No. 22-1226

IN THE
Supreme Court of the United States

IDAHO,

Petitioner,

v.

KIRBY ANTHONY DORFF,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Idaho,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court of Idaho correctly held that law enforcement's deployment of a narcotics dog that "stood on, and occupied, [respondent's] vehicle—without privilege or [respondent's] consent" during the course of the drug search—is a trespass under *United States v. Jones*, 565 U.S. 400 (2012), and *Florida v. Jardines*, 569 U.S. 1 (2013).

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STATEMENT OF THE CASE

1. In August 2019, police pulled respondent over for a traffic violation. Pet. App. 2. During the stop, an officer deployed a trained drug-detection dog to sniff for contraband in respondent's vehicle. Pet. App. 3. The officer circled the car with the dog and directed the dog by making upward gestures, "presenting areas for [the dog] to sniff." Pet. App. 3, 37, 44-45. The dog complied with the instructions, including jumping onto the driver side of the vehicle, "planting his front paws to stand up on the door and window" to sniff the vehicle's upper seams. Pet. App. 3. While in that position, the dog alerted to the presence of narcotics. *Id*. Based on the dog's signal, officers searched the vehicle and found drugs, leading to respondent's arrest and subsequent searches. Pet. App. 3-4.

2. Petitioner charged respondent for possession offenses, and respondent moved to suppress the evidence found in his vehicle. Pet. App. 4. He argued that the police dog's physical intrusion onto his car was an unlawful search under the trespass test articulated in *United States v. Jones*, 565 U.S. 400 (2012), and *Florida v. Jardines*, 569 U.S. 1 (2013). Pet. App. 4.

The trial court denied the motion. The court agreed that the issue presented was "whether the government has trespassed in this particular case on a constitutionally protected area" under this Court's decisions in *Jones* and *Jardines*. Pet. App. 37-38. The court also agreed that the test for whether a trespass occurred turns on "common law property rights." Pet. App. 38-39. The court concluded, however, that

because the dog intruded only on the exterior of the vehicle and did not go inside, its act of jumping onto the car and planting its paws did not amount to trespass. Pet. App. 37-38. The court acknowledged that this Court's decision in *Jones* concluded that a trespass had occurred within the meaning of the Fourth Amendment where officers placed an object on the exterior of a vehicle, but it distinguished *Jones* because "[t]he placing of the paws on the vehicle"—unlike a GPS device—"does not transmit or give any information." Pet. App. 39.

Respondent entered a conditional guilty plea, reserving the right to appeal the denial of his suppression motion. Pet. App. 6.

3. Respondent appealed to the Supreme Court of Idaho, reiterating his argument that the police dog's physical intrusion onto his car in order to sniff and alert the officers was an unlawful search under the property-based Fourth Amendment test articulated in *Jones* and *Jardines*. Pet. App. 7. Petitioner did not dispute that the determination of whether a trespass has occurred should be determined "by reference to trespass law at the time the Fourth Amendment was adopted." Resp. Br. 9. Petitioner asserted that there was no physical intrusion within the meaning of the Fourth Amendment because it applies differently to intrusions on the exterior of a car, but did not identify any historical sources to support the distinction between intrusions on the interior or exterior of property. *See generally* Resp. Br.

The Supreme Court of Idaho agreed with respondent. The court relied heavily on its recent decision in *State v. Howard*, 496 P.3d 865 (Idaho 2021), *cert. denied*, 143

S. Ct. 271 (2022). Pet. App. 9-11, 19-20, 24. There, the court applied the property-based test from this Court's decisions in *United States v. Jones*, 565 U.S. 400 (2013) and *Florida v. Jardines*, 569 U.S. 1, 11 (2013), to conclude that a police dog trespassed by sticking its nose into the window of the defendant's car. *Howard*, 496 P.3d at 867-68. The Idaho Supreme Court explained that here, as in *Howard*, "this case is *only* concerned with the property-based test—not the 'reasonable expectation of privacy' test under *Katz* [*v. United States*, 389 U.S. 347 (1967)]." Pet. App. 10.

The court began by observing that petitioner had waived any argument that respondent lacked a proprietary interest in his car and therefore proceeded on the assumption that such an interest existed. Pet. App. 10. Then, applying this Court's decision in *Jones*, the court explained that whether a "search" occurred under the property-based test turns on whether the officers committed a "a common law 'trespass' for the purpose of obtaining information." Pet. App. 7, 10 (citing *Jones*, 565 U.S. at 404-05).

The court rejected the distinction between intrusions on the interior and exterior of property, Pet. App. 9, which petitioner had failed to substantiate with historical sources in its briefing, *see generally* Resp. Br. Rather, after reviewing Blackstone and the other historical sources that this Court has routinely consulted in historical analyses, the Idaho Supreme Court viewed it as "plain" and "relatively straightforward" to conclude that the physical intrusion onto the side of one's car constituted

"intermeddling," "intruding" or "interposing officiously" on one's property, as was required for trespass at common law. Pet. App. 16-22 (reviewing historical treatises, restatements and dictionaries). Moreover, relying on its decision in *Howard*, the court found "a drug dog sniff is an 'activity that is self-evidently conducted for the purpose of obtaining information.'" Pet. App. 22 (quoting *Howard*, 496 P.3d at 868). Reviewing the facts of this case, the court concluded that a search had occurred under the property-based test because the dog had "jumped up onto the door, and planted his two front paws on the door (and then the window) as he sniffed the upper seams of the vehicle." Pet. App. 24.

The court explained that the limits of its decision "[could] not be overemphasized." Pet. App. 22. It explained that common law trespass distinguishes "between a dog's tail that brushes against the bumper of your vehicle as it walks by" and circumstances like this or *Howard* in which a police dog "approaches your vehicle to jump *on* its roof, sit *on* its hood, stand *on* its window or door—or enter *into* your vehicle." Pet. App. 20. Furthermore, that the officers here trespassed in the course of a drug search made this case "plainly distinguishable from a case where, for example, a police officer leans up against a driver's vehicle as he gathers information from the driver about, or related to, a lawful traffic stop." Pet. App. 23.[1]

[1] The Idaho Supreme Court grounded part of its decision in Idaho property law, which petitioner did not address below and does not challenge in its petition before this Court. Pet. App. 13. Moreover, to the extent the court identified any ambiguity in its historical analysis, it concerned whether certain types of trespass were or were not

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Of Authority.

Petitioner argues that the Idaho Supreme Court's decision conflicts with the decisions of other lower courts as to two legal issues. Petitioner's account largely re-treads the same ground from its recent petition in *Idaho v. Howard*, 143 S. Ct. 271 (2022), and does not warrant this Court's review.

1. As in *Howard*, petitioner claims a conflict of authority as to whether "the actions of a drug-detection dog, taken without direction, prompting, or facilitation by officers, [are] attributable to the Government for purposes of the Fourth Amendment." Pet. i. As explained in the respondent's brief in opposition to certiorari in *Howard*, no such conflict exists. *See* Br. in Opp. at 3-7, *Howard*, 143 S. Ct. 271 (No. 21-975) (hereinafter *Howard* BIO).

As the Idaho Supreme Court explained below, this case, like *Howard*, "is *only* concerned with the property-based test" articulated in *United States v. Jones*, 565 U.S. 400 (2012), and *Florida v. Jardines*, 569 U.S. 1 (2013), and "not the 'reasonable expectation of privacy' test under *Katz*." Pet. App. 9 (citing *Howard*, 496 P.3d at 868). Yet petitioner regurgitates the same cases from the Third, Sixth, Seventh, and Tenth Circuits that it relied on in *Howard*, none of which even mentioned *Jones* or *Jardines*, let alone applied the trespass test in a manner that conflicts with the Idaho Supreme

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"actionable" at common law. Pet. App. 16. The court found that particular distinction irrelevant for the purposes of the Fourth Amendment. *Id*. Petitioner never addressed that issue below and does not raise it in its petition to this Court.

Court's analysis in this case. Pet. 22-24; *see also Howard* BIO at 3-6. As explained in respondent's brief in opposition in *Howard*, many of the cases petitioner cites, in fact, predated *Jones* and *Jardines*, and the cases that came later never considered any argument under the property-based approach and relied exclusively on pre-*Jones* caselaw. *Howard* BIO at 3-6. Petitioner did not even contest this in *Howard*. *See* Reply Br. at 3-4, *Howard*, 143 S. Ct. 271 (No. 21-975). As these circuits have themselves explicitly recognized, *Jones* and *Jardines* "fundamentally altered this legal landscape" and circuits therefore must reconsider their earlier caselaw concerning what constitutes a search. *See United States v. Katzin*, 769 F.3d 163, 181 (3d Cir. 2014); *see also, e.g.*, *United States v. Richmond*, 915 F.3d 352, 357 (5th Cir. 2019) (recognizing *Jones* as "a sea change").[2]

Petitioner still has not identified a single case in any federal circuit or state high court that analyzed the lawfulness of a dog's physical intrusion on a car under *Jones* or *Jardines*, let alone one that reached a contrary outcome to the decision below. Indeed, petitioner's alleged conflict of authority does not identify a single case that post-dates the recently denied *Howard* petition.

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[2] As explained in the *Howard* BIO, the purported conflict falls further apart because, in addition to never even considering the trespass test, the cases petitioner relies on discuss whether a "search" occurred in dicta. The decisions cited ultimately held that any search could be upheld based on probable cause that existed before, and independent of, any physical intrusion on the car. *See Howard* BIO at 6 n.2 (collecting cases). Here, petitioner has never disputed that jumping onto the car was necessary for the dog to sniff the upper seams of the door and alert the officers as to the possible presence of narcotics.

2. Petitioner's new move in this case is to assert a separate conflict over whether "touch[ing] the exterior of a lawfully stopped car while sniffing for potential contraband" constitutes a physical intrusion, and thus a search for Fourth Amendment purposes. Pet. i. But there's no conflict on this question either.

To begin with, petitioner's purported conflict mischaracterizes the decision below. The Idaho Supreme Court never held that merely "*touch[ing] the exterior of a car* while sniffing for potential contraband" constitutes a trespass. The court was careful—and explicit—in advising that common law trespass distinguishes between merely touching the car in the course of a search and the police dog who "approaches your vehicle to jump *on* its roof, sit *on* its hood, stand *on* its window or door—or enter *into* your vehicle" as in cases like this and *Howard*. Pet. App. 20.

In any event, not one of the cases petitioner claims conflicts with the decision below involved or considered "touch[ing] the exterior of a lawfully stopped car while sniffing for potential contraband." Pet. i. None of them even involved a traffic stop. Petitioner cites three circuit cases that involve circumstances where the police have "lawful possession" of an item of property—such as an article of clothing or a set of keys. Pet. 17-18. In *United States v. Cowan*, 674 F.3d 947 (8th Cir. 2012), police seized the defendant's keys pursuant to a valid warrant. Once they had "lawfully seized" the keys and had "possession" of them, the Eighth Circuit rejected the argument that pressing a button on the keys constituted a trespass. *Id.* at 956. The government, it held, was "authorized" to be in physical contact with the keys and could not trespass

on them. *Id.* The Fourth and Sixth Circuits have similarly held that once the government has lawful possession of an item of property, they cannot trespass against it. *United States v. Davis*, 690 F.3d 226, 241 n.23 (4th Cir. 2012); *United States v. Bah*, 794 F.3d 617, 630 (6th Cir. 2015). None of these cases attached significance to the fact that police solely touched the *exterior* of the item in question; they simply held that once police lawfully possess an item, they cannot further intrude on any property rights.

Accordingly, none of these cases conflicts with the decision here. Petitioner has never asserted—nor could they—that the police took lawful possession of respondent's car when they initiated the traffic stop. Indeed, the Idaho Supreme Court found that petitioner waived any argument as to respondent's possessory interest in the vehicle during the stop. Pet. App. 10.

The only two cases petitioner cites that involve even remotely similar facts are, as petitioner recognizes, in complete accord with the decision below. Pet. 19. In *United States v. Richmond*, 915 F.3d 352 (5th Cir. 2019), the Fifth Circuit concluded that pushing on the exterior of a vehicle's tire during a traffic stop in order to determine what was inside constituted a search under the trespass theory. *See id.* at 358. Noting that *Jones* found a trespass "because of the physical contact the device made with the car at the moment it was affixed," the Fifth Circuit concluded that "[i]n terms of the physical intrusion, we see no difference between the *Jones* device touching the car and an officer touching the tire." *Id.* Similarly, in *Taylor v. City of Saginaw*, 922 F.3d

328 (6th Cir. 2019), the Sixth Circuit held that the act of chalking the tires of parked cars constituted a search because the City "made intentional physical contact with [the plaintiff's] vehicle," which amounts to "physical intrusion, regardless of how slight." *Id.* at 333.

The remaining cases petitioner cites have absolutely no bearing on the issue resolved below. In *Verdun v. City of San Diego*, 51 F.4th 1033 (9th Cir. 2022), the Ninth Circuit assumed without deciding that tire chalking constitutes a search and grounded its holding exclusively in the application of the administrative search exception to the Fourth Amendment. *Id.* at 1037-42. Petitioner never asserted the administrative search exception in the proceedings below, and does not attempt to assert it before this Court. Similarly, in *State v. Speights*, 497 P.3d 340 (Utah 2021), the court never analyzed whether a search occurred; it found that determination unnecessary because officers clearly had probable cause. *Id.* at 346.[3]

II. The Petition All But Concedes That The Issue Actually Decided By The Idaho Supreme Court Is Not Sufficiently Important.

Beyond bare assertions that the issue in this case is important, the petition entirely fails to explain why. *See* Pet. 6, 7, 16. Nor does it even argue that the issue

[3] The petition also refers in a parenthetical to *United States v. Owens*, No. 2:15-cr-55-NT, 2015 WL 6445320 (D. Me. Oct. 23, 2015), *aff'd*, 917 F.3d 26 (1st Cir. 2019). The petition did not assert this case is part of any split, nor could it. Although the district court in *Owens* briefly considered whether an officer's touching of a car was a trespass (notably without any reference to common-law trespass law), *id.* at *9, the First Circuit affirmed on entirely different grounds, finding any search justified by exigent circumstances, 917 F.3d at 37. This Court denied certiorari. *Owens v. United States*, 140 S. Ct. 200 (2019).

resolved in the decision below is important on its own terms. Rather, it invents two broader questions for the Court to consider, neither of which is actually presented by this case.

The petition's first question suggests that the decision below applies any time a drug-detection dog "touches the exterior of a lawfully stopped car." Pet. i. But the Idaho Supreme Court explicitly said otherwise. It explained that under the common law test "some contact to the exterior surface of a chattel" will not rise to the level of trespass. Pet. App. 20. And, accordingly, it explicitly distinguished "between a dog's tail that brushes against the bumper of your vehicle as it walks by" and the facts in cases like this and *Howard* where the drug-detection dog "approaches your vehicle to jump *on* its roof, sit *on* its hood, stand *on* its window or door—or enter *into* your vehicle." *Id*.

Indeed, it's not even clear what disagreement exists as to the legal standard here. Everyone—petitioner, respondent, and the court below—agrees that not all "touches" of the exterior of a car during a traffic stop or drug search constitute a trespass. Pet. 16; Pet. App. 20. And everyone—petitioner, respondent, and the court below—also agrees that physical occupation of the exterior of the vehicle constitutes a trespass. Pet. 15; Pet. App. 18-19. Petitioner simply disagrees with the Idaho Supreme Court's application of that test to the particular facts of this case. *See* Pet. App. 24 (determining that the fact that the dog here "stood on, and occupied, [respondent's]

vehicle—without privilege or [respondent's] consent—is enough"). This Court does not grant certiorari to apply settled legal principles to facts.

The petition next tries to inflate the importance of this case by reasserting an argument from the *Howard* petition: that the intrusions of a drug-detection dog who acts "without direction, prompting, or facilitation by officers" should not be "attributable to the Government for purposes of the Fourth Amendment." Pet. i. This does not remotely warrant review of this case. To begin with, here, petitioner never even made this argument in the lower courts (and as described below, the argument is clearly waived under Idaho practice).

And in any event, as in *Howard*, petitioner's concern is not implicated by the record this case. *Cf. Howard* BIO at 7-11. It is undisputed that the officer deployed the narcotics dog for the purposes of a search and then made upward gestures, "presenting areas for [the dog] to sniff," to which the dog complied. Pet. App. 3. In other words, there *was* a "direction" and "prompt" that caused the dog to jump on the car. For the same reason, it remains unclear what it means for petitioner to assert that the dog's conduct was "instinctive"—any "instinct" was in response to the direction that preceded it. Nor did the Supreme Court of Idaho characterize the case as one involving instinctive or undirected conduct. It acknowledged the direction, *id.*, and held that the intrusion which followed was a trespass within the meaning of the Fourth Amendment.

As to both questions presented, petitioner tries to exaggerate the importance of this case by suggesting broader issues are at play than those actually implicated by the record and the Idaho Supreme Court's holding. Petitioner does not seem to think the issue in the decision below sufficiently important on its own terms, and that is correct.

III. This Case Is Not A Suitable Vehicle To Decide Petitioner's More Expansive Questions.

For similar reasons, this is not an appropriate vehicle to decide the questions posed and discussed throughout the petition. Petitioner urges the Court to consider whether "mere cursory touching" constitutes trespass, Pet. 7, but the court below never held that it does. This is not a case where the dog's nose brushed the car or its tail swiped it; the dog "jumped up onto the door, and planted his two front paws on the door (and then the window) as he sniffed the upper seams of the vehicle." Pet. App. 24. To the extent the Court is interested in the issue of cursory touching, it should wait for a case where that is what happened.

Similarly, a case where the dog was directed or prompted by its handler is not an appropriate vehicle to consider the constitutional limits of a dog's actions that occurred "*without* direction" or "prompting." Pet. i (emphasis added). And were this issue presented on the facts of this case, petitioner would have had to preserve it. Petitioner did not contend that the dog acted without direction in the trial court and, under Idaho practice, is precluded from doing so for the first time on appeal. *State v. Hoskins*, 443 P.3d 231, 235-36 (Idaho 2019).

Moreover, as described above, petitioner's purported conflict of authority is premised on non-traffic stop cases in which law enforcement had taken lawful possession of the property in question. *See supra* 7-8. Here, the Idaho Supreme Court found that petitioner waived any challenge to respondent's possessory interest in the vehicle during the relevant period. Pet. App. 10. Therefore, even assuming the line of authority petitioner now draws upon could have any application in the context of a traffic stop, this case is not a suitable vehicle to address it.

IV. The Decision Below Followed From A Straightforward Application Of *Jones* and *Jardines*.

1. In *Jones*, this Court revived the property-based test for determining whether a search has occurred under the Fourth Amendment, explaining that the reasonable-expectation-of-privacy test "has been added to, not substituted for, the common-law trespassory test." 565 U.S. at 409. Considering the attachment of a small GPS device to the underside of a car, the Court had "no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *Id*. at 404-05. One year later, in *Jardines*, this Court applied the same test to hold that an "unlicensed physical intrusion" by a drug-sniffing dog onto a defendant's front porch "in hopes of discovering incriminating evidence" was a search under the trespass test. 569 U.S. at 7-9.

As the Idaho Supreme Court accordingly observed, a Fourth Amendment search occurs where two elements are present: (1) a trespass (2) for the purpose of

obtaining information. Pet. App. 10 (quoting *Jones*, 565 U.S. at 404). The court applied that straightforward test to this case. The second prong is undisputed—petitioner concedes that the police dog was "sniffing for potential contraband." Pet. i. Because the police dog physically intruded on the car when he jumped up and stood on the door and window, a search occurred under *Jones*.

Petitioner argues that no trespass occurred because the police dog did not enter the interior of the vehicle. Pet. 16. Petitioner never supported that view of the common law with any historical authorities in the courts below, and does not before this Court either. And this Court's decision in *Jones* itself dispels the argument that a trespass to a vehicle can only be committed by going inside. There, the Court found that police "encroached on a protected area" when they attached a device to the *exterior* of the car. 565 U.S. at 410. As that case makes clear, it is immaterial whether a physical intrusion is on the exterior or interior of a vehicle—both are constitutionally protected space. And *Jardines*, too, corroborates the point: there, a trespass occurred even though police never entered the house. The fact that the police and police dog "firmly planted" their feet on a constitutionally protected area meant that they had trespassed. *Jardines*, 569 U.S. at 8. Accordingly, the sole question in assessing a trespass in the present case is whether the dog's contact with respondent's vehicle is the sort of heightened contact that amounts to common-law trespass.

Perhaps recognizing that its exterior-only argument is contrary to *Jones*, petitioner attempts to draw a line between "mere cursory touching" and "occupation of

property." Pet. 7, 15-16. But, as already explained, this argument doesn't even reflect a disagreement with the test applied by the Idaho Supreme Court, which similarly held that "some contact to the exterior surface of a chattel in every-day type commotions will be insufficient." Pet. App. 20. Petitioner merely disagrees with the application of that test to this particular dog. But, as the Idaho Supreme Court amply explained after review of common-law authorities and the particular facts in this case, the police dog here did in fact make a trespassory contact when he "jumped up onto the door, and planted his two front paws on the door (and then the window) as he sniffed the upper seams of the vehicle." Pet. App. 24.

2. Petitioner also recapitulates the same argument it made in *Howard*, 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. Pet. 22. But, as explained in respondent's brief in opposition in *Howard*, the motivation of the dog, instinctual or otherwise, is irrelevant. *Howard* BIO at 12-14.

For one, it is unclear what "instinctive" even means in this context. There is nothing innate about a dog seeking out drugs. There is also no support for the "instinctive actions of dogs" test in *Jones* or *Jardines*. Petitioner relies on this Court's holding that "the accidental effects of otherwise lawful government conduct" do not implicate the Fourth Amendment. Pet. 21 (quoting *Brower v. Cnty. of Inyo*, 489 U.S.

593, 596 (1989)). But there is nothing "accidental" about deploying a trained narcotics dog to sniff a vehicle for contraband.

Petitioner's suggested test would undermine the efficacy of the property-based approach, which—properly applied—"keeps easy cases easy." *Jardines*, 569 U.S. at 11. Petitioner would depart from this straightforward test by requiring arbitrary distinctions between one side of a chattel's surface and the other, or a subjective inquiry into the motivation of dogs. There is no basis to add this to *Jones*'s clear test.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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