No. 23-5903

In the Supreme Court of the United States

NATHAN RUSSELL CATES, PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The circuits are split 2–2 over whether, under *Florida v. Harris*, 568 U.S. 237 (2013), canine records are inherently "material" to a suppression motion and thus automatically discoverable under Federal Rule of Criminal Procedure 16. Canine records, generally, are documents relating to the canine's certification, training, and field performance. In the Second and Ninth Circuits, the answer is yes: when a defendant seeks canine records to support a suppression motion, Rule 16 compels disclosure. *United States v. Foreste*, 780 F.3d 518, 528-29 (2d Cir. 2015); *United States v. Thomas*, 726 F.3d 1086, 1096-97 (9th Cir. 2013). But in the Eighth and Tenth Circuits, the answer is no: disclosure of canine records isn't required unless the defendant makes a "threshold showing" that, for instance, the dog's certification is invalid or unreliable. App. 45-46; *see also United States v. Salgado*, 761 F.3d 861, 867 (8th Cir. 2014).

This disagreement is outcome-determinative. Had the government prosecuted Cates in the Second or Ninth Circuit, the government would have needed to disclose the records. But the Tenth Circuit here held that the government had no disclosure obligation because Cates didn't meet its "threshold showing" requirement.

The government doesn't dispute that this case is a strong vehicle for resolving the question presented. Pet. 8. Nor does it dispute that this case raises an important and recurring question. Pet. 6.

Instead, the government claims that the split isn't real by arguing the merits and then rehashing how the decision below attempted to downplay the conflict. But the government's (incorrect) reading of *Harris*

doesn't make the split go away, and the government's purported factual distinctions fail. The Second and Ninth Circuits apply categorial rules requiring discovery without any threshold showing from the defendant. *See Foreste*, 780 F.3d at 529. As the Ninth Circuit puts it, when a defendant seeks canine records to support a suppression motion, disclosure is "mandatory." *Thomas*, 726 F.3d at 1096. The decision below tried to dismiss the split by looking at the district court's reasoning in *Foreste*, App. 48-49, but that reasoning is irrelevant, because the Tenth Circuit's threshold-showing requirement conflicts with the *Second Circuit*'s mandatory discovery rule.

Lastly, the Second and Ninth Circuits' reading of *Harris* is correct. A "principle at the heart of *Harris*," *Thomas*, 726 F.3d at 1096, is "that a defendant 'must have an opportunity to challenge … evidence of a dog's reliability,'" *Foreste*, 780 F.3d at 529. For instance, *Harris* made clear that a defendant may cross-examine the testifying officer about "how the dog (or handler) performed" during the "certification or training" process. 568 U.S. at 246-47. But the right to challenge the dog's reliability "would be stripped of its value if the defendant were not entitled to discover" canine records, *Foreste*, 780 F.3d at 529, because, as Judge O'Scannlain has explained, access to those records is "crucial to [the defendant's] ability … to conduct an effective cross-examination," *Thomas*, 726 F.3d at 1096.

The Tenth Circuit's rule is a perfect Catch-22: To obtain canine records, a defendant must show that the records cast doubt on the dog's reliability. But to show that the records cast doubt on the dog's reliability, he must obtain the records. Joseph Heller would be

proud, but the judiciary shouldn't be. The Court should grant review.

ARGUMENT

I. The circuits have divided 2–2 over whether canine records are inherently "material" to a suppression motion under *Harris* and thus discoverable as of right under Rule 16.

The circuits are split over whether a defendant seeking to suppress evidence seized after a dog sniff is automatically entitled to the canine's records under Federal Rule of Criminal Procedure 16. The divide reflects disagreement over *Harris*. The Second and Ninth Circuits hold that canine records are inherently "material" under *Harris*, meaning their disclosure is mandatory. The Eighth and Tenth Circuits disagree, holding that disclosure of canine records isn't required unless the defendant makes a "threshold showing" that the dog's certification is invalid or unreliable, and that *Harris* doesn't say otherwise. *See* Pet. 4-6. Rather than explain why these conflicting rules don't create an outcome-determinative split (they do), the government simply rehashes the Tenth Circuit's irrelevant factual distinctions.

A. 1. The Second and Ninth Circuits hold that, under *Harris*, canine records are inherently material to a motion to suppress. Thus, to obtain discovery of canine records, a defendant need not make a "threshold showing" casting doubt on the validity or reliability of the dog's certification. *Contra* App. 45-46. He need only request discovery under Rule 16—nothing more. *See Foreste*, 780 F.3d at 528-29; *Thomas*, 726 F.3d at 1096-97.

As Judge O'Scannlain explained, *Harris* supports "the principle" that Rule 16 "compels the government

to disclose" canine records "when a defendant requests dog-history discovery to pursue a motion to suppress." *Thomas*, 726 F. 3d at 1096. *Harris* made clear that a defendant "must have an opportunity to challenge … evidence of a dog's reliability. 568 U.S. at 247. And as the Ninth Circuit has long held, canine records are "crucial to [the defendant's] ability to assess the dog's reliability, a very important issue … , and to conduct an effective cross-examination of the dog's handler' at the suppression hearing." *Thomas*, 726 F.3d at 1096. "The government has [thus] long been on notice," before and after *Harris*, "that a defendant" in the Ninth Circuit "is *entitled* to canine training records and that their disclosure is *mandatory*." *United States v. Salazar*, 598 F. App'x 490, 491 (9th Cir. 2015) (emphases added).

The Second Circuit reads *Harris* the same way: *Harris* recognized a defendant's right to challenge evidence of a dog's reliability, and that right "would be stripped of its value if the defendant were not entitled to discover the evidence on which he would base such a challenge"—*i.e.*, the canine records. *Foreste*, 780 F.3d at 529. The Second Circuit has thus held that a defendant moving to suppress evidence seized after a dog sniff is automatically entitled to the canine's records, *id.*, meaning he doesn't have to make a "threshold showing" of unreliability to obtain such discovery.

Had the government prosecuted Cates in the Second or Ninth Circuit, he would have been entitled to discovery of canine records as a matter of right.

2. The Eighth and Tenth Circuits hold that, under *Harris*, canine records are *not* inherently material to a motion to suppress. Thus, to obtain discovery of

canine records, a defendant must do more than simply request discovery under Rule 16. He instead must make a "threshold showing" that casts doubt on the dog's certification, App. 45-46, or show that the canine records would be more than "minimally probative," *Salgado*, 761 F.3d at 867.

That's the exact opposite of what the Second and Ninth Circuits hold, and it results from reading *Harris* the exact opposite way. According to the Tenth Circuit, "*Harris* counsels that a criminal defendant does not have an automatic right to historical canine records." App. 48. While a defendant "must have an opportunity to challenge" a dog's reliability, the Tenth Circuit reasons, access to canine records is not inherently crucial to a defendant's ability to exercise that right. App. 47-48. Thus, the government need not produce canine records in discovery unless the defendant makes a "threshold showing" that the canine's certification is invalid or unreliable. App. 45-46.

The Eighth Circuit also holds that *Harris* does not establish the materiality of canine records for Rule 16 purposes. In *Salgado*, the district court denied a motion to suppress evidence seized after a dog sniff, and it relied on canine records that the government disclosed only to the court *in camera*. *See* 761 F.3d at 864, 867. Reling exclusively on *Harris*, the Eighth Circuit held that the district court did not err in denying the defendant access to the canine records, particularly because he "was able to cross-examine the dog's handler about the dog's performance in the field" and because the canine records would be "minimally probative" to that cross-examination. *Id.* at 867. That, too, is the exact opposite of what the Second and Ninth Circuits hold. As Judge O'Scannlain explained, canine records are "crucial to [the defendant's] ability to …

conduct an effective cross-examination of the dog's handler," a "principle at the heart of *Harris*." *Thomas*, 726 F.3d at 1096.

The split is outcome-determinative. Here, Cates "failed to make a 'threshold showing,'" so the Tenth Circuit denied discovery. App. 52. But he would have been entitled to discovery in the Second and Ninth Circuits, which reject a threshold-showing requirement and instead hold that when a defendant requests canine records to support a suppression motion, Rule 16 "compels the government to disclose" those records. *Thomas*, 726 F.3d at 1096. Similarly, had the Eighth Circuit read *Harris* as supporting the inherent materiality of canine records, then Salgado would have been entitled to discovery of those records.

B. Rather than squarely confront the circuit split, the government spends most of its brief in opposition arguing that canine records are not inherently material under Rule 16, Opp. 9-11, and that *Harris* does not suggest otherwise, Opp. 11-14. Those merits arguments are wrong, as explained below (at 9-12). But when the government finally gets to the split, it spends just a page and a half (Opp. 15-17) rehashing the Tenth Circuit's irrelevant factual distinctions. Ultimately, the government all but concedes the split, admitting that the Second and Ninth Circuits' decisions "would conflict with Rule 16" and *Harris* "[t]o the extent" they require "production of a drug-detection dog's records, even where the defendant cannot make any case-specific showing of materiality." Opp. 17. Of course, that's *exactly* what the Second and Ninth Circuits hold. *Supra* pp. 3-4.

To try to distinguish those decisions, the government says that "[t]he decision below did not view

either the Second or Ninth Circuit to always require, in every case, production of a drug-detection dog's records, even where the defendant cannot make any case-specific showing of materiality." Opp. 17. But the Tenth Circuit's attempt to downplay the conflict fails, and the government doesn't make the reasoning better by repeating it.

1. In *Foreste*, the Second Circuit reversed the district court's ruling that "the Government did not need to turn over the dog's field performance records." 780 F.3d at 527. In remanding "for discovery of the narcotics canine's field performance records," the Second Circuit did not condition discovery on the defendant's ability to satisfy a threshold-showing requirement—or on *anything*. *Id.* at 529. It instead ordered discovery outright, reasoning that the defendant's right to challenge a dog's reliability—a right *Harris* recognized—"would be stripped of its value if the defendant were not entitled to discover the evidence on which he would base such a challenge." *Id.*

That holding and analysis squarely conflicts with the decision below, which upheld the denial of canine-record discovery because Cates failed to satisfy the requirement that he make a "threshold showing" that the dog's certification was invalid or unreliable. App. 45-46, 52. The decision below emphasized that the district court in *Foreste* denied discovery based on its mistaken belief that the canine field records were irrelevant to the probable cause inquiry. App. 48-49. But the *Second Circuit* didn't condition its discovery order on anything—the defendant was automatically entitled to the records. The split is clear.

2. In *Thomas*, the Ninth Circuit made clear that, under *Harris* and longstanding Circuit precedent,

when a defendant seeks canine records to support a suppression motion, Rule 16 "compels the government to disclose" those records. 726 F.3d at 1096. But here, the decision below held that the government has no duty to disclose canine records under Rule 16 unless the defendant makes a "threshold showing" that the dog's certification is invalid or unreliable. App. 45-46.

The decision below purported to dismiss *Thomas* on the facts. *See* App. 49-50; Opp. 16-17. But the factual differences don't matter, because the Ninth Circuit's rule is categorical and doesn't turn on those nuances.

For context, while the government disclosed the canine records in *Thomas*, they were "heavily redacted." 726 F.3d at 1096. At least one record "revealed marginal performance in 'search skills.'" *Id.* And at the suppression hearing, the K9 official "said that if the redactions were lifted, he would expect to see critiques of the team's competence as well as discussions about areas for improvement." *Id.* at 1097. Here, by contrast, the government disclosed "a one-page canine narcotics certification" "without any redactions." App. 24, 50. And "unlike the dog in *Thomas*," the court of appeals reasoned, "there is no indication that [the canine's] performance was 'marginal.'" App. 50.

These minor factual differences are a distraction from the legal issue over which the circuits have split. *Thomas* applied a categorical rule: "when a defendant requests dog-history discovery to pursue a motion to suppress, … [Rule] 16 *compels* the government to disclose" the canine's records. 726 F.3d at 1096 (emphasis added). Such "disclosures are 'mandatory,'" because canine records are "crucial" to the realization of the

defendant's right to challenge "evidence of a dog's reliability." *Id.* Thus, the rule in the Ninth Circuit is that defendants are "entitled to canine training records" no matter the facts. *Salazar*, 598 F. App'x at 491. That rule squarely conflicts with the threshold-showing requirement.

II. This case is an excellent vehicle to resolve this important discovery issue.

The government doesn't dispute that this "case is a strong vehicle for resolving the question presented." Pet. 8. The "materiality" issue is squarely presented and the split is outcome-determinative. If Cates wins, he will be entitled to the canine records and reconsideration of his suppression motion.

The government also doesn't dispute that this case raises an "important and recurring question." Pet. 6. The discovery issue bears on the fundamental fairness of the criminal process. "Society wins not only when the guilty are convicted but when criminal trials are fair." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). And it is "fundamentally unfair" when the prosecution, with its "inherent information-gathering advantages," maintains "'poker game' secrecy" during "discovery." *Wardius v. Oregon*, 412 U.S. 470, 475-76 & n.9 (1973). Here, the split heightens the fundamental-fairness concern, because defendants in Colorado lack protections that defendants in California have.

III. The decision below is wrong.

As the Second and Ninth Circuits correctly hold, under *Harris*, canine records are inherently material to a suppression motion and thus discoverable as of right under Federal Rule of Criminal Procedure 16. The court of appeals' contrary ruling is irrational and incorrect. *See* Pet. 6-7.

A. This Court made clear in *Harris* that a defendant "must have an opportunity to challenge … evidence of a dog's reliability." 568 U.S. at 247. For example, *Harris* explained that a defendant may cross-examine the testifying officer about "how the dog (or handler) performed" during the "certification or training" processes. *Id.* at 246-47. Such a cross-examination will be "effective" only when the defendant has the information that is "crucial" to "the dog's reliability"—the canine's records. *Thomas*, 726 F.3d at 1096.

This "principle" is "at the heart of *Harris*." *Id.* As *Foreste* explained, "the principle that a defendant 'must have an opportunity to challenge … evidence of a dog's reliability'"—the *Harris* principle—"would be stripped of its value if the defendant were not entitled to discover the evidence on which he would base such a challenge." 780 F.3d at 529. Thus, as the Second and Ninth Circuits have recognized, *Harris* necessarily contemplates that a defendant can realize his right to challenge a dog's reliability only if he has access to the dog's records. That makes sense. "It is difficult to imagine how a defendant could ever successfully contest the adequacy of a certification or training program, or the dog's performance in such programs, without access to the underlying records documenting those details." Pet. 6.

B. 1. The decision below, by conditioning access to canine records on a defendant's ability to satisfy a threshold-showing requirement, all but nullifies the *Harris* principle. Indeed, as the decision below shows, so long as the government produces a "one-page" document showing that the dog in question was certified at the time of the alert, App. 24, the defendant will *never* be entitled to discover canine records, which are

"crucial to [the defendant's] ability to assess the dog's reliability," *Thomas*, 726 F.3d at 1096, unless he can make a "threshold showing" casting doubt on the on the validity or reliability of the one-page certification. App. 45-46. In other words, to access canine records, the defendant must show that the records "would contain evidence that the dog and its handler did not perform satisfactorily in a recent assessment of their capabilities in a controlled setting," Opp. 13, even though the defendant has never seen the records. That's fundamentally unfair and makes no sense.

2. The government ignores the perfect circularity of this reasoning and instead focuses on the materiality requirement in Rule 16. *See* Opp. 9-11. But given the *Harris* principle, when coupled with the fact that canine records are "crucial to [the defendant's] ability to assess the dog's reliability," *Thomas*, 726 F.3d at 1096, it is clear that canine records are inherently material under Rule 16.

The government argues that *Harris*, "if anything, … suggests that detailed records of the sort that petitioner seeks here ordinarily are *not* material." Opp. 12. That argument is based on the notion that "records of a dog's field performance … have relatively limited import." *Harris*, 568 U.S. at 245. But Cates also seeks the dog's certification and training records, *see* App. 24-25, the "better measure of … reliability," *Harris*, 568 U.S. at 246. The government is thus wrong to suggest that, in light of *Harris*, canine records are immaterial unless proven otherwise.

Lastly, there is no merit to the government's argument that the district court did not abuse its discretion in denying Cates' discovery request, Opp. 14, because the court's denial was based "on an

erroneous view of the law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

CONCLUSION

The petition for a writ of certiorari should be granted.

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