

IN THE DISTRICT COURT OF APPEAL  
FIFTH APPELLATE DISTRICT OF FLORIDA

JASON HASSAN BAXTER,

*Appellant,*

v.

STATE OF FLORIDA,

*Appellee.*

CASE NO: 5D23-0118

LT NO: 16-2021-MM-014027

**AMENDED MOTION FOR LEAVE OF COURT**  
**TO FILE AN AMICI BRIEF**

Pursuant to Florida Rule of Appellate Procedure 9.370, the Southern Poverty Law Center (SPLC), the American Civil Liberties Union Foundation (ACLU), and the American Civil Liberties Union Foundation of Florida (ACLU-FL) move for leave to appear as amicus curiae in support of the Appellant and state as follows:

1. The Southern Poverty Law Center (SPLC) is a nonprofit 501(c)(3) organization that is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. The SPLC's Decarceration and

Decriminalization practice uses litigation and advocacy to reform the criminal legal system by ending unjust detention and challenging unconstitutional and racially discriminatory law enforcement and criminal justice practices.

2. 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.

3. The ACLU of Florida (ACLU-FL) is the state-wide Florida affiliate of the ACLU. ACLU-FL is a private, nonprofit, nonpartisan organization supported by a 180,000 members and supporters across Florida. The mission of the ACLU of Florida is to protect, defend, strengthen, and promote the constitutional rights and liberties of all people in Florida. We envision a fair and just Florida, where all people are free, equal under the law, and live with dignity.

4. Amici seek to provide the court with context for answering questions one and two as stated in its November 16, 2023 order for rehearing en banc. Specifically, amici endeavor to provide the court with data and information regarding racial disparities in traffic stops, arrests, and sentencing related to marijuana offenses that amici believe will be exacerbated if this Court authorizes an approach that allows only the odor of raw cannabis to provide reasonable suspicion of criminal activity sufficient to warrant a detention and subsequent search.

5. A copy of the proposed amici brief is attached as Exhibit A.

6. The undersigned has contacted Elizabeth Hogan Webb, Esq. counsel for Appellant, and Christina Piotrowski and Trisha Pate, counsel for Appellee. Counsel for Appellant consents to this motion. Counsel for Appellee indicated that they take no position on amici's motion.

WHEREFORE, the SPLC, the ACLU, and the ACLU-FL respectfully request that this Court grant its motion for leave to appear as amicus curiae in this proceeding.

Respectfully submitted,

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**Certificate of Service**

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# **EXHIBIT A**

No. 5D23-0118

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District Court of Appeal  
Fifth Appellate District of Florida

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JASON HASSAN BAXTER,

*Appellant,*

v.

STATE OF FLORIDA,

*Appellee.*

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**On Appeal from the County Court of Fourth Judicial Circuit  
in and for Duval County, Florida  
No. 16-2021-MM-014027-AXXX**

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**BRIEF OF AMICI CURIAE SOUTHERN POVERTY LAW CENTER,  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AND ACLU  
FOUNDATION OF FLORIDA IN SUPPORT OF APPELLANT JASON  
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## **Interest of Amici Curiae**

The Southern Poverty Law Center (SPLC) is a nonprofit 501(c)(3) organization that is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. The SPLC's Decarceration and Decriminalization practice uses litigation and advocacy to reform the criminal legal system by ending unjust detention and challenging unconstitutional and racially discriminatory law enforcement and criminal justice practices.

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 Florida (ACLU-FL) is a state affiliate of the ACLU.

*Amici* are interested in this case because of the broader implications of using cannabis odor to establish reasonable suspicion of criminal activity for an investigatory stop. Such stops disproportionately impact Black communities—Black people are disproportionately stopped, arrested, and sentenced for cannabis-related offenses.

### **Summary of the Argument**

The only justification for the investigatory stop and vehicle search in this case is the odor of raw cannabis. As Judge Kilbane astutely noted in her opinion concurring in part and dissenting in part from the panel opinion, “[w]ithout the smell of fresh marijuana, there is little doubt that the remaining circumstances would be insufficient to provide a basis for reasonable suspicion.” *Baxter v. State*, No. 5D23-118, 2023 WL 7096645, at \*6 (Fla. 5th DCA Oct. 27, 2023) (Kilbane, J., concurring in part and dissenting in part).

Thus, the question this Court presents for rehearing en banc is whether the odor of cannabis alone, in this case raw cannabis, establishes reasonable suspicion of criminal activity for an investigatory detention that gives rise to a warrantless vehicle search.

*Amici* urge this Court to answer the question in the negative and reverse the panel's decision.

The legal and social status of cannabis in Florida has shifted significantly over the last several years. As political and social tides have turned, so too has the plant's legality and cultural acceptability. Today, Florida law permits legal possession and use of hemp and medicinal marijuana (for qualified patients). Given the meteoric rise in the number of lawful cannabis users and the amount of legal cannabis produced, transported, sold, and purchased in Florida, the mere presence of its attendant odor alone simply no longer suggests illegality or criminality.

Holding the odor of cannabis does not give rise to reasonable suspicion will not only promote officers' adherence to the strictures of the Fourth Amendment, but reduce the likelihood that officers will use cannabis as a pretext to disproportionately stop and search Black drivers, which leads to tremendous harm for people of color in the name of seizing contraband that police rarely, if ever, actually

find.<sup>1</sup> Such vehicle searches, typically following pretextual traffic stops, disproportionately burden Black and Latino drivers, who are likewise targeted for disparate enforcement of cannabis laws. A holding by this Court that the alleged odor of cannabis alone established reasonable suspicion to detain Mr. Baxter and search his vehicle in this case will only exacerbate these inequities.

### **Argument**

#### **A. The Odor of Cannabis Alone Does Not Provide Reasonable Articulate Suspicion of Criminal Activity to Justify an Investigatory Detention**

The evolution of cannabis' status under Florida state law<sup>2</sup> and the continued growth of the number of people non-criminally *and* lawfully possessing, buying, and using cannabis in the state, have rendered the odor of cannabis alone insufficient as a basis for reasonable suspicion of criminal activity. Simply put, the odor of cannabis no longer has the significance it once had as a basis for

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<sup>1</sup> 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>.

<sup>2</sup> See FLA. STAT. §§ 381.986, 581.217(1) (allowing for the cultivation, distribution, and consumption of hemp and hemp extracts); FLA. STAT. § 381.986 (regulating medical marijuana in Florida).

reasonable suspicion and probable cause, in light of the legalization of hemp and medical marijuana in Florida.

There are a multitude of legal and non-criminal ways an individual can come to smell like raw cannabis—the odor of which is indistinguishable from marijuana.<sup>3</sup> Although the odor of cannabis alone, without other circumstances, at one time provided a sufficient basis for the higher standard of probable cause, today, it provides at most a mere suspicion that a crime involving cannabis has happened, is happening, or will occur. However, mere suspicion is not enough to support a stop. *State v. Baez*, 894 So. 2d 115, 122 (Fla. 2004) (citing *Carter v. State*, 454 So.2d 739 (Fla. 2d DCA 1984)).

Instead, in order not to violate a citizen's Fourth Amendment rights, an investigatory stop requires a well-founded, articulable suspicion of criminal activity. *Id.* The odor of cannabis cannot meet that standard. Unlawfully possessed cannabis, lawfully possessed

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<sup>3</sup> *People v. Molina*, 208 N.E.3d 579 (Ill. App. 4th 2021) (“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.”), *appeal allowed*, 210 N.E.3d 799 (Ill. 2023).

hemp, and lawfully possessed medical cannabis all smell, look, and feel the same—drug-sniffing dogs,<sup>4</sup> let alone police officers, are unable to distinguish them. Today, if an officer smells the odor of cannabis, they cannot be certain *which type* of cannabis produced the odor—hemp, medical, or illegal cannabis? Moreover, the ever-increasing prevalence of legal cannabis in Florida makes it less likely—and therefore less reasonable to conclude—its odor derives from unlawful cannabis.

As of December 8, 2023, there are 862,824 people in Florida that have an active medical marijuana license.<sup>5</sup> This represents approximately 5% of the almost 18 million people aged 18 or older in Florida.<sup>6</sup> Thus, approximately one out of every twenty adults in Florida may lawfully use medical marijuana. And while 5% is

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<sup>4</sup> Debra Cassens Weiss, *New Hemp Laws Leave Police and Prosecutors Dazed and Confused*, ABA J., Aug. 9, 2019, <http://www.abajournal.com/news/article/are-new-hemp-laws-accidentally-legalizing-pot-drug-sniffing-dogs-could-be-obsolete-along-with-pot-smell-probable-cause>.

<sup>5</sup> December 8, 2023 OMMU Update, OFFICE MED. MARIJUANA USE, [https://knowthefactsmmj.com/wp-content/uploads/ommu\\_updates/2023/120823-OMMU-Update.pdf](https://knowthefactsmmj.com/wp-content/uploads/ommu_updates/2023/120823-OMMU-Update.pdf) (last visited Dec. 12, 2023).

<sup>6</sup> *Quick Facts: Florida*, U.S. CENSUS BUREAU (July 1, 2022), <https://www.census.gov/quickfacts/fact/table/FL/PST045222>.

certainly a sizeable percentage of the adult population in Florida, it does not account for all people who may smell like cannabis for entirely lawful reasons. For example, consider the unknown but certainly statistically significant number of adults who grow, transport, sell, consume, or otherwise come in contact with hemp. Like the *Kilburn* Court reasoned, here “[t]he thought that these [hundreds of thousands] of people are subject to seizure by law enforcement...is antithetical to [this Court’s] Fourth Amendment jurisprudence.” *Kilburn v. State*, 297 So. 3d 671, 676 (Fla. 1st DCA 2020).

In a state such as Florida, where hemp—the odor of which is indistinguishable from marijuana—and medical marijuana are not only legal but also ubiquitous, police must not be able to conduct a stop or search based upon the odor of cannabis alone. Indeed, “a potentially lawful activity cannot be the sole basis for a detention.”<sup>7</sup>!

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<sup>7</sup> *Hatcher v. State*, 342 So. 3d 807 (Fla. 1st DCA 2022) (Bilbrey, J., concurring) (quoting *Kilburn v. State*, 297 So. 3d 671, 675 (Fla. 1st DCA 2020)).

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

Holding en banc that the odor of cannabis alone does not establish a reasonable suspicion of criminal activity for an investigatory detention in Florida will promote officers' adherence to the strictures of the Fourth Amendment.

Unlike most facts giving rise to reasonable suspicion, probable cause, or exigent circumstances, odors are intangible and incapable of being preserved as evidence for future criminal prosecutions. As is the case here, an odor will not appear on video or audio from body-worn cameras. Also, odors, like that of cannabis, are diffuse and may spread and linger long after a person comes in contact with their source. Ultimately, when police rely on the odor of cannabis, they are using much less reliable evidence, and courts are relying on much less reliable assertions, to justify an investigatory stop or search.

Furthermore, it is difficult in practice for people like Mr. Baxter, who are subjected to unreasonable detentions and warrantless vehicle searches based on the odor of 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")<sup>8</sup> 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 out before their motion is heard,<sup>9</sup> 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

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<sup>8</sup> See, e.g., *Draper v. United States*, 358 U.S. 307, 333 (1959).

<sup>9</sup> *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.").

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*<sup>10</sup> claims would be equally challenging due to the difficulty in gathering evidence of a policy or practice.

Giving officers carte blanche to use the unverifiable odor of cannabis to justify investigatory stops and warrantless searches would not only threaten Floridians' Fourth Amendment protections, it would inevitably exacerbate racial disparities already rampant in traffic enforcement. Adhering to the Fourth Amendment's protections by holding that the odor of raw cannabis alone does not establish reasonable suspicion and does not provide probable cause to search a vehicle here would have the added benefit of mitigating these harms.

### **C. 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

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<sup>10</sup> *Monell v. Department of Soc. Svcs.*, 436 U.S. 658 (1978).

investigation and enforcement of cannabis-related conduct.<sup>11</sup> 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.<sup>12</sup> While the national arrest rate of white people for cannabis-related conduct remained largely constant for the first decade of the millennium, the arrest rate for Black people steadily *increased* between 2002 and 2010.<sup>13</sup> 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.<sup>14</sup>

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<sup>11</sup> 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).

<sup>12</sup> *Marijuana Arrests by the Numbers*, ACLU, <https://www.aclu.org/gallery/marijuana-arrests-numbers> (last visited Aug. 22, 2023).

<sup>13</sup> *The War on Marijuana in Black and White*, ACLU 21 (2013), <https://www.aclu.org/report/report-war-marijuana-black-and-white> [hereinafter “The War on Marijuana in Black and White”].

<sup>14</sup> *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>.

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,<sup>15</sup> and some studies posit that white people possess and use cannabis at higher rates than Black people.<sup>16</sup> Yet, as stated above, across the nation police still arrest Black people for cannabis-related offenses at four times the rate of white individuals.<sup>17</sup> Indeed, in Florida, a report

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<sup>15</sup> *Id.* at 66.

<sup>16</sup> 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.”); *The War on Marijuana in Black and White*, *supra* note 13, 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 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.”).

<sup>17</sup> *The War on Marijuana in Black and White*, *supra* note 13, 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>.

found that Black people were 4.2 times more likely to be arrested for marijuana possession than white people.<sup>18</sup> 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 those arrested may have engaged in entirely lawful behavior.

Compounding this problem is the fact that when Black people are arrested for drug offenses, they are more likely than white people to be convicted; once convicted, they are more likely to be imprisoned and receive lengthy sentences.<sup>19</sup>

In the Fourth Judicial Circuit, encompassing Duval, Nassau, and Clay counties, Black individuals were most likely to have their

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<sup>18</sup> The War on Marijuana in Black and White, *supra* note 13, at 130.

<sup>19</sup> *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENTENCING PROJECT, <https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/> (Apr. 19, 2018).

marijuana possession cases filed and least likely to have diversion.<sup>20</sup> Black individuals were also less likely to have their marijuana possession cases dismissed by a prosecutor or judge than their white counterparts.<sup>21</sup> And, Black individuals also were less likely than white individuals to receive diversion for marijuana possession.<sup>22</sup> Finally, Black individuals were most likely to receive a custodial sentence for marijuana possession in the Fourth Judicial Circuit.<sup>23</sup>

Moreover, Black people convicted of felony drug crimes routinely receive lengthier sentences than white people convicted of the same offenses. For example, in Duval County—where this incident occurred—Black people convicted of felony drug crimes were sentenced to nearly 80% more time in prison than white people convicted of similar offenses.<sup>24</sup> And this trend is not unique to Duval

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<sup>20</sup> Besiki Luka Kutateladze et al., *Race, Ethnicity and Prosecution in Clay, Duval and Nassau Counties, Florida*, ADVANCING PROSECUTORIAL EFFECTIVENESS AND FAIRNESS REPORT SERIES, August 2019, at 10 <https://caj.fiu.edu/projects/ppis/duval-county-disparity-report-printable.pdf>.

<sup>21</sup> *Id.* at pgs. 22, 23.

<sup>22</sup> *Id.* at pg. 26.

<sup>23</sup> *Id.* at pg. 34.

<sup>24</sup> *One War. Two Races. Bias reigns in Florida's war on drugs.* SARASOTA HERALD-TRIBUNE, Dec. 16, 2017, <http://projects.heraldtribune.com/one-war-two-races/intro/>.

County: “Nearly half the counties in Florida sentence [B]lack[] [people] convicted of felony drug possession to more than double the time of white[] [people], even when their backgrounds are the same.”<sup>25</sup>

As these disparities demonstrate, cannabis enforcement has had a staggeringly disproportionate impact on Black and Latino people and has come at tremendous human cost. The litany of cannabis enforcement’s attendant harms bolsters the importance of ruling that the odor of cannabis alone is insufficient to establish reasonable suspicion of criminal activity for an investigatory stop.

**D. Police Stop and Search Drivers of Color at Disproportionately High Rates Nationwide and in Florida**

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

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<sup>25</sup> Josh Salman, Emily Le Coz and Elizabeth Johnson, *Florida’s broken sentencing system*, SARASOTA HERALD-TRIBUNE, Dec. 12, 2016, <http://projects.heraldtribune.com/bias/sentencing/>.

than twenty-one million such encounters that year.<sup>26</sup> An extensive body of literature has long made clear that police do not stop or investigate all community members equally.<sup>27</sup> Racial and ethnic disparities in traffic stops have persisted for decades,<sup>28</sup> despite

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<sup>26</sup> *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).

<sup>27</sup> 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>; *Black Motorists in Florida Cited for Seatbelt Violations nearly Twice as Often as White Motorists*, ACLU (Jan. 27, 2016), <https://www.aclu.org/press-releases/aclu-black-motorists-florida-cited-seatbelt-violations-nearly-twice-often-white>; Sharon LaFraniere & Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015).

<sup>28</sup> 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)).



evidence indicating that white drivers commit moving violations at equal or higher rates than other racial groups.<sup>29</sup>

In Florida, data collected on traffic stops over a one-year period shows prolific, persistent, and severe racial and ethnic disparities in traffic stops.

A report analyzing enforcement of seatbelt laws in Florida found that police stopped and ticketed Black individuals far out of proportion to their representation—nearly twice as often as white drivers.<sup>30</sup>

In Jacksonville, where Mr. Baxter was unlawfully detained and searched, this trend extends to pedestrian stops where a report showed that law enforcement issued pedestrian tickets to Black people at a higher rate than any other large county in the state.<sup>31</sup>

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<sup>29</sup> 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>.

<sup>30</sup> *Racial Disparities in Florida Safety Belt Law Enforcement*, ACLU (2016), [https://www.aclu.org/wp-content/uploads/publications/racial\\_disparities\\_in\\_florida\\_safety\\_belt\\_law\\_enforcement.pdf](https://www.aclu.org/wp-content/uploads/publications/racial_disparities_in_florida_safety_belt_law_enforcement.pdf).

<sup>31</sup> Kate Rabinowitz, Topher Sanders, and Benjamin Conarck, *How We Calculated the Risks of Walking While Black*, PROPUBLICA, Nov. 16,

There, “Black pedestrians are nearly three times as likely to receive a ticket as nonblack pedestrians.”<sup>32</sup>

### **E. 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.<sup>33</sup> Commonly referred to as “pretextual stops,” these are stops ostensibly based on an observed traffic infraction or equipment violation (neither of which applies to the stop of Mr. Baxter), but 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

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2016, <https://www.propublica.org/article/how-we-calculated-the-risks-of-walking-while-black>.

<sup>32</sup> *Id.*

<sup>33</sup> 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 27, at 10.

investigative purposes. With traffic laws that are so elaborate, so detailed, and so unrealistic,<sup>34</sup> virtually “no driver can avoid violating some traffic law during a short drive, even with the most careful attention.”<sup>35</sup> Pretextual stops increased in popularity among police nationwide at the inception of the War on Drugs,<sup>36</sup> and remain a favored tactic by police to allegedly interdict drugs and other contraband.<sup>37</sup> Florida is no exception.<sup>38</sup>

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

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<sup>34</sup> Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1480–81 (2021).

<sup>35</sup> 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).

<sup>36</sup> 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.

<sup>37</sup> EPP ET AL., *supra* note 27, at 59.

<sup>38</sup> See, e.g., *Illinois v. Caballes*, 543 U.S. 405 (2005); see also Albert Serna Jr., ‘*An excuse to racially profile*’: *How Florida trains police on bias*, TAMPA BAY TIMES (Sept. 8, 2022), <https://www.tampabay.com/investigations/2022/09/08/an-excuse-to-racially-profile-how-florida-trains-police-on-bias/>.

where police make pretextual stops than the rate of crime itself.<sup>39</sup> 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.<sup>40</sup>

When making pretextual stops, police rely largely on intuition<sup>41</sup> to decide which cars to pull over and investigate.<sup>42</sup> Extensive evidence shows officers use this “intuition” to target drivers of color more often

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<sup>39</sup> 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).

<sup>40</sup> 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).

<sup>41</sup> 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”).

<sup>42</sup> Kreit, *supra* note 36, at 751.

than white drivers.<sup>43</sup> 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.<sup>44</sup>

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

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<sup>43</sup> 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://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).

<sup>44</sup> See Harris, *supra* note 35, at 560–69.

twice as likely as white people to be subjected to a pretextual traffic stop.<sup>45</sup> The study concluded that once stopped, Black and Latino drivers disproportionately were cited for minor infractions, such as equipment violations.<sup>46</sup>

Similarly, a study of four million traffic stops in California found that for “Black Californians the likelihood of being searched is more than twice that of white Californians—a search rate of 20.5 percent and 8.2 percent, respectively.”<sup>47</sup> 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.<sup>48</sup> Concentrating pretextual stops within Black and brown neighborhoods causes

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<sup>45</sup> EPP ET AL., *supra* note 27, at 110.

<sup>46</sup> *Id.*

<sup>47</sup> 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>.

<sup>48</sup> 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](https://www.sc.edu/uofsc/posts/2020/06/racial_disparities_traffic_stops.php#.Y96Cc3bMI2y).

severe harms, as community members who are stopped are at significant risk of economic, psychological, and physical harm.

To begin with, Black and Latino drivers routinely subjected to pretextual traffic stops face burdensome fines, fees, forfeitures, and arrests.<sup>49</sup> 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.<sup>50</sup>

And for many Black and Latino drivers, stops are a real and justifiable source of fear, stress, and trauma.<sup>51</sup> Recent traffic stops across the country demonstrate why: low-level traffic stops can

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<sup>49</sup> *Fines and Fees*, VERA, <https://www.vera.org/ending-mass-incarceration/criminalization-racial-disparities/fines-and-fees> (last visited Feb. 10, 2023).

<sup>50</sup> *Id.*

<sup>51</sup> 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.ncbi.nlm.nih.gov/pmc/articles/PMC8061162/>.

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 during traffic stops, 400 of whom had no weapon and were not being pursued for a violent crime.<sup>52</sup> Again, “Black drivers were overrepresented among those killed.”<sup>53</sup>

**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

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<sup>52</sup> 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>.

<sup>53</sup> *Id.*



establishes that stops and searches not based on reliable evidence of serious criminal activity are unlikely to be efficient or productive.<sup>54</sup> This is borne out by the fact that majority of pretextual traffic stops do not result in the recovery of contraband, such as drugs or firearms.

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.<sup>55</sup> Similarly, in the District of Columbia, research found only one percent of pedestrian and traffic stops *combined* led to the recovery of a gun in 2020.<sup>56</sup>

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<sup>54</sup> 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://dx.doi.org/10.2139/ssrn.2614058>.

<sup>55</sup> *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 two percent of stops resulted in arrest or recovery of contraband).

<sup>56</sup> *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 to recover contraband and reduce crime yet 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 a jurisdiction where 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.

### **Conclusion**

For the foregoing reasons, *amici* respectfully request this Court reverse the panel's affirmation of the denial of Mr. Baxter's motion to suppress and hold that the odor of raw cannabis alone is both insufficient to establish reasonable suspicion *and* does not provide probable cause to search a vehicle pursuant to the automobile exception to Fourth Amendment's warrant requirement.

Respectfully submitted,

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**Certificate of Service**

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**Certificate of Compliance**

I certify that this brief is in conformity with all font and word count provisions pursuant to Rule 9.045, Fla. R. App. P. and complies with Rule 9.100, Fla. R. App. P.

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