No, Virginia, there is no implied consent

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I'm eagerly awaiting the Supreme Court's ruling in Missouri v. McNeely. I want to know whether the exigency created by the dissipation of alcohol in the body, without more, permits the police to compel the withdrawal of blood from an impaired driving suspect without a warrant. But there's one thing I already know: The legal fiction of implied consent will play no part in the analysis.

Indeed, the State made no argument that Missouri's implied consent law, see Mo. Ann. Stat. § 577.020 (West), obviated the need for the Fourth Amendment analysis. And the justices' probing questions regarding the State's ability to forgo constitutional protections when it came to a procedure that intruded into the body demonstrated the likely futility of any assertion a state can avoid the Fourth Amendment analysis in a refusal case by enacting laws that imply or require consent to such a search.

Yet, while state courts (including our own) rely on the Fourth Amendment requirements in analyzing the constitutionality of warrantless compelled blood draws, courts frequently rely on the legal fiction of implied consent as rendering lawful the obtaining of breath samples under threat of license revocation. *See, e.g.*, Seders v. Powell, 298 N.C. 453, 462 (1979) ("[A]nyone who accepts the privilege of driving upon our highways has already consented to the use of the breathalyzer test and has no constitutional right to consult a lawyer to void that consent.). I don't think the implied consent analysis holds up. Even though breath tests indisputably are less intrusive than blood draws, they nevertheless are searches that implicate the Fourth Amendment. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616-17 (1989). Thus, they too must satisfy the Fourth Amendment's requirements–regardless of whether a state legislature sanctions their use.

Given that officers do not routinely (if ever) obtain a search warrant before asking a suspected impaired driver to submit to a breath test, consideration of the Fourth Amendment raises the sticky question of whether such searches qualify under an exception to the warrant requirement—an issue that Chief Justice Roberts raised at oral argument in *McNeely*. When the chief justice asked McNeely's attorney whether the police needed a warrant to conduct a breath test, the attorney responded that he thought the police probably did need a warrant. That led the chief justice to remark that if the logic of the respondent's position "leads to the requirement of a warrant for a breathalyzer, that would be pertinent" to the court's analysis. Justice Scalia threw the respondent a lifeline of sorts, suggesting that he "not bite off more than he could chew," and positing that what was reasonable for "sticking a needle in your arm is not necessarily reasonable for asking you to blow up a balloon."

Whatever the court's ruling in *McNeely*, I doubt that it leads to a determination that a warrant is required to force an impaired driving suspect to provide a breath sample. Even if the dissipation of alcohol alone is not enough to render permissible a warrantless blood draw over a defendant's objection, it may, as Justice Scalia intimated, be sufficient to render permissible a warrantless breath test. Even absent an exigency, searches of deep lung breath may be the type of nonintrusive search that may be conducted incident to arrest. Several courts have upheld breath testing following an arrest for impaired driving on this basis. *See* United States v. Reid, 929 F.2d 990 (4th Cir. 1991) (finding breath tests permissible under the exigency and search incident to arrest exceptions to the Fourth Amendment's warrant requirement); Burnett v. Municipality of Anchorage, 806 F.2d 1447 (9th Cir. 1986) (concluding that a breath test following an arrest for impaired driving "is an appropriate and reasonable search incident to arrest" that arrestees

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“have no constitutional right to refuse”); Wing v. State, 268 P.3d 1105 (Alaska Ct. App. 2012) (“[T]he statutory scheme that requires a DUI arrestee to take a chemical breath test is a valid search incident to arrest under either theory of DUI [the “under the influence” theory and the “blood alcohol level” theory] when there is independent evidence to charge the arrestee with driving under the influence.”); Commonwealth v. Anderi, 477 A.2d 1356 (Pa. Super. 1984) (concluding that “warrantless seizure of appellant’s alcohol-laden breath is valid either as a search incident to arrest . . . or a search necessitated by exigent circumstances, i.e., the evanescent nature of alcohol in the appellee’s blood stream.”)

So, Virginia, warrantless breath testing likely is constitutional. But, where the Fourth Amendment is concerned, there is no implied consent. And the jury (or rather, the supreme court) is out on compelled warrantless blood draws.

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