No. 03-923

IN THE

Supreme Court of the United States

ILLINOIS,

Petitioner,

v.

ROY I. CABALLES,

Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF ILLINOIS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

HARVEY GROSSMAN
SHANNON P. BARTLETT
ROGER BALDWIN FOUNDATION OF ACLU, INC.
180 North Michigan Avenue
Suite 2300
Chicago, Illinois 60601
(312) 201-9740

BARRY SULLIVAN *
JACOB I. CORRÉ
LISA D. JOHNSON
JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

* Counsel of Record

Attorneys for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE 1
STATEMENT OF THE CASE 1
SUMMARY OF ARGUMENT 3
ARGUMENT 7
I. By Changing The Nature, Quality And Duration Of A Simple Traffic Stop, The Deployment Of A Drug-Detection Dog Violates The Fourth Amendment By Extending The Stop Beyond Its Permissible Scope 7
A. The Use of a Drug-Detection Dog During a Routine Traffic Stop is Wholly Unrelated to the Basis for the Stop and Requires Independent Justification 8
B. The Use of a Drug-Detection Dog During a Routine Traffic Stop Impermissibly Alters the Nature and Quality of the Stop 12
1. The Use of Drug-Detection Dogs During Routine Traffic Stops Subjects Motorists to Drug Screenings Conducted in a Random Manner 12

2. The Presence of a Dangerous Dog Creates an Intimidating Environment for Motorists 17

3. The Use of a Drug-Detection Dog During a Routine Traffic Stop Will Often Extend the Duration of the Seizure 20

C. This Court's Prior Cases do not Support the Proposition that Probable Cause to Conduct a Traffic Stop Justifies an Intrusive, Unrelated Drug Investigation 22

II. The Use Of A Drug-Detection Dog In The Investigation Of An Individual Motorist Is A Fourth Amendment Search Requiring Independent Justification 25

TABLE OF AUTHORITIES

CASES

Atwater v. City of Lago Vista, 532 U.S. 318 (2001) 14, 23
Berkemer v. McCarty, 468 U.S. 420 (1984) 8, 10, 24
Boyd v. United States, 116 U.S. 616 (1886) 11
Camara v. Municipal Court, 387 U.S. 523 (1967) 15
Commonwealth v. Tarrant, 314 N.E.2d 448 (Mass. App. Ct. 1974) 18
Delaware v. Prouse, 440 U.S. 648 (1979) 8, 12, 15, 17
Florida v. Royer, 460 U.S. 491 (1983)..... 21
Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451 (U.S. 2004) 8
Indianapolis v. Edmond, 531 U.S. 32 (2000) 3, 16, 17, 26
Joshua v. DeWitt, 341 F.3d 430 (6th Cir. 2003)..... 21, 22
Katz v. United States, 389 U.S. 347 (1967)..... 5, 27
Knowles v. Iowa, 525 U.S. 113 (1998)..... 9, 10, 11
Kyllo v. United States, 533 U.S. 27 (2001) 5, 26, 27
Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) 17
New York v. Belton, 453 U.S. 454 (1981) 10
New York v. Class, 475 U.S. 106 (1986)..... 27
Ohio v. Robinette, 519 U.S. 33 (1996) 24

People v. Cox, 782 N.E.2d 275 (Ill. App. Ct. 2002) 22
People v. Kay, 328 N.W.2d 424 (Mich. App. Ct. 1982) 18
People v. Koutsakis, 649 N.E.2d 605 (Ill. App. Ct. 1995) 21
People v. Luna, 752 N.E.2d 477 (Ill. App. Ct. 2001) 21
People v. Lynch, 609 N.E.2d 889 (Ill. App. Ct. 1993) 18
People v. O'Brien, 591 N.E.2d 469 (Ill. App. Ct. 1992) 24
Silverman v. United States, 365 U.S. 505 (1961) 27
State v. Bowers, 721 P.2d 268 (Kan. 1986) 18
State v. Storm, 238 P.2d 1161 (Mont. 1951) 19
Terry v. Ohio, 392 U.S. 1 (1968) 8, 11
United States v. Brigham, 343 F.3d 490 (5th Cir. 2003) 22
United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 15
United States v. Caruana, 652 F.2d 220 (1st Cir. 1981) 20
United States v. Hoff, 22 F.3d 222 (9th Cir. 1994) 19
United States v. Jackson, 377 F.3d 715 (7th Cir. 2004) 11
United States v. Karo, 468 U.S. 705 (1984) 27

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 12

United States v. Ortiz, 422 U.S. 891 (1975) 8

United States v. Place, 462 U.S. 696 (1983) 12, 26, 27-28, 29

United States v. Raynor, 2004 U.S. App. LEXIS 18845 (10th Cir. 2004) 22

United States v. Robinson, 414 U.S. 218 (1973) 9

United States v. Santiago, 310 F.3d 336 (5th Cir. 2002) 21

United States v. Stone, 866 F.2d 359 (10th Cir. 1989) 30

United States v. Williams, 356 F.3d 1268 (10th Cir. 2004) 18

United States v. Winningham, 140 F.3d 1328 (10th Cir. 1998) 30

Warden v. Hayden, 387 U.S. 294 (1967) 11

Whren v. United States, 517 U.S. 806 (1996) 14, 23

STATUTES

165 ILCS 5/16-102 24

MISCELLANEOUS

Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog,* 85 Ky. L .J. 405, 420-25, 429-32 (1996) 29

Taylor Branch, PILLAR OF FIRE: AMERICA IN THE KING YEARS, 1963-65 (1998) 19

DOJ's Findings Letter re: Use of Force by the Washington Metropolitan Police Department, available at http://www.usdoj.gov/crt/split/documents/dcfindings.htm 19

DOJ's Investigation of the Miami Police Department; Memorandum of Agreement Between the United States Department of Justice and the City of Cincinnati, Ohio and the Cincinnati Police Department, available at http://www. usdoj.gov/crt/split/Cincmoafinal.htm 19

Palm-Print Readers: Police Cars to Get New Equipment, Columbus Dispatch at News 6B (Sept. 4, 2004) 28-29

INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution. Since its founding in 1920, the protection of Fourth Amendment rights has been a central concern of the ACLU, which has appeared before this Court in numerous Fourth Amendment cases, both as counsel for a party immediately involved and as amicus curiae. The ACLU of Illinois is one of the ACLU's statewide affiliates. Because this case addresses an important Fourth Amendment question, its proper resolution is a matter of substantial concern to the ACLU, its affiliates, and its members.

STATEMENT OF THE CASE

On November 12, 1998, Illinois State Police Trooper Daniel Gillette stopped Respondent Roy I. Caballes for driving six miles above the speed limit on Interstate 80 in La Salle County, Illinois. (Pet. App. 1a.) Trooper Gillette radioed the police dispatcher that he was making a traffic stop. (*Id*.)

Another officer, Trooper Craig Graham of the State Police Drug Interdiction Team, overheard Gillette's radio transmission and advised the dispatcher that he was on his way to conduct a "canine sniff." (*Id*.) Gillette had not requested assistance. (*Id*.)

Gillette thereafter approached Caballes's car, informed him that he was speeding, and asked to see his driver's license,

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part and no person other than amici, their members or counsel, made any monetary contribution to the preparation or submission of this brief.

registration, and insurance card. (*Id*. at 2a.) Caballes complied with these requests. (*Id*.) Gillette noticed an atlas on the front seat, an open ashtray, the odor of air refresher, and two suits hanging in the back seat, but no other luggage. (*Id*.) Gillette told Caballes to move his car and then come to the squad car. (*Id*.) After Caballes did so, Gillette told him that he was only going to write a warning ticket. (*Id*.)

Gillette then called the dispatcher to ascertain the validity of Caballes's license and to do a warrant check. (*Id*.) While waiting for the results, Gillette questioned Caballes about where he was going and why he was "dressed up." (*Id*.) Caballes said he was moving from Las Vegas to Chicago, and that he usually "dressed up" because he was a salesman, but that he was unemployed. (*Id*.) According to Gillette, Caballes seemed nervous. (*Id*.)

The dispatcher told Gillette that Caballes had surrendered an Illinois license for a Nevada license. (*Id*.) Gillette then requested Caballes' criminal history from the dispatcher. (*Id*.) In the meantime, Gillette asked to search the car, but Caballes refused. (*Id*.) Gillette then asked Caballes whether he ever had been arrested, which Caballes denied. (*Id*.) The dispatcher reported that Caballes had two prior arrests for distribution of marijuana, and Gillette began writing the ticket, but was interrupted by an unrelated call. (*Id*. at 2a-3a.)

Gillette was still writing the warning ticket when Graham arrived and began walking around Caballes's car with his drug-detection dog. (*Id*. at 3a.) The dog alerted at the trunk of the car. (*Id*.) Gillette then searched the trunk and found marijuana. (*Id*.)

Caballes was taken to the police station and charged with one count of cannabis trafficking. (*Id*.) A motion to suppress was subsequently denied. (*Id*.) Caballes was tried

to the court sitting without a jury, sentenced to 12 years in prison, and ordered to pay a street value fine of $256,136. (*Id*.) The Illinois Appellate Court affirmed the conviction (*id*.), but the Supreme Court of Illinois reversed on the ground that Caballes's Fourth Amendment rights had been violated. (*Id*. at 1a.) The State of Illinois filed a petition for a writ of certiorari, which was granted on April 5, 2004.

SUMMARY OF ARGUMENT

In *Indianapolis v. Edmond*, 531 U.S. 32 (2000), this Court held that police violate the Fourth Amendment when they randomly stop automobiles and use trained dogs to try to discover illegal drugs. The question presented in this case is conceptually distinct, but practically related: Whether police likewise violate the Fourth Amendment when, having validly stopped a motorist for driving a few miles above the speed limit, for having a faulty muffler or tail-light, for failing to buckle up, or for some other routine traffic infraction not involving alcohol or a controlled substance, they expand the scope of that routine traffic stop to encompass a canine drug investigation. In short, does the mere existence of a traffic stop supported by probable cause justify the commencement of an intrusive, unrelated drug investigation that otherwise would violate the Fourth Amendment, absent independent justification?

This Court's prior cases show that the scope of a valid traffic stop that does not result in a custodial arrest may not be extended to include other investigations, such as a canine drug investigation, unless the police have grounds amounting to individualized suspicion for doing so. It is not enough that the initial traffic stop was justified; the use of drug-detection dogs must be independently justified. This is so because every traffic stop is a "seizure," and the Constitution requires that any activity that extends the scope of such a seizure must have an identifiable basis in the reason for the initial stop, in

the inherent authority of the police to secure their own safety, or in some specific circumstance that creates individualized suspicion.

The permissible scope of a routine traffic stop is clear: A motorist reasonably expects that she will be detained briefly while the police officer asks for her name, checks her driver's license, and properly documents her alleged violation. She also reasonably expects that she will then be allowed to resume her journey, without being subjected to an invasive, unrelated drug investigation.

The deployment of drug-detection dogs cannot be justified by the legitimate investigative needs of a routine traffic stop. A trained dog will add nothing to the evidence of a broken tail-light nor assist in resolving any mystery about the motorist's identity. But the use of such a dog necessarily broadens the scope of the stop. It takes the stop beyond its rationale and into new investigatory directions. It also alters the nature and quality of the stop. Dogs are neither antiseptic scientific devices nor demure creatures. They frighten people and have long been used for that purpose. Having one's car or person circled by a large unknown dog, trained in an unknown way, clearly alters the traffic stop. In addition, the use of a dog may well lengthen the duration of a stop. For example, a police officer might well question a motorist a little more slowly and a little more fully, or put questions to the dispatcher one at a time, rather than all at once, knowing that a canine unit is in the vicinity and on the way. Moreover, absent any logical connection between the commission of traffic infractions and drug possession, the use of dogs in routine traffic stops is arbitrary and subjects individuals to random public drug screenings.

The requirement that a canine drug investigation be justified independently from the stop proceeds from the constitutional imperative that every search or seizure be

reasonable, both at its inception and in the manner in which it is conducted. Absent independent justification, deploying a drug-detection dog in a routine traffic stop violates this principle because it unreasonably extends the scope of the stop. This use of dogs violates the Fourth Amendment for a second reason as well, namely, that it constitutes a search.

This Court affirmed a cornerstone principle of Fourth Amendment law when it observed in *Kyllo v. United States*, 533 U.S. 27 (2001), that "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Id*. at 33, *citing Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). That statement serves to clarify that the answer to the question whether the deployment of a drug-detection dog constitutes a Fourth Amendment "search" will depend on the circumstances. Thus, it may not be a Fourth Amendment "search" for police officers to use a drug-detection dog to inspect luggage being transported between international airports. But the deployment of the same dog to investigate an automobile and its occupants, in the course of a routine traffic stop, will be deemed a "search" because the motorists' "expectation of privacy" in those circumstances is one that society recognizes as reasonable.

To the extent that a contrary rule might be grounded on the assumption that trained dogs operate with scientific precision, or that they can be counted on invariably to detect only unlawful activity (in which no one has a legitimate expectation of privacy), without ever uncovering facts about lawful activity that citizens have a right to keep secret, the assumption is incorrect. Indeed, research shows that the reliability of drug-detection dogs varies widely, based on several factors, including the degree of its training and the skill and attitude of its trainer. In addition, false alerts are more likely to occur where dogs are deployed without

individualized suspicion. When full searches are conducted on predictably false alerts, dogs will uncover facts that fall predictably within a citizen's legitimate expectation of privacy and deserve constitutional protection.

In a sense, this case narrowly involves the use of trained dogs in the context of individual automobile stops. In another sense, however, this case raises a more general question: the extent to which the use of any investigative tool will be deemed to comport with constitutional requirements in particular circumstances. For this reason, the specific circumstances are critical. Legitimate expectations of privacy are strongest, of course, when rooted in the home, weakest when the citizen is present in a public place such as airports, where the government's legitimate interest is significant. The nature of the specific investigative tool is also important, of course. While drug-detection dogs are involved here, other intrusive techniques, such as DNA testing and advanced imaging technologies, may very well be implicated by the Court's decision in this case. We also emphasize, contrary to the State's argument, that it makes little difference whether the appended investigative intrusion constitutes a "search" or is simply an extension of the scope of the initial stop. In either case, the relevant question is whether the government's use of a particular investigative tool bears an appropriate relationship to the government's original justification for the stop. If not, it must be independently justified based on individualized suspicion. When such individualized suspicion is lacking, as it was here, the Constitution does not allow the police to convert a routine traffic stop into an intrusive drug investigation.

ARGUMENT

I. By Changing The Nature, Quality And Duration Of A Simple Traffic Stop, The Deployment Of A Drug-Detection Dog Violates The Fourth Amendment By Extending The Stop Beyond Its Permissible Scope.

Millions of people in the United States drive automobiles every day. They go to work. They look for work. They go to church. They go shopping. They pick up their children at school and sports. They go to sporting events. They go to the movies. They go to the hospital. They take their neighbors to the doctor. They visit their lawyers. They travel to serve on juries.

Most of them, from time to time, drive a few miles over the speed limit. Some also have broken tail-lights or turn signals that they do not know about or are meaning to have fixed. Others forget to use their seat belts. Others forget that a right turn on a red light is not permitted at a particular intersection. Others sometimes fail to pull back into the right-hand lane after they have passed another car. Others miss a yield sign in an unfamiliar neighborhood.

Of course, a police officer would have probable cause to stop each of those motorists and issue a citation. The motorists understand that, and they expect to be detained briefly, while the officer asks for their names, checks their driver's licenses, and issues an appropriate citation. They reasonably expect that they will then be free to continue their journeys.

A motorist also reasonably expects not to be detained longer than necessary, not to be harassed, and not to have her trunk, let alone her person, searched, without individualized suspicion, and certainly not as a matter of routine. Nor does she expect to have her car or person sniffed for drugs simply because a canine officer with time on his hands has heard on

the police radio that "a motorist has been stopped" – for exceeding the speed limit, for having a faulty tail-light, or for changing lanes precipitously – and chooses to come unbidden to the scene. That is because the Fourth Amendment requires that a seizure be reasonable, both at its inception and in its conduct, and that the scope and conduct of the seizure be reasonably related to its rationale.

A. The Use of a Drug-Detection Dog During a Routine Traffic Stop is Wholly Unrelated to the Basis for the Stop and Requires Independent Justification.

When police detain a motorist for a traffic violation, a seizure is effectuated. *See Berkemer v. McCarty*, 468 U.S. 420, 436-37 (1984); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). To pass muster under the Fourth Amendment, such a seizure must be shown to be reasonable, both in the sense of being justified at its inception and in the additional sense of being conducted in an appropriate manner. *See Prouse*, 440 U.S. at 654; *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968). Thus, the encounter should be "limited," and the detention of a motorist "brief." *Berkemer*, 468 U.S. at 437. Most important, as this Court frequently has observed, such seizures must be limited in scope to the purpose that initially gave rise to the government intrusion. *See Hiibel v. Sixth Judicial District Court,* 124 S. Ct. 2451, 2458 (2004); *Berkemer*, 468 U.S. at 439; *Terry*, 392 U.S. at 28-29.

Though justified at its inception, therefore, even a traffic stop supported by probable cause will violate the Fourth Amendment if it is conducted in an unreasonable manner, or if its scope is extended beyond its rationale, without independent probable cause or reasonable suspicion to support the extension. A stop must be reasonable from beginning to end, and reasonableness depends as much on execution as on initial justification. *See United States v. Ortiz*, 422 U.S. 891, 895 (1975); *Terry*, 392 U.S. at 28-29.

The use of a drug-detection dog necessarily extends the scope of a routine traffic stop, and, absent independent justification or consent, violates the Fourth Amendment.[2]

A drug-detection dog adds no value to the investigation of a simple traffic infraction. A trained dog cannot ascertain the speed at which a vehicle was traveling or the true state of an apparently broken tail-light, let alone the real identity of a detained motorist. Nor are the services of a drug-detection dog useful with respect to any of the other purposes for which a routine traffic stop may be made. What drug-detection dogs are used for is investigating the presence of drugs – a legitimate matter for investigation, to be sure, but not one with any reasonable connection to the class of infractions that result in a routine traffic stop. Thus, the use of such dogs necessarily extends the scope of a routine traffic stop into a different and unrelated area of law enforcement activity. The Fourth Amendment prohibits the police from crossing that line, absent independent probable cause, or at least individualized suspicion, depending on the nature and quality of the additional intrusion. If individuals were subject to such arbitrary governmental treatment every time they violated a traffic ordinance, the security guaranteed by the Fourth Amendment would disappear.

Nonetheless, the State seems to believe that a motorist's full enjoyment of her Fourth Amendment rights depends serendipitously upon her not falling subject to a valid traffic stop. In the State's view, a valid stop confers a kind of "wild

---

[2]Of course, a more extensive investigation may also be conducted in connection with the effectuation of a custodial arrest. *See, e.g., United States v. Robinson*, 414 U.S. 218 (1973). It is clear, however, that the "search incident to arrest" exception applies only in cases in which an arrest is actually made, and not in cases in which such an arrest *could* have been made. *See Knowles v. Iowa*, 525 U.S. 113 (1998).

card" upon the police. Thus, while the police cannot lawfully stop a car for a random drug inspection, the State contends that the same drug inspection may go forward once the car has been stopped for an unrelated traffic law enforcement reason, such as a faulty tail-light or a child who has wriggled out of his seatbelt. The State's reasoning is contrary to the fundamental Fourth Amendment requirement that a search or seizure not exceed the scope of its rationale.

Of course, individualized circumstances may justify an expansion of the scope of a traffic stop. In *New York v. Belton*, 453 U.S. 454 (1981), for example, the scope of a routine traffic stop was properly expanded when the investigating officer smelled marijuana and noticed the presence of drug paraphernalia in plain view. *Id*. at 455. But the expansion of the scope of a traffic stop cannot be justified without such individualized circumstances. The Court emphasized that point in *Knowles v. Iowa*, 525 U.S. 113 (1998), where it rejected the contention that a police officer was entitled to do a full search of the car because he lawfully *could* have arrested the motorist, even though he had not actually done so. *Id*. at 114. In these circumstances, the Court held, a search was not permissible without independent justification, such as a reasonable belief that the motorist was armed. *Id*. at 118-119.[3]

---

[3] Here, the decision of the Illinois Supreme Court properly may be understood as focusing on the question whether sufficient grounds existed to extend the investigation beyond the scope of the routine traffic offense that led to the stop. It was not error to liken the permissible scope of a seizure justified by a routine traffic stop to the standards that this Court first articulated in *Terry*. *See* Pet. App. 3a. Indeed, this Court stated in *Berkemer*, and reiterated in *Knowles*, that a simple traffic stop that results only in the issuance of a citation is akin in nature and scope to a *Terry* stop, and the correct Fourth Amendment analysis of such a stop therefore resembles that applicable to a *Terry* stop. *Berkemer*, 468 U.S. at 439;

The scope requirement is essential to one of the fundamental purposes of the Fourth Amendment: protecting citizens against "police conduct which is overbearing or harassing," or which otherwise interferes with essential personal liberty and security. *Terry*, 392 U.S. at 15. As this Court observed long ago, the Fourth Amendment was designed to protect citizens from indiscriminate police actions. *Warden v. Hayden*, 387 U.S. 294, 301 (1967). "It was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect against invasions of the 'sanctity of a man's home and the privacies of life.'" *Id*., *quoting Boyd v. United States*, 116 U.S. 616, 630 (1886).

Consistent with these principles, a routine traffic stop cannot be deemed a "free pass," whereby the scope requirement is set aside, and the police are automatically empowered to undertake whatever additional, unrelated and intrusive investigation they see fit, simply because a motorist has fallen subject to their dominion by driving a mile or two above the speed limit or by forgetting to replace the bulb in his tail-light. If, in a particular case, the scope of a routine traffic search is to be expanded beyond the reasons for which

---

Knowles, 525 U.S. at 116-119. Thus, the State's insistence (Pet. Br. 13-17) that a routine traffic stop based on probable cause is categorically and invariably different from a *Terry* stop is wide of the mark. Clearly, what is constitutionally permissible in a traffic stop that does not result in a custodial arrest is different from what would be permissible in a traffic stop that does result in a custodial arrest. *See, e.g., United States v. Jackson*, 377 F.3d 715, 717 (7th Cir. 2004) (Easterbrook, J.) ("And as *Knowles* explained it is *custody*, and not a stop itself, that makes a full search reasonable: officers' needs to protect themselves and preserve evidence are what justify the rule allowing searches of arrested persons.") (emphasis in original). Thus, the type of analysis undertaken by the Illinois Supreme Court was plainly appropriate.

the stop was initiated, that move must be supported by some independent showing of individualized suspicion. It cannot be automatic.

B. The Use of a Drug-Detection Dog During a Routine Traffic Stop Impermissibly Alters the Nature and Quality of the Stop.

The introduction of a drug-detection dog transforms a simple traffic stop into a public drug investigation, which is materially different, not simply in scope, but also in nature and quality, from the stop that was initially authorized by virtue of the motorist's traffic infraction. When the investigative focus shifts from broken tail-lights to possible drug offenses, and entails the use of drug-detention dogs, the nature and quality of the stop are fundamentally changed. To determine whether this additional intrusion satisfies constitutional requirements, "the nature and quality of the intrusion on the individual's Fourth Amendment interests [must be balanced] against the importance of the governmental interests alleged to justify the intrusion." *United States v. Place*, 462 U.S. 696, 703 (1983). *See Prouse*, 440 U.S. at 654; *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976).

1. The Use of Drug-Detection Dogs During Routine Traffic Stops Subjects Motorists to Drug Screenings Conducted in a Random Manner.

The State argues (Pet. Br. 6-10) that a valid stop for any traffic violation vests the police with absolute discretion to investigate the car and all of its occupants for possible drug offenses, and that the deployment of a drug-detection dog requires no justification independent of the reason for the initial stop. Whether they exercise that discretion in a particular case, according to the State, is entirely up to the

police, because they have the power to do so in all cases, automatically and as a matter of course.

As the facts of this case demonstrate, the State believes that police need no reasoned basis for choosing to investigate one stopped car rather than another. They may pick a car at random. They may pick a car based on its color. They may make the decision based on stereotypes concerning the motorists. The decision may be made by an officer at the scene, either before or after some preliminary investigation, or, as here, by a canine officer who knows nothing of the situation on the ground, but has time on his hands and hears on the radio that "a motorist has been stopped for speeding."[4] Notwithstanding the State's admittedly important interest in intercepting illegal drugs, it is difficult to see how that interest could justify such arbitrary law enforcement practices.

But it is not difficult to understand that becoming the subject of a public drug screening, with its attendant annoyance, notoriety, and embarrassment, is materially different for motorists than simply being stopped for speeding or driving with a noisy muffler, being given citations, and being sent on their way. Unlike a simple traffic stop, the addition of a drug investigation component may well entail the presence of multiple police officers and a second, specially marked "K-9 unit" police car, and, by definition, the presence of a drug-detection dog circling the

---

[4] Here, of course, the officer with probable cause to stop the vehicle did not request the assistance of the canine unit. (Pet. App. 2a.) Nor, apparently, did anyone in the chain of command order the canine unit to the scene. The canine officer, who knew nothing more than the fact that a car had been stopped for speeding, decided to commence a drug investigation. (*Id*.) He simply advised the dispatcher that he was on the way. (*Id*.)

stopped vehicle. Passers-by – whether interstate travelers or the motorist's neighbors – are likely to view this amplified stop as "a crime scene," and assume that more is amiss than a broken tail-light. At all events, the deployment of a canine unit is an exceptional act that casts suspicion, and unmerited attention, on the vehicle and its occupants. To permit such harm to be visited on citizens by a street-level police officer acting arbitrarily, without any reasonable basis to suspect drug possession, is itself extraordinary. It is also contrary to the core meaning of the Fourth Amendment.

The specific impetus for any police investigation must always play a central role in defining its permissible scope. That principle applies with special force in circumstances where, as here, the relevant jurisprudence of this Court establishes that the police have no Fourth Amendment obligation to explain why they have chosen to stop one motorist violating traffic laws rather than another. *See Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); *Whren v. United States*, 517 U.S. 806 (1996). The very absence of any requirement that the police explain their reasons for focusing on a particular individual makes it all the more important that the investigation be held to its proper scope and not be used as a reason for commencing some unrelated, intrusive investigation that the police might find interesting to pursue. Indeed, in these circumstances, a contrary rule would vest the state with unbounded discretion to initiate criminal investigations against anyone who exercises the privilege of driving, and does so in a less than perfect manner. That is not a reasonable interpretation of the Fourth Amendment.

As this Court has previously noted, "[t]he essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order to safeguard the privacy and security of individuals

against arbitrary invasions." *Prouse*, 440 U.S. at 653-54. *See also Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). To single out an individual for public investigation without individualized suspicion is the essence of such arbitrary action.

In *Prouse*, of course, the police were stopping cars on a random basis. *See Prouse*, 440 U.S. at 650-651. There, the arresting officer decided to stop the car simply because he "saw the car in the area and wasn't answering any complaints." *Id*. The police action here is different from *Prouse* (where the stop itself violated the Fourth Amendment), but it is no less arbitrary. In both cases, the police decided to take some action (the stop in *Prouse*, the post-stop drug investigation here) for no better reason than the fact that they *could*. Both actions were taken with no "legitimate basis upon which a patrolman could decide that [investigating] a particular driver . . . would be more productive than [investigating] any other driver." *Id*. at 661. In *Prouse*, the Court specifically noted the arbitrary nature of the police action in that case, and recognized that "sporadic and random stops of individual vehicles making their way through city traffic [are to be distinguished from] those stops occasioned by roadblocks where *all* vehicles are brought to a halt or to a near halt, and *all* are subjected to a show of the police power of the community." *Id*. at 657 (emphasis added).[5]

[5] Among other things, the Court recognized that checkpoint investigations do not entail the same stigma or potential for fear and annoyance: "[a]t traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." *Id*. *See also United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) ("[e]xcept at the border and its functional equivalents, officers on roving patrol may

But even the law relating to roadblocks is not sufficiently capacious to provide support for the State in this case. As the Court recognized in *Edmond*, even that body of case law cannot justify suspicionless investigations "designed primarily to serve the general interest in crime control." *Edmond*, 531 U.S. at 42. The Court noted:

> We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion. We suggested in *Prouse* that we would not credit the "general interest in crime control" as justification for a regime of suspicionless stops. . . . Consistent with this suggestion, each of the checkpoint programs that we have approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety. Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.

---

stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.)" In *Edmond,* the Chief Justice, who would have found no violation of the Fourth Amendment on the facts of that case, specifically emphasized the differences between "roving patrols" and the "regularized manner" in which checkpoint stops are conducted. 531 U.S. at 49-50 (Rehnquist, C. J., dissenting).

Edmond, 531 U.S. at 41-42 (citation omitted).[6] Similarly, the existence of a valid traffic stop cannot by itself serve to justify the commencement of a suspicionless, unrelated drug investigation. Without independent justification, the transformation of a traffic stop into a drug investigation, at the sole discretion of a street-level police officer acting on his own initiative, is precisely the kind of "standardless and unconstrained discretion" that this Court has previously condemned. *Edmond*, 531 U.S. at 39, *quoting Prouse*, 440 U.S. at 661.

In sum, the use of a drug-detection dog at a routine traffic stop, even where the stop itself is based on probable cause, impermissibly alters the nature and quality of the stop. Given the absence of any logical relationship between traffic violations and drug offenses, the transformation of a traffic stop into a drug investigation is simply arbitrary. Absent at least reasonable suspicion, such a drug investigation cannot withstand Fourth Amendment scrutiny.

2. The Presence of a Dangerous Dog Creates an Intimidating Environment for Motorists.

The introduction of a drug-detection dog into a routine traffic stop is not unobtrusive; nor is it akin to the use of an antiseptic, scientific instrument. The mere presence of a

---

[6] As the Court pointed out, it has frequently approved checkpoint programs for such purposes as "policing the border or … ensuring roadway safety." *Id*. at 41. Recognizing that the scope of a traffic stop may not be expanded to include a drug investigation, without individualized suspicion, is not in any way inconsistent with those precedents. Nor is there any reason to believe that insisting that traffic stops normally be held to their original scope would affect in any way the ability of law enforcement officials to mount checkpoint programs designed to preserve public safety by checking for drunk drivers or the presence of explosive devices. *Compare Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), *with Edmond*, 531 U.S. at 42.

drug-detection dog is intimidating. As one judge has noted, "drug dogs are not lap dogs." *United States v. Williams*, 356 F.3d 1268, 1276 (10th Cir. 2004) (McKay, J., dissenting). Drug detection dogs "typically are large, and to many ordinary innocent people, fearsome animals." *Id*. They may or may not be trained to attack on command, but many motorists will undoubtedly believe that they are, and will therefore be frightened by them. *See People v. Lynch*, 609 N.E.2d 889, 891 (Ill. App. Ct. 1993) (luggage was transported to DEA office for canine search because narcotics detection dog was trained to attack and could not be released near public).[7]

That the handlers of such animals are uniformed officers is not likely to assuage the fears of otherwise frightened motorists. Indeed, the United States Department of Justice has expressed concern about the number of suspects and arrestees who have been bitten by police dogs in recent years. For example, the Department noted that the deployment of

---

[7] Not surprisingly, several state courts have held that dogs may be classified as deadly weapons, depending on breed, training, and handler, for purposes of deadly force statutes. In *Commonwealth v. Tarrant*, 314 N.E.2d 448 (Mass. App. Ct. 1974), for example, the Massachusetts Appellate Court found that a particular German Shepherd was a dangerous weapon. The *Tarrant* court noted that "[i]t is common knowledge that dogs can be instructed to attack persons on command, thus being used as instruments of harm, and we take judicial notice of the fact that dogs so trained are frequently used in police units known as 'K-9 Corps.'" 314 N.E.2d at 451 (citation omitted). *See also People v. Kay*, 328 N.W.2d 424 (Mich. App. Ct. 1982) (German Shepherd was a dangerous weapon within meaning of statute proscribing assault with dangerous weapon); *State v. Bowers*, 721 P.2d 268 (Kan. 1986) (Doberman Pinschers were deadly weapons for purposes of criminal statute). More generally, the widespread fear of dogs is reflected in the practice of posting "Beware of Dog" signs by property owners, whether they have dogs or not.

canine units in one jurisdiction between 1996 and 1999 resulted in bites nearly 70% of the time – far above the 10% level the Department considers acceptable. *DOJ's Findings Letter re: Use of Force by the Washington Metropolitan Police Department*, available at http://www.usdoj.gov/crt/split/documents/dcfindings.htm (visited 09/14/04). The Department has identified inadequate handler training as the likely source of this unacceptable incidence of dog bites. *See id.*; *DOJ's Investigation of the Miami Police Department; Memorandum of Agreement Between the United States Department of Justice and the City of Cincinnati, Ohio and the Cincinnati Police Department*, available at http://www.usdoj.gov/crt/split/Cincmoafinal.htm (visited 09/14/04).

Moreover, dogs have been used to frighten people throughout our history, and they have sometimes been used for that purpose by law enforcement officials. *See, e.g., State v. Storm*, 238 P.2d 1161, 1178-1181 (Mont. 1951) (discussing the use of dogs for tracking and intimidating slaves). In the 1960s, many people were exposed to photographs and films of police dogs being used to intimidate children and other civil rights protesters. *See, e.g.,* Taylor Branch, PILLAR OF FIRE: AMERICA IN THE KING YEARS, 1963-65 77 (1998) ("Police dogs tore into the march lines and high-powered fire hoses knocked children along the pavement like tumbleweed. News photographs of the violence seized millions of distant eyes, shattering inner defenses."). Many who saw those photographs well remember those scenes, to say nothing of those who were present.

Finally, the intimidating demeanor of dogs has been recognized in a number of federal criminal cases in which citizens have been successfully prosecuted for using dogs to intimidate federal law enforcement officials. *See United States v. Hoff*, 22 F.3d 222 (9th Cir. 1994) (affirming district

court's affirmance of magistrate judge's finding that defendant at illegal campsite intimidated forest ranger by saying "go get 'em" three times to defendant's companion's growling dog): *United States v. Caruana*, 652 F.2d 220 (1st Cir. 1981) (affirming jury verdict where two Doberman Pinschers were released onto porch to intimidate FBI agents attempting to serve subpoena).

Among other things, these criminal prosecutions show that even professional law enforcement officials have recognized that large, ferocious dogs can be quite threatening. If threatening to law enforcement officials cloaked with the authority of the state and specifically trained to deal with dangerous situations, all the more so for an ordinary citizen, who faces the power of the state in the person of one or more officers on the scene, and, of course, the dog himself.

3. The Use of a Drug-Detection Dog During a Routine Traffic Stop Will Often Extend the Duration of the Seizure.

The use of a routine traffic stop to conduct a suspicionless drug investigation violates the Fourth Amendment by unreasonably altering the nature and quality of the stop. In addition, the duration of the stop often will be extended as well. Often, as here, a motorist will not be stopped by a canine unit. A traffic officer will make the stop, and a canine unit will then be requested, or, as in this case, will volunteer for duty. The unit may be close by, or it may be some distance away. In either event, it will take some amount of time for the canine unit to make its way to the investigation site.

In some cases, the time necessary for the arrival of the canine unit will not extend the time ordinarily necessary for the officer on the scene to perform the duties normally incident to a traffic stop. In other cases, of course, the

distance to be traveled will be greater than that, and the time necessary for the arrival of the canine unit may well exceed the amount of time ordinarily necessary to perform those tasks. In the latter case, a police officer will be sorely tempted to ask a few more questions, to take his time contacting the dispatcher with respect to a warrant search, and so forth. Once he is told that a canine unit is on the way, the officer on the scene will certainly do his best to avoid having to tell the canine officer (or his own supervisor) that there is no car available to investigate because the officer completed his processing of the traffic violation and was able to send the car on its way a moment or two before the canine officer's arrival at the scene. To expect otherwise is to ignore the realities of human nature. *See*, *e.g.*, *People v. Luna*, 752 N.E.2d 477, 479 (Ill. App. Ct. 2001) (finding that officers improperly "stalled" to ensure that dog would arrive before traffic stop was completed); *People v. Koutsakis*, 649 N.E.2d 605, 608-09 (Ill. App. Ct. 1995) (same).

Of course, prolonging the duration of a traffic stop will violate the Fourth Amendment, even when the initial stop was supported by probable cause. *See, e.g., Florida v. Royer,* 460 U.S. 491, 500 (1983) (White, J.) (plurality opinion) ("This much … is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"); *Joshua v. DeWitt*, 341 F.3d 430 (6th Cir. 2003); *United States v. Santiago*, 310 F.3d 336 (5th Cir. 2002). But to say that police officers should not drag out their inquiries is to state a precept that will often prove unenforceable as a practical matter. In many cases, it will be difficult for a motorist, or for a court, to determine whether a police officer may have extended the duration of his legitimate traffic investigation in order to provide sufficient time for a colleague to arrive on the scene and begin a drug investigation. Moreover, the question normally will not even

be presented for decision unless drugs have been found and a drug prosecution ensues. Otherwise, the issue will be raised only in those instances when a motorist has been able to ascertain that the duration of the stop was unreasonably extended, and has the fortitude and the means to bring a civil rights action. Notwithstanding the State's view that the Court should adopt the principle that "anything goes," so long as there are reasonable grounds for a stop and it does not take "too long" (*see* Pet. Br. 15), an individual's Fourth Amendment interests cannot be measured purely in temporal terms.[8]

The only reasonable solution is to remove the incentive for the police officer to extend the necessary duration of the stop by restricting the scope of the stop to its actual purpose, and not permitting drug investigations to be appended serendipitously to valid traffic stops.

C. This Court's Prior Cases Do Not Support The Proposition That Probable Cause to Conduct a Traffic Stop Justifies an Intrusive, Unrelated Drug Investigation.

That Trooper Gillette had probable cause to stop respondent for speeding did not justify the commencement of a drug investigation. The State Amici (Ark. Br. 14-15) base

---

[8] Whether a stop is "too long" is not a question that the courts have answered with any degree of consistency. *See, e.g., Joshua v. DeWitt*, 341 F.3d at 445 (42-minute stop unreasonable); *United States v. Raynor*, 2004 U.S. App. LEXIS 18845, *8 (10th Cir. 2004) (47-minute stop reasonable); *United States v. Brigham*, 343 F.3d 490, 501 (5th Cir. 2003) (any unnecessary delay unreasonable) *People v. Cox*, 782 N.E.2d 275, 281 (Ill. App. Ct. 2002) (Illinois courts require reasonable suspicion to extend routine traffic stop beyond 15 minutes). Thus, reliance on duration as a dispositive factor would create great uncertainty for citizens, the police, and the courts.

their contrary contention on the assertion that the decisions in *Whren* and *Atwater* mandate a different rule where traffic stops are supported by probable cause. Neither case supports that assertion.

In *Whren*, this Court held only that the existence of probable cause to effectuate a traffic stop will preclude an inquiry into a police officer's actual motivation for making the stop, when evidence of other criminal activity is discovered in the ordinary course of investigating and administering the stop, so long as the stop itself was not "conducted in an extraordinary manner unusually harmful to an individual's privacy or even physical interests." *Whren*, 517 U.S. at 818. Similarly, the Court held in *Atwater* that the existence of probable cause to effectuate a custodial arrest for a traffic infraction will preclude an inquiry into a police officer's actual motivation for making the arrest, subject to the same individual privacy interests. *Atwater*, 532 U.S. at 354.

The State Amici's reliance on these cases is misplaced. Neither decision even deals with possible grounds for expanding a seizure beyond its original scope; nor does either case suggest any basis for asserting that the existence of probable cause to make a routine traffic stop necessarily vests the police with absolute discretion to expand the scope of the traffic stop into an intrusive, unrelated drug investigation, unfettered by otherwise applicable Fourth Amendment requirements. On the contrary, these decisions make clear that the existence of probable cause authorized Trooper Gillette (regardless of any subjective motivation he may have had) to undertake actions reasonably incident to the investigation of a traffic stop, including the making of a custodial arrest, so long as those actions did not constitute extraordinary or serious intrusions on individual privacy. The case law does not authorize the transformation of a traffic

investigation into a drug search, absent the existence of individualized suspicion to do so.

The Court's unanimous decision in *Knowles* illustrates the basic principle that the grounds supporting a particular seizure that was (or could have been) made cannot automatically be invoked to justify a search or seizure of differing scope. 525 U.S. at 117 (historical rationales for the "search incident to arrest" exceptions inapplicable to routine traffic stops.) In *Knowles*, the police officer could have conducted a full search of the motorist's car if he had effectuated a custodial arrest (which he was authorized by state law to do), but he chose to issue a citation instead. *Id*. at 114-15.[9] Having chosen to issue a citation, his search of the car could not be justified, the Court held, by the fact that he *could* have arrested the motorist. *Id*. at 116-17. What he could have done, but did not do, was simply immaterial. In reaching that conclusion, the Court reiterated its observation in *Berkemer* that a routine traffic stop "is more analogous to a so-called '*Terry* stop' . . . than to a formal arrest." *Id.* at 117, *quoting Berkemer*, 468 U.S. at 439.

Had the officer in *Knowles* effectuated a formal arrest, the Fourth Amendment would have permitted a more extensive search. But absent an arrest, probable cause to effectuate a

---

[9] Under Illinois law, Trooper Gillette likewise could have effectuated a formal arrest. *See* 165 ILCS 5/16-102 (authorizing arrest for violation of any provision of Illinois motor vehicle code); *People v. O'Brien*, 591 N.E.2d 469, 472 (Ill. App. Ct. 1992) (recognizing probable cause to arrest for speeding). Of course, a police officer may also ask for consent to search an automobile even when he does not choose to make an arrest. *See Ohio v. Robinette*, 519 U.S. 33 (1996). Here, Trooper Gillette made that request before the arrival of the canine unit, but respondent declined to authorize the search. The power to arrest, together with the authority to request consent, equips the police with all of the authority they require to extend the scope of an investigation.

traffic stop conferred no special investigative authority. *Knowles* and *Terry* are cut from the same Fourth Amendment cloth: the police must have individualized grounds for conducting their investigative activities. *Whren* and *Atwater* stand for the corollary proposition that when the police have such reasonable grounds, the subjective motivations of individual police officers ordinarily do not warrant scrutiny in individual cases.

Here, it is *Knowles* that provides the relevant analytic framework.[10] Trooper Gillette made a judgment in the field and decided to give respondent a warning, not even a citation. That should have ended the matter, regardless of how good the grounds were for the initial stop or the warning. There were no grounds at all, much less individualized suspicion, to start a drug investigation. The Fourth Amendment simply does not countenance suspicionless drug investigations incidental to traffic stops.

II. The Use Of A Drug-Detection Dog In The Investigation Of An Individual Motorist Is A Fourth Amendment Search Requiring Independent Justification.

The issues in this case are properly resolved by viewing the use of a drug-detection dog as entirely unrelated to the grounds for the initial seizure, that is, respondent's having exceeded the speed limit by six miles per hour on an interstate highway, and unsupported by any additional justification for extending the scope of that initial seizure to include a drug investigation. (*See* pages 8-12, *supra*.) The

[10] In light of *Knowles*, the State's reliance on *Atwater* to describe the proper scope of a traffic stop supported by probable cause (Pet. Br. 15) is perplexing. In its brief, the State fails to mention *Knowles*, much less to offer any reason to distinguish its holding that the difference between an actual arrest and one that *might* have occurred is dispositive.

Court may also resolve the issues in this case by holding that the deployment of a drug-detection dog was itself a "search" in the circumstances of this case, and therefore required at least a showing of reasonable suspicion, in its own right.

This Court's decision in *Place* is not to the contrary. There, the Court found no Fourth Amendment "search" when the police at one international airport had reasonable grounds to believe that drugs were contained in luggage bound for another international airport and used drug-detection dogs to inspect it. The Court's determination was based on certain assumptions about the nature of search dogs. Specifically, the Court took for granted the notion that the dog in question was "a well-trained narcotics detection dog," and that such dogs can be relied upon to "alert" only to contraband items. *Place*, 462 U.S. at 707. In light of these assumptions, the Court held that "the canine sniff is *sui generis*" and should not be characterized as a Fourth Amendment "search." *Id.*[11]

In *Kyllo,* the Court considered a somewhat different type of investigatory device which also functioned by amplifying human senses. There, the Court held that the use of a thermal imaging device aimed at a private home did constitute a Fourth Amendment search. The Court emphasized that this device was capable of providing information about the occupants' lawful as well as unlawful activities. 533 U.S. at 37-38. The technology involved in *Kyllo* could provide a basis for determining whether powerful lamps were being used, possibly for the purpose of growing marijuana, but it

[11] In *Edmond*, the Court repeated *Place*'s characterization of the activities of drug-detection dogs in the context of a challenge to an automobile checkpoint. *Edmond*, 531 U.S. at 40. In *Edmond*, however, the Court found that the checkpoint itself was an unconstitutional seizure, which obviated any need for an extended consideration of the search issue. *See* pages 16-17, *supra*.

likewise could provide information about the occupants' bathing and sauna routines. *Id*. at 38. In determining that the use of this device did constitute a search, the Court returned to first principles. The Court's holding proceeded from the principle, first articulated by Justice Harlan in his concurring opinion in *Katz,* that "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo,* 533 U.S. at 33, *citing Katz,* 389 U.S. at 361 (Harlan, J., concurring). Applying that principle to the canine sniff at issue in the materially different circumstances of this case leads to the conclusion that here, unlike *Place*, the deployment of a drug-detection dog did constitute a Fourth Amendment search.

To be sure, an automobile does not have the constitutional status of a dwelling place. *See United States v. Karo*, 468 U.S. 705, 714-15 (1984) ("[P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable"); *Silverman v. United States*, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right … to retreat into his own home and there be free from unreasonable governmental intrusion"); *New York v. Class*, 475 U.S. 106, 114-15 (1986) ("While the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one's home, a car's interior as a whole is nonetheless subject to Fourth Amendment protection from unreasonable intrusions by the police"). It is also the case, however, that a motorist has a far greater expectation of privacy with respect to the interior of her private automobile than a passenger *en route* between two international airports has in luggage which he proposes to take aboard an airplane. *Cf. Place*, 462 U.S. at

707 ("exposure of respondent's luggage, *which was located in a public place*, to a trained canine [] did not constitute a 'search' within the meaning of the Fourth Amendment") (emphasis added). An automobile is a place in which most people spend a good part of their lives, and with respect to which they have an enhanced expectation of privacy. It is also the case that that enhanced privacy expectation is one which society deems reasonable.

Everyone knows that airline passengers cannot reasonably expect to board an airplane without exposing their luggage to forms of inspection that are far more intrusive than a canine sniff. The vital national interest in the security of the air transport system would be crippled by the recognition of any other expectation. That is simply not the case with individual motorists. Surely, we have not reached the point where people cannot reasonably expect to have their cars secure from inspection by drug-detection dogs. In terms of societal norms regarding reasonable privacy expectations, the secured areas of personal automobiles are much closer to the homes involved in *Kyllo* than to the airports in *Place.* Thus, the use of dogs in this case was a Fourth Amendment search in its own right and required a legitimate police interest to disregard the normal requirement of a warrant, and at least individualized grounds to suspect unlawful activity.

The State's exceptionally narrow view with respect to what generally recognized expectations of privacy should be deemed reasonable and therefore protected by the Fourth Amendment portends far more extensive intrusions into personal realms. Evolving technology promises almost unlimited possibilities for transforming routine traffic stops into far-reaching, multi-purpose investigations. Already, the police have begun to use portable devices which permit the acquisition of fingerprints and palmprints from automobile occupants in a traffic stop. *See*, *e.g.*, *Palm-Print Readers:*

Police Cars to Get New Equipment, Columbus Dispatch at News 6B (Sept. 4, 2004). Other such devices will undoubtedly allow the police to acquire voice exemplars and other private information that may prove useful to them in the future. To be sure, the use of drug-detection dogs as a means of investigation does not represent the cutting edge of modern technology, but this case nonetheless provides both a harbinger of things to come and an opportunity to reiterate the principle articulated in *Kyllo*: That science and technology may increasingly provide government with the means to invade private realms in ever more subtle and genteel ways, but those private realms remain protected by the Fourth Amendment, and, no matter how subtle or genteel the means of invasion chosen by the government, unreasonable incursions into areas that society deems private cannot be permitted.

At all events, the *Place* Court's stated assumptions about the nature of "canine sniffs" simply have not been borne out by subsequent experience and research. Drug-detection dogs have proved to be less reliable and disciplined than the Court thought in *Place*, where it assumed that canine sniffs categorically "do[] not expose noncontraband items.*"*' 462 U.S. at 707. In fact, research shows that the reliability of dogs varies widely based on several factors, including the degree of its underlying training and the skill and attitude of its handler. Another significant factor is the randomness of the inquiry, with false alerts being much more likely in cases in which individualized suspicion is absent. *See* Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 420-25, 429-32 (1996). When full searches are conducted on predictably false alerts, dogs may well uncover facts that fall predictably within a citizen's legitimate expectation of privacy, and which are deserving of constitutional protection. Dogs have

also proven difficult to control and have sometimes engaged in unexpected intrusions into personal domains. *See, e.g., United States v. Winningham,* 140 F.3d 1328 (10th Cir. 1998) (officer's facilitation of canine's sniff of vehicle interior violates Fourth Amendment); *United States v. Stone,* 866 F.2d 359, 363 (10th Cir. 1989) (considering whether a drug-detection dog's unexpected leap into motorist's vehicle violates the Fourth Amendment).

Accordingly, the use of dogs by law enforcement officials may sometimes contravene societal norms of reasonable expectations of privacy. Regardless of their accuracy and reliability, therefore, the Court should hold that the use of dogs to amplify the human sensory capabilities of police in inspecting a motorist's private automobile is, in circumstances such as these, a "search" that requires an independent showing of individualized suspicion. To hold otherwise would be inconsistent with the fundamental principle which this Court traditionally has applied, and which should continue to be applied to emerging technologies, that is, the principle that the question whether an activity constitutes a "search" depends on the circumstances, and, ultimately, on whether the government has "violate[d] a subjective expectation of privacy that society recognizes as reasonable."

CONCLUSION

The judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

HARVEY GROSSMAN
SHANNON P. BARTLETT
ROGER BALDWIN FOUNDATION
OF ACLU, INC.
180 North Michigan Avenue
Suite 2300
Chicago, Illinois 60601
(312) 201-9740

BARRY SULLIVAN*
JACOB I. CORRÉ
LISA D. JOHNSON
JENNER & BLOCK LLP
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

*Counsel of Record

Attorneys for Amici Curiae