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In the Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

GERALD P. MITCHELL,
DEFENDANT-APPELLANT

On Appeal from the Sheboygan County Circuit Court,
The Honorable Terence T. Bourke, Presiding,
Case No. 2013CF365

BRIEF OF THE STATE OF WISCONSIN

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ISSUE PRESENTED

Under Wisconsin's implied-consent law, is a warrantless blood draw of an unconscious driver who properly has been arrested for an intoxicated-driving offense an unreasonable search under the Fourth Amendment?

The circuit court answered no, and the Court of Appeals certified the case to this Court.

INTRODUCTION

Wisconsin's implied-consent law offers drivers a deal: In exchange for the privilege of operating dangerous, four-ton machines on state roads, motorists agree that, by voluntarily sitting behind the wheel, they allow an inference that they presently consent to a search of their blood-alcohol content if they are arrested for an intoxicated-driving offense. For Fourth Amendment purposes, there is nothing fictitious about this agreement. "[B]ecause we presume that Wisconsin's citizens know the law," *State v. Weber*, 2016 WI 96, ¶ 78 & n.9, 372 Wis. 2d 202, 887 N.W.2d 554 (Kelly, J., concurring), it may "be fairly inferred from context" that voluntary conduct undertaken against the backdrop of a legal rule is presumptively meant to accord with that rule, *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016).

Hence, the blood draw performed on Gerald P. Mitchell, the unconscious drunk driver in this case, was reasonable. By operating a vehicle on Wisconsin roads with a presumed understanding of the reasonable conditions imposed by the implied-consent statute and a presumed desire to act in accordance with that statute, Mitchell conveyed his consent to a suspicion-based search of his blood-alcohol content. That consent was not the fruit of government coercion. The State did not force him to drive. Nor did the State require him to maintain his consent once he was arrested. Indeed, in the near hour that elapsed between the time he was arrested and the moment he fell unconscious, Mitchell was free to

withdraw at any second the consent implied by his conduct, subject of course to "unquestionably legitimate" civil penalties. *South Dakota v. Neville*, 459 U.S. 553, 560 (1983). Even if Mitchell had been found unconscious, his last word, communicated by his conduct, would have been consent. *See, e.g.*, *Colorado v. Hyde*, 393 P.3d 962 (Colo. 2017) (holding that warrantless implied-consent blood draws of unconscious drivers are constitutional); *id.* at 970 (Eid, J., concurring in the judgment) (agreeing).

This is not to say that legislatures are free to devise, and impose upon drivers, any kind of implied-consent condition that they think desirable. Plainly, "[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." *Birchfield*, 136 S. Ct. at 2185. But, for a number of reasons, the unconscious-driver provisions of the implied-consent statute do not exceed that limit, including because the intrusion of an authorized blood draw for unconscious intoxicated drivers—already under arrest and often already undergoing medical treatment—is slight. Hence the U.S. Supreme Court, time and again, "ha[s] referred approvingly to the general concept of implied-consent laws" like Wisconsin's. *Id.*

Although both sides benefit from the statute's reasonable bargain—hopeful motorists gain access to the driving "privilege" (it is not a "right"), *Steeno v. State*, 85 Wis. 2d 663, 671, 271 N.W.2d 396 (1978), while the State obtains

an effective means to promote its "paramount" interest in "enforcing drunk-driving laws and, thus, protecting public safety," *Milewski v. Town of Dover*, 2017 WI 79, ¶¶ 203–07, 377 Wis. 2d 38, 899 N.W.2d 303 (Abrahamson, J., dissenting)—the agreement, like any contract, can be "breach[ed]," *State v. Lemberger*, 2017 WI 39, ¶ 47 n.4, 374 Wis. 2d 617, 893 N.W.2d 232 (Abrahamson, J., concurring). The statute itself implicitly recognizes that consent can be "withdrawn" by one "capable" of that act. Wis. Stat. § 343.305(3)(b). But then the deal contains a damages clause: a person who revokes consent, thereby reneging on his end of the fair bargain, is subject to "civil penalties and evidentiary consequences." *Birchfield*, 136 S. Ct. at 2185; *see* Wis. Stat. § 343.305(9)(a). Once arrested, Mitchell could have breached his agreement with Wisconsin by revoking his implied consent before falling unconscious. That he did not hardly diminished the consent conveyed by his earlier conduct. Nor did it somehow render it insufficient. There is no constitutional right to be given an affirmative opportunity to revoke consent already given.

ORAL ARGUMENT AND PUBLICATION

By granting certification, this Court has indicated that the case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

A. The Scourge Of Intoxicated Driving In Wisconsin

"Drunk drivers take a grisly toll on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions of dollars in property damage every year." *Birchfield*, 136 S. Ct. at 2166. On average, drunk driving takes one life in the United States every 53 minutes. *See* National Highway Traffic Safety Administration ("NHTSA"), *Traffic Safety Facts: Alcohol-Impaired Driving*, at 1 (Dec. 2015) ("*NHTSA Facts*"), https://goo.gl/6V9Mjq.[1] "[T]he statistics are . . . staggering." *Birchfield*, 136 S. Ct. at 2178.

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), https://goo.gl/rmoFVB. Between 2003 and 2012, 2,577 people died in Wisconsin in crashes involving a drunk driver. *See* Center for Disease Control, *Sobering Facts: Drunk Driving in Wisconsin* (2014), https://goo.gl/tshOv9. 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. *Id.* The percentage of adults in Wisconsin who report intoxicated driving is a considerable 3.1 percent, far exceeding the national rate of 1.9 percent. *Id*.

[1] All URLs in this Brief were last visited on November 17, 2017.

Meanwhile, incidents of "drugged" driving have been on the rise, fueled in part by the nationwide opioid epidemic. One recent study "found a large increase in the number of drivers" using illegal drugs; "nearly one in four drivers tested positive for at least one drug that could affect safety." NHTSA, *Drugged Driving: Understanding The Challenge*, https://goo.gl/73QMt8. In 2015, for example, "drugs were present in 43% of the fatally-injured drivers with a known test result, more frequently than alcohol." Governors Highway Safety Association, *Drug-Impaired Driving: A Guide For States*, at 2 (Apr. 2017), https://goo.gl/MAHHXK. One possible reason for this disturbing trend is that "addicts aren't waiting to get home to get high"—"they have to keep to a fixed schedule." Corky Siemaszko, *Opioid Crisis: Driving While Drugged Is More Common Than You Think*, NBC News (Apr. 1, 2017), https://goo.gl/Nofc9r (quoting a drug-addiction specialist). More and more, users are ingesting powerful, mind-altering drugs before getting behind the wheel.

B. Wisconsin's Implied-Consent Statute

States promote highway safety by drawing on "a broad range of legal tools to enforce their [intoxicated]-driving laws and to secure BAC [blood-alcohol content] evidence without undertaking warrantless nonconsensual blood draws." *Missouri v. McNeely*, 569 U.S. 141, 160–61 (2013) (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 [an intoxicated-driving] offense." *Id.*; *see* Wis. Stat. § 343.305.

In Wisconsin, as in other States, "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), and "[a]ny analysis of a driver's consent under Wisconsin's implied consent law must begin with this presumption," *State v. Brar*, 2017 WI 73, ¶ 29, 376 Wis. 2d 685, 898 N.W.2d 499 (lead op.). The statute states that "[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 probable cause to believe that" the suspect has committed an intoxicated-driving offense, such as operating a motor vehicle under the influence of an intoxicant or controlled substance. *Id.* § 343.305(3)(b); *see id.* § 346.63(1)(a). The law enforcement agency "may designate which of the tests shall be administered first." *Id.* § 343.305(2).

The statute applies differently depending on whether suspects, having created a presumption of consent under the statute by voluntarily driving on the State's roads, are physically "capable" of withdrawing that consent when the police wish to administer the test. *Id.* § 343.305(3)(b). If they are, then the statute affords them an opportunity to do so. The police must advise conscious suspects 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 usually convey (among other facts) that (1) the suspect has been arrested or detained for an intoxicated-driving offense; (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).

If instead the suspect is found "unconscious or otherwise not capable of withdrawing consent," then he generally "is presumed not to have withdrawn consent," and the relevant subsections state that "one or more samples" may

be taken. *Id.* § 343.305(3)(b). Two features of this text are significant. First, the law acknowledges that implied consent under Section 343.305(2) may conceivably be withdrawn. Second, and relatedly, the statute does not conclusively establish that drivers found unconscious have not in fact withdrawn their consent; it simply presumes it—which suggests that the fact of consent, like most statutory presumptions under Wisconsin law, is in principle rebuttable. *See id.* §§ 903.01; 903.03(3).

Implied-consent laws impose "consequences when a motorist withdraws consent" and thereby reneges on his commitment under the statute, made in exchange for the privilege of driving. *McNeely*, 569 U.S. at 160–61 (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, before *Birchfield*, those consequences were "significant," *McNeely*, 569 U.S. at 160–61 (plurality), and resulted in criminal liability. But the Supreme Court in *Birchfield* invalidated those criminal implied-consent penalties, while at the same time "cast[ing] [no] doubt" on "implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Birchfield*, 136 S. Ct. 2160, 2185. Wisconsin's implied-consent law falls in the second category, "attempt[ing] to overcome the possibility of refusal" merely "by the threat of . . . license revocation" and

evidentiary inferences. *Zielke*, 137 Wis. 2d at 48.[2] Specifically, if a motorist has been arrested for an intoxicated-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.

C. Facts

One afternoon in late May 2013, Alvin Swenson called the Sheboygan County police to report that Mitchell had been driving and appeared to be intoxicated. Officer Alex Jaeger responded to dispatch's request that an officer "check[ ] the welfare of a male subject" near the intersection of North Eighth Street and St. Clair Avenue. Supplemental Appendix ("SA") 20. When he arrived, Officer Jaeger spoke to Swenson, who said that he knew Mitchell and "received a telephone call from [ ] Mitchell's mother concerned about his safety." SA20. (Later, Officer Jaeger also spoke with Mitchell's mother, who confirmed the account. SA24.) Swenson observed Mitchell leaving his apartment. Mitchell was "very disoriented," and he "appeared [to be] intoxicated or under the influence, was stumbling, had thrown a bag of garbage into the backyard and had great difficulty in maintaining balance, nearly falling several times before getting into a gray minivan and driving

[2] Mitchell states that refusing to submit to a test "leads to a separate criminal offense." Opening Br. 15. As explained, that is incorrect.

away." SA21. The van belonged to Mitchell's mother, who gave Officer Jaeger the plate number. SA24.

About a half hour later, the police found Mitchell. A community-services officer with the Sheboygan County Police Department had "located a male subject matching the physical description" that Officer Jaeger had provided. SA23. Officer Jaeger observed Mitchell walking down St. Clair Avenue. His "state was consistent with what Swenson described." SA2. He was shirtless, wet, and covered in sand, as if "had gone swimming in the lake." SA25. He "was slurring his words" and "had great difficulty in maintaining balance," nearly falling over "several times," requiring the officers' help to keep upright. SA26. As they crossed a street, Mitchell "nearly fell after stepping up and over the curb." SA26.

Mitchell admitted that "he had been drinking." SA26. First, he stated that he had been drinking "in his apartment," but then he said "that he was drinking down at the beach" and had parked his vehicle "because he felt he was too drunk to drive." SA27. In the meantime, another officer located the van nearby on Michigan Avenue. SA28; SA57. That officer relayed to Officer Jaeger "that there was some minor damage [to the van] that appeared to be fresh." SA28. Officer Jaeger learned that Mitchell had "prior convictions" for "operating while intoxicated." SA27. Officer Jaeger concluded that Mitchell's condition "made administration of the standard field sobriety tests unsafe, so he declined to administer them."

SA3. Officer Jaeger administered a preliminary breath test, which showed an alcohol concentration of .24. He arrested Mitchell for operating while intoxicated. SA3.

On the way to the police station, Mitchell's condition began "declining," and he became more "lethargic." SA31. When they arrived, Mitchell had to be "helped out of the squad car." SA31. "[O]nce he was in a holding cell with his handcuffs removed, he began to close his eyes and sort of fall asleep or perhaps pass out. But he would wake up with stimulation." SA31. Officer Jaeger concluded that, in light of Mitchell's condition, a breath test would not be appropriate, and so he took Mitchell from the station to the hospital for a blood test. SA31. The drive to the hospital took approximately eight minutes. SA32. During it, Mitchell "appeared to be completely incapacitated, would not wake up with any type of stimulation," including "shak[ing] his arm, lift[ing] up his hands, shak[ing] his hands, [and] rub[bing] the top of his head." SA32. Mitchell "had to be escorted into the hospital by wheelchair," where he sat "slumped over" unable to "lift himself up" into a normal sitting position. SA32–33. Mitchell was admitted to the hospital and moved to the emergency room. SA36. Soon thereafter, Officer Jaeger read the "Informing the Accused form verbatim" to Mitchell, but Mitchell was "so incapacitated [that] he could not answer." SA33.

Officer Jaeger recalled that, as he waited for the phlebotomist to draw blood, "medical efforts were being

attempted," SA37, and Mitchell was being "monitored" by hospital staff, SA42. The unconscious Mitchell, however, "couldn't answer any hospital staff . . . and did not awake[n] while they placed catheters or any other type of medical instruments on him." SA37–38; SA43 (recalling again "specifically" that one nurse had inserted a catheter). The test was administered about one hour after arrest. SA35. It revealed a blood-alcohol concentration of .222g/100mL. SA4. Mitchell was eventually admitted to the hospital's intensive-care unit. SA52.

Officer Jaeger stated on cross-examination that he could have applied for a warrant but that he did not. He did not know how long it would have taken to secure a warrant. He explained that his office had only recently started seeking warrants in cases like this one. SA52.

D. Procedural History

The State charged Mitchell with driving a motor vehicle while under the influence of an intoxicant (OWI) and with a prohibited alcohol concentration (PAC). SA2 n.1.[3] He moved to suppress the warrantless blood test, arguing that it violated the Fourth Amendment.[4] The State responded that

[3] He had been convicted of six prior intoxicated-driving offenses. SA2 n.1.

[4] Mitchell also raised a claim under Article I, Section 11 of the Wisconsin Constitution. This Court "generally interpret[s]" that language "consistent with the United States Supreme Court's interpretation of the Fourth Amendment." *Lemberger*, 2017 WI 39, ¶ 34.

Mitchell had consented to the blood draw under Wisconsin's "implied consent" law. Wis. Stat. § 343.305. The circuit court denied Mitchell's motion. SA4. The only other question was whether probable cause supported the blood draw, and the court held that it plainly did. SA4.

The State tried Mitchell before a jury, which convicted him on both the OWI count and the PAC count. He was concurrently sentenced to three years' initial confinement and three years' extended supervision on each count. Mitchell appealed the denial of his suppression motion. SA4.

The Court of Appeals certified the appeal to this Court, noting that this case "raises a single question: whether the warrantless blood draw of an unconscious motorist pursuant to Wisconsin's implied consent law, where no exigent circumstances exist or have been argued, violates the Fourth Amendment." SA1.

This Court granted certification.

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). The unconstitutionality of a state statute must be proven "beyond

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n.13 (citation omitted). For convenience, this brief will use "Fourth Amendment" as shorthand for both provisions.

a reasonable doubt." *In re Gwenevere T.*, 2011 WI 30, ¶ 47, 333 Wis. 2d 273, 797 N.W.2d 854 (citation omitted).

SUMMARY OF ARGUMENT

I. Suspicion-based blood-alcohol tests of consenting motorists arrested for intoxicated driving, including unconscious drivers, are reasonable under the Fourth Amendment. Basic search-and-seizure doctrine provides that a defendant may imply consent to a search by conduct. In particular, "because we presume that Wisconsin's citizens know the law," *Weber*, 2016 WI 96, ¶ 78 & n.9 (Kelly, J., concurring), it may "be fairly inferred from context" that voluntary conduct undertaken against the backdrop of a legal rule is best understood as according with that rule, *Birchfield*, 136 S. Ct. at 2185. 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, and it may be withdrawn by one so capable.

Precedent confirms the statute's validity. This Court already has indicated in a number of cases that a motorist effectively consents to searches under the statute 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 dicta in *State v. Padley*, 2014 WI App 65, ¶¶ 26, 39 n.10, 354 Wis. 2d 545, 849 N.W.2d 867.

Likewise, the U.S. Supreme Court has concluded that implied consent laws are "unquestionably legitimate," *Neville*, 459 U.S. at 560, that they are effective "legal tools" for securing evidence of intoxication "without undertaking warrantless *nonconsensual* blood draws," *McNeely*, 569 U.S. at 160–61 (plurality) (emphasis added), and that none of its cases should be read to "cast doubt" on them, *Birchfield*, 136 S. Ct. at 2185.

II. While there is "a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads" under a statute, *id.*, the law challenged here is well within the Fourth Amendment's general rule of reasonableness. The statute's search conditions bear a close nexus to the privilege of driving and entail penalties that are proportional to the severity of the violation. The search authorized by the implied-consent condition is clear and specific. A vital government interest justifies the tests. The "intrusiveness" of implied-consent blood draws, especially for unconscious drivers who have been arrested for intoxicated driving and who (like Mitchell) often can expect to receive equally invasive medical treatment, do not "exceed[ ] that required to serve the legitimate security concerns." *McGann v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 8 F.3d 1174, 1182 (7th Cir. 1993). Finally, imposing a categorical warrant requirement in these cases would not further the ends of the Fourth Amendment. *See Birchfield*, 136 S. Ct. at 2181.

ARGUMENT

I. When Authorized By The Implied-Consent Statute, Suspicion-Based Searches Of Unconscious Drivers' Blood-Alcohol Content Satisfy The Consent Exception To The Fourth Amendment's Warrant Requirement

A. By Voluntarily Driving On Wisconsin's Roads, Motorists Allow A Rebuttable Presumption Of Consent To Blood-Alcohol Testing Where There Is Probable Cause Of Intoxication

The question in this case is whether the warrantless testing of Mitchell's blood under the implied-consent statute violated the Fourth Amendment. That Amendment codifies "[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*, 569 U.S. at 148 (plurality), "[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 (citation omitted). "[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 Wayne R. 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 (1) "whether consent was given in fact by words, gestures, or conduct" and (2) "whether the consent given was voluntary." *State v. Artic*, 2010 WI 83, ¶ 30, 327 Wis. 2d 392, 786 N.W.2d 430.

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 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 conveyed by "conduct," which alone "provides a sufficient basis" for a warrantless search. *Phillips*, 218 Wis. 2d at 197; *Brar*, 2017 WI 73, ¶¶ 17–18 (lead op.). Consent by conduct

can arise simply from "the person's . . . engaging in a certain activity" or from other "circumstantial evidence." 4 Wayne R. LaFave, et al., *Search & Seizure: A Treatise on the Fourth Amendment* § 8.2(l) (5th ed. 2015). Police officers "may . . . fairly infer[ ]" such consent "from context." *Birchfield*, 136 S. Ct. at 2185. "Th[is] principle of consent by conduct is neither new nor infrequently applied." *State v. Howes*, 2017 WI 18, ¶ 68, 373 Wis. 2d 468, 893 N.W.2d 812 (Gableman, J., concurring in the judgment).

The U.S. Supreme Court's recent decision in *Birchfield v. North Dakota*, *see infra* pp. 36–37, which looks favorably upon non-criminal implied-consent laws, cites two helpful examples of consent by conduct. 136 S. Ct. at 2185; *see also Brar*, 2017 WI 73, ¶ 20 (lead op.) (citing the same cases). The first is *Florida v. Jardines*, 569 U.S. 1 (2013). The detective in that case had entered "the constitutionally protected extensions of Jardines' home" without a warrant and without Jardines' express consent. *Id.* at 8. One of the questions presented was "whether [Jardines] had given his leave . . . *implicitly* . . . for them to do so." *Id.* (emphasis added). Invoking the principle of property law that front paths and door knockers are "treated as an invitation . . . to attempt an entry, justifying ingress to the home," the Court held that the defendant in that case had granted to police an "implicit license" to enter the curtilage by virtue of residing in a home with a front path. *Id.*; *see also* 1 LaFave, *Search & Seizure*, *supra*, § 2.3(c) ("[C]ourts have held that police with legitimate

business may enter the areas of the curtilage which are impliedly open to use by the public . . . ." (citation omitted)). It did not matter whether Jardines even had *known* of this common law–derived "customary invitation" or had meant to observe it. 569 U.S. at 9. So the Court saw no need to inquire whether Jardines subjectively had intended to open his curtilage to passers-by. For the Court, it was enough that he had voluntarily engaged in conduct—residing in a home with a front path and a door knocker—that the law deemed to convey consent. *Id.* at 8–9.[5]

Another line of cases in which "consent to a search . . . may be fairly inferred from context," according to *Birchfield*, 136 S. Ct. at 2185, governs "closely regulated" activities with "a history of government oversight," *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313–14 (1978). Those precedents hold that when a person "embarks upon" such an activity, "he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." *Id.* at 313. In particular, by "accept[ing] the burdens as well as the benefits" of such an activity, a person in "a regulated industry in effect *consents* to the restrictions placed upon him," *id.* (emphasis added; citation omitted), including possible warrantless searches.

[5] Drawing upon similar logic, Justice Kelly has concluded that there is yet another setting in which law enforcement reasonably may infer consent from conduct undertaken against the backdrop of an established legal rule: traffic stops that take place in a suspect's garage. *See Weber*, 2016 WI 96, ¶¶ 77–81 (Kelly, J., concurring); *compare id.* ¶ 3 (lead op.) (deciding the case under the hot-pursuit doctrine).

Thus 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); *see Marshall*, 436 U.S. at 313 (citing *Biswell*).

As members of this Court have pointed out, the consent-by-conduct framework also applies in sensitive public settings where risks to the safety of others are especially salient. For instance, "[e]ven in the absence of an express indication, implied consent to an airport security search may be imputed from posted notices." *Brar*, 2017 WI 73, ¶ 17 (lead op.) (quoting *Hawaii v. Hanson*, 34 P.3d 1, 5 (Haw. 2001)); *see also Howes*, 2017 WI 18, ¶ 68 (Gableman, J., concurring in the judgment) (citing *United States v. DeAngelo*, 584 F.2d 46, 47–48 (4th Cir. 1978)); *United States v. Doran*, 482 F.2d 929, 932 (9th Cir. 1973). Likewise, "a warrantless search of a person seeking to enter a military base may be deemed reasonable based on the [consent] implied . . . from the act of driving past the guard shack and onto the base and imputed from the posted notice indicating that entry onto the base constituted consent to a search," *Howes*, 2017 WI 18, ¶ 68 (Gableman, J., concurring in the judgment) (quoting *Morgan v. United States*, 323 F.3d 776, 778 (9th Cir. 2003), and *Hawaii v. Torres*, 262 P.3d 1006, 1022 (Haw. 2011)).

2. Implied consent is voluntary if not coerced.

To be valid under the Fourth Amendment, consent also must be voluntary. *Phillips*, 218 Wis. 2d 180, ¶ 26; *Brar*, 2017 WI 73, ¶ 24 (lead op.). Consent is voluntary if "given in the absence of duress or coercion, either express or implied." *Phillips*, 218 Wis. 2d 180, ¶ 26. "Coercive [government] activity is a necessary predicate" to deeming an act not voluntary. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *see, e.g.*, *Colorado v. Magallanes-Aragon*, 948 P.2d 528, 531 n.6 (Colo. 1997). In other words, so long as the State has not coerced a person into consenting, his or her consent is constitutionally sufficient.

In the context of consent implied by a "person's . . . engaging in a certain activity," 4 LaFave, *Search & Seizure*, *supra*, § 8.2(1), the coercion inquiry is simple. In *Jardines*, for example, it was enough that the suspect had not been forced to live in a home with a front path or a door knocker. 569 U.S. at 7–8. Likewise, in the airport context, the government does not coerce passengers into taking "hand luggage on board a commercial aircraft"; they "chose to engage in th[at] regulated activity" themselves. *Doran*, 482 F.2d at 932.

3. Motorists like Mitchell imply real, uncoerced consent to suspicion-based blood-alcohol testing by driving on Wisconsin's roads, and by not revoking that consent when capable.

a. Like the homeowner with a front path and the luggage-toting airline passenger, the Wisconsin motorist

creates by his or her conduct a presumption of real consent to a certain kind of limited, predefined search. This follows from two premises.

First, Wisconsin motorists are on notice of the implied-consent statute's provisions. In *Doran*, for example, posted signs notified passers-by of the inference that the law would draw from their conduct, whether or not they actually read and understood them. *See* 482 F.2d at 932. The implied-consent statute performs the same function as the sign—except more directly. That is "because we presume that Wisconsin's citizens know the law." *Weber*, 2016 WI 96, ¶ 78 & n.9 (Kelly, J., concurring); *State v. Neumann*, 2013 WI 58, ¶ 50 n.29, 348 Wis. 2d 455, 832 N.W.2d 560. Thus, just as the homeowner in *Jardines* was presumed to know the common-law principle that to have a front path is to invite outsiders to enter the curtilage without express consent, motorists are presumed to understand that driving in Wisconsin will signal consent to suspicion-based blood-alcohol tests per the terms of the statute, unless and until the driver "withdraw[s]" that consent when "capable" of doing so. Wis. Stat. § 343.305(3)(b).

Second, just as drivers in Wisconsin are presumed to know the law, they are also presumed to want to comply with it by holding up their end of the reasonable implied-consent bargain. As *Jardines* shows, for purposes of Fourth Amendment consent analysis, a person's voluntary conduct is presumed to reflect not only *knowledge* of the law but also (absent evidence showing otherwise) an intention to *act in*

accordance with the law. So, in *Jardines*, the Court seemed to conclude not only that the homeowner was aware of the common-law "customary invitation" rule but also that he must have intended, by his conduct, to assent to that rule, thereby conveying to the public a license to certain warrantless entries into his curtilage. 569 U.S. at 7–8.

Bolstering the reasonableness of inferring consent under the statute is the reality that operating a motor vehicle on state roads is a "closely regulated" activity with "a history of government oversight." *Marshall*, 436 U.S. at 313–14 (1978); *Birchfield*, 136 S. Ct. at 2185 (citing *Marshall* approvingly); *South Dakota v. Opperman*, 428 U.S. 364, 367–68 (1976) ("Automobiles . . . are subject to pervasive and continuing governmental regulation[ ] and control[ ]."). Operating a multi-ton vehicle at high speeds "is a privilege and not an inherent right." *Steeno*, 85 Wis. 2d at 671; *see Buck v. Kuykendall*, 267 U.S. 307, 314 (1925). As the many restrictions on driving reflect, "[m]otor vehicles are dangerous machines, and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property"—which is why driving is the classic example of a privilege to which governments may attach reasonable conditions, including ones that could not constitutionally be imposed on the public at large. *Hess v. Pawloski*, 274 U.S. 352, 356 (1927) (upholding rule that motorist give "implied consent" to appointment of state registrar as representative for service of process in cases arising from accidents). By

taking "the benefits" of that privileged activity, a driver accepts "the burdens as well" and "consents to the restrictions placed upon him." *Marshall,* 436 U.S. at 313 (citation omitted).

b. Second, like the consent of the homeowner with the front path and the airline passenger with luggage, the consent implied under the statute is voluntary. Driving, though important to many, is plainly not the product of "coercive [government] activity." *Connelly*, 479 U.S. at 167. As the Court of Appeals has noted, "[i]t is the motorist who has voluntarily asserted his or her autonomy" in getting behind the wheel. *State v. Wintlend*, 2002 WI App 314, ¶ 19, 258 Wis. 2d 875, 655 N.W.2d 745; *see also Howes*, 2017 WI 18, ¶ 84 (Gableman, J., concurring in the judgment). Similarly, no "implied threat or covert force" compels motorists to keep their end of the implied-consent bargain. *Schneckloth*, 412 U.S. at 228. Indeed, the law even recognizes that drivers may breach the bargain, either by directly "refus[ing]" a "request" to perform the test or by otherwise "withdrawing consent" when "capable." Wis. Stat. § 343.305(3)(b), (9); *Lemberger*, 2017 WI 39, ¶ 47 n.4 (Abrahamson, J., concurring).

Although the prospect of privilege revocation for reneging on the statutory bargain may encourage a motorist not to withdraw his consent, *Neville* holds (and *Birchfield* confirms) that a State does not coerce a motorist simply by putting him to the choice of either consenting or losing the privilege. *Neville*, 459 U.S. at 564 ("We hold . . . [that it] is

not an act coerced by the officer."); *Birchfield*, 136 S. Ct. at 2185–86. The Supreme Court could not be clearer on this point: imposing the "penalty [of revocation] for refusing to take a blood-alcohol test is unquestionably legitimate." *Neville*, 459 U.S. at 560. Breaching the implied-consent bargain simply puts a motorist like Mitchell where he would have been had he not accepted the deal in the first place: unable to drive. As Justice Abrahamson has explained, that is hardly coercive: "Tough choices, even choices that discourage the exercise of a Fourth Amendment right, are common in the law and are viewed as voluntary and constitutionally valid." *Milewski*, 2017 WI 79, ¶ 203 (Abrahamson, J., dissenting) (describing the implied-consent law). That is because, "[a]lthough 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." *Id.* ¶¶ 203–04.

c. Applying those principles here is straightforward. By operating a vehicle on Wisconsin roads with a presumed understanding of the reasonable conditions imposed by the implied-consent statute and a presumed desire to act in accordance with that statute, Mitchell allowed a reasonable inference of consent to a suspicion-based search of his blood-alcohol content. That consent was not the product of government coercion. The State did not force him to drive. Nor did the State require him to maintain his consent once he was arrested. Indeed, at any moment before Mitchell fell

unconscious, he was free to "withdraw" that consent, subject to "unquestionably legitimate" civil penalties. *Neville*, 459 U.S. at 560; *compare* Opening Br. 17 (incorrectly stating that "Mitchell had no opportunity to . . . withdraw his consent"). Accordingly, Mitchell's consent to the search was both actual and voluntary. The test was therefore reasonable.

Several out-of-state courts, having upheld the unconscious-driver provisions of their own implied-consent laws from constitutional challenges, would agree. Just this year, for instance, the Colorado Supreme Court held that, "[b]y driving in Colorado," a motorist found unconscious could be deemed to have "consented to the terms of the Expressed Consent Statute, including its requirement that he submit to blood-alcohol testing under the circumstances present here." *Hyde*, 393 P.3d at 964; *id.* at 970 (Eid, J., concurring in the judgment). Courts in Idaho, Virginia, and Minnesota have concluded likewise. *See, e.g.*, *Bobeck v. Idaho Transp. Dep't*, 363 P.3d 861, 867 (Idaho Ct. App. 2015); *Goodman v. Virginia*, 558 S.E.2d 555, 560 (Va. Ct. App. 2002) (same); *Minn. Dep't of Pub. Safety v. Wiehle*, 287 N.W.2d 416, 419 (Minn. 1979).

d. Mitchell errs when he contends that because consent under the statute is revocable, it "cannot function" as "[a]ctual" consent under the Fourth Amendment. Opening Br. 16–17. This assertion is unsupportable. Whether consent is revocable simply has no bearing on whether an act of consent has occurred. More to the point, it is well established

that in principle a suspect's consent is *always* revocable. If a homeowner tells a police officer to proceed with a warrantless search of her garage, but then, while the officer is walking up the driveway, announces that she has changed her mind, the officer no longer has consent to search. *See, e.g.*, *United States v. Zamora-Garcia*, 831 F.3d 979, 982 (8th Cir. 2016); *United States v. McWeeney*, 454 F.3d 1030, 1035 (9th Cir. 2006).

Mitchell's concept of "actual consent" seems to rely upon the unconvincing contrast drawn between supposedly real consent and allegedly insufficient "'consent' implied by law." *Brar*, 2017 WI 73, ¶ 59 (Kelly, J., concurring). On that view, "[i]t is a metaphysical impossibility" for a person "to freely and voluntarily give 'consent' implied by law," including under the implied-consent statute. *Id.* Whether or not that proposition is true, it misunderstands the source of consent here: consent under the statute is not consent implied by *law*; it is a *presumption* of consent implied by a person's voluntary *conduct* undertaken against the *backdrop* of law, which the person is presumed to know. The same is true of implied consent in other contexts. The homeowner's implicit license in *Jardines* and the consent of the airline passenger with luggage are hardly "legal fiction[s]." *Id.* They are reasonable inferences from conduct that "did . . . really happen." *Id.* That the conduct in those cases was susceptible of alternative inferences does not make the inference of consent unreasonable. Hence, courts have concluded that implied consent is not at all a "second-tier form of consent" and is no

less "sufficient . . . than consent given by other means." *Id.* ¶¶ 20, 23 (lead op.).

Relatedly, Mitchell seems to object that the State's approach to the voluntariness analysis for implied consent short-circuits the usual "exhaustive inquiry into virtually every conceivable circumstance that could possibly have some bearing on whether the defendant's consent was the product of the State's influence." *Id.* (Kelly, J., concurring); Opening Br. 21. To begin, this critique fundamentally misunderstands the voluntariness analysis. Although the test looks to the totality of circumstances, not *all* circumstances in the totality are always relevant. That is true even in the context of express police-to-suspect consent requests. Where, for example, a person opens the door to his home, holds the door open, and "wave[s]" the police "into his home," courts routinely conclude that, unless the officer made some show of force, the consent was uncoerced. *E.g.*, *Kaminsky v. Schriro*, 243 F. Supp. 3d 221, 228 (D. Conn. 2017). Because the person's conduct so clearly conveys voluntary permission to the objective observer, courts in those cases perceive no need to consider the person's "age," "intelligence," "education," "physical and emotional condition," or "whether he had prior experience with law enforcement," *Brar*, 2017 WI 73, ¶ 61 (Kelly, J., concurring); *e.g.*, *Minnesota v. Mallett*, No. A09-627, 2010 WL 2362284, at *3 (Minn. Ct. App. June 15, 2010) (unpublished).

In any event, the reason an exhaustive, circumstance-by-circumstance analysis of the totality of particular facts in these cases is unnecessary is that "the circumstances in drunk driving cases are often typical," *McNeely*, 569 U.S. at 166 (Roberts, C.J., concurring in part and dissenting in part). Here, as in most cases, there is no dispute that the defendant voluntarily drove a vehicle on Wisconsin's roads. In so doing, he implied his consent to a chemical test under the statute. And because Mitchell was unconscious, he was "presumed" not to have withdrawn that consent—subject of course to a possible showing that when he had been conscious minutes before, he had in fact manifested an intent to revoke his implied consent. To obtain that implied consent in the first place, here and in all other cases, the State does not "use[ ] deception, trickery, or misrepresentation" to persuade drivers to consent or otherwise "threaten[ ] or physically intimidate[ ]" them. *Artic*, 2010 WI 83, ¶ 33. 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 by conduct. *Id.* And the statute itself, which the drivers are presumed to know, informs them that they can "refuse consent." *Id.* Although the remaining factor—the suspect's "characteristics"—would seem to call for a defendant-specific inquiry in unconscious-suspect cases, this Court has clarified (consistent with the out-of-state cases cited above) that this factor is relevant only if there has first been "improper

influence, duress, intimidation, or trickery," *id.* ¶ 59 (quoting *Phillips*, 218 Wis. 2d at 202–03), and under the implied-consent law there is none, *see supra* pp. 24–26.

Mitchell's suggestion that the implied-consent law unfairly "imposes a greater burden" on unconscious arrestees also misses the mark. Opening Br. 20. In an important sense, the statute applies equally to all drivers: consent can always be withdrawn (subject to penalty) by those "capable of withdrawing consent." Wis. Stat. § 343.305(3)(b). Although a person found "unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent," Wis. Stat. § 343.305(3)(b), nothing prevents that driver from withdrawing consent when able. Here, for example, Mitchell—who, again, is presumed to have understood the implied-consent statute even before the officers reminded him of it—could have withdrawn his consent at any moment during the "[a]pproximately one hour [that] elapsed from the time of arrest" to his arriving at the hospital. Opening Br. 7. And while other drivers will lack that opportunity because, by choosing to become intoxicated, they have rendered themselves unconscious before the police even arrive, it would be entirely unreasonable to presume that those drivers—in contrast to all other drivers—did *not* impliedly consent by voluntarily getting behind the wheel. The far more sensible assumption is that when the formerly conscious intoxicated motorist is found unconscious, he or she knew the law and meant to comply with it, absent evidence to

the contrary. If the rule were otherwise, unconscious intoxicated drivers would receive a windfall: by the happy accident that they have knocked themselves out by their drug use, the best evidence of their intoxicated state—a blood-alcohol test—might well be suppressed.

Finally, Mitchell suggests 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. Opening Br. 13–15. Mitchell is mistaken. Under both the unconscious- and conscious-driver provisions, a motorist is presumed to consent by his or her voluntary conduct of driving. But as the statute's conscious-driver provisions reflect, the best way to find out whether a motorist consents *presently*, at the moment of the search, is simply to ask. Hence a conscious suspect's present consent is not conclusively presumed from his or her past conduct but rather is discerned principally from the suspect's contemporaneous response to the "Informing the Accused" form. That it makes sense to double-check with a conscious driver when that is possible ("Do you mean to continue your consent?") does not suggest, however, that the consent implied by the driver's earlier conduct is somehow insufficient. Nor does it support an argument that drivers have a constitutional right to be given an affirmative opportunity, just before a search is to be performed, to revoke consent. Fourth Amendment law contains no such requirement. *Hyde*, 393 P.3d at 972 (Eid, J., concurring in the

judgment) ("[N]othing more [is] necessary to comport with the Fourth Amendment.").

B. Precedents Of This Court And The U.S. Supreme Court Confirm The Constitutionality Of Wisconsin's Implied-Consent Law

Constitutional challenges to implied-consent statutes are nothing new. Both this Court and the U.S. Supreme Court have rejected several. As those decisions and others show, both courts have concluded that, by voluntarily operating a motor vehicle on a State's roads, motorists effectively imply consent to warrantless chemical testing on suspicion of intoxicated driving.

1. This Court consistently has made clear that motorists on Wisconsin's roads impliedly consent to blood-alcohol testing if detained for intoxicated driving. In *State v. Neitzel*, this 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 or her 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. 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." *Reitter*, 227 Wis. 2d 213, ¶ 45 (emphasis added); *Brar*, 2017 WI 73, ¶ 21 n.9 (lead op.) (relying on *Neitzel* and *Reitter*).

This Court's decision in *State v. Piddington*, 2001 WI 24, 241 Wis. 2d 754, 623 N.W.2d 528, follows the same reasoning. *Brar*, 2017 WI 73, ¶ 21 n.9 (lead op.) (relying on *Piddington*). *Piddington* addressed what methods the Due Process Clause and an earlier version of the statute prescribe for "convey[ing] the 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.* ¶¶ 1–2, 32. But this 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 violation "warrant[ing] suppression" of the test results. *Id.* ¶ 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.[6]

[6] Other cases in which this Court has suggested that Wisconsin drivers effectively consent by conduct to searches under the statute

2. The U.S. Supreme Court also has confirmed the effectiveness of civil implied-consent laws in at least three cases. It first endorsed implied-consent laws in *South Dakota v. Neville*, 459 U.S. 553, 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 drivers' failure to keep their end of the bargain assumes that drivers can and do 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).

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*

include *Scales v. State*, 64 Wis. 2d 485, 494, 219 N.W.2d 286 (1974); *State v. Disch*, 129 Wis. 2d 225, 236, 385 N.W.2d 140 (1986); *State v. Crandall*, 133 Wis. 2d 251, 257, 394 N.W.2d 905 (1986); *Zielke*, 137 Wis. 2d at 48–49; and *State v. Krajewski*, 2002 WI 97, ¶¶ 19–23, 255 Wis. 2d 98, 648 N.W.2d 385.

blood draws." 569 U.S. at 160–61 (plurality) (emphases added). Of course, calling implied-consent laws "legal tools" suggests that they are lawful. And describing searches premised on consent derived from those statutes as *not* "nonconsensual" indicates, of course, that the consent derived therefrom is anything but fictional. No Justice disagreed with the plurality on this point.

Most recently, the Supreme Court's decision in *Birchfield* also fortified the validity of civil implied-consent laws. Although Wisconsin's implied-consent law imposes only civil penalties on revocations of consent, other States had gone further, providing that "motorists lawfully arrested for drunk driving may be convicted of a crime . . . for refusing to take" a warrantless chemical test. 136 S. Ct. at 2172. The Court considered the constitutionality of those criminal laws, giving 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.* (emphasis added). First, because the search-incident-to-arrest doctrine categorically justifies breath tests, States can criminalize the refusal to undergo one. *Id.* at 2186. 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 2185–86.

Critically, in the paragraph distinguishing that question from the one in this case, the Court telegraphed unmistakable approval for laws like Wisconsin's. *See Hyde*, 393 P.3d at 970 (Eid, J., concurring in the judgment). Citing *Jardines* and *Marshall*, the Court explained that "consent to a search need not be express but may be fairly inferred from context." *Birchfield*, 136 S. Ct. at 2185. Citing *McNeely* and *Neville*, the Court added, "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." *Id.* The Court then cautioned that "Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them." *Id.*

Yet "[i]t is another matter . . . to impose *criminal penalties* on the refusal to submit to such a test." *Id.* (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 "[r]espondents and their *amici* all but concede[d]." *Id.* at 2185–86. Applying a general reasonableness standard, the Court concluded that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* at 2186.

3. Although Mitchell does not discuss nearly any of these numerous authorities, he does assert that certain case law—presumably *McNeely*—forbids "per se" or "categorical

rules regarding consent." Opening Br. 18. But *McNeely* had nothing to do with consent. On this point, *Birchfield* has removed any possible doubt: "the [*McNeely*] Court pointedly did not address any potential justification for warrantless testing of drunk-driving suspects" other than exigency. 136 S. Ct. at 2174. This Court agrees, having stated unequivocally that *McNeely* can have no negative effect on the "the [implied-consent] law." *Lemberger*, 2017 WI 39, ¶ 33 n.11.

Mitchell does discuss one case at length, and he rests his theory almost entirely upon its reasoning: *State v. Padley,* 2014 WI App 65. But any discussion in *Padley* of the statute's unconscious-driver provisions is pure dicta. To the extent that this Court truly owes deference to lower-court analysis of the constitutionality of a state statute, it is only a *holding* of the Court of Appeals that could possibly carry any 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 in that case made no holding whatsoever on the validity of the implied-consent law's unconscious-driver provisions. 2014 WI App 65, ¶ 39 & 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, Mitchell clings to three dicta-ridden paragraphs from *Padley* that describe how implied consent works in conscious-driver cases. Opening Br. 14–15 (citing *Padley*, 2014 WI App 65, ¶¶ 37–39). 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." As the State has explained, *supra* pp. 31–32, when the conscious driver is arrested, the best indication of whether he or she continues to consent *presently* to a search is not whether the driver consented at some prior time but whether the driver continues that consents *now*. So if the conscious driver agrees to a search, his consent is no longer "implied"; in a sense, it is now, according to *Padley*, "actual," meaning *contemporaneous* and *express*. 2014 WI App 65, ¶ 38. But that does not mean that the driver's 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.'" *Id.* (emphasis added). Yet, that is precisely how *Padley* put it.

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. To the extent this Court instead reads *Padley*'s footnote to adopt a holding that the implied-consent law's unconscious-driver provisions are unconstitutional, this Court should withdraw that language from the Court of Appeals' opinion—just as the lead opinion in *Brar* did to other erroneous parts of *Padley*. *See Brar*, 2017 WI 73, ¶ 27 (lead op.); *see also Lemberger*, 2017 WI 39, ¶ 33.

II. Although The Fourth Amendment Imposes Certain Limits On Any Statutory Implied-Consent Regime, Suspicion-Based Blood Draws Under Wisconsin's Law Do Not Exceed Those Limits

"[S]ince reasonableness is always the touchstone of Fourth Amendment analysis," it is obvious that the State is not free to impose simply *any* kind of implied-consent condition, no matter how expansive, on voluntary activities such as driving. *Birchfield*, 136 S. Ct. at 2186. It could not, for example, deem motorists stopped for a traffic infraction to have consented to surrender their smartphones for warrantless inspection. Nor could the State make motorists, if stopped for intoxicated driving, agree implicitly and preemptively to waive their right to counsel in any future

intoxicated-driving proceeding brought against them. Nor, as *Birchfield* squarely holds, can "motorists . . . be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.* 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." *Id.* at 2185; *see also Brar*, 2017 WI 73, ¶ 83 (Kelly, J., concurring). The application of the implied-consent law to unconscious intoxicated drivers, however, falls well within those limits for at least five reasons.

First, the implied-consent law's search conditions "are 'reasonable' in that they have a 'nexus' to the privilege of driving and entail penalties that are proportional to severity of the violation." *Birchfield*, 136 S. Ct. at 2186 (explaining that this formulation accords with the Fourth Amendment's reasonableness standard). The statute's consent provisions, plainly tailored to discourage intoxicated driving, bear an obvious nexus to the State's interest in regulating the safety of the driving privilege, with all of its manifest dangers to public safety. The statute also entails penalties that are proportional to the severity of the offense. Hence the Supreme Court has "referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply." *Birchfield*, 136 S. Ct. at 2185.

Second, the search authorized by the implied-consent condition is "clear[ ]" and "specific." *Howes*, 2017 WI 18, ¶ 82

(Gableman, J., concurring in the judgment). As Justice Gableman has explained, courts have held that "*generic* 'subject to search' notices d[o] not provide fair notice of the extensive searches actually performed, and it [is] therefore unreasonable to deem individuals to have consented to those searches." *Id.* (emphasis added) (citing *McGann*, 8 F.3d at 1176, 1182–83); *Florida v. Iaccarino*, 767 So. 2d 470, 477 (Fla. Dist. Ct. App. 2000)). Here, by contrast, "the statute explicitly notifies all drivers that they will be deemed to have consented" to tests in "particular circumstances specifically tailored to combating the dangers of intoxicated driving," and so is "[u]nlike the parking lot in *McGann*, where unwarned and unprecedented searches were . . . based on a vague notice." *Howes*, 2017 WI 18, ¶ 82 (Gableman, J., concurring in the judgment).

Third, a "compelling security concern" and a "vital" government interest justify searches under the statute. *McGann*, 8 F.3d at 1181–82. "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.* (citation omitted). So has this Court: "Drunk driving is indiscriminate in the personal tragedy of death, injury, and suffering it levies on its victims." *State v. Nordness*, 128 Wis. 2d 15, 33, 381 N.W.2d 300 (1986). 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. "No one can seriously dispute . . . the States' interest in eradicating" it. *Sitz*, 496 U.S. at 451. Few state interests are more "paramount." *Birchfield*, 136 S. Ct. at 2178 (citation omitted). This Court gives these concerns "considerable weight." *Nordness*, 128 Wis. 2d at 34.

The implied-consent law "serve[s] the paramount governmental interest of enforcing drunk-driving laws and, thus, protecting public safety," *Milewski*, 2017 WI 79, ¶¶ 203–07 (Abrahamson, J., dissenting), by permitting the State to secure evidence of intoxication "as soon as possible," *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 623 (1989). 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. Securing a warrant is not always an effective alternative, since that "may take some time and may often be impracticable." *State v. Faust*, 2004 WI 99, ¶ 29, 274 Wis. 2d 183, 682 N.W.2d 371; *see also Krajewski*, 2002 WI 97, ¶ 42 n.19. Relying instead on the exigent-circumstances doctrine can be risky, since it can be difficult for officers to assess in the moment whether there is a true exigency under the *McNeely* standard. *Compare McNeely*, 569 U.S. at 152–53 (requiring "careful case-by-case assessment of exigency"

based on the totality of the circumstances), *with id.* at 166 (Roberts, C.J., concurring in part and dissenting in part) ("A police officer reading this Court's opinion would have no idea—no idea—what the Fourth Amendment requires of him."). Consensual searches are by far the State's most promising means of collecting, as expeditiously as the circumstances permit, undiminished evidence of intoxication.

Fourth, "the intrusiveness" of implied-consent blood draws, especially for drivers who have been arrested for intoxicated driving and who can expect to receive medical attention, do not "exceed[ ] that required to serve the legitimate security concerns." *McGann*, 8 F.3d at 1182. On the state-interest side of that equation, it is clear that blood draws are the narrowest possible means of collecting the best evidence of an unconscious driver's intoxication. *Compare id.* at 1182 (unreasonable to conclude person "impliedly consent[s] to a strip search upon seeking access to a prison," since such an "intrusion" is "excessive"). As for intrusiveness, there are a number of reasons to conclude that, for an unconscious driver arrested for intoxicated driving, a blood draw, while certainly an "invasion of bodily integrity," *McNeely*, 541 U.S. at 148 (plurality), is a relatively "minimal intrusion," *Syring v. Tucker*, 174 Wis. 2d 787, 811, 498 N.W.2d 370 (1993).

The first few reasons relate to the context of the arrest. To begin, because of the implied-consent statute, motorists are "on notice . . . that some reasonable police intrusion on

[their] privacy is to be expected." *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013). That reduces any expectation of privacy. *Id.* Second, in cases like this one, the police administer the test only after the suspect has been arrested on suspicion of a intoxicated-driving offense. *See McNeely*, 569 U.S. at 160–61 (plurality). That is important because, after detention, a suspect's "expectations of privacy" and "freedom from police scrutiny" are "necessarily . . . of a diminished scope." *King*, 133 S. Ct. at 1978 (citation omitted). And those expectations of privacy are further diminished by the established principle that motorists have a "reduced privacy interest" on the roads. *State v. Parisi*, 2016 WI 10, ¶ 55, 367 Wis. 2d 1, 875 N.W.2d 619. In any event, because accurate chemical testing will sometimes disclose a suspect's *sobriety*, it sometimes serves to promote privacy interests by "lead[ing] to [the] 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.

Likewise, the intrusiveness of the blood draw itself in these cases is "slight." *Krajewski*, 2002 WI 97, ¶ 60. That is especially so for unconscious arrestees, who do not experience any immediate discomfort from the procedure and who, at any rate, often can be expected to undergo blood draws and other invasive treatments as part of their emergency medical treatment. Here, for example, around the same time as the search, medical staff monitored the unconscious Mitchell,

inserted a catheter, and later transferred him to the ICU. Further, a medically administered blood draw "does not threaten the individual's safety or health." *Id.* ¶ 60. It 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.

Fifth, although the warrant requirement serves important ends in other contexts, *Birchfield* makes clear that requiring magistrate approval for all blood-alcohol tests of intoxicated drivers makes little sense. The warrant requirement has two functions: (1) it provides "an independent determination" of probable cause, and (2) it "limits the intrusion on privacy by specifying the scope of the search." 136 S. Ct. at 2181. 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 every case would impose a substantial burden but no commensurate benefit." *Id.* at 2181–82.

CONCLUSION

The decision of the circuit court should be affirmed.

Dated this 21st day of November, 2017.

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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 10,945 words.

Dated this 21st day of November, 2017.

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