No. A22-0425

State of Minnesota

In Supreme Court

State of Minnesota,

Appellant,

vs.

Adam Lloyd Torgerson,

Respondent.

BRIEF OF *AMICI CURIAE* RESTORE THE FOURTH, INC., RESTORE THE FOURTH MINNESOTA, & SENSIBLE MINNESOTA SUPPORTING RESPONDENT ADAM LLOYD TORGERSON

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Amici Identity, Interest, & Authority to File[1]

A. The Amici's Identity

The Amici are non-partisan nonprofits. Each is concerned with individual privacy, police abuses, and systemic discrimination in drug enforcement against minority and low-income communities.

Restore the Fourth, Inc. ("Restore the Fourth") is dedicated to robust enforcement of the Fourth Amendment, which guarantees the privacy of persons, homes, papers, and effects against unwarranted government intrusions. Restore the Fourth advances this mission by overseeing a network of local chapters whose members include lawyers, academics, advocates, and ordinary citizens. Each local chapter devises grassroots activities to bolster political recognition of Fourth Amendment rights. Restore the Fourth also files amicus briefs in major Fourth Amendment cases. *E.g.*, Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Collins v. Virginia*, 138 S. Ct. 1663 (2018) (No. 16-1027).

Restore the Fourth Minnesota ("RT4-MN") is the Minnesota-based chapter of Restore the Fourth. RT4-MN advocates for individual privacy and against mass government surveillance. In 2020, RT4-MN helped to establish an anti-surveillance coalition with the American Civil Liberties

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[1] The Amici certify under MRCAP 129.03 that: (1) no counsel for a party authored this brief either in whole or in part; and (2) no person or entity has contributed money to the preparation or submission of this brief other than the Amici, their members, and their counsel.

Union (ACLU) and other groups. In 2021, RT4-MN successfully helped Minneapolis enact a ban on police use of facial recognition.

Sensible Minnesota is a volunteer-led group of diverse individuals that seeks to make Minnesota neighborhoods safer and more inclusive for those negatively impacted by cannabis prohibition and the war on drugs. Sensible Minnesota educates the public and promotes legislative changes that emphasize compassion over isolation, restorative justice over mass incarceration, and public health over social stigma. Sensible Minnesota is the first organization in Minnesota to provide free advocacy services to Minnesota medical cannabis patients and those interested in joining the patient registry. Sensible Minnesota has built strong relationships in this capacity with the Minnesota Department of Health, medical practitioners, and Minnesota's medical cannabis manufacturers.

B. The Amici's Interest in *Torgerson*

The Amici have a public interest in *Torgerson*. This appeal concerns federal and state constitutional protections against unreasonable searches and seizures. These protections assume vital importance when the police stop and search vehicles, leaving drivers with the "choice" of quietly submitting "to whatever the officers undertake" or objecting at the "risk of arrest or [suffering] immediate violence." *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting). Traffic stops thus present a pervasive risk of police abuse, requiring courts to view any given stop as "a search of the car of Everyman." *Id.* at 181; *see also Rodriguez v. United States,* 575 U.S. 348, 354–55 (2015) (standards for traffic stops).

In *Torgerson*, the district court held that "a smell of marijuana alone is not enough to support probable cause" to search a vehicle that the police originally stopped for an equipment violation. (Appellant's Add.15.) The court also noted the broader societal harms presented by the kind of vehicle search that the driver (Torgerson) experienced—harms that "render[] the protections of the Fourth Amendment hollow" for many individuals and communities. *Mullenix v. Luna*, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting); *see Jamison v. McClendon*, 476 F. Supp. 3d 386, 395 (S.D. Miss. 2020) (describing the "emotional toll" of a traffic stop on an African-American driver detained for two hours).

The Amici support these conclusions, which align with this Court's longstanding concern for (and consistent safeguards against) increasingly intrusive traffic stops. For example, the Court has determined that article I, section 10 of the Minnesota Constitution—i.e., Minnesota's analogue of the federal Fourth Amendment—"provid[es] distinct protection from the expansion of traffic stops to include intrusive police questioning when there was no reasonable articulable suspicion to justify the questioning." *State v. Askerooth*, 681 N.W.2d 353, 362 (Minn. 2004); *see Ascher v. Comm'r of Pub. Safety*, 519 N.W.2d 183 (Minn. 1994). The Amici thus believe the Court should affirm the district court and clear away any of the Court's outdated cases that conflict with the district court's holding.

C. The Amici's Authority to File in *Torgerson*

On January 12, 2023, the Court granted leave to file this amici brief.

Argument

The Fourth Amendment safeguards individual privacy "against arbitrary invasions." *Carpenter v. United States*, 138 S. Ct. 2206, 2213–14 (2018). This right is of fundamental importance in traffic stops. When the police "stop and search an automobile but find nothing incriminating, this invasion … often finds no practical redress." *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting). "Courts can protect the innocent against such invasions only indirectly" by "excluding evidence obtained against those who frequently are guilty." *Id.*

This is one such case. Police stopped Adam Torgerson's vehicle for a light-bar violation. Police then searched Torgerson's vehicle based on their alleged perception of a cannabis odor, detected by the human nose. The police did not see any contraband beforehand, nor did they see any indicia of driver intoxication. The search yielded drug paraphernalia and a minor amount of methamphetamine. The district court suppressed this evidence as the fruit of an unlawful search and seizure.

This Court should affirm. Fourth Amendment rights "are not mere second-class rights but belong in the catalog of indispensable freedoms." *Brinegar v*, 338 U.S. at 180 (Jackson, J., dissenting). Consistent with this principle, the Court has rejected "[police] exploitation of a routine traffic stop." *State v. Fort*, 660 N.W.2d 415, 416 (Minn. 2003). Permitting vehicle searches based on the mere odor of cannabis invites such exploitation. The district court properly recognized this, as well as the way that police militarization and traffic stops erode public trust in the police.

I. Past is prologue: Justice Jackson, traffic stops, and *Brinegar*.

During his 13 years on the U.S. Supreme Court (from 1941 to 1954), Justice Robert H. Jackson wrote and joined many of the Court's seminal opinions. On the First Amendment, he explained: "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Virginia Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943). After suffering a heart attack, Justice Jackson "left the hospital and went directly to [the] Court so that the entire Supreme Court could be present while Chief Justice Warren announced the [Court's] unanimous decision in *Brown v. Board of Education*."[2]

Justice Jackson addressed many legal issues with great prescience, including the Fourth Amendment and traffic stops. Jackson's concern for this issue grew from his service as Chief Prosecutor for the United States at the Nuremberg trials in 1945. Jackson considered his "hard months at Nuremberg" to be "the most important, enduring, and constructive work of [his] life."[3] Jackson recognized the trials sought to condemn "wrongs" that were "so devastating" that civilization itself could not tolerate these wrongs "being ignored" or "survive their being repeated."[4]

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[2] Eugene C. Gerhart, *The Legacy of Robert H. Jackson*, 68 ALBANY L. REV. 19, 19 (2004), *available online* https://bit.ly/40P5BwF.

[3] Brian R. Gallini, *Nuremberg Lives On: How Justice Jackson's International Experience Continues to Shape Domestic Criminal Procedure,* 46 LOYOLA UNIV. CHICAGO L.J. 1, 31 & n.233 (2015) (quoting Jackson).

[4] Jackson's Opening Statement Before the Int'l Military Tribunal (Nov. 21, 1945), ROBERT H. JACKSON CTR., https://bit.ly/3YNGoRC.

Jackson carried his Nuremberg experience home with him when he returned to the Supreme Court and began hearing Fourth Amendment cases. One of these cases was *Brinegar v. United States*, 338 U.S. 160 (1949). Brinegar was "convicted of importing intoxicating liquor into Oklahoma from Missouri" in violation of federal law. *Id.* at 161–62. Police stopped and searched Brinegar's vehicle, finding two dozen cases of liquor. *See id.* The Supreme Court upheld the search based on recent police observation of Brinegar "engaged in illicit liquor dealings." *Id.* at 166.

Justice Jackson dissented. *See id.* at 180–88. Jackson observed that "[a]mong deprivations of rights, none is so effective" than uncontrolled government search-and-seizure in "cowing a population, crushing the spirit of the individual, and putting terror in every heart." *See id.* at 180. Jackson knew this from his time at Nuremberg, having lived and worked "among a people possessed of many admirable qualities but deprived of these rights." *Id.* Jackson had witnessed how "personality deteriorates and dignity and self-reliance disappear" when people "are subject at any hour to unheralded search and seizure." *Id.* at 180–81.

In his *Brinegar* dissent, Justice Jackson aimed to teach three lessons about the Fourth Amendment and traffic stops—lessons that still merit attention today[5] in vehicle stop-and-search cases (like *Torgerson*):

First, Fourth Amendment rights are fragile. "[I]llegal search and seizure usually is a single incident, perpetrated by surprise, conducted in

[5] Courts have cited Jackson's *Brinegar* dissent "more than 2000 times." Gallini, *supra* note 3, at 6 n.29 (tallying citations as of 2015).

haste, kept purposely beyond the court's supervision, and limited only by the judgment and moderation of officers whose own interests and records are often at stake in the search." *Id.* at 182. "The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence." *Id.* By contrast, violations of "the press, or free speech, or religion, usually require[] a course of suppressions against which the citizen can … obtain [a court] injunction." *Id.*

Second, only the "more flagrant abuses" of the Fourth Amendment "come to the attention of the courts"—and even then, "only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted." *Id.* at 181. Courts in these cases see only the tip of the iceberg, beneath which hides "many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear." *Id.*

Third, courts "must remember" officers will be the first to "interpret and apply" any judicially-granted "privilege of [warrantless] search and seizure." *Id.* at 182. This authority will subsequently "be exercised by the most unfit and ruthless officers as well as by the fit and responsible." *Id.* And officers will exercise any court-granted authority to search-and-seize across the board—against "petty misdemeanors as well as … the gravest felonies." *Id.* In sum, when courts allow warrantless searches, police will "push" this authority "to the limit"—especially since there is "no way in which the innocent citizen can invoke advance protection. *Id.*

Based on these observations, Justice Jackson pronounced that "a search against Brinegar's car must be regarded as a search of the car of Everyman." *Id.* at 181. Applying this standard to Brinegar's case, Jackson found that the stop-and-search of Brinegar's car lacked "the justification of probable cause." *Id.* at 188. It made no difference that the police found contraband liquor in Brinegar's car. "[W]hen a car is … summoned to stop by a siren, and brought to a halt … the search at its commencement must be valid and cannot be saved by what it turns up." *Id.*

"[W]hat's past is prologue." W. SHAKESPEARE, THE TEMPEST, act 2, sc. 1. Like the search of Brinegar's car over 70 years ago, the search of Torgerson's car "must be regarded as a search of the car of Everyman." *Brinegar*, 338 U.S. at 181 (Jackson, J., dissenting). The Court must consider the extent to which sustaining this search on the mere, human-detected odor of cannabis may lead to "searches of … automobiles of innocent people … about which we never hear." *Id.* And the Court must consider how "ruthless officers" may exercise this power. *Id.* at 182.

Through such considerations, the Court ensures ongoing vitality of the "right to be secure against [unreasonable] searches and seizures," which is "one of the most difficult to protect." *Id.* at 181. Since the police "are themselves the chief invaders" of the Fourth Amendment, there is "no enforcement outside of court." *Id*. The alternative is to "obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state, where they are the law." *Johnson v. United States*, 333 U.S. 10, 17 (1948).

II. The Court should hold that mere cannabis odor does not establish probable cause to search a stopped vehicle.

Viewing the search of Adam Torgerson's car as the search of the car of Everyman, the district court held that "the mere odor of marijuana is not sufficient to support probable cause to search." (Appellant's Add.10.) The State asserts error based on *State v. Schultz*, 271 N.W.2d 836 (Minn. 1978). (Appellant's Br. 10–16.) In *Schultz*, the Court declared that a police officer "properly conducted a warrantless search" of a car's passenger compartment to the extent the officer truthfully testified he "smelled the odor of marijuana" coming from the compartment. *Id.* at 837.

The Court should formally overrule *Schultz* and hold—as the district court did—that human detection of mere cannabis odor does not equal probable cause to search a vehicle. To be sure, the Court is "extremely reluctant to overrule [its] precedent under principles of *stare decisis*." *State v. Lee,* 706 N.W.2d 491, 494 (Minn. 2005). The Court needs a "compelling reason" before the Court will overrule a prior decision. *Id.*

Three compelling reasons exist here:

First, in the decades following *Schultz*, the Court has systematically affirmed the need for "more protection" of Fourth Amendment rights "in the context of vehicle stops." *State v. Ortega*, 770 N.W.2d 145, 152 (Minn. 2004). This arc traces to *Ascher v. Commissioner of Public Safety*, 519 N.W.2d 183 (Minn. 1994), which concerned "police use of temporary roadblocks" to "investigate a large number of drivers in the hope of discovering" that some of the drivers were "alcohol-impaired." *Id.* at 184.

Exercising the Court's "independent authority" to "protect the rights of the citizens of Minnesota" under the state constitution, the Court held the roadblocks violated Minnesota's analogue of the Fourth Amendment (Minn. Const. art. I, §10). *Id.* at 187. The roadblocks subverted the core Fourth Amendment principle that, in general, the police must "have an objective individualized articulable suspicion of criminal wrongdoing *before* subjecting a driver to an investigative stop." *Id.*

In reaching this conclusion, the Court emphasized that the "real issue" was not "whether the police conduct in question is reasonable in some abstract sense"—or "whether the police procedure is in some sense effective." *Id.* at 186. The Court also did not care whether a "substantial segment of … society would willingly suffer the short term intrusion of a sobriety checkpoint … to remove drunken drivers from the road." *Id.* The Court was bound to protect the privacy rights of all Minnesotans—rights that could not survive warrantless roadblocks that let the police in effect "decide the reasonableness of their own conduct." *Id.*

In *State v. Fort,* 660 N.W.2d 415 (Minn. 2003). the Court again enhanced the protection of Fourth Amendment rights in the context of traffic stops. The officers in *Fort* stopped a vehicle "for speeding and a cracked windshield." *Id.* at 419. The officers nevertheless investigated for "the presence of narcotics and weapons" despite having "no reasonable articulable suspicion of any other crime." *Id.* These actions raised the issue of whether "the scope and duration of a traffic stop investigation must be limited to the justification for the stop." *Id.* at 418.

Exercising the Court's "independent authority to interpret … [the] state constitution," the Court held that: "in the absence of reasonable, articulable suspicion a consent-based search obtained by exploitation of a routine traffic stop that exceeds the scope of the stop's underlying justification is invalid." *Id.* at 416. On this score, the "questioning … and subsequent search" of the driver in *Fort* "went beyond the scope of the traffic stop." *Id.* at 418. The Court upheld suppression of what the invalid search revealed: "several small, hard lumps" of crack cocaine. *Id.*

In *State v. Askerooth*, 681 N.W.2d 353 (Minn. 2004), the Court again expanded its rights-protective traffic stop jurisprudence. The Court held that normal restrictive Fourth Amendment rules for warrantless stops cover the "reasonableness of seizures during traffic stops even when a minor law has been violated." *Id.* at 363. The Court refused to adopt the more permissive federal standard that "probable cause of a minor traffic violation eliminates the need for balancing individual and governmental interests" under the Fourth Amendment. *Id.* at 360.

The Court went the opposite direction, establishing that "each incremental intrusion during a traffic stop" must be tied to either the stop's "original legitimate purpose," facts establishing "independent probable cause," or "reasonableness." *Id.* at 365. Police justification for the intrusion had to "be individualized to the person toward whom the intrusion [was] directed." *Id.* Through these standards, the Court made it clear that "the state is required to justify the confinement in a squad car of a driver stopped for a minor traffic violation." *Id.* at 369.

The Court's traffic-stop jurisprudence has placed Minnesota ahead of the curve. Consider *Fort*'s holding that Fourth Amendment principles afford "distinct protection" against the "expansion of traffic stops" into "intrusive police questioning when there [is] no reasonable articulable suspicion." *Askerooth*, 681 N.W.2d at 362 (citing *Fort*). Over a decade later, the U.S. Supreme Court reached essentially the same view: a traffic stop "exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." *Rodriguez v. United States*, 575 U.S. 348, 350, 354–57 (2015).

Against this backdrop, the Court should not hesitate to overrule *Schultz* insofar as *Schultz* authorizes officers to search vehicles based on the mere smell of cannabis. Reaffirming *Schultz* would undermine the Court's rights-protective jurisprudence in *Ascher, Fort,* and *Askerooth*. The Court would return Minnesota to a pre-1990s universe in which the police used traffic stops in ways that let them "decide the reasonableness of their own conduct." *Ascher*, 519 N.W.2d at 186.

Or, in the Framers' words, authorizing vehicle searches based on mere cannabis odor means placing the privacy of every driver "in the hands of every petty officer." *Boyd v. United States*, 116 U.S. 616, 625–26 (1886) (quoting James Otis). Unlike the "status quo" of 45 years ago, "vast numbers of citizens" today both "use and possess non-criminal amounts of marijuana." (Appellant's Add.8.) Any mere-odor rule would diminish these Minnesotans' privacy without genuine "individualized articulable suspicion of criminal wrongdoing." *Ascher*, 519 N.W.2d at 187.

Second, we now know that permissive rules for traffic stops (like mere cannabis odor) enable "many unlawful searches of … automobiles of innocent people." *Brinegar*, 338 U.S. at 182 (Jackson, J., dissenting). When the Court decided *Schultz*, only limited knowledge existed of the problematic relationship between traffic stops and civil forfeiture abuse. Public investigations have since exposed "unchecked [police] use" of civil forfeiture without any regard for due process. *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992).

Consider the facts of *United States v. $20,000*, No. 8:07-cv-214, 2008 U.S. Dist. LEXIS 8559 (D. Neb. Feb. 5, 2008). Realtor Deon Owens was driving from Indiana to California with two passengers. *See id.* at *2–3. Owens was also carrying $20,000 with him to buy some real estate in California. *See id.* As Owens was driving through Nebraska, local police officers stopped Owens for speeding. *See id.* The stop revealed "no drugs or other illegal items." *Id.* at *5. The officers nevertheless seized Owens' cash while letting Owens go. *See id.* A police car dash-cam recorded one of the officers saying: "I say we take his money and, um, count it as a drug seizure" so the officers could get "new laptops in their offices." *Id.* A federal court eventually reversed the seizure. *Id.* at *10.

Owens' experience is not isolated. In 2016, the Washington Post examined 62,000 roadside cash seizures and 400 federal civil forfeiture cases.[6] The Post discovered "an aggressive brand of policing that has spurred the seizure of hundreds of millions of dollars in cash from

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[6] Michael Sallah, et al., *Stop and Seize*, WASH. POST, Sept. 6, 2014.

motorists and others not charged with crimes."[7] This aggressive brand of policing entailed the "use of minor traffic infractions as pretexts for stops; an analysis of 'indicators' about drivers' intentions, such as nervousness; a request for warrantless searches; and a focus on cash."[8] Finally, in most of these traffic stops, the police never made an arrest.[9]

This reality has drawn widespread censure. Former directors of the DOJ's Asset Forfeiture Office have declared: "[t]oday, the old speed traps have all too often been replaced by forfeiture traps, where local police stop cars and seize cash and property to pay for local law enforcement efforts."[10] Comedian John Oliver's popular broadcast on civil forfeiture[11] is similarly critical: "there are all these dash-cam videos of cops asking people, 'Do you have any cash in the car?' Then you … realize they're funding their departments by shaking people down."[12]

In *Schultz*, the Court had no occasion to consider the broader abuses that might follow allowing vehicle searches to rest upon the mere smell of

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7 Sallah, et al., *supra* note 6.

8 Robert O'Harrow Jr., et al., *They Fought the Law. Who Won?*, WASH. POST, Sept. 8, 2014.

9 *Id.*

10 John Yoder & Brad Cates, Opinion, *Government Self-Interest Corrupted a Crime-Fighting Tool Into an Evil*, WASH. POST, Sept. 18, 2014.

11 *Last Week Tonight with John Oliver: Civil Forfeiture*, YouTube (Oct. 5, 2014), https://youtu.be/3kEpZWGgJks; *see State v. Sprunger*, 458 S.W.3d 482, 493 & n.19 (Tenn. 2015) (citing John Oliver's program as part of a "national conversation" on the use and abuse of civil forfeiture).

12 David Marchese, *In Conversation: John Oliver*, VULTURE, Feb. 22, 2016, https://bit.ly/2RdHWFj.

cannabis. The Court now has ample reason to consider this reality given report after report proving the ways that police have used traffic stops to profit their departments and victimize countless individuals.[13] These reports establish that affirming *Schultz* today would mean only adding to the many "searches of … automobiles of innocent people … about which we never hear." *Brinegar*, 338 U.S. at 181 (Jackson, J., dissenting).

Third, Minnesota is on the path to legalizing adult use of cannabis. This matters because in delineating Fourth Amendment protections, the Court is bound to contemplate "what may be." *Weems v. United States*, 217 U.S. 349, 373 (1910) (noting that "[t]ime works changes" and "brings into existence new conditions"). In January 2023, Minnesota representatives introduced a bill to authorize personal adult use of cannabis.[14] The bill "represents the most serious push yet for marijuana legalization" in the state, with a real possibility of passage before year's end.[15]

The 2023 bill follows a decade-long transformation of Minnesota's cannabis laws. In May 2014, the Legislature enacted Minnesota's medical cannabis program. *See* Act of May 29, 2014, ch. 311, 2014 Minn. Laws 1. The program consists of a patient registry system "administered by the Minnesota Department of Health" that "allows qualifying patients" to

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13 *See, e.g.*, Sarah Stillman, *Taken*, THE NEW YORKER, Aug. 12, 2013 (describing how civil forfeiture motivated officers in Tenaha, Texas to stalk vehicles for property to forfeit, including one case in which officers "claimed to have smelled [cannabis]" despite finding "none").

14 H.F. 100, Minn. H.R. 93rd Sess. (2023), https://bit.ly/3XCDZrQ.

15 Ryan Faircloth, *'2023 Is The Year': Minnesota Democrats Unveil Bill to Legalize Recreational Marijuana*, STAR TRIB., Jan. 5, 2018.

"possess and use cannabis for medical purposes."[16] The program covers a wide range of conditions that afflict substantial numbers of Minnesotans, including Alzheimer's disease, PTSD, and glaucoma.[17]

The Legislature has since expanded the medical cannabis program in several key ways, including a 2021 amendment that "allows patients age 21 or over to combust dried raw cannabis."[18] In the end, the program is currently providing comfort and relief to 35,711 Minnesotans (as of June 3, 2022).[19] All these Minnesotans then stand to lose their right to privacy in their vehicles if the Court reaffirms *Schultz*—a decision from a bygone era when Minnesota law criminalized all cannabis use.

Overruling *Schultz*, on the other hand, would vindicate the medical cannabis program's express criminal and civil "protections" for program participants.[20] Minn. Stat. §152.32, subd. 2; *see also, e.g., id.* §152.32 subd. 2(1) (expressly providing that an enrolled patient's "use or possession of

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16 MINN. HOUSE RESEARCH, MINNESOTA'S MEDICAL CANNABIS PROGRAM 2 (June 2022) (legal overview), https://bit.ly/3K6btMh.

17 *Id.*

18 *Id.* at 32 (legislative history summary).

19 *Id.* at 26 (table: participation in medical cannabis program)

20 The medical cannabis program forbids all registered patients from "operating … any motor vehicle … while under the influence of medical cannabis." Minn. Stat. §152.23(a)(4). But *Schultz* does not purport to limit cannabis-odor-inspired searches to cases where police reasonably suspect impairment. And in citing *Schultz*, the State maintains the mere odor of cannabis afforded probable cause for police to search Torgerson's vehicle regardless of the undisputed fact that "neither" Torgerson (the driver) nor his passengers "displayed any indicia of impairment or intoxication." (Appellant's Add.11 (relating Officer Heck's testimony).)

medical cannabis" in the program is "not [a] violation"). "Once a patient enrolls in the registry program, there is a presumption that the patient is engaging in the authorized use of medical cannabis."[21]

There is also the matter of industrial hemp, which consists of any part of the Cannabis sativa L. plant "with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." Minn. Stat. §18K.02, subd. 3. Industrial hemp is "not marijuana" but, as a matter of odor, police confusion abounds.[22] In 2018, Congress enacted a farm bill that legalized the cultivation of hemp nationwide. *See* 7 U.S.C. §§1639o *et seq.* Affirming *Schultz* would invite endless odor-based vehicle searches of Minnesota hemp farmers engaged in wholly legal activity.

The Court "must take the long view." *Kyllo v. United States*, 533 U.S. 27, 34, 40 (2001). The Court is well aware of the "enormous discretion" that the police retain "in enforcing traffic laws" and the ever-present risk of the police "tak[ing] advantage" of this discretion. *State v. George*, 557 N.W.2d 575, 579 (Minn. 1997). There is also "abundant" evidence that the police have done just this, using stops "to justify broader investigations." *State v. Taylor*, 965 N.W.2d 747, 768 (Minn. 2021) (Thissen, J., dissenting). By overruling *Schultz*, the Court protects Minnesotans who use cannabis and hemp legally against these violations, preventing mere cannabis odor from swallowing whole these Minnesotans' right to privacy.

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21 MINN. HOUSE RESEARCH, *supra* note 16, at 11.

22 *See, e.g.,* Zuri Davis, *A Hemp Company Sues After Police Mistake Their Product for Weed*, REASON, Feb. 5, 2019, https://bit.ly/3YTuyoV.

Conclusion

The "right to be secure against searches and seizures is one of the most difficult to protect" because only the "more flagrant abuses come to the attention of the courts." *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting). This case involves one of those "more flagrant abuses," with police justifying a vehicle search based not on any evidence of contraband or intoxication, but the mere smell of cannabis—an observation subject to numerous innocent explanations under present Minnesota law on cannabis use. The Court should thus reject this abuse just as the district court did, recognizing *Torgerson* now speaks for all the vehicle searches based on mere cannabis odor about which "we never hear"—searches without any "practical redress." *Id.*

Respectfully submitted,

Dated: February 15, 2023

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Certification of Brief Length

The undersigned counsel certifies that this amici brief satisfies MRCAP 132.01. This brief: (1) is printed using 13–point, proportionally-spaced fonts; and (2) complies with the relevant word-limit, containing 4,587 words (including headings, footnotes, and quotations) according to the Word Count feature of the word-processing software that counsel used to prepare this brief (Microsoft Word 2010).

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