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In the

Supreme Court of Ohio

STATE OF OHIO,	:	Case Nos. 2025-0912
	:	
Appellee,	:	On Appeal from the
	:	Hamilton County
v.	:	Court of Appeals,
	:	First Appellate District
DANIELLE BARTON,	:	
	:	Court of Appeals
Appellant.	:	Case No. C-240427

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INTRODUCTION

This case asks what happens when a police dog does what any dog might do—jumps up to an open car window and briefly pokes its head inside, unprompted by its owner. During an undisputedly lawful traffic stop of Danielle Barton's car, police officers conducted an undisputedly lawful dog sniff for drugs. But the dog unexpectedly, and unprompted, jumped up and poked its head inside her open car window for about one to three seconds. Afterward, the dog alerted the police to the presence of narcotics in the car. This led the police to find drug paraphernalia in Barton's car.

Barton disputes the legality of the dog sniff on the basis that the dog's unexpected leap and brief intrusion into her window was an unlawful Fourth Amendment search. But every path to a Fourth Amendment search, much less an unlawful one, leads to a dead end.

On the first path, which asks whether the dog-sniff in question violated her reasonable expectation of privacy, no search occurred because Barton had no expectation of privacy in her open car's contraband odors. The dog's minimal entry into the car does not add any meaningful privacy invasion above a sniff just outside the open window, so it does not transform a lawful sniff into a violation of protected privacy.

On the second path, which asks whether the dog's intrusion into the window was a trespass on property, no search occurred because there was no *constitutionally relevant* trespass. The dog's actions, for one, are not enough for trespass to land (putting aside the awkwardness of treating cars as land) because the dog's head poking into the car was not intentional or attributable to the officers. And, treating the car as

chattel (which it is), no trespass occurred because the dog's head-poke did not damage, interfere, or dispossess Barton of the car. And mere touches of personal property did not count as actionable trespass in common law. Because such touches would not have sufficed to sustain a trespass suit, which was the common way to vindicate the right against unlawful searches in antiquity, they play no analogous role in the constitutional analysis.

At any rate, even if she could cross these hurdles to establish a search, Barton cannot show that the search was unreasonable or that the exclusionary rule should be applied. This Court should thus reverse the lower court's judgment.

STATEMENT OF *AMICUS* INTEREST

The Attorney General of Ohio is the State's "chief law officer" and represents the State's interests before this Court. R.C. 109.02. He is interested in ensuring that the Fourth Amendment is applied correctly such that Ohioan's rights are protected and police officers are able to carry out their duties.

STATEMENT OF THE CASE AND FACTS

I. The Government conducts a Fourth Amendment search when it intrudes upon a reasonable expectation of privacy or trespasses on physical property.

The Fourth Amendment provides, in relevant part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. That establishes a physical "baseline": "[w]hen 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original

meaning of the Fourth Amendment' has 'undoubtedly occurred.'" *Florida v. Jardines*, 569 U.S. 1, 5 (2013) (quoting *United States* v. *Jones*, 565 U.S. 400, 406–07 & n.3 (2012)).

Though "property rights are not the sole measure of Fourth Amendment violations," *id.* (quotation omitted), the Supreme Court reasoned its Fourth Amendment cases by analogy to physical invasion from the time of ratification until the early 20th century. Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 Sup. Ct. Rev. 67, 77 (2012). In *Boyd*, for example, the Supreme Court explained, "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty." *Boyd v. United States*, 116 U.S. 616, 630 (1886). This case and others "suggest that early Supreme Court search doctrine was not tied to property law," but at the same time, "[p]hysical invasion of a home clearly counted as a search." Kerr, *The Curious History* at 79–80.

Moving into the late 20th century, the Supreme Court adopted the reasonable-expectation-of-privacy test. Justice Harlan piloted the test in his concurrence in *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). The Supreme Court shortly afterward adopted the test. *Terry v. Ohio*, 392 U.S. 1, 9 (1968). Under that test, the touchstone for Fourth Amendment protection was privacy, not physical invasion. "The existence of a physical trespass [was] only marginally relevant to the question of whether the Fourth Amendment [had] been violated," and "an actual

trespass [was] neither necessary nor sufficient to establish a constitutional violation." *United States v. Karo*, 468 U.S. 705, 712–13 (1984).

All this changed in 2012, when the Supreme Court adopted a trespass framework, returning Fourth Amendment analysis to its prior focus on physical invasions. In *Jones*, the Supreme Court "h[eld] that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" *Jones*, 565 U.S. at 404 (footnote omitted). A year later, the Court used a similar framework and held that "[t]he government's use of trained police dogs to investigate the home and its immediate surroundings," also called the "curtilage," "is a 'search' within the meaning of the Fourth Amendment" because the curtilage receives the same protections from intrusion as the home. *Jardines*, 569 U.S. at 5–7, 11–12.

From these cases, two kinds of Fourth Amendment searches emerged. The first flows from an invasion of a reasonable expectation of privacy. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring). The second is a trespass upon property for the purpose of obtaining information. *See Jones*, 565 U.S. at 404; *Jardines*, 569 U.S. at 5.

II. Police officers discovered drug paraphernalia in Danielle Barton's car when a police dog jumped up to her window, poked its head in, and alerted the police to the odor of narcotics in the car.

The relevant facts are undisputed. Police officers stopped Danielle Barton's car because her temporary license plate was not fully visible. Mot. Suppress at 2. After arresting her passenger for an outstanding warrant, the officers conducted a dog sniff for drugs. *Id.* During the sniff, the dog jumped up and poked its head inside the open car window for one to three seconds, depending on how you count. *Id.* at 3; Body Cam

at 23:29:45–48. The dog then alerted the police to the presence of narcotics in Barton's car, and the police thereafter found drug paraphernalia inside. *State v. Barton*, 2025-Ohio-1904, ¶2 (1st Dist.) ("App.Op."). The encounter was recorded on an officer's body camera. App.Op.¶3.

Barton was charged with possessing drug-abuse instruments. App.Op.¶2. Barton moved to suppress the evidence found inside the car. *Id.* She argued that the dog's head-poke violated the Fourth Amendment because it trespassed into the interior of the car. *Id.*; Mot. Suppress at 3–5. The trial court denied the motion. App.Op.¶4. Barton pleaded no contest and appealed. *State v. Barton*, C/23/CRB/6070 (Hamilton Cnty. Mun. Ct. June 25, 2024).

On appeal, the First District affirmed. App.Op.¶24. It noted that, as a general matter, a dog sniff does not qualify as a search. App.Op.¶8 (citing *United States v. Place*, 462 U.S. 696, 707 (1983); *Illinois v. Caballes*, 543 U.S. 405 (2005)). After reviewing the trespass test and related precedents, it concluded that "a dog's instinctual jump does not violate the Fourth Amendment when the jump was not prompted by an officer or handler." App.Op.¶20. One judge dissented, writing that Barton had an expectation of privacy in her car's interior equal to that of the interior of her house. App.Op.¶31 (Moore, J., dissenting). The dissent asserted that "the dog's intrusion into the interior of her car constituted a trespass" (but did not explain why or under what specific trespass standard) and wrote that the dog entered the car because it had investigatory intent. App.Op.¶¶41, 48 (Moore, J., dissenting).

Barton appealed, and this Court accepted the case. *09/16/2025 Case Announcements*, 2025-Ohio-3300.

ARGUMENT

<u>Appellant's Proposition of Law:</u>

> *Law enforcement violates the Fourth Amendment when a drug dog sniffs inside a vehicle during a traffic stop without probable cause, consent, or a warrant.*

This case tests the boundaries for what qualifies as a "search" under the Fourth Amendment. Barton cannot show that the police dog's unprompted and brief intrusion into her car window qualified as a search under the Fourth Amendment under either the Supreme Court's reasonable-expectation-of-privacy or property-based trespass tests. Because there was no search, there is no reason to exclude the evidence of drugs discovered by the dog-sniff.

I. Barton had no reasonable expectation of privacy in the odors of contraband.

Under current Supreme Court precedent, Barton cannot claim a reasonable expectation of privacy in the odor of the drug paraphernalia, so no Fourth Amendment search occurred under that test when the dog caught wind of contraband in Barton's car.

A. Barton cannot show that the dog's sniff detecting contraband in the interior of her car violated her reasonable expectation of privacy.

The Supreme Court has recognized a privacy-based test that proscribes searches in areas in which a person demonstrates a reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *Terry v. Ohio*, 392 U.S. 1, 9 (1968). There are two aspects to a reasonable expectation of privacy. First,

an individual must have "manifested a subjective expectation of privacy in the object of the challenged search." *California v. Ciraolo*, 476 U.S. 207, 211 (1986). Second, society must be "willing to recognize that expectation as reasonable." *Id.* The individual challenging a police search on privacy grounds bears the "burden of proving" that she "had a legitimate expectation of privacy" that the police violated. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980).

When it comes to dog sniffs, the Court has said that "governmental conduct that only reveals the possession of contraband compromises no legitimate privacy interest." *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (quotation and emphasis omitted). Thus searches, like dog sniffs, that can only reveal contraband reflect the lowest possible intrusion into privacy. Moreover, entry into a car does not implicate privacy interests as strong as those of a house because everyone has a lower expectation of privacy in her car than in her house. *See, e.g.*, *Arizona v. Gant*, 556 U.S. 332, 345 (2009); *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999); *New York v. Class*, 475 U.S. 106, 114–15 (1986); *Cardwell v. Lewis*, 417 U.S. 583, 590–591 (1974) (plurality opinion).

Barton has not met her burden to show either an objectively reasonable or subjective expectation of privacy in the odors of contraband detected by the dog.

First, any expectation Barton may have had would have been unreasonable. Unlike when an officer enters a car and can observe more than just contraband with his senses, a dog sniff that extends into the car will reveal only the smell of contraband.

And the Supreme Court has already held that there exists "no legitimate privacy interest" in contraband odors. *Caballes*, 543 U.S. at 408–09.

Second, Barton manifested no subjective expectation of privacy in the contraband smell inside her car. A person manifests an expectation of privacy by taking "normal precautions to maintain [her] privacy," and she cannot "claim any legitimate expectation of privacy" in property that is "in plain view." *Rawlings*, 448 U.S. at 105–06. Anything "a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351. For example, leaving the blinds open or having a readily audible conversation manifests no expectation of privacy in what is visible through the window or overheard. *United States v. Taylor*, 90 F.3d 903, 908–09 (4th Cir. 1996); *United States v. Llanes*, 398 F.2d 880, 884 (2d Cir. 1968). Here, Barton did not manifest any subjective expectation of privacy in the smell of contraband in the air of her car. She left the window fully open, meaning that air passed freely from her car to the outside and vice versa. In short, if she "did not wish to be [smelled,] [she] could have [rolled up the window]." *Ponce v. Craven*, 409 F.2d 621, 625 (9th Cir. 1969). Nothing in the record hints that the officer would have prevented her from doing so.

B. Barton's counterarguments all fail.

Barton tries to skirt around this roadblock by asserting that, "If an officer placing his own nose through a car window is a search, the officer's highly skilled drug-detection canine doing the same is a search, too." Apt.Br.31. That analogy misses the Supreme Court's holding that drug dogs are *sui generis*—and in a way particularly relevant here. *Caballes*, 543 U.S. at 409. If an officer put his head into the car, he

could invade a reasonable expectation of privacy in many ways: seeing a stigmatizing prescription on the floor of the car, smelling perfume that betrays a recent encounter in the vehicle, hearing the radio, reading papers that are left out, and so on. Dogs do not do that. The dog will never tell the officer about personal signs, sounds, or smells in the car. He indicates only contraband, so he intrudes only on an unreasonable expectation of privacy in illegal drugs.

Barton also likens a drug dog to a thermal-imaging camera like that in *Kyllo*. Apt.Br.29–30. But the Supreme Court has been clear that they are not comparable. A thermal imager "explore[s] details of the home that would previously have been unknowable without physical intrusion." *Kyllo v. United States*, 533 U.S. 27, 40 (2001). But a drug dog "discloses only the presence or absence of narcotics," which "compromises no legitimate privacy interest." *Caballes*, 543 U.S. at 408–09 (quotation omitted). A drug dog is not just any "tool." *Contra* Apt.Br.29. It is "*sui generis*" because it will only ever relay information that the defendant had no reasonable expectation of privacy in. *Caballes*, 543 U.S. at 408–09 (quotation omitted). For that reason, Justice Kagan's likening a drug dog to a pair of binoculars is out of step with binding precedent. *See Florida v. Jardines*, 569 U.S. 1, 12–13 (2013) (Kagan, J., concurring).

II. No constitutionally cognizable trespass occurred.

A trespass analysis based in *Jones* allows for two possible frameworks to govern this case. The first is trespass to land, and the second is trespass to chattels. Neither gets Barton to a constitutionally proscribed search.

Before explaining why, however, one brief point. When it comes to Fourth Amendment analysis, the only trespasses that are relevant are actionable trespasses. Trespass suits, rather than the modern-day evidence-exclusion principle, were the means of vindicating the Fourth Amendment right against unlawful searches. *See* George C. Thomas III, *The Common Law Endures in the Fourth Amendment*, 27 Wm. & Mary Bill Rts. J. 85, 92 (2018); Laurent Sacharoff, *Constitutional Trespass*, 81 Tenn. L. Rev. 877, 884 (2014). Thus, only those trespasses that were actionable—*i.e.*, would have resulted in punishment—are the kinds of trespasses that matter for the vindication of a constitutional right. The following analysis focuses on them.

A. Under a trespass-to-land analysis, no search occurred because the head-poke was not intentional or attributable to the officers.

Trespass-to-land standards are an odd choice for a case about trespass on a car. Vehicles are, by definition, moveable property. "Vehicle," Merriam Webster, https://perma.cc/GV35-EKP6. But some have suggested that trespass-to-land standards must apply because Justice Scalia applied such standards to cars in *Jones*. That is doubtful—*Jones* never specifies what trespass law it is applying, and Justice Alito's concurrence repeatedly refers to trespass to chattels as the force behind the majority reasoning. *Jones*, 565 U.S. at 419 & n.2, 425, 426, (Alito, J., concurring). Justice Scalia's choice not to respond to that statement, especially given his "many volleys with Alito in *Jones* … may suggest tacit agreement." Kerr, *The Curious History* at 91. Nevertheless, if trespass-to-land standards applied, there would be no trespass here under either founding-era or modern-day standards for two reasons: lack of necessary intent and rules about liability for dogs.

1. Trespass to land must be intentional.

Even though trespass does not require an intent to do wrong—or even an intent to trespass—it does require intentional movement into the area that is subject to the trespass. That is true both in common-law trespass and modern trespass standards. For example, a person does not intend to trespass when other people carry him onto the land against his will, *Smith v. Stone*, 82 Eng. Rep. 533 (1647), or when he accidentally crashes a vehicle into someone's land, Dan B. Dobbs *et al.*, *The Law of Torts* §50 (2d ed. 2025). By the same logic, it is not a trespass to accidentally launch a golf ball into a house, *id.*, though it could be a different tort. And if one person chases another person onto someone else's land, it is the chaser who is the trespasser, not the person who was chased. W. Page Keeton *et al.*, *Prosser & Keeton on the Law of Torts* 72 (5th ed. 1984); *see also* Dobbs *et al.*, *The Law of Torts* at §49; Restatement (First) of Torts §158 (1934). In sum, "[t]he intent required as a basis for liability as a trespasser is simply an intent to be at the place on the land where the trespass allegedly occurred," *Prosser & Keeton* at 73, and "[i]t is a good defence in an action of trespass that the act complained of was an involuntary and inevitable accident happening without negligence." 7 Hardinge Stanley Giffard, Earl of Halsbury, *The Laws of England, being a complete statement of the whole law of England* 862 (1913), https://perma.cc/J6SG-ZRT5 (citing *Basely v. Clarkson* 3 Lev. 37 (1681); *Williams v. Price*, 3 B. & Ad. 695 (1832)). Ohio law is in accord. *See, e.g.*, *Bend-Fast, Inc. v. SBA Monarch Towers III, LLC*, 2024-Ohio-2036, ¶40 (11th Dist.); *McNabb v. Ottawa Cnty. Commissioners*, 2019-Ohio-1487, ¶30 (6th Dist.); *Brown v. Scioto Cty. Bd. of Commrs.*, 87 Ohio App. 3d 704, 716 (4th Dist. 1993).

The intent requirement also shows up in the common-law rules for liability for canine actions. At common law, the rule was that a dog's owner was not liable for his dog's trespass unless he commanded it, failed to take reasonable steps to stop it, or knew that the dog would cause damage while roaming at large.

Start with the baseline: "The owner of a dog is not answerable in trespass for its unauthorized entry into the land of another, often described as an unprovoked trespass." 1 Hardinge Stanley Giffard, Earl of Halsbury, *The Laws of England, being a complete statement of the whole law of England* 395 (1907), https://perma.cc/8WK9-VVND (citing *Millen v. Fawdry*, 79 Eng. Rep. 1259 (1625) (Littleton, J.)); *see also* Hamilton C. Horton, Jr., *Torts—Animals—Liability of Owner for Trespass of Dogs While Hunting*, 33 N.C. L. Rev. 134, 135 (1954). Three judges explained this rule in *Mitten v. Faudrye*, a case in which the Defendant had used a dog to chase sheep off his land, after which the dog did not immediately return when called back and strayed onto someone else's land. 79 Eng. Rep. 1259 (1625). The defendant's counsel argued that "a man cannot have such power upon his dog as to recall him when he pleaseth," and he noted that "a dog is ignorant of the bounds of land." *Id.* at 1260. The Chief Justice agreed that the defendant "could not withdraw his dog when he would in an instant," and "he did his best endeavour to recall the dog, and therefore trespass does not lie." *Id.* Justice Doderidge added that "the nature of a dog is such that he cannot be ruled suddenly, and here it appeareth to be an involuntary trespass," and "a trespass ought to be done voluntarily, and so it is *injuria*, and a hurt to another, and so it is *damnum*." *Id.*

The rule was different for those that trespassed with their dogs, commanded their dogs to trespass, or knowingly set a destructive dog loose. In *Beckwith v. Shordike*, "a defendant was held liable in trespass for his dog killing a deer, on the ground that the owner took the dog with him and was really the trespasser." 1 Giffard, *The Laws of England* at 395 n.(t) (citing 4 Burr. 2092 (1767)). Likewise, "if a man wilfully send a dog on another man's land in pursuit of game he is liable in trespass, although he did not himself go on the land." *Id.* And he is also liable "if he allow a dog to roam at large, knowing it to be addicted to destroying game." *Id.*

The U.S. Supreme Court seems to agree with this analysis. In *Jardines*, the Court wrote that "[t]he *officers* were gathering information in" the curtilage and that "the *officers'* investigation took place in a constitutionally protected area." *Jardines*, 569 U.S. at 5, 7 (emphasis added). "It [was] not the dog that [was] the problem, but the behavior that [t]here involved use of the dog." *Jardines*, 569 U.S. at 9 n.3. The concurrence likewise focused on the officer's actions—not those of the dog, which it likened to "a super-sensitive instrument" rather than a volitional actor. *Jardines*, 569 U.S. at 12 (Kagan, J., concurring). To think of this another way, imagine that *Jardines* had involved a police dog that broke away from his handler and was found signaling at a doorstep all alone. The opinions in *Jardines* point to the opposite outcome in such a case because the dog itself cannot be a trespasser, nor does it make its handler into a trespasser through its independent and undirected actions.

Some have made the mistake of assuming that the same common-law rules applied to both barnyard animals and dogs alike. The Idaho Supreme Court explicitly

relied on that mistaken assumption. *State v. Dorff*, 171 Idaho 818, 826 (2023). But while "barnyard animals" had a "rule of strict liability" if their owner accidentally let them escape, that rule "did not apply to pets like dogs and cats, although the keeper of such animals might be liable for negligently or intentionally causing them to enter the land." Dobbs *et al.*, *The Law of Torts* at §438.

2. No search occurred under a trespass to land theory because the *officers* did not intend for the dog's head to enter the car window.

Applying both principles here, no trespass under a trespass-to-land theory occurred here. First, the intentionality requirement leads to the conclusion that the officers did not trespass into the car when the dog poked its head into the airspace of the car. Everyone agrees that the officers did not do anything wrong—that the dog poked its head of its own volition. Feb. 9 Tr.55–56. Whether that falls under a label of "instinctive" action or unintentional intrusion does not matter. What matters is that the officers did not themselves intrude or intend for the dog to intrude. Thus, they did not trespass into the car even if trespass-to-land standards applied.

Second, applying the rule for dogs, the officers cannot be liable for the dog's head-poke because they did not command the dog to poke his head into the car. Without wrongdoing, the officers cannot be at fault for the dog's head-poke, even if it were a trespass.

B. Under trespass-to-chattels law, no search occurred because the dog's head-poke did not dispossess, interfere, or damage.

1. Trespass to chattel requires dispossession, damage, or harmful interference with the personal property.

Under both the founding-era law of trespass to chattels and the modern American law of trespass to chattels, only dispossession, damage, or harmful interference with personal property is actionable. Start with founding-era principles. Blackstone explained in 1768 that "[t]he rights of personal property in *possession* [as distinguished from contract-based rights] are liable to two species of injuries: the amotion or deprivation of that possession; and the abuse or damage of the chattels, while the possession continues in the legal owner." 3 William Blackstone, *Commentaries on the Laws of England* *144, *153. Indeed, the common-law writ of *trespass de bonis asportatis*, despite its Latin reference to carrying away, covered both the removal or taking of goods and the damaging of goods. Keeton *et al.*, *Prosser & Keeton* at 85; W.V.H. Rogers, *Winfield & Jolowicz on Torts* 817–18 (18th ed. 2010); *Marentille v. Oliver*, 2 N.J.L. 379, 380 (1808) (Pennington, J.); Kerr, *The Curious History* at 92 & n.140. Later English law may have broken away and permitted legal action for harmless intermeddling, but that conclusion is both uncertain and irrelevant for this case. *See* Richard A. Epstein, *Cybertrespass*, 70 Univ. Chi. L. Rev. 73, 77–78 (2003); Rogers, *Winfield & Jolowicz* at 817–18, 820; *see also* 7 Giffard, *The Laws of England* at 863–64 & n.(a).

As for American trespass-to-chattels law, it is "striking … how little doctrinal change it has undergone in hundreds of years." Epstein, *Cybertrespass* at 76. Trespass to chattel requires either "dispossessing another of the chattel" or "using or intermeddling with a chattel in the possession of another." Restatement (Second) of Torts §217 (1965). Or perhaps more simply, trespass to chattels is "intentionally

interfering with the plaintiff's possession in a way that causes legally recognizable harm," such as "interfering with the plaintiff's access or use or by causing actual harm to the chattel." Dobbs *et al.*, *The Law of Torts* at §60 (footnote omitted).

Mere dignitary violations against chattel ownership are not included in trespass to chattels. Other courts have misread *Prosser and Keeton* by plucking a phrase out of context, *see, e.g.*, *Dorff*, 171 Idaho at 826, but in reality, *Prosser and Keeton* explained that the rule of liability for harmless trespass to land does *not* apply to chattels because "the dignitary interest in the inviolability of chattels, unlike that as to land, is not sufficiently important to require any greater defense than the privilege of using reasonable force when necessary to protect them. Accordingly, it has been held that nominal damages will not be awarded, and that in the absence of any actual damage the action will not lie." Keeton *et al.*, *Prosser & Keeton* at 87. That "is not the same as saying that an intermeddling occurs—and thus a trespass—when the dignitary interest in inviolability is transgressed." Will Baskin, *Trespass to Chattel and the Fourth Amendment*, 11 Tex. A&M J. Prop. L. 285, 297 (2025). In fact, Prosser and Keeton say the opposite of what *Dorff* supposed. And "none" of the "prominent treatises on the subject" defines trespass to chattel "in terms of violating the dignitary interest in the chattel's inviolability." *Id.* at 296.

A damage or dispossession requirement for a trespass to chattel but not to land made sense. Trespass to land threatens the landowner's rights to the land "because unprivileged entry on land … if repeated over time, can lead to prescription." *Id.* at 297 (citing Keeton *et al.*, *Prosser & Keeton* at 67, 75). In other words, even a harmless

entry into someone's land could be a step toward taking away some of her rights to the land. There is no need for a similar rule for chattels "because there is no risk of prescription" for chattels. *Id.* That is, "[s]imply touching chattel cannot lead to another person acquiring an interest in it." *Id.*

Ohio law accords with the principles that Blackstone, Epstein, Prosser and Keeton, Dobbs, Kerr, and the Second Restatement articulated. Momentarily opening another person's backpack did not qualify as trespass to chattel because it did not cause dispossession; impairment of condition, quality, or value; substantial deprivation of use; or bodily harm. *Dryden v. Cincinnati Bell Tel. Co.*, 135 Ohio App. 3d 394, 403–04 (1st Dist. 1999). Moving an ex-lover's belongings to a storage unit and keeping the key for a day did qualify as trespass to chattels because of the dispossession. *Mercer v. Halmbacher*, 2015-Ohio-4167, ¶¶3, 24 (9th Dist.). And in a federal case based on Ohio law, an unauthorized use of a computer network to spam subscribers was a trespass to chattels because it drained the servicer's computing power and hurt its "business reputation." *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1017, 1022–23 (S.D. Ohio 1997).

2. The police dog did not damage, dispossess, or interfere with Barton's car.

Those straightforward principles lead to a simple application. The police dog's head-poke did not trespass on Barton's car because it did not constitute a trespass to chattels. Poking the head past the plane of the open window did not harm the car. And since the car was already validly seized for a traffic stop, the head-poke itself did not dispossess Barton of her car or interfere with her use of the car. The head-poke

did not meet any of the standards for qualifying as a trespass to chattels. Thus, under either the 18th-Century or the modern standard, the dog's head-poke did not commit a true, actionable trespass.

This does not mean, however, that a police officer would be free to insert his head into a vehicle or otherwise intrude on privacy of chattels. Under the privacy-based test, an officer who inserted his (human) head into a car would violate a reasonable expectation of privacy. *See* above at 8–9. Unlike a dog, an officer can meaningfully perceive and communicate information other than the smell of contraband—at least some of which falls inside the car owner's reasonable expectation of privacy. Thus, the Fourth Amendment bars an officer's physical intrusion into a car even when it is not a trespass. *See New York v. Class*, 475 U.S. 106, 112, 115 (1986). Courts across the country have had no qualms holding that police officers conduct Fourth Amendment searches under a privacy-based analysis when they insert themselves inside a car. *See, e.g., Class*, 475 U.S. at 115; *Commonwealth v. Podgurski*, 386 Mass. 385, 387–89 (1982); *Grant v. State*, 449 Md. 1, 16–19 (2016); *cf. United States v. Ryles*, 988 F.2d 13, 15 (5th Cir. 1993). But none of those human-privacy-invasion concerns apply to a dog smelling for contraband, and they do not affect the trespass analysis in any event.

C. Barton's arguments that a Fourth Amendment search occurred based on various theories of trespass fail.

1. *Jones* does not embrace a mere-touch test.

Barton argues that *Jones* requires courts to always apply a mere-touch test and a trespass-to-land framework. Apt.Br.25. That is incorrect. *Jones* quoted *Entick*'s

comments on property as exemplifying the general "significance of property rights in search-and-seizure analysis." *Jones*, 565 U.S. at 405. It did not direct courts to refuse to analyze actual "tie[s] to common-law trespass" in favor of a new everything-is-land or every-touch-is-trespass approach. *Id.* Indeed, overreading this portion of *Jones* would overrule the open-field doctrine that the Supreme Court has established and reaffirmed. *Oliver v. United States*, 466 U.S. 170, 176 (1984). The lesson here is that it is poor reasoning to grab sentences from *Jones* and extrapolate exhaustive rules that override real legal distinctions.

In reality, not every touch is a trespass, and not every trespass is a touch. It all depends on the legal standards for trespass, and the Supreme Court has not yet "elaborate[d] upon the trespass standard it was applying." *State v. Speights*, 497 P.3d 340, 345–46 (Utah 2021). The Court has never expressly required courts to use any particular touchstone—whether "one based on the common law of 1791, on the specific trespass law of the state where the search occurred, or on some other trespass principles." Sacharoff, *Constitutional Trespass* at 877.

Judges and constitutional scholars have noted the gap and provided helpful guidance for most faithfully applying the Supreme Court's vision for property analysis. Most importantly, the property test does not simply "compare the contact in question to the contact in *Jones*." Baskin, *Trespass to Chattel* at 286. That simplistic analysis "renders *Jones* a 'touching' test rather than a 'trespass' test" with only "superficially compelling common-law underpinning." *Id.* at 304 (describing *State v. Dorff*, 171 Idaho 818, 821 (2023)). Instead, courts need to "ask[] what the principles of common-

law trespass have to say," *id.* at 286, as relevantly modified by modern legal changes. Especially in light of later Supreme Court cases, "[i]t is not clear *Jones* should be read to suggest that every physical touch that is designed to obtain information … rises to the level of a 'physical intrusion,' as required for a Fourth Amendment search." *Verdun v. City of San Diego*, 51 F.4th 1033, 1037 (9th Cir. 2022).

With the understanding that the trespass test should be applied intelligently rather than reflexively, Barton has no valid argument for finding a trespass here. Her read of common-law trespass is tainted by confusion between trespass standards for land and chattels. Apt.Br.25. And she falls prey to the same mistake that *Dorff* did in misreading *Prosser & Keeton* on trespass to chattels. Apt.Br.26–27.

Barton is also mistaken when she argues that the relevant common law included a mere-touch test for chattel. Indeed, the "English common law" that Barton relies on is past the date that would matter for influencing our founders or the Fourth Amendment. Apt.Br.27 (citing Shyamkrishna Balganesh, *Property Along the Tort Spectrum: Trespass to Chattels and the Anglo-American Doctrinal Divergence*, 35 Common L. World Rev. 135, 141 (2006) (cases from mid-1800s and beyond)). And by the time of the Fourteenth Amendment, the diverging English law was irrelevant to the American Constitution's legal backdrop.

Barton's other authorities do not support her point either. One notes that no authority supports actionability for harmless trespass to chattels. John W. Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* 331 (1907). Another discusses how water rights must be legally vindicated lest the

property owners lose rights through prescription, but a "temporary trespass … if there be no sensible damage and it be transient in its nature and character … may possibly (for I give no opinion upon such a case), be without redress at law." *Webb v. Portland Mfg. Co.*, 29 F. Cas. 506, 507–08, 510 (C.C.D. Me. 1838). In *Bruch v. Carter*, the trespassing defendant caused a horse's death, so comments on nominal damages are dicta—and late-19th century dicta at that. 32 N.J.L. 554, 565 (1867). And *Entick v. Carrington* is about real property, not chattels. 95 Eng. Rep. 807, 817–18 (1765).

2. *Jones* does not establish a technical-trespass test.

Barton also confuses the existence of a property right and actionability of trespass. She is right that everyone is entitled to use self-help to exclude others from their chattels. Apt.Br.27. But that does not mean anyone has the right to invoke legal punishment for harmless interference with chattels.

At common law, technical trespass was not the measure of an official's invasion. It was "fear of civil tort judgments" that "protected property, privacy, and freedom from unlawful restraint in eighteenth-century England and in the colonies." Thomas III, *The Common Law Endures* at 92; Kerr, *The Curious History* at 71. And thus it was only actionable trespass that mattered.

That approach maintains a consistent baseline from the founding until now: actionable trespasses are punishable trespasses. Or put another way, if you could punish a private person for the intrusion, then you can punish the government official for it. If courts rejected this guideline and excluded evidence based on any technical trespass, that would depart from the common-law background. In effect, the modern

courts would be imposing punishment for officials' actions that were not punishable at common law (and would not be punishable for a private person today).

A focus on actionable trespass fits best with existing precedent too. An actionable trespass rule is "not only a more reasonable interpretation of the principle articulated in *Jones* but also more consistent with a precise application of trespass law to the *Jones* facts." Baskin, *Trespass to Chattel* at 306. The Court did not hold that touching the GPS to the car alone completed the unlawful search. It was not just the "installation of a GPS device on a target's vehicle" that violated the Fourth Amendment, but also the "use of that device to monitor the vehicle's movements" that completed the constitutional violation. *Jones*, 565 U.S. at 404 (footnote omitted). After all, a car that is being tracked by strangers is worth less than a car that is not being tracked—that is why people are willing to spend time and money to avoid unwanted tracking. *Cf.* Pieter Arntz, *Apple and Google join forces to stop unwanted tracking*, Malwarebytes (May 15, 2024), https://perma.cc/C5MV-JR89. In other words, "[a] trespass occurred in *Jones* not only because the GPS device was attached to the vehicle but because it had the qualitative effect of diminishing the value of the vehicle to its owner." Baskin, *Trespass to Chattel* at 306–07.

What kind of trespass would not be actionable? Trespass to chattels has always required some damage or substantial interference in order to be actionable, so harmless contact with chattels or trivial interference would not be actionable. 3 William Blackstone, *Commentaries* *145, *153. The same is true today: "[t]he interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of

land, is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel." Restatement (Second) of Torts §218 cmt. e (1965).

Why bother to have non-actionable trespass if it cannot see its day in court? Harmless contact or interference with chattels still matters because that fact can be "important in the determination of the legal relations of the parties." *Id.* at §217 cmt. a. For example, a trespass to chattels gives the owner of the chattels the "privilege to use reasonable force to protect his possession against even harmless interference." *Id.* at §218 cmt. e. And in some circumstances "the fact that one person is a trespasser is important in determining the duty of care owing to him by the possessor of the chattel." *Id.* at §217 cmt. a. In sum, trespasser-status could matter to legal questions other than whether to punish or deter the trespasser.

To hold the equation constant, punishable conduct now corresponds to punishable conduct back then. Because harmless interference was not actionable (punishable) at common law, then it is not excludable (punishable) now. Barton gives no reason for treating non-actionable (non-punishable) intrusions at common-law as punishable intrusions now. Apt.Br.26. She simply asserts that it should be so.

3. Barton's attacks on the instinct test ignore important legal doctrines about intent and attributability of a dog's actions in trespass law

Barton argues that whether a dog acts instinctually cannot matter for Fourth Amendment purposes. Apt.Br.32–46. But regardless of whether "instinct" is the best label, she is wrong on the substance. Whether a dog intrudes of its own volition or at the direction of its master is important. "[T]he Fourth Amendment addresses misuse of power, … not the accidental effects of otherwise lawful government conduct."

Brower v. Cnty. of Inyo, 489 U.S. 593, 596 (1989) (quotation omitted) (addressing seizure). As explained above, the lack of intent to poke the dog's head into the car means that the dog's head-poke is not attributable to the officer. Barton is wrong that *Jones* and *Jardines* make intent irrelevant. An accidental police dog bite is not a seizure because it is not intentional. *Whitworth v. Kling*, 90 F.4th 1215, 1218 (8th Cir. 2024); *Dunigan v. Noble*, 390 F.3d 486, 492–93 (6th Cir. 2004). In the same way, a dog's trespass that is not commanded for the purpose of discovering information is not a search because it is not intentional.

Barton argues that the fact that the police are using the dog to sniff for drugs supplies the "purpose" to obtain information, meaning that the dog's head-poke is a trespass *for the purpose* of obtaining information. Apt.Br.39. That rests on an overly broad concept of purpose, and it leads down a slippery slope. When officers intend to use a drug-sniffing dog for a lawful exterior sniff, that is the extent of their "purpose." When the dog touches or enters a car incidentally and without officer direction, that does not mean that the officers touched the dog to the car for the purpose of obtaining information. Otherwise, any incidental contact would be "for the purpose" of obtaining information, no matter how accidental. *Contra United States v. Olivera-Mendez*, 484 F.3d 505, 511 (8th Cir. 2007). After all, the police only have the dog on the scene because they want to use it to determine whether contraband odors are around the car. If the dog's tail touches the car while doing an exterior search, under Barton's rule, that touch is contact for the purpose of obtaining information. Not even Barton

would argue for that conclusion, but she cannot explain why an accidental entry should be treated differently than an accidental tail-wag.

Barton implies that *Karo* is relevant to whether the police can accidentally trespass through a dog's uncontrolled actions, but that is not true. Apt.Br.36–37 (citing *United States v. Karo*, 468 U.S. 705 (1984). *Karo* was decided during the heyday of reasonable expectations of privacy without any analysis about trespass. At most, *Karo* stands for the idea that police can infringe a reasonable expectation of privacy by releasing information-gathering technology into suspects' homes, even accidentally. *Karo*, 468 U.S. at 714–15. It does not hint at the idea that police can become trespassers because of an accidental contact between a dog and chattel. And as far as dogs' trespassing goes, Barton is wrong because she fails to appreciate the role of intent and the dog-specific rules at common law.

One final point here. Barton thinks that if the police use dogs for their specialized skills, then they must accept responsibility for everything their dogs do. Apt.Br.36–37, 39–40. But there is nothing anomalous about acknowledging that dogs are reliable tools but also not possible to control in every particular at all times. Jurists have understood this for centuries. Even back then, dogs were incredible farm hands and could be trained to herd sheep with skill and intelligence. Still, "a dog is ignorant of the bounds of [property]," so dog owners could foresee that their dogs would harmlessly stray onto others' land from time to time when used for farming tasks. *Mitten v. Faudrye*, 79 Eng. Rep. 1259, 1260 (1625) (defense counsel). That did not mean that a dog owner was liable for the foreseeable harmless trespass if he used his dog to herd

sheep. *Id.* (Popham, C.J.). So no, foreseeable harmless trespasses by dogs do not lead to the conclusion that the police handlers are liable as knowing or reckless.

4. Even if human intent were not the touchstone, Barton would fail when treating the dog like an officer.

The dissent in the court below tries to avoid the legal roadblocks by ignoring the differences between the officers and the dog. As this argument goes, courts need to know "the dog's purpose in entering the vehicle" in order to complete their analysis. App.Op.¶45 (Moore, J., dissenting). This argument is strange for many reasons, but in any event, the argument fails on its own terms because it only selectively treats the dog as a canine officer.

If a dog were an officer for all relevant purposes, that would mean that the dog would have the same liabilities and privileges as an officer. One privilege an officer has is to react to contraband within plain view or plain smell. *Illinois v. Andreas*, 463 U.S. 765, 771–72 (1983); *United States v. Haley*, 669 F.2d 201, 203 (4th Cir. 1982); *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470, 477 (5th Cir. 1982); *United States v. Clayton*, 210 F.3d 841, 845 (8th Cir. 2000); *United States v. Angelos*, 433 F.3d 738, 747 (10th Cir. 2006). If an officer smells illegal contraband outside the car, he has probable cause to search the car's interior. *Carroll v. United States*, 267 U.S. 132, 149 (1925). By extension, a dog who is an officer would have probable cause to enter the car and search further as soon as he smelled contraband. So when "the canine [is] attracted into the vehicle by the smell of contraband," its entry would be justified by the plain-smell doctrine. *United States v. Hutchinson*, 471 F. Supp. 2d 497, 510 (M.D. Pa. 2007). "[W]here a canine makes entry of its own accord due to its

independent reaction to an odor emanating from the car, the plain-smell rule would apply" as long as "the dog was not aided in its sniff by an intervening officer and the dog detected the odor in an area in which it was lawfully present." *Id.*

On the dissent's reasoning, "[t]here is no evidence in the record that the dog entered the car" for any reason "other than" responding to "the stimulus it was trained to respond to—the smell of illegal drugs." App.Op.¶47 (Moore, J., dissenting). If that is true, then the dog had probable cause to enter the car because he smelled contraband while he was still outside. That would mean that the entry was justified.

Of course, this reasoning would open a line of questions into the dog's intent and whether it had smelled contraband before entry or was merely "in search of the odor" of contraband. App.Op.¶48 (Moore, J., dissenting). That analysis would be unsatisfying because dogs cannot communicate their thought processes to human handlers. But this would be the only way to truly treat police officers' dogs as if they were officers. That is reason enough to reject this line of reasoning.

5. Barton is wrong about workability.

Barton also says that determining whether an intrusion was intentional or instinctual is unworkable and requires judges to be "canine mind readers." Apt.Br.42–46. But no one wants to read the dog's mind. The question is whether the officer directed or facilitated the dog's entry into the car. That test is as simple as it gets. It is unclear why Barton thinks this would delve into dissection of a dog's body language. Apt.Br.43.

But even so, all tests will have their gray areas. If Barton has her way, judges will just as easily spend hours bent over grainy bodycam footage to determine if any

millimeter of the dog's nose passed the plane of the open car window. And if mere touch really is the test, there is no clear stopping point. If a dog's tail hits a car, a defendant will claim that the touch was for the purpose of finding drugs (after all, that is why the dog is there). If a dog's snout touches a car's seam, a defendant will claim that the touch was for the purpose of finding drugs. So officers at the scene will just as well be trying to determine if the dog touched the car in the wrong way before indicating. All the while, if a private person's dog touched a car or inserted its head in the exact same way, there would be no actionable trespass and no punishment.

Moreover, courts have been able to use the dog-specific rule discussed above since the 17th century. Just as Barton agrees would be proper, Apt.Br.44, the court could look to objective facts to determine that a canine trespass was attributable to the dog, not the owner. *See Mitten*, 79 Eng. Rep. at 1260. It blinks reality to claim that courts would suddenly be unable to differentiate an energetic dog's spontaneous movements from actions directed by the officer.

III. Even if Barton could show that a search occurred, exclusion would not be appropriate.

Even if the head-poke were a search, exclusion would not be appropriate for two reasons: the search was reasonable—meaning it did not violate the Fourth Amendment—and exclusion would not be warranted in any event.

A. If a search occurred, it did not violate the Fourth Amendment because it was reasonable.

Even when the government does search without a warrant, the touchstone of the Fourth Amendment is still reasonableness. In this context, reasonableness means "balancing the need to search (or seize) against the invasion which the search (or

seizure) entails." *Terry v. Ohio*, 392 U.S. 1, 20–21 (1968) (quotation omitted). A search is likely reasonable if it is 1) "focused in its objective and no more intrusive than necessary to fulfill that objective," and 2) "far less intrusive" than other available options or at least "little more intrusive" than the alternative the defendant admits would be permissible. *New York v. Class*, 475 U.S. 106, 118 (1986). *Jones* never addressed a reasonableness analysis because the government had forfeited it. 565 U.S. 400, 413 (2012).

Under that balancing test, the head-poke was reasonable. The dog sniff was "focused in its objective," *Class*, 475 U.S. at 118, and dog sniffs in general are more limited than any "other investigative procedure" that officers could use to detect drugs. *United States v. Place*, 462 U.S. 696, 707 (1983). Moreover, Barton admits that it would have been perfectly acceptable for the dog to sniff the air immediately outside her open window. It is "little more intrusive," *Class*, 475 U.S. at 118, for the dog to briefly insert its head beyond the window's plane. When balancing the intrusion against the government's interest, there is no reason that a barely perceptible additional intrusion would flip the balance from reasonable to unreasonable.

B. Even if Barton could show a search, she could not prevail on exclusion of the evidence.

Even more, if Barton could prevail despite all the above, she would still not be entitled to exclusion of the evidence. The exclusionary rule is a judicially created remedy, originally designed to apply only to "intentional conduct that was patently unconstitutional." *Herring v. United States*, 555 U.S. 135, 143 (2009). But excluding evidence imposes "substantial social costs." *Davis v. United States*, 564 U.S. 229, 237

(2011). For that reason, "[c]ourts may apply the exclusionary rule only when its benefits outweigh the societal risks." *State v. Castagnola*, 2015-Ohio-1565, ¶97 (citing *Herring*, 555 U.S. at 141). Those invoking the exclusionary rule face a "high obstacle," *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 364–365 (1998), and the rule will not apply unless they can show that "the costs of exclusion outweigh its deterrent benefits," *Utah v. Strieff*, 579 U.S. 232, 235 (2016). "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." *Herring*, 555 U.S. at 144. Because this Court has rejected the exclusionary rule under Ohio's Constitution, this Court should command exclusion only if the United States Supreme Court has clearly required it. *State v. Lindway*, 131 Ohio St. 166, syl.4–5 (1936).

Moreover, the point behind the exclusionary rule and its various exceptions is "putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred." *Nix v. Williams*, 467 U.S. 431, 443 (1984). Thus, courts should not exclude evidence if "the police would have obtained that evidence if no misconduct had taken place." *Id.* at 444. To exclude evidence that the police would have discovered without any legal violation would be a "formalistic, pointless, and punitive approach." *Id.* at 445.

The inevitable-discovery exception teaches that evidence need not be excluded every time a police dog crosses a constitutional line. For example, one police dog was supposed to signal on a package of contraband, but he got agitated and instead tore

it open before officers could stop him. *United States v. Lyons*, 957 F.2d 615, 616 (8th Cir. 1992). The court held that the dog's proper alert on the package would have given probable cause to search it anyway, so discovery of the evidence was inevitable. *Id.* at 617. Likewise, when a dog smells contraband from mere inches inside an open window, he likely would smell the same odor from just outside the plane of the open window. *See United States v. Lyons*, 486 F.3d 367, 373–74 (8th Cir. 2007).

Here, even if the head-poke violated the Fourth Amendment, there is every reason to believe that the dog would have smelled the contraband from outside the window plane. And Barton has not made any effort to explain why that would not be the case. Because smelling the contraband from just outside the window would have led the police to the exact same evidence just the same, excluding the evidence would be an unwarranted punishment. For one, it would put the police in a much worse position than if there had been no intrusion into the car. The evidence would have been discovered just the same without a three-second head-poke. For another, it would punish faultless police conduct. The police did not command the dog to intrude or unreasonably fail to control the dog, so there is no misconduct to deter, much less "sufficiently culpable" conduct. *Herring*, 555 U.S. at 144. Thus, even if this Court were to find a Fourth Amendment violation, it should refuse to apply the exclusionary rule.

CONCLUSION

For the foregoing reasons, the Court should affirm the First District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of *Amicus Curiae* Ohio Attorney General Dave Yost was served on January 13, 2026, by e-mail on the following:

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