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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether, in the absence of any reasonable suspicion of drug activity, a police officer may bring a drug-detection dog to the scene of another officer's routine traffic stop in order to prospect for illegal drugs by having the dog sniff the trunk of the stopped car.

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OPINIONS BELOW

The opinion of the Illinois Supreme Court (Pet. App. 1a-10a) is reported at 207 Ill. 2d 504, 802 N.E.2d 202. The opinion of the Illinois Appellate Court (Pet. App. 11a-19a) is unpublished, but the decision is noted at 321 Ill. App. 3d 1063, 797 N.E.2d 250 (table). The oral ruling of the Illinois Circuit Court (Pet. App. 20a-27a) is unreported.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> 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.

STATEMENT

1. Trooper Daniel Gillette of the Illinois State Police stopped respondent Roy Caballes for driving 71 miles per hour on a portion of Interstate 80 where the speed limit was 65. Pet. App. la. Gillette notified the police dispatcher of the stop and asked the dispatcher to run a check on the car's license plates. *Id.* at 1a, 12a. Hearing about the stop on the police radio, Trooper Craig Graham of the state police Drug Interdiction Team "immediately started for the scene with his drug-sniffing dog." *Id.* at 12a. Although Gillette had not requested assistance, Graham's action was not unexpected. To the contrary, although the stated reason for the stop had nothing to do with drug activity, Gillette expected Graham to show up, because that was his "responsibility as part of the team." *Id.*

Meanwhile, Gillette approached Caballes's car, told him that he had been speeding, and asked for his license, registration, and proof of insurance. Pet. App. 2a. He then told Caballes to move his car out of the way of traffic and to come sit in Gillette's car. *Id.* Once Caballes was in the police car, Gillette told him that he was only going to issue a warning ticket. *Id.* Gillette then asked the police dispatcher to check the validity of Caballes's license and whether there were any outstanding warrants for his arrest. *Id.*

While he waited to hear from the dispatcher, Gillette asked Caballes about his destination and attire, and Caballes responded. Pet. App. 2a. After the dispatcher reported that Caballes's Nevada license was valid and that there were no outstanding warrants, Gillette requested a criminal history check. *Id.* at 2a, 13a. He then asked Caballes for permission to search Caballes's car, but Caballes declined to consent. *Id.* at 2a. Gillette also asked whether Caballes had ever been arrested, and Caballes said no. *Id.* The dispatcher later reported that Caballes had been arrested twice for distribution of marijuana.

Gillette then began writing the warning ticket. Pet. App. 2a. He was interrupted, however, by another officer calling him on the radio on an unrelated matter. *Id.* at 2a-3a.

Gillette testified that he was still writing the ticket when Graham arrived and began walking his dog around Caballes's car. *Id.* at 3a. The dog alerted at the trunk. *Id.* Gillette then searched the trunk and found marijuana. *Id.*

2. a. Caballes moved to suppress the evidence found by opening his trunk and to quash the resulting arrest. Pet. App. 3a. The trial court denied the motion, concluding that the traffic stop and detention were proper; that Gillette did not unreasonably prolong the stop; and that the dog's alert was reliable enough to provide probable cause to search the trunk. *Id.* at 3a, 14a, 21a-26a. After a bench trial, the court found Caballes guilty of trafficking in marijuana. *Id.* at 3a.

b. The Illinois Appellate Court affirmed. Pet. App. 11a-19a. Although the court concluded that, in the absence of a reasonable articulable suspicion of criminal activity, Gillette "was not justified in detaining the defendant for the purpose of running a check of the defendant's criminal history," it dismissed the resulting extension of the duration of the traffic stop as "*de minimis*." *Id.* at 15a-17a. Accepting the trial court's conclusion with respect to the reliability of the dog sniff, it held that because the traffic stop had not been improperly extended, a sniff conducted before conclusion of the stop did not have to be supported by any reasonable suspicion of criminal activity. *Id.* at 18a-19a n.2.[1]

c. The Illinois Supreme Court reversed. Pet. App. 1a-10a. Applying principles drawn from *Terry* v. *Ohio*, 392 U.S. 1 (1968), the Court concluded that the "overall reasonableness" of police conduct during a traffic stop should be tested by considering "(1) whether the officer's action was justified at its inception and (2) whether it was reasonably related in scope to the circumstances which justified the interference [with the citizen's freedom of movement] in the first place." Pet. App. 4a (internal quotation marks omitted). Because it

[1] The court also rejected Caballes's two alternative arguments and held that an officer is not required to issue a verbal warning instead of a written warning, and that a dog's alert is sufficiently reliable to give rise to probable cause to search the trunk. Pet. App. 17a-19a.

was undisputed that Gillette's stop of Caballes was properly initiated, the court focused on whether the State had established that "the [officers'] conduct remained within the scope of the stop." *Id.*

Here, after reviewing the information available to Trooper Gillette before the dog sniff, the court concluded that "there were no specific and articulable facts to support the use of a canine sniff" to check for the presence of drugs in Caballes's car. Pet. App. 4a-5a. Rather, "even when [all the available pre-sniff] factors are viewed together, they constitute nothing more than a vague hunch that defendant may have been involved in possible wrongdoing." *Id.* at 5a. In view of that conclusion, the court held that in this case the use of the dog sniff "impermissibly broadened the scope of the traffic stop . . . into a drug investigation" (*id.* at 4a), and "the trial court should have granted defendant's motion to suppress the evidence obtained after the police dog's alert" (*id.* at 5a).

Three Justices dissented. Pet. App. 6a-10a. In their view, this Court's cases established that "a canine sniff is not a search," and "allowing a canine to sniff a vehicle that is already detained does not transform the seizure into a fourth amendment search." *Id.* at 7a. The dissenters rejected the majority's reliance on *Terry* in applying an "articulable facts" standard, arguing instead that if the dog sniff was any sort of "search" then it could not be conducted without probable cause, while if it was "not a search," it could not implicate the Fourth Amendment at all. *Id.* at 8a-10a. They reasoned that "[t]here simply cannot be a 'reasonable suspicion' middle ground because the United States Supreme Court has not expanded *Terry* to general searches for incriminating evidence, as opposed to searches for weapons." *Id.* at 10a. Accordingly, they would have held that "[t]he canine sniff was not a search, and thus the police did not need probable cause or a reasonable suspicion of wrongdoing before conducting it." *Id.*

SUMMARY OF ARGUMENT

Respondent was stopped for speeding, for which the stopping officer decided to issue him a warning. A second officer, apparently in accordance with standard procedure, drove his drug detection dog to the scene and had it sniff the stopped car—even though the sniff could not have disclosed anything relevant to the traffic violation, and the police had no reasonable suspicion of a drug offense. The State argues that the Fourth Amendment did not require any justification for the drug sniff, beyond probable cause to believe that respondent had violated a traffic law.

1. This Court has viewed dog sniffs in particular contexts as imposing only modest burdens on Fourth Amendment interests. Nothing, however, in *United States* v. *Place*, *City of Indianapolis* v. *Edmond*, or any of the Court's other cases establishes the sweeping proposition the State advances here: That use of a trained dog to sniff a locked car trunk requires no individualized justification whatsoever, because it is a "Fourth Amendment non-event" (Pet. 5).

While dog sniffs are not physically invasive, they do intrude on reasonable privacy interests. Bringing a drug dog to the scene of a traffic stop for the specific purpose of sniffing a motorist's locked trunk is not at all analogous to observing some contraband item in "plain view" during the ordinary course of another investigation. Moreover, using a drug dog during an otherwise routine stop can be intimidating, accusatory and humiliating. Without any substantive limit on when a sniff is permissible, officers' decisions about when to use a dog are open to the reality or perception of discriminatory investigation. And while drug sniffs may in theory be designed to detect only the presence of contraband, in practice they are prone to errors—including, for example, the detection of non-contraband currency—that will inevitably result in further unjustified invasions of motorists' privacy.

Because investigatory sniffs by drug dogs during routine traffic stops implicate such Fourth Amendment interests, they should not be authorized in the absence of some

reasonable, articulable, individualized suspicion of wrongdoing that could be either sharpened or dispelled by the sniff. Requiring that modest level of justification will not interfere with any legitimate investigative activity. It will, however, prevent police from using roving, suspicionless drug sniffs at the scene of routine traffic stops to replace the indiscriminate checkpoints, serving only a general interest in crime control, that this Court specifically disapproved in *Edmond*.

2. The fact that the police had probable cause to stop Caballes for speeding did not authorize them to undertake an investigatory dog sniff, designed solely to prospect for possible evidence of an unrelated offense. Standard Fourth Amendment principles, reflected in *Terry* v. *Ohio* and many other decisions, require particularized justification not only for the initiation of a non-consensual police encounter, but for its scope. Those principles apply even when an encounter is justified by probable cause (or, for that matter, even when the police are executing a warrant). They cannot be reconciled with the State's submission that officers who have probable cause to stop a driver for speeding need no further justification to conduct a dog sniff designed to detect illegal drugs. Adopting that standard would be an open invitation to abuse.

The Illinois Supreme Court held only that when officers stop a driver on the highway, they may not take the additional, targeted investigative step of having a dog sniff the car for drugs unless that measure is either reasonably related to the circumstances that justified the initial stop, or otherwise supported by some reasonable suspicion of drug-related wrongdoing. That standard appropriately balances the government's interest in law enforcement against the important personal interests protected by the Fourth Amendment.

ARGUMENT

Respondent Caballes was stopped on the highway based on probable cause to believe that he had committed a minor traffic violation—driving 71 miles per hour in an area where the limit was 65. A second officer, evidently in accordance with standard procedure, monitored the police scanner, heard about the traffic stop, and drove his drug-detection dog to the scene of the stop for the specific purpose of walking the dog around the stopped car, just to see if the dog smelled any drugs.

The State does not challenge the Illinois Supreme Court's conclusion that until the dog alerted at Caballes's trunk, the officer who stopped him for speeding had no reasonable suspicion of any other criminal activity. Because there was nothing to justify the drug sniff, the State is forced to argue that it required no justification. The State contends that it was entitled to use this focused criminal investigative technique, under these everyday circumstances, without *any* threshold level of relevant, individualized suspicion, because having a drug-detection dog sniff a motorist's closed trunk on the side of the highway is "a Fourth Amendment non-event." Pet. 5.

This Court should not accept that glib dismissal of Fourth Amendment interests. The court below held only that an individually targeted, investigatory dog sniff of a car that police have stopped on the highway must either rest on some reasonable suspicion of wrongdoing to which the sniff would be relevant, or otherwise be "reasonably related . . . to the circumstances which justified the interference [with the citizen's freedom of movement] in the first place." *See* Pet. App. 4a-5a (internal quotation marks omitted). Those minimal requirements fairly balance the limited, but real, intrusion entailed by an investigative dog sniff against the citizen's constitutional right to be free of "unreasonable" invasions of the privacy, possessory, and liberty interests that the Fourth Amendment protects. Indeed, what is perhaps most remarkable about this case is the government's insistence that it should instead be free to use targeted criminal

investigatory techniques against particular citizens based on nothing more than its general interest in crime control, without any specific justification whatsoever.

I. AN INDIVIDUALLY TARGETED, INVESTIGATIVE DOG SNIFF IS NOT "A FOURTH AMENDMENT NON-EVENT"

A. This Court Has Never Held That Investigative Dog Sniffs Do Not Implicate Fourth Amendment Interests

In arguing that the Fourth Amendment simply has nothing to say about the dog sniff at issue here, the State and its amici rely principally on this Court's decisions in *United States* v. *Place*, 462 U.S. 696 (1983), and *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000). Neither decision sweeps as broadly as the State contends.

1. In *Place*, federal agents suspected that an airline passenger was carrying drugs in his luggage. 462 U.S. at 698-699. Lacking probable cause to search the luggage or to make an arrest, the officers allowed the passenger to leave the airport, but they detained his bag, took it to a different location, and had a drug dog sniff it. *Id.* at 699. The question presented was whether *Terry* principles, allowing a limited intrusion on Fourth Amendment interests based on less than probable cause, applied to the seizure of the luggage, and the Court held that they did—although on the facts of the case, it held that the length and manner of the seizure "exceeded the permissible limits of a *Terry*-type investigative stop." *Id.* at 702, 709.

In the course of its discussion, the Court pointed out that the question whether reasonable suspicion was enough to justify temporary detention of the luggage would be academic if subjecting the detained luggage to a dog sniff—which was, in *Place*, the *purpose* of the detention—was "itself a search requiring probable cause." 462 U.S. at 706. In that context, the Court noted its understanding that a properly conducted dog sniff was "much less intrusive than a typical search," "disclose[d] only the presence or absence of narcotics, a contraband item," and did not subject the owner

"to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods." *Id.* at 707. On that basis, the Court concluded that the dog sniff did not require any greater justification than the reasonable suspicion that was advanced to justify the initial detention of the luggage, because "the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment." *Id.*

The Court in *Place* was careful to confine the scope of its analysis to "the particular course of investigation" and the "precise type of detention" presented by the facts of the case before it. 462 U.S. at 707-708. The type of police encounter involved here is materially different. Most importantly, in *Place* the dog sniff was logically related to—indeed, it was the object of—the detention whose Fourth Amendment legitimacy the Court was principally considering. Here, by contrast, the dog sniff of Caballes's car is functionally unrelated to the Fourth Amendment justification for his initial detention.[2] Certainly, *Place*'s reasoning suggests

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[2] The sniff in *Place* also involved checked luggage detained in an airport, and was conducted by the police in private. While the locked trunk of a personal car may not be as private a place as, say, a locked closet in a home, it is at least arguably more private than luggage that has been checked on a flight and then retrieved from the baggage claim at an airport. *See generally, e.g.*, *Edmond*, 531 U.S. at 47-48 (Fourth Amendment has narrower scope in airports, where need for "measures to ensure public safety can be quite acute"); *United States* v. *Thomas*, 757 F.2d 1359, 1366 (2d Cir. 1985) (checked baggage is surrendered to common carrier that also has responsibility for assuring safety of passengers by monitoring what is carried on planes); *State* v. *Tackitt*, 67 P.3d 295, 299-303 (Mont. 2003) (insignificant privacy interest in checked luggage). Moreover, the sniff in this case was conducted in the presence of the individual being investigated, and in an area readily viewed by other members of the public. The use of drug dogs in this manner is more intimidating, accusatory, and embarrassing than was the case in *Place*. Cases before and after *Place* have held, for example, that a dog sniff of a suspect's person is a "search." *E.g., B.C.* v. *Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1266 (9th Cir. 1999); *Horton* v. *Goose Creek Indep. Sch. Dist.*, 690

that in many circumstances the Court will view a properly conducted dog sniff as intruding only modestly on Fourth Amendment interests. Equally certainly, however, *Place* did not resolve whether, at least in some circumstances, even a modestly intrusive dog sniff must be justified by, for example, the correspondingly minimal degree of reasonable suspicion *of a drug offense* that was present in *Place*—or whether instead, as the State contends, a dog sniff requires no justification at all. *See, e.g.*, *Thomas*, 757 F.2d at 1366-1367 (dog sniff at apartment door is a search; "It is one thing to say that a sniff in an airport is not a search, but quite another to say that a sniff can *never* be a search.").[3]

2. In *Edmond*, the Court held that the Fourth Amendment does not permit the government to set up a highway "checkpoint" at which motorists are subjected to "brief, suspicionless seizures," where the "primary purpose" of the program is "to detect evidence of ordinary criminal wrongdoing"—or, more specifically, "the discovery and interdiction of illegal narcotics." 531 U.S. at 34, 37-38. As in *Place*, before turning to its central inquiry, the Court paused to note

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F.2d 470, 477-479 (5th Cir.1982) (per curiam); *Doe* v. *Renfrow*, 451 U.S. 1022, 1026 n.4 (1981) (Brennan, J., dissenting from denial of cert.) (distinguishing sniff of person from sniff of "inanimate and unattended objects"); *Commonwealth* v. *Martin*, 626 A.2d 556, 559-561 (Pa. 1993) (sniff of person requires probable cause under state constitution).

[3] *See also United States* v. *Quinn*, 815 F.2d 153, 159 (1st Cir. 1987) ("To be entitled to use a dog for purposes of making a sniff test, the officers were required merely to have had 'reasonable suspicion' that the car contained narcotics, at the moment it was performed.") (citing *Place*, 462 U.S. at 698); *Tackitt*, 67 P.3d at 301 (*Place* sanctioned certain warrantless dog sniffs where reasonable suspicion of drug activity existed); *State* v. *Wiegand*, 645 N.W.2d 125, 133 (Minn. 2002) ("[*Place*] concluded that a reasonable, articulable suspicion of criminal activity was required to seize the luggage in order to conduct the dog sniff."); *State* v. *Ortiz*, 600 N.W.2d 805, 820 (Neb. 1999) (dog sniff of apartment hallway was a search); *People* v. *Dunn*, 564 N.E.2d 1054, 1057-1058 (N.Y. 1991) (under state constitution, although dog sniff of luggage at an airport is not a search, sniff of apartment hallway is); *People* v. *Unruh*, 713 P.2d 370, 377-378 (Colo. 1986) (dog sniff of safe was a search).

that its analysis was not controlled by the fact that one of the things the police did at the checkpoints was to walk drug-detection dogs around the stopped cars. *Id.* at 40.

As in *Place*, if those sniffs amounted to "searches" as that term is commonly used, they would normally have required probable cause, and the whole complexion of the case would have been different. Reiterating *Place*'s observation that a dog sniff of a car's exterior is "much less intrusive than a *typical* search" (531 U.S. at 40 (emphasis added)), the Court focused instead on the "primary purpose" of the challenged program—implying that *if* the Fourth Amendment generally permitted brief, suspicionless roadside stops for the specific purpose of allowing the police to check for narcotics-related activity, then the use of a drug sniff as one part of such a stop would not change the constitutional result. In the end, however, the Court concluded that "[w]hen law enforcement authorities pursue primarily general crime control purposes at [highway] checkpoints . . . , stops can only be justified by some quantum of individualized suspicion." *Id.* at 47. In light of that holding, the Court had no occasion to decide what sort of Fourth Amendment justification might be necessary for a drug sniff under any other circumstances—in particular, where the justification advanced for a stop bears *no relation at all* to the investigative purposes of the sniff. *Cf. id.* at 47 n.2 (expressing "no view on the question whether police may expand the scope of a license or sobriety checkpoint seizure in order to detect the presence of drugs in a stopped car," and citing *Terry* v. *Ohio*'s standard that any "search must be 'reasonably related in scope to the circumstances which justified the interference in the first place.' " (some internal quotation marks omitted)).

3. Other cases in which this Court has discussed *Place* likewise do not resolve the question presented here. In *Soldal* v. *Cook County*, 506 U.S. 56, 62-64 (1992), the Court reaffirmed that the Fourth Amendment protects property as well as privacy interests, and thus was violated when government agents physically detached and moved an

individual's entire mobile home—even though they did not look inside. *Soldal* relied in part on the two-stage analysis—looking to both privacy and property interests—used in *Place* and in *United States* v. *Jacobsen*, 466 U.S. 109 (1984). *Jacobsen* held that the government did not violate the Fourth Amendment by conducting a field test to confirm that a highly suspicious white powder, already revealed to view when a private courier service opened a package that had been committed to it for delivery, was in fact cocaine.

The facts and holdings of *Soldal* and *Jacobsen* are remote from the facts and question here. *Jacobsen* does focus on one part of the reasoning in *Place*—that the dog sniff, at least as the Court understood the matter, "could reveal nothing about noncontraband items." 466 U.S. at 123-124 & n.24. And both cases contain broad language, going well beyond what *Place* actually held. *See Soldal*, 506 U.S. at 63 (describing *Place* as holding that a sniff was not a search "because it did not compromise any privacy interest"). What the Court said just last Term about *Edmond*, however, applies equally here with respect to those cases in which the Court has previously mentioned dog sniffs: "We must read . . . general language in *Edmond* as we often read general language in judicial opinions—as referring in context to circumstances similar to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering." *Illinois* v. *Lidster*, 124 S. Ct. 885, 889 (2004).[4]

The Court's cases surely indicate that the Court has considered dog sniffs to impose only modest burdens on Fourth Amendment interests—indeed, burdens not unlike those imposed by short investigative detentions, or by an

[4] "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821).

accompanying "frisk" intended to reveal only the presence of accessible weapons that might pose a threat to an officer's safety. *Cf. Terry* v. *Ohio*, 392 U.S. 1, 19 (1968) (recognizing that the terms " '[s]earch' and 'seizure' are not talismans," and rejecting the "notion[] that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.' "). But neither the Court's careful contextual analysis in *Place*, nor its rejection of suspicionless checkpoints in *Edmond*, nor its general references in other cases, may fairly be read as having removed dog sniffs from the ambit of the Fourth Amendment altogether. *Cf. id.* at 17 n.15 ("In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness.").

B. The Dog Sniff In This Case Implicated Fourth Amendment Interests

The State and its amici argue that an investigative dog sniff of a motorist's trunk, undertaken during—but without any other connection to—a traffic stop, requires no Fourth Amendment justification because: (1) it does not physically intrude into the interior of the trunk (U.S. Br. 10, 11; Chiefs Br. 5-6); (2) it is analogous to observing objects in plain view from a lawful vantage point (State Br. 8-10; Chiefs Br. 6); (3) it does not cause embarrassment or inconvenience (U.S. Br. 10, 11); and (4) it reveals only limited information about the presence of contraband drugs (State Br. 10; U.S. Br. 10, 11). Under the circumstances here, none of these arguments justifies allowing the police to conduct dog sniffs without any individualized suspicion of wrongdoing that might be revealed by the sniff.

1. The lack of physical intrusion into a motorist's trunk makes a dog sniff less intrusive than an ordinary search, but it does not mean that the sniff invades no privacy interest. At least since *Katz* v. *United States*, 389 U.S. 347, 353 (1967), which held that eavesdropping on a conversation in a phone

booth was a "search," it has been "clear that the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." Most recently, in *Kyllo* v. *United States*, 533 U.S. 27 (2001), the Court held that use of a thermal-imaging device from a public street to detect relative amounts of heat emanating from a home constituted a "search," *id.* at 29, although neither government agents nor even probing rays from the machine ever passed through the walls of the home. Use of the imager burdened protected privacy interests because it revealed information about the interior of a private area that would not otherwise have been obtained, in the ordinary course of social interaction, without a physical intrusion. *Id.* at 34. Under *Katz* and *Kyllo*, a non-invasive dog sniff, purposefully used to investigate the contents of a car trunk that is otherwise lawfully closed to the police, clearly at least *implicates* a privacy interest. It merits some level of Fourth Amendment scrutiny. *See Wiegand*, 645 N.W.2d at 130 (*Kyllo* suggests dog sniff could be a search); *People* v. *Haley*, 41 P.3d 666, 671 n.2 (Colo. 2001) (suggesting that *Kyllo* undercuts *Place*'s reasoning).

Kyllo involved a home and not a car, but that does not make its reasoning irrelevant here. *See* U.S. Br. 11 n.1. To be sure, it was least difficult for the Court to confront the question of "technological enhancement" in the context of intrusions involving the home—the context that, more than any other, defines " 'the very core' of the Fourth Amendment." 533 U.S. at 31, 33-34. Moreover, in that context, once the Court concluded that a protected privacy interest had been invaded, the investigative technique at issue was clearly subject to the highest level of Fourth Amendment protection—it was "presumptively unreasonable without a warrant." *Id.* at 40. This case, by contrast, involves a car—a context that the Court recognized as more "difficult." *Id.* at 34. Nonetheless, the only holding called for here is that a dog sniff of a locked trunk, intentionally used as a criminal investigative technique, requires the minimal Fourth Amendment justification of reasonable, individualized suspicion of some offense to which the results of the sniff might be

relevant. *Kyllo*'s core rationale—that even "non-intrusive" investigative techniques raise Fourth Amendment *concerns* when they reveal information about the contents of an otherwise private area—directly supports that conclusion. *See also id.* at 48-49 (Stevens, J., dissenting) ("Clearly, a rule that is designed to protect individuals from the overly intrusive use of sense-enhancing equipment should not be limited to a home.").[5]

2. Purposefully transporting a drug-detection dog to the scene of a traffic stop so that the dog can be deployed to sniff the stopped car is not at all analogous to an officer's mere observation of items that are in "plain view" from some vantage point at which an officer's duties have otherwise placed him. To be sure, officers who properly find themselves in one place or another need not "shield their eyes." *Kyllo*, 533 U.S. at 32 (quoting *California* v. *Ciraolo*, 476 U.S. 207, 213 (1986)). Indeed, they are free to keep an eye out for anything that seems suspicious or dangerous, whether or not it is something that they were originally seeking. *Horton* v. *California*, 496 U.S. 128 (1990) (no "inadvertence" requirement for application of plain-view doctrine). But the plain-view doctrine assumes that there is no incremental invasion of privacy, and it does not authorize any expansion of the scope of the otherwise authorized activity that has put an officer in a particular position in the first place. *See, e.g.*, *id.* at 141 ("by hypothesis the seizure of an object in plain view does not involve an intrusion on privacy"); *id.* at 136-137 (in

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[5] *Kyllo* also involved manmade detection technology, rather than a trained dog. There is no reasoned basis for treating animal-assisted enhancement of the human senses differently from mechanical or electronic sense-enhancement for purposes of Fourth Amendment analysis—except perhaps that animal assistance is likely to be, if anything, less accurate, more difficult to interpret, and potentially more alarming or intimidating. Those distinctions—implying, for example, a higher error rate and a correspondingly greater rate of unsuccessful, but clearly intrusive, physical searches following up on positive "sniffs"—would argue for greater, not lesser, Fourth Amendment scrutiny of animal-based sense-enhancement techniques.

addition to object being in plain view, its incriminating character must be "immediately apparent," and the officer "must also have a lawful right of access to the object itself"); *Minnesota* v. *Dickerson*, 508 U.S. 366, 378-379 (1993) (although there is a "plain feel" analogy to the plain-view doctrine, once officer who was frisking a suspect determined that an item was not a weapon, he could not continue to feel it to try to ascertain if it was contraband).

In this case, it might be one thing if the officer who stopped Caballes happened to have a drug dog along, and the dog alerted when the officer pulled alongside Caballes's car.[6] There is, however, nothing in the "plain view" doctrine that justifies immunizing from any Fourth Amendment scrutiny the actions of an officer who, hearing about a traffic stop made by a different officer, drives his dog to the scene for the specific purpose of sniffing the stopped car to check for drugs. *Cf. Arizona* v. *Hicks*, 480 U.S. 321 (1987) (plain-view doctrine did not authorize particular search or seizure where police presence was justified by unrelated exigent circumstances, but police developed probable cause to believe particular stereo items were stolen only after moving the equipment so that they could read its serial numbers).

3. Bringing a drug dog to the scene of a traffic stop to sniff the motorist's car also implicates Fourth Amendment interests because it is, or can easily be perceived as, intimidating, accusatory and humiliating. Such an investigatory sniff, unlike the sniff at issue in *Place*, occurs in the presence of the stopped citizen. Drug dogs are often large, and can easily be intimidating—especially when handled by police. At a minimum, bringing a dog onto the scene of an otherwise routine traffic stop amounts to an "unsettling show of authority." *Delaware* v. *Prouse*, 440 U.S. 648, 657 (1979).

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[6] Even in that situation, of course, the contents of Caballes's trunk would hardly have been in "plain view," or even within "plain smell." It is undisputed that officers, unaided by a dog or some enhancement technology, would have had no way of knowing what was in the trunk once Caballes refused to consent to a search.

Bringing a dog to an individual traffic stop also differs markedly from using a dog in an airport or train station, at a public event or building, or at some sort of checkpoint where all or many motorists are being stopped. "At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." *Michigan Dep't of St. Police* v. *Sitz*, 496 U.S. 444, 453 (1990) (quoting *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 558 (1976)). In contrast, bringing a dog to the scene of a traffic stop singles out the stopped individual, and suggests suspicion of drug activity, even if the police actually have no reasonable suspicion to support their action. This accusatory element of the encounter—which will typically play itself out in public, at the side of public road, in front of other motorists and passers-by—makes it much more embarrassing, alarming, and annoying.

Moreover, unlike checkpoints at which all passing motorists are stopped, allowing officers unfettered discretion in selecting motorists for individual, but suspicionless, drug sniffs carries with it a real risk that officers will make choices that reflect (or are perceived to reflect) denigrating stereotypes. For example, when the Orlando Sentinel studied the operations of the Criminal Patrol Unit of the Orange County Sheriff's Office—"a special patrol squad that uses routine traffic stops to search for narcotics"—the "records of more than 3,800 stops by the Unit" found that "black drivers represented 16.3% of the drivers stopped," but accounted for "more than 70% of the canine searches." Tracey Maclin, *Race and the Fourth Amendment*, 5I Vand. L. Rev. 333, 352 (1998).

4. It is true that drug sniffs are designed, and if properly conducted are generally likely, to reveal only the presence of contraband. *See Place*, 462 U.S. at 707; *see also Jacobsen*, 466 U.S. at 123. While that characteristic helps justify treating sniffs as less intrusive than many other investigative techniques, it does not warrant excluding them entirely from Fourth Amendment analysis.

To begin with, as *Kyllo* teaches, Fourth Amendment analysis must take account of the nature of the private space investigated, not just the nature of the information that police obtain. In that regard, as noted above, a home may lie at one end of the spectrum, checked luggage (or the already-revealed contents of a mailed package) near the other, and a locked car trunk somewhere in between. It is difficult to believe that, after *Kyllo*, the Court would approve the use of drug dogs, or technological devices, to snuffle around the outside of a home, even if the sniffs were intended only to disclose drug fumes, or other subtle evidence of the presence of contraband, escaping from the inside of the house. *Cf. Kyllo*, 533 U.S. at 37 ("In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes."). If that is so, however, then using the same technique on the also presumptively—although less—private area of a car trunk must also require at least some degree of justification.

Even assuming, however, that there is no cognizable privacy interest in contraband, a program of conducting dog sniffs will inevitably intrude on, or lead to intrusion on, legitimate privacy interests, unless the sniffs are so reliable that they never lead to physical searches of private spaces that turn out not to contain any drugs. *Place*'s discussion of dog sniffs—which was not, of course, focused on the present question of whether sniffs such as those at issue here implicate *any* privacy interest, warranting *any* degree of Fourth Amendment scrutiny—essentially assumed the accuracy of sniffs, at least if performed "by a well-trained . . . dog." 462 U.S. at 707. That assumption may have been adequate to support the Court's limited holding, but it was made without the benefit of evidence, fact-finding, briefing or argument. *See id.* at 719 (Brennan, J., concurring); *id.* at 723-724 (Blackmun, J., concurring). In the present context, the Court should take care to note that dog sniffs clearly do produce "false positives."

As experience since *Place* has amply shown, both drug dogs and their handlers make mistakes. *See, e.g.*, *Merrett* v.

Moore, 58 F.3d 1547, 1549 (11th Cir. 1995) (of 1450 vehicles sniffed at checkpoint, "[t]he dogs alerted to 28 vehicles; and, after a full search, only one person was arrested for possession of illegal narcotics"); *Doe* v. *Renfrow*, 631 F.2d 91, 95 (7th Cir. 1979) (Fairchild, C.J., dissenting from order denying reh'g) (of 2780 students randomly sniffed, dogs alerted to 50 students, but only 15 were found to possess contraband). Drug dogs sometimes alert merely to the smell of another dog. *Doe* v. *Renfrow*, 475 F. Supp. 1012, 1017 (N.D. Ind.), *aff'd in part*, 631 F.2d 91 (7th Cir. 1979).

They also frequently alert simply to currency that contains traces of narcotics, indicating only that the bills were at some point in proximity to the drugs. *See United States* v. *$506,231 in U.S. Currency*, 125 F.3d 442, 453 (7th Cir. 1997) ("Even the government admits that no one can place much stock in the results of dog sniffs because at least one-third of the currency in the United States is contaminated with cocaine."); *United States* v. *$639,558 in U.S. Currency*, 955 F.2d 712, 714 n.2 (D.C. Cir. 1992) (citing officer's testimony "that 10 percent of the alerts he had witnessed were to cash alone, a phenomenon we have encountered before"). Currency is *not* contraband. The use of a technique that is prone to trigger otherwise impermissible searches based solely on the presence of currency plainly invades legitimate privacy interests, and cannot be justified as some sort of surgically precise measure that by its nature can detect only illegal substances.[7]

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[7] Estimates indicate that a substantial proportion of U.S. currency—perhaps 70-90%—is contaminated with drug residue. *See United States* v. *$53,082.00 in U.S. Currency*, 985 F.2d 245, 250 n.5 (6th Cir. 1993) (" '[T]here is some indication that residue from narcotics contaminates as much as 96% of the currency currently in circulation.' ") (quoting *United States* v. *$80,760 in U.S. Currency*, 781 F. Supp. 462, 475 & n.32 (N.D. Tex. 1991)); *United States* v. *$5,000 in U.S. Currency*, 40 F.3d 846, 849-850 (6th Cir. 1994); *$639,558.00 in U.S. Currency*, 955 F.2d at 714 n.2 (referencing expert testimony that 90% of all cash in the United States contains sufficient quantities of cocaine to cause a trained dog to alert); *Courts Reject Drug-Tainted Evidence*, 79 A.B.A.J. 22 (Aug. 1993).

Handler error can also lead to false positives—and thus to unjustified physical searches. A handler may, for example, fail to distinguish a true alert from the dog's merely showing "interest" in an object. *See United States* v. *Guzman*, 75 F.3d 1090, 1096 (6th Cir. 1996). There are many other possible mistakes. Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 422-425 (1997).

Finally, and of particular importance here, the risk of false positives is heightened when sniffs are undertaken in the absence of any independent reasonable suspicion of drug possession—suspicion of the sort that was present, for example, in *Place*, but is absent here. "[D]og sniffs are least effective when they survey a random population"; and under such circumstances, "even a highly accurate dog will inevitably trigger numerous false alerts." Bird, 85 Ky. L.J. at 430. False alerts, in turn, will trigger plainly intrusive physical searches—here, of the cars of motorists who have been stopped by the police for ordinary traffic violations.

We need not contend that these risks of error, and of unwarranted physical intrusion into private areas that will turn out not to contain contraband at all, require treating every dog sniff as a " 'full-blown search' " (*Terry*, 392 U.S. at 19) that may not be undertaken without probable cause. We do contend, and the Court should hold, that a purely investigatory drug sniff of the particular sort at issue here is not "a Fourth Amendment non-event" (Pet. 5). Such a sniff implicates Fourth Amendment interests to a sufficient extent that it should not be authorized in the absence of some reasonable, articulable, individualized suspicion of wrongdoing that could be sharpened or dispelled by the sniff.

C. The Sniff Of Caballes's Trunk Was Unreasonable In The Absence Of A Reasonable, Articulable Suspicion Of Drug-Related Wrongdoing

It is no novelty for the Court to recognize a category of police conduct that burdens Fourth Amendment interests to an extent that requires some justification, but not so sub-

stantially as to require probable cause or the obtaining of a warrant. As *Terry* itself demonstrates, in some circumstances balancing "the nature and extent of the governmental interest involved" against "the nature and quality of the intrusion on individual rights" leads to an intermediate conclusion. 392 U.S. at 22, 24; *see also, e.g.*, *Edmond*, 531 U.S. at 42-43 ("[I]n determining whether individualized suspicion is required, we must consider the nature of the interests threatened and their connection to the particular law enforcement practices at issue.").

"In appropriate circumstances the Fourth Amendment allows a properly limited 'search' . . . on facts that do not constitute probable cause to . . . search for contraband or evidence of a crime." *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (discussing, *inter alia*, *Terry*); *see Florida* v. *Royer*, 460 U.S. 491, 505 n.10 (1983) (plurality opinion) (recognizing, before *Place*, that a dog sniff might be justified using the "articulable suspicion" standard). The test the Court has typically applied in such situations requires that officers "be able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." *Terry*, 392 U.S. at 21; *see Richards* v. *Wisconsin*, 520 U.S. 385, 394-395 (1997) (requiring reasonable articulable suspicion to justify no-knock entry). That is the standard applied here by the Illinois Supreme Court, and it is well adapted for the purpose.

As discussed above, the sniff of Caballes's trunk was perhaps a limited intrusion, but it did intrude to a cognizable extent on Caballes's legitimate privacy and liberty interests. On the other side of the balance, a sniff such as this one is not justified by any interest in, for example, the physical safety of the officer who made the traffic stop, or in public safety beyond the general interest in crime control. But the Court has expressly recognized that the general crime-control interest—even in the specific context of combatting drug trafficking on the Nation's highways—is no "justification for a regime of suspicionless" intrusions. *Edmond*, 531

U.S. at 41-43; *see id.* at 43 ("We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends."). *Id.* at 43. In such a situation, it is most reasonable to apply the intermediate standard of reasonable suspicion.[8]

That standard sets only a low bar for police, and will not interfere with any legitimate investigative activity. It could, of course, interfere with the sort of indiscriminate "dragnet" operation that this Court disapproved in *Edmond*—and that law enforcement authorities have evidently now sought to recreate in the guise of purportedly random, suspicionless investigation of motorists who have been stopped for non-drug-related traffic offenses. *See generally, e.g.*, Chiefs Br. 7 (describing "drug interdiction programs" used by "many police agencies" that "actively utilize traffic stops to *develop* reasonable suspicion of illegal drug activity" (emphasis added)). But nothing in the Constitution or this Court's cases requires the Court to countenance the use of roving drug patrols that amount to little more than an obvious end-run around *Edmond*'s prohibition on fixed drug-interdiction "checkpoints." *Cf. Whren* v. *United States*, 517 U.S. 806, 818 (1996) (noting argument that "the 'multitude of applicable traffic and equipment regulations' is so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop."). While the police may not need much in the way of individualized suspicion in order to

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[8] The degree of justification that the Fourth Amendment requires for particular police conduct frequently varies with the surrounding circumstances. The balance struck for this category of police activity—suspicionless drug sniffs of the cars of motorists who have been stopped for traffic offenses—might be different from the balance struck in other circumstances. For example, with respect to suspicionless sniffs to detect the presence of explosives in or near public buildings or assemblies (*cf.* Chiefs Br. 12-14), the general expectation of privacy would likely be lower, and in any event the degree of intrusion involved in a sniff might well be outweighed by the very different public interests involved.

justify an investigative drug sniff of a motorist's trunk, in this case they had no reasonable suspicion at all. Pet. App. 5a. An investigative dog sniff conducted without *any* individualized justification does not comport with the Fourth Amendment.

II. THE SNIFF OF CABALLES'S TRUNK EXCEEDED THE PERMISSIBLE SCOPE OF A STOP THAT WAS JUSTIFIED ONLY BY PROBABLE CAUSE RELATING TO A TRAFFIC VIOLATION

"Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning" of the Fourth Amendment. *Whren* v. *United States*, 517 U.S. 806, 809-810 (1996). In this case, it is undisputed that Trooper Gillette had probable cause to believe Caballes had been driving six miles per hour over the legal speed limit, and that he was accordingly entitled to stop Caballes, obtain his license and registration, and otherwise take appropriate action to investigate and address the traffic offense. Indeed, Gillette might have been authorized to place Caballes under full custodial arrest *for the traffic offense*, had he chosen to do so—which of course he did not.

Probable cause to detain Caballes for speeding did not, however, authorize Gillette's colleague, Trooper Graham, to bring his drug-detection dog to the scene of the stop and walk it around Caballes's car, for the sole and specific purpose of satisfying general investigative curiosity about whether Caballes might be carrying illegal drugs. That investigative measure bore no relation to the only probable offense that the government has ever invoked to justify the stop. It went well beyond the "limited purpose" (*Whren*, 517 U.S. at 809) of the seizure authorized by the Fourth Amendment.

A. The Fourth Amendment Limits The Scope, As Well As The Initiation, Of A Traffic Stop

As noted above, in *Terry* v. *Ohio* this Court articulated a general principle to guide Fourth Amendment analysis: courts are "to recognize that the Fourth Amendment

governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness." 392 U.S. at 17 n.15. *Terry* applied that analysis to the common stop-and-frisk category of police encounters, and it made clear that the appropriate inquiry is a dual one: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference [with a citizen's liberty or privacy] in the first place." *Id.* at 20.

The State and its amici argue that *Terry*'s focus on "the scope, as well as the initiation, of police action" (392 U.S. at 17) is out of place here, because in this case, unlike in *Terry*, the police's initial action in stopping Caballes was supported by probable cause to believe that he had violated a specific provision of the traffic laws. *See, e.g.*, State Br. 12-17. They contend that once police have probable cause to stop a citizen to address one offense, the Fourth Amendment imposes no "special" limit on the scope of the stop, short of outer boundaries such as the use of deadly force. *See, e.g.*, U.S. Br. 12-14; Ark. Br. 14-15. That position cannot be reconciled with *Terry*, with this Court's other cases, or with common sense.

1. *Terry* dealt with a specific "rubric" of police conduct—the investigative stop. 392 U.S. at 20. On consideration, it allowed initiation of limited stops on the basis of reasonable suspicion rather than probable cause, and limited "pat-down" searches designed only to assure officers' safety. The principles it applied, however, are general ones, drawn from, and applicable to, cases that involve other types of government conduct. *See, e.g., id.* at 20-21 (looking to "the notions which underlie both the warrant procedure and the requirement of probable cause" as sources for the approach of balancing governmental interests against the degree of intrusion entailed by particular police conduct). And those principles apply not only to the initiation of police contact, but also to its scope or nature:

> The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation.

Id. at 28-29. Contrary to the State's argument here, the *Terry* Court clearly was not speaking only of investigative stops when it observed, for example, 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.*" *Id.* at 29 (emphasis added). That principle applies equally to stops based on probable cause—or, for that matter, to searches conducted in execution of a warrant.[9]

To be sure, the reasonable scope of a seizure will be broader when it is based on probable cause, rather than simply on suspicion. To take only the most obvious example, a probable-cause based seizure of the person may constitutionally extend, without any further justification, all the way to full custodial arrest. *See Atwater* v. *City of Lago Vista*, 532 U.S. 318 (2001). This rather elementary observation is, indeed, the whole substance of the Court's passing observation in *Berkemer* v. *McCarty*, 468 U.S. 420, 439 n.2 (1984), that its discussion of the Fifth Amendment issue in that case was not meant to "suggest that a traffic stop

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[9] Naturally, if information lawfully acquired *after* a proper initial stop gives rise to reasonable suspicion (or probable cause) with respect to another offense, the police are entitled to expand the scope of the initial investigation to whatever extent is independently justified by that new information. *See, e.g.*, *United States* v. *Jones*, 269 F.3d 919, 926-927 (8th Cir. 2001) ("[I]f the response of the detainee and the circumstances give rise to suspicions unrelated to the traffic offense, an officer may broaden his inquiry and satisfy those suspicions."); *Medrano* v. *State*, 914 P.2d 804, 808 (Wyo. 1996) (although reasonable suspicion justifying initial stop concerned a robbery, additional reasonable suspicion developed during the course of the stop justified asking whether defendant was carrying drugs or weapons).

supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop." Of course, where there is probable cause to believe, rather than mere suspicion, that an individual has committed a particular offense, the police may go further in detaining the individual to investigate *that offense*. The State and its amici misread *Berkemer*, however, just as they misread *Terry*, when they argue 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.[10]

2. As *Terry* suggests, the importance of delimiting the *scope* of the government conduct that is recognized as constitutionally reasonable under particular circumstances is a constant theme in this Court's Fourth Amendment jurisprudence. This is true even in cases in which some police conduct is clearly justified by the existence of probable cause to believe that some particular offense has been committed.

In *Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977), for example, the Court considered a case that started just like this one: officers properly stopped a motorist to address an observed traffic violation—in *Mimms*, driving with an expired license plate. *Id.* at 107. The central question was whether the Fourth Amendment allowed the officers to direct the driver to get out of his car during the stop. *Id.* at 109. The Court began by noting that, "unlike [in] *Terry*," there was no question about the propriety of the initial stop. *Id.* It then balanced the important interest in officer safety against the "*de minimis*" incremental intrusion on the driver's interests, and held that the order to alight was

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[10] Accordingly, lower courts have properly refused to read *Berkemer* "to imply that the existence of probable cause to believe that only a minor traffic violation was committed is sufficient to sanction a substantially more intrusive stop than would be justified under *Terry*, at least where the police officer is not undertaking to make an arrest based on the traffic violation." *Mitchell* v. *United States*, 746 A.2d 877, 887 (D.C. 2000).

constitutionally permissible. *Id.* at 110-111. Also tellingly, the Court then went on to explain that a second question—whether the officers were authorized to frisk the driver after noticing a bulge in his jacket—was "controlled by *Terry*," and that the situation clearly warranted a limited *Terry* pat-down. *Id.* at 111-112.

Although the Court's opinion in *Mimms* is, as the United States remarks, "brief" (U.S. Br. 16), its analytical implications are unmistakable. Indeed, the opinion could have been shorter still if the Court had taken the view urged by the State and its amici here—that once the police have probable cause to stop a motorist for any infraction, there is no need for any "special inquiry" into anything else they may do during the stop, short of some "exceptional" extra intrusion such as the use of deadly force. U.S. Br. 13; *see* State Br. 14-15; Ark. Br. 11-12. Instead, the Court viewed even a minor incremental expansion of the scope of the initial stop as requiring its own Fourth Amendment justification. *See also Maryland* v. *Wilson*, 519 U.S. 408, 411-414 (1997) (reaffirming *Mimms*'s approach of balancing interests, and treating existence or absence of probable cause with respect to a particular individual as only one factor in the analysis).

Michigan v. *Long*, 463 U.S. 1032 (1983), would also have been a much easier case if the Court subscribed to the State's theory that probable cause to stop a car for one offense eliminates the need for much additional Fourth Amendment inquiry about the scope of the stop. There, officers who stopped a car for "traveling erratically and at excessive speed" later conducted a protective search of the car's interior. *Id.* at 1035-1036. Applying the same underlying balancing principles as in *Terry*, the Court held that the limited protective search was reasonable. *Id.* at 1045-1052. Significantly, the Court first explained that although the officers had probable cause to arrest the driver for speeding or for driving while intoxicated, they did not act on that basis, and the State had not presented the question whether "if probable cause to arrest exists, but the officers do not actually effect the arrest, . . . the police may never-

theless conduct a search as broad as those authorized" in connection with a full custodial arrest. *Id.* at 1035 n.1.

That question was presented in *Knowles* v. *Iowa*, 525 U.S. 113 (1998), and the Court unanimously answered "no." Knowles, like Caballes, was stopped for speeding. *Id.* at 114. As in this case, the stopping officer "issued [Knowles] a citation rather than arresting him." *Id.* Nonetheless, he also searched the car, finding marijuana. *Id.* The Court held that in the absence of an actual custodial arrest, that search went beyond the permissible scope of the speeding stop—even though the probable cause justifying the stop would also have justified a full arrest. Balancing, as usual, the incremental intrusion on the driver's interests against the government's asserted need for that intrusion, the Court reasoned that where no arrest was made, a search of the car could not be justified either by a need to disarm the driver or by a need to discover or preserve evidence. *Id.* at 116-118.

As to the need to disarm, the Court noted that a traffic stop "is more analogous to a so-called '*Terry* stop' . . . than to a formal arrest." 525 U.S. at 117 (quoting *Berkemer*, 468 U.S. at 439 (internal quotation marks omitted)). Concern for officer safety during such a stop, the Court explained, can justify some intrusions, but not others. As to the need to discover and preserve evidence, the Court rejected the government's proffered justifications with an observation that is directly relevant here:

> Once Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute *that offense* had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car.

Id. at 118 (emphasis added).

Similarly, the Court rejected the government's argument that a search was justified because a driver stopped for speeding might attempt to "destroy evidence of another, as yet undetected crime." 525 U.S. at 118. Accordingly,

Knowles squarely rejects a central proposition of the State's argument here: that once the police have probable cause to stop a driver for speeding, the Fourth Amendment allows them to expand the *scope* of their investigation based on nothing more than "the possibility that an officer [will] stumble onto evidence wholly unrelated to the speeding offense." *Id.*

One could multiply examples. *See, e.g., Wilson* v. *Layne*, 526 U.S. 603, 611 (1999) (police could not bring reporters into home to witness execution of arrest warrant; even "police actions in execution of a warrant [based on probable cause must] be related to the objectives of the authorized intrusion"). The essential point, however, is that the Court has always paid careful attention not only to what circumstances justify police officers in commencing non-consensual citizen encounters, but also to the metes and bounds that the Fourth Amendment continues to impose on such encounters even if they are legitimately begun. *See, e.g., Edmond*, 531 U.S. at 47 n.2 (reaffirming permissibility of certain suspicionless "checkpoint" stops, but reserving "the question whether police may expand the scope of a license or sobriety checkpoint seizure in order to detect the presence of drugs in a stopped car"); *Hiibel* v. *Sixth Judicial Dist. Court*, 124 S. Ct. 2451 (2004) (permissible scope of investigative stop extends to requiring stopped individual to identify himself); *Muehler* v. *Mena*, No. 03-1423 (cert. granted June 14, 2004) (presenting question whether officers exceeded permissible scope of detention in connection with execution of search warrant by asking detained individual questions about other criminal activity); *cf. Thornton* v. *United States*, 124 S. Ct. 2127, 2137 (2004) (Scalia, J., concurring in the judgment) (proposing reformulation of rationale for permitting warrantless searches of cars incident to the arrest of the driver, and noting that such searches should be "limit[ed] ... to cases where it is reasonable to believe evidence *relevant to the crime of arrest* might be found in the vehicle" (emphasis added)). The same sort of inquiry is warranted in this case.

3. In arguing against any serious scope inquiry, the State and its amici rely principally on this Court's decisions in *Berkemer* v. *McCarty*, *Atwater* v. *City of Lago Vista*, and *Whren* v. *United States*. None of those cases supports the State's position here.

In *Berkemer*, the Court held that "persons temporarily detained pursuant to [traffic] stops are not 'in custody' for the purposes of *Miranda*." 468 U.S. at 440. That holding rests on the Court's conclusion that in terms of interactions between police and citizen, traffic stops are usually more akin to *Terry* stops than to custodial arrests. *Id.* at 437-439. We have already discussed why the Court's passing observation that it did not mean this comparison to "suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop" (*id.* at 439 n.29), while perfectly sensible, says nothing about whether the permissible scope of a traffic stop under the Fourth Amendment extends to the active investigation of (or, rather, active prospecting for) *unrelated offenses*. In addition, we note that in characterizing traffic stops as generally non-coercive in atmosphere, and therefore more like *Terry* stops than like formal arrests, *Berkemer* specifically relied on the *limited nature* of *Terry* stops, which it noted "must be 'reasonably related in scope to the justification for their initiation.' " 468 U.S. at 439-440 (quoting *Terry*, 392 U.S. at 29). That chain of reasoning would cease to be valid if, as the State advocates here, a routine traffic stop automatically authorized the police to deploy additional, targeted investigative measures, such as the dog sniff at issue here, that most citizens would find intrusive and offensive, and that are unrelated to any traffic violation, but are designed solely to fish for evidence of other crimes.[11]

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[11] Not surprisingly, those circuits that have concluded that traffic stops based on probable cause are limited by the dictates of *Terry* have focused on *Berkemer*'s analogy to *Terry*. *See United States* v. *Shabazz*, 993 F.2d 431, 434-435 (5th Cir. 1993); *United States* v. *Walker*, 933 F.2d

Atwater held that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." 532 U.S. at 354. Caballes has never argued that Trooper Gillette could not have arrested him for speeding. Gillette did not, however, do so, and *Knowles* squarely holds that the permissible scope of the police's conduct in the stop that actually took place is not determined by what might have been permissible if Gillette had instead decided to make a full custodial arrest.

In *Whren*, the police had probable cause to stop a car on the basis of traffic infractions. 517 U.S. at 808. When they approached the car, they "immediately" saw drugs in plain view. *Id.* at 809. This Court rejected an argument that the courts must try to evaluate, with respect to every traffic stop, whether "the [stopping] officer's conduct deviated

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812, 813, 815 (10th Cir. 1991); *but see United States* v. *Childs*, 277 F.3d 947, 953-954 (7th Cir. 2002) (en banc) (acknowledging some scope limitations, but distinguishing traffic stops based on probable cause from *Terry* stops); *United States* v. *$404,905.00 in U.S. Currency*, 182 F.3d 643, 647-648 (8th Cir. 1999) (similar). Moreover, it is worth noting that although the circuits that have considered the proper scope of traffic stops based on probable cause disagree on the exact scope of such stops and consequently the specific techniques that are permitted during them, they all agree—contrary to the position advanced by the State and its amici—that traffic stops based on probable cause do have limits that require a specific inquiry into whether the investigative technique employed was reasonable under the circumstances. *See United States* v. *Brigham*, No. 02-40719, 2004 WL 1854552, at *3-5 (5th Cir. Aug. 19, 2004) (noting that traffic stops based on probable cause are treated like *Terry* stops, but concluding that unrelated questions are permitted); *Childs*, 277 F.3d at 952-954 (noting that nature and duration of traffic stop based on probable cause must be reasonable, but holding that asking unrelated questions is permissible); *United States* v. *Holt*, 264 F.3d 1215, 1221-1226, 1228-1230 (10th Cir. 2001) (en banc) (noting that traffic stops based on probable cause are limited in both scope and duration and applying balancing test to determine appropriateness of questioning unrelated to the purpose of the stop); *$404,905.00 in U.S. Currency*, 182 F.3d at 648-649 (noting that traffic stops based on probable cause require balancing of interests, but holding that dog sniff that only momentarily extends stop is permissible).

materially from usual police practices, so that a reasonable officer in the same circumstances would not have made the stop for the reasons given." *Id.* at 814. It also declined an invitation to use "the balancing inherent in any Fourth Amendment inquiry" to hold that a plainclothes officer in an unmarked car could not reasonably investigate minor traffic infractions. *Id.* at 816-817.

Neither of those holdings has much to do with the question presented here, which is what scope of investigation the Fourth Amendment permits officers to undertake once they have made a stop that was concededly justified by, but *only* by, probable cause relating to a traffic infraction. In particular, *Whren*'s observation that the result of a Fourth Amendment balancing analysis is generally "not in doubt where the search or seizure is based upon probable cause" (517 U.S. at 817), while no doubt accurate in context, does not speak to how the balance should be struck where probable cause for one offense justifies the initial seizure, but what the government seeks to justify is the use of an investigative technique that could not possibly reveal evidence of *that* offense. *Cf. Knowles*, 525 U.S. at 118.

4. Finally, as a policy matter, there is little to recommend the State's suggestion that the Court dispense with any substantial limitation on what sort of investigation government agents may undertake once they have probable cause to believe that a motorist has committed one traffic offense. To be sure, that probable cause authorizes some degree of warrantless seizure. But to keep that seizure within constitutional bounds, it should be limited by some "criterion of reason." *Chimel* v. *California*, 395 U.S. 752, 765 (1969) (quoting *United States* v. *Rabinowitz*, 339 U.S. 56, 83 (1950) (Frankfurter, J., dissenting)). The Illinois Supreme Court, drawing on *Terry*, imposed such a reasonable (and fully workable) limit here by demanding that the dog sniff of Caballes's car—an active, targeted, investigative measure designed to see if a crime was being committed—be either reasonably related in scope to the circumstances that originally justified the traffic stop, or supported by some inde-

pendent reasonable articulable suspicion of wrongdoing that the sniff could either strengthen or dispel.

The State and its amici, by contrast, offer *no* standard to limit the scope of the investigation that may be undertaken during any traffic stop. *See* State Br. 16 ("[F]act-specific balancing is inappropriate when determining the validity of routine traffic stops supported by probable cause *and of police conduct occurring at such stops*." (emphasis added)); *see also* Ark. Br. 13 ("Consistent with any other seizure supported by probable cause, a traffic stop meets the general rule of reasonableness without any additional balancing of the interests."). That approach, which is justified only by "the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime" unrelated to the traffic offense that led to an initial stop, "would do little to prevent . . . intrusions" such as the dog sniff at issue here "from becoming a routine part of American life." *Edmond*, 531 U.S. at 42.

Indeed, it is particularly instructive to note the open enthusiasm with which the amici police chiefs embrace what they perceive as *Whren*'s approval of "pretextual traffic stops," which they say "many police agencies . . . actively utilize . . . to develop reasonable suspicion of illegal drug activity." Chiefs Br. 7. It is certainly questionable whether this Court thought the point of *Whren* was principally to "permit law enforcement to employ pretextual stops for the purpose of investigating drug activity." *Id.* at 12. Nevertheless, it is clear that there is a significant Fourth Amendment distinction between making a valid traffic stop, walking up to the stopped car, and seeing drugs in plain view, as in *Whren*, and making a valid traffic stop and then having a colleague bring a drug dog to sniff the car, as in this case (let alone dawdling over the issuance of a warning ticket in order to give the colleague time to arrive, as one could certainly

also conclude happened here).[12] That distinction makes all the difference between viewing *Whren*, for example, as confining judicial review to whether objective circumstances justified particular police conduct, and viewing it as an open invitation to police abuse, particularly in intentionally evading the limits otherwise recognized by *Edmond* on suspicionless drug investigations. *See Atwater*, 532 U.S. at 372 (O'Connor, J., dissenting) ("An officer's subjective motivations for making a traffic stop are not relevant considerations in determining the reasonableness of the stop. But it is precisely because these motivations are beyond our purview that we must vigilantly ensure that officers' poststop actions—which are properly within our reach—comport with the Fourth Amendment's guarantee of reasonableness.") (citation to *Whren* omitted); *Maryland* v. *Wilson*, 519 U.S. at 423 (Kennedy, J., dissenting) ("The practical effect of our holding in *Whren*, of course, is to allow the police to stop vehicles in almost countless circumstances. When *Whren* is coupled with today's holding, the Court puts tens of millions of passengers at risk of arbitrary control by the police.").

B. The Dog Sniff Here Exceeded The Permissible Scope Of The Traffic Stop

Applying these principles, the dog sniff of Caballes's car exceeded the permissible scope of a stop that was justified only by probable cause to believe that he had exceeded the speed limit.

The State proffers no justification for the sniff that bears any relation to the speeding violation. Nor does it claim that the sniff was justified by the interest in officer

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[12] In the courts below, Caballes contended that the events in this case also improperly extended the *duration* of the traffic stop to permit the second officer to arrive and conduct the dog sniff. The Illinois Supreme Court did not specifically address that contention. If this Court concludes that the dog sniff here was not beyond the permissible scope of the stop without regard to duration, it should remand the case for further assessment of the duration issue.

safety, or offer any public-safety rationale beyond the public's general interest in crime control. While there is no doubt a substantial public interest in combatting drug trafficking, and the use of motor vehicles in that trafficking no doubt poses special challenges, neither "the gravity of the threat [from drug trafficking] alone" nor "the difficulty of examining each passing car" is enough "to justify a regime of suspicionless searches and seizures." *Edmond*, 531 U.S. at 42-43. And here—unlike, for instance, in *Whren*—the routine conduct of the legitimate traffic stop did *not* give rise to any new, independent suspicion of drug activity that could in turn justify undertaking a further, drug-related investigation. *See* Pet. App. 5a. Accordingly, there is no cognizable government interest to support the suspicionless drug sniff in this case.

On Caballes's side of the balance, by contrast, there is, to begin with, the presumption that individuals are free to go about their business unless government officials have some specific justification for interfering with that freedom. Caballes, of course, was legitimately subject to detention *for the purpose of addressing his speeding offense*. As discussed above, however, while the incremental intrusion on a detained motorist's privacy and liberty interests caused by an investigative drug sniff may be relatively small, it is real; and here, there was *no* legitimate governmental interest to counterbalance it. As to the drug sniff, Caballes stood in the same relation to the police as any other citizen on the highway. The Fourth Amendment does not permit the police to deploy a drug dog to sniff the trunk of any car during the course of a routine traffic stop, just to see what such an investigation might turn up.

CONCLUSION

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

Respectfully submitted.

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