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

Reply Brief for the Petitioner

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INTRODUCTION

The State takes the extraordinary position that the Fourth Amendment permits it to exempt particular searches from the warrant requirement simply by enacting a statute to that effect. Wisconsin Statute § 343.305 purports to deem the millions of individuals who drive in Wisconsin to have given valid constitutional consent to a warrantless blood draw, such that the State need not seek a warrant, or establish actual consent, before drawing the blood of an unconscious motorist suspected of drunk driving. This breathtaking assertion of authority to sidestep the Fourth Amendment's warrant requirement has no evident limiting principle. The State certainly has not supplied one: it has not suggested any principled reason that a State could not enact a statute providing that other everyday conduct — walking down public streets at certain times of day and in particular neighborhoods, for instance, or using a cell phone — constitutes consent to a search or seizure.

Nor does the State offer any persuasive justification for treating warrantless blood tests on unconscious individuals as a reasonable condition of driving. This Court has already held that a blood draw is a significant bodily intrusion that implicates substantial individual privacy interests. *Missouri* v. *McNeely*, 569 U.S. 141, 148 (2013) (plurality); *id*. at 174 (Roberts, C.J., joined by Alito and Breyer, JJ., concurring); *Birchfield* v. *North Dakota*, 136 S. Ct. 2160, 2178 (2016). The Court has also held that the need to obtain a warrant, absent exigent circumstances, does not hinder law-enforcement interests to investigate and prevent intoxicated driving. The State identifies no law-enforcement interest requiring a different result

here. The State's position cannot be reconciled with this Court's Fourth Amendment jurisprudence and should be rejected.

ARGUMENT

I. Petitioner's blood draw cannot be justified on the basis of "consent" imputed by a state statute.

A. The State may not dispense with the voluntary-consent analysis by deeming consent to be present.

1. The State argues that petitioner consented to an unconscious blood draw, such that the Fourth Amendment permitted officers to draw his blood without a warrant. The State has not attempted to show (nor could it) that petitioner in fact voluntarily consented to the blood draw. Instead, the State relies solely on Section 343.305, which purports to render a single circumstance — the act of driving in the state — conclusive evidence of consent. Br. 24. The State further argues that individuals need not even be aware that by driving, they are consenting to a warrantless blood draw. *Id*. at 30. Citizens' lack of actual awareness is no concern, the State asserts, because they are legally presumed to know the law.[1] *Id*. at 30–31. The State thus piles presumption upon presumption: every motorist within its borders is presumed to know about the implied-consent statute; their consent to its terms is

[1] The State has not attempted to show that motorists are in fact aware of the implied-consent statute. And it has abandoned the Wisconsin Supreme Court plurality's unsupported assertion that the statute's provisions are "well-publicized." J.A. 19, 28.

presumed from their decision to drive; and, if they become unconscious, they are presumed not to have withdrawn consent. That novel and troubling position cannot be reconciled with this Court's well-established voluntary-consent precedents.

By imputing consent by operation of law, the State purports to relieve itself of its burden to establish the existence of voluntary consent under "the totality of all the circumstances." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222–223 (1973); *Florida* v. *Bostick*, 501 U.S. 429, 439 (1991). And by providing that the mere act of driving constitutes consent to an unconscious blood draw, the State has deemed dispositive a fact that will necessarily be present in all cases. See *Bostick*, 501 U.S. at 439 (lower court erred by applying per se rule to consent analysis making a "single factor * * * dispositive in every case"). Section 343.305 thus purports to create a per se exception to the warrant requirement in the case of unconscious motorists. But state law cannot control the scope of the Fourth Amendment's warrant requirement.

2. The State attempts to analogize the operation of its statute to situations where courts have held that consent may be inferred from conduct. See Br. 25–27. These arguments are meritless.

First, the State relies on a smattering of circuit-court cases stating that consent to search could be inferred from individuals' actions under the circumstances. To the extent that those decisions relied on voluntary consent to justify the searches at issue,[2]

[2] Although these cases refer to "implied consent," they also analyze the searches under the reasonable conditions framework. See *Ellis*, 547 F.2d at 866 (military authorities could reasonably

however, they applied the traditional totality-of-the-circumstances analysis. See *United States* v. *Ellis*, 547 F.2d 863, 866 (5th Cir. 1977) (civilian visiting naval base consented to search of vehicle where he read terms of visitor pass stating that acceptance of pass constituted consent to search and displayed pass on his windshield); *Morgan* v. *United States*, 323 F.3d 776, 781–782 (9th Cir. 2003) ("a person may impliedly consent to a search on a military base" but "'[c]onsent is implied by the totality of all the circumstances'") (citation omitted); *McGann* v. *Northeast Illinois Reg'l Commuter R.R.*, 8 F.3d 1174, 1180–1181 (7th Cir. 1993) (sign warning that vehicles are "subject to search" was relevant to consent, but "courts have not accepted [defendant's] notion of implied consent characterized simply by notice and voluntary conduct").[3]

These decisions did not impute consent by operation of law. They did not look only to a single circumstance deemed by state statute to be the sole dispositive factor. Instead, they examined the circumstances that actually attended the search and considered whether the defendant's consent could be fairly inferred as a matter of fact.

Second, the State suggests that this Court's discussion of inferred consent in *Florida* v. *Jardines*, 569 U.S. 1 (2013), supports its position. Br. 26, 35. To the

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"condition[]" defendant's "entry and stay on the military reservation upon his consent to the search of his vehicle"); *Morgan*, 323 F.3d at 778 (referring to "search as a condition to entry"); *McGann*, 8 F.3d at 1181 (noting that "the doctrine of implied consent really 'has little to do with "consent"' as that term is generally understood" (citation omitted)).

[3] The State's remaining court of appeals cases stand for the unremarkable proposition that consent may be expressed by gestures or actions rather than words. Br. 25 n.16.

contrary, *Jardines* demonstrates the limits of inferring consent from conduct. *Jardines* held that the presence of a knocker on the front door of a residence grants an implicit license to approach the home to knock on the door — but *not* to conduct a canine sniff search. *Id.* at 8–9. *Jardines*' holding was based on "background social norms" that inform the inferences that may reasonably be drawn from conduct. *Id.* at 9. Those norms make it reasonable to infer that a homeowner's installation of a knocker at the front door represents an invitation to approach and knock. *Id.* at 8–9. But because there is no norm permitting a visitor to conduct a search at the homeowner's doorstep, no consent to such a search could be inferred. *Ibid.*

Here, the State does not ask this Court to draw inferences from factual circumstances based on widely accepted social norms. The State does not contend that there is any "background social norm[]" of submitting to warrantless blood draws when suspected of drunk driving. *Jardines*, 569 U.S. at 9. Indeed, a significant proportion of drivers in fact refuse a blood test when they have the opportunity to do so. Pet. Br. 29. Thus, the State's argument relies not on factual inferences but rather on a series of legal presumptions. Accordingly, the principle that consent may be inferred from conduct is not applicable here.

3. The State next attacks two strawmen, addressing arguments petitioner does not press.

The State contends that petitioner asserts the right to an opportunity to withdraw consent previously given. Br. 33–37. That misunderstands petitioner's argument. Petitioner asserts that, because the implied-consent statute cannot establish valid consent to

a warrantless blood draw based solely on the motorist's decision to drive, valid consent, if any, must occur at the scene when the officer requests a blood sample. Because an unconscious motorist cannot give valid consent, the State cannot rely on the consent exception to conduct a warrantless blood draw on such a person. Contrary to the State's contention, this does not "reward" motorists who become unconscious or "enhance[]" their Fourth-Amendment rights. Br. 33–34, 37. It merely recognizes that unconscious persons are incapable of giving the actual, voluntary consent required for the consent exception to apply.[4]

The State also suggests that petitioner seeks to impose a requirement of a knowing and intelligent waiver of the kind rejected in *Schneckloth*. Br. 31. Petitioner does not question *Schneckloth*'s holding that, for consent to be voluntary, individuals need not be informed of their right to refuse a search. 412 U.S. at 232–233. But for consent to mean anything, individuals must, at a minimum, be aware *that they are consenting to something*. The State's position that an individual may be deemed to consent to the terms of a statute without even knowing of that statute's existence demonstrates just how far removed its argument is from ordinary consent analysis.

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[4] Nor is petitioner suggesting that police officers must wait for an individual to regain consciousness and give consent. Br. 37. The State may obtain a warrant permitting it to draw blood while the individual is unconscious, or it may proceed without a warrant if exigent circumstances exist.

B. The State may not rely on *Birchfield* to support its application of its implied-consent statute.

The State next argues that this Court expressed approval of implied-consent statutes, as a general matter, in *Birchfield*, 136 S. Ct. 2160. See Br. 22. True enough. But *Birchfield* did not hold that a State may supply constitutionally valid consent to a search by enacting such a statute. Had it done so, *Birchfield* would not have invalidated the criminal penalties imposed by North Dakota for refusing to submit to blood testing. If implied-consent statutes establish valid consent to a warrantless blood draw, then there can be no constitutional obstacle to the State's imposition of criminal penalties for refusing to submit — just as there is no constitutional bar on criminal penalties for refusing to submit to warrantless breath tests. *Birchfield*, 136 S. Ct. at 2186.

Rather, at issue in *Birchfield* was the validity of the condition imposed by the State in exchange for the privilege of driving — *i.e.*, submission to a warrantless blood draw on pain of criminal penalties. The Court described the condition as one that "deemed" individuals "to have consented" to those "consequences," and it applied the reasonableness framework that governs the validity of conditions that are imposed regardless of actual consent. 136 S. Ct. at 2185. Under this framework, the validity of a search condition turns on the reasonableness of the condition based on the balancing of public and private interests. Thus, *Birchfield* establishes that the appropriate inquiry is the reasonableness of the search condition, not the consent of the motorist to the search. And, for the reasons described in petitioner's opening brief, Pet. Br. 36–46,

and *infra*, pp. 9–21, submission to a warrantless unconscious blood draw is not a reasonable condition on the privilege of driving.

C. The State's remaining arguments in support of its imputed-consent regime lack merit.

The State makes various arguments regarding the purported reasonableness of the searches authorized by its implied-consent statute. See Br. 37–43. Those arguments are not relevant to the question of consent, which depends on the motorist's actual, voluntary consent to the search, not on the search's reasonableness. *Schneckloth*, 412 U.S. at 224–226. In any event, the State's justifications for the reasonableness of the search are meritless.

The State contends that its unconscious blood-draw provision is reasonable because it is tailored to situations in which the defendant is unconscious. Br. 38–39. But it makes no sense to impute consent only where the defendant, by definition, lacks capacity to consent. The State also makes various arguments to the effect that it has a heightened interest in obtaining BAC evidence from unconscious motorists, but offers no reason why these interests could not be equally served by conducting a blood draw pursuant to a warrant.

The State further posits that presuming that an unconscious person has not withdrawn consent is reasonable because the presumption is rebuttable. Br. 39–40. But the possibility that an unconscious person could regain consciousness and withdraw consent has no bearing on the validity of the consent of those who remain unconscious. And it strains credulity to believe

that people would wear a bracelet saying "no needles." *Id*. at 39.

Finally, the State asserts that the consent to the blood draw flows from the unconscious motorist's own choices. Br. 40–43. However, the choices at issue concern not the motorist's consent to the search, but rather his suspected criminal conduct itself. The notion that a defendant consents to a search by engaging in conduct that gives rise to probable cause has no basis in this Court's precedents. In many cases where the State wishes to conduct a search, the probable cause will arise from the defendant's own actions. Under the State's rationale, it would be reasonable to enact statutes dispensing with the warrant requirement in all such cases.

In sum, the State's assertion that it may impute consent to all drivers on its roads cannot be squared with this Court's consent jurisprudence and has troubling implications extending well beyond the drunk-driving context. This Court should reject it.

II. The Fourth Amendment does not permit the State to impose an unconscious blood draw as a condition of driving.

Just as the State may not justify petitioner's blood draw on the basis of consent, it may not justify it as a reasonable condition imposed on driving in the State. As *Birchfield* held, the Fourth Amendment imposes a "limit" on such conditions: they must be reasonable under the Fourth Amendment, in that the intrusion on privacy must be outweighed by the legitimate government interests in the search. 136 S. Ct. at 2185. *McNeely* and *Birchfield* establish that the intrusion on privacy occasioned by a blood draw is significant, and

that the law enforcement interests in drawing blood without a warrant are slight. Officers will ordinarily be able to obtain a warrant in the time it takes to arrange for a blood draw, and the exigent-circumstances exception will protect their ability to proceed without a warrant when time is of the essence. There is no reason to reach a different conclusion in the context of unconscious drivers. The State's arguments to the contrary are meritless.

A. An unconscious motorist has a substantial privacy interest in avoiding the significant bodily intrusion of a blood draw.

This Court has already held that a blood draw is a significant bodily intrusion that "'require[s] piercing the skin' and extract[ing] a part of the subject's body." *Birchfield*, 136 S. Ct. at 2178 (citation omitted); accord *McNeely*, 569 U.S. at 148. An individual's unconsciousness only worsens the intrusion, because the individual cannot object. The State has three responses, all meritless.

First, the State attempts to minimize the intrusion on the ground that an unconscious person "feels none of it." Br. 52. But that is no answer to this Court's repeated statements that, even though a blood test "typically involves virtually no risk, trauma, or pain," "any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests." *McNeely*, 569 U.S. at 159 (citation omitted); accord *id*. at 174 (Roberts, C.J., joined by Alito and Breyer, JJ., concurring) (describing a forced blood draw as a "significant bodily intrusion[]"); *Birchfield*, 136 S. Ct. at 2183. A person's interest in preventing

the government from piercing his skin to obtain evidence is a *privacy* interest against bodily invasion that does not depend on the extent to which the individual contemporaneously feels pain as a result. Cf. *Winston* v. *Lee*, 470 U.S. 753, 765 (1985) (surgery under general anesthesia at the behest of law enforcement "involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin"). Indeed, the sense of having been powerless to advocate for oneself during a bodily intrusion undertaken for law enforcement purposes is in itself a substantial intrusion on one's sense of dignity and autonomy.[5]

Second, the State points out that an unconscious motorist may sometimes receive emergency medical care, and that "[m]edical personnel will likely draw blood no matter what." Br. 42–43, 51. The thrust of this argument seems to be that the governmental taking of blood involves little incremental invasion of privacy. But the purpose of the intrusion matters — the State's "'piercing the skin' and extract[ing] a part of the subject's body," *Birchfield*, 136 S. Ct. at 2178 (citation omitted), for the purpose of gathering evidence that may be used against the individual in a criminal proceeding is a far greater violation of personal dignity and autonomy than a medical provider doing the same for the purpose of rendering care. Even where a medical procedure is performed without informed consent because of emergent circumstances such as unconsciousness, it is

[5] In addition, Wisconsin's statute applies not only to unconscious motorists, but also to any "person who is * * * otherwise not capable of withdrawing consent." Wis. Stat. § 343.305(3)(b). That would include motorists who are incoherent or incapable of communicating due to, for instance, a stroke or other medical condition, but who are still capable of experiencing the process.

understood that the medical provider is acting in the interests of the patient, such that the patient ordinarily would consent if given the opportunity.[6] See *Winston*, 470 U.S. at 765; see also *Birchfield*, 136 S. Ct. at 2178 (acknowledging that people often "voluntarily submit to the taking of blood samples as part of a physical examination," but nonetheless reaffirming that a "'compelled'" blood test is a significant intrusion) (citation omitted). As a result, a blood draw performed to facilitate medical care does not vitiate a driver's privacy interest against the qualitatively different, and more severe, intrusion presented by a blood draw for law enforcement purposes.[7]

Finally, the State argues that the fact that not many people will be subject to a warrantless unconscious blood draw renders the intrusion "narrow" in scope. Br. 51. But this Court has not evaluated the severity of a bodily intrusion based on how many people might be subject to it. Thus, in *Winston*, the court stated that in "analyzing the magnitude of the intrusion," the relevant factors are the intrusion upon the individual's dignitary interest in bodily integrity, as well as the degree of pain and risk, if any. 470 U.S. at 761–762.

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[6] Accordingly, statutes such as the Health Insurance Portability and Accountability Act of (HIPAA) 1996, Pub. L. No. 104-191, 110 Stat. 1936, reflect the understanding that receiving medical care does not vitiate an individual's privacy interests in avoiding having medical information used for other purposes, including law-enforcement purposes. See, *e.g.*, 45 C.F.R. § 164.512(f)(1)(ii) (HIPAA regulations providing that medical personnel generally may disclose results of a blood test to law enforcement only pursuant to a warrant or other court order or legal requirement).

[7] For the same reasons, absent actual consent, the motorist cannot be said to have entered a "bargain" by which he or she agrees to a blood draw in exchange for "society's" provision of potentially life-saving treatment. Br. 51–52.

The Court did not consider the fact that few individuals were likely to be subject to compelled surgery to retrieve evidence of a crime.

B. The law enforcement interest in proceeding without a warrant is slight.

The State implicitly concedes that its interest in drawing blood from unconscious motorist without a warrant is minimal at best. The State does not argue that seeking a warrant before drawing blood from an unconscious driver would impair its ability to enforce its drunk-driving laws. Br. 47–50. And the State does not dispute that — as this Court has repeatedly recognized — obtaining a warrant ordinarily causes no material delay in securing a blood sample. *McNeely*, 569 U.S. at 154; *id.* at 172 (Roberts, C.J., joined by Alito and Breyer, JJ., concurring); accord *Riley* v. *California*, 573 U.S. 373, 401 (2014); Pet. Br. 40–43. Nor does the State dispute that when seeking a warrant *would* threaten its ability to collect reliable BAC evidence, it may perform a warrantless blood draw pursuant to the exigent-circumstances exception. These points should be dispositive: the State has identified no interest that would justify dispensing with the warrant requirement in the context of unconscious drivers.

Instead, the State emphasizes its compelling interest in combating and prosecuting drunk driving. Br. 48–49. The strength of that interest is undisputed — but that is not the dispositive question. Rather, this Court has focused on the State's more specific justification for "demanding the * * * intrusive alternative" of a blood test "without a warrant." *Birchfield*, 136 S. Ct. at 2184; *Skinner v. Railway*

Labor Execs.' Ass'n, 489 U.S. 602, 628 (1989) (considering not simply the government interest in enforcing its law, but its interest in performing the search without a warrant or individualized suspicion). And the Court has concluded that the interest in proceeding without a warrant in the case of conscious drivers is slight, because obtaining a warrant "when there is sufficient time to do so in the particular circumstances" will not impede the State's ability to obtain BAC evidence. *Birchfield*, 136 S. Ct. at 2184. The unconsciousness of a driver does not change that conclusion.

The State also suggests, without support, that obtaining a warrant by telephonic or electronic means might delay necessary medical treatment when a driver is unconscious because he has been in a car accident. Br. 54–55. But when an individual requires immediate medical attention, police officers ordinarily address that need before seeking a warrant — and if officers conclude as a result that there is no time to seek a warrant, they may rely on exigent circumstances to proceed with the blood draw. See, *e.g.*, *Kansas* v. *Chavez-Majors*, 402 P.3d 1168, 1184 (Kan. Ct. App. 2017) (upholding blood test under exigent-circumstances exception where officers first addressed defendant's injuries); *Minnesota* v. *Stavish*, 868 N.W.2d 670, 677–678 (Minn. 2015) (officers arranged for emergency medical care rather than seeking warrant; exigent circumstances justified warrantless blood draw); *Dennison* v. *Texas*, No. 09-15-00525-CR, 2017 WL 218911, at *9 (Tex. Ct. App. Jan. 18, 2017) (upholding warrantless blood test where

officers were occupied securing accident scene and addressing injuries).[8]

Finally, the State suggests in passing that the exigent-circumstances exception does not adequately protect its interests because "determining whether an exigency exists requires guesswork." Br. 52. But as the *McNeely* plurality observed, "[n]umerous police actions are judged based on fact-intensive, totality of the circumstances analyses rather than according to categorical rules," and "we expect that officers can make reasonable judgments about whether the warrant process would produce unacceptable delay under the circumstances." 569 U.S. at 158 & n.7. When officers make such judgments, moreover, reviewing courts assess them from the perspective of the reasonable officer at the scene, giving appropriate deference to the officer's expertise and his need to make in-the-moment judgments. See *ibid*.; *Ryburn* v. *Huff*, 565 U.S. 469, 477 (2012) (per curiam). There is no reason to think that officers will not be able to operate under the exigent-circumstances framework here as they do in other contexts.

In sum, no governmental interest supports a categorical exception to the warrant requirement for unconscious drivers.[9] Because the significant privacy

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[8] In any event, this case illustrates that unconscious-motorist cases will not invariably involve serious car accidents. Petitioner was conscious when arrested, and then spent an hour at the police station before police decided to take him to the hospital to perform an evidentiary blood draw; he lost consciousness during this second trip.

[9] The State also relies on *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444 (1990), and *Maryland* v. *King*, 569 U.S. 435 (2013),

interest outweighs the law-enforcement interest in proceeding without a warrant, the State may not impose unconscious blood draws as a condition of driving.

C. Driving is not a highly regulated activity.

Perhaps recognizing the difficulty of arguing that its interests in dispensing with a warrant outweigh the substantial privacy interests at stake, the State argues (Br. 45–46) that driving is a highly regulated activity. Therefore, in the State's view, it need not offer as weighty a justification to impose a warrantless blood test. That argument is foreclosed by this Court's decisions.

This Court has repeatedly declined to expand the "pervasively regulated business" doctrine beyond the narrow industries in which it was first applied. *Marshall* v. *Barlow's, Inc*., 436 U.S. 307, 313 (1978) ("[t]he clear import of our cases is that the closely regulated industry * * * is the exception"); Pet. Br. 35–36. And in *City of Los Angeles* v. *Patel* — a decision that the State does not acknowledge — this Court

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but neither suggests that the search here is a reasonable condition. *Sitz* was not a conditions case, but instead involved a sobriety checkpoint analyzed under precedents holding that warrantless, suspicionless checkpoints are generally reasonable because of the minimal nature of the intrusion. *Sitz*, 496 U.S. at 452–453. Similarly, *King* upheld suspicionless DNA swabs of arrestees based on the slight nature of the intrusion and the State's strong interest in accurately identifying individuals it had arrested. Neither decision involved the much greater intrusion at issue here. Indeed, neither *Birchfield* nor *McNeely* suggested that *Sitz* or *King* was relevant to its assessment of the reasonableness of blood tests on individuals suspected of drunk driving. *Birchfield*, 136 S. Ct. at 2183–2186; *McNeely*, 569 U.S. at 151–156.

declined to expand the doctrine to the hotel industry precisely because "[t]o classify hotels as pervasively regulated would permit what has always been a narrow exception to swallow the rule." 135 S. Ct. 2443, 2455 (2015). That point is dispositive here. Driving is a common, everyday activity — indeed, a practical necessity — for most citizens. In 2018, 83 percent of adult survey respondents reported that they drive every day or most days.[10] Classifying driving as a highly regulated industry would subject millions of people to warrantless searches.[11]

The State's argument, moreover, cannot be reconciled with *McNeely* and *Birchfield*. The *McNeely* plurality explained that although driving on a public highway is a state-granted "privilege" subject to considerable regulation, that fact "does not diminish a motorist's privacy interest in preventing an agent of the government from piercing his skin." 569 U.S. at 159 (plurality op.); accord *id*. at 174 (Roberts, C.J., joined by Alito and Breyer, JJ., concurring). And *Birchfield* analyzed the reasonableness of a condition imposed on driving, and concluded that the condition exceeded the "limit[s]" on such conditions — without

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[10] Megan Brenan, 83% of U.S. Adults Drive Frequently; Fewer Enjoy It a Lot (2018), https://news.gallup.com/poll/236813/adults-drive-frequently-fewer-enjoy-lot.aspx.

[11] The State also suggests that driving while intoxicated should be considered a heavily regulated activity because the liquor industry is heavily regulated. Br. 46 (citing *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72 (1970)). But it is quite a leap from permitting warrantless administrative searches of businesses involved in the liquor industry in the course of verifying regulatory compliance to permitting warrantless searches of individuals suspected of criminal offenses involving alcohol. This Court has never suggested that such searches would be permissible simply because alcohol is involved.

suggesting that the analysis should proceed on the understanding that driving falls within the heavily regulated industry doctrine. 136 S. Ct. at 2185. Had the Court believed that the doctrine was applicable, it surely would have proceeded on that basis.

Finally, the State emphasizes that this Court has upheld various suspicionless drug testing regimes under the reasonableness balancing test. In those situations, however, the searches were justified by interests distinct from ordinary law-enforcement needs. See, *e.g.*, *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 653 (1995) (interest in deterring drug use in children was a "special need[], beyond the normal need for law enforcement") (citation omitted); *Skinner*, 489 U.S. at 620, 641 n.5 (1989) (noting that drug tests were for safety purposes and results were not turned over to law enforcement); *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 666 (1989) (same). And cases involving searches of probationers and parolees relied on the reduced expectation of privacy resulting from the extensive supervision inherent in that status. *Samson* v. *California*, 547 U.S. 843, 852 (2006). Here, by contrast, only ordinary law-enforcement interests are at stake, and this Court has already held that a motorist has a substantial and legitimate privacy interest "in preventing an agent of the government from piercing his skin." *McNeely*, 569 U.S. at 159.

D. Requiring a warrant serves important public purposes.

Finally, the State argues that requiring a warrant absent exigent circumstances will not protect individual privacy interests. It argues, citing

Birchfield, that there is no need for a "neutral magistrate" to evaluate probable cause because the arresting officer's "own characterization of his or her observations" will be the basis for any probable cause, and a magistrate would "be in a poor position to challenge such characterizations." 136 S. Ct. at 2181.

Although the State relies on *Birchfield*'s statement that "requiring the police to obtain a warrant in every case" before performing a breath test "would impose a substantial burden but no commensurate benefit," that reasoning is not apposite here. 136 S. Ct. at 2181–2182. *Birchfield* considered the benefits offered by warrants in the context of breath tests — not blood tests — only after concluding that requiring a warrant before every breath test would impose a significant burden on law enforcement. *Id*. at 2181. Here, requiring a warrant before blood draws on unconscious motorists will not impose that sort of burden. As the Court observed in *Birchfield*, there is "no reason to believe that such situations [*i.e.*, unconscious motorists] are common in drunk-driving arrests." *Id*. at 2184–2185. The State has not offered any evidence to the contrary. And for the reasons discussed above and in the opening brief, seeking a warrant does not impose any substantial burden on law enforcement. See pp. 13–16, *supra*; Pet. Br. 39–46.

In addition, the State's argument that warrants will serve no purpose here is in significant tension with the treatment of blood tests in *McNeely* and *Birchfield*. In *McNeely*, the Court emphasized that a blood draw is a significant bodily intrusion, and that "absent an emergency, no less [than a warrant] could be required where intrusions into the human body are concerned." 569 U.S. at 148 (citing *Schmerber* v. *California*, 384

U.S. 757, 770 (1966)). And the concurring Justices observed that in view of the significance of that intrusion, warrants are generally necessary to ensure that the intrusion is "justified," *i.e.*, to ensure that "that a neutral, detached judicial officer [has] review[ed] the case" and concluded "that there is probable cause for any search and that any search is reasonable." *Id*. at 174 (Roberts, C.J., joined by Alito and Breyer, JJ., concurring). Notably, neither the plurality nor the concurrence suggested that the fact that evidence of probable cause and the nature of the intrusion will be the same in most drunk-driving cases lessened the importance of the warrant requirement. And while the *Birchfield* Court concluded that requiring warrants would not confer significant benefits in the context of the much lesser intrusion of a breath test, the Court reaffirmed that warrants are generally necessary to justify blood draws. 136 S. Ct. at 2184.

Finally, the State's premise is wrong: there is no reason to think that cases involving unconscious drunk-driving suspects will present the same facts, or that the existence of probable cause can never be "subject to serious doubt." Br. 53. As this case illustrates, police officers may encounter an unconscious motorist under a variety of circumstances, and thus the evidence supplying probable cause may vary widely. See Pet. Br. 44–45. Police may encounter an unconscious motorist after a crash, or pulled over by the side of the road, or some distance from his vehicle. The existence of probable cause may turn on a variety of circumstances, such as the availability of eyewitness testimony, the smell (or lack thereof) of alcohol, and the presence of alcohol

containers in the car.[12] Absent exigent circumstances, whether a particular set of facts amounts to probable cause should be determined "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U.S. 10, 14, (1948).

III. Petitioner's blood test may not be justified as a search incident to arrest.

In *Birchfield*, this Court held that warrantless blood draws of conscious individuals could not be justified as searches incident to arrest. In so doing, the Court acknowledged that some drivers might not be able to undergo breath testing because they are unconscious. But the Court stated that it had "no reason to believe that such situations are common in drunk-driving arrests," and that "when they arise, the police may apply for a warrant if need be." 136 S. Ct. at 2184–2185. That conclusion was correct, and the State provides no reason to depart from it here.

First, the State points out that a breath test is unavailable where a motorist is unconscious. Br. 56. But, of course, the Court was aware of that in *Birchfield*, and it still concluded that police should apply for a warrant in such situations. And because the search-incident-to-arrest exception involves balancing privacy interests against law-enforcement interests, the Court should conclude that the Fourth Amendment

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[12] See Brief of Colorado et al. as Amicus in support of Respondent, 13–14 (noting that establishing probable cause when motorist is unconscious may require consideration of broader range of facts than in "run-of-the-mill DUIs").

does not permit warrantless blood draws on unconscious individuals incident to their arrest for the reasons stated above.

Second, the State argues that contrary to *Birchfield*'s statement, unconscious driver situations "occur[] far too often." Br. 56. However, neither it nor the state amici offer any evidence of the incidence of unconscious motorists suspected of drunk driving. The State clearly has a compelling interest in combating drunk driving, including when motorists lose consciousness. But obtaining a warrant in the absence of exigent circumstances will not impede that interest.

Third, the State repeats its arguments that the intrusion on an individual's privacy interests is less severe when the individual is unconscious. That argument fails for the reasons stated above. See pp. 9–13, *supra*.

In short, the State has given the Court no reason to retreat from *Birchfield*'s conclusion — where a breath test is unavailable, police can and should "get a warrant" for a blood test.

IV. The State has waived any argument that the BAC evidence should not be suppressed.

The State argues, for the first time and in a footnote, that even if this Court holds that the blood draw was unconstitutional, it should remand to state court, apparently to provide the State an opportunity to argue that the evidence should not be suppressed under *Heien* v. *North Carolina*, 135 S. Ct. 530 (2014). Br. 57 n.31. This Court should decline to do so. Because the State failed to present this argument in the trial court,

the intermediate appellate court, the Wisconsin Supreme Court, or to this Court in opposing certiorari, it is waived. The State should not be afforded an opportunity to present a new theory that it could have raised at any time during this nearly six-year-old litigation. If this Court holds that the blood draw was unconstitutional, the BAC evidence must be suppressed.

CONCLUSION

For the foregoing reasons, the judgment of the Wisconsin Supreme Court should be reversed.

Respectfully submitted.

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