No. _____

In the

Supreme Court of the United States

CHRISTOPHER MARCEL ESQUEDA, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

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Question Presented

When an individual invites an undercover agent into their residence, can the agent secretly record without a warrant, or does such conduct exceed the agent's implicit license and constitute a Fourth Amendment search under this Court's decision in *Florida v. Jardines*, 569 U.S. 1 (2013)?

Statement of Related Proceedings

- *United States v. Christopher Marcel Esqueda*,
  Case No. 8:20-cr-00155-JFW-2 (C.D. Cal.)

- *United States v. Christopher Marcel Esqueda*,
  Case No. 22-50170 (9th Cir.)

Table of Contents

Page(s)

Table of Appendices

Table of Authorities

Page(s)

Federal Cases

State Cases

Federal Statutes

Constitutional Provisions

Petition for a Writ of Certiorari

Christopher Marcel Esqueda petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The Ninth Circuit's opinion (App. 1a–22a) [1] is reported at 88 F.4th 818. The United States District Court for the Central District of California made no relevant written ruling; its oral ruling is included in the transcript in the Appendix at App. 23a-44a.

Jurisdiction

The Ninth Circuit filed its opinion on December 12, 2023. App 1a. Petitioner filed a timely petition for rehearing, which the Ninth Circuit denied on March 20, 2024. App. 45a. This petition is filed within 90 days of the Ninth Circuit's final judgment.

This Court has jurisdiction under 28 U.S.C. § 1254(1). The district court had jurisdiction under 18 U.S.C. § 3231, and the Ninth Circuit had jurisdiction under 28 U.S.C. § 1291.

[1] "App. xx" refers to a page in the attached Appendix.

Constitutional Provision Involved

United States Constitution, Amendment IV, states:

> 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.

Introduction

All persons have the right to control what guests may do within their homes, whether those guests are private individuals or government actors. In *Florida v. Jardines*, this Court reaffirmed this fundamental principle, holding that law enforcement officers violate the Fourth Amendment when they enter the curtilage of a home "to engage in conduct not explicitly or implicitly permitted by the homeowner." 569 U.S. 1, 6 (2013). This was not because of a reasonable expectation of privacy, *see Katz v. United States*, 389 U.S. 347 (1967), but because of the right to set the terms of the government's physical intrusion onto one's property. Thus, absent a warrant or other circumstance permitting a warrantless search, an officer's conduct within a residence is strictly bounded by the resident's consent. And given that the boundaries of consent are often implicit, *Jardines* directs courts to rely on prevailing social norms and common-law trespass doctrine to delineate those limits.

This case presents an exceptionally important question that follows logically from *Jardines*: Did Petitioner Christopher Marcel Esqueda implicitly permit undercover agents to secretly record him within his home simply by inviting them inside? Under *Jardines*, the answer is clearly no. An invitation into a home—whether for a casual dinner, an intimate encounter, or even to engage in suspect activities—does not include consent to covertly record once

inside. Thus, courts have long recognized trespass claims against individuals (such as undercover journalists) who exceed the scope of their invitation to enter a property by secretly recording once inside.

In its published opinion, the Ninth Circuit completely bypassed the *Jardines* test. Instead, the court relied on pre-*Jardines* cases to frame its decision, despite explicitly acknowledging that these cases did not apply the *Jardines* analysis. App. 21a n.8. It did so even though the government had conceded that these cases did not control the outcome under *Jardines*. *See* Brief for the United States, *United States v. Esqueda*, No. 22-50170, at 13 n.2 (9th Cir. Apr. 24, 2023). In fact, to date, this Court has *never* applied a property-based test to uphold warrantless secret recordings in the home. Left uncorrected, the Ninth Circuit's decision not only undermines the property-based framework this Court reaffirmed in *Jardines* but also severely threatens the rights of Americans to control what takes place in their homes.

That does not mean that the government lacks the ability to investigate, secretly record, and apprehend criminals. Our system allows for the swift issuance of warrants by neutral magistrates upon a showing of probable cause. This safeguard ensures that the exercise of such invasive powers is justified and limited. The Ninth Circuit's decision circumvents this judicial oversight and places immense power in the hands of informants and their handlers, a situation fraught with potential for misuse. As Justice Brandeis presciently

warned one century ago, "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent." *Chandler v. Miller*, 520 U.S. 305, 322 (1997) (quoting *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)). Absent this Court's intervention, however, innocent individuals who have done nothing wrong are left unprotected, without recourse, and exposed to invasive government actions, unsure if their property rights, as secured by the Fourth Amendment, will be protected from unwarranted intrusion.

The Ninth Circuit's opinion conflicts with this Court's binding precedent, threatens the fundamental property rights of Americans, and leaves them unprotected from unwarranted government intrusion. This Court should grant Esqueda's petition.

Statement

1. In January 2020, Esqueda resided in a motel room at the Valencia Inn in Anaheim, California. App. 6a. Undercover agents investigating Esqueda's codefendant, Daniel Alvarado, arranged to meet Alvarado to purchase firearms and methamphetamine. *Id.* Alvarado directed the agents to Esqueda's motel room and let them inside. *Id.* During the visit, Alvarado sold methamphetamine and a pistol to the agents and asked Esqueda to provide another firearm, which he did. *Id.* at 6a–7a. The agents secretly

recorded the transaction, capturing visual and audio evidence. *Id.* at 7a. Esqueda did not consent to any recording, and the government identified him only after leaving the room. *Id.*

2. In October 2020, Esqueda was indicted for possessing a firearm under 18 U.S.C. § 922(g)(1). *Id.* He moved to suppress the recordings, arguing that the secret recordings in his residence exceeded the scope of consent and violated the Fourth Amendment. *Id.* at 7a–8a. The district court denied the motion in an oral ruling. *Id.* at 8a; *id.* at 31a–41a. Esqueda then entered a conditional guilty plea, preserving his right to appeal the district court's denial of his motion to suppress. *Id.* at 8a.

3. Esqueda appealed the issue preserved in his plea agreement—namely, whether the warrantless undercover recordings violated his constitutional rights under the property-based approach to the Fourth Amendment set forth in *Jardines*. *Id.* The Ninth Circuit affirmed in a published opinion, holding that warrantless undercover recordings did not violate the Fourth Amendment. *Id.* at 5a.

4. Esqueda subsequently filed a motion for panel rehearing or rehearing en banc. *Id.* at 45a. On March 20, 2024, the Ninth Circuit denied Esqueda's petition. *Id.*

This petition followed.

Reasons for Granting the Writ

Undercover officers and informants, operating without judicial oversight, enter the homes of thousands, possibly tens of thousands, of Americans nationwide to secretly record their activities, ostensibly to gather evidence of criminal activity. The lack of clear limits or oversight for these actions creates a significant risk of government overreach and casts a chilling pall over free speech and the open exchange of ideas within the supposed sanctuary of one's home.[2] This case thus raises an exceptionally important issue and should be addressed by this Court. Further, the Ninth Circuit's disregard of *Jardines* will contribute to a growing confusion among lower courts about when and how *Jardines*'s property-based test should be applied.

[2] Amici provided various examples of how, historically, religious and political minorities—such as Jewish people during the Cold War and Catholic priests during the Vietnam War—have faced disproportionate, suspicionless government surveillance. *See* Brief for American Civil Liberties Union California Affiliates as Amici Curiae Supporting Petitioner, at 12, *Esqueda*, No. 22-50170 (9th Cir. Feb. 14, 2023). Although people inevitably accept some risk that their misplaced confidences might be relayed to others, few would engage openly if aware that their every word, inflection, intonation, laugh, or crude remark within the home could be secretly recorded and published without a warrant or consent. Just because we forfeit a *privacy* right to the things we utter to another, *Jardines* reminds us that Americans do not necessarily relinquish their *property-based* constitutional right to control what others do in their homes. *Jardines*, 569 U.S. at 11 ("[A] person's 'Fourth Amendment rights do not rise or fall with the *Katz* formulation.'") (quoting *United States v. Jones*, 565 U.S. 400, 406 (2012)). By ignoring this distinction, the Ninth Circuit has sidelined a crucial constitutional safeguard.

Thus, this Court's intervention is necessary to clarify and enforce the *Jardines* framework.

Because this case affects countless Americans, implicates other important constitutional rights, and involves a decision that conflicts with this Court's binding precedent, this Court should grant the petition. *See* Supreme Court Rule 10(c).

A. Under *Jardines*, law enforcement officers must act within the scope of consent when they enter a home.

Jardines sets forth a clear Fourth Amendment test: when law enforcement officers rely on consent to justify entering an individual's property, their activities must remain within the scope of the consent that was given.

In *Jardines*, this Court held that officers violated the Fourth Amendment when they brought a dog onto the defendant's porch to search for drugs. 569 U.S. at 3–4. The Court explained that once an officer enters a "constitutionally protected area," including a curtilage, the "officer's leave to gather information is sharply circumscribed" by the scope of the resident's consent. *Id.* at 7. Thus, "the only question [was] whether [the defendant] had given his leave (even implicitly) for [the officers to bring their dog onto his curtilage]." *Id.* at 8. To determine the boundaries of consent, this Court looked to the "habits of the country," or "background social norms." *Id.* at 8–9. Such

norms can be identified by asking, "what is typical for a visitor, what might cause alarm to a resident of the premises, what is expected of ordinary visitors, and what would be expected from a reasonably respectful citizen." *Id.* at 8 n.2 (cleaned up).

This Court found that societal norms might implicitly permit someone to knock on a door, wait briefly, and leave. *Id.* at 8. But they do not include bringing a trained police dog onto someone's porch to sniff for drugs—"[t]here is no customary invitation to do *that*." *Id.* at 9. Thus, "by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner," the officers violated the Fourth Amendment. *Id.* at 6. Importantly, it was irrelevant that the officers never strayed beyond the walkway or left their dog unattended, *id.* at 9 n.3, or that the dog could simply smell what one of the officers himself could smell, *see id.* at 18 (Alito, J., dissenting). The critical factor was the home's residents never consented, "even implicitly," to the dog's presence on the property. *Id.* at 8.

B. Surreptitious recordings exceed the implied license afforded to guests in the home.

The undercover agents entering Esqueda's residence were bound by the same principles articulated in *Jardines*. Because their entry was based on consent, what they could do once inside was confined to what Esqueda "explicitly or implicitly" allowed. *See id.* at 6; *see also Whalen v. McMullen*,

907 F.3d 1139, 1147 (9th Cir. 2018) (explaining that an undercover agent cannot "exceed the scope of his invitation while inside the home"). The scope of that permission turns on common-law trespass doctrine and "background social norms." 569 U.S. at 8–9.

Applying that test, it is apparent that covertly videotaping inside a residence is not a "habit of the country," nor is it a widely accepted social norm. *See id.* at 8. To the contrary, courts have long held that an invited guest commits a trespass when he engages in surreptitious recording.[3] Under *Jardines*, that should have been dispositive. Just as one does not implicitly consent to the presence of trained police dogs on their property, *Jardines*, 569

[3] *See, e.g.*, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (holding that although journalists did not trespass by misrepresenting their identities to obtain jobs at a supermarket, they trespassed after they "secretly film[ed] in non-public areas" while inside, and thus committed "an act in excess" of their license); *Planned Parenthood Fed. of Am. v. Newman*, No. 20-16068, 2022 WL 13613963, 24 at *2 (9th Cir. Oct. 21, 2022); *Med. Lab'y Mgmt. Consultants v. Am. Broad. Cos., Inc.*, 30 F. Supp. 2d 1182, 1204 (D. Ariz. 1998), *aff'd*, 306 F.3d 806 (9th Cir. 2002); *Democracy Partners v. Project Veritas Action Fund*, 285 F. Supp. 3d 109, 119 (D.D.C. 2018); *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 214 F. Supp. 3d 808, 834–35 (N.D. Cal. 2016), *aff'd,* 890 F.3d 828 (9th Cir. 2018), *amended,* 897 F.3d 1224 (9th Cir. 2018), and *aff'd,* 735 F. App'x 241 (9th Cir. 2018); *Pitts Sales, Inc. v. King World Prods., Inc.*, 383 F. Supp. 2d 1354, 1364–67 (S.D. Fla. 2005); *Turnbull v. Am. Broad. Cos.*, No. 03-cv-3554-SJO, 2004 WL 2924590, at *15 (C.D. Cal. Aug. 19, 2004); *Hervatin v. Knickerbocker*, No. B130572, 2000 WL 35393280, at *13 (Cal. Ct. App. Aug. 21, 2000); *Special Force Ministries v. WCCO TV*, 584 N.W.2d 789, 792 (Minn. Ct. App. 1998); *Copeland v. Hubbard Broad., Inc.*, 526 N.W.2d 402, 405 (Minn. Ct. App. 1995).

U.S. at 9, neither does one consent to being secretly recorded. "There is no customary invitation to do *that*." *See id.*

C. The Ninth Circuit disregarded *Jardines*'s property-based test, and, in doing so, will create serious confusion among the lower courts about when that test must be applied.

The Ninth Circuit failed to apply the test set forth in *Jardines*. The court did not claim that it would be "customary, usual, reasonable, respectful, ordinary, typical, nonalarming, etc.," for a guest to secretly record within a home. *See id.* at 8 n.2. Instead, it bypassed the question by making two critical errors. First, the Ninth Circuit wrongly suggested that Esqueda's "express" consent to entry distinguished his case from the "implicit" consent at issue in *Jardines*. App. 15a–16a, 21a–22a. And second, the Ninth Circuit incorrectly believed that it was bound by the pre-*Jardines* rulings in *On Lee v. United States*, 343 U.S. 747 (1952), and *Lopez v. United States*, 373 U.S. 427 (1963), even though these decisions did not involve recordings in a residential setting and were decided under a different legal framework. App. 16a–22a.

1. False distinction between express and implied consent

The Ninth Circuit suggested that Esqueda's case differed from *Jardines* because he provided "express consent" for the agents to enter his residence, whereas the officers in *Jardines* "had *no* consent—either express or implied—to snoop about the homeowner's front porch." *Id.* at 15a (cleaned up). That is

a false distinction. The undercover agents here also had "*no* consent—either express or implied" to do what they ultimately did: secretly record Esqueda in his residence. *See id.* They were authorized to enter his room for the sole purpose of purchasing contraband and to leave promptly thereafter. That was the scope of consent given.

In reasoning otherwise, the court overlooked a key point in *Jardines*: the officers in that case *did* have consent to enter the curtilage, knock on the door, and wait briefly to be received. 569 U.S. at 8. The issue was not that they had no license to be on the property but that they overstepped that license by bringing a dog to sniff for drugs. *Id.* at 9. *Jardines* therefore did not turn on whether a person gave "consent to snoop" but whether the snooping exceeded the boundaries of the pre-existing implied consent to enter the premises for a limited purpose. *Id.* (explaining that "[a]n invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker").

The Ninth Circuit's related assertion—that *Jardines* was "primarily concerned with the scope of an *implicitly* licensed physical intrusion," rather than an expressly licensed one—is also incorrect. App. 16a. *Jardines* never differentiated between express and implied consent; rather, it treated the two as functionally equivalent. *See Jardines*, 569 U.S. at 9 ("The scope of a license—express *or* implied—is limited not only to a particular area but also to

a specific purpose.") (emphasis added); *see also id.* (illustrating limitations of express consent during a traffic stop).

Troublingly, the Ninth Circuit's reasoning suggests that express consent to entry can be construed to allow more invasive actions than implied consent would permit—a peculiar loophole that even panel members seemed wary of opening.[4] Yet, the Ninth Circuit ultimately delivered an opinion that disregarded these apprehensions.

Finally, the court suggested that, because the agents were invited inside, they merely "discover[ed] information in the course of engaging in . . . permitted conduct." App. 16a (quoting *Jardines*, 569 U.S. at 9 n.4). That isn't true; the agents didn't simply "engag[e] in . . . permitted conduct." Rather, by secretly recording Esqueda, they acted beyond the scope of their invitation. This mirrors *Jardines*'s hypothetical where an officer who, after stepping into the curtilage, uses binoculars to "peer into the house." *Jardines*, 569 U.S. at 9 n.3. Although the officer has implied license to approach the door, the officer's

[4] During oral argument, Judge Johnstone posited the consequences of such a distinction: just because a person invites undercover agents inside, does that mean they can hide *any* information-gathering tool on their body, like a "mechanical sniffer" or even a "small puppy"? *Esqueda*, No. 22-50170, Oral Argument at 24:55–25:18; 26:28–26:40 (9th Cir. Oct. 16, 2023), available at https://www.youtube.com/watch?v=84wYX1ij510. The government responded that such situations would merit a privacy rather than trespass analysis, prompting Judge Johnstone to remark, "There goes *Jardines*, right?" with Judge Christen echoing his skepticism. *Id.* at 26:40–26:55.

use of that license to capture information in a way that exceeds the homeowner's implied consent violates the Fourth Amendment. *See id.* That is because, under *Jardines*, it is the nature of the officers' conduct that determines whether a search occurred, not just the crossing of a physical boundary itself. *Id.*

2. *On Lee* and *Lopez* are inapplicable.

The Ninth Circuit erroneously held that this Court's decisions in *On Lee* and *Lopez* "foreclosed" Esqueda's Fourth Amendment challenge because, as pre-*Katz* cases, they supposedly "applied the same property-based framework that *Jardines* applied." App. 18a. Yet, in a footnote at the end of the opinion, the Ninth Circuit acknowledged that this wasn't true—the frameworks are *not* the same. *Id.* at 21a n.8 ("We recognize that *On Lee* and *Lopez* did not expressly evaluate the 'habits of the country' with respect to secret recording in undercover investigations, a fact which *Jardines* suggests is relevant to the Fourth Amendment search inquiry in certain cases.") (quoting *Jardines*, 569 U.S. at 8). In fact, not even the government advanced this theory; instead, it correctly conceded that neither *On Lee* nor *Lopez* "control [Esqueda's] argument under a physical intrusion theory." Brief for the United States, *Esqueda*, No. 22-50170, at 13 n.2.

Both *On Lee* and *Lopez* focused on legal questions and environments distinct from Esqueda's case, and neither had the benefit of *Jardines*, which establishes the current law on consent in relation to Fourth Amendment property rights. *On Lee* involved a laundromat owner who did not know that his conversation with an informant was being secretly transmitted to a government agent. 343 U.S. at 749. The conversation occurred in the public area of the defendant's business, "as customers came and went"—a scenario far removed from secret recording in a residence. *See id.*; *see also Jardines*, 569 U.S. at 6 ("[W]hen it comes to the Fourth Amendment, the home is first among equals."). The Court did not analyze the "scope of consent" or whether social norms permitted such recordings;[5] in fact, the defendant never raised the issue or anything even resembling it.[6]

[5] *On Lee* is also distinguishable for other reasons. Some lower courts have held that the *Jardines* test does not apply to businesses because, unlike homes, they are not specifically enumerated in the Fourth Amendment's plain text. *See Patel v. City of Montclair*, 798 F.3d 895, 898 (9th Cir. 2015) (holding that publicly accessible areas of a motel do not receive a property-based analysis because they are not "one of the enumerated areas of the Fourth Amendment").

[6] The defendant instead argued that because the informant violated the Federal Communications Act by secretly transmitting their conversation to another, he vitiated his consent to entry under a civil doctrine called "trespass ab initio." *Id.* at 752. This Court declined to adopt that doctrine, which is wholly unrelated to the issue presented here.

Lopez similarly does not apply here. There, an IRS agent recorded conversations in the defendant's office while pretending to be interested in accepting bribes from the defendant. 373 U.S. at 429–32. The defendant sought to suppress the recordings, arguing that the agent "gained access to [the defendant's] office by misrepresentation" and thus "illegally 'seized'" the conversation between them. *Id.* at 437. Unlike Esqueda's challenge, the defendant in *Lopez* did not argue that he had been "searched" because the agent exceeded the scope of consent by secretly recording them. He simply argued that the agent's initial misrepresentation to gain entry violated the Fourth Amendment, an issue not raised here.

In *Lopez*, much like in *On Lee*, the Court did not apply anything like the property-based, social-norms set forth in *Jardines*. Instead, it concluded that the agent's deceit regarding his willingness to accept a bribe did not make the initial entry, and by extension, the recording, unlawful. *Id.* at 438–39. And critically, although *Lopez* predates *Katz* by four years, its analysis involved a privacy, rather than property-based, analysis: Not only did the Court use the term "privacy" expressly in holding that the recording was not unlawful, it also used a *Katz*-like, assumption-of-risk rationale. *Id.* (explaining the defendant "*knew full well* [his statements] could be used against him") (emphasis added). Indeed, this Court has since treated *Lopez* as having been decided under a *Katz* analysis. *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (citing *Lopez* for the

proposition that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties").[7]

To be clear, this Court has *never* applied a property-based framework to uphold secret recording within the sanctity of a home. Notably, even *On Lee* and *Lopez*, which involved recordings in business environments rather than homes, resulted in sharply divided opinions and substantial dissents that questioned the constitutional foundations of such surveillance. *See On Lee*, 343 U.S. at 758 (Frankfurter, J., dissenting) ("The law of this Court ought not to be open to the just charge of having been dictated by the 'odious doctrine,' as Mr. Justice Brandeis called it, that the end justifies reprehensible means."); *id.* at 762–63 (Douglas, J., dissenting) (admitting that it was "wrong" for him, in a prior case, not to overrule prior precedent upholding wiretapping and lamenting the "progress of science in furnishing the government with [newer] means of espionage"); *id.* at 765 (Burton, J., joined by Frankfurter, J., dissenting) (finding no difference between bringing a concealed radio to surreptitiously transmit a conversation and bringing the agent himself onto the premises); *Lopez*, 373 U.S. at 449 (Brennan, J., joined by Douglas,

[7] Further, as in *On Lee*, *Lopez* is distinguishable because the recordings did not take place in a residence, but in an office, to which *Jardines*'s property-based, social-norms test may not apply. 373 U.S. at 438; *see* note 5, *supra*.

Goldberg, JJ., dissenting) ("[I]f a person communicates his secret thoughts verbally to another, that is no license for the police to record the words.").[8]

3. The Ninth Circuit's remaining reasoning is incorrect.

The Ninth Circuit cited additional reasons to avoid finding a Fourth Amendment violation, but none are persuasive. For example, the court asserted that the recordings merely "capture[d] only what [the agent could] see and hear by virtue of that consented entry." App. 22a. Even if true, that fact would be irrelevant. In *Jardines*, one of the officers could plainly smell what

[8] The only time this Court addressed undercover recordings in the home was in *United States v. White*, 401 U.S. 745 (1971) (plurality opinion), shortly after *Katz* was decided. Though upholding the practice under a *Katz* framework, no opinion garnered a majority, and four justices severely criticized the practice. *See id.* at 755 (Brennan, J., concurring) ("[C]urrent Fourth Amendment jurisprudence interposes a warrant requirement not only in cases of third-party electronic monitoring (the situation in *On Lee* and in this case) but also in cases of electronic recording by a government agent of a face-to-face conversation with a criminal suspect, which was the situation in *Lopez*."); *id.* at 764 (Douglas, J., dissenting) ("[M]ust everyone live in fear that every word he speaks may be transmitted or recorded and later repeated to the entire world?") (footnote omitted); *id.* at 790 (Harlan, J., dissenting) ("I think it must be held that third-party electronic monitoring, subject only to the self-restraint of law enforcement officials, has no place in our society."); *id.* at 795 (Marshall, J., dissenting) ("I am convinced that the correct view of the Fourth Amendment in the area of electronic surveillance is one that brings the safeguards of the warrant requirement to bear on the investigatory activity involved in this case."). Crucially, none of the opinions used a property-based test akin to the one in *Jardines*. Thus, *White* does not address or foreclose the issue here. *See Jardines*, 569 U.S. at 11 ("[A] person's 'Fourth Amendment rights do not rise or fall with the *Katz* formulation.'") (quoting *Jones*, 565 U.S. at 406).

the dog smelled, but that did not alter the outcome. *See Jardines*, 569 U.S. at 18 (Alito, J., dissenting) (explaining that one officer "notice[d] th[e] smell [of marijuana] and was able to identify it"). That is because the act of bringing the dog, by itself, exceeded the homeowner's implied consent and thus violated the Fourth Amendment. *See id.* at 8–9.

Second, the Ninth Circuit reasoned that no Fourth Amendment violation occurred because the agents "stayed within the physical confines of Esqueda's express consent" and did not leave their recording devices behind. App. 14a. But such restraint didn't matter in *Jardines*: the officers there also stayed on the walkway, never roved into the backyard or garden, and did not leave their dog behind. 569 U.S. at 9 n.3; *see also id.* at 19 (Alito, J., dissenting). As this Court emphasized, it is the aberrational *conduct* within the premises that determines whether a search has occurred, not just whether the officers stayed on the "base-path." *See id.* at 9 & n.3 (examining whether there was a "customary invitation to *do*" what the officers did, not just to *go* where they went) (emphasis added). It is for that reason that an officer who lawfully enters the curtilage but then uses binoculars to peer into the home conducts an unlawful Fourth Amendment search. *See id.* The Ninth Circuit's insistence that Esqueda "voluntarily showed" the agents incriminating evidence within his residence is therefore beside the point. App. 14a. While he may have

forfeited a privacy expectation in the information itself, he did not forfeit his right to prevent the agents from engaging in unauthorized recording.[9]

Conclusion

For the foregoing reasons, Esqueda respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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DATED: June 17, 2024

By: _____
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[9] The Seventh Circuit also addressed the use of secret recordings in the home by undercover agents and, like the Ninth Circuit here, also failed to apply *Jardines*'s property-based test. *See United States v. Thompson*, 811 F.3d 944 (7th Cir. 2016). The court's analysis was largely conclusory, holding that because the officers were "lawfully entitled" to be in the defendant's home, they did not "vitiate consent" by secretly recording the defendant. *Id.* at 949. The court never addressed whether the agents acted outside their license, however, by addressing prevailing social norms or common-law trespass doctrine. While the Ninth Circuit reached a similar conclusion, even it did not rely on *Thompson* but merely noted in a footnote that their outcomes were "in accord." *See* App. 22a n.9.