No. 14AP1870-CR

In The Supreme Court of Wisconsin

STATE OF WISCONSIN, PLAINTIFF-APPELLANT,

v.

DAVID W. HOWES, DEFENDANT-RESPONDENT.

On Appeal from the Dane County Circuit Court, The Honorable John W. Markson, Presiding, Case No. 2013CF1692

OPENING BRIEF AND APPENDIX OF THE STATE OF WISCONSIN

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General

RYAN J. WALSH
Chief Deputy Solicitor General
State Bar #1091821

Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, Wisconsin 53707-7857
walshrj@doj.state.wi.us
(608) 267-1332

Attorneys for Plaintiff-Appellant

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INTRODUCTION

Testing an unconscious driver's blood-alcohol content without a warrant, when authorized under Wisconsin's implied-consent law, is reasonable. Both this Court and the U.S. Supreme Court have repeatedly concluded that, by "operating a motor vehicle within [a] State" with such a law (which is all fifty), drivers "consent to [blood-alcohol content] testing if they are . . . detained on suspicion of a drunk-driving offense." *Missouri v. McNeely*, 133 S. Ct. 1552, 1566 (2013) (plurality). That is what makes those laws effective "legal tools": they allow States to enforce their drunk-driving laws "without undertaking warrantless *nonconsensual* blood draws." *Id.* (emphasis added).

Those decisions are correct. A defendant may imply consent to a search by conduct, such as driving. And that consent is valid so long as it is not coerced. Here, it is entirely voluntary. The law does not force anyone to drive. Nor, more importantly, does it require anyone who chooses to drive to continue his consent. A motorist who is conscious and otherwise capable of withdrawing consent may do so at any time. If the police find him unconscious, the presumption that he has not withdrawn consent may be rebutted by circumstances suggesting otherwise (such as a notarized letter in his front pocket objecting to a search). A test premised on an unrebutted presumption of consent is constitutional.

ISSUE PRESENTED

By statute, motorists on Wisconsin highways give their revocable consent to tests of their blood-alcohol content if they are detained for a drunk-driving offense. Wis. Stat. § 343.305(2). If the motorist is found "unconscious or otherwise incapable of withdrawing consent," then the officer may "presume[ ]" that the motorist has not "withdrawn [his] consent" (unless the circumstances rebut that presumption) and may perform the test. Wis. Stat. § 343.305(3)(b). Is a warrantless blood test of an unconscious drunk-driving suspect, premised on the unrebutted presumption of the suspect's implied consent under the statute, an "unreasonable search" under the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution?[1]

The circuit court answered, yes.

ORAL ARGUMENT AND PUBLICATION

In light of the issue's state-wide importance, this case is appropriate for oral argument and publication.

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[1] This question is different from that presented in *Birchfield v. North Dakota*, No. 14-1468 (U.S. cert. granted Dec. 11, 2015), currently pending in the U.S. Supreme Court. The issue in *Birchfield* is "[w]hether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood." Petition for Writ of Certiorari, *Birchfield v. North Dakota*, No.14-1468 (June 12, 2015), 2015 WL 3746432, at *i.

STATEMENT OF THE CASE

I. The Tragedy Of Drunk Driving In Wisconsin

Drunk driving "continues to exact a terrible toll on our society." *McNeely*, 133 S.Ct. at 1565 (plurality). On average, it takes one life in the United States every 52 minutes. *See* NHTSA, *Alcohol-Impaired Driving*, Traffic Safety Facts, 1 (December 2014), http://www-nrd.nhtsa.dot.gov/Pubs/812102.pdf. Of the more than 32,000 lives claimed annualy in motor-vehicle crashes, nearly a third involve intoxicated drivers. *Id*. at 7. The costs of this bloodshed are staggering, ranging annualy from $50 billion to more than $200 billion (depending on the method of calculation). *Id*. at 2.

Wisconsin in particular "has long experienced a dismal level of carnage due to drunken driving." Bill Lueders, *Why Wisconsin Has Weak Laws on Drunken Driving,* Urban Milwaukee (2014), http://urbanmilwaukee.com/2014/11/10/under-the-influence-why-wisconsin-has-weak-laws-on-drunken-driving/. Between 2003 and 2012, 2,577 people died in Wisconsin in crashes involving a drunk driver. And the fatality rate for all age groups—and, in particular, the 20-and-under and the 35-and-up categories—exceeded the national average. *See* Center for Disease Control, *Sobering Facts: Drunk Driving in Wisconsin* (2014), http://www.cdc.gov/motorvehiclesafety/pdf/impaired_driving/drunk_driving_in_wi.pdf. The percentage of adults in Wisconsin who report intoxicated driving is a considerable 3.1 percent, much higher than the

national rate of 1.9 percent. *Id*. Four years ago, the State had the sixteenth highest percentage of fatal, drunk-driving-related crashes. *See* NHTSA, *2012 Motor Vehicle Crashes*, Traffic Safety Facts, 6 (November 2013), http://www-nrd.nhtsa.dot.gov/Pubs/811856.pdf. Although those numbers have decreased in recent years, the "scourge" of drunk driving in Wisconsin remains. *State v. Nordness*, 128 Wis. 2d 15, 33, 381 N.W.2d 300 (1986).

II. Wisconsin's Implied-Consent Statute

Like every other State, Wisconsin promotes traffic safety by imposing a myriad of conditions on the privilege of operating a motor vehicle on public roads. All motorists in Wisconsin, for example, must have a valid driver's license "in his or her immediate possession at all times when operating a motor vehicle." Wis. Stat. § 343.18(1). To obtain a Wisconsin-issued license, an applicant must pass a "knowledge test," which requires an understanding of, among other things, "[t]he rules of the road," "[s]afe driving practices," and "[t]he effects of alcohol or other controlled substance use in connection with the operation of motor vehicles." Wis. Admin. Code. § Trans. 104.03(5); Wis. Stat. § 343.16(1). Vehicles in Wisconsin must be registered, Wis. Stat. § 341.04, and must be covered by "a motor vehicle liability policy," Wis. Stat. § 344.62. And, of course, all drivers must obey the "rules of the road." They must, for example,

drive on the right side of the road and ensure that the volume of their car radios is not excessive. *See* Wis. Stat. Ch. 346.

States also promote highway safety by drawing on "a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." *McNeely*, 133 S. Ct. at 1566 (plurality). "For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Id.*; *see* Wis. Stat. § 343.305.[2]

In Wisconsin, "consent is implied as a condition of the privilege of operating a motor vehicle upon state highways." *State v. Zielke*, 137 Wis. 2d 39, 48, 403 N.W.2d 427 (1987). Under the State's implied-consent law, "[a]ny person who . . . drives or operates a motor vehicle upon the public highways of this state . . . is deemed to have given consent to one or more tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood or breath" of alcohol or other controlled substances "when requested to do so by a law enforcement officer" under certain subsections or "when required to do so" under certain others. Wis. Stat. § 343.305(2). Under the subsection relevant here, the statute permits testing "if a law enforcement officer has

[2] Although Wis. Stat. § 343.305 covers other kinds of intoxication, this brief will refer to the statute's application to drunk driving in particular.

probable cause to believe that" the suspect has committed a drunk-driving offense, such as operating a motor vehicle under the influence of intoxicanting or controlled substance. Wis. Stat. § 343.305(3)(b); *see* Wis. Stat. § 346.63(1)(a). The law enforcement agency "may designate which of the tests shall be administered first." Wis. Stat. § 343.305(2).

The statute applies differently depending on whether the suspect, having consented to a search by driving, is physically "capable" of *withdrawing* that consent when the police wish to administer the test. Wis. Stat. § 343.305(3)(b). If he is, then the statute affords him an opportunity to do so. The police must advise the conscious suspect of "the nature of the driver's implied consent." *State v. Reitter*, 227 Wis. 2d 213, ¶ 15, 595 N.W.2d 646 (1999). Reading from the "Informing the Accused" form, the police convey (among other facts) that (1) the suspect has been arrested or detained for a drunk-driving offense or is the operator of a vehicle that was involved in an accident that caused substantial bodily harm (or worse) to a person; (2) the officer "now wants to test one or more samples of [the suspect's] breath, blood or urine to determine the concentration of alcohol or drugs in [the suspect's] system;" (3) if the test shows intoxication, the suspect's "operating privilege will be suspended"; (4) "[i]f [the suspect] refuse[s] to take any test that this [officer] requests, [the suspect's] operating privilege will be revoked and [the suspect] will be subject to other penalties"; (5) "[t]he test results or the fact that [the suspect] refused testing can be

used" against the suspect in court; and (6) the suspect may take alternative tests if he takes "all the requested tests." Wis. Stat. § 343.305(4); *see State v. Luedtke*, 2015 WI 42, ¶ 11, 362 Wis. 2d 1, 863 N.W.2d 592.

But if instead the suspect is found "unconscious or otherwise not capable of withdrawing consent [he] is presumed not to have withdrawn consent," and "one or more samples" may be taken from him. Wis. Stat. § 343.305(3)(b). Two features of this text are significant. First, the law does not conclusively establish that drivers found unconscious have not in fact withdrawn their consent; it simply presumes it. Second, the law makes clear that implied consent under § 343.305(2) may be withdrawn, and that, if it has been withdrawn, §343.305(2) simply does not apply.

The unconscious-driver "presum[ption]" is thus rebuttable. When the police find a suspect "unconscious or otherwise not capable of withdrawing consent," they must "presume" that he has not in fact withdrawn the consent manifested by his driving—unless the circumstances convey to the officer that, when the driver had been "capable of withdrawing his consent" under §343.305(2), he had done so. *Cf. State v. Faust*, 2004 WI 99, ¶ 27, 274 Wis. 2d 183, 682 N.W.2d 371 ("[E]ven if the suspect has apparently complied with the implied consent statute and provided an initial chemical sample, there may later be an issue as to whether the defendant" withdrew his consent). In any event, the officer need not read an unconscious driver the consent

warnings and "request" a sample, Wis. Stat. § 343.305(4), since that "would be useless." *State v. Disch*, 129 Wis. 2d 225, 233, 385 N.W.2d 140 (1986).

Implied-consent laws sometimes impose "consequences when a motorist withdraws consent" and thereby reneges on his commitment under the statute, which he makes in exchange for the privilege of driving. *McNeely*, 133 S. Ct. at 1566 (plurality). An implied-consent law can "serve its purpose [only] if there are penalties for [ ] revoking consent." *State v. Brooks*, 113 Wis. 2d 347, 356, 335 N.W.2d 354 (1983). In some States, those consequences are "significant," *McNeely*, 133 S. Ct. at 1566 (plurality), such as criminal liability. But Wisconsin "attempts to overcome the possibility of refusal" merely "by the threat of . . . license revocation," which is a civil penalty. *State v. Zielke*, 137 Wis. 2d 39, 48, 403 N.W.2d 427 (1987). If a motorist has been arrested for a drunk-driving offense and "refuses to take a test," the officer must prepare a "notice of intent to revoke . . . the person's operating privilege," Wis. Stat. § 343.305(9)(a), the filing of which begins a suspension proceeding in court.

III. Facts

In this appeal, "very few facts matter, and they are uncontested." App. 2. A police officer was dispatched to the scene of an accident involving a motorcycle and a deer. The deer was dead. The driver of the motorcycle, David Howes, was seriously injured and unconscious. He "smelled of

alcohol." App. 2. An ambulance took him to the hospital, where, still unconscious, he was hooked up to a respirator. App. 2–3.

The officer had probable cause to believe that Howes was intoxicated, and he arrested him at the hospital. App. 53. The officer read from the "Informing the Accused" form, which explained the nature of Howes' offense, the officer's interest in obtaining samples of his breath, blood, or urine pursuant to the implied-consent law, and Howes' opportunity to refuse. App. 54. Still unconscious, Howes did not respond. App. 54. Relying on Howes' unrevoked implied consent to testing, the officer directed a phlebotomist to draw a sample of his blood. The test showed a BAC of 0.11. App. 3.

IV. Procedural History

Howes was charged with operating a motor vehicle under the influence (fourth offense) and operating a motor vehicle with a prohibited alcohol concentration (fourth offense). App. 3. Howes moved to suppress the result of the blood-draw test, arguing that the officer had lacked probable cause to arrest him and that, in any event, the officer had failed to obtain his consent for the warrantless search under the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution,

"violat[ing]" *McNeely*.[3] Def.'s Mem. in Supp. of Mot. to Suppress, 4. Supplementing his motion to suppress, Howes added the argument that the relevant unconscious-suspect provisions of the implied-consent law were unconstitutional (facially and as applied) under the Fourth Amendment per *McNeely*. Suppl. to Def.'s Mot. to Suppress, 2–3.

At a hearing, the circuit court ruled that the officer had probable cause to arrest, App. 91, but that the unconscious-suspect provisions of the statute were unconstitutional as applied and on their face. App. 99–103. According to the court, when those provisions apply, the "officer can test, period"; the motorist's implied consent is conclusive, not presumptive. App. 99; *see* App. 26. It concluded that, because the law created an "irrebutable presumption" of implied consent, which the court thought fell short of legitimate "actual" consent, it could not "be reconciled with the Fourth Amendment's warrant requirement." App. 26. The court relied on the court of appeals' decision in *State v. Padley*, 2014 WI App 65, ¶ 26, 354 Wis. 2d 545, 849 N.W.2d 867, which it read to require "actual" consent of a conscious suspect before a search. The court referred to dictum in *Padley* raising doubts that the implied consent of a driver found unconscious amounted to "actual consent." App. 100. Finally, the court

[3] "[T]his court interprets [these] two constitutional provisions in concert." *State v. Krajewski*, 2002 WI 97, ¶ 18 n. 9, 255 Wis.2d 98, 648 N.W.2d 385. For convenience, this brief will use "Fourth Amendment" as shorthand for both provisions.

held that, under *McNeely*, exigent circumstances did not justify the search. App. 102.

The State filed a motion for reconsideration. The court denied it, reiterating its conclusions in a written order. *See* App. 26–33.

The State filed a notice of appeal in District IV of the court of appeals. After the appeal had been briefed, District IV certified the case for this Court. It stated that the appeal "presents a single recurring issue: whether provisions in Wisconsin's implied consent law authorizing a warrantless blood draw from an unconscious suspect violate the Fourth Amendment to the United States Constitution." App. 1. In particular, it wrote, "the issue is whether the 'implied consent,' deemed to have occurred before a defendant is a suspect, is voluntary consent for purposes of the consent exception to the Fourth Amendment's warrant requirement." App. 1. The court acknowledged that its own case law was "muddled" on this point, admitting, for example, that *Padley* "appears to conflict" with a prior decision. App. 13–17.

This Court took jurisdiction of the case on April 7, 2016.

STANDARD OF REVIEW

This Court "independently appl[ies] the constitutional principles to the facts as found to determine" whether the Fourth Amendment has been violated. *State v. Phillips,* 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998).

In facial and as-applied challenges to the constitutionality of a Wisconsin statute, the claimaint must prove that the "statute is unconstitutional beyond a reasonable doubt." *In re Gwenevere T.*, 2011 WI 30, ¶ 47, 333 Wis. 2d 273, 797 N.W.2d 854. To prevail on a facial challenge, the claimant also must show that the law "cannot be constitutionally enforced under any circumstances." *Id.* ¶ 46.

SUMMARY OF ARGUMENT

I. The question in this appeal has already been answered. The U.S. Supreme Court has concluded that it is "fair" to assume that unconscious motorists have impliedly consented to BAC testing, *Breithaupt v. Abram*, 352 U.S. 432, 435 n.2 (1957), that implied consent laws are "unquestionably legitimate," *South Dakota v. Neville*, 459 U.S. 553, 560 (1983), and that they are effective "legal tools" for securing evidence of intoxication "without undertaking warrantless *nonconsensual* blood draws," *McNeely*, 133 S. Ct. at 1566 (plurality) (emphasis added). This Court, too, has indicated in more than seven cases that a motorist impliedly consents by driving, including in a decision implicitly holding that, upon arrest, a driver has already "consent[ed] . . . to submit" to BAC testing under the statute, *State v. Neitzel*, 95 Wis. 2d 191, 201, 289 N.W.2d 828 (1980), contrary to dictum in *Padley*, 2014 WI App 65, ¶ 26 n.10.

II. Even if the question were open, suspicion-based BAC tests of impliedly consenting motorists are not

"unreasonable searches" under the Fourth Amendment. Basic search-and-seizure doctrine provides that a defendant may imply consent to a search by conduct, and that implied consent is valid if not coerced. Those exercising the privilege of driving on Wisconsin highways are on notice that their conduct implies consent. And, like the activity of driving itself, that consent is entirely voluntary: The statute permits *any* motorist, even a conscious suspect found unconscious at the time of arrest, to withdraw it. Accordingly, many courts in other states have upheld warrantless searches of impliedly consenting drivers in drunk-driving cases.

Traditional standards of reasonableness confirm the constitutionality of these searches. As the U.S. Supreme Court and this Court have repeatedly stated, the State has a particularly compelling interest in punishing and deterring drunk driving, and the consensual tests' intrusion on privacy is minimal.

III. The Supreme Court's holding in *McNeely* is not to the contrary. *McNeely* concerned an entirely different exception to the warrant requirement: the exigent-circumstances doctrine. Even if *McNeely* silently disapproves of any *per se* rule in consent cases, the unconscious-driver provisions of Wisconsin's implied-consent law do not create one. Nor should this Court. Rather, consistent with the implied-consent statute's plain meaning, the Court should hold that drunk-driving suspects found unconscious are

presumed not to have withdrawn their consent, unless the circumstances suggest otherwise.

ARGUMENT

Howes asserts that the warrantless testing of his blood under the implied-consent statute violated the Fourth Amendment. That Amendment recognizes "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures" and provides that warrants shall not issue without probable cause. U.S. Const. amend. IV. But "the text of the Fourth Amendment does not specify when a search warrant must be obtained." *Kentucky v. King*, 563 U.S. 452, 459 (2011). Although a warrant is generally required for a search of a person, *McNeely*, 133 S. Ct. 1552, 1558, "[t]he touchstone of the Fourth Amendment is reasonableness," *State v. Purtell*, 2014 WI 101, ¶ 21, 358 Wis. 2d 212, 851 N.W.2d 417 (quoting *United States v. Knights*, 534 U.S. 112, 118 (2001)). "[C]ertain categories of permissible warrantless searches have long been recognized" as reasonable, and "[c]onsent searches" are "one of the[m]." *Fernandez v. California*, 134 S. Ct. 1126, 1132 (2014).

"The practice of making searches based on consent is by no means a disfavored one." 2 LaFave et al., *Crim. Proc.* § 3.10(a) (4th ed.). Indeed, "[i]n a society based on law, the concept of agreement and consent should be given a weight and dignity of its own." *United States v. Drayton*, 536 U.S. 194, 207 (2002). Accordingly, "[c]onsent 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, 231–32 (1973).

"To determine if the consent exception is satisfied," this Court asks, "first, whether consent was given in fact by words, gestures, or conduct; and, second, whether the consent given was voluntary." *State v. Artic*, 2010 WI 83, ¶ 30, 327 Wis. 2d 392, 786 N.W.2d 430. "The test for voluntariness is whether consent to search was given in the absence of duress or coercion, either express or implied." *State v. Phillips*, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998). And the standard for discerning whether consent was given is one of "objective reasonableness," measured from the hypothetical perspective of a reasonable person observing the interaction leading up to the search. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991); *see, e.g.*, *United States v. Sanchez*, 32 F.3d 1330, 1331 (8th Cir. 1994) (upholding warrantless search because officer "reasonably believed that the [defendants] had consented").

This Court need not resort to these doctrines to decide this challenge, since precedent forecloses Howes' argument. But the principles point to the same result: The search here meets the consent exception, and traditional standards of reasonableness confirm its constitutionality. *McNeely* does not hold otherwise.

I. Precedents Of The U.S. Supreme Court And This Court Dictate The Conclusion That Motorists In Wisconsin Impliedly Consent To Suspicion-Based BAC Searches

Constitutional challenges to implied-consent statutes are nothing new. Both the U.S. Supreme Court and this Court have considered, and rejected, several. As those decisions and others show, both courts have concluded that, by voluntarily operating a motor vehicle on a State's highways, motorists imply their revocable consent to warrantless chemical testing on suspicion of drunk driving. That consent authorizes warrantless testing under Wisconsin's implied-consent law.

A. The U.S. Supreme Court has confirmed the legality of implied consent in at least three cases. In *Breithaupt v. Abram*, 352 U.S. 432 (1957), as here, the police directed a physician to collect a blood sample from an unconscious driver injured in a collision and believed to be intoxicated. The test showed a BAC above the legal limit. The question was whether the allegedly "involuntary" blood test was admissible under the Due Process Clause. *Id.* at 433–34. The Court held that it was. *Id.* at 435–37. That the suspect had been incapable of giving "*conscious* consent" just before the test did not, "without more," make a constitutional difference. *Id.* at 435 (emphasis added). Recognizing that at least one State had enacted an implied-consent law, the Court explained that "[i]t might be a fair assumption that a driver on the highways in obedience to a policy of the State, would consent to have a

blood test made as a part of a sensible and civilized system protecting himself as well as other citizens not only from the hazards of the road due to drunken driving, but also from some use of dubious lay testimony." *Id.* at 435 n.2. This provoked the principal dissent to criticize the Court for "*imply[ing] that a different result might follow* if [the suspect] had been conscious and had voiced his objection," thereby revoking his implied consent. *Breithaupt*, 352 U.S. at 441 (Warren, C.J., dissenting) (emphasis added).

The Court also endorsed implied-consent laws in *South Dakota v. Neville*, 459 U.S. 553 (1983), showing that the consent derived from those laws is indeed valid. *Neville* concerned a Fifth Amendment challenge to South Dakota's implied-consent law, which provided that drivers consented to testing by driving and penalized consent-revoking drivers by allowing their refusals to be used against them in court. 459 U.S. at 559–60. The Court rejected the defendant's constitutional challenge because penalizing a driver for revoking consent was "unquestionably legitimate." *Id.* at 560.

The implication of that holding for the implied-consent question here is plain: The unquestionable legitimacy of punishing a driver's failure to keep his end of the bargain (which he does first by impliedly consenting to the search, and by not withdrawing consent later) assumes that the driver can and does meet that obligation by engaging in the conduct that implies consent (driving). *Id.* at 560. *See also Mackey v. Montrym*, 443 U.S. 1, 18 (1979) (praising Massachusetts'

implied-consent law for "provid[ing] strong inducement to take the breath-analysis test and thus effectuat[ing] the Commonwealth's interest in obtaining reliable and relevant evidence for use in subsequent criminal proceedings").

The lead opinion in *McNeely* also praised the effectiveness of implied-consent statutes. It indicated that implied-consent statutes belong to "a broad range of *legal tools* to enforce drunk-driving laws and to secure BAC evidence *without* undertaking warrantless *nonconsensual* blood draws." 133 S.Ct. at 1566 (plurality) (emphasis added). Of course, calling implied-consent laws "legal tools" suggests that they *work*. And describing searches premised on (unrevoked) consent derived from those statutes as *not* "nonconsensual" indicates, of course, that the consent derived therefrom is anything but fictional. No Justice noted disagreement with the plurality on this point.

B. Likewise, this Court consistently has made clear that motorists on Wisconsin's highways impliedly consent to BAC testing if detained for intoxicated driving. In *State v. Neitzel*, the Court held that a suspect is not "entitled to consult counsel before deciding to take or refuse to take a chemical [BAC] test." 95 Wis. 2d at 193. An explicit premise of this holding is that, by the time a suspect may wish to confer with an attorney, his consent is a *fait accompli*: "By reason of the implied consent law, a driver . . . submits to the legislatively imposed condition . . . that, upon being arrested . . . he consents to submit to the prescribed chemical tests."

Id.; *see also id.* at 194 (the test is "consented to" by the driver's conduct). As this Court put the point in a related case, "[b]ecause the driver *already has consented to the test*, it is unnecessary to secure the advice of an attorney about the decision to submit." *State v. Reitter*, 227 Wis. 2d 213, 240, 595 N.W.2d 646 (1999) (emphasis added).[4]

This Court's logic in *State v. Piddington*, 2001 WI 24, 241 Wis. 2d 754, 623 N.W.2d 528, is of a piece. *Piddington* addressed what methods due process and an earlier version of the statute prescribe for "convey[ing] implied consent warnings" to conscious arrestees. *Id.* ¶ 1. The defendant, "severely deaf since birth," argued that he needed a certified interpreter to "inform[ ]" him of the nature of the search request. *Id.* ¶¶ 1, 32. But the Court held that whether the suspect had understood the warnings was not the measure of their legality (or the test's admissibility). It was not even "part of the inquiry." *Id.* ¶ 55. The test was instead whether the officer "reasonably convey[ed] the implied consent warnings under the circumstances existing at the time of the arrest," regardless of whether the suspect understood them. *Id.* Since the officer in that case had done so, there was no

[4] It is true, as the certification opinion notes, that *Neitzel* and *Scales v. State*, 64 Wis. 2d 485, 219 N.W.2d 286 (1974), wrongly suggest that implied consent occurs when a motorist "applies for and receives an operator's license," *e.g.*, *Neitzel*, 95 Wis. 2d at 193, rather than, as the law states, when the driver "operates a motor vehicle upon the public highways of this state," Wis. Stat. § 343.305(2). But that error does not detract from those cases' recognition that consent under the statute may be implied by conduct, and that such consent is valid.

violation "warrant[ing] suppression" of the test results. *Piddington*, 2001 WI 24, ¶ 36.

This would have been a radical holding indeed if the "severely deaf" defendant had not been understood to have consented to the search by driving on Wisconsin highways. In that circumstance, *Piddington* would mean that police could lawfully perform warrantless searches of suspects who could *neither* expressly consent (perhaps because of a disability) *nor* impliedly consent (because implied consent is impossible). Not only is this reading patently implausible; it contradicts "[t]he majority['s] correct[ ]" observation "that the implied consent law is . . . [a] means by which a law enforcement officer may lawfully obtain chemical evidence of intoxication from a drunk driving suspect." *Id.* ¶ 67 (Sykes, J., consenting).

Other cases in which this Court has suggested that Wisconsin drivers impliedly consent to searches under the statute include *Scales v. State*, 64 Wis. 2d 485, 494, 219 N.W.2d 286 (1974) ("We need not resort to the terms of sec. 343.305, Stats., to justify the conduct of the police here, but it should be pointed out that, when the accused is unconscious or otherwise incapacitated, he is 'presumed not to have withdrawn his consent.' That was the situation here."); *State v. Disch*, 129 Wis. 2d 225, 236, 385 N.W.2d 140 (1986) ("Law enforcement officers and courts should be very reluctant to declare a person 'not capable of withdrawing consent.'"); *State v. Crandall*, 133 Wis. 2d 251, 257, 394 N.W.2d 905 (1986)

(refusing test not only reflects "consciousness of guilt by the accused" but also "violates the consent impliedly given under the statute"); *State v. Zielke*, 137 Wis. 2d 39, 48–49, 403 N.W.2d 427 (1987) (statute's refusal procedures apply "when an arrested driver refuses to honor his or her *previously given consent*" to chemical testing, which consent "is implied as a condition of the privilege of operating a motor vehicle upon state highways") (emphasis added); *State v. Thorstad*, 2000 WI App 199, ¶ 8, 238 Wis. 2d 666, 618 N.W.2d 240 (quoting *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 277–78, 542 N.W.2d 196 (Ct. App. 1995)) ("Every driver in Wisconsin impliedly consents to take a chemical test for blood alcohol content. A person may revoke consent, however, by simply refusing to take the test."). *State v. Krajewski*, 2002 WI 97, ¶ 25, 255 Wis. 2d 98, 648 N.W.2d 385 (recognizing that, although the statute does not permit "the warrantless search of a driver who withdraws consent," other constitutional doctrines might).

C. Applied here, these precedents establish that, by voluntarily operating a vehicle in Wisconsin, Howes implied his revocable consent to chemical testing upon his arrest for drunk driving. The fact of that consent was the "fair assumption" on which *Breithaupt*'s due-process holding relied. 352 U.S. at 435 n.2. In *Neville*, it was a premise of those statutes' "unquestionable legitimacy." 459 U.S. at 560. *See McClelland v. State*, 84 Wis. 2d 145, 153, 267 N.W.2d 843 (1978) (identifying and applying the "rationale" of a prior case

as a precedential "implicit holding"). And it was taken for granted by the *McNeely* plurality's characterization of implied-consent statutes as legally effective.[5]

Similarly, the reality of implied consent was essential to the holding in *Neitzel*. 95 Wis. 2d at 193; *see* App. 19 (recognizing that *Neitzel* "can be read as holding that it is statutory implied consent, given before a person becomes a suspect, that supplies voluntary consent to a blood draw"). It also informed the logic of *Piddington*, which suggests that the reason drivers need not adequately comprehend an express request to perform a chemical test is that they already have impliedly consented to that request by their conduct. Howes has not identified a good reason for this Court to question this settled view.

II. Even If The Issue Were Open, Suspicion-Based BAC Searches Of Impliedly Consenting Motorists Under The Statute Are Reasonable

A. Motorists imply their (revocable) consent to searches under the statute

1. Consent to a search may be implied by conduct.

Just as a person may express consent to a request through words or gestures, he may also "manifest[ ]" agreement "by signs, actions, or facts, or by inaction or

[5] Even if this Court were to conclude (incorrectly) that other parts of *McNeely* somehow undermine *Breithaupt* and *Neville*, *but see infra* p. 38, it may not part ways with those precedents until the U.S. Supreme Court does. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

silence, which raise a presumption that the consent has been given." *State v. Douglas*, 123 Wis. 2d 13, 14–15 n.1, 365 N.W.2d 580 (1985) (quoting definition of "implied consent" in *Black's Law Dictionary 276* (rev. 5th ed. 1979)). This consent is often conveyed by "conduct," which alone "provides a sufficient basis" for a warrantless search. *Phillips*, 218 Wis. 2d at 197. Consent by conduct could arise simply from "the person's . . . engaging in a certain activity" or from other "circumstantial evidence." 4 LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 8.2(l) (5th ed. 2015).

Fourth Amendment law supplies several illustrations. An airline passenger impliedly consents to searches of his luggage by "engag[ing] in the regulated activity of bringing hand luggage on board a commercial aircraft"—whether or not he expressly agrees to those searches, or even reads the posted notices. *United States v. Doran*, 482 F.2d 929, 932 (9th Cir. 1973); *see also Hawaii v. Hanson*, 34 P.3d 1, 5 (Haw. 2001), *as amended* (Nov. 7, 2001) (collecting cases). Likewise, one who visits a military installation implies his consent to warrantless inspection where a sign so states, *Hawaii v. Torres*, 262 P.3d 1006 (Haw. 2011) (interpreting Hawaii's constitution); *see Morgan v. United States*, 323 F.3d 776 (9th Cir. 2011), as does a jail employee when he enters his place of work, *United States v. Sihler*, 562 F.2d 349 (5th Cir. 1977). Even a member of an industry that the government can, and does, closely regulate "in effect consents" to carry "the burdens as well as the benefits of their trade," including by

submitting to warrantless inspections. *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973). Accordingly, one who enters the firearms business, for example, "does so with the knowledge" that his records and goods "will be subject to effective inspection." *United States v. Biswell*, 406 U.S. 311, 316 (1972).[6]

2. Implied consent is voluntary if not coerced.

Consent is voluntary if "given in the absence of duress or coercion, either express or implied." *State v. Phillips*, 218 Wis. 2d 180, ¶ 26, 577 N.W.2d 794 (1998). "Coercive [government] activity is a necessary predicate" to deeming an act not 'voluntary.'" *Colorado v. Connelly*, 479 U.S. 157, 157 (1986); *see, e.g.*, *Colorado v. Magallanes-Aragon*, 948 P.2d 528, 531 n.6 (Colo. 1997).

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[6] Under a related Fourth Amendment doctrine, the U.S. Supreme Court also has recognized that a person may imply consent to certain warrantless intrusions by engaging in conduct against the backdrop of certain legal principles. In *Florida v. Jardines*, 133 S. Ct. 1409 (2013) "it [wa]s undisputed that the detectives had . . . [entered] the constitutionally protected extensions of Jardines' home" without express consent. *Id.* at 1415. The issue was "whether he had given his leave . . . implicitly . . . for them to do so." The Court held that he had given the officers license to approach the home. *Id.* at 1415–16. Invoking the principle of property law that "the knocker on the front door is treated as an invitation . . . to attempt an entry, justifying ingress to the home," the Court held that the defendant in that case had granted such an "implicit license" simply by his residing in a home with a front path. *Id.* at 1415. Whether or not he had meant to, he had implicitly agreed by his conduct to the terms of this common law–derived "customary invitation." *Id.* at 1416.

In the context of consent implied by "the person's . . . engaging in a certain activity," 4 LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 8.2(1) (5th ed. 2015), the coercion inquiry is simple. In *Doran*, for example, it was enough that the government had not forced the defendant to take "hand luggage on board a commercial aircraft"; he had "chose[n] to engage in th[at] regulated activity" himself. 482 F.2d at 932. Likewise, in *Torres*, "there [was] nothing to suggest" that the defendant had indicated "in any way" to the officer at the gate that he "did not want to enter [the base] and instead, wished to turn around at the guard shack." 262 P.3d at 1022; *see also United States v. Ellis*, 547 F.2d 863, 866 (5th Cir. 1977) (noting that the defendant's "decision to enter the base subject to the possibility of a search can in no wise be considered coerced"). And the government had not forced the jail employee in *Sihler* to "accept[ ] and continue[ ] [ ] employment which subjected him to search on a routine basis." 562 F.2d at 351. The firearms dealer in *Biswell* similarly made an uncoerced "cho[ice] to engage in [a] pervasively regulated business and to accept a federal license." 406 U.S. at 316.

3. Motorists like Howes voluntarily imply their consent to chemical testing by driving on Wisconsin's highways—and by not revoking that consent.

Like the luggage-toting airline passenger, the military-base visitor, the prison employee, and the firearms dealer, the

Wisconsin motorist implies his consent by conduct. In *Doran*, *Torres*, and *Sihler*, posted signs informed passers-by of the inference that the law would draw from their conduct—whether or not the defendants read and understood those signs. *See Doran*, 482 F.2d at 932 (inferring that defendant should have known, based on the signs and other warnings, that he could be subject to search). Here, the implied-consent statute performs the function of the sign—except more effectively, since it is assumed that everyone knows the laws that govern his or her conduct. *See, e.g.*, *Barlow v. United States*, 32 U.S. 404, 411 (1833).[7] And in *Biswell*, the nature of the thoroughly regulated and inherently dangerous activity put the defendant on notice of the consent condition. So too here.[8]

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[7] Wisconsin-licensed motorists in particular should be "presumed to know" the implied-consent law, since it is described in detail in the Wisconsin Department of Transportation *Motorists' Handbook* (which, generally, a license applicant studies in preparation for the "knowledge test"). *See* Wisconsin Department of Transportation, *Motorists' Handbook* 52–53, http://wisconsindot.gov/Documents/dmv/shared/bds126-motorists-handbook.pdf (2016).

[8] Of course, the State is not free to impose *any* sort of implied-consent condition on *any* kind of activity. It matters here that engaging in the regulated activity is a privilege, to which, given its countless public-safety implications, the State may attach related conditions. *See infra* p. 35 (additional authorities on driving privilege); *Hess v. Pawloski*, 274 U.S. 352, 356 (1927). The State can impose those conditions on motorists even if it could not impose them on the general public. *See Hess*, 274 U.S. at 356 (a State may provide that motorists give "implied consent" to appointment of state registrar as representative for service of process in suits arising from accidents). It also matters that the condition bears an obvious nexus to the privilege, since it promotes the safety of its exercise.

To show that the consent is implied under the statute, however, is not to conclude that it is somehow final or irrevocable. Consent given by words or conduct can also be withdrawn by those means. That is no less true of the implied consent of a motorist found "unconscious or otherwise not capable of withdrawing consent" and thus "presumed not to have withdrawn consent." Wis. Stat. §§ 343.305(3)(b). The statute's presumption is rebuttable. If a "conscious" person may withdraw his consent under § 343.305(2), then he may do so *before* he loses consciousness or is otherwise rendered "incapable of withdrawing consent." In other words, the presumption of unrevoked consent yields to circumstances reasonably showing that, when the driver had been capable of withdrawing consent under § 343.305(2), he had done so.

Second, like the consent of the airline passenger with luggage, the visitor to a military base, or the prison employee, the consent implied under the statute is voluntary. Driving—while no doubt important to many—is plainly not the product of "coercive [government] activity." *Connelly*, 479 U.S. at 157. And, more importantly, no "implied threat or covert force" compels motorists to *maintain* that consent even while driving. *Schneckloth*, 412 U.S. at 228. To the contrary, the law explicitly permits "refusal[s]" of "request[s]" to search and affirms motorists' capacity to "withdraw[ ] consent," Wis. Stat. § 343.305—as it must, *see, e.g.*, *United States v. Carter*, 985 F.2d 1095, 1097 (D.C. Cir. 1993) (recognizing a "constitutional right to withdraw one's consent to a search"); *United States v.*

Dyer, 784 F.2d 812, 816 (7th Cir. 1986) (same). Thus, consenting drivers do not merely "acquiesce[ ] to a claim of lawful authority" to search. *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968). Although motorists need not know of those rights in order to voluntarily consent, *see Schenckloth*, 412 U.S. 249, the law assumes that they do, *see Barlow*, 32 U.S. at 411.

Although the prospect of privilege revocation for refusing a request to search may encourage a motorist not to withdraw his consent, *Neville* holds that a State does not "coerce[ ]" a motorist by putting him to the choice of either maintaining his consent or losing that privilege. 459 U.S. at 564 ("We hold . . . [that it] is not an act coerced by the officer."). Imposing the "penalty [of revocation] for refusing to take a blood-alcohol test is unquestionably legitimate." *Id.* at 560 (citing *Mackey*, 443 U.S. 1). Anyway, the prospect of the penalty risks putting the motorist in no worse a position than the similarly uncoerced decision not to drive in the first place: Either way, he drives, or he does not. Whether he gives (and does not revoke) his consent is up to him.

Applying the conventional coercion factors—transposed imperfectly from the context of express police-to-suspect requests—leads to the same conclusion. The State does not "use[ ] deception, trickery, or misrepresentation" to persuade drivers to imply consent or otherwise "threaten[ ] or physically intimidate" them. *Artic*, 327 Wis. 2d at 414. Implied consent is not the "opposite" of "congenial, non-

threatening, and cooperative." *Id.* The unconscious driver has "responded to the request to search" by unequivocally manifesting consent (unless the driver revokes it). *Id.* And the statute itself informs drivers that they can "refuse consent." *Id.* Although the remaining factor—the suspect's "characteristics"—would seem to call for a case-by-case inquiry in unconscious-suspect cases, the Court has clarified that this factor is relevant only if there has first been "improper influence, duress, intimidation, or trickery." *Id.* at 424 (quoting *Phillips*, 218 Wis. 2d at 202–03). There has not.[9]

Decisions from other States support the conclusion that drivers impliedly consent to suspicion-based BAC searches. Several courts have held, for example, that the unrevoked implied consent of an unconscious motorist permits a consent-based search. *See, e.g.*, *Bobeck v. Idaho Transp. Dep't*, 159 Idaho 539, 363 P.3d 861, 867 (Ct. App. 2015), *review denied* (Dec. 23, 2015) ("The fact that [the suspect] was allegedly

[9] This brief's consent analysis shows the impropriety not only of Howes' requested remedy of suppression, but especially of his prayer for facial invalidation of the implied-consent law's unconscious-suspect provisions. In addition to overcoming the presumption that, as a "regularly enacted statute[ ]," the law is constitutional, *State v. Gudenschwager*, 191 Wis. 2d 431, 441, 529 N.W.2d 225 (1995), Howes must show that those provisions cannot validly apply "under any circumstances." *League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker*, 2014 WI 97, ¶ 15, 357 Wis. 2d 360, 851 N.W.2d 302. But, even under Howes' theory, there is one set of circumstances in which both the unconscious-suspect provisions apply and no search is permitted: the driver is unconscious when the police find him, but the circumstances show that he had previously withdrawn consent. The presumption still does work in those cases: it is triggered before it is rebutted.

unconscious when the officer read her the advisory does not effectively operate as a withdrawal of her consent."); *Sims v. Idaho*, 358 P.3d 810, 817–18 (Ct. App. 2015), *review denied* (Nov. 4, 2015) (same); *Goodman v. Virginia*, 558 S.E.2d 555, 560 (Va. Ct. App. 2002) (same); *Minnesota, Dep't of Pub. Safety v. Wiehle*, 287 N.W.2d 416, 419 (Minn. 1979). And other courts have affirmed the validity of implied consent even in conscious-motorist cases. *See, e.g.*, *Martini v. Virginia*, No. 0392-15-4, 2016 WL 878017, at *4 (Va. Ct. App. Mar. 8, 2016); *Idaho v. Eversole*, No. 43277, 2016 WL 1296185, at *3–*4 (Idaho April 4, 2016) (driver must have the right to voluntarily withdraw that consent); *Burnell v. Indiana*, 44 N.E.3d 771, 777 (Ind. 2015) (consent is implied by driving, but "anything short of an unqualified, unequivocal assent to a properly offered chemical test constitutes a refusal"); *Tiller v. Arkansas*, 439 S.W.3d 705, 710 (Ark. Ct. App. 2014); *see also Massachusetts v. Thompson*, 32 N.E.3d 1273, 1276–77 (Mass. Ct. App. 2015) (interpreting the boating statute, which is functionally identical to the driving statute). And, notably, "in nearly all of the cases where courts rejected the validity of implied consent, the suspect actively refused or resisted a blood test." *Flonnory v. Delaware*, 109 A.3d 1060, 1074 (Del. 2015) (Strine, J., dissenting) (collecting cases).

B. A chemical test of a consenting, unconscious arrestee, such as Howes, is otherwise reasonable under the Fourth Amendment

The "ultimate measure of the constitutionality of a governmental search" is not the presence of warrant but simply "reasonableness." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995). Applying that traditional standard, courts "generally determine whether to exempt a given type of search from the warrant requirement" by weighing, on the one hand, the "degree to which [the type of search] is needed for the promotion of legitimate governmental interests," and, on the other, "the degree to which it intrudes upon an individual's privacy." *Riley v. California*, 134 S.Ct. 2473, 2484 (2014); *see also Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). "[C]ertain general, or individual, circumstances may render a warrantless search or seizure reasonable," such as "special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like." *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013). In those cases, for example, "the public interest" may lessen the need for a warrant, or the individual may "already [be] on notice . . . that some reasonable police intrusion on his privacy is to be expected." *Id.*

Applied here, the "traditional standards of reasonableness" confirm the constitutionality of chemical testing of consenting, unconscious arrestees under the statute.

1. The State has an overwhelmingly compelling interest in identifying, deterring, and punishing drunk drivers.

"No one can seriously dispute the magnitude of the drunken driving problem," *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990). "For decades," the U.S. Supreme Court "has 'repeatedly lamented the tragedy.'" *Id.* (quoting *Neville*, 459 U.S. at 558). So has this Court: "Drunk driving is indiscriminate in the personal tragedy of death, injury, and suffering it levies on its victims." *Nordness*, 128 Wis. 2d at 33. A "scourge on society," it "exacts a heavy toll in terms of increased health care and insurance costs, diminished economic resources, and lost worker productivity," and it "destroys and demoralizes personal lives and shocks society's conscience." *Id.* at 33–34.

In light of that continuing tragedy, "[n]o one can seriously dispute . . . the States' interest in eradicating" it. *Sitz*, 496 U.S. at 451. This interest is "compelling," *McNeely*, 133 S. Ct. at 1565, and "paramount," *Mackey*, 443 U.S. at 17. And this Court gives it "considerable weight." *Nordness*, 128 Wis. 2d at 33–34.

Wisconsin "has endeavored" to further that interest "in part through [its] implied consent law." *Id.* at 34. The law promotes that interest in several ways. First, it permits the State to secure evidence of intoxication "as soon as possible," *Skinner*, 489 U.S. at 623, which is important given the biological fact that, with each second, "the body functions to

eliminate [alcohol] from the system." *Schmerber v. California*, 384 U.S. 757, 770 (1966); *see also Krajewski,* 2002 WI 97, ¶ 27. Samples "must be obtained as soon as possible," lest the delay "result in the destruction of valuable evidence." *Skinner*, 489 U.S. at 623. And, per *Skinner*, "the government's interest in dispensing with the warrant requirement is at its strongest when, as here, 'the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.'" *Id.* (quoting *Camara v. San Francisco Mun. Ct.,* 387 U.S. 523, 533 (1967)).

Securing a warrant is not an effective alternative, since that "may take some time and may often be impracticable." *Faust*, 2004 WI 99, ¶ 29; *see also Krajewski*, 2002 WI 97, ¶ 42 n.19 ("The principal difficulty is reaching a judge or court commissioner after normal working hours. Many counties have only one judge. Judges cannot always be found at their office or home."). And proceeding by exigency is not always possible, *see McNeely*, 133 S.Ct. at 1562–63, and it is not always easy to tell when it *is* possible. Consensual searches are by far the State's most promising means of collecting, as expeditiously as the circumstances permit, undiminished evidence of intoxication.

What is more, capturing the suspect's BAC also furthers the State's "legitimate evidence gathering objectives" as prosecutor. *Faust*, 2004 WI 99, ¶ 29. Since blood samples are "most direct and accurate evidence of intoxication," *id.*, measuring BAC before it dissipates "effectuates [the State's]

interest in obtaining reliable and relevant evidence for use in subsequent criminal proceedings," *Mackey*, 443 U.S. at 18.

Accordingly, "the state's interest of keeping the highways safe is best served when those who drive while intoxicated are prosecuted and others are thereby deterred from driving while intoxicated," *Nordness*, 128 Wis. 2d at 33, and this "interest is served by . . . the implied consent law," *id.*

2. The intrusion of a suspicion-based chemical test on a consenting, unconscious suspect's Fourth Amendment interests is not severe.

"On the other side of the balance from this compelling need is a minimal intrusion." *Syring v. Tucker*, 174 Wis. 2d 787, 811, 498 N.W.2d 370 (1993) (describing blood tests). Although chemical testing certainly constitutes an "invasion of bodily integrity," *McNeely*, 133 S.Ct. at 1558 (plurality), courts have identified five reasons to regard the degree of intrusion on privacy interests, in cases of suspicion-based blood draws on unconscious, consenting suspects, as less than severe.

First, and most importantly, the test is consensual. The motorists searched have voluntarily implied (and have not revoked) their consent to suspicion-based testing. Put another way, motorists are "on notice . . . that some reasonable police intrusion on [their] privacy is to be expected." *King*, 133 S. Ct. at 1969.

Second, just as the public-safety risk of drunk driving underscores the State's interest, it also reduces a driver's expectation of privacy on the roads. *See State v. Parisi*, 2016 WI 10, ¶ 55, 367 Wis. 2d 1, 875 N.W.2d 619 (acknowledging a motorist's "reduced privacy interest" in drunk-driving cases). Driving is a privileged activity "regulated pervasively to ensure safety." *Skinner*, 489 U.S. at 627. In Wisconsin, operating a two-ton vehicle at high speeds "is a privilege and not an inherent right." *Steeno v. State*, 85 Wis. 2d 663, 671, 271 N.W.2d 396 (1978). So it is "subject to reasonable regulation under the police power in the interest of public safety and welfare." *State v. Stehlek*, 262 Wis. 642, 646, 56 N.W.2d 514 (1953); *see also, e.g.*, *Kane v. New Jersey*, 242 U.S. 160, 167 (1916) ("The power . . . extends to nonresidents as well as to residents."). Because "[t]he highways belong to the state," it "may make provision appropriate for securing the safety and convenience of the public in the use of them." *Buck v. Kuykendall*, 267 U.S. 307, 314 (1925).

Third, an arrest lessens a suspect's expectation of privacy. In cases like this one, the police administer the test only after the suspect has been detained on suspicion of a drunk-driving offense. *See McNeely*, 133 S. Ct. at 1566 (plurality). As a consequence of that detention, the suspect's "expectations of privacy" and "freedom from police scrutiny" are "'necessarily of a diminished scope.'" *King*, 133 S. Ct. at 1978 (2013) (quoting *Bell v. Wolfish*, 441 U.S. 520, 557 (1979)).

Fourth, "[t]he intrusion in the usual blood draw is slight." *Krajewski*, 2002 WI 97, ¶ 60. Administered "by medical personnel in a medical environment, according to accepted medical procedures," *Syring*, 174 Wis. 2d at 811, it "does not threaten the individual's safety or health." *Krajewksi*, 2002 WI 97, ¶ 60. Blood draws are "commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." *Syring*, 174 Wis. 2d at 811 (quoting *Skinner,* 489 U.S. at 625); *see also Schmerber*, 384 U.S. at 771 (same); *Krajewski*, 2002 WI 97, ¶ 57 (characterizing "[b]lood draws to test for alcohol concentration" as "so commonplace, so accepted, [and] so likely to be reasonable in their execution"). "*Schmerber* [ ] confirmed society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's privacy and bodily integrity." *Skinner*, 489 U.S. at 625; *see also Breithaupt v. Abram,* 352 U.S. at 436. Consequently, blood testing has been "relegated . . . to a realm of lesser protection under the Fourth Amendment." *Syring*, 174 Wis. 2d at 810 (quoting *Johnetta J. v. Mun. Court*, 267 Cal. Rptr. 666, 679 (Ct. App. 1990)).

Partly for this reason, this Court recently upheld the nonconsensual blood draw of an unconscious heroin user under the exigent-circumstances doctrine. *Parisi*, 2016 WI 10. Acknowledging that *McNeely* had described blood draws

as "implicat[ing] significant, constitutionally protected privacy interests," the Court pointed out that *McNeely* also had described "blood test[s] conducted in a medical setting by trained personnel" as "concededly less intrusive than other bodily invasions we have found unreasonable." *Id.* ¶ 58 (quoting *McNeely,* 133 S.Ct. at 1565 (plurality)). The Court concluded that the warrantless blood draw in that case was reasonable in part because, though the defendant had not been found in a vehicle (which meant that "the reduced privacy interest in [intoxicated-driving] cases [did] not apply"), "the intrusion in the usual blood draw is slight, and the draw in this case was performed reasonably, in a hospital by a phlebotomist." *Id.* ¶¶ 55, 59 (citation omitted).

Fifth, since immediate, accurate chemical testing will sometimes disclose a suspect's *sobriety*, it minimizes intrusion in yet another way: it frees the guiltless. Indeed, as the U.S. Supreme Court has noted, if the test does not confirm that a driver was drunk, it will likely "lead to prompt release of" an unimpaired driver, *Mackey*, 443 U.S. at 19, who otherwise would face the far more invasive extended seizure that a criminal charge would bring, *see King*, 133 S. Ct. at 1978.

For these reasons, the Court in *Nordness* was right to conclude that "[t]o require a person to submit to chemical testing where an officer has probable cause to believe that the person was driving while under the influence of an intoxicant is a small inconvenience to an individual in comparison to the

worthy benefits of the implied consent law." 128 Wis. 2d at 34.[10]

III. The U.S. Supreme Court's Narrow Exigent-Circumstances Holding in *McNeely* Does Not Affect The Reasonableness Analysis In This Case

In *McNeely*, the U.S. Supreme Court considered a separate exception to the warrant requirement: the exigent-circumstances doctrine. That doctrine "applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King*, 563 U.S. 452, 469 (2011). In *Schmerber*, an earlier drunk-driving case, the Court had held that, because the "delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence" (given the natural dissipation of alcohol in the bloodstream), performing a warrantless blood test on the unconscious suspect had been reasonable. 384 U.S. at 770. In *McNeely*, the Court considered whether *Schmerber* established a *per se* rule that "the natural metabolization of alcohol . . . justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." 133 S. Ct. at 1556 (plurality). The Court held that it did not.

[10] Even if this Court holds the unconscious-suspect provisions of the implied-consent law unconstitutional, the exclusionary rule should not apply to the blood-test result in this case, since the officer relied in good faith on the law's validity. *See, e.g. State v. Kennedy*, 2014 WI 132, ¶¶ 35–37, 349 Wis. 2d 454, 856 N.W.2d 834.

Rather, "exigency . . . must be determined case by case based on the totality of the circumstances." *Id.*

Howes asserts that this narrow exigent-circumstances holding somehow conveys the Court's tacit disapproval of implied consent. *See* Br. of Def.-Resp't, 18. Specifically, he infers that, if the Court had thought implied consent "a valid per se exception to the warrant requirement," then "there would have been no need to draft the opinion the first place—the Court could have just relied on Missouri's analogous 'implied consent' involved in that case." App. 10.

Howes misreads the Court's opinion. Unlike Howes, the motorist in *McNeely* had been conscious and *had explicitly withdrawn his consent*: "Upon arrival at the hospital, the officer asked McNeely whether he would consent to a blood test" and read from "a standard implied consent form." "McNeely nonetheless refused." 133 S. Ct. at 1557. So the consent question was not presented.[11] This explains why the Court repeatedly characterized *McNeely* as a "*nonconsensual*" blood-testing case. *Id.* at 1556, 1557, 1558; *see also id.* at 1563, 1568. It also confirms that it was not bald self-contradiction for the plurality to declare pages later that implied-consent laws are "legal tools" for "secur[ing] BAC evidence without undertaking warrantless nonconsensual blood draws." *Id.* at 1566.

[11] Many cases from other jurisdictions have made this same observation. *See, e.g.*, *Nebraska v. Modlin*, 867 N.W.2d 609, 617 (Neb. 2015).

For the same reason, Howes is also incorrect to suggest that, notwithstanding its narrowness, *McNeely* somehow mandates a case-by-case analysis of the totality of the circumstances to justify *every* warrantless blood draw in a drunk-driving case. Howes seizes on one broadly written sentence that, in context, concerns *Schmerber* and exigency. 133 S. Ct. at 1563; Br. of Def.-Resp't, 17–18. Every other statement in *McNeely* eschewing a categorical approach deals explicitly with the exigent-circumstances doctrine only. *See McNeely,* 133 S. Ct. at 1559–62.

More importantly, Howes' misreading of *McNeely* aside, the State does not dispute that the voluntariness of consent under *Schenckloth* is ordinarily "determined from the totality of all the circumstances." 412 U.S. at 227. But "the circumstances in drunk driving cases are often typical," and the statute "offer[s] guidance on how police should handle cases like the one before [the Court]." *McNeely*, 133 S. Ct. 1569 (Roberts, C.J., concurring in part and dissenting in part). Here, as in many other cases, it so happens that the relevant circumstances are few: No one disputes that Howes voluntarily drove his motorcycle on Wisconsin's highways the night of the accident. In so doing, he implied his consent to a chemical test under the statute. And, since Howes was found unconscious, he was "presumed" not to have withdrawn that consent—subject of course to circumstances indicating that he had in fact previously *withdrawn* his consent when capable. If those circumstances had existed, they might have been

enough to rebut the presumption of unrevoked consent. But Howes pointed to no such circumstances, so the presumption went unrebutted. Thus, the search was consensual.

CONCLUSION

The decision of the circuit court should be reversed.

Dated this 27 day of May, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General

RYAN J. WALSH
Chief Deputy Solicitor General
State Bar #1091821

Wisconsin Department of Justice
17 W. Main Street
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-1332
(608) 261-7206 (Fax)
walshrj@doj.state.wi.us

Attorneys for Plaintiff-Appellant

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 9,862 words.

Dated this 27th day of May, 2016.

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RYAN J. WALSH
Chief Deputy Solicitor General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 27th day of May, 2016.

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RYAN J. WALSH
Chief Deputy Solicitor General