A15-0076

STATE OF MINNESOTA
IN SUPREME COURT

State of Minnesota,
Appellant,

vs.

Ryan Mark Thompson,
Respondent.

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA

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Identification and Interest of the Amicus

The American Civil Liberties Union of Minnesota ("ACLU-MN") is a not-for-profit, non-partisan, membership-supported organization dedicated to the protection of civil rights and liberties.[1] It is the statewide affiliate of the American Civil Liberties Union and has more than 8,000 members in the state of Minnesota. Its purpose is to protect the rights and liberties guaranteed to all Minnesotans by the state and federal constitutions and laws. ACLU-MN's interest in this matter is public, as the outcome of this case will have a significant impact on the constitutional rights of all Minnesotans.

ARGUMENT

I. INTRODUCTION

The government cannot criminalize the assertion of a constitutional right. Yet that is precisely what the state attempts to do in this case: subject Thompson to criminal liability for asserting his Fourth Amendment right to refuse a warrantless blood or urine search. Such searches are highly intrusive, impinging on "human dignity and privacy" in a "fundamental" way. *See Schmerber v. California*, 384 U.S. 757, 768 (1966). Moreover, they subject the most private aspects of the body and its chemistry—from which a whole host of private facts can be ascertained—to expansive and largely unfettered analysis by the state. Such serious intrusions of privacy should not be contingent solely on "the judgment of officers whose perspective might be colored by their primary involvement in the often competitive enterprise of ferreting out crime." *Maryland v. King*, 133 S. Ct. 1958, 1969-70 (2013) (quoting *Treasury Employees v. Von Raab*, 489 U.S. 656, 667

[1] Other than the identified amicus and its counsel, no person has made a monetary contribution to the preparation or submission of this brief. No counsel for a party authored the brief in whole or in part.

(1989)). Neither Thompson nor any other Minnesotan should be subject to such a search without at least the safeguard of a warrant and concomitant review by a neutral and detached magistrate.

This court should therefore hold that there is no exception to the warrant requirement for blood and urine searches based solely on an officer's suspicion and arrest, and that refusing to consent to such a warrantless search consequently cannot result in criminal liability. Consistent with these principles, the Court of Appeals correctly overturned Thompson's conviction, and its judgment should be affirmed.

II. MINNESOTA CANNOT CRIMINALIZE THOMPSON'S ASSERTION OF HIS FOURTH AMENDMENT RIGHT TO REFUSE A WARRANTLESS SEARCH

An individual "may not be prosecuted for exercising his constitutional right to insist that the [government] obtain a warrant." *See v. Seattle*, 387 U.S. 541, 546 (1967); *see also Camara v. Municipal Court*, 387 U.S. 523, 450 (1967). The United States Supreme Court established this proposition nearly 50 years ago, "striking down hundreds of city ordinances throughout the country" for violating the Fourth Amendment's prohibition on unreasonable searches. *See id.* at 547 (Clark, J., dissenting). The court therefore need not engage in a substantive Due Process analysis in this case—the Fourth Amendment, by its own terms, disallows criminal punishment for the refusal to consent to an unconstitutional search. *See id.*

This rule was clearly established by the United States Supreme Court in *Camara*, which involved San Francisco's "mandatory" building inspection laws. *Id.* at 525. At the time of *Camara*, San Francisco—like a number of other cities—required its citizens to submit to building inspections to ensure that safety standards were met. *See id; See v. Seattle*, 387 U.S. at 547 (Clark, J., dissenting). The failure to submit to these inspections

was punishable as a crime. *Camara*, 387 U.S. at 525. Camara refused to submit to such an inspection, and he challenged the government's subsequent criminal prosecution of him as violating the Fourth Amendment—arguing that the ordinance unconstitutionally subjected him to criminal penalty "for refusing to permit an inspection unconstitutionally authorized by [the legislature]." *Id.* at 527. The United States Supreme Court agreed, holding that Camara "had a constitutional right to insist that the inspectors obtain a warrant to search and that *appellant may not constitutionally be convicted for refusing to consent*." *Id.* at 540 (emphasis added); *see also See v. Seattle*, 387 U.S. at 546 (holding that a business owner "may not be prosecuted for exercising his constitutional right to insist that the [government] obtain a warrant" before conducting an inspection).

The Fourth Amendment rule set forth in *Camara* has direct application to this case. Just like Roland Camara, Ryan Thompson challenges the government's imposition of criminal liability for refusing to consent to a warrantless search. As a result, the only issue is whether the Fourth Amendment requires a warrant in Thompson's circumstances. If it does, then under the rule in *Camara*, Minnesota cannot impose criminal penalties on Thompson for asserting his Fourth Amendment right.

III. INDIVIDUALS HAVE A FOURTH AMENDMENT RIGHT TO REFUSE WARRANTLESS BLOOD OR URINE SEARCHES

Minnesotans have a constitutional right to refuse warrantless blood and urine searches—searches that are simply more intrusive than the kinds of warrantless searches upheld in other cases. Blood and urine searches differ from such other searches not only in degree but in *nature*, representing a kind of governmental intrusion that requires *at least* the warrant process as a safeguard against abuse. In fact, recent experiences in Minnesota demonstrate numerous and significant possibilities for abuse through blood and urine searches. The Fourth Amendment therefore requires that law enforcement

obtain a warrant before engaging in a blood or urine search based on suspicion of intoxicated driving.

A. Blood and Urine Searches are More Intrusive than the Kinds of Warrantless Searches Upheld in Other Cases.

When this court upheld warrantless breath tests in *Bernard*, it emphasized that "[t]aking a sample of an arrestee's breath is not materially different from warrantless searches upheld in [other] cases." *State v. Bernard*, 850 N.W. 2d 762, 767 (Minn. 2015) *cert granted*, 136 S. Ct. 615.[2] Blood and urine searches, in contrast, *are* materially different and significantly more intrusive than the kinds of warrantless searches approved in Bernard and similar cases. *See id.* at 768 n.6 ("[t]he differences between a blood test and a breath test are material.") These differences establish that the analysis in *Bernard* does not extend to warrantless blood and urine searches.

To begin with, searches incident to arrest are usually ordinary physical searches. *Id.* at 767. *Bernard* expanded that doctrine to breath tests by likening the intrusiveness of a breath test to an ordinary physical search. *See id.* For example, *Bernard* compared breath tests to the physical inspection of an arrestee's mouth to discover contraband, to the inspection of a man's genitals to identify him, and to other momentary inspections of body parts in search of a single data point. *Id*. The court likened the imposition of those inspections to the intrusiveness of a breath test, which is a momentary intrusion "reveal[ing] the level of alcohol in the [individual's] bloodstream and nothing more." *See Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 625 (1989). Indeed, this court emphasized that breath tests do not contain "highly personal information," instead

[2] While ACLU-MN remains opposed to the decision in *Bernard*, it acknowledges that *Bernard* is precedent in determination of the case at bar.

"reveal[ing] nothing more than the level of alcohol in the arrestee's bloodstream." *Bernard*, 859 N.W. 2d at 770 n.8 (*citing Skinner*, 489 U.S. at 625).

But as the United States Supreme Court recognized in *Skinner*, blood and urine searches are not comparable to breath tests or ordinary physical searches in this way. *See Skinner*, 489 U.S. at 625. Unlike ordinary searches, blood and urine searches encompass significant "further invasion[s]" of privacy, including the seizure of, and "ensuing chemical analysis of the sample." *Id.* Even aside from the specially invasive nature of the seizure itself, the subsequent analysis is highly intrusive because it "can reveal a host of private medical facts about an [individual], including whether he or she is epileptic, pregnant, or diabetic." *See Skinner*, 489 U.S. at 617.[3] Blood and urine searches are therefore unlike breath or ordinary physical searches, because they seize an object (blood or urine) that can reveal private, personal facts.

The United States Supreme Court has held that a search that reveals significant private facts though the seizure and analysis of an object does not fall within the search-incident-to-arrest exception. *Riley v. California*, 134 S. Ct. 2473, 2485 (2014). Specifically, in *Riley v. California*, the Supreme Court held that law enforcement could not engage in warrantless searches of cell phone data under the search-incident-to-arrest doctrine. *Id.* The Court emphasized that "[a] search of information on a cell phone bears little resemblance to the type of brief physical search" approved in traditional search incident to arrest cases, such as the ones cited in *Bernard*. *Id.* It emphasized that, when a phone is seized and subjected to further analysis, it can reveal data that is both "quantitatively" and "qualitatively different" than traditional "physical" searches—

[3] This case is therefore not about "a chemical test that will *only* reveal a scientific measurement of impairment." Appellant's Brief at 17 (emphasis added).

including information about "private . . . concerns" like "symptoms of disease." Similarly here, the seizure and subsequent analysis of blood and urine samples reveals data that is both quantitatively and qualitatively different than traditional physical searches. *See id.* at 2490. This includes information about "private . . . concerns" like "symptoms of disease." *See id.* The Supreme Court's holding in *Riley* thus makes clear that blood and urine samples invade "privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet" or other ordinary physical item. *Id.* at 2485. Such searches therefore could not be justified as searches incident to arrest under the rationale of *Bernard*.

Finally, even the ordinary physical aspects of taking blood and urine samples are far more intrusive than the type of warrantless search that typically falls within the search incident to arrest exception. *See Skinner*, 489 U.S. at 616. Blood and urine searches require governmental "intrusions beyond the body's surface," which differ from ordinary "state interferences with property relationships or private papers." *See Schmerber*, 384 U.S. at 768. This is not a mere formal distinction: it is one thing to have to turn over your papers for inspection or blow into a tube, it is quite another for a police officer to force you to urinate by the roadside or to stick a needle in your arm.[4] As a result, the United States Supreme Court has recognized that these kinds of intrusions impinge on "human dignity and privacy" in a "fundamental" way. *See id.* at 770.

"[T]he importance of requiring authorization by a 'neutral and detached magistrate' before allowing a law enforcement officer to 'invade' another's body in search of evidence of guilt is indisputable and great.'" *McNeely*, 133 S. Ct. at 1558

[4] *See* Section III(B), *supra*.

(quoting *Schmerber*, 384 U.S. at 770) Because blood and urine searches reveal a whole host of personal information about an individual and require governmental intrusion beyond the body's surface, they cannot be justified as a search incident to arrest. See *Bernard*, 850 N.W. 2d at 768 n.6 ("[t]he differences between a blood test and a breath test are material"). In these circumstances, "to provide the necessary security against unreasonable intrusions upon the private lives of individuals," a warrant is required. *See Trupiano v. U.S.*, 344 U.S. 699, 705 (1948).

B. Warrantless Blood and Urine Searches Lack the Kind of Safeguards Against Abuse that the Fourth Amendment Requires.

The United States Supreme Court has approved warrantless searches of blood, urine, and other such materials in cases involving "special needs" beyond the needs of ordinary law enforcement *and where the circumstances of the searches where highly regulated and controlled*. *See Skinner*, 489 U.S. at 625; *Maryland v. King*, 133 S. Ct. 1958, 1970 (2013). For example, in *Skinner*, the Supreme Court approved warrantless blood and urine searches that were governed by a highly restrictive federal regulatory regime. *See Skinner*, 489 U.S. at 625. The relevant regulations "defined narrowly and specifically" the "permissible limits of such intrusions" so as to permit essentially no opportunity for the exercise of discretion as to when or how to carry out a search. *Id.* at 622. Similarly, the warrantless buccal swab approved in *King* was governed by narrowly tailored state statutory controls. *King*, 133 S. Ct. at 1970. Maryland statutes limited the circumstances under which samples could be collected and purpose for which the samples could be used. *See id.* at 1967-68.

The regulatory schemes in *Skinner* and *King* addressed one of the traditional justifications for the warrant requirement: ensuring that "collection is not subject to the judgment of officers whose perspective might be colored by their primary involvement in

the often competitive enterprise of ferreting out crime." *Id.* (citations and quotations omitted). Both the *King* and *Skinner* courts expressly acknowledged this factor in their reasoning. *Id.* at 1969-70 (quoting *Treasury Employees v. Von Raab*, 489 U.S. 656, 667 (1989) (The "need for a warrant" was at its "least" because "the search involve[d] no discretion that could properly be limited by the 'inter[polation of] a neutral magistrate between the citizen and the law enforcement officer."); *Skinner*, 489 U.S. at 622 (due to the regulatory strictures, "[t]here [were] virtually no facts for a neutral magistrate to evaluate").

In contrast here, Minnesota law provides no comprehensive regulatory or statutory scheme controlling the circumstances of the collection, preservation, and testing of blood or urine samples. This omission opens Minnesotans to the possibility of significant invasions of privacy, unchecked by regulatory controls or the review of a detached and neutral magistrate. This is not a mere theoretical concern; recent experience suggests the potential for significant abuse in the collection and analysis of unwarranted blood and urine.

1. Officers Have Collected Blood and Urine Samples in Unregulated and Potentially Dangerous Conditions.

The Supreme Court warned in *Schmerber* that "serious questions. . . would arise if a search involving use of a medical technique, even the most rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of a stationhouse." *Schmerber*, 384 U.S. at 771-72. Yet officers in Minnesota are already conducting blood draws themselves, in the station house, without medical oversight and with no *ex ante* judicial review. *See State v. Forster*, No. A14-0757, 2015 WL 1280972 (Minn. App. March 23, 2015) (describing an officer conducting a warrantless blood draw with his own hands).

Even more shockingly, officers have demanded urine samples by the side of the road, in freezing weather, without any oversight or control. *See Junker v. Comm'r*, No. 31-CV-14-1499 (Itasca Cnty. 9th Dist. Ct. *filed* Sept. 24, 2014). Regardless of whether such searches are deemed to pass constitutional muster after the fact, it is reasonable to question whether a neutral magistrate would really approve a search in these conditions—or whether an officer would even have the gumption to ask. In any case, it is surely not too much to ask that "the inferences to support [such a highly invasive] search 'be drawn by a neutral and detached magistrate instead of being judged by the officer'" acting as his own judge, jury, and executioner in the field. *See Shmerber*, 384 U.S. at 770 (quoting *Johnson v. United States*, 333 U. S. 10, 13-14 (1948)).

2. Law Enforcement Investigation of Blood and Urine Samples Has Resulted in Continuing, Escalating Intrusions into Private Medical Facts.

Minnesota's experience shows that the investigation that begins with a urine or blood raw does not promptly end—even where exculpatory evidence is revealed. For example, in *State v. Fawcett*, *three months* after a car accident led to a blood draw on suspicion of drunk driving, and *two months* after testing showed no alcohol in the defendant's blood stream, the government reported on an *additional* investigation of the blood sample that indicated the presence of Alprazolam and THC. *State v. Fawcett*, No. A15-0938, 2016 WL 102544 (Minn. App. Jan. 11, 2016) (review granted March 29, 2016). This invasion occasioned *yet another*, "subsequent investigation into Fawcett's prescription history," ultimately revealing "a valid prescription for Alprazolam." *Id.* at *2. Fawcett was forced to explain to the government the recent death of her daughter and her troubles with depression. *See id.* This significant and ongoing intrusion into Fawcett's privacy stemmed from a routine car accident occurring in broad daylight. While the blood

draw in *Fawcett* was taken pursuant to a warrant, the point is that chemical investigations can take on a highly invasive life of their own.

In fact, in *State v. Fawcett* the Minnesota Court of Appeals expressly sanctioned this kind of endless inquiry, explicitly holding that "[o]nce a blood sample has been lawfully removed from a person's body, a person loses an expectation of privacy in the blood sample, and a subsequent chemical analysis of the blood sample is, therefore, not a distinct Fourth Amendment event." *Id.* at *6. This ruling, when combined with the warrantless blood and urine searches that the state urges here, essentially deprives Minnesota citizens of any control over the collection and analysis of blood and urine samples such as those in *King* and *Skinner*. And again, regardless of whether this court upholds the *Fawcett* rule, it is surely not too much to ask that before subjecting individuals to such a searching invasion, "the inferences to support the search 'be drawn by a neutral and detached magistrate instead of being judged by the officer'" alone. *Shmerber*, 384 U.S. at 770 (1966) (quoting *Johnson*, 333 U.S. at 13-14).

3. Blood and Urine Samples May Be Placed in the Hands of a Loosely Regulated Industry with a History of Abuse.

Finally, Minnesota's experience with the St. Paul Crime Lab and the well-documented widespread evidence of abuse and neglect at forensic labs around the country should give the judiciary pause before relinquishing *ex ante* control over the collection of blood and urine samples. *See, e.g.*, Eric Maloney, *Two More Problems and Too Little Money: Can Congress Truly Reform Forensic Science?* 14 Minn. J. L. Sci. & Tech. 923 (2013). The focus of repeated scandals over the last several years, forensic labs still lack meaningful regulation; "improper laboratory policies and procedures" are therefore "common." *Id.* at 933. And in the case of the St. Paul Crime Lab, "[d]eficiencies in the laboratory's procedures were known to the St. Paul police and the

city government" for years, yet "St. Paul failed to follow through" on taking any meaningful steps to correct these deficiencies. *Id.* at 934-35. This is precisely the kind of situation that cries out for some measure of judicial oversight—"[t]he right of privacy" is simply too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals" *See McDonald v. United States*, 335 U.S. 451, 455-56 (1948).

In light of this history, *at least* the warrant process must govern blood and urine searches before they pass constitutional muster. In fact, even warrantless searches involving substantial regulatory constraints can fail Fourth Amendment scrutiny. For example, the law at issue in *Camera* imposed significant restrictions on inspectors' discretion: they could only enter (1) "upon presentation of proper credentials," (2) "at reasonable times," and (3) "so far as may be necessary for the performance of their [legal] duties." *Camara*, 387 U.S. at 526 (quoting § 503 of the Housing Code).[5] Yet that statute was nevertheless constitutionally infirm because, in view of the Fourth Amendment command, the intrusiveness of the search required review by a neutral magistrate. *See id.* No less could be required here.

CONCLUSION

Blood and urine searches are highly intrusive, impinging on "human dignity and privacy" in a "fundamental" way. *See Schmerber*, 384 U.S. at 768. The Fourth Amendment therefore requires that the government obtain a warrant before commencing such a search, and Minnesota cannot impose criminal penalties on Thompson for

[5] It did not "afford[] inspectors unfettered discretion to search a private dwelling," as the Attorney General suggests. *See* Br. of Atty. Gen. at 7 (citing *Camara*, 387 U.S. at 532-33).

asserting this Fourth Amendment right. The Court of Appeals therefore correctly overturned Thompson's conviction, and the ACLU of Minnesota urges that its judgment be affirmed.

Dated: May 2, 2016

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