

THE PRYING NOSE: *FLORIDA V. JARDINES* AND WARRANTLESS DOG-SNIFF TESTS ON PRIVATE PROPERTY

ALI MIRSAIDI*

I. INTRODUCTION

K-9 units have become an invaluable resource for police departments and federal agencies in the war against drugs. A trained dog's keen sense of smell alerts officers to the presence of contraband, thereby leading to the prompt apprehension of drug traffickers, dealers, and the like. The United States Supreme Court has approved warrantless use of K-9 units in several situations: public airports, routine drug stops, and narcotics detection points.¹ In *Florida v. Jardines*,² the Court will determine for the first time whether sniff tests on private premises violate the Fourth Amendment. This case will serve as a conduit for the Court to refine the Fourth Amendment's protections of the home. The Court will address whether sniff tests within the curtilage of an individual's residence constitute a search under the Fourth Amendment. The Court will likely decide that its holdings in previous dog-sniff cases, which involved private property in public places, are inapplicable to the facts present in *Jardines*. Additionally, because dog-sniff tests violate a homeowner's reasonable and justifiable expectation to be free from the government's prying eyes (and nose) within his home, they likely violate the Fourth Amendment.

* 2014 J.D. Candidate, Duke University School of Law.

1. See generally *Illinois v. Caballes*, 543 U.S. 405 (2005) (holding sniff test of an automobile during a routine traffic stop did not constitute a search); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (holding sniff test of an automobile during a narcotics detection stop did not constitute a search); *United States v. Place*, 462 U.S. 696 (1983) (holding sniff test of luggage at an airport did not constitute a search).

2. *Florida v. Jardines*, No. 11-564 (U.S. argued Oct. 31, 2012).

II. FACTS

In November 2006, Detective William Pedraja of the Miami-Dade Police Department received an unverified Crime Stoppers tip that Respondent, Joelis Jardines, was using his home to grow marijuana.³ A month later, Jardines's home was the subject of surveillance by the Miami-Dade Police Department, the Narcotics Bureau, and the Drug Enforcement Administration.⁴ The surveillance began at 7 a.m., when Detective Pedraja briefly examined Jardines's house while waiting for a drug detection dog and his handler to arrive.⁵ When the drug detection dog, Franky, and his handler, Detective Douglas Bartlet, arrived, the two conducted a "sniff test" on Jardines's property.⁶

The dog-sniff unit and Detective Pedraja entered the property through the driveway and headed toward the front door.⁷ During the sniff test, Franky was at the lead followed by Detectives Bartlet and Pedraja.⁸ During the approach to the front door, Franky picked up the smell of contraband and alerted his handler of the odor.⁹ Although Detective Bartlet had not crossed the archway immediately adjacent to Jardines's front door, Franky's sniff test culminated in him sitting at the base of the door, indicating the strongest point of the odor.¹⁰

After Detective Bartlet told Detective Pedraja that the sniff test was positive, Detective Bartlet and Franky left to assist with other cases.¹¹ Detective Pedraja left approximately fifteen minutes later to prepare a search warrant for Jardines's house.¹² During this time, federal agents "remained behind to maintain surveillance of Jardines' home."¹³ After obtaining the warrant, police officers and federal agents gained entry to Jardines's home.¹⁴ Jardines was apprehended after fleeing from his home through an exit at the rear of his house.¹⁵

3. *Jardines v. State*, 73 So. 3d 34, 37 (Fla. 2011) *cert. granted*, 132 S. Ct. 995 (U.S. Jan. 6, 2012) (No. 11-564).

4. *Id.* at 46.

5. *Id.* at 37.

6. *Id.*

7. Brief for Petitioner at 4, *Florida v. Jardines*, No. 11-564 (U.S. Apr. 26, 2012).

8. *Jardines*, 73 So. 3d at 46.

9. *Id.* at 46–47. A detection dog's alert consists of bracketing—a technique involving a back-and-forth walk until the dog finds the strongest point of the odor, at which point the dog sits. *Id.* at 47.

10. *Id.* at 46–47.

11. Brief for Petitioner, *supra* note 7, at 4.

12. *Jardines*, 73 So. 3d at 48.

13. *Id.*

14. *Id.*

15. *Id.*

III. LEGAL BACKGROUND

The Fourth Amendment has long protected the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizure. . . .”¹⁶ Despite the Fourth Amendment’s historical rooting in the idea of protecting private property against physical invasions, the Supreme Court since clarified that “the Fourth Amendment protects people, not places.”¹⁷ To ensure searches are conducted in compliance with the Fourth Amendment, they must first be approved by a judge or magistrate.¹⁸ Warrantless searches are presumptively unlawful because the Constitution requires that the “deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police.”¹⁹ To determine whether Fourth Amendment protection applies to a particular case, the Court employs Justice Harlan’s expectation-of-privacy analysis. To trigger the Fourth Amendment, a person must exhibit an “actual (subjective) expectation of privacy . . . that society is prepared to recognize as reasonable.”²⁰ Originally proposed in *Katz v. United States*,²¹ the standard was accepted by the Court in *Smith v. Maryland*.²² Ultimately, *Jardines* requires the Court to reconcile two heretofore distinct lines of Fourth Amendment case law—cases governing privacy rights within the home and cases concerning the use of dog-sniff tests.

A. *The Reasonable Expectation of Privacy Afforded in the Home*

Though the Court has affirmed that the protections of the Fourth Amendment extend beyond mere property rights, it has also reiterated that the home remains central to the Fourth Amendment’s protections.²³ In two distinct cases, the Court has held that warrantless searches that reveal private information concerning the home are Fourth Amendment searches when the private information could not

16. U.S. CONST. amend. IV.

17. *Katz v. United States*, 389 U.S. 347, 351–52 (1967).

18. *See id.* at 357 (“[T]he mandate of the (Fourth) Amendment requires adherence to judicial processes . . . and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment.” (quoting *United States v. Jeffers*, 342 U.S. 48, 51 (1951)) (internal quotation marks omitted)).

19. *Id.*

20. *Id.* at 361 (Harlan, J., concurring).

21. 389 U.S. 347 (1967).

22. 442 U.S. 735 (1979); *id.* at 740; *United States v. Jones*, 132 S. Ct. 945, 950 (2012).

23. *Jones*, 132 S. Ct. at 950–51.

be obtained otherwise.²⁴

A Fourth Amendment search occurs whenever details concerning the interior of the house are uncovered using a technological or sense-enhancing device.²⁵ In *United States v. Karo*,²⁶ DEA agents placed a beeper into a can of ether that would later be used to process cocaine.²⁷ The can had been moved periodically until it ultimately entered the defendant's possession within his home.²⁸ Although "the actual placement of the beeper into the can violated no one's Fourth Amendment rights,"²⁹ the monitoring of the beeper constituted a Fourth Amendment search of the defendant's residence.³⁰ Though the Court acknowledged that "the monitoring of an electronic device . . . is, of course, less intrusive than a full scale search," it nonetheless "reveal[s] a critical fact about the interior of the premises that the Government . . . could not have otherwise obtained without a warrant."³¹

Additionally, privacy protection does not vanish simply because the devices used to obtain protected information never entered the home.³² In *Kyllo v. United States*,³³ agents of the Department of the Interior used a thermal imaging device "to determine whether [the] amount of heat . . . emanating from petitioner's home [was] consistent with the use" of high-intensity lamps used to grow marijuana.³⁴ Unlike in *Karo*, the device was used from beyond the curtilage of the defendant's home.³⁵ Nonetheless, the Court held that information

24. See *Kyllo v. United States*, 533 U.S. 27, 38 (2011) (holding the use of an infrared scanner a Fourth Amendment search because it could reveal, among other private details, "at what hour each night the lady of the house takes her daily sauna and bath"); *United States v. Karo*, 468 U.S. 705, 715 (1984) (holding the placement of a beeper inside a can that entered the defendant's home a Fourth Amendment search because it revealed private details of the home; that is, the location of the can).

25. See *Karo*, 468 U.S. at 715 (stating there is no distinction between the government agent who enters a home without a warrant to obtain information versus the government agent who, without a warrant, uses technology to obtain the same information).

26. 468 U.S. 705 (1984).

27. *Id.* at 708.

28. *Id.* at 708–10.

29. *Id.* at 711.

30. *Id.* at 714.

31. *Id.* at 715.

32. See *Kyllo v. United States*, 533 U.S. 27, 33–36 (2011) (holding the use of an infrared scanner from beyond the curtilage of a home to be a Fourth Amendment search because it reveals private details about the interior of the home).

33. 533 U.S. 27 (2011).

34. *Id.* at 29.

35. *Id.* at 30.

obtained using “sense-enhancing technology . . . regarding the interior of the home that could not otherwise have been obtained . . . constitutes a search.”³⁶ Furthermore, the Court clarified that the distinction between “off-the-wall” and “through-the-wall” imaging devices does not alter the substance of whether a Fourth Amendment search has occurred.³⁷ Finally, the Court indicated that the quality of the information obtained also has no effect on the Court’s analysis because “*all* details [of the home] are intimate details.”³⁸ Although the Government “contend[ed] that the thermal imaging was constitutional because it did not detect private activities occurring in private areas,” the Court disagreed.³⁹ In reflecting upon its previous home-related cases, the Court held that none of its cases have been decided by the “quality or quantity of information obtained,” but rather “because the entire area is held safe from prying government eyes.”⁴⁰

B. The Fourth Amendment and Searches Involving Drug-Detection Dogs

The Court has reviewed whether the Fourth Amendment protects private property subjected to dog-sniff tests three times.⁴¹ Despite the varying factual contexts of the three cases,⁴² the Court held in each case that the sniff tests did not violate the Fourth Amendment.⁴³ In

36. *Id.* at 34.

37. *Id.* at 36. In *Kyllo*, the government argued that no information was gleaned concerning the interior of the home via the thermal imager. *Id.* at 35. Instead, the device merely captured heat radiating from the “external surface of the house.” *Id.* (citation omitted). The Court rejected the “mechanical interpretation of the Fourth Amendment in *Katz*.” *Id.* In *Katz*, a listening device was placed on the outside of a telephone booth to record the defendant’s conversation inside. *Katz v. United States*, 389 U.S. 347, 348 (1987). Although the Court acknowledged that “no physical penetration of the telephone booth” had occurred, the Fourth Amendment had been expanded to encompass intrusions beyond physical trespass. *See id.* at 351–53 (noting that the Court has departed from the “narrow view” that the Amendment requires the presence of a physical intrusion onto a property interest).

38. *Kyllo*, 533 U.S. at 37.

39. *Id.*

40. *Id.*

41. *See generally* *Illinois v. Caballes*, 543 U.S. 405 (2005) (holding sniff test of an automobile during a routine traffic stop did not constitute a search); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (holding sniff test of an automobile during a narcotics detection stop did not constitute a search); *United States v. Place*, 462 U.S. 696 (1983) (holding sniff test of luggage at an airport did not constitute a search).

42. It is important to note that all three cases involved private property seized in public places.

43. *See Caballes*, 543 U.S. at 408 (“Official conduct that does not ‘compromise any legitimate interest in privacy’ is not a search subject to the Fourth Amendment.” (quoting

these cases, the Court held that searches were permissible because citizens do not have a legally protectable interest in possessing contraband.⁴⁴

Sniff tests of private property exposed to the public, such as luggage in an airport, are not prohibited by the Fourth Amendment.⁴⁵ In *United States v. Place*,⁴⁶ the Court reviewed the seizure of Raymond Place's personal luggage at an airport, which was later subject to a sniff test.⁴⁷ Although Place, like all individuals, retained "a privacy interest in the *contents* of personal luggage," the sniff test conducted on his luggage did not constitute a Fourth Amendment search for two reasons.⁴⁸ First, sniff tests invade no legally protected interest because they merely reveal the presence of contraband.⁴⁹ Second, no actual "search" within the Fourth Amendment occurs during sniff tests because the tests do not involve opening luggage, are minimally intrusive, and do not subject the owner "to the embarrassment and inconvenience entailed in less discriminate and more intrusive" methods.⁵⁰

Similarly, sniff tests conducted during a lawful traffic stop do not amount to a Fourth Amendment search. In *Indianapolis v. Edmond*,⁵¹ the Court analogized "an exterior sniff of an automobile" for narcotics detection at a highway checkpoint to the search conducted in *Place*.⁵² Because sniffs "do[] not require entry into the car and [are] not designed to disclose any information other than the presence of narcotics," no Fourth Amendment search occurs. The Court elaborated on the issue of sniff tests during lawful traffic stops in *Illinois v. Caballes*.⁵³ In *Caballes*, the Court reiterated that no Fourth Amendment search occurs without a violation of a legitimate interest

United States v. Jacobsen, 466 U.S. 109, 123 (1984)); *Edmond*, 531 U.S. at 40 ("[A]n exterior sniff . . . is not designed to disclose any information other than the presence or absence of narcotics."); *Place*, 462 U.S. at 707 ("Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item.").

44. See, e.g., *Caballes*, 543 U.S. at 408.

45. *Place*, 462 U.S. at 698.

46. 462 U.S. 696 (1983).

47. *Id.* at 699.

48. *Id.* at 707 (emphasis added). More particularly, the sniff tests do not expose "noncontraband items that would otherwise remain hidden from public view." *Id.*

49. See *id.* (noting that sniff tests expose limited information only relating to the possession of contraband).

50. *Id.*

51. 531 U.S. 32 (2000).

52. *Id.* at 40.

53. 543 U.S. 405 (2005).

in privacy.⁵⁴ Because individuals do not have a legal interest in the possession of contraband, dog-sniff tests that reveal contraband do not constitute searches.⁵⁵

In *Jardines*, the Court will have to clear the blurry line that divides legally acceptable behavior from acts that amount to Fourth Amendment searches. On the one hand, it has repeatedly held that private details concerning the home are protected by the Amendment, regardless of the information that is revealed. On the other hand, it has approved dog-sniff tests for detecting contraband because they do not invade a legally protected interest. Because the two propositions cannot stand together, the Court must decide which principle is stronger when sniff tests occur on private property.

IV. HOLDING

In *Jardines v. State*,⁵⁶ the Florida Supreme Court held that a warrantless sniff test conducted within the curtilage of an individual's home—specifically, the area adjacent to the front door—is a violation of the Fourth Amendment.⁵⁷ In reaching this conclusion, the court first analyzed whether the Supreme Court's prior decisions concerning sniff tests were applicable to the facts presented.⁵⁸ After answering in the negative, the court considered whether dog-sniff tests performed on a person's property constituted a Fourth Amendment violation for separate reasons.⁵⁹

The court first discussed the dog-sniff cases examined by the U.S. Supreme Court. In each of these cases, the Supreme Court held that sniff tests of a person's property in public violated no Fourth Amendment protection.⁶⁰ Although the factual background of each case varied, two consistent themes emerged. First, dog-sniff tests are *sui generis*⁶¹ because they reveal only limited information using a

54. *Id.* at 408 (quoting *United States v. Jacobsen*, 466 U.S. 109, 124 (1984)); *see supra* note 43 and accompanying text.

55. *Id.*

56. 73 So. 3d 34 (Fla. 2011), *cert. granted*, 132 S. Ct. 995 (U.S. Jan. 6, 2012) (No. 11-564).

57. *Id.* at 55–56.

58. *Id.* at 44–45.

59. *Id.* at 45–50.

60. *Id.* at 40–42.

61. “Of its own kind or class; unique or peculiar.” BLACK’S LAW DICTIONARY 1572 (9th ed. 2009). The Supreme Court has stated that sniff tests are treated as “*sui generis* because [they] disclose[] only the presence or absence of narcotics, a contraband item.” *Caballes*, 543 U.S. at 409.

method “less intrusive than a typical search.”⁶² Second, the Fourth Amendment protects an individual’s “legitimate expectations of privacy” which excludes the possession of contraband.⁶³ In distinguishing *Jardines*’s situation from the other dog-sniff cases, the Florida Supreme Court stated that “the United State Supreme Court was careful to tie its ruling to the particular facts” of each particular case. Furthermore, the court noted nothing indicated the analysis would apply to a “sniff test conducted at a private residence.”⁶⁴ The court further distinguished the facts in *Jardines* by explaining that each of the dog-sniff cases involved property that had been exposed to the public and that the tests were minimally invasive and applied in a non-discriminatory manner.⁶⁵

The court then considered whether the Fourth Amendment protects homes from warrantless sniff tests performed on private property. Without specifically discussing which interest the Fourth Amendment protects, the court determined that dog-sniff tests conducted at private residences constitute “a substantial government intrusion into the sanctity of the home.”⁶⁶ The court first explained that the “sanctity of the citizen’s home” is “[a]t the very core of the Fourth Amendment.”⁶⁷ The court then noted two specific ways sniff tests invade the sanctity of one’s home.⁶⁸ Specifically, the court stated that sniff tests are “a sophisticated undertaking” that “invariably entail a degree of public opprobrium, humiliation and embarrassment for the resident” regardless of the homeowner’s presence during the search.⁶⁹ Additionally, the court noted that sniff tests performed at private residences lack the “objective, uniform application of [the] tests” that were guaranteed in the dog-sniff cases.⁷⁰ Because “a private residence is not susceptible to being seized beforehand based on

62. *Jardines*, 73 So. 3d at 40 (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000)).

63. *Id.* at 40–41.

64. *Id.* at 45.

65. *Id.* A major focus for the *Jardines* court was the invasiveness of the sniff test on *Jardines*’s house versus the invasiveness of the sniff tests in the dog-sniff cases. For example, the court highlights the humiliation that residents may suffer in their neighborhood when their homes are surrounded by federal and state agents and subjected to a sniff test. *See id.* at 48–49 (“Such a public spectacle [the sniff test] unfolding in a residential neighborhood will invariably entail a degree of public opprobrium, humiliation and embarrassment for the resident . . .”).

66. *Id.* at 49.

67. *Id.*

68. *Id.* at 46–50.

69. *Id.* at 48.

70. *Id.* at 49.

objective criteria,” the court felt that dog-sniff tests, such as the one in the present case, could be applied in an “arbitrary or discriminatory manner, or based on whim and fancy, at the home of any citizen.”⁷¹

V. ARGUMENTS

Both parties’ briefs focus on how the Court’s earlier dog-sniff cases and privacy-in-the-home cases inform whether sniff tests of a residence are searches under the Fourth Amendment. The State of Florida contends that the location of sniff tests does not alter the expectation-of-privacy analysis and that the search violates no legitimate interest in privacy because the sniff test detects only contraband and not private information concerning the home. By contrast, Jardines argues that sniff tests violate a homeowner’s expectation of privacy because they reveal private information about the home. Jardines also argues that the warrantless sniff test of his private residence effectively was a common-law trespass, thereby constituting a Fourth Amendment search.⁷²

A. Petitioner’s Arguments

The State appeals from the Florida Supreme Court’s decision on two grounds. First, the State argues that a dog-sniff test is not a Fourth Amendment search because of its *sui generis* nature.⁷³ Second, the State argues that a dog-sniff test does not become an unlawful search simply because it takes place within the curtilage of a private residence.⁷⁴

The State first examines the dog-sniff cases and notes that the Court has repeatedly held that dog-sniff tests are lawful because they are *sui generis* and “much less intrusive than a typical search.”⁷⁵ Additionally, because sniff tests do not “disclose any information other than the presence or absence of narcotics,” no legitimate interest in privacy is violated, and therefore no search has occurred.⁷⁶ The State relies on *Caballes* to extend the reasoning of the Court’s dog-sniff cases to the facts presented in *Jardines*. The State argues that the *Caballes* Court distinguished *Kyllo* from *Caballes* based on the

71. *Id.*

72. This argument has not previously been raised in this case.

73. Brief for Petitioner, *supra* note 7, at 11.

74. *Id.*

75. *Id.* at 13 (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)).

76. *Id.* at 14–15.

nature of the information obtained, rather than the location of the test.⁷⁷ The State also references the *Caballes* Court's reliance on the contraband exception established in *United States v. Jacobsen*⁷⁸ in arguing that the contraband exception exempts "from the Fourth Amendment . . . the method of finding . . . contraband."⁷⁹

The State then argues that sniff tests do not become unlawful searches simply because they occur immediately outside of a home. The State contends that the Fourth Amendment does not "proscribe officers from approaching the front door of a home," and thus dogs are not prevented from approaching alongside the officers.⁸⁰ Additionally, since the plain view doctrine does not protect "[w]hat a person exposes publicly," information obtained by an officer's vision or sense of smell does not violate the Fourth Amendment.⁸¹ Moreover, the State argues that sniff tests reveal nothing about the interior of the house but only information about the "air *outside* the house."⁸² Finally, the State analogizes the "use of a dog's nose instead of that of an officer's" to a tool, which merely aids police officers' senses, much like a flashlight.⁸³

The State distinguishes the dog-sniff test in *Jardines* from the infrared camera scans discussed in *Kyllo* by discussing the "fundamentally different nature" of the tools.⁸⁴ For example, the State highlights the difference between the "binary nature" of sniff tests and the ability of emerging technological devices to detect lawful, as well as unlawful, activity.⁸⁵ Unlike the methods at issue in *Kyllo*, the State argues, dog-sniff tests cannot reveal "information other than the

77. *Id.* at 16.

78. 466 U.S. 109 (1984). In *Jacobsen*, the Court explained that warrantless seizure of contraband does not implicate the Fourth Amendment because there is no "justifiable expectation of privacy" in possessing contraband. *See id.* at 121–22 (noting that seizure of contraband was acceptable because "it is well-settled that it is constitutionally reasonable for law enforcement officials to seize 'effects' that cannot support a justifiable expectation of privacy without a warrant.").

79. Brief for Petitioner, *supra* note 7, at 16–17.

80. *Id.* at 20 ("No serious argument exists that the Fourth Amendment proscribes officers from approaching the front door of a home.").

81. *Id.* at 21.

82. *Id.* (emphasis in original).

83. *Id.* at 22. The government relies on the approved use of tools to aid an officer's senses. *Id.*

84. *Id.* at 23.

85. *See id.* at 23–24 ("Unlike the high-tech devices in *Kyllo* and *Jones*, or even the low-tech flashlight in *United States v. Dunn*, dogs are not high-tech or 'advancing' devices that threaten privacy.").

location of a substance that no individual has the right to possess.”⁸⁶ Furthermore, the State distinguishes sniff tests from technology-aided searches by arguing that dogs have been used “for centuries all without modification or improvement.”⁸⁷ Because sniff tests do not “represent rapid technological change” that “permit[s] easy and cheap monitoring” of private facts in private residences, the State argues that “the rationale of *Kyllo* and [the] concerns of *Jones* do not apply” to dog-sniff tests.⁸⁸

Finally, the State addresses a policy concern raised by the Florida Supreme Court in *Jardines*. Specifically, the State argues that the dog-sniff test is a century-old law enforcement technique that is not susceptible to abuse in the form of dragnet-style sweeps of entire neighborhoods.⁸⁹ The State claims that no such sweeps have occurred since *Caballes* and, moreover, sweeps of entire neighborhoods would be both time-consuming and costly in practice.⁹⁰

B. Respondent’s Arguments

In response, *Jardines* argues that sniff tests on private property violate the Fourth Amendment for two reasons. First, such tests presumptively violate a homeowner’s reasonable expectation of privacy.⁹¹ Second, sniff tests on private property are a form common-law trespass which further violates a homeowner’s reasonable expectation of privacy.⁹²

Jardines contends that the use of a sniff test violates the homeowner’s reasonable expectation of privacy because it reveals the intimate, private details of the home.⁹³ *Jardines* emphasizes *Kyllo* when arguing that “the nature of the information obtained . . . is not relevant to the determination of whether a Fourth Amendment search has occurred.”⁹⁴ *Jardines* bolsters this argument by analogizing the facts of this case to *Karo* and *Arizona v. Hicks*.⁹⁵ In *Karo*, even though the “only thing detected” was the presence of contraband, the

86. *Id.* at 23 (quoting *Illinois v. Caballes*, 543 U.S. 405, 410 (2005)).

87. *Id.* at 24.

88. *Id.* at 23–25.

89. *Id.* at 26–27.

90. *Id.* at 27–28.

91. Brief for Respondent at 9, *Florida v. Jardines*, No. 11-564 (U.S. June 25, 2012).

92. *Id.* at 12.

93. *Id.* at 15.

94. *Id.* at 21.

95. 480 U.S. 321 (1987); Brief for Respondent, *supra* note 91, at 21–25.

Court held that a Fourth Amendment search had occurred.⁹⁶ Because the police had obtained information concerning the interior of the house that could not have been obtained otherwise, a warrant was required, despite the search's minimal intrusiveness.⁹⁷ In *Hicks*, police received a warrant before obtaining information related to the interior of the house.⁹⁸ The warrant, however, limited the scope of the search, and action that exceeded that scope and revealed unrelated information constituted a Fourth Amendment search.⁹⁹ Both cases, *Jardines* argues, illustrate that the exposure of intimate details of the home—whether without a warrant or beyond the scope of a warrant—violate the homeowner's reasonable expectation of privacy.¹⁰⁰

Jardines then distinguishes the dog-sniff cases from his case. First, *Jardines* argues that the location of the searches in *Place*, *Edmond*, and *Caballes* are key aspects of each case's outcome.¹⁰¹ All three cases involved private property located in a public place.¹⁰² *Jardines* argues that individuals have a legitimate expectation of privacy about the details inside the home, whereas individuals who expose their private property in a public place do not retain that interest.¹⁰³ Specifically, the dog-sniff cases “do not involve the historical foundations of the Fourth Amendment” that protect the home “from prying government eyes.”¹⁰⁴

Jardines also highlights the risk of invasive and indiscriminate random searches.¹⁰⁵ Contrary to the State's position, *Jardines* argues

96. Brief for Respondent, *supra* note 91, at 21–22.

97. *See id.* at 22 (discussing the occurrence of the Fourth Amendment search in *Karo* despite the fact that “a beeper is less intrusive than a full search.” (quoting *United States v. Karo*, 468 U.S. 705, 715 (1984) (internal quotation marks omitted))).

98. *Id.* at 23–24.

99. *Id.* Even though the officers possessed a warrant, “action, unrelated to the objective of the authorized intrusion . . . produce[d] a new invasion . . . unjustified by the exigent circumstances that validated the entry.” *Id.* (quoting *Hicks*, 480 U.S. at 325).

100. *See id.* at 23–24 (“Nevertheless, the Court held in both cases that the officer's acts in disclosing the presence of . . . objects inside the home constituted a Fourth Amendment search because all details in the home are held safe from prying government eyes.”).

101. *See id.* at 29 (“The Court's decisions demonstrate that whether a police action reveals details inside a home is the critical factor which establishes that the governmental action is a Fourth Amendment search.”).

102. *Id.* at 26–32.

103. *Id.* at 29.

104. *Id.* at 30.

105. *See id.* at 32–39 (discussing the policy implications that would result if “law enforcement officers could release a trained cocaine-sensitive dog . . . to roam the streets at random . . .” (quoting *United States v. Jacobsen*, 466 U.S. 109, 138 (1984) (Brennan, J.,

that allowing suspicionless sniff tests incentivizes states to create technologies that could reveal the presence of contraband, or other private information, with minimal overhead.¹⁰⁶ If police are able to perform dragnet-style sweeps of neighborhoods, “the protections of the Fourth Amendment would evaporate, and the people would be secure . . . only in the discretion of the police.”¹⁰⁷

Jardines also argues that sniff tests violate the Fourth Amendment because they reveal information about the interior despite detecting odors *outside* the home. In *Karo*, there was “no difference between the acts of a government agent in entering the house . . . and the surreptitious use of an electronic device to obtain the same information.”¹⁰⁸ This view is consistent with *Kyllo*, which addressed the intrusiveness of technological devices used to obtain private information from a home that was not otherwise available.¹⁰⁹ Additionally, Jardines argues that, contrary to the State’s position, a dog’s nose is not a tool that aids the senses of the police officer.¹¹⁰ And finally, Jardines addresses the State’s exterior/interior dichotomy by noting that the Court rejected similar arguments in both *Katz* and *Kyllo*.¹¹¹

Jardines concludes by arguing that a sniff test outside the door of a private residence is a Fourth Amendment search for two additional reasons: first, the front door is within the curtilage of the house; and second, entering onto private property to administer a sniff test is a common-law trespass. Because the curtilage of the home is “intimately linked to the home, both physically and psychologically,” the Fourth Amendment has been interpreted to extend to it.¹¹² Jardines concedes that egress and ingress do not immediately trigger the Fourth Amendment because of the implied consent given for a

dissenting)) (internal quotation marks omitted)).

106. *See id.* at 37–38 (“Presumably . . . States will be just as eager to use current technology and develop and use new technological innovations which will reveal only the presence of contraband inside a home.”).

107. *Id.* at 37 (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)) (internal quotation marks omitted).

108. *Id.* at 40.

109. *Id.* at 41–42.

110. *Id.* at 43. Rather, narcotics dogs use their own senses to provide the officers information, rather than enhancing the officers’ senses to similarly detect the same information. *Id.*

111. *See id.* at 45–46 (discussing the Court’s rejection of an “off-the-wall” versus “through-the-wall” distinction in *Kyllo* and “inference” argument in *Karo*).

112. *Id.* at 48 (quoting *California v. Ciraolo*, 476 U.S. 207, 212–13 (1986)).

private citizen or police officer to enter the premises for various reasons.¹¹³ Nonetheless, there is no implied consent for police officers to enter the premises with the intent to obtain “otherwise undiscoverable evidence.”¹¹⁴ Therefore, even without a reasonable expectation of privacy, “a police officer’s actions . . . can constitute a Fourth Amendment search” when the officer’s intent is to search for evidence.¹¹⁵

VI. ANALYSIS AND LIKELY DISPOSITION

It is likely that the Court will rule in favor of *Jardines*, once again affirming that the sanctity of the home remains central to the Fourth Amendment. First, the Court will likely find that its previous dog-sniff cases are inapplicable within the context of a private residence. Second, the Court will likely hold that *Jardines*’s reasonable expectation of privacy in his residence was violated when a warrantless sniff test was conducted on his private residence.

The Court will likely rule that *Place*, *Edmond*, and *Caballes* are inapplicable within the context of private residences. The dog-sniff cases all involved private property *outside* of the home.¹¹⁶ Unlike *Jardines*, the individuals in the dog-sniff cases possessed no legitimate private interest that could be intruded upon by a sniff test—at least, not in the possession of contraband.¹¹⁷ No search occurs unless a legitimate interest in privacy is compromised.¹¹⁸ *Jardines*, however, maintained a right to be free of the government’s prying eye within his own home.¹¹⁹ To be sure, the *Caballes* Court was careful to reconcile its decision with *Kyllo*, where the use of technology to discover private information within a home was considered a Fourth Amendment search.¹²⁰ The Court found that “the fact that the device

113. *See id.* at 53, 55 (“A person who enters upon the property of another is not a trespasser if consent to enter may be implied from custom, usage, or conduct.”).

114. *Id.* at 55.

115. *Id.* at 59.

116. *See* discussion *supra* note 1.

117. *See, e.g.,* *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (“We have held that any interest in possessing contraband cannot be deemed ‘legitimate’ and thus, governmental conduct that *only* reveals the possession of contraband compromises no legitimate privacy interest.” (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)) (internal quotation marks omitted)).

118. *Id.*

119. *See Kyllo v. United States*, 533 U.S. 27, 37 (2001) (discussing the Fourth Amendment’s protections of the intimate details of the home).

120. *Caballes*, 543 U.S. at 409–10.

was capable of detecting lawful activity was critical to *Kyllo*.¹²¹ However, reading the *Caballes* decision so narrowly would be at odds with *Kyllo* itself. In *Kyllo*, the Court stated that “[t]he Fourth Amendment’s protection of the home has never been tied to measurement of quality or quantity of information obtained.”¹²² If the search in *Kyllo* implicated the Fourth Amendment solely because the device used could detect lawful information, then the Fourth Amendment’s protection must necessarily be tied to the quality of the information obtained.

Furthermore, the location of the tests in the dog-sniff cases invariably played a crucial role in the Court’s analysis. Assuming, *arguendo*, that sniff tests can reveal legitimate information,¹²³ the dog-sniff cases would be no different than *Kyllo* absent the location of the test. On the other hand, if sniff tests are in fact *sui generis*, the cases would be identical to *Karo*. In either scenario, discounting the location of the sniff test would result in incompatible outcomes. In the former, allowing sniff tests at the home would be inconsistent with *Kyllo*’s prohibition of information gathering using sense-enhancing technology.¹²⁴ In *Karo*, the placement of a beeper could *only* reveal the presence of unlawful activity (akin to a sniff test’s *sui generis* results), yet the Court found that its placement amounted to a Fourth Amendment search. With little else to distinguish the cases, the location of the searches must play a significant role in the Court’s determination of whether a search has occurred.

Second, the Court will likely find that Jardines’s reasonable expectation of privacy in his home was violated when sniff tests were conducted on his private residence. In *Kyllo*, the case most analogous to *Jardines*, the Court held that a Fourth Amendment search occurs

121. *Id.* at 410.

122. *Kyllo*, 533 U.S. at 37.

123. See Brief for The National Association of Criminal Defense Lawyers, et al. as Amicus Curiae for Respondent at 8–15, *Florida v. Jardines*, No. 11-564 (U.S. July 2, 2012), for a discussion on dog-sniff tests revealing legitimate information protected by the Fourth Amendment.

124. See *Kyllo*, 533 U.S. at 34 (“We think that obtaining by sense-enhancing technology any information regarding the interior of the home . . . constitutes a search . . .”). If sniff tests can reveal information concerning legitimate and lawful activities, the result should be no different than the outcome in *Kyllo*. At the very least, the agents in *Kyllo* gained information concerning the house using technology from *beyond* the curtilage. Here, the information was gathered from within the curtilage, signaling a greater invasion of Jardines’s residence. See *United States v. Karo*, 468 U.S. 705, 715 (1984) (likening the placement of a tracking beeper inside Karo’s home to the physical intrusion of Karo’s property).

when information concerning the interior of the home is obtained without a warrant.¹²⁵ When DEA agents used a thermal imager to detect “information . . . that could not otherwise have been obtained without physical intrusion,” a Fourth Amendment search had occurred.¹²⁶ Despite the Government’s argument that sniff tests are *sui generis* and reveal nothing but the presence of contraband, the *Kyllo* Court already rejected a similar argument.¹²⁷ Because “all details are intimate details,” the Court did not distinguish between activities that suggested the possession or location of contraband from private, lawful activities.¹²⁸ This view is consistent with the Court’s holding in *Karo*. There, information obtained via an electronic device placed *inside* the home was deemed to be a Fourth Amendment search.¹²⁹ Notably, the Court reasoned that the search occurred because the information “could not have been obtained by observation from *outside the curtilage* of the house.”¹³⁰ In *Jardines*, the sniff test occurred *within the curtilage* of the house, which suggests that the sniff test was an even greater intrusion into Jardines’s right to retreat into the confines of his own home than the intrusion in *Karo*.¹³¹

This view is consistent with the Court’s analysis in other Fourth Amendment cases. For example, in *California v. Ciraolo*,¹³² the defendant’s Fourth Amendment rights were not violated when police flew a private charter plane over a marijuana field in his uncovered backyard.¹³³ Although the Court recognized that the curtilage is protected by the Fourth Amendment, the defendant’s public exposure of the field moved him beyond the purview of the Amendment’s protections.¹³⁴ More importantly, the Court focused its decision on the

125. *Kyllo*, 533 U.S. at 34.

126. *Id.*

127. *Id.* at 37.

128. *See id.* at 37–38 (discussing how the relative warmth of the home was an intimate detail, despite it possibly relating to lamps used to grow marijuana).

129. *Karo*, 468 U.S. at 715.

130. *Id.* (emphasis added).

131. The intrusive nature of the sniff test may be cause for a heightened review of the existence of a Fourth Amendment protection. A physically invasive inspection may expose an individual to “great indignity . . . and it is not to be undertaken lightly.” *Bond v. United States*, 529 U.S. 334, 337 (2000) (quoting *Terry v. Ohio*, 392 U.S. 1, 16–17 (1968)).

132. 476 U.S. 207 (1986).

133. *See id.* at 214 (“[I]t is unreasonable for respondent to expect his marijuana plants were constitutionally protected from being observed with the naked eye . . .”).

134. *See id.* at 213. (“The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares.”). The Court explained in *Katz*, “[w]hat a person knowingly exposes to the public, *even in his own home* or office, is not a subject of Fourth Amendment protection.”

defendant's voluntary exposure of the marijuana, suggesting that had it remained covered and "protected from being observed with the naked eye," the Fourth Amendment may have been implicated.¹³⁵ Jardines, on the other hand, took steps to prevent "observ[ation] with the naked eye" or, in this case, the nose, by keeping it within his home. In *Bond v. United States*,¹³⁶ the defendant's Fourth Amendment rights were violated when a federal agent engaged in a "careful tactile exploration of the outer surface" of the defendant's bag, which was placed in the overhead bin of a bus.¹³⁷ Although the agent discovered methamphetamine—in which Bond had no legitimate privacy interest¹³⁸—he nonetheless had a reasonable expectation that his bag would not be handled in such an "exploratory manner."¹³⁹ Homeowners, including Jardines, have an even stronger expectation that their homes will not be subject to warrantless sniff tests or other exploratory searches, regardless of whether or not their homes are being used for unlawful purposes.

VII. CONCLUSION

The Court will likely reaffirm the sanctity of the home as a central tenet of Fourth Amendment jurisprudence in deciding *Jardines*. Because the sniff test conducted on Jardines's residence varies considerably from earlier dog-sniff cases, the Court will likely use *Kyllo* and *Karo* to distinguish the legality of such tests in a private-residence context. To hold otherwise would surely chip away at Fourth Amendment protections, largely diminishing the traditional importance of the private details of one's household.

United States v. Katz, 389 U.S. 347, 351 (1987) (emphasis added).

135. See *Ciraolo*, 476 U.S. at 215.

136. 529 U.S. 334 (2000).

137. *Id.* at 337–38.

138. See *supra* notes 42–43 and accompanying text.

139. See *Bond*, 529 U.S. at 338. Bond's expectation, which society recognized as reasonable, translated into a Fourth Amendment protection. See *id.*