NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

PEDRO ARMANDO NAVA,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

1. Whether the Fourth Amendment of the United States Constitution permits a warrantless search of a vehicle based solely upon the odor of marijuana in a state where medical marijuana and industrial hemp are legal.

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

LIST OF DIRECTLY RELATED PROCEEDINGS

United States v. Pedro Armando Nava, No. 2:22-CR-20002-PKH, U.S. District Court for the Western District of Arkansas, judgment entered January 12, 2023.

United States v. Pedro Armando Nava, No. 23-1132, U.S. Court of Appeals for the Eighth Circuit, order entered on December 4, 2023.

TABLE OF CONTENTS

Page

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Statutes

Constitutional Provisions

Secondary Sources

PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

On December 4, 2023, a panel of the Eighth Circuit Court of Appeals entered its opinion and judgment affirming the district court's denial of Pedro Armando Nava's motion to suppress evidence seized after the odor of marijuana was used to conduct a warrantless search of his vehicle in a state where medical marijuana and industrial hemp are legal. *United States v. Nava*, No. 23-1132, 2023 WL 8368641 (8th Cir. Dec. 4, 2023). Petitioner's Appendix ("Pet. App.") 1a-3a. Therefore, it found that the odor of marijuana provides probable cause for a warrantless search under the automobile exception to the Fourth Amendment.

JURISDICTION

The Eighth Circuit's judgment was entered on December 4, 2023. This petition is timely submitted. Jurisdiction to review the judgment of the court of appeals is conferred upon this Court by 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner refers this Honorable Court to the following constitutional and statutory provisions:

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.

7 U.S.C. § 1639o:

> (1) The term "hemp" means the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

21 U.S.C. § 802:

> (16)(B) The terms "marihuana" and "marijuana" do not include—
>
> (i) hemp, as defined in section 1639o of Title 7 . . . .

Ark. Const. amend. 98 § 3:

> (a) A qualifying patient or designated caregiver in actual possession of a registry identification card shall not be subject to arrest, prosecution, or penalty in any manner or denied any right or privilege, including without limitation a civil penalty or disciplinary action by a business, occupational, or professional licensing board or bureau, for the medical use of marijuana in accordance with this amendment if the qualifying patient or designated caregiver possesses not more than two and one-half ounces (2 ½ oz.) of usable marijuana
>
> (b)(1) A qualifying patient or designated caregiver is presumed to be lawfully engaged in the medical use of marijuana in accordance with this amendment if the qualifying patient or designated caregiver is in actual possession of a registry identification card and possesses an amount of usable marijuana that does not exceed the amount allowed under this amendment . . . .

Ark. Code Ann. § 2-15-503(5):

> (5) "Industrial hemp" means the plant Cannabis sativa and any part of the plant, including the seeds of the plant and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a total delta-9 tetrahydrocannabinol concentration of no more than three-tenths of one percent (0.3%) of the hemp-derived cannabadiol on a dry weight basis, unless specifically controlled under the Uniform Controlled Substances Act, § 5-64-101 et seq.; . . . .

Ark. Code Ann. § 5-64-101(16)(B):

> (16)(B) "Marijuana" does not include:
>
> > (vi) Hemp-derived cannabidiol that:
> >
> > > (a) Contains not more than three-tenths of one percent (0.3%) of delta-9 tetrahydrocannabinol (THC) on a dry weight basis as verified by a nationally accredited laboratory for quality, purity, and accuracy standards; and
> > >
> > > (b) Is not approved by the United States Food and Drug Administration for marketing as a medication. . . .

STATEMENT OF THE CASE

On January 28, 2022, Pedro Armando Nava was named in a one-count complaint with possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1). He was later charged in a two-count indictment with possession with intent to distribute more than one kilogram of heroin in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A)(i), and possession with intent to distribute more than 500 grams of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(ii)(II).

On May 27, 2022, Mr. Nava filed a motion to suppress statements made and the controlled substances seized from his rental car, arguing that heroin and cocaine were seized from his vehicle in violation of the Fourth and Fifth Amendments of the United States Constitution. He argued that after a traffic stop conducted on January 22, 2022, he was in custody and subject to interrogation that was intended to elicit incriminating responses while he was inside the patrol car in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). In addition, he contended that the officer lacked probable cause to conduct a warrantless search of his vehicle based upon the odor or presence of marijuana in a state where medical marijuana and industrial hemp are legal. Accordingly, Mr. Nava argued that the search of the vehicle was constitutionally unreasonable, and therefore the drugs found in the suitcase were fruit of the poisonous tree and must be suppressed. He contended that the odor-plus standard, which requires more than a sniff by an officer should have been applied in a state that had legalized medical marijuana.

The district court held a hearing on the motion to suppress on July 8, 2022, in which the officer testified that he believed that narcotics would be found in the vehicle due to the odor of marijuana, the nervous demeanor of Mr. Nava and his passenger, their conflicting statements about their destination, and the one-way rental car. On August 22, 2022, the district court denied Mr. Nava's motion to suppress, opining that the placement of Mr. Nava in the patrol car, questions used to elicit incriminating information, and being told he could not leave were non-coercive, legal aspects of the traffic stop permitted under *Miranda*. *United State v. Nava*, No. 2:22-CR-20002-PKH-1, 2022 WL 3593724 (W.D. Ark. Aug. 1, 2022) (citing *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984)). Further, the district court pointed out that the Eighth Circuit Court of Appeals "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." *Id.* at *8 (citing *United States v. Smith*, 789 F.3d 923, 928 (8th Cir. 2015); *United States v. Williams*, 955 F.3d 734, 737 (8th Cir. 2020) ("We have repeatedly held that the odor of marijuana provides probable cause for a warrantless search of a vehicle under the automobile exception."). The court concluded that under an objective reasonableness standard, there was probable cause to conduct a search based on the odor of marijuana, the short duration of the one-way-cross-country rental, and the occupants' inconsistent statements. *Id.* at *9.

On September 13, 2022, Mr. Nava entered a conditional guilty plea to possession with intent to distribute more than one kilogram of heroin, preserving his right to appeal the denial of his motion to suppress. On January 11, 2023, he was

sentenced to 121 months imprisonment. He appealed his sentence to the Eighth Circuit pursuant to 28 U.S.C. § 1291, which gives it jurisdiction over all final decisions of the district courts of the United States. The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The Eighth Circuit affirmed the district court's denial of Mr. Nava's motion to suppress. *United States v. Nava*, No. 23-1132, 2023 WL 8368641 (8th Cir. Dec. 4, 2023); Pet. App. 1a-3a.

On appeal, Mr. Nava argued that the district court erred in denying his motion to suppress evidence when it found that he was not in custody for purposes of *Miranda* and the Fifth Amendment when he was placed in a police vehicle and asked about marijuana. He also argued that the presence or odor of marijuana alone no longer provides probable cause to search a vehicle in Arkansas where medical marijuana and industrial hemp are legal. He recognized that Eighth Circuit and Arkansas court precedent opposed his argument and held that the odor of marijuana provides probable cause for a warrantless search of a vehicle. *See Williams*, 955 F.3d at 737; *United States v. Briscoe*, 317 F.3d 906, 908 (8th Cir. 2003); *Colen v. State*, 643 S.W.3d 274, 280 (Ark. App. 2022). However, considering the increasing legalization of marijuana across the states, he preserved his claim for further appeal.

Mr. Nava maintained that the odor of marijuana no longer establishes a "fair probability" that the vehicle contained contraband when numerous states have legalized marijuana, either medically and/or recreationally, and where hemp is legal federally and in Arkansas. Many Arkansans are legally permitted to possess and consume marijuana pursuant to the state's medical marijuana amendment. *See* Ark.

Const. amend. 98 § 3. Indeed, other state and federal courts have rejected an automatic some-means-more inference and have instead applied a totality test. Thus, marijuana can no longer be unilaterally considered as contraband and he urged the lower courts to adopt the odor-plus standard, which requires more than an odor to indicate criminal activity.

On December 4, 2023, the Eighth Circuit panel issued its order rejecting both arguments. Pet. App.1a. Since Mr. Nava was not handcuffed and had a degree of movement while he was questioned inside the police car, the panel determined that *Miranda* was not violated because he was not in custody. Pet. App.2a (citing *United States v. Soderman*, 983 F.3d 369, 376 (8th Cir. 2020) (citing *Berkemer*, 468 U.S. at 436, 439–40. In addition, it found that "the odor of marijuana provides probable cause for a warrantless search of a vehicle under the automobile exception." *Williams*, 955 F.3d at 737. Pet. App.2a. This petition for a writ of certiorari follows.

REASON FOR GRANTING THE PETITION

This Court should address whether the Fourth Amendment of the United States Constitution permits a warrantless search of a vehicle based solely upon the odor of marijuana in a state where medical marijuana and industrial hemp are legal.

This case presents an important constitutional question—does the automobile exception to the Fourth Amendment allow a warrantless search of a vehicle based solely on the odor of marijuana where numerous states have entered the new paradigm of marijuana legalization and where industrial hemp is legal at the federal and state level? Mr. Nava submits that the odor-plus standard applies, and that something more than a sniff is required to determine that criminal activity has

occurred. To allow Eighth Circuit precedent to stand will permit prolonged traffic stops to conduct drug investigations whenever law enforcement encounters a nervous vehicle occupant and detects a slight odor of marijuana. Such a result is incompatible with the changing perception of marijuana usage and its increasing legalization across the nation.

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. AMEND. IV. Searches and seizures conducted outside the judicial process without prior approval by a judge or magistrate are *per se* unreasonable, subject only to a few specifically established and well-delineated exceptions. *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993). One such exception is when the officer has probable cause to search the vehicle "if, under the totality of the circumstances there is a fair probability that the car contains contraband or evidence." *United States v. Keck,* 2 F.4th 1085, 1089 (8th Cir. 2021) (internal citations omitted).

Mr. Nava contends that the presence or odor of marijuana alone no longer provides probable cause to search a vehicle in Arkansas where medical marijuana and industrial hemp are legal. He submits that current precedent in the lower courts is outdated amidst the changing landscape of marijuana legalization and that it is a violation of the Fourth Amendment to conduct a search based upon conduct that has been legalized if an individual obtains a medical marijuana card or resides in a state where recreational use is permitted. *See Williams*, 955 F.3d at 737; *Briscoe*, 317 F.3d

at 908. *See, e.g.*, *United States v. Turner*, 119 F.3d 18, 20-21 (D.C. Cir. 1997) (smell of marijuana and number of air fresheners permitted search of car and trunk, even if evidence was consistent with mere personal use); *United States v. Williams*, 731 F. App'x 863, 868 (11th Cir. 2018) (smell of marijuana gave probable cause to search a vehicle); *Colen*, 643 S.W.3d at 280 (same).

Mr. Nava maintains that the lower courts erred because the odor of marijuana no longer establishes a "fair probability" that the car contained contraband after the expansion of marijuana legalization. Thus, marijuana can no longer be unilaterally considered as contraband, and he urges this Court to adopt the odor-plus standard.

1. Hemp and marijuana are similar in odor and appearance.

The Federal Farm Bill and Arkansas legislation have legalized possession of hemp products by excluding hemp from the definition of marijuana. *See* Ark. Code Ann. § 5-64-101(B) (the state definition of marijuana excludes industrial hemp); 21 U.S.C. § 802(16)(B) ("the term marihuana does not include—hemp."). Generally, industrial hemp must have a THC concentration of less than .3% in order to be excluded from the definition of marijuana. The term "hemp" means the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis. 7 U.S.C. § 1639o. The Arkansas statute is virtually identical. *See* Ark. Code Ann. § 2-15-503(5).

Hemp and marijuana derive from the same species of plant but are genetically distinct forms of cannabis in their use and chemical composition. *See* Congressional Research Service, *Defining Hemp: A Fact Sheet*, at 1 https://sgp.fas.org/crs/misc/R44742.pdf (updated March 22, 2019) (last visited February 29, 2024). While hemp and marijuana are *genetically* distinct forms of cannabis, they are similar in appearance and odor, and unless it is sent to a specific lab for testing, it is difficult to tell the difference because "current lab tests are unable to distinguish between the low levels of THC in hemp and the higher amounts in marijuana." Meghan Matt, *In the Age of Decriminalization, Is the Odor of Marijuana Alone Enough to Justify A Warrantless Search?*, 47 S.U. L. Rev. 459, 485 (2020) (internal citations omitted). Yet, current precedent asks officers to make this determination on the roadside.

For example, the North Carolina State Bureau of Investigation (NCSBI) was concerned that because marijuana and hemp have the same odor and appearance, it is "impossible for law enforcement to use the appearance of marijuana to develop probable cause for an arrest, seizure of an item, or probable cause for a search warrant." North Carolina State Bureau of Investigation, *Industrial Hemp/CBD Issues*, https://www.sog.unc.edu/sites/default/files/doc_warehouse/NC%20SBI%20-%20Issues%20with%20Hemp%20and%20CBD%20Full.pdf (2019). This is so, because "[i]n order for law enforcement to seize and analyze an item, the officer must have probable cause that the item being seized is evidence of a crime." *Id.* at 2. Because of the legalization of hemp, law enforcement will no longer have probable

cause to seize and analyze material that looks and smells like marijuana because the probable cause to believe it is evidence of crime will no longer exist since the item could be legal hemp." *Id.* Canines fare no better since they are trained to detect THC and the substance is found in both plants. *Id.* Thus, in light of the changes in the legal status of hemp federally and in Arkansas, a court's holding that the smell or visual identification of marijuana gives rise to probable cause must be re-examined. If the scent of marijuana no longer conclusively indicates the presence of an illegal drug (given that legal hemp and illegal marijuana apparently smell the same), then the scent of marijuana is insufficient to show probable cause to perform a search. Likewise, if the sight of marijuana no longer conclusively identifies the presence of an illegal drug (given that legal hemp plants and illegal marijuana plants look similar), then a police officer may not be able to rely on a visual identification of marijuana alone to support probable cause.

Here, the officer testified that he smelled marijuana when he approached Mr. Nava's vehicle, which he used as the reason to conduct a warrantless search of the vehicle. However, neither reasonable suspicion nor probable cause arose at any point in the stop to justify the warrantless search, and thus any evidence obtained must be suppressed as fruit of the poisonous tree.

2. <u>The odor-plus standard should apply in a warrantless search because medical marijuana is now legal in Arkansas</u>**.**

While the odor of marijuana may once have been indicative of criminal activity, it is not anymore. Now, many Arkansans are legally permitted to possess and consume marijuana pursuant to the state's medical marijuana amendment. *See* Ark.

Const. amend. 98 § 3. Indeed, other state and federal courts have rejected an automatic some-means-more inference and have instead applied a totality test. For example, in a Sixth Circuit case, police arrested a man at the door of his house on an assault warrant. *United States v. McPhearson*, 469 F.3d 518, 520 (6th Cir. 2006). When officers searched the man before putting him in a police car, they found a baggie containing crack cocaine. The officers used that evidence to obtain a warrant to search the entire home for more drugs. *Id.* at 521-22. The Sixth Circuit held that the discovery of a personal-use quantity of drugs on the defendant's person did not provide probable cause to believe that additional drugs were inside. The court expressly rejected the government's argument that "an individual arrested outside his residence with drugs in his pocket is likely to have stored drugs and related paraphernalia in that same residence." *Id.* at 524. Similarly, the Ninth Circuit has held that a police officer's observation of a personal-use amount of marijuana in a home "supports only the inference that [the defendant] is a marijuana user," and did not provide probable cause to believe he used ecstasy, or that he was a drug trafficker. *United States v. Underwood*, 725 F.3d 1076, 1082 (9th Cir. 2013).

The Tenth Circuit has likewise refused to give police an automatic license to search stemming from a some-means-more inference. In *United States v. Nielsen*, for instance, the court held that the smell of burnt marijuana coming from the interior of a car did not provide probable cause to believe that more marijuana was in the trunk. 9 F.3d 1487, 1491 (10th Cir. 1993); *accord United States v. Wald*, 216 F.3d 1222, 1226 (10th Cir. 2000); *United States v. Downs*, 151 F.3d 1301, 1303 (10th Cir.

1998). *See also Garrett v. Goodwin*, 569 F. Supp. 106, 120 (E.D. Ark. 1982) ("Finding marijuana seeds, a pipe with marijuana residue in it, a 'roachclip,' or a few 'roaches' in the passenger compartment does not, without more, give probable cause to believe that marijuana or other drugs are being transported in the trunk."). The Seventh Circuit has found that the odor of burnt marijuana plus other suspicious circumstances gave police probable cause to search a car's trunk. *See United States v. Kizart*, 967 F.3d 693, 696 (7th Cir. 2020). Notably, however, the Seventh Circuit did not hold that the smell alone authorized the trunk search.

Mr. Nava urges this Court to adopt the odor-plus standard. He points to case law in states where marijuana possession has been decriminalized, and where the smell of unburnt marijuana, even if strong, does not constitute probable cause to justify the seizure of the defendant and search of the vehicle. For example, in *United States v. Maffei*, a district court granted the defendant's motion to suppress the fruits of a warrantless car search based on the odor of marijuana alone after marijuana was legalized in California. 417 F. Supp. 3d 1212, 1223-25 (N.D. Cal. 2019). In that case, marijuana was not seen in the possession of the passengers or in the cabin of the car, and the trunk and usual storage locations of drug trafficking did not smell of marijuana. *Id. See also State v. Torgerson*, 995 N.W.2d 164, 175 (Minn. 2023) (odor of marijuana, on its own, was insufficient to create probable cause to search vehicle under automobile exception to warrant requirement); *State v. O'Brien*, No. 2022-0081 (N.H. Apr. 26, 2023) (officer's detection of an odor of marijuana, standing alone, was insufficient to justify his expansion of the traffic stop to ask for consent to search the

defendant's vehicle); *Commonwealth v. Barr*, 266 A.3d 25 (Pa. 2021) (smell of marijuana emanating from vehicle, by itself, was insufficient to establish probable cause to search in light of legalization of medical marijuana); *State v. Clinton-Aimable*, 212 Vt. 107 (2020) (finding defendant's admission to possession of marijuana provided minimal support for the suspicion that there were additional illicit drugs in the vehicle); *Zullo v. State*, 205 A.3d 466, 501 (Vt. 2019) (odor of marijuana alone did not provide probable cause to search car); *People v. McKnight*, 446 P.3d 397, 410 (Colo. 2019) ("Because a sniff from a dog trained to detect marijuana (in addition to other substances) can reveal lawful activity, we conclude that sniff is a search [under the state constitution] and must be justified by some degree of suspicion of criminal activity."); *Commonwealth v. Rodriguez*, 472 Mass. 767 (2015) (where a stop of a vehicle was not warranted solely by the smell of burnt marijuana because it gave rise only to a reasonable suspicion of a possible civil marijuana infraction); *People v. Zuniga*, 372 P.3d 1052, 1060 (Colo. 2016) (in a state where possession of marijuana is legalized, "the odor of marijuana is relevant to the totality of the circumstances test and can contribute to a probable cause determination"); *Commonwealth v. Cruz*, 945 N.E.2d 899, 910 (Mass. 2011) (under state constitution, the odor of burnt marijuana alone does not provide reasonable suspicion to order a defendant from a vehicle). In any event, "the smell of burnt marijuana emanating from a vehicle provides probable cause to search the passenger compartment of that vehicle," but does not, standing alone, establish probable cause to search the trunk. *Wald*, 216 F.3d at 1226 ("[T]he smell of burnt marijuana is

indicative of drug usage, rather than drug trafficking, and . . . it is unreasonable to believe people smoke marijuana in the trunks of cars . . . .").

After Arkansas's legalization of hemp and medical marijuana, the smell or even knowledge of a small amount of marijuana alone cannot give rise to probable cause under the automobile exception, because officers cannot presume the marijuana is contraband. There was no objective reason for the officer to believe Mr. Nava was not permitted to possess marijuana given the legality of medical marijuana in Arkansas and California. Whether Mr. Nava is authorized to use marijuana for medical purposes is immaterial to the question of reasonable suspicion. What matters is whether, *at the point at which the officer extended the vehicle stop*, he had facts available to him that were "sufficient to establish reasonable suspicion" that Mr. Nava was involved in criminal activity. *See Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). For all of these reasons, the officer lacked the requisite reasonable suspicion to extend the traffic stop, and the subsequent search of the vehicle and discovery of the drugs violated Mr. Nava's Fourth Amendment rights. Indeed, there was no reason to search the trunk because the smell of marijuana in the driver's door does not provide probable cause to believe more marijuana is in the trunk. *Wald*, 216 F.3d at 1226.

The interplay between state and federal law regarding marijuana must be addressed. On another issue relating to marijuana, this Court denied certiorari in *Standing Akimbo, LLC v. United States*, in which petitioners operated a medical-marijuana dispensary in Colorado and later learned they were in violation of the federal tax code when they attempted to deduct business expenses. 141 S. Ct. 2236

(2021). In a statement regarding the denial of the petition, Justice Thomas opined that Congress' power to regulate interstate commerce authorized it "to prohibit the local cultivation and use of marijuana." *Id.* (citing *Gonzales v. Raich*, 545 U.S. 1, 5 (2005)). However, while federal law criminalizes intrastate possession and distribution of marijuana, federal government policies have sent "mixed signals on its views" and "simultaneously tolerates and forbids local use of marijuana." *Id.* at 2237.

This Court should act to correct the Eighth Circuit and require something more than a scent to justify a warrantless search. It is critical that this Court ensure that the lower courts are consistently and properly applying a higher standard, like an odor-plus standard, to conduct a warrantless search given the increasing legalization of marijuana across the states.

CONCLUSION

For all of the foregoing reasons, Petitioner Pedro Armando Nava respectfully requests that this Court grant the petition for a writ of certiorari and accept this case for review.

DATED: this 1st day of March, 2024.

Respectfully submitted,

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