No. 18-6210

IN THE

Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Writ of Certiorari to
the Supreme Court of Wisconsin

BRIEF OF THE DKT LIBERTY PROJECT, REASON FOUNDATION, AND THE DUE PROCESS INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JESSICA RING AMUNSON
Counsel of Record
ANDREW C. NOLL
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
jamunson@jenner.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE* [1]

Amici curiae are non-profit organizations dedicated to protecting individual liberties, and especially those liberties guaranteed by the Constitution of the United States, against all forms of government interference. *Amici* have a particular interest in this case. The Wisconsin Supreme Court's decision below, which imputed consent for a Fourth Amendment search through the state's implied consent law, poses a severe threat to individual liberty, generally, and specifically to Americans' Fourth Amendment right to be "secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV.

The DKT Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The Liberty Project is committed to defending privacy, guarding against government overreach, and promoting every American's right and responsibility to function as an autonomous and independent individual. The Liberty Project espouses vigilance against government overreach of all kinds, but especially with respect to restrictions on individual civil liberties. The Liberty Project has filed several briefs as *amicus curiae* with this Court on issues involving constitutional rights and civil liberties, including the

---

[1] Blanket consents from both parties to the filing of *amicus* briefs have been filed with the Clerk. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

freedom from unreasonable searches and seizures under the Fourth Amendment.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason participates as *amicus curiae* in cases raising significant constitutional or legal issues.

The Due Process Institute is a bipartisan, nonprofit, public interest organization that works to honor, preserve, and restore principles of fairness in the criminal justice system. Formed in 2018, the Due Process Institute has already participated as an *amicus curiae* before this Court in cases presenting important criminal law issues, such as *Timbs v. Indiana*, No. 17-1091 (decided February 20, 2019), *United States v. Haymond*, No. 17-1672 (on writ of certiorari), and *Turner v. United States*, No. 18-106 (petition for writ of certiorari pending).

SUMMARY OF ARGUMENT

The warrant requirement provides an essential safeguard against the government's ability to invade Americans' most private spaces. When considering whether "to invade another's body in search of evidence of guilt," the "importance of informed, detached and deliberate determinations" is particularly "indisputable and great." *Schmerber v. California*, 384 U.S. 757, 770 (1966). Yet, Wisconsin has attempted to impute consent, by statute, to enter one of the most sacrosanct of private places: an individual's body.

After Petitioner was arrested on suspicion of drunk driving, while he was unconscious, and without a warrant, Wisconsin officials drew a sample of his blood based only on the consent he purportedly provided under the state's implied consent law. Based on that statute, the Wisconsin Supreme Court found the consent exception to the warrant requirement satisfied on the theory that Petitioner had agreed to a blood draw as a consequence of his decision to drive on the state's roadways. Allowing the government to deem, by statute, an individual to have voluntarily waived essential constitutional rights would provide the government with expansive authority to chip away at the Fourth Amendment, as well as a number of other rights.

It is beyond dispute that a blood draw involves a serious invasion of an individual's expectation of privacy. Individuals have a strong liberty interest in their bodily integrity. Yet, through a blood draw the government pierces an individual's skin and extracts a part of her body. Not only does such a search invade an individual's

body, it also places in the government's hands material—a person's blood—from which a vast array of personal medical and genetic information can be obtained. In part because of these privacy interests, this Court has declined to find that warrantless blood draws, as a categorical matter, satisfy the exigent circumstances and search incident to arrest exceptions to the warrant requirement.

Under this Court's precedent, the result should be the same with respect to the consent requirement. Whether consent is actual and voluntary requires an analysis of the totality of the circumstances. The rule endorsed by the Wisconsin Supreme Court below, however, permits the government to impute consent based entirely on the fact that a motorist has elected to drive on the state's roads. Not only does this categorical rule fail to analyze whether an individual *actually* consented to a search, it also is necessarily coercive.

Most importantly, affirming the decision below would supply the government with a straightforward means to undermine essential constitutional protections. In the Fourth Amendment context, the ability to deem certain actions as establishing voluntary consent would provide the government with an easy avenue to avoid the necessity of seeking a warrant. But the consequences of an affirmance would not necessarily be cabined to the Fourth Amendment. Most constitutional rights can be waived after a finding that an individual has voluntarily relinquished those rights. Thus, deeming certain actions as sufficient consent to waive a constitutional right could likewise undermine the right to counsel, the right against self-incrimination, the right

to a jury trial, and other critical protections. That result cannot be squared with the Constitution; allowing the government to erode protected individual rights and liberties simply through legislation is impermissible. The decision below must be reversed.

ARGUMENT

I. A Blood Draw Constitutes A Serious Invasion Of An Individual's Bodily Integrity And Expectation Of Privacy.

There is no doubt that the drawing of blood from an individual—which involves a physical intrusion into a person's body and under her skin—is a search governed by the Fourth Amendment. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016). It also cannot be gainsaid that the drawing of blood from an unwilling individual is a serious invasion of that person's privacy. Through a blood draw, the government pierces an individual's skin and "extract[s] a part of the subject's body." *Id.* at 2178. Not only does that sort of "invasion of bodily integrity implicate[] an individual's 'most personal and deep-rooted expectations of privacy,'" *Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)), it also directly "places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC [blood alcohol concentration] reading," *Birchfield*, 136 S. Ct. at 2178. The possibility that state officials might use an individual's blood sample to unlock a substantial range of information about that person implicates severe privacy concerns that extend beyond the already significant invasion of the person's bodily integrity.

This Court has long emphasized, in a variety of contexts, that an individual's right to bodily integrity and autonomy is sacrosanct. "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891). When considering whether the government may compel a defendant to undergo surgery to recover possible evidence in the form of a bullet lodged in the defendant's body, this Court stressed that "compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime." *Winston v. Lee*, 470 U.S. 753, 759 (1985).

Similarly, the "forcible injection of medication into a nonconsenting person's body," in an effort to make that person competent to stand trial, "represents a substantial interference with that person's liberty." *Washington v. Harper*, 494 U.S. 210, 229 (1990). And the Court has held that other forcible invasions of a person's bodily integrity likewise raise serious privacy concerns. *See, e.g.*, *Rochin v. California*, 342 U.S. 165, 172 (1952) (forcible stomach pumping—"[i]llegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents"—to seek evidence "is bound to offend even hardened sensibilities"); *Parham v. J.R.*, 442 U.S. 584, 600 (1979).

It is these very heightened privacy interests in bodily integrity and autonomy that have led this Court to hold that warrantless blood tests do not fall, as a matter of course, within certain exceptions to the Fourth Amendment's warrant requirement. This Court has declined to find, for example, that the possibility that the alcohol in a suspect's blood will dissipate categorically constitutes an exigency permitting a warrantless blood draw. *McNeely*, 569 U.S. at 152-53. In *McNeely*, this Court acknowledged that in *some* cases, when obtaining a warrant is impractical, an exigency may exist allowing the government to conduct a warrantless blood test before the alcohol dissipates from an individual's blood stream. *Id.* at 153. Circumstances may arise, like those presented in *Schmerber*, where it takes an unusually long time to transport the defendant to a hospital or to investigate the scene of an accident, such that insufficient time remains to secure a warrant. *Id.* at 150-51 (discussing *Schmerber*, 384 U.S. at 758-59, 770). But in *McNeely* the Court pointedly declined to provide the government with an unrestricted ability to conduct warrantless blood tests and to invade an individual's bodily integrity and significant privacy interests in all cases under the exigent circumstances exception. *Id.* at 156 ("In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically.").

Similarly, in *Birchfield*, this Court refused to hold that a warrantless blood draw is categorically permissible as a search incident to a person's arrest. 136 S. Ct. at 2185. As this Court explained, "[b]lood tests are

significantly more intrusive" than breath tests and there is "no satisfactory justification for demanding the more intrusive alternative" of a blood draw "without a warrant." *Id.* at 2184. In the infrequent circumstance in which a person is unconscious—and where authorities are therefore unable to resort to that less intrusive alternative—this Court concluded that "the police may apply for a warrant if need be." *Id.* at 2184-85.

Thus, this Court has carefully considered the unique privacy interests at stake when considering whether to apply the Fourth Amendment's warrant requirement to blood draws. A blood draw involves a direct invasion into the body of an individual. And it gives the government access to material from which that person's sensitive medical and genetic information could be extracted. Indeed, DNA technology is "one of the most significant scientific advancements of our era." *Maryland v. King*, 569 U.S. 435, 442 (2013). In many ways "[t]he full potential for use of genetic markers in medicine and science is still being explored." *Id.* The reality that a significant range of information can now be obtained from a blood sample—information which may have previously been unavailable to law enforcement—should weigh heavily in this Court's determination of the privacy interests at stake. *Cf. Riley v. California*, 573 U.S. 373, 393-97 (2014) (closely considering the extension of this Court's prior case law given the heightened privacy interests implicated by "digital data").

These circumstances must be acknowledged when determining whether a state can deem, as Wisconsin has attempted to do here, the act of driving on the state's roads imputed consent sufficient as a constitutional

matter to invite the state to conduct a warrantless blood draw. For the Fourth Amendment's "overriding function" is "to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber*, 384 U.S. at 767.

II. Statutorily Imputed Consent Is Not Constitutionally Sufficient Under This Court's Precedent.

This Court should reject Wisconsin's claim that it can impute consent sufficient to sustain a warrantless search merely from an individual's choice to drive on the state's roadways. "Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). Although an individual may voluntarily consent to a search in the absence of a warrant, "consent" premised only on the fact that an individual has elected to drive on the state's roads is not voluntary under this Court's precedent.

1. This Court's case law clearly establishes that, for Fourth Amendment purposes, consent must be *actual* consent in fact. The government must show, based on the "totality of all the circumstances," that an individual's "consent to a search *was in fact* 'voluntary,'" and was not "the product of duress or coercion, express or implied." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). Only by analyzing all of the circumstances can it "be ascertained whether in fact [consent] was voluntary or coerced" and can a court determine whether the "legitimate need for such searches" is appropriately balanced against the "equally important

requirement of assuring the absence of coercion." *Id.* at 227, 233.

Wisconsin's categorical imputation of consent, *in fact*, to a blood draw by every individual who drives on a state's roads is directly at odds with this Court's holding in *Schneckloth*. It elevates a single consideration—the fact that a person exercised his right to drive—as the sole determinative one. And it precludes an inquiry into the actual circumstances that evidence (or do not) an individual's consent.

What is more, conditioning the privilege of driving on a state's roads on such consent is inherently coercive, and therefore cannot be voluntary. Driving is an essential feature of many Americans' everyday lives. Indeed, it is critical to a person's liberty. Americans frequently must drive to attend work. They need to drive to visit family and friends. Many drive as a means to make a living. It therefore is difficult to believe that, when put to the choice, individuals would sacrifice their mobility and freedom to travel on the remote chance they might someday be faced with a warrantless blood draw. That individuals cannot be expected to sacrifice their freedom to drive makes plain why that choice is coercive—and why the consent the court below believed was conveyed by that choice was inherently coerced. "[N]o matter how subtly the coercion was applied," any consent resulting from coercion is "no more than a pretext for [an] unjustified police intrusion against which the Fourth Amendment is directed." *Id.* at 228.

Moreover, the right to travel is a constitutional right of its own. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969), *overruled in part on other grounds by Edelman*

v. Jordan, 415 U.S. 651 (1974). The government cannot lawfully condition an individual's exercise of that right on that individual's agreement to forego essential Fourth Amendment protections. *Cf. Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013) ("[T]he unconstitutional conditions doctrine forbids burdening the Constitution's enumerated rights by coercively withholding benefits from those who exercise them.").

2. In limited circumstances, this Court has suggested that consent for a search can be implied by an individual's actions. But this type of consent—which again is based on an individual's *actual* consent—is wholly distinguishable from the sort of imputed consent that Wisconsin seeks to have this Court bless here.

In *Florida v. Jardines*, this Court explained that an individual may, through his actions, imply a license for authorities to enter into an area. 569 U.S. 1, 8 (2013). But this Court in *Jardines* referred to the possibility of an implied license when asking whether the homeowner there had provided *actual* consent for officers to approach his home with a drug-sniffing dog, as part of the "customary invitation" one extends to others to visit the curtilage of his home. *Id.* at 9. Here, by contrast, Wisconsin's legislature has attempted to impute consent to all motorists on its roadways by the mere act of driving. And it can hardly be considered customary to assume that motorists consent to allowing the government to take a part of their bodies merely by driving on the state's roads.

In other cases, involving administrative inspections conducted in closely regulated industries, this Court has

determined that individuals may have a lesser expectation of privacy when they know they will be subject to such inspections. But those cases do not support the expansive conception of consent that the Wisconsin Supreme Court endorsed below. This Court has permitted warrantless searches of business premises in closely regulated industries on the understanding that "businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade." *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973); *see also, e.g.*, *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (alcoholic beverage industry, although noting that the regulatory scheme there did not provide for forcible entry in absence of warrant, but only made it a criminal offense to refuse admission); *United States v. Biswell*, 406 U.S. 311 (1972) (regulation of trafficking in firearms).

Critically, however, these decisions rest not on a finding of consent, but on the commonsense recognition that, given the nature of a closely regulated business, an individual who chooses to engage in those economic pursuits "does so with the knowledge that his business records . . . will be subject to effective inspection." *Biswell*, 406 U.S. at 316. In that context, any privacy expectation is minimal. Therefore, this Court has explained that allowing warrantless administrative searches in those cases presented only a "limited threat[] to the [individual's] justifiable expectations of privacy." *Id.* The concurrence below correctly recognized this limitation on those cases' reasoning. J.A. at 39-41. And any claim that the regulation of the state's

roadways and drivers' licensing is a similarly pervasively regulated arena would directly conflict with this Court's automobile search case law: "Automobile or no automobile, there must be probable cause for the search." *Almeida-Sanchez*, 413 U.S. at 269.

3. Some states with an implied consent law, including Wisconsin, require the reading of a statement informing an individual of her opportunity to withdraw consent before a blood draw is performed (albeit at the pain of potential penalties). *See* J.A. at 30-32. Here, the Wisconsin Supreme Court found that Mr. Mitchell consented to the warrantless blood draw not only because of the initial consent implied by his decision to drive on Wisconsin's roadways, *id.* at 29-30, but also on the fact that he had forfeited his statutory opportunity to *withdraw* consent because he was unconscious, *id.* at 32. Even if a conscious person's decision not to withdraw statutorily imputed consent could be considered voluntary (which it cannot), at a bare minimum, consent cannot be considered "voluntary" when the individual whose blood will be obtained by the government is unconscious and thus unable to consider whether to withdraw it.

An individual who is unconscious certainly cannot be said to have consented because of the mere fact that he now lacks capacity to *withdraw* consent. Indeed, this Court has acknowledged that "where a person is unconscious or drugged or otherwise lacks capacity," any consent cannot even meet the minimal requirement of being "knowing" consent. *Schneckloth*, 412 U.S. at 224 (quotation marks omitted). A failure or inability to respond is the opposite of affirmative consent.

III. Allowing The Government To Impute Consent By Statute Would Establish A Significant End-Run Around Constitutional Protections.

Permitting the government to impute voluntary consent by statute would provide a ready means to override essential constitutional protections. For that reason, alone, this Court should reverse the decision below.

1. Allowing the government to deem, by simple legislation, its citizens to have consented to forego their constitutional protections results in a significant weakening of the Fourth Amendment's protections. Exceptions to the warrant requirement "have been jealously and carefully drawn." *Jones v. United States*, 357 U.S. 493, 499 (1958). This should be particularly so with respect to consent searches: Given the frequent reliance upon consent searches, the Fourth Amendment's protection against unreasonable searches naturally "widens or narrows, depending upon the difficult or ease with which the prosecution can establish such consent." 4 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 8.1, at 8-9 (5th ed. 2012).

If the government could impute consent through statute, legislatures would wield significant power to satisfy the consent exception, and thereby bypass the Fourth Amendment's protections. Rather than be required to show that an individual actually provided consent to a search, the government could simply rest on its statute. Permitting a state to deem into existence the *facts* necessary to establish voluntary consent—and to negate an individual's right to be free from unreasonable

searches—is inconsistent with the Fourth Amendment's protections. *Accord People v. Arredondo*, 199 Cal. Rptr. 3d 563, 574 (Ct. App. 2016), *review granted by* 371 P.3d 240 (Cal. 2016). If the Supremacy Clause means anything, it surely means that state governments cannot erode the Constitution's protections by legislating factual presumptions that decisively control the application of their citizens' rights.

Permitting the government to impute consent sufficient to justify a warrantless search also could provide the government with an avenue to more easily enter other areas protected by the Fourth Amendment. For example, a legislature could attempt to impute consent to search a person's home or apartment through the person's choice to accept government mortgage assistance, housing subsidies, or other financial benefits. Yet, the "very core" of the Fourth Amendment protects "the right of a man to retreat into his home and there be free from unreasonable government intrusion." *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

Or, like the warrantless blood draw at issue in this case, the government might attempt to imply consent to search an individual's cell phone through the individual's decision to drive on the state's roadways, on the theory that it might provide evidence of texting while driving or other violations of the state's traffic laws. But this Court has explained that a cell phone "not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form." *Riley*, 573 U.S. at 396-97.

Worse still, allowing the government to legislate constitutional consent also would significantly weaken the *procedural* protections this Court has put in place to govern consent searches. When the government invokes the consent exception and seeks to introduce evidence that is the product of a warrantless search, it is the government that bears the burden of demonstrating that consent was voluntarily obtained. *See Bumper v. North Carolina*, 391 U.S. 543, 548 (1968) (The government must prove "that the consent was, in fact, freely and voluntarily given."). To permit the government to legislate that, categorically, every motorist who drives on the state's roads consents as a matter of law to a search would subvert this protection. It would obviate the state's burden to show that a particular individual, in fact, freely and voluntarily consented to a search.

2. Nor would the government's ability to significantly erode essential constitutional protections if the decision below is affirmed necessarily be limited to the Fourth Amendment context. Instead, permitting the government to impute voluntary consent, through a statutory presumption, would provide the government with a ready tool to curtail a number of other essential constitutional rights.

The question of whether an individual has voluntarily consented to relinquishing her constitutional rights is a common one whenever the government maintains that it may take action that might otherwise be barred by the Constitution. Criminal defendants, in particular, may "knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution."

United States v. Mezzanatto, 513 U.S. 196, 201 (1995); *see also Peretz v. United States*, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are . . . subject to waiver.").

For example, defendants relinquish a number of constitutional rights when entering a guilty plea. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969). To affirm his guilt, a defendant waives his Fifth Amendment right to be free of compelled self-incrimination. *Id.* He also waives his right to a jury trial and his right to confront his accusers. *Id.* A criminal defendant can also waive any double jeopardy defense. *Ricketts v. Adamson*, 483 U.S. 1, 10 (1987). Because of the importance of these rights, a court accepting a guilty plea must determine that the defendant's "waiver of his constitutional rights is knowing and voluntary." *Godinez v. Moran*, 509 U.S. 389, 400 (1993). Just like the question of voluntariness under the Fourth Amendment's consent exception, to find that a plea is made voluntarily requires a determination that the defendant's decision "is uncoerced." *Id.* at 401 n.12; *see also McCarthy v. United States*, 394 U.S. 459, 466 (1969) ("[I]f a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.").

In a criminal case, a defendant also has the ability to waive his Sixth Amendment right to counsel. But, again, to waive that right, a defendant must do so "knowingly and intelligently"—meaning that he "was voluntarily exercising his informed free will." *Faretta v. California*, 422 U.S. 806, 835 (1975).

In the context of a custodial interrogation, too, an individual enjoys a number of constitutional rights. An individual under questioning has the right to the presence of counsel and a right to be free from self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). These rights can only be waived if a decision to relinquish them "is made voluntarily, knowingly and intelligently." *Id.* To be voluntary, any waiver must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

In each of these contexts, the essential question a court must ask is whether the defendant elected to waive or relinquish his constitutionally protected right *voluntarily*. This Court, appropriately, has consistently hesitated to infer a voluntary waiver of constitutional rights absent a clear indication. Courts should "indulge in every reasonable presumption against waiver," *Brewer v. Williams*, 430 U.S. 387, 404 (1977), and this Court does not "presume acquiescence in the loss of fundamental rights," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (quotation marks omitted).

A decision affirming the Wisconsin Supreme Court, however, risks providing the government with the ability to erode each of these constitutional protections. If the government can impute voluntary consent by statute sufficient to satisfy the exception to the warrant requirement, presumably a statutory presumption that an individual consents by taking a particular action could likewise be used to demonstrate that an individual "voluntarily exercise[ed] his informed free will" to

relinquish other constitutional rights. *Faretta*, 422 U.S. at 835.

Consider the guilty plea of a defendant who does not understand English. To assertain the charges against him and his risks of proceeding to trial, the defendant might need the aid of an interpreter. *See, e.g.*, 28 U.S.C. § 1827(d)(1) (requiring the use of interpreters when a judicial officer determines it is necessary to ensure a "party's comprehension of the proceedings or communication with counsel or the presiding judicial officer"). A legislature could attempt, however, to deem by statute that a defendant knowingly and voluntarily agrees to the charges and facts contained in a plea agreement if the defendant had an interpreter available to him, but did not avail himself of those services. That choice, under the reasoning of the Wisconsin Supreme Court, could be sufficient to deem any guilty plea voluntary. *But see McCarthy*, 394 U.S. at 466 ("[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.").

The government could also attempt to undermine the important protections against self-incrimination and the presence of counsel during a custodial interrogation by deeming an individual to have voluntarily waived those rights if he chooses to avail himself of certain privileges—like making a telephone call—and otherwise chooses to converse with government officials. *But see Miranda*, 384 U.S. at 475-76 ("[W]here in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual

answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated.").

And, as in the Fourth Amendment context, any ability to impute certain choices as a voluntary waiver of constitutional rights would undermine the related procedural protections afforded to criminal defendants. Just like the consent requirement, "[t]his Court has always set high standards of proof for the waiver of constitutional rights." *Id.* at 475. But if the government could deem certain actions as evidencing the voluntary relinquishment of constitutional protections, the government's burden of proof would be easily satisfied.

These and other possibilities demonstrate why permitting the government to impute or deem consent, through legislation, would provide the government with a ready tool to undermine a number of critical individual rights guaranteed by the Constitution. Adopting the Wisconsin Supreme Court's reasoning would establish a significant loophole in the Constitution's protections.

3. To be sure, the scourge of drunk driving in this country is a pressing public policy concern. State and federal legislatures are right to be focused on solutions to that vexing challenge. Undermining important constitutional protections in order to serve that goal, however, is an ill-advised solution. "[I]llegitimate and unconstitutional practices get their first footing" through "silent approaches and slight deviations from legal modes of procedure"; that result can "only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed." *Boyd v. United States*, 116 U.S.

616, 635 (1886), *overruled on other grounds by Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967).

The warrant requirement is an important bulwark protecting individual liberty. "The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." *Schmerber*, 384 U.S. at 770. Requiring the government to seek a warrant guarantees that "the inferences to support a search are 'drawn by a neutral and detached magistrate instead of being judged by the official engaged in the often competitive enterprise of ferreting out crime.'" *Riley*, 573 U.S. at 382 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). A state should not be permitted to deem exceptions to the warrant requirement satisfied.

It also bears emphasis that reversing the Wisconsin Supreme Court's reliance on imputed consent here would not cast any doubt on the other avenues available to authorities—avenues that better safeguard individual liberty. Nothing would prevent authorities from invoking the exigency exception in appropriate circumstances to take a blood draw without a warrant. *See McNeely*, 569 U.S. at 153. *But see* J.A. at 12 (noting that in this case the state "expressly stated that it was not relying on exigent circumstances to justify the blood draw"). Authorities also may employ a breath test incident to arrest and apply civil and, where constitutional, criminal penalties when an individual refuses to consent to be searched. *See Birchfield*, 136 S. Ct. 2185-86. But what should not be permissible is allowing a legislature to impute, through legislation, a

presumption that an individual has relinquished his constitutional protections.

CONCLUSION

The judgment of the Wisconsin Supreme Court should be reversed.

March 4, 2019

Respectfully submitted,

JESSICA RING AMUNSON
Counsel of Record
ANDREW C. NOLL
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
jamunson@jenner.com

Counsel for Amici Curiae