No. 11-817

In The
Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

v.

CLAYTON HARRIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Florida

BRIEF OF *AMICI CURIAE* FOURTH AMENDMENT SCHOLARS IN SUPPORT OF RESPONDENT

LESLIE A. SHOEBOTHAM
Associate Professor of Law
Counsel of Record
LOYOLA UNIVERSITY NEW ORLEANS
COLLEGE OF LAW
7214 St. Charles Ave.
New Orleans, LA 70118
(504) 861-5683
shoeboth@loyno.edu

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INTRODUCTION

The *amici curiae* submit this brief in support of Respondent, and urge the Court to affirm the decision of the Florida Supreme Court.

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professors and scholars in Fourth Amendment studies. *Amici* submit this brief in support of Respondent's position that under the totality of the circumstances, an alert by a drug-detection dog of unproven reliability fails to establish probable cause to justify a search. This brief addresses the State of Florida's conflation of the quantum of proof required to show probable cause – the fair-probability burden of proof – with the traditional legal analysis for determining probable cause – the totality-of-the-circumstances assessment. Further, this brief addresses the State's argument that trial courts should be prohibited from considering other probative evidence of a canine's reliability, aside from the detection dog's training or certification.

[1] The parties have consented to the filing of this brief in letters submitted to the Court.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The Court is asked to consider what evidence courts may use in determining whether a drug-detection dog's alert to the exterior of a vehicle is sufficiently reliable to establish probable cause to search the vehicle. The disagreement in this case turns on whether trial courts must accept the reliability of drug-detections dogs for purposes of probable cause if the dog is "trained" or "certified" in contraband detection (which this brief describes as a "credentials alone" canine-reliability test), or instead, if courts may require additional, probative information regarding canine reliability, such as the detection dog's field-performance records, for consideration in a totality-of-the-circumstances determination of probable cause. This brief argues against the "credentials alone" reliability test, and argues that the Florida Supreme Court's request for additional, probative canine-reliability evidence was reasonable based, in part, on (1) local considerations (including lack of standardized training or certification requirements for Florida's drug-detection dogs), and (2) concerns about circumstances that may reduce a particular dog's reliability for contraband detection in the field (including problems of canine-handler "cuing" and questions about whether "residual odors" of contraband may produce false-positive canine alerts).

In arguing that the "credentials alone" canine-reliability test is the applicable standard, the State of Florida's arguments conflate the quantum of proof required to demonstrate probable cause – the

fair-probability burden of proof – with the governing legal analysis – the totality of the circumstances. A "fair probability" thus became both the State's goal *and* the State's methodology for getting there. In so arguing, the State's reconfiguration necessarily ignored the required legal analysis for determining probable cause – the totality-of-the-circumstances analysis – the approach that courts have "traditionally" used in determining whether a fair probability of criminal activity exists. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983). By making the end also the means, the State was thereby positioned to argue for a blanket limitation on canine-reliability evidence – a rule that disables courts from considering other probative evidence, such as a drug-detection dog's field performance – an outcome that is entirely inconsistent with the traditional totality-of-the-circumstances determination of probable cause.

The Florida Supreme Court recognized the problems associated with the State's "credentials alone" canine-reliability test, and the court's concerns are supported by objective data. For instance, private vendors that certify and train drug-detection dogs have widely divergent standards that expose real differences in what canine professionals consider a properly certified canine-detection team. *See*, *e.g.*, *Matheson v. State*, 870 So.2d 8, 14 (Fla. Ct. App. 2 Dist. 2003). Further, because drug-detection dogs are said to alert to "residual odors" of contraband, the detection dog's field-performance records are important in determining canine reliability. Moreover, concerns

about handler error as well as handler cuing – which can affect the outcome of any given canine sniff – require review of the canine-handler's experience and field deployment. In sum, the Florida Supreme Court's request for an explanation of the canine-team's training, certification, and field performance, was a reasonable request for essential information for use in a totality-of-the-circumstances determination of probable cause.

Finally, the Florida Supreme Court's request for probative canine-reliability evidence, such as field-performance records, was necessary in order to ensure that the warrant exception for canine sniffs of luggage and vehicles remains adequately supported by this exception's justifications. The Court found a warrant exception based on the limited intrusiveness and accuracy of the canine-sniff technique for contraband detection involving luggage and vehicles. *See United States v. Place*, 462 U.S. 696, 707 (1983); *Illinois v. Caballes*, 543 U.S. 405, 409 (2005). Further, *Place*'s accuracy justification formed the basis of the Court's holding in *United States v. Jacobsen*, 466 U.S. 109, 124 (1984), which permitted field testing of suspected-cocaine because the testing, like a canine drug-detection sniff of luggage, could reveal only whether the white powder was cocaine.

The State cannot compel a canine-reliability test that so limits the trial court's consideration of the evidence that it "untether[s]" this warrant exception from the justifications that led the Court to create it in the first place. *Cf. Arizona v. Gant*, 556 U.S. 332,

343 (2009). In requiring additional, probative canine-reliability evidence, the Florida Supreme Court carried out its constitutional obligation, by ensuring that the accuracy justification on which this warrant exception is premised is not undermined.

For these reasons the Court should affirm the decision of the Florida Supreme Court, and hold that a drug-detection dog's reliability for contraband detection must be determined on a case-by-case basis applying a totality-of-the-circumstances analysis.

ARGUMENT

The issue before the Court is what evidence courts may consider in determining whether a drug-detection dog's alert to the exterior of a vehicle is sufficiently reliable to establish probable cause to search the vehicle. The disagreement in this case turns on whether courts are permitted to determine canine reliability for contraband detection on a case-by-case basis, or instead, whether a drug-detection dog's reliability must be "deemed conclusive" if the detection dog is either "trained" or "certified" to detect contraband (which this brief describes as a "credentials alone" canine-reliability test).[2] *See* Pet'r Br., at 32; *see also id.* at 22, 24, 32, 37 n.8.

[2] The State argued additionally that a drug-detection dog is reliable, even without formal training or certification, if the dog "otherwise exhibit[s] reliable performance in detecting contraband". Pet'r Br., at 22; *see also id.* at 24.

The Florida Supreme Court concluded that a drug-detection dog's reliability for contraband detection must be determined on a case-by-case basis, and rejected the State of Florida's proposed limitation on canine-reliability evidence because (1) Florida lacks uniform certification standards for drug-detection dogs; (2) Florida lacks standardized drug-detection dog training criteria; and (3) Florida does not require any certification whatsoever of so-called "single-purpose"[3] drug-detection dogs, such as the dog at issue here. *See Harris*, 71 So.3d at 771. Further, based on the lack of uniformity and standardization of canine drug-detection qualifications as well as other considerations,[4] the Florida Supreme Court concluded that a detection dog's field-performance records were necessary in order to establish "a complete evaluation" of the individual dog's reliability for contraband detection. *See id.* at 769.

The State, on the other hand, contends that a "credentials alone" canine-reliability test is the applicable standard because detection-dog qualifications, by themselves, the State argues are enough to satisfy the State's fair-probability burden of proof required

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[3] A "single-purpose dog" has received training "only to detect drugs," while a "dual-purpose dog" has received additional training, such as in "apprehension". *Harris*, 71 So.3d at 760.

[4] The Florida Supreme Court identified other important variables that may affect canine reliability for contraband detection, including canine alerts to residual odors of contraband, false alerts, handler error and handler cuing. *Harris*, 71 So.3d at 768-69.

for probable cause. *See* Pet'r Br., at 19-24. In getting to its desired outcome, the State made two analytical errors. First, the State reoriented the canine-reliability determination by using the quantum of proof required to show probable cause – the fair-probability burden of proof – as both its burden and as the governing legal analysis. A "fair probability" thus became both the State's goal *and* the State's methodology for getting there. In so arguing, the State's reconfiguration necessarily ignored the required legal analysis for determining probable cause – the totality-of-the-circumstances analysis – the approach that courts have "traditionally" used in determining whether a fair probability of criminal activity exists. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983) ("[W]e reaffirm the totality-of-the-circumstances analysis that traditionally has informed probable-cause determinations."). By making the end also the means, the State was thereby positioned to argue for a blanket limitation on canine-reliability evidence – a rule that disables courts from considering other probative evidence, such as a drug-detection dog's field performance – records that can assist in determining the dog's reliability for contraband detection in the field.

Second, although the State applies a fair-probability burden in its own case, the State mistakenly requires "certainty" that other canine-reliability evidence – i.e., the detection dog's field-performance records – would change the outcome of a "credentials alone" canine-reliability determination before such

evidence could be considered. *See*, *e.g.*, Pet'r Br., at 25-26. By categorizing and rejecting certain types of probative canine-reliability evidence, the State creates its own version of the "divide-and-conquer" approach to a totality analysis that the Court rejected in *United States v. Arvizu*, 534 U.S. 266, 274 (2002). Isolating factors and limiting trial courts to consideration of only those factors (to the exclusion of other probative evidence) is incompatible with a totality analysis of probable cause.

I. The State's "Credentials Alone" Canine-Reliability Test Violates the Fourth Amendment Because It Is Contrary To the Totality-of-the-Circumstances Analysis Required To Establish Probable Cause

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures" and provides that "no Warrants shall issue, but upon probable cause. . . ." U.S. Const. amend. IV. A "search" for Fourth Amendment purposes occurs when the government intrudes on a person's "constitutionally protected reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Although the Fourth Amendment generally requires police to secure a warrant before conducting a search, the Court recognized an exception to the warrant requirement for a vehicle-search, if the vehicle is readily mobile and probable cause exists to believe that it contains contraband. *Carroll*

v. United States, 267 U.S. 132, 153 (1925); *see also California v. Carney*, 471 U.S. 386, 392 (1985) (finding, as an additional justification for the automobile exception, a reduced expectation of privacy in vehicles due to their "pervasive regulation").

The Court also found an exception to the warrant requirement for a canine drug-detection sniff of luggage at an airport by a well-trained drug-detection dog. *See United States v. Place*, 462 U.S. 696, 707 (1983) (describing the canine sniff of luggage as "*sui generis*" because of the limited "manner" in which the information was revealed – the suitcase need not be opened – and the limited "content" of the information revealed – only the presence or absence of contraband). *Illinois v. Caballes* extended the warrantless use of the canine-sniff technique to a lawfully-stopped vehicle, because "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. 405, 409 (2005) (*quoting Place*, 462 U.S. at 707) (internal quotation marks and citation omitted).

Relying on *Caballes*'s description of the "well-trained" drug-detection dog – a dog that "does not expose noncontraband items", the Florida Supreme Court equated a well-trained detection dog to a "reliable dog", and proposed that "the best way" to determine whether a dog is "in fact well-trained, or reliable, is to evaluate the totality of the circumstances, including the dog's training, certification, and performance."

Harris, 71 So.3d at 766 n.6 (*quoting Caballes*, 543 U.S. at 409) (internal quotation marks omitted).

A. Probable Cause Must Be Determined Under the Totality of the Circumstances Through a Case-By-Case Determination of the Facts and Circumstances That Establish Probable Cause

While probable cause is a "fluid concept" that is "incapable of precise definition or quantification into percentages," *Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003) (*quoting Gates*, 462 U.S. at 232), the Court has been clear that probable cause must be determined under the totality of the circumstances. *Pringle*, 540 U.S. at 371 (observing that probable cause "depends on the totality of the circumstances"); *see also Gates*, 462 U.S. at 238. The Court has never limited the *types* of relevant information that a trial court may or should hear in considering the totality of the circumstances. In *Gates*, for example, it was the Illinois Supreme Court's use of a rigid "superstructure" in determining probable cause that the Court rejected, 462 U.S. at 235, not a trial court's authority to use the *very same information* "as relevant considerations in the totality-of-the-circumstances analysis that traditionally has guided probable-cause determinations". *Id.* at 233; *see also id.* at 230 ("We agree with the Illinois Supreme Court that an informant's 'veracity,' 'reliability,' and 'basis of knowledge' are all highly relevant . . . [, but] do not agree, however, that these elements should be understood as entirely separate and independent requirements. . . .").

A totality-of-the-circumstances analysis requires trial courts to determine whether the facts and circumstances, "[t]aken together," establish a fair probability of criminal activity. *See Arvizu*, 534 U.S. at 277 (describing a totality analysis in the context of a *Terry*-stop of a vehicle). In doing so, trial courts must avoid the mistake of considering the relevant facts and circumstances "in isolation from each other. . . ." *Id.* at 274 (rejecting a lower court's "methodology", *id.* at 268, of considering each fact separately to determine whether it was, by itself, suspicious, as a "divide-and-conquer" analysis which was inconsistent with the required totality assessment). It is this "assessment of the whole picture" from which the totality of the circumstances "yield[s]" the fair probability of criminal activity required to establish probable cause. *See United States v. Cortez*, 449 U.S. 411, 418 (1981) (describing a totality analysis of suspicion in the context of a *Terry*-stop of a vehicle). Further, the Court has recognized that it may be good practice for trial courts to consider whether facts or circumstances exist that, when taken in the totality, *reduce* an officer's suspicion of criminal activity. *See*, *e.g.*, *Terry v. Ohio*, 392 U.S. 1, 28 (1968) (describing with approval the investigating officer's detailed observations of Terry and his two companions as a basis for the officer's suspicion that the three men were planning an armed robbery, explaining that nothing in the men's conduct, either before or after the officer confronted them, "negate[d]" the officer's suspicion or "dispel[led]" the officer's reasonable belief that criminal activity was afoot).

The Court has carefully guarded the requirement that suspicion be determined through a totality analysis of the issue. When a totality analysis is called for under the Fourth Amendment, the Court *requires* a case-by-case determination of the facts and circumstances relevant to that issue, and has rejected the use of a "blanket exception" that dispensed with the trial court's totality consideration of suspicion. *See Richards v. Wisconsin*, 520 U.S. 385, 392, 394 (1997) (requiring a case-by-case determination of whether reasonable suspicion exists to dispense with the Fourth Amendment's knock-and-announce requirement in felony drug cases).

Richards stressed the importance of the totality analysis, explaining that "*it is the duty of a court* confronted with the question" to conduct a case-by-case determination of whether reasonable suspicion exists for officers to proceed with a no-knock entry – even though the Court agreed that grounds for dispensing with knock and announce would "*frequently*" be present in felony drug cases. *Id.* at 394 (emphasis added). *Richards* therefore chose to maintain the integrity of the totality analysis, even at a cost to judicial efficiency. Two reasons for this protective treatment appear in the cases. First, a probable-cause determination is inextricably linked to the totality analysis that reveals it, such that limiting the analysis risks redefining probable cause itself. *See Arvizu*, 534 U.S. at 275 (explaining that the lower court's "methodology", *id.* at 268, in "delimit[ing]" consideration of certain factors in a totality analysis

of reasonable suspicion risked "seriously undercut[ting] the totality of the circumstances principle which governs the existence *vel non* of reasonable suspicion.") (internal quotation marks omitted).

Second, creating an exception to the totality analysis in one case opens the door to further inroads on this foundational legal principle in others. As the Court explained in rejecting a "firearm exception" to the totality analysis under *Terry*, "the reasons for creating an exception in one category of Fourth Amendment cases can, relatively easily, be applied to others, thus allowing the exception to swallow the rule." *Florida v. J.L.*, 529 U.S. 266, 273 (2000) (*quoting Richards*, 520 U.S. at 393-94) (internal quotation marks and brackets omitted). Therefore, the Court has been wary of limitations on a trial court's authority to conduct a totality analysis of suspicion, and has rejected such limitations regardless of whether it was framed as a "rule", *Richards*, 520 U.S. at 393, an "exception", *J.L.*, 529 U.S. at 273, or a "delimit[ed] . . . consideration", *Arvizu*, 534 U.S. at 275.

B. The State's "Credentials Alone" Canine-Reliability Test Violates the Fourth Amendment Because It Isolates Individual Factors For Trial Court Consideration – Training or Certification – and Limits Trial Courts From Considering Other Probative Factors – i.e., Field-Performance Records – Which Is Contrary To the Totality-of-the-Circumstances Analysis Required To Establish Probable Cause

Although the State was careful to avoid characterizing its "credentials alone" canine-reliability test as an exception to the totality-of-the-circumstances analysis, there can be no doubt but that it is. The State's position was clear that a drug-detection dog's reliability for contraband detection must be "deemed conclusive" on the basis of the dog's training or certification alone.[5] Pet'r Br., at 32; *see also id.* at 22, 24. The State's proposed limitation would force courts to

[5] Although the State left open a basis for rebutting this conclusion – limiting rebuttal to those drug-detection dogs that received their certification from so-called "sham" certifying organizations, *see* Pet'r Br., at 24, 33 n.7 – these grounds are extraordinarily narrow and likely unprovable. *See infra*, at 24-25. In practical terms, the State's canine-reliability limitation is therefore an *exception* to the required totality analysis. Even if one were instead to style the State's limitation as a "presumption," it is a conclusive presumption (with respect to any canine-reliability argument other than the dog's certification by a "sham" organization) – which, again, amounts to an exception. Because the State's canine-reliability test operates as an exception to the totality analysis, it has been treated as such here.

make probable-cause determinations based solely on evidence the State believes is helpful to its case (evidence of training or certification), without hearing the other side – facts or circumstances that, when viewed in their totality, may call into question a particular dog's reliability for contraband detection in the field.[6]

Despite the State's recognition that a totality-of-the-circumstances assessment is the applicable legal analysis, *see* Pet'r Br., at 13, 14, the State remained silent on how its "credentials alone" canine-reliability test can be reconciled with the very totality analysis that the State admitted must control.[7] The State cannot use its burden of proof as cover for foreclosing the required totality analysis, especially where the State's rigid evidentiary limitation directly contradicts *Gates*'s assurance that trial courts retain discretion to examine the reliability of the information on which those courts base their probable-cause determinations. *See Gates*, 462 U.S. at 240 ("[U]nder our

[6] While the State's "credentials alone" standard would seemingly allow trial courts to consider *other* facts associated with the vehicle-search (aside from the drug-detection dog's reliability), probable cause to conduct a warrantless vehicle-search is based in most cases on a drug-detection dog's positive alert to the vehicle. Therefore, probable cause in most warrantless vehicle-search cases, for all intents and purposes, collapses into a canine-reliability determination.

[7] The United States avoided mention of the totality-of-the-circumstances analysis altogether in its *amicus* brief. *See generally* Br. for the U.S. as *Amicus Curiae* Supp. Pet'r [hereinafter U.S. Br.].

opinion magistrates *remain perfectly free* to exact such assurances as they deem necessary, as well as those required by this opinion, in making probable-cause determinations.") (emphasis added). The Florida Supreme Court's thorough explanation of the additional, probative canine-reliability evidence that that court "deem[ed] necessary", *see id.*, to perform a totality analysis of probable cause was reasonable based on the particularized circumstances in Florida.

The State's "credentials alone" canine-reliability test is based on an overgeneralized assertion – that *all* trained or certified drug-detection dogs are reliable in the field, and that therefore, a totality analysis of canine reliability is unnecessary. First, the premise behind this overgeneralized claim is inaccurate, both scientifically and intuitively (measured from a "common-sense" perspective, such as *Gates* reminded courts to apply, *see Gates*, 462 U.S. at 238). Part I.C., *infra*, considers applicable scientific studies and detector dog-industry literature that demonstrate the reasonableness of the Florida Supreme Court's request for additional, probative canine-reliability information.

Second, the State's overgeneralized assertion mistakenly assumes that an exception to the totality analysis need only be supported by the same fair-probability burden of proof that is required to establish probable cause. The Court has been clear that an exception to the totality analysis must be

supported by much more. In *Richards*, for example, the Court considered whether an exception to a totality analysis of suspicion in felony drug cases – one that would allow officers to dispense with the Fourth Amendment's knock-and-announce requirement – was supportable. *See Richards*, 520 U.S. at 391-92. In considering the exception, *Richards* recognized that grounds for officers to proceed on a no-knock basis – danger to the officer or danger that evidence will be destroyed – would "frequently" be present in felony drug investigations. *Id.* at 394.

Even though "frequent[ ]" circumstances could arguably describe a fair-probability occurrence, *Richards* made no attempt to base its analysis on the frequency with which grounds to dispense with knock and announce might occur. Instead, *Richards* required a case-by-case determination of suspicion because the proposed exception "contain[ed] considerable overgeneralization" – in that danger necessitating a no-knock entry is not present in *every* felony drug case. *Id.* at 393 (expressing the additional concern that exceptions to a case-by-case determination of suspicion could "relatively easily" be extended to other dangerous crimes, *see id.* at 394). Therefore, supporting the State's proposed exception to the totality analysis with the State's fair-probability burden of proof is a red herring. The State's limitation on canine-reliability evidence must instead be examined for overgeneralization. *See id.* at 393. As discussed in Part I.C., *infra*, the State's premise – that an exception

to a case-by-case determination of canine-reliability is proper because *all* trained or certified drug-detection dogs are reliable – contains "considerable overgeneralization." *See id.* Even assuming *arguendo* that trained or certified drug-detection dogs are "frequently" reliable, it is simply hyperbole to suggest that trained or certified dogs are reliable in the field "*in each case*". *See id.* at 394 (emphasis added).

Additionally, the State compounds the rigidity of its canine-reliability safe-harbors with the troubling proposition that trial courts should simply accede to law-enforcement determinations of canine reliability.[8] The State's view is problematic because it removes the trial court as a neutral and detached check on law-enforcement decision-making[9] regarding an investigative technique that lacks the clear standards and national accreditation associated with, for example, blood testing performed by a nationally-accredited

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[8] *See* Pet'r Br., at 24 ("The canine professionals – including K-9 officers – that train or certify dogs are in a far better position than the courts to determine the legitimacy of such training or certification."); *see also id.* at 22-23.

[9] *See*, *e.g.*, *Terry*, 392 U.S. at 21 ("The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge. . . ."); *see also Richards*, 520 U.S. at 394 ("[T]he fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to [knock and announce] in a particular case.").

laboratory, and which is subject to documented vulnerabilities in implementation[10] that could skew the probable-cause determination in a given case. A trial court's review of an officer's decision to conduct a warrantless vehicle-search becomes a mere formality if the trial court is prohibited from considering additional probative canine-reliability information.

The State of Florida Would Impose a "Certainty" Burden of Proof On Other Canine-Reliability Evidence: Although the State applies a fair-probability burden in its own case, the State mistakenly requires "certainty" that other canine-reliability evidence – i.e., field-performance records – would change the outcome of the "credentials alone" canine-reliability determination before that additional information could be considered. *See*, *e.g.*, Pet'r Br., at 25-26 ("Field performance records are not necessary. . . . [because] [f]ield activity reports are by no means the full measure – nor even the most meaningful gauge – of a dog's reliability."); *see also* U.S. Br., at 15 ("[T]he only way to evaluate the dog's reliability is in a controlled setting where it can be definitely determined whether or not the dog's alert occurred in the presence of such an odor [the odor of drugs].").

In application, the State's canine-reliability limitation would function as a prosecution-oriented variant of the "divide-and-conquer" analysis that the

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[10] *See infra*, at 23-34.

Court rejected in *Arvizu*. *See* 534 U.S. at 274. There, the lower court erred when it isolated each of the facts that led to a border patrol agent's *Terry*-stop of a vehicle and excluded from consideration any fact that, taken alone, the court believed was explainable and therefore not suspicious. *Id.* at 272-73. In rejecting the lower court's "methodology", *id.* at 268, *Arvizu* refused to require the government to prove that each factor, in isolation, was suspicious, or that any particular factor was determinative of suspicion before the trial court could consider it in a totality analysis. *See id.* at 277 ("Undoubtedly, each of these factors alone is susceptible to innocent explanation, and some factors are more probative than others.").

In this new variant of *Arvizu*, the State "divide[s]" by assigning a certainty burden of proof to the evidence the State opposes for consideration in the totality analysis, while reserving for the State the more modest fair-probability burden for its "credentials alone" canine-reliability test. *Cf.* 534 U.S. at 274. By assigning what is close to an impossible burden of proof, the "conquer[ing]" becomes a foregone conclusion once the "divid[ing]" has been done. *Cf. id*. The State cannot have it both ways. Although the probative value of canine-reliability evidence will vary from case-to-case, the Court has never required that probative evidence be proven to a certainty before trial courts may consider it in a totality analysis of suspicion. *See id.* at 277.

A totality analysis requires trial courts to consider the facts and circumstances in their totality (both

pro and con) in determining whether a fair probability of criminal activity exists. *See Terry*, 392 U.S. at 28. Isolating factors and limiting trial courts to consideration of only those factors (to the exclusion of other probative evidence) is incompatible with a totality analysis of probable cause.

C. Under the Circumstances, the Florida Supreme Court's Request For Additional Probative Canine-Reliability Information For Consideration In a Totality Analysis of Probable Cause Was Reasonable

The State's "credentials alone" canine-reliability test is based on an overgeneralized assertion – that *all* trained or certified drug-detection dogs are reliable in the field. Rather than certainty that other canine-reliability information – i.e., field-performance records – would change the outcome of a "credentials alone" reliability determination, instead, the Florida Supreme Court's request for additional probative canine-reliability evidence must be reasonable. Under the particularized circumstances presented in Florida, the Florida Supreme Court's request for additional information was reasonable.

1. Differences in Canine Drug-Detection Training and Certification Support the Reasonableness of the Florida Supreme Court's Case-by-Case Reliability Determination

A simple recital that a drug-detection dog is "certified" does not *on its own* establish the dog's reliability for contraband detection in the field. Training and certification standards vary widely between private vendors that certify drug-detection dogs. *Matheson v. State*, 870 So.2d 8, 14 (Fla. Ct. App. 2 Dist. 2003) (comparing government and private certification differences). For instance, some agencies require 100% accuracy, while others only 70% accuracy. *See*, *e.g.*, United States Police Canine Assoc., Inc., *Certification Rules and Regulations* 17 (2012) (certifying drug-detection dogs scoring 140 out of 200, which is 70%) [hereinafter USPCA Rules], *available at* http://www.uspcak9.com/certification/USPCARulebook2012.pdf (last visited Aug. 27, 2012); *compare also* National Police Canine Assoc., *Standards for Training & Certifications Manual* 6 (2011) (certifying drug-detection dogs that find three of four "hides", which is 75%) [hereinafter NPCA Standards], *available at* http://www.npca.net/Files/Standards/Standards.pdf *with* North American Police Working Dog Assoc., *Bylaws and Certification Rules* 22 (2011) (certifying drug-detection dogs that find eleven of twelve "hides", which is 92%) [hereinafter NAPWDA Bylaws], *available at* http://www.napwda.com/uploads/bylaws-cert-rules.pdf (last visited Aug. 27, 2012). Thus, even were these divergent, canine-certification standards to be considered from a "best practices"

standpoint – rather than simply comparing them for uniformity – some private vendors' standards are better, sometimes much better, than others.

In addition to disagreement regarding certification standards, vast differences in the various agencies's methodology abound, including (1) the length of pre-certification training, *see Matheson*, 870 So.2d at 14 (describing that some training and certification sessions take twelve weeks, but others last only thirty days); (2) the length of time that must pass before a non-qualifying drug-detection team can try again to obtain certification, *compare* NPCA Standards, *supra*, at 6 (2011) (five days) *with* National Narcotic Detector Dog Assoc., *Narcotic Detection Standards* 1, 2 (2008) [hereinafter NNDDA Detection], *available at* http://www.nndda.org/official-docs/doc_view/2-narcotics-detection-standard?tmpl=component&format=raw (thirty days); and (3) the amount of contraband that the drug-detection dog is trained to locate, *compare* NAPWDA Bylaws, *supra*, at 22 (2011) ("The amount of narcotic substance used for testing will not be less than one (1) gram") *with* NNDDA Detection, *supra*, at *id.* (minimum amount of cocaine is ten grams).

If the differences between the various certification standards and methodologies were not enough to support the Florida Supreme Court's request for explanatory information, then perhaps a *similarity* between certifying agencies will carry the day. Certifications are given to canine drug-detection *teams* – which consist of the specific human officer who obtained the certification (thus, not simply a generic human handler) and the individual drug-detection dog.

NNDDA Detection, *supra*, at 1 (certifying canine teams); NPCA Standards, *supra*, at 6 (certifying "K-9 Teams"); USPCA Rules, *supra*, at 13 ("The certification is for the team – handler and dog. If the dog has multiple handlers, each handler has to certify as a team with the dog."). Importantly, when a drug-detection dog receives a new human handler, the team's certification *lapses*. *See*, *e.g.*, NAPWDA Bylaws, *supra*, at 23 ("If the dog changes handlers, a new team exists and the team will need to be certified.").

Certification of drug-detection *teams*, not simply *dogs*, represents the gold standard for canine drug-detection. It is apparently one of the few things about which the industry is in agreement. *See*, *e.g.*, U.S. Dep't of the Army, Field Manual No. 3-19.17, *Military Working Dogs* ¶ 2-35, at 2-7 (2005) ("Certification of an MWD [Military Working Dog] and handler is valid for one year and is immediately nullified when . . . [t]he dog is assigned to another handler."). Yet, in this case, Aldo and Aldo's human handler were *never* certified together as a team. *See* Resp't Br., at 1-2, 11, 43. In fact, even Aldo's certification *with his prior handler* had expired months earlier. *Id*. at 1-2. Thus, based on the industry's own standards, the sniff conducted in this case required further information and explanation concerning the detection dog's reliability for contraband detection in the field.

Certification By a "Sham" Organization: The State left open a possible rebuttal argument if the drug-detection dog was certified by a so-called "sham" certifying organization. *See* Pet'r Br., at 24, 33 n.7. The State provided no indication as to what a "sham"

certification might mean, nor did the case that the State cited for this proposition. *See id.* at 24, 33 n.7 (*citing United States v. Ludwig*, 641 F.3d 1242, 1251 (10th Cir. 2011). In looking to the word itself for meaning, "sham" is defined as "counterfeit," Webster's New Dictionary 478 (2001), which therefore seemingly limits a defendant's rebuttal to organizations that are false-fronts for certification puppy-mills. By creating such a narrowly-drawn opportunity for rebuttal, the State ensures that the circumstances of a detection dog's training or certification will *never* be examined (since one must assume that the purchasing police group acted in good faith, and was therefore unaware that the certifying organization from which it purchased the dog was a sham).

2. Drug-Detection Dogs Are Trained To Alert To Volatile Molecules and Compounds That Are Not Unique To Contraband

While the State quoted literary sources that touted the *power* of a dog's nose, Pet'r Br., at 16-19, the more relevant literature – scientific studies that examine the specific odors to which drug-detection dogs alert – prove that drug-detection dogs alert to specific, volatile molecules or compounds that are themselves in no way illegal. Brief of *Amici Curiae* Fourth Amendment Scholars in Support of Respondent, at 18-30, *Florida v. Jardines, cert. granted*, 132 S. Ct. 995 (No. 11-564) (Jan. 6, 2012), 2012 WL 2641847 [hereinafter *Jardines* Scholars Br.]. Rather than detecting the contraband itself, instead, a

drug-detection dog reacts to specific noncontraband substances, which enables police to *infer* that contraband is *also* present. The police inferencing on which the canine-sniff technique relies is what produces the issue of the individual detection dog's reliability for contraband detection. Therefore, because drug-detection dogs alert to noncontraband molecules and compounds, rather than the drugs themselves, it is essential to determine whether detection dogs may mistakenly alert to lawful items that contain those same volatile substances, and if so, how often.

With cocaine, for example, research shows that drug-detection dogs alert to the volatile molecule, methyl benzoate – a breakdown product of cocaine – rather than cocaine itself. *See id.* at 19-20 (setting out scientific studies). Methyl benzoate is a sweet-smelling molecule that is a commonly-used ingredient in the perfume industry. *See id.* at 24. In order to evaluate meaningfully whether drug-detection dogs can be induced to alert to a *bottle* of perfume, or a *bottle* of other personal-use products that often contains methyl benzoate, further scientific research is essential, *see id.* at 24 n.14, notwithstanding the State's assertion in its *Jardines* Reply Brief that this issue has been laid to rest. Reply Brief for the State of Florida, at 6, *Florida v. Jardines*, *cert. granted*, 132 S. Ct. 995 (No. 11-564) (Jan. 6, 2012), 2012 WL 3132158 [hereinafter *Jardines* Pet'r Reply Br.].

In its *Jardines* Reply Brief, the State referenced a currency-contamination study, a review of which reveals only the most limited consideration of perfume. *See id.* at 6 (*citing* Kenneth G. Furton, et al.,

Identification of Odor Signature Chemicals in Cocaine Using Solid Phase Microextraction-Gas Chromatography and Detector-Dog Response to Isolated Compounds Spiked on U.S. Paper Currency, 40 J. Chromatographic Sci. 147 (2002) [hereinafter Furton]). In the cited study, only *two* drug-detection dogs were exposed to a *single* methyl benzoate-containing perfume sample, and additionally, the study failed to disclose the volume of perfume to which the two dogs were exposed. *See id.* at 153, Table IV (Table IV reflects that, for every other substance to which the drug-detection dogs were exposed, the amount of that substance – aside from the perfume sample – was documented, *see id.*); *see also id.* at 154 (one methyl benzoate-containing perfume sample was used in the field test).

Without knowing whether the two dogs used in the field test were exposed to a spritz of perfume, or instead a more substantial volume – like a bottle – it is difficult to draw any conclusion (both because of the limited number of detection dogs tested as well as the failure to establish the volume of the perfume sample used). In fact, even the study's authors described this portion of the study as "limited field tests", *see id.* at 155, although the State nevertheless interpreted this limited study to be determinative of the issue. *See Jardines* Pet'r Reply Br., at 6. The dearth of scientific study that considers whether drug-detection dogs can differentiate between cocaine and more-substantial sources of methyl benzoate, such as a bottle of perfume, is especially concerning because detection dogs may be trained, or have their field-training reinforced, using methyl benzoate-training

devices, not real cocaine. *See Jardines* Scholars Br., at 21, 21 n.11, 21 n.12; *see also id.* at 28-29. The concern that drug-detection dogs may alert to more substantial sources of methyl benzoate, like a bottle of perfume, is much more than hypothetical. *Cf., e.g.*, *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 474 (5th Cir. 1982) (false-positive canine alert; student had a bottle of perfume in her purse).

3. Canine Alerts To So-Called Residual Odors Support the Reasonableness of the Florida Supreme Court's Case-By-Case Reliability Determination

In *Harris*, the Florida Supreme Court expressed concern that drug-detection dogs may alert to residual odors, meaning that detection dogs may alert even though no contraband is actually present at the time law enforcement conducted the sniff. *Harris*, 71 So.3d at 769. Interestingly, residual-odor arguments have been used by law enforcement in two very different ways: (1) to seize currency, based upon the money's connection to drug-trafficking, and (2) as an explanation for what would otherwise be a false-positive canine alert in the field. In civil forfeiture proceedings, the government relies on the *rapid* evaporation rate of methyl benzoate (120 minutes) as a basis to seize currency, *see, e.g.*, *United States v. Funds in the Amount of $30,607*, 403 F.3d 448, 458 (7th Cir. 2005), thus making the rapid evaporation of the alert-producing molecule the *sword* the government uses to seize currency. On the other hand, in more traditional canine sniffs (i.e., vehicle-sniffs) canine-handlers

routinely testify that drug-detection dogs can alert to odors for as much as seventy-two hours, *see*, *e.g.*, *State v. Cabral*, 859 A.2d 285, 300 (Md. Ct. Spec. App. 2004), making the extended period over which the volatile odors supposedly persist the *shield* that explains a positive canine-alert in the field when no drugs are found. The theories behind these two arguments are in tension with one another, and require further scientific study to determine whether both are, in fact, scientifically supportable.

As a defense in civil forfeiture proceedings, defendants argued a "currency contamination theory" – that a large percentage of United States currency is contaminated with cocaine, and is therefore capable of producing a positive canine alert even if the money had not recently been in contact with cocaine. *See*, *e.g.*, *Caballes*, 543 U.S. at 411-12 (Souter, J., dissenting) (discussing "judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine."). The government's rebuttal to the currency-contamination defense relied on scientific research that established that drug-detection dogs alert to methyl benzoate, a breakdown product of cocaine, not to cocaine itself. *See* Furton, *supra*, at 155 ("[T]his study . . . confirm[s] that drug detector dogs alert to the common cocaine byproduct methyl benzoate rather than to the cocaine itself."). Based on methyl benzoate's high volatility, or rapid evaporation rate, a positive canine alert to currency established that the

money had recently been in contact with cocaine, making the currency seizable in a civil forfeiture proceeding. *See, e.g.*, *Funds in the Amount of $30,607*, 403 F.3d at 458.

Yet, law enforcement contends that the dissipation rate of residual odors is much slower when justifying a vehicle-sniff. *Harris*, 71 So.3d at 774. For instance, in *Cabral* the handler testified that residual odors – in that case heroin – can last as long as seventy-two hours. 859 A.2d at 300. In fact, the court there concluded that the detection dog's ability to detect an odor up to seventy-two hours-old actually demonstrated the superiority of the dog's nose. *Id*. at 300 (stating that the dog's ability to detect a seventy-two hour-old odor "strengthens the argument that the dog has a superior sense of smell on which to rely to support a finding of probable cause."). *Harris* correctly questioned *Cabral*'s reasoning, stating that the residual-odor time delay may instead indicate that "a dog's inability to distinguish between residual odors and actual drugs undermines a finding of probable cause." *Harris*, 71 So.3d at 774.

4. Concerns of Handler Error and Handler Cuing Support the Reasonableness of the Florida Supreme Court's Case-By-Case Reliability Determination

The Florida Supreme Court also identified handler error and handler cuing as potential impediments to canine reliability. *Harris*, 71 So.3d at 769.

Handler error occurs when a handler erroneously interprets a drug-detection dog's ambiguous behavior in the field to be a positive alert to presence of contraband. *See id.* at 768-69. Handler cuing, on the other hand, occurs when a canine-handler either consciously or, more likely, unwittingly *induces* a drug-detection dog to alert positively in the field. *See id*. (*quoting* Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 Geo. Mason L. Rev. 1, 5 (2006)).

Handler cuing generally occurs when the canine-handler believes that contraband is present at the sniff location and through words or conduct conveys that belief to the handler's canine partner. A recent scientific study establishes that handler cuing occurs far more often than was previously realized. *See* Lisa Lit, et al., *Handler beliefs affect scent detection dog outcomes*, 14 Animal Cognition 387, 392 (2011), *available at* http://www.springerlink.com/content/j477277481125291/fulltext.pdf (last visited Aug. 25, 2012) (finding that a canine-handler's belief that contraband is present at a particular "hide" – even though researchers, in fact, had hidden no drugs at the hide – influenced whether the drug-detection dog alerted positively to the presence of contraband). The Lit study described that canine-handlers telegraph the handler's belief that contraband is present by movements or posture, such as "pointing, gazing, head nodding in the direction of a target, glancing at a target and head turns toward a target. . . ." *Id*. at 388. Lit found that "handler beliefs affect working dog outcomes, and human indication of scent location affects distribution of alerts more than dog interest in a particular location." *Id*. at 393.

The Lit study was the object of considerable criticism by law enforcement agencies, private vendors, and affiliated associations, such as the Scientific Working Group on Dog and Orthogonal Detector Guidelines ("SWGDOG"). *See SWGDOG Membership Commentary on 'Handler beliefs affect scent detection dog outcomes" by L. Lit, J.B. Schweitzer and A.M. Oberbauer* (2011), *available at* http://casgroup.fiu.edu/news/docs/2126/1302011268_SWGDOG_Response_to_Lit_Study.pdf. SWGDOG did not deny that handler cuing exists, but instead challenged Lit's methodology.

Ironically enough, SWGDOG's criticism of the Lit study was based, in part, on Lit's failure to obtain and use in her analysis the very information regarding canine reliability that the Florida Supreme Court sought below. *See id*. at 1-2 (claiming the study was flawed because, among other things, the study "did not indicate if the canine team's training records were reviewed to determine if the teams regularly engaged in documented maintenance training . . . "; did not include details about certification or certification standards, and whether certification conformed to best practices; and did not provide sufficient information about the canine-handler's level of experience). In essence, the SWGDOG industry-group used Lit's failure to include this information as a *sword* in its attempt to discredit Lit's conclusion that handler cuing was a bigger problem than had previously been realized.

Yet, the State used this very information as a *shield* here, claiming that it is "not necessary", Pet'r

Br., at 25, in determining canine reliability for contraband detection, and that the Florida Supreme Court's request for the information was based on "faulty factual assumptions", Pet'r Br., at 26. Even without reconciling these two views – Lit, on the one hand, and SWGDOG, on the other – it is apparent that the information the Florida Supreme Court sought below is *probative* of canine reliability for contraband detection in the field. The State's argument that courts must be *prohibited* from using information such as field-performance records in determining canine reliability asks us to suspend the very "commonsense" that *Gates* cautioned was paramount in determining probable cause. *See Gates*, 462 U.S. at 238.

5. The Florida Supreme Court's Request For Additional Canine-Reliability Information Was Reasonable

Under the circumstances, the Florida Supreme Court was reasonable in rejecting the "credentials alone" limitation on canine-reliability evidence. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996) (explaining that because "resident judges" are particularly aware of local conditions, their factual inferences in a totality analysis are afforded "due weight"). The State's overgeneralized assertion – that *all* trained or certified drug-detection dogs are reliable in the field – produces an outcome-determinative assessment of a positive canine alert, and therefore probable cause, that "relax[es] the fundamental requirements of probable cause." *Cf. Wong Sun v. United States*, 371 U.S. 471,

479 (1963). Further, the State's blanket rule sets the stage to "seriously undercut" the integrity of totality-of-the-circumstances determinations more generally. *See Arvizu*, 534 U.S. at 274. By creating an exception to the required totality analysis, the State's proposed canine-reliability limitation renders the magistrate's probable-cause determination "a rubber stamp" for the officer's decision to conduct a warrantless search of a vehicle. *See Aguilar v. Texas*, 378 U.S. 108, 111 (1964).

II. The Florida Supreme Court's Request For Additional Probative Canine-Reliability Evidence Was Necessary To Ensure That the Warrant Exception For Canine Sniffs of Luggage and Vehicles Is Adequately Supported By the Technique's Accuracy Justification

Canine drug-detection sniffs of luggage and vehicles were accepted as non-searches based on the justifications for warrantless use of this investigative technique – limited intrusiveness and accuracy. *Place*, 462 U.S. at 707; *Caballes*, 543 U.S. at 409. The State relies on *Place* and *Caballes*, yet seeks a canine-reliability rule that contradicts the justifications that led the Court to create a warrant exception for canine sniffs of luggage and vehicles in the first place. The State cannot compel a canine-reliability test that so limits the trial court's consideration of the evidence that it "untether[s]" this warrant exception from the reasons that led the Court to create it. *Cf. Arizona*

v. Gant, 556 U.S. 332, 343 (2009). The justifications on which the Court relies in creating a warrant exception are not empty recitals that can later be ignored. *See id.* (refusing to extend *New York v. Belton*, 453 U.S. 454 (1981) to allow for a warrantless search of the passenger compartment of a vehicle under the search-incident-to-arrest exception to the warrant requirement after the arrestee is secured and therefore unable to access the vehicle's interior because *Belton*'s safety justification no longer supported the warrantless search).

A. The Warrant Exception For a Canine Sniff of Luggage and Vehicles Assumed the Accuracy of This Investigative Technique

Place explained that a canine sniff of luggage was not a "search" under the Fourth Amendment because (1) the sniff was "much less intrusive than a typical search" – it did not require opening the luggage, which would "expose noncontraband items that otherwise would remain hidden from public view," and (2) the information that the sniff revealed was "limited" in that it "disclosed only the presence or absence of narcotics, a contraband item." 462 U.S. 696, 707 (1983). Based on the technique's accuracy and limited intrusiveness, *Place* held that the canine sniff of luggage was not a search, and characterized the sniff as a "*sui generis*" investigative technique. *See Caballes*, 543 U.S. at 410 (Souter, J., dissenting) (observing that *Place*'s characterization of the canine sniff of luggage

as "*sui generis*" was based on the limited intrusiveness of the sniff and its accuracy).

Thereafter, *Place*'s accuracy justification formed the basis of the Court's holding in *United States v. Jacobsen*, 466 U.S. 109 (1984), which considered whether the warrantless field-testing of a white powder to determine if it was cocaine violated the Fourth Amendment when that powder was discovered by Federal Express employees and turned over to the U.S. Drug Enforcement Administration (DEA). *Id.* at 111. *Jacobsen* held that the field-testing of the white powder was not a search because the field test could reveal only whether the white powder was cocaine – of which a person lacks a legitimate expectation of privacy in its possession – but no other legitimately-private information about the powder, not even whether it was "sugar or talcum powder." *Id.* at 122, 123.

Jacobsen likened the apparently perfect or near-perfect accuracy of the chemical field-testing, *see id.* at 123 (observing that "[i]t 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. . . .") (emphasis added), to a canine drug-detection sniff of luggage. *Id.* at 124. In emphasizing the accuracy of both investigative techniques – the chemical field-testing and a canine sniff of luggage, *Jacobsen* characterized the likelihood that either technique might be wrong (and therefore reveal noncontraband items) as "much too

remote" to view the field test as a search under the Fourth Amendment. *Id.*[11]

Jacobsen further tied its holding to *Place*, explaining that *Place* "dictated" the result that the field test was not a search, *id.* at 123, because field-testing, like a canine sniff, could reveal "nothing about noncontraband items." *Id.* at 124 n.24. Therefore, in reliance on the similar accuracy of the two investigative techniques, *Jacobsen* concluded that chemical field-testing, like a canine drug-detection sniff of luggage, could reveal only the presence or absence of contraband, and accordingly, was not a search for Fourth Amendment purposes. *Id.* at 123. More recently in *Caballes*, the Court relied on both the accuracy and limited intrusiveness of the canine-sniff technique as the justifications for finding that a canine sniff of a lawfully-stopped vehicle was not a search. *See* 543 U.S. at 409 (explaining that a canine sniff of a vehicle "reveals no information other than the location of [contraband]").

Accuracy of the investigative technique was the foundation for *Jacobsen*'s non-search holding. *See Jacobsen*, 466 U.S. at 123 (observing that "virtually all" chemical testing of the white powder would have

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[11] In comparing the chemical field test at issue to *Place*'s canine sniff of luggage, *Jacobsen* considered only *Place*'s accuracy justification because the Court considered separately the intrusiveness of the DEA agent's destruction of a minute amount of the white powder in performing the chemical field test. *See id.* at 125.

come to the same result and comparing the accuracy of the chemical field test to a canine drug-detection sniff of luggage). Further, *Jacobsen*'s treatment of *Place*'s accuracy justification makes clear that the warrant exception for a canine sniff of luggage was premised on the accuracy of the canine-sniff investigative technique too. *See id.* at 124 (assuming that the likelihood a canine drug-detection sniff of luggage might reveal noncontraband was "remote").

B. The Florida Supreme Court Carried Out Its Constitutional Obligation – Ensuring That the Canine-Sniff Technique's Accuracy Justification Is Not Undermined

Contrasting the State's treatment of the canine-sniff technique in *Florida v. Jardines*, *see* Brief for the State of Florida, *Florida v. Jardines*, *cert. granted*, 132 S.Ct. 995 (No. 11-564) (Jan. 6, 2012), 2012 WL 1594294 [hereinafter *Jardines* Pet'r Br.], and in this case reveals that the State supports its arguments in these two cases using different interpretations of *Place*'s conclusion that canine drug-detection sniffs "disclose[ ] only the presence or absence of narcotics. . . ." *See Place*, 462 U.S. at 707. In the State's Merits Brief in *Jardines*, the State argued that drug-detection dogs alert only to the "presence" of contraband – meaning that contraband is actually there – and do not react to any other substances, a clear accuracy-based argument. *See, e.g.*, *Jardines* Pet'r Br., at 17 ("When a drug-detection dog alerts, he conveys only the public fact that the house contains drugs.").

In *Harris*, on the other hand, the State argues that "presence" also means that contraband was at the sniffed location at some earlier time (and thus left behind a residual odor). *See, e.g.*, Pet'r Br., at 31 ("The possibility that a dog could alert to a residual odor always exists in theory, and can never truly be eliminated."). The State therefore seeks a broad reading of *Place*'s "presence" conclusion here, but advocates a fair-reading interpretation of *Place* in *Jardines*.

At a minimum, the State's inconsistent positions regarding *Place*'s presence-of-contraband conclusion calls into question *Place*'s accuracy justification for warrantless canine sniffs. The State compounds the impact of its proposed broad reading of *Place* (that "presence" also includes residual odors) by barring courts from considering in their canine-reliability determinations the very circumstances that made the State's proposed broad reading of *Place* necessary in the first place. When a fair-probability standard for purposes of determining probable cause is applied to what can potentially be a "C" canine-student under Florida's unregulated system of canine drug-detection training and certification (some private vendors certify detection dogs that attain only a 70% accuracy rate[12]), then the technique's accuracy justification risks being undermined. The Florida Supreme Court's request for additional, probative canine-reliability evidence was necessary to ensure

[12] *See*, *e.g.*, USPCA Rules, *supra*, at 17 (requiring 70% accuracy to qualify for certification); *see also* NPCA Standards, *supra*, at 6 (requiring 75% accuracy for certification).

that the warrant exception for canine sniffs of luggage and vehicles remains "[ ]tether[ed]" to its justifications. *Cf. Gant*, 556 U.S. at 343.

CONCLUSION

For the reasons stated above, the Florida Supreme Court's decision must be affirmed.

Respectfully submitted,

LESLIE A. SHOEBOTHAM
Associate Professor of Law
Counsel of Record
LOYOLA UNIVERSITY NEW ORLEANS
COLLEGE OF LAW
7214 St. Charles Ave.
New Orleans, LA 70118
(504) 861-5683
shoeboth@loyno.edu

APPENDIX

LIST OF *AMICI CURIAE*

Janet E. Ainsworth
John D. Eshelman Professor of Law
Seattle University

Robert Batey
Professor of Law
Stetson University College of Law

Tamar R. Birckhead
Associate Professor of Law
University of North Carolina School of Law

Shawn Marie Boyne, J.D., Ph.D.
Associate Professor of Law
Indiana University
Robert H. McKinney School of Law

Sandra J. Carnahan
Professor of Law
South Texas College of Law

Leonard L. Cavise
Professor of Law
DePaul College of Law

Daniel T. Coyne
Clinical Professor of Law
IIT/Chicago-Kent College of Law

J. Amy Dillard
Associate Professor of Law
University of Baltimore School of Law

Dolores A. Donovan
Professor of Law
Director, USF Center for Law and Global Justice
University of San Francisco School of Law

Steven B. Duke
Professor of Law
Yale Law School

Ian P. Farrell
Assistant Professor of Law
University of Denver
Sturm College of Law

Bruce C. French
Professor of Law
Ohio Northern University College of Law

Patrice A. Fulcher
Associate Professor of Law
Atlanta's John Marshall Law School

Brian R. Gallini
Associate Professor of Law
University of Arkansas School of Law – Fayetteville

Thaddeus Hoffmeister
Associate Professor of Law
University of Dayton School of Law

Sandra D. Jordan
Professor of Law
Charlotte School of Law

Arthur G. LeFrancois
Professor of Law
Oklahoma City University School of Law

Richard A. Leo, Ph.D., J.D.
Associate Professor of Law
Dean's Circle Research Scholar
University of San Francisco School of Law

Arnold H. Loewy
George Killam Professor of Criminal Law
Texas Tech School of Law

Michael J. Zydney Mannheimer
Professor of Law
Salmon P. Chase College of Law
Northern Kentucky University

Lynn McDowell
Director of Clinical Programs
Florida Coastal School of Law

Colin Miller
Associate Professor of Law
University of South Carolina School of Law

Louis M. Natali, Jr.
Professor of Law
Temple University
Beasley School of Law

Ira P. Robbins
Barnard T. Welsh Scholar and
Professor of Law and Justice
American University, Washington College of Law

Amy D. Ronner
Professor of Law
St. Thomas University School of Law

Josephine Ross
Associate Professor of Law
Howard University School of Law

Albert E. Scherr
Professor of Law
University of New Hampshire School of Law

William A. Schroeder
Professor of Law
Southern Illinois University

Dru Stevenson
Hutchins Research Professor of Law
South Texas College of Law

David Swank
David Ross Boyd Professor of Law
University of Oklahoma College of Law

Rodney J. Uphoff
Elwood Thomas Missouri Endowed Professor of Law
Director, University of Missouri South African
Educational Program
University of Missouri School of Law

James Etienne Viator
Adams & Reese Distinguished Professor of Law
Loyola University New Orleans College of Law

April J. Walker
Associate Professor of Law
Thurgood Marshall School of Law
Texas Southern University