

Nos. 129201, 129237 Consolidated

In the Supreme Court of Illinois

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant v. RYAN DON SHAVOR REDMOND, Defendant-Appellee	On Appeal from the Appellate Court of Illinois, Third Judicial District, No. 03-21-0523 There on Appeal from the Circuit Court of the Fourteenth Judicial Circuit, Henry County, Illinois, No. 20 CL 27/20 TR 3348, The Hon. Daniel P. Dalton, Presiding
PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee v. VINCENT E. MOLINA, Defendant-Appellant	On Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 04-22-0152 There on Appeal from the Circuit Court of the Fourteenth Judicial Circuit, Whiteside County, Illinois, No. 20 TR 5612, The Hon. Daniel P. Dalton, Presiding

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, ACLU OF ILLINOIS, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND ILLINOIS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF MR. REDMOND AND MR. MOLINA

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Points and Authorities

Interest of Amici Curiae	1
Summary of the Argument	2
<i>People v. Redmond</i> , 2022 IL App (3d) 210524.....	3
<i>People v. Molina</i> , 2022 IL App (4th) 220152	4
Argument	4
A. Introduction	4
<i>People v. Redmond</i> , 2022 IL App (3d) 210524.....	4
<i>People v. Molina</i> , 2022 IL App (4th) 220152	4
B. Disproportionate Enforcement of Cannabis Laws Harms Black and Latino People	5
Jamie Fellner, <i>Race, Drugs, and Law Enforcement in the United States</i> , 20 STAN. L. & POL’Y REV. 257 (2009)	5
<i>Marijuana Arrests by the Numbers</i> , ACLU, https://www.aclu.org/gallery/marijuana-arrests-numbers (last visited Aug. 22, 2023)	5
<i>The War on Marijuana in Black and White</i> , ACLU (2013), https://www.aclu.org/report/report-war-marijuana-black-and-white	6-7
<i>A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform</i> , ACLU (2020), https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform	6-7
U.S. Dept. of Health & Hum. Servs., Substance Abuse and & Mental Health Servs. Admin., 2021 Nat’ Survey on Drug Use & Health (NSDUH), https://perma.cc/CE2E-2X4G	6
2021 NSDUH Annual Report (Dec. 2022), https://perma.cc/73WD-VZRV	6
Silvia S. Martins, Luis E. Segura, Natalie S. Levy et al., <i>Racial and Ethnic Differences in Cannabis Use Following Legalization in U.S. States with Medical Cannabis Laws</i> , 2021 JAMA NETWORK OPEN 1, https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2784528	6

John Hudak, <i>Marijuana’s Racist History Shows the Need for Comprehensive Drug Reform</i> , BROOKINGS INST. (June 23, 2020), https://www.brookings.edu/articles/marijuanas-racist-history-shows-the-need-for-comprehensive-drug-reform	7
<i>People v. Molina</i> , No. 20-TR-5612 (Ill. Cir. Ct. 2021).....	7
<i>People v. Hill</i> , 2020 IL 124595	7
C. Police Stop and Search Drivers of Color at Disproportionately High Rates Nationwide and in Illinois	8
<i>Contacts Between Police and the Public, 2020</i> , DEPT. OF JUSTICE BUREAU OF JUSTICE STATISTICS (Nov. 2022), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cbpb20.pdf	8
Charles R. Epp, Steven Maynard-Moody & Donald Haider-Markel, <i>PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP</i> (2014).....	8
Bernard E. Harcourt & Tracey L. Meares, <i>Randomization and the Fourth Amendment</i> , 78 U. CHI. L. REV. 809 (2011)	8
Emma Pierson et al., <i>A Large-scale Analysis of Racial Disparities in Police Stops Across the United States</i> , 4 NATURE HUMAN BEHAVIOUR 736 (2020), https://5harad.com/papers/100M-stops.pdf	8
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<i>Investigation of the City of Minneapolis and the Minneapolis Police Department</i> , U.S. DEP’T OF JUSTICE 32 (June 16, 2023)	8
David A. Harris, <i>PROFILES IN INJUSTICE</i> (2003).....	9
<i>State v. Pedro Soto</i> , 734 A.2d 350 (N.J. Sup. Ct. 1996).....	9
<i>Wilkins v. Maryland State Police</i> , Civ. No. MJG-93-468 (D. Md. 1993).....	9

William Cai, Johann Gaebler, Justin Kaashoek, Lisa Pinals, Samuel Madden & Sharad Goel, <i>Measuring Racial and Ethnic Disparities in Traffic Enforcement with Large-scale Telematics Data</i> , 2022 PNAS NEXUS 1, https://academic.oup.com/pnasnexus/article/1/4/pgac144/6652221	9
Ill. P.A. 93-0209	9
625 ILCS 5/11-212.....	9
<i>Illinois Traffic and Pedestrian Stop Study 2004 Annual Report: Traffic Stops</i> , ILL. DEP'T TRANSP., https://idot.illinois.gov/content/dam/soi/en/web/idot/documents/transportation-system/reports/safety/traffic-stop-studies/2004-illinois-traffic-stop-study.pdf (last visited Aug. 22, 2023)	9-10
<i>Illinois Traffic and Pedestrian Stop Study 2006 Annual Report: Traffic Stops</i> , ILL. DEP'T TRANSP., https://idot.illinois.gov/content/dam/soi/en/web/idot/documents/transportation-system/reports/safety/traffic-stop-studies/2006-illinois-traffic-stop-study-statewide-report.pdf (last visited Aug. 22, 2023)	10
Ill. P.A. 94-997	10
Ill. P.A. 95-290	10
Ill. P.A. 96-658	10
Ill. P.A. 98-686	10
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ACLU-IL, <i>Racial Disparity in Consent Searches and Dog Sniff Searches</i> , (Aug. 13, 2014), https://perma.cc/P6CC-832K	11
Nayak Polissar et al., <i>Illinois Traffic and Pedestrian Stop Study 2022 Annual Report: Traffic Stops</i> , ILL. DEP'T TRANSP. 2 (June 30, 2023), https://idot.illinois.gov/content/dam/soi/en/web/idot/documents/transportation-system/reports/safety/traffic-stop-studies/final--il-stop-study-2022-part-ii-traffic-stops--6-30-23.pdf	11-14
Claire J. Rice, <i>Failing the Sniff Test: Using Marijuana Odor to Establish Probable Cause in Illinois Post-Legalization</i> , U. CHI. L. REV. ONLINE (Sept. 23, 2022), https://lawreview.blog.uchicago.edu/2022/09/23/rice-probable-cause	11
ACLU-IL, <i>Racism in the Rear-view Mirror: Illinois Traffic Stop Data 2015-2017</i> , https://www.aclu-il.org/sites/default/files/racism_in_the_rear_view_mirror_il_traffic_stops_2015-2017.pdf (last visited Aug. 22, 2023)	11
Ill. P.A. 101-24	11

<i>King v. City of Chicago</i> , 22-cv-04604 (N.D. Ill. Jul. 11, 2023).....	12
D. Pretextual Traffic Stops Increase the Likelihood of Racial Profiling15	
Stephen Rushin & Griffin Edwards, <i>An Empirical Assessment of Pretextual Traffic Stops and Racial Profiling</i> , 73 STAN. L. REV. 637 (2021).....	15
Charles R. Epp, Steven Maynard-Moody & Donald Haider-Markel, <i>PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP</i> (2014).....	15-16, 18
<i>Whren v. United States</i> , 517 U.S. 806 (1996)	15
Jordan Blair Woods, <i>Traffic Without the Police</i> , 73 STAN. L. REV. 1471 (2021).....	15
David A. Harris, “ <i>Driving While Black</i> ” and All Other Traffic Offenses: The Supreme Court and Pretextual Stops, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997).....	15, 17
Alex Kreit, <i>Marijuana Legalization and Pretextual Stops</i> , 50 U.C.D. L. REV. 741 (2016).....	16-17
David Rudovsky, <i>The Impact of the War on Drugs on Procedural Fairness and Racial Equality</i> , 1994 U. CHI. LEGAL F. 237	16
<i>Illinois v. Caballes</i> , 543 U.S. 405 (2005).....	16
<i>Illinois State Police CRIMPAT/ Valkyrie Training</i> , 39 ILL. STATE POLICE (2013), https://www.aclu-il.org/sites/default/files/criminal_patrol_core_1.pdf	16
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- David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Probable Cause*, 3 U. PA. J. CONST. L. 296 (2001).....17
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E. The Harms of Pretextual Traffic Stops and Vehicle Searches, Including Those Based on the Alleged Odor of Cannabis Alone, Greatly Outweigh Any Perceived Benefits.....20

John MacDonald, Jeffrey Fagan, & Amanda Geller, *The Effects of Local Police Surges on Crime and Arrests in New York City*, PLOS ONE (June 16, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2614058.....21

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F. Pretextual Stops and Searches Based on the Alleged Odor of Cannabis Alone are Insulated from Judicial Scrutiny, Preventing Review of Baseless Police Actions.....22

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The Truth About Trials, MARSHALL PROJECT, <https://www.themarshallproject.org/2020/11/04/the-truth-about-trials>23

State v. Torgerson, 2023 WL 5944620 (Minn. Sept. 13, 2023)23

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Commonwealth v. Barr, 266 A.3d 25 (Pa. 2021)24

People v. Trone, 2021 WL 1205194 (Cal. App. Ct. 2d Dist. Mar. 30, 2021)24

State v. T.T., 479 P.3d 598 (Or. 2021).....24

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Zullo v. State, 205 A.3d 466 (Vt. 2019)24

Commonwealth v. Overmyer, 11 N.E.3d 1054 (Mass. 2014).....24

Commonwealth v. Cruz, 945 N.E.2d 899 (Mass. 2011).....24

United States v. Jackson, No. 23-1708 and 23-1721 (7th Cir. 2023).....24

Conclusion24

Certificate of Compliance.....26

Interest of Amici Curiae

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 harsh crime policies that result in mass incarceration and criminalization.

The ACLU of Illinois (“ACLU-IL”) is the state-wide Illinois affiliate of the ACLU. ACLU-IL is a private, nonprofit, nonpartisan organization supported by a membership of approximately 50,000 individuals. Its purpose is to protect the rights and liberties guaranteed to all Illinoisans by the United States and Illinois Constitutions. Among these rights is the right to be free from unreasonable searches and seizures, and the right to be free from unlawful discrimination on the basis of race and national origin, both of which are central to the legal question raised in this case.

The National Association of Criminal Defense Lawyers (“NACDL”) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 lawyers, and up to 40,000 with affiliates. NACDL’s members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration

of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal legal system as a whole.

The Illinois Association of Criminal Defense Lawyers (“IACDL”) is a nonprofit organization dedicated to defending the rights of all individuals as guaranteed by the United States Constitution and the Constitution of the State of Illinois. The organization’s membership includes private criminal defense attorneys, public defenders, and law professors throughout the State of Illinois. The IACDL’s mission is to serve as a leader, alongside diverse coalitions, in identifying and reforming flaws and inequities in the criminal legal system, redressing systemic racism, and ensuring its members and others in the criminal defense bar are fully equipped to serve all accused persons at the highest level. IACDL is committed to enhancing the criminal defense bar’s capacity to safeguard fundamental constitutional rights. It is an affiliate organization of the National Association of Criminal Defense Lawyers.

Summary of the Argument

Amici urge the Court to hold that the odor of burnt or raw cannabis—the possession and use of which is often legal under state law—does not alone provide a legally sufficient basis for police officers to search a vehicle pursuant to the motor vehicle exception to the Fourth Amendment’s warrant requirement. Such vehicle searches, typically following pretextual traffic stops, disproportionately burden Black and Latino drivers, who are likewise targeted for disparate enforcement of cannabis laws. The better policy, which will begin to remedy a long history and ongoing pattern of racially discriminatory law

enforcement, is to not allow officers to utilize what may be lawful behavior as an excuse to detain and search drivers—a disproportionate number of whom inevitably will be drivers of color.

Statistics show that police disproportionately target Black and Latino people for enforcement of cannabis laws, both in Illinois and throughout the United States. Data further establish that the Illinois State Police (who stopped both Mr. Redmond and Mr. Molina), as well as other police agencies in Illinois and nationwide, pull over and search motorists of color at disproportionately high rates. Pretextual traffic stops—those conducted for investigatory purposes and not for roadway safety—are a primary policing tool that drives these racial and ethnic disparities. The alleged odor of cannabis is one of the most common pretexts that police use for stopping and searching drivers, especially drivers of color. This is true despite the fact that white people and people of color tend to use and possess cannabis at similar rates.

Giving officers *carte blanche* to perform warrantless vehicle searches based only on the alleged odor of cannabis will judicially sanction the unacceptable racial and ethnic disparities among the drivers whom police officers stop and search. When police can conduct warrantless searches based on the alleged, unverifiable odor of cannabis without anything more, history and experience show that police will use that authority to disproportionately target and harm Black and Latino drivers.

In a state such as Illinois, where use and possession of certain amounts of cannabis is legally permitted, police must not be able to conduct a search or seizure based upon the odor of cannabis alone. *Amici* urge this Court to affirm the ruling of the Illinois Appellate Court for the Third District in *People v. Redmond*, 2022 IL App (3d) 210524, and reverse

the ruling of the Illinois Appellate Court for the Fourth District in *People v. Molina*, 2022 IL App (4th) 220152.

Argument

A. Introduction

An Illinois State Police Officer pulled over Defendant-Appellee Ryan Redmond on Interstate 80 in Henry County, Illinois, allegedly for driving three miles per hour over the speed limit and having an improperly secured rear license plate. *Redmond*, 2022 IL App (3d) 210524, at ¶ 3. The officer testified that he smelled the odor of burnt cannabis emanating from the vehicle, and he believed that odor alone gave him probable cause to search the car. *Id.* ¶¶ 4, 8. The officer admitted that Mr. Redmond did not appear to be impaired. *Id.* ¶ 5. The trial court found there were no circumstances other than the alleged odor of burnt cannabis giving rise to probable cause sufficient to justify a search of Mr. Redmond's vehicle. *See* A5 (Redmond Sp. App.). Upon searching, the ISP officer seized about one gram of cannabis from the center console of Mr. Redmond's vehicle and gave him a misdemeanor citation. *Redmond*, 2022 IL App (3d) 210524, at ¶ 9.

Defendant-Appellant Vincent Molina was a passenger in a car whose driver was stopped on an allegation of speeding by an Illinois State Police Officer in Whiteside County, Illinois. *Molina*, 2022 IL App (4th) 220152, at ¶ 5. Based solely on the alleged odor of raw cannabis emanating from the passenger side of the vehicle, the officer searched the car and located small amounts of cannabis packaged for personal use. *Id.* Mr. Molina told the officer before the search that he had a license for medical use of cannabis. *Id.* The officer nonetheless charged him with a misdemeanor for possession of improperly-secured cannabis by a passenger in a vehicle. *Id.* at ¶ 4.

Alleged speeding and license plate violations do not justify searching a car. The only claimed justification for the vehicle searches in these cases was the odor of raw or burnt cannabis and nothing more. The question presented is therefore whether the odor of cannabis alone is a sufficient basis for a warrantless vehicle search. *Amici* urge this Court to answer the question in the negative to protect the people of Illinois from the racially-biased misuse of vehicle stops by police. There is a decades-long pattern of police in this state using pretext like cannabis odor to disproportionately stop and search Black and Latino drivers, leading to tremendous harm for people of color in the name of seizing contraband that police rarely, if ever, actually find. A holding by this Court that the alleged odor of cannabis alone provided sufficient cause to search the vehicles in these cases will only exacerbate these inequities.

B. Disproportionate Enforcement of Cannabis Laws Harms Black and Latino People

For decades, police departments across the United States have disproportionately targeted Black and Latino individuals for investigation and enforcement of cannabis-related conduct.¹ Although Black people account for roughly 13% of the United States population, they are nearly four times more likely than white people to be arrested for a cannabis-related offense.² While the national arrest rate of white people for cannabis-related conduct remained largely constant for the first decade of the millennium, the arrest

¹ Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 272–3 (2009) (reviewing drug arrest rates by race from 1980 to 2007).

² *Marijuana Arrests by the Numbers*, ACLU, <https://www.aclu.org/gallery/marijuana-arrests-numbers> (last visited Aug. 22, 2023).

rate for Black people steadily *increased* between 2002 and 2010.³ Over the last decade, as more states have decriminalized and/or legalized possession and consumption of cannabis, the arrest rate disparity between white and Black individuals has remained largely constant—including in states that have adopted legalization measures.⁴

Notably, the police targeting of Black and Latino people in this way cannot be justified or excused on the basis of actual drug usage and possession. Researchers have consistently found that cannabis usage rates are similar between white and non-white individuals. For example, a 2021 survey by the U.S. Department of Health and Human Services showed that 22.6% of Black adults used marijuana within the past year, as compared with 20.2% of white adults.⁵ Other studies posit that white people possess and use cannabis at higher rates than Black people.⁶ Yet, as stated above, across the nation

³ *The War on Marijuana in Black and White*, ACLU 21 (2013), <https://www.aclu.org/report/report-war-marijuana-black-and-white>.

⁴ *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, ACLU (2020), <https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform>.

⁵ *Id.* at 66; *see also* U.S. Dept. of Health & Hum. Servs., Substance Abuse and & Mental Health Servs. Admin., 2021 Nat’ Survey on Drug Use & Health (NSDUH), at tbl. 1.27B, <https://perma.cc/CE2E-2X4G>; *see also* 2021 NSDUH Annual Report (Dec. 2022), at 17, <https://perma.cc/73WD-VZRV>.

⁶ *See, e.g.*, Silvia S. Martins, Luis E. Segura, Natalie S. Levy et al., *Racial and Ethnic Differences in Cannabis Use Following Legalization in U.S. States with Medical Cannabis Laws*, 2021 JAMA NETWORK OPEN 1, <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2784528> (“in 2018 the lifetime prevalence of cannabis use was lower for Black (45.3%) than White (53.6%) adults aged 18 years or older, but Black individuals were 3.64 times more likely to be arrested for cannabis possession.”); *ACLU, supra* note 3, at 21 (“In 2010, 34% of whites and 27% of Blacks reported having last used marijuana more than one year ago—a constant trend over the past decade. In the same year, 59% of

police still arrest Black people for cannabis-related offenses at four times the rate of white individuals.⁷ In Illinois, the racial disparities are among the worst in the country—Black people are more than seven times more likely to be arrested for cannabis possession than white people.⁸ Thus, while the criminal legal system casts a wide net over cannabis use and possession by Black individuals in America, it has effectively ignored the same conduct occurring at the same *or greater* rates in many white communities. This significant inequity is especially problematic in light of the fact that many of the people arrested may have engaged in entirely lawful behavior.⁹

Blacks and 54% of whites reported having never used marijuana. Each year over the past decade more Blacks than whites reported that they had never used marijuana.”).

⁷ *ACLU*, *supra* note 3, at 17; *see also* John Hudak, *Marijuana’s Racist History Shows the Need for Comprehensive Drug Reform*, BROOKINGS INST. (June 23, 2020), <https://www.brookings.edu/articles/marijuanas-racist-history-shows-the-need-for-comprehensive-drug-reform>.

⁸ *ACLU*, *supra* note 4, at 8.

⁹ As the trial court found below, a person may smell of cannabis for a host of innocent reasons. “[O]ne such reason is that a person working at a cannabis cultivation facility, or a dispensary could, and likely would, leave their place of employment smelling like raw cannabis. Persons with medical cannabis card may cultivate plants and, in the process of doing so, would likely smell of raw cannabis. Persons using or handling raw cannabis in *any way* can smell of raw cannabis. Persons using, possessing, or otherwise around raw cannabis wholly within the bounds of the law can, and likely will, have the odor of cannabis on their clothes, hair, and even personal effects.” A004 (Molina Sp. App.), *People v. Molina*, No. 20-TR-5612 (Ill. Cir. Ct. 2021). Importantly, plausible innocent explanations are probative in the probable cause analysis. *See, e.g., People v. Hill*, 2020 IL 124595 at ¶ 24 (explaining that courts assessing probable cause must consider “the plausibility of an innocent explanation”).

C. Police Stop and Search Drivers of Color at Disproportionately High Rates Nationwide and in Illinois

Many of the historical and present racial and ethnic disparities in cannabis-related enforcement by police arise out of systemic disparities in police stops and investigations, including traffic stops.

In 2020, the traffic stop was the most common type of police-initiated contact with U.S. residents age sixteen or older, with more than twenty-one million such encounters that year.¹⁰ An extensive body of literature has long made clear that police do not stop or investigate all community members equally.¹¹ Racial and ethnic disparities in traffic stops

¹⁰ *Contacts Between Police and the Public, 2020*, DEPT. OF JUSTICE BUREAU OF JUSTICE STATISTICS (Nov. 2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cbpp20.pdf> (publishing data that showed 16,709,200 drivers and 4,918,700 passengers had contact with police during a traffic stop in 2020).

¹¹ *See, e.g.*, Charles R. Epp, Steven Maynard-Moody & Donald Haider-Markel, *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* (2014); Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 854–59 (2011) (citing numerous studies providing evidence of racial profiling); Emma Pierson et al., *A Large-scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUMAN BEHAVIOUR 736 (2020), <https://5harad.com/papers/100M-stops.pdf>; ACLU-IL, *Racism in the Rear-view Mirror: Illinois Traffic Stop Data 2015-2017* (Jan. 3, 2019), https://www.aclu-il.org/sites/default/files/racism_in_the_rear_view_mirror_il_traffic_stops_2015-2017.pdf; Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015); CIV. RTS. DIV., *Investigation of the Chicago Police Department*, U.S. DEP'T OF JUSTICE 142 (Jan. 13, 2017) (finding that the Chicago Police Department disproportionately targeted Black and Latino individuals for stops); *Investigation of the City of Minneapolis and the Minneapolis Police Department*, U.S. DEP'T OF JUSTICE 32 (June 16, 2023) (finding that the Minneapolis Police Department disproportionately targets Black and Native American individuals for traffic and pedestrian stops).

have persisted for decades,¹² despite evidence indicating that white drivers commit moving violations at equal or higher rates than other racial groups.¹³

In Illinois, data collected on traffic stops over the last two decades shows prolific, persistent, and severe racial and ethnic disparities in traffic stops and searches. This trend includes the Illinois State Police, who stopped and searched Mr. Redmond and Mr. Molina.

In 2003, concerned about decades of reports regarding biased traffic stops, the Illinois General Assembly passed Public Act 93-0209 (“the Study Act”) to study racial discrimination in traffic stops. *See* 625 ILCS 5/11-212. The Study Act required all law enforcement agencies in Illinois to collect and report uniform demographic data on each traffic stop they conducted for three and a half years. In 2005, the first annual report issued by the Illinois Department of Transportation (“IDOT”) pursuant to the Study Act confirmed what many community members had already known and experienced for decades: police in Illinois were more likely to pull over drivers of color (defined as Black, Latino, Asian, and Native American drivers) than white drivers, and they were two and a half times more likely to search vehicles driven by people of color.¹⁴

¹² In the 1990s, for example, 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. Sup. Ct. 1996), and Maryland, *Wilkins v. Maryland State Police*, Civ. No. MJG-93-468 (D. Md. 1993)).

¹³ *See* William Cai, Johann Gaebler, Justin Kaashoek, Lisa Pinals, Samuel Madden & Sharad Goel, *Measuring Racial and Ethnic Disparities in Traffic Enforcement with Large-scale Telematics Data*, 2022 PNAS NEXUS 1, <https://academic.oup.com/pnasnexus/article/1/4/pgac144/6652221>.

¹⁴ *See Illinois Traffic and Pedestrian Stop Study 2004 Annual Report: Traffic Stops*, ILL. DEP’T TRANSP., <https://idot.illinois.gov/content/dam/soi/en/web/idot/documents/transpor>

Subsequent annual reports issued by IDOT pursuant to the Study Act revealed that the racial and ethnic disparities in Illinois traffic stops were not an anomaly but a fixture of policing in Illinois. By 2006, the year the data collection law was originally set to expire, the disparities had *worsened* compared to 2004. Statewide, Illinois police were still more likely to stop Black drivers than white drivers, and they were three times more likely to attempt searches of Black drivers compared to white drivers.¹⁵ More troubling, IDOT found that although drivers of color were two and a half times more likely to be asked by police for a search of their vehicle, police in Illinois found contraband in vehicles driven by people of color at *half* the rate they did for white drivers.¹⁶ These disparities show that police apply lower thresholds of suspicion to search people of color compared to white people.

The Illinois legislature extended and amended the Study Act several times. *See* Ill. P.A. 94-997; Ill. P.A. 95-290; Ill. P.A. 96-658; Ill. P.A. 98-686. Then in 2012, concerned about racial disparities in the use of police canines, Illinois began requiring law enforcement agencies to report data on sniffs by police dogs during traffic stops. Ill. P.A. 97-469. The first year of data on dog sniffs revealed that, statewide, Black motorists were 55% more likely to be subjected to a dog sniff by police, even though police were 14%

[tation-system/reports/safety/traffic-stop-studies/2004-illinois-traffic-stop-study.pdf](https://idot.illinois.gov/content/dam/soi/en/web/idot/documents/transportation-system/reports/safety/traffic-stop-studies/2004-illinois-traffic-stop-study.pdf) (last visited Aug. 22, 2023).

¹⁵ *See Illinois Traffic and Pedestrian Stop Study 2006 Annual Report: Traffic Stops*, ILL. DEP'T TRANSP., <https://idot.illinois.gov/content/dam/soi/en/web/idot/documents/transportation-system/reports/safety/traffic-stop-studies/2006-illinois-traffic-stop-study-statewide-report.pdf> (last visited Aug. 22, 2023).

¹⁶ *Id.*

more likely to find contraband during searches performed in response to a dog alert with a white motorist¹⁷—disparities which continue to this day and continue to show that police officers stereotype Black drivers as more suspicious.¹⁸

In 2019, the ACLU-IL released a report documenting continued racial and ethnic disparities in Illinois traffic stops and searches.¹⁹ The report found that stop disparities statewide increased every year from 2015–2017, and that Black and Latino drivers continued to be searched at higher rates than white drivers. By 2019—a decade and a half after the Study Act was first adopted—racial and ethnic disparities in Illinois traffic stops and searches were so persistent that the Illinois General Assembly made the data collection requirement under the Study Act permanent. Ill. P.A. 101-24.

¹⁷ ACLU-IL, *Racial Disparity in Consent Searches and Dog Sniff Searches*, (Aug. 13, 2014), <https://perma.cc/P6CC-832K>.

¹⁸ See Nayak Polissar et al., *Illinois Traffic and Pedestrian Stop Study 2022 Annual Report: Traffic Stops*, ILL. DEP'T TRANSP. 2 (June 30, 2023), <https://idot.illinois.gov/content/dam/soi/en/web/idot/documents/transportation-system/reports/safety/traffic-stop-studies/final-il-stop-study-2022-part-ii-traffic-stops--6-30-23.pdf> (showing that Black drivers in Illinois in 2022 were subjected to dog sniffs disproportionately relative to their share of the estimated driving population, while white drivers were subjected to lower rates of dog sniffs relative to their share of the population and despite dog sniffs having a higher positive alert rate for white drivers compared to Black drivers); see also Claire J. Rice, *Failing the Sniff Test: Using Marijuana Odor to Establish Probable Cause in Illinois Post-Legalization*, U. CHI. L. REV. ONLINE (Sept. 23, 2022), <https://lawreviewblog.uchicago.edu/2022/09/23/rice-probable-cause> (“Experts suggest that canines often make mistakes by reacting to unconscious cues from their handlers who themselves may exhibit implicit or explicit racial bias.”).

¹⁹ ACLU-IL, *Racism in the Rear-view Mirror: Illinois Traffic Stop Data 2015-2017*, https://www.aclu-il.org/sites/default/files/racism_in_the_rear_view_mirror_il_traffic_stops_2015-2017.pdf (last visited Aug. 22, 2023).

Today, law enforcement agencies across Illinois continue to engage in discriminatory traffic stop and search practices. The racial and ethnic disparities are worse in densely populated areas where there are more diverse demographics. In 2022, each of Illinois' ten largest cities by population—together accounting for nearly one-third of the state's total population—reported severe racial and ethnic disparities in traffic stops and searches.²⁰

In Chicago, police in 2022 were nearly four times more likely to stop Black drivers and more than twice as likely to stop Latino drivers relative to each group's share of the estimated driving population.²¹ Chicago police also subjected Black drivers to vehicle searches during traffic stops at a rate four and a half times greater than white drivers, and searched Latino drivers at three times the rate of white drivers, although the police were significantly *less* likely (or, in the case of Latino drivers, equally as likely) to find contraband in vehicles driven by Black drivers. One federal court has found plausible evidence to believe that the Chicago Police Department “maintained a policy that disproportionately targeted motorists based on race.”²²

In Urbana in 2022, police stopped Black drivers at more than six times the rate of white drivers. Police stopped Latino drivers at more than twice the rate of white drivers

²⁰ See Polissar et al., *supra* note 18.

²¹ *Id.* at 206–07.

²² *King v. City of Chicago*, 22-cv-04604, at 11 (N.D. Ill. Jul. 11, 2023), ECF No. 59 (denying motion to dismiss).

relative to each group's share of the estimated driving population.²³ Police in Urbana searched nearly one-fifth (18%) of all stopped vehicles driven by Black drivers—*three times* the rate of those driven by white drivers—despite finding contraband in vehicles driven by Black drivers at significantly *lower* rates than those driven by white people.²⁴

In Champaign, police in 2022 stopped Black drivers more than nine times more frequently than white drivers, and Latino drivers nearly three times as often relative to each group's share of the estimated driving population.²⁵ Police searched vehicles driven by Black and Latino drivers at twice the rate of vehicles driven by white drivers, despite finding contraband in vehicles driven by white and Black drivers at equal rates, and finding contraband in vehicles driven by Latino drivers at nearly half the rate as vehicles driven by white drivers.

Black and Latino motorists in rural and less racially-diverse areas of Illinois likewise suffer from police targeting them for traffic stops and searches. Last year in Kankakee, for example, police stopped Black drivers at more than three times the rate of white drivers, and Latino drivers at more than twice the rate relative to each group's share of the estimated driving population.²⁶ Police in Kankakee subjected Black drivers to

²³ Polissar et al., *supra* note 18, at 1266–67.

²⁴ *See id.*

²⁵ *Id.* at 190–91.

²⁶ *Id.* at 631–32.

vehicle searches at nearly double the rate of white drivers, yet found contraband in vehicles driven by Black drivers at a lower rate compared to those driven by white drivers.²⁷

In Watseka, a small town of 5,000 people that is 97% white, officers last year searched the vehicle of *every single Black person they pulled over*.²⁸ In Rockton, a village of 7,800 that is 92% white, police in 2022 stopped Black drivers at more than twice the rate of white drivers, searched Black drivers and their vehicles at more than twice the rate of white drivers, and yet they found contraband significantly *less* often compared to white drivers.²⁹

The racial and ethnic disparities in traffic enforcement in Illinois are not limited to traffic stops initiated by municipal policing agencies in the state. In 2022, the Illinois State Police (“ISP”) stopped Black drivers at 1.25 times the rate of white drivers relative to each group’s share of the estimated driving population within ISP’s jurisdiction.³⁰ ISP officers were more likely to search cars driven by Black drivers, but less likely to find contraband when searching Black and Latino drivers and passengers,³¹ again indicating a lower threshold to suspect Black and Latino people of wrongdoing.

²⁷ *Id.*

²⁸ *See id.* at 1298–99.

²⁹ *See id.* at 1081–82.

³⁰ *See id.* at 585.

³¹ *Id.* at 586.

D. Pretextual Traffic Stops Increase the Likelihood of Racial Profiling

Racial and ethnic disparities in traffic stops often worsen when police use traffic stops to enforce laws other than those related to traffic safety.³² Commonly referred to as “pretextual stops,” these are stops ostensibly based on an observed traffic infraction or equipment violation—like the stops of Mr. Redmond and Mr. Molina—but they are conducted with the ulterior motive of investigating unrelated criminal activity for which the officer has no or insufficient individualized suspicion. Though these stops do not violate the Fourth Amendment as long as there is probable cause of the traffic violation, *Whren v. United States*, 517 U.S. 806, 819 (1996), pretextual stops give the police nearly unlimited discretion in deciding whom to stop for investigative purposes. With traffic laws that are so elaborate, so detailed, and so unrealistic,³³ virtually “no driver can avoid violating some traffic law during a short drive, even with the most careful attention.”³⁴ Pretextual stops increased in popularity among police nationwide at the inception of the

³² See, e.g., Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Traffic Stops and Racial Profiling*, 73 STAN. L. REV. 637 (2021); Epp et al., *supra* note 11, at 10.

³³ Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1480–81 (2021).

³⁴ 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).

War on Drugs,³⁵ and remain a favored tactic by police to allegedly interdict drugs and other contraband.³⁶ Illinois is no exception.³⁷

In major jurisdictions known to rely heavily on pretextual traffic stops as a supposed crime-fighting tactic, the racial and ethnic makeup of a given geographic area is often a greater predictor of where police make pretextual stops than the rate of crime itself.³⁸ Even where traffic stops do match neatly onto “hot spots” of crime, the crime rates and data used by police is skewed by the historic over-policing of Black and brown communities, resulting in increased, disproportionate targeting of Black, Latino, and Indigenous people with pretextual stops.³⁹

³⁵ 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.

³⁶ Epp et al., *supra* note 11, at 59.

³⁷ See, e.g., *Illinois v. Caballes*, 543 U.S. 405 (2005); see also *Illinois State Police CRIMPAT/ Valkyrie Training*, 39 ILL. STATE POLICE (2013), https://www.aclu-il.org/sites/default/files/criminal_patrol_core_1.pdf (encouraging Illinois State Police to engage in “highly visible traffic operations” as a “proactive style of policing” with the goals of allegedly addressing “violent crime, traffic safety, drug crimes.”).

³⁸ See, e.g., *Report on Race- and Ethnicity-based Disparities in the Chicago Police Department’s Use of Force*, CITY OF CHI. INSPECTOR GEN. 32 (Mar. 1, 2022), <https://igchicago.org/wp-content/uploads/2022/02/Use-of-Force-Disparities-Report.pdf> (finding that Chicago police traffic stops are more highly concentrated in areas where the majority of the population is Black than in areas the police classify as higher crime areas).

³⁹ 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. 1051 (2021); Andrew Ferguson, *Policing Predictive Policing*, 94 WASH. U. L. REV. 1109, 1146–47 (2017).

When making pretextual stops, police rely largely on intuition⁴⁰ to decide which cars to pull over and investigate.⁴¹ Extensive evidence shows that officers use this “intuition” to target drivers of color more often than white drivers.⁴² 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 possess contraband and, therefore, who should be stopped and investigated.⁴³

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 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

⁴⁰ 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”).

⁴¹ Kreit, *supra* note 35, at 751.

⁴² See, e.g., Peter Vernierio & Paul H. Zoubek, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING 26–28, 67–68 (1999), https://www.state.nj.us/lps/intm_419.pdf [<https://perma.cc/5T8Y-25PG>] (finding nonwhite drivers were treated differently than white drivers in terms of consent searches and hit rates of searches); David A. Harris, *Driving While Black: Racial Profiling on Our Nation’s Highways*, ACLU (1999), <https://www.aclu.org/report/driving-while-black-racial-profiling-our-nations-highways> [<https://perma.cc/HMK5-JUSK>] (concluding that Latinos make up a disproportionate number of those stopped by police, particularly of those stopped by drug interdiction units); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Probable Cause*, 3 U. PA. J. CONST. L. 296, 299–306 (2001) (chronicling many of the then existing studies on racial profiling).

⁴³ See Harris, *supra* note 34, at 560–69.

likely as white people to be subjected to a pretextual traffic stop.⁴⁴ The study concluded that once stopped, Black and Latino drivers disproportionately were cited for minor infractions, such as equipment violations.⁴⁵

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% and 8.2%, respectively.”⁴⁶ 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.⁴⁷ Concentrating pretextual stops within Black and Latino neighborhoods causes severe harms, as community members who are stopped are at significant risk of economic, psychological, and physical harm.

⁴⁴ Epp et al., *supra* note 11, at 110.

⁴⁵ *Id.*

⁴⁶ Magnus Lofstrom, et al., *Racial Disparities in Law Enforcement Stops*, PUB. POLICY INST. CAL. (Oct. 2021), <https://www.ppic.org/?show-pdf=true&docraptor=true&url=https%3A%2F%2Fwww.ppic.org%2Fpublication%2Fracial-disparities-in-law-enforcement-stops%2F>.

⁴⁷ 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.

To begin with, Black and Latino drivers routinely subjected to pretextual traffic stops face burdensome fines, fees, forfeitures, and arrests.⁴⁸ 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.⁴⁹

And for many Black and Latino drivers, stops are a real and justifiable source of fear, stress, and trauma.⁵⁰ Recent traffic stops across the country demonstrate why: low-level traffic stops can quickly spiral into deadly uses of force by police. The horrifying police killings of Tyre Nichols, Duante Wright, Sandra Bland, and Philando Castile, amongst many others, during police traffic stops 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

⁴⁸ *Fines and Fees*, VERA, <https://www.vera.org/ending-mass-incarceration/criminalization-racial-disparities/fines-and-fees> (last visited Feb. 10, 2023).

⁴⁹ *Id.*

⁵⁰ Amber Landers, David Rollock, Charity Rolfes, and Demietrice Moore, *Police Contacts and Stress among African American College Students*, AM. J. ORTHOPSYCHIATRY 81, no. 1 (2011), 72–81, <https://psycnet.apa.org/doiLanding?doi=10.1111%2Fj.1939-0025.2010.01073.x>; Amanda Geller, Jeffrey Fagan, Tom Tyler, and Bruce G. Link, *Aggressive Policing and the Mental Health of Young Urban Men*, AM. J. PUB. HEALTH 104, no. 12 (2014), 2321–2327, <https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2014.302046>; J.L. Hirschtick, S.M. Homan, G. Rauscher, et al., *Persistent and Aggressive Interactions with the Police: Potential Mental Health Implications*, EPIDEMIOLOGY AND PSYCHIATRIC SCIS. 29 (2020), e19, <https://www.cambridge.org/core/journals/epidemiology-and-psychiatric-sciences/article/persistent-and-aggressive-interactions-with-the-police-potential-mental-health-implications/08A72C424643BA06BF558E579CC30312>.

during traffic stops, 400 of whom had no weapon and were not being pursued for a violent crime.⁵¹ Again, “Black drivers were overrepresented among those killed.”⁵²

Just last year, the City of Chicago’s Office of Inspector General found that 98% of Chicago police officers’ reported use of force during traffic stops involved force against a Black (87%) or Latino (11%) person.⁵³ A report issued this spring by Chicago-based BPI (now known as Impact for Equity) and the Free 2 Move Coalition found that traffic stops by the Chicago police resulted in the largest share of incidents of officers pointing firearms at civilians—more incidents than those recorded in response to dispatch calls about a “person with a gun” or “shots fired,” *combined*.⁵⁴

E. The Harms of Pretextual Traffic Stops and Vehicle Searches, Including Those Based on the Alleged Odor of Cannabis Alone, Greatly Outweigh Any Perceived Benefits

Beyond exacerbating racial disparities and inflicting physical, psychological and economic harm, pretextual traffic stops and subsequent searches, including those based on the alleged odor of cannabis, do not improve public safety. Academic research establishes that stops and searches that are not based on reliable evidence of serious criminal activity

⁵¹ 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>.

⁵² *Id.*

⁵³ CITY OF CHI. INSPECTOR GEN., *supra* note 38.

⁵⁴ *A New Vehicle for “Stop and Frisk”: The Scope, Impact, and Inequities of Traffic Stops in Chicago*, BPI & FREE 2 MOVE 26 (Mar. 2023), https://www.impactforequity.org/wp-content/uploads/2023/05/BPI_Traffic-Stop-Report_F.pdf.

are unlikely to be efficient or productive.⁵⁵ This is borne out by the fact that the vast majority of pretextual traffic stops do not result in the recovery of contraband, such as drugs or firearms.

In Illinois in 2022, for example, police found contraband (defined as drugs, drug paraphernalia, alcohol, weapons, stolen property, or “other”), in only 1.5% of all traffic stops statewide.⁵⁶ The results for the ISP are on par with statewide figures: only 2% of ISP traffic stops resulted in discovery of contraband in 2022.⁵⁷ Likewise, in Nashville, researchers found that pretextual traffic stops disproportionately targeting Black and Latino drivers rarely led to arrests or the recovery of drugs or contraband, and had no statistically significant relationship to crime in the short- or long-term.⁵⁸ Similarly, in the District of Columbia, research found that only 1% of pedestrian and traffic stops *combined* led to the recovery of a gun in 2020.⁵⁹

⁵⁵ John MacDonald, Jeffrey Fagan, & Amanda Geller, *The Effects of Local Police Surges on Crime and Arrests in New York City*, PLOS ONE (June 16, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2614058.

⁵⁶ See Polissar et al., *supra* note 18, at 1.

⁵⁷ See Polissar et al., *supra* note 18, at 585.

⁵⁸ *An Assessment of Traffic Stops and Policing Strategies in Nashville*, POLICING PROJECT 10 (2018), <https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/5bf2d18d562fa747a554f6b0/1542640014294/Policing+Project+Nashville+Report.pdf> (finding that just 2% of stops resulted in arrest or recovery of contraband).

⁵⁹ *Racial Disparities in Stops by the D.C. Metropolitan Police Department: Review of Five Months of Data*, ACLU-DC AND ACLU ANALYTICS 8–9 (June 16, 2020), <https://perma.cc/N4B8-AA86>.

In short, pretextual traffic stops are deployed by police supposedly to recover contraband and reduce crime, and yet pretextual traffic stops are demonstrably ineffective at achieving that goal. They rely on the arbitrary and inaccurate characterization of Black and Latino drivers as criminals, which unfairly subjects them to at-will intrusions of their privacy and relegates them to second-class citizenry. Thus, this Court will not hinder public safety if it holds that officers in Illinois, where possession and use of personal amounts of cannabis is legal, may not use its odor as a pretext to fish for other evidence against a driver. Such a holding will, however, discourage officers from using pretextual traffic stops in ways that disproportionately single out Black and Latino drivers for harassment, fear, physical harm, and even death.

F. Pretextual Stops and Searches Based on the Alleged Odor of Cannabis Alone are Insulated from Judicial Scrutiny, Preventing Review of Baseless Police Actions

Finally, holding that the odor of raw cannabis alone does not constitute probable cause for a vehicle search in Illinois will promote officers' adherence to the Fourth Amendment.

Unlike most facts giving rise to probable cause or exigent circumstances, odors are intangible and dissipate soon after they are allegedly perceived. An odor will not appear on video or audio from officer-worn cameras (sometimes called body-worn cameras). As a result, it is difficult in practice for most people subjected to unfounded warrantless vehicle searches for cannabis to mount an effective challenge to the legality of a search based on an officer's claim that an odor was present. The challenge sets up a credibility war between the officer and the motorist where the motorist is at a distinct disadvantage. Courts have long deemed officers' claims of smelling cannabis to be credible, and stopped all further

inquiry, without determining whether the officer's opinion about detecting the odor is reliable (i.e., "reasonably trustworthy")⁶⁰ information, and supported by a factual basis rather than a bare assertion.

Worse, only drivers who are criminally charged as a result of the search will be able to bring a challenge via a suppression motion. Many will likely plead guilty before their motion is heard,⁶¹ and therefore, will waive any right to challenge a search's legality.

If no contraband is recovered and no court case results, the overwhelming majority of people subjected to the type of warrantless searches at issue in this case have no practical means of seeking relief if they believe an officer fabricated an odor of cannabis as a false basis for a search. Without the ability to recover substantial damages, motorists will be unlikely to find counsel willing to represent them. If they do, they may face hurdles such as qualified immunity defenses. *Monell* claims would be equally challenging due to the difficulty in gathering evidence of a policy or practice.

The most practical way for this Court and others⁶² to discourage discriminatory, baseless and harassing pretextual traffic stops premised on the alleged odor of cannabis is

⁶⁰ See, e.g., *Draper v. United States*, 358 U.S. 307, 333 (1959).

⁶¹ *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.").

⁶² Courts in California, Colorado, Massachusetts, Minnesota, New Jersey, Oregon, Pennsylvania, and Vermont have addressed this emerging issue of law in light of cannabis legalization or decriminalization within their jurisdictions and have held that the odor of cannabis alone, without additional corroborating facts indicating that a person is engaging in criminal activity, does not provide probable cause to search a vehicle. See *State v. Torgerson*, 2023 WL 5944620 at *8-9 (Minn. Sept. 13, 2023) (holding that the smell of burnt cannabis alone did not justify a vehicle search); *State v. Cohen*, 296 A.3d 480, 489-

to hold that, due to the legalization of personal amounts of cannabis in Illinois, the odor of raw cannabis alone does not provide probable cause to search a vehicle here.

Conclusion

For the foregoing reasons, *amici* respectfully submit that this Court should affirm the Third District’s ruling in *Redmond*; reverse the Fourth District’s ruling in *Molina*; and find that, because Illinois has legalized possession of personal amounts of cannabis, the odor of cannabis alone is not a sufficient 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 do not

90 (N.J. 2023) (holding that the odor of raw cannabis emanating from passenger compartment did not provide probable cause to search a car’s engine compartment and trunk); *Commonwealth v. Barr*, 266 A.3d 25, 41 (Pa. 2021) (holding that the mere odor of cannabis alone does not establish probable cause for a warrantless vehicle search); *People v. Trone*, 2021 WL 1205194, at *9 (Cal. App. Ct. 2d Dist. Mar. 30, 2021) (unpublished) (holding that “the mere odor of marijuana, without more, is insufficient to establish probable cause.”); *State v. T.T.*, 479 P.3d 598, 616 (Or. 2021) (holding that “the smell of marijuana” alone was insufficient, but together with other evidence of drug trafficking established reasonable suspicion that a person has committed drug crimes); *People v. McKnight*, 446 P.3d 397, 408 (Colo. 2019) (holding that a canine alert that could indicate the presence of multiple drugs, including legal amounts of cannabis, constitutes a search and violates a driver’s reasonable expectation of privacy in light of legalization of small amounts of cannabis); *Zullo v. State*, 205 A.3d 466, 503 (Vt. 2019) (holding that “the faint odor of burnt marijuana” alone was insufficient to establish probable cause of criminal wrongdoing); *Commonwealth v. Overmyer*, 11 N.E.3d 1054, 1059-60 (Mass. 2014) (holding that the odor of raw cannabis alone does not establish probable cause to believe that a vehicle contains contraband); *Commonwealth v. Cruz*, 945 N.E.2d 899, 910 (Mass. 2011) (holding that the odor of burnt cannabis alone does not establish probable cause to believe that a vehicle contains contraband).

The same issue currently is pending before the Seventh Circuit Court of Appeals in *United States v. Jackson*, No. 23-1708 and 23-1721, on appeal from the District Court’s denial of a suppression motion, in a case arising from a traffic stop effected by local police officers in Urbana, Illinois.

meaningfully improve traffic safety or fight crime, and would allow for the harmful racial disparities endemic to traffic and cannabis enforcement to continue.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 345 and 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 25 pages.

/s/ Alexandra K. Block
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Counsel for Amici Curiae

NOTICE OF FILING AND PROOF OF SERVICE

The undersigned, an attorney, certifies that on September 26, 2023, she caused the foregoing **Brief of the American Civil Liberties Union et al. as *Amici Curiae* in Support of Mr. Redmond and Mr. Molina** to be filed with the Clerk of the Supreme Court of Illinois using the Court's electronic filing system and that the same was served by e-mail to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned also states that she will cause thirteen copies of the Brief of *Amici Curiae* to be mailed with postage prepaid to the following address:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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