

No. 25-399

IN THE
Supreme Court of the United States

RONELL MOSES, JR., *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Third Circuit

**Brief *Amicus Curiae* of Gun Owners of
America, Gun Owners Fdn., Gun Owners of
California, Tennessee Firearms Association,
Tennessee Firearms Fdn., America's Future,
DownsizeDC.org, Downsize DC Fdn., U.S.
Constitutional Rights Legal Defense Fund, and
Conservative Legal Defense and Education
Fund in Support of Petitioner**

JOHN I. HARRIS III
Nashville, TN 37203

OLIVER M. KRAWCZYK
Carlisle, PA 17013

November 3, 2025

ROBERT J. OLSON*
WILLIAM J. OLSON
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
**Counsel of Record*
Attorneys for Amici Curiae

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.	ii
INTEREST OF THE <i>AMICI CURIAE</i>	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT.	4
ARGUMENT	
I. THIS COURT SHOULD GRANT THE PETITION TO REFOCUS FOURTH AMENDMENT ANALYSIS ON ORIGINAL MEANING	6
A. The Panel Failed to Analyze the Fourth Amendment’s Text and Historical Context and Instead Employed a “Judge- Empowering” Balancing Test.	6
B. The Founders Unquestionably Would Have Understood Petitioner’s Driveway to Be “Curtilage”	12
C. The Panel Never Engaged with this Court’s <i>Jones</i> and <i>Jardines</i> Framework, which Squarely Controls this Case	16
II. REVIEW IS NECESSARY TO REMIND THE LOWER COURTS THAT FOURTH AMENDMENT RIGHTS DO NOT RISE AND FALL ON “REASONABLE EXPECTATIONS OF PRIVACY”	19
CONCLUSION	21

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CONSTITUTION</u>	
Amendment II	12
Amendment IV	3-9, 12-14, 18-20
 <u>STATUTES</u>	
18 U.S.C. § 922(g)(1)	3
 <u>CASES</u>	
<i>Carroll v. United States</i> , 267 U.S. 132 (1925)	7
<i>Chong v. United States</i> , 112 F.4th 848 (9th Cir. 2024)	14, 15
<i>Coal. for TJ v. Fairfax Cnty. Sch. Bd.</i> , 218 L. Ed. 2d 71 (2024)	21
<i>Collins v. Virginia</i> , 584 U.S. 586 (2018)	3, 7, 18, 20
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	8, 14
<i>Florida v. Jardines</i> , 569 U.S. 1 (2013)	6-8, 13, 16-19
<i>Katz v. United States</i> , 389 U.S. 347 (1967)	20, 21
<i>N.Y. State Rifle & Pistol Ass’n v. Bruen</i> , 597 U.S. 1 (2022)	7, 8, 12
<i>Oliver v. United States</i> , 466 U.S. 170 (1984)	14, 16
<i>Rainwaters v. Tenn. Wildlife Res. Agency</i> , 2024 Tenn. App. LEXIS 208 (May 9, 2024)	14
<i>SEC v. Jarkesy</i> , 603 U.S. 109 (2024)	10
<i>State v. McCarthy</i> , 501 P.3d 478 (Or. 2021)	18
<i>Terry v. Ohio</i> , 392 U.S. 1 (1968)	8
<i>United States v. Dunn</i> , 480 U.S. 294 (1987)	3, 11, 19, 21
<i>United States v. Jones</i> , 565 U.S. 400 (2012)	8, 10, 16-21
<i>United States v. Masciandaro</i> , 638 F.3d 458 (4th Cir. 2011)	13

<i>United States v. Van Damme</i> , 48 F.3d 461 (9th Cir. 1995)	13
<i>Warden v. Hayden</i> , 387 U.S. 294 (1967)	20

MISCELLANEOUS

William Blackstone, <u>Commentaries on the Laws of England</u>	13, 15, 17
J. Burn, <i>A New Law Dictionary</i> (1792)	15
T. Cunningham, <i>A New and Complete Law Dictionary</i> (1764)	14
Damini R., “8 Youngest Federal Judges in the US History,” <i>Oldest.org</i> (Mar. 21, 2025)	12
T. Potts, <i>A Compendious Law Dictionary</i> (1803)	15
F. Shen, <i>Aging Judges</i> , 81 OHIO ST. L.J. 235 (2020)	12
S. Warren & L. Brandeis, <i>The Right to Privacy</i> , 4 HARV. L. REV. 193 (1890)	20
N. Webster, <i>An American Dictionary of the English Language</i> (1828)	15

INTEREST OF THE *AMICI CURIAE*¹

Amici Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Inc., Tennessee Firearms Association, Tennessee Firearms Foundation, America's Future, DownsizeDC.org, Downsize DC Foundation, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Some of these *amici* filed *amicus* briefs in this Court in two previous cases related to the curtilage question at issue here.²

¹ It is hereby certified that counsel of record for all parties received timely notice of the intention to file 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.

² See *United States v. Antoine Jones*, No. 10-1259, Brief Amicus Curiae of Gun Owners of America, Inc., et al., (May 16, 2011) and Brief Amicus Curiae of Gun Owners of America, Inc., et al., (Oct. 3, 2011); and *Ryan Austin Collins v. Commonwealth of Virginia*, No. 16-1027, Brief Amicus Curiae of United States Justice Foundation, et al., (Mar. 27, 2017) and Brief Amicus Curiae of Conservative Legal Defense and Education Fund, et al., (Nov. 20, 2017).

STATEMENT OF THE CASE

In 2020, Petitioner Ronell Moses, Jr. and Penn Hills Police Department Officer Dustin Hess passed each other while driving in opposite directions in a Pittsburgh suburb. Petition Appendix (“Pet.App.”) at 2a. Apparently wielding a superhuman olfactory sense, Officer Hess claimed that he smelled burnt marijuana emanating from Mr. Moses’s illegally tinted Chevrolet Impala, and so turned his car and followed Mr. Moses all the way home. *Id.* There, Mr. Moses parked his Impala on his property — in his driveway only feet away from his porch and front door. *Id.*; *see also* Pet.App.8a. Officer Hess parked his patrol vehicle “at an angle” on the street, “with the front of [his] vehicle parked in the driveway” entrance so as to prevent Mr. Moses from backing his Impala out onto the street. Pet.App.46a. Mr. Moses’s home is located on a small plot of land, closely flanked by neighboring houses. *See* Pet.App.8a. Hedges delineate the property’s boundary with the street, and also line one side of the driveway which leads to and abuts Mr. Moses’s home. *See id.*; *see also* Petition at 7.

Officer Hess made contact with Mr. Moses, who admitted to possessing marijuana but declined a search of his Impala. Pet.App.46a-47a. Based on this information and over Mr. Moses’s objection, Officer Hess searched the Impala without a warrant and discovered a stolen handgun in its center console. Pet.App.47a. And, because Mr. Moses had “prior felony convictions for voluntary manslaughter and kidnapping,” he was arrested and charged with

possessing a firearm in violation of 18 U.S.C. § 922(g)(1). Pet.App.2a.

Relying in part on *Collins v. Virginia*, 584 U.S. 586 (2018), Mr. Moses moved to suppress evidence of the handgun, arguing that the portion of the driveway where he had parked his Impala was within the “curtilage” of his home under the Fourth Amendment, and so Officer Hess’s warrantless and unconsented-to search was unconstitutional. Pet.App.52a. The district court denied Mr. Moses’s motion. Applying the factorial test this Court developed in *United States v. Dunn*, 480 U.S. 294 (1987), the district court concluded that, “[o]n balance, ... the portion of the driveway at issue was not intimately linked to the home and, therefore, not curtilage.” Pet.App.56a. Thus, the district court held that “Officer Hess did not ... physically intrude into a constitutionally protected area,” and so his entry onto Mr. Moses’s “private property” did not “violate[] Moses’s Fourth Amendment rights....” *Id.*; Pet.App.51a. Finally, the district court concluded that, “[b]ecause Officer Hess had a lawful right of access to the Impala parked in Moses’s driveway” and he had “probable cause to search the Impala,” the search was constitutional under the “automobile exception” to the Fourth Amendment’s warrant requirement. Pet.App.57a.

A divided panel of the Third Circuit affirmed. First, the panel majority applied its “daily experience” to conclude that Mr. Moses “did not have a reasonable expectation of privacy in that part of his driveway like the one he has in his home,” and so the area fell outside the curtilage of his home. Pet.App.8a-9a. In

so holding, the panel majority distinguished the driveway at issue in *Collins*, noting that here, Officer Hess had “stayed thirty to forty feet in front of Moses’s home....” Pet.App.9a. Second, the panel majority explained that, “[a]lthough the *Dunn* factors are not very illuminating here,” they nevertheless “confirm[ed]” the court’s view that Mr. Moses’s Impala was not in his home’s curtilage. Pet.App.10a. Specifically, “the third and fourth factors favor[ed] the government, the first favor[ed] Moses a little, and the second [wa]s a wash.” Pet.App.13a. And third, the panel majority believed, “[t]he rationale for protecting curtilage does not extend to this patch of driveway,” because Officer Hess would not have detected the goings-on within Mr. Moses’s home from his vantage point on the driveway. Pet.App.13a-14a.

Judge Ambro concurred in part and dissented in part. As relevant here, Judge Ambro highlighted the steps Mr. Moses’s family took to maintain the privacy of their driveway (Pet.App.19a-20a), before disputing each of the panel majority’s three rationales (Pet.App.23a-36a). Judge Ambro also noted that “the *Dunn* factors have gone unmentioned in the Supreme Court’s two most recent curtilage cases, *Collins* and *Jardines*.” Pet.App.22a.

SUMMARY OF ARGUMENT

If a British customs official had walked up to the hitching post in front of a Founding-era home, and searched the saddlebags of the homeowner’s horse for evidence of crime — all within *feet* of the front door — it seems unlikely that the Framers of the Fourth

Amendment would have accepted this invasion as a valid search. Yet in upholding the warrantless trespass and search at issue here, neither court below consulted Founding-era practices, much less the original meaning of the Fourth Amendment’s text. Likewise, neither court applied the originalist property-rights approach this Court re-recognized in *United States v. Jones*, 565 U.S. 400 (2012), and applied in *Florida v. Jardines*, 569 U.S. 1 (2013). Instead, the courts below “balanced” constitutional rights, weighing modern “factors” and the sensibilities of *judges* to justify an atextual and ahistorical conclusion. That was serious error, because the Founders unquestionably would have considered the driveway of a modern home to be “curtilage” protected from warrantless search under the Fourth Amendment.

In addition to those reasons already highlighted in the Petition, this Court should grant certiorari for two additional reasons. First, this case presents a critical opportunity to reject one of the many “judge-empowering ‘interest-balancing’” approaches that began to permeate constitutional analysis in the mid-20th century. Such jettisoning of original meaning occurs far too often. Review would allow this Court to refocus Fourth Amendment analysis based on the understanding of those who adopted it. According to *their* understanding, a driveway obviously would fall within the home’s curtilage because it is a “piece of ground lying near a dwelling house.” Thus, an unlicensed governmental trespass for the purpose of gathering information is a “search” requiring a

warrant under this Court’s original property-rights approach.

And second, this Court should grant the Petition to remind the lower courts that Fourth Amendment property rights “do not rise or fall” with judicial notions of “reasonable expectations of privacy.” The panel majority appeared to conflate the issues, declaring that, because Mr. Moses lacked a “reasonable expectation of privacy” in the portion of his driveway where his vehicle had been searched, the driveway *could not have been* within the “curtilage” of the property protected by the Fourth Amendment. That confused approach misapplies (and indeed ignores) this Court’s property-based precedents and warrants correction.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION TO REFOCUS FOURTH AMENDMENT ANALYSIS ON ORIGINAL MEANING.

A. The Panel Failed to Analyze the Fourth Amendment’s Text and Historical Context and Instead Employed a “Judge-Empowering” Balancing Test.

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects....” In *Florida v. Jardines*, 569 U.S. 1, 6 (2013), this Court explained that, “when it comes to the Fourth Amendment, the home is first among

equals,” and the “right would be of little practical value if the State’s agents could stand in a home’s porch or side garden and trawl for evidence with impunity....”

The word curtilage may not be found in the Fourth Amendment’s text, but historically has received the same protection as “houses,” which are textually protected. This “Court considers curtilage — the area immediately surrounding and associated with the home — to be part of the home itself for Fourth Amendment purposes.” *Collins v. Virginia*, 584 U.S. 586, 592 (2018) (internal quotations omitted). This “protection of curtilage has long been black letter law,” *id.*, and “the identity of home and ... ‘curtilage’” has “ancient and durable roots.” *Jardines* at 6.³

³ In contrast, over the past century, this Court has justified various atextual “exceptions” to the Fourth Amendment’s warrant requirement with rationales falling far short of an “ancient and durable” historical property-based tradition. For example, this Court has justified its so-called “automobile exception” to the warrant requirement based not on history, but rather on vehicles’ “ready mobility” and “pervasive regulation,” taking “care to emphasize that the rationales applied only to automobiles and not to houses....” *Collins* at 591-92. But in the case that created this “exception,” *Carroll v. United States*, 267 U.S. 132 (1925), the closest Founding-era practice this Court could identify was the warrantless *customs* search of “ship[s] or vessel[s]” suspected of concealing “goods, wares or merchandise subject to duty,” and the warrantless *customs* search of “any vehicle, beast or person” *on land* that began to occur *decades* after the Founding. *Id.* at 150, 151; *see also N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 36 (2022) (“to the extent later history contradicts what the text says, the text controls”).

The justification for this Court’s *Terry* “stop and frisk” “exception” is even more tenuous. Eschewing consultation of

Given the historic roots of the Fourth Amendment’s coverage of curtilage, it would stand to reason that the Third Circuit should have consulted *history* to determine whether Mr. Moses’s driveway fell within the curtilage of his home. After all, “[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them,” *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008), and the Fourth Amendment was adopted in 1791. Thus, Founding-era understandings of curtilage can help “determine the scope of th[e] right,” and such “focus on history” would “comport[] with how we assess many other constitutional claims.” *Bruen* at 25. But rather than consult the Fourth Amendment’s original meaning to resolve this case, the panel majority ignored it completely. Instead, taking a decidedly *modern* approach to constitutional

historical practice altogether, this Court “consider[ed] ... the governmental interests involved,” the “constitutionally protected interests of the private citizen,” and then arrived at “the proper balance” between them. *Terry v. Ohio*, 392 U.S. 1, 22, 21, 27 (1968). This, of course, is precisely the sort of untethered reasoning that led this Court to refocus Fourth Amendment law on private property rights in *Jones* and *Jardines*. And it is precisely the sort of “judge-empowering ‘interest-balancing’” that this Court recently repudiated in the Second Amendment context, observing that “[a] constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.” *Bruen* at 22, 23.

Thus, it would appear that many (if not most) judicially concocted “exceptions” to the Fourth Amendment’s warrant requirement rest on shaky historical footing. This case is no exception, and this Court should grant the Petition to continue restoring the intent of the Framers to Fourth Amendment analysis.

analysis, the panel majority explained its methodology as follows:

First, the panel majority observed that Fourth Amendment curtilage questions present “mixed question[s] of fact and law,” where courts first must find certain facts regarding the search and the property at issue. Pet.App.5a. Then, based on those facts, courts must answer the ultimate legal question: “curtilage or not.” *Id.*

Second, in answering that legal question, the panel majority explained that “the test for whether an area is curtilage” is “whether the area in question is so intimately tied to the home itself that it should be placed under the home’s “umbrella” of Fourth Amendment protection.” Pet.App.7a (quoting *United States v. Dunn*, 480 U.S. 294, 301 (1987)). This question may be answered using the court’s “daily experience.” Pet.App.8a.

Third, as “heuristics” that may “confirm” a court’s “belief” on the curtilage question, the panel majority cited “the *Dunn* factors.” Pet.App.7a. In the case of Mr. Moses’s driveway, these factors examined “(1) how close the area was to the house; (2) whether it was enclosed with the house; (3) whether the homeowner apparently used it for domestic activities; and (4) how much Moses shielded it from the view of people passing by.” Pet.App.10a.

Fourth and finally, the panel majority checked its work against its understanding of the “purpose” of protecting curtilage: to prevent law enforcement from

“sneak[ing] onto the homeowner’s property to learn more about its interior than they could by observing it from a public place....” Pet.App.14a.

The problems with this highly subjective, modernistic approach are manifest, and this Court should correct them here. First, consider the wholly amorphous nature of the Third Circuit’s constitutional inquiry. If the standard for deciding whether an area is “curtilage” is whether it is “intimately tied” to the home based upon judicial “daily experience,” then that is no standard at all. As the divided panel itself makes clear, judges differ drastically in their notions of intimacy and their daily experiences. Of course, “that kind of “we know it when we see it” approach to constitutional rights ... can hardly claim any serious advantages when it comes to workability or predictability.” *SEC v. Jarkesy*, 603 U.S. 109, 164 (2024) (Gorsuch & Thomas, JJ., concurring).

Also consider the sort of judgment calls the panel majority’s “daily experience” approach invites. Based on little more than the visibility of Mr. Moses’s driveway from the street, the panel majority summarily concluded that Mr. Moses “did not have a reasonable expectation of privacy in that part of his driveway like the one he has in his home.” Pet.App.8a-9a. But as this Court made clear, the “reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.” *United States v. Jones*, 565 U.S. 400, 409 (2012). Contrary to this Court’s precedents, the panel majority thought its “daily experience” with “privacy” was dispositive. It should not be.

Finally, consider the panel majority's analysis of the *Dunn* factors, which even the panel admitted "[we]re not very illuminating here...." Pet.App.10a. The majority concluded that *Dunn*'s proximity factor "does not favor [Mr. Moses] much," because Officer Hess "was likely slightly closer to the street than to Moses's house and certainly thirty to forty feet away from the house." Pet.App.11a. In other words, Officer Hess was not *close enough* to Mr. Moses's home, despite being *on his property* and *within feet* of the front door – another quintessential judgment call. With respect to *Dunn*'s "enclos[ure]" factor, the panel majority discounted Mr. Moses's privacy hedges as insufficient, ultimately concluding that "this factor is a wash." Pet.App.12a. And on the homeowner-use factor, the panel majority similarly discounted evidence of Mr. Moses's actual uses of his driveway, and "consider[ed] only ... whether a reasonable officer would believe that the space was used for domestic activities." *Id.* Claiming that there is "nothing domestic or private about parking cars" at one's home, the panel majority concluded that "this factor favors the government." Pet.App.12a-13a. Finally, as for the privacy factor, the panel majority concluded that, despite the presence of boundary hedges on the property, Mr. Moses had done nothing to "protect[] the area from observation" because "anyone walking by on the street could see clearly into the driveway." Pet.App.13a. Apparently, camouflage netting was required. All told, "the third and fourth factors favor[ed] the government, the first favor[ed] Moses a little, and the second [wa]s a wash." *Id.*

Constitutional rights should not turn on language as squishy as this, seemingly designed to empower modern judges to reach whatever result they prefer. Indeed, the approach employed below is exactly the type of “judge-empowering ‘interest-balancing’” inquiry this Court already rejected for the Second Amendment. *Bruen* at 22. This Court’s review is necessary to restore principle over predilection and refocus Fourth Amendment analysis on original meaning.

B. The Founders Unquestionably Would Have Understood Petitioner’s Driveway to Be “Curtilage.”

In stark contrast to the panel majority’s conclusion below, the Founders had a far more protective conception of “curtilage.” Had the panel majority consulted Founding-era authorities, it is likely that its Fourth Amendment holding would have been quite different. Accordingly, this case presents a critical opportunity for this Court to refocus its precedents on the intent of the Framers, rather than the “daily experience” of federal judges.⁴

⁴ The “daily experience” of federal judges test is no test at all. For example, some have been appointed in their thirties. *Damini R.*, “8 Youngest Federal Judges in the US History,” *Oldest.org* (Mar. 21, 2025). Yet on average, “America’s judiciary is aging. The average age of federal judges is sixty-nine years old, older than it has been at any other time in the country’s history.” F. Shen, *Aging Judges*, 81 OHIO ST. L.J. 235, 235 (2020). It seems unlikely that the average judge’s “daily experience” is comparable to his or her younger colleagues, much less that of the general population. Indeed, it was this same “daily experience” that once led one judge to believe the right to keep and bear arms should only be

As this Court observed in *Florida v. Jardines*, “the distinction between the home and the open fields is ‘as old as the common law,’” and “so too is the identity of home and what Blackstone called the ‘curtilage or homestall,’ for the ‘house protects and privileges all its branches and appurtenants’....” *Id.* at 6-7. Thus, this Court explained, the Fourth Amendment protects the “area around the home” as if it is the home itself. *Id.* at 7.

At common law, recognition of the home’s curtilage provided protection from certain offenses against the security of habitations. To that end, curtilage was “an ancient English law term used to mark off an area outside the walls of the home as being within the geographic area in which theft at night amounts to burglary.” *United States v. Van Damme*, 48 F.3d 461, 464 (9th Cir. 1995). As Blackstone explained, “if the barn, stable, or warehouse, be parcel of the mansion-house and within the same common fence, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenants, if within the curtilage or home-stall.” 4 William Blackstone, Commentaries on the Laws of England at 225 (1769). Curtilage “was also a

exercised *within the home*: “We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights.” *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (Wilkinson, J.). Constitutional tests which invite different decisions by judges with different experiences invite inconsistency and uncertainty, at the expense of constitutional fidelity.

common-law arson concept.” *Chong v. United States*, 112 F.4th 848, 865 (9th Cir. 2024) (Bumatay, J., concurring). Similar to burglary, the common law recognized that the burning of material *near* a “dwelling-house” logically posed a risk to the occupants therein. *Id.* at 866.⁵

Thus, “the boundaries of curtilage were well understood” historically. *Chong* at 866 (Bumatay, J., concurring). Timothy Cunningham’s “important”⁶ Founding-era legal dictionary defined “curtilage” to mean “a yard, backside, or piece of ground lying near a dwelling house, where they sow hemp, beans, and such like.”⁷ John Burn’s 1792 legal dictionary

⁵ In other words, the concept of curtilage was designed to give *heightened* protection to homeowners against crime, not *reduced* constitutional protection of property declared not to be “curtilage.” Yet that is precisely what occurred here. Under the panel majority’s logic, Mr. Moses’s driveway was given the same protection as an “open field,” despite being *partially enclosed* and *directly attached* to his home. *Cf. Oliver v. United States*, 466 U.S. 170, 179 (1984) (“cultivation of crops ... occur[s] in open fields”). But even in “open fields,” the government certainly can commit a common-law trespass. *See, e.g., Rainwaters v. Tenn. Wildlife Res. Agency*, 2024 Tenn. App. LEXIS 208 (May 9, 2024) (rejecting warrantless installation of game cameras on farming and hunting properties under the Tennessee Constitution). By effectively declaring Mr. Moses’s driveway an “open field” where supposedly *anything goes* under the Fourth Amendment, the panel majority sanctioned lawless government action that would have appalled the Framers.

⁶ *Heller* at 581.

⁷ T. Cunningham, A New and Complete Law Dictionary vol. I (1764).

similarly explained that “curtilage” is “a court yard, backside, or piece of ground, lying near and belonging to an house,” but without Cunningham’s agricultural connotation.⁸ This definition persisted for decades, with Noah Webster explaining in 1828 that “curtilage” includes “a yard, garden, inclosure or field near and belonging to a messuage.”⁹

According to this uniform historic understanding, Mr. Moses’s driveway clearly fell within the curtilage of his home. Indeed, although the Founders may have been unfamiliar with *asphalt*, they certainly were familiar with *hedges*,¹⁰ and they nevertheless would have understood the driveway to be a “piece of ground,” “court yard,” or even a “field” that lies “near a dwelling house.” This conception is clearly distinguishable from an “open field” entirely *outside*

⁸ J. Burn, A New Law Dictionary vol. I (1792); accord T. Potts, A Compendious Law Dictionary (1803) (“a yard, backside, or piece of ground, lying near a dwelling house”).

⁹ N. Webster, An American Dictionary of the English Language vol. I (1828). A “messuage” was “a Dwelling-house, with some Land adjoining, assigned to the Use thereof.” *Chong* at 866 n.1 (Bumatay, J., concurring).

¹⁰ See 3 William Blackstone, Commentaries on the Laws of England at 209 (1794) (“For every man’s land is in the eye of the law inclosed and set apart from his neighbours ... as one field is divided from another by a hedge....”). Here, the partial fencing of Mr. Moses’s driveway objectively indicated that it was within his home’s curtilage. Yet according to the panel majority’s subjective opinion, the driveway simply was not fenced in *enough* to evince an expectation of *privacy*. But that has *nothing* to do with the *property*-rights analysis.

the immediate vicinity of the home. Indeed, “open fields” are not “land *immediately surrounding* and associated with the home.” *Oliver v. United States* at 180 (emphasis added). Mr. Moses’s driveway is within the curtilage of his home, and this Court’s review is necessary to set the record straight.

C. The Panel Never Engaged with this Court’s *Jones* and *Jardines* Framework, which Squarely Controls this Case.

In *United States v. Jones* at 405, this Court recognized that “the Fourth Amendment reflects its close connection to property,” and so “our Fourth Amendment jurisprudence [i]s tied to common-law trespass....” Thus, when “[t]he Government physically occupie[s] private property for the purpose of obtaining information,” there is “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. And when the government enters private property to gather information without a warrant, “the only question is whether [the owner] had given his leave (even implicitly) for [the government] to do so.” *Jardines* at 8.

At no point did the panel majority below engage with this Court’s property-rights approach, which is the “baseline” approach intended to “keep[] easy cases easy.” *Jardines* at 11. Rather, the panel majority ignored *Jones* entirely, and merely cited *Jardines* in passing, skipping over both precedents in favor of a privacy-rights analysis that this Court has instructed should only be conducted secondarily — if at all — if a

property-rights analysis is for some reason insufficient.¹¹ Pet.App.8a; Pet.App.13a. Yet had the panel majority applied these governing precedents, Officer Hess's search would have fallen squarely within the *Jones* and *Jardines* framework, as the officer's search constituted a common-law trespass. As Blackstone explained:

Every unwarrantable entry on another's soil the law entitles a trespass.... For every man's land is in the eye of the law inclosed and set apart from his neighbours: and that either by a visible and material fence, as one field is divided from another by a hedge; or, by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other.... [3 William Blackstone, Commentaries on the Laws of England at 209-10 (1794).]

If there could be a textbook (or treatise) example of common-law trespass, this case would be it. Mr. Moses's driveway was private property. So too was his car. *See Jones* at 404. Mr. Moses's driveway was demarcated on one side by a "visible and material

¹¹ *See Jones* at 409 ("*Katz* ... has been *added to*, not *substituted for*, the common-law trespassory test"); *see also Jardines* at 11 ("The *Katz* reasonable-expectations test ... is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas.").

fence” — indeed, a “*hedge*” — but also by an “ideal invisible boundary” — his property line where the driveway met the street. And Officer Hess “physically occupied [this] private property for the purpose of obtaining information” without Mr. Moses’s consent. *Jones* at 404. Indeed, Mr. Moses had not “given his leave (even implicitly) for [Officer Hess] to do so.” *Jardines* at 8 (no “invitation or license to attempt an entry”). While a visitor may have an “implicit license ... to approach the home by the front path, knock promptly, wait briefly to be received,” *id.*, a visitor has no license to walk onto a driveway and begin rummaging through a parked car. Ironically, that sort of behavior would warrant *calling* the police.

Accordingly, the Fourth Amendment required that Officer Hess first obtain a warrant,¹² and this Court

¹² The fact that an *automobile* was involved in this curtilage case changes nothing about the analysis. Under the property-based approach, the Fourth Amendment has no concern with whether a vehicle was “read[ily] mobil[e]” (*Collins* at 591) or whether it was “on the public roads” (*Jones* at 406). What matters is whether the vehicle was private *property*, and whether it was physically occupied by the government for the purpose of obtaining information. That is unquestionably the case here. See *Jones* at 404 (“It is beyond dispute that a vehicle is an ‘effect’ as that term is used in the Amendment.”); Pet.App.2a (“He searched the car....”). And in any case, Mr. Moses’s parked Impala was not “readily mobile” when Officer Hess blocked him into his driveway, and there is no reason why Officer Hess could not have called for a search warrant on the spot. See, e.g., *State v. McCarthy*, 501 P.3d 478, 507 (Or. 2021) (State “failed to ‘adequately explain why the police could not observe the vehicle during the period of time needed to obtain a warrant and seize the vehicle only if there was an attempt to move the vehicle.’”). Indeed, that is what the

should grant the Petition to instruct the lower courts to apply *Jones* and *Jardines* — first and foremost — in Fourth Amendment cases, before proceeding secondarily (if at all) to amorphous notions of privacy. But the panel never engaged in this sort of analysis. And it never even considered the license of the community — where strangers have never been “traditional[ly] invit[ed]” (*Jardines* at 8) to rummage around in another person’s car parked in their own driveway.

II. REVIEW IS NECESSARY TO REMIND THE LOWER COURTS THAT FOURTH AMENDMENT RIGHTS DO NOT RISE AND FALL ON “REASONABLE EXPECTATIONS OF PRIVACY.”

At times, the panel majority conflated its analysis of Mr. Moses’s *property* — his curtilage — with an analysis of his “reasonable expectation of privacy.” See Pet.App.8a-9a (“Moses did not have a reasonable expectation of privacy in that part of his driveway”); Pet.App.13a (fourth *Dunn* factor “cuts against a reasonable expectation of privacy”). Although this confusion may be understandable given this Court’s adoption of alternative Fourth Amendment approaches, it nevertheless warrants correction.

In the 1960s, this Court began to decide Fourth Amendment cases according to the view that the Amendment protects only a right to privacy — a right

Fourth Amendment demanded here.

first articulated in an 1890 law review article coauthored by then-attorney Louis Brandeis.¹³ Although initially explained in *Warden v. Hayden*, 387 U.S. 294 (1967), and applied soon thereafter in *Katz v. United States*, 389 U.S. 347 (1967),¹⁴ as a means of bolstering the Fourth Amendment’s protections against modern technological advancements, this “right to privacy” soon began to have precisely the opposite effect. Indeed, over the last several decades, many of the Fourth Amendment’s protections have been eroded based on judges’ perceptions of what governmental intrusions are necessary, as balanced against what expectations of privacy are reasonable. The same is true here. *Compare Collins* at 593-94 (“the driveway enclosure where Officer Rhodes searched the motorcycle ... is properly considered curtilage”), *with* Pet.App.7a (“this patch of driveway was not ... curtilage”).

But this modern trend should have ended with *United States v. Jones*, which restored the primacy of private property rights. As this Court made clear, “the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.” *Id.* at 409. In other words, “Fourth Amendment rights do not rise or fall with the *Katz* formulation,” and a judicial finding that a litigant lacks a “reasonable expectation of privacy” is not

¹³ See S. Warren & L. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

¹⁴ See *id.* at 360 (Harlan, J., concurring) (coining the phrase “reasonable expectation of privacy”).

dispositive when the government “physically occupie[s] private property for the purpose of obtaining information.” *Id.* at 406, 404.

Ultimately, the panel majority’s analysis of the *Dunn* factors spoke only to this Court’s “*Katz* formulation.” *See Dunn* at 300 (factors “bear upon wh[at] an individual reasonably may expect”). But under this Court’s original property-based approach, none of *Dunn*’s considerations matter. Indeed, this Court already rejected the argument that government tracking of a “Jeep on the public roads, which were visible to all,” could mean that “no search occurred.” *Jones* at 406. Rather, regardless of where that private property was located, a search occurred because the government “physically occupied private property for the purpose of obtaining information,” *id.* at 404, just as it did here — entirely aside from and irrespective of one’s so-called “reasonable expectation of privacy.”

This Court should grant the Petition to correct the record (again), as the lower courts are failing to recognize these basic precepts. The panel majority’s refusal to apply this Court’s property-based approach “is a virus that may spread if not promptly eliminated.” *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 218 L. Ed. 2d 71, 75 (2024) (Alito & Thomas, JJ., dissenting from denial of certiorari).

CONCLUSION

For the foregoing reasons, the Petition for certiorari should be granted.

Respectfully submitted,

JOHN I. HARRIS III
SCHULMAN, LEROY &
BENNETT, P.C.
3310 West End Avenue
Ste. 460
Nashville, TN 37203

OLIVER M. KRAWCZYK
AMBLER LAW OFFICES,
LLC
115 S. Hanover St.
Ste. 100
Carlisle, PA 17013

ROBERT J. OLSON*
WILLIAM J. OLSON
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
**Counsel of Record*
Attorneys for Amici Curiae

November 3, 2025