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INTRODUCTION

Early one fall morning, Jeffrey Sisler was driving down the highway when he was suddenly stopped by a police officer.[1] Suspecting that Sisler had been drinking, the officer arrested Sisler and took him to a hospital for a blood draw.[2] When they arrived at the hospital, the officer, without obtaining a warrant, ordered hospital staff to draw a sample of Sisler's blood, but Sisler refused to comply.[3] Following Sisler's refusal, the officer commanded another officer, two hospital security guards, a physician, and a nurse to shackle him to the bed and forcefully draw his blood.[4]

Sisler was subsequently prosecuted for drunk-driving and moved to have the results of his blood test suppressed on the grounds that it was drawn without his consent in violation of the Constitution.[5] Upon review by Ohio's Second District Court of Appeals, the court explained, "[i]t offends a fundamental sense of justice . . . that an accused who has been shackled to a

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1. State v. Sisler, 683 N.E.2d 106, 108 (Ohio Ct. App. 1996).
2. *Id.* at 108.
3. *Id.*
4. *Id.*
5. *Id.*

hospital bed is held down by six persons while a seventh jabs at his arm . . . at the direction of the State's officers."[6] Thus, the court concluded, an officer is prohibited from using this type of force to compel a motorist to submit to a blood draw.[7]

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" unless an officer obtains a search warrant from a neutral and detached magistrate.[8] The U.S. Supreme Court has long considered blood draws to be a search under Fourth Amendment principles and proclaimed that penetrating the skin to obtain a sample containing nearly every aspect of a person's identity implicates the most significant privacy interests.[9] Moreover, the Supreme Court has also recognized the States' interest in battling drunk-driving and the importance of blood alcohol content (BAC) evidence to enforce drunk-driving laws.[10] Yet, the Court has been adamant about demanding a warrant for blood draws unless officers can show that a well-established exception exempts the warrant requirement.[11]

In an effort to enforce drunk-driving laws and encourage motorists to submit to BAC testing, all fifty states, including Ohio, have enacted "implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing" if an officer suspects them of drunk-driving.[12] Despite being coined "implied consent," these laws, alone, do not form the basis of consent sufficient for officers to conduct a warrantless search.[13] Rather, they allow the State to punish refusal through civil and evidentiary penalties.[14] Thus, motorists still have the freedom to refuse a blood draw, but implied consent laws just make such refusal unlawful.[15]

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6. *Sisler*, 683 N.E.2d at 111. The court also explains that "[b]odily intrusions to obtain evidence of crime implicate privacy considerations of the highest order." *Id* at 110. Moreover, consent sufficient to waive an accused expectations of privacy implies consent to the methods employed as well. *Id*. However, when the method used to perform a search "offends a fundamental sense of justice, the resulting due process violation is not waived by the [original] consent that was given. *Id*.

7. *Id.*

8. U.S. CONST. amend. IV.

9. *See* Mitchell v. Wisconsin, 139 S. Ct. 2525, 2543 (2019); Birchfield v. North Dakota, 136 S. Ct. 2160, 2184 (2016); Missouri v. McNeely, 569 U.S. 141, 148 (2013); Schmerber v. California, 384 U.S. 757, 767 (1966).

10. *Mitchell*, 139 S. Ct. at 2531; *Birchfield*, 136 S. Ct. at 2166; *McNeely*, 569 U.S. at 145; *Schmerber*, 384 U.S. at 767-68.

11. *Mitchell*, 139 S. Ct. at 2531; *Birchfield*, 136 S. Ct. at 2173; *McNeely*, 569 U.S. at 145; *Schmerber*, 384 U.S. at 767-68.

12. *McNeely*, 569 U.S. at 161. *See* OHIO REV. CODE ANN. § 4511.191 (2016).

13. *Birchfield*, 136 S. Ct. at 2185.

14. *Id.* at 2185-86.

15. City of Kettering v. Baker, 328 N.E.2d 805, 807 (Ohio 1975); State v. Newton, 636 P.2d 393, 397 (Or. 1981); State v. Prado, 960 N.W.2d 869, 875 (Wis. 2021).

Despite this character of implied consent laws, Ohio used its implied consent law to contravene the warrant requirement for certain motorists.[16] In 2008, Ohio added a new provision to its implied consent law that states if a motorist suspected of drunk-driving is a repeat offender and refuses to submit to a blood draw, "[t]he law enforcement officer who made the request may employ *whatever reasonable means are necessary* to ensure that the person submits to a chemical test of the person's [blood]."[17] The provision even grants officers immunity from criminal and civil liability for any claims arising from the officer's actions "unless the officer so acted with malicious purpose, in bad faith, or in a wanton or reckless manner."[18]

This provision, Ohio Revised Code Section 4511.191(A)(5)(b), was founded upon an erroneous and outdated interpretation of *Schmerber v. California.*[19] Following *Schmerber*, many States believed the Supreme Court had created a categorical *per se* rule that the inherent dissipation of alcohol in the blood, alone, constitutes an exigent circumstance justifying a warrantless blood draw.[20] However, since *Schmerber*, the Supreme Court clarified in *McNeely* that the dissipation of alcohol in the blood is *not* a *per se* exigency, and any determination of exigent circumstances must be determined on a case-by-case basis.[21] Moreover, in *Birchfield*, the Supreme Court elevated its view of the intrusiveness of blood draws and placed limits on the punishments that may be imposed through implied consent laws for refusing to consent to BAC testing.[22] Interestingly, although several of Ohio's courts of appeals adopted the categorical interpretation of *Schmerber*, the Ohio Supreme Court has never established its own understanding of *Schmerber* or considered the constitutionality of warrantless blood draws in light of *McNeely* and *Birchfield*.[23]

This Article evaluates the constitutionality of section 4511.191(A)(5)(b) in light of *McNeely* and *Birchfield* and provides a modern analysis of the constitutionality of warrantless blood draws under the Fourth Amendment.[24] Part I summarizes the U.S. Supreme Court's interpretations of warrantless blood draws under the Fourth Amendment and explains the evolution of the Court's ideology regarding blood draws.[25] Part II provides a brief history of

16. *See e.g.*, § 4511.191.

17. § 4511.191. (A)(5)(b). *See* 2007 Ohio SB 17.

18. § 4511.191. (A)(5)(b).

19. 384 U.S. 757 (1966). *See Critics: Ohio DUI Bill Violates Constitution*, 19 NEWS (June 24, 2008, 3:39 PM), https://www.cleveland19.com/story/8546689/critics-ohio-dui-bill-violates-constitution/.

20. *See McNeely*, 569 U.S. at 151.

21. *See generally McNeely*, 569 U.S. 141.

22. *See Birchfield*, 136 S. Ct. 2160.

23. *See e.g.*, State v. Pearson, 682 N.E.2d 1077, 1080 (Ohio Ct. App. 1996) (comparing different applications of the *Schmerber* rule.).

24. *See infra* Parts I. B-C.

25. *See infra* Part I.

drunk-driving laws in Ohio and explains the context leading up to the General Assembly's enactment of section 4511.191(A)(5)(b).[26] Part III discusses the initial reactions to section 4511.191(A)(5)(b) and analyzes prior challenges to warrantless blood draws presented to Ohio's courts of appeals.[27] Lastly, Part IV explains why section 4511.191(A)(5)(b) is unconstitutional and analyzes the searches authorized by the provision under the search incident to arrest, exigent circumstances, and voluntary consent exceptions to the warrant requirement.[28]

I. SUPREME COURT INTERPRETATIONS OF THE CONSTITUTIONALITY OF WARRANTLESS BLOOD DRAWS

Early constitutional challenges of warrantless blood draws were not presented under the Fourth Amendment.[29] Rather, they were challenged under the Due Process Clause of the Fourteenth Amendment.[30] The U.S. Supreme Court first considered the constitutionality of a warrantless blood draw in 1957.[31] In *Breithaupt v. Abram*, Paul Breithaupt was involved in a car accident that left three passengers deceased.[32] When officers responded to the accident scene, they found Breithaupt lying unconscious and a half-empty bottle of whiskey in the glove compartment of his vehicle.[33] An officer then took Breithaupt to a hospital and requested that a physician conduct a blood draw, the results of which were used as evidence to convict him.[34] Breithaupt argued that this involuntary blood draw deprived him of his right to Due Process under the Fourteenth Amendment.[35] Because the blood draw was challenged under the Fourteenth Amendment, the Court considered whether a blood draw, generally, comports with a common sense of decency and fairness.[36] According to the Court, there is nothing "brutal" or "offensive" about the common procedure of drawing a blood sample under the care of a physician, and it does not "shock the conscious" or offend a

26. *See infra* Part II.
27. *See infra* Part III.
28. *See infra* Part IV.
29. Breithaupt v. Abram, 352 U.S. 432, 434 (1957).
30. *Id.* The *Breithaupt* Court likely analyzed warrantless blood draws under the Fourteenth Amendment framework because it was decided four years prior to *Mapp v. Ohio*, which held that the Fourth Amendment protections apply to the States. *See Mapp v. Ohio*, 267 U.S. 643 (1961). Prior to *Mapp*, the Fourth Amendment protections only applied to the federal government.
31. *Breithaupt*, 352 U.S. at 434.
32. *Id.* at 433.
33. *Id.*
34. *Id.*
35. *Id.* at 434.
36. *Breithaupt*, 352 U.S. at 436.

sense of justice.[37] Ultimately, the Court believed, a blood draw is only a minor intrusion that does not raise Due Process concerns.[38]

Interestingly, the *Breithaupt* Court characterized blood draws as minor intrusions and only considered the blood draw in light of Fourteenth Amendment Due Process concerns.[39] The problem with using Due Process to analyze blood draws is that Due Process serves to protect citizens from arbitrary and fundamentally unfair use of government power while the Fourth Amendment protects citizens from unreasonable searches and seizures by the government.[40] Thus, Due Process engages in a vastly different analysis than the Fourth Amendment, and just because a search does not violate Due Process does not necessarily mean it will not implicate Fourth Amendment concerns.[41] It was not until 1966, almost ten years later, that the constitutional issues surrounding warrantless blood draws were presented before the Supreme Court under Fourth Amendment principles.[42]

A. Schmerber v. California

In *Schmerber v. California*, Armando Schmerber was involved in a car accident and suffered serious injuries.[43] When officers responded to the accident scene, they smelled alcohol on Schmerber's breath, along with other signs of intoxication, and subsequently placed him under arrest.[44] After placing Schmerber under arrest, an officer took him to a nearby hospital and requested that he submit to a blood test.[45] Schmerber refused.[46]

Despite Schmerber's refusal, the officer ordered a physician to draw Schmerber's blood for a blood test.[47] The results of the blood test revealed a BAC well above the legal limit and were admitted into evidence at his subsequent prosecution.[48] Schmerber contested the admissibility of his blood test results on the ground that the warrantless blood draw violated his Fourth Amendment right not to be subject to unreasonable searches and seizures.[49]

When considering the admissibility of Schmerber's blood test results, the Court's main inquiry was whether the results were the product of an

37. *Id.* at 435, 437.
38. *Id*. at 439.
39. *Id.*
40. *See* U.S. CONST. amend. IV; U.S. CONST. amend. XIV.
41. *See, e.g.*, *Breithaupt*, 352 U.S. at 439.
42. *Schmerber*, 384 U.S. at 759.
43. *Id.* at 757.
44. *Id.*
45. *Id.* at 758.
46. *Id.* at 759.
47. *Schmerber*, 384 U.S. at 759.
48. *Id.* at 757.
49. *Id.* at 759.

unconstitutional search and seizure.[50] The Court explained that the purpose of the Fourth Amendment is to "protect personal privacy and dignity against unwarranted intrusion by the State."[51] According to the Court, the security of citizens' privacy against unreasonable intrusion is essential to the protections of the Fourth Amendment and fundamental to a free society.[52] Thus, the Court explained, a blood draw is a search under Fourth Amendment principles, and, absent an emergency, the warrant requirement also extends to blood draws.[53]

The Court then analyzed the specific facts of Schmerber's case and concluded that the officer could have reasonably believed he was confronted with an emergency that would excuse the warrant requirement.[54] According to the Court, the inherent dissipation of alcohol in the blood in conjunction with the time it took the officer to investigate the scene of the accident and transport the suspect to the hospital gave the officer reason to believe that the delay necessary to obtain a warrant would have threatened the destruction of evidence.[55] Thus, under these circumstances, the Court found that Schmerber's warrantless blood draw was an appropriate search incident to his arrest.[56]

The Court also considered the reasonableness of blood draws as a means of obtaining BAC evidence.[57] The Court explained that blood testing is a highly effective means of determining BAC levels and believed that blood draws are routine procedures that are minimally intrusive.[58] The Court also believed that the test was performed in a reasonable manner because it was conducted in a hospital by a physician and in conformity with accepted medical practices.[59] After considering all the circumstances surrounding Schmerber's blood draw, the Court concluded that his warrantless blood draw was constitutional.[60] The Court disclaimed, however, that its decision was based only upon the particular facts of Schmerber's case and "in no way indicates that [the Constitution] permits more substantial intrusions, or intrusions under other conditions."[61]

Ultimately, *Schmerber* established two new principles in Fourth Amendment jurisprudence: First, a blood draw is a search under the Fourth

50. *Id.* at 766-67.
51. *Id.* at 767.
52. *Schmerber*, 384 U.S. at 767. *See* Wolf v. Colorado, 338 U.S. 25 (1949).
53. *Schmerber*, 384 U.S. at 767-70.
54. *Id.* at 770.
55. *Id.*
56. *Id.* at 771.
57. *Id.*
58. *Schmerber*, 384 U.S. at 771.
59. *Id.* at 771-72.
60. *Id.* at 772.
61. *Id.*

Amendment and subject to the warrant requirement; and second, the inherent dissipation of alcohol in the blood *may* be a factor contributing to an emergency situation authorizing a warrantless blood draw.[62] Despite the *Schmerber* Court expressly making its decision based on the particular facts of Schmerber's case, many states erroneously interpreted *Schmerber* as creating a categorical rule designating the inherent dissipation of alcohol in the blood, itself, an exigent circumstance justifying a warrantless blood draw.[63] Almost fifty years later, the Supreme Court granted certiorari to clarify any confusion arising from *Schmerber*.[64]

B. Missouri v. McNeely

In 2013, the U.S. Supreme Court considered whether the natural dissipation of alcohol in the blood, alone, constitutes a *per se* exigency justifying a warrantless blood draw in drunk-driving investigations.[65] In *Missouri v. McNeely*, a police officer stopped Tyler McNeely for driving erratically and, after noticing several signs of intoxication, placed him under arrest.[66] The officer requested that McNeely submit to a breath-test to measure his BAC, but he refused.[67] Because McNeely was reluctant to submit to a breath test, the officer took him to a nearby hospital and ordered a lab technician to draw his blood without his consent.[68] The results revealed a BAC over the legal limit.[69]

McNeely was subsequently prosecuted and moved to suppress the results of his blood test arguing that, under the circumstances, a warrantless blood draw violated his Fourth Amendment rights.[70] The State, on the other hand, contended that exigent circumstances necessarily existed due to the natural dissipation of BAC evidence from the blood, and such instances were categorically reasonable for officers to obtain a blood sample without a warrant.[71]

The Court explained that "a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation" implicates his most fundamental expectations of privacy.[72] The exigent circumstances exception permits

62. *Id.* at 767, 770.
63. *McNeely*, 569 U.S. at 147.
64. *Id.* at 144.
65. *Id.* at 147.
66. *Id.* at 145.
67. *Id.*
68. *McNeely*, 569 U.S. at 145-46.
69. *Id.* at 146.
70. *Id.*
71. *Id.* at 151-52.
72. *Id*. at 148.

officers to conduct a search without a warrant to prevent the imminent destruction of evidence, but any determination of exigent circumstances must be a fact-specific analysis looking at the totality of the circumstances and evaluated on a case-by-case basis.[73] The Court recognized that alcohol naturally dissipates from the blood immediately after alcohol consumption stops, and a significant delay in testing could hinder the accuracy of BAC evidence.[74] However, the Court refused to depart from the careful case-by-case assessment of exigency and adopt a categorical *per se* rule.[75] According to the Court, when officers can reasonably obtain a warrant before conducting a blood draw on an individual suspected of drunk-driving, the Fourth Amendment requires they do so.[76]

The Court differentiated natural dissipation of alcohol in the blood from other destruction of evidence situations.[77] The Court explained that drunk-driving cases are unique because (1) suspects have no control over easily disposable evidence; (2) BAC evidence dissipates in a gradual and predictable manner; and (3) there is some inevitable delay that causes evidence to dissipate because it takes time to transport the suspect to a hospital.[78] The Court also noted the vast technological advances that made obtaining warrants much faster and more efficient, such as the introduction of telephonic warrants and standard-form warrant applications for drunk-driving investigations.[79]

Additionally, the Court declined to recognize warrantless blood draws as reasonable automobile searches.[80] According to the Court, the fact that people are generally afforded a lower privacy interest in automobiles does not diminish a motorist's privacy interest in preventing a government agent from penetrating his skin.[81] The Court explained that "any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests."[82] While the Court recognized highway safety as an important State interest, it also explained that States have a vast array of legal tools to secure BAC evidence without conducting warrantless blood draws, such as implied consent laws, and found no evidence that restrictions on nonconsensual blood draws have negatively impacted enforcement of

73. *McNeely*, 569 U.S. at 149-50.
74. *Id.* at 152.
75. *Id.*
76. *Id.*
77. *Id.* at 153.
78. *McNeely*, 569 U.S. at 153.
79. *Id.* at 154.
80. *Id.* at 159.
81. *Id.*
82. *Id.*

drunk-driving efforts.[83] Ultimately, the Court concluded that the natural dissipation of alcohol from the blood is not a *per se* exigeny justifying a categorical exception to the warrant requirement, and the reasonableness of warrantless blood draws must be determined on a case-by-case basis.[84]

McNeely changed the nation's understanding of BAC testing in two ways. First, it formally rejected the idea that alcohol's natural dissipation from the blood is a *per se* exigency justifying a warrantless blood draw and affirmed the idea that the reasonableness of a warrantless blood draw must be determined on a case-by-case basis considering a totality of the circumstances.[85] Second, it signified a departure from *Schmerber*'s belief that blood draws are minimally intrusive to an understanding that blood draws "implicate[] significant, constitutionally protected privacy interests."[86] Three years later, the Supreme Court reviewed the constitutionality of warrantless blood draws again in the context of implied consent laws.[87]

C. Birchfield v. North Dakota

In 2016, the U.S. Supreme Court considered whether implied consent laws making it a criminal offense for drunk-driving suspects to refuse a blood draw were consistent with the protections of the Fourth Amendment.[88] *Birchfield v. North Dakota* involved the cases of three petitioners who were suspected of drunk-driving and faced with the decision of submitting to a blood draw or facing criminal charges.[89] The first petitioner, Birchfield, was arrested on suspicion of drunk-driving and, after refusing a blood draw, sentenced to thirty days in jail, one year of unsupervised probation, $1,750 in fines and fees, mandatory participation in a sobriety program, and substance abuse evaluation pursuant to North Dakota's implied consent law.[90] Similarly, the second petitioner, Bernard, was arrested on suspicion of drunk-driving and, after refusing a blood draw, criminally prosecuted under Minnesota's implied consent statute.[91] Contrary to the others, the third petitioner, Beylund, was arrested on suspicion of drunk-driving and, after being told that refusing a blood draw would be a criminal offense, submitted to a blood draw that revealed a prohibited BAC and was subsequently

83. *McNeely*, 569 U.S. at 160-62.
84. *Id.* at 156, 165.
85. *Id*. at 165.
86. *Id.* at 159.
87. *Birchfield*, 136 S. Ct. at 2172.
88. *See generally id*.
89. *Id.* at 2172.
90. *Id.* at 2170-71.
91. *Id.* at 2171.

prosecuted.[92] Each petitioner raised a common issue: whether the State may impose criminal sanctions for refusing to submit to a blood draw.[93]

The Court's main inquiry was how the search-incident-to-arrest doctrine applied to BAC testing incident to an arrest for drunk driving.[94] To analyze this issue, the Court examined the degree to which blood draws intrude upon an individual's privacy and the degree to which blood tests are needed to promote legitimate government interests.[95] The Court began by distinguishing blood tests from breath tests.[96] According to the Court, breath tests do not implicate significant privacy interests because they do not require the skin to be penetrated and cause minimal inconvenience.[97] Moreover, the Court explained, exhaling—the standard means of collecting a sample for a breath test – is a natural process that inevitably occurs among humans, and there is no evidence to suggest that anyone has ever asserted a possessory interest in the air in their lungs.[98] Lastly, the Court noted that breath tests only reveal one type of information—the amount of alcohol in the arrestee's breath—and do not leave law enforcement with any other information about the arrestee.[99]

To the contrary, the Court illustrated, blood tests implicate substantial privacy interests because they "require piercing the skin and extract[ing] a part of the subject's body."[100] According to the Court, humans do not continually shed blood like they constantly exhale air, and despite the fact that blood draws are common in physical examinations, they are considerably intrusive.[101] Blood tests give officers access to a sample that can be preserved indefinitely and contains tremendous quantities of DNA and genetic information.[102]

Next, the Court assessed the States' need to obtain BAC information for drunk-driving suspects.[103] According to the Court, the States and the federal government have an overwhelming interest in highway safety, and obtaining BAC information is key to enforcing drunk-driving laws.[104] However, when balancing the degree of intrusion upon an individual's privacy and the need for BAC tests to promote highway safety, the Court found that breath tests

92. *Birchfield*, 136 S. Ct. at 2172.
93. *Id.*
94. *Id.* at 2174.
95. *Id.* at 2176.
96. *Id.*
97. *Birchfield*, 136 S. Ct. at 2176.
98. *Id.* at 2177.
99. *Id.*
100. *Id.* at 2178.
101. *Id*.
102. *Birchfield*, 136 S. Ct. at 2178.
103. *Id.* at 2176.
104. *Id.* at 2178-79.

are reasonable as warrantless searches incident to arrest because they are minimally invasive and implicate minimal privacy interests, but not blood tests because they are considerably intrusive and implicate significant privacy interests.[105] According to the Court, blood draws must be considered under the exigent circumstances framework and analyzed on a case-by-case basis with their reasonableness determined by "the availability of the less invasive alternative of a breath test."[106] Thus, the Court concluded that the State may not impose criminal sanctions on motorists for refusing to submit to a blood draw.[107]

Ultimately, *Birchfield* made two more contributions to the Fourth Amendment framework. The Court now recognized blood draws as "considerably intrusive," and the Court put a limit on the punishment States may impose for noncompliance with implied consent laws.[108] Three years later, the Supreme Court would consider the constitutionality of warrantless blood draws yet again in the context of unconscious drivers.[109]

D. Mitchell v. Wisconsin

In 2019, the U.S. Supreme Court found that exigent circumstances "almost always" exist justifying a warrantless blood draw when a drunk-driving suspect is unconscious.[110] In *Mitchell v. Wisconsin*, a Wisconsin police officer responded to a report that an apparently intoxicated man had driven off in a van.[111] The officer eventually found Gerald Mitchell near a lake stumbling and slurring his words.[112] The officer then arrested Mitchell and began driving him to the police station to conduct an evidence-grade breath test.[113] On the way to the station, Mitchell fell unconscious, so the officer decided to take him to a hospital for a blood test.[114] Upon arrival at the hospital, the officer ordered a nurse to draw Mitchell's blood pursuant to Wisconsin's implied consent statute, which allows officers to conduct warrantless blood draws of unconscious drivers.[115] The blood test revealed a BAC nearly three times the legal limit, and Mitchell was prosecuted for violating two drunk-driving provisions.[116] Mitchell moved to suppress the

105. *Id.* at 2183-85.
106. *Id.* at 2183-84.
107. *Birchfield*, 136 S. Ct. at 2186.
108. *Id.* at 2184.
109. Mitchell, 139 S. Ct. at 2525.
110. *See generally id.*
111. *Id.* at 2532.
112. *Id.*
113. *Id.*
114. *Mitchell*, 139 S. Ct. at 2532.
115. *Id.*
116. *Id.*

results of the blood test alleging that the warrantless blood draw violated his Fourth Amendment right against unreasonable searches without a warrant.[117]

Justice Alito, writing for the majority, explained that highway safety is a vital public interest, and because an unconscious driver is unable to blow into a machine for a breath test, there is a "compelling interest" for blood tests of unconscious drivers.[118] The Court then considered whether this compelling need created an exigeny justifying a warrantless search.[119] According to the Court, "exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application."[120] The Court stated that a driver's unconsciousness, itself, is a pressing emergency creating urgent needs that may delay the warrant application.[121] The Court also explained that unconscious drivers have to be rushed to the hospital for urgent medical care and might require support en route, immediate treatment could delay testing and distort the results of the test, and, importantly, it is likely that blood will be drawn anyway while receiving treatment.[122] Moreover, the Court explained, in many unconscious driver cases, officers have to provide medical attention themselves until paramedics arrive, preserve evidence at the scene, or redirect traffic to prevent further accidents.[123] According to the Court, "[t]his is just the kind of scenario for which the exigency rule was born – just the kind of grim dilemma it lives to dissolve."[124]

Thus, the Court concluded, when police have probable cause to believe a person has been driving under the influence and his unconsciousness makes a breath test unattainable, a warrantless blood draw is "almost always" reasonable without offending the Fourth Amendment.[125] The Court noted that in the "unusual case" a defendant could show (1) his blood would not have been drawn if officers were not seeking BAC evidence, and (2) officers could not reasonably determine that applying for a warrant would interfere with pressing needs, then a warrantless blood draw of unconscious drivers would be unreasonable.[126]

Ultimately, *Mitchell* elaborated on the exigencies sufficient for a warrantless blood draw.[127] The Court identified a test that requires "some

117. *Id.*
118. *Id.* at 2535-37.
119. *Mitchell*, 139 S. Ct. at 2537.
120. *Id.*
121. *Id.*
122. *Id.* at 2537-38.
123. *Id.* at 2538.
124. *Mitchell*, 139 S. Ct. at 2538.
125. *Id.* at 2539.
126. *Id.*
127. *Id.* at 2540-41.

other [compelling] factor" in addition to dissipating BAC evidence and identified unconscious drivers as a factor that presents an exigency "almost always" authorizing a warrantless blood draw.[128] Given the evolution of Supreme Court jurisprudence concerning warrantless blood draws, it is interesting that a statute allowing officers to use "whatever reasonable means are necessary" to compel a motorist to submit to a blood draw remains within Ohio's implied consent statute.[129] A brief history of the provision will provide context on how it emerged and why it remains.

II. HISTORY OF R.C. 4511.191(A)(5)(B)

Ohio enacted its first drunk-driving statute, General Code 6307-19, in 1941.[130] According to the statute "[n]o person who is under the influence of intoxicating liquor or narcotic drugs, or opiates shall operate or be in actual physical control of any vehicle, streetcar or trackless trolley within this state."[131] In 1953, General Code 6307-19 was recodified to R.C. 4511.19, but the language of the statute was virtually identical.[132]

Early drunk-driving laws made it illegal to drive while intoxicated but did not define what it meant to be "intoxicated."[133] The American Medical Association and National Safety Council had previously established a national standard that a driver with a BAC of 0.15% or more could be presumed "intoxicated," but the technology necessary to obtain BAC evidence was not easily accessible.[134] Experts had long known that blood testing was an accurate means of measuring how much alcohol a person had consumed, but wide-scale blood testing was not feasible because it was expensive and time consuming.[135] Thus, in order to prove that a driver was intoxicated, prosecutors had to present evidence that a defendant was exuding outward signs of intoxication, such as imbalance, blood-shot eyes, or slurred speech.[136]

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128. *Id.* at 2538, 2540.
129. *See* § 4511.19(A)(5)(a).
130. State v. Peprah, 858 N.E.2d 436, 442 (Oh. Mun. Ct. 2006).
131. Toledo v. Best, 176 N.E.2d 520, 521 (Ohio 1961).
132. § 4511.19; *Best*, 176 N.E.2d at 521.
133. *Birchfield*, 136 S. Ct. at 2167.
134. Brockton D. Hunter, *The History of DUI Laws in America*, L. OFF. BROCKTON D. HUNTER, P.A. (Nov. 27, 2014), https://www.brockhunterlaw.com/blog/2014/november/the-history-of-dui-laws-in-america/; *History of DWI Laws*, NAVE L. FIRM, https://www.nysdwi.com/history-of-dwi-laws/.
135. Terence J. Clark, *Recent Decisions: Recent Legistlation: Driving While Intoxicated – Implied Consent Statute in Ohio*, 20 CASE W. RES. L. REV. 277 (1968) (providing an overview of legislation and jurisprudence leading up to the enactment of Ohio's implied consent statute); Jeremiah Denslow, *History of Breath Testing Machines*, OHIO'S DUI DUDE, https://ohioduidude.com/dui-testing/breath-test-machine-history/.
136. *Birchfield*, 136 S. Ct.at 2167.

In 1952, Ohio's Third District Court of Appeals attempted to define "intoxication." According to the court,

> the accused must have consumed some intoxicating beverage, whether mild or potent, and in such a quantity, whether small or great, that the effect thereof on him was to adversely affect his actions, reactions, conduct, movements or mental processes, or to impair his reactions, under the circumstances then existing so as to deprive him of that clearness of the intellect and control of himself which he would otherwise possess.[137]

In short, the main inquiry was "what effect did the liquor the accused consumed have on him at the time under consideration."[138] The fact finder had to find beyond a reasonable doubt that the defendant was under the influence, and BAC evidence was merely evidence to support a conviction.[139] This definition of intoxication had two apparent defects. First, it was a subjective test, and it was well-known that alcohol effects every consumer differently. Second, a defendant could rebut the State's claim of intoxication with evidence of sobriety.[140] Thus, this definition of intoxication proved difficult to enforce.[141]

In 1953, Robert Borkenstein, a former Indiana police officer, invented the Breathalyzer – a portable and easy-to-use device that allowed police officers to estimate the level of alcohol in the blood by examining the amount of alcohol vapors in the breath.[142] The Breathalyzer made BAC testing much easier and more efficient for officers.[143] That same year, states began enacting implied consent laws requiring drivers to consent to BAC testing, as a condition of obtaining a driver's license, if they were suspected of driving under the influence.[144]

Ohio adopted its implied consent law in 1967.[145] The original law simply stated that any person who drove a motor vehicle on a public highway in the state of Ohio was deemed to have consented to BAC testing if arrested on

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137. State v. Steele, 117 N.E.2d 617, 619 (Ohio Ct. App. 1952).

138. *Steele*, 117 N.E.2d at 620.

139. Lewis Katz & Robert Sweeney, *Ohio's New Drunk Driving Law: A Halfhearted Experiment in Deterrence*, 34 CASE WEST. RES. L. REV. 239, 242-43 (1984) (analyzing the potential effects of Ohio's Senate Bill 432, adopted in 1982, that increased penalties, simplified evidentiary requirements, and mandated incarceration for all defendants convicted of drunk-driving. Katz and Sweeney also discussed any constitutional issues raised by the amendments and offered proposals to enhance the law).

140. *Id.* at 243.

141. *Id.*

142. *First Drunk Driving Arrest*, HISTORY (Nov. 24, 2009), https://www.history.com/this-day-in-history/first-drunk-driving-arrest.

143. *Id*.

144. *Birchfield*, 136 S. Ct. at 2169.

145. Clark, *supra* note 135, at 280.

reasonable grounds for driving under the influence.[146] The statute also provided that a driver's license may be revoked for six months if, upon request by police and a warning of the consequences, the driver refused to submit to testing.[147]

While these new implied consent laws were a step toward battling the nation's drunk-driving problem, they had flaws. The biggest issue was persuading drivers to actually submit to BAC testing rather than refuse and suffer the license suspension.[148] Suffering a license suspension could conceivably be a more attractive alternative than giving the State key evidence for a conviction of driving under the influence. Thus, to make refusal an even less attractive option, in 1968, the Ohio Supreme Court held that a defendant's refusal to submit to BAC testing is admissible as evidence in the defendant's prosecution for drunk-driving.[149] According to the court,

> Where a defendant is being accused of intoxication and is not intoxicated, the taking of a reasonably reliable chemical test for intoxication should establish that he is not intoxicated. On the other hand, if he is intoxicated, the taking of such a test will probably establish that he is intoxicated. Thus, if he is not intoxicated, such a test will provide evidence for him; but, if he is intoxicated, the test will provide evidence against him. Thus, it is reasonable to infer that a refusal to take such a test indicates the defendant's fear of the results of the test and his consciousness of guilt.[150]

This certainly made refusal a less appealing option, but prosecutors still faced the difficult burden of overcoming the rebuttable presumption of proving that someone was actually "intoxicated."[151]

It was not until 1983, with the passage of S.B. 432, that Ohio established a *per se* rule for intoxication.[152] Under this new *per se* rule, rather than creating a presumption of intoxication, a person was deemed intoxicated if they had a BAC of at least 0.10%.[153] Accordingly, under this new law, the trier of fact need only prove that the defendant operated a vehicle with the proscribed BAC.[154] This new *per se* law created a new demand for evidence-

146. *Id.*
147. *Id.*
148. *Id.*
149. *See* City of Westerville v. Cunningham, 239 N.E.2d 40, 41 (Ohio 1968).
150. *Cunningham*, 239 N.E.2d at 41. *See also* South Dakota v. Neville, 459 U.S. 553, 564 (1983) (holding that the admission of a defendant's refusal to submit to a blood as evidence against him does not violate the Fifth Amendment right against self-incrimination).
151. *Cunningham*, 239 N.E.2d at 41.
152. Katz & Sweeney, *supra* note 139 at 243.
153. *Id.*
154. *Id.*

grade BAC testing, and accurate BAC tests became essential to prosecuting drunk-driving suspects.[155]

While the Breathalyzer made BAC testing much more efficient, roadside breath testing had its limits. According to the Washington Supreme Court, "When used to establish blood alcohol levels, breath testing devices use a mathematical constant to approximate the percentage of alcohol in the blood based on the amount of alcohol present in a breath sample."[156] Because blood-breath ratios vary between individuals, and even at different times in the same person, this mathematical equation does not always present an accurate BAC level.[157] Factors that can influence the blood-breath ratio include "body temperature, hematocrit level (the ratio between red blood cells and plasma), and the time at which alcohol was consumed in relation to the time breath alcohol is measured."[158] Thus, a more effective means of determining BAC (i.e. blood testing) became essential to enforcing drunk-driving laws.

In 2004, Ohio lowered its prohibited BAC limit to 0.08% following efforts by Congress to convince States to enact stricter drunk-driving laws.[159] Shortly thereafter, in 2008, Ohio amended its implied consent statute and added a new provision permitting officers to "employ whatever reasonable means are necessary to ensure that the person submits to a chemical test of the person's [blood]" when a person has previously been convicted of a felony DUI or two or more misdemeanor DUIs.[160] According to Ohio Senator Timothy Grendell, sponsor of the legislation, "[d]riving in Ohio is a privilege not a right", and "we can precondition that privilege on any condition we want that helps keep the other drivers on the road safe."[161]

This provision has been met with controversy since it was enacted. Ohio's American Civil Liberties Union (ACLU) has long argued that the provision is unconstitutional.[162] However, Senator Grendell believed that the

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155. *Mitchell*, 139 S. Ct. at 2535.

156. State v. Brayman, 751 P.2d 294, 297 (Wash. 1988).

157. *Id.*

158. *Id.*

159. *See* Safety Incentives to Prevent Operation of Motor Vehicles by Intoxicated Persons, 23 U.S.C. § 163(a) (2022); § 4511.191.

160. § 4511.191(A)(5)(b).

161. *Supra* note 19.

162. *ACLU says Ohio's new DUI law unconstitutional*, WTOL 11 (Oct. 1, 2008, 8:57 AM), https://www.wtol.com/article/news/aclu-says-ohios-new-dui-law-unconstitutional/512-03cd0003-942e-4f93-b561-b8e8213ba5ab; *ACLU Calls on Governor to Veto Bill That Would Allow Involuntary Seizure of Blood Without a Warrant*, ACLU OH. (June 18, 2008), https://www.acluohio.org/en/press-releases/aclu-calls-governor-veto-bill-would-allow-involuntary-seizure-blood-without-warrant (According to then Ohio Legal Director, Jeffrey Gamso, "Unless there is an emergency, taking a person's blood without permission is simply not something authorities may do on their own, without the check of a judicially ordered warrant." *Id*. Moreover, Gamso explained "forcing people to submit to bodily fluid tests without a judge's

U.S. Supreme Court's decision in *Schmerber* provided a solid foundation for the provision, and any attempt to argue that the statute was unconstitutional would fail.[163] Interestingly, the statute was enacted prior to *McNeely* and *Birchfield*, and, at the time, there was a common misconception among many states that *Schmerber* created a *per se* rule that the rapid dissipation of alcohol in the blood, alone, is an exigency justifying a warrantless blood draw.[164] However, *McNeely* made it clear that the dissipation of alcohol in the blood is *not* a *per se* exigency authorizing a warrantless blood draw, and any determination of exigent circumstances in this context must be examined on a case-by-case basis.[165]

Despite the Supreme Court recognizing on multiple occasions that alcohol's evanescent nature is not a *per se* exigency, the provision remains in Ohio's implied consent law today.[166] In fact, an amended version of Ohio's implied consent statute took effect on September 30, 2021, and the language of R.C. 4511.191(A)(5)(b) remains identical.[167] In the wake of *McNeely* and *Birchfield*, the constitutionality of this provision could be in jeopardy.

III. REACTIONS TO R.C. 4511.191(A)(5)(B)

The controversy surrounding R.C. 4511.191(A)(5)(b) is a topic that is somewhat familiar to Ohio courts. In 2011, two years prior to *McNeely* and five years before *Birchfield*, a constitutional challenge to R.C. 4511.191(A)(5)(b) was presented before the Ninth District court of appeals.[168] In *State v. Slates*, a motorist was pulled over by officers for driving erratically and without headlights in the middle of the night.[169] When the officer approached Slates' vehicle, he noticed that Slates' speech was

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consent will do nothing to prevent people from driving drunk and nothing to assist in the prosecution of those who do." *Id*.)

163. *Id.*; *supra* note 19.

164. Strong v. State, 202 S.E.2d 428, 432 (Ga.1973) ("The evanescent nature of alcohol in the blood made it necessary to have a sample extracted to prevent a failure of justice from a certain disappearance of this evidence"); State v. Woolery, 775 P.2d 1210, 1212 (Idaho 1989) ("the destruction of the evidence by [the] metabolism of alcohol in the blood provides an inherent exigency which justifies the warrantless search"); State v. Shriner, 751 N.W.2d 538, 545 (Minn. 2008) ("The rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from a defendant"); City of Willoughby v. Dunham, No. 2010-L-068, 2011 WL 2120095, at ¶¶ 36-37 (Ohio Ct. App. May 27, 2011); State v. Slates, No. 25019, 2011 WL 303246, at ¶ 56 (Ohio Ct. App. Jan. 26, 2011); State v. Troyer, No. 02-CA-0022, 2003 Ohio App. LEXIS 529, at ¶ 28 (Ohio Ct. App. Feb. 5, 2003); State v. Anderson, No. 00CAA12039, 2001 Ohio App. LEXIS 3804, *8 (Ohio Ct. App. Aug. 24, 2001); State v. Bohling, 494 N.W.2d 399, 402 (Wis. 1993) ("[w]e believe that the more reasonable interpretation of *Schmerber* is the first one set forth—exigency based solely on the fact that alcohol rapidly dissipates in the bloodstream.").

165. *McNeely*, 569 U.S. at 142.

166. *See supra* Part I. A-D.

167. *See* § 4511.191(A)(5)(b).

168. *See generally Slates*, 2011 WL 303246.

169. *Id.* at ¶ 51.

slurred, an odor of alcohol was coming from his vehicle, and Slates even admitted to having a few drinks that evening.[170] The officer then arrested Slates and took him to the police station for a breath test.[171]

Upon arriving at the station, Slates refused to take a breath test.[172] Following this refusal, officers compelled Slates to submit to a blood test pursuant to R.C. 4511.191(A)(5)(b).[173] At his subsequent prosecution, Slates moved to suppress the results of this blood test on multiple grounds, including that R.C. 4511.191(A)(5)(b) violated his Fourth Amendment rights and is unconstitutional.[174]

The Ninth District used a three-step test to evaluate the reasonableness of the intrusive search, which states:

> (1) the government must have a clear indication, rather than a mere chance, that incriminating evidence will be found; (2) there must be a search warrant or exigent circumstances, such as the imminent destruction of evidence; and (3) the method used to extract the evidence must be reasonable and must be performed in a reasonable manner.[175]

Slates only challenged the second factor of this test, and, because it was undisputed that there was no warrant for his blood draw, the court's only inquiry was whether exigent circumstances excused the warrant requirement.[176]

According to the court,

> the United States Supreme Court has recognized the exigent circumstances underlying the drawing of blood for purposes of chemical analysis in OVI [operating a vehicle impaired] cases. The *Schmerber* court recognized that 'the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system.' Accordingly, time is of the essence where evidence of the charged offense may diminish or be lost completely.[177]

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170. *Id.*

171. *Id.* at ¶ 55.

172. *Id.*

173. *Slates*, 2011 WL 303246, at ¶ 55 (the court does not indicate what measures the officers took to compel Mr. Slates to submit to the blood draw).

174. *Id.* at ¶3.

175. *Id.* at ¶ 50.

176. *Id.* at ¶ 53.

177. *Id.* at ¶ 56. The acronyms DUI (Driving Under the Influence), DWI (Driving While Impaired), OMVI (Operating a Motor Vehicle Impaired), and OVI (Operating a Vehicle Impaired) all refer to the same thing: operating a vehicle under the influence of alcohol or drugs. Jon Saia, *DUI, DWI, OMVI, and*

The Ninth District also characterized a blood draw as a "minimally invasive" search and believed that the statute was a reasonable means of protecting the government's interest in protecting the public from repeat offenders.[178] Ultimately, the Ninth District upheld the constitutionality of the statute.[179]

In 2013, the same year as *McNeely*, the Fifth District considered the constitutionality of a warrantless blood draw.[180] In *State v. Hollis*, Matthew Hollis was operating a vehicle involved in a single car crash that resulted in the death of a passenger.[181] When officers arrived at the accident scene, they observed alcoholic beverage containers in and around the vehicle and smelled alcohol around the entire accident scene.[182] Mr. Hollis was transported to a nearby hospital, and the officer attempted to ask Mr. Hollis to submit to a blood draw, but he was so distraught that he was unresponsive to all of the officer's questions and statements.[183] Thus, the officer ordered a nurse to draw Mr. Hollis's blood, and the blood test revealed a BAC well over the legal limit.[184] Subsequently, Mr. Hollis was prosecuted for several offenses, including OVI, and moved to have the results of his blood test suppressed.[185]

Mr. Hollis argued that the warrantless blood draw was a violation of his Fourth Amendment rights because the State did not prove exigent circumstances existed.[186] According to the Fifth District, "we have recognized that the potential for alcohol to dissipate within a suspect's blood system constitutes exigent circumstances."[187] The court construed *Schmerber* as authorizing warrantless blood draws in any situation where "there was a risk that evidence would be destroyed as appellant's system

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OVI: What Do They Mean?, OH. STATE BAR ASS'N (July 21, 2020), https://www.ohiobar.org/public-resources/commonly-asked-law-questions-results/criminal-justice/dui-dwi-omvi-and-ovi-what-do-they-mean/. In the past, Ohio used the acronym OMVI; however, the legislature started using OVI to make clear that the law includes not only motorized "vehicles" but also bicycles, horse-drawn carriages, and several other types of vehicles. *Id*.

178. *Slates*, 2011 WL 303246, at ¶¶ 57-58.

179. *Id.* at ¶ 56.

180. State v. Hollis, No. 12CA34, 2013 Ohio App. LEXIS 2564, at ¶¶ 16-17 (Ohio Ct. App. June 17, 2013).

181. *Id.* at ¶ 3.

182. *Id.* at ¶ 6.

183. *Id.* at ¶ 7.

184. *Id.* at ¶¶ 8-10.

185. *Hollis*, 2013 Ohio App. LEXIS 2564, at ¶¶ 11-13.

186. *Id.* at ¶¶ 16-17, 30.

187. *Id.* at ¶ 31. The Fifth District previously held, in *State v. Anderson*, that a warrantless blood draw was constitutional because exigent circumstances existed. No. 00CAA12039, 2001 Ohio App. LEXIS 3804, at *8 (Ohio Ct. App. Aug. 24, 2001). However, it is not so clear whether the *Anderson* court actually intended to establish a *per se* rule. According to the court, "exigent circumstances existed, due to the dissipation of alcohol in the blood system, *and* the time constraints under which the officer was operating." (Emphasis added). *Id*. Apparently, the *Anderson* court considered at least one factor in addition to the natural dissipation of alcohol in the blood stream when determining whether exigent circumstances existed.

began to eliminate the alcohol."[188] Ultimately, the Fifth District found that the warrantless blood draw did not violate Mr. Hollis's Fourth Amendment rights and upheld his conviction.[189]

Although the *McNeely* decision had been published two months prior, the *Hollis* court did not consider *McNeely* in its analysis and did not consider how this decision could have impacted the reasonability of warrantless blood draws.[190] In fact, no Ohio court has reviewed the constitutionality of R.C. 4511.191(A)(5)(b) or warrantless blood draws generally in light of *McNeely* and *Birchfield*.

IV. WHY THE STATUTE IS UNCONSTITUTIONAL

Generally, warrantless searches are *per se* unreasonable unless they fall under a well-established exception to the warrant requirement.[191] Thus, because a blood draw is a search under the Fourth Amendment, a warrantless blood draw is presumptively unreasonable unless it can be justified by an exception to the warrant requirement.[192] The Supreme Court has considered the constitutionality of warrantless blood draws under the search incident to arrest, exigent circumstances, and consent exceptions to the warrant requirement.[193] Contrary to Senator Grendell's belief, although keeping roads safe for motorists is a vital state interest and driving is generally considered a privilege, the State cannot precondition this privilege on submitting to a search that would otherwise be unconstitutional.[194]

A. Search Incident to Arrest

The concept of search incident to arrest was first articulated by the U.S. Supreme Court as dicta in *Weeks v. United States*.[195] The Court acknowledged "the right on the part of the government always recognized

188. *See generally id.*
189. *Id.* at ¶ 45.
190. *See generally Hollis*, 2013 Ohio App. LEXIS 2564.
191. Katz v. U.S., 389 U.S. 347, 357 (1967).
192. State v. Cooper, No. L-15-1083, 2016 WL 2945144, at ¶ 20 (quoting *Schmerber*, 384 U.S. 757).
193. Tyler Ludwig, Note, *Out for Blood: The Expansion of Exigent Circumstances and Erosion of the Fourth Amendment*, 85 MO. L. REV. 883, 888 (2020); *See also Birchfield*, 136 S.Ct. at 2163; *McNeely*, 569 U.S. at 141-42; *Schmerber*, 384 U.S. at 771.
194. *Birchfield*, 136 S.Ct. at 2186; Ybarra v. Illinois, 444 U.S. 86 (1979); Dobbins v. Ohio Bureau of Motor Vehicles, 664 N.E.2d 908, 912 (Ohio 1996); *supra* note 19.
195. Weeks v. United States, 232 U.S. 383, 392 (1914) (reviewing the constitutionality of a warrantless search of a defendant's home, in his absence, where officers found various papers and articles that were ultimately submitted into evidence against him at trial. In its analysis, the Court differentiated this situation from the well-recognized search incident to arrest that had been "uniformly maintained in many cases." The *Weeks* Court did not coin the term "search incident to arrest," but it was the first to formally recognize the concept).

under English and American law, to search the person of the accused when legally arrested, to discover and seize the fruits or evidence of crime."[196] Just over fifty years later, the Supreme Court elaborated on the scope of a search incident to arrest.[197] In *Chimel v. California*, the Court determined that a valid search incident to arrest is limited to "a search of the arrestee's person and the area 'within his immediate control.'"[198] Moreover, the Court explained, "it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction."[199]

The *Birchfield* Court explicitly held that blood draws may not be authorized as warrantless searches incident to arrest because they are considerably intrusive and implicate substantial privacy interests.[200] Blood tests require officers to penetrate a person's skin and extract body fluids containing nearly every aspect of a person's identity.[201] Blood samples may also be preserved indefinitely and leave officers with unfettered access to a person's DNA and other genetic information.[202]

Importantly, the blood inside a suspect's body is not "within his immediate control."[203] Thus, there is no concern that a suspect will gain possession of destructible evidence. Although the level of alcohol in the blood inherently dissipates when drinking stops, the suspect has no control over this dissipation and has no tangible means of destroying BAC evidence.[204] Therefore, the purposes of searches incident to arrest – officer safety and preventing the suspect from concealing or destroying evidence – are not achieved by warrantless blood draws incident to arrest.[205] Rather, the *Birchfield* Court explained, warrantless blood draws must be considered under the exigent circumstances framework.[206] They must be analyzed on a

196. *Id.*

197. Chimel v. California, 395 U.S. 752, 762-63 (1969) (elaborating on the permissible scope under the Fourth Amendment of a search incident to a lawful arrest. The Court considered the constitutionality of a warrantless search of a defendant's entire home incident to a lawful arrest. According to the Court, "it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape" as well as the area "within his immediate control." The Court construed the phrase "within his immediate control" to mean "the area from which he might gain possession of a weapon or destructible evidence." However, anything outside these parameters is beyond the scope of the search incident to arrest doctrine).

198. *Id.* at 763.

199. *Id.*

200. *Birchfield*, 136 S. Ct. at 2183-85.

201. *Id.* at 2178.

202. *Id.*

203. *Id.* at 2175.

204. *Id.*

205. *Chimel*, 395 U.S. at 763.

206. *Birchfield*, 136 S. Ct. at 2183-84.

case-by-case basis with their reasonableness being determined by "the availability of the less invasive alternative of a breath test."[207]

B. Exigent Circumstances

The exigent circumstances exception was first identified by the U.S. Supreme Court in 1948.[208] In *McDonald v. U.S.*, Mr. McDonald was under police surveillance for several months on suspicion of running a numbers operation.[209] One day while surveying McDonald's home, an officer thought he heard an adding machine and, despite having no arrest or search warrant, entered Mr. McDonald's home, searched the premises, and arrested him.[210] The Court's main inquiry was the lawfulness of the warrantless search.[211] According to the Court,

> Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals . . . We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.[212]

Ultimately, the warrantless search of McDonald's home was found unconstitutional because there was no finding of exigency authorizing a warrantless search.[213]

In support of R.C. 4511.191(A)(5)(b), Senator Grendell indicated *Schmerber* as providing a solid foundation for the statute.[214] This is not surprising given that the statute was enacted in 2008, five years prior to *McNeely*.[215] In the days before *McNeely*, many States interpreted *Schmerber* as creating a *per se* rule making the natural dissipation of alcohol in the blood,

207. *Id.*
208. McDonald v. United States, 335 U.S. 451, 456 (1948).
209. *Id.* at 452.
210. *Id.* at 452-53.
211. *Id.* at 451.
212. *Id.* at 455-56.
213. *McDonald*, 335 U.S. at 456.
214. *Supra* note 19.
215. *See McNeely*, 569 U.S. 141; *supra* Part II.

alone, an exigency permitting a warrantless blood draw.[216] However, this was an unfounded misinterpretation.

In its conclusion, the *Schmerber* Court explicitly disclaimed "we reach this judgment only on the facts of the present record", and their decision "in no way indicates that [the Constitution] permits more substantial intrusions, or intrusions under other conditions."[217] Essentially, the Court explained that their decision was based solely on the circumstances of Schmerber's case and should not be understood as categorically authorizing warrantless blood draws in any other case.[218] Yet, many States still adopted a categorical interpretation.[219]

In 1993, the Wisconsin Supreme Court recognized the two conflicting interpretations of *Schmerber* before adopting the categorical interpretation.[220] According to Wisconsin,

> *Schmerber* can be read in either of two ways: (a) that the rapid dissipation of alcohol in the bloodstream alone constitutes a sufficient exigency for a warrantless blood draw to obtain evidence of intoxication following a lawful arrest for a drunk driving related violation or crime . . . or (b) that the rapid dissipation of alcohol in the bloodstream, coupled with an accident, hospitalization, and the lapse of two hours until arrest, constitute exigent circumstances for such a blood draw.[221]

Wisconsin believed that the categorical approach was the most reasonable interpretation.[222] According to the Maine Supreme Court, "[t]he bodily process that eliminates alcohol also provides exigent circumstances obviating the need to obtain a warrant prior to administering a blood test. '[T]he delay occasioned by obtaining a search warrant could destroy the evidence.'"[223] The Idaho Supreme Court believed, "the destruction of the evidence by metabolism of alcohol in the blood provides an inherent exigency which justifies the warrantless search."[224] The Minnesota Supreme Court also

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216. *See infra* Part IV.
217. *Schmerber*, 384 U.S. at 772.
218. *Id.*
219. *See generally supra* note 166; *infra* note 222; *supra* notes 181, 191-92.
220. *Bohling*, 494 N.W.2d at 402.
221. *Id.*
222. *Id.* ("We believe that the more reasonable interpretation of *Schmerber* is the first one set forth – exigency based solely on the fact that alcohol rapidly dissipates in the bloodstream").
223. State v. Baker, 502 A.2d 489, 493 (Me. 1985) (quoting State v. Libby, 453 A.2d 481, 458 n. 4 (Me. 1982)).
224. State v. Woolery, 775 P.2d 1210, 1212 (Idaho 1989).

explained "the undisputed rapid dissipation of alcohol in the defendant's blood creates a single-factor exigent circumstance."[225]

The Ohio Supreme Court has not explicitly recognized either interpretation of *Schmerber* or addressed the constitutionality of warrantless blood draws. However, the court of appeals has adopted the categorical interpretation.[226] The Ninth District adopted this interpretation in 2003 when it explained "[t]he *Schmerber* court concluded that because of the rapid rate at which alcohol diminishes in the blood . . . there would be no time reasonably to expect the officer to obtain a warrant. Such facts demonstrate an exigent circumstance, excusing the obtaining of a warrant."[227] Moreover, the Twelfth District adopted this interpretation in 2010 when the court of appeals stated that the *Schmerber* Court, "determined that a warrantless seizure of a blood sample for purposes of testing an individual's alcohol level could be justified based on exigent circumstances resulting from the evanescent nature of the evidence, i.e., the fact that the level of alcohol in blood dissipates over time."[228] More recently, in 2018, the Fifth District found "the potential for alcohol to dissipate within a suspect's blood system constitutes exigent circumstances."[229]

Because so many States interpreted *Schmerber* as establishing the inherent dissipation of alcohol in the blood as a categorical exigency justifying a warrantless blood draw, the *McNeely* Court took it upon themselves to clarify any misunderstanding arising from *Schmerber*.[230] *McNeely* explicitly held that the reasonableness of a warrantless blood draw of a drunk-driving suspect must be determined on a case-by-case basis looking at the totality of the circumstances.[231] Exigent circumstances is not a categorical exception, and the natural dissipation of alcohol from the blood does not permit a departure from the careful case-by-case assessment of exigency and justify the adoption of a categorical *per se* rule.[232] When officers can reasonably obtain a warrant before conducting a blood draw on

225. State v. Shriner, 751 N.W.2d 538, 548 (Minn. 2008).

226. State v. Kiger, 105 N.E.3d 751, 759 (Ohio Ct. App. 2018); *City of Willoughby*, 2011 WL 2120095, at ¶¶ 36-37; *Slates*, 2011 WL 303246, at ¶ 56; *Anderson*, 2001 Ohio App. LEXIS 3804, at *8; *Troyer*, 2003 Ohio App. LEXIS 529, at ¶ 28.

227. *Troyer*, 2003 Ohio App. LEXIS 529, at ¶ 28.

228. State v. Palmieri, No. CA2009-12-294, 2010 WL 4721234, at ¶ 9 (Ohio Ct. App. Nov. 22, 2010). *See also* State v. Capehart, No. CA2010-12-035, 2011 WL 2175713, at ¶ 10 (Ohio Ct. App. May 31, 2011).

229. *Kiger*, 105 N.E.3d at 759.

230. *McNeely*, 569 U.S. at 147 ("We granted certiorari to resolve a split of authority on the question whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations").

231. *Id.* at 156.

232. *Id.* at 150-52.

a drunk-driving suspect, they must do so pursuant to the Fourth Amendment.[233]

Overall, *McNeely* changed the nation's understanding of warrantless blood draws and, following the opinion, many states reconsidered their stance on the reasonableness of warrantless blood draws.[234] In 2014, the Idaho Supreme Court overruled its own precedent that characterized the dissipation of alcohol in the blood, alone, as an exigency permitting a warrantless blood draw.[235] In *State v. Wulff*, the Idaho Supreme Court explained,

> *Missouri v. McNeely* indicates that Idaho cannot use a per se exigency exception to the warrant requirement based upon the natural dissipation of alcohol in the bloodstream . . . Accordingly, *McNeely* abrogated *Woolery*'s holding that the natural dissipation of alcohol always creates an exigency exception in drunk-driving cases. The rule is now that the exigency exception applies based on the totality of the circumstances, which is analyzed case by case.[236]

The same year, the Wisconsin Supreme Court overturned its own similar precedent.[237] In *State v. Kennedy*, the Wisconsin Supreme Court held,

> In light of the Supreme Court's decision in *McNeely*, we recognize our holding in *Bohling*, that the rapid dissipation of alcohol alone constitutes an exigent circumstance sufficient for law enforcement officers to order a warrantless investigatory blood draw, is no longer an accurate interpretation of the Fourth Amendment's protection against unreasonable searches and seizures. Accordingly, we hold that the rapid dissipation of alcohol alone no longer constitutes a per se exigent circumstance. Exigent circumstances, sufficient to justify a warrantless investigatory blood draw of a drunk-driving suspect, are to be determined on a case-by-case totality of the circumstances analysis.[238]

The next year, the Georgia Supreme Court also overturned its own precedent in light of *McNeely*, rejecting the idea that the natural dissipation of alcohol from the blood necessarily constitutes an exigent circumstance justifying a warrantless blood draw in favor of a case-by-case assessment of exigency.[239]

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233. *Id.* at 152.
234. *Prado*, 960 N.W.2d at 875-76.
235. State v. Wulff, 337 P.3d 575, 582 (Idaho, 2014).
236. *Id.* at 578-79.
237. State v. Kennedy, 856 N.W.2d 834, 844-45 (Wis. 2014).
238. *Id.*
239. Williams v. State, 771 S.E.2d 373, 376 (Ga. 2015) (explaining that although the Court previously determined, in *Strong v. State*, 202 S.E.2d 428 (Ga. 1973), that the "evanescent nature of

In addition to formally rejecting the categorical interpretation of *Schmerber*, *McNeely* changed the nation's perspective on the intrusiveness of blood draws.[240] After *McNeely*, blood draws were no longer viewed as minimally intrusive.[241] The *McNeely* court expressed that blood draws implicate "significant, constitutionally protected privacy interests," and *Birchfield* took it a step further and characterized blood draws as "significant bodily intrusions."[242] Thus, many warrantless BAC test perspectives arising from *Schmerber* gradually became obsolete.

Although the Ohio Supreme Court has never expressed a preference for either interpretation of *Schmerber*, Senator Grendell was apparently a proponent of the categorical interpretation when he sponsored R.C. 4511.191(A)(5)(b).[243] Moreover, in the only constitutional challenge of the statute presented to the court of appeals, the Ninth District used the same categorical interpretation to uphold the statute.[244] Thus, it seems as if the statute was founded upon an outdated, categorical understanding of *Schmerber* that the dissipation of alcohol in the blood is a *per se* exigency authorizing a warrantless blood draw.[245] Even though Ohio attorneys have recognized that *McNeely* put R.C. 4511.191(A)(5)(b) in jeopardy, the constitutionality of the statute, or warrantless blood draws generally, has not been presented before the Ohio Supreme Court in light of *McNeely* and *Birchfield*.[246]

Ultimately, R.C. 4511.191(A)(5)(b) cannot be upheld under the exigent circumstance exception. The exigent circumstance exception is not categorical, and each determination of exigency must be made on a case-by-case basis.[247] Even if a particular situation "almost always" constitutes exigent circumstances, the legislature cannot identify that situation in a

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alcohol in the blood," alone, authorizes a warrantless blood draw "to prevent a failure of justice from a certain disappearance of this evidence," the U.S. Supreme Court's decision in *McNeely* overrules this ideology in favor of a case-by-case analysis).

240. *See generally McNeely*, 569 U.S. 141.

241. *McNeely*, 569 U.S. at 148.

242. *Birchfield*, 136 S. Ct. at 2178 (2016); *McNeely*, 569 U.S. at 159.

243. *Supra* note 19.

244. *See Slates*, 2011 WL 303246, at ¶ 56.

245. *See supra* note 19.

246. Charles M. Rowland II, *Forced Blood Draw in Ohio (What Happens After Missouri v. McNeeley)*, DAYTON DUI (2014), https://daytondui.com/forced-blood-draw-in-ohio-what-happens-after-missouri-v-mcneeley/amp/ (acknowledging that *McNeely* placed the constitutionality of R.C. 4511.191 in jeopardy. Some of the questions Rowland recognized include "(1) Did [*McNeely*] invalidate the implied consent laws? And (2) Are search warrants required for every DUI arrest before a forced blood draw can be taken from a person suspected of drunk-driving?"). Douglas E. Riddell, *U.S. Supreme Court: Police Must Get a Warrant Before Forcing a Blood Draw in a DUI / OVI Arrest*, RIDDELL L. (Apr. 20, 2013), https://www.riddelllaw.com/u-s-supreme-court-police-must-get-a-warrant-before-forcing-a-blood-draw-in-a-dui-ovi-arrest/ (explaining how the U.S. Supreme Court's decision in *McNeely* could affect Ohioans charged with OVI).

247. *Mitchell*, 139 S. Ct. at 2533.

statute and blanketly authorize warrantless blood draws for that situation.[248] This is evidenced by the fact that the Wisconsin Supreme Court found Wisconsin's unconscious driver provision unconstitutional even in light of *Mitchell* holding that unconscious drivers "almost always" present exigent circumstances justifying a warrantless blood draw.[249] As the Wisconsin Supreme Court explained, "even if a separate warrant exception may often apply . . . that does not save the constitutionality of the incapacitated driver provision."[250]

Because this provision is part of Ohio's implied consent statute, the constitutionality of the provision, itself, must be considered under the consent exception, and consent is a separate and distinct exception to the warrant requirement from exigent circumstances.[251] Consideration of the implied consent statute does not involve any application of exigent circumstances.[252] If an officer relies on exigent circumstances to justify a warrantless blood draw, he is not relying on the implied consent statute and vice versa.[253] Therefore, the appropriate manner of analyzing the constitutionality of R.C. 4511.191(A)(5)(b) must be under the consent analysis.[254]

C. Voluntary Consent

The U.S. Supreme Court has approved of "the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply."[255] However, the term "implied consent" does not do exactly what its name suggests. It is generally understood that motorists do not have a constitutional right to decline a blood draw, but this does not mean that implied consent laws empower law enforcement with unrestricted authority to compel blood draws upon probable cause of drunk-driving.[256] The Ohio Supreme Court has explained that the implied consent statute does not entitle an arresting officer to administer blood draws, and it does not impose an obligation on motorists to consent to warrantless blood

248. *See Prado*, 960 N.W.2d at 879.

249. *See Mitchell,* 139 S. Ct. at 2539; *Prado*, 960 N.W.2d at 880-81, 883. The *Mitchell* Court declined to address the constitutionality of Wisconsin's unconscious driver provision; therefore, it did not overrule or uphold the statute. Rather, the Court made a general analysis of how the exigent circumstances framework applies to unconscious drivers. The Wisconsin Supreme Court independently reviewed and overruled its unconscious driver provision in *Prado*. Ohio has a similar unconscious driver provision codified in R.C. 4511.191(4) that may also raise constitutional concerns.

250. *Prado*, 960 N.W.2d at 881.

251. *Id.* at 879.

252. *Id.*

253. *Id.*

254. *See generally id.*

255. *Birchfield*, 136 S. Ct. at 2185.

256. *City of Westerville*, 239 N.E.2d at 40-42. *See also Schmerber*, 384 U.S. at 768, 772.

draws.[257] It simply means that the State may make refusal, upon a finding of probable cause for drunk-driving, unlawful and impose civil penalties for such refusal.[258]

When reviewing a provision of Wisconsin's implied consent statute, the Wisconsin Supreme Court explained that

> [T]he implied consent law is explicitly designed to allow the driver, and not the police officer, to make the choice as to whether the driver will give or decline to give actual consent to a blood draw when put to the choice between consent or automatic sanctions. Framed in the terms of 'implied consent,' choosing the 'yes' option affirms the driver's implied consent and constitutes actual consent for the blood draw. Choosing the 'no' option acts to withdraw the driver's implied consent and establishes that the driver does not give actual consent. Withdrawing consent by choosing the 'no' option is an unlawful action, in that it is penalized by 'refusal violation' sanctions, *even though it is a choice the driver can make*.[259] (Emphasis added).

Moreover, according to the Oregon Supreme Court, "'[c]onsent' describes a legal act; 'refusal' describes a physical reality. By implying consent, the statute removes the *right* of a licensed driver to lawfully refuse, but it cannot remove his or her *physical power* to refuse."[260]

In other words, "actual consent" at the time of arrest is necessary for an officer to conduct a warrantless blood draw under the consent exception, and motorists do not give actual consent to a warrantless blood draw simply by driving on State highways.[261] Actual consent must be given freely and voluntarily, and the voluntariness of this consent is a question of fact to be determined from the totality of the circumstances.[262] Consent is not voluntary if it is the product of duress or coercion, and simple acquiescence to authority is insufficient to constitute actual consent to a warrantless search.[263] The actual consent required for officers to conduct a warrantless blood draw upon suspicion of drunk-driving must be clear and unambiguous and not coerced

257. *City of Kettering*, 328 N.E.2d at 807 (explaining that Ohio's implied consent statute "merely provides that one 'shall be deemed to have given consent' to [BAC] tests by virtue of his use of public highways. There is nothing whatsoever in the language stated therein that entitles anyone to the administration of the tests by the city or any arresting officer." To be clear, the court explicitly stated that the implied consent statute cannot "be read in such a manner as to impose an obligation mandating these tests").

258. *Id.*

259. *Prado*, 960 N.W.2d at 880-81, 883.

260. *Newton*, 636 P.2d at 397.

261. *Id.*

262. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973); Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

263. *Schneckloth*, 412 U.S. at 227; *Bumper*, 391 U.S. at 549.

or "implied."[264] Thus, actual consent to a warrantless blood draw must be determined on a case-by-case basis.[265]

The "implied consent" that drivers give at the time they obtain a driver's license is not continuous and ongoing "actual consent" to submit to a blood draw.[266] Rather, it allows the state to punish motorists for the unlawful action of failing to give actual consent when an officer has probable cause to believe they have been driving under the influence.[267] The key fact here is that, even though refusing BAC testing pursuant to the implied consent statute is unlawful, motorists still have the *option* to refuse and suffer the consequences of that refusal.[268] Motorists cannot be compelled to comply with the law.[269]

"There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads."[270] As the Georgia Supreme Court explained, "to hold that the legislature could nonetheless pass laws stating that a person 'impliedly' consents to searches under certain circumstances where a search would otherwise be unlawful would be to condone an unconstitutional bypassing of the Fourth Amendment."[271] Thus, contrary to Senator Grendell's erroneous belief, the State cannot precondition the privilege of driving on any condition it wants.[272]

The State cannot precondition the privilege of driving on consenting to a search that would otherwise be unconstitutional.[273] In *Birchfield,* when reviewing North Dakota's implied consent statute that imposed criminal sanctions for refusing BAC testing, the U.S. Supreme Court stated that "motorists could be deemed to have consented to only those conditions that are 'reasonable' in that they have a 'nexus' to the privilege of driving and entail penalties that are proportional to the severity of the violation."[274] Authorizing officers to use "whatever reasonable means are necessary" to ensure that motorists submit to a blood draw is not a reasonable condition of driving a motor vehicle in Ohio, even if the motorist has a prior OVI

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264. *Schneckloth*, 412 U.S. at 228-29.

265. *See Wulff*, 337 P.3d at 581 (Explaining that a holding that the consent implied by statute is irrevocable would be utterly inconsistent with the *McNeely's* denouncement of categorical rules that allow warrantless forced blood draws. Moreover, the court explains, irrevocable implied consent operates as a *per se* rule that cannot fit under the consent exception because it does not always analyze the voluntariness of that consent).

266. *See Schneckloth*, 412 U.S. at 228-29; *Bumper*, 391 U.S. at 548-50.

267. *City of Kettering*, 328 N.E.2d at 807.

268. § 4511.191(A)(5)(b); *City of Kettering*, 328 N.E.2d at 807.

269. *See* § 4511.191(A)(5)(b); *City of Kettering*, 328 N.E.2d at 807

270. *Birchfield*, 136 S. Ct. at 2185.

271. Cooper v. State, 587 S.E.2d 605, 612 (Ga. 2003) (quoting Hannoy v. State, 789 N.E.2d 977, 987 (Ind. App. 2003)).

272. *Id.* at 612; s*upra* note 19.

273. *See Ybarra*, 444 U.S. at 87, 96 (explaining that a statute cannot authorize a search that would otherwise be unconstitutional).

274. *Birchfield,* 136 S. Ct. at 2186.

conviction.[275] Permitting an officer to penetrate an individual's skin using "whatever reasonable means are necessary" and invade their most sacred privacy interest has no nexus to the privilege of driving and is severely disproportional to the violation.[276] Therefore, because "implied consent" is not sufficient "actual consent" to satisfy the consent exception to the warrant requirement, the statute cannot be justified under the consent exception.[277]

D. Risk of Police Brutality

Not only does the provision violate Fourth Amendment principles, it also subjects citizens to a high risk of police brutality. The provision grants officers complete immunity from civil or criminal liability resulting from actions pursuant to the provision unless the officer acted with "malicious purpose, in bad faith, or in a wanton or reckless manner."[278] Ohio courts define "malicious purpose" as "willful and intentional design to do injury, or the intention or desire to harm another, usually seriously, through unlawful or unjustified conduct."[279] "Bad faith" is defined as acting with "dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud."[280] "Wanton" misconduct is defined as "the failure to exercise any care toward those to whom a duty of care is owed in circumstances in which there is a great probability that harm will result."[281] Lastly, "reckless conduct" means "the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct."[282]

These are very vague and broad terms that give officers too much leeway to impose force on citizens. Even the Supreme Court has long recognized that "police acting on their own cannot be trusted", and the power entrusted in them can be destructive.[283] This becomes even more alarming considering the infrequency that police are held accountable for their misconduct, and lack of police accountability has been apparent in Ohio.[284]

275. § 4511.191(A)(5)(b).
276. *Id.*; *Birchfield*, 136 S. Ct. at 2186.
277. *Schneckloth*, 412 U.S. 228-29; *Newton*, 636 P.2d at 397.
278. § 4511.191(A)(5)(b).
279. Lewis v. City of Toledo, No. L-12-1360, 2014 WL 1569475, at ¶13 (Ohio Ct. App. 2014).
280. *Id.*
281. *Id.*
282. *Id.*
283. *McDonald*, 335 U.S. at 456.
284. *See generally infra* notes 287-88.

The Cincinnati Police Depart is infamous for having "a culture and practice of unsanctioned and inconsistent discipline."[285] Between 2016 and 2018, 126 use of force complaints were filed against the Cincinnati Police Depart, and only 10 percent were resolved in favor of civilians.[286] In a 2014 investigation launched by the U.S. Department of Justice (DOJ), it was discovered that the Cleveland Police Department consistently engaged in a pattern of misconduct including "the unnecessary and excessive use of deadly force," "the unnecessary, excessive or retaliatory use of less lethal force," "excessive force against persons who are mentally ill or in crisis," and "the employment of poor and dangerous tactics that . . . place officers and civilians at unnecessary risk."[287] Not only did Cleveland police engage in a pattern of misconduct, but the department failed, as a whole, to "adequately review and investigate officers' uses of force" and "fully and objectively investigate all allegations of misconduct."[288] In fact, in 2014, 144 Cleveland police officers were brought up on internal charges for misconduct, and only one was terminated.[289] Lastly, the Columbus Police Department received 329 use of force complaints between 2016 and 2020, and none were resolved in favor of civilians.[290]

Essentially, this provision gives officers an alarming amount of power and discretion to use force against citizens, and, as history shows, local police departments in Ohio's largest cities have been ineffective at preventing and rectifying misconduct from police officers. This is the type of unchecked power the Supreme Court cautioned against and exactly why the Constitution

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285. Jennifer Baker, *FOP Asks City to Intervene in 'Mismanagement' of Police Discipline,* FOC 19 (Oct. 22, 2018), https://www.fox19.com/2018/10/22/police-union-leader-asks-city-intervene-mismanagement-discipline/. Sarah Brookbank, *Cincinnati Police Union Chief Dan Hils: 'Do I Have Confidence in the Chief of Police? The Answer Is No'*, Cincinnati Enquirer (Oct. 22, 2018), https://www.cincinnati.com/story/news/2018/10/22/fop-president-alleges-mismanagement-officer-reviews-dan-hils-eliot-isaac/1725959002/ (showing that Cincinnati police officers have recognized the insufficiency if its own internal disciplinary process).

286. *Columbus,* POLICE SCORECARD, https://policescorecard.org/oh/police-department/columbus (last visited Feb. 11, 2022).

287. *See Investigation of the Cleveland Division of Polie,* U.S. DEPT. OF JUST. (Dec. 4, 2014), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/04/cleveland_division_of_police_findings_letter.pdf, 3 (The U.S. Department of Justice found that the Cleveland Police Department had a practice of using unreasonable force in violation of the Fourth Amendment).

288. *Id*.

289. Sarah Buduson, *Investigation: CPD Disciplinary Process Flawed*, NEWS 5 CLEVELAND (Dec. 8, 2015), https://www.news5cleveland.com/longform/insufficient-accountability-arrests-drug-use-convictions-dont-cost-cpd-offiicers-their-jobs.

290. POLICE SCORECARD, *supra* note 289. *See* Andy Downing, *The List: Tracking Five Years of Damning Stories Out of CPD*, COLUMBUS ALIVE (Oct. 5, 2021), https://www.columbusalive.com/story/entertainment/human-interest/2021/10/05/list-tracking-five-years-damning-columbus-police-stories/6009124001/ (explaining some of the numerous incidents of misconduct by the Columbus Police Department. A few of these incidents include an officer shooting and killing a 13-year-old boy, an officer shooting and killing a 23-year-old boy after shooting him seven times, and an officer being filmed while kicking a suspect in the head).

requires officers to obtain a search warrant from a neutral and detached magistrate before intruding into a citizen's privacy.[291]

CONCLUSION

Ohio currently has an unconstitutional and potentially dangerous provision within its implied consent statute. It is apparent that the provision was adopted at a time when many States had a misconception that the inherent dissipation of alcohol in the blood, alone, was an exigency justifying a warrantless blood draw.[292] However, it is clear that the U.S. Supreme Court, in *McNeely* and *Birchfield*, expressed that the dissipation of alcohol in the blood is *not* a *per se* exigency, and any determination of exigent circumstances must be analyzed on a case-by-case basis.[293] Although R.C. 4511.191(A)(5)(b) has been upheld on one occasion by the court of appeals, this decision was issued prior to *McNeely* and *Birchfield* and did not consider the principles asserted in those cases.[294]

In light of *McNeely* and *Birchfield*, this provision is unconstitutional and should be removed from Ohio's implied consent statute. Highway safety is a significant state interest, but there are limits to the means Ohio may use to achieve that interest. Rather than authorizing an unconstitutional intrusion into a person's most sacred privacy interest, Ohio should abide by its own precedent that implied consent laws do not impose a mandate and entitle officers to administer blood draws.[295] Blood draws, like any other search, require a warrant. Any determination of exigent circumstances or voluntary consent that may authorize a warrantless blood draw must be analyzed on a case-by-case basis.

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291. *McDonald*, 335 U.S. at 456. According to the Court, "Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police" before they may intrude upon a citizen's privacy interests.

292. *See* § 4511.191(A)(5)(b); *supra* notes 222, 228, 239-40.

293. *See Birchfield*, 136 S. Ct. at 2180; *McNeely*, 569 U.S. at 156.

294. *See McNeely*, 569 U.S. 141; *Hollis*, 2013 Ohio App. LEXIS 2564, at ¶ 27; *supra* Part II.

295. *City of Kettering*, 328 N.E.2d at 807.