No. 12-1395

In The

Supreme Court of the United States

JAMES LOUIS PEPPIN,

Petitioner,

vs.

MINNESOTA COMMISSIONER OF PUBLIC SAFETY,

Respondent.

On Petition For A Writ Of Certiorari To The Minnesota Court Of Appeals

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL COURT CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

BRIEF IN OPPOSITION

Respondent State of Minnesota respectfully requests that the Court deny the petition for writ of certiorari seeking review of the decision of the Minnesota Court of Appeals, of which the Minnesota Supreme Court denied review. The opinion of the Minnesota Court of Appeals is unpublished, but may be found at *Peppin v. Commissioner of Public Safety*, 2012 WL 5990267 (Minn. Ct. App. Dec. 3, 2012) (unpublished), *rev. denied* (Minn. Feb. 27, 2013). The opinion is reproduced at pages A-5 through A-16 of the Appendix to the Petition.

JURISDICTION

The Minnesota Court of Appeals issued its opinion on December 3, 2012, affirming the district court's order sustaining the revocation of Petitioner's driving privileges. In an order filed on February 27, 2013, the Minnesota Supreme Court denied review. The Minnesota Court of Appeals issued a judgment on March 4, 2013. Petitioner filed the petition on May 24, 2013. This Court's jurisdiction to review the decision of the Minnesota Court of Appeals on a writ of certiorari is based on 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

At the Minnesota Court of Appeals, Petitioner conceded the constitutionality of both the Minnesota

Implied Consent Law and the Test Refusal Statute. *Peppin*, 2012 WL 5990267, at *2. In his petition to this Court, however, Petitioner frames the issue as "[w]hether a person can be legislatively deemed to have consented to a warrantless search, as a matter of law." *See* Petition for a Writ of Certiorari at 7.

On April 18, 2011, Kanabec County Deputy Lance Herbst arrested Petitioner on probable cause of driving while impaired ("DWI").[1] Deputy Herbst read to Petitioner the standard Minnesota Implied Consent Advisory ("Advisory"). Petitioner acknowledged he understood the Advisory, waived his pre-test right to consult with an attorney, and provided a urine sample for chemical testing. The analysis revealed the presence of amphetamine and methamphetamine. On August 16, 2011, the Minnesota Department of Public Safety revoked Petitioner's driving privileges based on the results of the urine test.

Petitioner sought judicial review of his license revocation, and a hearing was held on December 5, 2011. Petitioner asserted that the warrantless collection of his urine sample violated the Fourth

[1] These facts are taken from the district court's findings of fact, conclusions of law, and order sustaining the revocation of Petitioner's driving privileges, and the facts recited by the Minnesota Court of Appeals decision at issue here, *Peppin v. Commissioner of Public Safety*, 2012 WL 5990267 (Minn. Ct. App. Dec. 3, 2012) (unpublished), *rev. denied* (Minn. Feb. 27, 2013). In his petition for writ of certiorari, Petitioner does not challenge the sufficiency of any of the district court's findings of fact.

Amendment because his consent was impermissibly coerced by the prospect of criminal and civil consequences if he refused. Petitioner further maintained that no exigent circumstance justified the warrantless collection of his urine.

The district court rejected Petitioner's claim that a warrant was required to collect the sample for chemical testing. On December 12, 2012, the Minnesota Court of Appeals held that the district court did not err in determining that Appellant knowingly and voluntarily submitted to testing under the Implied Consent Law and that the collection of the urine sample did not violate Petitioner's Fourth Amendment rights. *Peppin*, 2012 WL 5990267 at *3. In his brief and at oral argument to the Minnesota Court of Appeals, Petitioner conceded the constitutionality of both the Implied Consent Law and the Test Refusal Statute. *Peppin*, 2012 WL 5990267 at *2. On February 27, 2013, the Minnesota Supreme Court denied review of the Court of Appeals' decision. On April 17, 2013, the United States Supreme Court decided *Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552 (2013).

REASONS FOR DENYING THE PETITION

There is no sound reason for the Court to grant review in this case, let alone the requisite "compelling reasons." Sup. Ct. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons.").

First, the Minnesota Supreme Court has under consideration the same issue in the cases of *State v. Brooks*, Nos. A11-1042 and A11-1043. Second, on appeal, Petitioner waived any challenge to the constitutionality of Minnesota's Implied Consent Law and Refusal Statute by conceding that the statutes were constitutional. Third, Minnesota's Implied Consent Law provides a reasonable means to protect the public from impaired drivers and does not violate the Fourth Amendment.

I. Granting Certiorari In This Case Is Premature Because The Reasonableness Of Minnesota's Implied Consent Law Is Currently Under Accelerated Review By The Minnesota Supreme Court.

The issue in this case is whether chemical testing conducted in accordance with Minnesota's Implied Consent Law violates the Fourth Amendment. This Court recently granted certiorari in *Wesley Brooks v. Minnesota*, 133 S. Ct. 1996 (2013). *Brooks* involves a driver who was arrested for driving while intoxicated and submitted to chemical testing in accordance with Minnesota's Implied Consent Law. *Id.* This Court remanded *Brooks* to the Minnesota Court of Appeals for further consideration in light of *Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552 (2013). By Order dated July 16, 2013, the Minnesota Supreme Court granted the State's request for accelerated review in *Brooks*. Briefing is complete and oral argument is scheduled for September 11, 2013. The issue

presented in *Brooks* is the same as this case; namely, whether chemical tests administered in accordance with the Minnesota Implied Consent Law violate the Fourth Amendment. Like *Brooks*, this case was also decided by the Minnesota appellate courts prior to *McNeely*. The Minnesota appellate courts should be given the opportunity to rule on this issue in the first instance.

This Court will allow a state court the full opportunity to decide constitutional issues in its own cases as a matter of federalism. "Under our federal system, the federal and state 'courts [are] equally bound to guard and protect rights secured by the Constitution.'" *Rose v. Lundy*, 455 U.S. 509, 518, 102 S. Ct. 1198, 1203 (1982) (quoting *Ex parte Royall*, 117 U.S. 241, 251, 6 S. Ct. 734, 740 (1886)). As an aspect of this federalism, federal courts apply the doctrine of comity, in which federal courts defer action on a case until the state court has an opportunity to decide constitutional issues in litigation before a state court. *Rose*, at 518, 102 S. Ct. at 1203. Applying comity avoids the "unseemly" result of having a federal court decide a constitutional issue without the state court having an opportunity to correct a constitutional violation. *Id.* (citing *Darr v. Burford*, 339 U.S. 200, 204, 70 S. Ct. 587, 590 (1950)).

The Minnesota Supreme Court in *Brooks* is currently considering whether chemical tests obtained under Minnesota's Implied Consent Law are reasonable searches under the Fourth Amendment. This case presents the same issue. Both this case and *Brooks*

were decided before *McNeely*. The Minnesota Supreme Court should be allowed the first opportunity to determine post-*McNeely* whether chemical tests obtained pursuant to the procedures of Minnesota's Implied Consent Law violate the Fourth Amendment.

In the alternative, if this Court grants the petition, it should remand the case to the Minnesota Court of Appeals to reconsider its decision in light of *McNeely*, as this Court did in *Brooks*. The Minnesota Court of Appeals issued its opinions in both *Brooks* and in this case prior to this Court's decision in *McNeely*. This Court remanded *Brooks* to the Minnesota Court of Appeals to reconsider in light of *McNeely*. Just as in *Brooks*, the Minnesota court did not have the opportunity to consider this Court's reasoning in *McNeely* when it reached its decision and should be given that opportunity before this Court accepts for review the constitutionality of Minnesota's Implied Consent Law.

II. Petitioner Waived Any Challenge To The Constitutionality Of Minnesota's Implied Consent Law And Refusal Statute By Conceding In The Lower Courts That The Statutes Were Constitutional.

This case presents a head-on challenge to Minnesota's Implied Consent Law and Refusal Statutes, not simply an argument against a single exception to the warrant requirement, as Petitioner suggests. By consistently conceding the constitutionality of the

Minnesota law in the Minnesota state courts, Petitioner has failed to properly develop the record, depriving reviewing courts of a complete record for review, and has waived his challenge.

This Court generally will not grant certiorari in a case where the question presented was not "pressed or passed on below." *Duignan v. United States*, 274 U.S. 195, 200, 47 S. Ct. 566, 568 (1927); *see also, e.g.*, *United States v. Lovasco*, 431 U.S. 783, 788, n.7, 97 S. Ct. 2044, 2048, n.7 (1977); *United States v. Ortiz*, 422 U.S. 891, 898, 95 S. Ct. 2585, 2589 (1975). At the Minnesota Court of Appeals, Petitioner "conceded the constitutionality of both the implied-consent law and the test-refusal statute." *Peppin*, 2012 WL 5990267 at *2. The court referred to the "inconsistency in Peppin's argument regarding the implied consent law and the consent exception to the warrant requirement" and commented as follows:

> We reject Peppin's argument that Minnesota law could constitutionally criminalize test refusal on the one hand and simultaneously stand for the proposition that submitting to chemical testing in accordance with the implied-consent law is inherently coercive and compels evidence suppression on the other. In practical terms, such a holding would place the implied-consent law and test-refusal statue in direct conflict with a recognized exception to the Fourth Amendment.

Id.

The problem with the way the Petitioner has framed his arguments in this case is that the lower courts never directly addressed the fundamental issue, which is whether a chemical test obtained in accordance with the Minnesota Implied Consent Law is reasonable under the Fourth Amendment. If a search is reasonable, no warrant is necessary, and a reviewing court need not determine whether it is justified by an exception to the warrant requirement. Respondent argued to the Minnesota Court of Appeals that implied consent searches are reasonable under the Fourth Amendment, such that the court need not consider whether an exception to the warrant requirement applies.[2] The Court of Appeals, however, did not consider that fundamental issue but instead, analyzed whether the consent or exigent circumstances exceptions to the warrant requirement applied. Petitioner avoided consideration of the more fundamental issue of the applicability of the Fourth Amendment by conceding the constitutionality of the Minnesota Implied Consent Law and the Test Refusal Statute. Thus, Petitioner has waived the issue of whether a search is reasonable under the Implied Consent Law, and this Court should deny certiorari.

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[2] Even though the Court of Appeals did not decide the issue, Respondent preserved it by presenting it to the trial court and the Court of Appeals.

III. Chemical Testing Conducted In Accordance With Minnesota's Implied Consent Law Is Reasonable And Does Not Violate The Fourth Amendment.

Petitioner has failed to provide any compelling reasons for this Court to accept review. Petitioner has not identified any split of authority among the state or circuit courts on this issue. Petitioner focuses on exceptions to the warrant requirement, but fails to address the reasonableness of the search in the first instance.

Nearly 60 years ago, this Court identified impair drivers as "one of the great causes of the mortal hazards of the road." *Breithaupt v. Abram*, 352 U.S. 432, 77 S. Ct. 408 (1957). In response to the public safety concern over impaired driving, the Minnesota Legislature enacted Minn. Stat. §§ 169A.50-.53 (2012), collectively referred to as the "Implied Consent Law."

A. Minnesota's Implied Consent Law.

As this Court recently observed, drinking and driving is a "serious and deadly crime." *McNeely*, 133 S. Ct. at 1571. In fact, during 2011 alone, 111 people were killed and 2,375 people suffered injuries in alcohol-related crashes in Minnesota.[3] In 2011, there

[3] Minnesota Department of Public Safety, Office of Traffic Safety, *Minnesota Impaired Driving Facts* 2011, Table 5.02,
(Continued on following page)

were 29,257 DWI arrests in Minnesota, down from a staggering record high of 41,951 DWI arrests in 2006.[4] Thus, Minnesota, like all 50 states, has criminalized impaired driving. Minn. Stat. § 169A.20 (2012).

The Minnesota Legislature enacted the Implied Consent Law in 1961. 1961 Minn. Laws, ch. 454, § 1. In passing the Implied Consent Law, the Minnesota Legislature has long recognized that the public interest is served by laws designed to maintain the safety of Minnesota's roadways and the driving public and to avoid potentially unsafe confrontations between police, medical personnel and uncooperative intoxicated DWI suspects. *See Nyflot v. Commissioner of Public Safety*, 369 N.W.2d 512, 517 (Minn. 1985) (citing *South Dakota v. Neville*, 459 U.S. 553, 559-60, 103 S. Ct. 916, 920-21 (1983)) *abrogated on other grounds by Friedman v. Commissioner of Pub. Safety*, 473 N.W.2d 828, 832 (Minn. 1991).

Under the Implied Consent Law, a licensed peace officer may only request a test if there is probable cause to believe the individual has violated the DWI laws and one of the following conditions exist: the officer has lawfully placed the individual under arrest; the individual was in a motor vehicle accident or collision resulting in property damage, personal injury, or death; the individual refused the screening

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available at https://dps.mn.gov/divisions/ots/educational-materials/Documents/IMPAIRED-DRIVING-FACTS-2011.pdf.

[4] *Id.*

test; or, the screening test indicated an alcohol concentration of 0.08 or more. Minn. Stat. § 169A.51, subd. 1(b).[5]

At the time the officer requests a test of the DWI suspect, the officer is required to read the Advisory. Minn. Stat. § 169A.51, subd. 2. The Advisory informs the driver that Minnesota law requires the driver to take a test, that refusal to take a test is a crime, and that the person has a limited right to consult with an attorney before deciding whether to permit testing. *Id.* Only trained and properly qualified persons may withdraw blood for purposes of the Implied Consent Law. Minn. Stat. § 169A.51, subd. 7(a). The person tested has the right to have someone of the person's own choosing administer a chemical test or tests in addition to any administered at the direction of a peace officer. Minn. Stat. § 169A.51, subd. 7(b). If the additional test is prevented or denied by the peace officer, then the test taken at the direction of the peace officer is not admissible in evidence. *Id.* The driver may request administrative and judicial review of any resulting license revocation. Minn. Stat. § 169A.53. If a suspect has an aversion to a particular testing method, the individual can decline an initial request for a blood or urine test and the officer must offer an alternative test. Minn. Stat. § 169A.51,

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[5] An officer may also request a test if there is probable cause to believe an individual has been driving a commercial vehicle with the presence of any alcohol. Minn. Stat. § 169A.51, subd. 1(c).

subd. 3. The law provides the suspect with an opportunity to refuse testing. Minn. Stat. § 169A.52, subd. 1. If the driver refuses to permit a test, then a test must not be given. *Id.* It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine when properly requested by a licensed peace officer under, and in conformance with, the Implied Consent Law. Minn. Stat. § 169A.20, subd. 2.

B. The Fourth Amendment Only Prohibits Unreasonable Searches.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. "The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy, and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *United States v. Knights*, 534 U.S. 112, 118, 122 S. Ct. 587, 591 (2001) (warrantless search of probationer's apartment, supported by reasonable suspicion and authorized by a condition of probation, was reasonable within the meaning of the Fourth Amendment); *Samson v. California*, 547 U.S. 843, 848, 126 S. Ct. 2193, 2197 (2006) (where officers do not obtain a warrant, the reasonableness of a search or seizure depends on a balancing of the degree to which the search or seizure intrudes upon

the individual's privacy and the legitimate governmental interests.).

The reasonableness of a search or seizure "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Skinner v. R.R. Labor Executives's Ass'n*, 489 U.S. 602, 620, 109 S. Ct. 1402, 1415 (1989) (as a condition of employment, a federal administrative rule authorized the taking of both blood and urine samples from employees following certain categories of accidents without any individualized suspicion, or where a supervisor had a reasonable suspicion that an employee is under the influence).

In other cases involving public safety, this Court has similarly balanced the compelling needs of the state against the reasonable privacy expectations of the citizen. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455, 110 S. Ct. 2481, 2488 (1990) (DWI checkpoints whose primary purpose was roadway safety were reasonable searches under a Fourth Amendment balancing test without showing of "special needs").

Recently, this Court applied the same balancing test when upholding a Maryland law requiring the collection of a biological sample of DNA from an arrestee, not yet convicted of a crime. *Maryland v. King*, 569 U.S. ___, 133 S. Ct. 1958, 1970 (2013). In its decision, this Court observed that, "In some circumstances, such as '[w]hen faced with special law enforcement needs, diminished expectations of privacy,

minimal intrusions or the like, the Court has found that certain general, or individual circumstances may render a warrantless search reasonable.'" *Id.* 569 U.S. at ___, 133 S. Ct. at 1969 (citations omitted). This Court recognized that circumstances that might diminish the need for a warrant could include occasions when "an individual is already on notice, for instance because of his employment, or the conditions of his release from government custody, that some reasonable police intrusion on his privacy is to be expected." *Id.* (internal citations omitted).

This same balancing test applies when a search or seizure pursuant to a statute, regulation, or government practice is at issue. *Skinner*, 489 U.S. at 620, 109 S. Ct. at 1415. Where a statutorily-mandated search is reasonable, no warrant is required, and the results of the search are admissible in a criminal prosecution. *King*, 569 U.S. at ___, 133 S. Ct. at 1970.

C. Chemical Testing Conducted Under And In Accordance With Minnesota's Implied Consent Law Is Constitutional Because The State's Legitimate Interest In Public Safety Outweighs The Impaired Driver's Interest.

All Minnesota motorists accept their privilege to drive on public roads subject to the Implied Consent Law. There is no dispute about the gravity of the problem associated with impaired driving. Minnesota has a legitimate interest in enforcing its DWI laws

and this interest outweighs any intrusion on the individual driver's privacy interest.

1. The State has a legitimate interest in protecting its citizens from impaired drivers.

It is beyond debate that the State has a compelling and legitimate interest in preserving the safety of Minnesota roadways. As this Court explained in *Mackey v. Montrym*:

> We have traditionally accorded the states great leeway in adopting summary procedures to protect the public health and safety. States surely have at least as much interest in removing drunken drivers from their highways as in summarily seizing mislabeled drugs or destroying spoiled foodstuffs.

443 U.S. 1, 17-18, 99 S. Ct. 2612, 2620-21 (1979). The Implied Consent Law serves the governmental interest by providing an inducement for drivers to submit to testing and by promptly removing impaired drivers from roadways. *Id.*

This Court has long recognized the validity and efficacy of implied consent laws. In 1957, this Court cited with approval the implied consent laws of the State of Kansas, which declared that any person who operates a motor vehicle on the public highways "would consent to have a blood test made as part of a sensible and civilized system protecting himself as well as other citizens . . . from the hazards of the road

due to drunken driving." *Breithaupt*, 352 U.S. at 435 n.2, 77 S. Ct. at 410 n.2.

Over 50 years later in *McNeely*, this Court again acknowledged that all 50 states employ implied consent laws that are "legal tools to enforce their drunk-driving law and to secure BAC evidence without undertaking warrantless nonconsensual blood draws" and further recognized the validity of "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." *McNeely*, 133 S. Ct. at 1566 (citations omitted). Further, this Court acknowledged the "significant consequences imposed when a driver withdraws consent" to test and observed that "most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." *Id.* Consistent with this Court's reasoning in *McNeely*, the Minnesota Implied Consent Law is a legitimate tool to ensure the safety of Minnesota citizens from the scourge of impaired drivers.

In *McNeely*, this Court considered the issue of whether the natural dissipation of alcohol in a driver's blood creates a *per se* exigency justification for compelling warrantless blood tests in all DWI cases. *McNeely* involved a compelled blood draw after the driver had refused to provide a breath sample. The officer in *McNeely* attempted to obtain a sample from the driver under the Missouri implied consent law and requested that the driver submit to a test. *Id.* at

1557. When the driver refused, the officer *departed* from the implied consent procedure and directed a hospital technician to take a blood sample without first obtaining a search warrant. *Id.* Unlike *McNeely*, the chemical test involved in the petition before this Court was obtained in accordance with the Minnesota Implied Consent Law, rather than as an involuntary warrantless blood draw.

The State of Minnesota has a legitimate interest in its Implied Consent Law. The government's interest in DWI enforcement is to get a test result that best reveals the driver's alcohol concentration at the time of driving. The State's interest in obtaining accurate test results is compelling and should be afforded great weight.

The Implied Consent Law also furthers the State's legitimate interest by offering a safer alternative to nonconsensual blood draws in routine DWI arrests:

> The legislature, therefore, could repeal the implied consent law and direct police officers to administer chemical tests against a DWI suspect's will. The obvious reason the legislature has chosen to retain the implied consent law is to avoid the violent confrontations which could occur when people are forced to submit to testing.

Nyflot, 369 N.W.2d at 517 (citing *Neville*, 459 U.S. at 559-60, 103 S. Ct. at 920-21).

Petitioner asserts that the Minnesota Implied Consent Law and the Refusal Statute unconstitutionally

coerce a driver's consent to a test. Petition at p. 11. This Court has held otherwise in the context of the Fifth Amendment. *Neville*, 459 U.S. at 565, 103 S. Ct. at 923-24 (admitting drivers refusal to test in a criminal proceeding does not violate the Fifth Amendment). The Refusal Statute is not coercive because it is part of a broader, legitimate regulatory framework with the primary purpose of protecting Minnesota citizens from impaired drivers. Drivers are on notice of the requirements and consequences of the laws before they choose to obtain a driver's license or operate a motor vehicle. As such, the chemical tests provided for are reasonable and do not violate the Fourth Amendment.

The fact that a driver is required to cooperate with the Implied Consent Law does not impermissibly coerce consent. In many regulatory contexts, citizens must choose between complying with the law or facing criminal consequences. *See, e.g.*, *New York v. Burger*, 482 U.S. 691, 694, 107 S. Ct. 2636, 2639 (1987) (junkyard owners must permit record inspections or face class A misdemeanor); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77, 90 S. Ct. 774, 777 (1970) (Congress may set standards of reasonableness, so retail liquor dealers must permit inspection or be fined). Difficult choices imposed by the law do not violate the Constitution or render searches unreasonable. *Neville*, 459 U.S. at 566, 103 S. Ct. at 923-24.

In *Skinner*, this Court upheld warrantless searches conducted pursuant to a comprehensive

regulatory framework similar to that of Minnesota's Implied Consent Law. *Skinner*, 489 U.S. at 634, 109 S. Ct. at 1422. That case involved an administrative rule that prohibited covered railroad employees, as a term of their employment, from using or possessing alcohol or drugs and from reporting for duty while under the influence. 489 U.S. at 608, 109 S. Ct. at 1408. The rule permitted the taking of both blood and urine samples from employees following certain categories of accidents without any level of individualized suspicion. *Id.* at 609, 109 S. Ct. at 1409. It also authorized breath or urine tests in other circumstances where a supervisor had a "reasonable suspicion" that an employee's actions contributed to the occurrence or severity of an incident, or that an employee is under the influence of alcohol or drugs. *Id.* at 611, 109 S. Ct. at 1410. This Court balanced the intrusion on the individual's privacy interests against the government's important public safety interests and concluded that the regulations were reasonable under the Fourth Amendment. *Id.* at 634, 109 S. Ct. at 1422.

The legitimate governmental interest underlying Minnesota's Implied Consent Law is supported by this Court's decision in *Skinner*. The Implied Consent Law is reasonable within the meaning of the Fourth Amendment.

2. Alcohol tests administered under the Implied Consent Law are a minimal intrusion on the individual's privacy interests.

An individual's privacy interests depend on the context, and a person's legal relationship with the State can reduce the individual's privacy interests. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 654, 115 S. Ct. 2386, 2391 (1995) (*recognizing reduced privacy interest because* searches involved students committed to the temporary custody of the state); *Griffin v. Wisconsin*, 483 U.S. 868, 873, 875, 107 S. Ct. 3164, 3168, 3169 (1987) (recognizing decreased privacy interest of person under state supervision on probation). Privacy interests are also diminished when an individual voluntarily participates in a highly regulated activity. *Skinner*, 489 U.S. at 627, 109 S. Ct. at 1418. Like the railroad employees in *Skinner*, drivers on Minnesota roadways take part in an inherently dangerous and highly regulated activity. Minnesota regulations cover all aspects of driving, from the qualifications of those who may participate, *see generally* Minn. Stat. §§ 171.02-.06 (driver's licenses), the rules they must follow while driving, *see generally* Minn. Stat. §§ 169.14-.201 (driving rules), to the type and condition of vehicles that may be driven, *see generally* Minn. Stat. § 171.02 subd. 2-subd. 5, §§ 169.46-.75 (vehicle equipment and safety).

All Minnesota drivers accept their privilege to drive on public roads subject to the Implied Consent

Law. Drivers have notice that anyone who operates a motor vehicle in Minnesota consents to a chemical test if a licensed peace officer has probable cause of a DWI violation. Consent is implied and continues until expressly withdrawn by the driver. Minn. Stat. § 169A.51, subd. 6; *see also State, Dep't of Pub. Safety v. Wiehle*, 287 N.W.2d 416, 419 (Minn. 1979). Every person is presumed to know the law. *Cheek v. United States*, 498 U.S. 192, 199, 111 S. Ct. 604, 609 (1991). In addition, a person may waive certain rights to privacy under the Fourth Amendment in consideration for receiving a benefit from the government. *Zap v. United States*, 328 U.S. 624, 628, 66 S. Ct. 1277, 1279 (1946) (contractor waived Fourth and Fifth Amendment rights when he agreed to permit inspection of his accounts and records in order to obtain the government's business). Under Minnesota law, drivers agree to be bound by the Implied Consent Law when they receive a driver's license and drive a vehicle on Minnesota roadways.

A driver's privacy interests are further diminished after he or she is arrested and taken into police custody. *King*, 133 S. Ct. at 1978. Under the Fourth and Fourteenth Amendments, an arresting officer may, without a warrant, search a person validly arrested. *Michigan v. DeFillippo*, 443 U.S. 31, 35, 99 S. Ct. 2627, 2631 (1979). "A search of the detainee's person when he is booked into custody may involve a relatively extensive exploration . . . " *King*, 133 S. Ct. at 1978; *see also Florence v. Board of Chosen Freeholders of the County of Burlington*, 566 U.S. ___, 132

S. Ct. 1510, 1520 (2012). Because the Implied Consent Law does not apply until a driver is arrested upon probable cause for DWI, a driver's privacy in this context is significantly lower than an otherwise law-abiding citizen in their home or walking down the street.

The context in which an officer may request a test under the Implied Consent Law is also narrowly drawn. Minn. Stat. §§ 169A.50-.53. The intrusion on an individual's privacy interest is reduced because of the procedural protections the Implied Consent Law affords to the individual. Those rights include the opportunity to consult with an attorney before making the testing decision. Minn. Stat. § 169A.51, subd. 2(4). The law also provides an opportunity to refuse the test, and upon refusal, no test may be administered. Minn. Stat. § 169A.52, subd. 1. The individual also has the right to obtain a test of their own. Minn. Stat. § 169A.51, subd. 7(b), and to request judicial review of any resulting license revocation. Minn. Stat. § 169A.53. The individual can decline an initial request for a blood or urine test and the officer must offer an alternative form of test. Minn. Stat. § 169A.51, subd. 3.

Further, the Implied Consent Law limits the scope of the search to the detection of drugs or alcohol in the driver's system, thus eliminating the danger that an officer's search will sweep more broadly than permitted under the circumstances, such as what might occur in a search warrant of a premises. Minn. Stat. § 169A.51, subd. 1(a).

The minimal intrusion on the diminished privacy interests of impaired drivers does not outweigh the State's compelling interest in protecting its citizens from the dangers of drunk driving. As a result, warrantless chemical tests under the Implied Consent Law are reasonable under the Fourth Amendment.

3. Applying the balancing test, the State's interest substantially outweighs Petitioner's diminished expectation of privacy.

In *Skinner*, this Court upheld warrantless testing of covered employees without a warrant or even individualized suspicion as reasonable within the meaning of the Fourth Amendment. 489 U.S. at 634, 109 S. Ct. at 1422. If the administrative regulation in *Skinner* authorizing warrantless blood and urine tests without individualized suspicion did not offend the Fourth Amendment, then Minnesota's Implied Consent Law, invoked only upon probable cause, cannot offend the Fourth Amendment.

Like the employees in *Skinner*, drivers are placed on notice by published statute that they agree to testing as a condition of driving. The Implied Consent Law provides numerous statutory and procedural safeguards that protect the interests of the driver. Before testing, the driver is read an advisory summarizing the law and is allowed to consult with an attorney before deciding whether to permit testing. Minn. Stat. § 169A.51, subd. 2. The driver may decline the offer of a blood or urine test without

consequence unless the driver refuses a subsequent offer of an alternative test. Minn. Stat. § 169A.51, subd. 3. The combination of these and other procedural safeguards make Minnesota's Implied Consent Law a reasonable means to safely enforce DWI laws and still maintain the constitutional rights of the individual citizen suspected of driving while impaired.

Comparing the right of an individual to be free from the intrusion of a blood test against the interests of society in deterring drunk driving, this Court once observed:

> As against the right of an individual that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of the kind to which millions of Americans submit as a matter of course nearly every day, must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road. And the more so since the test likewise may establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses. Furthermore, since our criminal law is to no small extent justified by the assumption of deterrence, the individual's right to immunity from such invasion of the body as is involved in a properly safeguarded blood test is far outweighed by the value of its deterrent effect due to public realization that the issue of driving while under the influence of alcohol can often by this method

> be taken out of the confusion of conflicting contentions.

Breithaupt, 352 U.S. at 439-40, 77 S. Ct. at 412.

Applying the traditional Fourth Amendment balancing test, the State's compelling interests in safely enforcing its DWI laws substantially outweigh the minimal intrusion of a blood, breath or urine test, administered to a person who has been arrested for DWI and is in police custody. Because the balance weighs in favor of the State's interest, this Court should deny Petitioner's request for certiorari.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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