No. _____

In The
Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

AARON JAMES HOWARD,

Respondent.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The question presented is:

When officers lawfully deploy a narcotics-detection dog on the exterior of a vehicle and, without any direction, prompting, or facilitation by officers, the dog briefly touches the vehicle or places its snout through an open window, does the dog's conduct constitute a Fourth Amendment search by officers?

PARTIES TO THE PROCEEDINGS

Petitioner is the State of Idaho. Respondent is an individual, Aaron James Howard, the defendant-appellant below.

RELATED CASES

- *State of Idaho v. Aaron James Howard*, No. CR28-19-3966, District Court of the First Judicial District of the State of Idaho, Kootenai County. Judgment entered September 10, 2019.
- *State of Idaho v. Aaron James Howard*, No. 47367, Supreme Court of the State of Idaho. Judgment entered October 5, 2021.

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The state district court's order denying Howard's motion to suppress physical evidence recovered from his vehicle is unreported but is reproduced in the Appendix at Pet. App. 20. The motion was initially denied orally at the conclusion of a hearing on the motion. The state district court's oral denial of the motion is reproduced in the Appendix at Pet. App. 23-24. The Idaho Supreme Court's opinion on direct appeal is reported at 496 P.3d 865, and is reproduced in the Appendix at Pet. App. 1-19.

JURISDICTION

The judgment of the Idaho Supreme Court was entered on October 5, 2021. The State of Idaho is filing this Petition within 90 days of the entry of judgment. Supreme Court Rules 13.1, 13.3. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Officers lawfully stopped a vehicle driven by Howard and arrested him after discovering that he was the subject of outstanding warrants. Pet. App. 2, 22-23, 28-29.[1] An officer then deployed a narcotics-detection dog on the exterior of the vehicle. *Id.* During the dog sniff, the dog briefly placed its paws on the side of the vehicle and its snout through a window left open by Howard. *Id.* The dog then alerted to the presence of narcotics. *Id.* Officers recovered heroin, methamphetamine, and paraphernalia in a subsequent search of the vehicle. *Id.*

Howard filed a motion to suppress the physical evidence recovered from the vehicle. He argued, in relevant part, that "the state illegally searched the defendant's vehicle when its dog put its feet on his car and stuck its head inside." Pet. App. 35-41.[2] In support, he relied centrally on this Court's opinions in

[1] The parties stipulated to these facts at the hearing on the motion to suppress that was the subject of the appeal below.

[2] Howard additionally argued that the warrants on which he was arrested were invalid. Pet. App. 29-35. The state district court rejected that argument, Howard did not argue on appeal that the district court erred thereby, the Idaho Supreme Court did not address it, and that issue forms no part of the instant petition.

United States v. Jones, 565 U.S. 400 (2012), and *Florida v. Jardines*, 569 U.S. 1 (2013). *Id.* In *Jones* this Court revived a "common-law trespassory test" for determining when law enforcement conduct constitutes a Fourth Amendment search. *Jones*, 565 U.S. at 409. The Court held that officers conducted a Fourth Amendment search by surreptitiously placing a Global-Positioning-System (GPS) tracking device on Jones' vehicle because, whether or not doing so violated any reasonable expectation of privacy, the Government "physically occupied private property for the purpose of obtaining information." *Id.* at 404. In *Jardines*, this Court held that when officers took a narcotics-detection dog onto the front porch of Jardines' home they thereby conducted a Fourth Amendment search because "the officers learned what they learned [that the house contained narcotics] only by physically intruding on Jardines' property to gather evidence," and without license to be on the property for that purpose. *Jardines*, 569 U.S. at 11. Howard argued that his "case parallels the *Jones* and *Jardines* cases" because the dog touched his vehicle and placed its snout into his open window without his permission. Pet. App. 40.

In opposition to the motion, the state relied on prior precedent from the Idaho Court of Appeals, *State v. Naranjo*, 159 Idaho 258, 359 P.3d 1055 (App. 2015), for the proposition that a narcotic-detection dog's "brief, spontaneous entry into the open window of a stopped vehicle does not constituted a search under

the Fourth Amendment." Pet. App. 46.[3] *Naranjo* involved facts relevantly identical to those here: Naranjo was the subject of a lawful traffic stop; officers deployed a narcotics-detection dog on the exterior of the vehicle; during the dog sniff, the dog placed its head into a window left open by Naranjo; the dog then alerted to the presence of narcotics. *Naranjo*, 159 Idaho at 259, 259 P.3d at 1056. "Naranjo argue[d] that the dog's brief, spontaneous entry into the open window exceeded the scope of an exterior vehicle sniff, amounting to an unconstitutional search without a warrant or probable cause." *Id.* at 259-60, 259 P.3d at 1056-57. Citing federal case law in support—including opinions from the Sixth, Third, Eighth, and Tenth Circuit Courts of Appeals—the court in *Naranjo* held that, "absent police misconduct, the instinctive actions of trained drug dogs do not expand the scope of an otherwise legal dog sniff to an impermissible search without a warrant or probable cause." *Id.* at 260, 259 P.3d at 1057. Because "the dog putting his nose in the window was an instinctual act that the police did not facilitate," the dog's conduct did not amount to a search by law enforcement. *Id.* at 261, 259 P.3d at 1058.

The state district court in this case agreed that *Naranjo* was "as close to being on point as one can imagine," that *Naranjo* controlled the question whether the dog's conduct amounted to a Fourth Amendment

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[3] The state additionally cited a decision from the Iowa Court of Appeals, *State v. George*, 889 N.W.2d 244 (Iowa App. 2016), standing for the same proposition as *Naranjo*.

search by officers, and denied the motion to suppress on that basis. Pet. App. 23-24.

On appeal, over the dissent of one justice, the Idaho Supreme Court reversed. The majority "agree[d] with Howard that *Naranjo* is inconsistent with *Jones*" because "any trespass by the government against private property for the purpose of obtaining information—whether by dog or human, instinctual or otherwise—is a violation of the Fourth Amendment unless police have a warrant, or a warrant exception applies." Pet. App. 4-5. According to the court, "there is no asterisk to the Fourth Amendment excusing the unconstitutional acts of law enforcement when they are accomplished by means of a trained dog." Pet. App. 5. Because, in the court's view, "the drug dog entered the car during a sniff, an activity that is self-evidently conducted for the purpose of obtaining information" and "the entry was a trespass because it was without Howard's express or implied consent," the dog's conduct constituted a search by officers notwithstanding the fact that the dog's behavior was instinctive and was not directed by officers. Pet. App. 4-5. While the court acknowledged that "a dog's nose passing through an open window is a minimal interference with property," it nevertheless held that "when a law enforcement drug dog intrudes, to any degree, into the interior space of a car during a drug sniff, without express or implied consent to do so, a search has occurred under the Fourth Amendment." Pet. App. 6-7.

In further explaining its overruling of *Naranjo*, the court in *Howard* cited to and relied upon its

opinion in another appeal it decided on the same day that addressed a relevantly similar issue, *State v. Randall*, 496 P.3d 844 (Idaho 2021).[4] Pet. App. 5.

There, the court acknowledged that "the Court of Appeals [in *Naranjo*] is not alone in its embrace of the rule that a dog's instinctive entry into a car during an exterior sniff does not implicate the Fourth Amendment," cited four federal circuit courts of appeals that have clearly held as much, but suggested that they were not persuasive either because they were decided before *Jones* or did not explicitly discuss *Jones*. *Randall*, 496 P.3d at 853. But, according to the court, "in any event our duty is to interpret the Constitution, not to follow juridical trends, and we reject the instinctive entry rule because it cannot be reconciled with the Fourth Amendment." *Id.*

The perceived irreconcilability between *Jones* and *Jardines*, on the one hand, and the "instinctive entry rule" on the other, was a result of the court's view that the "distinction between trespasses by law enforcement officers and those by drug dogs . . . is irrelevant under *Jones*." *Id.* at 854-55. In the court's view, where the dog is deployed by officers "as an investigatory tool to obtain information about the contents" of a vehicle and the dog touches or enters a vehicle—even merely

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[4] The state is not seeking review of *State v. Randall* in this petition. Rather, *Randall* is discussed here only because the legal analysis therein is referenced by and relied on in the majority's opinion in *Howard* (Pet. App. 4-5), and the dissenting justice in *Howard* likewise references and relies on his dissent in *Randall* (Pet. App. 18-19).

by placing its snout briefly in an open window and even where not at "the direction of officers"—the dog's conduct "result[s] in trespass against private property" for which law enforcement is "wholly responsible," and thereby constitutes a Fourth Amendment search "much like the attachment of the GPS device to the defendant's car in *Jones*." *Id.*

While the court's holding in *Howard* is ostensibly limited to circumstances in which the dog "intrudes" into "the interior space of a car during a drug sniff"—by, for example, and as here, briefly and instinctively putting its snout through an open window—the court's reasoning does not appear so limited. The court approvingly cited *Taylor v. City of Saginaw*, 922 F.3d 328 (6th Cir. 2019), in support of its conclusion that even a "minimal interference with property" constitutes a trespass and therefore a search. Pet. App. 5-7. In *Taylor*, the Sixth Circuit Court of Appeals held that the practice of marking the tire of a parked car with chalk to determine whether the car had been parked too long in the same spot constituted a Fourth Amendment search under *Jones*. *Taylor*, 922 F.3d at 332-33. The Idaho Supreme Court's rationale in *Howard* and its approving citation of *Taylor* suggests that, in its view, (1) even a *de minimis* touching (as opposed to entry) of a vehicle constitutes a trespass for purposes of the Fourth Amendment, and (2) every trespass by a narcotics-detection dog is immediately attributable to the handling officer for purposes of the Fourth Amendment.

The dissenting justice on the Idaho Supreme Court, Justice Bevan, would have affirmed the denial of the motion to suppress based on the rationale of *Naranjo* and would have held that "a drug-detection dog's instinctive actions" do not "instantaneously transmute[] a warrantless, exterior sniff into an unconstitutional search." Pet. App. 18-19. *See also Randall*, 496 P.3d at 859-65 (Bevan, J., dissenting). Instead, the "key inquiry" for purposes of whether officers violated the Fourth Amendment is the conduct of officers, not the inadvertent, undirected, and instinctive behavior of the dog. *Randall*, 496 P.3d at 860 (Bevan, J., dissenting). Where a narcotics-detection dog touches or briefly enters a vehicle, the question for purposes of the Fourth Amendment is "whether the officer was a participant in the trespass—that is, whether the dog's entry was instinctual or facilitated by the police." *Id.*

REASONS FOR GRANTING THE PETITION

As the Idaho Supreme Court correctly acknowledged below, the deployment of a narcotics-detection dog on the exterior of a vehicle does not constitute a Fourth Amendment search requiring probable cause. Pet. App. 4-5 (citing *Illinois v. Caballes*, 543 U.S. 405, 409 (2005).) But the court then concluded that what would not have been a Fourth Amendment search by the officer became one due only to acts that were not the officer's and events that the officer did not direct or will—the dog's brief and instinctive touching of the vehicle and insertion of its snout through a window left

open by Howard. *Id.* The court came to that conclusion because, on its view, "any trespass by the government against private property for the purpose of obtaining information—whether by dog or human, instinctual or otherwise—is a violation of the Fourth Amendment unless police have a warrant, or a warrant exception applies." *Id.* According to the court, a narcotics-detection dog is "an investigatory tool to obtain information" and where the use of that tool "resulted in trespass against private property" by the dog, the officer is "wholly responsible" for the dog's conduct and the trespass constitutes a search "much like the attachment of the GPS device to the defendant's car in [*United States v.*] *Jones*[, 565 U.S. 400 (2012)]." *State v. Randall*, 496 P.3d 844, 855 (Idaho 2021). Thus, notwithstanding the fact that the dog's "trespass" was instinctive, without having been directed, prompted, or willed by the handling officer, the Idaho Supreme Court determined that the dog's "trespass" was attributable to the officer for purposes of determining whether the officer violated the Fourth Amendment.

In so holding, the Idaho Supreme Court decided an important federal question that has not been, but should be, settled by this Court: whether a police dog's conduct—instinctive and undirected by officers—is automatically attributable to officers for purposes of determining whether officers have violated the Fourth Amendment. The Idaho Supreme Court's resolution of that question is at odds with a majority of courts to consider it and reflects confusion among lower courts. Its resolution of that question is incorrect, in direct

tension with a fundamental Fourth Amendment principle articulated by this Court: the Fourth Amendment looks to the willful conduct of officers, not to inadvertent events or accidents. Moreover, the rule endorsed by the Idaho Supreme Court will only deter officers from engaging in lawful and important methods of law enforcement, without deterring any illegality. For all of those reasons, review is appropriate and this Court should grant the instant petition.

I. The Idaho Supreme Court's Holding Conflicts With The Majority Of Courts To Consider The Question And Reflects Confusion Among Lower Courts.

A majority of courts have recognized what a majority of the Idaho Supreme Court did not—that the Fourth Amendment inquiry focuses on the actions of officers, "not the accidental effects of otherwise lawful government conduct." *Brower v. Cty. of Inyo*, 489 U.S. 593, 596 (1989). What is lawful conduct by the officer does not become unlawful conduct by the officer in virtue of something the officer did not do, but that a dog instinctively did. *See State v. Randall*, 496 P.3d 844, 860 (Idaho 2021) (Bevan, J., dissenting) (for purposes of determining whether law enforcement violated the Fourth Amendment, "without the direction of the officer, th[e] instinctual action [of a police dog] cannot be attributed to its officer-handler"). Though that is the majority rule, several courts in other jurisdictions have expressed sympathy with the position adopted by the Idaho Supreme Court or have adopted relevantly

similar positions. This split reflects confusion among lower courts regarding the extent to which the instinctive and undirected behavior of police dogs is attributable to officers for purposes of the Fourth Amendment.

The Third, Sixth, Seventh, and Tenth Circuit Courts of Appeals have held in published opinions that a dog's instinctive, undirected touching of or entry into a vehicle during an otherwise lawful exterior sniff does not constitute a Fourth Amendment search by officers. *See United States v. Pierce*, 622 F.3d 209, 214-15 (3d Cir. 2010) (where a narcotics-detection dog enters or touches a vehicle instinctively—"without assistance, facilitation, or other intentional action by its handler"—the dog's conduct does not constitute a Fourth Amendment search by officers, but instead a Fourth Amendment search occurs where "the officer facilitated or encouraged the dog's entry into the car" (quotation marks omitted)); *United States v. Sharp*, 689 F.3d 616, 619-20 (6th Cir. 2012) (holding "a trained canine's sniff inside of a car after instinctively jumping into the car is not a search that violates the Fourth Amendment as long as the police did not encourage or facilitate the dog's jump"); *State v. Guidry*, 817 F.3d 997, 1006 (7th Cir. 2016) (citing the Third, Tenth, and Eighth Circuit Courts of Appeals in support and concluding that a dog's entry into a vehicle was not an unconstitutional search both because it was not directed or facilitated by officers and because the dog had already alerted on the exterior of the vehicle); *United States v. Vazquez*, 555 F.3d 923, 930 (10th Cir. 2009) (no Fourth Amendment search where narcotics-detection

dog entered vehicle and entry was "instinctual rather than orchestrated" and officers did not open the dog's point of entry to the vehicle); *United States v. Stone*, 866 F.2d 359, 364 (10th Cir. 1989) (where officer did not open point through which dog entered vehicle and did not direct dog to enter vehicle, "police remained within the range of activities they may permissibly engage in when they have reasonable suspicion to believe an automobile contains narcotics").

The Fifth and Eleventh Circuit Courts of Appeals have so held in unpublished opinions. *See United States v. Shen*, 749 F. App'x 256, 262 (5th Cir. 2018) ("The Fourth Amendment comes into play when an officer facilitates, encourages, or prompts a drug dog to enter a vehicle."); *United States v. Mostowicz*, 471 F. App'x 887, 891 (11th Cir. 2012) ("Because Cody jumped instinctively into the car without encouragement or facilitation from the officers, we see no Fourth Amendment violation.").

In *State v. Miller*, 367 N.C. 702, 766 S.E.2d 289 (2014), the Supreme Court of North Carolina likewise adopted that majority rule. In *Miller*, the court rejected the proposition that because a narcotics-detection dog is an "instrumentality of the police," the dog's "actions, regardless of whether they are instinctive or not, are no different than those undertaken by an officer." *Id.* at 704, 766 S.E.2d at 294. Instead, the court correctly determined that it is the *officer's* conduct that is relevant to whether the officer violated the Fourth Amendment and, unless "police misconduct is present," or "the dog is acting at the direction or guidance of its

handler," a dog's touching or entry to a vehicle cannot be attributed to the handling officer for purposes of the Fourth Amendment. *Id.* at 713, 766 S.E.2d at 296. The court explicitly rejected the argument that *Jones* somehow undermined that proposition. *Id.* at 712-13, 766 S.E.2d at 296.

The Idaho Supreme Court acknowledged many of these cases, but attempted to distinguish them primarily on the theory that they pre-dated or inadequately addressed *Jones*. *Randall*, 496 P.3d at 853. But, as discussed in the next section, and as the court in *Miller* correctly determined, *Jones* in no way undermines the proposition underlying those cases: that the Fourth Amendment inquiry focuses on the officer's conduct. At any rate, the Idaho Supreme Court determined that its "duty is to interpret the Constitution, not to follow juridical trends," and so disregarded the above cited precedents. *Id.*

Other courts, however, have expressed skepticism regarding that majority rule or have endorsed positions relevantly similar to the position adopted by the Idaho Supreme Court.

The Eighth Circuit Court of Appeals has been inconsistent. In *United States v. Lyons*, 486 F.3d 367 (8th Cir. 2007), the court initially determined that, "Absent police misconduct, the instinctive actions of a trained canine do not violate the Fourth Amendment." *Id.* at 373. Subsequently, in *United States v. Pulido-Ayala*, 892 F.3d 315 (8th Cir. 2018), the court expressed skepticism regarding that majority rule. According to the

court, a narcotics-detection dog is an "instrumentality" of law enforcement, and the actions of agents and instrumentalities of law enforcement are generally attributable to law enforcement for purposes of the Fourth Amendment. *Id.* at 318.[5] The court additionally expressed concern that the majority rule adopted in *Lyons* is improperly concerned with the handling officer's intent. *Id.* at 319. But the court determined it was unnecessary to address the continued viability of the majority rule. *Id.* Even if the entry of the narcotics-detection dog to the vehicle in that case constituted a Fourth Amendment search, the search was lawful because the officer acquired probable cause to search the vehicle prior to the narcotic-detection dog's instinctive entry. *Id.* at 319-20.

In *Melgar ex rel. Melgar v. Greene*, 593 F.3d 348 (4th Cir. 2010), the court attributed a dog's undirected behavior to the handling officer for purposes of determining whether a Fourth Amendment seizure occurred. An officer used a police dog to assist in finding a thirteen-year-old boy who was lost and intoxicated. *Id.* at 351. As the officer rounded a corner with the leashed dog, the dog turned into a bush where the officer could not see it and where the boy happened to be sleeping. *Id*. at 352-53. Before the officer realized what was happening, the dog bit the boy's leg. *Id.* at 353.

[5] *See also Herrera-Amaya v. Arizona*, No. CV-14-02278-TUC-RM, 2016 WL 7664134, *9-10 (D. Ariz. Sept. 29, 2016) (holding that because dogs are part of a law enforcement "team," there was a Fourth Amendment search where narcotics-detection dog entered vehicle during exterior sniff, though action was not directed, prompted, or facilitated by handling officer).

While the court had "no doubt that the bite was unintended," it held that the dog's conduct nevertheless effected a Fourth Amendment seizure by the officer. *Id.* at 354-55. *But see Dunigan v. Noble*, 390 F.3d 486, 492-93 (6th Cir. 2004) (holding that handling officer did not seize person bit by police dog where the dog did so "spontaneous[ly]" and without the officer's direction); *Sebastian v. Douglas Cty.*, 366 P.3d 601, 606-08 (Colo. 2016) (officer did not effect a Fourth Amendment seizure where he released a police dog and commanded it to pursue two fleeing suspects but the dog bit a suspect that remained on scene).

Though many courts have correctly rejected the precise rule adopted by the Idaho Supreme Court, and have also rejected the more general and underlying proposition that the behavior of a police dog is immediately attributable to officers for purposes of the Fourth Amendment, there is a split of authority, inconsistency, and confusion amongst lower courts regarding the issue. The Idaho Supreme Court's opinion is representative of that confusion, and this Court should take this opportunity to clarify.

II. The Idaho Supreme Court Incorrectly Decided An Important Question Regarding The Fourth Amendment That Has Not Been, But Should Be, Addressed By This Court.

This Court has not directly addressed the proposition that a police dog's conduct is attributable to

officers for purposes of the Fourth Amendment even where the conduct was instinctive and not directed or prompted by officers. However, that proposition is in direct tension with a fundamental Fourth Amendment principle articulated by this Court: the amendment governs the willful conduct of law enforcement, not inadvertence or accidents. What is lawful conduct by a law enforcement officer does not become unlawful due to actions that were not the officer's, or events that were inadvertent and the officer did not will.

This Court has held that "the Fourth Amendment addresses 'misuse of power,' *Byars v. United States*, 273 U.S. 28, 33, 47 S.Ct. 248, 250, 71 L.Ed 520 (1927), not the accidental effects of otherwise lawful government conduct." *Brower v. Cty. of Inyo*, 489 U.S. 593, 596 (1989). Thus, in the context of determining whether officers have effected a Fourth Amendment seizure, the Court has emphasized that the officer's actions must be "willful" and "an intentional acquisition of physical control." *Id.* Even if law enforcement in fact "desire[s] termination of an individual's freedom of movement," and even where the termination of the individual's freedom of movement was "governmentally caused," officers have not effected a seizure unless the termination was effected by "*means intentionally applied*." *Id.* (emphasis original). Officers cannot accidentally seize a subject under the Fourth Amendment.

The same principle applies with equal force to the question whether an officer can accidentally conduct a Fourth Amendment search, whether by means of the instinctive behavior of a dog, which behavior the officer

did not direct or will, or some other inadvertent events. Just as it is "implicit in the word 'seizure' " that the acts constituting a seizure "must be willful," *Brower*, 489 U.S. at 596, it is implicit in the word "search" that the acts constituting a search must be willful. Just as an officer does not seize a suspect by means of events he did not will even if he in fact wants to seize the suspect and was attempting to do so by other means, *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 843-44 (1998) (no Fourth Amendment seizure where officers were in pursuit of suspect fleeing on a motorcycle and attempted to seize him by show of authority with overhead lights but "accidentally stopped the suspect by crashing into him"), an officer does not conduct a search by means of events that he did not will even if he in fact wanted to find evidence of criminal conduct and was attempting to do so by other means. *See*, *e.g.*, *Gorman v. Sharp*, 892 F.3d 172, 173 (5th Cir. 2018) ("the Fourth Amendment concerns only intentional, not accidental, searches and seizures"); *First v. Stark Cty. Bd. of Commissioners*, 234 F.3d 1268 (6th Cir. 2000) ("Inadvertent discovery or procurement does not violate the Fourth Amendment."); *United States v. Whitten*, 706 F.2d 1000, 1011-13 (9th Cir. 1983) (affirming district court's determination that there was no Fourth Amendment search where officers inadvertently rewound answering machine tape too far and heard messages other than the ones they were authorized to hear), *abrogated on other grounds by United States v. Perez*, 116 F.3d 840, 842 (9th Cir. 1997); *People v. Holmes*, 981 P.2d 168, 171 (Colo. 1999) (where an officer was investigating a crime and knocked on the suspect's door and the door

inadvertently opened because the latch was defective, the inadvertent event of the door opening did not transform "reasonable and lawful conduct into an unconstitutional warrantless search"); *Weed v. City of Seattle*, No. C10-1274-RSM, 2012 WL 909935, at *2 (W.D. Wash. Mar. 15, 2012) (holding that jury in § 1983 action was properly instructed that the events allegedly constituting a Fourth Amendment search must not have been accidental or inadvertent); Comment, Model Civ. Jury Instr. § 9.12 (CA9 2021) (noting that this Court has held that a seizure occurs only by means intentionally applied, and assuming that the same proposition applies to searches).

The underlying tenet that the Fourth Amendment is violated only by willful conduct by officers is not undermined by *United States v. Jones*, 565 U.S. 400 (2012), or *Florida v. Jardines*, 569 U.S. 1 (2013). This Court held in *Jones* that officers conducted a Fourth Amendment search when they surreptitiously placed a GPS tracking device on Jones' vehicle. *Jones*, 565 U.S. at 402. In *Jardines*, again applying the common-law trespassory test, the Court determined that officers conducted a Fourth Amendment search by taking a narcotics-detection dog onto the front porch of Jardines' home. *Jardines*, 569 U.S. at 3-6. Thus, in both cases, officers willfully trespassed for the purpose of gathering evidence. There was no inadvertence involved.

By contrast, and as noted by the dissenting justice on the Idaho Supreme Court, where the dog's entry or touching of a vehicle was instinctive, without direction or prompting by the officer, *the officer's* actions were

entirely legal and the officer "did nothing wrong." *Randall*, 496 P.3d at 860 (Bevan, J., dissenting). The officer was conducting a lawful exterior sniff of the vehicle that did not constitute a Fourth Amendment search. The dog's instinctive and undirected conduct of touching the vehicle and placing its snout through the window was entirely inadvertent. Thus, the officer did nothing wrong and where the officer did nothing wrong there was no Fourth Amendment violation. Neither *Jones* nor *Jardines* suggests otherwise.

Nor does ascribing the instinctive actions of dogs to their handling officers advance the goals or objectives of the Fourth Amendment. This Court has recognized that the exclusionary rule is a means of deterring unlawful conduct constituting a violation of the Fourth Amendment. *See Brown v. Illinois*, 422 U.S. 590, 599-600 (1975); *Davis v. United States*, 564 U.S. 229, 236–37 (2011) (the "sole purpose [of the exclusionary rule], we have repeatedly held, is to deter future Fourth Amendment violations"). Even in the Idaho Supreme Court's view, it was the dog's conduct that was illegal. It is only because, in the court's view, the dog's conduct is attributable to the officer for purposes of the Fourth Amendment that the officer can be said to have violated the Fourth Amendment. So, if deterrence is possible in such cases, it must start and end with the dog. But as the dissenting Idaho justice noted, it is fairly absurd to suppose that any dog will be deterred by application of the exclusionary rule. *Randall*, 496 P.3d at 861 (Bevan, J., dissenting) ("A dog is not able to be deterred by its reading our latest case or going to

continuing education. It has no ill will or improper motivation that can be trained-away by learning the latest nuance of constitutional law."). Where, as here, "there is no *police* illegality," as opposed to canine illegality, there is "nothing to deter." *United States v. Leon*, 468 U.S. 897, 921 (1984) (emphasis added). Nevertheless, the erroneous conclusion that there has been a Fourth Amendment violation requiring application of the exclusionary rule will have a deterrent effect: it will simply deter lawful investigatory methods that risk, through happenstance, the suppression of physical evidence.

Moreover, though the Idaho Supreme Court's holding is framed in terms of the dog's "intru[sions]" into the interior of the vehicle—even if only by inserting its snout briefly through an open window—the court's rationale sweeps much more broadly. Pet. App. 5-7. *Jones*, on which the Idaho Supreme Court centrally relied, did not involve any intrusion into the interior of Jones' vehicle. And the Idaho Supreme Court approvingly cited *Taylor v. City of Saginaw*, 922 F.3d 328 (6th Cir. 2019), for the proposition that marking car tires with chalk constitutes a trespass and therefore a Fourth Amendment search. Pet. App. 6. If the touching of private property without the owner's implied or express consent is a trespass, as *Jones* suggests; even a *de minimis* touching under such circumstances is a trespass, as *Taylor* suggests; and any conduct by a dog during an exterior sniff is attributable to the handling officer as though the officer directed it, as *Howard* held; then any touching of a vehicle by a dog will

constitute a Fourth Amendment search requiring suppression absent antecedent probable cause. Officers must not only be confident that the dog will not place a snout through an open window, but the officer will also have to be confident that the dog will not so much as touch or brush up against the vehicle as the dog is deployed close enough to the vehicle for the dog to detect the odor of narcotics.

The decision whether to employ what is a lawful investigatory method is still more convoluted for officers in Idaho. While the Idaho Supreme Court has held that the instinctive actions of a narcotics-detection dog can transform a lawful exterior sniff into an unlawful Fourth Amendment search, the U.S. District Court for the District of Idaho has held that "the instinctive actions of trained drug dogs do not expand the scope of an otherwise legal dog sniff to an impermissible search without a warrant or probable cause." *United States v. Mahan*, No. 1:19-CR-00233-DCN-2, 2021 WL 1341038, at *6 (D. Idaho Apr. 9, 2021). Whether the officer's choice to employ a lawful investigatory method will ultimately result in the suppression of any physical evidence recovered by means of that method depends on two separate fortuities: whether the dog avoids touching the vehicle during the exterior sniff and whether charges are ultimately pursued in state or federal court.

Finally, law enforcement dogs serve vital and lawful functions in addition to drug interdiction. They are widely used, for example, to locate suspects and missing persons, and for national security. Though

undoubtedly a tool, "a trained canine is [not] like a computer or a human-operated drone, a dog is a dog, and takes certain actions instinctively." *Randall*, 496 P.3d at 860 (Bevan, J., dissenting). The view that the undirected actions of dogs are automatically attributable to officers will inevitably discourage and undermine their use for these other lawful purposes as well.

The Idaho Supreme Court's decision in *Howard* decides an important issue regarding the application of the Fourth Amendment that this Court has yet to address: whether, for purposes of the Fourth Amendment, officers that deploy a police dog are effectively vicariously liable—for Fourth Amendment purposes, at least—for the instinctive actions of the dog. The court answered that question incorrectly, in a manner inconsistent with fundamental principles regarding the Fourth Amendment, and in a manner that can only deter lawful police investigations and conduct.

III. This Case Is An Ideal Vehicle To Address The Question Presented.

The Idaho Supreme Court squarely and unequivocally addressed a question of federal law, holding that "when a law enforcement drug dog intrudes, to any degree, into the interior space of a car during a dog sniff, without express or implied consent to do so, a search has occurred under the Fourth Amendment." Pet. App. 7. It endorsed Howard's view that "any trespass by the government against private property for the purpose

of obtaining information—whether by dog or human, instinctual or otherwise—is a violation of the Fourth Amendment unless police have a warrant, or a warrant exception applies." Pet. App. 4-5.

The facts are straightforward and there are no factual disputes with respect to the question presented. The parties stipulated that the officer deployed the narcotics-detection dog on the exterior of the vehicle, Howard left his window down, the dog placed its paws on the side of the vehicle and its head through the open window, and the dog then alerted to the odor of narcotics. Pet. App. 22-23, 28-29. The Idaho Supreme Court also found as much. Pet. App. 2. There has never been any dispute that the dog's behavior was instinctive and not directed by the officer. Howard never argued otherwise. Pet. App. 35-41. The state district court found as much and denied the motion to suppress on that basis. Pet. App. 23-24. And, the Idaho Supreme Court accepted as much when deciding the appeal. The court relied on its repudiation of *Naranjo* (Pet. App. 5), a prior opinion from the Idaho Court of Appeals that the court characterized as endorsing the "rule that a dog's instinctive entry into a car during an exterior sniff does not implicate the Fourth Amendment." *Randall*, 496 P.3d at 853. *See also* Pet. App. 18-19 (Justice Bevan dissenting because, "Unlike the majority, I do not believe that a drug-detection dog's instinctive action instantaneously transmutes a warrantless, exterior sniff into an unconstitutional search.").

Because the appeal clearly presents a question of federal law, the Idaho Supreme Court clearly addressed it, and there are no relevant factual disputes, this petition presents an ideal vehicle to address the question presented.

CONCLUSION

This Court should grant the instant petition to address the question whether a narcotics-detection dog's instinctive touching or entry to a vehicle—not directed, prompted, or otherwise facilitated by officers—is a trespass by the handling officer and therefore a Fourth Amendment search under *Jones* and *Jardines*. The Idaho Supreme Court's holding reflects a fundamental misunderstanding regarding the Fourth Amendment, and confusion among lower courts with respect to this issue. The amendment applies to willful searches and seizures, not to inadvertence or accidents. Where an officer is conducting a lawful exterior sniff of the vehicle and the officer has done nothing to direct, prompt, or facilitate a dog's *de minimis* touching or entry to the vehicle, the events are inadvertent and the officer has not violated the Fourth Amendment. The Idaho Supreme Court's mistaken conclusion otherwise only deters lawful conduct, not the unlawful conduct the Fourth Amendment is intended to govern and the exclusionary rule is intended to deter.

As an alternative to granting certiorari, the State requests that this Court summarily reverse the Idaho

Supreme Court because it has misinterpreted and misapplied the Fourth Amendment and this Court's holdings in *Jones* and *Jardines*.

Respectfully submitted,

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