No. 13-9972

IN THE

Supreme Court of the United States

DENNYS RODRIGUEZ, *Petitioner*,

v.

UNITED STATES, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

Brief *Amicus Curiae* of
U.S. Justice Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Free Speech Defense and Education Fund, Free Speech Coalition, Lincoln Institute for Research and Education, Abraham Lincoln Foundation, Institute on the Constitution, Conservative Legal Defense and Education Fund, Policy Analysis Center, Downsize DC Foundation, and DownsizeDC.org in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

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These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, including the defense of the rights of crime victims, the rights to own and use firearms, and related issues.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Each organization has filed many *amicus curiae* briefs in this and other courts.[2]

STATEMENT

In back-to-back terms in 2012 and 2013, this Court ruled, and then confirmed, that the Fourth Amendment is fundamentally "property-based," not privacy driven. In United States v. Jones, 565 U.S. ___, 132 S. Ct. 945 (2012), the Chief Justice and Justices Kennedy, Thomas, and Sotomayor joined Justice Scalia's opinion that, without a warrant, the government installation of a GPS tracking device on the undercarriage of a person's automobile is an unconstitutional search regardless of whether such installation invaded the owner's "reasonable expectation of privacy [under] *Katz*."[3] *Id.* at 948-950. Then in Florida v. Jardines, 569 U.S. ___, 133 S. Ct. 1409 (2013), Justice Scalia — this time joined by Justices Thomas, Ginsburg, Sotomayor, and Kagan — ruled that a warrantless search of the curtilage of a house by a "drug-sniffing" dog violates the Fourth

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[2] These *amici* filed *amicus curiae* briefs in several Fourth Amendment cases (*see* n.6, *infra*), most importantly, in the case of United States v. Jones. http://lawandfreedom.com/site/constitutional/USvJones_Amicus_Merits.pdf, which is discussed in H. Titus and W. Olson, "*United States v. Jones*: Reviving the Property Foundation of the Fourth Amendment." 3. J. OF LAW, TECHNOLOGY & THE INTERNET, no. 2 (Spring 2012), pp. 243-264. http://lawandfreedom.com/site/publications/Case%20Western%20Law%20Review.pdf

[3] Katz v. United States, 389 U.S. 347 (1967).

Amendment regardless of whether "the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*." *Id.* at 1417.

Together, the Jones and Jardines majorities comprise seven of the nine sitting justices who agree that the primary protection provided by the Fourth Amendment is property-based, not privacy-driven. Irrespective of the conclusions reached in each case, these seven justices adopted the view that "the Katz reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test" (Jones at 952), as derived from the original Fourth Amendment text and its historical context. *See* Jones at 917-18. "[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ('persons, houses, papers, and effects') it enumerates." Jones at 950. *See also* Jardines at 1413-14. Additionally, all seven justices agreed that the reasonable-expectation-of-privacy test cannot be applied so as to circumvent the Fourth Amendment's primary purpose of protecting private property rights. *See* Jones at 951 ("*Katz* ... did not 'snuf[f] out the previously recognized protection for property....' *Katz* did not narrow the Fourth Amendment's scope."); *see also* Jardines at 1417 ("'Fourth Amendment rights do not rise or fall with the *Katz* formulation.'").

Jones and Jardines reaffirmed property's paramount place in the Court's Fourth Amendment jurisprudence and described the relationship between property and privacy in application of that amendment. By strictly subordinating privacy

considerations to property principles in both Jones and Jardines, the Court rejected Justice William J. Brennan's opinion that "the principal object of the Fourth Amendment is the protection of privacy rather than property." *See* Warden v. Hayden, 387 U.S. 294, 304 (1967). In Jones the Court explicitly rejected the notion that the Katz "reasonable-expectation-of-privacy test" was to be "appl[ied] *exclusively*" in Fourth Amendment cases — "even when applying the privacy test eliminates rights that previously existed." Jones *id.* at 953. By recognizing that the privacy test, in fact, could derogate existing rights, the Court also rejected Justice Brennan's cavalier acceptance of the likelihood that abandoning established property-based rules would "enlarge the area of permissible searches." Hayden at 309. To the contrary, both Jones and Jardines dispel any notion that failure to satisfy the reasonable-expectation-of-privacy test conclusively determines compliance with the Fourth Amendment. *See* Jones at 950 and Jardines at 1417.

While Jones signaled this Court's retreat from its practice of relying almost exclusively upon the privacy test (*see* Jones at 949-52), the entrenched Hayden/Katz rule continues to dominate this Court's jurisprudence. *See, e.g.*, Riley v. California, 573 U.S. ___, 134 S. Ct. 2473, 2484 (2014). One would have expected to see a resurgence of property-based arguments in Fourth Amendment cases reaching this Court after Jones and Jardines; however, that has not been the case. *See, e.g.*, Heien v. North Carolina, Docket No. 13-604. Both at the petition stage, and at the merits stage, litigants before this Court appear to be trapped in the past, relying exclusively upon the Katz privacy test without

first addressing the property principles articulated and applied in Jones and Jardines. *Compare, e.g.,* Heien Brief for Petitioner[4] *with* Heien brief *amicus curiae* of Gun Owners Foundation, *et al.*[5] After all, if the Katz test is truly an "add-on," as both Jones and Jardines say it is, the question should be, **first and foremost**, whether the "property-rights baseline" has been violated. As Justice Scalia noted in Jardines, that "baseline ... keeps easy cases easy." *See* Jardines at 1417. Unfortunately, that has not turned out to be the case.

In his brief, Petitioner repeatedly urged this court to adopt a "bright-line rule" to govern such cases. Pet. Br. at 9-11, 15-16, 21, 23, 30-31. To assist in that effort, as these same *amici* have done in several recent cases,[6] this brief strives to provide the Court with a

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[4] http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-604_pet.authcheckdam.pdf.

[5] http://www.lawandfreedom.com/site/constitutional/Heien%20GOF%20amicus%20brief.pdf.

[6] *See amici curiae briefs of*: Gun Owners Foundation, *et al.* Heien v. North Carolina, Docket No. 13-604, June 16, 2014 (traffic stop based upon mistake of law), http://www.lawandfreedom.com/site/constitutional/Heien%20GOF%20amicus%20brief.pdf; Downsize D.C. Foundation, *et al.* U.S. v. Wurie, Docket No. 13-212, April 9, 2014 (searches of cell phones incident to arrest), http://www.lawandfreedom.com/site/constitutional/Wurie%20DDCF%20Amicus%20Brief.pdf; U.S. Justice Foundation, *et al.* Quinn v. Texas, Docket No. 13-765, January 27, 2014 (no-knock warrants), http://www.lawandfreedom.com/site/firearms/Quinn%20v%20Texas%20amicus%20brief.pdf; U.S. Border Control, *et al.* Cotterman v. U.S., Docket No. 13-186, Sept. 9, 2013

faithful application of the Fourth Amendment property principles articulated in Jones, to the circumstances of the present case.

SUMMARY OF ARGUMENT

In 2012 in United States v. Jones, this Court restored its Fourth Amendment jurisprudence to its original property rights base. Relying on the Amendment's text which protects the property rights of the people in their "persons, houses, papers, and effects," the Jones Court established that first and foremost the Fourth Amendment ban on unreasonable searches and seizures protected the people's fixed property rights and, only secondarily, their privacy. One year later, this Court reaffirmed Jones in Jardines v. Florida (2013), explaining that the Fourth Amendment's protection of property rights was the constitutional "baseline," which could be augmented by privacy expectations, but not diminished.

Together, Jones and Jardines signaled a change in Fourth Amendment analysis, calling initially for an inquiry into whether a contested government intrusion constitutes a violation of property rights and, only if not, then secondarily an inquiry into whether the intrusion at issue violated one's reasonable expectation of privacy. Unless the first inquiry is made, there can be no assurance that the property baseline has been met and, therefore, whether the privacy expectation

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(suspicionless border searches), http://lawandfreedom.com/site/constitutional/Cotterman_v_US_Amicus.pdf.

adds to, rather than subtracts from, the property rights secured by the Fourth Amendment.

In this case, the courts below erroneously bypassed the property inquiry, asking only whether an eight-minute delay after the completion of a traffic stop was a "de minimis" intrusion upon the driver's reasonable expectation of privacy. Had the threshold property question been addressed, the courts would have found that Rodriguez's common law property right in his **person** was violated because the intruding officer unlawfully detained Rodriguez after completion of the initially valid traffic stop. According to the rule in Jones, Rodriguez was denied the "*minimum* ... degree of protection ... afforded [by the Fourth Amendment] when it was adopted." *Id.* at 953.

Additionally, disregarding Jardines, the courts below failed to inquire whether an unconsented-to search of an unlawfully seized vehicle by a drug sniffing dog constitutes an unlawful physical intrusion upon Rodriguez's undisputable, constitutionally protected Fourth Amendment property rights in his vehicle, as recognized in Jones. However, as this Court recognized in Jardines, an intrusion of a trained drug sniffing dog in the immediate area surrounding one's house is no ordinary event. Likewise, siccing such a dog upon the exterior surface of one's "effects," on the basis of mere suspicion, falls far short of the probable cause protection afforded Rodriguez's property rights.

ARGUMENT

I. THE COURTS BELOW FAILED TO COMPLY WITH THE BASELINE PROPERTY PRINCIPLE ESTABLISHED IN JONES AND JARDINES.

A. The Property Right Baseline Restated.

As stated in Jones, the Fourth Amendment first and foremost protects fixed individual property rights from government intrusion and, only secondarily, protects evolving privacy considerations. *Id.* at 949-51. As stated in Jardines, protection of property rights is the established Fourth Amendment "baseline," limiting government intrusions regardless of any expectation of privacy — reasonable or otherwise. *Id.* at 1414-17. Thus, in both Jones and Jardines, this Court addressed whether the government intrusions — the fastening of a GPS tracking device on Jones' car, and the introduction of a "trained police dog to explore the area around [Jardines'] home" respectively — compromised any Fourth Amendment property right in "persons, houses, papers, [or] effects." *See* Jones at 949 and Jardines at 1416.

In Jones, tracking the Amendment's text, the Court found first that Jones' vehicle on which the government had installed the GPS tracking device was an "effect." *Id.* at 949. It then found that implanting the device was a "physical intrusion" protected by the Fourth Amendment because it violated Jones's right to exclusive possession, even though the implantation did no damage whatsoever to Jones's vehicle. *Id.* The

Court rejected the government's contention that "no search occurred here, since Jones had no 'reasonable expectation of privacy' in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads." *Id.* at 950. The Court did so, not on the ground that Jones had a reasonable expectation of privacy, but on the ground that "Jones's Fourth Amendment rights [did] not rise or fall with the *Katz* formulation." *Id.*

Likewise, in Jardines, the Court determined that the government officials with their drug-sniffing dog were gathering information by intrusion upon the curtilage of Jardines' house, a Fourth Amendment protected property right, traceable it all the way back to Blackstone's Commentaries. *Id.* at 1414-15. After finding that the area searched by the government and its dog was "constitutionally protected," the Court asked "whether [the search] was accomplished through an unlicensed physical intrusion." *Id.* at 1415. The Court found that "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence" did not come within the customary permissive license accorded to persons coming to the front door of a home, particularly because the intrusion had not been consented to. *Id.* at 1415-17.

Even so, the government argued further that "investigation by a forensic narcotics dog by definition cannot implicate any legitimate privacy interest," citing three Supreme Court precedents in which the Court had concluded that, under similar facts, the government intrusion did "not violate the 'reasonable

expectation of privacy' described in *Katz." Id.* at 1417. Relying solely upon Jones, the Court determined that "we need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*," since the property law baseline had been breached by the physical intrusion upon Jardines' house in violation of the Fourth Amendment. Jardines at 1417.

B. The Property Baseline Precludes the *De Minimis* Argument Here.

As it was in Jardines and Jones, so it is here. While driving his Mercury Mountaineer on a public highway, Dennys Rodriguez momentarily crossed the fog line, drifting off the roadway in violation of Nebraska law. Upon observing the violation, Officer Morgan Struble stopped Rodriguez's vehicle. Although he became suspicious that Rodriguez and his passenger, Scott Pollman, were engaged in other wrongdoing, Officer Struble issued a warning ticket on the traffic violation, and returned all of the documents to the two men. However, instead of letting the men go on their way, Officer Struble asked Rodriguez whether he minded if a drug dog walked around Rodriguez's vehicle. Rodriguez declined. Continuing to rely on his initial authority to stop Rodriguez's vehicle, Struble ordered Rodriguez to turn off the ignition, exit the vehicle, and stand in front of the police cruiser. *See* Brief for Petitioner ("Pet. Br.") at 2-6.

Apparently, Officer Struble's request for consent was no more than an empty formality as he wholly

disregarded Rodriguez's refusal. After a second officer arrived, Officer Struble led his dog to the passenger side of the vehicle where the dog alerted. The officer estimated that as much as eight minutes had transpired from the time that he issued the warning ticket and the dog alerted on the vehicle. *Id.* at 6.

Rodriguez does not dispute that the initial stop was lawful, but he does contend that he was unlawfully detained by Officer Struble after the warning ticket was issued. *Id.* at 7. While the period of detention following the issuance of the ticket was only eight minutes long, the officer physically intruded upon Rodriguez's inherent right of freedom of movement.[7] That right, in turn, is a property right vested in Rodriguez's "person" and, thus, is recognized by the original Fourth Amendment as one of four distinct protected property rights. *See* Jones at 949. As John Locke wrote in his Second Treatise of Government:

> every Man has a Property in his own Person. This no Body has any Right to but himself. The Labor of his Body and the Work of his Hands ... are properly his. [J. Locke, Second Treatise of Government ("Second Treatise"), para. 27 (facsimile ed.), reprinted in J. Locke,

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[7] "Propriety is naturally antecedent to Government, which doth not give it ... Every man is born with a propriety in his own members...." Richard Baxter's *Holy Commonwealth*, quoted in J. Locke, Two Treatises of Government, p. 287, n. 27 (P. Laslett, ed., Cambridge Univ. Press: 2002).

> Two Treatises of Government, pp. 287-88 (P. Laslett, ed., Cambridge Univ. Press: 2002).]

"[B]eing the Master of himself, and the Proprietor of his own Person, and the Actions ... of it," a man has "in himself the great Foundation of Property...." Locke's Second Treatise at para. 44. Thus, Stanford University historian and Pulitzer Prize winner Jack Rakove has written:

> For Locke, as for his American readers, the concept of property encompassed not only the objects a person owned but also the ability, indeed the right to acquire them. Just as men had a right to their property, so they held a property in their rights. Men did not merely claim their rights, but also owned them, and their **title to their liberty** was as sound as their title to the land or to the tools with which they earned their livelihood." [J. Rakove, Revolutionaries. A New History of the Invention of America, p. 78 (New York: 2010) (emphasis added).]

At common law, this property right in one's personal liberty was protected by an action for the injury of false imprisonment "by the loss of time and liberty." 3 W. Blackstone, Commentaries on the Laws of England 127 (Univ. Of Chi. Facsimile ed.: 1768).

> To constitute the injury of false imprisonment ... requi[res] [a] detention of the person; and ... [t]he unlawfulness of such detention. Every confinement of the person is

> an imprisonment.... **even by forcibly detaining one in the public streets**. Unlawful, or false, imprisonment consists in such confinement or detention without sufficient authority: which authority may arise ... from some warrant from a legal officer.... [*Id.* (emphasis added).]

Applying these factors here, it is beyond dispute that, after Officer Struble issued the warning ticket, for the traffic violation, his authority to detain Rodriguez came to an end. *See* Pet. Br. at 12-13, 18-19. However, the court of appeals below ruled that the continuing detention of Rodriguez "constituted a *de minimis* intrusion on Rodriguez's personal liberty" and, therefore, was constitutionally "reasonable" under the Fourth Amendment.[8] United States v. Rodriguez, 741 F.3d 905, 908 (8th Cir. 2014). The court, in disregard of Rodriguez's property right in his person, reasoned that "a dog sniff conducted during a traffic stop that is 'lawful at its inception and otherwise executed in a reasonable manner' does not infringe upon a constitutionally protected interest in **privacy**." *Id.* at 907 (emphasis added).

In so ruling, the court of appeals relied upon Illinois v. Caballes, 543 U.S. 405 (2005), an opinion

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[8] The error inherent in reducing the Fourth Amendment's protection down to a modern judge's subjective assessment of "reasonableness" was examined in an *amicus curiae* brief filed by Gun Owners Foundation, *et al.* in Heien v. North Carolina (July 16, 2014), pp. 5-17. http://www.lawandfreedom.com/site/constitutional/Heien%20GOF%20amicus%20brief.pdf

handed down by this Court seven years before Jones. In Caballes, the Court restated the rule that a "seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." *Id.* at 407. Nevertheless, the Court concluded that the conduct of a drug sniff during a legitimate traffic stop was permissible because the sniff did not "infringe[] [any] protected interest in privacy" (*id.* at 408):

> Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. [*Id.*]

Under the property principle of Jones and Jardines, neither the ruling of the court of appeals below nor the Caballes precedent upon which the court below relied, can stand. Both rulings acknowledged that a lawful stop for a traffic violation becomes unlawful when continued after completion of that mission. Yet, both the court below and the Caballes Court found a dog sniff to be permissible on the ground that under the circumstances there was no privacy violation. Demonstrably, the Eighth Circuit's and this Court's reliance upon the Katz privacy test to justify a detention that violates the common law property right of freedom of movement undermines "the [minimum] degree of protection" of Rodriguez's person that the "18th-century guarantee against unreasonable searches ... afforded when [the Fourth Amendment] was adopted." Jones at 953.

Further, by applying the Katz privacy test, both opinions invite future courts to plunge "needlessly into additional thorny problems," as would have been the case in Jones. *See* Jones at 954. In Jones, this Court refused to be drawn into the "'vexing problems'" presented by the Katz test as applied to the totality of the circumstances without first determining whether the search or seizure at issue violated the property principle. *Id.* at 953. Likewise, here, there is no reason to harness the courts with the Katz test to sort out those equally "vexing problems" where the delay between a lawful stop and a dog sniff is *de minimis* in light of the totality of the circumstances.[9] *See* Pet. Br. at 22-23.

C. The Property Principle Precludes the Reasonable Suspicion Argument.

The Government attempts to block the clear pathway to a finding of a Fourth Amendment violation with an Eighth Circuit precedent which ruled that:

> once an officer finishes the[] [routine tasks involved in a traffic stop] "the purpose of the traffic stop is complete and further detention of the driver or vehicle would be unreasonable, 'unless something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention' ...." [United States v. Flores, 474 F.3d 1100, 1103 (8th Cir. 2007).]

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[9] *See, e.g.,* United States v. $404,905.00 in U.S. Currency, 182 F.3d 643, 649 (8th Cir. 1990).

Accordingly, the government has contended that in the course of his effecting the traffic stop, Officer Struble observed several things that gave him an "articulable suspicion" that a crime was being committed — including use of air fresheners, extreme nervous behavior, and an unbelievable story. Brief of United States in Opposition at 11-14. On this ground, the government asserted that the deployment of the drug-sniffing dog was reasonable under the Fourth Amendment. *Id.* at 17.

Wholly missing from the government's analysis and any of the precedents upon which it relied is any consideration of the distinct property rights vested in Rodriguez's vehicle. Yet, as Jones ruled, "[i]t is beyond dispute that a vehicle is an 'effect' as that term is used in the Amendment." *Id.* at 949. And, as Jones also ruled, the planting of a GPS monitor on the undercarriage of Jones's vehicle was a physical intrusion upon Jones's property right in the vehicle. *Id.* at 949-50. Thus, Jones held that the government's trespassory action of placing the GPS tracking device triggered Fourth Amendment protection and, therefore, the warrant and probable cause requirements were not met. Likewise is the search of Rodriguez's vehicle by the deploying of a drug-sniffing dog. As Jones had a protected property right in his vehicle, including its undercarriage, so Rodriguez had a protected Fourth Amendment right in his vehicle and its exterior parts. And, as Jardines had a protected property right in the curtilage of his house, so Rodriguez had a protected property right in the immediate exterior area around his truck. As Jardines observed, it would be outside the custom of permitting

uninvited visitors to the front door of one's home to include the "introduc[tion] [of] a trained police dog to explore the area around the home in hopes of discovering incriminating evidence." *Id.* at 1416. Likewise, it would be outside the custom of permitting the touching of one's vehicle for a law enforcement agent to parade a drug-sniffing dog around a vehicle stopped for violation of a traffic law. Even if it is believed that such a vehicle may be searched without a warrant under the so-called automobile exception, that exception does not dispense with the Fourth Amendment probable cause requirement. *See* C. Whitebread, Criminal Procedure § 7.02, pp. 142-44 (Foundation Press: 1980).

No doubt the government would argue that, unlike Jones, the dog sniff involved no physical intrusion upon Rodriguez's vehicle and, unlike Jardines, the sniff did not involve the police "physically entering and occupying" Rodriguez's property. Yet, while Rodriguez might not have "owned" the physical space on the side of the road, he was there only because the government forced him to stop there, something that no private citizen could do. The government might argue that, had Rodriguez been parked on the side of the street near his home, a private citizen could have walked his beagle by the car, and that dog might have taken a casual sniff as it passed. Of course, that is nothing like what happened here.

As this Court noted in Jardines, what is important is that the police do "'no more than any private citizen might do,'" such as through a "license ... implied from the habits of the country...." *Id.* at 1415-16. As

Jardines explained, while someone might bring his dog with him when he enters his neighbor's porch and knocks on his front door, that is completely different than "introducing a trained police dog to explore the area ... in hopes of discovering incriminating evidence." *Id*. at 1416. Likewise, here, while a dog on a walk might have sniffed Rodriguez's car, a thorough, careful sniff of his car by a drug dog is "something else. There is no customary invitation to do *that*." *See* Jardines at 1416. As pointed out in Petitioner's Brief, a sniff search can be a "humiliating," "frightening," and "intimidating" experience. Pet. Br. at 27.

Indeed, if anyone were to park his car to run a quick errand, and return to the car to find two men with a dog peering into the windows, the dog standing on its hind legs with its paws on the doors, examining every nook and cranny of the exterior of the vehicle, such behavior "would inspire most of us to — well, call the police."[10] *See* Jardines at 1416. Like Jardines,

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[10] Of course, the suspicionless dog sniff here was also an invasion of privacy. Concurring in Jardines, Justices Kagan, Ginsburg, and Sotomayor found that the drug dog sniff on Jardines' front porch also violated Jardines' reasonable expectation of privacy because of the "uncommon behavior" of the police as compared to ordinary members of the public, employing a "super-sensitive instrument" to acquire details about one's personal life that ordinary people neither know nor care to know. Here, like in Jardines, Officer Struble's "dog was not your neighbor's pet [walking by your car] on a leisurely stroll." *See* Jardines at 1418. Put simply, the suspicionless drug sniff here was a privacy violation because normal people and normal dogs do not act like that. As Justice Kagan wrote in Jardines, "Was this activity a trespass? Yes.... Was it also an invasion of privacy? Yes, that as well." *Id*.

"the background social norms that invite a [person to walk his dog on a sidewalk] do not invite him there to conduct a search." *Id.*

Of course, all of the above assumes that the drug sniffing dog never actually touched Rodriguez's car. That is likely not the case. In fact, it is routine procedure for drug-sniffing dogs to jump up and put their paws and noses all over a vehicle as they search it and, indeed, to sometimes claw at an item as an indicator of a "hit."[11] Surely this constitutes a physical intrusion, and a trespass, for "'no man can set his foot [or instruct his dog to set its foot] upon his neighbour's close without his leave; if he does he is a trespasser.'" *See* Jones at 949 (quoting Entick v. Carrington).

In short, the Jones and Jardines property principle precludes the government from justifying its dog-sniffing search of Rodriguez's vehicle regardless of whether Officer Struble had a reasonable suspicion of a drug crime, and even if based upon observations made during the time of a lawful traffic stop. If the dog-sniff constituted a trespass upon Rodriguez's vehicle — and it did — then, because the vehicle was a constitutionally protected "effect," it was protected from any search based upon anything less than probable cause.

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[11] http://www.youtube.com/watch?v=Dg4if0UpGo8 (at 0:40-0:55); http://www.youtube.com/watch?v=_HIw9XVLMDI (at 1:40 "and then at that point, the third indication is 'scratch.'"); http://www.youtube.com/watch?v=CO09LXMd-ps (at 0:23); http://www.youtube.com/watch?v=CzlGKvU1g80 (at 0:48, 3:03, 3:25, etc.)

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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