IN THE SUPREME COURT OF IOWA
Supreme Court No. 22-1232
Plymouth County Nos. FECR018888, OWCR018822

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KYRA ROSE BAULER,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR PLYMOUTH COUNTY
THE HONORABLE JEFFREY A. NEARY, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

The State requests retention for two primary reasons. First, the Iowa Supreme Court has granted further review in *State v. Arietta*, No. 21-1133, which presents similar issues to those here. Retaining this case would enable the Court to uniformly address whether the incidental touching of a lawfully stopped vehicle by a narcotics detection dog or their handler constitutes an unconstitutional trespass under the Fourth Amendment and article I, section 8 of the Iowa Constitution.

Second, this Court should overrule, or limit, *State v. Wright*, 961 N.W.2d 396 (Iowa 2021) to the extent it (1) generally adopts a common law trespass test into article I, section 8,[1] (2) applies to traffic stops generally, and (3) otherwise limits law enforcement to only methods that a private citizen could do when investigating vehicle-related crimes. *See* Iowa R. App. P. 6.1101(2)(f).

[1] *See State v. Wright*, 961 N.W.2d 396, 450 (Iowa 2021) (Christensen, C.J., dissenting) (joined by Waterman & Mansfield, JJ.).

STATEMENT OF THE CASE

Nature of the Case

The Plymouth County District Court convicted Kyra Bauler of introduction of contraband, a class "D" felony under Iowa Code section 719.7(3)(a) (2021), possession of a controlled substance, a class "D" felony under section 124.401(5) (2021). Bauler was also convicted of operating while intoxicated, first offense. Iowa Code § 321J.2(2)(a) (2021). Bauler now appeals only the denial of her motions to supress. She contends her rights against unreasonable search and seizure were violated because (1) the officer lacked sufficient reasonable suspicion to stop her vehicle, (2) the drug-dog sniff of her vehicle's exterior was an trespass, and (3) the search of her purse was unjustified. The Honorable Jeffrey A. Neary presided.

Course of Proceedings

The State accepts the defendant's course of proceedings as essentially correct. Iowa R. App. P. 6.903(3).

Facts

On January 29, 2021, Plymouth County Deputy Jaycee Vander Berg was on routine patrol on Highway 75 when she observed a car driving around ten miles per hour below the posted speed limit. State's Ex. 3 (FECR018888) (11/29/21) at 1, Dkt. No. 47; Conf. App.

11; MTS Tr. Vol. II at 4:23–5:24. The vehicle's speed was "peculiar," as "traffic was still quite heavy." State's Ex. 3 at 1, Dkt. No. 47; Conf. App. 11; *see* MTS Tr. Vol. II at 5:14–19, 7:5–12. So Deputy Vander Berg followed the vehicle. State's Ex. 3 at 1, Dkt. No. 47; Conf. App. 11; *see* MTS Tr. Vol. II at 5:25–6:10.

The vehicle then turned into a nearby gas station and stopped at one of the pumps. State's Ex. 3 at 1, Dkt. No. 47; Conf. App. 11; MTS Tr. Vol. II at 10:14–24, 11:20–23. Meanwhile, Deputy Vander Berg checked the vehicle's registration and discovered its owner, Kyra Bauler, had "a history of drug offenses on her driver's license." State's Ex. 3 at 1, Dkt. No. 47; Conf. App. 11; State's Ex. 2, Dkt. No. 25; Conf. App. 4–10; MTS Tr. Vol. II at 11:3–19.

Once Bauler left the gas station, Deputy Vander Berg continued following behind as they merged back onto the highway. State's Ex. 3 at 1, Dkt. No. 47; Conf. App. 11; MTS Tr. Vol. II at 11:20–23. Once back on the highway, Bauler was driving even slower than before: She was now driving 20 mph below the speed limit. State's Ex. 3 at 1, Dkt. No. 47; Conf. App. 11; MTS Tr. Vol. II at 7:1–4, 11:24–12:2. Her slow speed caused "somewhat of a traffic hazard as there was a lot of traffic at the time and semis and vehicles were fighting to take the fast

lane to go around this vehicle." State's Ex. 3 at 1, Dkt. No. 47; Conf. App. 11; *see* MTS Tr. Vol. II at 7:5–12, 12:3–6, 13:5–16.

Bauler was observed "riding" the "fog line for some time" and she crossed the centerline at least three times. State's Ex. 3 at 1, Dkt. No. 47; Conf. App. 11; *see* MTS Tr. Vol. II at 5:11–19, 6:17–21. The last two centerline crosses "were very clear," as "both wheels on the driver's side [went] completely across the dotted centerline separating the two lanes." State's Ex. 3 at 1, Dkt. No. 47; Conf. App. 11.

By that point, Deputy Vander Berg made the decision stop Bauler because of her "poor driving," but she planned to wait until they reached the nearby exit from the highway because "initiating a traffic stop on the vehicle for the poor driving would be safer off the highway than on it." State's Ex. 3 at 1, Dkt. No. 47; Conf. App. 11; *see* MTS Tr. Vol. II at 7:25–8:8.

Before the stop, Deputy Vander Berg contacted City of Le Mars Police Officer Bob Rohmiller about conducting a canine sniff of Bauler's vehicle, given her suspicions that Bauler was possibly intoxicated and that potential "drug related activity [was] taking place." State's Ex. 3 at 2, Dkt. No. 47; Conf. App. 12. Officer

Rohmiller agreed to assist. *See* State's Ex. 3 at 2, Dkt. No. 47; Conf. App. 12; MTS Tr. Vol. I at 7:13–17; MTS Tr. Vol. II at 13:22–14:1.

As expected, Bauler exited the highway, and Deputy Vander Berg began a traffic stop. State's Ex. 3 at 1–2, Dkt. No. 47; Conf. App. 11–12. Deputy Vander Berg also noticed that Bauler's vehicle "had one plate lamp out" over her rear license plate. State's Ex. 3 at 1–2, Dkt. No. 47; Conf. App. 11–12. Once stopped, Deputy Vander Berg told Bauler she had been driving poorly. *See* State's Ex. 3 at 2, Dkt. No. 47; Conf. App. 12; State's Ex. 5 at 19:42:00–19:42:14.

Because Bauler could not provide proof of insurance for her vehicle, Deputy Vander Berg asked her to come back to her patrol car so that she could issue a citation failure to provide proof of insurance, as well as warnings for improper rear lamps (for the equipment violation) and failure to obey a traffic control device (for the multiple lane violations observed while driving). State's Ex. 3 at 2, Dkt. No. 47; Conf. App. 12; State's Ex. 5 at 19:50:40–19:5.

During this encounter, Bauler exhibited further signs of intoxication; she appeared sweaty despite the "below freezing weather," she seemed "sluggish," and her speech was "mumbled." State's Ex. 3 at 2, Dkt. No. 47; Conf. App. 12.

While Deputy Vander Berg prepared the citation and other warnings with Bauler in her patrol vehicle, Officer Rohmiller and his certified narcotics detection dog, Ace, arrived on-scene. State's Ex. 3 at 2, Dkt. No. 47; Conf. App. 12; State's Ex. 5 at 19:49:47. Rohmiller and Ace completed a free-air sniff around the car's exterior by walking two laps around it. State's Ex. 3 at 2, Dkt. No. 47; Conf. App. 12; State's Ex. 4 at 19:53:15–19:54:25; *see also* State's Ex. 5 at 19:54:27–19:54:35. During the sniff, Officer Rohmiller held up his hand or touched the exterior of Bauler's vehicle to "detail" Ace. MTS Tr. Vol. I at 9:13–19, 10:4–9; State's Ex. 4 at 19:53:15–19:54:25. During this detailing, Ace's paws touched the car's exterior several times. MTS Tr. Vol. I at 11:23–12:10; State's Ex. 4 at 19:53:15–19:54:25. At no point during the sniff did Rohmiller or Ace enter the car, nor was there evidence of any damage to Bauler's vehicle resulting from the officer touching the car or Ace putting his paws on it. MTS Tr. Vol. I at 9:23–10:3.

Ace then sat or laid down near the passenger-side door of Bauler's car, which confirmed the presence of illegal drugs as this behavior reflects Ace's "final indication." MTS Tr. Vol. I at 8:15–23, 9:10–12, 10:16–19; State's Ex. 5 at 19:54:17–19:54:25. Rohmiller

notified Vander Berg and Bauler of his findings just as Vander Berg finished printing the citation for lack of insurance. State's Ex. 5 at 19:54:18–19:54:55. The investigation was then converted into a drug investigation. *See* State's Ex. 5 at 19:54:55–19:55:12; *see* State's Ex. 3 at 2, Dkt. No. 47; Conf. App. 12.

The officers then searched Bauler's car based on Ace's positive alert to the odor of narcotics. State's Ex. 3 at 2, Dkt. No. 47; Conf. App. 12; *see* State's Ex. 5 at 19:57:24–20:17:30. They discovered several items of drug paraphernalia. State's Ex. 3 at 2, Dkt. No. 47; Conf. App. 12. And, after obtaining Bauler's permission to open two "taped-off" packages that were inside the car, they found "a scale with white powder residue" consistent with methamphetamine. State's Ex. 3 at 2, Dkt. No. 47; Conf. App. 12; State's Ex. 5 at 20:12:20–20:15:30. A "suspected methamphetamine pipe, a makeup container with white crystalline residue, and a small vile with white powdery residue" were discovered in Bauler's purse, too. State's Ex. 3 at 2, Dkt. No. 47; Conf. App. 12; State's Ex. 5 at 20:06:01–20:12:10.

Bauler was arrested for possessing drug paraphernalia and operating while intoxicated, and she was transported to the jail. There, Officer Rohmiller conducted a drug recognition evaluation,

given Deputy Vander Berg's suspicions that Bauler was driving while intoxicated. State's Ex. 3 at 3, Dkt. No. 47; Conf. App. 13; State's Ex. 13, Dkt. No. 50; Conf. App. 18–20. He concluded Bauler was under the influence of a stimulant, likely methamphetamine. State's Ex. 12 at 7, Dkt. No. 83; App. --; State's Ex. 13 at 2–3, Dkt. No. 50; Conf. App. 12–13.

Deputy Vander Berg then invoked implied consent and requested a urine sample from Bauler for testing, which Bauler refused to provide. *See* State's Ex. 3 at 3, Dkt. No. 47; Conf. App. 13.

During the booking process, jail personnel found two baggies of methamphetamine that Bauler had concealed inside her vagina. State's Ex. 3 at 3–7, Dkt. No. 47; Conf. App. 13–17; *see* State's Ex. 8, Dkt. No. 63; App. --.

ARGUMENT

I. Deputy Vander Berg's Decision to Stop Bauler's Vehicle was Reasonable After She Observed Bauler Commit Multiple Traffic Infractions and Exhibit Several Signs of Poor Driving and Impairment.

Preservation of Error

The State does not dispute error preservation on this issue. Bauler's claim that Deputy Vander Berg lacked reasonable suspicion or probable cause before stopping her was raised before, and rejected

by, the district court. Ruling on MTS (FECR018888) (12/29/21) at 1, 5–6, Dkt. No. 53; App. 15, 19–20. That ruling preserved error. *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

"When a defendant challenges a district court's denial of a motion to suppress based upon the deprivation of a state or federal constitutional right, [the] standard of review is de novo." *State v. Hague*, 973 N.W.2d 453, 458 (Iowa 2022) (quoting *State v. Brown*, 930 N.W.2d 840, 844 (Iowa 2019)). The Court independently evaluates "the totality of the circumstances found in the record, including the evidence introduced at both the suppression hearing and at trial." *State v. Vance*, 790 N.W.2d 775, 780 (Iowa 2010) (citation omitted).

The Court gives "deference to the district court's fact findings due to its opportunity to assess the credibility of the witnesses, but [it is] not bound by those findings." *In re Prop. Seized from Pardee*, 872 N.W.2d 384, 390 (Iowa 2015).

On review, the Court may affirm on any ground presented to the district court, including any "appearing in the record but not included in that court's ruling." *DeVoss v. State*, 648 N.W.2d 56, 62 (Iowa

2002) (quoting *Iowa Tel. Ass'n v. City of Hawarden*, 589 N.W.2d 245, 252 (Iowa 1999)).

Merits

The district court correctly found reasonable suspicion supported the decision to stop of Bauler's vehicle. *See* Ruling Denying MTS (FECR018888) (12/29/21) at 5–6, Dkt. No. 53; App. 19–20. Probable cause supported the stop, as well.

The Fourth Amendment and article I, section 8 protect people from "unreasonable searches and seizures." U.S. Const. amend. IV; Iowa Const. art. I, § 8. The "'[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutions a 'seizure' of 'persons' within the meaning of' the Fourth Amendment." *State v. Warren*, 955 N.W.2d 848, 859 (Iowa 2021) (quoting *Whren v. United States*, 517 U.S. 806, 809–10 (1996); citing *State v. Pals*, 805 N.W.2d 767, 773 (Iowa 2011)).

For such a stop to be constitutionally permissible, it must be reasonable. *State v. Salcedo*, 935 N.W.2d 572, 577 (Iowa 2019) (citing *State v. Kreps*, 650 N.W.2d 636, 641 (Iowa 2002)). That is, an officer must have either probable cause or reasonable suspicion

before stopping a vehicle. *Warren*, 955 N.W.2d at 860; *State v. McIver*, 858 N.W.2d 699, 702 (Iowa 2015).

A. Bauler's numerous traffic violations gave probable cause for a detention.

Although the district court focused its ruling to find reasonable suspicion existed to stop Bauler's vehicle, that does not prevent the Court from finding probable cause existed, as well. *DeVoss*, 648 N.W.2d at 62. On review, "The motivation of the officer stopping the vehicle is not controlling in determining" if probable cause or reasonable suspicion existed: An officer is "not bound by his real reasons for the stop." *Brown*, 930 N.W.2d at 847 (quoting *Kreps*, 650 N.W.2d at 641).

"When a peace officer observes a violation of our traffic laws, however minor, the officer has probable cause to stop a motorist." *State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004). If a defendant challenges the stop, the State bears "the burden of proof by a preponderance of the evidence that the officer had probable cause to stop the vehicle," when evaluated from the viewpoint of an objectively reasonable officer. *Brown*, 930 N.W.2d at 955 (quoting *State v. Tyler*, 830 N.W.2d 288, 293–94 (Iowa 2013)).

In this case, objective circumstances offered a reasonable officer three reasons to detain Bauler. First, Deputy Vander Berg observed a faulty license plate light. Second, she observed Bauler impede the flow of traffic, which created a risk for others on the road. And third, she observed Bauler cross the centerline and fog line multiple times.

Deputy Vander Berg observed an equipment violation on Bauler's vehicle: "[A]nother minor detail I noticed was that one of her plate lamps was exceptionally bright. And upon getting close enough, I realized another one was out, so it would have been an equipment violation." MTS Tr. Vol. II (FECR018888) (12/27/21) at 6:20–25. This made "the plate difficult to read. [Bauler] had one [light] that was especially bright and it almost reflected off the plate kind of weird and then you couldn't see the other half of the plate." MTS Tr. Vol. II (FECR018888) (12/27/21) at 8:13–17, 8:20–22; *see* State's Ex. 3 at 1–2, Dkt. No. 47; Conf. App. 11–12. Under Iowa law, rear license plates must be lit so that it is "clearly legible from a distance of fifty feet to the rear." Iowa Code § 321.388. Further, "[a]ll lamps and lighting equipment originally manufactured on a motor vehicle shall be kept in working condition or shall be replaced with equivalent equipment." *Id.* § 321.387. Because Bauler's rear license plate had a light out that

made it so "you couldn't see the other half of the plate," she was subject to a traffic citation. *Id.* §§ 321.385A(1)(b), 321.387; *see State v. Haas*, 930 N.W.2d 699, 703 (Iowa 2019) (per curiam) (citing *State v. Lyon*, 862 N.W.2d 391, 398 (Iowa 2015)) ("The absence of these equipment features serves as reasonable suspicion to justify an investigatory stop.").

Second, Bauler was still driving well-below the speed limit, which impeded the "reasonable and proper" flow of traffic. *See id.* §§ 321.285(1), (8); MTS Tr. Vol. II (FECR018888) at 5:14–16 ("She was driving around–at the lowest—20 miles an hour below the speed limit causing a traffic hazard to the vehicles around her."); State's Ex. 3 at 1, Dkt. No. 47; Conf. App. 11 (noting Bauler's slow driving "was actually creating somewhat of a traffic hazard as there was a lot of traffic at the time and semis and vehicles were fighting to take the fast lane to go around [Bauler's] vehicle."). This too is a citable traffic infraction under section 321.294, which allows officers to stop any car that is driving "at such a slow speed as to impede or block the normal and reasonable movement of traffic" to provide "directions to [the] drivers."

Finally, Deputy Vander Berg observed Bauler cross the fog line and centerline of the highway multiple times. *See* MTS Tr. Vol. II at 8:5–8; State's Ex. 3 at 1, Dkt. No. 47; Conf. App. 11 ("I noticed [Bauler's vehicle] ride on the fog line for some time and then have a slight cross of the centerline . . . . the vehicle [then] crossed the centerline an additional two times that were very clear crosses, that being both wheels on the driver's side going completely across the dotted centerline separating the two lanes."). Based on those observed violations, probable cause existed to stop Bauler's vehicle for violating Iowa Code section 321.297. That is because, under section 321.297(3), "the median was the center line," so when Bauler drove her vehicle "to the left of the center line of the roadway," she acted in the manner "prohibited by section 321.297(3)." *Tague*, 676 N.W.2d at 203.

To the extent Bauler relies on *Tague*, it does not apply. Bauler crossed the centerline and fog line at least three times. *See* State's Ex. 3 at 1, Dkt. No. 47; Conf. App. 11.

Any one of the above-traffic infractions provided probable cause to stop Bauler's car. *See Warren*, 955 N.W.2d at 860 (citing *Brown*, 930 N.W.2d at 855). The record before the Court, therefore, supports

a probable cause finding, despite the district court not specifically analyzing the stop through such a lens. *DeVoss*, 648 N.W.2d at 62. As it follows then, Bauler's first claim fails.

B. Reasonable suspicion also supported the detention.

The district court correctly determined reasonable suspicion supported stopping Bauler. *See* Ruling Denying MTS (FECR018888) (12/29/21) at 5–6, Dkt. No. 53; App. 19–20.

"Reasonable suspicion to stop a vehicle for investigative purposes exists when articulable facts and all the circumstances confronting the officer at the time give rise to the reasonable belief that criminal activity may be afoot." *McIver*, 858 N.W.2d at 702. "Whether reasonable suspicion exists for an investigatory stop must be determined in light of the totality of the circumstances confronting a police officer, including all information available to the officer at the time the decision to stop is made." *Kreps*, 650 N.W.2d at 642 (citing *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). This is an objective standard: "[W]ould the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?" *State v.*

Heminover, 619 N.W.2d 353, 357 (Iowa 2000) (quoting T*erry v. Ohio*, 392 U.S. 1, 21–22 (1968)).

The circumstances under which the officer acted must be viewed "through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *Kreps*, 650 N.W.2d at 642 (citations and quotations omitted). "The evidence justifying the stop need not rise to the level of probable cause. An officer may make an investigatory stop with 'considerably less than proof of wrongdoing by a preponderance of the evidence.' " *Id.* (quoting *State v. Richardson*, 501 N.W.2d 495, 496–97 (Iowa 1993)).

And even lawful conduct can give rise to reasonable suspicion under the totality of the circumstances test. "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause for arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate course." *Adams v. Williams*, 407 U.S. 143, 145 (1972) (citing *Terry*, 392 U.S. 1 (1968)).

Here, the totality of the circumstances supported Deputy Vander Berg's suspicion that criminal activity was afoot and, in turn,

her decision to stop Bauler's vehicle. When first observed, Bauler was driving well-below the speed limit, which was "peculiar." *See* MTS Tr. Vol. II at 9:5–11, 9:12–15. At one point, Bauler drove "20 miles an hour below the speed limit causing a traffic hazard to the vehicles around her. And she was crossing the centerline and riding the fog line, which is – I guess weaving within the lane and out of the lane." MTS Tr. Vol. II at 5:15–19. That slow driving was unusual, as "[i]t was a busy time and there was a lot of traffic" on the road, "so all the vehicles were trying to get around her. And when one vehicle's traveling extremely slowly and they're fighting for one line where there's a lot of traffic, it can be kind of messy." MTS Tr. Vol. II at 7:15–19. Thus, Bauler's unusually slow driving supports finding reasonable suspicion existed that she was intoxicated or, at the very least, that she had committed a traffic infraction. *See State v. Otto*, 566 N.W.2d 509, 510–11 (Iowa 1997); *State v. Mahoney*, 515 N.W.2d 47, 49 (Iowa Ct. App. 1994); *see, e.g.*, *State v. Van Kirk*, 32 P.3d 735, 741 (Mont. 2001) (finding slow driving supported finding reasonable suspicion of intoxication); *Leaper v. State*, 753 P.2d 914, 915 (Okla. Crim. App. 1988) ("[T]he appellant's driving at an extremely slow rate

of speed . . . constituted unusual or suspicious behavior which was sufficient probable cause . . . to stop appellant's automobile.").

Deputy Vander Berg then followed Bauler's car and observed her cross the centerline and fog line on "[m]ore than one [occasion] for sure." MTS Tr. Vol. II at 8:8.

> I noticed [Bauler's vehicle] ride on the fog line for some time and then have a slight cross of the centerline. I began to focus on its driving behavior . . . and I did note that the vehicle crossed the centerline an additional two times that were very clear crosses, that being both wheels on the driver's side going completely across the dotted centerline separating the two lanes.

State's Ex. 3 at 1, Dkt. No. 47; Conf. App. 11. True, "crossing the edge line for a brief moment" does not always provide a reasonable suspicion to stop a car when that driving behavior is occurs "brief" and an "isolated incident." *See Tague*, 676 N.W.2d at 205. But Bauler's suspect-driving was neither "brief" nor an "isolated incident." *Id.* The reasonable suspicion present here is distinguishable from *Tague*, so *Tague* does not support Bauler's argument to the contrary now. *See id.* at 204–05.

Further, after checking her license plate before the stop, Deputy Vander Berg discovered Bauler had "a number of drug related

offenses on her record." State's Ex. 3 at 1, Dkt. No. 47; Conf. App. 11. Bauler's past drug convictions support Deputy Vander Berg's reasonable suspicion that she may have been intoxicated. *See McNeal*, 967 N.W.2d at 102 ("[A]n individual's prior criminal record is a valid consideration" in a probable cause or reasonable suspicion analysis); *State v. Hoskins*, 711 N.W.2d 720, 727 (Iowa 2006).

The totality of the circumstances, therefore, gave rise to Deputy Vander Berg's reasonable suspicion that Bauler was committing a crime. Bauler's erratic and "unusual" driving behavior, her known history of illegal drug use, and the observed traffic infractions provided sufficient reasonable suspicion for Deputy Vander Berg to stop her vehicle. Bauler's first claim thus fails under a reasonable suspicion analysis, too.

II. The District Court Properly Declined to Suppress the Drugs Detected During a Drug-Dog's Sniff During the Lawful Traffic Stop of Bauler's Vehicle.

Preservation of Error

The State does not dispute error preservation on this issue. Bauler's challenge to the constitutionality of the drug-dog's sniff of her vehicle's exterior was rejected by the district court. Ruling on MTS (FECR018888) (12/29/21) at 1, 6–9, Dkt. No. 53; App. 15, 20–

23; Def.'s MTS Br. (FECR018888) (11/28/21), Dkt. No. 45; Def.'s MTS (FECR018888) (10/15/21) at 1, Dkt. No. 30; App. 12. That ruling preserved error. *Lamasters*, 821 N.W.2d at 864.

Standard of Review

"When a defendant challenges a district court's denial of a motion to suppress based upon the deprivation of a state or federal constitutional right, [the] standard of review is de novo." *Brown*, 930 N.W.2d at 844. The Court evaluates "the totality of the circumstances found in the record, including the evidence introduced at both the suppression hearing and at trial." *Vance*, 790 N.W.2d at 780 (citation omitted). And it gives "considerable deference to the trial court's findings regarding the credibility of the witnesses," and its findings of fact, although the Court is not bound by those findings. *Tague*, 676 N.W.2d at 201.

On review, the Court may affirm on any ground presented to the trial court, including any "appearing in the record but not included in that court's ruling." *City of Hawarden*, 589 N.W.2d at 252.

Merits

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures." U.S. Const. amend. IV; *see Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018). Article I, section 8 of the Iowa Constitution is "essentially identical" to the Fourth Amendment's text. *State v. Burns*, 988 N.W.2d 352, 360 (Iowa 2023). "[S]ection 8 'as originally understood, was meant to provide the same protections as the Fourth Amendment, as originally understood." *Id.* (quoting *Wright*, 961 N.W.2d at 411–12). So, the Court "generally 'interpret[s] the scope and purpose of the Iowa Constitution's search and seizure provisions to track with federal interpretations of the Fourth Amendment' because of their nearly identical language." *Brown*, 930 N.W.2d at 847 (quoting *State v. Christopher*, 757 N.W.2d 247, 249 (Iowa 2008)).

But the Court is not automatically compelled to adopt the Supreme Court's interpretation of the Fourth Amendment when construing section 8. *Id.* Rather, "if a federal interpretation of the Fourth Amendment is not consistent with the text and history of section 8, [the Court] may conclude that the federal interpretation should not govern [its] interpretation of section 8." *Burns*, 988 N.W.2d at 360. In all cases, however, the Court's duty is "to 'interpret our constitution consistent with the text given to us by our founders,'

and to 'give the words used by the framers their natural and commonly-understood meaning' in light of the 'circumstances' at the time of adoption." *Id.* (citations omitted).

In this case, Bauler does not give any reason why the Court should depart from interpretation of federal search and seizure law. So the Court should construe section 8 in a manner consistent with the prevailing interpretation for cases arising under the Fourth Amendment.

Bauler claims the drug-dog sniff of her vehicle's exterior constitutes an unreasonable search because Officer Rohmiller and Ace "physically trespassed" on her vehicle by touching its exterior surface. *See* Def.'s Br. at 35–43. That argument, however, lacks merit under established precedent, the history of the Fourth Amendment's text, and the customs and practice that have limited the breadth of search and seizure protections from before the Amendment was ratified and onward. This is true for three reasons.

First, the sniff here, as well as the officer's and Ace's contact with the car, were not a "search" within the "fair and ordinary meaning of the term." *Wright*, 961 N.W.2d at 413. The officer's hand

and Ace's paws touching Bauler's car are not the type of unreasonable contact, or "trespass," that the Fourth Amendment prohibits.

Second, recent theories of common law trespass have not undone the law of dog sniffs. Like other courts have held, this Court should find that the common law trespass to property theory does not apply within the context of traffic stops.

And third, because *Wright* cuts too broadly in its discussion of Iowa's search and seizure law—and, as a result, injects significant confusion into Iowa law—its holding should be limited to cases involving one's house. If it cannot be limited in such a way, it should be overruled. The Amendment's history, the law and customs at the time of ratification, and Iowa's trespass statute present in the current Iowa Code all support either limiting or overruling *Wright*.

A. Precedent establishes that sniffs of a vehicle's exterior are not Fourth Amendment "searches."

Setting aside consideration of common law trespass for a moment, this is an easy case. The district court properly held that, within the context of traffic stops, caselaw forecloses Bauler's claim that Ace's sniff of her car's exterior constituted a search.

For nearly 60 years, Fourth Amendment protections have been tied to "reasonable expectation[s] of privacy." *Katz v. United States*,

389 U.S. 347, 360 (1967) (Harlan, J., concurring); *see Burns*, 988 N.W.2d at 361 (same). A reasonable expectation of privacy exists if a defendant (1) "sought to preserve something as private" and (2) that privacy expectation is "one that society is prepared to recognize as reasonable." *Burns*, 988 N.W.2d at 361 (citations omitted). "Unless both criteria are met, there is no reasonable expectation of privacy, and the Fourth Amendment does not apply." *Id.* (quoting *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018)).

An "external sniff" of a vehicle is generally not considered a search, as they do not "compromise any legitimate interest in privacy." *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (quoting *United States v. Jacobsen*, 466 U.S. 109, 123 (1984)). Society has generally been unwilling to recognize a "legitimate expectation of privacy" in contraband, such as illegal drugs. *Id.* at 408–10. Consequently, "Any intrusion on [one's] privacy expectations does not rise to the level of a constitutionally cognizable infringement. A dog sniff conducted during a concededly lawful traffic stop reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." *Id.* at 409–10 (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)).

Similarly, the Iowa Supreme Court has also held that sniffs of a vehicle's exterior are not searches because they do "not expose noncontraband items that otherwise would remain hidden from public view," they reveal "only the presence or absence of narcotics, a contraband item[,]" and "the airspace around the car is not an area protected by the Fourth Amendment." *State v. Bergmann*, 633 N.W.2d 328, 334 (Iowa 2001) (quoting *Place*, 462 U.S. at 707). And because such sniffs are "not a search under the meaning of the Fourth Amendment," "neither probable cause [n]or reasonable suspicion must be present to justify" them. *Id.*

The general rule that drug-dog sniffs are not constitutional searches, however, has limits. For example, a sniff of a house or its curtilage is a search when the officers only learn what they learn by "physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner." *Florida v. Jardines*, 569 U.S. 1, 5–6, 11–12 (2013). That is, a sniff is a search "regardless of any privacy expectations if [officers] physically trespass on a constitutional 'effect' for the purpose of obtaining information, or they commit an unlicensed physical intrusion of one's curtilage." *Wright*, 961 N.W.2d at 441 (Christensen, C.J., dissenting). This limit

recognizes that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *State v. Wilson*, 968 N.W.2d 903, 911–12 (Iowa 2022) (citation omitted).

But, while "*Jardines* is premised on a trespass rationale involving the special protection accorded to the home[,] it does not alter the analysis for traffic stops." *United States v. Winters*, 782 F.3d 289, 292 (6th Cir. 2015); *accord United States v. Seybels*, 526 F. App'x 857, 859 n.1 (10th Cir. 2013) (noting *Jardines* "was based on property rights not implicated in the traffic stop context and, hence, did not undermine *Caballes*."); *United States v. Cordero*, No. 5:13–cr–166, 2014 WL 3513181, at *9 (D. Vt. July 14, 2014) ("*Jardines* did not reverse the Court's decisions holding that canine sniffs during traffic stops do not implicate the Fourth Amendment"); *United States v. Taylor*, 978 F.Supp.2d 865, 881–82 (S.D. Ind. 2013) ("nothing in *Jardines* disturbed th[e] well-settled proposition . . . that [a] dog sniff [is] not a Fourth Amendment search" if "conducted by law enforcement in an area they have a legal right to be.").

Jardines thus recognizes the distinction between the "part of the home itself for Fourth Amendment purposes" and other property. And given that this case involves a traffic stop and not Bauler's house,

the common law trespass principles set out in *Jardines* and *Wright* are inapplicable, as discussed below.

Sniffs can also become a search if an officer directs, or encourages, the drug-dog to enter the vehicle to smell around.[2] Such "interior sniffs" implicate the automobile exception, given that some of the Amendment's protections extend to a vehicle's interior. *United States v. Pulido-Ayala*, 892 F.3d 315, 318 (8th Cir. 2018) (citations omitted). "The automobile exception allows officers to search a vehicle without a warrant if the officers have probable cause to believe the vehicle contains contraband. The 'exception rests on twin rationales: (1) the inherent mobility of the vehicle, and (2) the lower expectation of privacy in vehicles compared to homes and other structures.'" *State v. Stevens*, 970 N.W.2d 598, 602 (Iowa 2022) (quoting *State v. Storm*, 898 N.W.2d 140, 145–46 (Iowa 2017)).

Here, Ace did *not* enter Bauler's car while sniffing around it. *See* State's Ex. 4 at 19:53:15–19:54:25; *see also* Def.'s Br. at 41–42.

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[2] *See, e.g.*, *United States v. Guidry*, 817 F.3d 997, 1005–06 (7th Cir. 2016); *United States v. Sharp*, 689 F.3d 616, 618–20 (6th Cir. 2012); *United States v. Pierce*, 622 F.3d 209, 214–15 (3d Cir. 2010); *United States v. Lyons*, 486 F.3d 367, 373–74 (8th Cir. 2007); *United States v. Stone*, 966 F.2d 359, 364 (10th Cir. 1989); *State v. George*, No. 15-1736, 2016 WL 6636750 (Iowa Ct. App. Nov. 9, 2016).

And the officers did not enter her vehicle until after Ace positively alerted on the car which, in turn, established probable cause to search inside it. *See Bergmann*, 633 N.W.2d at 338. Thus, any "interior sniff" that could otherwise convert a sniff into a Fourth Amendment search does not exist here.

Bauler also had no reasonable expectation of privacy in the area around her car that the dog was sniffing. And, under longstanding precedent, any contact with the vehicle is not fatal. Such incidental contact is not a tactile inspection of the car:

> [The drug-dog] jumped and placed his front paws on the body of the car in several places during the walk-around sniff that took less than one minute. This minimal and incidental contact with the exterior of the car was not *a tactile inspection of the automobile*. It did not involve entry into the car; it did not open any closed container; and it did not expose to view anything that was hidden. The sniff of [the defendant's] car was comparable to other canine alerts evaluated by the Supreme Court, and it did "not rise to the level of a constitutionally cognizable infringement."

United States v. Olivera-Mendez, 484 F.3d 505, 511–12 (8th Cir. 2007) (citations omitted) (emphasis added).

To be sure, Iowa's courts have found similar sniffs "up to snuff." *See State v. Carson*, 968 N.W.2d 922, 929–30 (Iowa Ct. App. 2021)

(affirming denial of a motion to suppress because "[w]hile making these passes along the vehicle, [the officer] leads [the dog] by running his hand along the vehicle," and "[o]n the pass along the passenger side of the vehicle, [the dog] jumps up onto the car twice"); *State v. Arrieta*, No. 21-1133, 2023 WL 152494, at *5 (Iowa Ct. App. Jan. 11, 2023) (approving of sniff after dog "jump[ed] up on the driver's side of the truck" to "get [his] nose close to the seams of the sleeper cab" to "seemingly sniff higher in the air."), *further rev. granted* (Iowa Apr. 27, 2023); *see also Stevens*, 970 N.W.2d at 601 (expressing no disapproval when the drug-dog "jumped up on the driver's door where the window was open and sat after sniffing inside").

As in those cases, so too here. The officer's and Ace's contact with Bauler's car was not unreasonable and did not amount to a "constitutionally cognizable infringement" because Ace was not searching with his paws. *Olivera-Mendez*, 484 F.3d at 512 (quoting *Caballes*, 543 U.S. at 409). That is, Ace did not confirm the presence of drugs because he *felt* the exterior of Bauler's car. Unlike an officer during a pat-down of a defendant, Ace learned nothing by touching the vehicle. *See State v. Hunt*, 974 N.W.2d 493, 496–500 (Iowa 2022).

And while it is true the Supreme Court of Idaho recently decided that a drug-dog commits a trespass if it touches a car's exterior during a sniff, that court stands alone in concluding as much outside the context of the narrow limitations on sniffs discussed above. *See State v. Dorff*, 526 P.3d 988 (Idaho 2023), *petition for cert. filed* (U.S. June 21, 2023) (No. 22–1226). As discussed below within the context of *Wright*, *Dorff* defines "trespass" too broadly and ignores the Fourth Amendment's relevant history and context for vehicle and vessel searches. *See id.* at 995–98. In doing so, the *Dorff* Court overlooks the distinctions between houses and cars and returns "to the murky and uncertain legal waters" that should be avoided now. *Id.* at 999 (Moeller, J., dissenting).

The district court correctly denied Bauler's motions to suppress under the reasonable expectation of privacy test.

B. Common law trespass theory does not erode the caselaw that approves of sniffs like Ace's.

Recognizing the sniff around her vehicle was not a "search" under established law, Bauler focuses on Officer Rohmiller's and Ace's contact with her car, claiming their contact was an unlawful trespass under the Fourth Amendment's trespass to property theory. *See* Def.'s Br. at 38–42. But that argument lacks merit: The Supreme

Court's interpretation of the trespass theory does not support finding the officer and Ace's contact with Bauler's car during the sniff was an unlawful trespass.

In *Jones*, the Supreme Court for the first time integrated a "historical" trespass test into Fourth Amendment jurisprudence. 565 U.S. 400; *but see* Orinn Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 68 (2012) ("Neither the original understanding nor Supreme Court doctrine equated searches with trespass. *Jones* purports to revive a test that did not actually exist."). *Jones* involved "a law enforcement task force installed a GPS tracking device on the undercarriage of" the defendant's wife's vehicle "without a warrant and tracked the Jeep's movements over the course of twenty-eight days while investigating the defendant for narcotics trafficking." *Wright*, 961 N.W.2d at 446 (Christensen, C.J., dissenting) (quoting and summarizing *Jones*, 565 U.S. at 402–04). The *Jones* Court determined that such conduct was an unlawful trespass because "the Government *physically occupied* private property for the purpose of obtaining information." *Jones*, 565 U.S. at 404 (emphasis added).

Concurring with the *Jones* Court's judgment, Justice Alito—joined by Justices Ginsburg, Breyer, and Kagan—criticized the majority's trespass to property analysis, as it "strains the language of the Fourth Amendment; it has little if any support in current Fourth Amendment case law; and it is highly artificial." *Id.* at 418–31 (Alito, J., concurring in judgment). Indeed, circuit courts acknowledge that "*Jones* does not provide clear boundaries for the meaning of common-law trespass[.]" *See Taylor v. City of Saginaw*, 922 F.3d 328, 332 (6th Cir. 2021). Even so, Justice Alito noted that, historically, "[a]t common law, a suit for trespass to chattels could be maintained if there was a violation of 'the dignitary interest in the inviolability of chattels,' but today there must be 'some actual damage to the chattel before the action can be maintained.'" *Jones*, 565 U.S. at 419 n.2 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser & Keeton on Law of Torts* 87 (5th ed. 1984) ("*Prosser & Keeton*").

Then, in *Jardines*, the Supreme Court again considered *Jones*'s common-law trespass to property approach, this time within the context of a canine sniff around a defendant's house and its curtilage. 569 U.S. 1 (2013). After noting that "[a]t the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be

free from unreasonable governmental intrusion[,]" the Court held that the sniff around the defendant's house was an unlawful trespass because the government "gathered th[e] information by *physically entering and occupying the area* to engage in conduct not explicitly or implicitly permitted by the homeowner." *Jardines*, 569 U.S. at 6 (emphasis added). As in *Jones*, *Jardines* emphasizes that physical entry and occupation into a protected area are vital requirements to finding a common law trespass occurred: If no entry or occupation of a protected area occurred, a "trespass" did not either. *Id.*

Under Iowa law, this Court suggested that section 8 integrates the *Jones* and *Jardines* trespass test. *See Wright*, 961 N.W.2d at 413–14. In *Wright*, the Court examined whether the officer's conduct amounted to a search or seizure under the terms' "fair and ordinary meaning." *Id.* at 413 ("There is no evidence [seizure and search] were terms of art at the time of founding. 'No literal or mechanical approach should be adopting in determining what may constitute a search and seizure.'") (citations omitted). Acknowledging this, the majority concluded that

> A constitutional search occurs whenever the government commits a physical trespass against property, even where de minimis, conjoined with an attempt to find something or

> to obtain information. Government obtains information by physically intruding on persons, houses, papers, or effects, a "search" within the original meaning of the Fourth Amendment has undoubtedly occurred.

Wright, 961 N.W.2d at 413–14 (cleaned up); *see also* Intrusion, *Black's Law Dictionary* (11th ed. 2019) ("A person's entering without permission"). But both intrusion *and* damage are required to prove that a trespass occurred.

Proving a common law trespass to chattels "requires 'some actual damage to the chattel before the action can be maintained.'" *Wright*, 961 N.W.2d at 405 (Christensen, C.J., dissenting) (quoting *Jones*, 565 U.S. at 419 n.2 (Alito, J., concurring)). And Iowa law generally only criminalizes a "trespass" if some form of damage accompanies it. *Id.* (citing Iowa Code § 716.7(2)).

Bauler relies on *Wright*—and, by extension, *Jones* and *Jardines* –for the proposition that Officer Rohmiller's and Ace's physical contact with her vehicle's exterior was an unlawful trespass. Def.'s Br. at 38–42. But her assertion lacks merit. Neither Officer Rohmiller nor Ace ever "physically entered into" Bauler's vehicle during the sniff. MTS Tr. Vol. I at 9:23–10:3. And touching Bauler's vehicle did not provide any information to them: Ace *smelled* Bauler's

methamphetamine, he did not touch it. MTS Tr. Vol. I at 9:10–12, 10:16–19; State's Ex. 5 at 19:54:17–19:54:25. There is also no evidence of any "actual damage" caused by their contact with the car. *See Wright*, 961 N.W.2d at 405 (Christensen, C.J., dissenting) (discussing *Prosser & Keeton* at 87; Restatement (2d) of Torts § 218, at 420 (Am. L. Inst. 1981), and Iowa Code § 716.7(2)). Thus, under *Jones* and *Jardines*, a trespass did not, and could not, have occurred.

Still, Bauler's claim exemplifies the issues with *Wright*. As detailed below, *Wright* has proven to be untenable as a broadly applicable source of search and seizure law in Iowa.

C. *Wright* and the trespass test set out in *Jones* and *Jardines* do not generally apply to cases involving traffic stops and canine sniffs; to the extent *Wright* applies beyond the walls of the house, it should be limited or overruled.

Bauler's reliance on *Wright* and the common-law trespass to property test is misplaced. *Wright* injects confusion into the law without reflecting any agreement, or clear direction, as to how it applies to a variety of search and seizure cases, including traffic stops, *Terry* stops, and other modes of general patrol.

While federal circuit courts have distinguished *Jones* and *Jardines*, given neither arose from a traffic stop, *Wright*'s broad

opinion lacks similar limits. And like the federal precedent its test flows from, *Wright* should be limited to cases involving the house; if it cannot be, it should be overruled. A close analysis of its majority opinion and the Amendment's history on vehicle searches support acting now, before adverse consequences grow—the Court should seize the chance to set the bone while the break is still fresh.

For starters, the *Wright* majority agreed that, under section 8, "an officer acts unreasonably when, without a warrant, [the officer] physically trespasses on protected property or uses means or methods of general criminal investigation that are unlawful, tortious, or otherwise prohibited." *Id.* at 416 (citation omitted).[3]

But no majority agreed that "[i]n determining the minimum degree of protection the constitution afforded when adopted, we generally look to the constitution as illuminated by the lamp of precedent, history, custom, and practice." *Id.* at 402 (citations omitted). Nor did a majority agree on the meaning of "unreasonable" when identifying section 8's original meaning, or, technically, that

[3] Given the ubiquitous approval of using drug-dog exterior sniffs as a method of investigating crime, it is unclear how they would be "unlawful, tortious, or otherwise prohibited." Yet *Wright*'s breadth and its "trespass" definition may well implicate even the most common investigative methods that officers use to protect the public.

section 8's "prohibition against unreasonable searches and seizures was tied to common law trespass," although Iowa law seems to recognize that "a peace officer engaged in general criminal investigation acts unreasonably under []section 8 when the peace officer commits a trespass against a citizen's house, papers, or effects without first obtaining a warrant[.]". *Id.* at 404 (div. III(A)), 412 & n.5 (div. III(E)), 421.

The majority, moreover, did not technically agree on the constitutional construction when deciding what conduct "amounted to a seizure or search within the meaning of article I, section 8." *See id.* at 413 (div. IV(A)), 421. A majority also did not agree that "the expectation of privacy test is relevant only to the question of whether a seizure or search was unreasonable within the meaning of [section 8] and not whether a seizure or search has occurred." *Id.* at 414 (div. IV(A)).

Thus, the *Wright* majority injected confusion into Iowa search and seizure law by too broadly defining "trespass." And it did so without acknowledging the relevant history, customs, and practices that have breathed meaning into the scope of the Fourth Amendment for matters outside the home. To show why, the State's analysis

begins by tracing the Amendment's history, especially as it relates to vehicle searches.

While the Fourth Amendment was being ratified, it was well-established that the Founders believed houses were special, but other places and things were not. Vehicles and ships have been entitled to fewer, if any, of the Fourth Amendment's protections that were afforded to houses. Concluding the same now is "consistent with the text given to us by our founders," and "give[s] the words used by the framers their natural and commonly-understood meaning in light of the circumstances at the time of adoption." *Burns*, 988 N.W.2d at 360 (citations and quotations omitted).

Again, by conscious repetition, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Wilson*, 968 N.W.2d at 911–12. "[W]hen it comes to the Fourth Amendment, the home is first among equals. At [its] 'very core' stands 'the right of a man to retreat into his home and there be free from unreasonable government intrusion." *Jardines*, 569 U.S. at 6 (quoting *Silverman*, 365 U.S. at 511).

This was not always the case, though. Since at least *Semaines Case* in 1604, "[a]n assumption of the common law of trespass . . .

was that an Englishman's house was the king's castle in all instances of public concern." William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602–1791*, 593 (Oxford Univ. Press 2009) ("*Cuddihy*") (emphasis added).[4] And long before the Revolution and *The Wilkes Cases*, Englishmen challenged unlawful, or unreasonable, searches and seizures by bringing private, civil trespass and false imprisonment cases before a jury. *Id.* One's ability to bring such cases, however, was not without "severe limitations;" while "trespass was quite effective when a forcible search and seizure had occurred without affecting the public interest," "nearly all kinds of general warrants and searches *did* affect that interest . . . . The promiscuity of a search, arrest, or seizure [by the government] constituted neither false imprisonment nor trespass, nor was it even an aggravation of either." *Cuddihy* at 593 (emphasis in original). Then the *Wilkes Case*'s changed that approach. And, in *Entick v.*

[4] Cuddihy's research on the Amendment's roots has been called a "necessary" read "for any scholar who seeks to do serious work on search-and-seizure law," "simply unparalleled," and "a life-long research tool." Thomas K. Clancy, *The Role of History*, 7 Ohio St. J. Crim. L. 811, 823 (Spring 2010). As Justice O'Connor put it, Cuddihy's work is "one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken[.]" *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 669 (1995) (O'Connor, J., dissenting).

Carrington (1765), Lord Camden proclaimed "any invasion or seizure of private property was a trespass unless some positive law stipulated otherwise." *Id.* at 593–94.

Jumping forward, at the time of the Revolution, the new state governments regularly used methods of search like the reviled general warrant, including "general powers of arrest, and searches of *all ships or wagons* entering or departing a particular jurisdiction." *Id.* at 620 & n.65 (compiling statutes) (emphasis added). Even after the Revolutionary War, "[p]romiscuous searches and seizures were not emergency measures that the new states used only as the exigencies of war required. To the contrary, the revolutionary state governments employed those methods for such commonplace activities as collecting taxes, protecting wildlife, pursuing fugitives, and subjugating slaves. In at least one jurisdiction, Connecticut, general warrants were still used to recover stolen property." *Id.* at 623. Between 1776 and 1789, at least five states kept using general warrants to execute searches. *Id.* at 624. And, even in New England, state statutes enabled officials to "'search any suspected places or Houses' without any sort of warrant." *Id.* at 629 & n.99 (citing N.H.

St., 3d Gen. Ct., 5th sess., c. 13 (26 Nov. 1778), *N.H. Laws*, Vol. 4 (1776–84), p. 184).

And still, the Fourth Amendment continued to take shape, reflecting "centuries of definition [that] were neither unidentifiable nor ambiguous. A broad consensus existed on the meaning of 'unreasonable searches and seizures' when the Bill of Rights emerged." *Cuddihy* at 734. In fact, while the Amendment was being ratified, the First Congress enacted search and seizure legislation that gives great insight on the Amendment's scope, meaning, and limits.

Take the Collection Act of 1789, for example, which is hailed as the "most significant" indicator of the Amendment's meaning, as understood by the Framers, at the time of ratification. *Id.* at 736–38. It "identified the techniques of search and seizure that the framers . . . believed reasonable while they were framing it," given that the Congress considered "the search warrant section of that act" "only twelve days before the amendment originated, and that section became law just three weeks before the amendment assumed definitive form." *Id.*

"The Collection Act explicated the Fourth Amendment for both documents expressed the thoughts of the same persons upon the

same subject at the same time." *Id.* Substantively, the Act "introduced search and seizure to federal law in an effort to enforce the nation's first tax," and permitted officials to "enter any ship or vessel" to conduct "a warrantless search on reasonable suspicion that it concealed taxable property." *Id.* at 735.[5] And it allowed "officers to conduct warrantless searches not only of ships but, upon disembarkation, of their cargoes as well. A customs officer who suspected an importer of giving a false account of goods awaiting entry could open and search the containers bearing those goods." *Id.* at 746.

The First Congress also passed the Excise Act of 1791 in its final session, which allowed officials to search all "houses, store-houses, ware-houses, buildings and places" that were registered during the day without a warrant. *Id.* at 736.[6] Like the Collection Act, the Excise Act still permitted warrantless searches and seizures, but it included

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[5] U.S. St., 1st Cong., 1st sess., c. 5, § 24 (31 July 1789), U.S. Stats., vol. 1 (1789–99), pp. 29 at 43; REPRINTED; *D.H.F.F.C.*, vol. 4 (Legis. Histories), pp. 309 at 327)).

[6] *See* U.S. St., 1st Cong., 3rd Sess. c. 15, §§ 29, 32 (3 Mar. 1791), U.S. Stats., vol. 1 (1789–99), pp. 199 at 207; REPRINTED; D.H.F.F.C., vol. 4 (Legis. Histories), pp. 551 at 561, 562.

protections for houses, which "were vulnerable to search only by 'specific warrant.'" *Id.*

Indeed, "In the minds of the Congressmen who wrote the Fourth Amendment, the belief that a man's house was his castle cut in both directions. Structures afforded the privacy of houses to the extent they resembled them. Dwelling houses were castles, but ships were not, and places of business affecting the public interest were somewhere in between." *Id.* at 746. Legal guides from 1788 and 1791 similarly reflect this distinction between places: Those guides document the deep roots of the "hot pursuit" and "exigent circumstances" exceptions to the Amendment's warrant preference clause. *Id.* at 750–51 (collecting sources).

As for common law trespass, history shows there were limits on the early Americans' ability to recover against officials. For example, "A sheriff who penetrated a house to arrest on a civil process" could only be found "guilty of trespass if the person to be arrested was not there and did not own that house." *Id.* at 751. And after a defendant was in custody, police were broadly permitted to search and seize "the prisoner, his clothing, baggage, saddlebags, and sometimes even his lodgings would be searched . . . . [And] the legitimacy of body

searches as an adjunct to the arrest process had been thoroughly established in colonial times, so much so that their constitutionality in 1789 cannot be doubted." *Id.* at 751–52. To be sure, the Founders never had a bright line rule—or really a rule at all—against warrantless searches and seizures.

The government's authority by statute to permit warrantless searches and seizures was widely accepted, as was its ability to limit a citizen's ability to recover against it for unlawful searches or seizures. *Id.* at 761–64. History reveals that vehicles, vessels, and ships were regularly subject to warrantless searches and seizures. *Id.* at 770. "The current notion that the Framers intended the Fourth Amendment to address ships likely derives from Chief Justice Taft's claim in *Carroll* that the Framers would have viewed warrantless searches of 'vehicles' as 'reasonable' searches under the Fourth Amendment because the First Congress had authorized customs officers to make warrantless searches of ships in the 1789 Collections Act." Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 606 (1999) (citing *Carroll v. United States*, 267 U.S. 132, 150–51 (1925)) ("*Davies*"). And, again in

1815 (under then-President James Madison), the Collection Acts expressly allowed officials to

> stop, search and examine any carriage or vehicle, of any kind whatsoever, and to stop any person travelling on foot, or beast of burden, on which he shall suspect there are [uncustomed] goods, wares, or merchandise . . . . The necessity for a search warrant arising under this act, shall in no case be considered as applicable to any carriage, wagon, cart sleigh, vessel, boat, or other vehicle, of whatever form or construction, employed as a medium of transportation, or to any packages on any animal or animals, or carried by man on foot."

Act of Mar. 3, 1815, ch. 94, § 2, 3 Stat. 231, 232. And while this law was repealed a year later, it was reenacted in 1865 and remained on the books afterward in a similar form. Act of Feb. 28, 1865, ch. 67, § 1, 13 Stat. 441, 441–42, *reenacted in* Act of July 18, 1866, ch. 201, § 2, 14 Stat. 178, *incorp. into* Rev. Stats., ch. 10, § 3061, 18 Stat. 588.

Apart from these statutes, nothing indicates that "the constitutionality of this search authority regarding vehicles was [e]ver challenged in court." *Davies* at 714 n.472. Thus, history, custom, and judicial interpretations dating back to the Founding Era do not support the notion that vehicles were entitled to any significant constitutional protections.

Like the statutes addressing vehicles after the Founding, the Supreme Court officially recognized the automobile exception to the Fourth Amendment warrant preference requirement almost a century ago. *See Carroll*, 267 U.S. 132. Although *Carroll* marked the first time the automobile exception was recognized by name, the Supreme Court acknowledged the longstanding, entrenched distinction between places to be searched for purposes of the Amendment:

> We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Carroll, 267 U.S. at 153. Since *Carroll*, the Supreme Court has generally declined to alter the recognized automobile exception, including the refusal to "distinguish between 'worthy' and 'unworthy' vehicles which are on the public roads and highways, or situated such

that it is reasonable to conclude that the vehicle is not being used as a residence." *California v. Carney*, 471 U.S. 386, 394 (1985).

> Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.

South Dakota v. Opperman, 428 U.S. 364, 368 (1976). The Supreme Court has emphasized that "the rationales applied only to automobiles and not to houses, and therefore supported 'treating automobiles different from houses' as a constitutional matter." *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)).

All of this is to say that both history and caselaw recognize at least four well-established conclusions. First, while the Amendment is silent on what level of protection vehicles are entitled, history, societal customs, and early statutes reveal that the Framers granted far fewer protections to vehicles than to houses.

Second, after the Fourth Amendment was ratified, the early-Congresses continued to enact laws limiting the search and seizure

protections to vehicles and vessels. At times, early statutes even granted no protections at all for vehicles.

Third, the Framers recognized the Congress's statutory authority to enact laws granting broad search and seizure powers to officials, on top of the power to limit governmental exposure to liability for those rare searches and seizures found to be unlawful via tort action. In any case, the judicially created "exclusionary rule" lacks historical support for the practice of excluding relevant evidence of criminal activity. *Burns*, 988 N.W.2d at 373–82 (McDonald, J., concurring). Indeed, the Framers ignored the rule as an insufficient, undesirable protection for purposes of the Amendment. *Id.* at 377.

And last, courts have routinely recognized for almost a century the automobile exception. By upholding this exception, state and federal courts have recognized that history, custom, and the law from the Founding to today has granted regulated, controlled places or property (cars and businesses) less protection. And that regulatory interest, in turn, reflects society's agreement to afford those places and things fewer protections under the Fourth Amendment and state constitutional analogues.

Applying these notions to traffic stops and the like in the wake of *Wright*, though, is difficult. *Wright* unduly limits law enforcement's authority without specifying when a warrant is, and is not, required. Contrary to the majority's suggestion, a warrant has never been historically required in all instances. *See Davies* at 571 ("It is clear that the Framers did not intent that warrants be required for all searches and seizures conducted by officers.") Likewise, the historical, practical understanding of *who* could commit a trespass—and *how* they could commit it—was "severely limited" to often exclude government officials. Often, statutes provided the well-accepted source of authority for warrantless searches and seizures, reflecting society's general acceptance of warrantless searches of places or things as the norm, not the exception, outside the home.

Additionally, positive law in effect today supports affirming the district court and limiting *Wright*'s application. "In determining whether an officer's conduct is unlawful, tortious, or otherwise prohibited," courts try "to discern and describe existing societal norms" by examining "democratically legitimate sources of [positive] law," including "statutes, rules, orders, ordinances, judicial decisions, etc." *Wright*, 961 N.W.2d at 416 (quoting *Carpenter*, 138 S. Ct. at

2265, 2268 (citations and quotations omitted)). In doing so, the Court aims to identify "the proper scope of law enforcement authority." *Id.* "Statutes do not serve as constitutional definitions but provide us with the most reliable indicator of community standards to gauge the evolving views of society important to our analysis." *Griffin v. Pate*, 884 N.W.2d 182, 198 (Iowa 2016) (citations omitted).

Property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972); *accord Moore v. Harper*, 143 S. Ct. 2065, 2088 (2023).

In *Wright*, the majority suggested "[t]he original meaning of article I, section 8 was to prohibit an officer engaged in general criminal investigation from committing a trespass against a citizen's person, house, papers, and effects without first obtaining a warrant." *Wright*, 961 N.W.2d at 412 n.5 (citations omitted). But it also recognized that even if trespass laws swept broadly in 1791, such actions can still be limited under modern Iowa law: "The scope of what constitutes a trespass has changed, not the meaning of article I, section 8." *Id.* (citation omitted). Contemporary trespass laws are

therefore the best source for discerning what society considers a trespass and, in turn, what violates the Fourth Amendment and section 8. *Id.*

Modern trespass principles and law do not support defining "trespass" as broadly as the *Wright* majority does. *Wright*, 961 N.W.2d at 405 (Christensen, C.J., dissenting) (quoting *Jones*, 565 U.S. at 419 n.2 (Alito, J., concurring); citing Iowa Code § 716.7(2)). As discussed above, a trespass to chattels requires proof of "actual damages." *Id.* (discussing Iowa Code § 716.7(2); *Prosser & Keeton* at 87; Restatement (2d) of Torts § 218, at 420 (Am. L. Inst. 1981)). The *Wright* majority did not recognize that, perhaps unlike trespasses to real property, damages are required to prove a trespass to chattels. *Id.* Because of this, the majority also did not recognize that modern positive law altered the scope of the Amendment's protections and, in doing so, also refined the definition of "trespass" to include the damages requirement. *Wright*'s definition of "trespass" therefore is too broad to be easily applied now.

* * *

In short, neither history nor modern positive law support finding that Officer Rohmiller and Ace trespassed on Bauler's car. Bauler's second claim therefore fails, and this Court should affirm.

III. Error was not Preserved as to the Search of Bauler's Purse; Even If It Were Preserved, Iowa Caselaw Establishes the Automobile Exception Permitted the Search of Her Purse.

Preservation of Error

The State contests error preservation on this issue. Three essential requirements preserve error: A party's presentation of a (1) timely, (2) specific objection or argument, and (3) a ruling from the court on the same. *See, e.g.*, Thomas A. Mayes & Anuradha Vaitheswaran, *Error Preservation in Civil Appeals in Iowa: Perspectives on Present Practice*, 55 DRAKE L. REV. 39, 52, 68–70 (2006). An argument is "preserved when it is raised and decided by the district court." *State v. Bynum*, 937 N.W.2d 319, 324 (Iowa 2020) (citing *Lamasters*, 821 N.W.2d at 862).

Unlike the issues other discussed above, error was not preserved as to the constitutionality of the search of her purse. Bauler's Motions to Suppress do not mention the word "purse." *See* Def.'s MTS (FECR018888) (10/15/21), Dkt. No. 30; App. 12–13; Def.'s MTS (OWCR018822) (1/5/22), Dkt. No. 20; App. 25–26.

Reference to a "purse" is made only once in her motion to suppress trial brief, but only about the Court's decision in *Brown*, 905 N.W.2d 846 (Iowa 2018). Def.'s MTS Br. (11/28/21) at 2 n.1, Dkt. No. 45.

The word "purse" appears once in the district court's ruling denying Bauler's motions to suppress, but only when reciting the case's facts. Ruling Denying MTS (FECR018888) (12/29/21) at 5, Dkt. No. 53; App. 19. The court also refers to Bauler's purse only once—also in the factual background section—when issuing its verdict. Verdict (FECR018888) (5/25/22) at 5, Dkt. No. 52; App. 57.

Moreover, the transcripts from the suppression hearing never reference a purse, as the term does not appear in either of the two transcripts. *See* MTS Tr. Vol. I (FECR018888) (11/29/21); MTS Tr. Vol. II (FECR018888) (12/27/21). And while Bauler correctly notes that her counsel mentioned her purse at the bench trial, that passing reference was made only about the district court's probable cause finding. *See* Bench Trial Tr. (FECR018888, OWCR018822) (5/16/22) at 7:13–23 ("In particular–While I know the Court's ruling dealt with this issue, the legitimacy or illegitimacy of the initial stop, the credibility of the officer, and particularly the probable cause that may

or may not have existed before the independent search of her purse, which was separate from any K-9 sniff of the vehicle . . .").

Although Bauler did ask the district court to "revisit its ruling on the motion to suppress," *see* Def.'s Br. at 43, the search of her purse was never a subject addressed in the court's ruling. "It is a fundamental doctrine of appellate review that issues must ordinarily be raised and decided by the district court before [the Court] decide[s] them on appeal." *Lamasters*, 821 N.W.2d at 862 (citation and quotations omitted). This rule applies equally to constitutional issues, as well. *Garwick v. Iowa Dep't of Transp.*, 611 N.W.2d 286, 288 (Iowa 2000) (en banc). So because the district court did not rule on any issue related to the search of her purse, and Bauler did not move for the court to address the issue before appeal, "there is nothing for [the Court] to review" now. *Stammeyer v. Div. of Narcotics Enf't*, 721 N.W.2d 541, 548 (Iowa 2006).

Standard of Review

The Court reviews constitutional challenges de novo. *Brown*, 930 N.W.2d at 844. The Court considers "the totality of the circumstances found in the record, including the evidence introduced at both the suppression hearing and at trial." *Vance*, 790 N.W.2d at

780 (citation omitted). And it gives "considerable deference to the trial court's findings regarding the credibility of the witnesses," and its findings of fact, although the Court is not bound by those findings. *Tague*, 676 N.W.2d at 201. The Court may affirm on any ground presented to the trial court, including any "appearing in the record but not included in that court's ruling." *City of Hawarden*, 589 N.W.2d at 252.

Merits

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Section 8 is "essentially identical" to Fourth Amendment. *Burns*, 988 N.W.2d at 360. And "section 8 'as originally understood, was meant to provide the same protections as the Fourth Amendment, as originally understood." *Wright*, 961 N.W.2d at 411–12. So, the Court "generally 'interpret[s] the scope and purpose of the Iowa Constitution's search and seizure provisions to track with federal interpretations of the Fourth Amendment' because of their nearly identical language." *Brown*, 930 N.W.2d at 847 (citation and quotations omitted).

If the Court finds error was somehow preserved on this issue, the search of Bauler's purse was proper. Although Bauler argues the search of her purse was improper under the automobile exception because it "was not in the car at the time probable cause arose to search the car," Def.'s Br. at 48, that argument was rejected by the Court nearly 40-years ago: Under the automobile exception, Bauler had "no right to insulate her purse or any other container from a lawful warrantless search by the simple expedient of physically removing the purse and its contents from the car while the search was in progress." *State v. Eubanks*, 355 N.W.2d 57, 60 (Iowa 1984); *accord State v. Rincon*, 970 N.W.2d 275, 276–77 (Iowa 2022) ("We believe *Eubanks* was well-reasoned and reaffirm it today.").

Eubanks and *Rincon*, contrary to Bauler's assertions, do control the outcome here. As this Court has explained, "Once the patrolman lawfully stopped the car and had probable cause to search for contraband, all containers within the car *when it was stopped* were fair game for the car search." *Eubanks*, 355 N.W.2d at 60 (emphasis added). The "Supreme Court has not expressly imposed any temporal limitation on searches conducted under the automobile exception."

State v. Wiggins, 270 P.3d 306, 494 n.1 (Or. Ct. App. 2011). And this Court should likewise decline to do so here.

Even if the automobile exception does not apply, however, the drugs within Bauler's purse would have still been inevitably discovered under the search-incident-to-arrest (SITA) exception. Courts have "long recognized the lawful custodial arrest of a person justifies the contemporaneous search of the person arrested and the immediately surrounding area, meaning the area from which the person might gain possession of a weapon or destructible evidence." *State v. Vance*, 790 N.W.2d 775, 786 (Iowa 2010) (citation omitted). "The Supreme Court created this exception to the warrant requirement to serve the dual purposes of protecting arresting officers and safeguarding any evidence the arrestee *may seek to conceal or destroy*." *Id.* (emphasis added).

Here, the SITA exception to the warrant preference rule applies even if the automobile exception does not. Bauler's purse was searched only after probable cause arose to search her vehicle. *See* State's Ex. 3 at 2, Dkt. No. 47; Conf. App. 12; State's Ex. 5 at 20:06:01–20:12:10. Once the drug residue, paraphernalia, and other contraband was discovered on-scene and Bauler was arrested, the

officers would have inevitably discovered the contraband in her purse. *See State v. Ericson*, No. 14–1746, 2016 WL 719178, at *3 (Iowa Ct. App. Feb. 24, 2016) ("Because the [officers] inevitably and actually in short order, would have searched [the defendant] incident to executing the valid arrest warrant and would have obtained the methamphetamine through lawful means, the exclusionary rule does not apply.") (citation omitted).

To the extent it is relevant, *State v. Gaskins*, 866 N.W.2d 1 (Iowa 2015), does not change the Court's calculus here. In *Gaskins*, the Court departed from state and federal precedent to hold that the SITA exception did not permit searching a locked safe that was inside an unoccupied vehicle after had driver already been removed from the car and arrested. *See State v. Kilby*, 961 N.W.2d 374, 382 (Iowa 2021) (discussing *Gaskins*, 866 N.W.2d at 14) (citation omitted).[7] The Court has since clarified that such warrantless searches are still

[7] Members of the Court have recognized that *Gaskins* is a "demonstrably erroneous interpretation of article I, section 8 of the Iowa Constitution and should be overruled." *Kilby*, 961 N.W.2d at 386 (McDonald, J., concurring specially) (joined by Oxley, J.). The State agrees. Should the Court find *Gaskins* precludes application of the SITA exception here, it should be overruled.

allowed under the automobile exception. *Id.* at 382 & n.6 (citing *Storm*, 898 N.W.2d at 156).

In any event, the search of Bauler's purse would be permissible under either, or both, the SITA or automobile exception. Bauler's unpreserved claim that the search of her purse was improper should therefore be rejected.

CONCLUSION

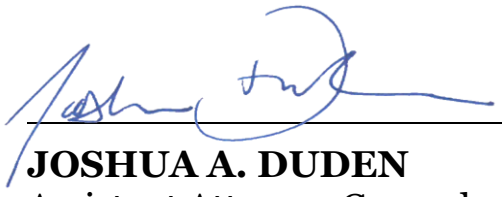
Bauler has failed to show that the district court improperly denied her motions to suppress. This Court should therefore affirm her convictions and sentences.

REQUEST FOR ORAL SUBMISSION

The State requests to be heard in oral argument.

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa



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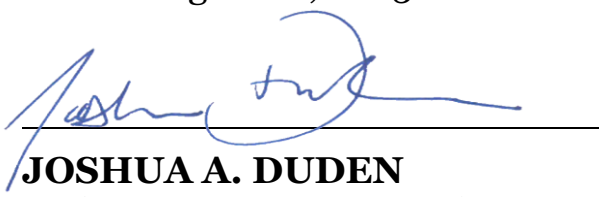

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