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IN THE SUPREME COURT OF THE UNITED STATES

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FLORIDA, :

Petitioner : No. 11-564

v. :

JOELIS JARDINES :

- - - - - x

Washington, D.C.

Wednesday, October 31, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

GREGORY G. GARRE, ESQ., Washington, D.C.; on behalf of Petitioner.

NICOLE A. SAHARSKY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

HOWARD K. BLUMBERG, ESQ., Assistant Public Defender, Miami, Florida; on behalf of Respondent.

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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.)

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