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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 11-564, Florida v. Jardines.

5 Mr. Garre.

6 ORAL ARGUMENT OF GREGORY G. GARRE

7 ON BEHALF OF THE PETITIONER

8 MR. GARRE: Thank you, Mr. Chief Justice,
9 and may it please the Court:

10 In the three prior cases in which this Court
11 has held that a dog sniff is not a search, this Court
12 has emphasized that a dog sniff is unique, both in terms
13 of the manner in which information is obtained and the
14 nature of the information revealed.

15 As to the latter point, this Court has
16 emphasized that a drug detection dog reveals only the
17 presence of contraband, and that no one has a legitimate
18 expectation of privacy in that.

19 JUSTICE KENNEDY: I mean, that just can't be
20 a proposition that we can accept across the board.
21 Nobody under that view has an interest in contraband in
22 their home. The question is, can you find out the
23 contraband? It's just a circular argument.

24 And if -- and in the -- was it the Caballes
25 case that talked about that, if I have the right name?

1 That was where the contraband was visible; it was almost
2 like the smoking gun falls out. Well, of course,
3 there's no interest in the smoking gun when it falls out
4 in front of you. So I just don't think that works.

5 MR. GARRE: Well, Justice Kennedy, in the
6 Caballes case, the contraband wasn't visible before the
7 dog alerted.

8 In the home case, we're not saying that you
9 don't have a legitimate expectation of privacy in the
10 home. Of course, you do. The question is whether you
11 have a legitimate expectation --

12 JUSTICE SOTOMAYOR: So doesn't that mean
13 that what's in your home that's not visible to the
14 public has an expectation of privacy as well?

15 MR. GARRE: Not when it comes to contraband,
16 Your Honor. And we think that the Kyllo case helps --

17 JUSTICE SOTOMAYOR: But that -- that is
18 circular. Then why do you need a search warrant? If
19 you have no expectation of privacy in the contraband,
20 why bother even with a search warrant?

21 MR. GARRE: Because, Your Honor, when you
22 have a search warrant and you go into a home, there's
23 going to be a lot of private information that you're
24 going to come across, even if your expectation is
25 finding evidence of a crime.

1 JUSTICE GINSBURG: Mr. Garre, does your
2 argument mean -- you say minimally intrusive, and that
3 the dog will detect only contraband, that the police
4 then are to go into a neighborhood that's known to be a
5 drug dealing neighborhood, go into -- just go down the
6 street, have the dog sniff in front of every door, or go
7 into an apartment building?

8 Is that -- I gather that that is your
9 position.

10 MR. GARRE: Your Honor, they could do that,
11 just like the police could go door to door and then
12 knock on the doors and hope that they will find out
13 evidence of wrongdoing that way.

14 But the two responses this Court has always
15 pointed to is the restraint on resources and the check
16 of community hostility.

17 Here, the police were combatting a serious
18 epidemic of grow houses, hundreds of houses each year
19 that were a scourge to the community, not only in terms
20 just of the drugs that they were growing --

21 JUSTICE GINSBURG: Suppose -- suppose the
22 house had on the lawn, no dogs allowed?

23 MR. GARRE: I think that would be different,
24 Your Honor. It would be -- and that's a way in which
25 the house is different than a car. Homeowners can

1 restrict access to people who come up to their front
2 door by putting gates or a sign out front.

3 JUSTICE SCALIA: Well, that's right.

4 And there's such a thing as what is called the curtilage
5 of a house.

6 As I understand the law, the police are
7 entitled to use binoculars to look into the house if --
8 if the residents leave the blinds open, right?

9 MR. GARRE: That's right.

10 JUSTICE SCALIA: But if they can't see
11 clearly enough from a distance, they're not entitled to
12 go onto the curtilage of the house, inside the gate, and
13 use the binoculars from that vantage point, are they?

14 MR. GARRE: They're not, Your Honor.

15 JUSTICE SCALIA: Why isn't it the same thing
16 with the dog? This dog was brought right up -- right up
17 to the -- to the door of the house.

18 MR. GARRE: Your Honor, first of all, I
19 think that, as this case comes to the Court, the police
20 were lawfully present at the front door. That was
21 established by the courts below, and we don't think that
22 they've challenged it here.

23 That's at least true with respect to the
24 police officer. The police officer could go up to the
25 front door and knock and detect the smell of marijuana,

1 just like Officer Pedraja did.

2 JUSTICE SCALIA: Well, then we've taken an
3 unrealistic case, if that has been conceded, because it
4 seems to me crucial that this officer went onto the
5 portion of the house that -- as to which there is
6 privacy, and -- and used a means of -- of discerning
7 what was in the house that -- that should not have been
8 available --

9 MR. GARRE: Well, I think the way you
10 would --

11 JUSTICE SCALIA: -- in that space.

12 MR. GARRE: I think the way that you would
13 answer that question, Your Honor, is, of course, there's
14 a curtilage that extends around the house and protects,
15 in which the homeowner has a reasonable expectation of
16 privacy.

17 It's well established, we think, going back
18 to the common law, that there is an implied consent for
19 people, visitors, salesmen, Girl Scouts,
20 trick-or-treaters, to come up to your house and knock on
21 the door --

22 JUSTICE GINSBURG: Yes, but not implied
23 consent for the policeman to come up with the dog. The
24 only purpose of the dog is to detect contraband.

25 So you can say, yes, there's an implied

1 invitation to the Girl Scout cookie seller, to the
2 postman, even to the police officer, but not police
3 officer with dog, when the only reason for having the
4 dog is to find out if there's contraband in the house.

5 MR. GARRE: Well, Justice Ginsburg, first of
6 all, I think, if the Girl Scout or the salesman or the
7 trick-or-treater brought up a dog with them, there would
8 be complied consent for that too, at least as long as
9 the dog was on a leash.

10 I don't think the subjective --

11 JUSTICE GINSBURG: This is not any dog.
12 This is a drug detecting dog.

13 MR. GARRE: No, that's right. But I don't
14 think it changes the subjective purpose of why they
15 brought the dog with them.

16 JUSTICE SOTOMAYOR: Why is that an implied
17 consent? That's a huge assumption. At least in the
18 cities that I've lived in, you have to have a dog on a
19 leash. And you don't give implied consent. If you're
20 allergic to animals, you don't want dogs walking around
21 at your door.

22 MR. GARRE: Well, you can certainly put the
23 "No Dogs Allowed" sign out front. And there, there
24 would not be implied consent.

25 JUSTICE SOTOMAYOR: No, no, no. But tell me

1 why that you presume that there's implied consent?

2 MR. GARRE: Well, we start with the
3 proposition that --

4 JUSTICE SOTOMAYOR: Do you think homeowners
5 freely let dogs just come into their apartment? I mean,
6 there might be some homes that do.

7 MR. GARRE: Well, certainly not in the
8 apartment, Your Honor. This search took place, the dog
9 walked up the same way that a salesman would and alerted
10 at the front of the door. He didn't go in --

11 JUSTICE SOTOMAYOR: So we're going to treat
12 it like a human being now? You're invited to knock on
13 my door because you're a dog?

14 MR. GARRE: No, I think -- and certainly
15 this is true in my neighborhood, Your Honor, is
16 neighbors can bring their dog up on the leash when they
17 knock on your front door, and I think that's true in
18 most neighborhoods in America.

19 Homeowners that don't like dogs and want
20 them off their property have a way to combat that, and
21 that's putting a fence around it to say, no dogs --

22 JUSTICE SOTOMAYOR: So now we tell --

23 MR. GARRE: -- allowed.

24 JUSTICE SOTOMAYOR: -- all the drug dealers,
25 put up a sign that says "No dogs."

1 MR. GARRE: Well, they could, Your Honor.
2 There are certainly houses that have that.

3 But with respect to the question --

4 JUSTICE SOTOMAYOR: Isn't it fair just to
5 assume that -- what's logical? I -- I let people knock
6 on my door because they have to say something to me. I
7 don't let a dog come up to my door -- I don't
8 willy-nilly invite it to come up to my door.

9 MR. GARRE: And I think -- Your Honor, I
10 think the reason why that doesn't work here is that if
11 you ask that question with respect to the officer, I
12 think it's well settled or accepted that police officers
13 can walk up the front path, absent a sign or something,
14 knock on the door --

15 JUSTICE SOTOMAYOR: That implied consent,
16 does that include them coming up and -- up to your porch
17 and sweeping stuff into a garbage pan?

18 MR. GARRE: I don't think it would,
19 Your Honor. I think that we're talking about going up
20 there, knocking on the door. The police officer cannot
21 just --

22 JUSTICE SCALIA: Police officers can come
23 there to knock on the door, but I thought you've
24 conceded that police officers can't come there to look
25 into the house with binoculars, right?

1 MR. GARRE: With binoculars --

2 JUSTICE SCALIA: When the purpose of the
3 officer's going there is to -- is to conduct a search,
4 it's not permitted.

5 MR. GARRE: If the purpose of the police
6 officer here, for example, was to walk up to the house,
7 hope that they answered the door, or hope that once they
8 were up there, that they would smell the odor of
9 marijuana, as Officer Pedraja did, that would not
10 convert it into a search. There was no invasion,
11 physical invasion.

12 JUSTICE BREYER: That's true, but if you're
13 looking at expectation of a reasonable homeowner,
14 imagine you have a home, a long driveway. You do expect
15 people to come up and come into the house, knock on the
16 door, maybe even with dogs. Do you expect them to sit
17 there for 5 to 15 minutes, 15 minutes, not knocking on
18 the door, doing nothing? I mean --

19 MR. GARRE: Well, Your Honor --

20 JUSTICE BREYER: -- is that something I
21 wouldn't -- would you be nervous about that?

22 MR. GARRE: -- I think --

23 JUSTICE BREYER: Anyone coming to your door
24 and not knocking.

25 MR. GARRE: I think what -- I think what

1 happened here --

2 JUSTICE BREYER: Just sniffing.

3 MR. GARRE: Well, I think everyone accepts
4 when someone comes to your door, they can avail
5 themselves of their God-given senses, whether it's
6 looking into a window without binoculars,
7 taking -- breathing in and smelling the air, as Officer
8 Pedraja did.

9 I don't think there's a constitutional
10 difference when the person has --

11 JUSTICE BREYER: No, there is in this sense.
12 Justice Scalia just said it. He said, you do have an
13 expectation of people coming into your door, perhaps
14 even with animals, perhaps even with binoculars, but not
15 looking into the house, not looking into the house from
16 the front step with the binoculars.

17 Now, why is that unconstitutional? Because
18 it's very unusual that someone would do that, and a
19 homeowner would resent it.

20 MR. GARRE: Well, Your Honor --

21 JUSTICE BREYER: Would a homeowner resent
22 someone coming with a large animal sitting in front of
23 the front step on his property and sitting there
24 sniffing for 5 to 15 minutes?

25 Forget the sniffing. Just talking, loud

1 noises. Is that something that you invite people to do?

2 MR. GARRE: Your Honor, what I think you can
3 say there is implied consent to is a dog accompanying a
4 person on a leash walking up to the front door, taking a
5 sniff in a matter of seconds, not minutes --

6 JUSTICE BREYER: Ah. Is that what happened
7 here?

8 JUSTICE KAGAN: Well, that's not what the
9 record says, Mr. Garre.

10 JUSTICE BREYER: I thought what happened
11 here was 5 to 15 minutes.

12 JUSTICE KAGAN: I mean, the record suggests
13 that he put the dog on a very long leash, the dog goes
14 back and forth, tries to figure out where the smell is
15 coming from.

16 It's not just -- you know, my first thought
17 was you go up to the door, the dog barks once, and
18 that's it. But you read the record, this dog is there
19 for some extended period of time, going back and forth
20 and back and forth, trying to figure out where the
21 greatest concentration of the smell is.

22 It actually seemed, from my reading of the
23 record, to be, you know, a lengthy and obtrusive
24 process.

25 MR. GARRE: Your Honor, I think what the

1 record shows is, is that the dog was on the scene, i.e.,
2 at the curb, walking up, going back into the car, and
3 then leaving, for a total of 5 to 10 minutes.

4 Walking up to the front steps, sniffing,
5 alerting and leaving is a matter of seconds or minutes.
6 It's not -- the dog isn't up there for 5 to 10 minutes.
7 It happens very quickly.

8 I think in thinking about reasonable
9 expectations of privacy, it is important to keep in mind
10 physically what's happening in these houses. These
11 people are growing drugs in the houses with the aid of
12 electricity and light and heat. And they need -- they
13 need air conditioning in order to control the heat.

14 And that air conditioning is blowing a very
15 strong odor of drugs out into the public, and the people
16 know that. They know that. We know they know that
17 because they use mothballs, which Officer Pedraja found
18 here at the front of the house, outside of the house.

19 And so what you're talking about, although
20 we talk about what's going on in the home, really what's
21 happening here is odor of illegal contraband is being
22 blown out into the street and someone is coming up to it
23 and using their God-given senses in a way that humans
24 and dogs have used for centuries and detecting that.

25 CHIEF JUSTICE ROBERTS: Well, we've had a

1 lot of -- we've had a lot of discussion about whether
2 it's 5 minutes or 15 minutes or whether it's mothballs.
3 I understood the issue before us to be whether or not
4 under the Fourth Amendment it is a search for a dog to
5 come up to the door and sniff, not with respect to --
6 we're not making a judgment, I thought, on the probable
7 cause in light of the totality of the circumstances, but
8 the ground of decision below was this is a search when
9 the dog sniffs.

10 MR. GARRE: That you need probable cause
11 just for the dog to sniff. No, that's absolutely right.

12 And the dog sniff itself clearly is not a
13 physical invasion in the same way that looking is not a
14 physical invasion under the common law. And the dog, we
15 think --

16 JUSTICE SCALIA: It isn't just the sniffing
17 in the abstract. It's the sniffing at this point, the
18 sniffing at a person's front door, right? I mean --

19 MR. GARRE: Well, that's true, Your Honor,
20 but I think if it wasn't a search for the police officer
21 to walk up there and sniff and report smelling live
22 marijuana, then it wasn't a search when Franky walked up
23 there and alerted to the presence of an illegal
24 narcotic.

25 JUSTICE SCALIA: Well, I didn't say it

1 wouldn't be a search if the police officer himself did
2 that if he went there with the intention of -- of
3 smelling at the door. He's going there to search, and
4 he shouldn't be on the curtilage to search.

5 MR. GARRE: I think it's been conceded in
6 this case, at least it was below, that the officer could
7 walk up there, knock on the door, report the smell of
8 marijuana, and that that was not a search.

9 JUSTICE KAGAN: Mr. Garre, this is what we
10 said in *Kyllo*. And I'm just going to read it. We said,
11 "We think that obtaining by sense-enhancing technology
12 any information regarding the interior of the home that
13 could not otherwise have been obtained without physical
14 intrusion into a constitutionally protected area
15 constitutes a search, at least where, as here, the
16 technology in question is not in general public use."

17 So what part of that do you think separates
18 your case from this one? In other words, what part of
19 that language does not apply in this case?

20 MR. GARRE: Well, first of all, Franky's
21 nose is not technology. It's -- he's using -- he's
22 availing himself of God-given senses in the way that
23 dogs have helped mankind for centuries.

24 JUSTICE KAGAN: So does that mean that if we
25 invented some kind of little machine called a, you know,

1 smell-o-matic and the police officer had this
2 smell-o-matic machine, and it alerted to the exact same
3 things that a dog alerts to, it alerted to a set of
4 drugs, meth and marijuana and whatever else, the police
5 officer could not come to the front door and use that
6 machine?

7 MR. GARRE: Your Honor, I think the
8 contraband rationale would be the same. It would be
9 different in that you don't have technology in this
10 case.

11 And I think that's an important distinction
12 because, as we read *Kyllo*, the Court was very concerned
13 about advances in technology, and that's just not true
14 for a dog's nose.

15 JUSTICE KAGAN: So your basic distinction is
16 the difference between like a machine and Franky.

17 MR. GARRE: Well --

18 JUSTICE KAGAN: That we should not
19 understand Franky as kind of a sense-enhancing law
20 enforcement technology, but we should think of him as
21 just like a guy.

22 MR. GARRE: Your Honor, I think that's true
23 for two reasons. One is Franky is using the same sense
24 of smell that dogs have used for centuries. So this
25 isn't a case where if you allow a dog to sniff today, he

1 might use x-ray vision in the future. That's not going
2 to happen.

3 And the other thing is that Franky -- that
4 the use of dogs for their sense of smell, which everyone
5 agrees is extraordinary, mankind has been using them for
6 law enforcement type purposes for centuries.

7 JUSTICE GINSBURG: Not this -- not this
8 purpose. You said centuries, but I think you recognize
9 that it wasn't until the seventies when the dogs were
10 used to find culprits. But to use it in this way I
11 think it was only since the seventies.

12 MR. GARRE: Well, to use it for drug
13 detection purposes, that's right. But they've -- we've
14 been using dogs to track thieves for centuries going
15 back before the founding. Scotland Yard -- Scotland
16 Yard used dogs to track Jack the Ripper. That's the
17 same type of way in which they are being used here.

18 The fact is today they're looking for
19 drugs in this context, but --

20 JUSTICE SOTOMAYOR: Mr. Garre, there's no
21 dispute that dogs can smell what human beings can't; is
22 that correct? It's not that we can find a machine to
23 put it on a human being to enhance their sense of
24 smells; dogs can do something human beings can't.

25 MR. GARRE: They have a much better sense of

1 smell, that's right. But I think if you look at --

2 JUSTICE SOTOMAYOR: So you have to treat him
3 like a guy, to think that he is not like technology in
4 terms of augmenting what a human being can do.

5 MR. GARRE: Well --

6 JUSTICE SOTOMAYOR: He's not augmenting what
7 a human being can do. He's substituting what a human
8 being can do.

9 MR. GARRE: He's -- the dogs, no doubt, have
10 an enhanced sense of smell compared to the officer. But
11 I think that's really not functionally different than
12 using an airplane to look into the house, like in
13 Florida v. Reilly. And in that sense, I think this case
14 is a lot like that.

15 In Florida v. Reilly, the officers used a
16 helicopter to fly over the drug house, and they saw
17 exposed marijuana. Here, you're using the drug
18 detection dog to smell the odor of marijuana that is
19 being pumped out of the house into the street.

20 And the people who use the house know that.
21 They know that, and we know they know that because the
22 mothballs were present. Mothballs are a masking agent.

23 People don't have a legitimate expectation
24 of privacy, this Court has held, in things that they
25 knowingly expose to the public, even in the home.

1 That's what the Court said in Florida v. Reilly. It's
2 what it said in Katz itself.

3 And I think, here, one way to resolve it is
4 to say people who live in grow houses with a distinct
5 odor of marijuana, who know that that is being pumped
6 out into the street because of the air conditioning that
7 they need to run the grow houses, there is no invasion
8 in their -- in their expectation of privacy when either
9 a man or a dog, when lawfully present on the property,
10 uses their God-given senses to detect that.

11 If I could reserve --

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 MR. GARRE: Thank you.

14 CHIEF JUSTICE ROBERTS: Ms. Saharsky.

15 ORAL ARGUMENT OF NICOLE A. SAHARSKY,
16 FOR THE UNITED STATES, AS AMICUS CURIAE,
17 SUPPORTING THE PETITIONER

18 MS. SAHARSKY: Mr. Chief Justice and may it
19 please the Court:

20 I'd like to go right to two points that
21 respond to the Court's questions. The first is the
22 question of whether the officer and the dog were
23 lawfully in place, whether they could approach the front
24 door, was conceded below. And, as the court -- as the
25 case comes to this Court, that is not an issue before

1 the Court. And I want to make sure that the Court
2 has --

3 JUSTICE GINSBURG: I didn't -- I didn't
4 understand the concession to be that the police had come
5 to the door with the dog, the sole purpose of the dog
6 being to detect contraband.

7 MS. SAHARSKY: Well, let me give the Court
8 specific citations on that. The court of appeals, the
9 Florida Court of Appeals, found that the dog and the
10 officer were lawfully in place. That's JA pages 104,
11 105, 112, 116 and 120.

12 Before the Florida Supreme Court at oral
13 argument, Respondent conceded that there was no
14 reasonable expectation of privacy in the porch, and the
15 Florida Supreme Court accepted that concession. That's
16 Petition Appendix page 31, also noted by the dissent in
17 pages 78 to 79.

18 In the brief in opposition to cert,
19 Respondent said that the police could approach the front
20 door for a knock and talk, and made no separate argument
21 about the dog's presence there making it not lawful.

22 So as this case comes to the Court, it is
23 with the dog and the officer lawfully in place at the
24 front door, approaching the front door just like any
25 Girl Scout, trick-or-treater, or anyone else could.

1 And just to respond, Justice Ginsburg, to
2 the questions that you raised, the police officer's
3 purpose in approaching the front door does not mean that
4 the officer can't come to the door. The Court has said
5 in many contexts that officer purpose doesn't matter,
6 and it doesn't matter if the officer is looking for a
7 lost child or thinking that that --

8 JUSTICE GINSBURG: You're agreeing with
9 Mr. Garre that the police could take a dog and go down
10 every house on the street, every apartment in the
11 building?

12 MS. SAHARSKY: Well, assuming that the
13 police can lawfully be in the place that they are going
14 with the dog, which is conceded here --

15 JUSTICE GINSBURG: A house just like this
16 house?

17 MS. SAHARSKY: If they are approaching the
18 front door using the normal path, because the dog only
19 detects contraband, yes, they could be used in those
20 circumstances, but that's not happening.

21 There have been justices who've warned about
22 that --

23 JUSTICE GINSBURG: Well, so any home, any
24 home anywhere, and we should say that that's okay, and
25 we can say it's okay because the government won't use

1 it?

2 MS. SAHARSKY: There are justices that have
3 warned about this for over 30 years, and these problems
4 have not come to fruition. There are restraints on
5 police resources. There's the potential for community
6 hostility. If you look at the cases that have arose in
7 the courts of appeals --

8 JUSTICE GINSBURG: This Court has dealt with
9 an item that was seized before, a piece of luggage, a
10 car. They have not dealt with the dog sniff in the
11 context of a home that's not seized.

12 MS. SAHARSKY: But in Caballes, where
13 admittedly the Court did not decide this specific issue,
14 it distinguished the case of Kyllo as saying that that
15 was finding out about lawful activity in the home, and
16 that a person -- the critical distinction between Kyllo
17 and the dog sniff in Caballes is that a person does not
18 have a reasonable expectation of privacy in contraband.

19 JUSTICE KENNEDY: I just -- again, as I told
20 Mr. Garre, I just can't accept that as the premise for
21 the case. The argument we're having about whether there
22 is a reasonable expectation in society generally,
23 whether or not the police because of limited
24 resources are not going to have -- that's all fine. But
25 this idea that, oh, well, if there is contraband,

1 then all the -- all the rules go out the window, that's
2 just circular, and it won't work for me, anyway.

3 MS. SAHARSKY: Well, I wanted to be sure to
4 respond to that, Justice Kennedy, because I would hate
5 for the Court to have the impression that all the rules
6 go out the window. That's not the case.

7 What we're talking about here is a
8 sniff that would allow the police to go to a detached
9 and neutral magistrate to say that, we have probable
10 cause --

11 JUSTICE KENNEDY: Fine --

12 MS. SAHARSKY: -- to get a warrant.

13 JUSTICE KENNEDY: -- but don't ask me to
14 write an opinion and say, oh, we're dealing with
15 contraband here, so we don't need to worry about
16 expectation of privacy. There is simply no support for
17 that because Caballes cited Jacobsen, and Jacobsen was
18 where the contraband fell out of the package and it was
19 in plain view. So that just doesn't work, at least for
20 me, in this case.

21 MS. SAHARSKY: Well, the reasoning in
22 contraband -- in Jacobsen, though, the Court said that
23 the rationale, the reason for its decision in Place, is
24 because when you're talking about people's reasonable
25 expectations of privacy, they have both a subjective and

1 an objective component.

2 So it's not just that you want to keep
3 something private; it's that you need to have a
4 legitimate expectation that you can keep that private.
5 And the Court has said over and over, in Place, in
6 Caballes, in Jacobsen, that you do not have a legitimate
7 expectation with respect to contraband.

8 That doesn't mean that the --

9 JUSTICE KENNEDY: Again, I don't think the
10 cases go that far because those were cases in which the
11 contraband -- Jacobsen -- was in plain view. Everybody
12 knows that it falls out of the package. At that point,
13 you don't have any --

14 What you're saying is, oh, well, if there is
15 contraband in the house, then you have no legitimate
16 expectation of privacy. That, for me, does not work.

17 MS. SAHARSKY: What we're trying to say,
18 Justice Kennedy, is not that you lack any privacy
19 expectation in the home. That's why you need to get a
20 warrant before going into the home.

21 All the dog sniff allows is for the police
22 to try to go to a magistrate and establish probable
23 cause to get a warrant.

24 JUSTICE KENNEDY: That's fine. We can talk
25 about reasonable suspicion. That's all okay.

1 JUSTICE KAGAN: How does what you're saying,
2 Ms. Saharsky, square with Karo? Because in Karo, the
3 only thing that the beeper alerted to in the home was
4 the can of ether, which was clearly an item that was
5 being used for drug manufacture. And there was nothing
6 else other than that item, which you might not call it
7 contraband, but it was evidence of illegality, this can
8 of ether. There was no thought that it was used for
9 anything else. And that was the only thing that the
10 beeper alerted it to; and, yet, nonetheless, we said,
11 you know, of course that's a search.

12 MS. SAHARSKY: I think that my answer
13 touches on the point that you made, which is it was not
14 contraband. The police thought that it might be
15 evidence of a crime, but the Court did not say it was
16 contraband.

17 And, actually, there was a discussion at the
18 oral argument, where defense counsel made very clear
19 that ether has many lawful uses. That makes it
20 different from what the Court considered in Place. This
21 came after the Court's decision in Place.

22 JUSTICE KAGAN: Well, not lawful uses in
23 somebody's house. I mean, maybe lawful uses in a
24 factory or in an operating room, but nobody has cans of
25 ether in their house unless they're making drugs.

1 MS. SAHARSKY: Well, with respect,
2 Your Honor, the defense counsel I think correctly
3 suggested in the Karo oral argument that, in fact, there
4 are lawful uses in photography labs in houses and the
5 like. He actually had an expert that came to the
6 suppression hearing in that case and testified about the
7 various lawful uses of ether in a house.

8 So I think, as the argument came to the
9 Court, the government was not making an argument that
10 that was contraband or evidence of a crime. The
11 government was just saying, oh, it's very limited
12 information, because we had already -- we had already
13 tracked the ether to the house, so you weren't finding
14 out much.

15 And the Court said basically what it said in
16 Kyllo, which is, it might not be much, but it's still
17 about lawful information, activity in the house, and
18 that's protected.

19 But in Caballes, the Court came back and
20 said, sure, we've said Kyllo, lawful activity in the
21 house, but your interests in protecting contraband are
22 different; those are not legitimate interests. And the
23 Court has said that again and again and again.

24 JUSTICE KAGAN: But in Kyllo -- and I think
25 this was what Justice Kennedy was saying. In Kyllo,

1 there was already a seizure that had happened, and the
2 Court just said, this is no -- this is really no greater
3 an intrusion.

4 MS. SAHARSKY: Well, with respect, when we
5 look at the -- when we look at the language in these
6 cases, in Caballes and the like, you know, the Court
7 wasn't saying, oh, it's not a search because this has
8 already -- this had already been seized and nothing more
9 was happening. The Court said it was not a search
10 because there is no legitimate expectation of privacy.

11 And just to be clear, the question about
12 whether folks have a reasonable expectation of privacy
13 with respect to contraband in their house has to take
14 into account two facts: First, that we're only talking
15 about contraband; but, also, that dogs have been
16 used and known for centuries for their sense of smell.

17 JUSTICE BREYER: Yes, but I -- what I'm
18 curious about, and it's an unanswered question for me,
19 is we are considering whether the dog sniff is
20 permissible, so I wanted to know what a dog sniff at the
21 front door involves. And at page 96, 97, 98 of the
22 joint appendix, with which you are familiar, it explains
23 that. It isn't just going up and (indicating); that's
24 it. It's a process called bracketing.

25 They describe it at length. The officer,

1 the dog officer, said he was in a rush that day and it
2 didn't take more than 5 to 10 minutes. And my question
3 really is whether an ordinary homeowner expects people
4 to walk down the curtilage and, with a big animal, and
5 the animal -- they don't knock. They behave in the page
6 96, 97, 98 way.

7 I subjectively think, well, that's pretty
8 unusual behavior, whether it's a policeman or anybody
9 else. So what do you respond?

10 MS. SAHARSKY: This sniff occurred very
11 quickly, and it --

12 JUSTICE BREYER: It was 5 to 10 minutes and
13 it's 96-97.

14 MS. SAHARSKY: Right. I think the 5 to 10
15 minutes, like counsel said, was the whole process of --
16 of bringing the dog up to the door, et cetera. The
17 sniff happened very quickly. But putting that to the
18 side, what the dog is doing is sniffing things that have
19 been exposed to the public from inside the house, smells
20 that the officer himself could smell, could smell in --
21 in plain smell.

22 And the Court has said in other cases, like
23 in Place, that what the dog is doing is very limited in
24 scope; it happens very quickly; there is no physical
25 invasion; it's something that actually this Court has

1 said in Florida v. Royer is something that we want
2 officers to do, because it --

3 CHIEF JUSTICE ROBERTS: Could I follow up on
4 Justice Breyer's question, because it strikes me as a
5 little confusing. Does the dog, as soon as he or she is
6 at the door, sniff and sit or sniff and not sit, or does
7 the dog -- I mean, you've talked about the sniff is
8 immediate. What -- what is the 5 to 10 minutes?

9 MS. SAHARSKY: The 5 to 10 minutes as I read
10 the record was the whole process. The -- the dog sniff
11 I think took seconds or maybe a minute or 2 minutes --

12 CHIEF JUSTICE ROBERTS: And the whole
13 process is -- is what?

14 MS. SAHARSKY: That they were -- that they
15 met at the front gate, that they were walking up to
16 the -- to the door, that the dog did the sniff, that
17 the -- that he talked to the other officer, and then he
18 went back to his car, which was parked I think some --
19 some length of time away. So --

20 CHIEF JUSTICE ROBERTS: It doesn't take the
21 5 to 10 minutes to walk to the door. So the officer
22 walks to the door, the dog sniffs right away and then?

23 MS. SAHARSKY: Well, the dog sniffs. He has
24 to find the strongest source of the odor. So he
25 starts sniffing right away. He sniffs around for a few

1 seconds; he finds the strongest source of the odor and
2 he sits down at that place.

3 CHIEF JUSTICE ROBERTS: Where -- where in
4 the -- where in the record do I find the few seconds
5 point?

6 MS. SAHARSKY: Well, I think the -- probably
7 the cites that -- that Justice Breyer gave are the cites
8 that describe it. So I'm not sure that there is
9 something more specific than that.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 MS. SAHARSKY: Thank you.

12 CHIEF JUSTICE ROBERTS: Mr. Blumberg.

13 ORAL ARGUMENT OF HOWARD K. BLUMBERG

14 ON BEHALF OF THE RESPONDENT

15 MR. BLUMBERG: Mr. Chief Justice, and may it
16 please the Court:

17 Police officers taking a narcotics detection
18 dog up to the front door of a house is a Fourth
19 Amendment search for two distinct and separate reasons.

20 First, when police reveal any details inside
21 a home which an individual seeks to keep private, that
22 is a Fourth Amendment search and that is exactly what a
23 narcotics detection dog is doing, revealing details in
24 the home the individual seeks to keep private.

25 JUSTICE KENNEDY: That's your first reason

1 and I don't want you to be deterred from giving us the
2 second, but if we can concentrate on that for a minute.

3 That seems to me a proposition that's
4 equally unacceptable to what the government is saying,
5 that you have no interest in contraband. The police
6 often, when they have ordinary conversation with people,
7 want to find out the details of what that person is
8 doing, where the person lives, what goes on in the
9 house.

10 "Hello, have you had a nice time at the --
11 at the park today? I see you're coming home with your
12 children; is this where you live?" This is all routine
13 conversation that we always have in order to try to find
14 out what people are doing, what they are like, where
15 they live. So I -- I think the statement, and you --
16 you repeated it quite accurately from what you have at
17 page 16 of your brief -- just goes too far. Our
18 decisions "establish that police action which reveals
19 any detail an individual seeks to keep private is a
20 search" -- that is just a sweeping proposition that in
21 my view, at least, cannot be accepted in this case. I
22 think it's just too sweeping and wrong.

23 MR. BLUMBERG: Justice Kennedy, I would add
24 a few words to the end of that statement: Anything that
25 an individual seeks to keep private in the home, and

1 that's the difference. Your hypothet about
2 conversation, certainly a police officer can talk to
3 someone and ask them questions about --

4 JUSTICE KENNEDY: Well, the police officer
5 talked with somebody at the police station, or walking
6 down the street about what their occupation is, do they
7 work at home. They're -- they are trying to get
8 information. That's perfectly legitimate.

9 MR. BLUMBERG: Certainly, but in that
10 hypothet --

11 JUSTICE KENNEDY: Well, then your broad
12 statement simply does not work.

13 JUSTICE SCALIA: Suppose you -- you have
14 someone who, who has been guilty of a crime. He has --
15 he has the body. He has committed a murder and he has
16 the body in the home. He certainly wants to keep that
17 private, right? And he foolishly and mistakenly leaves
18 the blinds open in the room where -- where the corpse is
19 lying, and the policeman at a great distance has a
20 telescope and he looks through the blinds and he sees
21 the corpse. Can the police go into the home?

22 MR. BLUMBERG: In that situation, the person
23 inside the home has knowingly exposed what is inside the
24 home to the public.

25 JUSTICE SCALIA: Oh -- he hasn't knowingly.

1 He was careless.

2 MR. BLUMBERG: Well, but I -- I understood
3 under your hypothetical that he knowingly left the blinds
4 open.

5 JUSTICE SCALIA: He certainly wanted to keep
6 it -- he wanted to keep it private.

7 MR. BLUMBERG: Well, certainly; and the
8 defendant in Reilly wanted to keep the marijuana
9 private.

10 JUSTICE SCALIA: Well, you could say the
11 same thing here. They wanted to keep private the fact
12 that they were growing the marijuana, but they -- they
13 used a means of suppressing the heat that made it
14 impossible to keep it private.

15 MR. BLUMBERG: Well, that --

16 JUSTICE SCALIA: They were careless.

17 MR. BLUMBERG: I -- I don't believe there is
18 anything in the record to indicate that the air
19 conditioner was blowing the smell of marijuana out from
20 the house in a very strong manner. As a matter of
21 fact --

22 JUSTICE SCALIA: There were the mothballs.

23 MR. BLUMBERG: There were mothballs there,
24 and Detective Bartelt, the dog handler that was standing
25 at the front door as well, testified without

1 contradiction or without hesitation he didn't smell
2 anything.

3 So if -- if Mr. Garre's representation about
4 an air conditioner basically blowing the smell of
5 marijuana outside the house so that anybody would smell
6 it --

7 CHIEF JUSTICE ROBERTS: What were the
8 mothballs there for?

9 MR. BLUMBERG: The mothballs presumably were
10 there to -- to mask the smell of an odor coming from the
11 house.

12 CHIEF JUSTICE ROBERTS: Okay, then --

13 MR. BLUMBERG: It's manifesting an
14 expectation of privacy.

15 CHIEF JUSTICE ROBERTS: Well, that's my
16 question. Are we talking about the expectation of
17 privacy in the marijuana or the expectation of privacy
18 in the odor?

19 MR. BLUMBERG: The expectation of privacy on
20 the -- in the details, what's going on inside your
21 house.

22 CHIEF JUSTICE ROBERTS: Well -- well, no,
23 that can't be right, because if you're letting smoke out
24 that -- that -- I don't know, from the burning of a body
25 or something, you don't say, well, because he's trying

1 to conceal that you can't rely on the smoke.

2 MR. BLUMBERG: But that's knowingly
3 exposing what's inside the house.

4 CHIEF JUSTICE ROBERTS: So I guess the
5 question here is, if you appreciate the fact that the
6 odor is coming out to the extent that you're going to
7 put mothballs all around the house, it seems to me that
8 you -- you may have an expectation of privacy in the
9 marijuana plants, but you don't have an expectation of
10 privacy in the odor, because you're emitting it out, out
11 into the world, and it's the odor that was detected.

12 MR. BLUMBERG: But assuming that's what the
13 mothballs were there for, that's to keep the odor inside
14 the house, so that the public cannot find -- cannot
15 detect that odor, unless you go up there --

16 CHIEF JUSTICE ROBERTS: That's like saying
17 you put the -- the drugs in a -- in a bag to protect
18 them from observation on the outside, but you use, you
19 know, a clear bag rather than a, you know, opaque one or
20 something. You didn't -- you weren't very successful.
21 And -- when you began you said assuming that's what the
22 mothballs were there for. That is what they were there
23 for, isn't it? There is no other reason --

24 MR. BLUMBERG: There's -- there is really no
25 evidence in the record as to -- the only people who

1 testified at the hearing on the motion to suppress were
2 the two police officers.

3 JUSTICE ALITO: Well, I think your first
4 reason is -- is so broad, it is clearly incorrect. It's
5 so broad, you ought to go on to your second reason.

6 JUSTICE KENNEDY: Yes, I was going to
7 ask for your second, your second point.

8 MR. BLUMBERG: Well, the -- when a police
9 officer takes a narcotics detection dog up to the front
10 door of the house, that is also a Fourth Amendment
11 search because that is a physical trespass upon the
12 constitutionally protected area of the curtilage of the
13 home.

14 JUSTICE ALITO: You know, we've had hundreds
15 of years of trespass cases in this country and in
16 England. Has there -- do you have a single case
17 holding that it is a trespass for a person with a dog to
18 walk up to the front door of a house?

19 MR. BLUMBERG: Well, there are cases that go
20 back to the -- I'm sorry, I don't have the, the
21 citations -- but there are cases in the 1700s that
22 established that basically a dog running on to someone
23 else's property is a trespass.

24 JUSTICE ALITO: That really wasn't my
25 question, was it?

1 MR. BLUMBERG: I thought your question
2 was if a dog comes on to private property --

3 JUSTICE ALITO: If a dog on a leash is
4 brought up to the front door of a person's house, was
5 that a trespass at the time when the Fourth Amendment
6 was adopted?

7 MR. BLUMBERG: If it was without the consent
8 of the homeowner, yes, it was a trespass.

9 JUSTICE ALITO: What is the case that says
10 that?

11 MR. BLUMBERG: I do not have the case.

12 JUSTICE ALITO: You don't have the case.

13 JUSTICE BREYER: You're assuming the
14 conclusion in these things. I mean, I thought since
15 Katz the rule has been whether the homeowner has a
16 reasonable expectation of privacy in -- which is
17 infringed or violated or interfered with when the
18 government acts. So it's a question of does he have
19 that reasonable expectation. So now we're back to
20 exactly where we were. Your opponents say, no, there is
21 no reasonable expectation of privacy --

22 MR. BLUMBERG: Well --

23 JUSTICE BREYER: -- to protect a person with
24 a dog coming up to the door and going (indicating), all
25 right? Now, your response to that is what?

1 MR. BLUMBERG: My response to that is that
2 does violate the resident's reasonable expectation of
3 privacy.

4 JUSTICE BREYER: And then the question was,
5 as Justice Alito put it, why? He says, we go back to
6 the 17th century, as far as you want, and there is no
7 law that says there is any kind of expectation in a
8 homeowner that a person won't walk up to the dog -- to
9 the door with a dog on a leash and sniff, which, as he
10 says -- which your opponents say is what happened here.
11 And your response to that is?

12 MR. BLUMBERG: My response to that is that
13 any entry onto private property in the 1700's was a
14 trespass, was the tort of trespass, unless it was with
15 consent.

16 JUSTICE GINSBURG: What about, Mr. Blumberg,
17 the government cited many, many pages in the record, I
18 just took the first one, petition -- appendix to the
19 petition, 104 and 105. The court said, the officer and
20 the dog were lawfully present at the defendant's front
21 door, and we were told that that was conceded by you a
22 number of times.

23 MR. BLUMBERG: Absolutely not,
24 Justice Ginsburg. What I -- what I said in the Florida
25 Supreme Court, I was given a hypothet about an officer

1 coming up by himself without the dog to knock on the
2 front door and talk to the homeowner. And I said that I
3 conceded that would not be a violation of a reasonable
4 expectation of privacy, and this Court has stated as
5 much in Kentucky v. King.

6 And then the Court said to me, what's the
7 difference? And I said the dog. And that's exactly
8 what I'm saying here.

9 JUSTICE KAGAN: Okay. So that's
10 clearly -- you do concede if the police officer walks up
11 to the door, smells it himself, no problem there; is
12 that right?

13 MR. BLUMBERG: If the police officer is
14 perform -- is knocking on the door, part of a knock and
15 talk, yes; but, if the police --

16 JUSTICE KAGAN: But smells it himself, so
17 there's no problem there.

18 So the difference is the dog. So what
19 difference does the dog make?

20 Suppose the dog were not doing this
21 ten-minute bracketing that Justice Breyer was talking
22 about. Suppose this really were a very simple
23 procedure. The dog comes up, takes a sniff, barks, sits
24 down. And, you know, to make it even more, the dog is
25 not a scary-looking dog, the dog is a Cockapoo.

1 So just like, you know, your neighbor with
2 his Cockapoo walks up to your door all the time, that's
3 what this police officer has done. Why do you win then?

4 MR. BLUMBERG: Well, whether it's a Cockapoo
5 or Franky, who, from all the pictures, appears to be a
6 very cute dog, it's not what the dog looks like, it's
7 what the dog is doing on the front porch, which is --

8 JUSTICE KAGAN: The dog does what your
9 neighbor's dog does.

10 MR. BLUMBERG: Well, no, this dog -- the
11 neighbor's dog does not search for evidence on your
12 front porch. That's the key distinction.

13 JUSTICE SCALIA: But, Mr. Blumberg, I think
14 you're, with respect, misguided to concede that if it
15 was just the officer alone without the dog, it would be
16 perfectly okay.

17 MR. BLUMBERG: I did not mean to concede
18 that, and I was going to say that.

19 JUSTICE SCALIA: Well, I thought you did.

20 MR. BLUMBERG: I was about to return to
21 your --

22 JUSTICE SCALIA: And I would assume you
23 would say that if the officer walks up there with no
24 intention to knock and talk, but just walks up to the
25 door with the intention of sniffing at the door, you

1 would consider that to be a violation, wouldn't you?

2 MR. BLUMBERG: And that was the point I was
3 going to make in response to Justice Kagan's question.

4 CHIEF JUSTICE ROBERTS: Well, our
5 Fourth Amendment cases are very clear that they don't
6 turn on the subjective intent of the particular officer.

7 MR. BLUMBERG: And I am not arguing that. I
8 am arguing --

9 CHIEF JUSTICE ROBERTS: I thought you just
10 said it depends on whether or not he's going up to the
11 door to sniff or going up for something else.

12 MR. BLUMBERG: It depends what the officer
13 does at the front door, not what his state of mind is.

14 If the officer goes up to the front door and
15 starts sniffing around the cracks and crevices --

16 CHIEF JUSTICE ROBERTS: Yes, sure, if he's
17 down on his knees; but, what if he goes up to the front
18 door and sniffs? I mean, he's --

19 MR. BLUMBERG: That's --

20 CHIEF JUSTICE ROBERTS: -- he's got to
21 breathe. I mean, how do you tell whether it's
22 different?

23 I don't understand. He's going up to drop
24 off, you know, tickets to the Policeman's Ball, and he
25 smells marijuana. What is that? Is that a violation or

1 not?

2 MR. BLUMBERG: It is not because he is not
3 performing any type of search.

4 CHIEF JUSTICE ROBERTS: So it depends
5 on -- but if he's going up to sniff, it is a violation?

6 MR. BLUMBERG: Not going up to sniff. If he
7 goes up there and does sniff --

8 JUSTICE ALITO: What if he goes to --

9 MR. BLUMBERG: -- and starts searching
10 around, looking in the windows --

11 JUSTICE ALITO: -- he goes to deliver the
12 tickets, and he sniffs? He doesn't intend to sniff
13 before he goes, but he goes to deliver the tickets, and
14 he smells the marijuana. Is that a search?

15 MR. BLUMBERG: No, because he's not
16 performing any kind of search. And this Court has
17 repeatedly held that an officer --

18 JUSTICE ALITO: Well, he doing exactly the
19 same thing. Two officers go up to two identical houses.
20 One goes up with the subjective intent to sniff. The
21 other one goes up with the subjective intent to drop off
22 the tickets to the Policeman's Ball. Your answer is one
23 is a search, one is not a search.

24 MR. BLUMBERG: No, and I am not in any way,
25 shape or form tying it to the subjective intent of the

1 officer.

2 JUSTICE SCALIA: All right. Again, I think
3 you're wrong not to accept that. I think our cases
4 support it. I think you cannot enter the protected
5 portion of a home, which is called the curtilage, with
6 the intention of conducting a search, that that is not
7 permitted. I think our cases establish that.

8 MR. BLUMBERG: I believe the language --

9 JUSTICE SCALIA: And it's fine to say -- I
10 don't think it's true that the intent of the officer is
11 never relevant. It is relevant in that context.

12 The reason for the officer going onto
13 protected property, if he's going on just to knock on
14 the door to sell tickets to the Policeman's Ball, that's
15 fine. If he's going on to conduct a search, that's
16 something else.

17 MR. BLUMBERG: The language in this Court's
18 opinion in Jones is for the purpose of conducting a
19 search.

20 CHIEF JUSTICE ROBERTS: Can odors be in --
21 in the equivalent of plain sight, plain smell? In other
22 words, the officer goes up to drop off the Policeman's
23 Ball tickets, the door is open, he sees the dead body.
24 The officer goes up to sell the Policeman's Ball
25 tickets, and he sees -- he smells the marijuana. Okay

1 in both cases, right?

2 MR. BLUMBERG: Yes, Mr. Chief Justice.

3 CHIEF JUSTICE ROBERTS: So this depends upon
4 how strong the odor is.

5 MR. BLUMBERG: This Court's decisions
6 establish that a police officer does not have to close
7 his eyes when he goes up to the front door of a house to
8 do a knock and talk. He does not have to hold his nose
9 to prevent. Anything that he naturally observes using
10 his ordinary senses when he is there for a lawful
11 purpose such as a knock and talk is fine.

12 CHIEF JUSTICE ROBERTS: If the -- let's say
13 it's a townhouse that goes right up to the sidewalk. If
14 the police go by with their dog intending to sniff, and
15 the dog alerts, on the sidewalk but two feet away is the
16 front door, that's okay, right?

17 MR. BLUMBERG: Well, that would not be a
18 trespass. That would not be a search because a
19 trespass --

20 CHIEF JUSTICE ROBERTS: So it's okay?

21 MR. BLUMBERG: No, it's not okay,
22 respectfully, because the dog would still be revealing
23 details inside the home that the officer could not
24 reveal using his or her ordinary senses. That's our
25 first argument in this case.

1 CHIEF JUSTICE ROBERTS: Well, let me make
2 sure I understand you. The policeman is walking down
3 the sidewalk with his dog, the dog stops and alerts.
4 That doesn't constitute sufficient probable cause to get
5 a search warrant to go into the townhouse. There's been
6 no entry onto the property, just a policeman walking
7 with his dog.

8 MR. BLUMBERG: Well, but I assume on your
9 hypothet it's a policeman walking with his narcotics
10 detection dog up and down the street.

11 CHIEF JUSTICE ROBERTS: Sure.

12 MR. BLUMBERG: A dog that he knows is
13 trained --

14 CHIEF JUSTICE ROBERTS: He's walking the
15 dog. He's not out searching. He's walking the K-9 dog,
16 and the dog alerts on a house without any trespass. You
17 think that's still bad?

18 MR. BLUMBERG: Yes. And I would submit that
19 would basically be the same thing as a police officer
20 walking up and down the street with a thermal imager
21 that's turned on.

22 JUSTICE SCALIA: But you do say that this is
23 an easier case.

24 MR. BLUMBERG: This is an easier case, of
25 course, because the police officer in this case -- and

1 not only the facts of this case, but the question
2 presented is going up to the front door of a home.

3 JUSTICE ALITO: I thought the relevance of
4 technology was that the technology that we have now was
5 not necessarily -- was not -- much of it was not
6 available at the time when the Fourth Amendment was
7 adopted, so we can't tell what the -- what people in
8 1791 would have thought about it.

9 But that's not true of dogs. Dogs were
10 around. They have been around for 10,000 years.

11 MR. BLUMBERG: Dogs were around,
12 Justice Alito --

13 JUSTICE ALITO: -- and they've been
14 used -- and they've been used to detect scents for
15 10,000 -- for thousands of years. Certainly, they were
16 available for that purpose in 1791, weren't they?

17 MR. BLUMBERG: But in 1791, dogs had not
18 been trained to detect criminal activity within a
19 house -- not -- I'm sorry --

20 JUSTICE ALITO: But they had been trained to
21 track people, had they not?

22 MR. BLUMBERG: Yes. Dogs have been tracking
23 people --

24 JUSTICE ALITO: So in 1791, if someone -- if
25 the police were using -- or somebody was using a

1 bloodhound to track -- someone who was suspected of a
2 crime, and the bloodhound -- and they used the
3 bloodhound to track the person to the front of -- to the
4 front door of a house, would that have been regarded as
5 a trespass?

6 MR. BLUMBERG: Yes, I believe it still would
7 have.

8 JUSTICE ALITO: And what's the case that
9 says that?

10 MR. BLUMBERG: Well, the -- I do not have a
11 case that says that taking a bloodhound up to the front
12 door of a house would be a trespass. But if you analyze
13 it under the definition of what a trespass is, it's an
14 unlawful entry onto private property without consent of
15 the homeowner. And there is no --

16 JUSTICE ALITO: Without implied consent.

17 MR. BLUMBERG: Right.

18 JUSTICE ALITO: Actual or implied consent.

19 MR. BLUMBERG: I don't believe a homeowner,
20 back in the 1700's, impliedly consented to police coming
21 up to the front door of his house with a bloodhound,
22 even though everybody knew they could do that.

23 JUSTICE ALITO: Well, are there cases that
24 say that the implied consent exists only where the
25 person is coming to the door for a purpose that the

1 homeowner would approve, if the homeowner knew the
2 purpose of the person coming to the door?

3 MR. BLUMBERG: The specific doctrine is
4 implied consent by custom. And so you look to what is
5 it customary for people to accept in terms of people
6 coming onto their property.

7 JUSTICE KENNEDY: How is that different from
8 what Justice Breyer I think correctly indicated, our
9 inquiry as to whether there is a reasonable expectation
10 of privacy? In a way, that's circular because if we say
11 there is, then there is, if we say there isn't, then
12 there isn't.

13 But if we're looking at community values in
14 general, isn't it a reasonable expectation of privacy?

15 MR. BLUMBERG: It's very similar. The two
16 doctrines are very similar. Whether you're saying it's
17 a violation of a reasonable expectation of privacy, as
18 Justice Breyer --

19 JUSTICE KENNEDY: Let me ask this. I think
20 I know what your answer would be. Suppose the policemen
21 have little microphones on so they can talk into their
22 radio, the microphone on their lapel. Suppose the
23 policeman goes to the homeowner and he has the
24 microphone in his lapel on so his partner can hear the
25 conversation, and they can -- the two of them talk about

1 it later. They're talking to the homeowner. Is that an
2 unlawful search?

3 MR. BLUMBERG: If the homeowner chooses to
4 engage in conversation with that officer and his
5 conversation is overheard on the microphone --

6 JUSTICE KENNEDY: It doesn't occur to him
7 that that mike is on.

8 MR. BLUMBERG: But, again, when you talk to
9 the police officer, that's a reasonable possibility.
10 You don't have -- that's not a reasonable expectation of
11 privacy, that if you talk to a police officer, that that
12 might be going out to another police officer that's in
13 the car down the street. But there's no -- a
14 homeowner does not --

15 JUSTICE KENNEDY: But -- but maybe it is a
16 reasonable expectation, maybe it isn't. I frankly think
17 that might be harder than the dog case or that you can
18 make a stronger case for a reasonable expectation of
19 privacy. If the -- if the homeowner is making a lot of
20 marijuana with -- with odors coming out, he knows that a
21 dog or a person might smell it.

22 MR. BLUMBERG: But, again, this particular
23 case is not -- the question presented does not hinge on
24 whether or not a normal officer could smell it, because
25 this officer, Detective -- I'm sorry -- Detective

1 Bartelt said he did not smell it.

2 JUSTICE KENNEDY: It does hinge on what is a
3 reasonable expectation of privacy.

4 MR. BLUMBERG: It does.

5 JUSTICE KENNEDY: And that's what we're
6 trying to find out.

7 MR. BLUMBERG: It does.

8 JUSTICE BREYER: I'll look at this later,
9 but I'm rather surprised. My understanding of the case
10 law was the Chief Justice's, and I thought what you're
11 supposed to look at is the behavior of the individual,
12 the police officer, who comes to the door or looks into
13 the house, not his subjective motive.

14 Now, as we just heard, you said, and with
15 support here, that Jones changed that, but I don't know
16 what in Jones changed that. Jones was the case where
17 the police did in fact go to a person's car and
18 physically put something in it. That's -- something
19 that tracked. That's behavior.

20 MR. BLUMBERG: Correct. But the
21 definition --

22 JUSTICE BREYER: So what is it in Jones that
23 said what we're supposed to look at is not behavior, but
24 the subjective intent of the officer?

25 MR. BLUMBERG: It's the language in Jones

1 that says one of the elements in determining whether or
2 not a physical trespass constitutes a search under the
3 Fourth Amendment is, is there a physical trespass, onto
4 a constitutionally protected area, for the purpose of
5 conducting a search. Those are the three elements of
6 the --

7 CHIEF JUSTICE ROBERTS: What is the
8 constitutionally protected area in this case?

9 MR. BLUMBERG: In this case, the curtilage
10 of the home.

11 CHIEF JUSTICE ROBERTS: Even though it's the
12 sidewalk where people -- there's an implied license for
13 people to walk up to --

14 MR. BLUMBERG: Well, that was your --

15 JUSTICE BREYER: I mean, it may be a search.
16 I see that.

17 MR. BLUMBERG: It's not a sidewalk here.
18 It's the front door.

19 JUSTICE SCALIA: It's not the sidewalk here,
20 is it? It's the front part.

21 MR. BLUMBERG: No, no, it's the front door
22 of the home here.

23 CHIEF JUSTICE ROBERTS: But there is an
24 implied license to walk up to the front door, right?

25 MR. BLUMBERG: Only -- only to do certain

1 things.

2 JUSTICE SCALIA: There's -- there's an
3 implied license to -- to go on to the curtilage for most
4 people.

5 MR. BLUMBERG: Yes.

6 JUSTICE SCALIA: The curtilage is -- is not
7 sacrosanct.

8 MR. BLUMBERG: To do certain things such as
9 to try to and sell Girl Scout cookies, to knock -- even
10 a police officer can go on to the curtilage, to knock on
11 to the door -- I'm sorry -- to knock on the front door,
12 to try and engage the person inside the home in a
13 conversation.

14 JUSTICE SOTOMAYOR: Could we go back to the
15 concession that was asked of you, what you conceded in
16 the Florida court or didn't? Have you conceded that the
17 police officer sans dog, if he had come up to the door
18 and knocked, that that would have been permissible, that
19 that was not a search or seizure?

20 MR. BLUMBERG: If what the police officer
21 was doing at the front door was a knock and talk. That
22 was the law --

23 JUSTICE SOTOMAYOR: Did he have -- did he
24 have a right under the facts of this case? He had been
25 told that in this house they were growing marijuana by a

1 confidential informant. Assume that's all that he had.
2 Would he have had a right to walk up to the door, knock
3 on it, and start asking questions?

4 MR. BLUMBERG: Without the dog.

5 JUSTICE SOTOMAYOR: Let's -- sans dog, yes.

6 MR. BLUMBERG: Yes, yes. That's Kentucky v.
7 King, I believe.

8 JUSTICE SOTOMAYOR: All right. So you are
9 conceding that he had license to walk onto -- or walk to
10 the door and ask questions.

11 MR. BLUMBERG: A police -- there's implied
12 consent for a police officer to go up to the front door,
13 knock on the door and attempt to engage the person in
14 the house in conversation if they open the door.

15 JUSTICE ALITO: So why is that? Why is
16 that? If you took a poll of people and said do you
17 want -- do you want police officers who suspect you of
18 possibly engaging in criminal conduct to come to your
19 front door and knock on the door so they can talk to you
20 and attempt to get incriminating information out of you,
21 would most people say, yes, I consent to that?

22 MR. BLUMBERG: In terms of consent? Again,
23 it's implied consent by custom. And I think at this
24 point it's customary for people to expect that police
25 officers may come to your front door and knock on your

1 front door to try and talk to you. You don't have to
2 talk to them.

3 JUSTICE SOTOMAYOR: I guess the bottom line
4 is that are you taking -- it sounds to me like you're
5 saying there's no implied consent to bring a dog on to
6 my property.

7 MR. BLUMBERG: Absolutely. Absolutely. And
8 certainly not a narcotics detection dog.

9 JUSTICE SOTOMAYOR: You're -- Mr. Garre said
10 differently, that there is an implied consent for your
11 neighbor to bring the dog up for anyone else but a
12 police officer. Is that what you're saying? There's an
13 implied consent for anyone else or there is no implied
14 consent, period?

15 MR. BLUMBERG: I think a strong argument can
16 be made that there is no implied consent for anyone to
17 bring a dog up to the front door of your house, because,
18 as you pointed out, a lot of people don't like -- don't
19 like dogs and -- and some people are allergic to dogs.

20 JUSTICE GINSBURG: I thought you were
21 talking about a dog trained to detect contraband --

22 JUSTICE SCALIA: Yes.

23 JUSTICE GINSBURG: -- not just any old dog.

24 MR. BLUMBERG: We are, but I believe the
25 hypothet was just any dog. But certainly, when it's --

1 when it's a dog trained to detect contraband, there's no
2 question that no one impliedly consents to that
3 happening and there's no question, as Justice Breyer
4 pointed out, that a homeowner has a reasonable
5 expectation of privacy that that's not going to happen.

6 JUSTICE ALITO: You draw a distinction
7 between dogs that are not drug detection dogs and
8 ordinary dogs. Would you draw the same distinction
9 between a police officer who is not expert at detecting
10 the smell of methamphetamine and a police officer who is
11 expert at detecting the smell of that drug?

12 MR. BLUMBERG: In terms of the right of that
13 officer to come up to the house and knock on the front
14 door?

15 JUSTICE ALITO: To knock on the front door,
16 yes.

17 MR. BLUMBERG: No, there -- there wouldn't
18 be any distinction to that. You impliedly consent and
19 you have no reasonable expectation of privacy that any
20 type of police officer is going to come and knock on
21 your front door and try and talk to you.

22 JUSTICE BREYER: Not a police officer. If
23 we start -- policemen have to know how to behave. And
24 in this area, they can behave the same way as other
25 people can behave, and we expect them to behave, even

1 though their motive differs. They're always trying to
2 find crime. That's what I thought the law was.

3 I've been trying to figure out just what you
4 say, but in a slightly different form. Do people come
5 up to the door with dogs? Yes. Do the dogs breathe?
6 Yes.

7 Do in fact policemen, like other people,
8 come up and breathe? Yes. Do we expect it? Yes, we
9 expect people to come up and breathe. But do we expect
10 them to do what happened here? And at that point, I get
11 into the question: What happened here? And I'd be
12 interested in your view on that.

13 MR. BLUMBERG: And -- and just to clear up
14 the factual, I don't believe that -- that what happened
15 here in terms of the use of the drug detection dog took
16 5 to 15 minutes. It didn't take 5 to 15 minutes. It
17 certainly took, I would say, at least 1 or 2 minutes,
18 because what happened -- and again, this is on 96, 97
19 and 98 -- the officer goes from the street over the
20 curb, up to the front door of the house, with the dog
21 basically dragging him up to the front door of the
22 house.

23 They go up this walkway -- and a picture of
24 the home is -- is in the appendix to the brief -- and
25 then the dog crosses the -- into the alcove, the area

1 right in front of the house. And once he gets in that
2 area, the dog starts violently bracketing back and
3 forth, pulling on the leash. The dog handler testified
4 that the other officer had to stay back, because it was
5 so violent that people could get knocked down by what's
6 happening.

7 And for a period of time the dog goes back
8 and forth, back and forth, and then at some point goes
9 to the crack on the bottom of the front door, sniffs
10 that, and then the process finally stops, he sits down.
11 So that's factually what happened.

12 JUSTICE GINSBURG: Mr. Blumberg, the
13 Florida appellate court, yes, the court of appeals, did
14 say that that the officer and the dog were lawfully
15 present. But you say you didn't make that concession.

16 MR. BLUMBERG: Well, that's -- I did not
17 make that concession and -- no, I certainly did not
18 concede that, but the court found that. And that's the
19 point I wanted to make. The courts, both courts in
20 Florida, squarely addressed that issue, Justice
21 Ginsburg. There is a whole section in the opinion in
22 the Third District Court of Appeals saying the officer
23 and the dog were lawfully present. They didn't -- that
24 section doesn't go, defense counsel concedes that issue.
25 That -- that issue -- that part of the opinion goes: We

1 find that the officer and the dog were lawfully present.
2 So it's squarely before this Court.

3 JUSTICE ALITO: Well, don't we have to
4 accept that? Don't we have to accept that as a
5 statement of Florida law?

6 MR. BLUMBERG: I'm sorry. I didn't hear the
7 beginning of your --

8 JUSTICE ALITO: Do we not have to accept
9 that as a statement of Florida law?

10 MR. BLUMBERG: No.

11 JUSTICE ALITO: No?

12 MR. BLUMBERG: The issue is whether or not
13 that's a violation of the Fourth Amendment. And -- and
14 just because the Third District Court of Appeal found --
15 that's -- that's what's before the Court today. That's
16 why the issue is squarely before the Court.

17 The Third District Court of Appeal decided
18 the officer had the right to go up and be there on the
19 front porch with the dog. The Florida Supreme Court
20 disagreed. There is a passage in the decision of the
21 Florida Supreme Court that says an officer going up to
22 the door -- can go up to the door and do a knock and
23 talk, but when the officer goes up with a narcotics
24 detection dog, that is a qualitatively different matter.

25 So that issue is --

1 CHIEF JUSTICE ROBERTS: Maybe this is the
2 same question Justice Alito asked earlier, but people
3 have different senses of smell. So what if there is
4 some person who has, you know, the best sense of smell
5 in the department, and they say, well, let's use him to
6 go do the knock and talks when we suspect drugs; that
7 way, he may discover the odor of marijuana when other
8 people wouldn't. Is it -- is it -- is it wrong for them
9 to select the person with the best sense of smell to do
10 that?

11 MR. BLUMBERG: I think that would lead more
12 to a determination that there was a trespass because
13 they selected the officer who had the best sense of
14 smell to go up to that door. So they weren't
15 really going up there to do a knock --

16 CHIEF JUSTICE ROBERTS: To do a knock and
17 talk. You said knock and talks are okay.

18 MR. BLUMBERG: Well, but there's -- knock
19 and talks are okay; but, under your hypothet, it appears
20 that the knock and talk was -- was not really what the
21 officer was going up there for. They picked the officer
22 with the best sense of --

23 JUSTICE SOTOMAYOR: You're on a really
24 slippery slope with that answer. There's dual motives
25 in everything police officers do.

1 MR. BLUMBERG: Right.

2 JUSTICE SOTOMAYOR: They knock to hope the
3 person comes to the door and that they can see something
4 from the door. They knock -- they always have a dual
5 motive. So you're suggesting what?

6 MR. BLUMBERG: No.

7 JUSTICE SOTOMAYOR: In terms of our rule --

8 MR. BLUMBERG: I don't --

9 JUSTICE KAGAN: -- that if they select
10 somebody with a sense of smell because they have gotten
11 a tip of drugs in a house, that we give up, in that
12 situation, the assumption that they went to investigate?

13 MR. BLUMBERG: No. But the rule I'm asking
14 this Court to adopt does not rely on the subjective
15 intent of the police officer. The rule I'm asking this
16 Court to adopt --

17 JUSTICE SOTOMAYOR: He knocks, and he says
18 to the neighbor, who are you? I've gotten a report, and
19 I'm smelling drugs, so I know you have drugs in there.

20 MR. BLUMBERG: That -- that would be fine.
21 That would be -- that would be plain smell in that. But
22 if --

23 JUSTICE SOTOMAYOR: But if he smells first
24 and asks the question second, that's not okay?

25 MR. BLUMBERG: No, no. What's not okay is

1 if he goes up there to perform a search, or if he
2 conducts a search -- and, again, back to the facts of
3 this case, when a police officer goes up to the front
4 door with a narcotics detection dog, there is no
5 question what that officer is doing. That officer is
6 performing a search. And, therefore, if you go to
7 Jones, the officer and the dog have entered -- have
8 physically trespassed, because there is no consent to do
9 that, onto a constitutionally protected area, the
10 curtilage of the home, and performed a search.

11 If you just -- you follow the test set forth
12 in Jones and apply it to what happened here and the
13 question presented here, it is a trespass.

14 JUSTICE ALITO: I thought the reason -- I
15 thought the rationale in Jones, what Jones added, was
16 that it is a search if it was a trespass.

17 MR. BLUMBERG: Yes.

18 JUSTICE ALITO: And so I come back to the
19 very first question I asked you, do you have any
20 authority for the proposition that this would be a
21 trespass? Any case that says this is -- any trespass
22 case in the last five hundred years in any
23 English-speaking country?

24 MR. BLUMBERG: I don't believe any court has
25 faced this issue as to whether or not taking a police

1 dog up to the front door of a house is a trespass under
2 the common law.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 MR. BLUMBERG: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Garre, you have
6 three minutes remaining.

7 REBUTTAL ARGUMENT OF GREGORY G. GARRE

8 ON BEHALF OF THE PETITIONER

9 MR. GARRE: Thank you, Your Honor.

10 First, with the question of how long they
11 were at the scene, the record says that they were at the
12 scene for five to ten minutes. That's -- that includes
13 in the car; walking up to the door, which my friend
14 conceded was a minute or two; and, then back in the car
15 and leaving.

16 With respect to the bracketing, bracketing
17 just means that the dog is getting excited, moving his
18 head around. This is a passive alert dog. They get a
19 little bit excited and then sit down. It's no different
20 than what a neighbor's dog would do when they get to the
21 front door.

22 Second, with respect to state law, we do
23 think it's important. And Florida has a decision, State
24 v. --

25 JUSTICE SOTOMAYOR: I thought what the dog

1 does, according to the police officer's testimony, is he
2 gave him a long leash so the dog would lead him to the
3 drugs. And what the dog did, I thought, according to
4 what I read, was go past the motorcycle to make sure --
5 I mean, the officer said this -- you don't know if the
6 drugs are in the motorcycle, you don't know if they're
7 in the garage, you don't know where they might be. So
8 the dog is permitted to roam around until he catches the
9 scent. Is that accurate?

10 MR. GARRE: Yes. They're walking up the
11 common path, and you can see it from the picture at
12 the -- appended to the brief, and then up to the front
13 door. It's near the front door where he alerted by
14 sitting down.

15 JUSTICE SOTOMAYOR: But the point is that
16 he's sniffing all the way around to see --

17 MR. GARRE: He's sniffing; he's breathing.
18 That's right.

19 JUSTICE SOTOMAYOR: Yes.

20 MR. GARRE: With respect to state law,
21 State v. Morsman, 394 So.2d 408 at 409, this was a case
22 that came up during oral argument in the Supreme Court.
23 It says that, under Florida law, there is no reasonable
24 expectation of privacy in a porch, taking into account
25 that visitors and salesmen can come up to the front

1 door. And I think that that's pertinent here.

2 Justice Kennedy, if you don't like the
3 contraband rationale, then I hope you would consider the
4 knowingly exposed to the public rationale.

5 Here, the record does show that they -- drug
6 houses do vent the stuff outside. It's page A-48 of the
7 joint appendix. That's in the warrant, where they talk
8 about what the air conditioning unit does to the scent
9 of marijuana in the house.

10 We know that they knew about that because
11 Officer Bartelt came across the moth balls -- that's on
12 page 100 of the joint appendix -- outside of the house.
13 The mothballs were outside of the house, which means --

14 JUSTICE KAGAN: But I think, Mr. Garre, that
15 the --

16 MR. GARRE: -- which means that they knew
17 that the odors were outside the house.

18 JUSTICE KAGAN: I think, Mr. Garre, that you
19 have to concede that this is a case about police use --
20 call it a technology, call it whatever you want to call
21 it -- of something that enhances what normal people can
22 sense. And then the question becomes, do you have a
23 reasonable expectation of privacy in, basically, people
24 just having their normal senses, rather than some
25 technique or method or technology that enhances those

1 senses?

2 So that your implied consent or expectations
3 about your neighbor might differ fundamentally, you
4 know, if the neighbor comes and knocks on your door, or
5 if the neighbor brings his magnifying glass and his
6 microscope and everything else and starts testing
7 everything around it.

8 You might say, no, that's -- I'm -- I'm not
9 there for that.

10 MR. GARRE: Well, and I think that gets back
11 to our point that this is a dog that's been used by
12 humans for centuries by scent. And in that respect,
13 it's quite different than the helicopter that was used
14 for aerial surveillance in Florida v. Reilly.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 MR. GARRE: Thank you, Your Honor.

17 CHIEF JUSTICE ROBERTS: Counsel.

18 The case is submitted.

19 (Whereupon, at 11:05 a.m., the case in the
20 above-entitled matter was submitted.)

21

22

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