No.

In The Supreme Court Of The United States

Haseeb Malik,

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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Question 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 states where recreational marijuana is legal in personal use amounts, does the Fourth Amendment prohibit local state law enforcement from searching a vehicle to look for a personal use amount?

List of Proceedings

1. The district court granted Petitioner Hasib Malik's motion to suppress on May 10, 2019, *United States v. Haseeb Malik*, Case No. 3:19-cr-00077-MMD-WGC, Dkt. 57 (D. Nev.). App. A.

2. The Ninth Circuit Court of Appeals reversed on July 6, 2020, *United States v. Malik*, 963 F.3d 1014 (9th Cir. 2020). App. B.

3. The Ninth Circuit Court of Appeals denied rehearing en banc on October 15, 2020, *United States v. Haseeb Malik*, Case No. 19-10166, Dkt. 69 (9th Cir.). App C.

4. Codefendant Abdul Majid filed a petition for writ of certiorari with this Court on January 21, 2021, which has been distributed for conference of February 19, 2021. *Majid v. United States*, 20-6827 (U.S.).

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Petition for Certiorari

Petitioner Haseeb Malik petitions for a writ of certiorari to review judgments of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The Ninth Circuit decision reversing the district court's suppression of car search is published at *United States v. Malik*, 963 F.3d 1014 (9th Cir. 2020). The Ninth Circuit opinion denying en banc rehearing is not published. App. A. The district court's order suppressing evidence local law enforcement found during the car search is unreported. App. C.

Jurisdiction

The Ninth Circuit issued its decision in this direct appeal on June 6, 2020 and denied rehearing en banc on October 15, 2020. App. A, B. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(a). This Petition is timely filed pursuant to Supreme Court Rule 13.3 and under this Court's Order of March 19, 2020, extending the deadline from 90 days to 150 days to file a petition for a writ of certiorari after the lower court's order denying discretionary review.

Constitutional and Statutory Provisions Involved

1. The Fourth Amendment to the United States Constitution protects "[t]he 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 Statute § 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 statute further 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. Nevada Revised Statute § 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. Nevada Revised Statute § 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).

6. Nevada Revised Statute. § 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.

Introduction

Eighteen states and territories have legalized 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. Six of the Ninth Circuit's states—Alaska, Arizona, 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 truck Petitioner Hasib Malik was driving in search of a personal use amount of marijuana.

While state courts across the country have recently heard cases addressing the impact of marijuana's legalization on Fourth Amendment jurisprudence, no federal appellate court has established a test that lower courts can use to determine when probable cause exists to search in a recreational use state based on the smell of marijuana. Without a test, lower federal courts are issuing decisions that confuse rather than clarify this burgeoning area of law.

It is critical for this Court to provide guidance to the federal courts on this important issue. The time has come to clearly hold that smell alone is not enough to establish probable cause in recreational use states and provide guidance to the states regarding what indicia of criminality in combination with smell can establish probable cause. by addressing whether, and if so, under what circumstances,

[1] Washington; Colorado: Alaska; District of Columbia; Oregon; Massachusetts; Nevada; California; Maine; Vermont; Michigan; Illinois; Northern Mariana Islands; Guam; Arizona; Montana; New Jersey; and South Dakota.

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 in search of a user amount of marijuana, despite the state voters' decision to legalize recreational marijuana. This is an exceptionally important question to the residents of numerous states who have voted to legalize marijuana.

Statement of the Case

I. The district court suppressed evidence obtained after police searched based on the faint hint of marijuana in a state that legalized recreational marijuana use.

A Nevada Highway Patrol trooper, Trooper Garcia, conducted a routine traffic stop on July 19, 2018 of a commercial truck suspected of speeding. Ninth Circuit Appellant Excerpts of Record (ER) 5; Ninth Circuit Appellee Supplemental Excerpts of Record (SER) 50. The trooper "smelled a little marijuana in [the truck's] cab," and Malik, the driver, told the trooper he had smoked the end of a marijuana cigarette 6 or 7 hours before. ER 28; SER 95-97. Malik explained there was no longer any marijuana in the truck as he had kept the marijuana cigarette (joint) in his cigarette pack but threw it out when he was done. SER 95. At the trooper's request, Malik showed the trooper his cigarette pack which contained no marijuana. SER 96. The trooper noted that Malik and his passenger, Majid, were cooperative, answered his questions, didn't seem nervous, and didn't seem impaired. ER 51, 58, 59.

The trooper called his colleague, Trooper Zehr, to discuss what to do as he didn't have any training on truck protocols. SER 97. Trooper Zehr said they could conduct a probable cause search on the truck which he later clarified was to look for a "user amount" of marijuana, likely the end of a joint. SER 98, 105; ER 66, 99.

The troopers pulled Malik and Majid out of the truck to begin the search. Both men were cooperative and had no contraband on them when frisked. SER 105-106; ER 68, 99-100. Before beginning the search, the troopers continued their questioning. Malik repeatedly confirmed he had smoked marijuana that morning and threw away the end of the joint. SER 106-108. During this questioning he estimated he had last smoked 3 to 4 hours before. SER 106.

The troopers conducted an intrusive, warrantless search of every area of the truck's cab and sleeping area. Garcia Body Camera at 4:42:35-4:52:31. The troopers found no marijuana. ER 75. In the living quarters, Trooper Garcia found sealed packages wrapped in brown paper that Trooper Zehr cut into with a knife, revealing a white powdery substance. Garcia Body Camera at 4:50:40-4:52:31; SER 88; Zehr Body Camera 4:53:51-4:54:44. Based on this discovery, the troopers obtained and executed a search warrant, finding approximately 135.36 pounds of suspected cocaine and 114.27 pounds of suspected methamphetamine in the truck. SER 172. A federal grand jury indicted Malik and Majid with possession with intent to distribute a controlled substance. ER 5; Dist. Ct. Dkt. 24.

Malik and Majid moved to suppress the drugs, arguing the troopers' warrantless truck search lacked probable cause and violated their Fourth

Amendment rights. SER 58-223, 224-268. The government opposed, arguing marijuana is still contraband under federal law, giving the state troopers probable cause to search the truck for violations of federal criminal law. SER 42-50. The government also argued there was probable cause to search under Nevada state law even though recreational marijuana is legal in Nevada. SER 50-55.

After an evidentiary hearing where both troopers testified and the parties admitted the troopers' body camera recordings, the district court suppressed the drugs because the troopers lacked probable cause to search the truck under both state and federal law. ER 4-25. The court held "the odor and smoking admission here [were] within the permissible possession of an ounce or less of marijuana under Nevada law." ER 21. And, based on the record, "there was nothing to suggest that the [truck] contained marijuana at all—much less in excess of a one-ounce user amount—in light of Malik's repeated explanation that he had thrown the unwanted remains of the marijuana cigarette out." ER 24. Furthermore, the "Troopers were not concerned with Malik's sobriety as a driver—as evidenced by the fact that they never administered a sobriety test." ER 14.

The district court rejected the government's probable cause argument to conduct the search pursuant to federal marijuana law. The court concluded "the government's argument suggesting the Troopers relied on federal marijuana law is not supported by the record." ER 15. "The NHP troopers' failure to enforce the law within the confines of the Fourth Amendment leads to one conclusion: that the

ultimate fruits of their stop and search—the drugs found in the truck—must be suppressed." ER 4.

II. The Ninth Circuit reversed, applying the pre-recreational marijuana legalization reasoning that the faint smell of marijuana establishes probable cause to search.

The government appealed, arguing the search was supported by probable cause based on the smell of marijuana alone, despite Nevada's decision to legalize recreational marijuana. It further argued that even if marijuana smell were not, alone, enough, Malik could have hypothetically violated Nevada's marijuana law. Finally, the government argued the Nevada troopers had probable cause to search because possession of any amount of marijuana is a crime under federal law.

Malik and Majid argued the Nevada troopers lacked probable cause to believe the truck contained any marijuana, let alone evidence of a Nevada state law violation. Malik and Majid also explained marijuana's prohibited status under federal law was irrelevant.

The Ninth Circuit reversed the district court's order granting suppression. *United States v. Malik*, 963 F.3d 1014 (9th Cir. 2020). The Ninth Circuit posited, without evidence, 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 trooper to believe an occupant had smoked in a public place or while the truck was in motion since the truck had been in motion and the deputy detected a faint scent of marijuana once the truck was stopped. *Id.* The Ninth Circuit further found reason to believe Malik lied about throwing out the end of the joint because of his

"changing story about when he smoked the marijuana cigarette." *Malik*, 963 F.3d at 1016. The Ninth Circuit did not reach the government's argument that the search was legal under federal marijuana law.

Malik and Majid petitioned for rehearing en banc. App. Dkt. 55, 56. Malik explained the Ninth Circuit's decisions addressing this burgeoning area of law are internally inconsistent and confused rather than clarified a path forward for district courts. App. Dkt. 56. The Ninth Circuit summarily denied Malik's petition. App. Dkt. 57.

Reasons for Granting the Petition

I. Marijuana legalization has nationally expanded and federal courts in states with recreational marijuana need guidance on the constitutional implications of its legalization.

Nevada is part of the growing national expansion of legalized recreational marijuana. 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 sixteen additional states and territories: Alaska; Washington D.C.; Oregon; Massachusetts; Nevada; California; Maine; Vermont; Michigan; Illinois; Northern Mariana Islands; Guam; Arizona; Montana; New Jersey; South Dakota.

Despite growing marijuana legalization, no federal appellate court has published an opinion holding that marijuana smell no longer establishes probable cause. 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 necessarily 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").[2]

The fundamental premise of these decisions is no longer valid in the eighteen states and territories that have legalized marijuana for recreational use. At least one panel in the Ninth Circuit recognizes this critical change in the role marijuana smell can play in the assessment of probable cause. *See United States v. Martinez*, 811 F. App'x 396, 397-98 (9th Cir. 2020) (unpublished) (vacating the district court's denial of suppression holding the district court erred in relying on case law predating California's legalization of recreational marijuana in holding that marijuana smell was sufficient to establish probable cause because "[t]hese cases were decided at a time when possession of any quantity of marijuana was unlawful under state law," which "is no longer true in California after the passage of

[2] 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 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).

Proposition 64, which legalized the possession of 28.5 grams or less of marijuana, Cal. Health & Safety Code § 11362.1(a)"), *petition for writ of certiorari on other grounds pending*, *Martinez v. United States*, 20-7038 (U.S. Jan 29, 2021); *see also United States v. Eymann*, 962 F.3d 273, 283 (7th Cir. 2020) (recognizing that "in this era of increasing legalization of marijuana, coupled with widespread cultivation," the court considered flights from places indicative of drug trafficking was "only a small nudge in the direction of reasonable suspicion").

Other panels of the Ninth Circuit, however, have refused to engage with the role marijuana smell now plays in determining probable cause in a recreational state. *See, e.g.*, *United States v. Gray*, 772 F. App'x 565 (9th Cir. 2019) (unpublished) (affirming the trial court's order denying suppression because officers detected the smell of marijuana but the car's driver denied smoking or possessing marijuana and a drug dog trained to detect marijuana alerted on the car), cert. denied, 140 S. Ct. 1222 (2020). This same avoidance of the important Fourth Amendment question that recreational marijuana legalization raises occurred in the instant case. The *Malik* Panel held that, based on the faint smell of marijuana and Malik's admission that he had smoked hours earlier, held the trooper "was entitled to rely on Malik's admission in making the probable cause determination." *Malik*, 963 F.3d at 1016.

Gray and *Malik* reveal the Ninth Circuit has taken the stance in holding the faint smell of marijuana alone is enough to conduct a warrantless, probable cause search, as any response to an officer's inquiry about smoking marijuana—be it a

denial or an admission to—is inherently suspicious. The *Gray* decision permits an officer to assume the occupants of a vehicle are lying about possessing marijuana when the officer faintly smells marijuana, but an occupant denies consuming marijuana. 772 F. App'x at 566. The *Malik* opinion determined an officer can assume the occupant is lying about possessing marijuana when the officer faintly smells marijuana and an occupant admits to previously possessing and smoking marijuana but having none left. 963 F.3d at 1016. Yet *Martinez* recognized smell alone is not enough. *Martinez*, 811 F. App'x at 397-98.

Reconciling these decisions is particularly critical as district courts across the country are struggling with these questions. Now is the time to give them clear guidance.

II. State court have begun to provide possible frameworks for addressing this burgeoning issue.

Leading decisions from two state courts addressing the role marijuana's scent plays in the probable cause analysis following its legalization—the Colorado Supreme Court and the Court of Appeals of Washington—are instructive and provide guidance in determining an appropriate test.[3] These courts have identified a number of factors that, in combination with marijuana scent, were sufficient to establish probable cause.

[3] While these are not the only courts to have considered the impact of marijuana smell on probable cause, Colorado and Washington provide the clearest guidance on which indicia of criminality, in conjunction with the smell of marijuana, may establish probable cause.

The Colorado Supreme Court has published two decisions since the state's legalization of an ounce or less of marijuana addressing marijuana smell: *People v. Zuniga*, 372 P.3d 1052 (Colo. 2016), and *People v. Cox*, 401 P.3d 509 (Colo. 2017). Both decisions identify a number of indicia of criminality that, only in combination with smell, can be used to establish probable cause.

In *Zuniga*, the Colorado Supreme Court found the following indicia established probable cause under the totality of the circumstances:

1. Extreme nervousness. The driver had beads of sweat on his face, stuttered in response to requests, and had shaky hands, remained overly nervous, would not look the trooper in the eye. The passenger appeared nervous and was overly nice.

2. Remarkably disparate accounts. The driver told law enforcement he and the passenger drove out to Colorado four days previously; the passenger said just two days. The driver stated they didn't go anywhere and didn't do anything; the passenger said they were visiting]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. The driver said they stayed in a hotel around the Denver area but couldn't remember the name; the passenger said they stayed with his grandmother.

3. Heavy odor of raw marijuana. The trooper detected the strong smell of unburnt marijuana.

4. K-9 alert. A K-9 trained to alert on both marijuana as well as illegal drugs alerted to the rear of the car.

Zuniga, 372 P.3d at 1054-55, 1060.

In *Cox*, the Colorado Supreme Court identified additional indicia in support of its probable cause analysis after a trooper stopped a car for a minor traffic infraction.

1. Unusual nervousness. Cox was unusually nervous and had beads of sweat on his face, was stuttering, and was continuously licking his lips.

2. Inconsistent explanations regarding his travels. Cox stated he had rented the car in California 11 days earlier and had driven straight throug' on his way to Bellevue, Nebraska. The trooper, knowing the route, realized this left 8 unaccounted days.

3. Two cell phones on the car seat. The trooper saw two cell phones on the passenger seat which, in conjunction with his other observations, stated led to the possibility that Cox could be trafficking illegal contraband

4. K-9 alert: A K-9 trained to detect marijuana as well as illegal drugs alerted on the trunk.

Cox, 401 P.3d at 511.

The Washington Court of Appeals has issued one decision following the state's legalization of recreational marijuana addressing marijuana smell. In *State v. K.C.-S.*, 192 Wash. App. 1018 (2016), officers stopped a juvenile driver who had passengers over the age of 21 in his car. The driver challenged the officers' search warrant, alleging a lack of probable cause. The appellate court affirmed the lower court's probable cause finding based on the following facts viewed in their totality:

1. Prior observation of illegal activity. Before the car stop, officers observed the driver engage in a suspected drug deal.

2. Outstanding drug warrant. A warrants check revealed the driver had three outstanding warrants, one of which was for a controlled substance offense.

3. Furtive movements. After the officers activated their emergency lights, the officers see K.C.-S. lift his body off the seat, reach into his waistband, and then bend toward to floorboard before he swung open the door and jumped out of the car.

4. Strong odor of fresh marijuana. Even though the car's windows were open, and all occupants had gotten out of the car, it still had a strong odor of fresh unsmoked marijuana.

5. Small baggie of marijuana on juvenile driver. In a search incident to arrest, the officers found a small baggie of marijuana in the driver's pocket.

6. K-9 alert. A drug-sniffing dog walked around the car and indicated there were controlled substances inside.

K.C.-S., 192 Wash. App. at 1018.

In each of these cases, the state appellate court did not render its decision based on the scent of marijuana alone. Rather, each court concluded that all of the factors, taken together, established probable cause.

III. This case provides an apt vehicle for addressing the impact of marijuana's legalization on the Fourth Amendment.

In this case, unlike the state court cases discussed above, there were no indicia of criminality that, in combination with the faint smell of marijuana, supported probable cause to search. The truck's occupants were not nervous. There

was nothing incriminating visible in the car. There were no furtive movements. There was no K-9 alert. The troopers observed no illegal activity. The occupants were frisked and had nothing illegal on them.

Probable cause "demands factual specificity and must be judged according to an objective standard,' taking into account 'the nature and trustworthiness of the evidence of criminal conduct available to the police." *United States v. Struckman*, 603 F.3d 731, 739-40 (9th Cir. 2010). Yet the Ninth Circuit never articulated any crime for the troopers to predicate a probable cause to search for evidence. While the decision correctly notes it is still a misdemeanor in Nevada to consume marijuana in a public place or in a moving vehicle and remains illegal to drive while under the influence of marijuana, this case involved only the faint smell of marijuana. *See Malik*, 963 F.3d at 1016; ER 14, 21. The troopers stopped the truck for speeding and did not suspect impaired driving. The troopers did not see ash, smoke, or the end of a joint to suspect anyone was smoking in a public place or in a moving vehicle.[4]

Because this Court has not addressed how courts should decide whether the probable cause standard is met for warrantless search where recreational marijuana is legal, the Ninth Circuit engaged in judicial speculation to adjudicate the new normal, placing undo weight on one factor it found important in its test.

[4] And, indeed, even if they had, because it is legal to smoke marijuana in a parked car on private property or to transport personal use quantities of marijuana, even finding a partially smoked joint would not have provided probable cause to search.

The district court found, based on the Troopers admissions, that "Defendants exhibited no indicia of criminality—particularly nervousness." ER 23, 51, 58; SER 115 (Transcript of body camera recording: "Trooper Zehr: 'There was not even any indicators. Was there any nervousness?' Trooper Garcia: 'No.'"). The Ninth Circuit speculated, however, that there was reason to believe Malik was lying about throwing out the end of the joint because he gave two different estimates of when he last smoked in the morning. *Malik*, 963 F.3d at 1016; SER 94-96, 106-108. Malik's slightly varying time estimates share no comparison to the inconsistent statements identified in *Zuniga*, 372 P.3d at 1059 or *Cox*, 401 P.3d at 511.

But even if troopers could reasonably deduce Malik was lying about throwing the end of a joint, having it in the truck would not have been a violation of Nevada law nor would it have been evidence of any other Nevada crime, as he can possess a personal use amount, as discussed above. Yet, the Ninth Circuit still determined the search was legal because troopers had probable cause to search for something that, if found, would *not* have been contraband or evidence of a crime.

In sum, the facts here would not meet the probable cause standard under any feasible test this Court could construct. Allowing the Ninth Circuit's decision to stand as the only published federal opinion addressing the effect of marijuana's legalization on probable cause to search creates confusion rather than clarity in this area and allows for local law enforcement to continue searching without a warrant simply based on the smell of legal marijuana. It is critical for this Court to give direction to lower federal courts to ensure that the Fourth Amendment's protections

are realized for residents of the 18 states where the voters have spoken and declared marijuana legal for recreational purposes.

Conclusion

The smell of marijuana—alone—should no longer 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 articulated a test for assessing probable cause in light of recreational legalization. Here, the Ninth Circuit abdicated its responsibility and, in avoiding the critical question, created a result that threatens the Fourth Amendment's tenets. It is vital that this Court address the implications of marijuana's legalization for Fourth Amendment purposes and articulate a proper constitutional test for courts across the country. Malik requests this Court grant this Petition for Certiorari.

Dated: February 11, 2021

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