THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. Pen-24-401

STATE OF MAINE
Appellee

v.

AUSTIN DAVIS
Appellant

ON APPEAL from the Penobscot County Unified Criminal Docket

BRIEF OF APPELLANT

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I. INTRODUCTION

The issue in this case is whether, following coercive police action, Mr. Davis's submission to a breath test was voluntary under the Fourth Amendment of the Federal Constitution and Article I, Section 5 of the Maine Constitution; and under the Due Process Clause of the Fourteenth Amendment and Article I, Sections 6 and 6-A of the Maine Constitution. To resolve these issues, the Court must decide: (1) when a person submits to a breath test in response to police coercion, whether the court should assess voluntariness of the submission under either the Fourth Amendment and Article I, Section 5 or under the Due Process Clause and Article I, Sections 6 and 6-A; and (2) if so, whether Mr. Davis's submission to the breath test was involuntary in light of the officer's coercive actions. This Court should answer both questions in the affirmative.

II. STATEMENT OF FACTS

On May 26, 2023, Mr. Davis was arrested by Officer Haass for operating under the influence. *See* 29-A M.R.S. § 2411(1)(A). After arresting Mr. Davis, Officer Haass brought Mr. Davis back to the police station where he submitted to a breath test. Appendix ("A.") 8-9. Mr. Davis filed a motion to suppress the results of the warrantless breath test, challenging the voluntariness of the test. A. 14. The trial court denied Mr. Davis's motion, and Mr. Davis entered a conditional plea of guilty reserving the right to appeal that ruling. A. 16-17. If Mr. Davis prevails on

appeal, he will be allowed to withdraw his plea of guilty. A. 16. The trial court granted Mr. Davis's Motion for Stay Pending Appeal. A. 23-24.

At the evidentiary hearing on Mr. Davis's motion, the parties stipulated that Officer Haass had probable cause to arrest Mr. Davis for operating under the influence. A. 8. None of the relevant interactions between Officer Haass and Mr. Davis are in dispute, as all relevant interactions between them were video and audio recorded. (Mot. Tr. 9-11 (May 21, 2024).)[1] While at the police station, Officer Haass brought Mr. Davis, handcuffed, into a room of the police station where they took breath tests, and Mr. Davis remained handcuffed and alone with Officer Haass for the majority duration of the time in the room and during the breath tests. *See generally*, State's Ex. A 00:00:49 - .00:30:26. At the beginning of the fifteen minute waiting period that takes place before a breath test, Mr. Davis told the officer, "I just want to get back to my apartment . . . I worked sixty hours in Berlin, New Hampshire this week." State's Ex. A 00:05:17 - 00:05:27; *see also* (Mot. Tr. 7 (May 21, 2024).) Officer Haass replied by assuring Mr. Davis that he will "not be going to jail tonight," State's Ex. A 00:06:15 - 00:06:17, and the worst that will happen is that "you'll get a piece of paper from me, and I'm going to

[1] The motion transcript does not transcribe the video in question. However, the video was played at the motion to suppress hearing up until 00:22:11 and then entered into evidence in its entirety as State's Exhibit A. (Mot. Tr. 9-11 (May 21, 2024).) Citations to the video will reflect the timestamps of the relevant interactions from State's Exhibit A.

bring you home." State's Ex. A 00:06:17 - 00:06:22. He assured Mr Davis, "I have zero plans on bringing you to the jail." State's Ex. A 00:06:50 - 00:06:52.

Seconds later, Mr. Davis says, "I don't consent to taking a breathalyzer test." State's Ex. A 00:07:03 - 00:07:07. Officer Haass then read the implied consent form aloud. State's Ex. A 00:07:36 - 00:10:44. After that, the following conversation took place:

> [Mr. Davis]: If I refuse the test it will still be a summons?
> [Officer Haass]: If I don't get a breath test we're going to jail.

State's Ex. A 00:11:02 - 00:11:11. Officer Haass then gave Mr. Davis three options: (1) he blows under a .08 and Officer Haass takes him home, (2) he blows over a .08 and Officer Haass takes him home with a summons, or (3) he doesn't blow and Officer Haass takes him to jail. State's Ex. A 00:11:40 - 00:11:54; *see also* (Mot. Tr. 8 (May 21, 2024).). Nevertheless, Officer Haass acknowledged that he could not physically force Mr Davis to blow into the machine; "you have a choice, I'm not going to stand on your chest and . . . force . . . air out of you." State's Ex. A 00:13:10 - 00:13:14. Only after these conversations with Officer Haass did Mr. Davis eventually submit to the breath test. State's Ex. A 00:16:11 - 00:16:14 ("I'll blow into the instrument, I guess.").

At the motion to suppress hearing, Officer Haass confirmed that the typical protocol since COVID-19 was to release those with similar charges with a

summons. (Mot. Tr. 9 (May 21, 2024).) However, it was still his normal practice to take people to jail for refusing breath tests. (Mot. Tr. 8-9 (May 21, 2024).) When he was questioned about how he makes the decision about whether or not to take someone to jail, he said his decision to take a person to jail in a situation like this is informed in part by whether "this person need[s] to go to jail to learn from the mistake that they made." (Mot. Tr. 9 (May 21, 2024).)

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. When a person submits to a warrantless breath test in response to coercive actions by a police officer, is that submission voluntary within the meaning of the Fourth Amendment to the U.S. Constitution or Article I, Section 5 of the Maine Constitution?
2. When a person submits to a breath test in response to coercive actions by a police officer, is that submission voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment and Article I, Sections 6 and 6-A of the Maine Constitution?

IV. SUMMARY OF ARGUMENT

The trial court erred when it failed to consider voluntariness when assessing Mr. Davis's submission to a breath test under either (1) the consent exception to the warrant requirement, or (2) as part of the reasonableness of the search incident to arrest under the Fourth Amendment of the United States Constitution and Article I,

Section 5 of Maine's Constitution. In *Birchfield*, the United States Supreme Court held that, in some circumstances, the Fourth Amendment allows breath tests to be administered as searches incident to lawful arrest. However, *Birchfield* does not analyze breath tests in which the defendant submits, and the Law Court only addressed this issue in dicta.

Additionally, Maine's implied consent law is distinct from the laws analyzed in *Birchfield* in that Maine's implied consent law inherently contains a choice. Applying Maine's law, breath tests fall under the consent exception to the warrant requirement and must therefore be voluntary. While there is a "duty to submit" to testing in Maine, there is still ultimately a choice to refuse testing. Therefore, submitting to a breath test should be analyzed under the consent exception to the warrant requirement rather than under the search incident to arrest exception to the warrant requirement.

If this Court determines that breath tests fall under the search incident to arrest exception to the Fourth Amendment and Article I, Section 5 warrant requirement, the search must still be reasonable. Breath tests always require the cooperation of the accused, and so voluntariness must be analyzed under the reasonableness prong of the analysis. Whether under search incident to arrest or consent, Mr. Davis's submission to the breath test, considering the totality of the

circumstances, was involuntary and the lower court erred by denying his motion to suppress.

The trial court also erred when it failed to consider whether Mr. Davis's submission to the breath test was voluntary under the Due Process Clause of the Fourteenth Amendment or the heightened protections of Article I, Sections 6, and 6-A of the Maine Constitution. The plain meaning and statutory use of "furnish" reinforces the heightened protections of the accused under Article I, Section 6 of the Maine Constitution. The State is required to prove beyond reasonable doubt that evidence was furnished voluntarily.

Under both the Due Process Clause of the Fourteenth Amendment and Article I, Sections 6 and 6-A of the Maine Constitution, voluntariness is analyzed considering the totality of the circumstances. A breath test that is furnished in response to police coercion is inherently involuntary and, consequently, protected against by Article I, Section 6 and 6-A of Maine's Constitution. To align with Maine's heightened voluntariness standard and to comport with due process, courts should evaluate police coercion when determining whether a breath test was furnished voluntarily. The trial court erred when it denied Mr. Davis's motion to suppress because he furnished the breath test in response to Officer Haass's misrepresentation and coercion at the police station, rendering his consent

involuntary within the meaning of the Due Process Clause of the Fourteenth Amendment and Article I, Sections 6 and 6-A.

V. ARGUMENT

"The denial of a motion to suppress is reviewed for clear error as to factual issues and de novo as to issues of law." *State v. Fleming*, 2020 ME 120, ¶ 25, 239 A.3d 648. In addition, a challenge of application of facts to constitutional protections is a matter of law that is reviewed de novo, and "a ruling on a motion to suppress based on essentially undisputed facts is viewed as a legal conclusion that is reviewed de novo." *State v. Bailey*, 2010 ME 15, ¶ 16, 989 A.2d 716.

This Court must examine the merits of state constitutional claims "independently of the federal constitutional claim[s]," *State v. Athayde*, 2022 ME 41, ¶ 20, 277 A.3d 387, to avoid unnecessary federal rulings and give primacy to the Maine Constitution as the "primary protector of the fundamental liberties of Maine people since statehood was achieved." *State v. Larrivee*, 479 A.2d 347, 349 (Me. 1984); *see also* Hon. Catherine Connors & Connor Finch, *Primacy in Theory and Application: Lessons from a Half-Century of New Judicial Federalism*, 75 Me. L. Rev. 1 (2023) ("The impossibility of the perfect application of the primacy approach is no reason to avoid the duty under our federalist system to engage in a vigorous, independent review of the state constitution as a primary protector of

civil rights."). Even when federal and Maine constitutional provisions are similar, this Court looks to federal precedent only as "potentially persuasive but not dispositive guidance." *Fleming*, 2020 ME 120, ¶ 17 n.9, 239 A.3d 648; *State v. Reeves*, 2022 ME 10, ¶ 41, 268 A.3d 281 (when analyzing the Maine Constitution, this Court considers the interpretations of other courts (including the United States Supreme Court) only to the extent that such interpretations are persuasive). While the federal Constitution creates a floor, for protection of individual rights, Maine is "'free, pursuant to [its] own law, to adopt a higher standard' than that set by the federal constitution." *All. for Retired Ams. v. Sec'y of State*, 2020 ME 123, ¶ 23, 240 A.3d 45 (quoting *State v. Rees*, 2000 ME 55, ¶ 5, 748 A.2d 976).[2]

A. The trial court erred when it failed to consider voluntariness when assessing Mr. Davis's submission to a breath test under the Fourth Amendment of the United States Constitution and Article I, Section 5 of the Maine Constitution.[3]

[2] The Court interprets our state constitutional provisions independently based on the "value[s]" and "public policy" that animate the Maine Constitution, even when the language of the state constitutional provision is similar or identical to that of the federal provision. *State v. Collins*, 297 A.2d 620, 626 (Me. 1972).

[3] Article I, Section 5 of the Maine Constitution provides:

> The people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized, nor without probable cause—supported by oath or affirmation.

Me. Const. art. I, § 5. The Fourth Amendment to the United States Constitution reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

A breath test is considered a search under both the United States Constitution and the Maine Constitution. *See Birchfield v. North Dakota*, 579 U.S. 438, 455 (2016); *State v. LeMeunier-Fitzgerald*, 2018 ME 85, 13, 188 A.3d 183, *modified* (July 17, 2018). Most searches require a warrant to be secured, but "[t]his usual requirement . . . is subject to a number of exceptions." *Birchfield*, 579 U.S. 438, 456. In addition, "[a]s the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness'" even absent a warrant. *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 652 (1995); *see* U.S. Const. amend. IV; Me. Const. art I, § 5.

1. In *Birchfield*, the United States Supreme Court held that, in some circumstances, the Fourth Amendment allows breath tests to be administered as searches incident to lawful arrest. However, Maine's implied consent law is distinct from the laws analyzed in *Birchfield* in that it inherently contains a choice.

The United State Supreme Court most recently analyzed breath tests in *Birchfield v. North Dakota*, which consolidated three separate cases. *See Birchfield*, 579 U.S. 438, 450-54. However, only one of those cases, *Bernard v. Minnesota*, involved a breath test. *See id.* at 452–53.[4] In *Bernard*, the defendant *refused* a breath test, and was appealing a criminal charge of refusing a breath test based on the fact that it was warrantless search that did not fall under a valid exception. *See*

[4] The other two cases were (1) where a defendant refused a blood test and was appealing their charge and conviction for refusing a blood test, and (2) where a defendant consented to a blood test and was appealing an administrative decision to suspend their license. *See Birchfield*, 579 U.S. at 450-54.

id. The Court in *Birchfield* concluded that "the Fourth Amendment did not require officers to obtain a warrant prior to demanding the test, and Bernard had *no right to refuse it*." *Id.* at 478 (emphasis added). Following an analysis of the history of searches incident to arrest, the Court in *Birchfield* held that,

> [b]ecause breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test . . . may be administered as a search incident to a lawful arrest for drunk driving. As in all cases involving reasonable searches incident to arrest, a warrant is not needed in this situation.

Id. at 476.[5] The important context here is that in all of the cases analyzed by *Birchfield*, including the one breath test case, "the drivers were searched or told that they were *required to submit* to a search after being placed under arrest for drunk driving." *Id.* at 457 (emphasis added). The breath test analyzed in *Birchfield* was a *refusal* to a breath test in a state which independently criminalized the refusal. *See id.* at 454. Because the refusal to take a breath test in *Birchfield* took place in a state where there was no right to refuse a breath test, *Birchfield* concluded that this breath test was a valid search under the search incident to arrest exception to the warrant requirement. *See id.* at 478.

[5] Not all states have fallen into line with *Birchfield*'s proclamation that breath tests fall under the search incident to arrest exception to the warrant requirement. The Hawai'i Supreme Court has expressly rejected the Supreme Court's reasoning in *Birchfield*, and they have held that under their constitution, a breath test does not qualify as a search incident to lawful arrest. *See State v. Wilson*, 141 Haw. 459, 465–66, 413 P.3d 363, 369–70 (Ct. App. 2018), *aff'd but criticized*, 144 Haw. 454, 445 P.3d 35 (2019). It is important to note that at the time *Wilson* was decided, refusing a breath test was a separate criminal offense in Hawai'i. *See id.* at 141.

.

However in Maine, while there is a duty to submit to a breath test under the implied consent law, there is no independent criminal offense for refusing a breath test. This is an important distinction that this Court has acknowledged.

> Unlike the North Dakota [and Minnesota] statute[s] reviewed in *Birchfield*, Maine's statute includes no threat of a separate, independent criminal charge for refusing to submit to testing. Nor does the refusal to submit expose the driver to any additional threat of immediate incarceration. Instead, the statutory warnings make the driver aware that a *choice* must be made, and they inform the driver of the potential consequences of refusing to comply with the duty to submit to testing.

LeMeunier-Fitzgerald, 2018 ME 85, ¶ 25, 188 A.3d 183 (internal citations omitted) (emphasis added). Therefore, unlike North Dakota and Minnesota, Maine's implied consent laws do provide defendants a choice. *See id.*

2. <u>Because there is a choice to refuse under Maine's implied consent law, breath tests fall under the consent exception to the warrant requirement.</u>
    a. Birchfield *does not analyze breath tests in which the defendant submits and later challenges voluntariness; and the Law Court has only addressed this issue in dicta.*

The one case in *Birchfield* that concerned submission to testing, *Beylund v. North Dakota*, was remanded to determine the voluntariness of the submission. *See Birchfield*, 579 U.S. at 478.[6] *Beylund* was a blood testing case, and the *Birchfield*

[6] The Court in *Birchfield* remanded Beylund's case saying this;

> [The defendant] submitted to a blood test after police told him that the law required his submission, and his license was then suspended and he was fined in an administrative proceeding. The North Dakota Supreme Court held that Beylund's consent was voluntary on the erroneous assumption that the State could permissibly compel both blood and breath tests. Because voluntariness of consent to a search must be "determined from the totality of all the circumstances," *Schneckloth, supra,* at 227, 93 S.Ct. 2041, we leave it to

court did not have any cases before them in which a person had submitted to a breath test. Therefore, *Birchfield* was silent as to the proper analysis for *breath tests* in which a person submitted to them.

In *LeMeunier-Fitzgerald*, the most analogous case in Maine jurisprudence, this Court had the opportunity to review whether Maine's implied consent law rendered a defendant's consent to a blood test involuntary. *See generally LeMeunier-Fitzgerald*, 2018 ME 85, 188 A.3d 183. This Court held that the recitation of the implied consent warnings, absent other coercive factors, did not render a person's consent to a blood test involuntary. *Id.* ¶¶ 31-32. However, in dicta, this Court stated the following,

> [i]n addressing the reasonableness of searches aimed at detecting impaired driving, the Supreme Court has held that a *breath test* measuring blood-alcohol content is a search that does not require a warrant, consent, or other exceptions, as long as there is probable cause to believe that the driver was operating, or attempting to operate, a vehicle while under the influence. The Court has reasoned that a breath test is less intrusive than a blood test, and when balanced against the law enforcement needs of keeping impaired drivers off the roads, it is reasonable, even without a warrant, for a law enforcement officer to require a driver to submit to a breath test if probable cause exists.[7]

> the state court on remand to reevaluate Beylund's consent given the partial inaccuracy of the officer's advisory.

Birchfield, 579 U.S. at 478.

[7] The trial court primarily relied on this quote from *LeMeunier-Fitzgerald* when deciding whether a voluntariness analysis should be considered in Mr. Davis's case. A. 10-11.

Id. 13 (internal citation omitted) (emphasis in original). As previously discussed, *Birchfield's* holding as to breath tests was that they "may be administered as a search incident to a lawful arrest for drunk driving. As in all cases involving *reasonable searches* incident to arrest, a warrant is not needed in this situation." *Birchfield*, 579 U.S. at 476 (emphasis added). There is nothing in the *Birchfield* opinion which abdicates the possibility of consent as a possible exception to the warrant requirement, and thus the dicta in *LeMeunier-Fitzgerald* confuses the *Birchfield* holding.

Birchfield's holding concerning breath tests creates two express starting points for this Court: (1) warrantless breath tests must fall into a warrant exception because they are a search under the Fourth Amendment, and (2) the search, no matter whether it is performed with a warrant or without, must be performed in a reasonable manner. *See Birchfield*, 579 U.S. at 476.

b. While there is a "duty to submit" to testing in Maine, there is ultimately a choice to refuse testing. Therefore, submitting to a breath test should be analyzed under the consent exception rather than under the search incident to arrest exception to the warrant requirement.

While the implied consent law in Maine does attach penalties for refusals to a resulting OUI conviction,[8] refusing a breath test is not an independent crime in

[8] These penalties include, (1) "suspension of [a] person's driver's license for a period up to 6 years;" (2) admissibility of refusal "evidence at a trial for operating under the influence of intoxicants;" and (3) the refusal will "[b]e considered an aggravating factor at sentencing if the person is convicted of operating under the influence of intoxicants that, in addition to other penalties, will subject the person to a mandatory minimum period of incarceration." 29-A M.R.S. § 2521(3)(A)-(C) (2025).

Maine. *See* 29-A M.R.S. § 2521 (2025). The Court in *Birchfield* made specific note of the context in which they were reviewing chemical testing; that of criminalized refusals.

> While [implied consent] laws originally provided that refusal to submit could result in the loss of the privilege of driving and the use of evidence of refusal in a drunk-driving prosecution, *more recently States and the Federal Government have concluded that these consequences are insufficient*. In particular, license suspension alone is unlikely to persuade the most dangerous offenders, such as those who drive with a BAC significantly above the current limit of 0.08% and recidivists, to agree to a test that would lead to severe criminal sanctions. The laws at issue in the present cases—*which make it a crime to refuse to submit to a BAC test*—are designed to provide an incentive to cooperate in such cases, and we conclude that they serve a very important function.

Birchfield, 579 U.S. at 465–66 (internal citations omitted) (emphasis added). However, Maine has actively moved away from other states which make a refusal to submit to chemical tests a separate crime. For example, in 1995, the Maine Legislature revised their implied consent law, and repealed a portion of the statute that required 48 hour immediate incarceration for someone refusing a breath test. *See* 29 M.R.S. § 1312-B (1994) (Repealed 1995).

When discussing Maine's implied consent law in *LeMeunier-Fitzgerald*, this Court noted that "the duty to submit does not . . . create a statutory *mandate* to submit to testing. Rather, it provides specific consequences for a driver's decision not to comply with that duty." *LeMeunier-Fitzgerald*, 2018 ME 85, ¶ 19, 188 A.3d 183 (emphasis in original). While there is no constitutional right to refuse chemical

testing in Maine, there is no mandate to submit. *See id.* Therefore, when someone submits to a breath test, consent is the only exception to the warrant requirement that is applicable under Maine law.

3. The consent exception to the warrant requirement of the Fourth Amendment and Article I, Section 5 requires that consent to a search be voluntary.

"Consent is a firmly established exception to the warrant requirement of the Fourth Amendment." *Bailey*, 2010 ME 15, ¶ 26, 41 A.d 535. "When a defendant moves to suppress evidence obtained without a warrant and the State asserts that no warrant was required because the suspect consented to the search, it is the State's burden to prove, 'by a preponderance of the evidence, that an objective manifestation of consent was given by word or gesture.'" *LeMeunier-Fitzgerald*, 2018 ME 85, 21, 188 A.3d 183 (citing *State v. Bailey*, 2012 ME 55, 16, 41 A.3d 535). However, "[e]ven in the absence of a warrant, a search is reasonable—and the evidence obtained is admissible—if a person *voluntarily* consents to the search." *LeMeunier-Fitzgerald*, 2018 ME 85, 21, 188 A.3d 183 (emphasis added).

It is the agreement of both the United States Supreme Court and the Law Court that voluntariness of consent to a search is "determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); *see*

also Birchfield, 579 U.S. at 478; *LeMeunier-Fitzgerald*, 2018 ME 85, ¶ 22, 188 A.3d 183. In addition, "[a] search is unreasonable if a person's consent to the search was 'coerced, by explicit or implicit means, by implied threat or covert force' or duress, or was induced by 'deceit, trickery, or misrepresentation.'" *LeMeunier-Fitzgerald*, 2018 ME 85, ¶ 22, 188 A.3d 183 (citing *Schneckloth*, 412 U.S. at 228; *State v. Barlow*, 320 A.2d 895, 900 (Me. 1974)); s*ee, e.g.*, *United States v. Hutchinson*, No. 2:16-CR-168-DBH, 2018 WL 447619, at *7 (D. Me. Jan. 17, 2018) (holding that a blood test was coerced when the officer had misinformed the defendant that that blood-draw was compulsory under the law); *United States v. Weidul*, 325 F.3d 50, 54 (1st Cir. App. 2003) (holding that a consent to a search of a house was involuntary because the defendant had merely acquiesced to what he believed was lawful authority).

4. Alternatively, even if breath tests fall under the search incident to arrest exception to the Fourth Amendment and Article I, Section 5 warrant requirement, the search must still be reasonable. Breath tests *always* require the cooperation of the accused, and so voluntariness must be analyzed under the reasonableness prong of the search.[9]

Even if breath tests do fall under the search incident to arrest exception to the warrant requirement, the breath test must still be performed in a reasonable

[9] *Birchfield* briefly speaks about the exigent circumstances exception in relation to both breath and blood tests, but they did not rule on these grounds. *See Birchfield*, 579 U.S. at 456–57. While the State did not raise the issue of exigent circumstances below, to the extent that the Court believes that exigent circumstances may be a viable exception to the warrant requirement here, the same voluntariness arguments from this section could be applied.

manner. *See Birchfield*, 579 U.S. at 455. Reasonableness of a search incident to arrest "is measured in objective terms by examining the totality of the circumstances." *State v. Sargent*, 2009 ME 125, ¶ 10, 984 A.2d 831. Reasonableness in the context of breath tests, should consider whether or not the search was performed voluntarily; without "coercion, . . . 'deceit, trickery, or misrepresentation.'" *LeMeunier-Fitzgerald*, 2018 ME 85, ¶ 22, 188 A.3d 183 (citing *Schneckloth*, 412 U.S. at 228). This is because breath tests always require the cooperation of the defendant. *See State v. Chase*, 2001 ME 168, ¶ 7 n.5, 785 A.2d 702 ("[A] breath test[] cannot be completed without the cooperation of the driver.").[10]

The cooperation required for a breath test is unlike other searches which typically fall under the search incident to arrest exception. A pat-down search of the body is performed by a police officer, with or without the cooperation of the defendant; and a search of the immediate surroundings of the person being arrested is done completely independent of the body of the person being searched. *See Chimel v. California*, 395 U.S. 752, 768 (1969). Even a blood test, which usually

[10] The Maine Criminal Justice Academy trains officers to use Breath Testing Devices. ME Crim. Just. Acad., Breath Testing Device Operation and Certification 2 (2016). In order to accurately take a sample, the subject must "exhale for 5-6 seconds." *See id.* In the event that a driver is not able to blow for this period of time, the breathalyzer will print out a message stating "deficient sample." *See id.* There are some instances where a person submits to a breath test, but they are unable to successfully perform the test. *See, e.g.*, *State v. Hinkel*, 2017 ME 76, ¶ 4, 159 A.3d 854 (the defendant attempted to complete the breath test four times, with each giving a "deficient sample" reading).

requires a warrant, can be taken while unconscious under certain circumstances. *See Birchfield*, 579 U.S. at 475; *Mitchell v. Wisconsin*, 588 U.S. 840, 857 (2019).

Because of the necessary cooperation of the defendant, police coercion, trickery, or misrepresentation—especially that which takes place at the police station—are threats that Courts have always been cognizant of.[11] While traditionally considered in the context of statements, this Court has recognized the "inherently coercive atmosphere of the police station." *State v. Bridges*, 2003 ME 103, ¶ 31, 829 A.2d 247 (citing *Proctor v. United States,* 404 F.2d 819, 821 (D.C. Cir. 1968)). In addition, when there is a "restriction of a defendant's movement" the interaction "transformed a neutral environment into one of 'police control'" *Bridges*, 2003 ME 103, ¶ 31, 829 A.2d 247 (citing *United States v. Thomas*, 190 F. Supp. 2d 49, 61 (D. Me. 2002)). Because a defendant must cooperate for an officer to obtain a breath test, and there is a recognized threat of coercion in the police station, a voluntariness analysis is necessary when evaluating the reasonableness of a breath test.

Whether breath tests fall under the consent exception to the warrant requirement or the search incident to arrest exception to the warrant requirement,

[11] When a case presents "a fact pattern that suggests an involuntary, compelled 'consent' search of an individual who had been seized for a traffic stop and from whom a verbal consent to search may have been extracted as the price of her freedom to leave[,] the circumstances surrounding the individual's seizure and subsequent verbal consent must be subject to careful Fourth and Fifth Amendment analysis and concurrent analysis under Article I, sections 5 and 6 of the Maine Constitution." *State v. Kremen*, 2000 ME 117, ¶¶ 19-20, 754 A.2d 964 (Alexander, J., dissenting).

there must be a voluntariness analysis for breath tests. The extreme consequence of having no voluntariness analysis for submissions to breath tests is that an officer could hold their weapon up to the accused and tell them to take a breath test or they will shoot. This scenario would clearly qualify as an unreasonable search. Nevertheless, this hypothetical scenario would still be a valid search if the officer had probable cause to arrest under the lower court's analysis of breath tests; that voluntariness need not be examined "if no consent is required." A. 11. This cannot be true.

5. Mr. Davis's submission to the breath test, considering the totality of the circumstances, was involuntary, and the lower court erred by denying his motion to suppress.

Whether by consent or pursuant to a search incident to arrest, Mr. Davis's submission to the breath test was involuntary considering the totality of the circumstances. Officer Haass told Mr. Davis multiple times that he had no intention of bringing him to jail. State's Ex. A 00:06:15 - 00:06:17; State's Ex. A 00:06:50 - 00:06:52. However, only after Mr. Davis indicated that he was going to refuse the breath test, Officer Haass said that he would take him to jail for refusing. State's Ex. A 00:11:02 - 00:11:11. As Officer Haass testified, part of his determination for whether or not to incarcerate someone is if "this person need[s] to go to jail to learn from the mistake that they made." (Mot. Tr. 9 (May 21, 2024).)[12] Therefore, the

[12] This is distinguishable from the circumstances in *LeMeunier-Fitzgerald* in which the defendant,

action of bringing Mr. Davis to jail would *not* have been because the officer had probable cause to charge him with an OUI, but because Mr. Davis refused to take the breath test. Considering the totality of these circumstances, this was coercive behavior by Officer Haass and it rendered Mr. Davis's submission to the breath test involuntary. The breath test should have been suppressed.

Officer Haass's behavior also constitutes a misrepresentation of the law. Under Maine's implied consent law, "[i]n order for the consequences of refusal to apply, the driver must have been provided with a direct and clear explanation of those consequences." *LeMeunier-Fitzgerald*, 2018 ME 85, ¶ 19, 188 A.3d 183; *see also* 29-A M.R.S. § 2521(3) (2025). These consequences *do not* include immediate incarceration. *See id*. It was the intention of the legislature to remove immediate incarceration for refusals when they amended the statute in 1995 and removed the 48-hour hold. *Compare* 29 M.R.S. § 1312-B(2)(B)(4) (1994) (Repealed 1995) *with* 29-A M.R.S. § 2521(3) (2025). Here, Mr. Davis was coerced into submitting to the breath test for fear of going to jail if he did not submit; something that the legislature has expressly rejected. The lower court refused to conduct a

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> was accurately warned by the arresting officer in the hospital that she had a duty to submit to chemical tests and that she would be lawfully subject to a mandatory minimum at sentencing if convicted of OUI after refusing to submit. The warnings informed [the defendant] of the other statutory consequences that would arise if she refused to submit to the test despite her duty to do so. The warnings did not constitute any form of deceit, misrepresentation, or trickery. . . . After receiving the information, LeMeunier–Fitzgerald expressly agreed to undergo the blood test. The court did not err in concluding, in the undisputed totality of the circumstances, that [the defendant]'s consent was voluntary and not induced by unconstitutional coercion or misrepresentation.

LeMeunier-Fitzgerald, 2018 ME 85, ¶ 32, 188 A.3d 183.

voluntariness analysis, but acknowledged that had this Court reached the voluntariness of submissions to breath tests in *LeMeunier-Fitzgerald*, then Officer Haass's threat of immediate incarceration would have been a persuasive factor. A. 11. *See also LeMeunier-Fitzgerald*, 2018 ME 85, 25, 188 A.3d 183 ("[R]efusal to submit [does not] expose the driver to any additional threat of immediate incarceration."). Therefore, Officer Haass's threat of jail was a misrepresentation of the law, rendering Mr. Davis's submission to the breath test involuntary and requiring the breath test be suppressed.

The Court erred by not conducting a voluntariness analysis. Further, considering the totality of the circumstances under the Fourth Amendment and Article I, section 5, Officer Haass's misleading and coercive actions, words, and subjective intent, in combination with Mr. Davis's position as someone who is handcuffed and alone in a room with a police officer, rendered Mr. Davis's submission to the breath test involuntary, and thus the breath test should have been suppressed.

B. The trial court erred when it failed to consider whether, considering the totality of the circumstances, Mr. Davis's submission to the breath test was voluntary under the Due Process Clause of the Fourteenth Amendment and the heightened standards of Article I, Sections 6 and 6-A of the Maine Constitution.

Article I, Section 6 states in relevant part, "[t]he accused shall not be compelled to furnish or give evidence against himself or herself." Me. Const. art. I,

§ 6. This is substantially different from the Federal Constitution which states in relevant part, "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This Court has independent "authority and important responsibility to construe the Maine Constitution," and is "'free, pursuant to [its] own law, to adopt a higher standard' than that set by the federal constitution." *All. for Retired Ams.*, 2020 ME 123, ¶ 23, 240 A.3d 45 (quoting *Rees,* 2000 ME 55, ¶ 5, 748 A.2d 976).

The Maine Constitution is "a live and flexible instrument fully capable of meeting and serving the imperative needs of society in a changing world," and thus "analysis of the scope of a constitutional protection can require consideration of the 'public policy for the State of Maine and the appropriate resolution of the values we find at stake.'" *Winchester v. State*, 2023 ME 23, ¶ 24, 291 A.3d 707 (quoting *Opinion of the Justices*, 231 A.2d 431, 434 (Me. 1967) and *Rees*, 2000 ME 55, ¶ 8, 748 A.2d 976). This Court exercised this discretion when it adopted "a more stringent standard of proof for establishing the voluntariness of statements in order to better secure the guarantee of freedom from self-incrimination." *Rees*, 2000 ME 55, ¶ 8, 748 A.2d 976; *see State v. Collins*, 297 A.2d 620 (1972).

This Court's long history of upholding heightened protections in the Maine Constitution "has occurred principally in the areas of due process and the privilege against self-incrimination." *Rees*, 2000 ME 55, ¶ 31 n.9, 748 A.2d 976 (Saufley, J.,

dissenting). Accordingly, this Court should also consider state and federal due process protections "arising from the due process clauses of our state and federal constitutions . . . created both to deter improper conduct by the State and to prevent the State from using its ill-gotten gains against a citizen." *Id.* 44; see Me. Const. Art. I, § 6-A ("No person shall be deprived of life, liberty or property without due process of law. . . ."). Self-incrimination and due process constitutional analyses are both concerned with voluntariness; "[w]here the Fifth Amendment analysis seeks to determine whether the defendant's confession was compelled, a due process analysis asks 'whether the State has obtained the confession in a manner that comports with due process.'" *Rees*, 2000 ME 55, 36, 748 A.2d 976 (Saufley, J., dissenting) (quoting *Miller v. Fenton,* 474 U.S. 104, 110 (1985)). *See also State v. Hunt*, 2016 ME 172, 19, 151 A.3d 911.[13] Evidence furnished under Article I, Section 6 is also involuntary under Section 6-A when provided "under circumstances that offend . . . fundamental values of social policy and constitutional law." *Hunt*, 2016 ME 172, 20, 151 A.3d 911.

1. <u>The plain meaning and statutory use of "furnish" in Article I, Section 6 are broader and, therefore, protect more actions of the accused than the word "witness" in the Federal Fifth Amendment.</u>

Although some language in Article I, Section 6 in the Maine Constitution and the Fifth Amendment of the Federal Constitution overlap, Maine's replacement

[13] This passage was cited with approval in *Hunt's* majority opinion. *See State* v. *Hunt*, 2016 ME 172, 19, 151 A.3d 911.

of the word "witness" with "furnish or give evidence" is indicative of the heightened protections afforded to Maine citizens. “When interpreting a statute, we look first to the plain meaning in order to discern legislative intent, viewing the relevant provision in the context of the entire statutory scheme to generate a harmonious result.” *State v. Tozier*, 2015 ME 57, ¶ 6, 115 A.3d 1240 (internal quotation marks omitted). Under the plain meaning of the word, “furnish” means to “provide with what is needed.” *Furnish*, Merriam-Webster, (last visited Apr. 7, 2025) https://www.merriam-webster.com/dictionary/furnish. Black’s Law Dictionary defines “furnish” as “[t]o supply; provide; provide for use.” *Furnish*, Black’s Law Dictionary (last visited April 8, 2025) thelawdictionary.org/furnish/. Accordingly, “provide” is “[a]n act of furnishing or supplying a person with a product.” *Provide*, Black’s Law Dictionary (last visited April 8, 2025) thelawdictionary.org/provide/. Maine Criminal Code defines “furnish” to mean to “give, dispense, administer, prescribe, deliver or otherwise transfer to another.” 17-A M.R.S. § 1101(18)(A) (2025).

In other areas of Title 17-A of the Maine Criminal Code, “furnish” means to provide a state actor with information which includes both testimonial and nontestimonial evidence. *See Id.* § 15-A(2) (2025) (“furnishes the officer evidence of the person’s correct name, address and date of birth”); *id.* § 1105-C(1)(K) (2025) (“the drug furnished by the defendant is a contributing factor to the death of the

other person."); *id.* § 1811(3) (2025) ("A copy of the motion must be furnished to the person prior to or at the initial appearance."); *id.* § 2305(6) (2025) ("the attorney for the state furnishes a revised statement to the administrator."). Therefore, the use of the word furnish in Article I, Section 6 is more expansive than the traditional testimonial or nontestimonial binary structure that the federal Constitution created. "Furnish," as it is used in Article I, Section 6, should include any evidence that is "give[n], dispense[d], administer[ed], prescribe[d], deliver[ed] or otherwise transfer[d]" against himself or herself. *Id.* § 1101(18)(A) (2025). Maine's statutory use of "furnish" reinforces the word's plain meaning and legislative intent that furnishing requires an affirmative action.

2. <u>This Court has established heightened protections for furnishing evidence under Article I, Section 6 which require that the State prove beyond reasonable doubt that evidence was furnished voluntarily.</u>

Article I, Section 6 of the Maine Constitution protects against police coercion that causes a defendant to involuntarily furnish evidence against themselves. To ensure the voluntariness of evidence furnished under Article I, Section 6, this Court "unlike the Supreme Court with respect to the United States Constitution, require[s] the State to prove voluntariness beyond a reasonable doubt to satisfy the Maine Constitution." *Athayde*, 2022 ME 41, ¶ 27, 277 A.3d 387. *Cf. Lego v. Twomey*, 404 U.S. 477, 489 (1972) (requiring, for purposes of the United

States Constitution, that the prosecution prove voluntariness by only a preponderance of the evidence).

Additionally, the State must prove beyond a reasonable doubt that the evidence furnished to the state by the defendant was the "the result of [the] defendant's exercise of his own free will and rational intellect." *State v. Caouette*, 446 A.2d 1120, 1123 (Me. 1982).

> It must be remembered that the privilege [against self-incrimination] exists in this case by virtue of the Maine Constitution. The Fifth Amendment is a limitation upon the federal government and has no direct reference to state action except to the extent incorporated as a requirement of due process under the Fourteenth Amendment. The maximum statement of the substantive conduct of the privilege and the requirements of voluntariness must be decided by this Court—as a matter of Maine law.

Id. at 1122. Accordingly, Maine's privilege against self-incrimination does not allow involuntary evidence to be used at trial. *See, e.g.*, *id.* at 1124.

"[T]he voluntariness requirement gives effect to three overlapping but conceptually distinct values: (1) it discourages objectionable police practices; (2) it protects the mental freedom of the individual; and (3) it preserves a quality of fundamental fairness in the criminal justice system." *State v. Mikulewicz,* 462 A.2d 497, 500 (Me.1983). *See also State v. Sawyer*, 2001 ME 88, 8, 772 A.2d 1173.

3. When analyzing voluntariness and evaluating the totality of the circumstances, the Court must consider whether misrepresentation or other coercion rendered the defendant's consent involuntary within the meaning of the Due Process Clause and Article I, Sections 6 and 6-A.

In protecting voluntariness, Maine is vigilant in preventing coercive police action by state actors. A breath test that is furnished in response to police coercion is protected against by Article I, Section 6 and 6-A of Maine's Constitution. Under both the Due Process Clause of the Fourteenth Amendment and Article I, Sections 6 and 6-A of the Maine Constitution, voluntariness is analyzed considering the totality of the circumstances. *State v. Coombs* 1998 ME 1, ¶ 7, 704 A.2d 387. In assessing voluntariness under the totality of the circumstances, Maine courts consider "the persistence of the officers; police trickery; threats, [and] promises or inducements made to the defendant." *Sawyer*, 2001 ME 88, ¶ 9, 772 A.2d 1173. Further, evidence furnished "in response to threats . . . or in response to police promises of leniency . . . may be determined to be involuntary." *State v. Dodge*, 2011 ME 47, ¶ 12, 17 A.3d 128.

The Due Process Clause in Article I, Section 6-A of Maine's Constitution mirrors the Fourteenth Amendment Due Process Clause in the United States Constitution. *Compare* Me. Const. art. 1, § 6-A ("No person shall be deprived of life, liberty or property without due process of law . . . ."), *with* U.S. Const. amend. XIV, § 1 ("No State shall ... deprive any person of life, liberty, or property, without

due process of law ....").[14] *See MSAD 6 Bd. of Dirs. v. Town of Frye Island*, 2020 ME 45, ¶ 36, 229 A.3d 514 ("The rights guaranteed by article I, section 6-A of the Maine Constitution are coextensive with those guaranteed by the Fourteenth Amendment of the United States Constitution.").[15]

Information that is "taken from an individual who has lost his freedom, and who is in the complete control of law enforcement and the penal system, should be, and are, accorded greater protections than statements of an individual who is not incarcerated." *Rees*, 2000 ME 55, ¶ 17, 748 A.2d 976. When analyzing voluntariness and evaluating the totality of the circumstances, the Court must consider whether misrepresentation or other coercion rendered the defendant's consent not voluntary within the meaning of the Due Process Clause and Article I, Sections 6 and 6-A. *See generally, Hunt*, 2016 ME 172, ¶ 19, 151 A.3d 911.

The actions of the police officer must also be analyzed in relation to the due process considerations afforded to all defendants under the Due Process Clause and Article I, Section 6-A. *See Hunt*, 2016 ME 172, ¶ 19, 151 A.3d 911; *Rees*, 2000 ME 55, ¶ 36, 748 A.2d 976 (Saufley, J., dissenting). "The Due Process Clause . . . prohibits deprivations of life, liberty, or property without fundamental fairness

[14] "Article I, section 6-A was adopted on the recommendation of the Maine Constitutional Commission of 1963, which urged the Legislature to adopt '[a] due process clause, similar to that which appears as the 14th Amendment to the United States Constitution.'" *Dupuis v. Roman Cath. Bishop of Portland*, 2025 ME 6, ¶ 88, 331 A.3d 294 (Douglas J., dissenting); *See* L.D. 33 at 2 (101st Legis. 1963).

[15] "The Supreme Court's interpretation of the Fourteenth Amendment's Due Process Clause neither dictates nor constrains our interpretation of article I, section 6-A." *Dupuis*, 2025 ME 6, ¶ 90, 331 A.3d 294 (Douglas, J., dissenting).

through governmental conduct that offends the community's sense of justice, decency and fair play." *State v. McConkie,* 2000 ME 158, ¶ 9, 755 A.2d 1075 (internal quotation marks omitted). The Court must "examine whether statements are free and voluntary or whether, considering the totality of the circumstances under which the statements were made, their admission would be fundamentally unfair." *Hunt*, 2016 ME 172, ¶ 19, 151 A.3d 911.

In considering the totality of the circumstances of voluntariness, the court considers the defendant's "stated reliance on his understanding of their assurances" even when the officer made "no direct promises" to the defendant. *Id.* ¶ 42. When determining coercive state action, the Law Court has "found officers' statements to defendants to be problematic when those statements involve false promises of leniency or misrepresentations about legal rights." *Id.* ¶ 25. Accordingly, Maine courts should evaluate the presence of coercion and misrepresentation when determining the admissibility of furnished evidence.

4. The trial court erred when it denied Mr. Davis's motion to suppress because he furnished the breath test in response to Officer Haass's misrepresentation and coercion at the police station, rendering his consent not voluntary within the meaning of the Due Process Clause and Article I, Sections 6 and 6-A.

In addition to Officer Haass's misrepresentation of the law, the officer's stated intention to take Mr. Davis "to jail to learn from the mistake" he made, had he refused a breath test, offends the tenants of fundamental fairness protected by

due process. (Mot. Tr. 9 (May 21, 2024).); *see Mikulewicz*, 462 A.2d at 500. This officer went beyond the implied consent form and threatened to take Mr. Davis to jail only when he did not furnish a breath test. In fact, Officer Haass did not finish reading the implied consent form before threatening to take Mr. Davis to jail. State's Ex. A 00:11:02 - 00:11:11. Officer Haass violated Mr. Davis's due process rights because he made an independent determination and acted as judge and jury.

Officer Haass's behavior constituted a misrepresentation of Maine's implied consent law because the officer withheld "the consequences of a refusal" and did not provide "a direct and clear explanation of those consequences," none of which include immediate incarceration. *LeMeunier-Fitzgerald*, 2018 ME 85, ¶ 19, 188 A.3d 183; *see* also 29-A M.R.S. § 2521(3) (2025). This officer went against the legislative intent to remove immediate incarceration for refusals. *Compare* 29 M.R.S. § 1312-B(2)(B)(4) (1994) (Repealed 1995) *with* 29-A M.R.S. § 2521(3) (2025). Officer Haass's threat of immediate incarceration was a persuasive factor for the defendant. This unfounded threat of jail renders Mr. Davis's breath test that he furnished involuntary.

Considering the totality of these circumstances, Officer Haass's coercive and misleading behavior rendered Mr. Davis's submission to the breath test involuntary pursuant Due Process Clause of the Fourteenth Amendment and Article I, Sections

6 and 6-A of the Maine Constitution, and therefore the breath test must be suppressed.

VI. CONCLUSION

This Court should reverse the trial court's Order, vacate the judgment, and remand the case to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the brief was sent to opposing counsel at the address noted on the Briefing schedule.