No. 11-817

In The
Supreme Court of the United States

STATE OF FLORIDA,

Petitioner,

v.

CLAYTON HARRIS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Florida

AMICUS BRIEF OF THE COMMONWEALTH OF VIRGINIA AND THE STATES OF DELAWARE, HAWAII, KANSAS, MISSOURI, NEBRASKA, OREGON, TEXAS AND UTAH IN SUPPORT OF PETITIONER

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STATEMENT OF THE IDENTITY, INTEREST AND AUTHORITY OF AMICI TO FILE[1]

The Commonwealth of Virginia and Amici States Delaware, Hawaii, Kansas, Missouri, Nebraska, Oregon, Texas and Utah each have a vital state interest in combating the flow of illegal drugs, a problem of interstate (and international) proportions. Drug-detecting canines are one of the essential weapons in the States' arsenal to combat this illegal traffic. As argued by petitioner, Pet. 35-36, the Florida Supreme Court decision in *Harris v. State*, 71 So. 3d 756 (Fla. 2011), misinterprets this Court's precedents to draw into question, and then practically prohibit, the long-standing practice of utilizing trained canines to detect the presence of illegal drugs. The burdens erroneously placed on Florida's efforts to interdict illegal drugs will be borne not only by the citizens and law enforcement officials in the State of Florida but also by the citizens and law enforcement officials throughout the States, imposing significant harm upon them. A deep split of authority now exists among the circuits and state supreme courts regarding what evidence needs be shown to establish that a canine's alert is a reliable predicate for a search requiring probable cause.

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[1] Pursuant to Supreme Court Rule 37.2(a), amici provided counsel of record for all parties timely notice of intent to file ten days prior to the due date of this amicus brief. Neither consent of the parties nor leave of court is required for the States to file an amicus brief. SUP. CT. R. 37.4.

Accordingly, the Commonwealth of Virginia and the other Amici States join in requesting that the Court grant the State of Florida's Petition for Certiorari in *Florida v. Harris*, No. 11-817 (Dec. 21, 2011), resolve the issue and, in doing so, provide a clear rule to guide law enforcement practices.

ARGUMENT

As demonstrated in Florida's Petition for Certiorari, the Florida Supreme Court's decision in *Harris v. State* "imposes an evidentiary burden on the state which is based on a misconception of the federal constitutional requirement for probable cause."[2] 71 So. 3d at 775 (Canady, C.J., dissenting). Unsurprisingly, it also conflicts with the vast majority of jurisdictions to have considered what evidence is needed to establish a narcotics-detection dog's reliability for purposes of establishing probable cause.

I. THE DECISION BELOW MISCONSTRUES THIS COURT'S PRECEDENTS AND DEEPENS A CONFLICT AMONG THE JURISDICTIONS.

Because the use of dogs as investigative tools is older than existence of professional police forces, "[t]he courts are not strangers to the use of trained dogs

[2] No independent and adequate state ground supports the Florida Supreme Court's decision in *Harris*. *See* Pet. 12 n.3.

to detect the presence of controlled substances. . . ." *Florida v. Royer*, 460 U.S. 491, 505 (1983); *see also United States v. Ludwig*, 10 F.3d 1523, 1528 (10th Cir. 1993) (stating "that bloodhound evidence 'was looked upon with favor as early as the twelfth century' and relating the declaration of Richard I of England: 'Dress yonder Marquis [who had stolen the banner of England] in what peacock robes you will, disguise his appearance, alter his complexion with drugs and washes, hide himself amidst a hundred men; I will yet pawn my scepter that the hound detects him'" (quoting *Blair v. Commonwealth*, 204 S.W. 67, 68 (Ky. 1918))). As a predicate to a Fourth Amendment search, this Court and lower courts are agreed that a trained narcotics-detection "dog's positive indication alone is enough to establish probable cause for the presence of a controlled substance if the dog is reliable." *United States v. Sundby*, 186 F.3d 873, 876 (8th Cir. 1999) (citing *United States v. Owens*, 167 F.3d 739, 749 (1st Cir. 1999); *United States v. Kennedy*, 131 F.3d 1371, 1376-77 (10th Cir. 1997); *United States v. Berry*, 90 F.3d 148, 153 (6th Cir. 1996); and *United States v. Lingenfelter*, 997 F.2d 632, 639 (9th Cir. 1993)); *see Royer*, 460 U.S. at 506 ("[A] positive result [following a dog sniff] would have resulted in his justifiable arrest on probable cause."); *see also United States v. Kitchell*, 653 F.3d 1206, 1223 (10th Cir. 2011) (same); *United States v. Sanchez-Pena*, 336 F.3d 431, 444 (5th Cir. 2003) (same). Nevertheless, "[c]ourts have not definitively addressed the issue of the quality or quantity of evidence necessary to establish a drug

detection dog's training and reliability." *United States v. Diaz*, 25 F.3d 392, 394 (6th Cir. 1994); *cf. State v. Nguyen*, 726 N.W.2d 871, 876 (S.D. 2007) (collecting cases).

Where courts have addressed the issue, they have disagreed regarding the burden to be borne and the quantum of evidence necessary to lay the foundation for an officer's conclusion that there is probable cause to believe contraband is present when a trained narcotics-detection dog alerts. Most of the jurisdictions have concluded that "[a] drug detection dog is considered reliable when it has been trained and certified to detect drugs," *United States v. Winters*, 600 F.3d 963, 967 (8th Cir. 2010) (internal quotation marks omitted), and have demanded little to no evidence regarding what that training may have entailed. *See Sanchez-Pena*, 336 F.3d at 444, n.62 (stating that "evidence that the dog was certified was sufficient proof of his training to make an effective alert" to establish probable cause and stating that courts should not, even where the dog's reliability is challenged, "take up whether the dog's training was sufficient"); *Sundby*, 186 F.3d at 876 (holding that statements that "the dog has been trained and certified to detect drugs" that did "not give a detailed account of the dog's track record or education" was sufficient to establish probable cause); *Kennedy*, 131 F.3d at 1377 ("We decline to encumber the affidavit process by requiring affiants to include a complete history of a drug dog's reliability beyond the statement that the dog has been trained and certified

to detect drugs."); *Berry*, 90 F.3d at 153 ("[T]o establish probable cause, the affidavit need not describe the particulars of the dog's training. Instead, the affidavit's accounting of the dog sniff indicating the presence of controlled substances and its reference to the dog's training in narcotics investigations was sufficient to establish the dog's training and reliability."); *Diaz*, 25 F.3d at 396 (holding "that testimony is sufficient to establish a dog's reliability in order to support a valid sniff," and that reliability need not be proven "with training and performance records"); *United States v. Klein*, 626 F.2d 22, 27 (7th Cir. 1980) (holding that statements that a "dog 'graduated from a training class in drug detection'" and "'has proven reliable in detecting drugs and narcotics on prior occasions'" were sufficient evidence to establish probable cause); *Jones v. Commonwealth*, 670 S.E.2d 727, 733 (Va. 2009) (rejecting any requirement that "specific certifications [or] the results of field testing" be proffered to establish a drug-detection dog's reliability).

However, some jurisdictions have suggested that evidence of more than the fact of training, or the fact of training coupled with testimony that the dog was reliable, must be proffered before a narcotics-detection dog's alerting will be credited for purposes of establishing probable cause. *See United States v. Limares*, 269 F.3d 794, 798 (7th Cir. 2001) (holding that testimony to establish reliability "need not describe training methods or give the dogs' scores

on their final exams," and that "[i]t is enough if a dog is reliable in the field" as testified to by the dog's handlers and proven by an "evidentiary hearing" that showed that the dog "ha[d] been right 62% of the time, enough to prevail on a preponderance of the evidence, and 'probable cause' is something less than a preponderance"); *see also State v. Foster*, 252 P.3d 292, 298 (Or. 2011) ("[I]n assessing whether the alert gave rise to probable cause, a court must consider the totality of the circumstances known to the officers, which typically will include such things as the dog's training, certification, continued training and recertification, and performance in the field."); *Nguyen*, 726 N.W.2d at 877 ("[T]rial courts making drug dog reliability determinations may consider a variety of elements, including such matters as the dog's training and certification, its successes and failures in the field, and the experience and training of the officer handling the dog. Under the totality of circumstances, the court can then weigh each of these factors."); *England v. State*, 19 S.W.3d 762, 768-69 (Tenn. 2000) ("the trial court, in making the reliability determination *may* consider such factors as: the canine's training and the canine's 'track record,' with emphasis on the amount of false negatives and false positives the dog has furnished. The trial court should also consider the officer's training and experience with this particular canine." (emphasis added)). However, in none of these cases did the courts hold, as did the Florida Supreme Court, that despite proof of ongoing training, certification, and other testimony regarding

reliability from the handler, the foundation of reliability was inadequate to establish probable cause and thus that the evidence uncovered by the dog's positive alert must be excluded. Nor has Amici States' research revealed another jurisdiction that presumes that trained and certified drug-detection dogs are not reliable enough to provide an officer probable cause to search when they alert, unless the State keeps and produces extensive evidence of each dog's reliability.

Yet this is precisely what the decision in *Harris* does. There the Florida Supreme Court observed that "[b]ecause a dog cannot be cross-examined like a police officer," in determining whether the officer enjoyed probable cause as a result of the "trained and certified" drug-detection dog alerting, it is the State's burden to show under a "totality of the circumstances" analysis "that the officer had a reasonable basis for believing the dog to be reliable" before conducting the search. 71 So. 3d at 758-59. The court concluded that this was necessary because the Fourth Amendment places "the burden . . . on the State to establish probable cause for a warrantless search." *Id.* at 759. For the Florida Supreme Court, "evidence that the dog has been trained and certified to detect narcotics, standing alone, is not [a] sufficient" foundation for the alert to afford Fourth Amendment's probable cause. *Id.* Rather, in each case,

> the State must present the training and certification records, an explanation of the

> meaning of the particular training and certification of that dog, field performance records, and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability in being able to detect the presence of illegal substances within the vehicle.

Id.; *but see United States v. Delaney*, 52 F.3d 182, 188 (8th Cir. 1995) ("[T]here is *no legal requirement* that [an] affidavit specify the number of times the dog previously has sniffed out drugs" (emphasis added) (internal quotation marks omitted)). In reaching this conclusion, the Florida Supreme Court analogized the case to "situations where probable cause to search is based on the information provided by informants," and opined that this tutorial was necessary to allow the trial court "to make an adequate determination as to the dog's reliability." 71 So. 3d at 759, 767, 771-72.

Harris's approach to drug-detection dogs and probable cause is contrary to fundamental principles expounded by this Court. It is beyond dispute that, to establish probable cause, it must merely be shown that the officer had "'a substantial basis'" on which to conclude that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983) (quoting *Jones v. United States*, 362 U.S. 257, 271 (1960)). In concluding that the alert of a trained and certified drug-detection dog did not

provide the officer here a substantial basis on which to believe that there was a fair probability that drugs were in the defendant's vehicle, the Florida Supreme Court plainly misapprehended the probable cause inquiry.

Furthermore, this Court has long treated "a canine sniff by a well-trained narcotics-detection dog as 'sui generis,'" subject to a unique Fourth Amendment analysis not applicable to other sources of information. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (quoting *United States v. Places*, 462 U.S. 696, 707 (1983)). Just as a "canine sniff" by a "well-trained narcotics-detection dog" is not like a search by police officers, *see id.*, a dog alert is not like a statement by a criminal informant. Dogs, unlike humans, do not prevaricate. *See United States v. Meyer*, 536 F.2d 963, 966 (1st Cir. 1976) (noting that "a canine, when trained, reacts mechanically to certain cues in his environment," and that "[t]he same concerns that would be present in a human informant are simply not relevant here"). If the courts are to credit, as they often do, the trained senses of police officers—officers "engaged in the often competitive enterprise of ferreting out crime," *Arizona v. Evans*, 514 U.S. 1, 15 (1995)—to establish probable cause and act upon it, *see, e.g.*, *Kentucky v. King*, 131 S. Ct. 1849 (2011), courts should be even more willing to credit the senses of trained and certified drug-detection dogs who can have no corrupt interest. *See Ludwig*, 10 F.3d at 1527 (holding that a "dog alert usually is at least as reliable as many other sources of probable

cause and is certainly reliable enough to create a 'fair probability' that there is contraband"). The absence of canine guile is a staple of literature. *See, e.g.,* Sir Walter Scott, THE TALISMAN 371 (1904), *available at* http://www.archive.org/stream/talismanwithintr00scotuoft#page/370/mode/2up.

II. THE DECISION BELOW THREATENS TO SIGNIFICANTLY UNDERMINE THE USE OF CANINES FOR DRUG INTERDICTION.

This case also implicates long-standing law enforcement practices utilized to interdict the flow of illegal drugs. That being so, several undisputed realities of that traffic and its detection bear on this case. Situated as it is in the southeasternmost portion of the United States and acting as a hub for international travel, trade, and tourism, Florida is an involuntary host of much parasitic drug trafficking activity. *See* U.S. Dep't of Justice, National Drug Intelligence Center, National Drug Threat Assessment 2011 at 8-10, *available at* http://www.justice.gov/ndic/pubs44/44849/44849p.pdf (noting that Florida is "first in the nation for the number of indoor cannabis grow sites seized . . . and second for the number of cannabis plants eradicated" and noting that Florida is a primary point of entry for many international drug smuggling operations). To combat the flow of illegal drugs, the Florida State Highway Patrol, like the law enforcement agencies in many other states, has long deployed contraband interdiction teams, now numbering 26, each of which

utilize canines. Florida Dep't of Highway Safety & Motor Vehicles, Florida Highway Patrol, "K-9's Join the Florida Highway Patrol," *available at* http://www.flhsmv.gov/fhp/CIP/VIP1.htm (stating that "[t]he primary use of these units is the detection of illegal drugs"). In the five years preceding 2004, Florida Highway Patrol's canine teams "seized over $18.5 million of illegal drugs and other contraband, resulting in 6,089 criminal cases with 12,987 arrests." *Id.* These efforts reduce the flow of illegal drugs, such as cocaine and methamphetamine, from Florida to other parts of the United States, including most Amici States. *See* Central Florida High Intensity Drug Trafficking Area: Drug Market Analysis 2011 at 1, 7, *available at* http://www.justice.gov/ndic/dmas/Central_Florida_DMA-2011(U).pdf.

Like law enforcement officials in Florida, Amici States utilize canines to detect and interdict illicit drugs. This use results in a substantial number of seizures and arrests. For example, in 2010 alone, the Virginia State Police, which has 18 narcotic canine teams, utilized those teams in response to 718 calls, resulting in 118 arrests and 127 drug seizures. *See* Virginia State Police, Annual Report: 2010 Facts and Figures 46, *available at* http://www.vsp.state.va.us/Annual_Report.shtm. Furthermore, as of 2000, the U.S. Customs Service alone employed over 600 canine teams, which in a single year made over 9,000 seizures of drugs valued in excess of 3 billion dollars. U.S. Department of Justice, NIJ Guide 601-00, Guide for the Selection of Drug Detectors for

Law Enforcement Applications 21-22 (2000). As substantial as these numbers are, they represent only the tip of the proverbial iceberg, as they do not include the activities of local police and sheriff departments, many of whom have their own canine teams.

The Florida Supreme Court's decision in *Harris* undermines these vital law enforcement activities in two ways. First, it places substantial administrative burdens on the use of canines. As the Florida Supreme Court would have it, law enforcement, before availing itself of the benefit of a trained and certified narcotics-detection dog, must consider whether it can make myriad showings and thus introduce whatever evidence the dog's nose might point up. As *Harris* recites, "[t]he State's presentation of evidence that the dog is properly trained and certified is the beginning of the analysis." 71 So. 3d at 771. After that

> the State must explain the training and certification so that the trial court can evaluate how well the dog is trained and whether the dog falsely alerts in training (and, if so, the percentage of false alerts). Further, the State should keep and present records of the dog's performance in the field, including the dog's successes (alerts where contraband that the dog was trained to detect was found) and failures ("unverified" alerts where no contraband that the dog was trained to detect was found). The State then has the opportunity to present evidence

> explaining the significance of any unverified alerts, as well as the dog's ability to detect or distinguish residual odors. Finally, the State must present evidence of the experience and training of the officer handling the dog. Under a totality of the circumstances analysis, the court can then consider all of the presented evidence and evaluate the dog's reliability.

Id. By making the determination of probable cause dependent upon such an array of factors, with no clear guidance as to how much evidence of reliability is enough to justify an officer in searching in response to a drug-detection dog's alert, the Florida Supreme Court forgets that probable cause "'is a practical, nontechnical conception' that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (quoting *Gates*, 462 U.S. at 231).

Second, the decision elicits a number of difficult questions for the courts applying these factors to the facts on the ground, questions the Florida Supreme Court provided no guidance for resolving. Informed by the concern that courts have clear guidance, this Court, "[i]n determining what is reasonable under the Fourth Amendment, [has] given great weight to the 'essential interest in readily administrable rules.'" *Virginia v. Moore*, 553 U.S. 164, 175 (2008) (quoting *Atwater v. Lago Vista*, 532 U.S. 318, 347 (2001)). The decision in *Harris* is bereft of this virtue, however,

and raises a number of difficult questions, such as: what constitutes a "false alert";[3] do residual odors count as false alerts; what percentage of false alerts is "too many"; how long must records be kept; if records are destroyed, may the dog still be placed in the field; assuming records of past success and failure rates do not exist, are experienced dogs "grandfathered in" on the basis of their past work; whether the alert of a "rookie" dog—one who has not previously been in the field—could provide probable cause; and finally, whether a positive alert, the results of which were excluded by a finding of unreliability, be utilized to establish in the future that the dog is *now* reliable. The potential for varied and inconsistent applications raises serious questions regarding whether the "deterrent effect" outweighs the proportional "harm to the justice system." *See Herring v. United States*, 555 U.S. 135, 147-48 (2008).

[3] The term "false alert" may better be termed a "non-productive final response." Although a dog's alert may not uncover contraband, the site on which the dog alerted often can be shown to have previously contacted contraband, and so still retains trace amounts. Thus, a narcotics-detection dog, as the dog in this case may have done, *see Harris*, 71 So. 3d at 761, may correctly alert at the presence of contraband, but the subsequent search reveal no amount for which a suspect could be charged. In any case, such an alert should ordinarily afford an officer the requisite probable cause.

CONCLUSION

This Court should grant Florida's Petition for Certiorari to resolve the split between Florida and jurisdictions with workable rules that do not threaten national harm.

Respectfully submitted,

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