IN THE SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,
Plaintiff-Appellee,

v. Case No. 2024AP1635-CR

AYANNA CHUNTEL MCAFEE,
Defendant-Appellant.

NON-PARTY BRIEF OF *AMICUS CURIAE* BLACK LEADERS ORGANIZING FOR COMMUNITIES ("BLOC") IN SUPPORT OF DEFENDANT-APPELLANT MCAFEE

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INTEREST OF AMICUS CURIAE

Black Leaders Organizing for Communities ("BLOC"), a fiscally-sponsored project of Beyond Impact, is a Black-led, Milwaukee-based, non-profit, grassroots group founded in 2017 to advance racial justice, strengthen civic engagement, and improve the quality of life of Black residents in Milwaukee and throughout Wisconsin. Through year-round grassroots organizing, leadership development, political advocacy, and public education, BLOC works to ensure that the perspectives and experiences of Black Wisconsinites inform governmental decisions affecting their communities.

BLOC has identified mass incarceration, racial bias in policing, educational achievement gaps, and economic inequality as systemic barriers to the well-being of Black Wisconsinites. BLOC has undertaken research and advocacy examining the relationship between racial discrimination in the criminal legal system and the larger societal impacts on Black communities. The group's work addresses both the direct effects of discriminatory policies and the broader structural inequities that limit Black residents' access to political power, public resources, and economic opportunity. This case presents an issue that is particularly important to BLOC's work to address racial disparities in policing and the harmful impacts of those disparities on communities of color.

ARGUMENT

I. The facts in this case present a prime opportunity for the Court to revisit its prior holdings in *State v. Secrist* and *State v. Moore.*

This case presents an opportunity for the court to evaluate the continuing validity and application of its prior rulings in *Secrist* and *Moore* in light of changing circumstances and new evidence regarding the legal indistinguishability of various kinds of cannabis odors, and such reconsideration should not be considered barred by *stare decisis* because the holdings in those cases implicate nearly every separate factor that the Court has said would justify overturning prior precedent. The Court should take this opportunity to correct its rulings in those previous decisions based on present circumstances.

A. State v. Secrist and *State v. Moore* should be overturned because they permit law enforcement to establish probable cause based only on facts that can no longer justifiably support a conclusion that a crime has been committed.

The legalization of hemp has fundamentally altered the relationship between the odor of cannabis and the likelihood that criminal activity is occurring. Accordingly, the odor of cannabis, without additional objective indicia of illegality, should no longer be treated as sufficient to establish probable cause for a warrantless search.

Wisconsin law now recognizes a critical distinction between lawful hemp and unlawful marijuana that cannot be discerned by smell alone. Under Wisconsin Statutes § 961.01(14), the definition of marijuana expressly excludes hemp as defined in Wis. Stat. § 94.55(1). Likewise, Wis. Stat. § 961.14(4)(t)3 excludes tetrahydrocannabinols contained in legally defined hemp from Schedule I controlled substances. The relevant statutory distinction depends on the substance's delta-9-tetrahydrocannabinol (THC) concentration, not its appearance or smell. *See* Wis. Stat. § 94.55(1). Thus, although cannabis containing prohibited concentrations of THC remains unlawful to possess in Wisconsin, the

possession of legally qualifying hemp is permissible, and was at the time of the search in this case.

Both substances, hemp and marijuana, are derived from cannabis plants and share chemical compounds responsible for their characteristic smell. The odor associated with cannabis is produced by volatile compounds, including terpenes, that are not unique to cannabis containing an unlawful concentration of THC.[1] Because lawful hemp and unlawful marijuana may have indistinguishable odors, an officer's detection of a cannabis-like smell does not establish whether the substance responsible for that odor is prohibited by Wisconsin law and fails to provide any *reasonable* suspicion to believe the smell might be one over the other.

Moreover, the presence of an odor does not necessarily establish the present existence of its source. Cannabis odors can linger on clothing, upholstery, and other porous surfaces long after the substance producing the odor has been removed. Consequently, even if an officer correctly identifies the odor of *illegal* cannabis, that observation does not establish that illegal cannabis is currently present. Accordingly, there is a significant inferential gap between detecting an odor and establishing the present existence of illegal contraband when (1) the odor could originate from a lawful substance, and (2) where even otherwise *illegal* substances that could produce the smell are perfectly legal to consume directly across Wisconsin state lines in Illinois, Michigan, and Minnesota (and in 21 other states where a vehicle or person may have recently traveled).[2]

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[1] Somchai Rice & Jacek A. Koziel, *Characterizing the Smell of Marijuana by Odor Impact of Volatile Compounds: An Application of Simultaneous Chemical and Sensory Analysis*, 10 PLOS ONE (2015)

[2] *See The Divided States of Cannabis*, available at https://cannabis.lacity.gov/articles/divided-states-cannabis (noting the states in which recreational cannabis use is fully legal).

All these concerns were previously, and correctly, identified in the dissent in *Moore*, where the minority there recognized the constitutional difficulty created by continued reliance on the blanket permission to search granted in *Secrist*. The dissent observed that legalization of hemp undermines the assumption that an odor of cannabis necessarily indicates the presence of an unlawful controlled substance. *Moore*, 2023 WI 50, ¶¶ 28–32 (Dallet, J., dissenting). The dissent further recognized that Wisconsin residents may lawfully encounter or consume cannabis products in other jurisdictions, and that odors may persist after those products are no longer present. *Id*. ¶¶ 31–32. These developments, the dissent reasoned, call into question whether *Secrist*'s underlying rationale remains sound.

B. Stare decisis should be no obstacle to correcting the law in this case.

The doctrine of *stare decisis* is not absolute. The Court has previously explained numerous factors that individually should justify overruling a prior precedent, including:

1. Changes or developments in the law have undermined the rationale behind the prior decision.
2. Newly ascertained facts warrant reconsideration.
3. The precedent has become detrimental to coherence and consistency in the law.
4. The prior decision is unsound in principle.
5. The prior decision is unworkable in practice.

Johnson Controls, Inc. v. Employers Insurance of Wausau, 2003 WI 108, ¶¶ 94–100, 264 Wis. 2d 60, 665 N.W.2d 257 (2003). In *Johnson Controls*, this Court explained, "[w]e do more damage to the rule of law by obstinately refusing to admit errors, thereby perpetuating injustice, than by overturning an erroneous decision." *Id*. at ¶ 100.

Every single one of the independent justifications the Court has previously identified for disregarding *stare decisis* is present in this case. First, the law across

Wisconsin and in bordering states has significantly changed since the Court's original ruling in *Secrist.* It is no longer the case that the potential smell of marijuana implicates a crime, and this was made clear in Justice Dallet's dissent in *Moore.* Second, the facts in this case and surrounding science make clear that the facts involved warrant reconsideration. It is not scientifically possible for a law enforcement officer to discern the difference between legal or illegal substances, whether such smells indicate recent activity, or whether they may, in fact, be a result of some other factor entirely. See supra regarding studies indicating that skunk spray or roadkill is indistinguishable from illegal marijuana smell. Third, the court's ruling has become detrimental to the law in creating significant confusion about what factors a circuit court must credit, when the science says those factors are not reliable. Fourth, while the original ruling in *Secrist* may have been "sound" based on the circumstances of the day, the ruling in *Moore* failed to consider changing laws and policies and new science that would indicate the decision was erroneous from the start. And finally, the Court's previous decisions are unworkable in practice because they grant *carte blanche* to law enforcement to simply write down a subjective smell and be granted impunity from any concerns of probable cause. While this may be "workable" to law enforcement, it is not "workable" under the Fourth Amendment which requires actual probable cause based on objective criteria to justify a warrantless search.

II. Communities of color are disproportionately harmed when officers are allowed to search or arrest solely on the odor of marijuana.

Studies throughout the 1990s to the present day show a deep and ongoing correlation between being stopped, searched or arrested for alleged marijuana possession and being Black or Brown, despite statistics showing that White people are just as (or more)

likely to use cannabis products, other illegal substances, or to commit traffic violations.[3] People of color are more likely to be stopped for investigation of cannabis-related conduct.[4] However, The Hamilton Project published a report that found that while Black and White people sell and use illegal drugs at similar rates, Black people are 2.7 times more likely to be arrested for drug-related offenses.[5] While decriminalization of cannabis products has progressed throughout the nation, the disproportionate enforcement of marijuana laws has persisted in Black communities.[6]

A. Black people in Wisconsin are continuously subjected to more police stops in their daily lives than White people.

[3] *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 (citing numerous studies providing evidence of racial profiling); *See* Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 272–3 (2009) (reviewing drug arrest rates by race from 1980 to 2007); ACLU, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* (2020), p 7, *available at* https://www.aclu.org/wp-content/uploads/publications/ marijuanareport_03232021.pdf;Tonry, *Race and the War on Drugs*, 1994 Univ Chi Legal Forum 1, 27; *See* William Cai, Johann Gaebler, Justin Kaashoek, Lisa Pinals, Samuel Madden & Sharad Goel, *Measuring Racial and Ethnic Disparities in Traffic Enforcement with Large-scale Telematics Data*, 2022 PNAS NEXUS 1, https://academic.oup.com/pnasnexus/article/1/4/pgac144/6652221

[4] ACLU (above at n.3), at 34 and 35.

[5] The Hamilton Project, *Twelve Facts About Incarceration and Prisoner Reentry* (October 2016), available at https://www.brookings.edu/wp-content/uploads/2016/10/thp_20161020_twelve_facts_incarceration_prisoner_reentry.pdf ; *see also* Pew Charitable Trusts, *Drug Arrests Stayed High Even as Imprisonment Fell from 2009 to 2019* (February 15, 2022), *available at* https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2022/02/drug-arrests-stayed-high-even-as-imprisonment-fell-from-2009-to-2019.

[6] ACLU, *Extreme Racial Disparities Persist in Marijuana Arrests, available at* https://graphics.aclu.org/marijuana-arrest-report/; ACLU, *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform* (2020), p 7, *available at* https://www.aclu.org/wp-content/uploads/publications/marijuanareport_03232021.pdf.

By permitting law enforcement to conduct searches and stops based on smell alone, Wisconsin continues to enable discriminatory policing by green-lighting pretextual stops.[7] Discriminatory policing in such stops and searches has repeatedly been linked to false-bias conflating the likelihood of criminality or danger with skin color.[8] Even where traffic stops do match neatly onto "hot spots" of crime, the crime rates and data used by police is skewed by the historic over-policing of Black and Brown communities, resulting in increased, disproportionate targeting of Black, Latino, and Indigenous people with pretextual stops.[9] Multiple states report that pretextual stops are shown to be nothing more than a nuisance to communities of color and do not have significant impacts on crime rates.[10] When law enforcement can rely on an alleged "smell" in place of any other reasonable suspicion, it

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[7] *See* Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 663 (2021) (finding racial profiling by police is "relatively common").

[8] Lex Kreit, *Marijuana Legalization and Pretextual Stops*, 50 U.C.D. L. REV. 741, 743–44 (2016); David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 249.

[9] *See, e.g.*, Rashida Richardson, *Racial Segregation and the Data-driven Society: How Our Failure to Reckon with Root Causes Perpetuates Separate and Unequal Realities*, 36 BERK. TECH. L.J. 1051 (2021).

[10] Andrew Ferguson, *Policing Predictive Policing*, 94 WASH. U. L. REV. 1109, 1146–47 (2017). *A New Vehicle for "Stop and Frisk": The Scope, Impact, and Inequities of Traffic Stops in Chicago*, BPI & FREE 2 MOVE 26 (Mar. 2023), https://www.impactforequity.org/wp-content/uploads/2023/05/BPI_Traffic-Stop-Report_F.pdf. (establishes that stops and searches that are not based on reliable evidence of serious criminal activity are unlikely to be efficient or productive); John MacDonald, Jeffrey Fagan, & Amanda Geller, *The Effects of Local Police Surges on Crime and Arrests in New York City*, PLOS ONE (June 16, 2016), The Effects of Local Police Surges on Crime and Arrests in New York City (ssrn.com) (police found contraband (defined as drugs, drug paraphernalia, alcohol, weapons, stolen property, or "other"), in only 1.5% of all traffic stops); (pretextual traffic stops disproportionately targeting Black and Latino drivers rarely led to arrests or the recovery of drugs or contraband); *An Assessment of Traffic Stops and Policing Strategies in Nashville*, POLICING PROJECT 10 (2018), *available at* https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/5bf2d18d562fa747a554f6b0/154264.

only exacerbates these concerns, because this alleged basis for establishing probable cause is not documented by any other means, such as body camera video, and courts are forced to rely on individual officer's subjective opinion about what they smell, even when those scents are easily and commonly mistaken.

A 2023 report from the Criminal Justice Institute indicated that racial disparities in stops persist in Milwaukee, which has the largest concentration of Black residents in Wisconsin.[11] While the city of Milwaukee is working to correct those disparities, the research shows that Black people in Milwaukee are 10.1 times more likely to be subjected to police questioning in the field for investigation and 4.1 times more likely to be subject to that encounter and have no action taken by officers.[12] Black people are also 2.6 times more likely to be frisked and 4.5 times more likely to be stopped in traffic by police in Milwaukee.[13]

B. When focusing on marijuana-only arrests over time, Black people experience higher levels of enforcement despite similar levels of usage statistics compared to others.

During the decade ending in 2010, arrests of Black people for marijuana-only charges increased 153% across the U.S.[14] During that same period, 65% of arrests for marijuana possession in Wisconsin were of Black people, despite their share of the population as of that year's census making up only 7.1% of the Wisconsin population.[15] Black Wisconsinites were 5.29 times more likely to be arrested than White people for

[11] CJI Report 2023, *available at* https://www.cjinstitute.org/assets/sites/2/2023/09/CJI-Year-Five-Annual-Report.pdf.
[12] Id at Pg. 43
[13] Id.
[14] War of marijuana page 23; Uniform Crime Reporting Data [United States]: Arrests by Age, Sex, and Race [Alternative Title: ASR], 2001-2010
[15] CJI Report at 45.

marijuana possession in 2022.[16] The data showed that there were 13,400 arrests for marijuana-related offenses, 12,706 of them were for possession only.[17] This data represents those who were arrested based on marijuana and does not account for outcomes where the original suspected infraction of marijuana possession did not result in arrest for the same (and where initial wrongful suspicion for marijuana-related crimes resulted in arrest for some entirely different offense). Generally, Black people make up 13% of the national population but are four (4) times more likely to experience being stopped for marijuana possession.[18] Over the last decade, as more states have decriminalized and/or legalized possession and consumption of cannabis, the arrest rate disparity between White and Black individuals has remained largely constant—including in states that have adopted legalization measures.[19] In 2025, the population of Black people in Wisconsin makes up roughly 6.7% of people but accounts for 22% of arrests.

Between 2001 and 2010, when surveyed more White people than Black people indicated that they used marijuana in the previous year.[20] In 2010, specifically, 59% of Black people surveyed indicated they had never used marijuana, whereas 54% of White people indicated the same.[21] Generally, usage across all races has increased significantly since the 1990s.[22] Researchers have consistently found that cannabis usage rates are similar

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[16] FBI's Uniform Crime Reporting Program (UCR) Program via the Crime Data Explorer; US Census Bureau's 2022 5-year American Community Survey (ACS)
[17] Id.
[18] *Marijuana Arrests by the Numbers*, ACLU, *available at* https://www.aclu.org/gallery/marijuana-arrests-numbers.
[19] *A Tale of Two Countries: Racially Targeted Arrests in the Era of Marijuana Reform*, ACLU (2020), https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform.
[20] *See, e.g.*, *The War on Marijuana in Black and White*, ACLU 21 (2013), https://perma.cc/3976-N98V) pg. 23, 68
[21] Id. at 23.
[22] Id. 24, 38

between White and Non-White individuals,[23] and some studies posit that White people possess and use cannabis at higher rates than Black people.[24] This raises a significant question as to why law enforcement nevertheless targets Black and Latino people to such a greater extent.[25]

CONCLUSION

Permitting the unverifiable and subjective alleged smell of marijuana to serve as a basis for establishing probable cause, despite all of its proclivity to error with unrelated activity, likelihood of confusion with legal substances or with legal behavior in other states is contrary to basic logic, the analysis required under the Fourth Amendment and the State Constitution, is not supported by science and will continue to perpetuate discriminatory practices within our communities of color. The Court should make it clear that this type of observation is insufficient to confer authority for a warrantless search, absent other significant factors indicating criminality.

Dated: November 17, 2026.

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[23] Id. at 66.

[24] S*ee, e.g.*, Silvia S. Martins, Luis E. Segura, Natalie S. Levy et al., *Racial and Ethnic Differences in Cannabis Use Following Legalization in U.S. States with Medical Cannabis Laws*, 2021 JAMA NETWORK OPEN 1, *available at* https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2784528 ("in 2018 the lifetime prevalence of cannabis use was lower for Black (45.3%) than White (53.6%) adults aged 18 years or older, but Black individuals were 3.64 times more likely to be arrested for cannabis possession."); *ACLU*, *supra* n.3, at 21 ("In 2010, 34% of whites and 27% of Blacks reported having last used marijuana more than one year ago—a constant trend over the past decade. In the same year, 59% of Blacks and 54% of whites reported having never used marijuana. Each year over the past decade more Blacks than whites reported that they had never used marijuana.").

[25] Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 272–3 (2009) (reviewing drug arrest rates by race from 1980 to 2007). 2). 3 *The War on Marijuana in Black and White*, ACLU 21 (2013), https://www.aclu.org/report/report-war-marijuana-black-and-white.

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FORM AND LENGTH CERTIFCIATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (bm), and (c) for a brief. The length of this brief is 2,974 words, as calculated by Microsoft Word.

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EFILE/SERVICE CERTIFICATION

I certify that in compliance with Wis. Sat. § 801.16 (6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

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