No. 14-1470

In the Supreme Court of the United States

WILLIAM ROBERT BERNARD, JR.,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

On Writ of Certiorari to The Supreme Court of Minnesota

BRIEF FOR PETITIONER

JEFFREY S. SHERIDAN
Sheridan & Dulas, P.A.
320 Eagandale Center
1380 Corporate Center Curve
Eagan, MN 55121
(651) 686-8800

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

QUESTION PRESENTED

Minnesota law makes it a criminal offense for a person who has been arrested for driving while impaired to refuse to submit to a chemical test of the person's blood, breath, or urine to detect the presence of alcohol. Although the State acknowledges that such tests do not serve the purposes of officer safety or evidence preservation, a divided Minnesota Supreme Court held that a person may be compelled to submit to a warrantless breath test as a "search incident to arrest." From that starting point, the court held that the State may make refusal to submit to such a test a criminal offense. The question presented is:

Whether, in the absence of a warrant, a State may make it a crime for a driver to refuse to take a chemical test to detect the presence of alcohol in the driver's blood.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Statutes

Statutes—continued

Statutes—continued

Miscellaneous Authorities

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Minnesota Supreme Court (*Bernard* Pet. App. 1a-34a) is reported at 859 N.W.2d 762 (Minn. 2015). The decision of the Minnesota Court of Appeals (Pet. App. 35a-46a) is reported at 844 N.W.2d 41 (Minn. App. 2014). The decision of the Minnesota District Court (Pet. App. 47a-61a) is unreported.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on February 11, 2015. That court denied petitioner's motion for rehearing on March 16, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause * * *.

The Minnesota Statutes, M.S.A. § 169A.20, subd. 2, provide in relevant part:

> It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license).

M.S.A. § 169A.24 provides in relevant part:

> **Subdivision 1. Degree described.** A person who violates section 169A.20 (driving while impaired) is guilty of first-degree driving while impaired if the person:
>
> (1) commits the violation within ten years of the first of three or more qualified prior impaired driving incidents;
>
> * * *
>
> **Subd. 2. Criminal penalty.** A person who commits first-degree driving while impaired is guilty of a felony and may be sentenced to imprisonment for not more than seven years, or to payment of a fine of not more than $14,000, or both. The person is subject to the mandatory penalties described in section 169A.276 (mandatory penalties; felony violations).

M.S.A. § 169A.25 provides in relevant part:

> **Subdivision 1.**
>
> * * *
>
> (b) A person who violates section 169A.20, subdivision 2 (refusal to submit to chemical test crime), is guilty of second-degree driving while impaired if one aggravating factor was present when the violation was committed.
>
> **Subd. 2. Criminal penalty.** Second-degree driving while impaired is a gross

> misdemeanor.[1] The mandatory penalties described in section 169A.275 * * * may be applicable.

M.S.A. § 169A.26 (2014) provides in relevant part:

> **Subdivision 1.** * * * (b) A person who violates section 169A.20, subdivision 2 (refusal to submit to chemical test crime), is guilty of third-degree driving while impaired.
>
> **Subd. 2. Criminal penalty.** Third-degree driving while impaired is a gross misdemeanor. The mandatory penalties described in section 169A.275 * * * may be applicable.

M.S.A. § 169A.51, subd. 1 (2014) provides in relevant part:

> Any person who drives, operates, or is in physical control of a motor vehicle within this state or on any boundary water of this state consents, subject to the provisions of sections 169A.50 to 169A.53 (implied consent law), and section 169A.20 (driving while impaired), to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol, a controlled substance or its metabolite, or a hazardous substance. The test must be administered at the direction of a peace officer.

---

[1] "'Gross misdemeanor' means a crime for which a person may be sentenced to imprisonment for not more than one year, or to payment of a fine of not more than $3,000, or both." M.S.A. § 169A.03, subd. 8.

M.S.A. § 169A.275, subd. 1(a) provides, in relevant part:

> (a) The court shall sentence a person who is convicted of a violation of section 169A.20 (driving while impaired) within ten years of a qualified prior impaired driving incident to either:
>
> (1) a minimum of 30 days of incarceration, at least 48 hours of which must be served in a local correctional facility; or
>
> (2) eight hours of community work service for each day less than 30 days that the person is ordered to serve in a local correctional facility.

M.S.A. § 169A.276, subd. 1(a) provides:

> The court shall sentence a person who is convicted of a violation of section 169A.20 (driving while impaired) under the circumstances described in section 169A.24 (first-degree driving while impaired) to imprisonment for not less than three years. In addition, the court may order the person to pay a fine of not more than $14,000.

STATEMENT

Minnesota, like North Dakota and eleven other States, makes it a crime for anyone arrested for driving while impaired to refuse to submit to a warrantless test of the driver's breath, blood, or urine to detect the presence of alcohol. This case is one of three currently before the Court that challenge the constitutionality of such test-refusal statutes.

In *Birchfield* v. *North Dakota*, No. 14-1468 (cert. granted Dec. 11, 2015), and *Beylund* v. *Levi*, No. 14-1507 (cert. granted Dec. 11, 2015), the North Dakota Supreme Court upheld that State's laws on the ground that such test requirements are per se reasonable or that motorists may be deemed to have consented to the administration of warrantless tests. In this case, the Minnesota Supreme Court upheld its State's compelled-consent law on the very different ground that compelled application of a breath test—a procedure that requires the insertion of a tube into the driver's mouth to obtain "deep-lung air"—is permissible as a routine search incident to arrest, and is therefore *never* subject to the Fourth Amendment's warrant requirement. In reaching this conclusion, the court below recognized that, when a search is directed at the area or items near an arrestee, the search is permissible only to protect officer safety or to prevent the active destruction of evidence. But the court held that these limits do not apply at all when the search is of the person of the arrestee, making such searches per se permissible.

To avoid duplication, our brief in *Birchfield* addresses issues that are common to that case and this one. Petitioner's brief in this case therefore is directed principally to the search-incident-to-arrest issue. As to that, as we will explain below, the Minnesota Supreme Court's holding is manifestly wrong: it untethers the search-incident-to-arrest exception from the exception's rationale, while giving greater constitutional protection to an arrestee's pockets or handbag than to the arrestee's body. Unsurprisingly, that holding misunderstands both hornbook Fourth Amendment law and recent decisions of this Court. It should be set aside.

A. Factual and legal background.

1. Minnesota law provides that "any person who drives, operates, or is in physical control of a motor vehicle within this state or on any boundary water of this state" is deemed to "consent[] * * * to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol, a controlled substance or its metabolite, or a hazardous substance." M.S.A. § 169A.51, subd. 1(a). In a number of circumstances—among them, when a person has been validly arrested for driving while impaired—the law also makes it "a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine." M.S.A. § 169A.20, subd. 2.[2]

Criminal penalties for violating the test-refusal statute are the same as or greater than those for the separate offense of driving while impaired. Test refusal leads to as much as a year in prison and a fine of up to $3,000 for a third-degree violation, and up to as many as seven years' imprisonment and a fine of up to $14,000 for a first-degree violation. M.S.A. §§ 169A.03, subds. 3, 8; 169A.24-169A.26; 169A.75-169A.76 (2014). First-degree test refusal is classified as a felony. *Id.* § 169A.24, subd. 2.

2. This case "arises from a report that police received on August 5, 2012, that three men were attempting to get a boat out of the water at a boat launch in South Saint Paul." *Bernard* Pet. App. 3a. "When police arrived at the boat launch, a witness told the officers that the men's truck became stuck in the

---

[2] Officers may take action against a driver who refuses a blood or urine test "only if an alternative test was offered"; this limitation does not apply to breath tests. M.S.A. § 169A.51, subd. 3.

river while they were trying to pull their boat out of the water." *Ibid*. One of the men, petitioner here, "admitted to police that he had been drinking, but he and the other men denied driving the truck." *Ibid.* When witnesses nevertheless identified petitioner as the truck's driver, the officers arrested him on suspicion of driving while impaired. *Ibid.*

The officers proceeded to read petitioner the Minnesota Implied Consent Advisory. The advisory informed petitioner that "refusal to take a [chemical alcohol test] is a crime" and that petitioner could consult an attorney only if it did not "unreasonably delay administration of the test." M.S.A. § 169A.51, subd. 2. Under Minnesota law, the officer requiring a test may "direct whether the test is of blood, breath, or urine." *Id.* § 169A.51, subd. 3. The officers in this case chose a breath test. See *Bernard* Pet. App. 4a. At no point did the officers make any attempt to obtain a search warrant to authorize administration of the test.

After petitioner declined to take the test, the State charged him with two counts of the crime of First Degree Driving While Impaired—Test Refusal, in violation of Minn. Stat. § 169A.20, subds. 2-3 (2014). *Bernard* Pet. App. 4a. First-degree test refusal carries a mandatory minimum sentence of three years in prison, with a maximum of seven years' imprisonment and a fine of up to $14,000. Minn. Stat. § 169A.24, subd. 2 (2014); § 169A.276, subd. 1(a) (2014). The State did not charge petitioner with impaired driving. *Bernard* Pet. App. 50a.

B. The decisions below.

1. Petitioner filed a motion to dismiss, arguing that the State's imposition of criminal penalties for refusing to submit to a warrantless breath test violates the

Fourth Amendment. *Bernard* Pet. App. 50a. The state trial court agreed and ordered the prosecution dismissed. *Id.* at 47a-61a. The court started from the proposition that the Minnesota test-refusal statute is meant to impose criminal penalties only for refusal of a lawful demand to be tested. In this case, the court continued, a warrantless search is per se unreasonable, "subject only to a few specifically established and well delineated exceptions." *Id.* at 54a-55a (citations and internal quotation marks omitted). Those exceptions include consent and the existence of exigent circumstances, but here petitioner "refused to consent to provide a sample of his breath" and, under this Court's holding in *Missouri* v. *McNeely*, 133 S. Ct. 1552 (2013), something more is required than the "'natural dissipation of alcohol in the blood' to establish an exigency justifying a warrantless search." *Id.* at 55a, 58a. Accordingly, the trial court held, "[b]ecause no warrant was obtained and none of the recognized exceptions to the warrant requirement apply, no lawful basis exists in this case to request submission to a chemical test." *Id.* at 59a.

The Minnesota Court of Appeals reversed, holding that the State could compel petitioner to take a blood alcohol test because the arresting officers had probable cause to search petitioner and could have secured a warrant. *Bernard* Pet. App. 35a-46a. The court reasoned: "[T]he officer had a lawful option to require [petitioner] to submit to a chemical test, based on a search warrant, and he instead gave Bernard the choice to voluntarily submit to warrantless testing. That the officer chose one approach (the authority to make the request under the implied consent statute) rather than another (the authority to obtain a warrant under the impaired driving statute) does not make penalizing [petitioner's] decision unconstitutional[.]"

Id. at 43a. In reaching this conclusion, the court "recognize[d] that the officer did not actually possess a search warrant at the time of his request," but it regarded that omission as immaterial because "the constitutional and statutory grounds for a warrant plainly existed before the [test] request." *Ibid.*

2. The Minnesota Supreme Court in turn repudiated the appellate court's reasoning as "contrary to basic principles of Fourth Amendment law" because "[a] warrantless search is generally unreasonable, unless it falls into one of the recognized exceptions to the warrant requirement." *Bernard* Pet. App. 7a. But, in a divided ruling, the court below nevertheless held application of the state test-refusal law constitutional, reasoning that "a warrantless breath test of [petitioner] would not have violated the Fourth Amendment because it is a search incident to [petitioner's] valid arrest." *Id.* at 9a.

In reaching this conclusion, the court acknowledged both that "the State in this case cannot show that a search of [petitioner's] breath was related to officer safety or concerns that [petitioner] would destroy evidence," and that this Court "has required either a concern for officer safety or a concern over the preservation of evidence to support the constitutionality of a warrantless search of the area where the defendant was arrested or a search of items near the defendant." *Bernard* Pet. App. 11a & n.7, 12a. But the Minnesota court held that these considerations have no bearing on the legality of a search incident to arrest when a warrantless search concerns, not the "area" or "items" near the defendant, but "the body of a person validly arrested." *Id.* at 12a.

The court believed that this conclusion follows from what it characterized as this Court's holding in *United*

States v. *Robinson*, 414 U.S. 218 (1973), that "a warrantless search of a person [was] categorically reasonable under the Fourth Amendment as a search incident to that person's valid arrest." *Bernard* Pet. App. 13a. And the court below opined that this rule was reaffirmed in *Riley* v. *California*, 134 S. Ct. 2473 (2014), which it understood to permit a broader search of "the person of an arrestee" than of the "area where the defendant was arrested" or of "items near the defendant." *Bernard* Pet. App. 17a, 11a-12a. Accordingly, the Minnesota court held that "a warrantless breath test of [petitioner] would have been constitutional under the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement." *Id.* at 19a. And that conclusion, the court found, disposed of petitioner's appeal because petitioner "does not have a fundamental right to refuse a constitutional search." *Id.* at 20a.

3. Justices Page and Stras issued a joint dissent. Criticizing the majority for "a decision that is as notable for its disregard of Supreme Court precedent as it is for its defective logic," the dissent pointed to "[t]wo erroneous assumptions [that] permeate the court's analysis." *Bernard* Pet. App. 23a.

First, the dissent noted that this Court "has never implied, much less stated, that the search-incident-to-arrest exception extends to the forcible removal of substances from within a person's body." *Bernard* Pet. App. 23a. Any doubt about this, the dissent continued, "vanished after" this Court's decision in *Riley*: "Given *Riley*'s clarification that *Robinson* [which approved a search of a cigarette package in an arrestee's pocket] applies only to physical evidence found on a person's body—and not digital content found on cell phones—the only logical conclusion is that the removal of breath

(or blood or urine) from the body to discover an arrestee's blood alcohol level is not part of a search incident to arrest." *Id.* at 25a, 26a. In the dissent's view, "[i]t seems obvious that, similar to the digital content of a cell phone, alveolar 'deep-lung' air 'differ[s] in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." *Id.* at 27a (quoting *Ri- ley*, 134 S. Ct. at 2489). The dissent added that "[t]ypically, a person taking a breath test must insert a tube into his or her mouth and then comply with the officer's instructions to blow into the tube at a specified rate until the breathalyzer had had sufficient time to analyze a sample of deep-lung air" (*id.* at 28a), and the majority "does not cite a single Supreme Court case authorizing such a profound intrusion into a person's bodily integrity during a search incident to arrest" (*ibid.*).

The dissent also challenged the majority's "equally extreme" holding that "the rationales for the search-incident-to-arrest exception—officer safety and preventing the destruction of evidence—do not apply to searches of a person." *Bernard* Pet. App. 29a. In the dissent's view, "neither *Robinson* nor *Riley* rejected [those] rationales as bookends for the circumstances under which the search-incident-to-arrest exception applies." *Id.* at 30a. Indeed, the dissent continued, "[t]he only justification for allowing police to conduct a warrantless breath test is the preservation of evidence due to the natural dissipation of alcohol from a person's bloodstream. In *McNeely*, however, the Supreme Court specifically rejected the proposition that the natural metabolization of alcohol constitutes a per se exigency justifying a warrantless blood test." *Id.* at 31a. And "[i]t strains credulity to suppose that, after the Supreme Court carefully examined the exigent-circumstances exception in *McNeely*, it would conclude

in some future case that the search [in that case] would have been justified anyway under the search-incident-to-arrest doctrine, which according to *Chimel* [v. *California*, 395 U.S. 752 (1969)] and *Riley* turns on the same rationale regarding the preservation of evidence that the Supreme Court explicitly rejected in *McNeely*." *Id.* at 32a.

In this setting and because, under *Camara* v. *Municipal Court of San Francisco*, 387 U.S. 523 (1967), "a state cannot criminalize the refusal to con- sent to an illegal warrantless search," the dissent concluded that "the State may not constitutionally convict persons who exercise their 'constitutional right to insist that police obtain a warrant.'" *Bernard* Pet. App. 33a, 34a (quoting *Camara*, 387 U.S. at 540) (brackets omitted).

4. The court below subsequently denied a petition for rehearing, while noting that "members of the court disagree about the effect of" this Court's decision in *McNeely* and *Schmerber* v. *California*, 384 U.S. 757 (1966). *Bernard* Pet. App. 62a.

SUMMARY OF ARGUMENT

The court below premised its holding on the proposition that the search-incident-to-arrest exception to the warrant requirement permits *any* search of an arrestee's person—and that searches of the person are not limited by the rationales that determine the scope of searches incident to arrest in all other contexts. That illogical approach is utterly inconsistent with this Court's decisions.

A. The Court has been clear and consistent in its explanation of the basis for the search-incident-to-arrest exception: it is designed to preserve officer safety and prevent the destruction of evidence. All

agree that those rationales categorically can have no application to breath (or blood) tests. In the DUI context, the arrestee, once arrested, can do nothing to alter the alcohol content of his or her blood. And, like the cell phone data at issue in *Riley*, an arrestee's breath cannot be used as a weapon to harm the arresting officer or effectuate the arrestee's escape. To reach its conclusion below, the Minnesota Supreme Court accordingly held that the usual rationales for the search-incident-to-arrest doctrine, while governing searches of the arrestee's property or of the area near the arrestee, have no application at all to searches of the arrestee's *person*.

This holding, however, turns Fourth Amendment doctrine on its head. It is fundamental that a person's body is entitled to the *highest* level of protection under the Fourth Amendment, not the lowest, a point that this Court has emphasized repeatedly. The court below relied for its contrary ruling on this Court's decision in *Robinson*, but that decision, like the Court's other holdings addressing the search-incident-to-arrest exception, characterized the doctrine as relying on concerns for officer safety and evidence preservation. As the Court demonstrated in *Riley*, *Robinson*'s holding is entirely consistent with the view that the exception applies only when the category of search at issue raises those concerns. The Minnesota Supreme Court's very different understanding is in obvious tension with many of this Court's decisions and would render the holding in *McNeely* a virtual dead letter.

B. A different outcome is not required because the test demanded in this case was one of breath rather than of blood or urine. This Court has held that tests of "deep-lung" air are searches within the meaning of the Fourth Amendment that implicate significant privacy

interests. That is so for good reason; breath tests like the one demanded in this case require the insertion of a mouthpiece and lengthy, continuous exhalation. Accordingly, virtually all States that place restrictions on nonconsensual blood tests place equivalent restrictions on nonconsensual breath tests, which is a powerful demonstration that the two types of test implicate equivalent privacy interests. That consideration, along with the Minnesota Supreme Court's misunderstanding of the search-incident-to-arrest exception, requires reversal of the decision below.

ARGUMENT

There appear to be some significant areas of common ground between the parties in this case. The State, and the court below, evidently recognize that the Fourth Amendment authorizes a search only when (1) the searching officer obtains a warrant or (2) a recognized exception to the warrant requirement applies. We agree. And all appear to agree that a State may criminalize refusal to submit to a search only if the requested search itself would satisfy the Fourth Amendment's requirements. This Court reached just that conclusion in *Camara*, as we explain in more detail in petitioner's brief in *Birchfield*.

In nevertheless upholding the challenged state law in this case, the court below ruled that a warrantless search is constitutional under the search-incident-to-arrest exception to the warrant requirement; it understood this Court's decisions in *Riley* and *Robinson* to hold that *any* search of an arrestee's person is a valid search incident to arrest. But that holding, which gives greater Fourth Amendment protection to the place where a person is standing than to the person's body, surely is wrong: "The Fourth Amendment lists 'persons' *first* among the entities protected against

unreasonable searches and seizures." *Maryland* v. *King*, 133 S. Ct. 1958, 1982 (2013) (Scalia, J., dissenting). Moreover, as the dissent below recognized (and the majority did not deny), the Minnesota Supreme Court's holding "nullifies the warrant requirement in nearly every drunk-driving case" (*Bernard* Pet. App. 22a)—while, as a practical matter, reading this Court's *McNeely* decision off the books. Consequently, the holding below should not stand.

A. Because a breath test is not administered to further officer safety or to preserve evidence, it is not a valid search incident to arrest.

1. As we explain in more detail in petitioner's brief in *Birchfield* (at 12-14), this Court has made clear time and again that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment." *Arizona* v. *Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz* v. *United States*, 389 U.S. 347, 357 (1967)). This fundamental rule is "subject only to a few specifically established and well-delineated exceptions." *Ibid.* This case concerns the nature of one of these exceptions, that for "a warrantless search incident to a lawful arrest." *Riley*, 134 S. Ct. at 2482.

Under the search-incident-to-arrest exception, this Court has held permissible (1) searches of the person of the arrestee and (2) searches of the area within the control of the arrestee. *Riley*, 134 S. Ct. at 2483; *Robinson*, 414 U.S. at 224. In both circumstances, however, the Court has been very clear on the exception's rationale. First, "[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or

effect his escape." *Chimel* v. *California*, 395 U.S. 752, 762-763 (1969). And second, an arresting officer may "search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Id.* at 763. These two *Chimel* rationales "ensure[] that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." *Gant*, 556 U.S. at 339. The Court repeatedly has reaffirmed the limits on the search-incident-to-arrest exception stated in *Chimel*, which "laid the groundwork for most of the existing search incident to arrest doctrine." *Riley*, 134 S. Ct. at 2483. See also *Robinson*, 414 U.S. at 235; *Gant*, 556 U.S. at 338-339.

Most recently, in *Riley*, the Court reiterated "that the *Chimel* concerns for officer safety and evidence preservation underlie the search incident to arrest exception." 134 S. Ct. at 2484. From that starting point, the Court held that the search of cell phone data may not be justified as a search incident to arrest because "[d]igital data used on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape" (*id.* at 2485) and the government's concerns that cell phone data might be destroyed remotely or encrypted "are distinct from *Chimel*'s focus on a defendant who responds to arrest by trying to conceal or destroy evidence within his reach" (*id.* at 2486). And although the Court recognized "an arrestee's reduced privacy interests upon being taken into police custody," it found dispositive that, "when 'privacy-related concerns are weighty enough' a 'search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee.'" *Id.* at 2488 (quoting *Maryland* v. *King*, 133 S. Ct. 1958, 1979 (2013)).

2. The court below acknowledged that these *Chimel* rationales limit the scope of the search-incident-to-arrest exception as it applies to the search of the "*area* where the defendant was arrested or a search of *items* near the defendant." *Bernard* Pet. App. 12a (emphasis added). And the court recognized that "the State in this case cannot show that a search of [petitioner's] breath was related to officer safety or concerns that he would destroy evidence." *Id.* at 11a & n.7. That conclusion is beyond serious dispute. As this Court recognized in *McNeely*, blood alcohol content dissipates at a steady, predictable rate—and, in any event, dissipation is wholly beyond the control of a person in custody. The concern about destruction of evidence therefore cannot, without more, justify the search of a person's deep-lung air. Nor is the officer-safety rationale relevant. Just like the digital cell phone data at issue in *Riley*, a person's breath "cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape." 134 S. Ct. at 2485.

The court below nevertheless held, however, that the search-incident-to-arrest exception applies in this context because the majority believed that the limitations described by this Court in *Riley*, *Gant*, *Robinson*, and *Chimel* do not apply to "the warrantless search of the *body* of a person validly arrested." *Bernard* Pet. App. 12a (emphasis added). Thus, under the holding below, searches of an arrestee's body do not require *any* justification if they are associated with an arrest. Minnesota embraced that argument in its brief opposing certiorari. See *Berard* Opp. Br. 7-8.

This holding can fairly be said to turn Fourth Amendment doctrine on its head, and simply cannot be reconciled with this Court's decisions. "No right is held more sacred, or is more carefully guarded, * * * than

the right of every individual to the possession and control of his *own person*, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968) (emphasis added). For this reason, the *Chimel* rationales apply *both* to property found on or near the arrestee *and* to the person of the arrestee. Although the court below believed otherwise, that seemingly self-evident point was affirmed in *all* of this Court's search-incident-to-arrest decisions: as the Court explained in *Riley*, in *Robinson* "the Court *applied* the *Chimel* analysis in the context of a search of the arrestee's person." 134 S. Ct. at 2483 (emphasis added). See *id.* at 2484 ("*Gant*, like *Robinson*, recognized that the *Chimel* concerns for officer safety and evidence preservation underlie the search incident to arrest exception"). The majority below cited no decision of this Court that authorized *per se* searches incident to arrest inside a person's body; as the dissenters below explained, "[t]he reason is that no such case exists." *Bernard* Pet. App. 28a.

That necessarily is so. It would be perverse to suggest that a greater degree of justification is required for a search of an arrestee's *property* and of the area surrounding the arrestee than for a search inside the arrestee's *body*. After all, "the Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351. This Court has repeatedly stressed "the unique, significantly heightened protection afforded against searches of one's person." *Wyoming* v. *Houghton*, 526 U.S. 295, 303 (1999). See also *King*, 133 S. Ct. at 1969 ("Virtually any intrusio[n] into the human body * * * will work an invasion of cherished personal security.") (quotations omitted). For that reason, the Court explained in *Schmerber* that the rationales for a search incident to arrest "have little applicability with respect to searches

involving intrusions beyond the body's surface," as "[t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." 384 U.S. at 769-770.

In fact, that point becomes clear from the holding of *Schmerber* itself. In that case, as in this one, the State sought to require a person arrested on suspicion of DUI to take a chemical test. But the Court held that an arrest on probable cause was an insufficient basis to justify the search: "the mere fact of a lawful arrest does not end our inquiry." 384 U.S. at 769. As the Court explained:

> Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of petitioner's blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that inferences to support the search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U.S. 10, 13-14 [(1948)]; see also *Aguilar* v. *State of Texas*, 378 U.S. 108, 110-111 [(1964)]. The importance of informed, detached and deliberate determinations of the issue whether or

> not to invade another's body in search of evidence of guilt is indisputable and great.

Id. at 770.[3]

3. In nevertheless holding that the search-incident-to-arrest exception applies here, the court below relied on the statement in *Robinson* (repeated in *Riley*) that searches of a "person" incident to arrest are permitted "regardless of 'the probability in a particular arrest situation that weapons or evidence would in fact be found.'" 134 S. Ct. at 2485 (quoting 414 U.S. at 235). See *Bernard* Pet. App. 14a. But the court below missed this Court's point.

To begin with, despite its broad language, *Robinson* recognized that the search-incident-to-arrest doctrine is "based upon the need to disarm and to discover evidence." 414 U.S. at 235. To be sure, *Robinson* did not require a case-specific demonstration that a particular defendant posed those dangers; exceptions to the warrant requirement "do not require an assessment of whether the policy justifications underlying the exception * * * are implicated in *a particular case*." *McNeely*, 133 S. Ct. at 1559 n.3 (emphasis added). But this does not mean that *any* search of a person is automatically reasonable under the search-incident-to-arrest exception. Rather, the Court "ask[s] * * * whether application of the search incident to arrest doctrine to this particular *category* of [search] would 'untether the rule from the justifications underlying the *Chimel* exception.'" *Riley*, 134 S. Ct. at 2485 (quot-

---

[3] Of course, *Schmerber* upheld the State's authority to require a chemical test in the circumstances of that case, but it did so under the exigent circumstances exception, not as a search incident to arrest. See 384 U.S. at 770-772. The scope of that holding has been clarified by *McNeely*.

ing *Gant*, 556 U.S. at 343) (emphasis added). The necessary connection existed in *Robinson*, where the "unknown physical objects" concealed in Robinson's cigarette pack "pose[d] risks, no matter how slight, during the tense atmosphere of a custodial arrest." *Ibid.* But, in sharp contrast, the breath test at issue here (like the search of cell phone data at issue in *Riley*, see *id.* at 2485-2488) concededly *never* could have bearing either on officer safety or on evidence preservation. Therefore, it is a category of search that can have *no* connection to the *Chimel* justifications.

Moreover, the privacy interests at stake with chemical tests of breath, blood, or urine taken from inside the body are vastly greater than was Robinson's interest in keeping private the contents of his cigarette pack. See, *e.g.*, 2 Wayne R. LaFave et al., Criminal Procedure § 3.5(c) (4th ed.) ("Whatever *Robinson* * * * mean[s] in other contexts, [it has] no effect upon the limits imposed by the Court in *Schmerber v. California* upon the taking of a blood sample or a comparable intrusion into the body." (footnote omitted)). This Court has repeatedly stated that intrusions "beyond the body's surface" implicate much greater "interests in human dignity and privacy" than do searches of inanimate objects or places. *Schmerber*, 384 U.S. at 769-770. See also *United States* v. *Flores-Montano*, 541 U.S. 149, 152 (2004) (noting that "highly intrusive searches of the person" implicate "dignity and privacy interests of the person being searched"). Indeed, "[s]uch an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *McNeely*, 133 S. Ct. at 1558 (citation omitted). That is why this Court held in *Schmerber*—and reaffirmed in *McNeely*—that, "absent an emergency," a search warrant is required "'where intrusions into the human body are concerned,' even when the search was

conducted following a lawful arrest." *Ibid*. (citation omitted). *Robinson* did not state a contrary rule.

Indeed, if *Robinson* really stood for the proposition that there are no limits on the search of the body of a person who has been arrested, it would have followed *a fortiori* that the Maryland statute at issue in *King*—which permitted the taking of buccal swabs from individuals taken into custody on suspicion of committing a "serious crime" (see 133 S. Ct. at 1980)—is constitutional. But the Court's decision upholding that law instead cited *Robinson* only in passing (see 133 S. Ct. at 1971, 1974, 1978), instead relying both on considerations unique to "processing [an arrestee] for detention" (*id*. at 1971; see also *id*. at 1974-75)) and on the fact that "[t]he DNA collection [under the Maryland procedure] is not subject to the judgment of officers." *Id*. at 1970. If the decision below in this case is correct, most of the Court's analysis in *King* was beside the point.

4. In addition, as the dissent below recognized, the Minnesota Supreme Court's decision is in obvious tension with the understandings that animated this Court's holding in *McNeely*. The *McNeely* Court expressly disapproved a *per se* rule permitting blood alcohol tests under the exigent circumstances exception to the warrant requirement. 133 S. Ct. at 1563. That holding was a natural application of this Court's determination that "for the most part *per se* rules are inappropriate in the Fourth Amendment context." *United State*s v. *Drayton*, 536 U.S. 194, 201 (2002). Yet the defendant in *McNeely* was arrested prior to being subjected to a warrantless blood draw. 133 S. Ct. at 1556-1557. Accordingly, under the Minnesota Supreme Court's rule in this case, the officers in *McNeely* could have avoided the totality-of-the-circumstances inquiry re-

quired by this Court's *McNeely* decision simply by treating the blood test sought there as a search incident to arrest. This approach "nullifies the warrant requirement in nearly every drunk-driving case." *Bernard* Pet. App. 22a. No Justice in *McNeely* even adverted to such a possibility—because, we submit, that approach finds no support in this Court's doctrine.

Moreover, the holding below has disturbing implications that far transcend the impaired-driving context. Searches incident to arrest occur countless times every day across the Nation; in fact, "warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant." *Riley*, 134 S. Ct. at 2482. Yet the court below recognized essentially no discernible limit on the scope of such searches as they are directed at the most intimate feature of the arrestee's body. Such a rule, which finds no support in this Court's doctrine, would sanction unprecedented and insupportable invasions of constitutionally protected privacy.

B. In the DUI context, there is no constitutional distinction between warrantless breath and blood tests.

The court below also attempted to support its holding by pointing to what it described as the "less-invasive nature of breath testing" (*Bernard* Pet. App. 11a n.6), which it contrasted with blood or urine tests. That reasoning, however, rested on a misreading of this Court's precedents that dangerously expands officers' ability to conduct searches inside an arrestee's body.

This Court has explicitly held that breath tests are searches for Fourth Amendment purposes. *Skinner* v. *Ry. Labor Execs.' Ass'n.*, 489 U.S. 602, 616-617 (1989).

See also *McNeely*, 133 S. Ct. at 1569; *King*, 133 S. Ct. at 1969. And although the reduced privacy interests of an arrestee have some bearing on application of the search-incident-to-arrest exception (see *Riley*, 134 S. Ct. at 2488-2489), a breath test of the sort at issue here is "a profound intrusion *into* a person's bodily integrity." *Bernard* Pet. App. 28a (Page & Stras, JJ., dissenting). Such a test does not capture an ordinary exhalation of the kind that routinely is exposed to the public. Instead, it "requires a sample of 'alveolar' (deep lung) air; to assure that such a sample is obtained, the subject is required to blow air into the [breathalyzer] at a constant pressure for a period of several seconds." *California* v. *Trombetta*, 467 U.S. 479, 481 (1984).

The Datamaster, Minnesota's current breath test device, operates in this manner. To obtain a breath sample, an officer must "[i]nsert a mouthpiece and instruct the subject to provide a long and steady sample." David Eden et al., *Datamaster DMT Breath Test Operator Training Course Manual*, Minn. Dep't of Pub. Safety, 51 (Nov. 5, 2013), perma.cc/F6QH-WL6B. The DMT requires at least 1.5 liters of air, provided "in a single exhalation" at a rate of 3.0 liters per minute or greater. *Ibid.* "If the subject stops blowing before the instrument notes a uniformity of concentration (deep lung or alveolar air), the breath sample will not be accepted." *Id.* at 23.[4] Because of the intrusive nature of this testing regime, "[s]ubjecting a person to a

[4] North Dakota's breath test device, the Intoxilyzer S-D5, works in the same way. Achieving a reliable test requires instructing "the subject to blow steadily into the mouthpiece for as long as possible or until told to stop." Office of Attorney General, Crime Laboratory Division, *ND Intoxilyzer S-D5 (Five) Chemical Test Operator Instructions Using Gas Standards* 4 (2008), perma.cc/-H94L-2KL8.

breathalyzer test, * * * implicates similar concerns about bodily integrity" to those raised by blood tests. *Skinner*, 489 U.S. at 616-617. In terms of its interference with personal privacy and dignity interests, such a test is a very far cry from permissible examination of a "zipper bag," "billfold," "wallet," or "purse." *Riley*, 134 S. Ct. at 2488.

Additionally, "[i]n evaluating the reasonableness of police procedures under the Fourth Amendment," this Court "look[s] to prevailing rules in individual jurisdictions." *Tennessee* v. *Garner*, 471 U.S. 1, 15-16 (1985). The Court thus found it notable in *McNeely* "that a majority of States either place significant restrictions on when police officers may obtain a blood sample despite a suspect's refusal * * * or prohibit nonconsensual blood tests altogether." *McNeely*, 133 S. Ct. at 1566 & n.9 (plurality opinion). Though not dispositive, the "wide-spread state restrictions on nonconsensual blood testing provide[d] further support for [this Court's] recognition that compelled blood draws implicate a significant privacy interest." *Id.* at 1567. And here as well, nearly all of the States that place restrictions on nonconsensual blood tests impose the same restrictions on nonconsensual breath tests.[5]

---

[5] See Ala. Code § 32-5-192(a), (c) (2014); Alaska Stat. §§ 28.35.032(a), 28.35.035(a) (2014); Ariz. Rev. Stat. § 28-1321(D)-(1); Ark. Code §§ 5-65-205(a)(1), 5-65-208(a)(1) (non-relevant amendments enacted by 2015 Arkansas Laws Act 299); Conn. Gen. Stat. §§ 14-227b(b), 14-227c(b) (2014); Ga. Code § 40-5-67.1(d); Haw. Rev. Stat. § 291E-15 (2014); Iowa Code §§ 321J.6(1), 321J.9(1) (2014); Ky. Rev. Stat. § 189A.105(2)(b); La. Rev. Stat. § 32.666(A)(1)(a)(i), (2) (2014); Md. Transp. Code § 16-205.1-(b)(i)(1), (c)(1); Mass. Gen. Laws, ch. 90, § 24(1)(e), (f)(1); Mich. Comp. Laws § 257.625d(1); Miss. Code § 63-11-21; Mont. Code § 61-8-402(4), (5) (2014); Neb. Rev. Stat. § 60-498.01(2); N.H. Rev. Stat. § 265-A:14(I); N.M. Stat. § 66-8-111(A); N.Y. Veh. & Traf.

This provides strong evidence that breath tests, like blood tests, are understood to implicate significant privacy interests.

Against this background, the Court has suggested that warrantless breath tests are *per se* reasonable only "when special needs, *beyond the normal need for law enforcement*, make the warrant and probable-cause requirement impracticable." *Skinner*, 489 U.S. at 619 (emphasis added) (internal quotation marks omitted). And as we explain in more detail in petitioner's brief in *Birchfield* (at 15-18), that exception has no application here.

* * * *

Accordingly, the search-incident-to arrest exception to the warrant requirement cannot support application of Minnesota's compelled-consent requirement in the circumstances of this case. As we also explain in *Birchfield*, the other rationales offered by States in support of compelled-consent statutes are insupportable. See *Birchfield* Pet'r. Br. 20-41. And, as this Court recognized in *Camara*, a person may not be criminally punished for refusing to submit to an unconstitutional search. Under that fundamental principle, petitioner's conviction for criminal test refusal must be set aside.

Law §§ 1194(2)(b)(1), 1194(3); N.D. Code § 39-20-01.1(1); Okla. Stat., Tit. 47, § 753; Ore. Rev. Stat. § 813.100(2); 75 Pa. Cons. Stat. § 1547(b)(1) (2014); R.I. Gen. Laws §§ 31-27-2.1(b), 31–27–2.9(a); S.C. Code § 56-5-2950(B); Tex. Transp. Code §§ 724.012(b), 724.013; Vt. Stat., Tit. 23, § 1202(b), (f); Wash. Rev. Code. § 46.20.308(2)–(4); W. Va. Code §§ 17C-5-4(b), 17C-5-7; Wyo. Stat. § 31-6-102(d).

CONCLUSION

The decision of the Minnesota Supreme Court should be reversed.

Respectfully submitted.

JEFFREY S. SHERIDAN
Sheridan & Dulas, P.A.
320 Eagandale Center
1380 Corporate Center Curve
Eagan, MN 55121
(651) 686-8800

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic[*]
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
MICHAEL B. KIMBERLY
PAUL W. HUGHES
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

FEBRUARY 2016

[*] The representation of petitioner by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.