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1 P R O C E E D I N G S

2 (1:00 p.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 18-6210, Mitchell versus
5 Wisconsin.

6 Mr. Hinkel.

7 ORAL ARGUMENT OF ANDREW R. HINKEL

8 ON BEHALF OF THE PETITIONER

9 MR. HINKEL: Mr. Chief Justice, and
10 may it please the Court:

11 The State advances a bold and novel
12 proposition here, that it can excuse itself
13 from the Fourth Amendment warrant requirement
14 simply by enacting a statute saying that some
15 of its -- that its citizens have consented to a
16 search.

17 Here, that search is a blood draw, but
18 there's no reason that similar statutes
19 couldn't be enacted to authorize all manner of
20 other searches. For example, a state could
21 declare that driving on its roads constitutes
22 consent to the installation of a GPS tracking
23 device on a person's vehicle, or consent to an
24 officer scrolling through a person's cell phone
25 if they happen to be stopped.

1 Now this Court has never approved a
2 search on the theory that -- that a search --
3 that consent can be deemed by operation of law.
4 And that's because, under *Schneckloth*, consent
5 is a question of fact.

6 CHIEF JUSTICE ROBERTS: Is it -- it
7 doesn't strike me immediately as that
8 horrendous to allow the officers to look, not
9 through the cell phone, but to sort of calls,
10 find out was this person calling somebody or
11 talking to somebody at the time they, you know,
12 ran over somebody else? Is that -- is that so
13 obviously --

14 MR. HINKEL: I don't know that it's --

15 CHIEF JUSTICE ROBERTS: Is that so
16 clearly something that they couldn't do?

17 MR. HINKEL: Well, I don't know that
18 it's more -- that it's an equally intrusive
19 search as opposed to a blood draw.

20 CHIEF JUSTICE ROBERTS: Yeah.

21 MR. HINKEL: What I'm trying to
22 express is that once we accept that a -- the
23 simple existence of a statute can provide
24 consent, then reasonableness doesn't really
25 enter into the picture anymore.

1 A -- a search that's based on consent
2 is reasonable regardless of any other factors.
3 If a police officer comes to my house and says,
4 hey, I'd like to come in and look around, do
5 you mind, and I say yes, it doesn't matter if
6 he has any suspicion.

7 So these are the kinds of situations
8 that we find ourselves in if we permit that --
9 that a statute can bring about consent.

10 JUSTICE GINSBURG: How -- how -- how
11 would it be if the statute simply said, if you
12 don't consent -- let's say we have -- we now
13 have a conscious driver -- if you don't
14 consent, then we will immediately revoke your
15 license and, when we try you for driving under
16 the influence, we can tell the jury that you
17 refused to consent to a blood test.

18 Would that statute -- that statute
19 wouldn't have a Fourth Amendment problem, would
20 it?

21 MR. HINKEL: Under Birchfield, no.
22 That's the whole thing of Birchfield, that the
23 states can impose that sort of condition on the
24 decision to operate.

25 JUSTICE GINSBURG: What about the

1 unconscious driver, who couldn't hear that
2 notice?

3 MR. HINKEL: Who was incapable of
4 having that conversation, is that --

5 JUSTICE GINSBURG: He's incapable --
6 he's incapable of hearing what he's told, but,
7 in the -- in -- in the case of the unconscious
8 driver, could his license be revoked?

9 MR. HINKEL: The Wisconsin statute at
10 issue here doesn't lead to that result. I
11 don't see any constitutional problem with
12 saying that it could be, but it's just a fact
13 that Wisconsin statute doesn't permit that in
14 this circumstance. The legislature could
15 certainly remedy that.

16 Now, regarding consent, this Court
17 said in Schneckloth that the capacity for a
18 conscious choice is the bare minimum for
19 voluntary consent. Given that we're talking
20 about someone who is unconscious, that's a good
21 enough reason for this Court to reject the
22 State's consent theory.

23 JUSTICE SOTOMAYOR: Well, we let
24 people give advance consent on any number of
25 issues, including DNR, Do Not Resuscitate,

1 consent forms, and, generally, they come into
2 effect when you're not in a position to revoke.

3 Why isn't this comparable?

4 MR. HINKEL: That -- I mean, that's
5 certainly true, Justice Sotomayor. It's not
6 comparable because, in this instance, the State
7 has never argued that Mr. Mitchell or that any
8 other person who operates on Wisconsin roads
9 has made that choice.

10 In the case of a DNR, a person, you
11 know, sits down and -- and makes a decision.
12 Here, there's no indication that any decision
13 like that was made to permit the search.

14 JUSTICE KAGAN: Do you think Wisconsin
15 could do that? Suppose, at the time you went
16 in to get your driver's license, you had to
17 sign something and it said, I'm -- I'm -- I'm
18 agreeing that if I'm ever found unconscious,
19 you know, I'm giving my consent now.

20 MR. HINKEL: Yes, I think that's a
21 harder question. It's -- once we have
22 knowledge and -- and some course of action that
23 has been deemed to trigger a search, then it
24 gets -- it starts to look more like what we
25 commonsensically would think of as consent.

1 You know, you knew this was going to happen if
2 you did this; you did this.

3 The problem with that analysis,
4 though, is that, again, it opens -- it opens
5 the world up in terms of what the state can --
6 the conditions that the state can put on
7 different activities.

8 And I think that's why this Court,
9 when it's been invited to call sort of notice
10 and then action regimes consent, has declined
11 -- declined the request to do so. In the
12 probation cases, both of those parolees or
13 probationers had actually signed documents
14 saying, I consent to this search, sometime
15 before the search has occurred. And in both
16 cases, the government asked the Court to say,
17 well, hey, they consented. But the Court
18 didn't do so. It decided those on the basis of
19 a very limited expectation of probation.

20 CHIEF JUSTICE ROBERTS: Although it's
21 -- it's -- you know, ignorance of the law is no
22 excuse. And if the law says if you're going to
23 operate a motor vehicle on our highways, you --
24 you impliedly consent to this. And so people
25 are supposed to know the law, so they know if

1 they drive, that their -- will be deemed to
2 have consented.

3 Why -- why do you need to have them
4 actually sign a piece of paper, as I guess some
5 states do, but --

6 MR. HINKEL: Sure. The maxim
7 "ignorance of the law is no defense" is -- is
8 really another way of saying that we typically,
9 in criminal statutes, don't make knowledge of
10 illegality an element of the crime.

11 Criminal statutes, of courts -- of
12 course, define crimes, and they do so by
13 operation of law. That's a very different
14 thing from saying that a -- the existence of a
15 statute can, by -- by means of legal
16 presumption, bring about the factual situation
17 of consent in the individual.

18 JUSTICE ALITO: Well, these laws have
19 -- have been labeled implied consent law, but
20 -- implied consent laws, but it's kind of a --
21 an unusual type of consent, and maybe what
22 they're really about is attaching a condition
23 to the privilege of driving, so the state says
24 you want to drive, this is a very dangerous
25 activity, it causes thousands and thousands of

1 deaths and serious injuries every year, and if
2 you want to engage in this activity, you have
3 to bear certain consequences that are very
4 closely related, reasonably related, to -- to
5 traffic safety.

6 Now, if it's analyzed that way, what
7 would be wrong with that?

8 MR. HINKEL: I agree with you, Justice
9 Alito, that that is a more sensible way
10 doctrinally to look at this than as consent.

11 What would be wrong with it, some of
12 the things that this Court said in Birchfield.
13 First -- and Birchfield, of course, was
14 applying the exigency exception rather than a
15 reasonable condition, but the analysis is
16 essentially the same.

17 It's a balancing of privacy interests
18 versus government interest in the search. And
19 as in Birchfield, the state has perfectly
20 adequate means, other than a warrantless blood
21 draw, to vindicate its interest in -- in
22 catching and punishing drink drivers. First,
23 of course, there is the availability of the
24 warrant, which this Court has repeatedly
25 recognized. Warrants are increasingly

1 available and available in a timely way in a
2 lot of these cases.

3 And, second of all, if for some reason
4 they are not available in a particular case, we
5 have resort to -- to the exigency exception.

6 So the case is -- the State has
7 pointed to no situation, whether it be a real
8 case that actually happened or a hypothetical,
9 in which this regime of get a warrant if you
10 can, and if you can't, you don't have to, is
11 insufficient to vindicate its interest in
12 getting --

13 JUSTICE ALITO: Well, it's very --
14 it's easy to say, well, you can always get a
15 warrant and -- at 2:00 on Christmas morning.
16 You can find -- you know, every state can find
17 a prosecutor and wake up some judge to -- to
18 grant the warrant. And, you know, maybe that's
19 true everywhere. Maybe it's not true
20 everywhere.

21 In the case -- in a case like the case
22 of your client, what purpose is really served
23 by that, where they come upon somebody who is
24 -- has not been in an accident, and there's no
25 other plausible explanation for his condition,

1 other than having taken -- other than having
2 drunk and/or taken drugs.

3 What -- what accounts for that? I
4 mean, what -- what -- what purpose, really, is
5 served by this warrant requirement?

6 And in the case -- of the case of
7 somebody who's involved in a very serious
8 accident and is unconscious, how is a
9 magistrate on the phone supposed to be able to
10 distinguish between the possibility that this
11 person is unconscious as a result of the
12 accident or the possibility that the person's
13 unconscious as a result of -- of imbibing
14 alcohol or drugs?

15 MR. HINKEL: To respond to the first
16 part of your question, Justice Alito, of
17 course, the two elements typically of drunk
18 driving are -- are drunkenness and driving.
19 And in -- in this case, the question was
20 whether Mr. Mitchell had driven. I mean, it
21 was fairly apparent that he was intoxicated.

22 So that is a -- and that's one
23 situation in which you may well get
24 differing -- various factual scenarios in which
25 we have very good evidence that the person has

1 been driving, such as that they are discovered,
2 you know, passed out in the driver's seat, or
3 we may have them some distance from their
4 vehicle and we're not sure whether they've
5 driven.

6 And that's exactly the kind of
7 decision that, you know, the officer could say,
8 well, I have an eyewitness who puts him in the
9 driver's seat. That would be a very different
10 case than, eh, I think, you know, his car is
11 nearby and he's drunk, so I think he was
12 driving.

13 And that's exactly the kind of
14 decision that the Constitution reserves for the
15 neutral magistrate.

16 Speaking more generally, taking a step
17 back to, I guess, the second part of your
18 question, in these circumstances of an
19 unconscious driver, first of all, officers
20 can't perform a lot of the standard field
21 sobriety tests, which, in Birchfield, the
22 opinion discussed, hey, these are -- the basis
23 of probable cause is going to be sort of the
24 subjective observations, you know, he couldn't
25 walk a straight line, he couldn't say the

1 alphabet backwards, et cetera.

2 Again, I think, with an unconscious
3 motorist, you have a greater amount of factual
4 variability. It could be that someone was in a
5 crash and you might have great evidence of
6 intoxication. They might have an open bottle
7 of vodka next to them. You might have a faint
8 smell of alcohol. You might have no -- no
9 evidence of intoxication at all.

10 So, again, that's -- the fact that --
11 the fact that probable cause might vary, as the
12 18 states' amicus points out, or might be hard
13 to establish isn't a reason for a warrant
14 exception. It's a reason to apply the warrant
15 requirement.

16 JUSTICE BREYER: If somebody's there
17 lying down, he's unconscious, smells a little
18 of alcohol perhaps, wouldn't the policeman take
19 him to the hospital? Wouldn't that be the
20 first thing that -- that he'd think of?

21 MR. HINKEL: Yes, I would certainly
22 hope so.

23 JUSTICE BREYER: All right. So, if he
24 takes him to the hospital, they're going to do
25 various tests on him. So what's the policeman

1 supposed to do? He doesn't know about the
2 varying degrees and whether it's this or that
3 or a sniff here or a bottle there. He just
4 thinks he's an unconscious person, so he takes
5 him in.

6 Now what? What's supposed to happen
7 then in your view, and when?

8 MR. HINKEL: If the officer believes
9 that there might be evidence of a crime in his
10 blood, is that the hypothetical, or --

11 JUSTICE BREYER: I'm saying taking
12 your case, but all the officer knows is
13 somebody's lying here unconscious.

14 MR. HINKEL: Uh-huh.

15 JUSTICE BREYER: And in your opinion,
16 what's supposed to happen?

17 MR. HINKEL: In that opinion, I mean,
18 if -- if there's a medical emergency that an
19 officer comes upon, of course, they should make
20 sure that they're --

21 JUSTICE BREYER: No, isn't that always
22 going to be true, I mean, or almost always?
23 He's lying here unconscious.

24 MR. HINKEL: Yeah. Again --

25 JUSTICE BREYER: Take him to the

1 hospital. And now the question would be, well,
2 will the hospital do a blood test on him?
3 Normally, they do probably.

4 MR. HINKEL: I would agree with that.

5 JUSTICE BREYER: All right. So -- so
6 -- so what's a policeman supposed to do by way
7 of calling a magistrate? I mean, what's --
8 what's he supposed to do?

9 What I worry about, people -- the
10 opposite of your side, it seems to me, is
11 people will get mixed up. So you have to tell
12 them fairly clearly what they're supposed to
13 do, particularly the officers. So I'd like you
14 to say what they're supposed to do.

15 MR. HINKEL: The warrant requirement
16 in the Fourth Amendment typically requires
17 officers to make these sorts of judgments about
18 --

19 JUSTICE BREYER: No, I didn't ask that
20 question. I want you to tell me, who is
21 pretending to be an officer --

22 MR. HINKEL: Uh-huh.

23 JUSTICE BREYER: -- what am I supposed
24 to do when I get to a car and there's someone
25 there lying unconscious? Other people may or

1 may not be hurt.

2 I have to say that very often in my
3 experience this is a result of drunk driving.
4 I look around. I don't see any other cause.
5 What am I supposed to do?

6 MR. HINKEL: Well, certainly, you're
7 supposed to get the person to the hospital.
8 That's --

9 JUSTICE BREYER: Of course.

10 MR. HINKEL: It's not our position
11 that you shouldn't.

12 JUSTICE BREYER: No, of course. Now
13 what?

14 MR. HINKEL: Well, if you have
15 evidence of a --

16 JUSTICE BREYER: No, no, don't say if.
17 I just put the case because I want you to tell
18 me what I'm supposed to do.

19 MR. HINKEL: If there's no --

20 JUSTICE BREYER: You can make up
21 whatever you want in situations, but just tell
22 me as if I were this officer who wants to know.

23 MR. HINKEL: If there's no indication
24 that a crime has been committed, then there
25 would be no justification for a search.

1 JUSTICE BREYER: Well, we have a guy
2 lying on the ground. He's -- now what do I
3 have to have?

4 MR. HINKEL: I would think you would
5 have to have some reason to think that that was
6 due to intoxication, due to an intoxicated
7 drunk.

8 JUSTICE BREYER: Some reason? Okay.
9 Now, so I add there's a whiskey bottle. Now
10 what?

11 MR. HINKEL: That seems like a much
12 clearer case of probable cause.

13 JUSTICE BREYER: All right. Then now
14 -- okay, there's a whiskey bottle. Now what am
15 I supposed to do?

16 MR. HINKEL: You're supposed to call
17 -- well, you're supposed to arrange, first of
18 all, for medical care.

19 JUSTICE BREYER: Yeah.

20 MR. HINKEL: And if, again, you
21 believe that there is probable cause, you're
22 supposed to call up the magistrate and say, I
23 have probable cause to believe this person is
24 intoxicated.

25 JUSTICE BREYER: So you bring him to

1 the hospital?

2 MR. HINKEL: Correct.

3 JUSTICE BREYER: The intern or the
4 emergency room says, we better take care of
5 him. We're going to take a blood test. So
6 they often do.

7 MR. HINKEL: I agree.

8 JUSTICE BREYER: What does the officer
9 say?

10 MR. HINKEL: Again, I think, if the
11 officer wants access to that -- to that blood
12 as evidence, then he needs to either get a
13 warrant or have a --

14 JUSTICE BREYER: Does he say to the
15 intern, don't do it until I can find the --
16 find the magistrate?

17 MR. HINKEL: No, there's no reason
18 that there can't be more than one blood draw.
19 It doesn't have to interfere with medical care.
20 And, in fact --

21 JUSTICE BREYER: Okay.

22 MR. HINKEL: -- it probably shouldn't.

23 If, in fact, medical care is keeping
24 the officer from -- from pursuing a warrant,
25 that's a textbook case of exigency.

1 JUSTICE SOTOMAYOR: I was going --

2 JUSTICE BREYER: Hmm. Okay.

3 JUSTICE SOTOMAYOR: -- to ask your
4 adversary this, but maybe you know the answer.
5 I know HIPAA does not provide for the release
6 of those information -- of that information to
7 law enforcement.

8 Does HIPAA also prevent a subpoena?

9 MR. HINKEL: Yes, Justice Sotomayor.
10 Actually, I mean, really, the question is those
11 -- those questions, or the answers, those
12 questions are sort of percolating up through
13 the courts now.

14 In general, the cases that I've seen,
15 and I can't cite them, but they -- you know,
16 there have been instances in which a prosecutor
17 sometime after the fact wants to subpoena the
18 blood from the hospital or the results of the
19 blood test.

20 And I think the correct rule that I've
21 seen in some cases is, yes, if you can get
22 judicial approval of that. What a person
23 generally does, as you -- as you point out with
24 HIPAA, has an expectation of privacy. Even if
25 they're sharing information with a hospital,

1 that doesn't mean that they're sharing it with
2 the whole world, including law enforcement.

3 JUSTICE SOTOMAYOR: But it doesn't
4 mean necessarily that the courts are precluded
5 from subpoenaing that information?

6 MR. HINKEL: Oh, no, certainly.
7 Certainly. But, again, there, you have
8 judicial involvement.

9 JUSTICE SOTOMAYOR: So let's go back
10 to the hypothetical so I understand your
11 position.

12 Someone's sitting after an accident
13 unconscious. There's no smell of alcohol.
14 There's no open bottle. There's nothing else
15 to suggest alcoholism.

16 The first thing you do is you call and
17 you go to the hospital. Doctors say to you
18 it's going to take three hours for the blood
19 test to come back.

20 Would exigent circumstances, because
21 we'd suggested as such in Birchfield, in that
22 situation, would exigent circumstances be
23 different for you saying, well, draw the blood
24 because we need to preserve the evidence or --
25 and why wouldn't that hold true if the officer

1 knows it's because of alcohol?

2 Here, they were told he was drinking.
3 He admitted he was drinking. They waited an
4 hour and took him to the station, didn't do a
5 breathalyzer. Maybe they couldn't. I don't
6 know. But only took him to the hospital after
7 he was unconscious.

8 Is that -- why is that a difference?

9 MR. HINKEL: If I understand the
10 hypothetical, what you're proposing is would be
11 an obstacle to them getting a warrant in time.
12 And -- and that, again, is -- is essentially
13 the definition of exigency.

14 JUSTICE SOTOMAYOR: That would be the
15 first hypothetical. He's unconscious. They
16 don't know why. His blood can dissipate and he
17 can say it'll take three hours --

18 MR. HINKEL: Yes, that would be --
19 that would be, I believe, exigent
20 circumstances.

21 JUSTICE SOTOMAYOR: -- the result. So
22 how -- but why is that different than here,
23 where, yes, they waited an hour plus, they
24 talked to him, they put him in a cell, and he
25 went unconscious? What's the factual and legal

1 difference between the two things?

2 MR. HINKEL: The legal difference is
3 that exigency, as -- as it was described in
4 McNeely, involves some obstacle to getting a
5 warrant or something that would make timely
6 getting a warrant impractical.

7 JUSTICE SOTOMAYOR: They knew he --
8 they needed the warrant when they arrested him.
9 If they needed the evidence, then they didn't
10 have to wait an hour to try to get it.

11 MR. HINKEL: Well, and -- there --
12 there's just no indication that -- that there
13 was ever a thought of a warrant. I mean,
14 there's no indication whatsoever there was any
15 impediment to them getting a warrant.

16 CHIEF JUSTICE ROBERTS: Well, that's
17 the -- I mean, this discussion has highlighted,
18 I think, the reason you have these laws. I
19 mean, it's varying fact patterns with respect
20 to probable cause, varying fact patterns with
21 respect to exigencies, and the whole point is
22 you don't want to have to go through all that
23 when it makes sense, according to your friends
24 on the other side, to say: Look, here's --
25 here's -- this is a right -- it's -- it's not a

1 right; it's a privilege to drive on our roads.
2 It's a very dangerous thing. If you're going
3 to do it, you have to allow us to, you know,
4 check blood-alcohol levels if you're in an
5 accident. You have to agree to that.

6 I mean, that's the whole point. It's
7 to avoid all these -- these issues at a time
8 when exigency is certainly a common aspect,
9 given dissipation of alcohol in -- in -- in
10 blood. So, again, I guess what's -- maybe I'll
11 go back.

12 Did I understand your answer about
13 actual consent? In other words, you go down to
14 the DMV. When they take your -- you know, your
15 driver's test, they say here's a form; we need
16 you to sign this. And the form is, I consent
17 to have my blood drawn. That's actual consent.

18 Is there anything wrong with that?

19 MR. HINKEL: Yes, there's something
20 wrong with it, I mean, because, under
21 Schneckloth, we analyze consent under the
22 totality of the circumstances. One factor
23 isn't determinative.

24 I agree, Your Honor, that if we have
25 that initial agreement, it starts -- it's

1 certain -- that's certainly a heavy factor in
2 the Schneckloth balance.

3 CHIEF JUSTICE ROBERTS: So what would
4 count --

5 MR. HINKEL: But there --

6 CHIEF JUSTICE ROBERTS: What's on the
7 other side?

8 MR. HINKEL: I mean, certainly, the
9 lapse of time. I mean, a person could --

10 CHIEF JUSTICE ROBERTS: So, if he
11 signed it two years ago, it doesn't count
12 anymore?

13 MR. HINKEL: I -- I'm willing -- I --
14 I -- I will allow that -- again, that those --
15 those hypotheticals look a lot more like
16 consent than what happened here.

17 CHIEF JUSTICE ROBERTS: But does that
18 mean it's okay?

19 MR. HINKEL: I don't think it's okay,
20 but you don't have to agree with me to --

21 CHIEF JUSTICE ROBERTS: Well, no, but
22 I do have to have a reason you don't think it's
23 okay.

24 MR. HINKEL: Because, again, when the
25 state conditions, you know, participation in

1 some activity on your consent to give up some
2 part of your Fourth Amendment --

3 CHIEF JUSTICE ROBERTS: Right.

4 MR. HINKEL: -- rights, it becomes
5 very difficult to see where the limit to that
6 is.

7 CHIEF JUSTICE ROBERTS: Yeah, but this
8 is not -- I understand your argument, who knows
9 where this will stop, and I guess the answer is
10 it'll stop with, you know, a license to drive
11 on the roads. Just because they do this, which
12 has been a very commonplace practice, it
13 doesn't mean that they're going to say, you
14 know, walking on our sidewalks is a privilege,
15 and if you do that, we're going to imply that
16 you consent to be, you know, searched whenever
17 we want to.

18 I mean, that parade of horrors
19 doesn't seem to me to be that persuasive.

20 MR. HINKEL: The -- the problem with
21 -- again, the problem with using consent as the
22 -- as the way to -- to analyze this is that
23 consent doesn't take into account whether the
24 conditions are reasonable or not.

25 And for all the --

1 CHIEF JUSTICE ROBERTS: Well, the only
2 conditions -- I mean, to belabor it, the only
3 conditions you need to know about are the ones
4 that I gave you. You're perfectly compos
5 mentis, you're taking your driver's test, it
6 goes on, the person says here, read this
7 carefully and sign it if you want; if you don't
8 want to sign it, I guess we don't have to give
9 you a license.

10 What more circumstances do you need to
11 know?

12 MR. HINKEL: I agree with Your Honor,
13 in that circumstance, it's very likely that the
14 Schneckloth test would be met. But that's not
15 the circumstance that we have here, as -- as
16 I'm sure you're aware.

17 JUSTICE SOTOMAYOR: Don't you have an
18 -- an unconstitutional conditions argument?

19 MR. HINKEL: Well, yes, I think there
20 would be an argument of unconstitutional
21 conditions.

22 JUSTICE SOTOMAYOR: And don't you have
23 an argument that the state can't extract a
24 condition that's more invasive than reasonably
25 necessary for its needs?

1 MR. HINKEL: I think those -- I
2 think --

3 JUSTICE SOTOMAYOR: And a blood draw
4 is different than -- than searching somebody's
5 home?

6 MR. HINKEL: I -- I --

7 JUSTICE SOTOMAYOR: Intrusive as
8 searching someone's home is, invading someone's
9 body is a different level of intrusion.

10 MR. HINKEL: I agree with you, and
11 that's why I think it's --

12 CHIEF JUSTICE ROBERTS: Well, you've
13 come up -- you've come up with some good
14 arguments there, but --

15 (Laughter.)

16 CHIEF JUSTICE ROBERTS: -- but I guess
17 I would say in terms of the unconstitutional
18 conditions thing, it's been pretty well
19 established, I think uniformly, that driving on
20 the roads is considered a privilege and not a
21 right, to which certain conditions can -- can
22 attach. And I -- so, again --

23 MR. HINKEL: I -- I --

24 CHIEF JUSTICE ROBERTS: Go ahead.

25 MR. HINKEL: If I may, I agree with

1 Your Honor that conditions can be attached to
2 -- to operating on the roads. And I -- I would
3 also say that this Court in Birchfield
4 established the outer limit of what conditions
5 can be attached when it said that -- that
6 criminal penalties that were associated with
7 refusing a test would be unconstitutional
8 because they're unreasonable conditions.

9 The position of the State takes that
10 quite a bit further and says we're not going to
11 charge you with a crime for refusing; we simply
12 aren't going to give you the opportunity.

13 JUSTICE BREYER: Let me go back for a
14 second if I can.

15 I was conceding to you there are
16 dozens of good legal arguments. The law in
17 this area is filled with complication. And so
18 that's why I wanted to focus on a simple thing,
19 I thought, the policeman.

20 And I don't see why you -- perhaps you
21 want to tell the policeman this: Officer, if
22 you see somebody unconscious in the car or not,
23 get him to the hospital, okay? And if they're
24 going to take a blood test, which they probably
25 will be, fine. Let them. Of course.

1 But if you want to use that result in
2 your case -- now that's the question -- yeah,
3 you can. And why? Because, otherwise, what
4 you're going to have to do, you get to the
5 hospital, he's taking the blood test, you phone
6 up a magistrate, you say he's there under a
7 blood test anyway, you go through a certain
8 amount, there was a whiskey bottle nearby and
9 so forth, the magistrate says yes or no, he's
10 going to have that blood test.

11 I mean, so what? The simplest thing.
12 Policeman, if they take him to the hospital,
13 which you should do, and they give him a blood
14 test, you can use it. That's a reasonable
15 thing to do.

16 All right. Now what is your answer to
17 that not in terms of this law over here, that
18 law over there?

19 MR. HINKEL: Whether it's reasonable
20 simply to say that police can always use the
21 blood?

22 JUSTICE BREYER: Yeah, if they take
23 the test, if he goes to the hospital, so forth.

24 MR. HINKEL: If a nurse or -- or a
25 doctor draws the blood for medical reasons, I

1 understand.

2 If I may answer the question?

3 The difference is that when the
4 hospital is performing a blood draw on a
5 person, it's for their benefit. It's -- we
6 have actually a related but distinct concept
7 called implied consent in the medical setting
8 because we imagine that everyone who was in
9 this circumstance would want medical treatment,
10 and so, if they were capable of agreeing to it,
11 they would.

12 We don't have that same presumption
13 when it comes to blood draws. People are not
14 presumed to consent to things.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 MR. HINKEL: I reserve the balance of
18 my time.

19 CHIEF JUSTICE ROBERTS: Ms. Jurss.

20 ORAL ARGUMENT OF HANNAH S. JURSS

21 ON BEHALF OF THE RESPONDENT

22 MS. JURSS: Thank you, Mr. Chief
23 Justice, and may it please the Court:

24 The fundamental question is
25 reasonableness. Every state holds drivers to a

1 bargain to comply with testing should police
2 have probable cause of intoxicated driving.
3 Wisconsin, like over half the states in the
4 country, reasonably recognizes that a driver
5 should not evade that bargain by becoming the
6 most dangerous of intoxicated drivers.

7 An unconscious driver has made all the
8 choices that put others' lives at risk but
9 then, through no fault of the government, has
10 put himself in a position where he cannot make
11 further choices.

12 As medical care for him must be a
13 priority, and as that medical care will almost
14 invariably involve a draw of his blood to test
15 for intoxicants, a warrant offers him only
16 slight protection but guarantees law
17 enforcement distraction during a criminal time
18 -- or a critical time.

19 JUSTICE BREYER: No, no, he's just --
20 take him to the hospital. See, his last
21 answer, I thought, was pretty good. He said
22 take him to the hospital. Have the blood
23 draws. Okay. But, if you want to use it in
24 evidence, call up the magistrate and say:
25 Magistrate, I want to use this in evidence, I

1 want to -- is that okay?

2 And by doing that, you're not really
3 interfering with the medical treatment. You're
4 -- all you're doing is asking him to make
5 another phone call.

6 Now what's -- what's -- is there
7 anything wrong with that answer?

8 MS. JURSS: There are potential
9 problems with that, and we see that playing
10 out.

11 So, once we've -- once he's at the
12 hospital, if law enforcement -- excuse me --
13 medical staff will want to draw his blood
14 quickly because that's how they're determining
15 how to treat him.

16 And so, if, at that point, law
17 enforcement can say, instead of drawing X
18 amount of blood, please draw a little bit more
19 blood to be used for law enforcement purposes,
20 then we're talking about one blood draw all at
21 that time.

22 If, instead, a law enforcement officer
23 has to get on the phone and call the
24 magistrate, even if it's not a tremendously
25 significant delay in terms of time, what's

1 happening is then interim medical care may be
2 offered. There could be medication that's
3 given. Medical staff may be wanting to provide
4 other treatment, such that then, once that
5 warrant is obtained, the person may -- may not
6 be in a position where a second blood draw
7 could happen.

8 And then, at that point, as my friend
9 acknowledged, we're potentially talking about
10 two needles instead of one. And even if we can
11 obtain a sample at that time, if law
12 enforcement can, they're put then in the
13 difficult position at times of having to try to
14 interject themselves into additional medical
15 care that's being provided.

16 JUSTICE KAGAN: Ms. Jurss, if I could,
17 just to understand your argument, I mean,
18 usually you're exactly right, that
19 reasonableness is the core of the Fourth
20 Amendment.

21 But usually we say: Well, what's
22 reasonable is you get a warrant --

23 MS. JURSS: Uh-huh.

24 JUSTICE KAGAN: -- or you fall under
25 one of the established, well-acknowledged,

1 well-understood, historic exceptions to the
2 warrant.

3 Which exception are you saying we fall
4 under, or are you saying that it kind of
5 doesn't matter, we could do the reasonableness
6 inquiry free-style?

7 MS. JURSS: So this Court could decide
8 it under one of two theories: either consent
9 or as a condition of driving, which would fall
10 under a general reasonableness balancing test.

11 And, ultimately, under either of those
12 theories, it's going to come back to
13 reasonableness, because, as this Court
14 acknowledged in *Birchfield*, reasonableness sets
15 the boundaries of this type of implied consent
16 scheme.

17 JUSTICE KAGAN: Well, start with the
18 consent. Do -- do you think that there is
19 actual consent here?

20 MS. JURSS: Yes, it's a special
21 application of consent, but it still is
22 consent.

23 JUSTICE KAGAN: How is it consent?

24 MS. JURSS: Because the person has,
25 through his voluntary actions, demonstrated his

1 agreement with these conditions.

2 And so, when we look at consent and
3 the Schneckloth consent, what we're ultimately
4 talking about is a voluntary decision, meaning
5 not coerced by the government, and there
6 doesn't have to be a knowing waiver.

7 And so, here, both of those things are
8 met. His actions of driving with probable
9 cause then for police to believe he was driving
10 while intoxicated are voluntary actions that
11 he's taken.

12 We know that this has to work and move
13 a little differently because, in most consent
14 scenarios, we wouldn't be able to impose civil
15 penalties for someone's decision to say no.

16 And we also know that in most consent
17 scenarios, someone being intoxicated would
18 weigh against potentially a finding of
19 voluntary consent, but that's all we're dealing
20 with here.

21 JUSTICE KAGAN: I guess this isn't
22 consent in -- you said it a little bit
23 differently -- but it wouldn't seem as though
24 this is consent in the normal way, where it's
25 like I understand the choice I'm making, I

1 agree to that choice.

2 There's nothing to say that Mr.
3 Mitchell or anybody in his position understood
4 this choice he was making. Right?

5 MS. JURSS: Not --

6 JUSTICE KAGAN: I mean, if he had
7 signed something at the DMV, you might have an
8 argument, look, there's the manifestation of
9 consent, his signature on a page saying that he
10 agreed to a blood test.

11 But there's nothing like that here, is
12 there?

13 MS. JURSS: No, there's not. I would
14 note that Wisconsin does have a statute that
15 demands that as part of the knowledge test for
16 obtaining driver's licenses, there are
17 questions related to our implied consent laws
18 and intoxicated driving, but we don't have any
19 specific requirement when signing for the
20 driver's license.

21 But, to go to your point, it is --
22 it's an atypical type of consent because it has
23 to be, because we are only and exclusively
24 dealing with intoxicated people.

25 So the normal, what I would call the

1 typical at-the-scene consent that you might
2 expect in other circumstances simply can't work
3 in this context because we are only dealing
4 with intoxicated people.

5 And so it makes sense to evaluate his
6 actions while he's driving because that's when
7 he's making all of the decisions that are
8 putting other people's lives at risk.

9 JUSTICE SOTOMAYOR: Now the problem
10 that I have with this implied consent is I take
11 the road.

12 MS. JURSS: Uh-huh.

13 JUSTICE SOTOMAYOR: I should know the
14 law.

15 MS. JURSS: Uh-huh.

16 JUSTICE SOTOMAYOR: I'm guilty of
17 violating the law if I drive intoxicated,
18 whether with alcohol or drugs. All right?

19 So that amount of knowledge is
20 self-evident and everyone should know it and
21 they can't plead ignorance of the law.

22 MS. JURSS: Right.

23 JUSTICE SOTOMAYOR: This is not quite
24 ignorance of the law. This is something
25 substantially different because you're talking

1 about not ignorance of the law but knowledge
2 that your body can be invaded by the police to
3 secure evidence to prove you drove intoxicated.

4 And we go back to the presumption that
5 Justice Kagan spoke about, which is a
6 presumption that you're going to have a warrant
7 if you think I've committed a crime before --
8 before you can -- you can invade my privacy.

9 You have well-defined exceptions,
10 exigent circumstances. You say there were none
11 here. You've stipulated to that.

12 And now you're talking about implied
13 consent. That's really not consent in my mind.
14 If I don't think it's consent, what are you
15 left with?

16 MS. JURSS: If -- if you don't believe
17 it's consent, it's still a reasonable condition
18 of driving.

19 JUSTICE SOTOMAYOR: But we've always
20 said that reasonable -- how can it be
21 reasonable when you don't know that that
22 invasion is necessarily part of the law?

23 You know that not driving intoxicated
24 should be part of the law. If it's not,
25 everybody understands that. But why would you

1 know that invading your blood is?

2 MS. JURSS: Well, I think it's
3 reasonable to expect, given that every state in
4 the country has had implied consent laws for
5 decades, which are specifically designed to
6 test for evidence of intoxication, I think it's
7 reasonable to expect --

8 JUSTICE GINSBURG: But it's a fiction,
9 isn't it? It's not consent, no matter how much
10 you call it implied or presumed. And it's
11 typical of the original non-resident motor
12 vehicle statutes. They said, if you drive on
13 our roads, then you will be deemed to have
14 consented to appoint a secretary of state as
15 your agent, and in time, we came to appreciate
16 that that is not genuine.

17 MS. JURSS: Uh-huh.

18 JUSTICE GINSBURG: It doesn't mean
19 that you can't say you can drive on our roads.
20 You have to answer for any damages that you
21 cause. But we don't use this presumed consent
22 anymore because it is a fiction. It's the
23 legislature has consented to have this thing
24 happen. It's not the person who is arrested.

25 MS. JURSS: And so, if this Court

1 wishes to look at it not through consent but as
2 a condition of driving, it's still a reasonable
3 condition.

4 And as to your question, Justice
5 Sotomayor, why would this person expect it, for
6 the unconscious driver in particular, he has
7 every reasonable expectation that he will be
8 facing bodily intrusion to test for evidence of
9 intoxication.

10 So he, more than other intoxicated
11 drivers, has put himself in a position where
12 the reasonable expectation is he will be taken
13 to a hospital and there will be testing of his
14 blood.

15 JUSTICE GORSUCH: Counsel, I'm not
16 sure he expects much of anything at that stage,
17 but I -- I just have kind of a fundamental
18 state law question for you.

19 MS. JURSS: Uh-huh.

20 JUSTICE GORSUCH: We've been
21 proceeding on the assumption that -- that the
22 state law operates to create implied consent or
23 it's a condition of driving.

24 But has actually a majority of your
25 supreme court ever so held?

1 As I understand it, there were three
2 justices who held that that is, indeed, how the
3 law works, as you're arguing, but only three
4 justices. And two others proceeded on exigency
5 and treated it on that basis.

6 And a number of justices have
7 suggested that it isn't an implied consent
8 statute at all but proceeds as a number of
9 other states do to say, well, consent or no
10 consent, if you fail to comply, there are
11 collateral consequences. You may lose your
12 license.

13 So we've been proceeding on an
14 assumption here that I just wonder how sound
15 that presumption is about the nature of -- of
16 state law. So can you advise us on that?

17 MS. JURSS: Your Honor is correct that
18 it was a three-justice plurality in this case
19 that upheld this search under consent grounds.
20 The two other justices, just as one point of
21 clarification, recognized it as a valid search
22 incident to arrest.

23 JUSTICE GORSUCH: I'm sorry, I
24 misspoke. Search incident to arrest rather
25 than exigency. But -- but you take my point.

1 We don't -- we don't yet, I -- I believe, have
2 a majority holding from your court as to the
3 nature of this statute for purposes of state
4 law. So how are we to assess it as a matter of
5 U.S. constitutional law?

6 MS. JURSS: Well, I think Your Honor
7 and this Court may still recognize it
8 reasonably at -- under the Fourth Amendment as
9 a form of consent or, if this Court doesn't
10 wish to do that, as a reasonable condition of
11 driving.

12 JUSTICE GORSUCH: But we normally --
13 we normally take state law as it's given to us.
14 We are not great interpreters of state law.

15 We may think we're pretty good at a
16 lot of things, but -- but we're not the last
17 word on state law. And we normally defer to
18 state authorities on that, or are supposed to,
19 and then assess how it -- how it proceeds under
20 the federal Constitution.

21 If we're not sure what the state law
22 is here, what are we supposed to do?

23 MS. JURSS: Well, I would say that a
24 majority of our court has recognized that a
25 blood draw from an unconscious person is a

1 reasonable search. And there -- at the
2 Wisconsin Supreme Court, there was discussion
3 of both consent and search incident to arrest,
4 as I mentioned, but I think there is sufficient
5 ground here for this Court to affirm it as
6 reasonable.

7 Though if this Court should disagree
8 and say that in some way the Wisconsin Supreme
9 Court hasn't provided that clarity, this Court
10 would -- could remand for further clarity, but
11 I think we have that here.

12 JUSTICE ALITO: But is there a way --

13 CHIEF JUSTICE ROBERTS: How do we
14 remand for -- I mean, you know, there's
15 certification and all, which is -- I don't say
16 usually but often doesn't quite work out the
17 way you hope. But we already -- I mean, they
18 would just give us another 3-2 opinion.

19 MS. JURSS: And this was the second
20 case from the Wisconsin Supreme Court where
21 that happened. And so we're certainly asking
22 for this Court's --

23 CHIEF JUSTICE ROBERTS: But I'm not
24 faulting them for that. It happens, but --

25 MS. JURSS: Right.

1 CHIEF JUSTICE ROBERTS: -- but it
2 doesn't seem that it would help us with our
3 particular conundrum.

4 MS. JURSS: We would agree. And we
5 agree that there -- we assert that there is
6 enough here for this Court to decide based on
7 the Wisconsin Supreme Court's rationale.

8 JUSTICE ALITO: Is there any doubt
9 about what the Wisconsin law does? There's
10 disagreement on the state supreme court about
11 the -- the theoretical basis for the decision
12 in this case, but is there any doubt that
13 Wisconsin law says that if you drive on our
14 roads, and a police officer has probable cause
15 to believe that you were driving under the
16 influence, and you were unconscious, that the
17 police -- that the police may, without
18 obtaining a warrant, get a blood sample from
19 you?

20 MS. JURSS: There is no doubt of that.
21 Petitioner --

22 JUSTICE GINSBURG: The -- the main
23 rule, I think you would recognize, is that if
24 you're going to seize blood or anything else
25 from a person, you should get a warrant, with

1 -- with exceptions.

2 One thing that we take into account
3 is, how difficult is it to get a warrant? And
4 in this case, we are -- we were told that in
5 Wisconsin, magistrates are available around the
6 clock by phone or by email, and often it's only
7 -- it takes only 15 minutes. Is that the case?

8 MS. JURSS: So it varies from county
9 to county across Wisconsin. I would say, on
10 the fastest end, you're looking at 15 minutes,
11 though sometimes it's half an hour, 45 minutes
12 to an hour.

13 At this point, my understanding is
14 that most counties in Wisconsin are using a
15 variation of telephonic warrants, though that
16 still requires that if a law enforcement
17 officer and the judge do not have duplicate --
18 if the judge does not have a duplicate copy of
19 the warrant in front of him or her, the officer
20 will have to read the warrant verbatim to the
21 judge.

22 JUSTICE KAVANAUGH: Does every county
23 in Wisconsin have a judge who's on duty 24/7
24 for these purposes or at least on call 24/7?

25 MS. JURSS: I don't know for sure with

1 every county, but I think the common -- the
2 common practice is to have an on-call judge.
3 But what -- an important --

4 JUSTICE SOTOMAYOR: Could you have an
5 issue --

6 JUSTICE KAVANAUGH: That one of the --

7 JUSTICE SOTOMAYOR: -- it -- it -- it
8 -- I'm sorry.

9 JUSTICE KAVANAUGH: Go ahead.

10 JUSTICE SOTOMAYOR: It seems to me
11 that -- why did the officer wait to take him to
12 the precinct? Meaning he didn't black out for
13 an hour. If he thought that getting proof of
14 this crime was critical, why wasn't he calling
15 for a warrant as he was driving to the
16 precinct, or why didn't he go straight to the
17 hospital?

18 I'm a little bit confused as to what
19 was in their mind.

20 MS. JURSS: Uh-huh.

21 JUSTICE SOTOMAYOR: I think what was
22 in their mind is we either get consent, and if
23 we don't, they're going to suspend his license
24 anyway, and it's only convenient for me now
25 that I have to take him to the hospital to take

1 the blood draw.

2 MS. JURSS: So the officer in this
3 case first took him to the police station
4 because he wanted to first offer the lesser
5 intrusive breath test. So he took him there to
6 do a breath test.

7 But then it was at the police station
8 that Mr. Mitchell's condition really began to
9 deteriorate. He was having a hard time keeping
10 his eyes open and head up. So it was at that
11 point that then the officer, recognizing that,
12 said: Nope, we've got to get him to the
13 hospital. It's an eight-minute drive to the
14 hospital. And that's where then the blood draw
15 ultimately happened.

16 And so one of the things I think
17 that's important to keep in mind here is that
18 law enforcement officers with an unconscious
19 person are going to be confronted with at least
20 one person who needs urgent medical care. And
21 so we believe it's important that law
22 enforcement have clarity of a rule that says
23 that they may be able to focus on getting that
24 person that medical care, and then, again, once
25 the person is at the hospital, almost

1 invariably this testing will happen anyway.

2 So the warrant for the unconscious
3 intoxicated driver is offering little
4 meaningful protection but is then going to take
5 away from law enforcement resources and, as I
6 mentioned, could potentially jeopardize then
7 the legal blood once it's drawn.

8 JUSTICE KAVANAUGH: So that maybe
9 answers a question I had, which is what are the
10 practical problems with getting a warrant?

11 MS. JURSS: Uh-huh.

12 JUSTICE KAVANAUGH: And maybe you just
13 said that delaying medical care while you're
14 getting a warrant -- is that what you're
15 saying?

16 MS. JURSS: That's a --

17 JUSTICE KAVANAUGH: Because you're not
18 transporting the person right away? Or at
19 least just -- can you spell out --

20 MS. JURSS: Sure.

21 JUSTICE KAVANAUGH: Maybe I'll just
22 ask it generally. What are the practical
23 problems, in your view, with getting a warrant
24 in this class of cases?

25 MS. JURSS: Sure. So if law

1 enforcement has to be distracted at the
2 scene -- and figuring out whether you can get a
3 warrant is already something that's going to
4 take some time. And so, for law enforcement,
5 if they have to contemplate that, it's
6 potentially taking away time and resources from
7 making sure that person gets medical care; if
8 there's a crash that's happened, tending to the
9 scene of the crash.

10 And then, once we're at the hospital
11 --

12 JUSTICE KAVANAUGH: In some of these
13 situations, I assume it'll be a single officer?

14 MS. JURSS: Some of these situations,
15 it will be a single officer. And so that
16 officer's attention should be able to be
17 undivided on ensuring that that person gets the
18 medical care he needs.

19 And then, once we're at the hospital,
20 a delay between the medical draw of the blood
21 and the legal draw of the blood can potentially
22 jeopardize the results if there's interim
23 medication that's been offered or, if then,
24 once a warrant is obtained, the person is
25 receiving other medical care that would

1 prohibit a second blood draw from happening.

2 And so, given that, again, this person
3 is in all likelihood going to be experiencing
4 the intrusion of a blood draw, requiring law
5 enforcement in those circumstances to obtain a
6 warrant is not really offering him the
7 protection against the intrusion. Our statute
8 has a probable cause requirement built into it,
9 so he can always challenge probable cause.

10 And, again, the statute also limits
11 the scope, right? So this can only be testing
12 done for evidence of intoxication. It has to
13 be done by a medical professional.

14 JUSTICE KAVANAUGH: I assume most of
15 these cases or at least many are cases where
16 there's been an accident?

17 MS. JURSS: Yes, you're correct. One
18 of the other things --

19 JUSTICE KAVANAUGH: Do you have any
20 sense of the numbers in Wisconsin on that?

21 MS. JURSS: I don't have the numbers
22 of the breakdown of car crash versus other
23 circumstances. My understanding, though
24 anecdotally, is that most of these are car
25 crash cases.

1 And one of the other things that we're
2 seeing is a dramatic rise in the instances of
3 drugged driving. So particularly with regard
4 to opiates and unconsciousness as a direct
5 effect -- effect of excessive opiate usage.
6 For example, according to the Governor Highway
7 Safety Association's 2016 report, 16 percent of
8 fatally injured intoxicated drivers tested
9 positive for opiates.

10 And so we're seeing those numbers go
11 up. And, in fact, heroin and other drugs, the
12 -- actually -- they actually dissipate faster
13 from the blood stream than alcohol. And so,
14 given that increase, particularly with the
15 unconscious person, and given that, as my
16 friend noted, the unconscious --

17 JUSTICE SOTOMAYOR: That sounds like
18 an exigent circumstance argument, which you
19 stipulated against in seeking --

20 MS. JURSS: So there -- there may, in
21 many of these cases, be exigent circumstances,
22 but the question should not just simply be one
23 of time because, as this Court recognized in
24 Kentucky v. King, there's -- there's nowhere in
25 the Constitution that says that the minute

1 police have probable cause, they need to drop
2 everything and get a warrant.

3 And that should be particularly true
4 where we know law enforcement is going to be
5 confronted with someone who needs urgent
6 medical attention and, again, he hasn't
7 withdrawn his implied consent.

8 So law enforcement has every reason to
9 believe that he is continuing to agree.

10 JUSTICE SOTOMAYOR: Why -- why do you
11 -- the problem I'm having with your argument is
12 I don't know where you get the implied consent
13 from. I assume there's none.

14 MS. JURSS: Okay.

15 JUSTICE SOTOMAYOR: If there is none
16 for the reasons we've discussed, then you are
17 back to exigent circumstances or some other
18 recognized exception.

19 You say incident to arrest. That's a
20 close call given the language in Birchfield.

21 What's left for you?

22 MS. JURSS: So general reasonableness
23 in the same way that this Court has applied it
24 in Maryland v. King and in other -- a number of
25 other --

1 JUSTICE SOTOMAYOR: Well, what
2 Maryland v. King said was that an alcohol swab
3 of your mouth --

4 MS. JURSS: Uh-huh.

5 JUSTICE SOTOMAYOR: -- for purposes of
6 identification, not for purposes of proof at
7 trial but for purposes of identification, was
8 not sufficiently intrusive to require a
9 warrant. That's what Maryland v. King said.

10 But Birchfield said the intrusion into
11 a body is something else.

12 MS. JURSS: Well, even in Birchfield,
13 this Court said that, where there's been no
14 clarity from the founding, it looks to
15 reasonableness, and -- this Court looks to
16 reasonableness. And, again, we're back to the
17 balancing of the government's interests and the
18 individual's privacy interests.

19 And for the unconscious, intoxicated
20 driver, we have even more so than for other
21 intoxicated drivers a compelling interest in
22 obtaining that evidence. This will be -- the
23 blood evidence will be the only way to
24 definitively prove his intoxication one way or
25 another.

1 We know it's more compelling because
2 we have the need for law enforcement to be able
3 to focus on matters other than obtaining a
4 warrant, i.e., his care, and the individual has
5 placed himself in a position where he has a
6 lesser expectation of privacy against this --

7 JUSTICE GINSBURG: Suppose --

8 MS. JURSS: -- precise type of
9 intrusion.

10 JUSTICE GINSBURG: Suppose he had a
11 card on his windshield that says: If I'm
12 unconscious, I do not consent to a blood draw.

13 (Laughter.)

14 MS. JURSS: That -- that could very
15 well make a difference, because if we're
16 thinking about it through the lens of what I'll
17 call typical consent, if an officer objectively
18 perceives a withdrawal of that consent, then
19 the state may no longer proceed under his --
20 under the theory of -- that he's offered
21 consent. He may always withdraw it.

22 CHIEF JUSTICE ROBERTS: Well, there
23 may not be consent but you would have pretty
24 good evidence, wouldn't you?

25 MS. JURSS: Pretty good --

1 CHIEF JUSTICE ROBERTS: I mean, you
2 have a card saying if -- he's anticipating
3 being unconscious while he's driving a car.

4 (Laughter.)

5 MS. JURSS: Well, that would certainly
6 be helpful. That would certainly be helpful.

7 But so, again, Your Honor, Justice
8 Ginsburg gets to an important point here, that
9 even with the unconscious person, it's still a
10 presumption.

11 Unconsciousness with an intoxicated
12 person is not a static state. Right? This is
13 one person. His condition may change. And so
14 if prior to his blood being taken he explains I
15 do not want a blood draw taken, then we may no
16 longer proceed under his implied consent.

17 If he regains consciousness prior to
18 the blood draw being taken and says I do not
19 consent, then we may no longer proceed under
20 his implied consent.

21 CHIEF JUSTICE ROBERTS: Well, that's
22 the -- I mean, that's actually the question
23 presented is how to deal with an unconscious
24 person.

25 To what extent do you think the

1 ability to withdraw the consent that was given,
2 and -- I mean, call it implied consent, I'm not
3 quite -- I don't quite understand why it's not
4 consent if it's a condition --

5 MS. JURSS: Right.

6 CHIEF JUSTICE ROBERTS: -- upon
7 driving the automobile.

8 So, if you have that, the validity of
9 that, to what extent does it depend on the
10 ability to withdraw? Because that's the --
11 that's the problem here, of course, is the
12 unconscious person can't withdraw at the
13 moment.

14 MS. JURSS: Right. So that exchange
15 that Wisconsin, like most states, has with the
16 conscious driver, where we read what I'll call
17 the pre-test advisement, is not in any way a
18 request for consent. The person has already
19 consented.

20 What it is, is an explanation that
21 this testing is about to happen. And we
22 explain to the conscious driver, because we
23 realize when he hears that this test is about
24 to happen, he may not like it and he may
25 withdraw his implied consent.

1 We, therefore, further explain the
2 ramifications that will follow if he withdraws
3 it, again, to incentivize the consent. So that
4 exchange is not in any way constitutionally
5 mandated, and it doesn't in any way apply to
6 the unconscious driver.

7 What that is designed to do is prevent
8 confrontational encounters with law enforcement
9 because, again, we're dealing with intoxicated
10 people.

11 And so perhaps a helpful analogy is
12 thinking about a TSA agent at an airport,
13 right, the person has gone through security.
14 They've gone through the body scanner. And now
15 the agent has seen something that warrants a
16 pat-down.

17 The agent is not just going to walk up
18 to that person and start touching him or her
19 without saying anything. Right? They're going
20 to say -- the agent will say something to the
21 effect of: I'm about to pat you down. Okay?

22 Well, that's not a request for
23 consent. What that is, is this is a human
24 exchange where one is about to effectuate a
25 bodily search on the other.

1 That is what the pre-test advisement
2 that is read to the conscious driver is. It
3 doesn't apply to the unconscious driver because
4 we don't have that concern of the confrontation
5 and he's already demonstrated his implied
6 consent.

7 JUSTICE KAGAN: But I guess what you
8 just said suggests the limits of these laws.
9 You know, in general, these laws work fine, and
10 the reason that they work fine are because most
11 drivers are conscious.

12 And so the police officer engages with
13 them, and what the law does is it functions not
14 as implied consent, it functions as induced
15 consent or incentivized consent.

16 The police officer comes up and says:
17 Unless you consent, your license is going to be
18 taken away. And then the person has a choice.
19 Right?

20 Okay, I'll consent, or, no, take my
21 license away. And that's the way these laws
22 usually work. And we can understand how
23 consent is -- how the law is inducing the
24 consent and the person is giving the consent.

25 But that just falls apart in this

1 situation of the unconscious driver, where we
2 can't possibly get to any real notion of
3 consent.

4 MS. JURSS: So two parts in response.
5 I think it's important here that the government
6 has not put the person in that situation.
7 Right?

8 If -- if that opportunity -- if there
9 is an opportunity that's offered to the
10 conscious driver, the unconscious driver's lack
11 of having that opportunity is his fault, not
12 the government's.

13 And then what I would say as a second
14 response is, again, consent --

15 JUSTICE KAGAN: The Fourth Amendment
16 often applies against people who violate the
17 law. And we don't usually say: Tough luck.
18 It's your fault.

19 (Laughter.)

20 JUSTICE KAGAN: You're a criminal.

21 (Laughter.)

22 MS. JURSS: True enough. But, in the
23 consent world, this Court has also recognized
24 that we -- the government doesn't have to
25 provide a person an opportunity to withdraw

1 consent.

2 So this Court's discussion of the
3 facts of Illinois v. Rodriguez and Georgia v.
4 Randolph, when we're talking about an apparent
5 co-tenant at the door and another co-tenant
6 who's asleep. This Court said, well, the
7 government doesn't have to go rouse that person
8 to give him an opportunity to withdraw his
9 consent.

10 And the other thing I would note in
11 response to your question is that, again, this
12 has to work a little bit unusually because
13 we're dealing with intoxicated people. So the
14 danger of putting everything on that
15 at-the-scene encounter and exchange is that
16 it's never going to be the product of a sober
17 mind.

18 And so that's what's so important of
19 having the clarity upfront for law enforcement
20 and the individual of how --

21 CHIEF JUSTICE ROBERTS: Finish your
22 sentence.

23 MS. JURSS: Thank you -- of how that
24 consent will be demonstrated and the
25 expectations that person will be held to.

1 Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Mr. Hinkel, you have four minutes
5 remaining.

6 REBUTTAL ARGUMENT OF ANDREW R. HINKEL
7 ON BEHALF OF THE PETITIONER

8 MR. HINKEL: Thank you.

9 This Court has repeatedly recognized
10 that a blood draw is a significant interest
11 that affects -- sorry, that offends an
12 individual's sense of dignity and bodily
13 integrity. And, ordinarily, this is true
14 whether or not the person is conscious.

15 Again, against a significant
16 intrusion, the State offers no interest that is
17 not adequately served by either a warrant or
18 the exigent circumstances doctrine.

19 And, again, a warrant is the
20 presumption of the Fourth Amendment, and -- and
21 this Court has certainly made exceptions to
22 that, but it's been in cases where the state
23 could show, first, the need for a search, which
24 we concede certainly there is here, but,
25 second, some reason why the ordinary regime of

1 a warrant or a warrant exception isn't
2 sufficient to vindicate their interest. And
3 that's just not present here.

4 JUSTICE ALITO: Didn't we just hear
5 some reasons why the warrant would -- would --
6 the warrant requirement would create problems?
7 I mean, I'd like to hear your response to that.

8 If -- if there's a crash, the need to
9 attend to people who may be injured in the
10 crash, the need to attend to the medical needs
11 of the person who is unconscious, once at the
12 hospital the -- the potential that medical care
13 may interfere with the -- with the accuracy of
14 a subsequent blood draw, the possibility that
15 if the medical treatment proceeds at the
16 hospital before a warrant -- before the blood
17 draw for the presence of drugs or alcohol can
18 be administered, it may not be possible to do
19 it because of what -- the care that the person
20 is being given. Maybe the person is in
21 surgery.

22 What -- what is your answer to all of
23 that?

24 MR. HINKEL: Those are all textbook
25 factors that would go toward the exigency

1 analysis. It might be present in many cases.

2 It may be that in many cases the
3 exigency -- the -- the answer to the question
4 is this an exigent circumstance justifying the
5 absence of a warrant is yes.

6 But that, again, is not a reason for a
7 categorical exception, because that's not every
8 case. That is the case --

9 JUSTICE KAVANAUGH: Isn't it most?

10 MR. HINKEL: The most extreme --

11 JUSTICE KAVANAUGH: Why not have a
12 categorical exigency for this category of cases
13 involving unconscious, because the factors in
14 many cases are going to be such as were
15 described.

16 MR. HINKEL: Well, I don't think we
17 have any evidence that that is, in fact, the
18 case, that that is most cases. You know,
19 police departments all across the country are
20 different.

21 There are -- and -- and accidents are
22 different and situations of arrests are
23 accidents. I mean, certainly the State is
24 making a lot of assertions about how these
25 things tend to go. But we just don't have any

1 of that in the record and just no indication
2 that that is typically the case.

3 JUSTICE ALITO: Well, what's on the
4 other side of the balance where you have
5 somebody who is unconscious, so will not even
6 be able to perceive that the blood test is
7 being administered, and the person is in all
8 likelihood having a blood draw for other
9 purposes anyway?

10 MR. HINKEL: Well, the reasonableness
11 of the search hasn't ever depended on whether
12 or not someone was around to see it. It's no
13 less unreasonable to search a person's house
14 without a warrant if that person happens to be
15 absent or if that person happens to be asleep.

16 The -- the problem that the Fourth
17 Amendment seeks to protect against is the
18 invasion of privacy. That's the same. The
19 interest that this Court identified in
20 Birchfield, the anxiety that comes along with
21 knowing that the government is in possession of
22 this information about you, that's the same
23 even if it happens a few minutes or a few hours
24 later.

25 JUSTICE KAVANAUGH: How many --

1 JUSTICE BREYER: So -- I mean, in
2 Birchfield, you say I'm going to take your
3 license away unless you're going to agree. I
4 mean, of course he's going to agree. So -- so
5 that's ridiculous.

6 So, I mean, so you have very little
7 protection when he's awake. Okay?

8 So to say he's asleep, and you're
9 going to take him to the hospital anyway, the
10 thing that I can't get my hands on is this just
11 seems like a sort of bureaucratic set of rules
12 that is going to confuse people achieving no
13 real purpose.

14 MR. HINKEL: I disagree.

15 JUSTICE BREYER: Unless you're into
16 Birchfield, it's sort of good-bye. Do -- do --
17 do -- and I -- I can't get my hands on that,
18 which is why I repeat it.

19 MR. HINKEL: I disagree with the
20 premise that the consequence of license
21 revocation is going to lead to automatic
22 consent in every case. In fact --

23 JUSTICE BREYER: No, no, you're right,
24 not every case, but on many it will be
25 confusing and a few he will say no, but

1 99 percent, sure.

2 MR. HINKEL: If I may?

3 CHIEF JUSTICE ROBERTS: Sure.

4 MR. HINKEL: I don't think that's
5 true. I think there is actually -- it's not
6 one percent. It's a considerably
7 higher percent of people who refuse a blood
8 draw regardless of that license consequence.
9 They make that choice.

10 JUSTICE BREYER: Okay.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel. The case is submitted.

13 (Whereupon, at 2:01 p.m., the case was
14 submitted.)

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