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No. 11-564

In the Supreme Court of the United States

STATE OF FLORIDA, *Petitioner,*

v.

JOELIS JARDINES

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

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

U.S. Supreme Court Rules

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ARGUMENT

The two issues that Petitioner, the State of Florida, seeks to raise in this Court are not issues concerning the Florida Supreme Court making erroneous factual findings or misapplying a properly stated rule of law. S.Ct. rule 10. Rather, the Florida Supreme Court has misinterpreted the Fourth Amendment and that misinterpretation warrants this Court's review.

Jardines argues that the Florida Supreme Court prohibiting a dog sniff of a private residence is a correct interpretation of the Fourth Amendment due to the heightened protection afforded private residences under the Fourth Amendment and that *Jardines v. State*, - So.3d -, 2011 WL 1405080 (Fla. April 14, 2011), follows this Court's well-established Fourth Amendment jurisprudence as announced in *Kyllo v. United States*, 533 U.S. 27 (2001). BIO at 12. But *Kyllo* does not apply to dog sniffs as this Court explained in *Illinois v. Caballes*, 543 U.S. 405 (2005). *Caballes* applies when a dog is involved; *Kyllo* does not. The Florida Supreme Court looked only at the fact that a house was involved, not at the fact that a dog was involved. The Florida Supreme Court's decision does not comport with this Court's Fourth Amendment jurisprudence as expressed in *Caballes*.

Jardines attempts to characterize the issues in this case as being fact-bound. He uses the phrases "fact-intensive," "fact-specific," and "the particular facts of this case" five times in his brief in opposition. BIO at 7, 15, 21, 28. But whether the Fourth Amendment is violated when a trained narcotics dog sniffs the front door of a grow house is not a fact-bound issue. In all these types of cases, an officer leads his trained narcotics dog to a private residence and the dog alerts. The only factual difference in most dog sniff cases is the name of the dog. While Jardines claims the case is

fact-bound, he points to no unique or unusual facts, or even, convoluted facts. The facts can be stated in one short sentence. Two officers and one narcotics dog went to the front porch of a suspected grow house where the dog alerted on the front door. Jardines, while never explicit, seems to rely upon the fact that a drug task force was involved in this case. BIO at 10, 12. But a drug task force where state law enforcement operates in conjunction with the federal Drug Enforcement Agency is not unusual. The caselaw is replete with use of the phrase "drug task force" and DEA. Furthermore, the second issue relates to the involvement of the DEA. The case is not fact-bound and it presents an excellent vehicle to address the two issues presented.

I. Conflict with other courts

Conflict with this Court

Jardines asserts there is no conflict with the Florida Supreme Court's decision in this case and this Court's decisions in *United States v. Place*, 462 U.S. 696 (1983); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000); and *Illinois v. Caballes*, 543 U.S. 405 (2005), because none of these cases involved a house. BIO at 15-23. Jardines is correct that *Place* involved a dog sniff of luggage at the airport; *Edmond* involved a dog sniff of a car at a

checkpoint; and *Caballes* involved a dog sniff of a car during a traffic stop. None of these cases involved a dog sniff of a house. But this Court's reasoning in *Place* and *Caballes* did not focus on the place or the item being examined; rather, this Court focused on the nature of a dog sniff. Moreover, while none of these three cases involved a house, *Kyllo* certainly did. *Kyllo* involved the search of a home with a thermal imagining device. This Court in *Caballes*, explaining *Kyllo*, stated:

> This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. *Kyllo v. United States*, 533 U.S. 27, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." *Id.*, at 38, 121 S.Ct. 2038. The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from

> respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

Caballes, 543 U.S. at 409-410. The Florida Supreme Court quoted this critical paragraph of *Caballes* reconciling the dog sniff line of cases with *Kyllo* but then totally ignored it in its analysis, as does Jardines in his brief in opposition, provoking one to ask what do the Florida Supreme Court and Jardines think this paragraph means? BIO at 18. It was the dissent in *Caballes* that believed that "if constitutional scrutiny is in order for the imager" in *Kyllo*, then it was "in order for the dog" as well. *Caballes*, 543 U.S. at 413, n.3 (Souter, J., dissenting). The majority in *Caballes* rejected such an analogy. The Florida Supreme Court, by requiring probable cause before a narcotics dog is employed, basically followed the dissent in *Caballes*. *Caballes*, 543 U.S. at 417-425 (Ginsburg, J., dissenting). Florida's conformity clause prohibits the Florida Supreme Court from following

a dissent. Under Florida's constitution, the Florida Supreme Court must follow the majority.

Conflict with the federal circuit courts of appeals

Jardines also attempts to establish that there is no conflict between the Florida Supreme Court and the Eighth Circuit or the Seventh Circuit. BIO at 23. Jardines vainly attempts to distinguish the Eighth Circuit's decision in *United States v. Scott*, 610 F.3d 1009 (8th Cir. 2010), *cert. denied*, 131 S.Ct. 964 (2011)(No. 10-7745), and the Seventh Circuit's decision in *United States v. Brock*, 417 F.3d 692 (7th Cir. 2005). Neither *Scott* nor *Brock* are distinguishable.

Brock involved a dog sniff of a locked bedroom door, with a sign "stay out" on it, from inside the house. *Brock*, 417 F.3d at 693. While unclear, surely, Jardines is not attempting to assert that one has a lesser expectation of privacy in a bedroom than in a house. Brock argued just the opposite – that he had a heightened expectation of privacy in his bedroom. *Brock*, 417 F.3d at 695 (arguing that he has "a far greater privacy interest inside his home, particularly inside the bedroom," than in a public space or a car). Jardines asserts that *Brock* is distinguishable because the dog in

that case was legally present inside the house. The dog in *Brock* was legally inside the house because the officers obtained consent to enter the house from the defendant's roommate. But Franky was legally present on the front porch in this case as well. The Florida Supreme Court openly admitted that, under their precedent, there is no expectation of privacy on the front porch because "salesmen or visitors may appear at any time" on the porch. *Jardines v. State*, 2011 WL 1405080, *10 (Fla. 2011)(citing *State v. Morsman*, 394 So.2d 408, 409 (Fla. 1981). And that is this Court's view as well. *Kentucky v. King*, 131 S.Ct. 1849, 1862 (2011) (observing that when "officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do."). In all three cases, *Brock*, *Scott* and this case, the dog was legally present at the spot where the sniff was conducted. Moreover, the location of the dog when he sniffed was not the violation of the Fourth Amendment according to the Florida Supreme Court. Rather, the violation was that the dog was sniffing the front door of a private residence.

Scott involved a dog sniff of the front door of an apartment. Jardines attempts to distinguish between a private house and an apartment as did the Florida Supreme Court. *Jardines*, 2011 WL 1405080 at *3, n.3 (distinguishing a sniff of "an

apartment or other temporary dwelling" from a sniff of a "private residence."); BIO at 24 n.6. But this will not do. There is no difference between an apartment and a detached house for Fourth Amendment purposes. As this Court has observed, the "most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion." *United States v. Ross*, 456 U.S. 798, 822 (1982). Nor does the protection of the Fourth Amendment depend on whether the dwelling is temporary. *Minnesota v. Olson*, 495 U.S. 91 (1990)(holding that an overnight guest has a legitimate expectation of privacy in such temporary quarters); *Stoner v. California*, 376 U.S. 483, 490 (1964)(holding that a person who rents a hotel room has a legitimate expectation of privacy in such temporary quarters). The Florida Supreme Court's view of the Fourth Amendment as limited to houses rather than apartments and to permanent dwellings rather than temporary dwellings conflicts this Court's repeated holdings to the contrary. The State pointed out this error to the Florida Supreme Court in its motion for rehearing. This is simply another way, among the myriad of ways, that the Florida Supreme Court in *Jardines* violated this Court's precedent. And the Florida Supreme Court's mistaken view of the Fourth Amendment protection due apartments and

temporary dwellings is yet another reason to grant certiorari review of this case. There is conflict between the Florida Supreme Court's decision in this case and that of the Seventh Circuit in *Brock* as well as that of the Eighth Circuit in *Scott*.

Jardines states that there is not a single case holding "that a dog sniff conducted at the front door of a private residence does not constitute a Fourth Amendment search." BIO at 25. This is not an accurate statement of the caselaw. The Eighth Circuit's decision in *Scott* is a case holding that a dog sniff of the front door of a private residence is not a Fourth Amendment search. An apartment is a private residence. Furthermore, Jardines makes this statement and then cites *United States v. Byle*, 2011 WL 1983355 (M.D.Fla. 2011) with the signal cf. "But see" would be the correct signal. In *Byle*, a narcotics dog named Missy alerted on the mailbox of one private residence and then she alerted on the window of another private residence being used as a grow house. The district court denied the motion to suppress in which the defendant claimed a dog sniff of a house was a search citing *Jardines*. The district court disagreed with the Florida Supreme Court's legal analysis in *Jardines,* concluding that "the Supreme Court meant what it said—a dog sniff is not a search." *Byle*, 2011 WL 1983355 at *4. There are cases, from both federal circuits and

federal district courts, holding that a dog sniff of a private residence is not a search.

Independent source doctrine

Jardines also attempts to limit the Florida Supreme Court's holding regarding Detective Pedraja's smell being tainted by Franky alerting first to situations where the officer only approaches the front door to confirm the dog's alert. BIO at 28 n.7. The Florida Supreme Court, however, did not limit its holding in this manner. The Florida Supreme Court noted that the trial court stated in a footnote: "There was evidence that after the drug detection dog had alerted to the odor of a controlled substance, the officer also detected a smell of marijuana plants emanating from the front door. However, this information was only confirming what the detection dog had already revealed." *Jardines v. State*, 2011 WL 1405080, 18 (Fla. 2011). The Florida Supreme Court also discussed the Fourth District's observation in *State v. Rabb*, 920 So.2d 1175, 1191 (Fla. Ct. App. 2006), that "the chronology of the probable cause affidavit suggests that the dog alert to marijuana occurred prior to law enforcement's" and "we cannot assume that law enforcement detected the odor of marijuana before

the dog alerted." *Jardines*, 2011 WL 1405080 at *18.

While the Florida Supreme Court stated "the trial court had the opportunity to observe Detective Pedraja's testimony first-hand at the suppression hearing," the trial court's statement is not a credibility finding. Rather, it is a statement of chronology, as is the Fourth District's observation in *Rabb*. A statement that the "information was only confirming what the detection dog had already revealed" is a first-in-time statement. But under the independent source doctrine, chronology is not the focus. *Murray v. United States*, 487 U.S. 533, 542 (1988)(referring to a "later" lawful seizure that is genuinely independent of an "earlier" tainted one). Often, indeed, most of the time, the independent source of the information arises after the tainted first source as is the scenario in most inevitable discovery situations. The Florida Supreme Court improperly emphasized chronology rather than properly emphasizing whether the source was independent or dependent. Detective Pedraja's nose is independent of Franky's nose.

Furthermore, this Court has never limited its independent source doctrine or inevitable discovery doctrine to situations where the second source was not attempting to confirm the first source. *See generally Hudson v. Michigan*, 547

U.S. 586, 600-601 (2006)(plurality)(holding the exclusionary rule did not apply and discussing and comparing the case to *Segura v. United States*, 468 U.S. 796 (1984), where the only entry was warrantless to the present case "where the only entry was with a warrant" and concluding obtaining a search warrant "before going in must have at least this much effect"). Attempting to confirm with an independent means of confirmation, such as a human nose, is inherently an independent source. *See United States v. Byle*, 2011 WL 1983355, 4 (M.D.Fla. 2011)(concluding that the human officers' smell of marijuana by itself is sufficient to support the issuance of a warrant and that their testimony about the smell was not "the fruit of the poisonous tree" and provides probable cause even disregarding the positive alert by the dog).

II. Significance of the issue

This is a significant issue to the future of joint drug task forces. The Florida Supreme Court's decision undermines the cooperation between state and federal law enforcement that is necessary to enforce the nation's drug laws.

Jardines asserts the Florida Supreme Court's decision in this case lacks exceptional importance, relying on this Court's denial of

certiorari review in *State v. Rabb*, 920 So.2d 1175 (Fla. Ct. App 2006), *cert. denied*, *Florida v. Rabb*, 549 U.S. 1052 (2006) (No. 06-309). This assertion ignores the fact that *Rabb* was not a decision from a state court of last resort; *Rabb* was a decision from a state intermediate appellate court. This Court's rule concerning considerations governing review on certiorari, rule 10(b), refers to conflict created by "a state court of last resort." *Jardines*, in contrast to *Rabb*, is a decision from a state court of last resort. *Jardines* is a decision from the Florida Supreme Court, not an intermediate appellate court. This Court rarely grants review of decisions from state intermediate appellate courts in the expectation that the respective state's Supreme Court will resolve the matter correctly without the necessity of this Court's involvement. The Florida Supreme Court, however, did not resolve the matter correctly. Rather, the Florida Supreme Court joined the intermediate appellate court's erroneous view of the Fourth Amendment necessitating this Court's involvement. Additionally, this Court's rule speaks of an "important federal question," not of "exceptional" importance. S.Ct. rule 10(b). Whether the Fourth Amendment prohibits a dog sniff of the front door of a suspected grow house is an important federal question.

Moreover, contrary to Jardines' view, there have been significant developments in the law since *Rabb* was decided in 2006. BIO at 27. *Jardines* itself is a significant development in that a state supreme court refused to follow this Court's decision in *Caballes* – the first state supreme court to do so as a matter of Fourth Amendment law. Furthermore, the conflict between the Florida Supreme Court and the federal circuits did not exist until the Florida Supreme Court decided this case. Moreover, the Eighth Circuit has joined the fray since *Rabb*. *United States v. Scott*, 610 F.3d 1009 (8th Cir. 2010), *cert. denied*, 131 S.Ct. 964 (2011)(No. 10-7745). *Scott* was issued in 2010. The legal landscape is not the same as it was five years ago.

Jardines also argues that the effect on law enforcement's ability to detect grow houses from the Florida Supreme Court's decision is overstated by Petitioner because human officers, "using their ordinary senses," can smell the scent of the marijuana coming from a grow house, while at the front door, and, then, obtain a search warrant based on that information. BIO at 27. The operators of grow houses, however, often tape the doors and windows to prevent the scent of marijuana from escaping. They also use items with strong scents, such as mothballs, to mask the smell

of the marijuana. *United States v. Phillips*, 496 F.2d 1395, 1398 (5th Cir. 1974)(explaining that mothballs are often used to mask the scent of marijuana). While these tactics often prevent a human officer from smelling the marijuana; they rarely prevent a trained narcotics dog, with their excellent sense of smell, from doing so. Jardines' argument limits law enforcement to the least effective method of detection rather than the most effective and guarantees that numerous grow houses will remain undetected.

The issues presented are not fact-bound. The Florida Supreme Court's decision in *Jardines* conflicts with this Court's views and the holdings of the federal circuits. The issues are significant to both state and federal law enforcement. And the decision in this case has ramifications far beyond Florida. Other states are adversely impacted by the Florida Supreme Court's decision. Texas filed an amicus curiae brief urging this Court to grant review which was joined by 17 other states and Guam. This Court should grant review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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