No. _____

In the
Supreme Court of the United States

JUVENTINO LARA PLANCARTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Petition for a Writ of Certiorari

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Question Presented for Review

The recent legalization of CBD has changed the legal landscape for searches by drug-sniffing dogs, but some police departments have failed to adapt. This Court's Fourth Amendment precedent dictates that when police use a device that is not in general public use to explore the contents of a constitutionally protected space, they violate a reasonable expectation of privacy. But there is a canine exception to this rule. Because a well-trained drug dog reveals only contraband (which no one can reasonably expect to remain private), a warrantless sniff by a well-trained dog is permitted. In other words, sniffs by drug-detection dogs that alert "only to contraband" are not searches. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005).

The dog in this case could not distinguish illegal marijuana from legal CBD. And so, his sniffs did not reveal *only* the presence of contraband. They also revealed the presence of legal CBD. Thus, the canine exception does not apply here.

The Seventh Circuit failed to apply these principles, instead holding that sniffs are not a search under the Fourth Amendment, even when the dog's training means that it will consistently alert to the possession of *legal* substances. Consequently, the millions of Americans who use legal CBD are subject to warrantless searches by this opinion. This error presents an important question affecting constitutional rights, which this Court can correct by applying longstanding Fourth Amendment principles.

The question presented is:

Whether a warrantless sniff by a dog trained to reliably alert to legal possessions constitutes a search under the Fourth Amendment.

Parties to the Proceeding and Rule 29.6 Statement

Petitioner is Plancarte. Respondent is the United States of America. No party is a corporation.

Related Proceedings

The prior proceedings for this case are found at:

United States v. Plancarte, 105 F.4th 996 (7th Cir. 2024), attached at App. 8a.

United States v. Plancarte, No. 22-cr-64-wmc, 2023 WL 3597600 (W.D. Wis. May 23, 2023), attached at App. 1a.

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Petition for a Writ of Certiorari

Juventino Plancarte petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the denial of petitioner's motion to suppress evidence under the Fourth Amendment.

Opinions Below

The Seventh Circuit's decision affirming the denial of petitioner's motion to suppress is published at *United States v. Plancarte*, 105 F.4th 996 (7th Cir. 2024). App. 8a. The order denying the motion to suppress from the District Court for the Western District of Wisconsin, while not published, is available at *United States v. Plancarte*, No. 22-cr-64-wmc, 2023 WL 3597600 (W.D. Wis. May 23, 2023). App. 1a.

Jurisdiction

The Seventh Circuit entered its final order by denial of the petition for rehearing on October 7, 2024. App. 17a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). On January 8, 2025, this Court granted petitioner's motion to extend the time to file until March 6, 2025. This petition is timely pursuant to Supreme Court Rule 13.1.

Constitutional and Federal Statutory Provisions

The Fourth Amendment to the U.S. 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."

Introduction

This case is about whether the Fourth Amendment permits the use of a police canine that alerts to legal possessions. Importantly, this case is *not* about whether the sniff produced probable cause to justify a warrantless search. *See Florida v. Harris,* 568 U.S. 237, 245 (2013). Rather, the question is whether the sniff itself was a search. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005).

Drug-sniffing dogs are "a specialized device for discovering objects not in plain view (or plain smell)." *Florida v. Jardines*, 569 U.S. 1, 13 (2013) (Kagan, J., concurring). A "well-trained" canine is one whose sniff discloses only the presence of narcotics. *Caballes*, 543 U.S. at 409 (quotation omitted). Because such a sniff "does not expose noncontraband items that otherwise would remain hidden from public view," it is not a search. *Id.*

The recent legalization of hemp-derived products (such as CBD) has changed this once-settled landscape. Although CBD used to be considered illegal marijuana, it is now one of the most commonly-used supplements in the country. But many canines, including the one used in this case, cannot distinguish between these two substances derived from the same plant: illegal marijuana and legal CBD.

This Court has held that dog sniffs are not searches because they are "not designed to disclose any information other than the presence or absence of narcotics." *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000). But the sniff in this case was capable of exposing noncontraband. Thus, under the logic of *Caballes*, the sniff was a search. Put differently, a drug-detection dog unable to distinguish illegal contraband

from a legal product is not "well-trained" within the meaning of this Court's precedent, given that it *does* "expose noncontraband items." *Caballes*, 543 U.S. at 409.

The Seventh Circuit held otherwise and, in doing so, misapplied this Court's precedent. It concluded that a drug dog which executes its training with a low error rate is "well-trained," even if that training means that the dog will alert when presented with *legal* items. App. 15a. The decision was not only incorrect, but also failed to identify any limiting principle that would prevent police from using devices to reveal other types of legal possessions. This Court should resolve the exceptionally important question presented here by granting this petition and holding that drug-detecting devices do not constitute a search, provided they reveal *only* contraband.

Statement of the Case

I. A dog sniff produced the dispositive evidence in this case.

On January 20, 2022, in La Crosse, Wisconsin, an officer had a hunch that a car was involved in drug activity. App. 1a. The police lacked probable cause that a crime was occurring, but nevertheless stopped the car due to a window-tint violation. *Id.* An officer with a drug-sniffing dog named Loki arrived to perform a drug sniff. *Id.*

In 2018, Loki underwent a 14-week training course, learning to alert to cocaine, heroin, methamphetamine, and marijuana.[1] He was certified that year as a drug-detection dog.[2] But Loki could not distinguish between legal cannabis products like CBD and the illegal marijuana he was trained to detect.[3] As Loki's handler

[1] *United States v. Plancarte*, No. 22-cr-64-wmc, dkt. no. 31 at 31–33 (W.D. Wis.) (Transcript of evidentiary hearing).
[2] *Id.* at 37–38.
[3] *Id.* at 63–64, 73.

testified, "[T]he odor that comes off of what's considered a 'CBD plant material' and the odor that comes off the illegal marijuana substance material is the same, at least to a dog's nose and a human's nose."[4] Loki would alert to any trained scent, including marijuana and CBD, in the same manner; as a result, police could not know which substance caused the alert.[5]

Returning to the underlying traffic stop, Loki circled the car and alerted to its trunk. App. 1a. Officers searched the trunk and found a backpack containing over ten pounds of methamphetamine. *Id.*

A. The law controlling the use of drug-sniffing dogs.

To better understand this Court's dog sniff cases, it is helpful to first look at the Court's broader precedent defining a search. In *Kyllo*, the police used a thermal imaging device to detect heat signatures, attempting to identify a marijuana grow operation inside a house. *Kyllo v. United States*, 533 U.S. 27, 34–35 (2001). The device could identify this unlawful activity, but it could also reveal other activities inside the house. *Id.* at 34–35. Because the device could reveal private information that would not otherwise be observable, it violated the defendant's reasonable expectation of privacy. *Id.* at 34–36. Importantly, the decision did not turn on whether the device *had* revealed intimate information; rather, the Court looked to whether the device had the potential to do so. *Id.* at 37–38. When using the device, police could not determine "*in advance*" whether the scan would reveal legal activity, illegal activity, or both. *Id.* at 38–40. Thus, its use constituted a "search." *Id.* at 40.

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[4] *Id.* at 63–64.
[5] *Id.* at 63–64, 73.

Drug dogs fit *Kyllo*'s mold because they're a specialized device not in public use. *See Jardines*, 569 U.S. at 14–15 (Kagan, J., concurring). But courts generally do not analyze dog sniffs under the *Kyllo* standard because of an exception established by *United States v. Place*, 462 U.S. 696 (1983). There, a dog sniffed some luggage and, although Place had a reasonable expectation of privacy in its contents, the sniff was not a search. *Id.* at 705–07. The reason was that "any interest in possessing contraband cannot be deemed legitimate, and thus, governmental conduct that *only* reveals the possession of contraband compromises no legitimate privacy interest." *Caballes*, 543 U.S. at 408 (quotations omitted). Given that the sniff did not "expose noncontraband items that otherwise would remain hidden from public view," it did not violate a reasonable expectation of privacy. *Place*, 462 U.S. at 707.

A few years after *Kyllo,* this Court in *Caballes* applied the canine exception to a sniff of a car and explained what was required for a dog to qualify as "well-trained." 543 U.S. at 409. The Court held that while Caballes had a reasonable expectation of privacy in the car's contents, that expectation did not extend to contraband. *Id.* The "use of a well-trained narcotics-detection" dog thus did not violate a reasonable expectation of privacy. *Id.* And the Court defined a well-trained drug dog as one that did "not expose noncontraband items that otherwise would remain hidden from public view." *Id.* (quoting *Place*, 462 U.S. at 707). The Court explained that this reasoning was "entirely consistent" with *Kyllo* for a simple reason: an "expectation that information about perfectly lawful activity will remain private" is reasonable; an expectation that contraband will remain private is not. *Id.* at 409–10.

B. The intervening legalization of CBD.

The legalization of CBD has changed what makes a dog "well trained" within the meaning of *Caballes*. The dog at issue in this case underscores the point. In 2018, Loki was trained to alert only to controlled substances (including marijuana), but by 2020, the legal definition of marijuana had changed.

Marijuana is a cannabis plant that contains the psychoactive chemical THC.[6] Hemp and CBD are both derived from the cannabis plant, but because they have very low levels of THC, they are not psychoactive.[7] The federal Controlled Substances Act previously defined "marihuana" to include CBD, but in 2018 the law was amended to allow legal possession of CBD containing less than .3% of THC. *See* Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4908 (amending 7 U.S.C. § 1639o(1)). In 2019, Wisconsin made the same change. *See* S.B. 188, 104th Leg. (Wis. 2019); WIS. STAT. § 961.14(4)(t) (2021–22); WIS. STAT. § 94.55(1) (2021–22). In short, in 2018, hemp-derived CBD was illegal marijuana; by 2020, it was not.

These changes spurred an explosion in the legal-THC industry, most prominently with CBD products. People use CBD for a variety of medicinal purposes, including pain, anxiety, insomnia, and arthritis.[8] It is freely available for sale and infused into a wide variety of products, including oils, drops, and even CBD dog treats. Put simply, CBD has become ubiquitous, with as many as one-third of

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[6] *See United States v. Plancarte*, No. 23-2224, dkt. no. 9 at 9 (7th Cir.) (Opening Brief) (citing Brooke Porter et al, *Cannabidiol (CBD) Use by Older Adults for Acute and Chronic Pain*, J. OF GERONTOLOGICAL NURSING at 6–15 (July 2021)).

[7] *Id.*

[8] *Id.*

American adults having used it.[9] Because of these changes, what had recently been a Schedule I narcotic is now sold in grocery stores, gas stations, and pet stores. And yet, many police departments continued to use dogs that—like Loki—cannot distinguish illegal marijuana from CBD.

II. Following an evidentiary hearing, the district court denied the motion to suppress.

Returning to this case, Plancarte was indicted for two drug-trafficking counts. App. 1a. Based on Loki's sniff, the defense filed a motion to suppress. *Id.* Following an evidentiary hearing, the following key facts were undisputed:

- CBD is legal.[10]
- CBD is widely available in many legal products.[11]
- Loki cannot distinguish between marijuana and CBD.[12]
- Loki gives the same alert to any trained odor.[13]
- Loki will alert to legal substances.[14]

The district court denied the motion. App. 7a. The court relied on *United States v. Bentley*, where the Seventh Circuit addressed whether a dog's error rate was sufficiently low so that its sniff created probable cause. 795 F.3d 630, 635 (7th Cir. 2015). Although *Bentley* did not address Plancarte's main argument—that the sniff itself was a search—the district court concluded that *Bentley* controlled. App. 2a.

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[9] *Cannabidiol (CBD) – Potential Harms, Side Effects, and Unknowns*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION (Feb. 2023) (*available at* https://store.samhsa.gov/sites/default/files/pep22-06-04-003.pdf).

[10] *See United States v. Plancarte*, No. 22-cr-64-wmc, dkt. no. 31 at 27 (W.D. Wis.) (Transcript of evidentiary hearing).

[11] *Id.* at 25.

[12] *Id.* at 63, 69, 73.

[13] *Id.* at 41–42.

[14] *Id.* at 59, 63–64.

III. The Seventh Circuit affirmed, failing to engage with the relevant Fourth Amendment principles.

The Seventh Circuit affirmed the district's court order. The opinion began from the premise that "dog sniffs conducted in public places are generally not" a search, but it failed to apply the limitations that *Place* and *Caballes* established. App. 14a.

The opinion mistakenly focused exclusively on a dog's ability to reliably execute its training. The opinion stated that "Courts have long acknowledged and tolerated the imperfection of drug detection dogs," implying that Loki's training was one of those "imperfection[s]." *Id.* The opinion then stressed that Loki had a low error rate in the field. It stated: "we have never held that a low rate of false positive alerts converts an otherwise permissible dog sniff into a search." App. 16a. Based on this belief that Loki had rarely alerted to CBD in the field, the lower court reasoned that any alerts to legal substances were acceptable errors by a well-trained dog.

However, the opinion never cited to *Caballes*' definition of a "well-trained" drug dog: one whose sniff "does not expose noncontraband items that otherwise would remain hidden from public view." 543 U.S. at 409. A dog like Loki, whose training means that it indisputably cannot distinguish marijuana from CBD, cannot and does not satisfy that standard. The Seventh Circuit nevertheless affirmed. App. 16a.

Reasons for Granting the Petition

The Court should grant a writ of certiorari for two reasons. First, the Seventh Circuit incorrectly decided an important constitutional question in a way that conflicts with this Court's controlling precedent. The opinion approved the use of drug dogs that reveal legal possessions, contrary to caselaw defining a "well-trained" dog. The practical and foreseeable result is that the millions of Americans who lawfully possess CBD risk having their constitutional rights infringed. The doctrinal result is that the Seventh Circuit has effectively authorized a new and unprecedented category of warrantless searches. Its opinion permits the use of specialized surveillance devices not in public use to reveal citizen's otherwise-private legal possessions in the absence of probable cause. By granting the writ, the Court can curtail this violation of core Fourth Amendment principles.

Second, this case presents an ideal vehicle for addressing this significant issue because the material facts are undisputed. Courts all over the country will be encountering challenges arising from the legalization of CBD. Here, the defense has presented a single argument—that the sniff itself is a search—and that argument is premised on just a few undisputed facts—Loki could not distinguish legal CBD from illegal marijuana, and he would alert in the same manner for any positive hit. This case provides an opportunity for the Court to squarely address this important issue.

I. The Seventh Circuit incorrectly decided an important constitutional question.

A. The opinion mistakenly focused on "error" rate, which is irrelevant because Loki's alert to CBD would not be an error.

The Seventh Circuit mistakenly focused on cases challenging a dog's ability to reliably execute its training. *See Harris*, 568 U.S. at 245. Those cases involve review of the animal's training logs to evaluate its error rates. *Id.* But the constitutional problem Loki poses is not because of his errors; the problem is his accuracy.

The parties do not contest Loki's accuracy or his reliability—he has been trained to reliably alert to *legal* substances as well. That's why cases analyzing error rates are inapposite. If the police deployed Loki to cars containing only marijuana, it would alert every time to that odor—a 0% error rate. But if the police instead deployed Loki to cars containing only CBD, it would likewise alert every time to that same (and legal) odor. Would this be a 0% error rate, because Loki alerted as it was trained? Or would this be a 100% error rate, because Loki alerted to a lawful item each time? This contradiction reveals the Seventh Circuit's error.

Again, a "well-trained" dog is one whose sniff "does not expose noncontraband items that otherwise would remain hidden from public view." *Caballes*, 543 U.S. at 409. The Seventh Circuit's statement that "we have never held that a low rate of false positive alerts converts an otherwise permissible dog sniff into a search" shows its misapprehension of the disputed legal issue. App. 16a. The sniff was not "otherwise permissible" unless Loki was trained to reliably alert *only* to controlled substances.

Because the animal could not distinguish between legal CBD and illegal marijuana, Loki did not qualify as a well-trained drug dog—and his sniffs were a search.

B. This case involved a dog sniff in a public place; the Seventh Circuit went astray by focusing on searches involving the home.

The Seventh Circuit also blended several lines of precedents together, muddling the analysis. The opinion purported to follow the general rule that "using trained police dogs to investigate the home is a search . . . [but] dog sniffs conducted in public places are generally not." App. 14a (cleaned up). This oversimplifies the standard, and because of this, the analysis glosses over *why* dog sniffs in public places are generally not a search. The result is that the opinion fails to correctly understand and apply *Caballes* to the case's undisputed facts.

As discussed above, *Place* and *Caballes* analyzed dog sniffs in public places and established the standard for whether such a sniff was a search. The sniffs in those cases were not searches because "governmental conduct that *only* reveals the possession of contraband compromises no legitimate privacy interest." *Caballes*, 543 U.S. at 408 (internal quotation marks omitted). The Seventh Circuit's statement that "dog sniffs conducted in public places are generally not [a search]" is true, but only within the limitations *Place* and *Caballes* established. App. 14a. And although the opinion acknowledged those standards in passing, it failed to apply them. App. 12a.

Instead, the opinion framed the question as whether it should extend cases regarding the home, like *Kyllo*, to the car. App. 13a–14a. But this case requires no extension of the home caselaw. *Caballes* itself addressed *Kyllo* outside the context of the home and explained why its holding was "entirely consistent" with *Kyllo*.

Caballes, 543 U.S. at 409. The Court did not rule that the sniff was permissible merely because it occurred in a public place. Rather, the *Caballes* Court stated: "The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car." *Id.* at 410.

Critically, the principles articulated in *Kyllo* have been applied outside the home. In *Dow*, this Court addressed surveillance of an industrial complex, which the Court distinguished from the home. *Dow Chem. Co. v. United States*, 476 U.S. 226. 235, 238 (1986). The Court explained that the outcome might have been different had the government used "surveillance equipment not generally available to the public." *Id.* at 238. *Kyllo* later applied the device-not-in-public-use standard to the home, but it did not create the standard nor limit its application to those facts. 533 U.S. at 34–36. Nor did the *Caballes* Court reject the reasoning of *Dow* and *Kyllo* as applied to a car in public. Instead, it explained that the decision was based on a different limitation. *Caballes*, 543 U.S. at 409 (explaining that "[c]ritical to that decision [in *Kyllo*] was the fact that the device was capable of detecting lawful activity"). It was the same limitation *Place* articulated: whether the device "reveal[ed] no information other than the location of a substance that no individual has any right to possess." *Id.* at 410. That is the standard the *Caballes* Court applied to a dog sniff of a car. And that is the standard that should have been applied here.

In sum, *Place* and *Caballes* established the governing standard: "conduct that *only* reveals the possession of contraband compromises no legitimate privacy

interest." *Caballes*, 543 U.S. at 408. Contrary to the Seventh Circuit's analysis, this rule has never been cabined to the home. And it controls here, where the Court faces a car sniff (just like it did in *Caballes*). Because Loki's sniff could reveal legal possessions in which there was a reasonable expectation of privacy, it was a search.

II. The Seventh Circuit has authorized searches for legal items and provided no limiting framework to apply in future cases.

The implications of the Seventh Circuit's error are underscored by applying its reasoning to future cases. Imagine a person who walks out of a grocery store with their purchases: bananas and some CBD-infused dog treats. On the way home, they are pulled over for speeding. The police then deploy a drug-sniffing dog trained to detect marijuana around the car. It alerts. This alert was not an "error"; the dog's training meant that it would alert to the presence of CBD or marijuana—and it did. At this point, police have already gathered information about the citizen's private and lawful possessions in the car and, on the basis of that information, search the car.

The Seventh Circuit fully permits these police actions, notwithstanding the absence of probable cause. It erroneously held that precedent authorizes all sniffs so long as they occur outside the home, disregarding that these precedents are premised on the limitation that the dog reliably alert *only* to controlled substances.

And the Seventh Circuit's reasoning offers no limiting principle. Its holding would apply equally if the dog's training meant that it would instead alert to the aforementioned bananas. CBD is just as legal as that produce, and the opinion in no way would prevent the police from using a dog that alerts to other legal possessions. Nor is the analysis limited to drug dogs. This Court has considered the impact on

future cases of a "potential mechanical substitutes for dogs trained to react when they sniff narcotics." *Kyllo*, 533 U.S. at 47 (Stevens, J., dissenting). The Seventh Circuit's reasoning would hold that programming this device to alert to CBD constitutes no search. What other legal possessions may police use devices to reveal? The opinion provides no framework for answering this important and troubling question.

This example reveals the consequences of the Seventh Circuit's failure to follow precedent. Courts, the police, and parties need guidance about when police are—and are not—permitted to use devices to reveal a person's private possessions. This Court can provide such guidance by clarifying when dog sniffs are—and are not—searches.

III. This case presents an ideal vehicle for deciding this important constitutional question.

The question presented is whether a warrantless sniff by a dog that will reliably alert to legal possessions constitutes a search under the Fourth Amendment. This important constitutional question arises only where the undisputed facts establish that the police dog in question could not distinguish between legal and illegal possessions. That is the case here. Petitioner's case therefore is the ideal vehicle to resolve this issue.

The Seventh Circuit's mistaken focus on error rates caused it to mischaracterize some of these undisputed facts. The opinion stated, "Even if drug sniffing dogs struggle to differentiate between illegal marijuana and other legal cannabis products, Loki does not." App. 15a. To support this misstatement, the opinion relied on Loki's deployment records showing that his false alerts in the field were rare. *Id.* That approach disregarded this Court's guidance that "[t]he better

measure of a dog's reliability . . . comes away from the field, in controlled testing environments." *Harris*, 568 U.S. at 246.

But on a more basic level, the opinion ignored the undisputed nature of Loki's training. Loki's handler explained that the dog could not tell the difference between CBD and marijuana.[15] He testified: "[T]he odor that comes off of what's considered a 'CBD plant material' and the odor that comes off the illegal marijuana substance material is the same, at least to a dog's nose and a human's nose."[16] Thus, there is no factual dispute as to whether Loki could distinguish between marijuana and CBD. The Seventh Circuit erroneously relied on deployment logs, but they reflect opportunity—not capability. In other words, Loki was deployed in situations targeting drug trafficking, where he may have rarely encountered CBD. That does not change the undisputed testimony that his training *dictated* that he could not distinguish between illegal marijuana and legal CBD.[17] To conclude otherwise is the equivalent of reviewing the records of a dog deployed to heroin-specific task force and reasoning that because it rarely alerted to cocaine in the field, it would not alert to cocaine. A lack of opportunity does not prove a lack of capability.

Other courts have addressed the matter, but often have muddled the issues presented by CBD legalization or had an inadequate record. *See, e.g., United States*

[15] *United States v. Plancarte*, No. 22-cr-64-wmc, dkt. no. 31 at 63–64 (W.D. Wis.) (Transcript of evidentiary hearing).
[16] *Id.*
[17] *Id.*

v. Deluca, No. 20-8075, 2022 WL 3451394, at *4-5 (10th Cir. Aug. 18, 2022). This case squarely tees up the legal and factual issues for the Court to address the question.

Conclusion

Because the Seventh Circuit's opinion conflicts with this Court's precedent on a constitutional issue of exceptional importance, this Court should grant a writ of certiorari.

Dated this 6th day of March, 2025.

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