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DECONSTRUCTING DOG SNIFFS AT TRAFFIC STOPS

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Trial courts often uphold searches of cars at traffic stops when the grounds for the search are that a drug dog established probable cause to think that the vehicle was involved in a drug crime. Traditionally, courts have not considered the sniffs to be searches. The United States Supreme Court has relied on two presumptions to uphold searches based on dog sniffs. These are (1) the dog is trained to only signal the presence of the scent of contraband; and (2) the dog does not physically occupy the vehicle but simply walks around the vehicle.

In many circumstances, these presumptions do not continue to be true. First, where dogs cannot distinguish the scent of hemp from marijuana, federal legalization of hemp necessarily means that a dog trained to sniff for marijuana cannot establish probable cause. Second, searches based on sniffs by dogs trained to sniff for scents of residual contraband that is no longer present in a vehicle are not supported by signals from dogs trained to only communicate the presence of contraband; upholding searches based on sniffs by dogs trained to signal the presence of residual odors also conflicts with constitutionally protected rights of due process and association. Finally, dogs who jump into vehicles or otherwise physically intrude on vehicles during a sniff are conducting searches requiring probable cause. This Article asks that trial courts carefully examine circumstances before upholding searches based on dog sniffs.

I. INTRODUCTION

Who doesn't love dogs? They're sweet, smart, and loyal, sharing our better impulses and possessing few of our character flaws. And they're capable of so much: deterring burglars, detecting diabetics' blood sugar distresses, and defending sheep from would-be predators. Not only that, but police have used drug-detection dogs for the purpose of searching for controlled substances since about 1970.[1] No question, every working dog earns her kibble, her treats, her toys, and her soft bed. Just the same, courts should never reflexively uphold a vehicle search based on a canine alert or indication without carefully considering whether, under the circumstances, the dog's behavior established probable cause to think that the vehicle contained illegal narcotics or whether the dog itself engaged in a search.

Trial courts typically uphold the constitutionality of searches resulting from drug dogs sniffing around a vehicle during a traffic stop. And why not? In 1983 the Supreme Court ruled in *United States v. Place* that a dog sniff is not a search.[2] The Supreme Court reasoned that a drug-sniffing dog is uniquely trained to reveal contraband—and only contraband—and therefore, a sniff "did not constitute a 'search' within the meaning of the Fourth Amendment."[3] In *Illinois v. Caballes*, the Supreme Court expanded its approval of dog sniffs, holding that a sniff around a vehicle during a routine traffic stop did not change

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1. Craig Scheiner, *Time is of the Es 'Scents': The Fourth Amendment, Canine Olfaction, and Vehicle Stops*, 76 FLA. B. J. 26, 26 (2002).

2. 462 U.S. 696, 707 (1983).

3. *Id.*

the character of the stop and required no articulable suspicion.[4] But these early holdings relied on presumptions about dog sniffs that do not necessarily continue to be correct. These are (1) that a drug dog can only disclose the presence or absence of contraband and not anything that is legally possessed[5]; and (2) that a dog sniff means that the dog simply walks around the car.[6]

Over the years the legal landscape has shifted in ways that are inconsistent with the above two presumptions. Following the federal 2018 Farm Bill which legalized hemp and following new state laws which legalized marijuana, [7] an indication by a dog trained to sniff for marijuana cannot objectively establish probable cause to search. And the idea that a dog trained to signal the presence of the residual odors of items no longer in vehicles is not only inconsistent with *Place* and *Caballes*'s presumption that drug dogs only alert to illegal substances but also violates constitutionally protected rights to privacy and association. Moreover, the United States Supreme Court's decisions in *United States v. Jones*[8] and *Florida v. Jardines*[9] and subsequent cases applying them indicate that sometimes a drug dog's sniff is a search that requires probable cause.

This Article explains that because of changing laws, courts should view canine sniffs of vehicles during traffic stops with more skepticism than in the past. Courts deconstruct the meanings of statutes and precedent by questioning presumptions underlying the content at issue.[10] In popular use, "deconstruction" means "a critical dismantling of tradition and traditional modes of thought."[11] This Article deconstructs and critically dismantles traditional modes of thought about dog sniffs at traffic stops by examining factors that can affect the constitutionality of such sniffs. It deconstructs dog sniffs by identifying presumptions that have historically led courts to uphold their constitutionality and applying them in light of changing statutes and Supreme Court cases. It seeks to fill gaps in scholarly literature on the constitutionality of dog sniffs first by analyzing the effect of the 2018 Farm Bill and state laws legalizing

4. 543 U.S. 405, 408–10 (2005).

5. *Id.*

6. Indianapolis v. Edmond, 531 U.S. 32, 40 (2000).

7. Agriculture Improvement Act of 2018, 7 U.S.C. § 9011 (2018); *see* Michael Hartman, *Cannabis Overview*, NAT'L CONF. STATE LEGISLATURES (May 31, 2022), https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx [https://perma.cc/R8FC-BGX8].

8. 565 U.S. 400 (2012).

9. 569 U.S. 1 (2013).

10. Madeleine Plasencia, *Who's Afraid of Humpty Dumpty: Deconstructionist References in Judicial Opinions*, 21 SEATTLE U. L. REV. 215, 221, 237, 247 (1997); J.M. Belkin, *Deconstructive Practice and Legal Theory*, 96 YALE L. J. 743, 757 (1987).

11. *Deconstruction*, ENCYC. BRITANNICA, https://www.britannica.com/topic/deconstruction [https://perma.cc/JK4F-47ME].

marijuana. Second, it criticizes the constitutional incompatibility of dogs trained to sniff for residual odors with presumptions underpinning dog sniff jurisprudence and with constitutional protections of due process and association. Finally, the Article applies recent search and seizure jurisprudence to determine when a sniff at a traffic stop may become a search.

In Part II, this Article explains how courts view automobile searches and sniffs by trained police dogs in light of the Fourth Amendment, as well as some responses by state courts applying federal and state constitutional law. Part III discusses how courts should scrutinize dogs' training in light of applicable law to determine whether there is an objectively reasonable and constitutional basis for probable cause to think that the vehicle sniffed is involved in crime. Part IV analyzes how, under current Supreme Court case law, some dog sniffs at traffic stops amount to warrantless searches.

II. SUPREME COURT DECISIONS GOVERNING DOG SNIFFS AT TRAFFIC STOPS

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[12] Warrantless searches "are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[13] One exception is that police may need to take immediate action during an emergency.[14] Another is that police with probable cause may search a vehicle without violating the Fourth Amendment's warrant requirement.[15] But police efficacy, efficiency, or convenience do not justify a warrantless search.[16] Every warrantless search "must be 'strictly circumscribed by the exigencies which justify its initiation.' "[17]

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12. U.S. CONST. amend. IV.

13. Mincey v. Arizona, 437 U.S. 385, 390 (1978) (footnotes omitted) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

14. *Mincey*, 437 U.S. at 392.

15. Wyoming v. Houghton, 526 U.S. 295, 307 (1999) (holding that an officer with probable cause to search a car could search passengers' belongings); Pennsylvania v. Labron, 518 U.S. 938, 940 (1996) (holding that the automobile exception permits officers with probable cause to think a vehicle contains contraband to search the readily mobile vehicle); California v. Acevedo, 500 U.S. 565, 580 (1991) (holding that officers with probable cause to search a car may also search the containers within it); United States v. Ross, 456 U.S. 798, 825 (1982) (holding that officers who have legally stopped a vehicle and who have probable cause to believe it contains contraband may search the car, its containers, and packages without obtaining a search warrant); Carroll v. United States, 267 U.S. 132, 162 (1925) (holding that the ready mobility of automobiles justified the warrantless search of a vehicle when police had probable cause to believe that the car that they observed driving on the road carried illegal liquor).

16. *See Mincey*, 437 U.S. at 393–94.

17. *Id.* at 393 (quoting Terry v. Ohio, 392 U.S. 1, 25–26 (1968)).

A. Early Supreme Court Decisions Expanded the Use of Canine Sniffs at Traffic Stops.

The Supreme Court held that a sniff by a trained drug dog was not a search.[18] The Court reasoned that the Fourth Amendment only protects legitimate expectations of privacy from government intrusion.[19] Since the Court considered a "well-trained narcotics detection dog" to be *sui generis* (unique) in that it exposed contraband but no other items to police scrutiny, the sniff was not a search.[20] Even at the time, *United States v. Place*'s limiting Fourth Amendment protection to the possession of legal items was remarked upon as odd and erroneous.[21] Justice Brennan and Justice Marshall were concerned that whether a dog sniff was a search was neither briefed nor argued.[22] Moreover, the dog added "a new . . . dimension to human perception" that they believed represented an intrusion into privacy.[23] But by 2000, in *Indianapolis v. Edmond*, the Supreme Court regarded a dog sniff as a simple dog-walk around a car, not intrusive and not a search.[24] Following *Place* and *Edmond*, many courts were uncertain as to whether a dog sniff could ever constitute a search.[25]

In *United States v. Jacobsen*, the Supreme Court reiterated that no reasonable expectation of privacy existed for contraband.[26] In *Jacobsen*, which involved seizure of a package opened in a shipping accident, a responding officer removed plastic bags from the accidental opening and removed a trace of white substance from each bag.[27] The officer performed a field test which indicated that the substance was cocaine.[28] Other officers performed a second field test, used the results to obtain a search warrant for the location that the box was addressed, searched, and arrested the *Jacobsen* defendants.[29] The Court said that once the box was open and the shipping employees noticed the white

18. United States v. Place, 462 U.S. 696, 707 (1983).

19. *Id.* at 706–07 (citing United States v. Chadwick, 433 U.S. 1, 7 (1977)).

20. *Place*, 462 U.S. at 707. The Court took issue instead with the government seizing luggage for the purpose of performing the sniff, holding that the ninety-minute seizure was unreasonably long and that the officers not telling the owner where they were transporting his luggage, how long they might keep it, and how to obtain it, was unreasonable. *Id.* at 709–10.

21. *Id.* at 719–20 (Brennan, J., concurring in the result).

22. *Id.* at 719; *id.* at 723–24 (Blackmun, J., concurring separately).

23. *Id.* at 719–20 (Brennan, J., concurring in the result).

24. 531 U.S. 32, 40 (2000).

25. Brian R. Gallini, *Suspects, Cars, & Police Dogs: A Complicated Relationship*, 95 WASH. L. REV. 1725, 1737 (2020).

26. 466 U.S. 109, 123–26 (1984).

27. *Id.* at 111.

28. *Id.* at 112.

29. *Id.*

powder, defendants had no privacy interest in the contents.[30] The Court said that *Place* "dictated" that "government conduct that can only reveal" whether contraband was present "and no other arguably 'private' fact, compromise[d] no legitimate privacy interest."[31] Again, Justices Brennen and Marshall dissented, calling the Supreme Court's approach fundamentally misguided because the Court had previously looked "to the context in which an item is concealed, not to the identity of the concealed item" to determine whether a reasonable expectation of privacy was violated.[32]

The Supreme Court next held in *Illinois v. Caballes* that a dog sniff during a traffic stop did not require reasonable articulable suspicion.[33] Following *Jacobsen* and *Place*, the Court held that since no legitimate privacy interest existed in contraband, a government action that only revealed contraband compromised no legitimate privacy interest.[34] Following *Place*, the Court said that a well-trained dog that only reveals contraband does not implicate any legitimate privacy interests.[35] The Court distinguished the dog sniff from a scan by a thermal-imaging device by noting that unlike a thermal-imaging device, the dog sniff only revealed contraband.[36] The Court held that the dog sniff at the traffic stop did not violate the Fourth Amendment, even without articulable suspicion that the car would have contraband."[37]

Justice Souter dissented, saying that he would hold that the dog sniff was a search.[38] His first concern was that drug dogs had not proved to be as accurate as the Court had presumed in *Place*.[39] Justice Ginsburg joined Justice Souter, additionally cautioning that the Court's decision was inconsistent with *Terry v.*

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30. *Id.* at 119.

31. *Id.* at 123.

32. United States v. Jacobsen, 466 U.S. 109, 136–40 (1984).

33. 543 U.S. 405, 408–10 (2005).

34. *Id.* at 408.

35. *Id.* at 408–09.

36. *Id.* at 409–10; *see also* Kyllo v. United States, 533 U.S. 27, 35–36 (2001). One commentator argues that the interweaving of training with canine olfactory powers makes drug dogs properly biotechnology. Irus Braverman, *Passing the Sniff Test: Police Dogs as Surveillance Technology*, 61 BUFF. L. REV. 81, 82–89 (2013); *see also* Florida v. Jardines, 569 U.S. 1, 12 (2013) (Kagan, J., concurring) (explaining how viewing drug dogs as akin to *Kyllo*-style technology for the purpose of seeing into a home was another reason to agree with the majority opinion).

37. *Caballes*, 543 U.S. at 407–10.

38. *Id.* at 410 (Souter, J., dissenting).

39. *Id.* at 410–13 ("The infallible dog . . . is a creature of legal fiction."); *see also* Radley Balko, Opinion, *The Furor Over Sonia Sotomayor's False Covid Claim Misses a More Important Problem*, WASH. POST (Jan. 11, 2022), https://www.washingtonpost.com/opinions/2022/01/11/furor-over-sonia-sotomayors-false-covid-claim-misses-more-important-problem/ ("Over the years, the justices have been presented with statistics showing that drug dogs' alerts are often no more accurate than a coin flip.").

Ohio.[40] Justice Ginsburg argued that the dog sniff was not reasonably related to the reason for the stop and was beyond the scope of the stop.[41] Further, she took issue with the idea that there is no legitimate privacy interest in contraband.[42] But following *Caballes* and *Place*, many lower courts assumed that dog sniffs are automatically not searches.[43]

The Court next held in *Florida v. Harris* that a drug dog who has performed sufficiently satisfactorily to be certified by a "bona fide" organization can establish probable cause to search a vehicle without a warrant.[44] *Harris* involved a traffic stop.[45] The officer, who noticed that the driver seemed nervous and shaky, asked for permission to search the truck.[46] Such permission being refused, the officer walked his dog around the truck.[47] The drug dog signaled the scent of drugs at the driver-side door handle.[48] The officer, believing he had probable cause to search the truck, found pills and items used for manufacturing methamphetamine but no substances that the dog was trained to detect.[49] During a subsequent stop of the same vehicle, the same dog again indicated on the driver's door but police found nothing during the second search.[50]

In *Harris*, the driver's lawyer argued that based on the drug dog's field performance, especially during the two traffic stops, the dog was insufficiently reliable for his signals to establish probable cause for the vehicle search.[51] The officer acknowledged not maintaining records of alerts not leading to arrests.[52] But he argued that the drug dog, far from alerting incorrectly, had probably detected the residual odor of methamphetamine that the driver, an admitted methamphetamine user, transferred to the door handle.[53] The Florida Supreme Court held that the dog was insufficiently reliable because, absent records of

40. *Caballes*, 543 U.S at 418–22 (Ginsburg, J., dissenting); *see also* Terry v. Ohio, 392 U.S. 1, 27 (1968) (holding that the reasonableness of a traffic stop depends on (1) was it justified at its inception; and (2) were the officers' actions reasonably related in scope to the circumstances justifying the stop).

41. *Caballes*, 543 U.S at 421.

42. *Id.* at 422–25.

43. Gallini, *supra* note 25, at 1737–39.

44. 568 U.S. 237, 246–47 (2013).

45. *Id.* at 240.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 240–41.

50. *Id.* at 241.

51. *Id.* at 242.

52. *Id.*

53. *Id.*

field performance, the court could not evaluate the dog's tendency to alert to residual odors or the presence or absence of officer cuing.[54]

But the United States Supreme Court considered the dog's field performance to be relatively unimportant.[55] According to the Supreme Court, when a dog alerts and no drugs are found in the search, the dog is not necessarily wrong: It could have alerted to the residual odor of a drug no longer present or present in too small of a quantity to be findable or the scent of drugs on the person of someone in the car.[56] While willing to consider the possibility of cuing, the Court held that a dog's performance certification testing and training provided satisfactory evidence to support a presumption of reliability.[57] The Court acknowledged that some caveats are whether a dog was exposed to sufficiently diverse training environments and whether a training program used sufficiently blind tests to avoid cuing.[58] The Court held that defendants could still challenge dogs' reliability by cross-examining officers or by introducing other witnesses such as experts.[59] The Court cautioned against inflexible guidelines for determining reliability, saying that a well-trained dog actually *should* indicate the presence of residual odors.[60] Unfortunately, absent Supreme Court guidance, some lower courts have assumed that any certification or training program is bona fide, allowing some programs to produce unreliable dogs.[61]

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54. *Id.* at 242–43; *see* Lisa Lit, Julie B. Schweitzer & Anita M. Oberbauer, *Handler Beliefs Affect Scent Detection Dog Outcomes*, 14 ANIM. COGN. 387, 387 (2011) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3078300/ [https://perma.cc/2NNH-A3GX] (explaining a study in which handlers, falsely told that a scent of interest was present, reported that their dogs indicated the presence of the scent); *see also* United States v. Jordan, 455 F. Supp. 3d 1247, 1255–59 (D. Utah 2020) (holding that lack of double-blind training failed to remove risk of cuing and cast doubt on K9's accuracy and suppressing search because it was based on officer's unreasonably subjective interpretation of K9's signals); United States v. Esteban, 283 F. Supp. 3d 1115, 1123–24 (D. Utah 2017) (holding that lack of double-blind training failed to remove risk of cuing and cast doubt on K9's accuracy and suppressing search because it was based on officer's unreasonably subjective interpretation of K9's signals).

55. *Harris*, 568 U.S. at 245.

56. *Id.* at 245–46.

57. *Id.* at 246–47.

58. *Id.* at 249.

59. *Id.* at 247.

60. *Id.* at 248–49. This Article argues that indicating on residual odors indicates unreliability and violates constitutional protections of due process and association. *See infra* Section III.B.

61. Taylor Phipps, *Probable Cause on a Leash*, 23 B.U. PUB. INT. L.J. 57, 62–63 (2014) ("Therefore, it is imperative that courts define a 'bona fide organization' as an accredited certification program that adequately trains dogs while discrediting other less rigorous organizations as 'shams.' "); *see also* Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L. 405, 417–18 (1997); Balko, *supra* note 39 ("A ProPublica investigation found that certification groups don't test drug dogs for false positives.").

B. Later Supreme Court and State Court Decisions Limit the Use of Canines at Traffic Stops.

The Supreme Court's twenty-first-century decisions on vehicle searches and dog sniffs changed the direction of dog sniff jurisprudence.

Although not addressing drug dogs, the Supreme Court's decision in *United States v. Jones* recognized defendants' privacy interests in vehicles applies to all law enforcement investigations, including traffic stops involving drug dogs.[62] In *Jones*, officers suspected the respondent of narcotics trafficking.[63] They obtained a warrant authorizing them to attach a Global-Positioning-System (GPS) tracking device to a car registered to the respondent's wife.[64] The agents attached the GPS after the warrant expired and attached it in Maryland rather than the District of Columbia, which the warrant specified.[65] The question for the Supreme Court was whether attaching the GPS was a search or a seizure for Fourth Amendment purposes.[66]

The Court considered first that by attaching the GPS to the car, officers had "physically occupied private property for the purpose of obtaining information."[67] The Court considered it "beyond dispute" that vehicles are effects, entitled to Fourth Amendment protection.[68] The Court said this would have been considered a search at the time that the Fourth Amendment was drafted.[69] The Court said that up until the latter half of the twentieth century, Fourth Amendment protection arose from property interests and protected against governmental trespass.[70] The Court treated these later twentieth-century cases as having "deviated" from the property-based approach, protecting instead a person's "reasonable expectation of privacy" based on *Katz v. United States*.[71] *Katz*, the Court explained in *Jones*, did not repudiate the property-based approach to Fourth Amendment protection but supplemented it.[72] The officers had trespassed onto a Fourth-Amendment-protected area because the Jeep was property.[73]

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62. *See* United States v. Jones, 565 U.S. 400, 404–07 (2012).
63. *Id.* at 402.
64. *Id.* at 402–03.
65. *Id.* at 403.
66. *Id.* at 402.
67. *Id.* at 404.
68. *Id.*
69. *Id.* at 404–05.
70. *Id.* at 405.
71. *Id.* at 405–06 (citing Katz v. United States, 389 U.S. 347, 351 (1967)).
72. *Id.* at 406–09.
73. *Id.* at 410.

The Court rejected the federal government's argument that the respondent, a driver on open roads, had no reasonable expectation of privacy in his movements.[74] The Court held that attaching the device was more invasive than simply viewing the car as it drove.[75] The Court similarly rejected the concurrence's suggestion that privacy protection could vary according to the crime investigated.[76] Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, while concurring in the Court's judgment, opined that the "reasonable expectation of privacy" test would have been more appropriate than considering trespass.[77]

In *Florida v. Jardines*, the Court not only continued its property-based approach[78] to Fourth Amendment privacy but applied it to sniffs by trained narcotics dogs. [79] In *Jardines*, officers received a tip that the respondent was growing marijuana in his house.[80] They brought a drug dog to the house.[81] As the dog approached the front porch, he strained at the leash, searching for the source of an odor.[82] The dog sniffed the base of the front door and sat, which was his trained behavior to alert officers to the presence of the smell of contraband.[83] Officers used the dog's "alert" to obtain a search warrant for the home.[84] Upon searching, they found marijuana plants and charged the respondent with cannabis trafficking.[85]

The Supreme Court, following *Jones*, said that because the officers physically intruded and were gathering information on the respondent's private property—the curtilage of his house—the case was "straightforward."[86]

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74. *Id.* at 406.

75. *Id.* at 406–11.

76. *Id.* at 412.

77. *Id.* at 419–31 (Alito, J., concurring).

78. Although "no single rubric" defines reasonable privacy expectations, even after the death of the Honorable Antonin Scalia, the Supreme Court continues to regard property rights as a source of Fourth Amendment protection. *E.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2213–14, n.1 (2018). Also, as Professor Gallini points out, Justice Alito's dissent in *Rodriguez*, saying that police can proceed to search after a dog alerts, additionally indicates that probable cause must exist before the search, indicating therefore that the search's legality depends on what police know before the search rather than whether they find illegal contraband during the search. Gallini, *supra* note 25, at 1744; Rodriguez v. United States, 575 U.S. 348, 370–72 (2015) (Alito, J., dissenting).

79. Florida v. Jardines, 569 U.S. 1, 5 (2013).

80. *Id.* at 3.

81. *Id.* at 4.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 5–6.

Gathering information by "physically entering and occupying the area" and "engag[ing] in conduct not explicitly or implicitly permitted by the homeowner" was a search.[87] The Court noted that while *Katz* could add to Fourth Amendment protection, the "reasonable expectation of privacy" test could not subtract protection in a situation where officers physically intruded onto a protected area.[88] In considering whether the officers' intrusion was nevertheless allowed because they were only on the front porch and many people—including trick-or-treaters and Girl Scouts—were allowed to walk up to the front porch to knock, the Court thought that the officers' purpose changed the constitutionality of the officers' approach onto the property.[89] The Court denied that considering the officers' reasons was subjective because the officers' behavior objectively revealed a purpose to search, which was outside the reasonable scope of what visitors could do.[90] The Court rejected, as inconsistent with *Jones*, the State of Florida's argument that the drug dog, "by definition [could] not implicate any legitimate privacy interest," despite Florida's arguing *Place*, *Jacobsen*, and *Caballes*.[91] The Court reiterated that "[t]he *Katz* reasonable-expectations test 'has been added to, not substituted for,' the traditional property-based understanding" of Fourth Amendment protection.[92]

Additionally, *Jardines* appears to have revived Justice Ginsburg's concerns about the scope of traffic stops that the Court rejected in *Caballes*.[93] Justice Scalia wrote, "The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose."[94] "Consent to a traffic stop to an officer's checking out an anonymous tip that there is a body in the trunk does not permit the officer to rummage through the trunk for narcotics."[95]

Three principles emerged from *Jones* and *Jardines* that apply to sniffs by drug dogs at traffic stops.

- A person who is legally in possession of a vehicle has a reasonable expectation of privacy (albeit less than someone in a residence[96]) that the Fourth Amendment

87. *Id.* at 6–10.

88. *Id.* at 5.

89. *Id.* at 8–9.

90. *Id.* at 10.

91. *Id.*; *see also id.* at 16–26 (Alito, J., dissenting) (arguing that the homeowner had no legitimate expectation of privacy in odor emitting from his house).

92. *Id.* at 11 (emphasis omitted) (quoting United States v. Jones, 565 U.S. 400, 409 (2012)).

93. Illinois v. Caballes 543 U.S. 405, 418–22 (2005).

94. *Jardines*, 569 U.S. at 9.

95. *Id.*

96. *Id.* at 14 n.1.

protects because the vehicle is an effect.[97]

- Involvement in illegal drugs does not do away with the reasonable expectation of privacy in private property.[98]
- When the government physically intrudes on property for the purpose of obtaining information it is a search even if the drug dog can only disclose the presence or absence of contraband.[99]

In *Rodriguez v. United States* the United States Supreme Court further curtailed the use of drug-sniffing dogs at traffic stops.[100] *Rodriguez* "present[ed] the question whether the Fourth Amendment tolerates a dog sniff conducted after completion of a traffic stop."[101] In *Rodriguez*, officers stopped the defendant for driving on the road's shoulder.[102] After verifying the defendant's license, registration, and proof of insurance, and writing a warning ticket, the officer asked permission to walk his dog around the car.[103] When the defendant denied such permission, the officer ordered the defendant to turn off his car and wait near the front of the vehicle for a second officer.[104] Seven or eight minutes after the first officer issued the traffic warning, the officer's dog alerted officers to the presence of drugs.[105] Upon searching, officers found methamphetamine.[106] The Court considered that in *Caballes* it said that a traffic stop could violate the Fourth Amendment if it were prolonged past the time "reasonably required" to complete tasks associated with the purpose of the stop.[107] The Court held that the dog sniff was "not fairly characterized as part of the officer's traffic mission."[108] It also held that a dog sniff that prolonged the stop violated the Fourth Amendment.[109]

Justice Thomas, dissenting and, joined by Justices Kennedy and Alito, argued that because the driver had no legitimate expectation of privacy in contraband, running the dog around the vehicle did not change the character of

97. *See* United States v. Jones, 565 U.S. 400, 410 (2012).
98. *See Jardines*, 569 U.S. at 10–11; *Jones*, 565 U.S. at 403, 405–13.
99. *See Jardines*, 569 U.S. at 10–11; *Jones*, 565 U.S. at 403, 405–13.
100. 575 U.S. 348 (2015).
101. *Id.* at 350.
102. *Id.* at 351.
103. *Id.* at 352.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 354–55 (quoting Illinois v. Caballes 543 U.S. 405, 407 (2005)).
108. *Rodriguez*, 575 U.S. at 356.
109. *Id.* at 357–58.

the stop because it did not add an extraordinary amount of time.[110] Thomas considered the extra time trivial and called the Court's reasoning arbitrary.[111] He considered the result to be at odds with *Caballes*, which he believed contemplated extra time at a traffic stop for a dog sniff.[112] Justice Thomas likened a dog sniff to police questioning that was prompted by concerns arising during a stop.[113] Moreover, Justice Thomas thought that *Rodriquez*, by designating a difference between a traffic stop and a dog sniff, capitulated to concerns about scope that the *Caballes* dissent articulated but that the *Caballes* majority rejected.[114] Justice Alito additionally called the majority's holding arbitrary and perverse.[115]

Some states have resolved the lingering tension about scope that arose after *Rodriguez* by requiring reasonable articulable suspicion for dog sniffs at traffic stops as a matter of state constitutional law. For example, in *State v. Wiegand* the Minnesota Supreme Court held that a dog sniff at a traffic stop requires reasonable articulable suspicion to satisfy the Minnesota Constitution.[116] The Minnesota Supreme Court said that a dog sniff during a traffic stop "is intrusive to some degree" because it revealed something "purposefully hidden" and typically undetectable.[117] The Minnesota court reasoned that the dog sniff was outside the scope of the traffic stop.[118] It concluded that the Minnesota Constitution "imposes a reasonableness limitation on both the duration and the scope of a *Terry* detention."[119] And it held that both the Fourth Amendment and the Minnesota Constitution limited "the scope of a *Terry* investigation to that which occasioned the stop, to the limited search for weapons, and to the investigation of only those additional offenses for which the officer develops a reasonable, articulable suspicion within the time necessary to resolve the originally-suspected offense."[120]

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110. *Id.* at 360–61 (Thomas, J., dissenting).

111. *Id.* at 361–62 (Thomas, J., dissenting).

112. *Id.* at 361–64 (Thomas, J., dissenting).

113. *Id.* at 363–64 (Thomas, J., dissenting). The majority opinion's facts in *Rodriguez* did not indicate that the dog sniff was prompted by any specific concerns that arose during the traffic stop. *See id.* at 351–53. Although Justice Thomas argued that the smell of air freshener prompted the dog sniff, the Magistrate Judge in the lower court attributed the officer's desire to conduct a dog sniff to a hunch. *Id.* at 368–69 (Thomas, J., dissenting). Justice Kennedy did not join in this part of the dissent. *Id.* at 358 (Kennedy, J., dissenting).

114. *Id.* at 366–67 (Thomas, J., dissenting).

115. *Id.* at 370–71 (Alito, J., dissenting).

116. 645 N.W.2d 125, 133–35 (Minn. 2002).

117. *Id.* at 134 (citing Kyllo v. United States, 533 U.S. 27, 34 (2001)).

118. *Rodriguez*, 575 U.S. at 134.

119. *Id.* at 136.

120. *Id.*

Likewise in *State v. Ikimaka*, the Supreme Court of Hawaii held that a dog sniff, unrelated to the reason for the traffic stop, violated the Hawaiian Constitution.[121] In *Ikimaka*, the defendant, stopped for suspected purse theft, argued that using the trained canine at the traffic stop constituted a prohibited "general exploratory search."[122] The Hawaiian Supreme Court held that the sniff was unrelated to the alleged purse theft and was "not reasonably related in scope" to the stop.[123] The defendant's known drug history also failed to provide reasonable suspicion to support the dog sniff.[124]

The Pennsylvania Supreme Court held that under the Pennsylvania Constitution, a dog sniff is a search.[125] But as "a relatively minor intrusion upon privacy," it required only reasonable suspicion.[126] Similarly, although not directly discussing scope, the Montana Supreme Court held that the Montana Constitution required "particularized suspicion" for a dog sniff of a vehicle.[127] Some other state courts require reasonable suspicion for all dog sniffs as matters of state constitutional law.[128]

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121. 465 P.3d 654, 658, 665–66 (Haw. 2020).

122. *Id.* at 659 (internal quotation marks omitted).

123. *Id.* at 665.

124. *Id.*

125. Commonwealth v. Rogers, 849 A.2d 1185, 1190 (Penn. 2004).

126. *Id.* (quoting Commonwealth v. Johnston, 530 A.2d 74, 79 (Penn. 1987)) (internal quotation marks omitted).

127. State v. Tackitt, 2003 MT 81, ¶ 29, 315 Mont. 59, 69, 67 P.3d 295, 302.

128. *E.g.*, State v. Kono, 152 A.3d 1, 9–27 (Conn. 2016) (holding that a dog sniff outside of an apartment—or any other home—is a search under state constitution); Hoop v. State, 909 N.E.2d 463, 470 (Ind. Ct. App. 2010) (holding that Indiana state constitution required reasonable suspicion for dog sniff of residence); State v. Pellicci, 580 A.2d 710, 717 (N.H. 1990) (upholding canine sniff at lawful traffic stop under *Terry* and under state constitution because it was supported by reasonable suspicion and did not increase the length of the stop); People v. Dunn, 564 N.E.2d 1054, 1058–59 (N.Y. 1990) (rejecting reasonable expectation of privacy test under state law and holding that a dog sniff of a residence is a search but upholding the search as supported by reasonable suspicion); State v. Dearman, 962 P.2d 850, 852–53 (Wash. Ct. App. 1998) (holding that a dog sniff outside home garage was a search requiring probable cause and a warrant, under Washington constitution); State v. Waz, 692 A.2d 1217, 1226 (Conn. 1997) (holding that reasonable suspicion supported dog sniff of package); Commonwealth v. Johnston, 530 A.2d 74, 80 (Pa. 1987) (upholding canine sniff of storage unit under state constitution because officers had reasonable suspicion); Pooley v. State, 705 P.2d 1293, 1306–07 (Alaska Ct. App. 1985) (holding that exposing luggage to dog sniff is a search but is minimally intrusive and was supported by reasonable suspicion). *But see* State v. Conner, No. 82536-4-1, 2021 WL 4521083, at *4 (Wash. Ct. App. Oct. 4, 2021) (holding that as long as a canine sniffs from an area where the defendant does not have a reasonable expectation of privacy, no constitutional violation occurred). In *People v. Cox*, the Illinois Appellate Court held that the Illinois Constitution required reasonable suspicion, citing concerns about scope. 739 N.E.2d 1066, 1071 (Ill. App. Ct. 2000).

III. IN SOME CIRCUMSTANCES, AN INDICATION OR ALERT BY A TRAINED NARCOTICS DOG DOES NOT ESTABLISH PROBABLE CAUSE TO THINK THE VEHICLE OR ITS OCCUPANTS ARE CURRENTLY INVOLVED IN CRIME.

An indication from even the best-trained dog may not be able to establish probable cause to support a vehicle search. A dog sniff's constitutional validity depends on the presumption that the dog will only signal the presence or absence of the odor of contraband. In the case of dogs trained to sniff for marijuana or contraband's residual odors, this presumption no longer holds true. First, since the federal 2018 Farm Bill legalized hemp, a substance whose smell is indistinguishable from marijuana, dogs that are trained to sniff for marijuana cannot establish probable cause to think that a crime is being committed. Second, dogs that cannot distinguish the scent of a legally possessed residual odor of an absent controlled substance from the scent of present controlled substance may not establish probable cause and may also violate constitutionally protected rights of privacy and association.

A. The Federal 2018 Farm Bill Legalized Hemp, Which Smells Like Marijuana, So an Alert by a Dog Trained to Sniff for Marijuana Cannot Establish Probable Cause to Think that a Crime is Being Committed.

Following hemp's legalization, dogs cannot tell the difference between illegal marijuana and legal hemp. In December 2018, the United States legalized and regulated hemp.[129] Congress defined hemp as "the plant Cannabis sativa L. and any part of that plant, including the seeds . . . and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers . . . with a delta-9-tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis."[130] Congress removed hemp from the federal Controlled Substances Act.[131] Cannabinoid, an oil, is popularly called "CBD" and has therapeutic uses.[132] CBD produced by a licensed grower is now legal according to federal law.[133]

Neither trained narcotics dogs nor trained officers can distinguish legal hemp from illegal marijuana. Both hemp and marijuana come from the plant

129. Shannon Smith, *Hemp on the Horizon: The 2018 Farm Bill and the Future of CBD*, 98 N.C. L. REV. F. 1503, 1503–04 nn.2–4 (2020).

130. 7 U.S.C. § 1639o(1); *see also* 7 U.S.C. § 5940(a)(2) (defining "industrial hemp").

131. ALICE G. GOSFIELD, HEALTH LAW HANDBOOK § III.A.2 (2020).

132. Smith, *supra* note 129, at 1505.

133. *Id.* at 1515.

genus *Cannabis*.[134] Each have "nearly identical smells, textures, tastes, and looks . . . ."[135] The Tennessee Bureau of Investigation said that high grade marijuana is visually indistinguishable from legal hemp, even under a microscope.[136] Chemical compounds present in cannabis are called "terpenes."[137] Terpenes produce cannabis' distinctive odor and are also present in hemp, pine trees, lavender, hops, lemons, and black pepper.[138] In Tennessee, drug dog handlers reported that their trained dogs could not tell the difference between the scent of legal hemp and the scent of illegal marijuana.[139] Nor could the officers discern a difference in odor—burned or unburned.[140] "[T]he only way to tell whether a given cannabis plant is high enough in THC to run afoul of the law is through sophisticated laboratory analysis (or maybe through ingesting or smoking it)."[141]

A dog trained to search for marijuana who cannot tell the difference between legal hemp and illegal marijuana cannot establish probable cause. A drug dog's ability to establish probable cause necessarily depends on its ability to distinguish legal from illegal scents.[142] In *Caballes*, the Supreme Court depended on a "well-trained narcotics-detection dog" to "not expose noncontraband items that would otherwise remain hidden from public view" for its approval of narcotics dogs' ability to establish probable cause.[143]

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134. Cynthia A. Sherwood, Davis F. Griffin & Alexander H. Mills, *Even Dogs Can't Smell the Difference, The Death of 'Plain Smell,' as Hemp is Legalized*, 55 TENN. B.J. 14, 17 (2019); *see also* Bill Bush, *Police Dogs Can't Tell the Difference Between Hemp and Marijuana*, AKRON BEACON J. (Aug. 12, 2019), https://www.beaconjournal.com/story/news/local/2019/08/12/police-dogs-can-x2019-t/4481487007/ [https://perma.cc/44VB-HM8D].

135. Sherwood, Griffin & Mills, *supra* note 134, at 17.

136. *Id.* at 15.

137. *Id.* at 17.

138. *Id.* at 17–18.

139. *Id.* at 15. *See also* Kylie McGivern, *K9 Retirement, Backlog in Test Kits Under Florida's New Hemp Law*, ACTION NEWS, https://www.abcactionnews.com/news/local-news/i-team-investigates/k9-retirement-backlog-in-test-kits-under-floridas-new-hemp-law, [https://perma.cc/LNR6-R8AD] (Jan. 7, 2020). (noting that Florida dogs were also unable to tell the difference between legal hemp and illegal marijuana after Florida legalized hemp on July 1, 2019).

140. Sherwood, Griffin & Mills, *supra* note 134, at 15, 19. Officers in Columbus, Ohio were advised that the smell of burning marijuana could still support probable cause, simply because it was more likely that someone would smoke marijuana than hemp. Bush, *supra* note 134. But if someone claimed to be smoking hemp, then the officer needed to "assess the totality of the circumstances." *Id*.

141. Sherwood, Griffin & Mills, *supra* note 134, at 17.

142. "[T]he sniff discloses only the presence or absence of narcotics, a contraband item." United States v. Place, 462 U.S. 696, 707 (1983). *See also* Stacey Cowley, *Marijuana Legalization Threatens These Dogs' Collars*, N.Y. TIMES (Nov. 24, 2018), https://www.nytimes.com/2018/11/24/business/marijuana-legalization-police-dogs.html [https://perma.cc/47AS-UHXA].

143. Illinois v. Caballes 543 U.S. 405, 409 (2005) (quoting *Place*, 462 U.S. at 707) (internal quotation marks omitted).

Distinguishing a dog sniff from the thermal-imaging device in *Kyllo*, the *Caballes* Court held that "[t]he legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from [the *Caballes*] respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car."[144] Thanks to the 2018 Farm Bill, possession of hemp is now perfectly lawful.[145] Since dogs make the same signals for all controlled substances, an officer cannot know whether a dog trained to sniff for marijuana is indicating that it smelled legal hemp, illegal marijuana, or other substances.[146] Unless narcotics dogs can be trained to ignore the scent of hemp in any form—and early results indicate that they cannot[147]—an alert by a narcotics dog trained to sniff for marijuana cannot establish probable cause for a warrantless search.

Despite this, one federal court has rejected the argument that a dog trained to sniff for marijuana and who cannot distinguish hemp from marijuana cannot establish probable cause.[148] In *United States v. Hayes*, a case about a traffic stop in which officers found methamphetamine after a dog sniff, the defendants argued, *inter alia*, that the dog's marijuana training made it useless following hemp's legalization.[149] The dog was trained to search for marijuana and was certified by the United States Police Canine Association.[150] As proof that the dog could not distinguish marijuana from hemp, the defendants presented an article in which the director of the Tennessee Bureau of Investigation laboratory said that a "dog trained to test for marijuana cannot tell the difference between hemp and marijuana" and "has now become useless, thanks to hemp."[151] They also cited Colorado and Delaware Supreme Court opinions acknowledging "the

144. *Id.* at 410.

145. Smith, *supra* note 129, at 1515.

146. Bush, s*upra* note 134.

147. *Id.*

148. United States v. Hayes, No. 3:19-CR-73-TAV-HBG, 2020 WL 4034309 (E.D. Tenn. Feb. 21, 2020) (Report & Recommendation) (holding that the traffic stop was unconstitutional, exceeded the scope of the stop, and that questioning was unconstitutional), *analysis adopted in relevant part*, 458 F. Supp. 3d 857 (E.D. Tenn. 2020).

149. *Hayes*, 2020 WL 4034309, at *7, *19. The *Hayes* court, having found that the traffic stop was unconstitutional, that it exceeded the scope of the stop, and that the driver and passenger were unconstitutionally questioned, suppressed all evidence stemming from the stop. *Id.* at *11–18.

150. *Id.* at *7.

151. *Id.* at *19 (quoting TBI Assistant Director of Forensic Services Mike Lyttle) (internal quotation marks omitted).

reduced utility of drug-sniffing dogs in the wake of marijuana and hemp legalization."[152]

The Eastern District of Tennessee was unpersuaded.[153] The court said that it was unclear what experience the laboratory director had with drug dogs.[154] Moreover, both of the cases that the defense relied upon, *People v. McKnight* and *State v. Jernigan*, were from jurisdictions in which marijuana was at least somewhat legal, while federal law still prohibited marijuana possession.[155] The *Hayes* court followed *United States v. Vaughn*, in which the Eastern District of Tennessee held that a marijuana smell supported a search warrant, reasoning that the smell was probably marijuana.[156] "[T]he Court disagree[d] that federal courts must find that the legalization of hemp means that the odor of marijuana can no longer provide probable cause for a search."[157] It explained, "An alert by a drug detection dog, trained to detect marijuana and other illegal narcotics, means there is a fair probability, not an absolute guarantee, that one of the illegal narcotics, which the dog is trained to detect, will be found in that location."[158]

The *Hayes* court was incorrect about the dog sniff because it failed to engage with the presumptions underpinning *Place*, *Caballes*, or *Kyllo*. First, the *Hayes* court failed to consider Supreme Court cases governing dog sniffs and traffic stops. Second, it misplaced the burden of determining whether the search fell within a narrowly drawn exception to the warrant requirement. Finally, *Hayes* followed reasoning in *Vaughn* that was inapplicable.

First, the *Hayes* court failed to apply *Place*, *Caballes*, or *Kyllo*. A "fair probability" that the substance is marijuana is inconsistent with the *sui generis* requirements underpinning *Caballes* and *Place*, the two cases that enabled dog sniffs in the first place.[159] A dog's ability to establish probable cause necessarily depends on it *only* disclosing the presence of illegal smells, not smells that have

152. *Id.* (first quoting Brief for Defendant at 13, United States v. Hayes, 2020 WL 4034309 (E.D. Tenn. Feb 21, 2020) ECF No. 33; then citing People v. McKnight, 446 P.3d 397, 410 (Colo. 2019) (holding that a sniff by a dog trained to search for marijuana is a search); and then citing State v. Jernigan, 2019 WL 2480808 (Del. Super. Ct. June 13, 2019) (holding that officer should have asked about medical marijuana card prior to searching car after smelling marijuana)).

153. *Id.* at *20.

154. *Id.*

155. *Id.*

156. *Id.* (citing United States v. Vaughn, 429 F. Supp. 3d 499, 512 (E.D. Tenn. 2019)).

157. *Id.*

158. *Id.*

159. *Compare Hayes*, 2020 WL 4034309, at *19, *with* Illinois v. Caballes, 543 U.S. 405, 409–10 (2005) *and* United States v. Place, 462 U.S. 696, 707 (1983).

merely a fair probability of being associated with illegal substances.[160] According to *Place*, "the sniff discloses only the presence or absence of narcotics, a contraband item."[161] Considering a "fair probability" that the dog smelled marijuana because marijuana is more common than hemp is also inconsistent with *Kyllo*.[162] If in *Kyllo*, Justice Scalia had reasoned, as the *Hayes* judge did, that there was a fair probability that thermal images showed marijuana growing lamps rather than "the lady of the house tak[ing] her daily sauna and bath"[163] (which would probably look different), *Kyllo* would have had a different result.[164] In *Caballes*, the Supreme Court distinguished a dog sniff from *Kyllo*'s thermal imaging device because the dog sniff was incapable of revealing legal activity.[165] By contrast, in *Hayes* (and *Vaughn* before it), dogs and officers were capable of mistaking hemp for marijuana; they were incapable of distinguishing the legal activity from the illegal.[166] And although the *Hayes* dog was certified,[167] any organization that does not train dogs to distinguish legal from illegal smells should not be considered bona fide.[168]

Second, the *Hayes* court misplaced the burden of showing that the warrantless search fell within an exception to the warrant requirement. Warrantless searches are *per se* unreasonable.[169] Thus the government must show that a dog is trained to only reveal the scent of illegal substances before it can establish probable cause for a warrantless search.[170] This meant establishing that the dog was trained to not mistake hemp for marijuana. The *Hayes* court's concern that the laboratory director lacked sufficient experience with drug dogs missed the point of whether the dog was capable of establishing probable cause.[171] The *Hayes* defendants had no burden to show that they possessed hemp or where hemp was available. Rather, for probable cause, it was the government's burden to prove that its dog could distinguish legal from illegal scents.

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160. *Place*, 462 U.S. at 707; *Caballes*, 543 U.S. at 408–09.

161. *Place*, 462 U.S. at 707.

162. *Compare Hayes*, 2020 WL 4034309, at *19, *with* Kyllo v. United States, 533 U.S. 27, 34–40 (2001).

163. *See Kyllo*, 533 U.S. at 38.

164. *See id.* at 34–40.

165. *Caballes*, 543 U.S. at 409–10.

166. *See Hayes*, 2020 WL 4034309, at *19; United States v. Vaughn, 429 F. Supp. 3d 499, 509–10 (E.D. Tenn. 2019); Sherwood, Griffin & Mills, *supra* note 134, at 14–15, 17–19.

167. *Hayes*, 2020 WL 4034309, at *19.

168. *See Harris*, 568 U.S. at 246–47; United States v. Place, 462 U.S. 696, 707 (1983).

169. Mincey v. Arizona, 437 U.S. 385, 390 (1978); Katz v. United States, 389 U.S. 347, 357 (1967).

170. *See Mincey*, 437 U.S. at 390–91; *Katz*, 389 U.S. at 357; *Place*, 462 U.S. at 707.

171. *See Hayes*, 2020 WL 4034309, at *19.

Finally, *Vaughn*, which *Hayes* relied on, was incorrect for the same reasons that *Hayes* was incorrect, and it was inapplicable. The *Vaughn* court quoted, "Generally, an 'odor' that is 'sufficiently distinctive to identify a forbidden substance . . . might very well be . . . evidence of the most persuasive character.' "[172] But in *Johnson v. United States*, which the *Vaughn* court believed it was following, officers smelled the "strong odor of burning opium . . . distinctive and unmistakable."[173] By contrast, marijuana is no longer so distinctive as to be unmistakable. Marijuana odor is *not* sufficiently distinctive to identify a forbidden substance.[174] And in *Vaughn*, although the defendants argued on appeal that the odor that the officers smelled could have been legal hemp, the defendants likely weakened that argument by waiving and failing to preserve it in the trial court.[175] The defendants may not have asked whether the officers could distinguish hemp smells from marijuana smells.

Other jurisdictions' responses to the legalization of hemp or marijuana have varied. Following hemp's legalization, at least one state court has suppressed evidence obtained by officers searching after receiving a signal from a dog trained to search for marijuana.[176] After Colorado legalized possessing marijuana in its state constitution, the Colorado Supreme Court held that a dog trained to alert on the scent of marijuana could not be said "to detect 'only' contraband" and had therefore performed a search requiring probable cause.[177] This was true even though the contraband found in the truck was a pipe containing the residue of methamphetamine.[178] As states have legalized marijuana, many have retired all dogs trained to sniff for marijuana and have stopped training new dogs on marijuana.[179] The National Police Canine

172. United States v. Vaughn, 429 F. Supp. 3d 499, 511 (E.D. Tenn. 2019) (quoting Johnson v. United States, 333 U.S. 10, 13 (1948)).

173. Johnson v. United States, 333 U.S. 10, 12 (1948).

174. Sherwood, Griffin & Mills, *supra* note 134, at 14–15, 17–19.

175. *Vaughn*, 429 F. Supp. 3d at 509–10; *Hayes*, 2020 WL 4034309, at *20.

176. *See* State v. Major, 2021 WL 4347273, at *1–2 (Tenn. Crim. App. 2021).

177. People v. McKnight, 446 P.3d 397, 399 (Colo. 2019).

178. *Id.* at 399–400, 408.

179. *See* Cowley, *supra* note 142 ("Older canine workers across the country—and 14 narcotics dogs in Canada, where retail marijuana sales began last month—are being eased out of the labor force."); *see also* Denise Lavoie, *Since the Nose Doesn't Know Pot is Now Legal, K-9's Retire*, L.A. TIMES (May 29, 2021), https://www.latimes.com/world-nation/story/2021-05-29/marijuana-pot-legal-k-9s-retire [https://perma.cc/NQ6R-VBHL] (listing dogs in Virginia, Colorado, and Massachusetts trained to sniff for marijuana being retired and adopted by handlers); Robin Young, *Legalization Is Putting Some Pot-Sniffing Police Dogs Out of a Job,"* WBUR (Jan. 3, 2019), https://www.wbur.org/hereandnow/2019/01/03/legalization-marijuana-sniffing-police-dogs [https://perma.cc/KL2D-TD9V] (discussing mandatory retirement of Colorado police dogs following marijuana legalization); Mark D. Wislon, *Law and Odor: Police Hazy on How to Use Drug Sniffing*

Association Standards for Training & Certifications Manual still tests for dogs' ability to locate marijuana but across the country, marijuana-trained dogs are disappearing.[180]

B. An Alert on a Residual Odor Does Not Establish Probable Cause to Think a Crime is Being Committed and Violates Constitutionally Protected Rights of Association, Privacy, and Due Process.

Lest anyone mourn dogs' loss of employment[181], the presumption that drug dogs can discern and communicate the presence or absence of illegal narcotics was wrong all along. At best, they can signal the presence of smells.[182] First, since it is not illegal to possess a smell, especially a residual smell which dogs can be trained to ignore, an alert signal from a dog trained to smell residual smells does not signal probable cause to think an illegal activity is occurring in the vehicle. Second, searches based on sniffs by dogs trained for residual smells should not be considered exceptions to the warrant requirement. Third, it violates constitutionally protected rights to freedom of association, assembly, and due process to subject persons exercising the right to associate with drug-users to a greater likelihood of being searched based on a dog indicating that he or she senses a residual odor. Courts determining whether a dog is sufficiently reliable to support probable cause should require that dogs be trained to ignore residual odors.

First, a dog cannot really sense the presence or absence of narcotics. Dogs have excellent olfactory senses "uniquely equipped to detect the faintest of odors."[183] But a dog detects an odor, not an object, so their ability is limited to detecting scents, not detecting the presence or absence of contraband[184]—and

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Dogs Under Texas Hemp Law, CHI. TRIB. (July 23, 2019), https://www.chicagotribune.com/marijuana/sns-law-and-odor-20190724-bviqsxshrihp3guvcym45i-story.html [https://perma.cc/E7BM-8ZB2]. One commentator suggested that dogs can be retrained to ignore marijuana. Alex C. Carroll, *Weed, Dogs, & Traffic Stops*, 21 WY. L. REV. 1, 6, 34, 36–37 (2021). Others disagree. *See, e.g.*, Cowley, *supra* note 142; Pete Sherman, *Cannabis Sniffing Dogs Staying Around*, ILL. B. J., Feb. 2020, at 10, 10, https://www.isba.org/ibj/2020/02/lawpulse/cannabissniffingdogsstayingaround, [https://perma.cc/E3ZW-YFZM].

180. NATIONAL POLICE CANINE ASSOCIATION, STANDARDS FOR TRAINING & CERTIFICATIONS MANUAL 6 (2014), https://leerburg.com/NPCA_StandardsForTrainingAndCertificationsManual.pdf [https://perma.cc/4MXN-K69S].

181. "Retired dogs typically go home with their handlers and spend the rest of their lives as pets." Cowley, *supra* note 142; *see also* Lavoie, *supra* note 179 (describing how retired drug dogs are being adopted by their handlers).

182. *See* Scheiner, *supra* note 1, at 26.

183. *Id.* at 27.

184. "A detection dog recognizes an odor, not a drug . . . ." Florida v. Harris, 568 U.S. 237, 247 n.2 (2013).

it has never been illegal to possess a smell. The Supreme Court in *Place* and *Caballes* gave great weight to the idea that walking a dog around luggage or a car is not as intrusive as police rummaging through private areas.[185] But a search based on a residual smell will necessitate rummaging, despite the absence of contraband.

Contrary to *Caballes*' and *Place*'s presumptions that a dog can only signal the presence or absence of currently present contraband scent, a dog can signal the presence of a residual odor of illegal narcotics without illegal narcotics being present.[186] When Justice Kagan said in *Harris* that a dog who "alerts to a car in which the officer finds no narcotics . . . may not have made a mistake at all" she focused on the dog's sensory accuracy.[187] But sensory accuracy is a different question than whether an alert establishes probable cause. And whether an alert establishes probable cause depends on whether the dog has been trained to only signal the smell of a present controlled substance rather than a smell consistent with innocence.[188] For example, a driver can give a ride to a drug user without knowingly possessing drugs or even necessarily knowing of the drug user's involvement with drugs. A dog alerting officers about the smell of something no longer present is a flaw rather than a feature "because it actually demonstrates that the dog is less reliable at discerning whether drugs are actually present."[189] And it is not that dogs cannot be trained to ignore residual odors: the U.S. Customs Service trains its drug sniffing dogs to ignore residual odors.[190] A law enforcement agency's decision to train a dog to alert officers to the scent of a controlled substance that is not present—a residual scent—is a choice rather than an inherent canine characteristic. Admitting evidence from a search based on a signal from a dog that cannot discern the difference between a legally possessed residual scent and the scent of a present controlled substance is inconsistent with *Place* and *Caballes* because the alert is not limited to revealing the presence or absence of illegal controlled substance.[191]

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185. *See* United States v. Place, 462 U.S. 696, 707 (1983); Illinois v. Caballes, 543 U.S. 405, 408–09 (2005).

186. *Harris*, 568 U.S. at 245–46.

187. *Id.* at 245.

188. *See Caballes*, 543 U.S. at 409–10; *Place*, 462 U.S. at 707.

189. Phipps, supra note 61, at 77.

190. *Id.* at 81. This "significantly increases the reliability and dependability of an alert." *Id. See also* Bird, supra note 61, at 414.

191. "[T]he sniff discloses only the presence or absence of narcotics, a contraband item." *Place*, 462 U.S. at 707; *see also Caballes*, 543 U.S. at 409 (quoting *Place*, 462 U.S. at 707). "Accordingly, the use of a well-trained narcotics-detection dog—one that 'does not expose noncontraband items that

Second, upholding searches based on sniffs by dogs trained to detect residual smells also fails the Supreme Court's requirement that exceptions to the warrant requirement be narrowly drawn, well-delineated, and strictly circumscribed. Training a dog to seek out smells that are not necessarily associated with illegal behavior is not a narrowly drawn, well-delineated, or strictly-circumscribed-by-exigency exception to the warrant requirement. [192] A deliberate decision to not train a dog to ignore a residual smell is not a compelling exigency. Nor is it related to officer safety.[193] Courts should suppress searches based on sniffs by dogs trained to indicate on residual smells.

Third, allowing warrantless searches based on dogs' alerts to residual odors conflicts with the First and Fourteenth Amendments' protection of freedom of association and due process. The First Amendment prohibits government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble."[194] The Due Process Clause of the Fourteenth Amendment precludes states from abridging First Amendment rights.[195] "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[196] This includes the "corresponding right to associate with others."[197] The Supreme Court additionally "recognize[s] the vital relationship between freedom to associate and privacy in one's associations."[198] The United States, founded by a revolution with its roots in smuggling and violent tax-protest, includes states with proud traditions of

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otherwise would remain hidden from public view' . . . during a lawful traffic stop, generally does not implicate legitimate privacy interests." *Caballes*, 543 U.S. at 409 (quoting *Place*, 462 U.S. at 707). "The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from . . . hopes or expectations concerning the nondetection of contraband in the trunk of [a] car." *Id.* at 410.

192. *See* Katz v. United States, 389 U.S. 347, 357 (1967); Mincey v. Arizona, 437 U.S. 385, 392–93 (1978).

193. *Cf.* New York v. Class, 475 U.S. 106, 118–19 (1986) (holding that an officer's reaching into the car to find VIN was justified partially by officer and highway safety concerns).

194. U.S. CONST. amend. I.

195. Grosjean v. Am. Press Co., 297 U.S. 233, 242–43 (1936) (holding that a special tax on publishing violated constitutional due process, the First and Fourteenth Amendments). "[C]ertain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process clause of the Fourteenth Amendment . . . ." *Id.* at 243–44.

196. Lawrence v. Texas, 539 U.S. 558, 562 (2003) (holding that the Due Process Clause of the Fourteenth Amendment protected same-sex sexual conduct).

197. Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) (holding that law compelling voluntary association to admit women violated protected right of association).

198. NAACP v. Alabama, 357 U.S. 449, 462 (1958) (holding that compelling production of Association's members' names and addresses violated liberties guaranteed by the Due Process Clause of the Fourteenth Amendment).

sympathy for and association with persons who violated laws. For a few examples, the Underground Railroad, the Suffragettes' civil disobedience, polygamy, union organizing, and drinking during Prohibition all violated federal laws.[199] Merely associating with persons who may be lawbreakers is a cherished American tradition and is not by itself illegal.

Subjecting persons in vehicles to searches resulting from the residual scents of their association or encounters with drug users violates the First and Fourteenth Amendments' protection of the right to association. Forty-six percent of American adults, consistent for race, class, and sex, have a family member or close friend currently or previously addicted to drugs.[200] Persons having such associations are "entitled to respect for their private lives."[201] Everyone has the right to associate with drug-addicted friends and family without ordinarily disclosing such association to law enforcement.[202] Engaging in legal association with someone involved with illegal behavior, such as by shaking hands with, giving a ride to, loaning a car to, or borrowing a car from a drug user are all legal, constitutionally protected activities that should not subject anyone to having their vehicle searched. To the degree that a dog's indication on a residual odor compels a vehicle occupant to submit to a search or disclose association with drug users, this violates the First and Fourteenth Amendments. Subjecting persons with personal connections to drug users to searches based on dogs smelling residual scents constitutes a government

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199. See U.S. CONST. amend. XIII, XIX, XXI, which, respectively, prohibited slavery, gave women the right to vote, and ended Prohibition. The National Labor Relations Act guarantees the right of employees to organize and bargain collectively with their employers. 29 U.S.C. §§ 151–166 (1934). The Edmonds Anti-Polygamy Act of 1882 declared polygamy a felony in federal territories. It prohibited persons who practiced polygamy from voting or serving on juries. Polygamy continues to be illegal in many places, for example in Utah. UTAH CONST. art. 3. But marrying more than one person at a time is now an infraction in Utah. UTAH CODE ANN. § 76-7-101(2) (West 2022). And many of the drafters of Utah's constitution were acquainted with or sympathetic to persons who practiced polygamy. Kenneth Wallentine, *Heeding the Call: Search and Seizure Jurisprudence Under the Utah Constitution, Article I, Section 14*, 17 J. CONTEMP. L. 267, 276–82 (1991).

200. *See* John Gramlich, *Nearly Half of Americans Have a Family Member or Close Friend Who's Been Addicted to Drugs*, PEW RSCH. CTR. (Oct. 26, 2017), https://www.pewresearch.org/fact-tank/2017/10/26/nearly-half-of-americans-have-a-family-member-or-close-friend-whos-been-addicted-to-drugs/ [https://perma.cc/2UHU-NJY7] (describing how an August 2017 Pew Research Center survey found that 46% of American adults, consistent for race, class, and sex, said they had a family member or close friend currently or previously addicted to drugs).

201. *See Lawrence*, 539 U.S. at 578.

202. "[B]ecause the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Roberts*, 468 U.S. at 618. "Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others." *Id.* at 619; *see also NAACP v. Alabama*, 357 U.S. at 462.

intrusion on private activity and a potential chilling of such protected activity.[203] These are the kind of private facts that the Supreme Court in *Jacobsen* presumed would not be revealed by a constitutional dog sniff.[204]

Courts review with exacting scrutiny state action which may chill the freedom to associate.[205] This means that "there must be 'a substantial relation between the disclosure requirement and a sufficiently important government interest.' "[206] It requires that governmental action "be narrowly tailored to the government's asserted interest."[207] Obviously, state and federal law enforcement have an interest in stopping narcotics use and trafficking—"[s]uch offenses cause serious social harms."[208] But the government must be able to demonstrate its need for a drug dog disclosing residual scents from association with drug users "in light of any less intrusive alternatives."[209] Where drug dogs can be trained to ignore residual odors, training dogs to sniff for residual odors does not appear to be narrowly tailored to the government interest.[210]

Courts should require bona fide dog-certification organizations to train dogs to ignore residual odors. When an individual must waive one constitutionally protected right—here, privacy in the contents of a vehicle—to assert another such as associating with persons who use drugs, "an undeniable tension is created" which courts must resolve in favor of protecting all constitutional rights. [211]

VI. A DRUG DOG PHYSICALLY OCCUPYING A VEHICLE IS A SEARCH.

Despite prior assurances that a dog sniff is not a search, a dog sniff is a search in some circumstances. In *Jardines*, the Supreme Court rejected the argument that a sniff for contraband cannot be a search because no one has a

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203. *See Roberts*, 468 U.S. at 618–19.

204. *See Jacobsen*, 466 U.S. at 123.

205. *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383, 2385, 2388–89 (2021) (holding that regulations burdening rights of association were subject to exacting scrutiny and that a state regulation requiring charitable organizations to disclose major donors' identities failed strict scrutiny and violated the First Amendment); *NAACP v. Alabama*, 357 U.S. at 460–61.

206. *Bonta*, 141 S. Ct. at 2383 (quoting Doe v. Reed, 561 U.S. 186, 196 (2010)).

207. *Id.*

208. See *id.* at 2386, in which the Supreme Court recognized an important governmental interest in fraud prevention. In *United States v. Place*, 462 U.S. 696, 703 (1983), the Supreme Court considered that the government had an interest in briefly seizing luggage reasonably believed to contain narcotics for the purpose of further investigation.

209. *See Bonta*, 141 S. Ct. at 2386.

210. *See id*. at 2383–86.

211. *See* Simmons v. United States, 390 U.S. 377, 393–94 (1968) (holding that testimony establishing standing for a Fourth Amendment claim could not be admitted at trial on issue of guilt without violating the Fifth Amendment privilege against self-incrimination).

reasonable expectation of privacy in contraband.[212] In early holdings that a dog sniff is not a search, the Supreme Court presumed that a drug dog would "simply walk around a car" rather than physically occupying any part of it.[213] Post-*Jones*, any physical trespass onto private property by government officials "seeking information" is a search.[214] Even a momentary reach into a vehicle is a search.[215] Since *Jardines* and *Jones*, any investigation—including by a drug dog—that involves the physical occupation of private property is a search.[216] And this is true even though drug dogs sniff for contraband. When *Jacobsen*'s presumption, that the dog simply walks around the car without occupying it, becomes incorrect, the sniff becomes a search.

Following *Jones*, the Sixth Circuit held that touching a vehicle for the purpose of obtaining information was a search. In *Taylor v. Saginaw*, officers chalked cars while enforcing parking regulations.[217] The Sixth Circuit held that chalking was a search.[218] It also determined "that two exceptions to the warrant requirement, the 'community caretaking' exception and motor-vehicle

212. 569 U.S. 1, 11–12 (2013).

213. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000).

214. United States v. Jones, 565 U.S. 400, 404–05 (2012). On one hand, some commentators object that *Jones*' concern about officers "seeking information" requires a problematic inquiry into an officer's motive. *E.g.*, Geoffrey Corn, *The* Jones *Trespass Doctrine and the Need for a Reasonable Solution to Unreasonable Protectio*n, 73 ARK. L. REV. 531, 544 (2020) (citing United States v. Robinson, 414 U.S. 218, 235–36 (1973)). On the other hand, courts routinely consider officers' motives when judging the reasonableness of officers' actions in Fourth Amendment cases. *E.g.*, New York v. Class, 475 U.S. 106, 115 (1986) (holding that an officer's momentary reach into a vehicle did not violate the Fourth Amendment because it was minimally intrusive and justified by a concern for officer safety). The Supreme Court demonstrated ambivalence about motives even in *Whren v. United States*, where it held that the real reason for a pretextual stop did not matter. *See* 517 U.S. 806, 812 (1996). There, the Court held that an unacceptable motive did not invalidate otherwise justifiable behavior. *Id.* But it also said that an "exemption from the need for probable cause (and warrant)," made for some purposes, such as, for example, inventory searches "is not accorded to searches that are *not* made for those purposes." *Id.* at 811–12. In *Jardines* the Supreme Court again examined law enforcement motives when it considered whether a physical occupation of private property was less of a search because such was arguably within the social license afforded trick-or-treaters and Girl Scouts. 569 U.S. at 8–9. "The scope of a license [to search]—express or implied—is limited not only to a particular area but also to a specific purpose." *Id.* at 9. "Consent at a traffic stop to an officer's checking out an anonymous tip that there is a body in the trunk does not permit the officer to rummage through the trunk for narcotics." *Id.*; *see also* Orin S. Kerr, *The Questionable Objectivity of Fourth Amendment Law*, 99 TEX. L. REV. 447, 449 (2021) (discussing how objectivity in Fourth Amendment cases is weaker than the Supreme Court claims and proposing a framework in which to judge police conduct).

215. *Class*, 475 U.S. at 116.

216. *Jardines*, 569 U.S. at 6, 10–12; *Jones*, 565 U.S. at 404–05.

217. Taylor v. City of Saginaw, 11 F.4th 483, 486 (6th Cir. 2021).

218. Taylor v. City of Saginaw, 922 F.3d 328, 336 (6th Cir. 2019) ("*Taylor I*").

exception," did not apply.[219] It left the reach of its holding unsettled: "This not to say that [the community caretaking exception] can never apply to the warrantless search . . . ."[220] And it suggested that other exceptions might apply.[221] As in *Taylor 1*, it considered first whether a search had occurred and second whether the search was reasonable.[222] The Sixth Circuit held that following *Jones*, chalking vehicles was a physical trespass onto a constitutionally protected area to obtain information and was therefore a search.[223]

Similarly, in *United States v. Richmond*, the Fifth Circuit saw "no difference between the *Jones* device touching [a] car and an officer touching the tire" to determine whether the tire contained anything in addition to air.[224] The Fifth Circuit characterized *Jones* as defining a search as "a trespass . . . 'conjoined' with 'an attempt to find something or obtain information.' "[225] In *Richmond*, which involved a truck stopped for wobbly tires, the officer touched a tire to see if it might contain drugs.[226] The thumping noise that resulted made the officer suspect that drugs were inside.[227] The Fifth Circuit held that the officer's tapping the tire "was a search regardless of how insignificant it might seem."[228] It affirmed because a reasonable officer, having pulled over the truck for wobbly tires, could have touched the tire out of safety concerns.[229]

By contrast, the United States District Court in Maine held that an officer walking across a defendant's lawn onto his driveway and physically touching a vehicle parked with its nose to the garage to see whether it was warm was not

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219. *Id.* The claimed motor-vehicle exception in *Taylor 1* was that an officer believing that a vehicle might contain items such as explosives or biological weapons dangerous to human safety. *Id.*

220. *Id.*

221. *Id.* Later, the Sixth Circuit considered whether another exception, that of a valid administrative search, might apply. *Taylor*, 11 F.4th at 486.

222. *Taylor*, 11 F.4th at 487.

223. *Id.* The Sixth Circuit additionally reasoned that the administrative exception did not apply because the subject of the search had no opportunity for a pre-search review and car-parking was not the sort of inherently dangerous activity or special law enforcement need that exempts some administrative searches from pre-search review. *Id.* at 488–89. Nor did that exception justify suspicionless car-chalking, although the officer doing the chalking was entitled to qualified immunity because of the newness of the issue and the unsettled nature of whether, after *Jones*, some minimal trespass remained constitutionally valid. *Id.* at 489.

224. United States v. Richmond, 915 F.3d 352, 358 (5th Cir. 2019).

225. *Id.* at 357 (internal quotation marks omitted) (quoting United States v. Jones, 565 U.S. 400, 408 n.5 (2012)).

226. *Id.* at 354.

227. *Id.*

228. *Id.* at 359.

229. *Id.* at 360.

a search.[230] The federal district court held that the driveway was not protected as curtilage and that the officer placing his hands on the vehicle was not a search.[231] The federal district court considered that attaching the GPS to the vehicle in *Jones* was "far more physically intrusive . . . ."[232] "[I]t is a stretch to describe this type of momentary contact with the outside of an inanimate object as an 'intrusion' upon the Defendant's effect. I do not believe that *Jones* extends this far."[233]

Although the *United States v. Owens* court discussed both *Jones* and *Jardines*, its decision was inconsistent with both. First, *Owens* questioned whether the driveway was curtilage and whether the officers intruded onto private property rather than considering that the car itself was private property.[234] Second, under *Jones*, touching the hood to obtain information was a search.[235]

First, whether the car was parked on curtilage is less important than, as in *Jones*, the fact that the car itself was private property. And as in *Jardines* the car was located on private property.[236] Whether the officers were reasonable to enter the private property "depend[ed] upon whether the officers had an implied license to enter" the driveway "which in turn depends upon the purpose for which they entered."[237] Most persons licensed to enter onto private property are licensed only because they will not search.[238] "[P]hysically intruding on . . . property to gather evidence is enough to establish that a search occurred."[239]

Second, the *Owens*' court's beliefs about *Jones* notwithstanding, under *Jones*, touching the car's hood was a search. *Jones* was clear: A physical trespass by the government for the purpose of obtaining information is a search.[240] That the officer in *Owens* touched the vehicle without consent, a

230. United States v. Owens, No. 2:15-cr-55-NT, 2015 WL 6445320, *2, *7–9 (D. Me. Oct. 23, 2015), *aff'd on other grounds*, 917 F.3d 26, 35 (1st Cir. 2019) (holding that exigent circumstances justified the officer entering the driveway and placing his hands on the vehicle).

231. *Owens*, 2015 WL 6445320, at *8.

232. *Id.* at *9.

233. *Id.*

234. *Id.* at *7–9.

235. *See* United States v. Jones, 132 U.S. 400, 404–05 (2012).

236. *Owens*, 2015 WL 6445320, at *2.

237. *See* Florida v. Jardines, 569 U.S. 1, 10 (2013).

238. *See id.*

239. *See id.* at 11.

240. *See Jones*, 565 U.S. at 404–05.

physical occupation and intrusion for the purpose of obtaining information, indicates that a search took place, however short-lived.[241]

The question of whether a drug dog's sniff amounts to a vehicle search may arise in two situations, when a dog jumps into a vehicle and when a dog physically touches the vehicle. First, although courts have yet to reach a consensus, following *Jones*, *Harris*, *Mincey*, and *Katz*, when a dog jumps into a vehicle it is a search. Second, following *Jones*, *Harris*, *Mincey*, and *Katz*, dogs touching vehicles as part of the sniff or as their means to communicate with handlers are also engaging in searches.

A. When a Dog Jumps Into a Car, It is a Search.

Before *Jones* and *Jardines*, the Tenth Circuit held that when during a sniff a dog leaps into a vehicle, unbidden or aided by officers, it is not a search.[242] The Tenth Circuit reasoned, the leap is simply a working dog following its canine instincts.[243] Several courts have followed *Stone*.[244] Obviously, these cases did not engage with *Jones*' holdings that vehicles are protected effects or that a physical intrusion upon private property for the purpose of obtaining information is a search.

Post-*Jones*, courts considering whether a dog's leap into a vehicle is a search have done one of three things. Some have concluded that, following *Jones*, a dog's entry into a vehicle is a search because it is a physical intrusion on private property for the purpose of obtaining information. For example, in *Herrera-Amaya v. Arizona*, the federal district court held that a dog entering a vehicle was a search, reasoning that it undermines training to accept that dogs are allowed to leap into vehicles and that if there is no pre-jump alert, a court cannot assume that a scent prompted the jump.[245] Other courts have followed pre-*Jones* holdings and continue to maintain that the dog's instinctive entry into

241. *Owens*, 2015 WL 6445320, at *2, *6.

242. *See* United States v. Winningham, 140 F.3d 1328, 1330–31 (10th Cir. 1998) (holding that officers' opening vehicle door for dog rendered the dog's entry into the vehicle a search); *see also* United States v. Stone, 866 F.2d 359, 364 (10th Cir. 1989).

243. *Stone*, 866 F.2d at 364.

244. *E.g*., United States v. Sharp, 689 F.3d 616, 619 (6th Cir. 2012); United States v. Lujan, 398 Fed. Appx. 347, 352 (10th Cir. 2010); United States v. Pierce, 622 F.3d 209, 214–15 (3d Cir. 2010); United States v. Hutchinson, 471 F. Supp. 2d 497, 510 (M.D. Penn. 2007).

245. Herrera-Amaya v. Arizona, No. CV-14-02278-TUC-RM, 2016 WL 7664134, *9–10 (D. Ariz. Sept. 29, 2016); *see also* State v. Randall, 496 P.3d 844, 853 (Idaho 2021) ("Though the Supreme Court has not directly addressed the question, *Jones* and *Jardines* make clear that a drug dog's trespass into a car during an exterior sniff converts what would be a non-search under *Caballes* into a search.").

the vehicle is not a search, often without engaging with *Jones* or *Jardines*.[246] The United States District Court for the District of Vermont, while acknowledging *Jones* and *Jardines*, held that a dog's actions does not become a search unless it invades the privacy of a home.[247]

But even a dog's instinctive action of jumping into a vehicle is a search. Following *Jones* and *Jardines*, the government's physical intrusion—in the form of a GPS, officer, dog, or other investigatory tool—into a protected effect for the purpose of obtaining information is a search. As the Arizona district court noted, it is also a training issue.[248] A dog that can be trained to signal the presence of various scents can be trained not to jump into cars; dogs trusted for their reliable obedience should not impulsively leap into unfamiliar vehicles.[249] Nor, as the Idaho Supreme Court recognized, is a dog's instinctive nature a Fourth Amendment exception: "[T]here is no asterisk to the Fourth Amendment excusing the unconstitutional acts of law enforcement when they are accomplished by means of a trained dog."[250] The Idaho Supreme Court additionally cautioned that focusing on why a dog may have entered a vehicle changes the inquiry from what an officer knew to support probable cause for a warrantless search to focusing on what motivated a dog.[251] Such a shift "risks that courts will draw their own post hoc conclusions about the significance of a drug dog's pre-entry behavior without competent evidence on which to rely."[252] Warrantless searches are disfavored, subjected only to specifically enumerated and strictly circumscribed exceptions—and a dog's instinct is not a recognized exception.[253] Nor is it an exigency because whether the dog jumps is a result of a prior training decision or lack thereof.

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246. *E.g.*, United States v. Mahan, No. CV-14-02278-TUC-RM, 2021 WL 1341038, at *6 (D. Idaho Sept. 29, 2021); United States v. Zabokrtsky, No. 5:19-cr-40089-HLT-1, 2020 WL 1082583, at *6 (D. Kan. Mar. 6, 2020); *see also Randall*, 496 P.3d at 853 (noting that courts upholding leaps into vehicles mostly pre-date *Jones*); State v. Ruiz, 2021 UT App 94, ¶¶ 19–29, 497 P.3d 832, 837–38 (holding, without considering *Jones* or *Jardines*, that dog's instinctive leap through vehicle window did not violate Fourth Amendment).

247. United States v. Cordero, No. 5:13-cr-166, 2014 WL 3513181, *9 (D. Vt. Jul. 14, 2014).

248. *See Herrera-Amaya*, 2016 WL 7664134, at *10.

249. *See id.*; Florida v. Harris, 568 U.S. 237, 247 (2013); *Randall*, 496 P.3d at 856 (holding that if drug dogs cannot be trained to jump into cars, "it is not the Fourth Amendment that must yield").

250. State v. Howard, 496 P.3d 865, 868 (2021), *cert. denied*, No. 21-975, 2022 WL 4657170 (U.S. Oct. 3, 2022).

251. *Randall*, 496 P.3d at 854.

252. *Id.* The Idaho Supreme Court also thought that if competent evidence supported that the dog made a recognized alert prior to entering the vehicle, such could be consistent with the Fourth Amendment. *Id.*

253. *See* Katz v. United States, 389 U.S. 347, 357 (1967); Mincey v Arizona, 437 U.S. 385, 392–93 (1978).

B. When a Dog Actively Indicates the Presence of the Scent of Drugs by Touching the Vehicle, it is a Search.

Following *Jones* and *Jardines*, dogs who are trained to physically touch vehicles as part of their sniff[254] are performing searches. A dog may be trained to jump on a vehicle to indicate to officers that it has located the source of the scent it was trained to search for.[255] Or, it may be trained to sit or stand in front of the source of a scent.[256] Under *Jones*, a government's physical intrusion onto private property is a search and under *Jardines*, that includes intrusions by drug dogs.[257] Following *Mincey* and *Katz*, warrantless searches are per se unreasonable, subject to a few well-established exceptions which do not include drug dogs.[258] Under *Harris*, a training deficiency may be grounds to suppress a search.[259]

So far, courts have not subjected cases where dogs physically touch vehicles as part of their sniff to a *Jones*/*Jardines*/*Harris*/*Mincey*/*Katz*-style analysis. For example, in *United States v. Zabokrtsky*, a case involving a firearm found in the vehicle of a restricted person, the federal court in Kansas upheld the constitutionality of a drug dog's putting its paws on a vehicle.[260] In *Zabokrtsky*, the defendant argued that the drug dog's placing his front paws on the vehicle prior to sitting at that location violated the Fourth Amendment.[261] The federal district court followed a pre-*Jones* case that held that a drug dog touching a car during a sniff did not violate the Fourth Amendment.[262] The federal district court characterized the dog's action as a "minimal and incidental contact," not a search.[263]

This result is inconsistent with Supreme Court case law. First, under *Jones* and *Jardines*, physically intruding onto private property for the purpose of obtaining information—here, the dog's attempt to get closer to the scent or to

254. *See e.g.*, United States v. Zabokrtsky, No. 5:19-cr-40089-HLT-1, 2020 WL 1082583, at *2 (D. Kan. Mar. 6, 2020); *see also* Wendell Nope, *Narcotics Detector Dog Performance Objectives*, *in* NARCO DOG TRAINING MANUAL, UTAH POST K-9 PROGRAM, 2, 8 (2016), https://site.utah.gov/dps-post/wp-content/uploads/sites/24/2015/04/Narco-Dog-Certification-Standards-20160922.pdf, [https://perma.cc/683V-RCYR] (depicting "active indicator" dogs putting their paws and noses on vehicles).

255. *See* Nope, *supra* note 254, at 8.

256. *Id.*

257. *See* United States v. Jones, 565 U.S. 400, 404–05 (2012); Florida v. Jardines, 569 U.S. 1, 8 (2013).

258. *Mincey*, 437 U.S. at 390; *Katz*, 389 U.S. at 357.

259. Florida v. Harris, 568 U.S. 237, 242–44 (2013).

260. No. 5:19-cr-40089-HLT01, 2020 WL 1082583, at *2, *6 (D. Kan. Mar. 6, 2020).

261. *Id.* at *6.

262. *Id.* (citing United States v. Olivera-Mendez, 484 F.3d 505, 511–12 (8th Cir. 2007)).

263. *Zabokrtsky*, 2020 WL 1082583, at *6.

communicate its presence to the handler—is a search.[264] Even a momentary reach-in is a search.[265] Second, under *Harris*, training a dog to violate the Fourth Amendment is a training deficiency which calls into doubt that the training program is bona fide.[266] Finally, whether the physical intrusion is the result of a decision to train a dog to trespass or a dog's instinctive action, neither are recognized warrant requirement exceptions.[267] The *Zabokrtzky* court should have suppressed the search.

V. CONCLUSION

Just as citizens are obliged to change their behavior in response to changing laws, so too should law enforcement and reviewing courts consider how changing laws affect the constitutionality of dog sniffs. Before upholding a sniff, courts must consider whether the circumstances were in keeping with the Supreme Court's presumptions that (1) the dog is trained to only reveal the scent of present contraband; and (2) the sniff includes no physical trespass.

Courts must abandon reflexive approval of drug dogs in favor of upholding current law and constitutional protections. It demonstrates no disrespect to hard-working, well-trained dogs to recognize that their sensory perception does not extend to distinguishing the scent of legal hemp from that of illegal marijuana. Nor should courts condone searches based on sniffs by dogs trained to perceive residual scents; such a practice, although consistent with *Harris*, is inconsistent with *Place* and *Caballes* and violates constitutional protections of due process and association. Finally, a dog's physical intrusion into or onto a vehicle is inconsistent with *Jones* and *Jardines*, indicates a training deficiency, and is not a recognized exception to the warrant requirement. Courts reviewing dog sniffs at traffic stops should analyze resulting searches with an up-to-date understanding of applicable law.

264. *See* United States v. Jones, 565 U.S. 400, 404–05 (2012); Jardines, 569 U.S. 1, 11 (2013).

265. *See* New York v. Class, 475 U.S. 106, 116 (1986).

266. Florida v. Harris, 568 U.S. 237, 247–48 (2013).

267. *See* Mincey v. Arizona, 437 U.S. 385, 390 (1978); Katz v. United States, 389 U.S. 347, 357 (1967).