IN THE SUPREME COURT OF IOWA
Supreme Court No. 19–1219

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRIAN DE ARRIE MCGEE,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HON. WILLIAM PRICE, JUDGE (MOTION TO SUPPRESS),
THE HON. BECKY GOETTSCH, JUDGE (TRIAL),
& THE HON. CHRISTOPHER KEMP, JUDGE (SENTENCING)

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Did the district court err in determining that drawing McGee's blood for testing under section 321J.7 did not violate the Fourth Amendment or Article I, Section 8 of the Iowa Constitution?

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II. Did the district court err in finding that McGee's blood was drawn in compliance with section 321J.7?

Authorities

State v. Axline, 450 N.W.2d 857 (Iowa 1990)
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ROUTING STATEMENT

McGee seeks retention to challenge the constitutionality of Iowa Code section 321J.7, which authorizes warrantless blood tests in some situations by stating that, for a driver who is deceased, unconscious, or otherwise incapable of consent or refusal, they are "deemed not to have withdrawn" their implied consent to chemical testing. *See* Iowa Code § 321J.7; Def's Br. at 25–26. The State concurs: this challenge strikes at the heart of implied consent, and lower courts desperately need intelligible guidance on how to apply other recent decisions to rule on these challenges. This Court should retain this case to clarify that implied consent is constitutionally valid grounds for a test, in the absence of an actual refusal. *See* Iowa R. App. P. 6.1101(2)(a) & (f).

STATEMENT OF THE CASE

Nature of the Case

This is Brian De Arrie McGee's direct appeal from a conviction for operating while intoxicated (first offense), a serious misdemeanor, in violation of Iowa Code section 321J.2. McGee crashed his car and required medical treatment. His blood was drawn without a warrant under section 321J.7, after he had been sedated for treatment and a registered nurse certified that he was unable to consent or refuse. McGee moved to suppress the chemical test results from that sample.

He argued that he had not given actual consent, and that the State could not prove exigent circumstances that made it impossible to obtain a warrant in his particular case. The State argued that neither actual consent nor exigent circumstances were necessary, because McGee's implied consent to chemical testing was never withdrawn. The district court rejected McGee's argument to the contrary, as well as McGee's other challenges, and it overruled the motion to suppress. *See* MTS-Tr. 69:5–71:4; MTS Order (5/8/19); App. 13.

McGee stipulated to a trial on the minutes of testimony. He was found guilty and sentenced to a one-year term of incarceration, with all but 7 days suspended. *See* Sentencing Order (7/22/19); App. 24.

In this direct appeal, McGee argues: **(1)** the district court erred by finding that the blood draw did not violate the Fourth Amendment or Article I, Section 10 of the Iowa Constitution; **(2)** section 321J.7 is unconstitutional because it violates equal protection, by depriving drivers who cannot make a consent/refusal decision of their right to make a consent/refusal decision; and **(3)** the district court erred by finding that the blood sample was withdrawn in compliance with section 321J.7, because McGee regained consciousness after the required certification but before the sample could be withdrawn.

Course of Proceedings

The State generally accepts McGee's description of the course of proceedings. *See* Iowa R. App. P. 6.903(3); Def's Br. at 27–34.

Summary of Facts

On December 8, 2018, police were called to a vehicle collision on Euclid Avenue in Des Moines, with "numerous injuries and one person unconscious." *See* Minutes (3/13/19) at 5; C-App. 8. McGee was extracted from the driver's seat of one of those vehicles, and he was taken to the hospital "in critical condition." *See id.*; C-App. 8. Witnesses told officers that the collision occurred because McGee was "traveling at a high rate of speed" and failed to yield before making a left turn. *See* MTS-Tr. 6:17–9:6; Minutes (3/13/19) at 5, 8, 25; C-App. 8, 11, 28. Each of the five occupants of the other vehicle had been injured, but none of their injuries were life-threatening. *See* Minutes (3/13/19) at 9; C-App. 12. Officers and medics noticed that "McGee had a strong odor of marijuana coming from his person." *See id.* at 8; C-App. 11; *accord* MTS-Tr. 8:16–21; MTS-Tr. 27:13–28:20.

Des Moines Police Department Officer Tim Fricke was on call, and he received a call about this collision. He went to Mercy Hospital to arrange for testing of the "suspected impaired driver." *See* MTS-Tr.

6:7–16. When Officer Fricke arrived, McGee had been "sedated in a medical state." *See* MTS-Tr. 9:4–17; *accord* MTS Ex. 1; App. 12 (noting McGee had received "Ativan, Fentanyl, and Haldol" by IV). Officer Fricke could see that McGee was unresponsive. *See* MTS-Tr. 13:12–22. Officer Fricke presented the attending physician with a form, requesting certification that McGee was presently unable to give consent or refusal for implied consent testing. *See* MTS-Tr. 9:7–12:18. A registered nurse made that certification. *See* MTS Ex. 1; App. 12.

After that certification, and as McGee's blood was being drawn, McGee awoke in a muddled state. He repeated the word "pee" and began to urinate on himself, as medical staff attempted to help him urinate into a receptacle. He did not respond to any of the questions they asked about his condition, and he seemed to pass out again. All of this was captured on Officer Fricke's body camera. *See* MTS Ex. A.

McGee's blood was eventually drawn at 4:10 p.m. *See* MTS-Tr. 26:16–19. By then, it had been more than two hours since the collision, which occurred at 1:59 p.m. *See* MTS-Tr. 27:3–12.

Officer Fricke explained that, given McGee's condition, it would have been impossible to administer field sobriety tests, a PBT, or a drug recognition exam. *See* MTS-Tr. 14:5–24.

Testing of McGee's blood showed the presence of lorazepam at 15 ng/mL and "delta9-tetrahydrocannabinol (THC)" at 17 ng/mL, along with the presence of multiple THC metabolites. *See* Minutes (3/13/19) at 19–20; C-App. 22–23.

McGee's primary argument was that, after *North Dakota v. Birchfield* and *State v. Pettijohn*, implied consent was no longer a valid exception to the warrant requirement, and that samples drawn under section 321J.7 were now inadmissible without "a warrant or exigent circumstances." *See* MTS-Tr. 43:15–51:4. The State, in turn, argued that *Pettijohn* "was completely wrongly decided" and was also inapplicable to this case, which did not involve boating and did not center around whether a consent/refusal was voluntarily given. *See* MTS Tr. 61:19–63:14. And it argued that implied consent was still "an exception to the warrant requirement," and no warrant was required to proceed under section 321J.7. *See* MTS-Tr. 64:12–66:7. In its ruling, the district court found that *Pettijohn* did not apply to implied consent under chapter 321J, and that implied consent was a valid exception to the warrant requirement. *See* MTS-Tr. 69:5–71:4. Based on that, it denied McGee's motion to suppress. *See* MTS Order (5/8/19); App. 13.

Additional facts will be discussed when relevant.

ARGUMENT

I. A warrantless blood draw under section 321J.7 is not an unreasonable search or seizure, either under the Fourth Amendment or under Article I, Section 10 of the Iowa Constitution.

Preservation of Error

Error was preserved. McGee made this argument below, and the district court ruled on it when it denied his motion to suppress. *See* MTS-Tr. 43:15–51:4; MTS-Tr. 69:5–71:4; *accord Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

"Constitutional issues are reviewed de novo, but when there is no factual dispute, review is for correction of errors at law." *See State v. Young*, 863 N.W.2d 249, 252 (Iowa 2015).

The Iowa Supreme Court decides between competing interpretations of the Iowa Constitution through "exercise of [its] best, independent judgment of the proper parameters of state constitutional commands." *See State v. Short*, 851 N.W.2d 474, 490 (Iowa 2014). In doing so, Iowa courts may "construe a provision of our state constitution differently than its federal counterpart." *See State v. Brooks*, 888 N.W.2d 406, 410–11 (Iowa 2016) (quoting *State v. Jackson*, 878 N.W.2d 422, 442 (Iowa 2016)).

Merits

McGee is correct that the withdrawal of his blood was a search and a seizure, and that it was conducted without a warrant—which means that the State must establish the applicability of an exception to the warrant requirement. *See* Def's Br. at 43–44. But he is wrong when he claims: "the State relied on the consent exception to justify the warrantless blood draw." *See* Def's Br. at 45. The State relied on *implied consent*, which is not the same as actual consent. There is no need to determine whether McGee understood how implied consent would potentially apply to him when he started driving or when he obtained his most recent driver's license (if he ever had one at all).

This case presents the opportunity to consider the validity of implied consent as an exception to the warrant requirement, when the driver is unable to exercise his or her statutory right to affirm or withdraw consent to testing. Warrantless searches and seizures are constitutional if they are reasonable. This scenario involves testing under implied consent at its *most* reasonable: the public need for that chemical test sample was compelling, and the strength of McGee's asserted interests in privacy and bodily inviolability was diminished by his delirium and his need for medical treatment.

A. Under *Mitchell*, this warrantless blood test did not violate the Fourth Amendment.

When an OWI suspect is conscious, the Fourth Amendment prohibits a warrantless blood test without either actual consent or a showing of case-specific exigency. *See Birchfield v. North Dakota*, 136 S.Ct. 2160, 2184 (2016); *Missouri v. McNeely*, 569 U.S. 141, 148–56 (2013). On the other hand, "when a driver is unconscious, the general rule is that a warrant is not needed." *See Mitchell v. Wisconsin*, 139 S.Ct. 2525, 2531 (2019) (plurality opinion). The *Mitchell* plurality adopted a near-categorical rule that warrantless blood draws are generally reasonable in those cases. This is because "[t]he importance of the needs served by BAC testing is hard to overstate," and the need to facilitate medical treatment for an unconscious driver is similarly of paramount importance—so when officers face that "grim dilemma" where both interests are implicated, it is presumptively reasonable to determine that introducing further delay would be unacceptable and to proceed without a warrant. *See id.* at 2535–39. A defendant may rebut that presumption by showing that (1) "his blood would not have been drawn if police had not been seeking BAC information," and (2) "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *See id.* at 2539.

The *Mitchell* plurality opinion is controlling. Justice Thomas filed a concurring opinion; he would overturn *McNeely* and adopt a categorical rule that dissipation of alcohol in the bloodstream always qualifies as an exigency that supports a warrantless chemical test. *See id.* at 2539–41 (Thomas, J., concurring). That would be much broader than the near-categorical rule that the plurality opinion adopts, so the plurality's rule is the narrowest grounds for the decision. *See People v. Eubanks*, No. 123525, 2019 WL 6596704, at *13 n.6 (Ill. Dec. 5, 2019); *Commonwealth v. Trahey*, No. 38 EAP 2018, 2020 WL 1932770, at *10 n.11 (Pa. Apr. 22, 2020); *see generally Marks v. United States*, 430 U.S. 188, 193 (1977).

For conscious drivers, a warrantless breath test is a reasonable search incident to arrest, and a warrantless blood test is not—but only because the reasonableness of a blood test "must be judged in light of the availability of the less invasive alternative of a breath test." *See Birchfield*, 136 S.Ct. at 2184. Accordingly, *Mitchell* held that "in the case of unconscious drivers, who cannot blow into a breathalyzer, blood tests are essential for achieving [those] compelling interests" served by effective OWI enforcement and undivided police attention on other time-sensitive matters. *See Mitchell*, 139 S.Ct. at 2536–39.

McGee's motion to suppress was litigated and overruled before *Mitchell* was decided. *See* MTS Order (5/8/19); App. 13. In cases presenting the same issue on similar timelines, some appellate courts have conditionally affirmed and remanded for proceedings where the defendant can try to prove both elements of *Mitchell*'s exception to its near-categorical rule. *See, e.g.*, *McGraw v. State*, 289 So.3d 836, 839 (Fla. 2019); *State v. Chavez-Majors*, 454 P.3d 600, 608 (Kan. 2019); *State v. Ruiz*, 581 S.W.3d 782, 787 (Tex. Ct. Crim. App. 2019). McGee requests that remedy, as a fallback. *See* Def's Br. at 82–83. The State submits that the existing record already forecloses any possibility that the exception to *Mitchell*'s near-categorical rule could apply.

Deciding the case on this record would not be unfair to McGee. Although *Mitchell* was decided after the hearing on McGee's motion, McGee was already focused on attempting to show that there was no exigency that would have prevented Officer Fricke from completing a warrant application and obtaining a search warrant before drawing his blood. *See* MTS-Tr. 16:22–18:12; MTS-Tr. 26:16–27:2. McGee established that Officer Fricke was contacted by officers at the scene, and needed to drive "30 to 40 minutes" from his home to the hospital. *See* MTS-Tr. 33:5–24. Other officers were busy handling other tasks:

> In this case we had somebody that went out there and marked up the scene for a potential Total Station because we didn't know the condition of your client and the seriousness of his injuries and then I conducted the OWI portion of the case.

See MTS-Tr. 33:21–35:3. Also, because this was a stipulated trial on the minutes of testimony, this Court may consider information from those minutes because they comprise the record at trial, which may be considered in reviewing the ruling on the motion to suppress. *See State v. Andrews*, 705 N.W.2d 493, 496 (Iowa 2005). The minutes establish that other officers were handling other time-sensitive tasks:

> -Assisting medics in dealing with "two trauma alerts" in addition to McGee, who was "in critical condition." *See* Minutes (3/13/19) at 5; C-App. 8.
>
> -"[D]iverting traffic" around the collision area on Euclid in Des Moines, on a Saturday afternoon. *See id.*; C-App. 8.
>
> -Determining McGee's identity. He had no ID on his person. A Taco Bell apron was found in the vehicle, so officers talked to employees at the nearby Taco Bell. *See id.*; C-App. 8.
>
> -Identifying and interviewing eyewitnesses to the collision, before they left the scene. *See id.*; C-App. 8.
>
> -Taking measurements to diagram the collision, before either vehicle was towed away. *See id.* at 25; C-App. 28.
>
> -Arranging medical care for five injured occupants of other vehicle, identifying them, and following up to check on the seriousness of their injuries. *See id.* at 9; C-App. 12.
>
> -Having both vehicles towed and arranging for McGee's vehicle to be impounded, to clear that obstruction on Euclid so that traffic could resume. *See id.* at 16; C-App. 19. The roadway was not cleared until 4:30, which was 20 minutes after the blood draw. *See id.* at 24; C-App. 27.

Thus, because officers were faced with such an extensive assortment of pressing, time-sensitive tasks, this record forecloses any claim that "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *See Mitchell*, 139 S.Ct. at 2539; *accord State v. Miller*, No. 53,356-KA, 2020 WL 1933230, at *13–15 (La. Ct. App. Apr. 22, 2020) (finding exception to *Mitchell* did not apply because aftermath of collision had given officers "a slew of urgent tasks beyond that of securing medical care" that would have "put off applying for a warrant").

McGee argues that officers faced no exigency that prevented them from completing a warrant application and obtaining a warrant. *See* Def's Br. at 80–82. But he recognizes that Officer Fricke was driving to the hospital. McGee is either arguing that Officer Fricke should have delayed the blood test to apply for a search warrant, or that another officer should have sought a warrant during that time. Neither argument can prove that the *Mitchell* exception could apply.

McGee's argues Officer Fricke could have delayed the blood test because he primarily suspected that McGee was under the influence of marijuana, not alcohol—so concerns about dissipation of alcohol in the bloodstream could not create an exigency. *See* Def's Br. at 70–79.

McGee is right that *Mitchell* references the metabolization of alcohol, specifically, as one of the broadly generalizable exigencies that justify its near-categorical rule. *See Mitchell*, 139 S.Ct. at 2536–37 (quoting *McNeely*, 569 U.S. at 169, and *Schmerber v. California*, 384 U.S. 757, 770–71 (1966)); *see also Trahey*, 2020 WL 1932770, at *12–13. But *Mitchell* does not expressly limit its near-categorical rule to alcohol, to the exclusion of other intoxicants—and such a limitation would not make sense. Most drugs that cause intoxication are metabolized in the body over time, until they become undetectable in the bloodstream. And while marijuana metabolites can remain detectable for weeks, other intoxicants disappear *more* quickly than alcohol, to the point where suspected drug intoxication can *heighten* exigencies:

> . . . [O]fficers quickly believed that McCall was impaired by a substance other than alcohol. While alcohol has a relatively steady dissipation rate, other substances dissipate much faster. [Footnote: A SLED toxicologist testified that the body metabolizes some drugs rapidly, such as cocaine and THC in marijuana, while alcohol dissipates at a steadier rate.] Without immediately knowing the substance's identity, officers could not possibly know how long it would remain in McCall's blood, thus increasing the urgency.

State v. McCall, 839 S.E.2d 91, 95 & n.2 (S.C. 2020). And even that is just a generalized estimate. Intoxicant half-life can vary widely, based on the individual user and the method of taking the intoxicant.

> Half-lives of drugs are estimates and not specifics since there are many variables that can impact how long it takes the body to process a drug. A person's specific metabolism can play a role, for example, as can kidney and liver functions since these organs are vital in drug metabolism and blood filtration.
>
> How a person takes a drug can affect how quickly it starts working and how long it takes to process out as well. For instance, smoking, snorting, and injecting drugs tends to send it more rapidly into the bloodstream while ingesting them results in a slower onset of action. Half-lives of drugs are therefore generalizations and not exact.

See SUNRISE HOUSE, *Short Half-Life vs. Long Half-Life Drugs* (last updated July 11, 2019), https://sunrisehouse.com/prescription-drug-addiction-recovery/half-life/. Limiting *Mitchell* to alcohol-related intoxication would ignore that drug-related intoxication presents the same generalized exigency from rapidly dissipating evidence.

Beyond that, McGee is incorrect that officers had no reason to suspect that he was *also* under the influence of alcohol. Beyond the odor of marijuana, another factor that created a suspicion that McGee was intoxicated was his "erratic driving." *See* MTS-Tr. 38:12–39:4; *see also* MTS-Tr. 14:5–11 (specifying "erratic driving conditions" as part of reasonable grounds to invoke chapter 321J); MTS-Tr. 6:17–9:3 (describing collision, including McGee's "high rate of speed"). From his manner of driving, officers suspected he was "intoxicated with marijuana or something else." *See* MTS-Tr. 38:12–39:4. And

while it is technically true that no officer had noticed behavioral signs of alcohol-based intoxication, they saw no indicia of sobriety, either—there was no opportunity to observe McGee's behavior at all, because he was unconscious, receiving medical treatment. *See People v. Hyde*, 393 P.3d 962, 969 (Colo. 2017) ("When drivers are unconscious, law enforcement officers are deprived of the evidence they typically rely on in drunk-driving prosecutions: unlike conscious drivers, unconscious drivers cannot perform roadside maneuvers, display speech or conduct indicative of alcohol impairment, or admit to alcohol consumption"). The odor of marijuana did not preclude or foreclose the suspicion that some additional intoxicant—potentially alcohol—also contributed to McGee's intoxication, as evidenced by his erratic driving that caused multiple hospitalizations, so his "drugged not drunk" argument fails and he cannot defeat *Mitchell*'s near-categorical rule on that basis.

This leaves the suggestion that another officer could have been tasked with completing a warrant application, in addition to all of the officers who were already handling time-sensitive tasks that related to this collision and investigation. Note that Officer Fricke was "on call" and drove in from his home, 30 to 40 minutes from Mercy Hospital. This suggests there were no otherwise unoccupied officers on duty.

But even if a dispatcher at the Des Moines Police Department could have called other officers away from unrelated duties, those officers would unable to draft a warrant application on their own—they would need to take statements from the officers conducting the investigation. As the Texas Court of Appeals noted, that poses its own challenges:

> While deputies handled traffic, DPS troopers, led by McWhinney, investigated the scene. That required talking to the various witnesses at two different crash sites and photographing and marking the scene. It was important to perform these tasks quickly, so that evidence could be preserved and remain untainted. McWhinney testified he was in the charge of the investigation and could not stop to draft a search warrant, nor could he stop to relay that information to a third party for them to draft a search warrant. The other officers all testified they did not know the details of the crash necessary for a probable cause affidavit, nor could they have delayed their tasks to do so, even if they had the information. . . . Every officer at the scene was performing an important task necessary to the investigation or safety at the scene, and none of them could be pulled away to assist with a warrant.

Matthews v. State, No. 05-18-01267-CR, 2019 WL 5690715, at *6 (Tex. Ct. App. Nov. 4, 2019). Moreover, if the "find one more officer" argument were enough to defeat *Mitchell*'s presumptive exigency, that would invert the "general rule" that warrantless blood draws on unconscious OWI suspects are constitutional. *Mitchell* must be read to permit *most* warrantless blood draws in those cases, beyond the rare situation where every single officer in the county is unavailable.

Finally, McGee argues that the State cannot invoke *Mitchell*, because it "did not rely upon the exigency exception below." *See* Def's Br. at 62–65. But the State is still making the same argument: this blood test did not require a warrant, actual consent, or a fact-specific showing of exigency because McGee was an unconscious OWI suspect. Section 321J.7 and implied consent make warrantless blood tests on unconscious drivers *reasonable by default*. *See* MTS-Tr. 41:10–43:5; 64:12–65:11; *accord Mitchell*, 139 S.Ct. at 2536 ("These laws and the BAC tests they require are tightly linked to a regulatory scheme that serves the most pressing of interests."). Conversely, if the State had attempted to establish a fact-specific exigency, that would bear *less* resemblance to *Mitchell*'s near-categorical rule that officers "may almost always order a warrantless blood test" in these situations. *See Mitchell*, 139 S.Ct. at 2539. As a result of its advocacy below, the State is not defending a finding of fact-specific exigency—it is defending a broader ruling, which aligns well with *Mitchell*'s near-categorical rule. *See* MTS-Tr. 69:5–71:4. The State is not arguing that *Mitchell* offers additional grounds to affirm, beyond the district court's actual ruling. Instead, *Mitchell* illustrates that the district court was correct to reject McGee's arguments that *Birchfield* and *McNeely* required it to hold

that section 321J.7 was unconstitutional and that a search warrant is typically required for blood tests for unconscious OWI suspects, and that it was correct for the same basic reason that the State offered: in that generalizable situation, a warrantless blood test is reasonable.

B. Article I, Section 8 does not demand application of a narrower rule than *Mitchell*'s plurality.

McGee argues that, even if *Mitchell* permits this warrantless blood draw, "the same is not true of the Iowa Constitution" because Article I, Section 8 "is more exacting" than the Fourth Amendment. *See* Def's Br. at 83–84. That is true in some contexts, but not others. *See, e.g.*, *State v. Storm*, 898 N.W.2d 140, 149 (Iowa 2017) (quoting *Commonwealth v. Gary*, 91 A.3d 102, 126 (Pa. 2014)) (warning that courts "should not simply 'reflexively find in favor of any new right or interpretation asserted'" under state constitutional provisions). Here, McGee's argument for rejecting *Mitchell* is that "the Iowa Constitution more stringently *limits exceptions* to the warrant requirement *to the purposes which they serve*." *See* Def's Br. at 84. But *Mitchell*'s rule is calibrated to the underlying purpose that it describes: protecting lives through effective OWI enforcement, which requires probative evidence that can only be obtained through chemical testing of blood when the OWI suspect is unconscious, and which must be withdrawn promptly.

See Mitchell, 139 S.Ct. at 2535–39. Article I, Section 8 permits some categorical exceptions to the warrant requirement where it does not matter whether officers could have obtained a warrant before acting, in any particular case. *See, e.g.*, *Storm*, 898 N.W.2d at 156 (retaining the automobile exception under Article I, Section 8, and observing that it is "easy to apply, unlike its alternative—an amorphous, multifactor exigent-circumstances test"); *State v. Christopher*, 757 N.W.2d 247, 250 (Iowa 2008) (upholding search incident to arrest because "[w]e have never interpreted article I, section 8 of the Iowa Constitution to require anything more than probable cause to arrest in a public place and decline to do so here"). Indeed, in the context of blood testing for unconscious OWI suspects, Article I, Section 8 would even permit the true categorical exception that *Mitchell* stopped short of adopting.

The Iowa Supreme Court already held that Article I, Section 8 permits warrantless blood draws on unconscious OWI suspects, when authorized by statute. That statutory provision used to be codified at section 321B.5, and it has withstood constitutional attack under both the Fourth Amendment and Article I, Section 8:

> [U]nder our law, if the suspect is not unconscious or not in a condition rendering him incapable of consent or refusal, there must be a prior arrest and an opportunity given him to withdraw his prior implied consent to the test.

> [Iowa Code § 321B.3 (1966)]. But this is not the case at bar, where the evidence shows the officers reasonably believed defendant drove while intoxicated, where he was unconscious when the officer ordered the nurse to take the specimen of blood from defendant in an approved medical manner, and where no arrest had been made until some time after. The public interest requires a holding that the disappearing evidence due to bodily assimilation created an emergency requiring prompt action. Under these conditions we find no unreasonable search and seizure and no substantial violation of defendant's constitutional right of due process.

State v. Findlay, 145 N.W.2d 650, 654–55 (Iowa 1966). This suggests that Article I, Section 8 would permit a true categorical exception.

McGee also argues that Article I, Section 8 cannot tolerate the "burden shifting aspect of *Mitchell*" because it rejects any approach that would "relieve the State of its burden of proving exigency under the totality of the circumstances test." *See* Def's Br. at 85. But the Iowa Supreme Court rejected a challenge to a warrantless blood draw that was performed under section 321J.10A, which "requires only a reasonable belief" on the officer's part "that the delay necessary to obtain a warrant would threaten the destruction of the evidence."

> Despite the availability of a telephone warrant, we believe the facts of this case still show the exigency required by *Schmerber* and section 321J.10A . . . Perhaps more importantly, we believe that Iowa Code section 321J.10A eliminates the requirement for any warrant, telephonic or traditional, if the specified conditions are met.

State v. Johnson, 744 N.W.2d 340, 344–45 (Iowa 2008). That runs parallel to *Mitchell*'s near-categorical rule, which is only inapplicable if "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *See Mitchell*, 139 S.Ct. at 2539. While *Johnson* did not reject a constitutional challenge under Article I, Section 8, it applied section 321J.10A after discussing relevant precedent on the constitutionality of warrantless blood tests. *See Johnson*, 744 N.W.2d at 342–46. If this construction of the statute had authorized unconstitutional searches and seizures, *Johnson* would have steered clear. *See, e.g.*, *State v. Nail*, 743 N.W.2d 535, 540 (Iowa 2007) (quoting *State v. Williams*, 238 N.W.2d 302, 306 (Iowa 1976)).

Finally, McGee asks this Court to refuse to apply *Mitchell* when an unconscious OWI suspect is thought to have used drugs, rather than alcohol. *See* Def's Br. at 84. But the Iowa Supreme Court has applied the logic from *Schmerber* and other alcohol-related cases to reject a challenge under Article I, Section 8 in a drug-related case:

> Exigent circumstances were also present which, when coupled with the existing probable cause, could relieve the warrant requirement. The officers might reasonably have believed they were "confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" [*Schmerber*, 384 U.S. at 770] . . . .

> It is common knowledge that the body functions to eliminate substances which are ingested. The most readily accessible illustration of this is alcohol. *See* [*Schmerber*, 384 U.S. at 770; *Findlay*, 145 N.W.2d at 656]. Likewise, it is common knowledge that cocaine, once ingested orally, is absorbed into the blood and, like alcohol, is eliminated by the body. Therefore, the passage of time alone will operate to destroy the evidence. We conclude, under the rationale of *Schmerber*, that exigent circumstances existed here which justified a warrantless search.

State v. Strong, 493 N.W.2d 834, 836–37 (Iowa 1992); *accord Cole v. State*, 490 S.W.3d 918, 926–27 (Tex. Ct. Crim. App. 2016) ("[D]uring the hour to an hour and a half necessary to obtain a warrant Cole's body would continue to metabolize the methamphetamine and other intoxicating substances he may have ingested. . . . In this case, without a known elimination rate of methamphetamine, law enforcement faced inevitable evidence destruction without the ability to know—unlike alcohol's widely accepted elimination rate—how much evidence it was losing as time passed."). Nothing in *Mitchell* reaches beyond what Article I, Section 8 would permit, or what it has already permitted.

C. Warrantless blood draws on unconscious drivers under section 321J.7 are categorically reasonable and should be permitted by Article I, Section 8.

It would be incorrect to apply "an interpretive predisposition that the Iowa Constitution must, as a matter of law, be interpreted to provide only greater protection than the United States Constitution."

See State v. Brown, 930 N.W.2d 840, 863 (Iowa 2019) (McDonald, J., concurring specially). This Court has an opportunity to adopt its own analytical framework under Article I, Section 8, and it should do so.

1. *Historically, Iowa courts have treated implied consent as a valid exception to the warrant requirement.*

Iowa courts "have continuously affirmed that the primary objective of the implied consent statute is the removal of dangerous and intoxicated drivers from Iowa's roadways in order to safeguard the traveling public." *Welch v. Iowa Dep't of Transp.*, 801 N.W.2d 590, 594 (Iowa 2011). Implied consent means that drivers on Iowa roadways are deemed to have impliedly consented to requests for chemical test samples, if a peace officer determines that there are reasonable grounds for such a request. *See* Iowa Code § 321J.6. The statute grants a right to withdraw that consent and refuse a test—but that triggers automatic penalties that include license revocation and administrative fees, so that decision must be made voluntarily. *See* Iowa Code § 321J.9; *State v. Knous*, 313 N.W.2d 510, 512 (Iowa 1981).

Again, this is not actual consent—it does not require proof of the motorist's knowledge of the law, nor does it require proof that the motorist had sufficient capacity to give meaningful consent when they began to drive. At the point of OWI testing, implied consent is usually

superseded by actual consent or actual refusal, which creates various statutory rights—including the implied right to suppression of any evidence of the consent/refusal decision, if it is not voluntary. *See State v. Hutton*, 796 N.W.2d 898, 902 (Iowa 2011); *State v. Garcia,* 756 N.W.2d 216, 220 (Iowa 2008). "Although the implied-consent law is based on the premise that all drivers consent to the withdrawal of a body substance for testing if suspected of driving while intoxicated, the law is tempered by giving drivers the right to withdraw this implied consent and refuse the test." *See State v. Fischer*, 785 N.W.2d 697, 699–701 (Iowa 2010). Section 321J.7 is unique because it applies in cases where actual consent/refusal is impossible—so it provides that a person who is "incapable of consent or refusal is deemed not to have withdrawn the consent" that is imputed to all drivers, by default. *See* Iowa Code § 321J.7; *Welch*, 801 N.W.2d at 595 & n.4.

For more than fifty years, the Iowa Supreme Court upheld Iowa's implied consent laws against various constitutional attacks. *See generally Fischer*, 785 N.W.2d at 699–701. Analogous laws that apply to boating were called into question in *State v. Pettijohn*—but the decision was expressly limited to boating-while-intoxicated laws under chapter 462A, rather than OWI enforcement in chapter 321J.

See State v. Pettijohn, 899 N.W.2d 1, 38 (Iowa 2017) ("[T]his decision only applies to the statutory scheme for operating a boat while under the influence and not to the statutory scheme for operating a motor vehicle while under the influence."). That limitation was a sensible recognition that extending *Pettijohn* to OWI would be catastrophic and would undermine any real hope of effective OWI enforcement.

Pettijohn did recognize that the Iowa Supreme Court had previously stated "an individual has no constitutional right to refuse a warrantless [chemical] test under the United States Constitution when statutorily implied consent applies." *See Pettijohn*, 899 N.W.2d at 29 n.10 (citing *State v. Massengale*, 745 N.W.2d 499, 501 (Iowa 2008); *Knous*, 313 N.W.2d at 512). Still, it held "statutorily implied consent does not justify a warrantless search under Article I, Section 8." *See id.* This was pure dicta, because the State conceded that Pettijohn had a statutory right to withdraw consent, which meant that his decision about whether to take the chemical test needed to be voluntary. It was also dicta because *Pettijohn*'s determination that the defendant was "legally intoxicated when he submitted to the warrantless breath test" mooted the issue of the test's admissibility. *See id.* at 32. And it went far beyond the scope of the defendant's preserved challenge, which

was that Iowans have unalienable rights to use Iowa waterways and that those fundamental rights to access Iowa's navigable waters were incompatible with implied consent for boating under chapter 462A. *See id.* at 43–44 (Waterman, J., dissenting) ("Pettijohn did not raise the unsupported theories employed by the majority to reverse his conviction. The majority goes well beyond what Pettijohn argued in district court or on appeal and thereby blindsides the State and unfairly reverses the district court on theories never presented in that forum."). Additional problems with *Pettijohn* and reasons to overrule/limit it will be discussed later—for now, it is enough to show that *Pettijohn* is a regrettable outlier among Iowa precedent on implied consent.

Pettijohn's statement about "statutorily implied consent" gave short shrift to the long line of Iowa cases that upheld implied consent as a valid, free-standing exception to the warrant requirement. *See, e.g.*, *State v. McIver*, 858 N.W.2d 699, 704–05 (Iowa 2015) (citing *State v. Overbay*, 810 N.W.2d 871, 875 (Iowa 2012)) (explaining that implied consent laws "make it possible for a peace officer to obtain a bodily substance for chemical testing from a driver suspected of operating while intoxicated, without the necessity of obtaining a search warrant"); *State v. Palmer*, 554 N.W.2d 859, 861 (Iowa 1996)

(citing *State v. Stanford*, 474 N.W.2d 573, 575 (Iowa 1991)); *State v. Johnson*, 135 N.W.2d 518, 525 (Iowa 1965); *cf. State v. Brockman*, 725 N.W.2d 653, 655 n.3 (Iowa Ct. App. 2006) ("Iowa's implied consent law constitutes an exception to the warrant requirement of the Fourth Amendment to the United States Constitution."); *accord* MTS-Tr. 64:12–66:7. *Pettijohn* impliedly asserted that it was writing on a blank slate, because prior Iowa cases had only considered the constitutionality of implied consent under the Fourth Amendment. *See Pettijohn*, 899 N.W.2d at 29 n.10. But *Findlay* rejected an attack on a warrantless blood draw on an unconscious OWI suspect, under Article I, Section 8, by finding an exigency that seemed generalizable. *See Findlay*, 145 N.W.2d at 651–57. Broadly speaking, until *Pettijohn*, Iowa courts had never strayed from understanding the idea that "the implied consent law was intended to give greater rights to an alleged drunken driver than were constitutionally afforded theretofore." *See State v. Hitchens*, 294 N.W.2d 686, 688 (Iowa 1980) (quoting *Scales v. State*, 219 N.W.2d 286, 292 (Wis. 1974)).

Pettijohn was wrongly decided for those reasons, among others. This Court should take the earliest opportunity to either overrule it or to confirm that it will never be extended beyond the context of boats.

More problems with *Pettijohn* will be discussed later, when relevant. As a parting thought on *Pettijohn* for now, consider its remark on the provision of chapter 462A for unconscious BWI suspects, in passing: that "the exigent-circumstances exception to the warrant requirement may permit a warrantless search under such circumstances even if the consent implied under the statute does not justify a warrantless search." *See Pettijohn*, 899 N.W.2d at 29 n.9; *cf.* Iowa Code § 462A.14A(4)(f)). Again, pure dicta. But *Pettijohn*'s unprompted remark on this specific subsection reveals that its majority was uncomfortable with the idea that officers might not be able to obtain a chemical test in a scenario where a BWI suspect is unconscious. Of course, the *Pettijohn* majority would demand a search warrant, or require the State to establish some case-specific exigency that made it impractical to seek a warrant. But that remark, in itself, recognizes that unconscious BWI/OWI suspects present unique concerns that merit special consideration. That makes it even more unfortunate that *Pettijohn*'s advice for officers who must decide how to proceed in the face of uncertainty about the feasibility or practicality of obtaining a search warrant is that they should try to get actual, voluntary consent or refusal—which is never an option in these special cases under section 321J.7 or section 462A.14A(4)(f).

Iowa courts have historically agreed that "the right to refuse the [chemical] test is a statutory right to withdraw consent" imputed by Iowa's implied consent laws. *See Knous*, 313 N.W.2d at 512. Certainly, historical practice cannot save an unconstitutional statute—but this long-standing recognition of the reasonableness of implied consent means that it would be anomalous to interpret Article I, Section 8 to treat a blood draw under section 321J.7 as "unreasonable" by default. *See, e.g.*, *Brown*, 930 N.W.2d at 854; *Storm*, 898 N.W.2d at 148.

2. *Implied consent is reasonable because of heightened public interests in OWI enforcement, and because drivers have a diminished expectation of privacy against minimally intrusive testing in OWI investigations.*

Determining whether an asserted warrant exception is valid requires "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." *See Birchfield*, 136 S.Ct. at 2176 (quoting *Riley v. California*, 573 U.S. 373, 385 (2014)); *accord Storm*, 898 N.W.2d at 145–47.

The reasonableness of implied consent has always depended on the heightened public interest in OWI enforcement, "to reduce the holocaust on our highways part of which is due to the driver who imbibes too freely of intoxicating liquor." *See Severson v. Sueppel*,

152 N.W.2d 281, 284 (Iowa 1967); *accord Overbay*, 810 N.W.2d at 875–76; *State v. Wallin*, 195 N.W.2d 95, 96 (Iowa 1972) ("The law was enacted to help reduce the appalling number of highway deaths resulting in part at least from intoxicated drivers."). *Pettijohn* did not even mention this concern when it analyzed the constitutionality of a breath test as search-incident-to-BWI-arrest under Article I, Section 8. *See Pettijohn*, 899 N.W.2d at 20–25. Failure to consider the weighty public interest at stake invalidates *Pettijohn*'s analysis.

The most recent CrashFacts report from the Iowa Department of Transportation shows that, in 2016, intoxicated drivers in Iowa caused 130 fatalities, more than 9,000 other injuries, and $24 million in property damage. *See* IOWA DOT, *CrashFacts: A Summary of Motor Vehicle Crash and Driver Statistics on Iowa Roadways* at 7, 211 (2018), https://iowadot.gov/mvd/stats/2016CrashFacts.pdf. Preventing senseless death, injury, and destruction is a public interest of the highest order. In an individual case, those stakes can establish a one-off exigency that justifies a warrantless search. *See, e.g.*, *State v. Simmons*, 714 N.W.2d 264, 273–74 (Iowa 2006). And when those high stakes are present in a whole category of cases, they can justify a categorical exception to the warrant requirement. The public interest

in preventing destruction of evidence and protecting officer safety is the rationale for permitting a search of an arrestee's person, even if it would have been trivial to obtain a search warrant—even if the arrest takes place on the steps of the courthouse during a slow day, officers may still search the arrestee's person because the strong public interest in permitting that type of search makes it categorically reasonable. *See, e.g.*, *State v. Halverson*, No. 16–1614, 2017 WL 5178997, at *3 (Iowa Ct. App. Nov. 8, 2017) ("It is imminently reasonable, within the meaning of the federal and state constitutions, for an officer who intends to arrest an individual based on probable cause to search the individual immediately prior to, substantially contemporaneous with, or immediately after an arrest."); *accord State v. Peterson*, 515 N.W.2d 23, 24–25 (Iowa 1994) ("It is well-settled that a search incident to an arrest requires no additional justification"). Similarly, in OWI cases, the strong public interest in effective OWI enforcement is present in every OWI investigation—even when the suspect is unconscious.

McGee's response is sure to be that warrantless breath tests on conscious drivers and warrantless blood tests on unconscious drivers are not necessary to further that public interest in OWI enforcement. But OWI enforcement depends on both deterrence and incapacitation.

See Birchfield, 136 S.Ct. at 2178–79 (quoting *Mackey v. Montrym*, 443 U.S. 1, 18 (1979)). Research on OWI has established that "[f]or deterrence to be effective, drivers must have the perception that, if they drive while impaired, (1) apprehension is probable, (2) sanctions will follow swiftly, and (3) sanctions will be severe." *See* NHTSA, *Alcohol and Highway Safety: A Review of the State of Knowledge*, at 121 (2011), https://www.nhtsa.gov/staticfiles/nti/pdf/811374.pdf. Those first two points are the most salient, and they align with other research on the effectiveness of deterrence. *See, e.g.*, Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, at 4–5 (2010), https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf ("Criminological research over several decades and in various nations generally concludes that enhancing the certainty of punishment produces a stronger deterrent effect than increasing the severity of punishment."). The strong public interest in effective OWI deterrence is undermined by anything that erodes perceptions of certainty and inevitability in OWI enforcement. Conversely, if every OWI suspect must provide a chemical test sample or face consequences for refusal, that maximizes the deterrent effect of OWI enforcement efforts. And

incapacitation interests are undermined by challenges that result in exclusion of the most probative evidence in OWI prosecutions. *See Mitchell*, 139 S.Ct. at 2536 ("[E]nforcing BAC limits obviously requires a test that is accurate enough to stand up in court."). An apprehension removes a dangerous driver from Iowa highways for just one night; to achieve any meaningful incapacitation through a license revocation or OWI conviction, officers must be able to get a chemical test result or test refusal that can withstand the inevitable motion to suppress.

Against those strong public interests, this Court must weigh the degree of intrusion on OWI suspects' privacy interests. *See Birchfield*, 136 S.Ct. at 2176; *Storm*, 898 N.W.2d at 145–47. Breath tests are the least intrusive search imaginable that would still qualify as a search. They are "capable of revealing only one bit of information, the amount of alcohol in the subject's breath." *See Pettijohn*, 899 N.W.2d at 44 (Waterman, J., dissenting) (quoting *Birchfield*, 136 S.Ct. at 2177). No person expects the contents of the air they exhale to remain private, and nobody demands that exhaled air be returned to their possession. *See Birchfield*, 136 S.Ct. at 2176–77. Breath tests are not particularly embarrassing or painful for the OWI suspect. *See id.* And yet, again, *Pettijohn* mentions none of this in its Article I, Section 8 analysis.

Of course, this case is about blood tests, not breath tests—but it is also about unconscious OWI suspects, not conscious OWI suspects. *Birchfield* held that blood tests are "significantly more intrusive" than breath tests because they involve piercing the skin, which is painful—which is why most states have OWI laws that "specifically prescribe that breath tests be administered in the usual drunk-driving case instead of blood tests or give motorists a measure of choice over which test to take." *See Birchfield*, 136 S.Ct. at 2178; *accord* Iowa Code § 321J.6(2) (allowing conscious OWI suspects to decline request for a blood sample without qualifying as a refusal, unless they also refuse a subsequent request for a breath sample or urine sample). Still, *Birchfield* "is only applicable in those cases in which a suspect is conscious and physically able to alternatively furnish a less intrusive breath test for the detection of the potential presence of alcohol." *See State v. Speelman*, 102 N.E.2d 1185, 1188 (Ohio Ct. App. 2017). This makes sense because *Birchfield* only rejected the reasonableness of a blood test incident to OWI arrest after evaluating blood tests "in light of the availability of the less invasive alternative of a breath test." *See Birchfield*, 136 S.Ct. at 2184. When an OWI suspect is unconscious, the impossibility of breath testing makes blood tests more reasonable.

See Mitchell, 139 S.Ct. at 2536–37 ("Thus, in the case of unconscious drivers, who cannot blow into a breathalyzer, blood tests are essential for achieving the compelling interests described above."). Moreover, unconscious suspects do not experience the pain or discomfort that blood testing would normally present. In this specific subset of cases, blood tests are a minimally intrusive way to serve key public interests.

Additionally, McGee's expectation of privacy would necessarily be diminished by the fact that Iowa law puts motorists on notice that a blood sample will be drawn for chemical testing if they are involved in a collision that leaves them unable to withdraw implied consent. *See* Iowa Code § 321J.7; *accord People v. Hyde*, 393 P.3d 962, 967–68 (Colo. 2017) ("By choosing to drive in the state of Colorado, Hyde gave his statutory consent to chemical testing in the event that law enforcement officers found him unconscious and had probable cause to believe he was guilty of DUI."). Again, this is not *actual* consent. Rather, this diminishes reasonable expectations of privacy, much like pervasive regulation has reduced Iowans' expectations of privacy in motor vehicles generally—which provides half of the basic rationale for the categorical "automobile exception" for warrantless searches of vehicles with probable cause. *See Storm*, 898 N.W.2d at 146–47.

The other basic rationale for the automobile exception is a categorical exigency, inherent in movable vehicles. *See id.* at 145–46. *McNeely* rejected the idea that metabolization of alcohol may qualify as a "per se" exigency to create a categorical rule for conscious OWI suspects who withdraw implied consent. *See McNeely*, 569 U.S. at 156. *Pettijohn* focused on the holding of *McNeely*, and when it "perceive[d] no meaningful distinction" between *Birchfield* and *McNeely*, it chose to reject *Birchfield* under the Iowa Constitution. *See Pettijohn*, 899 N.W.2d at 25. But that missed the point of the analysis that courts must perform to determine whether categorical warrant exceptions are reasonable, as *Mitchell* subsequently illustrated: if the State is proposing or defending a different kind of categorical exception that will implicate different privacy interests, then the balance may shift. *Mitchell* still purported to apply the exigent-circumstances exception. But *Mitchell* distinguished *McNeely* because, in the category of cases where the driver is unconscious (rather than conscious and refusing), the balance shifts—even though the generalizable exigency is similar. *See Mitchell*, 139 S.Ct. at 2538 (explaining that unconsciousness of the driver "sets this case apart from the uncomplicated drunk-driving scenarios addressed in *McNeely*"). The effect is that the *same* facts

about the generalizable time-sensitive pressures in OWI enforcement that were insufficient to establish the reasonableness of a categorical warrant exception for *all* chemical tests, including the most intrusive (like a blood draw from a conscious suspect over refusal, in *McNeely*), can still be sufficient to establish the reasonableness of a categorical warrant exception for certain chemical tests that are barely intrusive (like the breath tests in *Birchfield*) or for cases that involve additional categorical factors that heighten enforcement interests or diminish a competing privacy interest (like the unconscious driver in *Mitchell*). In other words, *McNeely* held that the generalizable exigency from the metabolization of alcohol did not have *sufficient* weight to justify a categorical warrant exception for all chemical testing in OWI cases, and *Pettijohn* interpreted that to mean that it had *no* weight. That is why *Pettijohn* could not understand the rationale of *Birchfield* and would not have understood *Mitchell*: both of them concluded that the generalizable need to collect BAC evidence before metabolization had *enough* weight to be constitutionally relevant, and to serve as one of the rationales for categorical (or near-categorical) warrant exceptions with narrower applicability or minimal intrusiveness that made them ultimately *reasonable*, unlike the broader rule that *McNeely* rejected.

The need for prompt withdrawal of samples for chemical tests is present across most OWI investigations, but it is uniquely pressing in cases with an unconscious driver—in these cases, there is a scarcity of other evidence of intoxication. There is no behavior to observe, and no opportunity for sobriety testing. *See Hyde*, 393 P.3d at 969. And with every second taken to gather the witness and officer accounts, type up the affidavit, proofread for inaccuracies, add qualifications, find a judicial officer, swear out the oath, and wait for the judge to read and consider the warrant application, metabolization of alcohol and drugs still proceeds onward and diminishes the probative value of that critical evidence. *See Matthews*, 2019 WL 5690715, at *6–7; *accord Storm*, 898 N.W.2d at 154–55 (quoting *State v. Angel*, 893 N.W.2d 904, 912–13 (Iowa 2017) (Appel, J., dissenting)) (explaining that amount of time and attention required to obtain a valid warrant will typically be substantial because "[t]he process of issuing a valid search warrant is not a bureaucratic bother in which a lackadaisical, close-enough attitude toward legal requirements is good enough").

In the end, "a driver impliedly agrees to submit to a test in return for the privilege of using the public highways." *See Welch*, 801 N.W.2d at 594–95 (quoting *Hitchens*, 294 N.W.2d at 687). With that,

drivers accept a diminished expectation of privacy in their breath if they are suspected of OWI while they are still conscious (and capable of providing that less intrusive sample). Drivers accept a similarly diminished expectation of privacy in their blood if they are suspected of OWI after a collision renders them unconscious (and incapable of providing a breath sample, but also incapable of experiencing pain or discomfort from withdrawal of a blood sample). On the other side of the balance is the compelling public interest in OWI enforcement, which requires effective chemical testing—especially in cases where the driver is unconscious, because there are few other ways to prove intoxication when there is no behavior to observe. That objective is undermined by delaying chemical tests to apply for a search warrant, which is a labor-intensive task that requires attention to detail. And failure to effectively deter OWI by eliminating doubt about whether chemical testing will be required or whether results will be admissible jeopardizes efforts to keep intoxicated drivers off of Iowa roadways, which risks lives. After balancing the critical public interests against the diminished privacy interests, this Court should find warrantless blood tests for unconscious OWI suspects (and warrantless breath tests for *conscious* OWI suspects) are reasonable, and thus constitutional.

3. *In this unique context, warrants cost valuable time and offer little actual protection that is not similarly achieved by retrospective analysis of probable cause.*

A warrantless search or seizure is generally constitutional if it is reasonable. Sometimes, the reasonableness of a warrantless search is affected by what it would look like if officers *did* get a search warrant before proceeding, and whether that would further the interests that Article I, Section 8 exists to protect. *See Storm*, 898 N.W.2d at 155 (finding warrantless vehicle searches are reasonable under Article I, Section 8 of the Iowa Constitution, in part because "the purposes for requiring warrants are not furthered here"). *Birchfield* identified the two main benefits of search warrants:

> Search warrants protect privacy in two main ways. First, they ensure that a search is not carried out unless a neutral magistrate makes an independent determination that there is probable cause to believe that evidence will be found. . . . Second, if the magistrate finds probable cause, the warrant limits the intrusion on privacy by specifying the scope of the search—that is, the area that can be searched and the items that can be sought.

See Birchfield, 136 S.Ct. at 2181. On that second objective, there is no benefit from particularity of a written search warrant in this context, because the withdrawal and chemical testing of a single sample is the entirety of the search/seizure and is governed by chapter 321J. Thus, in these unique cases, particularity in warrants is mostly superfluous:

> [Even without a written copy of the authorized warrant], the officers' discretion in executing the warrant was circumscribed by statute. Iowa Code section 321J.11 contains the procedure by which a blood specimen may be obtained. It states that a blood specimen may be withdrawn only by a "licensed physician, licensed physician assistant as defined in section 148C.1, medical technologist, or registered nurse." Iowa Code § 321J.11. The person withdrawing the blood specimen must be acting at the request of a peace officer. *Id.* Section 321J.11 further provides that "[o]nly new equipment kept under strictly sanitary and sterile conditions shall be used for drawing blood." *Id*. Under these circumstances, we are satisfied that the executing officer's discretion was sufficiently cabined such that Breuer was protected from arbitrary police intrusion.

State v. Breuer, 808 N.W.2d 195, 202 (Iowa 2012); *see also Birchfield*, 136 S.Ct. at 2181 (explaining that warrants for chemical tests did not provide benefit of particularity because "[i]n every case the scope of the warrant would simply be a BAC test of the arrestee"); *accord Storm*, 898 N.W.2d at 155 (noting that warrant requirement does not provide benefit of particularity where "the search by definition is confined to a specific vehicle"). Obtaining a search warrant cannot impose more particularized boundaries on the scope of the search or the items to be seized in this specific context.

As for the first benefit associated with search warrants, it is true that no chemical testing occurs if officers apply for a search warrant but cannot establish probable cause. But that would rarely happen.

These search warrant applications would "consist largely of the officer's own characterization of his or her observations" about the suspect's behavior, speech, or condition, and "[a] magistrate would be in a poor position to challenge such characterizations." *See Birchfield*, 136 S.Ct. at 2181. If officers affirmed that McGee smelled strongly of marijuana, it would be incorrect to refuse to issue a search warrant. *See, e.g.*, *State v. Watts*, 801 N.W.2d 845, 853–54 (Iowa 2011); *State v. Eubanks*, 355 N.W.2d 57, 59 (Iowa 1984). Also, in the absence of a search warrant, McGee would be able to challenge the existence of probable cause in a motion to suppress and put the burden on the State to prove that he smelled like marijuana (and McGee could even present testimony from other witnesses to dispute that evidence, if such witnesses existed). But if the officers obtained a search warrant, McGee would need to carry a much heavier burden, and might need to move for a *Franks* hearing as a predicate to his actual challenge. *See, e.g.*, *State v. Robertson*, 494 N.W.2d 718, 724–25 (Iowa 1993) (quoting *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978)). This is not a situation where requiring officers to obtain a search warrant would have strengthened McGee's protections against unreasonable search and seizure—in practice, it likely would have *weakened* them.

Many OWI cases involve more than olfactory evidence. Officers typically see and hear things that are relevant to determining whether there is probable cause for chemical testing. But again, when written in a warrant application, they often defy meaningful review because they form a familiar laundry list of common indicia of intoxication. *See Birchfield*, 136 S.Ct. at 2181 (observing "the facts that establish probable cause are largely the same from one drunk-driving stop to the next and consist largely of the officer's own characterization of his or her observations," like noticing "that the motorist wobbled when attempting to stand"); *accord Pettijohn*, 899 N.W.2d at 44–45 (Waterman, J., dissenting) ("How often does the majority imagine a magistrate will refuse a warrant for a breath test . . . based on the officer's stated observations of the suspect's intoxication?"). But retrospective review allows presentation of an important kind of evidence that *does* enable meaningful review: video footage from body cameras and dashboard cameras. This type of video footage must generally be uploaded to agency servers, burnt to a DVD, and then watched at 1x speed (especially for any auditory observations)—which means that it cannot be used to support a warrant application, and it can only be assessed in retrospect. Again, a defendant does not

stand to gain meaningful protection against arbitrary searches from a requirement that police get a judge's stamp on their narrative report before withdrawing a chemical sample, and it will likely backfire when that defendant must carry a dramatically enhanced burden on any subsequent challenge to the constitutionality of that chemical test, after objective evidence of what happened finally becomes available. Without a warrant, the State has the burden in resisting a motion to suppress, and the defendant can write on a clean slate in attempting to demonstrate an absence of probable cause. *See Storm*, 898 N.W.2d at 155 (citing *State v. Tompkins*, 423 N.W.2d 823, 832 (Iowa 1988)). No privacy interest is significantly advanced by refusing to recognize this limited warrant exception for minimally intrusive OWI testing.

The primary downside to *ex ante* review is needless delay. *Pettijohn* dismisses this concern, based on its assertion that officers can submit search warrant applications electronically. *See Pettijohn*, 899 N.W.2d at 22 (stating that "law enforcement officers who wish to conduct a breath test on an arrestee can seek a warrant electronically" and that "[t]his expanded access to the courts enables law enforcement officers throughout the state to obtain search warrants more quickly than ever before"). But there was no system for electronic warrants

when *Pettijohn* was decided. An evidentiary record was made on that issue in *Storm*, which was decided on the very same day as *Pettijohn*. *See Storm*, 898 N.W.2d at 143–44 (describing officer testimony about extensive time and effort required to complete a warrant application and explaining that "there was no process for submitting warrants electronically to judges in Dallas County"). And *Pettijohn*'s statement about statewide availability of electronic warrant applications would not even be correct today. *See* Supervisory Order, *In re Establishment of the Electronic Search Warrant Pilot Project* (4/27/20) (creating a pilot project to test and evaluate use of electronic search warrants in Fremont, Mills, Montgomery, and Page Counties). Even in 2020, the process of applying for a search warrant, especially in rural counties, involves a lot of delays that do not further privacy interests.

> Due to judicial officer vacancies and the fact that more and more counties do not have resident magistrates, rural law enforcement officers are often forced to drive a significant distance to personally meet with a judicial officer to consider a paper search warrant application and then drive back to execute the warrant, resulting in significant delays in the execution of the warrant . . .

See id. at 1. Of course, McGee was arrested in Polk County—not in a rural county where the nearest magistrate may have been far from a law enforcement officer who could present a warrant application. But

that fact *minimizes* the potential time-savings from the eventual adoption of electronic search warrant application procedures:

> While electronic search warrants will not reduce the time required for law enforcement officers to prepare search warrant applications, efficiencies resulting from the use of electronic search warrants will likely occur when a judicial officer is not conveniently located near the law enforcement officer.

See id. at 2. That means the eventual availability of electronic search warrants was never the panacea that *Pettijohn* described—it cannot reduce the delay that always accompanies any effort to compose an adequate warrant application. *See Storm*, 898 N.W.2d at 154–55 (quoting *State v. Andersen*, 390 P.3d 992, 998 (Or. 2017)).

An additional downside is the burden on the court system. There are approximately 14,000 OWI revocations in Iowa, on an annual basis. *See* IOWA DEP'T OF TRANSP, *Iowa OWI Revocations by Year and County 1999–2018*, at 3 (last updated Oct. 11, 2019), https://iowadot.gov/mvd/stats/owirevocations.pdf. That works out to about 270 revocations per week—which would represent a large increase in workload, if each of those revocations was accompanied by a search warrant application. The strain on judicial staffing would be magnified by the fact that OWI offenses predominately occur in the evening or early morning hours. *See Birchfield*, 136 S.Ct. at 2180

("Particularly in sparsely populated areas, it would be no small task for courts to field a large new influx of warrant applications that could come on any day of the year and at any hour.").

Mitchell accurately noted that "with better technology," the amount of time required to complete a warrant applications and obtain a warrant "has shrunk, but it has not disappeared"—and that matters because "in the emergency scenarios created by unconscious drivers, forcing police to put off other tasks for even a relatively short period of time may have terrible collateral costs." *See Mitchell*, 139 S.Ct. at 2539. And *Birchfield* had already noted that search warrants provide few benefits in this context, where *ex ante* review is toothless and where concerns about particularity are almost never present. *See Birchfield*, 136 S.Ct. at 2181–82; *accord Storm*, 898 N.W.2d at 155 (finding "the purposes for requiring warrants are not furthered here" and the warrant requirement "does little to protect privacy or advance civil liberty"). Even so, *Mitchell* adopted a *near*-categorical rule—not a bright-line categorical rule that would enable officers to focus solely on critical time-sensitive concerns in these unique OWI investigations. Instead, under *Mitchell*, officers must also gather relevant facts about whether it is feasible to obtain a search warrant, in order to make a

reasonable judgment about whether it "would interfere with other pressing needs or duties," in the estimation of a court reviewing the officer's actions with the benefit of hindsight. *See Mitchell*, 139 S.Ct. at 2539. This wrinkle will "burden both officers and courts who must attempt to apply it." *See id.* at 2539 (Thomas, J., concurring). This is especially relevant in cases where unconscious OWI suspects need medical treatment and are transported to a hospital in a different city, county, or judicial district—officers who are familiar with their own local warrant application procedures will still need a "crash course" in search warrant practice in the new locality, *before* they can make a reasonable judgment about whether it is feasible to obtain a warrant.

The alternative—which this Court should adopt under Article I, Section 8—is a true bright-line rule. *See Storm*, 898 N.W.2d at 156 (quoting *State v. Hellstern*, 856 N.W.2d 355, 364 (Iowa 2014)) (explaining that Iowa courts "prefer the clarity of bright-line rules in time-sensitive interactions between citizens and law enforcement"). Bright-line rules are "especially beneficial" in contexts where officers need to make "quick decisions as to what the law requires where the stakes are high, involving public safety on one side of the ledger and individual rights on the other." *Id.* (quoting *Welch*, 801 N.W.2d at 601).

Even if the United States Supreme Court never revisits *Mitchell* and never adopts a true categorical exception, it would still be preferable to exercise independent judgment in interpreting Article I, Section 8 and foreclose follow-on arguments that a warrantless blood draw on an unconscious OWI suspect under section 321J.7 is unconstitutional under an Iowa-specific conception of what searches are "reasonable." The present uncertainty that accompanies *Mitchell* is suboptimal, but it would be compounded if officers and lower courts needed to apply a second standard (or an Iowa-specific flavor of the same standard) in assessing the same blood draw, both prospectively and retrospectively. *See Storm*, 898 N.W.2d at 156 (noting bright-line rule is preferable to ad-hoc exigency analysis, which "would lead to many more contested suppression hearings with inconsistent and unpredictable results").

This Court should take this opportunity to recognize that these minimally intrusive searches (breath tests for conscious OWI suspects and blood tests for unconscious OWI suspects) are reasonable and can be performed without a warrant, under a categorical exception to the warrant requirement. It is not actual consent, fact-specific exigency, or even a presumptive exigency—it ought to be a free-standing exception for OWI investigations, as "implied consent" has always been.

D. Any equal protection challenge to section 321J.7 fails because conscious and unconscious OWI suspects are not similarly situated, and there are good reasons to treat those situations differently.

McGee argues that section 321J.7 violates equal protection under the federal and state constitutions through "unwarranted differential treatment of conscious and unconscious persons." *See* Def's Br. at 87–93. McGee is right that conscious OWI suspects are given a right to withdraw their implied consent. But conscious and unconscious OWI suspects are not similarly situated with respect to the purposes of implied consent laws—and that is fatal to the claim. *See In re Morrow*, 616 N.W.2d 544, 548 (Iowa 2000).

McGee argues that strict scrutiny applies. *See* Def's Br. at 88. But there is no fundamental right to refuse a chemical test. This is a statutory right. McGee argues it is unfair that it is not extended to him. If there *was* a fundamental right to refuse an implied-consent test, McGee would prevail on his argument that section 321J.7 violates it, and this claim would be superfluous. The toughest review that could apply is rational-basis review, which section 321J.7 easily satisfies.

Iowa's implied consent laws seek to facilitate gathering of evidence to help guarantee that intoxicated drivers are convicted. *See* Iowa Code § 321J.23(3) ("The conviction of a driver for operating

while intoxicated identifies that person as a risk to the health and safety of others, as well as to the intoxicated driver."). That is why evidence of implied consent refusal is admissible to prove OWI. *See* Iowa Code § 321J.16. That is also why the legislature disincentivizes refusal by attaching administrative penalties and license revocation—test results are better evidence than refusals. *See* Iowa Code § 321J.16; *accord State v. Ness*, 907 N.W.2d 484, 489 (Iowa 2018) (citing *State v. Gieser*, 248 P.3d 300, 303 (Mont. 2011)). Still, the legislature would prefer not to empower police to forcibly override a conscious OWI suspect's refusal, unless a fatality makes it unconscionable to prohibit them from collecting that critical evidence. *See* Iowa Code §§ 321J.10(1), 321J.10A; *accord Birchfield*, 136 S.Ct. at 2184 (explaining "many States reasonably prefer not to take this step"). In most cases where the suspect is conscious, allowing them to make a choice about whether to provide a sample or withdraw consent is sufficient to serve the legislature's goals, because *both* options produce usable evidence.

But if the driver is unconscious, a "refusal" is not probative, and the need for a test result is much greater. This is especially true when the driver's unconsciousness is a by-product of medical treatment, as in this case—without observations of intoxicated behavior and with

no way to disentangle the effects of the sedatives from drugs/alcohol, a test result is the only probative evidence available to either party. The Colorado Supreme Court rejected a similar claim for that reason:

> When drivers are unconscious, law enforcement officers are deprived of the evidence they typically rely on in drunk-driving prosecutions: unlike conscious drivers, unconscious drivers cannot perform roadside maneuvers, display speech or conduct indicative of alcohol impairment, or admit to alcohol consumption. In order to effectively combat drunk driving, the state needs some means of gathering evidence to deter and prosecute drunk drivers who wind up unconscious. Section 42-4-1301.1(8) satisfies that need. Therefore, Hyde's equal protection challenge, like his Fourth Amendment claim, fails.

Hyde, 393 P.3d at 969. And the harms of taking a blood sample from an unconscious OWI suspect are minimal: a conscious suspect may experience pain, discomfort, or anxiety during a blood draw, but an unconscious suspect will not—McGee did not seem to notice at all. *See* MTS Ex. A, at 12:30–17:00. Nor can unconscious OWI suspects actively resist, so drawing blood without their actual consent does not create the same undesirable risks. *See Hitchens*, 294 N.W.2d at 688.

McGee complains that motorists cannot designate someone else to make their implied-consent decision. *See* Def's Br. at 90–91 (citing *Lubka v. Iowa Dep't of Transp.*, 599 N.W.2d 466, 469 (Iowa 1999)). Of course not. The refusal decision can only be probative as evidence

of *subjective awareness* of intoxication, which nobody but the suspect can have. *See State v. Smidl*, No. 12–2182, 2014 WL 69751, at *2 & n.1 (Iowa Ct. App. Jan. 9, 2014); *cf. State v. Wilson*, 878 N.W.2d 203, 212–13 (Iowa 2016) (explaining analogous chain of inferences).

Finally, McGee argues it is unfair that conscious OWI suspects are not subject to warrantless blood draws without consent unless the conditions in section 321J.10A are met, including an actual exigency and a death or likely death resulting from the suspected OWI offense. *See* Def's Br. at 92–93. But that does not *protect* a conscious person—it gives police *additional* options to collect evidence of intoxication beyond test refusal, in cases that implicate the very strongest interests in exhaustive prosecution. In those cases, on top of refusal evidence, police can seek a warrant for a forced blood draw—or they can obtain that blood sample and establish a reasonable basis to believe that a real exigency existed, retrospectively. *See* Iowa Code § 321J.10A(1)(c); *Johnson*, 744 N.W.2d at 342–45. Those additional/alternative sources of probative evidence were not available here. This means McGee is not similarly situated to a motorist who is conscious and whose blood is drawn over their refusal under section 321J.10 or section 321J.10A, and there is a rational basis for treating him differently.

II. The court did not err in finding that Officer Fricke complied with section 321J.7.

Preservation of Error

Error was preserved. McGee argued that a recertification was required to comply with section 321J.7. *See* MTS-Tr. 55:23–60:8. The district court rejected that argument. *See* MTS-Tr. 71:5–25.

Standard of Review

Review of this ruling applying section 321J.7 is for errors at law. The district court's finding that McGee remained unable to consent or refuse must stand if supported by substantial evidence. *See State v. Weidner*, 418 N.W.2d 47, 48–49 (Iowa 1988).

Merits

McGee argues that his condition "meaningfully changed" in the time between the certification and the blood draw, invalidating the certification. *See* Def's Br. at 93–96. He is wrong. The video footage established the opposite: that he was, in fact, still incapacitated.

After receiving the certification, Officer Fricke explained the situation to McGee's family. *See* MTS Ex. A, at 0:40–4:45. Then, as medical examiner's office staff were preparing the blood draw, McGee started moving and vocalizing. *See* MTS Ex. A at 6:45–7:00. Hospital staff helped McGee sit up and stopped him from ripping out his IVs.

Someone had heard him say that he had to pee. Hospital staff helped him to the edge of the bed and got him a urinal, but he had either already started urinating or was unable to control his urination, and the sound of liquid hitting the floor is audible as the plastic receptacle wobbles into view. *See* MTS Ex. A, at 7:00–7:45. McGee apparently finished urinating without incident, but then he tried to get up and walk away—he would not follow directions to sit down, and he could not answer the question: "What do you need?" *See* MTS Ex. A, at 7:45–8:35. Hospital staff helped McGee sit down and lay back down. McGee curled up on his side and closed his eyes. MTS Ex. A, at 8:35–9:30. Hospital staff and his family helped cover McGee with blankets. By the time the staff member from the medical examiner's office was ready to try again to take a blood sample, he was unconscious again. *See* MTS Ex. A, at 9:30–12:30. McGee did not respond to anything that was said or done, as his sample was withdrawn (which included more stimulus as a family member started picking through his hair, looking for remnants of broken glass from the vehicle collision). *See* MTS Ex. A, at 12:30–17:00. And McGee did not appear to be aware of Officer Fricke's subsequent conversation with his family, while they all stood around his hospital bed. *See* MTS Ex. A, at 17:00–25:45.

The recording of this interaction makes it *harder* for McGee to challenge the validity of the certification under section 321J.7. This is because the certification is not conclusive as to whether McGee was capable of consenting or refusing. *See Weidner*, 418 N.W.2d at 48. "[I]n order for the test to be validly obtained under this statute that the conditions authorizing withdrawal of blood in fact be shown to have existed"—that it, McGee must actually be incapacitated. *See id.* "[T]he required certificate is strong evidence that this is the case." *Id.* And the video of the entire episode forecloses any doubt. Nobody in McGee's apparent condition could make any decision that would be anywhere near voluntary under *Pettijohn*. *See Pettijohn*, 899 N.W.2d at 32, 37 (finding that Pettijohn's intoxication "weighs against finding his consent voluntary and uncoerced" and concluding that meant "his capacity to make reasoned and informed decisions was diminished"). The district court found this was "a terribly disingenuous argument." *See* MTS-Tr. 58:2–59:11. It has not improved on appeal by citation to any authority or identification of any countervailing fact.

Nothing in the video, even if it were favorable, could change the fact that McGee had already been sedated with a combination of ativan, fentanyl, and haldol. *See* MTS-Tr. 30:22–31:19; MTS Ex. 1;

App. 12. And the video left no doubt that McGee remained unable to make a voluntary implied-consent decision. The district court did not err by rejecting this challenge. *See State v. Axline*, 450 N.W.2d 857, 860 (Iowa 1990) (finding substantial evidence to support the district court's ruling that "even though Axline was conscious at the time, he was nevertheless in a condition rendering him incapable of giving or refusing consent").

III. McGee's challenges to section 814.7 are moot.

The State does not contest error preservation for any of McGee's other claims. Error was exhaustively preserved. Therefore, section 814.7 is irrelevant, and McGee's arguments about it are moot.

CONCLUSION

The State respectfully requests that this Court reject McGee's challenges and affirm his conviction.

REQUEST FOR ORAL ARGUMENT

If retained, this case should be set for oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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