No. 11-564

In the Supreme Court of the United States

STATE OF FLORIDA,

PETITIONER,

v.

JOELIS JARDINES,

RESPONDENT.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a dog sniff at the front door of a suspected grow house by a trained narcotics detection dog is a Fourth Amendment search requiring probable cause.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, the Cato Institute publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*. This case is of central concern to Cato because the protections of the Fourth Amendment are part of the bulwark for liberty that the Framers set out in the Constitution and Bill of Rights.

SUMMARY OF ARGUMENT

This case offers the Court an opportunity to place the Fourth Amendment on solid jurisprudential footings. Current Fourth Amendment doctrine has failed to produce rules that are administrable and that protect privacy over time. In particular, this Court's use of proxies such as having a "reasonable expectation of privacy" to locate Fourth Amendment interests has failed to produce a workable rule, and it has eroded privacy. The *Caballes* Court used a corollary from

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amicus or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

"reasonable expectations" analysis that threatens to erode privacy protections even further.

Reasoning backward from "expectations" requires courts to engage in impossible surmise about privacy, neglecting the Fourth Amendment's protection of a constitutional right. This Court should return to plain meanings of Fourth Amendment terms such as "search," and to precedents that spring from the Fourth Amendment's terms.

A "search" occurs when government agents seek out that which is otherwise concealed from view, the opposite condition from what pertains when something is in "plain view." People maintain "privacy" by keeping things out of others' view, exercising control over personal information using physics and law. This Court's cases give Fourth Amendment backing to physical and legal arrangements that control information appurtenant to persons, houses, papers, and effects. The Court in this case should make that explicit while finding that government agents' use of a drug dog to sniff at Joelis Jardines's front door was a Fourth Amendment search that required probable cause and a warrant.

ARGUMENT

I. CURRENT FOURTH AMENDMENT DOCTRINE HAS FAILED TO PRODUCE ADMINISTRABLE RULES THAT PROTECT PRIVACY CONSISTENTLY OVER TIME

When he tried to synthesize this Court's Fourth Amendment cases in his concurrence to *Katz v. United States*, 389 U.S. 347 (1967), Justice Harlan set search and seizure jurisprudence on a course that

still sorely challenges this Court, lower courts, law enforcement, and privacy-loving American citizens. "Reasonable expectation" doctrine is a jumble of puzzles not up to the task of administering the Fourth Amendment, though the amendment was meant to be a principal source of protection for Americans' privacy from government.

A. This Court's use of proxies to locate Fourth Amendment interests has failed to produce a workable rule, and it has eroded the Fourth Amendment's protections for privacy.

To survey Fourth Amendment history ever-so-briefly, during our nation's low-tech and relatively sedentary early period, presence in and around the home was a strong proxy for having the security from government intrusion that the Fourth Amendment protects. "Houses" are specifically named in the Fourth Amendment because they have traditionally been the locus of activity and communications the Framers meant to protect from government access and scrutiny. *Boyd v. United States*, 116 U.S. 616, 624-627 (1886) (recounting history related to Fourth Amendment and "unreasonable searches and seizures"). This Court has been particularly solicitous of the home, of course. *See, e.g.*, *Gouled v. United States*, 255 U.S. 298, 305-06 (1921), *Agnello v. United States*, 269 U. S. 20, 32 (1925) (calling the search of a private dwelling without a warrant . . . "unreasonable and abhorrent to our laws.").

Presence in or absence from one's house says little about Fourth Amendment protections for "papers and effects," of course. The Framers had used written

communications both public and private to revolutionize political life on the American continent, so providing for control of information as against government was a priority at the founding. Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 Stan. L. Rev. 553, 564 (2007). Congress's first comprehensive postal statute wrote the confidentiality of sealed correspondence into law with heavy fines for opening or delaying mail. *Id.*at 566-57; Act of Feb. 20, 1792, § 16, 1 Stat. 232, 236. This Court validated Fourth Amendment protection for mail in *Ex Parte Jackson*, 96 U.S. 727 (1877).

Advances in mobility and information technology have weakened the proxy that presence in the home served for having Fourth Amendment interests, and courts have struggled to recognize communications in forms other than paper as "effects." So Fourth Amendment protections for communications once borne exclusively on paper have diminished while the quantity of communication and the extent of personal information it contains has increased.

In the year this Court decided *Ex Parte Jackson*, both Western Union and the Bell Company began establishing voice telephone services. Gerald W. Brock, *The Second Information Revolution* 28 (Harvard University Press, 2003). Now, instead of written messages in the post, representations of the human voice itself began moving across distance, at light speed, in a way few people understood. This is the technology this Court confronted in *Olmstead v. United States*, 277 U.S. 438 (1928).

The Court handled this technological development poorly. Chief Justice William Taft fixed woodenly on

the material things listed in the Fourth Amendment's search and seizure clause. Wiretapping had not affected any of the defendants' tangible possessions, he found, so it had not affected their Fourth Amendment rights. *Olmstead*, 277 U.S. at 464. In dissent Justice Butler noted how "contracts between telephone companies and users contemplate the private use" of telephone facilities. "The communications belong to the parties between whom they pass," he said. *Olmstead*, 277 U.S. at 487 (Butler, J., dissenting). *Cf. Ex Parte Jackson*, 96 U.S. 727 (1877) ("Letters and sealed packages … are as fully guarded from examination and inspection … as if they were retained by the parties forwarding them in their own domiciles.").

When the Court applied its corrective thirty-nine-and-a-half years later, it found Fourth Amendment protection for a conversation that would at an earlier time been held in the home, office, or other secluded environment. *Katz*, 389 U.S. at 352. To replicate that seclusion, Charles Katz had shielded the sound of his voice from others, even though in a public place. *Katz*, 389 U.S. at 352.

Since then, courts might have been examining how parallels to the walls of the home and the phone booth in *Katz* conceal information to maintain that "intimate relation" to the person that characterizes personal effects. *Black's Law Dictionary* 1143 (6th ed. 1990) (defining "personal effects").[2] The physical and

[2] This Court is familiar, of course, with the treatment of information and expression as a form of property when such things fall within the ambit of federal statutory laws protecting copyright, patent, and trade secret. Less so when self-help causes information and expression to remain within the control of an individual, dyad, family, or other limited group. Developments in technology and society suggest that, in some future case, this

legal barriers people place around information can generally answer whether people have held it close, showing at the same time when the threshold of personal security the Fourth Amendment protects has been crossed.

But Justice Harlan's solo concurrence slipped in a new proxy for Fourth Amendment interests: having "expectations" about "privacy" that society regards as valid. This proxy has caused this Court, lower courts, law enforcement, and citizens to contend with sweeping judgments about privacy and social consensus that they are ill-equipped to make. Courts have regularly purported to apply the "reasonable expectation of privacy" test Justice Harlan debuted in *Katz*, but they have almost never applied it faithfully.

B. The *Caballes* Court, using a corollary from "reasonable expectations" analysis, produced a rule that threatens to erode privacy protections even further.

A precedent in this case neatly illustrates how this Court has neglected to apply *Katz* analysis faithfully to Justice Harlan's formulation, and it also illustrates the illogic of the "reasonable expectation of privacy" test itself. That test, as Justice Harlan intro-

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Court may address to what extent intellectual assets constitute personalty and thus electronic or digital effects subject to Fourth Amendment protection. Movable property—things we easily think of as Fourth Amendment "effects" today—was "not esteemed of so high a nature, nor paid so much regard to by the law" in feudal times prior to the development of trade and commerce. But "we have learned to conceive different ideas of it," wrote Blackstone. 2 W. Blackstone, Commentaries *16, *384-*385. These issues are not before the Court in this case.

duced it in *Katz*, is "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361 (Harlan, J. concurring).

In *Illinois v. Caballes*, 543 U.S. 405 (2005), this Court did not apply *Katz* analysis. It did not examine (or even assume) whether Roy Caballes had exhibited a subjective expectation of privacy, the first step in the *Katz* test. Thus, the Court could not take the second step, examining its objective reasonableness.

Instead, the *Caballes* Court skipped forward to a corollary of the *Katz* test that the Court had drawn in *United States v. Jacobsen*, 466 U.S. 109 (1984): "Official conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment." *Caballes*, 543 U.S. at 408 (quoting *Jacobsen*, 466 U.S. at 123).

This is a logical extension of the *Katz* test, and one that helps reveal its weakness in maintaining the Fourth Amendment's protections consistently over time. Now, instead of examining whether searches and seizures are reasonable, courts applying the *Jacobsen/Caballes* corollary can uphold any activity of government agents sufficiently tailored to discovering only crime. The right kind of government examination given to persons, houses, papers, and effects is "not a search," *id.*, however intimate it is, no matter how often it recurs, and irrespective of any context or circumstances.

The application of the *Jacobson/Caballes* corollary to present and future technology is fascinating and concerning. In the present case, this Court confronts whether government agents could walk a drug-

sniffing dog to the front door of every home in America, or similarly patrol lines at movie theaters, shopping mall entrances, and such without implicating the Fourth Amendment. Government agents' efforts are not likely to stop with *canis lupus familiaris*. A rule permitting "examinations" of this type would guide their efforts.

The U.S. Dept. of Homeland Security is working on a number of technologies that government agents could deploy in ways that nest with the *Jacobsen/Caballes* corollary but that expose objects of Fourth Amendment protection to intimate scrutiny. For example, the DHS has developed and conducted initial validation of what it calls "Future Attribute Screening Technology" (or FAST), which monitors specific biologic cues to detect intent to cause harm. Testimony of Acting Under Secretary Bradley I. Buswell, Science & Tech. Directorate, before the House Comm. on Approps., Subcomm. on Homeland Security, "Science and Technology Research and Transitioning Products Into Use," Mar.26, 2009, available at http://tinyurl.com/CatoJardines4. Using "video images, audio recordings, cardiovascular signals, pheromones, electrodermal activity, and respiratory measurements," the FAST program would gather the "physiological cues, nonverbal behavioral cues, and paralinguistic (vocally produced sounds, not specific language or words) cues" that indicate wrongful intent. Privacy Impact Assessment for the Future Attribute Screening Technology (FAST) Project, Dec. 15, 2008, at 3, available at http://tinyurl.com/Cato Jardines1. The DHS believes that remote, automated examination of a person's heart rate, eye movements, perspiration, odors, and other bodily characteristics can reveal criminality. This would invade no privacy

interest under the *Jacobsen/Caballes* corollary because the FAST system—though examining all persons in the area where it is deployed—would indicate only on the guilty.

A DHS program that might be directed not only at persons, but also at their houses and effects, is called the "Remote Vapor Inspection System" (or RVIS). RVIS "generates laser beams at various frequencies" to be aimed at a "target vapor." Beams "reflected and scattered back to the sensor head" reveal "spectral 'signatures'" that can be compared with the signatures of sought-after gasses and particulates. Modification to the Statement of Work for the Development of the Remote Vapor Inspection System to Detect Chemical, Biological and High Explosive Threats, Directorate of Science & Technology, U.S. Dept. of Homeland Security, Dir. of Innovation (Dec. 17, 2009) at 5, available at http://tinyurl.com/CatoJardines2; *see* Gregory Mogilevsky et al., *Raman Spectroscopy for Homeland Security Applications*, Int'l J. of Spectroscopy, Vol. 2012 (2012), available at http://tinyurl.com/CatoJardines3. Using RVIS, government agents might remotely examine the molecular content of the air in houses and cars, quietly and routinely explore the gasses exiting houses through chimneys and air ducts, and perhaps even silently inspect any person's exhaled breath. If RVIS technology is programmed to indicate only on substances that indicate wrongdoing, the *Jacobsen/Caballes* corollary extinguishes the idea that its pervasive, frequent, and secret use would be a search.

The DHS Science and Technology Directorate's Commercialization Office exists to "identify, evaluate and commercialize technology for the specific goal of

rapidly developing and deploying products and services" for use by its "customers" throughout government. Testimony of Acting Under Secretary Buswell, *supra*. In the coming thirty-nine and a half years, these and other technologies could see mass deployment across government and law enforcement if this Court maintains or strengthens the *Jacobsen*/*Caballes* corollary. Technology is historically contingent. Given other, similar technologies on the horizon, it is not reliable over time to say that any technology, including a drug-sniffing dog, is "*sui generis*," *See United States v. Place*, 462 U.S. 696, 707 (1983).[3]

It is no answer to the constitutional weakness of the *Jacobsen*/*Caballes* corollary to deny as "ludicrous" a future in which "police officers will be wondering [sic] the myriad of residential streets in the United States in order to locate front doors with narcotics odor." Br. of *Amici Curiae* National Police Canine Association and Police K-9 Magazine at 29. The legal question whether such activity would be Fourth Amendment searching does not turn on predictions that it would not come to pass. When *amici* supporting law enforcement officers deny that this will happen, it confesses their sense that it would be wrong.

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[3] The *Place* Court reached the constitutionality of dog-detection even though Place did not contest the issue, 498 F. Supp. 1217, 1228 (E.D.N.Y. 1980), and it was not briefed at the Supreme Court. *United States v. Place*, 462 U.S. 696, 723-34 (Blackmun, J., concurring in the judgment).

C. Reasoning backward from "expectations" requires courts to engage in impossible surmise about privacy, neglecting the Fourth Amendment's protection of a constitutional right.

It is reasonable to expect that one's privacy will be maintained when one has placed sufficient physical and legal barriers around personal information. But the "reasonable expectation of privacy" test does not examine whether physical and legal protections for information were in place. It starts with the beliefs that might flow from information husbandry and works backward to determine whether the Fourth Amendment protects given privacy-protective arrangements.

Prompted to guess at society's privacy values by "reasonable expectations" analysis, courts regularly mistreat the topic. When this Court in *Caballes*, for example, said that "the use of a well-trained narcotics-detection dog . . . generally does not implicate legitimate privacy interests," 543 U.S. at 409, it treated as established by law what should be adjudged on the facts in each case. The court below in this case did a creditable job of analyzing several dimensions of "privacy" that were negatively affected when government agents walked a drug-sniffing dog to the front door of a private home. *See Jardines v. State*, 73 So. 3d 34, 45-51 (Fla. 2011). If courts are to apply *Katz* analysis, reasoning backward from privacy expectations to constitutional protection, this Court should not set presumptions in the doctrine that bias their analyses of privacy expectations relative to the use of detection technologies.

It is wrong to presume in analyzing privacy consequences that the use of a drug-sniffing dog always produces a correct result. Any detection technology has error rates, or "false positives." This is even true, though far more rarely, of chemical tests, such as the one at issue in *Jacobsen*, 466 U.S. at 112 fn. 1. A case recently filed in Nevada reminds us of the possibility that rogue officials may illicitly train dogs to "falsely detect the presence of drugs on cues from handlers." Ed Vogel, *Officers File Suit Alleging Wrongdoing in Police Dog Training Program*, Las Vegas Review Journal, Jun. 26, 2012, available at http://tinyurl .com/CatoJardines11.

The *Caballes* Court's implicit presumption about the accuracy of "well-trained" drug-sniffing dogs is a notable element of its reasoning. A drug-sniffing dog's positive signal is evidence of the presence of narcotics, of course. But the quality of such evidence should be subject to examination and impeachment. Careful consideration of these issues is commended in *Florida v. Harris*, No. 11-817, because when a drug-sniffing dog or any other detection technique does produce a false positive, the privacy consequences are substantial. The use of the detection technique rains costs on the victim in the form of unwarranted detention, arrest, further searching, public embarrassment, opprobrium, and more.

But there are deeper purposes—beyond "privacy"—that the right against unreasonable searches and seizures serves. Justice Louis Brandeis, a founder of privacy as a legal value, *see* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890), spoke of a "right to be let alone." *Olmstead*, 277 U.S. at 478. The broad ambiguity of

such language is telling. (It is not an invitation to sloppy reasoning around privacy.) Courts owe Americans the protections of the Fourth Amendment not only because of its functional value in protecting "privacy," but because freedom from unreasonable searches and seizures is a right.

One is not "let alone" when government agents tap one's telephone lines without a warrant. *Id.* One is not "let alone" when government agents bug one's telephone booth without a warrant. *Katz*, 389 U.S. at 348. One is not "let alone" when, in addition to prosecution of an ordinary traffic stop and in the absence of suspicion, one suffers the further ignominy of having one's vehicle, a constitutional effect, *United States v. Jones*, 132 S. Ct. 945, 949 (2012); *United States v. Chadwick*, 433 U.S. 1, 12 (1977), sniffed by a dog. *Cf. Caballes*, 543 U.S. at 406. One is not "let alone" when government agents lacking requisite suspicion come to the front door of one's private residence to scan it for drugs.

The Fourth Amendment is not just a privacy management tool. It is not there simply to keep average Americans well-tended, like garden plants susceptible to over-watering through excess surveillance. The Fourth Amendment describes the right of individuals, retaining sovereignty not given to the state, to be free of unreasonable searches and seizures no matter what material or social consequences a wrongful search might have.

When it originated the *Jacobsen/Caballes* corollary, the *Jacobsen* Court treated privacy as an individual "interest," 466 U.S. at 122, which could be balanced against the government's interest in crime control to determine whether or not there had been a

search. This follows Justice Harlan's reasoning in *Katz*, but it is reasoning that misplaces where the judging is to be done in Fourth Amendment cases. Rather than using "reasonable expectations" analysis, this Court should determine factually and legally whether there has been a search, applying its judgment in determining whether or not any given search was reasonable.

II. THIS COURT SHOULD RETURN TO THE PLAIN MEANINGS OF FOURTH AMENDMENT TERMS SUCH AS "SEARCH," AND TO THE PRECEDENTS THAT SPRING FROM THE FOURTH AMENDMENT'S TERMS

Rather than reasoning backwards from "reasonable expectations" to constitutional protection, this Court should return to the plain meanings of terms, the *Katz* majority's holding, and the more recent holding in *Kyllo v. United States*, 533 U.S. 27 (2001), to find that a "search" occurs when government agents seek out something that is otherwise concealed from view. This turns on facts and law: whether there were physical and legal barriers preventing the government accessing the information or the thing. Thermal imagers and drug-sniffing dogs are designed to expose concealed things. They are paradigmatic tools for searching. When a search has occurred, the Fourth Amendment calls for an examination of its reasonableness.

A. A "search" occurs when government agents seek out that which is otherwise concealed from view, the opposite condition from what pertains when something is in "plain view."

"'Search' consists of looking for or seeking out that which is otherwise concealed from view." *Black's Law Dictionary* 1349. "When the Fourth Amendment was adopted, as now, to 'search' meant '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief.' N. Webster, *An American Dictionary of the English Language* 66 (1828) (reprint 6th ed. 1989)." *Kyllo v. United States*, 533 U.S. 27, 32 fn. 1 (2001). Dictionary definitions of "search" accord with *Kyllo*. That case held that when government agents use "a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Id.* at 40.

The question of whether a search has occurred turns first on whether something is concealed, the opposite of exposed. *Black's Law Dictionary* defines the verb "to expose" as "[t]o show publicly; to display; to offer to the public view, as, to 'expose' goods to sale, to 'expose' a tariff or schedule of rates, to 'expose' misconduct of public or quasi-public figures." *Black's Law Dictionary* 579. Webster's 1828 dictionary defined "to expose" first as "[t]o lay open; to set to public view; to disclose; to uncover or draw from concealment; as, to expose the secret artifices of a court; to expose a plan or design." N. Webster, *An American*

Dictionary of the English Language (1828) (reprint 6th ed. 1989), available at http://tinyurl.com/Cato Jardines5.

These definitions suggest that exposure is a condition that can be determined objectively. The physical location of a thing with reference to other things—say, a letter kept inside the drawer of a desk inside a home—determines whether photons will bounce off it and reach the eyeballs of someone in a place he or she is legally entitled to be. A cat in a yard along the street is exposed because photons it reflects will come to rest in the eyes of passers-by. Physical arrangements determine whether the sound waves a person or thing produces or reflects will reach the ear of someone lawfully nearby. So bedroom conversation inside a home generally cannot be heard on the sidewalk. A shouting match on the front porch is exposed.

This Court has developed simple and administrable rules for the treatment of "exposure" under the Fourth Amendment. The majority in *Katz*, for example, said, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351. This Court refined the "plain view" doctrine in *Horton v. California*, 496 U.S. 128 (1990), holding: 1) that the officer seizing evidence must not have violated the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed, 2) that the item must have actually been in plain view, and 3) that its incriminating character must have been immediately apparent. *Horton*, 496 U. S. at 136-37.

While this Court administers "plain view" using fairly straightforward application of law to facts, con-

cealment can only be found once a court has run through the doctrinal puzzles and societal pronouncements that the "reasonable expectation of privacy" test requires. It should be that information one conceals from the general public using physics and law one also conceals from the government, unless the legal predicates that justify searches and seizures are met. Precedents of this Court, both pre- and post-*Katz*, support this simple rule, if inarticulately. It is a rule that survives changes in the state of technology.

B. People maintain "privacy" by exercising control over personal information using physics and law.

A welcome point of agreement between the majority and concurrence in this Court's recent *Jones* decision, 132 S. Ct. 945 (2012), was the goal of preserving "that degree of privacy against government that existed when the Fourth Amendment was adopted." *Id.* at 950 (majority opinion), and 958 (Alito, J., concurring)(quotations omitted). Preserving some past state of affairs with relation to privacy cannot be a clear goal without a command of what privacy is. Though the Fourth Amendment does not require the Court to consider "privacy" per se, examining privacy and its protection can help rationalize protections against unreasonable searches and seizures.

In 1967, the year that the Supreme Court decided *Katz v. United States*, scholar Alan Westin characterized privacy in his seminal book as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." Alan Westin, *Privacy and Freedom* 7 (1967). This is the strongest sense of the word "privacy": the enjoyment

of control over personal information. A tighter, more legalistic definition of privacy is: "the subjective condition that people experience when they have power to control information about themselves and when they exercise that power consistent with their interests and values." *See* Jim Harper, *Understanding Privacy—and the Real Threats to It*, Cato Institute, Policy Analysis No. 520 (2004). Given control over information about themselves, people will define and protect their privacy as they see fit.

Whether or not the Fourth Amendment requires courts to preserve some past level of privacy protection, giving individuals the same level of control over personal information is at least a meaningful and judicially administrable goal. One simply has to examine how people controlled information in the past and see that their ability to do so is maintained in the present.

In the late 18th century, people controlled information about themselves by how they arranged the things in the world. Retreating into one's home and drawing the blinds, for example, caused what happened inside to be "private." Lowering one's voice to a level others could not hear made a conversation "private." Draping the body with clothing made the details of its shapes, textures, and colors "private."

A list of all privacy-protecting decisions and behaviors would be very long, and it would not be helpful for crafting lasting privacy-protecting rules. But abstracting the nature of privacy protection can: People protect privacy by preventing others from perceiving things.

Perceiving something is being able to collect and process its representation in physical media. Photons

are media which, upon reaching eyeballs, make a thing visible to a person. Sound waves reaching ear drums make a thing audible to a person. Particulates reaching a person's nostrils or tongue make a thing perceptible by scent or taste. The surface of an object touched or pressed upon by skin can reveal its density, hardness, size, and weight. When a person's brain collects these data, he or she perceives the things in the world. The observer can quickly draw inferences about things, and about the people who own and control them.

When the photons, sounds waves, particulate remnants, and surfaces that reveal things are not available, such things are not perceptible, and the drawing of inferences about people is blocked. This, abstractly stated, is how people protect privacy. They did it this way in the late 18th century, and they do it this way today.

It is not enough, though, for people to withdraw into their homes, lower their voices, or wrap their bodies in clothes. When people enter their homes, they do so relying on the aggregate of rights that prevent others from entering or accessing their homes to discover what goes on within. They rely on property rights. When people put clothing on their bodies to prevent photons from revealing the appearance of sensitive areas, they do so relying on protection against wrongful physical contact that might strip the body of its wrappings. That is the law of battery.

Sometimes people do rely almost entirely on physics to protect privacy, such as when they lower their voices in a public place. And sometimes they rely heavily on law, such as when they share information with a fiduciary or service provider bound to confi-

dentiality by contract or regulation. Purely physical arrangements like whispering are an insufficient part of much privacy protection, though, and purely legal arrangements are rare. Most of the time, people protect privacy using natural laws and human laws together.

C. This Court's cases give Fourth Amendment backing to physical and legal arrangements that control information appurtenant to persons, houses, papers, and effects.

Ex Parte Jackson, 96 U.S. 727 (1877), an early case dealing with the Fourth Amendment status of mail, neatly illustrates the interplay of physics and law in privacy protection. The Court accorded constitutional protection to sealed mail, the content of which was controlled by physics. Protection did not obtain for unsealed mail:

> [A] distinction is to be made between different kinds of mail matter,-- between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined. Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers,

> thus closed against inspection, wherever they may be.

Jackson, 96 U.S. at 733.

Letters and packages enclosing their contents in opaque materials had the same security as letters kept in the home. Mailed matter left open had no physical security and thus had no constitutional security. The arrangement of things in the world made things private in a way the Fourth Amendment protects.

In *Olmstead*, this Court failed to adapt that rule to a new technology. When Olmstead and his colleagues spoke on the telephone, a microphone in the handset produced a modulated electrical current that varied its frequency and amplitude in response to the sound waves arriving at its diaphragm. The resulting current was transmitted inaudibly and invisibly along the telephone line to the local exchange, then on to the phone at the other end of the circuit. At its destination, the signal passed through the coil of the receiver and produced a corresponding movement of the diaphragm in the receiving phone's earpiece. This roughly reproduced the sound of Olmstead's conversations.

The signal passing along the electric wire was invisible and inaudible to any human. It could not be perceived and was thus private. Overcoming the protection in physics for Olmstead's communications required some aid to ordinary perception. Chief Justice Taft described how the government tapped the defendants' phones: "Small wires were inserted along the ordinary telephone wires from the residences of four of the petitioners and those leading from the chief office" of the conspiracy. *Olmstead*, 277 U.S. at 457.

These wires carried the signal to a coil and diaphragm the government controlled. The diaphragm reproduced the sound of the voices that were otherwise unheard all along the wire. Government agents took the conversations down to use as evidence.

But later in his opinion, Taft denied those facts. Justifying his legal conclusions, he wrote: "There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing, and that only." *Id.* at 464.

In fact, to make the conversations audible, the government introduced wires into the telephone system and captured the signals it carried. It converted those signals into the sounds they represented and amplified them to replicate conversations. Those actions are not "the use of the sense of hearing, and that only." Those actions made audible something that was concealed, which was a search.

The corrective this Court applied to Fourth Amendment law in *Katz* does not reveal the precise functionality of the bug used to capture Charles Katz's conversations, but it almost certainly worked as a telephone receiver does, by converting sound waves to electrical signals. Assuming those signals were stored on magnetic tape, a tiny magnetic pulse would have reoriented the ferrous molecules coating a tape to match the electrical pulses the sounds produced. When the time came to listen to the tape, a sensor run over it would pick up the magnetic orientation of the molecules and use them to vary electric signals driving a diaphragm. This would reproduce the sounds of Katz's conversations to be taken down and used as evidence.

Crucially, the listening and recording devices were configured to be invisible to Katz. Unable to see the device, and seeing nobody near the phone booth in which he spoke, Katz believed his conversations were private. And they were—but for the FBI agents using high-tech gadgetry to hear what they otherwise could not have heard.

Justice Potter Stewart's majority opinion reversing Katz's conviction rested on the physical protection that Katz had given to his oral communications by going into a phone booth. The holding did not turn on Katz's "expectations of privacy" as Justice John Harlan's concurrence would suggest.

Both parties to the case had fixated on location, assuming based on precedent that being "in private" garnered constitutional protection, while being "in public" meant all bets were off. *Id.* at 351. But, as discussed earlier, an increasingly mobile society and advancing communications technology had rendered physical location a weak proxy for having the interest in security against government intrusion that the Fourth Amendment protects.

Justice Stewart wrote for the Court:

> [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Katz, 389 U.S. at 351(citations omitted).

In the paragraphs that followed, the Court discussed how Katz had preserved his privacy: he went

into a phone booth made of glass that concealed the sound of his voice. *Id.* at 352. Against the argument that Katz's body was in public for all to see, the Court wrote: "[W]hat he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear." *Id*.

Using the physical items around him to husband the sound of his voice, Katz protected his privacy. The government's use of a secreted listening and recording device to enhance ordinary perception overcame Katz's control of that information. It was a Fourth Amendment search that required a warrant.

The majority decision did not raise or explore additional conditions controlling whether phone conversations occurring inside a telephone booth might be protected. The Court later noted that Katz "justifiably relied" on the privacy he enjoyed "while using the telephone booth," *Id.* at 353, but this is simply a conclusion from the fact that it is unreasonable for government agents to invade privacy as they had done. Unfortunately, Justice Harlan would expound on this conclusion in a way that distracted future courts from *Katz*'s actual holding.

It is not only the special problem of communications privacy that benefits from apprehending the physical realities at play in concealment and search. In *Terry v. Ohio*, 392 U.S. 1 (1968), a plain-clothes police detective observed three men acting strangely and became suspicious that they were "casing" a store for a "stick-up." *Id.* at 7. Stopping them some blocks away and receiving unsatisfactory answers to his questions, Officer McFadden "grabbed petitioner Terry, spun him around so that they were facing the

other two . . . and patted down the outside of his clothing." *Id.* at 7.

The government had urged this Court to place brief "stop and frisk" incidents like this outside the Fourth Amendment, *id*. at 16 fn. 12, arguing that police behavior short of a "technical arrest" or a "full blown-search" did not implicate constitutional scrutiny. *Id.* at 19. The Court rejected the idea that there should be a fuzzy line dividing "stop and frisk" from "search and seizure." It wrote with precision about the seizure, then the search, of Terry: "[T]here can be no question … that Officer McFadden 'seized' petitioner and subjected him to a 'search' when he took hold of him and patted down the outer surfaces of his clothing." *Id. See also Terry*, 392 U.S. at 35 (Douglas, J., dissenting) ("I agree that petitioner was "seized" within the meaning of the Fourth Amendment. I also agree that frisking petitioner and his companions for guns was a 'search'"). The seizure and search of Terry were reasonable and therefore constitutional.

Consider how physics and law worked in the *Terry* case. Terry and his fellows had not concealed their movements on the street. Officer McFadden, standing in a place he was legally entitled to be, had used his eyes to capture the photons bouncing off the men and the things around them. Visual observation and inference combined to give McFadden an idea that they might be armed.

After he seized Terry and turned him, Officer McFadden placed his hands on Terry's outer garments. Because he had reasonable suspicion, McFadden was allowed to touch Terry in a way that would otherwise have been a battery. He used touch to "seek[] out that which is otherwise concealed from

view." *Black's Law Dictionary*. The hard resistance and weight of the gun were different from the soft resistance of the human body, of clothing, papers, and such, and the gun was found.

The physical media by which information traveled to Officer McFadden in *Terry* are familiar to judges and Fourth Amendment law, so only a year after the *Katz* decision this Court did not resort to "reasonable expectations" analysis. This Court wrote with confidence and clarity about the seizure of Terry, the search it facilitated, and the legal import of both.

The thermal imaging case, *Kyllo*, is a key recent case in which this Court recognized that the Fourth Amendment backs the physical and legal protections individuals throw around the information appurtenant to their persons, houses, papers, and effects. Thermal imaging cameras detect radiation in the infrared range of the electromagnetic spectrum (that is, with longer wavelengths than visible light), and they produce images of that radiation, called thermograms, by representing otherwise invisible radiation in the visible spectrum. Morovision, "How Thermal Imaging Infrared Technology Works" Web page, available at http://tinyurl.com/CatoJardines6. Because the amount of radiation an object emits increases with temperature, one can see variations in temperature as the government agents did. *Kyllo*, 533 U.S. at 29.

As Charles Katz had done by entering a telephone booth, Danny Kyllo used the walls of his house to conceal from others what goes on within, including the temperature of its rooms. As a matter of fact—not expectation—Kyllo had privacy in the temperature of the rooms of his home. When the government used

out-of-the ordinary sense-enhancing technology to "see" temperatures that were otherwise not in view, it was a search requiring a warrant, and it violated his Fourth Amendment rights. "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Kyllo*, 533 U.S. at 40.

This was the rationale of the *Katz* majority—people who have concealed the information on or about their persons, houses, papers, and effects have also concealed it from the government. Other than in certain narrow cases, such as exigency, the government cannot overcome their privacy with a search except after getting a warrant.

III. THE TRAINED DRUG DOG'S SNIFF AT JOELIS JARDINES'S FRONT DOOR WAS A FOURTH AMENDMENT SEARCH THAT REQUIRED PROBABLE CAUSE AND A WARRANT

It is a search when government agents bring a drug-sniffing dog to the front door of a person's home to examine the home for the presence of drugs. The dog makes perceptible what otherwise was not perceptible. Such a search is presumptively unreasonable without a warrant. This drug-sniffing dog case is on all fours with *Kyllo*.

Olfaction is a dog's primary sense. Dogs have more than 220 million olfactory receptors in their noses, compared to only about 5 million in humans. Julio E. Correa, *The Dog's Sense of Smell*, Alabama A&M and Auburn Universities UNP-0066 (2011), at

1, available at http://tinyurl.com/CatoJardines7. This enables them to sense airborne particulates and gasses at much lower concentrations than humans can. Properly trained using Pavlovian classical conditioning, a dog is turned into a signaling device. It will indicate where it has sensed the presence of trained-for molecules at concentrations too low for humans to perceive. The details are very different, but the result is the same as with a device that converts invisible infrared radiation into visible-spectrum imagery: The human operator can perceive things that are otherwise imperceptible.

The use of a drug-sniffing dog is a "search" in ordinary legal language and the nearest precedent of this court. The sniff of such a dog "look[s] for or seek[s] out that which is otherwise concealed from view." *Black's Law Dictionary* 1349. It is "'look[ing] over or through for the purpose of finding something." Webster 66." And it is use of "a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion." *Kyllo*, 533 U.S. at 40.

Put to use in drug detection, a dog is a technological device. Detecting compounds through the use of an animal applies scientific principles (more or less well) to a practical problem. Dog detection parallels other forms of chromatography. *See, e.g.*, Kenneth G. Furton et al., *Identification of Odor Signature Chemicals in Cocaine Using Solid-Phase Microextraction–Gas Chromatography and Detector-Dog Response to Isolated Compounds Spiked on U.S. Paper Currency*, J. Chromatographic Science, Vol. 40 (March 2002), available at http://tinyurl.com/CatoJardines8; Bogusław Buszewski et el., *Identification of volatile lung*

cancer markers by gas chromatography–mass spectrometry: comparison with discrimination by canines, J. Analytical & Bioanalytical Chem. (Jun. 3, 2012), available at http://tinyurl.com/CatoJardines9. Without prejudice to the affection between a drug-sniffing dog and its handler (as well as your *amicus*'s affection for dogs generally), detector-dog literature refers to detector dog teams as "equipment." *See History of Drug Dogs*, K9 Global Training Academy ("As of now there is no single piece of police equipment that can perform as many functions, or perform as reliably as a well-trained detector dog team."), available at http://tinyurl.com/CatoJardines10.

The widespread existence of dogs in society, and their use historically and presently in other kinds of detection, does not make the drug detection capabilities of specially trained dogs commonplace. In *Kyllo*, this Court rightly limited the "search" concept to use of devices "not in general public use," *Kyllo*, 533 U.S. at 40, which distinguishes common enhancements to ordinary perception, including such things as spectacles, hearing aids, and flashlights. *See United States v. Lee*, 274 U.S. 559, 563 (1927); *Texas v. Brown*, 460 U.S. 730, 739-740 (1983); *United States v. Dunn*, 480 U.S. 294, 305 (1987). These devices people can anticipate others using as they arrange their affairs for privacy protection.

A drug-sniffing dog is not ordinary. It is a product of rare and special training, and of familiarity between the dog and its handler. People do not anticipate friends and neighbors examining the molecular content of the air around themselves, their houses, and their things, so they do not arrange their affairs to frustrate such examinations and protect privacy.

When a government agent guides a drug-sniffing dog in an examination of a person's house or effects, he uses the technology's uncommonness to learn information he otherwise could not.[4] This is a search.

As this Court held in *Kyllo*, such searches are "presumptively unreasonable without a warrant." 533 U.S. at 40. This Court should uphold the judgment of the Supreme Court of Florida on these grounds.

CONCLUSION

This Court could apply Fourth Amendment "reasonable expectation" doctrine to resolve this case. The home and curtilage are areas where people typically and reasonably do expect privacy. But electrical tape and baling wire can only hold the jalopy of "reasonable expectation" doctrine together for so long. Intractable problems will continue to rise to this Court from lower courts struggling to apply confused doctrine.

This Court should revise search and seizure law so it hews more closely to the language of the Fourth Amendment, and so that courts are faced with more clear and more methodical application of facts to law in Fourth Amendment cases. This Court should find a "search" to have occurred in this case because the use of a drug-sniffing dog made perceptible to government agents what they otherwise could not perceive.

Doing so will shift the locus of judging in Fourth Amendment cases back to where the Fourth Amendment calls for it—on the question of reasonableness in searching. This Court, lower courts, law enforce-

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[4] The trial court declined to treat an investigator's later report of detecting suspicious odor sufficient to establish suspicion. *See Jardines v. State*, 73 So. 3d 34, 55 (Fla. 2011).

ment, and the citizenry will be better off for having clear rules that are consistent with the Fourth Amendment's language.

Were this Court to maintain or endorse the *Jacobsen/Caballes* corollary to *Katz* doctrine, it would not only allow dog sniffs wherever government will or whim takes them, but all manner of technical inspection, analysis, monitoring, and many other synonyms for what is rightly known as "searching."

The Fourth Amendment is part of a document that girds human freedom. It helps to ensure that the individual is a sovereign, endowed by the Creator with inalienable rights to life, liberty, and the pursuit of happiness. The Fourth Amendment is not a surveillance management tool for a government endowed with 300 million people to tend as a flock. While the good-faith efforts of courts since *Katz* to manage "privacy" is welcome, it would be better to let Americans manage their own privacy, backed by this Court and the Fourth Amendment when they use physics and law to conceal personal information as they wish.

Respectfully submitted,

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