IN THE SUPREME COURT OF THE STATE OF VERMONT

No. 2019 - 388

State

v.

Phillip Walker-Brazie & Brandi Lena Butterfield

Brief Amicus Curiae Migrant Justice in support of Petitioner

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STATEMENT OF THE ISSUE

Whether the personal rights enshrined in Article 11 of the Vermont Constitution require the exclusion of evidence discovered by federal agents during a warrantless and unconsented vehicle search on a Vermont highway.

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IDENTITY AND INTERESTS OF AMICUS CURIAE[1]

BACKGROUND

Migrant Justice "Justicia Migrante" is a 501(c)(3) non-profit based in Burlington, Vermont since 2009. Members of Migrant Justice define problems and advance a human rights agenda for migrant workers in Vermont, specifically farmworkers on dairy farms. Migrant Justice has drawn national attention for its "cutting edge" human rights organizing, and its victories and accomplishments with respect to migrant farmworkers. While Migrant Justice's structural focus is on adequate treatment of migrant farmers on Vermont farms, it is equally active in advocating for farmworker's constitutional rights and equal rights as residents of Vermont.

STATEMENT OF INTEREST

Migrant Justice's mission is to "build the voice, capacity, and power of the farmworker community and engage community partners to organize for economic justice and human rights." Its members have outlined the problems of immigration and farmworker rights in Vermont as a denial of rights and dignity. Migrant Justice's goal is to secure dignified work and quality housing; freedom of movement and access to transportation; freedom from discrimination and; access to healthcare.

The outlined fundamental rights of freedom of movement and access to transportation and freedom from discrimination are relevant to any decision in this case. Specific to the issues in this case, Migrant Justice has been involved in advocating on behalf of migrant farmworkers with respect to: (1) Vermont's fair and impartial policing (FIP) policy; (2) Vermont State

[1] No party or counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Police's noncompliance with the required FIP policy; (3) Vermont authorities collaboration with Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP); and litigation against federal immigration authorities, the Department of Homeland Security, and the Vermont DMV over the continued discriminatory targeting of Migrant Justice Members. Migrant Justice wishes to inform the Court of the current state of the diminished constitutional rights of its members and the likely ramifications on its members' rights stemming from this Court's decision on the legal issues presented in this interlocutory appeal.

More specifically, Migrant Justice wishes to provide this Court with additional insights into the legal and policy implications inherent in this Court's interpretation of Vermonters' rights under the Fourth Amendment to the United States Constitution and Article 11 of the Vermont Constitution. In addition, Migrant Justice wishes to provide context to this Court with respect to the increased presence of CPB and ICE in Vermont and the increased entanglement between CPB, Vermont State Police, and other Vermont authorities such as the Department of Motor Vehicles.

While Migrant Justice acknowledges there are no specific facts in this case that implicate a migrant worker, many farmworkers work near the highly militarized northern border and live in fear of racial profiling practices of police, border patrol, and some community members, which together converts many into virtual prisoners on the farm. The members of Migrant Justice have a substantial interest in providing this Court with context on the legal issues in this case and their impacts on the Vermonters Migrant Justice serves.

STATEMENT OF THE CASE

On August 12, 2018, a federal Border Protection agent, on a "roving patrol," stopped Appellants Phillip Walker-Brazie and Brandi Lena-Butterfield on a road near the Canadian border. While the Border Protection Agent observed no traffic violations, he deemed Appellants suspicious and pulled them over. Without consent, the federal Border Protection Agent and his supervisor searched Appellants' vehicle and found marijuana and a bag of hallucinogenic mushrooms. The federal Agent contacted Vermont authorities and turned the seized marijuana and mushrooms over to state law enforcement. Appellants were subsequently charged in the Superior Court, Orleans Unit. During an evidentiary hearing, the Superior Court denied Appellants' motion to suppress the evidence seized by the Border Patrol Agent and this interlocutory appeal ensued.

SUMMARY OF ARGUMENT

Amicus Curiae is a non-profit organization dedicated to building the voice, capacity, and power of the farmworker community and engage community partners to organize for economic justice and human rights. Its members have outlined the problems of immigration and farmworker rights in Vermont as a denial of rights and dignity and many of its members have been subject to immigration enforcement actions.

Amicus Curiae believes that Custom and Border Protection's (CPB) increased role is a threat to the rights of Vermont residents – including undocumented Vermonters. As CPB's role has dramatically increased in recent years in Vermont and across the country, it is critical that Vermont authorities that collaborate or coordinate with a growing CPB remain subject to the Vermont Constitution. Indeed, Vermont's political branches at both the state and local level

have embraced this principle by limiting state and local authorities' ability to collaborate with federal border patrol agents.

Amicus Curiae believes that without the efforts of state and local governments, CBP's activities will continue to infringe upon Vermonters' sacred constitutional rights at a time when CBP has expanded into traditional areas of state law enforcement in new and troubling ways. As a result of this federal expansion, it is incumbent upon this Court to protect the Vermont Constitution by requiring that evidence used by state law enforcement in state criminal proceedings be subject to Article 11 of the Vermont Constitution when obtained by federal authorities during a "roving patrol."

ARGUMENT

I. Customs and Border Protection's Increased Role Is a Threat to the Constitutional Rights of Documented and Un-Documented Vermont residents.

A. CBP's Aggressive Activities Have Increased in Recent Years in Vermont.

CBP's activities have not been limited to the southern border or major ports of entry and Vermont has born witness to expanding operations throughout the state. Examples such as checkpoints along the Sand Bar access to the Champlain Islands,[2] CBP officers boarding greyhound busses, and undercover roving patrols making immigration arrests,[3] all at a significant distance from the international border, underscore the increased presence of CBP in the lives of Vermonters. CBP also appears to enjoy a close working relationship with local law enforcement:

[2] Xander Landen, *Vermonters Question Ramped Up Border Security*, VTDIGGER (Sep. 15, 2019), https://vtdigger.org/2019/09/15/ramped-up-border-patrol-checkpoints-divide-vermonters/ (describing local reactions to border patrol checkpoints on the Sandbar Causeway between Colchester and the Champlain Islands).
[3] *See* Daniela Allee, *Documents Show Other Methods Border Patrol Uses to Find Undocumented Immigrants*, NHPR (Sep. 18, 2019), https://www.nhpr.org/post/documents-show-other-methods-border-patrol-uses-find-undocumented-immigrants#stream/0 (describing roving patrols by plainclothes CPB officers in unmarked vehicles detaining farmworkers thought to be undocumented in Lebanon and White River Junction).

a Franklin County sheriff's deputy received media scrutiny in 2017 by calling in CBP officers during a traffic stop shortly after learning that the vehicle's occupants did not speak English.[4]

Such developments have led to significant concern by Vermonters of all political stripes, including its Congressional delegation and Governor.[5] Many see CBP's objectives as increasingly at odds with local values and priorities, embodied by efforts to limit Vermont's involvement in federal immigration enforcement.[6] Furthermore, CBP's apparent willingness to use its federal authority broadly conflicts with Vermont's strong tradition of individual liberty from unreasonable search and seizure under Article 11 of the State Constitution.

Many of the individuals represented by Migrant Justice, lawfully present in the United States or not, may feel at risk of racial profiling, to the extent that CBP is alleged to engage in such behavior.[7] Evidence originating from racially-discriminatory investigations and brought into state courts would implicate Vermont courts in this unconstitutional behavior. Furthermore, from the perspective of a non-citizen residing in Vermont, lawfully or otherwise, anything that could

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[4] Taylor Dobbs, *Footage Shows Feds Using Ethnic Slur During Traffic Stop*, SEVEN DAYS (Dec. 8, 2017) https://www.sevendaysvt.com/OffMessage/archives/2017/12/08/footage-shows-feds-using-ethnic-slur-during-traffic-stop (describing how traffic stop lead to CBP officers on the scene within 10 minutes, and subsequent footage apparently showing a grinning CBP officer making a racial slur, referring to the vehicle's occupant as a "wet").

[5] Landen, *supra* note 2 (describing Senator Leahy's plans to "rein in" interior checkpoints and Governor Scott describing CBP's 100 mile authority as "excessive"); Elizabeth Hewitt, *Border Patrol Sandbar Checkpoint Rankles Civil Liberties Advocates*, VTDIGGER (May 5, 2019), https://vtdigger.org/2019/05/05/border-patrol-sandbar-checkpoint-rankles-civil-liberties-advocates/ (describing statement by Vermont's Congressional delegation "sharply condemning" checkpoints within Vermont).

[6] *E.g.,* Alicia Freese, *Scott Signs Bill Limiting Trump's Immigration Executive Orders*, SEVEN DAYS (Mar. 28, 2017), https://www.sevendaysvt.com/OffMessage/archives/2017/03/28/scott-signs-bill-limiting-trumps-immigration-executive-orders (Bipartisan bill limiting state involvement with federal immigration enforcement); Pat Bradley, *Vermont Selectboard Votes to Adopt Impartial Policing Policy,* WAMC NORTHEAST PUBLIC RADIO (Apr. 10, 2020), https://www.wamc.org/post/vermont-selectboard-votes-adopt-fair-and-impartial-policing-policy (Norwich barring police officers from enforcing immigration law or sharing immigration information with federal authorities).

[7] *E.g.*, Adiel Kaplan & Vanessa Swales, *Border Patrol Searches Have Increased on Greyhound, Other Buses Far From Border*, NBC NEWS (June 5, 2019), https://www.nbcnews.com/politics/immigration/border-patrol-searches-have-increased-greyhound-other-buses-far-border-n1012596 (describing apparent use of racial profiling in questioning bus passengers about citizenship status).

lead to a State conviction, no matter how trivial in the State's eyes, can trigger extremely severe immigration consequences (often removal). State courts in Vermont and elsewhere have often attempted to limit the extent to which their decisions can be co-opted by federal authorities to create additional federal immigration consequences beyond the limited punishment the state court seeks to impose.[8] By shepherding additional evidence into state courts, CBP might further commandeer Vermont's justice system to secure federal removal orders, contrary to the stated interest of the Vermont court system and the public.

In recent years, CBP has ramped up its operations and undergone efforts to drastically enlarge its work force.[9] Because federal law grants CBP officers broad law enforcement authority deep into the interior of the country, these expanded operations may pose a significant risk to the civil liberties of citizens and non-citizens alike.[10] Unlike many traditional law enforcement agencies, CBP can shroud itself in the secrecy afforded by its national security affiliation. Indeed, it appears CBP recently used masked agents dressed in camouflage and driving unmarked vehicles to "arrest" protesters in Portland, Oregon.[11] However, FOIA litigation has yielded some results, including CBP training materials demonstrating some of the

[8] *See, e.g.,* State v. Lumumba 2014 VT 85, 197 Vt. 315, 104 A.3d 627 (overturning criminal sentence where sentencing judge had explicitly refused to consider the immigration consequences of the sentence).

[9] JOHN KELLY, IMPLEMENTING THE PRESIDENT'S BORDER SECURITY AND IMMIGRATION ENFORCEMENT IMPROVEMENTS POLICIES, DEPARTMENT OF HOMELAND SECURITY MEMORANDUM, (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf; EXEC. ORDER NO. 13,767, BORDER SECURITY AND IMMIGRATION ENFORCEMENT IMPROVEMENTS, (Jan. 25, 2017), https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements.

[10] *See generally*, Matthew Feeney, WALLING OFF LIBERTY: HOW STRICT IMMIGRATION ENFORCEMENT THREATENS PRIVACY AND LOCAL POLICING, CATO INSTITUTE (Nov. 1, 2018), https://www.cato.org/publications/policy-analysis/walling-liberty-how-strict-immigration-enforcement-threatens-privacy (detailing various concerns posed by CBP's heightened activity).

[11] Ken Klippenstein, THE BORDER PATROL WAS RESPONSIBLE FOR AN ARREST IN PORTLAND, THE NATION (July 17, 2020), https://www.thenation.com/article/society/border-patrol-portland-arrest/ (detailing recent events in which CBP used masked agents and unmarked vehicles to arrest at least one protester in Portland, Oregon).

intrusive tactics that CBP officers are taught to employ, often far from of the nation's border.[12] In addition to the use of "roving patrols" and interior checkpoints, CBP is increasingly relying on drone surveillance and nationwide databases, while actively pursuing facial recognition technology to link the two in a way that some believe could foreshadow a dystopian surveillance state along the border.[13] Searches of individual's electronic devices at the border have also increased sharply,[14] eventually resulting in a federal court ruling that such intrusive searches must be justified by an individualized determination of reasonable suspicion of contraband.[15] CBP officers have increasingly taken to boarding busses many miles from the northern border and questioning passengers regarding citizenship, often along what appear to be racial lines.[16]

Even more concerning, CBP has a poor record when it comes to constitutional abuses. CBP makes large outlays of cash to settle claims against its agents for excessive use of force and other constitutional violations.[17] Particularly troubling are the widespread accounts of CBP officers unnecessarily resorting to deadly force against unarmed individuals (including children)

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[12] Max Rivlin Nadler, *Newly Released FOIA Documents Shed Light on Border Patrol's Seemingly Limitless Authority*, THE INTERCEPT (Jan. 7, 2019), https://theintercept.com/2019/01/07/cbp-border-patrol-enforcement-law-course/ (relating CBP training materials interpreting broad agent law enforcement authority).

[13] *See, e.g*., Feeney, *supra* note 10 (arguing that, given CBP's authority up to 100 miles from the border and growing facial recognition databases, "[i]f linked with local and state law enforcement databases, CBP drones could be used for far more than immigration enforcement, with the agency aiding with crackdowns on petty traffic offenses such as parking violations.").

[14] Elizabeth Hewitt, *Judge Rules Suspicionless Border Searches of Devices Unconstitutional*, VT DIGGER (Nov. 17, 2019), https://vtdigger.org/2019/11/17/judge-rules-suspicionless-border-searches-of-devices-unconstitutional/ (noting a four-fold increase in searches of electronic devices along the border, raising concerns of privacy among journalists, lawyers, and families).

[15] *Id*.; Alasaad v. Nielsen, 419 F. Supp.3d 142 (D. Mass. 2019).

[16] Kaplan & Swales, *supra* note 7 (reporting increasing Greyhound bus searches and claims that agents only seriously question people of color regarding citizenship).

[17] Sarah Macaraeg, *Border Patrol Violence: US Paid $60m to Cover Claims Against the Agency*, THE GUARDIAN (May 1, 2018), https://www.theguardian.com/world/2018/may/01/border-patrol-violence-us-paid-60m-to-cover-claims-against-the-agency [*hereinafter* Macaraeg, *Border Patrol Violence*].

and engaging in racial profiling.[18] Occasional insights into the culture of CBP[19] do little to allay the concerns regarding CBP's commitment to respecting constitutional rights and the people with whom they interact.

B. Consistent with principles of state sovereignty, Vermont's political branches have sought to limit cooperation with federal immigration enforcement.

The Tenth Amendment enshrines state sovereignty in the Constitution. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 713–14 (1999) ("Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power."). Consistent with this principle, Vermont's Constitution created the organs of state government and vested them with authority to act on behalf of the sovereign. And, the Tenth Amendment makes clear that the state has no excuse for failing to exercise its sovereignty unless that sovereignty is displaced by the Constitution or preempted by federal law.[20] Indeed, states recognize the state government's duty to exercise the sovereignty reserved to it by the Tenth Amendment. *Tatum v. Wheeless*, 180 Miss. 800, 822, 178 So. 95, 100 (Miss. 1938) ("[W]e adhere to the position that the state is sovereign over matters confided to it, or reserved to it, by the Tenth Amendment to the Federal Constitution; and we recognize the fact that *state sovereignty cannot be bargained away or surrendered by the state Legislature*." (emphasis added)); *Cline v. Consumers' Coop. Gas &*

[18] Sarah Macaraeg, *Fatal Encounters: 97 Deaths Point to Pattern of Border Agent Violence Across America*, THE GUARDIAN (May 2, 2018), https://www.theguardian.com/us-news/2018/may/02/fatal-encounters-97-deaths-point-to-pattern-of-border-agent-violence-across-america [*hereinafter* Macaraeg, *Fatal Encounters*] (describing accounts of excessive use of force by CPB agents); Feeney, *supra* note 10 (describing high discipline rate at CBP, excessive use of force claims, and a its "documented history of being among the most ill-disciplined and abusive of the federal government's large law enforcement agencies."); Kaplan & Swales, *supra* note 7 (describing apparent use of racial profiling in questioning bus passengers about citizenship status).

[19] Consider the email obtained by the ACLU from a CBP official to supervisors wishing them "happy hunting" and encouraging them to "have fun" while boarding busses. *Id.*

[20] *See Parker v. Brown*, 317 U.S. 341, 359–360 (1943) (emphasis added) ("The governments of the states are sovereign within their territory save *only* as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers."); *accord New York v. United States*, 505 U.S 144, 156 (1992).

Oil Co., 152 Misc. 553, 671, 274 N.Y.S. 362, 383 (Sup. Ct. 1934) ("[T]here is no power in the Legislature of the State of New York to delegate any of its legislative powers to any outside agency, as to the Federal government or to the President of the United States. To do so is to impair the sovereignty of the State itself.").

State sovereignty is critical to our federal system, but state sovereignty and federalism are not ends in themselves. The Supreme Court's opinion in *Bond v. United States* waxes on the significance of federal-state dual sovereignty to individual liberty:

> [F]reedom is enhanced by the creation of two governments, not one . . . . The Framers concluded that allocation of powers between the National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived.
> . . . .
> Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.
> . . . .
> By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.

564 U.S. 211, 220–22 (2011) (internal quotations omitted).

As part of its sovereign authority and obligation to protect its residents, there are many significant examples of the political branches of Vermont government, at both state and local levels and often across the political spectrum, distancing themselves from federal immigration enforcement in recent years.[21] So far, these efforts have focused on ensuring that state/local officials do not assist federal agents, rather than the reverse (as occurred here). However, by

[21] *E.g.,* Sarah Asch, *Burlington Council Passes Fair and Impartial Policing Resolution*, VT DIGGER, (Mar. 10, 2020), https://vtdigger.org/2020/03/10/burlington-council-passes-fair-and-impartial-policing-resolution/ (detailing one effort to prevent local law enforcement from cooperating with federal immigration authorities).

rewarding the continuing cooperation between CBP and VSP, Vermont's judiciary would stand nearly alone as a branch of government defying the public's demonstrated interest in avoiding such state/federal collaboration. At the local level, towns like Norwich and Hartford (among others) are proposing or have already passed their own fair and impartial policing policies.[22] The town of Norwich's proposal would prohibit any information sharing with ICE, DHS, or CBP unless necessary for an ongoing investigation of a felony supported by probable cause.[23]

II. CBP's Activities Expand Well Beyond Border Security Issues and Impinge Upon Traditional Domains of State Law.

Though such broad authority and reports of rampant constitutional abuses would be troubling enough in the border security context, these concerns are magnified when CBP seeks to insert itself in the policing of garden-variety state law.[24] While engaging in "roving patrols" or setting up checkpoints deep within the interior of the country, CBP officers appear to be, to a remarkable extent, enforcing state, rather than federal, law.[25] When enforcing local law, CBP agents pose additional threats to constitutional rights and federalism principles. The U.S. Supreme Court has long granted sweeping deference to the authority to the executive in matters of immigration and border security, in contrast to the close review Vermont courts undertake when examining the behavior of state and local law enforcement.[26] Shielded from local criticism

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[22] Anna Merriman, *Voters to Decide Immigration Policing Policies in Hanover, Hartford, Lebanon, Norwich*, VALLEY NEWS, (Feb. 28, 2020) https://www.vnews.com/Four-Upper-Valley-towns-will-ask-voters-to-approve-welcoming-ordinances-32774904.

[23] TOWN OF NORWICH, *A Policy for Fair and Impartial Policing Policy in the Town of Norwich* (Feb. 2020), http://norwich.vt.us/wp-content/uploads/2020/02/Proposed-NORWICH-FIPP.pdf.

[24] *See* 8 U.S.C. § 1357(a)(5)(B) (authorizing CBP agents to conducts arrests for "any felony cognizable under the laws of the United States").

[25] *See, e.g.*, Macaraeg, *Fatal Encounters*, *supra* note 18 (describing the shooting of a U.S. Citizen based on an alleged attempt to steal two cases of beer); Feeney, *supra* note 10 (detailing federal immigration enforcement's growing involvement in the enforcement of state law).

[26] *Compare Fong Yue Ting v. United States*, 149 U.S. 698, 711–12, 729 (1893) (upholding Chinese Exclusion Act provision allowing warrantless arrests of Chinese laborers and subsequent deportation absent a supporting certificate of residence or "credible white witness," because, according to the Court, the government's "inherent" immigration

or state law by the status and authority of federal border protection, CBP agents may trample the otherwise closely-guarded civil liberties of state residents when they exercise their fairly unfettered discretion far from the border and on matters unrelated to federal border security.

This concern is highlighted by the troubling use of "parallel construction" by federal authorities to secretly push evidence derived from potentially unlawful surveillance sources into state criminal courts.[27] Under this approach, federal authorities tip local law enforcement based on information gathered from a potentially unconstitutional federal search.[28] Local law enforcement then uses a pretextual basis to search the suspect.[29] Throughout the court process, law enforcement relies entirely upon the pretextual rationale for the search, hiding the true source of the tip from the court and the defense, denying the defendant the opportunity to exclude the evidence or demand potentially exculpatory evidence from the prosecution.[30] This practice is generally shrouded in secrecy, and the extent of its use among federal law enforcement is unknown.[31] However, concern over this practice is indicative of the dangers implicit in allowing federal border patrol agents to feed information to local law enforcement enforcing state law, much like is done in the reverse silver platter context.

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authority rested with the political branches, and would not be subject to a searching review because the judiciary "does not undertake to pass upon political questions") *with State v. Bryant*, 2008 VT 39 n.2, 183 Vt. 355, 950 A.2d 467 ("Article 11 provides broader protection to individual rights than does the Fourth Amendment").

[27] HUMAN RIGHTS WATCH, DARK SIDE: SECRET ORIGINS OF EVIDENCE IN US CRIMINAL CASES (Jan. 9, 2018), https://www.hrw.org/report/2018/01/09/dark-side/secret-origins-evidence-us-criminal-cases (describing "daily" use of parallel construction as a "bedrock principle" by Drug Enforcement Administration); John Shiffman & Kristina Cooke, *Exclusive: U.S. directs agents to Cover up Program Used to Investigate Americans*, REUTERS (Aug. 5, 2013), https://www.reuters.com/article/us-dea-sod/exclusive-u-s-directs-agents-to-cover-up-program-used-to-investigate-americans-idUSBRE97409R20130805.

[28] *Id*.

[29] *Id*.

[30] *Id*.

[31] *E.g.*, Nadler, *supra* note 12 (noting that use of parallel construction impedes attorneys' abilities to understand how CBP uses its surveillance authority).

III. *State v. Coburn's* underlying rationale is no longer practicable.

State v. Coburn[32] is based on three premises: two are unremarkable, the third is staggering. 165 Vt. 318, 683 A.2d 1343 (1996). The two unremarkable premises are (1) that security of the national border is a federal, not state, interest; and (2) that the Vermont Constitution does not restrain the conduct of federal officers. However, *Coburn* expresses the third premise in dull and seemingly innocuous terms: "We defer to federal law where the federal interest i[n] the conduct at issue outweighs Vermont's interest." *Id.* at 325. This statement could be interpreted to mean that the Vermont constitution *never* applies to evidence that is initially seized by federal officers, an outcome our constitution cannot countenance. In light of the growth of CBP activities, this rationale is no longer practicable.

In support of the proposition that the Vermont Constitution may be applied or set aside depending on the facts, *Coburn* cites only one case—a case in which it *rejected* an invitation to defer to the federal government in the pervasively federal area of Indian affairs, writing: "We think it inappropriate to ground a burden of proof rule on deference to the interests of another sovereign which, in fact, has no interests in the case before us. This is not deference to another sovereign; it is abdication of responsibility." *State v. St. Francis*, 151 Vt. 384, 391, 563 A.2d 249, 253 (1989). Far from supporting the *Coburn* analysis, *St. Francis* exposes its fundamental error. Consider that the reverse "silver platter" situation involves a prosecution under state law in state court and the Vermont constitution applies to the conduct of state prosecutors. The only exception to this basic rule of constitutional law is federal preemption. But there is no preemption here.[33] Rather, a

[32] *State v. Rennis*, 2014 VT 8, ¶¶ 10–15, 195 Vt. 492, 90 A.3d 906 (2014) simply parrots the reasoning in *Coburn* and expands it to checkpoints.

[33] And even if there was preemption, the Supremacy Clause grants the federal government power to displace state law: it does not grant the federal government power to commandeer state courts for enforcement of federal law. *See New York v. United States,* 505 U.S. 144 (1992) (interpreting the Tenth Amendment as prohibiting "impermissible commandeering"); *see also Printz v. United States*, 521 U.S. 898 (1997). Thus, it is doubtful that the federal government could force the hands of state prosecutors and require state judges to ignore state constitutions.

looming federal interest cannot excuse a state court from enforcing the state constitution.[34] And even if it could, federal interests cannot outweigh state interests when the federal government has declined to prosecute an offense and turned over evidence for prosecution in state court, under state law.[35]

Coburn cites cases from other state courts to demonstrate that it is "not alone" in accepting the reverse "silver platter" doctrine. However, these cases only support the proposition that state constitutions do not constrain federal officers, they do not support *Coburn*'s leap that, where federal officers initiate a search, the evidence they obtain is never subject to the state constitution. The cases are summarized below:

- *People v. Mitchell*, 79 Cal. Rptr. 764, 768 (Cal. Ct. App. 1969), is not on point because the court says "no 'silver platter' issue is involved." On the contrary, the court cites *People v. Kelley*, 66 Cal.2d 232 (1967), which did involve a "silver platter" issue. *Kelley* excluded a confession from state court because, in accord with a military exception to the civil liberties, the military investigators who obtained the confession did not give the defendant a *Miranda* warning.
- *Morales v. State*, 407 So.2d 321, 329 (Fla. Dist. Ct. App. 1981), gives no indication that the search and seizure protections of the Florida constitution are more protective than the Fourth Amendment outside the area of electronic communications. Thus, the case does not involve a "silver platter" issue.
- *State v. Bradley*, 105 Wn.2d 898, 903, 719 P.2d 546, 549 (Wash. 1986), is on point, but it relies on *Morales, Mitchell,* and *Allard* with no analysis of its own.

Because this Court often looks to the Supreme Judicial Court of Maine's decisions as persuasive authority, it is worth considering the Supreme Judicial Court of Maine's decision in *State v. Allard*, 313 A.2d 439, 451 (Me. 1973). In *Allard*, the Court denied a motion to suppress evidence that CBP seized and transferred to state police. The Court reasoned that suppressing the

[34] State supreme courts have the final say on the meaning of state constitutions. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

[35] Additionally, it is deeply problematic to condition the state constitution on the contour of federal interests. The federal government has shown an increasing proclivity for invading state interests, especially in criminal law. *See* John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 673–77 (1999).

evidence was inappropriate because it would not deter CBP officers. In focusing on the deterrent function of suppression, the Maine Supreme Judicial Court aligned itself with the U.S. Supreme Court's view of the exclusionary rule. *See Mapp v. Ohio*, 367 U.S. 643, 655–56 (1961) (extending, to the states, an exclusionary rule premised on deterrence). This is all well and good as far as it goes, but the Vermont Supreme Court cannot rely on this reasoning to reach the same result because Vermont does not limit its exclusionary rule to a deterrent function. Rather than focusing on deterrence alone, the Vermont exclusionary rule preserves individual constitutional rights, protects individual privacy, promotes fairness, and guards the judicial process against the taint of official misconduct. *See State v. Badger*, 141 Vt. 430, 452–53, 450 A.2d 336, 349 (Vt. 1982). Of these purposes, protection of individual constitutional rights predominates. *See State v. Lussier*, 171 Vt. 19, 30, 757 A.2d 1017, 1025 (Vt. 2000). Given the difference between Vermont's exclusionary rule and the deterrence-only version, *Allard* may well have come out differently if it had been a Vermont case. Therefore, the *Coburn* Court's reliance on *Allard* is misplaced.

In addition to suffering from limited support, the *Coburn* decision fails to acknowledge Vermont's exclusionary rule is a protective measure. If the rule were a preventative measure, then the Court's concern with the chain of custody between federal and state officers would be appropriate because it would be important to identify the exact point at which Vermont police crossed the line of permissible conduct. But the exclusionary rule is not a preventative measure. Rather it intervenes to protect an individual no matter how the individual's constitutional rights were violated. The *Coburn* decision fails to recognize that "[t]o the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer." *Elkins v. United*

States, 364 U.S. 206, 215 (1960). This is the very reasoning which has led courts in other states to reject the reverse "silver platter" doctrine.[36]

IV. In no event can the *Coburn* analysis support extending the reverse "silver platter" doctrine to roving patrols like the one at issue in this case.

Even accepting the balancing of federal and state interests analysis in *Coburn* and *Rennis*, those precedents do not support extending the reverse "silver platter" doctrine to roving patrols. Not only do *Coburn* and *Rennis* involve border crossing/checkpoints, but all the cases the Court relies on for its reasoning and conclusion are border crossing cases.[37] This Court has yet to consider how Article 11 applies to searches performed by CBP on roving patrols. In this case, there was no checkpoint and the defendant was stopped miles from the Canadian border crossing. The vehicle was not going to or coming from the border crossing, just simply driving home. There is an inherent difference between a border check, or its functional equivalent and a "roving patrol."

The Supreme Court offered some guidance in this distinction in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). The Court explained the difference, by the balancing of the government's interest with the individual's. The Court required reasonable suspicion under the U.S. Constitution because a stop with no suspicion "would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers." *Id.* at 882. Likewise, a roving patrol subjects all Vermonters to the discretion of CBP nearly anywhere on Vermont roads. If CPB stops a car away from a border checkpoint or its functional equivalent, reasonable suspicion under Article 11 must be met by CBP

[36] *People v. Griminger*, 71 N.Y.2d 635, 641, 524 N.E.2d 409, 412 (N.Y. 1988) ("Since defendant has been tried for crimes defined by the State's penal law, we can discern no reason why he should not also be afforded the benefit of our State's search and seizure protection."); *State v. McCarthy*, 2018 WL 2106769, *8 (N.H. Super.) ("[G]iven that the defendants in this matter are facing prosecution in the State court for violations of State laws the constitutional protections of the New Hampshire Constitution should apply.").

[37] *See Mitchell*, 79 Cal. Rptr. at 766 (crossing the U.S./Mexico border in California); *Morales*, 407 So. 2d at 324 (crossing into U.S. waters in vessels off the coast of Florida); *Allard*, 313 A.2d at 442 (crossing the U.S./Canada border in Maine); *Bradley*, 719 P.2d at 547 (crossing the U.S./Canada border in Washington).

in order for that evidence to be admissible in state court for a state crime. There is a fundamental difference in a stop at an international border or checkpoint and a stop based on an officer's personal observations on roving patrol. The government has a strong interest in protecting national borders, at a border crossing, but the individual has a higher interest in personal privacy on state highways. *See id.* at 881–84 (discussing a strong individual interest in privacy during a roving patrol stop).

Another important point of distinction between roving patrols and borders/checkpoints is that borders/checkpoints are established. As a result, Vermonters have fair warning that the protections of the Vermont constitution do not extend to certain geographical areas and can reasonably avoid those areas. Vermonters cannot avoid roving patrols. Because most of Vermont is within 100 miles of the border, applying the reverse "silver platter" doctrine to roving patrols would subject Vermonters to unbridled CBP authority, effectively bypassing Article 11 protections that restrain state law enforcement. It makes some sense to have a system where Vermonters' rights depend on whether they are crossing a border or passing a checkpoint. It makes much less sense to have a system where Vermonters' rights depend entirely on who stops them.

An example of a state that rejected the reverse "silver platter doctrine" is New Mexico. In *State v. Cardenas-Alvarez*, a federal agent stopped a vehicle at a permanent border patrol checkpoint sixty miles north of the border. 2001-NMCS-017, ¶1, 130 N.M. 386, 25 P.3d 225. The Supreme Court of New Mexico interprets its constitution "more broadly than its federal counterpart, and specifically applies that broad protection to motorists." *Id.* ¶ 15. The Court held the officer lacked reasonable suspicion under the state constitution and said it "would not abandon [its] guard of those protections in order to accommodate evidence thereby yielded." *Id.* ¶ 19. As its justification the Court said, "we do not claim the authority to constrain the activities of federal

agents, we do possess the authority-and indeed the duty-to insulate our courts from evidence seized in contravention of our state's constitution." *Id.* It is worth noting that this case was not a roving patrol but was far from the border and was a checkpoint and the Court *still* declined to accept the evidence under the state constitution.

In short, *Coburn* and its progeny do not support applying the reverse "silver platter doctrine" to roving patrols.

CONCLUSION

For the forgoing reasons, this Court should reverse the decision of the Vermont Superior Court, Criminal Division, Orleans Unit.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief totals 6, 585words, per V.R.A.P. 32(a). I have relied upon the word processor used to produce this brief, Microsoft Office Word 2016, to calculate the word count.

I additionally certify that the electronic copy of this brief submitted to the Court and all parties was scanned for viruses, and that no viruses were detected.

DATED: July 21, 2020

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