No. _____

In The
Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

KIRBY ANTHONY DORFF,

Respondent.

On Petition For Writ Of Certiorari To The Idaho Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does a drug-detection dog physically intrude upon a constitutionally protected area and therefore conduct an unreasonable search under the Fourth Amendment when it touches the exterior of a lawfully stopped car while sniffing for potential contraband?

II. Even if touching the exterior of a lawfully stopped car is a physical intrusion of a constitutionally protected area, are the actions of a drug-detection dog, taken without direction, prompting, or facilitation by officers, attributable to the Government for purposes of the Fourth Amendment?

PARTIES TO THE PROCEEDINGS

Petitioner is the State of Idaho. Respondent is an individual, Kirby Anthony Dorff, the defendant-appellant below.

PROCEEDINGS IN STATE COURTS

- *State of Idaho v. Kirby Anthony Dorff*, No. CR20-19-2341, District Court of the Fourth Judicial District of the State of Idaho, Elmore County. Judgment entered June 22, 2020.
- *State of Idaho v. Kirby Anthony Dorff*, No. 48119, Supreme Court of the State of Idaho. Judgment entered March 20, 2023.

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JURISDICTION

The judgment of the Idaho Supreme Court was entered on March 20, 2023. 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 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

An officer lawfully stopped Dorff for traffic violations. (Pet. App. 2-3.) A second officer deployed a drug-detection dog, Nero. (Pet. App. 3.) As Nero circled the outside of the car, he "made two potential contacts, and one explicit contact" with the exterior of the car; he made the explicit contact when he put his paws "on the door and window as he sniffed the vehicle's upper seams." (Id.) "Nero alerted during his explicit contact with Dorff's vehicle." (Id.)

Based on the probable cause provided by Nero's alert, police searched the car and found methamphetamine and other evidence. (Pet. App. 3-4.) This evidence, plus statements by Dorff's passenger in the car, served as grounds for law enforcement to obtain a search warrant for Dorff's motel room. (Pet. App. 4.) There, police found 19 grams of methamphetamine and drug paraphernalia. (Id.)

The state charged Dorff with felony counts of possession of methamphetamine and possession of methamphetamine with intent to deliver, and one misdemeanor count of possession of drug paraphernalia. (Id.) Dorff filed a motion to suppress evidence based, in part, on the theory that Nero had trespassed his vehicle prior to alerting, which he argued amounted to a Fourth Amendment violation. (Id.) The state trial court denied the motion to suppress, rejecting the "trespass" theory on the grounds that "Nero's contacts with the vehicle did not amount to 'intermeddling'—i.e., did not

amount to trespass to chattel at common law." (Pet. App. 5.)

Dorff entered a conditional guilty plea preserving for appeal the right to challenge the denial of his motion to suppress. (Pet. App. 6.)

The Idaho Supreme Court reversed based on its interpretation of this Court's precedents. (Pet. App. 7-25.) It concluded that *United States v. Jones*, 565 U.S. 400 (2012), and *Florida v. Jardines*, 569 U.S. 1 (2013), articulated a "traditional property-based test" consisting of two components: "whether Nero (1) 'trespass[ed]' against Dorff's vehicle (2) for 'the purpose of obtaining information' about, or related to, the vehicle." (Pet. App. 9-10 (brackets original, quoting *Jones*, 565 U.S. at 404).)

The Idaho Supreme Court disposed of the second component first, holding that it is "self-evident that when the State deploys a drug dog to conduct a free air sniff of a vehicle, that activity is conducted for the purpose of obtaining information." (Pet. App. 11 (quotation marks and brackets omitted).)

The Idaho Supreme Court then focused on the first element, which it characterized as a question of whether the government had committed a trespass to chattels. Reasoning that property rights are not created by the Constitution of the United States, and there is no federal general common law, the Idaho Supreme Court turned to the "intersec[tion]" of common law with "state law surrounding the Fourth Amendment's adoption." (Pet. App. 11-12.) "With this in mind,

England's common law surrounding 1791 certainly commences our inquiry—but the overlay of *state*-focused common law 'trespass' into the property-based Fourth Amendment test forces our analysis closer to the common law surrounding 1868, when the Fourteenth Amendment was adopted—and Idaho in fact existed." (Pet. App. 13 (emphasis original).) After its analysis of English and Idaho common law, the Court concluded that "a 'trespass' to chattel occurs when an actor violates 'the dignitary interest in the inviolability of chattels,'" including "the right to use, possess, and exclude," "'either by intentionally using *or otherwise intermeddling* with a chattel in the possession of another or by continuing to use or intermeddle therewith after a privilege to do so has been terminated.'" (Pet. App. 13-17 (emphasis original, quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER & KEETON ON THE LAW OF TORTS 85, 87 (5th ed. 1984), and RESTATEMENT (FIRST) OF TORTS § 217 (1934)).) Intermeddling, in turn, involves a "heightened contact with another's chattel." (Pet. App. 17-18.) Thus, "someone who brushes up against your purse while walking by" commits no trespass while "someone who, without privilege or consent, rests their hand on your purse or puts their fingers into your purse" does trespass. (Pet. App. 18-20 (emphasis omitted).)

Armed with its trespass by intermeddling test that it had derived from other contexts, it held that "a drug dog trespasses against a vehicle by 'intermeddling' with its exterior—or its interior (i.e., breaching its 'close')—without privilege or consent." (Pet. App.

22.) "Applying these principles to the instant case, a Fourth Amendment 'search' occurred here because the State's drug dog, Nero, intermeddled with (and thereby trespassed against) Dorff's vehicle for the purpose of obtaining information." (Id.)

The Idaho Supreme Court also rejected the reasoning that Nero's actions in putting his paws on the car were not attributable to the police or Government, citing prior Idaho precedent so holding and also reasoning that an owner of an animal is responsible for its trespasses. (Pet. App. 17 (citing 3 W. Blackstone, COMMENTARIES *211 (1768), *State v. Randall*, 496 P.3d 844, 856 (Idaho 2021).))

Justice Moeller, joined by Chief Justice Bevan, dissented. (Pet. App. 25-33.) Both dissenters agreed, "It cannot be said that Nero, acting as a tool of law enforcement, 'physically occupied private property for the purpose of obtaining information.'" (Pet. App. 26 (quoting *Jones*, 565 U.S. at 404).) The dissent relied on opinions from other courts holding that "brief touches with a vehicle do not constitute searches under the Fourth Amendment." (Pet. App. 28-29 (citing *United States v. Olivera-Mendez*, 484 F.3d 505, 511-12 (8th Cir. 2007); *United States v. Owens*, 2015 WL 6445320, at *9 (D. Me. 2015), *aff'd*, 917 F.3d 26 (1st Cir. 2019); *United States v. Zabokrtsky*, 2020 WL 1082583, at *6 (D. Kan. Mar. 6, 2020)).) The dissent was concerned that the "majority's analysis will lead to other absurd and troubling possibilities," such as a search resulting from an officer "lean[ing] against a car door as he speaks with

the driver" (Pet. App. 31), an issue the majority expressly left open (Pet. App. 23).

Chief Justice Bevan additionally entered a separate dissent. (Pet. App. 33-34.) He would also have held that "a dog's instinct to jump cannot be imputed to its officer-handler when the dog acts without instruction" because it is the "misuse of power" that triggers the Fourth Amendment. (Pet. App. 34.) "The majority's decision today effectively converts Idaho's analysis of the Fourth Amendment into a strict liability system, where the officer-handler's intent and the extent of the intrusion are irrelevant." (Id.)

REASONS FOR GRANTING THE PETITION

The Idaho Supreme Court has decided two important Fourth Amendment questions in a way that conflicts with this Court's holdings and that deepens direct and troubling splits in courts across the country. This Court has not yet resolved these questions, but now with increasing fractures, it should step in and provide necessary clarity. Supreme Court Rule 10. The first question is whether physically touching the outside of a lawfully seized vehicle while obtaining information constitutes an unreasonable search. The second question is whether a police dog's instinctive and undirected conduct is automatically attributable to officers.

Certiorari is appropriate to determine whether physically touching the outside of a lawfully seized

vehicle while obtaining information constitutes an unreasonable search. In *United States v. Jones*, 565 U.S. 400 (2012), this Court stated that "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." *Id.* at 406. Thus, an unreasonable search occurs whenever the Government engages "in physical intrusion of a constitutionally protected area in order to obtain information." *Id.* at 407 (quotation marks omitted). *See Carpenter v. United States*, ___ U.S. ___, 201 L. Ed. 2d 507, 138 S. Ct. 2206, 2213 (2018). This standard was applied by this Court in *Florida v. Jardines*, 569 U.S. 1, 6 (2013), where officers "gathered . . . information by physically entering and occupying" the curtilage of a house with a drug-detection dog.

The Idaho Supreme Court's "intermeddling" standard is incompatible with the property-based search rationale articulated in *Jones* and *Jardines* and the property-based analysis employed in earlier cases. Review of those cases shows that a physical intrusion into or occupation of property is a prerequisite to finding a Fourth Amendment violation. Whether a mere cursory touching of a lawfully stopped car while conducting an exterior drug-detection dog sniff transforms that sniff into a search is an important constitutional question that should be settled by this Court.

Additionally, since *Jones* and *Jardines* were decided, courts have inconsistently applied the physical intrusion into or occupation of a constitutionally protected area standard when it comes to chattels. *See*

State v. Speights, 497 P.3d 340, 345-46 (Utah 2021) (discussing inconsistent application of standard). This inconsistency is even more pronounced when it comes to lawfully seized chattels, such as the car in this case, where seizure entails some touching. *See United States v. Davis*, 690 F.3d 226 (4th Cir. 2012) (extracting DNA from lawfully seized coat not search); *United States v. Bah*, 794 F.3d 617, 630 (6th Cir. 2015) (extracting information from lawfully seized financial cards not search); *United States v. Cowan*, 674 F.3d 947, 955-56 (8th Cir. 2012) (pressing button on lawfully seized key fob to learn what car it belonged to not a search). The Idaho Supreme Court's decision is certainly at the extreme end of cases finding an intrusion and directly conflicts with the analyses of three Circuit Courts of Appeal that merely touching the outside of properly seized items is not a search even if that touching reveals information.

Whether a drug-detection dog's mere touching of a car during a lawful traffic stop constitutes an unreasonable search prohibited by the Fourth Amendment merits this Court's review.

Certiorari should also be granted to resolve whether a drug-detection dog's instinctive and undirected conduct is automatically attributable to officers for purposes of the Fourth Amendment. 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). A majority of courts have held 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. The decision of the Idaho Supreme Court conflicts with these decisions.

The Idaho Supreme Court's decision that a dog's instinctive and undirected actions in touching the exterior of a car while sniffing for contraband constitutes a search attributable to the government also merits this Court's consideration.

I. Certiorari is Warranted on Whether Merely Touching the Exterior of a Chattel to Gather Information is an Unreasonable Search.

A. The Idaho Supreme Court's Ruling Conflicts with This Court's Holdings that Require Physical Intrusion or Occupation for a "Property-Based" Search.

The Idaho Supreme Court's "intermeddling" test conflicts with this Court's Fourth Amendment precedents in two important ways. First, this Court's precedents have found a Fourth Amendment violation under a property theory only where there is a physical intrusion into a constitutionally protected area. Finding a violation by merely touching the exterior of a chattel is contrary to that physical intrusion standard. Second, the "intermeddling" test adopted by the Idaho Supreme Court directly applies 18th and 19th century tort law despite this Court's clear statement that such is not the proper standard.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches." This protection applies even where "aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching among his papers, are wanting." *Boyd v. United States*, 116 U.S. 616, 622 (1886). The right applies to "all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty[,] and private property. . . ." *Id.* at 630.

However, addressing whether the Fourth Amendment applied to telephone wiretaps, the Court stated, "The language of the amendment cannot be extended and expanded to include telephone wires," which are "not part of [the] house or office." *Olmstead v. United States*, 277 U.S. 438, 465 (1928), *overruled by Berger v. State of N.Y.*, 388 U.S. 41 (1967), and *overruled by Katz v. United States*, 389 U.S. 347 (1967). The "historical purpose" of the Fourth Amendment "was to prevent the use of governmental force to search a man's house, his person, his papers, and his effects, and to prevent their seizure against his will." *Id.* at 463. Its "extreme limit" was to prevent entry by stealth, but it still required "actual entrance." *Id.* at 463-64. The Court had never found a Fourth Amendment violation "unless there has been an official search and seizure of his person or such

a seizure of his papers or his tangible material effects or an actual physical invasion of his house or curtilage for the purpose of making a seizure." *Id.* at 466 (quotation marks omitted). The Court concluded that, because the "evidence was secured by the use of the sense of hearing" without "entry of the houses or offices of the defendants" there was no Fourth Amendment violation. *Id.* at 464. *See also Goldman v. United States*, 316 U.S. 129, 135 (1942) (use of listening device attached to wall of neighboring office not a search), *overruled by Katz*, 389 U.S. 347.

Applying the standard requiring actual entrance this Court did find a Fourth Amendment violation in *Silverman v. United States*, 365 U.S. 505 (1961). In that case, police inserted a "spike mike" into a wall of the target residence until it touched a heating duct, effectively turning the duct into "a giant microphone, running through the entire house occupied by appellants." *Id.* at 509 (quotation marks omitted). This was a search because it was accomplished "by means of an unauthorized physical encroachment within a constitutionally protected area" by means of "usurping part of the petitioners' house or office—a heating system which was an integral part of the premises occupied by the petitioners." *Id*. at 510-11. Significantly, the Court did not "pause to consider whether or not there was a technical trespass under the local property law relating to party walls." *Id*. at 511. Rather, the decision was "based upon the reality of an actual intrusion into a constitutionally protected area." *Id.* at 512.

The requirement of a physical intrusion into a constitutionally protected area was abandoned in the context of electronic eavesdropping shortly after *Silverman* was decided. In *Katz v. United States*, 389 U.S. 347, 353 (1967), this Court concluded that the "underpinnings" of *Olmstead* and *Goldman* had been "eroded" such that "the 'trespass' doctrine there enunciated can no longer be regarded as controlling." The use of an external microphone to listen to and record a conversation in a phone booth "violated the privacy upon which [Katz] justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.* Thus, the "fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance." *Id.*

Against this background this Court more recently addressed "whether the attachment of a Global Positioning System (GPS) tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment." *United States v. Jones*, 565 U.S. 400, 402 (2012). The fact that the "Government physically occupied private property for the purpose of obtaining information" was "important." *Id.* at 404. This is so because the "text of the Fourth Amendment reflects its close connection to property." *Id.* at 405. Thus, "Fourth Amendment jurisprudence was tied to common-law trespass." *Id.*

Significantly, this connection to trespass led the Court to previously conclude that "wiretaps attached to telephone wires on the public streets did not constitute a Fourth Amendment search because '[t]here was no entry of the houses or offices of the defendants.'" *Id.* (quoting *Olmstead*, 277 U.S. at 454). Although this Court's subsequent decisions effectively brought conduct such as wiretapping within the scope of the Fourth Amendment under a violation of a reasonable expectation of privacy theory, adoption of that theory did not "repudiate" the understanding that a search occurs upon a "government trespass upon the areas ('persons, houses, papers, and effects') it enumerates." *Id.* at 405-08. The Court concluded a search may occur whenever the Government engages "in physical intrusion of a constitutionally protected area in order to obtain information." *Id.* at 407. *See also Carpenter v. United States*, ___ U.S. ___, 201 L. Ed. 2d 507, 138 S. Ct. 2206, 2213 (2018).

After adopting (or re-adopting) the physical intrusion into a constitutionally protected area standard, the Court rejected the concurrence's claim that the majority was "applying '18th-century tort law,'" asserting that claim was "a distortion" and that what the Court was applying was "an 18th-century guarantee against unreasonable searches." 565 U.S. at 411.

This Court applied the *Jones* standard to police using a drug-detection dog on the curtilage of a home in *Florida v. Jardines*, 569 U.S. 1 (2013). It articulated that standard as follows: "When the Government obtains information by physically intruding on persons,

houses, papers, or effects, a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." *Id.* at 5 (quotation marks omitted).

Applying the physical intrusion into a constitutionally protected area standard made the case "straightforward." *Id.* "The officers were gathering information . . . in the curtilage of the house," which is constitutionally protected "as part of the home itself" and "gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner." *Id.* at 5-6. Addressing "the question of whether [the police investigation] was accomplished through an unlicensed physical intrusion," this Court distinguished "visual observation" from "set[ting] foot upon" the curtilage. *Id.* at 7-8 (quotation marks omitted). Notably, although the Court did find that bringing the dog to the porch exceeded the "implicit license" to "approach the home by the front path," the Court did not explicitly find that the officers *trespassed*. *Id.* at 3-12.

It is well-established in this Court's precedents that officers do not transform a traffic stop seizure into a search by walking a drug-detection dog around the exterior of each car because "an exterior sniff of an automobile does not require *entry into the car* and is not designed to disclose any information other than the presence or absence of narcotics." *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (emphasis added). Despite the touching, the dog sniff in this case was still an exterior sniff. A contrary conclusion is not

suggested by the facts, analysis, or holdings of *Jones* or *Jardines*.

In *Jones*, officers placed a GPS tracker on a car and used it to track the car within 50 to 100 feet, at all times, for 28 continuous days. 565 U.S. at 403. This turned the car into a device gathering information on the target's movements and location, the functional equivalent of turning the vent in *Silverman* into a listening device. By doing so, the "Government physically occupied private property for the purpose of obtaining information." *Id.* at 404. Unlike in *Jones* or *Silverman*, the officers in this case did not commandeer Dorff's car for information-gathering purposes. Rather, the dog merely put its paws on the outside while it smelled for odors coming through the crack in the door. *Jones* does not support the conclusion that physical contact with the outside of a car is a physical intrusion or occupation of the car for Fourth Amendment purposes.

In *Jardines*, officers took a drug-detection dog onto the constitutionally protected curtilage of a residence as part of a drug investigation, 569 U.S. at 3-4. The police conducted a search by "physically entering and occupying" the curtilage to gather evidence. *Id.* at 5-6. This should be compared with *Goldman*, the pre-*Katz* case where this Court held that placing an electronic listening device on the adjoining wall of an office to hear conversation within that office was not a physical intrusion or occupation of that office. 316 U.S. at 135. In this case a dog briefly put its paws on the exterior of a lawfully stopped car during an exterior sniff. Such

is closer to *Goldman* than *Jardines*, and not a physical intrusion into or occupation of the car.

Despite the *Jones* majority's express disclaimer that it was not applying 18th century tort law,[1] the Idaho Supreme Court in this case applied its interpretation of 18th (and 19th) century tort law. (Pet. App. 11-16.) The majority concluded that "intermeddling" with a chattel violates the Fourth Amendment. (Pet. App. 22.) No such standard has ever been applied by this Court. Rather, as noted above, this Court required physical intrusion or occupancy in its pre-*Katz* jurisprudence and in *Jones* and *Jardines*. As the dissenting Idaho Supreme Court justices point out, a dog placing its paws on the exterior of a car is not a physical intrusion. (Pet. App. 27.)

Whether an unreasonable search occurs under the Fourth Amendment upon any information-gathering "intermeddling" of a chattel is an important question of constitutional law that should be settled by this Court.

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[1] A survey of pre-*Katz* caselaw indicates that this Court's precedents did not employ a trespassory test. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 Sup. Ct. Rev. 67, 76-90 ("The law had never adopted a trespass test."). Rather, the cases focused on "physical penetration into a protected space." *Id.* at 85.

B. The Idaho Supreme Court's Ruling Deepens a Conflict on Whether Merely Touching the Exterior of a Chattel to Gather Information is an Unreasonable Search.

The Idaho Supreme Court's decision also conflicts with the decisions of other lower courts. "The reach of *Jones*'s holding" on whether touching a car while seeking to acquire information is sufficient to create an unreasonable search "remains unsettled." *State v. Speights*, 497 P.3d 340, 345 (Utah 2021). *See also United States v. Thomas*, 726 F.3d 1086, 1093 (9th Cir. 2013) (stating, in *dicta*, that "it is conceivable that by directing the drug dog to touch the truck and toolbox in order to gather sensory information about what was inside, the border patrol agent committed an unconstitutional trespass or physical intrusion"). The *Speights* court noted that "a review of how *Jones* has been applied by lower federal courts reveals some inconsistency." *Speights*, 497 P.3d at 346 (citing *United States v. Owens*, 2015 WL 6445320, at *9 (D. Me. Oct. 23, 2015), *aff'd*, 917 F.3d 26 (1st Cir. 2019)). Review confirms the Utah court's observation.

At least three federal circuit courts of appeals have held that touching the exterior of a chattel to obtain information does not constitute a search where the property is lawfully seized, as was the automobile in this case. In *United States v. Cowan*, 674 F.3d 947, 956 (8th Cir. 2012), the court held that pressing the button of a key fob to learn what car it belonged to was not a trespassory search "because [the officer] lawfully

seized [the fob]." *See also Wiley v. State*, 388 S.W.3d 807, 819-20 (Tex. App. 2012) ("Because Wiley does not contest that the officer lawfully possessed his keys as a seizure incident to his arrest, our conclusion that simply pressing a button to identify the associated car did not constitute a 'search' for Fourth Amendment purposes is determinative of the issue on appeal.").

In *United States v. Davis*, 690 F.3d 226 (4th Cir. 2012), the court determined that extracting DNA from lawfully seized clothing constituted an invasion of privacy, and therefore a "search" under the Fourth Amendment. *Id.* at 246. It rejected, however, the trespassory search theory: "once the police had lawful possession of Davis' clothing, there was no further intrusion of, or trespass upon, his property rights." *Id.* at 241 n.23.

Finally, in *United States v. Bah*, the court held that "when law enforcement officers *lawfully possess* credit, debit or gift cards, scanning the cards to read the virtual data contained on the magnetic strips involves no physical penetration of constitutionally protected space." 794 F.3d 617, 630 (6th Cir. 2015) (emphasis original). *See also United States v. DE L'Isle*, 825 F.3d 426, 431-32 (8th Cir. 2016) ("because sliding a card through a scanner to read virtual data does not involve physically invading a person's space or property, there was no Fourth Amendment violation under the original trespass theory of the Fourth Amendment" (quotation marks omitted)).

Other courts have held that touching the exterior of a car in a manner that reveals information is an unreasonable search. In *United States v. Richmond*, 915 F.3d 352 (5th Cir. 2019), an officer during a traffic stop "pushed on" a tire he had seen wobbling, which produced a "solid thumping noise" instead of a normal sound, indicating "something besides air was inside." *Id.* at 354. The court determined that the touching of the tire constituted a search. "In terms of the physical intrusion, we see no difference between the *Jones* device touching the car and an officer touching the tire." *Id.* at 358.

The Sixth Circuit Court of Appeals in *Taylor v. City of Saginaw*, 922 F.3d 328, 333 (6th Cir. 2019), held that the act of "chalking" the tires of parked cars to track if they stayed in a parking spot longer than allowed was an unreasonable search because the officer "made intentional physical contact" with the car.

The Ninth Circuit stated it "is not clear *Jones* should be read to suggest that every physical touch that is designed to obtain information, even one as fleeting as tire chalking, rises to the level of a 'physical intrusion,' as required for a Fourth Amendment search." *Verdun v. City of San Diego*, 51 F.4th 1033, 1037 (9th Cir. 2022) (holding that if a chalking is a search, it was a reasonable administrative search), *petition for cert. filed* (March 24, 2023) (No. 22-943).

The Idaho Supreme Court's decision is incompatible with the reasoning of federal circuit courts of appeals' decisions requiring more than merely external

contact with a lawfully seized chattel, even if the contact is designed to obtain information. Whether Nero touching the exterior of Dorff's car when he followed the scent of contraband to the top of the car door window constituted an unreasonable search is contrary to the conclusions of other courts.

Although the physical intrusion on a constitutionally protected area standard is easily applied to the house and curtilage, it is not as easily applied to chattels. The conclusion of the Idaho Supreme Court and other courts as set forth above that all physical contact with a chattel while seeking information is a search is not mandated by this Court's precedents and conflicts with other courts that have rejected the argument that all such contact rises to the level of a Fourth Amendment violation. Certiorari in this case will allow the Court to resolve concerning splits across the country that are leading to inconsistent results under the Fourth Amendment.

II. Certiorari is Warranted on Whether a Drug-Detection Dog's Instinctive and Undirected Conduct is Attributable to Law Enforcement.

A. The Idaho Supreme Court's Ruling Conflicts with This Court's Holdings that Require Intentional Governmental Conduct for There to be a Search.

"A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the

location of a substance that no individual has any right to possess does not violate the Fourth Amendment." *Illinois v. Caballes*, 543 U.S. 405, 410 (2005). However, officers conduct a search under the Fourth Amendment by taking a dog into a constitutionally protected area to obtain information. *Jardines*, 569 U.S. at 5.

It does not necessarily follow, however, that a canine intrusion into a constitutionally protected area violates the Fourth Amendment if the intrusion was unsought by the dog's police handler. "[T]he Fourth Amendment addresses 'misuse of power,' *Byars v. United States*, 273 U.S. 28, 33 (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.* at 597 (emphasis original).

The Idaho Supreme Court determined that any lack of intent to trespass by the officer was irrelevant because an owner of an animal is responsible for its trespasses. (Pet. App. 17.) Moreover, the Idaho Supreme Court has previously concluded that even instinctive actions by a dog, unintended by his handling

officer, implicate the Fourth Amendment. *Randall*, 496 P.3d at 853-54. (Id.)

This Court has not directly addressed whether a dog's instinctive touching of the exterior, undirected by its police handler, violates the Fourth Amendment, but its precedents requiring misuse of power and willful conduct by officers suggest it does not.

B. Courts Disagree Whether a Drug-Detection Dog's Instinctive and Undirected Conduct is Attributable to Law Enforcement.

Addressing the necessity for deliberate actions by police, the Third, Sixth, Seventh, and Tenth Circuit Courts of Appeals have held 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 drug-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"); *United States v. Guidry*, 817 F.3d 997, 1006 (7th Cir. 2016) (citing the Third, Tenth, and Eighth Circuits for the proposition that a dog's entry to a vehicle amounts to a search only if facilitated by officers and concluding both for that reason and because the dog had already alerted on the exterior of the car that a subsequent search was lawful); *United States v. Vazquez*, 555 F.3d 923, 930 (10th Cir. 2009) (no Fourth Amendment search where drug-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*, 766 S.E.2d 289 (N.C. 2014), the Supreme Court of North Carolina likewise adopted

that majority rule. In *Miller*, the court rejected the proposition that because a drug-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 294 (quotation marks omitted). 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 296. The court explicitly rejected the argument that *Jones* somehow undermined that proposition. *Id.* at 296.

The majority rule that a dog's undirected, instinctive actions do not implicate the Fourth Amendment is consistent with the holdings, in other contexts, that searches arise only from the intentional actions of officers. *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 Cnty. Bd. of Commissioners*, 234 F.3d 1268, 2000 WL 1478389, *6 (6th Cir. 2000) (unpublished) ("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 *1-2 (W.D. Wash. Mar. 15, 2012) (holding that jury in § 1983 action was properly instructed in accordance with Ninth Circuit model civil jury instruction 9.11 (now designated as 9.12) that the events allegedly constituting a Fourth Amendment search must not been accidental or inadvertent).

The majority rule is also consistent with the underlying purposes of the exclusionary rule. This Court has recognized that the exclusionary rule is a means of deterring unlawful conduct. *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"). Excluding evidence obtained after a dog, without intent by the officer, touched the outside of a lawfully stopped car does not fulfill the purposes of this rule.

Other courts have, however, reached different conclusions. 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 drug-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.[2] 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 drug-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 drug-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

[2] *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 drug-detection dog entered vehicle during exterior sniff, though action was not directed, prompted, or facilitated by handling officer).

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. 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).

Despite the substantial number of courts holding that instinctive, undirected actions by a drug-detection dog do not show willful police conduct, the Idaho Supreme Court held that whether the trespass was by the dog or the officer himself was of "no import." (Pet. App. 17.) It did so on two bases. First, the Idaho Supreme Court had already rejected the majority rule in *Randall*, 496 P.3d 844. (Id.) In that case the Idaho Supreme Court deemed the distinction between human police officers and drug-detection dogs "irrelevant" because dogs are "an investigatory tool to obtain information." *Randall*, 496 P.3d at 855. Second, continuing its application of 18th century tort law, the Idaho Supreme Court concluded that trespasses by animals are

attributed to their owners. (Pet. App. 17 (*citing* 3 W. Blackstone, COMMENTARIES *211 (1768).)

The dissent of Chief Justice Bevan reiterated his "view that a dog's instinctual acts do not violate the Fourth Amendment." (Pet. App. 33.) The Chief Justice stated that equating "a drug dog instinctually jumping onto the exterior of a car to a government agent intentionally affixing a GPS tracking device to the undercarriage of a vehicle and monitoring its location for four weeks" was not reasonable. (Id.)

The division in the Idaho Supreme Court reflects a broader division in courts across the country. Whether the actions of a drug-detection dog, taken without direction, prompting, or facilitation by officers, are attributable to law enforcement for purposes of the Fourth Amendment is a question that needs this Court's resolution.

* * *

This Court should grant the instant petition to address one or both of two questions: First, whether a drug-detection dog physically intrudes upon a constitutionally protected area—and therefore conducts a search under the Fourth Amendment—when it touches the exterior of a lawfully stopped car while sniffing for potential contraband. Second, whether a drug-detection dog's instinctive touching or entry to a vehicle—not directed, prompted, or otherwise facilitated by officers—is a search attributable to the government.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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