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

BRIEF OF *AMICUS CURIAE* DUI DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF THE CASE AND FACTS[1]

Amicus DUI Defense Lawyers Association adopts the Statement of the Facts as laid out by Petitioner and believes it provides a short and concise summary of the facts and issues in this matter.

Amicus DUIDLA would highlight two salient but potentially overlooked facts: (1) Petitioner was arrested approximately one month after this Honorable Court's decision in *Missouri v. McNeely*, 569 U.S. 141 (2013), and (2) Petitioner's jury trial was held on December 17, 2013, and Petitioner was sentenced on February 28, 2014, prior to this Honorable Court's decision in *Birchfield v. North Dakota*, 136 S.Ct. 614 (2016).

INTEREST OF *AMICUS CURIAE* DUIDLA

The DUI Defense Lawyers Association ("DUIDLA") is a nonprofit national bar association comprised of lawyers throughout North America who endeavor to protect the constitutional rights of citizens accused of driving under the influence (DUI) and related charges and to ensure that such accused citizens receive a fair trial as guaranteed under United States Constitution.

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[1] The parties have consented to the filing of this *amicus* brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amicus curiae* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Amicus Curiae DUIDLA has a strong interest in the promulgation and enforcement of fair and constitutional DUI laws that create a safe society, but still protect the civil liberties of our populace. Its mission is to protect and ensure by rule of law those individual rights guaranteed by the state and federal constitutions in DUI-related cases, to resist the constant efforts that are made to curtail these rights, and to encourage cooperation between lawyers engaged in the furtherance of these objectives.

DUIDLA is concerned with the practical problems presented to law enforcement, judges, defense attorneys, and the general public, and works to prevent the erosion of all citizens' Fourth Amendment rights; erosion which tends to frequently occur in the context of DUI cases. This is especially true when a search implicates the integrity of the human body and all of the privacy and dignity concerns associated with it.

Laws like those at issue in this case critically undermine the very concept of "free and voluntary consent." They lead us down a slippery slope where legislatures (pressured by voters) and agents of the executive (concerned primarily with investigating and prosecuting crimes) become the branches of government that make determinations regarding whether or not a suspect has "consented" to a Fourth Amendment search.

Amicus Curiae DUIDLA, through its members' efforts in trial courts and through the organization's *amicus* efforts, seeks to ensure that the legislative and

executive branches of government do not usurp the role of the judiciary in defining the scope of what does and does not qualify as consent to search in a criminal investigation where, absent such consent, the search would violate the Fourth Amendment to the United States Constitution.

The DUIDLA is particularly interested in cases focusing on this Court's decision in *Birchfield*, of which DUIDLA was an *Amicus Curiae.* It is DUIDLA's belief that this Court ruled correctly in *Birchfield* and in *McNeely* with regard to warrantless blood draws.

Amicus DUIDLA believes that cases such as the instant case are, in large part, the result of state legislatures and state courts not having made changes to their statutes and interpretations thereof to reflect the holdings of this Court in *McNeely* and *Birchfield.*

Amicus DUIDLA submits this brief to help ensure that the rights outlined in *Birchfield* are protected and safeguarded and to urge this Court to send a clear message to the state legislatures that have been slow to heed the previous pronouncements of this Court regarding the Fourth Amendment and warrantless blood draws.

ARGUMENT

Warrantless searches "conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions." *Katz v. U.S.*, 389 U.S. 347, 357 (1967).

This Court has previously rejected the exceptions raised by the State in Petitioner's case to justify the warrantless blood draw of Petitioner while he was unconscious, therefore, it was *per se* unreasonable and Petitioner's blood test results are inadmissible.

This Court has consistently adhered to the Constitution's "require[ment] 'that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police.' 'Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes.'" *Id.* (Citing *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963), *United States v. Jeffers*, 342 U.S. 48, 51 (1951)) (citations and punctuation omitted).

Despite this Court's consistent adherence to the provisions protecting the privacy interests of citizens under the Fourth Amendment, the government is once again urging this Court to abandon those principles by adopting a categorical exception to the Fourth Amendment.

Although this Court has previously rejected the precise arguments being made by the Respondent in the instant matter, the Respondent now contends that this Court's clear pronouncements in *McNeely* and *Birchfield* are not applicable to unconscious individuals when a state legislates a legal fiction - that an unconscious individual has waived his or her Fourth Amendment rights. Similarly, the government would argue that such legal fiction would apply to one who lacks the capacity to consent or decline to consent to such a search.

Thus, the government argues that the legislature has the authority to deny one of the most fundamental rights that our Constitution guarantees by declaring that an individual consented to an intrusive blood test by driving on the roads when, in fact, that individual had not consented to the search.

As discussed below, this Court considered this exact scenario in *Birchfield* and correctly analyzed the legal fiction of implied consent. This Court held that the government may not intrude on the privacy of citizens through a warrantless blood draw by enacting a statute that gives them the authority to do so through the fiction of "implied consent," and not actual, voluntary consent.

The rise in technological advances seen in recent years has been accompanied by a rise in governmental intrusions into the most private areas of a citizen's life. Those areas that are protected under the constitutional provisions that were drafted by our Framers have fallen under attack by state governments seeking to expand their authority over

the individual. State governments are forgetting that our Constitution and Bill of Rights were drafted by men who had first-hand experience of the dangers that a tyrannical government posed upon its citizens. The Framers sought to protect citizens from unreasonable encroachments on the most personal of civil liberties by preserving them in this nation's Constitution, and it is essential that the Court continue to adhere to those strict precedents by protecting unconscious suspects from intrusive searches of the individual's body through warrantless blood draws.

The vigilance this Honorable Court, and all those who venerate our Constitution, must adhere to was aptly described by another court:

> The [Fourth and Fifth Amendments] appear in the fundamental law of every state of this Union, as well as in the federal Constitution. They are the sacred civil jewels which have come down to us from an English ancestry, forced from the unwilling hand of tyranny by the apostles of personal liberty and personal security. They are hallowed by the blood of a thousand struggles, and were stored away for safe-keeping in the casket of the Constitution. It is infidelity to forget them; it is sacrilege to disregard them; it is despotic to trample upon them. They are given as a sacred trust into the keeping of the courts, who should with sleepless vigilance guard these priceless

> gifts of a free government. We hear and read much of the lawlessness of the people. One of the most dangerous manifestations of this evil is the lawlessness of the ministers of the law. This court knows and fully appreciates the delicate and difficult task of those who are charged with the duty of detecting crime and apprehending criminals, and it will uphold them in the most vigilant, legal discharge of their duties; but it utterly repudiates the doctrine that these important duties cannot be successfully performed without the use of illegal and despotic measures. It is not true that in the effort to detect crime and to punish the criminal "the end justifies the means." This is especially not true when the means adopted are violative of the very essence of constitutional free government. Neither the liberty of the citizen nor the sanctity of his home should be invaded without legal warrant.

Underwood v. State, 78 S.E. 1103, 1106 (Ga. App. 1913).

Most importantly, there is not even a practical need for this Court to retreat from its pronouncements in *McNeely* and *Birchfield*. Indeed, to do so is likely to only muddy the waters, cause more confusion, and engender further litigation, all of which will lead to more individuals who legitimately should be convicted

of DUI and related vehicular injury or death charges escaping punishment.

In the instant case the officers first sought a breath test and, realizing that the accused lacked the physical and/or mental capacity to cooperate with the breath testing procedure, decided to go to the hospital with the intention of invoking the "implied consent" provisions of the Wisconsin statute rather than take any action to seek a warrant.

There can be little doubt, given the information possessed by the officers at the time they decided to go to the hospital, that had the officers sought a warrant, as commanded by *McNeely,* they would have either obtained a warrant and a constitutionally valid blood draw, or, if they legitimately attempted to obtain a warrant and were unable to do so, they would have then been able to obtain a blood draw that would have been constitutionally valid under the "exigent circumstances" exception long recognized by this Court and discussed in detail in *McNeely.*

Thus, the primary problem in this case and many other cases involving warrantless blood draws is that some state legislatures and, to an extent, some state courts, have been slow to acknowledge or accept this Court's clear pronouncements in *McNeely* and *Birchfield* and as a result, law enforcement officers (just like the officer in *McNeely* and the officers in this case), have felt free to ignore the mandates of this Court to apply for a warrant.

The solution to the problem is not to retreat from the holdings in *McNeely* and *Birchfield.*

Similarly, the solution to the problem is not to just legislatively manufacture and assign to all driving citizens a fictitious consent.

The solution to the problem is to forcefully and unanimously reiterate the basic pronouncements in *McNeely* and *Birchfield* regarding the Fourth Amendment's warrant requirement. Therefore, this Honorable Court should render a decision in this case that makes it clear that this Honorable Court means what it has pronounced in *McNeely* and *Birchfield*.

I. RECENT DECISIONS OF THIS COURT HAVE CONSISTENTLY HELD THAT, ABSENT A RECOGNIZED EXCEPTION, WARRANTLESS BLOOD DRAWS ARE PROHIBITED BY THE FOURTH AMENDMENT.

A. The State's Arguments Directly Contradict This Court's Analysis, Sound Reasoning and Holdings in *Birchfield* and *McNeely*.

In *Birchfield v. North Dakota*, 136 S.Ct. 614 (2016), this Court was presented with numerous intertwined issues of warrantless blood draws and the right to refuse those intrusive searches during DUI investigations.

Contrary to the opinion of the Wisconsin Supreme Court below in the instant case, in *Birchfield*, this Court held, in no uncertain terms, that a warrantless blood draw does not fall within search incident to a lawful arrest (SILA) exception to the warrant requirement.

This Court in *Birchfield* did not suggest that its ruling might be different if the driver was unconscious, rather it specifically addressed the unconscious driver scenario and found:

> It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But 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.

Birchfield, 136 S. Ct. at 2184-85.

Certainly, in part, the *Birchfield* Court suggested that the search incident to a lawful arrest (SILA) exception was not applicable because there are less intrusive means, such as a breath test. But the Court also addressed situations where there were not alternative means and where the taking of blood might be preferable or necessary:

> In instances where blood tests might be preferable – e.g., where substances other than alcohol impair the driver's ability to operate a car safely, **or where the subject is unconscious—nothing prevents the police from seeking a warrant or from relying on the exigent circumstances exception if it applies.**

Birchfield, 136 S. Ct. at 2165 (emphasis added).

Petitioner has conceded that there were no exigent circumstances present in this case when the Petitioner's blood was drawn. *See State v. Mitchell,* 914 N.W.2d 151, 155 (Wisc. 2018) ("The State expressly stated that it was not relying on exigent circumstances to justify the blood draw.")

This Court's decision in *McNeely* expressly rejected the notion that the dissipation of alcohol from the bloodstream categorically supports a finding of exigent circumstances sufficient to authorize warrantless blood draws. *McNeely* further explained that "[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, **the Fourth Amendment mandates that they do so**." *Id.* at 1561 (emphasis added).

The reasoning of this Court in *McNeely* and *Birchfield* unequivocally required Officer Jaeger, the officer who arrested Petitioner, to obtain a warrant prior to taking a sample of Petitioner's blood. Officer Jaeger could have applied for a warrant but chose not to.

Moreover, Officer Jaeger observed several signs of Petitioner's intoxication prior to the unconsciousness which certainly would have provided him with the requisite probable cause to apply for a search warrant. Also notable, there were other officers present when Petitioner's consciousness began to fade, and any of those officers could have assisted and

expedited the process by transporting Petitioner to the hospital while Jaeger applied for the warrant.

This situation is on all fours with *McNeely*. "Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. **In such a circumstance, there would be no plausible justification for an exception to the warrant requirement**." *McNeely*, 569 U.S. at 153-54 (emphasis added).

Additionally, Respondent appears to acknowledge *Birchfield*'s holding on this issue, when it stated that "subjecting a drunk driver to a breath test was lawful as a search incident to arrest, but **subjecting that suspect to a blood test was not lawful**…" *Respondent's Brief in Opposition*, page 19 (emphasis added).

Despite this acknowledgement, Respondent then proceeds to ignore *Birchfield* and invokes Wisconsin Supreme Court Justice Kelly's erroneous analysis, which essentially claims that the same exigent circumstances squarely rejected in *McNeely* (the dissipation of alcohol in the bloodstream alone) ought to be resurrected as a categorical exception here.

The only additional arguments that Respondent and Justice Kelly present to distinguish *McNeely* and *Birchfield* are that, in the instant case, "no less intrusive means were available to obtain the

evanescent evidence" and that it was unknown how long Petitioner might "remain unconscious." *Id.*

As discussed above, this Court already considered situations where blood would be the preferred or only means of testing available where drug-induced intoxication was suspected or where, like here, the driver was unconscious. And despite its *express* awareness of these scenarios, the Court still held that nothing prevents the police from seeking a warrant or from relying on the exigent circumstances exception if it applies. *Birchfield*, 136 S. Ct. at 2165.

Finally, it must be emphasized that the State has yet to provide any reasonable explanation as to why Officer Jaeger did not apply for a warrant. The length of time Petitioner would have been unconscious is irrelevant because, once a warrant was obtained, the officers could have legally drawn Petitioner's blood whether he was conscious or unconscious.

The Respondent lastly makes the emotionally compelling but legally infirm argument that by "'drinking to the point of unconsciousness … Petitioner forfeited his statutory opportunity under Wis. Stat. § 343.305(4) to withdraw consent.'" *Id.* at 8.

Thus, Respondent asserts that Petitioner "'voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to the point of intoxication.'" *Id.*

In making these arguments, Respondent ignored a critical reality that this Court recognized and addressed in *Birchfield*: that the most likely

situation where such a wrongful forfeiture of this cherished constitutional protection would be wrought is in situations where a driver is unconscious as a result of an accident, injury, or medical condition.

If the legal arguments presented by Respondent are accepted, the Court would give law enforcement officers across the country *carte blanche* authority to perpetrate invasive, warrantless bodily intrusions upon all drivers injured in an accident who are "unconscious" or "semiconscious" or "confused" or "disoriented" or "not properly oriented" (all terms frequently used by physicians describing patients seen in emergency rooms) or suffering from any medical condition which, in the opinion of the officer, causes the driver to appear unable to fully understand his or her circumstances and therefore incapable of consenting to or declining a chemical test.

There is obviously a temptation to carve out an exception for that rare situation where a person is capable of driving but has been drinking or using drugs "to the point of [eventual] unconsciousness." Before the Court succumbs to that temptation, it must first consider how that exception would work in practice.

The Court has long warned that "[t]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise

of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

Similarly, "[i]t has been repeatedly decided that these Amendments [to the Constitution] should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers." *Gouled v. United States*, 255 U.S. 303, 304 (1921).

If this Court carves out an exception that only applies when a person has "consumed alcohol [or drugs] to the point of unconsciousness" but does not apply to individuals who are suffering from injuries or medical conditions, it will place the job of determining whether this inherently dubious exception applies in the hands of some of the most often well-intentioned but frequently — and mistakenly — overzealous members of law enforcement: DUI patrol officers.

Such a holding would put these officers in the position of making a medical evaluation and decision as to whether a person's disposition is solely the result of alcohol or drug consumption or is the result of a medical condition. Moreover, the officer would know that one "conclusion" would allow him to proceed without a warrant while the other would require him to attempt to obtain a warrant.

Common sense, experience and recent headlines advise us that it is not wise to put officers bent upon ferreting out possible crime in the position of making medical judgements about those they

suspect of committing an offense when it can be avoided. See, e.g., "Police chief suspends officer in connection with DUI arrest of suspect who died days later," Live5 WCSC News (February 25, 2019) http://www.live5news.com/2019/02/25/police-chief-officer-suspended-connection-with-dui-arrest/ (last accessed March 3, 2019).

The instant case does not present a situation where we need to place zealous investigating officers in the position of physicians on a mission. To do so would be to invite drastic consequences. The Court must reiterate and make clear that warrantless blood draws are prohibited by the Fourth Amendment and that the two relevant exceptions are those that it has already long-recognized: (1) actual, voluntary, uncoerced consent, and (2) where it is established that under the specific factual circumstances then presented, officers did not have the ability to obtain a warrant in a timely manner.

Carving out additional exceptions, splitting hairs or leaving questions unanswered benefits no one and does not actually promote the apprehension and conviction of those who are guilty of DUI as it only muddies the water. A clear, concise, unanimous opinion by this Honorable Court would, however, benefit all.

B. Heightened Privacy Interests Involved in Blood Draw Cases Make It Extremely Reasonable to Require An Officer to Obtain a Search Warrant Before Drawing The Blood of an Unconscious Person.

It has long been recognized that a blood test is more intrusive than a breath test because "[blood tests] 'require piercing the skin' and extract a part of the subject's body. . . [and] place[ ] in the hands of law enforcement authorities a sample that can be preserved from which it is possible to extract information beyond a simple BAC reading." *Birchfield,* 136 S. Ct. at 2178. Blood tests are a search that go far beyond the body's surface and implicate "important 'interests in human dignity and privacy,' and impinge on far more sensitive interests than the typical search of the person of an arrestee." *Id.* at 2183 (citing *Schmerber v. California*, 86 S. Ct. 1826 (1966)).

Although a "search conducted pursuant to … valid consent is constitutionally permissible," *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973), valid consent is "in fact, freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). The Fourth Amendment requires that an arrestee's voluntary consent be independent of implied consent. *State v. Butler*, 232 Ariz. 84 (2013). Moreover, "[v]oluntariness is a question of fact," *Schneckloth*, 412 U.S. at 248-49, which "is assessed from the totality of the circumstances." *Id.* at 227. "[The government's] burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper*, 391 U.S. at 548-49.

Because an unconscious suspect is incapable of showing even the slightest bit of acquiescence to a warrantless blood draw, the State cannot presume that the suspect has given actual, voluntary consent under the totality of the circumstances merely because they agreed to drive on the roads of the state.

The State bears the burden of proving how actual, voluntary consent can be obtained from an individual that is incapacitated and unable to respond to any request for chemical testing.

Because of the serious privacy implications that are associated with blood tests, it is not unreasonable to require an officer to obtain a search warrant before drawing the blood of an unconscious DUI suspect.

As *McNeely* recognized, "technological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency. That is particularly so in this context, where BAC evidence is lost gradually and relatively predictably." *McNeely*, 569 U.S. at 155. Most states, including Wisconsin, have statutes that authorize officers to obtain warrants electronically.

> **Wis. Stat. § 968.12 (2)** *Warrant upon affidavit.* A search warrant may be based upon sworn complaint or affidavit, or testimony recorded by a phonographic reporter or under sub. (3)(d), showing probable cause therefor. The complaint, affidavit or testimony may be upon information and belief. The person requesting the warrant may swear to the complaint or affidavit before a notarial officer authorized under s. 706.07 to take acknowledgments or before a judge, **or a judge may place a person under oath via telephone, radio, or other means of**

> **electronic communication, without the requirement of face-to-face contact, to swear to the complaint or affidavit**. The judge shall indicate on the search warrant that the person so swore to the complaint or affidavit. (Emphasis added).

The application and issuance of electronic warrants is also discussed in further detail in Wis. Stat. § 968.12(3)(b)(2) (the provision addressing warrants upon oral testimony). Thus, while a breath test is the less intrusive alternative to a blood test and is not available to the unconscious suspect, there is nothing that prevents officers from applying for a search warrant through electronic means in order to ensure that the *more* intrusive test is conducted in a way that protects the constitutional rights of the suspect. In addition, all states may and probably should authorize the application and issuance of electronic warrants to expedite the process.

Wisconsin is urging this Court to create the type of *per se* rule that was rejected in *McNeely*. The only distinguishing factor in the instant case is that the State is asking for a *per se* rule that would apply to individuals that are incapacitated and incapable of giving actual, voluntary consent as required by the Fourth Amendment and its progeny. Such a rule would not only allow states to enact statutes that are effectively waivers of a suspect's constitutional rights, but it would also be in direct contradiction of the analysis and reasoning in *McNeely* and *Birchfield*:

> [A]dopting the State's *per se* approach would improperly ignore the current and future technological developments in warrant procedures, and might well diminish the incentive for jurisdictions 'to pursue progressive approaches to warrant acquisition *that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement*.'

McNeely, 569 U.S. at 156 (emphasis added).

The State's interest in promoting highway safety and deterring drunk driving cannot overcome the value of protecting the constitutional rights drafted by our Framers. As this court held in *Arizona v. Gant*, 556 U.S. 332, (2009), the State's interests do not:

> outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected. If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement "entitlement" to its persistence. *Cf. Mincey v. Arizona*, 437 U.S. 385, 393, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978) ("[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment).

Id. at 349.

Amicus also believes that advances in DNA testing and the seemingly daily news about database breeches further support the heightened privacy concerns implicated in blood draw cases. For example, in *Birchfield*, in distinguishing breath procedures from blood draws, this Court noted "in prior cases, we have upheld warrantless searches involving physical intrusions that were at least as significant as that entailed in the administration of a breath test. Just recently we described the process of collecting a DNA sample by rubbing a swab on the inside of a person's cheek as a "negligible" intrusion. *Maryland v. King*, 569 U.S. ___, ___, 133 S.Ct. 1958, 1969, 186 L.Ed.2d 1 (2013)." *Birchfield*, 136 S. Ct. 2160, 2177 (2016).

But while obtaining a breath sample was no more of a bodily intrusion than rubbing a swab inside a person's mouth, the Court emphasized a critical distinction here, that: "breath tests are capable of revealing only one bit of information, the amount of alcohol in the subject's breath. In this respect, they contrast sharply with the sample of cells collected by the swab in *Maryland v. King*." *Id.*

The Court also noted "[a]lthough the DNA obtained under the law at issue in that case could lawfully be used only for identification purposes, 569 U.S., at ___, 133 S.Ct., at 1967-68, … the process put into the possession of law enforcement authorities a sample from which a wealth of additional, highly personal information could potentially be obtained. A breath test, by contrast, results in a BAC reading on

a machine, nothing more. No sample of anything is left in the possession of the police." *Id.*

Thus, while this Court has approved warrantless DNA collection for certain *limited purposes*, it has also acknowledged the fact that DNA contains a wealth of additional, highly personal information and thus distinguishes it from a breath sample. To this point, it should be noted that there are *no* limitations on the use or retention of the blood sample collected under Wisconsin statutes, nor any restriction on the use or dissemination of the data that may be obtained in the analysis of the sample.

Thus, approving the warrantless blood draw in this case, unlike in a case involving a warrant, permits the government to obtain this highly personal, highly sensitive information with no restriction of the use of the sample once it is in the possession of the government or the use or dissemination of information gained through any analysis the government may choose to conduct on that sample.

As noted earlier in this brief, creating such an exception is unnecessary as *McNeely* provides the proper directives as to how an officer can obtain a blood draw without the need for a new exception.

C. A State Cannot Enact A Statute That Directly Infringes Upon the Constitutional Rights of Individuals and Cannot Waive a Suspect's Constitutional Rights Through a Statute.

If this Court adopts the arguments presented by Wisconsin, it will give every state the authority to

enact statutes that directly infringe on or eviscerate citizens' constitutional rights. Such a decision would have ripple effects reaching far beyond the realm of drunk driving legislation, and it would open the door to excessive governmental abuses that our Constitution was designed to prevent. The State contends that it can create consent and waive an individual's constitutional protections through a statute. If this were so, what would stop the government from imposing limits on other constitutional rights through statutes? A state could choose to amend their license-to-carry-firearms statutes and include a condition stating that – merely by obtaining the license to carry – that individual has impliedly consented to a warrantless full body search by a police officer investigating any crime involving a gun. (Justice Blackwell of the Supreme Court of Georgia posed a similar scenario to the State of Georgia during oral arguments in *Elliott v. State*, S18A1204 (2019)).

The State has relied on the holdings in *Florida v. Jardines*, 569 U.S. 1 (2013), *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978), and *Birchfield* for its determination that consent may be implied, however these cases have no bearing on the issues raised and do not in any way support the conclusion that a statute may serve as a waiver of a constitutional right. *Jardines* held that by placing a knocker on one's front door, an individual has implicitly invited visitors to approach the curtilage of the home through the "home path," and grants visitors the ability to "knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Jardines*, 569 U.S.

at 8. However, this Court specifically noted that while an officer may enter the curtilage of an individual's home under the same circumstances as a visitor, the privilege to enter the curtilage only gives an officer without a warrant the ability to approach the home and knock "precisely because that is 'no more than any privilege a citizen might do.'" *Id.* A private citizen does not have the ability to obtain a blood sample from another private citizen, and thus, *Jardines* is impertinent to the determination of whether a statute can serve as a substitute to voluntary consent. Further, as the *Jardines* Court expressly noted:

> The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose. . . **Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search**.

Id. at 9 (emphasis added).

The State's contention that the case of *Marshall v. Barlow's, Inc.* is relevant to its view of implied consent is even more puzzling, given that this Court found that the statutory authorization of warrantless searches of a business's work areas was unconstitutional under the Fourth Amendment. *Marshall,* 436 U.S. at 307. The statute this Court deemed unconstitutional in *Marshall* authorized the Secretary of Labor to search the work areas of any employment facility that was regulated under the Occupational Safety and Healthy Act of 1970

("OSHA"). The owner of an electrical and plumbing installation business (subject to the regulations provided in OSHA) was approached by a government inspector who sought to inspect the non-public areas of his business without a warrant, and the case came before this Court after the business owner refused to allow the warrantless search based on his protections guaranteed under the Fourth Amendment.

Similar to *Jardines*' holding that an officer can do no more than a visitor would upon entering the curtilage of an individual's home without a warrant, *Marshall* found that

> [w]ithout a warrant [the Government inspector] stands in no better position than a member of the public. What is observable by the public is observable, without a warrant, by the Government inspector as well. *The owner of a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents.*

Id. at 315 (emphasis added).

The business owner in *Marshall* did not agree to unchecked warrantless searches by operating a business regulated under OSHA, just like the Petitioner did not agree to unchecked warrantless searches of his body while unconscious by merely driving on the roadways of Wisconsin.

The State has vainly tried to extend *Marshall*'s discussion of warrantless searches for closely regulated industries like firearms and alcohol to governmental regulations of the highways and the operation of motor vehicles. *Marshall* explains that the alcohol and firearm industries are "exceptions [because] they represent . . . relatively unique circumstances . . . [and] 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." *Marshall,* 436 U.S. at 313. This Court's recent holdings in *McNeely* and *Birchfield* have made it abundantly clear that a DUI suspect **does** have a reasonable expectation of privacy while driving on the roadways, regardless of whether a state has an implied consent statute.

II. IMPLIED CONSENT IS NOT A SUBSTITUTE FOR THE ACTUAL, VOLUNTARY CONSENT REQUIRED FOR A WARRANTLESS BLOOD DRAW.

The State has yet to provide any legal support for its contention that this Court's reasoning and analysis were incorrect in *McNeely* and *Birchfield*. This Court found that the search incident to arrest, one of most recognized exceptions to the warrant requirement, did not categorically apply to blood testing of DUI suspects due to, among other things, the privacy rights of such individuals. The concept of the search incident to arrest has an ancient pedigree of sound legal analysis, but this Court refused to extend it to permit intrusive, warrantless blood tests

in *Birchfield*. This Court even predicted this exact circumstance and specifically found that law enforcement would be required to apply for a warrant or rely on the exigent circumstances exception to a warrant. A state statute that purports to waive a fundamental constitutional right of all those individuals who drive on its roads is offensive to the Constitution. The search incident to arrest doctrine has already been rejected by this Court under the exact same circumstances as this case.

The State argues that by driving on the roads, the Petitioner "impliedly consented" to warrantless blood draws. In *State v. Ryce*, 368 P.3d 342 (Kan. 2016), *adhered to on reh'g*, 396 P.3d 711 (Kan. 2017), the Supreme Court of Kansas addressed the illogical conclusion that "implied consent" means every driver is deemed to have given actual consent to testing for DUI:

> While the implied consent scheme may operate on the assumption that drivers have 'deemed to have consented' to tests for DUI purposes, '**[w]hen that person has expressly refused consent … it would be incongruous and oxymoronic to say the person was deemed to have consented to the test**.'

Id. at 356 (emphasis added).

Ryce addresses the core issue of the State's position; that a driver has deemed to have given consent by driving on the roadways. Wisconsin

provides (conscious) DUI suspects the statutory right to withdraw consent to chemical testing pursuant to Wis. Stat. § 343.305(4); thus "it would be incongruous and oxymoronic" to say that a suspect who has withdrawn consent under this statute has given the State unbridled implied consent to chemical testing for DUI merely by driving on the roadways. *Id.*

A. There Are Limits To The Consequences To Which Motorists May Be Deemed To Have Consented By Virtue Of A Decision To Drive On Public Roads.

"There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Birchfield,* supra, at 2185. Justice Alito was absolutely correct – implied consent laws cannot give the state carte-blanche authority to circumvent the Constitution in their pursuit of evidence.

Implied consent laws do not give any State unlimited license to violate the Constitution or infringe on the rights of motorists. Justice Alito's opinion for the Court in *Birchfield* stands for the clear principle that implied consent laws simply must have limits. *Id.* at 2185. This case presents this Court with an ideal vehicle to articulate those limits.

The State's core argument is stunning in its breadth. Wisconsin would have this Court accept that a state legislature may pass a law that says all drivers, state-wide, hereby give their free and voluntary consent to intrusive searches of their person. If such a principle were extended to its logical conclusion, statutory law would soon eviscerate and

completely displace the long line of case law regarding consent, instructing courts to look to the totality of the circumstances when determining the existence of free and voluntary consent. *See, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

In addition, a world where a state could legislatively deem voluntary consent into existence would not logically stop at persons who were unconscious. If free and voluntary consent were truly able to be deemed into existence by statute, then such a principle would equally apply to each and every driver on the roads. Every person arrested for a DUI offense would not need to be asked for consent to search; it would be presumed. Officers would be free to compel any driver arrested for DUI to submit to a blood draw, because the legislature had already deemed their consent.

In addition, if free and voluntary consent is taken out of the constitutional framework and made subject to statutory law, what would stop a State from statutorily declaring that the consent is conclusively presumed under specific circumstances, thereby taking away a person's ability to affirmatively decline to consent to a warrantless search?

It is not a logical stretch at all to see that the State's proposed principles completely eviscerate the concept of free and voluntary consent, instead leading to a system of legislatively-mandated limits on a person's ability to decline to be subjected to a warrantless search of their bodily fluids. A State legislative scheme whereby a person, conscious or unconscious, is conclusively deemed to have consented

to a warrantless blood draw is no different at its core than the State's scheme at issue today – if a State can displace the constitutional framework requiring free and voluntary consent merely by legislating it away, then there are truly no meaningful limits on the government's power to deem a constitutional right waived by virtue of a decision to drive on public roads.

A foundational principle of the constitutional doctrine of consent is that it is a free and voluntary choice made by the individual, considering the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). This Court was therefore completely correct when it said there must be meaningful limits to implied consent laws. *Birchfield, supra,* at 1285. This case presents this Court with a perfect opportunity to enforce that provision – that a statute may not circumvent the constitution and deem actual and voluntary consent into existence merely by virtue of a person's decision to drive on a public roadway.

B. Implied Consent Statues Only May Require Drivers To Provide Consent In Certain Circumstances; They Do Not Act As A Substitute For Consent.

Cemented in *Birchfield* is the proposition that implied consent statutes are statutes which provide for administrative and evidentiary sanctions for motorists who refuse to consent to evidentiary searches of the person's bodily fluids. *Birchfield*, supra, at 2185. ("Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary

consequences on motorists who refuse to comply.") Rejected in *Birchfield* is the proposition that these laws can go any further, by – for example – imposing criminal penalties on a person's refusing consent to a warrantless blood draw. *Id.*

The Court summarized much of the same in *McNeely*, stating that these laws require the motorist to give consent to the test in certain circumstances or face driver's license sanctions or evidentiary penalties. 569 U.S. at 161. These statutes are thus best understood as using a carrot-and-stick approach to *entice* consent – offering a benefit of showing that a person is not impaired and safe to drive (and retaining their privilege to drive), while threatening a detriment of license sanctions and evidentiary consequences to those who refuse or are unable to grant consent.

McNeely and *Birchfield* together have only blessed implied consent laws that impose administrative or evidentiary consequences on a person when they refuse to grant consent to search the person's bodily substances when appropriate.[2] In contrast, there is nothing in either opinion that indicates the Court believed that the statutory consent was a substitute for free and voluntary consent. In fact, the court squarely contradicted that

[2] *Amicus* would note that there are serious constitutional concerns raised where the government imposes administrative or evidentiary sanctions on a person who exercises his constitutional right to be free from warrantless searches and refuses to consent to a blood test. However, since that issue is not squarely presented in the facts of this case, it is not properly before the Court and *Amicus* will not address it any further.

position under the *Beylund* companion case in *Birchfield*, supra, at 2186. In that case, the Supreme Court acknowledged that Petitioner Beylund only consented to a blood draw when he was provided legally inaccurate information about the State's ability to punish him for refusing the test. This Court, however, made clear that the proper standard for evaluating the issue was to look at the totality of the circumstances to see if Mr. Beylund had provided free and voluntary consent. *Id.*

CONCLUSION

The Respondent will undoubtedly portray this as "the sky is falling" situation which must be solved by a new exemption to the warrant requirement which further encroaches upon citizens' Fourth Amendment rights. However, nothing could be further from the truth.

There is no doubt that in this case had the officers sought a warrant, as commanded by *McNeely,* they would have either obtained a warrant, or, if they legitimately attempted to obtain a warrant and were unable to do so, they would have then been able to obtain a constitutionally valid blood draw under the "exigent circumstances" exception.

Thus, the real problem at the core of current blood draw cases is that some state legislatures and, to an extent, some state courts, have been slow to acknowledge or accept this Court's clear pronouncements in *McNeely* and *Birchfield.* As a result, law enforcement officers have felt free to

operate under the assumption that they do not need a warrant.

The solution to the problem is not to retreat from the holdings in *McNeely* and *Birchfield,* nor to allow state legislatures to manufacture and assign to all driving citizens a fictitious consent.

The solution to the problem is to forcefully and unanimously reiterate the basic pronouncements in *McNeely* and *Birchfield* regarding the Fourth Amendment's warrant requirement.

For all of the foregoing reasons, *amicus* DUIDLA respectfully requests that this Court reverse the decision of the Wisconsin Supreme Court and make it clear that implied consent laws are not a substitute for the actual, voluntary consent required under the Fourth Amendment when the government seeks to conduct a warrantless blood draw.

Respectfully submitted,

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