Nos. 23-1708 and 23-1721

In the United States Court of Appeals for the Seventh Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PRENTISS JACKSON,

Defendant-Appellant.

Appeals from the United States District Court
for the Central District of Illinois, Nos. 2:10-cr-20043-JES-JEH-1
& 2:22-cr-20044-CSB-EIL-1.
The Honorable James E. Shadid, Judge Presiding.

AMICUS CURIAE BRIEF OF THE INSTITUTE FOR JUSTICE IN SUPPORT OF DEFENDANT-APPELLANT AND SUPPORTING REVERSAL

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Attorney's Signature: /s/ Daniel Nelson Date: 9/25/2023

Attorney's Printed Name: Daniel Nelson

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N/A

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Attorney's Signature: /s/ Josh Windham Date: 9/25/2023

Attorney's Printed Name: Josh Windham

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Institute for Justice (IJ)[1] is a nonprofit public-interest law firm committed to defending the foundations of a free society. One such foundation is the Fourth Amendment's guarantee that all Americans be secure in their person and property.

To that end, IJ challenges searches and seizures that violate the Fourth Amendment and similar state guarantees. IJ does so by litigating its own cases, *see, e.g.*, *Rainwaters v. Tenn. Wildlife Res. Agency*, No. 20-CV-6, 2022 WL 17491794 (Tenn. Cir. Ct. Mar. 22, 2022) (challenging wildlife officers' warrantless patrols and cameras on private land); *Snitko v. United States*, No. 2:21-CV-04405-RGK-MAR, 2021 WL 3139707 (C.D. Cal. June 22, 2021) (challenging FBI seizure of hundreds of individuals' safe deposit boxes), and by filing amicus briefs nationwide, *see, e.g.*, *Riley v. California*, 573 U.S. 373 (2014); *Long Lake Twp. v. Maxon*, 509 Mich. 981, 973 N.W.2d 615 (2022).

[1] IJ affirms that both parties received timely notice and have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no person except amicus curiae, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

INTRODUCTION

Officer Barrie threatened to search Mr. Jackson's car based on one fact: the smell of "a little bit of weed." That threat, which prompted Mr. Jackson to produce a small bag of cannabis, was a search subject to the Fourth Amendment's probable cause standard. *See* Jackson Br. 14–16.

However, Officer Barrie lacked probable cause because he lacked one of its key elements: a *particularized* basis for the search. Cannabis is legal in Illinois. And there were several innocent explanations for the smell. So Officer Barrie needed facts—not a mere hunch—suggesting the smell, in that particular instance, indicated illegal activity.

The Fourth Amendment Framers, in response to *un*particularized searches they faced, demanded that officers have probable cause of particular illegal activity. (Section I, *infra*.) Judges must enforce that requirement, especially in the context of warrantless automobile searches, which are primed for abuse. (Section II, *infra*.) Finally, vigorous review shows Officer Barrie lacked particularized probable cause. Were it otherwise, large swaths of innocent persons would be subject to indiscriminate searches. (Section III, *infra*.) This Court should therefore reverse the denial of Mr. Jackson's motion to suppress.

ARGUMENT

I. The Fourth Amendment was ratified to end searches like Officer Barrie's.

Before the Founding, government officers routinely searched anyone and any place based on a hunch of possible criminality. They did so under "general warrants"—"unparticularized warrant[s]" that gave officers "blanket authority to search where they pleased." Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 558 (1999); *Payton v. New York*, 445 U.S. 573, 583 n.21 (1980).

The founding generation's reaction to these general warrants has continuing relevance today. As Section A explains, the Founders despised general warrants as a grave abuse of government power. Indeed, as Section B explains, they ratified the Fourth Amendment specifically to end the searches general warrants authorized. But, as Section C explains, today's warrantless automobile searches, left unchecked, invite the same abuses that general warrants did. Like general-warrant searches, warrantless automobile searches are performed without a neutral magistrate's finding of probable cause. Officer Barrie's automobile search, premised on a hunch of possible

criminality, is the very sort of unparticularized search the founding generation rejected when it ratified the Fourth Amendment.

A. The founding generation despised unparticularized searches.

The common law had long rejected general warrants. Davies, *Recovering*, *supra*, at 578–81. Leading up to the Revolutionary War, however, they became an increasing problem in the colonies. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1193–94 (2016). Armed with these warrants, officers could search any place or person and fish for evidence without ever having to convince a judge that they had objectively good reasons to suspect a particular person of a crime. Donohue, *supra*, at 1194; *Steagald v. United States*, 451 U.S. 204, 220 (1981).

The colonists "reviled" general warrants for subjecting large swaths of innocent persons to oppressive searches. *Riley v. California*, 573 U.S. 373, 403 (2014). Lawyer James Otis famously denounced them as the worst "instrument of 'arbitrary power'" for "'plac[ing] the liberty of every man in the hands of every petty officer.'" Davies, *Recovering*, *supra*, at 581. Otis's remarks echoed throughout the colonies, from "town meetings [and] the Continental Congress" to "pamphleteers,

essayists, and the man-on-the-street." William J. Cuddihy, 5 *The Fourth Amendment: Origins and Original Meaning* 541 (2009). The colonists' hatred for general warrants—and the unparticularized searches they authorized—became a driving force behind the Revolution. *Riley*, 573 U.S. at 403.

B. The founding generation ratified the Fourth Amendment to require particularized searches.

Searches under the unparticularized general warrants also inspired the Fourth Amendment. They were given the "pejorative label" of "unreasonable searches," Thomas Y. Davies, *How the Post-Framing Adoption of the Bare-Probable Cause Standard Drastically Expanded Government Arrest and Search Power*, 73 Law & Contemp. Probs. 1, 4 (2010), for being against the reason of the common law, Donohue, *supra*, at 1269–76. The Fourth Amendment reinstituted two common-law safeguards to end unreasonable searches. First, officers generally had to obtain specific warrants from a neutral judge *before* searching private property. Donohue, *supra*, at 1269–80. Second, the warrant had to be based on probable cause, with facts implicating a particular person in a particular crime. *Id.* at 1300. Thus, officers could no longer invade private property at their own discretion to fish around for evidence.

Instead, they needed to convince a judge that they had a particularized basis for the search.

The point of these two safeguards was to cabin the officer's discretionary search power. And there was every reason to expect it would work. That is because the eighteenth-century officer could rarely search or arrest without a warrant. Wesley MacNeil Oliver, *The Modern History of Probable Cause*, 78 Tenn. L. Rev. 377, 391 (2011); Davies, *Post-Framing*, *supra*, at 16. Further, he could never search or arrest solely on probable cause. Oliver, *supra*, at 378. Instead, an officer needed knowledge of "an *actual* felony [that] had been committed *in fact* [and] *probable cause* that a particular individual was responsible." Donohue, *supra*, at 1228.

C. General-warrant searches are gone, but warrantless searches create the same risks of abuse.

Under the Supreme Court's holding in *Carroll v. United States*, 267 U.S. 132 (1925), police officers can search cars without a warrant or a felony in fact. But "the *Carroll* doctrine does not declare a field day for the police in searching automobiles." *Almeida-Sanchez v. United States*, 413 U.S. 266, 269 (1973). Instead, *Carroll* emphasized that a car search

is proper only if there is probable cause to suspect contraband inside. 267 U.S. at 153–54.

Now, though, it is the field officer himself, not a neutral judge, who decides whether he has probable cause before searching a car. As a result, courts' post hoc enforcement of the probable cause requirement is the only thing standing between drivers and the wholly discretionary, unparticularized searches that inspired the Fourth Amendment.

II. The automobile exception leaves drivers vulnerable to abuse, making vigorous judicial review of probable cause vital.

Because modern-day police decide—alone—whether they can search cars, vigorous judicial review is vital. As Section A explains, today's police face powerful financial incentives to conduct warrantless searches. And as Section B explains, these incentives generate unjust results that afflict innocent drivers. When police believe they have unchecked authority to conduct warrantless searches, innocent drivers can lose their life savings—or their lives.

A. Modern-day officers have strong financial incentives to conduct warrantless searches.

Unlike a neutral judge evaluating probable cause before issuing a search warrant, police today are pressed by various financial incentives

tied to "the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948). Indeed, the modern-day officer stands in stark contrast to the eighteenth-century officer, who had little capacity to investigate crime and acted mostly in response to private complaints, Davies, *Recovering*, *supra*, at 620–22; Oliver, *supra*, at 381.

Perhaps the most powerful financial incentive is civil forfeiture, which gives police the power to seize and forfeit a person's assets—even if that person is never charged or convicted of a crime. Before the 1980s, governments seldom used civil forfeiture. Annemarie Bridy, *Carpe Omnia: Civil Forfeiture in the War on Drugs and the War on Piracy*, 46 Ariz. St. L.J. 683, 694–95 (2014). When it was used, assets went to governments' general funds, not law enforcement. Rachel J. Weiss, Note, *The Forfeiture Forecast After* Timbs*: Cloudy with A Chance of Offender Ability to Pay*, 61 B.C. L. Rev. 3073, 3082 (2020).

But civil forfeiture underwent a "meteoric rise" when Congress, in an effort to advance the war on drugs, empowered law enforcement to keep the net proceeds from assets they seized. Bridy, *supra*, at 694; *see also* Weiss, *supra*, at 3081–82. Net deposits in law enforcement funds grew from $27 million in 1985 (the first year assets went to law

enforcement funds) to $2.8 billion in 2019—an increase of over 10,000%. Bridy, *supra*, at 694–95; Lisa Knepper et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 162, Institute for Justice (Dec. 2020), https://ij.org/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf. Meanwhile, drug arrests increased only 143%. *Compare* Human Rights Watch, *Decades of Disparity: Drug Arrests and Race in the United States* (Mar. 2, 2009), https://tinyurl.com/2p9znyu5 (FBI data estimating 640,626 drug arrests in 1985), *with* FBI, *2019 Crime in the United States*, https://tinyurl.com/2bmfppn9 (last visited Aug. 28, 2023) (FBI data estimating 1,558,862 drug arrests in 2019).

Civil forfeiture likewise ballooned at the state level during this period. In 2019 alone, Illinois law enforcement collected over $61 million in revenues. Knepper, *supra*, at 86. Since 2000, it has collected over $1 billion, *id.*, with those proceeds going straight to law enforcement, *see* 725 Ill. Comp. Stat. Ann. 150/13.2 (specifying allocation of proceeds).[2]

[2] Illinois does not report whether forfeitures are civil or criminal in nature. Knepper, *supra*, at 87. But the vast majority of forfeitures nationwide are civil or administrative in nature. *Id.* at 24–26.

Outside of civil forfeiture, officers are commonly encouraged or pressured to satisfy quotas or point systems that push officers to conduct more stops, more searches, and more arrests. Jackie Fielding, *Outlawing Police Quotas*, Brennan Center for Justice (Jul. 13, 2022), https://tinyurl.com/3wat2nx5. Until recently, for example, the City of Sparta had a point system that awarded and disciplined officers based on their monthly rate of cases, citations, and traffic stops. *Policemen's Benevolent Lab. Comm. v. City of Sparta*, 2020 IL 125508, ¶ 26, 181 N.E.3d 848, 853 (striking down that system for violating municipal code). Similarly, many municipalities, including in Illinois, depend on traffic stops for revenue and, consequently, push officers to make more stops. Mike McIntire & Michael H. Keller, *The Demand for Money Behind Many Police Traffic Stops*, N.Y. Times (Nov. 2, 2021), https://tinyurl.com/rfd9vwca.

All these incentives for searches are compounded by how easy they are to initiate. Any simple traffic infraction justifies a stop—and officers may conduct stops with the express intention to investigate other, unrelated crimes. *See Whren v. United States*, 517 U.S. 806

(1996) (holding that pretextual stops do not violate the Fourth Amendment).

B. The financial incentive to conduct warrantless searches creates unjust results for drivers and officers alike.

The financial incentives to search generate abusive searches and seizures. As a result, what starts as a simple traffic stop can end in an innocent person losing his life savings.

Retired U.S. Marine Stephen Lara is one such innocent person. In 2021, officers pulled Lara over as he was driving to see his family. They never issued Lara a ticket, much less a warning. They did, however, seize his entire life savings—$86,900—as suspected proceeds of criminal activity. Lara was never charged with a crime. Only after Lara secured pro bono counsel and filed a lawsuit did law enforcement agree (the very next day) to return the money. *Nevada Civil Forfeiture*, Institute for Justice, https://ij.org/case/nevada-civil-forfeiture/ (last visited Sept. 21, 2023).

Band tour manager Eh Wah faced a similar story. In 2016, Eh Wah was driving through Oklahoma with $53,000 that a Burmese Christian rock band had raised for a nonprofit Christian school in

Burma. Officers stopped Eh Wah for a broken taillight. They then searched his car and interrogated him for hours before seizing the entire $53,000 in donations (but not the $300 check made out to Eh Wah, which the officers would not have been able to cash). Prosecutors later charged Eh Wah with felony possession of drug proceeds, despite zero evidence connecting the seized cash to drugs. Only after Eh Wah secured pro bono counsel and sued did prosecutors drop the charges and agree to immediately return all the seized money. *Highway Robbery in Muskogee*, Institute for Justice, https://ij.org/case/muskogee-civil-forfeiture/ (last visited Sept. 21, 2023).

Stephen Lara and Eh Wah's happy endings defy the norm. Most civil forfeitures (about 80%) go uncontested—unsurprising given that attorneys' fees for reacquiring seized assets are on average greater than the value of those assets, including in Illinois. Knepper, *supra*, at 6, 20–21.

The financial incentives to search also fuel more stops—and thus more life-threatening stops. Traffic stops account for about seven percent of police officer deaths. Bernd Debusmann Jr., *Why Do So Many Police Traffic Stops Turn Deadly?*, BBC News (Jan. 31, 2023),

https://tinyurl.com/55d9z7bf. And over the past five years, police officers have killed more than 400 occupants who were neither wielding a gun or knife nor stopped for a violent crime. David D. Kirkpatrick et al., *Why Many Police Traffic Stops Turn Deadly*, N.Y. Times (Nov. 30, 2021), https://tinyurl.com/4fwwca23.

But lawsuits against officers are rare, even for fatal shootings of unarmed drivers. Kirkpatrick, *supra*. Successful lawsuits are rarer yet, not least due to qualified immunity—a powerful defense for officers that postdates *Carroll*. *See Pierson v. Ray*, 386 U.S. 547 (1967) (establishing qualified immunity). Qualified immunity is so robust that even officers committing outright theft have escaped liability. *See, e.g.*, *Jessop v. City of Fresno*, 936 F.3d 937, 942 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2793 (2020) (officers alleged to have stolen over $225,000 in seized cash entitled to qualified immunity because "[w]hether that conduct violates the Fourth Amendment[] … would not be 'clear to a reasonable officer'"). Contrast that to the Founding- and *Carroll*-era officers, who could be held liable under common law or statute if they acted without probable cause. *See* Davies, *Reframing*, *supra*, at 627; *Carroll*, 267 U.S. at 155–56.

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These unjust results, and the financial incentives that fuel them, make it crucial that courts vigorously enforce the probable cause requirement. Nothing else can protect vulnerable drivers from abuses in the automobile-search context.

III. Officer Barrie lacked the particularized facts that probable cause requires.

A vigorous, historically informed application of probable cause shows Officer Barrie lacked it here. As Section A explains, the need for particularized facts remains a key element of probable cause, just as it was at the Founding. But Officer Barrie's sole basis for searching Mr. Jackson's car—that he "smelled a little bit of weed" (*i.e.*, cannabis), Dist. Ct. Op. at 2—had any number of innocent explanations. Accordingly, Officer Barrie needed additional facts indicating that the smell in Mr. Jackson's car was the source of unlawful activity. He had none, so this Court should reverse.

That conclusion is clear, as Section B shows, given how the particularity requirement works in other contexts. Finally, as Section C shows, holding that Officer Barrie had probable cause would eviscerate

that standard, exposing a substantial portion of innocent drivers to indiscriminate and abusive searches.

A. Particularity remains an element of probable cause.

Today, as at the Founding, particularity is a key element of probable cause: "[A] search or seizure of a person must be supported by probable cause *particularized with respect to that person*." *United States v. Johnson*, 170 F.3d 708, 715 (7th Cir. 1999) (emphasis added) (quoting *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)). In turn, courts "must be especially cautious when the evidence that is alleged to establish probable cause is entirely consistent with innocent behavior." *Moya v. United States*, 761 F.2d 322, 325 (7th Cir. 1984).

Particularized evidence is required even for the lower standard of reasonable suspicion. Time and again, courts have held that police need "*particularized* suspicion … that the *particular* individual being stopped is engaged in wrongdoing." *United States v. Cortez*, 449 U.S. 411, 418 (1981) (emphasis added); *see also United States v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000) (en banc) ("reasonable suspicion [requires] that *the particular person being stopped* has committed or is about to commit a crime.").

Officer Barrie lacked a particular basis for suspecting Mr. Jackson of a crime. He therefore lacked probable cause—and even reasonable suspicion—to search Mr. Jackson's car. His sole basis for the search was that he "smelled a little bit of weed." Dist. Ct. Op. at 2. Based on that smell, Officer Barrie claimed to suspect a violation of Illinois's odor-proof container law, Dist. Ct. Op. at 2, which requires that cannabis transported by car be kept inside such a container, 625 Ill. Comp. Stat. Ann. 5/11-502.15. But again, cannabis is legal in Illinois. Residents over the age of 21 can lawfully possess, consume, use, purchase, cultivate, and transport cannabis. 410 Ill. Comp. Stat. Ann. 705/10-5. So its smell could indicate any number of lawful activities.

For example, Mr. Jackson or his passenger might have been carrying the smell of unburnt cannabis from his own house, a friend's house, or a dispensary. Mr. Jackson or his passenger might have even held unburnt cannabis earlier in the day. These innocent explanations are especially plausible here because Mr. Jackson told Officer Barrie he had smoked earlier that day. Dist. Ct. Op. at 2.

Mr. Jackson could have been lawfully transporting hemp flower, a fully legal alternative to cannabis. This too would have been perfectly

plausible. Hemp cigarettes are growing in popularity and are used for a variety of reasons. *See* Emily Corwin, *Smoking Hemp Catches On*, NPR (Sept. 7, 2019), https://tinyurl.com/8tf4zs6j. Hemp also smells identical to cannabis. Cynthia Sherwood et al., *Even Dogs Can't Smell the Difference: The Death of "Plain Smell," as Hemp is Legalized*, 55 Tenn. Bar J. 14, 15 (2019) (explaining that drug-sniffing dogs "simply cannot tell the difference between hemp and marijuana."). Yet it is not subject to the odor-proof container law at all.[3]

Given these innocent explanations, cannabis "odor … is [not] one sufficiently distinctive to identify a forbidden substance." *Johnson*, 333 U.S. at 13. And Officer Barrie did not have—or offer—a single reason to think the smell of cannabis, *in Mr. Jackson's particular case*, indicated unlawful activity. Without any particular basis to search Mr. Jackson's car, Officer Barrie lacked probable cause to search.

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[3] Only "cannabis," not hemp, is subject to the odor-proof container statute. 625 Ill. Comp. Stat. Ann. 5/11-502.15. That is because Illinois law defines "cannabis" as "marijuana, hashish, and other substances … of the plant Cannabis sativa" yet specifically excludes "hemp." 410 Ill. Comp. Stat. Ann. 705/1-10. Because the odor-proof container law does not have its own special definition of "cannabis," the standard definition under Illinois law applies.

B. Particularity is the rule across the board.

Probable cause requires particularity in all other contexts. Indeed, a demand for particularity drove this Court's decision in *United States v. Paniagua-Garcia*, which held that an officer lacked probable cause *or even reasonable suspicion* under facts analogous to those here. 813 F.3d 1013 (7th Cir. 2016).

The case concerned an Indiana statute that forbade texting or emailing while driving but allowed all other forms of cellphone use. Pursuant to that statute, an officer pulled Paniagua over because he "appeared to be texting." The problem was, "[n]o *fact* perceptible to a police officer glancing into a moving car and observing the driver using a cellphone would enable the officer to determine whether it was a permitted or a forbidden use." *Id.* at 1014. Rather than texting, Paniagua could have been making a phone call, surfing the internet, using GPS, or doing any number of things other than texting or emailing. What the officer called reasonable suspicion of unlawful texting was just bare suspicion—one "so broad that it would permit the police to stop a substantial portion of the lawfully driving public." *Id.* at 1014–15 (cleaned up).

Like the officer in *Paniagua-Garcia*, Office Barrie did not have any particular basis for suspecting that Mr. Jackson was violating the odorless container statute. The sole fact Officer Barrie used to justify his search—the smell of unburnt cannabis—gave no clues as to whether the smell stemmed from a legal or illegal use. And just like Paniagua's phone use could have been legal in any number of ways, the smell of cannabis in Mr. Jackson's car could have stemmed from any number of legal sources. Officer Barrie's suspicion rested on a hunch—and that's not enough to search anybody's property.

Paniagua-Garcia was not unique in requiring particularity when police stop or search cars. For example, police can't stop people merely for driving in areas known for human trafficking. *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975). But police can stop people if they have good reason to suspect a "particular vehicle" in the area is transporting illegal aliens. *United States v. Cortez*, 449 U.S. 411, 419, 421–22 (1981) (officers had reasonable suspicion for stop where vehicle, travel patterns, and shoeprints matched those of a known smuggler).

Indeed, particularity is the rule for *all* stops and searches. For example, police can't stop an airline passenger just because the person

fits a general “drug courier profile” defined by innocent traits (*e.g.*, taking an early flight, traveling without checked bags). *Reid v. Georgia*, 448 U.S. 438, 440–41 (1980). Instead, police must identify “particular conduct” suggesting that particular passenger is up to no good. *Id.* at 441. Otherwise, police would be free to seize “a very large category of presumably innocent travelers.” *Id.*

C. Affirming the decision below would eviscerate the probable cause standard.

Any other result would render the Fourth Amendment’s probable cause requirement meaningless. It “would eliminate [the] individualized suspicion required for probable cause” and restore the bare, generalized suspicion that made general warrants dangerous. *See Commonwealth v. Barr*, 266 A.3d 25, 43–44 (Pa. 2021) (“odor of marijuana alone does not amount to probable cause to conduct a warrantless search of a vehicle”). Anyone—drivers and pedestrians alike—“possessing, consuming, using, purchasing, [or] obtaining” cannabis, 410 Ill. Comp. Stat. Ann. 705/10-5, would be subject to a search simply because of some general possibility of unlawful activity.

That’s no small portion of the population: One in five Illinoisians reports having smoked cannabis in 2019. *See* University of Illinois

Chicago Jane Addams College of Social Work, *2022 Annual Cannabis Report: Cannabis Regulation & Tax Act Evaluation* 32 (2022), https://tinyurl.com/34kbacx8. Sixteen percent of Americans are self-described cannabis smokers and even outnumber cigarette smokers. Ayana Archie, *Marijuana Use Is Outpacing Cigarette Use for the First Time on Record*, NPR (Aug. 30, 2022), https://tinyurl.com/zc8f99fh. Exposing this "substantial portion" of the population to indiscriminate searches and seizures, *Paniagua-Garcia*, 813 F.3d at 1014–15, would undermine the Fourth Amendment's probable-cause requirement.[4]

The abuses wouldn't stop there. Armed with the knowledge that the mere *possibility* of illegal activity based on a *single* fact justifies searches and seizures, officers could, contrary to established law:

- Seize money in the backseat of a car because money could always be tied to sinister activity. *Contra United States v. $506,231 in U.S. Currency*, 125 F.3d 442, 454 (7th Cir. 1997) ("[T]he

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[4] Not to mention the law that legalized cannabis in Illinois. *See* 410 Ill. Comp. Stat. Ann. 705/1-7 ("a person shall not be considered an unlawful user … solely as a result of his or her possession or use of cannabis … .").

government may *not* seize money, even half a million dollars, based on its bare assumption … [of] some [] sinister activity.”).

- Search a car with unopened packages because someone in the neighborhood stole some packages. *Contra Henry v. United States*, 361 U.S. 98, 104 (1959) (“[T]hat packages have been stolen does not make every man who carries a package subject to arrest nor the package subject to seizure.”).
- Stop a car with an out-of-state license plate where drug trafficking occurs. *Contra Huff v. Reichert*, 744 F.3d 999, 1004–05 (7th Cir. 2014) (“[S]imply driving with out-of-state license plates … [does] not amount to reasonable suspicion … .”).
- Search anyone in a high-crime area, even if that person’s “activity was no different from the activity of other pedestrians in that neighborhood.” *Contra Brown v. Texas*, 443 U.S. 47, 52 (1979) (Being “in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct.”).
- Search vehicles near the southern border, especially those with occupants of Mexican ancestry, because of the general presence of

illegal, cross-border traffic. *Contra United States v. Brignoni-Ponce*, 422 U.S. 873, 885–86 (1975) (The "single factor" of "the apparent Mexican ancestry of the occupants" cannot furnish reasonable grounds to believe they are aliens.).

- Seize anyone possessing a gun because he might lack the required license or permit. *Contra United States v. Watson*, 900 F.3d 892, 896 (7th Cir. 2018) (A "'mere possibility of unlawful use' of a gun is not sufficient to establish reasonable suspicion … the observed conduct [must] suggest[] unlawful activity.").
- Search a person simply because he is talking at length with known narcotics addicts. *Contra Sibron v. New York*, 392 U.S. 40, 62 (1968) ("It is clear that the heroin was inadmissible in evidence … . So far as [the officer] knew, they might indeed 'have been talking about the World Series.'").
- Search a person's plastic bag poking out from his backpack because it could contain contraband. *Contra Moya v. United States*, 761 F.2d 322, 326 (7th Cir. 1984) ("There is nothing apparently incriminating about a plastic bag.").

Of course, none of this is to say that lawful activity can't be one of several factors that give rise to probable cause. *See United States v. Ortiz*, 422 U.S. 891, 897 (1975); *see also Barr*, 266 A.3d at 43 ("[T]he lawful possession and use of marijuana, *in conjunction with other articulable facts supporting a finding of probable cause*, may be considered in the requisite analysis of the totality of the circumstances." (emphasis added)). Or that one plainly incriminating fact (like openly using an illegal drug or assaulting somebody) cannot by itself generate probable cause. Or even that "several innocent facts" cannot, "when considered together, add up to reasonable suspicion" or probable cause. *United States v. Jerez*, 108 F.3d 684, 693 (7th Cir. 1997).

But Mr. Jackson's case is different. It's about a single fact—the smell of cannabis—that cannot, without more, distinguish between "a permitted or forbidden use." *See Paniagua-Garcia*, 813 F.3d at 1014. Because that single fact is all Officer Barrie had, Mr. Jackson's motion to suppress should have been granted and this Court should reverse.

CONCLUSION

The Court should hold that Officer Barrie lacked probable cause and reverse the decision below.

Dated: September 25, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Amicus Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 7th Cir. R. 29 because it contains 4,584 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

The undersigned further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 2010 in 14-point Century Schoolbook font.

Dated: September 25, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the Court's CM/ECF system.

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