S287164

ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Northern California

November 7, 2024

Honorable Chief Justice Patricia Guerrero
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Sellers v. Superior Court of Sacramento County*, No. S287164
Amicus Letter in Support of Petition for Review

Dear Chief Justice Patricia Guerrero and Associate Justices of the Court:

The American Civil Liberties Union Foundation of Northern California ("ACLU NorCal") respectfully submits this letter in support of the petition for review in *Sellers v. Superior Court of Sacramento County*, No. S287164. In this case, Davonyae Sellers challenged the trial court's denial of his motion to suppress the fruits of a warrantless search of his vehicle. The trial court found that police officers had probable cause for the search based on 0.36 grams of marijuana debris sprinkled in the backseat of the car—an amount akin to one-third the size of a grape. The Court of Appeal upheld this search, holding that the marijuana debris was evidence of a violation of Proposition 64's "open container" law, Health and Safety Code section 11362.3, subdivision (a)(4). As explained below, the petition merits this Court's review for at least three reasons.

First, the decision below deepens a conflict in the courts of appeal over whether, after Proposition 64, a legal amount of marijuana is sufficient to establish probable cause to search a car under the Fourth Amendment. Other courts of appeal have squarely held that remnants of marijuana debris are not a valid basis for probable cause. (See *People v. Hall* (2020) 57 Cal.App.5th 946 (*Hall*).) This Court's review is necessary to resolve this important and recurring conflict.

Second, the Court of Appeal's holding was wrong on the merits. As the Attorney General conceded at oral argument, scattered marijuana on a car's floorboards does *not* violate the open container law. That's because, as Justice Duarte's dissent explained, a person cannot violate section 11362.3(a)(4) without the presence of a "container." The majority erroneously rejected that plain-text interpretation based primarily on policy concerns that it would produce an "absurd result." Additionally,

there is no evidence that the marijuana scattered on the rear floorboards was "usable," or otherwise meant for consumption by anyone in the car.

Third, absent this Court's review, the decision will expand the disproportionate enforcement of cannabis laws against Black and Latine people. Even now, vehicle searches based on the possession of cannabis—which, as here, typically follow pretextual traffic stops—disproportionately burden Black drivers like Mr. Sellers. Allowing officers to perform warrantless vehicle searches based merely on observing bits of marijuana debris on the floor of a car will only deepen the racial and ethnic disparities in policing in this state. ACLU NorCal therefore urges this Court to grant review and reverse.

I. Interests of *amicus curiae.*

ACLU NorCal is an affiliate of the national ACLU, a nonpartisan, nonprofit organization with nearly two million members dedicated to defending the guarantees of individual liberty secured by the state and federal Constitutions. ACLU NorCal has long engaged in litigation and advocacy to protect the constitutional and civil rights of the criminally accused and to end the disproportionate impact of drug policy laws and police stops and searches on communities of color.

II. This Court must resolve the conflict over whether loose marijuana in the car violates Proposition 64's open container law and thus establishes probable cause to search a vehicle.

Voters passed Proposition 64 in 2016 to legalize the possession of cannabis in California. (Health & Saf. Code, § 11357, et seq.)[1] Proposition 64 expressly permits adults to "possess" and "transport" up to 28.5 grams of cannabis. (§ 11362.1, subd. (a).) It also set out several prohibited categories of conduct in section 11362.3, including a prohibition on "[p]ossess[ing] an open container or open package of cannabis or cannabis products while driving, operating, or riding in the passenger seat or compartment of a motor vehicle." (§ 11362.3, subd. (a)(4).)

Since Proposition 64 was enacted, several courts of appeal have limited the circumstances under which loose marijuana debris can serve as the basis for probable cause for a search. To establish probable cause for a warrantless vehicle search, the officer must "belie[ve] [that] the vehicle contains contraband or evidence of a crime." (*Hall*, *supra*, 57 Cal.App.5th at p. 951.) Before this case, the courts of appeal agreed that, under Proposition 64, something more than the mere presence of marijuana was needed to establish probable cause for a vehicle search. (*Blakes v. Superior Court*

[1] All statutory references are to the California Health and Safety Code.

(2021) 72 Cal.App.5th 904, 912; *People v. McGee* (2020) 53 Cal.App.5th 796; *People v. Johnson* (2020) 50 Cal.App.5th 620; *In re Randy C.* (2024) 101 Cal.App.5th 933.) That is consistent with Proposition 64's command that lawfully possessed cannabis is "not contraband," and that "no conduct deemed lawful by [Proposition 64] shall constitute the basis for detention, search, or arrest." (§ 11362.1, subd. (c).)

In *Hall,* for example, the First District held that trace amounts of loose marijuana found in a car were not enough to establish probable cause to search the car. There, an officer pulled Mr. Hall over for a vehicle-equipment violation, and then observed in the car "a clear plastic baggie" of what appeared to be marijuana and bits of marijuana leaves in his lap. (*Hall*, *supra*, 57 Cal.App.5th at p. 949.) The court found that the marijuana in the "clear plastic baggie" was a lawfully possessed amount and so did not establish probable cause. (*Id.* at p. 954.) Additionally, the court held that the loose marijuana on the center console and in Mr. Hall's lap did not establish probable cause because "remnants" of marijuana did not constitute either an "open container or open package of cannabis or cannabis products" or "loose cannabis flower not in a container." (*Id.* at p. 958.) Furthermore, given that during the traffic stop, the officer did not smell marijuana, or suspect that Hall was driving under the influence, this loose marijuana by itself was not enough to establish probable cause. (*Ibid.*)

The decision below directly conflicts with *Hall*. In this case, the Third District held that the statute should be read as prohibiting marijuana "that is not in a closed package or container," even though this is not the language of the statute. This decision contradicts that of several other courts of appeal, who have found that there must explicitly be an "open container" for there to be probable cause to search a vehicle for marijuana. (See, e.g., *In re Randy C., supra,* 101 Cal.App.5th at p. 940; *McGee, supra,* 53 Cal.App.5th at p. 803.) The facts in *Hall* are more extreme than in this case, where the *only* marijuana present was the loose leaves on the rear floorboard of the car that, when swept together, amounted to approximately 0.36 grams. But the Third District held that this loose marijuana was enough to establish probable cause simply because it was not in a closed container.

Instead of grappling with the conflict it created, the decision below distinguished *Hall* on its facts, contending that, "in that case, there was no evidence that the fragments of loose marijuana observed in the driver's lap constituted a usable quantity, as opposed to useless trace amounts." (*Sellers v. Superior Court of Sacramento County*, (2024) 104 Cal.App.5th 468, 479.)[2] But nothing about *Hall*'s

[2] Although not relevant to the legal issue presented here, there is strong reason to doubt the officer's testimony that the one-third gram of "scrapings" of marijuana found scattered on the back floorboards—which were "never analyzed" and could have

holding rested on this fact; instead, the court there emphasized that the marijuana "remnants" were not in "an open container or open package of cannabis." (*Hall, supra,* 57 Cal.App.5th at p. 958). The decision below therefore deepens a split in the lower courts that has serious consequences for the enforcement of cannabis laws throughout the state. This Court's intervention is needed to bring uniformity to the law.

III. The Third Appellate District impermissibly broadened section 11362.3's scope to include loose, minimal amounts of marijuana debris.

The open container law prohibits "possess[ing] an open container or open package of cannabis" while driving or riding in a vehicle. (§ 11362.3, subd. (a).) The statute's plain text makes clear that this law can't be violated absent a "container." Nevertheless, in concluding that the police had probable cause to search Mr. Sellers's car, the majority below impermissibly interpreted section 11362.3 to prohibit a person from possessing marijuana "that is not in a closed package or container," instead of "in a[n open] container." The majority held that a literal interpretation of the statute would undermine the law's purpose, which is to ensure that marijuana is inaccessible while driving or riding as a passenger in a vehicle. (*Sellers*, *supra,* 104 Cal.App.5th at p. 478.) As both Justice Duarte's dissent and petitioner explain, this construction of the statute cannot survive scrutiny. (See *Sellers, supra,* 104 Cal.App.5th at p. 480 (dis. opn. at Duarte, J.) [observing that "[w]ithout *any* evidence of a container or package, there can be no *open* container or package" (emphasis original)]; see also Petn. at pp. 13-19.)

To start, a court cannot rewrite a statute's text based on its view of what best advances the legislature's purpose in enacting that law. (See *In re D.B.* (2014) 58 Cal.4th 941, 948 ["When statutory language is unambiguous, [the Court] must follow its plain meaning 'whatever may be thought of the wisdom, expediency, or policy of the act, even if it appears probable that a different object was in the mind of the legislature'"]. Even so, however, the circumstances of the case indicate that this marijuana was *not* accessible for the driver or passenger. The marijuana leaves were scattered across the car's rear floorboards and found under the passenger seat, areas of the car that are not accessible from the front seat, and without any evidence that the marijuana could have been scraped together to use it while driving, operating, or riding in a car. (See *Sellers, supra,* 104 Cal.App.5th at p. 480 (dis. opn. of Duarte, J.).) The police found an empty rolling tray in the back seat, but there were no rolling papers or paraphernalia to actually ingest the marijuana. (*Ibid.*) Furthermore, as in

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been mixed with "other materials"—qualifies as a "usable" amount. (*Sellers*, *supra*, 104 Cal.App.5th at p. 481 (dis. opn. of Duarte, J.) [analogizing amount to a "tablespoon of beer"].)

Hall, there was no evidence that the car occupants were under the influence of marijuana or even aware of the small amount of marijuana scattered on the rear floorboards. (*Id.* at p. 482.)

Additionally, the amount of marijuana, 0.36 grams, was approximately one-eightieth of the amount that would be legal if it were in a sealed baggie on the front seat. As the dissent said, "[t]o criminalize the tiny amount of scattered marijuana on the rear floorboards but legalize the closed baggie in the front seat containing 80 times that amount [would be far] more absurd" than the plain language interpretation of the statute. (*Id.* at p. 481.) Proposition 64 sought to decriminalize possession and use of small amounts of marijuana by adults, and to prevent unjust searches based solely on legal possession. (Petn. at p. 7.) Therefore, the majority's widening of section 11362.3 creates an unprincipled distinction between marijuana in a container and loose marijuana, opening the doors to searches based solely on legal possession and undermining the very purpose of Proposition 64.

Thus, for the reasons set out above and in the petition, we urge this Court to clarify that section 11362.3 should be read to mean exactly what it says: to violate the open container law, there must actually be an open "container."

IV. The Court of Appeal's holding will disproportionately harm Black and Latine people.

By holding that a legal amount of marijuana debris can establish probable cause for a vehicle search, the decision below will expand the disproportionate impact of both cannabis laws and pretextual traffic stops on communities of color, particularly Black and Latine people.

For decades, police departments have disproportionately targeted Black and Latine individuals for investigation and enforcement of cannabis-related conduct. Despite the fact that marijuana is legalized in many states, Black people are nearly four times more likely to be arrested for marijuana possession than white people, despite comparable marijuana usage rates.[3] Additionally, according to a 2023 report by the United States Sentencing Commission, over 70 percent of federal offenders sentenced for marijuana possession in the past five years were Hispanic, although Hispanic people only account for 19 percent of all Americans.[4]

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[3] ACLU, *The War on Marijuana in Black and White* (2013) p. 4 < https://assets.aclu.org/live/uploads/publications/1114413-mj-report-rfs-rel1.pdf > [as of Nov. 7, 2024].

[4] United States Sentencing Commission, *Weighing the Impact of Simple Possession of Marijuana: Trends and Sentencing in the Federal System* (Jan. 2023) p. 2

Furthermore, many of the racial disparities in cannabis-related enforcement by police stem from systemic disparities in police stops, including pretextual traffic stops. Studies show that police stop and investigate Black people more than white people, despite evidence indicating that white drivers commit driving violations at equal or higher rates than other racial groups.[5] Black Californians are more than twice as likely to be searched as white Californians, even though searches of Black people are less likely to yield to contraband or evidence than searches of white people.[6] Furthermore, Black drivers in California make up about a third of traffic stops in nighttime stops around midnight, also roughly twice the share of white drivers.[7]

Racialized traffic stops are particularly problematic in Sacramento County. ACLU NorCal and Catalyst California recently released a report demonstrating that Sacramento County Sheriff's Office (SCSO) deputies disproportionately stop Black people for traffic violations, reasonable suspicion, and "consensual searches." In 2019, for example, SCSO stopped Black people for vehicle equipment violations and non-moving violations at a rate of five times higher than for white people.[8] Additionally, approximately three-fourths of the time that the SCSO stopped people, the stop resulted in no warning or action. [9] This suggests that they are pretextual stops, which occur when an officer stops a person ostensibly for a traffic violation or minor

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<https://www.ussc.gov/sites/default/files/20230509_Marijuana-Possession.pdf> [as of Nov. 5, 2024]; Pew Research Center, *A Brief Statistical Portrait of U.S. Hispanics* (2022) p. 16 <https://www.pewresearch.org/wp-content/uploads/sites/20/2022/06/PS_2022.06.14_hispanic-americans-science_REPORT.pdf> [as of Nov. 5, 2024].

[5] See, e.g., Epp et al., *Pulled Over: How Police Stops Define Race and Citizenship* (2014); Harcourt & Meares, *Randomization and the Fourth Amendment* (2011) 78 U. Chi. L.Rev. 809, 854–59 (2011) [citing numerous studies providing evidence of racial profiling].

[6] Public Policy Institute of California, *Racial Disparities in Law Enforcement Stops* (2021) p. 3 < https://www.ppic.org/publication/racial-disparities-in-law-enforcement-stops/> [as of Nov. 5, 2024].

[7] Public Policy Institute of California, *Racial Disparities in Traffic Stops* (2022) p. 3 <https://www.ppic.org/publication/racial-disparities-in-traffic-stops/> [as of Nov. 5, 2024].

[8] ACLU of Northern California & Catalyst California, *Reimagining Community Safety: Sacramento County* ("Reimagining Safety") (2023) p. 7 <https://www.aclunc.org/sites/default/files/FINAL%20Sacramento%20RIPA_Full%20Report_Digital.pdf> [as of Nov. 5, 2024].

[9] *Ibid.*

infraction, like the stop of Mr. Sellers, but with the actual intent of using the stop to investigate an officer's hunch, which can be influenced by an officer's bias.[10]

Pretextual traffic stops increase the likelihood of racial profiling because police rely largely on intuition to decide which cars to pull over and investigate. Evidence shows that officers use this "intuition" to target drivers of color more than white drivers.[11] Studies analyzing national data show that Black people are twice as likely as white people to be subjected to a pretextual traffic stop.[12] Once stopped, Black and Latine drivers disproportionately are cited for minor infractions, such as equipment violations. These traffic stops cause real trauma and can even lead to horrific police killings.[13] In 2021, for example, studies found that over a five-year period, 1,500 people were killed by police officers during vehicle stops, 400 of whom had no weapon and were not being pursued for a violent crime.[14] Black drivers were overrepresented in those killed.[15]

The facts of this case illustrate these concerns. The police stopped Mr. Sellers, a Black man, for a line-limit violation—an extremely minor traffic infraction. "[T]he record reveals no arguably suspicious circumstances related to the car or its occupants at the time of the stop." (*Sellers, supra,* 104 Cal.App.5th at p. 482 (dis. opn. of Duarte, J..).) "There was no suspected drug transaction," "no smell of marijuana or any other suspicious smell," and "no evidence of current drug consumption and no evidence the car's occupants were under the influence." (*Ibid.*) And "[t]here were no evasive answers to questions or attempts to avoid contact with the officers"; rather, "the driver politely declined [the] officer's request for consent to search." (*Id.* at pp. 480–482.) Nevertheless, after seeing through the car window a tiny amount of marijuana on the back floorboards, the officers conducted a warrantless search of the entire car. That search resulted in Mr. Sellers being charged not with anything related to the marijuana, but with unlawful firearms possession.

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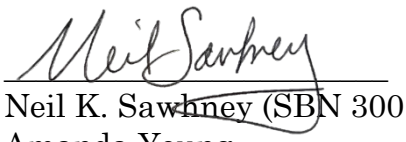
[10] *Id.* at p. 13.
[11] *E.g.*, Webb, *Driving While Black: Tracking Unspoken Law-Enforcement Racism* (Apr. 1, 1999) Esquire, at p. 118, 122-23 [reporting on officer intuition in deciding who to stop and describing one officer as being of the "belie[f] he can spot drug traffickers from the general cut of their jib"].
[12] *See, e.g.*, Epp, *supra* 5.
[13] *Reimagining Safety*, *supra* 8 at p. 17.
[14] Kirkpatrick et al., *Why Many Police Traffic Stops Turn Deadly* (Nov. 30, 2021) The New York Times <https://www.nytimes.com/2021/10/31/us/police-traffic-stops-killings.html?smid=nytcore-ios-share&referringSource=articleShare> [as of Nov. 5, 2024].
[15] *Id.*

If the decision below is upheld, this form of pretextual policing will only become more prevalent in the state—with dire consequences for drivers and passengers of color. This Court should grant review to settle the conflict amongst the courts of appeal regarding whether a legal amount of marijuana debris can establish probable cause for a vehicle search. And it should hold that marijuana debris in the backseat of a car does not violate the open container law, and thus cannot be the basis for a warrantless vehicle search.

Respectfully submitted,



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PROOF OF SERVICE

I, Sara Cooksey, declare that I am over the age of eighteen and not a party to the above action. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is scooksey@aclunc.org. On November 7, 2024, I served the attached:

Amicus Letter in Support of Petition for Review
in *Sellers v. Superior Court of Sacramento County, No. S287164*

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused to be transmitted to the following case participants a true electronic copy of the document via this Court's TrueFiling system:

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BY MAIL: I mailed a copy of the document identified above to the following case participants by depositing the sealed envelope with the U.S. Postal Service, with the postage fully prepaid:

Clerk of the Superior Court Sacramento County
For: Hon. Deborah D. Lobre
720 9th Street
Sacramento, CA 95814
Trial Court, Case No. 21FE018661
Respondent

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 7, 2024, in Fresno, CA.

Sara Cooksey

Sara Cooksey, Declarant