No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

HECTOR GUADALUPE LOZANO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a drug dog's alert, standing alone, is sufficient to establish probable cause to search when the dog is known to react to the odor of a substance that may be lawfully possessed.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Hector Guadalupe Lozano respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 761 F. App'x 444. The district court's memorandum opinion and order denying petitioner's motion to suppress evidence (Pet. App. 7a-11a) is available at 2017 WL 6508410.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 2019. This petition is filed within 90 days of that date and therefore is timely. *See* Sup. Ct. R. 13.1 and 13.3. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

A. Factual background

Several days after Hurricane Harvey made landfall in southeast Texas, the mayor of one of the affected cities, Aransas Pass, ordered a 7:00 p.m. to 7:00 a.m. city-wide emergency curfew. Around midnight on August 31, 2017, while the curfew remained in effect, Officer Luis Reyes and several fellow officers stopped petitioner Hector Guadalupe Lozano for driving without headlights. Petitioner was travelling with his common-law wife.

Shortly after the stop, the officers learned that petitioner had several outstanding arrest warrants for failing to pay traffic citations and placed him under arrest. Rather than allow petitioner's wife to drive home, the officers decided to impound the vehicle. The decision to impound meant that, before the vehicle was towed away, the officers would have to inventory its contents. But the officers' governing inventory policy constrained them to take note only of items in plain view, and petitioner declined to give consent for a more thorough search. Officer Reyes wanted to know if there were drugs in the vehicle before he inventoried it, so he called a canine unit to the scene.

The unit consisted of San Patricio County Sherriff's Deputy Olan Brooks and his canine partner Karr, a five-year-old German Shephard. Karr performed a free-air sniff of the vehicle and alerted to the driver's side front door. A subsequent search of the center console uncovered plastic containers concealing 71 bars of Xanax, 10 Ecstasy pills, around 229 grams of methamphetamine, and 45.8 grams of heroin.

B. Proceedings below

Petitioner was charged with possessing with intent to distribute more than 50 grams of methamphetamine (count 1) and less than 100 grams of heroin (count 2). *See* 21 U.S.C. § 841(a), (b)(1)(A), (C). Petitioner moved to suppress the drugs as fruit of an unlawful search.

At a suppression hearing, Deputy Brooks testified that Karr was trained to detect cocaine, marijuana, heroin, methamphetamines, and ecstasy. Brooks explained that Karr had been trained and certified by a national agency, was up-to-date on his certification at the time of the stop, and had never falsely alerted in training. Brooks also noted that Karr has only one alert, and it is "aggressive" (he "scratches").

On cross-examination, defense counsel questioned the deputy about his records of Karr's field performance for the year 2017 (the only records the government produced). In one exchange, Deputy Brooks testified, unequivocally, that Karr will alert to the odor of Xanax in the field—even though he does not train with that substance—and will do so even when only Xanax is present.[1]

[1] The exact colloquy was as follows:

Counsel: That's what I'm asking. Now, I don't dispute that [the officers searching petitioner's car] found [Xanax]. I don't dispute that there are other chemicals situated right next to [the Xanax], but I'm trying to find out, does your dog – will your dog alert to Xanax?

Brooks: Yes.

Counsel: If that's all that's there?

Brooks: Yes.

Counsel: But he has not been trained to alert to Xanax?

Brooks: Correct.

Xanax is the trade name for the drug Alprazolam. Alprazolam is a Schedule IV controlled substance. 21 C.F.R. § 1308.14(c)(2). It is also one of the most commonly prescribed anti-anxiety medications in the country. *See* Drug Enforcement Agency, *Benzodiazepines* (Jan. 2013) (available at https://www.deadiversion.usdoj.gov/drug_chem_info/benzo.pdf) (noting that 49 million Alprazolam prescriptions were dispensed in 2011).

Based on the evidence adduced at the hearing, the district court concluded that the "positive dog alert" alone was sufficient to establish probable cause and denied the suppression motion. Pet. App. 11a. Petitioner later entered a conditional plea to the first count, reserving the right to appeal the suppression issue.

In the Fifth Circuit, petitioner contended that the totality of the circumstances surrounding the stop did not justify the warrantless search of his vehicle. Focusing primarily on Deputy Brooks' uncontroverted Xanax testimony, petitioner argued that the knowledge that any of Karr's alerts could be a response to the smell of a lawfully possessed substance rendered his alert insufficient, standing alone, to provide probable cause to search for *contraband* or evidence of a *crime*.[2]

The court of appeals affirmed. Pet. App. 1a-6a. After rejecting the auxiliary field-performance argument, the court determined that the only "evidence undermining reliability of the dog was Deputy Brooks' testimony that Karr will alert to Xanax even though that drug

[2] As an auxiliary point, petitioner contended that Deputy Brooks' field-data testimony further undermined the reliability of Karr's alert. The court of appeals rejected this argument, concluding that the district court could plausibly have found that the field data did not negatively impact Karr's reliability. Pet. App. 6a. Due to the fact-bound nature of that determination, petitioner does not ask the Court to review it here.

is not necessarily contraband[.]" Pet. App. 6a. Nevertheless, the court held that even accepting that testimony, Karr's alert was sufficient, on its own, to justify the officers' warrantless entry into petitioner's vehicle. *Id.*

REASONS FOR GRANTING THE PETITION

A. The Fifth Circuit's decision is incorrect.

Canine officer Karr will alert to Xanax. And Xanax, like many lower-level controlled substances on the rolls of state and federal schedules, is both lawful and unlawful to possess in certain circumstances. The Fifth Circuit held that even accepting Karr's inability to differentiate between lawfully possessed Xanax, unlawfully possessed Xanax, and any of the other substances he is trained to detect, his alert was sufficient, by itself, to establish probable cause for the warrantless search of petitioner's vehicle. That conclusion is contrary to the rationale underlying this Court's decisions respecting the relationship between drug-detection dogs and the Fourth Amendment's probable-cause requirement.

The most basic principle animating this Court's conception of the "probable cause" needed to effect a Fourth Amendment "search" is that it requires a "fair probability," in light of the "totality of the circumstances," that "*contraband* or evidence of a *crime* will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (emphasis added). This Court has held that an alert from a well-trained drug-detection dog, standing alone, presumptively satisfies this standard. *See Florida v. Harris*, 568 U.S. 237, 246-47 (2013). As the Court has long recognized, that conclusion rests on the premise that "drug-detection dogs alert only to contraband," *Illinois v. Caballes*, 543 U.S. 405, 409 (2005)—or, more precisely, only to the "odor" of contraband. *Harris*, 568 U.S. at 246 n.2; *see also United States v. Place*, 462 U.S. 696, 707 (1983) (explaining that "the canine sniff is *sui generis*" in that it "discloses only the presence or absence of narcotics, a contraband item"). So long as the premise holds,

a positive alert necessarily raises the requisite "fair probability" that "a search would reveal contraband or evidence of a crime." *Harris*, 568 U.S. at 248.

That premise is absent when a particular dog is known to reliably alert to the scent of a substance that is not necessarily contraband. When that is the case, the dog's positive alert always signals more than the potential presence of evidence of a drug crime. Standing alone, any alert presents an equal chance that the dog has responded to a lawful substance, or its residual odor. A reasonably prudent officer who knows this, as Deputy Brooks testified he did, cannot be confident that a search will likely yield evidence of *criminal* activity based on the alert alone. As such, Karr's alert was insufficient, in and of itself, to justify the search of petitioner's vehicle.

That does not mean his alert was irrelevant. Consistent with this Court's "'flexible, common-sense standard' of probable cause," *Harris*, 568 U.S. at 240 (quoting *Gates*, 462 U.S. at 239), the natural response is to treat this kind of alert just like any other factor relevant to, but not determinative of, the totality-of-the-circumstances analysis. Just as independent investigation may fill the gap when an informant's tip is insufficient alone, *see Gates*, 462 U.S. at 241-44, the existence of other circumstances suggestive of illegal-drug activity may tip the probable-cause scale when a dog's alert itself is not enough. The question is whether the totality of the circumstances, including the dog's alert, rise to the level of probable cause to search for evidence of a drug *crime*. Because it treated Karr's alert as determinative in the face of uncontroverted testimony that he does *not* alert "only to contraband," *Caballes*, 543 U.S. at 409, the Fifth Circuit's decision is fundamentally at odds with this Court's precedent.

The Fifth Circuit's decision is also contrary to state court decisions recognizing that, on its own, the odor of marijuana is insufficient to create probable cause where its possession is no longer per se unlawful.

The Supreme Court of Colorado recently held that "[a] sniff from a drug-detection dog that is trained to alert to marijuana constitutes a search under . . . the Colorado Constitution because that sniff can detect lawful activity, namely the legal possession of up to one ounce of marijuana by adults twenty-one and older." *People v. McKnight*, — P.3d —, 2019 WL 2167746, at *2 (Colo. May 20, 2019). That holding obviated the need to conclusively resolve the narrower question presented: whether a positive alert from a marijuana-trained dog alone can establish probable cause. *See id.* at *4 n.1.[3] The court nevertheless took the opportunity to explain why two of its prior decisions, *People v. Zuniga*, 372 P.3d 1052 (Colo. 2016), and *People v. Cox*, 401 P.3d 509 (Colo. 2017), "suggest the answer to [that] question is no." *McKnight*, 2019 WL 2167746, at *8. Both cases, the court explained, recognized "that, with the legalization of small amounts of marijuana, a [marijuana-trained] dog's alert doesn't provide a yes-or-no answer to the question of whether illegal narcotics are present in a vehicle. At most, the alert could be 'suggestive of criminality,' but not determinative on its own." *Id.* (quoting *Zuniga*, 372 P.3d at 1059). Rather, because the dog "can't distinguish legal marijuana from illegal marijuana, or legal marijuana from illegal narcotics," the alert

[3] *See People v. McKnight*, — P.3d —, 2017 WL 2981808, at *7 (Colo. App. July 13, 2017) (Jones, J., specially concurring) (endorsing resolution on this narrower ground and holding that the alert alone would not suffice to create probable cause); *see also id.* at *4 (Berger, J., specially concurring) (agreeing with Judge Jones's analysis of this point).

is "legally ambiguous" and must be regarded as "one factor, among many, supporting a finding of probable cause" to search. *Id.* at *7 (citing *Cox*, 401 P.3d at 512-13; *Zuniga*, 372 P.3d at 1057-59).

This common-sense reasoning is not peculiar to the Colorado Supreme Court. Courts in other states where possession of small amounts of marijuana is either legal or decriminalized have similarly recognized that the odor of marijuana itself does not automatically trigger probable cause. For example, intermediate appellate courts in Washington have twice accepted State concessions to this effect with respect to canine alerts. *See State v. Shabeeb*, 194 Wash. App. 1032, 2016 WL 3264421, at *3 (Wash. Ct. App. 2016) ("The State concedes and we agree that since the decriminalization of marijuana, a K-9 alert *standing alone* no longer establishes probable cause when the K-9 was trained to alert on multiple narcotics, one of which is marijuana. However, a magistrate may consider a K-9 alert as one factor in determining if probable cause exists." (original emphasis)); *see also State v. Souza*, 199 Wash. App. 1052, 2017 WL 2955534, at *6 (Wash. Ct. App. July 11, 2017). And other state courts have held that when an officer (not a dog) recognizes the smell of marijuana emanating from a vehicle, that fact alone is insufficient to permit a search. *See Zullo v. State*, 205 A.3d 466, 502 (Vt. 2019) ("[O]ur caselaw has made it clear that an odor of marijuana is a factor, but not necessarily a determinative factor, as to whether probable cause exists."); *Commonwealth v. Overmyer*, 11 N.E.3d 1054, 1057-59 (Mass. 2014) (noting that scent of marijuana alone does not "reliably predict[ ] the presence of a criminal amount of the substance").

B. The question presented warrants this Court's review because it is important, and this case is a suitable vehicle for deciding it.

The question whether probable cause necessarily flows from the alert of a drug dog known to react to lawful substances warrants this Court's review.

Detector dogs are one of the primary investigative tools employed by state and federal law enforcement across the country, making the scope of their permissible use under the Fourth Amendment a matter of considerable nationwide importance. Indeed, this Court has granted review to examine the Fourth Amendment implications of police reliance on drug-sniffing dogs on numerous occasions. *See Place*, 462 U.S. at 707; *City of Indianapolis v. Edmond*, 531 U.S. 32, 40-41 (2000); *Caballes*, 543 U.S. at 407; *Harris*, 568 U.S. at 240; *Florida v. Jardines*, 569 U.S. 1, 9-10 (2013).

Whether officers may search based solely on the alert of a dog known to react to the odor of a substance that may be lawfully possessed is particularly salient in the growing number of states that have decriminalized or legalized marijuana for recreational use. As the discussion above indicates (Pet. 9-10), the question whether an alert from a marijuana-trained dog suffices to create probable cause is a recurring issue in these states. And it will continue to arise as more states tread the decriminalization and legalization paths.[4]

[4] Recreational marijuana use is fully legal, to some degree, in the following jurisdictions: Alaska, Washington, Oregon, Nevada, California, Colorado, Michigan, Vermont, Maine, Massachusetts, and Washington D.C. *See* Marijuana Overview, Nat'l Conference of State Legislatures (Dec. 14, 2018), http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx (visited June 9, 2019). Save Michigan, all of these jurisdictions decriminalized small amounts of marijuana before progressing to legalization. *Id.* The states that have decriminalized, but not legalized, marijuana is: Connecticut, Delaware, Illinois, Maryland, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, New York, North Carolina, Ohio, and Rhode Island. *Id.*

Resolving that question will provide much needed guidance. In these states, individuals have a legal right to possess certain quantities of marijuana in their homes, on their persons, and in their cars. Law enforcement entities operating in these states unquestionably retain their interest in the continued use of reliable drug dogs to detect *unlawful* marijuana possession. At the same time, these entities have an equally "strong incentive" to avoid "incurring unnecessary risks or wasting limited time and resources" on mere lawful possessors. *Harris*, 568 U.S. at 247. Moreover, judges, prosecutors, and defense attorneys in these states need to know how to evaluate police reliance on marijuana-trained dogs in order to adjudicate suppression disputes, make charging decisions, and advise clients. Even in states that traditionally interpret their own state constitutions to provide greater search-and-seizure protections, these parties would benefit from a clear understanding of the federal constitutional floor in this context. Only this Court can provide definitive guidance on that important and timely question.

This case is a suitable vehicle for providing that guidance. The question whether the alert of a drug dog known to react to a substance that is not necessarily contraband is sufficient, standing alone, to generate probable cause is cleanly presented. The district court found Deputy Brooks to be credible, and the court of appeals accepted his uncontroverted testimony that Karr will alert to Xanax as true. At all stages, the case was litigated on the understanding that Karr's alert was the sole basis for the of search petitioner's vehicle. And both lower courts resolved the suppression issue by finding that the alert alone was sufficient to establish probable cause.

CONCLUSION

The petition for a writ of certiorari should be granted.

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