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 THE RUTHERFORD INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

John W. Whitehead
(Counsel of Record)
Rita M. Dunaway
Douglas R. McKusick
Christopher F. Moriarty
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

Counsel for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTION PRESENTED

Whether a law enforcement officer may obtain a nonconsensual and warrantless blood sample from a drunk driver under the exigent circumstances exception to the Fourth Amendment warrant requirement based upon the natural dissipation of alcohol in the bloodstream.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

INTEREST OF *AMICUS*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues.

SUMMARY OF THE ARGUMENT

Amicus submits that this case – like thousands of other suspected drunk driving cases – could have been resolved in a manner that secured the blood alcohol evidence necessary to secure a conviction of Respondent, while at the same time protecting Respondent's constitutional rights. Indeed, States throughout the nation, including Petitioner, have procedures that allow for expeditious warrants to be issued in cases such as this, and Petitioner's sister States routinely use these procedures without difficulty. For these reasons, Petitioner's request for a per se rule permitting warrantless nonconsensual blood samples

---

[1] Pursuant to Sup. Ct. R. 37.6, *Amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have filed letters with this Court consenting to *amicus curiae* briefs on behalf of either party.

of suspected drunk drivers is unnecessary and must therefore be rejected.

ARGUMENT

I. A Per Se Rule Permitting Warrantless Nonconsensual Blood Samples of Suspected Drunk Drivers is Impermissible.

Amicus recognizes that evidence of drunk driving must be obtained quickly after a suspect is arrested. *Amicus* contends, however, that this can be achieved through compliance with the warrant process and that there is no justification for a per se rule eliminating this, as requested by Petitioner. Only in this way can both the needs of States in ridding the nation's roads of drunk drivers and upholding constitutional protections be met. As one scholar has noted, "[i]f . . . the state can further both its own interests in highway safety and the individual's interests in personal integrity, the choice must favor the least intrusive, effective alternative."[2]

Bodily intrusions for the extraction of blood, however routine, "plainly involve[] the broadly conceived reach of a search and seizure under the Fourth Amendment." *Schmerber v. California*, 384 U.S. 757, 767 (1966). Despite Petitioner's arguments about the routine nature of such intrusions, they remain particularly significant because, as the Court of Appeals for the Tenth Circuit has pointed out, "[a]

---

[2] Robert Brooks Beauchamp, *'Shed Thou No Blood': The Forcible Removal of Blood Samples from Drunk Driving Suspects*, 60 S. CAL. L. REV. 1115, 1135 (1987).

person's home is his or her castle, and throughout history, one of the key purposes of a castle's walls has been to protect the castle-owner's blood." *Marshall v. Columbia Lea Reg'l Hosp.*, 474 F.3d 733, 745 (10th Cir. 2007). Consequently, "there remains the nagging feeling that the removal of blood from within the body of the accused by means of force in routine drunk driving cases shocks the conscience . . . ."[3] Even if the actual process of drawing an individual's blood against his or her will is a relatively minor procedure,

> it does not follow from the fact that a technique is a product of science or is in common, consensual use for other purposes that it can be used to extract evidence from a criminal defendant without his consent. Would the taking of spinal fluid from an unconscious person be condoned because such tests are commonly made and might be used as a scientific aid to law enforcement?

Breithaupt v. Abram, 352 U.S. 432, 442 (1957)(Warren, C.J., dissenting).

Amicus respectfully reminds this Court that the facts of this case are limited to "routine" arrests of suspected drunk drivers, and this is not a case involving "special facts," such as vehicular manslaughter. As the trial court noted, "[t]his was not an emergency, it was a run of the mill driving while intoxicated case." Pet. App. 43a. Moreover, "a prosecutor was readily available to apply for a

---

[3] *Id.*

search warrant and a judge was readily available to issue a warrant." *Id.* Despite this, however, Petitioner takes the extraordinary step of claiming that in ***any*** case involving a suspected drunk driver – where that suspicion is based solely on a law enforcement officer's subjective determination – warrants are never required for forced blood samples. Such a position is squarely at odds with the Fourth Amendment.[4] *See United States v. Drayton*, 536 U.S. 194, 201 (2002) ("[F]or the most part per se rules are inappropriate in the Fourth Amendment context."); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) ("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.")(internal quotations omitted)(citing *Katz v. United States*, 389 U.S. 347, 357 (1967)).

Despite Petitioner's claims to the contrary about the necessity of warrantless forced blood samples from suspected drunk drivers, the blood alcohol evidence at issue in this case – evidence that would have shown that Respondent had a blood alcohol level in excess of the legally permissible level – could have been obtained if Cpl. Winder had

---

[4] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

obtained a search warrant. Here, as Petitioner acknowledges in its Brief, obtaining a search warrant in this case would have taken "approximately two hours." Br. of Pet'r at 5. Moreover, the trial court below was presented with six recent cases in which search warrants authorizing blood draws had been obtained in less than an hour. Br. of Resp. at 7 (citing J.A. 70). In five of the cases, the time period from application to warrant was less than 30 minutes. *Id.* Accepting Petitioner's statement that the "rate of alcohol in the bloodstream is generally somewhere between .015 and .020 per hour[,]" Br. of Pet'r at 5, Respondent's blood alcohol level would have been in the region of 0.114 to 0.124 (accepting Cpl. Winder's two-hour estimation), more than the .08 g/dL legal limit.

Despite this, and eschewing the notion that "[t]he integrity of an individual's person is a cherished value of our society[,]" *Schmerber*, 384 U.S. at 772, Petitioner seeks to avoid the warrant requirement in ***every*** case of suspected drunk driving, even when it can secure its objective – securing blood alcohol evidence from the suspect – through compliance with the Fourth Amendment's warrant requirement. Such a per se rule is at odds with this Court's holding that all non-consensual "surgical intrusions beneath the skin depend[] 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." *Winston v. Lee*, 470 U.S. 753, 760 (1985). *Amicus* readily acknowledges Petitioner's interest in obtaining evidence from suspected drunk drivers, but because this interest can be met through the use

of warrants (or through case-by-case determinations), Petitioner's argument must fail.

Moreover, this case (and run-of-the-mill drunk driving cases generally) is not a case where law enforcement was faced with the imminent destruction of evidence – such as where drugs are being flushed down the lavatory, *see Roaden v. Kentucky*, 413 U.S. 496, 504 (1973) – but rather where evidence is being slowly and gradually metabolized and destroyed. If it were, the blood alcohol evidence that Cpl. Winder obtained would not have been present. That the blood alcohol evidence would still have been available if a warrant had been obtained illustrates that warrantless nonconsensual blood samples simply provide law enforcement personnel with greater convenience in obtaining evidence from a suspect, rather than preventing the destruction of evidence. Greater law enforcement convenience, however, is not a basis for an exception to the Fourth Amendment's warrant requirement. *See Mincey*, 437 U.S. at 392 ("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."). Moreover, as Justice Scalia has asked, if law enforcement personnel do not need to obtain a warrant even when a warrant could be obtained expeditiously, "what rational officer would not take those measures?" *Thornton v. United States*, 541 U.S. 615, 628 (2004)(Scalia, J., concurring). It would be prima facie unreasonable, therefore, to permit an

exception to the Fourth Amendment when, as here, compliance with the Fourth Amendment's warrant requirement can satisfy the State's need. *See Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (holding that an action is "reasonable" under the Fourth Amendment as long as the circumstances, viewed objectively, justify the action). This further militates against Petitioner's request for a per se rule.

Even accepting that warrants might, on occasion, potentially be difficult to obtain on short notice, the solution is not to trample fundamental constitutional rights, but to enact procedures that allow for the expeditious issuance of warrants. The solution to this problem is not to allow a per se exception in all cases as this would result in an end-run around the Fourth Amendment. It would allow law enforcement to haul suspects – whether intoxicated or not – to medical facilities for nonconsensual blood samples based solely on their own suspicions. Moreover, "justify[ing] the officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity." *Johnson v. United States*, 333 U.S. 10, 14 (1948). Alternatively, at the very least, the propriety of law enforcement personnel not obtaining a warrant should be determined on a case-by-case basis, as opposed to through a per se rule permitting such searches.

II. Warrants Are Readily Available In Drunk Driving Cases.

Throughout its brief, Petitioner makes much of the exigent circumstances that purportedly justify an exception to the Fourth Amendment's warrant requirement. What Petitioner fails to do, however, is to present ***any*** substantive evidence that compliance with the warrant requirement would have prevented Cpl. Winder from obtaining relevant evidence from Respondent (or, indeed, other suspected drunk drivers). This alone illustrates that a per se rule is unnecessary and overbroad.

Petitioner's concerns undergirding its per se rule request are, at best, tenuous. Furthermore, they are not shared by its sister States. On the contrary, "approximately half of all states prohibit the warrantless blood draw that took place in this case . . . ." Br. of Resp. at 12. Rather than implementing legislation that infringes on Fourth Amendment rights, many of Petitioner's sister States find that compliance with the warrant requirement in routine drunk driving cases is relatively straightforward. The States of Arizona, Kentucky, and New York, for example, require arresting officers to secure warrants or court orders before obtaining a forced blood sample.[5] Petitioner has not shown any reasons why such procedures could not be used successfully in Missouri. This is for good reason, namely that Cpl. Winder could have obtained a warrant under Petitioner's warrant protocols and still secured the

---

[5] *See* ARIZ. REV. STAT. ANN. § 28-1321 (2010); KY. REV. STAT. ANN. § 189A.105 (LexisNexis 2010); N.Y. VEH. & TRAF. LAW § 1194 (Consol. 2010).

blood alcohol evidence from Respondent that would have been sufficient to secure a conviction.

Similarly, Petitioner's concerns are not shared by the U.S. Department of Transportation, National Highway Traffic Safety Administration ("U.S.D.O.T."), which has published several case studies on the use of warrants in breath test refusal cases.[6] In one study, the report stated that, "[i]n general, police officers in these participating counties report that the 15 to 60 minutes of added processing time needed to obtain a warrant and draw blood was time well spent, and that the chemical evidence obtained from blood was of great value."[7] Moreover, such procedures, regardless of location, are straightforward:

> The basic process for using warrants in the four States was straightforward. If a driver was arrested for DWI and refused to provide a breath test, the arresting officer contacted a magistrate or judge, day or night, and by phone if necessary; the officer requested a

---

[6] *See, e.g.*, U.S. Department of Transportation, National Highway Safety Traffic Administration, *Use of Warrants for Breath Test Refusal: Case Studies* (Oct. 2007); U.S. Department of Transportation, National Highway Safety Traffic Administration, *Use of Warrants to Reduce Breath Test Refusals: Experiences from North Carolina* (Apr. 2011), at i, *available at* www.nhtsa.gov/staticfiles/nti/pdf/811461.pdf.

[7] U.S. Department of Transportation, *Use of Warrants to Reduce Breath Test Refusals: Experiences from North Carolina*, *supra* note 6, at i.

> warrant that required the driver to provide a blood sample; and then arranged for the blood sample to be drawn.[8]

The U.S.D.O.T. noted that "***[j]udges and prosecutors interviewed strongly supported warrants***, to the extent of volunteering to answer the telephone in the middle of the night to issue a warrant."[9] Similarly, "[l]aw enforcement officers interviewed in case study States generally supported the use of warrants. They are willing to take the additional time that the warrant process requires in order to obtain BAC evidence."[10] The reports are perhaps most significant for what they do not state: there is no record that the surveyed jurisdictions failed to secure blood alcohol evidence by obtaining warrants. Even if such concerns exist, the reports note other procedures that are available to streamline the process and therefore help meet the need to obtain blood alcohol evidence promptly. For example,

> in Arizona and Utah, a number of law enforcement officers have been trained and certified as phlebotomists and are authorized to draw blood samples. They typically draw the blood sample at the police station, eliminating the need to transport the driver to a medical

---

[8] *Id.* at 2.

[9] U.S. Department of Transportation, *Use of Warrants for Breath Test Refusal: Case Studies, supra* note 6, at vi (emphasis added).

[10] *Id.* at vi-vii.

> facility. If a law enforcement phlebotomist is not available, blood can be drawn by medical personnel as in Michigan and Oregon. In all States, the driver will be charged with and will face the penalties for a BAC test refusal, in addition to potential charges and penalties for DWI.[11]

Moreover, a variety of means exist whereby Petitioner may further discourage non-compliance with roadside testing and therefore disincentivize suspected drunk drivers from refusing to provide a blood alcohol test. As mentioned above, States can (and do) enact legislation that provides for sanctions for refusing to take a breath test.[12] Furthermore, States may further discourage breath test refusals (and the need for forced blood samples) by making punishment for refusal to take a breath test the same as a conviction for drunk driving.[13] The U.S.D.O.T. concludes by stating that

---

[11] *Id.* at vi.

[12] *See* U.S. Department of Transportation, National Highway Safety Traffic Administration, *Refusal of Intoxication Testing: A Report to Congress* (Sept. 2008), at 7 (noting that in Minnesota, "[b]oth DWI and refusals are criminal offenses, and a driver can be convicted on either or both charges.").

[13] *See id.* at 7-8 (noting that in Minnesota "the legal consequences of conviction of a criminal refusal are the same as those of a criminal conviction of DWI."); *id.* at 9 (noting that in Nebraska, "[i]n almost every case (i.e., 98%), either the DWI or the refusal resulted in a conviction. . . . DWI and refusal carry the same sentence . . . .").

> it is clear that BAC test refusal does not necessarily lead to lower conviction rates, even if lack of BAC concentration information makes prosecution more difficult. When refusal is a separate criminal offense, offenders are likely to be convicted on the test refusal charge and perhaps on the impaired driving charge in addition.[14]

Alternatively, there is nothing to prevent Petitioner from enacting legislation that the refusal to take a breath test may be used as per se evidence of intoxication at trial. Easily implemented laws and procedures such as these meet the needs of States in combatting drunk drivers, while at the same time upholding individual constitutional rights.

Given the absence of necessity for abandoning the warrant requirement, both in this case and in routine drunk driving cases generally, eviscerating constitutional protections by implementing a per se exception to the warrant requirement cannot be justified in light of the alternatives available to Petitioner. The answer to the problems of suspected drunk drivers and the evanescent nature of blood alcohol evidence is through the use of effective laws and procedures such as these (or by making case-by-case determinations as to the exigent circumstances when delays arise in connection with the issue of a warrant). Only in this way can blood alcohol evidence be secured and constitutional rights be protected.

---

[14] *Id.* at 10.

CONCLUSION

The problems associated with drunk drivers are familiar to this Court, the parties, and their respective *amici*. The solution to these problems, however, will not be solved through a per se rule allowing warrantless nonconsensual blood samples of suspected drunk drivers. *Amicus* therefore respectfully urges this Court to uphold the decision of the Missouri Supreme Court. To decide otherwise would create an exception to the Fourth Amendment's warrant requirement in numerous cases where there is not an exigent circumstance. As illustrated herein, experiences from Petitioner's sister States show that nonconsensual blood samples can be readily obtained through compliance with the warrant requirement and that a per se rule as requested by Petitioner is unnecessary. Indeed, this case could have been prosecuted with the incriminating blood alcohol evidence that could have been obtained through Petitioner's established warrant procedures. While case-by-case exceptions may, on occasion, justify a departure from the warrant requirement, the evidence is this case (and cases throughout the nation) shows that the need for a per se rule dispensing with the warrant requirement altogether is neither necessary nor justified.

Respectfully submitted,

John W. Whitehead
Counsel of Record
Rita M. Dunaway
Douglas R. McKusick
Christopher F. Moriarty
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888

Attorneys for *Amicus Curiae*