

No. 91642-0

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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CORTNEY L. BLOMSTROM,  
BROOKE M. BUTTON,  
CHRISTOPHER V. COOPER,

Petitioners,

v.

The Honorable GREGORY J. TRIPP,  
in his official capacity as a Spokane County District Court Judge,  
and the SPOKANE COUNTY DISTRICT COURT,

Respondents.

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PETITIONERS' ANSWER TO BRIEF OF AMICUS CURIAE  
STATE OF WASHINGTON

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## **I. INTRODUCTION**

The State of Washington’s amicus curiae brief focuses on technicalities distracting from the merits of the petitioners’ error claims. This is the same tactic the respondents have used since this litigation began. This court should reject the State’s contentions and should decide all the issues on which it granted discretionary review.

## **II. ARGUMENT**

### **A. Random urinalyses.**

It is telling that the State does not attempt to defend random urinalyses ordered as conditions of pretrial release. Instead, the State “focuses on the importance of ignition interlock device requirements.” (Br. of Amicus Curiae State of Wash. at 4.) The State even urges this court to “not equate an ignition interlock device with a random urinalysis test.” (*Id.* at 10.) The State apparently lacks confidence in the constitutionality of pretrial random urinalyses.

### **B. What an ignition interlock device is and how it functions.**

An ignition interlock device is “breath alcohol analyzing ignition equipment or other biological or technical device certified . . . and designed to prevent a motor vehicle from being operated by a person who has consumed an alcoholic beverage.” RCW 46.04.215. More specifically, an ignition interlock device is

An electronic device that is installed in a vehicle which requires submitting to a BrAC test prior to the starting of the vehicle and at periodic intervals after the engine has been started. If the ignition interlock device detects a BrAC test result below the alcohol setpoint, the ignition interlock device will allow the vehicle's ignition switch to start the engine. If the ignition interlock device detects a BrAC test result above the alcohol setpoint, the vehicle will be prohibited from starting.

WAC 204-50-030(11). Breath alcohol concentration (BrAC) is “the amount of alcohol in a person’s breath determined by chemical analysis, which shall be measured by grams of alcohol per 210 liters of breath.”

WAC 204-50-030(3).

When a trial court imposes a pretrial ignition interlock restriction on a DUI defendant, the Department of Licensing places that restriction on the defendant’s driving record. RCW 46.20.720(1)(a). It is a crime to operate a motor vehicle without a functioning ignition interlock device when the defendant is subject to a pretrial ignition interlock restriction. RCW 46.20.740(1)-(2); 11A *Washington Practice, Washington Pattern Jury Instructions: Criminal* (WPIC) 99.01-.02 (4th ed. 2016). It is a crime to circumvent or tamper with an ignition interlock device. RCW 46.20.750(1)-(2); WPIC 99.05-.06. Circumvention is “[t]he attempted or successful bypass of the proper functioning of an ignition interlock device.” WAC 204-50-030(6). Tampering is “[a]ny act or attempt to disable or circumvent the legal operation of an ignition interlock device.”

WAC 204-50-030(23). It is a crime to have actual physical control of a motor vehicle while under the influence of alcohol. RCW 46.61.504; WPIC 92.01-.02, .11. Moreover, there are several other ways that ignition interlock violations can land a DUI defendant in jail.<sup>1</sup>

An ignition interlock device must record detailed information regarding a DUI defendant's blows, failures to blow, and attempts to circumvent or tamper with the device. WAC 204-50-110(1)(h), (n)(i) (specifying time, date, duration, and results, including BrAC and any other indications of wrongdoing). The device must include a digital camera and take a picture of the defendant at various intervals. WAC 204-50-110(1)(n), (2). The device must notify law enforcement officers of a violation reset. WAC 204-50-110(1)(k). The vendor must download and store ignition interlock data for three years. WAC 204-50-110(1)(n)(i). The vendor must notify the trial court, the Department of Licensing, and the Washington State Patrol of ignition interlock violations. *See* WAC 204-50-080(4)-(9), -090(5), -110(3); WAC 204-50-030(13). Such data may later be presented as evidence in either criminal or civil proceedings.

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<sup>1</sup> If a DUI defendant submits to a test that reveals the presence of alcohol, the prosecution could potentially use that information to prosecute crimes or probation violations, or for impeachment purposes. If the defendant submits to a test that reveals the presence of alcohol, or does not submit to a test altogether, the trial court may revoke his or her release. CrRLJ 3.2(j)(2). Violating the trial court's order could also trigger remedial or punitive sanctions for contempt. Ch. 7.21 RCW. Further, the defendant who fails in his or her testing requirement could face other consequences later, such as enhanced penalties at sentencing or denial of release pending appeal.

A DUI defendant must pay the vendor to lease an ignition interlock device and must also pay the Department of Licensing a \$20 monthly fee to maintain the device. *See* Wash. Cts., *DUI Sentencing Grid 4* (rev. July 2016), available at [http://www.courts.wa.gov/newsinfo/content/duigrid/duiGrid\\_201606rev07.pdf](http://www.courts.wa.gov/newsinfo/content/duigrid/duiGrid_201606rev07.pdf). If the defendant has a qualifying prior offense and cannot afford the device, he or she must either submit to random urinalyses (or some other form of alcohol monitoring) or stay in jail pending trial. *See* RCW 10.21.055.

**C. Motion to exclude and to strike.**

The petitioners move this court to exclude the declaration of Paul Abbott, and to strike all references to it made in the State's amicus curiae brief. Mr. Abbott's declaration constitutes new evidence subject to RAP 9.11(a)'s requirements. RAP 9.11(a) provides,

The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

RAP 9.11(a) is concerned with whether this court "may take and

consider additional evidence on the merits.” *In re Adoption of B.T.*, 150 Wn.2d 409, 414, 78 P.3d 634 (2003). Evidence is “[s]omething (including testimony, documents and tangible items) that tends to prove or disprove the existence of an alleged fact.” *Black’s Law Dictionary* 635 (9th ed. 2009).

RAP 9.11(a) has been applied to various forms of new evidence, including, for example, an auditor’s report addressing light rail ridership published after the trial court granted summary judgment, *Freeman v. State*, 178 Wn.2d 387, 405-06, 309 P.3d 437 (2013), evidence of a family’s public assistance history and history behind the father’s original child support obligation, *State ex rel. M.M.G. v. Graham*, 159 Wn.2d 623, 629 n.1, 152 P.3d 1005 (2007), a city manager’s letter purportedly showing the city council’s inconsistent legal positions on its legislative intent and interpretation of its tax ordinances, *City of Puyallup v. Pac. Nw. Bell Tel. Co.*, 98 Wn.2d 443, 447-48, 656 P.2d 1035 (1982), a declaration from a proposed witness contradicting the sheriff’s testimony on employment matters in an administrative hearing, *In re Decertification of Martin*, 154 Wn. App. 252, 268, 223 P.3d 1221 (2009), documents pertaining to a ballot authorizing construction of an arena, a contract for development of the arena, and a newspaper article quoting the arena’s general manager, *Schreiner v. City of Spokane*, 74 Wn. App. 617, 620, 874

P.2d 883 (1994), and an affidavit from a bank official discussing settlement proceeds kept in a money market account, *Buckley v. Snapper Power Equip. Co.*, 61 Wn. App. 932, 941, 813 P.2d 125 (1991).

Mr. Abbott's declaration is testimony that attempts to prove the existence of new facts concerning ignition interlock devices based on the Department of Licensing's records. (Abbott Decl. ¶¶ 5-7.) Specifically, Mr. Abbott's declaration alleges the number of all ignition interlock restrictions existing in 2016, the number of all ignition interlock restrictions imposed in 2016, the number of pretrial ignition interlock restrictions imposed in 2016, and the number of ignition interlock licenses issued in 2016. (*Id.*)

This court should reject Mr. Abbott's declaration, and all references to it made in the State's amicus curiae brief, because the facts it seeks to bring to this court's attention do not help this court resolve the issues before it. *See B.T.*, 150 Wn.2d at 415 (rejecting a party's new evidence because "the facts it seeks to bring to our attention do not help us resolve the issues before us"); RAP 9.11(a)(2) (requiring the proponent of new evidence to show "the additional evidence would probably change the decision being reviewed"). Such data postdates the pretrial ignition interlock restriction imposed in Button's case. (*See Button* Dist. Ct. VRP at 1-2, Mar. 2, 2015; Mot. for Discretionary Review App. at 7-8.) But

even if such data fit the timeframe of Button's case, it does not help this court resolve the fundamental question of whether warrantless, suspicionless breath tests occur without authority of law under article I, section 7 when ordered as conditions of pretrial release.

**D. Standing.**

The State argues the petitioners lack standing to challenge pretrial ignition interlock restrictions because “[n]one of the petitioners presented evidence that they were subject to a pretrial order to submit to an ignition interlock test.” (Br. of Amicus Curiae State of Wash. at 9.) The State is incorrect.

On the weekend before her preliminary appearance, the district court ordered Button to install an ignition interlock in every motor vehicle she operates. (*Button* Dist. Ct. VRP at 1-2; Mot. for Discretionary Review App. at 7-8.) Then, the district court changed the pretrial ignition interlock restriction to a requirement of random urinalyses. (CP at 90.) But the district court granted the State leave to request re-imposing the pretrial ignition interlock restriction if it discovered evidence supporting that request. (*Button* Dist. Ct. VRP at 6.) Thus, Button has shown she was subject to a temporary pretrial ignition interlock restriction, which is enough to establish standing.

Because this court is not a federal court, it is “not limited by the

federal constitution's 'cases' and 'controversies' requirement." *McDevitt v. Harborview Med. Ctr.*, 179 Wn.2d 59, 80 n.13, 316 P.3d 469 (2013) (Chambers, J., concurring in result) (quoting U.S. Const. art. III, § 2). Thus, this court is not limited by the restrictive standing doctrine that arose from the federal constitution's 'cases' and 'controversies' requirement. *See id.*

Only an aggrieved party may seek this court's review. RAP 3.1. "Generally, '[a]n aggrieved party is one who was a party to the trial court proceedings, and one whose property, pecuniary and personal rights were directly and substantially affected by the lower court's judgment.'" *In re Dependency of B.F.*, 197 Wn. App. 579, 584, 389 P.3d 748 (2017) (alteration in original) (quoting *In re Welfare of Hansen*, 24 Wn. App. 27, 35, 599 P.2d 1304 (1979)).

Here, the district court ordered warrantless, suspicionless breath tests as a temporary condition of Button's pretrial release. Button is aggrieved by the district court's temporary order because the court acted illegally and she has no adequate remedy at law. *See Kozol v. Dep't of Corr.*, 185 Wn.2d 405, 408, 373 P.3d 244 (2016) (stating a petitioner is "entitled to a statutory writ of review under RCW 7.16.040 if he [or she] establishes '(1) that an inferior tribunal (2) exercising judicial functions (3) exceeded its jurisdiction or acted illegally, and (4) there is no adequate

remedy at law” (quoting *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 244, 821 P.2d 1204 (1992)); *see also* RCW 7.16.040.

The district court acted illegally because it committed probable error and the order itself substantially altered Button’s status quo or limited her freedom to act. *See City of Seattle v. Holifield*, 170 Wn.2d 230, 244-45, 240 P.3d 1162 (2010) (stating an inferior tribunal “acts illegally when that tribunal . . . has committed probable error and the decision substantially alters the status quo or substantially limits the freedom of a party to act”).

The district court’s order constitutes probable error for three primary reasons. First, “[w]arrantless disturbances of private affairs are subject to a high degree of scrutiny.” *State v. Chacon Arreola*, 176 Wn.2d 284, 292, 290 P.3d 983 (2012). This court presumes a warrantless search is per se unconstitutional unless the State shows an established exception to the warrant requirement applies. *Id.* (quoting *State v. Day*, 161 Wn.2d 889, 893-94, 168 P.3d 1265 (2007)). Such exceptions are “‘jealously and carefully drawn.’” *State v. Duncan*, 185 Wn.2d 430, 439, 374 P.3d 83 (2016) (quoting *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)). Second, the unconstitutional conditions doctrine prohibits a trial court from conditioning pretrial release on a criminal defendant’s waiver of a constitutional right. *United States v. Scott*, 450 F.3d 863, 866-68 (9th

Cir. 2006); *Butler v. Kato*, 137 Wn. App. 515, 530, 154 P.3d 259 (2007).

Finally, the special needs exception does not apply for a variety of reasons, the most obvious being that “[c]rime prevention is a quintessential general law enforcement purpose and therefore is the exact opposite of a special need.” *Scott*, 450 F.3d at 870; see *State v. Rose*, 146 Wn. App. 439, 456-58, 191 P.3d 83 (2008).

The district court’s order substantially altered Button’s status quo or limited her freedom to act because, for three days, it had three concrete impacts on her life. First, it *required* her to submit to warrantless, suspicionless breath tests as a prerequisite to exercising her driving privilege.<sup>2</sup> (*Button* Dist. Ct. VRP at 1-2; Mot. for Discretionary Review App. at 7-8.) Second, it *prohibited* her from exercising her driving privilege unless she submitted to warrantless, suspicionless breath tests. (*Button* Dist. Ct. VRP at 1-2; Mot. for Discretionary Review App. at 7-8.) Most importantly, it *forced* her to submit to these restrictions in order to

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<sup>2</sup> “A driver’s license is a property interest protected by the due process clauses of the [federal and state c]onstitutions.” *State v. Nelson*, 158 Wn.2d 699, 702, 147 P.3d 553 (2006) (citing *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971); *State v. Dolson*, 138 Wn.2d 773, 776-77, 982 P.2d 100 (1999)). “Thus, before a driver’s license may be revoked, the government must provide the licensee with ‘notice and opportunity for hearing appropriate to the nature of the case.’” *Id.* at 702-03 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950); *Olympic Forest Prods., Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 422, 511 P.2d 1002 (1973)). Here, the record contains no allegation that Button’s driving privilege was suspended at the time of her arrest or at any other time in the pendency of her case. Thus, it reasonable to infer Button’s driving privilege was intact when the district court ordered her to install an ignition interlock device on all motor vehicles she operates.

get and stay out of jail pending trial. (*Button* Dist. Ct. VRP at 1-2; Mot. for Discretionary Review App. at 7-8.)

Likewise, Button is aggrieved by the superior court's ruling because the court erroneously denied her application for a statutory writ of review, a remedy to which she was entitled. *See Kozol*, 185 Wn.2d at 408 (quoting *Raynes*, 118 Wn.2d at 244)); *see also* RCW 7.16.040.

Nonetheless, the State argues Button must prove more to claim the unconstitutionality of pretrial ignition interlock restrictions. It is true that “[a] person may not urge the unconstitutionality of a statute unless he is harmfully affected by the particular feature of the statute alleged to be violative of the constitution.” *State v. Rowe*, 60 Wn.2d 797, 799, 376 P.2d 446 (1962). And it is true that “[o]ne who challenges the constitutionality of a statute must claim infringement of an interest particular and personal to himself, as distinguished from a cause of dissatisfaction with the general framework of the statute.” *Id.*

But these requirements are merely precursors to the general rule that only an aggrieved party may seek this court's review. *See* RAP 3.1. Button is an aggrieved party for the reasons discussed above. Even so, Button meets these requirements on the record before this court.

Button claims the district court violated article I, section 7 by ordering her to submit to warrantless, suspicionless breath tests as a

condition of pretrial release. The district court apparently relied on RCW 10.21.030 and .055 in doing so. The first statute provides, “[a]ppropriate conditions of release under this chapter include, but are not limited to, the following: . . . [t]he defendant may be prohibited from operating a motor vehicle that is not equipped with an ignition interlock device.” RCW 10.21.030(j). The second statute provides, “the court authorizing the release shall require, as a condition of release that [the defendant] comply with one of the following four requirements: . . . [h]ave a functioning ignition interlock device installed on all motor vehicles operated by the person.” RCW 10.21.055(1)(a)(i).

Button was harmfully affected by the quoted portions of these statutes because, again, the district court apparently relied on them in ordering her to submit to warrantless, suspicionless breath tests as a condition of pretrial release. In this way, the quoted portions of these statutes infringed upon Button’s particular and personal privacy interest, namely, her “constitutionally protected interest in the privacy of [her] internal bodily functions and fluids.” *State v. Mecham*, 186 Wn.2d 128, 145, 380 P.3d 414 (2016) (Wiggins, J., lead opinion) (citing *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 308, 178 P.3d 995 (2008) (Sanders, J., lead opinion)). “[T]he State infringes on this interest when it takes someone’s . . . breath.” *Id.* (citing *State v. Garcia-Salgado*, 170

Wn.2d 176, 184, 240 P.3d 153 (2010); *York*, 163 Wn.2d at 308 (Sanders, J., lead opinion); *Robinson v. City of Seattle*, 102 Wn. App. 795, 819-22, 10 P.3d 452 (2000)). “These activities infringe on a person’s privacy interests on multiple levels: the physical intrusion associated with . . . extracting ‘deep lung’ breath intrudes on an individual’s privacy; and the chemical analysis associated with these tests provide a wealth of private medical information . . . .” *Id.*<sup>3</sup>

Button claims the quoted portions of these statutes did not provide the district court the authority of law required by article I, section 7 because they do not embody warrant exceptions firmly rooted in common law principles recognized in 1889. In other words, Button claims the quoted portions of these statutes were insufficient to dispense with the warrant requirement.

But the constitutionality of these statutes almost does not matter because the district court apparently relied on the alternative authority of CrRLJ 3.2(d)(10). Even if this court held these statutes were unconstitutional, the district court would likely continue to impose identical pretrial release conditions by exercising its discretion under

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<sup>3</sup> The State argues “the petitioners have not made clear precisely what privacy implications they believe the State would unreasonably intrude upon if it *did* impose a pretrial ignition interlock requirement.” (Br. of Amicus Curiae State of Wash. at 15.) The State is incorrect. The petitioners plainly articulated their privacy interests in both their opening and reply briefs. (Pet’rs’ Opening Br. at 29-30; Pet’rs’ Reply Br. at 13-14.)

CrRLJ 3.2(d)(10). The court rule provides, “the court may impose one or more of the following nonexclusive conditions: . . . [i]mpose any condition other than detention to assure noninterference with the administration of justice and reduce danger to others or the community.” CrRLJ 3.2(d)(10). It is for this reason that the petitioners focus on the constitutionality of the district court’s order, rather than the constitutionality of any specific statute or court rule.

In sum, Button suffered harm to or infringement of her particular and personal interests when the district court ordered her, as a condition of pretrial release, to install an ignition interlock in every motor vehicle she operates. The order is a constitutional violation in and of itself.

**E. Waiver.**

The State claims the petitioners “waived the argument [challenging pretrial ignition interlock restrictions] by failing to raise it in the superior court.” (Br. of Amicus Curiae State of Wash. at 1.) The State is incorrect.

On the weekend before her preliminary appearance, the district court ordered Button to install an ignition interlock in every motor vehicle she operates. (*Button* Dist. Ct. VRP at 1-2; Mot. for Discretionary Review App. at 7-8.) Then, the district court changed the pretrial ignition interlock restriction to a requirement of random urinalyses. (CP at 90.) But the district court granted the State leave to request re-imposing the pretrial

ignition interlock restriction if it discovered evidence supporting that request. (*Button* Dist. Ct. VRP at 6.) Thus, Button asked the superior court to issue a writ of review and an order to cease and desist from enforcing “the release conditions imposed upon the defendant to subject [her]self to an ignition interlock device and/or alcohol monitoring. (CP at 62.) Button argued “if the order complained of is or has been subsequently rescinded prior to hearing of this writ, it does not render these issues moot.” (CP at 63.) Button reasoned, “[t]he issue(s) is/are not rendered moot and is/are nonetheless justiciable at this point because it is a recurring issue of public importance.” (CP at 64.) As Button explained, “The issuance of these [pretrial release] orders has become routine and systematic. All of the district court judges are issuing these orders in many if not most DUI cases.” (CP at 63-64.)

Before the superior court, Button both briefed<sup>4</sup> and argued<sup>5</sup> the

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<sup>4</sup> In briefing to the superior court, Button argued as follows:

- “Petitioner contends that the District Court Judge acted illegally by committing probable error in imposing alcohol monitoring and an ignition interlock device.” (CP at 66.)
- “The alcohol monitoring and the ignition interlock requirements are unreasonable warrantless searches in violation of the Fourth Amendment . . . and article I, section 7 . . . .” (*Id.*)
- “The court acted unlawfully by imposing alcohol monitoring and an ignition interlock device as a condition of release.” (*Id.* at 71.)
- “[P]etitioner submits that the Spokane County District Court Judge acted illegally . . . by ordering petitioner to submit to alcohol monitoring and ignition interlock device . . . . [S]uch pretrial release conditions infringe upon petitioner’s constitutional rights to be free from unreasonable warrantless searches and seizures . . . .” (*Id.* at 83.)

<sup>5</sup> At oral argument in the superior court, the petitioners argued as follows:

unconstitutionality of pretrial ignition interlock restrictions. In its memorandum opinion, the superior court expressly noted that the petitioners were challenging the constitutionality of pretrial ignition interlock restrictions. (CP at 106-17.)

Contrary to the State’s claim, the petitioners did not waive their challenge to pretrial ignition interlock restrictions.

**F. Adequacy of record.**

The State argues “the petitioners failed to make an adequate record for this Court to address the constitutionality of ignition interlock devices as conditions of pretrial release.” (Br. of Amicus Curiae State of Wash. at 9.) Specifically, the State complains “the petitioners failed to make a

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- “By way of background, here we are talking about District Court’s imposition of pretrial testing requirements [and] ignition interlock in DUI cases . . . .” (Super. Ct. VRP at 6, Mar. 20, 2015.)
  - “Here petitioners are being required to submit to pretrial testing and sometimes ignition interlock on top of that and we submit that this imposition substantially limits the freedom of petitioner’s [sic] pretrial.” (*Id.* at 8.)
  - “[T]he cost of the ignition interlock is also substantial. There is a one-time fee and then there’s a monthly monitoring, so for indigent folks who have to . . . have ignition interlock, we’re talking a very substantial figure, all pretrial.” (*Id.*)
  - “[W]hat the District Court said was that based on RCW 10.21.055, the Court is going to impose and did impose sometimes both the monitoring . . . and sometimes the ignition interlock. And, yes, Your Honor, the objection was the same from the defense and that is you still cannot conduct – the Washington legislature cannot adopt legislation that amounts to warrantless searches, which is what goes on here when either ignition interlocks are blown into or urinalysis [sic] are done. So the argument is the same and we submit that the analysis is the same under *Scott* and under *Rose* if there are priors.” (*Id.* at 15.)
  - “[T]he primary issue here . . . is the warrantless search and seizure which results when someone is required to take a urinalysis test or blow into an ignition interlock. That is the issue. That’s the issue in *Rose* and *Scott* and now that’s the issue here. It’s a warrantless search.” (*Id.* at 22-23.)

record establishing the details of what an ignition interlock device is or how it functions.” (Br. of Amicus Curiae State of Wash. at 14.)

But doing so was unnecessary because all of those details are written in statutes and regulations, as outlined in Part II.B above. These laws are not evidence. This court is bound to apply these laws regardless of whether the parties presented them to the lower courts.

Moreover, the State’s argument attempts to confuse the various uses of ignition interlock devices with the real issue here: the constitutionality of pretrial ignition interlock restrictions.

It is now well established that a breath test is a search. *Birchfield v. North Dakota*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 2160, 2173, 195 L. Ed. 2d 560 (2016); *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989); *State v. Baird*, 187 Wn.2d 210, 218, 386 P.3d 239 (2016) (Madsen, C.J., lead opinion) (citing *Garcia-Salgado*, 170 Wn.2d at 184); *Mecham*, 186 Wn.2d at 145 (Wiggins, J., lead opinion) (citing *Garcia-Salgado*, 170 Wn.2d at 184). The only possible exception is that when a law enforcement officer has reasonable grounds to believe a person was driving impaired, the officer arrests the suspect for that reason, and the officer captures the person’s breath incident to arrest, society may not be willing to recognize as reasonable the suspect’s subjective privacy expectation in his or her breath. *See Baird*, 187 Wn.2d

at 229-32 (González, J., concurring). This rationale does not apply to a pretrial releasee, who is many hours or days removed from the time of arrest, when he or she was allegedly driving impaired.

Thus, this court's analysis hinges instead on whether warrantless, suspicionless breath tests are justified by 'authority of law' under article I, section 7. But the State has not borne its heavy burden of proving, by clear and convincing evidence, that a narrowly drawn exception to the warrant requirement applies. *State v. Russell*, 180 Wn.2d 860, 867, 330 P.3d 151 (2014); *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009); *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

Considering all, the petitioners made an adequate record for this court to consider the constitutionality of pretrial ignition interlock restrictions.

#### **G. Scope of review.**

The petitioners are only asking this court to invalidate *pretrial* ignition interlock restrictions. The implications are not nearly as far reaching as the State fears. While ignition interlock devices may be important tools in the fight against impaired driving, the State must save them for after conviction, if any.

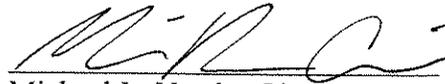
### **III. CONCLUSION**

In sum, this court should reverse the superior court, holding (1) the

petitioners are entitled to a statutory writ of review, and (2) the district court violated article I, section 7 and the Fourth Amendment.

DATED this 23rd day of May, 2017.

Respectfully submitted,



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Declaration of Service

I, Michael L. Vander Giessen, declare under penalty of perjury under the laws of the state of Washington that on May 23, 2017, I e-mailed a copy of the foregoing Petitioners' Answer to Brief of Amicus Curiae Washington Association of Prosecuting Attorneys to Brian C. O'Brien, Gretchen E. Verhoef, and Samuel J. Comi of the Spokane County Prosecuting Attorney's Office, and to April S. Benson and Leah E. Harris of the Washington State Attorney General's Office.

May 23, 2017 Spokane, Washington  
Date and Place

  
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