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Brief of Amicus Curiae Fred T. Korematsu Center for Law and Equality in Support of Appellant

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34765-6-III

COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MEGAN LARES-STORMS,

Appellant.

BRIEF OF *AMICUS CURIAE*
FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY
IN SUPPORT OF APPELLANT

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Fred T. Korematsu Center for Law and Equality ("Center") is based at Seattle University School of Law and advances justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the incarceration of over 110,000 Japanese Americans. He took his challenge to the military orders to the United States Supreme Court, which upheld his conviction in 1944 on the ground that the removal of Japanese Americans was justified by "military necessity." Mr. Korematsu went on to successfully challenge his conviction and to champion the cause of civil liberties and civil rights for all people. The Korematsu Center, inspired by his example, works to advance his legacy by promoting social justice. It has a special interest in promoting fairness in the courts of our country. That interest includes ensuring that effective remedies exist to address implicit and explicit bias in the courtroom and in the criminal justice system at large. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

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INTRODUCTION AND SUMMARY OF ARGUMENT

When considered as a class,[1] drug-detection dogs are often not reliable informants. Empirical evidence demonstrates that drug-detection dogs produce high rates of false positives, alerting their handlers to the existence of odors associated with illicit substances despite the absence of those illicit substances. Thus, as a class, drug-detection dogs would fail the veracity or accuracy prong of the *Aguilar-Spinelli* test, which requires the warrant affidavit to demonstrate the informant's basis of knowledge and the veracity of that information. *See Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). Though federal courts no longer follow *Aguilar* and *Spinelli*, Washington continues to adhere to this standard. *See State v. Jackson*, 102 Wn.2d 432, 437, 688 P.2d 136 (1984).

Further empirical evidence demonstrates that drug-detection dogs can be influenced by cues they intuit from their handlers. Drug-detection dogs may provide alerts because of the handler's belief that drugs might

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[1] Courts have considered the reliability of different classes of informants such as anonymous tipsters, confidential informants, and citizen informants, in ascending order of reliability. *People v. McLaurin*, 43 N.Y.2d 902, 905, 374 N.E.2d 614, 403 N.Y.S.2d 720 (1978) (Fuchsberg, J., dissenting) (anonymous tips are inherently unreliable); Michael E. Rebell, *The Undisclosed Informant and the Fourth Amendment: A Search for Meaningful Standards,* 81 Yale L.J. 703, 712-14 (1974) (confidential informants are regarded as inherently suspect because of their anonymity); *United States v. Harris*, 403 U.S. 573, 599, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971) (Harlan, J., dissenting) (citizen informant is most credible type of informant).

be present, rather than the actual presence of drugs. The susceptibility of drug-detection dogs to handler cues is made even more troubling when a handler's explicit or implicit bias might lead a drug-detection dog to produce false positives when searching racial minorities. Though race is not directly involved in this case, the Court should not turn a blind eye to the fact that the legal rule that emerges from this case will impact the role that race plays in our state's criminal justice system.

Because drug-detection dogs give high rates of false positives and are further susceptible to giving those false positives based on handler cues—including false beliefs flowing from racial bias, explicit or implicit—as a class, drug-detection dogs fail the basis of knowledge prong of *Aguilar-Spinelli*. Amicus does not take the position that law enforcement should not be able to employ drug-detecting dogs, but instead urges that it is incumbent on both courts and law enforcement agencies to better understand the problems with regard to drug-detection dog reliability.

Therefore, given the privacy interests at stake, unless an exception to the warrant requirement exists, a warrant should be required before law enforcement conducts a dog sniff search of a person's car. Further, because drug-detection dogs as a class are not reliable, a drug dog's alert should not support issuance of a warrant unless particularized information

is provided to the judicial officer that this particular drug-detection dog is both sufficiently accurate and not susceptible to improper handler cues, intentional or otherwise.

ARGUMENT

I. Empirical Research Demonstrates that Drug-Detection Dogs Frequently Give Unreliable Information, as Evidenced by High Rates of Providing False Positives and Uncertain Rates of False Negatives.

Drug-detection dogs frequently give false alerts, or "false positives." The circumstances in which a dog alerts—especially how long it has been working that day—can radically affect the reliability of that alert. A 2001 study cited by dog proponents to suggest the *reliability* of dogs concludes that dogs issue false alarms between 12.5% and 60% of the time in experimental conditions. Kelly J. Garner et al., *Duty Cycle of the Detector Dog: A Baseline Study* 12 (2001), http://info.dsiiti.com/hs-fs/hub/40565/file-14168106-pdf/docs/6-8-09_dutycycle_of_police_dog.pdf; *see also Illinois v. Caballes*, 543 U.S. 405, 412 ,125 S. Ct. 834, 160 L. Ed. 2d 842 (2005) (Souter, J., dissenting) (criticizing Illinois's reliance on this study as indicia of canine reliability). The dogs involved in the study were specifically trained to work for long periods to detect certain smells, or, in the jargon of the study, to work a long "duty cycle." *Garner*, *supra* at 6. Even these specially trained dogs'

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performance steadily deteriorated as they worked. After only two hours of work, the dogs' rate of false alarms spiked to 60%. *Id.* at 12. This study, among other considerations, led Justice Souter to conclude that the "infallible dog" is "a creature of legal fiction." 543 U.S. at 411.

Other empirical literature confirms that false positive rates range dramatically among dogs. While some dogs rarely err, having a false positive rate cited by a court of only 8%, others are far more reactive, with false positive rates determined by judges reaching rates of over 50%, meaning one of every two alerts will be a false positive. Lewis R. Katz & Aaron P. Golembiewski, *Curbing the Dog: Extending Protection of the Fourth Amendment to Police Drug Dogs*, 85 Neb. L. Rev. 735, 757 (2007).

Further, empirical literature instructs that dogs' highly sensitive sense of smell can indicate a wide range of both legal and illegal substances, contrary to the State's assertion that a drug dog alert "only discloses the presence or absence of contraband," Br. of Resp't at 10-11. In some cases, dogs have been trained to alert to "generic forms of valium, one of the most common prescribed forms of drugs in the United States." Katz & Golembiewski, *supra*, at 754. Likewise, dogs do not smell heroin per se, but rather alert to the acetic acid in heroin, which is a common substance also found in pickles and certain glues. *Id*. at 755. The chemical

compound which a dog alerts to in cocaine, methyl benzoate, is found in many legal products. *Id.* Although methyl benzoate is found in higher concentrations in cocaine than in legal substances, the compound dissipates quickly when exposed to the air and can dissipate into levels consistent with legal products in a little over a week. *Id* at 756.

Because the empirical literature calls into question the ability of drug-detection dogs to give accurate "tips," information and context about the individual dog's track record should be at the core of the *Aguillar-Spinelli* veracity analysis. *State v. Jackson*, 102 Wn.2d 432, 437, 688 P.2d 136 (1984) ("The most common way to satisfy the 'veracity' prong is to evaluate the informant's 'track record', *i.e.,* has he provided accurate information to the police a number of times in the past?"). It would undoubtedly be relevant if a 9-1-1 tipster had sent police on goose chases before. The same is true for a dog that frequently gives false positives.

II.   Empirical Research Demonstrates that Drug-Detection Dogs Are Influenced by Their Handlers, Tending to Give an Alert If the Handler Suspects the Presence of Illicit Substances, Thus Calling into Question Whether the Basis for the Alert Is the Presence of Odors Associated with Illicit Substances or the Handler's Suspicions.

Dogs have "unusual skills" in interpreting human cues—what the literature sometimes refers to as the "Clever Hans Effect." Brian Hare et al., *The Domestication Hypothesis for Dogs' Skills with Human*

Communication, 79 Animal Behav. e1, e6 (2010). Clever Hans, an Orlov

trotter horse, appeared to do math, tell time, and count people. Laasya

Samhita & Hans J. Gross, *The "Clever Hans Phenomenon" Revisited*, 6

Communicative & Integrative Biology 1, 1-2 (2013). This "thinking"

horse used his hooves to answer questions, captivating audiences and

receiving global attention in the early twentieth century. *Id.* Though not a

hoax, it turned out that Clever Hans was so adept at reading human cues

that he was able to provide correct answers in response to those cues, even

when he had never previously met the examiner and the examiner did not

consciously disclose the correct answers. *Id.* Clever Hans's cleverness

stemmed from his ability to give humans what they implicitly wanted.

Human cues have a powerful impact on dog behavior. Scientists

have found that dogs respond to many types of human characteristics and

behaviors, including their handler's gender, personality, eye movements,

gestures, posture, head orientation, proximity, and voice. Lisa Lit et al.,

Handler Beliefs Affect Scent Detection Dog Outcomes, 14 Animal

Cognition 387, 388 (2011) (citation omitted). Sometimes dogs trust

humans above and beyond their own senses. In one study, almost half of

dogs approached an empty bowl indicated by human pointing rather than a

bowl where the dog had already seen and smelled food. *Id.* at 388

(citations omitted). Not only are dogs *not* neutral, but human cues can override powerful sensory inputs—like food.

Dr. Lit's recent double-blind study, *Handler Beliefs Affect Scent Detection Dog Outcomes*, demonstrates that even trained police dogs become more error-prone due to handler beliefs. Researchers at the University of California, Davis, invited eighteen actual police dogs and their handlers to participate in a study in which they would attempt to detect the presence of contraband in four separate rooms, checking each room twice, for a total of 144 searches ("runs"). *Id.* at 388-90. Unbeknownst to the handlers, there was no contraband in any room, so any dog alerts of contraband were false positives—alerts of contraband when there was none. *Id.* at 389.[2]

In total, the handlers reported their dogs to have (erroneously) alerted 225 times in total—an average of 12.5 times per dog. *Id.* at 390.[3] Stated otherwise, the dogs alerted 85% (123 / 144) of the time when there was no contraband present—a glaring error rate. *Id.* at 390. Moreover,

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[2] Each of the four rooms had four possible "conditions": (1) control; (2) red paper marker; (3) unmarked decoy scent (sausage and tennis ball); and (4) red paper marker at the decoy scent. *Id.* at 389. Before the dogs inspected a room, the researchers instructed their handlers that each condition might contain up to three target scents, and that target scent markers consisting of a red piece of construction paper would be present in two conditions. *Id.* at 389. In actuality, these red papers were decoys and there was no contraband, but the handlers were none the wiser. *Id.*

[3] Interestingly, the handlers were told that each of the four "conditions" (room) might contain up to three target scents—for a total of 12 possible scents in an entire run.

false positives were especially prevalent when the handler held

preconceived notions about the presence of contraband—and inadvertently

cued his or her dog. *Id.* at 392-93. The dogs had 15 runs without alerting

in rooms *without* red paper, but only 6 runs without indicating in rooms

with red paper—over twice as many. *Id.* at 391.

The researchers reasoned that dog responses to human cues were

not surprising because "in training, alerts are originally elicited through

overt handler cuing" and "more subtle unintentional cues." *Id.* at 394. The

experimenters were unsurprised that dogs, trained to alert based in part on

certain human cues, would do so in the field. *Id.* The researchers

concluded that human belief that scent was present negatively affected the

accuracy of the dogs:

> The overwhelming number of incorrect alerts identified across
> conditions *confirms that handler beliefs affect performance*.
> Further, the directed pattern of alerts in conditions containing a
> marker compared with the pattern of alerts in the condition with
> unmarked decoy scent suggests that human influence on *handler
> beliefs affects alerts to a greater degree than dog influence on
> handler beliefs*.

Id. at 391 (emphasis added). This study undermines the State's

characterization of police dogs as neutral and accurate.[4]

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[4] At least one court has cited the Lit et al. study to support its suggestion that "the time
might be right for a reevaluation of the proper training, certification, use and application
of the dog sniff as a tool of law enforcement and as a means to enable intrusion into
Fourth Amendment protected space." *United States v. One Million, Thirty-Two*

III.   Lack of Reliability Becomes Even More Constitutionally
        Infirm Under Article I, Section 7, Because Empirical Data
        Demonstrates that Dog Sniff Searches of Racial Minorities
        Produce Disproportionately High False Positive Rates When
        Compared to Dog Sniff Searches of Whites.

Investigative reporters at the Chicago Tribune published an article

in 2011 analyzing three years of searches based on dog alerts conducted

by suburban police departments outside of Chicago. Dan Hinkel & Joe

Mahr, *Drug Dogs Often Wrong*, Chi. Trib., Jan 6, 2011. The reporters

found that only 44 percent of all alerts led to the discovery of drugs or

paraphernalia. *Id.* Critically, they found the dog sniff searches of Hispanic

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Thousand, Nine Hundred Eighty Dollars in U.S. Currency, 855 F. Supp. 2d 678, 722
(N.D. Ohio 2012). The same court in a different case did not find the study persuasive,
criticizing the study for not employing a complete double-blind protocol. *United States v.
Rhee*, No. 3:12CR2, 2014 WL 2213079 at *4 (N.D. Ohio May 28, 2014). However, the
study employed the double-blind protocol to the extent possible, Lit et al., *supra*, at 390,
but of course could not be truly double blind because the researchers had to tell the
handlers that the red paper markers indicated possible presence of contraband to test the
hypothesis that handler belief affected whether the dog would alert.

Another court noted that "the conclusions of this study have not been unanimously
accepted[,]" *United States v. Guyton*, No. 11-271, 2013 WL 2394895 at *7-8 (E.D. La.
Apr. 16, 2013), citing as an example a responsive article that purported to identify a
number of flaws in the study. That two page article—self-published online and without
peer review—by the Scientific Working Group on Dog and Orthogonal Detector
Guidelines, criticized the study because (1) the dogs themselves were not tested in a
controlled blind setting before conducting the runs; (2) the researchers did not review the
canine teams' previous training records and certification details; (3) the canines used
were trained to detect both drugs and explosives; (4) there was potential for
contamination of the testing areas; and (5) there was danger in extrapolating conclusions
from a small sample size to a larger population. Scientific Working Group on Dog and
Orthogonal Detector Guidelines (SWGDOG), *SWGDOG Membership Commentary on
"Handler beliefs affect scent detection dog outcomes" by L. Lit, J.B. Schweitzer and A.M.
Oberbauer* (Mar. 31 2011), http://swgdog.fiu.edu/news/2012/swgdog-response-to-lit-k9-
study/swgdog_response_to_lit_study.pdf. Dr. Lit's study forthrightly acknowledged these
limitations but gave satisfactory explanations for why these issues did not confound the
results. *See* Lit et al., *supra*, at 393.

drivers produced disproportionately high false positive rates: when the

data for Hispanic drivers was disaggregated, the success rate was just 27

percent.[5] *Id.*[6] Stated differently, drug-detection dogs had a false positive

rate of 56% overall and a 73% false positive rate when Hispanic motorists

were subjected to a dog sniff search.

After the Chicago Tribune article was published, a report by the

ACLU of Illinois confirmed that data collected on dog sniff searches

revealed that alerts were wrong as often as they were right, and that there

was "a substantial racial disparity in erroneous dog alerts." ACLU of

Illinois, *Racial Disparity in Consent Searches and Dog Sniff Searches*, at

7 (Aug. 13, 2014), https://www.aclu-il.org/en/publications/racial-

disparity-consent-searches-and-dog-sniff-searches. The report noted that

"Hispanic motorists were 2.16 times more likely than white motorists to

be subjected to a dog sniff search by ISP [Illinois State Patrol] troopers in

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[5] The success rate for Blacks was 46%, and for Caucasian 49%. Hinkel & Mahr, *supra*. The article did not explain or otherwise hypothesize why the success rates for Blacks and Hispanics differed so notably. *See id.* The Chicago Police Department did not report any data. *Id.*

[6] When the data was disaggregated for the individual departments who had the highest numbers of total dog sniff searches, it showed more significant disparities in alert accuracy as between Hispanic and non-Hispanic drivers. Hinkel & Mahr, *supra*. McHenry County data showed that 32 percent of the 103 searches based on dog alerts led to the finding of drugs or paraphernalia. *Id.* In the 8 searches on Hispanic drivers, officers reported finding drugs just one time. *Id.* Naperville County data demonstrated that 47 percent of searches turned up drugs or paraphernalia, with searches on Hispanic drivers turning up drugs in only 1 of the 12 stops, for a rate of 8 percent. *Id.* The article also noted that some of the false positives from the data set could have resulted from presence of drug residue rather than any legally significant quantity of drugs. *Id.*

2013." *Id.* at 8. However, comparing white motorists and Hispanic

motorists who were subjected to dog sniff searches, white motorists were

64% more likely than Hispanic motorists to be found with contraband. *Id.*

It is plausible to surmise that the higher rate of false positives for Hispanic

drivers might stem at least in part from handler cues, especially when the

initial decision to conduct a dog sniff search may itself be the result of

bias, explicit or otherwise, on the part of either the handler, the other

officers who make the initial decision to deploy the dog, or both.

IV.   The Existence and Pervasiveness of Implicit Racial Bias Raise
        Important Policy Considerations that Should Lead this Court to
        Require a Warrant Before a Dog Sniff Search of a Car.

Washington Courts, as well as the Ninth Circuit, have come to

understand that all people harbor implicit biases—and handlers, who

might cue their dogs based on these biases, intentionally or

unintentionally, are no exception. *See State v. Saintcalle*, 178 Wn.2d 34,

46-49, 309 P.3d 326 (2013) (plurality opinion) (highlighting studies on

implicit racial bias and their importance in informing the debate about

reforming the peremptory challenge system);[7] *see also In re Marriage of*

Black, 188 Wn.2d 114, 133-35, 392 P.3d 1041 (2017) (concluding that, in

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[7] The Court in *City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017)
answered the call of *Saintcalle* to take a closer look at the *Batson* framework and adopted
a bright-line rule to address one particular aspect of peremptory challenges.

a dissolution case, the guardian ad litem harbored bias against the

mother's sexual orientation, and the trial court's reliance on the biased

recommendations rendered portions of the parenting plan improper (citing

Saintcalle, 178 Wn.2d at 46)). The Ninth Circuit has recognized the effect

of implicit racial bias specifically in the Fourth Amendment traffic stop

context. *Gonzalez-Rivera v. INS.*, 22 F.3d 1441, 1449-50 (9th Cir. 1994)

(determining a border patrol's decision to stop a vehicle based on the fact

that the passengers appeared to be Hispanic was an egregious

constitutional violation requiring application of the exclusionary rule in

civil immigration proceeding, and noting that police "may use racial

stereotypes as a proxy for illegal conduct without being subjectively aware

of doing so." (citing Charles R. Lawrence III, *The Id, The Ego, and Equal*

Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317,

322 (1987)).

    Although Washington courts are familiar with implicit bias

scholarship, amicus provides the following sampling of studies of implicit

racial bias.[8] Some of the most telling evidence of implicit aversive bias

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[8] While the studies summarized below focus on implicit bias against Blacks, it is
undisputed that implicit bias operates against other people of color, and more generally
against populations who both historically and currently suffer from discrimination. *See,
e.g.*, Emily Ryo, *On Normative Effects of Immigration Law*, 13 Stan. J. C.R. & C.L. 95,
125-128 (2017) (discussing results of study of implicit bias against Latinos); Jerry Kang
et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. Empirical

emerges from experiments with the perception of black faces. *See* Jennifer

L. Eberhardt et al., *Seeing Black: Race, Crime and Visual Processing*, 87

J. Personality & Soc. Psychol. 876, 876 (2004). Studies show a strong

tendency to link the social category of black with concepts of crime. *Id.*

(citing studies). Eberhardt designed studies to further examine the

bidirectional nature of the link—i.e., "the association of Blacks with crime

renders objects relevant in the context of Black faces and Black faces

relevant in the context of crime." *Id.* at 877. Eberhardt's first study

demonstrated that when subjects were primed with 30-microsecond

images of black faces, and then shown a degraded and fuzzy image of a

gun, *id.* at 878-81, the "Black faces triggered a form of racialized seeing

that facilitated the processing of crime-relevant objects," *id.* at 881.

Conversely, "exposure to White faces inhibited the detection of crime-

relevant object." *Id.* Eberhardt's second study confirmed the hypothesis of

the bidirectional link between race and crime, revealing that "ostensibly

race-neutral concepts such as crime can become racialized. Not only are

Blacks thought of as criminal, but also crime is thought of as Black." *Id.* at

883; *see also* Joshua Correll et al., *The Police Officer's Dilemma: Using*

Legal Studies 886 (2010) (examining implicit bias against Asian Americans in the litigation context).

Ethnicity to Disambiguate Potentially Threatening Individuals, 83 J.

Personality & Soc. Psychol. 1314, 1325 (2002).

"In the policing context, implicit stereotypes can cause an officer

who harbors no conscious racial animosity and who rejects using race as a

proxy for criminality to unintentionally treat individuals differently based

solely upon their physical appearance." L. Song Richardson, *Arrest*

Efficiency and the Fourth Amendment, 95 Minn. L. Rev. 2035, 2039

(2011). Therefore, "an officer might evaluate behaviors engaged in by

individuals who appear black as suspicious even as identical behavior by

those who appear white would go unnoticed." *Id.*

The studies are not just important in the abstract—the problem of

racially discriminatory policing is well documented in Washington State,

including both Spokane and Seattle. Spokane is engaged in assessing the

problem of discriminatory policing.[9] A recent report by a professor at

Eastern Washington University and the captain of the Spokane Police

Department found that Spokane police disproportionately stop black and

Native American residents, which in turn drives subsequent

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[9] Spokane is engaged in a Collaborative Reform Initiative with the Community Oriented Policing Services of the U.S. Department of Justice. *See* Denise Rodriguez & Blake McClelland, Community Oriented Policing Services, U.S. Department of Justice, *Collaborative Reform Initiative*, *Sixth-Month Assessment Report on the Spokane Police Department* (2015), https://ric-zai-inc.com/Publications/cops-w0789-pub.pdf.

disproportionalities in searches and arrests. Edward Byrnes & Brad Arleth,

Officer Contacts with Civilians and Race in the City of Spokane: A

Quantitative Analysis 1 (Mar. 17, 2015),

https://www.scribd.com/document/259193754/Civilian-Police-Encounter-

Analysis-Spokane-Police-Department-Eastern-Washington-University.

The Department of Justice's investigation of the Seattle Police

Department from 2011 raised "serious concerns about biased policing."

U.S. Department of Justice, Civil Rights Division & United States

Attorney's Office Western District of Washington, *Investigation of the*

Seattle Police Department (Dec. 16, 2011),

https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findl

etter_12-16-11.pdf. Even though these concerns fell short of a finding that

SPD engaged in a pattern or practice of discriminatory policing, *id.* at 3,

the DOJ ordered SPD to begin collecting data to better understand the

problem of discriminatory policing, *id.* at 40.

The Seattle Police Monitor report of June 2017 analyzed the stop

and frisk data collected since implementation of the consent decree.

Seattle Police Monitor, *Tenth Systemic Assessment: Stops, Search, &*

Seizure 3 (June 2017),

https://static1.squarespace.com/static/5425b9f0e4b0d66352331e0e/t/5947

3ca3b3db2bc40ddf8a6c/1497840805898/Dkt.+394--

Stops+Assessment.pdf. While SPD is complying with the policy

requirements of stops, searches, and seizures, *id.* at 3, "the likelihood that

an individual will be stopped in the first instance and, when stopped, will

be frisked do vary substantially by and depend on race," *id.* The report

further stated:

> [R]acial disparity with respect to who is stopped and who is frisked
> in Seattle cannot be easily explained in terms of underlying
> societal or social disparities in crime, demographics, or
> socioeconomic factors manifesting in neighborhood or geographic
> trends. Even after incorporating those factors, an individual's race
> alone helps to predict the likelihood of being stopped and the
> likelihood of being frisked by an SPD officer.

Id. at 4.

In the context of a dog sniff search, an officer's implicit bias may

operate at two points—the initial decision to deploy the dog, and the

handler cues that may influence a dog's issuance of an alert. Thus,

weaving together what Washington courts acknowledge about the

operation of implicit bias with studies establishing the "handler effect"

make it likely that a handler's implicit racial bias—i.e., an officer's

unstated, subconscious thought that people of color are more likely to have

contraband in their possession—will negatively affect canine reliability.

    V.   Because the State Has Provided Insufficient Evidence that this
Dog Is Reliable and Not Susceptible to Handler Cues, the
"Tip" From this Dog Does Not Satisfy the Requirements
of *Aguilar-Spinelli*.

The previous four sections have examined serious concerns about the reliability of drug-detecting dogs as a class, and the State has failed to acknowledge these reliability issues in Ms. Lares-Storms's case. A police dog's indication of contraband is construed as a type of informant's tip. *See Florida v. Harris*, 568 U.S. 237, 244, 133 S. Ct. 1050, 185 L. Ed. 2d 61 (2013). Washington applies the *Aguilar-Spinelli* two-pronged test when evaluating the reliability of a tip. *State v. Jackson*, 102 Wn.2d 432, 435, 688 P.2d 136, 138 (1984). Under Washington's test, the State must demonstrate both the reliability of the tip and of the informant. *Id.*; Br. of Appellant at 18-19. Here, the State did neither.

The State purports to meet these twin requirements—veracity and basis of knowledge—by analogizing its dog to a tool. Its sources characterize dogs as a "*tool* of law enforcement." Br. of Resp't at 10 (emphasis added). To the State, a dog's nose "is comparable to a flashlight," a neutral tool that operates mechanically. Br. of Resp't at 11. The State gives evidence of the instant dog's *experience*—400 applications and certification—but does not tell of *performance*—false positives or the levels of contraband scents that will elicit an alert. Br. of Resp't at 13-14.[10] Extensive certification, moreover, may make the dog

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[10] Indeed, the State admits that the dog detected "substances" or "odors." Br. of Respondent at 13. The State never clarifies if the detection of "odors" is in an

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more responsive to unintentional cues with handlers, as the research suggests.

Moreover, training does not indicate talent. Justifying a dog's veracity based on its frequent interactions with law enforcement is akin to justifying a human tipster's veracity because she calls 9-1-1 often. The *Aguilar-Spinelli* standard is not concerned with how often a police dog alerts, but how those alerts can be verified to be true. Here, training might just as well inculcate a dog to give frequent false positives, exacerbated by human cues, than to indicate contraband accurately.

CONCLUSION

The empirical data reveal two important problems with the use of drug-detection dogs—first that they often give high rates of false positives, and second that they are susceptible to improper human cues. In light of these problems described in the empirical literature, and considering the strong privacy interests at stake in this case, this Court should require a warrant before police may conduct a dog sniff search of a car. Further, this Court should give clear guidance to judicial officers with regard to the particularized information the state must provide to them in order to satisfy the requirements of *Aguilar-Spinelli*.

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experimental setting or if the handler just presumed the dog to be accurate in a field setting, despite no verification of the presence of any contraband or odor of contraband.

RESPECTFULLY SUBMITTED this 14th day of September, 2017.

s/Jessica Levin
_____

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Korematsu Center for Law and Equality

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington, that on September 14, 2017, the forgoing document was electronically filed with the Washington State's Appellate Court Portal, which will send notification of such filing to all attorneys of record.

Signed in Seattle, Washington, this 14th day of September, 2017.

By: *s/ Melissa Lee*
Melissa Lee
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