No. 14AP1870

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

REPLY BRIEF OF THE STATE OF WISCONSIN

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TABLE OF CONTENTS

As the Supreme Court explained in June, "[i]t is well established that a search is reasonable when the subject consents, and that sometimes consent to a search need not be express but may be fairly inferred from context." *Birchfield v. North Dakota*, 579 U.S. ___, 2016 WL 3434398, at *26 (2016) (citation omitted); *see* Opening Br. 22–25. The unconscious-driver provisions of Wisconsin's implied-consent law permit just such a "fair infer[ence]." *See* Wis. Stat. § 343.305(3)(ar), (3)(b). When a motorist exercises the privilege of driving on state highways against the backdrop of that statute, he accepts that, if a police officer were to find him unconscious at a crash site and suspect him to be drunk, the officer could infer that the motorist (when conscious) had consented to tests of his blood-alcohol content (BAC)—subject, of course, to circumstances showing that the motorist (when conscious) had revoked consent.

Under the Fourth Amendment, consent is effective so long as the government has not coerced it. Here, it is voluntary. Opening Br. 27–29. The State does not force anyone to take to its highways. Nor does it require drivers to maintain the consent communicated by that conduct. And putting drunk-driving suspects to a choice—either maintain consent or lose the operating privilege—is "unquestionably legitimate" and not "coerc[ive]." *South Dakota v. Neville*, 459 U.S. 553, 560, 564 (1983).

It is little wonder, then, that this Court's precedents and "prior opinions [of the U.S. Supreme Court] *have*

referred approvingly" to implied-consent laws such as Wisconsin's, *Birchfield*, 2016 WL 3434398, at *26 (emphasis added); Opening Br. 16–22. For these reasons and others, the challenged statute, on its face and as applied, is constitutional. Opening Br. 16–37.

In his Response Brief, Howes does not dispute many of the State's arguments. He concedes that consent may be implied by conduct, Response Br. 14, and does not dispute that uncoerced consent is voluntary. (Indeed, Howes addresses not *a single authority* cited in Parts II.A.1 and II.A.2 of the State's brief, which establish the statute's constitutionality under the consent doctrine.) Nor does Howes disagree that driving on state roads is voluntary, or that imposing a civil penalty on revoking consent is not coercive, *see* Response Br. 10. Howes likewise does not dispute the State's interests in prosecuting drunk driving and quickly securing evidence of intoxication. Nor does he question that getting a warrant "is not an effective alternative" or that "blood samples are the most direct and accurate evidence of intoxication." Opening Br. 32–34 (citation omitted). Similarly, he does not dispute that drunk driving reduces a motorist's expectation of privacy, that an arrest further diminishes this expectation, and that immediate testing minimizes intrusion by occasionally freeing the innocent. Opening Br. 34–35, 37.

Instead, Howes' brief makes four main points: (I) the court of appeals' decision in *State v. Padley*, 2014 WI App 65,

354 Wis. 2d 545, 849 N.W.2d 867—which *upheld* the constitutionality of the implied-consent statute—somehow "controls" how this Court must decide this case, and requires affirmance; (II) notwithstanding what the U.S. Supreme Court *said* in *Birchfield*, the Court's opinion shows that the implied-consent law is unconstitutional; (III) the statutory presumption of an unconscious driver's consent is somehow irrebuttable; and (IV) many out-of-state authorities support his challenge. Each point is mistaken.

I. *Padley* Does Not Support Howes

Howes' leading argument is that *Padley*—a court of appeals case that he discusses at length—is "control[ling] here," Response Br. 15 n.10, and establishes that implied consent categorically falls short of the "actual" consent necessary to permit a search under the Constitution, *e.g.*, Response Br. 2. Both statements are incorrect.

To the extent that this Court truly owes deference to a lower court decision on the constitutionality of a state statute, only the *holdings* of the court of appeals carry precedential weight. *See Cook v. Cook*, 208 Wis. 2d 166, 186, 560 N.W.2d 246 (1997). Yet, as the *Padley* opinion makes clear, the court made no holding whatsoever on the validity of the implied-consent law's unconscious-driver provisions. 354 Wis. 2d 545, ¶ 39 and n.10. Rather, *Padley* held that a conscious defendant's contemporaneous consent to a search is voluntary, notwithstanding that she is told that "the

alternative" to consent is "a [civil] penalty." *Id.* ¶ 72. The court also rejected a facial attack "premised on the inaccurate view that Wisconsin's implied consent law," like the laws of some other States, "*require[s]* a driver to submit to a search." *Id.* ¶ 44 (emphasis added). As the court recognized, the statute gives all motorists a *choice* between consenting "or withdrawing 'implied consent' and suffering implied-consent-law sanctions." *Id.* ¶ 42. Those holdings are entirely consistent with the State's argument here.

Nevertheless, Howes relies on three (dicta-ridden) paragraphs from *Padley* that describe how implied consent works in conscious-driver cases. *E.g.*, Response Br. 7–8. But that description does not conflict with the State's argument, especially if one reads *Padley*'s use of the term "actual consent" reasonably to mean simply "contemporaneous, express consent." When the conscious driver is arrested, the best indication of whether he *presently* consents to a search is not whether he should be understood to have consented *at some prior time* but whether he consents *now*. So if the conscious driver agrees to a search, his consent is no longer "implied" but is (as *Padley* states) "actual," meaning *contemporaneous* and *express*. 354 Wis. 2d 545, ¶ 38. But that does not mean that his earlier implied consent (even though no longer especially probative of his present intentions) simply is, or was, a fiction. If so, it would make no sense to say that, when a conscious driver contemporaneously refuses to be tested, he "*withdraws*

'implied consent.'" Yet, that is precisely how *Padley* put it. *Id.* (emphasis added) (citing cases recognizing the reality of implied consent).[1]

In a footnote, the court wondered whether "there *may be* tension" between its understanding of consent and the text of the unconscious-driver provisions. *Id.* ¶ 39 n.10 (emphasis added). But it did not "address this tension further." *Id.* So, whether or not the State is correct to perceive no *necessary* "tension" at all, *Padley*'s dicta remain dicta. They do not bind this Court.

II. *Birchfield* Reinforces The Constitutionality of Wisconsin's Implied-Consent Law

Howes also argues that *Birchfield* confirms the invalidity of Wisconsin's implied-consent law. The opposite is true.

A. Although Wisconsin's implied-consent law imposes only civil penalties on revocations of consent, other States go further, providing that "motorists lawfully arrested for

[1] Howes argues that, under the State's view, reading the "Informing the Accused" form to a conscious suspect would be "superfluous," because the driver would have already consented to the search by driving. Response Br. 13. Howes is mistaken. Under the statute's *conscious*-driver provisions, the fact of a suspect's consent is not presumed but rather is discerned principally from his contemporaneous response to the "Informing the Accused" form—evidence that is especially probative of a suspect's present intentions, but that is obviously unavailable when the suspect is unconscious. *Supra* pp. 4–5. Additionally, the "Informing the Accused" warnings serve the purpose of honoring the suspect's "right to withdraw one's consent." *United States v. Carter*, 985 F.2d 1095, 1097 (D.C. Cir. 1993).

drunk driving may be convicted of a crime . . . for refusing to take" a warrantless chemical test. *Birchfield*, 2016 WL 3434398, at *11. *Birchfield* considered the constitutionality of those *criminal* laws.

The Court gave a two-part answer to the question of whether the Fourth Amendment permits the police to "*compel* a motorist to submit" to warrantless blood and breath tests on penalty of criminal punishment. *Id.* at *12 (emphasis added). First, because the search-incident-to-arrest doctrine categorically justifies breath tests, States can criminalize the refusal to undergo one. *Id.* at *27. But since neither the search-incident-to-arrest doctrine nor the exigent-circumstances doctrine categorically authorizes blood draws, the Court had to consider whether an implied-consent law threatening criminal sanctions could justify a blood draw. *Id.* at *26.

Critically, the Court distinguished that question from the one in this case:

> It is well established that a search is reasonable when the subject consents, *e.g.*, *Schneckloth v. Bustamonte*, 412 U. S. 218, 219 (1973), and that sometimes consent to a search need not be express but may be fairly inferred from context, *cf. Florida v. Jardines*, 569 U. S. 1, ___–___ (2013) (slip op., at 6–7); *Marshall v. Barlow's, Inc.*, 436 U. S. 307, 313 (1978). 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. *See, e.g.*, *Missouri v. McNeely*, 569 U.S. __, __

> (2013) (plurality opinion) (slip op., at 18); *Neville*, 459 U.S. at 560. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them.

Id.[2] Yet, "[i]t is another matter . . . to impose *criminal penalties* on the refusal to submit to such a test." 2016 WL 3434398, at *26 (emphasis added). After all, "[t]here must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads," as the "respondents and their *amici* all but concede[d]." *Id.* The Court therefore concluded that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.*

The Court applied this principle to the one petitioner who had "submitted to a blood test after police told him that the [criminally enforced implied-consent] law required his submission." *Id.* at *27. The lower court had held that the petitioner's consent was "voluntary" on the assumption that the State could categorically compel blood tests in those circumstances. But the *Birchfield* Court contradicted that assumption, instructing "the state court on remand to

[2] The State's Opening Brief cited *Jardines*, two of the cases on which *Marshall* relies, *McNeely*, and *Neville* for these same propositions. Opening Br. 21–22, 24. Yet—even though the U.S. Supreme Court *also* invoked those authorities in the meantime—Howes' brief simply ignores *Jardines*, bypasses the cases cited in *Marshall*, suggests that the State's (as well as *Birchfield*'s) reliance on *McNeely* is "somewhat perverse," Response Br. 17, and, in a single sentence, dismisses *Neville* as irrelevant, Response Br. 10 n.6.

reevaluate [petitioner's] consent" in light of "the partial inaccuracy of the officer's advisory." *Id.*

B. *Birchfield* yields several lessons for this case, none of which supports Howes' challenge.

First, *Birchfield* explicitly forecloses any argument that *Birchfield* undermines Wisconsin's implied-consent law. The Court could not have been clearer: *"[N]othing we say here should be read to cast doubt"* on that law. 2016 WL 3434398, at *26 (emphasis added). By disregarding this directive, *e.g.*, Response Br. 15, Howes himself violates *Birchfield*.

Second, *Birchfield* explicitly endorses two of the State's principal arguments: that consent to a search "may be fairly inferred from context," and that several precedents "refer[ ] approvingly" to civil implied-consent laws. 2016 WL 3434398, at *26; *see* Opening Br. 16–18, 22–25.[3]

Third, *Birchfield* confirms that *McNeely*'s holding has no effect on this case. In his brief, Howes contends that *McNeely* "control[s] here." *E.g.*, Response Br. 15 n.10. But, as *Birchfield* repeatedly confirms, "the [*McNeely*] Court pointedly did not address any potential justification for warrantless testing of drunk-driving suspects" other than exigency. 2016 WL 3434398, at *14; *see also id.* at *21, *24

[3] *Birchfield* also supports the State's point that, even if Howes did not consent, the evidence should be not suppressed. 2016 WL 3434398, *27 n.9.

(same). More importantly, even if *McNeely* does forbid any "per se or categorical" exception to the warrant requirement, Response Br. 17, the unconscious-driver provisions do not create one: because implied consent is revocable, and the presumption of implied consent rebuttable, a finding of consent in a given case is not automatic. *E.g.*, Opening Br. 40–41; *see infra* pp. 11–12.

Fourth, *Birchfield* shows that requiring a magistrate to approve blood draws of unconscious drivers would not serve the warrant requirement's two functions: (1) providing "an independent determination" of probable cause and (2) "limit[ing] the intrusion on privacy by specifying the scope of the search." 2016 WL 3434398, at *22.[4] Here, as in *Birchfield*, a warrant would serve neither end. First, "to persuade a magistrate that there is probable cause for a search warrant, the officer would typically recite the same facts that led the officer to find . . . probable cause for arrest," and "[a] magistrate would be in a poor position to challenge such characterizations." *Id.* Second, "[i]n every case the scope of the warrant would simply be a BAC test of the arrestee"; a warrant would not limit the search's scope "at all." Thus, "requiring the police to obtain a warrant in

[4] *Birchfield* states that there must be a "special need" for requiring warrants in these cases partly because of "t[he] burden" that processing warrant applications imposes on short-staffed, hard-to-reach local courts in mostly rural states, *id.* at *22, such as Wisconsin, *see State v. Krajewski*, 2002 WI 97, ¶ 42 n.19, 255 Wis. 2d 98, 648 N.W.2d 385.

every case would impose a substantial burden but no commensurate benefit." *Id.*

Fifth, although *Birchfield* found blood tests "significantly more intrusive" than breath tests, the Court reached that judgment "in light of the availability of the less invasive alternative of a breath test." 2016 WL 3434398, at *25. But since "the cooperation of the test subject is necessary" in breath tests, *id.* at *7, they are unavailable in unconscious-driver situations. Also significant is that, while "the process" of blood draws "is not one [that many drivers] relish," *id.* at *18, the *unconscious* subject is oblivious to the test and experiences no immediate discomfort, making the search less intrusive.[5]

III. A Motorist's Consent Is Revocable, And The Presumption Of An Unconscious Motorist's Consent Is Rebuttable

Howes asserts that the statute's presumption of an unconscious driver's implied consent is irrebuttable, which would mean that his implied consent under the statute is irrevocable. *E.g.*, Response Br. 1. He adds that the State's contrary position is somehow unconstitutional under the

[5] By citing the *Birchfield* passage stating that, when the need to blood test an unconscious suspect arises, "the police may apply for a warrant if need be," *id.* at *25, Howes again flouts *Birchfield*'s command that "*nothing*" in the opinion be read to cast constitutional doubt on this statute, *id.* at *26 (emphasis added). He also overlooks the sentence's telling conditional—"*if need be*"—and its context, which compares the utility of blood and breath tests under the search-incident-to-arrest doctrine.

Fourth Amendment. Response Br. 4 n.2. Both conclusions are incorrect.

Howes' position cannot be squared with the statute. Opening Br. 7, 27. The law plainly states that a conscious driver—notwithstanding the consent implied by his driving—may "refuse" to be tested, Wis. Stat. § 343.305(4), and thereby revoke the consent implied under § 343.305(2). Just as well, a conscious driver could revoke consent *before* becoming unconscious. Indeed, the unconscious-driver provisions suggest just that: until he is unconscious or otherwise incapable of revoking consent, a driver is capable of "withdrawing consent." *Id.* § 343.305(3)(ar), (3)(b). It would be a peculiar use of language to "presume" that a thing *had not* been done if that thing *could not* have been done in the first place. And because revocation is possible, it makes sense that the statute's "presum[ption]" of consent would be rebuttable, *id.* § 343.305(3)(ar), (3)(b); *see* Opening Br. 1, 7–8, 40–41, as statutory presumptions in Wisconsin generally are, *see* Wis. Stat. § 903.01; *id.* § 903.03(3).

It is *Howes'* position that would raise a constitutional doubt. Just as one has a right to consent to a search, one has a "right to withdraw one's consent to a search." *Carter*, 985 F.2d at 1097; *see United States v. Dyer*, 784 F.2d 812, 816 (7th Cir. 1986). Accordingly, reading Wisconsin's implied-consent law to permit drivers to withdraw consent not only respects the law's plain meaning but also avoids an utterly needless suggestion of "a constitutional conflict."

Milwaukee Branch of NAACP v. Walker, 2014 WI 98, ¶ 64, 357 Wis. 2d 469, 851 N.W.2d 262.

IV. Howes' Out-Of-State Cases Do Not Help Him

Howes' reliance on out-of-state cases is misplaced. Several come from jurisdictions that, unlike Wisconsin, make a driver's implied consent irrevocable—and so, in the parlance of Howes' *McNeely* argument, "per se." *E.g., Aviles v. Texas,* 443 S.W.3d 291, 292 (Tex. Ct. App. 2014); *Byars v. Nevada*, 336 P.3d 939, 945 (Nev. 2014); *South Dakota v. Fierro*, 853 N.W.2d 235, 237 n.2 (S.D. 2014); *see also Idaho v. Wulff*, 337 P.3d 575, 581–82 (Idaho 2014) (rejecting implied consent to the extent it is irrevocable). Several others lack precedential value. *E.g.*, *Kansas v. Dawes*, 2015 WL 5036690 (Kan. Ct. App. Aug. 21, 2015) (unpublished); *Minnesota v. Schlingmann*, 2016 WL 3461854 (Minn. Ct. App. June 27, 2016) (unpublished); *Colorado v. Schaufele*, 325 P.3d 1060 (Col. 2014) (plurality). In others, an appeal is pending. *See California v. Arredondo*, 245 Cal. App. 4th 186 (Cal. Ct. App. 2016), *review granted*, 371 P.3d 240 (Cal. 2016); *Williams v. Florida*, 167 So.3d 483 (Fla. Ct. App. 2015), *review granted*, 2015 WL 9594290 (Fla. Dec. 30, 2015). Still others are simply distinguishable. *E.g.*, *Arizona v. Butler*, 302 P.3d 609, 613 (Ariz. 2013) (turning in part on voluntariness of juvenile consent).

CONCLUSION

The decision of the circuit court should be reversed.

Dated this 14th day of July, 2016.

Respectfully submitted,

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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 2,914 words.

Dated this 14th day of July, 2016.

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CERTIFICATE OF COMPLIANCE
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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).

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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 14th day of July, 2016.

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