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 THE GEORGIA ASSOCIATION OF SOLICITORS-GENERAL & DISTRICT ATTORNEYS' ASSOCIATION OF GEORGIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

In 2023 alone, 12,429 people died in crashes involving drivers impaired by alcohol. This grim figure constituted thirty percent of all traffic fatalities that year, and reflected an average of one alcohol-impaired-driving fatality every forty-two minutes.[2]

The Georgia Association of Solicitors-General is a voluntary professional association comprising Georgia's sixty-six full and part-time misdemeanor prosecutors known as State Court Solicitors-General; those District Attorneys who also prosecute misdemeanor offenses in State Court; prosecutors in county and municipal courts; and the personnel who work in their offices. The Solicitors-General Association provides a forum through which prosecuting attorneys throughout the State can address matters of common concern that affect not only the direct interests of prosecuting attorneys, but also the law enforcement community. Most violations of Georgia's Driving Under the Influence law, O.C.G.A. § 40-6-391, are prosecuted as misdemeanors and handled in Georgia's State Courts by the Solicitors-General and their staffs. *See* O.C.G.A. §§ 15-7-4 & 15-18-66.

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1. Notice to all parties of intent to file this brief was provided in accordance with the requirements of Rule 37. 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 than Amici and their counsel made a monetary contribution to the preparation or submission of this brief.

2. National Highway Traffic Safety Administration, (May 2025), *2023 Alcohol Impaired Driving*, (Report No. DOT HS 813 713). https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/813713.

The District Attorneys' Association of Georgia comprises the District Attorneys of Georgia's fifty-one judicial circuits, charged with "represent[ing] the State in all criminal cases in the Superior Court of such district attorney's circuit and in all cases appealed from the Superior Court and the Juvenile Courts of that circuit to the Supreme Court and the Court of Appeals and to perform such other duties as shall be required by law." Ga. Const. 1983 Article VI, Section VIII, Paragraph 1(d). Since its founding in 1934, and especially since 1951, the Association has worked to enhance "the proficiency of the … prosecuting attorneys of the State" through presenting continuing education programs and providing a forum in which the District Attorneys may fulfill their obligation to "reform and improve the administration of criminal justice." 1970 Ga. Laws 938.

The prosecutors of Georgia have a deep interest in this matter because any decision in this case will significantly impact their ability to prosecute violations of Georgia law. As explained below, keeping the evidentiary issues raised in this Petition settled, rather than further limiting the evidence available in Driving Under the Influence cases, is highly relevant to Georgians in particular. Over the past decade, a series of Supreme Court of Georgia decisions relying primarily upon state constitutional principles have held that motorists' refusal of most state-administered tests to determine blood alcohol concentration ("BAC testing") is inadmissible in Driving Under the Influence trials. Only blood tests fall outside the ambit of these decisions, thus elevating the importance of any decision affecting such tests.

Beyond the peculiarities of Georgia's Driving Under the Influence jurisprudence, the issues presented in this Petition impact DUI prosecution nationwide. Breath tests cannot detect intoxicating substances beyond alcohol, but blood tests allow for analyzing an impaired motorist's blood for the presence of alcohol *and* other drugs. One of the trends in Driving Under the Influence enforcement is a marked increase in cases where motorists are under the combined influence of multiple intoxicating substances. If granted relief, the Petition would invalidate a valuable tool used by law enforcement, regulatory agencies, and the courts in keeping the roadways safe.

SUMMARY OF ARGUMENT

Throughout the Nation, each of the fifty States faces an arduous task: keeping their roadways safe for the motoring public through enforcing Driving Under the Influence statutes. With each passing day, the number of motorists injured or killed because of impaired driving grows. As this Court has long recognized, "[t]he slaughter on the highways of this Nation exceeds the death toll of all our wars." *Perez v. Campbell*, 402 U.S. 637, 657 (1971) (Blackmun, J., concurring in part and dissenting in part). In 2023, crashes involving at least one alcohol-impaired driver accounted for 12,429 deaths. This represented thirty percent of all traffic fatalities in the United States for the year and yielded an average rate of one alcohol related fatality every forty-two minutes.[3] This dismal

3. National Highway Traffic Safety Administration, (May 2025), *2023 Alcohol Impaired Driving*, (Report No. DOT HS 813 713). https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/813713.

statistic only grows worse when it accounts for impairment due to other drugs: fifty-six percent of drivers involved in a serious injury or fatal crash tested positive for at least one drug other than alcohol.[4]

To accomplish the goal of keeping motorists safe, each State has adopted so-called "implied consent" statutes. *Birchfield v. North Dakota,* 579 U.S. 438, 444 (2016). Laws from different states are generally similar in nature and establish a common scheme for state-administered BAC testing, but they take a variety of specific forms and carry a variety of consequences. In almost every State, a motorist suspected of DUI has the right to refuse state-administered testing, but that decision has administrative and evidentiary consequences. These include suspending the motorist's privilege to drive in the State; authorizing the evidentiary use of refusal if the motorist goes to trial; and requiring the motorist to install an ignition interlock device on his or her vehicle. This Court has repeatedly endorsed sanctions like these: "Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Birchfield,* 579 U.S. at 476-477. In fact, this Court has affirmed some States' decisions to impose additional criminal charges for refusing a breath (but not blood) test. *See Ibid.* at 478.

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4. National Highway Traffic Safety Administration, Office of Behavioral Safety Research (June 1, 2021), Update to Special Reports on Traffic Safety during the COVID-19 Public Health Emergency: Fourth Quarter Data, (Report No. DOT HS 813 135). https://doi.org/10.21949/1526015.

Despite this variety of approaches across the United States, Petitioner Evelyn-Natasha La Anyane seeks to have this Court declare the entire nationwide structure of implied consent unconstitutional under the Fourth Amendment, overruling its own well-established jurisprudence in the process. To accomplish her goal, the Petitioner asks this Court to extend Fourth Amendment protections to *any* consequences that may follow refusal of implied consent testing, and additionally find that the refusal itself is inadmissible under the "unconstitutional conditions doctrine."

This case originates in Georgia for a reason: DUI defendants in that State are especially well insulated due to a quirk of state constitutional jurisprudence. If the Court endorses the Petitioner's arguments, it will work to her advantage in particular. However, this case is not well adjusted to addressing nationwide questions about implied consent. At the same time, the Petitioner ignores a bedrock exception to the Fourth Amendment's warrant requirement that has been present since the founding of the Nation, both in Georgia and elsewhere: consent.

To accept the Petitioner's invitation would both undermine the foundations of the Fourth Amendment and ignore the States' compelling government interest in collecting blood samples during DUI investigations involving both alcohol and other drugs. There is no reason to grant a writ of certiorari in this case.

ARGUMENT

I. This case originates in Georgia for a reason – and that same reason makes it a poor vehicle for addressing nationwide implied consent laws.

This Court may wonder why, despite nearly universal acceptance of civil and evidentiary penalties for refusing BAC testing, the Petitioner seeks to revisit the issue again and thereby forestall a *potential* split of authorities that may never develop in the first place. *See* Pet. at 23-28. The answer is that Georgia DUI defendants will benefit more than anyone else in the Nation if this Court retreats from its established holdings in this area. Placing the Petitioner's case in its proper context reveals that, while the Petition is cloaked in the language of balancing individual rights against governmental interest, her case is really a thinly veiled attempt to advance a tactical advantage that only exists in Georgia. That is no reason to grant certiorari review.

A. Context reveals the true reasons for seeking a writ of certiorari.

Prior to 2016, Georgia's courts treated BAC testing just like this Court and the rest of the United States. Georgia jurisprudence correctly followed the line of this Court's reasoning seen in *Schmerber v. California*, 384 U.S. 757 (1966); *South Dakota v. Neville*, 459 U.S. 553 (1982); and *Missouri v. McNeely*, 569 U.S. 141 (2013), holding Georgia's implied consent laws were legitimate under the Fourth Amendment and its state constitutional equivalent. However, because no *per se* exigency supported BAC testing except in special cases, evidentiary use of BAC testing required proof of a motorist's actual,

voluntary consent. *See Williams v. State*, 296 Ga. 817 (2015).

After this Court decided *Birchfield v. North Dakota*, 579 U.S. 438 (2016), Georgia state courts tried to determine whether its holding would apply under the state constitution. That quest resulted in *Olevik v. State*, 302 Ga. 228 (2017). The *Olevik* court correctly determined that *Birchfield*'s rule would apply to Georgia cases – but at the same time, it identified a quirk of state constitutional interpretation that caused Georgia to diverge from the rest of the United States. Understanding that divergence both contextualizes the Petitioner's question and underscores that her case is not the right vehicle for an answer.

Georgia's state constitution confers a greater degree of protection against self-incrimination than the Fifth Amendment. Although the state constitution's language specifically protects against compelled "testimony," *see* Ga. Const. 1983 Art. I, § I, Para. XVI, an 1879 decision unilaterally declared that the protection also extended to compelled, non-testimonial physical acts. *Day v. State*, 63 Ga. 667 (1879). Since then, Georgia courts have drawn numerous (and at times, seemingly arbitrary) distinctions between compelling a suspect to perform an act himself or herself – which may violate the right against compelled self-incrimination – and merely compelling a suspect to be present while an act is done *to* him or her. For instance, Georgia law prohibits compelling a suspect to provide a handwriting sample but approves compelling a suspect to provide a voice sample. *See Brown v. State*, 262 Ga. 833 (1993) (handwriting sample); *compare Davis v. State*, 158 Ga. App. 549 (1981) (voice sample).[5]

5. While outside the scope of this Petition, it is notable that this "affirmative act" standard renders Georgia an outlier among

Although it adopted the *Birchfield* rule into Georgia cases involving the Fourth Amendment, the *Olevik* court determined that this wrinkle of self-incrimination jurisprudence would nonetheless bar compelled breath testing because, as this Court has previously recognized, a motorist arrested for DUI must perform an affirmative act to provide a breath sample. *See Birchfield*, 579 U.S. at 446-447; *California v. Trombetta*, 467 U.S. 479, 481 (1984); *Olevik*, 302 Ga. at 244. Subsequently, and for the same reason, Georgia has extended self-incrimination protection to providing urine samples (*Awad v. State*, 313 Ga. 99 (2022)) and even to performing roadside field sobriety evaluations (*Ammons v. State*, 315 Ga. 149 (2022)). These decisions bar Georgia prosecutors from admitting evidence that a motorist refused to perform field sobriety tests, breath testing, or urine testing because that refusal is effectively an invocation of the right to "remain silent." Further, these decisions may bar admission of otherwise valid test results if a motorist can prove law enforcement compelled him or her to act in a particular case.

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all state and federal jurisdictions. In fact, the few other states that briefly flirted an affirmative act standard – Alabama, Texas, Oklahoma, and Utah – all rejected it in short order, partly because "[w]hat constitutes affirmative and non-affirmative acts is often merely a question of semantics providing enforcement officers with very little guidance on which to base their decisions." *American Fork City v. Cosgrove*, 701 P.2d 1069, 1074 (Utah 1985). Georgia considered these examples and declined to follow the same path. *See Elliott v. State*, 305 Ga. 179, 201-203 (2019). Recently some Georgia jurists have questioned the reasoning of the 19th-Century cases establishing the affirmative act standard, but declined to overrule them due to *stare decisis* considerations. *See Ammons v. State*, 315 Ga. 149, 162-175 (2022) (Pinson, J., concurring; Colvin, J. concurring in part and dissenting in part).

As a direct practical result of these decisions, Georgia does not align with the *Birchfield* Court's clear preference for less invasive methods of testing. Instead, a blood test (which merely requires a motorist to be present while blood is removed *from* his or her veins) is the only type of BAC test that, done properly with either a warrant or actual consent, offends neither the Fourth Amendment nor Georgia's state right against self-incrimination. It is also the only type of BAC test for which prosecutors can present evidence of a motorist's refusal at trial.

It therefore makes sense that Georgia DUI defendants have repeatedly tried to get Georgia to break from this Court's holdings – and the nationwide consensus – that implied consent laws are not unduly coercive. As seen in the proceedings below, so far Georgia courts have declined to do so because the state constitution's search-and-seizure protections are coextensive with the Fourth Amendment. Only success before *this* Court is likely to change that position in the Petitioner's favor.

B. These same considerations leave this case poorly suited to once again address how Implied Consent laws interact with the Fourth Amendment.

While the Petitioner attempts to invoke broad, nationwide concerns regarding the general scheme of implied consent laws, and *amicus* DUIDLA leans into the nationwide state of implied consent laws after *McNeely*, *Birchfield*, and *Mitchell v. Wisconsin,* 588 U.S. 840 (2019), the opinion below very clearly interprets *Georgia's* implied consent scheme within the context of *Georgia's* jurisprudence. And since both the statute at issue and its

application are unique to Georgia, this case proves a poor vehicle for addressing those broad concerns.

In response to the state court decisions described above, Georgia's implied consent statutes have undergone significant changes since 2016. Prior to *Olevik*, the statutory implied consent warning began with, "Georgia law ***requires you to submit*** to state administered chemical tests…" O.C.G.A. § 40-5-67.1(b)(2) (2016) (***emphasis*** supplied). The *Olevik* court reviewed the language of the then-current implied consent warning and determined it did not unconstitutionally coerce consent to BAC testing – thereby rejecting the same argument the Petitioner now revives nearly ten years later. *See* 302 Ga. at 250-252.

No one challenged that aspect of *Olevik*, this Court was not asked to review that decision, and nothing affecting Fourth Amendment jurisprudence has changed in the interim. Regardless, in 2019 the Georgia legislature responded to *Olevik* and its progeny by amending the statutory implied consent warning to begin with, "The State of Georgia has ***conditioned your privilege to drive*** upon the highways of this state upon your submission to state administered chemical tests…" O.C.G.A. § 40-5-67.1(b)(2) (2019) (***emphasis*** supplied).[6] In its current form, Georgia's implied consent warning limits the evidentiary use of a refusal to cases involving blood or urine tests.

6. Notably, *amicus* DUIDLA continues to recite the language of Georgia's pre-2019 implied consent warning. *See* DUIDLA Brief at 7. This is the wrong language, in reference to both Petitioner's own case and Georgia DUI cases more generally.

Ibid.[7] Both these changes plainly reduce any risk that the implied consent warning might coerce a motorist's consent, especially compared to other states' implied consent statutes that might better present the Petitioner's questions. *See, e.g., Arizona v. Valenzuela*, 239 Ariz. 299 (Arizona 2016); *South Dakota v. Medicine*, 865 N.W.2d 492 (S.D. 2015).

As noted in the opinion below, the Petitioner wholly ignored these modifications to the implied consent warning and basically repeated the same argument that failed in *Olevik*: the warning advises motorists they are "required" to submit to blood testing. *See* Pet. App. 8a-9a. And she did so explicitly based on the *Georgia* warning as viewed through *Georgia* law, so that is how the court below approached the question as well. *Id.* This was necessary, because the language in Georgia's implied consent warning is tailored and adjusted to its legal environment. And because that environment presents a unique layer of state constitutional concerns overlying typical Fourth Amendment considerations, it does not translate well to the nationwide questions the Petitioner and her *amicus* attempt to ask. For this reason and others, this Court should decline to grant a writ of certiorari.[8]

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7. After that statute was enacted, Georgia excluded urine refusals as well, leaving blood as the only test for which a refusal is admissible in Georgia. *See Awad*, 313 Ga. at 103. But that distinction did not affect the decision below and should not affect this Court's analysis either.

8. This is not the only reason the Petitioner's case is a poor vehicle for addressing nationwide concerns about implied consent laws. The *amici* recognize and concur with the other problems raised in the principal Brief in Opposition as well. *Br. in Opp.* at 17-18.

II. The ultimate decision whether or not to undergo BAC testing turns is a matter of actual, voluntary consent.

Whether in Georgia or otherwise, all the parties and *amici* seem to agree with this Court that the concept of "implied consent" is a misnomer because none of these laws actually "do what their popular name might seem to suggest – that is, create actual consent to all the searches they authorize." *Mitchell v. Wisconsin*, 588 U.S. at 846-847. Implied consent statutes do not supplant the Fourth Amendment's requirement for actual, voluntary consent to search in the absence of a warrant or another exception. But neither do they create any special rules for analyzing that consent.

To search a person or their home, papers, and effects, police generally need a warrant supported by probable cause unless a legal exception exists. Throughout the years, this Court has recognized several now-familiar Fourth Amendment warrant exceptions: when a law enforcement officer observes contraband in plain view; when a vehicle contains evidence of a crime; when case-specific exigent circumstances exist; and when the search is performed incident to a lawful arrest. This last exception formed the basis for this Court's discussion of breath testing in *Birchfield*.

However, this Petition presents another well-settled exception to the Fourth Amendment's warrant requirement: consent. The question presented to this Court is whether the valid, informed consent of a motorist suspected of Driving Under the Influence invokes the consent exception, or conversely whether there are

instances where such consent is not enough to support a warrantless search.

A warrantless search violates the Fourth Amendment unless the facts and circumstances of the search show an officer was acting under one of the few well-established exceptions. *Katz v. United States,* 389 U.S. 347, 357 (1967). One such exception is a search conducted pursuant to consent. *Davis v. United States*, 328 U.S. 582, 593-94 (1946). "Consent searches are part of the standard investigatory techniques of law enforcement agencies" and are "a constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973).

Recent cases from this Court reinforce the importance and acceptance of this Fourth Amendment exception. When considering California officers' search of an occupied apartment, the Court found that a sole occupant's oral and written consent was lawful. "A warrantless consent search is reasonable and thus consistent with the Fourth Amendment irrespective of the availability of a warrant." *Fernandez v California,* 571 U.S. 292, 306 (2014).

Birchfield and other cases have recognized that the consent exception applies to BAC testing. "Absent more precise guidance from the founding era," this Court wrote, "we generally determine whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Birchfield*, 579 U.S. at 460-461.

"Highway safety is critical; it is served by laws that criminalize driving with a certain BAC level; and enforcing these legal BAC limits requires efficient testing to obtain BAC evidence, which naturally dissipates. So, BAC tests are crucial links in a chain on which vital interests hang. And when a breath test is unavailable to advance those aims, a blood test becomes essential." *Mitchell,* 588 U.S. at 850-851. Further, "enforcing BAC limits obviously requires a test that is accurate enough to stand up in court. And we have recognized that 'extraction of blood samples for testing is a highly effective means of" measuring 'the influence of alcohol.'" *Ibid.* at 852, *citing Schmerber v. California*, 384 U.S. 757, 771 (1966). The accuracy and effectiveness of blood testing are also critical to cases involving suspected impairment by drugs other than alcohol.

Under the Fourth Amendment, individuals can consent to searches of their persons, property, or effects as long as their consent is voluntary and not coerced. Voluntary consent is determined based on the totality of the circumstances, and it does not require the individual to be informed of their right to refuse consent. "The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search." *U.S. v. Drayton,* 536 U.S. 194, 206 (2002), *citing Ohio v. Robinette,* 519 U.S. 33, 39-40 (1996) and *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). Because many implied consent warnings directly inform motorists that they have a right to refuse, the choice of whether or not to undergo state-administered BAC testing receives additional protections beyond those mentioned in *Schneckloth*. This is especially true

in Georgia, where the statutory implied consent warning references a motorist's right to refuse three separate times and concludes by *asking* the motorist if he or she will submit to testing. The Petitioner asks this Court to find that such warnings coerce motorists' consent *despite* these additional protections.

A. Implied consent warnings are not coercive; they merely provide additional information about the consequences of a motorist's choice.

The use of implied consent warnings is largely unique to the context of Driving Under the Influence of alcohol or other drugs. The majority of States use very similar language for their implied consent warnings. For example, Georgia's implied consent warning reads as follows:

> The State of Georgia has ***conditioned your privilege*** to drive upon the highways of this state upon your submission 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. If you refuse this testing, your Georgia driver's license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. ***Your refusal to submit to blood or urine***[9] ***testing*** may be offered into evidence against you at trial. If you submit to testing and the

9. As discussed above, refusal of urine testing is now inadmissible at trial on self-incrimination grounds due to *Awad v. State*, 313 Ga. 99 (2022).

> results indicate an alcohol concentration of 0.08 grams or more, your Georgia driver's license or privilege to drive on the highways of this state may be suspended for a minimum period of one year. After first submitting to the requested state tests, you are entitled to additional chemical tests of your blood, breath, urine, or other bodily substances at your own expense and from qualified personnel of your own choosing. Will you submit to the state-administered chemical tests of your (designate which test)?

O.C.G.A. § 40-5-67.1 (***emphasis*** added).

Across the United States, most implied consent warnings provide penalties for refusing all manner of testing and are phrased to require such testing. In most federal and state jurisdictions, these warnings implicate only the Fourth Amendment and are "unprotected by the Fifth Amendment privilege." *South Dakota v. Neville*, 459 U.S. 553, 560 (1983). As discussed above, Georgia is uniquely different in this regard and has barred evidence of refusing on-scene preliminary breath testing (*Bradberry v. State*, 357 Ga. App. 60 (2020)); pre-arrest field sobriety testing (*Ammons v. State*, 315 Ga. 149 (2022)); and post-arrest breath and urine testing (*Olevik v. State*, 302 Ga. 228 (2017) and *Awad v. State*, 313 Ga. 99 (2022)) on self-incrimination grounds. Despite this, no Georgia or federal decision has ever held implied consent warnings to be inherently coercive under either the Fourth Amendment or Fifth Amendment. In fact, the opposite is true, and neither the Petitioner nor her *amicus* can point to any authority criticizing implied consent warnings'

explanation of non-criminal consequences attending a motorist's choice about testing.[10]

B. Implied consent warnings advise suspects of specific consequences, differentiating them from most other criminal contexts.

Driving Under the Influence, whether based on alcohol or other drugs, is a crime with unique evidence considerations. In most crimes, relevant evidence like physical evidence, statements, or documents is not readily fungible and may be obtained at any time. Even most evidence derived from bodily fluids – for instance, DNA – is immutable and can often be obtained at a later date. However, the crime of DUI involves evidence that exists only within a motorist's body *and* which is dissipating by the minute. *McNeely*, 569 U.S. at 169. Breath testing provides a convenient and minimally invasive solution to this problem, and further can be performed as a search incident to arrest. *Birchfield*, 579 U.S. at 478. But not every instance of suspected DUI can be resolved with a breath test. In circumstances where a driver is incapable of giving or withdrawing consent, officers may utilize blood tests. *See Mitchell*, 588 U.S. at 857 (holding a warrantless blood test admissible where the driver was unconscious). Blood testing is also necessary in cases of drug-impaired driving, where a breath sample will not be adequate to determine the source of impairment.

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10. Even *Commonwealth v. McCarthy*, 628 S.W.3d 18 (Ky. 2021) – which the Petitioner holds up as an example of a "split" on this issue – explicitly dealt with a statute imposing enhanced *criminal* penalties for refusal of BAC testing in the form of sentence enhancements.

Because blood tests cannot be performed incident to arrest, and because not every suspected DUI involves sufficient exigency to justify blood testing, state legislatures have enacted laws mandating that officers explain motorists' rights and duties as drivers. Implied consent laws work to *incentivize* a motorist's cooperation by making consent to BAC testing the touchstone for maintaining an unfettered privilege to drive – but this does not mean they *coerce* consent. That is why this Court has routinely affirmed the constitutionality of these implied consent frameworks, *see Birchfield*, 579 U.S. at 451, and is why there is a nationwide consensus that the Petitioner wants to dismantle. But although these frameworks serve to explain the conditional benefits of a suspect's cooperation, the Fourth Amendment does not *mandate* them. In the absence of implied consent warnings, law enforcement officers could still simply ask a suspect to take a blood test and obtain valid consent without *any* additional notifications, explanations, or protections. It would arguably make motorists' choices less informed and more difficult, but difficulty does not equate to constitutional infirmity.

C. Every choice has consequences – and even unpleasant consequences do not render a choice invalid.

This Court's prior decisions have already acknowledged that implied consent schemes present motorists with a choice between two perceived evils. "We recognize, of course, that the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices." *South Dakota v. Neville,* 459 U.S. 553, 564 (1983).

As such, this Court has held that a suspect's right to refuse a blood-alcohol test is a matter of legislative grace under a Fifth Amendment analysis. *Ibid.* at 565. As noted above, this Court has recognized that "implied consent" warnings are more akin to "informed refusal" laws. *See Mitchell v. Wisconsin,* 588 U.S. at 836-847. In other related contexts, the Constitution requires similar warnings and explanations about the consequences of waiving rights. Famously, officers questioning a suspect in custody must give the advisements discussed in *Miranda v. Arizona*, 384 U.S. 436 (1966), complete with a warning about what can and will be done with any statement the suspect makes. Upon receiving those warnings, criminal suspects are allowed to waive their rights and make a statement.

While it addresses a different suite of rights, the Fourth Amendment is subject to the same considerations. A motorist suspected of DUI has the same freedom of choice afforded to a suspect advised of his *Miranda* rights, particularly if an implied consent warning has explained the consequences attending that choice.

The *difficulty* of a given choice does not and should not affect its *validity*. "If consent can overcome a traditional double jeopardy complaint about a second trial for a greater offense, it must also suffice to overcome a double jeopardy complaint under *Ashe*'s more innovative approach. Holding otherwise would be inconsistent not only with *Jeffers* but with other cases too." *Currier v. Virginia*, 585 U.S. 493, 495 (2018), *referencing Ashe v. Swenson,* 397 U.S. 436 (1969) *and Jeffers v. United States,* 432 U.S. 137 (1977). Currier's decision to bifurcate his trial, preventing the admission of potentially prejudicial evidence about his

convicted felon status in his first trial, was deemed a valid choice even though it exposed him to a second trial solely on the bifurcated charges. "The criminal process, like the rest of the legal system, is replete with situations requiring 'the making of difficult judgments' as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *McMann v. Richardson*, 397 U.S. 759, 769 (1970); *McGautha v. California*, 402 U.S. 183, 213 (1971).

Life is full of difficult choices. Choices have consequences. The rights and freedoms of United States of America citizenship go along with requiring individuals to make those difficult choices and accept the consequences of doing so. So long as the choice in question is an informed one – particularly if accompanied by a formal advisement of rights and consequences – the law validates whichever decision a person makes. This idea unquestionably applies to the decisions provoked by implied consent laws, and permits motorists a free and uncoerced choice whether to consent to BAC testing and thereby preserve their right to drive, or whether to refuse BAC testing and accept the "unquestionably legitimate" civil and evidentiary consequences of refusal. There is no reason to grant a writ of certiorari and reevaluate this well settled framework.

III. Implied Consent laws are about more than just alcohol impairment.

If this Court is inclined to grant a writ of certiorari in the Petitioner's case, there is another issue the *amici* wish to highlight: the need for this Court to address

the differences between DUI cases involving alcohol and those involving other drugs. As noted above, a breath test – if available – is the least invasive means to determine alcohol impairment and may constitute a valid search incident to arrest. However, the fact remains that DUI cases involving other types of drugs are rising dramatically. Sometimes those drivers have also consumed alcohol – but even then, there is no way to evaluate whether other intoxicants are present except through a blood test.

Officers often obtain search warrants for blood testing, thereby obviating the need for an exception to justify their search. Technological advances have allowed courts to operate remotely in the face of disasters and contagious infection outbreaks. However, as this Court noted, "[e]ven with modern technological advances, the warrant procedure imposes burdens on the officers who wish to search, the magistrate who must review the warrant application, and the party willing to give consent." *Fernandez v. California*, 571 U.S. 292, 307 (2014).

When a warrantless search is justified, requiring the police to obtain a warrant anyway may "unjustifiably interfer[e] with legitimate law enforcement strategies." *Kentucky v. King*, 563 U.S. 452, 466 (2011). Such a requirement may also impose an unmerited burden on the person who consents to an immediate search, since the warrant application procedure entails delay. *Fernandez v. California*, 571 U.S. 292, 306-07, (2014).

In investigations involving suspected impaired motorists, the Fourth Amendment mandates that officers obtain a warrant unless excused by an exception to the

warrant requirement. *Missouri v. McNeely*, 569 U.S. 141, 152-153 (2013). The *McNeely* Court observed that a warrantless search in exigent circumstances is reasonable when "there is compelling need for official action and no time to secure a warrant." *Id*. at 1559 *quoting Michigan v. Tyler*, 436 U.S. 499, 509 (1978).

While nearly all this Court's jurisprudence regarding DUI laws concerns alcohol alone, it is important to note that DUI cases involve far more than just alcohol. With each passing day, the number of drug-related instances of DUI grows. In 2020, "almost two thirds of drivers involved in a fatal incident tested positive for alcohol, marijuana, or opioids between mid-March and mid-July. The proportion of drivers testing positive for opioids nearly doubled after mid-March, compared to the previous six months, while marijuana prevalence increased by about fifty percent."[11] The percentage of DUI cases involving Marijuana is frequently at or near that of DUI cases involving alcohol cases, while cases involving other drugs such as opioids and stimulants constituted approximately twenty-five percent of DUI cases overall.[12] While the Petitioner's case concerns alcohol, it is important to bring to the Court's attention that DUI concerns all of these substances, and in the case of Driving Under the Influence of drugs cases, blood testing is the only way to obtain meaningful results.

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11. National Highway Traffic Safety Administration, Office of Behavioral Safety Research (June 1, 2021), Update to Special Reports on Traffic Safety during the COVID-19 Public Health Emergency: Fourth Quarter Data, (Report No. DOT HS 813 135). https://doi.org/10.21949/1526015.

12. *Id.*

CONCLUSION

It is unquestioned that States have a paramount interest in protecting the highways within their borders, and the public traveling upon them, from drivers under the influence of alcohol or other drugs. As this Court remarked over a half-century ago, "The increasing slaughter on our highways, most of which should be avoidable, now reaches astounding figures only heard of on the battlefield." *Tate v. Short*, 401 U.S. 395, 501 (1971). While the Petitioner and her *amicus* are broadly correct that governmental interest must be balanced against individuals' constitutional rights, this case remains a poor vehicle through which to explore that balance. Petitioner seeks to leverage the unique jurisprudence of Georgia – where nearly every part of a case can already be suppressed on other grounds – to her advantage by raising a nationwide question that does not exist yet and asking this Court to reconsider its own well-established precedent regarding consent generally and implied consent specifically.

The fact remains that nothing in an implied consent notice renders consent the choice of consenting to or refusing testing involuntary. It does not rise to the level of depriving motorists of their own free will. In contrast, such warnings merely aid motorists' choices about BAC testing by explaining that there are evidentiary and civil consequences following a refusal of testing. Neither those consequences nor admission of evidence about refusal at a later trial undermines the validity of the motorist's consent or lack thereof under the Fourth Amendment. Given the ever-expanding variety of substances that the public ingests to the point of impairment, it is important to consider the critical need for testing in these instances,

and the important role blood testing specifically plays in the context of both *alcohol* and *drug* impairment.

For the foregoing reasons, *amici* Georgia Association of Solicitors-General and District Attorneys' Association of Georgia respectfully request that this Court decline Petitioner's invitation to issue a writ of certiorari to the Supreme Court of Georgia in this case.

Respectfully submitted,

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