IN THE SUPREME COURT OF THE STATE OF VERMONT
Docket No. 2019-388

State of Vermont,
Appellee

v.

Phillip Walker-Brazie & Brandi Lena-Butterfield,
Appellants

Appeal from Vermont Superior Court, Criminal Division, Orleans Unit
Docket Nos. 555-9-18 Oscr, 558-9-18 Oscr

Brief of the Appellants

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STATEMENT OF THE CASE

On the evening of August 12, 2018, Appellants Brandi Lena-Butterfield and Phillip Walker-Brazie were driving home to Richford on Route 105 through Jay, Vermont. P.C. 062:1-10; P.C. 081:24-082:21. Two miles west of North Jay Road, a Customs and Border Patrol ("CBP") agent on "roving patrol," P.C. 082:3-7; P.C. 090:13-14, pulled the couple over because Ms. Lena-Butterfield slowed her car as it approached the stopped CBP cruiser and the agent detected "signs of nervousness" as he followed them. P.C. 019:12-17; *see* P.C. 083-84. CBP conducts roving patrols up to—and, in "unusual circumstances," beyond—"100 air miles from any external boundary of the United States." 8 C.F.R. § 287.1(a)-(b) (so defining "reasonable distance," as used in 8 U.S.C. § 1357(a)(3)); *see also* P.C. 153, 157-59; P.C. 065:5-6; Migrant Justice Amicus Br. Part IV. Virtually all of Vermont is within CBP's "100-mile zone" for roving patrol stop and search authority. P.C. 153-157; Office of the Defender General ("ODG") Amicus Br., Summary of Argument

The CBP Agent approached the car and asked about Appellants' citizenship. P.C. 086:8-13. Ms. Lena-Butterfield told him they were United States citizens and were heading home to Richford. P.C. 133 (Ms. Lena-Butterfield "stated that they were . . . headed home to Richford, Vermont."). The CBP agent also claimed to have smelled marijuana. P.C. 086:14-15. Based on the marijuana scent, the CBP agent asked Ms. Lena-Butterfield if he could search her car. P.C. 086:21-22. She said no. P.C. 029:5-15; P.C. 086:21-24. The CBP agent ordered Ms. Lena-Butterfield and Mr. Walker-Brazie from the vehicle and handcuffed Mr. Walker-Brazie, placing him in a CBP vehicle. P.C. 056:18-22; P.C. 134. The involved CBP agents never sought a warrant for the search. P.C. 077:25-078:8. The search resulted in finding a small amount of marijuana and dry psilocybin mushrooms in backpacks and the center console. P.C. 030:15-19; P.C. 117.

Upon discovery of the contraband, CBP agents contacted the Vermont State Police. P.C. 055:19-21; P.C. 081:2-7. A State Police Trooper responded and seized the contraband. P.C. 081:2-7. CBP then released the couple. P.C. 134. Both Appellants were cited to the Vermont criminal division for unlawful possession. *Id*.

There is no dispute that if a Vermont officer on a Vermont highway searched Ms. Lena-Butterfield's car without consent, a warrant, or probable cause and exigent circumstances, any resulting evidence introduced in state court would be suppressed. P.C. 077:11-078:8; *see State v. Birchard*, 2010 VT 57, ¶ 12, 188 Vt. 172, 5 A.3d 879; *State v. Bauder*, 2007 VT 16, ¶ 1, 181 Vt. 392, 924 A.2d 38. Here, CBP agents took custody of the vehicle's occupants, conducted warrantless roadside vehicle search without consent or probable cause and exigent circumstances, and provided the resulting contraband to the Vermont State Police. Now the State seeks to use that evidence to prosecute Appellants.

The trial court denied Appellants' motion to suppress, citing two rationales. First, it concluded suppression would not satisfy the Vermont exclusionary rule's "primary" purpose of deterring police misconduct. P.C. 076:21-23; P.C. 078:15-18; P.C. 093:5-10. Second, it extended *State v. Coburn*, 165 Vt. 318, 683 A.2d 1343 (1996), and *State v. Rennis*, 2014 VT 8, 195 Vt. 492, 90 A.3d 906—each explicitly limited to the border and its functional equivalents—to searches by CBP agents on roving patrol in Vermont's interior. P.C. 091:5-092:2. Both conclusions were in error.

SUMMARY OF ARGUMENT

"[T]he Vermont Constitution is the fundamental charter of our state, and it is this Court's duty to enforce the constitution." *State v. Badger*, 141 Vt. 430, 448, 450 A.2d 336, 347 (1982). Appellants Brandi Lena-Butterfield and Phillip Walker-Brazie ask this Court to discharge that duty by ensuring that evidence gathered contrary to Article 11's protections cannot be used in a Vermont prosecution.

Vermont should adopt the "exclusionary rule analysis" followed by the majority of state courts facing similar scenarios because that approach honors Vermonters' independent and personal Article 11 rights and this Court's Article 11 precedent. Under this approach, Article 11 must be given effect here. Furthermore, *Coburn*'s interest-based analysis is inapposite and should not apply here. Regardless, even if this Court extends *Coburn* to roving patrols, Article 11 must apply because Vermont has a weighty and fundamental interest in safeguarding its people's state constitutional rights and enforcing its constitution in its own courts, among other interests, while the federal government has no interest in an opposite result.

STANDARD OF REVIEW

The legal conclusions of a lower court's decision on a motion to suppress are reviewed de novo by this Court. *State v. Bryant*, 2008 VT 39, ¶ 9, 183 Vt. 355, 950 A.2d 467. Where, as here, defendants challenge only the lower court's legal conclusions, this Court's review is plenary and nondeferential. *Id.*; *State v. Sheperd*, 2017 VT 39, ¶ 13, 204 Vt. 592, 170 A.3d 616.

ARGUMENT

I. Vermont Must Reject the "Reverse Silver Platter" Doctrine and Adopt the Exclusionary Rule Analysis Regarding Evidence Obtained in Vermont by Officers of a Separate Sovereign.

A. The History of the Reverse Silver Platter Doctrine.

The "reverse silver platter" doctrine permits the admission of evidence obtained by a separate sovereign's officers in a state criminal prosecution, even if the same evidence would be excluded had state officers conducted the search. The doctrine takes its name from the "silver platter" doctrine, under which federal prosecutors could use evidence handed to them by local police on a "silver platter" even though the local police obtained the evidence by means inconsistent with the Fourth Amendment. In 1960, the U.S. Supreme Court rejected the silver platter doctrine. *Elkins v. United States*, 364 U.S. 206, 223 (1960) ("[E]vidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible . . . ."). After *Elkins*, when local officials seized evidence in violation of the Fourth Amendment, it was inadmissible in federal prosecutions.

As state courts broadened state constitutions' search and seizure rights beyond the U.S. Supreme Court's Fourth Amendment jurisprudence, the "reverse silver platter" phenomenon arose in state criminal courts. State prosecutors would introduce evidence they received on a "silver platter" from federal law enforcement, when the evidence was obtained in ways that complied with the federal constitution but were inconsistent with broader state protections. *See Commonwealth v. Britton*, 55 MAP 2018, 2020 WL 1932629, at *11 (Pa. Apr. 22, 2020) (Wecht, J., concurring). Under the reverse silver platter doctrine, the state-based unconstitutionality of

the search nonetheless did not require exclusion in the state prosecution because a separate sovereign's officers conducted the search.

The Vermont Supreme Court has never adopted the reverse silver platter doctrine. To the contrary, without commenting on the doctrine, this Court has analyzed the admissibility of evidence seized by non-Vermont officials inside and outside of Vermont's boundaries under Article 11. *See State v. Muhammad*, 2007 VT 36, ¶¶ 2, 7-8, 182 Vt. 556, 927 A.2d 769 (analyzing the constitutionality of a federal agent's warrantless electronic recording under Article 11 and approving of the recording's suppression under Article 11); *State v. Platt*, 154 Vt. 179, 182-89, 574 A.2d 789, 791-95 (1990) (analyzing the legality of Massachusetts officers' seizure of defendant's car in Massachusetts under Article 11); *see also State v. Martin*, 2008 VT 53, ¶ 9, 184 Vt. 23, 955 A.2d 1144 ("Vermont's Chapter I, Article 11 . . . provides *freestanding* protection that in many circumstances exceeds the protection available from its federal counterpart." (emphasis added)). New Hampshire, Colorado, and Indiana courts have responded similarly. *See, e.g.*, *State v. McDermott*, 554 A.2d 1302, 1305 (N.H. 1989) (analyzing and affirming suppression of a confession given to federal agents in Connecticut under the New Hampshire Constitution); *People v. Taylor*, 804 P.2d 196, 198 (Colo. App. 1990) (holding that exclusion is required if evidence was seized out of state in a manner that violated Colorado constitutional rights); *Stidham v. State*, 608 N.E.2d 699, 700-01 (Ind. 1993) (ruling defendant's confession inadmissible under Indiana statute even though lawfully taken by Illinois officers in Illinois).

Just as the U.S. Supreme Court in *Elkins* rejected the silver platter doctrine in federal prosecutions because the doctrine subverts the protections of the Fourth Amendment, so too must this Court reject the reverse silver platter doctrine in this state prosecution—most importantly because it would subvert the independent protections of the Vermont Constitution. As set forth below, this Court should explicitly adopt the analysis used in most state supreme

courts analyzing reverse silver platter scenarios because that analysis best protects state constitutional rights and interests.

B. The Exclusionary Rule Analysis Best Protects State Constitutional Rights and Interests.

State courts primarily take one of two approaches when reviewing reverse silver platter scenarios: an exclusionary rule analysis or a conflict of law analysis. *State v. Torres*, 262 P.3d 1006, 1013 (Haw. 2011); *Britton*, 2020 WL 1932629, at *11 (Wecht, J., concurring); Tom Quigley, *Do Silver Platters Have a Place in State–Federal Relations? Using Illegally Obtained Evidence in Criminal Prosecutions*, 20 Ariz. St. L.J. 285, 321–25 (1988). Each is examined below.

1. The Exclusionary Rule Analysis

The exclusionary rule analysis requires courts to analyze the purposes of the state's exclusionary rule and evaluate how suppression serves those purposes.[1] *Torres*, 262 P.3d at 1013-14; *State v. Ramirez*, 895 N.W.2d 884, 900 (Iowa 2017) (Wiggins, J., dissenting). Nearly all courts facing reverse silver platter cases explicitly or implicitly use the exclusionary rule analysis. *See, e.g.*, *Ramirez*, 895 N.W.2d 884; *Torres*, 262 P.3d 1006; *State v. Boyd*, 992 A.2d 1071 (Conn. 2010); *Commonwealth v. Brown*, 925 N.E.2d 845 (Mass. 2010); *State v. Cardenas-Alvarez*, 2001-NMSC-017, 130 N.M. 386, 25 P.3d 225; *State v. Rodriguez*, 854 P.2d 399 (Or. 1993) (en banc); *State v. Davis*, 834 P.2d 1008 (Or. 1992); *Mollica*, 554 A.2d 1315; *People v. Porter*, 742 P.2d 922 (Colo. 1987) (en banc); *Echols v. State*, 484 So.2d 568 (Fla. 1985); *State v. Lucas*, 372 N.W.2d 731 (Minn. 1985); *People v. Blair*, 602 P.2d 738 (Cal. 1979).

"[M]ost [courts] agree that using an exclusionary rule analysis is preferable." Dana Perkins, *State Constitutional Law—Search and Seizure—Declining to Adopt an Agency*

[1] When using the exclusionary rule approach for federally secured evidence, courts "treat [federal] officers as officers from another jurisdiction." *State v. Mollica*, 554 A.2d 1315, 1327 (N.J. 1989).

Analysis in Determining the Admissibility of Evidence Obtained in Another Jurisdiction Promotes Circumvention of the Connecticut Constitution, 42 Rutgers L.J. 1041, 1045 (2011); *see also Commonwealth v. Banville*, 931 N.E.2d 457, 463 n.1 (Mass. 2010) (noting that, although the law may not be "clear or settled," "[i]n the area of searches, the trend is toward the exclusionary rule approach"); Megan McGlynn, Note, *Competing Exclusionary Rules in Multistate Investigations: Resolving Conflicts of State Search-and-Seizure Law*, 127 Yale L.J. 406, 442 (2017) (writing that the exclusionary rule approach "enjoys the most widespread judicial and scholarly support"). The exclusionary rule analysis enjoys this support because it appropriately centers state constitutional protections—preserving the value and weight of hallowed state rights. Quigley, *supra*, at 323. Courts using the exclusionary rule approach recognize that the propriety of admitting evidence resulting from any search in state court depends upon the "critical assumption . . . that the state's constitutional goals will not [] be compromised." *Mollica*, 554 A.2d at 1328; *see also Torres*, 262 P.3d at 1015 ("Jurisdictions [using the exclusionary rule] approach have held that, where evidence obtained by federal agents is sought to be admitted in a state court prosecution, the admission of such evidence requires consideration of the state constitution.").

Adherents to the exclusionary rule analysis also explicitly or implicitly agree that state constitutional rights, particularly those deemed inherent and personal, should not be judged according to court-made procedural tests such as conflict of law analyses. A constitution is "a superior, paramount law, unchangeable by ordinary means." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803). To eschew a constitutional analysis for judge-made doctrine would elevate courts above the Constitution, "a result that goes against the very nature of our form of government." *Britton*, 2020 WL 1932629, at *13 (Wecht, J., concurring). Using an

analysis based in states' "paramount law" ensures that personally held constitutional rights remain courts' North Star.

2. The Conflict of Law Analysis

The conflict of law analysis, derived from civil contexts, considers a variety of factors that have little relevance to constitutional rights in criminal cases. In contrast to the widespread adoption and approval of the exclusionary rule approach, conflict of law approaches are generally criticized and disfavored. *See State v. Bridges*, 925 P.2d 357, 365 (Haw. 1996) ("Both courts and commentators have concluded it is preferable to use an exclusionary rule analysis rather than the traditional conflicts of law approach . . . ."), overruled by *Torres*, 262 P.3d at 1021 (noting that *Bridges* correctly identified exclusionary rule approach as better approach, but rejecting its application of it, which more closely reflected conflict of law approach); 1 Wayne R. LaFave, *Search and Seizure* § 1.5(c) (describing conflict of law analyses as "justly criticized" and potentially resulting in "absurdity"); McGlynn, *supra*, at 436 (conflict of law approaches fail to be "sufficiently sensitive to the policies underlying the exclusionary doctrine"). It thus appears only Rhode Island's high court affirmatively applies a conflict of law analysis in reverse silver platter scenarios, although without ever considering or analyzing the exclusionary rule approach. *See State v. Briggs*, 756 A.2d 731, 739-40 (R.I. 2000). Other courts that applied a conflict of law analysis in the distant past have since used the exclusionary rule approach. *Compare, e.g.*, *People v. Saiken*, 275 N.E.2d 381 (Ill. 1971), *with People v. Fidler*, 391 N.E.2d 210 (Ill. 1979).

Conflict of law doctrine is used in civil cases to determine which law to apply in cases where more than one jurisdiction's substantive law is implicated, as when the events at issue occurred in one jurisdiction, but the case is brought in another. State courts have adopted a variety of approaches to conflict of law issues, but generally, the tests are multi-factor analyses concerned with the location of events at issue, each jurisdiction's relevant interests,

predictability, ease in determining the law to be applied, and reliance interests. *See, e.g.*, Gregory E. Smith, *Choice of Law in the United States*, 38 Hastings L.J. 1041, 1043-50 (1987) (describing six distinct tests adopted in various states). For civil cases, Vermont has adopted the approach articulated in the Restatement (Second) of Conflict of Laws. *See Amiot v. Ames*, 166 Vt. 288, 292, 693 A.2d 675, 677 (1997).

Regardless of the conflicts approach applied, a conflict of law analysis is a poor fit for criminal matters. These analyses give too little weight to constitutional rights and the purposes of the exclusionary rule, while giving "too much weight to factors irrelevant to the administration of the criminal justice system." McGlynn, *supra*, at 437-38. Considering largely irrelevant interests or policy objectives in the adjudication of a criminal defendant's constitutional rights "risks compromising th[e] purposes" of the exclusionary rule and thus the state search and seizure right itself. *Id*. at 438. The traditional policy justifications for the exclusionary rule—individual privacy, integrity of the judicial process, and deterrence—may not even be considered. "Indeed, the *Briggs* court gave no attention to whether the conflict rule it announced would actually further . . . values underlying Rhode Island's or New Hampshire's exclusionary rules." *Id*. at 439.

Conflict of law approaches also may compromise traditional notions of fairness and equal protection of law. 1 LaFave, *supra*, at § 1.5(c); McGlynn, *supra*, at 438. For example, if a court were to render opposite results regarding the rights of defendants in situations identical but for the officer's jurisdiction, the public would likely see it as unjust.[2] Moreover, conflict of law analyses risk reaching different conclusions even on entirely identical facts, including the officer's jurisdiction: "The decisions in any given jurisdiction are often decidedly, even wildly,

[2] As discussed *infra*, n.10, this Court determines impacts on the integrity of Vermont's judicial process and notions of fairness by looking at the likely public perception.

different." *Smith*, *supra*, at 1041. The public would rightly see as unjust a system wherein a criminal defendant's constitutional rights are left to such an arbitrary, inconsistent, and uncertain approach. Conflict of law analyses simply do not belong in criminal court.[3]

3. Only the Exclusionary Rule Analysis Is Consistent with the Vermont Constitution and this Court's Duty to Enforce It.

Vermont's Constitution predates the federal constitution, and it is this Court's duty to enforce it as our state's fundamental charter. *Badger*, 141 Vt. at 447-48, 450 A.2d at 347. The title of Chapter I of the Vermont Constitution, A Declaration of the Rights of the Inhabitants of the State of Vermont, "signifies that the rights that follow are personal to Vermont's inhabitants." *Skiff v. S. Burlington Sch. Dist.*, 2018 VT 117, ¶ 28, 208 Vt. 564, 201 A.3d 969 (collecting cases). The Declaration of Rights, "of which Article Eleven is an integral part, sets forth the 'natural, inherent, and unalienable' rights of the citizenry . . . . not delegated to the government under the written constitution, but [] reserved to the people." *State v. Wood*, 148 Vt. 479, 487, 536 A.2d 902, 907 (1987) (quoting Vt. Const. Ch. I, Art. 1). Vermonters' state constitutional rights are "the expression of the will of the sovereign people of the state." *In re Town Hwy. No. 20*, 2012 VT 17, ¶ 26, 191 Vt. 231, 45 A.3d 54. "As such, the constitution stands above legislative and judge-made law, and the rights contained therein speak 'for the entire people as their supreme law.'" *Id.* (quoting *Davis v. Burke*, 179 U.S. 399, 403 (1900)).

The rights guaranteed by the Declaration of Rights "ought not to be violated on any pretence whatsoever," Vt. Const. Ch. II, § 71, and every Vermont jurist takes an "oath to uphold the Vermont Constitution" and ensure that state "power is exercised only in accordance with

[3] Without discussing conflict of law approaches' impacts, on a few occasions this Court has implicitly used them in criminal cases involving border or equivalent searches. *See, e.g.*, *Coburn*, 165 Vt. 318, 683 A.2d 1343. As detailed in Part II, this Court should, in the least, reject this analysis for CBP searches in Vermont's interior.

law." *Miner v. Chater*, 137 Vt. 330, 334, 403 A.2d 274, 277 (1979). As described below, this Court has a long history of centering defendants' personal rights in criminal adjudications. Because the exclusionary rule analysis ensures focus on those rights, and choice of law analyses give insufficient consideration to the purpose and values of state constitutional protections, among other state interests, this Court should adopt the exclusionary rule analysis here in keeping with its longstanding practice and to prevent Vermonters' "sacred rights" from being unjustifiably overlooked. *Badger*, 141 Vt. at 453, 450 A.2d at 349.

C. Appellants' Article 11 Rights Apply Here Because the Vermont Exclusionary Rule's "Overriding Function" Is to Protect Individual Rights.

1. Application of the Exclusionary Rule Approach in Other States

Where state exclusionary rules' primary purpose is to protect individual rights, state courts have uniformly held that state constitutional protections apply to federally secured evidence. *Britton*, 2020 WL 1932629, at *15-16 (Wecht, J., concurring). For example, Hawaii's exclusionary rule protects individual privacy, while also intended to protect the integrity of the judicial process and deter unlawful police conduct. *Torres*, 262 Pd.3d at 1018-20. Consequently, in *Torres*, where a defendant sought to exclude evidence obtained by federal officers, the court reviewed those purposes in turn. Regarding the Hawaii rule's privacy rationale, the court reasoned that "the question of whether or not the privacy rights of a defendant who is tried in our courts and under our penal law have been violated, should not be governed by the law and constitution of jurisdictions that have deemed privacy rights irrelevant." *Id*. at 1020 (referencing the federal exclusionary rule's sole rationale: to deter illegal police conduct); *see, e.g., Pa. Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363 (1998) ("The exclusionary rule is [] a judicially created means of deterring illegal searches and seizures.").

Examining the additional purposes of Hawaii's exclusionary rule, the *Torres* court found they, too, required enforcing Hawaii constitutional rights in Hawaii courts. As for judicial integrity, the court noted that it is bound to follow Hawaii's constitution and found that allowing evidence in its courts that was gathered contrary to its constitution's protections "would necessarily be placing [the courts'] imprimatur of approval on evidence that would otherwise be deemed illegal." *Torres*, P.3d. at 1019. Similarly, the rule's deterrence rationale would be satisfied by applying state constitutional rights because, going forward, doing so "would deter any federal and state cooperation to evade state law." *Id*. at 1020 (internal quotation marks omitted).

Likewise, in *State v. Rodriguez*, the Oregon Supreme Court determined that suppression was required under its Constitution when the evidence was seized by a separate sovereign's officer because Oregon's constitutional rights are "given to the individual." 854 P.2d at 403 (quoting *Davis*, 834 P.2d at 1012). Since courts are bound to vindicate those inherent and personal rights, and the state exclusionary rule is the mechanism to vindicate those rights in criminal court, the state rule applied to all evidence in state criminal court. *Davis*, 834 P.2d at 1013 ("[T]he constitutional rights that we are required to vindicate belong to the individual defendant. They are guaranteed to him or her in trials in this state, and there is only one place and only one way in which such rights can be vindicated . . . ."). In addition, because defendants' rights are personal, "[i]n the context of a criminal prosecution, the focus then is on protecting the individual's rights *vis-à-vis* the government, not on deterring or punishing . . . any particular government actor." *Id*. at 1012. Therefore, the relevant inquiry was whether the State sought to profit from evidence seized in a manner that did not "comport[] with the protections given to the individual." *Rodriguez*, 854 P.2d at 415 (quoting *Davis*, 834 P.2d at 1012) ("It does not matter . . . *what* governmental entity (local, state, federal, or out-of-state) obtained it; the

constitutionally significant fact is that the Oregon government seeks to use the evidence in an Oregon criminal prosecution. Where that is true, the Oregon constitutional protections apply." (emphasis in original)); *see also Cardenas-Alvarez*, 2001-NMSC-017, ¶ 18 ("[W]hen a federal agent effectuates such an intrusion [inconsistent with New Mexicans' state constitutional rights] and the State proffers the evidence thereby seized in state court, we will subject it to New Mexico's exclusionary rule."); *Torres*, 262 P.3d at 1017 (citing *People v. Griminger*, 524 N.E.2d 409, 412 (N.Y. 1988), for the proposition that, despite seizure of evidence upon federal warrant, "a defendant tried under [New York's] penal law should be afforded the benefit of the state's 'search and seizure protections'").

By contrast, in states where exclusionary rules are based primarily on a deterrence rationale, courts generally admit federally obtained evidence because suppression does not fulfill the purpose of those states' exclusionary rules. *See Ramirez*, 895 N.W.2d at 898; *Mollica*, 554 A.2d at 1329; *State v. Toone*, 823 S.W.2d 744, 748 (Tex. App. 1992), aff'd, 872 S.W.2d 750 (Tex. Crim. App. 1994); *State v. Gwinner*, 796 P.2d 728, 732 (Wash. Ct. App. 1990); *State v. Hudson*, 849 S.W.2d 309, 310-12 (Tenn. 1993). For example, the New Jersey exclusionary rule's "essential objective . . . is to deter unlawful police conduct." *Mollica*, 554 A.2d at 1328[4] (citing *Delguidice v. N.J. Racing Comm'n*, 494 A.2d 1007, 1010 (N.J. 1985) ("Deterrence of future unlawful police conduct is the 'prime purpose' of the exclusionary rule, 'if not the sole one.'" (quoting *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041 (1984))). Believing that "no purpose of deterrence relating to the conduct of state officials is frustrated" by admitting federally seized evidence, these courts

[4] *Mollica* is "[p]erhaps the most influential decision" for states using an exclusionary rule analysis where their exclusionary rule focuses on the deterrence rationale. *Britton*, 2020 WL 1932629, at *17 (Wecht, J., concurring).

do not apply defendants' state constitutional rights.[5] *Id.*; *accord Brown*, 925 N.E.2d at 851; *Ramirez*, 895 N.W.2d at 898. Although the *Mollica* court mentions individual rights[6] and judicial process integrity,[7] these values receive little consideration because New Jersey's rule is "remedial"—not intended to effectuate personal rights. *Mollica* 554 A.2d at 1328.

2. Article 11 Demands Suppression of the Evidence in this Case.

Using the exclusionary rule approach, Article 11 must apply to evidence seized in Vermont and used in Vermont prosecutions, regardless of the jurisdiction of the officer who performed the search or seizure.[8] Vermont's exclusionary rule is necessary because "[e]vidence obtained in violation of the Vermont Constitution, or as the result of a violation, cannot be admitted at trial as a matter of state law." *Badger*, 141 Vt. at 452-53, 450 A.2d at 349. As in Hawaii, Oregon, and New Mexico, Vermont's search and seizure protections and exclusionary rule are intended primarily to protect individual rights. They also further judicial integrity, public perceptions of fundamental fairness, and institutional compliance with constitutional commands. *Id.* at 453 ("Introduction of [evidence obtained in violation of the Vermont Constitution] at trial eviscerates

[5] The *Mollica* court failed to consider that its rule incentivizes state officers to explicitly or implicitly seek federal cooperation to evade state law and encourages federal officers to conduct activities that local police could not under the New Jersey Constitution. *See* Part I.C.2.iii; *see also Torres*, 262 P.3d at 1020-21 (describing how the application of Hawaii's constitution to a reverse silver platter scenario would disincentivize local and federal officers from cooperating to evade state law).

[6] *Mollica* takes only one sentence to conclude, without further explanation, that no state constitutional rights are violated because "no state official or person acting under color of state law has violated the State Constitution." 554 A.2d at 1328. But, as noted below, from the defendant's perspective, the identity of the officer conducting the search is constitutionally irrelevant. *See* Part I.C.2.i. Moreover, *Mollica* fails to consider that the State, not merely its police, violates defendants' rights by admitting and using evidence seized in a manner that violates personally held state constitutional rights. *See* Part I.C.2.ii.

[7] The judicial integrity rationale likewise received only one sentence of consideration. Without explanation, the *Mollica* court states that "[j]udicial integrity is not imperiled because there has been no misuse or perversion of judicial process." *Id.*

[8] Despite the breadth of caselaw discussing the Vermont exclusionary rule's primary and other purposes, the lower court determined that "the exclusionary rule is there to deter illegal police conduct, primarily." P.C. 93:5-20. As discussed in Part I.C.2.i, the lower court was wrong as a matter of law.

our most sacred rights, impinges on individual privacy, perverts our judicial process, distorts any notion of fairness, and encourages official misconduct."). Every Vermont exclusionary rule rationale requires giving Appellants' Article 11 rights effect here.

i. Protecting Individual Rights to Privacy and Dignity

It is axiomatic that Article 11 embodies personal rights. *See Skiff*, 2018 VT 117, ¶ 28; *State v. Brooks*, 157 Vt. 490, 495, 601 A.2d 963, 965 (1991) (Morse, J., dissenting) ("Article 11 focuses on personal expectations of privacy rather than defined places."), abrogation recognized in *State v. Judkins*, 161 Vt. 593, 594, 641 A.3d 350, 351-52 (1993); *accord State v. Rheaume*, 2005 VT 106, ¶¶ 8-9, 179 Vt. 39, 889 A.2d 711; *see also State v. Sprague*, 2003 VT 20, ¶ 34, 175 Vt. 123, 824 A.2d 539 ("This is fundamentally a case about preserving personal freedom."). "The overriding function of Article 11 is to protect personal privacy and dignity against unwarranted intrusion by the state." *Bryant*, 2008 VT 39, ¶ 36; *see also State v. Kirchoff*, 156 Vt. 1, 6-7, 587 A.2d 988, 992 (1991) ("We believe Article 11 embraces the core value of privacy . . . ."). Article 11 is the basis for and given effect by the exclusionary rule. *See State v. Oakes*, 157 Vt. 171, 174, 598 A.2d 119, 121 (1991) (noting that the "Court would maintain the obligation to ensure that the [exclusionary rule] remedy effectuates Article 11 rights" regardless of whether the rule could be distinguished from Article 11 itself); *State v. Delaire*, 127 Vt. 462, 464, 252 A.2d 531, 533 (1969) (defining "[i]llegally obtained evidence" as "evidence obtained in violation of some constitutional right personal to the [defendant]"). Like Article 11 itself, our exclusionary rule is intended, first and foremost, to safeguard Vermonters' individual rights to privacy and dignity. *Badger*, 141 Vt. at 452-53, 450 A.2d at 349; *State v. Lussier*, 171 Vt. 19, 33, 757 A.2d 1017, 1026 (2000) (applying the exclusionary rule in civil license suspension proceedings "to protect the core value of privacy embraced in Article 11").

This Court regularly determines whether to apply the exclusionary rule by standing in defendants' shoes. *See State v. Geraw*, 173 Vt. 350, 356, 795 A.2d 1219, 1224 (2002) (explaining that Article 11 prevents secret warrantless recording in a suspect's home because "[f]rom the standpoint of the citizen" there is no difference between an officer and their undercover police informant); *Sprague* 2003 VT 20, ¶ 30; *State v. Simmons*, 2011 VT 69, ¶ 15, 190 Vt. 141, 27 A.3d 1065 ("Under Article 11, the question of whether an individual has a legitimate expectation of privacy hinges on the essence of underlying constitutional values—including respect for *both* private, subjective expectations and public norms." (emphasis in original)); *see also Elkins*, 364 U.S. at 215 ("To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer. It would be a curiously ambivalent rule that would require the courts of the United States to differentiate between unconstitutionally seized evidence upon so arbitrary a basis." (footnote omitted)). To do otherwise would fail to honor the "core value that gave life to Article 11, the freedom from unreasonable *government* intrusions into the privacy of Vermont citizens." *Geraw*, 173 Vt. at 357, 795 A.2d at 1224-25 (internal quotation marks omitted) (emphasis in original). As in Oregon, Vermont's exclusionary rule emphasizes "protecting the individual's rights *vis-à-vis* the government." *Davis*, 834 P.2d at 1012; *see Lussier*, 171 Vt. at 33, 757 A.2d at 1027 (citing *Lopez-Mendoza*, 468 U.S. at 1060 (Marshall, J., dissenting), for proposition that exclusionary rule assures public that "government [will] not profit from its lawless behavior"); *Wood*, 148 Vt. at 487-88, 536 A.2d at 907-08 ("In drafting Article Eleven, the framers of the Declaration of Rights vested responsibility and authority in the judiciary to review and restrain overreaching searches and seizures by the government. . . . [Article 11] is the authority upon which the judiciary acts to protect the people from unlawful searches and seizures, which are the means historically relied upon by a government seeking to impose its will upon a reluctant people.").

Notably, Article 11's prohibitions speak broadly to "any officer or messenger." As a matter of plain meaning, its language is not limited to Vermont officers. And, at the time of Vermont's Constitutional Convention, the Framers likely intended to protect, among other things, Vermonters' right to "hold themselves, their houses, papers, and possessions, free from search or seizure" by New York and foreign officers. *See* Preamble to Vt. Const. (1777) (detailing grievances against New York, including its sending of sheriffs and foreign troops to dispossess Vermont residents of their land); *see also Baker v. State*, 170 Vt. 194, 210, 744 A.2d 864, 876 (1999) (noting "Vermont's double revolution—a rebellion within a rebellion to describe the successful revolt against both Great Britain and New York by [those] who comprised the bulk of the Green Mountain Boys" (internal quotation marks omitted)). While Article 11 may not bind federal officers, it does require that Vermont courts reject evidence gathered by "any officer" in contravention of its protections.

In this case, the Court must maintain its enduring focus on individual rights in criminal prosecutions. Vermonters' experience of a privacy intrusion is the same regardless of whether another sovereign's officer conducted it. Ms. Lena-Butterfield refused consent to search her vehicle because she sought to protect her privacy. That CBP agents on roving patrol are not obligated to operate under Vermont law is of no consequence to the invasion of her or Mr. Walker-Brazie's Vermont constitutional rights. Their personally held Article 11 rights were impinged in the same way as if the search had been conducted by any other government agent, and admitting such evidence similarly violates their rights by allowing the State to profit from the piercing of sacrosanct protections.[9] Thus, in accordance with Article 11, the resulting evidence should be subject to Vermont's exclusionary rule.

[9] "While th[e] right to be let alone is protected by the Fourth Amendment of the United States Constitution, our system of federalism in the United States ensures that 'a double security arises to the

ii. Protecting the Integrity of the Judicial Process and Fundamental Fairness

Vermont's exclusionary rule also safeguards the integrity of Vermont's judicial process and notions of fundamental fairness. *Badger*, 141 Vt. at 453, 450 A.2d at 349. These interests exist in relation to one another: when the integrity of the judicial process is maintained, it will be—and will be perceived by the public as being—fundamentally fair.[10] *See Lussier*, 171 Vt. at 33, 757 A.2d at 1026 (the purpose of Vermont's exclusionary rule is, in part, "to promote the *public's* trust in the judicial system." (emphasis added)).

As the Hawaii Supreme Court noted in *Torres*, to place the "imprimatur of approval on evidence that would otherwise be deemed illegal" would "compromis[e] the integrity of our courts." 262 P.3d at 1019. Article 11's focus on privacy and dignity yields a promise that "the state [will] temper its efforts to apprehend criminals with a concern for the impact of its methods on our fundamental liberties." *Bryant*, 2008 VT 39, ¶ 36; *see also Britton*, 2020 WL 1932629, at *18 (Wecht, J., concurring) ("Our Constitution makes promises to all those who are subject to its provisions, whether they be criminal defendants or innocent victims, Pennsylvania residents or visitors from other jurisdictions. Those promises must be enforced in our courts if they are to have their intended effects." (footnote omitted)). To allow Vermont's government to gain a conviction by relying on evidence obtained in a manner inconsistent with Article 11 would

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rights of the people.' The Federalist No. 51 (James Madison). Article I, Section 8 is that double security. It guarantees that our law enforcement officers, our prosecutors, and our courts do not violate that essential component of liberty." *Britton*, 2020 WL 1932629, at *25 (Wecht, J., concurring) (analyzing Pennsylvania's Article 11 analogue).

[10] This Court considers public perceptions of judicial fairness in a variety of cases. For instance, in judicial discipline cases, the Court's goal is to "preserve and enhance public confidence in the integrity and fairness of the justice system." *In re O'Dea*, 159 Vt. 590, 604, 622 A.2d 507, 515 (1993); *see also In re Hodgdon*, 2011 VT 19, ¶ 16, 189 Vt. 265, 19 A.3d 598 ("[W]e must protect the fairness, and perceived fairness, of judicial decision-making . . . ."). In reviewing Confrontation Clause cases for plain error, this Court's final question is whether the error "seriously affects the fairness, integrity or *public reputation* of judicial proceedings." *See, e.g.*, *State v. Koons*, 2011 VT 22, ¶ 11, 189 Vt. 285, 20 A.3d 662 (emphasis added).

implicate the courts in breaking that promise and "would only serve to undermine the integrity of the judiciary." *Britton*, 2020 WL 1932629, at *18 (Wecht, J., concurring).

In exercising its "duty to enforce the constitution," *Badger*, 141 Vt. at 448, 450 A.2d at 347, this Court has frequently departed from federal precedent interpreting parallel federal constitutional provisions where that precedent disserves the values underlying Vermont's provision. These departures have been especially numerous in the search-and-seizure context, *see* ODG Amicus Br. Part I.e.1, in part in recognition of the fact that "the [U.S.] Supreme Court has continued to narrow the scope of the federal exclusionary rule based on questionable reasoning that has been subject to much criticism," *Lussier*, 171 Vt. at 31, 757 A.2d at 1025. This Court's work in ensuring that Vermont's constitutional values are honored is incompatible with allowing evidence secured in violation of those rights to be used by a Vermont prosecutor in a Vermont courtroom.

Because "[i]t is the duty of this Court to see that constitutional rights are upheld," *id.* at 33, 757 A.3d at 1027, the public's trust can only be maintained if Vermont courts are led by the Vermont Constitution. *See also Badger*, 141 Vt. at 449, 450 A.2d at 347 (recognizing the Court's duty to enforce the Vermont Constitution and its obligation to enforce defendants' state constitutional rights when invoked). By upholding Vermonters' rights in Vermont courts, the judiciary "avoid[s] the taint of partnership in official lawlessness." *Lussier*, 171 Vt. at 33, 757 A.2d at 1027 (citing and quoting *Lopez-Mendoza*, 468 U.S. at 1060 (Marshall, J., dissenting)). As the U.S. Supreme Court noted in *Mapp v. Ohio*, "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." 367 U.S. 643, 659 (1961); *see also Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare . . . that

the government may commit crimes in order to secure the conviction of the private criminal would bring terrible retribution.").

Vermonters rightfully expect the Vermont exclusionary rule to protect those rights "which may not be encroached upon by the government," *Wood*, 148 Vt. at 487, 536 A.2d at 907. As described in Part I.C.2.i, to the individual Vermonter whose privacy is invaded through a warrantless search, it is of no consequence whether the invader is a federal officer or local police. *See Torres*, 262 P.3d at 1016 (quoting *Rodriguez*, 854 P.2d at 403). When Ms. Lena-Butterfield refused consent to search, P.C. 029:14-15; P.C. 086:21-24, she expected the judicial branch to prevent Vermont from directly or indirectly profiting from the infringement of the state constitution. Failing to uphold Appellants' Article 11 rights regarding evidence obtained in Vermont through the infringement of personally held rights, while permitting the State to profit from that evidence in Vermont courts, would "necessarily be placing [Vermont courts'] imprimatur of approval" on violations of constitutional protections. *Torres*, 262 P.3d at 1019. Moreover, public notions of fundamental fairness would be endangered because Vermont defendants identical to Appellants, subject to the same search by Vermont police, would have their rights upheld. To allow such an arbitrary discrepancy would undermine the integrity of the judicial process and defy reasonable Vermonters' expectations of fundamental fairness.

iii. Encouraging Institutional Compliance with State Constitutional Rights

Vermont's exclusionary rule is also intended to "create[] an incentive for the police as an institution to train its officers to conform with the Constitution." *Oakes*, 157 Vt. at 180, 598 A.2d at 125. In novel exclusionary rule cases, the most important deterrence rationale question is, therefore, whether the failure to suppress will "lower the incentive for institutional compliance." *Id*. at 180, 598 A.2d at 125. Here, preventing the State from profiting from violations of Vermont constitutional protections would unequivocally incentivize training Vermont law enforcement to

avoid evading state law through explicitly or implicitly encouraging federal officers to do something state law prohibits for local police. *See Torres*, 262 P.3d at 1020 ("[A]pplication of the Hawai'i exclusionary rule factors in future cases would deter any federal and state cooperation 'to evade state law.'"). However, failing to apply Article 11 will "lower the incentives for institutional compliance" because police and prosecutors could seek evidence otherwise inaccessible for state prosecution by implicitly encouraging federal officers to do what Vermont police cannot. This alone fails the deterrence rationale standard and should be dispositive.[11]

Moreover, in addition to CBP's regulatory roving patrol authority over virtually all of Vermont, Vermont and federal law enforcement have a collaborative relationship and regularly cooperate in operations. The longstanding and ongoing relationship necessarily increases incentives for federal officers to engage in more searches that Vermont officers could not, to incentivize Vermont officers' subsequent cooperation and assistance in federal matters. Thus, not only would admitting the fruits of the CBP roving patrol warrantless search here lower incentives for Vermont police to adhere to the Vermont Constitution in the future, it would itself encourage CBP and other federal officials to conduct pretextual searches throughout Vermont that Vermont officers otherwise could not.

* * * *

"The erosion of liberty is a slow, subtle process, and we are long gone down the road before a memory of what we used to have causes us to look back and notice our loss." *Sprague*, 2003 VT 20, ¶ 34. Using the exclusionary rule analysis here, as this Court must to give full effect to Vermonters' personally held rights, Article 11 must apply. To admit evidence secured in

[11] It is difficult to fathom how defendants would know about implicit encouragement and then prove an adequate level of encouragement necessary to satisfy the *Mollica* standard. This scheme puts defendants at a substantial disadvantage that Article 11 should not tolerate.

Vermont by government actors through the intrusion of Ms. Lena-Butterfield's and Mr. Walker-Brazie's sacred and inalienable Vermont rights is to hollow out those rights. Such action risks Vermonters' faith in those rights and the branch that is sworn to uphold them. This Court cannot allow such an "erosion of liberty" to occur. As the guardian of the rights enshrined in Article 11, this Court must protect them here.

II. The *Coburn* Interest-Based Analysis Is Inapposite Here, but Nonetheless Would Require Application of Article 11 Rights.

Coburn involved an Article 11 challenge to evidence discovered by federal customs officials at New York's JFK International Airport during routine baggage inspections. 165 Vt. 318, 683 A.2d 1343. Finding contraband in the defendant's luggage, the federal officials forwarded the defendant's possessions to Vermont officials for prosecution. With limited analysis, *Coburn* held that Article 11 rights did not apply regarding the contraband because "the federal interest in the conduct at issue outweigh[ed] Vermont's interests." *Id.* at 325 (citing *State v. St. Francis*, 151 Vt. 384, 391, 563 A.2d 249, 253 (1989)).

In this case, the lower court extended *Coburn*'s analysis to roving patrol searches in the interior of Vermont because "there is a strong Federal interest in the border patrol, and . . . in the border patrol being able to do its work, and that that outweighs essentially any State interest,"[12] P.C. 91:9-15, and because the stop was "so close to the border that the State law would essentially interfere at some level with the exercise of Federal authority," P.C. 091:25-092:2. As explained below, the court's deference to federal interests and concern about interference with federal authority are unwarranted.

[12] The trial court found that this was a roving patrol search and did not occur at the border or its functional equivalent. P.C. 090:13-14.

A. The *Coburn* Analysis Is Inapplicable Here Because It Is Explicitly Limited to Searches at the Border or Border Equivalents.

The lower court's extension of the *Coburn* analysis to this case is inapposite because *Coburn* explicitly and repeatedly restricts its holding to evidence initially seized at recognized equivalents of the U.S. international border. *Coburn* first notes that the federal interest is preeminent "[w]ith respect to safeguarding the United States border or its functional equivalent," pointing to the federal constitution's foreign commerce clause, which preserves "[c]ontrol of commerce with foreign nations [a]s an exclusive federal function under the United States Constitution." *Id*. at 325 (citing U.S. Const. art. I, § 8, cl. 3); *see also id*. (federal government has "inherent sovereign authority to protect its territorial integrity" (quoting *Torres v. Puerto Rico*, 442 U.S. 465, 472-73 (1979))). Second, noting it was "not alone in holding the state constitution does not apply to federal *border searches*," *id*. (emphasis added), the Court cited four cases from other states regarding customs searches at the border or its equivalents. *Id*. (citing cases from California, Florida, Maine, and Washington allowing admission in state criminal proceedings of evidence seized by customs agents performing border searches). Third, *Coburn*'s "routine customs border inspection[s]" are inherently limited to United States borders and their functional equivalents.[13] *Id*. None of these justifications are true of roving patrols in the State's interior.

The lower court nevertheless extended *Coburn* beyond geographic enclaves like the border and its equivalents to evidence obtained in a CBP roving patrol warrantless search miles

[13] *Rennis* "add[ed] to *Coburn's* holding . . . only to note that the 'functional equivalent' of the U.S. border generally includes immigration checkpoints." 2014 VT 8, ¶ 10. Because the U.S. Supreme Court held that checkpoint searches "might be functional equivalents of border searches," *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973), "the federal interest in the conduct of [federal] officers [at an immigration checkpoint] . . . outweigh[ed] Vermont's interests, as described in *Coburn*." *Rennis*, 2014 VT 8, ¶ 10. Again, the holding is limited to border searches. *Id*. ¶ 16 ("We hold only that this *border search* by federal officers . . . cannot be challenged under Article 11." (emphasis added)).

from the border. P.C. 091:5-092:2. For Fourth Amendment purposes, CBP roving patrol searches are "of a wholly different sort" in comparison to CBP border and border equivalent searches. *Almeida-Sanchez*, 413 U.S. at 273. The U.S. Supreme Court treats roving patrol searches like any other law enforcement search—requiring consent, a warrant, or probable cause and exigent circumstances. *Id*. On roving patrol, CBP agents lose their plenary border search powers because Vermonters "within the country . . . have a right to free passage without interruption or search" unless justified under the Fourth Amendment. *Id*. at 274-75. The CBP roving patrol search here was nothing more than common law enforcement. P.C. 082:3-7; P.C. 090:13-14. *Coburn's* analysis cannot extend to federal searches in Vermont's interior.

B. Applying Article 11 Causes No Interference with Federal Interests.

Even if *Coburn*'s reference to "exclusive federal authority" includes geographic locations *and* the exercise of federal authority, applying Article 11 does not interfere with that authority. Disputes about state interference with federal authority arise where state law conflicts with federal law or seeks to regulate exclusively federal activities. *Arizona v. United States*, 567 U.S. 387, 399 (2012). In so-called preemption analyses, "courts should assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress." *Id.* at 400 (internal quotation marks omitted). The Supremacy Clause, for this reason, did not prevent the *Rodriguez* court from protecting defendants' state constitutional rights through suppression of federally obtained evidence because:

> No decision by this court concerning the lawfulness of defendant's arrest under Article I, section 9, of the Oregon Constitution possibly could interfere with or otherwise affect the ability of the federal government to administer or enforce its immigration laws.

Rodriguez, 854 P.2d at 404. Inversely, where Arizona passed criminal laws requiring immigrants to carry documentation and permitting local police to arrest for immigration

violations, the provisions were struck down because Congress expressly reserved exclusive power to regulate immigration. *Arizona,* 567 U.S. at 402.

Here, enforcing Vermonters' Article 11 rights in Vermont courts would not—as a legal or practical matter—regulate or interfere with federal activities or missions. First, the federal government has no exclusive authority to conduct traffic stops or vehicle searches miles from the border. There is no preemption issue. Second, no record evidence or argument even hints that applying Article 11 would have any potential impact on CBP agents' exercise of federal authority.[14] If Appellants' Article 11 rights were given effect, federal agents would remain free to conduct roving patrols virtually everywhere in Vermont as permitted by federal law, conduct stops and searches pursuant to federal law, confiscate contraband and transfer it to state authorities, make arrests for federal crimes, and refer violations of federal law to federal prosecutors. To apply Article 11 here would constrain only the State and its subdivisions, to the benefit of Vermonters' inherent individual rights.

Nevertheless, the trial court refused to enforce Article 11 here because doing so for a search "so close to the border . . . would essentially interfere at some level with the exercise of Federal authority."[15] P.C. 91:25-92:2. The court's determination was erroneous. There is no potential for interference with the exercise of federal authority—legally, practically, or otherwise. Unwarranted deference to speculative or nonexistent federal interests at the expense of state constitutional rights cannot be permitted.

[14] The trial court, too, was silent on how applying Article 11 would "interfere . . . with the exercise of federal authority."

[15] *Rennis* similarly states that "where federal interests outweigh Vermont's interests, we will [not] attempt to deter federal officials from their duties," but does not explain how applying Article 11 to suppress in such cases could "deter federal officials from their duties." 2014 VT 8, ¶ 15.

C. Even Using *Coburn's* Interest-Based Analysis, Vermont's Interests Significantly Outweigh Any Potential Federal Interests.

Assuming *arguendo* that it is appropriate to extend *Coburn*'s interest-based analysis to roving patrols, Article 11 must nonetheless apply because Vermont's interests[16] in applying Article 11 far outweigh any potential federal interests. As discussed in Part I.C.2.i, Vermonters' rights in their own courts and this Court's precedent regarding the core privacy-protecting function of Article 11 are at stake. It is critical to note how far-reaching the damage would be: taking together CBP's increasing, aggressive activities in Vermont, *see* Migrant Justice Amicus Br., Part I.A, the fact that virtually all of Vermont is within CBP's "100-mile zone," and the number and significance of this Court's departures from Fourth Amendment jurisprudence, *see* ODG Amicus Br. Part 1.e.i, the potential for undermining Vermonters' constitutional rights is enormous.

Similarly, the maintenance of our constitutional form of government, keeping our constitution above any one branch, is at risk of erosion through application of court-made doctrine over constitutional protections. *See* Part I.B.2. And, the public's perception of the judiciary as fundamentally fair may be damaged if Vermont courts render different outcomes as to identical defendants simply because a different sovereign's officer conducted a search in Vermont. *Id*.

Conversely, it is difficult to detect *any* federal interest in Vermont courts admitting evidence that was seized contrary to Vermont constitutional protections, in light of the federal government's lack of exclusive geographic authority and lack of impact on the exercise of federal authority. CBP did not arrest Appellants, it released them—presumably because the case was not

[16] The trial court failed to discuss any state interests in ruling that the federal interest "in the border patrol being able to do its work . . . outweighs essentially any State interest." P.C. 91:9-15.

of interest to the federal government. P.C. 134. Nonetheless, suppression here will not affect federal concurrent jurisdiction or restrict future federal law enforcement actions they choose to undertake in accordance with the Fourth Amendment.

Juxtaposing Vermont's weighty and fundamental interests against the federal government's negligible ones, Vermont's interests are self-evidently dominant. Appellants' Article 11 rights must be given effect.

III. Applying Article 11 Requires Suppression Here.

Article 11 protects against warrantless searches of automobiles. *See Birchard*, 2010 VT 57, ¶ 12; *Bauder*, 2007 VT 16, ¶ 1. A warrantless vehicle search requires either the detained party's consent or that the officer has probable cause with exigent circumstances present. *Bauder*, 2007 VT 16, ¶ 32. Exigent circumstances exist only when there is a threat to officer safety or the preservation of evidence. *Id*. ¶ 21. "[T]he latter requirement also requires exceptional circumstances." *Birchard*, 2010 VT 57, ¶ 12. The mobility of a car or its contents is not per se an exigent circumstance. *State v. Trudeau*, 165 Vt. 355, 361, 683 A.2d 725, 729 (1996). Moreover, where the opportunity exists, Article 11 requires police to obtain a warrant before opening closed containers found in a vehicle. *State v. Savva*, 159 Vt. 75, 91, 616 A.2d 774, 783 (1991).

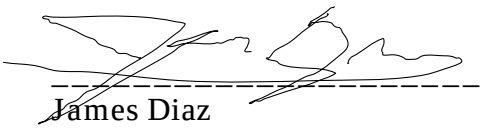
In this case, there is no dispute that the CBP agents conducted a warrantless search of Ms. Lena-Butterfield's vehicle and containers found inside despite the lack of any exigent circumstances and her explicit refusal to give consent. The trial court noted that the evidentiary hearing yielded no evidence of exigent circumstances. P.C. 192 n.2. The testifying CBP agent stated that Ms. Lena-Butterfield refused to consent to a search. P.C. 29:5-15. The agents nevertheless ordered Appellants from the vehicle and performed the warrantless searches. P.C. 056:20-21.

Had a Vermont law enforcement officer acted in the same manner, exclusion of evidence uncovered in the vehicle search would be a foregone conclusion. *See Birchard,* 2010 VT 57, ¶ 12; *Bauder,* 2007 VT 16, ¶ 1. Accordingly, in applying Appellants' Article 11 rights to any evidence discovered as a result of CBP's warrantless search, such evidence must be excluded in the state prosecutions.

CONCLUSION

For all of these reasons, this Court should reverse the decision denying Appellants' motion to suppress.

Dated: July 21, 2020



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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief totals 8,848 words, excluding the statement of issues, table of contents, table of authorities, signature blocks, and this certificate as permitted by Vt. R. App. 32(a)(7)(C). I have relied upon the word processor used to produce this brief, Microsoft Word 2010, to calculate the word count.

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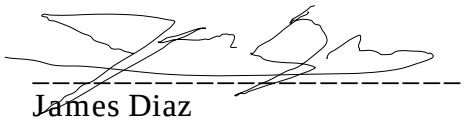

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