No. 18-6210

IN THE

Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ of Certiorari to the Supreme Court of Wisconsin

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QUESTION PRESENTED

Whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.

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OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin (J.A. 8–60) is reported at 914 N.W.2d 151. The certification of the case to that court by the state court of appeals (J.A. 61–76) is unreported. The opinion of the circuit court (J.A. 97–140) is unreported.

STATEMENT OF JURISDICTION

The Supreme Court of Wisconsin issued its decision on July 3, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "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."

Wisconsin Stat. § 343.305(2) provides: "(2) **Implied consent.** Any person who is on duty time with respect to a commercial motor vehicle or drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in § 346.61, is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath, of alcohol, controlled substances, controlled substance analogs or other drugs, or any combination of alcohol,

controlled substances, controlled substance analogs and other drugs, when requested to do so by a law enforcement officer under sub. (3)(a) or (am) or when required to do so under sub. (3)(ar) or (b). Any such tests shall be administered upon the request of a law enforcement officer. The law enforcement agency by which the officer is employed shall be prepared to administer, either at its agency or any other agency or facility, 2 of the 3 tests under sub. (3)(a), (am), or (ar), and may designate which of the tests shall be administered first."

Wisconsin Stat. § 343.305(3)(b) provides: "A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that the person has violated § 346.63 (1), (2m) or (5) or a local ordinance in conformity therewith, or § 346.63 (2) or (6) or 940.25, or § 940.09 where the offense involved the use of a vehicle, or detects any presence of alcohol, controlled substance, controlled substance analog or other drug, or a combination thereof, on a person driving or operating or on duty time with respect to a commercial motor vehicle or has reason to believe the person has violated § 346.63 (7), one or more samples specified in par. (a) or (am) may be administered to the person."

STATEMENT OF THE CASE

Without seeking a warrant, police caused petitioner Gerald Mitchell's blood to be drawn while he was unconscious following his arrest on suspicion of drunk driving. The State conceded that no exigent circumstances prevented it from obtaining a warrant. Rather, it maintained that no warrant was required

pursuant to Wisconsin's implied-consent law, Wis. Stat. § 343.305, which authorizes the police to draw blood from an unconscious person if they have probable cause to suspect drunk driving. That provision, it contended, establishes that any person who chooses to drive on Wisconsin's roads consents to submit to a blood draw while unconscious.

In recent years, this Court has twice rejected efforts to create new, categorical exceptions to the warrant requirement in the context of drunk-driving arrests. In *Missouri* v. *McNeely*, 569 U.S. 141 (2013), the Court held that the natural dissipation of alcohol from the blood stream does not constitute per se exigent circumstances that justify the warrantless drawing of blood from an individual suspected of drunk driving. *Id.* at 156. And in *Birchfield* v. *North Dakota*, 136 S. Ct. 2160 (2016), the Court held that a blood draw is not a reasonable search incident to arrest. *Id.* at 2184. The State now seeks yet again to create a categorical exception to the warrant requirement, this time for blood draws from unconscious drunk-driving suspects. And it seeks to do so in an unprecedented manner — by writing consent into law where no actual consent exists in fact. The Fourth Amendment does not permit this end run around the warrant requirement.

A. Factual Background

In May of 2013 in Sheboygan, Wisconsin, petitioner Gerald Mitchell's neighbor called the police and reported that petitioner's sister had called him and said that petitioner was planning to take his own life. The neighbor found petitioner in the stairwell of his apartment building. He seemed intoxicated and agitated, and the neighbor watched him get into a van

and drive off. J.A. 146–156. At his trial, petitioner would testify that, on that day, he was depressed and had decided to kill himself. To that end, he had mixed a half-liter of vodka with Mountain Dew, and brought that and about 40 pills to the shore of Lake Michigan. There, he took the pills and drank. J.A. 263–267.

Police quickly located petitioner walking near the lake; his van was found parked nearby. He was belligerent and was having trouble staying upright. J.A. 104–105. The officers gave him a roadside breath test (using a device of limited accuracy whose results are inadmissible by state statute), which showed a blood-alcohol concentration ("BAC") of .24. J.A. 107–109. Then they loaded him into a squad car and took him to the police department. There, he was placed in a holding cell, where at some point he "began to close his eyes and sort of fall asleep or perhaps pass out," though he "would wake up with stimulation." Because petitioner was "so intoxicated * * * or having some type of a medical concern" and police "didn't feel that a breath test would be appropriate," they decided to take him to the hospital for a blood draw. J.A. 110. By the time they arrived at the hospital, approximately an hour after his arrest, he was unresponsive and could not be roused. J.A. 110–113.

An officer read Wisconsin's statutorily mandated "Informing the Accused" form aloud in petitioner's presence, though petitioner remained unconscious. J.A. 111. The officer then directed hospital personnel to take petitioner's blood for testing. J.A. 115–117. The blood was drawn about an hour and a half after petitioner's arrest. J.A. 118–119, 125. Testing showed a BAC of .222. J.A. 220.

B. Procedural Background

Petitioner was charged with operating while intoxicated and with a prohibited blood alcohol concentration. J.A. 11. He moved to suppress the blood test results on the ground that his blood was taken without a warrant or exigent circumstances. J.A. 12. The State agreed there was no exigency, but argued that, under Wisconsin's implied-consent statute, petitioner had consented to the test simply by driving on state roads, and had not withdrawn his consent. J.A. 133–134. The trial court upheld the search, relying on the implied-consent statute. J.A. 137–140. The State introduced the test results at petitioner's jury trial, and he was convicted of both counts. J.A. 12.

Petitioner appealed the suppression decision, and the court of appeals certified the case to the Supreme Court of Wisconsin on a single issue: "whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin's implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment." J.A. 61. The court of appeals explained that while this Court has "referred approvingly of the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply, * * * it has yet to decide whether the 'implied consent' that flows from a statutory scheme constitutes actual Fourth Amendment consent." J.A. 67. It observed that some state courts have "concluded that statutory implied consent satisfies the Fourth Amendment" while others "have reasoned that such implied consent is a legal fiction that does not take into account the totality of the circumstances as required

by" this Court, and so cannot sustain a warrantless search. J.A. 67 (citation omitted).

The Supreme Court of Wisconsin accepted certification. The court ultimately upheld the search by a 5-2 vote, but there was no majority for any rationale. A three-justice plurality concluded that the search was constitutional on the basis of the implied-consent statute. First, the plurality invoked Wis. Stat. §§ 343.305(2) & (3)(a), which provide that anyone who drives on the public highways is "deemed to have given consent" to a blood test upon arrest on suspicion of, among other things, drunk driving. It posited that, "in the context of significant, well-publicized laws designed to curb drunken driving," a driver's consent to Wisconsin's warrantless blood draw regime is "complete at the moment the driver begins to operate a vehicle upon Wisconsin roadways." J.A. 19–20.

Second, because petitioner was unconscious at the time of the blood draw, the plurality relied on Wis. Stat. § 343.305(3)(b), which provides that "[a] person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent" to a warrantless blood draw. Although the plurality recognized that, "[o]f course, consent voluntarily-given before a blood draw may be withdrawn," J.A. 25, it concluded that, by drinking sufficient alcohol to render himself unconscious, petitioner "forfeited all opportunity to withdraw the consent to search that he had given." J.A. 32.

Two justices, in a concurring opinion, also concluded that the search was constitutional, but not on the basis of consent. The concurring justices found that "legislative consent cannot satisfy the mandates of our State

and Federal Constitutions." J.A. 38. Nonetheless, they voted to uphold the constitutionality of the blood draw as a reasonable search incident to arrest — a rationale not advanced in the State's brief. They reasoned that, unlike *Birchfield*, where the arrestees were conscious and could have submitted to a breath test, no less-intrusive option was available to the officers who arrested petitioner, and the warrantless search was therefore reasonable. J.A. 43–45.

Two justices dissented. Noting that a blood draw is a "particularly intrusive search" that "invades the interior of the human body and implicates interests in human dignity and privacy," the dissenting justices found that "[c]onsent provided solely by way of an implied consent statute is constitutionally untenable." J.A. 50–51.

This Court granted petitioner's petition for certiorari on January 11, 2019.

SUMMARY OF THE ARGUMENT

A blood draw is a "compelled physical intrusion" that "implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Missouri* v. *McNeely*, 569 U.S. 141, 148 (2013) (citation omitted). This Court's precedents firmly establish that the State must obtain a warrant before it may undertake this physical intrusion, unless a recognized exception to the warrant requirement applies. The State here sought to rely on the voluntary-consent exception. But rather than relying on actual consent in fact, which, under this Court's precedents, must be inferred from the "totality of all the surrounding circumstances," *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973),

it relied on consent "deemed" by law. The State, and a plurality of the Wisconsin Supreme Court, asserted that pursuant to Wisconsin's implied-consent statute, petitioner's decision to drive on state roads constituted consent to a blood test while unconscious.

This legislatively deemed consent is irreconcilable with the requirements of the Fourth Amendment. The necessary implication of the Wisconsin Supreme Court's decision is that a State could simply provide by law that commonplace conduct that millions of people engage in every day — walking down public streets at certain times of day, for instance, or using a cell phone — constitutes consent to a search or seizure. This Court should not countenance that end run around the Fourth Amendment's bedrock warrant requirement. Nor can the blood draw that occurred here be justified as a condition on receipt of a government benefit or, as two justices of the Wisconsin Supreme Court held, as a search incident to arrest.

I. This Court's precedents establish that consent to a search under the Fourth Amendment must be "freely and voluntarily given." *Bumper* v. *North Carolina*, 391 U.S. 543, 548–550 (1968). Whether an individual gave valid consent is "to be determined from the totality of all the circumstances," and the State bears the "burden of proving that the consent was, in fact, freely and voluntarily given." *Schneckloth*, 412 U.S. at 222, 227 (internal quotation marks and citation omitted). Moreover, an essential feature of voluntary consent is that it may be limited or withdrawn at will. See *Florida* v. *Jimeno*, 500 U.S. 248, 252 (1991).

All 50 states maintain what are known as "implied-consent" laws. Those laws generally provide that a

driver consents to BAC testing if arrested for drunk driving, and they impose administrative or evidentiary penalties for refusal to consent to testing at the scene. In that way, these statutes regulate the incentives operating on a driver who is stopped on suspicion of drunk driving and asked to consent to BAC testing. In *Birchfield* v. *North Dakota*, 136 S. Ct. 2160 (2016), this Court held that an implied-consent statute that imposed criminal penalties on the refusal to consent at the scene (rather than merely civil consequences) was unduly severe — in other words, coercive — and therefore unreasonable under the Fourth Amendment. Thus, a driver's consent to a blood test upon his arrest must be voluntary under the totality of the circumstances. This conclusion is consistent with that of the majority of states to consider the matter; they have overwhelmingly held that implied-consent statutes cannot themselves supply constitutionally sufficient consent, but instead simply incentivize cooperation with law enforcement and thus provide encouragement to consent at the scene.

Here, though, the State argued that Wisconsin's implied-consent statute relieves it of the burden to demonstrate, by the totality of the circumstances, that petitioner gave actual, voluntary consent to the blood draw. A plurality of the Wisconsin Supreme Court agreed, holding that the implied-consent statute "deem[s]" every motorist on Wisconsin's highways to have consented to a blood draw upon arrest on suspicion of drunk driving. Because petitioner was unconscious, the State further relied on the provision of the implied-consent statute that provides that unconscious individuals are "presumed" not to have withdrawn their consent to warrantless blood testing. The plurality accepted the State's theory, holding that,

simply by his act of driving, petitioner could be deemed to have consented to have his blood drawn while he was unconscious.

This contention cannot be squared with this Court's approach to voluntariness in the Fourth Amendment context. The Court has repeatedly held that the existence of voluntary consent is a question of fact that the State bears the burden to prove in light of "all the surrounding circumstances." *Schneckloth*, 412 U.S. at 226; *Florida* v. *Bostick*, 501 U.S. 429, 438 (1991). The State made no effort to meet this burden, and it would have been unable to do so. By definition, petitioner was unable to give voluntary consent because he was unconscious and unable to exercise volition. But that incontrovertible fact was rendered irrelevant by the State's implied-consent statutes — as were various other circumstances that would have been relevant to the consent inquiry. The State thus purported to relieve itself of the burden of making the showing required by this Court's precedents regarding voluntary consent to search. This Court should not permit the State to bypass the Fourth Amendment's warrant requirement by legislatively deeming consent to be present in every case.

II. Nor may the State impose warrantless blood draws while unconscious as a condition of the privilege of driving. Such a condition would be unreasonable in light of the balance of interests involved. A blood test is a significant bodily intrusion that "infringes an expectation of privacy that society is prepared to recognize as reasonable." *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989). The severity of this intrusion is not diminished, and may even be exacerbated, when performed on an unconscious person.

On the other side of the ledger, requiring a warrant to draw blood from unconscious drivers poses little risk of impeding the State's ability to obtain BAC evidence. Advances in warrant procedures and technologies have significantly reduced the time and burden of securing a warrant. At the same time, obtaining a blood sample necessarily entails some delay, as the suspect usually must be transported to an appropriate facility. Thus, the State will often be able to secure a warrant within the time it takes to initiate the blood draw. And, if the circumstances are such that obtaining a warrant is not feasible, the State will be able to invoke the exigent circumstances exception. Thus, the balance of interests tilts strongly in favor of the individual's privacy interest in being free from warrantless blood draws.

III. Finally, the State argued for the first time in its opposition to certiorari that the blood draw could be justified as a reasonable search incident to arrest, for which no warrant was required. This Court rejected that argument in *Birchfield*. It recognized that a blood test may be called for where the suspect is unconscious and therefore unable to submit to a breath test, but it concluded that there was "no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be." 136 S. Ct. at 2184–2185. In any event, the same balancing test that demonstrates that warrantless blood draws while unconscious are an unreasonable condition of the privilege of driving also demonstrates that they are not a reasonable search incident to arrest.

ARGUMENT

I. The Fourth Amendment does not permit the State to deem a motorist to have consented to an unconscious blood draw simply by virtue of his decision to drive.

In recent years, this Court has made clear that the bedrock Fourth Amendment principles governing searches and seizures apply with full force to investigations of individuals suspected of drunk driving — in particular, to physical intrusions into their bodies. The Court has thus twice declined to adopt a categorical rule placing blood draws from suspected drunk drivers outside the warrant requirement — first in the form of a per se rule that suspicion of drunk driving creates exigent circumstances justifying a warrantless blood draw, and then in the form of a per se rule that blood tests may be performed as searches incident to arrest. See *Missouri* v. *McNeely*, 569 U.S. 141 (2013); *Birchfield* v. *North Dakota*, 136 S. Ct. 2160 (2016). This case concerns yet another proposed per se exception to the warrant requirement: the asserted consent of unconscious drivers to a blood draw, imputed by virtue of state law rather than — as this Court's voluntariness precedents clearly require — inferred from the totality of the circumstances. The Court should reject that bespoke categorical exception to the warrant requirement, just as it rejected the per se exceptions at issue in *McNeely* and *Birchfield*.

A. Fourth Amendment principles apply with full force to blood draws from drunk-driving suspects.

Taken together, *McNeely* and *Birchfield* establish that a warrant is generally required before law enforcement may draw the blood of an individual suspected of drunk driving. In both cases, the Court employed general Fourth Amendment principles, expressly rejecting arguments that the drunk-driving context merited unique, categorical rules.

1. In *McNeely*, the Court held that the natural dissipation of BAC evidence in the blood does not create a per se exigency that categorically justifies drawing blood without first seeking a warrant. The Court emphasized that under ordinary Fourth Amendment principles, a warrant is required before law enforcement officers may conduct a search of an individual's body: "[o]ur cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception" to the warrant requirement. 569 U.S. at 148. "That principle," the Court explained, "applies to the type of search at issue in this case, which involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Ibid*. (citation omitted).

Seven Members of the Court concluded that a blood draw is a "significant bodily intrusion" that implicates substantial "constitutionally protected privacy interests." *McNeely*, 569 U.S. at 159 (plurality op.); *id*. at

174 (Roberts, C.J., joined by Alito and Breyer, JJ., concurring). As the plurality explained, while driving on a public highway is a state-granted "privilege" subject to considerable regulation, that fact "does not diminish a motorist's privacy interest in preventing an agent of the government from piercing his skin." *Id*. at 159 (plurality op.); accord *id*. at 174.

The Court accordingly declined to create a categorical exigent-circumstances exception to the warrant requirement for blood tests of suspected drunk drivers. The Court explained that under its Fourth Amendment precedents, whether exigent circumstances are present ordinarily depends on the "totality of the circumstances." 569 U.S. at 150. The Court saw no reason that those principles should not apply in the drunk-driving context. *Id*. at 156; accord *id*. at 166–167 (Roberts, C.J., concurring) (agreeing that ordinary exigent-circumstances principles should apply, but extrapolating a general rule from those principles).

2. In *Birchfield*, the Court considered the exception to the warrant requirement for searches incident to arrest, once again applying ordinary Fourth Amendment principles. 136 S. Ct. at 2174. The State contended that both breath and blood tests of drivers arrested for drunk driving should be considered searches incident to arrest. Applying the general balancing test applicable to such searches, the Court held warrantless breath tests reasonable because the intrusion of a breath test was minimal and outweighed by the law enforcement interests at stake. *Id*. at 2176, 2184. It reached the opposite conclusion with respect to blood tests. The Court reaffirmed its statement in *McNeely* that blood tests are a "significant" intrusion that "extract a part of the subject's body," and "place[] in the

hands of law enforcement authorities a sample that can be preserved" and used to glean additional information. *Id*. at 2178. In light of the severity of the intrusion and the usual availability of breath tests, the Court held that officers may not perform warrantless blood tests as searches incident to arrest. *Id*. at 2185.

In sum, the Court has now twice reached the same conclusion — that if police "can reasonably obtain a warrant" for a blood draw "without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *McNeely*, 569 U.S. at 152.

B. When law enforcement relies on consent to justify a blood test of a suspected drunk driver, ordinary Fourth Amendment consent principles apply.

As with searches in other contexts, many (if not most) drunk-driving blood draws are achieved not through the compulsion of a warrant, but by the consent of the motorist. But here, too, the Court applies the usual rules. This is plain from *Birchfield*, which, though it primarily addressed the "search incident to arrest" rationale, also addressed claims that blood tests "are justified based on the driver's legally implied consent to submit to them." 136 S. Ct. at 2185.

1. Consent to search is a well-established exception to the warrant requirement. See *Katz* v. *United States*, 389 U.S. 347, 358 n.22 (1967); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219 (1973); 2 Wayne R. LaFave, et al., *Criminal Procedure* § 3.10(a) (4th ed. 2004) ("Consent searches are frequently relied upon by police as a means of investigating suspected criminal

conduct."). Equally well established is that, to be valid for Fourth Amendment purposes, consent must be "freely and voluntarily given." *Bumper* v. *North Carolina*, 391 U.S. 543, 548–550 (1968); *Florida* v. *Bostick*, 501 U.S. 429, 438 (1991) (consent to search is valid "only if the cooperation is voluntary," and the court must determine whether defendant "chose to permit the search"). Consent that is the "product of duress or coercion," *Schneckloth*, 412 U.S. at 227, or that results from mere "acquiescence to a claim of lawful authority," *Bumper*, 391 U.S. at 549, is invalid and the ensuing search unreasonable. Whether the individual in fact gave valid consent to a search is "to be determined from the totality of all the circumstances," and the State bears the "burden of proving that the consent was, in fact, freely and voluntarily given." *Schneckloth*, 412 U.S. at 222, 227 (internal quotation marks and citation omitted).

Critically, an individual's consent must persist, and remain voluntary, throughout the course of the search. "A suspect may of course delimit as he chooses the scope of the search to which he consents." *Florida* v. *Jimeno*, 500 U.S. 248, 252 (1991); *Florida* v. *Jardines*, 569 U.S. 1, 9 (2013) ("[T]he scope of a license — express or implied — is limited not only to a particular area but also to a specific purpose"). A suspect therefore may withdraw previously given consent before or during a search, and the officers must respect that withdrawal. See, *e.g.*, *United States* v. *Williams*, 898 F.3d 323, 330 (3d Cir. 2018), *cert. filed*, No. 18-7726 (Feb. 1, 2019); *United States* v. *$304,980.00 in U.S. Currency*, 732 F.3d 812, 819 (7th Cir. 2013) ("Clearly a person may limit or withdraw his consent to a search, and the police must honor such limitations.") (citation omitted); 4 Wayne R. LaFave, 4 *Search & Seizure* § 8.2(f)

(5th ed. 2012) ("A consent to search is not irrevocable and thus if a person effectively revokes his prior consent prior to the time the search is completed, then the police may not thereafter search in reliance upon the earlier consent."). Whether an individual has withdrawn consent turns on whether a reasonable officer would understand him to have done so. *Jimeno*, 500 U.S. at 252. In all events, the State bears the burden of demonstrating that the search and its scope are supported by actual, voluntary consent. See *Schneckloth*, 412 U.S. at 227.

2. In *Birchfield*, the Court considered the constitutionality of an "implied consent" statute that imposed criminal penalties on the refusal to submit to a blood test when arrested on drunk driving charges. 136 S. Ct. at 2184–2185. As the Court observed, all 50 States have implied-consent statutes that provide that "cooperation with BAC testing [is] a condition of the privilege of driving on state roads and that the privilege [will] be rescinded if a suspected drunk driver refuse[s] to honor that condition." *Id*. at 2169. Although these statutes are generally known as "implied-consent" statutes because they state that consent to BAC testing is a condition of driving, they contemplate that a suspected drunk driver will have the opportunity, upon his arrest, to either acquiesce to a blood test, or else refuse and face the consequences. *Ibid*. The statutes seek to discourage refusal (especially physical resistance) by imposing these consequences, thus altering the incentives at the scene of a drunk-driving arrest by making the driver think twice about refusing the test. That is, they seek to create conditions that encourage consent, while allowing enough leeway for refusal to ensure that consent, if given, will ordinarily be voluntary within

the meaning of *Schneckloth* and this Court's other precedents. See, *e.g.*, *Commonwealth* v. *Myers*, 164 A.3d 1162, 1170–1171, 1176 (Pa. 2017) ("Our implied consent statute is not an ipso facto authorization to conduct a chemical test. Rather, it is the statutory mechanism by which a police officer may seek to obtain voluntary consent.").

The *Birchfield* Court struck down North Dakota's implied-consent statute on the ground that imposing criminal consequences for refusing to submit to a blood test is unreasonable under the Fourth Amendment. The Court emphasized that it was not casting doubt on traditional implied-consent statutes that impose civil penalties and evidentiary consequences on the refusal to submit to testing. *Birchfield*, 136 S. Ct. at 2185. But the Court concluded that it "is another matter * * * for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test." *Ibid*.

The only distinction between traditional implied-consent laws — of which the Court spoke "approvingly" — and the North Dakota statute was the severity of the consequences that the North Dakota statute imposed for refusing a blood test. *Id*. at 2185–2186. In holding that the severity of the consequences rendered the North Dakota statute unreasonable under the Fourth Amendment, the Court established that a driver must have a meaningful, uncoerced opportunity to refuse a blood test. In other words, because the role of the implied-consent statute is to encourage the driver at the scene to consent to the blood test, the consequences of refusing must not be so severe that they would risk coercing the driver to submit to the test. Indeed, the Court cited *Schneckloth* in discussing the

type of consent that may render a blood test reasonable. *Birchfield*'s treatment of criminal consequences thus affirms that a driver's consent to blood testing at the scene pursuant to an implied-consent regime must be voluntary for the search to be valid on a consent theory.

The Court followed that principle in applying its ruling to the petitioners in the case. One petitioner, Beylund, had submitted to a blood test after he was told that the North Dakota statute "required his submission" and would impose criminal consequences for refusal. *Birchfield*, 136 U.S. at 2186. The North Dakota Supreme Court had held that Beylund had voluntarily consented to the blood test, and that the criminal penalties for refusal were not unduly coercive. *Beylund* v. *Levi*, 859 N.W.2d 403, 409 (N.D. 2015); *Birchfield*, 136 S. Ct. at 2172. Beylund contended before this Court, however, that his consent could not be considered voluntary because of the coercive nature of the criminal penalties with which he was threatened. Beylund Br. 9–13, *Birchfield, supra* (No. 14-1507). This Court agreed, holding that "[b]ecause voluntariness of consent to a search must be 'determined from the totality of all the circumstances,'" the lower courts would have to reevaluate the voluntariness of Beylund's consent in light of the fact that he was erroneously told that the state could impose criminal penalties if he refused consent. *Birchfield*, 136 S. Ct. at 2186 (citing *Schneckloth*, 412 U.S. at 227).

In sum, *Birchfield* establishes that, to be justified on the basis of consent, a blood test must be the product of actual, *voluntary* consent. While a driver's decision to drive in a state against the backdrop of an implied-consent law may be part of the facts relevant to

consent, the driver's consent at the scene must be voluntary in light of the incentives informing that choice and the totality of the circumstances. That conclusion is consistent with the well-established rule that consent must be voluntary under the totality of the circumstances, *Schneckloth*, 412 U.S. at 227, as well as the related principle that an individual's withdrawal of any previously given consent must be respected, *Jimeno*, 500 U.S. at 252.

The vast majority of state appellate courts to consider the interaction of an implied-consent statute with this Court's voluntariness precedents have reached the same conclusion. *Williams* v. *State*, 771 S.E.2d 373, 377 (Ga. 2015) (collecting cases). They have held that implied-consent statutes do not obviate the need to examine whether a driver's consent to BAC testing at the scene was voluntary under *Schneckloth*. See, *e.g.*, *Myers*, 164 A.3d at 1178 (analyzing *Birchfield* and concluding "that the requirement of voluntariness remains in full force despite the existence of a statutory implied consent provision").[1] Put another

[1] See also, *e.g.*, *State* v. *Banks*, --- P.3d ---, 2019 WL 474794, at *3–4 (Or. 2019) (relying on Oregon constitution, which, like the Fourth Amendment, has a consent exception to the warrant requirement); *State* v. *Pettijohn*, 899 N.W.2d 1, 28 (Iowa 2017) ("From these general observations about the nature of effective consent sufficient to justify a warrantless search, it follows that statutorily implied consent cannot function as an automatic exception to the warrant requirement."); *State* v. *Ryce*, 368 P.3d 342, 363–369 (Kan. 2016), *adhered to on reh'g*, 396 P.3d 711 (2017); *People* v. *Arredondo*, 199 Cal. Rptr. 3d 563, 573 (2016), *review granted*, 371 P.3d 240 (Cal. 2016); *Flonnory* v. *State*, 109 A.3d 1060, 1065 (Del. 2015); *State* v. *Modlin*, 867 N.W.2d 609, 619 (Neb. 2015) (distinguishing between "implied" and voluntary consent, but finding the implied-consent statute relevant to the totality-of-the-circumstances inquiry); *State* v. *Yong Shik Won*, 372

way, the Fourth Amendment does not permit an implied-consent statute to supply, as a matter of law, constitutionally sufficient consent to BAC testing. See *State* v. *Fierro*, 853 N.W.2d 235, 243 (S.D. 2014) ("[T]he Legislature cannot enact a statute that would preempt a citizen's constitutional right, such as a citizen's Fourth Amendment right.").

C. The blood test performed on petitioner while he was unconscious cannot be justified on the basis of implied consent.

In this case, the State invoked Wisconsin's implied-consent statute to supply petitioner's consent *as a matter of law* to a blood test performed when he was unconscious. That use of the implied-consent statute is fundamentally inconsistent with the voluntary-consent analysis required by the Fourth Amendment.

Petitioner had no opportunity to consent or refuse the blood test that the officer sought following his arrest, because he was unconscious at the time. Unable to establish that petitioner voluntarily consented, the State defended the warrantless blood test on the sole ground that petitioner's consent could be imputed based on Wisconsin's implied-consent framework. A three-justice plurality of the Wisconsin Supreme Court accepted that rationale. Specifically, the plurality first asserted that under subsection 343.305(2), a motorist on a public highway "is deemed to have given consent

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P.3d 1065, 1089–1090 (Haw. 2015), as corrected (Dec. 9, 2015); *State* v. *Halseth*, 339 P.3d 368, 371 (Idaho 2014); *State* v. *Villarreal*, 475 S.W.3d 784, 800 (Tex. Crim. App. 2014); *Byars* v. *State*, 336 P.3d 939, 945 (Nev. 2014); *State* v. *Fierro*, 853 N.W.2d 235, 243 (S.D. 2014); *State* v. *Butler*, 302 P.3d 609, 613 (Ariz. 2013); *State* v. *Brooks*, 838 N.W.2d 563, 568–569 (Minn. 2013).

to" a blood test if, among other things, a law enforcement officer has probable cause to suspect drunk driving. J.A. 26. Because petitioner became unconscious after his arrest, the court then invoked subsection 343.305(3)(b), which provides that a "person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn" the consent implied through the act of driving. J.A. 32–33. These provisions, the plurality held, supply constitutionally sufficient consent, thereby categorically justifying warrantless blood tests in all cases in which a driver is unconscious, regardless of the actual circumstances present at the time. J.A. 37.

That rationale bears no resemblance to the limited use of the implied-consent statutory framework that the Court approved in *McNeely* and *Birchfield*. Rather than simply invoking the implied-consent framework to regulate the incentives around a motorist's decision to accept or decline an officer's request for a warrantless blood draw, the plurality instead relied on that framework to legislate consent into being by deeming an unconscious individual — who by definition cannot make any choice — to have provided constitutionally sufficient voluntary consent. If the North Dakota statute in *Birchfield* was invalid under the Fourth Amendment because it operated coercively on motorists deciding whether to consent to a blood test, there can be no question that Wisconsin's unconsciousness statute cannot render a blood test reasonable. The statute does not simply coerce consent; rather, it purports to make actual voluntary consent irrelevant by deeming it present in all cases.

1. Petitioner did not voluntarily consent to the blood test.

There can be no question that petitioner did not give his actual, voluntary consent to the blood draw taken at the direction of the police approximately an hour and a half after his arrest. Unlike the run-of-the-mill drunk-driving arrests considered in *Birchfield*, in which the individuals were conscious and therefore able to choose whether to submit to the blood draw, by the time of the request, petitioner had no ability to consent, voluntarily or otherwise. An unconscious individual "lacks capacity for conscious choice." *Schneckloth*, 412 U.S. at 224. This Court has described that condition as fundamentally incompatible with voluntary consent. *Ibid*. ("*Except where a person is unconscious or drugged or otherwise lacks capacity for conscious choice*, all incriminating statements — even those made under brutal treatment — are 'voluntary' in the sense of representing a choice of alternatives." (emphasis added) (citation omitted)). Indeed, this Court has long recognized in a variety of circumstances that someone who is unconscious "is not able to make an informed and voluntary choice to exercise * * * any * * * right." *Cruzan* v. *Director, Missouri Dep't of Health*, 497 U.S. 261, 280 (1990) (describing a person in a vegetative state).

The State therefore cannot satisfy its burden under *Birchfield* and *Schneckloth* of demonstrating that petitioner voluntarily consented to the blood draw. Indeed, the State rightly conceded below that it did not obtain petitioner's actual consent to the blood draw following his arrest. State Br. at 12 ("Officer Jaeger read the 'Informing the Accused form verbatim' to Mitchell,

but Mitchell was 'so incapacitated [that] he could not answer.'").

2. The Wisconsin Supreme Court improperly deemed petitioner to have consented by operation of the implied-consent statute.

Because the State cannot demonstrate that petitioner voluntarily consented to the blood draw, a plurality of the Wisconsin Supreme Court upheld the blood test on the sole ground that he may be *deemed* to have consented to a blood draw (including an unconscious blood draw) by virtue of his decision to drive in the state. Rather than treating voluntary consent as a question of fact on which the State bears the burden, *Schneckloth*, 412 U.S. at 222, the court simply deemed consent to be present by operation of law. But the State may not create a categorical exception to the warrant requirement by legislatively providing that consent is present in all cases, regardless of the actual facts.

(a) The State would be unable to demonstrate that drivers actually voluntarily consent to an unconscious blood draw.

As an initial matter, the legal presumptions on which the plurality of the Wisconsin Supreme Court relied — that an individual consents to a blood test by driving in the State, and then declines to withdraw that consent when unconscious — have no basis in fact. To the contrary, the State would be exceedingly unlikely to be able to shoulder its burden on either

question, absent the conclusive presumptions supplied by statute.

i. To demonstrate that individuals *actually* voluntarily consent to a blood draw by choosing to drive in the State, the State would have to demonstrate that "all the surrounding circumstances" justified that conclusion. *Schneckloth*, 412 U.S. at 226. While the existence of the implied-consent statute and the driver's decision to drive would be relevant to the analysis, the relevant circumstances would also include number of other factors: at a minimum, whether the driver had actual notice of the unconscious blood draw provision and whether, in light of his age, level of education, and intelligence, he understood its significance and, through his conduct, manifested actual consent.

In particular, consent extends only to those intrusions that a reasonable person in the situation would anticipate. *Jimeno*, 500 U.S. at 250–251. The State would therefore be hard-pressed to demonstrate consent unless it could show, at a minimum, that individuals know what they are purportedly consenting to when they drive in Wisconsin — in other words, that they are aware of the implied-consent statute and its unconscious blood-test provision, and that they understand that driving signifies consent. Although the plurality asserted, in conclusory fashion, that the state's laws concerning drunk driving are "well-publicized," J.A. 19, 28, the State did not make that argument in its brief, and the record is devoid of any such evidence. In fact, no mention of the unconscious blood-draw provision can be found in the Wisconsin Department of Motor Vehicles' "Motorist's Handbook," on its website's "frequently asked questions" page, or in its online driver's license

application.[2] It is highly unlikely, then, that the typical person would actually know about the statutes, much less expect that the mundane act of driving would authorize the State to draw her blood while unconscious.[3] This is particularly true given that a blood draw entails a significant intrusion on bodily integrity. See *McNeely*, 569 U.S. at 159 (noting drivers' "privacy interest in preventing an agent of the government from piercing [their] skin"). Moreover, for the overwhelming majority of drivers, any consent could not be considered truly voluntary, as driving is not an optional activity for large portions of the

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[2] The Wisconsin Department of Transportation's 88-page "Motorist's Handbook" contains a section entitled "Wisconsin's alcohol laws," but it does not mention Wisconsin's unconsciousness provision. Wisconsin Department of Transportation, *Motorist's Handbook*, https://wisconsindot.gov/Documents/dmv/shared/bds126-motorists-handbook.pdf. Instead, it reinforces the impression of traditional implied-consent laws: that drivers have an opportunity to refuse a chemical test but can lose their license or be arrested for that choice. *Id.* at 8, 74. Nor does Wisconsin's online driver's license application contain any mention of consent to blood testing, much less the unconsciousness provision at issue here. Wisconsin Department of Transportation, *Driver License Guide*, https://app.wi.gov/DLGuides/. And while the Department of Motor Vehicles' "frequently asked questions" page states that an individual's license will be revoked for one to three years if he "refuse[s]" an "[i]ntoxilyzer" test (i.e., a breath test), it contains no mention of consenting to such a test, much less consenting to a blood test, conscious or unconscious. Wisconsin Department of Transportation, *Enforcement – FAQs*, https://wisconsindot.gov/Pages/safety/enforcement/faqs/default.aspx.

[3] It is easy to think of categories of drivers who would be particularly unlikely to know what they are purportedly consenting to. Out-of-state drivers, drivers with limited English proficiency, and drivers with low levels of education, to name just a few, cannot be presumed to know the technicalities of Wisconsin law, let alone to understand their significance and make a free and voluntary decision to accept their consequences.

population — in particular, those who must drive to work, and those who live in rural areas.[4]

The plurality attempted to sidestep the State's inability to prove knowledge of the law by holding that "we presume that drivers know the laws applicable to the roadways on which they drive." J.A. 24. But this Court has squarely rejected the argument that the general public can be held to have consented to a search regime established by statute on the theory that people are presumed to know the law. In *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), the Court held that a warrantless search contemplated by the Occupational Safety and Health Act of 1970 could not be justified on the ground that the individual had consented to the search by operating a business in interstate commerce with presumed knowledge of the law. The Court explained that while certain narrowly defined industries have such a history of pervasive regulation that participants can be subject to warrantless searches, *see* pp. 34–35, *infra*, "[i]t is quite unconvincing to argue that [federal labor regulations] prepared the entirety of American interstate commerce for regulation of working conditions to the minutest detail." 436 U.S. at 314. It was therefore impossible to infer "any but the most fictional sense of voluntary consent to later searches [from] the single fact that one conducts a business affecting interstate commerce; under current practice and law, few businesses can be con-

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[4] See, *e.g.*, Bureau of Transportation Statistics, *Commuting to Work*, https://www.bts.gov/content/commuting-work (in 2013, 76.4% of American workers age 16 or older drove to work alone, and 9.4% carpooled; in Wisconsin, those figures were 80.5% and 8.2%, respectively).

ducted without having some effect on interstate commerce." *Ibid*. Thus, the Court declined to impute to anyone who conducts business in interstate commerce — i.e., any member of the public — knowledge of the law. And the Court further declined to presume that the commonplace act of engaging in a business in interstate commerce constituted voluntary consent to warrantless searches.[5]

It follows a fortiori from *Barlow's* that the State may not simply presume that the general public knows about the State's blood-draw statute. Only in "the most fictional sense" can citizens be said to know that state law authorizes law enforcement to draw their blood while they are unconscious if they are arrested for drunk driving. *Barlow's*, 436 U.S. at 314; see pp. 25–26 & note 2, *supra*. And driving is an even more commonplace, everyday activity than operating a business in interstate commerce — one that millions of people engage in every day.

ii. Subsection 343.305(3)(b) creates an equally counterfactual presumption that an unconscious person

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[5] By contrast, consent may be inferred from "the habits of the country," i.e., "background social norms" that everyone knows. *Florida* v. *Jardines*, 569 U.S. 1, 8 (2013). In *Jardines*, the Court observed that a homeowner with a knocker on his door implicitly grants a license to anyone to approach his home and knock. That inference arises because everyone knows that a door knocker is intended to be used by people who approach the house and wish to speak with its occupants. That is very different from presuming knowledge of a *statute* imposing warrantless searches and using that presumption as a basis for inferring consent to those very searches. As the Court emphasized in *Jardines*, it is possible to infer a license to approach a house precisely because that "customary invitation" "does not require fine-grained legal knowledge." 569 U.S. at 8.

has not withdrawn any previously given consent. Wisconsin's statutory scheme, like other implied-consent laws, contemplates that conscious individuals may refuse a blood test (subject to administrative consequences). Wis. Stat. § 343.305(9); *Birchfield*, 136 S. Ct. at 2185. But subsection 343.305(3)(b) provides that "[a] person who is unconscious *or otherwise not capable of withdrawing consent* is presumed not to have withdrawn consent under this subsection." (Emphasis added.) That presumption has no basis in reality: as the statutory text itself acknowledges, a person who is unconscious is *incapable* of withdrawing consent. The decision not to withdraw consent is just as much a volitional choice as the decision to consent in the first place. And given that a significant proportion of conscious drivers refuse to submit to blood testing, there is no basis on which to assume that an unconscious driver would not withdraw any consent previously given, if he could exercise volition. See NHTSA, Traffic Safety Facts Research Note, *Breath Test Refusal Rates in the United States – 2011 Update* 2 (Mar. 2014) (approximately one quarter of drunk-driving arrestees refuse a chemical test, with two states reporting over 70% refusal rates).

(b) The State may not dispense with the voluntary-consent analysis by deeming consent to be present.

As applied by the Wisconsin Supreme Court's plurality opinion, Wisconsin's statutory framework relieves the State of its burden of demonstrating voluntary consent to a blood draw by making a single fact — the defendant's decision to drive on Wisconsin roads —

dispositive of consent. That is fundamentally inconsistent with the voluntary-consent analysis required by the Fourth Amendment, in two respects.

First, the existence of voluntary consent is a question of fact that "necessitates a consideration of 'all the circumstances surrounding the encounter.'" *United States* v. *Drayton*, 536 U.S. 194, 201 (2002) (quoting *Florida* v. *Bostick*, 501 U.S. 429, 439 (1991)); see also *Richards* v. *Wisconsin*, 520 U.S. 385, 391–396 (1997). The State bears the burden of demonstrating that, in light of all the circumstances, the individual's consent has been "freely and voluntarily given."[6] *Schneckloth*, 412 U.S. at 222. The Wisconsin statutes short circuit that constitutionally mandated inquiry by declaring that the decision to drive is the only fact relevant to consent. In doing so, they render irrelevant all other circumstances, including the driver's actual knowledge of the statute, the circumstances surrounding her decision to drive, and most critically, her lack of opportunity to refuse the blood draw.

That is no different in substance from legislatively authorizing warrantless searches where the Fourth Amendment would forbid them. A statute that directly authorized warrantless blood tests in drunk-driving cases would unquestionably be invalid in light of *McNeely*'s instruction that the Fourth Amendment requires a warrant in the absence of exigent circumstances. See *McNeely*, 569 U.S. at 156; see also *City of Los Angeles* v. *Patel*, 135 S. Ct. 2443, 2452 (2015)

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[6] Indeed, because the existence of voluntary consent is a question of fact, appellate courts review for clear error. See, *e.g.*, *United States* v. *Siwek*, 453 F.3d 1079, 1083 (8th Cir. 2006).

(striking down statute that authorized warrantless inspections without providing the constitutionally mandated opportunity to object). Here, the State seeks to accomplish the exact same result by means of the consent exception to the warrant requirement. By providing that the mere act of driving constitutes consent to an unconscious blood draw, the State has deemed dispositive a fact that will necessarily be present in all cases. The statutes thus create a per se exception to the warrant requirement, and relieve the State of its burden to demonstrate consent in the particular case.

That per se rule is particularly troubling because it pertains to the "jealously and carefully drawn" consent exception to the warrant requirement. *Georgia* v. *Randolph*, 547 U.S. 103, 109 (2006) (citations omitted). The State's argument that it may legislate constitutionally sufficient consent in the driving context contains no evident limiting principle. If the State may simply provide that the act of driving constitutes consent to an unconscious blood draw, there is no apparent reason why it could not do the same in a wide range of other contexts.[7] As the LaFave treatise has explained, "[c]onsent in any meaningful sense cannot be said to exist merely because a person (a) knows that an official intrusion into his privacy is contemplated if he does a certain thing, and then (b) proceeds to do that thing," because otherwise, "the police could utilize the implied consent theory to subject everyone on the

[7] Indeed, perhaps for this reason, this Court has repeatedly declined to establish categorical rules that individuals have consented in advance to a search condition — even when the search condition is expressly presented to them so that they are aware of it. See, *e.g.*, *Samson* v. *California*, 547 U.S. 843, 852 n.3 (2006); *United States* v. *Knights*, 534 U.S. 112, 118 (2001).

streets after 11 p.m. to a search merely by making public announcements in the press, radio and television that such searches would be undertaken." 4 *Search & Seizure* § 8.2(l) (internal quotation marks omitted); *People* v. *Arredondo*, 199 Cal. Rptr. 3d 563, 577–578 (2016), *review granted*, 371 P.3d 240 (Cal. 2016) ("It is far from implausible, for example, that a legislative body — state or federal — might decree, in the name of public safety or national security, that the use of the mails, or the phone lines, or the Internet — all of which rely to a greater or lesser extent on publicly owned property or facilities or publicly provided services — constitutes consent to search the contents of all communications thus conducted.").

Second, the Wisconsin Supreme Court plurality compounded its error by effectively treating the act of driving as supplying irrevocable consent to an unconscious blood draw. Perhaps recognizing that an unconscious person cannot consent to or refuse testing in any meaningful sense, the plurality asserted that once a driver initially consents under subsection 343.305(2) by driving, "the opportunity to refuse" the blood test on the scene "is not of constitutional significance."[8] J.A. 36. That is contrary to *Birchfield*, which proceeded on the premise that individuals arrested for drunk driving must voluntarily consent to a blood test at the scene, even when they have decided to drive

[8] The plurality relied on *South Dakota* v. *Neville*, 459 U.S. 553 (1983), but that decision held only that the Fifth Amendment permits a State to use a driver's *refusal* to submit to BAC testing against him in a subsequent prosecution. *Neville* did not address the circumstances in which a driver may be viewed as *consenting* to BAC testing for purposes of the Fourth Amendment.

against the backdrop of implied-consent statutes. 136 S. Ct. at 2185–2186; see pp. 18–20, *supra*.

The error in the Wisconsin Supreme Court plurality's reasoning is particularly stark in the case of a conscious individual who *does* refuse the blood test. If an individual consents to a blood test by deciding to drive on state roads against the backdrop of subsection 343.305(2), such that provision of an "opportunity to refuse" the blood test on the scene "is not of constitutional significance," then the State may treat a motorist as consenting even if he vociferously refuses the blood test at the scene. That cannot be right: a suspect's revocation of previously given consent is a critical factor in evaluating whether the totality of the circumstances demonstrates that the consent was voluntary. See *Jimeno,* 500 U.S. at 252; *Jardines*, 569 U.S. at 9. Indeed, numerous state high courts have rejected the reasoning adopted by the plurality.[9] *E.g.*,

[9] The Wisconsin Supreme Court plurality also suggested that by "[drinking] sufficient alcohol to render himself unconscious," petitioner "forfeited all opportunity to withdraw the consent to search that he had given." J.A. 32. But consent must always be "freely and voluntarily given." *Schneckloth*, 412 U.S. at 222. If an individual is unable to freely give consent, then he cannot consent to the search; it does not matter *why* he is unable to give consent. Thus, for instance, when an individual is intoxicated but still conscious, courts examine whether the individual was so intoxicated that he could not give voluntary consent. *United States* v. *Hardison*, 859 F.3d 585, 591 (8th Cir. 2017); *Hubbard* v. *Haley,* 317 F.3d 1245, 1253–1254 (11th Cir. 2003). They do not conclude that the individual forfeited his right to protest the search. And to the extent that the plurality believed that committing the criminal offense of driving while intoxicated could constitute an implicit waiver of constitutional protections, that reasoning would render Fourth Amendment protections meaningless.

State v. *Fierro*, 853 N.W.2d 235, 241–242 (S.D. 2014); *Byars* v. *State*, 336 P.3d 939, 945–946 (Nev. 2014).

Thus, the State may not rely on an implied-consent statute to supply irrevocable Fourth Amendment consent that overrides a conscious individual's actual refusal at the scene. There is no reason for a different rule when the individual is unconscious. Given that consent to a blood test at the scene must be voluntary, *Birchfield*, 136 S. Ct. at 2185–2186, and a significant number of conscious individuals refuse to provide that consent, the State should not be permitted to use an implied-consent statute to supply consent that overrides an unconscious individual's inability to consent or refuse at the scene.

3. Petitioner's unconscious blood draw cannot be justified on the ground that driving is analogous to a pervasively regulated business.

Throughout its opinion, the three-justice plurality of the Wisconsin Supreme Court analogized driving to a "pervasively regulated business." J.A. 17–18 (citing *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970)). This Court has upheld statutes authorizing warrantless regulatory inspections of certain "closely regulated" industries that have long been "subject to close supervision and inspection." *Colonnade*, 397 U.S. at 74, 77.[10] The plurality reasoned that driving is

[10] *Colonnade* involved the liquor industry. The other industries that fall within this narrow exception to the warrant requirement are firearms dealers, *United States* v. *Biswell*, 406 U.S. 311 (1972), vehicle junkyards, *New York* v. *Burger*, 482 U.S. 691 (1987), and mines, *Donovan* v. *Dewey*, 452 U.S. 594 (1981).

heavily regulated, and that as a result, voluntary consent to warrantless searches may be inferred from a motorist's decision to drive against that regulatory backdrop. J.A. 17–18, 28.

The "pervasively regulated business" exception has no application here, however, because it does not rest on any theory of consent. Rather, the Court has held that the government may impose such searches, regardless of consent, because the relevant "industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such an enterprise." *Barlow's*, 436 U.S. at 313 (internal citation omitted)); see also *Burger*, 482 U.S. at 701; *Biswell*, 406 U.S. at 316; *Colonnade*, 397 U.S. at 75. To be sure, the Court has emphasized that industry participants are on notice that they will generally be subject to extensive regulation, but it has made that point only to explain why there is no reasonable expectation of privacy. See, *e.g.*, *Biswell*, 406 U.S. at 316; *Donovan*, 452 U.S. at 600. The Court has not relied on a voluntary-consent theory to justify these warrantless searches.[11]

In addition, the Court has repeatedly declined to expand the "pervasively regulated business" doctrine beyond the narrow circumstances in which it first arose. The Court explained in *Barlow's* that "[t]he clear import of our cases is that the closely regulated

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[11] In addition, even the closely regulated industry cases do not go as far as the State needs the Court to go here. The provisions authorizing inspections in those cases merely create penalties for denying entry to inspectors; they do not authorize inspectors to enter the premises regardless of lack of consent. See *Donovan*, 452 U.S. at 596–597; *Burger*, 482 U.S. at 694 n.1; *Colonnade*, 397 U.S. at 76.

industry * * * is the exception." 436 U.S. at 313. As a result, regulations to which the general public is subject are not sufficient to invoke the doctrine. *Ibid*. In *Patel*, for instance, the Court declined to categorize the hotel industry as a "closely regulated industry," reasoning that "[t]o classify hotels as pervasively regulated would permit what has always been a narrow exception to swallow the rule." 135 S. Ct. at 2455. So too here: treating driving as a pervasively regulated industry would expand the exception to one of the most routine activities of everyday life, subjecting hundreds of millions of people to warrantless searches.

II. The Fourth Amendment does not permit the state to impose an unconscious warrantless blood draw as a condition of driving.

For the reasons stated above, petitioner's blood draw may not be justified on the basis of consent. The State also may not simply impose a warrantless blood draw while unconscious as a condition of driving in the State. Such conditions must be reasonable under the Fourth Amendment, in that the intrusion on privacy must be outweighed by the legitimate government interests in the search. An unconscious blood draw is an unreasonable condition. As this Court has already concluded, the intrusion on privacy occasioned by a blood draw is significant — and the severity of that intrusion is exacerbated by the fact that the individual is incapacitated at the time. Conversely, the law enforcement interests served by drawing blood without a warrant are slight, and the ability to obtain reliable BAC evidence will not be hindered by requiring a warrant.

A. Search conditions must be reasonable.

In *Birchfield*, this Court held that the Fourth Amendment imposes a "limit" on the conditions that the State may place on the privilege of driving. 136 S. Ct. at 2185. The Court explained that the "limit" is one of reasonableness, "since reasonableness is always the touchstone of Fourth Amendment analysis." *Id*. at 2186. Determining whether a condition is reasonable thus turns on whether imposing the condition is supported by a balancing of individual privacy interests against legitimate law enforcement needs. *Id*. at 2176. That is the same inquiry that the Court has used in evaluating the reasonableness of searches imposed as a condition of accepting certain government benefits such as employment or parole. There, the Court has "assess[ed], on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Samson* v. *California*, 547 U.S. 843, 854–856 (2006); *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 652–653 (1995); *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 668 (1989); accord U.S. Amicus Br. 21, *Birchfield*, *supra*.

B. Imposing an unconscious blood draw as a condition of driving is unreasonable.

The intrusion on individual privacy interests occasioned by an unconscious blood draw is great, and the law enforcement interests served by a warrantless blood draw are slight. The Fourth Amendment therefore does not permit the government to impose unconscious blood draws as a condition of the privilege of driving.

1. A blood test is a significant intrusion.

As this Court has recognized, blood tests are a significant bodily intrusion that "require piercing the skin and extract[ing] a part of the subject's body." *Birchfield*, 136 S. Ct. at 2178 (citation omitted); accord *McNeely*, 569 U.S. at 148. "In light of our society's concern for the security of one's person, it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable." *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989). In addition, a blood test "places in the hands of law enforcement authorities a sample that can be preserved," and that can be used to garner additional information about the subject. *Birchfield*, 136 S. Ct. at 2178; see also *Skinner*, 489 U.S. at 616.

The fact that the motorist is unconscious does not alleviate, and may even exacerbate, the intrusion of a blood test. Although unconsciousness spares the individual from the pain and unpleasantness of the blood draw itself, the physical or mental sensations of undergoing a blood draw are not what make the intrusion "significant." As this Court has repeatedly observed, blood draws are "commonplace" and typically involve "virtually no risk, trauma, or pain." *McNeely*, 569 U.S. at 159 (citing *Schmerber* v. *California*, 384 U.S. 757, 771 (1966)). Instead, the violation of privacy arises from the state's "piercing the skin" to "extract a part of the subject's body." *Birchfield*, 136 S. Ct. at 2178 (citation omitted). This violation of privacy is the same whether the motorist is conscious while it occurs, or whether he instead becomes aware, sometime after awaking, that the State has been inside his skin. Indeed, the sense of having been powerless to advocate

for oneself in the face of a bodily intrusion undertaken for law enforcement purposes is in itself a substantial intrusion on one's sense of dignity and autonomy. See *Winston* v. *Lee*, 470 U.S. 753, 765 (1985) (surgery under general anesthesia at the behest of law enforcement "involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin" and is therefore more "demeaning" and "intrusive" than surgery for medical purposes).[12]

2. The law enforcement interest in proceeding without a warrant is slight.

Conversely, the law enforcement interest in performing a blood test on unconscious driver without a warrant is slight. Requiring a warrant to draw blood from unconscious drivers poses little risk of impeding the state's ability to obtain reliable BAC evidence. As the *McNeely* Court recognized in discussing blood draws of conscious drivers, although BAC evidence dissipates over time, it does so in a "gradual and relatively predictable manner," and police will often be able to obtain a warrant in the time it takes to obtain the blood draw. 569 U.S. at 153–156. In situations in which securing a warrant would threaten the ability to obtain reliable BAC evidence, officers may rely on

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[12] This Court held in *Breithaupt* v. *Abram*, 352 U.S. 432, 437 (1957), that a nonconsensual blood test performed while the subject was unconscious was not "conduct that shocks the conscience" and therefore did not violate the Due Process Clause. The Court subsequently held, however, that a blood test is a "significant intrusion" for purposes of the distinct privacy interests protected by the Fourth Amendment. *Birchfield*, 136 S. Ct. at 2178; *McNeely*, 560 U.S. at 148.

the exigent circumstances exception to dispense with the warrant. *Id*. at 156.

a. Advances in technology have substantially reduced the time and effort necessary to obtain a warrant. The federal government and almost all States, including Wisconsin, allow police officers to obtain warrants remotely, by means of a telephone, radio, fax, or email.[13] *McNeely*, 569 U.S. at 154; Wis. Stat. § 968.12(3) ("A search warrant may be based upon sworn oral testimony communicated to the judge by telephone, radio or other means of electronic communication, under the procedure prescribed in this subsection."); Fed. R. Crim. P. 41. In many jurisdictions, including in Wisconsin, judges are on call to grant warrants remotely, including in the middle of the night. See, *e.g.*, *State* v. *Schultz*, 379 Wis. 2d 768 (2017); *State* v. *Kerr*, No. 2016AP1766-CRNM, 2017 WL 1628519, at *3 (Wis. Ct. App. Apr. 28, 2017). Warrants can therefore be obtained expeditiously, often in 15 minutes or less. *Riley* v. *California*, 573 U.S. 373, 401 (2014) ("Recent technological advances similar to those discussed here have, in addition, made the process of obtaining a warrant itself more efficient."); *McNeely*, 569 U.S. at 172 (Roberts, C.J., concurring).

At the same time, "some delay between the time of the arrest or accident and the time of the [blood] test is inevitable regardless of whether police officers are

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[13] Forty-five States have electronic or telephonic warrant procedures. Elaine Borakove & Rey Banks, Justice Management Institute, *Improving DUI System Efficiency: A Guide to Implementing Electronic Warrants* 8–9, 68–76, https://www.responsibility.org/wp-content/uploads/2018/04/FAAR_3715-eWarrants-Interactive-PDF_V-4.pdf?pdf=eWarrants_Implementation_Guide (accessed Feb. 20, 2019).

required to obtain a warrant," because "a police officer must typically transport a drunk-driving suspect to a medical facility and obtain the assistance of someone with appropriate medical training before conducting a blood test." *McNeely*, 569 U.S. at 153; *id*. at 171–172 (Roberts, C.J., concurring). That is particularly true in the case of unconscious suspects, who may have been injured in a crash, and whose unconsciousness provides an independent reason to transport them to a medical facility. In other words, even in jurisdictions that employ roadside blood testing or phlebotomists at the police station, *id*. at 157, the police ordinarily cannot avoid transporting unconscious suspects to a medical facility.

In addition to transportation time, the medical facility will take some time actually to perform the blood draw. Case studies indicate that the entire process may sometimes take up to two or three hours. NHTSA, *Use of Warrants for Breath Test Refusal: Case Studies* 17 (Oct. 2007) (describing practices in Michigan); NHTSA, *Use of Warrants to Reduce Breath Test Refusals: Experiences from North Carolina* 11 (2011) (transportation to hospital and completion of blood draw in one North Carolina County took between 20 and 40 minutes).[14] As a result, many States, including Wisconsin, have anticipated some delay between the offense and a blood draw, drafting their statutes either to define the drunk-driving offense as involving a certain BAC level two to four hours after driving, or to

[14] In this case, for instance, approximately an hour elapsed between petitioner's arrest and his arrival at the hospital, most of which was spent at the police station, before officers decided to have his blood drawn. J.A. 109–113. Petitioner then appears to have waited for at least 35 minutes at the hospital before his blood was actually drawn. J.A. 112, 118–119.

permit reliance on BAC evidence taken within two to four hours after driving. *State* v. *Mechler*, 153 S.W.3d 435, 445–446 & nn.18–20 (Tex. Crim. App. 2005) (Cochran, J., concurring); see, *e.g.*, Ariz. Rev. Stat. § 28-1381(A)(2) (2012) (two hours); Ga. Code § 40-6-391(a)(5) (2011) (three hours); Mich. Comp. Laws § 257.625a(6)(a); Wis. Stat. § 885.235(1g).

In sum, law enforcement officers ordinarily will be able to obtain a warrant expeditiously — often within the time it takes to transport an unconscious driver to a medical facility and wait to have his blood drawn. Even before *McNeely*, States experimenting with obtaining remote warrants before performing blood tests on conscious drivers found that the extra time involved (as compared to performing a warrantless *breath* test) did not adversely affect officers' ability to obtain reliable BAC evidence. *Use of Warrants for Breath Test Refusal, supra*, at vi–vii (describing case studies in Arizona, Michigan, Oregon, and Utah).

In situations in which an officer has a legitimate concern that obtaining a warrant will hinder the ability to recover reliable BAC evidence from an unconscious driver, he will be able to invoke the exigent circumstances exception. In applying that exception, courts have deferred to an officer's reasonable estimation that the delay involved in obtaining a warrant would risk allowing the BAC evidence to dissipate. See, *e.g.*, *State* v. *Chavez-Majors*, 402 P.3d 1168, 1184 (Kan. Ct. App. 2017). Courts have also recognized that when an individual is unconscious because of injury, the time necessary to treat the individual at the scene and attend to the scene of the accident may create exigent circumstances that justify dispensing with a warrant. See, *e.g.*, *Brumbley* v. *State*, No. 1106, 2016

WL 197104, at *8 (Md. Ct. Spec. App. Jan. 15, 2016); *State* v. *Kiger*, 105 N.E.3d 751, 759 (Ohio Ct. App. 2018). Here, of course, the State rightly never asserted that exigent circumstances were present, given that petitioner was held at the police station for nearly an hour (during which time he lost consciousness) before officers even decided to have a blood draw performed. J.A. 109–113. But the fact remains that as a general matter, the exigent-circumstances exception provides an effective backstop that ensures that the need to obtain a warrant will not hinder the State's interest in obtaining BAC evidence.

b. The burden of obtaining a warrant is further reduced by the fact that since *McNeely*, law enforcement officers have had to obtain warrants before drawing the blood of conscious drivers (at least absent exigent circumstances). *McNeely* thus "routinized the practice of obtaining a warrant," and, indeed, enabled some jurisdictions to use blood tests more regularly. Victoria A. Terranova & Joycelyn Pollock, *DUI Enforcement after* Missouri v. McNeely, 52 No. 1 Crim. Law Bulletin Art. 5 (2016). In many cases, law enforcement agencies have instituted procedures designed to facilitate that practice, and officers have become familiar with, and proficient at, quickly obtaining warrants. See, *e.g.*, *ibid*. ("Since the ruling, police departments have formalized this process through training and implementation of guidelines for blood draw warrant procedures and streamlined the practice of obtaining a warrant."); *Flonnory* v. *State*, 109 A.3d 1060, 1062 n.5 (Del. 2015) (after *McNeely*, the state "instructed law enforcement officers to apply for a search warrant under all circumstances before performing a blood draw"); *Espinoza* v. *Shiomoto*, 10 Cal. App. 5th 85, 94

(2017) (referring to post-*McNeely* policy of seeking warrants in felony DUI cases).

Including unconscious drivers within the existing practice of obtaining warrants before drawing blood should not impose any material additional burden on law enforcement. Although statistics on the incidence of DUI arrest involving an unconscious person do not appear to be readily available, this Court observed in *Birchfield* that "we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be." 136 S. Ct. at 2184–2185. To be sure, the States that maintain unconscious-driver statutes have concluded that the situation merits legislation. But appellate courts in several States have already held that warrants are required when the driver is unconscious, and there is no indication that law enforcement has had difficulty complying with those decisions.[15]

c. Requiring a warrant in the case of unconscious drivers will serve important public purposes. First, warrants will ensure that a neutral judicial officer has the opportunity to evaluate the sufficiency of the asserted probable cause before the blood test is performed. When a driver is conscious, there are well-es-

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[15] *People* v. *Arredondo*, 199 Cal. Rptr. 3d 563, 574 (2016), *review granted and opinion superseded*, 371 P.3d 240 (Cal. 2016); *Bailey* v. *State*, 790 S.E.2d 98, 104 (Ga. Ct. App. 2016), *overruled on other grounds by Welbon* v. *State*, 799 S.E.2d 793 (Ga. 2017); *State* v. *Ruiz*, 545 S.W.3d 687, 693 (Tex. App. 2018), *review granted* (Apr. 25, 2018); *Myers*, 164 A.3d at 1172; *State* v. *Havatone*, 389 P.3d 1251, 1255 (Ariz. 2017); *State* v. *Romano*, 800 S.E.2d 644, 648 (N.C. 2017); *State* v. *Dawes*, No. 111310, 2015 WL 5036690, at *5 (Kan. Ct. App. Aug. 21, 2015) (unpublished).

tablished initial tests that are generally used to establish probable cause — preliminary breath tests, for instance, or having the driver recite the alphabet backwards — and the probable-cause showing will be based primarily on the officer's observations. *Birchfield*, 136 S. Ct. at 2181. But officers cannot rely on these tests when the driver is unconscious. Rather, they must identify other indicia of intoxication, such as the individual's behavior or manner of driving before he was stopped or before he became unconscious, the smell of alcohol on the individual, or the presence of alcohol in the car. *E.g.*, *State* v. *Merwin*, No. 1 CA-CR 16-0260, 2017 WL 4129182, at *4 (Ariz. Ct. App. Sept. 19, 2017) (probable cause based on odor of alcohol and eyewitness accounts of driving before crash). This evidence will vary from case to case, and it may often include the observations of witnesses other than the officers themselves. As a result, warrants have a particularly important role to play, as they will "ensure[] that the inferences to support a search are 'drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Riley* v. *California*, 573 U.S. 373, 382 (2014) (quoting *Johnson* v. *United States*, 333 U.S. 10, 14 (1948)).

Relatedly, the warrant requirement serves the salutary purpose of assuring citizens that the State will not perform blood tests on unconscious individuals without any supervision by a neutral magistrate. A driver who is unconscious is unable to refuse a blood test at the scene or otherwise advocate for himself. That incapacitation renders the prospect of the state-sponsored bodily intrusion more concerning. Requiring a warrant ensures that law enforcement officers do not order blood tests of unconscious individuals as a

matter of course, and that when they do so, a magistrate has determined the existence of probable cause and the scope of the search. *McNeely*, 569 U.S. at 174 (Roberts, C.J., joined by Alito and Breyer, JJ., concurring) ("Requiring a warrant whenever practicable helps ensure that when blood draws occur, they are indeed justified.").

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In sum, any law enforcement interest in performing blood draws on unconscious individuals without first obtaining a warrant is outweighed by the substantial intrusion on weighty privacy interests that such tests impose. The State therefore may not impose such blood draws as a condition of driving.

III. Petitioner's blood test may not be justified as a search incident to arrest.

In its opposition to certiorari, respondent raised the argument (not briefed below) that the drawing of petitioner's blood while he was unconscious could be upheld on the alternative ground that it was a search incident to arrest that does not require a warrant. This Court effectively rejected this contention three years ago in *Birchfield*.

Birchfield held that while a breath test is a reasonable search incident to the arrest of a suspected drunk driver, a blood test is not. 136 S. Ct. 2184. In reaching this conclusion, the Court applied the same balancing test used in determining the reasonableness of a search imposed as a condition of accepting certain government benefits, see p. 37, *supra*, which involves "assessing, on the one hand, the degree to which [the

search] 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 2176 (quoting *Riley*, 573 U.S. 373, 385 (2014)).

This balancing weighed in favor of allowing warrantless breath tests because they do not "implicate significant privacy concerns" and "the need for BAC testing is great." *Id*. at 2176 (citing *Skinner*, 489 U.S. at 626); *id*. at 2184. Blood tests, however, were "a different matter" because they are "significantly more intrusive": a "compelled physical intrusion beneath the defendant's skin and into his veins." *Id*. at 2178 (citing *McNeely*, 569 U.S. at 148). The Court concluded that the State's interest in obtaining BAC results could not justify imposing this procedure on motorists without a warrant. *Id*. at 2184.

This conclusion was informed by "the availability of the less invasive alternative of a breath test" for obtaining BAC evidence from suspected drunk drivers. *Id*. The Court recognized, however, that there may be circumstances in which a breath test is ineffective or unavailable and a blood test is necessary — including when the driver is unconscious as a result of a crash or otherwise. *Id.* at 2184–2185. But the Court concluded that it "ha[d] no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be." *Id*. Thus, the Court has already weighed the interests at stake when the police wish to obtain BAC evidence from an unconscious driver, and has concluded that they favor requiring a warrant.

That conclusion is undoubtedly correct. As discussed, a blood draw is a significant intrusion on

legitimate privacy interests, particularly when performed on a person who is unconscious and therefore unable to observe the procedure or advocate for himself. See pp. 37–39, *supra*. At the same time, the State's interest in performing a warrantless blood draw is minimal. In light of advances in warrant procedures, requiring police to obtain a warrant before drawing blood from an unconscious driver is unlikely to impede their ability to obtain necessary evidence. See pp. 39–40, *supra*. Moreover, as this Court observed in *Birchfield*, there is nothing to suggest that unconscious drivers are so common that requiring a warrant would overburden the courts, 136 S. Ct. at 2184, and indeed, many jurisdictions already impose that requirement without significant disruption, see p. 44, *supra*. And, in cases where circumstances do not permit the police to obtain a warrant, they may rely on the exigent-circumstances exception to justify a warrantless blood draw. See pp. 42–43, *supra*; see also *Birchfield*, 136 S. Ct. at 2184 (noting that "[n]othing prevents the police from * * * relying on the exigent circumstances exception to the warrant requirement" when there is not enough time to seek a warrant for a blood test); *Riley*, 573 U.S. at 388 (noting that situations where particular facts render seeking a warrant unduly burdensome "are better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances").

In short, this Court should reject the State's effort to create a new per se exception to the warrant requirement for blood tests of unconscious motorists suspected of drunk driving. Absent a showing of actual obstacles to a warranted search in a particular case —

that is, absent exigency — the proper procedure for obtaining a blood draw is "simple — get a warrant." *Riley*, 573 U.S. at 403.

CONCLUSION

For the foregoing reasons, the judgment of the Wisconsin Supreme Court should be reversed.

Respectfully submitted.

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