In its amicus brief in Mitchell v. Wisconsin the State and Local Legal Center (SLLC) argues that when police officers encounter an unconscious motorist they have probable cause to believe is impaired it should be permissible for the motorist’s blood to be drawn without a warrant. Wisconsin and 28 other states allow this practice.

Most, if not all, states have adopted “implied consent” laws where drivers may be tested if police have probable cause to suspect they have been driving while intoxicated. Drivers may withdraw consent and refuse to take a test, subject to penalties. In Birchfield v. North Dakota (2016) the Supreme Court held that generally police must obtain a warrant to require a blood test (versus a breath test) where officers have probable cause.

But what if a driver is unconscious and unable to withdraw consent to a blood test (and unable to take a breath test)? The question the Supreme Court will decide in Mitchell v. Wisconsin is whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.

A majority of the Wisconsin Supreme Court held that the blood draw in this case didn’t violate the Fourth Amendment. Three judges relied on a Wisconsin statute that presumes an unconscious person who police have probable cause to believe is intoxicated hasn’t withdrawn consent. Two concurring judges concluded the blood draw in this case was constitutional because it was reasonable.

The SLLC amicus brief argues that no fresh consent is required when an impaired driving suspect is unconscious. In this situation “it is not reasonable, practical, or workable” to require law enforcement to seek a warrant for a blood test. The brief explains: [w]hen law enforcement has probable cause to believe that an unconscious driver is impaired, the compelling and urgent need of law enforcement to both gather evidence and care for the unconscious driver justify an exception to the warrant requirement. On the one hand, blood evidence of impaired driving should not be sacrificed because the unconscious driver needs medical care; on the other hand, medical care for the unconscious driver should not be delayed by the process of seeking a warrant.”

Lauren S. Kuley and Keith Bradley of Squire Patton Boggs wrote the SLLC brief in this case which the following organizations joined: National Conference of State Legislatures, International City/County Management Association, International Municipal Lawyers Association, and National District Attorneys Association.