

Alderson Reporting Company

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3 STEVE MICHAEL BEYLUND, :

4 Petitioner, : No. 14-1507

5 v. :

6 GRANT LEVI, DIRECTOR, :

7 NORTH DAKOTA DEPARTMENT OF :

8 TRANSPORTATION, :

9 Respondent. :

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11 Washington, D.C.

12 Wednesday, April 20, 2016

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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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21  
22  
23  
24  
25

1	C O N T E N T S	
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		

1 P R O C E E D I N G S

2 (10:15 a.m.)

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

6 Mr. Rothfeld.

7 ORAL ARGUMENT OF CHARLES A. ROTHFELD

8 ON BEHALF OF THE PETITIONERS

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

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

18 The States concede that these tests are  
19 searches under the meaning of the Fourth Amendment. The  
20 United States and North Dakota appear to recognize that  
21 no exception under the recognized exceptions of the law  
22 requirement applies. Nevertheless, a person is  
23 obligated to take this warrantless -- to submit to this  
24 warrantless search, and is committing a criminal offense  
25 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.)

23  
24  
25

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

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

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

64:16,17 <b>critical</b> 65:23 <b>critically</b> 60:18 69:21 70:12 <b>crossed</b> 65:24 <b>crossing</b> 14:22 <b>crucial</b> 14:10 <b>curiae</b> 3:4 4:14 60:8 <b>curious</b> 28:4 <b>currently</b> 55:3 <b>cut</b> 54:16 73:4	10:17 <b>defendants</b> 8:24 13:2 14:16 71:5 <b>definitely</b> 63:8 <b>degree</b> 7:24 31:12 <b>degrees</b> 73:14 <b>delay</b> 49:8,9 51:24,25 52:1 62:16 <b>demonstrate</b> 72:6 <b>demonstrated</b> 71:4 <b>department</b> 2:7 3:3 52:2 <b>depends</b> 12:2 14:2 <b>Deputy</b> 3:2 <b>described</b> 8:25 30:13 <b>designed</b> 30:22 31:8 <b>detained</b> 63:20 <b>determine</b> 5:16 14:7 <b>die</b> 19:18 <b>difference</b> 6:16 15:19 21:10,22 28:25 31:12,20 38:2 49:5,10 49:12 58:14 69:19 <b>differences</b> 20:20 36:22 73:10 <b>different</b> 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 <b>differently</b> 17:7	57:2,7,8 65:9 73:16 <b>difficult</b> 13:6 39:24 <b>dioxide</b> 21:14 24:25 <b>direct</b> 7:14 14:12,13 <b>direction</b> 54:15 <b>directly</b> 7:20 8:6 41:1 42:18 <b>DIRECTOR</b> 2:6 <b>disagree</b> 7:7 29:15 45:20 56:24 <b>disappeared</b> 21:17 <b>discretion</b> 18:6 20:8 <b>discussed</b> 64:25 <b>discussing</b> 20:21 <b>discussion</b> 70:22 71:23 <b>disfavor</b> 43:15 <b>dispense</b> 40:10 <b>dispute</b> 6:7 41:7 <b>disregard</b> 19:5 <b>dissent</b> 56:2 <b>dissenting</b> 23:5 <b>dissipate</b> 34:8 34:22 62:3,5 <b>dissipated</b> 24:25 35:14 <b>dissipation</b> 31:4 31:9 34:14 39:17 62:15 <b>distinction</b> 6:18 66:15 <b>distinctions</b> 15:22 <b>District</b> 61:18 <b>DNA</b> 64:18 <b>doctor</b> 50:24 <b>doctrine</b> 16:14 23:21 24:16 34:16 35:1 <b>doing</b> 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 <b>doubt</b> 32:12 <b>doubtful</b> 36:22 <b>dozens</b> 58:1 <b>drank</b> 26:2 <b>drastic</b> 59:1 <b>draw</b> 56:10 69:11 <b>draws</b> 40:18,23 51:20 61:6 <b>drinking</b> 37:5 38:15 <b>drive</b> 8:14 9:10 10:21 11:8,17 11:24 14:21,23 69:5 71:1 <b>driven</b> 69:10 <b>driver</b> 37:19 <b>driver's</b> 6:2 9:2 <b>drivers</b> 11:1 55:11 64:1 72:19 <b>drives</b> 72:18,20 <b>driving</b> 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 <b>drug</b> 70:13 <b>drugs</b> 69:22 <b>drunk</b> 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 <b>DUI</b> 72:20 <b>duty</b> 41:20 42:6 42:8 53:2,4 <b>DWI</b> 58:16,18 58:20,22 59:8
<b>D</b>				<b>E</b>
<b>D</b> 5:1 <b>D.C</b> 2:11,18 3:3 61:7,21 <b>daily</b> 11:10 <b>Dakota</b> 1:6 2:7 2:22 5:5,14,20 9:11 10:20 11:9 12:6 22:23 27:18 36:3 41:16,16 42:4,6,14,15 43:16 46:1 50:8 51:14 52:3 53:1,3,7,9 70:25 <b>Dakota's</b> 43:19 <b>dangerous</b> 66:4 <b>DANNY</b> 1:3 <b>days</b> 6:14 <b>dealing</b> 34:21 <b>deaths</b> 13:23 <b>decide</b> 18:7 20:9 48:25 62:22 63:3 <b>decided</b> 26:25 55:24 72:9 <b>deciding</b> 24:7,14 <b>decisions</b> 48:2 <b>deep</b> 26:11 29:6 32:1 <b>deep-lung</b> 25:24 <b>defendant</b> 13:8 <b>defendant's</b>				<b>E</b> 4:1 5:1,1 <b>easily</b> 46:7 <b>effect</b> 7:17 41:3 <b>effective</b> 72:18 72:21 <b>effectively</b> 46:1 72:14 <b>efficient</b> 72:4 <b>effort</b> 35:6 <b>Eight</b> 61:25 <b>either</b> 6:3 23:10 29:5 50:24 <b>elapses</b> 21:18 <b>electronic</b> 62:24 <b>element</b> 50:1 <b>employees</b> 64:16 71:16,20 <b>employment</b> 64:14 <b>encapsulated</b> 21:22 <b>endorsed</b> 41:9 41:11 <b>enforce</b> 36:9 46:2 65:15 <b>enforcement</b> 18:7 20:9,14 22:19 33:19 41:12 45:11 73:3 <b>enhance</b> 58:22 <b>enhanceability</b> 58:13,15,18 <b>enter</b> 15:12 <b>entering</b> 15:13 16:6,19 <b>entire</b> 8:4 19:22 20:6 <b>entirely</b> 33:9

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

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

<b>jurisdiction</b> 53:6 63:13	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	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	64:23 73:3 <b>laws</b> 5:14 27:18 46:2 58:18 <b>leans</b> 54:14 <b>leave</b> 64:10 <b>leaves</b> 63:1 <b>leeway</b> 22:11 <b>left</b> 39:21 40:4 40:14 58:21 <b>legal</b> 62:2 70:21 70:24 <b>legitimate</b> 44:18 <b>lesser</b> 63:25 <b>let's</b> 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 <b>level</b> 23:25,25 24:5,14 34:22 35:8 39:15 59:11	<b>located</b> 53:6 <b>Lockner</b> 65:4 <b>long</b> 42:11,13 47:15 48:25 49:24 61:10,10 61:23,24 62:3 62:6,19,20 <b>longer</b> 35:7 58:21 <b>look</b> 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 <b>looked</b> 72:1 <b>looking</b> 8:10,18 18:5 25:13 26:5,6 <b>looks</b> 25:4 65:8 65:9 <b>loophole</b> 39:23 <b>lose</b> 16:9,12 21:19 59:22 70:23 71:2 <b>losing</b> 58:11,12 <b>lost</b> 63:12 <b>lot</b> 13:24 53:1 <b>lots</b> 21:23
<b>justice</b> 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	<b>Justice's</b> 39:9 56:5,7 <b>Justices</b> 23:6 <b>justifies</b> 34:24 44:25	<b>key</b> 11:6 <b>kind</b> 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 <b>knew</b> 54:5 <b>know</b> 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 <b>knowledge</b> 71:4 <b>known</b> 42:7 <b>knows</b> 60:21	<b>LEVI</b> 2:6 <b>license</b> 6:3 8:14 9:3 15:2,5 36:10,16 40:25 41:2,5 45:14 45:21 <b>life</b> 11:11 <b>light</b> 50:19 <b>limit</b> 62:2 <b>limitations</b> 32:17 71:19 <b>line</b> 6:22 7:9 8:4 10:12 17:19 18:3 20:6 22:6 32:9,25 33:4 70:11 <b>listed</b> 61:10 62:24 <b>listen</b> 55:11 <b>literally</b> 30:23 <b>little</b> 21:11,12 22:2 25:3 42:16 68:24 <b>lives</b> 18:21 21:24	<b>Mackey</b> 48:10 65:25 <b>magistrate</b> 40:6 42:19,25 54:20 68:2 <b>magistrate's</b> 70:5 <b>magistrates</b> 41:20 42:6 61:7 72:15 <b>magnetometer</b> 15:15 <b>major</b> 64:5 <b>majority</b> 72:6 <b>making</b> 14:5,10
	<b>K</b>			<b>M</b>
	<b>Kagan</b> 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 <b>Kagan's</b> 33:14 <b>KATHRYN</b> 2:22 4:10 51:6 <b>Keena</b> 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 <b>keep</b> 21:15 <b>Kennedy</b> 6:1,9 7:3 9:1,13,19 10:3,19 11:1	<b>L</b>		
		<b>lack</b> 43:8 <b>large</b> 43:3,8 <b>larger</b> 42:16 <b>Laughter</b> 43:6 48:18 59:24 60:4 65:21 <b>law</b> 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>34:4 48:12  <b>manage</b> 43:16  <b>manipulation</b>  7:25  <b>manner</b> 49:21  67:14  <b>manpower</b> 43:9  <b>map</b> 68:25  <b>Maryland</b> 61:5  61:12 62:18  <b>matter</b> 2:14  25:19 54:9  61:16 64:3,12  73:22  <b>McCARTHY</b>  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  <b>McNeely</b> 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  <b>McNeely's</b> 40:16  <b>mean</b> 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  <b>meaning</b> 5:19  12:12,13 22:16  27:13  <b>means</b> 17:19  24:1  <b>meant</b> 11:21  <b>measurable</b>  17:16  <b>measure</b> 28:18  <b>measured</b> 29:13  <b>mechanism</b>  41:12 49:22  72:10  <b>mechanisms</b>  72:8  <b>medical</b> 44:16  50:24  <b>member</b> 19:6  <b>mentioned</b> 34:8  <b>merry</b> 26:21  <b>MICHAEL</b> 2:3  <b>miles</b> 51:13 53:3  <b>mind</b> 54:9 56:16  <b>minimal</b> 70:2  <b>minimum</b> 69:16  <b>Minn</b> 2:23  <b>Minnesota</b> 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  <b>Minnesota's</b>  55:3 56:25  59:16  <b>minute</b> 36:18  <b>minutes</b> 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  <b>missing</b> 54:6  <b>mistake</b> 60:17  62:22 63:2  <b>misunderstood</b>  18:14  <b>mobiles</b> 67:17  67:18  <b>modern</b> 47:10  <b>Montana</b> 42:13  <b>morning</b> 5:4  41:21 60:12  <b>motorist</b> 14:3  63:19  <b>mouth</b> 25:20  26:10 28:17  29:1,6  <b>moved</b> 27:24</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p><b>N</b> 4:1,1 5:1  <b>narrower</b> 67:4  <b>nation's</b> 19:3  <b>National</b> 71:25  <b>natural</b> 64:1  <b>nature</b> 31:21  71:23  <b>nay</b> 59:2,3  <b>nearest</b> 53:8,8  <b>nearly</b> 49:21  <b>necessarily</b>  38:22 45:11  56:24  <b>necessary</b> 23:11  23:14 47:14  59:16  <b>necessity</b> 27:14  47:25  <b>need</b> 19:11,19  34:3 45:11  69:14,17 70:13  <b>needle</b> 40:12  <b>needs</b> 18:9,16  33:20 46:24  47:1  <b>neutral</b> 68:2  <b>never</b> 55:11</p>	<p>66:21 73:2  <b>Nevertheless</b>  5:22  <b>Neville</b> 48:10  65:25 69:8,9  <b>new</b> 17:23 34:4  41:17 61:18  <b>NHTSA</b> 60:21  72:11  <b>night</b> 41:18  <b>nine</b> 60:25  <b>Nobody's</b> 70:4  <b>nonconsenting</b>  69:11  <b>North</b> 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  <b>Nos</b> 2:21 4:8  35:25  <b>noted</b> 73:10  <b>notion</b> 23:14,15  <b>novelty</b> 33:25  <b>number</b> 15:4,22  57:15,16 58:5  62:1,10  <b>nurse</b> 50:25</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p><b>O</b> 4:1 5:1  <b>o'clock</b> 41:21  <b>object</b> 29:14  31:25  <b>objection</b> 40:18  44:12 47:5  <b>obligated</b> 5:15  5:23  <b>obligation</b> 10:13  13:7</p>	<p><b>obstruct</b> 44:21  <b>obstructing</b>  44:23  <b>obstruction</b>  58:11,21 59:5  59:6,11  <b>obtain</b> 30:22  35:17  <b>obviously</b> 6:16  13:23 29:17  <b>occur</b> 41:19  <b>odd</b> 67:24 68:13  <b>odds</b> 60:15  <b>offense</b> 5:13,24  <b>offer</b> 15:24  30:10 55:4  57:6  <b>offered</b> 71:7,15  <b>office</b> 64:10,11  65:20 66:4  <b>officer</b> 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  <b>officers</b> 72:14,19  <b>official</b> 64:12  <b>oftentimes</b> 42:22  <b>oil</b> 21:3  <b>okay</b> 12:19 22:5  28:4 48:22,23  54:3 56:20  57:22 59:18  <b>on-site</b> 38:23  50:22  <b>once</b> 26:25 55:4  63:11 73:2  <b>one-year</b> 64:10  <b>ones</b> 24:18  <b>operate</b> 9:10  15:6  <b>operating</b> 15:8  15:10</p>
--	---	--	---	---

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

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

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

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

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

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