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ADVANCE SHEET HEADNOTE
February 3, 2025

2025 CO 4

No. 24SA225, *People v. Pham*—Fourth Amendment—Traffic Stop—Probable Cause—Drug-Detection Dog.

In this interlocutory appeal, the supreme court concludes that although the trial court erred in finding that removing the defendant from his vehicle during a lawful traffic stop was a search, the court correctly determined that the dog's entry into the defendant's vehicle, which was facilitated by the police, was a search under the Fourth Amendment and that this search was conducted without the requisite probable cause.

Accordingly, the court affirms the trial court's suppression order and remands this case to the trial court for further proceedings consistent with this opinion.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2025 CO 4

Supreme Court Case No. 24SA225
Interlocutory Appeal from the District Court
Jefferson County District Court Case No. 23CR1739
Honorable Tamara S. Russell, Judge

Plaintiff-Appellant:

The People of the State of Colorado,

v.

Defendant-Appellee:

Tien Dinh Pham.

Order Affirmed

en banc

February 3, 2025

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JUSTICE GABRIEL delivered the Opinion of the Court, in which **JUSTICE HOOD, JUSTICE HART, JUSTICE SAMOUR,** and **JUSTICE BERKENKOTTER** joined.

JUSTICE BOATRIGHT, joined by **CHIEF JUSTICE MÁRQUEZ,** dissented.

JUSTICE GABRIEL delivered the Opinion of the Court.

¶1 In this interlocutory appeal, the People ask us to reverse the trial court's order suppressing the results of a police dog sniff search of the interior of Tien Dinh Pham's vehicle.

¶2 We conclude that although the trial court erred in finding that removing Pham from his vehicle during a lawful traffic stop was a search, the court correctly determined that the dog's entry into Pham's vehicle, which was facilitated by the police, was a search under the Fourth Amendment and that this search was conducted without the requisite probable cause.

¶3 Accordingly, we affirm the trial court's suppression order.

I. Facts and Procedural Background

¶4 After watching Pham's vehicle drive away from a house in an allegedly high-crime area, Lakewood police agents began following him, observed a lane change violation, and initiated a traffic stop. Pham pulled into a parking lot, where the agents ordered him out of the vehicle. Although it appears that Pham initially opened the door from inside the car, the agent at the door immediately put his hand on the top of the car door. Pham then got out of the car, and the agent conducted a brief pat down and quickly directed Pham to a different location in the parking lot, leaving the car door open.

¶5 Agent Kyle Winters then deployed a drug-detection dog and directed the dog to conduct a free air sniff of Pham's vehicle. When the dog got to the open driver's side door, Agent Winters partially closed the door to allow him and the dog to maneuver around it. Agent Winters then reopened the door sufficiently to allow the dog to place his head and front paws inside the vehicle, at which point the dog alerted to the presence of drugs. After the dog did so, Agent Winters walked the dog around the rest of the car, and the dog did not alert again until he returned to the open door. The agents on scene thereafter searched the vehicle and found, among other things, suspected methamphetamine, cocaine, heroin, drug paraphernalia, and two handguns. Officers then arrested Pham.

¶6 The Jefferson County District Attorney charged Pham with nine counts, including possession with intent to manufacture or distribute a controlled substance, possession of a weapon by a previous offender, and possession of drug paraphernalia. Pham moved to suppress the evidence seized as a result of the traffic stop, arguing, among other things, that the law enforcement officers had no basis to remove him from his vehicle and that the dog sniff of his vehicle was an unconstitutional search because it was conducted without probable cause.

¶7 The trial court subsequently held a suppression hearing and concluded that the search was unconstitutional because the officers (1) had no reason to remove Pham from his vehicle and (2) acted improperly when they intentionally left the

vehicle door open so that the dog could sniff inside the vehicle. Specifically, the court found and concluded:

[T]he issue here is that officers aren't looking in the car for evidence of an unsafe lane change. That happened, and the officer has a right to pull him over for that. Does he have the right then to ask Mr. Pham to get out of the car so he can do an open air search around the car?

I haven't been given any law that says that's okay. . . .

[I]n this case, he said they took him out – unless I misheard – they said they took him out so they could search the car – or so they could do the open air sniff and they didn't want the dog to bite Mr. Pham. Also, then, we get to the point in the video it's pretty clear that the officer is the one holding the door open.

They tell Mr. Pham to get out and come over here, and I don't know what the reason is, other than he's going to get a ticket, and then they don't shut the door. And it's a little bit disingenuous for Officer Winters to say, yeah, I asked him questions about the car and is it the same way as we left it, yeah, but who opened the door. And I don't know, in that video it's pretty clear that the officer – somebody opens the door. The officer puts his hand on the door and escorts Mr. Pham away and leaves the door open.

I don't think that's okay. . . .

The – for me, the stop is fine. The ticket is fine. For me even – sure, even pulling him out of the car, if there's a reason – and I haven't heard one, so that's the first reason that I don't think this is a valid search. They don't have any reason to take him out

. . . .

And the second part is that they left the door open and the dog sniffed there. . . . [I]s it a valid open air sniff if he leaves the car door open on purpose, which it looks like they did. I don't know. I didn't hear anymore [sic] about that.

So I'm going to find, in fact, that I will suppress the search of the car because I don't find that they had a valid reason. The dog sniff would have been a good reason. It would have been probable cause to search the car, but, again, I don't have anything to support that they can take him out, take him out of the car to do a dog sniff, or if they can on purpose leave the door open so that they can sort of sniff what's inside.

And the reason I'm making this ruling is because these people have – the police officers knew what they were doing. . . .

. . . I think the search is not authorized because they didn't have probable cause, even with the dog sniff, and that was because they left the door open.

¶8 The People then filed this interlocutory appeal.

II. Analysis

¶9 We begin by addressing our jurisdiction over this matter. Next, we set forth the applicable standard of review. We then discuss the applicable law and apply that law to the facts before us.

A. Jurisdiction

¶10 Section 16-12-102(2), C.R.S. (2024), and C.A.R. 4.1(a) authorize the prosecution to file an interlocutory appeal in this court from a trial court's order granting a defendant's pretrial motion to suppress evidence if the prosecution certifies to both the judge who granted the motion and this court that the appeal is not taken for purposes of delay and the evidence at issue is a substantial part of the proof of the charge pending against the defendant. *People v. Thompson*, 2021 CO 15, ¶ 13, 500 P.3d 1075, 1078. The prosecution has so certified here, and Pham

has not challenged that certification. Accordingly, we have jurisdiction over the People's appeal in this case.

B. Standard of Review

¶11 A trial court's suppression order presents a mixed question of fact and law. *Id.* at ¶ 15, 500 P.3d at 1078. "We accept the trial court's findings of historic fact if those findings are supported by competent evidence, but we assess the legal significance of the facts de novo." *Id.* (quoting *People v. Coke*, 2020 CO 28, ¶ 10, 461 P.3d 508, 512). Accordingly, "[w]e will not substitute our own judgment for that of the trial court unless the trial court's findings are clearly erroneous or not supported by the record." *People v. Glick*, 250 P.3d 578, 582 (Colo. 2011). We will, however, correct on review a trial court's application of an erroneous legal standard or the court's ultimate legal conclusion if that conclusion is inconsistent with or unsupported by evidentiary findings. *People v. Kaiser*, 32 P.3d 480, 483 (Colo. 2001).

¶12 "In reviewing a trial court's ruling on a motion to suppress, we look solely to the record created at the suppression hearing." *Thompson*, ¶ 16, 500 P.3d at 1078.

C. Searches and Probable Cause

¶13 The Fourth Amendment protects individuals against unreasonable searches and seizures. U.S. Const. amend. IV. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

¶14 “It is beyond dispute that a vehicle is an ‘effect’ as that term is used in the Amendment.” *United States v. Jones*, 565 U.S. 400, 404 (2012).

¶15 In addition, a search occurs within the meaning of the Fourth Amendment when the government physically occupies private property, including a vehicle, in order to obtain information. *Id.* at 404–05.

¶16 “In enforcing the Fourth Amendment’s prohibition against unreasonable searches and seizures, the [Supreme] Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution.” *Chambers v. Maroney*, 399 U.S. 42, 51 (1970). A law enforcement officer has probable cause to conduct a search when “the facts available to [him] would ‘warrant a [person] of reasonable caution in the belief’” that contraband or evidence of a crime is present. *Florida v. Harris*, 568 U.S. 237, 243 (2013) (alterations in original) (quoting *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality opinion)).

¶17 In determining whether probable cause exists, courts consider the totality of the circumstances. *Id.* at 243–44. Moreover, the Supreme Court has viewed probable cause as “a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.” *Id.* at 244 (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)).

¶18 Turning to the specific issues now before us, we note that the Supreme Court has made clear that, out of concern for police officer safety, officers may, “consistent with the Fourth Amendment, exercise their discretion to require a driver who commits a traffic violation to exit the vehicle even though they lack any particularized reason for believing the driver possesses a weapon.” *New York v. Class*, 475 U.S. 106, 115 (1986). In this regard, the Court has observed that requiring a driver to exit a vehicle is a “*de minimis*” additional intrusion and, at most, a “mere inconvenience” when balanced against legitimate concerns for officer safety. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977).

¶19 With respect to dog sniffs, the search of the interior of a home and its curtilage are indisputably subject to Fourth Amendment protection. *See Florida v. Jardines*, 569 U.S. 1, 6 (2013). Accordingly, the Supreme Court has concluded that the government’s use of a trained police dog to investigate a home and its immediate surroundings is a “search” under the Fourth Amendment. *Id.* at 11–12.

¶20 The search of a vehicle’s interior is likewise subject to Fourth Amendment protection, and such a search must be supported by probable cause. *Class*, 475 U.S. at 114–17. This case requires us to determine when a dog sniff of a vehicle’s interior rises to the level of a search warranting Fourth Amendment protection.

¶21 Both the Supreme Court and our court have concluded that a dog sniff around the exterior of a vehicle while a person is lawfully seized for a traffic

violation does not rise to the level of an infringement of the person's constitutional rights and thus does not implicate Fourth Amendment protections. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005); *People v. Mason*, 2013 CO 32, ¶ 10, 310 P.3d 1003, 1005. The Tenth Circuit has concluded, however, that when, prior to establishing probable cause, law enforcement officers facilitate a dog's entry into a vehicle during a dog sniff, this implicates the Fourth Amendment. *Felders v. Malcom*, 755 F.3d 870, 879 (10th Cir. 2014).

¶22 Specifically, in *Felders*, video footage showed that a state trooper had opened the passenger doors of a vehicle during an investigatory stop, removed the passengers, and intentionally left a door open, even physically preventing one of the passengers from closing that door. *Id.* at 877. A K-9 unit officer then led a drug-sniffing dog around the vehicle, and the dog jumped into the vehicle through the open passenger door. *Id.* The sniff ultimately yielded no drugs, and Felders and her passengers brought a civil action, alleging that the law enforcement officers had searched Felders's car in violation of the Fourth Amendment. *Id.* at 875, 877.

¶23 The *Felders* court ultimately determined that the officers did not have probable cause to conduct the dog sniff at issue. *Id.* at 879. Although the court observed that a dog sniff outside a car during a lawful traffic stop is not a search, the court noted that "officers cannot rely on a dog's alert to establish probable

cause if the officers open part of the vehicle so the dog may enter the vehicle or otherwise facilitate its entry.” *Id.* at 880. The court thus concluded:

[A] trained dog’s alert from areas where the motorist has no legitimate expectation of privacy—the exterior of the car or the interior of the car that the motorist has voluntarily exposed to the dog—provides sufficient probable cause to search the interior. But where there is evidence that it is not the driver but the officers who have “create[d] the opportunity for a drug dog to go where the officer himself cannot go,” the Fourth Amendment protects the driver’s right to privacy to the interior compartment until the dog alerts from the exterior of the car.

Id. (second alteration in original) (quoting *United States v. Lyons*, 486 F.3d 367, 373 (8th Cir. 2007)).

D. Application

¶24 Applying the foregoing principles to the facts before us, we initially conclude that the trial court erred in finding that it was improper for the agents to remove Pham from his vehicle after properly initiating a traffic stop.

¶25 As noted above, in *Mimms*, 434 U.S. at 111, the Supreme Court concluded that legitimate concerns for officer safety outweigh the *de minimis* intrusion into a driver’s personal liberty occasioned by an officer’s request that a lawfully stopped driver get out of the car. There, officers had pulled Mimms over for driving with an expired license plate, and one of the officers asked Mimms to exit the vehicle, apparently as a standard practice. *Id.* at 107, 109–10. Although the State conceded that the officer had no reason to suspect Mimms of foul play at that point in the

interaction, the Court nonetheless concluded that when a vehicle has been lawfully detained for a traffic violation, police officers may order the driver to exit the vehicle without violating the Fourth Amendment. *Id.* at 109, 111 n.6.

¶26 In our view, the same principle applies here. The agents had lawfully stopped Pham for a suspected lane change violation. Accordingly, under *Mimms*, the agents acted appropriately when they ordered Pham out of his vehicle, even though they had no particularized concern for their safety when they did so. *See id.* As a result, we conclude that the trial court erred in determining that the agents had acted unlawfully in ordering Pham out of his vehicle.

¶27 The question thus becomes whether the agents conducted a search of Pham's vehicle when the drug-detection dog entered the vehicle to conduct a sniff. On the facts of this case, we conclude that they did, and because the search was not supported by probable cause, we further conclude that the search was unconstitutional.

¶28 As discussed above, in *Felders*, 755 F.3d at 877, the Tenth Circuit concluded that when a police officer, without probable cause, facilitates a drug-detection dog's entry into a vehicle during a dog sniff, this constitutes an unconstitutional search. Indeed, the cases on which the People rely are in accord.

¶29 Specifically, as the People contend, some federal courts have perceived no Fourth Amendment violation when a drug-detection dog acted "instinctively" and

without facilitation by its handler in entering a vehicle. *See, e.g., United States v. Sharp*, 689 F.3d 616, 620 (6th Cir. 2012); *United States v. Pierce*, 622 F.3d 209, 214–15 (3d Cir. 2010). Accordingly, even the case law on which the People rely supports the conclusion that when a police officer, without probable cause, facilitates a drug-detection dog’s entry into a vehicle during a dog sniff, it constitutes a search. *See Sharp*, 689 F.3d at 620; *Pierce*, 622 F.3d at 214–15.

¶30 Here, we need not confront the difficult question of whether and when a dog acts instinctively because the trial court found, with ample record support, that the police agents in this case facilitated the dog’s entry into Pham’s vehicle. Specifically, the record, including footage from Agent Winters’s body-worn camera, shows that an agent ordered Pham out of the vehicle, putting his hand on the top of the door when Pham exited so that he could not have closed the door had he tried. The agents then immediately conducted a pat down of Pham and directed him away from the vehicle, leaving the door open. Once Pham was away from the vehicle, Agent Winters deployed the drug-detection dog, and when the dog got to the open driver’s side door, Agent Winters partially closed the door to allow him and the dog to maneuver around it. Agent Winters then reopened the door sufficiently to allow the dog to place his head and front paws inside the vehicle, at which point the dog alerted to the presence of drugs.

¶31 On these facts, and in light of the above-described case law, we conclude that the law enforcement officers in this case conducted a search within the meaning of the Fourth Amendment when they facilitated the dog's entry into Pham's vehicle. This was not a scenario in which the officers merely left a door open so that the dog could get a better sniff of the ambient air. Rather, the record reflects, and the trial court properly found, that, through their own actions, the officers facilitated the dog's entry *into* Pham's vehicle so that the dog could sniff inside. (Notably, the dog did not alert when sniffing around the vehicle's closed doors; he alerted only after entering the vehicle.)

¶32 The question remains whether this search was supported by probable cause. We conclude that it was not.

¶33 As noted above, probable cause exists when the facts available to a police officer would warrant a person of reasonable caution to believe that contraband or evidence of a crime is present. *Harris*, 568 U.S. at 243. The record does not establish such a reasonable belief here.

¶34 Law enforcement officers stopped Pham for a suspected lane change violation after he left an allegedly high-crime area. The officers had no indication that Pham had been involved in any criminal activity in that area. Nor does the record show that the officers were aware of any facts suggesting that there was contraband in Pham's vehicle (a lane change violation, in and of itself, does not

establish such a fact). And the dog did not alert until it entered Pham's vehicle (thus, any facts establishing probable cause arose after the search began).

¶35 Accordingly, we conclude that the officers conducted the search at issue without the requisite probable cause.

III. Conclusion

¶36 For these reasons, we conclude that although the Lakewood police agents acted properly in removing Pham from his vehicle in the course of a lawful traffic stop, they conducted a search of that vehicle under the Fourth Amendment when they facilitated the drug-detection dog's sniff of the vehicle's interior. We further conclude that the agents conducted this search without probable cause, thereby violating Pham's Fourth Amendment rights.

¶37 Accordingly, we affirm the trial court's order granting Pham's motion to suppress evidence discovered as a result of the unconstitutional search, and we remand this case to the trial court for further proceedings consistent with this opinion.

JUSTICE BOATRIGHT, joined by **CHIEF JUSTICE MÁRQUEZ**, dissented.

JUSTICE BOATRIGHT, joined by CHIEF JUSTICE MÁRQUEZ, dissenting.

¶38 In this case, the district court suppressed evidence because “the police officers knew what they were doing” by “on purpose leav[ing] the door open so that they can sort of sniff what’s inside.” I agree; the agents did know what they were doing. They were familiar with, and knowingly adhered to, the prevailing standards governing how to properly conduct a K-9 drug sniff when a vehicle’s occupant leaves its doors or windows open, as Tien Dinh Pham did here.

¶39 Today the majority concludes that evidence must be suppressed, not because of any specific unlawful police conduct, but rather, what the police did not do. The majority concludes that the police facilitated K-9 Duke’s illegal entry into Pham’s vehicle, largely because they failed to affirmatively close the door that Pham, himself, had left open. Maj. op. ¶¶ 30–31. Apparently, not closing the defendant’s door amounts to unlawful conduct, as the “‘prime purpose’ of the exclusionary rule ‘is to deter future unlawful police conduct.’” *Illinois v. Krull*, 480 U.S. 340, 347 (1987) (quoting *United States v. Calandra*, 414 U.S. 338, 347 (1974)).

¶40 In this case, however, I do not perceive that any unlawful police conduct occurred. It is undisputed that the agents properly stopped Pham, and I agree with the majority that ordering him out of the vehicle was justified. However, there is no constitutional right requiring the police to close a vehicle’s door after it has been left open by its occupant. Further, although I agree with the majority’s

“facilitation” test, I disagree with its application and conclusion. Because Pham left his car door open, the agents’ leaving it open did not “facilitate” Duke’s entry and was lawful. Hence, I respectfully dissent.

I. Pham Left the Door Open

¶41 As the majority notes, “In reviewing a trial court’s ruling on a motion to suppress, we look solely to the record created at the suppression hearing.” Maj. op. ¶ 12 (quoting *People v. Thompson*, 2021 CO 15, ¶ 16, 500 P.3d 1075, 1078). However, body-worn camera footage is part of the record, and “we may independently review recordings including police bodycam footage.” *People v. Bohler*, 2024 CO 18, ¶ 17, 545 P.3d 509, 514; *see also People v. Platt*, 81 P.3d 1060, 1067 (Colo. 2004) (“When considering recorded statements . . . trial and appellate courts are in a similar review position.” (citing *People v. Al-Yousif*, 49 P.3d 1165, 1171 (Colo. 2002))). Accordingly, to elucidate the reasons for my dissent, I begin by reviewing the relevant facts from Agent Winters’s body-worn camera footage and testimony, starting after the police lawfully stopped Pham’s vehicle.

¶42 When an agent ordered Pham out of the vehicle, Pham opened his door and exited. The agent stood nearby, briefly resting one hand on the doorframe. When Pham was outside, the same agent moved him to the side of the vehicle and performed a pat-down as another agent approached. Once the pat-down was complete, the agents directed Pham to wait nearby. At no point did Pham attempt

to close his door; nor did the agents do anything to prevent Pham from closing it. Instead, Pham walked away while looking at his phone.



Pham did not attempt to close the door.

¶43 True, the police knew that an open car door would allow Duke to have a better whiff of the contents of Pham's car. They also knew that their opening the door could be problematic. Indeed, Agent Winters, who was Duke's handler, testified that based on his knowledge of the applicable legal standards, he closes doors or windows opened by the police before beginning a K-9 sniff.

[M]y standard practice is to ask my officers how the vehicle . . . came to be in the position it was in. And if they inform me that [an officer] took some action to open a door, open a window, or anything like that, I will return it to a closed position. Essentially, I don't seek any unfair advantage in these sniffs.

Body-worn camera footage confirms that the police followed this protocol here: an agent told Agent Winters that Pham left the door open. Agent Winters replied, "He did. Perfect, thank you," before proceeding.

¶44 Agent Winters then approached the vehicle with Duke. The pair started the open-air sniff on the passenger side, then proceeded around the front of the vehicle. As they neared the driver's side, Pham's open door was blocking their path, penned in by a cart in the adjoining parking space. Agent Winters closed the door partway; just enough for him and Duke to pass between the vehicle and the cart, then left the door in that partially closed position. The footage never shows Agent Winters shutting the door so completely that Duke could not have entered the vehicle. Nor does the footage show Agent Winters reopening the door to any significant degree, if at all.



Agent Winters partially closing the door.

¶45 As Duke rounded the partially closed door, he apparently caught a scent emanating from the car, because he immediately went to the vehicle's open doorway. Agent Winters did not direct Duke to enter the vehicle. Nonetheless,

Duke placed his head and paws inside the car and sniffed, for a total of approximately three seconds, before alerting to the presence of contraband.



The extent of Duke's entry. The door is partially closed, as Agent Winters left it.¹

¶46 Duke later alerted a second time, outside the driver's doorway and without entering the vehicle. Based on Duke's alerts, the agents determined that they had probable cause to search Pham's vehicle. That search revealed significant quantities of illegal narcotics, along with distribution paraphernalia and two handguns.

II. The Agents' Conduct Was Lawful

¶47 As noted above, the purpose of the exclusionary rule is to deter future unlawful police conduct. *Krull*, 480 U.S. at 347. If there is no unlawful police

¹ The included photos show that the door was fully open when Pham exited, whereas it was partially shut when Duke entered. This supports Agent Winters's testimony that, "I had to shut the door slightly to allow Duke and myself to move past. Once we did, though, Duke began to examine the open driver's area"

conduct, however, the exclusionary rule does not apply. In this case, the majority finds that the police facilitated Duke's entry when an agent briefly put his hand on Pham's door, then directed Pham away from the vehicle while leaving the door open. Maj. op. ¶¶ 30–31. Further, according to the majority, Agent Winters "reopened the door sufficiently to allow the dog to place his head and front paws inside the vehicle." *Id.* at ¶ 30. In doing so, the majority apparently leans into the district court's findings that "the police officers knew what they were doing"; they "were after a little more than" an open-air sniff; and "the search [was] not authorized . . . because they left the door open." *Id.* at ¶¶ 7, 30–31.

¶48 The majority and the district court seem to imply that the agents purposely took these actions, including leaving the door open, to make it easier for Duke to *enter the vehicle*. *Id.* at ¶¶ 30–31. Yet neither the district court nor the majority cite any evidence to support this position. In my view, the more accurate conclusion is that the agents knew they were not required to close the door and that leaving it open would give Duke a better chance of detecting any contraband in the vehicle. Leaving the door open, even if it was to give the dog a better sniff, does not violate the Constitution. Ample case law supports this position, as I describe below.

A. There Is No Constitutional Right to Closing a Car Door

¶49 No constitutional right requires an agent to close a vehicle's door after it has been left open by its occupant. See *United States v. Pulido-Ayala*, 892 F.3d 315, 319–20 (8th Cir. 2018) (“[T]he officers had no responsibility to close the door; they simply took the situation as they found it.”); *United States v. Lyons*, 486 F.3d 367, 373 (8th Cir. 2007) (“Appellants do not cite to any authority that holds that the officers had the affirmative duty to close the windows in preparation for the dog sniff, and we find none.”); compare *United States v. Guidry*, 817 F.3d 997, 1006 (7th Cir. 2016) (affirming the denial of the defendant's motion to suppress and noting that the officers had no duty to close a vehicle's door when the defendant had left it open), with *United States v. Winningham*, 140 F.3d 1328, 1330–31 (10th Cir. 1998) (affirming suppression where “the officers themselves opened the door” then unleashed the drug dog, allowing it to enter the vehicle).

¶50 Logic dictates that when a vehicle's doors or windows are left open, interior air can more easily escape. And a “dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.” *Illinois v. Caballes*, 543 U.S. 405, 410 (2005). Accordingly, when a vehicle's occupant leaves its doors or windows open, I perceive no constitutional barrier to agents allowing them to remain open because they recognize it may help

a K-9 to better sniff any contraband inside. *See Pulido-Ayala*, 892 F.3d at 320 (“Insofar as the dog’s ability to perceive the odor of drugs from outside the car was enhanced by the open door, the situation was created voluntarily by the passenger, and there was no unlawful search in leaving the door open.”); *see also Lyons*, 486 F.3d at 373; *Guidry*, 817 F.3d at 1006; *cf. Winningham*, 140 F.3d at 1330–31.

¶51 In this case, the district court did not find that the agents prevented Pham from closing his door, only that they left it open. I am aware of no authority stating that because Agent Winters partially closed the door to get around the cart, he must then proceed to shut the door fully. Indeed, a comparison of the photos included above confirms Agent Winters’s testimony that Pham left the door open, but that it was partially closed, by Agent Winters, at the time of Duke’s entry.

¶52 Because no constitutional right required the agents to affirmatively close Pham’s door, leaving it open was permissible.

B. The Agents Did Not Facilitate Duke’s Entry; *Felders* Is Distinguishable

¶53 Because the agents’ choice to leave the door open did not, in itself, violate the Constitution, I now evaluate whether their actions improperly “facilitated” Duke’s entry into Pham’s vehicle. *Felders v. Malcom*, 755 F.3d 870, 880 (10th Cir. 2014). “[A] dog’s instinctive jump into a car does not violate the Fourth Amendment” *United States v. Sharp*, 689 F.3d 616, 619 (6th Cir. 2012). “[I]nstantive’ implies the dog enters the car without assistance, facilitation, or

other intentional action by its handler.” *United States v. Pierce*, 622 F.3d 209, 214 (3d Cir. 2010).

¶54 The majority notes these standards, and reasons that, “[W]e need not confront the difficult question of whether and when a dog acts instinctively because the trial court found, with ample record support, that the police agents in this case facilitated the dog’s entry into Pham’s vehicle.” Maj. op. ¶¶ 28–31. However, the district court did not find that the agents “facilitated” Duke’s entry. In fact, the district court did not use the word “facilitate” at all. Instead, it found that the agents “didn’t tell the dog to sniff there,” and that “the behavior taken by the dog was on its own instinct.” In other words, the district court found that Duke entered Pham’s vehicle instinctively. Despite this finding, the majority concludes that the agents facilitated Duke’s entry because an agent briefly placed his hand on Pham’s door, agents left the door open, and Agent Winters partially closed, then supposedly reopened the door. *Id.* at ¶¶ 30–31. This conduct is clearly distinguishable from the case that the majority relies on: *Felders*.

¶55 As the majority notes, “in *Felders*, video footage showed that a state trooper had *opened the passenger doors* of a vehicle . . . and intentionally left a door open, even *physically preventing* one of the passengers from closing that door.” *Id.* at ¶ 22 (emphases added); *see also Felders*, 755 F.3d at 877. Thus, in *Felders*, the potential “facilitation” was not merely police leaving the door open but opening the door in

the first place, then physically preventing the occupants from closing it.² Consequently, the test applied in *Felders* requires purposeful state action, not inaction.

¶56 Moreover, the swath of cases cited in *Felders* lead to the same conclusion. For example, the Tenth Circuit compared *Winningham*, 140 F.3d at 1330–31, in which the court found a “desire to *facilitate* a dog sniff of the van’s interior” where officers opened the van door and unleashed their K-9 prior to its entry, with *United States v. Stone*, 866 F.2d 359, 363–64 (10th Cir. 1989), where the court found no facilitation when a car’s owner voluntarily opened the vehicle’s rear hatch and there was no evidence that the police “encouraged the dog to jump in the car.” *Felders*, 755 F.3d at 885. In *Felders*, the Tenth Circuit also referenced *Sharp* to further explain that the police must *act* during a K-9 sniff to constitute a Fourth Amendment violation:

“It is a Fourth Amendment violation for a narcotics detection dog to jump into a car because of *something the police did*, like training the dog to jump into cars as part of the search or facilitating or encouraging the jump” but no violation occurs “as long as the canine enters the vehicle on its own initiative and is neither encouraged nor placed into the vehicle by law enforcement.”

² In *Felders*, the Tenth Circuit did not conclude that there was facilitation because the case arose in the context of a motion for summary judgment. 755 F.3d at 886. The Tenth Circuit affirmed the district court’s denial of the motion because issues of material fact existed as to whether the officer’s conduct violated the defendant’s constitutional rights. *Id.*

755 F.3d at 880 (emphasis added) (first quoting *Sharp*, 689 F.3d at 619–20; then citing *Pierce*, 622 F.3d at 213–15; and then citing *Lyons*, 486 F.3d at 373–74).

¶57 In this case, the agents did not open the door. Nor did Pham attempt to close the door, and thus the agents did not physically prevent him from closing it. The agents neither unleashed Duke near the car door nor lifted him inside. They did not gesture, direct, or in any way encourage Duke to enter the vehicle. Further, Agent Winters testified that he has “never trained [Duke] to search the inside of vehicles.” Because the agents had no duty to affirmatively close Pham’s door, the fact that Agent Winters partially closed it to get around the cart is irrelevant. And although, after watching the body-worn camera footage, I disagree with the majority that Agent Winters reopened the door, the fact remains that even if he did, it did not facilitate Duke’s entry because the door was never sufficiently closed to prevent Duke from entering in the first place.

¶58 When viewed in the context of the cases cited above, these facts show that the agents did *not do anything* to facilitate Duke’s entry. Further, the majority does not analogize to any cases in support of its conclusion that the agents’ action in this case amounted to facilitation. Accordingly, I conclude that *Felders*, and the weight of authority, dictate that in this case the agents’ conduct did not violate the Fourth Amendment.

III. Conclusion

¶59 Today the majority finds that it was unlawful for agents to leave Pham's car door partially open. Or, in other words, it was unlawful for the agents to not close Pham's door. The result of the majority's decision appears to require police to affirmatively close a vehicle's doors or windows after they are left open by occupants before conducting a K-9 sniff; otherwise, they risk a finding that they facilitated the dog's entry. This standard is unlike any other I am aware of in the country. Furthermore, it raises significant questions about when other forms of police inaction may violate the Constitution.

¶60 Because I perceive no unlawful police conduct in this case, I would not suppress the evidence found here. Hence, I respectfully dissent.