No. 25-774

In the Supreme Court of the United States

ERIC TYRELL JOHNSON, PETITIONER,

v.

UNITED STATES

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

BRIEF OF *AMICUS CURIAE* PROFESSOR LAURENT SACHAROFF SUPPORTING PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued Page(s)

Statutes

Other Authorities

Other Authorities—Continued Page(s)

INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae Laurent Sacharoff is a law professor at University of Denver Sturm College of Law. He has written numerous articles on criminal procedure and, in particular, on dog sniffs and the Fourth Amendment. As a scholar in the field of Fourth Amendment law, he has an interest in the correct interpretation of the Fourth Amendment and the protection of individual liberty in the face of potentially intrusive government surveillance.

Based on his scholarly knowledge on the Fourth Amendment, *amicus* submits this brief to urge the Court to grant certiorari and reverse the judgment of the Fourth Circuit.

SUMMARY OF ARGUMENT

This case concerns whether a dog sniff of an apartment for drugs is a Fourth Amendment search. This brief considers the question presented under the reasonable expectation of privacy test. Under this test, courts have split over whether such a dog sniff constitutes a search because they follow one of two radically different conceptions of how the Fourth Amendment applies to the home—a place-based approach versus a fact-based approach. This Court should grant the petition to resolve this conflict in favor of a place-based approach, recognizing dog sniffs of any home as a search.

The reason for the court split is clear. Those courts finding a dog sniff of an apartment to be a search treat the home as a *place* entitled to seclusion from government surveillance regardless of the nature of the facts revealed. *See, e.g., United States v. Whitaker*, 820 F.3d 849, 853 (7th

[1] No counsel for a party authored this brief in whole or in part. No person other than *amicus* or his counsel made a monetary contribution to its preparation or submission. The parties were given timely notice of *amicus's* intent to file this brief.

Cir. 2016). These courts follow the conception of the home articulated in *Kyllo v. United States*, which said that courts should not measure the "quality or quantity" of any facts potentially disclosed. 533 U.S. 27, 37 (2001). Even if surveillance reveals only a single trivial or nonintimate fact, such as the presence of a "rug on the vestibule floor," discovering this fact counts as a Fourth Amendment search. As a result, when a dog alerts to the putative presence of drugs in an apartment, this alert constitutes a search even if the possession of contraband is not a legitimately private or intimate fact considered in isolation. That fact becomes an intimate fact, it is *deemed* intimate, because it is a disclosure about the interior of the home; it *is* a private fact. *Id.*; *see also* Laurent Sacharoff, *The Binary Search Doctrine*, 42 Hofstra L. Rev. 1139 (2014).

On the other hand, those courts finding no search essentially atomize a home's privacy into discrete facts, weigh those individual facts, and determine whether they are worthy of privacy protection. *See, e.g., United States v. Scott*, 610 F.3d 1009, 1016 (8th Cir. 2010). These courts follow *Illinois v. Caballes*, 543 U.S. 405 (2005), and *United States v. Place*, 462 U.S. 696 (1983), even though those cases concerned cars and luggage and not *homes*. In particular, these lower courts apply the mechanical test that a dog sniff that reveals nothing but the presence or absence of contraband does not count as a search. This binary-search test measures the quality of the particular fact (apparent drug possession) to assess its degree of privacy—an approach flatly rejected by *Kyllo* for homes. Even though lower courts err in applying *Caballes* to the home, this Court need not overrule *Caballes* to reach the correct result for homes.

The petition should also be granted because, even if one were to accept *Caballes's* fact-based approach, a homeowner still enjoys a legitimate expectation of privacy

in the supposed fact that she possesses drugs as indicated by any dog alert. *Caballes* and *Place* were wrong to hold that a person enjoys no legitimate expectation of privacy in this fact, and the principle announced in those cases for cars and luggage should not be extended to homes. A person enjoys a legitimate expectation of privacy whether the alert is true or false.

First, if the alert is false—which can happen in up to 50 percent of alerts, according to some studies—the homeowner has essentially been falsely accused of a crime. Such a false accusation does effect a privacy invasion, as seen most readily from the privacy tort of false light. This tort expressly protects against the generation and dissemination of false and negative information as a privacy invasion. Even if some elements are not met, the tort shows conceptually that a person has a legitimate expectation of privacy against being associated with negative false facts, such as a false alert for drugs. The tort of defamation supports the same principle.

Second, if the alert is true, then there are drugs in the home. *Caballes* largely envisioned such accurate alerts, albeit for cars. But that Court also assumed that those motorists *knowingly* possessed drugs, that they were essentially drug dealers or traffickers, and that their criminal guilt eviscerated the legitimacy of any privacy interest. But when a dog accurately alerts to the presence of drugs in a home, the homeowner or resident may be unaware of their presence and therefore not guilty of a crime. Dogs alert to drug residue, which can be found in up to 80 percent of currency; residue can contaminate clothes and furniture as well. Guests or previous tenants may have left small amounts of drugs behind. Is a homeowner to frisk all guests and conduct regular sweeps of his apartment for drugs or drug residue? Rather, a home's privacy and security under the Fourth

Amendment should afford him freedom and "repose" from such measures. *See Payton v. New York*, 445 U.S. 573, 597 n.44 (1980) ("'[T]he house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.'") (quoting *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603)).

ARGUMENT

I. AN APARTMENT RESIDENT ENJOYS A LEGITIMATE EXPECTATION OF PRIVACY AGAINST THE DISCLOSURE OF *ANY* FACTS ABOUT THE HOME.

Courts considering dog sniffs of apartments should follow the place-based reasoning of *Kyllo* rather than the fact-based reasoning of *Caballes* and *Place*. This Court should therefore resolve the split among the circuit and state courts in favor of a *Kyllo*-type approach. Such an approach would not require overruling *Caballes*.

A. The *Kyllo* line of cases correctly rejects assessing the quality of facts learned about the home.

Kyllo v. United States, 533 U.S. 27 (2001), and its predecessors treat the home as a place rather than as a collection of facts when considering a resident's reasonable expectation of privacy under the Fourth Amendment; they therefore reject disaggregating and assessing any individual facts that might be learned about the home's interior. *See Kyllo*, 533 U.S. at 37; *Arizona v. Hicks*, 480 U.S. 321, 325 (1987); *United States v. Karo*, 468 U.S. 705, 714–717 (1984); *Payton v. New York*, 445 U.S. 573, 589 (1980). Even trivial facts that are neither private nor intimate are protected because they concern the interior of the home. *Kyllo*, 533 U.S. at 37–38; *cf. Silverman v. United States*, 365 U.S. 505, 509 (1961) (holding that the Fourth Amendment protects against even trivial physical intrusions into the home).

Thus, this Court's declarations that the home is "first among equals" and enjoys "heightened privacy," reflect

not only a higher degree of privacy, or a greater weight in the balance, but a different type of privacy—one that treats an intrusion as per se injurious even if no harm in fact occurs and if the facts revealed are not intimate. The Fourth Amendment draws a "bright line" at the home to protect the privacy, security and repose of the homeowner or resident.

Kyllo makes the case most expressly. Both the holding and reasoning of *Kyllo* show that this Court found a Fourth Amendment search based entirely upon the nature of the place surveilled and not at all upon the nature of the facts either disclosed or potentially disclosed. As this Court said without equivocation: "The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained." 533 U.S. at 37.

In particular, in *Kyllo*, law enforcement used thermal imaging to measure the heat on the outside of a triplex home to infer the presence of grow lights and marijuana within. This Court held this was a search because the agents used "a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion." *Id.* at 40. Even when we consider the words of the holding alone, we see it ignores the nature or quality of the facts learned; rather, it protects any facts relevant to the interior of the home.

This Court's reasoning furthered the point when it responded to the government's argument that this Court should assess the quality or nature of particular facts. In assessing whether remote detecting tools effect a search, the government argued, courts should distinguish based on the level of intimacy of the facts revealed. *Id.* at 37. This Court rejected that approach repeatedly and in depth.

The Fourth Amendment protects the home categorically as a place, this Court reasoned, and it is

therefore misguided to attempt to distinguish intimate from non-intimate facts and protect the former only. As to place, it noted that "the entire area" of the home "is held safe from prying government eyes." *Id.* After all, "the Fourth Amendment draws 'a firm line at the entrance to the house.'" *Id.* at 40 (quoting *Payton*, 445 U.S. at 590).

Kyllo focused even more precisely on assessing facts individually and expressly rejected the government's proposed approach: "The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained." 533 U.S. at 37. Rather, it said that all facts inside the home are intimate in the figurative sense: All facts, even those that are not intimate, are *deemed* intimate because they are in the home—a categorically protected place. *Id.* ("In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes."). Referring to earlier cases that involved facts that were not intimate or private in and of themselves, the Court wrote: "These were intimate details because they were details of the home." *Id.* at 38. Deeming facts of the home intimate means they *are* private.

The Court highlighted this crucial point with a few examples. Most famously, it noted that perhaps a thermal imager could discern at "what hour each night the lady of the house takes her daily sauna and bath" or "that someone left a closet light on." *Id.* This Court recognized the first as an example of an intimate fact, the second, a nonintimate fact, in order to show that it did not matter. All facts about the inside of the home are protected, whether intimate or not intimate. The Fourth Amendment protects even details about "the nonintimate rug on the vestibule floor." *Id.* at 37.

Similarly, in *Arizona v. Hicks*, a police officer lawfully inside the respondent's home—but lacking a search

warrant—read and recorded the serial number of a turntable he suspected was stolen. 480 U.S. 321, 323–24 (1987). The turntable had indeed been stolen and the respondent was subsequently indicted for robbery. *Id.* The question before this Court was whether the officer conducted a search when he lifted the turntable to look underneath. *Id.* The place in question, therefore, was the bottom of the turntable—found in a home. This Court could have taken a fact-based approach and said that the serial number underneath the turntable was a private fact that the police learned, and, therefore, Hicks's privacy was intruded upon; or it could have said that the serial number was an insignificant fact, and, therefore, that the police did not invade Hicks's privacy. But it did not take this fact-based approach.

Instead, this Court focused on the place, famously, writing that upending the turntable would have been a search even if there had been no serial number at all. "A search is a search, even if it happens to disclose nothing but the bottom of a turntable." *Id.* at 325. In so holding, it rejected the view of the dissenting Justices that a "cursory inspection" for mundane facts such as a serial number or brand name on the surface should not constitute a Fourth Amendment search as would a "full-blown" search of the home. *Id.* at 333. The majority insisted that it is the *place* that confers a reasonable expectation of privacy, irrespective of any facts, intimate or not, that might be learned.

Other cases similarly treat the home as a place to be protected without considering the quality of any individual facts learned. In *United States v. Karo*, law enforcement agents used a beeper to trace a can of ether, used as part of the drug trade, into the respondent's home. 468 U.S. 705, 708–11 (1984). The government argued that this surveillance was not a search because "the beeper constitute[d] only a minuscule intrusion on

protected privacy interests." *Id.* at 717. This Court rejected the argument. While it recognized that the presence of the can of ether was critical in securing a search warrant for the home, it did not weigh how intimate or legitimate the fact itself was. *Id.* at 714–15. Rather, this Court treated the home as *per se* protected against the disclosure of any facts. *Id.* at 717. The surveillance was therefore a Fourth Amendment search, even though the ether was so closely tied to criminal activity. In a telling conclusion that also challenges the approach in *Caballes*, this Court in *Karo* said: "Those suspected of drug offenses are no less entitled to that protection than those suspected of nondrug offenses." *Id.*

B. *Caballes* misconstrued *Kyllo* and wrongly assessed the quality of individual facts about the interior of a place.

Illinois v. Caballes misunderstood *Kyllo* as approving an assessment of the nature or quality of the facts that are or could be learned. 543 U.S. 405, 409–10 (2005). *Kyllo* held exactly the opposite. While *Caballes* was distinguishing between so-called lawful and unlawful facts, rather than between intimate and non-intimate facts, this Court in *Kyllo* had drawn no such distinction. Specifically, *Caballes* claimed that "critical" to the *Kyllo* decision was that the thermal imager could detect lawful activity. 543 U.S. at 409–10. But *Kyllo* said no such thing and did not even use the word "lawful" in connection with activities in the home. What was critical to the *Kyllo* decision, as detailed above, was that the place was a home, and all facts emanating from it were protected.

Caballes similarly misconstrued *Kyllo*'s whimsical example of the sauna. It wrote that the *Kyllo* court had written that the thermal imager could detect sauna use, that such sauna use was an "intimate fact" about the home, and that these factors were also "critical" to the *Kyllo* decision. *Caballes*, 543 U.S. at 409–10 ("Critical to

that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as 'at what hour each night the lady of the house takes her daily sauna and bath.'"). *Caballes* pointed to these observations to conclude that *Kyllo* approved of courts assessing the quality of facts as intimate or not, lawful or unlawful, and that, in *Caballes*, the Court was therefore justified in distinguishing among the quality of facts observed. *Id.* at 409–10.

But *Kyllo made up* the sauna example, as well as the example of the closet light and the foyer rug. *Kyllo,* 533 U.S. at 37–38. The thermal imager in *Kyllo* did not disclose any sauna information, there was no suggestion the thermal imager there could have discerned when any putative sauna was running, and, more generally, home saunas are very well insulated. *Id.* at 50 (Stevens, J., dissenting) (noting that the imager there did not, and could not, have detected the lady in her sauna or the foyer rug). Indeed, the majority expressly restated the lower court finding that "'[n]o intimate details of the home were observed.'" *Id.* at 30; *see also* Sacharoff, 42 HOFSTRA L. REV. at 1155–56 (examining the sauna example).

Even aside from these errors, this Court in *Caballes* and *Place* erred conceptually by treating car trunks and luggage not as places entitled to privacy protection, but as yielders of facts to be atomized and assessed for their nature and quality. Whether the analysis assesses based on intimacy or so-called lawfulness, *i.e.*, the possession of contraband, the approach contradicts the predominant historical principle that the Fourth Amendment protects the private place and not the facts about that place—at least and especially for the home. To be secure in one's home means not having to worry about exposing any fact from within.

Thus, when William Pitt described the heroic cottage standing against the depredations of the Crown, he

emphasized its dignity against intrusion and not that it might guard particularity valuable information. *Miller v. United States*, 357 U.S. 301, 307 (1958) ("'The poorest man may in his cottage bid defiance to all the forces of the Crown.'") (quoting Hansard, *Parliamentary History of England* (1813), vol. 15, column 1307). Edward Coke, in calling a home one's "castle and fortress" for his "repose," focused too on security and dignity, since castles are known more for majesty, power, and security than as a place for guarding intimate details. *Payton*, 445 U.S. at 597 n.44 (quoting *Semayne's Case*, 77 Eng. Rep. at 195).

True, Pitt and Coke had in mind physical intrusions, but the principle that the home protects repose and security categorically applies equally to remote surveillance. Indeed, the analogy of such surveillance to the tort of civil trespass furthers the idea that a search cannot turn on the nature or quality of the fact learned or the degree of intrusion. After all, the tort of trespass to land required then and requires today no showing of harm or damage—the physical intrusion into another's land *is* the injury. Restatement (Second) of Torts § 163; *see also Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (1765) (holding that a person is liable for trespass even "though the damage" of their actions "be nothing").

C. The Court need not overrule *Caballes* to find apartments are protected.

Even though *amicus* disagrees with the premises upon which the Court rested when deciding *Illinois v. Caballes*, the Court here need not overrule it to afford apartment dwellers protection against dog sniffs. This Court could find that such residents enjoy a reasonable and legitimate expectation of privacy consistent with the approach taken both there and in the entire line of related cases. *United States v. Jacobsen*, 466 U.S. 109 (1984); *Place*, 462 U.S. 695. In these cases, the Court was careful to avoid ruling out *any* expectation of privacy and instead

employed balancing tests, applied to the specific facts in those cases, indicating the factual scenarios were special.

For example, in *Place*, the Court pointed out that the luggage sniffed there was in public. The Court appeared to concede that there was some intrusion, albeit one that was "much less" than a "typical search." 462 U.S. at 707. It limited its holding to "the particular course of investigation that the agents intended to pursue here." *Id.*

Jacobsen similarly noted that it addressed very special facts: The "official conduct of the kind disclosed in the record." 466 U.S. at 124. The Court noted that such chemical tests for drugs were special for two reasons: (1) The police already lawfully had the substance in their possession, and (2) such tests were almost always positive. *Id.* at 123 ("It is probably safe to assume that virtually all of the tests conducted under circumstances comparable to those disclosed by this record would result in a positive finding").

Caballes also limited the scope of its holding to a dog's sniff of a car during a lawful traffic stop. It even limited this holding by adding the term "generally"; in the Court's reasoning, such dog sniffs during lawful traffic stops "generally" do not "implicate legitimate privacy interests" and therefore are not searches. 543 U.S. at 409. We can contrast this limited holding—even with respect to cars—with what the Court did not hold: The Court did not, for example, hold more broadly that dog sniffs of cars, wherever they may be found, including for example every car in a parking lot, are not searches. Nor did it assert motorists have no expectation of privacy; it merely held that during a lawful traffic stop, any such interest does not rise to a constitutional level. *Id.* at 410. This is a balancing test.

The *Caballes* line of cases should have little influence on homes. This Court could hold that a resident enjoys a legitimate expectation of privacy in the home, as against

dog sniffs, consistent with *Caballes* line of cases. The balance reverses for homes. Residents have far higher expectations of privacy in their homes, including apartments. Homes are not luggage in highly public airports where they are already vulnerable to inspection. Homes are not powder already exposed and therefore involving no searched place at all.

But most important, and considering *Caballes* itself, homes are not cars. *Caballes* emphasized that the rules for cars will often not apply to homes because cars enjoy a lower expectation of privacy than homes. *Id.* at 409–10. Cars are highly regulated and mobile; homes are not and, in fact, have been dubbed "first among equals" when it comes to the Fourth Amendment. *Florida v. Jardines*, 569 U.S. 1, 6 (2013).

These principles may have guided the Court in *Jardines* to conclude that it need not worry about overruling *Caballes*. *Jardines* considered the dog sniff of a house under a physical trespass test for search. In doing so, it noted that it need not consider the reasonable expectation of privacy test. 569 U.S. at 11. Avoiding such a test strongly signals that the Court did not believe that *Caballes* mandated a result with respect to homes, one way or the other. Indeed, even though *Jardines* relied on physical trespass, much of its language relies on the privacy a person enjoys in her home. After all, police entering a porch without a dog perform no search; those with a drug sniffing dog do, according to this Court. The only difference between this hypothetical and *Jardines* is the sniff, and the sniff only makes a difference because its function is to learn private details about the inside of the home.

II. EVEN UNDER A FACT-BASED APPROACH, A PERSON HAS A LEGITIMATE EXPECTATION OF PRIVACY IN AVOIDING A DRUG-SNIFFING DOG ALERT.

This Court should grant certiorari for a second reason: Even if we take the fact-based approach of *Caballes*, the fact of a dog alert *does* give rise to a reasonable and legitimate expectation of privacy, especially in the home. We will first consider false alerts, then true alerts.

A. A false alert invades a legitimate expectation of privacy.

If the dog alert is false, there are no drugs in the home. Studies vary widely, but at least some show that dogs falsely alert at or above 50 percent of the time. *See* Eyder Peralta, *Report: Drug Sniffing Dogs are Wrong More Often than Right*, NPR (Jan. 7, 2011, at 13:27 ET), https://perma.cc/8U9K-ZDPQ (According to one analysis, "officers found drugs or paraphernalia in only 44 percent of cases in which the dogs had alerted them"). But even false alerts at a far lower rate, such as 10 percent, would implicate 10 percent of those subjected to such surveillance, and, of course, police cannot know in advance which alerts are false.

Caballes addressed the question of false alerts dismissively, in a single sentence without any analysis. It said, essentially, that a false alert does not invade person's legitimate expectation of privacy. *Caballes*, 543 U.S. at 409 (noting that the respondent had "not suggest[ed] that an erroneous alert, in and of itself, reveals any legitimate private information"). And, of course, the *Caballes* test logically presupposes as much. This Court appeared to believe that the generation of false facts about a person cannot invade their privacy because those facts are false. That view is wrong. False facts about a person can, of course, contribute to an invasion of privacy, both legally and as a matter of common sense.

First, consider the law. The tort of false light, a privacy tort, recognizes that false facts are an element of an invasion of privacy. Restatement (Second) of Torts §§ 652A, 652E. "Essential" to the tort is that the facts are "not true." *Id.* § 652E cmt. a. And of course, this tort is an invasion of privacy; as the Restatement says, placing another "in a false light before the public" makes one liable for "invad[ing] the right of privacy of another." *Id.* § 652A; *see also id.* § 652E cmt. b (describing false light as an "invasion of privacy" because it presents a person to the public "otherwise than as he is"). False light is a tort recognized, and specifically recognized as a "privacy" right, in many states, including Maryland where petitioner lived and was arrested. *See, e.g.*, *Bagwell v. Peninsula Reg'l Med. Ctr.*, 665 A.2d 297, 318 (Md. Ct. Spec. App. 1995) (using the definition of the Second Restatement). Defamation overlaps significantly with the tort of false light; defamation also shows that a person enjoys a legitimate interest in avoiding false negative facts about them.

Not surprisingly, under a false light analysis, accusing someone of a crime they have not committed would be the type of falsity that could support the tort of false light. William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 399 (1960) (giving as an example of the tort of false light the act of including a person never convicted of a crime in a "'rogues-gallery' of convicted criminals"). Slander law treats false accusations of certain crimes as slander *per se*, without any need to show special, *i.e.*, concrete, harm. Restatement (Second) of Torts § 571.

The point is not that the elements of these torts are met, nor that a suspect has a cause of action against the officers. After all, officers would likely believe any false alert to be true. The point is that *Caballes* was wrong to say false facts do not implicate a legitimate expectation of privacy.

Second, common sense tells us that a false dog alert implicates legitimate interests. A false alert announces to the officers false and highly negative information about the homeowner—namely, that they possess illegal drugs. It also may, at the same time, announce the same negative facts to attendant media, neighbors, and even family members. *See, e.g.*, *Jardines v. State*, 73 So. 3d 34, 46-49 (Fla. 2011) (noting that "[c]ontrary to popular belief, a 'sniff test' conducted at a private residence is not necessarily a casual affair"), *aff'd on other grounds sub nom. Florida v. Jardines*, 569 U.S. 1 (2013). Finally, officers will also take this false information to court to obtain a warrant, alleging in court and court documents this same false information. Putting aside any later search, this false portrayal of the individual in court undermines their privacy interests and its inextricably tied to the dog sniff and alert.

This false information invades the person's privacy because it intrudes upon an individual's personhood and dignity, their place and role in the world. *See, e.g.,* Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962, 991 (1964). Individuals encounter this all the time. Even something as simple as leaving a store or a library and setting of an alarm (falsely) makes one feel shame that intrudes upon one's sense of privacy and security—even if the intrusion does not amount to a legal cause of action.

Of course, the police sometimes generate false and negative information about a person as part of a legitimate investigation without doing anything wrong or violating the Fourth Amendment. Simply generating such information alone does not implicate the Fourth Amendment. But when the false information comes from the interior of the home, as a result of government surveillance, the Fourth Amendment comes into play.

It is critical to note that this argument is different from an argument that a false alert will lead to a later full-blown search of the home, and that this later search invades an expectation of privacy. While Justice Souter argued courts should take that later search into account, *Caballes*, 543 U.S. at 413 (Souter, J., dissenting), the argument here merely contends that a person has an interest in avoiding false negative information about her in the form of the alert. Relatedly, this Court in *Caballes* said false alerts were too rare to undermine its argument, but again, that argument largely related to any later warranted search and whether there would be probable cause for that later search. False alerts may be rare enough so as not to undermine probable cause for a subsequent search and yet common enough to afford the homeowner a legitimate interest in avoiding the dog sniff that leads to any false alert.

B. A person has a legitimate expectation of privacy in the unknowing possession of contraband.

Even if a dog alert accurately reveals the presence of drugs in the home, a person enjoys a legitimate expectation of privacy in this fact if she does not know about the drugs—an occurrence common enough to undermine *Caballes*. Dogs cannot smell *mens rea*.

To restate, *Caballes* held that a dog sniff does not constitute a search because it reveals the presence or absence of contraband only, and, critically here, a person has no legitimate expectation of privacy in the fact that they possess contraband. *See Caballes*, 543 U.S. at 408 (noting that "governmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest'").

But the key rationale for this conclusion arose from the Court's further premise: The person at issue knowingly possesses. The Court's notion that drug possession deserves no privacy, that a person has no

interest in keeping "secret" such a fact, rested upon its criminality—and incorrectly assumed all who possess knowingly possess.

This Court in *United States v. Jacobsen* made this presumption of criminality express. 466 U.S. 109 (1984). It pointed out that Congress had made cocaine possession criminal and thus treated "the interest in 'privately' possessing cocaine as illegitimate." *Id.* at 123. It expressly spoke of criminals when it pointed to burglars as lacking privacy interests: "A burglar plying his trade in a summer cabin during the off season" has no privacy expectation "which the law recognizes as 'legitimate.'" *Id.* at 122 n.22 (quoting *Rakas v. Illinois*, 439 U.S. 128, 143–44 n.12 (1978)). It denominated his activity as "wrongful." It also cited a law review article that expressly argued that the Fourth Amendment, in principle, protects only those "innocent" of the crime investigated and that those who are guilty are protected only in order to further protection of the "innocent." *Id.* at 123 n.23 (citing Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 Mich. L. Rev. 1229 (1983)).

Caballes relied upon *Jacobsen* and its rationale: That one guilty of a crime has no right to keep that fact secret. But *Caballes* also independently made clear that it presumed the person knowingly possesses. It made this clear when it distinguished *Kyllo*. The thermal imager in *Kyllo* could capture lawful activity as well as unlawful, *Caballes* asserted. *Caballes*, 543 U.S. at 409 ("Critical to [the *Kyllo*] decision was the fact that the device was capable of detecting lawful activity."). Detecting lawful activity does invade a reasonable expectation of privacy, the *Caballes* court continued. The dog sniff, by contrast, can detect unlawful activity only and therefore intrudes upon no legitimate expectation of privacy. The criminality and unlawfulness of the possession, and the fact of that

possession, are therefore critical to the *Caballes* decision. But again, possession is only unlawful if it is knowing.

After all, what does it mean to be guilty of drug possession, to be a burglar, to do something that is "wrongful" and "unlawful?" It means, of course, to have *mens rea*, to possess knowingly. A plumber inside a summer cabin, turning off the water for the winter, is not a burglar because he has no intent to steal. *See, e.g.,* Md. Code Ann., Crim. Law § 6-202(a) ("A person may not break and enter the dwelling of another with the intent to commit theft."). That means that a homeowner, or motorist, who possesses cocaine without knowledge—if "possess" is even the right word—commits no crime, does nothing "wrongful," and does nothing that is "unlawful." *Mens rea* is no mere technicality; it is critical to the wrongfulness and the unlawfulness of nearly all crimes including drug crimes. *See States v. United States*, 511 U.S. 600, 605 (1994) (noting that "the requirement of some *mens rea* for a crime is firmly embedded" in common law).

And, of course, people commonly possess drugs without the knowledge that they "possess" them. First, look to drug residue, present on up to 80 percent of currency. *Caballes*, 543 U.S. at 412 (Souter, J., dissenting) (collecting cases and studies). Drug residue can also sometimes even be unknowingly present on clothing and in vehicles. Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 Geo. Mason L. Rev. 1, 4–5 (2006). Possession of residue is a crime on the state level—but only if the possession is knowing. Those who unknowingly possess residue should have a reasonable and legitimate expectation of privacy; they fall outside *Caballes's* premise that the person is guilty of a crime and within its premise that lawful activity in the home does enjoy protection.

The home presents particular hazards for housing drugs completely unbeknownst to an innocent

homeowner—in ways that trench the very values of security and privacy the home protects. Imagine someone has a party or a few houseguests. A guest uses drugs in the bathroom, or bedroom, and leaves some behind, perhaps even just medical marijuana. *See* Morgan Smith, *Beware of the Drug Detection Dog: The Fourth Amendment, Drug Detection Dogs, and State Legalization of Marijuana*, 73 SMU L. Rev. 611, 631 (2020). The next day, a drug sniffing dog would alert to the apartment. Is the apartment owner's privacy intruded upon? Yes. A resident, especially one who lives in city-owned housing where police and their dogs may roam without resident consent, will now have to frisk all guests for drugs. And after any visit, and certainly after larger gatherings, he will have to sweep his home. Or he could limit whom he invites, or even decide to live in solitude, as that may be the only option that protects his privacy. Those renting a furnished apartment, or staying even one night in a hotel room, will need to bring their own dog to sweep for drugs to make the room safe and secure. These effects are all privacy intrusions—as well as free association incursions, equally protected by the Fourth Amendment.

Thus, even if it is true a person has no legitimate expectation of privacy in drugs he knowingly possesses—after all, he has control and can choose not to possess them—he does have a legitimate expectation of privacy in drugs he unknowingly possesses. The rule announced by the decision below infringes on that legitimate expectation of privacy. Only this Court's intervention can restore the Fourth Amendment's protections.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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