IN THE COURT OF APPEALS OF MARYLAND

Case Nos. 37, 39 and 46

September Term, 2016

JERMAUL RONDELL ROBINSON, DEXTER WILLIAMS, VERNON HARVEY SPRIGGS,

Appellants

v.

STATE OF MARYLAND

Appellee

On Writs of Certiorari from the
Court of Special Appeals

BRIEF OF AMICI CURIAE ACLU OF MARYLAND AND CHAZ SLAUGHTER

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The American Civil Liberties Union of Maryland and Chaz Slaughter respectfully submit this brief, as *amici curiae*, to address the important issues presented in this appeal, specifically the extent to which the decriminalization of marijuana impacts when individuals, including those innocent of any wrongdoing, may be subject to searches based on an allegation that an officer smells marijuana.

INTEREST OF AMICI

The **American Civil Liberties Union of Maryland** is the state affiliate of the American Civil Liberties Union ("ACLU"), a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1931, the ACLU of Maryland, which comprises approximately 14,000 members throughout the state, has appeared before various courts and administrative bodies in numerous civil rights cases against the government or government officials, both as direct counsel and as *amicus curiae*. The issue before the Court is of vital interest to the ACLU of Maryland, as it receives numerous complaints from and frequently represents individuals whose Fourth Amendment rights have been violated and who have been subjected to racially-biased police conduct. The ACLU of Maryland has also documented the scope of racially-disparate arrests for marijuana specifically, and has supported efforts to decriminalize marijuana because of Maryland-specific data, including data arising from ACLU of Maryland cases, demonstrating the extent to which searches of individuals innocent of any wrongdoing are justified by marijuana enforcement activities. The ACLU of Maryland has also previously appeared before Maryland courts as direct counsel and *amicus curiae* seeking to protect against unreasonable Fourth Amendment searches and racial profiling. *See, e.g.*, *King v. State*, 434 Md. 472 (2013); *Maryland Dep't of State Police v. Maryland State Conference of NAACP Branches*, 430 Md. 179 (2013); *State v. Andrews*, 227 Md.App. 350 (2016); *Espina v. Jackson*, 442 Md. 311 (2015); *Prince George's Cnty. v. Longtin*, 419 Md. 450

(2011); *Houghton v. Forrest*, 412 Md. 578 (2010); *Lee v. Cline*, 384 Md. 245 (2004); *Ashton v. Brown*, 339 Md. 70 (1995). Accordingly, the standard under which individuals innocent of any wrongdoing may be subjected to searches by police is of substantial concern to the ACLU and its members.

Chaz Slaughter is a recent graduate of Hampton University and the son of two retired police officers. Mr. Slaughter sought legal assistance from the ACLU after being subjected to a search in which Maryland State Police asserted that they smelled marijuana as a basis to search the car, but recovered nothing.

Amici incorporate by reference the Statement of the Case, Questions Presented, and Statement of Facts as set forth in the Appellants' brief.

SUMMARY OF ARGUMENT

Before the Court in this case is a legal question about how Maryland police are to determine probable cause to search in light of changing public attitudes and laws decriminalizing marijuana possession. Typically, courts assessing the propriety of probable cause determinations do so after the fact, in criminal cases, because police have recovered evidence of illegal activity.

But rarely before the Court is the other side of probable cause rulings—the palpable human toll of police searching people innocent of any wrongdoing. In recent years, public scrutiny of police has led members of the public to ask why and how police are able to do the things that they do. Much attention has been paid to the role of "back-end" accountability—transparency, civilian oversight, police discipline and criminal prosecution. But little attention has been paid to the web of laws and cases that shape police behavior on the streets on the *front* end. Legal rulings about whether an officer had reasonable suspicion to question someone, or probable cause to search, play an enormous role in incentivizing and guiding police and setting the boundaries for what is acceptable and what is not. They also have a huge impact on public trust in police.

Whatever the intent of individual officers, when people innocent of any wrongdoing are subjected to discretionary searches, they tend to feel wronged. Relative to other abuses like police brutality, a single search may seem like a minor inconvenience or intrusion with few ramifications. But, in actuality individuals who are searched often feel deeply affected for being singled out and subjected to that intrusion. And that impact is cumulative, gradually creating deep mistrust in police.

These experiences and their impact are an essential part of the Fourth Amendment assessment of reasonableness. The Court's obligation is to consider not only the reasonableness of a search in a particular instance, but also the reasonableness of subjecting individuals wholly innocent of any wrongdoing to those searches. In light of recent changes decriminalizing marijuana and public attitudes disfavoring marijuana enforcement, as well as growing awareness about the true human cost of routine discretionary searches, it is not reasonable under the Fourth Amendment to justify the intrusion of a potentially humiliating search solely because police claim to detect the odor of marijuana.

ARGUMENT

I. EVERY STOP OR SEARCH IS AN INTRUSION INTO SOMEONE'S DIGNITY AND SENSE OF SECURITY

A. Even "routine" searches can have a lasting impact

As this Court is well aware, Fourth Amendment jurisprudence is typically developed in the context of criminal cases in which police have recovered evidence of a crime and have criminally charged the person contesting the search. Because of this, courts are rarely confronted with information, evidence and argument about the human toll—and wasted law enforcement hours—associated with failed searches in which nothing is recovered and the search was plainly unjustified. Individuals who have experienced baseless searches, and particularly those who have not experienced significant financial damages flowing from such a search, rarely have opportunities to be

heard in court. In many instances, those searches—and their troubling human impact—go undocumented in any meaningful way. They are routine.

But that does not mean that there are not significant consequences to such searches. Rather, when people innocent of any wrongdoing are subjected to searches—especially where the stated justification is flimsy—such searches can have a significant and lasting impact. They may be, and often are, experienced as harassment.

Moreover, this experience is disproportionately visited upon racial minorities, who are more likely to be stopped and more likely to be searched than their white counterparts.[1] The public discourse is replete with specific examples in which someone seeks to articulate the impact of such an encounter. For example, retired Chicago Cub baseball player Doug Glanville recently wrote about how a single incident – being questioned by an officer as he was shoveling snow in his driveway – affected him and his family. Doug Glanville, *I was racially profiled in my own driveway*, The Atlantic, Apr. 14, 2014.[2] He explains:

> In one moment, I went from being an ordinary father and husband, carrying out a simple household chore, to a suspect offering a defense. The inquiry had forced me to check my tone, to avoid sounding smug even when I was stating the obvious: that I was shoveling the driveway because the house belonged to me. ….

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[1] While the explanations given for such disparities vary, the data are clear on this point, both in Maryland and elsewhere. *See generally, e.g.*, Dept. of Justice, Civil Rights Div., *Investigation of the Baltimore City Police Department*, August 10, 2016, https://www.justice.gov/opa/file/883366/download; ACLU of Maryland, *The Maryland War on Marijuana in Black and White* (2013), http://www.aclu-md.org/uploaded_files/0000/0470/aclu_marijuana_in_md_report_whitecover.pdf; Sharon LaFraniere and Andrew Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. Times, Oct. 24, 2015, http://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html?_r=0; *Wilkins v. MSP*, Case No. CCB-468 (April 22, 1997) (finding pattern and practice of stops on the basis of race), http://www.clearinghouse.net/chDocs/public/PN-MD-0003-0009.pdf.

[2] http://www.theatlantic.com/national/archive/2014/04/i-was-racially-profiled-in-my-own-driveway/360615/

> As offended as I'd been, the worst part was trying to explain the incident to my kids. When I called my wife to tell her what had happened, she was on her way home from the Black History Month event, and my son heard her end of the conversation. Right away, he wanted to know whether I'd been arrested. My 4-year-old daughter couldn't understand why a police officer would "hurt Daddy's feelings." I didn't want to make my children fear the police. I also wasn't ready to talk to them about stop-and-frisk policies, or the value judgments people put on race.
>
> Until that moment, skin colors had been little more than adjectives to my kids.

Id. Later in the piece, Mr. Glanville points out that "these practices have 'side effects.' They may help police find illegal drugs and guns, but they also disenfranchise untold numbers of people, making them feel like suspects … all of the time." *Id.* Mr. Glanville's comments echo those made by Federal Appellate Judge Robert L. Wilkins, a former ACLU of Maryland client and lead plaintiff in *Wilkins v. Maryland State Police*, Civ. No. 93–468 (D.Md.), a long-running federal court lawsuit challenging racial profiling by the Maryland State Police. In an interview, Mr. Wilkins explained that the message sent to those who are searched is that "[t]hey are less worthy of respect, they are less worthy of any benefit of the doubt, they are less worthy of trust."[3]

The effects of those encounters are visited not only upon the person searched, but also their loved ones and communities. For example, Paul Smith, a professor and criminal justice lawyer, who has written about how *he*, as a parent, was affected by what happened to his son:

> When I heard that my 21-year-old son, a student at Harvard, had been stopped by New York City police on more than one occasion during the brief summer he spent as a Wall Street intern, I was angry. On one occasion, while wearing his best business suit, he was forced to lie face-down on a filthy sidewalk because—well, let's be honest about it, because of the color of his skin. As an attorney and a college professor who teaches

[3] CNN, *U.S. Law Enforcement Coming Under Fire For Racial Profiling*, Mar. 5, 2000, http://www.cnn.com/TRANSCRIPTS/0003/05/wv.03.html.

> criminal justice classes, I knew that his constitutional rights had been violated. As a parent, I feared for his safety at the hands of the police—a fear that I feel every single day, whether he is in New York or elsewhere.
>
> Moreover, as the white father of an African-American son, I am keenly aware that I never face the suspicion and indignities that my son continuously confronts. In fact, all of the men among my African-American in-laws—and I literally mean every single one of them—can tell multiple stories of unjustified investigatory police stops of the sort that not a single one of my white male relatives has ever experienced.

Paul Smith, *What I learned about stop and frisk from watching my black son*, The Atlantic, Apr. 1, 2014.[4]

The authors of *Pulled Over: How Police Stops Define Race and Citizenship* offer an analytical framework describing their findings about how racial minorities experience stops and searches as compared to whites, distinguishing between stops motivated by enforcing traffic safety and stops that are investigatory:

> [T]he investigatory stop is made not to enforce traffic laws or vehicle codes but to investigate the driver. Is this driver carrying a gun or illegal drugs? What is he up to? … Because officers are not supposed to stop a driver without a legal justification, most investigatory stops are nominally justified by minor violations: a burned-out license-plate light, failing to signal a lane change, driving 2 miles per hour over the speed limit and the like. … But the purpose of these stops is to criminally investigate the driver in the hope of making an arrest.
>
> "The investigatory stop is why blacks are stopped at much higher rates than whites and why police pursue intrusive lines of questioning and searches more commonly in stops of blacks than of whites. While whites mainly experience conventional traffic-safety stops, racial minorities—blacks especially—commonly experience investigatory stops. This racial difference in police practices and people's lived experience and shared knowledge of these practices … is a key reason why, compared to whites, African Americans so distrust the police."

[4] http://www.theatlantic.com/national/archive/2014/04/what-i-learned-about-stop-and-frisk-from-watching-my-black-son/359962/

Charles R. Epp, Steven Maynard-Moody, and Donald Haider-Markel, *Pulled Over: How Police Stops Define Race and Citizenship* 7 (2014).[5]

In sum, even searches where "nothing" happens are costly and can have real and longstanding impacts on the individuals subjected to those searches, their loved ones, and their communities. *Amici* offer below, just as examples, descriptions of the experiences of two ACLU clients, Judge Robert Wilkins and Chaz Slaughter, two decades apart.

B. Judge Robert Wilkins, 1992

At the time that Robert Wilkins – now a federal court judge in Washington, D.C – was stopped by Maryland State Police and subjected to a baseless search, he was a Harvard-educated public defender. He knew his rights and how to assert them, but that did not stop him from being subjected to an improper and humiliating search:

> On that day, just before dawn, I was traveling on a highway in the state of Maryland with my cousin, my uncle and my uncle's wife. We were quite tired, because we had driven all night. We were also tired because we were emotionally spent. We were returning from my grandfather's funeral in Chicago, Illinois, and on the previous day, we had buried my grandfather and watched my grandmother wail as her husband of over 50 years was lowered into the ground. We had left Chicago the previous afternoon and driven all night, because we were all due back at our jobs on that morning; I am a lawyer, and I even had a court appearance in Washington that morning. My cousin Scott was driving; I was in the front passenger seat, and my uncle and his wife were in the back. I should also add that myself and my family are African American, while all of the police officers involved were Caucasian.
>
> As we were driving on the highway, an officer from the Maryland State Police stopped our car and told my cousin that he had "paced him" driving 60 miles per hour (mph) in a 40 mph zone. The officer took Scott's license and the rental car contract and returned to his marked police car. (Our car, a Cadillac, had been rented by my uncle for the trip.) Approximately five

[5] The authors do not assert that officers are acting with specific intent to discriminate in carrying out such stops, but rather reflect structural biases and institutionalized practices. *See, e.g., id.* at 6-7.

> minutes later, the officer returned and asked Scott to step out of the car. After a brief discussion between the two of then, Scott leaned toward the car and said "Daddy, they want to search the car."
>
> At that time, my uncle and I got out of the car. I politely explained to the officer that I was an attorney, indeed a public defender, and I asked what was happening. The officer showed me a "Consent to Search" form that he had asked Scott to sign. Scott had not signed it, and I told the officer that we did not consent to him searching anything and that my understanding of the law was that he could not search our car unless he was arresting Scott and was making a search incident to that arrest. The officer informed me that such searches were routine, that he had never had any problems before with people refusing consent, and that "if we had nothing to hide, then what was the problem." … We continued to refuse a search, so he informed us that we would have to wait for a narcotics dog to arrive. We got back inside the car.

Robert Wilkins, *Robert Wilkins' Voice*, Durban Review Conference (April 21, 2009), at 1-2.[6]

The stop continued for nearly another half hour, concluding only after officers made the family stand outside in the rain while a drug-sniffing dog searched the car and failed to alert. *Id.* at 2-3. Judge Wilkins described the impact of the experience:

> So there we were. Standing outside the car in the rain, lined up along the road, with police lights flashing, officers standing guard, and a German Shepard jumping on top of, underneath, and sniffing every inch of our vehicle. We were criminal suspects; yet we were just trying to use the interstate highway to travel from our homes to a funeral and back again. It is hard to describe the frustration and pain you feel when people presume you to be guilty for no good reason and you know that you are innocent. I particularly remember a car driving past with two young White children in the back seat, noses pressed against the window. They were looking at the policemen, the flashing lights, the German Shepard, and us. I fear that those children, upon viewing this spectacle, likely concluded that these Black people standing along the road certainly must have been bad people who had done something wrong, for why else would the police have us there?

[6] http://www.un.org/en/durbanreview2009/pdf/Robert%20Wilkins.pdf.

> Those children were being miseducated about me and Black people in general by this spectacle, but there was nothing in the world that I could do about it.
>
> A few minutes later, Hughes returned to the car with the two driver's licenses and a $105 ticket for my cousin. We were finally able to continue on our way. In addition to the anger, frustration and embarrassment, the detention caused us to hit the peak of morning rush hour traffic, and I missed my appearance in court that morning.

Id. at 3.

C. Chaz Slaughter, 2013

In 2013, the ACLU of Maryland was contacted by three young men whose vehicle had been searched by officers claiming to smell marijuana. One of these young men, Chaz Slaughter, described the experience and its impact on him:

> I have never been in trouble with the law. Both my parents are retired police officers and they always taught me to respect the "Family of Blue." So, when police officers stopped my college classmates and me for allegedly speeding along an Eastern Shore highway on our way back to college, I did not protest. But the officers insisted that I was driving above the limit and claimed that they smelled a strong odor of marijuana. Before we knew it, we were surrounded by four officers yelling, shining lights in our faces, putting their hands on us to pat us down, and searching the car. They kept asking us where we hid the drugs.
>
> The officers ripped apart my new car, breaking the ashtray and the console in the backseat in their feverish attempt to find something incriminating. They even managed to dent and scratch the outside of the car. My classmates and I were forced to sit on the wet grass by the side of the road for nearly an hour while they ransacked the car. They made us look like criminals to anyone who passed by.
>
> The officers found nothing, because there was nothing to find. They had no reason to put us through this humiliating - and expensive - ordeal. Maybe worst of all, even after finding nothing, the officers insisted that we had "gotten away with it this time" and kept threatening that they would "get us next time."

I will never forget how they treated us that night.

ACLU of Maryland, *The Maryland War on Marijuana, supra* note 1 at 15.

As is clear from the statements of Judge Wilkins and Mr. Slaughter, the impacts of being subjected to searches when innocent of any wrongdoing are real. In Maryland and across the country, there is widespread recognition that public trust in the police is significantly eroded and that aggressive and racially biased policing tactics foster this distrust. *See, e.g.*, Police Executive Research Forum, *Advice from Police Chiefs and Community Leaders on Building Trust: "Ask for Help, Work Together, and Show Respect"* at 71 (March 2016) (Summarizing consensus of law enforcement and community leaders from across the country that "the state of community-police relations in many cities is not good.").[7] Maryland law enforcement officials have themselves acknowledged this crisis, citing both the history and current practices in policing as contributing to deep distrust. Commissioner Kevin Davis has said that police "don't have the trust that we yearn for from our communities." Ed Gunts, *Police Commissioner Davis: We Have "Most Prepared Police Department in America" in Event of More Unrest*, BaltimoreBrew.com (Dec. 3, 2015).[8] But trust in police is critically important to public safety, according to law enforcement officials. *See, e.g.,* International Association of Chiefs of Police, *Institute for Community-Police Relations* ("No single factor has been more crucial to reducing crime levels than the partnership between law enforcement agencies and the communities they serve. In order for law enforcement to be truly effective, police agencies cannot operate alone; they must have the active support and assistance of citizens and communities.");[9] U.S. Dep't of Justice Office of Community Oriented Policing Services, *Building Trust Between the Police and the Citizens They*

[7] http://www.policeforum.org/assets/policecommunitytrust.pdf

[8] https://baltimorebrew.com/2015/12/03/police-commissioner-davis-we-have-most-prepared-police-department-in-america-in-event-of-more-unrest/

[9] www.iacp.org/icpr

Serve: An Internal Affairs Promising Practices Guide for Local Law Enforcement 7 (2014) (community trust is "the key to effective policing").[10]

II. AVAILABLE DATA SHOWS THAT THOUSANDS OF MARYLANDERS ARE ROUTINELY SUBJECTED TO FRUITLESS SEARCHES AND THAT BLACK AND OTHER RACIAL MINORITIES DISPROPORTIONATELY BEAR THE BURDEN OF THESE SEARCHES

Judge Wilkins and Mr. Slaughter present examples of "routine" searches. Their searches were unremarkable in many ways. But the police actions at issue nonetheless made the two men feel and believe that authorities viewed them as inherently suspicious, and that had lasting impact.

Data shows that these routine searches happen thousands of times a year in Maryland, and are disproportionately inflicted upon Black and other minority motorists.

A. Available data suggests that searches based on the smell of marijuana alone are not productive and invite biased application.

Due to the *Wilkins v. MSP* lawsuit challenging racial profiling by the Maryland State Police, the ACLU of Maryland has data that is otherwise not typically public—police records showing the reasons given by MSP troopers to justify searches, as well as the outcomes of those searches. For this brief, the ACLU analyzed data between 2003 and 2007, the last five complete years for which the ACLU has data. The data showed that:

1. During that period, MSP personnel documented about 13,000 searches.[11] The smell of marijuana was the single most common justification provided for probable cause to search, accounting for more than 40 percent of all searches (about 5,245 searches).

[10] http://www.theiacp.org/portals/0/pdfs/BuildingTrust.pdf

[11] MSP officers conducted 12,884 searches during that period.

2. *Nearly two-thirds of the time* where police listed the smell of marijuana as the basis for the search, police did not recover any kind of drugs or weapons.[12] Put another way, more than 3,300 motorists innocent of any wrongdoing, like Chaz Slaughter and his classmates, were subjected to searches because officers asserted that they detected the smell of marijuana.

3. When disaggregated by race, data shows that Blacks and Latinos were subjected to fruitless searches based on the alleged smell of marijuana at far higher rates than their white counterparts. Police failed to find drugs or weapons about 52 percent of the time they searched Whites. That rate jumped to about 70 percent for Black motorists, and skyrocketed to 90 percent for individuals identified by MSP as "Hispanic." MSP personnel were also more likely to assert that they detected the odor of marijuana as justification for the search with Black motorists (47% of all searches) than with whites (39% of all searches).

Unlike other types of probable cause assessments which involve judgments based on observation of behavior, the smell of marijuana—like the smell of alcohol—should not yield false positives frequently. Yet, data suggest that this happens with great regularity when police cite the odor of marijuana during traffic stops. For example, after Mr. Slaughter contacted the ACLU about being searched without reason, the ACLU requested MSP search records for the officers involved in the search. Of the records produced, approximately 35 reflected searches conducted solely because officers asserted that they detected the smell of marijuana. Yet in 18 of those searches, police found nothing. In another 11 of those cases, police found less than five grams of marijuana

[12] About 64% of the time, no CDS, property or any other kind of contraband was recovered, according to MSP's own records.

(half the amount that has now been decriminalized).[13] Put another way, using the smell of marijuana alone as justification, police searched *seven people* for every instance in which they recovered a non-negligible amount of marijuana, or any amount of any other drug.

Probable cause determinations do not, of course, require mathematical certainty. But neither should courts accept or endorse probable cause determinations based on factors plagued by unreliability. The odor of marijuana alone – at least based on available data – is by itself unreliable. Whether that is because it is too easy to be mistaken about the smell, to imagine it, or something else, the fact that there are thousands of cases where police say they detect the odor of marijuana but fail to recover anything undermine its reliability as a basis for probable cause to search.

B. Statewide data shows that thousands of Marylanders are subjected to searches in which nothing is recovered

While statewide data about searches based on the smell of marijuana is not available, the available data regarding police searches in the course of traffic stops provides a sense of scope:[14]

1. In 2015, police across the state conducted more than 22,000 searches of motorists.[15]

[13] In several instances, the quantity of marijuana recovered was so miniscule as to undermine the legitimacy of asserting that there was a smell detected. For example, the recovery of a small bag with seeds only; recovery of less than one tenth of one gram of marijuana; recovery of flakes too small in quantity to weigh.

[14] Maryland law enforcement agencies are required to compile and report certain information about traffic stops pursuant to Md. Code Ann., Trans. Art § 25-113. The ACLU's analysis is based on the raw data for 2015, obtained through a Maryland Public Information Act request.

2. Nearly 9,000 of those searches were based on a probable-cause determination. In about 4,000 of those searches, police recovered nothing at all.

3. About 2,700, or 68 percent, of those empty searches were conducted on Black people, who make up less than a third of Maryland's population. (By contrast, about 915 whites innocent of any wrongdoing were subjected to searches on the basis of probable cause).

4. As was true with the 2003-2007 MSP data, police were more likely to assert that they had probable cause to search Black people than white people.[16] Probable cause was asserted to be the basis for searching in 51 percent of all searches of Black people—more than 5,000 people. For whites, that number was 31 percent—slightly less than 2,800 people. Put another way, for every white person searched for "probable cause," police searched two black people.

5. Moreover, police who asserted probable cause as the basis for the search were wrong with far greater frequency when searching Black, rather than white, motorists. Police failed to recover any evidence of a crime just more than half of the time (51%) when searching Black motorists. By contrast, police came up empty just more than one-third of the time (34%) with white motorists.

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[15] Despite making up less than one-third of Maryland's population (30%), Blacks made up nearly half (47%) of those searched. *See* U.S. Census Bureau, Maryland QuickFacts, http://www.census.gov/quickfacts/table/PST045215/24.

[16] About 60 percent of the 8,938 probable-cause searches were conducted on Black motorists (5,343), compared to about 31 percent conducted on whites (2,783).

C. The findings of the Department of Justice regarding the Baltimore Police Department provide a snapshot of the disproportionate burden of police intrusion borne by Black residents

In its recent investigation into the Baltimore City Police Department, the U.S. Department of Justice analyzed and documented the extraordinary racial disparities in pedestrian and vehicle stops and searches that are equally compelling. For example:

1. "BPD disproportionately stops African-American pedestrians. Citywide, BPD stopped African-American residents three times as often as white residents after controlling for the population of the area in which the stops occurred. In each of BPD's nine police districts, African Americans accounted for a greater share of BPD's stops than the population living in the district." *Dept. of Justice, supra* n. 1 at 8.

2. "BPD is far more likely to subject individual African Americans to multiple stops in short periods of time. In the five and a half years of data we examined, African Americans accounted for 95 percent of the 410 individuals BPD stopped at least 10 times." *Id*.

3. "One African American man in his mid-fifties was stopped 30 times in less than 4 years. Despite these repeated intrusions, none of the 30 stops resulted in a citation or criminal charge." *Id*.

4. "BPD also stops African American drivers at disproportionate rates. African Americans accounted for 82 percent of all BPD vehicle stops, compared to only 60 percent of the driving age population in the City and 27 percent of the driving age population in the greater metropolitan area." *Id*.

5. "BPD searched African Americans more frequently during pedestrian and vehicle stops, even though searches of African Americans were less likely to discover contraband. Indeed, BPD officers found contraband twice as often when searching white individuals compared to African Americans during vehicle stops and 50 percent more often during pedestrian stops." *Id*.

The Department of Justice noted that "[t]hese racial disparities, along with evidence suggesting intentional discrimination, erode the community trust that is critical to effective policing." *Id*.

III. SEARCHES BASED SOLELY ON A CLAIM THAT AN OFFICER DETECTS THE SCENT OF MARIJUANA CAN NO LONGER BE JUSTIFIED IN LIGHT OF CHANGES TO THE LAW AND THE INTRUSION INTO PERSONAL DIGNITY THAT ACCOMPANIES EVERY SEARCH

A. Courts should consider the impact of Fourth Amendment intrusions in light of their impact on individuals innocent of any wrongdoing and how the Courts' rulings will shape police behavior

Amici provide specific examples and data documenting the impact of subjecting people innocent of any wrongdoing to investigatory stops and searches so that they may be included in the Court's assessment of "reasonableness" in its Fourth Amendment analysis.

In establishing legal precedents concerning broad police practices, courts have an obligation to assess not only the reasonableness of a search in a particular instance, but also the reasonableness of subjecting individuals *innocent of any wrongdoing* to those intrusions. This is so because every time courts decide what is permissible in a criminal case, they are deciding where the line falls in *every* case. And because of the broad deference afforded police at the boundaries of the law, court rulings about what gives rise to reasonable suspicion or probable cause inoculate police against conduct that is broader than the ruling itself.

The scope of those rulings has significant impact on law enforcement strategies and how the public is policed. The less courts demand of law enforcement in articulating specific reasonable suspicion and probable cause, the more people innocent of any wrongdoing will be subjected to baseless stops and searches. Rulings like *Terry v. Ohio*, 392 U.S. 1 (1968) (permitting investigative stops upon frisks reasonable suspicion rather than probable cause); *Whren v. United States*, 517 U.S. 806 (1996) (permitting pretextual traffic stops); and *Illinois v. Wardlaw*, 528 U.S. 19 (2000) (ruling flight at sight of police

in "high crime area" enough to create reasonable suspicion), have had unintended consequences. These rulings have encouraged and condoned volume-based policing that treats large swaths of the population as inherently suspect, rather than policing that emphasizes observation and skill in detection.[17] In so doing, they have undermined effective law enforcement. Moreover, as is now well documented, the burdens of excessive stops and searches have been disproportionately visited upon racial minorities. The question in this case presents an opportunity to help mitigate those unintended consequences by requiring officers to articulate more than the mere, unreliable assertion that they detect the odor of marijuana.[18] Requiring less incentivizes pretextual stops and that invites fruitless searches of individuals like Chaz Slaughter and Robert Wilkins, innocent of any wrongdoing.

B. Changes in Marijuana Laws and Attitudes Warrant a Change in Fourth Amendment Analysis

Importantly, public attitudes and Maryland's laws regarding marijuana have changed. And with those changes, the analysis for what is reasonable under Fourth Amendment must change as well. Several years ago, in 2013, the Maryland legislature made possession of marijuana a citeable offense (meaning that officers could write a criminal citation, rather than arrest, an individual for possession). In 2014, the legislature decriminalized possession of small quantities of marijuana, after being confronted with evidence of changing public attitudes and extraordinarily racially-disparate arrest rates. Earlier this year, the legislature overrode a veto by Governor Hogan, decriminalizing possession of marijuana paraphernalia. Maryland is also developing a scheme for

[17] *See, e.g., Epp supra* at 9, 12 (identifying constitutional standards as playing key role in expansion of non-specific investigatory stops).

[18] Moreover, unlike the drug-sniffing dog in *Bowling v. State*, 227 Md. App. 460 (2016), police officers have the ability to articulate more than a simple "positive" or "negative" alert.

dispensing medical marijuana and it is expected that in the years to come Maryland will likely be among the states to legalize possession.[19]

Maryland-specific polling has also shown significant support for legalizing possession of marijuana—showing also that this support is consistently increasing. A Washington Post-University of Maryland poll conducted in September 2016 found that 61 percent of Maryland adults favored legalizing possession of marijuana.[20] This represented an increase from 49 percent in a similar poll conducted just two years prior.[21]

These changes reflect evolving attitudes towards marijuana, as well as declining willingness to accept the human and financial costs of enforcing criminal laws against those who possess small quantities of marijuana. Such developments should not be treated as irrelevant to the Fourth Amendment analysis.

Rather, these changes—together with evidence about the unreliability of the odor of marijuana alone—call for a change to the Fourth Amendment inquiry where officers assert they have detected the smell of marijuana. Whether or not it continues to be proper for police to rely upon detection of marijuana as part of the "totality of circumstances" analysis, it alone is too unreliable to constitute probable cause to search.

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[19] As of November 9, 2016, marijuana is legal in some form, whether medical or for recreational use, in 28 states across the country. Zusha Elinson, *Voters Approve Recreational Marijuana in Four States, Medical Marijuana in Three Others*, The Wall Street Journal, November 9, 2016, http://www.wsj.com/articles/voters-approve-recreational-marijuana-in-at-least-three-states-medical-marijuana-in-others-1478677170.

[20] Washington Post-University of Maryland Poll, September 27-30, 2016, https://www.washingtonpost.com/page/2010-2019/WashingtonPost/2016/10/07/National-Politics/Polling/release_451.xml

[21] Josh Hicks and Emily Guskin, *Marylanders support longer summers and legal marijuana*, The Wash. Post, October 6, 2016, https://www.washingtonpost.com/local/md-politics/marylanders-support-longer-summers-and-legal-marijuana/2016/10/06/b864a2be-88de-11e6-b24f-a7f89eb68887_story.html

CONCLUSION

For the foregoing reasons, Amici urge the Court of Appeals should reverse the decisions of the lower courts.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of November 2016, two copies of the foregoing Brief were mailed, postage paid to:

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