

**State of Minnesota
In Supreme Court**

State of Minnesota,
Appellant,
vs.
Adam Lloyd Torgerson,
Respondent.

**BRIEF OF AMICI CURIAE, AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND
AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA**

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Interest of *Amici Curiae*¹

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. The ACLU's Criminal Law Reform Project (ACLU-CLRP) engages in litigation and advocacy throughout the country to protect the constitutional and civil rights of criminal defendants and end excessively harsh crime policies that result in mass incarceration and criminalization.

The ACLU of Minnesota (ACLU-MN) is the state-wide Minnesota affiliate of the ACLU. ACLU-MN is a private, nonprofit, nonpartisan organization supported by approximately 39,000 individual supporters in the State of Minnesota. Its purpose is to protect the rights and liberties guaranteed to all Minnesotans by the United States and Minnesota Constitutions. Among these rights is the right to be free from unreasonable searches and seizures, which is implicated by this case.

Amici submit this brief urging the Minnesota Supreme Court to uphold the decision of the Court of Appeals and hold that the odor of burnt cannabis alone is insufficient as a basis for probable cause to search a vehicle pursuant to the automobile exception to the

¹ Pursuant to Rule of Appellate Procedure 129.03, *amici* state that no counsel for a party authored the brief in whole or in part and no other person or entity, other than the *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

warrant requirement of Fourth Amendment of the U.S. Constitution and Article I, Section 10 of the Minnesota Constitution.

Introduction

The legal and social status of cannabis in Minnesota has shifted significantly over the last several decades. As political and social tides have turned, so too has the plant's legality and cultural acceptability. Today, Minnesota law permits not only decriminalized but certain legal cannabis use and possession. Given the meteoric rise in the number of lawful cannabis users and the amount of legal cannabis produced, transported, sold, and purchased in Minnesota, the mere presence of its attendant odor alone simply no longer suggests illegality or criminality. Police should not be permitted to use the odor of burnt cannabis as a sole basis for probable cause to conduct warrantless vehicle searches—a subjective standard that fuels pretextual stops. To hold otherwise would mean that tens of thousands of Minnesotans, and soon perhaps many multitudes more, who lawfully use medical cannabis and hemp, will be suspected of criminal behavior and subjected to invasive government searches during traffic stops.

Moreover, in contrast to the mixed evidence about the value of discretionary pretextual traffic stops and their effects on public safety, there is scholarly consensus that minorities are disproportionately stopped.² Traffic stops expose drivers and passengers to law enforcement. This exposure has severe negative consequences. Pretextual investigatory stops often cause a litany of harms and abuses of civil liberties that

² See *infra* note 33.

disproportionately affect Black and brown Minnesotans. Permitting the police to conduct warrantless searches based on the unverifiable odor of burnt cannabis alone exacerbates these serious attendant harms.

For these reasons, *amici* urge the Court to affirm the Court of Appeals’ decision and to adopt a standard to evaluate probable cause for a warrantless search of a vehicle that does not include consideration of the odor of burnt cannabis. To the extent that the Court will allow consideration of the odor of burnt cannabis, it should—at a minimum—adopt an “odor plus” standard. This standard comports with both contemporary law and culture in Minnesota, and discourages racial profiling and abuses of civil liberties.

Argument

I. The Evolution of Minnesota Law on the Possession and Use of Cannabis Has Rendered Its Odor Insufficient to Support Probable Cause to Conduct Warrantless Vehicle Searches.

Over the last fifty years, Minnesota has steadily deviated from an across-the-board prohibition and criminalization of cannabis. Evolving public opinion and state-legislative positions on cannabis in Minnesota have led to its decriminalization, the legalization of its use for medicinal purposes, its legal cultivation for hemp-derived products, and soon may even lead to its legalization for adult recreational use.³

The relaxation of state law prohibitions on cannabis began in 1976 when the Minnesota Legislature decriminalized marijuana possession.⁴ With this measure, the

³ H.F. 100, 93rd Leg. (Minn. 2023).

⁴ MINN. STAT. § 152.15 subd. 2 (1976).

possession of a small amount of marijuana (42.5 grams or less) in Minnesota became a petty misdemeanor,⁵ not a crime,⁶ as did the possession of less than 1.4 grams of marijuana in a vehicle.⁷

In 2014, the Minnesota Legislature expanded access to legal cannabis yet again with the passage of the Minnesota Medical Cannabis Act.⁸ The law authorized qualified patients to use medical cannabis in the form of pills, oils and liquids for treating certain medical conditions.⁹ It thus, for the first time, created a large class of people whose use and possession of certain forms of cannabis was entirely legal.

One year later, the Minnesota Industrial Hemp Development Act (IHDA), Minnesota Statutes Chapter 18K, became law.¹⁰ With the passage of IHDA, it became legal to possess, transport, process, sell, or buy industrial hemp—a variety of the cannabis plant that has low-THC content but is otherwise nearly indistinguishable from illegal cannabis. And in 2021, the Legislature expanded the state’s legal medical cannabis program to allow patients to possess and use (i.e., smoke) the dried plant¹¹—cannabis that is identical to the substance that is also sold and used illegally.

⁵ MINN. STAT. § 152.01, subd. 16 (2022).

⁶ MINN. STAT. § 609.02, subd. 4a (2022).

⁷ MINN. STAT. § 152.027, subd. 3 (2022).

⁸ MINN. STAT. §§152.21-152.37 (2014).

⁹ MINN. STAT. §152.22, subd. 6 (2020).

¹⁰ MINN. STAT. § 18K (2015).

¹¹ MINN. STAT. §152.22, subd. 6 (2021).

The evolution of cannabis’ status under Minnesota state law, the ubiquity of legal cannabis and its indistinctness from illegal cannabis, and the continued growth of the number of people non-criminally *and* lawfully possessing, buying, and using cannabis in the state, have rendered the mere odor of burnt cannabis alone insufficient to provide probable cause to conduct a warrantless vehicle search. Accordingly, this Court should not only affirm the Court of Appeals’ decision,¹² but it should go further and conclude that the smell of burnt cannabis carries no independent weight—or at the most, minimal weight—in a totality of the circumstances probable cause assessment.

a. Under the Totality of the Circumstances Test, the Applicable Standard, a Factor’s Weight Must Evolve with the Law and Culture.

The District Court was correct in concluding that the probable cause analysis includes factoring in changes in the state of the law.¹³ Courts regularly engage in assessments of whether legal changes impact the reasonableness of an officer’s conclusion. *See, e.g., People v. Zuniga*, 372 P.3d 1052 (Col. 2016) (“odor of marijuana can properly be considered as part of the totality of the circumstances test for probable cause” but is insufficient on its own given the legality of marijuana possession for adult personal use).¹⁴

¹² *State v. Torgerson*, 2022 WL 6272042 (Minn. Ct. App. Oct. 10, 2022) (“Given the totality of the circumstances, the officers did not have the requisite probable cause to believe that a search of the vehicle would reveal evidence of crime or contraband.”).

¹³ *State v. Torgerson*, 47-CR-21-606 (Minn. Dist. Ct. Meeker County) (“Unlike the status quo at the time of Wicklund, there are vast numbers of citizens who use and possess non-criminal amounts of marijuana. The mere detection of the moderate odor of marijuana, without something more, does not indicate that a crime has occurred. The moderate odor of marijuana, without more, does not provide probable cause to search, detain or arrest.”).

¹⁴ *See also, e.g., Matter of T. T.*, 479 P.3d 598, 611 (Or. Ct. App. 2021) *review denied sub nom. State v. T. T.*, 484 P.3d 1071 (Or. 2021) (“given the legality of an adult possessing

What might have once been sufficient for probable cause to conduct a warrantless search¹⁵ may diminish over time to create only reasonable suspicion. And, with the continued evolution of both law and culture, the same evidence may create no suspicion of criminal activity at all. This Court is not required to blind itself to the evolution of cannabis in law, regulatory schemes, and culture in order to adhere to reasoning that was based on a state of affairs that no longer exists.¹⁶

The change to the legal status of cannabis in Minnesota necessitates reducing the weight that should be given to the odor of burnt cannabis in a probable cause assessment. Before the passage of the Medical Cannabis Act in 2014 (and the Industrial Hemp

some amount of marijuana in Oregon, the smell of marijuana in a car in which an adult is present is no longer remarkable, and, by itself, does not give rise to reasonable suspicion that it is being unlawfully possessed by or delivered to an underage passenger.”); *People v. Lee*, 40 Cal. App. 5th 853, 861 (Cal. Ct. App. 2019) (“the recent legalization of marijuana in California means we can now attach fairly minimal significance to the presence of a legal amount of the drug on [the defendant’s] person.”); *Commonwealth v. Cruz*, 945 N.E.2d 899, 910 (Mass. 2011) (“Given our conclusion that [the decriminalization act], has changed the status of possessing one ounce or less of marijuana [. . .], without at least some other additional fact to bolster a reasonable suspicion of actual criminal activity, the odor of burnt marijuana alone cannot reasonably provide suspicion of criminal activity”); *People v. Brukner*, 25 N.Y.S.3d 559, 572 (N.Y. Sup. Ct. 2015) (the same); *State v. Sisco*, 373 P.3d 549, 554 (Ariz. 2016) (the same).

¹⁵ See, e.g., *Johnson v. United States*, 333 U.S. 10 (1948) (finding that the odor of the “forbidden substance” is so distinctive that “it might very well be found to be evidence of the most persuasive character.”); *State v. Wicklund*, 295 Minn. 403, 205 N.W.2d 509 (1973) (finding the smell of burnt marijuana provided probable cause to believe one of the vehicle’s occupants broke the law by smoking marijuana).

¹⁶ See, e.g., *Riley v. California*, 573 U.S. 373 (2014) (finding the new nature of a cell phone as a digital storage device deserves different protection in the search incident to arrest context); *Carpenter v. United States*, 138 S.Ct. 2206 (2018) (employing a normative adjustment in the digital context and rejecting application of the “third party doctrine” to cell site location information).

Development Act in 2015), cannabis, irrespective of its form or source, was unlawful; though the sanction varied from civil citation to criminal. Thus, its odor created a reasonable inference of contraband (*i.e.*, anything that the law prohibits possessing),¹⁷ regardless of the quantity. Now that several forms of cannabis have been made legal, however, the calculus is altered.

Unlawfully possessed cannabis, lawfully possessed hemp, and lawfully possessed medical cannabis all smell, look, and feel the same—drug-sniffing dogs,¹⁸ let alone police officers,¹⁹ are unable to distinguish them. Today, if an officer smells the odor of burnt cannabis, he/she/they cannot be certain of *which type* of cannabis produced the odor—hemp, medical, or illegal cannabis?

The inquiry must continue—*whom possesses it*—a lawfully authorized medical patient? A lawful hemp cultivator? An unlawful recreational user? And lastly, the officer

¹⁷ *Black's Law Dictionary* defines ‘contraband’ as “[g]oods that are unlawful to import, export, produce, or possess.” (9th ed. 2009).

¹⁸ Debra Cassens Weiss, *New Hemp Laws Leave Police and Prosecutors Dazed and Confused*, ABA J., Aug. 9, 2019, <http://www.abajournal.com/news/article/are-new-hemp-laws-accidentally-legalizing-pot-drug-sniffing-dogs-couldbe-obsolete-along-with-pot-smell-probable-cause>.

¹⁹ The Minnesota Department of Health recognizes as much. On its website, under the “Medical Cannabis Frequently Asked Questions” section, in response to the question “How can law enforcement tell the difference between medical cannabis and what is sold on the illicit market?” the Department answered: “Patients should carry their medical cannabis in the package in which it was originally dispensed, with a label showing their name and date of birth for law enforcement to verify.” <https://www.health.state.mn.us/people/cannabis/patients/generalfaq.html#:~:text=Your%20use%20and%20possession%20of,not%20allowed%20under%20Minnesota%20law>.

must ascertain whether the cannabis is possessed in an amount *above a particular threshold*. The answers to those questions are what now separates legal and illegal conduct.

The inquiry is further complicated by the fact that those thresholds vary depending upon the type of cannabis lawfully possessed (i.e., medical cannabis²⁰ or hemp²¹). The possession of cannabis by a legally-authorized possessor below the legal threshold is no longer unlawful activity sanctioned by civil citation. It is entirely lawful. Therefore, the odor of burnt cannabis is no longer inherently indicative of criminal activity, and police should not be permitted to draw incriminating inferences from an odor with ambiguous origins that could be, and in many instances are, entirely legal.

b. The Odor of Burnt Cannabis Alone Does Not Establish Probable Cause and Should Be Given Little, If Any, Weight in a Totality of the Circumstances Probable Cause Assessment.

The issue before this Court is whether an officer’s detection of an odor of burnt cannabis, if reliable—which itself is problematic and will be addressed below—continues to create a “fair probability” that contraband or evidence of a crime will be found in the location searched. *Illinois v. Gates*, 462 U.S. 213, 235, (1983)); *State v. Gail*, 713 N.W.2d 851, 858 (Minn. 2006). The process of determining probable cause “does not deal with hard certainties, but with probabilities” informed by judgments based on objective facts.²² Probability in a constitutional context does not require empirical precision. Rather, it

²⁰ Medical Cannabis patients may purchase a maximum of a 90-day supply of the dosage determined for that patient. MINN. STAT. § 152.29 Subd. 3 (2021).

²¹ There is no Minnesota law that *amici* could identify that limits the amount of raw hemp a person in Minnesota may possess.

²² *United States v. Cortez*, 449 U.S. 411, 418 (1981).

necessitates a common-sense assessment of general numbers and chance.²³ Because of the prevalence of legal cannabis possession and use in Minnesota, there is no longer a fair probability that upon smelling the odor of burnt cannabis a police officer will discover contraband or evidence of criminal cannabis possession or use.

Of course, some forms of cannabis still remain civilly prohibited or illegal (depending on the amount possessed) for certain Minnesotans. But reasonable law enforcement officers in Minnesota can no longer presume that the odor of burnt cannabis they smell while walking their beat or emanating from a car necessarily indicates criminal activity is afoot. As the Supreme Court explained in *Reid v. Georgia*,²⁴ reasonable suspicion cannot exist where the conduct at issue “describe[s] a very large category of presumably innocent [people].” *Reid* forecloses a rule that would allow nearly all people acting legally within the scope of their rights when possessing or using cannabis to be subject to intrusive governmental searches and seizures.

Other state high courts recognize that, where a large number of citizens can use cannabis both legally and illegally, police must point to facts demonstrating that the conduct fits within the latter category to justify an intrusion. For example, after Oregon legalized cannabis, the Oregon Court of Appeals in the *Matter of T. T* held that “given the legality of an adult possessing some amount of marijuana in Oregon, the smell of marijuana in a car in which an adult is present is no longer remarkable, and, by itself, does not give

²³ See, e.g., *Texas v. Brown*, 460 U.S. 730, 742 (1983) (“A ‘practical, nontechnical’ probability that incriminating evidence is involved is all that is required.”).

²⁴ 448 U.S. 438, 441 (1980).

rise to reasonable suspicion it is being *unlawfully* possessed by or delivered to an underage passenger."²⁵ See also, e.g., *Commonwealth v. Overmyer*, 11 N.E.3d 1054 (Mass. 2014) (holding that decriminalization of cannabis meant that the odor of cannabis alone was not sufficient to permit the search of a vehicle) (citing *Commonwealth v. Cruz*, 459 Mass. 459 (2011)); *State v. Crocker*, 97 P.3d 93 (Alaska 2004) (finding that the state right to possess a limited amount of cannabis in one's own home cannot subject residents to "thorough-going police searches of their homes" by simply exercising the right). This logic has long been employed in other contexts, as well. See e.g., *Commonwealth v. Landry*, 779 N.E.2d 638 (Mass. 2002) ("Possessing a hypodermic needle is not necessarily a crime" and cannot create probable cause because many individuals "may lawfully possess hypodermic needles"); *Commonwealth v. Alvarado*, 667 N.E.2d 856 (Mass. 1996) (concealed weapons); *State v. Bridges*, 963 S.W.2d 487 (Tenn. 1997) (pill bottles).

Thus, to examine what weight the odor of burnt cannabis should carry in a probable cause assessment, this Court should consider how many people in Minnesota are lawfully permitted to possess and use cannabis. In 2022, roughly 40,000 people in Minnesota were licensed to possess and use medical cannabis.²⁶ In a 2021 survey by the Minnesota Office of Medical Cannabis, enrolled patients were asked if they were likely to try smokable

²⁵ 308 Or. App. 408, 427 (2021).

²⁶ The number of patients approved in the registry in 2022 was 39,577. *Minnesota Medical Cannabis Dashboard*, MINN. DEPT. HEALTH (Dec. 31, 2022), <https://www.health.state.mn.us/people/cannabis/data/dashboard.html>.

cannabis when it becomes available.²⁷ Of the respondents, 71% said they were very likely or somewhat likely to try it,²⁸ which suggests the majority of lawful medical cannabis patients smoke cannabis and produce the odor of burnt cannabis. Furthermore, the Minnesota Department of Health expects patient enrollment to double or triple, based on the experiences of other states that added dried flower to their medical cannabis program.²⁹ And these estimates do not include an untold number of Minnesotans who legally purchased and consumed legal hemp-derived products, such as cannabidiol (CBD) cigarettes—which also produce the odor of burnt cannabis.

Along with the number of lawful actors, a probability assessment must consider the proportion of noncriminal versus criminal possessors of cannabis. Obtaining data on this precise point is difficult, but data on the actual experience of police agencies in Minnesota provides insight. According to data from the Minnesota Bureau of Criminal Apprehension (MBCA), police in Minnesota made arrests or issued citations for marijuana offenses 6,075 times in 2021, with nearly 90% of offenses for simple possession—a civil offense, not a crime.³⁰

If the distribution of types of cannabis offenses is at all representative of police encounters with criminal compared to non-criminal cannabis users, the MBCA data

²⁷ *Dried Plant Available for Medical Cannabis Patients in March*, MINN. DEPT. HEALTH (Feb. 1, 2022), <https://www.health.state.mn.us/news/pressrel/2022/cannabis020122.html>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Minnesota Crime Data Explorer*, MINN. BUREAU CRIMINAL APPREHENSION, <https://cde.state.mn.us/DrugAbuseArrests/DrugAbuseArrests> (last visited Feb. 10, 2023).

suggests that the vast majority of users *who come in contact with the police* do not regularly possess criminal amounts of the substance. Consequently, the odor of burnt cannabis alone allows police little more than a guess as to which kind of user a person may be.

A probability assessment should factor not only the distribution of past offenses for arrests made or citations issued for cannabis offenses, but should also consider the “hit rate” or the proportion of searches based on the odor of cannabis that successfully turn up cannabis. It is common to see cases involving an officer who conducted a search after smelling cannabis only to find a weapon or a drug other than cannabis, but no actual cannabis—like in Mr. Torgerson’s case.³¹ These cases are not anomalies. For example, after analyzing 25,000 police traffic stops in Philadelphia, the Defender Association of Philadelphia found that in the first quarter of 2019, of 3,300 searches in which police documented “the odor of marijuana,” the hit rate for *any* contraband, not just cannabis, was

³¹ See, e.g., *United States v. Snyder*, 793 F.3d 1241, 1242–45 (10th Cir. 2015) (involving an officer who found a firearm and no marijuana in a search based on “the smell of burnt marijuana”); *United States v. Reed*, 882 F.2d 147, 149 (5th Cir. 1989) (finding that, in a search prompted by an Agent detecting “the distinct odor of burnt marihuana,” that “[i]t is not controlling that the substance eventually discovered in the vehicle was cocaine, and that no marihuana was ever found”); *United States v. Ushery*, 526 F. Supp. 2d 497, 504 (M.D. Pa. 2007) (evaluating a search based on the odor of marijuana which uncovered crack cocaine and no marijuana); *United States v. Nelson*, Criminal Action No. 06- 240, 2006 WL 2711743, at *1 (E.D. Pa. Sept. 19, 2006) (involving a trooper who “smelled marijuana” but found crack cocaine in the trunk and no marijuana); *United States v. Pittman*, No. 97-40015-01-RDR, 1997 WL 375734, at *1 (D. Kan. June 9, 1997) (“In spite of the fact that no marijuana was discovered, the court believes Officer Youse’s testimony that he smelled a strong odor of marijuana when he stopped defendant’s car”); *K.K. v. Indiana*, 40 N.E.3d 488, 495 (Ind. Ct. App. 2015) (involving an officer who smelled the odor of burnt marijuana but car search uncovered a handgun and no marijuana).

9.4%.³² In other words, nine out of ten searches yielded nothing at all. When police rely on the odor of burnt cannabis as a basis for probable cause, they are relying on unreliable, subjective evidence that does not create a “fair probability” that contraband, much less unlawful cannabis, will be discovered. This undermines the weight courts should give the odor of burnt cannabis under the totality of the circumstances assessment. Ultimately, when a police officer smells the odor of burnt cannabis and has no prior knowledge or reason to believe that the cannabis was used criminally, it is unreasonable for the officer to conclude that the mere odor alone is suggestive of criminal activity.

II. Permitting the Alleged Odor of Burnt Cannabis to Serve as a Basis for Probable Cause Incentivizes Pretextual Stops and Racial Profiling.

As explained, the alleged presence of the odor of burnt cannabis is a poor indicator of whether contraband will be discovered during a vehicle search. Giving officers carte blanche to use the unverifiable odor of burnt cannabis to justify warrantless searches would not only increase unreliable searches, it would inevitably exacerbate racial disparities already rampant in traffic enforcement.

³² Samantha Melamed, *Philadelphia Police Are Searching More Cars for Marijuana—But Finding Less of It, Critics Say*, PHILADELPHIA INQUIRER (Oct. 31, 2019), <https://www.inquirer.com/news/philadelphia/philadelphia-police-racial-profiling-marijuana-vehicle-stops-20191031.html?query=Samantha%20Melamed,%20Philadelphia%20police%20are%20searching%20more%20cars%20for%20marijuana%20%E2%80%94%20but%20finding%20less%20of%20it,%20critics%20say,%20Philadelphia%20Inquirer,%20Oct.%2031,%202019>.

An extensive and growing body of literature confirms that Black, Hispanic, Native American, and other communities are disproportionately stopped by police.³³ These disparities are most glaring in pretextual stops, when police have nearly unchecked discretion in selecting who to stop.³⁴ Commonly referred to as ‘pretext stops,’ ‘investigative stops,’ or ‘discretionary stops,’ these are stops ostensibly for a traffic infraction or equipment violation (like the stop of Mr. Torgerson). But they are conducted when the officer has the ulterior motive of investigating unrelated criminal activity for which the officer has no or insufficient individualized suspicion.

³³ See, e.g., Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 854–59 (2011) (citing numerous studies that have demonstrated evidence of racial profiling); see also Inspector General, LAPD, *Review of Stops Conducted by the Los Angeles Police Department* (Oct. 27, 2020), www.oig.lacity.org/files/ugd/b2dd23_d3e88738022547acb55f3ad9dd7a1dcb.pdf; Emma Pierson, et al, *A large-scale analysis of racial disparities in police stops across the United States* (2020), <https://5harad.com/papers/100M-stops.pdf> (concluding black drivers were less likely to be stopped after sunset, when race is more difficult to discern, suggesting bias in stop decisions); Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015).

In the 1990s, litigation in New Jersey and Maryland provided irrefutable statistical evidence of racial profiling in traffic stops. David A. Harris, PROFILES IN INJUSTICE 60–62 (2003) (discussing lawsuits in New Jersey, *State v. Pedro Soto*, 734 A.2d 350 (N.J. Super. Ct. 1996), and Maryland, *Wilkins v. Maryland State Police*, Civil No. MJG-93-468 (D. Md., 1993)).

Studies also confirm disparities in searches and uses of force. E.g., Schwartz & Jahn, *Mapping fatal police violence across U.S. metropolitan areas: Overall rates and racial/ethnic inequities* (2020).

³⁴ See, e.g., Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, STAN. L. REV. (2021); CHARLES R. EPP, ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 110 (2014); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 27 (1998).

In recent years, police nationwide have come to view the traffic stop as a core crime-fighting tactic—one of “policing’s most effective”³⁵ tools. As a result, the tactic has proliferated. Today, the routine police traffic stop is “the most common form of involuntary interaction between citizens and the police, with more than 20 million such encounters each year.”³⁶ Many police agencies—including several in Minnesota³⁷—use mapping techniques to identify crime and traffic-crash hot spots. They then target those areas with highly-visible, high-volume traffic enforcement.³⁸ Because these approaches target specific “high-crime” locations, using crime rates and data that reflect a variety of biases,³⁹ the targeted areas tend to have higher levels of poverty and are predominantly Black and brown communities.

Though facially constitutional, pretextual stops give the police nearly unlimited discretion in deciding whom to stop for investigative purposes. This is because our traffic

³⁵ EPP, *supra* note 34 at 59.

³⁶ *Contacts Between Police and the Public, 2015*, DEPT. OF JUSTICE BUREAU OF JUSTICE STATISTICS (Oct. 2018), <https://bjs.ojp.gov/content/pub/pdf/cpp15.pdf>.

³⁷ See, e.g., *Traffic Stop Data*, ST. PAUL MINN., <https://information.stpaul.gov/datasets/stpaul::traffic-stops/about> (last visited Feb. 10, 2023).

³⁸ See, e.g., *Duluth Police Department, Speed and Alcohol in Brief*, INT’L ASSOC. CHIEFS POLICE, *DuluthCaseStudyFINAL7252013.pdf* (last visited Feb. 10, 2023).

³⁹ There will be reporting bias—disparities in who reports crime to police. See, e.g., Rashida Richardson, *Racial Segregation and the Data-Driven Society: How Our Failure to Reckon with Root Causes Perpetuates Separate and Unequal Realities*, 36 BERK. TECH. L.J. (2022); Andrew Ferguson, *Policing Predictive Policing*, 94 WASH. U. L. REV. 1109, 1146-1147 (2017).

There will also be enforcement bias—disparities in where and against whom to direct police resources. See, e.g., Vincent M. Southerland, *The Intersection of Race and Algorithmic Tools in the Criminal Legal System*, MARY. L. REV. (2021).

laws are so elaborate, so detailed, and so unrealistic,⁴⁰ that “no driver can avoid violating some traffic law during a short drive, even with the most careful attention.”⁴¹ Pretextual stops have become a favored tactic by police to interdict drugs. Minnesota is no exception.⁴² This tactic was popularized at the beginning of the War on Drugs.⁴³ Lacking reasonable suspicion of criminal activity, police use a minor traffic infraction as a pretext for conducting a stop. They then fish for drugs or other contraband.

When making pretextual stops, police rely largely on intuition⁴⁴ to decide which cars to pull over and investigate.⁴⁵ Unable to reliably distinguish the cars that may contain drugs or evidence of other crimes, a driver’s race or ethnicity, whether consciously or unconsciously, factors into an officer’s suspicions of who may be breaking the law and, therefore, who should be stopped and investigated.⁴⁶ In *State v. George*, 557 N.W.2d 575 (Minn. 1997), this Court acknowledged as much when it observed that law enforcement’s “enormous discretion in enforcing traffic laws” creates the inherent risk that “police . . . may take advantage of their right to stop motorists for routine traffic violations

⁴⁰ Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1480-81 (2021).

⁴¹ David A. Harris, “*Driving While Black*” and *All Other Traffic Offenses: The Supreme Court and Pretextual Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 545 (1997).

⁴² See, e.g., *supra* note 37.

⁴³ Alex Kreit, *Marijuana Legalization and Pretextual Stops*, 50 U.C.D. L. REV. 741, 743–44 (2016); David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 249.

⁴⁴ E.g., Gary Webb, *Driving While Black: Tracking Unspoken Law-Enforcement Racism*, ESQUIRE (Apr. 1, 1999), at 118, 122-23 (reporting on officer intuition in deciding who to stop and describing one officer as being of the “belie[f] he can spot drug traffickers from the general cut of their jib”).

⁴⁵ Kreit, *supra* note 43 at 751.

⁴⁶ See Harris, *supra* note 41, at 560–69.

in order to target members of groups identified by factors that are totally impermissible as a basis for law enforcement activity.” *Id.* at 579–80 (internal quotation marks omitted).

Concentrating pretextual stops within certain neighborhoods causes severe harms, as community members are routinely subjected to burdensome fines, fees, forfeitures, arrests, and police uses of force.⁴⁷ Unpaid fines and fees in particular often result in a spiraling set of consequences—such as license revocations, additional debt through interest or late fees, arrest, or even jail.⁴⁸

These harms are not distributed evenly: they disproportionately affect Black and brown drivers. For example, in 2018, Minneapolis police officers stopped 7,177 cars for equipment violations. Nearly 42% (or 3,379) of the drivers stopped for such violations were Black, despite making up only about 19% of the city’s population at that time.⁴⁹ White drivers comprised only 30.2% of those stopped for equipment violations, while making up more than 55% of the city’s population.⁵⁰

The story of racial disparity in traffic stops is similar across the country. One study of traffic stops in Kansas City separated stops for minor violations done for purposes of

⁴⁷ Andy Mannix, *Black Drivers Make Up Majority of Minneapolis Police Searches During Routine Traffic Stops*, STAR TRIBUNE, (Aug. 7, 2020), <https://www.startribune.com/black-drivers-make-up-majority-of-minneapolis-police-searches-during-routine-traffic-stops/572029792/>; *Fines and Fees*, VERA, <https://www.vera.org/ending-mass-incarceration/criminalization-racial-disparities/fines-and-fees> (last visited Feb. 10, 2023).

⁴⁸ *Id.*

⁴⁹ *Minneapolis Police Department Stop Information*, MINNEAPOLIS DATA SOURCE, <https://perma.cc/7EH9-CA2U> (last visited Feb. 10, 2023).

⁵⁰ *Id.*

investigation from stops for more significant traffic violations, where the purpose of the stop was to enforce the traffic laws. The results showed that Black people were twice as likely as white people to be subjected to a pretextual traffic stop done for purposes of investigation.⁵¹ The study concluded that once stopped, Black and Latino drivers disproportionately are cited for minor infractions, such as equipment violations.⁵²

Similarly, a study of four million traffic stops in California found that for “Black Californians the likelihood of being searched is more than twice that of white Californians—a search rate of 20.5 percent and 8.2 percent, respectively.”⁵³ A study of fourteen years of police traffic stops in North Carolina showed that Black drivers were 63% more likely to be stopped and 115% more likely to be searched than white drivers, even though they drive less and contraband is less likely to be found in searches of Black drivers.⁵⁴

And with more stops and investigatory searches come more opportunities for uses of force. Recent stops across the country, including in Minnesota, demonstrate how low-level stops can spiral into police uses of force. In 2021, Daunte Wright, a 20-year-old Black

⁵¹ EPP, *supra* note 34 at 110.

⁵² U.S. DEP’T OF JUST., *Police Behavior During Traffic and Street Stops, 2011* at 4 (Sept. 2013, rev. Oct. 2016), www.bjs.gov/content/pub/pdf/pbtss11.pdf.

⁵³ Magnus Lofstrom, et al., *Racial Disparities in Law Enforcement Stops*, PUB. POLICY INST. CAL. (Oct. 2021), [Racial Disparities in Law Enforcement Stops - Public Policy Institute of California \(ppic.org\)](http://ppic.org/publications/racial-disparities-in-law-enforcement-stops).

⁵⁴ Chris Horn, *Racial Disparities Revealed in Massive Traffic Stop Dataset*, UNIV. S.C. (June 12, 2020), https://www.sc.edu/uofsc/posts/2020/06/racial_disparities_traffic_stops.php#.Y96Cc3bMI2y.

man, was fatally shot by a police officer in Brooklyn Center, Minnesota after he was stopped for a traffic violation related to expired registration tags.⁵⁵ Less than five years earlier, Philando Castile, a 32-year-old Black man, was fatally shot in Falcon Heights, MN by a St. Anthony Park police officer after he was stopped for a series of low-level traffic violations, including allegedly failing to signal and failing to fix a broken seatbelt.⁵⁶

These tragedies are not anomalies—they are representative of a much larger national trend. In 2021, a New York Times investigation found that, over a five-year period, 600 people in the United States were killed by police during traffic stops, 400 of which had no weapon and were not being pursued for a violent crime.⁵⁷ Again, “Black drivers were overrepresented among those killed.”⁵⁸

Compounding the racial disparities and other attendant harms, it is difficult in practice for most people subjected to warrantless vehicle searches for cannabis to challenge the legality of the search. First, the principal mechanism for obtaining judicial review of warrantless searches has been the motion to suppress, and its corollary remedy of

⁵⁵ *What to Know About the Death of Daunte Wright*, N.Y. TIMES (Feb. 21, 2022), <https://www.nytimes.com/article/daunte-wright-death-minnesota.html>.

⁵⁶ Sharon LaFraniere & Mitch Smith, *Philando Castile Was Pulled Over 49 Times in 13 Years, Often for Minor Infractions*, N.Y. TIMES (July 16, 2016), <https://www.nytimes.com/2016/07/17/us/before-philando-castiles-fatal-encounter-a-costly-trail-of-minor-traffic-stops.html>.

⁵⁷ David D. Kirkpatrick, et al., *Why Many Police Traffic Stops Turn Deadly*, N.Y. TIMES (Nov. 30, 2021), <https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html?smid=nytcore-ios-share&referringSource=articleShare>.

⁵⁸ *Id.*

exclusion.⁵⁹ But this is only available for people who were criminally charged as a result of the search—many of whom will likely plea out,⁶⁰ and therefore, will waive any right to challenge a search’s legality. However, even this limited deterrent is not available for those who received a civil infraction.⁶¹

Second, the subject of a warrantless search could, ostensibly, obtain after-the-fact judicial review of the search by bringing a civil suit, for example in the form of a Section 1983 claim against the official who conducted the search, or a *Monell* claim against the municipality.⁶² But there are significant obstacles to pursuing a civil suit for someone who was subject to a warrantless search who seeks post-event judicial review of the search’s legality. For suits against an individual officer, a plaintiff would need to overcome qualified immunity granted to the potential municipal defendants—a steep challenge given the lack of case law on the matter.⁶³ *Monell* claims would be equally challenging due to the difficulty in gathering evidence of a policy or practice.

⁵⁹ See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that evidence obtained in violation of the Fourth Amendment is inadmissible in state prosecutions).

⁶⁰ *The Truth About Trials*, MARSHALL PROJECT, <https://www.themarshallproject.org/2020/11/04/the-truth-about-trials> (last visited Feb. 7, 2023) (“About 94 percent of felony convictions at the state level and about 97 percent at the federal level are the result of plea bargains.”).

⁶¹ Minnesota law does not recognize the remedy of exclusion of evidence in the context of a civil proceeding seeking a mere fine for a petty misdemeanor. MINN. STAT. § 626.21 (2022).

⁶² See Akil Reed Amar, *Fourth Amendment First: Principals*, 107 HARV. L. REV. 757, 776 (1994) (noting that jury's determination that search was unreasonable would "often" lead to awards of "heavy[] damages").

⁶³ Because Minnesota state courts currently widely recognize that the odor of cannabis can serve as a significant factor in a totality of circumstances probable cause assessment, there is not case law that establishes that an officer who conducts a warrantless vehicle search

It would be even more difficult, for most people of color subjected to stops and searches based on racial profiling to challenge their selection. After the Supreme Court’s decision in *Whren*, federal law requires only that the officer observe a traffic violation, regardless of ulterior motives.⁶⁴ A driver can still challenge their selection on equal protection grounds, but current law sets a very high bar.⁶⁵

These practical considerations bolster the importance of affirming the Court of Appeals’ decision and going further to find that mere odor of burnt cannabis alone is insufficient as a basis for probable cause to search a vehicle pursuant to the automobile exception to the warrant requirement. A ruling to the contrary would further incentivize police to engage in harmful pretextual stops—which arguably do not meaningfully improve traffic safety or fight crime—and would allow for the harmful racial disparities endemic to traffic enforcement to continue.

based on the odor of cannabis engages in conduct that violates clearly established statutory or constitutional rights.

⁶⁴ *Whren v. United States*, 517 U.S. 806 (1996).

⁶⁵ Even though the “Minnesota Rational Basis Test” would apply for purposes of an equal protection claim under the state constitution (*State v. Russell*, 477 N.W.2d 886 (Minn. 1991) (requiring “a more stringent standard of review as a matter of state law” for government action giving rise to equal protection concerns that do not trigger strict scrutiny), the Minnesota Supreme Court does not recognize a claim for damages in this context. (*Smith v. Youngbird*, No. 21-CV-2249 (DSD/ECW), 2022 WL 3648700, at *9 (D. Minn. July 29, 2022), report and recommendation adopted, No. CV 21-2249 (DSD/ECW), 2022 WL 3647862 (D. Minn. Aug. 24, 2022).

Conclusion

For the foregoing reasons, *Amici* respectfully submit that this Court should conclude that the mere odor of burnt cannabis alone is insufficient as a basis for probable cause to search a vehicle pursuant to the automobile exception to the warrant requirement.

Dated: February 13, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 & 3, for a brief produced in a proportional font. By automatic word count, the length of this brief is 6,064 words. This brief was prepared using Microsoft Word 2016.

Dated: February 13, 2023

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