No.

IN THE

# Supreme Court of the United States

GERALD P. MITCHELL,

*Petitioner,*

v.

STATE OF WISCONSIN,

*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

In both *Missouri v. McNeely* and *Birchfield v. North Dakota*, this Court referred approvingly to "implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply" with tests for alcohol or drugs when they have been arrested on suspicion of driving while intoxicated. 569 U.S. at 141, 161 (2013); 136 S. Ct. 2160, 2185 (2016). But a majority of states, including Wisconsin, have implied-consent laws that do something else entirely: they authorize blood draws without a warrant, without exigency, and without the assent of the motorist, under a variety of circumstances—most commonly when the motorist is unconscious. State appellate courts have sharply divided on whether such laws comport with the Fourth Amendment.

The question presented is:

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

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The opinion of the Supreme Court of Wisconsin (App., *infra*, 1a-57a) is reported at 914 N.W.2d 151. The certification of the case to that court by the state court of appeals (App., *infra*, 58a-71a) is unreported. The opinion of the circuit court (App., *infra*, 72a-125a) is unreported.

## 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(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provides: "A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection, and if a law enforcement officer has probable cause to believe that the person has violated s. 346.63 (1), (2m) or (5) or a local ordinance in conformity therewith, or s. 346.63 (2) or (6) or 940.25, or s. 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 s. 346.63 (7), one or more samples specified in par. (a) or (am) may be administered to the person."

## STATEMENT

Without obtaining a warrant, police directed the taking of petitioner's blood while he was unconscious following his arrest for driving while intoxicated. There was no evidence of any exigency preventing the police from obtaining a warrant, and the state has disclaimed any reliance on the exigency exception to the warrant requirement.

Instead, the state relied on Wis. Stat. § 343.305(3)(b). That statute, part of Wisconsin's implied-consent law, allows the taking of a person's blood if the person is unconscious and the police have probable cause to suspect drunk driving.

Petitioner challenged the warrantless blood draw as contrary to the Fourth Amendment, but a divided Supreme Court of Wisconsin found no constitutional violation. The court could not agree on a rationale, however. Three justices would have held that the state's implied-consent law, by "deeming" motorists to have consented, supplies actual, constitutional consent to the taking of blood—that is, the implied-consent law is itself an exception to the warrant requirement. Two concurring justices opined that "the state can[not] waive the people's constitutional protections against the state" but nevertheless upheld the blood draw on the theory

that a blood draw from an unconscious drunk-driving suspect is, categorically, a lawful search incident to arrest. (The justices reached this conclusion despite this Court's holding, in *Birchfield*, that while breath tests are valid searches incident, blood draws are not. 136 S. Ct. at 2184 (2016).) Two dissenting justices agreed with the concurrence that statutes cannot "deem" constitutional consent into existence, but rejected the concurrence's search-incident theory. They would have suppressed the blood draw evidence.

The Wisconsin court's divisions reflect a nationwide controversy. Provisions like Wisconsin's are widespread: twenty-nine states have laws sanctioning warrantless blood draws from unconscious intoxicated driving suspects.[1] Since

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[1] *See* ALA.CODE 1975 § 32-5-192 (b); ALASKA STAT. § 28.35.035 (b); ARIZ. REV. STAT. ANN. § 28-1321 C; ARK. CODE ANN. § 5-65-202 (b); CAL. VEH. CODE § 23612(a)(5); COLO. REV. STAT. § 42-4-1301.1(8); FLA. STAT. § 316.1932(1)(c); GA. CODE ANN. § 40-5-55 (b); 625 ILL. COMP. STAT. 5/11-501.1 (b); IOWA CODE § 321J.7; KY. REV. STAT. ANN. § 189A.103(2); LA. REV. STAT. ANN. § 32:661 B; MD. CODE ANN., CTS & JUD. PROC. § 10-305 (c); MO. REV. STAT. § 577.033; MONT. CODE. ANN. 61-8-402 (3); NEV. REV. STAT. § 484C.160; N.H. REV. STAT. ANN. § 265-A:13; , N.M. STAT. ANN. § 66-8-108; N.C. GEN. STAT. § 20-16.2(b); OHIO REV. CODE ANN. § 4511.191 (4); OKLA. STAT. TIT. 47, §751; ORE. REV. STAT. § 813.140; S.C. CODE ANN. § 56-5-2950 (H); TEX. TRANSP. CODE ANN. § 724.014 (WEST); UTAH CODE ANN. § 41-6a-522; VT. STAT. ANN. § 1202 (a) (2); W. VA. CODE, § 17C-5-7 (a); WIS. STAT. § 343.305(3)(b); WYO. STAT. ANN. 1977 § 31-6-102 (c).

McNeely revived the warrant requirement for drunk-driving blood draws, seven states' appellate courts have struck down such provisions. Another seven states have struck down or limited related implied-consent provisions, or declared that such statutes cannot substitute for voluntary consent as an exception to the warrant requirement. On the other hand, six states (excluding Wisconsin) have held that implied-consent laws provide blanket Fourth Amendment consent to the taking of blood, so that neither a warrant nor exigent circumstances are required.

This case is an opportunity for the Court to resolve an important constitutional question: can state legislatures obviate the warrant requirement by "deeming" their citizens to have consented to Fourth Amendment searches?

### A. Factual Background

In May of 2013, petitioner Gerald P. Mitchell was arrested for operating while intoxicated. App., *infra*, 2a-3a. Officers took him first to the police station, but on the way there he became lethargic, and the police determined a breath test wouldn't be feasible. *Id.* at 5a. So, they took him to a hospital, where an officer read him a statutorily mandated form regarding the implied-consent law. *Ibid.* Petitioner was too incapacitated to indicate whether he consented or not, and was soon unconscious. His blood was drawn about an hour after his arrest. *Id.* at 6a. No warrant was sought. *Id.* at 5a.

### B. Procedural Background

Petitioner was charged with operating while intoxicated and with a prohibited alcohol

concentration. App., *infra*, 6a. He moved to suppress the blood test results on the ground that his blood was taken without a warrant and without exigent circumstances. *Ibid.* The state agreed there was no exigency, but argued that, by operation of statute, petitioner had consented to the test by driving, and had not withdrawn his consent. *Id.* at 4a, 117a. The trial court upheld the search, relying on the implied-consent statute. *Id.* at 4a, 121a-23a. The state introduced the test results at petitioner's jury trial, and he was convicted of both counts. *Id.* at 4a-5a.

Petitioner appealed the suppression decision, and the court of appeals certified the case to the Supreme Court of Wisconsin, noting 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." App., *infra*, 58a. It explained that while 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… it has yet to decide whether the 'implied consent' that flows from a statutory scheme constitutes actual Fourth Amendment consent." *Id.* at 63a-64a. 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. *Id.* at 64a.

The Supreme Court of Wisconsin accepted certification. It ultimately upheld the search by a 5-2 vote, but there was no majority for any rationale.

One three-justice bloc analogized a person's decision to drive to entering one of the "pervasively regulated businesses [or] closely regulated industries" that are subject to certain warrantless searches. App., *infra*, 12a-13a; *see Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970). It went on to assert that, because *Birchfield* had approved civil penalties for refusing consent to a blood draw, it had also (silently) approved statutes legislating consent into existence: "because it is constitutionally permissible to impose civil penalties as a consequence for refusing to submit to a blood draw… Wisconsin's implied-consent statutes… describe a context consistent with Birchfield where constitutionally sufficient consent to search arises through conduct." App., *infra*, 18a-19a.

Two concurring justices, in an opinion authored by Justice Daniel Kelly, "incorporate[d] in toto" his analysis from a prior case, *State v. Brar*, 898 N.W.2d 499 (Wis. 2017). App., *infra*, 34a-35a. In that case, he had refused to join the same three-justice bloc noted above because its discussion "misunderstands how our implied consent law functions, [saying] 'consent' implied by law is something voluntarily given when such a thing is impossible, [and] introduces a destructive new doctrine that reduces constitutional guarantees to a matter of legislative grace." *Brar*, 898 N.W.2d at 511.

Justice Kelly went on, in Brar, to call it

> a metaphysical impossibility for a driver to freely and voluntarily give "consent" implied by law. This is necessarily so because "consent" implied by law isn't given by the driver. If it is given by anyone, it is given by the legislature through the legal fiction of "deeming."… One only "deems" when the thing deemed did not really happen, but you intend to act as though it did. So it makes no sense to ask if the driver freely and voluntarily gave something he manifestly did not give in the first place.

*Id.* at 515-16.

Nevertheless, in the concurring opinion in *this* case, Justice Kelly held the blood draw constitutional even in the absence of actual consent. Though it is not completely clear, he appeared to conclude the taking of blood was a valid search incident to arrest, relying on his reading of *Birchfield*, *McNeely*, and *Schmerber v. California*, 384 U.S. 757 (1966). App., *infra*, 38a-42a.

Regarding the dissent's observation that *Birchfield* had said, regarding unconscious motorists, "the police may apply for a warrant if need be," Justice Kelly responded that *Birchfield*'s "central logic is actually self-contradictory" and that the Court had spoken "with two contradictory voices in one opinion" such that "the best we can do is follow its logic until it starts contending with itself." App., *infra*, 42a.

Finally, two justices dissented in an opinion by Justice Ann Walsh Bradley. The dissenters would have held that "'implied consent' is not the same as 'actual consent' for purposes of a Fourth Amendment search" and said by concluding otherwise, the lead

opinion would "create a statutory per se exception to the … warrant requirement." App., *infra*, 47a.

## REASONS FOR GRANTING THE PETITION

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

As noted above, twenty-nine states have "unconscious clauses" in their implied-consent laws. Appellate courts in seven states have held such clauses inconsistent with the Fourth Amendment. Courts in seven other states have ruled that different, but related, provisions of their implied-consent laws violated the Constitution in the same way: by authorizing blood draws regardless of a motorist's actual consent. On the other hand, the appellate courts of seven states have held that implied-consent laws supply actual, Fourth Amendment consent, such that police may take a suspected motorist's blood with no warrant, even in the absence of exigent circumstances.

#### A. Seven state appellate courts have held that provisions for warrantless blood draws of unconscious motorists are unconstitutional

Courts in Arizona, California, Georgia, Kansas, North Carolina, Pennsylvania and Texas have issued decisions that would have compelled a different result than the one the Wisconsin court reached. All have held that statutes purporting, in the name of "implied consent," to allow warrantless blood draws from unconscious motorists are unconstitutional.

Some courts have reasoned that blanket legislative declarations of "consent" simply have nothing to do with the individual, factual, voluntary consent this Court has established as a warrant exception. That is, equating the two is simple linguistic conflation—wordplay. Or, as the court said in *People v. Arredondo*, "A state legislature does not have the power to 'deem' into existence 'facts' operating to negate individual rights arising under the federal constitution." 199 Cal. Rptr. 3d 563, 574, (Cal. Ct. App. 2016), *rev'w granted and opinion superseded*, 371 P.3d 240 (Cal. 2016).

The *Arredondo* court called "implied consent" "a misleading, if not inaccurate, label in this context. Certainly consent sufficient to sustain a search may be 'implied' as well as explicit, but it is nonetheless *actual* consent, 'implied' only in the sense that it is manifested by *conduct* rather than words." *Id.* at 571 (emphasis in original). "Nothing here resembles this 'implied consent.' The mere operation of a motor vehicle is not a manifestation of *actual* consent to a later search of the driver's person. To declare otherwise is to adopt a construct contrary to fact." *Id.* (emphasis in original).

This was especially true, said the court, of drivers from out of state who happened to cross into California. "These drivers cannot be argued to have consented in fact to a search of their persons. They have not been asked to agree, or told that they have a choice, or apprised of the consequences that will flow from their conduct…. The statute makes their conduct the legal equivalent of consent regardless of their knowledge, intentions, or understanding." *Id.* at 573.

Likewise in *Williams v. State*, the Supreme Court of Georgia held that "mere compliance with statutory implied consent requirements does not, per se, equate to actual, and therefore voluntary, consent on the part of the suspect so as to be an exception to the constitutional mandate of a warrant." 771 S.E.2d 373, 377 (Ga. 2015). Following *Williams*, the court of appeals applied this rule in *Bailey v. State*, holding a driver's "implied consent was insufficient to satisfy the Fourth Amendment, and he could not have given actual consent to the search and seizure of his blood and urine, as he was unconscious." 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).

Relatedly, several courts have noted that these statutes deem searches "consensual" without requiring any assessment of whether a motorist's supposed consent is voluntary under the "totality of all the circumstances," as this Court has long required. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). Thus, the Supreme Court of North Carolina: "[t]reating [the statute] as an irrevocable rule of implied consent does not comport with the consent exception to the warrant requirement because such treatment does not require an analysis of the voluntariness of consent based on the totality of the circumstances." *State v. Romano*, 800 S.E.2d 644, 652 (N.C. 2017).

The Texas high court employed the same reasoning in *State v. Villarreal*, saying implied consent as a warrant exception cannot "be squared with the requirement that, to be valid for Fourth Amendment purposes, consent must be freely and voluntarily given based on the totality of the

circumstances, and must not have been revoked or withdrawn at the time of the search." 475 S.W.3d 784, 800 (Tex. Crim. App. 2014). (*Villareal* did not concern an unconscious motorist; the subsequent case of *State v. Ruiz* did, and the court reached the same result. 545 S.W.3d 687, 693 (Tex. App. 2018), *review granted* (Apr. 25, 2018).) *See also State v. Dawes*, No. 111310, 2015 WL 5036690, slip op. at 5 (Kan. Ct. App. Aug. 21, 2015) (under implied-consent statute, officer contemplates only certain statutory facts, rather than "the rest of what was going on … 'the totality of the circumstances'").

And, in *Commonwealth v. Myers*, the Supreme Court of Pennsylvania interpreted that state's implied-consent statute not to authorize blood draws from unconscious motorists. 164 A.3d 1162, 1172 (Pa. 2017). However, it went further, saying that if it *had* interpreted the statute this way, it would be unconstitutional, because such "consent" does not satisfy the requirement that "voluntariness is evaluated under the totality of the circumstances." *Id.* at 1176.

Courts have also observed that implied-consent statutes authorizing blood draws create *per se*, categorical exceptions to the warrant requirement—a species of exception this Court has repeatedly rebuffed, most recently in *McNeely*, 569 U.S. at 158. Thus, per the North Carolina court:

> [I]n *McNeely*, though [it] only specifically addressed the exigency exception to the warrant requirement, the Court spoke disapprovingly of per se categorical exceptions to the warrant requirement, *id.* ("While the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly

> broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake.... [A] case-by-case approach is hardly unique within our Fourth Amendment jurisprudence.").

*Romano*, 800 S.E.2d at 653 (citations omitted); see also *Dawes*, No. 111310, 2015 WL 5036690, slip op. at 5 (informed-consent statutes create "a categorical exception to the warrant requirement, and they accordingly run afoul of the ruling in *McNeely*"); *State v. Havatone*, 389 P.3d 1251, 1255 (Ariz. 2017), ("unconscious clause" could not support a blood draw absent "case-specific exigent circumstances").

### B. Courts in seven other states have held that implied-consent laws do not supply the consent required by the Fourth Amendment

Though Petitioner has not counted them among the seven states squarely holding implied-consent statutes cannot validate a warrantless blood draw from an unconscious motorist, seven other jurisdictions have concluded, in other contexts, that implied-consent statutes cannot supply the voluntary consent the Fourth Amendment requires.

For example, South Dakota's implied-consent law simply authorizes the taking of blood: conscious or not, a motorist has no opportunity under the statute to refuse. S.D. CODIFIED LAWS § 32-23-10. So in *State v. Fierro*, a case involving a conscious motorist who did not, factually, consent to a blood draw, the Supreme Court of South Dakota held the law unconstitutional because it authorized "consent" searches where actual, "free and voluntary consent" was absent. 853 N.W.2d 235, 241 (S.D. 2014).

Similar results were had in *People v. Turner*, 97 N.E.3d 140, 152 (Ill. App. Ct. 2018) and *Byars v. State*, 336 P.3d 939, 946 (Nev. 2014).

Other courts have struck down statutory provisions authorizing implied-consent blood draws before going on to consider whether, under the totality of the circumstances, the driver actually gave voluntary consent. *Flonnory v. State*, 109 A.3d 1060, 1065 (Del. 2015); *State v. Pettijohn*, 899 N.W.2d 1, 26–27 (Iowa 2017) ("[T]he clear implication of the *McNeely* decision is that statutorily implied consent to submit to a warrantless blood test under threat of civil penalties for refusal to submit does not constitute consent for purposes of the Fourth Amendment."); *State v. Modlin*, 867 N.W.2d 609, 619 (Neb. 2015).

Finally, one court, faced with a statute that facially authorized blood draws without regard to actual consent, found the blood draw at issue unlawful but refrained from invalidating the statute, deciding instead that the its language could be read to authorize *warranted* searches. *State v. Wells*, No. M2013-01145-CCA-R9CD, 2014 WL 4977356, slip op. at 13, 19 (Tenn. Crim. App. Oct. 6, 2014).

### C. Six states (again excluding Wisconsin) have held that implied-consent laws constitute an exception to the warrant requirement, at least with respect to unconscious drivers

In contrast to the decisions discussed above, other states' courts have determined that implied-consent laws can provide a *per se* exception to the warrant requirement. These courts' analyses have

typically viewed *Birchfield* as blessing (or at least not forbidding) this conclusion.

The most cited of these decisions is *People v. Hyde*, 393 P.3d 962 (Colo. 2017), another case involving an unconscious motorist. There, the supreme court relied on *Birchfield*'s sanctioning of "the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, *and nothing we say here should be read to cast doubt on them*." *Hyde*, 393 P.3d at 968 (emphasis added by Colorado court) (citing *Birchfield*, 136 S.Ct. at 2185).

The court allowed that *Birchfield* had rejected implied-consent laws imposing criminal penalties for refusal, but noted that Colorado's imposed only civil ones. From this, the court concluded (without further explanation) that because legislatures may levy civil penalties on motorists who refuse a blood draw, they may also simply *authorize* such blood draws, regardless of actual consent. *Id.* (The Court of Appeals of Virginia took the same route on the way to announcing an "implied consent exception to the search warrant requirement." *Wolfe v. Commonwealth*, 793 S.E.2d 811, 814-15 (Va. Ct. App. 2016).).

In a discussion echoed by the three-justice lead opinion in petitioner's case, App., *infra*, 10a-13a, three concurring justices in *Hyde* noted *Birchfield*'s reference to *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). *Hyde*, 393 P.3d at 971-72 (Eid, J., concurring) (citing *Birchfield*, 136 S. Ct. at 2185). From this one citation, the concurrence went on to equate driving on a road to operating a "highly regulated business[]"

such that a driver's voluntary consent could be inferred from "context." *Id.* The Florida appellate court cited both *Hyde*'s majority and its concurrence with approval, and reached the same result. *McGraw v. State*, 245 So. 3d 760, 767 (Fla. Dist. Ct. App. 2018), *review granted*, No. SC18-792, 2018 WL 3342880 (Fla. July 9, 2018).

Three other courts have raised distinct rationales for allowing warrantless searches pursuant to implied-consent statutes. First, the high court of Oklahoma held that its statute—which authorized warrantless blood draws only in cases of an accident involving death or great bodily injury—created an acceptable *per se* exigency, as distinct from the *per se* exigency this Court rejected in *McNeely*. *Cripps v. State*, 387 P.3d 906, 909 (2016), *cert. denied*, 137 S. Ct. 2186, (2017).

Meanwhile the Court of Appeals of Ohio, in *State v. Speelman*, said (like the concurrence in this case below, App., *infra*, 42a-44a) that a blood draw from an unconscious motorist was a valid search incident to arrest, despite *Birchfield*'s holding that blood draws are not. 102 N.E.3d 1185, 1188 (Ohio Ct. App. 2017). The court opined that the *Birchfield* Court assumed the existence of the less-invasive breath test, which is unavailable when a motorist is unconscious. *Id.*

Finally, the Idaho Court of Appeals held that under its implied-consent law, a motorist's operation on Idaho highways supplied actual, constitutional consent. That state's supreme court had earlier applied a saving construction to the statute—it read it to permit a motorist to withdraw consent, though there was no such provision in the statute's text.

*Bobeck v. Idaho Transp. Dep't*, 363 P.3d 861, 866 (Idaho Ct. App. 2015) (citing *State v. Halseth*, 339 P.3d 368, 371 (Idaho 2014) and *State v. Arrotta*, 339 P.3d 1177, 1178 (Idaho 2014)). The court of appeals held that, since the unconscious motorist obviously did not actually withdraw this consent, her warrantless blood draw was constitutional. *Bobeck v. Idaho Transp. Dep't*, 363 P.3d 861, 867 (Ct. App. 2015).

## II. The decision below is wrong

Certiorari is also warranted because the decision below is not compatible with this Court's precedent. Though the Wisconsin court did not reach a majority for any rationale, the *result* it reached can't be sustained on any theory. By sanctioning a statutory declaration that a particular class of searches necessarily passes constitutional scrutiny, the Wisconsin court, and others like it, are permitting (and inviting) legislatures to carve out a new Fourth Amendment exception of "deemed consent."

Though "implied-consent" statutes have "consent" in the name, what they prescribe in cases like this one has nothing to do with the "voluntary consent" that this Court has established as an exception to the warrant requirement. "Voluntary consent" is a choice made by a person the police wish to search—a "free and unconstrained" choice, as demonstrated by the "totality of all the circumstances." *Schneckloth*, 412 U.S. at 225, 227. As many courts have observed, implied-consent statutes don't just dispense with the totality of the circumstances: they give the suspect motorist no choice at all. Such statutes' only link to the notion of

"consent" is a sort of rhetorical gesture toward the concept: a declaration that a certain class of people—motorists—are "deemed to have given consent" to having their blood taken. But this declaration—what the California court called "imputed" consent—is manifestly not a choice by the motorist: it is a choice by the legislature. *Arredondo*, 199 Cal. Rptr. 3d at 571.

A state legislature is not free to extinguish rights granted by the Constitution. And it is clear that, *contra* some state courts, a motorist does have a Fourth Amendment right to refuse a blood draw, absent a warrant or exigency. Some state court opinions blessing implied-consent blood draws have claimed to the contrary, citing *South Dakota v. Neville*, 459 U.S. 553 (1983). *Neville* did say that "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test," *id.* at 560 n.10, but it was talking about the *Fifth* Amendment, not the Fourth. As this Court said in *Skinner v. Railway Labor Executives' Ass'n*, "a compelled intrusio[n] into the body for blood to be analyzed for alcohol content must be deemed a Fourth Amendment search." 489 U.S. 602, 616 (1989). And, of course, what the Fourth Amendment says about searches is that the people have the right to "be secure … against" them—i.e., to *refuse* them.

The Court removed any doubt about this right in *McNeely*. In holding that blood draws of suspected drunk drivers would not always fall within the exigency exception, *McNeely* presupposed that, to be permissible, blood draws would *need* to satisfy a warrant exception. This is only true, of course, if the

Fourth Amendment generally forbids them, absent a warrant.

Nor (as some state courts have also suggested) did *Birchfield* sanction warrantless searches like the one here. When *Birchfield* spoke favorably of implied-consent laws, it was talking about a particular variety: "implied-consent laws that *impose civil penalties and evidentiary consequences on motorists who refuse to comply*." 136 S. Ct. at 2185 (emphasis added). Such laws are, of course, completely different from the widespread provisions that permit the taking of blood without a warrant. Rather than imposing civil penalties for refusing to comply, these statutes outright deny the motorist the *ability* to refuse.

And it's not at all convincing to claim, like the Colorado court and the plurality in this case, that *Birchfield*'s approval of civil penalties for refusal (as opposed to criminal ones, which it held unconstitutional) means that states imposing only civil penalties for refusal are also free to dispense altogether with the *possibility* of refusal. *Mitchell*, 914 N.W.2d at 160 (App., *infra,*, 15a); *Hyde*; 393 P.3d at 968. In fact, *Birchfield* strongly implies the opposite: if criminal penalties for refusal are unlawful because they too heavily burden the exercise of the Fourth Amendment right to refuse a blood test, can it really be that the state can outright *abolish* the very same right?

But *Birchfield* did more than just imply this conclusion. Addressing North Dakota's argument that blood tests were indispensible law enforcement tools (and thus valid searches incident to arrest) because they, unlike breath tests, could be performed

on unconscious motorists, the Court said: "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. Id.* at 2184-85 (emphasis added).

Per the Wisconsin court, and several others, in the very situation *Birchfield* described, there is actually no "need" at all for the police to "apply for a warrant." They can simply rely on legislative declarations that motorists are "deemed" to have consented to warrantless searches, whether they actually consent or not. This holding is irreconcilable with *McNeely* and with *Birchfield*. In declaring that the government may waive the citizen's rights against the government, it drains the constitutional (and indeed, the commonsensical) notion of consent of all meaning. It is wrong, and this Court ought to correct it.

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

As Petitioner showed above, the question presented, and closely related questions, have arisen in the courts of about twenty states. Those courts have given directly contradictory answers. For this reason alone, the question is an important one for this Court to address. If it does not, citizens of around half of the states will continue to be subject to statutes allowing the taking of their blood without a warrant, without exigency, and whether they agree or not.

Though petitioner can locate no statistics on the annual number of warrantless, non-consensual blood

draws conducted under implied-consent statutes, the Federal Bureau of Investigation reports there were nearly one million arrests for driving under the influence in 2017. Crime in the United States 2017, Table 29, available at https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-29. Given that around thirty states have implied-consent laws permitting warrantless blood draws under some circumstances, it stands to reason that thousands of motorists are subjected to warrantless, non-exigent, factually non-consensual searches every year.

If, as petitioner maintains and many courts have held, such searches are unconstitutional, then these motorists are being subjected, by their courts and legislatures, to systematic Fourth Amendment violations—specifically, warrantless government intrusions into their bodies. The situation merits this court's attention.

And this case is an ideal vehicle to address it. First, the constitutional question was squarely presented in the Supreme Court of Wisconsin (though that court could not find a majority for any holding on it). Its resolution is also dispositive of petitioner's suppression motion: the state has never claimed exigent circumstances as an alternative ground to uphold the blood draw and, in fact, the record reveals no such exigency. The facts and posture of this case thus provide an excellent opportunity to decide whether a state legislature, by means of an implied-consent law, may "deem" a warrantless search lawful under the Fourth Amendment.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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