Nos. 14-1468, 14-1470 & 14-1507

IN THE

Supreme Court of the United States

DANNY BIRCHFIELD, *Petitioner*,
v.
NORTH DAKOTA, *Respondent*.

WILLIAM ROBERT BERNARD, JR., *Petitioner*,
v.
STATE OF MINNESOTA, *Respondent*.

On Writ of Certiorari
to the Supreme Court of North Dakota and the
Supreme Court of Minnesota

Brief *Amicus Curiae* of Downsize DC Foundation, DownsizeDC.org, United States Justice Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Conservative Legal Defense and Education Fund, and Institute on the Constitution in Support of Petitioners

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D Street
Suite 2
Ramona, CA 92065
Attorney for Amicus Curiae
U.S. Justice Foundation

**Counsel of Record*
February 11, 2016

ROBERT J. OLSON
HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

Downsize DC Foundation, United States Justice Foundation, Gun Owners Foundation, and Conservative Legal Defense and Education Fund are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). DownsizeDC.org and Gun Owners of America, Inc. are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, and related issues.

SUMMARY OF ARGUMENT

These consolidated cases involve two states laws which criminalize an automobile driver's refusal to consent giving blood and breath samples as part of a traffic stop and subsequent arrest. This Court already has refused to create an "exception" to the Fourth

---

[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Amendment requirement that the police obtain a warrant before conducting these tests. But now, in an effort to do indirectly what this Court has ruled they cannot do directly, various states are now conditioning the right to drive an automobile on the waiver of a driver's constitutional rights.

In analyzing the state statutes, both the state supreme courts below assumed that the only Fourth Amendment issue was whether drivers have a "reasonable expectation of privacy." The Supreme Court of Minnesota decided that a blood or breath search is simply a "search incident to arrest," and that since a person has no privacy interest in his body once he has been arrested, the state has unlimited power to do with him whatever it wishes. On the other hand, the Supreme Court of North Dakota concluded that, by obtaining a driver's license, a person is deemed to have given "consent" to such searches, and, in any event, the requirement to participate in chemical tests is "reasonable." Neither court paused to consider whether Americans have a protected property interest — rather than an expectation of privacy interest — which is protected by the Fourth Amendment.

In Unite States v. Jones, this Court restored the Fourth Amendment's private property "baseline." Finding that a search occurred when a GPS tracking device was placed on a vehicle, it was unnecessary to consider whether the owner also had a "privacy" interest, because it was clear that the government had committed a trespass to property. The next year in Florida v. Jardines, the Court applied that same principle to a drug dog search of a home, finding not

only that a search had occurred, but also that the search was unreasonable because the government violated his property rights. Since Jones and Jardines., however, this Court has failed to apply these Fourth Amendment property principles consistently. Rather, for the most part, the Court has reverted to a narrow focus on expectations of privacy.

The Fourth Amendment first and foremost protects an individual's right to be secure in his "person" — which is to say, his own body. Unless the government first demonstrates that it has a superior property interest giving it the right to intrude on that property right, the government becomes a common law trespasser. Thus, while the government obtains a limited authority to safely seize and detain a person who has been arrested, that authority does not grant the government carte blanche power to do whatever it wishes to the person's body incident to arrest. This conclusion is in line with the Court's recent decision in Riley v. California, which held that the government does not obtain complete authority to do whatever it wishes with a person's cell phone simply because it has taken it away from him upon arrest.

Finally, no state may, as North Dakota has done here, invoke its police power to regulate automobile traffic to justify criminalizing the refusal to submit to a breath, blood or urine test without regard for the Fourth Amendment-protected property right in one's person.

ARGUMENT

I. THE SUPREME COURTS OF MINNESOTA AND NORTH DAKOTA WRONGLY ASSUMED THAT THE FOURTH AMENDMENT PROTECTS ONLY PRIVACY INTERESTS.

A. Breath Tests and Blood Tests Are Not Searches "Incident to Arrest" as Claimed in Bernard.

The Supreme Court of Minnesota attempts to justify its effort to compel Bernard to take a breath test as a "search incident to arrest" — as if that is akin to searching him for weapons or taking away his cell phone. Minnesota v. Bernard, 859 N.W.2d 762, 772 (2015). This rationale applies, it is claimed, because this Court, in United States v. Robinson, 414 U.S. 218 (1973), permitted a "full search of the person." Bernard, at 767, *see* Robinson at 235. The Minnesota court claims that "our research has not revealed a single case anywhere in the country that holds that a warrantless breath test is not permissible under the search-incident-to-a-valid-arrest exception." Bernard, at 767-68.

Although the Supreme Court of Minnesota recognizes this Court has put limits on searches of "areas" incident to arrest, it claims this Court has not similarly spoken of limits on a person's body, and so surmised that there are **no limits** on searches of

"persons" incident to arrest. *Id.* at 769.[2] Indeed, the Minnesota court asserts, "the Supreme Court referred to the police's 'authority' to search an arrested person as '**unqualified**,'" and "ha[s] not narrowed the exception with respect to a search of the arrestee's body." *Id.* at 769 (emphasis added). The Minnesota court then cites Riley for the proposition that the police need not have any sort of particularized suspicion before they conduct any sort of search "of the person" after arrest. *Id.* at 770. However, the Minnesota court drew no lessons from this Court's limitation on the search incident to arrest doctrine in Riley barring access to the arrestee's property, *i.e.*, his cell phone.

As Petitioner correctly notes, the holding of the Supreme Court of Minnesota that **any** search of the person is permissible "turns Fourth Amendment doctrine on its head." Bernard Brief at 13. If true, a person would have greater rights in the cell phone in his pocket than he would in the blood in his veins. Such searches of the person are permissible, the court believes, because "someone 'lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the **privacy** of his person.'" Bernard at 767. Indeed, the Minnesota court cites

---

[2] The government made a similar argument supporting limitless power to search "papers" and "effects" incident to arrest in United States v. Wurie, decided together with Riley v. California, 573 U.S. ___, 134 S.Ct. 2473 (2014) ("an arresting officer may seize and search any items found on an arrestee's person, including closed containers"). Petition for a Writ of Certiorari in Docket No. 13-212 at 4. This Court rejected the government's argument. Riley at 2485.

various cases where, based on a privacy analysis, it upheld warrantless searches as incident to arrest including: the taking of photographs, fingerprints, X-rays, the giving of medical examinations, and even forcibly stripping a person for a "close range inspection"[3] of his penis. *Id.* at 767. The court then cites various cases from other courts which have upheld taking strands of hair, cavity searches, etc. *Id.* at n.4.

Under the Minnesota court's "privacy" analysis, then, there appear to be no limits on the search of a person incident to arrest. Hypothetically, if a person were suspected of hiding narcotics, there might be no Fourth Amendment problem to searching his clothing, then strip searching him, then conducting cavity searches, then taking an X-ray of his intestines, then giving him several enemas, and then finally forcibly sedating him with drugs and giving him a nonconsensual colonoscopy, over a period of 14 hours — so long as a court deemed the person had no "reasonable expectation of **privacy**." Unfortunately, such a horrific "search" is not just a hypothetical — it actually occurred.[4]

---

[3] State v. Riley, 303 Minn. 251, 253 (1975).

[4] *See* Eckert v. City of Deming, USDC NM, Docket No. 13-0727, Document #81, p. 2. In this case, there were never any criminal charges filed because the police were unable to find any evidence of a crime. What is also notable in this case is that the police actually obtained a warrant permitting their aggressive search, on the wholly unsuspicious ground that the suspect stood "erect and he kept his legs together," as well as that he had been known to conceal drugs in the past. "David Eckert Appears to Clench His

Under such a **privacy**-based theory it has been decided that DNA can be taken from arrestees. *See* Maryland v. King, 569 U.S. ___, 133 S.Ct. 1958 (2013). Under such a privacy test, it could be decided that bloodletting (or perhaps even colonoscopies) were reasonable searches incident to each and every arrest. And indeed, this Court already has ruled that police may lawfully arrest a person for any minor infraction, even if the maximum penalty does not include jail time. *See* Atwater v. Lago Vista, 532 U.S. 318 (2001). Viewing the Fourth Amendment as only protecting an amorphous "expectation of privacy" has led to its virtual nullification by the Minnesota court.

B. A Person Has Not "Consented" to a Fourth Amendment Violation simply because He Obtained a Driver's License, as Claimed in Birchfield.

The Supreme Court of North Dakota's decision in North Dakota v. Birchfield, 2015 ND 6 (2015), is far from a model of clarity. To be sure, the court's ultimate holding is clear enough — that the state may criminalize a driver's refusal to submit to chemical tests. But the court's reasoning is entirely obtuse.

First, the court cites the Minnesota Court of Appeals for the proposition that no warrant is required for a Fourth Amendment search "when the

---

Buttocks; Cops Order Enemas, Colonoscopy, X-Ray For Non-Existent Drugs" (Nov. 5, 2013) http://www.huffingtonpost.com/2013/11/05/david-eckert-enema-colonoscopy-drugs-traffic-stop_n_4218320.html.

circumstances established a basis for the officer to have alternatively ... secur[ed] and execut[ed] a warrant." *Id.* at *P12 (*citing* State v. Bernard, 844 N.W.2d 41, 42 (Minn. Ct. App. 2014). *See* Birchfield Pet. at 5-6. But the court never says whether it agrees with this holding or adopts it as its own.[5]

Second, the court cites to the opinion of the district court below, which held that since Birchfield refused consent, "'[t]here was no search so there was no Fourth Amendment violation.'" 2015 ND 6 at *P14. *See* Birchfield Pet. at 6. Again, it is entirely unclear whether the court below actually adopted this argument.

Third, finally stating its holding, the court notes that whatever other issues are involved in the case "the 'touchstone of the Fourth Amendment is

---

[5] The warrant requirement is no small matter. This Court has explained that "[w]e are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.... And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative." McDonald v. United States, 335 U.S. 451, 455-56 (1948).

reasonableness,'" and that the search in this case was reasonable. *Id.* at *P17. The court notes that reasonableness is "assessed by balancing the promotion of legitimate governmental interests with the intrusion on an individual's **privacy**." *Id.* (emphasis added). In order to find the search to be reasonable, the Supreme Court of North Dakota simply assumed that laws which condition actions on the giving of so-called "implied consent" are insignificant privacy intrusions:

> A licensed driver has a diminished expectation of privacy with respect to enforcement of drunk-driving laws because he or she is presumed to know the laws governing the operation of a motor vehicle, and the implied consent laws contain safeguards.... [*Id.*]

In sum, statutory implied consent is justified because there is no reasonable expectation of privacy. And there is no privacy interest because there was implied consent. It is no wonder that this Court has stated the reasonable expectation of privacy test "has often been criticized as circular...." Kyllo v. United States, 533 U.S. 27, 34 (2001). This circular, manipulable reasoning that courses through the Supreme Court of North Dakota's opinion demonstrates why this Court in United States v. Jones, 565 U.S. ___, 132 S.Ct. 945 (2012) and Florida v. Jardines, 569 U.S. 1, 133 S.Ct. 1409 (2013) returned the Fourth Amendment to its property roots. As stated in Jardines, a property analysis "keeps easy cases easy." *Id.* at 1417. Privacy, on the other hand, leads to *ad hoc* decisions like the decisions of the

Supreme Courts of Minnesota and North Dakota here under review.

II. UNITED STATES v. JONES AND FLORIDA v. JARDINES REVITALIZED THE FOURTH AMENDMENT'S PROPERTY UNDERPINNINGS.

The decisions of the Minnesota and North Dakota courts under review wholly ignored the property interests protected by the Fourth Amendment.

A. Since Jones and Jardines, the Foremost Interest Protected by the Fourth Amendment Is Property, Not Privacy.

In Jones, a number of these *amici* filed a brief at the petition stage in support of neither party, asking the Court to grant the petition, but not to resolve the case based on the questions presented by the parties, which involved "reasonable expectations of privacy."[6] Rather, they urged the Court to take advantage of the "historic opportunity" to restore the Fourth Amendment to its private property roots. *Id.* at 3. Indeed, when granting the petition, the Court added

---

[6] Brief *Amicus Curiae* of Gun Owners of America, Inc., *et. al.* in Support of Neither Party, in United States v. Jones (No. 10-1259) (May 16, 2011) http://www.lawandfreedom.com/site/constitutional/USvJones_amicus.pdf. *See also* Brief *Amicus Curiae* of Gun Owners of America, Inc., *et. al.* in Support of Respondent, in United States v. Jones (No. 10-1259) (Oct. 3, 2011) http://www.lawandfreedom.com/site/constitutional/USvJones_Amicus_Merits.pdf.

the property issue to the questions to be addressed by the parties.[7]

In its decision in Jones, the Court held that "the Katz reasonable-expectation-of-privacy test [was] *added to*, not *substituted for*, the common-law trespassory test." *Id.* at 952. Returning to the Fourth Amendment's property rights "baseline,"[8] the Court found it unnecessary to proceed to any examination of privacy interests, finding instead that the warrantless installation of a GPS tracking device on a car was a search because the government trespassed upon property. *Id.* at 954.[9]

Confusingly, Jones expressly left open the issue whether the trespassory "search" of Jones' property could nevertheless somehow constitute a "reasonable" search. *Id.* at 954. Jones did not explain how the government could conduct a "reasonable" trespass. On the contrary, based on property principles, a search or seizure is *per se* unreasonable if the government violates a person's property rights without first demonstrating that it has a superior property interest, since otherwise, the government acts as no more than

---

[7] http://www.supremecourt.gov/qp/10-01259qp.pdf.

[8] Jardines, 133 S. Ct. at 1414.

[9] For a discussion of this Court's approach in Jones, *see* H. Titus & W. Olson, "U.S. v. Jones: Reviving the Property Foundation of the Fourth Amendment," CASE WESTERN RESERVE SCHOOL OF LAW JOURNAL OF LAW, TECHNOLOGY & THE INTERNET, vol. 3, no. 2 (Jan. 2013) http://lawandfreedom.com/site/publications/Case%20Western%20Law%20Review.pdf.

a common trespasser. Providentially, however, that was precisely the conclusion reached in Jardines, which came before the Court the very next year.

In Jardines, the police trespassed onto the front porch of a house in order to have a drug sniffing dog conduct a search of the exterior of the home. The Court initially stated that it would confine itself to the limited question, as it had done in Jones, "of whether the officers' behavior **was a search**...." *Id.* at 1414 (emphasis added). However, the Court expanded its inquiry, recognizing that "the question before the court is precisely *whether* the officer's conduct **was an objectively reasonable search**." *Id.* at 1416-17 (emphasis added). That question of reasonableness, the Court noted, "depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered." *Id.* at 1417. To determine whether the search was reasonable, the Court did not look at reasonable expectations of privacy. *Id.* Instead, the Court examined property principles, not only to determine that (i) a **search had occurred**, but also to decide (ii) **the search was unreasonable because it violated Jardines' property rights**. *Id.* at 1415-1417.

The Court began by citing the seminal English property case of Entick v. Carrington, 95 Eng. Rep. 807, 817 (K.B. 1765), for the proposition that "[o]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave." *See* Jardines at 1415. The Court then looked at the property concept of "license," and determined

"from the habits of the country" that, in the absence of any no trespassing sign, a person generally may traverse another's property in order to knock on his front door. However, the Court noted, that is all the police may do, because it is "'no more than any private citizen might do.'" *Id.* at 1416. However, the Court noted, "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*." *Id.*

Conspicuously and completely absent from this analysis in Jardines is any discussion of privacy interests — such as how serious an intrusion a drug dog sniff is to a homeowner, or how compelling an interest the government has in ferreting out marijuana grow houses. It was enough that there was a trespass — a violation of Jardines' property interests.

B. This Court's Recent Cases Have Not Consistently Applied Property Principles.

Since Jones and Jardines were decided, this Court has handed down opinions in numerous Fourth Amendment cases, involving persons,[10] houses, papers,[11] and effects.[12] Perhaps because litigants have not recognized the sea change that its recent decisions

---

[10] *See* Heien v. North Carolina, 574 U.S. ___, 135 S.Ct. 530 (2014).

[11] *See* Riley v. California, 573 U.S. ___, 134 S.Ct. 2473 (2014); City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443 (2015).

[12] *See* Rodriguez v. U.S., 575 U.S. ___, 135 S.Ct. 1609 (2015).

have made in Fourth Amendment jurisprudence, the Court has failed to follow its own lead from Jones and Jardines, instead deciding case after case based on subjective notions of privacy, without consideration as to whether the Fourth Amendment's property rights baseline applies.

In Missouri v. McNeely, 569 U.S. ___, 133 S.Ct. 1552 (2013), for example, the Court considered whether to create a *per se* exception to the warrant requirement for chemical tests, because of the transient nature of alcohol in the human body. Without even pausing to consider whether a person has a **property** right in his own body or blood, the Court instead asserted that the case "implicates an individual's 'most personal and deep-rooted expectations of **privacy**'" — noting the "motorist's **privacy** interest in preventing an agent of the government from piercing his skin." *Id.* at 1559, 1565 (emphasis added). Not even the dissenting justices mentioned property principles.

In Maryland v. King, the Court justified the Orwellian process of the state forcibly taking a DNA sample from persons after arrest. Although one's DNA is clearly the essence of one's property in his "person" (a virtual genetic blueprint of his being), the Court again failed to consider whether the state had a legitimate property interest in capturing and recording in a state database a person's genetic makeup. Unfortunately, the Court again reverted to its privacy analysis, stating that "we balance the privacy-related and law enforcement-related concerns...." *Id.*, 568 U.S. at 1970.

Although Jones rejected the idea that Fourth Amendment concerns were not implicated because the search was merely a "technical trespass" (*id.* at 958), the Court in King using a privacy analysis reached the opposite conclusion — that "the intrusion of a cheek swab to obtain a DNA sample is a minimal one," to be overridden by "legitimate police concerns" of verifying the identity of an arrested person. *Id.* at 1975, 1977. Once again, not even a dissenting Justice raised the property issue.

Then, just last year, without the benefit of briefing or argument, the Court issued a *per curiam* opinion in Grady v. North Carolina, 575 U.S. ___, 135 S.Ct. 1368 (2015). There, the Court considered the issue of placing a GPS tracking device on a person's body (rather than on his car). Just as in Jones, the Court held that the government "conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." *Id.* at 1370. But the Court then failed to do what it had done in Jardines, applying property principles to determine if the search was reasonable. Instead, the Court appears to have decided that a trespassory **property** violation somehow could be cured by consideration of "**privacy expectations**" — by examining "the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes...." *Id.* at 1371 (emphasis added). Whereas Jones instructed to look first and foremost at property principles, Grady appears to permit privacy considerations in through the back door as a means for the government to cure a property rights violation. This result appears to be

exactly what Jardines assured would not occur: that, while privacy may add to the property rights "baseline," it most certainly "does not subtract anything." Jardines at 1414.

In Jardines, the Court noted that "[o]ne virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy." *See* Jardines at 1417. By failing to reaffirm the property principles set out in Jones and Jardines, following Grady would make an "easy case[]" difficult again.

III. PROPERTY PRINCIPLES APPLY TO SEARCHES AND SEIZURES OF BLOOD AND BREATH.

A. Americans Have Property Interests in Their Persons, including Their Blood and Breath.

As Justice Scalia has noted, the Fourth Amendment first and foremost protects "persons." Maryland v. King, 133 S.Ct. at 1982 (Scalia, J., dissenting). This was far from a new concept, as John Locke noted that the property of one's body is the root of all other property rights: "being the Master of himself, and the Proprietor of his own Person, and the Actions ... of it," a man has "in himself the great Foundation of Property...." J. Locke, Second Treatise of Government, §44 (facsimile ed.), reprinted in J. Locke, Two Treatises of Government, pp. 297-98 (P. Laslett, ed., Cambridge Univ. Press: 2002). Locke wrote that "every Man has a Property in his own Person.... The

Labor of his Body and the Work of his Hands ... are properly his." *Id.* at §27, p. 287.

This Court, as well, has implicitly recognized[13] that a person's body constitutes his property. Indeed, Jones recognized that "[t]he text of the Fourth Amendment ... 'persons, houses, papers, and effects' ... reflects its close connection to property." *Id.* at 949. Jones went on to state that "[t]he Fourth Amendment protects against **trespassory searches**" of "'**persons**, houses, papers, and effects....'" *Id.* at 953 (emphasis added). In recognizing that a trespass can be committed against one's "person," the Jones Court recognized that one has a property interest in his own body. *See* Grady, 135 S.Ct. at 1370 ("In light of [Jones and Jardines], it follows that a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements.").[14]

---

[13] One would be hard pressed to find an explicit recent holding from this Court that a person has a property interest in his own body. This is, in part, because of the Court's five-decade odyssey into the atextual, judicially-invented notion of "privacy rights" in a variety of contexts.

[14] Admittedly, there have been cases holding that biological material (organs, blood, DNA, etc.) cease to be a person's property once they have been **voluntarily** removed from his body. *See, e.g.,* Moore v. Regents of the University of California, 793 P.2d 479 (Cal. 1990).

B. In Order to Interfere with One's Property in His Person, the Government Must First Prove It Has a Superior Property Interest.

A person's private property rights protect him not only against trespass by his fellow man, but also — and increasingly more importantly — against trespass by the government. Only when the government demonstrates that it has a superior property interest may it search or seize one's property — including his person. This Court embraced that principle in Boyd v. United States, 116 U.S. 616, 623 (1886). When the government intrudes upon a person's property (including his person) without first demonstrating such a superior property interest, it is nothing more than a trespasser. Judge Cardozo described the "basic principle" to be "[s]earch of the person is unlawful when the seizure of the body is a **trespass**.... Search of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its **physical dominion**." People v. Chiagles, 237 N.Y. 193, 197 (1923) (emphasis added).

No doubt some have claimed, as did the Supreme Court of Minnesota,[15] that this limited authority for a search "**of** the person" justifies an unlimited search **in** the person. But that view is insupportable in reason as well as law. At common law, the authority to arrest was accompanied by a very limited power to separate the person being arrested from various objects that

---

[15] *See* Minnesota v. Bernard, 859 N.W.2d 762, 769-770 (Minn. 2015).

may be on his person. The purpose of this "search incident to arrest" is to effectuate the arrest, and "merely involve[s] a search of [the] person [not] a separate search of effects found on his person." United States v. Robinson, 414 U.S. 218, 255 (1973) (Marshall, J., dissenting). Thus, "[a]n officer, having made an arrest, is required to keep the prisoner **safely** until lawfully discharged; and, if the latter is **violent**, or if for any other reason an attempt at escape is apprehended, he may search his person to ascertain whether he has **implements to aid his escape**, and may take them away." J.P. Bishop, Criminal Procedure at § 210, Little, Brown & Co., 1880 (emphasis added). *See* Chimel v. California, 395 U.S. 752 (1969). In no way could the government's limited interest in searching a person's body for weapons and implements of escape extend to taking a person's blood or his breath. *See* Bernard Brief at 15-16.

When the government has the authority to make a lawful arrest, the police and jailers are vested with a property interest over that person's body superior to the person's right to move freely and uninterrupted. However, that interest is limited to keeping the person safely detained while under arrest or imprisoned. The government does not own the entire "bundle of sticks" of property interests in a person's body simply because he has been arrested or imprisoned. The property interest the government possesses is limited to effectuating the arrest and detention safely — it does not extend to searching cell phones or searching blood and breath for evidence.

C. North Dakota's Claim of Implied Consent Conflicts with the Fourth Amendment Property Principle.

As the Petitioner in Birchfield points out, the State of North Dakota would have this Court rule that motorists who travel on the State's highways may be searched as if they had voluntarily and specifically given the State permission to conduct a breath, blood, or urine test for alcohol content. *See* Birchfield Brief at 9-10, 20-29. In addition to the reasons set forth by Petitioner Birchfield, the State's theory of consent should be rejected because it constitutes a direct attack on Petitioner's property interests that are expressly protected by the Fourth Amendment.

As noted above, the Fourth Amendment protects foremost the people's property interest in their persons. *See* Sec. III.A, *supra*. As Petitioner has amply demonstrated, we live in a motorized society wherein "the ability to drive is a practical necessity for most adults." Indeed, "the majority of persons in the United States today are entirely dependent on their ability to drive in order to commute to work, attend school, buy groceries, or visit a doctor." Birchfield Br. at 22-23. This dependency is "especially acute" in the wide-open spaces of North Dakota, where the distances are long and the alternatives to private transportation are few. *Id.* at 23.

Access to the public highways by means of a private automobile is, therefore, essential, enhancing one's freedom of movement and multiplying one's freedom of communication, both of which are necessities if a

person is to maximize the economic productivity of one's person. As is true of the cell phone today, automobiles have been "a pervasive and insistent part of daily life" such that, as this Court has recently observed, "the proverbial visitor from Mars might conclude they were an important feature of the human anatomy." Riley at 2484.

Indeed, if John Locke were alive in America today, he would have recognized that ownership of a car is not just an object to possess, but a central aspect of one "being the Master of himself, and the Proprietor of his own Person, and the Actions ... of it." Locke's Second Treatise, §44 at 298. A North Dakota driver does not suffer "'a diminished expectation of privacy with respect to enforcement of drunk driving laws'" — as the State has contended — leading to the loss of rights protected by the Fourth Amendment (Birchfield Br. at 24). Rather, the State's drivers should be understood to have an enhanced property interest in their private cars as "conveniences of life ... perfectly his own, ... not belong[ing] in common to others." Locke at §44, p. 299.

To be sure, North Dakota has also contended that consent may be implied from the fact that automobile use has been closely regulated, requiring licensure, vehicle inspections, and the like, triggering the "administrative inspection doctrine" of warrantless searches and seizures. *See* Birchfield Br. at 26-27. In addition to the Petitioner's objections that the doctrine applies only to a very limited sector of the nation's economy (*id.*), it must be remembered that the administrative inspection doctrine itself is inapplicable, resting upon an alleged "diminution of

privacy expectations" that would justify even "random searches of the stock and premises of the business." *See id.* at 26.

Just last term, this Court rejected an invitation to extend this administrative exception to hotel registries, based on the argument that the hoteliers have a reduced privacy interest in protecting the "sensitive information" of their guests. *See* City of Los Angeles v. Patel, 135 S.Ct. 2443, 2454-57 (2015). Rather, the Court deferred to the business interests of each hotel to be free from discretionary government searches without "precompliance review" by a disinterested magistrate, provided by the warrant clause of the Fourth Amendment. *Id.* at 2456-57. In so ruling, the Patel Court protected hotel owners from "searches ... used as a pretext to harass hotel operators and their guests," thereby leaving it up to the hotel operator — not the police — whether to permit government inspection of his guest registry.[16] *Id.* at 2453.

Likewise here, the operator of a motor vehicle should be free to make the decision to undergo a blood, breath, or urine test, without risking criminal prosecution for refusing to submit to such a test.

---

[16] *See generally* Brief *Amicus Curiae* of Gun Owners of America, *et. al.* in City of Los Angeles v. Patel (No. 13-1175) (Jan. 30, 2015) http://www.lawandfreedom.com/site/firearms/Patel%20GOA%20Amicus%20Brief.pdf.

D. North Dakota's Reasonableness Claim Conflicts with the Fourth Amendment Property Principle.

After toying with a number of rationales, the North Dakota Supreme Court finally concluded that the state statute criminalizing refusals to submit to a breath, blood, or urine test for alcohol content did not violate the Fourth Amendment because the statute is "reasonable." *See discussion at* I.B. *supra*. In explanation, the court reasoned that "[c]riminally penalizing test refusal 'reduces the likelihood that drunk drivers will avoid a criminal penalty' by refusing to take a test and, therefore, it is 'reasonable because it is an efficient tool in discouraging drunk driving.'" *See* Birchfield Br. at 7. In order to sustain this argument, the North Dakota court dispensed with the Fourth Amendment's warrant requirement on the ground that "impaired driving is a serious societal problem." *See id*. at 9.

As Petitioner points out in his brief, however, the warrant requirement is not to be "'weighed' against the claims of police efficiency." *Id*. at 20. Indeed, the Fourth Amendment's "reasonableness" inquiry is not a general one, as if the question of the constitutionality of a "search and seizure" were akin to the "general reasonableness" issue submitted to a common law jury in an ordinary automobile accident case. Rather, the Fourth Amendment reasonableness test is tethered to its text, the foremost pertinent part of which reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." This text

prioritizes a person's legal interest in the security of his "person, house, paper or effect," prohibiting a person's property right to be overridden by a generalized need for safety upon the public highways. The Fourth Amendment warrant requirement is satisfied only by particularity in the place to be searched or persons or things to be seized. Otherwise, why would the Fourth Amendment's warrant clause require before issuance both "probable cause supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized"? Any other interpretation would open the door to the "condemned general warrant" which triggered the adoption and ratification of the Fourth Amendment. *See* Sources of Our Liberties 304-05, 427 (R. Perry & J. Cooper, eds., rev. ed., ABA Foundation: 1978).

According to the North Dakota court, the only individual interest protected by the Fourth Amendment is that of privacy. Even that expectancy is "diminished" "with respect to enforcement of drunk driving laws" in that such laws are based upon "implied consent" of drivers who use the public highways. Birchfield Br. at 24-25. But as noted above, since Jones and Jardines, the interests constitutionally protected by the Fourth Amendment are not foremost privacy expectations, but property rights. As Petitioner Birchfield described those rights here, "driving is not a voluntary commercial enterprise, but a necessary aspect of daily living" (Birchfield Br. at 26):

> Practically everywhere in the United States, and especially in heavily rural States like North Dakota, driving a car is necessary to get to town, commute to work, worship, see a doctor, or visit with friends and family. [*Id*. at 27.]

The modern notion that driving is a "privilege" and not a "right" is a legal fiction used to justify driver's licenses and vehicle registration, regulation, and inspection. But the scope of that legal fiction must not be so stretched as to swallow and destroy the Fourth Amendment.

Without the ability to drive a car without sacrificing one's liberties, productive commerce outside of urban areas served by main transit would cease. As Locke observed in his Second Treatise, what good is it for man to engage in productive labor to acquire:

> Ten Thousand, or a Hundred Thousand acres of excellent Land, ready cultivated, land well stocked too with Cattle in the middle of the inland parts of *America*, where he had no hopes of Commerce with other Parts of the World, to draw *Money* to him by the Sale of the Product? It would not be worth the inclosing, and we should see him give up again to the wild Common of Nature, whatever was more than would supply the Conveniences of Life to be had there for him and his family. [Locke § 48 at 301.]

Weighed against one's property rights in one's "person, houses, papers, and effects," the North Dakota statute

that criminalizes a driver's refusal to submit to a breath, blood, or urine test is unreasonable *per se*, unworthy of a nation that was founded on the principle that its government is dedicated to secure the God-given rights of life, liberty, and the pursuit of happiness.

CONCLUSION

For the foregoing reasons, the decisions of the Supreme Courts of Minnesota and North Dakota should be reversed.

Respectfully submitted,

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D Street, Ste. 2
Ramona, CA 92065
(760) 788-6624
Attorney for Amicus Curiae U.S. Justice Foundation

**Counsel of Record*

ROBERT J. OLSON
HERBERT W. TITUS*
WILLIAM J. OLSON
JOHN S. MILES
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste.4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorneys for Amici Curiae

February 11, 2016