NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2020

RAHEM LIPFORD, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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

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I. QUESTION PRESENTED FOR REVIEW

Whether a trash pull which took place at Lipford's home, from a location where trash cans were not kept when they were put out for regular collection, occurred in the curtilage of the home and therefore was a trespass and violation of the Fourth Amendment.

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- *United States v. Lipford*, 845 F. App'x 266 (4th Cir. 2021), U.S. Court of Appeals for the Fourth Circuit. Judgment entered on April 28, 2021.

V. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the denial of the motion to suppress is unpublished and is attached to this Petition as Appendix A. The district court's ruling denying the motion was made in a written order which is attached to this Petition as Appendix B. The judgment order is unpublished and is attached to this Petition as Exhibit C.

VI. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on April 28, 2021. No petition for rehearing was filed. This Petition is filed within 150 days of the date the court's judgment, pursuant to this Court's order of March 19, 2020. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VII. STATUTES AND REGULATIONS INVOLVED

This case requires interpretation and application of the Fourth Amendment to the United States Constitution, which says:

> 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.

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction

On January 9, 2019, an indictment was filed in the Southern District of West Virginia charging Rahem Lipford with possession of heroin with the intent to distribute it, in violation of 21 U.S.C. § 841(a)(1) (Count One), and possession of a firearm after sustaining a felony conviction, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) (Count Two). J.A. 9-13.[1] Because those charges constitute offenses against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This is an appeal from the final judgment and sentence imposed after Lipford pleaded guilty to Count One of the indictment. J.A. 376-379. A judgment order was entered on December 27, 2019. J.A. 380-386. Lipford timely filed a notice of appeal on January 10, 2020. J.A. 387. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

B. Facts Pertinent to the Issue Presented

The evidence in this case came from a search of Lipford's home pursuant to the execution of a search warrant. That warrant was based on information developed by rummaging through Lipford's garbage after it was pulled from cans sitting next to the carport railing of his home. Without the information from the trash pull there was no probable cause to support a search warrant. At issue is

[1] "J.A." refers to the Joint Appendix filed in this appeal before the Fourth Circuit.

whether the trash pull that led to the evidence used to convict Lipford it was conducted on his property, within the curtilage of his home and therefore violated the Fourth Amendment.

1. Officers perform a trash pull at Lipford's home, leading to the execution of a search warrant and the seizure of heroin and a firearm.

In January 2017, Charleston, West Virginia, police officer Casey Rankin received an anonymous tip that a man named Rahem was selling heroin on the city's West Side. J.A. 358. Rankin conducted surveillance of the home for at least six weeks and was able to identify the man as Lipford, and confirm that he lived at 1721 Claire Street:

J.A. 188-119, 288. 358-359. Rankin also discovered that Lipford had prior convictions involving drugs. J.A. 118-119, 358-359. Rankin conducted surveillance at the home, which had a "lower level used as an open porch" and "carport," with the left side "fenced off with a white wrought iron fence," as depicted in this photograph:

J.A. 269, 359.[2] In front of the railing were two black trash cans. J.A. 359.

In the early morning of July 11, 2017, Rankin went to Claire Street with the intent of performing a trash pull – taking trash from the cans outside Lipford's home to search for evidence of drug distribution. However, when he arrived he saw Lipford parked in the carport and concluded he could not perform the trash pull at that time. Instead, he asked another officer, Christopher Bass, to perform the trash pull later that morning. Between 4:00 and 5:00 a.m., Bass went to Claire Street and pulled three bags of cash from the cans. J.A. 360.

Later that morning, Rankin went through the trash Bass had collected. In it he found several empty cigarillo packages and a "plentiful supply of tobacco," suggesting the cigarillos had been emptied and refilled with marijuana. J.A. 362. A burnt marijuana roach was also found, along with "several plastic baggies, many of which had the corners torn out of them, a practice employed by sellers of narcotics." *Ibid*.

Rankin used that information, along with the anonymous tip and a listing of Lipford's prior convictions, to obtain a warrant to search the Claire Street home. J.A. 21-33. Execution of that warrant led to the discovery of heroin and a firearm. J.A. 14, 54. As a result of the search of his home, Lipford was charged with

[2] The photograph was taken from Google Maps and was included in the affidavit in support of the search warrant. J.A. 269. It is unclear when the photo was taken in relation to the search or why the garbage cans are in that location.

possession of heroin with the intent to distribute it and being a felon in possession of a firearm. J.A. 9-13.

2. Lipford moves to suppress the evidence taken from his home.

Lipford filed a motion to suppress the evidence found in his home. J.A. 14-51. He argued that the trash pull "was conducted in violation of the Fourth Amendment" because Bass "physically trespassed onto [Lipford]'s residence property and into an area in which he had a reasonable expectation of privacy." J.A 17. That trespass led to the discovery of evidence that was used to obtain a search warrant, although, Lipford argued, it was not sufficient to support probable cause to issue a warrant. J.A. 18. In response, the Government conceded that if "Bass breached the curtilage of the defendant's residence when he conducted the trash pull, it would be fairly clear that his actions in opening the trash can's lid and taking the three trash bags would implicate the protections of the Fourth Amendment." J.A. 56. However, the Government continued, the trash cans were not within the curtilage of Lipford's home. *Ibid*. Furthermore, the evidence taken from the trash bags was sufficient to provide probable cause to search the home and, even if it did not, the officers were acting in good faith and the evidence should not be suppressed. J.A. 58-61.

On May 9, 2019, the first of two hearings on Lipford's motion to suppress was held. J.A. 98-241. The Government presented testimony from Rankin and Bass

about the trash pull, while Lipford presented testimony from two Charleston Division of Public Works employees who dealt with trash collection. J.A. 102-218.

Rankin testified about following up on the initial anonymous tip and how he tied it to Lipford and his home, although he admitted that during the six months of surveillance he saw no evidence of drug sales there. J.A. 103-105, 140. In discussing the photograph above, Rankin testified that the trash cans were "usually scooted up against that fence, on the street side of the fence." J.A. 110. He explained that the cans were opaque so that people could not see inside them, and that the cans were on Lipford's "driveway," which he agreed was "private property." J.A. 154.

Rankin also testified that about a month before the trash pull he witnessed Charleston trash collectors pick up garbage from those cans for collection when they were still back against the railing. J.A. 113. However, he admitted that he did not mention this sighting in the search warrant affidavit or in his investigative report. J.A. 121-122. He also explained that his assertion in the search warrant application that the trash was taken from where the cans were usually put out for collection was not based on that singular observation, but on "all the other surveillance" during which he had "never seen them in any other location." J.A. 125. Rankin, however, further admitted that out of more than two dozen days of surveillance over at least six months he only saw the trash collected one time, and he had no idea where the cans were when they were picked up on every other garbage day during that time period. JA. 112-13, 120-23.

On cross examination, Rankin was asked how he would deal with a person who was hanging around the area where he saw the trash cans at the time of morning the trash pull was performed, and whether "you'd tell them to leave or you'd arrest them for trespassing." J.A. 142. Rankin explained that he would contact the owner and "try to figure out if they were allowed to be there or not," but ultimately agreed that he would "probably" either ask the person to leave or arrest them if they were not supposed to be there. J.A 142-143. He agreed that was because "it's not their property or place to be there." J.A. 156.

Bass testified about performing the trash pull, which was his only involvement in the investigation of Lipford. J.A. 169. While testifying about the photograph above, Bass explained that the cans from which he took the garbage were located "outside of that wrought iron or picket fence." J.A. 170. He estimated that location was "10 to 15 feet" from the street. J.A. 176. He agreed that it was "private property" and that if "somebody fell down and got hurt . . . it's not the city's fault . . . it's the homeowners'." J.A. 181.

Lipford presented testimony from two people from the Division of Public Works involved with trash collection in Charleston. One, Kenneth Jordan, was the garbage truck driver on the route that included Lipford's home. He testified that trash cans were to be no more than five feet from the curb when put out for collection. J.A. 191. He also testified that trash in cans left back against the railing at Lipford's home would not be collected because they would be too far away from

the curb. J.A. 193. He also explained that, to the extent there are exceptions to the rule, they were made pursuant to a permit process with the city, not decided on the spot by collectors. J.A. 199.

The other witness was John Shannon, the Director of Refuse and Recycling for Charleston.[3] J.A. 201. Although Shannon initially testified about the five-foot rule and agreed that trash left back against the railing would not be picked up, he later contradicted himself. J.A. 203. He explained that "in the spirt of customer service . . . some of the guys go a little further." J.A. 206. Then, when answering questions from the district court, he first said that whether trash back against the railing "about 12, 14 feet" would be picked up was a "hard question to answer," but ultimately concluded that "if I was on the truck, I would go there and get those cans." J.A. 211. He further explained that if he "got a call from a resident to my office and they sent me that picture, I would tell my men, 'Go get that.'" *Ibid*. He then said, later, that to "be quite honest, I didn't even know that five-foot law . . . that there was an ordinance that stated five foot until I got this subpoena and I went and looked for myself."[4] J.A. 216-217.

A second hearing on Lipford's motion to suppress was held on July 16, 2019. J.A. 292-322. At that hearing, Lipford himself took the stand. J.A. 303-308. He

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[3] Shannon had previously been a Charleston Police Officer and had been one of Rankin's supervisors. J.A. 204-205. At the Division of Public Works, his current boss is a former chief of the Charleston Police Department. J.A. 218-219.

[4] Rankin and Bass both testified that they also did not know about the ordinance. J.A. 124, 183.

testified that he lived at the Claire Street home for about two years with his girlfriend. J.A. 303-304. During that time on trash day he would gather trash from the house, put it in the cans outside, then before he "went to work, I would put the trash cans to the curb, and I would leave and go to work." J.A. 304.[5] When he put trash in the cans they were "[u]p along the fence" along the street side. *Ibid*. If he did not take the cans to the curb when he returned from work they "would still be along the fence with the trash bags inside of them." J.A. 305. On the morning of the trash pull, Lipford went out to put trash in the cans and "noticed that two of the trash bags were missing." *Ibid*. He put more trash in the cans and "brought them out to the curb." *Ibid*.

3. The district court denies Lipford's motion to suppress.

The district court denied Lipford's motion to suppress in a written order. J.A. 358-364. In the order, the district court concluded that the "front of each of the two cans was about ten to twelve feet from Claire Street," but that Rankin had observed a Charleston garbage crew pick up trash at the home "by traversing the same ten to twelve feet" about a month before the trash pull. J.A. 359-360. It also noted that while a city ordinance required trash cans out for pickup to be no more than five feet from the curb and the truck driver for that route testified he would not have picked up trash from the location where the cans were that morning, the district court credited Shannon, who "testified that his department was customer oriented

[5] A photo of the cans in that location was part of the Joint Appendix. J.A. 274.

and he would expect the city collectors to go to containers that were located in front of the wrought iron fence in order to collect the refuse bags therefrom." J.A. 360, 361. Therefore, the district court concluded, Lipford "had no reasonable expectation of privacy in those two cans." J.A. 361.

Next, the district court examined the evidence found in the trash bags and concluded it was a sufficient basis to issue the search warrant. It concluded that Rankin "accurately represented" that the cans were "in a location that was consistent with normal trash pickup." J.A. 362. Therefore, those circumstances "formed a reasonable basis for the probable cause belief that evidence of marijuana distribution would be found in the residence." J.A. 362-363. Furthermore, even if the warrant itself was deficient, it was "executed by the officers in the good faith belief that it was a valid exercise of authority under the Fourth Amendment." J.A. 363.

Finally, and "[i]ndependently of the foregoing," the district court examined the four factors of *United States v. Dunn*, 480 U.S. 294 (1987), to determine whether the trash cans were within the curtilage of Lipford's home. J.A. 363-364. The district court concluded they were not, holding that on "balance it marginally appears that the two cans were routinely placed outside the curtilage to the home at 1721 Claire Street." J.A. 364.

Following the denial of his motion to suppress, Lipford entered into a plea agreement with the Government. J.A. 365-375. While Lipford generally waived his

right to pursue issues on appeal, the agreement contained a provision allowing him to appeal the denial of his motion to suppress. J.A. 371-372. Pursuant to that agreement, Lipford entered a guilty plea to Count One of the indictment. J.A. 387-379. He was eventually sentenced to 84 months in prison, followed by a six-year term of supervised release. J.A. 381-382.

4. The Fourth Circuit affirms the denial of Lipford's motion to suppress.

The Fourth Circuit affirmed the district court's denial of Lipford's motion to suppress in an unpublished opinion. *United States v. Lipford*, 845 F. App'x 266 (4th Cir. 2021). The court concluded that only one of the four *Dunn* factors for determining whether an area constituted curtilage weighed in Lipford's favor, the proximity of the area to the home. Otherwise, the court noted, the "area was not enclosed," the "area was open to public view," and the "area was used for storing trash that public sanitation workers collected weekly." *Id.* at 267. Therefore, the court concluded, "[w]e are thus satisfied that the trash pull did not occur within the curtilage of Lipford's home." *Ibid.* The court affirmed the district court's decision solely on the issue of curtilage, implicitly rejecting the district court's conclusion, based on Rankin's alleged sighting of trash being collected while the cans were up against the railing, that Lipford had no expectation of privacy in them regardless of whether they were located within the curtilage of his home.

IX. REASON FOR GRANTING THE WRIT

The Petition should be granted so the Court can determine whether a trash pull which took place at Lipford's home, from a location where trash cans were not kept when they were put out for regular collection, occurred in the curtilage of the home and therefore was a trespass and violation of the Fourth Amendment.

In this case, a police officer performed a trash pull from trash cans stationed at Lipford's home. If the cans were within the curtilage of Lipford's home, even the Government agrees that the trash pull would have violated the Fourth Amendment. The analysis of the courts below did not sufficiently address the four *Dunn* factors and how they applied to the facts of this case. Whether less affluent homeowners such as Lipford, who did all he could reasonably have done to protect his expectation of privacy, deserve the same protections of the Fourth Amendment as other individuals is an important question of federal law that this Court should resolve. *See* Rules of the Supreme Court 10(c).

A. If the trash pull occurred within the curtilage of Lipford's home, it violated the Fourth Amendment.

In its response to Lipford's motion to suppress, the Government conceded that if "Bass breached the curtilage of the defendant's residence when he conducted the trash pull, it would be fairly clear that his actions in opening the trash can's lid and taking the three trash bags would implicate the protections of the Fourth

Amendment." J.A. 56.[6] That is precisely what happened. As set forth below, the trash cans were within the curtilage of Lipford's home when Bass performed the trash pull. Because Bass lacked probable cause to support a search, much less a warrant to do so, his entry onto the curtilage for investigatory purposes violated the Fourth Amendment.

For decades, courts generally analyzed Fourth Amendment issues through the lens of Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347 (1967), looking to whether a person making a Fourth Amendment claim had a reasonable expectation of privacy. *See, e.g., United States v. Castellanos*, 716 F.3d 828, 832-833 (4th Cir. 2013). However, in *United States v. Jones*, 565 U.S. 400, 406 (2012), this Court reinforced that Fourth Amendment rights "do not rise and fall with the *Katz* formulation." Rather, "for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates" and "*Katz* did not repudiate that understanding." *Id.* at 406-407. Thus, this Court was able to avoid grappling with certain "vexing problems" with the use of GPS surveillance until "some future case where a classic trespassory search is not involved and result must be had to the *Katz* analysis." *Id.* 412-413.

[6] The Government's language appears to have been taken from *United States v. Jackson*, 728 F.3d 367, 373 (4th Cir. 2013).

Following on *Jones*, in *Florida v. Jardines*, 569 U.S. 1, 3 (2013), police "received an unverified tip that marijuana was being grown" in Jardines' home. After surveillance failed to uncover any evidence to support the tip, an officer with a drug-sniffing dog arrived and walked onto Jardines' front porch, where the dog alerted. On the basis of that alert, police obtained a warrant to search Jardines' home, the execution of which uncovered marijuana. *Id.* at 3-4. This Court ultimately concluded that the police violated the Fourth Amendment. In doing so, this Court concluded that the officers "were gathering information in an area belonging to Jardines and immediately surrounding his house – in the curtilage of the house." *Id.* at 5-6. While the "Fourth Amendment does not . . . prevent all investigations conducted on private property," nonetheless, "an officer's leave to gather information is sharply curtailed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas." *Id.* at 7. Similarly, while general societal norms provided permission to anyone – police officers included – to go to the door of a private home, those norms do not involve a criminal investigation. "An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker." *Id.* at 9. As this Court explained, to "find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to – well, call the police." *Ibid.* "Here," this Court concluded, "the background social

norms that invite a visitor to the front door do not invite him there to conduct a search." *Ibid*.

The Fourth Circuit recognized the impact of *Jardines* in cases involving trash pulls in *United States v. Jackson*, 728 F.3d 367 (4th Cir. 2013). That case involved a trash pull from a can that "was sitting on common property of the apartment complex, rather than next to the apartment's rear door." *Id.* at 369. The court concluded there was no *Jardines* problem because of that finding. In reaching that conclusion, however, it noted that "[u]nder *Jardines*, if [the officers] breached the curtilage of Cox's apartment when they conducted the trash pull, it would be fairly clear that their actions in opening the trash can's lid and taking the two bags would implicate the protections of the Fourth Amendment." *Id.* at 373.

"As with homes themselves, probable cause, and not reasonable suspicion, is the appropriate standard for searches of the curtilage." *Covey v. Assessor of Ohio County*, 777 F.3d 186, 192 (4th Cir. 2015)(internal quotation omitted). There was no probable cause for Bass to enter the curtilage of Lipford's home and "trawl" through his trash.[7] At the time Bass performed the trash pull the only evidence that Lipford was involved with drugs was an anonymous tip that was six months old and his prior record. J.A. 358-359. The tip itself was not corroborated – although Rankin was able to find Lipford and where he lived, that is the kind of easily observable

[7] Even if there had been, Bass was not acting pursuant to a properly obtained search warrant. *Kentucky v. King*, 563 U.S. 452, 459 (2011).

information that is not sufficient to corroborate an anonymous tip. *Florida v. J.L.*, 529 U.S. 266, 271-272 (2000). Nor is a person's prior criminal record a sufficient basis to conclude there is probable cause that he is currently engaged in criminal activity. *United States v. West*, 219 F.3d 1171, 1179 (10th Cir. 2000). Because Bass had no basis to enter the curtilage of Lipford's home and gather evidence, he violated the Fourth Amendment.

The district court erroneously concluded that Lipford otherwise lacked a reasonable expectation of privacy in the trash cans under *Katz*, based on a clearly erroneous conclusion that the cans were in a location from which trash would regularly be collected. J.A. 361. The Fourth Circuit implicitly rejected that conclusion by resolving Lipford's appeal on the curtilage analysis alone. Regardless, under *Jardines*, it does not matter whether Lipford otherwise had a reasonable expectation of privacy in the trash cans. When this Court concluded that walking the drug-sniffing dog onto the porch was a search under the Fourth Amendment, it "need not decide" whether it "violated his expectation of privacy under *Katz*" because the "Fourth Amendment's property-rights baseline is that it keeps easy cases easy." *Jardines*, 569 U.S. at 11. "That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence," the court concluded, "is enough to establish that a search occurred." *Ibid.*; *see also Jackson*, 728 F.3d at 374 (proceeding to *Katz* analysis only after concluding that *Jardines* did not apply because trash pull was not performed in the curtilage).

B. The trash pull took place within the curtilage of Lipford's home.

The Constitution protects the rights of citizens "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Among those places protected, "the home is first among equals." *Jardines*, 569 U.S. at 6. That is because at the "very core" of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961).

That protection extends to "the area immediately surrounding and associated with the home – what our cases call the curtilage." *Jardines*, 569 U.S. at 6 (internal quotation omitted); *see also United States v. Breza*, 308 F.3d 430, 433 (4th Cir. 2002) ("an individual ordinarily possesses the highest expectation of privacy within the curtilage of his home"). If it did not, the "right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity." *Ibid.*

This Court set forth the analysis for determining the extent of a home's curtilage in *United States v. Dunn*, 480 U.S. 294 (1987). The court identified four factors that informed the analysis: (1) "the proximity of the area claimed to be curtilage to the home;" (2) "whether the area is included within an enclosure surrounding the home;" (3) "the nature of the uses to which the area is put;" and (4) "the steps taken by the resident to protect the area from observation by people

passing by." *Id.* at 301. However, those factors are not a "finely tuned formula that, when mechanically applied, yields a 'correct' answer," but instead are "useful analytical tools only to the degree that, in a given case, they bear upon the centrally relevant consideration – whether the area in question is so intimately tied to the home itself" that it should enjoy Fourth Amendment protection. *Ibid.* Therefore, the "conception defining the curtilage is at any rate familiar enough that it is easily understood from our daily experience." *Jardines*, 569 U.S. at 7 (internal quotation omitted).

The courts below properly identified the four *Dunn* factors in concluding no Fourth Amendment violation had occurred. However, they did not provide any analysis of what those various factors meant to the issue of the curtilage, merely reciting facts without explaining their relevance. As a result, the district court reached the wrong conclusion from that analysis and the Fourth Circuit erred by affirming the district court's ultimate conclusion. The *Dunn* factors, informed by daily experience, show that the trash cans from which the garbage was pulled was within the curtilage of Lipford's home.

First, the "the proximity of the area claimed to be curtilage" supports the conclusion that the trash cans were in the curtilage, as the Fourth Circuit correctly concluded. As the district court put it, that area is "immediately adjacent to but outside the home." J.A. 363. Bass, who performed the trash pull, testified that the

cans were "outside that wrought iron or picket fence." J.A. 170. However, the term "fence" is somewhat misleading, as can be seen from a photograph of the home:

J.A. 269. The term "fence" conveys that it is separate from the home itself, defining the outer boundaries of a particular property. *See* "Fence," *Oxford English Dictionary*, online at http://www.oed.com/ (last visited February 28, 2020)(an

"enclosure or barrier . . . along the boundary of a field, park, yard or any place which it is desired to defend from intruders"). As the photograph shows, the railing against which the trash cans were set is not something defining the outer boundaries of the property or even separating a garden from the rest of the property, it is part of the home itself. The railing runs between the two columns that support the home's second floor. For practical purposes, the railing is another wall of the home and the trash cans were up against it. Such spaces are generally agreed to be curtilage by parties engaged in curtilage litigation. *See, e.g., Covey*, 777 F.3d a 192 (the court called a "walk-out basement patio" part of "the house's curtilage," which defendant in civil suit did not dispute on appeal);. *Jackson*, 728 F.3d at 373 (4th Cir. 2013)("the parties agree that the curtilage of Cox's residence included the concrete patio behind her apartment").

Second, the area next to the railing where the trash cans were located was not further enclosed by any kind of fence, wall, or other enclosure. While that does not favor a finding of curtilage, the presence of such an enclosure is ultimately not a determinative factor. *Oliver v. United States*, 466 U.S. 170, 179 (1984)(presence of fences or "no trespassing" signs do not transform open fields into curtilage).

Third, "the nature of the uses to which the area is put" demonstrate it is part of the curtilage. As the district court noted, the area was used "as a walkway/driveway area." J.A. 363. In *Collins v. Virginia*, 138 S. Ct. 1663 (2018), this Court dealt with the issue of whether an open-air carport was within the

curtilage of a home. Police officers had gone to the home investigating a possibly stolen motorcycle and, upon seeing something on the carport next to the home that could be a motorcycle, entered the grounds and discovered the stolen vehicle. *Id.* at 1668. Collins argued that the evidence discovered should be suppressed because the officer "had trespassed on the curtilage of the house to conduct an investigation in violation of the Fourth Amendment." *Id.* at 1669. This Court agreed. Although the main focus of the opinion is whether the automobile exception to the warrant requirement applied to save the search, this Court noted that as "an initial matter, we decide whether the part of the driveway where Collins' motorcycle was parked and subsequently searched is curtilage." *Id.* at 1670. This Court concluded that it was, noting that "[j]ust like the front porch, side garden, or area outside the front window, the driveway enclosure . . . is properly considered curtilage." *Id.* at 1671 (internal quotation omitted). Under *Collins*, Bass could not have gone up and searched Lipford's vehicle parked in the same area as the trash cans were located. There is no reason his rummaging in Lipford's trash should be any different.

Finally, contrary to the district court's clearly erroneous conclusion, Lipford did take what steps he could to protect the area from observation by passing people." J.A. 363. As Rankin agreed, the trash cans at issue were "opaque plastic, black and grey bins" where "the lid fits on top." J.A. 117. He also agreed that "[y]ou can't see into them." *Ibid.* He also conceded that to see what was in those cans someone "had to physically go into the can and remove the bag." J.A. 154. Just as

important, the cans were kept on what was undisputedly Lipford's property. When asked if he would arrest a stranger loitering in that area, Rankin agreed that "the point is, it's not their property or place to be there, right?" J.A. 156. Likewise, Bass agreed that it was "private property" and if, for example, someone was injured there it would be the homeowner's responsibility, not the city's. J.A. 181.

Lipford relied on the nature of the cans and the bags inside, along with the fact that the law recognized the property was private, as a means to protect the area from observation. The only way to "observe" Lipford's trash was to come onto his property and "trawl" through his opaque, enclosed, closed trash cans. There is little more he could have done, since, as the renter of the home, he lacked the authority to make improvements to it such as building an enclosure. J.A. 305. As one judge observed, the "curtilage would rarely extend beyond the house itself if complete, opaque enclosure were required. Few people, other than the very wealthy, barricade their front yard so completely that a person seeking to enter must request the unlocking of a solid gate that is higher than eye level." *United States v. Redmon*, 138 F.3d 1109, 1130 (7th Cir. 1998)(Posner, J., dissenting). If the trash cans were in Lipford's garage there is no dispute that Bass could not have surreptitiously opened the door and taken them. That Lipford could not afford such a structure should not limit his Fourth Amendment rights.

Whether something is within the curtilage of a home is "easily understood from our daily experience." *Jardines*, 569 U.S. at 7. In this case, the items searched

by Bass were related to a fundamental domestic chore – the disposal of trash. The cans he searched were next to Lipford's home, in the same area as a carport, which courts have recognized as curtilage. Viewing the totality of the evidence as it relates to the four *Dunn* factors, the district court erred by concluding that the cans were not within the curtilage when Bass searched them.

X. CONCLUSION

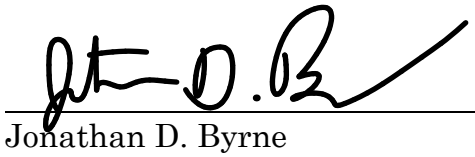
For the reasons stated, this Court should grant certiorari in this case.

Respectfully submitted,

RAHEM LIPFORD

By Counsel

WESLEY P. PAGE
FEDERAL PUBLIC DEFENDER



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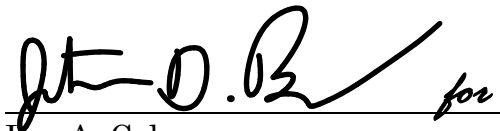

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