No. 22-1226

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**

**REPLY BRIEF**

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## REPLY BRIEF

This case presents two issues of national importance regarding whether a drug dog violates the Fourth Amendment by briefly touching a car while conducting a free-air sniff. First, it allows this Court to address the scope of the "physical intrusion of a constitutionally protected area" search standard of the Fourth Amendment for the first time since 2013. Second, it presents the question of whether a dog that touches a car in the instinctive act of following an odor to its source has acted as an agent of the state such that any resulting search was the product of deliberate government action.

### 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.

This Court has found a Fourth Amendment violation under a property theory only where there is a physical intrusion into or occupation of a constitutionally protected area. *Florida v. Jardines*, 569 U.S. 1 (2013); *United States v. Jones*, 565 U.S. 400 (2012). By adopting an "intermeddling" test found in neither *Jones* nor *Jardines*, the Supreme Court of Idaho decided an important question under the Fourth Amendment that

conflicts with relevant decisions of this Court. (Pet. 9–17.) First, finding a violation by merely touching the exterior of a chattel while seeking evidence is contrary to the physical intrusion standard set forth by this Court. (Pet. 9–16.) 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. (Pet. 13, 16.)

Dorff responds by arguing that the law is already settled and that the Petition merely requests an application of "settled legal principles to facts." (Resp. 9–11, 13–15.) This is not so. The Idaho Supreme Court held that "intermeddling" with an effect in a manner calculated to gather information was a search. (App. 16–22.) The test articulated in *Jones* and *Jardines*, however, is not "intermeddling," but is "physical intrusion of a constitutionally protected area in order to obtain information." *Jones*, 565 U.S. at 407 (quotation marks omitted). *See also Jardines*, 569 U.S. at 5. Far from a "settled legal principle[]," whether "intermeddling" is compatible with the physical intrusion standard employed by this Court is an important question under the Fourth Amendment.

Dorff also argues it is "not even clear" what difference exists between the Idaho Supreme Court's "intermeddling" standard and this Court's physical intrusion of a constitutionally protected area standard, and therefore Petitioner "simply disagrees with the Idaho Supreme Court's application of that test to the particular facts of this case." (Resp. 10–11.) This is

inaccurate. Unlike attaching a device to monitor a suspect's movements for 28 days, *Jones*, 565 U.S. at 404–05, or intruding upon the curtilage to learn information from the highly protected home, *Jardines*, 569 U.S. at 5–6, brief contact with the outside of a container, including an automobile, is not a "physical intrusion of a constitutionally protected area." *Jardines*, 569 U.S. at 5; *Jones*, 565 U.S. at 407. The Idaho Supreme Court's conclusion that the Fourth Amendment protects "effects" from "intermeddling" is not the legal standard articulated by this Court and is incompatible with that standard.

### 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.

Federal circuit courts of appeals are split as to whether touching the exterior of an effect is sufficient to fall within the intrusion into or occupation of search standard articulated in *Jones* and *Jardines*, with some holding it is and some holding it is not. (Pet. 17–20.) Such a conflict merits review by this Court. (Id.)

Arguing otherwise, Dorff first argues there is no split in authority because not all the cases address traffic stops and those addressing touching of chattels held only that "once police lawfully possess an item, they cannot further intrude on any property rights." (Resp. 7–9.) This argument fails because the Idaho Supreme Court's analysis is fundamentally at odds with

the analysis of cases holding that manipulation of a seized chattel is not a search.

It is beyond cavil that even effects lawfully seized may be unlawfully searched. *See*, *e.g.*, *Riley v. California*, 573 U.S. 373 (2014). Ultimately, the question of whether the lawfully seized key fob in *United States v. Cowan*, 674 F.3d 947, 956 (8th Cir. 2012), the lawfully seized clothing in *United States v. Davis*, 690 F.3d 226, 241 n.23 (4th Cir. 2012), and the lawfully seized credit, debit, and gift cards in *United States v. Bah*, 794 F.3d 617, 629–30 (6th Cir. 2015), were subjected to a search when they were touched to obtain information are analytically no different than the lawfully seized car in this case. *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)). The analysis of the Idaho Supreme Court did not hinge on what property rights Dorff retained in the car during the traffic stop. The standard it articulated is fundamentally incompatible with the analysis and conclusions of the courts in *Cowan*, *Davis*, *Bah*, and *DE L'Isle*.

## II. Certiorari is Warranted on Whether a Drug 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.

This Court has consistently held that the Fourth Amendment protects against intentional conduct by a government agent. (Pet. 20–22.) It has never addressed the question of whether the actions of a drug-detection dog, acting instinctively and without direction from the officer, are attributable to the government the same way the actions of its agents are. (Id.) The Idaho Supreme Court's determination that the government is responsible for the intrusions of its drug-detection dogs regardless of the handling officer's actions is a decision on an important Fourth Amendment question either in conflict with this Court's precedents or one that has not been, but should be, settled by this Court. (Id.)

Dorff challenges this assertion by contending that the drug-detection dog "complied with" the handling officer's instructions, "including jumping onto the driver side of the vehicle" and that the "petitioner's concern" with instinctual acts of the dog being attributed to the government "is not implicated by the record." (Resp. 1, 11.) The portion of the Idaho Supreme Court's decision he cites, however, does not support that claim. Although the Idaho Supreme Court determined that the officer made "upward gestures" indicating areas for the dog to sniff, it did not find that the

officer directed the dog to touch the car. (Pet. App. 3.) Importantly, the trial court (which made the relevant factual findings) rejected the claim that the dog was responding to the officer's actions, finding instead that the dog was reacting to the odor of a controlled substance. (Pet. App. 44–45.) Specifically, the trial court found that dog had detected an odor and followed it to the door where he jumped up "as the officer raises his arms," but in response to the odor, not the officer's actions. (Id.)

Ultimately, the Idaho Supreme Court held that whether the "trespass is committed by a drug dog—and not its handler—is of no import" because an officer "is answerable for not only his own trespass, but that of his [animal] also." (Pet. App. 17 (quotation marks omitted).) Thus, for Fourth Amendment purposes, a drug-detection dog is a state "actor." (Pet. App. 16–17.) Moreover, one justice rejected this reasoning and "reiterat[ed]" his view that "a dog's instinctual acts do not violate the Fourth Amendment." (Pet. App. 33.) Dorff's claim that there is a factual finding precluding this Court's review of this issue, and especially his claim that the Petitioner does not dispute whether the officer directed the dog to contact the car, is without merit.

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

The majority of courts to address the question have found that a drug-detection dog's instinctive and

undirected conduct is not attributable to the government for purposes of the Fourth Amendment. (Pet. 22–25.) The Idaho Supreme Court recently joined the minority of courts holding otherwise. (Id. 25–27; *see* Pet. App. 33–34 (Bevan, C.J., dissenting on same grounds as in prior decisions of the Idaho Supreme Court and concluding that "a dog's instinctual acts do not violate the Fourth Amendment").) In doing so, the Idaho Supreme Court decided an important federal question in a way that conflicts with decisions of other state courts of last resort and of United States circuit courts of appeals.

Dorff responds that there "is no conflict of authority" because the cited cases holding that the instinctive and undirected actions of a drug-detection dog are not attributable to the government for Fourth Amendment purposes all did so under the expectation of privacy standard and not the physical intrusion or occupation standard of *Jones* and *Jardines*. (Resp. 5–6.) This response, to the extent it is accurate, fundamentally misunderstands the Petitioner's argument, and the analysis of the cited cases, which is that *even if there was a search*, it is not attributable to the government if it was not the product of its agents, the police. What theory is applied to the initial question of whether there was a search is irrelevant to this issue.

### C. That the Actions of the Drug-Detection Dog are Attributable to the Government for Fourth Amendment Purposes was Directly Decided by the Idaho Supreme Court.

Dorff argues the State did not "preserve" the issue of whether the dog's instinctive and undirected behavior was attributable to the government by arguing it to the lower courts. (Resp. 12–13.) This argument fails for two reasons.

First, Dorff's proposed preservation standard is without merit. The Idaho Supreme Court held that actions of a drug dog were attributable to the government under the Fourth Amendment in *State v. Randall*, 496 P.3d 844 (Idaho 2021), and *State v. Howard*, 496 P.3d 865 (Idaho 2021). (*See also* Pet. App. 2, 7, 24.) Thus, when this case was argued to the Idaho Supreme Court, the issue was already decided. Asking the court to reverse its recent precedent would have been an effort in futility. More importantly, requiring such an argument as a prerequisite to a grant of certiorari would effectively preclude a viable petition in almost any case other than the initial case deciding the issue in any particular jurisdiction.

Second, although the State did not request the Idaho Supreme Court to revisit its *Randall* and *Howard* decisions in this case, those decisions were front and center in that court's analysis. The majority specifically invoked its holding from *Howard*: "And as we have said before, '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. 24 (*quoting Howard*, 496 P.3d at 868).) In addition, one dissenting Justice would have affirmed on this basis. (Pet. App. 33 (Bevan, C.J., dissenting, "I write separately to reiterate my view that a dog's instinctual acts do not violate the Fourth Amendment.").) That the majority relied heavily on the Idaho court's prior decisions that acts of drug-detection dogs are attributable to law enforcement while one of the dissenting justices would have reached a different result based specifically on his disagreement on that point demonstrates that the issue is properly presented to this Court.

* * *

This Court should grant the instant petition to address one or both of two important 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 narcotics-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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