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IN THE SUPREME COURT OF THE UNITED STATES

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DANNY BIRCHFIELD, :

Petitioner, : No. 14-1468

v. :

NORTH DAKOTA, :

Respondent; :

- - - - - x

and

- - - - - x

WILLIAM ROBERT BERNARD, JR., :

Petitioner, : No. 14-1470

v. :

STATE OF MINNESOTA, :

Respondent; :

- - - - - x

1 and

2 - - - - - x

3 STEVE MICHAEL BEYLUND, :

4 Petitioner, : No. 14-1507

5 v. :

6 GRANT LEVI, DIRECTOR, :

7 NORTH DAKOTA DEPARTMENT OF :

8 TRANSPORTATION, :

9 Respondent. :

10 - - - - - x

11 Washington, D.C.

12 Wednesday, April 20, 2016

13

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:15 a.m.

17 APPEARANCES:

18 CHARLES A. ROTHFELD, ESQ., Washington, D.C.; on behalf
19 of Petitioners.

20 THOMAS R. McCARTHY, ESQ., Arlington, Va.; on behalf of
21 Respondents in Nos. 14-1468 & 14-1507.

22 KATHRYN KEENA, ESQ., Assistant Dakota County Attorney,
23 Hastings, Minn.; on behalf of Respondent in
24 No. 14-1470.

25

1 APPEARANCES (Continued):
2 IAN H. GERSHENGORN, ESQ., Deputy Solicitor General,
3 Department of Justice, Washington, D.C.; for United
4 States, as amicus curiae, supporting Respondents.

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	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	CHARLES A. ROTHFELD, ESQ.	
4	on behalf of the Petitioners	5
5	ORAL ARGUMENT OF	
6	THOMAS R. McCARTHY, ESQ.	
7	On behalf of the Respondents in	
8	Nos. 14-1468 & 14-1507	35
9	ORAL ARGUMENT OF	
10	KATHRYN KEENA, ESQ.	
11	On behalf of the Respondent in No. 14-1470	51
12	ORAL ARGUMENT OF	
13	IAN H. GERSHENGORN, ESQ.	
14	For United States, as amicus curiae,	
15	supporting the Respondents	60
16	REBUTTAL ARGUMENT OF	
17	CHARLES A. ROTHFELD, ESQ.	
18	On behalf of the Petitioners	70
19		
20		
21		
22		
23		
24		
25		

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P R O C E E D I N G S

(10:15 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 14-1468, Birchfield v. North Dakota and the related cases.

Mr. Rothfeld.

ORAL ARGUMENT OF CHARLES A. ROTHFELD

ON BEHALF OF THE PETITIONERS

MR. ROTHFELD: Thank you, Mr. Chief Justice, and may it please the Court:

The fundamental problem with the statutes at issue in these three cases is that they make it a criminal offense to assert a constitutional right. Under laws of North Dakota and Minnesota, a person who is stopped on suspicion of impaired driving is obligated to take a warrantless chemical test to determine the alcohol content of their blood.

The States concede that these tests are searches under the meaning of the Fourth Amendment. The United States and North Dakota appear to recognize that no exception under the recognized exceptions of the law requirement applies. Nevertheless, a person is obligated to take this warrantless -- to submit to this warrantless search, and is committing a criminal offense if he or she does not do so.

1 JUSTICE KENNEDY: Is it correct to say that
2 you concede that the State could revoke the driver's
3 license for refusing to take the test, either blood,
4 alcohol or Breathalyzer?

5 MR. ROTHFELD: That -- that is not at issue
6 in this case. We haven't taken a position on that,
7 but -- but I -- but we don't dispute for purposes of
8 this case that the State could do that.

9 JUSTICE KENNEDY: Well, let's -- let's
10 assume that that is a concession or that we hold that or
11 that that's a premise. If the State can impose a civil
12 administrative sanction, why couldn't it also impose a
13 criminal sanction? We could have hypotheticals where
14 you would just be no more than three days in jail,
15 criminal sanction, or a three-year suspension, which is
16 obviously greater. Why should there be a difference?

17 MR. ROTHFELD: I -- I think the fundamental
18 distinction that -- that governs the outcome of this
19 case, we think, is that -- is that between the State
20 taking away a benefit that it didn't have to give you in
21 the first place, which is what the Court addresses in
22 the unconstitutional conditions line of cases.

23 In this situation here, where the State is
24 saying by fiat, you are subject to a criminal penalty,
25 affirmative criminal penalty, for -- for asserting a

1 constitutional right.

2 In the case that you are hypothesizing --

3 JUSTICE KENNEDY: Well, I think the
4 conditions are just different. I -- I don't think that
5 analytically -- analytically it's a -- it's a different
6 proposition.

7 MR. ROTHFELD: But I -- I have to disagree
8 with that, Your Honor, for this reason: I -- I think
9 that in the unconstitutional conditions line of cases,
10 what the Court has said is the State has given someone a
11 benefit that it did not have to give in the first place.
12 And that all the State is doing when it takes that
13 benefit away is saying you're back in the position that
14 you were to begin with. There is no sort of direct
15 penalty that's attached to what the individual is doing.

16 And the Court in those cases has said, we
17 will look to see the practical effect of the combination
18 of the benefit and the condition to see whether or not
19 the State in -- in reality is trying to do indirectly
20 what it could not do directly, that being the -- the
21 suppression of the constitutional right. And so in
22 those cases, the Court will look to see is -- what is
23 it, agree with the connection between the benefit and
24 the condition? And it will look to see the degree of
25 coercion that the -- the State's manipulation of the

1 benefit and condition imposes on the individual to
2 surrender a constitutional right.

3 But as the Court -- the Court has made very
4 clear in this entire line of cases what it's trying to
5 do is figure out, is the State trying to do indirectly
6 something that it could not do directly, which is
7 abdicate a constitutional right?

8 JUSTICE ALITO: One way --

9 JUSTICE KAGAN: This --

10 JUSTICE ALITO: One way of looking at what
11 the State is doing is not to criminalize the assertion
12 of a constitutional right, but to criminalize reneging
13 on a bargain. And the bargain was, we give you a
14 license to drive, and in exchange for that, you consent
15 to a -- to a blood-alcohol test under certain
16 circumstances. And if you renege on that bargain, then
17 that's what's criminalized. Why isn't that a better way
18 of looking at this?

19 MR. ROTHFELD: I -- I think it -- to look at
20 it that way, I think you're sort of in -- in the world
21 of consent. In this case, at least, there is no
22 suggestion that consent of that sort was present because
23 in this case, there -- there is no reason to believe
24 that the defendants had any idea that they were agreeing
25 to the bargain that -- that you -- you described.

1 JUSTICE KENNEDY: Well, under Justice
2 Alito's hypothetical, suppose if for every driver's
3 license you had to sign a consent form, I consent to
4 take a Breathalyzer test in the event the officer has
5 grounds to require it.

6 MR. ROTHFELD: Well, let me answer that
7 question in two parts, Your Honor. First, as to what's
8 going on in this case, where there is nothing like that
9 on -- on the form, what's happening here, the way that
10 these statutes operate, if you drive on the roads in
11 North Dakota or Minnesota, you are automatically and
12 irrevocably subject to the State's --

13 JUSTICE KENNEDY: I'm testing Justice
14 Alito's question. Suppose there is real consent. Is
15 that --

16 MR. ROTHFELD: Well, I -- then -- then the
17 analysis would be -- not the analysis in this case,
18 but -- but a consent analysis --

19 JUSTICE KENNEDY: I mean, it's -- it's real
20 in that everybody had to sign this form that they don't
21 --

22 MR. ROTHFELD: I'm -- my --

23 JUSTICE SOTOMAYOR: I'm assuming they're
24 going to stop everybody at the border. So someone who
25 isn't from that particular State who hasn't signed

1 anything is still subject to the same criminal
2 penalties.

3 JUSTICE KENNEDY: Well, that's my next
4 question, but let's just talk about just the State --
5 the State.

6 MR. ROTHFELD: And, Justice Sotomayor, that,
7 in fact, is the reality of this State.

8 JUSTICE SOTOMAYOR: I know.

9 MR. ROTHFELD: But -- but I -- I think, as I
10 say, the analysis there would be not the analysis in
11 this case, but a consent analysis under the Schneckloth
12 line of cases. And I think they're -- it would be the
13 State's obligation to show on the totality of the
14 circumstances that the consent to permit the search and,
15 therefore, to subject yourself to the conditions is --
16 is truly voluntary, that it's the product of the
17 defendant's choice, that it was not the product of
18 coercion --

19 JUSTICE KENNEDY: You know, that especially
20 in North Dakota and sparsely populated States, you have
21 to drive in order to -- so we know that consent is -- is
22 fictional in that sense. But suppose that it was
23 voluntary and that it was explained and so forth and
24 the -- and the --

25 MR. ROTHFELD: But -- but -- I think --

1 JUSTICE KENNEDY: -- and the drivers sign
2 it. It still seems to me you'd -- you'd have an
3 argument that it's -- it's coerced.

4 MR. ROTHFELD: I think that's right. I
5 think, as I say, the analysis would be a consent
6 analysis under Schneckloth. One of the key points of
7 that is coercion, and I would think that if someone is
8 told, you cannot drive, particularly in a rural State
9 like North Dakota, and probably anywhere, but certainly
10 there, something which is absolutely essential to daily
11 life, to going to your job --

12 CHIEF JUSTICE ROBERTS: So that would be
13 grounded in what provision in the Constitution?

14 MR. ROTHFELD: That would be grounded in the
15 Fourth Amendment, because the -- the --

16 CHIEF JUSTICE ROBERTS: No, the -- the right
17 people have to drive. I thought you were just
18 postulating something saying -- I mean you're saying the
19 States could not take away that right.

20 MR. ROTHFELD: No, no, no. I'm -- I
21 apologize, Your Honor. That's not what I meant to say.
22 What I'm saying is, if -- if the submission, as Justice
23 Kennedy hypothesizes, is people are told and actually
24 are aware that they are being told that if they drive
25 they are consenting to be searched, that they're

1 consenting to submit to the chemical test, I think
2 whether the State can execute on that depends on whether
3 or not there is consent.

4 CHIEF JUSTICE ROBERTS: Well, no. But I
5 thought you said, well, of course there's coercion
6 because you can't survive in North Dakota without a car,
7 which I'm happy to postulate, but -- but what is -- what
8 is the basis for that -- that right?

9 MR. ROTHFELD: I -- I think that's not a --
10 not a right that's granted in the Constitution. What --
11 what's -- the relevance of that is that there would be
12 coercion, we think, within the meaning of Schneckloth,
13 within the meaning of this Court's Fourth Amendment
14 coercion, you know, voluntary consent.

15 CHIEF JUSTICE ROBERTS: So -- so for
16 purposes of analyzing this case, we have to assume that
17 States could prohibit people from driving, period.

18 MR. ROTHFELD: I think that that's right.

19 CHIEF JUSTICE ROBERTS: Okay. Now, as far
20 as the border goes, now when it's -- I understand
21 stopping people at the border. But what if there's a
22 sign at the border that says anyone who uses the State
23 roads consents to, you know, blood alcohol testing if
24 they're -- they're pulled over?

25 MR. ROTHFELD: Again, that would -- that

1 would not be this case, because in this case there is no
2 suggestion that these defendants had any idea that these
3 statutes existed, let alone that they were voluntarily
4 surrendering their right to assert the Fourth Amendment.

5 But in the hypothetical that you suggest, I
6 think it would be a difficult case for the State to
7 make, because the State's obligation would have to be to
8 carry the burden of showing that the defendant actually
9 voluntarily surrendered the right to -- to resist --

10 JUSTICE SOTOMAYOR: Is it true that the
11 State could prohibit driving altogether without a
12 reason?

13 MR. ROTHFELD: Well, I -- I sort of conceded
14 that to the Chief Justice. That's not an issue in our
15 case. I'm not sure whether that is true. And if the
16 State could not do that, then that makes their case even
17 weaker, because in that -- they could not then condition
18 -- they would not have a -- have a benefit that they
19 could withdraw.

20 JUSTICE ALITO: You mean --

21 CHIEF JUSTICE ROBERTS: I suppose the reason
22 would be that the issue we're talking about, all the
23 traffic deaths, right? I mean, if -- I mean, obviously
24 it's not a realistic contention, but that's -- a lot of
25 the hypotheticals aren't. I'm trying to get to the

1 basis of, it seems to me that the flexibility that a
2 State has in this situation depends upon what rights the
3 motorist has.

4 And I understand the Fourth Amendment
5 argument, but it does seem to me that if you're making
6 an unconstitutional-conditions argument, it is pertinent
7 to determine what authority the State has in any event.

8 MR. ROTHFELD: That's right. But let me --
9 let me be very clear. I think that there are two points
10 that are crucial. One is that we are not making an
11 unconstitutional-conditions argument. We are saying
12 what the State is doing here is a -- is a direct
13 assertion of -- direct imposition of criminal penalties
14 on people who assert their Fourth Amendment rights.
15 This is nothing to do with a condition because, as I
16 say, these -- these defendants are not shown to have
17 been aware that they were subject to a condition at all.

18 JUSTICE ALITO: But we're interested in --
19 in other possibilities. And so if you assume that a
20 State can condition the -- the right to -- the ability
21 to drive on the State's roads -- and let's assume this
22 is not somebody who is crossing the border. Assume a
23 State can condition the -- the ability to drive on a
24 State's roads on consenting to a blood-alcohol test,
25 perhaps under certain circumstances. Let's say this is

1 done in writing at the time when the person applies for
2 the license, so it's not -- it's not just implied.

3 Why does that -- what is different about
4 that situation from a number of other situations that I
5 can think of? For example, conditioning a -- a license
6 to operate an interstate passenger train on submitting
7 to a blood-alcohol test in the event of reasonable
8 suspicion. The person is operating the -- the train
9 under the influence of -- of alcohol, or the same thing
10 with someone who is operating aircraft.

11 Or suppose there were a law that said that
12 if you want to enter certain government buildings, such
13 as this building, the -- the condition of entering is
14 consenting to a search, and you have to sign something,
15 you have to go through the magnetometer. And then if a
16 person got through that, and there was reasonable
17 suspicion that the person had smuggled in some kind of a
18 weapon, the person would be subjected to a search. What
19 would be the difference between that situation and this
20 situation?

21 MR. ROTHFELD: I think there would be a
22 number of -- of distinctions. One would be, I think
23 that's in at least some of the hypotheticals that --
24 that you offer, the train hypothetical, for example,
25 that's the Skinner case. There is a special-needs

1 exception to the warrant requirement applies. And so
2 there is no ability, no -- on the part of the individual
3 to resist the search. I mean, there is no -- no
4 warrantless -- there's no requirement for a warrant in
5 the first place.

6 I think entering the government building
7 would probably --

8 JUSTICE SOTOMAYOR: In those cases, don't
9 you just lose the benefit? You don't come into the
10 building.

11 MR. ROTHFELD: That -- that's correct.

12 JUSTICE SOTOMAYOR: You lose your job.

13 MR. ROTHFELD: Well, again, let's -- let's
14 be -- be clear on -- on sort of what the doctrine is. I
15 think in the Skinner situation, I mean, there simply is
16 no Fourth Amendment right. So we're -- we're not
17 asserting the benefits and conditions world, we're
18 simply saying you have no -- no right to resist the
19 search. I think that's true entering the building as
20 well. I think, otherwise --

21 JUSTICE KENNEDY: Well, but if -- if you say
22 that, and I -- and I recognize that there's some
23 circularity in -- in both positions here. But you say,
24 well, in Skinner there was no constitutional right
25 because we could take the constitutional right away.

1 Well, that's exactly what the government is going to
2 argue.

3 MR. ROTHFELD: But I --

4 JUSTICE KENNEDY: So it doesn't seem to me
5 to help us.

6 MR. ROTHFELD: I -- again, I -- I think I --
7 I would look at it differently, Your Honor. I think
8 that what's happening in a case like Skinner is the
9 Court is addressing the substantive scope of the Fourth
10 Amendment. It's saying that in the circumstances of this
11 search, is there a requirement for a warrant, because --
12 and as --

13 JUSTICE KENNEDY: Well, we would say,
14 suppose we said this is like Skinner. If the Chief
15 Justice asked about statistics, suppose there was a
16 compelling showing that there was a measurable increase
17 in traffic fatalities. If this was not in force, we
18 would say this is a special condition, and therefore you
19 must consent. And the bottom line is -- and that means
20 there is no constitutional right because we just said
21 there's no constitutional right.

22 MR. ROTHFELD: Well, I -- that, I think,
23 Your Honor, would be creating a new exception to the
24 Fourth Amendment, and it's not a certain-conditions
25 analysis. But -- but it's an important point, so let me

1 go back to this.

2 I think what was happening in Skinner is the
3 Court -- and that whole line of cases, Skinner and
4 Vernonia and Von Raab -- the Court is saying we're
5 looking at the circumstances that an individual's right
6 to privacy, the -- whether or not there is discretion on
7 the part of the law enforcement officer to decide
8 whether or not to execute the search, all those things
9 go into special needs. And the Court says in these
10 special-needs situations, there is no Fourth Amendment
11 -- applying the ordinary Fourth Amendment principles,
12 there is no Fourth Amendment entitlement --

13 JUSTICE KENNEDY: Maybe -- maybe I
14 misunderstood, but I thought that was the whole thrust
15 of Justice Alito's question. Why can't we say it's a
16 special needs? Let's assume the statistics are
17 compelling.

18 MR. ROTHFELD: But I -- I think that it's --
19 I think it's --

20 JUSTICE KENNEDY: And when we talk about --
21 talk about innocent -- innocent lives, just as we were
22 in Skinner.

23 MR. ROTHFELD: I think -- I think that the
24 analysis there is, I mean, do we look -- we look to the
25 basic Fourth Amendment's characteristics that go into

1 whether a search is required. In *McNeely*, I mean, the
2 Court essentially addressed that very question. The
3 Court addressed the argument that the nation's impaired
4 driving problem is so severe, so compelling, that we can
5 disregard the warrant requirement, and the Court
6 rejected that. And in fact, no member of the Court
7 accepted that as principle in *McNeely*.

8 CHIEF JUSTICE ROBERTS: Well, I'm not sure
9 that was the -- I'm not sure that's different in this
10 case. I mean, in the -- in the railroad case, I think
11 what we're saying is that the need for safe
12 transportation on the trains to protect the innocent
13 people there is -- is compelling enough that -- that it
14 falls within the special-needs exception. And I'm --
15 again, I'm not -- not sure why that analysis wouldn't
16 apply here.

17 I -- I don't know. I suspect more people
18 die from drunk driving accidents than from train
19 accidents, and so the special need would seem to be just
20 as -- as compelling.

21 MR. ROTHFELD: But I think that that was not
22 the rationale in *Skinner*, certainly not the entire
23 rationale. I think that the principal reason for saying
24 there was no warrant requirement there. And the Court
25 said not just that there was no warrant requirement but

1 that there was no probable cause requirement; that there
2 could be a search without suspicion at all. No one is
3 suggesting that that's appropriate here.

4 I think that the reason the Court came to
5 that conclusion, both in Skinner and Von Raab and
6 Vernonia and that entire line of cases, is kind of the
7 whole combination of characteristics that there was no
8 discretion, as I said, on the part of the law
9 enforcement officer to decide who to search, that --
10 that there were a variety of things that had sort of
11 nothing to do with the ordinary criminal process. These
12 were not criminal investigations at all.

13 And the Court has said time and again that
14 in the ordinary law enforcement circumstance where a
15 search is being conducted, that a warrant is required.
16 That is the presumption unless --

17 JUSTICE BREYER: The presumption -- but
18 there are many ways of analyzing this case, so let me
19 try to get you to focus on one that doesn't have to do
20 with consent or any of these differences that you --
21 many of them that you've been discussing.

22 One way to analyze it is you just ask: Is
23 it -- there is no such thing as an exception to the
24 Fourth Amendment. The question is whether the Fourth
25 Amendment requires a warrant in these circumstances, and

1 it seems to me if it does, then you win. And if it
2 doesn't, then the State has considerable freedom. It
3 couldn't boil people in oil, but it might be able to do
4 this. All right. So that's how -- what I'm thinking.

5 Now, the question is --

6 MR. ROTHFELD: It --

7 JUSTICE BREYER: And I don't find this very
8 much in the briefs, and it surprises me. That's what I
9 want you to address. Why -- why isn't there a big
10 difference between a blood test and a Breathalyzer? I
11 mean, look, I look at a Breathalyzer; it's a little box
12 the size of a cell phone. It has a little straw on the
13 end, and you breathe into it. And what you breathe into
14 it is carbon dioxide, which is going to go into the
15 environment anyway; you're not going to keep it. And
16 moreover, it takes place quickly, so the evidence hasn't
17 disappeared. A blood test, you have to go somewhere
18 else. There is risk involved. Time elapses, so you
19 lose some of the evidence. And it's painful in some
20 instances.

21 So, I immediately think, isn't there a
22 difference? So encapsulated in what I'm saying is what
23 is wrong with a Breathalyzer test when it can save lots
24 of lives and is given to those people where there is
25 probable cause, I take it, or at least reasonable

1 suspicion to think they're drunk. It'll clear the
2 innocent; it'll inculcate the guilty, very little
3 interference. But a blood test, I mean, that might be a
4 different thing.

5 Okay. I'd appreciate what your response is
6 to that line of thought.

7 MR. ROTHFELD: And I will do that. I will
8 say to begin, I think that your prefatory statement is
9 quite correct that if a warrant is required here, we
10 win. If a warrant is not required, then the State has
11 considerably more leeway in what it can do.

12 On the breath test, breath test is a
13 significant intrusion on personal integrity. As the
14 Court said in Skinner, the -- first of all, there is no
15 question that the breath test is a search in the Fourth
16 Amendment -- meaning of the Fourth Amendment. That's
17 conceded by -- by my friends on the other side. And the
18 Court's presumption has been that when there is a search
19 in a law enforcement proceeding, a warrant is going to
20 be required unless one of the regular exceptions to the
21 warrant requirement applies there.

22 And I think it is conceded by the
23 United States and North Dakota that there is no so -- no
24 such exception here. And so --

25 JUSTICE KAGAN: Well, why can't we say that

1 with respect to a breath test that this is a search
2 incident to arrest?

3 MR. ROTHFELD: I think that it's not a
4 search incident to arrest for the reasons that were
5 stated by the dissenting opinion in -- in the Bernard
6 case by Justices Stras and Page of the Minnesota Supreme
7 Court, which is, the court has made very, very clear
8 consistently from Chimel on through Riley most recently
9 that search incident to arrest turns on the existence of
10 one of two considerations, either the search is
11 necessary to preserve officer safety, or to preserve
12 evidence.

13 JUSTICE KAGAN: Well, I think that this
14 would be based on the notion that it's necessary to
15 preserve evidence, plus the notion which Justice Breyer
16 suggested that this is about as uninvasive as a search
17 can possibly be. And so that given those two things
18 together, that it is useful to preserve evidence and
19 that it is a extremely uninvasive search, that we can
20 assimilate it into the search-incident-to-arrest
21 doctrine.

22 MR. ROTHFELD: Well, let me answer both of
23 those points. On -- on the preservation of evidence,
24 the evidence that's being tested here is the
25 blood-alcohol level, so alcohol level in the blood. And

1 they're simply using breath as a means of doing that.
2 As to that, breath and blood are identical. And so, as
3 the Court -- the Court addressed this in McNeely.

4 JUSTICE KAGAN: Yes, but there's something
5 very different in the level of invasion, and certainly
6 it's appropriate to look at the invasiveness of a search
7 when deciding whether to do a search incident to arrest.
8 I mean, if that weren't true, we wouldn't have talked
9 about how much you could get off of a cell phone in
10 Riley. If that weren't true, we would allow people to
11 do body cavity searches when they do search incidents to
12 arrest.

13 So it seems to me that the Court can look at
14 the level of invasion incident to a search when deciding
15 whether a particular search comes within the
16 search-incident-to-arrest doctrine, and that that might
17 be a way of separating out this category of cases from
18 the ones that we were talking about in McNeely.

19 MR. ROTHFELD: Well, let me say two things
20 about that. First, our sense is that a breath test is
21 in fact a significant intrusion on personal integrity
22 for the reasons the Court suggested in the Skinner case.
23 When one takes one of these Breathalyzer tests, I mean,
24 it is not, Justice Breyer, simply that you're exhaling
25 in the ordinary way and carbon dioxide is dissipated

1 into --

2 JUSTICE BREYER: I didn't say ordinary way.
3 I said you blow hard into a little straw-like thing
4 that's connected with what looks like a cell phone. So
5 using the word "significant" or not doesn't help me.

6 MR. ROTHFELD: Well --

7 JUSTICE BREYER: I mean, it is what it is.

8 MR. ROTHFELD: It's --

9 JUSTICE BREYER: And that -- that -- the
10 question is why it is so intrusive that the Constitution
11 insists on a warrant where that insistence could
12 undermine in many cases the evidence that you are
13 looking for? Now, that's -- that's a question of
14 several factors. And it doesn't -- just doesn't help me
15 to say significant or not significant. That seems to me
16 the question, not the answer.

17 MR. ROTHFELD: Well, as to why we think it
18 is -- why we think it is significant as a personal
19 matter, when one takes a Breathalyzer test of this kind,
20 a tube is inserted into the person's mouth. You have to
21 exhale continuously for an extensive period of time.
22 Could be as many as 20 or 25 seconds. And the point of
23 it is to expel what the Court has characterized in
24 Skinner as deep-lung air. It's --

25 JUSTICE BREYER: What does that have to do

1 with it? I mean, after all, if in fact the person's
2 eyes turn bloodshot when every time he drank four
3 bottles of whiskey, you could look at the his eyes, and
4 that wouldn't be intrusive at all. I mean, what you're
5 looking for doesn't have much to do with the intrusion.
6 It's the way you're looking for it that's the problem.
7 That's the problem. It's not that you happen to want to
8 know it for a particular reason.

9 MR. ROTHFELD: You're inserting a tube into
10 a person's mouth to get them to expel something from
11 deep within their body so that it can be tested by the
12 government. And my --

13 JUSTICE SOTOMAYOR: Excuse me. I know we've
14 assumed that it's only evidentiary, but in my
15 experience, police, when they do the road test, do it
16 because they want to confirm that you are in fact drunk.
17 Before they take you in and take you off the road,
18 they're doing this test as part of the probable cause
19 evaluation: Is there enough probable cause to bring you
20 in? There may be, independent of it, but sometimes the
21 breath test exonerates people and they go on their merry
22 way.

23 So why are we thinking that it is only
24 evidentiary? I do think the blood test is, by the way.
25 Once you've arrested someone, you've decided to take

1 them off the road, and the road is now safe from that
2 person. But --

3 MR. ROTHFELD: And that is true with a
4 Breathalyzer, too. We're talking here not about
5 preliminary field sobriety screens; we're talking about
6 people who have been arrested or as to whom there is
7 probable cause to believe that they are -- have been
8 driving while intoxicated.

9 JUSTICE SOTOMAYOR: As I said, there's
10 always -- there's probable cause, and there's probable
11 cause.

12 MR. ROTHFELD: But these --

13 JUSTICE SOTOMAYOR: I'm meaning why can't we
14 view it as just part of the necessity of the -- of the
15 stop and suspicion of the stop?

16 MR. ROTHFELD: Because I think again the --
17 the tests we're talking about here, the -- under the
18 laws of both North Dakota and Minnesota, the officer has
19 the right to give --

20 JUSTICE BREYER: The right. So what is the
21 percent of tests of Breathalyzers that is given at -- by
22 the car? And under what -- and what percent of
23 Breathalyzers is given after the person has been
24 arrested and moved to jail or the equivalent?

25 MR. ROTHFELD: Well, there -- as I said,

1 they're field sobriety tests. I think that's given in
2 practically every case as an initial screen.

3 JUSTICE BREYER: I'm saying what percent is
4 which? Okay? I'm asking because I'm curious and think
5 that might be relevant. You may not know. So if you
6 don't know, say you don't know.

7 MR. ROTHFELD: I don't know, Your Honor. I
8 think that the answer to that question, how many people
9 who are stopped in a preliminary way are then arrested
10 for suspicion of driving while impaired, and I'm not
11 sure that there are statistics that anyone has that are
12 available.

13 JUSTICE ALITO: Suppose the Breathalyzer
14 test was improved, there's better technology. So let's
15 suppose that all that's required is to put the
16 Breathalyzer a couple of inch -- an inch from the
17 person's mouth and wait for the person to breathe, and
18 that would be sufficient to measure blood alcohol.
19 That -- would you say that's a search?

20 MR. ROTHFELD: I think that might not be a
21 search. I think that would be a very different
22 situation.

23 JUSTICE ALITO: All right. So if you
24 compare that with what -- what has to be done here, what
25 is the big -- what is the big difference between those?

1 That you have to put a straw in your mouth?

2 MR. ROTHFELD: Well, I would think, Your
3 Honor, that most people -- maybe this is just me, but my
4 suspicion would be that if presented with the
5 possibility of either inserting something into your
6 mouth and expelling something from deep within your body
7 to be tested by the government, people will find that
8 more intrusive than having an officer look in their
9 backpack. I think --

10 JUSTICE ALITO: It doesn't seem -- it
11 doesn't seem realistic. The reason why people don't
12 want to submit to a blood-alcohol test is that they
13 don't want their blood alcohol measured. It's not that
14 they object so much to blowing into a straw. Do you
15 disagree with that?

16 MR. ROTHFELD: Well, I -- I think maybe I
17 do, Your Honor. Obviously people don't want to have --
18 people who are stopped on the road don't want to be
19 tested in any respect. There's no question about that.

20 CHIEF JUSTICE ROBERTS: Well, that's not
21 true. If you're not drunk, you'd be happy to be tested,
22 right?

23 MR. ROTHFELD: Well, I think -- I think
24 that's an intrusion, too. And maybe that -- that
25 ultimately, you would be happy to be tested and let on

1 your way.

2 JUSTICE BREYER: It's an intrusion when you
3 pat down someone having probable cause to believe he's
4 committing a crime, and you pat him down, which is the
5 worst intrusion, I would guess. Pat-down is a much more
6 intrusive form of search than saying would you blow into
7 a straw.

8 MR. ROTHFELD: Well, I --

9 JUSTICE BREYER: But we allow it.

10 MR. ROTHFELD: Let me, again, sort of offer
11 two points on that. One -- one is, the States, in their
12 treatment of blood and breath tests, as the Court
13 described in *McNeely*, almost uniformly treat the breath
14 tests and blood tests identically. And as the Court
15 suggested --

16 JUSTICE BREYER: Why? That's -- that's
17 really my unknown question: Why. Why? That's why I
18 started with that, because I really don't know the
19 answer.

20 MR. ROTHFELD: And -- and I think the
21 answer, Your Honor, is that people understand the breath
22 test to be -- it's designed to obtain the same evidence,
23 literally -- exactly the same evidence as the blood
24 test. And why, in response to Justice Alito's
25 question --

1 JUSTICE KAGAN: But that's, I guess --
2 please, go ahead.

3 MR. ROTHFELD: But I -- I think that you
4 were concerned about the dissipation of this evidence.
5 I think as to the blood and the breath test, it's --
6 it's exactly the same.

7 JUSTICE KAGAN: Yes, you're right that it's
8 designed to get at the same evidence, and you're right
9 that the dissipation of the evidence works in exactly
10 the same way. But you're suggesting that we should
11 close our eyes to the fact that there's a very
12 significant difference in the degree of invasiveness.
13 You know, even assuming that both of these are searches,
14 which I have to say, you know, I think that that's --
15 we've -- we've held that, and so blowing is a search,
16 there's no question about that, but there are searches,
17 and then, again, there are searches. There are more
18 invasive searches and less invasive searches. And I
19 guess my intuitions are that that's an important
20 difference when we think about these questions.

21 MR. ROTHFELD: Well, as to the nature of the
22 breath test. And, again, I've been addressing this
23 and -- and I'm not sure how much more there is to say
24 about it, but I -- but I think that the reality is when
25 a foreign object is inserted into a person's body and

1 they are asked to expel something from deep within their
2 body to be tested by the government, that sort of, on
3 the face of it, is an intrusive proposition, something
4 that most people regard as -- as the Court suggested in
5 Skinner -- a significant invasion of their personal
6 integrity.

7 JUSTICE GINSBURG: What about the standard
8 sobriety tests? I take it you're not challenging a
9 police officer said, walk a straight line.

10 MR. ROTHFELD: That's -- that's right. I --
11 I think that would not certainly -- certainly would not
12 be a search. I doubt it would be a seizure. So I think
13 -- I think that that's correct.

14 JUSTICE GINSBURG: Even though it's
15 involuntarily, the person doesn't want to do it?

16 MR. ROTHFELD: If it's not a search, we're
17 not concerned with Fourth Amendment limitations.

18 CHIEF JUSTICE ROBERTS: So --

19 MR. ROTHFELD: It -- it may be a seizure
20 and -- and I -- that's something we have not analyzed or
21 thought about, and we certainly are not challenging it
22 here.

23 JUSTICE GINSBURG: But it is -- it is a
24 seizure if you say to a person, now you walk a straight
25 line, and that person is in the control of the police

1 officer at the time.

2 MR. ROTHFELD: I think these are almost all
3 voluntary. The officer asks, would you walk a straight
4 line? People do it or attempt to do it. So if that's
5 the case, certainly there can be no Fourth Amendment
6 problem.

7 So -- but -- but those are not -- as I say,
8 they are not challenged here. I think they present a
9 different -- an entirely different set of issues.

10 CHIEF JUSTICE ROBERTS: I guess, for some --

11 MR. ROTHFELD: I'm sorry, Your Honor.

12 CHIEF JUSTICE ROBERTS: No. Go ahead.

13 MR. ROTHFELD: Just to return to Justice
14 Kagan's point, I think in addition to the particular
15 characteristics of the breath test, which we do think
16 are personally intrusive, I think it is the fact that
17 the Court has always, whenever it has confronted a
18 search -- and there is no question that these are
19 searches -- in an ordinary law enforcement
20 investigation, not in the special needs kind of, sort of
21 general investigation, the Court has said there must be
22 a warrant unless one of the recognized exceptions apply.
23 And the recognized exceptions, I think, are
24 substantially conceded by the other side, do not apply
25 here. So it would be, I think, a novelty.

1 JUSTICE KAGAN: Well -- but I guess the
2 question that I asked -- I mean, I agree with you that
3 you do need a recognized exception, and that we should
4 not feel good about making up new exceptions
5 willy-nilly.

6 The question is, why isn't this a search
7 incident to arrest given the various aspects that I've
8 mentioned, the fact that the evidence does dissipate
9 over time, that getting a warrant might interfere with
10 that, and that it's -- relatively uninvasive.

11 MR. ROTHFELD: Right. If I may answer that
12 question, Your Honor, and then sit down?

13 CHIEF JUSTICE ROBERTS: Sure.

14 MR. ROTHFELD: I think -- for dissipation
15 for search-incident-to-arrest purposes, my understanding
16 of -- of that doctrine is, one is concerned with -- with
17 the suspect doing something affirmatively to get rid of
18 the evidence, flushing the evidence down the toilet.
19 That is the classic search-incident-to-arrest situation.
20 The Court in *McNeely* made very clear that we're not
21 dealing with that here. The alcohol, breath test, blood
22 test doesn't have to dissipate at a predictable level.
23 It's going to remain in the body to be tested later on.
24 And so I don't think that justifies a search
25 incident -- shoehorning into the

1 search-incident-to-arrest doctrine. It's simply graded
2 from an entirely different category of threats to
3 evidence, as I understand it.

4 And if I may --

5 JUSTICE GINSBURG: Why isn't -- why isn't it
6 an affirmative effort to get rid of the evidence because
7 you know the longer the interval passes, the less likely
8 that the test is going to reveal a level that's over the
9 standard amount.

10 MR. ROTHFELD: Well -- but, I think, Your
11 Honor, for the evidence suggested in McNeely, which --
12 which says that there is nothing you can do, nothing
13 affirmative you can do to take this evidence and hide
14 it, it's going to be dissipated in a predictable way,
15 and it's not in our control to do it. And if the State
16 can test you quickly, and breath tests are -- can be
17 very quick, the State will be able to do -- obtain the
18 evidence. If the State gets a warrant, they can do
19 that, and that's what they should do.

20 If I may, Your Honor.

21 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

22 Mr. McCarthy.

23 ORAL ARGUMENT OF THOMAS R. MCCARTHY

24 ON BEHALF OF THE RESPONDENTS

25 IN NOS. 14-1468 & 14-1507

1 MR. McCARTHY: Mr. Chief Justice, and may it
2 please the Court:

3 The North Dakota statute strikes a bargain
4 with individuals who wish to use the State's public
5 roads.

6 Conditioning their use thereon, on consent
7 to a blood-alcohol test, if arrested for drunk driving,
8 the Court has held that this is a valid bargain, and
9 that States may enforce it with the imposition of
10 significant consequences, including license revocation
11 and the use of test refusal as evidence in criminal
12 proceedings.

13 CHIEF JUSTICE ROBERTS: What about another
14 bargain, if people find that texting while driving is
15 becoming an increasing problem, and so when you get a
16 license, you're -- you give implied consent for the
17 officer to look at the texts or whatever they can look
18 at on your cell phone to make sure, you know, a minute
19 ago you were texting somebody while driving? Is --
20 would that be acceptable under your rationale?

21 MR. McCARTHY: I -- I think it's highly
22 doubtful, Your Honor. I think there's many differences
23 between that and what's going on here.

24 First of all, the interest here is -- is a
25 uniquely compelling interest?

1 CHIEF JUSTICE ROBERTS: Well, I assume. I
2 don't know what the statistics are going to say. It
3 wouldn't surprise me if there are at least as many
4 accidents caused by people texting while driving as
5 drinking while driving.

6 MR. McCARTHY: Even still, Your Honor, I
7 think this statute, it's -- given the history, given the
8 history here, it's a uniquely compelling interest. But
9 on top of that --

10 CHIEF JUSTICE ROBERTS: What do you mean
11 "the history"?

12 MR. McCARTHY: The history of the State's
13 battle in combatting drunk driving.

14 CHIEF JUSTICE ROBERTS: Well, there's not
15 that much history for texting, because there haven't
16 been iPhones around.

17 MR. McCARTHY: Certainly, Your Honor.

18 Nonetheless, there's -- in these cases,
19 there's first, the search only comes up when the driver
20 has been arrested. So there is probable cause to
21 believe that this person was driving drunk.

22 CHIEF JUSTICE ROBERTS: I know. I don't --

23 MR. McCARTHY: So this law is targeted very
24 tightly right there on the -- on the people that are
25 causing the problem.

1 CHIEF JUSTICE ROBERTS: I don't -- I don't
2 see that that's a difference with respect to my
3 hypothetical.

4 MR. McCARTHY: Well --

5 CHIEF JUSTICE ROBERTS: People swerve in the
6 road because they're texting just like they do when
7 they're -- you know, when they're intoxicated, and
8 they're stopped for doing that. And, you know, the
9 officer says, let me see your phone, as opposed to just
10 like let me see your breath -- let me test your breath.
11 Let me check the phone.

12 MR. McCARTHY: Again, Your Honor, I think --
13 I think it is different because there is probable cause.
14 The officer has reason to believe the person has been
15 drinking and driving as opposed to --

16 CHIEF JUSTICE ROBERTS: What does it --
17 where does that probable cause come from?

18 MR. McCARTHY: It comes from the field
19 sobriety tests. It comes from doing --

20 CHIEF JUSTICE ROBERTS: He's got to do those
21 before the Breathalyzer?

22 MR. McCARTHY: Not necessarily. I suppose
23 an officer could do a preliminary -- the on-site
24 screening test, breath test before the sobriety test.
25 But, typically, what happens with --

1 JUSTICE KENNEDY: The car's been weaving.
2 The alcohol is smelling. His -- his speech is -- is
3 slurred. His eyes are red.

4 MR. McCARTHY: Yes. There's --

5 JUSTICE KENNEDY: This is -- this is
6 standard stuff.

7 MR. McCARTHY: Yes, this is all standard.

8 JUSTICE KENNEDY: So it's like the Chief
9 Justice's hypothetical of weaving on the road while
10 you're texting.

11 MR. McCARTHY: Well, even -- even aside from
12 that, there's a whole separate set of -- the intrusion
13 is much different. As the Court indicated most recently
14 in the -- in the cell phone case, that there is --
15 it's -- that's separate. It's one level over, and it's
16 much more intrusive to go into that, and there's not the
17 same interest with the dissipation of the evidence as
18 there is in the case of the drunk driving.

19 Not only that, but what's happening here is
20 the States are really in a terrible bind. The situation
21 here, if -- if States are left only with administrative
22 penalties for refusal, then what happens is it creates a
23 loophole in the system that makes it very, very
24 difficult --

25 JUSTICE SOTOMAYOR: Well --

1 MR. McCARTHY: -- for this --

2 JUSTICE SOTOMAYOR: -- you can get a
3 warrant.

4 I mean, you're not left with that. You
5 don't want the administrative expense of calling a
6 magistrate or setting up a system to get a warrant, but
7 it is a very powerful alternative. That's what we said
8 in McNeely.

9 So it's not that you don't have an out. The
10 issue for us is: Do we dispense with a very important
11 requirement in our law, that before you search --
12 particularly the inside of a person with a needle or in
13 an intrusive way, that you get a warrant? I'm -- I'm
14 not sure why you think you're left with nothing.

15 MR. McCARTHY: Well, Your Honor, two things.
16 One, we think McNeely's helpful for us because what
17 the -- what the Court was concerned about there was
18 forced blood draws over the objection of the arrestee.
19 And those don't happen under this system.

20 And that's -- the second part of McNeely is
21 that McNeely pointed to these types of statutes and
22 said, these are alternatives that don't require forced
23 blood draws, that avoid the problem because they're --

24 JUSTICE SOTOMAYOR: They were only talked
25 about in civil consequences; suspend the license.

1 That's directly related to the condition that the
2 license is given. But I -- I -- criminal sanctions are
3 a very different thing. In scope and in effect. You're
4 putting someone in jail; you're not taking just their
5 license away.

6 MR. McCARTHY: Criminal penalties are
7 different; we don't dispute that. And that is really
8 just the essence of the question on the table here.
9 Given that the Court has already endorsed these types of
10 conditions being imposed on the privilege of driving and
11 has endorsed significant consequences being used as an
12 enforcement mechanism. So --

13 JUSTICE ALITO: Could you say something
14 about what the practical consequences of requiring a
15 warrant for every Breathalyzer would be in a State like
16 North Dakota? I -- when -- my picture of North Dakota
17 is that it's not like New York City. You don't have
18 night court going on all the time. And so how many of
19 these tests occur during some period of time, and how
20 many magistrates would you have on duty, let's say, at
21 2:00 o'clock in the morning to field a request for a
22 warrant?

23 MR. McCARTHY: Well, I'll -- the first --
24 first part of my answer is that if a warrant was
25 required in every case, that would go well beyond what

1 the Fourth Amendment requires. Because even this --
2 even in McNeely the Court acknowledged that many cases
3 of warrant won't be required.

4 But in North Dakota, Your Honor brings up an
5 interesting point. It's not that there are judges or
6 magistrates on -- on duty all the time in North Dakota.
7 In fact, they're considered what is known there as on
8 call. So they're not on duty, but they may be --
9 they're reachable somewhere, typically by phone. But it
10 often takes a while, especially in rural jurisdictions.

11 JUSTICE BREYER: How long? What it says in
12 the ACDL brief is that in Wyoming it takes five minutes
13 and in Montana it takes 15 minutes. How long in North
14 Dakota?

15 MR. McCARTHY: In North Dakota, in the
16 larger jurisdictions where there's a little bit of a
17 quicker process where they use more telephonic warrants,
18 and the arresting officer can go directly to a
19 magistrate in those systems, my understanding is it
20 takes about a half an hour to hour. But in the smaller
21 jurisdictions where it's more rural, where it's
22 oftentimes harder to get somebody on the phone, and
23 there the process is different. The -- the officer has
24 to go through a prosecuting attorney first and then to a
25 magistrate.

1 JUSTICE KENNEDY: Why is it harder to get
2 somebody on the phone in rural -- than in a busy city?

3 MR. McCARTHY: I think a large --

4 JUSTICE KENNEDY: I think people in the
5 rural areas were sitting waiting for the phone to call.

6 (Laughter.)

7 MR. McCARTHY: Your Honor -- Your Honor, I
8 think in large part it's a lack of resources and
9 manpower. There's not as many people available to cover
10 all the times, and so --

11 JUSTICE SOTOMAYOR: So that excuses you from
12 a constitutional requirement? We're now going to bend
13 the Fourth Amendment, which I always thought started on
14 the presumption that we favor warrants, we don't
15 disfavor them. But since many jurisdictions seem to
16 manage it, we give a pass to North Dakota because it
17 doesn't want to?

18 MR. McCARTHY: It's not that -- it's not
19 that North Dakota's asking for a pass here. There's a
20 couple things here. One again is that a warrant is not
21 required in every case.

22 The second thing is that the -- the
23 warrant --

24 JUSTICE KAGAN: Mr. McCarthy, I think what
25 we're -- people are asking you is to try to get some

1 sense of the real world harms here. So let me ask you
2 to assume something.

3 Assume that you actually could put into
4 practice a system which got you a warrant in 10 or 15
5 minutes, which many States of a similar kind have done.
6 What then would be your interest in the -- in -- in the
7 rule that you're asking us for?

8 MR. McCARTHY: The -- the interest would be
9 almost the same, really, because -- and this is the
10 important part here -- is that the warrant -- the -- the
11 purpose of the warrant is to authorize a search over the
12 objection of the arrestee. But that's not happening
13 here.

14 The -- the State does not want to undertake
15 those searches because it's a public safety risk, not
16 only to the officer and to the arrestee, but the medical
17 personnel would be in between them. And this is
18 something the Court acknowledged as legitimate --

19 JUSTICE SOTOMAYOR: If you --

20 JUSTICE BREYER: If --

21 JUSTICE SOTOMAYOR: If you obstruct justice
22 by refusing to comply with the warrant, you can punish
23 someone for the obstructing justice, and you can get the
24 same outcome as putting them in jail for being drunk and
25 driving. So what is it that justifies doing away with

1 something as important as the Fourth Amendment warrant
2 requirement?

3 MR. McCARTHY: Again --

4 JUSTICE SOTOMAYOR: If you can do it in 15
5 minutes.

6 MR. McCARTHY: Again, it's not that the
7 State is trying to get rid of the warrant requirement.
8 I think it helpful if we -- to take --

9 JUSTICE SOTOMAYOR: No. What it's trying to
10 do is get evidence of someone -- this is a pure law
11 enforcement need. This has nothing to do, necessarily,
12 with the safety of the community because the person's
13 been taken off the road. And we presume that you can
14 suspend their license. So this is something more.

15 MR. McCARTHY: Your Honor --

16 JUSTICE SOTOMAYOR: This is --

17 MR. McCARTHY: I'm sorry. Your Honor, this
18 is different. This is something more. But it's not
19 about doing away with a warrant requirement. And I
20 respectfully disagree that -- that the suspension of a
21 license and the arrest of the person takes them off the
22 road and makes it not a public safety interest. It's
23 still very much a public safety interest, and it
24 requires some explanation here.

25 But the problem here is that the States

1 really can't effectively -- and North Dakota in
2 particular -- cannot enforce its drunk driving laws
3 without a penalty for refusal that actually has teeth --

4 JUSTICE KAGAN: No, but --

5 MR. McCARTHY: -- because the way it is --

6 JUSTICE KAGAN: But that's what we're
7 asking. Because if you could get a warrant easily in
8 every case, I mean, then I'm struggling to figure out
9 what your interest is in having the kind of law that you
10 have. So -- but maybe I'm just not understanding
11 something. So -- so it really is a question.

12 Suppose you could set up a system where
13 somebody could be reached within 10 or 15 minutes, and
14 they would, in almost all circumstances, give a warrant.
15 And in a couple, say, no, I don't think you've satisfied
16 the requirements, right? So -- and you could do that in
17 10 or 15 minutes. What would be the problem with just
18 relying on a system like that?

19 MR. McCARTHY: Again, there's two -- there's
20 two problems. One is that the warrant's not required in
21 every case, but -- and so this would go beyond the
22 Fourth Amendment and put --

23 JUSTICE KAGAN: But I'm asking about your
24 practical needs, and then, you know, we'll figure out
25 like what is or what isn't consistent with the Fourth

1 Amendment. But your practical needs.

2 MR. MCCARTHY: Again, the -- the other point
3 here is that the warrant -- all -- is -- the point of
4 the warrant is to authorize the search over the
5 objection. The State doesn't want to do that. And I
6 think it's -- to step back --

7 JUSTICE KENNEDY: I think it's not -- I did
8 not understand that answer. What we're struggling for
9 in the wake of our recent cases where we talk about
10 warrants, we find out that modern technology allows, in
11 some States, both sparsely populated and heavily
12 populated, to get a warrant in 15 minutes. And the --
13 the position the States are arguing here is that there
14 has to be an -- that a warrant is not necessary, it
15 takes too long. We're saying: Suppose it takes 15
16 minutes; what then?

17 MR. MCCARTHY: Well --

18 JUSTICE KENNEDY: You're asking for an
19 extraordinary exception here. You're asking for us to
20 make it a crime to exercise what many people think of as
21 a constitutional right. There is some circularity
22 there. And you could point to no case which allows
23 that.

24 So we have to show that there is exceptions
25 -- there is a necessity for the exception, and you're

1 just not answering the question about whether or not, in
2 the wake of our recent decisions over the last three or
3 four years, warrants have been expedited in many cases,
4 and why; and if they have been, why that isn't an answer
5 to your argument.

6 MR. McCARTHY: Well, there's a -- there's a
7 couple reasons. One is to -- to require a warrant in
8 this situation, I think what actually required the Court
9 to -- it would essentially invalidate the statutes that
10 the Court upheld in Mackey and Neville. There was no
11 warrant required in those --

12 JUSTICE BREYER: We're making law. I don't
13 want -- none of us want an answer in terms of law. We
14 want to know a practical fact. The practical fact is,
15 is it possible that you could get a warrant in 30
16 seconds? You have a button on the cell phone. It has a
17 big "W."

18 (Laughter.)

19 JUSTICE BREYER: The policeman presses it.
20 A voice comes on, and it says, what's the problem? You
21 explain it in 15 seconds, and they say, ah, I got it.
22 Okay. You got your warrant. Or there's something
23 unusual, and he says no. Okay?

24 Now, if that were in front of us, it
25 wouldn't take me too long to decide this case because

1 I'd say why don't you use it? You might answer that's
2 ridiculous. It isn't 30 seconds; it can't be. It isn't
3 five minutes. It isn't 15, even, in most parts, and it
4 can't be without added expense. Or you could say it
5 doesn't make any difference and explain it. I think
6 you'd have a hard time with that one, but I want to know
7 what your answer is on the facts.

8 MR. McCARTHY: On the facts, there is delay
9 in -- in -- some delay in getting a warrant, and that
10 does make a difference here.

11 JUSTICE BREYER: Why does it make enough of
12 a difference?

13 MR. McCARTHY: Well, there's a couple
14 reasons. But I want to step back here, because the
15 implication of a Fourth Amendment right is the start of
16 the analysis; it's not the end of the analysis. Because
17 we're in the unconstitutional-conditions context where
18 there is a bargain here. And the Court has always
19 allowed States to impose bargains -- to impose
20 conditions on the use of the public roads in this
21 manner. For nearly a hundred years the Court has
22 allowed this type of thing as a mechanism to impose
23 conditions.

24 JUSTICE SOTOMAYOR: How long --

25 MR. McCARTHY: So it's really just the

1 criminal element that --

2 JUSTICE SOTOMAYOR: All right --

3 MR. McCARTHY: -- makes it different --

4 JUSTICE KENNEDY: You're not answering the
5 question.

6 JUSTICE ALITO: Do you know how many
7 Breathalyzer tests or blood tests are administered
8 during any period of time in North Dakota?

9 MR. McCARTHY: There's approximately 6,000
10 of the two, and they're roughly 50/50 over the course of
11 about a year.

12 JUSTICE ALITO: 6,000 per year?

13 MR. McCARTHY: Yes.

14 JUSTICE KAGAN: Could I ask you just a
15 different kind of just factual question, which -- how
16 many of these are done roadside, how many are taken to
17 the police station, when are people taken to a police
18 station? What is the practice? Sorry. I see your red
19 light.

20 CHIEF JUSTICE ROBERTS: Please answer.

21 MR. McCARTHY: So there -- the only -- the
22 only test that's done on-site is the preliminary test
23 which is not admissible in a court. The blood tests are
24 done at a medical facility, either by a doctor or a
25 nurse. The breath tests are done at, usually, a police

1 station or a jail or someplace where they have the
2 chemical breath test.

3 Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

5 Ms. Keena.

6 ORAL ARGUMENT OF KATHRYN KEENA

7 ON BEHALF OF THE RESPONDENT

8 IN NO. 14-1470

9 MS. KEENA: Mr. Chief Justice, and may it
10 please the Court:

11 I'd like to follow up on some of the
12 questions of the practicality of search warrants in
13 these situations. And having grown up 20 miles from the
14 North Dakota border and attending college in the
15 Fargo-Moorhead area, I'm very familiar with what the
16 realities are in the rural area. And yes, we -- we --
17 it may be possible to get a search warrant in every
18 case, but if that's what this Court is going to require,
19 in Minnesota, we are going to be doing warrants and
20 blood draws in every case.

21 And that is not what this Court wants.

22 JUSTICE BREYER: What -- why?

23 MS. KEENA: Because, why -- why would I now,
24 as a police officer, cause any more delay? Because
25 there is going to be a delay getting that search

1 warrant. And why would I delay by taking someone to the
2 police department -- because that's where most of these
3 tests are being conducted in Minnesota and North Dakota;
4 they're not done on the side of the road. They're
5 taken --

6 JUSTICE SOTOMAYOR: Blood and breath?

7 MS. KEENA: Breath, yes.

8 JUSTICE SOTOMAYOR: Breath.

9 MS. KEENA: And breath.

10 JUSTICE SOTOMAYOR: Are they done --

11 MS. KEENA: Blood -- blood, you have to go
12 to the hospital.

13 JUSTICE BREYER: Because I see -- I see
14 the -- the breath part is the part that sort of now gets
15 me. If you're taking them to the police station anyway
16 to do the breath test, and it just requires a phone call
17 to get the warrant, what's the problem?

18 MS. KEENA: But -- but why bother? Because
19 now I've -- I've transported this person to the police
20 station, I then have to get a warrant, and now take
21 the --

22 JUSTICE BREYER: Phone on the way. Phone on
23 the way. You say --

24 MS. KEENA: So -- so let's talk -- let's
25 talk about the rural aspects of Minnesota and North

1 Dakota. In a lot of these jurisdictions, there's only
2 one officer on duty. I grew up in a town of 2,000, 20
3 miles from the North Dakota border. There was only ever
4 one officer on duty, and that hasn't changed.

5 The other problem is there's not a hospital
6 located in every jurisdiction in Minnesota and North
7 Dakota. And, for example, in the town that I grew up
8 in, the nearest -- the nearest hospital would actually
9 be in Fargo, North Dakota. So now, where do I --

10 JUSTICE SOTOMAYOR: But you do the breath
11 test, then. You don't take them to --

12 MS. KEENA: I -- I --

13 JUSTICE SOTOMAYOR: -- do blood test.
14 That's the practical alternative. You have two tests,
15 bread -- breath test, blood test.

16 MS. KEENA: Right.

17 JUSTICE SOTOMAYOR: You can choose precinct
18 or hospital.

19 MS. KEENA: If they choose to take the
20 breath test.

21 Now, what -- I'm not going to get a warrant
22 to take a breath test, because --

23 JUSTICE BREYER: Why?

24 JUSTICE SOTOMAYOR: Why?

25 MS. KEENA: I can't force somebody to blow

1 into the straw.

2 JUSTICE BREYER: Right. You can make it a
3 crime not to. That will force them. Okay. So --

4 MS. KEENA: That's --

5 JUSTICE BREYER: I knew -- that was somehow
6 missing in this argument. I think what people are
7 trying to figure out, at least me, is if -- first,
8 forget the blood test. The blood test is a separate
9 matter, in my mind. I'm thinking solely about the
10 breath test. Do you -- does the Constitution require
11 you to get a warrant before you administer the blood --
12 the breath test, other things being equal?

13 MS. KEENA: And --

14 JUSTICE BREYER: The Constitution leans in
15 that direction. And so I ask you, why not? And now
16 you've told me all the things that cut against you. You
17 say, well, before we give the breath test we take them
18 to the station, and so then that seems to take 15
19 minutes, and -- and in the meantime why can't you just
20 call the magistrate, and at least we have some kind of
21 safeguard against total arbitrary behavior. That's
22 where you are.

23 MS. KEENA: Well --

24 JUSTICE BREYER: Is there -- and so why is
25 that bad for the State?

1 MS. KEENA: Well -- and I have to look at
2 our implied-consent statute and what that allows and
3 doesn't allow. So currently, Minnesota's
4 implied-consent statute says once I offer a test and
5 they refuse, we're done. We're done. So --

6 JUSTICE BREYER: But you -- I don't -- I
7 don't know how to explain it more clearly than that.
8 I'm not talking law. I'm talking practical facts. If
9 you're prepared to come back and say to me, you know, if
10 we have to get a warrant, 50 percent of the drunk
11 drivers are never going to be caught, ah, I'll listen to
12 that.

13 If you come back to me and say, you know, if
14 you say that a warrant is required, it will mean that
15 400 policemen have to spend ten seconds more than they'd
16 otherwise spend on a telephone, I say well, that's a
17 point, but not that much of a point.

18 Now, do you see? I'm trying to get a fact.

19 MS. KEENA: Well -- and I don't have those
20 type of statistics to answer that question.

21 JUSTICE KAGAN: Can I ask a different --
22 maybe a different way of asking a similar kind of
23 question.

24 When we decided *McNeely*, there were two
25 opinions. But even the opinion that was, you know, the

1 concurrence, or just -- I don't remember whether it was
2 a concurrence or a dissent -- but the one that was --

3 CHIEF JUSTICE ROBERTS: There was one that
4 --

5 JUSTICE KAGAN: The Chief Justice's opinion,
6 even that said -- and this was with respect to a blood
7 test. But the Chief Justice's opinion said, look, if
8 there's 20 minutes between the time that you're stopped
9 and the time that we can get you to a hospital to get a
10 blood draw, and you can get a warrant in that 20
11 minutes, then yes, you have to go get a warrant in that
12 20 minutes.

13 So at the very least, why wouldn't that be
14 the case? You know, if -- if you're -- if all of these
15 things -- I mean, I have to say when I originally
16 thought about this case, I had in my mind roadside
17 stops. But in all of these cases you're actually
18 driving these people to a station house. So why can't
19 you get a -- at least what the Chief Justice said in
20 McNeely, which is, okay, if you can get a warrant within
21 that time, you have to get a warrant within that time.

22 MS. KEENA: And, you know, and speaking on
23 behalf of Minnesota -- and it's very clear, Minnesota
24 treats -- and I don't necessarily disagree with you.
25 We're -- Minnesota's up here as kind of the alternative

1 argument. Minnesota specifically treats blood tests
2 differently than breath tests. We specifically do. And
3 our court has recognized that.

4 So, for example, under the implied-consent
5 law in Minnesota, if you are -- in order to get a blood
6 or urine test, you have -- you have to offer both. And
7 so we do treat it differently. And the case -- and
8 Minnesota treated it differently in the Bernard case;
9 that's very clear. And they very clearly stated that in
10 ruling that they weren't going to address blood or
11 urine, and they will be shortly because there are two
12 cases before them where that issue --

13 JUSTICE KENNEDY: That's good. Let's talk
14 just about the breath test.

15 Number one, I'm -- I'm not sure why they're
16 not roadside, but number two, if you take them to the
17 police station, then you have the -- our question about
18 the warrant. Let's talk just about the breath test and
19 the practicalities of -- of adopting the Petitioner's
20 position.

21 JUSTICE SOTOMAYOR: Let's assume -- I know
22 my colleagues are -- but as part of this, okay, assume,
23 as Justice Kagan did, that a system could be put in
24 place for a warrant on a breath test. If you're doing
25 it at the precinct, you can do it as you go there.

1 Right now, we get dozens of consent cases where the
2 police -- of homes, where the police tell the -- the
3 homeowner, we're applying for a warrant. And the
4 homeowner says, well, then I got to do it.

5 And so the number of warrants are much less
6 because of that. Because they know they're going to get
7 a warrant. So if you can put a system in place for a
8 warrant and you tell the person, if you don't take the
9 warrant, you're going to -- if you don't do the blood --
10 the breath test, you're going to be charged with
11 obstruction, what are you losing out?

12 MS. KEENA: Well, what we're really losing
13 out is the enhanceability. That is -- that is the
14 difference between charging someone --

15 JUSTICE SOTOMAYOR: What's enhanceability?

16 MS. KEENA: For a DWI. So in both
17 Minnesota -- well, I'm sure everywhere -- there's
18 enhanceability with DWI laws.

19 So in Minnesota -- and, for example, if I
20 just charge -- if I can't charge the DWI or refusal and
21 I'm only left with an obstruction, I can no longer use
22 that event to enhance any future DWI that same person
23 might commit. So --

24 JUSTICE SOTOMAYOR: Why? You change the
25 law. I mean, you know, it's as if you want us to create

1 an exception to the Fourth Amendment, and a very drastic
2 one, to give someone the right to say yea or nay without
3 a warrant, but we don't permit people to say yea or nay
4 when a warrant is present. If they don't comply,
5 they're charged with obstruction, and there will be
6 consequences to obstruction. I -- I --

7 MS. KEENA: But not the same -- not the same
8 consequences that it would be if it was a DWI or a
9 refusal.

10 JUSTICE SOTOMAYOR: Well, that's because you
11 choose not to penalize obstruction at a higher level.
12 That's your choice. We're -- we're now creating an
13 exception to the Fourth Amendment because of your
14 choice.

15 MS. KEENA: Well -- and -- and it's
16 Minnesota's position that a warrant isn't necessary.

17 JUSTICE SOTOMAYOR: I -- I appreciate that.

18 MS. KEENA: Okay.

19 JUSTICE SOTOMAYOR: But I'm assuming if you
20 can get a warrant.

21 JUSTICE ALITO: Justice -- Justice Sotomayor
22 is assuming that you're going to lose. So she wants to
23 know what your reaction is to that.

24 (Laughter.)

25 JUSTICE SOTOMAYOR: Well, it --

1 MS. KEENA: I don't like it. I don't like
2 it one bit.

3 Thank you.

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.
6 Mr. Gershengorn.

7 ORAL ARGUMENT OF IAN H. GERSHENGORN
8 FOR UNITED STATES, AS AMICUS CURIAE,
9 SUPPORTING THE RESPONDENTS

10 MR. GERSHENGORN: Mr. Chief Justice, and may
11 it please the Court:

12 I'd like to do three things this morning.
13 First, address the real-world consequences. Second,
14 explain why I think a bright-line criminal rule is at
15 odds with common sense, the U.S. code and this Court's
16 precedent. And, third, explain why it would be a
17 mistake to have a warrant requirement.

18 In the real world, I think it's critically
19 important that this Court not assume that warrants are
20 available 24/7. That is not the case in the real world.
21 The Court knows that from the NHTSA studies that are in
22 the record. The North Carolina example is -- is one.
23 What the -- what the study did there was compare three
24 jurisdictions that were able to put in a warrant
25 requirement against the nine jurisdictions that, for

1 various resource reasons, availability of judges reasons
2 and other reasons, were unable to do it.

3 The experience of the park police, I can
4 tell you in the wake of McNeely, is that while they can
5 get the warrants 24/7 in Maryland, they have stopped
6 doing blood draws, except in extraordinary cases in
7 Virginia and D.C. because the magistrates are not
8 available 24/7.

9 Even in McNeely itself, where the Court
10 listed in a long, long footnote --

11 JUSTICE KAGAN: Well, why is that? Why --
12 why in Maryland have they been able to and Virginia not?

13 MR. GERSHENGORN: In the Federal -- for the
14 Federal system, it's not a resource constraint. Some of
15 it, as the Court recognized in McNeely, is a willingness
16 of the judges to be available 24/7. A matter of
17 priority is in Federal court. You may not get -- in the
18 Southern District of New York, you may have 24/7
19 availability for terrorist attacks, but you may not have
20 them for routine drunk driving.

21 And so even in D.C. and Virginia, where you
22 may have it for fatal crashes, it's not available 24/7.

23 JUSTICE BREYER: How long it takes -- how
24 long does it take --

25 MR. GERSHENGORN: Eight.

1 JUSTICE BREYER: No number. A person is
2 drunk. He is 10 percent above the legal limit, whatever
3 that is. How long does it take to dissipate, do you
4 know?

5 MR. GERSHENGORN: To dissipate, I don't --

6 JUSTICE BREYER: I mean, how long before
7 that would -- would register 10 percent above is now
8 equal to or less than?

9 MR. GERSHENGORN: So Your Honor --

10 JUSTICE BREYER: Is there a number? Have
11 you come across any kind of study on --

12 MR. GERSHENGORN: So some of the
13 statistics -- I don't have the exact statistics, Your
14 Honor. What the Court has found is there's significant
15 dissipation but that you can back-calculate if you get
16 it. But there is a delay in getting the warrant at
17 times.

18 In the Maryland case, you can get it as soon
19 as 15 minutes. But a warrant can take as long as a half
20 hour or for as long as 90 minutes or two hours. That's
21 at page 37 of the study. So I think it would be a big
22 mistake for this Court to decide the case.

23 I was going to say in the McNeely footnote,
24 the Court listed 33 states that have electronic
25 warrants, which is not the same as 24/7 judicial

1 availability. But that leaves 17 states that don't have
2 it. And so I really think it's a mistake for the Court
3 to decide it on --

4 JUSTICE KAGAN: But there are more and more
5 every year, aren't there? I mean, we're now up to over
6 40, aren't --

7 MR. GERSHENGORN: So Your Honor, there are
8 definitely more and more every year. But, again, I
9 think that if the Court is doing a rule based on the
10 idea that these warrants are constant -- are always
11 available, there is a serious risk that in -- once you
12 require that, then the evidence is lost, particularly in
13 a breath test in the jurisdiction where you can't get a
14 warrant.

15 So if I could then turn to the -- to the
16 bright-line criminal rule that I understand to be the
17 core of Petitioner's case, in *McNeely*, this Court said
18 that a State may condition driving on public roads and
19 may require as a condition that a motorist arrested or
20 detained for drunk driving agree to a BAC testing and
21 that the State may impose significant consequences on
22 the subsequent refusal.

23 So the question is: Does the Constitution
24 impose a bright-line rule against criminal penalties,
25 even when lesser sanctions are insufficient to overcome

1 the natural incentive that many drivers will have not to
2 abide by that condition?

3 As a matter of common sense, I think that
4 doesn't make sense. The idea that you can only withdraw
5 a government benefit has major problems. For example,
6 if the condition would extend beyond the term of the
7 benefit, canceling the benefit does nothing.

8 And the U.S. Code reflects that. If I
9 could, Your Honor, I am subject under 18 U.S.C. 207 to a
10 one-year ban when I leave the Solicitor General's Office
11 for contacting or communicating with the SG's office on
12 an official matter. That is punishable under 18 U.S.C.
13 216 by up to a year in jail. That is a criminal penalty
14 as a condition on my employment.

15 That is not the only situation. 18 U.S.C.
16 603 criminalizes contributions by government employees.
17 42 U.S.C. 14135 criminalizes a probationer's refusal to
18 give DNA.

19 The idea that there is a bright-line between
20 administrative sanctions and criminal sanctions that
21 forces the government only to rely on withdrawal of the
22 benefit is just not the case. That's reflected in this
23 Court's case law.

24 Back in 1927, in the Stephenson case, which
25 is discussed in the briefs, that was a situation in

1 which Texas had conditioned driving on the Texas roads
2 and as a -- and restricted that by -- by imposing all
3 sorts of permitting requirements. Now, in that era, the
4 Lockner era, those were viewed as unconstitutional
5 interferences with private contracts. And although the
6 other side identifies Stephenson as a case that did not
7 have criminal penalties and that was just a withdrawal
8 of the benefit, I think if the Court looks, we read that
9 case differently. And I think if the Court looks at
10 page 260 of Stephenson, it will say that the -- see that
11 the Texas statute imposed criminal penalties.

12 And so again, the idea that the only thing
13 the government can do to -- is withdraw a benefit in the
14 context of an unconstitutional condition and can't go to
15 the -- to the core of it, which is to enforce the
16 prohibition, really makes --

17 JUSTICE KENNEDY: Well, I think one of our
18 concerns is that driving is so essential for so many
19 people that it's really different than opting to work
20 for the Solicitor General's Office.

21 (Laughter.)

22 MR. GERSHENGORN: So Your Honor, I take that
23 point, but I think this is the critical. What the Court
24 said in McNeely, the Court crossed that bridge in
25 McNeely, and in Breithaupt and in Mackey and in Neville.

1 Excuse me, Your Honor.

2 What the Court has said is for 60 years,
3 yes, of course, it's different than working in the
4 Solicitor General's Office. But it's a dangerous
5 activity where you're driving two tons of steel down the
6 road, and the Court said you can condition driving.
7 That is a reasonable condition that the State can
8 impose.

9 JUSTICE KENNEDY: This is a helpful answer,
10 and your -- your time is running, but I'm going to stop
11 you just to ask another question.

12 MR. GERSHENGORN: Yes.

13 JUSTICE KENNEDY: Is it permissible, based
14 on the pleadings and the briefs that are filed with us,
15 for -- for the Court to make a distinction between
16 taking a breath test, refusing to take the breath test
17 and refusing to take a blood test?

18 MR. GERSHENGORN: Certainly, it is, Your
19 Honor, and we set forth that in our brief. I do think
20 what this Court said in Skinner, and Your Honor's
21 opinion in Skinner, is -- the Court has never held the
22 way it did in McNeely that a warrant is required and it
23 should not do so here. The Court said in McNeely -- in
24 Skinner, that there are no significant privacy
25 interests, that we cannot include a breath test to

1 implement for privacy concerns. That makes good sense
2 because the intrusion is much smaller, the amount of
3 information that is revealed is just the alcohol. It's
4 a much narrower set, and it can be done as part of the
5 regular booking process.

6 So on that side of the scale, the privacy
7 interests are substantially smaller.

8 And the second --

9 JUSTICE KENNEDY: And are those tests often
10 administered roadside or -- everybody has -- they've
11 been telling us they have to go to -- I thought they
12 were roadside.

13 MR. GERSHENGORN: Your Honor, as a general
14 manner, they're actually done at the station. There's a
15 preliminary test that can be done at the side of the
16 road that often is not admissible in evidence. There
17 are these so-called BAT mobiles, the blood-alcohol
18 testing mobiles that can be done at the side of the
19 road, but many jurisdictions, including the park police,
20 are not using those. They actually are done at the
21 station.

22 But I also would like to say, on Your
23 Honor's opinion -- on Your Honor's question, that the
24 warrant requirement is kind of an odd fit in the -- in
25 the breath context, because -- because even with a

1 warrant, generally the warrant -- of course, it -- it
2 provides the function of having a neutral magistrate
3 look at the evidence. But generally with a warrant,
4 then the officer can force compliance. That's part of
5 what the warrant allows. That's not possible in the
6 breath context.

7 What this Court -- the -- a warrant -- a
8 warrant for a breath analysis can't be -- can't be
9 accomplished without the consent of the breather. You
10 can't force somebody to breathe steadily enough. It's
11 like an extended birthday-cake blowout, candle blowout,
12 you can't force somebody to do that. And so the warrant
13 is kind of an odd fit. And I think then --

14 CHIEF JUSTICE ROBERTS: Well, but presumably
15 there're sanctions for failing -- failing to comply with
16 a valid warrant.

17 MR. GERSHENGORN: But --

18 CHIEF JUSTICE ROBERTS: If the police have a
19 warrant to search your house and you say I don't care,
20 I'm not going to let you in, I mean that -- it's --
21 presumably is subject to criminal sanctions as well.

22 MR. GERSHENGORN: So, Your Honor, it might
23 well be, and I -- but I just think it just -- it shows a
24 little bit why the use of the warrant doesn't -- doesn't
25 quite map on, the way I think in a usual search context.

1 I think the other problem that you have is
2 because you can't force compliance, you might have a --
3 a statute -- another statute later to -- to do it. But
4 because the consequences are not as clear, what it will
5 do is drive the State to the blood -- blood testing
6 which one can force.

7 But that's the very situation that this
8 Court recognized in *Neville*, and that the States here
9 have told you, I think consistent with *Neville*, is a
10 situation that States don't want to be driven to, to a
11 forced blood draw on a nonconsenting individual.

12 JUSTICE BREYER: Again, what about that
13 is -- assuming, for argument's sake, that you can take a
14 Breathalyzer without a warrant. What need is there
15 for -- for a blood test without a warrant? I mean, why
16 isn't it, at a minimum, that if you're going to have a
17 blood test, you need a warrant?

18 MR. GERSHENGORN: So, Your Honor, one
19 difference, of course, is that the blood test does -- if
20 an officer has a suspicion that there's other than
21 alcohol at issue, the blood test is critically
22 important. If there are drugs --

23 JUSTICE BREYER: Of course it's important.
24 But it's going to take time. You've got to get to the
25 hospital. There's risks involved. It's a more serious

1 intrusion. And so the requirement, as we said, could be
2 pretty minimal. You go to -- during that 15, 20 minutes
3 you're going to the hospital, go get a warrant.

4 Nobody's saying they can't do it. The
5 question is whether they have to have a magistrate's
6 approval, and so that's what my question was.

7 Assuming you win on the Breathalyzer, why
8 would you win on the blood test?

9 MR. GERSHENGORN: Your Honor, we -- we win
10 on the blood test, because the -- because there is no
11 bright line on criminal sanctions, and because it's
12 critically important outside the blood context and --
13 where you need the drug evidence.

14 Thank you, Your Honor.

15 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

16 Three minutes, Mr. Rothfeld.

17 REBUTTAL ARGUMENT OF CHARLES A. ROTHFELD

18 ON BEHALF OF THE PETITIONERS

19 MR. ROTHFELD: Thank you, Mr. Chief Justice.

20 And if I may, I'll make three quick points,
21 two legal and one practical.

22 First, I think given the discussion here,
23 the Court should not lose sight of the -- what we think
24 is the fundamental legal proposition, what's going on in
25 this case, which is in North Dakota and Minnesota,

1 people who drive on the roads are automatically --
2 irrevocably lose their Fourth Amendment right to resist
3 warrantless searches. There's no consent here, there's
4 no knowledge that's been demonstrated on the part of
5 these defendants.

6 So the -- the proposition that's being
7 offered by the government is that States can simply
8 attach to any benefit that is provided to individuals
9 the surrender of a constitutional right, whether or not
10 the individuals know that they're going to do it. And
11 in the future, a criminal penalty can be attached to the
12 exercise of that constitutional right. That's quite a
13 remarkable proposition.

14 I think that the examples that Mr.
15 Gershengorn offered of -- of criminal penalties that can
16 be attached to -- to government employees, for example,
17 are situations in which there is no First Amendment
18 right. Those are Pickering cases in which there are --
19 are substantive limitations on what the government
20 employees can do, so there would be no constitutional
21 problem there.

22 Second, on practicalities, there have been
23 discussion about the nature of warrants and how -- how
24 readily available they are. If the Court reveals the
25 studies by the National Highway Traffic Safety

1 Administration, which has looked at this extensively, it
2 will find, as a contrast to some extent to McNeely, that
3 warrants are almost universally available on quick and
4 efficient terms.

5 The amicus briefs that filed on our side of
6 the case demonstrate this is true in the vast majority
7 of cases. There are more -- more States that -- that
8 provide these warrant mechanisms now than did when
9 McNeely was decided, so it's going to become a universal
10 mechanism.

11 As the NHTSA study shows that in virtually
12 all jurisdictions, including rural jurisdictions, as
13 Justice Alito asked about, these are -- warrant
14 procedures work effectively, that the officers on the
15 field, the magistrates and the judges who handle these
16 cases, the prosecutors, all -- almost universally praise
17 the warrant process as something that's going to be
18 effective that drives down test refusal, that makes
19 confrontations between officers and drivers
20 substantially reduced, and that drives up DUI
21 convictions. And so warrants are an effective way of
22 addressing this. And as the Court said in Riley, the
23 answer to a situation like this is simply get the
24 warrant.

25 A third, final point on the question of

1 breath versus blood tests, the Court, so far as I'm
2 aware, has never said that once there is a search that's
3 taken place in a law enforcement investigation, that one
4 can cut out certain character -- certain -- certain
5 types of procedures or certain types of evidence that's
6 being sought. The presumption is that a warrant should
7 be required.

8 And in the Skinner case, I mean, the Court
9 addressed both blood and -- and breath tests. Although
10 it noted there were differences between the two, it
11 treated them identically for Fourth Amendment purposes.
12 It said that they have essentially very, very similar
13 characteristics. They involve similar personal --
14 degrees of personal intrusion. And I do not think that
15 there is any supportable reason for treating the two
16 differently for purposes of the warrant requirement.

17 If there are no further questions, Your
18 Honor.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.
20 The case is submitted.

21 (Whereupon, at 11:26 a.m., the case in the
22 above-entitled matter was submitted.)

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a.m 2:16 5:2 73:21	affirmatively 34:17	71:17 73:11	approximately 50:9	assume 6:10 12:16 14:19,21
abdicate 8:7	ago 36:19	Amendment's 18:25	April 2:12	14:22 18:16
abide 64:2	agree 7:23 34:2 63:20	amicus 3:4 4:14 60:8 72:5	arbitrary 54:21	37:1 44:2,3
ability 14:20,23 16:2	agreeing 8:24	amount 35:9 67:2	area 51:15,16	57:21,22 60:19
able 21:3 35:17 60:24 61:12	ah 48:21 55:11	analysis 9:17,17 9:18 10:10,10	areas 43:5	assumed 26:14
above-entitled 2:14 73:22	ahead 31:2 33:12	10:11 11:5,6	argue 17:2	assuming 9:23 31:13 59:19,22
absolutely 11:10	air 25:24	17:25 18:24	arguing 47:13	69:13 70:7
acceptable 36:20	aircraft 15:10	19:15 49:16,16	argument 2:15 4:2,5,9,12,16	attach 71:8
accepted 19:7	alcohol 5:17 6:4 12:23 15:9	68:8	5:3,7 11:3 14:5	attached 7:15 71:11,16
accidents 19:18 19:19 37:4	23:25 28:18	analytically 7:5 7:5	14:6,11 19:3	attacks 61:19
accomplished 68:9	29:13 34:21	analyze 20:22	35:23 48:5	attempt 33:4
ACDL 42:12	39:2 67:3	analyzed 32:20	51:6 54:6 57:1	attending 51:14
acknowledged 42:2 44:18	69:21	analyzing 12:16 20:18	60:7 70:17	attorney 2:22 42:24
activity 66:5	Alito 8:8,10 13:20 14:18	answer 9:6 23:22 25:16	argument's 69:13	authority 14:7
added 49:4	28:13,23 29:10	28:8 30:19,21	Arlington 2:20	authorize 44:11 47:4
addition 33:14	41:13 50:6,12	34:11 41:24	arrest 23:2,4,9 24:7,12 34:7	automatically 9:11 71:1
address 21:9 57:10 60:13	59:21 72:13	47:8 48:4,13	45:21	availability 61:1 61:19 63:1
addressed 19:2 19:3 24:3 73:9	Alito's 9:2,14 18:15 30:24	49:1,7 50:20	arrested 26:25 27:6,24 28:9	available 28:12 43:9 60:20
addresses 6:21	allow 24:10 30:9 55:3	55:20 66:9	36:7 37:20	61:8,16,22
addressing 17:9 31:22 72:22	allowed 49:19 49:22	72:23	63:19	63:11 71:24 72:3
administer 54:11	allows 47:10,22 55:2 68:5	answering 48:1 50:4	arrestee 40:18 44:12,16	avoid 40:23
administered 50:7 67:10	alternative 40:7 53:14 56:25	anyway 21:15 52:15	arresting 42:18	aware 11:24 14:17 73:2
Administration 72:1	alternatives 40:22	apologize 11:21	aside 39:11	
administrative 6:12 39:21 40:5 64:20	altogether 13:11	appear 5:20	asked 17:15 32:1 34:2 72:13	B
admissible 50:23 67:16	Amendment 5:19 11:15	APPEARAN... 2:17 3:1	asking 28:4 43:19,25 44:7	BAC 63:20
adopting 57:19	12:13 13:4	applies 5:22 15:1 16:1	46:7,23 47:18	back 7:13 18:1 47:6 49:14
affirmative 6:25 35:6,13	14:4,14 16:16	22:21	47:19 55:22	55:9,13 64:24
	17:10,24 18:10	apply 19:16 33:22,24	asks 33:3	back-calculate 62:15
	18:11,12 20:24	applying 18:11 58:3	aspects 34:7 52:25	backpack 29:9
	20:25 22:16,16	appreciate 22:5 59:17	assert 5:13 13:4 14:14	bad 54:25
	32:17 33:5	appropriate 20:3 24:6	asserting 6:25 16:17	ban 64:10
	42:1 43:13	approval 70:6	assertion 8:11 14:13	bargain 8:13,13 8:16,25 36:3,8
	45:1 46:22		assimilate 23:20	36:14 49:18
	47:1 49:15		Assistant 2:22	bargains 49:19
	59:1,13 71:2			

<p>based 23:14 63:9 66:13 basic 18:25 basis 12:8 14:1 BAT 67:17 battle 37:13 becoming 36:15 behalf 2:18,20 2:23 4:4,7,11 4:18 5:8 35:24 51:7 56:23 70:18 behavior 54:21 believe 8:23 27:7 30:3 37:21 38:14 bend 43:12 benefit 6:20 7:11,13,18,23 8:1 13:18 16:9 64:5,7,7,22 65:8,13 71:8 benefits 16:17 Bernard 1:11 23:5 57:8 better 8:17 28:14 BEYLUND 2:3 beyond 41:25 46:21 64:6 big 21:9 28:25 28:25 48:17 62:21 bind 39:20 Birchfield 1:3 5:4 birthday-cake 68:11 bit 42:16 60:2 68:24 blood 5:17 6:3 12:23 21:10,17 22:3 23:25 24:2 26:24 28:18 29:13 30:12,14,23 31:5 34:21</p>	<p>40:18,23 50:7 50:23 51:20 52:6,11,11 53:13,15 54:8 54:8,11 56:6 56:10 57:1,5 57:10 58:9 61:6 66:17 69:5,5,11,15 69:17,19,21 70:8,10,12 73:1,9 blood-alcohol 8:15 14:24 15:7 23:25 29:12 36:7 67:17 bloodshot 26:2 blow 25:3 30:6 53:25 blowing 29:14 31:15 blowout 68:11 68:11 body 24:11 26:11 29:6 31:25 32:2 34:23 boil 21:3 booking 67:5 border 9:24 12:20,21,22 14:22 51:14 53:3 bother 52:18 bottles 26:3 bottom 17:19 box 21:11 bread 53:15 breath 22:12,12 22:15 23:1 24:1,2,20 26:21 30:12,13 30:21 31:5,22 33:15 34:21 35:16 38:10,10 38:24 50:25</p>	<p>51:2 52:6,7,8,9 52:14,16 53:10 53:15,20,22 54:10,12,17 57:2,14,18,24 58:10 63:13 66:16,16,25 67:25 68:6,8 73:1,9 Breathalyzer 6:4 9:4 21:10 21:11,23 24:23 25:19 27:4 28:13,16 38:21 41:15 50:7 69:14 70:7 Breathalyzers 27:21,23 breathe 21:13 21:13 28:17 68:10 breather 68:9 Breithaupt 65:25 Breyer 20:17 21:7 23:15 24:24 25:2,7,9 25:25 27:20 28:3 30:2,9,16 42:11 44:20 48:12,19 49:11 51:22 52:13,22 53:23 54:2,5 54:14,24 55:6 61:23 62:1,6 62:10 69:12,23 bridge 65:24 brief 42:12 66:19 briefs 21:8 64:25 66:14 72:5 bright 70:11 bright-line 60:14 63:16,24 64:19 bring 26:19</p>	<p>brings 42:4 building 15:13 16:6,10,19 buildings 15:12 burden 13:8 busy 43:2 button 48:16 <hr/>C<hr/>C 4:1 5:1 call 42:8 43:5 52:16 54:20 calling 40:5 canceling 64:7 candle 68:11 car 12:6 27:22 car's 39:1 carbon 21:14 24:25 care 68:19 Carolina 60:22 carry 13:8 case 5:4 6:6,8,19 7:2 8:21,23 9:8 9:17 10:11 12:16 13:1,1,6 13:15,16 15:25 17:8 19:10,10 20:18 23:6 24:22 28:2 33:5 39:14,18 41:25 43:21 46:8,21 47:22 48:25 51:18,20 56:14,16 57:7 57:8 60:20 62:18,22 63:17 64:22,23,24 65:6,9 70:25 72:6 73:8,20 73:21 cases 5:5,12 6:22 7:9,16,22 8:4 10:12 16:8 18:3 20:6 24:17 25:12 37:18 42:2</p>	<p>47:9 48:3 56:17 57:12 58:1 61:6 71:18 72:7,16 category 24:17 35:2 caught 55:11 cause 20:1 21:25 26:18,19 27:7 27:10,11 30:3 37:20 38:13,17 51:24 caused 37:4 causing 37:25 cavity 24:11 cell 21:12 24:9 25:4 36:18 39:14 48:16 certain 8:15 14:25 15:12 73:4,4,4,5 certain-condit... 17:24 certainly 11:9 19:22 24:5 32:11,11,21 33:5 37:17 66:18 challenged 33:8 challenging 32:8 32:21 change 58:24 changed 53:4 character 73:4 characteristics 18:25 20:7 33:15 73:13 characterized 25:23 charge 58:20,20 charged 58:10 59:5 charging 58:14 CHARLES 2:18 4:3,17 5:7 70:17 check 38:11</p>
---	---	--	--	---

<p>chemical 5:16 12:1 51:2 Chief 5:3,9 11:12,16 12:4 12:15,19 13:14 13:21 17:14 19:8 29:20 32:18 33:10,12 34:13 35:21 36:1,13 37:1 37:10,14,22 38:1,5,16,20 39:8 50:20 51:4,9 56:3,5,7 56:19 60:5,10 68:14,18 70:15 70:19 73:19 Chimel 23:8 choice 10:17 59:12,14 choose 53:17,19 59:11 circularity 16:23 47:21 circumstance 20:14 circumstances 8:16 10:14 14:25 17:10 18:5 20:25 46:14 city 41:17 43:2 civil 6:11 40:25 classic 34:19 clear 8:4 14:9 16:14 22:1 23:7 34:20 56:23 57:9 69:4 clearly 55:7 57:9 close 31:11 code 60:15 64:8 coerced 11:3 coercion 7:25 10:18 11:7 12:5,12,14 colleagues 57:22</p>	<p>college 51:14 combatting 37:13 combination 7:17 20:7 come 16:9 38:17 55:9,13 62:11 comes 24:15 37:19 38:18,19 48:20 commit 58:23 committing 5:24 30:4 common 60:15 64:3 communicating 64:11 community 45:12 compare 28:24 60:23 compelling 17:16 18:17 19:4,13,20 36:25 37:8 compliance 68:4 69:2 comply 44:22 59:4 68:15 concede 5:18 6:2 conceded 13:13 22:17,22 33:24 concerned 31:4 32:17 34:16 40:17 concerns 65:18 67:1 concession 6:10 conclusion 20:5 concurrence 56:1,2 condition 7:18 7:24 8:1 13:17 14:15,17,20,23 15:13 17:18 41:1 63:18,19 64:2,6,14</p>	<p>65:14 66:6,7 conditioned 65:1 conditioning 15:5 36:6 conditions 6:22 7:4,9 10:15 16:17 41:10 49:20,23 conducted 20:15 52:3 confirm 26:16 confrontations 72:19 confronted 33:17 connected 25:4 connection 7:23 consent 8:14,21 8:22 9:3,3,14 9:18 10:11,14 10:21 11:5 12:3,14 17:19 20:20 36:6,16 58:1 68:9 71:3 consenting 11:25 12:1 14:24 15:14 consents 12:23 consequences 36:10 40:25 41:11,14 59:6 59:8 60:13 63:21 69:4 considerable 21:2 considerably 22:11 considerations 23:10 considered 42:7 consistent 46:25 69:9 consistently 23:8 constant 63:10 Constitution</p>	<p>11:13 12:10 25:10 54:10,14 63:23 constitutional 5:13 7:1,21 8:2 8:7,12 16:24 16:25 17:20,21 43:12 47:21 71:9,12,20 constraint 61:14 contacting 64:11 content 5:17 contention 13:24 context 49:17 65:14 67:25 68:6,25 70:12 Continued 3:1 continuously 25:21 contracts 65:5 contrast 72:2 contributions 64:16 control 32:25 35:15 convictions 72:21 core 63:17 65:15 correct 6:1 16:11 22:9 32:13 counsel 35:21 51:4 60:5 70:15 73:19 County 2:22 couple 28:16 43:20 46:15 48:7 49:13 course 12:5 50:10 66:3 68:1 69:19,23 court 1:1 2:15 5:10 6:21 7:10 7:16,22 8:3,3 17:9 18:3,4,9 19:2,3,5,6,24</p>	<p>20:4,13 22:14 23:7,7 24:3,3 24:13,22 25:23 30:12,14 32:4 33:17,21 34:20 36:2,8 39:13 40:17 41:9,18 42:2 44:18 48:8,10 49:18 49:21 50:23 51:10,18,21 57:3 60:11,19 60:21 61:9,15 61:17 62:14,22 62:24 63:2,9 63:17 65:8,9 65:23,24 66:2 66:6,15,20,21 66:23 68:7 69:8 70:23 71:24 72:22 73:1,8 Court's 12:13 22:18 60:15 64:23 cover 43:9 crashes 61:22 create 58:25 creates 39:22 creating 17:23 59:12 crime 30:4 47:20 54:3 criminal 5:13,24 6:13,15,24,25 10:1 14:13 20:11,12 36:11 41:2,6 50:1 60:14 63:16,24 64:13,20 65:7 65:11 68:21 70:11 71:11,15 criminalize 8:11 8:12 criminalized 8:17 criminalizes</p>
--	--	---	--	--

64:16,17 critical 65:23 critically 60:18 69:21 70:12 crossed 65:24 crossing 14:22 crucial 14:10 curiae 3:4 4:14 60:8 curious 28:4 currently 55:3 cut 54:16 73:4	10:17 defendants 8:24 13:2 14:16 71:5 definitely 63:8 degree 7:24 31:12 degrees 73:14 delay 49:8,9 51:24,25 52:1 62:16 demonstrate 72:6 demonstrated 71:4 department 2:7 3:3 52:2 depends 12:2 14:2 Deputy 3:2 described 8:25 30:13 designed 30:22 31:8 detained 63:20 determine 5:16 14:7 die 19:18 difference 6:16 15:19 21:10,22 28:25 31:12,20 38:2 49:5,10 49:12 58:14 69:19 differences 20:20 36:22 73:10 different 7:4,5 15:3 19:9 22:4 24:5 28:21 33:9,9 35:2 38:13 39:13 41:3,7 42:23 45:18 50:3,15 55:21,22 65:19 66:3 differently 17:7	57:2,7,8 65:9 73:16 difficult 13:6 39:24 dioxide 21:14 24:25 direct 7:14 14:12,13 direction 54:15 directly 7:20 8:6 41:1 42:18 DIRECTOR 2:6 disagree 7:7 29:15 45:20 56:24 disappeared 21:17 discretion 18:6 20:8 discussed 64:25 discussing 20:21 discussion 70:22 71:23 disfavor 43:15 dispense 40:10 dispute 6:7 41:7 disregard 19:5 dissent 56:2 dissenting 23:5 dissipate 34:8 34:22 62:3,5 dissipated 24:25 35:14 dissipation 31:4 31:9 34:14 39:17 62:15 distinction 6:18 66:15 distinctions 15:22 District 61:18 DNA 64:18 doctor 50:24 doctrine 16:14 23:21 24:16 34:16 35:1 doing 7:12,15	8:11 14:12 24:1 26:18 34:17 38:8,19 44:25 45:19 51:19 57:24 61:6 63:9 doubt 32:12 doubtful 36:22 dozens 58:1 drank 26:2 drastic 59:1 draw 56:10 69:11 draws 40:18,23 51:20 61:6 drinking 37:5 38:15 drive 8:14 9:10 10:21 11:8,17 11:24 14:21,23 69:5 71:1 driven 69:10 driver 37:19 driver's 6:2 9:2 drivers 11:1 55:11 64:1 72:19 drives 72:18,20 driving 5:15 12:17 13:11 19:4,18 27:8 28:10 36:7,14 36:19 37:4,5 37:13,21 38:15 39:18 41:10 44:25 46:2 56:18 61:20 63:18,20 65:1 65:18 66:5,6 drug 70:13 drugs 69:22 drunk 19:18 22:1 26:16 29:21 36:7 37:13,21 39:18 44:24 46:2 55:10 61:20	62:2 63:20 DUI 72:20 duty 41:20 42:6 42:8 53:2,4 DWI 58:16,18 58:20,22 59:8
E				
E 4:1 5:1,1 easily 46:7 effect 7:17 41:3 effective 72:18 72:21 effectively 46:1 72:14 efficient 72:4 effort 35:6 Eight 61:25 either 6:3 23:10 29:5 50:24 elapses 21:18 electronic 62:24 element 50:1 employees 64:16 71:16,20 employment 64:14 encapsulated 21:22 endorsed 41:9 41:11 enforce 36:9 46:2 65:15 enforcement 18:7 20:9,14 22:19 33:19 41:12 45:11 73:3 enhance 58:22 enhanceability 58:13,15,18 enter 15:12 entering 15:13 16:6,19 entire 8:4 19:22 20:6 entirely 33:9				

<p>35:2 entitlement 18:12 environment 21:15 equal 54:12 62:8 equivalent 27:24 era 65:3,4 especially 10:19 42:10 ESQ 2:18,20,22 3:2 4:3,6,10,13 4:17 essence 41:8 essential 11:10 65:18 essentially 19:2 48:9 73:12 evaluation 26:19 event 9:4 14:7 15:7 58:22 everybody 9:20 9:24 67:10 evidence 21:16 21:19 23:12,15 23:18,23,24 25:12 30:22,23 31:4,8,9 34:8 34:18,18 35:3 35:6,11,13,18 36:11 39:17 45:10 63:12 67:16 68:3 70:13 73:5 evidentiary 26:14,24 exact 62:13 exactly 17:1 30:23 31:6,9 example 15:5,24 53:7 57:4 58:19 60:22 64:5 71:16 examples 71:14 exception 5:21 16:1 17:23 19:14 20:23</p>	<p>22:24 34:3 47:19,25 59:1 59:13 exceptions 5:21 22:20 33:22,23 34:4 47:24 exchange 8:14 Excuse 26:13 66:1 excuses 43:11 execute 12:2 18:8 exercise 47:20 71:12 exhale 25:21 exhaling 24:24 existed 13:3 existence 23:9 exonerates 26:21 expedited 48:3 expel 25:23 26:10 32:1 expelling 29:6 expense 40:5 49:4 experience 26:15 61:3 explain 48:21 49:5 55:7 60:14,16 explained 10:23 explanation 45:24 extend 64:6 extended 68:11 extensive 25:21 extensively 72:1 extent 72:2 extraordinary 47:19 61:6 extremely 23:19 eyes 26:2,3 31:11 39:3</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face 32:3</p>	<p>facility 50:24 fact 10:7 19:6 24:21 26:1,16 31:11 33:16 34:8 42:7 48:14,14 55:18 factors 25:14 facts 49:7,8 55:8 factual 50:15 failing 68:15,15 falls 19:14 familiar 51:15 far 12:19 73:1 Fargo 53:9 Fargo-Moorh... 51:15 fatal 61:22 fatalities 17:17 favor 43:14 Federal 61:13 61:14,17 feel 34:4 fiat 6:24 fictional 10:22 field 27:5 28:1 38:18 41:21 72:15 figure 8:5 46:8 46:24 54:7 filed 66:14 72:5 final 72:25 find 21:7 29:7 36:14 47:10 72:2 first 5:4 6:21 7:11 9:7 16:5 22:14 24:20 36:24 37:19 41:23,24 42:24 54:7 60:13 70:22 71:17 fit 67:24 68:13 five 42:12 49:3 flexibility 14:1 flushing 34:18 focus 20:19 follow 51:11</p>	<p>footnote 61:10 62:23 force 17:17 53:25 54:3 68:4,10,12 69:2,6 forced 40:18,22 69:11 forces 64:21 foreign 31:25 forget 54:8 form 9:3,9,20 30:6 forth 10:23 66:19 found 62:14 four 26:2 48:3 Fourth 5:19 11:15 12:13 13:4 14:4,14 16:16 17:9,24 18:10,11,12,25 20:24,24 22:15 22:16 32:17 33:5 42:1 43:13 45:1 46:22,25 49:15 59:1,13 71:2 73:11 freedom 21:2 friends 22:17 front 48:24 function 68:2 fundamental 5:11 6:17 70:24 further 73:17 future 58:22 71:11</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 5:1 general 3:2 33:21 67:13 General's 64:10 65:20 66:4 generally 68:1,3</p>	<p>Gershengorn 3:2 4:13 60:6,7 60:10 61:13,25 62:5,9,12 63:7 65:22 66:12,18 67:13 68:17,22 69:18 70:9 71:15 getting 34:9 49:9 51:25 62:16 GINSBURG 32:7,14,23 35:5 give 6:20 7:11 8:13 27:19 36:16 43:16 46:14 54:17 59:2 64:18 given 7:10 21:24 23:17 27:21,23 28:1 34:7 37:7 37:7 41:2,9 70:22 go 15:15 18:1,9 18:25 21:14,17 26:21 31:2 33:12 39:16 41:25 42:18,24 46:21 52:11 56:11 57:25 65:14 67:11 70:2,3 goes 12:20 going 9:8,24 11:11 17:1 21:14,15 22:19 34:23 35:8,14 36:23 37:2 41:18 43:12 51:18,19,25 53:21 55:11 57:10 58:6,9 58:10 59:22 62:23 66:10 68:20 69:16,24 70:3,24 71:10</p>
---	---	--	---	---

72:9,17 good 34:4 57:13 67:1 government 15:12 16:6 17:1 26:12 29:7 32:2 64:5 64:16,21 65:13 71:7,16,19 governs 6:18 graded 35:1 GRANT 2:6 granted 12:10 greater 6:16 grew 53:2,7 grounded 11:13 11:14 grounds 9:5 grown 51:13 guess 30:5 31:1 31:19 33:10 34:1 guilty 22:2	25:14 helpful 40:16 45:8 66:9 hide 35:13 higher 59:11 highly 36:21 Highway 71:25 history 37:7,8 37:11,12,15 hold 6:10 homeowner 58:3,4 homes 58:2 Honor 7:8 9:7 11:21 17:7,23 28:7 29:3,17 30:21 33:11 34:12 35:11,20 36:22 37:6,17 38:12 40:15 42:4 43:7,7 45:15,17 62:9 62:14 63:7 64:9 65:22 66:1,19 67:13 68:22 69:18 70:9,14 73:18 Honor's 66:20 67:23,23 hospital 52:12 53:5,8,18 56:9 69:25 70:3 hour 42:20,20 62:20 hours 62:20 house 56:18 68:19 hundred 49:21 hypothesizes 11:23 hypothesizing 7:2 hypothetical 9:2 13:5 15:24 38:3 39:9 hypotheticals 6:13 13:25	15:23 <hr/> I <hr/> IAN 3:2 4:13 60:7 idea 8:24 13:2 63:10 64:4,19 65:12 identical 24:2 identically 30:14 73:11 identifies 65:6 immediately 21:21 impaired 5:15 19:3 28:10 implement 67:1 implication 49:15 implied 15:2 36:16 implied-consent 55:2,4 57:4 important 17:25 31:19 40:10 44:10 45:1 60:19 69:22,23 70:12 impose 6:11,12 49:19,19,22 63:21,24 66:8 imposed 41:10 65:11 imposes 8:1 imposing 65:2 imposition 14:13 36:9 improved 28:14 incentive 64:1 inch 28:16,16 incident 23:2,4,9 24:7,14 34:7 34:25 incidents 24:11 include 66:25 including 36:10 67:19 72:12	increase 17:16 increasing 36:15 inculcate 22:2 independent 26:20 indicated 39:13 indirectly 7:19 8:5 individual 7:15 8:1 16:2 69:11 individual's 18:5 individuals 36:4 71:8,10 influence 15:9 information 67:3 initial 28:2 innocent 18:21 18:21 19:12 22:2 inserted 25:20 31:25 inserting 26:9 29:5 inside 40:12 insistence 25:11 insists 25:11 instances 21:20 insufficient 63:25 integrity 22:13 24:21 32:6 interest 36:24 36:25 37:8 39:17 44:6,8 45:22,23 46:9 interested 14:18 interesting 42:5 interests 66:25 67:7 interfere 34:9 interference 22:3 interferences 65:5 interstate 15:6	interval 35:7 intoxicated 27:8 38:7 intrusion 22:13 24:21 26:5 29:24 30:2,5 39:12 67:2 70:1 73:14 intrusive 25:10 26:4 29:8 30:6 32:3 33:16 39:16 40:13 intuitions 31:19 invalidate 48:9 invasion 24:5,14 32:5 invasive 31:18 31:18 invasiveness 24:6 31:12 investigation 33:20,21 73:3 investigations 20:12 involuntarily 32:15 involve 73:13 involved 21:18 69:25 iPhones 37:16 irrevocably 9:12 71:2 issue 5:12 6:5 13:14,22 40:10 57:12 69:21 issues 33:9 it'll 22:1,2
<hr/> H <hr/> H 3:2 4:13 60:7 half 42:20 62:19 handle 72:15 happen 26:7 40:19 happening 9:9 17:8 18:2 39:19 44:12 happens 38:25 39:22 happy 12:7 29:21,25 hard 25:3 49:6 harder 42:22 43:1 harms 44:1 Hastings 2:23 hear 5:3 heavily 47:11 held 31:15 36:8 66:21 help 17:5 25:5	<hr/> H <hr/> H 3:2 4:13 60:7 half 42:20 62:19 handle 72:15 happen 26:7 40:19 happening 9:9 17:8 18:2 39:19 44:12 happens 38:25 39:22 happy 12:7 29:21,25 hard 25:3 49:6 harder 42:22 43:1 harms 44:1 Hastings 2:23 hear 5:3 heavily 47:11 held 31:15 36:8 66:21 help 17:5 25:5	<hr/> I <hr/> IAN 3:2 4:13 60:7 idea 8:24 13:2 63:10 64:4,19 65:12 identical 24:2 identically 30:14 73:11 identifies 65:6 immediately 21:21 impaired 5:15 19:3 28:10 implement 67:1 implication 49:15 implied 15:2 36:16 implied-consent 55:2,4 57:4 important 17:25 31:19 40:10 44:10 45:1 60:19 69:22,23 70:12 impose 6:11,12 49:19,19,22 63:21,24 66:8 imposed 41:10 65:11 imposes 8:1 imposing 65:2 imposition 14:13 36:9 improved 28:14 incentive 64:1 inch 28:16,16 incident 23:2,4,9 24:7,14 34:7 34:25 incidents 24:11 include 66:25 including 36:10 67:19 72:12	increase 17:16 increasing 36:15 inculcate 22:2 independent 26:20 indicated 39:13 indirectly 7:19 8:5 individual 7:15 8:1 16:2 69:11 individual's 18:5 individuals 36:4 71:8,10 influence 15:9 information 67:3 initial 28:2 innocent 18:21 18:21 19:12 22:2 inserted 25:20 31:25 inserting 26:9 29:5 inside 40:12 insistence 25:11 insists 25:11 instances 21:20 insufficient 63:25 integrity 22:13 24:21 32:6 interest 36:24 36:25 37:8 39:17 44:6,8 45:22,23 46:9 interested 14:18 interesting 42:5 interests 66:25 67:7 interfere 34:9 interference 22:3 interferences 65:5 interstate 15:6	interval 35:7 intoxicated 27:8 38:7 intrusion 22:13 24:21 26:5 29:24 30:2,5 39:12 67:2 70:1 73:14 intrusive 25:10 26:4 29:8 30:6 32:3 33:16 39:16 40:13 intuitions 31:19 invalidate 48:9 invasion 24:5,14 32:5 invasive 31:18 31:18 invasiveness 24:6 31:12 investigation 33:20,21 73:3 investigations 20:12 involuntarily 32:15 involve 73:13 involved 21:18 69:25 iPhones 37:16 irrevocably 9:12 71:2 issue 5:12 6:5 13:14,22 40:10 57:12 69:21 issues 33:9 it'll 22:1,2
			<hr/> J <hr/> jail 6:14 27:24 41:4 44:24 51:1 64:13 job 11:11 16:12 JR 1:11 judges 42:5 61:1 61:16 72:15 judicial 62:25	

<p>jurisdiction 53:6 63:13</p> <p>jurisdictions 42:10,16,21 43:15 53:1 60:24,25 67:19 72:12,12</p> <p>justice 3:3 5:3,9 6:1,9 7:3 8:8,9 8:10 9:1,1,13 9:13,19,23 10:3,6,8,19 11:1,12,16,22 12:4,15,19 13:10,14,20,21 14:18 16:8,12 16:21 17:4,13 17:15 18:13,15 18:20 19:8 20:17 21:7 22:25 23:13,15 24:4,24 25:2,7 25:9,25 26:13 27:9,13,20 28:3,13,23 29:10,20 30:2 30:9,16,24 31:1,7 32:7,14 32:18,23 33:10 33:12,13 34:1 34:13 35:5,21 36:1,13 37:1 37:10,14,22 38:1,5,16,20 39:1,5,8,25 40:2,24 41:13 42:11 43:1,4 43:11,24 44:19 44:20,21,21,23 45:4,9,16 46:4 46:6,23 47:7 47:18 48:12,19 49:11,24 50:2 50:4,6,12,14 50:20 51:4,9 51:22 52:6,8 52:10,13,22</p>	<p>53:10,13,17,23 53:24 54:2,5 54:14,24 55:6 55:21 56:3,5 56:19 57:13,21 57:23 58:15,24 59:10,17,19,21 59:21,21,25 60:5,10 61:11 61:23 62:1,6 62:10 63:4 65:17 66:9,13 67:9 68:14,18 69:12,23 70:15 70:19 72:13 73:19</p> <p>Justice's 39:9 56:5,7</p> <p>Justices 23:6</p> <p>justifies 34:24 44:25</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Kagan 8:9 22:25 23:13 24:4 31:1,7 34:1 43:24 46:4,6 46:23 50:14 55:21 56:5 57:23 61:11 63:4</p> <p>Kagan's 33:14</p> <p>KATHRYN 2:22 4:10 51:6</p> <p>Keena 2:22 4:10 51:5,6,9,23 52:7,9,11,18 52:24 53:12,16 53:19,25 54:4 54:13,23 55:1 55:19 56:22 58:12,16 59:7 59:15,18 60:1</p> <p>keep 21:15</p> <p>Kennedy 6:1,9 7:3 9:1,13,19 10:3,19 11:1</p>	<p>11:23 16:21 17:4,13 18:13 18:20 39:1,5,8 43:1,4 47:7,18 50:4 57:13 65:17 66:9,13 67:9</p> <p>key 11:6</p> <p>kind 15:17 20:6 25:19 33:20 44:5 46:9 50:15 54:20 55:22 56:25 62:11 67:24 68:13</p> <p>knew 54:5</p> <p>know 10:8,19,21 12:14,23 19:17 26:8,13 28:5,6 28:6,7 30:18 31:13,14 35:7 36:18 37:2,22 38:7,8 46:24 48:14 49:6 50:6 55:7,9,13 55:25 56:14,22 57:21 58:6,25 59:23 62:4 71:10</p> <p>knowledge 71:4</p> <p>known 42:7</p> <p>knows 60:21</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>lack 43:8</p> <p>large 43:3,8</p> <p>larger 42:16</p> <p>Laughter 43:6 48:18 59:24 60:4 65:21</p> <p>law 5:21 15:11 18:7 20:8,14 22:19 33:19 37:23 40:11 45:10 46:9 48:12,13 55:8 57:5 58:25</p>	<p>64:23 73:3</p> <p>laws 5:14 27:18 46:2 58:18</p> <p>leans 54:14</p> <p>leave 64:10</p> <p>leaves 63:1</p> <p>leeway 22:11</p> <p>left 39:21 40:4 40:14 58:21</p> <p>legal 62:2 70:21 70:24</p> <p>legitimate 44:18</p> <p>lesser 63:25</p> <p>let's 6:9,9 10:4 14:21,25 16:13 16:13 18:16 28:14 41:20 52:24,24 57:13 57:18,21</p> <p>level 23:25,25 24:5,14 34:22 35:8 39:15 59:11</p> <p>LEVI 2:6</p> <p>license 6:3 8:14 9:3 15:2,5 36:10,16 40:25 41:2,5 45:14 45:21</p> <p>life 11:11</p> <p>light 50:19</p> <p>limit 62:2</p> <p>limitations 32:17 71:19</p> <p>line 6:22 7:9 8:4 10:12 17:19 18:3 20:6 22:6 32:9,25 33:4 70:11</p> <p>listed 61:10 62:24</p> <p>listen 55:11</p> <p>literally 30:23</p> <p>little 21:11,12 22:2 25:3 42:16 68:24</p> <p>lives 18:21 21:24</p>	<p>located 53:6</p> <p>Lockner 65:4</p> <p>long 42:11,13 47:15 48:25 49:24 61:10,10 61:23,24 62:3 62:6,19,20</p> <p>longer 35:7 58:21</p> <p>look 7:17,22,24 8:19 17:7 18:24,24 21:11 21:11 24:6,13 26:3 29:8 36:17,17 55:1 56:7 68:3</p> <p>looked 72:1</p> <p>looking 8:10,18 18:5 25:13 26:5,6</p> <p>looks 25:4 65:8 65:9</p> <p>loophole 39:23</p> <p>lose 16:9,12 21:19 59:22 70:23 71:2</p> <p>losing 58:11,12</p> <p>lost 63:12</p> <p>lot 13:24 53:1</p> <p>lots 21:23</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>Mackey 48:10 65:25</p> <p>magistrate 40:6 42:19,25 54:20 68:2</p> <p>magistrate's 70:5</p> <p>magistrates 41:20 42:6 61:7 72:15</p> <p>magnetometer 15:15</p> <p>major 64:5</p> <p>majority 72:6</p> <p>making 14:5,10</p>
--	--	--	---	---

<p>34:4 48:12 manage 43:16 manipulation 7:25 manner 49:21 67:14 manpower 43:9 map 68:25 Maryland 61:5 61:12 62:18 matter 2:14 25:19 54:9 61:16 64:3,12 73:22 McCARTHY 2:20 4:6 35:22 35:23 36:1,21 37:6,12,17,23 38:4,12,18,22 39:4,7,11 40:1 40:15 41:6,23 42:15 43:3,7 43:18,24 44:8 45:3,6,15,17 46:5,19 47:2 47:17 48:6 49:8,13,25 50:3,9,13,21 McNeely 19:1,7 24:3,18 30:13 34:20 35:11 40:8,20,21 42:2 55:24 56:20 61:4,9 61:15 62:23 63:17 65:24,25 66:22,23 72:2 72:9 McNeely's 40:16 mean 9:19 11:18 13:20,23,23 16:3,15 18:24 19:1,10 21:11 22:3 24:8,23 25:7 26:1,4 34:2 37:10 40:4 46:8</p>	<p>55:14 56:15 58:25 62:6 63:5 68:20 69:15 73:8 meaning 5:19 12:12,13 22:16 27:13 means 17:19 24:1 meant 11:21 measurable 17:16 measure 28:18 measured 29:13 mechanism 41:12 49:22 72:10 mechanisms 72:8 medical 44:16 50:24 member 19:6 mentioned 34:8 merry 26:21 MICHAEL 2:3 miles 51:13 53:3 mind 54:9 56:16 minimal 70:2 minimum 69:16 Minn 2:23 Minnesota 1:14 5:14 9:11 23:6 27:18 51:19 52:3,25 53:6 56:23,23 57:1 57:5,8 58:17 58:19 70:25 Minnesota's 55:3 56:25 59:16 minute 36:18 minutes 42:12 42:13 44:5 45:5 46:13,17 47:12,16 49:3 54:19 56:8,11 56:12 62:19,20</p>	<p>70:2,16 missing 54:6 mistake 60:17 62:22 63:2 misunderstood 18:14 mobiles 67:17 67:18 modern 47:10 Montana 42:13 morning 5:4 41:21 60:12 motorist 14:3 63:19 mouth 25:20 26:10 28:17 29:1,6 moved 27:24</p> <hr/> <p style="text-align: center;">N</p> <p>N 4:1,1 5:1 narrower 67:4 nation's 19:3 National 71:25 natural 64:1 nature 31:21 71:23 nay 59:2,3 nearest 53:8,8 nearly 49:21 necessarily 38:22 45:11 56:24 necessary 23:11 23:14 47:14 59:16 necessity 27:14 47:25 need 19:11,19 34:3 45:11 69:14,17 70:13 needle 40:12 needs 18:9,16 33:20 46:24 47:1 neutral 68:2 never 55:11</p>	<p>66:21 73:2 Nevertheless 5:22 Neville 48:10 65:25 69:8,9 new 17:23 34:4 41:17 61:18 NHTSA 60:21 72:11 night 41:18 nine 60:25 Nobody's 70:4 nonconsenting 69:11 North 1:6 2:7 5:4,14,20 9:11 10:20 11:9 12:6 22:23 27:18 36:3 41:16,16 42:4 42:6,13,15 43:16,19 46:1 50:8 51:14 52:3,25 53:3,6 53:9 60:22 70:25 Nos 2:21 4:8 35:25 noted 73:10 notion 23:14,15 novelty 33:25 number 15:4,22 57:15,16 58:5 62:1,10 nurse 50:25</p> <hr/> <p style="text-align: center;">O</p> <p>O 4:1 5:1 o'clock 41:21 object 29:14 31:25 objection 40:18 44:12 47:5 obligated 5:15 5:23 obligation 10:13 13:7</p>	<p>obstruct 44:21 obstructing 44:23 obstruction 58:11,21 59:5 59:6,11 obtain 30:22 35:17 obviously 6:16 13:23 29:17 occur 41:19 odd 67:24 68:13 odds 60:15 offense 5:13,24 offer 15:24 30:10 55:4 57:6 offered 71:7,15 office 64:10,11 65:20 66:4 officer 9:4 18:7 20:9 23:11 27:18 29:8 32:9 33:1,3 36:17 38:9,14 38:23 42:18,23 44:16 51:24 53:2,4 68:4 69:20 officers 72:14,19 official 64:12 oftentimes 42:22 oil 21:3 okay 12:19 22:5 28:4 48:22,23 54:3 56:20 57:22 59:18 on-site 38:23 50:22 once 26:25 55:4 63:11 73:2 one-year 64:10 ones 24:18 operate 9:10 15:6 operating 15:8 15:10</p>
--	---	--	---	---

<p>opinion 23:5 55:25 56:5,7 66:21 67:23 opinions 55:25 opposed 38:9,15 opting 65:19 oral 2:14 4:2,5,9 4:12 5:7 35:23 51:6 60:7 order 10:21 57:5 ordinary 18:11 20:11,14 24:25 25:2 33:19 originally 56:15 outcome 6:18 44:24 outside 70:12 overcome 63:25</p> <hr/> <p style="text-align: center;">P</p> <p>P 5:1 page 4:2 23:6 62:21 65:10 painful 21:19 park 61:3 67:19 part 16:2 18:7 20:8 26:18 27:14 40:20 41:24 43:8 44:10 52:14,14 57:22 67:4 68:4 71:4 particular 9:25 24:15 26:8 33:14 46:2 particularly 11:8 40:12 63:12 parts 9:7 49:3 pass 43:16,19 passenger 15:6 passes 35:7 pat 30:3,4 Pat-down 30:5 penalize 59:11 penalties 10:2 14:13 39:22</p>	<p>41:6 63:24 65:7,11 71:15 penalty 6:24,25 7:15 46:3 64:13 71:11 people 11:17,23 12:17,21 14:14 19:13,17 21:3 21:24 24:10 26:21 27:6 28:8 29:3,7,11 29:17,18 30:21 32:4 33:4 36:14 37:4,24 38:5 43:4,9,25 47:20 50:17 54:6 56:18 59:3 65:19 71:1 percent 27:21 27:22 28:3 55:10 62:2,7 period 12:17 25:21 41:19 50:8 permissible 66:13 permit 10:14 59:3 permitting 65:3 person 5:14,22 15:1,8,16,17 15:18 27:2,23 28:17 32:15,24 32:25 37:21 38:14 40:12 45:21 52:19 58:8,22 62:1 person's 25:20 26:1,10 28:17 31:25 45:12 personal 22:13 24:21 25:18 32:5 73:13,14 personally 33:16 personnel 44:17 pertinent 14:6</p>	<p>Petitioner 1:4,12 2:4 Petitioner's 57:19 63:17 Petitioners 2:19 4:4,18 5:8 70:18 phone 21:12 24:9 25:4 36:18 38:9,11 39:14 42:9,22 43:2,5 48:16 52:16,22,22 Pickering 71:18 picture 41:16 place 6:21 7:11 16:5 21:16 57:24 58:7 73:3 pleadings 66:14 please 5:10 31:2 36:2 50:20 51:10 60:11 plus 23:15 point 17:25 25:22 33:14 42:5 47:2,3,22 55:17,17 65:23 72:25 pointed 40:21 points 11:6 14:9 23:23 30:11 70:20 police 26:15 32:9,25 50:17 50:17,25 51:24 52:2,15,19 57:17 58:2,2 61:3 67:19 68:18 policeman 48:19 policemen 55:15 populated 10:20 47:11,12 position 6:6 7:13 47:13 57:20 59:16</p>	<p>positions 16:23 possibilities 14:19 possibility 29:5 possible 48:15 51:17 68:5 possibly 23:17 postulate 12:7 postulating 11:18 powerful 40:7 practical 7:17 41:14 46:24 47:1 48:14,14 53:14 55:8 70:21 practicalities 57:19 71:22 practicality 51:12 practically 28:2 practice 44:4 50:18 praise 72:16 precedent 60:16 precinct 53:17 57:25 predictable 34:22 35:14 prefatory 22:8 preliminary 27:5 28:9 38:23 50:22 67:15 premise 6:11 prepared 55:9 present 8:22 33:8 59:4 presented 29:4 preservation 23:23 preserve 23:11 23:11,15,18 presses 48:19 presumably 68:14,21 presume 45:13</p>	<p>presumption 20:16,17 22:18 43:14 73:6 pretty 70:2 principal 19:23 principle 19:7 principles 18:11 priority 61:17 privacy 18:6 66:24 67:1,6 private 65:5 privilege 41:10 probable 20:1 21:25 26:18,19 27:7,10,10 30:3 37:20 38:13,17 probably 11:9 16:7 probationer's 64:17 problem 5:11 19:4 26:6,7 33:6 36:15 37:25 40:23 45:25 46:17 48:20 52:17 53:5 69:1 71:21 problems 46:20 64:5 procedures 72:14 73:5 proceeding 22:19 proceedings 36:12 process 20:11 42:17,23 67:5 72:17 product 10:16 10:17 prohibit 12:17 13:11 prohibition 65:16 proposition 7:6</p>
---	--	---	--	---

<p>32:3 70:24 71:6,13 prosecuting 42:24 prosecutors 72:16 protect 19:12 provide 72:8 provided 71:8 provides 68:2 provision 11:13 public 36:4 44:15 45:22,23 49:20 63:18 pulled 12:24 punish 44:22 punishable 64:12 pure 45:10 purpose 44:11 purposes 6:7 12:16 34:15 73:11,16 put 28:15 29:1 44:3 46:22 57:23 58:7 60:24 putting 41:4 44:24</p> <hr/> <p style="text-align: center;">Q</p> <p>question 9:7,14 10:4 18:15 19:2 20:24 21:5 22:15 25:10,13,16 28:8 29:19 30:17,25 31:16 33:18 34:2,6 34:12 41:8 46:11 48:1 50:5,15 55:20 55:23 57:17 63:23 66:11 67:23 70:5,6 72:25 questions 31:20</p>	<p>51:12 73:17 quick 35:17 70:20 72:3 quicker 42:17 quickly 21:16 35:16 quite 22:9 68:25 71:12</p> <hr/> <p style="text-align: center;">R</p> <p>R 2:20 4:6 5:1 35:23 Raab 18:4 20:5 railroad 19:10 rationale 19:22 19:23 36:20 reachable 42:9 reached 46:13 reaction 59:23 read 65:8 readily 71:24 real 9:14,19 44:1 60:18,20 real-world 60:13 realistic 13:24 29:11 realities 51:16 reality 7:19 10:7 31:24 really 30:17,18 39:20 41:7 44:9 46:1,11 49:25 58:12 63:2 65:16,19 reason 7:8 8:23 13:12,21 19:23 20:4 26:8 29:11 38:14 73:15 reasonable 15:7 15:16 21:25 66:7 reasons 23:4 24:22 48:7 49:14 61:1,1,2 REBUTTAL</p>	<p>4:16 70:17 recognize 5:20 16:22 recognized 5:21 33:22,23 34:3 57:3 61:15 69:8 record 60:22 red 39:3 50:18 reduced 72:20 reflected 64:22 reflects 64:8 refusal 36:11 39:22 46:3 58:20 59:9 63:22 64:17 72:18 refuse 55:5 refusing 6:3 44:22 66:16,17 regard 32:4 register 62:7 regular 22:20 67:5 rejected 19:6 related 5:5 41:1 relatively 34:10 relevance 12:11 relevant 28:5 rely 64:21 relying 46:18 remain 34:23 remarkable 71:13 remember 56:1 renege 8:16 reneging 8:12 request 41:21 require 9:5 40:22 48:7 51:18 54:10 63:12,19 required 19:1 20:15 22:9,10 22:20 28:15 41:25 42:3 43:21 46:20</p>	<p>48:8,11 55:14 66:22 73:7 requirement 5:22 16:1,4 17:11 19:5,24 19:25 20:1 22:21 40:11 43:12 45:2,7 45:19 60:17,25 67:24 70:1 73:16 requirements 46:16 65:3 requires 20:25 42:1 45:24 52:16 requiring 41:14 resist 13:9 16:3 16:18 71:2 resource 61:1,14 resources 43:8 respect 23:1 29:19 38:2 56:6 respectfully 45:20 Respondent 1:7 1:15 2:9,23 4:11 51:7 Respondents 2:21 3:4 4:7,15 35:24 60:9 response 22:5 30:24 restricted 65:2 return 33:13 reveal 35:8 revealed 67:3 reveals 71:24 revocation 36:10 revoke 6:2 rid 34:17 35:6 45:7 ridiculous 49:2 right 5:13 7:1,21 8:2,7,12 11:4</p>	<p>11:16,19 12:8 12:10,18 13:4 13:9,23 14:8 14:20 16:16,18 16:24,25 17:20 17:21 18:5 21:4 27:19,20 28:23 29:22 31:7,8 32:10 34:11 37:24 46:16 47:21 49:15 50:2 53:16 54:2 58:1 59:2 71:2 71:9,12,18 rights 14:2,14 Riley 23:8 24:10 72:22 risk 21:18 44:15 63:11 risks 69:25 road 26:15,17 27:1,1 29:18 38:6 39:9 45:13,22 52:4 66:6 67:16,19 roads 9:10 12:23 14:21,24 36:5 49:20 63:18 65:1 71:1 roadside 50:16 56:16 57:16 67:10,12 ROBERT 1:11 ROBERTS 5:3 11:12,16 12:4 12:15,19 13:21 19:8 29:20 32:18 33:10,12 34:13 35:21 36:13 37:1,10 37:14,22 38:1 38:5,16,20 50:20 51:4 56:3 60:5 68:14,18 70:15 73:19</p>
---	---	---	--	---

<p>Rothfeld 2:18 4:3,17 5:6,7,9 6:5,17 7:7 8:19 9:6,16,22 10:6 10:9,25 11:4 11:14,20 12:9 12:18,25 13:13 14:8 15:21 16:11,13 17:3 17:6,22 18:18 18:23 19:21 21:6 22:7 23:3 23:22 24:19 25:6,8,17 26:9 27:3,12,16,25 28:7,20 29:2 29:16,23 30:8 30:10,20 31:3 31:21 32:10,16 32:19 33:2,11 33:13 34:11,14 35:10 70:16,17 70:19 roughly 50:10 routine 61:20 rule 44:7 60:14 63:9,16,24 ruling 57:10 running 66:10 rural 11:8 42:10 42:21 43:2,5 51:16 52:25 72:12</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 4:1 5:1 safe 19:11 27:1 safeguard 54:21 safety 23:11 44:15 45:12,22 45:23 71:25 sake 69:13 sanction 6:12,13 6:15 sanctions 41:2 63:25 64:20,20 68:15,21 70:11</p>	<p>satisfied 46:15 save 21:23 saying 6:24 7:13 11:18,18,22 14:11 16:18 17:10 18:4 19:11,23 21:22 28:3 30:6 47:15 70:4 says 12:22 18:9 35:12 38:9 42:11 48:20,23 55:4 58:4 scale 67:6 Schneckloth 10:11 11:6 12:12 scope 17:9 41:3 screen 28:2 screening 38:24 screens 27:5 search 5:24 10:14 15:14,18 16:3,19 17:11 18:8 19:1 20:2 20:9,15 22:15 22:18 23:1,4,9 23:10,16,19 24:6,7,11,14 24:15 28:19,21 30:6 31:15 32:12,16 33:18 34:6,24 37:19 40:11 44:11 47:4 51:12,17 51:25 68:19,25 73:2 search-incide... 23:20 24:16 34:15,19 35:1 searched 11:25 searches 5:19 24:11 31:13,16 31:17,18,18 33:19 44:15 71:3 second 40:20</p>	<p>43:22 60:13 67:8 71:22 seconds 25:22 48:16,21 49:2 55:15 see 7:17,18,22 7:24 38:2,9,10 50:18 52:13,13 55:18 65:10 seizure 32:12,19 32:24 sense 10:22 24:20 44:1 60:15 64:3,4 67:1 separate 39:12 39:15 54:8 separating 24:17 serious 63:11 69:25 set 33:9 39:12 46:12 66:19 67:4 setting 40:6 severe 19:4 SG's 64:11 shoehorning 34:25 shortly 57:11 show 10:13 47:24 showing 13:8 17:16 shown 14:16 shows 68:23 72:11 side 22:17 33:24 52:4 65:6 67:6 67:15,18 72:5 sight 70:23 sign 9:3,20 11:1 12:22 15:14 signed 9:25 significant 22:13 24:21 25:5,15,15,18</p>	<p>31:12 32:5 36:10 41:11 62:14 63:21 66:24 similar 44:5 55:22 73:12,13 simply 16:15,18 24:1,24 35:1 71:7 72:23 sit 34:12 sitting 43:5 situation 6:23 14:2 15:4,19 15:20 16:15 28:22 34:19 39:20 48:8 64:15,25 69:7 69:10 72:23 situations 15:4 18:10 51:13 71:17 size 21:12 Skinner 15:25 16:15,24 17:8 17:14 18:2,3 18:22 19:22 20:5 22:14 24:22 25:24 32:5 66:20,21 66:24 73:8 slurred 39:3 smaller 42:20 67:2,7 smelling 39:2 smuggled 15:17 so-called 67:17 sobriety 27:5 28:1 32:8 38:19,24 solely 54:9 Solicitor 3:2 64:10 65:20 66:4 somebody 14:22 36:19 42:22 43:2 46:13 53:25 68:10,12</p>	<p>someplace 51:1 soon 62:18 sorry 33:11 45:17 50:18 sort 7:14 8:20,22 13:13 16:14 20:10 30:10 32:2 33:20 52:14 sorts 65:3 Sotomayor 9:23 10:6,8 13:10 16:8,12 26:13 27:9,13 39:25 40:2,24 43:11 44:19,21 45:4 45:9,16 49:24 50:2 52:6,8,10 53:10,13,17,24 57:21 58:15,24 59:10,17,19,21 59:25 sought 73:6 Southern 61:18 sparsely 10:20 47:11 speaking 56:22 special 17:18 18:9,16 19:19 33:20 special-needs 15:25 18:10 19:14 specifically 57:1 57:2 speech 39:2 spend 55:15,16 standard 32:7 35:9 39:6,7 start 49:15 started 30:18 43:13 State 1:14 6:2,8 6:11,19,23 7:10,12,19 8:5 8:11 9:25 10:4 10:5,7 11:8</p>
--	---	--	--	--

<p>12:2,22 13:6 13:11,16 14:2 14:7,12,20,23 21:2 22:10 35:15,17,18 41:15 44:14 45:7 47:5 54:25 63:18,21 66:7 69:5 State's 7:25 9:12 10:13 13:7 14:21,24 36:4 37:12 stated 23:5 57:9 statement 22:8 states 1:1 2:15 3:4 4:14 5:18 5:20 10:20 11:19 12:17 22:23 30:11 36:9 39:20,21 44:5 45:25 47:11,13 49:19 60:8 62:24 63:1 69:8,10 71:7 72:7 station 50:17,18 51:1 52:15,20 54:18 56:18 57:17 67:14,21 statistics 17:15 18:16 28:11 37:2 55:20 62:13,13 statute 36:3 37:7 55:2,4 65:11 69:3,3 statutes 5:11 9:10 13:3 40:21 48:9 steadily 68:10 steel 66:5 step 47:6 49:14 Stephenson 64:24 65:6,10 STEVE 2:3 stop 9:24 27:15</p>	<p>27:15 66:10 stopped 5:15 28:9 29:18 38:8 56:8 61:5 stopping 12:21 stops 56:17 straight 32:9,24 33:3 Stras 23:6 straw 21:12 29:1 29:14 30:7 54:1 straw-like 25:3 strikes 36:3 struggling 46:8 47:8 studies 60:21 71:25 study 60:23 62:11,21 72:11 stuff 39:6 subject 6:24 9:12 10:1,15 14:17 64:9 68:21 subjected 15:18 submission 11:22 submit 5:23 12:1 29:12 submitted 73:20 73:22 submitting 15:6 subsequent 63:22 substantially 33:24 67:7 72:20 substantive 17:9 71:19 sufficient 28:18 suggest 13:5 suggested 23:16 24:22 30:15 32:4 35:11 suggesting 20:3 31:10</p>	<p>suggestion 8:22 13:2 supportable 73:15 supporting 3:4 4:15 60:9 suppose 9:2,14 10:22 13:21 15:11 17:14,15 28:13,15 38:22 46:12 47:15 suppression 7:21 Supreme 1:1 2:15 23:6 sure 13:15 19:8 19:9,15 28:11 31:23 34:13 36:18 40:14 57:15 58:17 surprise 37:3 surprises 21:8 surrender 8:2 71:9 surrendered 13:9 surrendering 13:4 survive 12:6 suspect 19:17 34:17 suspend 40:25 45:14 suspension 6:15 45:20 suspicion 5:15 15:8,17 20:2 22:1 27:15 28:10 29:4 69:20 swerve 38:5 system 39:23 40:6,19 44:4 46:12,18 57:23 58:7 61:14 systems 42:19</p>	<p style="text-align: center;">T</p> <p>T 4:1,1 table 41:8 take 5:16,23 6:3 9:4 11:19 16:25 21:25 26:17,17,25 32:8 35:13 45:8 48:25 52:20 53:11,19 53:22 54:17,18 57:16 58:8 61:24 62:3,19 65:22 66:16,17 69:13,24 taken 6:6 45:13 50:16,17 52:5 73:3 takes 7:12 21:16 24:23 25:19 42:10,12,13,20 45:21 47:15,15 61:23 talk 10:4 18:20 18:21 47:9 52:24,25 57:13 57:18 talked 24:8 40:24 talking 13:22 24:18 27:4,5 27:17 55:8,8 targeted 37:23 technology 28:14 47:10 teeth 46:3 telephone 55:16 telephonic 42:17 tell 58:2,8 61:4 telling 67:11 ten 55:15 term 64:6 terms 48:13 72:4 terrible 39:20 terrorist 61:19 test 5:16 6:3</p>	<p>8:15 9:4 12:1 14:24 15:7 21:10,17,23 22:3,12,12,15 23:1 24:20 25:19 26:15,18 26:21,24 28:14 29:12 30:22,24 31:5,22 33:15 34:21,22 35:8 35:16 36:7,11 38:10,24,24,24 50:22,22 51:2 52:16 53:11,13 53:15,15,20,22 54:8,8,10,12 54:17 55:4 56:7 57:6,14 57:18,24 58:10 63:13 66:16,16 66:17,25 67:15 69:15,17,19,21 70:8,10 72:18 tested 23:24 26:11 29:7,19 29:21,25 32:2 34:23 testing 9:13 12:23 63:20 67:18 69:5 tests 5:18 24:23 27:17,21 28:1 30:12,14,14 32:8 35:16 38:19 41:19 50:7,7,23,25 52:3 53:14 57:1,2 67:9 73:1,9 Texas 65:1,1,11 texting 36:14,19 37:4,15 38:6 39:10 texts 36:17 Thank 5:9 35:21 51:3,4 60:3,5 70:14,15,19</p>
--	--	---	---	--

73:19 thereon 36:6 they'd 55:15 thing 15:9 20:23 22:4 25:3 41:3 43:22 49:22 65:12 things 18:8 20:10 23:17 24:19 40:15 43:20 54:12,16 56:15 60:12 think 6:17,19 7:3,4,8 8:19,20 10:9,12,25 11:4,5,7 12:1,9 12:12,18 13:6 14:9 15:5,21 15:22 16:6,15 16:19,20 17:6 17:7,22 18:2 18:18,19,23,23 19:10,21,23 20:4 21:21 22:1,8,22 23:3 23:13 25:17,18 26:24 27:16 28:1,4,8,20,21 29:2,9,16,23 29:23 30:20 31:3,5,14,20 31:24 32:11,12 32:13 33:2,8 33:14,15,16,23 33:25 34:14,24 35:10 36:21,22 37:7 38:12,13 40:14,16 43:3 43:4,8,24 45:8 46:15 47:6,7 47:20 48:8 49:5 54:6 60:14,18 62:21 63:2,9 64:3 65:8,9,17,23 66:19 68:13,23 68:25 69:1,9	70:22,23 71:14 73:14 thinking 21:4 26:23 54:9 third 60:16 72:25 THOMAS 2:20 4:6 35:23 thought 11:17 12:5 18:14 22:6 32:21 43:13 56:16 67:11 threats 35:2 three 5:12 6:14 48:2 60:12,23 70:16,20 three-year 6:15 thrust 18:14 tightly 37:24 time 15:1 20:13 21:18 25:21 26:2 33:1 34:9 41:18,19 42:6 49:6 50:8 56:8 56:9,21,21 66:10 69:24 times 43:10 62:17 toilet 34:18 told 11:8,23,24 54:16 69:9 tons 66:5 top 37:9 total 54:21 totality 10:13 town 53:2,7 traffic 13:23 17:17 71:25 train 15:6,8,24 19:18 trains 19:12 transportation 2:8 19:12 transported 52:19 treat 30:13 57:7	treated 57:8 73:11 treating 73:15 treatment 30:12 treats 56:24 57:1 true 13:10,15 16:19 24:8,10 27:3 29:21 72:6 truly 10:16 try 20:19 43:25 trying 7:19 8:4,5 13:25 45:7,9 54:7 55:18 tube 25:20 26:9 turn 26:2 63:15 turns 23:9 two 9:7 14:9 23:10,17 24:19 30:11 40:15 46:19,20 50:10 53:14 55:24 57:11,16 62:20 66:5 70:21 73:10,15 type 49:22 55:20 types 40:21 41:9 73:5,5 typically 38:25 42:9	30:21 35:3 47:8 63:16 understanding 34:15 42:19 46:10 undertake 44:14 uniformly 30:13 uninvasive 23:16,19 34:10 uniquely 36:25 37:8 United 1:1 2:15 3:3 4:14 5:20 22:23 60:8 universal 72:9 universally 72:3 72:16 unknown 30:17 unusual 48:23 upheld 48:10 urine 57:6,11 use 36:4,6,11 42:17 49:1,20 58:21 68:24 useful 23:18 uses 12:22 usual 68:25 usually 50:25	13:9 voluntary 10:16 10:23 12:14 33:3 Von 18:4 20:5
W				
W 48:17 wait 28:17 waiting 43:5 wake 47:9 48:2 61:4 walk 32:9,24 33:3 want 15:12 21:9 26:7,16 29:12 29:13,17,18 32:15 40:5 43:17 44:14 47:5 48:13,13 48:14 49:6,14 58:25 69:10 wants 51:21 59:22 warrant 16:1,4 17:11 19:5,24 19:25 20:15,25 22:9,10,19,21 25:11 33:22 34:9 35:18 40:3,6,13 41:15,22,24 42:3 43:20,23 44:4,10,11,22 45:1,7,19 46:7 46:14 47:3,4 47:12,14 48:7 48:11,15,22 49:9 51:17 52:1,17,20 53:21 54:11 55:10,14 56:10 56:11,20,21 57:18,24 58:3 58:7,8,9 59:3,4 59:16,20 60:17 60:24 62:16,19				
V				
v 1:5,13 2:5 5:4 Va 2:20 valid 36:8 68:16 variety 20:10 various 34:7 61:1 vast 72:6 Vernonia 18:4 20:6 versus 73:1 view 27:14 viewed 65:4 Virginia 61:7,12 61:21 virtually 72:11 voice 48:20 voluntarily 13:3				
U				
U.S 60:15 64:8 U.S.C 64:9,12 64:15,17 ultimately 29:25 unable 61:2 unconstitutio... 6:22 7:9 65:4 65:14 unconstitutio... 14:6,11 49:17 undermine 25:12 understand 12:20 14:4				

63:14 66:22 67:24 68:1,1,3 68:5,7,8,12,16 68:19,24 69:14 69:15,17 70:3 72:8,13,17,24 73:6,16 warrant's 46:20 warrantless 5:16,23,24 16:4 71:3 warrants 42:17 43:14 47:10 48:3 51:12,19 58:5 60:19 61:5 62:25 63:10 71:23 72:3,21 Washington 2:11,18 3:3 way 8:8,10,17 8:20 9:9 20:22 24:17,25 25:2 26:6,22,24 28:9 30:1 31:10 35:14 40:13 46:5 52:22,23 55:22 66:22 68:25 72:21 ways 20:18 we'll 5:3 46:24 we're 13:22 14:18 16:16,16 16:17 18:4 19:11 27:4,5 27:17 32:16 34:20 43:12,25 46:6 47:8,15 48:12 49:17 55:5,5 56:25 58:3,12 59:12 59:12 63:5 we've 26:13 31:15,15 weaker 13:17 weapon 15:18	weaving 39:1,9 Wednesday 2:12 weren't 24:8,10 57:10 whiskey 26:3 WILLIAM 1:11 willingness 61:15 willy-nilly 34:5 win 21:1 22:10 70:7,8,9 wish 36:4 withdraw 13:19 64:4 65:13 withdrawal 64:21 65:7 word 25:5 work 65:19 72:14 working 66:3 works 31:9 world 8:20 16:17 44:1 60:18,20 worst 30:5 wouldn't 19:15 24:8 26:4 37:3 48:25 56:13 writing 15:1 wrong 21:23 Wyoming 42:12	<hr/> 0 <hr/> <hr/> 1 <hr/> 10 44:4 46:13,17 62:2,7 10:15 2:16 5:2 11:26 73:21 14-1468 1:4 2:21 4:8 5:4 35:25 14-1470 1:12 2:24 4:11 51:8 14-1507 2:4,21 4:8 35:25 14135 64:17 15 42:13 44:4 45:4 46:13,17 47:12,15 48:21 49:3 54:18 62:19 70:2 17 63:1 18 64:9,12,15 1927 64:24	<hr/> 400 55:15 42 64:17 <hr/> 5 <hr/> 5 4:4 50 55:10 50/50 50:10 51 4:11 <hr/> 6 <hr/> 6,000 50:9,12 60 4:15 66:2 603 64:16 <hr/> 7 <hr/> 70 4:18 <hr/> 8 <hr/> <hr/> 9 <hr/> 90 62:20
	<hr/> X <hr/> x 1:2,8,10,16 2:2 2:10	<hr/> 2 <hr/> 2,000 53:2 2:00 41:21 20 2:12 25:22 51:13 53:2 56:8,10,12 70:2 2016 2:12 207 64:9 216 64:13 24/7 60:20 61:5 61:8,16,18,22 62:25 25 25:22 260 65:10	
	<hr/> Y <hr/> yea 59:2,3 year 50:11,12 63:5,8 64:13 years 48:3 49:21 66:2 York 41:17 61:18	<hr/> 3 <hr/> 30 48:15 49:2 33 62:24 35 4:8 37 62:21	
	<hr/> Z <hr/> z	<hr/> 4 <hr/> 40 63:6	