

In The
Supreme Court of the United States

SHARON LYNN BROWN,

Petitioner,

vs.

POLK COUNTY, WISCONSIN, et al.,

Respondents.

**On Petition For Writ Of Certiorari To The United
States Court Of Appeals For The Seventh Circuit**

**BRIEF AMICI CURIAE NATIONAL ALLIANCE
TO END SEXUAL VIOLENCE, NATIONAL
INDIGENOUS WOMEN'S RESOURCE CENTER, INC.,
BATTERED WOMEN'S JUSTICE PROJECT,
WISCONSIN COALITION AGAINST SEXUAL
ASSAULT, MINNESOTA COALITION AGAINST
SEXUAL ASSAULT, COLUMBIA LAW SCHOOL
SEXUALITY AND GENDER LAW CLINIC,
MINNESOTA INDIAN WOMEN SEXUAL ASSAULT
COALITION, ALLIANCE OF TRIBAL COALITIONS
TO END VIOLENCE, MENDING THE SACRED
HOOP, STANDPOINT, GENDER JUSTICE,
AND OUR JUSTICE IN SUPPORT OF
PETITIONER SHARON LYNN BROWN**

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to End Violence, Mending the Sacred Hoop,
Standpoint, Gender Justice, and Our Justice*

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INTEREST OF THE AMICI CURIAE¹

Amici curiae are twelve non-profit and educational organizations dedicated to the prevention of gender and sexual violence, the advancement of racial, gender, and reproductive justice, and support of and advocacy for Native American tribal members and communities.

National Alliance to End Sexual Violence is the voice in Washington, D.C., for the 56 state and territorial sexual assault coalitions and works to educate the policy community about federal laws, legislation, and appropriations impacting the fight to end sexual violence. Its team of experts and advocates, donating time away from their state and local groups, publish written analysis, track legislation, provide media interviews, and advise members of Congress and the executive branch.

National Indigenous Women's Resource Center, Inc. ("NIWRC") is a Native-led non-profit organization dedicated to ending violence against Native women and children. The NIWRC provides national leadership in ending gender-based violence in tribal communities by lifting up the collective voices of grassroots advocates and offering culturally grounded

¹ This amicus brief is filed with the consent of Petitioner and Respondents. The parties received timely notice of this filing. No counsel for a party authored this brief in whole or in part. No person or entity, other than amici and their counsel, contributed money intended to fund the preparation or submission of this brief.

resources, technical assistance and training, and policy development to strengthen tribal sovereignty.

Battered Women’s Justice Project (“BWJP”) is a national technical assistance center that provides training and resources for advocates, battered women, legal system personnel, policymakers, and others engaged in the justice system response to intimate partner violence (“IPV”). The BWJP promotes systemic change within the civil and criminal justice systems to ensure an effective and just response to victims and perpetrators of IPV, and the children exposed to this violence. The BWJP is an affiliated member of the Domestic Violence Resource Network, a group of national resource centers funded by the Department of Health and Human Services and other support providers since 1993. The BWJP also serves as a designated technical assistance provider for the Office on Violence Against Women of the U.S. Department of Justice.

Wisconsin Coalition Against Sexual Assault (“WCASA”) is a hybrid organization; functioning both to support member Sexual Assault Service Providers (“SASPs”), while advancing the anti-sexual assault movement in the state and nationally. WCASA works towards creating a socially just world in which all people value equity and healthy sexuality.

Minnesota Coalition Against Sexual Assault (“MNCASA”) is a coalition of Minnesota’s rape crisis centers and dual domestic/sexual violence victim advocacy programs statewide. Its member programs

and allies also include health care agencies, community groups, victims/survivors, attorneys, and law enforcement agencies whose employees and volunteers support victims of sexual assault. MNCASA represents the interests of these stakeholders in matters of public policy, media outreach, prevention awareness, systems change, and community organizing around issues of sexual violence.

Columbia Law School Sexuality and Gender Law Clinic, founded in 2006, is the first such clinical law program at an American law school. The Clinic works on cutting-edge sexuality and gender law issues and provides vital assistance to lawyers and organizations throughout the country and the world that advocate for the equality and safety of women and lesbian, gay, bisexual, transgender, and queer individuals. The Clinic regularly submits amicus briefs on these matters to federal appellate courts and other courts throughout the United States.

Minnesota Indian Women Sexual Assault Coalition exists to support culturally-grounded, grassroots advocacy; and to provide national leadership and technical assistance to end gender-based violence. It supports the development of local and national policy, and capacity building of Indigenous communities to end all forms of violence and oppression; including racism, sexism, classism, heterosexism, ageism, and all other acts of violence that impede the safety and wellness of all people.

Alliance of Tribal Coalitions to End Violence (“ATCEV”) is a Native-led and operated non-profit organization that works to advance tribal sovereignty and safety of American Indian and Alaskan Native women by providing support to tribal coalitions and tribal communities in their efforts to address equal justice for survivors of violence.

Mending the Sacred Hoop is a Native-owned and operated non-profit organization that exists to address violence against Native women and works to end it. It organizes on issues surrounding violence against American Indian/Alaska Native women in its home community of Duluth, MN and throughout the State of Minnesota. Mending the Sacred Hoop works with Tribes and Native communities nationally that are addressing the issues of domestic and sexual violence, dating violence, sex trafficking and stalking in their communities.

Standpoint (formerly the The Battered Women’s Legal Advocacy Project, Inc.) is a private, non-profit organization that serves as a statewide agency in Minnesota, providing legal consultation, training, and resources to domestic and sexual violence victims and their advocates, attorneys, and law enforcement. Standpoint consults yearly with thousands of domestic and sexual violence victims, and has established a statewide reputation as a premiere legal resource. It strives to understand the world from the “standpoint” of marginalized groups to better serve the statewide community of survivors and the support networks surrounding them.

Gender Justice is a non-profit legal and advocacy organization working to create a world where everyone can thrive no matter their gender, gender identity or expression, or sexual orientation. Central to this work is dismantling the legal, political, and structural barriers to gender equity. Gender Justice fights to push the law forward through work in the courts, the legislature, and the community.

Our Justice, a non-profit reproductive justice organization, works to ensure that all people and communities have the power and resources to make sexual and reproductive health decisions with self-determination. Founded in 1967 by a small group of doctors, clergy, and community members to assist Minnesota women in accessing abortion care, Our Justice operates the largest abortion assistance fund in the Midwest. Our Justice works to defend and advance sexuality and reproductive choice as a human right by providing resources and education.

SUMMARY OF THE ARGUMENT

Amici advance three primary arguments. First, Amici contend that body cavity searches of detainees absent exigency or any safeguards constitute acts of state-ordered sexual violence, which violate a person's fundamental rights of dignity and bodily integrity. What Respondent Polk County did to Petitioner Sharon Lynn Brown ("Brown") was not a mere inconvenience or unpleasantry—it amounts to an

overt, physical act of sexual assault by the government, which forcibly overrode Brown's own right to bodily autonomy and in so doing, inflicted violence and trauma on her and her community. The lower courts failed to recognize the severity of the intrusion to Brown, nor did they acknowledge the broader societal context in which Brown's search occurred.

Second, Amici argue that this case and the core constitutional question of what standard should apply to a constitutionally-permissible, non-consensual body cavity search must consider the societal context in which the search is occurring. This requires acknowledging the realities of certain sociological facts and structural inequalities. Not all populations are equally-likely to be detained or imprisoned, where they may be subjected to forcible bodily cavity searches. Given the racial disparities in the criminal justice system, including the overrepresentation of Black, indigenous, and people of color (“BIPOC”) individuals in jails and prisons, these state violations of bodily autonomy are disproportionately inflicted upon and cause harm to marginalized communities. Amici thus advocate that the Court address this case through a lens centering on racial justice and focused upon the many racial disparities within the criminal justice system.

Non-consensual body cavity searches must also be considered with a focus upon the realities of sexual and gender-based violence, both in our society as a whole but also in our nation’s prisons and jails. Here too, an

intersectional lens is critical, because women of color and in particular Native American women like Brown face dramatically higher rates of sexual assault in the United States. Amici stress the common-sense but important point that forcible body cavity searches inflict trauma, both to the individual as well as their communities.

Finally, Amici highlight the context of the endemic sexual violence within our nation’s prisons and jails, which is so rampant and serious that it motivated Congress to pass the Prison Rape Elimination Act (“PREA”). The realities that necessitated the passage of PREA demonstrate that a permissive approach to forcible body cavity searches only furthers the lack of respect for bodily autonomy and human dignity in our criminal detention facilities. A substantial proportion of the sexual violence occurring within detention facilities is committed by prison authorities themselves—the same populations of prison officers tasked with administering body cavity search policies.

For these reasons, Amici urge the Court to grant the petition and conclude that Polk County’s invasive treatment of Brown violated her Fourth Amendment rights.

◆

ARGUMENT

I. Non-consensual body cavity searches should be lawful only under the rarest of circumstances, because such searches are state-ordered sexual assaults that violate bodily autonomy and inflict trauma.

A non-consensual body cavity search directed or conducted by a government actor is a state-ordered sexual assault. This is not hyperbole.

Respondents' probing of Brown's vagina and anus against her will *in a search for drugs* while she was being held as a pretrial detainee *suspected of shoplifting* meets the statutory definition of felony sexual assault. *See, e.g.*, Wis. Stat. Ann. § 940.225 (West 2020). This Court has recognized that “[t]he integrity of an individual’s person is a cherished value of our society.” *Schmerber v. California*, 384 U.S. 757, 772 (1966). “Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.” *Turner v. Safley*, 482 U.S. 78, 84 (1987). Detainees and inmates retain meaningful bodily autonomy. They can make healthcare choices and decline certain treatments or procedures. *See Washington v. Harper*, 494 U.S. 210, 221 (1990) (recognizing a prisoner’s “significant liberty interest in avoiding the unwanted administration of antipsychotic drugs”).

The Court should grant review in order to clarify that forcible body cavity searches run afoul of the Fourth Amendment absent a warrant, probable

cause, or exigent circumstances. These acts of state-sponsored sexual violence ought to be rare. A detainee's right to bodily autonomy should not be overridden by security interests except where those interests are grave and urgent. There are far more reasonable and humane methods of identifying and mitigating a possible safety concern. One such method might be temporarily isolating the detainee in order to observe them and allow their bodies time to expel any contraband. The Fourth Amendment is necessarily violated by a non-consensual body cavity search where less invasive alternatives exist.

In the instant case, the alleged security risk presented by Brown, who was being held as a pretrial detained after having been arrested for shoplifting, was the notion that she might be concealing drugs within her body. An ultrasound of Brown had already revealed no indication that she was concealing drugs. The Respondents know of and could have used less intrusive alternatives, but instead violated the Fourth Amendment by subjecting Brown to a non-consensual body cavity search.

Respondents' actions run afoul of the constitutional guidance this Court provided in *Birchfield v. North Dakota*, when comparing warrantless breath tests incident to drunk driving arrest to warrantless blood tests. 136 S. Ct. 2160, 2184 (2016). Where drunk driving is involved, there is an exigency to collect evidence while the suspect's blood alcohol content is still at or close to the level it was when the suspect was operating a vehicle. Contrasting breath

tests to blood tests, the Court noted that “[b]lood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant.” *Id.*

In Brown’s situation, there was no exigency to obtain evidence as there was in *Birchfield*, and less intrusive alternatives were available but not used. Any concerns about the risks that concealed drugs could present to Brown’s health could have been explained to Brown by jail officials in order to obtain consent for a search. If Brown still did not consent to a body cavity search, she could have been asked to provide informed consent to acknowledge the medical risks and to release the county from liability should any harm result from her decision to decline the search. Allowing Brown to balance those risks to her safety and security and decide for herself honors bodily autonomy, without creating a security risk.

Drugs in such a small quantity that an ultrasound cannot detect them presented a minimal safety risk, both to Brown and others. Yet the panel’s consideration of the “heft of the security interest at stake,” App. 11, and “the weight of jail safety concerns,” was so powerful to the panel that it held that as a matter of law, they outweighed the violent intrusion to Brown. App. 14. But upon whose safety and security was the panel centering its analysis? The panel’s decision ignores the autonomy and human dignity of detainees,

an already vulnerable population deprived of certain liberties. One of the most effective ways of promoting jail safety and security is to protect bodily autonomy and human dignity whenever possible. Requiring an extraordinarily high showing before a state actor can forcibly probe a detainee's body cavities promotes jail safety and security far more than does the permissive standard blessed by the panel.

II. Non-consensual body cavity searches perpetuate racial and gender disparities as well as individual and collective trauma.

Many significant material facts are absent from the lower courts' decisions. Neither the panel nor the district court acknowledged Brown as a Native American woman. More specifically, Petitioner Brown is a member of the Fond du Lac Band of Lake Superior Chippewa. Pet. at 14 (citing Dist. Ct. Dkt. 1 at 2; Dist. Ct. Dkt. 17 at 17:9-25.). Nor does either court acknowledge that through its forcible search of Brown's vagina and anus, Polk County inflicted trauma upon her. These omissions are simultaneously stunning and yet unsurprising.

Examples of the government controlling indigenous, Black, brown, and female bodies is utterly commonplace, as a matter of American history and contemporary life. While frequent, such state-sponsored violence is immoral and in many circumstances, illegal. Each and every instance of state

violence inflicts not only trauma upon the individuals impacted but also upon that person’s community. Amici urge the Court to grant review so that it may grapple with the constitutionality of the state violence that Brown resisted (and continues to resist through her civil rights lawsuit) in the context in which it actually occurred—within a society struggling with racial injustices and extremely high rates of sexual violence perpetrated against Native women and women of color.

There are far-reaching racial disparities in our nation’s criminal justice system.² This is also true in Wisconsin, where Brown was arrested for shoplifting, detained pretrial, and invasively searched. The Vera Institute’s survey of research on pretrial detention and race concludes that “in many jurisdictions, people of color are unduly burdened by pretrial detention and the imposition of monetary bail.”³ White people *are underrepresented* in the incarcerated population in Wisconsin, while BIPOC people *are overrepresented*.⁴ In Wisconsin, the disparities are most significant within Black and indigenous communities.⁵

² *Criminal Justice Fact Sheet*, NAACP, <https://www.naacp.org/criminal-justice-fact-sheet/> (last visited Feb. 22, 2021).

³ *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, Vera Institute of Justice (Apr. 2019), <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf>.

⁴ *Wisconsin Profile*, Prison Policy Initiative, <https://www.prisonpolicy.org/profiles/WI.html> (last visited Feb. 22, 2021).

⁵ *Id.* Obtaining a precise understanding of the scope of mass incarceration of Native people is a challenge, due to data



Because BIPOC individuals are so overrepresented in prisons and jails compared to their overall population in our communities, the impact of body cavity searches is not race-neutral. Policies and practices about non-consensual body cavity searches will disproportionately impact BIPOC people and communities.

An understanding of gender-based, sexual violence is also critical for accurately contextualizing non-consensual body cavity searches. More than four in five indigenous women report having experienced violence in their lifetime, and more than half have experienced sexual violence or intimate partner

collection issues and the tendency to group indigenous people with other ethnic and racial groups in publicized data. Roxanne Daniel, *Since You Asked: What Data Exists About Native American People in the Criminal Justice System*, Prison Policy Initiative (Apr. 22, 2020), <https://www.prisonpolicy.org/blog/2020/04/22/native/>.

violence.⁶ Native women experience sexual violence at higher rates than any other population in the United States.⁷ Black women are also at a disproportionate risk for sexual violence.⁸ Thirty-five percent of Black women experience some form of contact sexual violence within their lifetime.⁹ The overrepresentation of BIPOC people within the criminal justice system as well as within the population of survivors of prior sexual and gender-based violence means that non-consensual body cavity searches are more likely to traumatize and retraumatize BIPOC people and communities.

Amici also advocate a trauma-informed perspective to non-consensual body cavity searches. A trauma-informed approach benefits all detainees. A non-consensual cavity search is traumatic for any

⁶ *Policy Research Update: Violence Against American Indian and Alaska Native Women*, National Congress of American Indians, Policy Research Center (Feb. 2018), https://www.ncai.org/policy-research-center/research-data/prc-publications/VAWA_Data_Brief_FINAL_2_1_2018.pdf; Andre B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, National Institute of Justice (Sept. 2016), <https://www.ojp.gov/pdffiles1/nij/249822.pdf>.

⁷ Minnesota Indian Women's Sexual Assault Coalition, <https://www.miwsac.org/> (last visited Feb. 22, 2021).

⁸ Jameta Nicole Barlow, *Black Women, The Forgotten Survivors of Sexual Assault*, American Psychological Association, *In the Public Interest* (Feb. 2020), <https://www.apa.org/pi/about/newsletter/2020/02/black-women-sexual-assault>.

⁹ Black Women and Sexual Assault, The National Center on Violence Against Women in the Black Community (Oct. 2018), <https://ujimacommunity.org/wp-content/uploads/2018/12/Ujima-Womens-Violence-Stats-v7.4-1.pdf>.

person subjected to it **and** additionally traumatic where the individual and their community has experienced prior sexual and racial trauma. Survivors of prior sexual violence are often retraumatized when their bodily autonomy is not respected. Non-consensual body cavity searches retraumatize vulnerable populations and perpetuate historical state-inflicted traumas, both upon individuals and communities.

Brown's case is the ideal opportunity for the Court to address the standard for a constitutionally-permissive non-consensual body cavity search, and to do so with an analysis informed by issues of racial justice, sexual and gender-based violence, and the social science of trauma.

III. The high rates of sexual violence perpetrated by jail and prison authorities demonstrates the dangers of having a permissive standard for conducting non-consensual body cavity searches.

Brown's experience must also be considered in the context of the widespread issue of rape and sexual violence within prisons and jails. Non-consensual body cavity searches must be rare, lest such searches perpetuate the rampant sexual violence in detention facilities. Congress was so disturbed by the prevalence of sexual violence in our nation's prisons and jails that it enacted the Prison Rape Elimination Act ("PREA"), which was signed into law by President George W.

Bush on September 3, 2003. In PREA's legislative findings, Congress stated that “[m]embers of the public and government officials are largely unaware of the epidemic character of prison rape and the day-to-day horror experienced by victimized inmates,”¹⁰ and that while research is insufficient, it is a conservative estimate that at least 13% of inmates have been sexually assaulted while in prison, many repeatedly.¹¹

Through PREA, Congress created the National Prison Rape Elimination Commission to examine sexual abuse in correctional facilities and develop national standards. In its 2009 report, the Commission's first finding is that “[p]rotecting prisoners from sexual abuse remains a challenge in correctional facilities across the country. Too often, in what should be secure environments, men, women, and children are raped or abused by other incarcerated individuals **and corrections staff.**”¹² The Commission reported several surveys in which prisoners had reported higher rates of incidents perpetrated by corrections staff than by other prisoners.¹³ The report also described systemic sexual assaults by corrections staff within the Michigan

¹⁰ 34 U.S.C.A. § 30301 (West).

¹¹ *Id.*

¹² *National Prison Rape Elimination Commission Report*, National Prison Rape Elimination Commission, 3 (June 2009), <https://www.ojp.gov/pdffiles1/226680.pdf> (emphasis added).

¹³ *Id.* at 41.

Department of Corrections, which led to a Department of Justice lawsuit and settlement.¹⁴

The PREA Commission's findings demonstrate that the population of state actors and agents who will be administering and directing policies about non-consensual body cavity searches often perpetrates sexual violence against detainees. Polk County corrections staff shackled Brown and took her without explanation to a hospital, where they instructed a physician to perform a body cavity search. Petition at 17-18. Brown was traumatized by the search, began weeping at the hospital, and remained emotional for hours after guards returned her to the jail, crying herself to sleep. *Id.* at 18.

A physician performing a non-consensual cavity search at the direction of guards is not meaningfully different than guards performing the cavity search themselves. Correction staff requesting that a medical professional performs a cavity search introduces a level clinical terror, particularly to members of communities that have historical reasons to distrust medical personnel. The Supreme Court of Minnesota recently held that a body cavity search performed at the instruction of law enforcement that involved a physician searching a detainee's anal cavity with a speculum—just as the physician did to Brown—was an unreasonable search under the Fourth Amendment. *State v. Brown*, 932 N.W.2d 283, 292-93 (Minn. 2020).

¹⁴ *Id.* at 51.

Allowing non-consensual body cavity searches to be performed pursuant to low or lax standards makes such invasive searches more likely to be misused or abused by some bad state actors as an additional method of terrorizing detainees—whether performed by guards themselves or by medical personnel under the control or instruction of guards. Acknowledging the context of widespread sexual violence within prisons and jails lends additional support for adopting a high standard for non-consensual body cavity searches of detainees.



CONCLUSION

The Court should grant review and hold that forcible body cavity searches run afoul of the Fourth Amendment absent a warrant, probable cause, or exigent circumstances. These acts of state-sponsored sexual violence ought to be exceedingly rare, and constitutional only where no less intrusive alternatives exist. A detainee's right to bodily autonomy should only be overridden by security interests that are grave and urgent. A detainee's right to be safe from sexual assault is more critical to jail safety and security than rooting out more minor security risks, such as identifying small quantities of drug contraband, particularly when the security risk can be addressed through less-intrusive alternatives. Amici further urge the Court to keep issues of racial justice and disparities, sexual violence and trauma, and the prevention and deterrence of sexual violence

within detention facilities at the heart of its consideration of this case.

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