NO. 15-1063

In the Supreme Court of the United States

STATE OF TEXAS, PETITIONER

v.

DAVID VILLARREAL, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in the absence of exigent circumstances, a serious accident, or an unconscious driver, the Fourth Amendment permits Texas to draw blood from a driver to test for blood alcohol concentration over the driver's express refusal and without a warrant.

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STATEMENT

1. "States have a broad range of legal tools to enforce their drunk-driving laws and to secure [blood alcohol concentration] evidence without undertaking warrantless nonconsensual blood draws." *Missouri* v. *McNeely*, 133 S. Ct. 1552, 1566 (2013). On March 31, 2012, however, such warrantless nonconsensual draws were standard practice for Texas law enforcement. Any person arrested under suspicion of operating a motor vehicle while intoxicated was automatically deemed "to have consented . . . to submit to the taking of one or more specimens of the person's breath or blood for analysis." Tex. Transp. Code Ann. § 724.011(a) (2009). While some drivers could override such statutory "consent" through express refusal, *see id.* §§ 724.012–724.013, Texas law provides

that an officer "shall require" a breath test or blood draw "if the officer arrests the person for [driving while intoxicated]" and, *inter alia*, the driver, "on two or more occasions, has been previously convicted of [DWI]." *Id.* § 724.012(b)(3)(B) (2009). Texas is one of at most two States whose law mandates (or three States whose law authorizes) warrantless blood draws over a driver's objection in situations not involving a serious accident. *See* pp. 13-14, *infra*.

2. On March 31, 2012, respondent was stopped by the Corpus Christi Police and asked to undergo a field sobriety test. Pet. App. 5a. He declined and was taken into custody. An officer requested that respondent consent to a blood draw and advised him that a refusal would result in the denial or suspension of his driver's license for 180 days, but respondent expressly refused consent. Pet. App. 5a. While acknowledging that no exigent circumstances existed, Pet. App. 206a, the officer believed that Texas Transportation Code § 724.012(b)(3)(B) authorized him to undertake a forced blood draw without a warrant because respondent had more than two previous DWI convictions. Pet. App. 5a-6a. The officer then took respondent to a hospital, where a medical technician inserted a needle into his arm and drew his blood for testing. Pet. App. 5a-6a.

3. Respondent was indicted for driving while intoxicated, in violation of Texas Transportation Code § 49.04. Pet. App. 6a. He filed a motion to suppress evidence resulting from the blood draw. Pet. App. 201a-202a. At the subsequent evidentiary hearing, the State stipulated that his "blood was drawn without his consent and without a warrant." Pet. App.

6a. The officer who required the blood draw testified he "could have gotten a warrant for the blood draw," but chose not to do so. Pet. App. 206a. The trial court granted respondent's motion to suppress the blood test evidence, on the ground that the forced blood draw had violated the Fourth Amendment. Pet. App. 204a, 207a.

4. On appeal, petitioner argued that respondent's prior DWI convictions "precluded the involuntary, warrantless blood draw … from violating the Fourth Amendment." Pet. App. 174a. The court of appeals rejected that argument, holding that the forced blood draw was unconstitutional in "the absence of a warrant, the absence of exigent circumstances, and the absence of consent." Pet. App. 191a.

5. Petitioner was granted discretionary review before the en banc Texas Court of Criminal Appeals. In an opinion joined by five judges, the court held that the forced blood draw violated the Fourth Amendment. Pet. App. 3a-64a. Four judges dissented. Pet. App. 65a-67a, 68a-71a.

a. *Implied Consent/Prior Waiver.* The court rejected petitioner's argument that respondent implicitly and irrevocably waived his Fourth Amendment right because he "accept[ed] a license to drive and such acceptance may carry with it an obligation to allow statutorily authorized inspections of that activity that would otherwise require a warrant." Pet. App. 28a. The court explained that "it would be wholly inconsistent with [Supreme Court and Texas precedent] to uphold the warrantless search of a suspect's blood . . . when a suspect has . . . expressly

and unequivocally refused to submit to the search." Pet. App. 29a.

The court rejected petitioner's reliance on cases involving searches of government contractors who expressly waived their privacy rights in their contracts. The court explained that such waivers are not analogous to a "generalized and irrevocable waiver of Fourth Amendment rights in exchange for the enjoyment of everyday privileges, such as driving on the State's roadways." Pet. App. 32a (discussing *Zap* v. *United States*, 328 U.S. 624, 628 (1946)).

The court also declined to extend cases involving searches of parolees and probationers, such as *United States* v. *Knights*, 534 U.S. 112, 116 (2001), and *Samson* v. *California*, 547 U.S. 843, 852 (2006), to a warrantless blood draw of a driver who is not under government supervision as part of a criminal sentence. Pet. App. 33a-34a. The court noted that this Court had "expressly stated in *Knights* and *Samson* that it was not resting its holding in those cases on a consent rationale." Pet. App. 34a. Those cases therefore "cannot stand for the proposition that the Supreme Court has broadly recognized that acceptance of a condition or privilege from the government generally constitutes a valid basis for finding an advance irrevocable waiver of Fourth Amendment rights." Pet. App. 35a.

b. *Other exceptions.* The court rejected petitioner's reliance on "special needs" cases involving the drug testing of public school students. Pet. App. 36a. The court explained that petitioner's cases, such as *Board of Education* v. *Earls*, 536 U.S. 822 (2002), in-

volved the "'custodial and tutelary responsibility for children,' the minimally invasive nature of urinalysis, and students' limited privacy interest in a public-school environment," none of which is present in the context of the "investigation of criminal conduct" on a public highway at issue here. Pet. App. 36a (quoting *Earls,* 536 U.S. at 828); *see also* Pet. App. 40a.

The court held that the automobile exception to the Fourth Amendment's warrant requirement is inapplicable here because it is "expressly limited to the vehicular-search context" and does not "encompass a bodily search." Pet. App. 39a. The court noted that this Court in *McNeely* had similarly held that "the fact that people are accorded less privacy in . . . automobiles . . . does not diminish a motorist's privacy interest in preventing an agent of the government from piercing his skin." Pet. App. 39a (quoting *McNeely*, 133 S. Ct. at 1565 (internal quotation marks and citation omitted)).

The court also rejected the argument that the blood draw was justifiable as a search incident to arrest. The court held that such searches are justified by the need to prevent a suspect from harming officers or destroying evidence. Pet. App. 43a-45a. Alcohol in the bloodstream is not a danger to officers, and because it "dissipates at a predictable rate and is encased within a defendant's veins, there is no possibility of that evidence being subject to sudden destruction" by any action of the driver. Pet. App. 44a.

c. *Other opinions*. Judge Keller, joined by Judge

Hervey, dissented. Pet. App. 65a-67a. In their view, the forced blood draw in this case was permissible because it "falls between" cases involving searches incident to arrest in which buccal (*i.e.,* cheek) swabs are taken for identification purposes, *see Maryland* v. *King*, 133 S. Ct. 1958 (2013), and warrantless searches of probationers' apartments, *see United States* v. *Knights*, 534 U.S. 112 (2001). Pet. App. 65a. Judge Meyers dissented on the ground that, although the blood draw here "does not fall within any of the current recognized exceptions to the warrant requirement," the legislature could validly create a new exception applicable in these circumstances. Pet. App. 68a-71a. Judge Keasler dissented without opinion. *State* v. *Villarreal*, 475 S.W.3d 784, 815 (Tex. Crim. App. 2015).

6. The Court of Criminal Appeals originally granted petitioner's motion for rehearing. *See* Pet. App. 72a. In a 5–4 decision, however, the court later determined that the motion had been improvidently granted and denied rehearing. Pet. App. 72a. Judge Meyers, who had dissented from the court's original judgment, now agreed with the court's conclusion that the blood draw violated the Fourth Amendment, and he therefore concurred in the denial of rehearing. He explained that "it is . . . not permissible for the statute to provide for an individual's knowing consent or waiver based only on past convictions. You cannot make the presumption that a past intoxication offense indicates consent to an unwarranted blood draw." Pet. App. 74a.

Judges Newell and Richardson filed opinions concurring in the denial of rehearing and agreeing with

the court's original judgment. Pet. App. 75a-99a, 100a-103a. Four judges dissented. Pet. App. 104a-129a (Keasler, J., joined by Hervey, J., dissenting); Pet. App. 130a-170a (Yeary, J., joined by Keller, J., dissenting).[1]

REASONS TO DENY THE PETITION

The decision of the Texas Court of Criminal Appeals is correct and does not conflict with any decision of this Court, the highest court of any State, or any federal court of appeals. The Court of Criminal Appeals, as well as the petitioner in *Birchfield* v. *North Dakota*, No. 14-1468 (argued April 20, 2016), explain thoroughly why the warrantless blood draw performed over respondent's objection violated the Fourth Amendment, and it is unnecessary to repeat those explanations here. *See* Pet. App. 19a-58a; 14-1468 Pet. Br. 12-20. Moreover, the question presented here rarely arises; Texas is one of at most two States that mandate blood draws in cases (like this one) that do not involve a serious accident or unconscious driver, and only one other State appears to authorize them.

Indeed, the forced insertion of a needle into a driver's vein—with its accompanying risk and potential trauma—is a search that intrudes deeply into interests protected by the Fourth Amendment. At least outside cases involving a serious accident or

[1] Notwithstanding Judge Meyers's changed position, the decision to deny rehearing remained 5–4, because the composition of the court changed from the time of the court's original decision.

unconscious driver, a blood draw is not justifiable in the absence of a warrant or exigent circumstances. The parties' briefing in *Birchfield* and its companion cases underscores that conclusion. In those cases, the respondent States, amici States (including Texas), and the United States all fail to challenge the argument of the *Birchfield* petitioners that a forced blood draw like this one violates the Fourth Amendment. Strikingly, they do not argue that the Fourth Amendment permits a forced blood draw like this one, even though establishing that point would go far toward showing the constitutionality of the state laws at issue in *Birchfield*, which criminalize refusals to consent to a blood draw.

Regardless of this Court's disposition of *Birchfield*, further review is not warranted in this case. If this Court concludes that the laws criminalizing a refusal to consent to a blood draw in *Birchfield* are unconstitutional, the Court will necessarily have concluded that a State may not simply undertake a forced, warrantless blood draw in the absence of exigent circumstances. And if the Court concludes that the laws criminalizing refusal to consent to a blood draw are valid, that conclusion still would provide no support for the conclusion that the much greater intrusion here is permissible under the Fourth Amendment. Insofar as Texas needs to conduct blood draws on drivers who object, warrant procedures are readily available that permit it to do so with a minimum of delay.

I. THERE IS NO CONFLICT IN THE CIRCUITS OR AMONG THE STATES' HIGHEST COURTS

Petitioner does not claim that that there is a conflict among the States' highest courts or federal courts of appeals, and there is none. Three years ago, this Court in *McNeely* held that the dissipation of blood alcohol alone does not create a per se exigency justifying a warrantless, nonconsensual blood draw. 133 S. Ct. at 1563. Aside from pre-*McNeely* cases relying on the per se exigency rationale that *McNeely* rejected, no State's highest court or federal court of appeals has upheld a warrantless, nonconsensual blood draw during a DWI arrest unless there was a further exigency-related justification. Such a justification may include a serious accident or unconscious driver, both of which are provided for in a separate Texas statute not at issue here. *See* pp. 16-18, *infra*.

Petitioner takes a kitchen-sink approach, asserting a flurry of justifications for forced blood draws, including: a general reasonableness balancing test that petitioner would substitute for the Fourth Amendment's warrant requirement, Pet. 16-24; the purportedly diminished privacy rights of recidivists, Pet. 19-20; the special needs exception, Pet. 12-13; and implied consent or waiver, Pet. 13-16. None of those rationales, however, finds support in any decision of a state supreme court or a federal court of appeals. Indeed, the first two of petitioner's asserted justifications have never previously been accepted by any state supreme court or federal court of appeals in considering warrantless blood draws. Aside from two old and now-superseded cases involving serious accidents or unconscious drivers that addressed is-

sues not even arguably present here, the latter two have been uniformly rejected by every state supreme court or federal court of appeals to consider them.

A. No Court Holds That the Special Needs Doctrine Justifies a Warrantless, Nonconsensual Blood Draw During a DWI Arrest

1. No state supreme court or federal court of appeals holds that the "special needs" exception justifies warrantless, nonconsensual blood draws.[2] Application of that exception to the warrant requirement must be based on special needs that are "divorced from the State's general interest in law enforcement." *Ferguson* v. *City of Charleston*, 532 U.S. 67, 79 (2001). The exception rests on "the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes." *Id.* at 88 (Kennedy, J., concurring).

2. Applying those principles, the highest courts of the States that have considered the issue uniformly conclude that the special needs doctrine does not justify a warrantless blood draw administered for the purpose of obtaining evidence for a DWI-related charge. For instance, in rejecting a special needs justification for a forced, warrantless blood draw, the Supreme Court of South Dakota highlighted this Court's teaching that the special needs exception ap-

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[2] In the 1990s, two state supreme courts concluded that the special needs doctrine permitted blood draws in cases, unlike this one, involving serious accidents. *See Fink* v. *Ryan*, 673 N.E.2d 281, 286-87 (Ill. 1996); *State* v. *Roche*, 681 A.2d 472, 474-75 (Me. 1996). Both cases have likely been superseded by this Court's decision in *Ferguson*, as discussed in the text.

plies only when "special needs *beyond the normal need for law enforcement,* make the warrant and probable-cause requirement impracticable." *State* v. *Fierro*, 853 N.W.2d 235, 242 (S.D. 2014) (quoting *Skinner* v. *Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 619 (1989)). During the course of a DWI stop, "there are no 'special needs' beyond normal law enforcement that may justify departure from the usual warrant and probable-cause requirements." *Id.* at 242-43.

Other state supreme courts and federal courts of appeals have reached the same conclusion. *See, e.g.*, *Nelson* v. *City of Irvine*, 143 F.3d 1196, 1203 (9th Cir. 1998) ("It is untenable to equate the police DUI traffic stops with the pervasively regulated environments where special needs can justify even suspicionless drug testing."); *Cooper* v. *State*, 587 S.E.2d 605, 611 (Ga. 2003) (declining to apply the doctrine to a warrantless blood draw because "it is clear that a primary purpose of [Georgia's blood draw statute] is to gather evidence for criminal prosecution"); *McDuff* v. *State*, 763 So. 2d 850, 855 (Miss. 2000); *Commonwealth* v. *Kohl*, 615 A.2d 308, 313-14 (Pa. 1992). Courts are in agreement that blood draws conducted for law enforcement purposes fall well outside the scope of the special needs doctrine.

B. Courts Consistently Hold That an Implied Consent Law Cannot Justify a Warrantless Blood Draw Over a Driver's Objection

1. A driver's express refusal to consent to a blood draw cannot be disregarded under the Fourth Amendment simply because a statute purports to mandate "consent." Petitioner argues that "[t]he deal is sealed when [the driver] gets behind the wheel,

and it may not later be revoked when he gets caught driving in an impaired condition." Pet. 16. The amicus brief for petitioner and other States in *Birchfield*, however, acknowledges that in "the vast majority of States, drivers *can* revoke . . . implied consent (absent a court order or an accident involving death or serious bodily injury) and no test will be given." 14-1468 New Jersey Br. 14 (emphasis added). At most, implied-consent statutes establish only that a driver consents to the blood draw *in the absence of an objection*. *See, e.g., State Dep't of Pub. Safety* v. *Hauge*, 286 N.W.2d 727, 728 (Minn. 1979) (holding that an unconscious driver does not revoke his statutorily implied consent). They do not override an express refusal, as occurred here.

2. That conclusion follows from basic Fourth Amendment principles. "[W]hether a consent to a search was in fact 'voluntary' . . . is a question of fact to be determined from the totality of all the circumstances." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227 (1973). To be valid, consent must be "freely and voluntarily given." *Bumper* v. *North Carolina*, 391 U.S. 543, 548 (1968); *see Florida* v. *Jimeno*, 500 U.S. 248, 252 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents."). Petitioner's argument that statutorily implied "consent" may overcome a driver's express and unequivocal refusal to consent to a blood draw is inconsistent with all of those principles.

3. The States' highest courts consistently hold that a driver may revoke the "consent" purportedly imposed by statute. *See*, *e.g.*, *Williams* v. *State*, 771 S.E.2d 373, 377 (Ga. 2015) (holding that "mere com-

pliance with statutory implied consent requirements does not, per se, equate to . . . consent"); *State* v. *Halseth*, 339 P.3d 368, 371 (Idaho 2014) (holding that "[i]nherent in the requirement that consent be voluntary is the right of the person to withdraw that consent"); *Byars* v. *State*, 336 P.3d 939, 946 (Nev. 2014) ("We have found no jurisdiction that has upheld an implied consent statute that allows an officer to use force to obtain a blood sample upon the driver's refusal to submit to a test."). Rather than the "uncertainty" claimed by petitioner, Pet. 10, all lower courts that have tackled the issue agree that an implied consent statute does not override a driver's refusal to consent to a blood draw.

II. FURTHER REVIEW IS UNWARRANTED BECAUSE THE QUESTION PRESENTED IN THIS CASE RARELY ARISES

Texas and Tennessee are the only two States that explicitly mandate a forced, warrantless blood draw in cases not involving a serious accident or unconscious driver.[3] One other State appears to permit,

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[3] A Tennessee statute provides that if an officer has probable cause to believe that a driver is under the influence of drugs or alcohol and has a prior DWI conviction, "the officer shall cause the driver to be tested for the purpose of determining the alcohol or drug content of the driver's blood." Tenn. Code Ann. § 55-10-406(b)(5)(B) (2013). The test shall be administered "regardless of whether the driver does or does not consent." *Id*. A Tennessee appellate court has held that this law does not eliminate the warrant requirement, because "a conclusion that the legislature intended to create an exception to state and federal constitutional warrant requirements would require [it] to declare the statute unconstitutional." *State* v. *Kennedy*, No. M2013-02207-CCA-R9-CD, 2014 WL 4953586, at *12 (Tenn. Ct.

but not mandate, such blood draws.[4] Most States affirmatively forbid a warrantless forced blood draw in these circumstances. The question presented in this case therefore rarely arises.

1. An amicus brief in *Birchfield* in which petitioner joined concedes that "the vast majority of States . . . place significant restrictions on when law enforcement may obtain a chemical sample despite a suspect's refusal." 14-1468 New Jersey Br. 11. "Testing over a subject's objection is often limited to cases involving an accident resulting in serious bodily injury or death, or where law enforcement obtains a search warrant or other court order." *Id.* at 11-12. "That approach serves the public interest by reducing confrontations between citizens and law enforcement." *Id.* at 12. Indeed, five States forbid a blood draw over the driver's objection, without exception.[5] Eleven States forbid a blood draw over the

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App. May 13, 2014). The Tennessee Supreme Court has not construed this statute.

[4] Ohio's implied consent statute provides that, if a driver refuses to submit to a blood draw, "the law enforcement officer who made the request may employ whatever reasonable means are necessary to ensure that the person submits to a chemical test of the person's whole blood or blood serum or plasma." Ohio Rev. Code Ann. § 4511.191(A)(5)(b) (2016). The Ohio Supreme Court has not construed this statute.

[5] *See* Mass. Gen. Laws Ann. ch. 90, § 24(1)(f)(1) (West 2014) ("If the person arrested refuses to submit to such test or analysis, . . . no such test or analysis shall be made."); Neb. Rev. Stat. Ann. § 60-498.01(2) (West 2012); 75 Pa. Cons. Stat. Ann. § 1547(b) (West 2006); W. Va. Code Ann. § 17C-5-7(a) (West 2013). *See also* N.J. Stat. Ann. § 39:4-50.2(e) (West 2008) (pro-

driver's objection, except in cases involving serious accidents.[6] Twelve States forbid a blood draw over the driver's objection, except in cases in which a warrant is obtained.[7]

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hibiting performing the test "forcibly and against physical resistance").

[6] Ala. Code §§ 32-5-192(c), 32-5-200(d) (2015) (requires warrant); Alaska Stat. Ann. §§ 28.35.032; 28.35.035 (West 2010); Ark. Code Ann. §§ 5-65-205; 5-65-208 (West 2015); Haw. Rev. Stat. Ann. §§ 291E-15, 291E-21 (West 2015); Iowa Code Ann. §§ 321J.9, 321J.10, 321J.11 (West 2010) (requires warrant); Md. Code Ann. Transp. § 16-205.1(b)(1), 16-205.1(c)(1) (West 2015); Minn. Stat. Ann. § 169A.52 subd. 1 (West 2014); N.H. Rev. Stat. Ann. §§ 265-A:14, 254-A:16 (2015); N.Y. Veh. & Traf. Law §§ 1194.2(b)(1), 1194.3(b)(1) (McKinney 2010) (requires warrant); N.D. Cent. Code Ann. §§ 39-20-04, 39-20-01.1 (West 2013); Vt. Stat. Ann. tit. 23 §§ 1202(b), 1202(f) (West 2001) (requires warrant). Except where indicated, the statutes cited above do not expressly require warrants for blood draws in serious-accident cases.

[7] Ariz. Rev. Stat. Ann. § 28-1321(D)(1) (2013); Ga. Code Ann. §§ 40-5-67.1(d), 40-5-67.1(d.1) (West 2012); Mich. Comp. Laws Ann. § 257.625d(1) (West 2015); Mont. Code Ann. §§ 61-8-402(4), 61-8-402(5) (West 2015); Nev. Rev. Stat. Ann. § 484C.160(8) (West 2015); N.M. Stat. Ann. § 66-8-111(A) (West 2005); Okla. Stat. Ann. tit. 47, § 753(A) (West 2015); Ore. Rev. Stat. Ann. §§ 813.100(2), 813.100(5) (West 2013); R.I. Gen. Laws Ann. §§ 31-27-2.1(b), 31-27-2.9(a) (West 2009); Wash. Rev. Code Ann. §§ 46.20.308(3), 46.20.308(4) (West 2015); Wyo. Stat. Ann. § 31-6-102(d) (West 2011). The cited Montana and New Mexico statutes include additional limitations on when warrants may be obtained. Delaware statutory law does not expressly require a warrant, but since *McNeely* the State has "instructed law enforcement officers to apply for a search warrant under all circumstances before performing a blood draw." *Flonnory* v. *State*, 109 A.3d 1060, 1062 n.5 (Del. 2015).

2. Addressing warrantless blood draws, petitioner argues that a number of States have provisions that "require a sample be taken in spite of the suspect's refusal in cases involving repeat offenders or when a fatality or serious injury has occurred as a result of the DWI." Pet. 8. At most three States require or even permit warrantless blood draws in cases (like this one) involving repeat offenders. *See* pp. 13-14, *supra*. With respect to other types of cases, statutes in twelve States do not expressly require a warrant for a blood draw over the driver's objection—and therefore appear to authorize a warrantless blood draw—in cases involving a serious accident.[8] Most States permit warrantless blood draws if the driver is unconscious. A forced warrantless blood draw in a case involving a serious accident or unconscious driver, however, may be justified on an exigency-based rationale not applicable here.

a. A serious accident involving significant bodily injury may create exigent circumstances that are not present in a case like this one. For example, in *State* v. *Stavish*, 868 N.W.2d 670, 677 (Minn. 2015), the Minnesota Supreme Court upheld the constitutional-

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[8] Alaska Stat. Ann. § 28.35.035(a) (West 2010); Ark. Code Ann. § 5-65-205(a)(1)(A) (West 2015); Conn. Gen. Stat. Ann. § 14-227c(b) (West 2011); Haw. Rev. Stat. Ann. § 291E-15 (West 2015); Idaho Code Ann. § 18-8002(6)(b) (West 2014); Kan. Stat. Ann. §§ 8-1001(d)(3), 8-1001(b)(2) (West 2015); Md. Code Ann. Transp. § 16-205.1(b)(1) (West 2015); Minn. Stat. Ann. § 169A.52 subd. 1 (West 2014); N.H. Rev. Stat. Ann. § 265-A-16 (2015); N.D. Cent. Code Ann. § 39-20-01.1 (West 2013) (excepting serious accidents from the warrant requirement only if there are exigent circumstances); Okla. Stat. tit. 47, § 753 (2015); Wyo. Stat. Ann. § 31-6-102(d) (West 2011).

ity of a warrantless, nonconsensual blood draw administered on a driver involved in a crash that killed his passenger and left him critically injured. *Id.* at 673. Because the driver's injuries were sufficiently serious that they might have required an airlift to another hospital, the officer "did not know how long [the driver] was likely to remain at the same hospital or whether further medical care would preclude obtaining a sample even if [he] stayed at the same hospital." *Id.* at 677. Consequently, the officer reasonably concluded that exigent circumstances existed because the delay necessary to obtain a warrant would have threatened the destruction of evidence. *Id.*; *see also People* v. *Ackerman*, 346 P.3d 61, 67-68 (Colo. 2015) (holding that exigent circumstances justified a blood draw of a driver who was about to undergo surgery and therefore might have been unavailable for a blood draw for an unknown period of time).

b. A warrantless blood draw from an unconscious driver may be similarly justifiable under the Fourth Amendment, on the theory that the driver has not withdrawn consent previously granted under the State's implied-consent statute and exigent circumstances preclude waiting for the driver to recover. For example, in a case involving an unconscious driver, the Minnesota Supreme Court held that "where the driver's physical or mental condition as a result of alcohol consumption or the effects of injury or treatment for injury precludes him from knowingly, voluntarily, or intelligently exercising his statutory choice to refuse submission to such test, his statutorily implied consent remains continuous." *Hauge*,

286 N.W.2d at 728; *see also State* v. *Packineau*, 865 N.W.2d 415, 416-17 (N.D. 2015) (upholding warrantless blood draw of a driver incapable of communicating any withdrawal of consent); *People* v. *Kates*, 428 N.E.2d 852, 854-55 (N.Y. 1981) (upholding warrantless blood draw of an unconscious driver because the driver made himself incapable of refusing). That justification provides no support for a blood draw in a case like this, where the driver clearly communicated his objection and the State conceded that no exigency existed.

III. BLOOD DRAWS ARE AN UNJUSTIFIABLE INTRUSION ON INTERESTS PROTECTED BY THE FOURTH AMENDMENT, AS THE BRIEFING BY THE STATES AND THEIR AMICI IN *BIRCHFIELD* ILLUSTRATES

This Court has explained that a "compelled physical intrusion beneath [the] skin and into [the] veins" is an "invasion of bodily integrity [that] implicates an individual's most personal and deep-rooted expectations of privacy." *McNeely*, 133 S. Ct. at 1558. It therefore trenches deeply on interests protected by the Fourth Amendment and cannot be justified in a case like this one without a warrant. Currently pending before the Court are three consolidated cases raising a question that casts light on the Fourth Amendment issue in this case: *Birchfield* v. *North Dakota*, No. 14-1468; *Bernard* v. *Minnesota*, No. 14-1470; and *Beylund* v. *Levi*, No. 14-1507 (argued April 20, 2016). The briefing by the respondent States and their principal amici (including Texas) in those cases supports the conclusion that a warrantless, nonconsensual blood draw violates the Fourth Amendment.

A. Forced Blood Draws Intrude Deeply on Interests Protected by the Fourth Amendment

1. Drawing blood is a twenty-step process that involves the insertion of a needle into a vein and is typically performed by a trained phlebotomist. Ruth E. McCall & Cathee M. Tankersley, *Phlebotomy Essentials* 255-62 (5th ed. 2012). It can inflict disabling injuries even when performed on willing patients.

"Collecting blood specimens is like walking through a minefield. Arteries, tendons, nerves, and bone are all so close to the intended vein that one error in judgment or technique can result in an injury serious enough to bring an explosion of legal proceedings." Dennis J. Ernst, *Four Indefensible Phlebotomy Errors and How to Prevent Them*, J. Healthcare Risk Mgmt., Spring 1998, at 41, 41. Because vulnerable nerves actually intertwine with and overlay the veins targeted in a blood draw, even "successful, and otherwise atraumatic, routine venipunctures" can result in serious nerve injuries. Steven H. Horowitz, *Venipuncture-Induced Causalgia: Anatomic Relations of Upper Extremity Superficial Veins and Nerves, and Clinical Considerations*, 40 Transfusion 1036, 1038 (2000) [hereinafter Horowitz, *Anatomic*].

Nerve damage from a blood draw can trigger a cascade of debilitating symptoms, including "excruciating pain" and loss of motor function. Steven H. Horowitz, *Peripheral Nerve Injury and Causalgia Secondary to Routine Venipuncture*, 44 Neurology 962, 962 (1994) [hereinafter Horowitz, *Peripheral*]. Such nerve injuries are often "continuously disabling." *Id.* at 963. They usually do not respond to any

treatment or heal on their own; all eleven of the patients with blood-draw-related nerve damage examined in one study experienced symptoms for one to thirteen years afterwards despite receiving surgical and pharmaceutical interventions. *Id*. at 962-63.

The incidence of nerve injuries during blood draws is at least 1 in 6300, and likely higher due to underreporting. Horowitz, *Anatomic* at 1038. Other complications from blood draws are even more common. Three percent of healthy patients experienced "serious" complications during diagnostic blood draws, such as syncope (*i.e.*, loss of consciousness). Harold J. Galena, *Complications Occurring from Diagnostic Venipuncture*, 34 J. Fam. Prac. 582, 583 tbl.1 (1992). Fourteen percent of patients experienced pain, bruising, or hematoma (a buildup of clotted blood within the tissue). *Id*.

These risks have led practitioners to reject petitioner's argument that drivers undergoing a blood draw are not subjected to "some risky or painful medical procedure." Pet. 20. Practitioners have concluded that "venipuncture is not as innocuous as heretofore supposed." Horowitz, *Peripheral* at 963; *see also* Ann Japenga, *'A Little Sting' Can Become a Debilitating Injury*, N.Y. Times (May 30, 2006), http://www.nytimes.com/2006/05/30/health/30case.html (concluding with respect to blood draws that "[t]he most common and most seemingly harmless invasive procedure is not always harmless" because of the possibility of nerve injury). A textbook for phlebotomists cautions that a blood draw "is not an innocuous procedure," and provides five case studies of blood draws that led to serious injuries. *See* McCall

& Tankersley 59-60 (describing four patients who endured nerve damage and one patient who lost consciousness, fell, had her front teeth knocked out, and suffered "multiple facial fractures" and permanent facial scarring). Phlebotomists are likewise warned to prepare for a dizzying array of complications, including seizures, excessive bleeding, arterial punctures, and collapsed veins. *See* McCall & Tankersley 304-07; Diana Garza & Kathleen Becan-McBride, *Phlebotomy Handbook* 290-96 (8th ed. 2010).

2. These complications are more likely when, as here, the blood draw is forced. Blood draws carry the risk of serious injuries even when performed by a trained phlebotomist on a calm and compliant patient. During a forced blood draw, an uncooperative, intoxicated driver may not be able or willing to hold still, a crucial requirement for a phlebotomist safely to navigate the "minefield" of delicate structures adjacent to veins.[9]

Texas's law also creates the possibility that a driver will be physically restrained, exacerbating the risk of puncturing a nerve with the needle and greatly increasing the risk of other injuries. In the past, Texas has used physical force to take blood samples

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[9] Indeed, some nurses and doctors believe that nonconsensual blood draws are so intrusive that they would rather be, and have been, arrested than conduct a forced blood draw. *See, e.g.*, Jacob M. Appel, *Nonconsensual Blood Draws and Dual Loyalty: When Bodily Integrity Conflicts with the Public Health*, 17 J. Health Care L. & Pol'y 129, 130-31 (2014) (describing a nurse and two doctors who were either arrested or handcuffed and detained after refusing to forcibly draw blood from a driver).

from drivers suspected of DWI. *See, e.g.*, *Burns* v. *State*, 807 S.W.2d 878, 883 (Tex. Ct. App. 1991) (describing an incident in which "[two officers] forcibly took [the driver] to the cubicle while [the driver] cursed, resisted, and fought with the officers. The two wrestled [the driver] to the floor of the cubicle and a hospital lab technician . . . [took] a sample of blood"). The combination of a resistant patient and a delicate procedure can easily lead to injuries.

3. Using or threatening to use physical force to insert a needle into a vein escalates confrontations between police officers and (possibly intoxicated) drivers, increasing the risk of violence. The respondent States in the *Birchfield* cases criticize forced blood draws as unnecessarily dangerous for officers and drivers alike. *See, e.g.*, 14-1468 Resp. Br. 29 ("[Criminalizing refusal] reduces the likelihood of potentially violent encounters between police and drunk drivers. . . . [P]ressing ahead with the test in the face of a refusal creates a high risk of a physical confrontation."); 14-1470 Resp. Br. 18 ("[F]orced blood draws . . . are significantly more intrusive in nature than breath tests and create a public safety risk.").

The United States likewise notes in *Birchfield* that "nonconsensual blood draws . . . [are] materially worse than criminal enforcement, because [they] require[] forcible intrusions that most States ban to protect against violent confrontations." 14-1468 U.S. Br. 14. The United States explains that "[t]he risk of such confrontations is far from theoretical" and cites as examples ten cases in which an attempt to take a forcible blood draw resulted in violence. *Id.* at 28-29.

For example, one driver's arm was broken in a violent confrontation involving a hospital gurney, handcuffs, and a wall. *Carter* v. *Cty. of San Bernadino*, No. E044840, 2009 WL 1816658, at *2 (Cal. Ct. App. June 25, 2009).

4. Other States and the United States balk at the prospect of taking blood samples from drivers by physical force. The respondent States in *Birchfield* acknowledge that forced blood draws are highly intrusive and do not justify the risks they create. *See, e.g.*, 14-1468 Resp. Br. 29 ("Using force to administer the test is not in the interest of police officers, arrestees, or the medical personnel stuck between them."); 14-1470 Resp. Br. 17 n.1 (characterizing "the forcible taking of a blood sample" as "substantially more intrusive" than criminalizing refusal). Similarly, the United States notes in its amicus brief in *Birchfield* that "forcible blood-testing . . . is not only barred in most States, but also likely to be less reliable and more dangerous [than criminalizing refusal]." 14-1468 U.S. Br. 30-31. Finally, the eighteen amici States in *Birchfield* emphasize repeatedly that "the vast majority of states" have "significant limitations" on forced blood draws. 14-1468 New Jersey Br. 11; *see id.* at 2, 8.

Texas's use of nonconsensual blood draws—up to and including physically restraining struggling drivers while a needle is inserted into a vein—makes it an outlier among the States. Even if the Court in *Birchfield* concludes that the safer and less intrusive policies of other States to criminalize refusals are constitutionally permissible, that conclusion would

not support the vastly greater intrusion caused by Texas's anomalous approach.

B. The Conspicuous Failure of the States and Their Principal Amici in the *Birchfield* Cases Even to Argue the Fourth Amendment Issue Underscores the Weakness of Petitioner's Argument Here

While the *Birchfield* cases do not involve forced, warrantless blood draws, they do present the question whether a State may criminalize a driver's refusal to consent to a blood draw or, in *Bernard*, a breath test. Respondents North Dakota and Minnesota in the *Birchfield* cases have conspicuously *not* argued that a State has the right actually to conduct a warrantless blood draw over the driver's objection in non-exigent circumstances. They have declined to make that argument, even though, if valid, it would likely resolve the *Birchfield* cases in their favor. Indeed, the omission of any such argument by the respondent States, amici States (including Texas), and the United States underscores the weakness of the petition in this case, which presents that precise question.

1. *Birchfield* and *Bernard* present the question whether it violates the Fourth Amendment for a State to make it a criminal offense for a driver to refuse a blood draw (*Birchfield*) or breath test (*Bernard*) after being arrested for DWI. Unlike Texas, both North Dakota and Minnesota honor a driver's refusal to consent to a blood draw. While the state supreme courts in both *Birchfield* and *Bernard* rejected challenges to the convictions at issue, the reasoning of both state supreme courts casts doubt on

the constitutionality of a warrantless blood draw like the one in this case.[10]

In *Birchfield*, a driver who had been arrested for DWI was criminally prosecuted for his refusal to consent to a blood draw. *State* v. *Birchfield*, 858 N.W.2d 302, 303 (N.D. 2015). The trial court held that without the blood draw "[t]here was no search so there was no Fourth Amendment violation." *Id.* at 308. The Supreme Court of North Dakota agreed, holding the refusal statute constitutional because it "criminalizes the refusal to submit to a chemical test but *does not* authorize a warrantless search." *Id.* (emphasis added) (distinguishing *Camara* v. *Mun. Ct. of City & Cty. of San Francisco*, 387 U.S. 523 (1967)).

In *Bernard*, a driver who had been arrested for DWI refused to consent to a breath test and was criminally prosecuted for the refusal. *State* v. *Bernard*, 859 N.W.2d 762, 764-65 (Minn. 2015). The Minnesota Supreme Court upheld the conviction on the ground that "a warrantless breath test does not violate the Fourth Amendment because it falls under the search-incident-to-a-valid-arrest exception." *Id.* at 767. The court, however, relied on the fact that a breath test is less intrusive than a blood draw, noting that it "express[ed] no opinion as to whether a

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[10] In *Beylund*, the driver "consented" to a blood draw after being informed that refusal to consent was a criminal offense. The North Dakota Supreme Court relied on its decision in *Birchfield* in rejecting the claim that the driver's consent was invalid under the Fourth Amendment because it was coerced. *Beylund* v. *Levi*, 859 N.W.2d 403, 408-409 (N.D. 2015).

blood or urine test of a suspected drunk driver could be justified as a search incident to arrest. The *differences between a blood test and a breath test are material*, and not the least of those differences is the *less-invasive nature of breath testing*." *Id.* at 768 n.6. (emphases added).

2. As eighteen States (including Texas) argue in their *Birchfield* amicus brief, "[a] driver who withdraws his implied consent may be charged with refusal; *whether the officer can actually compel the driver to provide the sample is a completely separate question*." 14-1468 New Jersey Br. 5 (emphasis added). On that "separate question," the respondent States, amici States, and the United States all conspicuously fail to challenge petitioners' arguments in *Birchfield* that a warrantless, nonconsensual blood draw is unconstitutional.

a. In *Birchfield*, North Dakota declines to argue that a forced, warrantless blood draw is permissible under the Fourth Amendment absent exigent circumstances. As the State notes, "Birchfield argues at length that a chemical test is a search under the Fourth Amendment and, accordingly, may not be taken without a warrant unless an exception to that requirement applies." 14-1468 Resp. Br. 19; *see* 14-1468 Pet. Br. 12-29. Petitioner here agrees with the *Birchfield* petitioner that the question whether a blood draw is constitutional is a "necessary prerequisite" to the question presented in *Birchfield*. Pet. 10. Yet North Dakota not only does not challenge Birchfield's arguments, but concedes that "Birchfield is right," arguing only that "his point is irrelevant." 14-1468 Resp. Br. 19.

North Dakota's failure to challenge Birchfield's arguments is striking, because the State would have had a lot to gain by doing so. If performing a forced, warrantless blood draw were constitutional, the State would obviously have had a strong argument that it could criminalize efforts to hinder or obstruct the State's lawful search, presumably including the driver's refusal to consent. The State's failure even to attempt any such argument speaks volumes.

Similarly, while Minnesota argues in *Bernard* that a warrantless *breath test* is permissible under the Fourth Amendment as a search incident to arrest, *see* 14-1470 Resp. Br. 7, it virtually concedes that warrantless *blood draws* are impermissible. *See* 14-1470 Resp. Br. 7 ("Whereas *Birchfield* involves refusal to submit to a blood test, this case involves refusal to submit to the *less-intrusive* breath test." (emphasis added)). Indeed, the State argues that "police officers would be *required to obtain search warrants for forced blood draws*, which are significantly more intrusive in nature than breath tests." 14-1470 Resp. Br. 18 (emphasis added).

The third case, *Beylund*, involves a blood draw to which a driver "consented" after being informed that withholding consent is a criminal offense. North Dakota argues that the driver's "consent" in those circumstances could be valid. 14-1507 Resp. Br. 8-13. Again, if the Fourth Amendment permitted the State simply to perform the blood draw regardless of the driver's consent, the case would easily be resolved against the driver. Yet the State makes no attempt to counter petitioner's showing that a warrantless blood draw conducted over the driver's objection

would have violated the Fourth Amendment.

Similarly, the eighteen state amici (including Texas) emphasize that consent in *Beylund* was valid in part because "[t]he driver's choice [to refuse consent to a blood draw] is honored absent a court order or an accident involving death or serious bodily injury." 14-1468 New Jersey Br. 15. Neither North Dakota nor the state amici attempt to defend a forced, warrantless blood draw over the driver's objection.

b. Nor does the United States make any argument as amicus in the *Birchfield* cases that a warrantless blood draw like the one in this case would be constitutional. *See* 14-1468 U.S. Br. 20 ("[W]hile officers may be able to conduct nonconsensual blood draws *under the exigent circumstances doctrine or to seek blood-draw warrants* in the minority of States that allow those approaches, switching to a blood-draw method will often occasion substantial delay." (emphasis added)); *see also* Pet. 3 (conceding that respondent's blood was drawn "without a warrant or exigent circumstances"). The government does defend the constitutionality of the warrantless breath test in *Bernard*, but specifically distinguishes such tests from blood draws. The government argues that a breath test, unlike a blood draw, "is an intrusion that is close to de minimis," and "reveal[s] the level of alcohol in the . . . bloodstream and nothing more." 14-1468 U.S. Br. 34 (quoting *Skinner*, 489 U.S. at 625). The government contends that, insofar as practice in the States sheds light on the Fourth Amendment reasonableness inquiry, "[a]ll 50 States provide for warrantless breath tests in their implied-consent provisions." 14-1468 U.S. Br. 35. By contrast, blood

draws are widely prohibited. *See* pp. 14-15, *supra*. The government's arguments support the conclusion of the Texas Court of Criminal Appeals that the warrantless blood draw in this case violated the Fourth Amendment.

c. In short, the petitioner in *Birchfield* argues extensively that a forced, warrantless blood draw in the absence of exigent circumstances, such as the one that occurred here, violates the Fourth Amendment. If he were wrong on that point, the States would likely prevail in *Birchfield* and its companion cases. Yet respondent States, amici States (including Texas), and the United States in *Birchfield* all abjure any such argument. Instead, they emphasize the highly intrusive (and therefore likely unconstitutional) nature of such a blood draw. The respondent States in *Birchfield* and their amici (including Texas) have virtually conceded that the result reached by the Texas Court of Criminal Appeals in this case was correct.

IV. REGARDLESS OF THIS COURT'S RESOLUTION OF *BIRCHFIELD*, FURTHER REVIEW IN THIS CASE IS UNWARRANTED

While the *Bernard* case involves a breath test whose constitutionality may require a different analysis, *Birchfield* itself presents the question whether a statute criminalizing a refusal to consent to a blood draw is constitutional. Regardless of this Court's resolution of that question, the Court should deny certiorari in this case.

A. If the Court Holds That a State May Not Criminalize a Driver's Refusal to Submit to a Blood Draw, the Result Here Follows *a Fortiori*

If this Court concludes in *Birchfield* that a State cannot impose a criminal penalty on a DWI suspect for refusing to consent to a blood draw, it follows *a fortiori* that the Fourth Amendment prohibits the nonconsensual, warrantless blood draw here. Accordingly, if the Court so concludes in *Birchfield*, further review in this case would be unwarranted.

1. If a State may constitutionally undertake an action, it generally may criminalize conduct that hinders its performance of that action. *See, e.g., United States* v. *Williams,* 553 U.S. 285, 288 (2008) (concluding that because the First Amendment does not protect child pornography, "the government may criminalize the possession of child pornography"). *Compare* 18 U.S.C. § 111 (criminalizing resisting lawful arrest), *with Bad Elk* v. *United States*, 177 U.S. 529, 535 (1900) (upholding an individual's right to resist unlawful arrest). Thus, if the State may constitutionally conduct a warrantless blood draw over a driver's objection, it also may criminalize conduct that hinders the blood draw—presumably including the driver's refusal to consent. Indeed, the United States makes precisely that argument with respect to the *breath* test in *Bernard*. *See* 14-1468 U.S. Br. 31.

On the other hand, if a State may *not* criminalize refusal to submit to a warrantless blood draw, it follows *a fortiori* that the State may not conduct a warrantless blood draw like the one in this case. Accord-

ingly, if the Court rules for petitioner in *Birchfield*, the Court will necessarily have rejected the proposition that the State could have performed a warrantless blood draw over the driver's objection, as Texas did here. A ruling for petitioner in *Birchfield* would necessarily validate the judgment of the Texas Court of Criminal Appeals in this case.

2. Contrary to petitioner's argument (at Pet. 19-20), the fact that respondent had previous DWI convictions does not alter the Fourth Amendment analysis. It is true that some probationers and parolees, who have committed crimes and remain under the government's supervision, "do not enjoy the absolute liberty to which every citizen is entitled." *Knights*, 534 U.S. at 119 (internal quotations omitted). Accordingly, they may be subject to "privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." *Samson*, 547 U.S. at 853.

This Court has never held, however, that an individual who has fully discharged a criminal sentence and is no longer under the government's legal custody or supervision is entitled to diminished protection under the Fourth Amendment. Indeed, the Double Jeopardy Clause prohibits a "criminal from being twice punished for the same offence." *Ex parte Lange*, 85 U.S. 163, 173 (1873); *see Hudson* v. *United States*, 522 U.S. 93, 99 (1997). Once a person who has been convicted of a crime has discharged the sentence imposed, the State may not impose further disabilities on that person, including permanently diminished Fourth Amendment protection, solely on the ground of the prior offense. Recidivism alone does not affect the recidivist's right to privacy in the

home, in a safe deposit box—or, as here, in avoiding a forced insertion of a needle into a vein to remove blood.

B. Even If the Court Holds in *Birchfield* That a State May Criminalize Refusal to Submit to a Blood Draw, the Court Should Deny Certiorari in This Case

Even if the Court holds in *Birchfield* and its companion cases that a State may criminalize refusal to submit to a blood draw, further review would not be warranted here. As explained above, a blood draw intrudes far more deeply on interests protected by the Fourth Amendment than do the practices at issue in the *Birchfield* cases. *See* pp. 19-24, *supra.* The submissions of respondents, the state amici (including Texas), and the United States in *Birchfield* all confirm the conclusion that, regardless of whether a State may criminalize failure to consent to a blood draw, a warrantless, nonconsensual blood draw violates the Fourth Amendment. *See* pp. 24-29, *supra*.

Two other considerations also support a denial of further review in this case. Insofar as Texas needs to conduct blood draws over a driver's refusal to consent, it can quickly and easily obtain a warrant to do so. Furthermore, a decision that the State could criminalize refusal to submit to a blood draw would even further reduce the need for the kind of forced, warrantless blood draw that the State conducted in this case.

1. Because modern technology allows officers to secure warrants very quickly, there is little need for warrantless blood draws like the one in this case.

Several Texas counties have implemented programs that make obtaining a warrant nearly instantaneous. For example, a Lubbock County judge is available twenty-four hours a day to issue blood draw warrants electronically to local officers in the field. A-J Editorial Board, *Our View: Electronic Communications Help Speed Warrants in DWI Cases*, Lubbock Avalanche-Journal (Apr. 20, 2016, 12:09 AM), https://perma.cc/Z2CM-NEYZ. The Lubbock County Criminal District Attorney himself has confirmed that, because of electronic warrant procedures, "[i]t's no big deal to get a warrant anymore." *Id*.

Similarly, Galveston County is at the cutting edge of electronic warrant technology, through its "Safety Through Rapid Investigation of Key Evidence," or STRIKE, initiative. Chacour Koop, *Video Chat Program Aims to Bust More Drunken Drivers*, Galveston County: The Daily News (Mar. 18, 2015, 1:05 AM), https://perma.cc/K95S-ZD3G. That initiative enables a participating judge to use video chat and an electronic tablet to approve warrants twenty-four hours a day. *Id*. An officer can receive a blood draw warrant "before a wrecker arrives to tow cars." *Id*. One judge notes that the entire process takes "10 minutes and boom—we're done." *Id*. Neighboring Brazoria and Jefferson counties have similar video chat warrant programs. *Id*.

Furthermore, warrant initiatives result in lower refusal rates and stronger DWI evidence. NHTSA has developed and advocated the "No Refusal Initiative." During a "No Refusal Weekend," officers in a participating jurisdiction attempt to obtain warrants to administer blood draws on all drivers who refuse

to consent to a draw. NHTSA, *NHTSA No-Refusal Weekend Toolkit*, https://perma.cc/QLF8-BD6M**.** In Montgomery County, Texas, blood draw "refusal rates have dropped from fifty percent prior to the program, to as low as ten percent in 2010." NHTSA, *No Refusal Initiative Facts*, https://perma.cc/QLF8-BD6M (follow "No Refusal Initiative Facts" hyperlink under "Additional Earned Media"). Given the ease with which Texas jurisdictions may arrange for the ready availability of warrants in appropriate cases, the State has little need to conduct a warrantless, nonconsensual blood draw, such as the one in this case.

2. Finally, if the Court holds that a State may criminalize a refusal to consent to a blood draw, that holding itself would diminish the need for a State to engage in the much more intrusive practice at issue in this case. The ability to criminalize refusal would enable the State to impose on drivers who refuse a blood draw whatever criminal sanctions the State deems appropriate to achieve its goals. *See* NHTSA, DOT HS 811 098, Refusal of Intoxication Testing: A Report to Congress 20 (2008) (recommending making "refusal to take a [blood alcohol concentration] test . . . a criminal offense . . . [with] greater [penalties] than those for conviction on an impaired driving offense"). The result could be a decrease in the incidence of refusal. *See, e.g.*, *id.* at 8-9 (comparing the 18% refusal rate in New Mexico, where refusal is an administrative violation, with the 6% refusal rate in Nebraska, where it is a felony that carries the same penalties as a driving violation).

When a refusal does occur, a State's ability to

prosecute the driver for the refusal would vindicate its interests in highway safety and enforcement of its criminal laws to the same degree as blood alcohol evidence, but without the much greater intrusion of a forced blood draw. Moreover, the State's ability to vindicate its interests in that way would itself reduce the importance of the Texas Court of Criminal Appeals' judgment in this case, and hence make further review particularly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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