

GARBAGE PULLS UNDER THE PHYSICAL TRESPASS TEST

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By reintroducing the physical trespass test to the Fourth Amendment search inquiry, United States v. Jones (2012) and Florida v. Jardines (2013) supplemented the Katz privacy test with a property-based trespassory inquiry. Jones asks courts to consider whether police have physically trespassed on a personal effect with an investigatory purpose, and Jardines asks courts to consider whether police have engaged in an unlicensed physical intrusion into a constitutionally protected area, such as the curtilage of a home. This Note addresses one area of doctrinal uncertainty in the wake of Jones and Jardines: garbage pulls, a practice the Supreme Court found in California v. Greenwood (1988) did not constitute a Fourth Amendment search where garbage awaits collection on the curb.

This Note assesses the status of garbage pulls under the physical trespass test. First, it argues that under Jones, household garbage could qualify as an effect because of its status as personal property and its close connection to domestic intimacy. Second, it presents arguments that under Jardines, police likely exceed the boundaries of the implied license by entering the curtilage of a home to seize or investigate garbage. Here, the Note highlights a series of federal and state appellate court decisions that have historically dismissed the importance of the curtilage in cases involving garbage pulls. Ultimately, this Note demonstrates how the physical trespass test as articulated in Jones and Jardines could significantly restrict the permissible scope of garbage pulls.

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INTRODUCTION

In *United States v. Jones* (2012) and *Florida v. Jardines* (2013), the United States Supreme Court revived the physical trespass test as part of the Fourth Amendment search inquiry, which for nearly fifty years had been dominated by the reasonable-expectations-of-privacy test first announced in *Katz v. United States* (1967).¹ Under a strict reading of the physical trespass test as articulated in *Jones* and *Jardines*, courts assessing whether police have executed a search must ask whether police physically trespassed on a “personal effect” for the purpose of gathering information (for example, by placing a GPS tracker on an individual’s vehicle, as in *Jones*)² or committed an unlicensed physical invasion of a constitutionally protected area (for example, by walking onto a suspect’s porch with a drug-sniffing dog, as in *Jardines*).³ If so, under this trespass-based framework, the police have committed a Fourth Amendment search,

¹ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (“[T]here is a twofold requirement [in assessing cognizable privacy expectations under the Fourth Amendment], first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”).

² *United States v. Jones*, 565 U.S. 400, 404–05 (2012).

³ *Florida v. Jardines*, 569 U.S. 1, 3–5 (2013).

regardless of whether, under *Katz*, a defendant harbored reasonable privacy expectations in the place or items searched.⁴ By resurrecting long-dormant property principles⁵ and diminishing the *Katz* privacy rubric's role in cases involving physical invasions of constitutionally protected areas or effects,⁶ *Jones* and *Jardines* have significantly altered the Fourth Amendment search inquiry.

The reintroduction of the physical trespass test has already disrupted pockets of previously settled doctrine, forcing courts to grapple with new questions. For instance, the Supreme Court recently decided that, under *Jardines* and related decisions, police officers commit an unlicensed trespass into the “curtilage” of a home⁷ when they walk onto a suspect's driveway and, without a warrant, search a vehicle parked in a “partially enclosed top portion of the driveway that abuts the house,”⁸ a holding that curtailed the scope of the longstanding “automobile exception”⁹ in cases

⁴ Id. at 11 (“The *Katz* reasonable expectations test ‘has been *added to*, not *substituted for*,’ the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas.” (quoting *Jones*, 565 U.S. at 409)).

⁵ The story of property law's clout in Fourth Amendment jurisprudence has been one of ebb and flow. Prior to *Katz*, the Court adhered to the physical trespass test. See *Olmstead v. United States*, 277 U.S. 438, 464 (1928) (holding that warrantless wiretapping was not a search because Fourth Amendment searches must involve the physical invasion of “material things—the person, the house, his papers, or his effects”). Nearly forty years after *Olmstead*, *Katz* rejected the physical trespass test and overruled *Olmstead*. See *Katz*, 389 U.S. at 353 (“[T]he premise that property interests control the right of the Government to search and seize has been discredited. . . . [T]he reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion.” (quoting *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 304 (1967))).

⁶ See *supra* note 4.

⁷ The “curtilage” is defined as “the land immediately surrounding and associated with the home” that is “associated with ‘the sanctity of a man's home and the privacies of life,’” and thus is traditionally “considered part of the home itself for Fourth Amendment purposes.” *Oliver v. United States*, 466 U.S. 170, 180 (1984) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)); see also *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) (defining “curtilage”); *infra* notes 183–188 and accompanying text.

⁸ *Collins*, 138 S. Ct. at 1671, 1673 (“Given the centrality of the Fourth Amendment interest in the home and its curtilage and the disconnect between that interest and the justifications behind the automobile exception, we decline . . . to extend the automobile exception to permit a warrantless intrusion on a home or its curtilage.”).

⁹ Under the “automobile exception,” police can search a vehicle without a warrant if the “car is readily mobile and probable cause exists to believe it contains contraband.” *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (per curiam) (quoting *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam)); see also *Collins*, 138 S. Ct. at 1669–70 (noting that where dual justifications for the automobile exception “come into play”—namely, vehicles’ “ready mobility” and the “pervasive regulation of vehicles capable of traveling on the public

where a vehicle lies within the curtilage. The U.S. Court of Appeals for the First Circuit recently concluded that officers committed an unlicensed “trespassory invasion under *Jones* and *Jardines*” when they walked onto a defendant’s porch and inserted a key into the defendant’s front door, based in part on the court’s finding that the inside of the keyhole counted as part of the curtilage.¹⁰ Both the Sixth Circuit Court of Appeals and the U.S. District Court for the Middle District of Tennessee recently addressed how the plain view doctrine intersects with the physical trespass test when officers observe evidence of criminal activity following a warrantless entry into the curtilage of a defendant’s home.¹¹ And, the Sixth Circuit recently concluded that the “common parking enforcement practice” of “chalking” the “tires of legally parked cars to track how long they ha[ve] been parked” constitutes a Fourth Amendment search under *Jones*.¹² Although some courts have continued to apply a pure *Katz* privacy expectations rubric in cases that otherwise appear to implicate the physical trespass test,¹³ and some scholars have questioned whether the physical trespass framework will endure as a permanent component of the Fourth Amendment search inquiry,¹⁴ these decisions, and many others

highways”—“officers may search an automobile without having obtained a warrant so long as they have probable cause to do so” (citing *California v. Carney*, 471 U.S. 386, 390–93 (1985))).

¹⁰ *United States v. Bain*, 874 F.3d 1, 13–15 (1st Cir. 2017).

¹¹ *Morgan v. Fairfield Cty.*, 903 F.3d 553, 563 (6th Cir. 2018) (“[The police] discovered the marijuana only after entering [the defendants’] constitutionally protected curtilage. The plain-view exception does not apply.”); *United States v. Darden*, No. 3:17-cr-124-11, 2018 WL 6443078, at *3 (M.D. Tenn. Dec. 10, 2018) (“[T]he plain view doctrine is inapplicable in these circumstances because neither [police detective] had a legal right to be in the carport in the first place.”).

¹² *Taylor v. City of Saginaw*, 922 F.3d 328, 330–332 (6th Cir. 2019) (finding that “chalking” car tires “constitutes common-law trespass upon a constitutionally protected area” for the purpose of “obtain[ing] information under *Jones*”).

¹³ See, e.g., *United States v. Thompson*, 881 F.3d 629, 631–32 (8th Cir. 2018) (applying only the *Katz* privacy test to garbage pull when garbage arguably was located within the curtilage).

¹⁴ *Jones*’s longevity is perhaps most in doubt. See Maureen E. Brady, *The Lost “Effects” of the Fourth Amendment: Giving Personal Property Due Protection*, 125 *Yale L.J.* 946, 1014 n.299 (2016) (“Given the vehement disagreement of four Justices on the current Court with the ‘trespass to effects’ test, it may not be as long-lived as the privacy test from *Katz* has been.”); Susan Freiwald, *The Davis Good Faith Rule and Getting Answers to the Questions Jones Left Open*, 14 *N.C. J.L. & Tech.* 341, 342–43 (2013) (framing *Jones* as “anything but definitive” and “raising at least as many questions as it answered”); Thomas K. Clancy, *United States v. Jones: Fourth Amendment Applicability in the 21st Century*, 10 *Ohio St. J. Crim. L.* 303, 303 (2012) (“*Jones* is unlikely to have significant precedential value.”). This view of *Jones*, and of the longevity of the physical trespass test generally, is not universally shared.

highlighted herein,¹⁵ demonstrate that *Jones* and *Jardines* have indeed shifted the focus of the Fourth Amendment search calculus, injecting a threshold property-based analysis not previously present under the *Katz* privacy regime.

This Note tackles another corner of Fourth Amendment jurisprudence experiencing doctrinal tremors in the wake of *Jones* and *Jardines*: warrantless garbage pulls. In *California v. Greenwood* (1988), the Supreme Court extended the third-party doctrine—whereby individuals relinquish reasonable expectations of privacy in material they share with third parties like banks¹⁶ or telephone companies¹⁷—to police inspections of curbside garbage set out for collection.¹⁸ The Court held in *Greenwood* that because individuals convey their garbage to a third-party when they leave it curbside for collection, they forfeit reasonable privacy expectations in the garbage, and no Fourth Amendment search occurs when police inspect or confiscate the garbage.¹⁹ Several scholars have hinted that the reemergence of a trespass-based framework of the Fourth Amendment

See, e.g., Arnold H. Loewy, *United States v. Jones: Return to Trespass—Good News or Bad*, 82 Miss. L.J. 879, 882–83 (2013) (“*Jones* probably does not change everything, but it does require a different look at the legal landscape created by *Katz* and its progeny.”). Moreover, the Supreme Court has continued to cite *Jones* and note its application of the physical trespass test. See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2215, 2220 (2018).

¹⁵ Several federal circuit and state appellate courts have applied the physical trespass test as a new threshold component of the Fourth Amendment search inquiry. See, e.g., *Whalen v. McMullen*, 907 F.3d 1139, 1146–47 (9th Cir. 2018); *United States v. Jackson*, 728 F.3d 367, 373 (4th Cir. 2013); *Commonwealth v. Ousley*, 393 S.W.3d 15, 18, 23 (Ky. 2013). Although the trend of courts applying the physical trespass test as articulated in *Jones* and *Jardines* is probably less pronounced with respect to *Jones*, see *infra* notes 98–101 and accompanying text, scholars have statistically documented the extent to which lower courts have applied *Jones*. Christopher Totten & James Purdon, *A Content Analysis of Post-Jones Federal Appellate Cases: Implications of Jones for Fourth Amendment Search Law*, 20 New Crim. L. Rev. 233, 235 (2017) (“[T]he *Jones* decision and the accompanying return of the property-oriented trespass doctrine . . . has had an impact, albeit a gradual and incremental one, on Fourth Amendment law in general and Fourth Amendment search law specifically.”).

¹⁶ *United States v. Miller*, 425 U.S. 435, 442–43 (1976) (holding that individuals have no reasonable expectation of privacy in bank records because “the Fourth Amendment does not prohibit the obtaining of information revealed to a third party”).

¹⁷ *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (holding that individuals have no reasonable expectation of privacy in telephone numbers dialed because “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties”).

¹⁸ 486 U.S. 35, 40–41 (1988).

¹⁹ *Id.* The extant literature on *Greenwood* primarily comprises brief case commentaries published in the decision’s immediate aftermath. See Madeline A. Herdrich, *California v. Greenwood: The Trashing of Privacy*, 38 Am. U. L. Rev. 993, 994–95 (1989); James D. Secor, III, Note, *California v. Greenwood: Supreme Court Decides to Keep the Fourth Amendment Out of the Trash*, 67 N.C. L. Rev. 1191 (1989).

may carry implications for warrantless garbage pulls,²⁰ a sentiment echoed by Associate Justice Neil Gorsuch in a recent dissent.²¹ But this Note offers the first comprehensive assessment of the physical trespass test's potential to undermine the constitutionality of warrantless garbage pulls.

The Note proceeds as follows: Part I explores the facts and holdings of *California v. Greenwood*, *United States v. Jones*, and *Florida v. Jardines*, and delineates the extent to which *Jones* and *Jardines* appear to have altered the Fourth Amendment landscape. Part II examines warrantless garbage pulls in light of *Jones*, suggesting two analytical avenues that courts could theoretically pursue to conclude that household garbage, garbage bags, and garbage bins qualify as personal effects under the Fourth Amendment: first, by recognizing that garbage qualifies as unabandoned personal property and retains this status even while sitting on the curb awaiting collection; and, second, by recognizing that garbage is sufficiently associated with the intimacy of the home to garner heightened Fourth Amendment protections. Part III examines warrantless garbage pulls through the lens of *Jardines*. Here, I assess four federal courts of appeals²² and numerous state appellate courts²³ that have historically deemphasized the curtilage when reviewing warrantless garbage pulls²⁴

²⁰ A few scholars have suggested in passing that *Jones* might mean police commit an unlicensed trespass on an “effect” by touching garbage bins with an investigatory purpose. See Fabio Arcila, Jr., GPS Tracking Out of Fourth Amendment Dead Ends: *United States v. Jones* and the *Katz* Conundrum, 91 N.C. L. Rev. 1, 32 (2012); Stephen E. Henderson, After *United States v. Jones*, After the Fourth Amendment Third Party Doctrine, 14 N.C. J.L. & Tech. 431, 450 n.105 (2013); Lance Polivy, Note, *Jones*, Drones and Homes: How Ancient Property Doctrine Can Expand Notions of Privacy (2012), <https://ssrn.com/abstract=2154249> [<https://perma.cc/6BXJ-NXSW>]. At least one scholar has briefly suggested that *Jardines* could mean police execute a search when they enter the curtilage to inspect or confiscate garbage. See, e.g., Kit Kinports, The Dog Days of Fourth Amendment Jurisprudence, 108 Nw. U. L. Rev. Colloquy 64, 74–75 (2013).

²¹ *Carpenter v. United States*, 138 S. Ct. 2206, 2266–68 (2018) (Gorsuch, J., dissenting) (criticizing *Greenwood* as a “strange[]” and “curious” decision, and framing it as an example of the “often unpredictable—and sometimes unbelievable—jurisprudence” that application of “*Katz* has yielded” in a dissent generally favoring the “traditional property-based understanding of the Fourth Amendment”).

²² These include the Seventh, Eighth, Tenth, and Eleventh Circuits. See *infra* Section III.B.

²³ See *infra* Section III.B.

²⁴ Some scholars have analyzed various federal and state appellate interpretations of *Greenwood* but few have done so post-*Jones* or *Jardines*, and none have offered a comprehensive account. See Mark C. Anderson, Note, *United States v. Redmon*: The Demise of Curtilage in Fourth Amendment Determinations? A Study of Garbage Searches on Common Property, 9 Widener J. Pub. L. 61, 63 (1999); Randall L. Cox, Note, *United States v. Hedrick*: The Warrantless Search of Garbage Within the Curtilage of a Home, 45 Okla. L. Rev. 299, 305–12

and analyze how well those holdings sync with the level of protection afforded the curtilage under both *Katz*²⁵ and the physical trespass test. Drawing on local anti-rummaging statutes and accounts of trash tampering, I analyze whether police are impliedly licensed to enter the curtilage of a home for the purpose of gathering evidence from household garbage, concluding that the implied license likely does not permit garbage pulls within the curtilage.

Part IV addresses a potential loophole, whereby police may simply coordinate with trash collectors to seize or inspect garbage after collection. Although this loophole initially appears to undermine the property-based protections of *Jones* and *Jardines*, it may fail to manifest as a doctrinal and empirical reality, in part because courts may attribute trash collectors' activity at the behest of police to law enforcement.²⁶ This Note concludes with a reflection on the broader implications of my arguments for *Greenwood*'s precedential longevity and the third-party doctrine. Ultimately, this Note endeavors to show that, if tested in the crucible of the physical trespass test, the constitutionality of warrantless garbage pulls could be in significant jeopardy.

I. FROM *KATZ* TO *JONES & JARDINES*

A. *California v. Greenwood*: *Garbage Under the Katz Privacy Test*

Under the *Katz v. United States* (1967) privacy test,²⁷ the Supreme Court developed the third-party doctrine, a strand of Fourth Amendment

(1992); Ann R. Johnson, Note, *State v. DeFusco*: Warrantless Garbage Searches Under the Connecticut Constitution, 14 Quinnipiac L. Rev. 143, 144–45 (1994).

²⁵ *Katz*-era curtilage holdings suggest a robust level of protection for the curtilage, commensurate with protections afforded the home. See *United States v. Dunn*, 480 U.S. 294, 296 (1987); *California v. Ciraolo*, 476 U.S. 207, 212–13 (1986); *Oliver v. United States*, 466 U.S. 170, 180 (1984).

²⁶ See *infra* notes 331–338 and accompanying text.

²⁷ As noted above, *supra* note 5, the *Katz* privacy rubric rejected the physical trespass test articulated in *Olmstead v. United States*, and established privacy as the controlling factor in the Fourth Amendment search inquiry. In his influential *Katz* concurrence, Justice Harlan delineated a two-part test for discerning whether an individual has protected privacy interests under the Fourth Amendment: (1) whether the person has “exhibited an actual (subjective) expectation of privacy” over the place or things in question; and (2) whether this subjective expectation is “one that society is prepared to recognize as ‘reasonable.’” *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). For forty years, Justice Harlan’s privacy test governed the Fourth Amendment search inquiry, puzzling scholars with its ambiguity. See Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 *Stan. L. Rev.* 503, 504–05 (2007) (“Although four decades have passed since Justice Harlan introduced the

jurisprudence holding that individuals relinquish reasonable expectations of privacy in material they convey to third-party entities.²⁸ Although the Court's recent decision in *Carpenter v. United States* (2018) made clear that the doctrine does not apply in every factual scenario where individuals convey material to third parties,²⁹ the Supreme Court has historically applied the doctrine to bank records,³⁰ telephone records,³¹ and, in *Greenwood*, to garbage left curbside for collection.

Greenwood arose from a typical garbage pull: in 1984, an anonymous tipster informed a Laguna Beach narcotics investigator that a truck full of narcotics would arrive at Billy Greenwood's house.³² After witnessing several vehicles make brief stops at Greenwood's residence, the investigator asked Greenwood's neighborhood trash collector "to pick up the plastic garbage bags that Greenwood had left on the curb in front of his house and to turn the bags over to her without mixing their contents with garbage from other houses."³³ The trash collector did so, and the investigator found sufficient indicia of narcotics use to secure a search warrant for Greenwood's home, where police found cocaine and hashish.³⁴ The Superior Court dismissed Greenwood's charges on the basis of the Supreme Court of California's decision in *People v. Krivda* (1971), which held that warrantless trash pulls violated both the Fourth Amendment and the California Constitution.³⁵ The California Supreme Court denied the

test . . . the meaning of the phrase 'reasonable expectation of privacy' remains remarkably opaque."); Richard G. Wilkins, Defining the "Reasonable Expectation of Privacy": An Emerging Tripartite Analysis, 40 Vand. L. Rev. 1077, 1079–80 (1987) ("[T]he judiciary has floundered in its attempt to delineate which expectations of privacy are 'reasonable.'").

²⁸ See supra notes 16–17; see also *Carpenter v. United States*, 138 S. Ct. 2206, 2216 (2018) (noting that, under the third-party doctrine, "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties," even where "the information is revealed on the assumption that it will be used only for a limited purpose" (citations omitted) (first quoting *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979); and then quoting *United States v. Miller*, 425 U.S. 435, 443 (1976))).

²⁹ *Carpenter*, 138 S. Ct. at 2217 (declining to extend third-party doctrine to cell phone location records continuously transmitted to wireless carriers, and holding that "the fact that the information is held by a third party does not by itself overcome the user's . . . legitimate expectation of privacy in the record of his physical movements").

³⁰ *United States v. Miller*, 425 U.S. 435, 442–43 (1976).

³¹ *Smith v. Maryland*, 442 U.S. 735, 741–45 (1979).

³² 486 U.S. 35, 37 (1988).

³³ *Id.*

³⁴ *Id.* at 37–38.

³⁵ 486 P.2d 1262, 1268–69 (Cal. 1971), rev'd sub nom. *California v. Krivda*, 409 U.S. 1068 (1972).

State's petition for review, and the U.S. Supreme Court granted certiorari.³⁶

In holding that warrantless inspections and seizures of garbage left for collection do not violate the Fourth Amendment, Justice White, writing for the majority, applied the *Katz* test. Acknowledging that Greenwood may have harbored subjective expectations of privacy in his garbage, White nevertheless concluded that society would not “accept that expectation as objectively reasonable,”³⁷ citing two primary justifications. First, when Greenwood “exposed [his] garbage to the public,” he rendered it “accessible to animals, children, scavengers, snoops, and other members of the public.”³⁸ Second, Greenwood placed his “refuse at the curb for the express purpose of conveying it to a third party,” bringing the case under the umbrella of the third-party doctrine.³⁹ Although the dissent described the garbage bags as containing “personal effects,”⁴⁰ the majority did not.

The *Greenwood* dissenters—Justices Brennan and Marshall—departed from the majority in five important respects. First, the dissenters objected to the majority's view that “[s]crutiny of another's trash” falls within “commonly accepted notions of civilized behavior,” asserting instead that most individuals “would be incensed to discover a meddler . . . scrutinizing our sealed trash containers to discover some detail of our personal lives.”⁴¹ Second, the dissenters emphasized the intimacy of garbage, noting that a “single bag of trash testifies eloquently to the eating, reading, and recreational habits of the person who produced it,” revealing “intimate details about sexual practices, health, and personal hygiene,” as well

³⁶ *Greenwood*, 486 U.S. at 38–39.

³⁷ *Id.* at 40.

³⁸ *Id.* (footnotes omitted). Notably, the State argued in its opening brief that Greenwood's curbside garbage qualified as abandoned property. See Brief for Petitioner at *6, *Greenwood*, 486 U.S. 35 (No. 86-684), 1987 WL 881081 (“The act of placing trash out for collection constitutes an abandonment of the trash to, at the very least, the trash collector.”). The *Greenwood* majority ultimately did not frame leaving garbage for collection as abandonment.

³⁹ *Greenwood*, 486 U.S. at 40–41 (comparing the decision in *Greenwood* to *Smith v. Maryland*, 442 U.S. 735 (1979), an emblematic third-party doctrine decision).

⁴⁰ *Id.* at 48–50 (Brennan, J., dissenting) (“Respondents deserve no less protection just because Greenwood used the [garbage] bags to discard rather than to transport his personal effects. . . . A trash bag . . . is a common repository for one's personal effects.” (quoting *Arkansas v. Sanders*, 442 U.S. 753, 762 (1979))).

⁴¹ *Id.* at 45, 51. Justice Gorsuch recently echoed this point. *Carpenter v. United States*, 138 S. Ct. 2206, 2266 (2018) (Gorsuch, J., dissenting) (expressing “doubt” that “most people spotting a neighbor rummaging through their garbage would think they lacked reasonable grounds to confront the rummager,” and asserting that “the habits of raccoons don't prove much about the habits of the country”).

as “financial and professional status, political affiliations . . . and romantic interests.”⁴² Third, the dissenters quarreled with the majority’s assertion that Greenwood “voluntarily” conveyed his garbage to a third party, noting that “a county ordinance commanded” Greenwood to do so.⁴³ Fourth, the dissent objected to the majority’s assertion that Greenwood “exposed” his garbage to the public, arguing instead that rather than “strewing his trash all over the curb,” Greenwood exposed only “the exteriors of several opaque, sealed containers.”⁴⁴ Lastly, the dissenters departed from the majority in their formulation of risk, asserting that the “mere *possibility* that unwelcome meddlers *might* open and rummage” through Greenwood’s garbage should not void his privacy expectations “any more than the possibility of a burglary negates an expectation of privacy in the home.”⁴⁵ Thus, the dissenters offered distinct conceptions of societal norms, intimacy, exposure, voluntariness, and risk.

B. Jones & Jardines: The Return of the Physical Trespass Test

After over forty years of dormancy under the *Katz* privacy regime, the physical trespass test reappeared in *United States v. Jones* (2012), when the Supreme Court held that police committed a Fourth Amendment search by fixing a GPS tracker on Jones’s wife’s Jeep and monitoring Jones’s public movements for twenty-eight days without a valid warrant.⁴⁶ The rationale for this holding was primarily property-based, not privacy-based.

Writing for a thin and somewhat fractured majority,⁴⁷ Justice Scalia asserted that “Fourth Amendment rights do not rise or fall with the *Katz*

⁴² *Greenwood*, 486 U.S. at 50 (Brennan, J., dissenting).

⁴³ *Id.* at 41, 54–55.

⁴⁴ *Id.* at 53.

⁴⁵ *Id.* at 54.

⁴⁶ 565 U.S. 400, 403–05 (2012).

⁴⁷ Chief Justice Roberts, Justice Kennedy, Justice Thomas, and Justice Sotomayor joined Justice Scalia’s majority opinion in full. *Id.* at 401. In a separate concurrence, Justice Sotomayor noted her “agree[ment] that a search . . . occurs, at a minimum, ‘[w]here, as here, the Government obtains information by physically intruding on a constitutionally protected area.’” *Id.* at 413 (Sotomayor, J., concurring) (third alteration in original) (quoting *id.* at 406–07 n.3). Justice Alito, joined by Justices Kagan, Breyer, and Ginsburg, concurred in the judgment but not in the majority’s property-based rationale, arguing instead that the case should have been decided exclusively under *Katz*. *Id.* at 418–19 (Alito, J., concurring). Nonetheless, five justices—Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Sotomayor—endorsed the physical trespass framework as a supplement to *Katz*. *Id.* at 409 (majority

formulation.”⁴⁸ Rather, the *Katz* privacy test overlays a more fundamental core of Fourth Amendment protection against “physical intrusion[s] [that] would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.”⁴⁹ In the majority’s view, “*Katz* did not narrow the Fourth Amendment’s scope” to cover *only* intrusions into areas where individuals expect privacy; rather *Katz* expanded the Fourth Amendment’s historically “property-based” protections to also encompass individuals’ privacy expectations.⁵⁰ Under this view, a Fourth Amendment search occurs where police physically intrude on a personal “effect” for the “purpose of obtaining information,”⁵¹ even if such intrusions do not disturb an individual’s privacy expectations under *Katz*. The majority held that the surveilled Jeep, even though technically owned by Jones’s wife,⁵² qualified as Jones’s “personal effect.” Accordingly, under the physical trespass test, police committed a search by “physically occup[ying] [Jones’s] private property” with the goal of “obtaining information” about criminal activity.⁵³

Given that five Justices endorsed Justice Scalia’s conception of the physical trespass test,⁵⁴ *Jones* establishes that a warrantless “trespass to an effect to obtain information” constitutes a Fourth Amendment search.⁵⁵ *Jones* also signals the renewed importance of “effects” in Fourth

opinion). This two-tiered search inquiry was reaffirmed in *Florida v. Jardines*, 569 U.S. 1, 3–6 (2013).

⁴⁸ *Jones*, 565 U.S. at 406.

⁴⁹ *Id.* at 404–05.

⁵⁰ *Id.* at 405, 408.

⁵¹ *Id.* at 404.

⁵² *Id.* at 404 & n.2 (“It is beyond dispute that a vehicle is an ‘effect’ as that term is used in the Amendment. . . . [T]he Jeep was registered to Jones’s wife. The Government acknowledged, however, that Jones was ‘the exclusive driver.’ If Jones was not the owner he had at least the property rights of a bailee.” (citation omitted) (quoting *United States v. Maynard*, 615 F.3d 544, 555 n.* (D.C. Cir. 2010))).

⁵³ *Id.* at 404.

⁵⁴ See *supra* note 47.

⁵⁵ Brady, *supra* note 14, at 957–58 (“[T]he *Jones* per se rule—that a trespass on an effect to obtain information is a search—attempts to clarify the muddle of rules that previously governed effects.”); see also Totten & Purdon, *supra* note 15, at 234 (“After *Jones*, a search occurs when (1) an individual’s privacy rights are violated . . . ; and/or (2) an individual’s property is trespassed upon . . .”).

Amendment jurisprudence.⁵⁶ A majority of federal circuit courts,⁵⁷ and numerous state appellate courts,⁵⁸ have recognized that *Jones* offers a new, property-based avenue to finding a Fourth Amendment search in cases involving physical intrusions on personal property. Indeed, a team of scholars has documented “gradual and incremental” implementation of *Jones* among federal circuit courts.⁵⁹ But other courts have not applied *Jones* in cases that would otherwise seem to implicate the physical trespass test,⁶⁰ and some scholars have expressed doubts about the decision’s significance and staying power.⁶¹

⁵⁶ Brady, *supra* note 14, at 957 (“Until the last few years, effects had received little sustained attention from the Supreme Court. That all changed in 2012, when *United States v. Jones* reintroduced effects into the Supreme Court canon.”).

⁵⁷ See, e.g., *United States v. Mathias*, 721 F.3d 952, 957 (8th Cir. 2013) (noting that *Jones* “made clear” that “a challenged action may violate an individual’s Fourth Amendment rights as either a trespassory search or a violation of a reasonable expectation of privacy”). For additional cases similarly citing *Jones* for the proposition that the Fourth Amendment protects against both physical invasions to personal effects and invasions of reasonable expectations of privacy under *Katz*, see *Taylor v. City of Saginaw*, 922 F.3d 328, 332–33 (6th Cir. 2019); *United States v. Davis*, 785 F.3d 498, 506–07 (11th Cir. 2015); *Patel v. City of Los Angeles*, 738 F.3d 1058, 1061 (9th Cir. 2013) (en banc); *United States v. Jackson*, 728 F.3d 367, 373–74 (4th Cir. 2013); *Free Speech Coalition, Inc. v. Attorney General of the United States*, 677 F.3d 519, 543–44 (3d Cir. 2012); *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1029–30 (9th Cir. 2012) (suggesting that the physical trespass test as articulated in *Jones* would apply to warrantless searches of homeless individuals’ “unabandoned” effects); *United States v. Patel*, 485 F. App’x 702, 710–11 (5th Cir. 2012); *United States v. Perea-Rey*, 680 F.3d 1179, 1185–86 (9th Cir. 2012); *United States v. Skinner*, 690 F.3d 772, 779–80 (6th Cir. 2012).

⁵⁸ See, e.g., *State v. Phillips*, 382 P.3d 133, 148 (Haw. 2016) (“To determine whether a police entry constitutes a ‘search’ within the meaning of the Fourth Amendment and the Hawai’i Constitution, two tests have emerged: (1) the ‘*Katz* reasonable expectation of privacy test,’ and (2) the *Jones/Jardines* trespass-intrusion test.” (citations omitted)). For additional state appellate cases similarly citing *Jones*, see *State v. Robinson*, 765 S.E.2d 564, 568 (S.C. 2014), and *Commonwealth v. Ousley*, 393 S.W.3d 15, 23 (Ky. 2013).

⁵⁹ Totten & Purdon, *supra* note 15, at 235. Such “incremental” implementation, *id.*, is not necessarily surprising, as lower court application of U.S. Supreme Court precedent—particularly to cases involving analogous, but not identical, fact patterns—is often gradual. See Chad Westerland et al., Strategic Defiance and Compliance in the U.S. Courts of Appeals, 54 Am. J. Pol. Sci. 891, 902–03 (2010). Totten & Purdon, *supra* note 15, at 248–49 & nn.52–54, found that many courts have applied both *Jones* and *Katz*, an approach consistent with the physical trespass test as articulated in *Jones* and *Jardines*: in both decisions, the Court framed the trespassory framework as coexisting with the *Katz* privacy test, which continues to have bite in cases that do not involve physical intrusions to effects or constitutionally protected areas. *Florida v. Jardines*, 569 U.S. 1, 11 (2013); *Jones*, 565 U.S. at 409.

⁶⁰ See, e.g., *United States v. Thompson*, 881 F.3d 629, 632 (8th Cir. 2018) (not applying physical trespass test when garbage was arguably located within curtilage); *State v. Vasquez*, No. 2014AP277-CRNM, 2015 WL 13123106, at *2 (Wis. Ct. App. July 14, 2015) (applying only *Katz* where garbage was directly outside back door, arguably within the curtilage).

⁶¹ For a discussion of scholars raising such concerns, see *supra* note 14.

As Professor Maureen Brady argues in her analysis of the revival of the personal effects doctrine, *Jones* left several key questions unresolved, including “what sorts of actions count as ‘trespasses’ to effects,” and, more fundamentally, “what counts as an ‘effect.’”⁶² Justice Scalia simply assumed that the Jeep in *Jones* qualified as an effect, and no prior precedent provides a settled definition.⁶³ Moreover, Brady notes that *Jones*’s supposed “per se rule—that a trespass on an effect to obtain information is a search”⁶⁴ sits in tension with other precedent suggesting that a “trespass to an effect to obtain information has not always been sufficient to trigger Fourth Amendment protection,”⁶⁵ namely container⁶⁶ and abandonment⁶⁷ doctrines. Despite these lingering questions and the reticence of some courts and scholars to fully embrace a robust reading of *Jones*,⁶⁸ the Supreme Court and lower courts continue to cite and apply *Jones*.⁶⁹

The two-layered Fourth Amendment search inquiry *Jones* appeared to establish—where judges can find a Fourth Amendment search either because police have physically trespassed on an effect to obtain information

⁶² Brady, *supra* note 14, at 957.

⁶³ *Id.* at 960 (“[N]o Supreme Court decision has ever clarified what makes something an ‘effect.’”). The Court has held in at least three cases, counting *Jones*, that various items count as effects, including a vehicle, a wrapped parcel, and luggage. *Id.*; see *Jones*, 565 U.S. at 411; *United States v. Jacobsen*, 466 U.S. 109, 114 (1984) (“Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable.”); *United States v. Place*, 462 U.S. 696, 705–06 (1983) (deeming luggage an effect).

⁶⁴ Brady, *supra* note 14, at 958.

⁶⁵ *Id.* at 957.

⁶⁶ For Fourth Amendment purposes, a “container” is “any object capable of holding another object.” *New York v. Belton*, 453 U.S. 454, 460 n.4 (1981); Brady, *supra* note 14, at 961 n.62. Brady argues that the Court’s container doctrine suggests that mere physical trespass to an effect not ensconced in a container may not be sufficient to constitute a search; conversely, an effect may be entitled to greater privacy protection while in a container. See Brady, *supra* note 14, at 960–62; see also *United States v. Chadwick*, 433 U.S. 1, 7, 11 (1977) (finding container usage particularly significant because “one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment” just like “one who locks the doors of his home”).

⁶⁷ Brady contends that abandonment doctrine also demonstrates “that not all trespasses on personal property to obtain information are Fourth Amendment violations,” since courts have intimated that a trespass to an “abandoned” effect is immaterial. Brady, *supra* note 14, at 962; see *United States v. Rem*, 984 F.2d 806, 810 (7th Cir. 1993) (finding that effects like luggage may be the subject of reasonable privacy expectations unless “abandoned”).

⁶⁸ See *supra* note 14.

⁶⁹ See *Totten & Purdon*, *supra* note 15, at 235–36; see also *Carpenter v. United States*, 138 S. Ct. 2206, 2213, 2215 (2018) (citing and discussing *Jones*).

or violated a defendant's reasonable expectation of privacy⁷⁰—became further entrenched one year later in *Florida v. Jardines*.⁷¹ In 2006, on the basis of an anonymous tip reporting narcotics activity, a Miami-Dade police detective surveilled Jardines's home, and, without a warrant, walked onto Jardines's porch with a drug-sniffing dog, which detected a suspicious odor.⁷² The officer obtained a warrant to search Jardines's home on this basis, and Jardines was eventually charged with trafficking marijuana.⁷³

Writing for another slim majority,⁷⁴ Justice Scalia again applied the physical trespass test, holding that the police detective's unlicensed trespass into Jardines's curtilage—the area “surrounding and associated with the home”—constituted a Fourth Amendment search.⁷⁵ Echoing *Jones*, Scalia noted that while “property rights ‘are not the sole measure of Fourth Amendment violations,’” the “*Katz* reasonable-expectations test ‘has been *added to*, not *substituted for*,’ the traditional property-based understanding of the Fourth Amendment,” and is thus “unnecessary to consider” when police “physically intrud[e] on constitutionally protected areas.”⁷⁶

⁷⁰ See *supra* notes 57–58 for courts applying this new two-tiered Fourth Amendment search inquiry.

⁷¹ 569 U.S. 1, 5–6 (2013).

⁷² *Id.* at 3–4.

⁷³ *Id.*

⁷⁴ The *Jardines* majority included Justices Scalia, Thomas, Ginsburg, Sotomayor, and Kagan. *Id.* at 2. *Jardines* marked the first time that both Justices Ginsburg and Kagan endorsed the physical trespass test; both had joined Justice Alito's *Jones* concurrence, see *supra* note 47, arguing that *Jones* should have been decided exclusively under *Katz*. *Jones*, 565 U.S. at 419 (Alito, J., concurring). Justice Kagan (joined by Justices Ginsburg and Sotomayor, who had previously endorsed the physical trespass test as a supplement to *Katz* in *Jones*) concurred in *Jardines*, noting that although she endorsed the majority's “property rubric,” she “could just as happily” have “look[ed] to Jardines' privacy interests.” *Jardines*, 569 U.S. at 13 (Kagan, J., concurring). Justice Alito, joined by Chief Justice Roberts and Justices Kennedy and Breyer, dissented in *Jardines*, arguing again that the Court should have applied *Katz* and concluded that no search occurred. *Id.* at 16 (Alito, J., dissenting). Surprisingly, Alito was joined by two justices who had previously joined the *Jones* majority: Chief Justice Roberts and Justice Kennedy. See *supra* note 47.

⁷⁵ *Jardines*, 569 U.S. at 5–7; see also *supra* note 7 and accompanying text; *infra* notes 183–188 and accompanying text (defining and discussing the curtilage).

⁷⁶ *Jardines*, 569 U.S. at 5, 11.

In finding the use of a drug-sniffing dog within the curtilage “unlicensed,” the Court explicitly applied property principles.⁷⁷ Looking to the “strict rule of the English common law as to entry upon a close,” Scalia concluded that citizens give an “implicit license” for visitors to “approach the home by the front path, knock promptly, wait briefly . . . and then (absent invitation to linger longer) leave”—a license that does *not* extend to “introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence.”⁷⁸ Thus, while *Jones* appeared to apply the physical trespass test primarily to intrusions on “effects,” *Jardines* explicitly extended the trespassory framework to unlicensed trespasses on any “constitutionally protected area,” including a person’s papers, house (including the curtilage), person, and effects.⁷⁹ Numerous courts⁸⁰ and scholars⁸¹ have recognized that *Jardines* further

⁷⁷ Both the concurring and dissenting Justices noted the further retrenchment of property interests in the Fourth Amendment search inquiry. *Id.* at 13 (Kagan, J., concurring); *id.* at 16 (Alito, J., dissenting).

⁷⁸ *Id.* at 8–9 (majority opinion) (quoting *McKee v. Gratz*, 260 U.S. 127, 136 (1922)).

⁷⁹ *Jardines* appears to define “constitutionally protected area” as those items enumerated in the Fourth Amendment: papers, houses, persons, and effects. See *id.* at 5; Orin Kerr, *What Is the State of the Jones Trespass Test After Florida v. Jardines?*, *Volokh Conspiracy* (Mar. 27, 2013), <http://volokh.com/2013/03/27/what-is-the-state-of-the-jones-trespass-test-after-florida-v-jardines/> [<https://perma.cc/R7NQ-7FFP>] (“Most [post-*Jardines*] cases will be easy—just watch the officer or tools he is using as they cross into the constitutionally protected area of the house, paper, person, or effect.”). The seeds for *Jardines*’s explicit extension of the physical trespass test to any constitutionally protected area are found in *Jones*. See *Jones*, 565 U.S. at 411 n.8 (“[O]ur theory is *not* that the Fourth Amendment is concerned with ‘any technical trespass that led to the gathering of evidence.’ The Fourth Amendment protects against trespassory searches only with regard to those items (‘persons, houses, papers, and effects’) that it enumerates.” (citations omitted) (quoting *id.* at 420 (Alito, J., concurring in judgment))).

⁸⁰ See, e.g., *United States v. Alexander*, 888 F.3d 628, 631 (2d Cir. 2018) (noting that, under *Jardines*, “a search of the curtilage . . . without a warrant based on probable cause or an exception to the warrant requirement violates the Fourth Amendment”). For other cases similarly citing *Jardines*, see *Whalen v. McMullen*, 907 F.3d 1139, 1146–47 (9th Cir. 2018); *Morgan v. Fairfield Cty.*, 903 F.3d 553, 561–62 (6th Cir. 2018); *United States v. Maxi*, 886 F.3d 1318, 1327 (11th Cir. 2018); *United States v. Mitchell*, 720 F. App’x 146, 149–50 (4th Cir. 2018); *United States v. Bain*, 874 F.3d 1, 15 (1st Cir. 2017); *United States v. Beene*, 818 F.3d 157, 163 (5th Cir. 2016); *United States v. Jackson*, 728 F.3d 367, 373 (4th Cir. 2013).

⁸¹ Carol A. Chase, *Cops, Canines, and Curtilage: What Jardines Teaches and What It Leaves Unanswered*, 52 *Hous. L. Rev.* 1289, 1290 (2015) (noting that “for the second time” since *Jones*, the Court in *Jardines* used a “property rights theory to determine that a Fourth Amendment search had occurred”); Eric Connon, *Comment*, *Growing Jardines: Expanding Protections Against Warrantless Dog Sniffs to Multiunit Dwellings*, 67 *Case W. L. Rev.* 309, 310 (2016) (“The [*Jardines*] majority opinion . . . arrived at the conclusion not through a *Katz* ‘reasonable expectation of privacy’ analysis, but through a determination that the drug sniffing occurred in ‘an area . . . immediately surrounding [*Jardines*’s] house’ Both tests remain

solidified the physical trespass test as part of the Fourth Amendment search inquiry, particularly in cases involving police activity within the curtilage.

Any doubt about whether *Jones* and *Jardines* revitalized the physical trespass test was effectively put to rest by the Court's recent decision in *Collins v. Virginia* (2018). There, in considering "whether the automobile exception to the Fourth Amendment permits a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein,"⁸² eight members of the Court⁸³ applied the physical trespass test as articulated in *Jardines* to hold that an unlawful search occurred when officers "physically intrud[ed] on the curtilage of Collins' home to search" a motorcycle sitting therein.⁸⁴ Although the Court emphasized the heightened privacy protections the Fourth Amendment affords the home and curtilage, the Court did not apply the *Katz* privacy expectations test in concluding that the automobile exception does not justify an unlicensed warrantless "invasion of the curtilage."⁸⁵

Ultimately, then, *Jones* and *Jardines* reasserted a renewed role for the previously defunct physical trespass test: if police have committed a warrantless trespass on an effect for the purpose of gathering information (as in *Jones*) or an unlicensed intrusion into a constitutionally protected area with an investigatory purpose (as in *Jardines*), courts are empowered to find that a Fourth Amendment search has occurred under the physical trespass test, even if a defendant's reasonable privacy expectations have not been disrupted under *Katz*. The following analysis of how *Jones* and

viable approaches to determining Fourth Amendment searches." (footnotes omitted)); Kerr, *supra* note 79 (stating that *Jardines* is the "first Supreme Court application of the *Jones* test after *Jones* itself"); Kinports, *supra* note 20, at 69–71 ("Following in *Jones*'s footsteps . . . the majority in *Jardines* held that the police committed an 'unlicensed physical intrusion' on 'a constitutionally protected area.'" (footnote omitted)); Carrie Leonetti, A Grand Compromise for the Fourth Amendment, 12 J. Bus. & Tech. L. 1, 14–15 (2016).

⁸² *Collins v. Virginia*, 138 S. Ct. 1663, 1668 (2018).

⁸³ Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Kagan, and Gorsuch joined Justice Sotomayor's majority opinion. *Id.* at 1667. Justice Thomas joined the majority opinion but wrote separately to express his "serious doubts" about the Court's ability to "impose" the exclusionary rule on the states. *Id.* at 1675 (Thomas, J., concurring). Justice Alito dissented, noting that he would have decided the case using a freestanding reasonableness test and noting, somewhat remarkably in light of *Jardines*, that "whether or not" the search of the motorcycle "occurred within the curtilage is not of any direct importance." *Id.* at 1682 (Alito, J., dissenting).

⁸⁴ *Id.* at 1670–71 (majority opinion).

⁸⁵ *Id.*

Jardines could unsettle the constitutional validity of garbage pulls illustrates the disruptive potential of these decisions.

II. GARBAGE AS A PERSONAL EFFECT: *GREENWOOD & JONES*

In establishing that physical trespasses to personal effects for the purpose of gathering information can constitute a Fourth Amendment search irrespective of privacy expectations,⁸⁶ *United States v. Jones* raises questions about the viability of warrantless garbage pulls as an investigatory tool. Could household garbage itself be construed as an effect, even when it sits on the curb awaiting collection? If so, every warrantless touching of curbside garbage for an investigatory purpose would potentially constitute an unlawful search under *Jones*, casting serious doubt on the constitutionality of warrantless garbage pulls. Similarly, could garbage bags and bins qualify as personal effects? If so, a large number of warrantless garbage pulls could presumably be found to constitute unlawful searches under *Jones*, since many garbage pulls involve the physical touching of a bag or bin.⁸⁷

In this Part, I endeavor to show that *Jones*'s articulation of the physical trespass test offers an avenue by which courts *could* find that household garbage, garbage bags, and garbage bins⁸⁸ qualify as effects. (Whether courts are *likely* to do so in large numbers is relevant but not central to this inquiry.) Below, I identify two paths courts could take—each based on a distinct definitional framework of personal effects—to find that garbage, bags, or bins qualify as effects: (1) by holding that all three qualify as personal property, and thus as effects, until the moment of collection; or (2) by holding that all three qualify as effects because of their close association with domestic intimacy. Next, I address three compelling arguments that garbage, bags, or bins do not qualify as effects, namely that these items do not meet standard definitions of chattel property, have been

⁸⁶ *United States v. Jones*, 565 U.S. 400, 404–06 (2012).

⁸⁷ The garbage cases involving bags or bins are too numerous to list, although the majority of garbage pull cases cited herein involved garbage sitting in a bag or bin (usually both). For just a few examples, see *infra* note 112.

⁸⁸ It is important to analyze garbage, bags, and bins as distinct entities, since each comprises an important element of most standard garbage pulls. Moreover, analysis of one of these items under *Jones* has implications for the others. For instance, if bags and bins do not qualify as effects but garbage itself does, all warrantless garbage pulls would involve the impermissible touching of an effect, since all garbage pulls involve police handling garbage. If, however, garbage and garbage bags do not constitute effects but bins do, only garbage pulls involving bins would involve the impermissible touching of an effect.

abandoned, or are too “exposed” once on the curb. I argue that courts seeking to apply *Jones* to warrantless garbage pulls could theoretically rebut these arguments. Ultimately, my analysis shows how *Jones*, if applied consistently and robustly in judicial reviews of warrantless garbage pulls, could significantly curtail this investigatory practice.

A. Defining “Effects”

Since the Supreme Court did not define “effects” in *Jones* and has not provided a firm definition elsewhere,⁸⁹ we must first explore two possible definitional paradigms of “effects.” The first, articulated by Professor Brady,⁹⁰ centers on the link between effects and personal property. In Brady’s view, because the term “effects” at least encompasses items of personal property (i.e., “possessions other than buildings and land”),⁹¹ the best test for whether a particular item constitutes an effect is whether it is “reasonably recognizable as personal property,” using eighteenth-century features of chattel property ownership, including “(1) the ability to exclude others, (2) the ability to transfer the object, and (3) control over its use.”⁹² Under this definition, if an item qualifies as personal property and has not been abandoned or otherwise relinquished, the item presumably qualifies as an effect.⁹³

The second possible definitional paradigm for effects focuses on an item’s association with domestic intimacy. The Supreme Court has indicated that the “intimacy” of an item helps determine whether the item qualifies as an effect: in *Robbins v. California* (1981), for instance, the Court defined “personal effects” as “property worn on or carried about the person or having some intimate relation to the person.”⁹⁴ Some judges have similarly noted the connection between an item’s intimate association with an individual and whether that item counts as the individual’s

⁸⁹ See *supra* notes 62–63 and accompanying text.

⁹⁰ Brady, *supra* note 14; see also Petition for a Writ of Certiorari at 28–29, *Gonzalez-Badillo v. United States*, 138 S. Ct. 1282 (mem.) (2018) (No. 17-696), 2017 WL 5248442 (citing Brady’s definition of effects).

⁹¹ Brady, *supra* note 14, at 985, 1001 (noting that dictionaries from the Founding era “indicate that ‘effects’ was synonymous with personal property”).

⁹² *Id.* at 1001–02.

⁹³ *Id.* at 1001, 1006, 1013.

⁹⁴ 453 U.S. 420, 425 (1981) (plurality opinion) (reasoning that luggage qualifies as an effect), overruled on other grounds by *United States v. Ross*, 456 U.S. 798 (1982).

personal effect.⁹⁵ Outside of effects jurisprudence, the Supreme Court⁹⁶ and numerous scholars⁹⁷ have noted that protecting domestic privacy lies at the heart of the Fourth Amendment. Thus, household garbage's close connection to the intimacies of the home could have significant bearing on whether courts find that garbage qualifies as an effect. We turn now to the first of these definitional frameworks—whether garbage, bins, or bags might qualify as effects by virtue of their status as personal property.

B. Garbage, Bags, and Bins as Personal Property

Courts reviewing warrantless garbage pulls post-*Jones* have largely remained silent on the question of whether garbage itself counts as a personal effect.⁹⁸ The Supreme Court of Kentucky has offhandedly referred to garbage as an effect,⁹⁹ but only the Court of Appeals of Ohio has thoroughly weighed whether garbage qualifies as an “effect,” concluding that

⁹⁵ See, e.g., *United States v. Johnson*, 862 F.2d 1135, 1145–46 (5th Cir. 1988) (Goldberg, J., dissenting) (stating that “personal effects” kept in luggage “may be the most intimate in a person’s life,” revealing “political beliefs, sexual practices, financial status, and innermost thoughts”); *State v. Thompson*, 760 P.2d 1162, 1170 (Idaho 1988) (Bakes, J., dissenting) (noting definition of “personal effects” in Black’s Law Dictionary as “property having more or less intimate relation to [the] person”).

⁹⁶ See, e.g., *Florida v. Jardines*, 569 U.S. 1, 7 (2013) (noting that the curtilage is “intimately linked to the home” (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986))); *Kyllo v. United States*, 533 U.S. 27, 37 (2001) (“In the home, our cases show, *all* details are intimate details.”); *Florida v. Riley*, 488 U.S. 445, 452 (1989) (noting that police did not observe any “intimate details” connected with the domestic sphere when flying over greenhouse); *United States v. Dunn*, 480 U.S. 294, 300 (1987) (noting that a “central component” of the curtilage inquiry is “whether the area harbors ‘the intimate activity associated with the ‘sanctity of a man’s home’” (first quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984); and then quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886))); *Dow Chem. Co. v. United States*, 476 U.S. 227, 236 (1986) (“The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant.”); *Oliver*, 466 U.S. at 179 (noting that “open fields” are not sites of “intimate activities”).

⁹⁷ See Heidi Reamer Anderson, *Plotting Privacy as Intimacy*, 46 *Ind. L. Rev.* 311, 312 (2013); David A. Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 *Calif. L. Rev.* 1069, 1113 (2014); Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 *S. Cal. L. Rev.* 1083, 1152–53 (2002); Stephanie M. Stern, *The Inviolable Home: Housing Exceptionalism in the Fourth Amendment*, 95 *Cornell L. Rev.* 905, 908 (2010).

⁹⁸ See, e.g., *United States v. Jackson*, 728 F.3d 367, 373 (4th Cir. 2013) (finding that garbage within the curtilage is likely protected under *Jardines* but not analyzing whether garbage counts as an effect).

⁹⁹ *Commonwealth v. Ousley*, 393 S.W.3d 15, 23 (Ky. 2013).

it does not.¹⁰⁰ However, assuming that items of personal property presumptively count as effects,¹⁰¹ household garbage *could* plausibly be deemed an effect, since items of household garbage, at least at one point, count as personal property.

When it remains inside the home in receptacles and baskets, garbage is simply a compilation of discarded personal property, likely comprised of both papers¹⁰² and effects. Since owners are presumably free to use, transfer, and exclude others from items of personal property kept within the home, such items almost certainly qualify as chattel property under the three-prong definition, even if these items are ultimately destined for the garbage.¹⁰³ Thus, under the personal-property definitional paradigm of effects, items placed in household garbage would appear to qualify as effects, at least until garbage is placed on the curb for collection. We return to the significance of placing garbage on the curb, and how this act could potentially change whether garbage, bags, or bins qualify as effects under the personal-property definition, below.¹⁰⁴

Garbage bags and bins might also qualify as effects under this definitional framework. Garbage bags and bins are, at base, containers for other objects.¹⁰⁵ Although the use of a container has significant bearing on individuals' privacy expectations under *Katz*,¹⁰⁶ the container doctrine

¹⁰⁰ *State v. Adkins*, 2015-Ohio-1698, 2015 WL 2058975, at ¶¶ 30–34.

¹⁰¹ See *Oliver*, 466 U.S. at 177 n.7 (1984); Brady, *supra* note 14, at 960 (noting courts' "curt equation of effects and personal property").

¹⁰² See, e.g., *United States v. Segura-Baltazar*, 448 F.3d 1281, 1289 n.3 (11th Cir. 2006) (noting that garbage pull yielded "documents," such as "financial receipts, medical records, and mail"); *State v. Tanaka*, 701 P.2d 1274, 1276–77 (Haw. 1985) (finding reasonable expectations of privacy in curbside garbage, characterized as "personal effects," and noting that garbage often contains "[b]usiness records, bills, correspondence, magazines, [and] tax records"). Presumably, these "papers," as "constitutionally protected areas" listed in the text of the Fourth Amendment, see *supra* note 79, could be the subjects of impermissible physical trespasses under *Jones* and *Jardines*, although it does not appear that any court has yet applied the physical trespass test in the papers context.

¹⁰³ See *supra* notes 90–93 and accompanying text.

¹⁰⁴ See *infra* Subsections II.B.1–3.

¹⁰⁵ The Supreme Court defines containers broadly. See *New York v. Belton*, 453 U.S. 454, 460 n.4 (1981) (defining containers as "any object capable of holding another"); Brady, *supra* note 14, at 961 n.62, 962.

¹⁰⁶ See, e.g., *United States v. Chadwick*, 433 U.S. 1, 11 (1977) (use of a footlocker as a container undergirded defendant's privacy expectations); *State v. Crane*, 329 P.3d 689, 695 (N.M. 2014) (noting the importance of whether garbage was "placed in an opaque bag" and "sealed from plain view"); *State v. Goss*, 834 A.2d 316, 319 (N.H. 2003) (noting that people do not "voluntarily expose" intimacies of domestic life "when they leave trash, in sealed bags"); Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing*

provides little help in assessing whether bags and bins themselves qualify as effects.¹⁰⁷ Notably, several of the items the Supreme Court has recognized as containers would almost certainly qualify as effects under the personal-property definition of effects, including a paper bag,¹⁰⁸ suitcase,¹⁰⁹ footlocker,¹¹⁰ and leather jacket.¹¹¹ Still, no federal or state court appears to have explicitly addressed whether garbage bags or bins qualify as effects under *Jones*.

For essentially the same reasons that garbage itself could be construed as personal property, and thus as an effect, garbage bags could similarly be construed as personal property, at least until the moment they are left on the curb. Before property owners fill garbage bags with refuse and place them on the curb for collection, the bags qualify as personal property under Professor Brady's three-prong definition of chattel property: just like items individuals eventually discard in the bags, owners are presumably free to use, exclude others from, and transfer bags to others, however unlikely such transfers might be.

Garbage bins¹¹² present more complicated questions: bins might theoretically qualify as effects under *Jones*, but *whose* effects? Although some individuals living in areas without trash collection store household waste in bins they personally own prior to independent transport to landfills,¹¹³

Container Doctrine Can Tell Us About the Fourth Amendment, 100 J. Crim L. & Criminology 1403, 1420 (2010) (arguing that the container doctrine places "containers on an equal footing with private homes").

¹⁰⁷ But see Brady, *supra* note 14, at 1009 (noting that "[e]fforts to conceal something do not just indicate an expectation of privacy" but "also indicate the expectation of the owner to return to the property," which may signal that the owner does not intend to relinquish those items as effects).

¹⁰⁸ *United States v. Ross*, 456 U.S. 798, 801 (1982).

¹⁰⁹ *Arkansas v. Sanders*, 442 U.S. 753, 755 (1979), overruled on other grounds by *California v. Acevedo*, 500 U.S. 565 (1991).

¹¹⁰ *Chadwick*, 433 U.S. at 1.

¹¹¹ *New York v. Belton*, 453 U.S. 454, 456, 462–63 (1981).

¹¹² Although most courts have remained silent about whether bins count as effects, a few have assessed whether the presence of a bin might have *some* bearing on the constitutionality of warrantless garbage pulls. See, e.g., *United States v. Trice*, 864 F.2d 1421, 1424 (8th Cir. 1988) (noting that a "trash can is less accessible to animals than a garbage bag"); *Commonwealth v. Ousley*, 393 S.W.3d 15, 23 (Ky. 2013) (finding trash containers within the curtilage protected).

¹¹³ See, e.g., *Hyde v. State*, 13 So. 3d 997, 1019 (Ala. Crim. App. 2007) (garbage "routinely placed on the back porch" of trailer to be taken to "nearby dumpster"); *State v. Fisher*, 154 P.3d 455, 472 (Kan. 2007) (garbage "not left out for commercial trash collection" but rather "placed on the ground near a [burn] barrel for eventual disposition" by defendant); *State v.*

many individuals living in areas with third-party collection are issued bins by local governments or collection companies.¹¹⁴ In addition to making clear that the issuing local government or company technically owns the bins,¹¹⁵ local regulations for government- or corporate-owned bins often impose specific restrictions on appropriate uses for bins,¹¹⁶ as well as requirements that bins be left on the premises for future residents if individuals move, a requirement that effectively prohibits transfer of bins to others.¹¹⁷ Although property owners in possession of government- or corporate-issued bins could almost certainly exclude members of the general public from the bins, they presumably could *not* exclude the governmental or corporate owner of the bin (although even these true owners probably cannot enter an individual's garage or curtilage to inspect the bin without prior consent). Given that local regulations typically constrain individuals' ability to use, transfer, or exclude others from bins, bins

Birdsall, No. C9-02-1222, 2003 WL 21321419 (Minn. Ct. App. June 10, 2003) (garbage left at side of house that defendant took to landfill himself).

¹¹⁴ See *infra* notes 115–117.

¹¹⁵ See, e.g., SeaTac, Wash., Code § 7.40.050(F) (2019), <http://www.codepublishing.com/WA/SeaTac/?Seatac07/Seatac0740.html&?f> [<https://perma.cc/8XCA-NUXF?type=image>] (“All containers provided by the contractor shall remain the property of the contractor.”); Fairhope, Ala., City of Fairhope Waste Management, <http://www.cofairhope.com/departments/public-works/waste-management> [<https://perma.cc/8YMY-WNZU>] (last visited Aug. 25, 2019) (“[C]ity-issued automated garbage can[s] . . . are the property of the City of Fairhope . . .”).

¹¹⁶ See, e.g., Sebring, Fla., Automated Pick-up, <http://www.mysebring.com/FAQ.aspx> [<https://perma.cc/7CSK-CB2Z>] (last visited May 20, 2019) (“Do not load your container with hot ashes or coals, household hazardous waste or medical waste . . .”); Lima, Ohio, The Good Neighbor Guide, Garbage & Trash 15, <http://www.cityhall.lima.oh.us/index.aspx?NID=138> [<https://perma.cc/R7WT-2SYU>] (last visited May 20, 2019) (“No bricks, engine blocks, paints, solvents or flammable liquids may be placed in the containers.”); City of Raleigh, N.C., Solid Waste Common Questions, <https://www.raleighnc.gov/services/content/SolidWaste/Articles/SolidWasteQuestions.html> [<https://perma.cc/F2NQ-NADN>] (last visited May 20, 2019) (no “yard waste” in bins).

¹¹⁷ See, e.g., Village of Wellington, Fla., Garbage Guidelines, <http://www.wellingtonfl.gov/how-do-i/view/garbage-guidelines> [<https://perma.cc/H3YN-U5YU>] (last visited May 20, 2019) (“The container is owned by the Village and . . . must be left for the next resident.”); Frederick County, Md., Residents’ Guide to Solid Waste Management in Frederick County 13 (2016), <https://frederickcountymd.gov/DocumentView.aspx?DID=13934> [<https://perma.cc/272R-VFXC>] (“Carts are the property of Frederick County Government and are assigned to specific addresses, not to the individuals who live there. If you move, your cart stays behind.”); City of Winston-Salem, N.C., Curbside Garbage Collection FAQ, <http://www.cityofws.org/departments/sanitation/collections/curbside-pickup/curbside-garbage-collection-faq> [<https://perma.cc/7ETV-YURT>] (last visited May 20, 2019) (“Each [garbage] cart is assigned to a particular address. If you move, you must leave the cart for use by the next occupant.”).

issued and owned by local governments or collection companies appear to fail the three-prong test of chattel property ownership.

However, property owners who use and store a government-issued bin (sometimes in their garage, which some courts have held counts as part of the home¹¹⁸) perhaps have *some* limited property interest in the bin, at least with respect to all other individuals except the true owner, even if these residential bin users cannot exercise all the staples of chattel property ownership.¹¹⁹ And unlike with garbage and garbage bags, it would be difficult to argue that a garbage bin has been “abandoned” once it is placed on the curb since trash collectors do not “collect” bins during trash pulls, and the bin’s user continues to store the bin for the duration of residency.¹²⁰

That garbage bins may not qualify as chattel property is not necessarily an insurmountable barrier to courts finding that bins count as effects. After all, the Jeep in *Jones*, which the Court construed as Jones’s effect, was owned by Jones’s wife.¹²¹ Although Jones served as the Jeep’s “exclusive driver,”¹²² he presumably was not free to unilaterally transfer, use, or exclude others from the Jeep without his wife’s consent. Nonetheless, Justice Scalia noted that even “[i]f Jones was not the owner he had at least the property rights of a bailee.”¹²³ If Jones’s status as a quasi-bailee of the Jeep was no barrier to the Jeep qualifying as his effect, the same could be true of a bin not technically owned by a defendant as chattel property but stored and used solely by the defendant. Indeed, an individual’s relationship with a government- or corporate-owned bin bears a strong

¹¹⁸ See, e.g., *Coffin v. Brandau*, 642 F.3d 999, 1012–13 (11th Cir. 2011) (en banc) (finding defendant’s garage to be part of the curtilage); *United States v. Oaxaca*, 233 F.3d 1154, 1157 (9th Cir. 2000) (“[N]o reason exists to distinguish an attached garage from the rest of the residence for Fourth Amendment purposes.” (quoting *United States v. Frazin*, 780 F.2d 1461, 1467 (9th Cir. 1986))); *Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 600–01 (6th Cir. 1998) (finding unattached garage to be part of the curtilage); *Corey v. State*, 739 S.E.2d 790, 795 (Ga. Ct. App. 2013) (holding that defendant’s “garage should be placed under the home’s ‘umbrella’ of Fourth Amendment protection”).

¹¹⁹ Property principles of relativity of title are relevant here. Although technically not the true owner of the bin, the bin’s domestic possessor arguably has a superior claim to the bin as against all other potential owners, except the true owner: the local government or corporation issuing the bin. See *infra* notes 130–131 and accompanying text.

¹²⁰ See *infra* Subsection II.B.2.

¹²¹ *United States v. Jones*, 565 U.S. 400, 404 & n.2 (2012).

¹²² *Id.*

¹²³ *Id.* at 404 n.2.

resemblance to a bailment relationship.¹²⁴ Accordingly, although courts are probably less likely to find that bins qualify as effects under the personal-property definitional paradigm of effects, it is at least *possible* that courts could so hold given the Supreme Court's treatment of the Jeep in *Jones*. Household garbage and garbage bags, however, fit more cleanly into standard definitions of personal property and thus could more easily be found by courts to qualify as effects, at least until the moment garbage is left on the curb for collection.

Personal property is generally afforded a high degree of Fourth Amendment protection. In *United States v. Place* (1983), where the Court deemed luggage "personal property" and an "effect," the Court noted that "a seizure of personal property [is] *per se* unreasonable" without a warrant.¹²⁵ Thus, if courts did utilize *Jones* and the personal-property paradigm of effects to hold that garbage, bags, or bins qualify as personal property, Fourth Amendment precedent would appear to make the seizure of that personal property suspect, presumably requiring a warrant, exigency, or some other showing of reasonableness.¹²⁶

Even if we assume that courts could find that garbage, bags, and bins qualify as effects before these items are left for collection, how does the act of placing garbage on the curb for collection affect these items' status as personal property and thus as effects? There are at least three strong arguments that curbside garbage no longer qualifies as an effect. Below,

¹²⁴ A bailment is defined as a "delivery of possession of personal property to another without conveyance of title." Joseph William Singer, Property § 16.5, at 820–21 (4th ed. 2014). Bailment relationships are generally contractual; typical arrangements include "cars parked in parking lots, coats checked in a restaurant," or "suitcases checked for transport in airplanes." *Id.* at 820. Bailees are obligated to "return the property to the bailor." *Id.*; see also *Carpenter v. United States*, 138 S. Ct. 2206, 2268–69 (2018) (Gorsuch, J., dissenting) (outlining definition of bailment). Here, property owners living at particular residences arguably function as bailees for the bin assigned to that residence by the local government or collection company (i.e., the bailors or true owners).

¹²⁵ 462 U.S. 696, 700–01 (1983).

¹²⁶ The Court held in *Place* that "some brief detentions of personal effects may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime." *Id.* at 706. Police seizure of garbage during warrantless trash pulls is not usually a "brief detention" but rather a permanent confiscation for investigatory purposes. The Court further noted that the seizure of an effect may be justified where "the owner has relinquished control of the property to a third party" or where the property is no longer in the owner's "immediate custody and control." *Id.* at 705. This component of *Place* may still have purchase under *Katz* but not necessarily in cases involving physical invasions of effects, which the physical trespass test presumably now controls.

I tackle the merits of each and suggest that none of these arguments necessarily prevent a court from finding that household garbage retains its status as an effect even while on the curb, until the moment of third-party collection.

1. Curbside Garbage as Chattel Property

The first potential argument that curbside garbage does not qualify as an effect is that, under the three-prong definition of chattel property,¹²⁷ curbside garbage ceases to qualify as personal property by virtue of its location on the curb and the owner's intention to convey the items to a third-party collector. This argument is compelling because an individual's ability to use, transfer, and exclude others from items placed in curbside garbage is undoubtedly frustrated once the items have been placed on the curb for collection. At this point, individuals usually no longer monitor the garbage (and therefore would have a difficult time excluding scavengers) and generally will not desire to use or transfer already-discarded items. Doctrinally, the Supreme Court has indicated in at least one *Katzenbach* holding that the seizure of personal property may be justified where the property is no longer in "the immediate custody and control of the owner."¹²⁸ But even in the face of practical and doctrinal barriers that arguably strain chattel property ownership to the breaking point, is an individual's status as the owner of discarded personal property extinguished once garbage is placed on the curb for collection? And, if individuals have not completely ceded ownership rights, is there some limited form of property ownership at play during the transitional curbside hours that could still theoretically allow curbside garbage to be considered an effect?

To see how we might begin to conceptualize lingering, if substantially weakened, ownership rights in curbside garbage, consider an individual who decides to throw out a broken lamp, and so discards the lamp in a trash bag, places the bag in a garbage bin, and rolls the bin to the curb the night before the day of regular collection. If the individual changes her mind an hour later and decides to have the lamp rewired, does anything restrain her from retrieving it from the curb? Has some other party gained a superior claim to the lamp simply by virtue of its placement on the curb? It seems likely that the owner remains free to retrieve the lamp and resume all the trappings of chattel property ownership, including use, transfer,

¹²⁷ See Brady, *supra* note 14, at 1002.

¹²⁸ *Place*, 462 U.S. at 705; see *supra* note 126.

and exclusion of others. To be sure, it would certainly be more *difficult* for our hypothetical owner to exercise the three features of chattel property ownership once her refuse has been placed on the curb for collection, but the owner appears to retain at least some prerogative over her discarded personal property, at least until the moment of collection, and at least with respect to all others except the eventual next owners (the trash collectors).

If one avenue to finding that garbage qualifies as an effect is its status as personal property, perhaps garbage's status as an effect under this definitional paradigm should not be extinguished until we are *certain* that the garbage no longer qualifies as an individual's personal property, and the owner is completely unable to function as an owner.¹²⁹ Although strong arguments could be made that this point of certainty has been reached even when garbage awaits collection on the curb, perhaps the most definitive point at which garbage ceases to qualify as personal property and owners lose their status as owners is the moment of third-party collection, when a new "owner" takes possession and commingles the garbage with others' trash, at which point the former owner has no ability to use, transfer, or exclude others from her discarded items. Until the moment of collection, however, a court could reasonably find that garbage continues to function as personal property and thus as an effect by drawing on property concepts of relativity of title, which recognize that title is not always "absolute"; individuals may sometimes retain the "right to possess" an item of personal property "against all but the true owner."¹³⁰ At least one scholar has argued that relativity of title extends fully to chattel property.¹³¹

Courts assessing whether curbside garbage counts as an effect under *Jones* could draw on relativity of title principles to hold that, although curbside garbage will momentarily become the "property" of trash collectors (the next "true owners"), the original owner of the garbage arguably retains the *strongest* claim to title against all other possible owners

¹²⁹ Indeed, these individuals may be in the midst of executing another hallmark of property ownership: the right to destroy. See Lior Jacob Strahilevitz, *The Right to Destroy*, 114 *Yale L.J.* 781, 783 (2005). Placing garbage on the curb for collection could perhaps be characterized as designating the property for *eventual* destruction by the third-party collector.

¹³⁰ See Singer, *supra* note 124, § 16.3, at 812–13; see also *Carpenter v. United States*, 138 S. Ct. 2206, 2269 (2018) (Gorsuch, J., dissenting) ("I doubt that complete ownership or exclusive control of property is always a necessary condition to the assertion of a Fourth Amendment right.").

¹³¹ David Fox, *Relativity of Title at Law and in Equity*, 65 *Cambridge L.J.* 330, 330 (2006).

while the trash remains on the curb. Several courts have held that the mere disposal of personal property does not immediately negate an owner's interest in the property.¹³² Although the Supreme Court indicated in one *Katz*-era holding that an item of personal property may lose some purchase on Fourth Amendment protection when outside of an owner's "immediate custody and control,"¹³³ the Court has held elsewhere that Fourth Amendment protection does not necessarily hinge on an individual's "untrammelled power to admit and exclude" others from the property in question.¹³⁴ In sum, although the argument that curbside garbage no longer qualifies as chattel property is a strong one, it is not necessarily fatal to the proposition that such garbage qualifies as an effect, particularly if courts are willing to recognize attenuated ownership rights in garbage.

2. *Curbside Garbage & Abandonment*

The second potential argument that curbside garbage does not qualify as an effect is that the garbage's former owners have "abandoned"¹³⁵ the garbage, relinquishing any interest in the refuse by leaving it on the curb.¹³⁶ Some courts distinguish between "property abandonment," which requires a showing of "actual intent to abandon, in addition to an act manifesting that intent," and an "abandonment of privacy," which requires only that an individual take some step to signal the "abandonment of the

¹³² See *United States v. Biondich*, 652 F.2d 743, 745 (8th Cir. 1981) ("A person ordinarily retains some expectation of privacy in items that remain on his or her property, regardless of whether they are placed in an automobile, a home, or a garbage can."); *Commonwealth v. Ousley*, 393 S.W.3d 15, 31–32 (Ky. 2013) ("[T]hat the trash has been 'disposed of' . . . cannot be dispositive. If that were the case, then the police could enter a person's home without a warrant and take the contents of the kitchen garbage can, since trash is trash." (citation omitted)).

¹³³ *Place*, 462 U.S. at 705.

¹³⁴ *Minnesota v. Olson*, 495 U.S. 91, 99–100 (1990) ("If the untrammelled power to admit and exclude were essential to Fourth Amendment protection, an adult daughter temporarily living in the home of her parents would have no legitimate expectation of privacy because her right to admit or exclude would be subject to her parents' veto.")

¹³⁵ For a definition, see *infra* notes 151–152 and accompanying text.

¹³⁶ Many state and federal courts have subscribed to an abandonment-based theory of curbside garbage post-*Greenwood*. See, e.g., *United States v. Spotted Elk*, 548 F.3d 641, 653–54 (8th Cir. 2008) ("Police may search trash left outside the curtilage of the house to be picked up by garbage collectors, because the owners of the trash have abandoned it."); *State v. A Blue in Color*, 1993 Chevrolet Pickup, 116 P.3d 800, 805 (Mont. 2005) ("[W]hen [the defendant] placed his garbage at the alley's edge for collection, he abandoned his garbage . . ."). However, as noted *supra* note 38, *Greenwood* actually appeared to reject an abandonment theory of garbage.

privacy interest” in the items or place in question.¹³⁷ The argument assessed here is not that an individual relinquishes privacy interests in garbage by placing garbage on the curb—a question relevant under *Katz* and likely still controlled by *Greenwood*—but rather that doing so constitutes property abandonment.

The Supreme Court has intimated that abandoned personal property becomes “fair game” for police to search or seize.¹³⁸ The Court held in *Abel v. United States* (1960) that a defendant “abandoned” items of personal property when he “threw them away” in a hotel wastebasket and then “vacated the room,” leaving the hotel with the “exclusive right” to the discarded items and thereby permitting police to search the wastebasket.¹³⁹ However, items of personal property that have not been abandoned are generally thought to merit Fourth Amendment protection.¹⁴⁰ Some courts have even maintained this principle where personal property sits temporarily on the curb, as the Ninth Circuit noted in its post-*Jones* review of seizures of homeless individuals’ “unabandoned personal possessions, temporarily left on public sidewalks.”¹⁴¹

Given the sometimes dispositive role abandonment plays in determining whether effects are entitled to Fourth Amendment protection, the question whether curbside garbage could qualify as an effect might indeed turn on whether garbage is abandoned when it is placed on the curb for collection. Proponents of an abandonment theory of curbside garbage have strong arguments given that, absent some change of heart, individuals who leave garbage for collection relinquish significant control over

¹³⁷ Brady, *supra* note 14, at 1006–07, 1006 n.270; see also *United States v. Brown*, 663 F.2d 229, 232 (D.C. Cir. 1981) (en banc) (making this distinction).

¹³⁸ See *Hester v. United States*, 265 U.S. 57, 58 (1924) (finding no illegal search where defendants “abandoned” “illicitly distilled” whiskey); see also *Smith v. Ohio*, 494 U.S. 541, 543–44 (1990) (declining to hold that defendant “abandoned” bag by “throwing it on a car to respond to a police officer’s inquiry”); *Rios v. United States*, 364 U.S. 253, 262 n.6 (1960) (“A passenger who lets a package drop to the floor of the taxicab in which he is riding can hardly be said to have ‘abandoned’ it.”).

¹³⁹ 362 U.S. 217, 241 (1960) (“[P]etitioner had abandoned these articles. He had thrown them away. . . . There can be nothing unlawful in the Government’s appropriation of such abandoned property.”).

¹⁴⁰ See Brady, *supra* note 14, at 962–64 (“[E]ffects are without protection if abandoned.”); see also *United States v. Rem*, 984 F.2d 806, 810 (7th Cir. 1993) (“A person may possess a privacy interest in the contents of personal luggage. However, that privacy interest can be forfeited where the person abandons the luggage.” (citations omitted)); *Allinder v. Ohio*, 808 F.2d 1180, 1186 (6th Cir. 1987) (holding that beehives left in a field were protected effects and noting the absence of a claim that the hives were “abandoned”).

¹⁴¹ *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1023–24 (9th Cir. 2012).

their personal property. But is the act of placing garbage at the curb for collection really best characterized as an act of “abandonment”? And do individuals who place their household trash on the curb truly have intent to abandon their personal items such that they engage in “property law abandonment”?

In assessing how best to frame the act of placing garbage on the curb for collection under current doctrine, *Greenwood* is the most appropriate starting point. Although this Note endeavors to demonstrate how *Jones* and *Jardines* could place *Greenwood* under significant stress, *Greenwood* still offers valuable doctrinal guidance about how the act of placing garbage on the curb should be characterized. Notably, the *Greenwood* majority did not frame this act as abandonment; indeed, the *Greenwood* majority never mentioned “abandonment,”¹⁴² and Justice Brennan’s dissent applauds the majority for “properly reject[ing] the State’s attempt to distinguish trash searches from other searches on the theory that trash is abandoned.”¹⁴³ Rather, the *Greenwood* majority characterized the act as primarily one of “conveyance,” noting that the defendants “placed their refuse at the curb for the express purpose of *conveying* it to a third party, the trash collector.”¹⁴⁴ In doing so, the *Greenwood* Court appeared to conceptualize the act of leaving garbage on the curb similarly to the activities at issue in other third-party doctrine cases, namely, dialing telephone numbers through service providers and leaving financial records with banks.¹⁴⁵ Thus, although many courts have interpreted *Greenwood* as establishing an abandonment theory of curbside garbage,¹⁴⁶ *Greenwood* itself does not articulate this theory, and the majority’s apparent rejection of the State’s abandonment theory¹⁴⁷ appears to undermine the argument that curbside garbage has been “abandoned.” If, under *Greenwood*, the act of placing garbage on the curb is best understood as a

¹⁴² Brady, *supra* note 14, at 962.

¹⁴³ *Greenwood*, 486 U.S. at 51 (Brennan, J., dissenting).

¹⁴⁴ *Id.* at 40 (majority opinion) (emphasis added).

¹⁴⁵ *Smith v. Maryland*, 442 U.S. 735, 742–43 (1979) (“[T]elephone users realize that they must ‘convey’ phone numbers to the telephone company.”); *United States v. Miller*, 425 U.S. 435, 442 (1976) (bank depositor “voluntarily conveyed [financial records]” to bank). Indeed, in his *Carpenter* dissent, Justice Gorsuch framed *Greenwood* as an application of the third-party doctrine as articulated in *Smith* and *Miller*. See *Carpenter v. United States*, 138 S. Ct. 2206, 2266 (2018) (Gorsuch, J., dissenting).

¹⁴⁶ See *supra* note 136.

¹⁴⁷ See *supra* note 38.

“conveyance,”¹⁴⁸ the act may not qualify as an act of “property abandonment,”¹⁴⁹ which requires some showing of an “intent to abandon” the items in question.¹⁵⁰ Has an individual who conveys an item to a third party really evidenced intent to “abandon” the property?

Under traditional property law principles, individuals “abandon” property “only when the owner intends to relinquish ownership” and “engages in some type of action to demonstrate that intent,” like “leaving a newspaper on the table in a restaurant when one leaves.”¹⁵¹ The next “finder” of abandoned property is generally thought to become its owner, as opposed to finders of lost property, who only gain a “right to possess” the property.¹⁵² Thus, one way to identify “abandoned” property is to ask whether the property in question is susceptible to subsequent ownership by “finders.” Property designated for or conveyed to a specific third party is not “up for grabs” by anyone who happens to find it. For instance, an individual who transfers property to another by sale has not “abandoned” that property because the transferor, although ceding ownership interests, has not evidenced intent to leave the property for any random finder; rather, the property has been conveyed to a specific party through a hallmark of chattel property ownership.¹⁵³ The same is true when one party “gifts” personal property to another; in the gifting context, an individual gives up ownership interests, as in abandonment, but, like transfer, does so in the context of an exchange with a specific party.¹⁵⁴ Abandonment, however, entails a relinquishment of ownership interests without regard for who becomes the next owner, such that the items in question can be

¹⁴⁸ See supra notes 144–145 and accompanying text.

¹⁴⁹ See supra note 137 and accompanying text.

¹⁵⁰ *Id.*

¹⁵¹ See Singer, supra note 124, § 16.3, at 812–13; see also Edward G. Mascolo, *The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis*, 20 *Buff. L. Rev.* 399, 401–02 (1971) (“In the law of property, it has been recognized that the act of abandonment is demonstrated by the intention to relinquish all title, possession, or claim to property, accompanied by some type of activity or omission by which such intention is manifested. . . . Ultimately, it is a question of *intent*.”).

¹⁵² See Singer, supra note 124, § 16.3, at 813; see also Brady, supra note 14, at 993 n.216 (making the same distinction).

¹⁵³ See Brady, supra note 14, at 960, 1002; Singer, supra note 124, § 1.2.3, at 7 (“Owners are generally free to transfer their property to whomever they wish, on whatever terms they want.”).

¹⁵⁴ See Singer, supra note 124, § 16.4, at 817 (“A gift is a transfer of property from one person to another without payment.”).

considered “*bona vacantia*”—a property law term meaning “un-owned”¹⁵⁵—and available for the taking by any finder.

As between abandonment and standard conveyances like transfers or gifts, the act of leaving garbage for collection arguably looks more like a transfer or gift, at least in the sense that individuals who leave garbage on the curb generally do not expect that *anyone* will be able to take the discarded items but rather, per *Greenwood*,¹⁵⁶ understand themselves as conveying refuse to a specific party who will function as the next true owner: the trash collector. This understanding seems especially clear in localities with anti-rummaging ordinances, under which all but designated trash collectors are prohibited from tampering with curbside garbage,¹⁵⁷ such that unauthorized “finders” would presumably violate the ordinance by taking possession of garbage. If individuals placing garbage out for collection do not intend to leave the items for random “finders,” placing garbage curbside arguably lacks the requisite “intent to abandon” necessary to qualify as property abandonment.¹⁵⁸

Of course, there will be instances where discarded items left on the curb almost certainly satisfy the definition of property abandonment. For instance, in Portland, Oregon, individuals regularly leave unwanted furniture and personal items on the street in “free piles” for anyone to claim, a practice that does appear to constitute property abandonment given the former owner’s (1) apparent intent to disavow any ownership interest and (2) willful disinterest in who the next owner will be.¹⁵⁹ However, the act of leaving property for anyone to claim appears distinct under traditional property law principles from the act of leaving personal property in a designated spot for conveyance to a specific party. Accordingly, although proponents of the argument that curbside garbage has been abandoned make compelling points, courts disposed to find that curbside garbage still qualifies as an effect need not give dispositive weight to such arguments, since curbside garbage may not fit within standard property law definitions of abandonment. Rather, as *Greenwood* suggests, the act of placing garbage on the curb for collection might resemble something more like a

¹⁵⁵ Brady, *supra* note 14, at 962 & n.66; see *Abel v. United States*, 362 U.S. 217, 241 (1960).

¹⁵⁶ *Greenwood*, 486 U.S. 35, 40 (1988).

¹⁵⁷ See *infra* notes 314–322 and accompanying text.

¹⁵⁸ See *supra* note 137 and accompanying text.

¹⁵⁹ See Bradley W. Parks, *Unraveling the Mystery of Portland’s “Free Stuff” Piles*, Or. Pub. Broadcasting (Oct. 1, 2017, 7:15 AM), <http://www.opb.org/artsandlife/article/portland-oregon-free-stuff-reuse-recycle-why/> [<https://perma.cc/J5S2-ESSG>].

conveyance or transfer of property; if so, garbage could theoretically remain the personal property, and thus the effect, of its original owner, until the moment of actual conveyance to the third-party collector.¹⁶⁰

3. Curbside Garbage & Public Exposure

A final possible counterargument might be that garbage left on the curb for collection by a third party has been so “exposed” that it ceases to qualify as an effect. Such an argument finds ample support in *Greenwood*, where the majority makes much of the fact that the defendants “exposed their garbage” by placing it on the curb, leaving it “readily accessible to animals, children, scavengers, snoops, and other members of the public.”¹⁶¹ Numerous courts have presented the public exposure of curbside garbage as a dispositive factor in reviews of warrantless garbage pulls.¹⁶² However, of the three arguments examined here, the public exposure argument is perhaps least likely to stop a court disposed to find that curbside garbage qualifies as an effect under *Jones*. This is so for two reasons.

First, the question of whether personal property’s public exposure strips it of Fourth Amendment protection appears most relevant under the *Katz* inquiry into a defendant’s privacy expectations in the exposed items; *Greenwood*’s focus on exposure is directed at this privacy-based inquiry, not whether garbage qualifies as an effect, a question the *Greenwood* majority did not consider.¹⁶³ The physical trespass test as framed in *Jones* and *Jardines* does not stipulate any conceptual role for an item’s level of exposure. For instance, the defendant’s curtilage in *Jardines* was “exposed” given that members of the public could see the defendant’s walkway and porch, and even enter these spaces within the confines of the implied license, but this public exposure did not vitiate the Court’s property-based concerns about warrantless police activity within the curtilage.¹⁶⁴

Second, looking to prior effects jurisprudence, items found to qualify as effects are regularly exposed to the public. For instance, the Jeep in

¹⁶⁰ This is presumably just as true for garbage bags. Garbage bins, however, are less susceptible to abandonment counterarguments because bins are not conveyed to third parties, but rather remain in the custody of residential owners after collection.

¹⁶¹ *Greenwood*, 486 U.S. at 40 (footnotes omitted).

¹⁶² See generally *infra* Section III.B (examining *United States v. Hedrick* curtilage holdings finding public exposure of garbage dispositive, even where garbage was within curtilage).

¹⁶³ *Greenwood*, 486 U.S. at 40.

¹⁶⁴ *Florida v. Jardines*, 569 U.S. 1, 3–6 (2013).

Jones was regularly exposed to the public as it moved about on public roads.¹⁶⁵ Similarly, letters and packages¹⁶⁶ are routinely exposed to a great many people when transmitted through the postal system. Likewise, personal luggage is exposed to the public when individuals travel using means of mass transportation.¹⁶⁷ These holdings strongly suggest that mere exposure to the public is not sufficient to strip personal property of its status as an effect. Accordingly, although garbage, bags, and bins are often “exposed” when sitting on the curb awaiting collection, this exposure need not dissuade courts from finding that these items count as effects under *Jones*.

The three arguments dissected above are each strong counterweights to the proposition that garbage, bags, and bins count as effects under *Jones*. However, the preceding analysis demonstrates that, when viewed through the lens of traditional property law principles, none of these counterarguments necessarily bars courts from finding that curbside garbage, bags, or bins qualify as effects, at least until the moment of third-party collection. Having evaluated curbside garbage under the personal property paradigm of effects, we turn now to the second possible avenue by which garbage could be defined as an effect—its association with domestic intimacy.

C. Garbage and Domestic Intimacy

In addition to qualifying as personal property, items can qualify as effects because of their close connection to the domestic sphere, as exemplified by the Supreme Court’s definition of effects in *Robbins* as “property worn on or carried about the person or having some intimate relation to the person.”¹⁶⁸ Even assuming household garbage might somehow lose its status as personal property once placed on the curb for collection, household garbage’s “intimate relation to the person[s]”¹⁶⁹ who discard it could perhaps be sufficient for garbage to count as an effect until third-

¹⁶⁵ *United States v. Jones*, 565 U.S. 400, 403 (2012).

¹⁶⁶ *United States v. Jacobsen*, 466 U.S. 109, 114 (1984) (“When the wrapped parcel . . . was delivered to the private freight carrier, it was unquestionably an ‘effect’ within the meaning of the Fourth Amendment. Letters and other sealed packages are in the general class of effects . . . ; warrantless searches of such effects are presumptively unreasonable.”).

¹⁶⁷ *United States v. Place*, 462 U.S. 696, 705–06 (1983) (finding that luggage counts as an effect).

¹⁶⁸ 453 U.S. 420, 425 (1981) (plurality opinion), overruled on other grounds by *United States v. Ross*, 456 U.S. 798 (1982).

¹⁶⁹ *Id.*

party collection, at which point garbage is commingled and can no longer be matched to a particular person or household.¹⁷⁰

Household garbage is generally comprised entirely of personal property used within the home, and is thus inherently connected to the intimacy of the domestic sphere. Justice Brennan's *Greenwood* dissent eloquently elucidates this point, noting that household garbage can reveal "intimate details about sexual practices, health, and personal hygiene," as well as "financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests."¹⁷¹ Ultimately, Brennan concludes, "a sealed trash bag harbors telling evidence of the 'intimate activity associated with the 'sanctity of a man's home and the privacies of life,'" which the Fourth Amendment is designed to protect."¹⁷² Other courts have echoed Brennan's conception of household garbage as highly revelatory of personal identity and domestic life.¹⁷³

Studies of household garbage and garbage disposal practices by "garbologists" offer direct evidence of domestic waste's revelatory power. A longitudinal analysis of household garbage in Tucson, Arizona, conducted by the University of Arizona's Garbage Project,¹⁷⁴ revealed patterns among residents related to food choices, alcohol consumption, and contraceptive usage.¹⁷⁵ Another measure of garbage's capacity to lay bare the intimacies of the home is the outrage individuals express when others exploit their garbage. Although the most infamous examples of trash tampering are somewhat dated, like the 1975 search of then-Secretary of State Henry Kissinger's curbside garbage by the *National Enquirer*,¹⁷⁶ modern examples exist, like the scandal that ensued in 2002 when journalists

¹⁷⁰ Heather Rogers, *Gone Tomorrow: The Hidden Life of Garbage* 12 (2005) (noting that immediately commingling and condensing garbage means objects are "immediately destroyed and rendered unsalvageable").

¹⁷¹ *Greenwood*, 486 U.S. 35, 50–51 (1988) (Brennan, J., dissenting).

¹⁷² *Id.* at 50–51 (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)).

¹⁷³ See *State v. Crane*, 329 P.3d 689, 696 (N.M. 2014); *State v. Morris*, 680 A.2d 90, 94 (Vt. 1996); *State v. Hempele*, 576 A.2d 793, 803 (N.J. 1990).

¹⁷⁴ William Rathje & Cullen Murphy, *Rubbish!: The Archaeology of Garbage* 19–24, 63 (2001) (detailing the Garbage Project's history and techniques).

¹⁷⁵ *Id.* at 63–66 (condom and birth control pill usage patterns).

¹⁷⁶ *Id.* at 18 (noting that the *National Enquirer* rummager found a "crumpled piece of paper" listing "work schedules of the Secret Service agents assigned to guard the Secretary"); Paper Says Kissinger's Garbage Had Secret Service Documents, *N.Y. Times* (July 20, 1975), <https://www.nytimes.com/1975/07/21/archives/paper-says-kissingers-garbage-had-secret-service-documents.html> [<https://perma.cc/VST8-6BSE>] (noting that the search "caused grave anguish to Mrs. Kissinger" and "revolted" Secretary Kissinger).

printed the contents of household garbage belonging to Portland's mayor, police chief, and district attorney.¹⁷⁷ This academic and anecdotal evidence shows the extent to which household garbage contains markers of our most basic and private domestic activities. Since household garbage is inherently associated with such intimate domestic activities, and because the domestic sphere is generally afforded the highest degree of Fourth Amendment protection,¹⁷⁸ garbage likely could be construed as an effect under the domestic intimacy paradigm.

Garbage bags and bins may also qualify as personal effects because of their association with domestic intimacy. Although bags and bins are not themselves byproducts of intimate domestic activities, their primary function is to hold such intimate items; accordingly, both bags and bins might attain personal effects status by virtue of their functional role as containers for the remnants of intimate household behavior.¹⁷⁹ Moreover, garbage bins are often stored in garages, which are often treated as part of the home and thus are themselves one site of domestic intimacy.¹⁸⁰ Accordingly, even if courts are relatively unlikely to reach such holdings in large numbers, garbage, garbage bags, and garbage bins arguably could all qualify as effects under either the personal property paradigm or the domestic intimacy paradigm.

* * *

Ultimately, if applied robustly and consistently in cases involving garbage pulls, *Jones* could pose questions with existential implications for the entire enterprise of warrantless garbage pulls. If courts find that garbage bins qualify as personal effects, police would presumably violate the Fourth Amendment under *Jones* upon touching a bin without a warrant for the purpose of obtaining information. If courts find that garbage and garbage bags count as effects, the practice of warrantless garbage pulls could end altogether, since virtually every warrantless garbage pull involves household trash in a garbage bag, and all warrantless garbage pulls involve garbage. Although courts have so far been reluctant to expand effects doctrine into the field of warrantless garbage pulls, *Jones* suggests

¹⁷⁷ Chris Lydgate & Nick Budnick, *Rubbish! Portland's Top Brass Said It Was OK to Swipe Your Garbage—So We Grabbed Theirs*, *Willamette Wk.* (Dec. 11, 2017), <http://www.wweek.com/portland/article-1616-rubbish.html-2> [<https://perma.cc/4R4G-CT67>].

¹⁷⁸ See supra notes 96–97 and accompanying text.

¹⁷⁹ See supra notes 105–107 and accompanying text.

¹⁸⁰ See supra note 118 and accompanying text.

that courts may increasingly need to tackle these thorny questions. The next Part explores the implications of *Jardines*, a holding with similar potential to dramatically erode the permissible scope of warrantless garbage pulls.

III. GARBAGE IN THE CURTILAGE: *GREENWOOD & JARDINES*

Under *Florida v. Jardines*, police commit an impermissible search if, without a warrant, they enter the curtilage of a home in an unlicensed manner to retrieve garbage “in hopes of discovering incriminating evidence.”¹⁸¹ Courts applying *Jardines* to warrantless garbage pulls need to assess (1) whether the garbage in question was located within the curtilage and (2) if so, whether police violated the implied license by trespassing onto the curtilage with an investigatory purpose.¹⁸² This Part is organized accordingly. First, I examine federal and state courts’ treatment of the curtilage in garbage cases both before and after *Jardines*, highlighting at least four federal circuits and many state appellate courts that have historically eschewed consideration of the curtilage. Second, I highlight state and federal decisions that, while not entirely dismissive of the curtilage in garbage pull cases, offer indeterminate analysis about garbage’s location vis-à-vis the curtilage. I argue that both of these judicial approaches to the curtilage sit in tension with the physical trespass test as articulated in *Jardines*. Third, turning to the implied license inquiry, I highlight several post-*Jardines* holdings suggesting that police may violate the implied license by entering the curtilage to inspect or retrieve garbage without a warrant, and argue that individuals likely do not license garbage pulls within the curtilage.

Given the heightened importance of the curtilage post-*Jardines*, a brief definitional interlude is in order. The curtilage comprises “the area immediately surrounding a dwelling house” and is therefore connected with the “intimate activity associated with the ‘sanctity of a man’s home and the

¹⁸¹ 569 U.S. 1, 6, 9 (2013). The Supreme Court’s recent decision in *Collins v. Virginia* effectively extinguished any doubt about whether *Jardines* establishes this principle. 138 S. Ct. 1663, 1670 (2018) (citing *Jardines* for the proposition that “[w]hen a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred”).

¹⁸² *Jardines*, 569 U.S. at 5–6, 9–10; see infra Section III.D.

privacies of life.”¹⁸³ Because the curtilage is so closely linked to the home, the Court has historically extended to the curtilage the heightened Fourth Amendment protection afforded the home.¹⁸⁴ In determining whether an area lies within the curtilage, courts typically examine four factors enumerated in *Dunn v. United States* (1987): (1) the area’s proximity to the home, (2) whether the area lies “within an enclosure surrounding the home,” (3) how the area is used, and (4) steps taken to “protect the area from observation.”¹⁸⁵ The curtilage is distinguished from “open fields,” the parts of an individual’s property “accessible to the public and the police in ways that a home . . . would not be.”¹⁸⁶ Unlike the curtilage, open fields do not receive “the Fourth Amendment protections that attach to the home.”¹⁸⁷ As the Supreme Court’s curtilage holdings make clear, the curtilage has long been a subject of heightened protection, even under *Katz*.¹⁸⁸ Accordingly, *Jardines* is best understood not as introducing robust protections for the curtilage but rather reaffirming and strengthening longstanding protections under the physical trespass test. We turn now to an examination of post-*Jardines* rulings on the curtilage in cases involving warrantless garbage pulls.

A. Post-Jardines Curtilage Rulings

Although numerous courts have applied *Jardines* in other contexts,¹⁸⁹ only two federal courts of appeals—the Fourth and Eighth Circuits—have reviewed warrantless garbage pulls in the years since *Jardines*. Each has

¹⁸³ *United States v. Dunn*, 480 U.S. 294, 300 (1987) (first quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984); and then quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)); see also *Collins*, 138 S. Ct. at 1670.

¹⁸⁴ See *Collins*, 138 S. Ct. at 1670 (“[T]he Fourth Amendment’s protection of the curtilage has long been black letter law.”); *California v. Ciraolo*, 476 U.S. 207, 212–13 (1986) (“The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home . . . where privacy expectations are most heightened.”); *Oliver v. United States*, 466 U.S. 170, 180 (1984) (“[The curtilage] has been considered part of the home itself for Fourth Amendment purposes.”).

¹⁸⁵ *Dunn*, 480 U.S. at 301. Interestingly, the *Collins* majority did not apply the four-prong *Dunn* test in deciding that the defendant’s “driveway enclosure” was part of the curtilage. *Collins*, 138 S. Ct. at 1671. However, lower courts continue to apply the *Dunn* curtilage framework. See, e.g., *United States v. Coleman*, 923 F.3d 450, 455–57 (6th Cir. 2019).

¹⁸⁶ *Oliver*, 466 U.S. at 179.

¹⁸⁷ *Id.* at 179–80.

¹⁸⁸ See *supra* note 184.

¹⁸⁹ See *supra* note 80.

taken a decidedly different view of *Jardines*'s significance for warrantless garbage pulls within the curtilage.

In *United States v. Jackson* (2013), the Fourth Circuit confronted a garbage pull conducted in the “area immediately beyond the [defendants’] patio,” near a “two-to-three-foot strip of grass between the patio and the common sidewalk.”¹⁹⁰ Importantly, the defendants’ garbage had not been left for collection and was not in its normal place of collection.¹⁹¹ The Fourth Circuit’s analysis proceeded in two steps. First, the court concluded that the garbage was not located within the curtilage, and thus was not subject to the physical trespass test. Second, the court resolved the case under *Katz*, applying *Greenwood* to hold that the defendants enjoyed no reasonable expectations of privacy in the garbage, even though the defendants, unlike *Greenwood*, “had not yet taken their trash can to [the street] where the garbage collector regularly collected it.”¹⁹² Judge Thacker, in dissent, concluded that “[t]he proximity of the trashcan to Jackson’s home, and the fact that the area was largely enclosed, militate in favor of determining that the trashcan was indeed within the curtilage,” and thus “the search of the trashcan” without a warrant was “unreasonable under the trespassory test.”¹⁹³

The Fourth Circuit’s decision in *Jackson* signals that at least one federal circuit understands *Jardines* to have established the physical trespass test as a threshold property-based inquiry that now requires a precise answer about whether garbage lay within the curtilage.¹⁹⁴ Significantly, the Fourth Circuit noted that if the garbage had been seized in the curtilage, police would have committed an unlicensed physical trespass to obtain it, since “rummaging through a trash can located within the home’s curtilage” is “surely . . . beyond the scope of the implied license.”¹⁹⁵ The Fourth Circuit has since articulated similar concerns about the invasive nature of garbage pulls in a decision holding that evidence secured in a single inspection of curbside garbage did not support a finding of probable cause to justify the issuance of a search warrant for the defendant’s

¹⁹⁰ 728 F.3d 367, 373 (4th Cir. 2013).

¹⁹¹ *Id.* at 375.

¹⁹² *Id.*

¹⁹³ *Id.* at 382 (Thacker, J., dissenting). Judge Thacker also contended that the majority misapplied *Katz*. *Id.* at 382–83 (“*Jackson* had a reasonable expectation of privacy in his trashcan when it had not been left for collection, but was rather kept behind the home for temporary storage of personal waste.”).

¹⁹⁴ *Id.* at 373–74 (majority opinion).

¹⁹⁵ *Id.* at 373.

home.¹⁹⁶ In Section III.D, we return to the question of whether entrance into the curtilage for the purpose of investigating garbage violates the implied license.

The Eighth Circuit is the only other federal circuit to have addressed warrantless garbage pulls post-*Jardines*. In *United States v. Thompson* (2018), the Eighth Circuit rejected a defendant's challenge to the warrantless post-collection seizure of garbage originally located between the defendant's "garage door and the pedestrian door entrance to the garage."¹⁹⁷ The majority applied only *Katz*, concluding that the defendant lacked privacy expectations in his garbage on the basis of *Greenwood* and earlier precedent rejecting the importance of the curtilage, like *United States v. Comeaux* (1992), where the Eighth Circuit found "no objectively reasonable expectation of privacy in the trash," even though the bin was located in the defendant's "driveway by the garage door."¹⁹⁸ Earlier, in *Anderson v. United States* (2014), the Eighth Circuit rejected a defendant's claim that defense counsel was deficient in failing to move to suppress evidence seized from trashcans outside the defendant's residence on the basis that the trash may have been located within the curtilage, noting that defense counsel could have relied on earlier precedent like *Comeaux*.¹⁹⁹ As noted below, the Eighth Circuit is one of four circuits that have historically dismissed the importance of whether garbage was located within the curtilage when police inspected or seized it.²⁰⁰

The aftershock of *Jardines* has also been felt in state appellate courts. Approximately six state courts have reviewed garbage pulls post-*Jardines*. Some of these courts have applied the physical trespass test as articulated in *Jones* and *Jardines*. For instance, in *State v. Weatherly* (2018), the Court of Criminal Appeals of Tennessee concluded that it "need not decide whether the officers' investigation" of the defendant's trash violated his "reasonable expectation of privacy" because a Fourth Amendment search occurred when officers "entered the curtilage of the Defendant's home and approached his trash can" for the "express

¹⁹⁶ *United States v. Lyles*, 910 F.3d 787, 792 (4th Cir. 2018) (noting that the "trash from a home often will contain a variety of private items and effects" and that "trash pulls can be subject to abuse").

¹⁹⁷ 881 F.3d 629, 630–32 (8th Cir. 2018).

¹⁹⁸ *Id.* at 631–32 (citing *United States v. Comeaux*, 955 F.2d 586 (8th Cir. 1992)).

¹⁹⁹ 762 F.3d 787, 793–94 (8th Cir. 2014) (en banc).

²⁰⁰ See *Comeaux*, 955 F.2d at 589; *infra* notes 221–225 and accompanying text.

purpose” of gathering evidence.²⁰¹ In *State v. McMurray* (2015),²⁰² the Supreme Court of Minnesota held under its state constitutional search-and-seizure provision that the defendant did not enjoy reasonable expectations of privacy in garbage left curbside for collection, noting that “[b]ecause the police procured the garbage without trespassing on the curtilage of McMurray’s premises, the traditional property-based understanding of the Fourth Amendment,” i.e., *Jardines*, was “not at issue.”²⁰³ Similarly, the Superior Court of Delaware, in a case involving trash bags and a trashcan located outside the defendant’s residence, noted that before “turn[ing] to whether [the defendant] had a reasonable expectation of privacy in his discarded garbage,” *Jardines* required the court to first analyze whether “the trash can and trash bags were outside the curtilage,” stating that if the garbage had been within the curtilage, its “collection might have been a prohibited intrusion.”²⁰⁴ Likewise, in a case involving inspections of two defendants’ trash, the Court of Appeals of Ohio analyzed whether each defendant’s garbage was located within the curtilage and whether police had physically intruded on the defendants’ “papers” or “effects” in handling their garbage.²⁰⁵ Although the court answered each question in the negative, its application of the physical trespass test as a freestanding path to finding a Fourth Amendment search was in harmony with the physical trespass test as articulated in *Jardines*.²⁰⁶

At least one state appellate court discerned the resurgent significance of the curtilage in cases involving garbage pulls before *Jardines*, relying purely on *Jones*. In *Commonwealth v. Ousley* (2013), the Supreme Court of Kentucky assessed the seizure of garbage sitting in bins “level with the front of the [defendant’s] house.”²⁰⁷ The Court noted that, post-*Jones*, “*Katz* is no longer the exclusive test for deciding whether a Fourth Amendment violation has occurred,” and, after extensive analysis of the

²⁰¹ No. W2017-01014-CCA-R3-CD, 2018 WL 2263566, at *5–6 (Tenn. Crim. App. May 17, 2018).

²⁰² 860 N.W.2d 686 (Minn. 2015).

²⁰³ *Id.* at 691 n.4, 694–95.

²⁰⁴ *State v. Guardarrama*, No. 16-05-1029, 2016 WL 7235694, at *4–5 (Del. Super. Ct. Dec. 14, 2016).

²⁰⁵ *State v. Adkins*, 2015-Ohio-1698, 2015 WL 2058975, at ¶¶ 15–34.

²⁰⁶ *Id.* at ¶¶ 17–37; *Florida v. Jardines*, 569 U.S. 1, 11 (2013) (“The *Katz* reasonable-expectations test ‘has been *added to*, not *substituted for*,’ the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas.” (quoting *United States v. Jones*, 565 U.S. 400, 409 (2012))).

²⁰⁷ 393 S.W.3d 15, 29 (Ky. 2013).

Dunn curtilage factors, found that the garbage at issue was located within the curtilage and “therefore protected by the Fourth Amendment” from warrantless searches.²⁰⁸

A few state courts, however, have declined to apply the physical trespass framework to garbage pulls post-*Jardines*. In *Commonwealth v. Manjarrez-Torres* (2015), for instance, the Superior Court of Pennsylvania reviewed a suppression motion arising from a narcotics investigation in which police (1) procured the defendant’s consent to be photographed under false pretenses during a knock-and-talk and (2) later, conducted a garbage pull of trash bags “left in an alley at the rear” of the defendant’s residence.²⁰⁹ Curiously, the Court considered whether the police engaged in an unlicensed trespass under *Jardines* when they knocked on the defendant’s door and engaged under false pretenses—concluding that no unlicensed trespass occurred—but then analyzed the garbage pull exclusively under *Katz*, with no clarification of whether the garbage in question lay within the curtilage and no consideration of *Jones* and *Jardines*.²¹⁰ Similarly, in 2015, the Court of Appeals of Wisconsin applied only *Katz* in upholding the seizure of garbage the defendant contended lay directly outside his back door in what likely qualified as the curtilage.²¹¹

Thus, although some state and federal courts now recognize the physical trespass test as part of the Fourth Amendment search inquiry, some courts’ continued exclusive application of *Katz* demonstrates that the full ramifications of *Jardines* for warrantless garbage pulls have not been universally acknowledged. Having surveyed post-*Jardines* holdings about garbage within the curtilage of a home, we turn to a series of pre-*Jardines* holdings that now appear to sit in conflict with *Jardines*.

B. Curtilage Equivocations: The Hedrick Cases

At least four circuits—specifically, the Seventh, Eighth, Tenth, and Eleventh Circuits—have historically equivocated about the importance of the curtilage, holding that, under *Greenwood*, it is immaterial if garbage seized during a warrantless garbage pull lay within the curtilage of a

²⁰⁸ *Id.* at 23, 29.

²⁰⁹ No. 1255 MDA 2014, 2015 WL 6956855, at *1–2, *8 (Pa. Super. Ct. June 25, 2015).

²¹⁰ *Id.* at *8 (finding no reasonable expectations of privacy in the garbage); see also *Commonwealth v. Barony*, No. 475 WDA 2016, 2017 WL 2257617, at *1, *6 (Pa. Super. Ct. May 23, 2017) (affirming trash pull where defendants argued garbage was within the curtilage).

²¹¹ *State v. Vasquez*, 2014AP277-CRNM, 2015 WL 13123106, at *2 (Wis. Ct. App. July 14, 2015).

home. Although the bulk of these holdings predate *Jardines*, none have been overruled, and at least one circuit has explicitly affirmed these holdings post-*Jardines*.²¹² This Section presents arguments that such holdings currently sit in direct conflict with the level of protection a robust reading of *Jardines* suggests for garbage located inside the curtilage.

The line of decisions deemphasizing the importance of the curtilage in garbage search cases began in the Seventh Circuit with *United States v. Hedrick* (1991).²¹³ In *Hedrick*, the Seventh Circuit confronted the constitutionality of a garbage pull of trash “located 20 feet from the [defendant’s] garage and approximately 50 feet from the back door of the [defendant’s] house.”²¹⁴ Such garbage, the Seventh Circuit concluded, is “technically within the curtilage of the home,”²¹⁵ thus presenting a “middle ground” case not directly controlled by *Greenwood*, which involved curbside garbage outside the curtilage.²¹⁶ The Seventh Circuit held that although Fourth Amendment privacy expectations are “most heightened” in the home or curtilage, the “mere intonation of curtilage . . . does not end the inquiry.”²¹⁷ Rather, the Seventh Circuit maintained that the “proper focus under *Greenwood*” is not the garbage’s exact location but “whether the garbage was readily accessible to the public so as to render any expectation of privacy objectively unreasonable.”²¹⁸ The Seventh Circuit has since applied *Hedrick* numerous times.²¹⁹ Although the Seventh Circuit appears to have recognized the physical trespass test and its applications to the curtilage more fully in two recent decisions,²²⁰ *Hedrick* has never been overturned.

Hedrick’s influence quickly spread to the Eighth, Tenth, and Eleventh Circuits. In *United States v. Comeaux*, the Eighth Circuit reviewed the constitutionality of a garbage pull involving trash sitting in a “plastic

²¹² *United States v. Thompson*, 881 F.3d 629, 631–32 (8th Cir. 2018).

²¹³ 922 F.2d 396 (7th Cir. 1991).

²¹⁴ *Id.* at 399.

²¹⁵ *Id.*

²¹⁶ *Id.* at 400.

²¹⁷ *Id.* at 399.

²¹⁸ *Id.* at 400.

²¹⁹ See, e.g., *United States v. Jackson*, 370 F. App’x 724, 726 (7th Cir. 2010); *United States v. Redmon*, 138 F.3d 1109, 1112 (7th Cir. 1998); *United States v. Shanks*, 97 F.3d 977, 979–80 (7th Cir. 1996); *United States v. Groce*, 2 F.3d 1153, at *2 (7th Cir. 1993) (unpublished table decision).

²²⁰ See *United States v. Correa*, 908 F.3d 208, 217–18 (7th Cir. 2018); *United States v. Velazquez*, 906 F.3d 554, 558–60 (7th Cir. 2018).

garbage bag” in an alley “next to the [defendant’s] garage.”²²¹ Without deciding whether the garbage lay within the curtilage (as the defendant argued), the Eighth Circuit held, citing *Hedrick*, that “even assuming” the bins lay within the curtilage, the defendant’s claim was meritless because under *Greenwood* the “proper focus” is “whether garbage was readily accessible to the public so as to render any expectation of privacy objectively unreasonable.”²²² As with the Seventh Circuit in *Hedrick*, the Eighth Circuit has applied *Comeaux* in a variety of cases involving garbage pulls.²²³ Although the Eighth Circuit acknowledged applications of the physical trespass test to the curtilage in *Jardines* and *Collins v. Virginia* (2018) in a recent decision,²²⁴ the court explicitly reaffirmed *Comeaux* and the *Hedrick* line of curtilage holdings in 2018.²²⁵

Similarly, in *United States v. Long* (1999), the Tenth Circuit considered the validity of a garbage pull involving trash located by a trailer “seven feet from the [defendant’s] attached garage.”²²⁶ After concluding that the garbage was located outside the curtilage, the Tenth Circuit nonetheless noted that “[e]ven if . . . the trash bags were within the curtilage, Defendant would not prevail,” because “[i]n garbage cases, Fourth Amendment reasonableness turns on public accessibility to the trash.”²²⁷ To support this proposition, the Tenth Circuit cited *United States v. Redmon* (1998), a Seventh Circuit application of *Hedrick*.²²⁸ As with the Seventh Circuit’s application of *Hedrick* and the Eighth Circuit’s application of *Comeaux*, the Tenth Circuit has since applied *Long* in several decisions.²²⁹ Although the Tenth Circuit has not addressed garbage pulls explicitly post-*Jardines*, it has declined to apply *Jardines* in other contexts.²³⁰

²²¹ *United States v. Comeaux*, 955 F.2d 586, 588 (8th Cir. 1992).

²²² *Id.* at 589 (quoting *United States v. Hedrick*, 922 F.2d 396, 400 (7th Cir. 1991)).

²²³ See, e.g., *Anderson v. United States*, 762 F.3d 787, 793 (8th Cir. 2014) (en banc); *United States v. Williams*, 669 F.3d 903, 905 (8th Cir. 2012).

²²⁴ *United States v. Coleman*, 909 F.3d 925, 931–32 (8th Cir. 2018).

²²⁵ *United States v. Thompson*, 881 F.3d 629, 632 (8th Cir. 2018); *supra* note 197 and accompanying text; see also *Anderson*, 762 F.3d at 793–94 (impliedly reaffirming *Comeaux* by declining to consider whether “*Jardines* undermined *Comeaux*”).

²²⁶ 176 F.3d 1304, 1308 (10th Cir. 1999).

²²⁷ *Id.*

²²⁸ *Id.* at 1309; see *United States v. Redmon*, 138 F.3d 1109, 1112 (7th Cir. 1998).

²²⁹ *United States v. Timley*, 338 F. App’x 782, 787 (10th Cir. 2009); *United States v. Martinez*, 198 F.3d 259, 259–60 (10th Cir. 1999) (unpublished table decision).

²³⁰ *United States v. Shuck*, 713 F.3d 563, 567–68 (10th Cir. 2013) (holding that officers did not violate the Fourth Amendment by walking to trailer’s back door, without explicitly analyzing whether this constituted an unlicensed physical trespass into curtilage).

The Eleventh Circuit likewise adopted the reasoning of *Hedrick* in *United States v. Segura-Baltazar* (2006), a case involving a series of garbage pulls, one of which involved garbage cans “sitting to the left of the residence near the garage.”²³¹ The Eleventh Circuit ultimately determined that the defendant did not enjoy reasonable expectations of privacy in this area, but declined to consider whether the area lay within the curtilage because “*Greenwood* instructs us to consider the extent to which the garbage was exposed to the public, and that analysis does not require a ‘curtilage’ determination.”²³² Elsewhere, the court noted that the “curtilage determination has no talismanic significance in concluding whether the government has violated the Fourth Amendment by rummaging through someone’s garbage.”²³³

Setting *Jardines* aside momentarily, it is important to consider how well *Hedrick* and its progeny fit into the *Katz* privacy test, which dominated the Fourth Amendment search inquiry at the time these cases were decided.²³⁴ This line of inquiry raises two questions. First, how did the *Hedrick* cases’ assessment of the curtilage mesh with the U.S. Supreme Court’s view of the curtilage under *Katz*? Second, how did the *Hedrick* cases’ emphasis on the public exposure of curbside garbage fit with the Court’s framing of curbside garbage in *Greenwood*?

The *Hedrick* cases were decided against a backdrop of strong privacy protections for the curtilage, established in a series of 1980s holdings affirming the curtilage’s special status. In *Oliver v. United States* (1984), decided seven years before *Hedrick*, the Court announced that the curtilage “warrants the Fourth Amendment protections that attach to the home,” noting that the curtilage “has been considered part of the home itself for Fourth Amendment purposes.”²³⁵ Two years later, the Court reaffirmed the curtilage’s significance in *California v. Ciraolo* (1986), deeming the “protection afforded the curtilage” as “essentially a protection of families and personal privacy in an area intimately linked to the home,” where privacy is “most heightened.”²³⁶ Thus, by deemphasizing the importance of the curtilage under the then-dominant *Katz* privacy

²³¹ *United States v. Segura-Baltazar*, 448 F.3d 1281, 1284–85 (11th Cir. 2006).

²³² *Id.* at 1286–87.

²³³ *Id.* at 1287 n.1.

²³⁴ See *supra* notes 5, 25, 27.

²³⁵ 466 U.S. 170, 180 (1984).

²³⁶ 476 U.S. 207, 212–13 (1986).

regime, *Hedrick* and its progeny appear out of sync with the heightened protections afforded the curtilage under binding precedent at the time.

Moreover, the *Hedrick* decisions' conception of warrantless garbage pulls is also at odds with the underlying rationale of *Greenwood*. The *Hedrick* majority framed the "proper focus" under *Greenwood* and *Katz* as the degree of public exposure of the garbage.²³⁷ Although the garbage's public exposure certainly was an important part of the rationale underlying *Greenwood*,²³⁸ the Court arguably placed just as much emphasis on *Greenwood*'s status as a third-party doctrine case²³⁹ like *United States v. Miller* (1976) and *Smith v. Maryland* (1979), decisions explicitly premised on whether the material in question had been conveyed to third-party entities.²⁴⁰ Even if this conveyance to third parties was not the *dispositive* factor in *Greenwood*, it is at least as important a feature of the *Greenwood* decision as the curbside garbage's public exposure. Given that *Greenwood* never addressed the status of garbage located within the curtilage,²⁴¹ *Hedrick* and its progeny could justifiably have distinguished *Greenwood* as not controlling the curtilage scenario and erred instead in favor of greater privacy protections for garbage located within the curtilage, which, as the Seventh Circuit noted, settled precedent afforded a level of protection commensurate with the home, "where privacy expectations are most heightened."²⁴² These observations—that the *Hedrick* cases were perhaps not controlled by *Greenwood* and were possibly out of sync with heightened curtilage protections under *Katz*—were made in contemporaneous judicial dissents, by Judge Cudahy in *Hedrick*²⁴³ and Chief Judge Posner and Judge Rovner in *Redmon*.²⁴⁴

²³⁷ *United States v. Hedrick*, 922 F.2d 396, 400 (7th Cir. 1991).

²³⁸ See supra note 38 and accompanying text.

²³⁹ See supra note 39 and accompanying text.

²⁴⁰ See supra note 145.

²⁴¹ The garbage in *Greenwood* sat on the curb awaiting collection; no argument was made that the garbage lay within the curtilage. *Greenwood*, 486 U.S. 35, 37 (1988).

²⁴² *California v. Ciraolo*, 476 U.S. 207, 212–13 (1986); *Oliver v. United States*, 466 U.S. 170, 180 (1984); supra note 184 and accompanying text.

²⁴³ *United States v. Hedrick*, 922 F.2d 396, 401–02 (1991) (Cudahy, J., dissenting) ("The fact that the trash was clearly within Hedrick's property, not on the edge, distinguishes the case from *Greenwood*, where the trash was left at curbside. . . . The curtilage of Hedrick's house included the garbage, and the material was not, like an open back yard from the air, subject to ready public inspection." (emphasis omitted) (distinguishing situation from *Ciraolo* to advocate for heightened curtilage protections)).

²⁴⁴ *United States v. Redmon*, 138 F.3d 1109, 1131 (7th Cir. 1998) (Posner, C.J., dissenting) ("Once the garbage is beyond your property line, the police can search it at will. And though it is within your property line, once it is beyond the curtilage they can search it at will. What

More important today, however, is whether the *Hedrick* curtilage holdings can coexist with *Jardines* and applications of *Jardines*, like *Collins*. Although the curtilage has long enjoyed substantial privacy protection under *Katz*, *Jardines* appears to give the curtilage inquiry “talismanic significance”²⁴⁵ under the physical trespass test. Whereas the *Hedrick* decisions maintain that the Fourth Amendment search inquiry in garbage cases “does not require a ‘curtilage’ determination,”²⁴⁶ even a modest reading of *Jardines* leaves the impression that a “curtilage determination” will be necessary in all cases involving an alleged unlicensed physical trespass into the curtilage. After all, the basic holding of *Jardines* is that when “‘the Government obtains information by physically intruding’” in an unlicensed manner “on persons, houses [to include the curtilage²⁴⁷], papers, or effects, ‘a “search” within the original meaning of the Fourth Amendment’ has ‘undoubtedly occurred.’”²⁴⁸ Given that the *Hedrick* cases appear to dismiss the importance of the curtilage in garbage pull cases altogether,²⁴⁹ and that *Jardines* establishes a heightened level of protection for the curtilage under the physical trespass test,²⁵⁰ it is difficult to escape the conclusion that the *Hedrick* curtilage holdings sit in direct conflict, or at least great tension, with *Jardines* and the physical trespass test. Although most of the seven remaining federal circuits have not yet squarely addressed *Jardines*’s implications for warrantless garbage pulls,²⁵¹ none of these circuits historically eschewed the curtilage’s

is left is the case in which the police have to invade the curtilage in order to get at the garbage. And this is where the line should be drawn.”); *id.* at 1134 (Rovner, J., dissenting) (“[T]he majority makes scant mention of the curtilage doctrine and appears to stop short of definitively deciding whether Redmon’s cans were located inside or outside his curtilage. . . . [The majority] cannot ignore that the Supreme Court has considered the curtilage question to be of particular importance. . . .” (first citing *United States v. Dunn*, 480 U.S. 294, 300–01 (1987); then citing *Dow Chem. Co. v. United States*, 476 U.S. 227, 235, 237 (1986); and then citing *Ciraolo*, 476 U.S. at 213)).

²⁴⁵ *United States v. Segura-Baltazar*, 448 F.3d 1281, 1287 n.1 (11th Cir. 2006).

²⁴⁶ *Id.* at 1286–87.

²⁴⁷ *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (“We therefore regard the area ‘immediately surrounding and associated with the home’—what our cases call the curtilage—as ‘part of the home itself for Fourth Amendment purposes.’” (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984))).

²⁴⁸ *Id.* at 5 (quoting *United States v. Jones*, 565 U.S. 400, 406 n.3 (2012)).

²⁴⁹ See *supra* notes 213–233 and accompanying text.

²⁵⁰ See *supra* Section I.B.

²⁵¹ The Fourth Circuit is the sole exception. *United States v. Jackson*, 728 F.3d 367, 373 (4th Cir. 2013).

importance in reviews of warrantless garbage pulls under the *Katz* privacy test.²⁵²

Much of the litigation surrounding warrantless garbage pulls occurs in state courts. Each state's constitution contains a Fourth Amendment "analog" provision mirroring the text of the Fourth Amendment, which protects against unreasonable searches and seizures of persons, papers, houses, and effects conducted without warrants or probable cause.²⁵³ As with federal circuit courts, the story in state appellate courts is mixed with respect to recognizing the importance of the curtilage in warrantless garbage pull cases.

Importantly, some state courts emphasized the significance of the curtilage in garbage pull cases well before *Jardines*. Kansas is illustrative. In *State v. Fisher* (2007), the Supreme Court of Kansas analyzed the seizure of garbage not set out for collection and located on private property in a rural part of Kansas, "nearly 100 hundred [sic] yards from the highway . . . behind the [defendant's] large two-story house."²⁵⁴ Although the court recognized that garbage's location within the curtilage was "not determinative" under *Katz*, it nonetheless applied the *Dunn* curtilage factors, eventually concluding that the garbage was within the curtilage.²⁵⁵ Other

²⁵² The First, Second, Third, Fifth, Sixth, and Ninth Circuits do not appear to have ever addressed garbage within the curtilage; these circuits' garbage cases have all involved straightforward applications of *Greenwood* to garbage left for collection on the curb, outside the curtilage. See *United States v. Longoria*, 352 F. App'x 968, 969 (5th Cir. 2009); *United States v. McKenzie*, 283 F. App'x 13, 14–15 (3d Cir. 2008); *United States v. Harris*, 6 F. App'x 304, 307–08 (6th Cir. 2001); *United States v. Bowman*, 215 F.3d 951, 963 (9th Cir. 2000); *United States v. Deaner*, 1 F.3d 192, 196 (3d Cir. 1993); *Kyles v. Whitley*, 5 F.3d 806, 850 (5th Cir. 1993); *United States v. Scott*, 975 F.2d 927, 928–29 (1st Cir. 1992); *United States v. Wilkinson*, 926 F.2d 22, 27 (1st Cir. 1991); *United States v. Carmona*, 858 F.2d 66, 69 (2d Cir. 1988); see also *United States v. Tate*, 524 F.3d 449, 452, 455–57 (4th Cir. 2008) (remanding case for finding on garbage's location and construing *Greenwood* as "requiring trash to be abandoned for collection outside the curtilage of the home in order for an officer's search through it to be constitutional").

²⁵³ See Stephen E. Henderson, *Learning from All Fifty States: How to Apply the Fourth Amendment and Its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 *Cath. U. L. Rev.* 373, 427–38 (2006).

²⁵⁴ 154 P.3d 455, 470 (Kan. 2007); see also *State v. Hoffman*, 196 P.3d 939, 940 (Kan. Ct. App. 2008) ("First, the court must determine whether the trash was located within the curtilage. . . .").

²⁵⁵ *Fisher*, 154 P.3d at 468–71.

states that recognized heightened protection for garbage in the curtilage before *Jardines* include Kentucky,²⁵⁶ Michigan,²⁵⁷ and Ohio.²⁵⁸

Despite some states' protective stances on garbage within the curtilage, an analysis of pre-*Jardines* state appellate garbage rulings reveals an underbelly of decisions dismissing the importance of whether garbage was located within the curtilage. Some state courts have dismissed the curtilage's importance without explicit reference to the *Hedrick* line of cases. Take, for instance, the Supreme Court of Idaho's decision in *State v. McCall* (2001), holding that the "issue of whether the search of McCall's garbage was lawful does not turn on whether McCall's garbage was within the curtilage," but rather on whether the defendant waived her privacy expectations by surrendering it for collection.²⁵⁹ Numerous other state courts have similarly espoused a limited role for the curtilage in garbage pull cases without explicitly relying on the *Hedrick* holdings, including Ohio,²⁶⁰ Pennsylvania,²⁶¹ and Wisconsin.²⁶² While these decisions occurred before *Jardines*, the limited vision of the curtilage they advance, like the vision of the curtilage articulated in the *Hedrick* decisions,²⁶³ now appears to sit in direct conflict with the curtilage's heightened importance under the physical trespass test.²⁶⁴

Many state courts have similarly eschewed the curtilage with explicit reference to the *Hedrick* holdings. Take, for instance, the Court of Appeals of Maryland in *State v. Sampson* (2001). Citing *Hedrick*, *Redmon*, and *Long*, the court held that "it matters not whether [the] area [in question] is technically within or without the boundary of the curtilage," because the proper focus is whether a defendant placed her trash out for

²⁵⁶ *Commonwealth v. Ousley*, 393 S.W.3d 15, 26–29 (Ky. 2013).

²⁵⁷ *People v. Myers*, No. 276721, 2007 WL 4410037, at *2 (Mich. Ct. App. Dec. 18, 2007) ("[S]uppression is the proper remedy for a search that intrudes upon the curtilage . . . without probable cause.").

²⁵⁸ *State v. Payne*, 662 N.E.2d 60, 62 (Ohio Ct. App. 1995) ("[I]f an area is within the curtilage of a home, then the police must first obtain a warrant to come onto the premises . . . [S]uppression is inevitable when the trespass breaks the close of the curtilage.").

²⁵⁹ 26 P.3d 1222, 1224 (Idaho 2001).

²⁶⁰ See *State v. Feliciano*, 685 N.E.2d 1307, 1317 (Ohio Ct. App. 1996) ("Even if [defendant's] tree lawn was within the curtilage . . . it was still an area that was readily open to public inspection. . . .").

²⁶¹ See *Commonwealth v. Perdue*, 564 A.2d 489, 493 (Pa. Super. Ct. 1989).

²⁶² See *State v. Holland*, 336 Wis.2d 474, at *1 (Wis. Ct. App. 2011); *State v. Champagne*, 258 Wis. 2d 300, at *1–3 (Wis. Ct. App. 2002).

²⁶³ See supra notes 245–252 and accompanying text.

²⁶⁴ See supra notes 249–250 and accompanying text.

collection in a place “readily accessible to the public.”²⁶⁵ Declining to “engage in measuring expectations of privacy with a ruler,”²⁶⁶ the court deemed it “absurd” to “suggest that the concept of curtilage has any meaning to people in the context of placing their trash for collection,” asserting that “making the perimeter of the curtilage decisive for Fourth Amendment purposes lacks any reasonable basis and would lead to wholly irrational results.”²⁶⁷

Maryland state courts are not alone in using the *Hedrick* holdings to dismiss the curtilage’s importance in cases involving warrantless garbage pulls. Some state courts have applied *Hedrick* and its progeny in cases where garbage appeared to be within the curtilage at the time of seizure, although these courts often did not squarely answer this question, including cases involving garbage “discarded on the back porch of [a defendant’s] trailer” but not awaiting collection,²⁶⁸ garbage “directly adjacent to the sidewalk in front of [a defendant’s] residence,”²⁶⁹ garbage located “on the side of [a defendant’s] house near the garage,”²⁷⁰ and garbage located on a defendant’s “driveway within two feet of [an] alley.”²⁷¹ Other state appellate courts have downplayed the curtilage’s importance in cases where the court affirmatively found that the garbage in question lay within the curtilage at the time of the contested trash pull.²⁷² Numerous other state courts have similarly employed the *Hedrick* line of cases when reviewing warrantless garbage pulls.²⁷³

²⁶⁵ *State v. Sampson*, 765 A.2d 629, 636 (Md. 2001).

²⁶⁶ *Id.* (quoting *State v. Herrick*, 567 N.W.2d 336, 340 (N.D. 1997)).

²⁶⁷ *Id.*

²⁶⁸ *Hyde v. State*, 13 So.3d 997, 1018, 1020 (Ala. Crim. App. 2007) (citing *Hedrick* for the proposition that “the primary focus [in garbage pull cases] is not on whether the area where the garbage was located is within the curtilage of the house but whether there is a reasonable expectation of privacy”).

²⁶⁹ *People v. Hillman*, 834 P.2d 1271, 1277 (Colo. 1992) (“[T]he fact that a search occurs within the curtilage is not dispositive.” (quoting *People v. Shorty*, 731 P.2d 679, 681 (Colo. 1987))).

²⁷⁰ *State v. Lenczowski*, No. A-95-335, 1995 WL 762928, at *6 (Neb. Ct. App. Dec. 26, 1995).

²⁷¹ *Nilson v. State*, 106 S.W.3d 869, 873–74 (Tex. App. 2003).

²⁷² See, e.g., *State v. Hauser*, 464 S.E.2d 443, 446 (N.C. 1995) (“The important implication of *Hedrick* is that a reasonable expectation of privacy is not retained in garbage simply by virtue of its location within the curtilage. . . .”).

²⁷³ *People v. Sigmund*, No. B154797, 2003 WL 1930308, at *4–5 (Cal. Ct. App. Apr. 24, 2003) (citing *Hedrick* to find no reasonable expectation of privacy in garbage defendant argued was within curtilage); *Levario v. State*, 964 S.W.2d 290, 296 (Tex. App. 1997) (same); *Commonwealth v. Bryant*, No. 2715-04-1, 2005 WL 1017629, at *4 (Va. Ct. App. May 3,

To the extent that state courts have eschewed the importance of the curtilage as a matter of Fourth Amendment jurisprudence, such decisions are potentially problematic for the same reasons explored above²⁷⁴ with respect to *Hedrick*'s influence in federal circuit courts: where defendants allege that garbage lay within the curtilage at the time of police inspection or confiscation, *Jardines* now presumably requires careful analysis of whether police in fact trespassed into the curtilage of a suspect's home to retrieve garbage.²⁷⁵ As noted above, determining whether garbage lay within the curtilage was arguably just as important before *Jardines* under a series of *Katz*-era decisions establishing a high level of privacy-based protection for the curtilage,²⁷⁶ but the curtilage now appears to garner heightened protection under both *Katz* and the physical trespass test as articulated in *Jardines* and applied in cases like *Collins*.²⁷⁷

Moreover, to the extent that state appellate courts dismiss the importance of the curtilage as a matter of state constitutional law, doing so could arguably run afoul of settled principles of "new judicial federalism," under which state courts may offer *more* protection as a matter of state constitutional law than that offered under the Fourth Amendment, but not *less*.²⁷⁸ Post-*Jardines*, federal constitutional law now presumably offers two avenues by which courts can find that a search has taken place, either (1) through an unlicensed physical intrusion into a constitutionally protected area under the physical trespass test, or (2) through an intrusion into a zone of reasonable privacy expectations under *Katz*.²⁷⁹ When state courts dismiss the importance of the curtilage in garbage pull cases, they arguably foreclose the physical trespass test as an option for defendants contesting an alleged garbage pull within the curtilage and thereby recognize only one avenue to finding that a search occurred in such cases (*Katz*), where federal law now recognizes two such paths (both *Katz* and

2005) (declining to review trial court's finding that garbage lay outside curtilage since, per *Hedrick*, the "mere intonation of curtilage" does not "end the inquiry").

²⁷⁴ See supra notes 234–252 and accompanying text.

²⁷⁵ See supra notes 247–250 and accompanying text.

²⁷⁶ See supra notes 234–236 and accompanying text.

²⁷⁷ See supra notes 82–85 and accompanying text.

²⁷⁸ See Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 *Tex. L. Rev.* 1141, 1141–44 (1984); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 *Harv. L. Rev.* 489, 495 (1977); Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 *Hastings Const. L.Q.* 93, 93–95 (2000); G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 *Notre Dame L. Rev.* 1097, 1097–98 (1997).

²⁷⁹ See supra notes 57–59, 79 and accompanying text.

the physical trespass test).²⁸⁰ Thus, by arguably offering *less* protection for garbage within the curtilage under state constitutions than the minimum level of protection presumably now provided under the Fourth Amendment post-*Jardines*, state appellate rulings eschewing the curtilage might find themselves out of step with core principles of “new judicial federalism.”

C. Curtilage Indeterminacy

Many state and federal decisions on warrantless garbage pulls do not dismiss the curtilage altogether but nonetheless engage in “curtilage indeterminacy,” declining to specify where the garbage in a given case was located at the time of the contested garbage pull. Here, I suggest that the physical trespass test as articulated in *Jardines* tolerates such indeterminacy less well than the *Katz* privacy regime, since *Jardines* requires straightforward, specific answers about whether police activity occurred within or outside the curtilage.²⁸¹ I also predict a spike in factual conflicts between law enforcement and criminal defendants in garbage pull cases, since the physical trespass test incentivizes defendants to challenge police descriptions about garbage’s physical location.

Many federal and state courts reviewing warrantless garbage pulls stop short of dismissing the curtilage altogether but remain noncommittal about whether garbage lay within the curtilage. For instance, in *United States v. Wilkinson* (1991), the First Circuit reviewed a pull of garbage left out “for collection on [the defendant’s] lawn next to the curb,” but did not analyze whether the garbage lay within the curtilage.²⁸² Similarly, in *United States v. Deaner* (1993), the Third Circuit assessed whether a police affidavit describing a garbage pull provided probable cause for a warrant where “[t]he affidavit did not state where the garbage was found, where it was searched, or who seized it,” finding that “the absence of an express specification of this location was not fatal.”²⁸³

Numerous state courts have similarly avoided straightforward answers about whether garbage was located within the curtilage, leaving unanswered whether garbage located on “neutral ground in front of the

²⁸⁰ See *supra* notes 57–59, 79 and accompanying text.

²⁸¹ See *supra* notes 245–248 and accompanying text.

²⁸² 926 F.2d 22, 27 (1st Cir. 1991).

²⁸³ 1 F.3d 192, 196 (3d Cir. 1993).

residence,”²⁸⁴ in a “ditch just off the road,”²⁸⁵ “three feet from the street near the driveway in front of [the defendant’s] residence,”²⁸⁶ “[four] feet away from the back door of the [defendant’s] trailer,”²⁸⁷ at the end of the defendant’s “driveway near the street, but on [the defendant’s] property,”²⁸⁸ or on the defendant’s “property on the outside of a detached garage”²⁸⁹ technically lay within the curtilage.

Jardines appears to require clearer answers about the curtilage than courts previously gave under the *Katz* privacy test. To discern whether police have committed an unlicensed intrusion into the curtilage under the physical trespass test as articulated in *Jardines*,²⁹⁰ courts presumably must be explicit about whether the garbage in question lay within the curtilage at the time of the contested trash pull. Recognizing the heightened importance of the curtilage post-*Jardines*, several federal courts have carefully parsed the geographic contours of the curtilage in recent decisions.²⁹¹ Of course, absolute precision about the exact parameters of the curtilage may prove difficult given the somewhat amorphous multi-factor *Dunn* curtilage framework.²⁹² It is beyond the scope of this Note to advance an entirely new framework for determining the contours of the curtilage, although other scholars have addressed possible reformulations to address new residential configurations and digital privacy.²⁹³ Given that

²⁸⁴ *Walls v. State*, 536 So. 2d 137, 138 (Ala. Crim. App. 1988).

²⁸⁵ *Morris v. State*, 161 S.W.3d 314, 318 (Ark. Ct. App. 2004).

²⁸⁶ *Commonwealth v. Pratt*, 555 N.E.2d 559, 567 (Mass. 1990).

²⁸⁷ *State v. Trahan*, 428 N.W.2d 619, 622 (Neb. 1988).

²⁸⁸ *State v. Carriere*, 545 N.W.2d 773, 775 (N.D. 1996).

²⁸⁹ *State v. McGorty*, 2008-Ohio-2643, 2008 WL 2572039, at ¶ 5.

²⁹⁰ See *supra* notes 247–248 and accompanying text.

²⁹¹ See, e.g., *Morgan v. Fairfield Cty.*, 903 F.3d 553, 561–62 (6th Cir. 2018); *Rowley v. McArthur*, No. 2:13-cv-000959, 2018 WL 6788528, at *4–5 (D. Utah Dec. 26, 2018); *United States v. Darden*, No. 3:17-CR-124-11, 2018 WL 6443078, at *4–5 (M.D. Tenn. Dec. 10, 2018); *United States v. Bautista*, No. CR-18-00806-TUC-RCC, 2018 WL 6069640, at *6 (D. Ariz. Oct. 29, 2018); *Boule v. Egbert*, No. C17-0106RSM, 2018 WL 3993371, at *3 (W.D. Wash. Aug. 21, 2018); *United States v. Solano-Mendoza*, No. 2:18-CR-15-LSC-GMB, 2018 WL 3520816, at *6–7 (N.D. Ala. June 29, 2018); *United States v. Johnson*, No. 3:17-CR-130, 2018 WL 1225138, at *3–4 (S.D. Ohio Mar. 8, 2018).

²⁹² See *supra* note 185 and accompanying text.

²⁹³ See Andrew Guthrie Ferguson, *The “Smart” Fourth Amendment*, 102 *Cornell L. Rev.* 547, 617–31 (2017) (presenting a theory of “informational curtilage”); Andrew Guthrie Ferguson, *Personal Curtilage: Fourth Amendment Security in Public*, 55 *Wm. & Mary L. Rev.* 1283, 1284 (2014) (presenting a theory of “personal curtilage” where “persons can build a constitutionally protected space secure from governmental surveillance in public”); Amelia L. Diedrich, *Secure in Their Yards? Curtilage, Technology, and the Aggravation of the Poverty Exception to the Fourth Amendment*, 39 *Hastings Const. L.Q.* 297 (2011); Catherine Hancock,

the physical trespass test appears to tolerate fact-bound inquiries less easily than the *Katz* privacy framework under which *Dunn* developed, courts may increasingly ponder whether a bright-line curtilage rule would be more administrable than the *Dunn* framework.

A few closing predictions about post-*Jardines* litigation are in order. First, moving forward under the physical trespass framework, we should expect to see a spike in conflicting stories from police and defendants about where garbage was physically located at the time police inspected or confiscated it. Defendants seeking to suppress evidence obtained through a garbage pull now have increased incentives to frame garbage as having been within the curtilage, while police attempting to justify potentially unlawful trash pulls also have increased incentives to frame garbage as having been on the curb or in open fields.²⁹⁴ Second, courts will increasingly be forced to grapple with thorny curtilage questions, such as whether hallways in apartment complexes²⁹⁵ and alleyways outside of urban residences²⁹⁶ count as curtilage. Indeed, several courts are already wrestling with such questions.²⁹⁷

Justice Powell's Garden: The *Ciraolo* Dissent and Fourth Amendment Protection for Curtilage-Home Privacy, 44 San Diego L. Rev. 551 (2007); Carrie Leonetti, Open Fields in the Inner City: Application of the Curtilage Doctrine to Urban and Suburban Areas, 15 Geo. Mason U. C.R.L.J. 297 (2005); Brendan Peters, Fourth Amendment Yard Work: Curtilage's Mow-Line Rule, 56 Stan. L. Rev. 943 (2004).

²⁹⁴ See, e.g., *United States v. Warren*, No. 7:17-CR-121-FL-1, 2018 WL 6178447, at *4 (E.D.N.C. Nov. 27, 2018) (defendant argued that garbage was "within the border of Defendant's property" and "had not been placed into the public street for pick up," while officer testified that "the trash was on the curb" awaiting collection); *Robertson v. State*, No. 10-01-256-CR, 2003 WL 21816119, at *3 (Tex. App. July 23, 2003) (defendant contended that "garbage bags were in an enclosed area on [her] porch" while officer alleged that "garbage bags were at the curb").

²⁹⁵ See, e.g., *State v. Neanover*, 812 N.E.2d 127, 131 (Ind. Ct. App. 2004) (finding reasonable expectations of privacy in garbage located "just outside the door of [defendant's] apartment" on "an open landing"); *Commonwealth v. Bernard*, No. 2010-1175, 2011 WL 3942674, at *4 (Mass. Super. Ct. Aug. 2, 2011) (examining garbage located in apartment complex hallway).

²⁹⁶ See, e.g., *State v. Quinn*, 2012-Ohio-3123, 2012 WL 2692458, at ¶¶ 3, 16-18 (finding no reasonable expectations of privacy in garbage left in alley outside residence).

²⁹⁷ See also *United States v. Lucas*, 338 F. Supp. 3d 139, 165 (W.D.N.Y. 2018) ("[T]he principles of *Jardines* do not extend to the common area outside a storage locker at a commercial establishment."). Compare *United States v. Makell*, 721 F. App'x 307, 308 (4th Cir. 2018) (applying *Jardines* and *Dunn* to find that "the common hallway of the apartment building, including the area in front of [the defendant's] door, was not within the curtilage of his apartment"), with *People v. Bonilla*, 120 N.E.3d 930, 936 (Ill. 2018) ("[T]he threshold of the door to defendant's apartment falls within the curtilage of the home.").

Ultimately, although some federal and state courts have fully incorporated the physical trespass inquiry into reviews of warrantless garbage pulls, some have not, and many other federal and state courts maintain precedent dismissing the curtilage that now appears to sit in tension with *Jardines*. But the question whether garbage lies within the curtilage is only the first step of the analysis under *Jardines*.²⁹⁸ The next Section addresses the second step: whether the implied license permits police to enter the curtilage to seize garbage.

D. The Implied License & Garbage in the Curtilage

Here, I consider whether individuals impliedly license others to enter the curtilage of their homes for the purpose of inspecting or removing garbage. Since Justice Scalia cited no specific authority in *Jardines* beyond the “habits of the country” for the proposition that bringing a drug-sniffing dog into the curtilage violates the implied license to engage in a brief knock-and-talk,²⁹⁹ I draw on various sources to explore whether the implied license encompasses garbage pulls within the curtilage. On balance, several factors suggest that the implied license likely does not permit warrantless entries into the curtilage to conduct garbage pulls.

Although most federal and state courts have not squarely reexamined their garbage holdings in light of *Jardines*, a few have intimated that warrantless entries into the curtilage violate the implied license. As discussed above, in *United States v. Jackson*, the Fourth Circuit noted that if the officers had “breached the curtilage” in executing the contested trash pull, such an intrusion “would implicate the protections of the Fourth Amendment,” because “surely if bringing a drug-sniffing dog onto a home’s front porch is beyond the scope of the implied license that invites a visitor to the front door, so too is rummaging through a trash can” within the curtilage.³⁰⁰ At least one federal district court has affirmatively held that warrantless garbage pulls inside the curtilage violate the implied license, “agree[ing] with the Fourth Circuit” in *Jackson* “as a matter of law” that warrantless garbage pulls are “not permissible” if they occur within “the curtilage of Defendant’s home.”³⁰¹

²⁹⁸ See supra note 182 and accompanying text.

²⁹⁹ *Florida v. Jardines*, 569 U.S. 1, 7–10 (2013).

³⁰⁰ 728 F.3d 367, 373 (4th Cir. 2013).

³⁰¹ *United States v. Edwards*, No. 14-223-01, 2015 WL 3456651, at *3 (E.D. Pa. May 29, 2015).

A few state courts have similarly intimated that police violate the implied license by trespassing into the curtilage to retrieve garbage. The Michigan Court of Appeals, for instance, speculated in one case that the implied license “might not extend to a midnight visitor looking through garbage bins,”³⁰² and held in another case that “the scope of the implied license did not extend to opening a closed trash container and rummaging through the container in search of contraband . . . because the ‘background social norms that invite a visitor to the front door do not invite him there to conduct a search.’”³⁰³ Similarly, the Supreme Court of Kentucky held that police violate the implied license by conducting warrantless garbage pulls within the curtilage since police “must conduct themselves as would an ordinary social visitor,” which “hardly includes rummaging through the garbage cans of one’s host.”³⁰⁴ The Tennessee Court of Criminal Appeals echoed this holding, finding that officers engaged in an unlicensed trespass when they entered the defendant’s curtilage, “approached his trash can,” and retrieved the bags therein “for the express purpose of searching their contents.”³⁰⁵ Thus, at least among federal and state courts that have squarely addressed the implied license issue in post-*Jardines* garbage pull cases, most have concluded that warrantless garbage pulls within the curtilage are not licensed.

Moreover, the text of *Jardines* itself suggests that, from a doctrinal perspective, the implied license likely does not authorize garbage pulls within the curtilage. In *Jardines*, Justice Scalia advanced a narrow formulation of the implied license within the curtilage, which permits private individuals, and thereby police officers, “to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.”³⁰⁶ This delineation of the implied license seems to leave little room for unsolicited activity in the curtilage apart from brief knock-and-talk encounters. Indeed, as the Fourth Circuit

³⁰² *People v. Frederick*, 886 N.W.2d 1, 13 (Mich. Ct. App. 2015), rev’d on other grounds, 895 N.W.2d 541 (Mich. 2017).

³⁰³ *People v. Nelson*, No. 316624, 2014 WL 4088087, at *4 (Mich. Ct. App. Aug. 19, 2014) (quoting *Jardines*, 569 U.S. at 9).

³⁰⁴ *Commonwealth v. Ousley*, 393 S.W.3d 15, 30 (Ky. 2013) (emphasis omitted) (quoting 1 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 2.6(c), at 695 (4th ed. 2004)).

³⁰⁵ *State v. Weatherly*, No. W2017-01014-CCA-R3-CD, 2018 WL 2263566, at *5–6 (Tenn. Crim. App. May 17, 2018).

³⁰⁶ *Jardines*, 569 U.S. at 8.

recently noted,³⁰⁷ if bringing a drug-sniffing dog into the curtilage “in hopes of discovering incriminating evidence” violates the implied license, it seems to follow that pawing through garbage in the curtilage “in hopes” of finding “incriminating evidence” similarly violates the implied license.³⁰⁸ Numerous federal and state courts have similarly signaled post-*Jardines* that the scope of the implied license may be narrow, parsing carefully whether police exceed the bounds of the implied license when they, for instance, remain within the curtilage for “ninety minutes” after knocks at the defendant’s door go unanswered,³⁰⁹ gain consent to enter a defendant’s home “using a ruse,”³¹⁰ surround a defendant’s home at all four corners of the residence rather than first approaching the front door to knock,³¹¹ “walk[] along a gravel driveway into the backyard in order to knock on the [defendant’s] back door” rather than “using the paved walkway” leading to the front door of the residence,³¹² or break into a defendant’s home in the middle of the night.³¹³

Looking beyond *Jardines* and post-*Jardines* precedent, many localities maintain “anti-rummaging” ordinances prohibiting anyone other than municipal trash collectors from handling household garbage.³¹⁴ Justice Brennan’s *Greenwood* dissent mentions such regulations to support his argument that citizens enjoy reasonable expectations of privacy in curbside garbage.³¹⁵ Fairly recent state appellate garbage pull decisions

³⁰⁷ See *United States v. Jackson*, 728 F.3d 367, 373 (4th Cir. 2013).

³⁰⁸ *Jardines*, 569 U.S. at 9.

³⁰⁹ *Brennan v. Dawson*, 752 F. App’x 276, 282–84 (6th Cir. 2018) (finding that such activity exceeds the scope of the implied license but that this doctrinal principle was not clearly established at the time of the officers’ activity).

³¹⁰ *Whalen v. McMullen*, 907 F.3d 1139, 1148–50 (9th Cir. 2018) (finding that such activity violates the implied license).

³¹¹ *Morgan v. Fairfield Cty.*, 903 F.3d 553, 558–59, 562–63 (6th Cir. 2018) (finding that such activity exceeds the scope of the implied license); see also *United States v. McSwain*, No. 2:18-cr-20-FtM-29MRM, 2018 WL 5962429, at *4 (M.D. Fla. Nov. 14, 2018) (finding that officers violated the implied license by approaching the defendant’s home as “essentially ‘an armed battalion’ which ‘launch[ed] a raid’” on the defendant’s residence (alteration in original)).

³¹² *State v. Stanley*, 817 S.E.2d 107, 113 (N.C. Ct. App. 2018).

³¹³ *Luer v. St. Louis Cty.*, No. 4:17-CV-00767-NAB, 2018 WL 6064862, at *1, *4 (E.D. Mo. Nov. 19, 2018) (finding that such activity violates the implied license).

³¹⁴ A complete survey of all contemporary anti-rummaging ordinances is beyond the scope of this Note. See William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv. L. Rev. 1821, 1882 & n.308 (2016) (noting this phenomenon and listing several such ordinances).

³¹⁵ *Greenwood*, 486 U.S. at 52 (Brennan, J., dissenting) (noting many localities “prohibit[] anyone, except authorized employees of the Town . . . to rummage into, pick up, collect, move

confirm that such ordinances remain in place in many localities.³¹⁶ Take, for instance, an ordinance active in Columbia County, Florida, making it “unlawful for any person to physically enter into, or to remain inside of, or to dig into or remove any garbage, trash, or refuse from any county-owned refuse container.”³¹⁷ Consider a similar ordinance active in Minneapolis, making it unlawful for any person “other than those authorized by the city engineer” to “remove any solid waste [from a container], except with the consent of the owner or occupant of the property.”³¹⁸

These ordinances seem to indicate that the “golden age of human scavenging . . . has passed,”³¹⁹ undermining claims that the implied license authorizes private individuals or police to tamper with garbage located in the curtilage. Although several federal and state courts addressing these anti-rummaging ordinances have deemed them irrelevant to the Fourth Amendment search inquiry,³²⁰ such holdings sit in tension with positivist notions that Fourth Amendment protections “should be anchored in

or otherwise interfere with articles or materials placed on . . . any public street for collection” (quoting *United States v. Dzialak*, 441 F.2d 212, 215 (2d Cir. 1971)).

³¹⁶ See, e.g., *State v. DeFusco*, 620 A.2d 746, 759 n.9 (Conn. 1993) (New London City, Branford, and Stratford ordinances); *Commonwealth v. Pratt*, 555 N.E.2d 559, 567 (Mass. 1990) (Essex, Massachusetts, ordinance allowing “only licensed trash collectors to transport garbage”); *State v. Hempel*, 576 A.2d 793, 805, 808 (N.J. 1990) (Morristown, New Jersey, ordinance making it “unlawful for any person to disturb garbage placed on any curb, street or public place,” as well as ordinances prohibiting “garbage-picking” and “scavenging without a license”); *State v. Crane*, 329 P.3d 689, 696 (N.M. 2014) (Clovis, New Mexico, ordinance making it “unlawful for any person, not authorized to do so, to remove the lid from any refuse container or to collect, molest or scatter the refuse”). Some anti-rummaging ordinances specifically exempt law enforcement acting in their official capacity. See, e.g., *Talbert v. Commonwealth*, No. 2012-CA-000621-MR, 2013 WL 5885965, at *3 & n.1 (Ky. Ct. App. Nov. 1, 2013) (discussing an anti-rummaging ordinance in Lexington, Kentucky, that has since been “amended to exempt police officers”).

³¹⁷ Columbia County, Fla., Code § 90-192 (2018); see also Baude & Stern, *supra* note 314, at 1882 n.308 (noting the 2014 Columbia County, Florida, code section and other anti-rummaging ordinances).

³¹⁸ See *State v. McMurray*, 860 N.W.2d 686, 699 (Minn. 2015) (alteration in original) (quoting Minneapolis, Minn., Code of Ordinances § 225.590 (2014)).

³¹⁹ *Id.* at 699. But see Thomas Fuller, In San Francisco, Making a Living from Your Billionaire Neighbor’s Trash, *N.Y. Times* (Apr. 7, 2019), <https://www.nytimes.com/2019/04/07/us/trash-pickers-san-francisco-zuckerberg.html> [<https://perma.cc/2YNN-7M57>] (detailing widespread practice of “trash picking” in San Francisco, particularly trash-picker Jake Orta’s regular rummaging through Mark Zuckerberg’s garbage, and noting that “[t]rash picking is illegal in California” but “the law is rarely enforced”).

³²⁰ See, e.g., *Talbert*, 2013 WL 5885965, at *3; *Ashlock v. Commonwealth*, 403 S.W.3d 79, 80 (Ky. Ct. App. 2013).

background positive law.”³²¹ Indeed, two scholars have already applied positivist legal theory specifically to anti-rummaging ordinances and warrantless garbage pulls.³²² On a practical level, it is difficult to see how warrantless garbage pulls within the curtilage could be impliedly licensed in jurisdictions with anti-rummaging ordinances, since a practice probably cannot be both unlawful and impliedly licensed.³²³ It is unlikely that individuals (and, by extension, police) would legitimately feel licensed to tamper with garbage within the curtilage in a jurisdiction that explicitly makes such activity unlawful.

Lastly, we might consider societal intuitions surrounding household garbage. At least one empirical study has found that individuals would feel violated to find others handling their garbage without consent,³²⁴ a conclusion further supported by anecdotal instances of outrage by public

³²¹ Baude & Stern, *supra* note 314, at 1823; see also *Carpenter v. United States*, 138 S. Ct. 2206, 2268, 2270–71 (2018) (Gorsuch, J., dissenting) (advocating a return to positivist approaches to Fourth Amendment cases).

³²² Baude & Stern, *supra* note 314, at 1882 (“[M]any municipalities have enacted ordinances which restrict the right to collect and haul away trash to licensed collectors’ and ‘prohibit unauthorized persons from tampering with trash containers.’ Where such municipal protections apply, they should bring with them the protection of the Fourth Amendment.” (footnote omitted) (quoting *People v. Krivda*, 486 P.2d 1262, 1268 (Cal. 1971))).

³²³ One might argue that certain entries into the curtilage may be unlawful but nonetheless licensed by the residents of particular dwellings. Consider, for instance, someone who knocks at the door of a brothel to solicit a prostitute or at the door of a narcotics dealer’s home to initiate a drug transaction. Such unlawful activity may be “licensed” by the residents of those dwellings in a social, non-technical sense (i.e., the residents of those dwellings are unlikely to view these individuals as trespassing) but likely fall outside the scope of the implied license as articulated by Justice Scalia in *Jardines*. Justice Scalia framed the implied license narrowly and objectively (i.e., not tailored to individual dwellings or the characteristics of individual residents of those dwellings). The license allows “solicitors, hawkers and peddlers” like “Girl Scouts and trick-or-treaters” to “approach the home . . . knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.” *Florida v. Jardines*, 569 U.S. 1, 8 (2013). Importantly, the “specific purpose” of the entry into the curtilage matters. *Id.* at 9. Just as entering the curtilage “in hopes of discovering incriminating evidence” is not part of the implied license since it “does not inhere in the very act of hanging a knocker” on one’s door, there likely “is no customary invitation” to enter the curtilage for the purpose of committing a crime. *Id.* Thus, such entries into the curtilage, although possibly acceptable to particular residents of certain dwellings, are not technically within the implied license.

³²⁴ Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,”* 42 *Duke L.J.* 727, 738 tbl.1 (1993) (presenting empirical evidence that individuals view police “going through garbage in opaque bags at curbside” as intrusive); see also Matthew Kugler & Lior Strahilevitz, *The Myth of Fourth Amendment Circularity*, 84 *U. Chi. L. Rev.* 1747, 1798 n.179 (2017) (noting Slobogin and Schumacher’s results).

officials whose garbage has been exploited by journalists.³²⁵ As explored above,³²⁶ and as elucidated by Justice Brennan's *Greenwood* dissent,³²⁷ these sentiments about garbage likely stem from garbage's potential to reveal intimate details about individuals' private domestic activities. On balance, then, considering post-*Jardines* holdings finding warrantless garbage pulls within the curtilage unlicensed, Justice Scalia's narrow formulation of the implied license in *Jardines*, anti-rummaging ordinances, and societal intuitions surrounding household garbage, the implied license appears to leave little room for private individuals or police to inspect or seize garbage within the curtilage.

* * *

Jardines now requires greater clarity in cases involving warrantless garbage pulls about whether the garbage at issue lies within the curtilage of a residence. Although some federal circuits and state courts have acknowledged the heightened importance of the curtilage under the physical trespass test, a striking number of federal and state courts have followed the Seventh Circuit's lead in *Hedrick* by dismissing the curtilage altogether in cases involving warrantless garbage pulls. These rulings now sit in significant tension with the emphasis placed on the curtilage in *Jardines*. Moreover, *Jardines* presumably now requires courts to parse whether police activity within the curtilage violates the implied license. Although some courts have noted that police entry into the curtilage for the purpose of gathering evidence from household garbage violates the implied license, most courts have yet to address this question. As argued above, several factors support the conclusion that the implied license likely does not permit entry into the curtilage for the purpose of handling garbage.

IV. THE THIRD-PARTY TRASH COLLECTOR LOOPHOLE

If courts interpret *United States v. Jones* to mean that police can no longer touch garbage bins, bags, or garbage itself for investigatory

³²⁵ For examples involving Henry Kissinger and Portland officials, see *supra* notes 176–177.

³²⁶ See *supra* Section II.C.

³²⁷ *Greenwood*, 486 U.S. at 51 (Brennan, J., dissenting) (“Most of us, I believe, would be incensed to discover a meddler—whether a neighbor, a reporter, or a detective—scrutinizing our sealed trash containers to discover some detail of our personal lives.”).

purposes without a warrant before the moment of third-party collection, will police simply coordinate with trash collectors to collect a suspect's garbage, isolate it, and later transfer it to the police for subsequent investigation? If courts interpret *Florida v. Jardines* to mean that police cannot enter a suspect's curtilage to obtain garbage located therein without a warrant, will police similarly coordinate with collectors to obtain garbage after it has been removed from the curtilage by the trash collector? And if police can so easily subvert the physical trespass test by colluding with trash collectors, does the physical trespass test really offer garbage heightened protection? Well before *Jones* and *Jardines*, police hoping to investigate a suspect's garbage sometimes coordinated with trash collectors.³²⁸ Indeed, the officer in *Greenwood* employed this technique to obtain Greenwood's curbside garbage.³²⁹ Coordination between police and trash collectors has continued post-*Jones* and *Jardines*.³³⁰ The possibility that police may increasingly rely on third-party trash collectors to obtain garbage without ever touching a personal effect or entering the curtilage before collection suggests a potentially significant gap in the physical trespass test's property-based protections.

Nonetheless, for several reasons, the possibility of this loophole does not necessarily diminish the potential of *Jones* and *Jardines* to seriously circumscribe the practice of warrantless garbage pulls. First, the question of whether a trash collector, acting at the behest of police, executes a Fourth Amendment search by taking garbage with the intention of immediately transferring it to police is far from settled. Some courts have held that the Fourth Amendment applies in full force where trash collectors, acting under police direction, conduct the initial seizure of household

³²⁸ See, e.g., *United States v. Biondich*, 652 F.2d 743, 745 (8th Cir. 1981); *United States v. Moss*, 175 F. Supp. 2d 1067, 1068–69 (M.D. Tenn. 2001); *State v. Wheeler*, No. 102,638, 2010 WL 1253751, at *1 (Kan. Ct. App. Mar. 26, 2010); *State v. Howard*, 157 P.3d 1189, 1190 (Or. 2007); *Levario v. State*, 964 S.W.2d 290, 293, 295–96 (Tex. App. 1997).

³²⁹ *Greenwood*, 486 U.S. at 37.

³³⁰ See, e.g., *United States v. Hansen*, No. 4:18-cr-3140, 2019 WL 1254559, at *1 (D. Neb. Mar. 19, 2019) (officer “personally rode in the cab of the garbage truck,” “got out of the truck and physically brought the trash container to the truck,” and then rode with the trash collector to the local fire department, where officers unloaded the defendant's trash); *State v. Weatherly*, No. W2017-01014-CCA-R3-CD, 2018 WL 2263566, at *2 (Tenn. Crim. App. May 17, 2018) (officers “contacted the head of trash services in the public works department,” “arranged for the use of a garbage truck,” and “drove the truck down the street where Defendant lived” while two officers, “dressed as trash collectors, collected [the defendant's] trash”).

garbage set out for collection and later deliver it to law enforcement.³³¹ These holdings stem from longstanding agency principles, which suggest that an impermissible Fourth Amendment search occurs when government actors, with “preknowledge,” acquiesce “in a private party’s conducting a search and seizure which the government itself, under the circumstances, could not have undertaken.”³³² The Supreme Court has long held that, although searches effectuated “by a private party on his own initiative” do not fall within the Fourth Amendment’s ambit (which generally reaches only government encroachments),³³³ the Fourth Amendment *does* protect “against such intrusions if the private party acted as an instrument or agent of the Government.”³³⁴ The rationale for this principle is the prevailing deterrence-based theory of the Fourth Amendment, under which police are to be discouraged from circumventing the Fourth Amendment’s dictates.³³⁵ In the context of warrantless garbage pulls, police who coordinate in advance with trash collectors to obtain household garbage arguably transform the trash collectors into “instrument[s] [and] agent[s] of the government,” such that the Fourth Amendment applies in

³³¹ See, e.g., *State v. Wheeler*, No. 102,638, 2010 WL 1253751, at *8 (Kan. Ct. App. Mar. 26, 2010) (“[I]t cannot be said that the [coordinating] trash collector acted independently and not under the authority or direction of law enforcement in removing the defendant’s trash,” and thus, as the trash collector acted as an agent of the police, the Fourth Amendment applied to his activities).

³³² See, e.g., *United States v. Clegg*, 509 F.2d 605, 609 (5th Cir. 1975).

³³³ *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 613–14 (1989); see also *Burdeau v. McDowell*, 256 U.S. 465, 476 (1921) (finding no Fourth Amendment violation when government had no connection with individuals who wrongly seized property).

³³⁴ *Skinner*, 489 U.S. at 614; see also *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (noting that private action is not attributed to the government absent a “sufficiently close nexus between the State and the challenged action of the [private party] so that the action of the latter may be fairly treated as that of the State itself”); *Lustig v. United States*, 338 U.S. 74, 78–79 (1949) (“[A] search is a search by a federal official if he had a hand in it.”); *Byars v. United States*, 273 U.S. 28, 33 (1927) (finding that because federal agent participated in illegal search initiated by state officer “under the color of his federal office,” the search was “in substance and effect . . . a joint operation,” just as if “[the federal officer] had engaged in the undertaking as one exclusively his own”); *United States v. Mekjian*, 505 F.2d 1320, 1327–28 (5th Cir. 1975) (“[W]here federal officials actively participate in a search being conducted by private parties or else stand by watching with approval as the search continues, federal authorities are clearly implicated in the search and it must comport with Fourth Amendment requirements.”); Sam Kamin, *The Private Is Public: The Relevance of Private Actors in Defining the Fourth Amendment*, 46 B.C. L. Rev. 83, 85 n.9 (2004).

³³⁵ *Byars*, 273 U.S. at 32 (“[C]ourt[s] must be vigilant to scrutinize the attendant facts [in reviews of Fourth Amendment searches] with an eye to detect and a hand to prevent violations of the Constitution by circuitous and indirect methods.”).

full force to these hybrid, coordinated trash pulls.³³⁶ Although trash collectors almost certainly do not offend or implicate the Fourth Amendment by unilaterally bringing evidence of criminal activity to law enforcement's attention,³³⁷ advance coordination with police could create a sufficient "nexus" between the trash collector and police such that the trash pull in question is attributed to the government for Fourth Amendment purposes.³³⁸

Although third-party doctrine cases establish that police are free, at least under the *Katz* privacy regime, to use materials handed over voluntarily by third-party entities like banks and telephone companies for criminal investigatory purposes,³³⁹ receiving incriminating evidence collected in the ordinary course of business by third-party service providers seems markedly distinct from police coordinating in advance of collection with those third-party providers. Collection and isolation of a particular individual's garbage at the behest of police does not occur in the "ordinary course of business," a central facet of third-party doctrine holdings like *United States v. Miller* and *Smith v. Maryland*.³⁴⁰ Thus, doctrinally, if police coordination with trash collectors simply transforms the trash collectors' seizure of household garbage into a Fourth Amendment search to which *Jones* and *Jardines* apply, the third-party trash collector loophole may not function as much of a loophole in practice.

Second, although the loophole may raise legitimate concerns about police skirting the physical trespass test in *some* cases, police likely will not resort to coordination with third-party collectors in *all* or even *most* cases. During the *Katz* era, police had similarly strong incentives to coordinate with trash collectors and thereby seize garbage at the point when the former owner's privacy expectations were undoubtedly extinguished (i.e., post-collection). Yet, many garbage cases decided under the *Katz* test involve no coordination between police and trash collectors.³⁴¹ We can

³³⁶ *Skinner*, 489 U.S. at 614.

³³⁷ *State v. Martin*, No. 102,639, 2010 WL 1253752, at *7 (Kan. Ct. App. Mar. 26, 2010) ("[S]earches by agents of the State are subject to constitutional restrictions . . . [E]vidence obtained through a search by a private individual must come to the State upon a 'silver platter' and not as a result of instigation by state officials or participation by them in illegal activities.").

³³⁸ See *Jackson*, 419 U.S. at 351.

³³⁹ See *supra* notes 16–17 and accompanying text.

³⁴⁰ See *supra* notes 16–17 and accompanying text.

³⁴¹ See, e.g., *United States v. Jackson*, 728 F.3d 367, 370 (4th Cir. 2013); *State v. Sampson*, 765 A.2d 629, 630 (Md. 2001).

probably expect this pattern of unilateral warrantless garbage pulls by police to continue under the physical trespass test, since law enforcement often will not want, or be able, to undertake the transaction costs of coordinating in advance with third-party collectors. Even if police continue to occasionally coordinate with trash collectors, they will not always; when they do not, *Jones* and *Jardines* will still significantly constrain the permissible scope of warrantless garbage pulls.

Moreover, even assuming that police will sometimes enlist third-party collectors and that these coordinated trash pulls may fall outside the Fourth Amendment's ambit, the trash collector loophole could present distinct benefits related to judicial administrability. For instance, under *Jones*, complex questions remain about whether household garbage, bags, and bins qualify as personal effects up until the moment of collection, questions further complicated by the lack of a settled definition of "effects"³⁴² beyond the personal property and intimacy-based definitions presented above.³⁴³ If police sometimes refrain from touching garbage, bags, or bins, and instead obtain garbage from trash collectors post-collection, courts need not parse these difficult questions because, as argued above, household garbage and garbage bags likely lose their status as the effects of their former owners at the moment of third-party collection.³⁴⁴

Similarly, courts reviewing warrantless garbage pulls under *Jardines* must now presumably parse whether garbage was located within the curtilage of a residence, an inherently messy inquiry involving the amorphous *Dunn* factors and often-conflicting narratives from defendants and police about the garbage's location at the time of the trash pull. If police sometimes refrain from entering the curtilage to retrieve garbage but instead wait to obtain the garbage post-collection from trash collectors, courts could avoid these difficult curtilage questions, since police receiving trash through coordination with cooperating trash collectors will presumably receive garbage after it is removed from the curtilage. Thus, to the extent that the loophole becomes a doctrinal or empirical reality, it may have the benefit of removing complex questions surrounding garbage as an effect and garbage in the curtilage from the subset of cases in which police coordinate with trash collectors.

³⁴² Brady, *supra* note 14, at 960; see *supra* Section II.A.

³⁴³ Brady, *supra* note 14, at 1001–02; see *supra* Part II.

³⁴⁴ See generally *supra* Subsection II.B.1 (discussing the status of curbside garbage as an "effect").

CONCLUSION

United States v. Jones and *Florida v. Jardines* have reshaped the Fourth Amendment search inquiry from one wholly focused on individuals' reasonable expectations of privacy to one that also asks whether police have engaged in an unlicensed physical trespass on a constitutionally protected area.³⁴⁵ Although Justice Scalia, the architect of *Jones* and *Jardines*, is no longer on the Court, recent decisions like *Collins v. Virginia* indicate that the physical trespass test will likely continue to disturb pockets of Fourth Amendment jurisprudence.

This Note has argued that the physical trespass test's resurgence has placed *Greenwood* and the practice of warrantless garbage pulls under significant doctrinal strain. If, under *Jones*, household garbage, bags, or bins qualify as effects, warrantless garbage pulls likely constitute unlawful searches. At the very least, *Jardines* now presumably offers protection against warrantless garbage pulls within the curtilage.

But the import of this analysis extends beyond the warrantless garbage pull context. Garbage cases provide an ideal platform for the resolution of broader questions in Fourth Amendment jurisprudence, questions left largely unanswered by *Jones* and *Jardines*, including the best definition of effects, the exact contours of the curtilage, and the scope of the implied license. Moreover, the physical trespass test's potential to disrupt *Greenwood* shows that *Jones* and *Jardines* may well disturb the third-party doctrine in other unanticipated ways, particularly in contexts involving "constitutionally protected areas" or items that could be construed as "effects." For instance, if financial and telephone records are "papers" or "effects," do police commit unlicensed physical trespasses on those records when they seize them from third-party entities for the purpose of obtaining information or gathering evidence? Such questions merit further scholarly attention. Meanwhile, courts are already confronting how *Jones* and *Jardines* apply to warrantless garbage pulls. As criminal defendants continue to challenge warrantless garbage pulls under the physical trespass test at both the state and federal level, this longstanding investigatory tool may soon find itself tossed out entirely.

³⁴⁵ See *supra* Section II.B.