No. 21-975

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

REPLY BRIEF FOR PETITIONER

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SUMMARY

When an officer trespasses for the purpose of gathering evidence, that is a Fourth Amendment search. That is not in dispute. The Idaho Supreme Court held that a narcotics-detection dog's instinctive and undirected conduct—placing its snout briefly through the open window of a vehicle—also constitutes a Fourth Amendment search because the distinction between the officer's conduct and the dog's undirected conduct is irrelevant for Fourth Amendment purposes. That proposition is very much in dispute. This Court should grant review to resolve the dispute and address the conflict amongst lower courts.

Respondent's arguments to the contrary fail. He argues first that the petition does not identify a conflict of authority because the lower court relied on *United States v. Jones*, 565 U.S. 400 (2012), and *Florida v. Jardines*, 569 U.S. 1 (2013), while most courts adopting the contrary rule do not. Br. in Opp. 3-7. Relatedly, he argues the result reached by the lower court is a "straightforward" implication of *Jones* and *Jardines*. Br. in Opp. 12-14. Those arguments misconstrue the question presented, the nature of the conflict below, and the import of *Jones* and *Jardines*.

Respondent also argues the Court should deny review because there is a factual dispute whether the handling officer directed the dog to place its snout in the vehicle. Br. in Opp. 7-12. Respondent's attempt to manufacture a factual dispute is belied by the record.

ARGUMENT

I. The Idaho Supreme Court contributed to a conflict among lower courts that is not resolved, or even addressed, by *Jones* and *Jardines*.

There should be no dispute that there is a conflict of authority below. The majority rule—endorsed even in Idaho's lower courts before the Idaho Supreme Court's decision in this and its companion case, *State v. Randall*, 169 Idaho 358, 496 P.3d 844 (2021)[1]—is that a police dog's entry to a vehicle does not constitute a Fourth Amendment search if the entry was not directed or orchestrated by officers. *See*, *e.g.*, *United States v. Sharp*, 689 F.3d 616, 619 (6th Cir. 2012). In other contexts, courts have likewise held that the instinctive behavior of a police dog is not attributable to officers for Fourth Amendment purposes. *Dunigan v. Noble*, 390 F.3d 486, 492-93 (6th Cir. 2004) (no Fourth Amendment seizure where police dog "spontaneous[ly]" bit, without direction from officer). These courts have concluded that the Fourth Amendment inquiry must focus on the *officer's* behavior. By contrast, the Idaho Supreme Court held that the entry to a vehicle by a police dog constitutes a Fourth Amendment search by officers, even where it is instinctive, without direction by officers. Pet. App. 5-7; *Randall*, 169 Idaho

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[1] *State v. Naranjo*, 159 Idaho 258, 260, 359 P.3d 1055, 1057 (Ct. App. 2015) *abrogated by State v. Randall*, 169 Idaho 358, 496 P.3d 844 (2021), and *abrogated by State v. Howard*, 169 Idaho 379, 496 P.3d 865 (2021).

at 365-70, 496 P.3d at 851-56.[2] It held that officers are "wholly responsible" for the behavior of police dogs and the distinction between the dog's conduct and the officer's is "irrelevant" for Fourth Amendment purposes. *Randall*, 169 Idaho at 369, 496 P.3d at 855.

Respondent nevertheless claims there is no conflict because the Idaho Supreme Court relied on this Court's decisions in *Jones* and *Jardines*, while most courts taking the majority view either pre-date or do not discuss them. Br. in Opp. 3-7.[3] Respondent's view seems to be that *Jones* and *Jardines* effectively overruled case law adopting the majority rule. He cites cases from the Third, Seventh, and Tenth Circuits as demonstrating the significance of *Jones* and *Jardines*.

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[2] The Idaho Supreme Court's decision and holding in *Howard* expressly relies on its decision and rationale in *Randall*. Pet. App. 5. Citations to *Randall* are due to that reliance, but Petitioner has not sought this Court's review of *Randall*.

[3] In a footnote, Respondent suggests that the assertion of a conflict is "unpersuasive" because four of the cases cited in the petition endorse the majority rule only in dicta. Br. in Opp. 6 n. 2. That is incorrect. In *United States v. Pierce*, 622 F.3d 209, 214-15 (3d Cir. 2010), *United States v. Vazquez*, 555 F.3d 923, 929-30 (10th Cir. 2009), and *United States v. Guidry*, 817 F.3d 997, 1005-06 (7th Cir. 2016), the courts were giving alternative grounds for affirming the denial of the motions to suppress at issue. "[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949). In *United States v. Shen*, 749 F. App'x 256 (5th Cir. 2018), the court endorses the majority rule while addressing one of two distinct arguments for reversal. *Id.* at 261-63. In none of these cases is the adoption of the majority rule dicta, and in *Shen* it is the only articulated basis for affirmance.

Br. in Opp. 4-5. None of them, however, are remotely relevant to the issue here.

For example, the Third Circuit case cited by Respondent merely states that precedent regarding the warrantless placement of GPS tracking devices on vehicles was likely no longer good law after *Jones*. Br. in Opp. 4 (*citing United States v. Katzin*, 769 F.3d 163 (3d Cir. 2014)). It is no surprise and not instructive here that *Jones* might require reevaluation of case law holding that it was not a Fourth Amendment search for officers to place a GPS tracking device on a vehicle when *Jones* expressly held otherwise. 565 U.S. at 404. The other cases cited by Respondent for the import of *Jones* and *Jardines* are likewise unhelpful. Br. in Opp. 4-5. Each concerned the intentional conduct of officers, not the inadvertent behavior of a dog or other tool. Regardless, decisions that Respondent thinks should be overruled after *Jones* and *Jardines* conflict no less with the lower court's decision because Respondent thinks as much.

More importantly, Respondent is incorrect that *Jones* and *Jardines* resolved or even addressed the conflict of authority.

Courts after *Jones* and *Jardines* have continued to endorse the majority rule. *See*, *e.g.*, *Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 880-81 (10th Cir. 2014); *United States v. Guidry*, 817 F.3d 997, 1005-06 (7th Cir. 2016); *United States v. Shen*, 749 F. App'x 256,

262-63 (5th Cir. 2018); *State v. Miller*, 367 N.C. 702, 713, 766 S.E.2d 289, 296 (2014).[4]

That is no surprise because neither *Jones* nor *Jardines* addresses the issue. Contrary to Respondent's suggestion, the petition certainly does "contest that [the lower court's] conclusion follows from a straightforward application of *Jones* to this case." Br. in Opp. 13. *See* Pet. 15-22. As the dissenting justice on the Idaho court noted, "The clear distinction in both *United States v. Jones* and *Florida v. Jardines*, is that in both cases it was the *officer* who intentionally trespassed to gather information, not the non-state actor drug dog." *Randall*, 169 Idaho at 374, 496 P.3d at 860 (Bevan, C.J., dissenting) (emphasis original). From the fact that a trespass by an officer for purpose of gathering evidence constitutes a Fourth Amendment search it does not follow that a dog's instinctive entry to a vehicle constitutes a Fourth Amendment search.

Whether the Fourth Amendment is implicated must focus on the conduct of government agents, not the "accidental effects of otherwise lawful government conduct." *Brower v. Cty. of Inyo*, 489 U.S. 593, 596

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[4] Respondent dismisses *Miller* because it involved distinguishable facts. Br. in Opp. 6-7. While it did, it discussed the instinctive entry to vehicles by narcotics-detection dogs, addressed both *Jones* and *Jardines*, and endorsed the majority legal principle: that a dog's instinctive conduct cannot be attributed to the government for purposes of determining whether officers have conducted a Fourth Amendment search. *Miller*, 367 N.C. at 709-14, 766 S.E.2d at 294-97. *Miller* is directly on point. The lower court recognized as much, rejecting the analysis in *Miller* without distinguishing it. *Randall*, 169 Idaho at 367, 496 P.3d at 853.

(1989). The officer here deployed a narcotics-detection dog on the exterior of a vehicle, which conduct is not a Fourth Amendment search. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005). The instinctive, undirected behavior of the dog is an accidental effect of the officer's lawful conduct. "When the dog [places its snout in the window] without the direction of the officer, that instinctual action cannot be attributed to its officer-handler." *Randall*, 169 Idaho at 374, 496 P.3d at 860 (Bevan, C.J., dissenting). Instead, the "key inquiry" for Fourth Amendment purposes must be on the officer's conduct. *Id.* Petitioner is not claiming, as Respondent suggests, that "there should be an exception to the property-based test where police deploy a narcotics dog and the physical intrusion can be characterized as an 'instinctive' response on the part of the dog." Br. in Opp. 13. Petitioner is claiming only that the test, as with the Fourth Amendment generally, must focus on officer conduct.

While courts can and have reasonably disagreed regarding the Fourth Amendment significance of the distinction between an officer's conduct and a dog's undirected conduct, it is a mistake to suggest that *Jones* and *Jardines* resolve or even address that issue. Contrary to Respondent's argument, there is a conflict of authority below.

II. The petition presents a purely legal question regarding the application of the Fourth Amendment with no underlying factual disputes.

Respondent argues there is a factual dispute whether the handling officer directed the dog to place its snout in the vehicle. Br. in Opp. 7-9, 11-12. There is no such dispute.[5]

Before turning to that issue, Respondent also argues the Petitioner has "all but" conceded that the lower court's decision is not worthy of this Court's review because the petition "exaggerated [the] scope" of the Idaho court's decision by arguing that its rationale extends both to *de minimis* entries into a vehicle, as the court held, and to the *de minimis* touching of a vehicle by a dog. Br. in Opp. 7, 9-11.[6] The argument is a

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[5] Petitioner does not concede that the petition should be denied even if there were a factual dispute. If such a dispute existed, and remained relevant after the legal issues are resolved, it may be addressed on remand. *See*, *e.g.*, *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981) (remanding for lower court to address previously unaddressed issues).

[6] The petition acknowledged that the court's *holding* is limited to an entry to a vehicle but argued that the court's "rationale" sweeps more broadly. *E.g.*, Pet. 7. Contrary to Respondent's argument, it does. The court determined that the dog's entry "was for the purpose of obtaining information *because it occurred during a drug sniff*, which serves no purpose other than to provide information to officers about the presence of narcotics." *Randall*, 169 Idaho at 368-69, 496 P.3d at 854-55 (emphasis added). The court's rationale suggests that any trespass that occurs during a drug sniff—whether a touching or an entry—is a trespass for the purpose of obtaining information and therefore a Fourth Amendment

distraction because the issue Petitioner seeks this Court to address is not the scope of the trespass, but whether the dog's instinctive conduct is attributable to the officer for Fourth Amendment purposes. Regardless of what actions by the dog might constitute trespass, the petition presents the important issue of whether those actions are attributable to the state where unintended by the officer.

Turning to the alleged factual dispute, there is none. The record shows that at every stage of the proceedings below, this matter has been litigated by the parties and adjudicated by the lower courts on the factual premise that the dog's conduct was instinctive and undirected by the handling officer.

When Respondent filed his motion to suppress, he made no argument that the handling officer directed the dog to enter the vehicle. Pet. App. 35-41. He argued only that "the state illegally searched the defendant's vehicle when its dog put its feet on this car and stuck its head inside." Pet. App. 35. It was then established law in Idaho under *State v. Naranjo*, 159 Idaho 258, 359 P.3d 1055 (Ct. App. 2015), that the Fourth Amendment is implicated by such an entry only if it was directed by officers. Petitioner responded to the motion to suppress by relying on *Naranjo* and arguing that the dog's entry was not a Fourth Amendment search because it was "spontaneous." Pet. App. 46.

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search. Regardless, Respondent's argument that Petitioner is seeking review of a hypothetical set of facts is baseless.

The district court denied the motion because it found the dog's behavior was instinctive and not directed by the handling officer. The court held that it was "bound by the Court of Appeals' ruling" in *Naranjo*, which the court determined was "as close to being on point as one can imagine." Pet. App. 23. Again, *Naranjo* concluded that a dog placing its nose through a window was not a Fourth Amendment search because it was "an instinctual act that the police did not facilitate." *Naranjo*, 159 Idaho at 261, 359 P.3d at 1058. Quoting that language from *Naranjo*, the district court denied Respondent's motion to suppress "on those grounds." Pet. App. 24.

In his appellate brief below, Respondent did not challenge the district court's factual finding that the dog's conduct was instinctive. Brief of Appellant, *State v. Howard* (No. 47367-2019), 2020 WL 751863, *7-13. Instead, he argued that "this was a search for Fourth Amendment purposes, *even though the dog's behavior was instinctual and momentary*." Id. at *8 (emphasis added). He conceded that the dog's entry was instinctive and argued that *Naranjo* should be overruled based on *Jones* and *Jardines*. Id. at *7-13.

The Idaho Supreme Court did exactly that. The court recognized that the district court denied the motion to suppress because *Naranjo* was directly on point and the dog's entry was instinctive; that Respondent was arguing on appeal that "any trespass by the government against property for the purpose of obtaining information—whether by dog or human, instinctual or otherwise—is" a Fourth Amendment search and was

asking that *Naranjo* be overruled; and that Petitioner was asking the court to affirm based on *Naranjo* and the district court's finding that the dog's entry was instinctive. Pet. App. 3-4.

The court then stated, "We agree with Howard that *Naranjo* is inconsistent with *Jones* and that [the dog's] entry was a search." Pet. App. 5. The court relied on its reasoning in *Randall*, Pet. App. 5, where the court articulated its rationale for repudiating *Naranjo*, "reject[ed] the instinctive entry rule because it cannot be reconciled with the Fourth Amendment," and held that the distinction between the actions of an officer and the instinctive, undirected actions of a police dog was "irrelevant" for Fourth Amendment purposes. *Randall*, 169 Idaho at 367-70, 496 P.3d at 853-56.

Nevertheless, Respondent argues for the first time now that there is a factual dispute whether the dog was directed to put its nose in the vehicle. Br. in Opp. 8-9. As support, Respondent points to the Idaho Supreme Court's discussion of a different issue forming no part of the petition.

In addition to arguing that the dog's instinctive act did not constitute a Fourth Amendment search, Petitioner argued in the alternative that if that was incorrect there was nevertheless probable cause for that search. After overruling *Naranjo* and concluding that the dog's instinctive act constituted a Fourth Amendment search, the Idaho Supreme Court addressed that alternative argument. Pet. App. 7-13. In that discussion, the court quoted a portion of the handling officer's

testimony from the hearing on the motion to suppress about "why she believed [the dog] had detected the scent of narcotics before the entry." Pet. App. 8-11. During that testimony, she stated she said "show me" shortly before the dog placed its head in the window of the vehicle. Pet. App. at 8-9.

Neither the court's quotation of that testimony nor the testimony itself indicates a factual dispute. The court's quotation of that testimony was not to address any dispute regarding whether the dog was directed to enter the vehicle but addressed Petitioner's alternative argument that there was probable cause for the entry. As discussed above, the court had already overruled *Naranjo* and concluded that the dog's entry was a Fourth Amendment search. As to the substance of the testimony, even if it might have been used to argue below that the dog's entry was directed by the officer, Respondent did not make that argument. He did exactly the opposite and told the Idaho Supreme Court that the dog's entry was instinctive and undirected (and therefore *Naranjo* should be overruled, as opposed to distinguished). The lower courts resolved the motion to suppress and the appeal of the denial of the motion on that basis.

That Respondent now wants to repudiate that concession and argue for the first time that the officer directed the dog to enter the vehicle does not create a factual dispute. Respondent never argued the dog's entry was directed, the district court found that it was not, and the Idaho Supreme Court resolved the appeal on the concession that the dog's entry was instinctive and not directed. As the case comes to this Court, it

presents a narrow but important legal question with no factual disputes.

CONCLUSION

The conflict below concerns the core of the Fourth Amendment and the issue of who and what it regulates. According to the Idaho Supreme Court, the Fourth Amendment governs not just the intentional conduct of government agents, but the undirected behavior of tools deployed by government agents. According to that court, what was lawful conduct by an officer became unlawful conduct by virtue of something the officer did not do, direct, or intend. That view is in tension with this Court's Fourth Amendment jurisprudence and has been rightly rejected by most courts to consider the same issue. This case presents the legal question clearly, with no factual disputes. This Court should grant the petition.

Respectfully submitted,

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