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STATE OF WISCONSIN

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DISTRICT IV

Appellate Case No. 2021AP36-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

-vs-

CHARLES L. NEEVEL,

Defendant-Appellant.

APPEAL FROM A FINAL ORDER ENTERED IN THE CIRCUIT COURT FOR DODGE COUNTY, BRANCH I, THE HONORABLE BRIAN A. PFITZINGER PRESIDING, TRIAL COURT CASE NO. 18-CT-21

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Whether the circuit court appropriately denied Neevel's Motion to Suppress Blood Test Result Based Upon *Birchfield v. North Dakota*, 579 U.S. ____ (2016).

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument because the arguments should be fully developed in the parties' briefs. Publication of this Court's opinion is warranted, since this case raises an issue of first impression.

INTRODUCTION

Neevel asserts that the United States Supreme Court's recent decisions in *Birchfield v. North Dakota*, 579 U.S. ____; 136 S. Ct. 2160; 195 L.Ed.2d 560 (2016) and *Missouri v. McNeely*, 569 U.S. 141; 133 S. Ct. 1552; 185 L.Ed.2d 696 (2013) have changed the law with respect to the circumstances in which a law enforcement officer is permitted to pursue a blood withdrawal in an impaired driving case. (Def.'s Appeal Br.) Neevel contends that a suspected impaired or intoxicated driver must now first be offered the opportunity to submit to a breath or urine sample prior to undertaking any blood draw. As a result of this purported change in the legal landscape, Neevel asserts that the blood draw in this case, while voluntarily consented to, violates the Fourth Amendment and the results must now be suppressed. Neevel's interpretation of these cases however, completely misses the mark, overlooking the clear holdings of *Birchfield* and *McNeely* and failing to recognize the entirely different legal and factual contexts under which these cases arise.

In reality, blood samples obtained pursuant to a state's implied consent law are constitutionally permissible under the Fourth Amendment in the absence of criminal penalties

for refusal and especially where a defendant has not withdrawn his consent.

Moreover, Neevel's assertion that impaired or intoxicated drivers must now, or should first be offered an opportunity to elect a different form of testing prior to a demand for a blood draw, asks this Court to improperly legislate from the bench and rewrite this state's implied consent law. Such a function would exceed the powers of the Court and violate the doctrine of separation of powers.

Finally, even were this Court to find merit in Neevel's proposal to re-write Wisconsin's implied consent law, the blood draw undertaken in this case occurred based upon objectively reasonable reliance on binding appellant precedent that specifically authorized the search by means of the voluntary blood draw. Therefore, pursuant to *Davis v. United States*, 564 U.S. 229, 131 S. Ct. 2419 (2011) suppression of the blood results in this case would not be proper pursuant to the good faith exception to the exclusionary rule.

STANDARD OF REVIEW

The constitutionality of a statute is a question of law that an appellate court reviews *de novo*. *Winnebago Cnty. v. C. S.*, 2020 WI 33, ¶13, 391 Wis. 2d 35, 940 N.W.2d 875.

ARGUMENT

The body of common law authority which interprets the Fourth Amendment's reasonableness requirement in the context of the seizure of a person's blood during the course of an operating while impaired investigation is *constitutionally reasonable* under the Fourth Amendment.

I. Warrantless Blood Samples Are Constitutionally Permissible Based Upon A Driver's Legally Implied Consent In The Absence Of Criminal Penalties For Refusal.

Using *Schmerber v. California*, 384 U.S. 757 (1966) and

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016) as starting points, Neevel urges this Court to adopt a position that law enforcement must first offer drunk driving suspects the opportunity to submit to a less intrusive test prior to requesting or seeking a blood draw. (Def.'s Appeal Br. 9-10) This position fails to recognize the complete factual and legal context of the U.S. Supreme Court's decision in *Birchfield*, as well as its actual holdings. In addition, Neevel's position bypasses the full breadth of Fourth Amendment jurisprudence, offering a self-serving analysis of the gravity of impaired driving violations.

A. Consent is a well-established exception to the warrant requirement.

The State agrees with the purpose of the Fourth Amendment to the United States Constitution: to prevent arbitrary and oppressive interference or intrusion by the government with the privacy, dignity and security of individuals. *E.g.*, *Schmerber v. California*, 384 U.S. 757, 767-768, 86 S. Ct. 1826, 16 L.Ed.2d 908 (1966). The State also agrees that a search and seizure by the government must be reasonable. *Id.*

However, as the Supreme Court observed in *Schmerber*:

> ...the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.

Id. at 768. Thus, the Fourth Amendment does not prohibit all government searches and seizures; "it merely proscribes those which are unreasonable." *State v. Brar*, 2017 WI 73, ¶15, 376 Wis. 2d 685, 898 N.W.2d 499 (*citing Florida v. Jimeno*, 500 U.S. 248, 251, 111 S. Ct. 1801, 114 L.Ed.2d 297 (1991)).

Neevel asserts that the United States Supreme Court has "expressly frowned upon such notions as permitting

public policy to carve out exceptions to the Fourth Amendment." (Def.'s Appeal Br. 11) Neevel clearly overlooks that the U.S. Supreme Court has enumerated *more than twenty reasonable exceptions* to the presumptive warrant requirement of the Fourth Amendment. *See*, *California v. Acevedo*, 500 U.S. 565, 581 (Scalia, J., concurring) (1991).

Consent is one such well-established exception. *Birchfield*, 136 S. Ct. 2185; *Brar*, 2017 WI 73, 376 Wis. 2d 685, 898 N.W.2d 499. Neevel, however, disregards the constitutionality and reasonableness of searches based upon consent. As the U. S. Supreme Court has clearly articulated, "it is no doubt reasonable for the police to conduct a search once they have been permitted to do so." *Brar,* ¶16 (*citing Jimeno*, 500 U.S. at 250-251). Moreover, consent to a search can be demonstrated by either conduct or implication. *See Birchfield*, 136 S. Ct. at 2185. The Wisconsin Supreme Court has unequivocally stated in *State v. Brar*:

> ...lest there be any doubt, consent by conduct or by implication is constitutionally sufficient under the Fourth Amendment. We reject the notion that implied consent is a lesser form of consent. Implied consent is not a second-tier form of consent; it is well-established that consent under the Fourth Amendment can be implied through an individual's conduct.

Brar, ¶23 (footnote omitted).

As a result, consent can be given by an individual to lawfully and constitutionally permit a warrantless blood draw. With respect to such a warrantless blood draw, consent can be demonstrated or provided through a state's implied consent law. *Brar*, ¶21 ("An individual's consent given by virtue of driving on Wisconsin's roads, often referred to as implied consent, is one incarnation of consent by conduct."); *State v. Neitzel*, 95 Wis. 2d 191, 203, 289 N.W.2d 828 (1980) ("The entire tenor of the implied consent law is ... that consent

has already been given and cannot be withdrawn without the imposition of the legislatively imposed sanction of mandatory suspension.) As the U.S. Supreme Court approvingly observed in *McNeely*:

> ...States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence *without undertaking warrantless nonconsensual blood draws*. 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.

McNeely, 569 U.S. at 158. (Emphasis added; internal citations omitted).

More significantly, the U.S. Supreme Court in *Birchfield,* the very decision Neevel points to as paving the way for the unprecedented position presented in his brief, specifically went out of its way to make clear that it was not disturbing the status quo with respect to implied consent laws. In *Birchfield*, the U.S. Supreme Court proclaimed:

> Having concluded that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample, we must address respondents' alternative argument that such tests are justified based on the driver's legally implied consent to submit to them. It 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...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., McNeely, supra*, at ___, 133 S. Ct., at 1565-1566 (plurality opinion)...Petitioners do not question the constitutionality of those laws, and ***nothing we say here should be read to cast doubt on them.***

Birchfield, 136 S. Ct. at 2185 (Emphasis added).

Further, while it recognized a blood test as having a more intrusive nature than a breath test, the court went on to clearly validate implied consent laws imposing civil penalties for the withdrawal of that consent and affirming a state's ability to seek those blood tests that occur with respect to that consent emphasizing:

> [i]t is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There 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...applying this standard, we conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.

Id., 136 S. Ct. at 2185-2186. Thus, the U.S. Supreme Court did not invalidate blood tests under implied consent laws in their entirety. It is the consent given in those situations where a state seeks to impose *criminal penalties* for a refusal that the Court deems unreasonable; it is here where the limit to consent lies, not with the reasonableness of consent given in the context of civil penalties such as those set forth in the Wisconsin implied consent law.

Accordingly, since nothing in *Birchfield* discounts implied consent laws, there is nothing improper concerning Neevel's blood draw in this case. Wisconsin's implied consent law does not impose criminal penalties for a refusal and Neevel voluntarily provided his consent. Since *Birchfield* casts no constitutional doubt on Wisconsin's implied consent law, there is no basis to assert a new, unprecedented requirement that Neevel should have first been offered an opportunity to take a less intrusive test prior to the blood draw. Under the Fourth Amendment, a search is either reasonable or it is not. *Birchfield* holds that consent to blood

draws under implied consent laws similar to Wisconsin's are reasonable. Thus, the law is appropriate and constitutional as it stands. Nothing further is required.

Furthermore, given the U.S. Supreme Court's validation and affirmation of consensual and voluntary blood draws pursuant to implied consent laws, Neevel's lengthy discussions related to whether blood or breath tests are more "efficient" or "easier on law enforcement" are of no consequence. The U.S. Supreme Court has given its approval of blood tests conducted with respect to implied consent laws which do not impose criminal penalties for refusals. Pursuant to Wis. Stat. §343.305(2), law enforcement in the State of Wisconsin may properly "designate which of the tests shall be administered first." The choice then of which test to administer or offer first is lawfully and appropriately within the decision of law enforcement.

Indeed, consider further the effect such a position as Neevel's would have on the State's ability to protect a community in other impaired driving cases if adopted by a court. There is no rationale for law enforcement to offer a suspected *drugged driver* a breath test. Such a test would clearly be ineffectual in determining such impairments. And, furthermore, if a drugged individual consented to a breath test, under the position offered by Neevel, law enforcement would then be precluded from obtaining a warrant to draw blood, in essence allowing a drugged driver to escape the consequences of impaired driving enforcement.

B. Neevel consented to the blood draw.

Neevel's own Statement of Facts offers that he was read the Informing the Accused form and gave consent to the evidentiary chemical test of his blood (Def.'s Appeal Br. 8) (R. 1). In fact, both Neevel and the State stipulated to this fact and the admittance of the Informing the Accused form during the motion hearing before the circuit court. (R. 51) Regardless,

Neevel argues that the same concerns surrounding blood testing exist whether the blood sample was obtained via search incident to arrest or via an implied consent statue.

However, there was no "nonconsensual withdrawal of the [D]efendant's blood," in this matter, nor was there any forced blood draw. To the contrary, Neevel provided his voluntary consent to the blood draw requested of him by Dodge County Sheriff's Office Deputy Duane Olbinski. Moreover, given Neevel's consent to the blood draw requested of him, it was not necessary to obtain a warrant for the withdrawal of his blood. Accordingly, it would appear then that Neevel would not have standing to raise such issues related to a forcibly withdrawn/nonconsensual blood sample. *See, e.g., State v. Barbeau*, 2016 WI App 516, 370 Wis. 2d 736, 883 N.W.2d 520; *State v. Fisher*, 211 Wis. 2d 665; 565 N.W.2d 565 (Ct. App. 1997).

A review of Wisconsin Supreme Court *State v. Brar*, a post-*Birchfield* decision, is highly instructive in this matter. Upon review, the Wisconsin Supreme Court upheld the conviction of Navdeep Brar for OWI, 3rd offense. Brar had moved for suppression of his blood results on the basis that he did not consent to the blood draw upon his arrest and therefore, a warrant was required. During the course of his arrest, Brar was read the Informing the Accused form and while the precise words of his response were disputed, the circuit court found, and the Supreme Court agreed, that the defendant responded with a statement similar to "of course" and that "he didn't want to have his license revocated." *Id.* ¶31. Sometime after providing his affirmative response, Brar asked the officer what kind of test would be conducted and upon hearing the test was a blood test, asked the officer if he needed a warrant to conduct the blood draw. *Id.* ¶5-6. The officer shook his head to indicate he did not. *Id.* ¶6. After his conviction, Brar challenged his blood draw as involuntary and without consent.

Upon its review of the facts, the Wisconsin Supreme Court determined that Brar not only consented to the blood draw, but that his consent was given voluntarily. Specifically the Court outlined that 1.) Brar first consented to the test under Wisconsin's implied consent law through his conduct by virtue of driving on the roads of Wisconsin; 2.) his consent was also thereby considered to be voluntary as a result of his use of the Wisconsin roads; 3.) his subsequent statement to the law enforcement officer in conjunction with the reading of the Informing the Accused form *re-affirmed* this previously given consent; and 4.) Brar was informed of his opportunity to withdraw consent to a blood draw when read the Informing the Accused form but did not. *Id.* ¶34-39.

Under *Brar* then, it is clear that it is lawful to conduct a blood draw of a suspected impaired driver under Wisconsin implied consent law where a defendant consents and voluntarily submits and no warrant is required. And certainly where no warrant is required, no other requirement is necessary under the Fourth Amendment to the U.S. Constitution, Article, I, Section 11, Wisconsin Constitution or other state law such as offering a defendant an opportunity to submit first to a less intrusive test.

Applying *Brar* to the instant case, there has been no issue put forth by Neevel that he had not operated his motor vehicle on the highways of this state. Neevel was stopped by Lieutenant Chad Enright while in his automobile after driving on State Highway 26 with a trailer swaying across the white and yellow lane designation lines (R. 1 2-3) As demonstrated by *Brar*, as a threshold matter such operation of his vehicle provides Neevel's consent to an evidentiary test of his blood as provided under Wis. Stat. s. 343.305(2) of the implied consent law. *See, Id.* ¶29. As the court pointed out, [t]he use of the word 'implied' in the idiom 'implied consent' is merely descriptive of the way in which an individual gives consent. It is no less sufficient consent than consent given by

other means." *Id.* ¶20.

Secondly, Neevel has not presented any evidence that indicates he expressed an unwillingness to submit to the test, voiced any objection to Deputy Olbinski regarding the request to submit to an evidentiary test of his blood, or that blood was somehow forcibly removed from his body. Neevel makes no statements in his brief that would indicate he was somehow coerced or intimidated by Deputy Olbinski to submit to a blood test in some manner which exceeds the lawful consequences permitted by the implied consent law in the case of a refusal.

Thirdly, this is not a refusal case. No warrant was issued in this case. Neevel voluntarily submitted to the blood test requested of him by Deputy Olbinski after being read the Informing the Accused form (R. 1, R. 51). Upon being read the Informing the Accused form, similar to the defendant in *Brar*, Neevel did not withdraw his consent to the blood draw by answering "no" to the question asked: Will you submit to an evidentiary chemical test of your blood?" Rather, he re-affirmed his implied consent by answering "yes." (*Id.*)

II. *Birchfield v. North Dakota* Holdings Apply To Implied Consent Laws Imposing Criminal Sanctions Upon A Refusal To Submit To A Breath Or Blood Test.

Neevel claims that the United States Supreme Court's decision in *Birchfield* imposes a new requirement on law enforcement such that in the case of an impaired driving arrest an officer first has to offer a defendant the opportunity to submit to a breath test, and then, only if the defendant refuses, may the officer proceed to a blood test. Even further, Neevel declares that a law enforcement officer may only proceed to obtain a warrant to draw blood upon a defendant's refusal to take a breath test. Proceeding to its logical conclusion, law enforcement would apparently be denied the opportunity to obtain a blood draw in any case where a

defendant agreed to the breath or urine test. Such are not the holdings of *Birchfield* or *McNeely*.

Birchfield came before the U.S. Supreme Court as three consolidated drunk driving cases: two from North Dakota and one from Minnesota. Significantly, both North Dakota and Minnesota law make it a criminal offense to refuse to submit to blood alcohol testing (BAC). In the first case, defendant Birchfield was arrested after driving his vehicle off of a highway and into a ditch. After performing poorly on field sobriety tests and providing a preliminary breath test (PBT) sample of .254%, he was advised by law enforcement of his obligation to submit to a blood test under North Dakota law and that failure to submit to such a test would subject him to criminal penalties. Birchfield refused that test and ultimately was charged with and found guilty of a misdemeanor violation of the refusal statute. His sentence included among other things, 30 days in jail and 1 year of unsupervised probation. Upon appeal the North Dakota Supreme Court affirmed his conviction.

In the second case, defendant Bernard was arrested for driving while impaired after police were called to a boat launch where three apparently intoxicated men were attempting to pull a boat out of the water. At the police station, Bernard was read Minnesota's implied consent advisory, informing him it was a crime under state law to not submit to the required BAC test, which in this case was a breath test. Bernard refused and was charged with test refusal in the first degree which in his particular situation as a result of four prior impaired driving convictions, carries a mandatory minimum three year prison sentence. The Minnesota District Court dismissed the charges finding that the warrantless breath test required of the defendant violated the Fourth Amendment. The court of appeals reversed and the Minnesota State Supreme Court affirmed on the basis that police did not need a warrant to test his breath based

upon an exception to the Fourth Amendment authorizing warrantless searches incident to arrest.

In the final case, defendant Beylund was observed by a law enforcement officer attempting to turn into a driveway, nearly hitting a stop sign, and ultimately stopping partly on the public highway. He also was eventually arrested for driving while impaired, read North Dakota's implied consent advisory and informed that a test refusal would amount to a criminal offense. Unlike the other two defendants, Beylund did consent to the blood test. Based upon EAC test results of .250% his license was suspended for two years after an administrative hearing. Beylund appealed that decision arguing his consent was coerced by the warning that refusing to consent was a crime. The District Court rejected his argument and the North Dakota Supreme Court affirmed.

The U.S. Supreme Court's analysis of the consolidated cases recognized a breath test is a search governed by the Fourth Amendment. *Id.*, 136 S. Ct. at 2173. Its primary analysis focused upon whether these searches would nevertheless be exempt from the warrant requirement of the Fourth Amendment as falling within the exception for searches conducted incident to a lawful arrest. *Id.*, 136 S. Ct. at 2174. Thus, the ultimate issue before the U.S. Supreme Court in *Birchfield* was whether, in the absence of a search warrant, a state may make it a crime for a person to refuse to take a chemical test of either breath or blood. *Id.*, 136 S. Ct. at 2172.

After a thorough review of the history and purpose of the Fourth Amendment and a discussion of the undoubtable "grisly toll" drunk drivers take "on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions of dollars in property damage every year," the U.S. Supreme Court concluded that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. *Id.*, 136 S. Ct. at 2166 – 2170, 2184.

Thus, state laws that criminalize an arrestee's refusal to submit to a breath test are valid. The conviction of defendant Bernard was therefore upheld.

The U.S. Supreme Court then went on to hold, "that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample" due to the more intrusive nature of a blood test. *Id.*, 136 S. Ct. at 2185. In the context of a search incident to arrest the U.S. Supreme Court did not see any "satisfactory justification for demanding the more intrusive alternative without a warrant. *Id.*, 136 S. Ct. at 2184. Because defendant Birchfield was criminally convicted for refusing a warrantless blood draw, the Court reversed the judgment affirming his conviction. *Id.*, 136 S. Ct. at 2186.

Thus, it is clear, after a review of the circumstances presented to the U.S. Supreme Court and that its holding in *Birchfield* applies to searches conducted pursuant to the incident to arrest exception to the Fourth Amendment and to states in which refusals to submit to blood draws are subject to criminal penalties. The Unites States Supreme Court did not hold that all warrantless blood draws are unconstitutional; only that a state cannot impose criminal penalties for a refusal of such a warrantless blood draw. Further, nothing in the *Birchfield* decision provides that a warrant is required in every blood draw. As Wisconsin's implied consent law in no way imposes criminal penalties for a refusal, no holding in *Birchfield* casts doubt upon Wisconsin's consensual blood draws. Wis. Stat. §343.305(10)-(10m).

III. Neevel's Request For Judicial Legislation From This Court Is Inappropriate.

Neevel offers in his motion that "the court has the inherent authority to require the procedure advocated by [Neevel]." (Def.'s Appeal Br. 18) But what Neevel asks of this Court is to rewrite Wisconsin's implied consent law.

Wisconsin's implied consent law, Wis. Stat. §. 343.305(2), provides in relevant part:

> Any person who is on duty time with respect to a commercial motor vehicle or drives or operates a motor vehicle upon the public highways of this state or in those areas enumerated in s. 346.61, 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...when requested to do so by a law enforcement officer under sub. (3) (a) or (am) or when required to do so under sub. (3) (ar) or (b)... ***The law enforcement agency*** by which the officer is employed shall be prepared to administer...2 of the 3 tests under sub. (3) (a), (am) or (ar), and ***may designate which of the tests shall be administered first.***

(Emphasis added).

There is no constitutional infirmity in Wisconsin's implied consent law under *Birchfield* or any other U.S. Supreme Court decision, nor any decision of the courts of this state. Rather, Neevel's motion is a proposal to the Court to legislate an OWI process which Neevel would prefer over the one which has been mandated by Wisconsin's legislature. Neevel envisions an implied consent law within Wisconsin which requires a law enforcement officer to offer a defendant an opportunity to first take a breath or urine sample, before pursuing its designated method of testing which is through a blood test as clearly authorized under Wis. Stat. § 343.305(2).

While Neevel reaches back to *Marbury v. Madison*, 5 U.S. 137, 2 L.Ed. 60 (1803) in an effort to sway this Court to implement his vision of the operation of this state's implied consent laws, Chief Justice Marshall did not describe such a power. *Marbury* provides that the court has the power of judicial review; not judicial legislation. And that acts that are in conflict with the Constitution are void. ("Certainly all those who have framed written constitutions contemplate them as

forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution is void.") *Id.* at 177. However, in the absence of a determination that the Wisconsin implied consent law is void, no further action should be taken. Furthermore, Chief Justice Marshall does not state that any act, if void, should be re-written by the courts.

Such action belongs with the Wisconsin Legislature. The legislature is the body properly tasked with responsibility to weigh and balance the "public interests" in fashioning this state's impaired driving laws. Any constitutional infirmity that might later be determined by a court must likewise be left to the legislature to cure. As the Wisconsin Supreme Court emphasized in *Madison Teachers, Inc. v. Madison Metropolitan School District*, 197 Wis. 2d 731, 755, 541 N.W. 2d 786 (1995), "[i]f a statute requires curative action, the remedy is with the legislature, not the courts." (Internal citations omitted). *See also*, *State v. Gantter*, 240 Wis. 548, 555, 4 N.W.2d 153 (1942) ("It is beyond the power of the court to legislate..."); *Wagner Mobil, Inc. v. City of Madison*, 190 Wis. 2d 585, 594 527 N.W.2d 301 (1995) ("Had the legislature desired the effect that the court of appeals intimates..., it certainly could have drafted the statute as such. It did not, however, and it is not the function of this court to usurp the role of the legislature.") In the absence of finding any constitutional infirmity, this Court should deny Neevel's request.

IV. Suppression Is Not A Remedy For Searches Conducted In Objectively Reasonable Reliance Upon Settled Wisconsin Precedent.

Even in the event the Court were to find in favor of Neevel's arguments that a suspected impaired driver must now be offered the opportunity for a less intrusive test prior to requesting a blood test or obtaining a warrant for a blood

test, suppression of the blood results would not be an appropriate remedy. In *Davis v. United States*, 564 U.S. 229, 131 S. Ct. 2419 (2011) the U.S. Supreme Court created a good faith exception to the exclusionary rule for violations of the Fourth Amendment. The Court held that searches conducted by the police on objectively reasonable reliance on binding appellate precedent that specifically authorized the search in question are not subject to the exclusionary rule because suppression would do nothing to deter police misconduct in these circumstances and because it would come at a high cost to both the truth and the public safety. *Id.*

As the Court explained:

> About all that exclusion would deter in this case is conscientious police work. Responsible law-enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules. But by the same token, when binding appellate precedent specifically authorizes a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does not more than 'ac[t] as a reasonable officer would and should act' under the circumstances... The deterrent effect of exclusion in such a case can only be to discourage the officer from 'doing his duty.'

Id. at 241 (internal citations omitted). "It is one thing for the criminal 'to go free because the constable has blundered'...It is quite another to set the criminal free because the constable has scrupulously adhered to governing law." *Id.* at 249.

Wisconsin State law likewise recognizes a "good faith" exception to the exclusionary in a decision issued prior to the opinion of the U.S. Supreme Court in *Davis*. *State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97. In *Dearborn*, the Wisconsin Supreme Court held that the good faith exception to the exclusionary rule precludes the

application of the exclusionary rule where officers conduct a search in objectively reasonable reliance upon clear and settled Wisconsin precedent that is later deemed unconstitutional by the United States Supreme Court. *Id.*

All the interactions between Deputy Oblinski and Neevel were consistent with the requirements of this state's implied consent law, as well as the Federal and State Constitution. Deputy Oblinski read Neevel the Informing the Accused form. (R. 1, R. 51) He then requested Neevel to submit to the evidentiary chemical test prescribed by law enforcement in the Town of Oak Grove, just as law enforcement officers before and after him have done in the Town of Oak Grove and within this state innumerable times. Deputy Oblinski acted in full accord with his training and his public safety responsibilities; there is no police misconduct here to deter.

Furthermore the decisions of the courts of Wisconsin have consistently and repeatedly upheld the validity of the implied consent laws. *See*, *Neitzel*, 95 Wis.2d at 193 ("By reason of the implied consent law, a driver, when he applies for and receives an operator's license, submits to the legislatively imposed condition on his license that, upon being arrested ... for driving under the influence of an intoxicant ... consents to submit to the prescribed chemical tests."); *State v. Reitter*, 227 Wis. 2d 213, 225, 595 N.W.2d 646 (1999) ("The implied consent law provides that Wisconsin drivers are deemed to have given implied consent to chemical testing as a condition of receiving the operating privilege"). Therefore, Deputy Oblinski objectively and reasonably acted in accord with binding and settled Wisconsin precedent in obtaining a sample of Neevel's blood in accordance with the implied consent law. As a result, Neevel's blood draw was legal and the evidence should not be suppressed.

CONCLUSION

This Court should affirm the circuit court's final order denying Neevel's Motion to Suppress Blood Test Result Based Upon *Birchfield v. North Dakota*, 579 U.S. ____ (2016) because Neevel's blood draw was constitutionally reasonable and legal under the Fourth Amendment to the United States Constitution.

Dated this 26 day of April, 2021.

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) and (c) for a brief produced with a proportional serif font. The length of this brief is 5244 words.

Dated this 26 day of April, 2021.

MARGARET A. KUNISCH
Assistant District Attorney

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 26 day of April, 2021.

MARGARET A. KUNISCH
Assistant District Attorney