No. 11A22 DISTRICT FIVE

SUPREME COURT OF NORTH CAROLINA

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STATE OF NORTH CAROLINA	)	
	)	
v.	)	From New Hanover County
	)	No. COA21-144
JAQUALYN ROBINSON	)	

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BRIEF OF *AMICUS CURIAE* EMANCIPATE NC

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

EMANCIPATE NC[1] is a Black-led community organization dedicated to dismantling structural racism and mass incarceration in North Carolina through education, narrative shift, and litigation. EMANCIPATE NC supports North Carolina's people as they free themselves from an inequitable and racially unjust criminal legal system.

EMANCIPATE NC's programs include the JUSTICE LEAGUE, a team of individuals ages 16-59, directly impacted by the carceral state, whether through personal experiences being stopped, arrested, and/or incarcerated, or through the vicarious impact of these experiences by family, neighbors, and friends. The JUSTICE LEAGUE hails from twelve North Carolina counties and is being actively equipped with skills and leadership development tools to create campaigns to transform the way North Carolina envisions "public safety" and "justice."

The experience of being subjected to search and seizure based on the mere odor of cannabis is an experience shared by many Black and

[1] Pursuant to Rule 28(i)(2), the undersigned certifies that this *amicus* Brief was written exclusively by Elizabeth Simpson, with research assistance from Isabella Lane, an undergraduate intern from the University of North Carolina - Chapel Hill, Class of 2025. No entity other than EMANCIPATE NC contributed money for its preparation.

Brown residents in our State, including members of the JUSTICE LEAGUE. The issue before the Court is of interest to *amicus* EMANCIPATE NC because of the profound impact the case would have on the constitutional rights of the Justice League members, as well as other similarly-situated individuals that EMANCIPATE NC advocates on behalf of. EMANCIPATE NC offers this brief as information for the Court and not in support of either party.

SUMMARY OF ARGUMENT

The legal and social status of cannabis has shifted repeatedly over the course of American history. As political and social tides have turned, so has the plant's legality and cultural acceptability. Cannabis is a plant with a robust track record of utility in our State and Nation going back to the colonial era. Cannabis with lower levels of Delta-9-tetrahydrocannabinol (Delta-9-THC), commonly referred to as "hemp," has been used to manufacture sturdy rope, paper, and cloth, as well as other industrial products. Meanwhile, cannabis with greater quantities of Delta-9-THC has been used for centuries as a mild analgesic (pain relief) and antiemetic (anti-nausea). As a drug, it causes

many fewer socially-injurious consequences than alcohol, the third-leading cause of preventable death in the country.

Marijuana's pop cultural association with marginalized groups, including Mexican immigrants, Black people, poor people, and "hippies," has driven a counter-sensical punitive legal regime. Today, that regime imposes painful racial harms. Americans use marijuana at fairly consistent rates across race and class, with some differences by age and urban/rural geography. Yet, it is overwhelmingly low-income people of color who are searched, arrested, charged, and convicted for its possession. This racial disproportionality in enforcement – an abnegation of our duty to enforce laws neutrally and without favor – is a grave problem for our State's commitment to equal protection.

The 2018 Farm Bill solidified the federal legality of cannabis products that neither a law enforcement officer, nor a police canine, can visually or olfactorily distinguish from illegal cannabis. Accordingly, the permissible use of the mere odor of "weed" as probable cause for a warrantless search must end. This practice undermines justice, fairness, and personal liberty. It is a waste of law enforcement

resources. It imposes serious racial justice impacts that injure our Black and Latino communities most of all.

This Court should move to an "odor plus" standard to evaluate probable cause for a warrantless search of a person or vehicle. This standard, which takes into consideration the "totality of the circumstances," is consistent with the U.S. Supreme Court precedent on probable cause, comports with common sense, and will conserve our law enforcement resources.

ARGUMENT

I. What Is Hemp? What Is Marijuana?

Hemp and marijuana are two names for the *Cannabis sativa L.* plant, a quick-growing and valuable commodity crop that flourishes in the U.S. South, which was grown by our Founding Fathers, including George Washington, Ben Franklin, and Thomas Jefferson. Jack Herer, *The Emperor Wears No Clothes: The Authoritative Historical Record of Cannabis and the Conspiracy Against Marijuana*, (2000). Though the legality and social acceptability of cannabis has fluctuated over the course of American history, today, the legal distinction between "hemp" and "marijuana" rests upon the percent content of

"Delta-9-tetrahydrocannabinol" (Delta-9-THC). *See* 7 U.S.C. § 1639o(1); 21 U.S.C. § 802(16); N.C.G.S. § 106-568.51(7). THC is one of two medicinal agents that the cannabis plant offers; the other is CBD. Mary Barna Bridgeman, et al, "Medicinal Cannabis: History, Pharmacology, and Implications for the Acute Care Setting," Pharmacy & Therapeutics Journal, (Mar. 2017) (available online).

For thousands of years, marijuana, which contains higher thresholds of Delta-9-THC, has been used for medicinal purposes, to alleviate pain, inflammation, anxiety, depression, epilepsy, nausea, and glaucoma, as well as for recreational purposes, by inducing relaxation or euphoria. *Id.* It is legal for recreational purposes in 18 U.S. states, two territories, and the District of Columbia. National Conference of State Legislatures, State Medical Cannabis Laws (updated Apr. 19, 2022). It is legal for medicinal purposes in 37 states, four territories, and the District of Columbia. *Id.*

Under North Carolina law, "marijuana" is categorically illegal, *see* N.C.G.S. § 90-87(16), though analysts expect the North Carolina Senate to consider a medical marijuana bill in the short session set to begin May 18, 2022. Elizabeth Thompson, "What is the state of medical

marijuana legalization in North Carolina?", N.C. Health News (Apr. 20, 2022). The bill is sponsored by Senator Bill Rabon (Republican, Southport) and Senator Michael Lee (Republican, Wilmington) and has broad bipartisan support. *See* N.C. Compassionate Care Act, Senate Bill 711 (2021-2022 Session). In North Carolina, 64% of registered Republicans, 75% of registered Democrats, and 78% of unaffiliated voters support legalization of medical marijuana. Thompson, *supra.*

The 2018 U.S. Farm Bill legalized commodity hemp production. To qualify as "hemp," the product must contain less than 0.3% Delta-9-THC. 7 U.S.C. § 1639o(1); *see also* John Mudak, "The Farm Bill, hemp legalization and the status of CBD: An explainer," Brookings, (Dec. 14, 2018) (available online). Hemp has a variety of industrial uses, including in the production of clothing, textiles, paper, rope, and insulation, as well as utility as food, in cosmetics, and medicinally, via CBD. Wren, *supra*. CBD may reduce anxiety, nausea, and pain, without any of the psychoactive effects associated with the higher levels of Delta-9-THC in marijuana. Shafik Boyaji, "CBD for chronic pain: The science doesn't match the marketing," Harvard Health Publishing (Sept. 23, 2020) (available online). The global industrial hemp market is

expected to grow at a compound annual rate of 16.2 percent over the next six years, reaching an excess of $12.01 billion by 2028. Coit, *supra.* In 2021, the North Carolina hemp harvest was valued at upwards of $10.6 million. United States Department of Agriculture, "National Hemp Report," (Feb. 17, 2022) (available online).

The U.S. Domestic Hemp Production Program establishes federal regulatory oversight of the production of hemp in the United States. It authorizes the United States Department of Agriculture (USDA) to approve plans submitted by states and Indian tribes for the domestic production of hemp and also establishes a federal plan for producers in states or territories that choose not to administer their own plan. *See* United States Department of Agriculture, Agriculture Marketing Service, https://www.ams.usda.gov/rules-regulations/hemp. North Carolina's pilot program expired at the end of 2021, which means that North Carolina hemp farmers will now seek licensure directly from the USDA. Marne Coit, "Farms, Food, and You Podcast: What's Up With N.C. Hemp," North Carolina State University (Jan. 2022); *see also* 7 CFR § 990.21. "No State or Indian Tribe may prohibit the

transportation or shipment of hemp produced in accordance with the Farm Bill." 7 CFR § 990.63.

In accordance with Farm Bill regulations, participating farmers breed the crop to contain less than the legal threshold of Delta-9-THC. 7 CFR § 990.3. However, weather variations and harvest timing can render this threshold difficult to control. Marne Coit, "Farms, Food, and You Podcast: What's Up With N.C. Hemp," North Carolina State University (Jan. 2022) (available online). If a cannabis crop has too much Delta-9-THC, the farmer must dispose of it. 7 CFR § 990.27. The North Carolina Industrial Hemp Commission advocated for a higher Delta-9-THC threshold to insulate farmers from this risk: "Based on our experience operating a hemp program in North Carolina, we have found that non-compliant hemp samples rarely exceed 1.0% THC. These non-compliant samples with THC levels < 1.0% often occur because of weather, production issues and/or other factors that spike THC levels. We do not feel that these growers have intentions of growing an illegal substance. We also have concerns that growers who produce industrial hemp with borderline THC levels will face economic losses in a program that is intended to stimulate the farm economy." North Carolina

Industrial Hemp Commission, Letter to Sonny Perdue, Secretary of Agriculture (Dec. 19, 2019) (available online).

Today, North Carolina consumers purchase a wide variety of legal hemp products, often in mainstream supermarkets and drugstores, including food, cosmetics, lotions, pills, oils, and smokable hemp buds.[2] N.C. State Bureau of Investigation, "Industrial Hemp/CBD Issues," (undated) (available online). The North Carolina State Bureau of Investigation acknowledges that the appearance and odor of hemp buds is indistinguishable from marijuana, even for trained law enforcement canines, and that the North Carolina State Crime Lab chemical analysis tests are insufficient to distinguish between the two. *Id.* The level of Delta-9-THC in a product has no bearing on its odor, as THC is odorless. Tara Yarlagadda, "Why does Cannabis smell? The answer might not be what you think," Inverse, (Jan. 24, 2021) (available online).

[2] North Carolina retailers also sell some cannabis products containing Delta-8-THC. Delta-8-THC is a different chemical compound than Delta-9-THC, and it produces similar, but less potent effects. It is derived from CBD in hemp through a chemical process. U.S. Food & Drug Administration, "5 Things to Know about Delta-8 Tetrahydrocannabinol," (May 4, 2022) (available online).

II. The Shifting Legal and Cultural Status of Cannabis

Throughout the colonial era, cannabis was grown in our region, alongside tobacco, cotton, and other cash crops. Gene Johnson, "A History of Weed: From Jefferson to Clinton to Washington," MPRNews, (Dec. 6, 2012) (available online). By the late 1800s, cannabis was a common medicine in the U.S. and throughout the world. Bridgeman, et al, *supra*. British colonial bureaucrats in India studied its use in 1893-1894, resulting in a comprehensive multi-volume report on the subject. Government of India, Report of the Indian Hemp Drugs Commission Indian Hemp Report (1893-1894) (available online). The report concluded that occasional use of cannabis was beneficial and medicinal, with no evil results in physical or mental effects. The authors found no link between cannabis and crime or violence; it did not impair moral sense, induce laziness, or cause debauchery. *Id.*

In the United States, however, the rise of the temperance movement in the early 1900s, which succeeded in amending the Constitution to ban alcohol in 1919, dovetailed with increased social opprobrium for the use of cannabis. Dave Bewley-Taylor, et al. "The Rise and Decline of Cannabis Prohibition," Transnational Institute,

(Mar. 2014) (available online). Culturally, cannabis was associated with Mexican immigrants who migrated in the aftermath of the 1910 Mexican Revolution. *See* Isaac Campos, *Home Grown: Marijuana and the Origins of Mexico's War on Drugs,* (2012). Nativism and xenophobia contributed to a growing negative sentiment around cannabis. Richard Bonnie, *The Marijuana Conviction: A History of Marijuana Prohibition in the United States,* (1974). Nevertheless, before the 1930s, there were few regulations on the sale and use of cannabis in the United States, and it was smoked both medicinally and recreationally. Olivia B. Waxman, "The Surprising Link Between U.S. Marijuana Law and the History of Immigration," Time Magazine (Apr. 20, 2019) (available online).

The 1936 movie, *Reefer Madness*, was a propaganda film narrated by a high school principal imparting his wisdom and experiences with the "demon weed." Louis J. Gasnier (Director), "*Reefer Madness*," G&H Productions, (1936). The film linked cannabis with murder and miscegenation, and used racist tropes to frighten parents about the potential impact of cannabis on teens: "Just a young boy, under the influence of drugs, who killed his entire family with an axe," the

narrator intones ominously. The next year, Henry Anslinger, the director of the first federal narcotics agency, published articles about the grave "danger" of cannabis: "If the hideous monster Frankenstein came face to face with the monster marijuana, he would drop dead of fright." Johann Hari, "Chasing the Scream: The First and Last Days of the War on Drugs," Bloomsbury Publishing USA, (Jan. 2015). In 1937, Congress utilized its taxing power to make marijuana *de facto* illegal by making it prohibitively expensive to possess or transfer. Waxman, *supra.*

With the rise of World War II in the 1940s, however, the U.S. needed to increase hemp production to support economic and military efforts. The "Hemp for Victory" program encouraged farmers to grow industrial hemp to produce thread, rope, and cordage for the U.S. Army and Navy. Christopher S. Wren, "U.S. Farmers Covet a Forbidden Crop," *The New York Times*, (Apr. 1, 1999) (available online). In this same decade, New York Mayor Fiorello LaGuardia commissioned a study about the recreational use of marijuana, determining that "publicity concerning the catastrophic effects of marihuana smoking in New York City is misplaced," because it does not lead to morphine,

heroin, or cocaine addiction, and it is not a determining factor in the commision of major crimes. The Laguardia Committee Report, New York (1944) (available online).

And so the back-and-forth continued over the decades, through our nation's social movements of the 1960s, when marijuana was associated with hippies, Latin American immigrants, and Black people, and the successful decriminalization wave of the 1970s. *See* Emily Dufton, *Grass Roots: The Rise and Fall and Rise of Marijuana in America* (2017). In North Carolina, for instance, marijuana was decriminalized in 1977. *Id.* at 70. It was also decriminalized in Minnesota (1976), South Dakota (1977), Mississippi (1977), New York (1977), and Nebraska (1978). *Id.* Backlash ensued with the War on Drugs during the 1980s and 1990s, leading to increased federal and state drug penalties and increased deployment of police to enforce drug laws. *Id.*

Marked by a new kind of racist politics, the War on Drugs not only re-criminalized marijuana, but also demonized it and the communities associated with its use. While white people's use and abuse of alcohol

was often glorified in depictions in cultural media,[3] *see* Joel W. Grube, "Reducing Underaged Drinking: A Collective Responsibility," *Alcohol in the Media: Drinking Portrayals, Alcohol Advertisement, and Alcohol Consumption Among Youth*, National Research Council, (2004), federal government officials took conscious steps to associate marijuana use with criminality as a means of stigmafying political opponents. For instance, years after the fact, President Nixon's chief advisor, John Ehrlichman, admitted that the War on Drugs was a political tool to get: "the public to associate the hippies with marijuana and Blacks with heroin, and then criminalize both heavily, we could disrupt those communities. We could arrest their leaders . . . Did we know we were lying about the drugs? Of course we did." Tom LoBianco, "Report: Aide says Nixon's war on drugs targeted blacks, hippies," CNN (Mar. 24, 2016) (available online).

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[3] Alcohol is the third-leading cause of preventable disease and death in the United States and leads to thousands of car accidents every year. Between 2010 to 2019, more than 10,000 people died of drunk-driving crashes yearly. Comparatively, the U.S. Department of Transportation conducted a study which found that drivers under the influence of marijuana are significantly less likely to crash than those under the influence of alcohol. Richard P. Compton, et al., U.S. Department of Transportation National Highway Traffic Safety Administration, "Drug and Alcohol Crash Risk," (Feb. 2015) (available online). Between the years 2015 and 2019, excessive alcohol use was responsible for more than 140,000 deaths yearly in the United States. Center for Disease Control and Prevention, "Alcohol and Public Health," (undated) (available online).

The late 1990s brought medical marijuana legalization campaigns, which highlighted the important medicinal uses of cannabis. Carey Goldberg, *Medical Marijuana Use Winning Backing*, N.Y. Times (Oct. 30, 1996). A grieving widow described her husband's struggle with cancer: "The nausea from his chemotherapy was so awful it broke my heart. So I broke the law and got him marijuana. It worked. He could eat. He had an extra year of life." *Id.* In 1996, California and Arizona were the first states to permit medical marijuana. Opinion, *Marijuana for the Sick*, N.Y. Times (Dec. 30, 1996).

The early 2000s ushered in a wave of critiques of mass incarceration and the racially-disparate impact of drug enforcement. Though racial groups use marijuana at roughly similar rates, enforcement has disproportionately targeted Black people and people of Latin American descent. Ian Urbina, *Blacks Are Singled Out For Marijuana Arrests, Federal Data Suggests*, N.Y. Times (June 3, 2013). This pattern has created disparate outcomes in terms of neighborhood policing patterns, felony and misdemeanor convictions, and collateral consequences. *See* Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, (2010). With similar levels of

marijuana usage, Black people are 3.3 times more likely to get arrested for marijuana possession than white people. ACLU, "A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform," (Apr. 17, 2020) (available online).

III. With the Legalization of Hemp, North Carolina Should Move to an Odor-Plus Standard

With the federal legalization of smokable hemp, this Court should require an "odor-plus" standard to establish probable cause for a warrantless search of a person or a vehicle. This standard is common-sensical because the odor of cannabis is not "sufficiently distinctive to identify a forbidden substance," and there is no police officer or dog who is "qualified" to smell the difference between marijuana and hemp. *See Johnson v. United States*, 333 U.S. 10, 13 (1948).

An "odor-plus" standard would require that law enforcement officers holistically evaluate the "totality of the circumstances," with the "odor" of cannabis being only one factor among others, rather than a *sole* determinant of probable cause. This standard is consistent with U.S. Supreme Court jurisprudence on probable cause, which always

requires a "common-sensical" approach that encompasses a "fair probability" on which "reasonable and prudent [people] act." *See Illinois v. Gates*, 462 U.S. 213, 235 (1983). Given the ambiguity as to whether the odor of cannabis emanating from a vehicle denotes the presence of illegal activity, a reasonable officer should require more suspicion before concluding that probable cause exists for a warrantless search, a great intrusion on a person's personal liberty. Consistently, the U.S. Supreme Court has rejected rigid rules, bright-line tests, and mechanistic inquiries on probable cause in favor of an examination of the totality of the circumstances in an "all-things-considered approach." *See Florida v. Harris*, 568 U.S. 237 (2013). An "odor plus" rule comports with this spirit.

With a litany of states and territories having some form of legalized marijuana, the "odor plus" standard has emerged in some state court decisions. In *People v. Zuniga*, 2016 CO 52, 372 P.3d 1052 (2016), for instance, the Supreme Court of Colorado engaged in a "totality of circumstances" analysis in the context of a warrantless search involving a dog that smelled cannabis in a state where small quantities of marijuana are legal. The court noted that the totality of

the circumstances demonstrated probable cause where the "nervousness of the two men was to an extreme that wasn't normal," where the driver had "beads of sweat on his face, stuttered in response to requests, and had shaky hands," while the passenger was "overly nice," and where the two men had wildly inconsistent stories about why they were visiting Colorado. Under this holding, a fact, such as the odor of cannabis, that is *ambiguous* as to innocence or criminality, may contribute to an analysis of probable cause, but it may not be the *sole* factor.

Likewise, the Supreme Court of Pennsylvania has reasoned that conduct that may be "legislatively approved," such as possession of cannabis, may not be the *sole* basis for a probable cause determination. *Commonwealth v. Barr*, 266 A.3d 25 (2021). The court analogized the circumstances of "smelling marijuana" in a state with legalized marijuana to the situation of a person carrying a concealed weapon, which depending on individualized circumstances, may be licensed and lawful conduct. The court ruled that "one's liberty may not be abridged on the sole basis that a law enforcement officer detected the smell of marijuana, because, to do so, would eliminate individualized suspicion required for probable cause and would misapply the

totality-of-the-circumstances test." *Id*. at 43. Instead, law enforcement must analyze a situation holistically and take all factors into account.

Moving to an odor-plus standard is consistent with the touchstone of how courts evaluate all searches and seizures: "reasonableness." *See e.g.*, *Ohio v. Robinette*, 519 U.S. 33 (1996). Given that odors may linger in a place long after an activity has concluded, the inherent mobility of odor, and the inability of a human nose to attribute an odor to one identifiable source, there are many common sense indications that cannabis odor alone is unreliable when it is the *sole* indicator of criminal activity. Furthermore, courts increasingly recognize that permitting the mere odor of cannabis to establish probable cause for a warrantless search has led to abuses of civil liberties. A trial judge in New York ruled: "The time has come to reject the canard of marijuana emanating from nearly every vehicle subject to a traffic stop. So ubiquitous has police testimony about odors from cars become that it should be subjected to a heightened level of scrutiny if it is to supply the grounds for the search." Joseph Goldstein, "Officers Said They Smelled Pot. The Judge Called Them Liars," N.Y. Times (Sept. 12, 2019) (available online).

When police are permitted to give vague and unverifiable excuses for their probable cause analysis, they are more likely to engage in racial profiling and disparate enforcement against people of color and poor people. *See e.g.*, David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (1999). This is unjust and undermines public confidence in our institutions. In North Carolina, for instance, Black and white people use illegal drugs, including marijuana, at similar rates, yet in Wake County, Black people account for 59.7% of non-violent drug felonies, while existing as 20.4% of the population. UNC School of Government, Crime Justice Innovation Lab, "Measuring Justice Dashboard: Wake County" (last accessed Jan. 31. 2022); *see also* SAMHSA, 2020 National Survey of Drug Use and Health (2020); Karen T. Van Gundy et al., *Marijuana: Examining The Facts* (2018). Racial profiling is a scourge on our system's integrity.

Shifting to an "odor plus" standard will not prevent law enforcement officers from doing their job to interdict crime. Rather, it would encourage police to concentrate their resources on situations where the totality of circumstances indicate serious illegal activity, and to leave behind outdated methods that are unreliable and which have

undermined trust in our police force. Police officers have admitted that their brethren lie about smelling marijuana to manufacture justification for a search. Goldstein, *supra.* Requiring a more robust and objective standard for probable cause will discourage racial profiling and abuses of civil liberties, and will encourage police to utilize their expertise to concentrate on actual indicia of criminal activity.

CONCLUSION

To ensure fairness and equal protection of the laws, the North Carolina Supreme Court should adopt an "odor plus" totality-of-the-circumstances test for determining probable cause for a warrantless search of a person or vehicle, wherein the odor of cannabis may not be the *sole* factor in the determination.

Respectfully submitted, this the 13th day of May, 2022.

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CERTIFICATE OF WORD COUNT COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for *amicus curiae* certifies that the foregoing Brief, which is prepared using a proportional Century Schoolbook font, is fewer than 3750 words (excluding cover, captions, indexes, tables of authorities, counsel's signature block, certificate of service, this certificate of compliance, and any appendix or addendum), as reported by the Microsoft Word word-processing software used in its preparation.

This 13th day of May 2022,

/s/*Elizabeth Simpson*

CERTIFICATE OF SERVICE

The undersigned counsel of *amicus curiae* EMANCIPATE NC hereby certifies that a copy of amicus curiae's Motion and Brief was sent via email, addressed as follows:

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