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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 United States Court of Appeals
for the Eleventh Circuit**

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who regularly teach and write about criminal law and criminal procedure.[2] *Amici* have no stake in the outcome of this case other than their academic interest in the logical and rational development of the law. Because this case implicates fundamental issues of criminal procedure, *amici* believe that their perspective may assist the Court in resolving this case.

SUMMARY OF ARGUMENT

The State of Missouri asks this Court to authorize its police officers to order warrantless blood draws on every person arrested on suspicion of driving under the influence, regardless of whether exigent circumstances would justify the warrantless search. This radical retrenchment of the fundamental warrant requirement is neither supported by this Court's precedent nor justified by reason, and this Court should reject it.

The warrant requirement is the bulwark of the Fourth Amendment's protection against unconstrained governmental intrusions into a citizen's private sphere. Interposing neutral, detached magistrates between police officers and their suspects guards against improper searches, assures the subjects of any search of its legality and permissible scope,

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[1] The parties have consented to the filing of this brief, and letters expressing their blanket consent to the filing of *amicus* briefs have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] A full list of *amici*, including their institutional affiliations, is set forth in the Appendix to this brief.

and reduces the perception of police lawlessness. Warrants are so central to the Fourth Amendment's safeguards that warrantless searches are presumed unreasonable.

Nonetheless, a warrantless search may be reasonable when a compelling government interest overrides a suspect's privacy rights. In only a very few situations – such as conducting a limited search incident to arrest – is a compelling government interest so likely to override the citizen's privacy rights that a warrantless search is inevitably reasonable. Those rare situations are governed by *per se* rules. In addition to those few *per se* exceptions, this Court has identified several exigencies that *may* justify a warrantless search, such as the need to protect the police or public from an immediate threat of harm or prevent the imminent destruction of evidence in a suspect's control. Unlike the application of a *per se* exception to the warrant requirement, an exigent-circumstances justification for a warrantless search must be supported by evidence that the totality of the circumstances supports the claim of exigency.

This Court did not carve out a *per se* exception authorizing warrantless blood draws incident to all drunk driving arrests in *Schmerber v. California*, 384 U.S. 757 (1966). Rather, the *Schmerber* Court assessed the totality of the circumstances and concluded that a true exigency rendered the warrantless blood draw reasonable in that case. Nor should this Court create a *per se* rule in this case. The gradual dissipation of alcohol in a suspect's blood does not present the type of urgency or immediacy necessary to justify such an expansive exception to the foundational warrant requirement. Moreover, given the variance in the processes and timeframe for obtain-

ing warrants in various jurisdictions, allowing warrantless blood draws following every drunk driving arrest would routinely and predictably under-protect important Fourth Amendment rights. Finally, blood draws are intrusive searches that can reveal extensive personal information far beyond evidence of blood-alcohol content. Before police officers force a citizen to submit to such an intrusive search and take possession of such information-rich evidence, the Fourth Amendment demands that they obtain a warrant, absent truly exigent circumstances.

ARGUMENT

I. THE WARRANT REQUIREMENT IS FOUNDATIONAL TO THE FOURTH AMENDMENT'S PROTECTION AGAINST UNCONSTRAINED GOVERNMENTAL INTRUSION INTO PRIVATE SPHERES

A. The Warrant Requirement Has Long Been A Feature Of Governmental Intrusions On Personal Liberty

"The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." *Jones v. United States*, 357 U.S. 493, 498 (1958). The warrant requirement is the bulwark of that protection. As Justice Harlan wrote for the Court more than half a century ago, "[w]ere [law enforcement] officers free to search without a warrant merely upon probable cause . . . the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified." *Id.*

The hallmark of the warrant requirement is so entrenched in our constitutional law that warrantless searches when a person has a reasonable expectation

of privacy are presumptively unreasonable. *See*, *e.g.*, *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) ("It is basic principle of Fourth Amendment law, we have often said, that searches and seizures inside a home without a warrant are presumptively unreasonable.") (internal quotations omitted); *Payton v. New York*, 445 U.S. 573, 585 (1980) ("Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment."); *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967) ("[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."). Moreover, for a search warrant to be valid, such that it renders a search reasonable, the warrant must particularly describe the person, place, and things to be searched. *See Groh v. Ramirez*, 540 U.S. 551, 559 (2004) ("We have clearly stated that the presumptive rule against warrantless searches applies with equal force to searches whose only defect is a lack of particularity in the warrant."). The particularized warrant requirement "ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

B. The Warrant Requirement Serves Important Interests

The requirement that a police officer secure a particularized warrant before undertaking a search, even when probable cause is present, serves many important purposes. Warrants provide the protection of "a neutral and detached magistrate," *Johnson v.*

United States, 333 U.S. 10, 14 (1948), when a law enforcement officer is likely to be hurried, excited, or intent on safeguarding the arrest rather than the constitutional liberties of the suspect. *See also United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) (noting the benefit of "the informed and deliberate determinations of magistrates"). "[T]he detached scrutiny of a neutral magistrate . . . is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer." *United States v. Chadwick*, 433 U.S. 1, 9 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991). In addition, a valid warrant will "assure[] the individual being searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Id.* (citing *Camara*, 387 U.S. at 532). Similarly, "possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct." *Illinois v. Gates*, 462 U.S. 213, 236 (1983).

As this Court made clear in *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971), the "classic statement of the policy underlying the warrant requirement of the Fourth Amendment is that of Mr. Justice Jackson, writing for the Court in *Johnson v. United States*":

> The point of the Fourth Amendment, which often is 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. 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 Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Johnson, 333 U.S. at 13-14 (footnotes omitted).

II. BECAUSE OF ITS FOUNDATIONAL IMPORTANCE, EXCEPTIONS TO THE WARRANT REQUIREMENT ARE, AND SHOULD BE, EXTREMELY LIMITED

The Fourth Amendment prohibits warrantless searches and seizures, "'subject only to a few specifically established and well-delineated exceptions.'" *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). *Per se* exceptions to the warrant requirement are especially rare, and none of the justifications for such exceptions supports a *per se* rule that would allow warrantless blood searches of people arrested on suspicion of driving under the influence. Rather, the broadly applicable warrant requirement controls when a police officer seeks blood evidence from a suspected impaired driver. A claim that a warrantless blood draw was rendered reasonable due to exigent circumstances should be evaluated under a totality-of-the-circumstances test.

A. This Court Has Recognized Very Few *Per Se* Exceptions To The Warrant Requirement

In a very limited set of circumstances, this Court has recognized that some warrantless searches are inevitably reasonable, and thereby has created only a handful of *per se* exceptions to the warrant requirement. *See Jones*, 357 U.S. at 499 ("[t]he exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn"). Those exceptional circumstances fall into four categories: long-standing historical practices; cases of special need for government administration; situations in which the safety of law enforcement officers or the public is in immediate jeopardy; and situations in which the mobile and public nature of the automobile render an immediate, warrantless search both more important and less intrusive than non-vehicle cases. None of those circumstances is implicated in a drunk driving arrest when the suspect has been detained and no longer presents any threat to the officer or the public.

Certain exceptions to the warrant requirement are justified primarily because they are rooted in practices recognized at the time the Fourth Amendment was adopted. For example, this Court has upheld searches at the Nation's international borders because, "[s]ince the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country." *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). This Court similarly upheld the warrantless search

of mail at borders, *United States v. Ramsey*, 431 U.S. 606, 616 (1977),[3] as well as the warrantless and suspicionless search of a vessel, *United States v. Villamonte-Marquez*, 462 U.S. 579, 590-93 (1983), as "reasonable" based on the historical foundations of such practices.

This Court also has recognized *per se* exceptions to the warrant requirement in "special needs cases" – cases in which the government's need to perform a search fall outside normal law enforcement purposes, making the warrant and probable cause requirements impracticable. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (citations omitted). The *Griffin* Court, for example, permitted a probation officer to search a probationer's home pursuant to reasonable state regulations addressing the "special needs" of the probation system. *See also*, *e.g.*, *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (employers in highly regulated railroad industry may require their employees after an accident to submit to warrantless blood and urine tests pursuant to federal regulations).

Other well-established *per se* exceptions protect law enforcement officers and the public from threats of imminent harm. For example, this Court has found that warrantless searches "incident to arrest" are *per se* reasonable because, "[o]therwise, the officer's safety might well be endangered, and the arrest itself frustrated." *Chimel v. California*, 395 U.S. 752, 762-63 (1969). Thus, an officer may conduct a limited search for weapons on an arrestee's person or within lunging distance of the arrestee.

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[3] The search was made at the General Post Office in New York City, which "is the 'border' for purposes of border searches." *Ramsey*, 431 U.S. at 609 n.2.

See id. Importantly, that exception is limited by the concerns that justify it: "Under *Chimel*, police may search . . . only the space within an arrestee's '"immediate control,"' meaning 'the area from within which he might gain possession of a weapon or destructible evidence.'" *Arizona v. Gant*, 556 U.S. 332, 335 (2009) (quoting *Chimel*, 395 U.S. at 763). This Court has also held that the Fourth Amendment does not require an officer to obtain a warrant to order drivers and passengers to leave a vehicle to provide for the safety of the officers involved in the stop. *See Pennsylvania v. Mimms*, 434 U.S. 106, 110-11 (1977) (per curiam); *Maryland v. Wilson*, 519 U.S. 408, 413-14 (1997). Finally, an officer may conduct an inventory search of the contents of an automobile at least in part to guard "police from potential danger." *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976). In all of those cases, even though the warrantless searches infringe on the privacy rights of the target, this Court has held that warrantless searches will always be reasonable in light of the state's overriding interest in protecting police officers and the public.

Finally, this Court has carved out limited *per se* exceptions for searches of vehicles, with such exceptions justified by two factors: vehicles are readily moveable and therefore opportunities to search them may be fleeting, and the design, purpose, and pervasive regulation of vehicles result in diminished expectations of privacy in their contents. *See California v. Carney*, 471 U.S. 386, 390-92 (1985). Neither factor would justify subjecting a driver who has been removed from the vehicle and immobilized by an arrest to a warrantless search of her body – a place where she most decidedly does *not* have a diminished expectation of privacy. *Cf. United States 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."); *see also Wyoming v. Houghton*, 526 U.S. 295, 308 (1999) (Breyer, J., concurring) ("Equally obviously, the rule [that an officer may search containers within a vehicle] applies only to containers found within automobiles. And it does not extend to the search of a person found in that automobile.").

B. Exigent Circumstances That May Justify A Warrantless Search Require A True Emergency And Must Be Established On The Basis Of A Totality Of The Circumstances

In addition to a very few *per se* exceptions to the warrant requirement, "[t]his Court has identified several exigencies that *may* justify a warrantless search." *Kentucky v. King*, 131 S. Ct. at 1856 (emphasis added). Those cases make clear that exigent circumstances require some sort of emergency, maybe even a "grave emergency." *E.g.*, *McDonald v. United States*, 335 U.S. 451, 455 (1948) ("Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This . . . was done so that an objective mind might weigh the need to invade [the citizen's] privacy in order to enforce the law"); *see also Payton*, 445 U.S. at 583 (making clear that the Court had "no occasion [in this case] to consider the sort of emergency or dangerous situation, described in our cases as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of either arrest or search"). Indeed, the word "exigent" connotes urgency and is defined as "requiring immediate action or aid; urgent; pressing." *Webster's*

Encyclopedic Unabridged Dictionary of the English Language 499 (1989). Thus, the Court has upheld claims of exigency when law enforcement officers have demonstrated a compelling need to enter a home without a warrant to provide emergency aid, *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); to continue the hot pursuit of a fleeing suspect, *United States v. Santana*, 427 U.S. 38, 42-43 (1976); and to prevent the imminent destruction of evidence, *Ker v. California*, 374 U.S. 23, 40 (1963) (plurality op.).

Not all cases involving the potential loss of evidence give rise to the urgency required to justify a warrantless search due to exigent circumstances. Rather, the Court has upheld warrantless searches to protect evidence in circumstances in which the suspect retains control of evidence and could destroy it virtually instantaneously. Thus, in *Cupp v. Murphy*, 412 U.S. 291 (1973), the Court upheld a warrantless search of the debris under a suspect's fingernails when the police had reason to believe that the suspect was trying to rub and scrape the evidence away. *Id.* at 296. Similarly, in *Ker v. California*, the Court upheld a warrantless entry and search of an apartment when the police had reason to believe that the suspect had narcotics and might destroy them. 374 U.S at 42 ("The officers had reason to act quickly because of Ker's furtive conduct and the likelihood that the marijuana would be distributed or hidden before a warrant could be obtained at that time of night."). And this Court has recently affirmed the exception to the warrant requirement when the warrantless entry is necessary "'to prevent the imminent destruction of evidence,'" *Kentucky v. King*, 131 S. Ct. at 1856 (quoting *Brigham City*, 547 U.S. at 403) (remanding to the Kentucky Supreme Court for a

determination of whether a true exigency existed to justify the warrantless entry).

In contrast, when the potential evidence is not within a suspect's control, or for other reasons is not subject to *imminent* destruction, or when the warrantless search is overly intrusive, this Court has held that law enforcement interests do not outweigh the privacy interests protected by the warrant requirement. Thus, in *Johnson v. United States*, the Court rejected the government's claim that dissipation of opium fumes constituted an exigent circumstance permitting the warrantless search of the suspect's home. As the Court explained, "[n]o reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time would disappear." 333 U.S. at 15. The Court later relied on that reasoning in rejecting the warrantless search of a house after the police noticed a strong odor of "whiskey mash." *Chapman v. United States*, 365 U.S. 610, 611-12 (1961). Most importantly, this Court has rejected the argument that the possible dissipation of alcohol in a suspect's bloodstream justifies a warrantless entry into the home to effectuate an arrest. *See Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984) ("[A] warrantless home arrest cannot be upheld simply because

evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant.").

Moreover, the exigent-circumstance exception will justify a warrantless search only if law enforcement officers can demonstrate an actual exigency on the particular facts of the case. *See Kentucky v. King*, 131 S. Ct. at 1862 ("Any warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency."). Unlike the application of a *per se* exception to the warrant requirement, defenses of warrantless searches based on exigent circumstances are evaluated in light of careful consideration of the totality of the circumstances concerning the compelling nature of the threat and the intrusiveness of the search. *Cf. Winston v. Lee*, 470 U.S. 753, 760 (1985) ("The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach . . . . [T]he question whether the community's need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers.").

III. THERE IS NO JUSTIFICATION FOR A *PER SE* EXCEPTION TO THE WARRANT REQUIREMENT FOR BLOOD DRAWS MADE AFTER AN ARREST FOR DRIVING WHILE IMPAIRED

In *Schmerber v. California*, 384 U.S. 757, 766-72 (1966), this Court upheld a warrantless blood draw following an arrest for suspected drunk driving based on an assessment of the totality of the circumstances. *See Winston*, 470 U.S. at 760 ("[T]he [*Schmerber*] Court recognized that Fourth Amendment analysis thus required a discerning inquiry into the facts and circumstances to determine whether the intrusion was justifiable."). Even if *Schmerber* could be read

as creating a *per se* exception for warrantless blood draws, that exception would not govern this case. And there is no reason for this Court to expand the *Schmerber* holding to create a *per se* exception to the warrant requirement that would permit warrantless blood draws of every person suspected of driving under the influence.

A. *Schmerber* Applied A Totality-Of-The-Circumstances Test When It Upheld The Warrantless Blood Draw At Issue In That Case

The Court in *Schmerber* applied a totality-of-the-circumstances standard to determine whether exigent circumstances justified the warrantless blood draw. As the Court explained:

> 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*.

384 U.S. at 772 (emphases added).

Under the "special facts" of *Schmerber*, *id.* at 771, it is hardly surprising that the Court upheld the warrantless search, given its understanding that that case raised precisely the sort of urgent, emergency concerns that generally justify warrantless searches. In particular, the Court concluded that the

officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened "'the destruction of evidence.'" *Id.* at 770 (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)). The Court made clear that the "special facts" included not only the natural dissipation of alcohol, but also that "time had to be taken to bring the accused to a hospital and to investigate the scene of the accident," meaning that "there was no time to seek out a magistrate and secure a warrant." *Id.* at 770-71. The Court also considered the fact that, as far as bodily intrusions go, drawing blood is relatively modestly intrusive and that this blood draw was performed by a physician in a hospital. *Id.* at 771.

This reading of *Schmerber* as applying a straightforward totality-of-the-circumstances exigent-circumstances test is confirmed by the Court's careful explication of that case two decades later in *Winston v. Lee*. In *Winston*, the Court evaluated a Fourth Amendment challenge to the surgical removal of a bullet. The Court explained that "[t]he reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure. In a given case, the question whether the community's need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers. We believe that *Schmerber,* however, provides the appropriate framework of analysis for such cases." 470 U.S. at 760. The Court, "[a]pplying the *Schmerber* balancing test," *id.* at 763, then discussed and evaluated the numerous factors

that were relevant to the *Schmerber* holding. *See id.* at 761 ("Beyond these [ordinary requirements of the Fourth Amendment], *Schmerber*'s inquiry considered a number of other factors in determining the 'reasonableness' of the blood test."). The *Winston* Court ultimately concluded that the surgery would be unreasonable. In neither *Schmerber* nor *Winston* did the Court discuss, much less adopt, a *per se* exception to the broadly applicable warrant requirement.

B. Even If S*chmerber* Had Created A *Per Se* Exception To The Warrant Requirement, That Exception Would Not Justify The Search In This Case

If *Schmerber* could be understood to have created a *per se* exception to the warrant requirement, that exception would justify warrantless blood draws only when unavoidable delays extraneous to the warrant process created an urgent situation in which evidence in the blood was threatened with imminent destruction.

That unavoidable-delay formulation of any perceived *per se* exception flows from the language of the *Schmerber* opinion. *See* 384 U.S. at 770-71. As noted above, the *Schmerber* Court was concerned with the additional delay caused by the traffic accident and the need to attend to the safety of the suspect and others before the police officer could turn his attention to collecting evidence. In light of that unavoidable delay, the Court viewed *Schmerber* as an emergency case involving the potentially imminent destruction of evidence. *See id.* at 770. The Court made very clear that it was not addressing the run-of-the-mill arrest on suspicion of drunk driving. *See id.* at 772 ("It bears repeating . . . that we reach this judgment only on the facts of the present record.").

In this case, unlike *Schmerber*, there was no unavoidable delay that would justify turning a routine arrest into an exigent circumstance. This case involves neither an accident nor an injury. Rather, the officer stopped McNeely in a "routine traffic stop." Pet. App. 4a. Moreover, alcohol's slow dissipation in the bloodstream is completely out of the suspect's control. Thus, there was no urgency comparable to that justifying warrantless searches when the police are concerned with the "imminent destruction of evidence." In this case, no emergency existed that would justify an exception to the broadly applicable rule that warrantless searches are unreasonable.

C. This Court Should Not Create A *Per Se* Exception To The Warrant Requirement For All Drunk Driving Arrests

In *Richards v. Wisconsin*, 520 U.S. 385 (1997), this Court declined to create a blanket *per se* exception to the knock-and-announce requirement when police are executing a search warrant at a person's residence in a felony drug investigation. Two years earlier the Court had held that the Fourth Amendment requires police officers entering a dwelling to knock on the door and announce their identity and purpose before attempting forcible entry. *See Wilson v. Arkansas*, 514 U.S. 927, 931-36 (1995). At the same time, the Court recognized that compelling law enforcement concerns, such as "circumstances presenting a threat of physical violence" or when "police officers have reason to believe that evidence would likely be destroyed if advance notice were given," may justify an unannounced entry in some circumstances. *Id.* at 936. In *Richards*, the Court addressed the question whether the "indisputable" fact that felony drug investigations frequently involve

both of those circumstances "justifies dispensing with case-by-case evaluation of the manner in which a search was executed." 520 U.S. at 391-92. A unanimous Court held that it did not. This Court should similarly decline the invitation to craft a *per se* rule in these circumstances.

A *per se* exception to the warrant requirement for blood draws incident to arrest on suspicion of driving while impaired would permit too many intrusive searches in circumstances in which there was no real urgency to retrieve the blood. A warrantless blood draw to determine a driver's blood-alcohol content is not justified by any of the rationales that underlie existing *per se* rules. First, there is no long-standing historical exception to the warrant requirement for the coercive withdrawal of bodily fluids. Second, when a suspected drunk driver has been stopped and detained, there is no concern for officer or public safety that a warrantless blood draw could mitigate. Third, dissipation of alcohol in the bloodstream is a gradual process completely outside the control of the suspect, so there is no inherent threat of imminent destruction of evidence. And, finally, blood draws involve invasions of bodily integrity, which implicate significant, not diminished, expectations of privacy.

Arguments in support of a *per se* exception for blood draws in drunk driving arrests are unpersuasive. The principal assertion is that the gradual dissipation of alcohol combined with the relatively minimal intrusion of a blood draw and the importance of prosecuting drunk drivers always justifies a warrantless blood draw. That argument fails for the same reasons that the reach for a *per se* exception to the knock-and-announce rule failed – it overstates the need for the exception and understates the costs.

First, the gradual, natural dissipation of blood-alcohol evidence does not raise the urgent concerns about immediate destruction of evidence that is required to justify a *per se* exception to the warrant requirement. *Cf. McDonald*, 335 U.S. at 454 ("Where . . . officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant. A search without a warrant demands exceptional circumstances."). Blood-alcohol content ("BAC") measures the concentration of alcohol in the blood. *See* Samir Zakhari, *Overview: How is Alcohol Metabolized by the Body?*, 29 ALCOHOL RES. & HEALTH 245 (2006). After BAC reaches its highest peak, it declines as alcohol is distributed throughout the body and eliminated through the enzymatic processes of the liver. *See* Charles E. Becker, *The Clinical Pharmacology of Alcohol*, 113 CAL. MED. 37, 39-40 (1970). While elimination rates vary for each individual (based on factors such as diet, age, and drinking habits), the average rate of elimination is around 0.018% per hour (18 milligrams per 100 ml of blood per hour) and the dissipation rate is completely out of the suspect's control. *See* Douglas Posey & Ashraf Mozayani, *The Estimation of Blood Alcohol Concentration*, 3 FORENSIC SCI., MED. & PATHOLOGY 33 (2007). As petitioner acknowledges, even for heavy drinkers the elimination rate may increase to only 0.022% per hour. Pet. Br. 21. In most circumstances, the gradual dissipation provides ample opportunity for the police officer to honor the warrant requirement.

Second, the wide divergence in the processes for seeking search warrants and the disparate timeframes those processes generate counsels against adopting a *per se* rule. *See* U.S. Br. 25 ("[T]he time to

obtain a warrant can vary greatly within and among jurisdictions."); National District Attorneys' Ass'n Br. 28 ("[T]he procedures and requirements for securing a search warrant vary widely by state and even by jurisdiction within a state."). The arguments in support of a *per se* rule turn these differences on their head, by asserting that the inability of a police officer to *predict* how long it will take to get a warrant justifies the warrantless search. But the widespread variation in a crucial factor of the reasonableness inquiry ensures that a *per se* rule will regularly and predictably under-protect important Fourth Amendment rights. Moreover, the argument itself is fatally imprecise, because the fact that there are differences in warrant processes *across* jurisdictions does not mean that officers *within* a jurisdiction will not have a relatively accurate understanding of the average time it takes to get a warrant in their own jurisdiction.

Finally, nothing in the warrant requirement, or in *Schmerber*'s exception to that requirement in exigent circumstances, requires police officers to be prescient. Circumstances in which *per se* exceptions are appropriate involve officers making split-second decisions in dangerous and stressful context. In contrast, the risk of gradual dissipation of alcohol evidence in a drunk driving arrest does not require decisive action in dangerous circumstances. Rather, officers involved in a routine drunk driving arrest can presume that a warrant will be required for a blood search and begin the process of obtaining a warrant, and if that process is unduly delayed for reasons outside their control the officers can then determine whether a warrantless search would be reasonable in light of those circumstances. And if

the officers conclude that special facts exist – as in *Schmerber* – that demonstrate an increased exigency or protracted delay that may result in the actual destruction of the BAC evidence, the burden should be on the police to demonstrate that the warrantless search was justified.

The circumstances of this case, in fact, highlight the inappropriateness of a *per se* exception based on dissipation concerns. When McNeely's blood was drawn and tested, his BAC was reported as 0.154%. JA37, 60-61. Even assuming a very high rate of dissipation of 0.022% per hour, and even assuming that the warrant process had taken as long as two hours, the officer could have obtained a warrant and taken McNeely's blood and his BAC level still would have tested at 0.11% (well above the legal limit of 0.08%). As this example illustrates, the dissipation of BAC does not present the compelling exigent circumstance of the potential imminent and complete destruction of evidence within the suspect's control. *Cf. Kentucky v. King*, 131 S. Ct. at 1857 ("Destruction 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.").

Finally, a blood draw is not minimally intrusive in every case. As the *Schmerber* Court recognized, because "[s]earch warrants are ordinarily required for searches of dwellings, . . . no less could be required where intrusions into the human body are concerned." 384 U.S. at 770. While this Court has made clear that the Fourth Amendment provides particular protection for a person's home, it has also recognized a heightened privacy interest in bodily integrity. Indeed, this Court's Fourth Amendment jurisprudence can be understood to construct a spec-

trum of privacy interests, with border areas, objects in plain view, and objects in vehicles at the low end of privacy expectations and dwellings at the high end.[4] Dignity interests in personal privacy and bodily integrity fall closer to the home on this spectrum than to objects in plain view. *See Schmerber*, 384 U.S. at 369-70. This Court also considers the invasiveness of the search, with *Terry*[5] stops and plain-view searches found to be generally less invasive than, for example, longer detentions. *See United States v. Sharpe*, 470 U.S. 675, 686-88 (1985). Even the *Schmerber* Court, which permitted a blood draw as not unduly intrusive in the particular circumstances before it, recognized the special intrusiveness of a search beneath the skin. 384 U.S. at 769-70. Because of the special expectation of privacy within one's own body and the relative intrusiveness of even a needle prick into a vein, this Court should interpose magistrates into the decision to draw blood for a DUI in all but exigent circumstances.

The medical risks that come with even a simple blood draw are nontrivial and further amplify the invasiveness of the search. Although the rates of injuries from blood draws are relatively low, the absolute numbers of individuals potentially affected

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[4] *Compare Carney*, 471 U.S. at 390-94 (vehicle searches); *Katz*, 389 U.S. at 361 (Harlan, J., concurring) ("Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited."); *Montoya de Hernandez*, 473 U.S. at 539-40 (border searches), *with Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.").

[5] *Terry v. Ohio*, 392 U.S. 1 (1968).

are significant. One large study of simple blood draws reported that, out of 4,050 blood draws, 105 experienced some combination of shock-like sweats (diaphoresis) and near-fainting (near syncope), 24 patients fainted, and 6 experienced convulsions while they were unconscious. *See* Harold J. Galena, *Complications Occurring from Diagnostic Venipuncture*, 34 J. FAM. PRAC. 582, 583 (1992). In that same study, 416 experienced noticeable bruising, 80 suffered more substantial hematomas, and 80 experienced ongoing pain. *See id.* A rarer but potentially longer-lasting risk from a simple blood draw is nerve damage that can disable a person's arm. *See* Bruce H. Newman & Dan A. Waxman, *Blood Donation-Related Neurologic Needle Injury: Evaluation of 2 Years' Worth of Data from a Large Blood Center*, 36 TRANSFUSION 213 (1996).

Apart from the risks of direct physical injury, studies report that at least 2.2% of Americans experience a needle phobia meeting the relevant diagnostic criteria, and for whom the invasiveness of a blood draw would be far greater. *See* Brett Deacon & Jonathan Abramowitz, *Fear of Needles and Vasovagal Reactions Among Phlebotomy Patients*, 20 J. ANXIETY DISORDERS 946, 956 (2006). "Approximately 10% of individuals in medical settings report an excessive fear of needles that causes significant avoidance, distress, and/or impairment." *Id.* at 946-47.

The combined risks of medical injuries and psychological stress – even if relatively minor – renders blood draws sufficiently invasive that discretion to demand and conduct them should generally not be left in the hands of a police officer. Requiring a warrant will not reduce the risk of injury once a warrant is granted, but it will add the magistrate's neutral

judgment to the process (and protect suspects from unnecessary injury when a warrant is unjustified).

Moreover, by exposing markers of disease, paternity, genetic traits, and genetic identity to analyses, blood draws invade not only a physical space in which people have a high expectation of privacy – the body – but also an even more private informational space.[6] Blood contains markers for pregnancy and paternity, sexually transmitted diseases like HIV, various cancers, malnutrition, and an ever-growing list of genetic traits and diseases.[7] Many of those tests, such as paternity tests, either were discovered or have become more readily available since *Schmerber* was decided.[8] The information contained within one's blood is highly sensitive and clearly

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[6] This Court has granted certiorari in *Maryland v. King*, No. 12-207 (*cert. granted* Nov. 9, 2012), on the related issue whether "the Fourth Amendment allow[s] the States to collect and analyze DNA from people arrested and charged with serious crimes." Petition for a Writ of Certiorari i, *Maryland v. King*, No. 12-207 (U.S. filed Aug. 14, 2012), 2012 WL 3527847.

[7] *See* Pam Belluck, *Test Can Tell Fetal Sex at 7 Weeks, Study Says*, N.Y. TIMES, Aug. 9, 2011, *at* http://www.nytimes.com/2011/08/10/health/10birth.html?_r=0; Andrew Pollack, *Before Birth, Dad's ID*, N.Y. TIMES, June 19, 2012, *at* http://www.nytimes.com/2012/06/20/health/paternity-blood-tests-that-work-early-in-a-pregnancy.html?pagewanted=all; Avert, *HIV Test* (HIV tests), *at* http://www.avert.org/testing.htm (last visited Dec. 14, 2012); Mayo Clinic, *Cancer Blood Tests: Lab Tests Used in Cancer Diagnosis* (Mar. 5, 2011), *at* http://www.mayoclinic.com/health/cancer-diagnosis/CA00028; GeneCards, Weizmann Inst. of Science, *Genes Associated with Diseases*, *at* http://www.genecards.org/cgi-bin/listdiseasecards.pl?type=full (last visited Dec. 14, 2012).

[8] *See* New England Innocence Project, *A Brief History of DNA Testing*, *at* http://www.newenglandinnocence.org/knowledge-center/resources/dna/ (last visited Dec. 14, 2012).

within the sphere of a reasonable expectation of privacy. The expectation that police officers will generally secure a particularized warrant before taking a suspect's blood will protect the suspect from wide-ranging blood analyses that might reveal evidence not related to the drunk driving arrest. In the absence of a warrant limiting the scope of the search, the officer could request other tests and gain access to intimate personal details about a person's health, identity, or family. Also, depending in part on this Court's decision about the collection of identifying DNA evidence from arrestees in *Maryland v. King*, No. 12-207 (*cert. granted* Nov. 9, 2012), suspects' identifying information could be stored and used by police for completely unrelated crimes. Because both situations involve significant information about which people reasonably expect privacy, the intrusions are significant and should require a warrant.

This Court already recognizes the invasiveness of penetrating the skin and should also take into account the potential for even greater intrusions into that zone of reasonably expected privacy through modern analyses of blood. Warrants limit the scope of the search and analysis of the blood and place a magistrate between the suspect and the needle, with all of the related medical and psychological injuries that can come from a blood draw. This limitation of scope is even more important given the potential for resistance by defendants. A particularized warrant goes a long way toward ensuring the safety of all those involved by giving the defendant assurances of the lawfulness of the blood draw. *See supra* pp. 5-6.

In *Richards*, this Court rejected a *per se* rule eliminating the knock-and-announce requirement in circumstances in which the immediate destruction of

evidence will often be a very real possibility. In this case, by contrast, there is *no* possibility of immediate destruction of evidence. The Court should similarly reject calls for a *per se* rule eliminating the warrant requirement in routine impaired driving arrests.

IV. A TOTALITY-OF-THE-CIRCUMSTANCES TEST IS ADMINISTRABLE, AND ANY DIFFICULTIES WITH IT DO NOT JUSTIFY DISPENSING WITH THE WARRANT REQUIREMENT

Fourth Amendment standards of reasonableness "are not susceptible of Procrustean application." *Ker*, 374 U.S. at 33. Thus, there are many different situations in which police officers are required to assess the totality of the circumstances to determine whether their actions will comply with the Fourth Amendment. Officers currently evaluate the totality of the circumstances to determine whether a suspect can voluntarily give consent to a search because he is free to leave, *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996); how long they must wait to enter a residence after announcing their presence, *United States v. Banks*, 540 U.S. 31, 35-42 (2003); whether they are in "hot pursuit," *Santana*, 427 U.S. at 42-43; and whether other exigent circumstances justify a warrantless search, *e.g.*, *Brigham City*, 547 U.S. at 406. A totality-of-the-circumstances test is similarly appropriate for determining whether officers acted in an objectively reasonable manner in drawing blood following a traffic stop without a warrant.

In the case of an arrest for DWI, the circumstances relevant to determining whether exigency justifies a warrantless blood draw should be fairly easy for a police officer to assess. The officer will already have made a determination of probable cause before

arresting the suspect. Officers also will generally know how long it will take to obtain a warrant and how long it may take to complete the blood test after the warrant is obtained. Other possibly relevant facts, such as whether the suspected DWI resulted in injuries, will also be observable by the officers. Weighing these factors together is much like any other Fourth Amendment reasonableness determination that an officer may have to make.

However convenient it may be for law enforcement to be empowered to draw blood without a warrant after every legitimate DWI arrest, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. Cf. *Coolidge v. New Hampshire*, [403 U.S.] at 481. The investigation of crime would always be simplified if warrants were unnecessary." *Mincey*, 437 U.S. at 393. By rejecting not only all but a handful of *per se* rules, but even the "overlay of a categorical scheme on the general reasonableness analysis," *Banks*, 540 U.S. at 42, this Court has made clear that convenience will not override the requirements of the Fourth Amendment. The result should be no different in the traffic stop situation presented by this case.

CONCLUSION

The judgment of the Missouri Supreme Court should be affirmed.

Respectfully submitted,

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