No. 18-6210

In the Supreme Court of the United States

GERALD P. MITCHELL, PETITIONER,

v.

WISCONSIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF IN OPPOSITION

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General
Counsel of Record

RYAN J. WALSH
Chief Deputy Solicitor General

AMY C. MILLER
Assistant Solicitor General

Wisconsin Department of Justice
17 West Main Street
Madison, Wisconsin 53703
(608) 267-9323
tseytlinm@doj.state.wi.us

Attorneys for the State of Wisconsin

QUESTION PRESENTED

Whether, in a State with a civil implied-consent statute, a warrantless blood draw of an unconscious motorist who has been properly arrested for drunk driving is an unreasonable search under the Fourth Amendment.

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INTRODUCTION

Petitioner Gerald P. Mitchell got so drunk that, after driving while under the influence, he passed out and became unconscious. The police then drew his blood for testing blood-alcohol content, under Wisconsin's implied-consent statute, which testing confirmed Petitioner's severe intoxication. Petitioner argued to the Wisconsin Supreme Court that because he got so drunk that he could not withdraw his consent, as he could have done under Wisconsin's implied-consent law had he been conscious, the blood draw violated his Fourth Amendment rights. The Wisconsin Supreme Court rejected this argument, with the Justices comprising the majority urging two different approaches to the unconscious-driver context. Any other conclusion would have given those who drink so much that they become unconscious the windfall of avoiding the lawful civil choice, which other drunk drivers must face, of having their blood drawn or losing their license.

Petitioner urges this Court to review the constitutionality of his blood draw, but offers no persuasive reason for this Court to look into this difficult issue now, just two years after *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). While Petitioner claims that there is a deep division of authority regarding the constitutionality of warrantless blood draws of unconscious drunk drivers, he greatly overstates the legal landscape. In fact, only two state high courts have adopted Petitioner's position that unconscious drivers do not effectively consent to have their blood drawn after an automobile accident by operation of a state implied-consent statute, whereas two state high courts (as well as three of the five Justices of the Wisconsin Supreme Court

who comprised the majority below) have rejected it. In addition, on the broader question of whether blood draws of unconscious, properly arrested drunk drivers are lawful as a reasonable search incident to arrest, without regard to any notion of implied consent, there is no division of authority, given that two of the Wisconsin Supreme Court Justices who comprised the majority below just became among the first jurists to consider this doctrinal solution to the unconscious-driver puzzle. Given the undeveloped nature of the split on the implied-consent issue, and the possibility that the general-reasonableness argument will ultimately render the implied-consent question moot for unconscious drivers, further percolation is warranted.

This Court should deny the Petition.

STATEMENT

A. Legal Background

States protect their highways by drawing on "a broad range of legal tools to enforce their [intoxicated]-driving laws and to secure BAC [blood-alcohol content] evidence without undertaking warrantless nonconsensual blood draws." *Missouri v. McNeely*, 569 U.S. 141, 160–61 (2013) (plurality op.). "For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of [an intoxicated-driving] offense." *Id.* at 161; *see* Wis. Stat. § 343.305.

In Wisconsin, as in other States, "[a]ny person who . . . drives or operates a motor vehicle upon the public highways of this state . . . is deemed to have given

consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath of alcohol [or other] controlled substances . . . when requested to do so by a law enforcement officer" under certain subsections or "when required to do so" under certain others. Wis. Stat. § 343.305(2).

The statute applies differently depending on whether a suspect, having created a presumption of consent under the statute by voluntarily driving on the State's roads, is physically "capable" of withdrawing that consent when the police wish to administer the test. *Id.* § 343.305(3)(b). If the suspect is capable, then the statute affords the suspect an opportunity to do so. The police must advise the conscious suspect of "the nature of the driver's implied consent." *Wisconsin v. Reitter*, 595 N.W.2d 646, 652 (Wis. 1999). Reading from the "Informing the Accused" form, the police usually convey (among other facts) that (1) the suspect has been arrested or detained for an intoxicated-driving offense; (2) the officer "now wants to test one or more samples of [the suspect's] breath, blood or urine to determine the concentration of alcohol or drugs in [the suspect's] system"; (3) if the test shows intoxication, the suspect's "operating privilege will be suspended"; (4) "[i]f [the suspect] refuse[s] to take any test that [the officer] requests, [the suspect's] operating privilege will be revoked and [the suspect] will be subject to other penalties"; (5) "[t]he test results or the fact that [the suspect] refused testing can be used against [the suspect] in court"; and (6) the suspect may take alternative tests if he takes "all the requested tests." Wis. Stat. § 343.305(4). If, instead, the suspect is found "unconscious or otherwise

not capable of withdrawing consent," then the suspect generally "is presumed not to have withdrawn consent," and the relevant subsections state that "one or more samples" may be taken. *Id.* § 343.305(3)(b).

More generally, implied-consent laws impose "consequences when a motorist withdraws consent" and thereby reneges on the commitment under the statute, made in exchange for the privilege of driving. *McNeely*, 569 U.S. at 161 (plurality op.). In some States, before *Birchfield*, those consequences included criminal liability. But this Court in *Birchfield* invalidated those criminal implied-consent penalties, while at the same time "cast[ing] [no] doubt" on "implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." 136 S. Ct. at 2185. Wisconsin's implied-consent law fits into the second, civil-penalty category, since it "attempts to overcome the possibility of refusal" merely "by the threat of . . . license revocation" and evidentiary inferences. *Wisconsin v. Zielke*, 403 N.W.2d 427, 431 (Wis. 1987). Specifically, if a motorist has been arrested for an intoxicated-driving offense and "refuses to take a test," then the officer must prepare a "notice of intent to revoke . . . the person's operating privilege," Wis. Stat. § 343.305(9)(a), the filing of which begins a suspension proceeding in court.

B. Facts And Procedural History

1. One afternoon in 2013, Alvin Swenson called the Sheboygan County police to report that Petitioner had been driving and appeared to be intoxicated. *See* App. 59a, 76a–77a. Officer Alex Jaeger responded to dispatch's request that an officer "check [ ] the welfare of a male subject." App. 59a. When he arrived, Officer

Jaeger spoke to Swenson, who said that he knew Petitioner and "received a telephone call from [Petitioner's] mother concerned about his safety." App. 59a. Swenson observed Petitioner leaving his apartment. App. 77a–78a. Petitioner was "very disoriented," and he "appeared [to be] intoxicated or under the influence, was stumbling, had thrown a bag of garbage into the backyard and had great difficulty maintaining balance, nearly falling several times before getting into a gray minivan and driving away." App. 59a (alterations in original).

About a half hour later, the police found Petitioner. A community-services officer with the Sheboygan County Police Department "had located a male subject matching the physical description" that Officer Jaeger had provided. App. 80a. Officer Jaeger observed Petitioner walking, and his "state was consistent with what Swenson described." App. 59a. He was shirtless, wet, and covered in sand, as if he "had gone swimming in the lake." App. 59a. He "was slurring his words and had great difficulty in maintaining balance, nearly falling over several times," requiring the officers' help to keep upright. App. 59a–60a (internal quotation marks omitted). As they crossed a street, Petitioner "nearly fell after stepping up and over the curb." App. 83a.

Petitioner admitted that "he had been drinking." App. 83a. First, he stated that he had been drinking "in his apartment," but then he said "that he was drinking down at the beach" and had parked his vehicle "because he felt he was too drunk to drive." App. 83a–84a. In the meantime, another officer located the van nearby on Michigan Avenue. App. 85a. That officer relayed to Officer Jaeger "that there was

some minor damage [to the van] that appeared to be fresh." App. 85a. Officer Jaeger learned that Petitioner had "prior convictions" for "operating while intoxicated." App. 84a. Officer Jaeger concluded that Petitioner's condition "made administration of the standard field sobriety tests unsafe, so he declined to administer them." App. 60a. Officer Jaeger administered a preliminary breath test, which showed an alcohol concentration of .24. App. 60a. He arrested Petitioner for operating while intoxicated. App. 60a.

On the way to the police station, Petitioner's condition began "declining," and he became "more lethargic." App. 88a. Petitioner had to be "helped out of the squad car." App. 88a. "[O]nce he was in a holding cell with his handcuffs removed, he began to close his eyes and sort of fall asleep or perhaps pass out. But he would wake up with stimulation." App. 88a. Officer Jaeger concluded that, in light of Petitioner's condition, a breath test would not be appropriate, and so he took Petitioner from the station to the hospital for a blood test. App. 88a–89a. The drive to the hospital took about eight minutes. App. 89a. During the drive, Petitioner "appeared to be completely incapacitated, would not wake up with any type of stimulation," including "shak[ing] his arm, lift[ing] up his hands, shak[ing] his hands, [and] rub[bing] the top of his head." App. 89a. Petitioner "had to be escorted into the hospital by wheelchair," where he sat "slumped over" unable to "lift himself up" into a normal sitting position. App. 89a–90a. Soon thereafter, Officer Jaeger read the "Informing the Accused form verbatim" to Petitioner, but Petitioner was "so incapacitated [that] he could not

answer." App. 90a. Petitioner was eventually admitted to the hospital for treatment and monitoring. App. 94a–95a, 99a, 107a.

Officer Jaeger recalled that, as he waited for the phlebotomist to draw blood, "medical efforts were being attempted," App. 94a, and Petitioner was being "monitored" by hospital staff, App. 99a. The unconscious Petitioner, however, "couldn't answer any hospital staff . . . and did not awake[n] while they placed catheters or any other type of medical instruments on him." App. 94a–95a; App. 100a (recalling "specifically" that one nurse had inserted a catheter). The test was administered about one hour after arrest and revealed a blood-alcohol concentration of .222. App. 6a, 92a. Petitioner was eventually admitted to the hospital's intensive-care unit. App. 109a. Officer Jaeger stated on cross-examination that he could have applied for a warrant but that he did not. He did not know how long it would have taken to secure a warrant. He explained that his office had only recently started seeking warrants in cases like this one. App. 109a.

2. The State charged Petitioner with driving while under the influence (his seventh such offense) and with a prohibited alcohol concentration. App. 59a & n.1. He moved to suppress the warrantless blood test, arguing that the test violated the Fourth Amendment. The circuit court denied Petitioner's motion. App. 6a. The State tried Petitioner before a jury, which convicted him. App. 7a. He was sentenced to three years' initial confinement and three years' extended supervision on each count. App. 61a.

Petitioner appealed, App. 61a, and the Wisconsin Court of Appeals certified the appeal to the Wisconsin Supreme Court, App. 58a. The Wisconsin Supreme Court accepted certification and affirmed, holding in a splintered decision that the blood draw in this case was constitutional. App. 3a–4a, 34a.

Chief Justice Roggensack, joined by two other Justices, concluded that Petitioner had "voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to a point evidencing probable cause of intoxication." App. 4a. "[T]hrough drinking to the point of unconsciousness," Chief Justice Roggensack explained, Petitioner forfeited his statutory opportunity under Wis. Stat. § 343.305(4) to withdraw his consent. App. 4a. Citing this Court's decisions in *Birchfield,* 136 S. Ct. 2160, *Florida v. Jardines*, 569 U.S. 1 (2013), and *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), App. 10a–11a, Chief Justice Roggensack explained that "in the context of significant, well-publicized laws designed to curb drunken driving, [drivers on Wisconsin roads] consent to an evidentiary drawing of blood upon a showing of probable cause to believe that they operated vehicles while intoxicated," App. 14a. This regime is reasonable, and thus constitutional, as applied to drunk drivers, like Petitioner, who drink so much that they pass out and cannot, as a practical matter, withdraw their consent at the moment of the blood draw. App. 29a.

In turn, Justice Kelly, joined by Justice R.G. Bradley, concluded that the blood draw was lawful, but under another rationale. App. 34a, 45a. Although Justice Kelly disagreed with the view that the blood draw was a consent search, the search was

constitutional, in Justice Kelly's view, "because performing a blood draw on an unconscious individual who has been arrested for operating a motor vehicle while intoxicated . . . is reasonable within the meaning of the Fourth Amendment." App. 34a. The "warrantless blood test was reasonable" here because Petitioner "had been arrested for OWI, evidence of the offense was continually dissipating, there was no telling how long he would be unconscious, his privacy interest in the evidence of intoxication within his body had been eviscerated by the arrest, and no less intrusive means were available to obtain the evanescent evidence." App. 41a. Justice Kelly also pointed out that in the unconscious-driver context, the breath-test option critical to this Court's decision in *Birchfield* is unavailable. App. 41a.

Justice A.W. Bradley, joined by Justice Abrahamson, dissented, arguing that "[c]onsent provided solely by way of an implied consent statute is constitutionally untenable." App. 46a–47a, 56a. Finding no other basis in Fourth Amendment law to support the search, the dissent concluded that the blood-alcohol evidence should be suppressed. App. 47a, 56a.

REASONS FOR DENYING THE PETITION

I. There Is Only A Narrow Division Of Authority On The Implied-Consent, Unconscious-Driver Issue And Further Percolation Is Warranted

In *McNeely*, this Court held that the fact of dissipation of blood-alcohol evidence did not, standing alone, create a *per se* rule permitting police to draw the suspect's blood under the exigent-circumstances doctrine: "while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case

. . . it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." 569 U.S. at 156. A plurality of Justices further explained that "States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws." *Id.* at 160–61.

Two years ago in *Birchfield*, this Court held that States could require drunk-driving suspects to undergo breath tests—but not blood tests—as a search incident to arrest. 136 S. Ct. at 2184. In explaining this holding, this Court reasoned that blood tests are more intrusive than breath tests and the reasonableness of blood tests "must be judged in light of the availability of the less invasive alternative of a breath test." *Id.*

Then, turning to the consent inquiry, *Birchfield* held that States could not subject suspects who refuse to consent to blood draws to criminal sanctions notwithstanding the existence of an implied-consent law. In explaining its reasoning, *Birchfield* noted that "sometimes consent to a search need not be express but may be fairly inferred from context," and pointed out that this Court's "prior opinions [including *McNeely*] have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Id.* at 2185. Nevertheless, criminal penalties were beyond the scope of reasonableness even in the implied-consent context. *Id.* at 2186.

The present case involves a question that this Court has never confronted: whether, in a State with a civil implied-consent statute, a warrantless blood draw of an unconscious motorist who has been properly arrested for drunk driving is an unreasonable search under the Fourth Amendment. Petitioner cites a series of state-court decisions that he reads to reject the reasoning relied upon by Chief Justice Roggensack and two other Justices below that such a blood draw is permissible under consent-to-search principles. Pet. 8–13. According to Petitioner, these cases endorse his argument that implied-consent statutes, like the one at issue here, cannot justify warrantless blood draws in the unconscious-driver context because those drivers cannot, as a practical matter, revoke their consent at the time of the blood draw. Pet. 8–13. But Petitioner greatly overstates the legal landscape. In fact, only two state courts of last resort have endorsed his view of implied consent, while two have rejected it and adopted the approach articulated by Chief Justice Roggensack. This shallow division of authority should be permitted to further percolate, both because this Court's decision in *Birchfield* is so recent and because Justices Kelly and R.G. Bradley below proposed a non-consent-based solution to the unconscious-driver puzzle, which could well render the implied-consent issue moot.

A. There is only a narrow split of authority on whether an implied-consent statute justifies a probable-cause-based blood draw of an unconscious suspect.

1. Two courts of last resort have held, consistent with Chief Justice Roggensack's decision below, that warrantless blood draws of unconscious drunk drivers in implied-consent States are valid consent searches. Most recently, the

Colorado Supreme Court reached this conclusion in *Colorado v. Hyde*, 393 P.3d 962 (Colo. 2017), explaining that "[b]y choosing to drive in the state of Colorado, Hyde gave his statutory consent to chemical testing in the event that law enforcement officers found him unconscious and had probable cause to believe he was guilty of DUI." *Id.* at 967–68. Justice Eid, in a concurring opinion, expanded upon this reasoning, explaining that "*Birchfield* holds that traditional implied consent statutes such as Colorado's—which deem drivers to have consented to BAC testing as a condition of driving upon the state's roads and impose administrative and evidentiary consequences upon refusal to test—meet the dictates of the Fourth Amendment." *Id.* at 970. Hence in the case at bar, "the defendant is deemed by statute to have consented to BAC testing by virtue of driving on the roads, making irrelevant his inability to consent (due to his unconscious state) at the scene." *Id.* The Minnesota Supreme Court took a similar position on the implied-consent issue, in the unconscious-driver context, almost 40 years ago. *See Minn. Dep't of Pub. Safety v. Wiehle*, 287 N.W.2d 416, 419 (Minn. 1979).

Petitioner also cites *Cripps v. Oklahoma*, 387 P.3d 906, 909 (Okla. Crim. App. 2016), Pet. 15, but that case merely held that a statute creating *a per se* rule that drivers involved in a fatal or serious-bodily-injury accident must submit to a blood-alcohol test "as soon as practicable" did not violate *McNeely*. *Cripps*, 387 P.3d at 909. *Cripps* thus did not address whether implied-consent laws provide constitutionally sound authority for police to administer a blood test to an unconscious drunk-driving suspect as a general matter.

2. Contrary to Petitioner's claims, only two state courts of last resort have adopted Petitioner's view that an implied-consent statute does not authorize an unconscious blood draw from a drunk-driving suspect because that suspect has no practical opportunity to withdraw consent at the moment of the draw. *See Arizona v. Havatone*, 389 P.3d 1251 (Ariz. 2017); *North Carolina v. Romano*, 800 S.E.2d 644 (N.C. 2017). In *Havatone*, the Arizona Supreme Court, accepting a concession by the State, held that a blood draw can be taken from an unconscious driver only "if case-specific exigent circumstances exist," even in the face of an implied-consent regime. 389 P.3d at 1254. In *Romano*, the North Carolina Supreme Court reached the same result, agreeing with the Arizona Supreme Court in *Havatone* and disagreeing with the Colorado Supreme Court in *Hyde*. *See Romano*, 800 S.E.2d at 648 & n.2. And while Petitioner claims that the Pennsylvania Supreme Court adopted the same position in *Pennsylvania v. Myers*, 118 A.3d 1122 (Pa. 2015), Pet. 11, that decision turned on the fact that the officers failed to comply with the State's implied-consent law by not timely giving the defendant the chance to withdraw his consent, under a state law that gives drivers an absolute right to withdraw consent and has no exception for unconscious drivers, 118 A.3d at 1129–30.

Petitioner also points to cases from "other contexts," Pet. 12–13, but these cases do not involve unconscious drivers and thus do not purport to deal with consent issues that arise in that special context. In *South Dakota v. Fierro*, 853 N.W.2d 235 (S.D. 2014), the court held merely that when a suspect "verbally and physically refused to provide a sample," her "actions taken in their totality can hardly be taken as 'consent'

by constitutional standards." *Id.* at 242. The same is true of Petitioner's Delaware and Nebraska cases, since they hold only that, in conscious-driver cases, courts should look to the totality of the circumstances to assess whether the motorist is presently consenting. *See Flonnory v. Delaware*, 109 A.3d 1060, 1065–66 (Del. 2015); *Nebraska v. Modlin*, 867 N.W.2d 609, 613 (Neb. 2015). And *Byars v. Nevada*, 336 P.3d 939 (Nev. 2014), held unconstitutional a provision of Nevada's implied-consent statute enabling an officer to use force to obtain a blood sample. *Id.* at 942, 946; *see also Iowa v. Pettijohn*, 899 N.W.2d 1, 36 (Iowa 2017) (faulting Iowa's implied-consent statute for the state-specific reason that its advisory "failed to mention the serious criminal consequences [of boating while intoxicated]").

Petitioner also cites a handful of lower-court decisions that have adopted his position, Pet. 9–11, 13, but none of those cases support his claim of a division of authority warranting this Court's review. Indeed, a couple of them are currently pending further review by the State's court of last resort. *See, e.g.*, *California v. Arredondo*, 199 Cal. Rptr. 3d 563 (Cal. Ct. App. 2016), *review granted and opinion superseded by* 371 P.3d 240 (Cal. 2016); *Texas v. Ruiz*, 545 S.W.3d 687 (Tex. App. 2018), *review granted* (Apr. 25, 2018). There are, of course, lower-court decisions pointing the other way, and one of those cases is also pending further review by a higher state court. *See McGraw v. Florida*, 245 So. 3d 760 (Fla. Dist. Ct. App. 2018), *review granted*, No. SC18-792, 2018 WL 3342880 (Fla. July 9, 2018); *see also Bobeck v. Idaho Transp. Dep't*, 363 P.3d 861 (Idaho Ct. App. 2015).

B. Further percolation is warranted for two reasons.

First, the split on the implied-consent issue, as it relates to unconscious drivers, is exceedingly narrow, and this Court would benefit from permitting lower courts to consider this question, especially in light of *Birchfield*. The split is only 2-2 among state courts of last resort, with no federal court of appeals weighing in. In addition, one of the two cases on Respondent's side—*Wiehle*, from the Minnesota Supreme Court—was decided almost 40 years ago, while one of the two cases on Petitioner's side—*Havatone*, from the Arizona Supreme Court—appears to have been decided without adversarial briefing on this key issue, after a concession by the State. *See supra* p. 13. The rest of the decisions addressing the implied-consent, unconscious-driver issue come from lower courts, and several of them have been vacated and/or further proceedings are ongoing before those States' courts of last resort. *See supra* p. 14. Given that this Court spoke in the implied-consent area in *Birchfield* just two years ago, and in light of the paucity of caselaw from courts of last resort on the difficult unconscious-driver issue since, this is the paradigmatic case for the virtues of further percolation. *See McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting the denial of petitions for writs of certiorari) ("[I]t is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.").

Second, Justice Kelly, joined by Justice R.G. Bradley, has now offered an entirely different rationale for upholding the constitutionality of unconscious, drunk-driver blood draws, a rationale that does not turn on notions of implied consent and

may well render the narrow split on the consent issue moot. As explained by Justice Kelly and in more detail below, *see infra* pp. 18–20, there is a strong argument that the implied-consent regime is unnecessary in the unconscious-driver context because such blood draws are reasonable as a search incident to arrest. This powerful rationale has not yet been explored by lower courts, because, so far as Respondent has been able to determine, Justice Kelly's opinion appears to be the first articulation of this rationale in a published decision. As this argument becomes more prominent in lower courts, it may well swallow as irrelevant the shallow split on the implied-consent issue discussed above. At the very minimum, further percolation is warranted to permit lower courts to explore the import of this argument for this difficult, evolving area of Fourth Amendment law.

II. The Wisconsin Supreme Court Correctly Decided That The Blood Draw Was Lawful

The search here was reasonable for two independently sufficient reasons, each given by Justices of the Wisconsin Supreme Court below: (A) the search satisfied the consent exception to the warrant rule, and (B) the search was generally reasonable as a search incident to arrest and therefore constitutional, even if one puts to the side any notions of implied consent.

A. As Chief Justice Roggensack, joined by two other Justices, correctly concluded below, the blood-draw search here was lawful because the officers had probable cause to believe that Petitioner had driven while intoxicated, the testing was consistent with a reasonable, civil, implied-consent statute, and the only reason

Petitioner did not have the opportunity to withdraw his consent was his voluntary choice to drink so much that he rendered himself unconscious.

This Court's search-and-seizure doctrine provides that a defendant may imply consent to a search by conduct. *See generally Jardines*, 569 U.S. 1. As relevant here, because the courts properly presume that drivers know the law that governs their conduct, *see Barlow v. United States*, 32 U.S. 404, 411 (1833), it may "be fairly inferred from context" that voluntary conduct undertaken against the backdrop of a legal rule is best understood as according with that rule, *Birchfield*, 136 S. Ct. at 2185. Thus, "in the context of significant, well-publicized laws designed to curb drunken driving, [drivers] consent to an evidentiary drawing of blood upon a showing of probable cause to believe that they operated vehicles while intoxicated." App. 14a. And while there is "a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads" under a statute, as this Court made clear in *Birchfield*, the law challenged here is within the Fourth Amendment's permissible bounds. 136 S. Ct. at 2185–86. The statute's search conditions bear a close nexus to the privilege of driving, entail civil penalties that are proportional to the violation in question, and are otherwise reasonable in scope as applied to drivers whose own misconduct rendered them unable, as a practical matter, to withdraw their consent. App. 22a–29a.

As applied to this case, Petitioner voluntarily drove on Wisconsin's highways in the face of a "well-publicized" implied-consent statute. App 14a. Law enforcement surely had probable cause to arrest him for driving under the influence: "His speech

was slurred; he smelled of alcohol; he had difficulty maintaining his balance." App. 29a. And the only reason that he was not able to withdraw his consent was his own wrongdoing, as he voluntarily "chose to drink sufficient alcohol to produce unconsciousness." App. 29a. While Petitioner objects to this line of reasoning because, in his view, an unconscious driver does not have a "free and unconstrained" choice whether to consent, Pet. 16–18 (citation omitted), it was Petitioner's own choice that placed him into the conditions where he was not able to withdraw his consent, App. 29a, a consent that he voluntarily gave by operating a vehicle on Wisconsin roads. Nothing in the Fourth Amendment requires those in Petitioner's position to receive the windfall of avoiding the civil choice in implied-consent statutes—have a blood draw or lose your license—because they drank so much that they passed out.

B. The search here was also constitutional under the search-incident-to-arrest approach articulated by Justice Kelly below: drawing blood from Petitioner—a properly arrested, unconscious, drunk driver—was reasonable incident to the lawful arrest, without regard to any notions of implied consent.

The "ultimate measure of the constitutionality of a governmental search" is not the presence of a warrant but simply "reasonableness." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995). Courts "generally determine whether to exempt a given type of search from the warrant requirement" by weighing, on the one hand, the "degree to which [the type of search] is needed for the promotion of legitimate governmental interests," and, on the other, "the degree to which it intrudes upon an individual's privacy." *Riley v. California*, 134 S. Ct. 2473, 2484 (2014) (citation

omitted). Thus, in *Birchfield*, this Court held 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, especially because a breath test was less intrusive and the lawfulness of the blood test "must be judged in light of the availability of the less invasive alternative of a breath test." 136 S. Ct. at 2184.

Applying these principles here, warrantless blood draws are reasonable in the special context of unconscious drunk drivers, as lawful searches incident to arrest. A vital government interest justifies searches in this special context because an unconscious driver is the worst of the worst in this already serious area. Further, the intrusiveness of blood draws for drivers who have been arrested for intoxicated driving, who can typically expect to receive medical attention, and who will not be awake during the draw is less significant than in the conscious blood-draw context that this Court discussed in *Birchfield*, where the suspect is awake and the suspect's cooperation is required. 136 S. Ct. at 2184. More broadly, as Justice Kelly explained, the blood test was constitutional because Petitioner, and those similarly situated, had "been arrested for OWI, evidence of the offense was continually dissipating, there was no telling how long he would be unconscious, his privacy interest in the evidence of intoxication within his body had been eviscerated by the arrest, and no less intrusive means were available to obtain the evanescent evidence." App. 41a.

The last point that Justice Kelly emphasized is particularly critical: the breath-test option was key to this Court's decision in *Birchfield* rejecting the reasonableness of a blood test incident to arrest. *See* 136 S. Ct. at 2184. But that option is not

available in the unconscious-driver context, due to the driver's own egregious misconduct of driving after drinking so much that he eventually passes out. App. 41a–42a. While *Birchfield* in dicta speculated that police could seek a warrant for a "person who is unconscious (perhaps as a result of a crash)," adding that "we have no reason to believe that such situations are common in drunk-driving arrests," 136 S. Ct. at 2184–85, in fact, numerous States have enacted special statutes to deal with these rather common situations, *see* Pet. 3 n.1. And, as *Birchfield* itself explained, warrants serve only a limited purpose in this context because "[a] magistrate would be in a poor position to challenge [the officer's probable-cause] characterizations," and "[i]n every case the scope of the warrant would simply be a BAC test of the arrestee." 136 S. Ct. at 2181. Accordingly, in the limited situation of an unconscious driver, probable-cause-based blood draws are reasonable, as a lawful searches incident to arrest, without any need to seek a warrant or inquire into implied consent.

CONCLUSION

This Court should deny the Petition.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

Misha Tseytlin /ACM WI Bar #1101533

MISHA TSEYTLIN
Solicitor General
Counsel of Record

RYAN J. WALSH
Chief Deputy Solicitor General

AMY C. MILLER
Assistant Solicitor General

Attorneys for the State of Wisconsin

Wisconsin Department of Justice
17 West Main Street
Madison, Wisconsin 53703
(608) 267-9323
tseytlinm@doj.state.wi.us

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