No. _____

In the Supreme Court of the United States

Anthony Gray,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Petition for a Writ of Certiorari

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January 3, 2020

Questions Presented for Review

Probable cause requires facts and circumstances within an officer's knowledge establishing a fair probability that contraband or evidence of a crime will be found in the particular place to be searched. *Florida v. Harris*, 568 U.S. 1050, 1055 (2013); *Brinegar v. United States*, 338 U.S. 160, 175-76, (1949); *Carroll v. United States*, 267 U.S. 132, 162 (1925). In a state that has legalized recreational marijuana:

I. Does the faint smell of marijuana in a car, alone, give local police probable cause to search the car for contraband under the Fourth Amendment?

II. Is the sniff of a K-9 trained to detect marijuana in a recreational-use state a search within the meaning of the Fourth Amendment requiring probable cause?

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Petition for Certiorari

Petitioner Anthony Gray respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Related Proceedings and Orders Below

1. District Court of Nevada, 3:17-cr-00054-HDM-VPC, *United States v. Anthony Gray*, final judgment issued May 17, 2018.
2. Ninth Circuit Court of Appeals, 18-10016, *United States v. Anthony Gray*, final judgment issued on June 26, 2019.
3. Ninth Circuit Court of Appeals, 18-10016, *United States v. Anthony Gray*, rehearing en banc denied on October 8, 2019.

Jurisdictional Statement

The Ninth Circuit Court of Appeals issued its decision in this direct appeal on June 26, 2019, in *United States v. Anthony Gray*, 772 F. App'x 565 (9th Cir. 2019) (unpublished) (Appendix A), and denied rehearing en banc on October 8, 2019 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a). This petition is timely filed pursuant to Supreme Court Rule 13.1.

Relevant Constitutional, Statutory, and Rule Provisions

1. The Fourth Amendment to the United States Constitution protects: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Section 922(g)(1) of Title 18 of the U.S. Code provides "[i]t shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding on year," to possess a firearm.

3. Nevada Revised Statutes § 453D.020(1), effective January 1, 2017, states "the People of Nevada find and declare that the use of marijuana should be legal for persons 21 years of age or older, and its cultivation and sale should be regulated similar to other legal businesses." The law states that allowing such use is "[i]n the interest of public health and public safety" and "to better focus state and local law enforcement resources on crimes involving violence and personal property." *Id.*

4. Nev. Rev. Stat. § 453D.110 legalizes myriad marijuana-related activities, permitting those 21 or older to:

> 1. Possess, use, consume, purchase, obtain, process, or transport marijuana paraphernalia, one ounce or less of marijuana other than concentrated marijuana, or one-eighth of an ounce or less of concentrated marijuana;

> 2. Possess, cultivate, process, or transport not more than six marijuana plants for personal use and possess the marijuana produced by the plants on the premises where the plants were grown, provided that:
>
> (a) Cultivation takes place within a closet, room, greenhouse, or other enclosed area that is equipped with a lock or other security device that allows access only to persons authorized to access the area; and
>
> (b) No more than 12 plants are possessed, cultivated, or processed at a single residence, or upon the grounds of that residence, at one time;
>
> 3. Give or otherwise deliver one ounce or less of marijuana, other than concentrated marijuana, or one-eighth of an ounce or less of concentrated marijuana without remuneration to a person provided that the transaction is not advertised or promoted to the public; or
>
> 4. Assist another person who is 21 years of age or older in any of the acts described in this section.

5. Nev. Rev. Stat. § 453D.400 lists the penalties for violations of the new law. For instance, "[a] person who smokes or otherwise consumes marijuana in a public place, in a retail marijuana store, or in a moving vehicle is guilty of a misdemeanor punished by a fine of not more than $600." Nev. Rev. Stat. § 453D.400(2). Additionally, Nev. Rev. Stat. § 453D.100 clarifies that the law does not prevent law enforcement from imposing a civil or criminal penalty for "driving . . . while impaired by marijuana" or "knowingly delivering . . . marijuana to a person under 21 years of age," subject to delineated exceptions.

Argument Summary

Twelve states and territories legalize the recreational use of marijuana.[1] The Ninth Circuit is the largest and only federal circuit in which a majority of its states permit recreational marijuana use. Five of the Ninth Circuit's states—Alaska, California, Nevada, Oregon, and Washington—render it legal for individuals 21 or older to possess, consume, or transport, at least an ounce of marijuana. Yet after Nevada legalized marijuana, local state police searched the car in which Petitioner Anthony Gray was a passenger based solely on the scent of a "small hint" of marijuana identified by a deputy and confirmed by a K-9 trained to detect legal amounts of marijuana.

No federal appellate court has properly addressed the impact of marijuana's legalization on Fourth Amendment jurisprudence. Prior decisions holding the scent of marijuana alone—whether detected by human or canine—is sufficient to establish probable cause to conduct a warrantless search are premised on marijuana being contraband. However, where a state has legalized recreational marijuana, the scent or smell of marijuana alone can no longer establish probable cause to search.

It is critical for this Court to provide guidance to the federal appellate courts on this important issue by addressing whether, and if so, under what

[1] Washington (eff. Dec. 2012); Colorado (eff. Jan. 2014): Alaska (eff. Feb. 2015); Washington D.C. (eff. Feb. 2015); Oregon (eff. July 2015); Massachusetts (eff. Dec. 2016); Nevada (eff. Jan. 2017); California (eff. Jan. 2018); Maine (eff. May 2018); Vermont (eff. July 2018); Michigan (eff. Dec. 2018); Illinois (eff. Jan. 2020).

circumstances, probable cause exists to search for marijuana in a recreational use state. The Ninth Circuit's decision, if left uncorrected, carves the way for the absurd result that local state police can search a vehicle anytime a scent of marijuana is detected, despite the state voters' decision to legalize recreational marijuana. This is an exceptionally important question that would create precedent nationwide. The time has come to hold that marijuana scent *alone* cannot establish probable cause to search in recreational use states.

Statement of the Case

A. District Court Proceedings

Local police deputies in Nevada conducted a routine traffic stop on June 29, 2017. ER 73, 81. One deputy smelled a "small hint" of marijuana, and a K-9 trained to detect *legal* quantities of marijuana alerted. Exhibit A at 14:20-14:42; OB at 6-7. The car's driver, Matthew Cannon, said he and his passenger, Petitioner Anthony Gray, do not smoke marijuana and had not smoked marijuana in the car. Exhibit A at 14:20-14:42; OB at 7. Cannon offered to have himself and Gray drug tested. Exhibit A at 14:20-14:42; OB at 7. The deputy declined to do so. Exhibit A at 14:20-14:42. As the government conceded below, deputies "did not evaluate Mr. Cannon for any DUI-related offenses." ER 230. Instead, deputies searched the car without a warrant. The search found no illegal drugs; a deputy only saw "shake," i.e. raw marijuana particles, on the passenger floorboard during the search. Exhibit A at 50:40-50:45. But behind the driver's seat, deputies found a gun in a backpack. ER 98.

On July 12, 2017, a federal grand jury in the District of Nevada indicted Gray on one count of unlawfully possessing a firearm under 18 U.S.C. §§ 922(g)(1), 924(a)(2). ER 340-341.

Gray moved to suppress the gun, arguing the deputies' warrantless search of the car lacked probable cause, violating his Fourth Amendment rights. ER 51-68. Specifically, because Nevada legalized recreational marijuana six months before the stop, the "small hint" of marijuana alone could not support the warrantless search. ER 60-64. And because the K-9 was trained to detect legal amounts of marijuana and deputies deployed the K-9 without probable cause, the K-9's sniff constituted a search and violated Gray's reasonable expectation of privacy. ER 54-60.

The district court issued an oral ruling denying the motion to suppress. ER 13-33. The court noted the only issue was whether probable cause existed to search the car, stating:

> . . .There is, for purposes of this hearing, evidence which the Court accepts as true, . . . which I'm required to do, that in fact when the officers made the lawful stop of the vehicle, they smelled the odor of marijuana emanating from the passenger side of the vehicle. They were in a lawful position to make that detection and, in fact, made it.
>
> The law prohibits using any marijuana in a public place and in a moving vehicle. This was a moving vehicle. So there was a reasonable basis and reasonable cause for the officers to believe that they smelled marijuana, that it could well have been used in the vehicle in violation of Nevada law at the time of the stop. . . .
>
> The quantity is the issue that's been raised by the defense here, and while I think it's a novel argument, I presume it

> will be raised other places, has been raised, I think, in Oregon and some other jurisdictions, the Court is not persuaded by the argument.
>
> The officers properly, upon believing that there was marijuana in the vehicle, called in their trained K-9 to sniff, and based upon the dog hitting on the vehicle, had probable cause to enter the vehicle then under the automobile exception to the warrant requirement and to conduct the search.

ER 29-30.

The district court held that Nevada's legalization of recreational marijuana did not impact its analysis or decision:

> The fact that the Nevada law has changed and made marijuana legal for quantities of less than an ounce does not change the result. Odor of marijuana provides probable cause to search a vehicle to determine the likely source and quantity of marijuana in the vehicle.
>
> The Court finds that the odor of marijuana emanating from defendant's vehicle in this case established probable cause to search the vehicle for contraband.

ER 31.

Gray pled guilty on February 15, 2018, pursuant to a written conditional plea agreement, preserving his right to appeal the denial of his motion to suppress. ER 322, 324-326, 329, 339.

B. Ninth Circuit Arguments

Gray timely appealed the denial of his motion to suppress. ER 1-2. He argued that after Nevada became a recreational use state, local police conducting a routine traffic stop could not execute a warrantless probable cause search of a vehicle based only on a "small hint" of marijuana. OB at 2, 15.

Gray argued it was erroneous for the district court to have relied on pre-legalization cases to find the smell of marijuana sufficient to establish probable cause as those decisions depended on all marijuana being contraband. OB at 25-29. As marijuana is no longer contraband in recreational use states, the legal premise underlying those decisions has changed and they are no longer binding or persuasive authority.

Gray also argued the K-9 alert added nothing to the probable cause analysis. In the past, courts accepted that K-9 alerts can establish probable cause for only one reason—their training to alert *only* to the aroma of contraband. Because the K-9 used here had been trained consistently and repeatedly to alert to *legal* quantities of marijuana (including on the day before its deployment in this case), its alert brought law enforcement no closer to the probable cause standard. OB at 29-34. And because the K-9 could detect noncontraband, i.e., legal quantities of marijuana, the K-9 sniff itself was an unconstitutional search unsupported by probable cause. OB at 34.

The government argued the search was supported by probable cause based on a list of hypothetical acts that could have violated Nevada marijuana law, but that

were not articulated by the deputies below. AB at 24-29. Gray noted, however, that none of the hypothetical state law violations the government proffered found any support in the record. RB at 4-11.

C. Ninth Circuit's Decision

The Ninth Circuit upheld the district court's order denying suppression. *United States v. Gray*, 772 F. App'x 565, 567 n.2 (9th Cir. 2019) (unpublished). In doing so, the Ninth Circuit ignored the constitutional issues Gray asked it to consider due to Nevada's recreational use status, creating an irrational outcome. The Ninth Circuit instead posited that, because it remains a misdemeanor in Nevada to consume marijuana in a public place or in a moving vehicle, it was reasonable for the deputy to believe an occupant in the car had smoked in a public place or while the car was in motion since the car had been in motion and the deputy detected a faint scent of marijuana once the car was stopped. *Id.* The Ninth Circuit stated: "Because Cannon insisted that neither he nor Gray had been smoking marijuana, even though [the deputy] could smell it, [the deputy] 'could have reasonably inferred that [Cannon was] lying and that [his] lies suggested a guilty mind.'" *Id.* (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 587 (2018)). It concluded: "Even if the smell was too faint to suggest a large quantity of drugs, Cannon's conduct could reasonably suggest that either he or Gray had been smoking in a public place or while the vehicle was in motion." *Id.* [2]

[2] The Ninth Circuit did not address the government's alternative argument, which it raised for the first time on appeal, that the search was lawful because marijuana

Gray timely petitioned for rehearing en banc, arguing the Ninth Circuit's opinion permitted any vehicle on the public roadways to be searched if it emits a faint smell of marijuana, regardless of the lack of any indicia of criminality, regardless of the staleness of the smell, and regardless of whether the smell is that of fresh or burnt marijuana. App. Dkt. 42. Not only does this result ignore voters' decision to legalize recreational marijuana, it provides law enforcement with unchecked power. *Id.* Law enforcement could, for example, sit outside of Nevada's legal marijuana dispensaries and search the cars of every patron. *Id.* The Ninth Circuit denied Gray's petition without a written opinion. App. Dkt. 43.

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is illegal under federal law. AB at 9-16. There was no evidence the state deputies from Washoe County Nevada were trained to enforce or were actively seeking to enforce federal law at the time of the traffic stop. By failing to address the issue, the Ninth Circuit also declined to decide whether the government had forfeited this argument by "failing to adequately raise it before the district court. Gray, 772 F. App'x at 567 n.2.

Reasons for Granting the Petition

I. Marijuana legalization is a growing national trend and federal courts in states with recreational marijuana need guidance on the constitutional implications of its legalization.

Nevada is part of a growing national trend in legalizing marijuana. Many states have decriminalized marijuana or made medical marijuana legal. In 2012, Colorado and Washington were the first states to legalize marijuana for recreational use. *See* Washington Initiative 502 (eff. Dec. 2012); Colorado Amendment 64 (eff. Jan. 2014). Today, marijuana for recreational use is legal in ten additional states and territories: Alaska (eff. Feb. 2015); Washington D.C. (eff. Feb. 2015); Oregon (eff. July 2015); Massachusetts (eff. Dec. 2016); Nevada (eff. Jan. 2017); California (eff. Jan. 2018); Maine (eff. May 2018); Vermont (eff. July 2018); Michigan (eff. Dec. 2019); Illinois (eff. Jan. 2020).

Despite the growing trend of marijuana's legalization, no federal appellate court has published an opinion considering the impact of marijuana's legalization on the Fourth Amendment. While this Court has previously held the smell of marijuana, detected by law enforcement or canines, is sufficient to establish probable cause, the Court premised those decisions on marijuana being contraband. *See United States v. Johns*, 469 U.S. 478, 482 (1985) ("After the officers came closer and detected the distinct odor of marihuana, they had probable cause to believe that the vehicles contained contraband."); *Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015) ("A dog sniff, by contrast, is a measure aimed at detecting evidence of ordinary criminal wrongdoing."); *Illinois v. Caballes*, 543 U.S. 405, 409 (2005)

("Accordingly, the use of a well-trained narcotics-detection dog—one that does not expose noncontraband items that otherwise would remain hidden from public view—during a lawful traffic stop, generally does not implicate legitimate privacy interests.").

The same is true for federal courts across the country. *See, e.g., United States v. Paige,* 870 F.3d 693, 700 (7th Cir. 2017) (clarifying police officer's smell of marijuana, localized to a particular person, establishes probable cause in Wisconsin where marijuana possession remains a crime); *United States v. Smith*, 789 F.3d 923, 928 (8th Cir. 2015) (stating "[t]his court has held numerous times that the smell of marijuana coming from a vehicle during a proper traffic stop gives an officer probable cause to search for drugs"); *United States v. Kerr*, 876 F.2d 1440, 1445 (9th Cir. 1989) ("Detecting the odor of marijuana . . . corroborated the informant's allegation that [the defendant] was growing marijuana. Moreover, the presence of the odor of contraband may itself be sufficient to establish probable cause."); *United States v. Snyder*, 793 F.3d 1241, 1244 (10th Cir. 2015) (stating "officers had probable cause to search Snyder's vehicle based on the marijuana smell emanating from the car"); *United States v. Ward*, 722 F. App'x 953, 963 (11th Cir. 2018) (stating officers had probable cause to search a car "based on the smell of marijuana alone").[3]

[3] Likewise, all state courts to hold that the smell of marijuana can establish probable cause premised such reasoning on marijuana being contraband. *See, e.g.*, *State v. Smalley*, 225 P.3d 844, 848 (Or. Ct. App. 2010) (holding that because Oregon law prohibited possession of any quantity of marijuana, any amount of

The fundamental premise of these decisions is no longer valid in the dozen states and territories that legalize recreational marijuana. Many state courts now recognize the change in marijuana's legal status necessarily affects the probable cause analysis. Two state appellate courts—the Colorado Supreme Court and the Court of Appeals of Washington—considered the role marijuana's scent plays in probable cause analysis following legalization. *People v. Zuniga*, 372 P.3d 1052 (Colo. 2016), *Colorado v. Cox*, 401 P.3d 509 (Colo. 2017); *State v. K.C.-S.*, No. 73036-3-I, 2016 WL 264960 (Wash. Ct. App. Jan. 19, 2016).[4] Each of these cases determined that probable cause only exists when law enforcement identifies the smell of marijuana in conjunction with numerous criminal indicia.

For example, in *Zuniga*, the Colorado Supreme Court identified myriad indicia of criminality that, combined with the K-9 alert, established probable cause.

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marijuana was still contraband and evidence of its existence established probable cause to search); *People v. Waxler*, 168 Cal. Rptr. 3d 822, 828 (Cal. Ct. App. 2014) (finding "possession of any amount of marijuana . . . is illegal in California and is therefore 'contraband' . . . [t]hus, a law enforcement officer may conduct a warrantless search of a vehicle pursuant to the automobile exception when the officer has probable cause to believe the vehicle contains marijuana, which is contraband"); *Robinson v. State*, 152 A.3d 661, 664, 680, 683 (Md. 2017) (concluding that, "[d]espite the decriminalization of possession of less than ten grams of marijuana, possession of marijuana in any amount remains illegal in Maryland," that "marijuana in any amount constitutes contraband," and thus "the odor of marijuana constitutes probable cause for the search of a vehicle"); *State v. Ortega*, 749 N.W.2d 851, 854 (Minn. Ct. App. 2008) (finding "possession of a small amount of marijuana [is] a petty misdemeanor," and its smell established probable cause to search).

[4] While other courts may have considered these questions, counsel has not located any other decisions. Also not included in this analysis are decisions addressing fact patterns in which all car occupants admit to being under the age of 21.

First, the car's occupants "exhibited 'extreme' nervousness." *Zuniga*, 372 P.3d at 1059-60. The Colorado State Trooper noted the driver "had beads of sweat on his face, stuttered in response to requests, and had shaky hands." *Id.* at 1054. He later noted the driver remained "overly nervous" and "would not look the Trooper in the eye." *Id.* at 1055. The passenger, Zuniga, "appeared nervous and was 'overly nice.'" *Id.* at 1054. The court explained "the two men's extreme nervousness . . . leads to a reasonable inference that illegal activity was ongoing during the traffic stop." *Id.* at 1060.

Second, in *Zuniga*, the driver and passenger "gave remarkably disparate accounts of their visit to Colorado." 372 P.3d at 1055. The driver stated they had driven out to Colorado four days previously, but the passenger said two days. *Id.* The driver stated they "didn't go anywhere and didn't do anything," while the passenger stated they were "visit[ing] his grandmother, who was in the hospital due to kidney problems" and then "spent the rest of the time visiting the mountains and walking along the Sixteenth Street Mall in Denver." *Id.* The driver said they stayed in a hotel in the Denver area but couldn't remember the name, whereas the passenger claimed they stayed with his grandmother. *Id.* The court reasoned "[t]he vast inconsistencies between the two men's stories lead to a reasonable inference that the two men were attempting to conceal illegal conduct from the Trooper." *Id.* at 1059.

Third, the *Zuniga* court considered that the trooper smelled the "heavy odor" of "raw marijuana," suggesting the "marijuana was in the vehicle, potentially in an illegal amount." *Id.* at 1054, 1060.

It was these *combined* factors that prompted the trooper in *Zuniga* to call for a K-9. *Id.* at 1055 ("Based upon the men's inconsistent stories, their extreme nervousness, and the strong odor of raw marijuana, the Trooper was suspicious that criminal activity was ongoing in the vehicle. Accordingly, the Trooper told the two men that he was going to have his K–9 unit, Lobo, conduct a "free air sniff" around the vehicle."). Here, in contrast, no such combination of factors existed.

Likewise, in *Cox*, decided after its decision in *Zuniga*, the Colorado Supreme Court found there was probable cause to search when the trooper observed the defendant with two cell phones on the car seat exhibit unusual nervousness and give inconsistent explanations regarding his travels in conjunction with a subsequent dog alert. 401 P.3d at 510.

The Court of Appeals of Washington, like the Colorado Supreme Court, found there was probable cause to search the car based on several indicia of criminality combined with the K-9 alert. In *K.C.-S.*, the Washington appellate court affirmed the lower court's probable cause finding based on "the suspected drug deal, K.C.-S.'s furtive movements, the strong odor of fresh marijuana despite the car's open windows and the removal of its occupants, K.C.-S.'s outstanding [violation of the uniform controlled substances act] warrant, and the K9 sniff." No. 73036-3-I, 2016 WL 264960, at *4 (Wash. Ct. App. Jan. 19, 2016).

While state appellate courts have addressed the effect of marijuana's legalization on the Fourth Amendment, no federal appellate court has issued a published opinion on this question. This Court should, like the state appellate courts, address this question and articulate the role marijuana smell may play, if any, in probable cause analysis for a recreational-use states.

II. This case provides an apt vehicle for addressing the impact of marijuana's legalization on the Fourth Amendment, yet the Ninth Circuit's decision avoided this critical question, creating an absurd result.

Here, unlike the state court cases discussed above, there was no indicia of criminality that, combined with the "small hint" of marijuana, supported probable cause. Yet, the Ninth Circuit held the smell of marijuana from a car alone is sufficient to establish probable cause. The Ninth Circuit's decision ignores the effect of marijuana's legalization on this Court's jurisprudence and creates an absurd result.

The undisputed record in this case that the "small hint" of marijuana was the sole basis for the warrantless search makes it the proper vehicle for this Court to revisit its jurisprudence holding that marijuana smell alone is sufficient to establish probable cause to search. Unlike in the Colorado Supreme Court and Court of Appeals of Washington cases, no indicia of criminality supported a finding of probable cause here. The car's occupants were not nervous. Their responses were consistent. There was nothing incriminating visible in the car. The car's occupants were frisked and had nothing illegal on them. They were not intoxicated; they offered to be drug tested.

Rather than construct the parameters of the new probable cause analysis required by marijuana's legalization, the Ninth Circuit affirmed based on a hypothetical belief it was reasonable for the deputy to determine the occupants had been smoking in a public place or while the car was in motion in violation of Nevada law. *Gray*, 772 F. App'x at 566. Aside from being unsupported by the record, this decision renders all cars in Nevada that may carry a lingering scent of marijuana subject to a warrantless search if they were moving prior the scent being detected. Yet, in Nevada, like all recreational-use states, those 21 or older may lawfully possess marijuana while in a car. Nev. Rev. Stat. § 453D.110. There are neither restrictions on where in the car individuals may store marijuana nor on how the marijuana may be packaged. *See id.* A passenger may lawfully smoke marijuana before getting into a car. *See id.* A driver or passenger may be in a room with other individuals who are smoking marijuana before getting into a car. *See id.* Each of these acts are legal. Each could cause the car to smell of marijuana, particularly a faint smell. And, because neither of the car's occupants owned the car, as the deputies were aware, it would be impossible for them to know whether anyone who had recently gotten into the car had either smoked or possessed marijuana.

If deputies were actually concerned that the car's occupants had smoked marijuana in public or in a moving vehicle, they would have accepted Cannon's offer to drug test him and Gray. The deputy declined to do so. Exhibit A at 14:20-14:42. As the government itself conceded below, deputies "did not evaluate Mr. Cannon for any DUI-related offenses." ER 230.

Likewise, deputies observed nothing in the car suggesting marijuana had recently been consumed in it. No deputy observed a joint, ash, or smoke. The deputies did not even indicate whether the alleged "small hint" of marijuana was that of burnt, fresh, or raw marijuana.

The Ninth Circuit's decision creates the irrational result that any car moving on the road can be searched without a warrant if it emits a faint smell of marijuana, including when the occupants truthfully state they had not been smoking marijuana and have no illegal marijuana. This not only results ignore marijuana's changed status in recreational-use states, it provides law enforcement with otherwise unintended and unconstitutional power. This Court has the opportunity to prevent this result.

III. This Court should address the constitutional implications of using a K-9 that detects noncontraband, which the Ninth Circuit did not address.

The alert of a K-9 trained to detect legal amounts of marijuana not only fails to provide evidence of contraband in a car in a recreational use state, but also is itself an unconstitutional search unsupported by probable cause. The Ninth Circuit stated the dog alert in this case confirmed the car contained illegal drugs, leading to the reasonable belief that contraband or evidence of a crime was present. *Gray*, 772 F. App'x at 566 (citing *Florida v. Harris*, 568 U.S. 237, 244 (2013)). The decision relied on the K-9 sniff to establish probable cause without considering the constitutional implications of using a K-9 trained to detect noncontraband.

In this Court's previous decision holding that a K-9 sniff is not a search within the meaning of the Fourth Amendment, it relied on the premise that a K-9

only detected *illegal* substances. In *Caballes*, 543 U.S. 405, decided before marijuana's legalization in any state, this Court found that "the use of a well-trained narcotics-detection dog—one that does not expose noncontraband items that otherwise would remain hidden from public view—during a lawful traffic stop, generally does not implicate legitimate privacy interests." *Id.* at 409.

While this Court acknowledged that dog sniffs used to prolong a lawful stop may violate the Fourth Amendment (later affirmed in its decision in *Rodriguez*, 135 S. Ct. 1609), it held the use of dog sniffs that do not prolong a stop do not violate an individual's reasonable expectation of privacy. *Caballes*, 543 U.S. at 409. In so holding, this Court explicitly distinguished a dog sniff from the thermal imaging device in *Kyllo v. United States*, 533 U.S. 27 (2001), concluding a dog sniff, unlike a thermal imaging device, only identifies contraband. *Caballes*, 543 U.S. at 409. The Court reasoned that "[c]ritical" to its decision in *Kyllo* "was the fact that the device was capable of detecting lawful activity . . . . The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car." *Id.*

However, the K-9 in this case was a narcotics dog that *did* "expose noncontraband items." *Caballos*, 543 U.S. at 409. Here, like *Kyllo*, the device deputies used *was* capable of detecting lawful activity. Not only was the K-9 capable of detecting lawful activity, he was specifically trained to do so. Almost every narcotics training the K-9 received following the legalization of marijuana

included training to alert on marijuana. ER 103-04, 117-19, 120-21, 124-25, 128-29, 130-31, 132-33, 134-35, 142-43, 148-49, 150-51, 152-53. In fact, the day before the dog sniff in this case, the K-9 was trained to alert on three legal quantities of marijuana. ER 152-153. Following this argument to its reasonable conclusion, using this particular K-9 under these particular circumstances violated Gray's reasonable expectation of privacy, violating his Fourth Amendment rights, requiring suppression.

The only court to have considered whether a dog sniff itself is a search since the legalization of marijuana is the Colorado Supreme Court. In a recent unpublished decision, the Colorado Supreme Court held "a sniff from a drug-detection dog that is trained to alert to marijuana constitutes a search." *People v. McKnight*, 17SC584, 2019 WL 2167746, at *2 ¶ 7 (Colo. May 20, 2019) (rehearing denied July 1, 2019).

While the Colorado Supreme Court based its reasoning on Colorado state law, the dog sniff in this case violated Gray's reasonable expectation of privacy because it, too, constituted a search for noncontraband.

Here, the Ninth Circuit relied on the K-9's alert in upholding the district court's order without addressing the constitutional issue preserved by Gray in the district court and raised on appeal. ER 55-60; OB at 33-37. The Court should provide necessary guidance regarding the use of K-9s in recreational-use states trained to detect marijuana. Alternatively, this Court should remand to the Ninth Circuit to address this compelling constitutional issue.

Conclusion

The slight smell of marijuana alone cannot establish probable cause to search a car in a recreational-use state. State courts recognize the impact of marijuana's legalization on Fourth Amendment jurisprudence and have addressed the limited role marijuana smell plays as a result. However, no federal court has issued a published opinion on this question. Here, the Ninth Circuit abdicated its responsibility and, in avoiding the critical question, created an absurd result. It is time for this Court to articulate the effect of marijuana's legalization on the Fourth Amendment and address the constitutionality of utilizing K-9s trained to detect noncontraband.

For the reasons set forth herein, Gray requests this Court grant this petition for certiorari.

Respectfully submitted,

RENE L. VALLADARES
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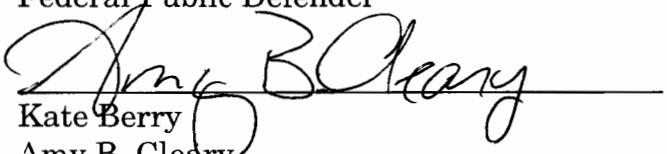

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