No. 14-266

In the Supreme Court of the United States

COLORADO,

Petitioner,

v.

JACK LEE SCHAUFELE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below properly considered the totality of the circumstances in holding that law enforcement authorities were not justified in ordering a nonconsensual draw of respondent's blood.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Cases—continued

Cases—continued

Statutes

Other Authorities

BRIEF FOR RESPONDENT IN OPPOSITION

Just last year, in *Missouri* v. *McNeely*, 133 S. Ct. 1552 (2013), this Court held that the totality of the circumstances must be considered when determining whether exigent circumstances justify compelling a warrantless blood draw in cases of suspected drunk driving. Faithfully applying that standard, the court below—in a fractured set of opinions that did not produce a majority decision—upheld the trial court's ruling that a warrantless and nonconsensual draw of respondent's blood violated the Fourth Amendment, in circumstances where law enforcement authorities could have obtained a warrant without compromising the efficacy of the search.

There is no need to review that decision. Petitioner Colorado's contention that the lower courts and law enforcement authorities are confused about the meaning of *McNeely* is manifestly incorrect: there is *no* disagreement among the courts—or, for that matter, any confusion that has been expressed by law enforcement personnel—about any issue presented in this case. To the contrary, courts and state officials are ably implementing *McNeely*'s dictates. And because these efforts have been underway for little more than a year, an immediate effort by this Court to elaborate upon *McNeely*'s holding would, in any event, be premature. For those reasons, and because the totality of the circumstances analysis applied below is in fact wholly consistent with the Fourth Amendment's requirements, the petition for certiorari should be denied.

STATEMENT

A. Warrantless blood draws under the Fourth Amendment

In 1966 this Court held that the Fourth Amendment forbids bodily intrusions "on the mere chance that desired evidence might be obtained." *Schmerber* v. *California*, 384 U.S. 757, 770 (1966). The Court confirmed that reasoning in *McNeely*. In that case, Justice Sotomayor, writing for five Justices (herself and Justices Scalia, Kennedy, Ginsburg, and Kagan), explained that "consistent with general Fourth Amendment principles, * * * exigency in [drunk driving cases] must be determined case by case based on the totality of the circumstances." 133 S. Ct. at 1556. The decision added that "the natural metabolization of alcohol in the bloodstream" does not present a "*per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk driving cases." *Ibid.* Rather, "[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id.* at 1561.

Justice Kennedy wrote separately to agree that the totality of the circumstances test is "correct * * * as a general proposition," while noting that "rules and guidelines * * * can give important, practical instruction to arresting officers." 133 S. Ct. at 1569 (Kennedy, J., concurring). That guidance, according to Justice Kennedy, could come from "[s]tates and other governmental entities which enforce the driving laws." *Ibid.*

Chief Justice Roberts, joined by Justices Breyer and Alito, also had "no quarrel with the Court's 'totality of the circumstances' approach as a general matter." 133 S. Ct. at 1569 (Roberts, C.J., concurring in part and dissenting in part). The Chief Justice, however, urged the Court to provide further guidance to law enforcement authorities and proposed what might be termed a modified *per se* rule: "The natural dissipation of alcohol in the bloodstream * * * would qualify as an exigent circumstance, except that there may be time to secure a warrant before blood can be drawn." *Ibid.* The Chief Justice then added: "If there is [time], an officer must seek a warrant." *Ibid.*

A plurality of the Court, however, expressly "decline[d] to substitute the Chief Justice's modified *per se* rule for [the] traditional totality of the circumstances analysis." 133 S. Ct. at 1563 (plurality opinion). First, the plurality noted that "odd consequences" arise when exigency is "completely dependent on the window of time between an arrest and a blood test." *Ibid.* Second, the plurality observed that the Chief Justice's rule would "distort law enforcement incentives" and "might discourage efforts to expedite the warrant process because it categorically authorizes warrantless blood draws so long as it takes more time to secure a warrant than to obtain medical assistance." *Id.* at 1563-1564. The plurality, however, expressed no misgivings about Justice Kennedy's observation that States and municipalities could provide clearer instruction to law enforcement personnel

on how to distinguish between permissible and impermissible blood draws.[1]

B. The warrantless blood draw in this case

On May 30, 2012, approximately a year before this Court decided *McNeely*, respondent was involved in a car accident. Pet. App. 39a. The first police officer on the scene, Officer Langert, quickly checked on the condition of respondent and the occupants of the other car involved in the accident. Pet. App. 83a. Officer Langert noted that respondent was conscious but unable to answer questions. Pet. App. 84a.

Shortly thereafter, paramedics, two fire engines, and two additional officers, Officers Andrews and Beckstrom, arrived at the accident site. After Officer Andrews redirected traffic and secured the accident area, he checked on respondent. Officer Andrews, like Officer Langert, noted that respondent was disoriented and had trouble answering questions. Pet. App. 3a-4a, 108a. The police officers and paramedics at the scene did not smell alcohol on respondent and believed that his disorientation could have been the result of a head injury. Pet. App. 4a. Although each officer had over twenty-five years of law enforcement experience and had extensive DUI investigation ex-

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[1] Justice Thomas, dissenting, would have adopted a *per se* exigency rule whenever there is probable cause to believe that a suspect was driving under the influence. 133 S. Ct. at 1574 (Thomas, J., dissenting). According to Justice Thomas, "[o]nce police arrest a suspect for drunk driving, each passing minute eliminates probative evidence of the crime," creating an exigency in "*every* situation where police have probable cause." *Id.* at 1575-1576. A majority of the Court, however, explicitly refused to hold that merely believing that a motorist consumed alcohol creates a *per se* exigency exception to the warrant requirement. *Id.* at 1556.

perience and training (Pet. App. 81a, 90a, 103a, 109a, 135a, 137a), none "considered applying for a search warrant" to draw respondent's blood. Pet. App. 2a.

At 7:36 a.m., twenty-one minutes after police arrived at the accident site, paramedics transported respondent to Littleton Adventist Hospital. Pet. App. 42a. The hospital was six miles from the scene of the accident. Pet. App. 42a. Officer Beckstrom also went to the hospital to continue investigating the accident. Pet. App. 42a. At the hospital, Officer Beckstrom tried to speak with respondent but he was still unresponsive; she there noted, for the first time, that respondent smelled of "stale" alcohol. Pet. App. 139a. Officer Beckstrom then went to check on the driver of the other vehicle. Pet. App. 141a. A doctor told Officer Beckstrom that the other driver had a cracked rib. Pet. App. 141a.

Officer Beckstrom then tried to inform respondent about Colorado's express consent law but was unable to because respondent was unconscious.[2] Pet. App. 143a. Without ascertaining the extent of respondent's injuries, Officer Beckstrom instructed a nurse to draw respondent's blood because the other driver sustained a "serious bodily injury." Pet. App.

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[2] Colorado's express consent law deems all drivers in the State to have automatically given consent for a chemical test by breath, blood, or urine to determine blood alcohol content. COLO. REV. STAT. § 42-4-1301.1(1) (2014). If a police officer has "probable cause to believe the person was driving a motor vehicle" under the influence, the person is "required" to take a breath or blood test to determine blood alcohol level. *Id.* § 42-4-1301.1(2)(a)(I). Failure to comply will result in a one-year revocation of driving privileges. *Id.* § 42-4-1301.1(4).

144a. The nurse drew respondent's blood at 8:14 a.m., approximately one hour and four minutes after the accident and thirty minutes after Officer Beckstrom first believed she had probable cause to order the blood draw. Pet. App. 145a. Although the officers involved in the accident investigation were aware of expedited warrant procedures in DUI blood draw cases that could produce a warrant in as little as an hour, none of the officers had "any practical experience with the expedited warrant process" and they made no attempt to use it in this case. Pet. App. 5a, 44a, 69a.

C. Procedural history

1. Respondent's blood alcohol level, at .205%, was above Colorado's statutory threshold. Pet. App. 5a. Police "ultimately determined that [respondent] caused the accident." Pet. App. 5a. He was charged with vehicular assault, driving under the influence, and careless driving resulting in injury.[3] Pet. App. 6a.

Five months after this Court's decision in *McNeely*, the trial court held a hearing to determine whether respondent's blood test results should be suppressed. Pet. App. 79a-80a. Relying on *McNeely* and *Schmerber*, the court granted respondent's motion to suppress evidence from the warrantless blood draw. Pet. App. 60a, 62a, 72a. The court noted that, although Missouri had an express consent statute that was identical to Colorado's, the *McNeely* Court "still *expressly* required that a blood draw be performed *only* pursuant to a search warrant" or under

[3] The only injury noted in the record is the cracked rib of the other driver. Pet. App. 141a.

an exigent circumstance exception to the warrant requirement. Pet. App. 63a. Thus, the trial court determined that Colorado's express consent statute did not override the Fourth Amendment warrant requirement. The court further concluded that the prosecution did not establish exigent circumstances justifying respondent's warrantless blood draw. Pet. App. 72a.

The State then filed a motion for reconsideration, arguing—for the first time—that the trial court should apply the modified *per se* rule proposed by Chief Justice Roberts in *McNeely*; under that approach, a warrant was not required because one could not have been obtained before respondent's blood could be drawn. Pet. App. 74a. The trial court denied the motion because the modified *per se* rule was not adopted by a majority of this Court and was expressly rejected by a plurality of four Justices. Pet. App. 77a. The State then filed an interlocutory appeal to the Colorado Supreme Court. Pet. App. 2a.

2. On appeal, a fractured Colorado Supreme Court affirmed. Pet. App. 1a-37a. A three-justice plurality determined that the trial court properly "considered the totality of the circumstances surrounding the nonconsensual and warrantless draw of [respondent's] blood." Pet. App. 12a. After closely reviewing the analysis in *McNeely* (Pet. App. 10a-12a, 18a-20a), the plurality noted that, although the police officers at the scene of respondent's accident did not have probable cause to believe that respondent was intoxicated, by the time Officer Beckstrom ordered respondent's blood draw at 8:14 a.m. she thought that probable cause did exist. Pet. App. 12a-13a. Thus, the "trial court's analysis [was] consistent with *McNeely*'s holding that the Fourth Amendment

requires officers in drunk driving investigations to obtain a warrant before drawing a blood sample when they can do so without significantly undermining the efficacy of the search." Pet. App. 20a.

In reaching this conclusion, the plurality declined to "disregard the majority opinion in *McNeely* * * * and to adopt instead Chief Justice Roberts's concurring and dissenting opinion that 'a warrantless blood draw may ensue' if 'an officer could reasonably conclude that there is not sufficient time to seek and receive a warrant.'" Pet. App. 2a-3a (quoting *McNeely*, 133 S. Ct. at 1573 (Roberts, C.J., concurring in part and dissenting in part)). The plurality explained that it did "not feel at liberty to adopt" the Chief Justice's approach because his opinion "garnered only three votes," while "four justices expressly rejected" the modified *per se* rule. Pet. App. 3a.

Two justices concurred only in the result. Pet. App. 21a-28a. Because motions for reconsideration in Colorado "are designed to allow trial courts to correct erroneous rulings or respond to changes in the law" rather than "to allow parties to litigate brand new arguments," these concurring justices limited their analysis to the conclusion that the trial judge had not abused his discretion in denying the prosecution's motion for reconsideration. Pet. App. 21a.

Finally, two justices dissented. Pet. App. 28a-37a. In their view, a "warrantless blood draw would have been reasonable" under both the *McNeely* plurality's totality of the circumstances test and Chief Justice Roberts's modified *per se* rule. Pet. App. 35a. The dissenters noted that a plurality of this Court (rather than a majority) had expressly declined in *McNeely* to adopt the modified *per se* rule. Pet. App. 29a-30a. They added that, in their view, the totality

of the circumstances test and the modified *per se* approach are not mutually exclusive, suggesting that "[t]he fact that the *McNeely* majority opinion embraces the totality of the circumstance[s] test thus cannot be read * * * as a rejection of the Chief Justice's approach." Pet. App. 33a.

REASONS FOR DENYING THE PETITION

Petitioner's central contention—that *McNeely* "has thrown the analysis of exigent circumstances for warrantless blood draws into utter turmoil" (Pet. 13)—is unfounded. Only one state court has expressed any degree of uncertainty about the post-*McNeely* standard for the exigency exception to the Fourth Amendment's warrant requirement in drunk driving cases: the Colorado Supreme Court itself. And even so, both the trial court and the plurality below correctly analyzed the warrantless blood draw in this case under the totality of the circumstances standard.

Wholly apart from the absence of a conflict, petitioner's request that this Court clarify *McNeely* does not merit review, for several reasons. First, the blood draw here—as in the vast majority of post-*McNeely* blood draw cases—involves events that occurred *before* this Court decided *McNeely*. Because States are only beginning to apply the totality of the circumstances test in cases arising after *McNeely*, reviewing the reasonableness of warrantless blood draws now would be premature. Second, many state and local law enforcement agencies have published helpful guidance for police officers to follow when they have probable cause that a suspect is driving under the influence; thus, Justice Kennedy's vision (in his concurring opinion in *McNeely*) is successfully coming to fruition. Third, as this case shows, *McNeely*'s totality

of the circumstances test strikes the proper balance between uniform Fourth Amendment protections and due respect for state diversity in warrant procedures. Finally, because the Colorado Supreme Court's decision in this case did not produce a majority for *any* proposition of law, it has no precedential value. The petition accordingly should be denied.

A. Courts are not confused about how to analyze exigent circumstances in light of *McNeely*

Colorado asks the Court to revisit, and to clarify or modify, its recent decision in *McNeely*. But in the absence of a conflict or practical confusion, and at a time when lower courts are just beginning to react to *McNeely*'s holding, the Court should decline that invitation.

1. There is no conflict in the lower courts on the questions petitioner has presented for review

Petitioner has presented two questions for review: (1) whether *McNeely* precludes adoption of the modified *per se* rule for exigent circumstances; and (2) if not, whether that rule *should* be adopted instead of the traditional totality of the circumstances approach. But there is no conflict in the lower courts on either of these questions.

Of the 331 decisions citing *McNeely* that were available in West's database as of November 30, only one case besides the decision below, a ruling of an intermediate New Jersey appellate court, even mentions the modified *per se* rule. *State* v. *Jones*, 96 A.3d 297, 304 (N.J. Super. Ct. App. Div. 2014). And that decision's approach to analyzing exigent circumstances is entirely consistent with that of the Colora-

do Supreme Court. Like the three-justice Colorado plurality, the New Jersey court declined to apply the modified *per se* rule and instead invoked the "traditional totality of the circumstances analysis." *Ibid.* (quoting *McNeely*, 133 S. Ct. at 1563). Thus, post-*McNeely* debate about petitioner's favored rule is confined to a single decision of the Colorado Supreme Court.

Although petitioner suggests that courts would adopt the modified *per se* rule if only they understood that *McNeely* did not preclude it, there is little evidence for this theory. The *Jones* court considered the modified *per se* rule on its merits; that court did not simply assume that the *McNeely* plurality's rejection of the rule was dispositive. 96 A.3d at 304-305. The judges in *Jones* found the rule wanting, not merely because this Court had declined to apply it, but because its emphasis on the amount of time available to obtain a warrant was too "stringent." *Id.* at 304. This very concern—the rigidity of the modified *per se* rule—is what deterred this Court from adopting that approach in the first place.

In the absence of any actual conflict on the point, petitioner cites three published and four unpublished opinions as evidence that "[o]fficers and courts desperately need guidance." Pet. 29 & n.3. Petitioner asserts that these cases have addressed "highly similar facts" and yet reached "starkly different results." *Id.* at 29. In fact, however, all seven of these decisions apply the totality of the circumstances approach in unexceptional ways. As noted above, only one of these cases, *State* v. *Jones*, even addresses the modified *per se* rule. And after evaluating that approach on the merits, the New Jersey court declined to adopt it.

Our survey of the law in this area reveals harmony, not discord.

The supposed confusion reported by petitioner actually reflects the predictable reality that some defendants prevail under *McNeely*'s test while others do not. This reality is neither surprising nor problematic. Given the fact-specific analysis required under this test, it is entirely appropriate that outcomes occasionally turn on seemingly minor factual differences.

For instance, petitioner contrasts the result in *State* v. *Granger*, 761 S.E.2d 923 (N.C. Ct. App. 2014) (exigency) with that in *Douds* v. *State*, 434 S.W.3d 842 (Tex. Crim. App. 2014) (no exigency). See Pet. 29 & n.3. But *Granger* involved facts meaningfully different from those in *Douds*. The officer conducting the accident investigation in *Granger* was acting alone, meaning that he could not both apply for a warrant and, simultaneously, rush the defendant to the hospital. Applying for a warrant would have jeopardized the defendant's health. *Granger*, 761 S.E.2d at 925, 928. In contrast, because the officer in *Douds* was a member of a response team and made an interim stop at police headquarters, any of several officers could have applied for a warrant while others tended to the defendant. 434 S.W.3d at 845-846, 855-856. In addition, the defendant in *Granger* was seriously injured; the court found there was a reasonable probability that if the officer had "left [the defendant] unattended to get a search warrant or waited any longer for the blood draw," the defendant "would have been administered pain medication by hospital staff as part of his treatment, contaminating his blood sample." 761 S.E.2d at 928. No such circumstance existed in *Douds*. Given these important fac-

tual differences, it is hardly surprising that *Douds* and *Granger* reached different results.

Likewise, petitioner contrasts the result in *Douds* (no exigency) with the result in *State* v. *Jones* (exigency). Although the facts of these cases are similar in some respects, they differ in at least one material way: the car accident in *Jones* was much more serious. 96 A.3d at 305 ("[T]he 'special facts' that supported a warrantless blood sample in *Schmerber* and were absent in *McNeely*, were present in this case: an accident, injuries requiring hospitalization, and an hours-long police investigation.").

In any event, so long as the "touchstone of the Fourth Amendment is 'reasonableness'" (*Fernandez* v. *California*, 134 S. Ct. 1126, 1132 (2014)), some amount of variation in outcomes is inevitable. Similar cases also would occasionally produce different results even under the modified *per se* test sought by petitioner. Because that test asks whether a police officer could "reasonably" conclude that there is insufficient time to obtain a warrant, it is not susceptible to mechanical application. See *McNeely*, 133 S. Ct. at 1573 (Roberts, C.J., concurring in part and dissenting in part).

With courts ably applying *McNeely*, there is no reason to modify the totality of the circumstances test merely because a handful of cases have presented facts that are close to the line between lawful and unlawful searches.

***2. It would be premature to revisit* McNeely**

Moreover, given that *McNeely* was decided only last year, petitioner's claim that courts and law enforcement officers are "at a loss" about the decision's meaning is not only inaccurate but premature. Pet.

29. About 90 percent of the previously mentioned 331 decisions citing *McNeely* turn on factual records that predate the *McNeely* decision. That statistic includes the seven cases petitioner cites as evidence of a "post-*McNeely* * * * divide" over how to analyze exigent circumstances. Pet. 29 & n.3. All seven of these "post-*McNeely*" opinions address events that occurred *before McNeely* was decided.[4]

These decisions cannot have taken account of, nor considered the constitutional implications of, post-*McNeely* changes to warrant or other procedures that may "preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement." *McNeely*, 133 S. Ct. at 1563. Yet new guidelines or procedures can have a profound effect on how courts analyze exigency. For instance, because courts consider factors such as the amount of time it takes to obtain a warrant, they may be less likely to find exigency when expedited warrant procedures have been implemented. And if such procedures enable officers actually to obtain a warrant, courts need not assess exigent circumstances at all. The full effect of *McNeely* thus remains to be seen, because even very recent decisions are still grappling with pre-*McNeely* facts. See, *e.g.*, *People* v. *Armer*,

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[4] See *People* v. *Walker*, No. A135326, 2014 WL 2738539, at *1-2 (Cal. Ct. App. June 17, 2014) (events occurred April 2009); *State* v. *Jones*, 2013 WL 5496786, at *1 (Del. Super. Ct. Sept. 9, 2013) (events occurred October 2012); *Jones*, 96 A.3d at 298-299 (events occurred December 2011); *State* v. *Sekhon*, 2014 WL 2480074, at *1 (N.J. Super. Ct. App. Div. June 4, 2014) (events occurred June 2011); *Granger*, 761 S.E.2d at 924-925 (events occurred May 2012); *Douds*, 434 S.W.3d at 845 (events occurred May 2010); *State* v. *Tullberg*, 349 Wis. 2d 526 (Ct. App. 2013) (events occurred July 2009).

No. 5-13-0342 (Ill. App. Ct. Oct. 27, 2014); *State* v. *Markle*, No. A13-2361, 2014 WL 5507023 (Minn. Ct. App. Nov. 3, 2014); *State* v. *Clark*, No. 5-13-34, 2014 WL 5510488 (Ohio Ct. App. Nov. 3, 2014).

Indeed, searches in many cases with pre-*McNeely* facts have been upheld because they were conducted "in objectively reasonable reliance on binding appellate precedent." *E.g.*, *People* v. *Youn*, 229 Cal. App. 4th 571, 573 (2014) (citing *Davis* v. *United States*, 131 S. Ct. 2419, 2423–2424 (2011)); *State* v. *Edwards*, 853 N.W.2d 246 (S.D. 2014); *State* v. *Reese*, 844 N.W.2d 396 (Wis. Ct. App. 2014). In cases decided under this Fourth Amendment "good faith" exception, there is no need to interpret *McNeely* at all. Over time, however, as States incorporate *McNeely* into their law enforcement training programs, the good-faith exception will become less salient. See *State* v. *Fierro*, 853 N.W.2d 235, 245 (S.D. 2014) (opting not to apply the good-faith exception because the officer had received training in line with *McNeely*).

As more courts apply *McNeely*, genuine differences of opinion may (or may not) emerge about the proper test for exigency. But so far, only a fraction of the courts citing *McNeely* in the context of exigency have applied *McNeely* on the merits. And many courts have yet to apply *McNeely* at all, in any context, let alone to the particular questions petitioner has presented for review. Courts in eighteen States[5] have yet even to cite *McNeely*. Courts in another eleven States and the District of Columbia have yet

[5] These include Alaska, Connecticut, Georgia, Maine, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina, Utah, Vermont, Virginia, and West Virginia.

to apply *McNeely*'s exigent circumstances test.[6] As we have explained, only two courts have discussed the applicability or desirability of the modified *per se* rule. And no state supreme court, other than Colorado's, has considered this rule. For all of these reasons, it is too early to conclude that courts cannot properly interpret and apply *McNeely* in the context of exigent circumstances.

*3. Much of the post-*McNeely *litigation focuses not on exigency but on implied consent, which is not at issue in this case*

In fact, to the extent there has been any uncertainty generated by *McNeely*, it concerns an issue that is *not* presented in this case: the constitutionality of warrantless blood draws conducted under implied consent statutes. Such statutes, which have been adopted by all fifty states, require motorists suspected of drunk driving to cooperate with a blood draw or face penalties, such as license suspension, if they refuse. *McNeely*, 133 S. Ct. 1566-1567 (plurality opinion) (describing various implied consent laws).

Before *McNeely*, some courts had accepted the argument that an implied consent statute could function as an exception to the warrant requirement. See *State* v. *Wells*, No. M2013-01145-CCA-R9-CD, 2014 WL 4977356, at *6-8 (Tenn. Crim. App. Oct. 6, 2014) (collecting cases); *Aviles* v. *State*, 385 S.W.3d 110 (Tex. App. 2012), cert. granted, judgment vacated, 134 S. Ct. 902 (2014). After *McNeely*, however, courts have grown more skeptical of this view. See,

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[6] These include Alabama, Arizona, Florida, Hawaii, Idaho, Iowa, Kentucky, Montana, New York, North Dakota, and Pennsylvania.

e.g., *Byars* v. *State*, 336 P.3d 939, 945-946 (Nev. 2014) (striking down a provision of the State's implied consent law on the ground that the statute could not by itself authorize a warrantless blood draw).

Even in the context of implied consent, however, any initial post-*McNeely* uncertainty in the courts appears to have been largely resolved. Most courts that have addressed *McNeely*-based challenges to the constitutionality of implied consent statutes have rejected them.[7] And because implied consent statutes vary by jurisdiction, courts that limit or invalidate provisions of such statutes are not necessarily in conflict with courts in other States that do not. In striking down part of Nevada's statute, for example, the Supreme Court of Nevada emphasized that it was not in conflict with any other courts. *Byars*, 336 P.3d at 946 ("We have found no jurisdiction that has up-

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[7] Courts have reaffirmed the constitutionality of implied consent statutes post-*McNeely* in the following states: Arizona, Delaware, Hawaii, Kansas, Minnesota, North Dakota, Pennsylvania, Tennessee, Texas, and Wisconsin. See *State* v. *Butler*, 302 P.3d 609, 612 (Ariz. 2013) (en banc); *State* v. *Flonnory*, 2013 WL 4567874, at *3 (Del. Super. Ct. July 17, 2013); *State* v. *Yong Shik Won*, 332 P.3d 661, 679 (Haw. Ct. App. 2014), cert. granted, No. SCWC-12-0000858, 2014 WL 2881259 (Haw. June 24, 2014); *State* v. *Nece*, No. 111,401, 2014 WL 5313744, at *7-8 (Kan. Ct. App. Oct. 10, 2014); *State* v. *Brooks*, 838 N.W.2d 563, 572 (Minn. 2013), cert. denied, 134 S. Ct. 1799 (2014); *State* v. *Smith*, 849 N.W.2d 599, 603-604 (N.D. 2014); *Sprecher* v. *Com., Dep't of Transp., Bureau of Driver Licensing*, 100 A.3d 768, 772 (Pa. Commw. Ct. 2014); *State* v. *Wells*, No. M2013-01145-CCA-R9-CD, 2014 WL 4977356 (Tenn. Crim. App. Oct. 6, 2014); *Aviles* v. *State*, 443 S.W.3d 291, 294 (Tex. App. 2014), petition for discretionary review filed (Aug. 8, 2014); *In re Hart*, 835 N.W.2d 292 n.3 (Wis. Ct. App. 2013).

held an implied consent statute that allows an officer to use force to obtain a blood sample upon the driver's refusal to submit to a test.").

The only existing disagreement of which we are aware concerning *McNeely*'s impact on implied consent jurisprudence is an *intra*-state conflict in Texas. But even there, every court but one now holds that the State's implied consent statute may not function as a *per se* exception to the warrant requirement. See *Bernal* v. *State*, No. 02-13-00381-CR, 2014 WL 5089182, at *4 (Tex. App. Oct. 9, 2014) (collecting cases). Thus, over time, a broad consensus has formed that implied consent statutes are valid so long as they do not purport to independently authorize warrantless forcible blood draws.

In any event, although courts sometimes address exigency and implied consent in the same case, the issues are separate: the implied consent inquiry is directed at what counts as voluntary consent, not what qualifies as an exigent circumstance. See *State* v. *Brooks*, 838 N.W.2d 563 (Minn. 2013); *Wells*, 2014 WL 4977356. Neither Colorado nor its *amici* in this case raise any issue of implied consent—and consideration of the issue, if ever warranted, accordingly must await future litigation.

B. States have provided guidance to law enforcement authorities on the proper implementation of *McNeely*

The petition also is flawed in making the related contention that law enforcement personnel are uncertain about their post-*McNeely* obligations. In fact, many state courts, police departments, and legislatures have provided clear guidance to law enforcement authorities on the proper response to *McNeely*,

obviating any need for this Court to alter or elaborate upon the *McNeely* rule. Three points confirm this conclusion.

First, courts have adapted to *McNeely*. Prior to that decision, some state courts had interpreted *Schmerber* to permit warrantless blood draws whenever an officer had probable cause to believe that a driver was intoxicated because alcohol naturally dissipates in the bloodstream over time. See, *e.g.*, *State* v. *Shriner*, 751 N.W.2d 538, 544-545 (Minn. 2008). *McNeely*, however, precluded this legal conclusion by reaffirming *Schmerber*'s totality of the circumstances test. Although there has not been sufficient time for the issue to reach many state supreme courts post-*McNeely*, those courts that had incorrectly interpreted *Schmerber* have, after *McNeely*, properly used the totality of the circumstances test. See, *e.g.*, *State* v. *Hubbard*, No. 2014AP738-CR, 2014 WL 3928591, at *1 n.4 (Wis. Ct. App. Aug. 13, 2014).

Second, local governments have provided clear guidance about how to implement the standard expounded in *McNeely*. Following that decision, many state and local executive departments promptly issued memoranda and guidelines to help officers understand warrant procedures for blood draws in DUI cases. Justice Kennedy urged just this approach in *McNeely*, explaining that the totality of the circumstances test "ought not to be interpreted to indicate that this question is not susceptible of rules and guidelines that can give important, practical instruction to arresting officers." *McNeely*, 133 S. Ct. at 1569 (Kennedy, J., concurring). He noted that guidance could come from "[s]tates and other governmental entities" through "rules, procedures, and protocols that meet the reasonableness of the Fourth Amend-

ment and give helpful guidance to law enforcement officials." *Ibid.* That is precisely what state and local governments and organizations have done.[8]

Third, as further evidence that law enforcement authorities are successfully adapting to *McNeely*, state legislatures have revised laws and warrant procedures to expedite blood draw warrants in cases involving suspected alcohol-related vehicular accidents. One particularly apt example comes from Colorado itself. After *McNeely*, Colorado agencies revised "how they request warrants—often by creating short-form warrant requests" to allow for expedited warrants in DUI cases. Lorelei Laird, *Trouble Behind the Wheel: A 2013 Supreme Court Ruling Could Complicate the Laws on Impaired Driving*, 100 A.B.A.J. 56, 67 (Apr. 2014). Thus, as the *McNeely* plurality predicted, a totality of the circumstances

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[8] For example, a Texas county prosecutions chief set out three guidelines: (1) "in all mandatory blood draw cases where the officer can't articulate an exigency" he or she should get a warrant; (2) if a judge is available, "law enforcement [should] get warrants in all DWI refusals"; and (3) officers should get a mandatory blood sample in intoxication, manslaughter, and assault cases, but should get a warrant an hour after the mandatory draw. W. Clay Abbott, *What to Do About Missouri v. McNeely*, TDCAA, http://perma.cc/-GHW9-MK4E (statement of Warren Diepraam, Special Prosecutions Chief for Montgomery Cnty.). See also Phil Rennick, *Blood Warrants: DUI Evidence Post*-McNeely, 19 Behind the Wheel 5, http://perma.cc/E55A-ZUY3 (2013) (California); Ben Fox, *A Comprehensive Analysis of the Impact of* Missouri *v.* McNeely *on Florida DUI Procedures*, http://-perma.cc/5GUR-7Q7H (May 9, 2013) (Florida); Memorandum from Marty J. Jackley, Att'y Gen., *Missouri* v. *McNeely* —Blood Testing Guidelines (Apr. 26, 2013), http://perma.cc/-K2B4-JA3B (South Dakota).

approach provides incentives for jurisdictions to improve warrant procedures and technology.[9]

There is no reason to doubt that courts, police departments, and legislatures will successfully implement *McNeely*. The decision's central holding is familiar to law enforcement personnel; many in the law enforcement community recognized that *McNeely*'s totality of the circumstances rule was "not * * * unusual" in the Fourth Amendment context. See, *e.g.*, Ben Fox, *A Comprehensive Analysis of the Impact of* Missouri *v.* McNeely *on Florida DUI Procedures*, http://perma.cc/5GUR-7Q7H (May 9, 2013). Officers are "often called upon to decide what is 'reasonable' in determining 'reasonable suspicion.'" *Ibid.* Indeed, this Court has recognized that law enforcement personnel must apply reasonableness requirements with regards to the Fourth Amendment in many contexts.[10] *McNeely*, 133 S. Ct. at 1564 (plural-

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[9] *McNeely*, 133 S. Ct. at 1563 (plurality opinion) (rejecting a *per se* approach because it "would improperly ignore the current and future technological developments in warrant procedures, and might well diminish the incentive for jurisdictions to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement" (internal quotations and citations omitted)).

[10] See, *e.g.*, *Brigham City* v. *Stuart*, 547 U.S. 398 (2006) (whether a suspect believes he or she is free to leave and thus can voluntarily consent to a search); *United States* v. *Banks*, 540 U.S. 31 (2003) (how long officers should wait after announcing their presence to enter a home); *Illinois* v. *Wardlow*, 528 U.S. 119 (2000) (whether officers have reasonable suspicion to make an investigative stop and pat down a suspect for weapons); *Ohio* v. *Robinette*, 519 U.S. 33 (1996) (whether consent to a search is recognized as "voluntary"); *United States* v. *Santana*, 427 U.S. 38 (1976) (whether officers are in "hot pursuit" of a suspect).

ity opinion) ("[A] case-by-case approach is hardly unique within our Fourth Amendment jurisprudence."). *McNeely* calls upon police officers to conduct a similar analysis.

C. The totality of the circumstances approach set forth by the majority in *McNeely* is the proper rule

Colorado's petition also presents the question whether adoption of the modified *per se* rule is barred by the majority or plurality opinions in *McNeel*y. There is, however, no need to resolve that issue here. The plurality below did not suggest that it *would* have adopted the modified *per se* rule had it felt free to do so. And in fact, there are good reasons not to follow that approach: the modified *per se* rule embraces an unduly narrow assessment of exigency that is in tension with the context-specific analysis at the heart of Fourth Amendment doctrine.

1. The flexibility of the McNeely *majority's approach is well-suited to the variability of warrant procedures across different jurisdictions*

Although Chief Justice Roberts's opinion in *McNeely* criticized the totality of the circumstances approach as unnecessarily indeterminate (*McNeely*, 133 S. Ct. at 1569 (Roberts, C.J., concurring in part and dissenting in part)), this standard is a touchstone of Fourth Amendment analysis. Time and again, this Court has emphasized that the reasonableness of a Fourth Amendment search is assessed by "examining the totality of the circumstances." See, *e.g.*, *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996); accord *Georgia* v. *Randolph*, 547 U.S. 103, 125 (2006) (Breyer, J., concurring); *Sampson* v. *California*, 547

U.S. 843, 848 (2006); *United States* v. *Knights*, 534 U.S. 112, 118 (2001). As the Court's precedent makes plain, "[t]he constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case." *Sibron* v. *New York*, 392 U.S. 40, 59 (1968).

In keeping with this precedent, the majority in *McNeely* rejected a *per se* exigency rule in favor of a case-by-case, totality of the circumstances approach. 133 S. Ct. at 1561-1562. More specifically, the Court stated, "where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id*. at 1561. Among the factors referenced by the Court as bearing on this inquiry were whether the police needed to attend to a car accident, the warrant procedures in the particular jurisdiction, and the on-going metabolization of alcohol in the bloodstream. *Id*. at 1568. This analysis is consistent with the Court's long-standing view that the potential for "endless variations in the facts and circumstances" inhibits the creation of single-factor tests, such as the modified *per se* rule advocated by petitioner. See *Florida* v. *Royer*, 460 U.S. 491, 506 (1983).

The flexibility of the *McNeely* majority's totality of the circumstances analysis is particularly appropriate in the context of blood alcohol tests. As the Court noted in *McNeely*, there is considerable variation in the warrant processing systems in different jurisdictions, with some taking several hours and others taking as little as fifteen minutes. See 133 S. Ct. at 1567 n.11, 1573. The totality of the circumstances approach allows courts to tailor their legal

analysis so as to provide uniform privacy protections in the face of these varied warrant practices.

The totality of the circumstances approach can yield practical instructions for arresting officers, but this Court has appropriately left it to the States to produce these guidelines. *McNeely*, 133 S. Ct. at 1568-1569 (Kennedy, J., concurring). Thus, the totality of the circumstances approach can provide both the specificity required by law enforcement personnel and the flexibility necessary to accommodate disparate warrant procedures.

2. Conversely, the modified per se *rule, by virtue of its rigidity, is both under- and over-inclusive*

On the other hand, the modified *per se* rule endorsed by Colorado both departs from the Court's well-established context-specific approach and is poorly tailored to the privacy interest it is designed to protect. Rather, depending on the factual circumstances, the rule is sometimes over- and sometimes under-inclusive.

The rule is over-inclusive when proximity to a hospital permits police to avoid applying for a warrant even when they might have received one in a matter of minutes. For example, as Chief Justice Roberts pointed out in *McNeely*, one county in Kansas can issue email warrants in as little as fifteen minutes. *McNeely*, 133 S. Ct. at 1573 (Roberts, C.J., concurring in part and dissenting in part).[11] If a DUI

[11] The speed of warrant processing is rapidly increasing as States adopt more efficient procedures, such as specialized warrants for DUI blood tests and telephonic, email, and video conferencing technology, to expedite communication between officers and judges. *McNeely*, 133 S. Ct. at 1562.

suspect in that county were arrested a few blocks from a hospital and transported to the hospital for a blood test within ten minutes, the modified *per se* rule would not require police to seek a warrant. See *id.* at 1573 (Roberts, C.J., concurring in part and dissenting in part).

But this conclusion is inconsistent with the theory of the exigency exception, which applies only where "the needs of law enforcement [are] so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky* v. *King*, 131 S. Ct. 1849, 1852 (2011). In the Kansas example, the five-minute delay necessary to vindicate the suspect's right against warrantless searches would have no significant effect on the blood test—and thus there is no compelling interest supporting the warrantless search. As the Court noted, blood alcohol content dissipates in a predictable manner, and it is only "longer intervals [that] raise questions about the accuracy of the calculation." *McNeely*, 133 S. Ct. at 1562-1563. As a consequence, in jurisdictions where warrants are issued quickly, the modified *per se* rule would deprive suspects of their Fourth Amendment protections without producing any significant gains with respect to the preservation of evidence.

The modified *per se* rule is also under-inclusive: it does not account for extenuating factors that might *justify* a warrantless blood draw. For example, where police are responding to serious vehicular accidents, it is likely that urgent matters at the scene of the accident will cause significant delays in the blood draw and take precedence over filing a warrant application. This is precisely the scenario that the New Jersey court addressed in *State* v. *Jones*, 96 A.3d 297

(N.J. Super. Ct. App. Div. 2014). That case involved a serious car accident where injuries and an investigation detained the officers at the scene for several hours. *Id.* at 299. The DUI suspect was taken to the hospital via ambulance, but police officers were unable to follow for more than an hour. *Ibid.* When they arrived, they concluded that the ongoing delay was likely compromising the BAC evidence and instructed the nurse to conduct a warrantless blood draw. *Ibid.* As the court explained, because the elapsed time was sufficient to apply for a warrant, under the modified *per se* rule the officers would have been required to do so. *Id.* at 304.

In light of the narrowness of the modified *per se* rule, the *Jones* court relied instead on the totality of the circumstances approach, concluding that the delays caused by the accident, injuries, and ensuing investigation justified the warrantless blood draw. *Id.* at 305. The factual scenario in *Jones*, which is not uncommon in the DUI context, illustrates the shortcomings of petitioner's proposed rule.

In addition to being over- and under-inclusive, the modified *per se* rule creates wide variation in the Fourth Amendment protections afforded to citizens in different jurisdictions. A rule that focuses exclusively on the time it takes to receive a warrant will lead to widely varied protections depending upon the warrant procedures of a given jurisdiction, while distorting the reasonableness inquiry at the heart of the Fourth Amendment. The point is made expressly in the brief submitted by petitioner's own *amici*, which notes that the time to obtain a search warrant "varies dramatically depending upon the jurisdiction and the facts of the case." Brief for *Amici* Wisconsin *et al.* at 10. The modified *per se* rule would peg Fourth

Amendment protections to these varied standards, vitiating uniformity of rights. *Virginia* v. *Moore*, 553 U.S. 164, 172 (2008) ("[T]he Fourth Amendment's meaning [does] not change with local law enforcement practices * * *.").

D. The plurality opinion below has no precedential effect in Colorado and therefore does not merit review

Finally, the holding below does not warrant review for the independent reason that the Colorado Supreme Court's decision was so deeply divided that it has no precedential weight. This Court, of course, generally grants review when the decision of a state court of last resort conflicts with the holding of another state court of last resort, of a federal court of appeals, or of this Court. Sup. Ct. Rule 10. But because the decision below produced no majority holding, the rule of that decision cannot possibly conflict with the decision of this or any other court.

The Colorado Supreme Court divided three ways in this case. Three justices voted to uphold the trial court's application of the totality of the circumstances approach, concluding as well that they were not free to apply a modified *per se* rule. Pet. App. 1a-20a. Two other justices concurred in the judgment but employed wholly different reasoning; they voted to affirm on procedural grounds, opining that Colorado's assertion of the modified *per se* rule for the first time on rehearing was improper. Pet. App. 21a-28a. The two dissenting justices voted to reverse the trial court. Pet. App. 28a-37a.

As the dissent below accordingly noted, the "plurality [decision] will not constitute binding precedent for future decisions." Pet. App. 36a. Because three

justices in the plurality reached the merits and two would have decided the case on procedural grounds, the justices voting to affirm shared no common reasoning. As this Court observed in *Texas* v. *Brown*, a decision that does not have majority support is "not a binding precedent" but merely "the point of reference for further discussion of the issue." 460 U.S. 730, 737 (1983) (plurality opinion). Lower courts have consistently interpreted this principle to mean that "in cases where approaches differ, no particular standard is binding on an inferior court because none has received the support of a majority." *Anker Energy Corp.* v. *Consolidation Coal Co.*, 177 F.3d 161, 170 (3d Cir. 1999); accord *King* v. *Palmer*, 950 F.2d 771, 782 (D.C. Cir. 1991) (en banc). And a decision that has no precedential effect even in the jurisdiction where it was issued does not warrant this Court's review.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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