

**IN THE SUPREME COURT OF OHIO
2014**

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

TERRANCE BROWN,

Defendant-Appellee.

Case No. 2014-0104

On Appeal from the
Wood County Court
of Appeals, Sixth
Appellate District

Court of Appeals
Case No. WD-12-070

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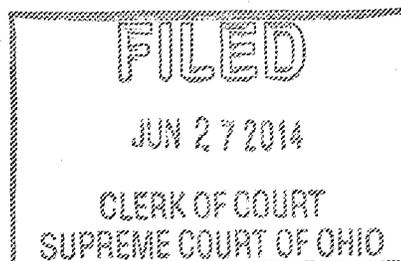
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INTRODUCTION

Article I, Section 14 of the Ohio Constitution and the Fourth Amendment of the United States Constitution are “virtually identical” and thus “afford[] the same protection.” *State v. Smith*, 124 Ohio St.3d 163, 2009-Ohio-6426, ¶ 10, n. 1, citing *State v. Robinette*, 80 Ohio St.3d 234, 238-239 (1997). Amicus curiae Ohio Prosecuting Attorneys Association (OPAA) respectfully requests that this Court reaffirm this basic principle and hold that, even when an arrest violates a statute, the constitutionality of the arrest under Article I, Section 14—just like under the Fourth Amendment—turns solely on the existence of probable cause (or reasonable suspicion, in the case of a non-arrest investigative detention). In other words, a probable-cause/reasonable-suspicion finding is enough to ensure that the government’s interests in the seizure outweigh the individual’s liberty and privacy interests—i.e., that the seizure is “reasonable.” No additional “balancing test” is required. Alternatively, this Court should reaffirm its holding in *State v. Lindway*, 131 Ohio St. 166 (1936), paragraphs four, five, and six of the syllabus, that there is no exclusionary rule under the Ohio Constitution.

The facts of this case are simple. A township police officer stopped defendant Terrance Brown for a marked-lanes violation, which ultimately led to Brown’s arrest for drug possession. The parties agreed that the stop violated R.C. 4513.39(A), which gives the highway patrol and sheriffs and their deputies exclusive authority to make traffic stops on state highways for certain traffic offenses. Opinion at ¶ 12. (Although the statute prohibits only “arrests,” this Court has held that it prohibits all “stop[s] of motorists for traffic offenses.” *State v. Holbert*, 38 Ohio St.2d 113, 117 (1974).) The statute, however, contains no penalty for a violation. The Sixth District acknowledged that the stop was supported by probable cause and thus did not violate the Fourth Amendment. Opinion at ¶ 15. The court, however, concluded that the drugs should have been suppressed under Article I, Section 14. Specifically, the court held that the government’s

interests in making the stop did not outweigh Brown’s privacy interests because “no extenuating circumstances were presented to justify an extraterritorial stop by township police officers for this type of traffic violation.” *Id.* at ¶ 20.

The Sixth District was wrong. Both *Virginia v. Moore*, 553 U.S. 164 (2008), and *State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, unequivocally held that the Fourth Amendment requires no additional balancing test beyond the probable-cause/reasonable-suspicion analysis. While this Court in *State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, held that an arrest supported by probable cause but in violation of R.C. 2935.26(A) (limiting arrests for minor misdemeanors) is unconstitutional under Article I, Section 14 because the government’s interests do not outweigh the arrestee’s interests, *Brown* borrowed the additional balancing test from Fourth Amendment case law, which is now outdated. *Brown* therefore should be overruled or, at the very least, confined to its narrow facts. In light of *Moore* and *Jones*, there is no “persuasive reason” why Article I, Section 14 should require an additional balancing test when the Fourth Amendment does not. *Robinette*, 80 Ohio St.3d at 238.

Even if this Court agrees with the Sixth District that Article I, Section 14 requires an additional balancing test—despite the Fourth Amendment requiring no such test—that still leaves the question whether Article I, Section 14 authorizes suppression of evidence. Although this Court has suppressed evidence under Article I, Section 14, it has done so with no analysis into the separate suppression issue and without ever expressly overruling *Lindway*. This Court should reaffirm *Lindway* and hold that suppression is available only under the Fourth Amendment. Of course, the suppression issue vanishes if this Court finds, as it should, that the traffic stop in this case was constitutional under Article. I, Section 14.

In the end, the Sixth District should have recognized this case for exactly what it was: an innocuous violation of a statute containing no exclusion remedy. Properly viewed this way, exclusion of evidence was not an option. *State v. Emerson*, 134 Ohio St.3d 191, 2012-Ohio-5047, ¶ 32 (statutory violation does not trigger the exclusionary rule unless the statute itself requires exclusion). Instead, the court improperly constitutionalized the case under Article I, Section 14 by applying an additional balancing test that is now defunct under the Fourth Amendment. And then, to make matters worse, the court invoked Article I, Section 14 to suppress evidence, despite that provision containing no exclusionary rule.

STATEMENT OF AMICUS INTEREST

OPAA is a private non-profit membership organization that was founded in 1937 for the benefit of the 88 elected county prosecutors. Its mission is to increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies that affect the office of the Prosecuting Attorney; and to aid in the furtherance of justice. The OPAA members have a strong interest in ensuring that courts do not improperly interpret Article I, Section 14 of the Ohio Constitution. In the interest of aiding this Court's review of this appeal, OPAA offers the following memorandum in support of Plaintiff-Appellant State of Ohio.

ARGUMENT

Proposition of Law: The constitutionality of a seizure under the Ohio Constitution turns solely on whether there is probable cause or reasonable suspicion. The Ohio Constitution does not require any additional balancing of the government's interest against the individual's interest in privacy. [*State v. Jones*, 121 Ohio St.3d 103, 2009-Ohio-316, followed.]

The Fourth Amendment of the United States Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” Article I, Section 14 of the Ohio Constitution is worded almost identically to the Fourth Amendment: “The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized.”

Even when a seizure violates a statute, the constitutionality of the seizure under the Fourth Amendment turns solely on probable cause (in the case of arrests) or reasonable suspicion (in the case of investigative detentions). No additional balancing test is required. The same should be true for Article I, Section 14, and the Sixth District erred in concluding otherwise. But even if there is an additional balancing test under Article I, Section 14, and even if the traffic stop in this case fails to satisfy that test (which is another point the Sixth District got wrong), suppression was still improper because there is no exclusionary rule under Article I, Section 14.

I. LIKE THE FOURTH AMENDMENT, ARTICLE I, SECTION 14 REQUIRES ONLY THAT A SEIZURE BE SUPPORTED BY PROBABLE CAUSE OR REASONABLE SUSPICION—NO ADDITIONAL BALANCING OF GOVERNMENTAL AND PRIVATE INTERESTS IS REQUIRED.

A. The Fourth Amendment Does Not Require Any Additional Balancing Test Beyond the Probable-Cause/Reasonable-Suspicion Analysis.

Recent cases from the United States Supreme Court and this Court confirm that the constitutionality of a seizure under Fourth Amendment turns solely on the existence of probable cause or reasonable suspicion (depending on the nature of the seizure). So even when the seizure violates a statute, the Fourth Amendment does not require any further balancing of the government’s interests against the individual’s interests.

In *Moore*, 553 U.S. 164, the defendant was arrested in violation of a Virginia statute prohibiting arrests for certain misdemeanors. In addressing whether the arrest also violated the Fourth Amendment, the United States Supreme Court began noting that “[w]e are aware of no historical indication that those who ratified the Fourth Amendment understood it as a redundant guarantee of whatever limits on search and seizure legislatures might have enacted.” *Id.* at 168. The Fourth Amendment was not “intended to incorporate subsequently enacted statutes.” *Id.* at 169.

“When history has not provided a conclusive answer,” the Court continued, “we have analyzed a search or seizure in light of traditional standards of reasonableness ‘by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’” *Id.* at 171, quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). But this balancing of interests resides solely within the probable-cause analysis: “[W]hen an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable.” *Moore*, 553 U.S. at 171, citing *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001).

“Our decisions counsel against changing this calculus when a State chooses to protect privacy beyond the level that the Fourth Amendment requires.” *Moore*, 553 U.S. at 171. To the extent a state chooses to “protect privacy beyond the level that the Fourth Amendment requires,” these additional protections are purely “matters of state law” and are “irrelevant” under the Fourth Amendment. *Id.* at 171, citing *Cooper v. California*, 386 U.S. 58, 62 (1967).

The Court in *Moore* adhered to this approach, reiterating that “an arrest based on probable cause serves interests that have long been seen as sufficient to justify the seizure.”

Moore, 553 U.S. at 174, citing *Wren v. United States*, 517 U.S. 806, 817 (1996). Even when an arrest violates a state statute, the state has an interest in the arrest, “because arrest will still ensure a suspect’s appearance at trial, prevent him from continuing his offense, and enable officers to investigate the incident more thoroughly.” *Moore*, 553 U.S. at 174. “A state is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional.” *Id.* Indeed, holding otherwise would “often frustrate rather than further state policy,” in that it would impose federal remedies (i.e., exclusion of evidence) that the state chose not to attach to the violation. *Id.*

The Court also stressed the “essential interest in readily administratable rules.” *Id.* at 175, quoting *Atwater*, 532 U.S. at 347. Officers benefit from a “bright-line constitutional standard.” *Moore*, 553 U.S. at 175. If the constitutionality of an arrest turned on factors other than probable cause, “officers might be deterred from making legitimate arrests.” *Id.*, citing *Atwater*, 532 U.S. at 351. Incorporating state-law arrest limitations into the Constitution would produce a “vague and unpredictable” constitutional regime. *Moore*, 553 U.S. at 175. “The constitutional standard would be only as easy to apply as the underlying state law, and state law can be complicated indeed.” *Id.* The Court went on to conclude that, even when an arrest violates state standards, as long as the arrest satisfies constitutional standards—i.e. it is supported by probable cause—the officers may conduct a search incident to the arrest. *Id.* at 176-178.

This Court followed *Moore* in *Jones*, 2009-Ohio-316. Although the officer in *Jones* violated R.C. 2935.03 (which limits extraterritorial arrests), this Court reiterated its prior holding that a violation of the statute does not render the arrest *per se* unreasonable. *Id.* at ¶¶ 12-14, citing *State v. Weidman*, 94 Ohio St.3d 501 (2002). But this Court then went one step further,

holding that *Moore* “removed any room for finding that a violation of a state statute, such as R.C. 2935.03, in and of itself, could give rise to a Fourth Amendment violation and result in suppression of evidence.” *Jones*, 2009-Ohio-316, ¶ 15. After explaining the holding in *Moore*, this Court noted that the officer in *Jones* had probable cause to initiate the traffic stop because he personally observed the defendant commit a traffic violation (driving without headlights). *Id.* at ¶ 19, citing *Dayton v. Erickson*, 76 Ohio St.3d 3, 11-12 (1996). “The sole focus of the inquiry should have been on the stop itself because the violation of R.C. 2935.03 does not rise to the level of a constitutional violation for the reasons expressed in *Moore*.” *Jones*, 2009-Ohio-316, ¶ 20; see, also, *id.* at ¶ 34 (“The Fourth Amendment requires exclusion only when the officer lacked probable cause to make the stop; the fact that the stop was extraterritorial is irrelevant.”) (O’Donnell, J., concurring).

R.C. 2935.03 contains no remedy provision, and this Court “was not in the position to rectify this possible legislative oversight by elevating a violation of R.C. 2935.03 to a Fourth Amendment violation and imposing the exclusionary rule, because the stop in this case was constitutionally sound.” *Jones*, 2009-Ohio-316, ¶ 21, citing *Moore*, 553 U.S. at 178.

Establishing a remedy for a statutory violation is a job for the General Assembly, not the courts. *Jones*, 2009-Ohio-316, ¶ 22, citing *State ex rel. Ohio Democratic Party v. Blackwell*, 111 Ohio St.3d 246, 2006-Ohio-5202, ¶ 37.

Thus, after *Moore* and *Jones*, even when an arrest violates a statutory provision, the arrest is constitutional under the Fourth Amendment if it is supported by probable cause—period. If the seizure is an investigative detention, then only reasonable suspicion is needed. *Jones*, 2009-Ohio-316, ¶ 19, n. 4, citing *United States v. Lopez-Soto*, 205 F.3d 1101, 1104 (9th Cir.2000).

There is no requirement under the Fourth Amendment that the seizure satisfy any additional balancing test beyond the probable-cause/reasonable-suspicion analysis.

B. There Is No Persuasive Reason for Article I, Section 14 to Require an Additional Balancing Test When the Fourth Amendment Does Not.

This Court has stated repeatedly that, given the “virtually identical” language used in the Fourth Amendment and Article I, Section 14, the two constitutional provisions “afford[] the same protection.” *Smith*, 2009-Ohio-6426, ¶ 10, n. 1, citing *Robinette*, 80 Ohio St.3d at 238-239; see, also, *State v. Buzzard*, 112 Ohio St.3d 451, 2007-Ohio-373, ¶ 13, n. 2; *State v. Murrell*, 94 Ohio St.3d 489, 493-494 (2002). Thus, “we should harmonize our interpretation of Section 14, Article I of the Ohio Constitution with the Fourth Amendment, unless there are persuasive reasons to find otherwise.” *Robinette*, 80 Ohio St.3d at 239.

There are no “persuasive reasons” for Article I, Section 14 to require an additional balancing test that is no longer required under the Fourth Amendment. All the reasons set forth in *Moore* and *Jones* for the Fourth Amendment not requiring any additional balancing test beyond the probable-cause/reasonable-suspicion analysis apply equally to Article I, Section 14. No less so under Article I, Section 14 than under the Fourth Amendment, a seizure based on probable cause or reasonable suspicion serves important state interests—i.e., to “ensure a suspect’s appearance at trial, prevent him from continuing his offense, and enable officers to investigate the incident more thoroughly.” *Moore*, 553 U.S. at 174. The General Assembly is of course free to prefer certain types of seizures over others. But as long as the seizure is supported by probable cause or reasonable suspicion, it is just as reasonable under Article I, Section 14 as it is under the Fourth Amendment. *Id.*

Moreover, the “essential interest in readily administratable rules,” *id.* at 175, is equally important under Article I, Section 14 as it is under the Fourth Amendment. Police officers in the

field need to make split-second decisions, often under dangerous circumstances. In deciding whether to make a seizure, officers do not have the luxury of researching the Revised Code and then, if the officer determines that the seizure violates some statutory provision, balancing the private and public interests in the seizure. Indeed, weighing these case-specific factors would produce the same type of “vague and unpredictable” constitutional regime that the United States Supreme Court eschewed in *Moore* and *Atwater*. *Id.* And this is to say nothing of the inherent unpredictability of the Revised Code. Existing statutes may be repealed or amended, and new statutes may be enacted. What violates a statute today may have been perfectly compliant when Article I, Section 14 was adopted in 1851, and may be perfectly compliant tomorrow. Like the Fourth Amendment, the constitutionality of a seizure under Article I, Section 14 should turn on familiar, bright-line constitutional standards that police officers can apply in the field—namely, probable cause for arrests and reasonable suspicion for investigative detentions.

Moreover, the separation-of-powers principles animating *Moore* and *Jones* are just as much part of Ohio’s Constitutional structure as they are under the Federal Constitution. *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶¶ 41-53. When the General Assembly provides no exclusion remedy for a statutory violation, courts have no more power to “rectify this possible legislative oversight,” *Jones*, 2009-Ohio-316, ¶ 21, under the Article I, Section 14 than they do under the Fourth Amendment.

This case illustrates perfectly why Article I, Section 14 should not require a balancing test beyond the probable-cause/reasonable-suspicion analysis. The Sixth District acknowledged that the officer had probable cause that Brown committed a marked-lanes violation. Opinion at ¶ 15. This finding of probable cause—all by itself—meant that the public’s interest in the arrest outweighed Brown’s interest in privacy. To repeat the words of *Moore*: “[W]hen an officer has

probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable.” *Moore*, 553 U.S. at 171, citing *Atwater*, 532 U.S. at 354.

While R.C. 4513.39(A) codifies a preference for certain types of law-enforcement officers to conduct traffic stops on state highways, the traffic stop was nonetheless reasonable, which—like the Fourth Amendment—is all Article I, Section 14 requires. While the Sixth District believed there were no “extenuating circumstances” for the traffic stop, Opinion at ¶ 20, the mere fact that Brown was committing a marked-lanes violation was all the “extenuating circumstances” the officer needed. The traffic stop was about much more than just issuing a citation for a traffic violation. The stop prevented Brown from continuing to cross over the white lines, which in itself is dangerous activity, and the stop enabled the officer to investigate the incident more thoroughly. *Moore*, 553 U.S. at 174. Indeed, for all the officer knew, the marked-lanes violation could have been caused by some defect with Brown’s vehicle or, worse yet, by Brown driving under the influence. It was thus reasonable—necessary, even—for the officer to initiate the traffic stop *right now*. Calling for assistance from the Highway Patrol or the Wood County Sheriff’s department and hoping that nothing bad happened in the time it would take for the other agency to respond to the scene (assuming the other agency was willing and able to respond at all) was not a viable option.

The Sixth District’s decision also infringes on the General Assembly’s prerogative to choose what remedy, if any, should follow from a statutory violation. *Jones*, 2009-Ohio-316, ¶ 21. The predecessor of R.C. 4513.39(A)—G.C. § 6297—was enacted in 1941¹, 90 years *after* Article I, Section 14 was adopted. The statute has been amended several times over the years,

¹ 119 Ohio Laws 810, § 1.

most recently in 2011, two years *after* this Court’s decision in *Jones*. Yet the General Assembly has chosen not to adopt any remedy for a violation of R.C. 4513.39(A), let alone an exclusion remedy. If a violation of R.C. 4513.39(A) is to warrant suppressing evidence, then that policy decision should come from the General Assembly, not the courts. *Id.* at ¶ 22.

Even if Article I, Section 14 does require that a seizure in violation of a statute satisfy an additional balancing test beyond the probable-cause/reasonable-suspicion analysis, the traffic stop in violation of R.C. 4513.39(A) would easily pass muster. As already explained, the public has a strong interest in law-enforcement officers enforcing traffic laws. On the other side of the balance, that a traffic stop was initiated by a law-enforcement officer who is not a state trooper or sheriff’s deputy implicates no legitimate privacy or liberty interests. Indeed, it would be an odd rule that said that privacy interests turn on what particular agency employs the officer making the stop. *C.f. Moore*, 553 U.S. 176 (noting the difficulty with a constitutional rule under which an arrest by federal officers was treated differently than an arrest by state officers).

C. *State v. Brown* Should Be Overruled or Limited to Its Facts.

In *Brown*, 2003-Ohio-3931, this Court held that an arrest for a minor misdemeanor in violation of R.C. 2935.26(A) is unconstitutional under Article I, Section 14 because—even when the arrest is supported by probable cause—the government’s interests in the arrest do not outweigh the arrestee’s privacy interests. While this Court held that there was “ample reason” for Article I, Section 14 to require a balancing test that is no longer required under the Fourth Amendment, *id.* at ¶ 22, this rationale is no longer viable.

The “ample reason” referenced in *Brown* was that an earlier *Jones* case—*State v. Jones*, 88 Ohio St.3d 430 (2000)—held that the constitutionality of an arrest supported by probable cause but in violation of R.C. 2935.26(A) turned on an additional balancing test. But the earlier

Jones case applied this additional balancing test because it believed that the *Fourth Amendment* required it to do so. For example, this Court noted that “protections provided by Ohio’s Constitution are coextensive with those provided by the United States Constitution.” *Id.* at 434, citing *Robinette*, 80 Ohio St.3d at 238. Later in the opinion, this Court referred to “appellee’s contention that an arrest for a minor misdemeanor, made in violation of R.C. 2935.26, is a violation of the *Fourth Amendment*.” *Jones*, 88 Ohio St.3d at 436-437 (emphasis added). This Court then cited Fourth Amendment cases in describing the balancing test. *Id.* at 437, citing *Veronia School District 47J v. Acton*, 515 U.S. 646, 652-653 (1995), and *Houghton*, 526 U.S. at 300; see, also, *Jones*, 88 Ohio St.3d at 438, citing *Houghton*, 526 U.S. at 300; *Jones*, 88 Ohio St.3d at 440, citing *Gustafson v. Florida*, 414 U.S. 260, 266 (1973) (Stewart, J., concurring). This Court concluded by stating that an arrest under R.C. 2935.26 is unconstitutional under both the Fourth Amendment and Article I, Section 14. *Jones*, 88 Ohio St.3d at 440.

Thus, while the earlier *Jones* case applied an additional balancing test under Article I, Section 14, it did so believing that it was required under the Fourth Amendment. In other words, this Court applied the additional balancing test with constitutional harmonization in mind—i.e., to adhere to the general rule that Article I, Section 14 and the Fourth Amendment “afford[] the same protection.” *Smith*, 2009-Ohio-6426, ¶ 10, n. 1. But *Moore* and the later *Jones* decision make clear that the Fourth Amendment does not require any balancing test beyond the probable-cause/reasonable-suspicion analysis. So the very reason this Court in the earlier *Jones* decision applied the additional balancing test under Article I, Section 14 is now reason to discard it.

In *Brown*, the State argued that the United States Supreme Court’s decision in *Atwater* undermined the Article I, Section 14 holding in the earlier *Jones* decision. *Brown*, 2003-Ohio-3931, ¶ 21. Rather than modifying the earlier *Jones* decision, this Court doubled down on it.

But with *Moore* and the later *Jones* decision both reaffirming the holding in *Atwater* that the Fourth Amendment requires no additional balancing test beyond the probable-cause/reasonable-suspicion analysis, the reasons for discarding the balancing test under Article I, Section 14 are too compelling to ignore.

True, the Ohio Constitution is a document of independent force, and the so-called “New Federalism” entitles States to provide greater protection than the Federal Constitution. This Court, however, has not hesitated to scale back protection under Article I, Section 14 when necessary to re-harmonize it with the Fourth Amendment. *Murrell*, 94 Ohio St.3d at 493-496, overruling *State v. Brown*, 63 Ohio St.3d 394 (1992). This Court should do so again here. The “assumptions upon which [*Brown*] was based” are no longer true. *Id.* at 494. *Brown* relied on case law that assumed that an additional balancing test under Article I, Section 14 was necessary to align it with the Fourth Amendment. But now, constitutional harmonization requires *discarding* the additional balancing test under Article I, Section 14. Doing so will also provide the “practical advantages” underlying the bright-line probable-cause/reasonable-suspicion rules governing seizures. *Id.* at 495. And, of course, it will preserve separation-of-powers principles by ensuring that the General Assembly decides what remedies—if any—should flow from a statutory violation. *Jones*, 2009-Ohio-316, ¶ 21.

In short, the time has come for this Court to overrule *Brown*. Stare decisis is less compelling when constitutional issues are at stake. *City of Rocky River v. State Emp. Rel. Bd.*, 43 Ohio St.3d 1, 6 (1989). But even for non-constitutional precedent, a decision may be overruled if: “(1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied

upon it.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, paragraph one of the syllabus.

Even applying the non-constitutional *Galatis* criteria, *Brown* does not withstand scrutiny. Whatever reasons *Brown* had for applying the additional balancing test under Article I, Section 14 (despite *Atwater*), *Moore* and the later *Jones* decision “no longer justify continued adherence to [*Brown*].” Also, having different standards under Article I, Section 14 and the Fourth Amendment “defies practical workability,” especially considering that the two provisions are worded nearly identically. Incorporating the Revised Code through additional balancing test into Article I, Section 14 hampers law enforcement’s ability to investigate and prevent criminal activity. Finally, discarding the additional balancing test would create no “undue hardship for those who have relied upon it.” No reliance interests are involved, because the additional balancing test is an “evidentiary rule” that “does not serve as a guide to lawful behavior.” *State v. Silverman*, 121 Ohio St.3d 581, 2009-Ohio-1576, ¶ 32 (citations omitted).

Even if this Court is not willing to overrule *Brown* entirely, it should limit *Brown* to its narrow facts. That is, this Court should make clear that Article I, Section 14 requires an additional balancing test only when an arrest violates R.C. 2935.26(A), and the constitutionality of seizures violating other statutory provisions should be governed solely by the probable-cause/reasonable-suspicion analysis. But, again, the proper course is to overrule *Brown* entirely.

II. EVEN IF ARTICLE I, SECTION 14 DOES PROVIDE GREATER PROTECTION THAN THE FOURTH AMENDMENT, THERE IS NO EXCLUSIONARY RULE UNDER ARTICLE I, SECTION 14.

Once the Sixth District acknowledged that the traffic stop was based on probable cause, the constitutional inquiry should have ended under both the Fourth Amendment and Article I,

Section 14. The Sixth District erred in holding that Article I, Section 14 required that the stop satisfy an additional balancing test. For this reason alone, the Sixth District should be reversed.

But even if this Court concludes that Article I, Section 14 does in fact require a balancing test beyond the probable-cause/reasonable-suspicion analysis, and that the traffic stop in this case failed to satisfy that test, then this Court should address the Sixth District's holding that a violation of Article I, Section 14 *ipso facto* requires suppression. Opinion at ¶ 20 ("Nonetheless, the drugs seized as a result of the stop should have been excluded from evidence because the stop was unreasonable under Article I, Section 14, of the Ohio Constitution."). For the following reasons, the court's "constitutional violation = suppression" holding was wrong.

First, and most importantly, this Court has held that there is no exclusionary rule under Article I, Section 14. *Lindway*, 131 Ohio St. 166, paragraphs four, five, and six of the syllabus. This Court explained that "the people of the state ought not to be penalized by the suppression of evidence tending to prove an offense against the peace and dignity of the state to shield a criminal from deserved punishment, when the Constitution by its plain language makes no such demand."

Id. at 173. This Court then offered this general criticism of the exclusionary rule:

"All this is misguided sentimentality. For the sake of indirectly and contingently protecting the Fourth Amendment, this view appears indifferent to the direct and immediate result, viz., of making Justice inefficient, and of coddling the criminal classes of the population. It puts Supreme Courts in the position of assisting to undermine the foundations of the very institutions they are set there to protect. It regards the over-zealous officer of the law as a greater danger to the community than the unpunished murderer or embezzler or panderer." And to bring the list more up to date we might add the terms gangster, gunman, racketeer and kidnaper.

Id. at 181 (quoting treatise). This "misguided sentimentality" is just as relevant today as it was in 1936.

This Court has never expressly overruled *Lindway*. While this Court has invoked Article I, Section 14 to suppress evidence, when it has done so the focus was solely on the underlying constitutional question of whether the search or seizure violated Article I, Section 14. The separate suppression issue does not appear to have been raised, let alone fully briefed or argued. Likely because of this, this Court ordered suppression under an apparent belief that suppression was an automatic consequence of the constitutional violation. See, e.g., *Brown*, 2003-Ohio-3931, ¶ 25 (the arrest violated Article I, Section 14 and “[a]ccordingly” the evidence must be suppressed); *Robinette*, 80 Ohio St.3d at 246 (search violated Article I, Section 14, and “[a]s a result, the evidence collected in that search is inadmissible.”); *Brown*, 63 Ohio St.3d at 352-353 (in affirming lower court’s suppression of evidence under Article I, Section 14, this Court focused solely on the constitutional question without addressing the separate suppression issue); *State v. Pi Kappa Alpha Fraternity*, 23 Ohio St.3d 141, 145 (1986) (reinstating trial court’s suppression order under Article I, Section 14, but focusing solely on underlying constitutional issue).

This “automatic suppression” approach under Article I, Section 14 is also likely due to the once-common belief that suppression flowed automatically from a Fourth Amendment violation. *Davis v. United States*, 131 S.Ct. 2419, 2427 (2011) (admitting that “our exclusionary-rule cases were not nearly so discriminating in their approach to the doctrine.”). But recently, the United States Supreme Court has returned to first principles, emphasizing that the federal exclusionary rule’s “sole purpose [] is to deter future Fourth Amendment violations.” *Id.* at 2426; see, also, *State v. Oliver*, 112 Ohio St.3d 447, 2007-Ohio-372, ¶ 12 (recognizing that applying the exclusionary rule generates “substantial social costs in permitting the guilty to go free and the dangerous to remain at large” and that “courts must apply the exclusionary rule

cautiously and only in case where its power to deter police misconduct outweighs its costs to the public”) (internal quotation marks and citations omitted). Accordingly, to trigger the federal exclusionary rule, “police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.” *Herring v. United States*, 555 U.S. 135, 144 (2009). For the federal exclusionary rule to apply, the police conduct must be “deliberate, reckless, or grossly negligent” or be the result of “systemic negligence.” *Id.*

Just because the United States Supreme Court has recognized a limited exclusionary rule under the Fourth Amendment does not mean this Court must adopt an exclusionary rule under Article I, Section 14. *California v. Greenwood*, 486 U.S. 35, 45 (1988) (“[T]he people of California could permissibly conclude that the benefits of excluding relevant evidence of criminal activity do not outweigh the costs when the police conduct at issue does not violate federal law.”); *State v. Kennedy*, 295 Ore. 260, 270-271 (1983) (Federalism “does not necessarily mean that state constitutional guarantees always are more stringent than decisions of the Supreme Court under their federal counterparts. A state’s view of its own guarantee may indeed be less stringent, in which case the state remains bound to whatever is the contemporary federal rule.”).

When it comes to governing what law enforcement may or may not do by way of searches and seizures, it makes perfect sense that the Fourth Amendment and Article I, Section 14 “afford[] the same protection.” *Smith*, 2009-Ohio-6426, ¶ 10, n. 1. After all, police conduct is what the *text* of the two constitutional provisions address. But neither provision’s text addresses the *remedy* for a violation. Thus, constitutional harmonization has minimal—if any—force when it comes to whether this Court should adopt under Article I, Section 14 the same

remedy that the United States Supreme Court has adopted for the Fourth Amendment. This Court should adhere to *Lindway* and reiterate that there is no exclusionary rule under Article I, Section 14. A defendant seeking to exclude evidence for an unconstitutional search or seizure must do so under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, OPAA respectfully submits that the judgment of the Sixth District be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day,

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