No.

In the Supreme Court of the United States

DANNY BIRCHFIELD,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Dakota

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

North Dakota law makes it a criminal offense for a motorist who has been arrested for driving under the influence to refuse to submit to a chemical test of the person's blood, breath, or urine to detect the presence of alcohol. The Supreme Court of North Dakota held that the State may criminalize *any* refusal by a motorist to submit to such a test, even if a warrant has not been obtained. The question presented is:

Whether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Danny Birchfield respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of North Dakota in this case.

OPINIONS BELOW

The opinion of the Supreme Court of North Dakota (App., *infra*, 1a-18a) is reported at 858 N.W.2d 302. The decision of the North Dakota District Court (App., *infra*, 22a-28a) is unreported.

JURISDICTION

The judgment of the Supreme Court of North Dakota was entered on January 15, 2015. That court denied petitioner's motion for rehearing on February 12, 2015. *Id*. at 29a. On May 5, 2015, Justice Alito extended petitioner's time to file a petition for certiorari until June 12, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> 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.

North Dakota law, N.D. Code § 39-08-01(1), provides in relevant part:

> 1. A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:
>
> * * *
>
> e. That individual refuses to submit to any of the following:
>
> (1) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-06.2-10.2 if the individual is driving or is in actual physical control of a commercial motor vehicle; or
>
> (2) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direction of a law enforcement officer under section 39-20-01; or
>
> (3) An onsite screening test, or tests, of the individual's breath for the purpose of estimating the alcohol concentration in the individual's breath upon the request of a law enforcement officer under section 39-20-14.

> 2. a. An individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state who refuses to submit to a chemical test, or tests, required under section 39-06.2-10.2, 39-20-01, or 39-20-14, is guilty of an offense under this section.

STATEMENT

This petition is one of several now before the Court presenting a question of exceptional importance: whether a State may criminalize a motorist's refusal to consent to chemical tests of his or her blood, breath, or urine. In affirming convictions for violation of these statutes, state courts have invoked a variety of justifications, among them that such tests may be treated as a routine search incident to arrest; that motorists may be *deemed* to have consented to the administration of such tests; and that such warrantless test requirements are *per se* reasonable. These holdings depart from decisions of this Court, conflict with the rulings of other federal and state courts, and contribute to widespread confusion about the rules governing this significant area of the law.

The issue presented here accordingly warrants this Court's attention. As described more fully in the petition for certiorari in *Bernard* v. *Minnesota*, No. 14-___ (to be filed on June 15, 2015), the Court should grant review both in that case and in this one, and should consolidate the cases for plenary review. Alternatively, the Court should grant review in *Bernard* and hold the petition in this case pending disposition of that matter.

1. North Dakota, like twelve other states, has criminalized a motorist's refusal to submit to a warrantless chemical test designed to detect the presence of alcohol in the driver's blood. See N.D. Code § 39-08-01(1). A first refusal to consent to a chemical test qualifies as a misdemeanor, while subsequent offenses may qualify as a felony. *Ibid.*

2. Here, after petitioner drove his car off the road, he failed a field sobriety test administered by a highway patrol officer. App., *infra*, 2a. A preliminary breath test suggested that petitioner was intoxicated, and the officer placed petitioner under arrest and advised him of the implied consent statute. *Ibid.* Petitioner nonetheless refused to submit to a blood test. *Ibid.* See also *id.* at 24a, 26a. He was charged with refusal to submit to a chemical test, but *not* for driving under the influence. *Ibid.*

Petitioner moved to dismiss the charge, asserting that it is "unconstitutional" under "the Fourth Amendment to the United States Constitution" for a State to criminalize refusal to submit to a chemical test of a driver's blood. App., *infra*, 22a. The state district court denied his motion. *Id.* at 22a-28a. The court reasoned that "[i]n an implied consent advisory scenario, a defendant has already granted implied consent to the search" and, further, that "[t]he basis for this implied consent is grounded in a strong public interest of promoting public safety." *Id.* at 24a. The court added that because petitioner "refused the test, the requested search, the blood draw, was not conducted." *Id.* at 26a. In the court's reasoning, because "[t]here was no search," "there was no Fourth Amendment violation." *Ibid.*

Following the district court's denial of his motion, petitioner conditionally pled guilty to the of-

fense but, as noted in the criminal judgment, "specifically reserve[ed] the right to appeal the January 16, 2014, Order on Motion to Dismiss." App., *infra*, 19a-21a.

3. On appeal, the Supreme Court of North Dakota affirmed. App., *infra*, 1a-18a.

Although the court acknowledged that "the administration of chemical tests to determine alcohol concentration is a search" for purposes of the Fourth Amendment, it concluded that the State may prosecute an individual for failing to consent to such a warrantless search. *Id*. at 5a. The court appears to have rested this conclusion on two rationales.

First, the court opined that attaching criminal penalties to test refusal in this context is, as a general matter, reasonable. The court relied for this proposition on the Minnesota intermediate appellate decision in *State* v. *Bernard*, 844 N.W.2d 41, 42 (Minn. Ct. App. 2014), which reasoned that the "'Fourth Amendment does not prohibit the state from criminalizing a suspected drunk driver's refusal to submit to a breath test for alcohol content when the circumstances established a basis for the officer to have alternatively pursued a constitutionally reasonable nonconsensual test by securing and executing a warrant.'" App., *infra*, 9a (quoting *Bernard*, 844 N.W.2d at 42).[1] Here, the North Dakota court explained that its State's implied consent law does "not

[1] Subsequently, the Supreme Court of Minnesota expressly rejected the reasoning of the Minnesota appellate court relied upon below (see *State* v. *Bernard*, 859 N.W.2d 762, 766 (Minn. 2015)), although it affirmed a State's authority to criminalize test refusal on the alterative ground that a blood alcohol test is a search incident to arrest.

authorize chemical testing unless an officer has probable cause to believe the defendant is under the influence, and the defendant will already have been arrested on the charge." *Id.* at 13a. Thus, the court appears to have taken the view it is reasonable to compel an individual to consent to a chemical test when an officer has probable cause to administer a breath or blood test, even when the officer does not in fact obtain a warrant to do so. The court concluded: "Criminally penalizing test refusal reduces the likelihood that drunk drivers will avoid a criminal penalty by refusing to take a test and, therefore, it is reasonable because it is an efficient tool in discouraging drunk driving." *Id.* at 16a (quotations omitted).

Second, the court reasoned that the entitlement to drive may be conditioned on the driver's deemed agreement to consent to a chemical test and that the "unconstitutional conditions doctrine" is not implicated where, as here, the State merely "criminalizes the refusal to submit to a chemical test but does not authorize a warrantless search." App., *infra*, 13a. See App., *infra*, 12a-13a (distinguishing *Camara* v. *Mun. Court of City & Cnty. of San Francisco*, 387 U.S. 523, 540 (1967)). The court added that "the giving of the implied consent advisory informing the arrestee that refusing a chemical test is a crime does not render consent to the test involuntary." App, *infra*, 16a-17a. The state Supreme Court—like the district court—thus appears to have taken the view that criminalizing refusal to consent to a warrantless search does not run afoul of the unconstitutional conditions doc-

trine so long as the unconstitutional search does not in fact occur.[2]

The state court subsequently denied petitioner's request for rehearing. App., *infra*, 29a.

REASONS FOR GRANTING THE PETITION

This petition is one of several that do or will present the question whether a State may criminalize a motorist's refusal to consent to a warrantless chemical search. Petitions raising this question are being filed contemporaneously herewith, see *Bernard* v. *Minnesota*, No. 14-___, and *Washburn* v. *North Dakota*, 14-___. Additional petitions will soon follow. See *State* v. *Beylund*, 861 N.W.2d 172 (N.D. 2015); *State* v. *Baxter*, No. 20140325, 2015 WL 1914409 (N.D. 2015).

For reasons described at greatest length in the *Bernard* petition, petitioner respectfully suggests that the Court grant certiorari in both that matter and this one, and consolidate the cases for argument. Granting both cases would present the Court with the broadest range of rationales that have been asserted in defense of convictions like the one in this case, as well as the broadest range of factual settings in which test-refusal statutes have been applied. Al-

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[2] More recently, addressing a civil penalty but pointing to its decision in this case, the North Dakota Supreme Court restated in more detail its holding that persons are deemed to have "voluntarily consented to the chemical blood test" under the State's test-refusal statute, and that this conclusion is consistent with the unconstitutional conditions doctrine. *Beylund* v. *Levi*, 859 N.W.2d 403, 414 (N.D. 2015); see *id*. at 410-414. A petition for review in this case will soon be filed.

ternatively, the Court should hold this petition pending its disposition of *Bernard*.

This Court's review of the question presented is plainly warranted: the decision below is wrong; that decision conflicts with the holdings of other state and federal courts; and the question is one of tremendous practical and doctrinal importance.

1. The decision below cannot be squared with this Court's Fourth Amendment jurisprudence. In *Missouri* v. *McNeely*, 133 S. Ct. 1552 (2013), the Court concluded that the natural metabolization of alcohol in the bloodstream does not present a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in drunk-driving cases. Instead, whether the circumstances justify an exception to the warrant requirement must turn on a case-by-case assessment that considers the totality of the circumstances. This holding is based upon the general principle that public officials may employ sweeping warrantless searches only in extraordinary circumstances. See *Skinner* v. *Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 619 (1989). Yet a routine DUI investigation, like the one in this case, is among the most ordinary of law enforcement functions and must be analyzed according to traditional Fourth Amendment principles, which preclude an "overly broad categorical approach * * * in a context where significant privacy interests are at stake." *McNeely*, 133 S. Ct. at 1564.

In light of this principle, a State's blanket policy of criminalizing *all* refusals by a motorist to submit to a warrantless chemical test in cases where the driver has been arrested for driving under the influence cannot withstand constitutional scrutiny; the

lower court's reasoning to the contrary in this case is incorrect.

To begin with, the court was wrong in holding that "deemed consent" can substitute for actual consent in this context. It is settled that, where an individual has "a constitutional right" not to be searched absent a "warrant to search," a State may not criminalize "refusing to consent" to the search. *Camara* v. *Mun. Court of City & Cnty. of San Francisco*, 387 U.S. 523, 540 (1967). Likewise, the "unconstitutional conditions doctrine * * * vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). Thus, the "'government may not grant a benefit on the condition that the beneficiary surrender a constitutional right.'" *Amelkin* v. *McClure*, 330 F.3d 822, 827-828 (6th Cir. 2003) (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989)).

These doctrines apply fully in this setting, and establish that a State may not condition award of a driver's license on the driver's consent to submit to a warrantless search. North Dakota has criminalized all "refus[als] to consent" (*Camara*, 387 U.S. at 540) to warrantless chemical searches of motorists notwithstanding that—as *McNeely* and the Court's broader Fourth Amendment holdings make clear—the government is not authorized to conduct such warrantless searches in all cases. Thus, under *Camara*, the State may not prosecute a driver's refusal to consent to a search. Nor may the State suggest that such consent is implied as a condition on the motorist's privilege of obtaining a driver's li-

cense, as this would violate the unconstitutional conditions doctrine.

The lower court's other rationale—that the search is "reasonable" in a general sense—is wholly inconsistent with the fundamental understanding that "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment" unless they fall within one of "a few specifically established and well-delineated exceptions." *Arizona* v. *Gant*¸556 U.S. 332, 338 (2009). That principle belies the reasoning below that Fourth Amendment requirements may be set aside simply because criminalizing test refusal "'is an efficient tool in discouraging drunk driving.'" App., *infra*, 16a (citation omitted). And the North Dakota court's observation that these prosecutions often involve circumstances where the police officer *could have* obtained a warrant (*id*. at 13a, 14a) misses the mark. The constitutional protections of the Fourth Amendment are not set aside whenever officers believe that they have probable cause to search and *could have* but *did not* obtain a warrant. The act of obtaining the warrant is one of grave constitutional significance that "is 'an important working part of our machinery of government'" (*Riley* v. *California*, 134 S. Ct. 2473, 2493 (2014), and the need for a warrant is greatest when—as here—the search involves "discretion that could properly be limited by the 'interpo[lation of] a neutral magistrate between the citizen and the law enforcement officer.'" *Maryland* v. *King*, 133 S. Ct. 1958, 1969 (2013) (citation omitted; bracketed material added by the Court). Indeed, the holding below—that a warrant is unnecessary whenever drunk driving is suspected—would essentially read *McNeely* off the books.

2. The reasoning of the Supreme Court of North Dakota also conflicts with that of other courts. After *McNeely*, many courts have clarified that the fiction of implied consent does not constitute a *per se* justification for a warrantless chemical test: "an implied consent statute * * * does not justify a warrantless blood draw from a driver who refuses to consent[] * * * or objects to the blood draw * * *. Consent to a search must be voluntary. * * * Inherent in the requirement that consent be voluntary is the right of the person to withdraw that consent." *State* v. *Halseth*, 339 P.3d 368, 371 (Idaho 2014).

Halseth is not alone. *See State* v. *Butler*, 302 P.3d 609, 613 (Ariz. 2013); *Flonnory* v. *State*, 2015 WL 374879, at *4 (Del. 2015) (unpublished); *Byars* v. *State*, 336 P.3d 939, 945-946 (Nev. 2014) (striking down a provision of the State's implied consent law on the ground that the statute could not by itself authorize a warrantless blood draw); *State* v. *Arrotta*, 339 P.3d 1177, 1178 (Idaho 2014); *State* v. *Wulff*, 337 P.3d 575, 582 (Idaho 2014); *State* v. *Fierro*, 853 N.W.2d 235, 241 (S.D. 2014); *Reeder* v. *State*, 428 S.W.3d 924, 930 (Tex. App. 2014); *State* v. *Declerck*, 317 P.3d 794, 804 (Kan. Ct. App. 2014); *United States* v. *Brown*, 2013 WL 5604589, at *4 & n.1 (D. Md. 2013). But see *State* v. *Yong Shik Won,* 332 P.3d 661, 681 n. 23 (Haw. Ct. App. 2014) ("In effect, by exercising the privilege of driving, a driver (like Won) consents to submit to a breath test."). This conflict in the lower courts, which stems from a disagreement about the meaning of this Court's holdings, can be resolved only by this Court.

3. Finally, there can be no disputing that the question posed in this case is one of the utmost practical importance. As detailed in the *Bernard* petition

(at 30-33), at least thirteen States criminalize a motorist's refusal to consent to a chemical test. Those States' test-refusal statutes are applied with considerable frequency: tens, if not hundreds, of thousands of convictions each year turn on the question presented here. Other States, moreover, are considering legislation that would impose similar criminal penalties, or are otherwise considering the adoption of other "rules, procedures, and protocols that meet the reasonableness requirements of the Fourth Amendment" in response to this Court's decision in *McNeely*. 133 S. Ct. at 1569 (Kennedy, J., concurring in part). This Court's guidance on the question presented is thus necessary, both to settle the constitutionality of these myriad convictions and to provide the States with necessary prospective guidance on what tools may appropriately be used to address driving under the influence.

4. If the Court concludes that review of the issue presented here is warranted, we suggest that it grant certiorari both in *Bernard* and in this case. That would present the Court with both the broadest array of rationales advanced in defense of the constitutionality of test-refusal statutes and the widest array of factual settings in which those statutes are applied (*Bernard* involved a breath test, see 859 N.W.2d at 767 & n.4, whereas this case a blood test, see App., *infra*, 24a, 26a). Alternatively, we urge the Court to grant review in *Bernard* and to hold the petition in this case pending the resolution of that matter.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the petition in this case should be held pending the disposition of *Bernard* v. *Minnesota*, No. 14-___.

Respectfully submitted.

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JUNE 2015

[3] The representation of petitioner by a Clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

APPENDICES

APPENDIX A

Filed 1/15/15 by Clerk of Supreme Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2015 ND 6

State of North Dakota,
Plaintiff and Appellee

v.

Danny Birchfield,
Defendant and Appellant

No. 20140109

Appeal from the District Court of Morton County, South Central Judicial District, the Honorable Bruce B. Haskell, Judge.

AFFIRMED.

Opinion of the Court by McEvers, Justice.

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State v. Birchfield
No. 20140109

McEvers, Justice.

Danny Birchfield appeals from a criminal judgment entered on a conditional plea of guilty to class B misdemeanor refusal to submit to a chemical test in violation of N.D.C.C. § 39-08-01, reserving his right to appeal the district court's denial of his motion to dismiss the charge on constitutional grounds. Because we conclude the criminal refusal statute does not violate Birchfield's rights under the Fourth Amendment or N.D. Const. art. I, § 8, we affirm the criminal judgment.

I

On October 10, 2013, Birchfield drove into a ditch in Morton County. A highway patrol officer arrived at the scene, believed Birchfield was intoxicated, and asked Birchfield to perform field sobriety tests, which he failed. Birchfield took a preliminary breath test, which revealed a .254 percent alcohol concentration. The officer placed Birchfield under arrest and read him the implied consent advisory. Birchfield refused to consent to a chemical test.

Birchfield was charged with refusal to submit to a chemical test in violation of N.D.C.C. § 39-08-01, a class B misdemeanor. Birchfield moved to dismiss the criminal charge, contending N.D.C.C. § 39-08-01, which criminalizes a refusal to submit to a chemical test, is unconstitutional under the Fourth Amendment and its state counterpart, N.D. Const. art. I, § 8. The district court concluded Birchfield's rights under these provisions were not violated by the criminal charge for refusing to consent to a chemical test. Birchfield conditionally pled guilty under

N.D.R.Crim.P. 11(a)(2), reserving his right to appeal the court's order denying his motion to dismiss.

II

Birchfield argues the district court erred in denying his motion to dismiss because the criminal refusal statute is unconstitutional under the Fourth Amendment and N.D. Const. art. I, § 8, and as applied to him.

Our standard for reviewing constitutional challenges to legislative enactments is well-established:

> The determination whether a statute is unconstitutional is a question of law, which is fully reviewable on appeal. All regularly enacted statutes carry a strong presumption of constitutionality, which is conclusive unless the party challenging the statute clearly demonstrates that it contravenes the state or federal constitution. Any doubt about a statute's constitutionality must, when possible, be resolved in favor of its validity. The power to declare a legislative act unconstitutional is one of the highest functions of the courts, and that power must be exercised with great restraint. The presumption of constitutionality is so strong that a statute will not be declared unconstitutional unless its invalidity is, in the court's judgment, beyond a reasonable doubt. The party challenging the constitutionality of a statute has the burden of proving its constitutional infirmity.

Simons v. State, 2011 ND 190, ¶ 23, 803 N.W.2d 587 (internal citations omitted).

Driving is a privilege, not a constitutional right and is subject to reasonable control by the State un-

der its police power. *See*, *e.g.*, *State v. Smith*, 2014 ND 152, ¶ 8, 849 N.W.2d 599; *McCoy v. North Dakota Dep't of Transp.*, 2014 ND 119, ¶ 26, 848 N.W.2d 659. Under N.D.C.C. § 39-20-01(1), an individual who drives "is deemed to have given consent, and shall consent, subject to the provisions of this chapter, to a chemical test . . . ." A chemical test may be administered "only after placing the individual . . . under arrest." N.D.C.C. § 39-20-01(2). However, a driver has a right to refuse a chemical test under N.D.C.C. § 39-20-04(1), which provides, "If a person refuses to submit to testing under section 39-20-01 . . . , none may be given." *See State v. Fetch*, 2014 ND 195, ¶ 8.

The criminal refusal provision is contained in N.D.C.C. § 39-08-01, which provides in relevant part:

> 1. A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:
>
> . . . .
>
> e. That individual refuses to submit to any of the following:
>
> . . . .
>
> (2) A chemical test, or tests, of the individual's blood, breath, or urine to determine the alcohol concentration or presence of other drugs, or combination thereof, in the individual's blood, breath, or urine, at the direc-

> tion of a law enforcement officer under section 39-20-01; . . .
>
> . . . .
>
> 2. An individual who operates a motor vehicle on a highway or on public or private areas to which the public has a right of access for vehicular use in this state who refuses to submit to a chemical test, or tests, required under section . . . 39-20-01 . . . is guilty of an offense under this section.

Section 39-20-01, N.D.C.C., sets forth the implied consent requirements for motor vehicle drivers in general and in subsection 3 states that the "law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs" and "that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence."

The Fourth Amendment and N.D. Const. art. I, § 8, prohibit unreasonable searches and seizures, and the administration of chemical tests to determine alcohol concentration is a search for purposes of these constitutional provisions. *See Smith*, 2014 ND 152, ¶ 7, 849 N.W.2d 599; *McCoy*, 2014 ND 119, ¶ 10, 848 N.W.2d 659. Before the Legislature enacted the criminal refusal statute in 2013, this Court had observed "[t]here is no Federal constitutional right to be entirely free of intoxication tests," *State v. Murphy*, 516 N.W.2d 285, 286 n.1 (N.D. 1994), and noted a "driver has only a conditional right to refuse a chemical test" because "[a]mong the conditions imposed upon the exercise of one's right to refuse a chemical test are

the revocation of the person's license or permit to drive a vehicle and the admission in evidence of proof of refusal in civil or criminal actions." *State v. Murphy*, 527 N.W.2d 254, 256 (N.D. 1995). We had not specifically ruled on a Fourth Amendment challenge to the penalty provisions of the implied consent statutes as they existed at the time.

However, other states during this period had enacted statutes criminalizing the refusal to consent to a chemical test, and Fourth Amendment challenges to those statutes were unsuccessful. For example, in *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1451 (9th Cir. 1986), the Ninth Circuit Court of Appeals upheld Alaska's criminal refusal statute against a Fourth Amendment challenge:

> Appellants' basic argument is that they have been deprived of their right to be free of unreasonable searches. Nothing in the Alaska statutes here at issue deprives them of that right, or otherwise burdens it. A motorist who has been stopped for DWI and who wishes to vindicate himself has two choices under the law. He may take the test as the state prefers him to do. If he does, and the evidence obtained is favorable to him, he will gain his prompt release with no charge being made for drunk driving. *See Mackey v. Montrym*, 443 U.S. [1, 19 (1979)]. If the evidence is unfavorable, he may challenge the government's use of that evidence by attacking the validity of the arrest. If he does not take the test, he can still challenge the evidence of his refusal by once again attacking the validity of the arrest. Either way, he remains fully capable of asserting the only

> Fourth Amendment right he possesses: the right to avoid arrest on less than probable cause. Thus, no improper condition has been placed on the exercise of appellants' rights under the Fourth Amendment.

See also *State v. Netland*, 762 N.W.2d 202, 214 (Minn. 2009) ("We hold that the criminal test-refusal statute does not violate the prohibition against unreasonable searches and seizures found in the federal and state constitutions because under the exigency exception, no warrant is necessary to secure a blood-alcohol test where there is probable cause to suspect a crime in which chemical impairment is an element of the offense.") (footnote omitted); *Rowley v. Commonwealth*, 629 S.E.2d 188, 191 (Va. Ct. App. 2006) (no Fourth Amendment violation for criminally punishing refusal to provide breath sample because the "act of driving constitutes an irrevocable, albeit implied, consent to the officer's demand for a breath sample"). The courts in these cases relied in part on the United States Supreme Court's decision in *Schmerber v. California*, 384 U.S. 757, 770 (1966) (internal citation omitted), which upheld the warrantless blood test of a person arrested for driving under the influence because the arresting officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'"

In 2013, the United States Supreme Court decided *Missouri v. McNeely*, 133 S. Ct. 1552, 1568 (2013) (plurality decision), which held that "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a

blood test without a warrant." The Court rejected the notion that *Schmerber* established that natural dissipation of alcohol in the bloodstream is a per se exigency that suffices to justify an exception to the warrant requirement, and interpreted *Schmerber* to require a "totality of the circumstances approach." *Id.* at 1559. The Court rejected the argument that a per se exigency rule was necessary to protect the governmental interest in preventing and prosecuting drunk-driving offenses noting:

> States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. . . . Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution. . . . see also South Dakota v. Neville, 459 U.S. 553, 554, 563-564, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) (holding that the use of such an adverse inference does not violate the Fifth Amendment right against self-incrimination).

Id. at 1566.

Since the *McNeely* decision, we have held that consent to a chemical test is not coerced and is not

rendered involuntary merely by a law enforcement officer's reading of the implied consent advisory that accurately informs the arrestee of the consequences for refusal, including the administrative and criminal penalties, and presents the arrestee with a choice. *See McCoy*, 2014 ND 119, ¶ 21, 848 N.W.2d 659; *Smith*, 2014 ND 152, ¶ 16, 849 N.W.2d 599; *State v. Boehm*, 2014 ND 154, ¶ 20, 849 N.W.2d 239; *Fetch*, 2014 ND 195, ¶ 9. The United States Supreme Court has not decided, and it is a question of first impression in North Dakota, whether criminalizing a refusal to consent to a chemical test violates a person's right to be free from unreasonable searches and seizures.

Birchfield has not drawn our attention to any appellate court decisions striking down criminal refusal statutes, and we have found that since the Supreme Court's ruling in *McNeely*, criminal refusal statutes have continued to withstand Fourth Amendment challenges, particularly in Minnesota. The Minnesota Court of Appeals has held that the "Fourth Amendment does not prohibit the state from criminalizing a suspected drunk driver's refusal to submit to a breath test for alcohol content when the circumstances established a basis for the officer to have alternatively pursued a constitutionally reasonable nonconsensual test by securing and executing a warrant." *State v. Bernard*, 844 N.W.2d 41, 42 Syll., 47 (Minn. Ct. App. 2014) (but declining to decide whether "the implied consent law is unconstitutional because it conditions the exercise of the privilege of driving on the driver surrendering his constitutional right to be free of unreasonable searches and seizures"), *review granted* (May 20, 2014). *See also State v. Brooks*, 838 N.W.2d 563, 572 (Minn. 2013), *cert. denied*, 134 S. Ct. 1799 (2014) (rejecting consti-

tutional argument that "the Legislature does not have the power to imply someone's consent to waive his or her Fourth Amendment rights as a condition of granting the privilege to drive in Minnesota"). In *State v. Yong Shik Won*, 332 P.3d 661, 681-82 (Hawai'i Ct. App. 2014), *cert. granted*, 2014 WL 2881259 (Hawai'i, June 24, 2014), the Hawai'i Court of Appeals held that its "statutory scheme, which imposes [criminal] sanctions to dissuade a driver from withdrawing his or her con[s]ent [to a breath test], is reasonable and does not violate the Fourth Amendment" or its state constitutional counterpart. Numerous unreported decisions, mostly from the Minnesota Court of Appeals, have also ruled criminal refusal statutes do not violate the Fourth Amendment. *See*, *e.g.*, *Hoover v. Ohio*, 549 Fed. Appx. 355 (6th Cir., Dec. 4, 2013); *United States v. Muir*, 2014 WL 4258701 (D. Ct. Md., Aug. 28, 2014); *State v. Isaacson*, 2014 WL 1271762 (Minn. Ct. App., March 31, 2014) *review granted* (June 17, 2014); *State v. Manska*, 2014 WL 1516316 (Minn. Ct. App., April 21, 2014), *review granted* (June 25, 2014); State v. Ornquist, 2014 WL 2565662 (Minn. Ct. App., June 9, 2014); *State v. Johnson*, 2014 WL 2565771 (Minn. Ct. App., June 9, 2014), *review granted* (August 19, 2014); *State v. Chasingbear*, 2014 WL 3802616 (Minn. Ct. App., Aug. 4, 2014) *review granted* (Oct. 14, 2014); *State v. Poitra*, 2014 WL 3892709 (Minn. Ct. App., Aug. 11, 2014) *review granted* (Oct. 14, 2014); and *State v. Trahan*, 2014 WL 4798876 (Minn. Ct. App., Sept. 29, 2014*) review granted* (Dec. 16, 2014).

In addressing *McNeely*, these courts point out as we have in our cases, that *McNeely* merely held the natural metabolization of alcohol in the bloodstream is not a per se exigency justifying a Fourth Amend-

ment exception to the warrant requirement for nonconsensual blood testing in all drunk-driving cases, and did not address the constitutional validity of implied consent statutes. *See*, *e.g.*, *Yong Shik W*on, 332 P.3d at 682; *Isaacson*, 2014 WL 1271762 at *2. They also point out the *McNeely* Court referred to acceptable "legal tools" with "significant consequences" for refusing to submit to testing which are available to the states as alternatives to warrantless, nonconsensual blood draws, including the constitutional use under the Fifth Amendment of a defendant's refusal to submit to chemical testing to show the defendant is guilty of drunk driving under *South Dakota v. Neville*, 459 U.S. 553 (1983). *See*, *e.g.*, Yong Shik Won, at 682; *Manska*, 2014 WL 1516316 at *7; *Chasingbear*, 2014 WL 3802616 at *2. The *Chasingbear* court explained:

> While the re-emphasized *Neville* decision is not a Fourth Amendment case, *McNeely* certainly is. And it was in the Fourth Amendment context that *McNeely* expressly reminds us through *Neville* that a state can *constitutionally* use the driver's test refusal (that is, the driver's exercise of his Fourth Amendment right not to be tested without consent) as inferential evidence to convict the driver of a crime, even though the Constitution would have prohibited the state from forcing that driver to submit to an actual chemical test. This contrasts sharply with the general rule that due process bars prosecutors from referring to a defendant's refusal to consent to a warrantless search to raise an inference of guilt. . . That the Supreme Court in *McNeely* buttressed its Fourth Amendment holding on the states' lawful authority

> to rely on test refusals *to convict drivers of a crime* significantly undermines the district court's conclusion that the Minnesota test-refusal statute is infected by a fatal Fourth Amendment infirmity.

Id. (citations omitted).

The district court in this case ruled because Birchfield refused to be tested, as was his right, and was not tested, "[t]here was no search so there was no Fourth Amendment violation." This reasoning requires examination of *Camara v. Municipal Court of City & Cnty. of San Francisco*, 387 U.S. 523 (1967), relied upon by Birchfield, in which no search was conducted but the Supreme Court found a Fourth Amendment violation. In *Camara*, a property owner refused to allow a warrantless inspection of his premises, but a city ordinance authorized city employees "'upon presentation of proper credentials'" to enter any building in the city. *Id*. at 526. The owner was criminally charged with refusing to permit an inspection in violation of the city code and he argued the city code section "is contrary to the Fourth and Fourteenth Amendments in that it authorizes municipal officials to enter a private dwelling without a search warrant and without probable cause to believe that a violation of the Housing Code exists therein." *Id*. at 527. The Supreme Court ruled the owner "had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection." *Id*. at 540.

Courts have distinguished *Camara* on the grounds urged by the State in this case. Unlike the regulation in *Camara* which allowed for suspicionless searches of private property, implied

consent laws, like North Dakota law, do not authorize chemical testing unless an officer has probable cause to believe the defendant is under the influence, and the defendant will already have been arrested on the charge. *See*, *e.g.*, *Hoover*, 549 Fed. Appx. at 356; *Poitra*, 2014 WL 3892709 at *2 n.3. Even onsite screening tests are allowed only when an officer "has reason to believe that the individual committed a moving traffic violation or was involved in a traffic accident as a driver, and in conjunction with the violation or the accident the officer has, through the officer's observations, formulated an opinion that the individual's body contains alcohol," N.D.C.C. § 39-20-14(1), and the *Camara* Court would have authorized code enforcement searches on less than traditional probable cause. 387 U.S. at 534-39. Unlike the regulation in *Camara*, the test refusal statute criminalizes the refusal to submit to a chemical test but does not authorize a warrantless search. *See Poitra*, at *4. Furthermore, reliance on *Camara* "overlooks the apparent difference between the way the Supreme Court treats cases in which the Fourth Amendment affects searching individuals by testing in the drunk-driving context and those where it affects a home search in any context." *Chasingbear*, 2014 WL 3802616 at *14.

For similar reasons, Birchfield's reliance on *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), and cases like it, is unavailing. In *Ferguson*, the Supreme Court struck down a warrantless, suspicionless regime of mandatory drug testing of maternity patients in which the test results were disclosed to police for law enforcement purposes. *Id.* at 77 n.10, 86. *See also, e.g.*, *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 310, 325 (1978) (holding unconstitutional statute allowing warrantless, suspicionless searches to inspect for

safety hazards and violations of OSHA regulations); *See v. City of Seattle*, 387 U.S. 541, 546 (1967) (reversing conviction for refusing to permit fire department inspection of appellant's locked commercial warehouse without a warrant and without probable cause to believe a violation of municipal ordinances existed); *Lebron v. Secretary of Florida Dep't of Children and Families*, 772 F.3d 1352, 1378 (11th Cir. 2014) (holding "the warrantless, suspicionless urinalysis drug testing of every Florida [Temporary Assistance for Needy Families] applicant as a mandatory requirement for receiving Temporary Cash Assistance offends the Fourth Amendment"); *State v. Stewart*, 2014 ND 165, ¶ 18, 851 N.W.2d 153 (holding unconstitutional a warrantless entry into defendant's home and rejecting application of the inevitable discovery doctrine because the "doctrine does not apply when the warrant requirement is simply bypassed without exigent circumstances"). Because none of these cases were decided in the context of drunk-driving prosecutions where an officer had probable cause to search a defendant's body, we do not believe they are helpful in determining whether criminalizing a defendant's refusal to submit to a chemical test when an officer has probable cause to believe the defendant is under the influence of alcohol violates a defendant's Fourth Amendment rights. Indeed, the Supreme Court has said "the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'" *Jenkins v. Anderson*, 447 U.S. 231, 236 (1980) (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973)).

Furthermore, the "touchstone of the Fourth Amendment is reasonableness," which is assessed by balancing the promotion of legitimate governmental

interests with the intrusion on an individual's privacy. *State v. Adams*, 2010 ND 184, ¶ 15, 788 N.W.2d 619. There is no question "the State's interest in decreasing drunk driving is a valid public concern. Indeed, '[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion.'" *Martin v. North Dakota Dep't of Transp.*, 2009 ND 181, ¶ 7, 773 N.W.2d 190 (quoting *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990)). A licensed driver has a diminished expectation of privacy with respect to enforcement of drunk-driving laws because he or she is presumed to know the laws governing the operation of a motor vehicle, and the implied consent laws contain safeguards to prohibit suspicionless requests by law enforcement officers to submit to a chemical test. *See, e.g.*, *Yong Shik Won*, 332 P.3d at 681; *Stevens v. Commissioner of Pub. Safety*, 850 N.W.2d 717, 728-29 (Minn. Ct. App. 2014); Muir, 2014 WL 4258701 at *6. The Legislature created a statutory right to refuse a chemical test, but has attached significant consequences to refusal so a driver may not avoid the potential consequences of test submission and gain an advantage by simply refusing the test. *See, e.g.*, *Smith*, 2014 ND 152, ¶¶ 9-10, 849 N.W.2d 599; *McCoy*, 2014 ND 119, ¶ 12, 848 N.W.2d 659; *Murphy*, 527 N.W.2d at 255-56. The defendant here submitted to a preliminary breath test which yielded a result well above the alcohol concentration necessary to implicate the possibility that he may have been subject to enhanced penalties based on his level of intoxication. N.D.C.C. § 39-08-01(5)(a)(2) (adding additional penalties for a first offense conviction, of a higher minimum fine and at least two days' imprisonment, where the alco-

hol concentration is at least sixteen one hundredths of one percent by weight). By choosing to refuse further testing, he was subject to criminal penalty for the refusal, but was able to avoid the enhanced penalties for being highly intoxicated. Criminal refusal statutes were in existence in some states at the time *McNeely* was decided, *see*, *Smith*, at ¶ 11, a fact the Supreme Court must have been aware when it noted the "broad range of legal tools" available to states to enforce drunk-driving laws which "impose significant consequences when a motorist" refuses to consent to a chemical test. *McNeely*, 133 S. Ct. at 1566. Criminally penalizing test refusal "reduces the likelihood that drunk drivers will avoid a criminal penalty" by refusing to take a test and, therefore, it is "reasonable because it is an efficient tool in discouraging drunk driving." *Chasingbear*, 2014 WL 3802616 at **12, 13; *Johnson*, 2014 WL 2565771, at *6; *see also Yong Shik Won*, 332 P.3d at 681 n.23 ("It is reasonable for the Legislature to condition its grant of the privilege of driving on a person's agreement to submit to breath testing if arrested. . . . It is also reasonable for the Legislature to enforce that bargain by imposing [criminal] penalties on a driver who refuses to honor his or her agreement."). The criminal refusal statute satisfies the general reasonableness requirement of the Fourth Amendment.

Finally, in *Smith*, 2014 ND 152, ¶ 16, 849 N.W.2d 599, this Court relied on the Minnesota Supreme Court's decision in *Brooks*, 838 N.W.2d 563, to hold the giving of the implied consent advisory informing the arrestee that refusing a chemical test is a crime does not render consent to the test involuntary. The court in *Chasingbear*, 2014 WL 3802616, noted the anomalous situation that would arise if the

Minnesota criminal refusal statute was ruled unconstitutional.

> Chasingbear cites *Brooks*, but he does not attempt to answer the question that arises from its holding as applied to this case: If the state threatens action that is not unconstitutionally coercive in violation of a person's Fourth Amendment rights, how can the state's carrying out the threat violate the person's Fourth Amendment rights? Although *Chasingbear* does not offer an answer, the *Brooks* court, like the *McNeely* Court, suggests one: "Although refusing the test comes with criminal penalties in Minnesota, . . . [and] the choice to submit or refuse to take a chemical test 'will not be an easy or pleasant one for a suspect to make,' the criminal process 'often requires suspects and defendants to make difficult choices.'" [838 N.W.2d] at 571 (quoting *Neville*, 459 U.S. at 564, 103 S. Ct. at 923).

Chasingbear, at *3.

Unpublished decisions from other jurisdictions have value if they are persuasive. *Lucas v. Riverside Park Condominiums Unit Owners Ass'n*, 2009 ND 217, ¶ 19, 776 N.W.2d 801; *In re Guardianship of Barros*, 2005 ND 122, ¶ 15, 701 N.W.2d 402. We recognize that several of these decisions, both reported and unreported, are pending review, but we find their reasoning persuasive. We conclude the criminal refusal statute is not unconstitutional under the Fourth Amendment or N.D. Const. art. I, § 8, or as applied to Birchfield.

III

We do not address other arguments raised because they either are unnecessary to the decision or are without merit. The criminal judgment is affirmed.

Lisa Fair McEvers
Daniel J. Crothers
Dale V. Sandstrom
Carol Ronning Kapsner
Gerald W. VandeWalle, C.J.

APPENDIX B

IN DISTRICT COURT, COUNTY OF MORTON STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,
PLAINTIFF;
v.
DANNY BIRCHFIELD,
DEFENDANT

CRIMINAL JUDGMENT
CRIMINAL NO. 30-2013-CR-01085

On March 17, 2014, by way of Rule 43 Misdemeanor Petition to Enter a Conditional Plea of Guilty, the State of North Dakota, represented by Justin Balzer, Assistant Morton County State's Attorney, and the above-named defendant, represented by counsel, Dan Herbel, agreed to disposition on this matter and the Defendant entered a conditional plea of guilty to the charge of Refusal to Submit to a Chemical Test, in violation of N.D,C.C. § 39-08-01(1)(e)(2), a Class B misdemeanor, specifically reserving the right to appeal the January 16, 2014, Order on Motion to Dismiss.

The defendant was permitted by the court to make a statement on his own behalf and to present any information in mitigation of punishment or which would require the court to withhold pronouncement of judgment and sentence and the defendant, through his Petition, knowingly and voluntarily waived these rights. The court finds no sufficient cause why judgment should not be pronounced as proffered by the parties to this action, and accordingly:

IT IS THE SENTENCE AND JUDGMENT OF THIS COURT:

IT IS ORDERED that the defendant be sentenced to serve thirty (30) days in the Morton County jail, Mandan, ND, with all but ten (10) days suspended for a period of one (1) year, and during that period the defendant shall be on unsupervised probation on the condition that Defendant have no further criminal violations. A violation of the rules or conditions may result in revocation and termination of probation, whereupon the Court may impose the maximum penalty allowed by law. As of March 17, 2014, the defendant shall be given credit for ten (10) days time served.

IT IS FURTHER ORDERED:

(a) The Defendant shall participate in the twenty-four seven sobriety program for a period of one (1) year. The Defendant shall be given credit against his one (1) year of testing beginning on October 18, 2013, and continuing through the date of this Judgment

(b) The Defendant shall obtain a substance abuse/addiction evaluation from a licensed addiction treatment facility and shall submit to the Court proof of completion of the same.

(c) The Defendant shall pay a fine in the amount of $1,500.00.

(d) The Defendant shall pay a court administration fee in the amount of $125.00.

(e) The Defendant shall pay a court facility fee in the amount of $100.00.

(f) The Defendant shall pay a $25.00 victim witness fee.

IT IS FURTHER ORDERED that due to the conditional nature of the plea of guilty, the terms of the defendant's sentence will be stayed until either a final appellate Judgment is formally entered or, if no appeal is taken, then immediately following the expiration of time to file a Notice of Appeal.

LET JUDGMENT BE ENTERED.

Dated this *20* day of March, 2014.

BY THE COURT:

/s/
HONORABLE BRUCE HASKELL
DISTRICT JUDGE, MORTON
COUNTY

APPENDIX C

STATE OF NORTH DAKOTA
IN DISTRICT COURT
COUNTY OF MORTON
Case No. 30-2013-Cr-01085
State Of North Dakota,
Plaintiff,
vs.
Danny Birchfield,
Defendant

The defendant, Danny Birchfield, is charged with Refusal to Submit to On-Site Screening or Chemical Testing. Birchfield requests this Court dismiss the charge for refusing to submit to on-site screening or chemical testing. Birchfield argues the refusal charge is unconstitutional under both the Fourth Amendment to the United States Constitution and Article I, Section 8 of the North Dakota Constitution. The State resists this motion contending the Implied Consent Advisory is an appropriate legislative action and constitutional. The North Dakota Attorney General filed an amicus brief requesting the motion be denied.

LAW AND ANALYSIS

"The Fourth Amendment . . . protects from unreasonable searches and seizures." *State v. Summer*, 2011 ND 151, ¶ 9,800 N.W.2d 853. "Under the Fourth Amendment, when a person reasonably expects privacy, the government must obtain a warrant before conducting a search unless the search falls within a recognized exception to the warrant requirement." *State v. Dudley*, 2010 ND 39, ¶ 7, 779 N.W.2d 369. The extraction of blood and administration of breath tests are searches requiring either a search warrant or a valid exception. *McNeely v. Mis-*

souri, 133 S. Ct. 1552 (2013); *see also Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989). Consent to search is a recognized exception. In Birchfield's brief in support of his motion to dismiss, Birchfield argues that he had a constitutional right under the Fourth Amendment to be free from unreasonable searches and seizures, that his refusal to submit to the blood test was an exercise of his Fourth Amendment rights, and that the exercise of these rights cannot result in criminal charges against him. Birchfield cites *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) and *Camara v. Municipal Court*, 387 U.S. 523 (1967).

Birchfield argues the United States Supreme Court has never endorsed implied consent statutes that criminalize a refusal, and that *McNeely* supports his constitutionality argument. Birchfield is incorrect. In *McNeely*, the Court recognized the value of tools to enforce drunk driving laws such as implied consent statutes. Birchfield's reliance on McNeely is misplaced. In *McNeely*, the Supreme Court addressed the narrow issue of "whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk driving investigations." *McNeely*, 133 S. Ct. at 1558. The Supreme Court concluded that it did not. The Court concluded that, "while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case . . . it does not do so categorically. Whether a warrantless blood test of a drunk driving suspect is reasonable must be determined case by case on the totality of the circumstances." *Id.* at 1563.

The facts in *McNeely* involved a defendant who was arrested for DUI, read the implied consent warning, refused testing, and a blood test was conducted without the defendant's consent and without a warrant. There was no attempt to obtain a warrant and no other facts presented to support finding an exigency that would have excused the warrant requirement. In this case, Birchfield was arrested for DUI, read the Implied Consent Advisory, and refused a blood test. The blood test was never performed on Birchfield so, unlike in *McNeely*, there was no Fourth Amendment Search without a warrant.

Birchfield attempts to argue *McNeely*, when read in conjunction with *Camara*, yields a different result. See *Camara v. Municipal Court*, 387 U.S. 523 (1967). This Court disagrees. In *Camara*, a building inspector attempted to gain access to the defendant's home to ensure the building's occupancy was in compliance with city code. In a limited holding, the United States Supreme Court held verification of city zoning requirements does not justify a warrantless search of the defendant's home, and the defendant should not be charged for failing to consent. The factual situations in *McNeely* and the case at hand are distinct from *Camara*. In an implied consent advisory scenario, a defendant has already granted implied consent to the search. The basis for this implied consent is grounded in a strong public policy interest of promoting public safety. In *Camara*, neither implied consent nor public safety were considered.

Birchfield also argues the North Dakota Implied Consent Advisory, which now includes language that refusal to submit to a chemical test is a crime punishable in the same manner as Driving Under the Influence, violated his constitutional rights. In

McNeely, the Court noted that states have a broad range of legal tools to enforce drunk driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. The Court states that all fifty states have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the state, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk driving offense. *Id.* at 1566. The Court noted, "[s]uch laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most states allow the motorists refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." *Id.*

North Dakota is included among the states which have adopted an implied consent law (N.D.C.C. § 39-20-01) and which allows the motorist's refusal to take a BAC test to be used against him in subsequent criminal prosecution (N.D.C.C. § 39-20-08). The North Dakota Supreme Court discussed the implied consent law and the admission of a motorist's refusal to submit to a BAC test in *State v. Murphy*, 516 N.W.2d 285 (ND 1994) as follows:

> The essence of our implied consent laws is that the driver of a vehicle in North Dakota is deemed to have consented to submit to a chemical test if arrested for driving, or being in actual physical control while intoxicated. The fact that North Dakota drivers are able to refuse testing is a matter of legislative grace. Refusing to submit to the test is a legislatively granted privilege, and, as such, it is

> clear that the legislature is able to limit the extent of that privilege.

516 N.W.2d at 287 (citations omitted).

Birchfield argues that the 2013 amendments to N.D.C.C. § 39-20-01 which added the language "that refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence" to the Implied Consent Advisory somehow affected his Fourth Amendment rights in this case in which he refused testing. He contends that the threat of potential criminal consequences of refusal goes beyond the constitutionally permissible "significant consequences" for refusal mentioned by the Court in *McNeely*.

This Court disagrees with Birchfield's argument. In this case, Birchfield refused the test, as he had a right to do under the existing law. Because he refused the test, the requested search, the blood draw, was not conducted. There was no search so there was no Fourth Amendment violation.

Furthermore, the addition of the language of the 2013 amendment to N.D.C.C. § 39-20-01, which imposes another potential consequence for refusal of a BAC, does not violate Birchfield's constitutional rights. Even before the 2013 amendment, N.D.C.C. § 39¬20-08 provided that refusal could be used in subsequent criminal proceedings. The only difference between the current law and the previous law is that refusal can now be a separate crime and not merely evidence to prove the crime of a DUI.

The North Dakota Supreme Court discussed the purpose of N.D.C.C. Chapter 39-20 in *Krehlik v. Moore*, 542 N.W.2d 433 (N.D. 1996). The Court stated:

> In *Lund*, we recognized that the purpose of chapter 39-20, NDCC, was "to eliminate the drunken driver from the highways by requiring drivers suspected of operating motor vehicles while under the influence of intoxicating liquor to submit to a chemical test to determine the alcoholic content of their blood. Although we realize that the legislature has modified the implied consent statutes, the purpose of chapter 39-20, NDCC, has not changed since *Lund*. . . . We continue to interpret the implied consent laws "consistent[ly] with the legislature's desire for suspects to choose to take the test." Since Lund, the legislature has magnified the ramifications for refusing to submit to testing . . . . These changes reflect the legislature's desire for testing.

542 N.W.2d at 445-46 (citations omitted).

By making refusal a crime, and adding that information to the Implied Consent Advisory, the legislature has again magnified the ramifications for refusing to submit to testing. The legislature wants a driver to choose to take the test and a state may, therefore, attach penalties to a driver's choice to refuse testing. *State v. Murphy*, 527 N.W.2d 254, 256 (N.D. 1995). A driver has only a conditional right to refuse a chemical test. *Id.* With the 2013 amendments, included among the conditions imposed upon the exercise of one's right to refuse a chemical test is the potential for being charged with the crime of refusal and the admission in evidence of proof of refusal in a subsequent criminal action. Refusing to submit to the test is a legislatively granted privilege, the extent of which the legislature is able to limit. *Id.*

at 287. Adding the additional condition of the crime of refusal is consistent with the legislature's desire for DUI suspects to choose to take the test.

For these reasons, the Court determines Birchfield's Fourth Amendment rights were not violated in this case when he refused to submit to a blood test. The Defendant's Motion to Dismiss is DENIED.

Dated this 16th day of January, 2014.

BY THE COURT:

/s/
Bruce Haskell, District Judge
South Central Judicial District

CC: Dan Herbel
Justin Blazer
Ken Sorenson

APPENDIX D

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER ON PETITION FOR REHEARING

Supreme Court No. 20140109
Morton Co. No. 2013-cr-01085

State of North Dakota,
Plaintiff and Appellee
v.
Danny Birchfield,
Defendant and Appellant

This appeal having been heard by the Court at the September 2014 Term and an opinion having been filed on January 15, 2015 by:

Chief Justice Gerald W. VandeWalle, Justice Dale V. Sandstrom, Justice Carol Ronning Kapsner, Justice Daniel J. Crothers and Justice Lisa Fair McEvers;

and a petition for rehearing having been filed by Danny L. Herbel, for the Appellant, and the Court having considered the matter, it is hereby ORDERED AND ADJUDGED, that the petition be and is hereby **DENIED**.

AND IT IS FURTHER ORDERED, that this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the judgment of this Court.

Dated: February 12, 2015

By the Court:

/s/