IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON,
Respondent on Review,
v.
RODNEY BANKS, SR.,
Petitioner on Review.
(CC 140130317) (CA A158466) (SC S065180)

On review from the Court of Appeals.*

Argued and submitted May 4, 2018.

Ben Eder, Thuemmel Uhle & Eder, Portland, argued the cause and filed the brief for petitioner on review.

Timothy A. Sylwester, Assistant Attorney General, Salem, argued the cause and filed the brief for respondent on review. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Walters, Chief Justice, and Balmer, Nakamoto, Flynn, Duncan, and Nelson, Justices, and Kistler, Senior Justice pro tempore.**

WALTERS, C. J.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

Kistler, S. J., concurred and filed an opinion.

Balmer, J., dissented and filed an opinion, in which Nakamoto, J., joined.

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* On appeal from Multnomah County Circuit Court, Michael A. Greenlick, Judge. 286 Or App 718, 401 P3d 1234 (2017).

** Garrett, J., did not participate in the consideration or decision of this case.

WALTERS, C. J.

Defendant was arrested for driving under the influence of intoxicants (DUII) and, when asked, refused to take a breath test, which would have revealed the percentage of alcohol in his blood. For the reasons that follow, we conclude that Article I, section 9, of the Oregon Constitution prohibited the state from using defendant's refusal as evidence when it prosecuted him for that crime. We reverse the contrary decision of the Court of Appeals, *State v. Banks*, 286 Or App 718, 401 P3d 1234 (2017), and the judgment of the circuit court.

I. BACKGROUND

The facts in this case are undisputed.[1] Defendant drove his vehicle into a fence one night in Portland. Paramedics and law enforcement responded to the scene, evaluated defendant, and determined that he was he was intoxicated. Defendant was arrested and transported to the police station, where officer Ladd was waiting. Ladd informed defendant that he had been in a crash and was at the police station because he "smelled of an alcoholic beverage pretty strongly." Ladd explained that he was "going to read [defendant] some information" and that he would "like [defendant] to open [his] mouth." When Ladd asked defendant, "Can I look in your mouth," defendant responded, "No." Ladd then explained that, "if you don't [open it], then I can't help you maybe take a breath test." After defendant responded that he would not open his mouth, Ladd read defendant the "rights and consequences" required by law. Ladd explained that defendant was "about to be asked to submit to a breath test *** under the implied consent law," and he provided information on the consequences for refusing or failing the test, including that his refusal to submit to the breath test "may be offered against [him]." After reading

[1] Defendant challenged the use of his refusal as evidence in a motion to suppress. When this court reviews a denial of a motion to suppress, it is "bound by the trial court's findings of historical fact that are supported by evidence in the record." *State v. Holdorf*, 355 Or 812, 814, 333 P3d 982 (2014). To the extent that the trial court did not make findings of facts, and where "there is evidence from which those facts could be decided more than one way," this court will presume that the facts were decided in a way that is consistent with the trial court's conclusion of law. *Id.*

the form, Ladd asked defendant, "[W]ill you take a breath test?" Defendant responded that he would not. Ladd did not obtain defendant's blood alcohol content (BAC). Defendant was charged with DUII, reckless driving, and criminal mischief.

Before trial, defendant moved to suppress evidence of his refusal to consent to the breath test. His position was that use of his refusal as substantive evidence of his guilt, as permitted under ORS 813.310, is unconstitutional. Defendant argued that use of his refusal would violate his right against self-incrimination under Article I, section 12, and his right against unreasonable searches and seizures under Article I, section 9. With respect to the latter, defendant argued that the use of his refusal as evidence as of his guilt placed too great a burden on his exercise of his Article I, section 9, right. The trial court denied the motion, the state presented evidence of defendant's refusal to support the inference that defendant knew he was intoxicated, and defendant was convicted of DUII.

Defendant appealed his judgment of conviction, and the Court of Appeals affirmed. *Banks*, 286 Or App 719. On the Article I, section 9, issue, the only issue that we address,[2] the Court of Appeals explained that Ladd had a lawful right to conduct a warrantless seizure and search[3] based on a warrant exception—the existence of probable cause and exigent circumstances. *Id.* at 727. As a result, the court reasoned, defendant had no right to refuse to consent to that search, and his right against unreasonable searches and seizures was not violated by the use of his refusal as evidence at trial. *Id.*

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[2] Defendant argued before the Court of Appeals, as he did at the trial court, that the use of his refusal as evidence against him violated his right against self-incrimination under Article I, section 12, because it forced him to decide between providing consent or withholding it, both of which, he argued, implicate his constitutional rights. Defendant renews that argument here, but, because we decide the case on the Article I, section 9, issue, we do not address defendant's Article I, section 12, argument.

[3] *See State v. Swan*, 363 Or 121, 137, 420 P3d 9 (2018) (describing breath test as a seizure and search). From this point forward, we will refer in this opinion to the request at issue as a "search" of defendant's breath. We use that single term only for simplicity's sake.

Defendant sought review in this court, which we allowed. In this court, defendant does not argue that Ladd did not have probable cause or that exigent circumstances did not exist to permit a warrantless search of his breath. Instead, he argues, as he did in the proceedings below, that his refusal to take a breath test was an invocation of his right under Article I, section 9, of the Oregon Constitution to refuse to give his consent to a warrantless search. That exercise of a constitutional right, he submits, cannot be used as substantive evidence of his guilt and may not be commented on at trial without violating that constitutional provision.

The state does not take issue with that latter proposition. The state acknowledges that, "as a general rule, a person's choice to refuse to consent to a warrantless search and seizure is not admissible as substantive evidence against him." *See, e.g.*, *State v. Smallwood*, 277 Or 503, 505-06, 561 P2d 600 (1977) (noting that it is "usually reversible error to admit evidence of the exercise by a defendant of the rights which the constitution gives him if it is done in a context whereupon inferences prejudicial to the defendant are likely to be drawn by the jury"); *State v. Moller*, 217 Or App 49, 51, 174 P3d 1063 (2007) (error to admit evidence of the defendant's refusal to consent to a search of his car); *United States v. Moreno*, 233 F3d 937, 941 (7th Cir 2000) (noting cases indicating that government cannot use refusal to consent to a search of home as evidence that person knew search would produce incriminating evidence); *United States v. Thame*, 846 F2d 200, 207 (3rd Cir), *cert den*, 488 US 928 (1988) (error for prosecutor to argue that defendant's refusal to provide consent to search constituted evidence of his guilt); *State v. Larson*, 788 NW2d 25, 32-33 (Minn 2010) (error to allow the introduction of defendant's refusal to consent to DNA testing as evidence of guilt); *State v. Jennings*, 333 NC 579, 604-05, 430 SE2d 188, 201 (1993) (error to allow officers to testify that defendant refused to allow search of hotel room and car); *Padgett v. State*, 590 P2d 432, 434 (Alaska 1979) (error to admit evidence of the defendant's refusal to consent to search of car); *Curry v. State*, 217 Ga App 623, 625-26, 458 SE2d 385, 386-87 (1995) (evidence of defendant's refusal to consent to surgery erroneously admitted).

The state's response, instead, is that that general rule is not implicated here for three reasons. First, the state contends, under the implied-consent statutes, defendant agreed, by driving on a public highway, to submit to a breath test if arrested for DUII and, therefore, did not have a constitutional right at the time of arrest to refuse to provide the consent that Ladd requested. Second, the state argues, defendant's refusal was not an invocation of a constitutional right. When Ladd asked defendant to take to a breath test, he was not asking defendant to waive his Article I, section 9, right; rather, he was seeking defendant's physical cooperation and submission to a breath test that Ladd had lawful authority to conduct. Third, the state asserts, even if defendant's refusal was an invocation of a constitutional right, it can be used against him because Ladd had another lawful basis for obtaining a breath sample from defendant without a warrant and without his consent—probable cause and exigent circumstances. We address each of those arguments in succession.

II. ANALYSIS

A. *Defendant had a legal right to refuse to provide consent at the time of arrest.*

Article I, section 9, of the Oregon Constitution prohibits unreasonable searches and seizures of "persons" and their "houses, papers, and effects." A search of one's breath is protected under that provision. *State v. Newton*, 291 Or 788, 800, 636 P2d 393 (1981), *overruled on other grounds by State v. Spencer*, 305 Or 59, 750, P2d 147 (1988). Generally, Article I, section 9, requires that law enforcement obtain a warrant before performing a search. *See* Art I, § 9 ("[N]o warrant shall issue but upon probable cause."); *State v. Bridewell*, 306 Or 231, 235, 759 P2d 1054 (1988) (noting that law enforcement must have a warrant to search unless warrant exception applies). However, in interpreting that constitutional provision, this court has recognized various exceptions to the warrant requirement. *See, e.g.*, *State v. Davis*, 295 Or 227, 237-38, 666 P2d 802 (1983) (noting some exceptions). One such exception is voluntary consent to search. *State v. Paulson*, 313 Or 346, 351-52, 833 P2d 1278 (1992). That exception is established when the state proves

that "someone having the authority to do so voluntarily gave the police consent to search the defendant's person or property," thereby waiving the right to insist that the government obtain a warrant. *State v. Weaver*, 319 Or 212, 219, 874 P2d 1322 (1994).

The state contends that, under ORS 813.100, when an individual drives on a public road, the individual provides that voluntary consent and irrevocably waives the right to insist that the state obtain a warrant to search his or her breath. The state relies on ORS 813.100(1), which provides that,

> "[a]ny person who operates a motor vehicle upon premises open to the public or the highways of this state shall be deemed to have given consent, subject to the implied consent law, to a chemical test of the person's breath *** for the purpose of determining the alcoholic content of the person's blood if the person is arrested for driving a motor vehicle while under the influence of intoxicants."

The problem with the state's argument, however, is that the implied-consent statutes also include a provision that permits a person who drives on public roads to later refuse to take a breath test if and when the person is arrested for DUII. As this court recently explained in *State v. Swan*, 363 Or 121, 420 P3d 9 (2018), decided after the state filed its brief in this case, "ORS 813.100(2) expressly recognizes that a person arrested for DUII may decide, at the point of arrest, to refuse to submit to a breath test and that the person's refusal limits the state's ability to determine his or her BAC under the implied-consent statutes." *Id.* at 139. Specifically, ORS 813.100(2) provides that, if a person arrested for DUII refuses to submit to a breath test, "'[n]o chemical test of the person's breath *** shall be given' under the implied-consent statutes, although the state can always apply for a warrant to determine a suspect's BAC." *Id.* Relying on that statutory provision, we rejected the state's argument that an individual who drives on public roads has no legal right to refuse a breath test. *Id.* at 138-39. We concluded that, at the time of arrest, "a DUII suspect does have a statutory right to decide whether to submit or refuse to submit to a breath test." *Id.* at 145.

That interpretation of the implied-consent statutes answers the state's first argument here that, under the implied-consent statutes, defendant did not have a right to refuse Ladd's request that he take a breath test. Because the implied-consent statutes preserve a driver's right to decide, at the point of arrest, whether to consent to a search of his or her breath or blood, it is that point in time that is relevant. Law enforcement officers may conduct a search of a driver's breath at that time, but they must have a constitutional basis to do so. The fact that the driver drove a vehicle on public roads prior to the arrest does not supply such a basis because Oregon law does not make the driver's implied consent irrevocable; rather, it gives the driver the opportunity to make a different choice at the time of arrest.[4] At the time of arrest, the constitutional bases for an officer's search may include the driver's voluntary consent given at that time. *See* ORS 813.100(5) ("Nothing in this section precludes a police officer from obtaining a chemical test of the person's breath or blood through any lawful means *** including, but not limited to, obtaining a search warrant."); *State v. Moore*, 354 Or 493, 495, 318 P3d 1133 (2013), *adh'd to as modified on recons*, 354 Or 835, 322 P3d 486 (2014) (upholding search of driver's breath based on express voluntary consent at time of arrest). As indicated in ORS 813.140(1), if the basis for the search is the consent of the driver, that consent must be the driver's express consent at the time of arrest. Specifically, ORS 813.140(1) provides that a police officer may obtain a chemical test of a driver's breath "[i]f, when requested by a police officer, the [driver] expressly consents to such a test." We reject the state's argument that, by driving on a public highway, defendant irrevocably gave his consent to a later search of his breath and had no constitutional right to refuse a request to search at the time of arrest.

[4] Our construction of the Oregon implied-consent statute is consistent with a decision of the Kansas Supreme Court recognizing that consent implied by statute can be withdrawn. *See State v. Ryce*, 303 Kan 899, 944, 368 P3d 342, 369 (2016) (stating that "Fourth Amendment principles recognize that" the consent implied by statute can be withdrawn because "[i]t would be inconsistent with [those] principles to conclude consent remained voluntary if a suspect clearly and unequivocally revoked consent"); *see also Olevik v. State*, 302 Ga 228, 233, 806 SE2d 505, 512 (2017) (holding that drivers have a constitutional right to refuse to consent to a breath test).

B. *The state did not meet its burden to prove that defendant's refusal to consent to a breath test was admissible.*

The state's second argument is that, when Ladd asked defendant to take a breath test, Ladd was not asking defendant to provide a constitutional basis for that search; rather, Ladd had a constitutional basis for the search provided by another warrant exception—probable cause and exigent circumstances—and was seeking only defendant's agreement to submit to the requested test. The state argues that defendant's refusal to take the breath test was a refusal to perform a physical act and not an invocation of his constitutional right to insist on a warrant.

The state is correct that, when an officer has probable cause to believe that a driver has been driving under the influence of alcohol, and exigent circumstances exist, the officer may conduct a warrantless search to determine a driver's BAC. *See Moore*, 354 Or at 497 n 5 (noting that exigent circumstances may permit warrantless search due to the "evanescent nature" of BAC); *Missouri v. McNeely*, 569 US 141, 165, 133 S Ct 1552, 185 L Ed 2d 696 (2013) (under Fourth Amendment, whether exigent circumstances exist in DUII context is determined on case-by-case basis).[5] The state also is correct that the implied-consent statutes are premised, at least in part, on the assumption that a police officer who asks a driver to take a breath test will have a constitutional basis for obtaining the driver's breath—the driver's consent implied by statute when the driver operates a motor vehicle on public highways—and will not need the driver's consent to search. *See* ORS 813.100(1)-(2) (providing that driver is "deemed to have given consent" but precluding test if the driver refuses to "submit" to breath test).[6] This court

[5] Although we have not decided the issue under Oregon law, the search incident to arrest exception also might justify a warrantless search of a driver's breath. *See Birchfield v. North Dakota*, __ US __, __, 136 S Ct 2160, 2185, 195 L Ed 2d 560 (2016) (holding that under federal constitution officers may obtain breath sample without a warrant under exception for search incident to arrest).

[6] ORS 813.100(1)-(2) provides:

"(1) Any person who operates a motor vehicle upon premises open to the public or the highways of this state shall be deemed to have given consent, subject to the implied consent law, to a chemical test of the person's breath, or of the person's blood if the person is receiving medical care in a health care facility immediately after a motor vehicle accident, for the

has explained that the implied-consent statutes are meant "'to overcome the possibility of physical resistance *** without resort to physical compulsion' by imposing adverse legal consequences on a refusal to submit to the test." *Spencer*, 305 Or at 67 (quoting *Newton*, 291 Or at 793); *see also State v. Cabanilla*, 351 Or 622, 632, 273 P3d 125 (2012) (legislative purpose with advice and consequences was to "coerce a driver's submission to take the tests"); *Spencer*, 305 Or at 71 ("[T]he statute's references to a driver's 'refusal' do not evince a legislative concern that the driver make a voluntary and fully informed decision whether to submit to the test.").

At the same time, though, the implied-consent statutes make it clear that an officer who stops a driver for DUII need not rely on a driver's implied consent to provide the constitutional basis for a search of the driver's breath. ORS 813.100(5) permits an officer to obtain chemical tests of a driver's blood or breath "through any lawful means *** including, but not limited to, obtaining a search warrant." And, ORS 813.140(1)[7] specifically describes those lawful

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purpose of determining the alcoholic content of the person's blood if the person is arrested for driving a motor vehicle while under the influence of intoxicants in violation of ORS 813.010 or a municipal ordinance. A test shall be administered upon the request of a police officer having reasonable grounds to believe the person arrested to have been driving while under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance. Before the test is administered the person requested to take the test shall be informed of consequences and rights as described under ORS 813.130.

"(2) No chemical test of the person's breath or blood shall be given, under subsection (1) of this section, to a person under arrest for driving a motor vehicle under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance, if the person refuses the request of a police officer to submit to the chemical test after the person has been informed of consequences and rights as described under ORS 813.130."

[7] ORS 813.140(1) provides:

"Nothing in ORS 813.100 is intended to preclude the administration of a chemical test described in this section. A police officer may obtain a chemical test of the breath or blood to determine the amount of alcohol in any person's blood or a test of the person's blood or urine, or both, to determine the presence of cannabis, a controlled substance or an inhalant in the person as provided in the following:

"(1) If, when requested by a police officer, the person *expressly consents* to such a test."

(Emphasis added.)

means as including obtaining a driver's "express[] consent[]" to take such a test.

Other statutes also reflect a difference between a request for physical submission and a request for express consent to search. For instance, and specifically relevant here, ORS 813.310 provides that, "[i]f a person refuses to *submit* to a chemical test under ORS 813.100 *or* refuses to *consent* to chemical tests under ORS 813.140, evidence of the person's refusal is admissible in any civil or criminal action[.]" (Emphasis added.) Other statutes allow the imposition of other consequences only when a driver refuses to submit to a test under ORS 813.100. *See* ORS 813.100(3) (driver who refuses to submit under ORS 813.100 subject to license suspension); ORS 813.095 ($650 fine for refusing to submit under ORS 813.100).

Thus, given the various provisions of the implied-consent statutes, an officer's question to a driver asking whether the driver will take a breath test may be either (1) a request under ORS 813.140 for express consent to search the driver's breath that, if given, will supply a constitutional basis for the test; or (2) a request under ORS 813.100 that the driver "submit" to a breath test that finds its constitutional justification elsewhere.[8] Stated another way, a driver's refusal to answer that question affirmatively may be either an invocation of a constitutional right or a refusal to cooperate without constitutional significance.

As discussed above, the invocation of a constitutional right cannot be admitted at trial as evidence of a defendant's guilt. However, no similar bar applies when an officer seeks only a driver's physical cooperation in conducting a constitutionally-authorized search. Defendant does not take issue with that notion, nor does he argue that the consequence that ORS 813.310 imposes for failure to submit under ORS 813.100 is unlawful. Rather, he contends only that the consequence that ORS 813.310 imposes for failure

[8] *State v. Moore*, 354 Or 493, is not to the contrary. Although in that case we treated a defendant's affirmative response to a request under ORS 813.100 as consent, defendant in that case had conceded that he had given consent and that his consent was voluntary in fact. *Id.* at 504 n 9. The defendant's concession in *Moore* was critical to our analysis in that case, but it does not decide the issue here, where defendant refused to submit to the officer's request.

to give express consent under ORS 813.140 is unconstitutional. And, he argues, he understood Ladd's question as seeking that express consent to search.

When the state seeks admission of a defendant's refusal to take a breath test, the state, as the proponent of the evidence, has the burden to establish its admissibility. *See State v. Fish*, 321 Or 48, 59, 893 P2d 1023 (1995) ("As proponent of the evidence of defendant's refusal [to take field sobriety tests], the state has the burden, after appropriate objection has been raised, of establishing the admissibility of the evidence."). The state must demonstrate that the officer's question could reasonably be understood only as a request to provide physical cooperation and not as a request for constitutionally-significant consent to search. If the state fails to establish that fact, then a driver's refusal cannot be admitted in evidence against the driver.

In this case, the state did not meet its burden. Ladd's question—"[W]ill you take a breath test?"—was ambiguous. Ladd could have been asking defendant to physically submit to a test that was justified by a warrant exception, or Ladd could have been asking defendant for his consent to search, thereby establishing a warrant exception. Ladd told defendant that he would be asked to submit to a breath test "under the implied consent law," but he did not specify the aspect of the implied-consent law to which he was referring. As explained, ORS 813.100 and 813.140 provide that a driver's consent to take a breath test may serve two different functions, one of which has constitutional significance. Here, the state did not meet its burden to establish that Ladd's request was solely a request for physical cooperation and could not reasonably be understood as a request for constitutionally significant consent to search. Consequently, the state did not establish that defendant's refusal to take the test was admissible as evidence of his guilt.

C. *The fact that the state had a constitutional basis to search does not make defendant's refusal to provide consent admissible.*

As indicated, the state's third and final argument is that, even if (1) an officer's request that a driver take a breath test is a request for constitutionally significant

consent to search, and (2) a defendant's refusal to provide consent to search is, as a general rule, not admissible against the defendant, we nevertheless should recognize an exception to that rule when an officer has a constitutional basis to search other than the defendant's consent. That is, the state contends, even if an officer is requesting constitutionally significant consent to search, the existence of an alternative basis for that search permits the admission of the driver's refusal. Applying that proposed exception here, the state argues that defendant's Article I, section 9, rights were not burdened by admitting evidence of his refusal to provide constitutional consent because Ladd had an unstated lawful basis for obtaining a breath sample from defendant without a warrant and without his consent—probable cause and exigent circumstances. The parties have not cited any Oregon Supreme Court case that has addressed that issue,[9] but other courts have done so, albeit outside the drunk driving context.

In *United States v. Rapanos*, 115 F3d 367, 369 (6th Cir 1997), the defendant was suspected of destroying wetlands on his property. Government officials with the Department of Natural Resources (DNR) met with the defendant at his property line, and, after a discussion, the defendant refused to allow them to visually search his property without a search warrant. *Id.* The defendant later attended a second meeting with the government officials, one that took place away from the defendant's property. *Id.* He again denied them access to his property without a warrant. *Id.* The government charged the defendant with discharging pollutants into wetlands, and, during trial, the defendant was questioned about his refusal to allow the government on his property. *Id.* at 370. The defendant did not object at the time, but, in a motion for a new trial after a guilty verdict was rendered, he argued that the prosecutor's questions impermissibly infringed on his Fourth Amendment rights. *Id.* at 371. The district court agreed and granted the defendant a new trial. *Id.*

[9] Both parties cite *State v. Moller*, 217 Or App 49, a Court of Appeals opinion that held it improper to admit as evidence against the defendant his decision not to consent to a search of his car. Whether the search was permitted under a different warrant exception was not at issue, or at least not litigated, in *Moller*.

On the government's appeal, the Sixth Circuit explained that, "[u]nless the defendant had a Fourth Amendment right to prevent the DNR representatives from coming onto [his property] for an inspection," the district court erred in granting the defendant's motion for a new trial. *Id.* at 372. And, the court further explained, the defendant had no such right: The open fields doctrine permitted the DNR officials to conduct a visual inspection of the defendant's property, and, because such a search would therefore be reasonable, the defendant had no Fourth Amendment right to assert. *Id.* at 374.

Here, the Court of Appeals relied on this court's decision in *State v. Meharry*, 342 Or 173, 149 P3d 1155 (2006), and one of its own opinions to reach a conclusion similar to that reached by the Sixth Circuit in *Rapanos*. *Banks*, 286 Or App at 725. In *Meharry*, we stated that, under Article I, section 9, "a search conducted without a warrant is deemed unreasonable" unless it falls within one of the exceptions to the warrant requirement. *Meharry*, 342 Or at 177. In this case, the Court of Appeals explained, probable cause and exigent circumstances justified a warrantless search of defendant. *Banks*, 286 Or App at 727. Therefore, the court reasoned, Ladd had requested only that defendant submit to a *reasonable* search, and, in that instance, the court held, there is no Article I, section 9, right to be burdened. *Id.* at 725-27 (citing *State v. Gefre*, 137 Or App 77, 83-84, 903 P2d 386 (1995), *rev den*, 323 Or 483 (1996)). The state does not cite the Court of Appeals' decision, but its argument is consistent with that court's reasoning. The state contends that, because Ladd had lawful authority to seize a sample of defendant's breath without a warrant, defendant's refusal to comply was not a valid exercise of his rights under Article I, section 9.

The difficulty with the state's argument, however, is that, at the time a suspect is asked to consent to a search, the suspect may not know whether another warrant exception provides an independent basis for the search. After all, when the state relies on exigent circumstances to justify a warrantless search, a determination of whether that exception applies will not be made until long after the search has been executed and, in circumstances similar to these, not

until long after the individual has been asked to provide consent. *See Davis*, 295 Or at 237 (1983) (noting that warrantless searches are "*per se* unreasonable" and that the state has the burden to prove that an exception applies). Furthermore, a suspect who is asked for consent reasonably could assume that his or her consent would not be necessary if officers already had another legal basis for conducting the search.

Some courts have recognized that an analysis of the admissibility of a suspect's refusal to consent must focus on the right asserted rather than on the ultimate legality of the warrantless search. For instance, in *Elson v. State*, 659 P2d 1195, 1198 (Alaska 1983), the Alaska Supreme Court considered whether the principle that makes a defendant's refusal to consent to a warrantless search inadmissible is applicable to a search that was lawfully executed pursuant to another warrant exception. The court explained that the principle precluding admission is based on the notion that the right to insist upon a warrant "'would be effectively destroyed if, when exercised, it could be used as evidence of guilt.'" *Id.* (quoting *Padgett*, 590 P2d at 434). That principle, the court concluded, applies with "equal force to lawful searches": "[T]he crucial question is not whether a search is illegal, but rather whether the admission of a refusal to consent to a search, legal or illegal, will inhibit the exercise of fourth amendment rights." *Id.*; *see also Commonwealth v. Welch*, 401 Pa Super 393, 398, 585 A2d 517, 520 (1991) (stating that focus on the ultimate legality of a search and seizure is "very misguided" and the "point of significance is that one should not be penalized for *asserting* a constitutional right" (emphasis in original)).

The Ninth Circuit reached a similar conclusion in *United States v. Prescott*, 581 F2d 1343 (1978). There, federal agents investigating a mail fraud scheme obtained a warrant to search Duvernay's apartment (but not Duvernay himself). *Id.* at 1346. Authorities executed the search warrant one morning following a controlled delivery of fraudulently purchased packages, but, to their surprise, Duvernay was not home. *Id.* Instead, he was in the defendant's apartment, which was the next door down from his. *Id.* When federal agents knocked on the defendant's door, she answered

and told them that Duvernay was not there; when asked, she declined to give the agents permission to search her apartment. *Id.* at 1346-47. After searching the building and again unsuccessfully seeking permission to enter the defendant's apartment, federal agents forcibly entered and immediately found Duvernay, who had the packages from the controlled delivery. *Id.* at 1347. For her actions, the defendant was charged as an accessory after the fact, and evidence of her refusal to allow federal agents in her apartment was used against her at trial. *Id.* at 1350.

Before the Ninth Circuit, the defendant contended that her refusal to let police in without a warrant was constitutionally protected conduct that could not be used as evidence against her. *Id.* The court agreed:

> "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. When, on the other hand, the officer demands entry but presents no warrant, there is a presumption that the officer has no right to enter, because it is only in certain carefully defined circumstances that lack of a warrant is excused. An occupant can act on that presumption and refuse admission. He need not try to ascertain whether, in a particular case, the absence of a warrant is excused. He is not required to surrender his Fourth Amendment protection on the say so of the officer. The Amendment gives him a constitutional right to refuse to consent to entry and search. His asserting it cannot be a crime. Nor can it be evidence of a crime.
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> "*****
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> "Had [the defendant] forcibly resisted the entry into her apartment, we might have a different case. We express no opinion on that question. We only hold that her passive refusal to consent to a warrantless search is privileged conduct which cannot be considered as evidence of criminal wrongdoing. If the government could use such refusal against the citizen, an unfair and impermissible burden would be placed upon the assertion of a constitutional right and future consents would not be freely and voluntarily given.
>
> "The rule that we announce does not have its raison d'etre the deterrence of unlawful conduct by law enforcement officers, as does the rule excluding evidence discovered

> and seized in the course of an unlawful search. Rather, it seeks to protect the exercise of a constitutional right, here the right not to consent to a warrantless entry."

Id. at 1350-51 (internal citations and quotations omitted).

Other courts have reasoned similarly. *See Welch*, 401 Pa Super at 398, 585 A2d at 520 ("[T]he actual entitlement to the right could be thought of as irrelevant to the point we are discussing. We would think that the same reasoning would apply even if the individual asserting the right had a mistaken belief that they were protected by a constitutional provision or were extended a right or protection when, in fact, they were not."); *Longshore v. State*, 399 Md 486, 537, 924 A2d 1129, 1159 (2007) (stating that "[a]n unfair and impermissible burden would be placed upon the assertion of a constitutional right if the State could use a refusal [to consent] to a warrantless search against an individual"); *Garcia v. State*, 103 NM 713, 714, 712 P2d 1375, 1376 (1986) (holding that the defendant's "refusal to allow the warrantless search cannot be used as proof of his guilt").

For the following reasons, we concur. For one thing, we question the probative value of evidence of a defendant's exercise of a constitutional right to establish the defendant's guilt. *See Moreno*, 233 F3d at 940 (questioning the probative value of a refusal to permit warrantless search of home); *Welch*, 401 Pa Super at 398, 585 A2d at 520 ("We do not think that a refusal to allow police to search one's bedroom without first producing a warrant is probative of the fact the items the police suspect are present are actually present. There are many personal reasons that an individual would not wish to have the police searching through [her] room."). But more importantly, we are convinced that, if a person's verbal refusal to consent to a warrantless search could be admitted as evidence of guilt, it would "impose a prohibitive cost upon an individual's assertion of his [or her] constitutional rights." *Elson*, 659 P2d at 1198.[10] An individual should

[10] Although a defendant has a right to refuse consent, a defendant may not have the right to physically obstruct law enforcement officers who are executing an otherwise lawful search. In this case, we address only a defendant's verbal exercise of a constitutional right.

be able to act on the presumption that a warrantless search is unreasonable. Permitting the state to adduce evidence of the exercise of that right would place an impermissible burden on its assertion. We reject the state's argument that because the police had a lawful basis for obtaining a breath sample from defendant without a warrant—probable cause and exigent circumstances—defendant's refusal to provide consent is admissible as evidence of his guilt.

III. CONCLUSION

The decision of the Court of Appeals is reversed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

KISTLER, S. J., concurring.

I join the majority's opinion and write separately to note an issue that the state has not argued in this case. In its briefing, the state has not offered a considered argument that we should follow *Birchfield v. North Dakota*, ___ US ___, 136 S Ct 2160, 195 L Ed 2d 560 (2016), and hold under the Oregon Constitution that a breath test is categorically permissible as a search incident to arrest for driving under the influence of intoxicants (DUII). *See State v. Banks*, 364 Or 332, __, __ P3d __ (2019) (noting that whether a breath test is permissible as a search incident to arrest for DUII is an open question under Oregon law).

In my view, if a breath test is categorically permissible as a search incident to arrest, then a person arrested for DUII and asked to submit to a breath test will be in the same position as a person faced with a request to permit a search pursuant to a search warrant. There is no arguably valid constitutional basis for refusing to comply with the request. In those circumstances, a person who refuses can be sanctioned for the refusal. *See Birchfield*, 136 S Ct at 2186 (holding that a defendant who refused to comply with a request to take a breath test can be criminally prosecuted for the refusal); *United States v. Prescott*, 581 F2d 1343, 1350-51 (1978) (distinguishing refusals to comply with search warrants from refusals to comply with most warrantless searches).

Conversely, when the question whether a search is constitutionally permissible turns on a case-by-case inquiry, as it almost always does when the state relies solely on an exigency as the justification for the search, a person faced with a request for a search reasonably may disagree with an officer's assessment that an exigency requires it. In those circumstances, we should not impose sanctions on a defendant's assertion of his or her constitutional right to refuse to consent.[1] As the majority notes, it may be that counsel or the courts will later conclude that an exigency existed, as defense counsel now concedes in this case. However, that later conclusion does not necessarily mean that the defendant did not have a legitimate basis for asserting his or her right to refuse consent earlier. In the absence of a considered argument that a breath test is categorically permissible as a search incident to arrest, I concur in the majority's opinion.

BALMER, J., dissenting.

Oregon's implied-consent statutes play an important role in preventing intoxicated driving and in ensuring that the state is able to punish individuals who choose to drive while intoxicated. Those statutes also raise difficult constitutional questions and interrelated questions of statutory construction. For that reason, this court has often struggled with how to interpret and apply those statutes. Recent attempts by this court to answer even relatively straightforward questions relating to those statutes have required the court to grapple with past inconsistent or ambiguous interpretations. *See State v. Swan*, 363 Or 121, 420 P3d 9 (2018). Unfortunately, the approach that the majority takes in this case makes some of these questions more complicated than they need to be and finds ambiguity where the statutes contain none. While I agree with much that the majority has to say, the effect of the opinion is to introduce unnecessary confusion into the implied-consent statutes, and into their implementation. For that reason, I respectfully dissent.

[1] Of course, if the officer conducts a search (a blood draw, for example) based solely on the exigency, which does justify it, then the evidence discovered as a result of the search will be admissible even though the defendant's refusal to consent will not be.

The question in this case is whether Article I, section 9, prohibits defendant's refusal to take a breath test from being introduced as evidence against him in a criminal case. Although the issue presented in this case has constitutional dimensions, the principal dispute between the parties is rooted in questions of statutory construction. For that reason, I begin with an overview of the statutes at issue, Oregon's implied-consent laws. Those laws are oriented around a key provision, found in ORS 813.100(1):

> "Any person who operates a motor vehicle upon premises open to the public or the highways of this state shall be deemed to have given consent, subject to the implied consent law, to a chemical test of the person's breath * * * for the purpose of determining the alcoholic content of the person's blood if the person is arrested for driving a motor vehicle while under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance. A test shall be administered upon the request of a police officer having reasonable grounds to believe the person arrested to have been driving while under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance. Before the test is administered the person requested to take the test shall be informed of consequences and rights as described under ORS 813.130."

That provision accomplishes several things. First, it establishes—or at least attempts to establish—that an individual's act of driving a motor vehicle constitutes that person's "consent" to a test of his or her breath. That is significant because a breath test is a search, and under Article I, section 9, of the Oregon Constitution a police officer generally cannot conduct a search, or force a person to submit to a search, without first obtaining a warrant, unless an exception to the warrant requirement applies.[1] Thus, the implied-consent statutes are a mechanism for obtaining constitutional authorization to perform the search. I discuss the legal effectiveness of that statutory mechanism below.

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[1] "'[T]his court has adopted a categorical view under Article I, section 9, that, subject to certain specifically established and limited exceptions, deems warrantless searches to be per se unreasonable.'" *State v. Bonilla*, 358 Or 475, 480, 366 P3d 331 (2015). However, "[a] warrantless search by the police is 'reasonable' under Article I, section 9, when it falls into one or another of the recognized exceptions to the warrant requirement." *State v. Weaver*, 319 Or 212, 219, 874 P2d 1322 (1994).

Second, the statute provides that the test shall be administered only after the suspect is informed of the consequences of *refusing* to submit to a breath test and of certain statutory rights in the breath test process. Those consequences are defined elsewhere in the statutory scheme. They include a driver's license suspension of at least one year, ORS 813.420; being found guilty of a traffic violation with a presumptive $650 fine, *see* ORS 813.100(3) and ORS 813.095; and introduction of the refusal to take the test as evidence of guilt in a subsequent criminal prosecution, ORS 813.310—the last, of course, being at issue in this case. One right that the implied-consent laws provide to suspects is the right to "refuse" to "submit" to a breath test, set out in ORS 813.100(2):

> "No chemical test of the person's breath or blood shall be given, under subsection (1) of this section, to a person under arrest for driving a motor vehicle while under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance, if the person refuses the request of a police officer to submit to the chemical test after the person has been informed of consequences and rights as described under ORS 813.130."

Note that ORS 813.100(2) does not speak of the driver *revoking* the *consent* that he or she is deemed to have given under ORS 813.100(1); rather, focusing on the practical realities of performing a breath test, the statute describes the "refusal" of the driver to "submit" to the test. As we explained in *Swan*, "[t]he implied-consent statutes thus provide that, notwithstanding the consent implied by driving on the public highways, a DUII suspect retains a statutory right to refuse to take a breath test at the point of arrest." 363 Or at 139. That the state accords such a statutory right is understandable. Even where the constitution does not prohibit the state from conducting a breath test, the state is faced with the practical difficulty of getting the suspect to give the required breath sample. As we have previously recognized, "[a] person may, of course, *physically* refuse to take the test, and the legislature has chosen to forbid the use of physical force to compel drivers to submit to the test." *State v. Cabanilla*, 351 Or 622, 628, 273 P3d 125 (2012) (emphasis in original).

Therefore, at least with respect to breath tests, the implied-consent laws envision a three-step process. First, the driver "consents" to the test by the act of driving, which gives the state constitutional authorization to perform the breath test. Second, after the driver is arrested because police believe she is driving under the influence of intoxicants, the officer requests that she submit to a breath test and advises her of her rights, including the statutory right to refuse a search, and of the consequences of refusing a search. Third, the driver makes her choice, no doubt influenced by the consequences of refusal that she has just been read. If the driver says yes, then the officer is statutorily authorized to perform the breath test. If the driver says no, exercising her right, then ORS 813.100(2) forbids the officer from performing the breath test, but the other consequences, mentioned above, are triggered.

The state's first argument in this case focuses on the first step of that process, the implied consent itself. The state argues that, because defendant consented to the eventual search of his breath when he made the decision to drive, defendant had no right to withhold consent after he had been arrested, and thus no constitutional provision protected defendant's refusal to consent. The majority responds to that argument by noting, as we held in *Swan*, "that the implied-consent statutes also include a provision that permits a person who drives on public roads to later refuse to take a breath test if and when the person is arrested for DUII." 364 Or at ___. But all we held in *Swan* was that a suspect has "a *statutory* right to refuse to take a breath test at the point of arrest." 363 Or at 139 (emphasis added). We did not hold that, upon arrest, a suspect's *constitutional* right to withhold consent is restored. The majority's holding that implied consent disappears, or is no longer binding, at the point of arrest leaves implied consent with no role to play in the statutory scheme. That is contrary to the structure of the statute, as I have explained above.

Nevertheless, I agree with the majority that the state's first argument fails, albeit for a different reason. Statutorily-implied consent is not the equivalent of, or a substitute for, constitutional consent. The implied-consent

statutes purport to authorize a search on the basis that "[a]ny person who operates a motor vehicle upon premises open to the public or the highways of this state shall be deemed to have given consent" to certain searches of her breath or blood under specified circumstances. ORS 813.100(1). But whether a person has given constitutionally valid consent to a search or seizure is a question of constitutional law and the fact that a statute states that all drivers have given consent does not mean that, as a legal or factual matter, the drivers actually have done so.

We have called the theory of implied consent into question before. *State v. Newton*, 291 Or 788, 801, 636 P2d 393 (1981) (plurality opinion) *overruled on other grounds by State v. Moore*, 354 Or 493 318 P3d 1133 (2013) ("The warrant requirement may be excused if there is consent. By this, we mean actual consent. Defendant's statutorily implied consent cannot excuse an otherwise unconstitutional seizure."). Moreover, despite a multitude of implied-consent cases, we have never upheld an otherwise-impermissible search on a theory of implied consent. And, outside the implied-consent context, we recently reaffirmed that consent for purposes of Article I, section 9, must be actual consent, determined by the authorization that the individual intended to give: "[I]n determining whether a particular search falls within the scope of a defendant's consent, the trial court will determine, based on the totality of circumstances, what the defendant actually intended." *State v. Blair*, 361 Or 527, 539, 396 P3d 908 (2017). The state cannot, consistent with that principle, impute consent to an individual who does not intend to give it.[2] Although the concept of "implied," as opposed to express, consent may be valuable, and appropriately used, in certain other contexts, as a matter of constitutional law the existence of a statute that "deems" a driver to have

[2] I note that this position appears to be a developing consensus in other states. *See State v. Butler*, 232 Ariz 84, 302 P3d 609 (Ariz 2013); *Flonnory v. State*, 109 A3d 1060 (Del 2015); *State v. Wulff*, 157 Idaho 416, 337 P3d 575 (2014); *McElwain v. Office of the Illinois Sec'y of State*, 2015 IL 117170, 39 NE 3d 550; *Commonwealth v. Myers*, 640 Pa 653, 164 A3d 1162 (2017) (plurality opinion); *State v. Fierro* 853 NW 2d 235, 2014 SD 62 (2014). *Cf. State v. Modlin*, 291 Neb 660, 675, 867 NW 2d 609, 620 (2015) (holding that implied consent is initially valid but that it can be withdrawn); *State v. Mitchell*, 383 Wis 2d 192, 914 NW 2d 151 (same) (2018) *cert granted*, __ S Ct __, 2019 WL 166881 (Jan 11, 2019).

irrevocably consented to a search whenever he or she operates a motor vehicle, is problematic.

Although the state provided some briefing on the matter, it is not relevant in this case whether "deemed" consent might fall into or satisfy a warrant exception other than the consent exception.[3] And that question may be something of a red herring in general. Although the constitutional authorization for the search of suspects' breath, under the implied-consent laws, likely cannot rest on the "implied" or "deemed" consent that ORS 813.100(1) purports to establish, ORS 813.100(5)[4] makes clear that the state may derive constitutional authority to perform a breath test from *other* sources. One well-established warrant exception available to the state in most DUII cases is the exigent circumstances exception. Under that exception, the police may perform a search without obtaining a warrant, provided that they can "establish both that the officers had probable cause and that exigent circumstances justified the officers' warrantless search." *State v. Ritz*, 361 Or 781, 790, 399 P3d 421 (2017). ORS 813.100(1), by its terms, applies only after the suspect has been arrested for driving under the influence of intoxicants, which requires probable cause. ORS 133.310(1) (providing for warrantless arrest based on probable cause). And, as this court has recognized, the natural dissipation of alcohol in the bloodstream will almost always qualify as an exigent circumstance:

> "It may be true, phenomenologically, that, among such cases, there will be instances in which a warrant could

[3] The state cited *Smith v. Washington Cty*, 180 Or App 505, 517-23, 43 P3d 1171, *rev den*, 334 Or 491 (2002), and *United States v. Montoya de Hernandez*, 473 US 531, 105 S Ct 3304, 87 L Ed 2d 381 (1985). The searches in *Smith*, however, ultimately rested on the administrative search exception, which does not apply where the search, as here, is performed to enforce *criminal* laws. *Nelson v. Lane Cty.*, 304 Or 97, 104-05, 743 P2d 692 (1987). And the warrantless seizure in *Montoya de Hernandez* "occurred at the international border, where the Fourth Amendment balance of interests leans heavily to the Government." *Montoya de Hernandez*, 473 US at 544. Neither of those cases lend support to a warrantless search here.

[4] ORS 813.100(5) provides that

> "[n]othing in this section precludes a police officer from obtaining a chemical test of the person's breath or blood through any lawful means for use as evidence in a criminal or civil proceeding including, but not limited to, obtaining a search warrant."

> have been both obtained and executed in a timely fashion. The mere possibility, however, that such situations may occur from time to time does not justify ignoring the inescapable fact that, in every such case, evidence is disappearing and minutes count. We therefore declare that, for purposes of the Oregon Constitution, the evanescent nature of a suspect's blood alcohol content is an exigent circumstance that will ordinarily permit a warrantless blood draw of the kind taken here. We do so, however, understanding that particular facts may show, in the rare case, that a warrant could have been obtained and executed *significantly* faster than the actual process otherwise used under the circumstances. We anticipate that only in those rare cases will a warrantless blood draw be unconstitutional."

State v. Machuca, 347 Or 644, 656-57, 227 P3d 729 (2010) (emphasis in original). What is true of blood draws will also be true of breath tests, which present precisely the same exigency. Thus, in the substantial majority of cases in which an officer conducts a search in accordance with the implied-consent laws, both probable cause and an exigency will be present, and thus neither a warrant nor any other warrant exception will be necessary.[5] And in the rare cases where there is no exigency the officer will presumably be able to obtain a warrant and will not need a warrant exception at all.[6]

In any event, it is undisputed that in this case the state had both probable cause and exigent circumstances, and it is unnecessary to ground police authority to conduct the search (the breath test) on the dubious concept of implied consent as a source of constitutional authorization. Thus, under the implied-consent statutes, and under Article I,

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[5] The concurrence, without addressing *Machuca*, suggests that whether an exigency is present "almost always" will turn "on a case-by-case inquiry." 364 Or at ___ (Kistler, S. J., concurring). That statement is inconsistent with *Machuca*, where the court made clear that in the ordinary case, absent unusual facts, the dissipation of blood alcohol content will constitute an exigency. I do not mean to suggest, however, that whether a breath test is "categorically permissible," 364 Or at ___ (Kistler, S. J., concurring), is relevant to the outcome in this case.

[6] This analysis does not take into account the *other* warrant exception that may be available to the state in impaired driving cases, the exception for searches incident to arrest. The Supreme Court has held that the Fourth Amendment always "permits warrantless breath tests incident to arrests for drunk driving." *Birchfield v. North Dakota*, 136 S Ct 2160, 195 L Ed 2d 560 (2016). This court has not yet considered that issue under Article I, section 9.

section 9, there was no impediment to the state requiring defendant to submit to a breath test.

Here, I reach the point upon which this case turns. The state argues that the second step of the implied-consent process that I have outlined above, where the suspect is asked to submit to a breath test, is a request to physically cooperate in the administration of the test, and not a request for defendant to give constitutionally sufficient *consent* to a search that otherwise would violate Article I, section 9. Defendant argues, however, that he was asked to consent to an otherwise unconstitutional search and that his refusal to do so cannot be used against him. The disagreement at the heart of this case, then, is whether an officer's request under ORS 813.100(2) is a request for consent to a search or a request for physical compliance in the administration of the breath test. If the state is correct, then defendant simply was not asked to consent at all, and his refusal was not an exercise of his Article I, section 9, rights.

I agree with the majority that,

> "an officer's question to a driver asking whether the driver will take a breath test may be either (1) a request under ORS 813.140 for express consent to search the driver's breath that, if given, will supply a constitutional basis for the test; or (2) a request under ORS 813.100 that the driver 'submit' to a breath test that finds its constitutional justification elsewhere."

364 Or at ___. Because that question is more central to how I would resolve this case, and because various particulars of the statute play into my disagreement with the majority, I discuss that statutory question in some detail.

The unambiguous text of Oregon's implied-consent statutes draws a consistent distinction between a request to *submit* to a breath test under ORS 813.100(2) and a request for the kind of express *consent* necessary to satisfy Article I, section 9. As discussed above, ORS 813.100(1) provides, in part, that when the requisite conditions are met "[a] test *shall be administered* upon the request of a police officer." (Emphasis added). ORS 813.100(2) creates an exception to that otherwise mandatory rule:

> "No chemical test of the person's breath or blood shall be given, under subsection (1) of this section *** if the person *refuses the request of a police officer to submit* to the chemical test after the person has been informed of consequences and rights as described under ORS 813.130."

(Emphasis added.)

Put together, the first two subsections of ORS 813.100 create a dichotomy between cases where the test "shall be administered" and those where the suspect "refuses the request of a police officer to submit" to a chemical test. The statute thus treats compliance as the default and carves out an exception for refusal. That choice of words suggests that the administering officer's "request" is intended only to determine whether the suspect will submit to or refuse to participate in the administration of the test, and perhaps to persuade him not to refuse; it was not designed to obtain the suspect's consent. *See Cabanilla*, 351 Or at 634-35 ("[T]he legislative history of ORS 813.130 [setting out the rights and consequences to be read to a suspect] suggests that the legislature's concern in enacting that statute was mainly with devising a simple form to serve as a persuasive tool to compel submission to the tests."). That reading is bolstered by the structure of ORS 813.100, discussed above, which takes for granted that the suspect already has "consented" simply by driving. As I outlined above, asking a suspect to give a breath sample under ORS 813.100(1)-(2) is a second step that is meant to take place only after the state has obtained constitutional authorization for the search. Thus, not only does nothing in ORS 813.100(2) indicate that the officer's request is intended to elicit a waiver of constitutional rights, but the logic of the statute dictates that such a waiver would be unnecessary at that point.

Moreover, other portions of the implied-consent laws do discuss situations where an officer requests or obtains a waiver of the suspect's Article I, section 9, rights, and do so in quite different terms. ORS 813.140 states,

> "Nothing in ORS 813.100 is intended to preclude the administration of a chemical test described in this section. A police officer may obtain a chemical test of the breath or

> blood to determine the amount of alcohol in any person's blood *** as provided in the following:
>
> "(1) If, when requested by a police officer, the person *expressly consents* to such a test."

(Emphasis added.) The words "expressly consents" in ORS 813.140 contrast with the implied (or "deemed") consent of ORS 813.100(1), and the alternate option of "refusal" of an officer's "request," in ORS 813.100(2). That contrast is made explicit by ORS 813.310:

> "If a person *refuses to submit* to a chemical test under ORS 813.100 or *refuses to consent* to chemical tests under ORS 813.140, evidence of the person's refusal is admissible in any civil or criminal action, suit or proceeding arising out of acts alleged to have been committed while the person was driving a motor vehicle on premises open to the public or the highways while under the influence of intoxicants."

(Emphasis added.) As that text makes clear, when a suspect refuses a test under ORS 813.100, what the suspect is refusing to do is to "submit." Only under ORS 813.140 does the statute speak of refusing to "consent."[7] That interpretation is in line with our prior holdings that the

> "legislative policy embodied in the implied consent law was '"designed to overcome the possibility of physical resistance, despite legal consent, without resort to physical compulsion" by imposing adverse legal consequences on a refusal to submit to the test.'"

Machuca, 347 Or at 658 (quoting *State v. Spencer*, 305 Or 59, 67, 750 P2d 147 (1988) (quoting *Newton*, 291 Or at 793)).[8]

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[7] Of course, ORS 813.310 does authorize the introduction of a suspect's "refusal to consent" in a criminal action. That provision raises the constitutional question that the majority decides. But that question is not presented in this case, and it will not be presented in other cases concerning a request under ORS 813.100(1)-(2), as the structure of the statute makes clear.

[8] Portions of *Moore*, 354 Or 493, could be read to imply that a suspect's decision to submit to a breath test under the implied-consent statutes would waive the suspect's constitutional rights. But in *Moore,* the defendant had conceded that he had given consent to a search in response to a request under the implied-consent statutes, 354 Or at 504 n 9, and we did not have cause to question that premise, upon which both parties agreed. The majority properly concludes that *Moore* does not stand in the way of its holding that a request under ORS 813.100 is not a request for consent. 364 Or at ___.

A suspect is entitled to refuse the request for physical compliance under ORS 813.100 by exercising the statutory right that we recognized in *Swan*, as defendant did in this case. But that the statute gives suspects a *statutory* right, and directs officers to respect the exercise of that right, does not entail that a request under the statute asks suspects to waive a *constitutional* right. Thus, an officer's request under ORS 813.100 is not intended to elicit actual, or express, consent, but something akin to compliance—compliance, subject to a statutory right not to comply. For that reason, an affirmative response to an officer's request under ORS 813.100, or a subsequent blow into a breathalyzer, is not a waiver of constitutional rights or express consent to the search.[9] An affirmative response is best parsed as "Yes, I will submit to the search"—all that the officer is asking—not "Yes, I will consent to the search."

The majority, however, concludes that defendant was not given a request under ORS 813.100 at all—or at least that the state has not proven that he was. The majority states,

> "Defendant does not take issue with that notion [that a refusal to physically cooperate may be introduced at trial], nor does he argue that the consequence that ORS 813.310 imposes for failure to submit under ORS 813.100 is unlawful. Rather, he contends only that the consequence that ORS 813.310 imposes for failure to give express consent under ORS 813.140 is unconstitutional. And, he argues, he understood [the officer's] question as seeking the latter and not the former."

That is something of a charitable reconstruction of defendant's argument because defendant never cited ORS 813.140 in his briefing, or argued that the officer's request

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[9] In *Bumper v. North Carolina*, 391 US 543, 88 S Ct 1788, 20 L Ed 797 (1968), the Supreme Court held that the state's burden to show that consent to a search was "freely and voluntarily given *** cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Id.* at 548-49 (footnotes omitted). The Georgia Supreme Court has applied this principle to a suspect's response to a request to submit to a breath test under that state's implied-consent statute and "distinguished compliance with the implied consent statute from the constitutional question of whether a suspect gave *actual consent* for the state-administered testing." *Williams v. State*, 296 Ga 817, 821, 771 SE2d 373 (2015) (emphasis in original).

was something other than a request under ORS 813.100. Instead, he argued before this court that ORS 813.130—the statute establishing "the requirements for information about rights and consequences for purposes of ORS 813.100," ORS 813.130—"creates incentives for a defendant to consent to a breath test." That argument is mistaken because, as discussed above, ORS 813.100 and ORS 813.130 are geared toward obtaining physical compliance, not consent.

In any event, there should be no doubt in this case that the officer's request was made pursuant to ORS 813.100. Here, the officer's request followed a recitation of rights and consequences, as required by ORS 813.100(1)-(2) but not by ORS 813.140. While reading that warning, the officer spoke in the language of ORS 813.100(2), informing defendant that he was "about to be asked to submit to a breath test."[10] Nowhere in the request did the officer ask defendant for "consent" or otherwise indicate that he was seeking consent. Most tellingly of all, two of the consequences of refusal that defendant was read, including a $650 fine and a driver's license suspension, may be imposed only as a consequence for a refusal to submit under ORS 813.100, not for a refusal to consent under ORS 813.140. *See* ORS 813.095(1) (fine), ORS 813.100(3) (license suspension). Most of the warning that defendant was read concerned those two consequences. Based on that evidence, I have no difficulty concluding that the officer's request was made under ORS 813.100(2).

The majority does not discuss any of that evidence. Instead, it focuses on the officer's final phrasing of the request: "[W]ill you take a breath test?" 364 Or at ___ and on what the officer *did not* say: "[the officer] told defendant that he would be asked to submit to a breath test 'under the implied consent law,' but he did not specify the aspect of the implied-consent law to which he was referring." 364 Or at ___. But what matters is whether the officer's request, taken as a whole, was ambiguous, not whether particular lines are ambiguous out of context. The phrasing of the officer's final

[10] That same phrasing was repeated twice more in the warning. The officer told defendant, "Your driving privileges will not be suspended if you *submit* to any test requested and do not fail." (Emphasis added.) He also informed defendant that "[i]f you *refuse to submit* to a test or fail a breath test, you must request a hearing within ten days after the arrest." (Emphasis added.)

question is not ambiguous if, as here, it is asked of a suspect who has just been informed that he is "about to be asked to submit to a breath test." Even if the officer did not explicitly mention ORS 813.100, the use of the word "submit," the reading of rights and consequences as required by ORS 813.100(1)-(2), and the focus on consequences that can only be imposed upon a refusal of a request under ORS 813.100 make it clear that that the officer was making a request under ORS 813.100. In this case, there was ample evidence that the officer was requesting defendant's physical compliance with the breath test and no evidence whatsoever that he was requesting consent. Even if the state bears a burden of proving that the request was made under ORS 813.100, 364 Or at ___, surely that burden was carried here.

For that reason, I conclude that defendant was not asked to give constitutionally valid consent. All he was asked to do was physically to participate in the administration of the breath test. Defendant exercised not a constitutional right, but a statutory right, to refuse the search.

Thus, the question that defendant asks us to decide, whether introduction of his exercise of a constitutional right can be used as evidence against him in a criminal case, simply is not presented here. The question is, instead, whether defendant's assertion of a *statutory* right can be introduced as evidence against him in a criminal case. Because defendant was not asked to give consent to a search, did not consent to a search, and no search was performed, his Article I, section 9, rights would not be burdened, much less violated, by the introduction of defendant's exercise of the statutory right as evidence of his guilt.[11]

The majority's decision may do more harm than good for the rights of suspects. Recall that, in impaired driving cases where a suspect has been arrested, probable cause and exigent circumstances are almost always present, and

[11] Defendant argues, in the alternative, that he was unconstitutionally forced to choose between waiving his Article I, section 9, right by consenting to a search and waiving his Article I, section 12, right against self-incrimination by giving an incriminating, testimonial statement through his refusal. That argument has the same flaw. Even on the assumption that defendant's refusal was testimonial, the argument fails because its premise is mistaken: Defendant was not asked to consent to a search or otherwise to waive any Article I, section 9, right.

an order by an officer to a suspect to submit to a chemical test would not ordinarily present constitutional problems. The legislature extended to suspects the right to refuse a breath test with the intent of avoiding the use of physical force or criminal penalties against suspects who refuse to participate in the testing procedure. Such an approach is likely to reduce the unnecessary use of force by police and prevent confrontations that may endanger officers and suspects alike. But, in the majority's analysis, it appears that the statutory right, and the attendant fact that the officer requested rather than demanded defendant's compliance, is a source of the ambiguity that requires evidence of defendant's refusal to be excluded. By turning a statutory right into a source of constitutional difficulty for the state, the majority makes the further creation of such statutory rights less likely. I would avoid those difficulties, hold that the officer's request, understood in the context of the statutory framework, was not a request for defendant's consent to a search, and affirm defendant's conviction.

For those reasons, I respectfully dissent.

Nakamoto, J., joins in this dissent.