STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellant,

-vs-

JEFFERY S. ARMSTRONG,

Defendant-Appellee.

Supreme Court No. 165233

Court of Appeal No. 360693

Wayne CC No. 21-003294-FH

BRIEF OF THE CATO INSTITUTE AND THE INSTITUTE FOR JUSTICE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

The Institute for Justice (IJ) 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., *Long Lake Twp v Maxon*, No. 164948 (Mich, May 3, 2024) (challenging warrantless drone surveillance of private backyards); *Snitko v United States*, 90 F4th 1250 (CA 9, 2024) (successful challenge to FBI search and seizure of hundreds of safe-deposit boxes)—and by filing amicus briefs nationwide, see, e.g., *United States v Jackson*, No. 23-1708 (CA 7, filed

[1] No party's counsel authored this brief in whole or in part. No one other than Amici Cato Institute and Institute for Justice contributed money for this brief's preparation or submission. See MCR 7.312(H)(5).

September 25, 2023) (urging court to reject argument that odor of marijuana creates probable cause after Illinois's legalization of cannabis).

This case concerns *amici* because it involves core questions of individual liberty protected by the Fourth Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

Do officers have authority to search and seize Michiganders based solely on the presence of an odor associated with a legal substance? No. The Fourth Amendment's particularity requirement—whether for probable cause or reasonable suspicion—demands more. The Fourth Amendment was enacted to ensure that officers have particular objective evidence of crime before conducting invasive searches. The automobile exception, however, now allows officers to make their own, on-the-spot probable-cause determinations. When coupled with the modern explosion in the number of crimes—and thus the number of activities a search or seizure can be based on—enforcing that particularity prerequisite is all the more important. But since Michigan has legalized marijuana, the odor of that substance, standing alone, no longer comes anywhere close to satisfying that requirement. And officers cannot now rely in good faith on contrary precedent dating from back when marijuana was illegal.

ARGUMENT

I. CORPORAL EATON AND OFFICER GENAW VIOLATED THE FOURTH AMENDMENT.

The search and seizure of Michiganders based on marijuana odor alone is akin to the suspicionless searches the Fourth Amendment was enacted to prohibit. Judicial vigilance regarding the existence of particularized suspicion is vital for protecting the rights of drivers and passengers. No objective evidence of criminal activity supported the search and seizure of Defendant-Appellee Jeffery Armstrong.

A. The Fourth Amendment was ratified to prevent searches and seizures like the one in this case.

The search at issue here, premised on the mere odor of marijuana, is the sort of unparticularized rummaging the founding generation rejected in the Fourth Amendment. Before the American Revolution, government officers routinely searched anyone and any place based on mere suspicion. They did so under the rubric of "general warrants"—"unparticularized warrant[s]" that gave officers "blanket authority to search where they pleased."[2]

The Founders' strong aversion to these general warrants has continuing salience. Indeed, the Founders ratified the Fourth Amendment specifically to preclude the type of searches that general warrants authorized. But today's warrantless automobile

[2] Davies, *Recovering the Original Fourth Amendment*, 98 Mich L Rev 547, 558 (1999), and *Payton v New York*, 445 US 573, 583 n 21; 100 S Ct 1371; 63 L Ed 2d 639 (1980).

searches, absent vigorous judicial oversight ensuring the level of particularized suspicion the Founders intended, invite similar abuses.

The common law long rejected general warrants.[3] But in the lead-up to the Revolutionary War they were used in the colonies with increasing—and vexing—frequency.[4] Officers could search any place or person without ever having to convince a judge that they had objectively good reasons for doing so.[5]

The colonists "reviled" general warrants. *Riley v California*, 573 US 373, 403; 134 S Ct 2473; 189 L Ed 2d 430 (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."[6] Otis's remarks echoed throughout the colonies, from "town meetings [and] the Continental Congress" to "pamphleteers, essayists, and the man-on-the-street."[7] They became a driving force behind the Revolution. *Riley*, 573 US at 403.

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[3] Davies, *Recovering*, 98 Mich L Rev at 578-81.

[4] Donohue, *The Original Fourth Amendment*, 83 U Chi L Rev 1181, 1193-1194 (2016).

[5] *Id.* at 1194, and *Steagald v United States*, 451 US 204, 220; 101 S Ct 1642; 68 L Ed 2d 38 (1981).

[6] Davies, *Recovering*, 98 Mich L Rev at 581.

[7] 5 Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791* (New York: Oxford Univ Press, 2009), p 541.

General warrants also inspired the Fourth Amendment. They were given the "pejorative label" of "unreasonable searches."[8] The Fourth Amendment reinstituted two common-law safeguards. First, officers generally had to obtain specific warrants from a neutral judge before searching private property or seizing a person.[9] Second, the warrant had to be based on probable cause, with facts implicating a particular person in a particular crime.[10]

There was every reason to expect that these limits would work. The eighteenth-century officer could rarely search or arrest without a warrant.[11] Further, "[p]robable cause was not enough to initiate a search or perform an arrest. Unless an officer saw a crime in progress, probable cause was sufficient for an arrest only if a victim attested that a crime had occurred. Officers were, therefore, most unlikely to act on mere suspicion, regardless of how strong it may be[.]"[12]

While the US Supreme Court has since held that police may generally search vehicles without a warrant, see, e.g., *Carroll v United States*, 267 US 132; 45 S Ct 280; 69

[8] Davies, *How the Post-Framing Adoption of the Bare-Probable Cause Standard Drastically Expanded Government Arrest and Search Power*, 73 L & Contemporary Problems 1, 4 (2010), and Donohue, *Original Fourth*, 83 U Chi L Rev at 1269-1276.

[9] Donohue, *Original Fourth*, 83 U Chi L Rev at 1269-1280.

[10] *Id.* at 1300.

[11] Oliver, *The Modern History of Probable Cause*, 78 Tenn L Rev 377, 391 (2011), and Davies, *Post-Framing*, 73 L & Contemporary Problems at 16.

[12] Oliver, *Modern History*, 78 Tenn L Rev at 378.

L Ed 543 (1925), it has also clarified that "the *Carroll* doctrine does not declare a field day for the police." *Almeida-Sanchez v United States*, 413 US 266, 269; 93 S Ct 2535; 37 L Ed 2d 596 (1973). A vehicle search is proper only if there is probable cause to believe there is contraband inside. 267 US at 153-154.

Carroll is anomalous in holding that officers and not neutral judges decide whether probable cause exists. Only the judiciary's after-the-fact enforcement of the probable-cause requirement keeps "law-abiding citizens" from being subject to "the mercy of the officers' whim or caprice." *Wong Sun v United States*, 371 US 471, 479; 83 S Ct 407; 9 L Ed 2d 441 (1963) (internal quotation marks and citation omitted) (discussing the probable-cause limit on arrest powers).

B. Modern developments like the automobile exception and overcriminalization leave drivers and passengers vulnerable to abuse, making vigilant judicial review of particularized suspicion vital.

The Fourth Amendment's "guarantee against unreasonable searches . . . must provide *at a minimum* the degree of protection it afforded when it was adopted." *United States v Jones*, 565 US 400, 411; 132 S Ct 945; 181 L Ed 2d 911 (2012). Modern legal developments, however, including the automobile exception and the explosion in the number of crimes, make it ever easier for today's officers to violate that protection. Amici hope the Court will keep these risks in mind when considering the importance of the particularity requirement.

The Founders fully appreciated the danger of unparticularized searches. But they could never have predicted the explosive growth of criminal law, and thus the explosive growth in the number of activities on which officers can base a search or seizure. Before the twentieth century, criminal law focused on morally reprehensible conduct.[13] But public-choice dynamics and the rise of the regulatory state have created space between criminal law and actual wrongdoing.[14] Modern criminal law bans behaviors that "threaten far less serious harms . . . or even no harms at all."[15] As a result, America's criminal justice system has experienced a "proliferation of an entire body of *morally neutral* criminal law" that, in some cases, "dispense[s] with individual culpability altogether."[16]

The proliferation of criminal laws has caused an increase in arrest and incarceration rates.[17] America's incarceration rate was relatively stable until around 1970, but it is now the world's highest, with around two million Americans behind

[13] See Luna, *The Overcriminalization Phenomenon*, 54 Am U L Rev 703, 713-714 (2005).

[14] See *id.* at 719 ("Conventional wisdom suggests that appearing tough on crime wins elections regardless of the underlying justification."); Larkin, *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 Hofstra L Rev 745, 749 (2014).

[15] Kadish, *The Crisis of Overcriminalization*, 7 Am Crim L Q 17, 17 (1968).

[16] Luna, *Overcriminalization Phenomenon*, 54 Am U L Rev at 722-723 (emphasis added).

[17] Barkow, *The Court of Mass Incarceration*, 2022 Cato Sup Ct Rev 11, 11.

bars.[18] "This extraordinary amount of state deprivation of liberty does not fall equally on the population."[19] African-Americans account for roughly one-third of inmates, and Black adults are more than "five times more likely to be incarcerated than white adults."[20] In terms of marijuana-related arrests alone, Black people are "nearly four times more likely than their white counterparts to be arrested, even though both use marijuana at similar rates."[21]

The inscrutable thicket of laws, rules, regulations, and ordinances to which Americans are now subject challenges our self-conception as citizens of a free country.[22] There are more than 4,500 federal criminal laws and an estimated 300,000 federal regulations carrying criminal penalties.[23] Some 40 percent of these were enacted after 1970.[24] State-level criminal laws are inestimable in number. When society criminalizes

[18] *Id.* at 11-12, and The Sentencing Project, *Growth in Mass Incarceration*, available at <https://bit.ly/3sTRz0e>.

[19] Barkow, *Mass Incarceration*, 2022 Cato Sup Ct Rev at 13.

[20] *Id.*

[21] Amaning, *The Facts on Marijuana Equity and Decriminalization*, Ctr for American Progress (April 20, 2021), available at <https://ampr.gs/46bkJqe>.

[22] See generally Stuntz, *The Collapse of American Criminal Justice* (Cambridge: Harvard University Press 2011); Husak, *Overcriminalization: The Limits of The Criminal Law* (New York: Oxford University Press 2008).

[23] Gainer, *Remarks on the Introduction of Criminal Law Reform Initiatives*, 7 J L Econ & Policy 587, 587 (2011); Larkin, *Regulation*, 42 Hofstra L Rev at 750.

[24] Smith, *Overcoming Overcriminalization*, 102 J Crim L & Criminology 537, 538 (2012).

even the most inconsequential acts, "no one is safe from arrest and prosecution."[25] Nor, as relevant here, from officers' rummaging through their person and property to look for evidence (even though, as detailed below, officers more often than not find nothing).[26] Under a watered-down probable-cause requirement, an officer who sees a bag of change in the backseat might want to search for further evidence that the driver is illegally exporting more than $25 worth of pennies or nickels. 31 USC 5111(d)(2); 31 CFR 82.2 (2023). Or the smell of fish might yield a search for evidence of illegally fishing with one's hands.[27] And so on.

Police have powerful financial incentives to conduct warrantless searches for evidence of violations of the evermore sprawling criminal codes. That is especially so in Wayne County. Civil forfeiture gives police the power to take citizens' property—and profit from the proceeds—even if the owner is never charged with or convicted of a crime. Since 2000, Michigan has collected nearly *half a billion* dollars in forfeiture revenue.[28] At least three-quarters of these proceeds—in many cases, all of them—go

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[25] Lynch, *Overcriminalization*, in *Cato Handbook for Policymakers* (2017), p 195, available at <https://bit.ly/3LSLeJp>.

[26] Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L Rev 672, 678 (2015) (explaining how overcriminalization "gives law enforcement access to a range of policing tools").

[27] Dep't of Natural Resources, *2024 Michigan Fishing Regulations*, p 13, available at <https://tinyurl.com/23hccfwt>.

[28] Knepper et al, *Policing for Profit: The Abuse of Civil Asset Forfeiture* (3d ed, Institute for Justice, 2020), p 104, available at <https://ij.org/wp-content/uploads/2020/12/policing-for-profit-3-web.pdf>.

straight to law enforcement. See MCL 333.7524(1)(b)(ii) (100 percent for Controlled Substances Act forfeitures) and 600.4708(1)(f) (75 percent for all others).

Judicial scrutiny of the forfeiture apparatus in Wayne County—the same county from which this case arises—illustrates the problems caused by these perverse incentives. In Michigan's largest county, officers "seize[] vehicles and their contents without probable cause that the property is connected to a crime." *Ingram v Wayne Co*, 81 F4th 603, 606 (CA 6, 2023). Often, the purported probable cause is simply "the vehicle's location in an area generally associated with crime." *Id.* The County then "impounds the vehicles and its contents until the owner pays a redemption fee"—$900 for a first seizure, $1,800 for a second, and $2,700 for a third. *Id.* If the owner cannot (or will not) pay the fee, the County subjects them to an elaborate, monthslong maze of private pretrial conferences; missing one such conference results in the property being automatically forfeited. *Id.* Only if the owner can withstand that entire gauntlet are they granted access to a judge in front of whom they can finally contest probable cause and recover their property without paying to do so. *Id.*

Just last year, in a case litigated by amicus Institute for Justice, the Sixth Circuit explained that the County's seizure and forfeiture behavior "suggests it is more interested in money than in remedying a public nuisance." *Id.* at 620; see also *id.* at 623 (THAPAR, J., concurring) ("[T]he County's scheme is simply a money-making venture—one most often used to extort money from those who can least afford it."). Prompt judicial review of the County's probable-cause determinations, the Sixth Circuit held,

would remedy some of the worst of these practices. *Id.* at 619-622 (majority opinion) (holding that due process requires a probable-cause hearing within two weeks of the seizure); *id.* at 629 (THAPAR, J., concurring) (saying the County "should provide a hearing within 48 hours"). Wayne County's aggressive vehicle-seizure and forfeiture tactics have recently caught this Court's attention as well. *In re Forfeiture of 2006 Saturn Ion*, No. 164360 (Mich, argued December 6, 2023) (concerning, in a case also litigated by amicus Institute for Justice, whether a vehicle used to transport a passenger who possessed personal-use drugs may be permanently confiscated by Wayne County under the Controlled Substances Act). Besides forfeitures, officers are commonly pressured to conduct more stops, more searches, and more arrests.[29] For example, until recently, the City of Novi's police officers were allegedly required to "make four stops . . . and issue two tickets" per day, and directed to "make more arrests."[30]

The incentive to search vehicles is compounded by the legal ease with which they may be initiated. Any traffic infraction will justify a stop, and the US Supreme Court has held that officers may even conduct pretextual stops. See *Whren v United States*, 517 US 806; 116 S Ct 1769; 135 L Ed 2d 89 (1996). Seventh Circuit Judge David Hamilton has explained the alarming implications for motorists:

[29] Fielding, *Outlawing Police Quotas*, (Brennan Ctr for Justice, 2022), <https://tinyurl.com/3wat2nx5>.

[30] Mann, *Ex-Novi Cop Wins $280k in Lawsuit Over Alleged Ticket Quotas*, ClickOnDetroit (April 18, 2014), <https://tinyurl.com/yj2bwazk>.

> Officers who have probable cause for a trivial traffic violation can stop the car under *Whren* and then order all occupants out of the car, *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997), often frisk them, *Arizona v. Johnson*, 555 U.S. 323, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009), question them in an intimidating way, visually inspect the interior of the car, *Colorado v. Bannister*, 449 U.S. 1, 4 & n 3, 101 S.Ct. 42, 66 L.Ed.2d 1 (1980), often search at least portions of the vehicle's interior, *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009); *Michigan v. Long*, 462 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), and hold the driver and the passengers while a drug-detection dog inspects the vehicle, *Illinois v. Caballes*, 543 U.S. 405, 406-08, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005).[31]

And, thanks to civil forfeiture, what starts as a simple traffic stop can end in an innocent person losing hard-earned savings. Retired US Marine Stephen Lara is one such person. In 2021, officers pulled him over in Nevada. They never issued him 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 he secured pro bono counsel (and media coverage from the Washington Post) and filed a lawsuit did law enforcement agree—the very next day—to return the money.[32]

Band tour manager Eh Wah was subjected to a similar seizure. In 2016, he was driving through Oklahoma with $53,000 that the Christian rock band he managed had raised for a nonprofit school in Burma by touring US churches. When officers stopped him for a broken taillight, they 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,

[31] *United States v Johnson*, 874 F3d 571, 577-578 (CA 7, 2017) (en banc) (HAMILTON, J., dissenting).

[32] *Nevada Civil Forfeiture*, Institute for Justice, <https://ij.org/case/nevada-civil-forfeiture/>.

which the officers would not have been able to cash). Prosecutors later charged him with felony possession of drug proceeds, despite zero evidence connecting the seized cash to drugs. Only after he secured pro bono counsel and sued did prosecutors drop the charges and agree to immediately return all the seized money.[33]

Unfortunately, Lara's and Wah's successes in resisting baseless forfeitures are exceptional. Most civil forfeitures (about 80 percent) go uncontested—which is unsurprising, given that attorneys' fees are usually greater than the value of the forfeited assets.[34] Put differently, it is often economically rational for completely innocent people to *allow* their property to be forfeited if officers seize it.

Moreover, police frequently take nothing after roadside searches—aside from the driver's dignity and trust in police. Consider Alek Schott. When he was on his way home to Houston from a business trip in West Texas, police pulled him over outside San Antonio for (allegedly) drifting across lanes. What should have been a few moments to write a traffic ticket turned into police interrogating Alek in a squad car, ordering a K-9 unit, and ransacking Alek's truck for nearly 40 minutes—ultimately finding nothing. During the stop, the officer all but admitted the pretextual nature of such

[33] *Highway Robbery in Muskogee*, Institute for Justice, <https://ij.org/case/muskogee-civil-forfeiture/>.

[34] Knepper, *Policing for Profit*, at pp 6, 20-21.

"criminal interdiction unit" drug-trafficking roadway stops—telling Alek that "nine times out of ten" their searches find nothing.[35]

The financial incentives to stop and search drivers also fuel more stops—needlessly putting drivers and police officers in high-pressure, dangerous interactions. Traffic stops account for about seven percent of police officer deaths. Debusmann, *Why Do So Many Police Traffic Stops Turn Deadly?*, BBC News (January 31, 2023), <https://tinyurl.com/55d9z7bf>. Over the past five years, police officers have killed more than 400 unarmed vehicle occupants who were not stopped for a violent crime. Kirkpatrick et al, W*hy Many Police Traffic Stops Turn Deadly*, New York Times (November 30, 2021), <https://tinyurl.com/4fwwca23>.

Amici hope the Court will approach the importance of the particularity requirement with these risks in mind. Police can easily use dubious allegations of marijuana odor as a pretext for stopping drivers and passengers and searching vehicles. The Supreme Court of Minnesota noted a study showing that in 3,300 marijuana-odor-based auto searches, police found contraband less than ten percent of the time. See *State v Torgerson*, 995 NW2d 164, 174 n 10 (Minn, 2023). The possibility of pretextual traffic stops to fish for potential evidence of an ever-growing number of crimes, and the reality

[35] *Texas Sheriff's Deputy Falsifies Traffic Offense to Justify Unwarranted Truck Search*, Institute for Justice, <https://ij.org/case/texas-traffic-stop/>.

of the financial incentives that fuel them, make it crucial for courts to vigorously enforce the Fourth Amendment's probable-cause requirement.

C. This search and seizure lacked the particularized suspicion of crime that probable cause—and even reasonable suspicion—requires.

Corporal Eaton and Officer Genaw lacked probable cause here. They did not even have reasonable suspicion of an ongoing crime. Upholding their search and seizure of Jeffery Armstrong would expose innocent Michiganders to indiscriminate, abusive searches. The sole basis for their search—and Mr. Armstrong's seizure—was Corporal Eaton's assertion that she smelled marijuana. This led the officers to suspect that Mr. Armstrong was unlawfully "smoking marihuana within the passenger area of a vehicle upon a public way" or driving while impaired. MCL 333.27954(1)(a) and (g); *People v Armstrong*, 344 Mich App 286, 290; 1 NW3d 299 (2022); and Prosecutor's Supp Br, p 16.

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 F2d 322, 325 (CA 7, 1984); see also *United States v Fifty-Three Thousand Eighty-Two Dollars in US Currency*, 985 F2d 245, 249 (CA 6, 1993) (probable cause cannot be based on "behavior which can be attributed to perfectly legal activities, as well as illicit ones"). Marijuana is generally legal in Michigan. Adults can lawfully possess, consume, purchase, cultivate, and transport it. MCL 333.27955. Moreover, it is common knowledge—and many courts have noted—that the odor of burnt marijuana lingers

long after its use.[36] In that way, the alleged odor of marijuana near a vehicle is equally—if not more—consistent with perfectly legal activity. Mr. Armstrong or his driver might have lawfully consumed marijuana earlier in the day. Mr. Armstrong might merely have been nearby someone else who did so. It is possible that someone else smoked marijuana in the car sometime in the past. The odor also could have come from hemp cigarettes, a fully legal—and similar-smelling[37]—alternative to marijuana.[38] Or perhaps the officers were simply mistaken about where the odor originated.

Innocent explanations are especially plausible here. Mr. Armstrong told Corporal Eaton that the driver had just picked him up from a nearby friend's house, and after the driver explained that "[t]here's no weed in the car," Corporal Eaton acknowledged, "[t]here might not be any now." *Armstrong*, 344 Mich App at 292. Corporal Eaton and

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[36] See, e.g., *People v Stribling*, 2022 IL App (3d) 210098, ¶ 28; 228 NE3d 766 (2022) (explaining that "the smell of burnt cannabis" can "linger[]" on a "defendant's car or on his clothing," even if someone smoked only "a long time ago"); *People v Redmond*, 2022 IL App (3d) 210524, ¶ 22; 207 NE3d 1175 (2022) (holding "a strong odor of burnt cannabis emanating from inside the vehicle" was not probable cause to believe defendant had illegally "smoked cannabis inside the vehicle"); *People v Brukner*, 25 NYS 3d 559, 571; 51 Misc 3d 354 (NY City Ct, 2015) (holding odor of burnt marijuana, "without more, is equally susceptible to the innocent non-criminal explanation that the Defendant smoked marihuana previously in private, and not in public."); *State v Moore*, 408 Wis 2d 16, 37; 991 NW2d 412 (2023) (DALLET, J., joined by BRADLEY and KAROFSKY, JJ., dissenting) ("[E]xperience teaches us that smells linger in cars, sometimes long after the item responsible for the smell is gone.").

[37] "Legal hemp and illegal marijuana smell the same, 'both unburned and burned.'" Sherwood, Griffin & Mills, *Even Dogs Can't Smell the Difference: The Death of 'Plain Smell," as Hemp is Legalized*, 55 Tenn Bar J 14, 15 (2019) (quoting the North Carolina State Bureau of Investigation). Even drug-sniffing dogs "simply cannot tell the difference between hemp and marijuana." *Id.* (quoting the Tennessee Bureau of Investigation Forensic Services Division's assistant director)).

[38] The legalizing Act made clear that "'marihuana' does not include . . . [i]ndustrial hemp." MCL 333.27953(f)(i).

Officer Genaw, then, lacked probable cause. See *Commonwealth v Barr*, 266 A3d 25, 28-29 (Pa, 2021) (holding that marijuana odor alone does not establish probable cause for an auto search post-legalization); *State v Torgerson*, 995 NW2d 164, 173-174 (Minn, 2023) (same); *People v Zuniga*, 372 P3d 1052, 1057-1060; 2016 CO 52 (Colo, 2016) (same); and *State v Clinton-Aimable*, 2020 VT 30, ¶ 32; 232 A3d 1092 (2020) ("The weight to be given to the smell depends on the nature and strength of the odor and other factors accompanying the odor and how those factors relate to the offense being investigated." (citation and quotation marks omitted)); see also *Commonwealth v Cruz*, 459 Mass 459, 472; 945 NE2d 899 (2011) (holding that burnt marijuana odor does not even provide reasonable suspicion—a lesser showing than probable cause); and *State v Perez*, 173 NH 251, 262; 239 A3d 975 (2020) (same).[39]

Michigan, too, required evidence beyond odor alone for at least two decades, until this Court's decision in *People v Kazmierczak*, 461 Mich 411; 605 NW2d 667 (2000). See *People v Hilber*, 403 Mich 312, 321, 328-329; 269 NW2d 159 (1978) ("We share the view that the odor of burned marijuana, *in some circumstances*, may provide . . . probable cause for arrest . . . ." (emphasis added, parenthetical marks omitted)). While *Kazmierczak* overruled *Hilber*, 461 Mich at 426 n 14, *Hilber*'s conclusion is the correct rule post-legalization. Alcohol-related precedents confirm this. Courts typically hold

[39] This Court need not reach any reasonable-suspicion question. As the Court of Appeals explained, there is no clear error in the trial court's finding that the firearm was *under* Mr. Armstrong's seat—requiring a search—and not in "open view" *in front of* the seat, as the government's brief seems to take for granted. *Armstrong*, 344 Mich App at 302-04.

that the mere odor of alcohol is not probable cause to search a vehicle for an open container.[40] This is because odor alone could easily have an innocent explanation—perhaps a past spill inside the vehicle or an open container stored lawfully in the trunk.[41]

Here, the officers did not see anything directly incriminating like smoke, paraphernalia, or even actual marijuana. Cf. *People v Stribling*, 2022 IL App (3d) 210098, ¶ 28; 228 NE2d 766 (holding no probable cause); *People v Brukner*, 25 NYS 3d 559, 571 (NY City Ct, 2015) ("There was no observation of the tell-tale glowing end of a burning blunt, a smoking pipe, or even the effervescent waft of a tiny cloud of smoke . . . ."). Nor does their behavior suggest suspicion that the (stationary) vehicle was being operated by someone under the influence of marijuana.

Post-legalization, probable cause (or even reasonable suspicion) to believe marijuana is being used illegally requires more than mere odor. As the trial court found, the officers here had nothing else. So they lacked particular, objective evidence of criminality, and their search and seizure of Mr. Armstrong violated the Fourth Amendment. Reaching any other result "would eliminate [the] individualized suspicion required for probable cause." *Barr*, 266 A3d at 43-44. A contrary rule even under the lesser reasonable-suspicion standard would subject anyone in any "public place" to a

[40] See *State v Stevenson*, 299 Kan 53, 65; 321 P3d 754 (2014); see also *State v Burbach*, 706 NW2d 484, 489 (Minn, 2005).

[41] *Stevenson*, 299 Kan at 66-67; see MCL 257.624a(2) (open containers legal in areas of vehicle "not normally occupied by the operator or a passenger").

stop and search of their person based on the odor of a lawful product. Cf. MCL 333.27954(1)(e) (illegal to smoke marijuana in public), and *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). That rule would have a dramatic impact and sweep—in 2020, one in five Michiganders reported having used cannabis, and the odor could attach to still more people in crowded public places.[42] Exposing a "very large category of presumably innocent" people to indiscriminate searches and seizures would undermine the Fourth Amendment's particularity requirement. *Reid v Georgia*, 448 US 438, 441; 100 S Ct 2752; 65 L Ed 2d 890 (1980).

Hoping in part to combat overcriminalization, Michiganders legalized marijuana.[43] But now, the government argues that the resulting increase in marijuana use should authorize fishing expeditions and *even more criminalization*, of the sort described in Part I.B above. That would subvert the electorate's will. This Court should hold that marijuana odor alone cannot provide particularized suspicion of criminal activity.

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[42] Anderson Economic Group, *Michigan Cannabis Market Growth and Size* (October 2021), available at <https://tinyurl.com/mr3vs8jt>.

[43] Gray, *Proposal 1 in Michigan: The Pros and Cons of Legalizing Marijuana*, Detroit Free Press (November 1, 2018), <https://www.freep.com/story/news/marijuana/2018/11/01/michigan-weed-marijuana-proposal/1774282002/> ("The biggest argument coming from the Coalition to Regulate Marijuana like Alcohol is that state and local police are spending too much time and money on enforcing low-level marijuana offenses and that resources should be going toward more serious crimes.").

II. THE FRUITS OF THE UNCONSTITUTIONAL SEARCH SHOULD BE EXCLUDED.

Rights need remedies. Cf. *Bauserman v Unemployment Ins Agency*, 509 Mich 673, 687; 983 NW2d 855 (2022) ("[T]his Court retains the authority—indeed the duty—to vindicate the rights guaranteed by our Constitution[.]"). The exclusionary rule exists to "compel respect" for Fourth Amendment rights in the "only effectively available way—by removing the incentive to disregard it." *Elkins v United States*, 364 US 206, 217; 80 S Ct 1437; 4 L Ed 2d 1669 (1960). This rule has deep roots and remains necessary. The "good faith" exception to the rule is inapposite here, and holding otherwise would create dangerous incentives for officers to remain willfully blind to changes in the laws we entrust them with enforcing.

A. The exclusionary rule has deep roots and remains necessary.

If nothing deters officials from violating a right, it becomes "valueless." *Mapp v Ohio*, 367 US 643, 655; 81 S Ct 1684; 6 L Ed 2d 1081 (1961). This Court recognized that principle over 40 years before *Mapp* in adopting the exclusionary rule under the Michigan Constitution. In *People v Marxhausen*, the Court held that if illegally seized evidence can be "used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value"—so it "might as well be stricken from the Constitution." 204 Mich 559, 571; 171 NW 557 (1919), quoting *Weeks v United States*, 232 US 383, 393; 34 S Ct 341; 58 L Ed 652 (1914).

Exclusion pre-dates the Founding.[44] In the 1765 case *Entick v Carrington*, one of the "most revered search and seizure cases known to the Framers of the American Constitution" and explicitly cited in *Marxhausen*, the King's representatives ransacked a property, searching for and seizing papers that were supposedly seditious.[45] Chief Justice Lord Camden held that the warrant purporting to authorize the search was invalid. He analogized the seizure to coercing a defendant into self-incrimination: "It is very certain that the law obligeth no man to accuse himself," he observed.[46] In the same way, illegally seized physical evidence could not be used "to help forward the conviction[]." *Id.*

That principle influenced the Fourth Amendment.[47] And it strongly influenced the decisions of early American courts. See, e.g., *Frisbie v Butler*, 1 Kirby 213, 213-215 (Conn, 1787); *Grumon v Raymond*, 1 Conn 40, 40-41 (1814); *Jones v Commonwealth*, 40 Va 748, 750 (1842); *Miller v Grice*, 31 SCL 27, 27-28 (SC, 1845).

B. Michigan's legalization of marijuana ended good-faith reliance on *Kazmierczak*.

The "good faith" exception to the exclusionary rule does not apply here. That exception allows evidence's use when searching or seizing officers "reasonably relied"

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[44] See Roots, *The Originalist Case for the Exclusionary Rule*, 45 Gonz L Rev 1 (2010).

[45] *Id.* at 38; *Entick v Carrington*, 19 How St Tr 1029, 1074 (1765); *Marxhausen*, 204 Mich at 564-565.

[46] *Entick*, 19 How St Tr at 1074.

[47] See Roots, *Originalist Case*, 45 Gonz L Rev at 38.

on apparently lawful authority. *Davis v United States*, 564 US 229, 238-239; 131 S Ct 2419; 180 L Ed 2d 285 (2011). "The government bears the burden of showing that the good-faith exception applies." *United States v Artis*, 919 F3d 1123, 1134 (CA 9, 2019), and *United States v Morales*, 987 F3d 966, 974 (CA 11, 2021); see also *United States v Syphers*, 426 F3d 461, 468 (CA 1, 2005) (describing this burden as "heavy").[48]

The government points to *Kazmierczak* as supporting good faith here. The problem with that argument—as the Court of Appeals held—is that it was not the Court of Appeals' 2022 decision in this case that ended valid reliance on *Kazmierczak*. Rather, it was voters' 2018 decision to legalize marijuana. The central premise of *Kazmierczak* was marijuana's status as per se contraband. 461 Mich 411, 421-422; 605 NW2d 667 (2000). By Mr. Armstrong's 2020 arrest, that premise had "been clearly . . . superseded by subsequent legislation." *Associated Builders & Contractors v Lansing*, 499 Mich 177, 192; 800 NW2d 765 (2016).

The legalization of marijuana in Michigan—even without the obvious developments in appellate jurisprudence that necessarily follow—made reliance on *Kazmierczak* unreasonable. Cf. *Barr*, 266 A3d at 41 (holding it "abundantly clear" that Pennsylvania's legalizing just *medicinal* marijuana "eliminated th[e] main pillar supporting

[48] This Court is not bound by the federal good-faith exception in interpreting Michigan law. See, e.g., *People v Katzman*, 505 Mich 1053; 942 NW2d 36 (Mem) (2020) (vacating a Court of Appeals opinion which stated that the federal and state search-and-seizure protections are "coextensive"). Many states have rejected the federal good-faith exception, either outright or in specific applications. Faulkner & Green, *State-Constitutional Departures from the Supreme Court: The Fourth Amendment*, 89 Miss L J 197, 200 & n 27, 201 & n 32, 203 & nn 50-52, 205 & n 77 (2020).

the 'plain smell' doctrine as applied to the possession or use of marijuana."); and *White v State*, 134 Nev 1030; 427 P3d 1044 (Table) (2018) ("A decision does not announce a new rule simply because it is the first time a court has interpreted a statute. If the court's interpretation is *dictated* by . . . the statute's plain language, the decision is not new; it simply states the existing law."). The good-faith exception does not excuse illegal searches and seizures based only on the odor of legal marijuana.

CONCLUSION

This court has already curtailed the exclusionary rule's deterrent effect this Term, by holding it inapplicable to zoning- and nuisance-abatement enforcement actions. See *Long Lake Twp v Maxon*, No. 164948 (Mich) (concerning civil cases). Now, the government asks for that critical safeguard to depend on judicial say-so rather than on the obvious substance of the law. This Court should reject the government's spurious invitation and instead affirm the unanimous decision of the Court of Appeals.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2024, I electronically filed the foregoing Brief of the Cato Institute and the Institute for Justice as *Amici Curiae* in Support of Defendant-Appellee, which was served on all Parties by the MiFILE system of the Michigan Supreme Court.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in MCR 7.212. I certify that this document contains 5,860 countable words, is set in 14-point Garamond font, and is double-spaced.

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Dated: May 7, 2024