U.S. at 39. As this Court held in *Kyllo*, an analysis that turned on whether the particular intrusion *in fact* disclosed intimate details of the home would be both "wrong in principle" and "impractical in application." *Id.* at 38. For the same reasons, this Court in *Karo* rejected the government's contention that no warrant should be required because officers had "no way of knowing in advance whether the beeper will be transmitting its signals from inside private premises." 468 U.S. at 718. This Court recognized that the mere possibility that the beeper could be used to locate an object in a home was sufficient to counsel against "deviating from the general rule that a search of a house should be conducted pursuant to a warrant." *Id.* Likewise, in this case, because the government could not know whether the dog sniff would reveal intimate details about the home rather than the presence of contraband, the dog sniff was a Fourth Amendment search.

Nor is there any merit to the State's argument (at 19-20) that no Fourth Amendment violation occurred here because law enforcement did not physically enter the home. *See also* U.S. Br. 7, 14-15, 19-20. This Court squarely rejected precisely such an argument in *Kyllo*, holding that "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes a search—at least where (as here) the technol-

ogy in question is not in general public use." 533 U.S. at 34 (citation omitted). *Kyllo* likewise rejected the State's argument (at 21-22) that odors emanating from a home are exposed to the public and thus not subject to Fourth Amendment protection. Rejecting such "a mechanical interpretation of the Fourth Amendment," this Court refused to make a distinction between heat waves that radiated "off the wall" into public view and surveillance that occurs "through the wall." *Kyllo*, 533 U.S. at 35. Such a distinction would be similarly artificial here, where the only difference is that a dog sniff detects odors, rather than heat, emanating from the inside of a house.

Finally, the State (at 23-24) and the United States (at 18-19) incorrectly contend that because dogs are not "technology," their use cannot be a search equivalent to the thermal-imaging device in *Kyllo*. To be sure, a dog is not a machine. But that fact has no constitutional significance. "[T]echnology" merely means "the practical application of knowledge" or "a capability given by" such practical application. *Merriam-Webster's Collegiate Dictionary* 1210 (10th ed. 1993). And trained narcotics-detection dogs are "sense enhancing" technology in the sense relevant to *Kyllo*: They are "not in general public use" and reveal "details of the home that would previously have been unknowable without physical intrusion." 533 U.S. at 40; *see also United States* v. *Jackson*, 2004 WL 1784756, at *3 (S.D. Ind. Feb. 2, 2004) (finding "no constitutional distinction between the use of specially trained dogs and sophisticated electronics

from outside a home to detect activities in or contents of the home's interior").[8]

Moreover, the use of dogs to detect contraband is a recent phenomenon. Although dogs have been used to *track* fugitives and prey for centuries, "[a]lmost all *detection* functions are relatively recent, most dating after 1970." Ensminger, *Police and Military Dogs* 4 (2012) (emphasis added). As the United States acknowledges (at 19), the use of dogs to detect narcotics is no exception, also having begun around 1970. *See* Ensminger at 5 tbl. 1.1; Simmons, *The Two Unanswered Questions of* Illinois v. Caballes, 80 Tul. L. Rev. 411, 428 (2005). Accordingly, the ratifiers of the Fourth Amendment would not have contemplated the use of dog sniffs to detect items present in a private home, let alone considered it a common or accepted practice. Permitting the government to use specially trained detection dogs to reveal what is concealed inside a private home—just like using a thermal-imaging device for the same purpose—would unacceptably dilute the "degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo*, 533 U.S. at 34.

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[8] Indeed, the 2002 version of "the White House's Office of National Drug Control Policy discusses detection dogs and lists them as 'Non-Intrusive Technology,' and … the government describes detection dogs as 'technology' in other project materials as well." Lunney, *supra*, at 893; *see id.* (describing the government's "intended goal of creating a 'worldwide gene pool' for substance-detection canines").

C. This Court's Previous Dog-Sniff Cases Involved Much Less Significant Intrusions On Privacy Interests

As discussed above, amici submit that characterizing narcotics-detection dogs as binary contraband detectors is incorrect; dogs can and do convey information about the interior of a sniffed house, car, or container other than the presence or absence of drugs. But recognizing that a dog sniff is a search does not end the Fourth Amendment inquiry. Rather, the question becomes whether, under the circumstances, the sniff is "unreasonable." That judgment is informed by the nature and quality of the infringement on privacy caused by the sniff, as well as by the law-enforcement interest at stake.

The practice the Court is asked to approve here—suspicionless dog sniffs of a private home—works a far greater intrusion on the privacy interests at the heart of the Fourth Amendment than the dog sniffs that previously came before the Court. To begin with, none of this Court's previous cases involved the home, where, as already explained, Fourth Amendment protection is at its zenith. *See, e.g.*, *United States* v. *Thomas*, 757 F.2d 1359, 1366 (2d Cir. 1985) ("[A] practice that is not intrusive in a public airport may be intrusive when employed at a person's home.").

Moreover, in each of this Court's previous cases, there had been a prior seizure of the object to be sniffed, and the question was whether the addition of the dog sniff could convert a lawful seizure into activity barred by the Fourth Amendment. In *Place*, the Court stated that a dog sniff, by itself, did not transform a "*Terry*-type investigative stop"—conducted after "an officer's observations lead him reasonably to believe

that a traveler is carrying luggage that contains narcotics"—into an unlawful one. 462 U.S. at 706, 709. Similarly, in *Edmond*, the Court stated that a dog sniff of the exterior of a car stopped at a traffic checkpoint "does not transform the seizure" into an unlawful search. 531 U.S. at 40. Finally, in *Caballes*, the Court emphasized that "[t]he question on which we granted certiorari is narrow: 'Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle *during a legitimate traffic stop*.'" 543 U.S. at 407 (citation omitted; emphasis added). The Court noted that "the dog sniff was performed on the exterior of respondent's car while he was lawfully seized for a traffic violation" before concluding that the additional intrusion it caused "does not rise to the level of a constitutionally cognizable infringement." *Id.* at 409.

In each case, therefore, an intrusion on the defendant's privacy interests—the seizure of the defendant or his property—had already occurred before the dog sniff took place. In *Place* and *Edmond*, the seizure itself was invalidated; in *Caballes*, this Court addressed only the constitutional significance of the marginal additional intrusion caused by subjecting a lawfully seized car to a dog sniff. By contrast, the dog sniff here encroaches far more deeply on Fourth Amendment interests. There was no prior lawful seizure; rather, the State contends that it is free to pry into the interior of a home via a narcotics-detection dog whenever and wherever it likes, for any reason or no reason. The potential deleterious effect on privacy is accordingly much greater.

These are differences of which the Fourth Amendment takes account by asking whether a particular search is "unreasonable." Rather than accepting the

State's invitation to disregard the Fourth Amendment altogether, this Court should recognize that the privacy interests that dog sniffs implicate will vary depending on the context. *See Karo*, 468 U.S. at 716 ("Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight."); *cf. Dow Chem.*, 476 U.S. at 237 n.4; *Karo*, 468 U.S. at 721; *Knotts*, 460 U.S. at 282. Outside the context of the home, some dog sniffs based on less than probable cause might be reasonable if the marginal intrusion into privacy interests is small and the governmental interest served is compelling. But a suspicionless sniff designed to furnish information about the interior of a private house—information that may indicate the presence of licit or illicit substances—cannot be reasonable if this Court is to maintain the "bright," "firm line" the Fourth Amendment has always drawn at the threshold of the home.

II. ALLOWING SUSPICIONLESS DOG SNIFFS OF THE HOME WOULD SERIOUSLY WEAKEN THE FOURTH AMENDMENT'S PROTECTIONS

Allowing suspicionless dog sniffs of the home, even if the immediate intrusion seems minimal, would do serious violence to Fourth Amendment protections over time. Because "illegitimate and unconstitutional practices get their first footing … by silent approaches and slight deviations from legal modes of procedure," this Court must be vigilant to ensure that increasingly aggressive governmental practices do not chip away at citizens' constitutional rights. *Silverman* v. *United States*, 365 U.S. 505, 512 (1961) (internal quotation marks omitted).

In the Fourth Amendment context, this Court has emphasized the importance of taking the "long view" to prevent seemingly small-scale intrusions of the home from leading to increasingly serious encroachments in the future. *Kyllo*, 533 U.S. at 40 ("While it is certainly possible to conclude … that no 'significant' compromise of the homeowner's privacy has occurred, we must take the long view[.]"). As in *Kyllo*, the "long view" in this case requires protecting the basic expectation of privacy in the home—and the warrant requirement that is its primary guardian—against developments in law enforcement that threaten to "erode the privacy guaranteed by the Fourth Amendment." *Id.* at 34.

By requiring officers to articulate probable cause before conducting a search, the warrant requirement ensures that tactics used by police to detect intimate details of the home are not abused. *See Karo*, 468 U.S. at 717 ("Requiring a warrant will have the salutary effect of ensuring that use of beepers is not abused, by imposing upon agents the requirement that they demonstrate in advance their justification for the desired search."). Removing that protection from homes where the tactic is a dog sniff, however, would open the door to suspicionless, dragnet-like sweeps of residential neighborhoods, contrary to well-established Fourth Amendment principles. *See id.* at 714 ("[P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant …. Our cases have not deviated from this basic Fourth Amendment principle.").

Contrary to the contentions of the State (at 27) and the United States (at 29) that these concerns have "not materialized," law-enforcement officials in some areas have begun to use detection dogs to conduct suspicionless sweeps of residential neighborhoods and

apartment buildings. For instance, in 2011, federal and state authorities using drug-detection dogs seized items during a random, early morning sweep of a Virginia apartment complex. Morrison, *Items seized in 2 a.m. drug search*, Roanoke Times, July 26, 2011, at 3 ("If the dogs alerted on an apartment, … officers could knock on the door or request a search warrant."). In addition, the Fargo, North Dakota, police department recently announced that it will use drug-detection dogs to perform indiscriminate sniffs of at least five public housing complexes. Wallevand, *Fargo Housing Authority to begin drug sweeps on properties*, WDAY TV (Mar. 26, 2012)[9]; *Dog to sniff for drugs in Fargo public housing*, Bismarck Trib., Mar. 27, 2012, at B1 ("If the dog smells drugs on a specific door, Fargo police may request a warrant to search the apartment unit.").

Such suspicionless sweeps of residences also pose the risk of selective and discriminatory law enforcement that exists whenever police discretion is unchecked. *See Payton*, 445 U.S. at 582 n.17 ("Inasmuch as the purpose of the Fourth Amendment is to guard against arbitrary governmental invasions of the home, the necessity of prior judicial approval should control[.]"). In particular, such unchecked discretion could result in dog sweeps of residences based on nothing more than an officer's inarticulable intuition or subconscious prejudice and consequently could "jeopardize[] the rights of often marginalized people, such as members of minority groups and those who reside in less affluent neighborhoods." Levenson, *A Missed Opportunity to Protect the Individual's Right to Privacy in His Home Under the Maryland Declaration of Rights*,

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[9] *Available at* http://www.wday.com/event/article/id/61188/.

65 Md. L. Rev. 1068, 1083 (2006). But under the State's proposed rule, any home at any time could be subject to sniffing by a narcotics-detection dog, for any reason including the bare desire to harass.

There is no merit to the responses of the State (at 27-28) and the United States (at 29-30) that law enforcement will refrain from suspicionless dog sweeps out of a desire to act responsibly, due to limited resources, or as a reaction to "community hostility." As an initial matter, this Court has made clear that it "would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States* v. *Stevens*, 130 S. Ct. 1577, 1591 (2010); *see also City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988). Moreover, to the extent that suspicionless sweeps are targeted at lower-income, disenfranchised neighborhoods, "community hostility" will likely be insufficient to prevent such intrusions. And as discussed above, limited resources have not prevented some law-enforcement officials from engaging in arbitrary sweeps of homes, and such sweeps of schools are already commonplace. *See, e.g.*, Lewin, *Drug Dogs Sniff Even 6-Year-Olds*, N.Y. Times, July 26, 2002, at A19; Federico, *Drug-Sniffing Dogs To Search School*, Hartford Courant, Feb. 15, 2012, at B9.

These risks reaffirm the need for this Court's long-standing insistence that, before a home may be searched consistent with the Fourth Amendment, a neutral magistrate, rather than a police officer in the field, must determine that probable cause exists and issue a warrant. *See Johnson* v. *United States*, 333 U.S. 10, 14 (1948) (probable cause supporting a warrant must be determined "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out

crime"). Relaxing this requirement, even for what initially may appear to be an insignificant intrusion into the home, ultimately "would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." *Id.*

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Supreme Court of Florida.

Respectfully submitted.

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