No. 25-114

IN THE

Supreme Court of the United States

EVELYN-NATASHA LA ANYANE,

Petitioner,

v.

GEORGIA,

Respondent.

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

BRIEF OF *AMICUS CURIAE* DUI DEFENSE LAWYERS ASSOCIATION FILED IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE DUIDLA[1]

The DUI Defense Lawyers Association (DUIDLA) is a nonprofit professional organization of lawyers with approximately 850 members throughout North America. Amicus Curiae DUIDLA has a strong interest in the promulgation and enforcement of fair and constitutional DUI laws that create a safe society, but still protect the civil liberties of our populace. Its mission is to protect and ensure by rule of law those individual rights guaranteed by the state and Federal Constitutions in DUI-related cases: to resist the constant efforts that are made to curtail these rights, and to encourage cooperation between lawyers engaged in the furtherance of these objectives. DUIDLA seeks to fulfill this mission through educational programs and other assistance; to serve as the constitution's first and last line of defense and to assist attorneys and public defenders in obtaining advanced training in DUI related areas through our education scholarship grants.

Concerned with the practical problems presented to law enforcement, judges, defense attorneys, and the general public, DUIDLA works to prevent the erosion of the Fourth Amendment rights of DUI arrestees. This is especially true when a search implicates the integrity of the human body—with all of the concerns with privacy and dignity associated with it. Such laws critically undermine

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1. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other Amicus and their counsel made a monetary contribution to the preparation or submission of this brief. Notice to both parties of intent to file this brief was provided in accordance with the requirements of Rule 37.

the very concept of "free and voluntary consent;" they lead us down a slippery slope where legislatures (pressured by voters) and agents of the executive (concerned primarily with investigating and prosecuting crimes) become the branches of government that make determinations regarding whether or not a suspect has truly "consented" to a Fourth Amendment search. DUIDLA is focused on making sure these branches of government do not usurp the role of the judiciary in defining the scope of what does and does not qualify as consent for the purposes of a criminal investigation.

The DUIDLA is particularly interested in cases focusing on the United States Supreme Court's decision in *Birchfield v. North Dakota*, 579 U.S. 438 (2016), of which DUIDLA was an Amicus Curiae, and seeks to bring a broad perspective to the new issues that *Birchfield* presents. DUIDLA submits this brief to ensure that only free and voluntary consent will exempt a search from the protections provided within the Fourth Amendment.

SUMMARY OF ARGUMENT

In the United States, there are over 1.5 million criminal cases every year that involve drinking and driving.[2] In many of those cases, DUI arrestees are told by police that they are required by law to submit to a warrantless blood draw. Further, failure to forfeit their right to be free from a warrantless search results in the loss of their license and evidentiary consequences

2. National Conference of State Legislators, Summary: Drunk Driving, updated October 11, 2023. See https://www.ncsl.org/transportation/drunken-driving (last accessed August 18, 2025).

at trial. These "implied consent" advisements – largely unchanged since this Court's rulings in *McNeely* and its progeny – fail to recognize the delineated right under the Fourth Amendment for DUI arrestees to be free from warrantless blood draws. This Court's guidance is needed to ensure that citizens are permitted to invoke constitutional protections without fear of penalty or reprisal from the state.

The Fourth Amendment prevents citizens from being subjected to unwarranted and unreasonable searches and seizures absent probable cause and exigent circumstances or free and voluntary consent. It is now well-established that the Fourth Amendment extends its protections to warrantless searches involving blood draws of citizens arrested for Driving Under the Influence (DUI). In Georgia – as in other states – citizens standing accused of DUI are not only instructed that the law requires them to submit to the warrantless search of their blood, but threatens administrative and evidentiary penalties for those who refuse to "consent." As such, a citizen must forgo a constitutional right – being free to refuse the search – in order comply with a statutory state mandate.

Georgia's statutory scheme poses two problems: first, it renders any consent provided under these circumstances involuntary. Second, because the notice provided informs those citizens accused of DUI that their Fourth Amendment rights must be forfeited in order to be in compliance with a state statute, the implied consent statute is unconstitutional both facially and as applied.

This Court should grant Ms. La Anaye's Petition to address the many states where courts are substituting

implied/express statutory consent to serve as actual voluntary consent for such searches. While the issue was noted in *Birchfield* and by-passed in *Mitchell*, it remains an open question: Can implied consent definitively replace actual consent in every non-exigency case? Or, simply put, is there now another exception to the Fourth Amendment warrant requirement but only when the allegation involves a DUI?

ARGUMENT

I. DUI SUSPECTS HAVE A CONSTITUTIONAL PRIVILEGE TO REFUSE TO CONSENT TO A WARRANTLESS BLOOD DRAW WHEN EXIGENT CIRCUMSTANCES ARE ABSENT.

It is now a well-settled matter that a citizen has the right to refuse to consent to a warrantless blood test in a DUI case. Prior to this Court's consideration of the so-called "modern trio' of DUI cases – *McNeely, Birchfield,* and *Mitchell* – most courts were operating under the (mistaken) belief that *Schmerber* stood for the proposition that a person had no right to refuse a DUI chemical test under any situation. *Schmerber v California,* 384 U.S. 757 (1966). However, *Schmerber* never held that the nature of a DUI creates a *per se* exigency to conduct a warrantless blood draw. *Missouri v. McNeely*, 569 U.S. 141, 151 (2013). While *Schmerber* held that the Fourth Amendment is invoked with the withdrawal of blood, exigent circumstances rendered the warrantless withdrawal constitutional *in that case.*

Forty-seven years after *Schmerber*, this Court recognized a "split of authority" in handling warrantless

requests to analyze breath or blood in DUI cases. *McNeely* at 147. In the first of three significant cases, this Court reiterated that the proper analysis to determining exigencies is analyzing the totality of the circumstances, rather than creating a *per se* exigency to always warrantless blood seizures. *Id.*

Four years after *McNeely,* the Court consolidated three DUI cases involving a question related to a search incident to a lawful arrest exception to the warrant requirement in a DUI context—one with a breath test refusal, one with a blood test refusal, and one with a blood test given after an implied consent warning was read. This Court considered whether officers were entitled to breath or blood as a search incident to lawful arrest; that is, whether motorists may be convicted of a crime *or otherwise penalized* for refusing to take a warrantless test that measures the alcohol in their bloodstream. *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2017) (emphasis added). Importantly, *Birchfield* drew a clear distinction between breath and blood testing. *Id.* at 2165. The Court concluded that blood tests are not justified based on search incident to lawful arrest, reiterating that warrantless searches are per se unreasonable, unless a valid warrant exception applies. *Id.* at 2185. Because the search incident to lawful arrest did *not* apply to blood draws, a warrant would be required unless the State could prove an exigency or "free and voluntary" consent.

The *Birchfield* Court then considered whether an arrestee who submitted to a blood test gave voluntary consent "after police told him that the law required his submission, and his license was then suspended and he was fined in an administrative proceeding." *Birchfield* at 2186.

Finding the state court had erroneously assumed that the state could permissibly compel a blood test, the matter was remanded to determine whether the consent was in fact voluntary. *Id*. Thus, the consequence of *Birchfield* is this: the submission of a blood test after implied consent warnings will only be constitutional if the arrestee had *actually* consented.

Finally, in 2019, this Court considered the validity of a state implied consent statute where an unconscious person is deemed to have automatically provided consent. The Court first found that implied consent was a misnomer and did not actually create consent for a blood test. "But our decisions have not rested on the idea that these laws [implied consent laws] do what their popular name might seem to suggest--that is, create actual consent to all the searches they authorize." *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2532-33, 204 L. Ed. 2d 1040 (2019). Rather, the *Mitchell* court analyzed the case under traditional Fourth Amendment principles and found exigent circumstances to collect blood will exist in most DUI cases involving an unconscious driver. *Id*. But notably, the lead opinion took care to distinguish the dicta of *McNeely* and *Birchfield* relating to general collateral sanctions for declining a blood test. *Mitchell* at 846. *Mitchell* reminded us that it is "the specific constitutional claims in each case" which must be addressed. *Id*. So while civil penalties and evidentiary consequences may be imposed in some—perhaps many—cases, they are not categorically applicable.

After *McNeely*, *Birchfield*, and *Mitchell*, the law pertaining to warrantless demands for blood is now clear: If a DUI suspect is requested to give a sample of breath or their blood *when an exigency exists*--under pains of civil

or evidentiary sanction—the motorist may not complain of coercion because they have no constitutional right to refuse the request. However, in the narrow category when officers demand blood without a warrant or exigency, and instead rely upon the "consent" exception to the Fourth Amendment, the motorist has a clear constitutional right to refuse to provide free and voluntary consent unless a warrant is procured.

Implied consent laws around the country have not kept pace with this Court's decision. Many states still adhere to similar demands as the one presented in this case: "Georgia law *requires* you to submit to state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs." This claim—as it pertains to a demand for blood—is now incorrect. For this reason, any claim of authority to penalize the assertion of this constitutional right is likewise coercive and unconstitutional.

II. AN ARRESTEE'S FOURTH AMENDMENT RIGHTS ARE VIOLATED WHEN THEY ARE THREATENED WITH PENALTIES FOR NOT "VOLUNTARILY" CONSENTING TO A BLOOD TEST

In the absence of a warrant or exigent circumstances, the State may obtain a sample of a DUI suspect's blood based upon "free and voluntary" consent. However, when a person is told they are (1) required by law to comply; and (2) will have their refusal used as evidence of guilt against them at trial, it can hardly be said consent is free and voluntary.

A. The Consent Exception for a Blood Draw in a DUI Case Only Applies if There was Actual, Free, and Voluntary Consent.

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.

Consent is not proven by showing mere acquiescence to a claim of lawful authority. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). Moreover, "[v]oluntariness is a question of fact," *Schneckloth*, 412 U.S. at 248-49, which "is assessed from the totality of the circumstances." *Id.* at 227. "[The government's] burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Bumper*, 391 U.S. at 548-49. *See also Florida v. Royer*, 460 U.S. 491 (1983). When the State causes or actively contributes to a citizen's belief that there is no option but to submit to the search, in an already inherently coercive environment, a defendant's conduct cannot be considered free and voluntary. *Bumper, supra*; *see also United States v. Drayton*, 536 U.S. 194, 122 S.Ct. 2105 (2002); *Ohio v. Robinette*, 519 U.S. 33, 117 S.Ct. 417 (1996).

A DUI case is no different. The reasoning of *Bumper* has recently been used in addressing whether DUI suspects voluntarily consented to a sample of their blood after they receive implied consent warnings. The Supreme

Court of Arizona found their implied consent notice rendered the defendant's consent involuntary. *State v. Valenzuela,* 239 Ariz. 299 (Arizona 2016). In *Valenzuela*, the defendant was arrested for DUI and read an implied consent provision advising, "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. The notice further warned that a refusal would result in a license suspension. *Id.* Subsequent to the warning, the defendant advised he understood the notice, had no questions, and cooperated with the testing process. *Id.*

Valenzuela moved to suppress the test results because his consent was not voluntary, and the court agreed. Conducting their analysis within the framework of *Bumper* and *McNeely*, the court noted that Valenzuela only consented to the chemical sample after the officer advised him 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.* That is closely analogous to the Georgia warning.

The Supreme Court of South Dakota likewise came to the same conclusion. *State v. Medicine*, 865 N.W.2nd 492 (South Dakota 2015). In *Medicine*, the defendant was arrested for DUI and read South Dakota's implied consent law. *Id.* at 494. The notice indicated that by operating his vehicle he had consented to the withdrawal of his blood,

and the notice then required the officer to ask whether he consented to the withdrawal. *Id.* Like *Valenzuela*, the notice did not threaten criminal sanctions if the arrestee refused a test. After the warning was read, Medicine agreed to give a sample of his blood. *Id.* Medicine contested the search on the basis that his consent was not voluntary, the circuit court agreed, and the state appealed.

The South Dakota Supreme Court found the consent involuntary. In spite of several factors suggesting express consent—Medicine was of "ordinary intelligence," the officer conducted himself in a professional and cordial manner, the encounter was relatively brief, and the defendant had several previous encounters with police—the defendant's consent was held involuntary because the notice led Medicine to believe that he was required to give a blood sample. *Medicine* at 496.

This decision was supported by the fact that the defendant was not advised that the state would have to obtain a warrant to draw his blood if he refused. *Id.* Indeed, as the *Medicine* Court points out, when a law enforcement officer acts with "presumed authority ... [a -16- defendant's] conduct complying with official requests cannot ... be considered free and voluntary." *Id.* at 498, citing *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329, 99 S.Ct. 2319, 2326 (1979). "'Consent' that is the product of official intimidation or harassment is not consent at all. Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse." *Florida v. Bostick*, 501 U.S. 429, 438 (1991).

Finally, whether or not the subject was told that they have a right to refuse to consent to the search is a relevant

factor in determining the free and voluntary aspect of the alleged consent to a test. Although being notified of a right to refusal is not determinative in considering the voluntariness of the alleged consent, it is "a factor to be taken into account." *Schneckloth*, 412 U.S. at 248-249. It can hardly be fair that the right of refusal is a key component to assess in a consent analysis, when the "right" of refusal is conditioned on evidentiary penalties and a driver's license suspension.

B. Implied Consent Provisions do not Establish Actual Consent.

If a State Legislature could statutorily deem consent in certain circumstances, that would completely obviate any number of important constitutional protections. As noted in the *Medicine* decision: "[T]he Legislature cannot enact a statute that would preempt a citizen's constitutional right, such as a citizen's Fourth Amendment right." *Medicine, supra.*, citing *State v. Fierro*, 853 N.W.2d 235, 244 (South Dakota 2014).

A foundational principle of the constitutional doctrine of consent is that it is a free and voluntary choice made by the individual, considering the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). This Court was therefore completely correct when it said there must be meaningful limits to implied consent laws. *Birchfield, supra,* at 1285. This case presents this Court with a perfect opportunity to enforce that provision – that a statute may not circumvent the constitution and deem actual and voluntary consent into existence by mere acquiescene to an officer's claim of lawful authority to search.

When considering consent, the totality of the circumstances must be considered, which includes both "subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *Schneckloth* at 229. The inclusion of the warning that the law required Appellant to submit to a warrantless blood draw is exactly the type of "subtly coercive," "colorably lawful" statements contemplated in *Schneckloth* and *Bumper*.

C. Custodial Situations are Inherently Coercive and Police Practice Must be Thoroughly Examined by Reviewing Courts for Constitutional Compliance.

There is no question that courts should conduct a substantially more thorough review of police practices that occur when a defendant is in custody. The analysis in *Miranda* and in *Shatzer* compel this conclusion. *Maryland v. Shatzer*, 559 U.S. 98, 103-04, 130 S.Ct. 1213, 1219 (2010). When the police execute a warrantless search of defendant who is in custody, reviewing courts must necessarily begin with a presumption of coercion. The same pressures that caused the genesis of the *Miranda* warning exist in every arrest, as does the same potential for the police use subtle pressures and other measures to overcome the free will of the person in custody. Given the extent to which the "psychological pressures [will] work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely," the *Miranda* court declared that "no statement obtained from the defendant can truly be the product – of his free choice," unless "adequate protective devices are employed to dispel the compulsion inherent in custodial settings." *Miranda v. Arizona*, 384 U.S. 436 (1966).

In this case, there are three separate provisions of Georgia's implied consent warnings which render the advisement unconstitutional. First is the assertion stating the law requires a person to submit to the tests. As discussed earlier, when the state is seeking free and voluntary consent, that statement is clearly coercive. Second, the warnings state that a refusal to submit may be offered into evidence in trial. Again, that is a penalization of the person's ability to decline consent and invoke their Fourth Amendment rights. Finally, arrestees are threatened with a minimum of a one-year suspension of his or her driving privileges, a clear penalization of a one's protected liberty interest.

Therefore, the question necessarily becomes what mitigating effect, if any, does Georgia's current implied consent warning have against that inherently coercive environment. A review of the plain language of the warning indicates that the coercive pressures of the custodial environment are not dissipated or mitigated at all; rather, they are aggravated by them. A reasonable person, under arrest, having been repeatedly told by an armed police officer that he or she is required to consent to the officer's demands for a sample breath, blood, or urine is not going to believe that there a choice to do anything but comply. See *Maryland v. Shatzer*, 559 U.S. 98, 105, 130 S.Ct. 1213, 1220 (2010) ("The implicit assumption, of course, is that the subsequent requests for interrogation pose a greater risk of coercion. That increased risk level results not only from the police's persistence in trying to get the suspect to talk, but also from the continued pressure that begins when the individual is taken into custody ..."). Add to that scenario the threat of the evidentiary and administrative penalties and it is hard to imagine that a reasonable person would not have his or her will overborne.

III. THE STATE MAY NOT INTRODUCE INTO EVIDENCE THE LAWFUL REFUSAL OF A BLOOD TEST WHEN THE DEMAND IS NOT MADE PURSUANT TO WARRANT OR EXIGENCY.

In Georgia, a DUI arrestee is told that "your refusal to submit to the required testing may be offered into evidence against you at trial." OCGA §40-5-67.1. This is an advisement mirrored throughout the country. And in blood cases where there is no warrant or exigent circumstances, that statement is now unconstitutional.

Prior to *McNeely*, courts had been reluctant to extend the same evidentiary protections given to suspects asserting their right to remain silent to those who refuse to give a sample of their blood. As those courts reasoned, suspects did not enjoy a constitutional right to refuse the request. See, e.g., *People v. Taylor*, 73 Mich. App. 139, 142 (Michigan Ct. App. 1977), citing *People v. Paddock*, 29 NY2d 504, 505 (New York 1971) ("Since there is no constitutional right to refuse to submit to such a test [*Schmerber v California, supra*], it necessarily follows that there can be no constitutional prohibitions to prevent comment upon the accused's failure to take the test"); *People v. Sudduth*, 65 Cal 2d 543, 546 (California 1966) ("The sole rationale for the rule against comment on a failure to testify is that such a rule is a necessary protection for the exercise of the underlying privilege of remaining silent. A wrongful refusal to cooperate with law enforcement officers does not qualify for such protection"); *Newhouse v. Misterly*, 415 F.2d 514 (9th Cir. 1969) (Because there is no constitutional right to refuse the blood test, the refusal is admissible).

This Court in *Neville* seemed to legitimize those decisions. *South Dakota v. Neville*, 459 U.S. 553 (1983). In analyzing whether a suspect's refusal could be used as evidence, the Court began its inquiry through the prism of the Fifth Amendment right against self-incrimination and found that constitutional provision inapplicable because a refusal was not testimonial. *Id.* at 559. But the decision went further: "*Schmerber*, then, clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test." *Id.* at 559. *Neville* justified the use of the refusal because "the State could legitimately compel the suspect, against his will to accede to the test"—and therefore, since the offer to take the test (under implied consent law, of course) was "clearly legitimate," their "action becomes no less legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice." *Id.* Put another way, since the *Neville* Court wrongly assumed officers could lawfully extract blood without a warrant, they may lawfully impose penalties for failing to comply with their lawful request.

This rational no longer holds under *McNeely* and its progeny. Now it is clear that there is a constitutional right to refuse a blood test when there is no warrant or exigency. Equally clear is the canon that defendants may not have their exercise of a constitutional privilege leveraged against them in trial. See, e.g., *Griffin v. California*, 380 U.S. 609 (1965) (Comment on Defendant's refusal to testify violates his constitutional rights); *State v. Thompson*, 33 Ohio St. 3d 1, 4 (Ohio 1987) (Comments by prosecutor penalizing a defendant for choosing to exercise a constitutional right will not be tolerated); *State v. Burke*, 163 Wash.2d 204 (Washington 2008) (Courts

are reluctant to penalize anyone for the exercise of any constitutional right).

Courts have not confined the prohibition on the exercise of a constitutional right to the Fifth Amendment. See, e.g., *US v. Taxe*, 540 F.2d 961, 969 (9th Cir. 1976) (holding that a prosecutor's comment on a defendant's refusal to consent to a search was misconduct); *US v. Thame*, 846 F.2d 200 (3d Cir. 1987) (same). See also *US ex rel. Macon v. Yager*, 476 F.2d 613 (3d Cir.), cert. cenied, 414 U.S. 855 (1973) (extending the *Griffin* rationale to the 6th Amendment right to counsel); *US v. McDonald*, 620 F.2d 559 (5th Cir. 1980) (same).

The protections of the Fourth Amendment are not subjacent to those within the Fifth. Why would a constitutionally valid refusal grounded in the Fourth Amendment carry less weight?

In no other area of Fourth Amendment jurisprudence – other than DUI – has any Court ever upheld a comment on a defendant's refusing an officer's request for consent to search. It is not constitutionally satisfying to say that seeking free and voluntary consent will make policing DUIs more difficult so therefore we should continue to permit the legal fiction of implied consent to stand as a proxy for the Fourth Amendment. "The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government." *Reid v. Covert*, 354 U.S. 1, 13 (1957).

CONCLUSION

Consent to search is not valid unless "it is the product of an essentially free and unconstrained choice by its maker." *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041 (1973). Given the inherently coercive nature of the custodial environment, the coercive language of the warnings, the threat of the use of refusal as evidence of guilt at future proceedings, the attendant administrative penalties providing an additional coercive basis for compelling the search, the warnings as read here were unconstitutional. The State may not rely on mere compliance with an order from a police officer to submit to a search to demonstrate voluntary consent; there must be an indication of a free exercise of will to overcome the lack of a warrant.

For the foregoing reasons, amicus DUIDLA respectfully requests this this Court grant the petition for certiorari and reverse the decision of the Georgia Supreme Court, and in doing so hold that free and voluntary consent does not come from the coerced and compelled acquiesence of citizens who have been illegally and unconstitutionally informed that they have no right to refuse a search.

Respectfully submitted,

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