NO. 19-996

In the Supreme Court of the United States

LINDSAY WATERS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

BRIEF OF *AMICUS CURIAE* DUI DEFENSE LAWYERS ASSOCIATION (DUIDLA) IN SUPPORT OF PETITIONER

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JUDICIAL RULES

INTEREST OF AMICUS CURIAE DUIDLA[1]

The DUI Defense Lawyers Association (DUIDLA) is a nonprofit national bar association comprised of lawyers throughout North America who endeavor to protect the constitutional rights of all citizens, with the understanding that DUI/DWI cases, by virtue of their frequency and the stigma attached thereto, are often at the front line for erosion of civil liberties.

DUIDLA's mission is to protect and ensure by rule of law those individual rights guaranteed by the state and federal constitutions in DUI-related cases, and to resist the constant efforts that are made to curtail these rights, while also facilitating cooperation between the defense lawyers who are engaged in the furtherance of these objectives.

Amicus Curiae DUIDLA, through its members' efforts in trial courts and through the organization's amicus efforts, seeks to ensure that our legislative and executive branches of government do not usurp the role of the judiciary in defining the scope of what does and does not qualify as consent to search in a criminal investigation where, absent consent, the search would necessarily violate the Fourth Amendment to the United States Constitution.

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[1] Amicus DUIDLA obtained consent to file this brief from counsel of record for both parties in this case more than 10 days prior to the date of this filing, as required by Rule 37.2(a) and have included these consents in the filing package for this amicus brief.

No monetary contributions were made to this brief by either party or their counsel, nor did counsel for either party author any portion of this brief, in whole or in part.

DUIDLA is particularly interested in the legal and constitutional issues impacted by this Court's decision in *Birchfield*, of which DUIDLA was an Amicus Curiae. It is DUIDLA's belief that the Court ruled correctly in *Birchfield* and in *McNeely* with regard to warrantless blood draws.

DUIDLA believes that the issues implicated in the instant case are the result of state legislatures and state courts (like Georgia's) failing to modify their implied consent statutes and interpretations thereof to reflect the holdings of this Court in *McNeely* and *Birchfield* with respect to warrantless blood draws and the Fourth Amendment. The result of this predicament is a nationwide epidemic of "implied/ express consent" statutory schemes being utilized by states to unconstitutionally compel blood draws, and in so doing, to evade *Birchfield* and the Fourth Amendment's requirement that police obtain a warrant or voluntary consent.

ARGUMENT

I. LAW ENFORCEMENT'S UNFETTERED DISCRETION TO SELECT A MORE INVASIVE BLOOD SEARCH OVER A FREELY-AVAILABLE, LESS INTRUSIVE BREATH SEARCH RENDERS SUCH SEARCHES UNREASONABLE.

The Fourth Amendment prohibits "unreasonable searches." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016). The taking of a blood sample or the administration of a breath test is a search. *Id.* However, although both blood tests and breath tests are searches under the Fourth Amendment, this Court

has underscored the immense differences between the two tests. In *Birchfield*, the Court recognized that breath tests are permitted pursuant to the "long-established rule that a warrantless search may be conducted incident to a lawful arrest." *Id.* at 2174. The Court next determined whether the search-incident-to-arrest doctrine could apply to the more intrusive search inherent to blood testing. It held that it could not. The Court's reasoning on these points was tied directly to each search's vastly different degrees of privacy invasion, both physical and personal.

Breath tests, the Court explained, "do not implicate significant privacy concerns." *Id.* at 2176. "The physical intrusion is almost negligible." *Id.* There is a "minimum of inconvenience." *Id.* "The effort is no more demanding than blowing up a party balloon." *Id.* at 2177. Further, breath tests "are capable of revealing only one bit of information, the amount of alcohol in the subject's breath." *Id.* Unlike blood testing or DNA swab testing, which leaves in the hands of police "a wealth of additional, highly personal information," with a breath test, "[n]o sample of anything is left in the possession of police." *Id.*

"Blood tests," however, "are a different matter." *Id.* at 2178. They require piercing the subject's skin, extracting a part of the subject's body, and place in the hands of police a sample that can be preserved and tested for information beyond a simple BAC reading. *Id.* The process is "significantly more intrusive than blowing into a tube." *Id.* This is likely why, the *Birchfield* Court surmised, "many States' implied consent laws . . . specifically prescribe that breath tests be administered in the usual drunk-driving case instead

of blood tests or give motorists a measure of choice over which test to take. *Id.*

For some states, this is true.[2] But this is not so in Georgia or the 38 other states that allow law enforcement to demand a blood test (without first offering breath tests) through so-called Implied Consent laws.[3] In these states, despite the hard line drawn between these two types of tests in *Birchfield*, and despite the lengthy analysis describing the highly intrusive nature of blood tests versus breath tests, officers are still permitted the unilateral discretion to pick to which type of test the motorist must submit. Pursuant to *Birchfield*, this unilateral and arbitrary imposition of the more intrusive search upon the citizen when the less intrusive search (breath test) is available is *per se* unreasonable, and categorically unconstitutional.

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[2] For example, *see* Map 1 below (Section III. A.).

[3] Ala. Code § 32-5-192; Az. Rev. Stat. § 28-1321; Cal. Veh. Code § 23612(a)(2)(A); Colo. Rev. Stat. § 42-4-1301(3); Conn. Gen. Stat. § 14-227b; D.C. Code § 50-1904.02; Del. Code Tit.21 § 2740; Fla. Stat. § 316.1932; Ga. Code § 40-5-55; Idaho Code § 18-8002; 625 Ill. Comp. Stat. 5/11-501.1; Ind. Code § 9-30-6-2; Iowa Code § 321J.6; Kan. Stat. § 8-1001; Ky. Rev. Stat. § 189A.103; La. Rev. Stat. § 32:661; Md. Code Transp. § 16-205.1; Mich. Comp. Laws § 257. 625a; Miss. Code § 63-11-5; Mo. Rev. Stat. § 577.020; Mont. Code § 61-8-402; Neb. Rev. Stat. § 60-6,197; Nev. Rev. Stat. § 484C.160; N.H. Rev. Stat. § 265-A:4; N.M. Stat § 66-8-107; N.Y. Veh. & Traf. Law § 1194; N.C. Gen. Stat. 20-16.2; N.D. Cent. Code § 39-20-01; Ohio Rev. Code § 4511.191; Okla. Stat. Tit. 47 § 751; 75 Pa. Cons. Stat. § 1547; R.I. Gen. Laws § 31-27-2.1; S.C. Code 56-5-2950; Tenn. Code § 55-10-406; Texas Veh. & Traf. Code, § 724.011; Utah Code 41-6a-520; Vt. Stat. Tit. 23, § 1202; Va. Code. § 18.2-268.2; Wis. Stat. § 343.305; Wyo. Stat. § 31-6-102.

The Court requires that a search warrant be drafted and executed in a manner that intrudes upon privacy interests as minimally as possible for a reason: general warrants are prohibited. Searches must be reasonable, and their scope carefully tailored to their purpose. Where a search can reasonably be completed with specificity and limited intrusiveness, it ought to be. Put simply, the Fourth Amendment requires that wherever possible, police search and invade citizens' privacy with a scalpel, not a sledgehammer. This restriction is important. For, without such a restriction, police will always select the sledgehammer.

The Court, in *Birchfield*, described and distinguished breath and blood testing in largely this way. *Birchfield*, 136 S. Ct. at 2167. ("The most common and economical method of calculating BAC is by means of a machine that measures the amount of alcohol in a person's breath."). Breath testing is to search for BAC evidence with a scalpel; blood testing, with a sledgehammer. The justification for compelling blood over the breath alternative therefore must be greater to comply with the Fourth Amendment's requirement of reasonableness.

Indeed, as the Court put it quite simply in *Birchfield*: "Blood tests are significantly more intrusive [than breath tests], and <u>their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test</u>." *Id.* at 2184 (emphasis added). Yet, in Georgia[4], blood tests' reasonableness is <u>not</u> being "judged in light of the availability of the less invasive alternative of a breath test." Quite

[4] As well as the 38 other states which allow law enforcement to immediately demand blood tests, *see* Map 1 below in Section III. A.

to the contrary, the availability of the less intrusive breath test alternative is not being considered at all. In *Birchfield*, "Respondents . . . offered no satisfactory justification for demanding the more intrusive alternative [of a blood test] without a warrant," and yet here, in Ms. Waters' case (and throughout Georgia on a daily basis), Respondents again neglect the same.

As explained by Justice Sotomayor in her partial concurrence/dissent to *Birchfield*:

> "Police officers may want to conduct a range of searches after placing a person under arrest. They may want to pat the arrestee down, search her pockets and purse, peek inside her wallet, scroll through her cellphone, examine her car or dwelling, swab her cheeks, or take blood and breath samples to determine her level of intoxication. But an officer is not authorized to conduct all of these searches simply because he has arrested someone. Each search must be separately analyzed to determine its reasonableness."

Id. at 2187 (emphasis added). Why, then, does a police officer's unchecked discretion to choose the more invasive search of a person's blood over the less invasive search of a person's breath in Georgia (and elsewhere), remain so unchecked? It seems that under *Birchfield* and basic Fourth Amendment principles such a scheme would be presumptively invalid, and yet, despite the frequency and pervasiveness of the violation, it continues to evade this Court's review.

This Court dedicated most of *Birchfield* to distinguishing the type of search involved in a breath test from the type of search involved in a blood test; yet

states like Georgia here four years later openly refuse to do the same. The result is an ongoing epidemic of Fourth Amendment violations, where police systematically rely on their statutorily-granted discretion to select the more intrusive (and therefore unreasonable) blood test, as happened in Ms. Waters' case. In essence, with warrantless breath tests, the *Birchfield* Court authorized an officer to cast a single fishing line, baited to attract one kind of fish, into a lake. Meanwhile, states like Georgia interpret the authorization to do a warrantless search at all as blanket permission to systematically trawl with fishing nets all corners of the sea—just to see what they might catch, with blood tests. In these states, the Fourth Amendment has become "an empty promise of protecting citizens from unreasonable searches." *Id.* at 2195 (Sotomayor, J., dissenting). This practice is unreasonable and unconstitutional. The States' willful dissidence in categorically exempting their law enforcement from this critical "commonsense comparative check"[5] mandates correction.

As if it needed to be made any clearer, this Court in *Birchfield*'s majority opinion even offered this statement in footnote 8: "Indeed, today's decision provides very clear guidance that the Fourth Amendment allows warrantless breath tests, but as a general rule

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[5] From Justice Sotomayor's *Birchfield* dissent: "It should go without saying that any analysis of whether to apply a Fourth Amendment's warrant exception must necessarily be comparative. If a narrower exception to the warrant requirement adequately satisfies the governmental needs asserted, a more sweeping exception will be overbroad and could lead to unnecessary and 'unreasonable searches' under the Fourth Amendment. . . . [O]ur cases have often deployed this commonsense comparative check." *Id.* at 2190 n.3.

does not allow warrantless blood draws, incident to a lawful drunk-driving arrest." *Id.* at 2185 n.8. Again, in *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2530 (2019), the Court reiterated: "[I]f an officer has probable cause to arrest a motorist for drunk driving, the officer may conduct a breath test (but not a blood test) under the rule allowing warrantless searches of a person incident to arrest." Somehow however, defying all reason, the *Birchfield* and *Mitchell* Court's "very clear guidance" was, to states like Georgia, still not clear enough.

There is a practical solution to this pervasive problem. To comply with the Fourth Amendment, police in states with implied/express consent schemes like Georgia's ought be required to either: (1) demand a breath test as the initial test, or (2) give the motorist a choice of which test s/he prefers to take. If the breath test is found to be unavailable, then, as set forth in *Birchfield*, the officer may apply for a warrant. If there is not sufficient time to apply for a warrant, then the officer can rely on the exigent circumstances exception to the warrant requirement. Many states already employ such a lawful procedure,[6] and none of those states report any problems associated therewith.

This Court should grant Ms. Waters' Petition for Writ of Certiorari for this very straightforward reason alone. Here, Officer Desvernine—like so many officers throughout the State of Georgia every day—required Ms. Waters to submit to the more invasive blood test without first offering or attempting the available and less invasive breath test. Under *Birchfield*, that demand rendered the search unreasonable. The Fourth Amend-

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[6] Alaska, Arizona, Arkansas, Hawaii, Maine, Massachusetts, Minnesota, South Dakota, Oregon, Washington, and West Virginia.

ment plainly requires suppression of the results of that test.

There is an additional reason to grant Ms. Waters' Petition, however: to address the nationwide epidemic of States substituting implied/express statutory consent to such testing for the actual knowing and voluntary consent that is required by the Fourth Amendment. This issue loomed in *Birchfield* and was dodged in *Mitchell*,[7] but the concerns implicated remain as urgent as ever.

Notably, it is only upon facts such as those present in Ms. Waters' case that this particular issue can be accessed. And the issue, put simply, is this:

> Can a state's statutory implied consent law categorically substitute for actual consent in every non-exigency blood test case?

In other words, is there suddenly yet another exception to the warrant requirement; now, the legal fiction that is legislative consent? One might think that the answer would seem to have to be "no," because petitioner Baylund in *Birchfield* acquiesced to a blood test in a state with implied consent laws and this Court still remanded the matter to state court to determine whether his consent was voluntary. *Birchfield* at 2186. And in *Mitchell* as well, an implied consent scheme was in place and the Court did not conclude the uncon-

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[7] As Justice Gorsuch stated in his *Mitchell* dissent: "We took this case to decide whether Wisconsin drivers impliedly consent to blood alcohol tests thanks to a state statute. That law says that anyone driving in Wisconsin agrees—by the very act of driving—to testing under certain circumstances. But the Court today declines to answer the question presented." *Mitchell*, 129 S. Ct. at 2551 (Gorsuch, J., dissenting).

scious petitioner there had already supplied consent by driving on the roads; it rejected that approach and upheld the blood test as an exigency exception to the warrant requirement. *Mitchell* at 2539. *See also id.* at 2533 ("Our decisions have not rested on the idea that these laws do what their popular name might seem to suggest—that is, create actual consent to all the searches they authorize.").

The unescapable reality is that if implied/express consent statutory schemes are held to supply the voluntary and actual consent that the Fourth Amendment requires for a warrantless blood test, then the analysis contained in all of the aforementioned cases has been entirely unnecessary. Every motorist driving anywhere would be considered to have already supplied blanket consent to any testing sought by a police officer. Both warrant and exigency considerations would be irrelevant. But, because this Court has never approved of such a disturbing notion, the question remains and the problem persists: If actual voluntary consent is still required in states with implied/express consent schemes, at what point does the requisite actual consent from the motorist become coerced, and therefore, invalid?

Amicus DUIDLA would respectfully submit that that threshold has been crossed in Ms. Waters' case, and in the State of Georgia (and as the included maps indicate, dozens of other states as well).

II. ANY ACQUIESCENCE TO BLOOD TESTING AFTER BEING READ GEORGIA'S COERCIVE IMPLIED CONSENT WARNING IS NOT VOLUNTARY CONSENT.

Implied consent schemes do not give officers the categorical right to draw blood without a warrant. If

they did, the entire analysis and discussion contained in *Birchfield* would have never occurred. Rather, implied consent schemes are the statutory mechanism by which a police officer may seek to obtain voluntary consent. Actual consent still must be obtained, and the burden is on the state to prove it.

A valid consent to search is given when the totality of the circumstances indicate that the acquiescence was "the product of an essentially free and unconstrained choice." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). Thus, when "the State attempts to justify a search [of a person] on the basis of [the person's] consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Id.* at 248.

In Ms. Waters' case, she was told by Officer Desvernine the following:

(1) That the law required her to submit to his blood test;

(2) That a failure to submit to the blood test would result in the loss of her driver's license for at least one year; and

(3) That any failure to submit to the blood test would be deemed a "refusal" of the test, which would become evidence of her guilt of the DUI crime in her criminal trial.

The warning read to Ms. Waters in Georgia is a patently coercive advisory. A suspect's agreement to a chemical search of her blood is not "free and unconstrained" when she is told that she is required by law to submit to the test, that the alternative is loss of

her license for a year and that her refusal will be used to cause her conviction of the underlying DUI offense. In states like Georgia, the threatened consequences of refusal are inescapably coercive. Such oppressive consequences simply cannot be squared with the exercise of a constitutional right.

A. Telling a Motorist That the Law Requires She Submit to a Blood Test (Without Offering Breath) Is Unlawful and Unconstitutionally Coercive.

Consent is not proven by showing mere acquiescence to a claim of lawful authority. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). Decades ago, the Supreme Court of the United States already considered whether consent in the face of an assertion of lawful authority was voluntary, and held it was not. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). In *Bumper*, an officer went to a house and announced to the defendant's grandmother that he had a warrant to search the home. *Bumper* at 546. The grandmother responded "go ahead," and opened the door to allow officers in. *Id.* The grandmother later testified that she permitted the officers in because she was "satisfied" they had lawful authority on account of their claim that they possessed a warrant. *Id.* at 547. The state sought to justify the search not on the warrant, but on the theory that the grandmother had voluntarily consented. *Id.*

The Court held that there was no valid consent and reasoned: "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coer-

cion—albeit colorably lawful coercion. Where there is coercion, there cannot be consent." *Bumper* at 550.

In the context of a warrantless blood test, it is difficult (if not impossible) to square Georgia's claim that Ms. Waters voluntarily consented to the blood search with the holding of *Bumper*. She was told she was required by law to acquiesce. When she equivocated at the hospital and tried to ask questions about the test, and whether she had any choice in the matter, she was forcefully reminded of this fact by the officer.

Many states do appreciate this reality. In *State v. Valenzuela*, 239 Ariz. 299 (2016), the Supreme Court of Arizona found that their implied consent notice rendered the defendant's consent to a blood test involuntary. In *Valenzuela*, the defendant was arrested for DUI and read an implied consent warning advising that "Arizona law requires you to submit to and successfully complete tests of breath, blood or other bodily substance as chosen by a law enforcement officer to determine alcohol concentration or drug content." *Id.* at 301. Like Georgia's, the warning also further warned that a refusal would result in a license suspension. The Arizona warning did not threaten or permit a separate criminal charge if the suspect refused, and it also did not threaten or advise that the refusal would become proof of guilt at the suspect's DUI trial. In that case, the defendant stated he understood the notice, had no questions and he then cooperated with the testing process. *Id.*

Valenzuela moved to suppress the test results on the ground that his consent was not voluntary. The Supreme Court of Arizona agreed. *Id.* Conducting their analysis within the framework of *Bumper* and *McNeely*, the court noted that Valenzuela only con-

sented to the blood test after the officer advised him that Arizona law required him to submit. *Valenzuela* at 306. The court reasoned that "[b]y telling Valenzuela multiple times that Arizona law required him to submit to and complete testing to determine alcohol or drug content, the officer invoked lawful authority and effectively proclaimed that Valenzuela had no right to resist the search." *Id.* In *Valenzuela*, as in *Bumper*, "[t]he officer's claim of authority to search was 'instinct with coercion.'" *Id.* (citing *Bumper* at 549).

The Supreme Court of South Dakota has also come to this inevitable conclusion. In *State v. Medicine*, 865 N.W.2d 492 (S.D. 2015), the defendant was arrested for DUI and read South Dakota's implied consent law. The notice told him that he had already consented to the withdrawal of his blood by driving on the roads. Like *Valenzuela*, the notice did not threaten criminal sanctions if the arrestee refused a test. After hearing the warning, Medicine agreed to submit to the blood test. The South Dakota Supreme Court found that his consent was not voluntary. *Id.* at 496. *Medicine*, like *Valenzuela*, relied on this Court's reasoning in *Bumper*. *Id.* at 497. Among other things, the South Dakota Supreme Court found that the statement within the notice that the defendant had "already consented" was "functionally equivalent to an assertion that the officer has authority to conduct a search," *id.* at 498, like the situation in *Bumper*. And, the court concluded, "the legislature cannot enact a statute that would preempt a citizen's constitutional right, such as a citizen's Fourth Amendment right" to refuse a search. *Id.* (citing *State v. Fierro*, 853 N.W.2d 235, 244 (S.D. 2014)).

Ultimately, either *Bumper* must be overruled and the state can affirmatively legislate its own citizens'

consent to searches across the board, or *Bumper* is still the law, and blood tests cannot be coerced by expressly telling citizens that the law already provided their consent. Amicus DUIDLA respectfully submits that if the Fourth Amendment is to have any meaning, it must be the latter, and as such, Georgia's implied consent cannot be permitted to substitute for actual voluntary consent to a blood test.

B. The Threat of the Refusal Being Proof of Guilt to the Crime of DUI Is Unconstitutionally Coercive and Renders Any Purported Consent Invalid.

Certainly, the role of states' Implied/Express Consent statutes is to encourage the arrested DUI driver at the scene to consent to testing. However, given that a blood test is constitutionally protected, the consequences of refusal of a blood test must not be so severe that they risk coercing the driver to submit to the test. Informing a driver that his or her refusal will be used as proof of guilt of the DUI crime at his or her trial goes too far in this direction. It is tantamount to the criminalization of the refusal that was prohibited in *Birchfield*.

This is particularly so for those motorists lacking legal acumen. A non-attorney suspect is not going to think to himself, when hearing the Georgia implied consent warning, "well, the refusal will be considered along with all other evidence and the jury will decide the weight to be applied to it, given the totality of everything else, and still the state will have the burden of proof beyond a reasonable doubt." A non-attorney suspect hearing Georgia's warning will instead think: "I have just been told that I will be found automatically

guilty of DUI based on the refusal to consent to this blood draw." The suggestion that a refusal will prove guilt very naturally causes most citizens to ascribe some automacy to the conviction as a result. Indeed, that is Georgia's (and dozens of other states') very purpose in passing these laws. In which case, we are right back in the prohibited coercive territory discussed in *Birchfield*. The only real distinction is that *Birchfield* involved the threat of criminal prosecution for a separate refusal-based crime; here, the threat is of the refusal causing the suspect to be deemed automatically guilty of the underlying DUI crime. Both unconstitutionally lord the threat of a criminal conviction over the motorist to coerce the consent. And, "[w]here there is coercion, there cannot be consent." *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968).

C. The Three Threatened Consequences Together Are Coercive *Per Se* and No Valid Fourth Amendment Consent Can Be Obtained Under Their Amalgamated Threat.

Perhaps it may be that just the threat of losing one's license alone, is not sufficiently coercive. Perhaps it may be that just the threat of evidentiary consequences in administrative proceedings for refusal alone is not sufficiently coercive. But the combination of multitudinous coercive tactics must have some reasonable limit. *Birchfield*, 136 S. Ct. at 2185 ("There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads."). When a motorist is told they are required by law to submit to a blood test and they will lose their license for a one year minimum for a refusal and that their refusal will be used at their criminal trial to prove their guilt of the underlying

DUI crime, is there really any functional difference from the criminal penalty invalidated in *Birchfield*? From the perspective of the citizen, and as a practical reality, there is not.

III. STATES COURTS' BLANKET APPROVAL OF SUCH COERCED CONSENT TO AN OFFICER'S UNREASONABLE BLOOD DRAW DEMAND IS A NATIONWIDE FOURTH AMENDMENT VIOLATION EPIDEMIC REQUIRING THIS COURT'S INTERVENTION.

One of the goals of the Amicus DUI Defense Lawyers Association in composing and filing this brief was to provide the Court with an accurate assessment of the ongoing epidemic of unconstitutional State Implied Consent laws. To accomplish this goal, Amicus DUIDLA surveyed its membership, which includes leading members of the DUI defense bar throughout the country (many of who author DUI practice manuals covering their states' DUI laws and teach continuing legal education courses on DUI-related topics).

Undersigned Amicus asked these DUI defense practitioners to provide information about their states' Implied Consent laws as they relate to warrantless blood draws and to include statutory cites for the same. This data was collected and is reflected in the graphical maps included in this section.

The results, as represented in these graphical maps, are even more startling than the undersigned Amicus DUIDLA initially suspected. Indeed, the extent to which the states have blatantly ignored this Court's decision in *Birchfield* is nothing less than shocking.

A. State Implied Consent Laws Require or Allow Law Enforcement to Demand a Blood Test Without First Offering a Breath Test.

As to the threshold issue in this case, it appears that at least 39 states[8] have not completely taken this Court's decision in *Birchfield* to heart. As the map below shows, the states in red all allow their law enforcement, through so-called implied consent laws, unbridled discretion to demand any form of chemical test that the officer chooses, including blood tests, without first offering the arrestee a choice of a breath test. The States in orange also allow law enforcement to demand blood tests, albeit only in limited circumstances, usually such as injury accidents, felony DUI cases, or cases where drug impairment is suspected. Only 10 states have implied consent laws that properly allow the arrestee to choose the test or first offer only breath tests.

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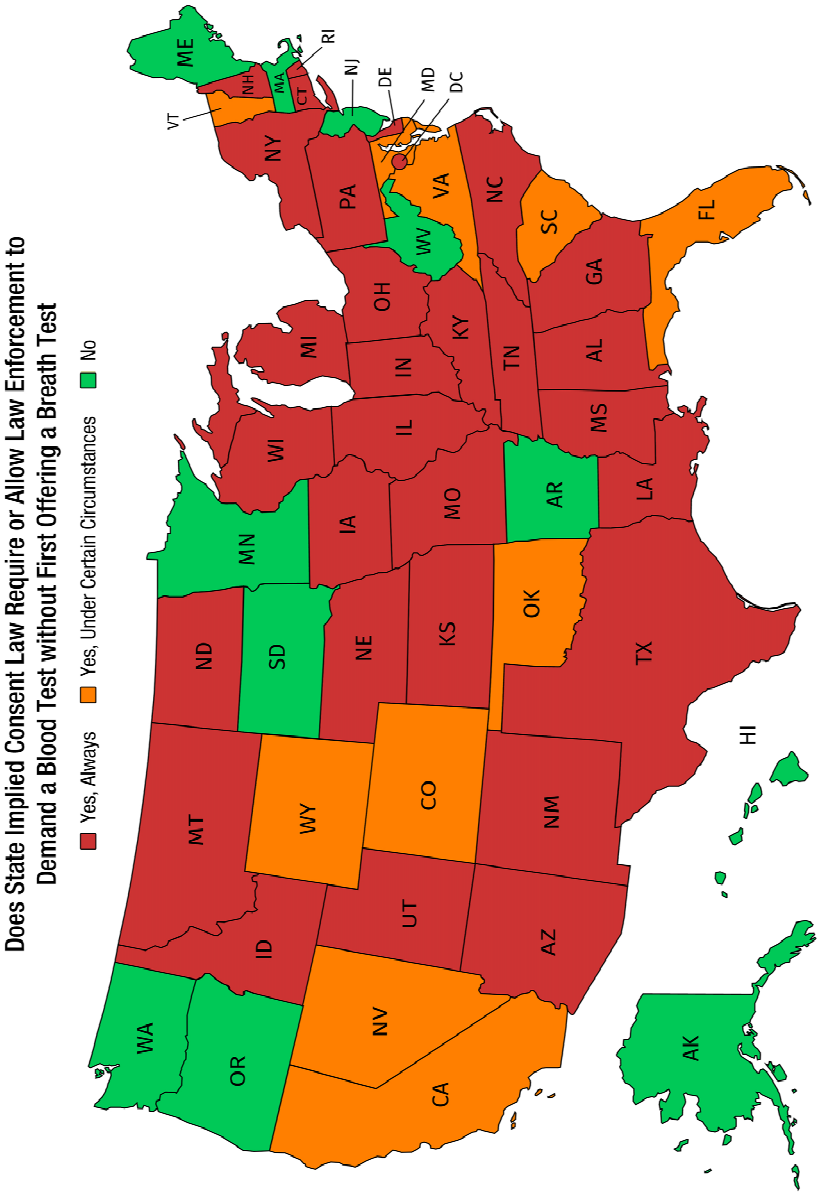
[8] *See* footnote 3 for the list of state statutes that provide the underlying data for this map.


Does State Implied Consent Law Require or Allow Law Enforcement to Demand a Blood Test without First Offering a Breath Test
Yes, Always
Yes, Under Certain Circumstances
No
ME
VT
NH
MA
CT
RI
NJ
DE
MD
DC
NY
PA
VA
NC
SC
FL
WV
GA
OH
KY
TN
AL
MI
IN
MS
WI
IL
LA
MO
AR
MN
IA
OK
TX
ND
SD
NE
KS
HI
MT
WY
CO
NM
UT
AZ
ID
WA
OR
NV
CA
AK

B. State Implied Consent Laws Still Unconstitutionally Punish Blood Test Refusals with Criminal Sanctions.

The core principle of *Birchfield* is that warrantless seizures of blood, without consent or exigency, run afoul of the Fourth Amendment—yet several states still impose criminal penalties on its citizens who assert their constitutional rights. It is axiomatic that a person "may not be punished for exercising a protected statutory or constitutional right," and "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *Id. See also United States v. Goodwin*, 457 U.S. 368, 372 (1982). But for four states, invoking the protection of the Fourth Amendment is a criminal act resulting in separate criminal charges.

The map below depicts states (in red) where law enforcement may demand a blood test under the Implied Consent law, and where refusing such a demand leads to either increased or additional criminal penalties.[9]

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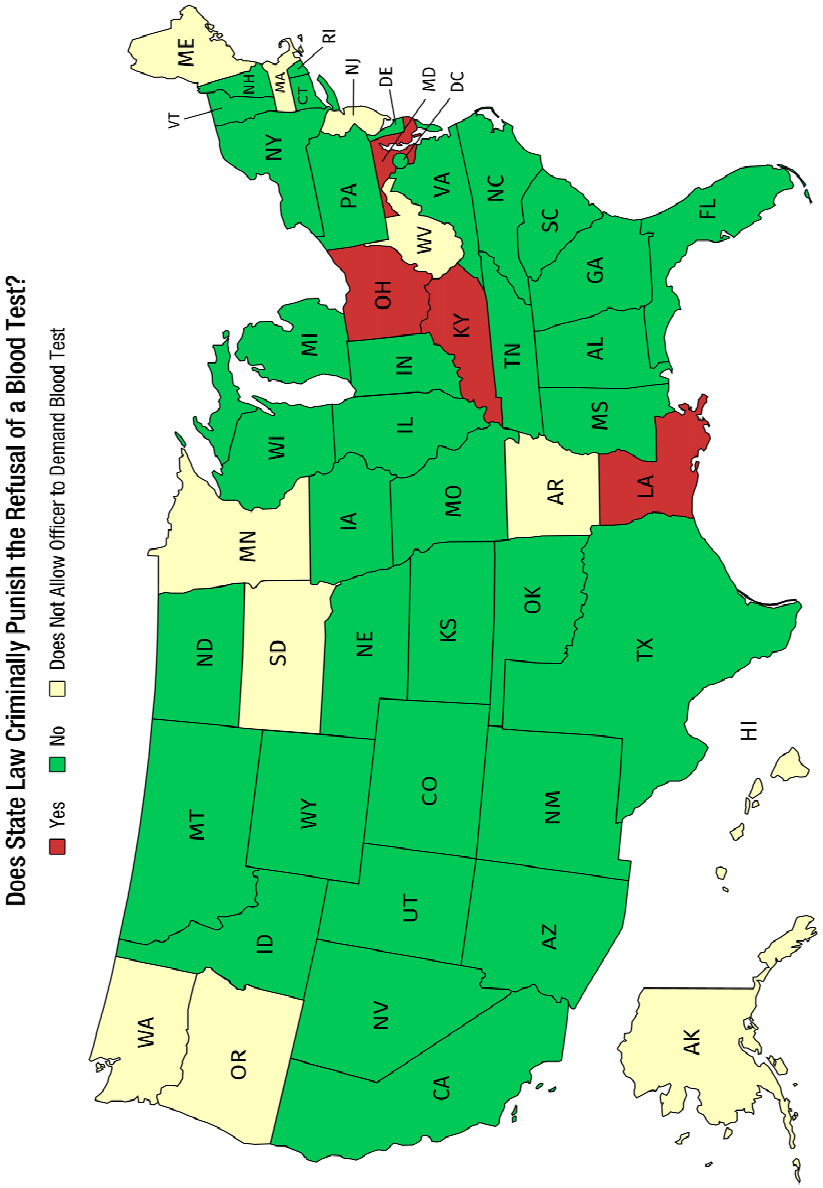
[9] Ky. Rev. Stat. § 189A.010(11)(f); La. Rev. Stat. § 32:661C.(1)(f), § 14:98.7; Md. Code Transp. § 32-902(g); Ohio Rev. Code. § 4511.19 (A)(2)&(G).

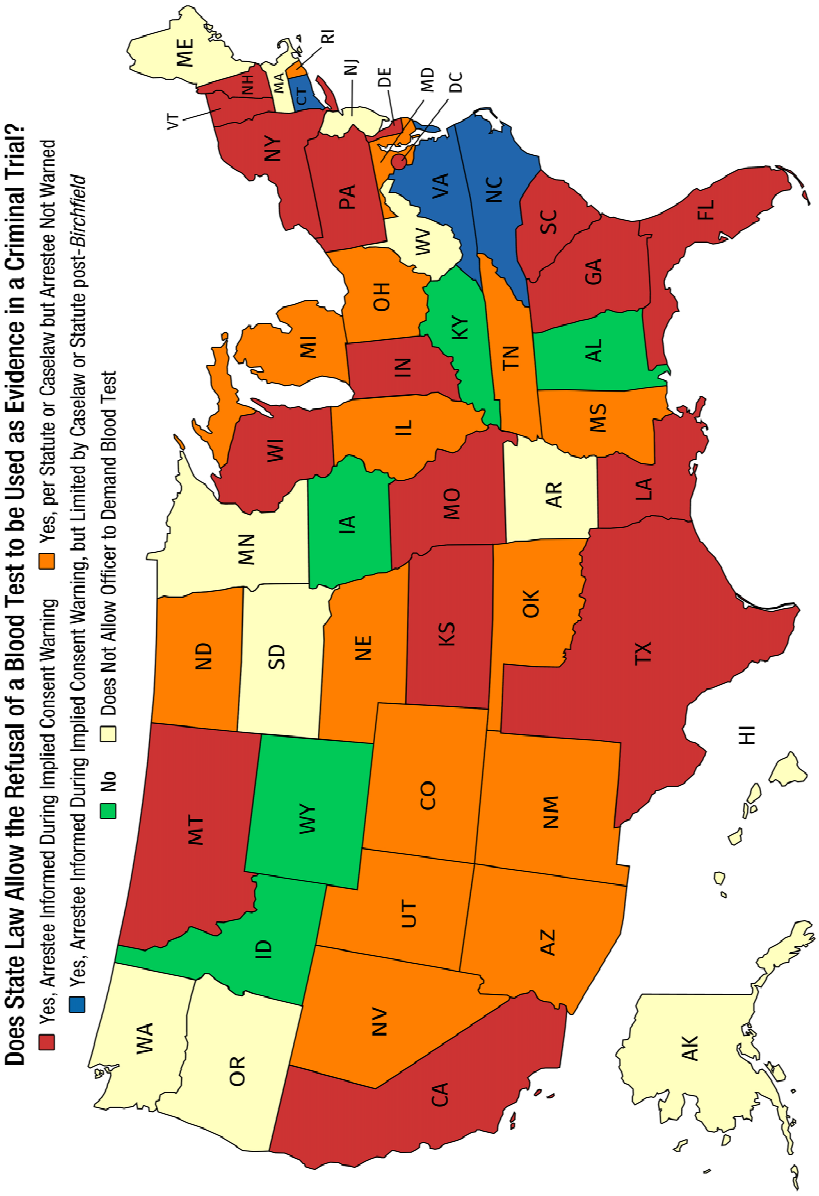

Does State Law Criminally Punish the Refusal of a Blood Test?
Yes
No
Does Not Allow Officer to Demand Blood Test
ME
VT
NH
MA
RI
CT
NJ
DE
MD
DC
NY
PA
VA
NC
SC
FL
WV
OH
KY
TN
GA
AL
MS
LA
MI
IN
IL
WI
MO
AR
IA
MN
ND
SD
NE
KS
OK
TX
MT
WY
CO
NM
ID
UT
AZ
NV
CA
OR
WA
AK
HI

C. State Implied Consent Laws Unconstitutionally Punish Blood Test Refusals by Using Them as Proof of Guilt of DUI.

The prohibitions on penalizing invocations of a constitutional right extend to what the state may use as evidence in seeking a conviction. Just as "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege" by introducing this evidence in trial; the Fourth Amendment carries no less protection for those who deny an officer the opportunity to stick them with a needle without a warrant or exigency. *Miranda v. Arizona*, 384 U.S. 436, 468, n. 37 (1966). Yet, thirty states still authorize the accused's refusal to submit to a warrantless blood draw to be used as evidence against them in their criminal DUI trial. In these states, the mere assertion of a constitutional right has been transformed into a sword that impales its proponent.

The map below depicts the status of state laws on such evidentiary issues nationwide. The states in red, below, specifically warn the arrestee (to coerce compliance with the test) that a refusal to submit to whatever test the officer demands, including a blood test, will result in that fact being used as proof of guilt against the person in their criminal DUI trial.

The orange states all generally permit the State to use the fact of refusal against the person in their criminal case; however, in these states the ability to do so is pursuant to case law or a separate statute and is not communicated to the arrestee at the time of refusal.


Does State Law Allow the Refusal of a Blood Test to be Used as Evidence in a Criminal Trial?
Yes, Arrestee Informed During Implied Consent Warning
Yes, per Statute or Caselaw but Arrestee Not Warned
Yes, Arrestee Informed During Implied Consent Warning, but Limited by Caselaw or Statute post-Birchfield
No
Does Not Allow Officer to Demand Blood Test
ME
VT
NH
MA
CT
RI
NJ
DE
MD
DC
NY
PA
WV
VA
NC
SC
GA
FL
OH
KY
TN
AL
MS
LA
MI
IN
IL
WI
MO
AR
MN
IA
ND
SD
NE
KS
OK
TX
MT
WY
CO
NM
ID
UT
AZ
NV
CA
OR
WA
AK
HI

Finally, the three states in blue are somewhat unique—they still warn the arrestee that a refusal can be used against them as evidence, so the coercive effect is still present. However, in these states the courts or legislatures have seen the light post-*Birchfield* and have curtailed the use of a blood refusal as evidence.[10]

D. State Implied Consent Laws Punish Refusal of Blood Tests with Administrative Consequences (*i.e.* License Suspensions).

Thirty-five states mandate that asserting a Fourth Amendment right comes at the cost of being able to drive. These provisions frustrate the Fourth Amendment's effectiveness and thrust a driver into a precarious position: avail themselves of the protections afforded to them by the U.S. Constitution, or abandon

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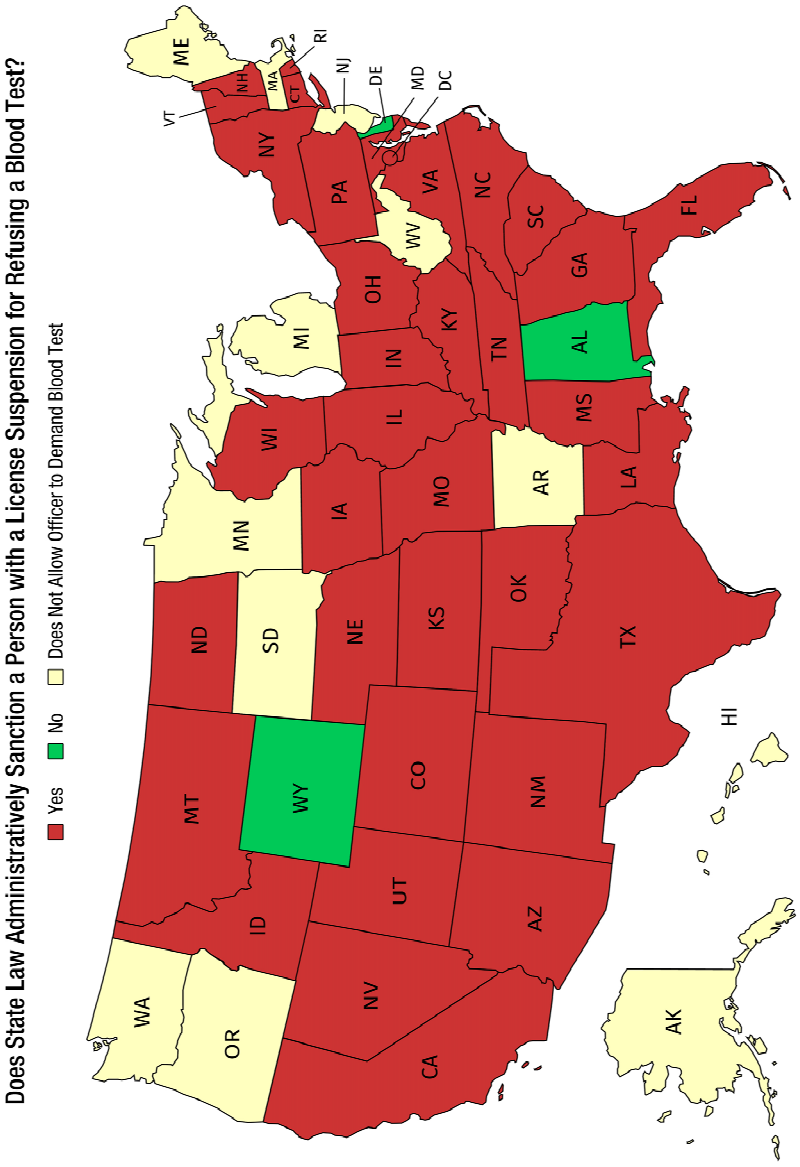
[10] STATES IN RED: Cal. Veh. Code § 23612(a)(1)(D); D.C. Code § 50-1905; Del. Code Tit. 21 § 2749; Fla. Stat. § 316.1932; Ga. Code § 40-5-67.1; Ind. Code § 9-30-6-3; Kan. Stat. § 8-1001; Mo. Rev. Stat. § 577.041; Mont. Code § 61-8-404; N.H. Rev. Stat. § 265-A:10; N.Y. Veh. & Traf. Law § 1194; 75 Pa. Cons. Stat. § 1547; S.C. Code 56-5-2950; Texas Veh. & Traf. Code, § 724.015; Utah Code 41-6a-524; Vt. Stat. Tit. 23, § 1202; Wis. Stat. § 343.305. STATES IN ORANGE: Ariz. Rev. Stat. § 28-1388(D); Colo. Rev. Stat. § 42-4-1301(6)(d); 625 Ill. Comp. Stat. 5/11-501.2; *Harding v. State*, 115 A.3d 762 (Md. Ct. Spec. App. 2015); *People v. Keskinen*, 441 N.W.2d 79 (Mich. Ct. App. 1989); Miss. Code §63-11-41; *State v. Beerbohm*, 427 N.W.2d 75 (Neb. 1988); *State v. Storey*, 410 P.3d 256, 267 (N.M. 2017); Nev. Rev. Stat. § 484C.150; 484C.160; *State v. Murphy*, 516 N.W.2d 285 (ND 1994); *Harris v. State*, 773 P.2d 1273 (Okla. Crim. App. 1989); *Westerville v. Cunningham*, 15 Ohio St.2d 121 (Ohio 1968); R.I. Gen. Laws § 31-27-2(c)(1); *State v. Frasier*, 914 S.W.2d 467 (Tenn. 1996); STATES IN BLUE: N.C. Gen. Stat. 20-16.2; invalidated by *State v. Romano*, 369 N.C. 678 (N.C. 2017); Va. Code. § 18.2-268.3(C); invalidated by *Wolfe v. Commonwealth*, 793 S.E.2d 811 (Va. Ct. App. 2016).

them to preserve their ability to earn a living or drive their kids to school.



The states in red, above, punish a refusal of an implied consent test, including blood, with a suspension of the person's right to drive in the state.[11] In some states, such as Ohio and Colorado, the suspension is immediate, significantly longer than if the person submitted to the test and had a high BAC result, and continues even if the person is found not guilty of the underlying DUI offense. *See* Ohio Rev. Code § 4511.19 (2019); Colo. Rev. Stat. § 42-2-126(3)(c) (2019).

In the dozens of states where police can ignore *Birchfield* and demand blood without regard to the availability of breath, hundreds of motorists per day are being forced to choose between their constitutional right not to be forcibly stuck with a needle and give to police all the private information contained in their blood, or losing the ability to drive for one or more years at a time. This arrangement is unreasonable and aggressively coercive; two features of a search that the Fourth Amendment, by its express terms, simply does not tolerate.

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[11] Az. Rev. Stat. § 28-1321; Cal. Veh. Code § 23612(a)(1)(D); Colo. Rev. Stat. § 42-2-126(3)(c); Conn. Gen. Stat. § 14-227b; D.C. Code § 50-1905; Fla. Stat. § 316.1932; Ga. Code § 40-5-67.1; Idaho Code § 18-8002; 625 Ill. Comp. Stat. 5/6-208.1; Ind. Code § 9-30-6-7; Iowa Code § 321J.9; Kan. Stat. § 8-1001; Ky. Rev. Stat. § 189A.103; La. Rev. Stat. § 32:661; Md. Code. Transp. § 16-205.1; Mich. Comp. Laws § 257.625a; Miss. Code § 63-11-21; Mo. Rev. Stat. § 577.041; Mont. Code § 61-8-402; Neb. Rev. Stat. § 60-6,197; Nev. Rev. Stat. § 484C.220; N.H. Rev. Stat. § 265-A:14; N.M. Stat § 66-8-111; N.Y. Veh. & Traf. Law § 1194; N.C. Gen. Stat. 20-16.2; N.D. Cent. Code § 39-20-01; Ohio Rev. Code § 4511.191; Okla. Stat. Tit. 47 § 753; 75 Pa. Cons. Stat. § 1547; R.I. Gen. Laws § 31-27-2.1; S.C. Code 56-5-2950; Tenn. Code § 55-10-406; Texas Veh. & Traf. Code, § 724.032; Utah Code 41-6a-520; Vt. Stat. Tit. 23, § 1202; Va. Code. § 18.2-268.3; Wis. Stat. § 343.305.

CONCLUSION

For all of the foregoing reasons, amicus DUIDLA respectfully requests that this Court reverse the decision of the Georgia Supreme Court and clarify that a breath test must be offered or sought before a blood test in suspected alcohol DUIs, and that implied consent laws which compel consent through criminal and administrative sanctions for refusing cannot possibly also supply the voluntary consent required under the Fourth Amendment for a warrantless blood draw.

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MARCH 11, 2020

APPENDIX

Thank you to DUIDLA Amicus Committee members Daniel Sabol and Blaise Katter for their countless hours of research and assistance on this brief.

Amicus DUI Defense Lawyers Association also extends a heartfelt thank you to the following individuals who contributed their knowledge and research regarding their states' implied/express consent statutory schemes to assist in preparing the maps contained in this brief:

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