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No. \_\_\_\_\_

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In the

## **Supreme Court of the United States**

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**SALVADOR VASQUEZ**, Petitioner

v.

**UNITED STATES OF AMERICA**, Respondent

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

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### **Petition for Writ of Certiorari**

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## **QUESTION PRESENTED FOR REVIEW**

In 2016, California legalized the possession, transportation, and use of up to 28.5 grams of marijuana through the passage of Proposition 64. Several California courts have since held that evidence of marijuana use inside a car fails to constitute probable cause for a vehicle search, even when combined with circumstances suggesting other illegal conduct. The Ninth Circuit contradicted that approach in this case by holding the smell of marijuana coming from a parked van *did* constitute probable cause for a vehicle search when combined with suggestions of other illegal conduct. The question presented by these conflicting decisions is:

When a state has decriminalized marijuana possession and use, does evidence of marijuana use inside a car—combined with nonspecific indications that the car’s occupant may be engaging in other criminal conduct—create probable cause for a warrantless vehicle search?

## **Statement of Related Proceedings**

- *United States v. Salvador Vasquez*,
  - Case No. 18-cr-247-DOC (C.D. Cal., Aug. 23, 2019)
- *United States v. Salvador Vasquez*,
  - Case No. 19-50275 (9th Cir. July 15, 2021)

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**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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Salvador Vasquez petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

**I. OPINIONS BELOW**

The opinion of the court of appeals is unreported. (App. 1a; *United States v. Vasquez*, 2021 WL 3011997 (9th Cir. July 15, 2021).) The ruling of the district court is also unreported, and was rendered orally. (App. 9a (transcript of oral ruling regarding motion to suppress, *United States v. Vasquez*, 18-cr-247-DOC (C.D. Cal., Feb. 20, 2019).)<sup>1</sup>

**II. JURISDICTION**

The judgment of the court of appeals was entered on July 15, 2021. (App. 1a.) A timely petition for rehearing and rehearing en banc was denied on August 23, 2021. (App. 8a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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<sup>1</sup> Citations to “App.” are to the appendix to this petition. Citations to “ER” are to the Excerpts of Record filed in the court of appeals.

### **III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

#### **U.S. Const., amend. IV**

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.

#### **California Health and Safety Code section 11362.1**

(a) Subject to Sections 11362.2, 11362.3, 11362.4, and 11362.45, but notwithstanding any other provision of law, it shall be lawful under state and local law, and shall not be a violation of state or local law, for persons 21 years of age or older to:

(1) Possess, process, transport, purchase, obtain, or give away to persons 21 years of age or older without any compensation whatsoever, not more than 28.5 grams of cannabis not in the form of concentrated cannabis; [and]

(4) Smoke or ingest cannabis or cannabis products; and

...

(c) Cannabis and cannabis products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure, and no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest.

### **IV. STATEMENT OF THE CASE**

On March 2, 2018, Vasquez and three companions were sitting inside a stopped van outside an apartment building. The van was partially pulled into the building's driveway, with its back end protruding into the street. (ER 123, 140, 172-173, 183-185, 187-188, 191.) Local law enforcement knew the

apartment complex as a place where gang members “hang out” and “commit criminal activities,” and it had previously been the site of arrests for narcotics sales and firearm possession. (ER 172-73.)

Two Los Angeles County Sheriff’s deputies saw the van and approached it on foot to tell the driver to stop blocking the street. (ER 118, 128.) Its running lights were on. (ER 180-81, 191-92.) As they did so, several people standing near the van’s driver’s window walked away towards the apartments. (ER 173-74.)

When the deputies drew near the van, they smelled burnt marijuana. (ER 194.) The occupants, however, gave no sign of being under the influence. (ER 259.) And though the deputies searched the male occupants and checked the female occupants’ waistbands, they found nothing suspicious. (ER 174-75.) Nor did they ask the van’s occupants any questions about the smell. (ER 195-97, 258-61.) Nevertheless, the deputies searched the van and found a firearm inside. (ER 119, 128-29, 258.) Because Vasquez had a prior felony conviction, he was charged with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g).

Vasquez moved to suppress all evidence from the warrantless search of the van, arguing the search violated the Fourth Amendment because the deputies lacked probable cause to suspect the van contained contraband or evidence of a crime. He pointed to California’s 2016 legalization of

transportation, possession, and use of up to 28.5 grams of marijuana through Proposition 64,<sup>2</sup> arguing that after Proposition 64 the smell of burnt marijuana no longer indicates criminal activity. (ER 35.) The district court denied Vasquez's suppression motion, holding the marijuana smell justified the deputies in believing the van would contain "contraband," and thus validated the search. (App. 15a-16a.) Vasquez pled guilty to the 922(g) charge, reserving his right to appeal the denial of his suppression motion. (ER 422, 429.)

The Ninth Circuit affirmed. It acknowledged that the smell of marijuana alone cannot support probable cause for a vehicle search after Proposition 64. (App. 4a.) However, it relied on several factors to find probable cause to suspect the van would contain evidence of driving under the influence of marijuana, in violation of California Penal Code § 23536: the smell of burnt marijuana, that "the van was stopped in front of a building known to be controlled by a gang, in an area known for drug use and drug trafficking," that the van was pulled partly into the driveway with its head and taillights on and four people inside, and that the people standing by the van dispersed as the deputies approached. (App. 4a-6a.)

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<sup>2</sup> The Control, Regulate, and Tax Adult Use of Marijuana Act, as approved by California voters, General Election, November 8, 2016.

## V. REASONS FOR GRANTING THE WRIT

### A. The Recent Trend Towards State Marijuana Legalization

The past decade has seen a trend towards state legalization of marijuana possession and use. Colorado and Washington first legalized such use in 2012, and were quickly followed by sixteen other states, the District of Columbia, and Guam.<sup>3</sup> These newly-enacted state laws generally permit adults to possess and consume defined amounts of marijuana—commonly between one and three ounces—while retaining prohibitions on driving under the influence or with open containers of marijuana in a vehicle, selling

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<sup>3</sup> Colorado Const. art. 18, § 16 (added by Colorado amendment 64 (Nov. 6, 2012)); Washington Initiative 502 (Nov. 6, 2012) (adding, *inter alia*, R.C.W. § 69.50.401(3)); Alaska 2014 Ballot Measure 2 § 1 (eff. Feb. 24, 2015) (adding, *inter alia*, A.S. §17.38.020); Oregon Ballot Measure 91 (2014); O.R.S. § 475B.337; O.R.S. § 475.005(6)(b) (excluding cannabis from the definition of “controlled substances”); Washington, D.C. Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Initiative of 2014 (“Initiative 71”) (eff. Feb. 26, 2015); D.C. Code § 48-1201; Control, Regulate, and Tax Adult Use of Marijuana Act, as approved by California voters, General Election, November 8, 2016 (adding, *inter alia*, Cal. Health & Safety Code § 11362.1)); Maine Marijuana Legalization Measure (“Question 1”) (2016) (eff. Jan. 30, 2017); 28-B M.R.S.A. § 1501; Massachusetts Legalization, Regulation and Taxation of Marijuana Initiative (“Question 4”) (eff. Dec. 15, 2016) (adding M.G.L.A. 94G § 7); Nevada Initiative to Regulate and Tax Marijuana (“Question 2”) (Nov. 8, 2016); N.R.S. §§ 678D.200; Michigan Regulation and Taxation of Marihuana Act (eff. Dec. 6, 2018); M.C.L.A. § 333.27955; 18 V.S.A. § 4230a (Vermont); 11 G.C.A. § 8103 (eff. March 16, 2018) (Guam); 410 I.L.C.S. §705/10-5 (Illinois); N.J. Stat. Ann. 2C:35-10a (New Jersey); M.C.A. 16-12-106 (Montana); S.D. Const. Art 30 § 4 (South Dakota); Ariz. Rev. Stat. § 36-2852 (Arizona); N.Y. Penal Law § 222.05 (New York); V.A. Code Ann. § 4.1-1100 (Virginia); N.M.S.A. § 26-2C-25 (New Mexico); Connecticut S.B. No. 1201, An Act Concerning Responsible and Equitable Regulation of Adult-Use Cannabis (eff. July 1, 2021).

marijuana without a license, and transferring marijuana to minors. *See, e.g.*, Cal. H. & S. Code § 11362.1; Cal. Vehicle Code § 23222; N.R.S. §§ 678D.200, 678D.300; M.C.L.A. §§ 333.27954, 333.27955.

California’s legalization measure, Proposition 64, amended California’s Health and Safety Code to add section 11362.1, permitting adults to, *inter alia*, “[p]ossess” up to 28.5 grams of, or “smoke or ingest,” marijuana. Cal. H. & S. Code § 11362.1(a)(1), (a)(4). Marijuana “involved in any way with conduct deemed lawful by . . . section [11362.1][is] not contraband” or “subject to seizure,” and “no conduct deemed lawful by . . . section [11362.1] shall constitute the basis for detention, search, or arrest.” Cal. Penal Code § 11362.1(c).

#### **B. The California Courts and the Ninth Circuit Take Diverging Approaches to Probable Cause Based on Marijuana Smell**

Since Proposition 64’s passage, the Ninth Circuit and the California courts have reached conflicting conclusions regarding when suggestions of marijuana use inside a car support probable cause for a warrantless vehicle search in California.<sup>4</sup> California courts have required specific indications that a vehicle’s occupant is hiding marijuana or responding untruthfully to an

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<sup>4</sup> The automobile exception to the Fourth Amendment’s warrant requirement permits warrantless vehicle searches upon probable cause to believe the vehicle contains contraband or evidence of a crime. *United States v. Ross*, 456 U.S. 798, 823-24 (1982); *United States v. Rodgers*, 656 F.3d 1023, 1028-29 (9th Cir. 2011).

officer—beyond merely being in a high-crime or suspicious area or committing traffic violations. But the Ninth Circuit in this case found such generalized suggestions of criminal conduct sufficient.

*People v. Johnson*, 50 Cal. App. 5th 620 (2020) illustrates the California courts’ more demanding probable cause threshold. There, officers conducted a warrantless search of a parked car without a registration tag. The defendant stepped out of the car, disobeyed officers’ commands to reenter, and resisted arrest. The officers smelled and saw marijuana inside the car. The California Court of Appeal found no probable cause, rejecting the People’s reliance on the marijuana smell combined with “[the] defendant’s resistance, agitation, and attempts to draw the officers away from the car, the ‘long-expired registration,’ and the ‘related anomalous circumstances of the license plate and the vehicle.’” *Id.* at 634. While the “defendant’s actions justified his arrest for resisting an officer,” the court held they failed to support “probable cause to search the car for contraband or evidence of a crime.” *Id.* at 635. Nor did the court see any “link” between the car’s registration tag violations and probable cause to suspect it would contain an illegal amount of marijuana. *Id.*

Similarly, the court in *People v. Shumake*, 45 Cal. App. 5th Supp. 1 (Cal. Superior Court, Appellate Div., Dec. 16, 2019) invalidated a search based on a smell of “freshly burnt” marijuana in a moving car with a missing license plate, though the driver admitted he had “bud.” *Id.* at \*3-4.

These circumstances may have justified “field sobriety tests,” but failed to constitute “probable cause to search.” *Id.* at \*8.

When California courts *have* found probable cause for vehicle searches based partly on marijuana smell, they have done so based on specific indications that the car’s occupant is lying to officers or hiding something—beyond ambiguous suggestions that criminal behavior may be afoot. In *People v. Moore*, 64 Cal. App. 5th 291 (2021) the California Court of Appeal found probable cause based on the smell of marijuana combined with a high-crime neighborhood, an apparent drug transaction occurring at the car (suggested by a person leaning into the passenger window, then leaving as the officer approached), and the defendant’s subsequent nervousness and unbelievable statements to the officer. The court said it would not have been sufficient for the vehicle to merely be parked in a high-crime area with a person leaning into the window and leaving as the officer approached, but that these circumstances created probable cause when combined with the strong odor of marijuana and the defendant’s “implausible explanation for that smell,” incredible statements, and nervous demeanor. *Id.* at 782.

The California Court of Appeal took the same stringent approach in *People v. Fews*, 27 Cal. App. 5th 553 (2018). There, officers saw the defendant driving evasively as if to avoid a stop, with an expired registration, in a high-crime area. When stopped the driver disregarded officers’ commands, the

driver and passenger both made furtive movements, and the driver was holding a half-burned cigar he admitted contained marijuana. The California Court of Appeal found probable cause due to the odor of marijuana emanating from the cigar and driver, the cigar itself, and the driver's admission that it contained marijuana. *Id.* at 562. That the driver, who had just been seen driving, was holding a half-burned marijuana cigarette created probable cause that he had been illegally driving under the influence. *Id.* at 563. Once again, probable cause rested on specific incriminating behavior by the car's occupant beyond the marijuana smell, high-crime area, and peripheral suggestions of illegality.

The Ninth Circuit took just the opposite approach in this case, deeming marijuana smell sufficient in combination with a high-crime area and suspicious surrounding circumstances—but without any suspicious behavior by the vehicle's occupants. As in *Johnson* and *Shumake*, the officers here were confronted with marijuana smell but no conflicting statements or suspicious behavior by Vasquez or his companions, and no movement of the vehicle; just vague suggestions that criminal acts could be occurring: Vasquez's van's protrusion into the street, the apartment building's history of criminal activity, and that people dispersed from the van at the deputies' approach. Yet where the California courts would have found these types of facts insufficient—as with the vehicle's missing registration tag and its

occupant's resisting arrest in *Johnson*, the missing license plate in *Shumake*, and the possible drug transaction and high-crime neighborhood the *Moore* court said would not have been enough—here the Ninth Circuit found the suggestions of possible criminality combined with the marijuana smell to create probable cause to search the van. That conclusion could just as well have been reached in *Johnson* based on the *Johnson* defendant's erratic behavior, visible marijuana, and location parked on a city street. And it could have been found in *Shumake* too, where the vehicle was seen driving and smelled of burnt marijuana immediately upon being pulled over. But the California courts in *Johnson* and *Shumake* found such facts too general for probable cause that the defendant was using marijuana in one of the limited ways still prohibited under California law.

### **C. This Court Should Grant Certiorari to Resolve the Conflict**

When officers can constitutionally rely on marijuana smell to search a vehicle is a question that likely affects thousands of police encounters with citizens every day across the nation. While the answer seems straightforward in states where marijuana possession and use remain illegal, the recent trend towards state legalization complicates the inquiry. Courts in states other than California that have decriminalized marijuana use and possession take contrasting approaches that mirror the inconsistency between California courts and the Ninth Circuit here. Massachusetts courts have ruled the smell

of marijuana insufficient for probable cause even when combined with conflicting statements by the defendant and the visible presence of marijuana in a vehicle. *Commonwealth v. Overmyer*, 11 N.E. 3d 1054 (Mass. 2014); *Commonwealth v. Cruz*, 945 N.E. 2d 899, 907-09 (Mass. 2011) (smell of burnt marijuana “alone cannot reasonably provide suspicion of criminal activity,” even when combined with the high-crime neighborhood, the driver’s nervous demeanor, and the occupants’ sharing of a cigar.) A Colorado court, by contrast, found probable cause based on the odor of burnt marijuana, coupled with the car occupants’ conflicting statements and nervousness. *People v. Zuniga*, 372 P.3d 1052, 1059-1060 (Colo. 2016). Still other states that have decriminalized marijuana possession and use hold the smell establishes probable cause for a vehicle search even by itself. See *In re O.S.*, 112 N.E. 3d 621, 632-33 (Ill. App. 2018) (listing cases).

Officers and citizens need guidance on what types of circumstances justify law enforcement in searching a vehicle for marijuana-related offenses, in states that have removed criminal penalties for marijuana possession and use. The wide range of outcomes in cases from such jurisdictions provides few guideposts. This Court should grant certiorari to clarify this increasingly important question of law.

## VI. CONCLUSION

For the foregoing reasons, Mr. Vasquez respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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DATED: September 27, 2021

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