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SUPREME COURT OF THE STATE OF WASHINGTON

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Washington State Supreme Court

STATE OF WASHINGTON,

APR 08 2015
Ronald R. Carpenter
Petitioner, Clerk *h/h*

v.

DOMINIC BAIRD and COLLETTE ADAMS,

Respondents.

BRIEF OF AMICUS CURIAE STATE OF WASHINGTON,
WASHINGTON STATE PATROL AND DEPARTMENT OF
LICENSING

ROBERT W. FERGUSON
Attorney General

SCHUYLER B. RUE
LEAH HARRIS
Assistant Attorneys General
Attorneys for Washington State
Patrol and Department of Licensing

Washington State Attorney
General's Office
PO Box 40110
Olympia, WA 98504-0110
(360) 586-2588



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I. INTRODUCTION

Washington State's implied consent law has been an important tool in the fight against drunk driving for nearly 50 years. The United States Supreme Court's decision in *Missouri v. McNeely*, which addressed the nonconsensual drawing of blood for alcohol testing, does not address the constitutionality of breath tests performed pursuant to state implied consent laws. In fact, a voluntary breath test is a preferred alternative to a nonconsensual blood test because it is less invasive. A breath test is a reasonable search: it is non-intrusive and administered only after a driver is under arrest, has received the implied consent warnings, and has given consent. A driver's consent to the test after advisement of the implied consent warnings is actual consent because the warnings are not coercive, creating an exception to the warrant requirement. The standard warnings plainly explain a person's right to refuse, are read after advisement of *Miranda* rights, and the legal consequences of refusing the test are not coercive. The choice put to a driver may be a difficult one. But the choice does not unconstitutionally burden a person's right to refuse because a driver who impliedly consents to a breath test by driving on Washington roadways has a diminished expectation of privacy in the alcohol content of his or her breath, and the State has a compelling interest in eradicating drunk driving through effective enforcement practices.

II. IDENTITY AND INTEREST OF AMICUS

The Washington State Patrol and Department of Licensing have a vital interest in eliminating drunk driving. In 2013, there were 149 fatalities in Washington in collisions involving a driver with a blood alcohol content of .08 or higher, accounting for 34 percent of total traffic fatalities.¹ On interstate and state highways alone, there were 527 DUI injury collisions during that same time period.² While those numbers are unacceptably high, there has been incremental progress in the fight to end drunk driving. Just 10 years earlier in 2003, there were 228 fatalities in crashes involving a driver with a blood alcohol content of .08 or higher, accounting for 38 percent of total traffic fatalities.³

This Court has recognized the State's effort to reduce the "carnage intoxicated drivers wreak upon the people and highways of the State." *Ingram v. Dep't of Licensing*, 162 Wn.2d 514, 517, 173 P.3d 259, 260 (2007). The implied consent law is an important tool in achieving that goal. In 1968, Washington voters overwhelmingly enacted the implied consent law. Laws of 1969, ch. 1, § 1, *codified as* RCW 46.20.308. The implied consent law's purpose is to discourage persons from driving motor

¹ NHTSA, Traffic Safety Facts, 2013 Data (accessed at <http://www-nrd.nhtsa.dot.gov/Pubs/812102.pdf>)

² Washington State Patrol, 2013 Annual Report (accessed at http://www.wsp.wa.gov/publications/reports/WSP_2013_Annual_Report.pdf)

³ NHTSA, Traffic Safety Facts, 2003 Data (accessed at <http://www-nrd.nhtsa.dot.gov/Pubs/809761.pdf>)

vehicles while under the influence of alcohol or drugs, to remove the driving privileges of those persons disposed to driving while intoxicated, and to provide an efficient means of gathering reliable evidence of intoxication or nonintoxication. *Cannon v. Dep't of Licensing*, 147 Wn.2d 41, 47, 50 P.3d 627 (2002).

The implied consent law provides the Washington State Patrol and other law enforcement agencies with a consistent protocol for safely gathering evidence of intoxication in DUI investigations. Under the implied consent law, a suspect has the choice of a breath test as opposed to a system in which all drivers would be subjected to involuntary blood draws via a search warrant. RCW 46.20.308(2).⁴ This implied consent law also represents a legislative determination that law enforcement officers should not use force to secure a breath test. Additionally, implied consent allows law enforcement to get the best evidence sooner rather than later. The process of applying for a warrant is time consuming, with each moment resulting in dissipating evidence. A breath test is a quick and painless method to acquire reliable evidence of intoxication.

The Washington State Department of Licensing relies on the implied consent statute to quickly suspend the driver's licenses of drunk

⁴ If the driver is unconscious or the arrest is for a serious DUI crime, an officer may elect to obtain a blood draw pursuant to a "search warrant, a valid waiver of the warrant requirement, or when exigent circumstances exist." RCW 46.20.308(3).

drivers under a civil administrative process that avoids delays of the criminal process and inconsistent results based on criminal plea bargaining. RCW 46.20.308(6), (7), RCW 46.20.3101. In 2013, DOL received 22,100 sworn reports from law enforcement indicating a driver had been arrested for DUI and met the initial criteria for a suspension. Of those arrests, 16,879 drivers consented to a test that was above the legal limit and 5,221 refused to submit to a test.

III. ISSUES ADDRESSED BY AMICUS

The Washington State Patrol and the Department of Licensing agree with the King County Prosecutor's argument that a warrantless search for a breath test under the implied consent law is justified by exigency. Accordingly, no further briefing on that issue is provided. Instead, this amicus brief focuses on the consent exception to the warrant requirement and the reasonableness of the breath test.

IV. ARGUMENT

A. **This Court Has Already Upheld Breath Tests Administered Pursuant to the Implied Consent Law, and *McNeely* Is Consistent With This Holding**

Shortly after the enactment of the implied consent law, this Court upheld the implied consent law against constitutional challenge. In *State v. Moore*, a driver submitted to a breath test after advisement of the implied consent warnings. *State v. Moore*, 79 Wn.2d 51, 52, 483 P.2d 630

(1971). The Court held that the requirement that a driver either submit to a breath test or face a license revocation did not compel an accused to give evidence against himself within the meaning of article 1, section 9. *Id.* at 57. The Court observed that:

[the driver] voluntarily consented to the performance of a Breathalyzer test. Even if he had not so consented, or if it can be argued that his consent was given only to avoid the sanction imposed for nonconsent, the result would not be different Whether an accused's consent to the chemical test be voluntary or involuntary, the law, with its rights afforded the accused, is constitutionally sustainable as a reasonable exercise of the state's police power, having as its purpose the reduction of traffic carnage occasioned by the inebriated driver.”

Id. at 57-58.

Baird and Adams rely heavily on the recent United States Supreme Court opinion in *Missouri v. McNeely*, ___U.S.___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). This reliance on *McNeely* is mistaken because the case addressed an involuntary blood draw and does not apply to Washington State's implied consent statute. *Id.* at 1556, 1565. In *McNeely* the Court clarified its earlier opinion, *Schmerber v. California*, 384 U.S. 757, 759, 86 S. Ct. 1826, 1829, 16 L. Ed. 2d 908 (1966), in which the Court held that a warrantless, nonconsensual blood draw, over the driver's objection, was valid under the Fourth Amendment because the arresting officer was confronted with exigent circumstances. *McNeely*, 133 S. Ct. at 1560. The

McNeely Court held that the metabolization of alcohol does not constitute a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement, but is one factor to be weighed in a totality of the circumstances analysis. *McNeely*, 133 S. Ct. at 1563.

Schmerber and *McNeely* apply only to nonconsensual, warrantless blood draws. In both cases, the drivers' blood was drawn despite their refusal to consent to the tests. *McNeely*, 133 S. Ct. at 1557; *Schmerber*, 384 U.S. at 758-59. And, in both cases, the question of whether a warrant was required arose only because the drivers refused to consent to the tests and the officers did not obtain warrants. *Id.* Those cases do not undercut the constitutionality of implied consent statutes, nor do they address whether breath tests administered after implied consent warnings are reasonable searches, or whether there are other exceptions to the warrant requirement in the implied consent setting. Thus, *McNeely* and *Schmerber* do not support the Respondents' arguments here. To the contrary, the *McNeely* court implicitly endorsed tests administered following implied consent warnings by recognizing that implied consent laws have the effect of avoiding nonconsensual blood draws and that the threat of nonconsensual blood draws, pursuant to a warrant, reduces the rate of breath test refusals. *McNeely*, 133 S.Ct. at 1566. It referred to such implied consent laws as "legal tools to enforce [States] drunk-driving laws

and secure BAC evidence without undertaking warrantless nonconsensual blood draws.” *Id.* *McNeely* does not alter existing case law dealing with breath tests performed under the implied consent law.

B. The Consent Exception Applies Because the Implied Consent Warnings Are Not Coercive

Consent is a valid exception to the warrant requirement. *State v. Leach*, 113 Wn.2d 735, 738, 782 P.2d 1035 (1989). Consent is established if (1) the consent is voluntary, (2) the person consenting has the authority to consent, and (3) the search does not exceed the scope of the consent. *State v. Thompson*, 151 Wn.2 793, 803, 92 P.3d 228 (2004). Baird appears to challenge only whether his consent was voluntary. Br. of Resp’t Baird at 25-26.

Whether consent was voluntary or instead the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances. *State v. Bustamante-Davila*, 138 Wn.2d 964, 981, 983 P.2d 590 (1999). Factors include (1) whether Miranda warnings had been given prior to obtaining consent; (2) the degree of education and intelligence of the consenting person; and (3) whether the consenting person had been advised of his right to consent. *Id.* at 981–82. No one factor is dispositive. *Id.*

While totality of the circumstances is a fact intensive inquiry, virtually all searches occurring under the implied consent law have similar circumstances that weigh heavily in favor of voluntariness. First, drivers will have received Miranda warnings because a lawful arrest is a prerequisite to the operation of the implied consent law. RCW 46.20.308(1). Second, regarding the intelligence of the consenting person, this Court has said that “the obvious purpose of the implied consent warnings is to provide the operator the opportunity of exercising an intelligent judgment.” *State Dep’t of Motor Vehicles v. McElwain*, 80 Wn.2d 624, 628, 496 P.2d 963, 965 (1972); *see also State v. Bartels*, 112 Wn.2d 882, 886, 774 P.2d 1183, 1185 (1989) (the statutory four-part warning “enables the driver to make an intelligent decision how to exercise his or her statutory rights.”). Third, the implied consent warnings uniformly advise a person of the right to refuse the test. RCW 46.20.308(2).

Baird argues that consent given following the implied consent warnings is coerced rather than voluntary because the driver is informed that a refusal may be used against him or her in a criminal proceeding. Br. of Resp’t Baird at 25-26. While a driver impliedly consents to a test of the alcohol content of his breath or blood by driving on Washington roadways, once arrested for driving under the influence, the driver has the

opportunity to give actual consent to the test or withdraw the implied consent. *See State v. Staeheli*, 102 Wn.2d 305, 309, 685 P.2d 591 (1984) (“Consent to a chemical test is implied from being granted driving privileges, upon condition that an opportunity to withdraw consent will be given.”). The implied consent warnings, provided before any test is administered, advise drivers of the right to refuse. RCW 46.20.308(2).

More importantly, the U.S. Supreme Court held and this Court has recognized that a refusal is not an act impermissibly coerced by the choice put to a driver and use of the refusal at a criminal trial is not fundamentally unfair, even if a driver is not warned of the consequences of refusal. *South Dakota v. Neville*, 459 U.S. 553, 564, 566, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983); *State v. Zwicker*, 105 Wn.2d 228, 238-241, 243, 713 P.2d 1101 (1986) (holding that there is no coercion in obtaining refusal evidence when a driver *receives* a warning regarding the consequences of refusal). Although *Neville* and *Zwicker* examined the issue in the context of the Fifth Amendment privilege against self-incrimination, the ultimate question is “whether the existence of a consequence for refusing to take a chemical test rendered the driver’s choice involuntary.” *State v. Brooks*, 838 N.W.2d 563, 570 (Minn. 2013). The same analysis applies here in the Fourth Amendment and article 1,

section 7 context, where the question is the same: whether Baird's consent to the breath test was voluntary or coerced.

Since *McNeely* was decided, several states have concluded that a driver's consent to a test following implied consent warnings is actual consent. *People v. Harris*, 170 Cal. Rptr. 3d 729, 734 (Cal. Ct. App. 2014) ("consent is not invalid under the Fourth Amendment simply because it was given in advance and in exchange for a related benefit, and this is all the implied consent law accomplishes"); *State v. Brooks*, 838 N.W.2d 563, 571 (Minn. 2013) ("a driver's decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test."); *State v. Moore*, 318 P.3d 1133, 1138 (Or. 2013) ("[I]t is difficult to see why the disclosure of accurate information about a particular penalty that may be imposed—if it is permissible for the state to impose that penalty—could be unconstitutionally coercive."); *State v. Padley*, 849 N.W.2d 867, 887 (Wis. Ct. App. 2014) (Defendant failed to establish that her consent to a blood draw under state's "Informing the Accused" statute was invalid); *McCoy v. ND Dep't of Trans.*, 848 N.W.2d 659, 667-68 (N.D. 2014) ("a driver's decision to agree to take a test is not coerced simply because an administrative penalty has been attached to refusing the test.")

The implied consent law also avoids many potential circumstances that would otherwise be relevant to involuntariness. Issues of coercion or duress often arise in police investigations where an officer's authority to conduct a warrantless search is uncertain or where the interaction between the police and a defendant has no pre-defined script. *See, e.g. State v. O'Neill*, 148 Wn.2d 564, 589, 62 P.3d 489 (2003) (police officer repeatedly pressed the defendant for consent to a warrantless search and insisted that he could obtain a warrant after observing what appeared to be narcotics in defendant's vehicle). Courts are often concerned about subtle coercion in seemingly straightforward police interactions with citizens that are in fact laden with additional context. Here, by contrast the implied consent law provides a standardized protocol for eliciting consent. RCW 46.20.308(2)-(5).

Finally, the extent of a driver's consent to a breath test is statutorily confined. The scope and manner of the search is limited to a search of an arrested person's breath, and a breath sample is precisely what he or she is asked to provide. RCW 46.20.308(2). There is little risk that—after advisement of warnings—a person would misunderstand the parameters of the search to which the person has agreed.

The warning that a refusal may be used at a criminal trial is an accurate statement of a potential consequence of refusal, even under

Baird's formulation of the permissible uses of evidence of refusal. Br. of Resp't Baird at 26 (conceding that "refusal may still be used at trial as impeachment"). There is no evidence that Baird's consent was actually influenced by the warning or that he had any further questions about the conditions under which a refusal could be used at a criminal trial.

Evidence of intoxication is a factor that courts take into consideration when determining whether a person voluntarily waives the right to remain silent. See e.g. *State v. Reuben*, 62 Wn. App. 620, 625, 814 P.2d 1177 (1991). But this Court has found that an intoxicated driver who had been thrown from a speeding vehicle, was injured and in severe shock voluntarily waived *Miranda* rights. *State v. Cuzzetto*, 76 Wn.2d 378, 378-79, 457 P.2d 204 (1969). The Court in *Cuzzetto* examined cases from foreign jurisdictions and noted that involuntariness was present in cases where intoxicated defendants were "nearly hysterical" or "in a mania." *Id.* at 386. In light of the other voluntariness factors that are present in an implied consent case and the high standard for involuntariness due to intoxication, the fact of intoxication does not weigh heavily. Because consent given following advisement of the implied consent warnings is actual consent and not coerced, a breath test satisfies the consent exception to the warrant requirement.

C. A Breath Test is a Reasonable, Non-Intrusive Test Performed Only After a Driver Consents

The breath test is a reasonable search because it is minimally intrusive, administered only after advisement of the implied consent warnings and actual consent is given, and because of the government's strong interest in gathering evidence of intoxication and keeping roadways safe. Under the Fourth Amendment, "the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652, 115 S. Ct. 2386, 2390, 132 L. Ed. 2d 564 (1995). "[T]raditional standards of reasonableness' require[] a court to weigh 'the promotion of legitimate governmental interests' against 'the degree to which [the search] intrudes upon an individual's privacy.'" *Maryland v. King*, ___US___, 133 S. Ct. 1958, 1970, 186 L. Ed. 2d 1 (2013), (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S. Ct. 1297, 143 L.Ed.2d 408 (1999)).

In approving the random breath testing of railway workers, the Supreme Court in *Skinner v. Ry. Labor Execs.' Ass'n* observed that a breath test is not invasive of a person's body and reveals no facts other than the presence of alcohol. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 626, 109 S. Ct. 1402, 1418, 103 L. Ed. 2d 639 (1989). Based on the factors, the Court could not "conclude that the administration of a breath

test implicates significant privacy concerns.” *Id.* The Court recognized the government’s interest in administering tests because railway workers “discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.” *Id.* at 628.

In *Maryland v. King*, the Supreme Court approved a warrantless cheek swab of an arrestee’s DNA. *King*, 133 S. Ct. at 1980. In reaching that conclusion, the Court found that “the fact that the intrusion is negligible is of central relevance to determining whether the search is reasonable.” *Id.* at 1969. The court also considered the State’s legitimate interest in a safe and accurate method for identifying people in custody. *Id.* at 1970.

Although a warrant or warrant exception is required for all searches in Washington, *State v. Ross*, 141 Wn. 2d 304, 312, 4 P.3d 130, 135 (2000), the federal Fourth Amendment analysis is helpful in determining the reasonableness of the search. Under the Washington Constitution, the relevant inquiry is whether the State unreasonably intruded into the defendant’s private affairs. *State v. White*, 135 Wn.2d 761, 768, 958 P.2d 982 (1998); *see also State v. Arreola*, 176 Wn.2d 284, 291, 290 P.3d 983 (2012) (“[R]easonableness does have a role to play along with history, precedent, and common sense in defining both the

broad privacy interests protected from disturbance . . . as well as the scope of disturbance that is or may be authorized by law . . .”) (internal citations and quotations omitted).

A voluntary breath test is materially less invasive than a compelled blood test. A breath test is a far more gentle process than a blood draw. Breath testing involves two samples of breath blown into a collection tube and requiring no intrusion beneath the skin. The breath test is defined by administrative regulation and only reveals information regarding the concentration of alcohol. *See* WAC 448-16-050.

Additionally, the implied consent law is reasonable because there is individualized suspicion that a DUI has occurred and a driver is already on notice that a breath test will be requested. The implied consent law does not give law enforcement officers unfettered discretion to request a breath test. In order for an officer to seek consent to a breath test, there must be probable cause for DUI. RCW 46.20.308(1). A lawful arrest for DUI is a “clear indication” that a requested test will reveal evidence of intoxication. *State v. Judge*, 100 Wn.2d 706, 712, 675 P.2d 219 (1984). A person also has a diminished expectation of privacy when in custody. *See Maryland v. King*, 133 S. Ct. at 1979 (a DNA swab “does not increase the indignity already attendant to normal incidents of arrest”); *see also State v. Surge*, 160 Wn.2d 65, 74, 156 P.3d 208 (2007) (“a person’s

privacy rights under article I, section 7 may vary based on that person's status as an arrestee, pretrial detainee, prisoner, or probationer"). In fact, the implied consent law places a driver on notice that he or she faces the choice of consenting to a search or forfeiting the privilege to drive before the driver even gets behind the wheel.

Further, a voluntary breath test under the implied consent statute is administered in an inherently reasonable manner. "The need for a warrant is perhaps least when the search involves no discretion that could properly be limited by the 'interpo[lation of] a neutral magistrate between the citizen and the law enforcement officer.'" *Maryland v. King*, 133 S. Ct. 1958, 1969, 186 L. Ed. 2d 1 (2013). Once an officer has determined that probable cause for a DUI arrest exists, there is little law-enforcement discretion that can be exercised. In routine DUI arrests, the test must be of breath only. RCW 46.20.308(3)⁵. The officer must provide warnings in substantially the same language as provided in RCW 46.20.308(2). In Baird's case, Trooper Kiehl testified that "it is my training and job to just read [the implied consent warnings] verbatim. I can repeat them not explain them." VRP (Jan. 23, 2014) pg. 53. If the driver refuses after advisement of the warnings, an officer must get a search warrant. RCW 46.20.308(4). A routinized protocol for obtaining evidence of intoxication

⁵ A blood test may be administered only after arrests for designated grave DUI crimes or where the driver is unconscious. RCW 46.20.308(3).

has long been one of the goals of the implied consent law. Historically, implied consent laws were enacted—in part—to “avoid violent confrontations” between citizens and law enforcement when a person refuses to submit to a blood alcohol test. *See Neville*, 459 U.S. at 559.

Finally, in assessing the reasonableness of a search under the implied consent law, a court should weigh the degree of the intrusion against “the promotion of legitimate governmental interests.” *Maryland v. King*, 133 S. Ct. 1958, 1970, 186 L. Ed. 2d 1 (2013). Washington courts have long recognized the threat to public safety posed by drunk driving. *City of Seattle v. Mesiani*, 110 Wn.2d 454, 459, 755 P.2d 775, 778 (1988) (quoting 4 W. LaFare, *Search and Seizure* § 10.8(d), at 71) (“This court takes judicial notice ‘there is no denying the fact that there is a very strong societal interest in dealing effectively with the problem of drunken driving.’”). A breath test is a reasonable search because it is minimally invasive, administered only after arrest, advisement of rights, and under controlled circumstances, and because of the government’s strong interest in the collection of evidence and keeping roadways safe.

D. Even if a Refusal is an Exercise of a Constitutional Right, the State has a Compelling Interest in Requiring a Person to Make a Difficult Choice

With respect to using refusal to a chemical test as incriminating evidence, Washington courts have long held that the “right to refuse to

submit to a breath test is a matter of legislative grace, the Legislature may condition that right by providing that a refusal may be used as evidence in a criminal proceeding.” *State v. Long*, 113 Wn.2d 266, 272, 778 P.2d 1027, 1030-31 (1989). The U.S. Supreme Court has recognized that the criminal process often requires suspects and defendants to make difficult choices. *Neville*, 459 U.S. at 564.

However, Adams argues that there is no longer support for the maxim that the choice to submit or refuse a test is a matter of legislative grace and not a constitutional right, arguing it is based on a fundamental misreading of *Schmerber v. California*, 384, U.S. 757, 770-71 (1966). Br. of Resp’t Adams at 8, 23. Assuming that exercising the right to refuse under the implied consent law is the exercise of a constitutional right to refuse a search, the State is not unnecessarily chilling the exercise of the right to refuse. It is true that the State cannot “needlessly chill a defendant’s constitutional rights.” *State v. Frampton*, 95 Wn.2d 469, 479, 627 P.2d 922, 927 (1981) (citing *United States v. Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968)). But the U.S. Supreme Court clarified that *Jackson* did not hold that “the Constitution forbids every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.” *Chaffin v.*

Stynchcombe, 412 U.S. 17, 30-31, 93 S. Ct. 1977, 1984, 36 L. Ed.2d 714 (1973).

There is no compelling evidence that Baird's specific choice to refuse was chilled or that refusing the breath test has been systematically chilled. In fact, Adams—like many other drivers—chose to refuse the test. The outcome of Adam's choice was to trade an increased license suspension and the use of her refusal at trial for the diminished likelihood that the State would be able to sustain a DUI conviction absent reliable evidence of intoxication. The Department of Licensing's records indicate that 5,221 arrestees exercised the choice to refuse in 2013.

The purpose of the implied consent law is to ensure reliable evidence for criminal DUI prosecutions. If a driver is not informed of the consequences of refusal—or worse, if a refusal carried no consequence—drivers would begin refusing breath tests in increasing numbers. An increase in refusals would also increase the need for search warrants. Search warrants would necessarily increase more intrusive blood draws because, as a practical matter, a breath test cannot be administered to a person who refuses. That outcome unnecessarily constrains effective DUI investigations and frustrates the gains the state has made in the fight to end drunk driving.

V. CONCLUSION

McNeely does not apply to the implied consent law. Rather, a person who submits a breath sample does so after giving actual consent to the test, satisfying an exception to the warrant requirement, and the resulting test is a reasonable search.

RESPECTFULLY SUBMITTED this 27th day of March, 2015.

ROBERT W. FERGUSON
Attorney General



SCHUYLER B. RUE, WSBA #42167

LEAH HARRIS, WSBA # 40815

Assistant Attorneys General

Attorneys for Washington State Patrol and Department of
Licensing

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Attached for filing:

Thank you.

Rachel M. Gibbons

Rachel Gibbons | *Legal Assistant*

Office of the Attorney General

Licensing and Administrative Law Division

1125 Washington St. SE | Olympia, WA | 98504

(360) 586-6236 tel | (360) 664-0174 fax | 40110 ms