No. 21-975

IN THE
Supreme Court of the United States

IDAHO,

Petitioner,

v.

AARON JAMES HOWARD,

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 intrudes "into the interior space of a car during a drug sniff, without express or implied consent to do so" 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 March 2019, police officers pulled respondent over for a traffic violation and arrested him based on an outstanding warrant. Pet. App. 2. Officers then called for and deployed a narcotics dog to detect whether there were drugs in respondent's car. *Id.* After the deploying officer said, "show me," the dog jumped onto the car door and stuck his nose into the car's window. Pet. App. 8, 44-45. The dog then indicated the presence of narcotics and, based on that signal, officers searched the vehicle and found drugs. Pet. App. 2.[1]

2. Petitioner charged respondent and respondent moved to suppress the evidence seized from his car. In particular, respondent argued that the police dog's unauthorized physical intrusion into his car was an unlawful search under the trespass test that this Court revived in *United States v. Jones*, 565 U.S. 400 (2012), and *Florida v. Jardines*, 569 U.S. 1 (2013). *See* Pet. App. 35-41.

The trial court concluded that it was bound to reject respondent's trespass argument under state intermediate appellate precedent. *See* Pet. App. 20, 23-24 (citing *State v. Naranjo*, 359 P.3d 1055 (Idaho Ct. App. 2015)). The court noted an incongruity "with the idea that an officer, without finding something in plain view, cannot stick his or her head or hand in the car but a police dog can stick their nose in." Pet.

[1] Before the courts below, petitioner argued that the dog indicated the presence of narcotics before his physical intrusion into the car. The Supreme Court of Idaho rejected that argument, Pet. App. 12-13, and petitioner has abandoned it before this Court.

App. 23. It explained, however, that respondent's trespass argument was "for another day and for another court, as this Court is bound by the Court of Appeals' ruling." *Id.*

Respondent entered a conditional guilty plea, reserving the right to appeal the denial of his suppression motion. Pet. App. 3.

3. Respondent appealed to the Supreme Court of Idaho, reiterating his argument that "the intrusion of the dog into the physical space of the car was a trespass, and therefore, an unlawful search under the common law trespassory test articulated in" *Jones* and *Jardines*. Pet. App. 1-2.

The Supreme Court of Idaho agreed with respondent. *Id.* It concluded that the intermediate appellate precedent relied upon by petitioner and the district court was "inconsistent with" the property-based approach articulated in *Jones* and *Jardines*. Pet. App. 5. The Idaho Supreme Court held that "when a law enforcement drug dog intrudes, to any degree, into the interior space of a car during a drug sniff, without express or implied consent to do so, a search has occurred under the Fourth Amendment." Pet. App. 7. The court explained that "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. 5. Moreover, "by simply adhering to the *Jones* test as it is formulated, courts, law enforcement, and the public benefit from the clarity of a bright line rule for determining when a non-search exterior sniff becomes a search." Pet. App. 7. Because here "the drug dog entered the car during a

sniff, an activity that is self-evidently conducted for the purpose of obtaining information," it was a search under *Jones*. Pet. App. 5.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Of Authority.

Petitioner claims the Court should grant certiorari because the Idaho Supreme Court's decision "conflicts with the majority of courts to consider the question." Pet. 10. That is not a credible description of the lower courts.

As petitioner observes, respondent's argument throughout these proceedings was that the physical intrusion into his vehicle was a 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), *see* Pet. 2-3, and the trespass test was the sole basis for the Idaho Supreme Court's conclusion that a search occurred. *See* Pet. 5-7, 20 (acknowledging that the Idaho's Supreme Court's decision "centrally relied" on *Jones* and *Jardines*). Despite claiming a "split of authority" on this issue, the petition does not identify *a single case in any federal circuit or state high court* that analyzed the lawfulness of a dog's physical intrusion into a car under *Jones* or *Jardines*. Not one of the federal circuit cases cited even purported to analyze whether a search occurred under the trespass test. And the one state high court decision that considered the trespass test did so in the context of a consensual search of a home.

According to petitioner, the Third, Sixth, Seventh and Tenth Circuits have reached decisions that conflict with the conclusion below. Pet. 11. But none of the

cases cited in the petition even mentioned *Jones* or *Jardines*, let alone applied the trespass test in a manner that conflicts with the Idaho Supreme Court's analysis in this case:

- Petitioner's Third Circuit case preceded *Jones* by two years (and *Jardines* by three years), and it never considered the trespass test. *See* Pet. 11 (citing *United States v. Pierce*, 622 F.3d 209, 214-15 (3rd Cir. 2010)). And, just as the Idaho Supreme Court did in this case, the Third Circuit has since been clear about the need to reconsider its earlier precedents in light of *Jones*. *United States v. Katzin*, 769 F.3d 163, 181 (3d Cir. 2014) (explaining that "*Jones* fundamentally altered this legal landscape").
- Petitioner's Sixth Circuit case came out a few months after *Jones* and before *Jardines*, and it never considered any argument under the trespass test. *See* Pet. 11 (citing *United States v. Sharp*, 689 F.3d 616, 617 (6th Cir. 2012)).
- Petitioner's Seventh Circuit case similarly never considered any argument under the property-based approach and relied exclusively on pre-*Jones* caselaw. *See* Pet. 11 (citing *United States v. Guidry*, 817 F.3d 997, 1006 (7th Cir. 2016)). And, just like the Idaho Supreme Court did here, the Seventh Circuit has frequently reconsidered its earlier precedents in light of *Jones* and *Jardines*. *See United States v. Gutierrez*, 760 F.3d 750, 755-56 (7th Cir. 2014) (holding that an earlier decision "is no longer good law" following *Jardines*); *United States v. Sweeney*, 821 F.3d 893, 898-99 (7th Cir. 2016)

(recognizing the same "based on the intervening Supreme Court decision in *Jardines*").

- Petitioner cites two Tenth Circuit cases that preceded *Jones* by three and 23 years, respectively. *See* Pet. 11 (citing *United States v. Vazquez*, 555 F.3d 923, 930 (10th Cir. 2009); *United States v. Stone*, 866 F.2d 359, 364 (10th Cir. 1989)). And the Tenth Circuit has, too, recognized the need to reconsider such earlier precedents in light of *Jones* and *Jardines*. *See United States v. Ponce*, 734 F.3d 1225, 1227-28 (10th Cir. 2013) ("We think that the Supreme Court's recent decision in [*Jardines*], which the Supreme Court issued almost two years after this dog sniff occurred, may call into question the application of some of our precedent that touches on this issue."); *cf. United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016) (Gorsuch, J.) ("Given the uncertain status of *Jacobsen* after *Jones*, we cannot see how we might ignore *Jones*'s potential impact on our case.").

Petitioner otherwise offers two unpublished cases from the Fifth and Eleventh Circuits, Pet. 12, but neither of those conflicts with the decision below, either. Like the other circuits, both the Fifth and Eleventh Circuit decisions never considered the trespass test, *see United States v. Shen*, 749 Fed. App'x 256 (5th Cir. 2018); *United States v. Mostowicz*, 471 F. App'x 887 (11th Cir. 2012), and the Fifth Circuit has—in

published opinions—"recognized *Jones* as a sea change." *United States v. Richmond*, 915 F.3d 352, 357 (5th Cir. 2019) (internal citation omitted) (collecting cases).[2]

Petitioner's only case analyzing a search under *Jones* and *Jardines* did not involve even remotely similar circumstances. In *State v. Miller*, 766 S.E.2d 289 (N.C. 2014), the North Carolina Supreme Court considered a dog sniff that occurred during the consensual search of a home following a suspected burglary. *Id.* at 290. After rushing to the home, police discovered a broken window and feared an intruder was present in the home. *Id.* The defendant's mother "gave [police] the key, as well as permission to search the premises." *Id.* The police "began the search by deploying [the dog] inside the house." *Id.* While sniffing for intruders inside the home, the dog incidentally discovered drugs. *Id.*

On those facts, the North Carolina Supreme Court concluded that law enforcement had not conducted a search under the trespass test because the dog sniff during

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[2] Petitioner's conflict argument is also unpersuasive because, in addition to never even considering the trespass test, the discussion of whether a "search" occurred in these cases was offered as dicta. In particular, those decisions ultimately held that any search could be upheld based on independent probable cause that existed before the dog entered the car. *See, e.g.*, *Pierce*, 622 F.3d at 215 (because dog had "alerted to the outside of the car," officer had probable cause to search interior); *Vasquez*, 555 F.3d at 927, 929-30 (holding that the search could be upheld because the dog "alerted at the car's front and rear bumpers" before it "leapt through the open passenger-side window and alerted in the car's back seat"); *Guidry*, 817 F.3d at 1006 (holding that, in any event, "the officers had probable cause to search the interior because [the dog] indicated that the car contained drugs while sniffing the car's perimeter"); *Shen*, 749 F. App'x 262 (explicitly concluding that the search could be upheld because "there was probable cause to believe the vehicle contained contraband" before the intrusion onto property).

the consensual search was not for the purpose of obtaining information. As the court explained, "[i]mportant . . . in [this] Court's search doctrine is the prerequisite that the State or government actor have as his or her purpose a desire to find something or obtain information." *Id.* at 296. Thus, "[a] trespass . . . is not alone a search unless it is done to obtain information." *Id.* (citing *Jones*, 556 U.S. at 408 n.5). That point was "dispositive," per the North Carolina Supreme Court, because the police sought an intruder, not drugs. *Id.*

Here, on the other hand, it is undisputed that the dog sniff did not take place during a consensual search for intruders, but during a search for drugs—precisely what the North Carolina Supreme Court said had *not* occurred in *Miller*. As the Idaho Supreme Court put it, the dog sniff here was "self-evidently conducted for the purpose of obtaining information." Pet. App. 5.

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

The petition all but concedes the actual decision at issue here is not sufficiently important. Instead, it invents two broader questions, neither of which is actually presented by this case. First, the petition suggests the question presented is whether a dog search that occurs "without any direction, prompting, or facilitation by officers" is a Fourth Amendment search. Pet. i. But that is not a question posed by this case and certainly not anything that the Supreme Court of Idaho credited in this case—as the officer's own testimony and the state's own briefing make clear, the dog's conduct in question was in response to a "direction" or "prompt" from the officer. Pet. App. 8-

11, 44-45. Second, the petition tries to make the question presented about whether a search occurs when a police dog merely "briefly touches" a vehicle. But the Supreme Court of Idaho did not decide that question either—it explicitly limited the reach of its holding to the circumstance in which a dog enters the interior of the vehicle.

The petition misleadingly and repeatedly takes for granted the premise that the dog's search here was "not directed or prompted" by officers and therefore was "instinctive." Pet. 9, 16; *see also* Pet. 11, 14, 19, 22. Petitioner has repeated that assertion all throughout these proceedings but never meaningfully explained what it means. As set forth above, the officer specifically instructed, "show me" and then the dog "lifted himself up, put his paws on the vehicle, and followed the scent into the vehicle." Pet. App. 9-11. The officer testified that the "show me" command directs the dog "to get as close as he can to [the] source." Pet. App.9. Petitioner's briefing below also conceded this order of events: "Officer Knisley then said to the K9, 'Show me.' *It was at this time* that the K9 raised itself up onto its hind quarters and placed its front paws on the driver's door. The K9 then followed the scent into the vehicle through the open driver's window." Pet. App. 44-45 (emphasis added). In other words, there was concededly a "direction" and "prompt" that caused the dog to intrude in the car. For the same reason, it has never been clear what it means for petitioner to assert that the dog's conduct as "instinctive"—any "instinct" was concededly in response to the direction that preceded it.

In any event, whatever petitioner means by these assertions, the Supreme Court of Idaho never credited them in this case. Aside from recognizing petitioner's own characterization of the entry in this case as "instinctual," Pet. App. 4, the court simply held that the intrusion here, which concededly followed the officer's prompt, was a trespass within the meaning of the Fourth Amendment.

The second way petitioner tries to exaggerate the importance in this case is to invent that the Supreme Court of Idaho's decision governs the circumstance where "*the dog briefly touches the vehicle or* places its snout through an open window." Pet. i (emphasis added); *see also* Pet. 6, 8, 20-21, 24 (arguing importance based on this premise). According to respondent, the Idaho Supreme Court's decision "sweeps much more broadly" than what the court actually said and means that a dog cannot "so much as touch or brush up against the vehicle as the dog is deployed." Pet. 20-21.

This is nonsense. The Idaho Supreme Court expressly stated its holding in this case. It said, "We hold: when a law enforcement drug dog intrudes, to any degree, *into the interior space of a car* during a drug sniff, without express or implied consent to do so, a search has occurred under the Fourth Amendment." Pet. App. 7 (emphasis added). At every point in which the court described the relevant intrusion, it was that "the drug dog *entered* the car during a sniff." Pet. App. 5 (emphasis added); *see also* Pet. App. 4 (issue is whether dog "trespassed by putting his nose through the window of the car before giving his final indication, and a final indication was necessary before probable cause could exist"); Pet. App. 5 (stating twice that the "entry was a

search" and "the entry was a trespass"); Pet. App. 6 ("nose entered the car"); *id.* ("nose passing through an open window"). At no point does the court say that its holding would apply to a dog that simply brushes up against a car.

Moreover, the Idaho Supreme Court's reasoning and interpretation of *Jones* makes clear that the decision would *not* have any application to a dog that simply brushes against a car. As this Court explained in *Jones*, the trespass approach applies only where law enforcement has "physically occupied private property *for the purpose of obtaining information*." *Jones*, 565 U.S. at 404; *see also id.* at 408 n.5 (explaining that the physical interference "must be conjoined with . . . an attempt to find something or to obtain information"). The Idaho Supreme Court explicitly recognized that limitation, and observed that the intrusion here—entering a car to sniff for drugs—is "an activity that is self-evidently conducted for the purpose of obtaining information." Pet. App. 5. That could not be said in the case of a dog's incidental contact with the exterior of a car, as petitioner posits.

So where does petitioner get this exaggerated scope? According to petitioner, this departure from the Idaho Supreme Court's holding and reasoning follows from the fact that the court "approvingly cited" the Sixth Circuit's decision in *Taylor v. City of Saginaw*, 922 F.3d 328 (6th Cir. 2019), which applied *Jones* to the chalking of a car's tires. That argument is quite the stretch to begin with. But it also conflicts with the Idaho Supreme Court's own understanding of *Taylor*. Consistent with its analysis of the facts here, the Idaho Supreme Court understood *Taylor* to hold that a search

had occurred because the chalking took place "for the purpose of obtaining information." Pet. App. 6 (quoting *Jones*, 922 F.3d at 332-33)—again, a requirement that is not true of the incidental brush. And in any event, the Idaho Supreme Court explicitly noted that its decision in this case—and not *Taylor*—provided the governing law, specifically flagging that *Taylor* was "not squarely on point" and "certainly not binding," but rather simply "instructive" in rejecting petitioner's argument to overlook the physical entry in this case because it did not include the dog's full body. *Id.*

The question presented by the decision below is the one that was decided by the Idaho Supreme Court—it concerns the deployment of a dog that enters "into the interior space of a car" without any probable cause or consent. Pet. App. 7. Petitioner does not seem to think that question is sufficiently important on its own terms, and respondent agrees.

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

For similar reasons, this is not an appropriate vehicle to decide the question posed and discussed throughout the petition. If this Court were to consider the application of the Fourth Amendment to a dog intrusion that occurred "without any direction" or "prompting," Pet. i, then it should do so in a case where there was no direction or prompting. Here, the dog's intrusion was concededly in response to an instruction by the officer and the decision below never said otherwise.

And if the Court were to decide the question of whether the Fourth Amendment is implicated where "the dog briefly touches the vehicle," Pet. i, it should do so in case

that actually presents that circumstance. Here, it is undisputed that the police dog did not merely touch the vehicle, but physically entered the interior of the car without consent or probable cause.

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

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 *Florida v. Jardines*, 569 U.S. 1 (2013), 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. *Id.* at 7-9.

As the Idaho Supreme Court accordingly observed, "*Jones* is clear that for purposes of the Fourth Amendment, a search occurs when the government trespasses in order to obtain information." Pet. App. 5. The court applied that straightforward test to this case. Because it is undisputed that the police dog physically intruded into the car and it is undisputed that the entry took place in order to obtain information, it was a search under *Jones*.

The petition does not appear to contest that this conclusion follows from a straightforward application of *Jones* to this case. Petitioner instead says 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. 21. According to petitioner, if an intrusion is characteristic of "instinctive actions of dogs," then no search occurred under the property-based test, but if the intrusion resulted from the dog's training, then it would be a search. Pet. 19, 24-25.

In addition to having no support in *Jones* or *Jardines*, this "instinctive actions of dogs" test would undermine the efficacy of the property-based approach. How, for instance, is a court to determine whether a police dog did something out of "instinct" or based on its narcotics training? Here, for example, the police officer instructing the dog testified that the dog jumped on the car after the officer thought there could be drugs inside the car and said "show me" to the dog. Pet. App. 8-11. What makes that "instinctive behavior"? Pet. 16. How does one know whether it was an "instinctive action of a dog" or instinct based on the particular training the dog had received? And why does any of this matter if it was law enforcement who deployed the narcotics dog in the first instance? Petitioner's theory would change the Fourth Amendment's objective inquiry—which doesn't even consider the subjective intent of *humans*—into some undefined, subjective examination of a dog.

"One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy." *Jardines*, 569 U.S. at 11. "That the officers learned what they

learned only by physically intruding on [the defendant's] property to gather evidence is enough to establish that a search occurred." *Id*. As the Idaho Supreme Court explained, that virtue is evident here: "[B]y simply adhering to the *Jones* test as it is formulated, courts, law enforcement, and the public benefit from the clarity of a bright line rule for determining when a non-search exterior sniff becomes a search." Pet. App. 7.

CONCLUSION

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

Respectfully submitted,

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