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A22-0425

STATE OF MINNESOTA

SUPREME COURT

STATE OF MINNESOTA

Appellant,

vs.

Adam Lloyd Torgerson,

Respondent.

AMICUS BRIEF ON BEHALF OF THE MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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INTRODUCTION

The Minnesota Association of Criminal Defense Lawyers[1] ("MACDL") submits this brief in favor of Respondent. The Minnesota Association of Criminal Defense Lawyers is a non-profit state-wide organization of defense lawyers seeking to uphold Constitutional rights and ensure justice for all, particularly from unchecked power of the government against the rights of individuals.

The issue in this case is whether the warrantless search of a motor vehicle based on the smell of cannabis alone is unreasonable under Article 1, Section 10 of the Minnesota Constitution. The appellate and district courts correctly suppressed the search of a motor vehicle based on smell of marijuana alone—similar to the limits on searches based on the smell of alcohol. Cannabis is legal in Minnesota in small amounts as marijuana, and as hemp. There can be no dispute that neither a drug sniffing dog nor an officer can differentiate legal or illegal cannabis by smell alone.

Furthermore, expanded traffic stops based on the smell of marijuana alone are ripe for abuse by law enforcement as a pretext to search motor vehicles.

MACDL submits this brief in support of Respondent.

[1] Undersigned counsel are the sole authors of this brief and received no monetary contributions to the preparation or submission of this brief.

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ARGUMENTS

I. The smell of cannabis alone does not necessarily indicate criminality sufficient to justify a vehicle search. That which we call cannabis, by any other name would smell the same.

Industrial hemp has been legal and defined as not marijuana in Minnesota by statute since July 1, 2019. Minn. Stat. §18K.02 subd. 3. Marijuana that is 5 milligrams or less of tetrahydrocannabinol (herein after "THC") recently became legal in Minnesota. Even drug sniffing dogs cannot distinguish between hemp and marijuana, nor the legal limit of THC, so how could a human? *See, e.g.,* Bill Bush, *Police dogs can't tell the difference between hemp and marijuana*, The Columbus Dispatch (Aug. 12, 2019); Peter Hermann and Justin Jouvenal, *Decriminalization of Marijuana is Pushing Pot-Sniffing Dogs into Retirement*, The Washington Post (July 4, 2021).

In its Amicus Curiae, the County Attorneys Association points out that of 2,017 people who were seriously injured or killed in 2022, 26.5% tested positive for some form of cannabis. They note that 26.3% of that same population tested positive for alcohol.[2] The numbers are virtually the same, and the crime of being a driver while intoxicated

[2] Marijuana is arguably much less dangerous than alcohol, in that it can provide relief for certain medical conditions. For example: The State of Minnesota's Department of Health has a government operated website detailing what conditions are treatable with medical marijuana and how to obtain it. *See* https://www.health.state.mn.us/people/cannabis/patients/index.html. There are no medical benefits to alcohol, and there are no similar state operated websites enabling people to obtain access to alcohol. The State of Minnesota lists these conditions as treatable with prescribed marijuana: Alzheimer's disease, amyotrophic lateral sclerosis (ALS), autism spectrum disorder (must meet DSM-5), cancer, chronic motor or vocal tic disorder, chronic pain, glaucoma, HIV/AIDS, inflammatory bowel disease, including Crohn's disease, intractable pain, irritable bowel syndrome, obsessive-compulsive disorder, obstructive sleep apnea, post-traumatic stress disorder (PTSD), seizures, including those characteristic of epilepsy, severe and persistent muscle spasms, including those characteristic of multiple sclerosis (MS), sickle cell disease, terminal illness with a probable life expectancy of less than one year, and Tourette syndrome.

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should be treated the same—but that is not the issue before the Court. The issue is whether the smell of cannabis, now legal in some forms and amounts, should be treated any differently than when an officer illegally searches a vehicle based on the smell of alcohol alone—it shouldn't.

In *State v. Parker*, the North Carolina Court of Appeals noted:

> Hemp and marijuana look the same and have the same odor, both unburned and burned. This makes it impossible for law enforcement to use the appearance of marijuana or the odor of marijuana to develop probable cause for arrest, seizure of the item, or probable cause for a search warrant.

State v. Parker, 860 S.E.2d 21, 28-29 (N.C. Ct. App. 2021) (not addressing the issue because there were other grounds for probable cause when a Defendant admitted he just smoked a joint and showed it to the officers).

In *Commonwealth v. Overmyer*, the Massachusetts Supreme Court also found that smell is too subjective in its nature to note quality, amount, or kind of cannabis:

> The officers in this case detected what they described as a "strong" or "very strong" smell of unburnt marijuana. However, such characterizations of odors as strong or weak are inherently subjective; what one person believes to be a powerful scent may fail to register as potently for another. Moreover, the strength of the odor perceived likely will depend on a range of other factors, such as ambient temperature, the presence of other fragrant substances, and the pungency of the specific strain of marijuana present. As a subjective and variable measure, the strength of a smell is thus at best a dubious means for reliably detecting the presence of a criminal amount of marijuana.

Com. v. Overmyer, 469 Mass. 16, 21-22, 11 N.E.3d 1054, 1059 (2014) (internal citations omitted).

The smell of alcohol alone does not justify a vehicle search. *State v. Burbach*, 706 N.W. 2d 484, 489 (Minn. 2005). It may be, coupled with behavior, reason to suspect

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someone is driving under the influence of alcohol to the point it affects their ability to drive safely, at which point, an officer has a justifiable reason to investigate whether that person is intoxicated to the point of impairment. *Id.* The same should be true of cannabis.

The protections against unreasonable searches and seizures in Minnesota are broader than those under the Fourth Amendment to the U.S. Constitution. Minn. Const. Art. I, §10. The Minnesota Supreme Court has held that under Article I, Section 10 of the Minnesota Constitution "the scope and duration of a traffic stop investigation must be limited to the justification for the stop." *Burbach*, 706 N.W.2d at 488; *State v. Fort,* 660 N.W.2d 415, 418 (Minn. 2003). In Minnesota, any "intrusion not closely related to the initial justification for the search or seizure is invalid . . . unless there is independent probable cause or reasonableness to justify that particular intrusion." *State v. Askerooth,* 681 N.W.2d 353, 364 (Minn. 2004). Moreover, the basis for the intrusion must be "particularized" and "individualized to the driver." *Askerooth,* 681 N.W.2d at 364; *Fort,* 660 N.W.2d at 418.

Any search of a vehicle must be justified by either (1) the original purpose of the stop; or (2) a "reasonable articulable suspicion of other criminal activity." *Fort,* 660 N.W.2d at 419. To be "reasonable," the intrusion must be supported by an objective and fair balancing of the government's need to search against the individual's right to personal security. *Askerooth,* 681 N.W.2d at 364-65.

The Court of Appeals held that given the totality of the circumstances, the officers did not have probable cause to suspect that Mr. Torgerson's vehicle would reveal evidence of a crime or contain contraband. *State v. Torgerson*, No. A22-0425, 2022 WL

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6272042, at 2 (Minn. Ct. App. Oct. 10, 2022) (unpublished decision), *review granted* (Dec. 28, 2022).

The officers did not note any indica of impairment of Mr. Torgerson, but said they could smell marijuana, and that the smell alone was the reason for the vehicle search. *Id.*

In *Burbach*, the smell of alcohol alone, without other evidence of criminality, was held insufficient to justify the search of the car even for an open container:

> At best, these facts provide only an attenuated inference of an open container. To allow a vehicle search solely because an adult passenger smelled of alcohol would be to permit highly speculative searches against a large group of entirely law-abiding motorists, including designated drivers. Such a rule would not comport with the substantial privacy interest in motor vehicles that the Minnesota Constitution ensures.

Burbach, 706 N.W.2d at 489; *see also State v. Wiegand,* 645 N.W.2d 125, 131 (Minn. 2002). Under an individualized and particularized analysis of the totality of the circumstances here, the smell of cannabis alone cannot justify the infringement the substantial privacy interest in motor vehicles that the Minnesota Constitution ensures. *Wiegand*, 645 N.W.2d at 131.

II. In other states the smell of cannabis is not considered probable cause to search a vehicle.

The County Attorneys Association cites *State v. Seckinger* to say, "most state and federal courts agree that the odor of marijuana alone furnishes probable cause for the warrantless search of a vehicle." 920 N.W.2d 963, 970 (Neb. 2018); *Robinson v. State*, 451 Md. 94, 99, 152 A.3d 661, 667 (2017). The County Attorneys Association fails to note an important distinction in the rational by those lines of cases—*Robinson* held that

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decriminalization of marijuana, the state of the law in Maryland, was not the same as legalization in its decision to allow for a vehicle search. 451 Md. At 99. In Massachusetts, the court held that decriminalization of marijuana meant that the odor of marijuana alone was not sufficient to permit the search of a vehicle. *Overmyer*, 469 Mass. at 20, *citing Commonwealth v. Cruz*, 459 Mass. 459 (2011).

In states like Minnesota, where marijuana is legal in some amounts, most state courts agree that the odor of marijuana alone does not establish probable cause to search a vehicle. *See, e.g., People v. Stribling*, No. 3-21-0098, 1-2 (Ill. App. Ct. 2022) appeal pending, (Jan. term 2023) (unpublished decision); *State v. Moore*, 311 Or. App. 13, 15, 488 P.3d 516, 518 (2021); *People v. Nguyen*, No. H049094, 2022 WL 16848402, at 1 (Cal. Ct. App. Nov. 10, 2022); *People v. Zuniga*, 2016 CO 52, 372 P.3d 1052.

The relatively recent national shift to legalize cannabis has created a rapidly evolving body of law on this issue. Minnesota, like Oregon and Colorado, should adopt the correct legal approach. Furthermore, protections against unreasonable searches and seizures are broader under the Minnesota Constitution than the Fourth Amendment. For these reasons, the lower court decision to suppress any evidence seized by an illegal search should be affirmed.

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III. The smell of cannabis can be used as a pretext to search the vehicles of Black and East African people.

In 1961, the United States Supreme Court held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in state court." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

Justice Clark, in his opinion, quoted Justice Brandeis in *Olmstead v. United States*:

> Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

277 U.S. 438, 485 (1928). (J. Brandeis, dissenting). Over the course of the next decade, the federal government would pass the Civil Rights Act (1964), the Voting Rights Act (1965) and the Fair Housing Act (1968). Throughout the country, there was civil unrest, and the judiciary and Congress recognized a need to level the playing field between the government and its people. In the summer of 1967, the City of Minneapolis saw rioting along Plymouth Avenue North, due to a boiling up of tensions between North Minneapolis residents and their government.[3] The riots brought about community involvement and educated white residents further of Black hardship within the city limits.[4] But in the decades to come, both the local government and federal landscape would see a shift back to favoring "law and order" and the declaration of the War on

[3] Susan Marks, *July 1967 Civil Unrest on Plymouth Avenue*, Minnesota Post (July 24, 2017), retrieved from: https://www.minnpost.com/mnopedia/2017/07/july-1967-civil-unrest-plymouth-avenue/

[4] Laura Yuen, *When Flames of Racial Strife Engulfed a Minneapolis Street*, MPRNEWS (July 19, 2017). Retrieved at: https://www.mprnews.org/story/2017/07/19/minneapolis-plymouth-avenue-riots-anniversary

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Drugs. Our state's judiciary would, once again, initiate protections for the most marginalized. In *State v. Russell*, the Court struck down laws that sought harsher punishment for the possession of crack cocaine than powder cocaine, and thus, disproportionately impacting Black Minnesotans. 477 N.W.2d 886 (Minn. 1991). When other branches of the government allow for unequal treatment under the law, it is the Court that has the power to protect them from their government's overreach.

Former police officer and now Minnesota Court of Appeals Judge Kevin Ross, wrote eloquently of the tension between policing while adhering to, and honoring, the Constitution:

> We appreciate that the people, through their legislature, have entrusted police with the difficult duty to find and remove [contraband] from [people] possessing [it]. We also recognize that hunch-based policing might sporadically and infrequently uncover contraband. In fact, we assume that an officer who stops enough people based only on conjecture will occasionally find someone who, like [defendant], apparently possesses evidence of a crime. But police officers are also entrusted with the higher duty to honor the constitutional rights of those they encounter … It is the court's duty to suppress evidence unconstitutionally obtained.

State v. Davis, 910 N.W.2d 50, 59-60 (Minn. Ct. App. 2018). Law enforcement stops and searches many drivers. Presumably, oftentimes they don't find evidence to arrest or cite their suspects. They don't have to write a report in those instances, so there is very little oversight of those encounters. In most cases, challenges to contacts between these police officers and residents don't occur until an attorney reviews the evidence. When evidence is recovered, then, the judiciary should examine these intrusions carefully and protect against unseen abuses largely impossible to challenge after they occur.

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The smell of marijuana used as a pre-textual reason to expand a stop to a search of a vehicle is ripe for misuse. This is shown by the expansion of stops on over 1,000 Black and East African people in a one-year period in Minneapolis where their vehicle was searched but no citation or charge was issued. Certified data of all recorded Minneapolis Police Department ("MPD") traffic stops between June 1, 2019, and May 31, 2020 that involved Black or East African drivers who were stopped for a traffic violation and had their person or vehicle searched but did not receive a citation and were released under an "advised" or "all ok" disposition code (*i.e.,* a search occurred resulting from a traffic stop but no arrests were made or citations issued) shows that 1,130 traffic stops fit the described parameters. *See* Order, 27-CR-20-7960, *State v. Isaac Early*, Hennepin County District Court (Jan, 29, 2021).

It is a logical conclusion that because there was no additional crime found, regardless of the reason the officer listed for the further intrusion, that the reason given for the expansion of the stop was not legitimate. It is also shown in a nationwide study, analyzing 100 million police stops, that Black and Hispanic persons are stopped more frequently than their white counterparts, and that those stops that resulted in searches were less likely to reveal contraband:

> Our data shows that Black and Hispanic drivers are searched at higher rates, but those searches are less likely to find contraband, so the threshold test concludes that Black and Hispanic drivers are searched at lower thresholds, suggesting discrimination.

Emma Pierson, Barr says there's no systemic racism in policing. Our data says the attorney general is wrong, The Washington Port (June 20, 2020).

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This was also shown by the Minnesota Department of Human Rights investigation into Minneapolis police which found that Minneapolis police engaged in race-based policing. Minnesota Department of Human Rights: Investigation into the City of Minneapolis and the Minneapolis Police Department, Findings issued April 27, 2022. The Minnesota Department of Human Rights met with community leaders, law enforcement in Minneapolis, people who had been charged with crimes, county attorneys and public defenders to gather information, and reviewed over 700 hours of body worn cameras and over 480,000 pages of city and Minneapolis Police Department documents before making its findings. *Id.* at page 6. The report cited as evidence of what it called the department's pattern of unlawful, discriminatory practices: racial disparities in how officers "use force, stop, search, arrest, and cite people of color, particularly Black individuals, compared to white individuals in similar circumstances." *Id.* at page 8.

In 1991, the Minnesota Supreme Court recognized that there was no rational basis to treat the illegal substances of crack cocaine and cocaine differently in sentencing. *Russell,* 477 N.W.2d at 891. While Mr. Torgerson is not in a protected class and not claiming any equal protection violation, his case will disproportionately affect Black and East African Minnesotans negatively as shown by data-based evidence if the Court were to reverse the appellate court decision. Therefore, the Court should hold that there is no basis to treat the legal substances of alcohol and cannabis differently when officers are seeking to expand a stop and search a motor vehicle.

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CONCLUSION

Respondent respectfully requests that the Court affirm the suppression of the evidence found in an illegal expansion of a stop of a motor vehicle.

RESPECTFULLY SUBMITTED,

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