NOTE

LET SLIP THE DOGS OF DRUG WAR: LAW ENFORCEMENT CANINES DON'T FALL UNDER THE "ONLY-CONTRABAND" EXCEPTION

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The 2018 Farm Bill removed hemp from the Schedule I list of the Controlled Substances Act. This legal change caused law enforcement agencies and courts to reanalyze assumptions made in routine investigation tactics and prior caselaw. Some law enforcement agencies still use marijuana-trained canines. Previous Supreme Court cases have held that a sniff by a law enforcement canine is not a Fourth Amendment search because these canines detect *only* contraband. But marijuana-trained canines cannot detect a difference between hemp and illicit marijuana. Because these canines no longer detect only contraband, the "only-contraband" exception should no longer apply—a canine sniff is a search that requires probable cause.

In *United States v. Deluca*, the Tenth Circuit held that, even in light of the 2018 Farm Bill, a law enforcement canine can still support probable cause. But *Deluca* did not grapple with Supreme Court precedent explaining when use of a sense-enhancing technology constitutes a search requiring probable cause. Even though the opinion was unpublished, subsequent opinions in other jurisdictions cite *Deluca* to conclude the question has been asked and answered. *Deluca* overlooks key reasoning from Supreme Court jurisprudence on canine sniffs and must be carefully analyzed to prevent it from metastasizing in other circuits.

Similarly, in *United States v. Plancarte*, the Seventh Circuit held that a law enforcement canine sniff is not an unreasonable search. *Plancarte* emphasized that a canine sniff's limited intrusiveness does not implicate a reasonable expectation of privacy. *Deluca* and *Plancarte* signal a troubling shift in the face of advancing law enforcement sense-enhancing technology.

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INTRODUCTION

You notice the blue and red lights after crossing the St. Croix River back into Wisconsin after a weekend trip to the Twin Cities. You slow and angle toward the shoulder. *Were you speeding?* Stay calm. *What is in the backseat?* Only a backpack is in plain view—but you have unlabeled CBD and hemp-derived THC in there. *What if the officer has a canine unit?* Law enforcement canines cannot tell the difference between hemp and illegal marijuana.[1] *What if the officer conducts a canine sniff?* Better hope not.

Canine sniffs are not a Fourth Amendment search because they can detect only contraband, which this Note refers to as the "only-contraband" exception.[2] There are many activities that are criminal in some contexts or quantities but legal in others. Criminal activity is not always a crime-or-not-crime binary. Under the only-contraband exception, sense-enhancing technology is not a Fourth Amendment search when the technology only conveys a crime-or-not crime—contraband-or-not-contraband—message to law enforcement.[3]

Consider a law enforcement device that beeps if it detects brain-altering chemicals based on the smell of an individual's sweat. The device gives an officer a yes-or-no alert. The brain-altering substance could be heroin, antidepressants, or thyroid medication. The use of this device *should* be a search that requires probable cause because it detects lawful activity. It does not detect *only* contraband, so it falls outside the Fourth Amendment's only-contraband exception.[4]

Another hypothetical: What if overhead highway traffic cameras could detect weapons in passing vehicles? Firearms are lawful to possess in vehicles depending on state laws regarding documentation and concealed carry. But felons cannot possess firearms.[5] This weapon-

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1. Andrea J. Garland, *Deconstructing Dog Sniffs at Traffic Stops*, 106 MARQ. L. REV. 419, 433–35 (2022); Cynthia A. Sherwood, Davis F. Griffin & Alexander H. Mills, *Even Dogs Can't Smell the Difference: The Death of 'Plain Smell,' as Hemp Is Legalized*, TENN. BAR J., Dec. 2019, at 14, 16–18. *See* Sarah Maslin Nir, *Hemp or Pot Farm? Police and Thieves Can't Always Tell*, N.Y. TIMES, https://www.nytimes.com/2019/12/03/nyregion/hemp-marijuana-thc.html (Feb. 27, 2021); Walter B. Wilson, Aaron A. Urbas & Frances Scott, *Study Reveals Inaccurate Labeling of Marijuana as Hemp*, NAT'L INST. JUST. (Oct. 17, 2022), https://nij.ojp.gov/topics/articles/study-reveals-inaccurate-labeling-marijuana-hemp [https://perma.cc/XM2Z-F64G].

2. *See Illinois v. Caballes*, 543 U.S. 405, 408 (2005) ("We have held that any interest in possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.'" (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984))).

3. *See Caballes*, 543 U.S. at 408; *see also Jacobsen*, 466 U.S. at 123.

4. *See Caballes*, 543 U.S. at 408; *see also Jacobsen*, 466 U.S. at 123.

5. *See* 18 U.S.C. § 922(g) (2018).

detecting technology *should* be a search because it can detect lawful activity, not only contraband. So too with canine sniffs. Law enforcement canines that were trained to detect marijuana should not fall under the only-contraband exception anymore. Ever since the Agricultural Improvement Act of 2018 ("2018 Farm Bill") legalized cannabidiol ("CBD") and low-level tetrahydrocannabinol ("THC") (collectively, "hemp"),[6] canines detect more than only contraband. As a result, canine sniffs are searches that require probable cause. But courts have not caught up. In the face of rapidly advancing sense-enhancing technology, this issue will soon apply beyond dog sniffs.

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The 2018 Farm Bill legalized CBD and hemp without much concern for how that change would impact criminal law.[7] Hemp legalization impacts law enforcement canines trained to detect marijuana because these canines cannot tell the difference between legal hemp and illegal marijuana.[8] Currently, a law enforcement officer does not need probable cause to conduct a dog sniff because it is not a Fourth Amendment search.[9] Canine jurisprudence relies on the only-contraband exception, which assumes a device that can only detect contraband does not

6. 21 U.S.C. § 802(16) (2018); Aly Conwell & Caroline B. Fichter, *An Overview of Legal Issues and Regulations Affecting CBD-Based Franchise Systems*, 41 FRANCHISE L.J. 543, 548–49 (2022) ("For consumers, the 2018 Farm Bill removed CBD from Schedule I status under the CSA, but only for CBD (1) derived from hemp grown by properly licensed growers; (2) produced in accordance with a hemp regulatory program; and (3) containing less than 0.3% THC."); *see Agriculture Improvement Act of 2018: Highlights and Implications*, U.S. DEP'T AGRIC., https://www.ers.usda.gov/topics/farm-bill/2018-farm-bill/ [https://perma.cc/4PBH-2QCV] (Feb. 28, 2024).

7. *See, e.g.*, *United States v. Brown*, 47 F.4th 147, 151 (3d Cir. 2022), *aff'd*, 144 S. Ct. 1195 (2024) (considering whether, in light of federal decriminalization of hemp, prior state marijuana convictions may serve as Armed Career Criminal Act predicate offenses); *United States v. Runner*, 43 F.4th 417, 422–23 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 532 (holding that a glass pipe in plain view, which could have been used to ingest CBD or hemp products, can support probable cause for a warrantless search); *United States v. Bignon*, 813 F. App'x 34, 37 (2d Cir. 2020) (finding probable cause to arrest based on the smell of marijuana, even though laboratory tests later confirmed odor came from legal hemp).

8. *See* sources cited *supra* note 1.

9. *United States v. Place*, 462 U.S. 696, 707 (1983); *Illinois v. Caballes*, 543 U.S. 405, 409 (2005).

implicate Fourth Amendment protections.[10] This assumption is no longer correct.[11]

As a result, a law enforcement canine now "alerts" (signals to its handler that a target scent was detected) to legal and illegal products alike.[12] And yet, even after the 2018 Farm Bill, some courts have held that an officer does not need probable cause to commence a canine sniff in public or on a vehicle.[13] A canine alert can support probable cause necessary for a warrantless physical search.[14]

Thus far, no federal court has been willing to declare that a canine sniff is now a search implicating Fourth Amendment protection. Nor have they been willing to declare that an alert from a law enforcement canine cannot provide the basis for probable cause.[15] After the 2018 Farm Bill, the Eastern District of Tennessee in *United States v. Hayes*[16] and the Tenth Circuit in *United States v. Deluca*[17] addressed this argument.[18] In nonprecedential opinions, both courts ruled that a canine sniff could still provide probable cause for a warrantless search.[19] But neither opinion addressed sense-enhancing technology or assumptions underlying the Supreme Court's analysis in the line of canine sniff cases.[20] Problematically, courts cite to *Hayes* and *Deluca* as resolving the question.[21]

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10. *See Caballes*, 543 U.S. at 409 ("[T]he use of a well-trained narcotics-detection dog—one that 'does not expose noncontraband items that otherwise would remain hidden from public view'—during a lawful traffic stop, generally does not implicate legitimate privacy interests." (citation omitted) (quoting *Place*, 462 U.S. at 707)).

11. *See* Sherwood, Griffin & Mills, *supra* note 1, at 18.

12. *See* sources cited *supra* note 1.

13. *See United States v. Deluca*, No. 20-8075, 2022 WL 3451394, at *4–5 (10th Cir. Aug. 18, 2022); *United States v. Hayes*, No. 19-CR-73, 2020 WL 4034309, at *19–20 (E.D. Tenn. Feb. 21, 2020). *But cf. Florida v. Jardines*, 569 U.S. 1, 11–12 (2013) (a canine sniff on the curtilage of a home is a search that requires probable cause).

14. *Deluca,* 2022 WL 3451394, at *4–5; *Florida v. Harris*, 568 U.S. 237, 247–48 (2013).

15. *See, e.g.*, *United States v. Plancarte*, No. 22-CR-64, 2023 WL 3597600, at *2 (W.D. Wis. May 23, 2023) ("[T]he legalization of THC products might prompt the Supreme Court to revisit its reasoning in *Illinois v. Caballes* . . . that a dog sniff was not a search, arguably in part because the dog was trained to detect only unlawful conduct. This uncertainty does not justify a district court setting aside long-standing Supreme Court and Seventh Circuit precedent, much less to do so retroactively to undermine law enforcement's reliance on *Caballes*." (citation omitted)).

16. No. 19-CR-73, 2020 WL 4034309 (E.D. Tenn. Feb. 21, 2020).

17. No. 20-8075, 2022 WL 3451394 (10th Cir. Aug. 18, 2022).

18. *Hayes*, 2020 WL 4034309, at *19; *Deluca*, 2022 WL 3451394, at *4.

19. *Hayes*, 2020 WL 4034309, at *20; *Deluca*, 2022 WL 3451394, at *4–5.

20. *See Hayes*, 2020 WL 4034309; *Deluca*, 2022 WL 3451394.

21. *See, e.g.*, *United States v. Plancarte*, No. 22-CR-64, 2023 WL 3597600, at *2 (W.D. Wis. May 23, 2023); *United States v. Spikes*, No. 19-CR-264, 2021 WL

Deluca was wrongly decided and should be analyzed carefully to prevent its metastasis through future caselaw. Plainly, after hemp products were legalized, a law enforcement canine sniff constitutes a Fourth Amendment search. To protect the public from unreasonable searches, law enforcement must have probable cause before deploying a canine. Part I of this Note will review why law enforcement use of sense-enhancing technology is a search. Part II will explain the 2018 Farm Bill's unintended consequences. Part III will analyze the Tenth Circuit's decision in *United States v. Deluca*, and Part IV will analyze the Seventh Circuit's decision in *United States v. Plancarte*. Part V will propose potential solutions to reduce warrantless searches based solely on humans or canines smelling marijuana.

I. CONSTITUTIONAL BACKGROUND

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and provides that "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."[22] Reading the clauses together, warrantless searches are presumptively unreasonable and therefore unconstitutional,[23] although there are exceptions.[24] Historically, Fourth Amendment jurisprudence protected property from physical invasion.[25] Advancements in law enforcement surveillance technology complicated this trespass framework.[26] The Supreme Court countered with the "reasonable expectation of privacy" test to protect individuals from surveillance when (1) the individual has a subjective expectation of privacy and (2) society is willing to recognize that expectation as reasonable.[27]

1853419, at *8 (D. Colo. May 10, 2021); *State v. Major*, No. M2021-01469-CCA-R3, 2023 WL 7166314, at *5 (Tenn. Crim. App. Oct. 31, 2023).

22. U.S. CONST. amend. IV.

23. *Payton v. New York*, 445 U.S. 573, 585 (1980) ("Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment.").

24. *See, e.g.*, *Texas v. Brown*, 460 U.S. 730, 735–36 (1983) (plain view exception); *Florida v. Bostick*, 501 U.S. 429, 438–39 (1991) (consent exception); *United States v. Leon*, 468 U.S. 897, 920 (1984) (good faith exception).

25. Andrew Guthrie Ferguson, *Personal Curtilage: Fourth Amendment Security in Public*, 55 WM. & MARY L. REV. 1283, 1298 (2014).

26. *Id.* at 1286–87.

27. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); Gerald S. Reamey, *Constitutional Shapeshifting: Giving the Fourth Amendment Substance in the Technology Driven World of Criminal Investigation*, 14 STAN. J. C.R. & C.L. 201, 204–05 (2018).

The Fourth Amendment applies "to techniques and equipment not yet developed, and perhaps not yet imagined."[28] Canine sniffs similarly challenge precedent, not because of a change in technology, but rather a change in law. However, the ultimate question is the same: How will the Court apply this doctrine to technology once believed to be primitive, but now capable of more? As technology advances, so too does the government's capacity to deploy sense-enhancing technology into areas "normally guarded from inquisitive eyes" (or noses).[29]

A. When Does Sense-Enhancing Technology Become a Fourth Amendment Search?

Sense-enhancing technology is a device used by law enforcement but not available to the general public that is capable of obtaining information that "could not otherwise have been obtained without physical intrusion."[30] Its use constitutes a search that requires probable cause.[31] In *Kyllo v. United States*,[32] a thermal imaging device that detected relative levels of heat constituted a Fourth Amendment search.[33] There, law enforcement used a device called the Agema 210 to reveal a "crude visual image of the heat being radiated from the outside of the house" where "no intimate details of the home were observed."[34] The majority plainly rejected the dissent's proposal to distinguish between intimate and nonintimate detail-detecting technology.[35] Although the Agema 210 could not detect intimate details, the device may be capable of doing so in the future.[36] So, the Court reasoned, careful inquiry into a device's current capabilities would quickly become obsolete.[37] Further, the dissent's proposed approach would be unworkable and unprincipled since, in a constitutionally protected space, "*all* details are intimate details."[38]

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28. Reamey, *supra* note 27, at 214 (citing *Kyllo v. United States*, 533 U.S. 27, 36 (2001)).

29. *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018).

30. *Kyllo*, 533 U.S. at 34 (internal quotation marks omitted).

31. *Id.* at 40.

32. 533 U.S. 27 (2001).

33. *Id.* at 34–35.

34. *Id.* at 30 (cleaned up).

35. *Id.* at 36–37 ("The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained.").

36. *See* Reamey, *supra* note 27, at 214 (citing *Kyllo*, 533 U.S. at 36).

37. *See id.*

38. *Kyllo*, 533 U.S. at 37.

The *Kyllo* majority rejected the dissent's intimate versus nonintimate proposal.[39] This approach would require courts to assess a specific technology's capabilities (which would quickly become outdated) and to conduct uncomfortable inquiries into what constitutes an "intimate" detail—providing little advance guidance to police officers as to what technology can be used.[40] The dissenting Justices in *Kyllo* went on to write majority opinions in later cases applying *Kyllo*, and the distinction between intimate and nonintimate permeates future caselaw even though *Kyllo* rejected it.[41]

Put simply, law enforcement technology becomes a Fourth Amendment search when the device is (1) not generally available to the public and (2) capable of obtaining information otherwise unobtainable absent a warrant.[42] If a specialized law enforcement tool can detect otherwise unobtainable information, then use of that tool violates an actual subjective expectation of privacy, and society is willing to recognize that expectation as reasonable.[43]

B. But What About Canine Sniffs? Introducing the "Only-Contraband" Exception

While society is prepared to recognize a reasonable privacy interest in lawful, intimate details,[44] society is not prepared to recognize a privacy interest in possessing unlawful contraband.[45] In other words, a privacy interest in contraband would be unreasonable.[46] Therefore, law enforcement technology that reveals only the presence of contraband implicates no legitimate privacy interests, so its use is not a search. The Court

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39. *Id.* at 36–39.

40. *Id.* at 38–39 ("Limiting the prohibition of thermal imaging to 'intimate details' would not only be wrong in principle; it would be impractical in application, failing to provide 'a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment.'" (quoting *Oliver v. United States*, 466 U.S. 170, 181 (1984))).

41. *See* discussion and sources cited *infra* notes 53–55.

42. *Kyllo*, 533 U.S. at 34, 40.

43. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

44. *See id.*; *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005).

45. *United States v. Jacobsen*, 466 U.S. 109, 122–23 (1984) ("A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy.").

46. *See id.* at 123.

elaborated on this only-contraband exception in a line of canine sniff cases.[47]

1. *United States v. Place*

The Supreme Court began its canine jurisprudence with *United States v. Place*.[48] In *Place*, the Court found that a canine sniff was not a search that required probable cause.[49] Reasonable suspicion was sufficient for law enforcement to conduct a canine sniff on temporarily seized luggage.[50] Canine sniffs were uniquely limited "both in the manner in which the information is obtained and in the content of the information revealed by the procedure."[51] A canine sniff "does not expose noncontraband items"; instead, "the sniff discloses only the presence or absence of narcotics, a contraband item."[52]

2. *Illinois v. Caballes*

Place predated *Kyllo*. After *Kyllo*, in *Illinois v. Caballes*,[53] the Court again held that "the use of a well-trained narcotics-detection dog—one that 'does not expose noncontraband items that otherwise would remain hidden from public view,'— . . . generally does not implicate legitimate privacy interests."[54] So, a dog sniff was still not a search.

Justice Stevens, who wrote *Kyllo*'s intimate/nonintimate dissenting opinion, wrote for *Caballes*'s majority:

> This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. Critical to [*Kyllo*] was the fact that the device was capable of detecting lawful activity . . . . The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband . . . . A dog sniff . . . that reveals no information other than the

47. *See* Garland, *supra* note 1, at 423–26.

48. 462 U.S. 696 (1983).

49. *Id.* at 707.

50. *Id.* at 706–07; *see also* Brian L. Owsley, *The Supreme Court Goes to the Dogs: Reconciling* Florida v. Harris *and* Florida v. Jardines, 77 ALB. L. REV. 349, 350, 352 (2014).

51. *Place*, 462 U.S. at 707.

52. *Id.*

53. 543 U.S. 405 (2005).

54. *Id.* at 409 (citation omitted) (quoting *Place*, 462 U.S. at 707).

> location of a substance that no individual has any right to possess does not violate the Fourth Amendment.[55]

Caballes articulated a lawful/unlawful distinction—a slight variation on the intimate/nonintimate dichotomy but with perhaps even less protection. Isn't unlawful activity frequently, if not always, "intimate"? In *Caballes*, the only-contraband exception was refined and *Kyllo* was applied outside the home.

3. *Florida v. Jardines*

Once a canine steps paw onto curtilage, however, the analysis changes. In *Florida v. Jardines*,[56] a police officer used a narcotics canine to check on an unverified tip before applying for a search warrant for a home.[57] The officer brought his canine to the home's front porch, where the canine alerted.[58] This canine alert then provided the basis for the officer's search warrant.[59]

Under common law property doctrine, this sniff constituted a search that required probable cause.[60] For Fourth Amendment purposes, a home's curtilage is "part of the home itself" where "privacy expectations are most heightened."[61] Since the officer and canine physically entered the curtilage of defendant's property to conduct the sniff, the sniff constituted a search.[62]

Justice Scalia's majority opinion rested on property grounds, while Justice Kagan's concurring opinion elaborated on privacy grounds. Summarizing *Kyllo*'s mandate, she wrote:

> [T]hat the device is just a dog cannot change the equation. As *Kyllo* made clear, the "sense-enhancing" tool at issue may be "crude" or "sophisticated," may be old or new . . . still, "at least where (as here)" the device is not "in general public use," training it on a home violates our "minimal expectation of

55. *Id.* at 409–10 (citations omitted).
56. 569 U.S. 1 (2013).
57. *Id.* at 3–4.
58. *Id.* at 4.
59. *Id.*
60. *Id.* at 5–7.
61. *Id.* at 6–7 (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)).
62. *Id.*

> privacy"—an expectation "that *exists*, and that is acknowledged to be *reasonable*."[63]

The concurrence connected the sense-enhancing analysis from *Kyllo* to canine sniffs.[64]

But this connection was limited to the home context by *Florida v. Harris*,[65] decided the same Term as *Florida v. Jardines*.[66] A reliable canine sniff was not a search in a vehicle or public setting and could still support probable cause.[67] "The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert . . . would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test."[68]

C. Dog Sniff Jurisprudence Under State Constitutions

Some states have higher thresholds for law enforcement use of drug-detecting canines due to state constitutional concerns. For example, in Minnesota, law enforcement use of a canine at a traffic stop requires "reasonable articulable suspicion to satisfy the Minnesota Constitution."[69] In Hawaii, law enforcement can deploy canines at traffic stops only if the sniff relates to the reason for the traffic stop.[70] Law enforcement in Pennsylvania must have reasonable suspicion before deploying a canine, while law enforcement in Montana must have particularized suspicion.[71] These examples demonstrate the feasibility of requiring a higher threshold of suspicion before deploying a canine; as further detailed below, some states are already doing it.

1. Colorado

The analysis becomes more complicated in states that legalized medical or recreational marijuana. Even prior to the 2018 Farm Bill, law

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63. *Id.* at 15 (Kagan, J., concurring) (quoting *Kyllo v. United States*, 533 U.S. 27, 34, 36 (2001)).

64. *Id.* (Kagan, J., concurring).

65. 568 U.S. 237 (2013).

66. *Id.* at 248.

67. *See id.* at 248–50.

68. *Id.* at 248.

69. Garland, *supra* note 1, at 431 (citing *State v. Wiegand*, 645 N.W.2d 125, 133–35 (Minn. 2002)).

70. *Id.* at 432 (citing *State v. Ikimaka*, 465 P.3d 654, 658, 665–66 (Haw. 2020)).

71. *Id.*

enforcement canines in these states could not communicate the difference between marijuana (legal under Colorado state law) and other illegal substances the canines were trained to detect. In *People v. McKnight*,[72] the Colorado Supreme Court held that law enforcement's use of a narcotics-trained canine to alert to marijuana is unconstitutional under Colorado's Constitution absent a warrant or probable cause.[73]

Colorado had previously held that drug detection canines were permissible because they detected only contraband, which aligned with the federal caselaw.[74] But, after Colorado's Amendment 64 legalized recreational marijuana, that was no longer the case.[75] The court held that "an exploratory sniff of a car from a dog trained to alert to a substance that may be lawfully possessed violates a person's reasonable expectation of privacy in lawfully possessing that item."[76] In Colorado, "Amendment 64 expanded the protections of [Colorado's Constitution] to provide a reasonable expectation of privacy to engage in the lawful activity of possessing marijuana."[77] The Colorado Supreme Court likened canine sniffs to the thermal-imaging device in *Kyllo*: A canine could not detect the difference between lawful products and contraband.[78]

However, a Colorado federal district court found that this expectation of privacy did not apply in federal court.[79] In *United States v. Spikes*,[80] the Court held that even though Colorado legalized marijuana, because marijuana is federally illegal and federal law controls admissibility in federal court, state officers did not need probable cause to conduct a dog sniff of the defendant's vehicle.[81] "Under federal law, a trained detection dog walking around a lawfully stopped vehicle does not implicate the Fourth Amendment because the alert only detects the presence of contraband, and people do not have a legitimate expectation of privacy in contraband."[82] This case highlights the limits faced by states interpreting their state constitutions more broadly than federal courts. But

72. 2019 CO 36, 446 P.3d 397.

73. *Id.* ¶¶ 54–55, 446 P.3d at 411–12.

74. *Id.* ¶¶ 33–34, 446 P.3d at 405 ("The sniff, we reasoned, could only communicate either the presence or absence of contraband.").

75. *Id.* ¶¶ 41, 54, 446 P.3d at 407, 411–12; COLO. CONST. art. XVIII, § 16(3).

76. *McKnight*, 2019 CO 36, ¶ 43, 446 P.3d at 408.

77. *Id.* ¶ 42, 446 P.3d at 408.

78. *Id.* ¶¶ 43–44, 446 P.3d at 408 ("Because persons twenty-one or older may lawfully possess marijuana in small amounts, a drug-detection dog that alerts to even the slightest amount of marijuana can no longer be said to detect 'only' contraband. . . . [The] sniff now seems more akin to the 'sense-enhancing' technology at issue in *Kyllo*.").

79. *United States v. Spikes*, No. 19-CR-264, 2021 WL 1853419, at *7–8 (D. Colo. May 10, 2021).

80. No. 19-CR-264, 2021 WL 1853419 (D. Colo. May 10, 2021).

81. *Id.* at *7–8.

82. *Id.* at *6.

it also highlights the limits of the only-contraband exception. After the 2018 Farm Bill, the district court's analysis is no longer entirely accurate.

2. Vermont

Article 11 of the Vermont Constitution (the state's Fourth Amendment equivalent) implies a civil cause of action for a law enforcement officer's incorrect reliance on the smell of burnt marijuana.[83] In *Zullo v. State*,[84] a state trooper seized Zullo's vehicle based solely on a faint smell of burnt marijuana while the trooper sought a search warrant.[85] This seizure violated the Vermont Constitution because the faint burnt marijuana odor alone did not create a "fair probability" that marijuana would be found in the vehicle.[86] The Vermont Supreme Court held that there was a "private right of action for damages based on alleged flagrant violations of Article 11."[87] *Zullo* addressed the constitutionality of a *human's* ability to detect marijuana odor, not a canine's. But this case demonstrates a potential tort action for unconstitutional search and seizure when law enforcement, relying solely on the odor of marijuana, searches a vehicle and finds only lawful items such as hemp.

State and federal prosecutors will likely argue that any alternative to the status quo would be untenably expensive and compromise law enforcement's ability to investigate drug crimes.[88] As these examples show, this is not the case. Some states have already made the transition to deploying canines only when a higher threshold of suspicion can be met,[89] while at least one state, Vermont, has articulated a civil cause of

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83. *Zullo v. State*, 2019 VT 1, ¶¶ 83–84, 205 A.3d 466, 502–03; *see* VT. CONST. art. 11.

84. 2019 VT 1, 205 A.3d 466.

85. *Id.* ¶ 83, 205 A.3d at 503.

86. *Id.*

87. *Id.* ¶ 85, 205 A.3d at 503.

88. *See* Patrick Aftoora-Orsagos & Bruce Shipkowski, *Nothing To Sniff at: Bill Would Help Pay To Retire Ohio Drug-Detecting K9s Under Legal Cannabis*, ASSOCIATED PRESS, https://apnews.com/article/ohio-marijuana-sniffing-police-dogs-cannabis-legal-d61ef85ee1607ae55a8ad94cc84c8d86 (Mar. 7, 2024, 3:43 PM); Josh Lee, *State Police Ready To Change But Albuquerque May Not*, PAPER (Sept. 7, 2021, 4:54 PM), https://abq.news/2021/09/state-police-ready-to-change-but-albuquerque-police-may-not/ [https://perma.cc/7PKH-G5U4].

89. *See, e.g.*, *People v. Stribling*, 2022 IL App (3d) 210098, ¶ 28, 228 N.E.3d 766, 773 (finding that an officer did not have probable cause to search a vehicle based solely on the smell of burnt cannabis); Bill Bush, *Is It Hemp or Is It Pot? Drug Dogs Can't Say*, COLUMBUS DISPATCH, https://www.dispatch.com/story/news/crime/2019/08/12/is-it-hemp-is-it/4478086007/ (Aug. 12, 2019, 5:26 AM) (noting that Ohio law enforcement is suspending marijuana-detection training for police dogs due to the identical smells of marijuana and hemp). *But see United States v. Bignon*, 813 Fed. App'x

action when reliance on a hemp smell violates a person's right to privately possess lawful products.

II. HEMP LAW CHANGES

The 2018 Farm Bill removed hemp-derived products from the Schedule I list of the Controlled Substances Act.[90] *Cannabis sativa* contains hundreds of cannabinoids, including THC and CBD.[91] Hemp-derived products that contain 0.3% or less THC are considered legal hemp.[92] High-level THC products and hemp products that were not grown in compliance with the 2018 Farm Bill remain federally illegal under the Controlled Substances Act.[93] But neither law enforcement officers nor canines can tell the difference between these legal and illegal products by sight or smell.[94] Hemp legalization has spurred problems in investigating, detecting, and sentencing marijuana-related crimes.

A. Investigation Issues Created by the 2018 Farm Bill

Investigators struggle to differentiate between legal hemp and illegal marijuana. Prior to the 2018 Farm Bill, any amount of THC was an illicit controlled substance.[95] However, this is no longer the case. Now, "crime

34, 37 (2d Cir. 2020) (admitting evidence discovered during search-incident-to-arrest for smoking marijuana that turned out, upon testing, to be legal hemp); *State v. Moore*, 2023 WI 50, ¶¶ 15–17, 991 N.W.2d 412, 417–18 (affirming that marijuana odor alone is sufficient to establish probable cause).

90. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490, 5018.

91. *Cannabis (Marijuana) and Cannabinoids: What You Need To Know*, NAT'L CTR. FOR COMPLEMENTARY & INTEGRATIVE HEALTH, https://www.nccih.nih.gov/health/cannabis-marijuana-and-cannabinoids-what-you-need-to-know [https://perma.cc/63XK-EF3Q] (Nov. 2019); Andrew Jacobs, *F.D.A. Seeks More Authority To Oversee CBD Products*, N.Y. TIMES (Jan. 26, 2023), https://www.nytimes.com/2023/01/26/health/fda-cbd-oversight.html.

92. 7 U.S.C. § 1639(o)(1); *see also* Sherwood, Griffin & Mills, *supra* note 1, at 17 (discussing the difference between legal hemp and illegal marijuana).

93. 21 U.S.C. § 812(c)(17) (listing tetrahydrocannabinols in Schedule I, "*except for tetrahydrocannabinols in hemp* (as defined under section 1639*o* of title 7)" (emphasis added)).

94. Garland, *supra* note 1, at 433–34 (noting that "high grade marijuana is virtually indistinguishable from legal hemp, even under a microscope"); Sherwood, Griffin & Mills, *supra* note 1, at 17 ("The big takeaway here is that the only way to tell whether a given cannabis plant is high enough in THC to run afoul of the law is through sophisticated laboratory analysis . . . ."); Sarah Olson, *Challenging an Officer's Identification of Marijuana by Sight or Smell*, FORENSIC RES.: OFF. INDIGENT DEF. SERVS. (Nov. 16, 2020), https://forensicresources.org/2020/challenging-an-officers-identification-of-marijuana-by-sight-or-smell/ [https://perma.cc/4J5H-RAFT].

95. Wilson, Urbas & Scott, *supra* note 1.

laboratories must figure out how to differentiate seized cannabis samples as either hemp or marijuana despite a lack of reliable methods to measure the quantity of THC in a sample, particularly at the low level specified by law."[96] Problematically, there are not reliable methods to measure THC ratios in a sample.[97] Moreover, product labelling might be inconsistent.[98]

Rapidly testing the THC ratio in a sample while in the field is also a problem. Some police departments have new technology to field test for the presence of THC versus CBD, but this test "cannot determine the concentration of the delta-9-tetrahydrocannabinol."[99] Moreover, funding the equipment for testing THC levels remains a problem, prompting some jurisdictions to stop prosecuting misdemeanor marijuana offenses altogether.[100] Hemp legalization complicated officers' ability to determine whether a seized product is illicit contraband.

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96. *Id.*; *see also* Richard Press, *NIST Study Will Help Labs Distinguish Between Hemp and Marijuana*, NAT'L INST. STANDARDS & TECH. (Jan. 14, 2021), https://www.nist.gov/news-events/news/2021/01/nist-study-will-help-labs-distinguish-between-hemp-and-marijuana [https://perma.cc/36CC-UFHT] (noting that measuring the concentration of THC, as opposed to detecting its mere presence, can have significant consequences).

97. Joe Gasper & Shanon Banner, *Official Statement: State Police Halts THC Toxicology Testing and Takes Steps To Ensure Transparency, Accuracy, After Technical Issues with CBD*, MSP NEWSROOM (Aug. 31, 2022), https://www.michigan.gov/mspnewsroom/news-releases/2022/08/31/state-police-halts-thc-toxicology-testing [https://perma.cc/GJ2E-QHRB]; *Expert: CMPD Crime Lab Test Does Not Tell the Difference Between Legal Hemp and Illegal Marijuana*, QUEEN CITY NEWS, https://www.qcnews.com/charlotte/expert-cmpd-crime-lab-test-does-not-tell-the-difference-between-legal-hemp-and-illegal-marijuana/ (Dec. 14, 2023, 8:19 AM).

98. *See* Wilson, Urbas & Scott, *supra* note 1 (noting anecdotal evidence of samples incorrectly labeled as hemp where virtually every mislabeled sample had THC concentrations greater than 0.3%); *see also Cannabis (Marijuana) and Cannabinoids*, *supra* note 91 ("Some cannabis/cannabinoid products contain amounts of cannabinoids that differ substantially from what's stated on their labels.").

99. Sandy Koresch, *Hemp or Marijuana: A New Tool for Law Enforcement*, WIS. ST. CRIME LABORATORIES, https://www.doj.state.wi.us/sites/default/files/dles/clab-forms/2020-04_LE%20Bulletin%20Hemp%20test-%20final.pdf [https://perma.cc/LC62-NQJB].

100. Bush, *supra* note 89; Johnny Magdaleno, *Major Decision in Hamilton County Weed Case Led Indy Crime Lab To Stop Testing Cannabis,* INDYSTAR (Sept. 2, 2022, 1:33 PM), https://www.indystar.com/story/news/local/hamilton-county/2022/09/02/carmel-marijuana-case-led-indy-crime-lab-to-stop-testing-cannabis/65469722007/ [https://perma.cc/4YKE-AEG5]; *see also* Nicholas Bogel-Burroughs, *Texas Legalized Hemp, not Marijuana, Governor Insists as Prosecutors Drop Pot Charges*, N.Y. TIMES (July 19, 2019), https://www.nytimes.com/2019/07/19/us/texas-hemp-marijuana-legalization.html.

B. Sentencing Issues Created by the 2018 Farm Bill

The 2018 Farm Bill also impacts federal sentencing guidelines. In *United States v. Brown*,[101] the Third Circuit addressed a quandary impacting sentencing courts when applying the Armed Career Criminal Act (ACCA), a sentence-enhancement provision for repeat offenders.[102] If a defendant's previous convictions were for state crimes that criminalized more conduct than the federal counterpart's language, then that previous conviction cannot serve as a predicate offense.[103] "Brown contends his prior state marijuana convictions may not serve as ACCA predicates because the crime of which he was convicted is no longer a categorical match to its federal counterpart" because "[t]he Agriculture Improvement Act of 2018 removed 'hemp' from the definition of marijuana."[104]

The Third Circuit acknowledged that "the Agriculture Improvement Act, by changing the definition of marijuana, indirectly affected penalties associated with prior serious drug offenses for marijuana convictions."[105] Circuits split as to how to resolve this issue.[106] The 2018 Farm Bill altered how federal and state statutes map onto one another for determining when a defendant has a predicate offense and a sentence enhancement should apply. The Supreme Court granted certiorari and held that "a prior state drug conviction qualifies" as an ACCA predicate offense "if the federal and state definitions of the relevant drug matched when the defendant committed" the predicate state crime.[107]

The criminal justice system is grappling with the unintended, indirect consequences of legalizing hemp. The legal change caused law enforcement and courts to reanalyze assumptions made in prior caselaw and to reconsider investigative tactics. Why not in canine jurisprudence, too?

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101. 47 F.4th 147 (3d Cir. 2022), *aff'd*, 144 S. Ct. 1195 (2024) (consolidated with *Jackson v. United States*, 55 F.4th 846 (11th Cir. 2022)).

102. *Id.* at 149–50.

103. *Id.* at 149.

104. *Id.* at 150 (citation omitted); *cf. United States v. Chaires*, 88 F.4th 172 (2d Cir. 2023) (per curium) (a conviction under New York's law could not be a "serious drug offense" sentence enhancement because the state law at time of conviction was broader than federal predicate definition).

105. *Brown*, 47 F.4th at 151.

106. *Id.* at 153.

107. *Brown v. United States*, 144 S. Ct. 1195, 1202 (2024).

C. Law Enforcement Canine Issues Created by the 2018 Farm Bill

Neither humans nor canines can tell the difference between hemp and illicit marijuana products;[108] in fact "[i]t is not scientifically possible to distinguish the [two] through sight or smell."[109] In order to determine whether the level of THC runs afoul of the law, the sample must go "through sophisticated laboratory analysis."[110]

The Tenth Circuit recently considered whether a canine sniff can contribute to a probable cause finding. In *United States v. Deluca*,[111] Deluca argued that the district court failed to make a factual finding regarding whether a law enforcement canine was trained to alert on hemp.[112] In the lower court, defendants were granted an evidentiary hearing to explore the law enforcement canine's reliability.[113] Following the hearing, the district court did not decide the factual question of whether the law enforcement canine could alert to legal hemp as well as contraband.[114] The Tenth Circuit held that this distinction did not matter because "probable cause existed [from the canine alert] even if [the canine] was trained to alert on hemp in addition to the other controlled substances."[115] Deluca did not cite *Kyllo* or *Caballes* in any briefings before the Tenth Circuit,[116] so the court did not grapple with the use of sense-enhancing technology by law enforcement or directly address whether a canine sniff is a Fourth Amendment search.[117] Even though this opinion was unpublished, subsequent opinions in other courts cite *Deluca* as if the question has been asked and answered.[118]

In a factually similar case, the Seventh Circuit arrived at the same conclusion but with different reasoning. In *United States v. Plancarte*,[119] the Seventh Circuit held that canine sniffs are not a search for two reasons: (1) canine sniffs are *designed* to detect only contraband and

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108. *See* sources cited *supra* note 1.

109. Olson, *supra* note 94 (citation omitted).

110. Sherwood, Griffin, & Mills, *supra* note 1, at 17.

111. No. 20-8075, 2022 WL 3451394 (10th Cir. Aug. 18, 2022).

112. *Id.* at *1–2.

113. *Id.*

114. *Id.*

115. *Id.* at *5.

116. *See generally* Appellant's Opening Brief at iv, *Deluca*, No. 20-8075, 2022 WL 3451394; Appellant's Reply Brief at iii, *Deluca*, No. 20-8075, 2022 WL 3451394.

117. *See Deluca*, 2022 WL 3451394, at *4–5.

118. *See, e.g.*, *United States v. Locke*, No. 22-CR-133, 2024 WL 1343120, at *5 (E.D. Wis. Mar. 28, 2024) (quoting *Deluca* to note a canine alert still gives rise to a high probability that a controlled substance will be found, even if a canine would alert to legal hemp); *Ohio v. Wright*, 2024-Ohio-1763, ¶ 23, 243 N.E.3d 782, 788 (Ct. App.).

119. 105 F.4th 996 (7th Cir. 2024).

(2) they *generally* reveal only contraband.[120] In *Plancarte*, the Seventh Circuit also asserted that *Kyllo* applies only to homes—sharply limiting where individuals will be granted protection from the use of sense-enhancing devices by law enforcement.[121]

While the criminal justice system actively grapples with the effects of hemp legalization in drug testing and sentencing, courts have not reconsidered the assumptions underlying canine sniff cases in the same way. The implications of *Deluca* are troubling for the future of privacy rights in the face of advancing sense-enhancing technology.

III. *DELUCA* WAS WRONGLY DECIDED

Courts must confront the deeper privacy interests at stake when analyzing government use of sense-enhancing surveillance without probable cause. Future courts addressing this argument should carefully consider the assumptions underlying *United States v. Deluca*. The only-contraband exception for sense-enhancing technology must not be incrementally eroded by acceptance of a loose "mostly-contraband" exception.

A. Facts of Deluca

Michael Deluca pled guilty to a charge of felon in possession of a firearm.[122] In April 2020, Deluca was driving in Cheyenne, Wyoming, in a car with both an unregistered Pennsylvania license plate and a temporary license plate in his back window.[123] Officer Freeman, upon searching the license plate and finding it unregistered, pulled over Deluca.[124] Deluca had no license, registration, or proof of insurance.[125] These factors raised the officer's suspicions, and the officer radioed for a canine, Maverick, to sniff the car.[126] Maverick was deployed, sniffed, and alerted, prompting the officers to search both Deluca and the car.[127] While the officers did not find drugs, they did discover a gun and Deluca's driver's license.[128] A database check on the license revealed an

120. *Id.* at 999–1000.

121. *Id.* at 1000 (noting that "dog sniff jurisprudence" distinguishes between "sniffs occurring in public" and "those that involve homes or other private places").

122. *Deluca*, 2022 WL 3451394, at *1–2.

123. *Id.* at *1.

124. *Id.*

125. *Id.*

126. *Id.* at *1–2.

127. *Id.* at *2.

128. *See id.*

outstanding warrant for his arrest in Pennsylvania[129] and Deluca was arrested.[130]

Deluca challenged the constitutionality of both the initial stop and the subsequent search. First, Deluca argued that Officer Freeman lacked reasonable suspicion to conduct a traffic stop.[131] Second, Deluca argued that since Maverick was trained to alert on marijuana, Maverick's sniff could not provide probable cause for a search.[132] At the evidentiary hearing, Maverick's handler testified that he was not actually sure whether Maverick could detect the difference between hemp and marijuana.[133] The district court, in denying the motion to suppress, stated that Officer Freeman had reasonable suspicion to justify the initial traffic stop and probable cause to justify the subsequent searches.[134] Deluca challenged both findings on appeal.[135]

B. The Tenth Circuit's Decision

Deluca argued on appeal that the district court erred by declining to resolve a factual finding as to whether Maverick was trained to alert on legal hemp.[136] If Maverick was trained to alert to legal and illegal substances alike, then any alert pursuant to such training could not provide the basis for probable cause.[137]

The Tenth Circuit looked first to whether the district court actually failed to resolve the factual dispute, citing to a footnote in the district court's order:

> [The handler] could not identify the specific component(s) of marijuana that Maverick recognizes. *However, the possibility of false-positives regarding hemp is not dispositive in this case*. It is not disputed that Defendant said he had smoked marijuana that day in the same clothes, and Defendant does not contend that hemp was in the car.[138]

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129. *Id.*
130. *Id.* at *1–2.
131. *Id.* at *2.
132. *Id.* at *2, 4–5.
133. *Id.* at *2.
134. *Id.*
135. *Id.*
136. *Id.* at *4–5.
137. *Id.*
138. *Id.* at *4 (emphasis underlined in original) (quoting Order on Motion to Suppress at 10 n.4, *United States v. Deluca*, No. 20-CR-064-F (D. Wyo. Sept. 16, 2020)).

Finding that the district court failed to resolve this dispute, the Tenth Circuit considered whether the dispute itself was essential to the probable cause determination. The court held that it was not.[139]

> If hemp was added to [the] list of four controlled substances [that Maverick alerts to], Maverick's alert on a car would still give rise to a high probability that a controlled substance is in the car *as four of the five substances that Maverick could detect are illegal*. Thus, we find that the officers had probable cause to search the car regardless of whether Maverick was trained to alert on legal hemp.[140]

The court strayed from an only-contraband exception, instead implicitly adopting a "probably-contraband" formulation.

In *Deluca*, the Tenth Circuit decided that—even after the 2018 Farm Bill—a canine alert can still provide the basis for probable cause since the positive alert shows a "probability or substantial chance of criminal activity."[141] The court was restricted by the lower court record—Maverick's handler testified that he did not actually know whether Maverick would alert on hemp, placing the onus on the district court to resolve that factual issue, which it declined to do.[142] The court found that Officer Freeman had reasonable suspicion to prolong the traffic stop, but had probable cause to search only after Maverick's alert.[143] Neither the district court nor the Tenth Circuit analyzed whether the canine sniff itself was a search that required probable cause in the first instance.[144] The court did not cite *Kyllo* or *Caballes*.[145] Since the question presented on appeal was limited to whether a canine alert could provide the basis for probable cause—and did not opine on whether the sniff itself was a search—the parties did not cite *Kyllo* or *Caballes* either.[146]

The problem with *Deluca* is that lawful circumstances can still be suspicious and contribute to probable cause.[147] But whether sense-enhancing technology can permissibly form the basis for that suspicion is a different inquiry. If sense-enhancing technology cannot tell the

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139. *Id.* at *4–5.

140. *Id.* at *5 (emphasis added).

141. *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 244 n.13 (1983)).

142. *Id.* at *2, *4.

143. *See id.* at *1–2, *5.

144. *See id.* at *4–5.

145. *See id.* at *2–5.

146. *See* Appellant's Opening Brief at iv, 1, *Deluca*, No. 20-8075, 2022 WL 3451394; Brief of Appellee at iii–vi, 8–9, *Deluca*, No. 20-8075, 2022 WL 3451394.

147. *See, e.g.*, *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000); *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

difference between lawful items and contraband, then the only-contraband exception cannot apply; the use of that technology is itself a search that requires probable cause.[148]

C. Counterarguments Raised in Deluca

The government raised three central counterarguments to Deluca's claim: (1) it does not matter if a canine *can* detect hemp if, here, it did not detect hemp; (2) officers can consider lawful-but-suspicious circumstances to find probable cause; and (3) probable cause is a loose evaluation of statistical likelihood and there is only a small probability that a canine is alerting to hemp and not marijuana.

1. Canine Ability Versus Actual Hemp Detection

The government's response brief emphasized that there was no evidence to suggest that Maverick alerted to hemp in Deluca's car.[149] But this misses the point. The bigger issue is not what the technology actually detected, rather what the intrusive technology has the theoretical *ability* to detect (currently or anticipated in the future).[150]

Kyllo makes this clear. In *Kyllo*, the government's thermal imaging device did not actually detect specific intimate details of the home[151]—it, in fact, detected a marijuana-growing operation. Nonetheless, the law enforcement technology was a search since "*all* details are intimate details, because the entire area is held safe from prying government eyes."[152] Like the thermal imaging technology in *Kyllo*, law enforcement canines can detect lawful, intimate details in a constitutionally protected space. Hemp use is a lawful, intimate detail of an individual's life. And just like in *Kyllo*, law enforcement cannot tell in advance, prior to

148. *See Kyllo v. United States*, 533 U.S. 27, 38, 40 (2001).

149. *See* Brief of Appellee at 21–22, *Deluca*, No. 20-8075, 2022 WL 3451394 (10th Cir. Aug. 8, 2022) ("[Deluca] made a conclusory allegation that Maverick could have alerted on hemp. However, he offered no evidence that Maverick actually did, or would, alert on hemp.").

150. *See Kyllo*, 533 U.S. at 39 ("[N]o police officer would be able to know *in advance* whether his through-the-wall surveillance picks up 'intimate' details—and thus would be unable to know in advance whether it is constitutional."); *Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2018) ("[T]he rule the Court adopts 'must take account of more sophisticated systems that are already in use or in development.'" (quoting *Kyllo,* 533 U.S. at 36)).

151. *Kyllo*, 533 U.S. at 30 (confirming that the technology at issue "show[ed] a crude visual image of the heat being radiated from the outside of the house" and did not allow observation of intimate details).

152. *Id.* at 37.

deploying their sense-enhancing technology, whether their surveillance will detect intimate, lawful details.

2. Lawful-but-Suspicious Circumstances Can Support Probable Cause

The government's response brief considered what the law enforcement officer might have reasonably believed during his investigation, drawing an analogy that law enforcement might have probable cause to seize an item that appears to be contraband but turns out to be lawful.[153] However, in this case, the constitutional concern is not what a reasonable officer could believe, but rather the capacity of the technology that the officer employs to form his belief.

In other words, the relevant perspective in this inquiry is not that of the reasonable officer, but rather that of the canine or other sense-enhancing technology. In *Deluca*, the officer did not rely on his own perception of the totality of the circumstances to find probable cause to search the vehicle. His own observations were sufficient to find reasonable suspicion to prolong a traffic stop.[154] But his suspicion rose to probable cause to physically search the vehicle after the canine alert.[155] The relevant issue here is the capabilities of the intrusive surveillance technology, because use of that technology itself can be a search.[156]

3. Statistically, It Is Probably Marijuana

In a footnote, the Tenth Circuit briefly considered a permutation of the government's but-it-was-not-actually-hemp-here argument: "Deluca presented no evidence and no argument about how common it is that hemp is found in a vehicle in the absence of other controlled substances."[157] In other words, probable cause is just that—probable—so even if a canine *can* alert on hemp, statistically, it is probably

153. *See* Brief of Appellee at 22–23, *Deluca*, No. 20-8075, 2022 WL 3451394 ("[A] law enforcement officer may have probable cause to seize what appears to be a controlled substance that is later determined to be something else.").

154. *See Deluca*, 2022 WL 3451394, at *1–2, *5.

155. *See id.* at *4–5 ("We therefore find that Officer Freeman had reasonable suspicion to stop Deluca, and his stop was justified both in its inception and scope. . . . Maverick's alert on a car would still give rise to a high probability that a controlled substance is in the car as four of the five substances that Maverick could detect are illegal.").

156. *See, e.g.*, *Katz v. United States*, 389 U.S. 347, 353 (1967) (finding government audio surveillance outside of a phone booth constitutes a search within the meaning of the Fourth Amendment); *United States v. Jones*, 565 U.S. 400, 406 (2012); *Carpenter v. United States*, 138 S. Ct. 2206, 2210, 2220 (2018).

157. *Deluca*, 2022 WL 3451394, at *5 n.5.

actually illicit marijuana.[158] Even if the canine is alerting to hemp, there is probably a controlled substance there, too, right? Based on current data, this does not appear to be correct.

Consistent statistics on hemp use are hard to come by, but the available data suggests that hemp has become very popular. There is not necessarily a substantial overlap between marijuana and hemp users.[159] Twenty-two percent of Americans over age twelve used illicit marijuana in 2022.[160] Even before hemp was officially legalized, hemp advocates suggested that "CBD use by a relatively high percentage (44.83%) of nonregular cannabis users suggests that individuals are not using CBD as a perceived legal route to THC consumption."[161] Hemp has only become more popular after the 2018 Farm Bill, with some estimates finding that as many as one-third of Americans have tried CBD.[162] Moreover, search activity for delta-8 (a form of THC legalized by the 2018 Farm Bill) increased 466.8% from 2019 to 2020, and then 850.2% from 2020 to 2021.[163] Most hemp users consume hemp to treat a medical condition.[164] This could safely be described as an "intimate detail" to which an individual has a subjective expectation of privacy—one that society is willing to recognize as reasonable.

The statistics discussed above demonstrate that a substantial number of Americans use hemp products—an intimate, lawful detail—and do not simultaneously possess illicit marijuana. "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity."[165] As courts make guesses regarding the statistical

158. *See id.* at *5.

159. *See* Jamie Corroon & Joy A. Philips, *A Cross-Sectional Study of Cannabidiol Users*, 3 CANNABIS & CANNABINOID RES., no. 1, 2018, at 152, 158; *see also* Nina Julia, *CBD Statistics: Usage Data & Demographics (2024 Update)*, CFAH, https://cfah.org/cbd-statistics/ [https://perma.cc/6QRF-JFQZ] ("1 in 6 marijuana users reports using delta 8 THC products.").

160. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUM. SERVS., PUB. NO. PEP23-07-01-006, NSDUH SERIES H-58, KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2022 NATIONAL SURVEY ON DRUG USE AND HEALTH 15 (2023), https://www.samhsa.gov/data/sites/default/files/reports/rpt42731/2022-nsduh-nnr.pdf [https://perma.cc/C9X6-Z7DR].

161. Corroon & Philips, *supra* note 159, at 158 (cleaned up).

162. SUBSTANCE USE & MENTAL HEALTH SERVS. ADMIN., PUB. NO. PEP22-06-04-003, CANNABIDIOL (CBD) – POTENTIAL HARMS, SIDE EFFECTS, AND UNKNOWNS 1, 4 (2023), https://store.samhsa.gov/sites/default/files/pep22-06-04-003.pdf [https://perma.cc/5ZQ3-Z4NG].

163. Julia, *supra* note 159.

164. *Id.*; Corroon & Philips, *supra* note 159, at 154.

165. *Illinois v. Gates*, 462 U.S. 213, 244 n.13 (1983); *see also Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

likelihood that a canine might alert to legal products, they must address hemp's real popularity.

Further, while probabilities might be relevant to a probable cause analysis,[166] the only-contraband exception should be granted its meaning—a device that detects *only* contraband is not a search.[167] So a device that can detect *mostly* contraband—but can also detect private, intimate, and lawful, non-contraband details—is a search.[168] To hold otherwise would mean either: (1) that an individual who lawfully possesses hemp sacrifices their subjective expectation of privacy or (2) that society is unwilling to recognize this privacy expectation as reasonable.[169]

D. The Government Brief's Reliance on Hayes *and* Vaughn

The Tenth Circuit did not cite to any contemporary cases grappling with the legalization of hemp,[170] but the briefing did. The government cited two cases, writing that: "[T]he Eastern District of Tennessee has twice disagreed with the proposition that because hemp has been legalized that the odor of marijuana can no longer provide probable cause for a search."[171] Analyzing these two cases reveals that, although the government and the Tenth Circuit act as though this issue has been resolved, it actually has not. The Eastern District of Tennessee was the first federal court to rule on the constitutionality of both human and canine marijuana odor detection following the 2018 Farm Bill. So, it is essential to understand the context, arguments raised, and persuasive force behind *Hayes* and *Vaughn*.

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166. *See* Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789, 815, 826–30 (2013) (arguing that quantifying investigative tool accuracy could help evaluate probable cause). *But see* Orin Kerr, *Why Courts Should Not Quantify Probable Cause*, *in* THE POLITICAL HEART OF CRIMINAL PROCEDURE 131, 136–40 (Michael Klarman, David Skeel & Carol Steiker eds., 2012) (arguing that quantifying probable cause would lead to less accurate determinations by "disabling the instincts [about the unknowns] that we rely on to determine probable cause accurately").

167. *See Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005).

168. *See id.*

169. *See Katz v. United States*, 389 U.S. 347, 361 (1967) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

170. *See United States v. Deluca*, No. 20-8075, 2022 WL 3451394 (10th Cir. Aug. 18, 2022).

171. Brief of Appellee at 24, *Deluca*, No. 20-8075, 2022 WL 3451394 (first citing *United States v. Hayes*, No. 19-CR-73, 2020 WL 4034309, at * 20 (E.D. Tenn. Feb. 21, 2020); and then citing *United States v. Vaughn*, 429 F. Supp. 3d 499, 510 (E.D. Tenn. 2019)).

1. *United States v. Vaughn*

In *United States v. Vaughn*,[172] Vaughn challenged the constitutionality of a search following an officer's claim that he smelled a marijuana odor when Vaughn opened the door to his apartment for a knock and talk.[173] While Vaughn raised multiple issues, only one is relevant here: Vaughn argued that, even if the officers detected the odor of marijuana, that odor may have come from lawful hemp which could not provide probable cause for the subsequent search.[174]

The district court rejected all of Vaughn's arguments. The court found that Vaughn waived the hemp argument by failing to raise it previously.[175] But the court rejected the argument on its merits as well:

> Probable cause for a search warrant requires "a fair probability, given the totality of the circumstances, that contraband or evidence will be found in a particular place." Absolute certainty is not required. As a result, Defendants' contention that the smell could have been hemp does not change the fact that it also could be, and was, marijuana. The officers' detection of a marijuana odor meant there was a fair probability that marijuana would be found within the apartment, which is sufficient for probable cause.[176]

So, at least in the Eastern District of Tennessee, a *human* detecting the smell of marijuana can provide the basis for probable cause even though the odor might be emanating from lawful hemp.[177]

2. *United States v. Hayes*

Following *Vaughn*, the district court addressed the constitutionality of a canine detecting the odor of marijuana. In *United States v. Hayes*,[178] defendants raised multiple Fourth Amendment violations for a traffic stop that culminated in a canine sniff and subsequent search of a vehicle.[179]

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172. 429 F. Supp. 3d 499 (E.D. Tenn. 2019).

173. *Id.* at 505–06.

174. *Id.* at 508.

175. *Id.* at 509–10.

176. *Id.* (citations omitted) (quoting *United States v. Greene*, 250 F.3d 471, 479 (6th Cir. 2001)).

177. *See id. But see People v. Stribling*, 2022 IL App (3d) 210098, ¶ 28, 228 N.E.3d 766, 773 (finding that an officer did not have probable cause to search a vehicle based solely on the smell of burnt cannabis).

178. No. 19-CR-73, 2020 WL 4034309 (E.D. Tenn. Feb. 21, 2020).

179. *Id.* at *5, *10.

The court agreed with the defendants that the officer lacked probable cause or reasonable suspicion to conduct the traffic stop to begin with, rendering the fruits of the search inadmissible.[180]

After disposing of the traffic stop as unconstitutional, the court weighed in briefly in dicta on another defense argument—that, following the 2018 Farm Bill, a canine alert cannot provide the basis for probable cause. The court was "not persuaded by the Defendants' argument that the legalization of hemp eliminates any probable cause gained from a trained and certified drug detection dog's alert," observing that "the cases cited by the Defendants are state cases in jurisdictions where marijuana has been legalized to some degree. However, the possession of marijuana remains illegal under federal law."[181] The court cited its previous decision in *Vaughn*, finding that the question of whether marijuana odor can underlie a probable cause finding had already been resolved.[182] The order did not cite *Kyllo*, discuss law enforcement's use of sense-enhancing technology, or address whether a canine sniff is a Fourth Amendment search.[183]

In *Deluca*, the government cited *Vaughn* and *Hayes* to demonstrate that other jurisdictions have already resolved the issue—glossing over the nonprecedential value of these opinions, as both cases arise from district courts and also addressed this issue only in dicta.[184] Problematically, *Vaughn* has since been cited in at least twenty-five other cases, *Hayes* in eleven, and *Deluca* in nine.[185]

3. There Is a Difference Between *Vaughn* and *Hayes*

The Eastern District of Tennessee did not see a difference between *Vaughn* and *Hayes*, and it seems like the Tenth Circuit would agree. The plain view doctrine has three requirements that, when met, allow a law enforcement officer to seize evidence: "(1) the police officer was lawfully located in a place from which to plainly view the item; (2) the officer had a lawful right of access to the item; and (3) it was immediately apparent

180. *Id.* at *10–14.

181. *Id.* at *20.

182. *See id.*

183. *See id.*

184. *See* Brief of Appellee at 22–25, *Deluca v. United States*, No. 20-8075, 2022 WL 3451394 (10th Cir. Aug. 8, 2022).

185. As of November 6, 2024: *Vaughn* has been cited by six federal district courts and seven different state appellate courts; *Hayes* has been cited in six different federal district courts and state appellate courts in Ohio and Tennessee; and *Deluca* has been cited in two federal district courts, the Tennessee Supreme Court, two Tennessee state appellate courts, and an Ohio state appellate court.

that the seized item was incriminating on its face."[186] Courts have applied this test to other senses, including "plain smell."[187]

Applying the plain smell doctrine here, law enforcement's use of sense-enhancing technology not available to the general public constitutes a search precisely because it exceeds an officer's plain smell abilities.[188] The Supreme Court has already observed that law enforcement canines fall into this category.[189] Law enforcement canines are specialized instruments not used by the general public that allow officers to detect what would otherwise be invisible to human senses.[190] Law enforcement canine sniffs are both factually and legally different from a human's plain sniff.[191] *Hayes* missed an important distinction between its facts and *Vaughn*'s—in *Vaughn*, the officers relied only on their own human perception of marijuana odor, not on a law enforcement canine's enhanced abilities. *Hayes* and *Deluca* overlook that the plain smell doctrine is carefully limited by what is within plain *human* smell.

IV. *PLANCARTE* WAS WRONGLY DECIDED

United States v. Plancarte is factually similar to *United States v. Deluca*—roadside stop, canine sniff and alert, search, some controlled substances, arrest, and conviction.[192] The issues raised on appeal were differently framed, however, so the Seventh Circuit's reasoning differed from the Tenth Circuit's. But the Seventh Circuit came to the same conclusion—canine sniffs are not searches.[193] Unlike the Tenth Circuit's per curium opinion, *Plancarte* was published[194] and is therefore the first binding authority on this issue. It has already been cited by two district courts. However, similar to *Deluca*, the *Plancarte* opinion overlooks the gulf between human and canine smell. *Plancarte* also settles for a "generally-contraband" exception that strays from the language of Fourth

186. *United States v. Muhtorov*, 20 F.4th 558, 597 (10th Cir. 2021).

187. *Id.* at 598 ("[C]ourts have applied the [plain view] doctrine to the full range of senses, including plain hearing, *see, e.g.*, *United States v. Ceballos*, 385 F.3d 1120, 1124 (7th Cir. 2004), plain smell, *see, e.g.*, *United States v. Gault*, 92 F.3d 990, 992 (10th Cir. 1996), and plain feel, *see, e.g.*, *United States v. Campbell*, 549 F.3d 364, 373 (6th Cir. 2008).").

188. *See Kyllo v. United States*, 533 U.S. 27, 38 (2001).

189. *Florida v. Jardines*, 569 U.S. 1, 15 (2013) (Kagan, J., concurring).

190. *Id.* at 12–14 (Kagan, J., concurring); *see California v. Ciraolo*, 476 U.S. 207, 215 (1986); *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005).

191. *Jardines*, 569 U.S. at 15 n.2 (Kagan, J., concurring); *see also* ED YONG, AN IMMENSE WORLD: HOW ANIMAL SENSES REVEAL THE HIDDEN WORLD AROUND US 19 (2022).

192. *United States v. Plancarte*, 105 F.4th 996, 998 (7th Cir. 2024).

193. *Id.* at 1001.

194. *Id.* at 998.

Amendment precedent and erodes privacy protections outside of a home context.

A. Facts of Plancarte

Officers tailed Plancarte's vehicle for several hours, eventually pulling him over for unlawful window tints.[195] A law enforcement canine arrived on the scene, performed a sniff, and alerted.[196] The officers searched the vehicle and found eleven pounds of meth.[197] Procedurally, Plancarte challenged the dog sniff as a warrantless search unsupported by probable cause because this canine could alert to CBD.[198] The "K9 Exception" to the Fourth Amendment only applied to well-trained law enforcement canines, defined as a canine that alerts to only contraband. An evidentiary hearing revealed that the canine's handler tracked the canine's efficacy rate and considered a hemp alert as substantiated—as in, the canine alerted to a substance he was trained to detect.[199] The issue on appeal was:

> A drug sniff by a well-trained K9 reveals only the presence of contraband, and because there is no reasonable expectation of privacy in the presence of contraband, such a sniff is not a Fourth Amendment search. Here, police used a K9 that they knew would alert to noncontraband items. Yet the district court held that the sniff was not a search and denied Plancarte's motion to suppress. Did it err?[200]

B. The Seventh Circuit's Decision

In short, the Seventh Circuit said no, the lower court did not err. The Seventh Circuit's opinion did not cite to *Deluca*. This makes sense because the issue was framed differently and *Deluca* is nonprecedential. But the government cited *Deluca* in briefing[201] and brought it up at oral argument, saying:

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195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. Rep. & Recommendation at *1, *3, *Plancarte*, No. 22-CR-64, 2023 WL 3944888 (W.D. Wis. Feb. 10, 2023), *adopted*, 2023 WL 3597600 (May 23, 2023), *aff'd*, 105 F.4th 996 (7th Cir. 2024).

200. Opening Brief & Short Appendix of Defendant-Appellant Juventino L. Plancarte at 2, *Plancarte*, 105 F.4th 996 (7th Cir. 2024).

201. Brief of Plaintiff-Appellee at 40–41, *Plancarte*, 105 F.4th 996.

> [A]ll other courts and district courts to have considered this argument that Plancarte offers you, have rejected it. Specifically in the Tenth Circuit in *Deluca*, where they considered . . . the argument that a dog could potentially be sniffing a legal object, the court ruled . . . that doesn't negate probable cause that it could have been an illegal controlled substance which police may investigate.[202]

The Seventh Circuit agreed with the government and held that dog sniffs are not searches for two central reasons. "First, dog sniffs on the exterior of an automobile during a traffic stop are 'not designed to disclose any information other than the presence or absence of narcotics.'"[203] In other words, canines are still *trained* to alert to only contraband. Hemp just smells like contraband. "Second, they are 'generally likely . . . to reveal only the presence of contraband.' Together, these concepts illustrate that 'the manner in which information is obtained' during a sniff is 'much less intrusive than a typical search' and results in only a 'limited disclosure . . . .'"[204] Put differently, canines still detect mostly contraband. And even if a canine sniff is a search, its nonintrusive quality deems it not an *unreasonable* search, particularly if *Kyllo* is limited to a home context and cannot inform the definition of "reasonableness" here. So, the Seventh Circuit said, canine sniffs are not searches. This Note addresses the Seventh Circuit's points in turn.

1. Canines Are Trained To Detect Marijuana, Not Hemp

Even in light of the 2018 Farm Bill, canines are still trained to detect only contraband.[205] In other words, canines are *trained* to detect only contraband, hemp just happens to smell like contraband. If bananas happened to smell like cocaine, then we wouldn't say that a false positive on a banana compromised the canine's ability to detect only contraband.

The problem with this line of argument is that canines are not trained to detect marijuana specifically, they are trained to detect air particles containing this scent generally—a substance found in both legal and

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202. Oral Argument at 18:50, *Plancarte*, 105 F.4th 996, https://media.ca7.uscourts.gov/sound/2024/gw.23-2224.23-2224_05_20_2024.mp3.

203. *Plancarte*, 105 F.4th at 999 (quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000)).

204. *Id.* at 999–1000 (citation omitted) (first quoting *Illinois v. Caballes*, 543 U.S. 405, 408 (2005); and then quoting *United States v. Place*, 462 U.S. 696, 707 (1983)).

205. *See id.* at 999.

illegal products. So here, dogs are trained to detect more than only contraband.

2. *Kyllo* and *Caballes* Create a "Generally-Contraband" Exception

The Seventh Circuit emphasized a different word from *Illinois v. Caballes*: "generally."[206] The *Plancarte* court used "generally" four times in a three-page discussion,[207] while the *Caballes* majority used "generally" twice in a five-page opinion.[208] In *Plancarte*, the court quoted *Caballes* as "recognizing that, even 'if properly conducted,' dog sniffs are merely '*generally* likely[] to reveal only the presence of contraband.'"[209]

The problem with this interpretation is two-fold. First, emphasizing "generally" renders the word "only" pointless. This language does not appear in other canine sniff cases that created the only contraband exception.[210] Second, this language on THC from *Caballes* relies on an assumption that THC is categorically contraband which no longer holds true.[211]

Finally, a "generally-contraband" exception offers no limiting principle for law enforcement use of sense-enhancing technology. And the Fourth Amendment and the public demand better specificity. *Illinois v. Caballes* was clear: A canine sniff is not a search because well-trained canines detect only contraband.[212] Individuals do not have a legitimate privacy interest in contraband.[213] After the 2018 Farm Bill, canines that were trained to detect marijuana will also alert on hemp, a lawful product.[214] Canines no longer detect only contraband, so their use should constitute a Fourth Amendment search.

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206. *See id.* at 999–1001.

207. *Id.*

208. *See Illinois v. Caballes*, 543 U.S. 405 (2005).

209. *Plancarte*, 105 F.4th at 1001 (emphasis added) (quoting *Caballes*, 543 U.S. at 409).

210. *See United States v. Place*, 462 U.S. 696 (1983).

211. *Caballes*, 543 U.S. at 409. In fact, the Court quoted from the Respondent's rendition of facts: "Respondent likewise concedes that 'drug sniffs are designed, and if properly conducted are generally likely, to reveal only the presence of contraband.'" *Id.*

212. *Id.* at 409–10.

213. *Id.* at 408.

214. Sherwood, Griffin, & Mills, *supra* note 1, at 15–16.

3. "Intrusiveness" Only Protects Property Interests: *Kyllo* Only Applies to Homes

The Seventh Circuit combined these two principles—canine sniffs are still *trained* to detect only contraband and these sniffs are *generally* likely to reveal only contraband—to find that dog sniffs are "much less intrusive than a typical search."[215] Significantly, *Kyllo* was limited to homes: "Since *Kyllo*'s holding also cannot be divorced from that context, we decline to extend it to these facts."[216]

Problematically, *Katz* showed that surveillance can be impermissibly intrusive when it violates a reasonable expectation of privacy, not only a property interest.[217] Observing that a search occurred outside of a home context does not end the inquiry. When a sense-enhancing technology detects more than only contraband, it intrudes into a reasonable expectation of privacy. *Plancarte* held that—despite hemp's legitimate, lawful, and intimate medical and recreational uses—there is no reasonable expectation of privacy in possessing hemp in public.[218] Further, *Kyllo* is a home case, but it is also a technology case. *Kyllo*'s definition of "sense-enhancing technology" has informed, although has not dictated, Fourth Amendment jurisprudence outside of a home context—for example, to analyze law enforcement use of pole cameras.[219] In *Plancarte*, the Seventh Circuit settled on a mostly-contraband exception that parts ways with the assumptions and reasoning of previous canine sniff cases.

D. Deluca *and* Plancarte

Deluca and *Plancarte* were both decided incorrectly but used different reasoning. The Tenth Circuit overlooked the gulf between human and canine abilities—the plain smell doctrine should end where *human* smell ends. In *Deluca*, the Tenth Circuit should have parted ways with *Hayes* to find that the district court failed to resolve a consequential factual dispute. Once the district court properly found that the canine could alert on hemp (a lawful item), then Deluca could argue that the canine sniff could not provide the basis for probable cause since the sniff itself was a search that required probable cause to initiate. On the other

215. *United States v. Plancarte*, 105 F.4th 996, 1000 (7th Cir. 2024).

216. *Id.* at 1000.

217. *See Katz v. United States*, 389 U.S. 347, 353 (1967).

218. *See Plancarte*, 105 F.4th at 1000–01.

219. *See, e.g.*, *United States v. Tuggle*, 4 F.4th 505, 515–17 (7th Cir. 2021); *United States v. Moore-Bush*, 36 F.4th 320 (1st Cir. 2022) (Barron, C.J., concurring). *See also California v. Ciraolo*, 476 U.S. 207, 215 (1986).

hand, in *Plancarte*, the Seventh Circuit accepted a Fourth Amendment exception that would permit law enforcement use of sense-enhancing technology in public—perhaps like *Katz*'s listening device—so long as it detected mostly contraband.

V. WHAT ARE THE OPTIONS MOVING FORWARD?

Courts will continue grappling with the impacts of legalized hemp to faithfully apply *Caballes*'s holding: "[G]overnmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.'"[220] Unless the Supreme Court revisits *Illinois v. Caballes*, criminal defendants can argue that a canine sniff is now a search under federal and state constitutions. Legislatures and law enforcement can also seek out creative solutions to reduce warrantless searches based solely on humans or canines smelling marijuana.[221] Possessing hemp should be recognized as an intimate, lawful detail. Intimate, lawful details carry a subjective expectation of privacy that society is willing to recognize as reasonable.

Defining when sense-enhancing technology becomes a search has never been more important. Artificial intelligence poses new opportunities for sense-enhancing surveillance.[222] When analyzing a sense-enhancing technology, the Court must "tread carefully . . . to ensure that we do not 'embarrass the future.'"[223]

A. Legislative and Policy Solutions

Legislatures and law enforcement agencies can adopt affirmative policies to train canines off marijuana, limit the use of canines during traffic stops, or require a probable cause finding prior to deploying a drug dog. Some law enforcement departments have suspended use of marijuana-trained canines.[224] Other states have chosen to reduce canine presence at routine traffic stops, transitioning trained canines to other

220. *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (quoting *United States v. Jacobsen*, 466 U.S. 109, 110 (1984)).

221. *See Zullo v. State*, 2019 VT 1, ¶¶ 81–84, 205 A.3d 466, 502–03; *see also* Garland, supra note 1, at 431–32.

222. *See* David Gray, *Bertillonage in an Age of Surveillance: Fourth Amendment Regulation of Facial Recognition Technologies*, 24 SMU SCI. & TECH. L. REV. 3, 4–6 (2021); Andrew Guthrie Ferguson, *Why Digital Policing Is Different*, 83 OHIO ST. L.J. 817, 830–31 (2022).

223. *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018) (quoting *Nw. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 300 (1944)).

224. Bush, *supra* note 89.

jobs.[225] As discussed earlier in this Note, multiple states require a higher suspicion threshold before law enforcement can employ a canine, or limit canine use to the original purpose of the traffic stop.[226] Legislatures and law enforcement agencies may also need to consider whether human detection of marijuana odor can still underly probable cause.[227]

B. A Civil Remedy for Incorrect Reliance on Odor

A more creative short-term option might be a civil remedy for errant reliance on an odor that turns out to be legal hemp. Discussed previously, the Vermont Supreme Court created a civil cause of action based on its State Constitution when an officer relies on marijuana odor to seize an individual's property and does not discover contraband.[228] There is not currently a civil remedy for law enforcement's errant reliance on marijuana odor in finding probable cause to search.[229] Litigating instances where a search turns up only lawful hemp will continue to undermine reliance on marijuana odor to find probable cause to search.

CONCLUSION

While the criminal justice system grapples with the effects of hemp legalization in drug testing and sentencing, courts have not reconsidered the assumptions underlying canine sniff cases. Law enforcement canines are a specialized sense-enhancing technology, not available to the general public, that can detect intimate and lawful details otherwise unavailable to law enforcement. This degree of intrusion violates an individual's subjective expectation of privacy and society is willing to recognize that expectation as reasonable. Accordingly, a canine sniff falls outside of the only-contraband exception and is a Fourth Amendment search.

In *United States v. Deluca* and *United States v. Plancarte*, the Tenth and Seventh Circuits addressed this issue without grappling with assumptions underlying canine sniff jurisprudence. Lower courts must

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225. *See, e.g.*, Andy Tsubasa Field, *CT Police Shift How They Use K9s Now That Cannabis Is Legal*, CTPOST (Apr. 17, 2023), https://www.ctpost.com/news/article/ct-police-k9-drug-sniffing-cannabis-legal-17897292.php.

226. *See supra* Section I.C.

227. *See, e.g.*, *United States v. Bignon*, 813 F. App'x 34, 37 (2d Cir. 2020) (admitting evidence discovered during search-incident-to-arrest for smoking marijuana that turned out, upon testing, to be legal hemp); *State v. Moore*, 2023 WI 50, ¶¶ 15–17, 991 N.W.2d 412, 417–18 (affirming that marijuana odor alone is sufficient to establish probable cause).

228. *Zullo v. State*, 2019 VT 1, ¶¶ 81–84, 205 A.3d 466, 502–03.

229. *See Hembrook v. Seiber*, No. 20-CV-00058, 2022 WL 3702091, at *9 (M.D. Tenn. Aug. 26, 2022).

enforce the key reasoning of *Caballes*'s only-contraband exception to expedite law enforcement agencies' phasing out marijuana-trained canines. Departures from the only-contraband exception signal a troubling future for privacy rights in the face of advancing sense-enhancing technology, leaving protection from surveillance in public vulnerable to rapidly advancing technology. The sniff is no longer "up to snuff,"[230] if it ever really was.

230. *Florida v. Harris*, 568 U.S. 237, 248 (2013).