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SB 722 - Motor Vehicles – Alcohol– or Drug–Related Driving Offenses – Testing Requirement

OPPOSE

The American Civil Liberties Union of Maryland (ACLU) opposes SB 722, which would unconstitutionally expand the circumstances under which a police officer can obtain a blood test from an individual suspected of driving or attempting to drive while under the influence of drugs and/or alcohol.

It is indisputable that a test of a person's blood, breath, or urine is a search under the Fourth Amendment, only justified by a warrant or subject to an exception to the warrant requirement.[1] One such exception to the warrant requirement may arise "when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment."[2] However, the Court has explicitly held that exigency depends on the totality of the circumstances.[3] In *McNeely*, the Court held that there is no "per se exigency" that justifies an exception to the 4th Amendment's warrantless search requirement.[4] As such, warrantless nonconsensual blood tests in all drunk-driving cases are unconstitutional.[5]

These Fourth Amendment principles were affirmed in an even more recent U.S. Supreme Court decision. Justice Samuel Alito, writing for the Court in *Birchfield v. North Dakota*, held that the Fourth Amendment forbids the police from conducting warrantless blood tests.[6] In *Birchfield*, Justice Alito stated,"[s]earch warrants protect privacy in two main ways. First, they ensure that a search is not carried out unless a neutral magistrate makes an independent determination that there is probable cause to believe that evidence will be found….Second, if the magistrate finds probable cause, the warrant limits the intrusion on privacy by specifying the scope of the search—that is, the area that can be searched and the items that can be sought.[7]

Current Maryland law provides for warrantless nonconsensual blood tests in drunk-driving cases that involve "a motor vehicle accident that results in the death of, or a life threatening injury to, another person."[8] While a state may "choos[e] to protect privacy beyond the level that the Fourth Amendment requires,"[9] this bill does just the opposite: expands the contexts in which nonconsensual blood

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[1] *Missouri v. McNeely*, 569 U.S. 141, 166, 133 S.Ct. 1552, 1569-70 (2013).
[2] *Kentucky v. King*, 563 U.S. 452, 460 (2011).
[3] *McNeely*, 133 S. Ct. at 1556.
[4] *Id.* at 1562-63.
[5] *Id.* at 1556.
[6] *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016).
[7] *Id*. at 2181.
[8] Md. Code Ann., Transportation, § 16-205.1.
[9] *Virginia v. Moore,* 553 U.S. 164, 171, 128 S.Ct. 1598 (2008).

tests are allowed by requiring medical personnel to perform a blood test, regardless of whether or not an individual consents, on the mere declaration by a police officer that they have "reasonable grounds" to believe that an individual was driving while impaired by drugs or alcohol. This is an impermissible rollback of restrictions on when police officers may obtain blood samples despite a suspect's refusal.[10] The declaration of a police officer that SB 722 contemplates is not a recognized exception to the Fourth Amendment's search warrant requirement that makes a warrantless search reasonable under constitutional principles.

Even giving law enforcement the benefit of the doubt in recognizing that there are instances where warrantless, nonconsensual blood tests are necessary in order to preserve evidence, the Court specifically rejected the notion that the metabolization of alcohol in the bloodstream "constitute[s] an exigency in every case sufficient to justify conducting a blood test without a warrant."[11] Instead, the Court held that exigency "must be determined case by case based on the totality of the circumstances."[12] The Court also distinguished that "[t]he context of blood testing is different in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a 'now or never' situation."[13] In short, each case must be evaluated by the "totality of the circumstances."[14] Indeed SB 722 does not even attempt to capture a new scenario that creates an exigent circumstance that would permit circumvention of the warrant requirement. It simply creates an easier method for law enforcement to obtain warrantless, nonconsensual blood tests. This is constitutionally impermissible.

For these reasons, we strongly urge an unfavorable report for SB 722.

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[10] See *McNeely*, 133 S.Ct. at 1566 (noting that a majority of States either place significant restrictions on when police officers may obtain a blood sample despite a suspect's refusal or prohibit nonconsensual blood tests altogether).
[11] *Id.* at 1568.
[12] *Id.* at 1556.
[13] *See also id.* at 1561.
[14] *Id*. at 1556.