No. 18-6210

IN THE

Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court of Wisconsin

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The brief in opposition presents no credible basis for denying review. On the essential question—whether a legislature can, by way of an informed-consent statute, "deem" a class of persons to have consented to a search—the lower courts are clearly divided. Respondent tries to wave this split away, insisting that only cases involving the precise facts here—an unconscious motorist—matter. But the condition of the individual motorist doesn't alter the basic question: can a statutory declaration of "consent" defeat the warrant requirement this Court revived in *Missouri v. McNeely*, 569 U.S. 141 (2013)?

Respondent also offers that the question may be "mooted" once the nation gets wind of the theory advanced by the two-justice concurrence in this case. But, depending which of Respondent's filings one reads, this new theory is either that a blood draw from an unconscious motorist is a valid search incident to arrest—a proposition this Court already rejected in *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184-85 (2016)—or that there is a heretofore unknown "general-reasonableness" exception to the warrant requirement. As Respondent makes no argument that the question presented is not important, and offers no reason why this case is not the right vehicle to answer it, this Court should grant certiorari.

I. State appellate courts are deeply divided on whether implied-consent laws create an exception to the warrant requirement

1. As the Petition noted, appellate courts of at least 20 states have decided whether implied-consent laws do away with the need for a warrant for a blood draw. Most have held they do not, but about one-third have gone the other way. Pet. 8-16. Respondent doesn't ever quite dispute this. Instead, it points to other, tangential features of some of these cases, while ignoring the courts' clear pronouncements on the main question.

So, for example, Respondent says the Supreme Court of Pennsylvania's decision doesn't count because it involved, among other things, officers' failure to comply with statutory requirements. Opp. 13. But what did the court itself say? It aligned itself with the "clear and unmistakable trend toward the recognition that statutorily implied consent alone does not satisfy the consent exception to the warrant requirement." *Commonwealth v. Myers*, 164 A.3d 1162, 1172 (Pa. 2017).

Or, take Respondent's dismissal of the high court decisions in Delaware and Nebraska. It says they hold only that "courts should look to the totality of the circumstances to assess whether the motorist is presently consenting." Opp. 14. That *is* what those courts held—which is why they *also* held that their states' implied-consent laws, despite purporting to authorize blood draws, could not constitutionally do so. *Flonnory v. Delaware*, 109 A.3d 1060, 1065 (Del. 2015) ("[T]he trial court erred when it concluded that 'Defendant's statutory implied consent exempted the blood draw from the warrant requirement.'"); *State v.*

Modlin, 867 N.W.2d 609, 619 (Neb. 2015) ("[A] court may not rely solely on the existence of an implied consent statute to conclude that consent to a blood test was given for Fourth Amendment purposes.").

Petitioner won't rehash each case discussed in the petition, but stands by what he has said (and what Respondent, again, doesn't really dispute): they all address whether an implied-consent law can supply actual, constitutional consent. Most say it can't, some say it can. Pet. 8-13.

2. Respondent also observes that no federal appellate court has decided the issue presented here. Opp. 15. There's a simple reason for this: there are few federal drunk-driving prosecutions, and the federal implied-consent statute doesn't permit testing absent actual consent. 18 U.S.C. § 3118 (b). And there's also virtually no *habeas corpus* review of Fourth Amendment claims. *Stone v. Powell*, 428 U.S. 465, 495 (1976).

So even a deep split on an important Fourth Amendment question related to drunk driving isn't going to be reflected in the federal courts. This is certainly why this Court's search-and-seizure cases involving drunk driving have all come, like this one, from the state courts. *See, e.g., Birchfield*, 136 S. Ct. 2160 (and its two companion cases); *Navarette v. California*, 572 U.S. 393 (2014); *McNeely*, 561 U.S. 141; *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990); *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *Schmerber v. California*, 384 U.S. 757 (1966). If this issue is going to be resolved, it's going to be resolved in this Court.

3. Respondent notes that some of the decisions Petitioner cites come from intermediate appellate courts. Opp. 14-15. This is true (though, as Respondent also observes, opp. 14, two of those are already pending in courts of last resort).

But what of it? Even limiting the field to the court-of-last-resort decisions, the doctrinal lines are drawn. The dispute is not complicated; it's well understood. Most courts (and some judges on divided courts) hold that consent must come from the individual, not the legislature, and must be voluntary under the totality of the circumstances, rather than a *per se* legislative declaration. *See, e.g.*, *State v. Havatone*, 389 P.3d 1251, 1255 (Ariz. 2017); *State v. Romano*, 800 S.E.2d 644, 652 (N.C. 2017); *State v. Mitchell*, 914 N.W.2d 120, 167 (Kelly, J. concurring) & 172 (Bradley, J. dissenting). Respondent doesn't explain what's wrong with this position, or even discuss it at all.

The few courts and judges to conclude otherwise have generally said that *Birchfield*'s commendation of civil penalties for refusing a blood draw also (silently) announced a warrant exception for laws permitting blood draws without consent. *See*, *e.g.*, *People v. Hyde*, 393 P.3d 962, 968 (Colo. 2017); *Mitchell*, 914 N.W.2d at 211-213. Respondent also declines to defend this analysis; instead, it assures the Court that it may someday "percolate" into something more substantial. But no amount of percolating will strengthen this weak tea.

4. Respondent further urges the Court to leave the question unresolved because *Birchfield* is only two years old. But to the extent *Birchfield* blessed implied-consent laws, it was only to say that they

could impose civil, but not criminal, penalties for refusal.

The question in this case is different and, in some ways, logically prior: can implied-consent laws do away with the option of refusal altogether? As Petitioner has argued, this seems to contradict *Birchfield*'s rationale: how can it violate the Fourth Amendment to criminalize a motorist's insistence on a warrant if the Fourth Amendment doesn't require a warrant at all? The fact that some courts have adopted this strained reading of *Birchfield* is not a reason for the Court to bypass the question here.

5. Respondent's main argument is that not enough lower courts have considered the constitutional question as applied to the precise circumstances here: an unconscious driver. Opp. 13-14. Respondent asserts that an unconscious driver is a "special context" giving rise to its own category of "consent issues." Opp. 13. But what are these issues? Respondent doesn't say. If the act of driving constitutes voluntary, Fourth Amendment consent to a blood draw (because of the assertedly "well-publicized" nature of the implied-consent statute), then why should the condition of the motorist at the time of the draw itself change anything?

If Respondent is really arguing that what the statute supplies is *consent*, then the only conduct necessary to manifest this supposed consent—driving—is complete some time before the blood draw. If Petitioner consented, then so did the drivers in all those cases Respondent dismisses. The question is the same. And those courts that have decided that a statute *can't* supply constitutional consent are necessarily wrong.

The difference between a conscious person and an unconscious one *might* matter, though, if we're not really talking about consent. And Respondent is mostly not talking about consent. Though it recites the argument of the plurality in this case, its main focus is on the position taken by the two concurring justices, which is not founded in consent at all. But, as Petitioner will argue below, this novel theory (despite the hopes Respondent places on it) is plainly wrong, and will not "solve" the problem of implied-consent statutes.

II. Respondent's defense of the decision below is meritless

1. Respondent only halfheartedly defends the theory advanced by the plurality below—that an implied-consent statute legislates into existence "voluntary consent" in a Fourth Amendment sense. It leaps from the maxim that "ignorance of the law is not a defense" to the conclusion that if a legislature declares certain conduct to manifest "consent," the Fourth Amendment is satisfied regardless of any other circumstances. Opp. 17-18. Petitioner, along with many courts, has already explained the flaws in this reasoning. He will add here only that it would permit state legislatures to do away with the warrant requirement in any number of contexts—simply by declaring that, for example, a homeowner consents to a search of the home by accepting the provision of public utilities, or that a pedestrian consents to a search of the person by use of the public sidewalk.

2. Respondent next claims that the concurrence in this case offers a solution to the

problem—that the "powerful rationale" that it (and it alone) advances will "become more prominent" and thereby "swallow as irrelevant" the implied-consent question that has so divided the lower courts. Opp. 16.

And what is this powerful rationale? The nub of the argument draws on *Schmerber*, *McNeely*, and *Birchfield*, and seems to be a sort of mashup of the doctrines of exigent circumstances and search incident to arrest. *Mitchell*, 914 N.W.2d at 170 (Kelly, J., concurring). But Respondent makes no claim of exigency here, choosing instead to place the theory under the heading of search incident to arrest. Opp. 16-20.

There's a problem, though: *Birchfield* has already excluded blood draws from searches incident to arrest, saying that faced with an unconscious driver "the police may apply for a warrant if need be." 136 S. Ct. at 2184-85. The concurrence's approach to this difficulty, as Petitioner has noted, was to declare that the *Birchfield* opinion is "self-contradictory" and thus can't have meant what it said. Pet. 7; *Mitchell*, 914 N.W.2d at 171 n.2.

Respondent takes a different approach to the *Birchfield* problem: hedging its bets. In fact, in other litigation, it has freely admitted that *Birchfield* disallows blood draws from unconscious motorists as searches incident to arrest, saying the concurrence "could not have tethered [its] analysis solely to the search incident to arrest doctrine without running afoul of *Birchfield*." Replacement Supplemental Brief for Respondent at 5, *State v. Hawley*, No. 2015AP1113, 2018 WL 4408869 (Wis. Ct. Apps. Nov. 21, 2018).

In that case, Respondent explicitly took the position that it hints at here: that blood draws from unconscious motorists fall not within the search-incident exception, but within what it calls the "general-reasonableness" exception. *Id.* at 2-5; Opp. 2, 18-19. This may be an accurate characterization of the concurrence's theory, because it does try to skirt *Birchfield*'s holding on searches incident to arrest by importing notions of exigency from *McNeely* (and even *Schmerber*). The problem with the mix-and-match "general-reasonableness" theory is that there's no such thing, as the court of appeals noted in *Hawley*:

> the State does not support the implicit assertion that there is such a thing as "a general reasonableness exception to the warrant requirement." It appears to us that cases that have surveyed exceptions to the warrant requirement, such as *McNeely*, teach that there is a limited list of recognized exceptions, with no mention of an amorphous general reasonableness exception. *See McNeely*, 569 U.S. at 148-50.

Hawley, No. 2015AP1113, slip op. at 8 (Wis. Ct. Apps. Nov. 21, 2018).

The court of appeals is right: "Our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception." *Missouri v. McNeely*, 569 U.S. at 148. So the theory of the concurrence fails. Blood draws like the one here can't be valid searches incident to arrest after *Birchfield*; still less can they survive as a species of the fictional "general-reasonableness" exception. The concurrence's theory is a nonstarter, and it will not save the day.

III. The question presented is important, and this case presents an ideal vehicle for deciding it

Respondent doesn't raise any argument that this case isn't a good vehicle to decide the question presented. In fact it volunteers that there was, factually, no exigency that could otherwise have justified the search, noting that the officer here could have applied for a warrant but didn't because it wasn't department policy. Opp. 7.

Nor does Respondent argue that the question presented is not important—it says, actually, that arrests of unconscious drunk-driving suspects are "rather common" and notes, with Petitioner, that many states have statutes specifically authorizing blood draws in this circumstance. Opp. at 20. It even allows that the question presented is a "difficult" one, in arguing that it ought to be allowed to further "percolate." Opp. 1, 15, 16.

But in truth, whether a state legislature can enact a blanket declaration of Fourth Amendment "consent" to a blood draw is a straightforward question. And, because *McNeely* and *Birchfield* have limited the exigency and search-incident rationales, it's an increasingly urgent one. As this case presents the question cleanly, it is worthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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