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Justice Sonia Sotomayor: The Court’s Premier Defender of the Fourth Amendment

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Justice Sonia Sotomayor: The Court's Premier Defender of the Fourth Amendment

*David L. Hudson Jr.**

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In 2009, President Barack Obama nominated Judge Sonia Sotomayor of the U.S. Court of Appeals for the Second Circuit to the U.S. Supreme Court to replace the retiring Justice David Souter. It was a historic appointment, as she became the first Hispanic justice and the third female to serve on the high court.[1]

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1. Nicandro Iannacci, *Sonia Sotomayor, the People's Justice*, CONST. DAILY: BLOG (May 26, 2016), https://constitutioncenter.org/blog/sonia-sotomayor-the-peoples-justice [https://perma.cc/U94U-DP4A].

Obama praised his first Supreme Court appointment, stating: "Over a distinguished career that spans three decades, Judge Sotomayor has worked at almost every level of our judicial system, providing her with a depth of experience and a breadth of perspective that will be invaluable as a Supreme Court justice."[2] President Obama was the third Chief Executive to nominate Sotomayor to a position in the federal judiciary. President George H. W. Bush nominated her to a federal district court position, and President Bill Clinton nominated her to the Second Circuit.

Justice Sotomayor had what Linda Greenhouse, a New York Times Supreme Court expert, called a "stirring life story and impressive résumé."[3] She rose from poverty in a Bronx housing project to become a New York City prosecutor, a federal district court judge, and a federal appeals court judge.[4]

Sotomayor's influence on the Court has been profound. She is a consistent defender of constitutional freedoms and individual rights.[5] Her solicitude for constitutional freedoms is shown most starkly in her Fourth Amendment jurisprudence; Matthew T. Mangino has called her a "fierce" defender of the Fourth Amendment.[6] Two legal commenters have observed that her "depth of exposure to criminal justice issues is unsurpassed among contemporary Supreme Court justices."[7] An astute student commentator observed from Sotomayor's lower court judicial record that she had a "tendency to rule in favor of Fourth Amendment protection over governmental intrusion."[8] Another commentator stated that the Fourth Amendment is "more or less safe in [her] hands."[9]

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2. *Transcript of Obama-Sotomayor Announcement*, CNN (May 26, 2009), http://www.cnn.com/2009/POLITICS/05/26/obama.sotomayor.transcript/index.html [https://perma.cc/7NNS-URC2].

3. Linda Greenhouse, Opinion, *Every Justice Creates a New Court*, N.Y. TIMES (May 26, 2009), https://www.nytimes.com/2009/05/27/opinion/27greenhouse.html [https://perma.cc/R9DR-2EEW].

4. Daniel Politi, *SCOTUS Nominee Stumps GOP*, SLATE (May 27, 2009), https://slate.com/news-and-politics/2009/05/obama-nominates-first-hispanic-to-the-supreme-court.html [https://perma.cc/3VLD-VADK].

5. *See* David L. Hudson, Jr., *Justice Sonia Sotomayor: Defending Individuals and Constitutional Freedoms*, FREEDOM F. (Aug. 10, 2020), https://www.freedomforum.org/2020/08/10/justice-sonia-sotomayor-defending-individuals-and-constitutional-freedoms/ [https://perma.cc/YN5A-Q3D3].

6. Matthew T. Mangino, Opinion, *Sotomayor Fierce Defender of the Fourth Amendment*, WAXAHACHIE DAILY LIGHT (June 1, 2018), https://www.waxahachietx.com/opinion/20180601/matthew-t-mangino-sotomayor-fierce-defender-of-fourth-amendment [https://perma.cc/F3A7-798N].

7. Christopher E. Smith & Ksenia Petlakh, *The Roles of Sonia Sotomayor in Criminal Justice Cases*, 45 CAP. U. L. REV. 457, 458 (2017).

8. William Sanders, Note, *The Future of Vehicle Searches Incident to Arrest*, 11 AVE MARIA L. REV. 479, 508 (2013).

9. Mark Joseph Stern, *Get Off My Lawn! Sonia Sotomayor's Defense of Property and Privacy Under the Fourth Amendment Puts Thomas and Alito to Shame*, SLATE (May 29, 2018), https://slate.com/news-and-politics/2018/05/in-collins-v-virginia-sonia-sotomayor-mounts-a-libertarian-defense-of-private-property.html [https://perma.cc/Q8ZY-KCVJ].

This essay posits that Justice Sotomayor is the Court's chief defender of the Fourth Amendment and the cherished values it protects. She has consistently defended Fourth Amendment freedoms—in majority, concurring, and especially in dissenting opinions. Part I recounts a few of her majority opinions in Fourth Amendment cases. Part II examines her concurring opinion in *United States v. Jones*. Part III examines several of her dissenting opinions in Fourth Amendment cases.

A review of these opinions demonstrates what should be clear to any observer of the Supreme Court: Justice Sotomayor consistently defends Fourth Amendment principles and values.

I. MAJORITY OPINIONS

A. Collins v. Virginia

In her majority opinion in *Collins v. Virginia*, Sotomayor held that a police officer violated the Fourth Amendment by conducting a warrantless search of a motorcycle parked in the driveway of the defendant's home. Two police officers on separate occasions had observed an orange and black motorcycle breaking the speed limit, but neither officer was able to apprehend the driver of the motorcycle.[10]

The officers compared notes and determined that both incidents involved the same motorcycle.[11] The officers learned the motorcycle was likely stolen and was now in Ryan Collins' possession. One of the officers discovered on Facebook that the motorcycle was parked at the top of a house's driveway.[12] The officer, without a warrant, went to the driveway of the home, where Collins' girlfriend lived, and saw the bike covered with a tarp in the driveway.[13] The officer walked up, pulled off the tarp, took a picture of the motorcycle, and then returned to his squad car.[14]

The officer then saw Collins return home and knocked on the door.[15] Collins answered and, upon questioning, admitted that he bought the motorcycle without title.[16] A grand jury indicted Collins for receiving stolen property.[17] He filed a motion to suppress the evidence resulting from

10. Collins v. Virginia, 138 S. Ct. 1663, 1668 (2018).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 1668–69.
17. *Id.* at 1669.

the warrantless search of the bike.[18] "The trial court denied the motion and Collins was convicted."[19]

Both the Virginia Court of Appeals and Virginia Supreme Court affirmed the conviction, though on different grounds. The Court of Appeals reasoned that the police officer had probable cause to believe that the motorcycle under the tarp was the same motorcycle that had eluded officers.[20] The Virginia Supreme Court, on the other hand, reasoned that the warrantless search was justified by the automobile exception to the Fourth Amendment.[21]

Collins appealed to the U.S. Supreme Court, which reversed his conviction by an 8–1 vote. Writing for the majority, Sotomayor detailed the history of both the automobile exception and the heightened Fourth Amendment protection for the curtilage, the area right outside a home.[22]

According to Sotomayor, this was "an easy case."[23] She explained that the automobile exception does not give "an officer the right to enter a home or its curtilage to access a vehicle without a warrant."[24] The automobile exception "is, after all, an exception for automobiles."[25] She explained that "searching a vehicle parked in the curtilage involves not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of the sanctity of the curtilage."[26] She concluded that "the automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein."[27]

B. City of Los Angeles v. Patel

Sotomayor also authored the Court's decision in *City of Los Angeles v. Patel*, a case involving a facial Fourth Amendment challenge to a city ordinance, which empowered police officers to obtain guest information from hotel operators upon demand.[28] The ordinance provided that hotel guest records "shall be made available to any officer of the Los Angeles Police Department for inspection."[29]

A group of hotel operators contended that the ordinance violated the Fourth Amendment. A federal district court ruled that the hotel operators

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18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 1669–70.
23. *Id.* at 1671.
24. *Id.*
25. *Id.* at 1673.
26. *Id.* at 1672.
27. *Id.* at 1675.
28. City of Los Angeles v. Patel, 576 U.S. 409, 412 (2015).
29. *Id.* at 413.

lacked a reasonable expectation of privacy in the records.[30] A divided three-judge panel of the Ninth Circuit affirmed. However, the en banc Ninth Circuit reversed, finding the ordinance unconstitutional.[31]

Writing for the majority, Justice Sotomayor first explained that facial challenges are permitted under the Fourth Amendment,[32] noting that the Court has invalidated other laws facially on Fourth Amendment grounds. Specifically, she highlighted precedent that invalidated a Georgia law that required candidates for state office to pass drug tests[33] and a hospital policy authorizing mandatory drug tests of pregnant women.[34] Sotomayor explained: "The Court's precedents demonstrate not only that facial challenges to statutes authorizing warrantless searches can be brought, but also that they can succeed."[35]

She then addressed the merits of the facial challenge, determining that this type of administrative search requires the ability to obtain "precompliance review before a neutral decisionmaker."[36] She noted that the Los Angeles ordinance failed to provide any semblance of such a review: "Absent an opportunity for precompliance review, the ordinance creates an intolerable risk that searches authorized by it will exceed statutory limits, or be used as a pretext to harass hotel operators and their guests."[37]

The city argued that it had a strong interest in the hotel guest records to combat crime and that hotels are a "closely regulated" industry.[38] But, Sotomayor explained that hotels have never been considered a closely regulated industry like liquor stores, firearms dealers, or automobile junkyards.[39] She wrote: "To classify hotels as pervasively regulated would permit what has always been a narrow exception to swallow the rule."[40]

She cautioned that even if hotels somehow fell within the ambit of a closely regulated industry, the Ordinance is still unconstitutional because warrantless inspections are not necessary and the ordinance "fails sufficiently to constrain police officers' discretion as to which hotels to search and under what circumstances."[41]

30. *Id.* at 414.
31. *Id.*
32. *Id.* at 415.
33. *Id.* at 417 (citing Chandler v. Miller, 520 U.S. 305, 308-09 (1997)).
34. *Id.* (citing Ferguson v. Charleston, 532 U.S. 67, 86 (2001)).
35. *Id.* at 418.
36. *Id.* at 420.
37. *Id.* at 421.
38. *Id.* at 424.
39. *Id.*
40. *Id.* at 424–25.
41. *Id.* at 427.

C. Missouri v. McNeely

Justice Sotomayor once again protected Fourth Amendment principles in *Missouri v. McNeely*, a drunk driving case in which a police officer obtained a blood test without first obtaining a warrant. A police officer stopped Tyler McNeely's truck after observing it exceed the speed limit and sway across the centerline of the road.[42] McNeely performed poorly on field sobriety tests and declined to take a breath test.[43]

The officer then placed McNeely under arrest and took him to a nearby hospital for blood testing.[44] For whatever reason, the officer declined to obtain a warrant.[45] McNeely refused to consent to the blood test, but the officer directed the lab technician to perform the test, which resulted in a blood alcohol content of 0.154 percent.[46]

Charged with driving while intoxicated, McNeely moved to suppress the results of the warrantless blood test as a Fourth Amendment violation.[47] The trial court granted the motion, finding that there was no emergency exception to the warrant requirement in the facts of this case.[48] The Missouri Supreme Court agreed, holding that this was "a routine DWI case" and not an emergency.[49]

Sotomayor, writing for a majority and at times a plurality of the Court, noted that whether there were exigent circumstances dissipating the need for a warrant before blood testing must be judged under the totality of the circumstances.[50] The state of Missouri argued for a per se rule for warrantless blood testing in drunk driving cases, but the majority was unpersuaded.[51] While Sotomayor recognized that the body's natural metabolic processes do dissipate alcohol in the body, she noted that this would generally require a "significant delay" from the time of the arrest to the test.[52]

She explained that "[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so."[53] She determined that "[w]hether a warrantless blood test of a drunk-driving suspect

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42. Missouri v. McNeely, 569 U.S. 141, 145 (2013).
43. *Id.*
44. *Id.* at 145–46.
45. *Id.* at 146.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 147 (quoting State v. McNeely, 358 S.W.3d 65, 74 (2012)).
50. *Id.* at 149.
51. *Id.* at 151.
52. *Id.* at 152.
53. *Id.*

is reasonable must be determined case by case based on the totality of the circumstances."[54]

She reasoned that this rule did not undermine drunk-driving enforcement efforts and noted that, in many states, there are restrictions on nonconsensual blood testing.[55] She concluded: "We hold that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant."[56]

II. CONCURRING OPINIONS

A. United States v. Jones

In this decision, the U.S. Supreme Court held that government officials violated the Fourth Amendment by attaching a global positioning system (GPS) device under a defendant's vehicle. The majority opinion, authored by Justice Antonin Scalia, noted that the government "physically occupied private property" by attaching the GPS device to the car.[57] Scalia reasoned that the government trespassed upon private property with its actions.[58]

Sotomayor authored a concurring opinion, noting that "the Fourth Amendment is not concerned only with trespassory intrusions on property," and that "physical intrusion is now unnecessary to many forms of surveillance."[59] In other words, she reasoned that Scalia's trespass theory of the Fourth Amendment was too limited[60] and preferred to consider the "reasonable expectation of privacy" test enunciated by Justice John Marshall Harlan II's concurring opinion in *Katz v. United States*.[61] The *Katz* test is an often-used formulation that has been called "a great

54. *Id.* at 156.

55. *Id.* at 162.

56. *Id.* at 165.

57. United States v. Jones, 565 U.S. 400, 404 (2012).

58. *Id.* at 406.

59. *Id.* at 414 (Sotomayor, J., concurring).

60. *Id.* at 415. While she disagreed with Justice Scalia's approach, she praised his defense of Fourth Amendment values in a tribute, even stating that "*United States v. Jones* is forefront in my mind when I think of Justice Scalia." Sonia Sotomayor, *A Tribute to Justice Antonin Scalia*, 126 YALE L.J. 1609, 1610 (2017).

61. *Jones*, 565 U.S. at 414–15 (Sotomayor, J., concurring) (citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

touchstone in the law of privacy"[62] that has become "synonymous" with the *Katz* decision.[63]

She also questioned the viability of the third-party doctrine in Fourth Amendment law—the idea that persons have no reasonable expectation of privacy if they voluntarily provide the information to a third party.[64] She wrote: "I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection."[65]

Sotomayor also warned that the governmental surveillance employed in this type of case could have harmful impacts on a person's associational freedoms, writing: "Awareness that the government may be watching chills associational and expressive freedoms."[66] Fourth Amendment experts lauded her for this insight.[67]

III. DISSENTING OPINIONS

A. Utah v. Strieff

In this decision, the Supreme Court relied on the attenuation doctrine to avoid applying the exclusionary rule even though the police lacked reasonable suspicion to conduct an investigatory stop of an individual.[68] An anonymous call to police claimed that "narcotics activity" was occurring at a particular residence.[69] A police officer then conducted intermittent surveillance of the residence and saw many visitors arrive at the residence and then depart after only a few minutes.[70]

One notable visitor was Edward Strieff.[71] The police observed Strieff leave the residence and go to a convenience store.[72] The officer detained

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62. Peter Winn, Katz *and the Origins of the "Reasonable Expectation of Privacy" Test*, 40 MCGEORGE L. REV. 1, 1 (2009).

63. Harvey A. Schneider, Katz v. United States*: The Untold Story*, 40 MCGEORGE L. REV. 13, 21 (2009).

64. *Jones*, 565 U.S. at 417 (Sotomayor, J., concurring).

65. *Id.* at 418.

66. *Id.* at 416.

67. *See, e.g.*, Wayne A. Logan, *Policing Police Access to Criminal Justice Data*, 104 IOWA L. REV. 619, 657 (2019) ("The broader societal implications of this authority are no less consequential."); Kevin Emas & Tamara Pallas, United States v. Jones*: Does* Katz *Still Have Nine Lives?*, 24 ST. THOMAS L. REV. 116, 165 (2012) ("It is the larger, and more universal issues of non-trespassory surveillance, and particularly privacy protection of information voluntarily disclosed to third parties, that cause greater concern for Justice Sotomayor.").

68. Utah v. Strieff, 136 S. Ct. 2056, 2060–61 (2016).

69. *Id.* at 2059.

70. *Id.*

71. *Id.* at 2060.

72. *Id.*

Strieff in the parking lot and had him produce identification.[73] After relaying the information to a police dispatcher, the officer learned that Strieff had an outstanding warrant for a traffic violation.[74] Consequently, the officer placed Strieff under arrest, searched him, and found illegal drugs.[75]

Justice Clarence Thomas, writing for the majority, reasoned that the valid arrest warrant broke the causal chain between the unlawful stop and the discovery of the illegal drugs.[76] Thomas further reasoned that the arrest warrant was valid and was "entirely unconnected with the stop."[77] Thomas went on to write that "there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct."[78] He ruled that "the evidence discovered on Strieff's person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant."[79]

Sotomayor wrote a blistering dissent that Professor Josephine Ross described as "literary and searing."[80] Others called it "epic,"[81] "headline-grabbing,"[82] "thundering,"[83] and "scorching."[84] It began with oft-quoted language: "The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer's violation of your Fourth Amendment rights."[85] She continued: "This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong."[86]

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73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 2063.
77. *Id.* at 2062.
78. *Id.* at 2063.
79. *Id.*
80. Josephine Ross, *Warning: Stop-and-Frisk May Be Hazardous to Your Health*, 25 WM. & MARY BILL RTS. J. 689, 691 (2016).
81. John Nichols, *Sonia Sotomayor's Epic Dissent Explains What's at Stake When the Police Don't Follow the Law*, THE NATION (June 20, 2016), https://www.thenation.com/article/archive/sonia-sotomayors-epic-dissent-shows-why-we-need-people-of-color-on-the-supreme-court/ [https://perma.cc/5F6L-XCHE].
82. Tal Kastner, *Policing Narrative*, 71 SMU L. REV. 1117, 1138 (2018).
83. Matt Ford, *Justice Sotomayor's Ringing Dissent*, THE ATLANTIC (June 20, 2016), https://www.theatlantic.com/politics/archive/2016/06/utah-streiff-sotomayor/487922/ [https://perma.cc/F47R-DGPQ].
84. Irin Carmon, *Sotomayor Issues Scathing Dissent in Fourth Amendment Case*, NBC NEWS (June 20, 2016), https://www.nbcnews.com/news/us-news/sotomayor-issues-scathing-dissent-fourth amendment-case-n595786 [https://perma.cc/SS7Y-GV7X].
85. Utah v. Strieff, 136 S. Ct. 2056, 2064 (2016) (Sotomayor, J., dissenting).
86. *Id.*

She openly discussed the topic of race, something regularly missing from Fourth Amendment jurisprudence.[87] She cited such luminaries as W.E.B. DuBois, James Baldwin, Michelle Alexander, and Ta-Nehisi Coates.[88] On race, Sotomayor wrote: "For generations, black and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them."[89]

She noted that many might forgive the police's conduct in this case, as the officer's instincts were correct that Strieff was carrying contraband.[90] But, "a basic principle lies at the heart of the Fourth Amendment: Two wrongs don't make a right."[91]

Sotomayor added that "the officer's sole purpose was to fish for evidence."[92] She also emphasized that many people have outstanding warrants, giving the example that 16,000 of 21,000 people in Ferguson, Missouri, had such warrants.[93] She warned that the majority's decision gives license to law enforcement to treat "members of our communities as second-class citizens."[94]

She also warned that "many innocent people are subjected to the humiliations of these unconstitutional searches," adding that "it is no secret that people of color are disproportionate victims of this type of scrutiny."[95]

B. Heien v. North Carolina

Sotomayor authored a lone dissent in *Heien v. North Carolina*, a case involving a vehicle stop wherein the police officer made a mistake of law. The officer stopped a vehicle after noticing that it had only one operable brake light, despite North Carolina law permitting the operation of vehicles with only one working brake light.[96] The defendant, who had illegal drugs in the car, filed a motion to suppress and argued that the initial vehicle stop was unlawful.[97]

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87. *See* Ross, *supra* note 80.
88. *Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting).
89. *Id.*
90. *Id.* at 2065.
91. *Id.* (citing Weeks v. United States, 232 U.S. 383, 392 (1914)).
92. *Id.* at 2067.
93. *Id.* at 2068.
94. *Id.* at 2069.
95. *Id.* at 2070.
96. Heien v. North Carolina, 574 U.S. 54, 57–59 (2014).
97. *Id.*

When the case reached the U.S. Supreme Court, the Court determined that the officer acted reasonably even though he was mistaken about state law.[98] Chief Justice John G. Roberts concluded, "[B]ecause the mistake of law was reasonable, there was reasonable suspicion justifying the stop."[99]

Sotomayor dissented, once again emphasizing that traffic stops can become frightening and humiliating.[100] She wrote that "permitting mistakes of law to justify seizures has the perverse effect of preventing or delaying the clarification of the law."[101] She concluded that "an officer's mistake of law, no matter how reasonable, cannot support the individualized suspicion necessary to justify a seizure under the Fourth Amendment."[102]

She also was the only justice to mention the troubling issue of race in the case.[103]

C. Mitchell v. Wisconsin

Recall that Sotomayor authored the Court's majority opinion in *Missouri v. McNeely*, holding that there was no categorical exception to the warrant requirement for blood draws of suspected drunk drivers.[104] The Court in *Mitchell* returned to this issue with a different twist—a blood draw from an unconscious driver.[105] An officer with the Sheboygan Police Department received a report that Gerald Mitchell climbed into a van while drunk and drove away.[106] The officer found Mitchell wandering around, out of the van, near a lake.[107] The officer gave Mitchell a preliminary breath test, which he failed miserably with a 0.24 percent.[108]

The officer who had arrested Mitchell could not conduct a more reliable breath test at the police station because Mitchell was too lethargic, so he drove Mitchell to a nearby hospital for a blood test.[109] Mitchell lost consciousness on the way and had to be wheeled into the hospital.[110] The

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98. *Id.* at 67.
99. *Id.* at 68.
100. *Id.* at 73 (Sotomayor, J., dissenting) (quoting Terry v. Ohio, 392 U.S. 1, 25 (1968)).
101. *Id.* at 74.
102. *Id.* at 80.
103. *See* Vivian M. Rivera, Note, *When the Police Get the Law Wrong: How* Heien v. North Carolina *Further Erodes the Fourth Amendment*, 49 LOY. L.A. L. REV. 297, 314 (2016).
104. Missouri v. McNeely, 569 U.S. 141, 145 (2013).
105. Mitchell v. Wisconsin, 139 S. Ct. 2525, 2525 (2019).
106. *Id.* at 2532.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*

officer had hospital staff conduct a blood test on the unconscious Mitchell without the officer first obtaining a warrant.[111]

Mitchell later challenged the warrantless blood test results on Fourth Amendment grounds.[112] The U.S. Supreme Court reasoned that, with unconscious drivers, police officers often can rely on the exigent circumstances exception to the warrant requirement.[113] Writing for a plurality, Justice Alito explained that in cases involving unconscious drivers, "the need for a blood test is compelling, and an officer's duty to attend to more pressing needs may leave no time to seek a warrant."[114] He determined that there is a compelling need for the blood test because the unconscious cannot perform a breath test.[115] He also noted that oftentimes with unconscious drivers, the police may have to assist other injured drivers, provide first aid, or even deal with fatalities.[116] The plurality, thus, remanded the case back to the Supreme Court of Wisconsin to give the government an opportunity to make the case for exigent circumstances.[117]

Sotomayor dissented, writing that the rule from *McNeely* should apply, and the police should obtain a warrant before drawing blood.[118] To her, "the answer is clear: If there is time, get a warrant."[119] She reiterated that "there is no categorical exigency exception for blood draws."[120] Sotomayor also explained that technological advances have made obtaining warrants a more expedited process.[121]

She also noted the irony in the plurality emphasizing that police officers may have other pressing needs, such as aiding other drivers, because "the police encountered Mitchell alone, after he had parked and left his car."[122] She concluded: "The Fourth Amendment . . . requires police officers seeking to draw blood from a person suspected of drunk driving to get a warrant if possible. That rule should resolve this case."[123]

D. Kansas v. Glover

In this decision, the Court ruled that a police officer did not violate the Fourth Amendment when he pulled over a vehicle assuming—but not

111. *Id.*
112. *Id.*
113. *Id.* at 2533
114. *Id.* at 2535.
115. *Id.* at 2537.
116. *Id.* at 2538.
117. *Id.* at 2539.
118. *Id.* at 2541 (Sotomayor, J., dissenting).
119. *Id.*
120. *Id.* at 2544.
121. *Id.* at 2548.
122. *Id.* at 2550.
123. *Id.*

knowing—that the driver of the vehicle was the owner of the automobile.[124] A sheriff's deputy in Douglas County, Kansas, observed a 1995 pick-up truck while on routine patrol.[125] He ran the license plate and learned the owner of the vehicle was Charles Glover Jr. who had a revoked driver's license.[126] The deputy assumed that Glover was the driver of the vehicle and pulled the vehicle over.[127] The driver was indeed Glover, and he was charged as a habitual violator.[128]

Writing for the majority, Justice Thomas reasoned that the deputy made a "commonsense inference" that Glover likely was the operator of the vehicle.[129] He also noted that "empirical studies" show that many persons with revoked driver licenses "frequently continue to drive."[130] He explained: "The inference that the driver of a car is its registered owner does not require any specialized training; rather, it is a reasonable inference made by ordinary people on a daily basis."[131] These commonsense judgments, according to Thomas, made the stop reasonable.[132]

Sotomayor filed another solitary dissent, writing that the Court "ignores key foundations of our reasonable-suspicion jurisprudence and impermissibly and unnecessarily reduces the State's burden of proof."[133] She emphasized that the "State bears the burden of justifying a seizure."[134] She also noted that suspicion generally "must be individualized."[135]

According to Sotomayor, the majority filled in the gaps of the reasonable suspicion inquiry "with its own 'common sense,'" thus "allowing judges to offer their own brand of common sense where the State's proffered justifications for a search come up short also shifts police work to the judiciary."[136]

Sotomayor concluded: "Before subjecting motorists to this type of investigation, the State must possess articulable facts and officer inferences to form suspicion."[137] She concluded that the

124. Kansas v. Glover, 140 S. Ct. 1183, 1187 (2020).
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 1188.
130. *Id.*
131. *Id.* at 1189.
132. *Id.* at 1191.
133. *Id.* at 1194 (Sotomayor, J., dissenting).
134. *Id.*
135. *Id.* at 1195.
136. *Id.* at 1196.
137. *Id.* at 1198.

Court "destroys Fourth Amendment jurisprudence that requires individualized suspicion."[138]

E. Messerschmidt v. Millender

In this decision, the Court ruled that Los Angeles County officers were entitled to qualified immunity for their broad search of a home for weapons related to a domestic dispute.[139] Shelly Kelly broke off her relationship with Jerry Ray Bowen, who was an active member of a local street gang, and Kelly called the sheriff's department to help gather her belongings at her and Bowen's residence.[140] Once the officers left, Bowen appeared at the home, yelled at Kelly, cursed her, and tried to throw her over the second-floor balcony.[141] Bowen even fired a gun at Kelly as she sped away from the residence.[142] Kelly reported the assault to the police.[143]

Detective Curt Messerschmidt, assigned to the case, learned that Bowen may have been staying at the home of seventy-year-old Augusta Millender, Bowen's foster mother.[144] The detective also learned that Bowen had been arrested at least thirty-one times, many of those instances being firearms related.[145] Based on this information, Messerschmidt drew up a broad search warrant for all firearms or gang-related material that may be at Millender's residence.[146] Law enforcement served the warrant a few days later at Millender's home.[147]

Law enforcement did not find Bowen at the residence but did seize Millender's shotgun and a box of .45-caliber ammunition.[148] The police found Bowen two weeks later at a motel.[149] The Millenders filed a lawsuit against the sheriff's department, the county of Los Angeles, and the individual sheriff's deputies, including Messerschmidt.[150] The key question before the U.S. Supreme Court was whether the officers were entitled to qualified immunity.[151]

Writing for the majority, Chief Justice Roberts reasoned that the officers were entitled to qualified immunity, in part because "[a]

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138. *Id.*
139. Messerschmidt v. Millender, 565 U.S. 535, 539 (2012).
140. *Id.* at 540.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 540–41.
145. *Id.* at 541.
146. *Id.* at 541–42.
147. *Id.* at 543.
148. *Id.*
149. *Id.*
150. *Id.* at 544.
151. *Id.* at 544–45.

reasonable officer also could believe that seizure of the firearms was necessary to prevent further assaults on Kelly."[152] It also was not unreasonable that Bowen owned multiple weapons.[153]

A reasonable officer might believe that evidence showing Bowen's gang affiliation "might prove helpful in impeaching Bowen or rebutting various defenses he could raise at trial."[154] Roberts also noted that Messerschmidt's affidavit was approved by a superior officer and a deputy district attorney.[155] Thus, according to Roberts, the warrant was not "so obviously defective that no reasonable officer could have believed it was valid."[156] Instead, the officer could have believed—based on all the facts—that the warrant was proper and entitled to qualified immunity.[157]

Sotomayor authored a dissenting opinion, characterizing the warrant as a "general warrant."[158] She wrote that "this kind of general warrant is antithetical to the Fourth Amendment."[159] Further, "[t]he Fourth Amendment does not permit the police to search for evidence solely because it could be admissible for impeachment or rebuttal purposes."[160] Sotomayor also noted that "merely possessing . . . firearms is not a crime at all" and characterized the majority's analysis as "akin to a rational-basis test" instead of a more traditional qualified-immunity analysis.[161]

She concluded that "it is not objectively reasonable for police investigating a specific, non-gang related assault committed with a particular firearm" to search for all evidence of gang activity and all firearms.[162]

CONCLUSION

Justice Sonia Sotomayor has demonstrated—time and time again—her commitment to Fourth Amendment principles. More than any other justice on either the so-called conservative or liberal wings of the Court, she holds government officials' feet to the fire in search and seizure cases. Her record on Fourth Amendment cases shows that she is an ardent

152. *Id.* at 549.
153. *Id.* at 548–49.
154. *Id.* at 552.
155. *Id.* at 554.
156. *Id.* at 555.
157. *Id.* at 555–56
158. *Id.* at 561 (Sotomayor, J., dissenting).
159. *Id.*
160. *Id.* at 566.
161. *Id.* at 568.
162. *Id.* at 574.

and consistent defender of individual privacy rights under the Fourth Amendment.

For example, she requires the government to generally obtain a warrant before conducting blood tests of suspected drunk drivers.[163] She recognizes that a person's home and curtilage are entitled to enhanced privacy protections.[164] She requires the government to have individualized suspicion before conducting traffic stops.[165] She understands that police stops can be particularly terrifying—particularly to those from communities that have a less-than-ideal relationship with law enforcement.[166]

She would not grant qualified immunity when police officers write clearly overbroad search warrant affidavits.[167] She believes that individuals have a reasonable expectation of privacy that can be infringed by the government's use of technology.[168]

Her Fourth Amendment record shows President Obama was prescient in proclaiming that her perspective would make her "an invaluable" member of the Supreme Court.[169]

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163. *See, e.g.*, Missouri v. McNeely, 569 U.S. 141, 144 (2012); Mitchell v. Wisconsin, 139 S. Ct. 2525, 2541 (2019) (Sotomayor, J., dissenting).

164. Collins v. Virginia, 138 S. Ct. 1663, 1670 (2018).

165. Kansas v. Glover, 140 S. Ct. 1183, 1197 (2020) (Sotomayor, J., dissenting).

166. Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting).

167. *Messerschmidt*, 565 U.S. at 574 (Sotomayor, J., dissenting).

168. United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring).

169. *Transcript of Obama-Sotomayor Announcement*, *supra* note 2.