No. 03-923

In the Supreme Court of the United States

ILLINOIS, PETITIONER,

v.

ROY I. CABALLES, RESPONDENT.

On Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Two settled propositions govern this case. First, allowing a drug-detection dog to sniff a vehicle's exterior is not a "search" within the meaning of the Fourth Amendment. Second, no legitimate Fourth Amendment interest is burdened when police officers, positioned at a lawful vantage point, discover incriminating facts without conducting an additional search or seizure. These propositions lead inexorably to the conclusion that police officers need no individualized suspicion that illegal drugs are present to justify conducting an external canine sniff of a vehicle at a lawful traffic stop.

Respondent acknowledges that canine sniffs are not searches and that they do not require probable cause, but nonetheless defends the Illinois Supreme Court's ruling that reasonable suspicion was necessary to justify the sniff of his car. He first argues that a canine sniff bears a close enough resemblance to a search, and imposes enough of an intrusion on privacy interests, as to require at least some individualized suspicion. Alternatively, he maintains that conducting a sniff at a traffic stop expands the "scope" of the stop in a manner that, under *Terry* principles, must be justified by reasonable suspicion. As shown below, respondent's arguments are incompatible with settled precedent and have no basis in Fourth Amendment doctrine.

I. Because A Canine Sniff Of A Vehicle's Exterior Is Not A Fourth Amendment Search, It May Be Conducted Without Individualized Suspicion.

Police action that is neither a "search" nor a "seizure" requires no individualized suspicion. See *Arizona v. Hicks*, 480 U.S. 321, 328 (1987); *Maryland v. Macon*, 472 U.S. 463, 468-469 (1985). In *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), this Court unanimously recognized that no search

occurs when a drug-detection dog sniffs the exterior of a stopped vehicle. See *id*. at 40 ("an officer walk[ing] a narcotics-detection dog around the exterior of each car * * * does not transform the seizure into a search"); *id*. at 52 (Rehnquist, C.J., dissenting) ("a 'sniff test' by a trained narcotics dog is not a 'search' within the meaning of the Fourth Amendment"); see also *United States v. Place*, 462 U.S. 696, 707 (1983); Pet. Br. 6-8; U.S. Br. 9-12. It follows that no reasonable suspicion was necessary to justify the exterior canine sniff of respondent's car.

Respondent offers three counter-arguments. First, he disputes the premise that *Place* and *Edmond* hold that canine sniffs need no Fourth Amendment justification. Resp. Br. 8-13. Second, relying upon *Kyllo v. United States*, 533 U.S. 27 (2001), he contends that a sniff of a vehicle's exterior invades legitimate Fourth Amendment interests and therefore demands at least some individualized suspicion — not probable cause, but the lesser standard of reasonable suspicion. Resp. Br. 13-15. Third, respondent likens canine sniffs to the type of police conduct that, under this Court's precedents, may be justified by reasonable suspicion. Resp. Br. 20-23. All three arguments are meritless.

A. Respondent maintains that *Place* is inapposite because the officers there, unlike the officers in this case, had reasonable suspicion that illegal drugs were present. Resp. Br. 8-10. This fundamentally misconstrues *Place*. Reasonable suspicion was relevant in *Place* only as a predicate to its holding that *Terry v. Ohio*, 392 U.S. 1 (1968), which permits brief investigative seizures based upon reasonable suspicion of wrongdoing, applies with full force to luggage. *Place*, 462 U.S. at 700-706. After stating that holding, the Court proceeded to the separate question of whether a "search" occurred when the seized luggage was sniffed by a drug-detection dog. *Id*. at 706-707. That question was separate from the *Terry* issue because, if a

sniff were a search, then the whole encounter, "no matter how brief[,] could not be justified on less than probable cause" — which would have mooted the question whether the seizure exceeded the permissible limits of a *Terry* stop. *Id*. at 706. Thus, contrary to respondent's suggestion, the presence of reasonable suspicion in *Place* was independent of, and had no bearing on, the Court's holding that a sniff is not a Fourth Amendment search.

Respondent's attempt to distinguish *Edmond* is even less convincing. Noting *Edmond*'s holding that the suspicionless drug checkpoint effected an unlawful seizure, respondent contends that "the Court had no occasion to decide what sort of Fourth Amendment justification might be necessary for a drug sniff under any other circumstances." Resp. Br. 11; see also ACLU Br. 26 n.11 (same). But *Edmond* decided precisely that question; its holding that an exterior canine sniff of a stopped vehicle is not a "search" necessarily means that the sniff itself required no Fourth Amendment justification. 531 U.S. at 40 (citing *Place*, 462 U.S. at 707).

B. Respondent next contends that *Kyllo v. United States*, 533 U.S. 27 (2001), supports his view that a canine sniff requires some individualized suspicion that drugs are present. Resp. Br. 13-15. *Kyllo* considered whether "the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment." 533 U.S. at 29. To answer that question, the Court applied the *Katz* test, which provides that "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Id*. at 33 (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). The Court concluded that a "search" occurs whenever "sense-enhancing technology" "not in general public use," such as a thermal-imaging device,

is employed to obtain "any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area." *Id*. at 34 (internal quotations omitted).

Attempting to analogize this case to *Kyllo*, respondent notes that a drug-detection dog, like a thermal-imaging device, reveals information about an enclosed space that could not otherwise be obtained without some physical intrusion. From this premise, respondent maintains that a canine sniff, while not rising to the level of a search, may not be conducted without some Fourth Amendment justification. Resp. Br. 13-15. Respondent's amici takes *Kyllo* a step further, arguing that a canine sniff is actually a "search," albeit one that requires only reasonable suspicion, not probable cause. ACLU Br. 25-30.

Kyllo is inapposite for two reasons. The first relates to the difference between what a canine sniff reveals and what thermal-imaging reveals. A sniff "discloses *only* the presence or absence of narcotics, a contraband item." *Place*, 462 U.S. at 707 (emphasis added); accord, *Edmond*, 531 U.S. at 40; *United States v. Jacobsen*, 466 U.S. 109, 124 & n.24 (1984). Thermal-imaging devices, by contrast, can reveal entirely innocent activities that have nothing to do with contraband, such as the movement of individuals, see *Kyllo*, 533 U.S. at 36 n.3, or "what hour each night the lady of the house takes her daily sauna and bath," *id*. at 38. See also Tr. of Oral Argument, *Kyllo v. United States*, No. 99-8508, at 6-9 (addressing capabilities of thermal imaging); Aronov, *Privacy in a Public Setting: The Constitutionality of Street Surveillance*, 22 QLR 769, 789 (2004) ("evidence suggests that [thermal-imaging technology] can be used to detect many activities which contribute to elevated heat levels, but are legal – such as cooking, bathing, sex, or the use of heat-generating home appliances"); *United States v. Cusamano*, 83 F.3d 1247, 1257-1262 (10th Cir. 1996) (en banc) (McKay, J., dissenting).

This distinction matters under the Fourth Amendment. There is no reasonable expectation of privacy in the mere presence or absence of narcotics. See *Jacobsen*, 466 U.S. at 124 n.24 (no search where "the government conduct could reveal nothing about noncontraband items"); *Place*, 462 U.S. at 707. Thus, under the *Katz* test, a canine sniff is not a search because it reveals nothing in which a reasonable expectation of privacy might lie. The opposite holds for thermal-imaging technology; because such technology can reveal legitimately private information that otherwise would be shielded from public view, its use by law enforcement can be a search. See *Kyllo*, 533 U.S. at 38-39.

The second reason why *Kyllo* is inapposite concerns the fundamental distinction under the Fourth Amendment between homes and cars. Crucial to *Kyllo* was the fact that the thermal-imaging device was directed at a private home. As the Court explained, because "*all* details [in the home] are intimate details," 533 U.S. at 37 (emphasis in original), a reasonable expectation of privacy lies in all aspects of the home that would otherwise remain concealed, *id*. at 34-38. Under *Katz*, it necessarily follows that a search occurs when officers use a thermal-imaging device to reveal otherwise concealed details about a private home. *Id*. at 34, 40. In so holding, however, the Court emphasized that the "firm" and "bright" line it drew "at the entrance to the house," *id*. at 40, would not apply to other places, "such as * * * automobiles," *id*. at 34. Accord, *Illinois v. Lidster*, 540 U.S. 419, 124 S. Ct. 885, 889 (2004) ("The Fourth Amendment does not treat a motorist's car as his castle."); *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976) ("This Court has traditionally drawn a distinction between automobiles and homes or offices in relation to the Fourth Amendment."). In cars and other places outside the home, not all details are intimate details, and thus all do not fall within the reasonable expectation of privacy. This is particularly true of details regarding the presence or absence of narcotics.

For these reasons, *Kyllo* is fully consistent with the proposition — reaffirmed just seven months before *Kyllo* in *Edmond* — that no Fourth Amendment justification is required when a drug-detection dog sniffs the exterior of a stopped vehicle. See *Morgan v. State*, 95 P.3d 802, 807-808 (Wyo. 2004) (reconciling *Kyllo* with *Place* and *Edmond*); *State v. Bergmann*, 633 N.W.2d 328, 334-335 (Iowa 2001) (same); 1 Wayne R. LaFave, *Search and Seizure*, § 2.2(f), at 455 (3d ed., 2004 pocket part) (same); Pierce, et al., *Technologies to Detect Concealed Weapons: Fourth Amendment Limits on a New Public Health and Law Enforcement Tool*, 31 J. L. MED. & ETHICS 567, 573 (2003) (reconciling *Kyllo* with *Place*).

C. Finally, respondent contends that canine sniffs fall within "a category of police conduct that burdens Fourth Amendment interests to an extent that requires some justification, but not so substantially as to require probable cause or the obtaining of a warrant." Resp. Br. 20-21. Respondent's argument founders at the outset because its premise, that a canine sniff "burdens Fourth Amendment interests," is incorrect. As shown above (*supra*, at 4-5), a canine sniff of a vehicle's exterior does not burden any interest recognized as legitimate under the Fourth Amendment. For that reason, a sniff does not require any justification.

The three precedents cited by respondent — *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); and *Richards v. Wisconsin*, 520 U.S. 385 (1997) — do not help his cause. In each case, the Court subjected certain police conduct to the reasonable suspicion standard. But the conduct in those cases, unlike the canine sniff here, truly burdened Fourth Amendment interests. The investigative seizure and pat-down search of a person in *Terry*, and the investigative seizure of a vehicle and its occupants in *Brignoni-Ponce*, were actual searches or seizures. The "no-knock entry" in *Richards* implicated the interest — recognized at common

law and incorporated at the Founding into the Fourth Amendment, 520 U.S. at 388 — in being "provided the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry." *Id*. at 393 n.5 (citing *Wilson v. Arkansas*, 514 U.S. 927, 930-932 (1995)).

Terry, *Brignoni-Ponce* and *Richards* illustrate the principle that there are limited circumstances where police conduct *that actually burdens Fourth Amendment interests* may be justified under the lesser standard of reasonable suspicion, rather than under the ordinary and more stringent standard of probable cause. See also *United States v. Knights*, 534 U.S. 112, 121 (2001) (same for search of a probationer's home); *Maryland v. Buie*, 494 U.S. 325, 337 (1990) (same for protective sweep of a house during an arrest). Those cases do not hold or even suggest that reasonable suspicion would ever be necessary to justify police conduct that burdens no Fourth Amendment interests.

In the end, respondent concedes that he is asking the Court to recognize an intermediate category of police conduct — not quite a Fourth Amendment search, but somehow more than a non-search — to which "the intermediate standard of reasonable suspicion" would apply. Resp. Br. 22. Justice Blackmun advanced a nearly identical approach in *Place*, suggesting that "a dog sniff may be a search, but a minimally intrusive one that could be justified in this situation under *Terry* upon mere reasonable suspicion." 462 U.S. at 723 (opinion concurring in the judgment). The Court in *Place* did not accept Justice Blackmun's suggestion, and four years later it rejected a similar proposal in *Arizona v. Hicks*, *supra*.

The police officer in *Hicks* entered an apartment after a gunshot had been fired; saw some expensive stereo equipment, which he (correctly) suspected was stolen; and slightly nudged a turntable to reveal its serial number. 480 U.S. at 323. Because exigent circumstances justified the officer's presence

in the apartment, the only questions were whether the manipulation of the turntable was a Fourth Amendment search and, if so, what degree of individualized suspicion was necessary. The Court held that the nudge was a search that required probable cause, *id*. at 326-328, and in so holding dismissed the suggestion that the nudge "was a 'cursory inspection' instead of a 'full-blown search,' and could therefore be justified by reasonable suspicion rather than probable cause," *id*. at 328. The Court explained:

> We are unwilling to send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a 'plain view' inspection nor yet a 'full-blown search.' Nothing in the prior opinions of this Court supports such a distinction * * * .

Id. at 328-329.

As in *Hicks*, the Court should decline to establish an intermediate "almost, but not quite, a search" category of police conduct. "A search is a search," *id*. at 325, a non-search is a non-search, and nothing lies in between. When police action is neither a search nor a seizure, it requires no Fourth Amendment justification, not even reasonable suspicion.

II. A Canine Sniff Does Not Expand The Scope Of A Traffic Stop In A Manner Requiring Reasonable Suspicion.

Because there was probable cause to pull over respondent for speeding, it is beyond dispute that the police were entitled to approach his car. Settled law holds that when police officers, positioned at a lawful vantage point, discover facts without effecting an additional search or seizure, the discovery does not intrude upon legitimate Fourth Amendment interests. See *Minnesota v. Dickerson*, 508 U.S. 366, 374-375 (1993); *Horton*

v. California, 496 U.S. 128, 133 n.5, 141 (1990); *Hicks*, 480 U.S. at 325. Consequently, because the exterior canine sniff of respondent's car was not a search, it did not improperly expand the scope of his traffic stop.

In arguing the contrary (Resp. Br. 23-34), respondent mischaracterizes our position. According to respondent, our position is that "the existence of probable cause to seize an individual to address one offense gives officers *carte blanche* to expand the scope of that seizure to include any other sort of investigation that they might choose to undertake." Resp. Br. 26; see also ACLU Br. 9-10 ("In the State's view, a valid stop confers a kind of 'wild card' upon the police."). Not so. Of course the Fourth Amendment limits the scope of police conduct at probable cause-based traffic stops. But those limits apply *only* to conduct that effects an incremental search or seizure, meaning a search or seizure *beyond* the seizure already effected by the traffic stop. The Fourth Amendment does not constrain, and demands no justification for, police conduct that effects no incremental search or seizure.

Therein lies the distinction between this case and the series of precedents upon which respondent and his amici rely. Resp. Br. 24-29; NACDL Br. 17-20; ACLU Br. 10-11, 24-25. Those precedents hold that the police conduct in question, which took place at a lawful traffic stop, required some independent Fourth Amendment justification. See, *e.g.*, *Maryland v. Wilson*, 519 U.S. 408 (1997) (passenger ordered to exit car); *Knowles v. Iowa*, 525 U.S. 113 (1996) (search of car for drugs); *Michigan v. Long*, 463 U.S. 1032 (1983) (protective search of car's interior); *New York v. Belton*, 453 U.S. 454 (1981) (search of car incident to arrest of driver); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (driver ordered to exit car); cf. *Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. ___, 124 S. Ct. 2451 (2004) (individual arrested upon refusing to provide identification at *Terry* stop). Importantly, the police action in each case

consisted of an incremental search or seizure, which is precisely why some independent Fourth Amendment justification — independent, that is, of the justification for initiating the traffic stop — was required.[1] No such justification is required for police conduct at a lawful traffic stop, such as a canine sniff, that effects no incremental search or seizure. See *Texas v. Brown*, 460 U.S. 730, 739-740 (1983) (plurality opinion) ("beyond dispute" that no Fourth Amendment "search" occurred when police officer, at driver's license checkpoint, "shin[ed] his flashlight to illuminate the interior of [the defendant's] car"); see also *United States v. Dunn*, 480 U.S. 294, 304-305 (1987) (no search occurred when officers shined a flashlight through the open front of the defendant's barn) (citing with approval *Brown*, 460 U.S. at 739-740).

Respondent contends that this conclusion is inconsistent with the holding of *Terry*, 392 U.S. at 29, that "evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation." According to respondent, because Officer Graham's use of a drug-detection dog bore no reasonable relation to the purpose for the traffic stop, the sniff violated *Terry*. Resp. Br. 24-26.

This argument fails as an initial matter because *Terry* does not govern police action at probable cause-based traffic stops. We considered this point at length in our opening brief. Pet. Br. 12-17; see also Ark. Br. 7-13; U.S. Br. 14-17. Respondent does not directly address any of the three grounds we offered (Pet.

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[1] The Fourth Amendment justification required in these cases took one of three forms: a case-by-case determination of probable cause (as in *Knowles*), a case-by case determination of reasonable suspicion (as in *Long*), or a categorical balance of burdens and benefits governing all similar circumstances (as in *Wilson*, *Belton*, *Mimms* and *Hiibel*).

Br. 15-17) as to why the *Terry* doctrine is incompatible with probable cause-based stops. Nor does respondent dispute our showing (Pet. Br. 12-15) that the Illinois Supreme Court incorrectly read this Court's precedents — including *Mimms*, 434 U.S. at 111-112, *Long*, 463 U.S. at 1047-1052, and *Berkemer v. McCarthy*, 468 U.S. 420, 439 (1984) — as requiring a *Terry* analysis at lawful traffic stops. Indeed, despite spending several pages on the subject, respondent offers no affirmative reason why the *Terry* doctrine should govern police action at a probable cause-based stop. Resp. Br. 24-26, 30-32.

Even if *Terry* governed, the exterior canine sniff of respondent's car still would pass Fourth Amendment muster. As respondent notes, *Terry* held that "'evidence may not be introduced if it was discovered *by means of a seizure and search* which were not reasonably related in scope to the justification for their initiation.'" Resp Br. 24 (quoting *Terry*, 392 U.S. at 29) (emphasis supplied). Thus, the *Terry* reasonable relationship test governs only those discoveries made "by means of a search and seizure." As we have shown, a canine sniff is neither a search nor a seizure, and thus could not possibly have run afoul of that test. See *United States v. Hensley*, 469 U.S. 221, 224 (1985) (no Fourth Amendment violation where, during investigatory stop of vehicle, officer observed butt of revolver protruding from underneath passenger's seat); *Long*, 463 U.S. at 1036 (same where officer discovered bag of marijuana under arm rest); Pet. Br. 17-18; U.S. Br. 17-19.

Respondent offers that the Fourth Amendment calculus might have been different "if the officer who stopped [respondent] happened to have a drug dog along, and the dog alerted when the officer pulled along side [respondent's] car." Resp. Br. 16. What makes this case different, respondent says, is that Trooper Graham, "hearing about a traffic stop made by

a different officer [Trooper Gillette], dr[ove] his dog to the scene for the specific purpose of sniffing the stopped car to check for drugs." *Ibid.* Thus, respondent's principal concern appears to be not that a dog sniffed his car, or that the sniff occurred at a traffic stop, but rather that the police brought the dog to his traffic stop in order to determine whether he was transporting drugs.

This passage in respondent's brief is crucial, for it reveals what really troubles him — and what likely troubled the Illinois Supreme Court — about this case. See Pet. App. 4a (noting that "calling in a canine unit unjustifiably broadened the scope of an otherwise routine traffic stop into a drug investigation."). Trooper Graham was not simply going about his business at the traffic stop when he accidentally discovered that respondent was transporting drugs. Rather, Graham took affirmative steps, unrelated to the justification for the stop, for the express purpose of determining whether drugs were present. This characterization of Trooper Graham's actions and motives, while accurate, is irrelevant. The Fourth Amendment is indifferent as to whether the police discover incriminating facts inadvertently or intentionally. See *Horton*, 496 U.S. at 141-142; *California v. Ciarolo*, 476 U.S. 207, 212-214 (1986); Pet. Br. 10-11 (discussing *Horton*). What matters, rather, is whether the discovery is the product of an incremental search or seizure. See *Hicks*, 480 U.S. at 325. Because a canine sniff effects neither a search nor a seizure, the sniff of respondent's car did not implicate, let alone violate, the Fourth Amendment.

For these reasons, conducting a canine sniff at a lawful traffic stop does not expand the scope of the stop in a manner requiring reasonable suspicion.

III. Respondent's Other Arguments Are Without Merit.

Respondent offers other arguments to support his view that the exterior canine sniff of his car required reasonable suspicion. All are red herrings, and none has merit.

A. First, respondent and his amici charge that canine sniffs are unreliable and result in an unacceptable number of false positives. Resp. Br. 18-20; NACDL Br. 10-12; ACLU Br. 5-6, 29-30. However, research shows that canine sniffs are generally reliable and that the incidence of false positives is generally low.[2] Agreement with our point comes from an unlikely source — the one law review article cited by respondent and his amici on the subject of canine sniff reliability. While acknowledging that false positives do occur, the article concluded that,

> [a]s a whole, law enforcement provides careful training to its dog and handler teams. State, regional, and national organizations set rigorous standards for certification and management. These requirements usually produce very effective narcotics detection teams, who show extraordinary accuracy during both training and real life sniffs.

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[2] See, *e.g.*, Garner, et al., Duty Cycle of the Detector Dog: A Baseline Study (2001) (viewed at http://www.vetmed.auburn.edu/ibds/pdf/dutycycle.pdf); Williams, et al., Canine Substance Detection: Operational Capabilities (1999) (viewed at http://www.vetmed.auburn.edu/ibds/pdf/k-9_det_capabilities.pdf); Waggoner, et al., Effects of Extraneous Odors on Canine Detection (1998) (viewed at http://www.vetmed.auburn.edu/ibds/pdf/extraneous_odors.pdf); Waggoner, et al., *Canine olfactory sensitivity to cocaine hydrochloride and methyl benzoate*, in Pilon & Burmeister (eds.), CHEMISTRY- AND BIOLOGY-BASED TECHNOLOGIES FOR CONTRABAND DETECTION (1997).

Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405, 432 (1997). Cf. *ibid.* ("The narcotics detection dog has been an essential tool in fighting the war on drugs. Canine alerts have resulted in countless seizures of illegal narcotics. Without them, fighting the tide of narcotics trafficking would be significantly more difficult.").

In any event, the debate over false positives is moot for purposes of this case. The reliability of canine sniffs pertains not to the question presented here — whether the Fourth Amendment requires reasonable suspicion to conduct an exterior sniff of a car at a lawful traffic stop — but only to an issue not presented here — whether a positive alert by the dog provides probable cause to actually search the car.[3]

An example illustrates why the two issues are distinct. A motorist's use of a fragrant masking agent, standing alone, might not provide probable cause to believe that the motorist is

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[3] On the probable cause issue, this Court and others have consistently held that a positive alert by a properly trained dog is sufficient to establish probable cause that drugs are present. See, *e.g.*, *Florida v. Royer*, 460 U.S. 491, 505-506 (1983) (plurality opinion); *United States v. Limares*, 269 F.3d 794, 797-798 (7th Cir. 2001) (recognizing that "[i]t is inevitable that *some* molecules of drugs will adhere to *every* Federal Reserve note," and noting the consequent "*potential* to increase the rate of false positives," but holding that a positive alert by a dog who was "right 62% of the time [is] enough to" establish probable cause) (emphasis in original); *Wallace v. State*, 372 Md. 137, 146, 812 A.2d 291, 297 (2002), cert. denied, 124 S. Ct. 1036 (2004). For a comprehensive review of how state and federal courts evaluate a dog's reliability and training in determining whether an alert by that dog provided probable cause, see *State v. Nguyen*, 157 Ohio App. 3d 482, 488-499, 811 N.E.2d 1180, 1185-1193 (2004) (citing cases), app. denied, ___ Ohio St. 3d ___, ___ N.E.2d ___ (No. 2004-1137) (Oct. 13, 2004).

transporting drugs. See *United States v. Villa-Chaparro*, 115 F.3d 797, 802 (10th Cir.), cert. denied, 522 U.S. 926 (1997). But that surely does not mean that an officer's visual or olfactory observation of the fragrance is, in itself, a search or quasi-search requiring some independent Fourth Amendment justification. Likewise, even if (contrary to fact) canine sniffs were unreliable indicators of the presence of drugs, it would mean only that a positive alert might not provide probable cause to conduct an actual search, not that the sniff itself required some level of individualized suspicion. Cf. *Dickerson*, 508 U.S. at 376 ("Even if it were true that the sense of touch is generally less reliable than the sense of sight, that only suggests that officers will less often be able to justify seizures of unseen contraband.").

B. Respondent and his amici also suggest that allowing external canine sniffs of vehicles at lawful traffic stops, without reasonable suspicion that drugs are present, will facilitate racial profiling. Resp. Br. 17; NACDL Br. 8; ACLU Br. 13. This suggestion ignores *Whren v. United States*, 517 U.S. 806, 813 (1996), which establishes that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." There being no equal protection claim here — or even any hint that respondent was pulled over because of his race or ethnicity — respondent's racial profiling argument is irrelevant to this case.[4]

C. Respondent's amici maintain that a canine sniff invariably increases the duration of a traffic stop and thereby causes an unlawful seizure. NACDL Br. 5, 15; ACLU Br. 4,

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[4] The State of Illinois does not condone the racial profiling of motorists, and has taken steps to ensure that any such profiling is exposed and eliminated at the state and local level. See 625 ILCS 5/11-212; see also 50 ILCS 705/7(a); 20 ILCS 2605/2605-85.

20-22. Duration, like racial profiling, is not an issue here. In finding that the canine sniff of respondent's car violated the Fourth Amendment, the Illinois Supreme Court did not cite the *duration* of stop; it held only that the sniff impermissibly broadened the *scope* of the stop. Pet. App. 4a-5a ("the police impermissibly broadened the scope of the traffic stop in this case into a drug investigation because there were no specific and articulable facts to support the use of a canine sniff"); see also Reply in Supp. of Pet. for Cert. 1-2; U.S. Br. 19-20. Even respondent admits that duration had no bearing upon the decision below. Resp. Br. 34 n.12. Some future case might present the question whether the Fourth Amendment prohibits detaining a vehicle after the conclusion of a traffic stop for the purpose of conducting a canine sniff, see Pet. for Cert. 7 n.* (noting split among lower courts), but this is not that case.

CONCLUSION

The judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted.

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