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 OF DELAWARE, ALABAMA, ARKANSAS, COLORADO, CONNECTICUT, DISTRICT OF COLUMBIA, FLORIDA, GUAM, IDAHO, ILLINOIS, INDIANA, IOWA, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WASHINGTON, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

Drunk driving is a serious public health hazard. Indeed, this Court has noted the "tragic frequency" with which drunk drivers cause frightful "carnage." *South Dakota v. Neville,* 459 U.S. 553, 558 (1983). Even more, as this Court's cases have repeatedly emphasized, "[t]here is no question that drunk driving is a serious and potentially deadly crime." *Virginia v. Harris,* 130 S. Ct. 10, 11 (2009) (Roberts, C.J., dissenting from denial of certiorari). Thus, it is incontestable that the Amici States have an overwhelming interest in enforcing their laws against drunk driving and effectively prosecuting those who commit that crime. *Michigan Dep't of State Police v. Sitz,* 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion."); *see also State v. Cocio*, 709 P.2d 1336, 1342 (Ariz. 1985) ("Drunk driving has become a problem of epidemic proportion in Arizona and other states throughout the country, and must be effectively dealt with to satisfy the public outcry against this crime." (citations omitted)).

"'[E]ssential to the guid[ance of the Amici States'] police officers,'" who investigate this crime and must collect evidence of it – often in the late night or wee hours of the morning – is "'[a] single familiar standard'" for the seizure of blood samples from impaired drivers. *New York v. Belton*, 453 U.S. 454, 458 (1981) (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)).

The question presented in this case focuses on what is reasonable under the Fourth Amendment and promotes the amici states' "essential interest in [a] readily administrable rule[ ]" for these seizures. *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001); *Florence v. Board of Chosen Freeholders*, 132 S. Ct. 1510, 1522 (2012) ("Officers who interact with those suspected of violating the law have an 'essential interest in readily administrable rules.'") (quoting *Atwater*). With a duty to enforce their criminal laws and to provide the guidance needed by law enforcement, Delaware, the other 31 Amici States, the District of Columbia, and the Territory of Guam respectfully submit this brief in support of petitioner "[i]n order to establish the workable rule this category of cases requires." *Belton*, 453 U.S. at 460.

STATEMENT OF THE CASE

At 2:08 a.m. on October 3, 2010, Missouri State Highway Patrol Corporal Mark Winder observed Tyler McNeely speeding. J.A. 19, 29, 30. Before he was able to pull him over, Corporal Winder observed McNeely crossing the center line of the road three times. J.A. 19. When he made contact with McNeely, the patrolman detected slurred speech, "a really strong odor of intoxicants," and that "[McNeely's] eyes were glassy and bloodshot." J.A. 31. McNeely admitted he was coming from a bar, but claimed he had only a couple of beers. J.A. 20. When Corporal Winder asked him to step out of the vehicle, McNeely was

unstable on his feet and swayed while maintaining his balance. J.A. 20.

Corporal Winder administered four field sobriety tests to McNeely, who performed "very poorly" on each of them. J.A. 31-32. McNeely refused to take a portable breath test at the roadside and was subsequently placed under arrest for driving while intoxicated.[1] J.A. 33.

Corporal Winder began to transport McNeely to the Cape Girardeau County Jail to administer a breath test, but McNeely stated he would refuse to take a breath test at the sheriff's office. J.A. 33. In turn, the patrolman transported McNeely to the St. Francis Medical Center Lab to obtain a blood sample. J.A. 20, 33-34.

Corporal Winder read McNeely the Missouri Implied Consent and asked that he provide a blood sample. J.A. 20, 34. McNeely refused. J.A. 35. The patrolman then informed McNeely that, pursuant to Missouri law, he was going to obtain the blood sample against his refusal. J.A. 34-35. At that point, a lab technician withdrew a blood sample from McNeely and Corporal Winder immediately took possession of it. J.A. 20. The patrolman transported McNeely to the Cape Girardeau County Jail. J.A. 20, 35. After arriving at the jail, Corporal Winder again read McNeely

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[1] McNeely had two prior drunk driving convictions and was, therefore, charged with a class D felony under Missouri law. J.A. 20-23.

the Missouri Implied Consent and asked that he submit to a breath test. McNeely again refused. J.A. 20, 35-36. The analysis of McNeely's sample taken at the medical center showed a blood-alcohol level of 0.154 g/dL or nearly twice the legal limit. J.A. 36-37, 60.

Corporal Winder did not attempt to obtain a search warrant before directing the hospital lab technician to draw the sample of McNeely's blood. Pet. App. 4a-5a, 40a. Obtaining a search warrant in the middle of the night in Cape Girardeau County, Missouri, involves a delay, on average, of approximately two hours. J.A. 53-54. Alcohol in the bloodstream is eliminated at a rate of between .015 and .020 g/dL per hour. J.A. 47-48.

McNeely moved to suppress the results of the blood test as a violation of his Fourth Amendment rights. J.A. 25-26. The trial court sustained the motion. Pet. App. 46a. The State brought an interlocutory appeal and the Missouri Court of Appeals determined that the trial court erred in granting McNeely's suppression motion. Pet. App. 38a. Because the state court of appeals also believed its finding would involve a significant departure from current state case law, and that the issues involved were of "general interest and importance," it transferred the case to the Missouri Supreme Court. *See* MO. SUPR. CT. R. 83.02; MO. CONST. art. V, § 10. The state supreme court affirmed the trial court's judgment granting suppression. Pet. App. 21a.

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SUMMARY OF THE ARGUMENT

The nonconsensual warrantless withdraw of Tyler McNeely's blood immediately after he had been arrested for driving under the influence, when such sample was obtained to preserve and provide evidence of his blood alcohol content, did not violate the Fourth Amendment. The reasonableness of this seizure is grounded in two "specifically established and well-delineated exceptions" to the warrant requirement: (1) the search-incident-to-arrest exception; and (2) the exigent circumstance exception. Both of these exceptions are at work in the drunk-driving blood draw context; and both are even more compelling now than when this Court decided *Schmerber v. California,* 384 U.S. 757 (1996).

This is so, in part, because as of 2005, all States, the District of Columbia, Guam, and Puerto Rico have enacted *illegal per se* laws, making it illegal to operate a motor vehicle when the person's blood alcohol content ("BAC") is at or above .08 g/dL. Now it is the offender's BAC – the numerical quantification of the *amount* of alcohol in the driver's blood – that is the critical element of the offense in a *per se* prosecution, as opposed to merely evidence used to establish impairment. And as is well-accepted, the actual numerical value quantifying one's alcohol content, which is ***the*** element of the *per se* crime, dwindles with each moment that passes before sample collection. It is, therefore, imperative that a blood sample be obtained at the earliest opportunity after the driver has been arrested.

First, when a police officer makes a constitutionally valid arrest, it is reasonable under the Fourth Amendment for the officer to search the person arrested as an incident to that arrest. The areas to be searched beyond those normally within the scope of a search incident to arrest may be expanded when it is "*reasonable to believe* evidence relevant to the crime of arrest might be found" there. Probable cause sufficient to lawfully arrest one for driving while intoxicated is perforce probable cause to believe evidence of the intoxicant will be found in his bloodstream when arrested. The police are therefore justified in immediately obtaining a sample of that blood as an incident to that arrest.

Second, a well-settled exception to the Fourth Amendment's warrant requirement allows police to conduct warrantless searches based on probable cause if exigent circumstances require immediate action. A warrantless search conducted pursuant to that exception is reasonable if the exigency arises from the "imminent destruction of evidence." No circumstance could be more readily understood to involve *imminent* destruction of evidence than the natural metabolism of alcohol within one's blood. There simply is no halting it; it occurs automatically. Under normal circumstances, as much as one-quarter of the alcohol content needed to prove a *per se* violation is gone within an hour of when the drunk driver is taken off the road. And that alcohol level will continue diminishing unabated until it has disappeared. In terms of a *per se* impaired driving offense, that critical number drops with each moment of delay.

Thus, the Court should adopt as a rule that probable cause supporting a lawful arrest for driving while under the influence establishes the authority to obtain a blood sample incident to that arrest as evidence of that specific crime. That is the "workable rule" this category of cases requires. And it is a rule supported by the single exigency always present in these cases. The States' interest in fairly and accurately determining guilt or innocence for this serious crime – an interest "of great importance" – here outweighs an individual's interest in avoiding the "slight intrusion" involved in halting that evidence destruction by obtaining a blood sample.

ARGUMENT

I. Withdrawal of a Blood Sample From an Arrested Drunk Driver is a Permissible Search Incident to Arrest Under this Court's Emergent Jurisprudence Defining that Exception to the Warrant Requirement.

A. Factors extant when Corporal Winder had the hospital draw McNeely's blood sample are common and illustrate well some of the guiding principles to resolution of the question presented here.

This case presents the Court with a discrete, recurring and significant issue of Fourth Amendment

law: whether a law enforcement officer, without violating the Fourth Amendment, may obtain a nonconsensual and warrantless blood sample from a drunk driver in the run-of-the-mill drunk-driving case. At the heart of this particular matter is the Missouri Supreme Court's interpretation of this Court's decision in *Schmerber v. California*, 384 U.S. 757 (1966).

Because this case involves only the lack of a warrant, the following factors, which were present here, are presumed to exist and guide the answer to the question presented:

(1) It is beyond dispute that driving is a highly-regulated, dangerous activity and that the States have a compelling interest in maintaining the safety of their highways;[2]

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[2] *Delaware v. Prouse*, 440 U.S. 648, 658 (1979) ("[W]e are aware of the danger to life and property posed by vehicular traffic and of the difficulties that even a cautious and an experienced driver may encounter. We agree that the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed." (footnote omitted)); *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield. The States, through safety measures, modern scientific methods, and strict enforcement of traffic laws, are using all reasonable means to make automobile driving less dangerous." (footnote omitted)).

(2) The process for obtaining a blood sample to quantify intoxicant level does not differ from a standard blood test administered for medical purposes;[3]

(3) A blood sample is/will be obtained only when there is probable cause to arrest for driving under the influence; and

(4) Evidence of intoxicants begins to diminish almost immediately and continues to disappear over time as normal bodily processes occur.[4]

Again, this case presents the *constitutional* question of whether obtaining a blood sample incident to a drunk driving arrest by state police officers violates the Fourth Amendment when that seizure is based upon probable cause but with neither the driver's consent nor a warrant. To be sure, the States place a multitude of their own restrictions on the taking of blood samples from drunk drivers. *See*, *e.g.*, Brf. in Opp. at 14 n.10. But these state rules must not be elevated to constitutional surrogates to the standard of reasonableness embodied in the Fourth Amendment. Constitutionalizing those state rules is simply unwarranted. *See Virginia v. Moore*, 553 U.S. 164,

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[3] Michael A. Correll, *Is There a Doctor in the (Station) House?: Reassessing the Constitutionality of Compelled DWI Blood Draws Forty-Five Years After* Schmerber, 113 W. VA. L. REV. 381, 388 (2011).

[4] *Schmerber,* 384 U.S. at 770 ("[T]he percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system.").

171 (2008) ("Our decisions counsel against changing th[e constitutional reasonableness] calculus when a State chooses to protect privacy beyond the level that the Fourth Amendment requires. We have treated additional protections exclusively as matters of state law.").

As with so much of this Court's Fourth Amendment jurisprudence, there exists no categorical bar to the noncensensual warrantless seizure of a blood sample from a drunk-driving arrestee. Instead, any claimed unreasonableness attaching to a warrantless seizure of this type of evidence can be overcome by a showing of one of the "specifically established and well-delineated exceptions" to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357 (1967). Two are at work here: (1) the search-incident-to-arrest exception; and (2) the exigent circumstance exception. And in the drunk-driving blood draw context, those two, since *Schmerber*, have been viewed always as acting in concert and have each become more compelling justifications for the immediate warrantless seizure of that evidence. 3 W. LaFave and D. Baum, SEARCH AND SEIZURE, § 5.3(c) (4th ed. 2011). "In order to establish the workable rule this category of cases requires," *New York v. Belton*, 453 U.S. 454, 460 (1981), this Court, if it is believed not to have already done so in *Schmerber*, should now state a constitutional rule that the Fourth Amendment categorically permits the warrantless seizure of a blood sample from a driver incident to the lawful arrest of that driver for driving under the influence.

B. Today's impaired driving laws are far different than those under which this Court has previously examined seizures of blood samples; it is not merely alcohol presence that matters, but quantification that is critical.

Criminal penalties have been associated with impaired driving for over 100 years. Early statutes prompted a subjective assessment of impairment and were difficult to prove. Jennifer L. Pariser, *In Vino Veritas: The Truth About Blood Alcohol Presumptions in State Drunk Driving Law*, 64 N.Y.U. L. REV. 141, 142 (1989). These statutes required proof that a subject was, due to the consumption of an impairing substance such as alcohol, less able to safely operate a motor vehicle. Mark Feigl, *DWI and the Insanity Defense: A Reasoned Approach*, 20 VT. L. REV. 161, 165-66 (1995). Technological advances over the first half of the 20th century led to the development of scientifically reliable instruments capable of precisely determining a subject's BAC at a given time. *Id.* at 165-66 ("It was not until after World War II and the advent of chemical tests of bodily substances for alcohol that drinking and driving statutes became easier to enforce."). The value of these devices in the prosecution of driving under the influence offenses was readily apparent, and many States adopted statutes which created a presumption of impairment when an individual was found to have a particular BAC at or within a specified time of driving a motor vehicle. *Id.* at 166 ("The early blood alcohol content (BAC) statutes adhered to the American Medical

Association's policy that individual's with BACs of under .05 percent were presumed not to be under the influence. . . ."). When *Schmerber* was decided in 1966, these "presumption" statutes were prevalent across the country.

The early 1980s saw a dramatic increase in public awareness of the dangers created by impaired drivers. Flowing from the work of Mothers Against Drunk Driving ("MADD") and Students Against Drunk Driving ("SADD"), the Alcohol Traffic Safety – National Driver Register Act of 1982 encouraged the development of state statutes assigning *per se* thresholds for impaired driving prosecutions through federal incentives. *Id*. Thereafter, States modified existing statutes to add *per se* violations. *See*, *e.g.*, *State v. Nesmith*, 276 P.3d 617, 627-28 (Haw. 2012) (discussing legislative history of Hawaii's *per se* driving under the influence statute). These *per se* laws define the offense of DUI in terms of the BAC, not in terms of the individual's intoxication. *Id*. Thus, the prosecution need only show that the defendant was driving on a public highway and that she had a BAC above that jurisdiction's prohibited level, commonly .08 to .10 percent, in order to convict her under the statute. *Id.*

In 2000, President Clinton signed legislation with a clear mandate: implement a *per se* statute with a threshold BAC of .08 or risk losing a percentage of federal transportation funding. Amanda Staples, *Another Small Step in America's Battle Against Drunk Driving: How the Spending Clause Can Provide*

More Uniform Sentences for Drunk-Driving Fatalities, 46 NEW ENG. L. REV. 353, 364 n.96 (2012). "As of 2005, all States, the District of Columbia, and Puerto Rico had enacted *illegal per se* laws, making it illegal to operate a motor vehicle when the person's BAC is at or above .08 g/dL, the quantity of alcohol in the blood." U.S. Dep't of Trans., Nat'l Highway Traffic Safety Admin., *Digest of Impaired Driving and Selected Beverage Control Laws,* vi (26th ed. Oct. 2012) (hereinafter NHTSA), *available at* www.trb.org/Main/Blurbs/167977.aspx; *see also* Staples, 46 NEW ENG. L. REV. at 364 ("Since 2005, all fifty states have imposed a .08 BAC as the *per se* standard for drunk driving. After this legislation was implemented, drunk-driving fatalities fell nationwide from 16,885 in 2005 to 10,839 in 2009."). "To secure a conviction for [a] '*per se* DUI' offense, the prosecution no longer ha[s] to prove the accused driver was actually impaired at the time of the offense, but only that he drove with a blood-alcohol level at or exceeding" a defined threshold – .08 – at or within a defined period following driving. *People v. McNeal*, 210 P.3d 420, 426 (Cal. 2009). Thus, an offender's BAC – the numerical quantification of the *amount* of alcohol in the driver's blood – is the critical element of the offense in a *per se* prosecution as opposed to merely evidence used to establish impairment.

Clearly, establishing an offender's BAC as close in time to the act of driving is critical to a *per se* prosecution. This consideration is further heightened

in States that have statutory aggravating enhancements based on proof of a greater alcohol content. In some jurisdictions, a heightened BAC results in a greater charge,[5] while others provide harsher penalties upon conviction of the base offense.[6] Thus, to charge

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[5] *See, e.g.,* ARIZ. REV. STAT. ANN. § 28-1382 (2012) (The crime of "Driving or actual physical control while under the extreme influence of intoxicating liquor" is established where an offender has an alcohol concentration of .15 or more within 2 hours of driving); MINN. STAT. § 169A.26 (2012) (establishing charge of "Third Degree Driving While Impaired" where an aggravating factor – such as an alcohol concentration greater than .20 – is present); MONT. CODE ANN. § 61-8-465 (2011) (establishing charge of "Aggravated DUI" where alcohol concentration is .16 or more); N.H. REV. STAT. ANN. § 265-A:3 (2012) (establishing charge of "Aggravated Driving While Intoxicated" where offender has, among other things, an alcohol concentration of .16 or more); N.M. STAT. ANN. § 66-8-102D (2012) (establishing charge of "Aggravated Driving While Under the Influence of Intoxicating Liquor or Drugs" where an offender has an alcohol concentration of .16 or more within three hours of driving).

[6] *See, e.g.,* D.C. CODE § 50-2201.05 (2011) (providing mandatory incarceration where an offender has an alcohol concentration greater than .20); IDAHO CODE ANN. § 18-8004C (2012) (providing sentencing enhancements for "excessive alcohol concentration" when an offender has an alcohol concentration greater than .20); LA. REV. STAT. ANN. § 14:98(B)(2)(a) (2012) (providing mandatory incarceration where an offender has an alcohol concentration greater than .15); ME. REV. STAT. tit. 29, § 2411 (2011) (providing mandatory incarceration where an offender has an alcohol concentration greater than .15); OKLA. STAT. tit. 47, § 11.902 (2012) (providing sentencing enhancements for "aggravated driving under the influence" where a convicted offender is found to have an alcohol concentration of .15 or more); OR. REV. STAT. § 813.010(6) (2012) (providing a sentencing enhancement where an offender has an alcohol concentration of .15 or more); TENN. CODE ANN. § 55-10-403

(Continued on following page)

and punish an offender for the crime committed, the sampling must be done as soon as possible after driving to determine the offender's alcohol concentration.

C. Obtaining an immediate and warrantless blood sample from a drunk-driving arrestee is a valid search incident to arrest.

"The touchstone of [this Court's] analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security,'" *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)), and that reasonableness "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Mimms*, 434 U.S. at 109 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)); *see also Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) ("[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness. . . .'"). The probable cause

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(2012) (providing sentencing enhancements where an offender has an alcohol concentration of .20 or more); VA. CODE ANN. § 18.2-270 (2012) (enhanced penalties where alcohol concentration is .15 or greater); WASH. REV. CODE § 46.61.5055 (2012) (enhanced penalties where alcohol concentration is at least .15); WIS. STAT. § 346.65(2)(g) (2012) (enhanced penalties where alcohol concentration is .17 or greater).

standard emblemizes Fourth Amendment reasonableness, "represent[ing the] necessary accommodation between the individual's right to liberty and the State's duty to control crime." *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975).

The probable cause standard "has roots that are deep in our history." *Henry v. United States*, 361 U.S. 98, 100 (1959). It reflects the "ancient common-law rule" that warrantless arrests were permissible if there was reasonable ground to believe a crime was committed. *United States v. Watson*, 423 U.S. 411, 418 (1976); *Atwater v. City of Lago Vista*, 532 U.S. 318, 327-39 (2001). The probable cause test also comports with "traditional standards of reasonableness." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). In turn, it is now beyond peradventure that, "[a] warrantless arrest of an individual . . . is consistent with the Fourth Amendment if the arrest is supported by probable cause." *Maryland v. Pringle*, 540 U.S. 366, 370 (2003); *Virginia v. Moore*, 553 U.S. 164, 177 (2008) ("[W]e have equated a lawful arrest with an arrest based on probable cause. . . .").

When a police officer makes a constitutionally valid arrest, it is reasonable under the Fourth Amendment for the officer to search the person arrested as an incident to that arrest. The propriety of such searches was "always recognized under English and American law" and "has been uniformly maintained in many cases." *Weeks v. United States*, 232 U.S. 383, 392 (1914). But when addressing the considerations

underlying the search-incident-to-arrest doctrine in *Schmerber*, this Court concluded then:

> Whatever the validity of these considerations in general, they have little applicability with respect to searches involving intrusions beyond the body's surface. The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is immediate search.

384 U.S. 757, 769-70 (1966).

Importantly, this Court then rejected the notion of administering a blood test upon only the "mere chance" of obtaining evidence, requiring instead that there be "clear indication" that relevant evidence would be found. *Id*. The Court explained shortly thereafter, however, that "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *United States v. Robinson*, 414 U.S. 218, 235 (1973). And since *Robinson* the Court clarified, that "[w]ith rare exceptions," the reasonableness of a search or seizure under the Fourth Amendment "is not in doubt where [it] is based upon probable cause." *Whren v. United States*, 517 U.S. 806, 817 (1996).

Those "rare exceptions" or certain "additional justification[s]" in the search-incident-to-arrest context have evolved to be understood as limiting principles for those circumstances in which the scope of the search expands to include areas not common or necessary for the average arrest. *See Schmerber*, 384 U.S. at 769 (in discussion of Schmerber's Fourth Amendment claim, "the mere fact of a lawful arrest does not end our inquiry"); *see also United States v. Edwards*, 415 U.S. 800, 808-09 (1974) ("While the legal arrest of a person should not destroy the privacy of his premises, it does – for at least a reasonable time and to a reasonable extent – take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence." (citation omitted)). And what has emerged therefrom, is a doctrine that calls for an articulable factor that justifies broadening the areas searched beyond those of the normal traditional search-incident-to-arrest.

A police incursion into an area where one's "privacy interest" is "important and deserving of constitutional protection" is constitutionally permissible, however, when it is "'*reasonable to believe* evidence relevant to the crime of arrest might be found.'" *Arizona v. Gant,* 556 U.S. 332, 343-45 (2009) (emphasis added) (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)). In the vast majority of cases, as when a driver is arrested for a garden variety traffic violation, there will be no reasonable basis to believe his or her blood contains relevant evidence. But, not so here. When one has been

or can be validly arrested for driving under the influence of intoxicants, the offense of arrest itself supplies the requisite "evidentiary interest" in obtaining his blood sample. *Gant*, 556 U.S. at 347.

"Weighed against [an] individual['s privacy] interests is the community's interest in fairly and accurately determining guilt or innocence": an interest "of great importance." *Winston v. Lee*, 470 U.S. 753, 762 (1985). Although this Court has found that many Fourth Amendment situations are not amenable to bright-line rules, *see United States v. Drayton*, 536 U.S. 194, 201 (2002), it has traditionally developed clear, *per se* rules in cases where such a rule would provide "'[a] single familiar standard,'" "'essential to guide police officers.'" *New York v. Belton,* 453 U.S. 454, 458 (1981) (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)). In the DUI context as with other searches, "the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances." *Schmerber*, 384 U.S. at 768. If, as in Tyler McNeely's case, there is probable cause sufficient to lawfully arrest one for driving while intoxicated – defined now as having a quantified *per se* prohibited alcohol content – then it is perforce "reasonable to believe evidence relevant to the crime of arrest" will be found in his bloodstream. *Gant*, 556 U.S. at 343 (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)). In fact, probable cause sufficient to lawfully arrest one for driving while intoxicated, is perforce *probable cause*

to believe evidence of the intoxicant will be found in his bloodstream. *See Ornelas v. United States*, 517 U.S. 690, 696 (1996) (Probable cause exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found."). Thus, as a rule, "[i]t is the fact of the lawful arrest [for that specific offense] which establishes the authority to search" incident to an arrest for that specific evidence without "additional justification." *United States v. Robinson*, 414 U.S. 218, 235 (1973); *Gant*, 556 U.S. at 343, 347, 351.

II. To the Extent That Some Additional "Exigency" is Required to Obtain an Immediate Warrantless Nonconsensual Blood Draw From a Defendant Validly Arrested for Driving Under the Influence, the Evolution, Since this Court's Decision in *Schmerber v. California*, of Impaired Driving Laws and Enforcement Thereof Renders the Highly Evanescent Nature of Alcohol in That Defendant's Bloodstream an Even More Compelling Exigent Circumstance.

The Fourth Amendment protects "against unreasonable searches and seizures" of (among other things) the person. U.S. CONST. amend. IV. This Court "ha[s] analyzed a search or seizure in light of traditional standards of reasonableness 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to

which it is needed for the promotion of legitimate governmental interests.'" *Virginia v. Moore*, 553 U.S. 164, 171 (2008) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)); *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). While the Fourth Amendment embodies a strong preference for warrants before certain police intrusions are made, the Court has long-recognized that in some circumstances "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable." *Mincey v. Arizona*, 437 U.S. 385, 394 (1978); *see also Michigan v. Fisher*, 130 S. Ct. 546, 548 (2009); *Brigham City v. Stuart*, 547 U.S. 398, 400 (2006). And it is well-established that police may conduct warrantless searches under the exigent circumstances exception to prevent the destruction of evidence. *Brigham City*, 547 U.S. at 403; *Minnesota v. Olson*, 495 U.S. 91, 100 (1990); *Coolidge v. New Hampshire*, 403 U.S. 443, 477-78 (1971); *Ker v. California*, 374 U.S. 23, 40 (1963) (plurality opinion).

Indeed, the destruction-of-evidence exception to the warrant requirement has been recognized at least as far back as *Johnson v. United States*, 333 U.S. 10 (1948), and *McDonald v. United States*, 335 U.S. 451 (1948), where the Court affirmed the suppression of evidence obtained from warrantless residential searches because, among other reasons, "[n]o evidence or contraband was threatened with removal or destruction" immediately preceding the search. *Johnson*, 333 U.S. at 15; *McDonald*, 335 U.S. at 455

(noting that officers had ample time to procure a warrant and that the evidence was not "in the process of destruction"). Confirming that ongoing or imminent destruction of evidence can justify a warrantless search, a plurality of the Court in *Ker v. California*, 374 U.S. at 40-41, affirmed a warrantless search based in part on officers' fears that evidence was about to be destroyed.

In sum, over the years the destruction-of-evidence exception has become axiomatic. *See*, *e.g.*, *Brigham City*, 547 U.S. at 403 (a warrantless search is justified by "imminent destruction of evidence"); *Georgia v. Randolph*, 547 U.S. 103, 117 n.6 (2006) ("[A] fairly perceived need to act on the spot to preserve evidence may justify entry and search under the exigent circumstances exception to the warrant requirement."); *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (same); *United States v. Watson*, 423 U.S. 411, 435 (1976) ("When law enforcement officers have probable cause to believe that an offense is taking place in their presence and that the suspect is at that moment in possession of the evidence, exigent circumstances exist. Delay could cause . . . the destruction of the evidence."); *see also State v. Entrekin*, 47 P.3d 336, 347 (Haw. 2002) ("This Court recognizes exceptions to the warrant requirement in 'those cases where the societal costs of obtaining a warrant, such as . . . the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate.'"). Invocation of the destruction-of-evidence exigent-circumstance exception to the warrant requirement is generally supported by a

showing of the "*imminent* destruction of evidence." *Minnesota v. Olson*, 495 U.S. 91, 100 (1990) (emphasis added); *see also Brigham City*, 547 U.S. at 403 (noting "prevent[ion of] the imminent destruction of evidence" justifies warrantless police intrusions).

The imminent destruction of blood-alcohol evidence by the normal metabolization of that alcohol provides an inherent exigency which justifies a warrantless seizure. This Court recognized in *Schmerber* that the level of alcohol in the bloodstream of an impaired driver is "a highly effective means of determining the degree to which a person is under the influence of alcohol." 384 U.S. 757, 771 (1966); *see also Winston v. Lee,* 470 U.S. 753, 763 (1985) ("[R]esults of the blood test were of vital importance if the State were to enforce its drunken driving laws."); Michael A. Correll, *Is There a Doctor in the (Station) House?: Reassessing the Constitutionality of Compelled DWI Blood Draws Forty-Five Years After* Schmerber, 113 W. VA. L. REV. 381, 388 (2011) ("Blood tests are also often regarded as the gold standard of [driving while intoxicated] evidence."). But blood-alcohol evidence is no longer just evidence probative of whether one is potentially impaired. Instead, under the illegal *per se* alcohol-content driving laws now existing in all 50 states, the District of Columbia, Guam, and Puerto Rico it is a criminal offense to operate a motor vehicle at or above a specified alcohol concentration in the blood. NHTSA, *supra* page 13, at iii; *see also* Section I.B., *supra*. Consequently, the evidence-destruction exigent circumstance under the current construct of the nation's impaired driving

laws is even more compelling than was present at the time of *Schmerber*, because today the actual numerical value quantifying one's alcohol content is ***the*** element of the *per se* crime and disappears with each moment that passes before sample collection.

"[B]lood tests suffer from a single debilitating problem – time." Correll, 113 W. VA. L. REV. at 389. As this Court has recognized, "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Schmerber,* 384 U.S. at 770. And because alcohol is eliminated from the bloodstream persistently until it is gone, "blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible." *Skinner v. Ry. Labor Exec. Ass'n,* 489 U.S. 602, 623 (1989); Correll, 113 W. VA. L. REV. at 389 ("[B]lood testing demands quick extraction to achieve an accurate result. . . .").

This Court has previously affirmed the warrantless seizure of a biological sample (nail scrapings), recognizing that once an individual is placed under formal arrest, he has an increased motive "to take conspicuous, immediate steps to destroy incriminating evidence." *Cupp v. Murphy*, 412 U.S. 291, 296 (1973). Investigation of impaired driving involves a far more immediate destruction-of-evidence circumstance. Destruction of the alcohol-concentration level is not a mere potentiality; it is an actuality. *Schmerber*, 384 U.S. at 770-71 (discussing the absorption and elimination of alcohol in the blood

stream as an exigency); Correll, 113 W. VA. L. REV. at 389-90 (2011) (same). In this distinct category of cases, the delay necessary to procure a warrant will undoubtedly result in the destruction of this distinct form of valuable evidence required for prosecution of *per se* alcohol-content offenses.[7] Surely the necessity of avoiding this destruction of critical evidence far outweighs the "slight . . . intrusion as is involved in applying a blood test." *Breithaupt v. Abram*, 352 U.S. 432, 433-39 (1957); *Schmerber*, 384 U.S. at 771 ("Such tests are commonplace . . . the quantity of blood extracted is minimal and . . . the procedure involves no risk, trauma, or pain." footnote omitted)).

State police officers conducting impaired-driving investigations – often in the middle of the night or wee hours of the morning – operate under circumstances in which "the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and [thus] the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years

[7] For example, a blood sample secured from an individual shortly after the investigating officer determines the existence of probable cause may yield a BAC of .08 – the national *per se* threshold. Taken a mere two hours later, blood taken from this same individual will yield a BAC well below this threshold (.04 to .05). Clearly, the States' drunk driving statutes are aimed at curbing the very dangerous act of impaired driving – the best indicator of an individual's impairment is evidence secured as close in time as possible to the act of driving.

after an arrest or search is made." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). Such circumstances call for "providing clear and unequivocal guidelines to the law enforcement profession." *California v. Acevedo*, 500 U.S. 565, 577 (1991) (internal quotation marks and citation omitted).

That principle is fully applicable here. In the investigation of today's drunk-driving laws "exigency based solely on the fact that alcohol rapidly dissipates in the bloodstream," *State v. Bohling*, 494 N.W.2d 399, 402 (Wis. 1993), is a reasonable bright-line rule defining when officers are authorized to immediately obtain a blood sample incident to arrest for that crime. *See State v. Netland*, 762 N.W.2d 202, 214 (Minn. 2009) ("[U]nder the exigency exception, no warrant is necessary to secure a blood-alcohol test where there is probable cause to suspect a crime in which chemical impairment is an element of the offense."). It is exactly this type of "readily administrable rule[ ]" that the Court has repeatedly endorsed in the Fourth Amendment context. *Virginia v. Moore*, 553 U.S. 164, 175 (2008) (quoting *Atwater*, 532 U.S. at 347). By contrast, relying on the demonstration of exigency posited by the Missouri Supreme Court and respondent – *i.e.*, requiring proof that an officer could not have obtained a warrant to draw a drunk-driving arrestee's blood without inevitably sacrificing evidence of that arrestee's blood alcohol content, *see* Pet. App. 3a, 8a, Brf. in Opp. at 26 – would seemingly require police, each time they must obtain a blood sample, to conduct a calculation of myriad factors, many of which are outside the

officer's control, including *inter alia*: the arrestee's extant BAC, the time it may take to conduct other investigative tasks, the ready availability of judicial and/or prosecutor resources, and the timely availability of a technician qualified to draw the blood. The officer would then be forced to attempt to quantify the potential success rate for obtaining a timely warrant and blood draw in an effort to determine whether the resulting guesstimate is adequate to forego a warrant. The Fourth Amendment mandates no such thing.

CONCLUSION

For the foregoing reasons, the judgment of the Missouri Supreme Court should be reversed.

Respectfully submitted,

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