No. 16-919

IN THE

Supreme Court of the United States

TEXAS,

Petitioner,

v.

SEAN MICHAEL MCGUIRE,

Respondent.

On Petition For Writ Of Certiorari To The Court of Appeals For The First District Of Texas

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether *McNeely* required exigent circumstances in all situations and implicitly struck per se state statutes permitting nonconsensual, warrantless blood draws from an intoxicated driver, who was involved in a fatality accident.

PARTIES TO THE PROCEEDING

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INTRODUCTION

The Court of Appeals of Texas determined that nothing about the circumstances of this case prevented the police from obtaining a warrant before drawing Respondent's blood over his refusal to consent. Petitioner, the State of Texas, no longer disputes that conclusion, but believes that a state statute permitting a blood alcohol concentration (BAC) test after a fatality accident dispenses with the Fourth Amendment's warrant requirement. The Texas courts, including the Texas Court of Criminal Appeals, have correctly rejected this claim. Although the Oklahoma Court of Criminal Appeals has held to the contrary, no other state high court has decided the question. The issue would benefit from further percolation as additional courts weigh in. Moreover, the practical importance of the question presented is limited by the wide variety of other methods at police officers' disposal to obtain BAC evidence. The petition for certiorari should be denied.

STATEMENT

A. Legal Background

Under the Fourth Amendment, "[a] warrantless search of the person is reasonable only if it falls within a recognized exception." *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013). Blood and breath BAC tests are searches under the Fourth Amendment, and thus are constitutional only with a warrant or if a recognized exception applies. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016).

In recent years, this Court has considered whether and in what circumstances two exceptions permit warrantless BAC tests. First, in *Missouri v. McNeely*,

133 S. Ct. 1552, 1563 (2013), this Court held that "while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, . . . it does not do so categorically." In reaching this conclusion, *McNeely* reaffirmed long-standing precedent that "[t]o determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of the circumstances." *Id.* at 1559. This Court noted that, for a variety of reasons, including the ability to seek warrants remotely and the time it takes to transport a suspect to a medical facility to draw blood, police officers could frequently obtain warrants without delaying the BAC test. In such situations, this Court observed, "there would be no plausible justification for an exception to the warrant requirement." *Id.* at 1561.

Second, in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), this Court held that the search incident to arrest exception to the warrant requirement generally permits warrantless breath tests, but not warrantless blood tests. This Court explained that unlike the exigent circumstances exception, which requires case-by-case analysis, the search incident to arrest exception is properly evaluated on a categorical basis. After extensively analyzing the public and private interests at stake, this Court concluded that "[b]ecause breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, . . . a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving." *Id.* at 2185.

In sum, this Court's recent case law establishes that police officers may generally conduct warrantless *breath* tests when making a drunk-driving arrest. But they may conduct warrantless *blood* tests only when the particular circumstances of the case establish exigent circumstances or another exception to the warrant requirement.

B. Factual Background

On August 2, 2010, Respondent was driving home on a rural road when his truck struck a motorcycle. The motorcyclist died at the scene before emergency personnel arrived. Pet. App. 5. Respondent drove to a nearby gas station, where he called his mother and two peace officers he knew, who in turn notified the police. Pet. App. 5.

Police officers picked Respondent up at the gas station and drove him back to the site of the accident. Pet. App. 5–6. Three state troopers and at least four county sheriff's officers were present. Pet. App. 33. Some officers stated that Respondent "showed no signs of intoxication," while others said that he "had glassy eyes, smelled of alcohol, and was unsteady on his feet." Pet. App. 6. None of the officers took any steps to obtain a warrant even though the county had assistant district attorneys on call with the ability to fax applications to "any of about 20 . . . judges at their homes to process a warrant or the officers could take a warrant request to the judges personally." Pet. App. 6, 33–34.

Instead, one of the officers drove Respondent to a hospital. There, over Respondent's express refusal to consent, the officer directed paramedics to draw

Respondent's blood. Pet. App. 6. The test showed a BAC of 0.16. Pet. App. 6.

C. Procedural Background

The state charged Respondent with felony murder based on the theory that two prior convictions made it a felony for him to drive while intoxicated. The trial court denied Respondent's motion to suppress evidence obtained from the blood test, and the jury convicted. Respondent's sentence was eighteen years on the felony murder charge and five years on a charge of failure to stop and render aid that is not at issue here. Pet. App. 8.

The Court of Appeals reversed the trial court's denial of the motion to suppress. It explained that although Texas law provides that a driver is "'deemed to have consented . . . to the taking of one or more specimens of the person's breath or blood for analysis to determine the alcohol concentration,'" Respondent had validly revoked this consent. Pet. App. 26 (quoting Tex. Transp. Code Ann. § 724.011(a) (West 2011)). Relying on this Court's decision in *McNeely*, 133 S. Ct. 1552, and the Texas Court of Criminal Appeals's decision in *State v. Villareal*, 475 S.W.3d 784 (Tex. Crim. App. 2015), the court concluded that statutes do not create their own exceptions to the warrant requirement. Pet. App. 29–30. The court thus held that a warrantless blood test is permissible only if it "fit[s] within a recognized exception to the search-warrant requirement." Pet. App. 29–30. Conducting the case-by-case inquiry *McNeely* requires, the court determined that no exigency justified a warrantless search. In particular, the court noted the number of officers on the scene who

could have sought a warrant, the availability of assistant district attorneys and judges, and the total lack of effort made to secure a warrant. Pet. App. 31–35.

Having reversed the trial court's denial of the motion to suppress, the Court of Appeals also reversed Respondent's felony murder conviction. It explained that the other evidence was contradictory and did not establish that the trial court's error in admitting evidence from the blood test was harmless beyond a reasonable doubt. Pet. App. 36–37. The court remanded the case for possible retrial.

The Court of Appeals denied the state's rehearing petition, Pet. App. 61, and the Texas Court of Criminal Appeals denied the state's petition for discretionary review, Pet. App. 62.

REASONS FOR DENYING THE PETITION

I. PETITIONER OVERSTATES THE EXTENT OF ANY SPLIT, AND THE ISSUE WOULD BENEFIT FROM FURTHER PERCOLATION

Petitioner suggests a deep conflict over the question that it asks this Court to resolve. But despite Petitioner's best efforts to assemble cases to support its claim, only two state high courts have ruled on the issue. If, despite the myriad other options available to police officers seeking BAC testing, the question presented is as important as Petitioner claims, it will continue to percolate among the more than a dozen states that Petitioner asserts have similar statutes.

A. The Texas Court Of Criminal Appeals Is The Only State High Court To Hold That A Statute Permitting BAC Testing After Fatality Accidents Cannot Excuse The Warrant Requirement

Petitioner suggests that, in addition to Texas courts, state courts in Florida, Illinois, Idaho, and Minnesota have all rejected the argument that a statute permitting BAC testing after a fatality accident provides an exception to the Fourth Amendment's warrant requirement. As described below, however, none of these other states' court systems have reached a final determination on this question.

First, both *State v. Liles*, 191 So. 3d 484, 489–91 (Fla. Dist. Ct. App. 2016), and *People v. Stokes*, No. 15-3044, 2016 WL 7108060, at *6–8 (Ill. App. Ct. Dec. 5, 2016), are intermediate court decisions that ultimately denied motions to suppress on good-faith grounds. There was thus no reason for either state to seek review of any ruling that a statute that permits a BAC test in the case of a fatality accident does not provide an exception to the warrant requirement. In fact, Florida successfully opposed a petition for discretionary review by the Florida Supreme Court filed by a defendant in a consolidated case. *See* Jurisdictional Br. of Resp't, *Willis v. State*, No. SC16-1118 (Fla. July 21, 2016), 2016 WL 3977308. Accordingly, neither the Florida Supreme Court nor

the Illinois Supreme Court has addressed the question Petitioner asks this Court to resolve.[1]

Nor can the cases Petitioner cites from Idaho and Minnesota bear the weight placed on them. As to Idaho, *State v. Wulff*, 337 P.3d 575 (Idaho 2014), the only post-*McNeely* case Petitioner cites, did not involve an accident leading to a fatality or serious injury. It was instead, in Petitioner's phrasing, a "routine case." According to Petitioner, the difference between "routine cases" and "fatality accidents" matters greatly because it distinguishes Petitioner's position from this Court's holding in *McNeely* that the natural dissipation of alcohol is not a per se exigency. Petitioner tries to escape the fact that *Wulff* was a "routine case" by arguing that it "overrul[ed] *State v. Woolery*, 775 P.2d 1210 (Idaho 1989), which approved a per se exception after a fatality accident." Pet. 10. Petitioner is technically correct that *Woolery* made a per se exigency finding "after" a fatality accident. But "after" does not mean "because of," and *Woolery*'s reasons for finding a per se exigency were independent of the fatality. This is clear from the language of *Woolery* itself. 775 P.2d at 1212 ("In the instant situation, the destruction of the evidence by metabolism of alcohol in the blood provides an inherent exigency which justifies the warrantless search."). It is also reflected in *McNeely*'s understanding that *Woolery* had held that "the natural dissipation of blood-alcohol evidence alone constitutes a *per se* exigency." 133 S. Ct. at

[1] Moreover, as an unpublished order, *People v. Stokes* is not even binding in the intermediate appellate court that issued it. Ill. Sup. Ct. R. 23(e)(1).

1558 n.2. Accordingly, the Idaho Supreme Court has not decided the question presented in this case: "Whether *McNeely* required exigent circumstances in all situations and implicitly struck per se state statutes permitting nonconsensual, warrantless blood draws from an intoxicated driver, *who was involved in a fatality accident*." Pet. i (emphasis added).[2]

Petitioner's Minnesota case, *State v. Stavish*, 868 N.W.2d 670 (Minn. 2015), is also distinguishable. There, the court held that probable cause of intoxication and involvement in a fatality accident do not alone establish exigent circumstances. But it did so without discussion of any statute allowing BAC testing after a fatality accident. Thus, the Minnesota Supreme Court also did not address the question presented in this case: "Whether *McNeely* required exigent circumstances in all situations *and implicitly struck per se state statutes* permitting nonconsensual, warrantless blood draws . . . ." Pet. i (emphasis added).

In short, contrary to Petitioner's suggestion, Texas is the only state where the high court has squarely held that a statute that allows BAC testing after a fatality accident does not provide an exception to the warrant requirement.

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[2] *Woolery* did discuss a per se statute, but did so only to hold that noncompliance with that statute's requirements did not trigger suppression of evidence that was constitutionally obtained under the exigent circumstances exception. *Woolery* did not conclude that the statute provided an independent exception to the warrant requirement. *See Woolery*, 775 P.2d at 1212–16.

B. The Oklahoma Court Of Criminal Appeals Is The Only State High Court To Hold That A Statute Permitting BAC Testing After Fatality Accidents Overcomes The Warrant Requirement

Petitioner's suggestion that multiple state courts have reached the opposite conclusion fares no better. While the Oklahoma Court of Criminal Appeals has held that a state statute provides a per se exception to the warrant requirement in the context of fatality accidents, Petitioner's citations of Maryland and Louisiana cases are unpersuasive.

To begin with, *Colbert v. State*, 143 A.3d 173, 175 n.1 (Md. Ct. Spec. App. 2016), Petitioner's case from Maryland's intermediate appellate court, limited its holding that a per se statute permitted a warrantless search to breath tests, and expressly reserved judgment as to blood tests. It recognized the "great emphasis on a distinction . . . between the bodily intrusion involved in a breath test and that involved in a blood test" in this Court's decision in *Birchfield*. *Id.* Thus, the intermediate Maryland court—let alone, the Maryland high court—has not resolved the question presented in this case.[3]

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[3] This is not the only portion of the Petition that ignores the distinction between breath and blood tests. Petitioner also claims that "[i]n *Birchfield*, this Court observed that to require a warrant for a blood draw in every driving while intoxicated case 'would impose a substantial burden with no commensurate benefit.'" Pet. 18 (quoting *Birchfield*, 136 S. Ct. at 2181–82). But in context, the quotation refers to BAC testing generally, not blood tests specifically, and, as noted above, *Birchfield* ultimately held that the search incident to arrest exception

Moreover, as Petitioner forthrightly acknowledges, *State v. Weber*, 139 So. 3d 519 (La. 2014) (per curiam), never discussed *McNeely*. Indeed, it barely even mentioned the Fourth Amendment, and never mentioned the warrant requirement or any exception to that requirement. Instead, it considered only whether the police had adequate reason to believe that the defendant was driving when the accident at issue occurred. It thus in no way spoke to the question presented in this case.

C. Further Percolation Would Be Beneficial

At bottom, there is only a spare 1-1 split between Texas and Oklahoma. There is no "manifest" need to resolve this conflict. *See* Pet. 11. To the contrary, this Court would benefit from the reasoning of additional courts. If the question is as important as Petitioner asserts, *but see infra* Section III, then decisions from among the more than a dozen states Petitioner lists as having statutes similar to Texas's will surely present themselves.[4]

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justified warrantless breath tests, but not warrantless blood tests. *Birchfield*, 136 S. Ct. at 2185.

[4] To the degree the Court believes the split between Oklahoma and Texas courts is sufficient to justify resolving the question presented, this case provides a cleaner vehicle than the three petitions currently pending out of Oklahoma. In *Cripps*, No. 16-423, the Oklahoma courts held in the alternative that exigent circumstances existed based on the facts of the case. And in *Cudjo*, No. 16-7092, and *Wright*, No. 16-7257, the state argued in the alternative in the courts below for denial of the suppression motions based on good-faith reliance on existing

II. THE TEXAS COURT OF APPEALS DECIDED THIS CASE CORRECTLY

McNeely established that "the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." 133 S. Ct. at 1568. Instead, it clarified that "[t]o determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of the circumstances" and that "where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id.* at 1560–61; *see also id.* at 1574 (Roberts, C.J., concurring in part and dissenting in part) (proposing a rule under which "[i]f there is time to secure a warrant before blood can be drawn, the police must seek one").

Nothing inherent in accidents involving fatalities changes this analysis. To be sure, exigent circumstances may arise more often in such cases, as they may require police attention to the injured or greater effort to secure a busy accident scene. But any such concerns can be accommodated by the ordinary case-by-case exigency analysis.

The facts of the present case belie Petitioner's claim that in all such cases "the attention of law

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law—an argument Petitioner here expressly disclaims. *See* Pet. 5 ("Texas does not recognize a good faith exception to the exclusionary rule for reliance on established law."). By contrast, the question presented is dispositive here.

enforcement and first responders will *necessarily* be divided between a variety of critical tasks, including providing medical attention to the victim(s), crowd control, traffic control, detaining a suspect, investigation, and collecting evidence." Pet. 19 (emphasis added). Here, seven police officers were present at the scene of an accident on a rural road with no injured individuals to tend to. Moreover, assistant district attorneys were on call, and law enforcement officials could have faxed or personally delivered a warrant application to any of a number of judges. As the Court of Appeals found—and as Petitioner no longer disputes—nothing beyond mere speculation suggests that the police officers here would have been unable to secure a warrant in a timely fashion. *See* Pet. App. 31–35.

Petitioner attempts to evade this logic by pointing to Justice Kennedy's statement in his *McNeely* concurrence that although "[t]he repeated insistence . . . that every case be determined by its own circumstances is correct, of course, as a general proposition," it "ought not to be interpreted to indicate this question is not susceptible of rules and guidelines that can give important, practical instruction to arresting officers." *McNeely*, 133 S. Ct. at 1568–69 (Kennedy, J., concurring). But the ability to "adopt rules, procedures, and protocols that meet the reasonableness requirements of the Fourth Amendment and give helpful guidance to law enforcement officials," *id.* at 1569, is not a blank check for states to pass laws authorizing officials to conduct warrantless searches absent exigent circumstances or any circumstances supporting any other recognized warrant exception. Indeed, such a

rule would clash with the statements of the *McNeely* majority—which included Justice Kennedy—that "a warrantless search of the person is reasonable only if it falls within a recognized exception" to the warrant requirement, and that when "the warrant process will not significantly increase the delay before the blood test is conducted . . . there would be no plausible justification for an exception to the warrant requirement." *Id.* at 1558, 1561 (majority opinion).

Petitioner's repeated references to the severity of offenses tied to fatality accidents are likewise unpersuasive. This Court has already rejected the idea that "the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search." *Mincey v. Arizona*, 437 U.S. 385, 394 (1978). The argument should fare no better here than it fared in defense of Arizona's categorical rule that no warrant was required to search a murder scene. *See id.*

III. OTHER METHODS OF OBTAINING BAC EVIDENCE DIMINISH THE IMPORTANCE OF THE QUESTION PRESENTED

As the *McNeely* plurality stated, "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." 133 S. Ct. at 1565 (plurality opinion). But police officers have at their disposal ample alternative methods to secure BAC evidence. First, they always have the option to seek a warrant—the Fourth Amendment's preferred approach because it "ensures that the inferences to support a search are 'drawn by a neutral and detached magistrate instead of being

judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). Moreover, when the particular circumstances they face make obtaining a warrant impractical, they may conduct a warrantless blood test pursuant to the exigent circumstances exception. *McNeely*, 133 S. Ct. 1552. Still further, when making an arrest for a DUI offense, they may conduct a warrantless breath test pursuant to the search incident to arrest exception. *Birchfield*, 136 S. Ct. 2160. And finally, they may take breath or blood evidence when consent has been granted, either expressly or pursuant to an implied consent statute, so long as that consent has not been revoked.

The question presented in this case becomes important only when none of these alternatives are available. Petitioner has given no reason to believe this will be a frequent occurrence, and indeed, common sense suggests quite the opposite.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 27, 2017