No. 11-564

In the Supreme Court of the United States

FLORIDA,
Petitioner,

v.

JOELIS JARDINES,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Florida

BRIEF OF TEXAS, ALABAMA, ARIZONA, COLORADO, DELAWARE, GUAM, HAWAII, IDAHO, IOWA, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, NEBRASKA, NEW MEXICO, TENNESSEE, UTAH, VERMONT, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

All States have a keen interest in combating illegal drugs. Drug-detection dogs play a vital role in these efforts. Petitioner is correct that the Florida Supreme Court's decision jeopardizes the States' ability to use this crucial tool to discover illegal drugs prior to their distribution. Pet. 31–32. Amici States thus have a distinct interest in the correct disposition of this matter.

DISCUSSION

I. THE DECISION BELOW CONFLICTS WITH COURT PRECEDENT AND JEOPARDIZES A WIDELY USED METHOD OF DETECTING ILLEGAL DRUGS.

The Court has repeatedly held that the use of a detection dog to determine whether narcotics are present does not constitute a Fourth Amendment search. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (investigation of a vehicle during a traffic stop); *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (investigation of a vehicle at a drug checkpoint); *United States v. Place*, 462 U.S. 696, 707 (1983) (investigation of a traveler's luggage). The Court explained that the use of detection dogs is "much less intrusive than a typical search" and that "no other investigative procedure . . . is so limited both in the manner in which the information is obtained and in the content of the information revealed." *Place*, 462 U.S. at 707; *see also Edmond*, 531 U.S. at 40 (noting that a dog sniff of a car

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1. Pursuant to Supreme Court Rule 37.2(a), amici provided counsel of record for all parties with timely notice of the intent to file this brief. Consent of the parties is not required for the States to file an amicus brief. SUP. CT. R. 37.4.

is "much less intrusive than a typical search") (citation omitted). Moreover, in criticizing one law enforcement agency's failure to use a detection dog, the Court explained that the practice is one that can *provide* the probable cause needed to justify an arrest, *Florida v. Royer*, 460 U.S. 491, 506 (1983), rather one that *requires* probable cause.[2]

Naturally, given the Court's clear guidance, state and federal officials routinely use drug-detection dogs during their investigations. For example, in Texas, the Department of Public Safety deploys more than 20 dog-handler teams across the State, and these teams routinely perform more than 1000 sniff tests annually.[3] Arizona's Department of Public Safety likewise deploys

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2. The Court has recognized that a law enforcement officer's sense of smell can provide probable cause supporting the issuance of a warrant. *United States v. Ventresca*, 380 U.S. 102, 111 (1965) ("A qualified officer's detection of the smell of mash has often been held a very strong factor in determining that probable cause exists so as to allow issuance of a warrant."); *Johnson v. United States*, 333 U.S. 10, 12–13 (1948) (noting that a federal agent smelling the "distinctive" and "unmistakable" odor of burning opium may be sufficient probable cause to obtain a warrant and describing that evidence as likely "to be evidence of [the] most persuasive character"). A detection dog's sense of smell should be treated no differently under the Fourth Amendment.

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

more than 25 canine teams.[4] And in 2010, the Virginia State Police Department's 18 narcotic teams led to 118 arrests and 127 drug seizures.[5] Local law enforcement agencies also often deploy their own detection teams. And the States often coordinate with federal authorities, just as the local authorities did in this case.

The Drug Enforcement Administration (DEA) has established the Domestic Cannabis Eradication / Suppression Program (DCE/SP) to target marijuana cultivation nationwide.[6] In 2010, that program resulted in the eradication of more than 4,700 indoor grow sites in 46 States.[7] And the federal government routinely uses its own detection dogs during its investigations. In 2000, the Department of Justice issued a guide for selecting detection dogs. That report noted that the U.S. Customs Service alone had more than 600 canine teams in service. U.S. Department of Justice, NIJ Guide 601-00, Guide for the Selection of Drug Detectors for Law Enforcement Applications

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

5. Virginia State Police, Annual Report: 2010 Facts and Figures 46, *available at* http://www.vsp.state.va.us/Annual_Report.shtm.

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

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

(2000) at 21.[8] The report also touted the success of the canine program, noting that in one year, 9,220 seizures of narcotics and other drugs (at an estimated value of $3.1 billion) were made as a result of detections by U.S. Customs Service canines. *Id*. at 22.

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

As the certiorari petition demonstrates, the Florida Supreme Court's decision that the use of a detection dog is a Fourth Amendment search requiring probable cause is based upon its misapplication of *Caballes*, *Edmond*, *Place*, and *Kyllo v. United States*, 533 U.S. 27 (2000). Pet. 14–17. The Florida Supreme Court attempted to distinguish this Court's dog-sniff cases by stating that the "minimally intrusive" nature of the investigations in those cases does not apply to an investigation of a home. *Jardines v. State*, No. SC08-2101, 2011 WL 1405080, at *8 (Fla. Apr. 14, 2001). But an officer walking a detection dog up to the front porch of a home to determine what can be smelled in that area is not intrusive. After all, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)); *see also Florida v. Riley*, 488 U.S. 445, 449

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

(1989) ("[T]he police may see what may be seen from a public vantage point where [they have] a right to be.") (internal quotation omitted). The officers were unquestionably permitted to approach the front door of Jardines's residence. *See Kentucky v. King*, 131 S.Ct. 1849, 1862 (2011) (noting that when "law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do"). And while they were standing on the porch, the officers were unquestionably permitted to use their senses in an attempt to determine whether marijuana was being grown within the house. *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.3(c), at 575–77(4th ed. 2004); *id*. at 575–77 n. 89–98 (collecting cases). This does not change merely because a detection dog also approached the front door.

The Florida Supreme Court is plainly incorrect that the sniff test conducted at Jardines's front door was a "vigorous and intensive" procedure, *Jardines*, 2011 WL 1405080, at *10, or an "intrusive procedure," *id*., at *13. Contrary to that court's view, there was *no* intrusion during the front porch sniff test, much less a "substantial government intrusion into the sanctity of the home." *Id*. There was thus no basis for the Florida Supreme Court's refusal to follow *Caballes* and the Court's other dog-sniff cases. And as the certiorari petition demonstrates, the decision below is in sharp conflict with the circuit courts' post-*Caballes* decisions. Pet. 18–21.

If the Florida Supreme Court's decision stands, it could have a profound chilling effect on law-

enforcement efforts to combat illegal drugs. The Court should instead reverse the judgment below to ensure that detection dogs retain their proper place at the forefront of state and federal efforts against the production and distribution of illegal drugs.

II. THE FLORIDA SUPREME COURT'S "PUBLIC SPECTACLE" TEST FINDS NO SUPPORT IN THE COURT'S CASES AND CANNOT CONVERT THE USE OF A DETECTION DOG INTO A SEARCH.

In an attempt to bolster its dubious conclusion regarding detection dogs, the Florida Supreme Court stated that the circumstances surrounding the sniff test—which it called "a sustained and coordinated effort by various law enforcement departments"—contributed to the Fourth Amendment violation. *Jardines*, 2011 WL 1405080, at *12, *13. While Miami-Dade police officers conducted the sniff test, additional officers, joined by federal DEA agents, established a perimeter around the residence and assumed stand-by positions. *Id.*, at *10, *12. After the dog sniff produced a positive alert and Detective Pedraja independently smelled the marijuana, the perimeter and back-up officers remained in place (in public view) while a warrant was obtained. *Id.*, at *12.

Law enforcement officers maintaining a perimeter during an investigation of this sort serve dual purposes. First, they provide for the safety of their fellow officers and the general public. And second, they can help ensure that evidence is not removed or destroyed. It should go without saying that officers may remain in public view while they serve these functions; officers are permitted to "freeze" the situation while other

officers obtain a warrant. *See Illinois v. McArthur*, 531 U.S. 326, 337 (2001) (An officer's refusal to allow defendant to enter his trailer without a police officer until a search warrant was obtained did not violate the Fourth Amendment.); *Segura v. United States*, 468 U.S. 796, 798 (1984) (Officers may secure the premises to preserve the status quo while obtaining a warrant.). Instead, the Florida Supreme Court called this a "public spectacle," *Jardines*, 2011 WL 1405080, at *12, constituting a Fourth Amendment search because it might "expose the resident to public opprobrium, humiliation[,] and embarrassment," *id*., at *13.

This new "public spectacle" test for determining whether probable cause and a warrant are required prior to the use of an investigation technique is unsupported by the Court's cases. Pet. 24–29. Notably, the Florida Supreme Court could not point to a single case in which this Court found that a search had occurred based on its determination of the mood of the person being investigated. Nor does the "public spectacle" test survive a common-sense inquiry. Any interaction with law enforcement authorities conducting an investigation into suspected criminal activity might well be unsettling for the suspect. Surely a suspect's potential unease cannot mean that warrants are required prior to commencing any investigation, but that is the implication of the decision below. The Florida Supreme Court's "public spectacle" inquiry was plainly erroneous, and its judgment relying on this analysis should be reversed.

III. THIS CASE MERITS SUMMARY REVERSAL.

Summary reversal is appropriate to "correct a clear misapprehension" of federal law, *Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004) (per curiam), and when the decision below is "flatly contrary to this Court's controlling precedent," *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (per curiam). Amici States submit that this is just such a case. *See* SUP. CT. R. 16.1; EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE § 5.12(a), (c) (9th ed. 2007).

The Florida Supreme Court's decision is "flatly contrary" to a number of this Court's decisions holding that a dog sniff is not a search. The judgment below is not saved by the court's creation of a "public spectacle" test. Rather, that test finds no support in this Court's precedent. Reliance on the "public spectacle" test thus introduced further error.

Summary reversal would allow the Court to reaffirm that a detection dog is an appropriate tool for law enforcement officers to use to establish probable cause during their investigations while conserving the Court's scarce resources. This remedy is especially appropriate here, to ensure that other courts do not follow the Florida Supreme Court's defiance of *Caballes*.

CONCLUSION

The Court should grant the petition for a writ of certiorari and summarily reverse the judgment of the Florida Supreme Court. Alternatively, the Court should grant the petition and set the case for briefing and oral argument.

Respectfully submitted,

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