No. 11-1425

IN THE

Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

—v.—

TYLER G. MCNEELY,

Respondent.

ON WRIT OF CERTIORARI TO
THE MISSOURI SUPREME COURT

BRIEF FOR RESPONDENT

Stephen Douglas Bonney
ACLU Foundation of Kansas & Western Missouri
3601 Main Street
Kansas City, MO 64111
(816) 994-3311

Anthony E. Rothert
Grant R. Doty
ACLU of Eastern Missouri
454 Whittier Street
St. Louis, MO 63108
(314) 652-3114

Steven R. Shapiro
Counsel of Record
Ezekiel R. Edwards
Brandon J. Buskey
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
sshapiro@aclu.org

Stephen C. Wilson
Wilson & Mann, L.C.
2907 Independence Street, Suite C
P.O. Box 512
Cape Girardeau, MO 63702-0512
(573) 651-1950

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STATEMENT OF THE CASE

1. At approximately 2:08 a.m. on October 3, 2010, Respondent Tyler G. McNeely was stopped by Corporal Mark Winder, an officer with the Missouri State Highway Patrol, for traveling 56 mph in a 45 mph zone. J.A. 29-30. According to Winder, Respondent smelled of alcohol, his speech was slurred, and his eyes were glassy and bloodshot. J.A.31. Based on these observations, Winder administered a standard set of field sobriety tests. *Id*. Winder later testified that Respondent performed poorly on each of the tests. Specifically, Winder testified that Respondent was unable to complete the alphabet correctly. *Id*. He exhibited six out of six clues on the horizontal gaze nystagmus test. J.A. 32.[1] He was unable to stand on one leg. *Id.* And, he lost his balance when asked to walk and turn. *Id*. Each of these tests was recorded on a police video that is part of the record in this case. J.A. 43. After administering the field sobriety tests, Winder asked Respondent to submit to a breath test using a portable device. Respondent declined, and he was then placed under arrest for driving while intoxicated in violation of Mo. Rev. Stat. § 577.010. J.A. 33.

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[1] Horizontal gaze nystagmus refers to an involuntary jerking of the eye as it moves from side to side. Officers administering the nystagmus test are trained to observe tiny, uncontrollable eye contractions that indicate possible intoxication. Joseph E. Manno, et al., *Experimental Basis of Alcohol-Induced Psychomotor Performance Impairment*, *in* James C. Garriott, Medicolegal Aspects of Alcohol (James C. Garriott ed., 5th ed. 2008), at 347, 357. Because depressant drugs such as alcohol affect motor control of the eye, intoxicated individuals are unable to smoothly move their eyes from left to right while focusing on an object. *Id*.

Once Respondent had been placed in the patrol car, Winder asked him whether he would submit to a breath test at the police station. *Id.* When Respondent again declined, Winder took him directly to St. Francis Hospital. J.A. 33-34. Reading from Missouri's implied consent form, Winder informed Respondent that he had been arrested for driving while intoxicated and asked him whether he would submit to a blood test.[2] Respondent was also told that his driver's license would be immediately revoked for one year if he refused the blood test, and that evidence of his refusal could be used against him in a future prosecution. J.A. 34-35. Understanding the consequences of his refusal, Respondent chose not to consent. J.A. 35, 59.[3]

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[2] Although drawing an individual's blood and testing its contents are two distinct processes, Respondent adopts the convention of the lower courts for purposes of this brief and uses the terms "blood draw" and "blood test" interchangeably to refer to the process of taking an individual's blood, unless otherwise indicated. Both the blood draw and the blood test are searches under the Fourth Amendment. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989).

[3] Pursuant to Mo. Rev. Stat. § 577.020, '[a]ny person who operates a motor vehicle upon the [Missouri] public highways … shall be deemed to have given consent to … a chemical test or tests of the person's breath, blood, saliva or urine for the purpose of determining the alcohol or drug content of the person's blood." § 577.020.1. Missouri law also provides that this statutory consent can be withdrawn. Before the police may rely on the implied consent law to test someone who has been arrested for drunk driving, they must therefore inform the driver of the reason why they are requesting the test, that evidence of the driver's refusal to submit to the test "may be used against him," and that his driver's license shall be immediately revoked if he refuses to take the test. § 577.041.1. At that point, the driver may withdraw consent immediately or request 20 minutes to consult with an attorney. *Id.*

Winder then directed hospital personnel to administer the blood test over Respondent's objection and without a court order. J.A. 35. The blood test was administered at 2:33 a.m., J.A. 36, 59, twenty-five minutes after Respondent's car was initially stopped. Respondent was handcuffed throughout the procedure and his arms were restrained. Following the blood draw, Respondent was taken to jail where he received written notice that his license would be revoked for a year pursuant to Missouri's implied consent law because of his refusal to submit to breath and blood tests. J.A. 73. Respondent's blood alcohol content (BAC) was measured at 0.154. J.A. 60.[4]

2. Respondent filed a pretrial motion to suppress the results of the blood test, arguing that the compulsory blood draw without either a warrant or consent violated his rights under the Fourth

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In either event, once the driver makes clear that he will not submit to the test or tests, "the officer shall … serve the notice of license revocation personally upon the [driver] and shall take possession of any license to operate a motor vehicle issued by [Missouri] which is held by that person." *Id.* Having been stripped of his license on the spot, the driver is given a 15-day temporary permit and notice of his right to file a petition for review to contest the license revocation. *Id.*

A driver arrested for drunk driving who refuses to submit to testing has his license revoked for one year, even for a first drunk driving arrest. § 577.041.3. By contrast, a driver who agrees to be tested and has a BAC over .08 has his license suspended for 30 days, § 302.525.2(1), unless he has been arrested for another drunk driving offense within the past five years. § 302.525.2(2).

[4] The BAC measurement refers to grams of alcohol per deciliter of blood.

Amendment. J.A. 25.[5] After reciting the details of Respondent's arrest, Winder was asked on cross-examination whether there was "any particular exigent circumstance as you understand that from your training or emergency circumstance that dictated the need to immediately get blood from Mr. McNeely." J.A. 40. Winder's answer was "No." *Id.* Winder was then asked whether he had made any effort to contact the prosecuting attorney following Respondent's arrest to determine whether or not a warrant could be obtained in timely fashion. J.A. 41. His answer, again, was "No." *Id.* That answer led to the following exchange:

> Q. On that night were you aware that or were you aware whether or not there was a prosecuting attorney on call?
>
> A. I'm sure there was.
>
> Q. Okay. In your time as a highway patrolman, have you obtained search warrants to obtain blood from people that have been arrested for driving while intoxicated?
>
> A. Yes.
>
> Q. And it's correct, is it not, that there's basically a form that the prosecutor of this county has prepared for use by officers to fill out for an affidavit?
>
> A. Yes.

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[5] Respondent's suppression motion also raised a claim under Article I, Section 15 of the Missouri Constitution, which likewise prohibits unreasonable searches and seizures. The Missouri courts did not rule on that state constitutional claim and it is not at issue here.

Q. Have you filled those out before?

A. Yes.

Q. Let me show you what we've got marked as Defendant's Exhibit B [J.A. 61-69]. Is that the type of form that you're familiar with?

A. Yes.

Q. And are those available to you at the sheriff's department?

A. Yes, they're readily available.

Q. In the 17 and a half years that you've been a highway patrolman, do you have an estimate for us of the number of times that you've had to obtain a search warrant to get blood from a person arrested for driving while intoxicated?

A. Probably less than ten.

Q. On any of the times in your training or in your experience when you have wanted to get a search warrant, have you been unable to because of the unavailability of a prosecuting attorney?

A. No.

Q. Have you ever been unable to because of the unavailability of a judge?

A. No.

Q. On this particular night, did you have any reason to believe that you couldn't have gotten a search warrant because of the unavailability of a prosecutor or the unavailability of a judge?

A. No.

J.A. 41-42.

Finally, when asked why he had chosen not to seek a search warrant in this case when he had obtained search warrants in the past under similar circumstances without difficulty, Winder explained that he had read an "opinion piece" written by a prosecutor in the Missouri Attorney General's Office indicating that search warrants were no longer necessary as a result of a change in Missouri's implied consent law. J.A. 39-40.[6]

The only other witness at the suppression hearing was Sergeant Blaine Adams, a supervisor with the Missouri State Highway Patrol. He testified that he had received conflicting advice about the new language of the implied consent law and its impact on police practices. J.A. 49-51. On the one hand, the Highway Patrol had prepared a memorandum "suggest[ing], after detailed legal review, [that warrantless and non-consensual blood draws] only be used in exigent circumstances and then only on manslaughter/vehicular assault cases with serious physical or disabling injuries, after expending all

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[6] Several months before Respondent's arrest, the state legislature removed the words "then [no chemical test] shall be given" from the state law section discussing the significance of a suspect's refusal to consent to a blood test. § 577.041. The State's contention that this statutory change authorized warrantless blood draws in all DWI cases was not addressed by the Missouri Supreme Court, which wrote: "Because the warrantless blood draw in this case was a violation of Defendant's Fourth Amendment right to be free from unreasonable searches, there is no need to address the State's arguments based on Missouri's implied consent law." Pet. App. 21a n.9.

reasonable means to obtain a search warrant." J.A. 71-72. On the other hand, the County Prosecutor's office had taken the position that warrants were more critical in serious accident cases than in run-of-the-mill DWI arrests. J.A. 56. Neither his superiors at the Highway Patrol nor the County Prosecutor's office advised Sergeant Adams that police officers could or should ignore the warrant requirement in all DWI cases.

Sergeant Adams also testified that there was a 91% probability, based on studies he had read, that someone who shows four or more "clues" out of a total of six on the horizontal gaze nystagmus test has a blood alcohol level of .08 or higher. J.A. 47. And, while he testified that it generally takes "about two hours" to obtain a search warrant in Cape Girardeau County, J.A. 54, an exhibit introduced without objection from the prosecution documented six recent cases in which search warrants authorizing blood draws had been obtained in less than an hour. J.A. 70. In five of the cases, the time period from application to warrant was less than 30 minutes. *Id.*

3. Respondent's motion to suppress was granted by the trial court. Pet. App. 39a-46a. In an opinion that carefully considered and distinguished this Court's decision upholding a warrantless and non-consensual blood draw in *Schmerber v. California*, 384 U.S. 757 (1966), the trial judge explained:

> The facts [in this case] are substantially different than the facts in *Schmerber*. There was no accident. There was no investigation at the scene of the stop other than the field sobriety tests, which took

> less than ten minutes. The defendant was not injured and did not require emergency medical treatment. This was not an emergency, it was a run of the mill driving while intoxicated case. As in all cases involving intoxication, the Defendant's blood alcohol was being metabolized by his liver. However, a prosecutor was readily available to apply for a search warrant and a judge was readily available to issue a warrant. *Schmerber* is not applicable because the "special facts" of that case, the facts which established the exigent circumstances, did not exist in this case to justify the warrantless search.

Pet. App. 43a.

4. The Missouri Court of Appeals construed *Schmerber* differently. Pet. App. 23a-38a. In its view, *Schmerber* broadly authorizes a warrantless and non-consensual blood test whenever the police have probable cause to arrest someone for drunk driving, without regard to any other "special facts." Pet. App. 33a. Rather than reverse the trial court, however, the court of appeals transferred the case to the Missouri Supreme Court (rendering its opinion entirely advisory), "in light of the general interest and importance of the issues involved." Pet. App. at 24a.

5. The Missouri Supreme Court unanimously affirmed the trial court's ruling. Pet. App. 1a-22a. Noting that warrantless searches are *per se* unreasonable unless they fall within certain narrow exceptions, the Missouri Supreme Court weighed society's interest in preventing drunk driving against

the defendant's Fourth Amendment interest in freedom from unreasonable searches and concluded that the fact that the blood alcohol level dissipates over time does not alone, and without regard to other factors, qualify as an exigent circumstance under *Schmerber*. Pet. App. 2a-3a, 20a-22a. Disagreeing with the State's contention that *Schmerber* established a categorical rule applicable to all DWI cases, the Missouri Supreme Court ruled that the determination of whether exigent circumstances exist must be made on a case-by-case basis. Pet. App. 20a. "Because there was no accident to investigate and there was no need to arrange for the medical treatment of any occupants," Pet. App. 3a, the court found on the facts of this case that "there was no delay that would threaten the destruction of evidence before a warrant could be obtained." *Id.* "Additionally," the court noted, "there was no evidence here that the patrolman would have been unable to obtain a warrant had he attempted to do so." *Id.*

6. On March 6, 2012, the State's motion for rehearing was denied without dissent. Pet. App. 47a.

SUMMARY OF ARGUMENT

Drunk driving is a serious problem and a cause for serious concern. The issue in this case, however, is not whether drunk drivers can be removed from the road to promote public safety. Under Missouri law, Respondent's license was immediately revoked for one year when he refused to consent to either a breath or blood test following his arrest. Similar laws exist throughout the country.

Nor does this case present the issue of whether the police can ever, under any circumstances, require

someone arrested for drunk driving to submit to a warrantless and non-consensual blood test. *Schmerber* upheld such a test and Respondent does not ask this Court to overrule *Schmerber*, properly construed.

The issue in this case is whether the police can compel a warrantless blood test in *every* DWI case, even when the "special facts" identified in *Schmerber* are missing, and even when there is no reason to believe that a search warrant could not be obtained in a timely fashion. Petitioner's effort to stretch *Schmerber* that far cannot be reconciled with the language of *Schmerber* itself, or with this Court's Fourth Amendment jurisprudence more generally.

This Court has repeatedly emphasized the importance of the warrant requirement, especially in the criminal context. This Court has also repeatedly stressed that *per se* exceptions to the warrant requirement are disfavored. Thus, while the Court has recognized the destruction of evidence as an exigent circumstance that can justify an exception to the warrant requirement, it has typically required at the same time that the existence of exigent circumstances be determined on a case-by-case basis rather than categorically. *Richards v. Wisconsin*, 520 U.S. 385 (1997). That is especially true when heightened privacy interests are at stake. Invasions of the home are one example; intrusions on bodily integrity are another.

More specifically, whether a warrantless blood test is unreasonable in any given case should be determined based on the totality of circumstances, including: whether there was anything that delayed the officers at the arrest scene, such as an accident or

injury; whether there was more than one officer at the scene; how far the police had to travel to a hospital (or other site where the blood was drawn); what the warrant procedures are in the particular state; how long it typically takes to obtain a warrant in the jurisdiction; whether and how the interval between time of arrest and time of testing affects the admissibility of BAC evidence under state evidentiary rules; and whether the officer(s) made any effort at all to obtain a warrant. All these facts are or should be well known to local police and magistrates.

Petitioner's argument in favor of a *per se* rule that would allow warrantless blood tests whenever there is a probable cause arrest for drunk driving purports to be based on a totality-of-the circumstances test. The State employs a version of the totality-of-the circumstances test, however, that relies on categorical balancing rather than fact-specific determinations. Such categorical balancing would be more appropriate if this were a "special needs" case where the State's primary interest was unrelated to traditional law enforcement concerns. It is not. This is a criminal case and the State's interest in obtaining Respondent's blood sample is to secure his criminal conviction.

In any event, Petitioner overstates the need for warrantless blood tests, and understates the affront to personal privacy and dignity when the States overrides an individual's objection and sticks a needle in his arm.

When assessing need in other Fourth Amendment contexts, the Court has looked at the practice of other states as an objective measure.

Here, the fact that approximately half of all states prohibit the warrantless blood draw that took place in this case undermines Missouri's argument that it served a compelling need. There is no reason to believe that other states are less concerned than Missouri about the problem of drunk driving, or have been less successful in prosecuting DWI cases.

Different states also have different procedures for obtaining search warrants. Since *Schmerber* was decided more than 60 years ago, it has become far more common for states (and the federal government) to permit telephonic warrant applications. *See Steagald v. United States*, 451 U.S. 204 (1981). With rapidly evolving technology, electronic applications are likewise increasing. As the time needed to obtain a search warrant decreases, the argument in favor of warrantless blood tests diminishes as well. This Court should not adopt a *per se* Fourth Amendment rule based on assumptions about the time needed to obtain a search warrant when that time can and does vary from jurisdiction to jurisdiction, and where technology continues to increase the speed with which warrants can be obtained. Nor should the Court adopt a Fourth Amendment rule that discourages states from expediting their warrant processes.

Similarly, states have adopted a checkerboard set of rules about the admissibility of "retrograde extrapolation" evidence. The theory of retrograde extrapolation is that it is possible to work backwards from the time of testing to determine a driver's blood alcohol level at the time of arrest. A few states categorically exclude it, most do not, and some apparently have not yet taken a position. Serious

questions have been raised regarding the reliability of such evidence, but this case is not the occasion for the Court to consider those questions. The argument that critical evidence will be destroyed unless the State preserves the right to engage in warrantless blood tests in all cases necessarily has less force in states that permit retrograde extrapolation to be considered by the fact-finder. The *per se* rule that Petitioner promotes would ignore those distinctions as well.

The natural dissipation of alcohol in the blood is also very different than other cases where the Court has worried about the destruction of evidence. On the one hand, as Petitioner points out, the dissipation of alcohol is natural and inevitable. On the other hand, it is not the "now or never" situation that the Court has confronted in other cases, *see Roaden v. Kentucky*, 413 U.S. 496, 504 (1973), for at least two reasons. First, once drugs are flushed down the toilet, they are gone instantly and forever. The dissipation of blood, by contrast, is gradual and predictable. For example, Respondent's blood alcohol level was 0.154 when he was tested 25 minutes after his arrest. Using commonly accepted dissipation rates, it would have been almost 4 hours before his BAC was below legal limits. Second, once drugs are flushed down the toilet, the prosecution's case often disappears with them. That is not so in DWI cases. Someone who fails the field sobriety tests still faces a substantial likelihood of conviction, and that likelihood is further increased by the fact that most states, including Missouri, permit an adverse inference to be drawn from the defendant's refusal to submit to a breath or blood test.

Petitioner's effort to minimize the privacy invasion on the other side of the scale is unpersuasive. To be sure, the Court stated in *Schmerber* that blood tests are routine and generally safe, but that comment must be understood in context. This Court's cases recognize a spectrum of privacy interests. A blood test may not be as invasive as the surgical operation to remove a bullet that this Court considered in *Winston v. Lee*, 470 U.S. 753 (1985), or the stomach pump at issue in *Rochin v. California*, 342 U.S. 165 (1952). Still, this Court's cases leave little doubt that any bodily intrusion represents a significant invasion of privacy. Moreover, very few people have their blood taken while they are handcuffed and subject to restraint by the police.

In short, this Court properly rejected a *per se* rule in *Schmerber* and should do so again. Petitioner argues that a *per se* rule is easier for the police to apply. Even if true, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). Petitioner's argument also begs the question of whether its *per se* rule allows exceptions to the warrant requirement that are not justified by exigent circumstances. If so, the *per se* rule cannot be sustained under the Fourth Amendment. *Arizona v. Gant*, 556 U.S. 332 (2009). Reasoned judgment is an inescapable part of the Fourth Amendment's reliance on a reasonableness standard. *Maryland v. Wilson*,

519 U.S. 408, 422-23 (1997) (Kennedy, J., dissenting).[7]

On the facts of this case, there is no reason to disturb the finding of the Missouri state courts that the police failed to carry their burden of proving exigent circumstances. *Minnesota v. Olson*, 495 U.S 91, 100 (1990). According to everyone involved, this was a run-of-the-mill stop. There was no accident and there were no injuries. The arresting officer testified that he had obtained warrants in the past under similar circumstances without any difficulty, that his decision not to seek a warrant in this case was prompted by a legal opinion he had read rather than any sense of urgency informed by his prior experience, both a prosecutor and a judge were on call, and the record revealed that warrants could be obtained expeditiously, even during nighttime.

[7] Should the Court decide that *Schmerber* did announce a *per se* rule authorizing warrantless blood tests in all DWI cases, the Court should now modify that holding in favor of a totality-of-the-circumstances test. The Court has proven its willingness to revisit *per se* rules when subsequent experience reveals that the factual assumptions underlying the rule are invalid. *See Gant*, 556 U.S. at 341. As demonstrated below, technological developments since *Schmerber* have altered the legal landscape in many states by reducing the time needed to obtain a warrant and increasing the time available to obtain an admissible blood test result. Those changes, and the disparate state practices they have produced, undermine any rationale for a *per se* rule.

ARGUMENT

I. *PER SE* EXCEPTIONS TO THE WARRANT REQUIREMENT ARE RARELY PROPER AND RARELY UPHELD.

Petitioner urges this Court to adopt a *per se* rule authorizing warrantless blood draws in *all* DWI cases based solely upon a police officer's determination of probable cause. This Court's Fourth Amendment jurisprudence takes the opposite approach: it favors a judicial role under the Fourth Amendment and disfavors *per se* exceptions to the warrant requirement.

A. The Warrant Requirement Plays A Critical Role In Protecting Personal Privacy.

The Court's classic statement regarding the warrant requirement was written more than 60 years ago:

> The point of the Fourth Amendment, which is often not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14 (1948). *See also Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971).

Accordingly, "it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Mincey v. Arizona*, 437 U.S. at 390 (internal quotations omitted)(citing *Katz v. United States*, 389 U.S. 347, 357 (1967)). *See also Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (exceptions to warrant requirement "jealously and carefully" drawn) (citing *Jones v. United States*, 357 U.S. 493, 499 (1958)) (quotations omitted).

More is typically required than an officer's determination of probable cause to justify a warrantless search. "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity." *Johnson v. United States*, 303 U.S. at 14. *See also Vale v. Louisiana*, 399 U.S. 30, 34 (1970); *Katz v. United States*, 389 U.S. at 357.

This Court has also recognized that the warrant requirement has special force when the privacy interests at stake lie at the core of the Fourth Amendment. The home is one example. *Payton v. New York*, 445 U.S. 573 (1980)("The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."); *Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.") (citing *Silverman v. United States,* 365 U.S. 505, 511 (1961) (quotations omitted)).

Bodily intrusions are another example. As the Court stated in *Schmerber*, 384 U.S. at 770, "warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned." *See also Winston v. Lee*, 470 U.S. at 760 (intrusions into the human body implicate the "most personal and deeply rooted expectations of privacy").

B. *Per Se* Exceptions To The Warrant Requirement Are Generally Disfavored.

When reviewing the constitutionality of warrantless searches, the Court has engaged in a balancing process, weighing the individual's privacy interests against the degree to which a warrantless search is necessary to advance legitimate government interests. *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). However, the Court has repeatedly cautioned in conducting that inquiry that "[t]here is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." *Ker v. California*, 374 U.S. 23, 33 (1963)) (citations and quotations omitted).

Thus, "for the most part *per se* rules are inappropriate in the Fourth Amendment context." *United States v. Drayton*, 536 U.S. 194, 201 (2002). As the Court explained in *Ohio v. Robinette*, 519 U.S. 33, 39 (1996):

> In applying [the reasonableness] test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry. Thus, in *Florida v. Royer,* 460 U.S. 491 (1983), we expressly disavowed any "litmus-paper test" or single "sentence or

> ... paragraph ... rule," in recognition of the "endless variations in the facts and circumstances" implicating the Fourth Amendment. *Id*. at 506. Then, in *Michigan v. Chesternut,* 486 U.S. 567 (1988), when both parties urged "bright-line rule[s] applicable to all investigatory pursuits," we rejected both proposed rules as contrary to our "traditional contextual approach." *Id.* at 572–573. And again, in *Florida v. Bostick,* 501 U.S. 429 (1991), when the Florida Supreme Court adopted a *per se* rule that questioning aboard a bus always constitutes a seizure, we reversed, reiterating that the proper inquiry necessitates a consideration of "all the circumstances surrounding the encounter." *Id.,* at 439.

"[L]largely avoiding categories and protocols for searches," *United States v. Banks*, 540 U.S. 31, 36 (2003), the Court has instead

> treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones.

Id. (citations omitted). *See also Ker v. California*, 374 U.S. at 33 ("standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application"); *Go-Bart Importing Co. v.*

United States, 282 U.S. 344, 357 (1931); *United States v. Rabinowitz*, 339 U.S. 56 (1950).

Petitioner's argument in favor of a *per se* rule purports to be an application of the totality-of-the-circumstances test, but the version of that test that Petitioner applies leaves no room to consider the actual facts of a particular case. Pet. Br. at 28-42. Even as a form of categorical balancing, Petitioner's argument is unpersuasive. *See* Point II, *infra*. More fundamentally, this Court has recognized that the reasonableness of any search under the Fourth Amendment is, in most cases, a fact-specific determination.

C. The Exigent Circumstances Exception To The Warrant Requirement Reflects The Court's Preference For A Totality-Of-The-Circumstances Test.

As Petitioner correctly notes, this Court has held that the potential destruction of evidence may constitute an exigent circumstance justifying a warrantless search. *Kentucky v. King*, 131 S. Ct. 1849, 1856-57 (2011). But, this Court has also warned against the adoption of *per se* rules in cases involving the potential destruction of evidence.

Most notably, in *Richards v. Wisconsin*, 520 U.S. 385 (1997), the Court rejected a blanket exception to the knock-and-announce rule in all felony drug cases. The Court acknowledged that such cases often pose a threat of physical violence and a risk that evidence could be destroyed if the suspect were alerted to the presence of the police. The Court further acknowledged that such considerations could justify an exception to the knock-and-announce rule on particular facts.

Indeed, the Court found that the facts presented in *Richards* warranted an exception. Nevertheless, the Court ruled that the Fourth Amendment required a "case-by-case evaluation," *id.* at 392, because the facts justifying a no-knock search might not be present in every felony drug case.

Richards is consistent with the approach that this Court has taken in other exigent circumstances cases. For example, in *Warden v. Hayden*, 387 U.S. 294, 298 (1967), the Court carefully reviewed the facts before concluding, "[u]nder the circumstances of this case," that the police were engaged in hot pursuit of a dangerous felon when they entered a home without a warrant, and therefore did not violate the Fourth Amendment. Similarly, in *Brigham City, Utah v. Stuart*, 547 U.S. 398, 406 (2006), the Court held that police officers acted reasonably "under the circumstances" when they entered a home without a warrant based on a reasonable belief that someone inside might be seriously injured. And, the Court's decision to uphold the admissibility of fingernail scrapings taken without a warrant and without consent in *Cupp v. Murphy*, 412 U.S. 291 (1973), emphasized the fact that, after refusing to consent to fingernail samples, Cupp "put his hands behind his back and appeared to rub them together. He then put his hands in his pockets, and a 'metallic sound, such as keys or change rattling' was heard." *Id.* at 296.

Numerous other cases have likewise applied a totality-of-the-circumstances test when weighing a claim of exigent circumstances. *See, e.g., United States v. Banks*, 540 U.S. 31 (2003)(15 to 20-second wait before forcible entry reasonable where officers had reasonable suspicion to believe suspect might

destroy drugs); *Minnesota v. Olson*, 495 U.S. 91 (1990) (warrantless home entry unreasonable where suspect allegedly played minor role in murder); *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (warrantless home entry unreasonable in part because suspect arrested on nonjailable DWI offense); *Mincey v. Arizona,* 437 U.S. at 393-94 (finding no exigent circumstances for a warrantless home entry where there was no indication that evidence would be destroyed and no showing that police lacked sufficient opportunity to obtain warrant); *Ker v. California*, 374 U.S. 23, 40 (1963) (upholding warrantless entry into the home of an individual suspected of marijuana possession because of reasonable fear that evidence would be destroyed but cautioning that the decision was based on "the particular circumstances of this case"); *see also Chimel v. California*, 395 U.S. 752 (1969)(search of arrestee's entire house incident to arrest unreasonably extended beyond the area under the arrestee's control).

There is no reason for the Court to adopt a different approach here. Whether a warrantless blood test is unreasonable in any given case should be determined based on the totality of circumstances, including: whether there was anything that delayed the officers at the arrest scene, such as an accident or injury; whether there was more than one officer at the scene; how far the police had to travel to a hospital (or other site where the blood was drawn); what the warrant procedures are in the particular state; how long it typically takes to obtain a warrant in the jurisdiction; whether and how the interval between time of arrest and time of testing affects the admissibility of BAC evidence under state

evidentiary rules; and whether the officer(s) made any effort at all to obtain a warrant. Each of these facts is or should be well known to local police and magistrates.

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), is not to the contrary. Although the Court in that case categorically upheld compulsory drug and alcohol tests for railway workers after "major accidents," it was careful to note that the testing program in *Skinner* was designed to address "'special needs' beyond normal law enforcement." *Id*. at 620. This is not a "special needs" case. As Justice Kennedy stated in *Ferguson v. City of Charleston*, 532 U.S. 67, 898 (2001)(Kennedy, J., concurring): "The traditional warrant and probable cause requirements are waived in our [special needs] cases on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes."

Petitioner argues that a categorical exception to the warrant requirement is nonetheless appropriate in *all* DWI cases because the destruction of evidence is inevitable in *every* case. There is a crucial difference, however, between inevitable and immediate when determining whether the police face a genuine emergency. The exigent circumstances exception only applies when the exigency makes it impracticable to secure a warrant. Thus, the relevant question is not whether alcohol in the blood will dissipate over time. It is whether there is time to obtain a warrant that safeguards the defendant's constitutional interest in bodily integrity and personal dignity without unduly impeding the state's ability to prosecute its case. Because there is no

categorical answer to that question, *see* Point II, *infra*, a *per se* exception to the warrant requirement is neither necessary nor appropriate.

Where the answer to the balancing question does lead to a categorical answer, the Court has on occasion recognized *per se* exceptions to the warrant requirement based on exigent circumstances. For example, the police may conduct a search incident to a lawful arrest without a warrant, *Chimel v. California*, 395 U.S. 752 (1969), and cars stopped on the highway with probable cause may be subject to a warrantless search, *Carroll v. United States*, 267 U.S. 132 (1925). But those exceptions do not assist Petitioner here.[8]

First, both exceptions have a long history that is lacking for warrantless blood draws. In *United States v. Robinson*, 414 U.S. 218, 224 (1973), the Court observed that "the validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation." The automobile exception is likewise rooted in the Court's historical treatment of a movable vehicle as a *per se* exigent

[8] Although there is language in *Schmerber* referring to the warrantless blood draw as a search incident to arrest, 384 U.S. at 771, the Court has never treated *Schmerber* as a simple search-incident-to-arrest case. *E.g. Georgia v. Randolph*, 547 U.S. 103, 116 n.6 (2006) (treating *Schmerber* and *Chimel* as separate exceptions to the warrant requirement). As *Schmerber* itself noted, the considerations supporting searches incident to arrest are of little moment with regard to "intrusions beyond the body's surface." *Id.* at 769. In addition, the blood draws at issue in *Schmerber* and this case were not contemporaneous with arrest. Had the Court regarded the blood draw in *Schmerber* as nothing more than a search incident to arrest, there would have been no need for the Court's extended discussion of the "special facts" in that case.

circumstance authorizing police to seize and search the vehicle. *See California v. Acevedo*, 500 U.S. 565, 569 (1991)(tracing historical roots of the automobile exception to 18th century treatment of movable vehicles).

Second, the Court has held that the driver of a car has a diminished expectation of privacy in his vehicle. *Rakas v. Illinois*, 439 U.S. 128, 153-54 (1978). Someone who has just been arrested has a diminished expectation of privacy, as well, when the police search his person and the immediately surrounding vicinity looking for weapons that might threaten the safety of the arresting officers. *United States v. Robinson*, 414 U.S. at 228. A violation of bodily integrity raises privacy interests of a wholly different magnitude.

Finally, the law enforcement interests served by the automobile exception and the exception for searches incident to arrest would be entirely frustrated by the requirement that the police first obtain a warrant. As explained in more detail below, that is not true for warrantless blood draws in every DWI case. *See* Point IIE, *infra.*

This Court's recent decision in *Arizona v. Gant*, 556 U.S. 332 (2009), demonstrates how *per se* exceptions to the warrant requirement are subject to mission creep and why they must be carefully limited. In *New York v. Belton*, 453 U.S. 454 (1981), the Court held that the police may search the entire passenger area of a car as an incident to the arrest of someone driving the car. In *Thornton v. United States*, 541 U.S. 615 (2004), the Court extended the *Belton* rule to someone arrested outside the car. Four years later, the Court reversed course in *Gant*,

holding that the rationale for a search incident to arrest no longer applied once the suspect was handcuffed and inside the police cruiser. Under those circumstances, the Court concluded, "[c]onstruing *Belton* broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis." 556 U.S. at 347.

A warrantless blood draw in the absence of true exigency is, for the same reason, "anathema to the Fourth Amendment."

D. *Schmerber* Did Not Establish A Per Se Rule Authorizing Warrantless Blood Draws In All DWI Cases.

The language of *Schmerber* does not support a *per se* exception to the warrant requirement. At the outset, the Court carefully framed the question presented:

> Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of petitioner's blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test . . . . The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

384 U.S. at 770.

Evaluating the totality of the circumstances to decide whether the officers faced a genuine emergency, the Court recognized that alcohol naturally dissipates from the blood, but did not rest its decision on that fact alone. *Id.* at 770-71; *cf. Banks*, 540 U.S. at 36 (Court's totality-of-the-circumstances test has recognized "factual considerations of unusual, albeit not dispositive, significance."). Instead, the *Schmerber* Court wrote:

> *Particularly in a case such as this*, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. *Given these special facts*, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.

384 U.S. at 770-71 (emphasis added).

Even more tellingly, the Court ended its opinion with these words:

> We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited

> conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Id. at 772.

Subsequent decisions from the Court confirm that *Schmerber* applied a totality-of-the-circumstances approach to assess the reasonableness of "intrusions beyond the body's surface." *Id.* at 769. In *Tennessee v. Garner,* 471 U.S. 1, 8-9 (1985), *Schmerber (*along with *Cupp*) was included among a list of cases decided on the basis of their "particular facts" under a totality-of-the-circumstances test. In *Winston v. Lee*, the Court explained the holding in *Schmerber* by stating:

> The Fourth Amendment neither forbids nor permits all . . . intrusions [into the human body]; rather, the 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."

470 U.S. at 760 (quoting *Schmerber*). Applying that standard, the Court then ruled that the Fourth Amendment barred the State from forcing a robbery suspect to undergo surgery to remove a bullet from his chest.

Petitioner contends that once the police have established probable cause, the only variable under *Schmerber* is the manner in which the blood test is conducted. Pet. Br. at 39-41. But the quoted language from *Schmerber* gives equal weight to whether or not a warrantless blood test is "justified in the circumstances." *See also Schmerber*, 384 U.S.

at 768 ("[T]he questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness.").

E. A Totality-of-the-Circumstances Test Would Not Unduly Impede Law Enforcement Interests.

Despite Petitioner's suggestions to the contrary, maintaining the totality-of-the-circumstances test in this case would not unduly impede law enforcement interests. It is of course true that a totality-of-the-circumstances test will require officers to consider a variety of facts potentially affecting their ability to obtain a timely warrant. Yet, this Court has required police to make swift, even life-or-death decisions under far more ambiguous circumstances.

For instance, in *Tennessee v. Garner*, 471 U.S. 1 (1985), the Court held that officers may not use deadly force unless such force is necessary to thwart the suspect's escape and the officer has probable cause to believe the suspect poses a significant threat of death or serious physical injury to the officer or others. Responding to the assertion that a rule limiting the use of deadly force unduly "requires the police to make impossible, split-second evaluations of unknowable facts," the Court noted that police must routinely make difficult judgments with limited knowledge under prevailing Fourth Amendment standards. *Id.* at 20. As one of those difficult judgments, the *Garner* Court cited the stop-and-frisk rules announced in *Terry v. Ohio*, 392 U.S. 1, 20

(1968) (holding that police may stop an individual upon reasonable suspicion that criminal activity is taking place and that police may frisk the individual upon reasonable suspicion that the individual presents a danger to officer or others).

Petitioner and its *amici* argue that a *per se* rule is necessary in this case to remove any uncertainty for police officers about when a warrantless blood draw is permissible. But that objection could be raised in every context in which this Court has held that the constitutionality of police action depends on the totality of circumstances, including cases like *Garner* where life and death are at stake. Moreover, the price of certainty should not be the sacrifice of Fourth Amendment principles that would result from a rule sanctioning warrantless searches in the absence of truly exigent circumstances.

As Justice Kennedy observed in *Maryland v. Wilson*: "The distinguishing feature of our criminal justice system is its insistence on principled, accountable decisionmaking in individual cases. If a person is to be seized, a satisfactory explanation for the invasive action ought to be established by an officer who exercises reasoned judgment under all the circumstances of the case. This principle can be accommodated even where officers must make immediate decisions to ensure their own safety." 519 U.S. at 422 (1997) (Kennedy, J., dissenting).

II. THE *PER SE* RULE THAT PETITIONER SEEKS IS NOT REASONABLE UNDER THE FOURTH AMENDMENT.

As explained above, this Court has, "for the most part," *United States v. Drayton*, 536 U.S. at 201,

eschewed categorical balancing in deciding whether to apply one of the few "specifically established and well-delineated exceptions" to the warrant requirement, *see Katz v. United States*, 389 U.S. at 357, including the exigent circumstances exception. The Court has instead focused on the particular facts before it in balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion," *United States v. Place*, 462 U.S. 696, 703 (1983). But even judged categorically, a *per se* rule authorizing warrantless blood tests in all DWI cases does not pass the reasonableness test.

Petitioner's argument in favor of a *per se* rule rests on two basic claims. First, evidence of a driver's blood alcohol level is critical to ensure effective DWI enforcement. Second, the warrant requirement is impractical in every case because alcohol naturally dissipates over time within the body. Neither claim supports the *per se* rule that Petitioner is seeking.

A. At Least Half The States Prohibit Warrantless Blood Draws In Run-Of-The-Mill DWI cases.

Petitioner's insistence that blood test evidence is critical in all cases – and justifies an exception to the warrant requirement - is contradicted by the laws in at least half the states that prohibit warrantless blood draws in run-of-the-mill DWI cases.[9]

[9]Some states have enacted general prohibitions against warrantless blood draws while other states have prohibited warrantless blood draws except in cases involving a death or

"In evaluating the reasonableness of police procedures under the Fourth Amendment," this Court has often "looked to prevailing rules in individual jurisdictions." *Tennessee v. Garner*, 471 U.S. at 15-16 (citing *United States v. Watson*, 423 U.S. 411, 421-22 (1976)). Thus, for example, as support for its holding that the Fourth Amendment prohibits the use of lethal force to apprehend a fleeing felon absent a significant threat of death or serious bodily injury to the officer or others, the Court noted in *Garner* that fewer than half the states had retained the common law rule allowing deadly force against any fleeing felon.[10] Almost exactly the same ratio exists in this case, with about half the states prohibiting warrantless blood draws in either

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serious bodily injury. *See* Ala. Code § 32-5-192(c)); Alaska Stat. Ann. §§ 28.35.032(a), 28.35.035(a); Ariz. Rev. Stat. Ann. § 28-1321(D)(1); Conn. Gen. Stats. Ann. §§ 14-227b(b), 14-227c(b); Fla. Stat. Ann. § 316.1933(1)(a); Ga. Code Ann. § 40-5-67.1(d), (d.1); Haw. Rev. Stat. §§ 291E-15, 291E-21(a); Iowa Code Ann. §§ 321J.9(1), 321J.10(1), 321J.10A(1); Kan. Stat. Ann. § 8-1001(b), (d); Ky. Rev. Stat. Ann. § 189A.105(2); Md. Code Ann., Transp. § 16-205.1(b)(1), (c)(1); Mass. Gen. Laws ch. 90 § 24(1)(e), (f); Mich. Comp. Laws Ann. § 257.625d(1); Mont. Code Ann. § 61-8-402(4), (5); N.M. Stat. Ann. § 66-8-111(A); N.Y. Veh. & Traf. Law §§ 1194(2)(a)(4)(b)(1), 1194(3); N.D. Cent. Code Ann. §§ 39-20-01.1, 39-20-04(1); N.H. Rev. Stat. Ann. §§ 265-A:14(I), 265-A:16; Okla. Stat. Ann. tit. 47, § 753; Or. Rev. Stat. Ann. § 813.100(2); R.I. Gen. Laws §§ 31-27.2.1(b), 31-27-2.9(a); S.C. Code Ann. §§ 56-5-2946, 56-5-2950(B) (as construed in *State v. Mullins*, 489 S.E.2d 923, 924 (1997)); 23 Vt. Stat. Ann. tit. 23 § 1202(b), (f); ; Wash. Rev. Code Ann. § 46.20.308(3), (5); W. Va. Code Ann. § 17C-5-7 (as construed in *State v. Stone*, 728 S.E.2d 155, 167-68 (W. Va. 2012)); Wyo.Stat.Ann. § 31-6-102(d).

[10] Fourth Amendment rules are not determined by state law, *Virginia v. Moore*, 553 U.S. 164 (2008), but *Garner* illustrates how the Court's assessment of reasonableness can be informed by relevant state practices.

all cases or in every case that does not involve a death or serious bodily injury. *See* n.9, *supra*.[11]

Explaining the relevance of this comparison, the *Garner* Court observed:

> We would hesitate to declare a police practice of long standing "unreasonable" if doing so would severely hamper effective law enforcement. But the indications are to the contrary. There has been no suggestion that crime has worsened in any way in jurisdictions that have adopted, by legislation or departmental policy, rules [limiting the use of lethal force].

471 U.S. at 19. The same observation applies to this case. Petitioner has cited no statistics, and Respondent is aware of none, suggesting that the drunk driving problem is greater or the DWI conviction rate is lower in states that have prohibited warrantless blood draws in whole or in part. And, because compulsory blood draws do not have the common law history of the fleeing felon rule that the Court rejected in *Garner*, the experience of other states should carry even more weight in evaluating Petitioner's claimed need for a *per se* exception to the warrant requirement.

The implicit assumption underlying Petitioner's argument is that the absence of chemical test results makes it more difficult to convict in DWI cases. Even if that were so, it would not lead to the

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[11] The compulsory testing for railroad employees that this Court upheld in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), similarly applied only when there was a death, significant injury, or substantial property damage. *Id*. at 609.

per se exception to the warrant requirement that Petitioner seeks. As this Court has observed: "The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that [individual] privacy … may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *Mincey v. Arizona*, 437 U.S. at 392.[12]

In fact, the evidence is far more ambiguous. The National Highway and Traffic Safety Administration (NHTSA) recently published a study of the relationship between breath test refusals and DWI conviction rates in five counties across the nation that were "selected to provide a range of factors believed to affect prosecution." NHTSA, Breath Test Refusals & Their Effect on DWI Prosecution (July 2012) (*Breath Test Refusals*), at v, *available at* http://www.nhtsa.gov/staticfiles/nti/pdf/811551.pdf. The authors of the study concluded that "our results do not indicate a clear relationship between refusing a BAC test and the probability of conviction for DWI/DUI." *Id.* at 44. Conversely, "refusers in sites where data was available received more severe sanctions than non-refusers. Average jail sentences and average fines were consistently higher for refusers than for non-refusers in all four sites for which data was available." *Id.* at 46.

These results were consistent with the conclusion of another NHTSA report published in

[12] Thus, the statement in *Schmerber* that blood test results are "a highly effective means of determining the degree to which a person is under the influence of alcohol," 384 U.S. at 771, does not resolve the question of when warrants are required.

2008, which likewise found that "BAC test refusal does not necessarily lead to lower conviction rates, even if the lack of BAC concentration information makes prosecution more difficult." NHTSA, Refusal of Intoxication Testing: A Report to Congress (Sept. 2008), at 10, *available at* http://www.nhtsa.gov/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/811098.pdf.

Summarizing this information in August 2012, the NHTSA wrote: "The relationship between refusals and conviction rates is complex." NHTSA, Traffic Tech: Breath Test Refusals and DWI Prosecution (August 2012), *available at* http://www.nhtsa.gov/staticfiles/traffic_tech/811653.pdf.

> If an officer has the probable cause to initiate an impaired driving stop and make the arrest, then the BAC serves then as additional, but not the only, evidence of impaired driving. Furthermore, many DWI cases never get to trial – the suspect pleads guilty (or not) based on his or her own belief about the strength of the case. As the data indicate that those who refuse often receive stronger sanctions, many drivers who have experience with the court system may choose to provide a BAC rather than face additional sanctions. It is also possible that a prosecutor may be even more motivated to present a strong case when there is a refusal, and devote increased attention to this kind of case.

Ibid.

In addition, Petitioner's claim of overriding need ignores the fact that approximately 80% of drivers nationwide consent to a breath test when stopped for drunk driving. *Breath Test Refusals*, at v.[13] Petitioner does not even attempt to explain why the State needs to put a needle in the arm of someone who has already submitted to a voluntary breath test. If that case can be made on a particular set of facts, it should be made to a neutral and detached magistrate. *See Winston v. Lee*, 470 U.S. at 765 (noting that the State had "substantial additional evidence" that mitigated the need for compelled surgery).[14]

Finally, while BAC evidence may be helpful to the government in prosecuting DWI cases,[15] it is only indispensable if the government chooses to prosecute under a statute where a BAC reading of .08 or above is an element of the crime. Every state and the District of Columbia now has such laws, in part because Congress has made the adoption of such laws a condition of federal highway funds. 23 U.S.C. § 163(a); U.S. Br. at 19. Every state, including

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[13] While the refusal rate varies among the states, there has been "relatively little change" in the nationwide rate since at least 1987. *Breath Test Refusals*, at v.

[14] The United States appears to recognize this flaw in the argument for a *per se* rule, but its only response is that it is irrelevant here since Respondent objected to both the breath test and the blood test. Brief of the United States as *Amicus Curiae* in Support of Petitioner (U.S. Br.) at 30 n.5. The government's reasoning is exactly backwards. It is the facts of Respondent's case that are irrelevant to the *per se* rule that the United States and Petitioner are advocating.

[15] Of course, it can also be helpful to the defendant if it reveals a BAC below the legal limit.

Missouri, also has what the National Highway and Traffic Safety Administration describes as "standard DWI laws," which make it a crime to drive while impaired or intoxicated. *See generally* NHTSA, Digest of Impaired Driving and Selected Beverage Control Laws (26th ed. October 2012) (collecting state laws as of June 1, 2011), *available at* http://www.nhtsa.gov/staticfiles/nti/pdf/811673.pdf.

BAC evidence is not an element of the crime in "standard" DWI prosecutions. In Missouri and elsewhere, "[t]he State is not required to produce results of a chemical test to prove intoxication. It has long been held that circumstantial evidence may prove the elements of the offense." *State v. Hall*, 201 S.W.3d 599, 603 (Mo. Ct. App. 2006)(internal quotations and citations omitted). The state can, and typically does, build its case around the arresting officer's observations, the results of one or more field sobriety tests, and a negative inference that can be drawn from the driver's refusal to submit to breath or blood testing. *See South Dakota v. Neville*, 459 U.S. 553 (1983). According to one of the two state troopers who testified at the suppression hearing in this case, the conviction rate for drivers who show four or more "clues" out of a total of six during the horizontal gaze nystagmus test is over 90%. J.A. 47.

B. Warrant Procedures, And The Time Necessary To Obtain A Warrant, Vary By Time And Place.

Petitioner's contention that the delay inherent in obtaining a search warrant creates an exigent circumstance that justifies a *per se* rule authorizing warrantless searches in *all* DWI cases is equally flawed. While there may be circumstances in which

a warrant cannot be obtained without undue delay – which is the essence of this Court's holding in *Schmerber* – that is not true in every case or in every jurisdiction.

At the time *Schmerber* was decided in 1966, search warrant applications had to be presented in person to the issuing magistrate. That is no longer the case. In 1977, the Federal Rules of Criminal Procedure were amended to allow for telephonic warrants. Fed. R. Crim. P. 41(d)(3). In 1993, the Rule was amended again to permit the use of fax machines. *Id.* The language of the Rule now provides that "a magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means." *Id.* These changes were specifically designed to encourage the use of search warrants in situations where the police were otherwise engaging in warrantless searches. As the advisory committee explained, the "use of search warrants can best be encouraged by making it administratively feasible to obtain a warrant when one is needed." *Id.* advisory committee's note (1977 Amendments). *See generally* Note, *Press One for Warrant: Reinventing the Fourth Amendment's Search Warrant Requirement Through Electronic Procedures*, 55 Vand. L. Rev. 1591, 1605-07 (2002).[16]

Even prior to the federal amendments, states had been encouraged to "enact legislation that

[16] Missouri has chosen not to take advantage of technological developments to expedite the warrant process. Under Missouri law, both the warrant application and the warrant must still be in writing. Mo. Rev. Stat. § 542.276. But that decision should not be the measure of Fourth Amendment reasonableness in states that have chosen otherwise.

provides for the issuance of search warrants pursuant to telephoned petitions and affidavits from police officers." National Advisory Comm'n on Criminal Justice Standards and Goals, Report on Police 95 (1973) (cited in Fed. R. Crim. P. 41(d)(3) advisory committee's note (1977 Amendments)). Approximately 20 states have done so in the intervening decades.[17]

More recently, an increasing number of states allow for the electronic transmission of warrants. In California, for example, an officer seeking a search warrant can be sworn over the telephone. Thereafter,

> [t]he affiant shall sign his or her affidavit in support of the application for the search warrant. The affiant's signature shall be in the form of a digital signature or electronic signature if electronic mail or computer server is used for transmission to the magistrate. The proposed search warrant and all supporting affidavits and attachments shall then be transmitted to the magistrate utilizing facsimile

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[17] Ala. R. Crim. P 3.8(b); Alaska Stat. Ann. § 12.35.015; Ariz. Rev. Stat. Ann. § 13-3914; Ark. Code Ann. § 16-82-201; Cal. Penal Code 1526; Colo. R. Crim. P. 41(c)(3); Idaho Code Ann. § 19-4406; Ind. Code Ann. § 35-33-5-8; La. Code Crim. Proc. Ann. art 162.1; Mont. Code Ann. § 46-5-222; Neb. Rev. Stat. § 29-814.03; N.H. Stat. § 595-A: 4-a; N.J. R. CRR 3:5-3(b); N.Y. Crim. Proc. § 690.36; N.D. R. Crim. P. 41; S.D. Codified Laws § 23A-35-4.2, 7; Utah. R. Crim. P. 40(l); Vt. R. Crim. P. 41(b)(c); Wash. Sup. Ct. Crim. R. 2.3(c); Wis. Stat. Ann. § 968.12(3). *See also* 2 Wayne R. LaFave, *Search and Seizure: A Treatise on Fourth Amendment Law* § 4.3(c), at 511-12 & n.29 (4th ed. 2011)(collecting sample of state laws).

> transmission equipment, electronic mail, or computer server.

Cal. Penal Code § 1526(b)(2)(A). If the application is granted, the magistrate may similarly "transmit via facsimile transmission equipment, electronic mail, or computer server, the signed search warrant to the affiant who shall telephonically acknowledge its receipt." *Id.* at § 1526(b)(2)(D).

In addition to California, at least six other states now authorize e-mail warrants and one state, Utah, permits text messaging.[18] In *State v. Rodriguez*, 156 P.3d 771 (Utah 2007), the Utah Supreme Court specifically relied on "[t]he astonishing advances that have marked communications and information technology over recent decades," *id.* at 778, to reject a *per se* rule permitting warrantless blood draws in all DWI cases. As the Court explained: "Utah Rule of Criminal Procedure 40 exploits communications and information technology in the cause of making warrants more readily obtainable without compromising the core constitutional considerations of authenticity and impartiality. In most cases, a police officer has readily at hand several methods of applying for a search warrant from the scene of an accident, a medical facility, or any other location where probable cause has been established." *Id.* at 779.

It is not necessary to speculate about the impact that electronic warrants can have on the time needed to secure a warrant. The following

[18] Colo. R. Crim. P. 4(c)(3); Mich. Comp. Laws § 780.651; N.D. R.Crim. P. 41; Utah R. Crim. P. 41(1); and Vt. R. Crim. P. 41(b)(c).

description of nighttime applications appeared in a recent edition of the official publication of the Kansas County and District Attorneys Association:

> Until recently in Douglas County, it took two officers to obtain a search warrant. The arresting officer would complete the search warrant affidavit and drive to the judge's home while another officer would transport the suspect to the hospital. Each time an officer woke a judge, the judge had to wait for the officer to arrive and review the search warrant before being able to go back to bed … The Douglas County judges searched for a better system that would facilitate the issuance of search warrants. After purchasing an iPad® for each judge, a judge can now review a search warrant e-mailed in pdf format using GoodReader® software installed on the iPad®, sign the search warrant directly on the iPad®, and e-mail the signed search warrant back to the officer. Since beginning to use the equipment in February, what used to take two officers and one and a half to two man hours to obtain a search warrant and retrieve a blood sample now takes one officer about 45 minutes. *From the time the officer begins completing the search warrant affidavit form to the time the judge returns the signed search warrant is now about 15 minutes.* The additional time is the time necessary to get the suspect to the medical facility/professional and obtain the blood sample …"

Gregory T. Benefiel, *DUI Search Warrants: Prosecuting DUI Refusals,* 9 The Kansas Prosecutor, no. 1, Spring 2012, at 18-19, http://www.kcdaa.org/KSProsecutor/KSProsecutor-Spring12.pdf (emphasis added).

The story is similar in Utah. A 2008 article describing a pilot program to introduce electronic warrants reported that one officer "requested an e-warrant for a forced blood draw on a man arrested for DUI. The warrant was approved in about five minutes." *See* Jason Bergreen, *Utah Cops Praise Electronic Warrant System*, Salt Lake Trib. (Dec. 26, 2008), http://www.policeone.com/police-products/communications/articles/1769302-Utah-cops-praise-electronic-warrant-system/.

Even telephonic warrants can significantly decrease the amount of time necessary to secure a warrant. *See e.g.*, *State v. Flannigan*, 978 P.2d 127, 154 (Ariz. Ct. App. 1998)("The record establishes that the Mesa Police Department is able to obtain a [telephonic] warrant within as little as fifteen minutes and that delays of only fifteen to forty-five minutes are commonplace."); *People v. Blackwell*, 147 Cal.App.3d 646, 653 n.2 (Cal. Ct. App. 1983)(citing a 1973 study from a San Diego District Attorney's office estimating that 95% of telephonic warrants can be obtained in less than 45 minutes). *See also Steagald v. United States*, 451 U.S. at 222 (noting that telephonic search warrants may mitigate the need to conduct a warrantless search based on exigent circumstances).

Whatever justification there may be for a warrantless blood draw disappears in cases where the time it takes to obtain a search warrant is no

greater, or not significantly greater, than the time it takes to drive the suspect to a hospital. A *per se* rule authorizing a warrantless blood draw in such cases would no longer serve the purposes that underlie the exigent circumstances exception. *See Arizona v. Gant*, *supra*.[19]

It would, moreover, create a perverse disincentive encouraging police officers to disregard the warrant requirement even in the absence of a true emergency. Once officers are instructed that they can compel non-consensual blood draws in every DWI case without a warrant, regardless of whether a warrant could be procured in a timely manner, "what rational officer would not take those measures?" *Thornton v. United States*, 541 U.S. at 628 (Scalia, J., concurring). *See also* Fed. R. Crim. P. 41(d), advisory committee's note.

Finally, local magistrates, familiar with local procedures and conditions, are in the best position to judge whether a warrant could have been obtained without undue delay. *See Minnesota v. Olson*, 495 U.S. at 100. For that reason, as well, the determination of whether exigent circumstances justify a warrantless blood draw in any particular case is not amenable to a *per se* rule.

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[19] Under Missouri law, Respondent had an absolute right to consult with an attorney before deciding whether to consent to a blood test. *See* n.3, *supra*. Had he exercised that right, the police would have been required to wait another 20 minutes before proceeding with a warrantless blood draw. *Id*. Other states have similar provisions, implicitly recognizing that the interest in obtaining BAC results as quickly as possible must be balanced against other important constitutional considerations. The individual's interest in bodily integrity certainly qualifies as an important constitutional consideration.

C. Evidentiary Rules Governing Retrograde Extrapolation Also Vary From Jurisdiction to Jurisdiction.

Petitioner and its *amici* place great emphasis on the fact that the level of alcohol in the blood naturally diminishes over time. While that is undeniably true, it also distinguishes this case from other cases where the Court has recognized exigent circumstances based on the potential destruction of evidence. This Court's description of the general rule in *Roaden v. Kentucky* is both illustrative and revealing: "Where there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation." 413 U.S. at 505. *Kentucky v. King*, 131 S. Ct. 1849 (2011), reflected a similar understanding. The Court observed in that case that "[d]estruction of evidence issues probably occur most frequently in drug cases because drugs may be easily destroyed by flushing them down a toilet or rinsing them down a drain." *Id*. at 1857.

There is no evidence that is flushed down the toilet or rinsed down the drain in a DWI case. Instead, there is a slow, steady, and relatively predictable process by which the body eliminates alcohol from the bloodstream. This process takes place in two stages. As long as one continues to drink, the body continues to absorb alcohol. The absorption process usually lasts for approximately 30 minutes after the drinking has stopped, when the blood alcohol content reaches its peak. U.S. Br. at 24. n.2 (citing studies). At that point, the body begins to eliminate alcohol through the liver, and the BAC declines.

While the rate of absorption and elimination can vary based on individual characteristics, it is generally agreed that alcohol dissipates at a rate between .015 and .02 per hour, J.A. 47, and that the rate of dissipation is linear until there is very little alcohol left in the body. *See* A.W. Jones, *Biochemical and Physiological Research on the Disposition and Fate of Ethanol in the Body*, *in* Garriott, *supra* n.1, at 88. Thus, for example, assuming a faster dissipation rate of .02 per hour, an individual who is tested three hours after reaching a peak of .08 – the legal limit in most states - will have a BAC of .02. The process of retrograde extrapolation involves working backward from the test results to calculate an individual's BAC at the time of arrest. To the extent that retrograde extrapolation is deemed reliable by the courts, it creates a window of opportunity for the police that can last three hours or longer (depending on peak BAC) rather than a "now-or-never" situation.

Like most scientific evidence, retrograde extrapolation can be challenged. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009)("Serious deficiencies have been found in the forensic evidence used in criminal trials."). Petitioner's *amici* in particular stress that defense lawyers can and do raise such challenges on a regular basis. U.S. Br. at 23; NDAA Br. at 10. This case is not the occasion for the Court to resolve that dispute, however, which is primarily addressed in any event through state evidentiary rules. For present purposes, it is far more relevant that the states have reached different judgments on that evidentiary question.

Challenges to retrograde extrapolation as inherently unreliable and thus excludable in all cases have not fared well. *E.g., State v. Jensen*, 482

N.W.2d 238 (Minn. Ct. App. 1992) (*Frye* test does not apply because retrograde extrapolation is not "emerging or novel"); *State v. Vliet*, 95 Haw. 94 (Haw. 2001). Case-based challenges have produced a range of results. Some courts have excluded expert testimony on retrograde extrapolation because the proffered evidence did not take into account potentially relevant variables. *E.g.*, *Mata v. State*, 46 S.W.23d 902 (Tex. Crim. App. 2001); *State v. Eighth Judicial District Court*, 267 P.3d 777 (Nev. 2011). Other states have ruled that challenges to the reliability of expert testimony on retrograde extrapolation go to weight, not admissibility. *E.g.*, *State v. Taylor*, 600 S.E.2d 483 (N.C. Ct. App. 2004); *State v. LaVoie*, 152 N.H. 542 (N.H. 2005). Some states have adopted so-called time-of-test rules, under which a BAC result over the legal threshold that is obtained within a specified period of time after arrest – usually two or three hours – is either treated as *prima facie* evidence of intoxication, *e.g.*, Ariz. Rev. Stat. Ann. § 28-1381(A)(2), or as establishing a rebuttable presumption, *e.g.*, Ind. Code Ann. § 9-30-6-15. Other states do not appear to have addressed the question of retrograde extrapolation, either by statute or case law. *See generally Admissibility and Sufficiency of Extrapolation Evidence in DUI Prosecutions*, 119 A.L.R.5th 379 (2004)(updated version available online).

Like the variation in warrant procedures, variations regarding the admissibility of extrapolation evidence caution against a *per se* rule authorizing warrantless searches based on an assumption of exigency that does not universally apply.

D. Compelled Blood Draws Implicate Significant Privacy Interests.

Quoting *Schmerber*, Petitioner describes compelled blood draws as a "minor intrusion" on personal privacy. Pet. Br. at 33-35. But the fact that blood tests may be "commonplace," *Schmerber*, 384 U.S. at 771, and "that for most people the procedure involves virtually no risk, trauma, or pain," *id.*, does not extinguish the privacy interest entirely nor relieve the State of its burden of demonstrating that a *per se* rule is necessary in every DWI case.[20]

In *Schmerber*, the Court concluded that the defendant's privacy interest was outweighed by the State's need to obtain a blood sample without further delay in light of the "special facts" present in that case, and thus approved a warrantless search. *See* pp. 27-28, *supra*. This Court has never suggested, however, that a warrantless blood test can be deemed reasonable even in the absence of exigent circumstances because the intrusion on personal privacy is entitled to little or no weight.

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[20] Petitioner invests the word "commonplace" with more weight than it can carry. That a procedure may be described as commonplace in an individual's private life says little about the degree to which the procedure undermines personal dignity when forcibly conducted at the State's behest. As the Court explained in *Winston*, there is a vast difference between a medical procedure "conducted with the consent of the patient," where the medical professional "is carrying out the patient's own will concerning the patient's body[,]" and a procedure that "involves a virtually total divestment of respondent's ordinary control" to the State over intrusions "probing beneath his skin." 470 U.S. at 765.

To the contrary, the Court has acknowledged that having to submit to a compelled blood test "perhaps implicated Schmerber's most personal and deep-rooted expectations of privacy." *Winston v. Lee*, 470 U.S. at 760. The Court has long recognized that intrusions on bodily integrity go to the very heart of the Fourth Amendment. *Schmerber* itself noted that "interests in human dignity and privacy," 384 U.S. at 769-70, are triggered whenever the State engages in "searches involving intrusions beyond the body's surface." *Id.* at 369. *Schmerber* characterized such interests as "fundamental," *id.* at 770, and stressed that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Id.* at 767.

That view has both ancient roots and modern resonance. *See* 1 William Blackstone, Commentaries, *127, *129 (stating that an "absolute right[]" of an individual was "the right of personal security [which] consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, [and] his health . . . . "). *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. at 602 (citation omitted)("In light of our society's concern for the security of one's person, it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable."); *State v. Rodriguez*, 156 P.3d 771, 775 (Utah 2007) (rejecting a rule of per se exigency for invasive alcohol-related blood seizures, and explaining that "the interest that poses the most substantial countervailing force to a community's interest in effective law enforcement is the dignity and integrity of the human body."). *See also Cruzan v. Director,*

Missouri Dept. of Health, 497 U.S. 261, 287-288 (1990)(O'Connor, J., concurring)("[T]he Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause . . . Fourth Amendment jurisprudence has echoed this same concern.").

The stomach pump in *Rochin v. California*, 342 U.S. 165, and the chest surgery in *Winston v. Lee,* 470 U.S. 753, were undoubtedly severe intrusions on bodily integrity and assaults on human dignity. This Court has never held, however, that they represent the outer limits of constitutional privacy. What the Court has done is to recognize a spectrum of privacy interests infringed by a range of police tactics, including procedures significantly less invasive than forced blood draws.

For example, the Court has described the patting of a suspect's outer clothing and the taking of a suspect's fingernail scrapings as a "'severe, though brief, intrusion upon cherished personal security,'" *Cupp v. Murphy*, 412 U.S. 291, 295 (1973)(quoting *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968). *See also New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (noting that the search of a student's purse, even in a school, is "undoubtedly a severe violation of subjective expectations of privacy").

If a "careful exploration of the outer surfaces of a person's clothing" in search of weapons and the scraping of a person's fingernails for evidence are "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment," *Terry*, 392 U.S. at 16-17, surely plunging a needle into a person's arm is an even greater intrusion and indignity. Paraphrasing *Terry*,

to categorize such an invasion as a mere "'petty indignity'" would be "simply fantastic." *Id.* Yet that is exactly what Petitioner does.

The manner in which a blood draw is conducted may make it more or less reasonable, *Schmerber*, 384 at 771-72, but the privacy interest remains the same. Home searches provide a useful analogy. The safeguards of the Fourth Amendment apply regardless of whether the police are using thermal imaging to pry into the privacy of a home or barging into the living room.

> In *Silverman*, for example, we made clear that any physical invasion of the structure of the home, "by even a fraction of an inch," was too much, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.

Kyllo v. U.S, 533 U.S. 27, 37 (2001)(citation omitted)(emphasis in original).

Petitioner's contention that Respondent had a diminished expectation of privacy in this case because he was driving a car when stopped by the police is equally flawed. "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge v. New Hampshire*, 403 U.S. at 461. Respondent is a person, not a car. For reasons previously described, *see* pp. 24-25, *supra*, the automobile exception to the warrant requirement does not extend to compelled

blood draws of a vehicle's occupants.

Petitioner's reliance on *New York v. Class*, 475 U.S. 106 (1986), for the proposition that motorists have a diminished expectation of privacy due to the pervasive regulation of the automobile industry is misplaced. In *Class*, the Court upheld a search of the interior of an automobile to remove papers from the dashboard obscuring the vehicle identification number, which then revealed a weapon in plain view under the driver's seat. Invasive bodily searches were not at issue; rather, the Court focused on the lessened expectation of privacy in the automobile itself.

Not surprisingly, this Court has often highlighted the distinction between people and cars that Petitioner's argument obscures. *See*, *e.g.*, *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) ("[P]eople are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles."); *U.S. v. Di Re*, 332 U.S. 581, 587 (1948) ("We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled"); *City of Indianapolis v. Edmond*, 531 U.S. 32, 55 (2000) (Rehnquist, C.J., dissenting)("[T]he brief seizure of an automobile can hardly be compared to the intrusive search of the body or the home."); *Almeida-Sanchez v. United States*, 413 U.S. 266, 279 (1973) (Powell, J., concurring)("The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or a building.").

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, which Petitioner also cites, is distinguishable on other grounds. Respondent was not an employee in a pervasively regulated industry when he was arrested, as were the Federal Railroad Administration employees in *Skinner*, *id.* at 627, and the toxicological tests in *Skinner*, unlike the blood test at issue here, were not designed "to assist in the prosecution" of those tested. *Id.* at 620. If anything, this case is less like *Skinner* and more like *Ferguson v. City of Charleston*, 532 U.S. 67, where law enforcement was intimately involved in the design and implementation of a program to drug test maternity patients suspected of cocaine use. The warrantless searches in *Ferguson* were declared unconstitutional. *See also* p.23 & n.11, *supra*.

Petitioner's argument that Respondent somehow waived his privacy rights by virtue of Missouri's implied consent law fares no better. Under Missouri's implied consent law, Respondent consented to the revocation of his driver's license if he was arrested for a DWI offense and refused to consent to a breath or blood test. *See* n.3, *supra*. He did not irrevocably consent to the blood test. Indeed, Missouri's implied consent law expressly recognizes the right of drivers, like Respondent, to withdraw their consent if stopped for drunk driving. *Id.* It makes no sense to say that Respondent has a diminished or non-existent claim to privacy when he retains the right to reclaim his privacy at precisely the point that it becomes imperiled – that is, when the state seeks to override his objection to a warrantless blood draw.

Finally, while Respondent's blood was drawn by trained medical personnel in a hospital setting,

that will not always be the case if this Court adopts the *per se* rule that Petitioner is advocating. In Arizona, for example, blood can be drawn at the arrest scene by police officers who have ostensibly been trained to draw blood.[21]

In the end, the *Schmerber* Court may have best summarized the privacy interests at stake. "The integrity of an individual's person is a cherished

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[21] An Arizona appellate court described one such blood draw in *State v. Jimenez,* CR20051907 (Ariz. Sup. Ct. 2005), slip op. at 2-3:

> The deputy directed the defendant to lean over the trunk of his patrol car with his knees slightly bent to have his blood drawn. When the deputy inserted the needle into the defendant's arm, he leaned back or straightened up causing his arm to move. On the second attempt to draw blood, the defendant flinched, jerking his arm. Thus, instead of obtaining the standard two vials of blood for testing, only one partial vial was obtained.
>
> The trial court further found that the procedures used by the deputy in this case violated the accepted protocol for drawing of blood. There is no dispute that the protocol for extraction of blood requires that the subjects be seated and have their arm supported. As supported by the record, the trial court cited numerous risks to persons who are standing when their blood is drawn, including risk of pain and serious injury if they were to become dizzy, faint or experience a sudden drop in blood pressure. Other medical problems could occur in connection with a blood draw. The trial court further noted that with the vacutainer method (as used in this case), the needle may draw in air. If the subject is standing, the subject may be injured by hitting his head on the ground if he fell because he fainted or was dizzy or the needle could be torn out of a vein or could hit a nerve.

value in our society." 384 U.S. at 772.

III. THE FACTS OF THIS CASE DO NOT ESTABLISH EXIGENCY UNDER A TOTALITY-OF-THE-CIRCUMSTANCES TEST.

Both the trial court and a unanimous Missouri Supreme Court concluded in this case that the State had not carried its burden of proving exigent circumstances, and therefore suppressed the results of Respondent's blood test that was taken without consent and without a warrant. That finding is amply supported by the record below. It is also entitled to deference. *See United States v. Doe*, 465 U.S. 605, 614 (1984) ("We have been reluctant to disturb findings of fact in which two courts below have concurred."); *Minnesota v. Olson*, 495 U.S. at 100 ("We are not inclined to disturb this fact-specific application" of the exigent circumstances exception.).

By all accounts, this was a "run-of-the-mill" DWI case. Pet. App. 3a, 43a. There was no delay in the arrest, there was no accident to investigate, and there were no injuries at the scene. Pet. App. 20a. Corporal Winder, the arresting officer, testified at the suppression hearing and was presumably prepared to testify at trial that Respondent smelled of alcohol, his eyes were bloodshot, and his speech was slurred when he was stopped on the highway a little after 2:00 a.m. for traveling 10 miles above the posted speed limit. J.A. 31. Winder administered four field sobriety tests and testified that Respondent performed poorly on all of them. J.A. 31-32.

At the time of Respondent's arrest, Cape Girardeau County had simplified the search warrant process in DWI cases. The County Prosecutor's Office

had prepared standardized forms for use by the arresting office, the prosecuting attorney, and the issuing judge. J.A. 61-69. Those forms were "readily available," J.A. 42, and could have been completed in a matter of minutes had Corporal Winder chosen to seek a search warrant. Since Respondent was subjected to a compulsory blood test only 25 minutes after he was initially stopped, Pet. App. 40a, it is reasonable to infer that he arrived at the hospital no more than 20 minutes after the highway stop. A prosecutor and a judge were on call throughout the night. J.A. 41-42; Pet. App. 40a-41a. If requested, the prosecutor could have met Winder at the hospital to complete the necessary forms. J.A. 53.

During the suppression hearing, Winder acknowledged that he had never experienced any difficulty in obtaining a search warrant in prior DWI cases, and had no reason to believe that he would have experienced any difficulty had he sought a search warrant in Respondent's case. J.A. 42. In addition, Winder testified that his decision not to contact a prosecutor or seek a search warrant was not based on exigent circumstances as he understood them having served as a trooper with the Missouri State Highway Patrol for more than seventeen years, J.A. 29, 41. Rather, it was based exclusively on his understanding that the law in Missouri had changed and that search warrants were no longer required. J.A. 39-40.[22]

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[22] Winder's factual belief that he could have obtained a timely warrant in this case based on his own prior experience in similar cases is relevant to the objective reasonableness of the search and not because of what it reveals about Winder's subjective motivation. Petitioner's reliance on *Whren v. United States*, 517 U.S. 806, 812 (1996), is thus misplaced.

To bolster a claim of exigency that Winder's testimony did not support, Petitioner cites the testimony of a second police officer, Sergeant Blaine Adams, who indicated at the suppression hearing that the process of obtaining a search warrant took "about two hours." J.A. 54; Pet. Br. at 53. However, an exhibit entitled "Recent Cape County Search Warrants For Blood," J.A. 70, which was admitted without objection at the suppression hearing, J.A. 54, shows that the time period from application to warrant was 30 minutes or less in five of the six identified cases, including applications submitted in the middle of the night.[23] Materials prepared by the Cape Girardeau Prosecutor for a meeting of the Missouri Association of Prosecuting Attorneys 18 months prior to Respondent's arrest similarly noted that "the Cape Girardeau County Prosecutor's Office has standard forms to use in [DWI cases] with blanks to fill in so the warrant may be obtained *in minutes* since time is always of the essence in these cases." H. Morley Swingle, Search & Seizure Law in Missouri 19 (2009)(emphasis added), *available at* http://www.capecounty.us/files/ProsecutingAttorney/SEARCH&SEIZURE_BOOK.pdf.

Moreover, Adam's testimony appears to have been discounted by the trial judge, who was presumably familiar with local practices and conditions. After reviewing the submissions by both

[23] The exhibit documents the time that the warrant was issued in each of the cases. It then sets forth either the time of the warrant application or the time of the officer's last observation of the suspect before submitting the warrant application. The difference appears to be immaterial, however, since the time of last observation and the time of the warrant application are identical in the two cases where both are listed.

parties, he wrote: "None of the authorities submitted on this issue have held, on their own facts, that an officer may obtain a warrantless blood draw on an ordinary driving while intoxicated arrest *when a warrant could be procured in a timely manner*." Pet. App. 45a (emphasis added). The highlighted comment would make little sense in an opinion granting Respondent's motion to suppress unless the trial court believed that a warrant could have been "procured in a timely manner" in this case, or at a minimum, that Petitioner had failed to prove otherwise. The Missouri Supreme Court took a similar view, stating "there is no evidence here that [Winder] would have been unable to obtain a warrant had he attempted to do so." Pet. App. 3a.

These findings do not describe exigent circumstances, as that term has been defined by this Court's cases, including *Schmerber*. On this record, therefore, the decision to subject Respondent to a warrantless blood draw cannot be justified, and the motion to suppress the blood test results was properly granted.

CONCLUSION

The judgment of the Missouri Supreme Court should be affirmed.

Respectfully submitted,

Steven R. Shapiro
Counsel of Record
Ezekiel R. Edwards
Brandon J. Buskey
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
(212) 549-2500
sshapiro@aclu.org

Stephen C. Wilson
Wilson & Mann, L.C.
2907 Independence Street, Suite C
P.O. Box 512
Cape Girardeau, MO 63702-0512
(573) 651-1950

Stephen Douglas Bonney
ACLU Foundation of Kansas & Western Missouri
3601 Main Street
Kansas City, MO 64111
(816) 994-3311

Anthony E. Rothert
Grant R. Doty
ACLU of Eastern Missouri
454 Whittier Street
St. Louis, MO 63108
(314) 652-3114

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