Nos. 14-1470, 14-1468, 14-1507

In The
Supreme Court of the United States

WILLIAM ROBERT BERNARD, JR.,

Petitioner,

v.

STATE OF MINNESOTA

DANNY BIRCHFIELD,

Petitioner,

v.

STATE OF NORTH DAKOTA

STEVE MICHAEL BEYLUND,

Petitioner,

v.

GRANT LEVI, DIRECTOR, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION.

On Writs Of Certiorari To The Supreme Court Of The State Of Minnesota And The Supreme Court Of The State Of North Dakota

BRIEF OF THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood.

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STATEMENT OF INTEREST[1]

The California District Attorneys Association as amicus curiae hereby seeks permission to file the enclosed amicus curiae brief in support of Respondent in the consolidated cases.

The California District Attorneys Association (CDAA) is the statewide organization of California prosecutors. CDAA is a professional organization that has been in existence for over 91 years, and was incorporated as a nonprofit public benefit corporation in 1974. CDAA has over 2,800 members, including elected and appointed district attorneys, the Attorney General of California, city attorneys principally engaged in the prosecution of criminal cases, and attorneys employed by these officials. The association presents prosecutors' views as amicus curiae in appellate cases when it concludes that the issues raised in such cases will significantly affect the administration of criminal justice.

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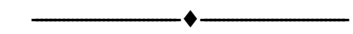
[1] Pursuant to Rule 37.2(a), amicus gave counsel of record for each party written notice of the intention of amicus to file this brief at least 10 days in advance, and all parties have consented in writing to the filing of this brief. Pursuant to Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and that no entity or person, other than amicus, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief.

These cases not only raise matters of concern for prosecutors and law enforcement professionals nationwide, they specifically present issues of national and statewide concern to prosecutors. California, like all other states, has an implied consent law with a similar statutory scheme to both Minnesota and North Dakota. The lower courts have been consistent in their rulings as to the constitutionality of such driving-consent statutory schemes. A decision by this Court will reaffirm that uniform rule and provide finality to the issue.

Your amicus is familiar and experienced with the issues presented here, specifically with the prosecution of cases where evidence of impairment is obtained by California law enforcement agencies pursuant to statutory scheme that requires motorists to submit to a chemical test of their bodily fluids.



SUMMARY OF ARGUMENT

California has a long history with the issue now confronting the Court, dating to *Schmerber v. California* (1966) 384 U.S. 757, and has crafted its laws in response to the direction of this Court. It is clear that the scourge on the roads of America has not abated in the years since *Schmerber*. Still, the advance consent laws and the choice they provide impaired drivers has been a tailored response by the States, including California, to mitigate the damage done by impaired drivers in the most reasonable way.

A. The exception to the Fourth Amendment requirement of obtaining a search warrant is met if there is consent based on the totality of the circumstances. One of the factors to consider in those circumstances is the existence of the advanced consent that is required of all drivers on the roads of California. Once confronted with the choice of providing a sample for testing, the factors surrounding that consent should be considered as well. The fact that if the impaired driver refuses, there will be negative consequences, does not render the asking for the consent at the time of the detention, coercive.

B. The advanced consent statutes, on their face, do not impermissibly burden a constitutional right. The conditions reasonably relate to the purposes sought by the legislation which confers the benefit, giving the driver a choice when that driver is suspected of driving impaired. The public value of those conditions manifestly outweighs any resulting imposition on the driver, as the havoc caused by impaired drivers is well recognized and its prevention is of high interest to a state. Finally, there are no alternative means imposing less on the driver that can be narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit. Should petitioner's position prevail, the real alternative is to effectively negate implied

consent laws by taking the choice away from the impaired driver and having a search warrant in every investigation.

C. Once the suspected impaired driver has been confronted with his choice, his Due Process rights are fully protected. Built into the statutory scheme is the very requirement of notice. Upon that notification, the impaired driver makes his or her choice. Once made, even if the consent is withdrawn, the impaired driver has multiple procedural avenues open to him to ensure that, if appropriate, his privilege to drive is restored.

ARGUMENT

A. Implied Consent Laws are not coercive, and the consent derived therefrom may be considered to be actual consent.

On two occasions, this Court has addressed whether a warrantless blood test in a driving under the influence case violated the Fourth Amendment. In *Schmerber v. California* (1966) 384 U.S. 757, this Court concluded "compulsory administration of a blood test" was a search under the Fourth Amendment. (*Id.*, at 767.) Nevertheless, the Court concluded that the warrantless search was justified when there are exigent circumstances. (*Id.*, at 770-771.)

More recently, in *Missouri v. McNeely* (2013) 568 U.S. ___, 133 S.Ct. 1552, this Court held that the sole

factor of the natural dissipation of alcohol in the bloodstream alone does not create exigent circumstances in every DUI case. (*Id.*, at 1563.) The Court went on to state that a search warrant should generally be obtained (*Id.*, at 1561), and where exigent circumstances exist, they must be demonstrated by the totality of the circumstances. (*Id.*, at 1563.) The *McNeely* Court had no occasion to determine whether there exists another exception that would justify a warrantless search under the Fourth Amendment.

With few exceptions, searches conducted without warrants are considered "unreasonable" under the Fourth Amendment. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 219.) Moreover, it is "well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." (*Ibid.*) "A search to which an individual consents meets Fourth Amendment requirements. . . ." (*Fernandez v. California* (2014) 571 U.S. ___, ___, 134 S.Ct. 1126, 1137.) In order for consent to be considered valid, it must be demonstrated to be the result of a "free and unconstrained choice." (*Id.*, at 225.) When the State seeks to justify a search based on actual consent, it must "demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." (*Schneckloth*, 412 U.S. at 248.) The fact that a defendant has been arrested at the time of the search does not render a suspect's consent coerced. (*United States v. Watson* (1976) 423 U.S. 411.) However, consent that amounts to nothing

more than submission to police intimidation is not voluntary. (*Florida v. Bostwick* (1991) 501 U.S. 429.) Whether consent is voluntary or involuntary is determined in a case-by-case basis and is based on the totality of the circumstances. (*Schneckloth*, 412 U.S. at 219.)

"We recognize, of course, that the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices. [Citation.] We hold, therefore, that a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer. . . ." (*South Dakota v. Neville* (1983) 459 U.S. 553, 564.) While *Neville* concerned the Fifth Amendment right against self-incrimination, the rationale equally applies to a Fourth Amendment analysis. Consent is neither coerced nor involuntary simply because the individual is faced with a difficult choice.

Additionally, in *McNeely*, this Court did not rule that implied consent laws were forever abrogated by the requirement for a warrant. On the contrary, the Court noted that even in light of its holding, states continue to have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless *nonconsensual* blood draws.

> For example, all 50 States have adopted *implied consent laws* that require motorists, as a condition of operating a motor vehicle

> within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. [Citation.] Such laws impose significant consequences *when a motorist withdraws consent*; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.

(*McNeely*, 568 U.S. at 1566, emphasis added.)

Thus, this Court recognized that states such as California would be able to continue to enforce their implied consent laws. Furthermore, this Court acknowledged that it is the *withdrawal of consent* that creates the necessity for a warrant, and it is the *withdrawal of consent* that raises the possibility of unpleasant consequences.

The Petitioner in *Birchfield*, on behalf of all petitioners, refers to implied consent laws as "compelled-consent" laws (Petitioners' brief, *Birchfield*, at 30.). Petitioners argue that "the suggestion that all drivers on North Dakota's roads *actually* consent to warrantless chemical tests is nonsensical. To begin with, there is nothing 'voluntary' about the statutory scheme." (Petitioners' brief, *Birchfield*, at 9, 21-22.) The essence of Petitioners' argument against the concept that implied consent laws may be considered to be actual consent is as follows.

> There is no basis to believe that motorists understand that they have granted consent

> to be tested simply by virtue of driving in North Dakota. And given the practical necessity of driving to carry out the essential activities of daily life, consent obtained upon threat of losing the ability to drive surely is the product of duress or coercion.

(Petitioners' brief, *Birchfield*, at 9-10.)

Petitioners mischaracterize the nature of the law[2] by referring to it as "compelled consent." Petitioners completely ignore the fact that driving a motor vehicle on a public highway, exposing persons and property to a machine with a current average weight of approximately two tons,[3] is a privilege, and the exercise of that privilege requires that the individual agrees in advance to certain conditions that ensure the safe exercise of that privilege.

Petitioners suggest that, due to the vicissitudes of daily life, they cannot survive without driving, that petitioners were somehow *compelled* to choose to obtain a license to drive, *compelled* to exercise the privilege to drive on the state's highways, *compelled* to consume alcohol and/or drugs, and then *compelled-coerced-forced* to submit to a chemical test. Moreover,

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[2] As to the statutory design in California, one need only examine footnotes 7, 8, and 9 to see that drivers in California are well-advised and have no excuse for claiming a lack of knowledge of their consent to give blood or breath samples in exchange for the privilege to drive.

[3] Light Automotive Technology, Carbon Dioxide Emissions, and Fuel Economy Trends, 1975 Through 2014, U.S. Environmental Protection Agency, EPA-420-S-14-001, October 2014.

Petitioners Birchfield and Beylund appear to suggest that due to the rural nature of North Dakota, that they should be granted special dispensation.[4]

Reality flies in the face of this argument. These are called choices, and millions of people in this country choose every day not to obtain licenses to drive, not to drive, and not to consume alcohol and/or drugs prior to driving. Drivers simply agree in advance to consent to give blood or breath samples in exchange for the privilege of driving on the roads of the state. After being arrested for driving under the influence, drivers are neither compelled nor coerced to give blood or breath samples after having given consent to such tests at the time of the acquisition of a license to drive.

In *U.S. v. Sugiyama* (2015) 113 F.Supp.3d 784, the United States District Court considered the Federal statutory design for driving under the influence on Federal property. The suspect in *Sugiyama* crashed her vehicle on the "Baltimore-Washington Parkway, which is in the special maritime and territorial jurisdiction of the United States." (*Id.*, at 786.) Accordingly, the provisions of 36 C.F.R. §4.23 and 18

[4] Is it possible that Petitioners are suggesting a "rural" exception to implied consent laws? Should all drivers in all rural areas of even the most populous states, such as California, be exempt from such laws because they cannot survive without driving?

U.S.C. §3118 applied.[5] It is significant that the Federal statutes are very similar to the statutes of many

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[5] 36 C.F.R. §4.23 provides:

(a) Operating or being in actual physical control of a motor vehicle is prohibited while:

(1) Under the influence of alcohol, or a drug, or drugs, or any combination thereof, to a degree that renders the operator incapable of safe operation; or

(2) The alcohol concentration in the operator's blood or breath is 0.08 grams or more of alcohol per 100 milliliters of blood or 0.08 grams or more of alcohol per 210 liters of breath. Provided however, that if State law that applies to operating a motor vehicle while under the influence of alcohol establishes more restrictive limits of alcohol concentration in the operator's blood or breath, those limits supersede the limits specified in this paragraph.

(b) The provisions of paragraph (a) of this section also apply to an operator who is or has been legally entitled to use alcohol or another drug.

(c) Tests.

(1) At the request or direction of an authorized person who has probable cause to believe that an operator of a motor vehicle within a park area has violated a provision of paragraph (a) of this section, *the operator shall submit to one or more tests of the blood, breath, saliva or urine for the purpose of determining blood alcohol and drug content.*

(2) *Refusal by an operator to submit to a test is prohibited and proof of refusal may be admissible [sic] in any related judicial proceeding*.

(Continued on following page)

(3) Any test or tests for the presence of alcohol and drugs shall be determined by and administered at the direction of an authorized person.

(4) Any test shall be conducted by using accepted scientific methods and equipment of proven accuracy and reliability operated by personnel certified in its use.

(d) Presumptive levels.

(1) The results of chemical or other quantitative tests are intended to supplement the elements of probable cause used as the basis for the arrest of an operator charged with a violation of paragraph (a)(1) of this section. If the alcohol concentration in the operator's blood or breath at the time of testing is less than alcohol concentrations specified in paragraph (a)(2) of this section, this fact does not give rise to any presumption that the operator is or is not under the influence of alcohol.

(2) The provisions of paragraph (d)(1) of this section are not intended to limit the introduction of any other competent evidence bearing upon the question of whether the operator, at the time of the alleged violation, was under the influence of alcohol, or a drug, or drugs, or any combination thereof.

18 U.S.C. §3118 provides:

(a) Consent. – *Whoever operates a motor vehicle in the special maritime and territorial jurisdiction of the United States consents thereby to a chemical test or tests of such person's blood, breath, or urine, if arrested for any offense arising from such person's driving while under the influence of a drug or alcohol in such jurisdiction.* The test or tests shall be administered upon the request of a police officer having reasonable grounds to believe the person arrested to have been driving a motor vehicle upon the special maritime and

(Continued on following page)

states.[6] Defendant argued that the charge of refusing to submit to a chemical test must be dismissed because the refusal statute is unconstitutional under the Fourth Amendment and that to criminalize a refusal to consent to a search is a violation of the Fourth Amendment. (*Id.*, at 786-787.) Defendant further argued that consent is coerced when the officer informs the suspect that taking the test is mandatory, and that a refusal is a criminal act. (*Id.*, at 791.) The Court noted that defendant had not cited

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territorial jurisdiction of the United States while under the influence of drugs or alcohol in violation of the laws of a State, territory, possession, or district.

(b) Effect of Refusal. – *Whoever, having consented to a test or tests by reason of subsection (a), refuses to submit to such a test or tests, after having first been advised of the consequences of such a refusal, shall be denied the privilege of operating a motor vehicle upon the special maritime and territorial jurisdiction of the United States during the period of a year commencing on the date of arrest upon which such test or tests was refused*, and such refusal may be admitted into evidence in any case arising from such person's driving while under the influence of a drug or alcohol in such jurisdiction. Any person who operates a motor vehicle in the special maritime and territorial jurisdiction of the United States after having been denied such privilege under this subsection shall be treated for the purposes of any civil or criminal proceedings arising out of such operation as operating such vehicle without a license to do so.

18 U.S.C. §3118 (emphasis added).

[6] See the discussion of the California Implied Consent Laws.

any case, federal or state, that has held that a test-refusal statute is unconstitutional, and the Court held that "Defendant's assertion that a defendant's consent is coerced when he is informed of the criminal consequences of refusing chemical testing thus is unavailing." (*Id.*, at 795.)

A more accurate characterization of implied consent laws is to refer to them as *advance consent* laws.[7] In advance of driving, and in exchange for exercising the privilege of driving on a state's roadways, individuals give *advance consent* to supply blood or breath samples should an officer have probable cause to believe that they were driving while impaired by alcohol and/or drugs. Moreover, the *consequences* for the failure to supply a sample are *predetermined* and well known before the individual begins to drive. The driver may choose to furnish the sample or choose the consequences. The California "implied consent" laws are an excellent example of what is better characterized as "advance consent" laws.

[7] Amicus would suggest to the Court that the Honorable Judge Charello of the Superior Court of the County of Santa Clara more aptly defines this category of laws as "advanced consent." (See *People v. Agnew*, (2015) 242 Cal.App.4th Supp. 1, 195 Cal.Rptr.3d 486.)

B. Implied Consent Laws in California

Advance consent by drivers in California[8] (as in many other states and similar to the Federal statutes), is given at the time of the issuance and receipt of a license to drive and when the driver begins to exercise their privilege to drive.[9] There is no coercion at this point in time. Drivers may *choose* not to exercise the privilege to drive with its attendant obligations. However, if the individual *chooses* to exercise the privilege to drive, they do so on condition that should they ever be *arrested* for driving under the influence (impaired driving), they will be required to submit to a blood or breath test.

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[8] California Vehicle Code section "*23612(a)(1)(A): A person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or breath for the purpose of determining the alcoholic content of his or her blood, if lawfully arrested for an offense allegedly committed in violation of [various DUI statutes].*"

[9] The California DMV Driver Handbook provides the following information to every potential driver: *"When you drive in California, you consent to have your breath, blood or, under certain circumstances, urine tested if you are arrested for DUI of alcohol, drugs, or a combination of both." In addition, the following question is frequently asked on the drivers license exam. "You consent to take a chemical test for the alcohol content of your blood, breath, or urine: a. Only if you have been drinking alcohol b. Whenever you drive in California c. Only if you have a collision.*" (California DMV Driver Handbook, 2016, at 86, 103. b. is listed as the correct answer).

Accordingly, when the individual is arrested for driving under the influence in California, the admonition[10] read by the officer to the suspect acts merely as a *reminder of the consent previously given*. Nevertheless, the individual is still not without options. The driver may *withdraw* consent, thereby exercising the option to choose to refuse to take a chemical test, thus choosing the unpleasant option (*Neville*, 459 U.S. at 564) of losing their license to drive for a specified

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[10] A number of California Vehicle Code sections (e.g., CVC sections 23612, 13353) relate the nature of the officer's admonition. The California DMV Driver Handbook summarizes them as follows:

When you drive in California, you consent to have your breath, blood or, under certain circumstances, urine tested if you are arrested for DUI of alcohol, drugs, or a combination of both.

If arrested, the officer may take your DL, issue you a temporary DL for 30 days, and give you an order of suspension. You may request a DMV administrative hearing within 10 days. The arresting officer may require you to submit to either a breath or blood test. You do not have a right to consult with a lawyer before selecting or completing a test.

If your BAC is 0.08% or higher, the peace officer may arrest you (CVC §§23152 or 23153). If the officer reasonably believes you are under the combined influence of alcohol and drugs, and you have already submitted to a preliminary alcohol screening (PAS) and/or breath test, you may still be required to submit to a blood or urine test because the breath test does not detect the presence of drugs.

If you refuse to submit to the required blood and/or urine test(s), your driving privilege may be suspended because of your refusal. Even if you change your mind later, your driving privilege may be suspended for both reasons, although both actions will run concurrently. (California DMV Driver Handbook, 2016, at 86).

period of time.[11] In California, the option remains for the individual to have a hearing where they may be able to have their license returned with no further ramifications to their privilege to drive.[12] Should the driver choose to take the chemical test, they may be immediately exonerated or they may face the possibility of having a jury determine their fate. In either situation, it is the choice of the individual. This is the view held by the California courts:

> We agree with *Brooks* and *Moore* that a motorist's submission to a chemical test, if freely and voluntarily given, is actual

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[11] California Vehicle Code section 23612(d) provides: ***The person shall be told*** *that his or her failure to submit to, or the failure to complete, the required chemical testing will result in a fine, mandatory imprisonment if the person is convicted of a violation of [specified DUI laws] and (i) the suspension of the person's privilege to operate a motor vehicle for a period of one year, (ii) the revocation of the person's privilege to operate a motor vehicle for a period of two years if the refusal occurs within 10 years of a separate violation of [specified DUI laws] that resulted in a conviction, or if the person's privilege to operate a motor vehicle has been suspended or revoked pursuant to [California Vehicle Code sections] for an offense that occurred on a separate occasion, or (iii) the revocation of the person's privilege to operate a motor vehicle for a period of three years if the refusal occurs within 10 years of two or more separate violations of [specified DUI offenses], or any combination thereof, that resulted in convictions, or if the person's privilege to operate a pursuant to [specified California Vehicle Code sections] for offenses that occurred on separate occasions, or if there is any combination of those convictions, administrative suspensions, or revocations.* [emphasis added]

[12] California Vehicle Code section 13353(e).

> consent under the Fourth Amendment. That the motorist is forced to choose between submitting to the chemical test and facing serious consequences for refusing to submit, pursuant to the implied consent law, does not in itself render the motorist's submission to be coerced or otherwise invalid for purposes of the Fourth Amendment.

(*People v. Harris* (2015) 234 Cal.App.4th 671, 689, 184 Cal.Rptr.3d 198, 212-13, *review denied* (June 10, 2015).)

Amicus is requesting this Court to find that statutory designs such as those utilized by the State of California continue to be a valid means by which to regulate drivers who are driving while impaired by alcohol and/or drugs, that individuals who choose to drive give actual, advance consent to give blood or breath samples upon request by a peace officer after a valid arrest, and that such advance consent is neither coerced nor involuntary.

C. The imposition of sanctions is not an impermissible penalty on the exercise of the Fourth Amendment.

First, it must be remembered that in California, the standard is the same as the Federal standard:

> The California Supreme Court has made clear, however, that "[t]he touchstone for all issues under the Fourth Amendment and article I, section 13 of the California Constitution is reasonableness. *Ingersoll v. Palmer*,

> (1987) 43 Cal.3d 1321, [cit. omitted]. This language indicates that the right to be free from unreasonable searches under Art. I §13 of the California Constitution parallels the Fourth Amendment inquiry into the reasonableness of a search. *See, e.g.*, *Smith v. Los Angeles County Bd. of Supervisors*, (2002) 104 Cal.App.4th 1104 [cit. omitted] (applying the Supreme Court's "special needs" rationale and *Wyman* to deny a similar challenge to a Los Angeles County welfare eligibility verification program arising under the state *and* federal constitutions); *see also Hill v. Nat'l Collegiate Athletic Ass'n*, (1994) 7 Cal.4th 1, [cit. omitted] ("The 'privacy' protected [under state law] is no broader in the area of search and seizure than the 'privacy' protected by the Fourth Amendment or by article I, section 13 of the California Constitution.").

(*Sanchez v. County of San Diego*, (9th Cir. 2006) 464 F.3d 916, 928-929.)

California law further mirrors Federal law on the unconstitutional conditions doctrine. The California Supreme Court has explained the "receipt of a public benefit is conditioned upon the waiver of a constitutional right, the government bears a heavy burden of demonstrating the practical necessity for the limitation." (*Robbins v. Superior Court*, (1985) 38 Cal.3d 199, 213, 695 P.2d 695, 211 Cal.Rptr. 398.) Under the unconstitutional conditions doctrine, the governmental entity seeking to impose such a condition must establish that:

> (1) the conditions reasonably relate to the purposes sought by the legislation which confers the benefit;
>
> (2) the value accruing to the public from imposition of those conditions manifestly outweighs any resulting impairment of constitutional rights; and
>
> (3) there are no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit.

(*Ibid.*)

Petitioners misstate this rule. (See Pet. Birchfield Brief, pg. 40.) They add further requirements of a "nexus" and "rough proportionality" (citing, *Koontz v. St. Johns River Water Management Dist.*, (2013) 133 S.Ct. 2586, 2595.) However, as *Koontz* itself makes clear, those requirements are clearly confined to the law of land use and governmental permitting. (*Id.*, at 2599) Amicus urges this Court to agree with the bounds set by *Robbins*, 38 Cal.3d at 213.

As a threshold issue, petitioner " . . . alleging a violation of the unconstitutional conditions doctrine, however, must first establish that a constitutional right is infringed upon." (*Sanchez*, 464 F.3d at 931.)

Petitioners argue that the so-called "implied consent"[13] laws impose a penalty for exercising the right to be free from unreasonable searches. (Pet. Beylund, pg. 7.) It is undisputed that a search of a person's body, which should include a bodily sample, is a search. That really was the point that the court made in *Schmerber* and reaffirmed in *McNeely*.

In California (as in all the other states) driving is not a fundamental right. *McGlothen v. Department of Motor Vehicles*, (1977) 71 Cal.App.3d 1005, 1021, 140 Cal.Rptr. 168, reiterated that simple concept: "The right to drive a motor vehicle on the public highways is not such a fundamental right as to require strict scrutiny of any law which appears to classify the driving privileges of persons otherwise similarly situated, and to necessitate a compelling state interest before such classification may be justified."

California, along with the other states, is saying – to drive on the public road, you must consent in advance to have your bodily fluids tested to determine if you are impaired, provided the peace officer has probable cause to detain you for driving impaired. If a person withdraws that advanced consent, certain consequences will flow. The granting of the privilege of driving, which is not a right, need be conditioned on giving up the protection of the Fourth Amendment.

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[13] (*People v. Agnew*, 242 Cal.App.4th Supp. 1, 195 Cal.Rptr.3d 486, 491.)

This Court has already answered that question when a refusal to provide a sample occurs, and the answer is "no." Clearly, if an impaired[14] driver refuses to comply with the peace officer's request to provide a bodily sample for testing to determine what he is impaired by, a warrant is required – unless exigent circumstances can be articulated or some other recognized exception to the warrant requirement found. "Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." (*McNeely*, 133 S.Ct. at 1563.)

So does the advance consent statute act as a reasonable exception, justifying a warrantless blood sample? And if so, does this advance consent statute create an unconstitutional condition? It seems clear, as discussed *ante*., that consent is a reasonable exception to the search warrant requirement when all the circumstances are taken into account, especially in the context of driving, which is again a privilege and not a right. Further, analyzing the unconstitutional conditions doctrine pursuant to *Robbins*, 38 Cal.3d 199, we arrive at the same conclusion: criminal penalties for refusing a chemical test in the context of driving while impaired are constitutionally proper.

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[14] Impaired driver means anyone operating a motor vehicle while under the influence of a drug or alcohol. (See Cal. Veh. Code §23152.)

(1) The conditions reasonably relate to the purposes sought by the legislation which confers the benefit.

Like this Court, in *Mackey v. Montrym* (1979) 443 U.S. 1, 17-18, California has long recognized its vital interest in public safety and the extreme hazard impaired drivers pose. "Over 30 years ago, in *Escobedo v. State of California* (1950) 35 Cal.2d 870, 222 P.2d 1 (overruled on other grounds in *Rios v. Cozens* (1972) 7 Cal.3d 792, 103 Cal.Rptr. 299, 499 P.2d 979), our court while acknowledging the great importance of driving at the same time explicitly emphasized that 'it is well established that usage of the highways is subject to reasonable regulation for the public good.'" (*Hernandez v. Department of Motor Vehicles*, (1981) 30 Cal.3d 70, 78-79, 177 Cal.Rptr. 566, 570, 634 P.2d 917, 921.)

A common Ford Taurus has a curb weight of 4,175 pounds.[15] The maximum speed allowed in California is 70 miles per hour. (Cal. Veh. Code §22356(a).) The destruction caused by a two-ton object propelled at that speed in the hands of an impaired driver is clearly of great concern to the state.

The advanced consent law is one reasonable regulation California has enacted to protect the public good in the usage of the public roads. The California Supreme Court has called the advance consent law, the "paradigm example of a classic

[15] http://www.ford.com/cars/taurus/specifications/view-all/.

'health and safety' police power measure, clearly enacted by the Legislature to foster the safety of the public in the use of the state's highways." (*Hernandez*, 30 Cal.3d at 76.) "In enacting the initial advance consent law, 'the Legislature sought to obviate these consequences for the driver and 'avoid the possible violence which could erupt if forcible tests were made upon a recalcitrant and belligerent inebriate' [citation], while at the same time preserving the state's strong interest in obtaining the best evidence of the defendant's blood alcohol content at the time of the arrest.'" (*Hernandez*, 30 Cal.3d at 77, 1, quoting *Anderson v. Cozens*, (1976) 60 Cal.App.3d 130, 143, 131 Cal.Rptr. 256.)

(2) The value accruing to the public from imposition of those conditions manifestly outweighs any resulting impairment of constitutional rights.

The imposition of this sanction does not outweigh the impairment of the constitutional right given the multiple purposes achieved. (*Mackey*, 443 U.S. at 18.) As part of the advance consent law, a person arrested for drunk driving is required to submit to a test for intoxication, or that person will lose his automobile driver's license. (Cal. Veh. Code §§13353 & 23612.)

The California Legislature recognized that "such an episode remains an unpleasant, undignified and undesirable one." (*People v. Superior Court* (*Hawkins*) (1972) 6 Cal.3d 757, 764, 493 P.2d 1145, 100 Cal.Rptr.

281.) In enacting California Vehicle Code section 13353, the Legislature sought to obviate these consequences for the driver and "avoid the possible violence which could erupt if forcible tests were made upon a recalcitrant and belligerent inebriate" (*Anderson*, 60 Cal.App.3d at 143), while at the same time preserving the state's strong interest in obtaining the best evidence of the defendant's blood alcohol content at the time of the arrest. "The Legislature devised an additional or alternative method of compelling a person arrested for drunk driving to submit to a test for intoxication, by providing that such person will lose his automobile driver's license for a period of six months if he refuses to submit to a test for intoxication. The effect of this legislation is to equip peace officers with an instrument of enforcement not involving physical compulsion." (*Hawkins*, 6 Cal.3d at 765.)

The California position has been recognized by this Court. The admonition, which informs the arrested person of the consequences of refusing the chemical test, is intended to encourage arrested motorists to take the required test, because "the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test." (*Neville*, 459 U.S. at 564.) The admonition therefore encourages consent to testing and reduces the need for forced blood draws, by informing arrested motorists of the serious consequences of refusing to test. (*See id.*, at 566, fn. 17 ("Since the State wants the suspect to submit to the

test, it is in its interest to fully warn suspects of the consequences of refusal.").)

The value accrued to California, or to any state, is simply control of its public roads and the safety of its citizens. According to the California Department of Transportation there are 394,787.46 miles of lanes for cars in California.[16] Vehicles in California traveled 329,174.25 million miles on those roads in 2013.[17] California clearly has a vested interest in setting conditions for individuals who may drive on the road.

Of course, driving on the roads of California is not unconstrained and it is very highly regulated by the state. A brief survey of the California Vehicle Code amply demonstrates that fact. There are over 4000 statutory sections. (See Cal. Veh. Code *et seq*.) It sets forth 5,564 sections on just how to register a vehicle in California. (See Cal. Veh. Code §§4000 to 9564.) It has 2,812 sections on licensing and its requirements. (See Cal. Veh. Code §§12500 to 15312.) Division 11, called the "Rules of the Road" spans from section 21070 to 23336, an additional 2,266 sections. Violations of these laws have penal consequences, everything from an infraction to a felony, as well as administrative consequences. (Cal. Veh. Code §12810.5.) This is the same point made in the Minnesota Court of Appeal when it said: "The short history and

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[16] http://www.dot.ca.gov/hq/tsip/hpms/hpmslibrary/prd/2013prd/2013PublicRoadData.pdf.

[17] *Ibid.*

tradition of automobile regulation teach us that laws regulating automobile use have existed since their advent." (*State v. Chasingbear* (Minn. Ct. App., Aug. 4, 2014, A14-0301) 2014 WL 3802616, at 11, review granted (Oct. 14, 2014), review denied (Apr. 14, 2015).)[18]

Within this realm of constrained activity, it is not unreasonable to ask the driver to agree in advance to take a test to determine if they are safe to operate on the public roads.

(3) There are no alternative means less subversive of constitutional right, narrowly drawn so as to correlate more closely with the purposes contemplated by conferring the benefit.

As noted above, the alternate means to attain safety on the roads is for the officer to get a search warrant every time they detain a motorist who is suspected of impaired driving. (*McNeely*, 133 S.Ct. at 1563.) This Court has never required that, always looking to "the fact-specific nature of the reasonableness

[18] In California an unpublished opinion may not be cited or relied upon. (Cal. Rules of Court, Rule 8.1555.) This is only limited to California cases and decisions of the courts of other states can be cited if they are "persuasive . . . depending on the point involved" (9 Witkin, California Procedure (4th ed. 1997) Appeal, §940, p. 980) (*Lebrilla v. Farmers Group, Inc*. (2004) 119 Cal.App.4th 1070, 1077, 16 Cal.Rptr.3d 25, 31-32.)

inquiry." (*Id*., at 1559.) The advance consent statutes are tailored to meet this reasonableness standard.

The fact that a motorist is told he will face serious consequences if he refuses to submit to a blood test does not, in itself, mean that his submission was coerced or that the search is unreasonable. As noted previously, this Court in *Neville* held that use of a defendant's refusal to submit to a chemical test as evidence in a DUI trial does not violate the defendant's Fifth Amendment privilege against self-incrimination. "'[T]he Fifth Amendment is limited to prohibiting the use of "physical or moral compulsion" exerted on the person asserting the privilege.'" (*Id.*, at 562.) "Here, the State did not directly compel respondent to refuse the test, for it gave him the choice of submitting to the test or refusing." (*Ibid.*) Although this Court recognized that in extreme situations the choice given to a suspect is no choice at all, such as when the blood is extracted in a manner "so painful, dangerous, or severe, or so violative of religious beliefs, that almost inevitably a person would prefer 'confession,'" this Court also held that "the values behind the Fifth Amendment are not hindered when the State offers a suspect the choice of submitting to the blood-alcohol test or having his refusal used against him." (*Id.*, at 563.)

The respondent in *Neville* conceded that "[t]he simple blood-alcohol test is so safe, painless, and commonplace . . . that the State could legitimately compel the suspect, against his will, to accede to the test." (*Neville*, 459 U.S. at 563.) Therefore, because

"the offer of taking a blood-alcohol test is clearly legitimate," the court concluded that

> "the action becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice. Nor is this a case where the State has subtly coerced respondent into choosing the option it had no right to compel, rather than offering a true choice. To the contrary, the State wants respondent to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test."

(*Id.*, at 563-564.)

Finally, the court acknowledged that, although "the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make," the difficultly of the decision does not mean the motorist's ultimate choice is coerced. (*Id.*, at 564.) "[T]he criminal process often requires suspects and defendants to make difficult choices. [Citation.]" (*Ibid.*)

The *Neville* rationale implicates the Fourth Amendment as well. Justice Sotomayor recognized as much when, in discussing state advance consent laws in *McNeely* her opinion cited *Neville* with approval. (*McNeely*, 133 S.Ct. at 1566 (plur. opn. of Sotomayor, J.), citing *Neville*, 459 U.S. at 563-564.)

California courts have adopted the holding of Minnesota Court of Appeals and summarize it thus:

> [California] confers on drivers the privilege of *soberly* operating inherently dangerous motorized vehicles on the state's roadways – . . . and, in exchange, each driver accepts a statutory choice. In that choice, if he is arrested on probable cause of driving while impaired, he will either agree (actually consent) to undergo a noninvasive chemical test for scientific evidence of his precise intoxication level, or he will face civil and criminal penalties substantially equivalent to penalties that await those convicted of driving drunk. Unlike those cases in which the Supreme Court has invalidated laws under the unconstitutional conditions doctrine, the condition imposed here tightly relates to the privilege conferred. The statutory condition that every arrested, apparently drunk, driver agrees to submit to a chemical test or be penalized for refusing the test directly and *only* furthers the state's interest in the sober use of public highways.

(*Chasingbear*, 2014 WL 3802616, at 7.)

As noted in a lower court decision in California, "[e]ven with advance consent, however, respondent could have withdrawn that consent and objected to any blood draw. The totality of the circumstances, therefore, includes not only the advance consent, but respondent's conduct and the circumstances surrounding the testing." (*People v. Agnew* (2015) 242 Cal.App.4th Supp. 1, 195 Cal.Rptr.3d at 491.) Within this context, it is not constitutionally impermissible for California to ask its drivers to submit to a simple test to determine if they are impaired.

D. Is there a due process argument here for how the scheme is implemented?

As set forth above, there is no fundamental right to drive on the roads of California. (*McGlothen*, 71 Cal.App.3d at 1021.) There are 32,980,355 registered vehicles in California.[19] Each of these vehicles presents an impaired driver with the opportunity to injure someone.

The California courts' understanding of the Due Process body of law is reflected in *Chasingbear*, 2014 WL 3802616, at 11. The California courts have followed the guidance in *Neville*:

> In *South Dakota v. Neville* (1983) 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (*Neville*), the United States Supreme Court considered whether admitting into evidence at trial a defendant's refusal to submit to a test under an implied consent law violated the defendant's right against self-incrimination under the Fifth Amendment. At the outset, the Court distinguished the holding in *Griffin v. California* (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, which had held that a prosecutor's or trial court's comments on a defendant's refusal to take the stand impermissibly burdened the defendant's Fifth Amendment right to refuse to testify. "Unlike the defendant's situation in Griffin, a person

[19] https://www.dmv.ca.gov/portal/dmv/dmv/dmvhomes/dmvnews.

suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." (*Neville*, *supra*, 459 U.S. at p. 560, fn. 10, 103 S.Ct. 916.) The Court then held that a refusal to take a blood-alcohol test, after an officer has lawfully requested it, is not an act coerced by the officer and is therefore not protected by the Fifth Amendment privilege against self-incrimination. In *Neville,* the officer had informed defendant of certain consequences of refusing to test under South Dakota's implied consent law, including license revocation, but had failed to advise defendant that the refusal could be used against him at trial. The Supreme Court therefore then addressed defendant's argument that admitting at trial his refusal to test violated the Due Process Clause because he was not fully warned of the consequences of refusal. The Supreme Court also rejected this challenge. "[W]e do not think it fundamentally unfair for South Dakota to use the refusal to take the test as evidence of guilt, even though respondent was not specifically warned that his refusal could be used against him at trial." (*Id.* at p. 565, 103 S.Ct. 916.) The Court held again that, in contrast to the constitutional right to silence, defendant's right to refuse the blood-alcohol test "is simply a matter of grace bestowed by the South Dakota Legislature." (*Ibid.*) The Court also recognized that other warnings made it clear that refusing to test was not free of adverse consequences.

In *Neville,* in addressing the consequences under the Due Process Clause of the fact that the officers did not specifically warn defendant that the test results could be used against him at trial, the Supreme Court added a note about the effect of warnings under the Fourth Amendment, applying the principles discussed above from earlier Supreme Court cases: "Even though the officers did not specifically advise respondent that the test results could be used against him in court, no one would seriously contend that this failure to warn would make the test results inadmissible, had respondent chosen to submit to the test. Cf. *Schneckloth v. Bustamonte,* [citation omitted] (knowledge of right to refuse not an essential part of proving effective consent to a search)." (*Neville*, *supra*, 459 U.S. at p. 565, fn. 16, 103 S.Ct. 916.) In a recent Ninth Circuit Court of Appeals decision, the Court considered whether an admonition that incorrectly informed the suspect that his refusal to test was not a freestanding crime under federal law violated due process. The Court cited *Neville* and *McNeely* in stating: "We doubt that the Constitution requires any admonition be given to DUI suspects. *Cf. Missouri v. McNeely* [citation omitted] (noting that 'States have a broad range of legal tools to enforce their drunk-driving laws,' with 'all 50 States hav[ing] adopted implied consent laws'); *Neville*, [citation omitted] (explaining that one's 'right to refuse' a blood alcohol test is not of constitutional origin; it is 'simply a matter of

grace bestowed by' state legislatures)." (*United States v. Harrington* (9th Cir. 2014) 749 F.3d 825, 830.) The Court held, though, that when an admonition is given, due process is violated when it "incorrectly informs the suspect that his refusal is not a freestanding crime, when in fact it is." (*Ibid.*)

In all the above cases addressing consent under the Fourth Amendment, of course, the Supreme Court was addressing the purported failure to inform persons of the right to refuse voluntary consent, where there was no advance consent and where the consequences of refusing consent were not codified. Here, respondent already provided advance consent under the implied consent law, and respondent is relying upon the failure to inform him of the consequences of withdrawing that consent, which are stated in the statute. As an initial matter, respondent should be presumed to know the law. (*People v. Hagedorn* (2005) 127 Cal.App.4th 734, 748, 25 Cal.Rptr.3d 879.) In any event, even applying the Supreme Court's analysis in the cases discussed above, the statutory admonishment of the consequences of refusing to submit to testing under section 23612 should not be a constitutional requirement under the Fourth Amendment.

In fact, the California courts have held that a similar statutorily-required admonition is not constitutionally required. Subdivision (a)(2)(A) of that same section 23612 of the Vehicle Code states: "If the person is lawfully

arrested for driving under the influence of an alcoholic beverage, the person has the choice of whether the test shall be of his or her blood or breath and the officer shall advise the person that he or she has that choice." This requirement that the officer "shall advise" the arrested person of the choice of test is therefore similar to the requirement that a person "shall be told" of certain consequences of failing to submit to testing under subdivision (a)(1)(D), and that the officer "shall advise" the person of other matters under subdivision (a)(4). The courts have nevertheless held that the failure to inform defendants of the choice of tests does not render the blood draw unconstitutional. (Respondent here was told of that choice.)

In *Ritschel v. City of Fountain Valley* (2006) 137 Cal.App.4th 107, 40 Cal.Rptr.3d 48 (*Ritschel*), the Court of Appeal affirmed the dismissal of civil rights claims that were based on officers' forcible taking of a blood sample. The plaintiff alleged that the officers had failed to comply with California's implied consent law by not offering him a choice between blood or breath tests, and therefore had violated his constitutional rights. The Court rejected the claim under the Fourth Amendment, holding that "even assuming the officers violated plaintiff's *statutory* rights under California's implied consent law, it was not a violation of his federal constitutional rights." (*Id.* at p. 118, 40 Cal.Rptr.3d 48, italics in original.) The Court then cited the California cases supporting

> that principle. "California case law unequivocally establishes a police officer's failure to comply with the implied consent law does not amount to a violation of an arrestee's constitutional rights." (*Ibid.*) "More apropos to the present appeal, case law has rejected contentions that a failure to *advise* an arrestee of the tests available or to *honor* the arrestee's choice of a particular test amounts to a constitutional violation." (*Id.* at p. 119, 40 Cal.Rptr.3d 48 (citations omitted).) The Court concluded: "Thus, California decisional law holds a police officer's mere failure to comply with the requirements of this state's implied consent law does not equate with or amount to a violation of the arrestee's rights under the federal Constitution." (*Id.* at 119, 40 Cal.Rptr.3d 48.) In *Harris*, as discussed above, in addressing the contention that the admonition there about the consequences of refusing to test was false, the Court of Appeal relied on this same principle: "As the appellate division recognized in its opinion, failure to strictly follow the implied consent law does not violate a defendant's constitutional rights." (*Harris*, *supra*, 225 Cal.App.4th at p. 692, 170 Cal.Rptr.3d 472 (citation to appellate division opinion, which in turn was quoting *Ritschel*, omitted).)

(*People v. Agnew*, 242 Cal.App.4th Supp. 1, 195 Cal.Rptr.3d at 496-498.)

In a scheme such as the one in California the impaired driver never loses the ability to challenge his withdrawal of his advanced consent. The impaired

driver is entitled to an administrative hearing pursuant to California Vehicle Code section 13353(e). If charged with driving while impaired, the jury could find that the crime was aggravated by withdrawing the advance consent. (See Cal. Veh. Code §23612.) Since due process is not violated by failing to advise the impaired driver of the consequences, it follows that it is not implicated when the full panoply of the opportunity to have a fair hearing is given to that driver.

CONCLUSION

Amicus urges this Court to affirm the rulings of the Supreme Courts of Minnesota and North Dakota.

Respectfully submitted,

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