No. 11-1425

In the Supreme Court of the United States

STATE OF MISSOURI, PETITIONER

v.

TYLER G. MCNEELY

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment permits a police officer to obtain a blood sample from a driver who has been arrested for driving under the influence of alcohol, without seeking a warrant, because of the natural dissipation of alcohol in the driver's bloodstream.

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INTEREST OF THE UNITED STATES

This case presents the question whether the Fourth Amendment permits a law enforcement officer to obtain a blood sample, without seeking a warrant, from a driver who has been arrested for driving while under the influence of alcohol based upon the natural dissipation of alcohol in the driver's bloodstream. Federal officials routinely make arrests for drunk driving that occurs in national parks and on other federal land. Further, the Department of Transportation, through the National Highway Traffic Safety Administration (NHTSA), has undertaken substantial efforts to reduce the incidence of drunk driving in the United States. NHTSA provides grants to States for impaired-driving prevention, enforcement, and research; conducts research to assist States in identifying new approaches to reduce impaired driving; and collects and maintains data on the effects of

impaired driving. Accordingly, the United States has a substantial interest in the resolution of this case.

STATEMENT

1. On October 3, 2010, shortly after 2 a.m., a Missouri state patrol officer observed respondent speeding and crossing the centerline in his white Ford truck. Pet. App. 4a; J.A. 19. The officer stopped the truck and noticed that respondent displayed several "tell-tale signs of intoxication": his eyes were "glassy and bloodshot" and there was a "strong odor" of alcohol on his breath. Pet. App. 4a; see J.A. 19, 30-31. The officer asked respondent if he had been drinking alcoholic beverages; respondent said he had "drunk a couple of beers." J.A. 20.

The officer asked respondent to step out of his truck. Pet. App. 4a. Respondent was "unstable on his feet" and "swayed while maintaining his balance." J.A. 20; see Pet. App. 24a. The officer administered four standard field sobriety tests; respondent performed poorly on all of them. Pet. App. 4a, 24a; J.A. 20, 31-32. The officer asked respondent to breathe into a portable breath tester, and respondent refused. Pet. App. 4a; J.A. 20, 33. The officer then arrested respondent for driving while intoxicated. Pet. App. 4a; J.A. 20, 33.

The officer placed respondent in his squad car and asked him if he would provide a breath sample at the stationhouse; respondent refused. Pet. App. 4a; J.A. 20, 33. The officer then transported respondent to a local hospital to obtain a blood sample. Pet. App. 5a; J.A. 20. Before taking the sample, the officer informed respondent that under Missouri's implied-consent law, a driver who has been arrested for drunk driving must consent to a chemical test, or he will lose his driver's license for one year and his refusal to consent to the test may be

used against him in a criminal proceeding. Pet. App. 25a; J.A. 34-35, 59; see Mo. Ann. Stat. §§ 577.020, 577.041 (West 2011). Respondent refused to consent to a blood test. Pet. App. 5a; J.A. 35, 73-74.

A trained medical technician took a blood sample from respondent. Pet. App. 5a; J.A. 20. Chemical analysis of the sample revealed that respondent's blood-alcohol content (BAC) was 0.154 percent, well above the State's legal limit of 0.08 percent. Pet. App. 5a, 25a; J.A. 37, 60-61.

The blood sample was taken about 25 minutes after the initial traffic stop. Pet. App. 21a; J.A. 20. The process of obtaining a warrant would have substantially delayed the test; a state patrol sergeant testified that it "usually" takes an extra "hour and a half to two hours" to obtain a warrant for a blood test in a drunk driving case. J.A. 53-54. The sergeant further explained that alcohol is absorbed into a person's bloodstream fairly quickly—typically "before the [person] even leave[s] the bar"—and when the person stops drinking, his BAC will decrease steadily, at a rate of 0.015 to 0.020 percent per hour. J.A. 47-48. At that point, the sergeant explained, the BAC evidence "is being destroyed with each passing minute." J.A. 51.

2. Respondent was charged in state court with driving while intoxicated, in violation of Mo. Ann. Stat. § 577.010 (West Supp. 2010). Pet. App. 23a; J.A. 22-23. This offense was a felony because respondent has two prior convictions for driving while intoxicated. J.A. 22-23.

Respondent filed a suppression motion, arguing that under the Fourth Amendment, the police were required to obtain a warrant before taking the blood sample. J.A. 25-26. The trial court granted the motion. Pet. App.

39a-46a. The court noted that in *Schmerber* v. *California*, 384 U.S. 757 (1966), this Court had upheld the taking of a nonconsensual and warrantless blood sample from a person who had been arrested for drunk driving. Pet. App. 42a. In *Schmerber*, the Court determined that the officer's actions were justified because "the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence," in that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops." 384 U.S. at 770-771 (citation and internal quotation marks omitted).

The trial court recognized that in this case, as in "all cases involving intoxication," respondent's BAC was constantly decreasing as the alcohol in his blood "was being metabolized by his liver." Pet. App. 43a. But the court declined to apply *Schmerber*'s holding, instead limiting it to the particular facts of that case: an accident causing injuries that required immediate medical attention and an on-scene investigation. *Ibid.*[1]

3. The Missouri Court of Appeals determined that the warrantless blood test was permissible under *Schmerber* because delay would risk the destruction of evidence. Pet. App. 23a-38a. The court explained that the evanescent nature of blood alcohol evidence by itself created sufficient exigency for a warrantless blood draw. *Id.* at 33a-34a. The court found "no reason" to require additional facts so long as "the officer had ample cause to reasonably believe [respondent] was under the influence of alcohol and that [his] blood alcohol concentration

[1] There was a dispute in the courts below about whether Missouri law allowed the officer to obtain a blood sample without consent or a warrant. See Pet. App. 34a-38a, 43a-45a. The Missouri Supreme Court did not resolve that dispute, *id.* at 21a n.9, and it is not before this Court.

would continue to decrease, thus destroying evidence." *Id.* at 33a.

4. The Missouri Supreme Court affirmed the suppression order. Pet. App. 1a-22a. While acknowledging that "the percentage of alcohol in a person's blood begins to diminish shortly after drinking stops," the court decided that that "threat of evidence destruction" does not provide sufficient exigency to justify obtaining a blood sample without a warrant. *Id.* at 2a-3a. In the court's view, *Schmerber* provides a "very limited exception to the warrant requirement," so that the police must obtain a warrant for a blood test unless there are "special facts" that create "an emergency situation," such as a "time delay created by the investigation of the accident as well as the transportation of the defendant to the hospital." *Id.* at 8a-10a; *id.* at 19a-20a.

SUMMARY OF ARGUMENT

The Fourth Amendment permits a law enforcement officer to obtain a blood sample, without seeking a warrant, from a person arrested for driving under the influence of alcohol because the evidence of the driver's intoxication is constantly being destroyed as the alcohol naturally leaves his bloodstream.

A. The touchstone of the Fourth Amendment is reasonableness, and a search or seizure based on probable cause may be conducted without a warrant if the police conduct is reasonable under the circumstances. One circumstance in which this Court has found it reasonable for the police to proceed without a warrant is when a search or seizure is necessary to prevent the imminent destruction of evidence. The exigency provided by the risk of destruction of evidence has justified taking physical samples from a murder suspect, making warrantless entries into homes, searching an arrestee's person and

property incident to arrest, and seizing incriminating evidence found in plain view. In each of those cases, the Court has weighed the government interests and individual privacy interests and concluded that the police behavior was reasonable in the circumstances.

B. This Court conducted that balancing of interests in *Schmerber* v. *California*, 384 U.S. 757 (1966), and concluded that it is reasonable for the police to obtain a blood sample from a suspected drunk driver without a warrant. The Court determined that once a police officer had probable cause to believe a person was driving under the influence of alcohol, so that evidence of intoxication would be found in his bloodstream, the government interests in obtaining that evidence outweighed the driver's privacy interest. The delay associated with obtaining a warrant "threatened the destruction of evidence," the Court explained, because "the percentage of alcohol in the blood begins to diminish shortly after the drinking stops, as the body functions to eliminate it from the system." *Id.* at 770-771 (citation omitted). The Court also noted that the blood test used is "commonplace" and the test was performed "in a reasonable manner" in a hospital environment. *Id.* at 771.

The Missouri Supreme Court erred in limiting *Schmerber* to its specific facts, because the Court's rationale was that the natural dissipation of alcohol in a drunk driver's bloodstream provides sufficient exigency to justify obtaining a blood sample from the driver without seeking a warrant. The Court did not base its holding on how long it would take the police to obtain a warrant or whether the police must spend time on other tasks. And in cases since *Schmerber*, this Court has consistently recognized that *Schmerber* "held that a State may, over the suspect's protest, have a physician

extract blood from a person suspected of drunken driving without violation of the suspect's [Fourth Amendment] rights." *Winston* v. *Lee*, 470 U.S. 753, 755 (1985).

C. States and the federal government have a compelling interest in quickly obtaining blood-alcohol evidence from suspected drunk drivers. Driving while intoxicated remains a serious problem in our society, and every State and the federal government criminalizes this conduct. These criminal laws generally define the offense based on the driver's BAC, which is measured through a chemical test such as a blood test. Time is of the essence in performing such a test because the suspect's BAC is constantly decreasing as the alcohol is naturally eliminated from his system.

The fact that the evidence of intoxication is necessarily leaving the suspect's system provides the required exigency. The police should not have to speculate about how long the alcohol might remain in the suspect's system, how long it might take to obtain a warrant or find a technician to perform the blood test, or how long it might take to complete other investigative tasks.

D. The government's need to promptly obtain blood-alcohol evidence from suspected drunk drivers justifies the intrusion on the driver's privacy interests. Although a blood test involves a bodily intrusion, this Court has characterized it as minimal and commonplace. Blood tests are routinely performed during annual physical examinations, or to obtain a marriage license or enter the armed forces. Moreover, a driver's privacy expectations in this context are reduced by the pervasive regulation of automobile travel and all States' and the federal government's implied-consent laws. Police officers must have the ability to order blood tests in appropriate circumstances to ensure that the roads and highways are

safe. The judgment of the Missouri Supreme Court should be reversed.

ARGUMENT

EXIGENT CIRCUMSTANCES JUSTIFY A WARRANTLESS BLOOD TEST WHEN THE POLICE HAVE PROBABLE CAUSE TO BELIEVE THAT AN INDIVIDUAL HAS BEEN OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF ALCOHOL

A. The Risk Of Imminent Destruction Of Evidence May Provide Exigency Sufficient To Permit A Warrantless Search Or Seizure

1. The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" and that "no Warrants shall issue, but upon probable cause." The Fourth Amendment's text "imposes two requirements": "all searches and seizures must be reasonable" and "a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity." *Kentucky* v. *King*, 131 S. Ct. 1849, 1856 (2011). Although the Amendment does not state when a warrant is required, this Court has "inferred that a warrant must generally be secured" before a search of a home or a person. *Ibid.*

But the "ultimate touchstone" of the Fourth Amendment is the "reasonableness" of the police practice, and in many circumstances it is reasonable for the police to proceed without a warrant. *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006). In particular, the Court has recognized that the "exigencies of the situation" may "make the needs of law enforcement so compelling that [a] war-

rantless search is objectively reasonable." *King*, 131 S. Ct. at 1856 (quoting *Mincey* v. *Arizona*, 437 U.S. 385, 394 (1978)). These exigent circumstances include "the need to assist persons who are seriously injured or threatened with such injury," *Brigham City*, 547 U.S. at 403; the "hot pursuit" of a fleeing suspect, *United States* v. *Santana*, 427 U.S. 38, 42-43 (1976); and, as relevant here, the need "to prevent the imminent destruction of evidence," *King*, 131 S. Ct. at 1856 (citation omitted).

2. This Court has permitted the police to conduct warrantless searches and seizures to prevent the destruction of evidence in a variety of contexts. In *Cupp* v. *Murphy*, 412 U.S. 291, 295 (1973), for example, the Court upheld a police officer's decision to obtain fingernail scrapings from a suspect without a warrant. The suspect had voluntarily come to the police station for questioning about his wife's murder. *Id.* at 292. When the police noticed what appeared to be a spot of blood on his hand, the man "put his hands behind his back and appeared to rub them together," then put his hands in his pockets. *Id.* at 292, 296. At that point, the Court explained, the police were justified in immediately taking scrapings from the suspect's fingernails, because they had "probable cause to believe that [the suspect] had committed the murder," the intrusion was "very limited," the evidence was "highly evanescent," and the suspect appeared to be "attempt[ing] to destroy what evidence he could without attracting further attention." *Id.* at 294-296.

The risk of destruction of evidence justifies searches and seizures in a variety of other circumstances. When police officers have the requisite individualized suspicion that evidence will be destroyed, they may make intrusions as significant as entering a dwelling without a war-

rant. See, *e.g.*, *King*, 131 S. Ct. at 1853-1854. The police also may search an automobile when they have probable cause but lack a warrant because the automobile's ready mobility creates a risk of destruction of evidence. *Wyoming* v. *Houghton*, 526 U.S. 295, 304 (1999). The destruction-of-evidence rationale also supports the rules that the police may seize without a warrant incriminating evidence found in plain view, as well as containers and vehicles believed to hold contraband or evidence of a crime. *United States* v. *Place*, 462 U.S. 696, 701-702 (1983); *Carroll* v. *United States*, 267 U.S. 132, 153 (1925). And this Court has approved a limited search incident to an arrest in part because the arrestee may destroy evidence. See, *e.g.*, *Chimel* v. *California*, 395 U.S. 752, 763 (1969).

3. To determine whether a search or seizure without a warrant is reasonable, this Court has weighed "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Scott* v. *Harris*, 550 U.S. 372, 383 (2007) (citation omitted); see, *e.g.*, *Illinois* v. *McArthur*, 531 U.S. 326, 331 (2001) (Court "balance[s] the privacy-related and law enforcement-related concerns"). In *Cupp*, for example, the Court upheld the warrantless taking of fingernail scrapings because it concluded that "the very limited intrusion undertaken" by the police was justified by the "existence of probable cause" to believe the suspect had killed his wife and "the ready destructibility of the evidence" that he was the murderer. 412 U.S. at 296.

In this case, the police officer who arrested respondent for driving under the influence obtained a warrantless blood sample because of the risk that this evidence

of respondent's intoxication would be destroyed if the officer sought a warrant. Whether that police action was reasonable depends upon a weighing of the government's need for the sample and the nature and extent of the intrusion upon respondent's privacy interests.

B. In *Schmerber*, This Court Authorized A Warrantless Blood Test Of A Driver Arrested For Driving Under The Influence Of Alcohol Based On Exigency

1. The Court considered whether the police may take a warrantless blood sample from a suspected drunk driver in *Schmerber* v. *California*, 384 U.S. 757 (1966). The defendant was involved in an automobile accident and was taken to a hospital for medical treatment. *Id.* at 758, 769. The investigating police officer noticed that the defendant smelled of alcohol and had glassy, bloodshot eyes. *Id.* at 768-769. The officer placed the defendant under arrest and asked him to take a "breathalyzer" test; the defendant refused, and so the police officer directed a doctor to take a blood sample from him. *Id.* at 758, 765 n.9. A chemical analysis of the sample confirmed that the defendant was intoxicated. *Id.* at 759.

This Court rejected the defendant's argument that the withdrawal and testing of his blood violated the Fourth Amendment. 384 U.S. at 767-772. The Court determined that taking the blood sample was "plainly" a search and that such an intrusion into the human body ordinarily requires a warrant. *Id.* at 767. But the Court concluded that the officer's decision to proceed without a warrant was "justified in the circumstances" in light of the government's need for the blood sample, the relatively minor intrusion on defendant's privacy interests, and the reasonable manner in which the test was conducted. *Id.* at 767-772.

Beginning with the asserted government interests, the Court found that the officer "plainly" had probable cause to arrest the defendant for driving under the influence of alcohol and that the officer "might reasonably have believed that he was confronted with an emergency" because the "delay necessary to obtain a warrant * * * threatened the destruction of evidence." 384 U.S. at 768-770 (citation and internal quotation marks omitted). The Court observed that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Id.* at 770. Because the blood-alcohol evidence was constantly being destroyed, the Court agreed that there was "no time to seek out a magistrate and secure a warrant," "[p]articularly in a case * * * where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident." *Id.* at 770-771.

The Court then considered the intrusion on privacy interests and concluded that it was "satisfied" that the test used to measure the defendant's blood-alcohol level "was a reasonable one." 384 U.S. at 771. The Court explained that obtaining a blood sample is a "highly effective means" of determining "the degree to which a person is under the influence of alcohol." *Ibid.* And such a blood test is "commonplace" in our society; these tests are performed at routine physical examinations and often are prerequisites for obtaining a marriage license, entering military service, or enrolling in college. *Id.* at 771 & n.13. The Court also noted that the "quantity of blood extracted is minimal" and "for most people the procedure involves virtually no risk, trauma, or pain." *Id.* at 771. Moreover, the Court observed that the test was "performed in a reasonable manner," with the sam-

ple "taken by a physician in a hospital environment according to accepted medical practices." *Ibid.*

The Court therefore concluded that the warrantless blood test did not infringe the defendant's Fourth Amendment rights. 384 U.S. at 772. But the Court cautioned that "[t]he integrity of an individual's person is a cherished value of our society," and the Court's acceptance of the blood test—a "minor intrusion[] into an individual's body under stringently limited conditions"—does not establish the constitutionality of "more substantial intrusions, or intrusions under other conditions." *Ibid.*

2. In this case, as in *Schmerber*, a police officer had probable cause to believe that respondent had been driving while intoxicated. Compare Pet. App. 24a (respondent had the "strong odor of intoxicants on his breath" and "glassy and bloodshot" eyes, was "unstable on his feet," and performed poorly on field sobriety tests), with *Schmerber*, 384 U.S. at 769 (officer "smelled liquor on [the defendant's] breath" and noticed that his eyes were "bloodshot," "watery," and "glassy"). Here, as in *Schmerber*, the "threat[] [of] destruction of evidence" exists because respondent's "body was working naturally to expunge the alcohol in his system." Pet. App. 20a; cf. *Schmerber*, 384 U.S. at 770-771. Nonetheless, the Missouri Supreme Court declined to apply the holding of *Schmerber*. In that court's view, a warrantless blood draw from a suspected drunk driver is not allowed unless police face a multi-hour delay caused by an on-scene investigation or the need to obtain medical treatment for injured persons. Pet. App. 8a-10a, 19a-21a.

The Missouri Supreme Court erred in confining *Schmerber* to its precise facts. *Schmerber* upheld a warrantless blood draw from a suspected drunk driver be-

cause any delay risked the destruction of evidence: "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system," and so the police had "no time to seek out a magistrate and secure a warrant." 384 U.S. at 770-771. The "fact that an accident occurred and that the defendant was taken to the hospital" in *Schmerber* "did not increase the risk that evidence of intoxication would be lost"; the evidence was being lost either way. *State* v. *Bohling*, 494 N.W.2d 399, 402 (Wis.), cert. denied, 510 U.S. 836 (1993). The *Schmerber* Court's observation that police had no time to seek a warrant "particularly in a case such as this" (384 U.S. at 770) recognized the especially acute circumstances in that particular case. But the enhanced risk of lost evidence when police face multiple sources of delay does not defeat the essential risk of lost evidence in *every* drunk-driving case. Even in a routine drunk-driving case, the suspect must be transported from the roadside to a place where a blood sample may be taken by a trained professional, and interrupting that process to obtain a warrant would risk losing the blood-alcohol evidence. *Bohling*, 494 N.W.2d at 402-403.

The Missouri Supreme Court limited *Schmerber* based on the Court's statement that it was "appropriate" for the police to obtain the blood sample without a warrant given the "special facts" of that case. 384 U.S. at 771-772. But the "special facts" that were crucial to the Court's holding were that the officer had probable cause to believe that the test would reveal evidence of intoxication and that the evidence would be destroyed because of the natural dissipation of alcohol from the defendant's body. The *Schmerber* Court did not base its holding on the time it would take to obtain a warrant or complete

other investigative tasks, and any such approach would be impractical and unworkable. See pp. 24-26, *infra*. As the Missouri Supreme Court itself acknowledged, "the exact time that had elapsed was not reflected in the opinion" in *Schmerber*. Pet. App. 21a n.8. The *Schmerber* Court likewise did not suggest that exigency would exist only if the evidence of intoxication was about to be *completely* destroyed. Instead, the Court recognized that evidence was being destroyed every minute. 384 U.S. at 770-771.

The Missouri Supreme Court also was mistaken in reading the *Schmerber* Court's concluding statement to "reject[] a *per se* exigency" rule. Pet. App. 18a. In stating that its decision "in no way indicates that [the Constitution] permits more substantial intrusions, or intrusions under other circumstances," 384 U.S. at 772, the *Schmerber* Court was making the common-sense point that more significant bodily intrusions, or blood tests conducted in circumstances other than a blood test of a suspected drunk driver performed in a medical setting, might be analyzed differently. Indeed, when a search involving a different bodily intrusion (surgical removal of a bullet) reached the Court in *Winston* v. *Lee*, 470 U.S. 753 (1985), the Court noted that the surgery was "an example of the 'more substantial intrusion' cautioned against in *Schmerber*." *Id.* at 755.

3. In its decisions since *Schmerber*, this Court has confirmed that *Schmerber* rested on the conclusion that the natural dissipation of alcohol in the bloodstream provides exigent circumstances that justify a warrantless blood test.

In *South Dakota* v. *Neville*, 459 U.S. 553 (1983), the Court considered whether a state implied-consent law, which requires suspected drunk drivers to submit to a

chemical test and permits their refusal to be introduced at trial, violated a defendant's privilege against compelled self-incrimination. *Id.* at 554. The Court upheld the law, explaining that because "the State could legitimately compel the suspect, against his will, to accede to [a blood] test," it also could "offer[] a second option of refusing the test" and accepting "the attendant penalties." *Id.* at 563-564. A fundamental premise underlying the Court's reasoning was that "*Schmerber* * * * clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test." *Id.* at 559. The Court did not suggest that warrantless blood tests of drunk drivers are only allowed when officers face a variety of competing demands in addition to the need to obtain evidence; rather, it accepted that such tests are permissible as a general matter.

The Court characterized *Schmerber* the same way in *Winston* v. *Lee*, *supra*, when it held that officers needed a warrant to order surgical removal of a bullet. The Court stated that *Schmerber* "held that a State may, over the suspect's protest, have a physician extract blood from a person suspected of drunken driving without violation of the suspect's [Fourth Amendment] right." 470 U.S. at 755. The Court contrasted the "commonplace" blood test at issue in *Schmerber* with the "extensive" intrusion and medical risk involved in the surgical removal of a bullet. *Id.* at 761-765. Moreover, the Court made no suggestion that all the particular circumstances in *Schmerber* were necessary to support its conclusion that "the exigent-circumstances exception to the warrant requirement" permits "compell[ing] an individual suspected of drunken driving to undergo a blood test." *Id.* at 759.

The Court took a similar view in *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), when it relied on *Schmerber* to reject a Fourth Amendment challenge to federal regulations requiring toxicological testing of bodily fluids of railroad employees involved in accidents or safety violations. The Court again stated that *Schmerber* "held that a State could direct that a blood sample be withdrawn from a motorist suspected of driving while intoxicated, despite his refusal to consent to the intrusion." *Id.* at 625. And the Court determined that in *Skinner*, as in *Schmerber*, a blood sample "must be obtained *as soon as possible*" after an accident because "alcohol and other drugs are eliminated from the bloodstream at a constant rate." *Id.* at 623 (emphasis added). Immediate blood tests are allowed under *Schmerber*, the Court explained, because "the delay necessary to procure a warrant * * * may result in the destruction of valuable evidence." *Ibid.*

Accordingly, this Court has recognized on numerous occasions that *Schmerber* permits a warrantless blood test of a suspected drunk driver, based solely on the exigency that the human body metabolizes alcohol and eliminates it from a person's system, thus threatening the loss of evidence with every interval of delay.

C. States And The Federal Government Need The Ability To Take A Warrantless Blood Test Of A Suspected Drunk Driver

1. Drunk driving "occurs with tragic frequency on our Nation's highways," and the "carnage caused by drunk drivers is well documented." *Neville*, 459 U.S. at 558. Over 50 years ago, this Court recognized that intoxication is "one of the great causes of the mortal hazards of the road." *Breithaupt* v. *Abram*, 352 U.S. 432, 439 (1957). On numerous occasions since then, this

Court has noted the "[t]he gravity of the drunk driving problem and the magnitude of the State's interest in getting drunk drivers off the road." *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 39 (2000); see *Illinois* v. *Batchelder*, 463 U.S. 1112, 1118 (1983); *Mackey* v. *Montrym*, 443 U.S. 1, 17-18 & n.9 (1979); see also, *e.g.*, *Virginia* v. *Harris*, 130 S. Ct. 10, 11 (2009) (Roberts, C.J., dissenting from denial of certiorari); *Perez* v. *Campbell*, 402 U.S. 637, 657 (1971) (Blackmun, J., concurring).

Despite significant and sustained efforts by the States, the federal government, and private groups, drunk driving has continued to be a serious nationwide problem. In 2010, over 10,000 people were killed in motor vehicle crashes involving alcohol-impaired drivers, which is an average of one death every 51 minutes. NHTSA, *Traffic Safety Facts, 2010 Data: Alcohol-Impaired Driving* (Apr. 2012), http://www-nrd.nhtsa.dot.gov/Pubs/811606.pdf. This number accounts for 31 percent of all traffic-related deaths in the United States. *Ibid.* Hundreds of thousands of people are injured in alcohol-related crashes each year. NHTSA, *Alcohol and Highway Safety: A Review of the State of Knowledge* 35 (Mar. 2011) (*NHTSA Review*) (estimating that 512,000 people were injured in alcohol-related crashes in 2000). Alcohol-related crashes cost our society billions of dollars annually. NHTSA, *The Economic Impact of Motor Vehicle Crashes, 2000*, at 2, 31-42 (May 2002) ($51 billion cost in 2000). At this point, "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 451 (1990).

2. Every State and the federal government criminalizes driving a motor vehicle while impaired by alcohol.

See NHTSA, *Digest of Impaired Driving and Selected Beverage Control Laws* vii (26th ed. Oct. 2012) (*NHTSA Digest*) (collecting state laws); 10 U.S.C. 911; 18 U.S.C. 13; 36 C.F.R. 4.23. These laws address drunk driving in two ways: by making it illegal to operate a motor vehicle under the influence of alcohol, and by making it *per se* illegal to operate a motor vehicle with a certain BAC. See, *e.g.*, Mo. Ann. Stat. §§ 577.010(1), 577.012(1) (West 2011); see generally *NHTSA Digest* (collecting state laws); 10 U.S.C. 911(a), (b); 32 C.F.R. 234.17(c), 1903.4(b)(1); 36 C.F.R. 4.23(a).

The laws based on BAC originated because numerous studies established that driving performance is "substantially impaired in virtually everyone at BAC levels of .08 g/dL [grams per deciliter, or percent by weight] and higher." *NHTSA Review* 60-73, 167-168. Congress then directed NHTSA to condition federal highway grants on each State's adopting a law providing that any person operating a motor vehicle "with a blood alcohol concentration of 0.08 percent or greater * * * shall be deemed to have committed a per se offense of driving while intoxicated." 23 U.S.C. 163(a); see 23 C.F.R. 1225.1. As a result, all 50 States and the District of Columbia enacted laws making it illegal to operate a motor vehicle with a BAC of 0.08 percent or above. *NHTSA Review* 167. Federal prohibitions on drunk driving likewise rely on the 0.08 standard. See 10 U.S.C. 911(b); 18 U.S.C. 13(a); 32 C.F.R. 234.17(c)(1)(ii), 1903.4(b)(1)(ii); 36 C.F.R. 4.23(a)(2).

NHTSA also has encouraged States to enact laws establishing additional penalties for certain high-risk drivers, such as individuals convicted of operating a motor vehicle with a BAC of 0.15 percent or above. 23 C.F.R. 1313.6(d). Many States now provide for such increased

penalties. See *NHTSA Review* 175 (noting that as of 2005, 32 States and the District of Columbia had enacted such laws).

3. Law enforcement officers have a critical need to obtain BAC evidence from suspected drunk drivers promptly after arrest. Once a police officer has probable cause to believe that a person has been driving under the influence of alcohol, it is likely that a blood test will reveal evidence of intoxication, and "[e]xtraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol." *Schmerber*, 384 U.S. at 770-771. Especially now that all States have defined an offense based on BAC, tests that reveal BAC are critical. The police may observe the driver's behavior after he has been stopped and note his performance on field sobriety tests, but that evidence alone may not be sufficient to establish the requisite BAC. See *Lee*, 470 U.S. at 763 ("Especially given the difficulty of proving drunkenness by other means, * * * results of the blood test were of vital importance if the State were to enforce its drunken driving laws.").

Time is of the essence when performing a test to obtain BAC evidence. That is because "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. As a person consumes alcoholic beverages, the alcohol is absorbed into his bloodstream and then the body's natural metabolic processes remove the alcohol from his system. See, *e.g.*, J.A. 47-48 (sergeant's testimony that BAC decreases steadily at a rate of 0.015 to 0.020 percent per hour). Law enforcement faces not merely a *risk* that evidence will be destroyed, but a certainty that it will. Cf.,

e.g., *Richards* v. *Wisconsin*, 520 U.S. 385, 395-396 (1997) (officers may dispense with knock-and-announce procedures when faced with a risk of destruction of evidence). And the suspect's BAC will decrease regardless of what actions the police take and regardless of whether the suspect has any motive or desire to destroy the evidence. See 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 5.4(b), at 199 (4th ed. 2004) ("evanescent" character of BAC evidence is "inherent in its nature and does not depend on any motive of the defendant to destroy it").

Police must obtain BAC evidence soon after the driver has been stopped in order to establish that his BAC was above the legal limit when he was driving. Most States, recognizing the impossibility of testing a suspect at the time he was driving, "have drafted their *per se* DWI laws such that the law expressly relates the BAC test back to the time of driving, either by a rebuttable presumption or by the definition of the offense." *State* v. *Mechler*, 153 S.W.3d 435, 445-446 & nn.18-20 (Tex. Crim. App. 2005) (Cochran, J., concurring). Some state statutes define the offense as having a BAC over the allowed limit when tested within a certain period of time after driving, *e.g.*, Ariz. Rev. Stat. Ann. § 28-1381(A)(2) (2012) (two hours); Ga. Code Ann. § 40-6-391(a)(5) (2011) (three hours); while other state statutes provide that BAC evidence taken within a certain period of time is presumed to be the person's BAC at the time he was driving, *e.g.*, Ind. Code Ann. §§ 9-30-6-2, 9-30-6-15(b) (LexisNexis 2010) (three hours); see also Mich. Comp. Laws Ann. § 257.625a(6)(a) (West 2006) (no time limit specified); see generally *Breithaupt*, 352 U.S. at 436 n.3 (noting that some state laws provide that a certain BAC

"gives rise to a presumption that [the driver] was under the influence of intoxicating liquor").

These state laws recognize that delayed testing can significantly prejudice the prosecution's case because critical evidence is being lost as time elapses. The suspect's BAC may slip below the legal limit, or the time elapsed may make it extremely difficult to estimate BAC level at the time the person was driving. Delay also jeopardizes the State's ability to secure a conviction for violation of a high-BAC law, which typically bases enhanced penalties on a BAC of 0.15 percent or above.

4. Respondent does not dispute the inherent evanescence of BAC evidence. Instead, he first contends that blood test evidence is unreliable (Br. in Opp. 8-9) and then argues that delays of up to four hours are tolerable (*id.* at 10-11). He is mistaken on both counts.

As an initial matter, respondent is wrong to suggest that the determination of exigent circumstances requires a "robust scientific inquiry into the complex pharmacokinetic processes governing" BAC. Br. in Opp. 8. All agree that alcohol is eliminated from a person's body through natural metabolic processes. Pet. App. 20a; Br. in Opp. 8-9; Pet. Br. 19-20. Regardless of when a person's BAC is at its peak or how quickly BAC decreases, the fact remains that BAC evidence "is being destroyed with each passing minute." J.A. 51. That natural dissipation of alcohol in the bloodstream provides exigent circumstances that permit the police to obtain a blood sample without a warrant.

Respondent contends that blood-test evidence "taken some time after a defendant has stopped driving" may not be sufficiently probative because it is not "direct evidence of the defendant's BAC at the time of operation," and trying to work backwards from that sample "may

yield questionable results." Br. in Opp. 10 & n.6, 12. Of course the police cannot actually obtain BAC evidence while the suspect is driving, but that does not mean that the police should be forced to wait to obtain it until it is almost destroyed. Rather, as respondent acknowledges, it is important to obtain BAC evidence as soon as possible after the suspect has been driving. *Id.* at 10-11.

Indeed, as respondent notes (Br. in Opp. 10-11), the more time that elapses before the driver is tested, the more difficult it is to determine BAC at the time the suspect was driving. Estimating a suspect's BAC at the time of operation based on a later blood test is generally done using a technique called retrograde extrapolation. This extrapolation depends on a host of variables, many of which may not be known to the police: when the suspect was drinking; what the suspect drank; the number, size, and alcohol concentration of the drinks; whether the suspect consumed any food with the drinks; the suspect's drinking history; and the suspect's gender, weight, and height. Richard Stripp, *Forensic and Clinical Issues in Alcohol Analysis*, in *Forensic Chemistry Handbook* 437-441 (Lawrence Koblinsky ed. 2012). That is not to say that such extrapolation cannot be performed, but simply that it is difficult, particularly as time elapses. *Id.* at 440-441; see Br. in Opp. 10-11 & n.6. Indeed, defense practitioners routinely seek to exploit the vulnerabilities inherent in such extrapolation. See, *e.g.*, Dominick A. Labianca, *Retrograde Extrapolation: A Scientifically Flawed Procedure (DWI)*, The Champion 58 (NACDL Jan.-Feb. 2012). And the uncertainties associated with retrograde extrapolation are one reason why some States permit a chemical test taken

within a certain period of time to establish BAC. See pp. 21-22, *supra*.[2]

Nonetheless, respondent suggests that "a police officer has a *minimum* of four hours to obtain a warrant and perform a blood test," because so long as some alcohol remains in the driver's bloodstream, the government could attempt to work backwards to identify his BAC at the time he was driving. Br. in Opp. 10-11. But respondent himself attacks retrograde extrapolation, and such a delay would make it impossible to comply with state statutes requiring that a chemical test be performed within a certain period of time for the results to form the basis for a *per se* offense. Moreover, this Court has never held that the police may intervene to stop the destruction of evidence only when the destruction of evidence is nearly complete.

5. More fundamentally, a rule that the natural dissipation of alcohol in the bloodstream permits a warrant-

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[2] Respondent contends (Br. in Opp. 8-9) that a BAC obtained from a blood test may be greater than the person's BAC at the time he was driving because his blood could still have been absorbing alcohol when he was driving. That is beside the point. Regardless of when the driver's BAC peaks, once alcohol is ingested, the body begins eliminating it, and that destruction of evidence provides the exigency necessary to justify the warrantless blood test.

In any event, although the rate of alcohol absorption (like the rate of dissipation) varies based on each person's characteristics and circumstances, a person's BAC typically peaks soon after he finishes drinking. See Charles L. Winek et al., *Determination of Absorption Time of Ethanol in Social Drinkers*, 77 Forensic Sci. Int'l 169, 170, 176 (1996) (study of social drinkers revealed that "the peak BAC is reached in less than 30 min[utes]"); American Prosecutors Research Inst., *Alcohol Toxicology for Prosecutors* 14-16 (2003) ("Peak concentrations are generally attained within 30-60 minutes of the cessation of drinking."); J.A. 47-48 (alcohol typically is absorbed "before the [person] even leave[s] the bar").

less blood test of a suspected drunk driver is necessary to provide clear guidance for the police. A police officer in the field simply has no way of accurately knowing at what point in time a suspect's BAC will slip below 0.08 percent; the officer "may not know the time of the suspect's last drink, the amount of alcohol consumed, or the rate at which the suspect will metabolize alcohol." *State* v. *Shriner*, 751 N.W.2d 538, 549 (Minn. 2008), cert. denied, 555 U.S. 1137 (2009). And even if they had that information, police officers have neither the time nor the training to undertake a scientific analysis of how long a suspect might still have alcohol in his system.

Exigent circumstances should not depend on case-by-case determinations of the time it would take to obtain a warrant. The stop may occur at a time of day or night when a prosecutor is not readily available for consultation, and the officer may be some distance away from a magistrate judge who can issue a warrant. In this case, for example, the traffic stop occurred shortly after 2 a.m., and an officer testified that it would typically take one and one-half to two hours to obtain a warrant under these circumstances. J.A. 53-54; cf. *Schmerber*, 384 U.S. at 768-769 (officer saw driver at the hospital "within two hours" of the accident). And the time to obtain a warrant can vary greatly within and among jurisdictions.[3]

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[3] The possibility of obtaining a telephonic warrant does not obviate these concerns. Although many States permit application for a warrant over a telephone or through electronic means, see 2 LaFave § 4.3(c), at 511-512 & n.29 (collecting state laws), some still require the application to be in writing, *e.g.*, Colo. Rev. Stat. § 16-3-303 (2012); or require the applicant to appear in person before a judge, *e.g.*, Mass. Ann. Laws ch. 276, § 2B (LexisNexis 1992); or limit oral warrant applications to certain death or personal-injury cases, *e.g.*, Iowa Code Ann. § 321J.10(3) (West 2005). "[T]he officer facing the need for a telephonic warrant cannot be expected to know how much

Further, an officer may not be able to accurately predict how much time he will need to spend on other investigatory tasks, or how long it will take to obtain a blood sample. The time to obtain the sample will depend on such factors as the distance between the location of the stop and the nearest hospital and whether a medical specialist is immediately available to perform the blood test. An officer should not be forced to "speculate on each of these considerations and predict how long the most probative evidence of the defendant's blood-alcohol level would continue to exist before a blood sample was no longer reliable." *Shriner*, 751 N.W.2d at 549.

D. The Government Need To Perform A Warrantless Blood Test Outweighs The Privacy Interests Of A Suspected Drunk Driver

1. A driver's privacy interest in avoiding a blood test does not outweigh the government's compelling need for BAC evidence. It is certainly true that searches that intrude into an individual's body implicate Fourth Amendment concerns in a way that routine searches of the person or of property do not. See *Lee*, 470 U.S. at 759-760. But whether an individual has a sufficient pri-

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delay will be caused by following the procedures necessary to obtain such a warrant," and BAC evidence will be lost in the meantime. *Shriner*, 751 N.W.2d at 549.

Similarly, Federal Rule of Criminal Procedure 4.1 lists a variety of procedures that must be followed, all of which take time, and "[t]ime is what is lacking" when the police need to test for alcohol in the body. *United States* v. *Reid*, 929 F.2d 990, 993 (4th Cir. 1991); see *United States* v. *Ogbuh*, 982 F.2d 1000, 1003 (6th Cir. 1993) ("on average," 45 minutes to an hour was required to obtain a telephonic warrant). Even to the extent that warrants can be obtained quickly in some circumstances, the range of procedures used and the variety of factors that affect the time to obtain a warrant underscore that exigency should not turn on case-by-case determinations.

vacy and security interest against any particular intrusion of this nature depends on the extent of that intrusion on "personal privacy and bodily integrity" and whether "the procedure may threaten the [individual's] safety or health." *Id.* at 761-762. Thus, while the Court has found some bodily intrusions to be so substantial as to outweigh the State's need for the evidence, see, *e.g.*, *id.* at 766-767 (surgical removal of a bullet under general anesthesia); *Rochin* v. *California*, 342 U.S. 165, 172-174 (1952) (pumping suspect's stomach to obtain drugs), the Court has determined that a blood test is not an intrusion of this order.

Blood tests are "commonplace" in our society. *Schmerber*, 384 U.S. at 771. "The blood test procedure has become routine in our everyday life," whether it is done as a condition for obtaining a marriage license or as part of a routine physical examination. *Breithaupt*, 352 U.S. at 436; see *Schmerber*, 384 U.S. at 771. This Court has noted "society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity." *Lee*, 470 U.S. at 762; see, *e.g.*, *Skinner*, 489 U.S. at 625 ("the intrusion occasioned by a blood test is not significant"). The amount of blood extracted is "minimal," and "for most people the procedure involves virtually no risk, trauma, or pain." *Schmerber*, 384 U.S. at 771; see *Neville*, 459 U.S. at 563 ("The simple blood-alcohol test is * * * safe, painless, and commonplace"); see also James Garriott et al., *Garriott's Medicolegal Aspects of Alcohol* § 15.3(G), at 409-412 (5th ed. 2008) (test typically involves taking two tubes of blood, for a combined total of 20 milliliters, or less than one ounce). Accordingly, blood tests for intoxication "do not constitute an un-

duly extensive imposition on an individual's privacy and bodily integrity." *Skinner*, 489 U.S. at 625.

2. Moreover, a motorist arrested for driving under the influence of alcohol has a significantly reduced expectation of privacy in avoiding a blood test. First, as the Court has repeatedly observed, given the pervasive regulation of motor vehicles and traffic, drivers' "expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976). Because motor vehicles are "the subject of pervasive regulation by the State," "[e]very operator of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy." *New York* v. *Class*, 475 U.S. 106, 113 (1986); see, *e.g.*, *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976) ("Automobiles * * * are subjected to pervasive and continuing governmental regulation and controls.").

But beyond this general reduction of privacy in the automobile context, drivers' privacy interests in this particular context are shaped by the state and federal implied-consent laws. These laws, which have been adopted by all States and the federal government, typically provide that a driver consents to a chemical test to determine BAC in the event that a police officer arrests him for drunk driving or has probable cause to do so. See Mo. Ann. Stat. §§ 577.020, 577.041 (West 2011); see also 18 U.S.C. 3118; 32 C.F.R. 234.17(c)(3), 1903.4(b)(3); 36 C.F.R. 4.23(c); *NHTSA Digest*, *supra*; Michele Fields, *Legal and Constitutional Issues Related to Detection*, in *Issues and Methods in the Detection of Alcohol and Other Drugs* C7 (Sept. 2000). Implied-consent

laws place a motorist on notice that, as a condition of obtaining the privilege to drive, he implicitly consents to submit to a chemical test to determine whether he is intoxicated. While the existence of implied-consent laws is not dispositive of the constitutional question, it underscores that a driver's privacy expectations are shaped by society's recognition that the paramount interest in highway safety can justify actions that might not be allowed in other contexts.

3. Of course, as this Court recognized in *Schmerber*, a blood test for evidence of intoxication must be conducted "in a reasonable manner." 384 U.S. at 771. In that case the blood "was taken by a physician in a hospital environment according to accepted medical practices." *Ibid.* In this case, a trained medical technician took a blood sample from respondent at a hospital. Pet. App. 5a; J.A. 20. Nothing suggests that the test was conducted in any manner that increased the "risk of infection and pain." *Schmerber*, 384 U.S. at 772.[4]

4. When the minimal intrusion occasioned by the blood draw is weighed against the government's compelling need for BAC evidence, the conclusion is the same as in *Schmerber*: once the police have probable cause to believe that an individual has been driving while intoxicated, so that a blood test likely will provide evidence of intoxication, it is reasonable for the police to obtain the blood sample without first seeking a warrant.

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[4] At least two states, Arizona and Utah, have provided medical training to law enforcement officers so that they are able to draw blood from individuals arrested for impaired driving at the stationhouse. See NHTSA, *Use of Warrants for Breath Test Refusal: Case Studies* 6-13, 26-31 (2007). Such an approach has the potential to save the time and expense of transportation to a medical facility and eliminate the need for medical personnel to testify at trial. *Ibid.*

This is not to say that police will conduct blood tests of every drunk driver. An officer who stops a person on suspicion of drunk driving typically observes the driver's behavior and appearance, and then asks the driver to participate in a series of standard field sobriety tests. International Ass'n of Chiefs of Police, *Manual of Police Traffic Services Policies and Procedures*, 1.6 (July 2004); NHTSA, *DWI Detection and Standardized Field Sobriety Testing: Student Manual* VII-1 to VII-7 (2004). If the driver performs poorly on those tests, the officer may ask to perform a chemical test to measure the driver's BAC. Fields C7. Numerous state laws regulate the types of chemical tests that may be given, when they may be given, whether drivers may refuse such tests, and whether a refusal may be introduced at trial as evidence of guilt. See, *e.g.*, Br. in Opp. 14 n.10.[5]

Which test the officer will use to measure BAC often depends on the circumstances. The most common way to measure BAC is to use a breath-testing device. See Stripp 446-447. These devices are commonly used because they can be performed by police officers on the scene or at the stationhouse and they provide immediate and accurate results. *Ibid.*[6] But if a driver is unwilling

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[5] Respondent suggests in passing (Br. in Opp. 11 n.8) that whether exigent circumstances justify obtaining a warrantless blood sample from a suspected drunk driver depends upon whether police have "less intrusive means of testing BAC." This case does not present that issue, because respondent refused a breath test and nothing suggests the police had another way to obtain BAC evidence.

[6] Officers may perform preliminary breath tests (to establish probable cause) and evidential breath tests (to obtain evidence for trial). Fields C4-C8. Evidential breath-testing devices typically are larger, more sophisticated, and more carefully calibrated than preliminary breath-testing devices. *Id.* at C7; see, *e.g.*, Alan Wayne Jones & Derrick J. Pounder, *Update on Clinical and Forensic Analysis of Alco-*

or unable to participate in a breath test, the officer may need to obtain BAC evidence another way, such as through a blood test. Blood tests are typically more time-intensive and costly than breath tests, because officers generally transport the driver to a medical setting for testing, laboratory analysis is required to obtain the results, and the evidence may require use of medical experts at trial. Steve Simon, *Evidence of Alcohol and Drug Impairment Obtained After Arrest*, in *Issues and Methods in the Detection of Alcohol and Other Drugs* G8-G9. But blood tests are critical in cases (like this one) where a person suspected of drunk driving refuses to provide a breath sample.[7] Accordingly, the police must have the flexibility to order a blood test of a suspected drunk driver without a warrant.

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hol, in *Forensic Issues in Alcohol Testing* 35-37 (Steven B. Karch ed. 2008).

Some police departments use handheld passive alcohol sensors that "draw[] in a mix of expired and environmental air from in front of a person's face" and do not depend on a suspect's voluntary cooperation. *NHTSA Review* 190-191. These devices "provide a good estimate of whether a driver has been drinking" but do not measure BAC accurately enough to provide evidence for trial. *Id.* at 190.

[7] BAC also can be measured through a person's urine or saliva, but these methods are not commonly used because they are not as readily available and easy to administer as breath tests and are typically less reliable than blood tests. Stripp 450.

CONCLUSION

The judgment of the Missouri Supreme Court should be reversed.

Respectfully submitted.

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