No. _____

In The

Supreme Court of the United States

ELIO GUTIERREZ,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The California Court Of Appeal, First District

PETITION FOR A WRIT OF CERTIORARI

ROBIN LIPETZKY
Contra Costa County
Public Defender

GILBERT RIVERA
Deputy Public Defender

MAYA NORDBERG
Deputy Public Defender
**Counsel of Record*

ANTHONY GEDEON
Deputy Public Defender

CONTRA COSTA COUNTY
PUBLIC DEFENDER
800 Ferry Street
Martinez, CA 94553
(925) 335-8000
Maya.Nordberg@pd.cccounty.us

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Is consent voluntary under the Fourth Amendment where a driving under the influence arrestee submits to a blood draw after the arresting officer tells him or her that he or she is required to submit to a blood or breath test to determine blood alcohol content?

Is a blood draw reasonable under the Fourth Amendment search incident to arrest exception, where a driving under the influence arrestee submits to a blood draw after a law enforcement officer tell him or her that he or she is "required" to provide a blood or breath test to determine blood alcohol content?

STATEMENT OF RELATED CASES

People v. Elio Gutierrez, No. S252532, Supreme Court of California order dismissing and remanding to the First District Court of Appeal entered on August 29, 2019.

People v. Elio Gutierrez, No. S252532, Supreme Court of California order granting review entered on January 2, 2019.

People v. Elio Gutierrez, No. A153419, Court of Appeal, First Appellate District, Division 4, order affirming judgment of appellate panel, entered on October 2, 2019.

People v. Elio Gutierrez, No. 5-170563-1, Superior Court of the State of California in and for the County of Contra Costa Appellate Division, judgment entered on December 13, 2017.

People v. Elio Gutierrez, No. 1-176383-8, Superior Court in and for the County of Contra Costa, California, order granting motion to suppress entered on January 27, 2017.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Elio Gutierrez respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeal, First Appellate District, Division Four, in this case.

OPINIONS BELOW

The opinion of the California Court of Appeal is reported at 238 Cal.Rptr.3d 729 (Cal. Ct. App. 2018), *reh'g denied* (Oct. 29, 2018), *review dismissed, cause remanded*, 447 P.3d 669 (Cal. 2019).

JURISDICTION

After granting review, the California Supreme Court dismissed the Petition for Review on August 28, 2019, and remanded to the Court of Appeal for the First Appellate District, Division One, for remittitur. The First Appellate District issued a remittitur on September 24, 2019 rendering the decision final. Petitioner exhausted all review of his Fourth Amendment challenges, though his case is still pending in criminal court. Nevertheless, this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Final judgment is a decision that "ends the litigation on the merits and leaves nothing for the court to do but execute judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Additionally, this Court created four categories where a decision on a federal issue is

treated as a final judgment for jurisdictional purposes. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 (1975).

Petitioner's case presents all four recognized circumstances, rendering final the California Court of Appeal's judgment on the federal suppression issue for jurisdictional purposes. *See Florida v. Thomas*, 532 U.S. 774, 777 (2001), discussing *Cox Broadcasting Corp.*, 420 U.S. 469.

The first category involves cases where proceedings are pending, including trial, but the federal issue is conclusive or the judgment of the state court on the federal issue is final. *Mills v. State of Ala.*, 384 U.S. 214 (1966). In petitioner's case, by remanding and dismissing review in petitioner's case, the Supreme Court of California has made the Court of Appeal, First Appellate District's judgment on the Fourth Amendment issue final. The decision is now binding and must be followed by all inferior state courts of California. *Auto Equity Sales, Inc. v. Superior Court of Santa Clara Cnty.*, 369 P.2d 937 (Cal. 1962). Although the decision "did not literally end the case[,] [i]t did . . . render a judgment binding upon," all lower trial courts. *Mills*, 384 U.S. at 217. Sending petitioner's case back to the trial court for finality will conclude in the same result, and "another appeal to the [state appellate court] for it to formally repeat its rejection of [petitioner's] constitutional contentions[.]" *Mills*, 384 U.S. at 217. In *Thomas*, 532 U.S. at 777-778, this Court denied review of a pending suppression motion in finding that the first *Cox* category had not been met. However, this

Court noted that the matter had not reached finality as the Florida Supreme Court remanded the case for application of legal principles and "further factfinding[.]" *Id.* at 778. Here, no "further factfinding" on the Fourth Amendment issue remains. To require a trial in order to obtain review of the Fourth Amendment issue would be a "completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets." *Mills*, 384 U.S. at 217-218.

The second category involves cases where the federal issue decided by a court of last resort will survive and ultimately warrant Supreme Court review. *Cox Broadcasting Corp*., 420 U.S. at 480. These are the special category of cases where the constitutional issue "cannot be mooted by [pending] proceeding[s]." *Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963). The issue in petitioner's case will survive and ultimately warrant Supreme Court review regardless of the outcome of future state court proceedings. *Cox Broadcasting Corp*., 420 U.S. at 480. Central to the issue in this case is a blood draw to determine blood alcohol content (BAC) conducted after a DUI arrest that involves Fourth Amendment consent and search incident arrest exceptions to the warrant requirement. In the United States in 2018, there were 1,001,329 driving under the influence arrests. Fed. Bureau of Investigations, *Table 29 Estimated Number of Arrests United States 2018*, https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/tables/table-29/ (last visited Nov. 21, 2019). Given that every state has an implied consent law and the documented high annual volume of

chemical tests, the Fourth Amendment issues involved in petitioner's case will require resolution by this Court.

The third category involves cases where the federal claim has been finally decided, with further proceedings pending, but review on the federal issue is now foreclosed. *Cox Broadcasting Corp*., 420 U.S. at 481. These cases involve a situation where "the governing state law would not permit him again to present his federal claims for review." *Id.* Petitioner has exhausted all other review of the Court of Appeal's decision. If convicted, he cannot appeal the judgment of the motion to suppress to the Appellate Division of the Contra Costa County Superior Court as the Court of Appeal affirmed the Appellate Division's prior decision. Following a conviction, petitioner cannot revisit this already litigated and decided federal claim on appeal. Petitioner's sole issue in this appeal is a constitutional contention on which the Supreme Court of California granted and then summarily dismissed review. Furthermore, petitioner cannot raise his suppression challenge via a federal habeas petition. *Stone v. Powell*, 428 U.S. 465 (1976).

Finally, the fourth category involves cases where "a refusal immediately to review the state-court decision might seriously erode federal policy[.]" *Cox Broadcasting Corp.*, 420 U.S. at 482-483. Review in this case is paramount as it involves Fourth Amendment constitutional protections. A denial of this petition would further erode the Court's decisions on announced Fourth Amendment principles. In this case, the California

Court of Appeal held that an officer can command submission to a warrantless search, and that submission will lawfully transform the compelled blood test to a lawful search incident to arrest. Petitioner's case erodes this Court's Fourth Amendment holding that mere acquiescence to a claim of authority is not voluntary consent, *Bumper v. North Carolina*, 391 U.S. 543 (1968), and that blood draws cannot be conducted as a search incident to arrest. *Birchfield v. North Dakota*, 136 S.Ct. 2149, 2160 (2019). This Court should grant certiorari to protect Fourth Amendment principles.

CONSTITUTIONAL PROVISION 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."

INTRODUCTION

Petitioner's case involves a scenario that occurs every day in the United States. An arresting officer informs a person arrested for a DUI that he or she is required to submit to a breath or blood chemical test to measure blood alcohol content under the state's

implied consent law. The arrestee must decide to comply with a test of blood or breath, or suffer, as a consequence of refusal, a suspension of driving privileges.

"[A]ll 50 States have adopted implied consent laws" that require drivers suspected of drunk driving to submit to BAC testing. *Missouri v. McNeely*, 569 U.S. 141, 161 (2013). Drivers most commonly submit to BAC testing by providing blood or breath samples. *See Birchfield v. North Dakota*, 136 S.Ct. 2160, 2167-2168 (2016). This Court has "referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply[.]" *Birchfield*, 136 S.Ct. at 2185.

Nonetheless, this Court has yet to directly address how implied consent laws harmonize with Fourth Amendment protections. The Court's *Birchfield* holding did not rely on implied consent law, rather it applied the doctrine of search incident to arrest. 136 S.Ct. at 2165.

The Court's legal conclusions in the *Birchfield* cases were unequivocal: a warrantless blood draw cannot be justified as a search incident to arrest or resulting from implied consent. 136 S.Ct. at 2186. Petitioner Bernard's conviction was lawful because he refused a breath test, which he had no right to refuse. *Id.* The Court remanded petitioner Beylund's case to the lower court to determine if consent was voluntary under the totality of the circumstances where he submitted to a

blood test only after police told him that the law required submission.

State courts struggle to interpret and apply *Birchfield* to suppression motions involving blood draws conducted after lawful DUI arrests. This struggle has caused confusion and conflicting opinions among state courts.

Post-*Birchfield*, six states have binding case law holding that implied consent laws are per se exceptions to the warrant requirement.

Twenty-nine states have applied a totality of the circumstances analysis in evaluating implied consent. Among these states are diverging opinions analyzing the existence and specific language of implied consent laws and admonishments.

In petitioner's case, California's Court of Appeal, First Appellate District deviated from other courts' application of a voluntary consent analysis, and instead justified the taking of a blood sample under the search incident to arrest exception to the warrant requirement. The decision also conflicted with three state courts of appeal which rejected search incident to arrest as a justification for a warrantless blood draw.

This case's procedural history highlights state courts' struggles with applying this Court's Fourth Amendment decisions in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), and *Birchfield* as they pertain to blood draws performed after a DUI arrest.

STATEMENT OF THE CASE

After being arrested for a DUI, a police officer told petitioner that "he was required to submit to either a blood or breath test." The police officer did not inform petitioner, as required by California Vehicle Code § 23612(a)(1)(A)(D) of the administrative consequences of refusal. The statute states that an arrestee "shall be told that his or her failure to submit to . . . the required breath, blood, or urine test will result in . . . administrative suspension" of the person's privilege to operate a motor vehicle for a period of one year. CAL. VEH. CODE, § 23612(a)(1)(A)(D). The arresting officer also did not advise petitioner that he could refuse. The officer did not mention or reference California's Implied Consent Law to petitioner. Petitioner submitted to a blood draw.

The trial court granted petitioner's suppression motion finding that his submission to a blood draw was not the product of voluntary consent.

The Contra Costa County district attorney filed an appeal to the Contra Costa County Appellate Division of the Superior Court.[1]

In a split decision, the Appellate Division reversed the trial court's order granting suppression: two judges

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[1] Section 1538.5 subdivision (j) of the California Penal Code permits the prosecution to appeal a superior court's granting of a motion to suppress to the appellate division of the superior court. The Constitution of California, article 6, sections 4 and 11, provide the appellate division of each superior court with appellate jurisdiction.

adopted two theories to justify reversal, and the third judge rejected the majority's decision. Each judge adopted a different path of reasoning.

One judge concluded that the trial judge erred by not applying a totality of the circumstances analysis to consent. This judge held that the officer was not constitutionally required to advise petitioner of the right to refuse. This judge further reasoned no consent or warrant was required because petitioner "voluntarily chose a blood draw rather than a breath test."

The second judge found that petitioner did not consent but held that his voluntary election of a blood test did "not implicate *McNeely*'s warrant requirement because the defendant is not being compelled to undergo a blood test rather than a breath test."

The third Appellate Division judge rejected the majority's conclusions and agreed with the trial court's finding that petitioner did not consent.

California's Court of Appeal, First Appellate District, affirmed the Appellate Division's ruling and held that despite *Birchfield*, petitioner's blood draw was a valid search incident to arrest because he "freely and voluntarily [chose] a blood test over a breath test." *People v. Gutierrez*, 238 Cal.Rptr.3d 729, 731 (Cal. Ct. App. 2018), *reh'g denied* (Oct. 29, 2018), *review dismissed*, *cause remanded*, 447 P.3d 669 (Cal. 2019).

The Supreme Court of California granted review pending that court's review and decision in *People v. Arredondo*, 371 P.3d 240 (Cal. 2016).[2]

The Supreme Court of California dismissed and remanded *People v. Arredondo*, 447 P.3d 668 (Cal. 2019) following this Court's ruling in *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019).

The Supreme Court of California dismissed and remanded petitioner's appeal, in light of its dismissal of *Arredondo*. *People v. Gutierrez*, 447 P.3d 669 (Cal. 2019).

This case's procedural history demonstrates state courts' difficulties in the application of *Birchfield*. The three judges of the Appellate Division adopted three divergent sets of reasoning in evaluating the constitutionality of petitioner's blood draw. The Court of Appeal rejected the Appellate Division's voluntary consent analysis and instead interpreted *Birchfield* to hold

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[2] The Supreme Court of California limited review in *Arredondo* to the following questions: "Did law enforcement violate the Fourth Amendment by taking a warrantless blood sample from defendant while he was unconscious, or was the search and seizure valid because defendant expressly consented to chemical testing when he applied for a driver's license (*see* CAL. VEH. CODE, § 13384 (1999)) or because defendant was 'deemed to have given his consent' under California's implied consent law (CAL. VEH. CODE, § 23612 (2019))? Did the People forfeit their claim that defendant expressly consented? If the warrantless blood sample was unreasonable, does the good faith exception to the exclusionary rule apply because law enforcement reasonably relied on CAL. VEH. CODE, § 23612 (2019) in securing the sample?" *Arredondo*, 371 P.3d at 240.

that petitioner's blood draw was justified as a search incident arrest exception to the Fourth Amendment.

This case presents an unequaled opportunity for this Court to resolve important constitutional questions and secure uniformity in Fourth Amendment law.

REASONS FOR GRANTING THE PETITION

I. State Courts Split in the Application of the Fourth Amendment to Implied Consent Laws

"[E]very state . . . ha[s] what are termed 'implied consent laws.'" *Birchfield*, 136 S.Ct. at 2166. These laws, essentially, require a person to submit to a blood alcohol chemical test after a lawful arrest for driving under the influence. Yet, state appellate courts are deeply divided as to how Fourth Amendment principles of consent and search incident to arrest apply to implied consent laws.

Six states have held that implied consent laws supply Fourth Amendment consent, such that police may take a suspected DUI motorist's blood without a warrant.

Twenty-nine states apply a totality of the circumstances analysis to assess whether a DUI arrestee voluntarily consented to a chemical test following an implied consent advisement.

Additionally, petitioner's case created a division with other state courts in holding that a blood draw may be administered incident to a lawful DUI arrest.

A. Six State Appellate Courts Have Held that the Implied Consent Statute Is a Per Se Exception to the Warrant Requirement

Consent is an exception to the Fourth Amendment warrant requirement if it is voluntary and not the product of duress or coercion. *Schneckloth*, 412 U.S. at 227. Consent is not voluntary if, under all the circumstances, the consent was coerced, or granted only in submission to a claim of lawful authority. *Bumper*, 391 U.S. at 548.

Notwithstanding these principles, courts in Colorado, Kentucky, Illinois, Missouri, Ohio, and Virginia have held that implied consent laws serve as a per se exception to the warrant requirement. *People v. Simpson*, 392 P.3d 1207, 1209 (Colo. 2017); *Com. v. Hernandez-Gonzalez*, 72 S.W.3d 914 (Ky. 2002); *People v. Hayes*, 121 N.E.3d 103 (Ill. App. Ct. 2018); *State v. Reeter*, 582 S.W.3d 913 (Mo. Ct. App. 2019); *State v. Hoover*, 916 N.E.2d 1056 (Ohio 2009); *Wolfe v. Commonwealth*, 793 S.E.2d 811 (Va. Ct. App. 2016).

Post-*Birchfield*, the Supreme Court of Colorado has held that a citizen's act of driving provides actual consent to a blood draw. "By driving in Colorado, Simpson consented to the terms of the Express Consent Statute, including its requirement that he submit to a

blood draw." *People v. Simpson*, 392 P.3d at 1209. The court went on to hold that "Simpson's prior statutory consent satisfies the consent exception to the warrant requirement." *Id.*

The Court of Appeals of Virginia in *Wolfe*, 793 S.E.2d at 811, held that appellant's blood draw was lawful under the "implied consent exception" to the warrant requirement due to its interpretation that *Birchfield* applies only to limited factual circumstances. The court believed that because the appellant was not threatened with criminal prosecution under implied consent, "the [U.S.] Supreme Court's restrictions on warrantless blood draws under the implied consent exception in *Birchfield* does not apply." *Id*. at 815.

The Supreme Court of Kentucky has not revisited cases involving blood draws pursuant to a DUI arrest post-*McNeely* or post-*Birchfield*. In 2002 the court held that under the state's implied consent legislative scheme, "consent is implied by law[.]" *Hernandez-Gonzalez*, 72 S.W.3d at 918. No Kentucky court has expressly overruled *Hernandez-Gonzalez*.

B. Twenty-Nine States Apply a Totality of the Circumstances Analysis in Determining Whether a Blood Draw Conducted Pursuant to Implied-Consent Satisfies the Fourth Amendment

Twenty-nine states apply a totality of the circumstances test to DUI blood draws as they relate to

implied consent laws. *Anderson v. State*, 246 P.3d 930 (Alaska Ct. App. 2011); *State v. Valenzuela*, 371 P.3d 627, 632-634 (Ariz. 2016); *Dortch v. State*, 544 S.W.3d 518 (Ark. 2018); *People v. Harris*, 184 Cal.Rptr.3d 198, 207 (Cal. Ct. App. 2015); *State v. Doyle*, 55 A.3d 805, 812 (Conn. Ct. App. 2012); *Flonnory v. State*, 109 A.3d 1060, 1064 (Del. 2015); *Williams v. State*, 771 S.E.2d 373 (Ga. 2015); *State v. Yong Shik Won*, 372 P.3d 1065, 1075 (Haw. 2015); *State v. Charlson*, 377 P.3d 1073, 1080 (Idaho 2016); *State v. Nece*, 367 P.3d 1260, 1266 (Kan. 2016), *on reh'g*, 396 P.3d 709 (Kan. 2017); *State v. Newsom*, 250 So.3d 894, 899 (La. Ct. App. 2017); *State v. LeMeunier-Fitzgerald*, 188 A.3d 183, 190 (Me. 2018), *modified* (July 17, 2018), *cert. denied*, 139 S.Ct. 917 (2019); *People v. Stricklin*, LC No. 2016-0004986-AR, 2019 WL 1745975, at *2 (Mich. Ct. App. 2019); *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013); *John v. State*, 189 So.3d 683, 688 (Miss. Ct. App. 2015); *City of Great Falls v. Allderdice*, 390 P.3d 954, 957 (Mont. 2017); *State v. Modlin*, 867 N.W.2d 609, 618 (Neb. 2015); *State v. Vargas*, 404 P.3d 416, 422 (N.M. 2017); *State v. Romano*, 800 S.E.2d 644, 652-653 (N.C. 2017); *State v. Vetter*, 923 N.W.2d 491, 497 (N.D. 2019); *Commonwealth v. Myers*, 164 A.3d 1162, 1180-1181 (Pa. 2017); *State v. Fierro*, 853 N.W.2d 235, 241-242 (S.D. 2014); *State v. Reynolds*, 504 S.W.3d 283, 306 (Tenn. 2016); *State v. Villareal*, 475 S.W.3d 784, 799-800 (Tex. Crim. App. 2014); *State v. Tripp*, 197 P.3d 99, 104 (Utah Ct. App. 2008); *State v. Baird*, 386 P.3d 239 (Wash. 2016); *State v. McClead*, 566 S.E.2d 652 (W.Va. 2002), *overruled on other grounds by State v. Stone*,

728 S.E.2d 155 (W.Va. 2002); *State v. Blackman*, 898 N.W.2d 774 (Wis. 2017).

State courts have diverged in the weight given under the totality of circumstances analysis to the existence of implied consent law and the language of implied consent admonishments.

The Arizona Supreme Court in *Valenzuela*, 371 P.3d at 632-634, considered Arizona's implied consent law and held that the officer's explanation to a DUI arrestee that "Arizona law required him to submit and complete testing to determine [blood alcohol content]" invoked "lawful authority and effectively proclaimed that Valenzuela had no right to resist the search." Therefore, the court found involuntary consent.

California's Court of Appeal, Fourth Appellate District has concluded that "free and voluntary submission to a blood test, after receiving an advisement under the implied consent law, constitutes actual consent to a blood draw under the Fourth Amendment." *Harris*, 184 Cal.Rptr.3d at 209. Applying that standard, another division of the Fourth District, in *People v. Balov*, found voluntary consent where an arrestee was told by a police officer "that per California Law [he] was required to submit to a chemical test." 233 Cal.Rptr.3d 235, 241 (Cal. Ct. App. 2018), *reh'g denied* (June 13, 2018), *review dismissed, cause remanded*, 447 P.3d 669 (Cal. 2019). The *Balov* court reasoned that the failure to communicate consequences of refusal did not make the statement "any more or less

coercive than if the information had been provided." *Id*. at 242.

The Georgia Supreme Court held that voluntary consent cannot be found per se by a simple reading of the implied consent warning. *Olevik v. State*, 806 S.E.2d 505, 521 (Ga. 2017). Additionally, a notice of the right to refuse is important to convey to a suspect "that they have a right to refuse to cooperate." *Id*. at 522.

The Hawaii Supreme Court, in interpreting *Schneckloth*, adopted a standard that voluntariness equals a "free and unconstrained choice." *Yong Shik Won*, 372 P.3d at 1075. The court held consent was involuntary because the arrestee was told that refusal would constitute commission of a crime. *Id*. at 1083. The court did not address how this factor weighed against other factors and did not explicitly state its holding as a per se rule.

The Supreme Court of Idaho adopted a totality of the circumstances analysis, but held that (1) an officer need not inform an arrestee of the right to refuse, (2) need not affirmatively ask for consent, and (3) consent is voluntary under implied consent "until affirmatively withdrawn." *Charlson*, 377 P.3d at 1080.

The Supreme Court of Kansas in *State v. Nece* stressed that "falsely claiming authority to impose consequences for refusing to submit to testing [under implied consent] can be coercive[.]" 367 P.3d at 1260. The court held consent to a blood draw involuntary solely "because it was obtained by means of an inaccurate, and therefore coercive, advisement." *Id.*

The Supreme Court of Maine in *LeMeunier-Fitzgerald*, 188 A.3d at 190-192, ruled that an implied consent statute imposing a duty to submit to a blood test upon pain of committing a criminal offense would be unconstitutionally coercive, and "could . . . undermine the voluntariness of the driver's consent[.]"

The Supreme Court of Nebraska concluded that "existence of an implied consent statute is one circumstance a court may and should consider in determining voluntary consent to a blood test." *Modlin*, 867 N.W.2d at 619. However, the court did not explain why this factor should be considered.

The Supreme Court of North Carolina applied a totality of the circumstances test to blood draws administered under implied consent. *Romano*, 800 S.E.2d at 653. The court held that the state's implied consent statute, and a person's decision to drive on a public road, are factors to be considered, but the court did not explain the relevance of these factors.

In *State v. Medicine*, 865 N.W.2d 492, 496-497 (S.D. 2015), the South Dakota's high court held that the language of a DUI advisement is relevant to an analysis of the totality of the circumstances. The court noted that the advisement card stated, "a person who operates *has consented* to the withdrawal of blood" and the officer told the appellant, "I request that you *submit* to the withdrawal of your _____ (blood, breath, bodily substance)." *Id*. at 496, emphasis in original. For those reasons, the court held that "Medicine did not know he had the right to refuse consent and that he actually

believed he was required to give a blood sample." *Id*. at 497.

C. One State Appellate Court Ruled a Blood Draw Is a Constitutional Search Incident to Arrest, While Three State Appellate Courts Rejected this Principle

As mentioned above, the majority of courts apply a Fourth Amendment voluntary consent analysis to implied consent blood draws. California's Court of Appeal, First Appellate District in petitioner's case is an outlier in holding that a blood draw is constitutional as a search incident to arrest. *Gutierrez*, 238 Cal.Rptr.3d at 730-731.

Courts in Kansas, Michigan, and Texas have categorically rejected that a blood draw may be justified as a search incident to a lawful arrest. Kansas interpreted *Birchfield* as "indicating the search-incident-to-lawful arrest exception would not categorically apply to a search for evidence of blood alcohol content." *State v. Ryce*, 396 P.3d 711, 713 (Kan. 2017). The Michigan Court of Appeals applied *Birchfield* to prohibit blood tests incident to arrest due to their highly intrusive nature. *Stricklin*, 2019 WL 1745975, at *1. Only two exceptions to the warrant requirement apply to blood draws: exigency and consent. *Id*. The Court of Criminal Appeals of Texas rejected that a warrantless blood draw constitutes a search incident to arrest. *Villareal*, 475 S.W.3d at 807-808.

II. The Decision Is Wrong

The Court of Appeal's decision is wrong in this case because it directly conflicts with *Birchfield*'s holding that blood tests seized incident to a DUI arrest are not constitutional exceptions to the warrant requirement. As other courts have recognized, a blood draw only satisfies the Fourth Amendment's reasonableness requirement if conducted pursuant to (1) a warrant, (2) an exigency, or (3) voluntary consent.

A. *Birchfield*'s Prohibition of Warrantless DUI Blood Draws Is a Categorical Rule

The "Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving but not warrantless blood tests." *Birchfield*, 136 S.Ct. at 2163. This Court unequivocally concluded that "the search incident to arrest doctrine does not justify the warrantless taking of a blood sample." *Id*. at 2160. Search incident to arrest requirements "apply categorically rather than in a case specific fashion." *Id*. at 2174, internal quotations omitted. A search incident to arrest involves a police officer making "necessarily quick ad hoc judgment[s] which the Fourth Amendment does not require to be broken down." *United States v. Robinson*, 414 U.S. 218, 235 (1973), internal quotations omitted. Therefore, the search incident to arrest doctrine operates by "categorical rule[s]" that are "needed to give police guidance." *Id.* This Court was clear that "the Fourth Amendment allows warrantless breath tests, but as a general rule does not allow

warrantless blood draws, incident to a lawful drunk-driving arrest." *Birchfield*, 136 S.Ct. at 2163 n.8.

Certain categories of searches may not be justified incident to arrest. *See Riley v. California*, 573 U.S. 373 (2014) (prohibiting warrantless searches of cell phones incident to arrest). When the founding era does not provide guidance, a court must weigh "the degree [the search] intrudes upon an individual's privacy, and, on the other, the degree to which is needed for the promotion of legitimate government interests." *Id*. at 385. This balancing test must be conducted by the courts to provide police with guidance as to which searches are permitted incident to arrest. *Robinson*, 414 U.S. at 235.

Because the significant privacy concerns involved in blood tests outweigh the government's interest in deterring drunk drivers, blood tests may not be administered incident to a lawful DUI arrest. *Birchfield*, 136 S.Ct. at 2185. By contrast, breath tests are a separate category of searches, which are significantly less intrusive, serve law enforcement interests, and may be administered incident to arrest. *Id.*

The Court of Appeal in this case held that *Birchfield*'s "broad language that a blood test may not be administered as a search incident to arrest" did not apply because this Court has yet to address the factual circumstances and "category of cases into which Gutierrez's fits." *Gutierrez*, 238 Cal.Rptr.3d at 735,

internal quotations and citations omitted.[3] The court rejected *Birchfield*'s clear guidance that the Fourth Amendment principle prohibits blood draws incident to a DUI arrest.

The Court of Appeal in this case deemed *Birchfield*'s decision as dictum and "not authority." *Gutierrez*, 238 Cal.Rptr.3d at 735, quoting *People v. Knoller*, 59 Cal.Rptr.3d 157 (Cal. 2007) ("[L]anguage in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered.").

B. Voluntariness Does Not Apply to a Search Incident to Arrest Analysis

The Court of Appeal in this case also erred by applying a voluntariness analysis to search incident to arrest. The court held the search incident to arrest exception applies "if a DUI suspect freely and voluntarily chooses a blood test over a breath test[.]" *Gutierrez*, 238 Cal.Rptr.3d at 731.

The only facts relevant to search incident to arrest analysis are the lawfulness of the arrest and type of search performed. "[T]he fact of custodial arrest . . . gives rise to the authority to search," *Robinson*, 414 U.S. at 236. In other words, an arrest acts as the

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[3] This is the same reasoning the Court of Appeals of Virginia used in *Wolfe* to find an implied-consent exception to the warrant requirement. *See Wolfe*, 793 S.E.2d at 815.

condition precedent that authorizes an officer to conduct a category of search.

This Court explained in *Birchfield* that the second part of the inquiry is whether the category of search was constitutionally permitted incident to arrest. The significant privacy concerns inherent to blood draws necessitate that law enforcement may not administer such searches incident to arrest. *Birchfield*, 136 S.Ct. at 2170.

The Court of Appeal in this case applied an erroneous voluntariness analysis and categorized the search as a fictional, combined "breath-or-blood test." *Gutierrez*, 238 Cal.Rptr.3d at 732, 734. In reality, blood and breath tests are two distinct searches that implicate distinct Fourth Amendment considerations. A blood draw is not a search unless and until law enforcement conducts or orders an agent to conduct a "piercing [of] the skin" to obtain "a sample . . . from which it is possible to extract information[.]" *Birchfield*, 136 S.Ct. at 2185. A breath test is not a search until an arrestee inserts his mouth over a mouthpiece and provides deep lung air. *Id*. at 2164.

Furthermore, the Court of Appeal held that because the arresting officer provided a choice between breath and blood testing, petitioner's submission to a blood test was a voluntary choice. This contradicts this Court's holding in *Schneckloth*: voluntariness must be the product of "free and unconstrained choice by its maker." 412 U.S. at 225. Petitioner's choice was constrained to two options because the arresting officer

failed to inform him of the consequences of refusal, or the right to refuse a blood test.

The voluntariness analysis is also wrong because it rests on the "erroneous assumption that the State could permissibly compel both a blood and breath test." *Birchfield*, 136 S.Ct. at 2186. As the court stated, "[f]rom the perspective of the suspect subjected to a search, there is a material difference between being compelled to take a blood test and being compelled to take *either* a breath or blood test[.]" *Gutierrez*, 238 Cal.Rptr.3d at 735, emphasis in original. The government cannot compel a blood test, absent a warrant or exigency. *See McNeely*, 569 U.S. at 143. A government's power to compel under implied consent includes the power to force compliance with the administrative consequence of revoking or suspending driving privileges, or criminal prosecution for refusing a breath test. This Court approved of these administrative consequences of refusal and the "general concept of implied-consent laws that impose civil penalties . . . on motorists who refuse to comply." *Birchfield*, 136 S.Ct. at 2185. The government's compelled seizure of a DUI arrestee's breath does not offend the Fourth Amendment. On the other hand, the Fourth Amendment does not permit a person to be "criminally prosecuted for refusing a warrantless blood draw, and therefore . . . cannot be justified as a search incident to arrest[.]" *Id.* Justifying the blood draw at issue as a search incident to arrest also implies that petitioner would not have had the constitutional right to withdraw or delimit consent. *Florida v. Jimeno*, 500 U.S. 248 (1991). If an officer may conduct

a search incident to arrest, then a citizen will have "no right to refuse it." *Birchfield*, 136 S.Ct. at 2186.

III. The Question Presented Is Important, and This Case Presents an Ideal Vehicle for Deciding It

State courts are struggling to apply Fourth Amendment analysis to government actions pursuant to implied consent laws. The conflicting and diverging opinions among petitioner's trial court, Appellate Division, and Court of Appeal, demonstrate the challenges in applying Fourth Amendment principles to implied consent blood draws.

The questions presented are also important due to the annual high number of DUI arrests. Nationally, in 2017, there were 990,678 driving under the influence arrests. Fed. Bureau of Investigations, *Table 29 Estimated Number of Arrests United States 2017*, https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-29/table-29 (last visited Nov. 21, 2019). In 2018, 1,001,329 people were arrested for driving under the influence. *Id*. There is no evidence suggesting a decrease in these arrests. It is probable that the number of chemical tests conducted every year are equal to or nearly equal to the number of arrests. This means that nearly one million chemical tests are conducted annually, which may be minimally intrusive like a breath test, or significantly intrusive like a blood draw.

Judicial scrutiny is paramount in cases involving one of the government's most invasive searches coupled with a citizen's possible misunderstanding of implied consent requirements. This Court has recognized that these laws do not "do what their popular name might seem to suggest . . . create actual consent to all the searches they authorize." *Mitchell*, 139 S.Ct. at 2533. Most citizens when confronted with a request by a police officer to submit to a search, regardless of whether the person is arrested or not, will not feel or understand the right to say no. A detective in one study estimated that over 90 percent of his warrantless searches were conducted by consent. Paul Sutton, *The Fourth Amendment in Action: An Empirical View of the Search Warrant Process*, 22 CRIM. L. BULL. 405, 415 (1986). In 2018, according to the Department of Justice, 57.7 percent of all traffic related searches were conducted with the driver's consent. U.S. Dep't of Justice, NCJ 234599, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008 (2011). However, the proportion is presumably higher since most consent searches likely go unreported as nothing incriminating is found, "or because the defendant plea bargained and thus no evidentiary issues were litigated." Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 214 n.7 (2001).

Police organizations have recognized that when officers seek to search community members' "person, belongings, vehicle, or home, a very thin line exists between voluntariness and coercion." GOV'T OF D.C., OFFICE OF POLICE COMPLAINTS, PCB, POLICY REPORT

#17-5: CONSENT SEARCH PROCEDURES 1–2 (2017). The ubiquitous nature of consent searches combined with the possible coercive nature of an implied consent admonishment including language that an arrestee is "required" to submit to a search, requires heightened constitutional scrutiny.

Lastly, uniformity in the law is required so that courts can provide police with bright line guidance on the constitutional parameters of implied consent blood draws following lawful DUI arrests. Facing inconsistent and conflicting state court decisions, law enforcement understandably struggle to apply Fourth Amendment boundaries to blood draws conducted pursuant to a DUI arrest. This struggle explains the high number of cases in state courts, and the recent number of cases this Court has reviewed in the last decade involving DUI blood draws. *See McNeely*, 569 U.S. at 141; *Birchfield*, 136 S.Ct. 2160; *Mitchell*, 139 S.Ct. 2525. Diverging court opinions create diverging police actions.

This case is an ideal vehicle to address Fourth Amendment issues related to implied consent. As the Court of Appeal recognized, petitioner's case involves a situation "that arises every day in California. A law enforcement officer arresting someone for driving under the influence informs the suspect that he or she is required to submit to a breath test or blood test to measure blood alcohol content[.]" *Gutierrez*, 238 Cal.Rptr.3d at 730. The recurrence of these issues throughout all jurisdictions necessitate that this Court weigh in and

introduce uniform application of Fourth Amendment protections.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBIN LIPETZKY
Public Defender

MAYA NORDBERG
Deputy Public Defender
**Counsel of Record*

GILBERT RIVERA
Deputy Public Defender

ANTHONY GEDEON
Deputy Public Defender

CONTRA COSTA COUNTY
PUBLIC DEFENDER
800 Ferry Street
Martinez, CA 94553
(925) 335-8000
Maya.Nordberg@pd.cccounty.us