No. 18-6210

IN THE

Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ of Certiorari
To the Supreme Court of Wisconsin

BRIEF OF MOTHERS AGAINST DRUNK DRIVING AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

DAWN DIAZ
MOTHERS AGAINST DRUNK DRIVING
511 E. John Carpenter Fwy.
Suite 700
Irving, TX 75062

THEANE EVANGELIS
Counsel of Record
LAUREN M. BLAS
STEPHANIE BALITZER
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Ave.
Los Angeles, CA 90071
(213) 229-7000
tevangelis@gibsondunn.com

Counsel for Amicus Curiae

QUESTION PRESENTED

In a State with an implied-consent statute for intoxicated motorists, is a warrantless blood draw of an unconscious driver for whom police have probable cause of operating under the influence an unlawful search under the Fourth Amendment?

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INTEREST OF *AMICUS CURIAE*[1]

MADD was founded in May 1980. Its mission is to end drunk driving, help fight drugged driving, support the victims of these violent crimes, and prevent underage drinking. In pursuit of those objectives, MADD participates actively in public and private studies, legislative initiatives, and law-enforcement programs aimed at reducing the incidence of alcohol-related roadway tragedies. MADD is one of the largest victim-services organizations in the United States, and since its founding, drunk driving deaths have fallen by 50%.

In 2006, MADD launched a new "Campaign to Eliminate Drunk Driving." One of the key aspects of this campaign is supporting law enforcement in their efforts to catch drunk drivers, keep them off the road, and discourage others from driving while under the influence of alcohol or other intoxicants. The strict and swift enforcement of drunk driving laws, through arrest and prosecution, is essential to that effort. MADD supports law enforcement's use of all constitutionally permissible tools to prevent drunk driving. Some of the most effective enforcement tools are blood alcohol concentration ("BAC") tests, to which drivers in all United States jurisdictions impliedly consent when receiving driver's licenses.

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[1] Pursuant to this Court's Rule 37.3(a), both parties submitted letters to the Clerk granting blanket consent to *amicus curiae* briefs. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

MADD is concerned that a reversal of the Wisconsin Supreme Court's decision in this case will impose an unnecessary restriction on law enforcement's ability to gather reliable, admissible BAC evidence with respect to a particularly dangerous class of drunk drivers: those who choose to get behind the wheel even though they have consumed so much alcohol that they risk losing consciousness. These offenders pose an even greater threat to public safety than the average intoxicated driver, and, when these drivers actually do lose consciousness, a blood test is the only means to gather reliable evidence to secure a conviction for driving under the influence and to protect the public. Imposing a default warrant requirement would not only serve little purpose in these circumstances, but would also hamper effective law enforcement, since these offenders often require medical treatment as a result of their elevated BAC and/or a crash they have caused, and, because they may fall in and out of consciousness, it may not always be simple to determine when a warrant is necessary and when a warrantless blood draw would be justified.

SUMMARY OF ARGUMENT

To hold drunk drivers accountable—and to prevent further deaths and debilitating injuries—States must be able to expediently gather accurate and admissible evidence related to the crime, including the driver's BAC at or near the time of the crash. Those mandates become even more compelling in the case of a particularly dangerous (but all-too-common) class of drunk drivers: those who become unconscious after having first taken the wheel.

In this case, the Wisconsin Supreme Court correctly held that a warrantless blood test of a then-

unconscious drunk driver, Gerald Mitchell, did not violate the Fourth Amendment because Mr. Mitchell validly consented to the blood test by driving a motor vehicle while intoxicated on a public road in Wisconsin. Such conduct readily satisfies Wisconsin's implied consent law, and should be deemed the equivalent of actual consent for the reasons argued by the State. That alone is enough to rule in the State's favor and affirm the Wisconsin Supreme Court's decision. But MADD submits that even if Mr. Mitchell had not provided actual consent, the warrantless blood test of Mr. Mitchell in this case was constitutional because under the totality of the circumstances, as a matter of law, the blood draw was a reasonable search. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) ("the ultimate measure of the constitutionality of a governmental search is [its] 'reasonableness'"). Drunk drivers who become unconscious are categorically more dangerous than conscious ones, have categorically weaker privacy interests, and, in every case, there is no less invasive alternative to gather the evidence law enforcement needs to prosecute them and deter other would-be drunk drivers. These categorical differences call for a categorical rule permitting warrantless blood draws, in a medical setting, for this limited class of persons in the limited circumstances covered by the statute. Such a rule is entirely consistent with this Court's precedents and is not vulnerable to abuse. Any other rule will create chaos and uncertainty for law enforcement, and would perversely provide greater protections to those individuals whose own choices and conduct put innocent lives at risk.

For this reason, and for those argued by the State, MADD respectfully asks the Court to affirm the Wisconsin Supreme Court's decision.

ARGUMENT

I. A WARRANTLESS BLOOD DRAW IS A REASONABLE SEARCH

Courts have long held that a blood draw constitutes a search under the Fourth Amendment. *See Schmerber v. California*, 384 U.S. 757, 770 (1966). Whether such a search is constitutional—even without a warrant—depends on whether it is "reasonable." *Maryland v. King*, 569 U.S. 435, 447 (2013).

Where "there was no clear practice[] either approving or disapproving the type of search at issue[] at the time the [Fourth Amendment] was enacted, whether a particular search meets the reasonableness standard is judged by balancing the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995). This is a case-specific analysis, rather than a "per se rule of unreasonableness," *King*, 569 U.S. at 448, because "[t]he Fourth Amendment does not require that every search be made pursuant to a warrant. . . . The relevant test is not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all the circumstances." *South Dakota v. Opperman*, 428 U.S. 364, 372–73 (1976).

In keeping with those principles, this Court has applied a broad balancing approach to Fourth Amendment searches in a range of contexts. *See King*, 569 U.S. at 448 (cheek swabs); *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999) (search of passenger belongings in car); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990) (suspicionless drunk driving checkpoints); *Vernonia*, 515 U.S.

at 652–53 (random drug testing of students' urine); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619–33 (1989) (testing of bodily fluids from certain railroad employees).

While the reasonableness inquiry has many facets, "special law enforcement needs," "minimal [bodily] intrusions," "diminished expectations of privacy," *King*, 569 U.S. at 447, the lack of less-invasive alternatives, *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184 (2016), and the difficulties in securing a warrant all play a role, *Schmerber*, 384 U.S. at 771. Collectively, these factors support a finding—whether under the actual consent exception, the search-incident-to-arrest exception, or under a broader reasonableness analysis—that the warrantless blood draw here was "reasonable" and therefore constitutionally permissible.

A. States Must Be Able To Protect The Public From Individuals Who Drink, Drive, And Become Unconscious

1. This Court has for decades confirmed that a State's interest in combatting drunk driving is very great indeed. *See, e.g.*, *Birchfield*, 136 S. Ct. at 2178–79; *Missouri v. McNeely*, 569 U.S. 141, 159–60 (2013); *Sitz*, 496 U.S. at 451; *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957). Despite the "progress [that] has been made" in combatting drunk driving, *McNeely*, 569 U.S. at 160, States continue to have a "'paramount interest . . . in preserving the safety of . . . public highways,'" and "in creating effective 'deterrent[s] to drunken driving,'" which remains "a leading cause of traffic fatalities and injuries," *Birchfield*, 136 S. Ct. at 2178–79 (quoting *Mackey v. Montrym*, 443 U.S. 1, 17, 18 (1979)). In light of this compelling interest, this Court often upholds "anti-

drunk-driving policies that might be constitutionally problematic in other, less exigent circumstances." *Virginia v. Harris*, 130 S. Ct. 10, 11 (2009) (Roberts, C.J., dissenting from denial of certiorari).

In furtherance of those interests, States, including Wisconsin, have rigorously enforced drunk driving laws by making arrests and obtaining convictions. These enforcement efforts take drunk drivers off the road, deter would-be drunk drivers,[2] reduce recidivism,[3] and encourage offenders to get treatment.[4] *See Indianapolis v. Edmond*, 531 U.S. 32, 37–38 (2000) (noting that in the Fourth Amendment context, the Court has upheld government measures "aimed at removing drunk drivers from the road").

2. The State's interest in protecting the public from drunk driving is heightened in cases where law enforcement officers encounter offenders who have either consumed so much alcohol that they have lost consciousness while driving, or who have become unconscious as a result of a drunk-driving crash—regrettably, an all-too-common occurrence.

By way of example, the median alcohol concentration for 2015 OWI citations in Wisconsin (the most recent year for which data is available) was

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2 Benjamin Hansen, *Punishment and Deterrence: Evidence from Drunk Driving*, 105 Am. Econ. Rev. 1581, 1582 (2015).

3 D. Paul Moberg & Daphne Kuo, *Five Year Recidivism after Arrest for Operating While Intoxicated: A Large-scale Cohort Study*, Univ. of Wis. Population Health Inst., 4–6 (Apr. 2017), http://tinyurl.com/y28cefwu.

4 Elisabeth Wells-Parker et al., *Final results from a meta-analysis of remedial interventions with drink/drive offenders*, 90 Addiction 907, 907–26 (1995).

0.16%,[5] meaning that more than half of those cited had a BAC more than twice the legal limit and beyond the threshold at which intoxicated individuals may begin to lose consciousness.[6] Further, nearly 80% of Wisconsin's alcohol-impaired driving fatalities in 2017 involved drivers with BAC levels of 0.15% or above, while almost 60% of the 10,874 alcohol-impaired traffic fatalities nationwide were caused by drivers with a BAC of 0.15% or higher.[7]

Anecdotal evidence also supports the view that drunk driving by persons who may lose consciousness due to alcohol is a serious law enforcement and public health issue. The majority of States (at least 29) have passed legislation specifically addressing how law enforcement ought to deal with suspected drunk drivers who have become unconscious.[8] And

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5 *See Drunk Driving Arrests and Convictions*, Wis. Dep't of Transp., https://tinyurl.com/yxq9esoc (last visited Apr. 2, 2019).

6 *Understanding the Dangers of Alcohol Overdose*, Nat'l Inst. on Alcohol Abuse and Alcoholism, 3 (Oct. 2018), https://tinyurl.com/yyg3pm86.

7 *2017 State of Drunk Driving Fatalities in America,* Foundation for Advancing Alcohol Responsibility, http://tinyurl.com/y5bxcjek (last visited Apr. 2, 2019).

8 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(3); 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. Title 47, § 751(C); Ore. Rev. Stat. § 813.140(2)(b); S.C. Code Ann. § 56-5-2950(H); Tex. Transp. Code

appellate courts in these States have heard cases involving such drivers at least 30 times in the last three years.

For example, in *State v. Thompson*, No. 18CA9, 2018 WL 6822570 (Ohio Ct. App. Dec. 24, 2018), officers performed a warrantless blood draw on a driver found unconscious at a crash site "reek[ing] of alcohol," who remained unresponsive at the hospital. *Id*. at *2. That driver's vehicle had collided head-on with another vehicle at approximately 90 miles per hour, causing serious injuries to multiple victims, scattering debris "over two city blocks," and causing a chaotic scene which, according to the investigating officers, "'look[ed] like a bomb went off.'" *Id.* at *1–3.

In another Ohio case, *State v. Speelman*, 102 N.E.3d 1185 (Ohio Ct. App. 2017), a motorcycle driver was traveling with a passenger at 102 miles per hour late in the evening. *Id*. at 1186. The motorcycle slammed into the rear of another vehicle, ejecting and killing the passenger. *Id.* When police arrived, they found the motorcyclist "injured so severely" that he was "presumed . . . to be deceased." *Id.* He could neither communicate nor respond to commands, but smelled strongly of alcohol. *Id.* Officers observed that he had a possibly severed artery and, given the circumstances, ordered a blood draw as soon as possible. *Id.* at 1187.

Other cases involving unconscious drunk drivers—i.e., those unable to give verbal consent or with-

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Ann. § 724.014(a); Utah Code Ann. § 41-6a-522; Vt. Stat. Ann., Title 23, § 1202(a)(2); W. Va. Code, § 17C-5-7 (a); Wis. Stat. Ann. § 343.305(3)(b); Wyo. Stat. Ann. § 31-6-102(c).

draw consent to a blood draw—confirm the real and present danger such drivers pose to the public and the challenges they pose to law enforcement. *See, e.g.*, *State v. Hayes*, No. 26379, 2016 WL 5888103 (Ohio Ct. App. Oct. 7, 2016) (warrantless blood draw taken from driver with a BAC of more than twice the legal limit who caused fatal crash and became unconscious in hospital); *State v. Howes*, 373 Wis.2d 468 (Wis. 2017) (warrantless blood draw taken from driver with multiple prior OWI convictions whose BAC exceed the legal limit and who crashed into a deer and became unconscious).

Thus, although *all* drunk drivers pose a clear and present danger to the public, the State's compelling interest in deterrence is consistently elevated in cases involving those drivers who drink so excessively that they black out, struggle to remain conscious, or fully lose consciousness behind the wheel. The reason is simple and irrefutable: a drunk driver who is barely conscious or loses consciousness due to alcohol (or another intoxicant) is certain to strike another vehicle, cyclist, pedestrian, or wildlife, or to otherwise harm him or herself.

Restricting law enforcement's ability to collect evidence in the course of arresting this discrete but particularly hazardous category of drivers will have unjust and dangerous consequences with respect to deterrence and the enforcement of drunk-driving laws. Unlike the case of a conscious drunk driver, law enforcement cannot obtain express consent from an unconscious driver and may have less time to secure a warrant in the likely event that the driver requires medical care. A rule that would make it *more* difficult for the police to apprehend a *more* danger-

ous class of drunk drivers is not one this Court should endorse.

3. Given the heightened threat that drunk drivers who are or become unconscious at the time of their arrest or shortly thereafter pose to public safety, and given the injuries and loss of life on the nation's roadways, law enforcement must have access to the *best* evidence it can lawfully obtain when investigating this violent crime—even if other evidence is available. Today's blood tests are the best evidence of a driver's BAC, and it is important to administer them quickly because the level of alcohol in the blood dissipates rapidly after drinking ceases. *Skinner*, 489 U.S. at 623 (explaining that blood samples must be obtained "as soon as possible" so as not to "result in the destruction of valuable evidence"). Obtaining a prompt and accurate reading is also important insofar as it may affect the severity of sentencing—indeed, Mr. Mitchell's BAC was past the level at which criminal penalties triple. *McNeely*, 569 U.S. at 170 ("[T]he concentration of alcohol can make a difference not only between guilt and innocence, but between different crimes and different degrees of punishment.") (Roberts, C.J., concurring); *see also, e.g.*, Wis. Stat. Ann. § 346.65(2)(g) (providing different penalties depending on BAC).[9] This Court has acknowledged and confirmed these compelling government interests by making it clear that, under the right circumstances, an arresting officer is not obligated to obtain a warrant before conducting a search incident to arrest simply because there might

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9 48 States and the District of Columbia also have laws imposing stricter penalties on those with elevated BAC levels. *See* note 7, *supra*, at 18.

be adequate time in the particular circumstance to do so. *See*, *e.g.*, *Birchfield*, 136 S. Ct. at 2186–87; *see also* Part I.D, *infra*.

Hindering law enforcement's ability to take a blood draw without a warrant under the limited circumstances present here will impede the State's fight against drunk driving and, in the immediate case, prevent enforcement of the law against unconscious drunk drivers, whom the State has a greater interest in apprehending and deterring. Moreover, the State's ability to obtain the best evidence necessary to secure convictions for drunk-driving offenses is a compelling state interest that weighs heavily against the unconscious drunk driver's diminished privacy interest, a point discussed at greater length in Part I.C.

B. There Is No Less Invasive Alternative

What makes this case different from *McNeely*—and consistent with this Court's decision in *Birchfield*—is the fact that, due to the unconscious driver's own conduct, there is simply no less invasive alternative to obtain necessary BAC evidence.

This Court has already agreed that "medically drawn blood tests are reasonable in appropriate circumstances." *McNeely*, 569 U.S. at 159; *Schmerber*, 384 U.S. at 770–72; *Skinner*, 489 U.S. at 633 (warrantless blood tests of employees justified where "the compelling Government interests served by the [regulations] . . . outweigh[ed] [employees'] privacy concerns"); *South Dakota v. Neville*, 459 U.S. 553, 559 (1983) ("*Schmerber*, then, clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test"). Consistent with *Schmerber*, *Neville*, and *Skinner*, "appropriate cir-

cumstances" always exist in the case of unconscious individuals whom the police have probable cause to arrest for drunk driving. That is because, in addition to the State's compelling interest in protecting innocent lives from drunk drivers and, in the immediate case, from drunk drivers who become unconscious, a blood test is the least invasive means of obtaining critical evidence—particularly when an unconscious drunk driver is already receiving medical attention.

This "less invasive alternative" analysis was central, if not dispositive, in *Birchfield*, which upheld warrantless breathalyzer tests as lawful under the search-incident-to-arrest doctrine. 136 S. Ct. at 2182. The Court stated that the "[r]easonableness" of a search "must be judged in light of the availability of the less invasive alternative," *id*. at 2184, and upheld the warrantless breath test because it is a relatively non-invasive means of obtaining a reading of a driver's BAC that is, in many cases, as effective as a blood test, while being superior to other more costly or less effective alternatives, such as sobriety checkpoints and ignition interlock systems. *Id*. at 2182 & n.8. But the Court also recognized that a blood test—unlike a breath test—is unique in that it "may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries." *Id*. at 2184; *see also* 2 Richard E. Erwin, Defense of Drunk Driving Cases §§ 18.01(2)(a), 18.02, 24.02(3), 24.05 (3d ed. 2017). Such a test would arguably be less invasive for an unconscious person than a conscious one because the test would be administered while the person is already receiving medical attention, and the unconscious person would not sense any pain in connection with the test.

Thus, for suspected drunk drivers found unconscious at the scene of a crash or who become unconscious thereafter, blood tests are not only a reliable means of obtaining evidence of intoxication; they are the *only* means of doing so, as breath tests are not an option. *Cf. Birchfield*, 136 S. Ct. at 2184.

C. Unconscious Drunk Drivers Have A Diminished Expectation of Privacy

In all Fourth Amendment cases, a suspected drunk driver's privacy interests must be balanced against the State's compelling public safety interests and the other circumstances identified above. Because of their choices and the nature of their crime, unconscious individuals suspected of driving drunk have even more diminished privacy interests.

As noted above, the category of unconscious suspected drunk drivers is narrow and readily identifiable. Further, this Court has ruled that individuals who choose to drive on public roadways—whether intoxicated or not—already have a diminished expectation of privacy because of the "compelling governmental need for regulation" of those roadways. *California v. Carney*, 471 U.S. 386, 392 (1985). Logically, drunk drivers who become unconscious on a public roadway and who leave decisions about their health and safety to others, including law enforcement and medical personnel, have an even weaker expectation of privacy than those who do not. *Cf. Shulman v. Group W Productions, Inc.*, 955 P.2d 469, 477 (Cal. 1996) (noting that accident victims may not have a

"reasonable expectation of privacy in the events at the accident scene itself").[10]

Therefore, and under the circumstances, the right of an unconscious drunk driver to be free of "a properly safeguarded blood test is far outweighed by the value of [such a test's] deterrent effect," as well as the other interests discussed above. *Breithaupt*, 352 U.S. at 439.

D. A Warrant Requirement Would Impose Additional Burdens With No Commensurate Benefits

While the warrant requirement is a cornerstone of Fourth Amendment jurisprudence, it is not a requirement that is reflexively applied in every case. *See* p. 4, *supra*. Under *Birchfield*, courts must consider whether such a requirement would actually provide additional protection to those suspected of drunk driving. *See Birchfield*, 136 S. Ct. at 2181–82. In the case of unconscious drunk drivers, the purposes of the warrant requirement—"ensur[ing] that a search is not carried out unless a neutral magistrate makes an independent determination that there is probable cause to believe that evidence will be found" and "limit[ing] the intrusion on privacy by specifying the scope of the search," *see id.* at 2181—would not

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10 And in this particular case, Mr. Mitchell arguably had a diminished expectation of privacy for two further reasons: he was in police custody at the time the blood draw was taken, *see King*, 569 U.S. at 463 ("[o]nce an individual has been arrested on probable cause for a dangerous offense that may require detention before trial, his or her expectation of privacy and freedom from policy scrutiny are reduced"), and he was partaking in an activity that posed a risk to public safety, *see Skinner*, 489 U.S. at 628.

be advanced, because (1) the facts setting forth probable cause to arrest and to justify a blood draw are largely the same and consist of the officers' observations, and (2) the scope of the search is inherently limited by its nature and by the statute to drugs and alcohol. Wis. Stat. Ann. § 343.305(3)(b).

Another reason a warrant should not be required is that obtaining one is especially difficult where unconscious drunk drivers are involved. That is because such drivers often require medical attention—as was the case here, *see* J.A. 110–11—and are likely to cause significantly more delays than the typical arrest involving a conscious drunk driver. As this Court recognized in *Schmerber*, a warrantless blood draw from a conscious drunk driver is constitutional under the circumstances where a driver must be transported to a hospital and provided treatment. *Schmerber*, 384 U.S. at 770–71 ("[W]here time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant."); *McNeely*, 569 U.S. 149–52 (reaffirming *Schmerber*'s holding that it was reasonable to dispense with the warrant requirement under the circumstances). Those circumstances are almost always present in the case of an unconscious, suspected drunk driver.

While *Birchfield* suggested in passing that the warrant requirement should not be dispensed with in the case of blood tests performed on unconscious drunk drivers, it did so, in part, because the record before it provided "no reason to believe that such situations are common in drunk-driving arrests . . . ." 136 S. Ct. at 2184–85. As discussed in Part I.A, however, there is evidence that such situations are

surprisingly common and pose risks that ordinary drunk-driving arrests do not. This case presents an ideal opportunity for the Court to reconsider its statement in *Birchfield* in light of a concrete set of facts.

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When the compelling state interest of protecting innocent victims on roadways is weighed against the minimal privacy interest of the offender, it becomes clear that permitting law enforcement to conduct warrantless blood tests in a medical setting on a narrow category of persons—unconscious drivers for whom police have probable cause to arrest for drunk driving—is not only reasonable, but also essential to keep our States' roadways safe, allow the States to fight drunk driving, protect innocent lives, and ensure a nation with No More Victims.

II. IMPLIED CONSENT LAWS ARE VALUABLE LAW ENFORCEMENT TOOLS THAT PROVIDE CERTAINTY AND ARE UNLIKELY TO BE ABUSED

The warrantless blood draw here was reasonable and thus constitutionally permissible. Holding otherwise, and thereby prohibiting officers from relying on section 343.305(3)(b) would not only cause chaos, but would undermine the viability of a widely-utilized, legislatively-approved remedy to a longstanding and significant public health problem.

Mr. Mitchell posits that affirming the Wisconsin Supreme Court's decision would produce a rule with "no evident limiting principle" that would be fertile ground for abuse. *See* Pet. Br. at 31. But the concern that a State could then conduct warrantless searches "in a wide range of other contexts," is unwarranted. *See id.* That is because these warrant-

less blood draws satisfy the constitutional reasonableness analysis, while Mr. Mitchell's proffered examples—e.g., that using the mail, the phone lines, or the Internet would constitute a consent to search—would not. Furthermore, Mr. Mitchell offers no examples of how *this* particular kind of statute, enacted by a majority of States, has been abused by State legislatures.

This case does not present any occasion to revisit the wisdom of implied consent laws. This Court has repeatedly recognized that such laws serve a valid and important law enforcement function and have been critical in combatting drunk driving. *See, e.g.*, *Neville*, 459 U.S. at 564; *Illinois v. Batchelder*, 463 U.S. 1112, 1118 (1983); *McNeely*, 569 U.S. at 160 (endorsing implied consent laws as "legal tools to enforce [States'] drunk driving laws"); *Birchfield*, 136 S. Ct. at 2185 (making clear that, although a State may not impose criminal penalties for refusing a blood test, the Court's holding "should [not] be read to cast doubt on" implied consent laws more generally). And since the 1970s, this Court has weighed the States' interest in protecting the public from drunk driving against the risk of abuse, and has recognized that implied consent statutes do not violate the Due Process Clause. In *Mackey v. Montrym*, for example, the Court held that Massachusetts's implied consent law, which authorized the suspension of licenses of intoxicated drivers who refused breath-analysis tests, adequately balanced the drivers' property interest with the State's compelling interest in highway safety. *Mackey*, 443 U.S. at 19. The Court acknowledged that while there could, in theory, be some risk of error or abuse by law enforcement, any such risk did not justify greater procedural protec-

tions. *Id.* at 15. That analysis applies equally to this case.

Taking the Court's precedents into account, Mr. Mitchell's proposed rule—that law enforcement cannot rely on section 343.305(3)(b) in the case of unconscious drunk drivers but must instead obtain a warrant in the ordinary case—would generate confusion and uncertainty. By way of example, in *People v. Hyde*, 393 P.3d 962 (Colo. 2017), the defendant was found at the scene of a crash, unconscious, "with blood gurgling from his mouth," but awoke en route to the hospital. *Id*. at 964–65. He then became combative, had to be sedated, and a blood draw was taken at the hospital about two hours after the crash. *Id.* at 965.

Similarly, in *McGraw v. State*, 245 So.3d 760 (Fla. Ct. App. 2018), the defendant was involved in a single car rollover crash. The fire department was attempting to extricate the defendant from his vehicle when officers arrived to find the defendant unconscious and unresponsive, but smelling strongly of alcohol. *Id.* at 762. The defendant was then transported to the hospital for treatment and a blood draw was taken, but given that his injuries were seemingly minor, an officer could reasonably have expected him to regain consciousness. *Id.*

Mr. Mitchell's proposed rule would require officers—who are often already dealing with chaotic crash scenes as well as victims and suspects in need of medical care—to predict or anticipate when a defendant might lose or regain consciousness in order to decide whether and when to take a blood draw or obtain a warrant. Such uncertainty would hamper effective law enforcement, which needs clear rules in order to be able to adapt and respond to constantly

evolving circumstances and competing interests. And indeed, this is exactly what implied consent statutes like Wisconsin's are meant to promote. Officers in such egregious cases should not have to linger in uncertainty, delaying evidence collection or otherwise facing greater obstacles to the lawful apprehension and deterrence of drunk drivers because of a defendant's fortuitous loss of consciousness.

CONCLUSION

For the reasons stated above and in Respondent's brief, the decision of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted.

DAWN DIAZ
MOTHERS AGAINST DRUNK DRIVING
511 E. John Carpenter Fwy.
Suite 700
Irving, TX 75062

THEANE EVANGELIS
Counsel of Record
LAUREN M. BLAS
STEPHANIE BALITZER
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Ave.
Los Angeles, CA 90071-3197
(213) 229-7000
tevangelis@gibsondunn.com

Counsel for Amicus Curiae

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