No. 11-564

In the Supreme Court of the United States

STATE OF FLORIDA, PETITIONER

v.

JOELIS JARDINES

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a trained narcotics-detection dog's sniff at the front door of a suspected grow house is a Fourth Amendment search.

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INTEREST OF THE UNITED STATES

This case presents the question whether a trained narcotics-detection dog's sniff at the front door of a suspected grow house is a Fourth Amendment search. Because United States law enforcement agencies use trained dogs to detect illegal narcotics in a variety of circumstances, and because the federal government prosecutes cases in which state authorities obtain evidence using those dogs, the Court's resolution of the question presented will affect federal criminal investigations and prosecutions.

STATEMENT

1. Detective William Pedraja of the Miami-Dade County Police Department received a "crime stoppers" tip that marijuana was being grown at respondent's resi-

dence. Pet. App. A5; J.A. 49, 76-77, 154. Based on this tip, Detective Pedraja went to the residence with other officers and initiated surveillance. Pet. App. A5; J.A. 49-50, 77, 154-155. Two Miami police officers established perimeter positions around the residence, and federal Drug Enforcement Administration (DEA) agents provided backup. Pet. App. A32.

Detective Pedraja observed that there were no vehicles in the driveway, the window blinds were closed, and there was no activity at the residence for fifteen minutes. Pet. App. A5; J.A. 49-50. These observations were consistent with the use of the residence as a "grow house" for marijuana. As Detective Pedraja later explained, persons running grow houses "don't want to be seen by neighbors" and typically have "no traffic" because "[t]hey are not selling or buying from that residence." J.A. 88-89.

After fifteen minutes of observation, Detective Pedraja approached the front door of the residence, planning to knock on the door and seek consent to enter the house. Pet. App. A5; J.A. 50. He was accompanied by a police dog, Franky, and Franky's handler, Detective Douglas Bartelt. Pet. App. A5; J.A. 50, 77, 93-94. Franky had been trained to detect marijuana, cocaine, heroin, hashish, methamphetamine, and ecstasy. J.A. 54. When Franky detects the odor of one of those substances, the dog tracks the odor to its strongest point and sits down. J.A. 54, 95-96.

Detective Bartelt placed Franky on a leash and walked the dog toward the front door of the home, with Detective Pedraja following behind. Pet. App. A5-A6; J.A. 77-78. The officers walked up the driveway and onto a walkway that led to a small porch. See J.A. 94-95. Detective Bartelt stopped at the entrance to the porch,

about six to eight feet from the front door, and allowed Franky to sniff the area. J.A. 80-81, 90, 95-96.

Franky crossed the threshold of the porch and immediately began tracking an airborne odor. J.A. 94-97. Franky then sat down at the base of the front door. Pet. App. A6; J.A. 98. Detective Bartelt signaled to Detective Pedraja that the dog had given a positive alert for narcotics, then returned to his vehicle. J.A. 81, 98-99.

At the front door, Detective Pedraja independently "smelled the scent of live marijuana" emanating from the residence. J.A. 81; see J.A. 50; Pet. App. A6. He knocked on the front door, but no one answered. J.A. 50, 82, 155. Detective Pedraja observed that the air conditioning unit at the residence had been running constantly for fifteen minutes, without cycling off. J.A. 50, 82. At grow houses, the air conditioning often runs constantly to offset the tremendous heat generated by high-intensity light bulbs. J.A. 82-83.

Based on Franky's alert and his own observations, Detective Pedraja sought a warrant to search the house. Pet. App. A6, A9. In his affidavit, Detective Pedraja detailed his substantial experience investigating indoor marijuana laboratories and listed the facts establishing probable cause that marijuana was being grown in the house. J.A. 44-56. Those facts included the crime stoppers tip; Franky's alert; Detective Pedraja's smelling marijuana at the front door; and the constant running of the air conditioner. J.A. 48-50. The affidavit also detailed Franky's training, certification, and past reliability in detecting controlled substances. J.A. 50-54. DEA agents maintained surveillance at the residence while Detective Pedraja sought the warrant. Pet. App. A38.

A judge issued the warrant. Pet. App. A6, A9. When police executed the warrant, they found numerous live

marijuana plants, as well as equipment used to grow those plants. Pet. App. A1, A9, A77. The police arrested respondent as he fled out the back door of the house during the search. *Id.* at A38-A39. Respondent confessed orally and in writing. J.A. 59.

2. Respondent was charged in Florida state court with felony drug trafficking and felony grand theft (for stealing electricity to run the grow house). See Record of Appeal 5-8. He moved to suppress the evidence obtained during the warrant-authorized search of his residence on the ground that Franky's sniff was a Fourth Amendment search requiring probable cause. J.A. 60-63. The trial court held an evidentiary hearing, where Detective Pedraja and Detective Bartelt testified. J.A. 66-152.

The trial court granted the suppression motion on the ground that the dog sniff at the front door of respondent's residence "constituted an unreasonable and illegal search." Pet. App. A137 (relying on *State* v. *Rabb*, 920 So. 2d 1175 (Fla. 4th Dist. Ct. App.), review denied, 933 So. 2d 522 (Fla.), cert. denied, 549 U.S. 1052 (2006)). The court also decided that, without Franky's alert, the remaining facts were insufficient to establish probable cause that marijuana was being grown in the house. *Id.* at A138.[1]

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[1] The court rejected the State's argument that the evidence had an independent source based on Detective Pedraja's observations at the front door, stating that those observations "only confirm[ed] what the detection dog had already revealed." Pet. App. A138 n.1. The court of appeal disagreed, *id.* at A117-A120, but the Florida Supreme Court affirmed the trial court's ruling, *id.* at A56-A58. The State did not renew this argument in its certiorari petition and it is therefore not before this Court.

3. The Florida Third District Court of Appeal reversed. Pet. App. A99-A135. That court explained that under this Court's decision in *Illinois* v. *Caballes*, 543 U.S. 405 (2005), "a dog sniff is not a search under the Fourth Amendment" because the sniff "detects only contraband" and "no one has a 'legitimate' privacy interest in contraband." Pet. App. A104-A105. The court also held that "[t]he officer and the dog were lawfully present at [respondent's] front door"; it explained that an officer "may approach a suspect's front door and knock in an attempt to talk to that suspect," and "the fact that [the officers here] approached with the dog does not change this result." *Id.* at A112-A113, A116 (citation and internal quotation marks omitted).

4. The Florida Supreme Court reversed. Pet. App. A1-A59. The court held that the dog sniff "is a substantial government intrusion into the sanctity of the home" that "constitutes a 'search' within the meaning of the Fourth Amendment" and must be justified by "an evidentiary showing" of probable cause. *Id.* at A42, A53-A54. The court recognized that this Court has held, in a variety of contexts, that a dog sniff is not a Fourth Amendment search because it is "unique, in the sense that it is minimally intrusive and is designed to detect only illicit drugs and nothing more." *Id.* at A26. But the court noted that individuals have a heightened privacy expectation in their homes, *id.* at A29-A30, and it decided that the sniff was an "intrusive procedure" because it was "the end result of a sustained and coordinated effort by various law enforcement departments"; involved "multiple police vehicles, multiple law enforcement personnel, * * * and an experienced dog handler and trained drug detection dog"; and "took place in plain view of the general public," *id.* at A39. Having con-

cluded that a dog sniff of a residence is a search, the court then held that probable cause, not reasonable suspicion, is required to justify it. *Id.* at A44-A54.

Justice Lewis concurred on the ground that an individual has a reasonable expectation of privacy in "the air and odors that may be within" a house and "may unintentionally escape" from it. Pet. App. A63.

Justice Polston dissented, explaining that "a dog sniff does not constitute a search within the meaning of the Fourth Amendment because it only reveals contraband and there is no legitimate privacy interest in contraband." Pet. App. A81. The determinative factor, Judge Polston stated, is "the very limited and unique type of intrusion involved in a dog sniff," "not whether the object sniffed is luggage, an automobile, or a home." *Id.* at A93.

SUMMARY OF ARGUMENT

The use of a trained narcotics-detection dog to sniff the front door of a suspected grow house is not a Fourth Amendment search.

A. This Court's decisions establish that a sniff by a trained drug-detection dog is not a "search." The Court has explained on several occasions, beginning with *United States* v. *Place*, 462 U.S. 696, 707 (1983), that a dog sniff is "*sui generis*" because it reveals only the presence of contraband, and not any private lawful activities. In *United States* v. *Jacobsen*, 466 U.S. 109 (1984), the Court further explained that a person lacks a legitimate privacy interest in contraband, and thus an investigatory technique that exposes only contraband, and nothing more, is not a Fourth Amendment search. The Court reiterated this principle in *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000), and *Illinois* v.

Caballes, 543 U.S. 405 (2005), where it upheld dog sniffs of vehicles. Taken together, these cases establish that a person lacks a protected privacy interest in contraband, and a dog sniff is not a search because the only thing it reveals is contraband.

B. A dog sniff for contraband narcotics does not become a "search" when it occurs outside the entrance to a home. In that instance, as with luggage or a vehicle, the sniff detects only contraband. A person does not have a right to possess contraband, even in his or her own residence. The Court's rationale in its prior dog-sniff cases therefore applies equally to a residence: because the sniff detects only contraband, it is not a search requiring individualized suspicion.

This Court made just that point in *Caballes*, when it distinguished a dog sniff from the use of a thermal imaging device outside of a home. The "[c]ritical" distinction is that the dog detects only contraband, while the thermal imager may detect lawful activity and reveal intimate details of the home. 543 U.S. at 409-410. A dog sniff is different from a thermal imager for another important reason: dogs' detection abilities have been recognized and used for centuries; they are not new, sense-enhancing devices that threaten a technological invasion of the home.

A dog sniff involves no physical invasion of the home, and thus it is not a search on a common-law trespass theory. So long as the police are in a place where they have a right to be when they use the dog, the dog sniff is permissible.

C. The Florida Supreme Court erred in holding that the dog sniff here was a search. It was undisputed that the police were lawfully at the front door when they used the dog and that the dog was trained only to detect

contraband. The Florida Supreme Court's conclusion that the dog sniff was a search misconstrued this Court's decisions and placed dispositive weight on facts not supported by the record and unrelated to the sniff itself. Moreover, the court's concerns about widespread use of drug-detection dogs are not borne out by experience. The decision of the Florida Supreme Court should be reversed.

ARGUMENT

A DOG SNIFF FOR CONTRABAND NARCOTICS AT THE FRONT DOOR OF A HOUSE IS NOT A FOURTH AMENDMENT "SEARCH"

The Fourth Amendment to the United States Constitution provides in pertinent part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Whether an investigatory technique is a "search" of a house within the meaning of the Fourth Amendment depends on two inquiries. First, it depends on whether the technique infringes a legitimate privacy interest. *United States* v. *Jacobsen*, 466 U.S. 109, 122 (1984); see *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). A person has a legitimate privacy interest if he has a subjective expectation of privacy and society recognizes that expectation as objectively reasonable. *California* v. *Greenwood*, 486 U.S. 35, 39 (1988); *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Second, a "search" occurs when the government obtains information through a "physical intrusion of a constitutionally protected area," in a manner that would constitute a "common-law trespass." *United States* v. *Jones*, 132 S. Ct. 945, 949-951 (2012)*; id.* at 955 (Sotomayor, J., concurring).

The dog sniff of respondent's residence was not a "search" under the Fourth Amendment. A person does not have a legitimate interest in possessing contraband, and a sniff by a narcotics-detection dog reveals only contraband, not protected private information. Accordingly, such a sniff is not a search. Moreover, a dog sniff at the front door of a house involves no physical intrusion into a constitutionally protected area, and thus it is not a search on a common-law trespass theory.

The fact that a dog sniff occurs outside a home does not make it a search. The determinative fact is the limited information the sniff reveals—the presence of contraband—and not where it occurs. So long as the police are in a place where they have a right to be, they may use a drug-detection dog to conduct a sniff limited to revealing the presence or absence of narcotics. The Florida Supreme Court's contrary conclusion should be reversed.[2]

A. This Court's Decisions Establish That A Sniff By A Trained Narcotics-Detection Dog Is Not A Fourth Amendment "Search"

This Court has concluded, in several different contexts, that a sniff by a police dog trained to detect only illegal narcotics is not a Fourth Amendment "search." The Court has explained that a sniff by a narcotics-de-

[2] Some police dogs are trained to detect substances other than contraband narcotics, such as explosives or weapons. See, *e.g.*, Paul B. Jennings, Jr., *Origins and History of Security and Detector Dogs*, *in* Canine Sports Medicine and Surgery 16, 18-19 (Mark S. Bloomberg et al. eds., 1998). This case does not concern the legality of those types of dog sniffs. As several Members of the Court have noted, sniffs by dogs trained to detect explosives or weapons may present different questions than sniffs by drug-detection dogs. See, *e.g.*, *Caballes*, 543 U.S. at 417 n.7 (Souter, J., dissenting); *id.* at 423-424 (Ginsburg, J., dissenting).

tection dog does not infringe protected privacy interests because the dog detects only contraband, and a person has no legitimate interest in possessing contraband.

1. The Court first addressed the legality of a canine sniff for narcotics in *United States* v. *Place*, 462 U.S. 696 (1983). In that case, after a man flying from Miami to New York aroused the suspicion of law enforcement officers, they had a narcotics-detection dog sniff his luggage. *Id.* at 698-699. Based on the dog's positive alert, the police obtained a warrant and found over one kilogram of cocaine in the luggage. *Id.* at 699. The question before the Court was whether it was permissible for the officers to detain the luggage to allow the dog sniff based on their suspicion that the luggage contained narcotics. *Id.* at 697-698. To resolve that question, the Court considered whether the dog's sniff of the luggage was a Fourth Amendment search. *Id.* at 706.

The Court held that the dog sniff "did not constitute a 'search' within the meaning of the Fourth Amendment." *Place*, 462 U.S. at 707. The Court reasoned that a "canine sniff is *sui generis*": it "discloses only the presence or absence of narcotics, a contraband item." *Ibid.* The sniff "does not require opening the luggage," and it "does not expose noncontraband items that otherwise would remain hidden from public view." *Ibid.* Thus, the Court concluded, even though "the sniff tells the authorities something about the contents of the luggage," the information obtained is so limited that it does not infringe a protected privacy interest. *Ibid.*

2. In *United States* v. *Jacobsen*, *supra*, the Court further explained its reasoning in *Place* and reiterated that an investigatory technique that reveals only the presence of contraband is not a Fourth Amendment search. The issue in *Jacobsen* was whether a chemical

field test to determine whether a substance in a package was cocaine was a search. 466 U.S. at 122. The package had been damaged in transit, revealing that it contained a white powder. *Id.* at 111-112. A federal agent performed a brief chemical test on the powder and confirmed that it was cocaine. *Id.* at 112.

The Court held that the chemical test was not a search because it did not infringe a reasonable expectation of privacy. *Jacobsen*, 466 U.S. at 122-124. The test "could disclose only one fact previously unknown to the agent—whether or not a suspicious white powder was cocaine." *Id.* at 122; see *id.* at 112 & n.1. Because "Congress has decided * * * to treat the interest in 'privately' possessing cocaine as illegitimate," the Court explained, "governmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest." *Id.* at 123.

The Court observed that *Place* "dictated" its conclusion that the chemical test was not a search. *Jacobsen*, 466 U.S. at 123. The determinative factor in *Place*, the Court noted, was that the canine sniff revealed only the presence of contraband: "[T]he *reason* [the dog sniff in *Place*] did not intrude upon any legitimate privacy interest was that the governmental conduct could reveal nothing about noncontraband items." *Id.* at 124 n.24. For both the chemical test in *Jacobsen* and the dog sniff in *Place*, the Court found that the likelihood that the technique "will actually compromise any legitimate interest in privacy" was "much too remote to characterize the [technique] as a search subject to the Fourth Amendment." *Id.* at 124.

3. In *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000), the Court applied this reasoning to a canine sniff

of a car at a drug-interdiction checkpoint. The question presented was whether police officers may stop a predetermined number of vehicles at a checkpoint, briefly converse with the occupants, and use a narcotics-detection dog to sniff the vehicles. *Id.* at 34-35. To answer that question, the Court considered whether the dog sniff was a search, independent of the seizure of the vehicles. *Id.* at 40.

The Court concluded that "walk[ing] a narcotics-detection dog around the exterior of each car" was not a search. *Edmond*, 531 U.S. at 40. The Court reiterated that the key factor was that the dog would detect only contraband. "Just as in *Place*, an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics." *Ibid.* Accordingly, although the Court concluded that the suspicionless seizures at the checkpoints were invalid, *id.* at 48, it reaffirmed that the police may conduct dog sniffs for illegal narcotics without first establishing probable cause, *id.* at 40. Every Member of the Court agreed with the conclusion that a dog sniff of a vehicle is not a search because it reveals only contraband. *Ibid.*; see *id.* at 52-53 (Rehnquist, C.J., dissenting).

4. The Court most recently reiterated that a sniff by a trained narcotics-detection dog is not a search in *Illinois* v. *Caballes*, 543 U.S. 405 (2005). The *Caballes* Court considered whether the Fourth Amendment permits police to use a narcotics-detection dog to sniff a vehicle during a valid traffic stop. *Id.* at 407. The Court concluded that use of the dog was lawful, relying on *Jacobsen*, *Place*, and *Edmond*. *Id.* at 408-409.

As in those cases, the Court reasoned that "[o]fficial conduct that does not compromise any legitimate inter-

est in privacy is not a search subject to the Fourth Amendment" and that "governmental conduct that *only* reveals the possession of contraband" is conduct that "compromises no legitimate privacy interest." *Caballes*, 543 U.S. at 408 (internal quotation marks omitted). The Court reiterated that "any interest in possessing contraband cannot be deemed 'legitimate,'" *ibid.*; a person's expectation or hope that his illegal drugs "will not come to the attention of the authorities" is not one that "society is prepared to consider reasonable," *id.* at 409 (quoting *Jacobsen*, 466 U.S. at 122). Because the use of a trained narcotics-detection dog at a traffic stop "[i]s '*sui generis*' because it 'discloses only the presence or absence of narcotics, a contraband item,'" the Court concluded, it "does not implicate legitimate privacy interests" and therefore is not a search. *Ibid.* (quoting *Place*, 462 U.S. at 707).

5. This Court's decisions establish two fundamental principles that are applicable here. First, a person does not have a legitimate expectation of privacy in the odor of contraband. In *Jacobsen*, this Court made clear that a person's "mere expectation * * * that certain facts will not come to the attention of the authorities" does not mean he has "an interest in privacy that society is prepared to recognize as reasonable." 466 U.S. at 122. Because certain drugs cannot be possessed legally, governmental conduct that reveals only whether a substance is one of those drugs "compromises no legitimate privacy interest." *Id.* at 123. The Court reaffirmed in *Caballes* that "any interest in possessing contraband cannot be deemed 'legitimate,'" 543 U.S. at 408-409, and

even those Justices who dissented in *Caballes* did not take issue with that settled principle.[3]

Second, a sniff by a trained drug-detection dog is not a "search" because the dog detects only limited information in which a person has no legitimate expectation of privacy—the presence of contraband. In each case addressing dog sniffs, the Court's primary rationale was that because the dog sniff "does not expose noncontraband items," it does not infringe a reasonable privacy expectation. *Place*, 462 U.S. at 707; see *Caballes*, 543 U.S. at 408-410; *Edmond*, 531 U.S. at 40.

The Court has noted other facts that make dog sniffs "much less intrusive than a typical search," *Place*, 462 U.S. at 707—such as their brevity, see *Jacobsen*, 466 U.S. at 125 n.28, and the fact that they do not involve any physical invasion of the item or place under investigation, see *Edmond*, 531 U.S. at 40. But the Court has made clear that the "*reason*" that a dog sniff "d[oes] not intrude upon any legitimate privacy interest [i]s that the governmental conduct could reveal nothing about noncontraband items." *Jacobsen*, 466 U.S. at 124 n.24.

B. A Dog Sniff At The Front Door Of A House Is Not A Fourth Amendment "Search" So Long As The Police Are Lawfully At That Location

A canine sniff for contraband narcotics does not become a Fourth Amendment search when it occurs out-

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[3] See *Caballes*, 543 U.S. at 416 (Souter, J., dissenting) (approving use of the chemical test in *Jacobsen* because it "would either show with certainty that a known substance was contraband or would reveal nothing more" about the powder but distinguishing a dog sniff); *id.* at 421-422 (Ginsburg, J., dissenting) ("Even if the drug sniff is not characterized as a Fourth Amendment 'search,' the sniff surely broadened the scope of the traffic-violation-related seizure." (internal citations omitted)).

side a private home. As with the other contexts the Court has considered, the determinative fact is that the dog sniff reveals only the presence of contraband. The Court made just that point in *Caballes*, when it distinguished the use of a thermal-imaging device from a dog sniff on the ground that the thermal imager could reveal intimate, private details inside the home and a dog sniff could not. Further, a dog sniff cannot be deemed a search on a common-law trespass theory, because it involves no physical invasion of a constitutionally protected area. So long as the police have a right to be at the location of the sniff, which they generally do when they approach the front door of a home, their use of a narcotics-detection dog is not a Fourth Amendment search.

1. A canine sniff for narcotics outside of a house does not infringe the resident's reasonable expectation of privacy. As with luggage or a vehicle, a dog sniff outside of a house is "much less intrusive than a typical search": it does not involve any physical entry into the house, its duration is brief, and "the information obtained is limited." *Place*, 462 U.S. at 707. The sniff is "*sui generis*" in that it "discloses only the presence or absence of narcotics, a contraband item." *Ibid.* It does not disclose whether the house is occupied, what rooms the occupants are in, or what the occupants are cooking for dinner. Cf. *Jacobsen*, 466 U.S. at 122 (chemical test "could tell [law enforcement] nothing more, not even whether the substance was sugar or talcum powder"). Even if the dog smells other odors, the only odor it is trained to communicate to police is that of contraband. "Everything" inside the home "remain[s] undetected except the narcotics, which [the occupant] ha[s] no right to possess in the first place." *United States* v. *Brock*,

417 F.3d 692, 697 (7th Cir. 2005). As this Court explained, "no other investigative procedure * * * is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure." *Place*, 462 U.S. at 707.[4]

The fact that a narcotics-detection dog sniffs a house, as opposed to a package or a vehicle, does not make the sniff a search. A person has no reasonable expectation of privacy in contraband, and the contraband does not become lawful when it is stored inside a residence. *Jacobsen*, 466 U.S. at 123 ("governmental conduct that can reveal whether a substance is cocaine, and no other arguably 'private' fact, compromises no legitimate privacy interest"). In none of its decisions addressing dog sniffs did the Court base its decision on where the contraband was stored; instead, the dispositive factor in each case was the uniquely targeted nature of this investigatory technique. *Caballes*, 543 U.S. at 408-409; *Edmond*, 531 U.S. at 40; *Place*, 462 U.S. at 707. Although several features of dog sniffs limit their intrusiveness, the Court has consistently pointed to the fact that the dog sniffs only detect contraband as the "rationale" for its holdings. *Jacobsen*, 466 U.S. at 124 n.24; see *Caballes*, 543 U.S. at 409; *Edmond*, 531 U.S. at 40; *Place*, 462 U.S. at 707. That rationale is fully applicable

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[4] The possibility that a well-trained narcotics-detection dog may alert in error does not convert a dog sniff of a house into a search. An erroneous alert does not "reveal[] any legitimate private information"; it means only that the dog has communicated wrong information about contraband. *Caballes*, 543 U.S. at 409. Although a false alert does not make the dog sniff a search, it "might affect whether a warrant issued in reliance on the dog sniff was supported by probable cause." *Brock*, 417 F.3d at 696 n.1. The dog's reliability is not at issue in this case. See note 10, *infra*.

to a dog sniff outside of a house. A dog sniff of a house for contraband narcotics therefore "does not rise to the level of a constitutionally cognizable infringement" on privacy interests. *Caballes*, 543 U.S. at 409.

2. The Court focused on the uniquely limited nature of dog sniffs in *Caballes*, when it distinguished such sniffs from the use of a thermal-imaging device. In *Kyllo* v. *United States*, 533 U.S. 27 (2001), the Court held that the use of a thermal-imaging device outside of a house to determine whether marijuana was being grown inside was a Fourth Amendment search requiring individualized suspicion. *Id.* at 29-30, 40. The Court observed that the right to be free of unreasonable government intrusions in a home is "[a]t the very core" of the Fourth Amendment, *id.* at 31 (quoting *Silverman* v. *United States*, 365 U.S. 505, 511 (1961)), and it concluded that the use of a thermal imager—"a device that is not in general public use"—to uncover "details of the home that previously have been unknowable without physical intrusion" is a Fourth Amendment search, *id.* at 40.

In *Caballes*, this Court distinguished a dog sniff from use of a thermal-imaging device on the ground that sniffs by drug-detection dogs reveal only contraband, whereas use of a thermal-imaging device could reveal private information about lawful activities. 543 U.S. at 409-410. The Court explained that its rule that a dog sniff is not a search is "entirely consistent" with *Kyllo* because of the "[c]ritical" distinction between the two investigatory techniques: a thermal-imaging device is "capable of detecting lawful activity," such as the "hour each night the lady of the house takes her daily sauna and bath," but a trained canine detects only contraband. *Ibid.* (citation and internal quotation marks omitted).

While the Court noted that the "legitimate expectation that information about perfectly lawful activity will remain private" in *Kyllo* was "categorically distinguishable" from a person's "expectations concerning the nondetection of contraband in the trunk of his car," *id.* at 410, the Court's emphasis was on the limited nature of the information obtained through a dog sniff—not on the location of the sniff.

In addition to the critical distinction noted in *Caballes*, a canine sniff is unlike the use of a thermal-imaging device in other important ways. The *Kyllo* Court focused on the fact that the thermal imager was a "sense-enhancing technology * * * not in general public use" and it expressed concern that citizens would be "at the mercy of advancing technology" if its use was allowed. 533 U.S. at 34-35; see *id.* at 40. Narcotics-detection dogs are not a new "technology," and the use of a dog to detect a particular scent is not a modern development. Dogs have long been recognized for their acute sense of smell. See, *e.g.*, *United States* v. *Broadway*, 580 F. Supp. 2d 1179, 1191 (D. Colo. 2008) (providing examples dating back to 800 B.C.); *Hodge* v. *State*, 13 So. 385, 385 (Ala. 1893) ("It is common knowledge that dogs may be trained to follow the tracks of a human being with considerable certainty and accuracy."). Before the Founding, dogs were routinely used to track thieves and murderers in England.[5] Dogs have been used by

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[5] See, *e.g.*, Samuel G. Chapman, *Police Dogs in North America* 4 (1990) ("English soldiers used tracking hounds in the 1620s to follow the trail of highwaymen who fled justice in unsettled parts of the United Kingdom."); Estelle Ross, *The Book of Noble Dogs* 40 (1922) (noting use of bloodhounds to track Robert the Bruce after he murdered John Comyn during the First War of Scottish Independence); 1 Edward Topsell, *The History of Four-Footed Beasts and Serpents and Insects*

law enforcement in the United States since at least the early 1900s,[6] and by the 1970s, federal agents had begun using narcotics-detection dogs to interdict illegal drugs.[7] Use of a police dog to detect contraband, then, does not raise the concerns about rapidly advancing technology that were present in *Kyllo*.

3. A sniff by a drug-detection dog does not physically invade a constitutionally protected area and therefore does not qualify as a "search" under the Court's "property-based" approach to the Fourth Amendment. *Jones*, 132 S. Ct. at 949-950, 951-953 & n.8. "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *United States Dist. Court*, 407 U.S. 297, 313 (1972). This Court has recognized that one way dog sniffs are limited is that they do not require entry into the item or place under investigation. See *Place*, 462 U.S. at 707; *Edmond*, 531 U.S. at 40; *Caballes*, 543 U.S. at 409; see also *Jacobsen*, 466 U.S. at 124 n.24 (dog sniff in *Place* "involved no physical invasion of Place's effects"). And unlike the field test at issue in *Jacobsen*, a dog sniff does not even minimally intrude on the

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118, 131 (1658) (reprinted 1967) (describing bloodhounds' unique ability to track thieves); J.G. Wood, *The Illustrated Natural History* 278 (1865) (explaining how "[s]heep-stealers * * * were frequently detected by the delicate nose of the Bloodhound").

[6] See Chapman 15-26 (citing a 1904 Philadelphia police program to use St. Bernards to discover unconscious victims, detect the smell of fire, and find lost children; a 1907 New Jersey patrol dog program; and twelve other similar programs in the early twentieth century); *Blair* v. *Commonwealth*, 204 S.W. 67, 68 (Ky. Ct. App. 1918) (noting use of bloodhounds to track perpetrator of a "housebreaking").

[7] See Mark Derr, *A Dog's History of America* 345 (2004); Jennings 18.

owner's possessory interests in property. See *Jacobsen*, 466 U.S. at 124-125.

Because a narcotics-detection dog does not physically invade a package, vehicle, or house, but simply sniffs the air around that item or place, it does not constitute a common-law trespass. The Court recognized as much in *Kyllo*, when it observed that visual observation of a home would not qualify as a common-law trespass, 533 U.S. at 31-32, and went on to analyze thermal imaging from outside the home under a principle that did not invoke notions of trespass, *id.* at 34. See *Jones*, 132 S. Ct. at 949-950; see also, *e.g.*, 3 William Blackstone, *Commentaries* 209 (1768). And this understanding is consistent with the Court's long recognition that the Constitution does not prohibit officers from smelling the air in areas where they are lawfully in place. See, *e.g.*, *Johnson* v. *United States*, 333 U.S. 10, 13-14 (1948) (smell of opium coming from room); *Taylor* v. *United States*, 286 U.S. 1, 6 (1932) (whisky smell coming from garage). Accordingly, although dogs have been recognized for their detection capabilities for centuries, see pp. 18-19, *supra*, nothing suggests that a mere sniff would have been treated as a trespass at the time of the Founding.

4. A canine sniff for narcotics is consistent with the Fourth Amendment's strong protection of privacy in a home. This Court long has recognized that the Fourth Amendment embodies a particular "respect for the sanctity of the home." *Payton* v. *New York*, 445 U.S. 573, 601 (1980). For that reason, the Court has held that, with limited exceptions, the police generally may not enter a home to collect evidence or arrest a suspect without a warrant supported by probable cause. See *id.* at 602-603 (arrest); *Mapp* v. *Ohio*, 367 U.S. 643, 654-655 (1961) (search); but see *Kentucky* v. *King*, 131 S. Ct.

1849, 1856 (2011) (imminent destruction of evidence); *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006) (emergency aid exception); *United States* v. *Santana*, 427 U.S. 38, 42-43 (1976) (hot pursuit); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219 (1973) (consent).

A dog sniff does not itself require entry into a home, and a positive alert does not mean the police may automatically enter the home. Rather, the ordinary rule is that police must have a warrant to enter. See *Payton*, 445 U.S. at 590. The warrant is required because even though a person lacks a reasonable expectation of privacy in contraband, he retains a legitimate privacy expectation in the "intimate details of [his] home" (*Kyllo*, 533 U.S. at 36), and the police may not interfere with that legitimate privacy expectation absent a warrant or a justification sufficient to excuse the warrant requirement.

The warrant requirement ensures a significant level of protection for the occupant of a home, because it precludes police entry unless a detached and neutral magistrate has examined the facts presented (including the dog's alert) and has found that there is probable cause to search all areas proposed by the police. See, *e.g.*, *Katz*, 389 U.S. at 356-357 (requirements that police "present their estimate of probable cause for detached scrutiny by a neutral magistrate" and "observe precise limits established in advance by [the] court order" are important Fourth Amendment "safeguards"). In that respect, a canine sniff outside of a house is different from a canine sniff of a vehicle, because although the police may search a vehicle or its containers once they have a reasonable belief that contraband is within, see, *e.g.*, *California* v. *Acevedo*, 500 U.S. 565, 569-573 (1991), they generally may not immediately search a house

based on that same belief. Although an alert by a narcotics-detection dog may lead to the search of a residence, then, that search itself must comply with the requirements of the Fourth Amendment.

5. This analysis assumes that law enforcement officers have not violated the Fourth Amendment by arriving at the location from which they use a narcotics-detection dog outside of a home. Just as a police officer may seize evidence in plain view or may seek consent to a search only when the officer is lawfully at that location, see, *e.g.*, *King,* 131 S. Ct. at 1858, so too the police only may use a narcotics-detection dog in places where they are lawfully present, see *Jacobsen*, 466 U.S. at 119-121. If the police committed a constitutionally proscribed trespass or otherwise invaded a protected privacy interest before the dog sniff, even though the dog sniff is not a search, the police action would not be valid.

It is well-settled that law enforcement officers may approach the front door of a home, knock, and attempt to obtain voluntary cooperation from the occupants. See *King*, 131 S. Ct. at 1862; *United States* v. *Gould*, 364 F.3d 578, 590 (5th Cir.) ("a 'knock and talk' police investigatory practice has clearly been recognized as legitimate"), cert. denied, 543 U.S. 955 (2004); 1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.3(c), at 574-577 (4th ed. 2004). When the police approach the front door of a home, they are "do[ing] no more than any private citizen might do." *King*, 131 S. Ct. at 1862; see, *e.g.*, *Estate of Smith* v. *Marasco*, 318 F.3d 497, 519 (3d Cir. 2003); *Ellison* v. *United States*, 206 F.2d 476, 478 (D.C. Cir. 1953); *Quintana* v. *Commonwealth*, 276 S.W.3d 753, 758 (Ky. 2008).

To reach the front door, the police may use a route customarily open to visitors. "[N]o Fourth Amendment search occurs when police officers who enter private property restrict their movements to those areas generally made accessible to visitors—such as driveways, walkways, or similar passageways." *United States* v. *Reed*, 733 F.2d 492, 501 (8th Cir. 1984). That is true for two reasons. First, use of driveways and walkways to reach the front door does not infringe the occupant's reasonable expectation of privacy because those areas are visible to the public and open to visitors. See, *e.g.*, *United States* v. *Wells*, 648 F.3d 671, 679 (6th Cir. 2011); *Lorenzana* v. *Superior Court*, 511 P.2d 33, 35 (Cal. 1973); see also *Santana*, 427 U.S. at 42 (person standing at the front door of her house "was not in an area where she had any expectation of privacy").

Second, such an entry onto private property is not a trespass because of the longstanding custom of implied consent to such visitors. See *United States* v. *Lakoskey*, 462 F.3d 965, 973 (8th Cir. 2006) ("The absence of a closed or blocked gate in this country creates an invitation to the public that a person can lawfully enter along the driveway during daylight hours to contact the occupants for a lawful request." (citation and internal quotation marks omitted)), cert. denied, 549 U.S. 1259 (2007); see also, *e.g.*, Joel Prentiss Bishop, *Commentaries on the Non-Contract Law* § 823 (1889); Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* 303 (1880).[8]

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[8] This view is consistent with the Court's explanation that the Fourth Amendment protects not only a home but the curtilage surrounding a home, and "the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself." *United States* v.

These principles apply to police officers just as they apply to "mail carriers, sanitation workers, neighbors, and Girl Scouts." *Wells*, 648 F.3d at 679. The analysis may be different if the police entered an area of the property that is not typically open to visitors, or the occupant took steps to bar all visitors from the property. But in the ordinary case, the police may approach the front door of a home, and when they do, they may bring a police dog with them because the dog's sniffing is not a search.

C. The Florida Supreme Court Erred In Concluding That The Dog Sniff In This Case Was A Search

The Florida Supreme Court erred in suppressing all of the evidence obtained from the warrant search of respondent's residence. The dog sniff here occurred in a place where the police were lawfully present; the sniff itself was not a search; nothing about the circumstances surrounding the sniff made it a search; and the Florida Supreme Court's concerns about the widespread use of drug-sniffing dogs lack foundation.[9]

Dunn, 480 U.S. 294, 300 (1987). Although the assessment of the extent of the curtilage is a fact-specific inquiry, the area outside a front door, and a walkway or driveway leading to the front door, may be considered outside the curtilage. See *Wells*, 648 F.3d at 675 & n.4; *United States* v. *Brown*, 510 F.3d 57, 65 (1st Cir. 2007); *Lakoskey*, 462 F.3d at 973; *United States* v. *French*, 291 F.3d 945, 954-955 (7th Cir. 2002). Whether these areas are treated as curtilage or not, the relevant point is that they are customarily open to visitors and therefore may be used by the police as well.

[9] The Florida Supreme Court also held that, assuming a dog sniff is a search, probable cause is the level of individualized suspicion required. See Pet. App. A44-A54. The State did not seek review of that holding in its certiorari petition, and it is therefore not at issue here.

1. The brief sniff by a drug-detection dog at respondent's front door was not a Fourth Amendment search. It was undisputed here that the two police officers and the dog were lawfully in place when the sniff occurred. Pet. App. A31; *id.* at A75 (Polston, J., dissenting). The officers and the police dog approached the front door of respondent's residence using the typical route from the street, through the driveway and up the walkway to the front door. See J.A. 94. This area was visible from the street, see J.A. 49-50, and no evidence indicated that respondent had taken any measures to restrict access to the front door. The courts below agreed that "the officer[s] had every right to walk to [respondent's] front door." Pet. App. A112; see *id.* at A31 (citing *State* v. *Morsman*, 394 So. 2d 408, 409 (Fla. 1981) ("Under Florida law it is clear that one does not harbor an expectation of privacy on a front porch.")).

Once the officers were present at respondent's front door, it was permissible for them to allow the police dog to sniff the area. The police dog here had been trained to alert only to the presence of certain illegal drugs. J.A. 54.[10] Because the dog was trained to reveal only the presence of contraband and not any other information about happenings inside of the house, and because the dog did not enter the house, its use was not a Fourth Amendment search. After the dog alerted, the police then proceeded in a reasonable way, with one officer obtaining a search warrant while others secured the scene. J.A. 44-56; Pet. App. A38.

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[10] This Court granted certiorari in *Florida* v. *Harris*, No. 11-817 (cert. granted Mar. 26, 2012), to consider whether an alert by a well-trained narcotics-detection dog is sufficient to establish probable cause for a search of a vehicle. Neither respondent nor any of the courts below has questioned the dog's training or reliability in this case.

2. The Florida Supreme Court cited several factors in support of its conclusion that the dog sniff here was a search. First, that court reasoned that a person's reasonable expectation of privacy is greatest in his home. Pet. App. A29-A31. That is true, but it does not answer the question here. "[T]he Fourth Amendment protects people, not places," *Katz*, 389 U.S. at 351; the relevant question is not whether a person has a reasonable expectation of privacy in his home generally, but whether he has a reasonable expectation as against an investigatory technique that detects only contraband. As this Court has explained, because a dog search "does not expose noncontraband items that otherwise would remain hidden from public view," it "does not rise to the level of" a Fourth Amendment search. *Caballes*, 543 U.S. at 409 (citation and internal quotation marks omitted).

The Florida Supreme Court found this reasoning "inapplicable" to dog sniffs outside of homes because this Court's dog-sniff decisions only involved luggage and vehicles. Pet. App. A26-A27. But this Court did not "limit its reasoning regarding dog[] sniffs to locations or objects unrelated to the home." *Id.* at A93 (Polston, J., dissenting); see pp. 15-18, *supra*. To the extent the Florida Supreme Court relied on *Kyllo*, that reliance was misplaced, because this Court has distinguished use of a thermal-imaging device from a dog sniff on the ground that the former "was capable of detecting lawful activity" ("intimate details in a home") and the latter could only detect "contraband." *Caballes*, 543 U.S. at 409-410.

The Florida Supreme Court also characterized the dog sniff as "an intrusive procedure." Pet. App. A39, A41. But the drug-detection dog here was trained only

to detect six types of illegal drugs, J.A. 54, and for that reason, the sniff was no more intrusive on legitimate privacy interests than those at issue in *Place*, *Edmond*, and *Caballes*. The Florida Supreme Court attempted to distinguish this case on the ground that a dog sniff of a home "does not *only* reveal the presence of contraband." Pet. App. A41. But the court did not find that the dog detected any substance other than contraband narcotics.

3. The Florida Supreme Court based its decision in part on its belief that a dog sniff of a residence involves a "public spectacle" that "will invariably entail a degree of public opprobrium, humiliation and embarrassment for the resident." Pet. App. A39-A40. The court noted that the dog sniff was "the end result of a sustained and coordinated effort by various law enforcement departments," that it "involved multiple police vehicles, multiple law enforcement personnel, including narcotics detectives and other officers." *Id.* at A39.[11]

These factors identified by the Florida Supreme Court, even if they were fully supported by the record,[12]

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[11] The State sought certiorari on the separate question whether the officers' conduct during the investigation was itself a search, Pet. i, and this Court did not grant review on that question. Because the Florida Supreme Court appeared to base its holding that the dog sniff was a search in part on its view of the officers' conduct, we address that factor briefly here.

[12] There is good reason to doubt these factual conclusions. See Pet. App. A94-A95 (Polston, J., dissenting). The trial court did not make factual findings on the number of officers present on the scene, the effect the dog sniff had on respondent, or whether there was any type of "public spectacle." See *id.* at A136-A138. The evidence at the suppression hearing established only that two officers and the dog approached the front door and that, after the dog alerted, the dog's handler and the dog left and the other officer went to seek a search warrant.

would not transform the dog sniff here into a search. Whether the dog sniff was preceded by a "sustained and coordinated" investigation (see Pet. App. A3, A39) does not change the nature of the sniff. Nor is it significant whether multiple officers were present in the area of respondent's residence, or whether neighbors might have seen the officers and the dog arrive. Although police may violate the Fourth Amendment by conducting a search in an unreasonable manner, see, *e.g.*, *Wilson* v. *Layne*, 526 U.S. 603, 610-612 (1999), that is a different question from whether a Fourth Amendment search occurred in the first place. The dog sniff here was no different in its execution from those in *Place*, *Edmond*, and *Caballes*; all of those dog sniffs involved law enforcement activity by multiple officers. See Pet. App. A94 (Polston, J., dissenting). Indeed, this Court has long recognized that dog sniffs are "much less intrusive" in their manner than typical searches, because they are brief in duration, do not require physical entry, and reveal only limited information. *Place*, 462 U.S. at 707 (finding "no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure").

Finally, the Florida Supreme Court incorrectly focused on events that transpired after the dog sniff, Pet. App. A39, both because those events did not change the nature of the sniff, and because none of those events

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J.A. 77-78, 83, 94-95. Other evidence not introduced at the suppression hearing showed that the two officers were accompanied by DEA agents and three other local police officers and that some of those officers remained on the scene when the lead officer left to obtain a search warrant. Dep. of Detective Pedraja 6-7, 20 (May 30, 2007) (F06-040839 Docket entry No. 70, 11th Judicial Cir., Miami-Dade County).

violated any constitutional protection. It was preferable that the police seek a search warrant rather than immediately attempt to enter the home, see, *e.g.*, *Payton*, 445 U.S. at 602-603, and it is permissible for officers to secure the premises to maintain the status quo while obtaining a warrant, see, *e.g.*, *Segura* v. *United States*, 468 U.S. 796, 798 (1984).

4. The Florida Supreme Court's suggestion that canine sniffs are uniquely "susceptible to being employed in a discriminatory manner" (Pet. App. A29, A41-A42) lacks foundation. The court provided no reason to believe that police would conduct arbitrary or discriminatory dog sniffs of residences as opposed to vehicles and luggage, and there are independent constitutional protections against such practices. See U.S. Const. Amend. V, XIV (equal protection). Further, experience does not suggest that police will conduct widespread, suspicionless dog sniffs in residential neighborhoods. That concern was first raised by the dissenting Justices in *Jacobsen*, see 466 U.S. at 138 (Brennan, J., dissenting), and was repeated by the dissenters in *Caballes*, see 543 U.S. at 422 (Ginsburg, J., dissenting); *id.* at 417 (Souter, J., dissenting). Yet in the nearly three decades since *Jacobsen*, those fears have not materialized.

The rule that a dog sniff outside of a home is not a search has been accepted by all but one of the federal court of appeals that has considered the issue,[13] and yet

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[13] See *United States* v. *Scott*, 610 F.3d 1009, 1015-1016 (8th Cir. 2010) (front door of apartment), cert. denied, 131 S. Ct. 964 (2011); *Brock*, 417 F.3d at 694-697 (locked bedroom door in a shared residence); *Reed*, 141 F.3d at 649-650 (inside home, when police were lawfully in place); *United States* v. *Roby*, 122 F.3d 1120, 1124-1125 (8th Cir. 1997) (front door of hotel room); *United States* v. *Colyer*, 878 F.2d 469, 472-477 (D.C. Cir. 1989) (outside train sleeper compartment); cf. *United States*

no evidence indicates police abuse of the technique. And use of this technique is subject to the "ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'" *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring) (quoting *Illinois* v. *Lidster*, 540 U.S. 419, 426 (2004)). Accordingly, this Court should reaffirm that the use of a narcotics-detection dog, whether outside a vehicle, a package, or a home, does not infringe legitimate privacy expectations and therefore does not constitute a Fourth Amendment search.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted.

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v. *Lingenfelter*, 997 F.2d 632, 637-639 (9th Cir. 1993) (outside warehouse); but see *United States* v. *Thomas*, 757 F.2d 1359, 1366-1367 (2d Cir. 1985) (outside apartment), cert. denied, 474 U.S. 819 (1985), and 479 U.S. 818 (1986).