No. 14-1470

In the Supreme Court of the United States

WILLIAM ROBERT BERNARD, JR.,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Minnesota

REPLY BRIEF FOR PETITIONER

JEFFREY S. SHERIDAN
Sheridan & Dulas, P.A.
320 Eagandale Center
1380 Corporate Center Curve
Eagan, MN 55121
(651) 686-7870

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

TABLE OF CONTENTS

Page

Table of Authorities..... ii

Reply Brief for Petitioner.....1

A. The Court Below Held As A Matter Of Law That A Compelled Search Of The Deep Lung Air Of Any Person Validly Arrested On Suspicion Of Driving While Impaired Is Permissible As A Search Incident To Arrest.....2

B. The Decision Below Stated A Rule Permitting Searches Incident To Arrest That Departs From This Court's Holdings. 4

C. Review By This Court Is Necessary To Resolve Confusion In the Lower Courts And Correct Repeated Misapplication Of The Fourth Amendment. 5

Conclusion 7

TABLE OF AUTHORITIES

Page(s)

CASES

Maryland v. *King*,
133 S. Ct. 1958 (2013) 4, 5

Missouri v. *McNeely*,
133 S. Ct. 1552 (2013) 1, 6, 7

Riley v. *California*,
134 S. Ct. 2473 (2014) 5

United States v. *Robinson*,
414 U.S. 218 (1973) 4, 5

Williams v. *State*, 2015 WL 3511222
(Fla. Dist. Ct. App. 2015) 6

REPLY BRIEF FOR PETITIONER

In this case, the Minnesota Supreme Court held that, under the search-incident-to-arrest doctrine, any person who is arrested on suspicion of driving while impaired may be required to submit to a warrantless chemical test of his or her deep lung air, and may be subjected to serious criminal penalties for refusing to take the test—even if the person is not prosecuted for, or is found not to have committed, the underlying DWI offense. In opposing review of this extraordinary decision, the State does not dispute several of the central arguments presented in the petition. The State thus very notably does *not* deny that the holding below "nullifies the warrant requirement in nearly every drunk-driving case" (Pet. App. 22a (dissenting opinion)); that this holding renders the decision in *Missouri* v. *McNeely*, 133 S. Ct. 1552 (2013), a virtual dead letter; that it perversely offers greater protection to the privacy of the area around a person than to the person's body; or that it involves a question of great practical importance, arising many thousands of times a year in jurisdictions acoss the Nation.

Instead, the State rests its opposition on three much more limited propositions. It contends (1) that review would require speculation about the scope of the Minnesota Supreme Court's decision; (2) that the holding below is consistent with this Court's rulings on the nature of the search-incident-to-arrest doctrine; and (3) that there is no conflict in the lower courts on the constitutionality of compelled-consent statutes like Minnesota's. On examination, each of these arguments is flawed.

A. The Court Below Held As A Matter Of Law That A Compelled Search Of The Deep Lung Air Of Any Person Validly Arrested On Suspicion Of Driving While Impaired Is Permissible As A Search Incident To Arrest.

At the outset, the State is incorrect in contending that, "[i]f the petition is granted, the parties and this Court will be required to engage in unwarranted speculative discussions and arguments as to the scope and application" of the decision below. Opp. 4. In fact, there is no doubt about the substance of the Minnesota Supreme Court's decision: that court very plainly held that a warrantless search of deep lung air may be compelled whenever a person is arrested on suspicion of driving while impaired.[1]

To be sure, as the State notes (at Opp. 3, 6), the court below purported to leave open the further question whether its holding also applies to compelled blood and urine tests. Pet. App. 10a-11a n.6. But that reservation does not militate against review, for several reasons.

First, even if limited to tests of deep-lung air, the holding that a warrantless chemical test may be ad-

---

[1] The State is incorrect in contending that the petition's question presented "fails to accurately reflect the scope and application of the Minnesota Supreme Court's decision." Opp. i. The question presented correctly describes the decision below as holding "that a person may be compelled to submit to a warrantless breath test as a 'search incident to arrest,'" and against this background poses the question 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." Pet. i.

ministered as a search incident to arrest is one of enormous practical and doctrinal importance. Compelled-consent statutes like Minnesota's give the arresting officer complete discretion whether to demand submission to a blood, urine, *or* breath test, all of which are treated identically by Minnesota law. See Pet. 4. The holding below, which allows officers to demand submission to a test of deep lung air (and thus to trigger imposition of criminal penalties for refusal to take that test) in *any* case where there has been a DWI arrest, accordingly authorizes the warrantless administration of a chemical test "in nearly every drunk-driving case." Pet. App. 22a (dissenting opinion). Whether the Minnesota Supreme Court's understanding of the search-incident-to-arrest doctrine was correct in these circumstances therefore is an enormously important question that merits review.

Second, *Birchfield* v. *North Dakota*, No. 14-1468, the subject of a petition for certiorari that is a companion to the one in this case, involves a prosecution that *was* premised on the defendant's failure to submit to a blood test.[2] Consequently, as we explain in the *Bernard* petition (at 29 n.10), granting review

---

[2] The State here observes, correctly, that the decision of the North Dakota Supreme Court in *Birchfield* "does not articulate what specific chemical test was requested from the defendant-appellant and [that court's] result does not distinguish between a breath, blood or urine chemical test." Opp. 4 n.2. But this observation proves our point. In fact, there is no doubt that the *Birchfield* prosecution *did* involve refusal to submit to a blood test. See *Birchfield* Pet. 4; *Birchfield* Pet. App. 24a, 26a. That the North Dakota Supreme Court made nothing of this fact confirms that, for present purposes, there are no material differences between tests of blood and of deep lung air.

both in this case and in *Birchfield* would put before the Court the full range of factual circumstances in which test-refusal statutes are applied. That makes these cases uniquely favorable vehicles with which to resolve the question presented.

B. The Decision Below Stated A Rule Permitting Searches Incident To Arrest That Departs From This Court's Holdings.

The State also is wrong in arguing that the decision below "is consistent with this Court's previous decisions related to the scope of searches incident to arrest." Opp. 6. In making this contention, the State concedes that a search of petitioner's breath would have advanced neither "safety concerns for law enforcement" nor "immediate preservation of evidence needs" (Opp. 8), but nevertheless asserts that this Court's decision in *United States* v. *Robinson,* 414 U.S. 218 (1973), laid down a "categorical rule" that "allows a search of the person of an arrestee [that is] justified only by the custodial arrest itself." Opp. 7. This rule, the State continues, permits "searches within the **body**" of an arrestee even when "searches involving the area in which the defendant was arrested" would be impermissible. Opp. 7-8.

For reasons explained in the petition (at 11-15), however, this reasoning rests on a plain misreading of *Robinson* and this Court's subsequent decisions. We showed in the petition that, as a general matter, the Fourth Amendment provides the highest level of protection against "intrusio[n] into the human body." *Maryland* v. *King*, 133 S. Ct. 1958, 1969 (2013). On the face of it, under that settled understanding it was bizarre for the court below to state a rule that makes it easier to conduct a search in a person's body

than in the person's pockets. And all of the Court's search-incident-to-arrest decisions, including *Robinson*, have held that the search-incident-to-arrest exception applies *only* when a warantless search is necessary to address "concerns for officer safety and evidence preservation" (*Riley* v. *California*, 134 S. Ct. 2473, 2484 (2014))—concerns that categorically *never* exist when a breath test is at issue. The contrary decision of the court below therefore both departs from this Court's holdings and confuses a very important area of the law.[3] The State fails even to attempt to address these points.

C. Review By This Court Is Necessary To Resolve Confusion In the Lower Courts And Correct Repeated Misapplication Of The Fourth Amendment.

Finally, the State observes that there is no square conflict in the lower courts on the constitutionality of test-refusal statutes like Minnesota's. Opp. 4-6. But this observation, although correct so far as it goes, does not obviate the need for review, again for several reasons.

First, as explained in detail in the petition (at 10-26), neither the decision of the Minnesota Supreme Court in this case nor that of the North Dakota Supreme Court in *Birchfield* can be squared with this

---

[3] The State is wrong in contending (Opp. 7 n.6) that the decision below is consistent with *Maryland* v. *King*, 133 S. Ct. 1958 (2013). Unlike *King*, where the search was required as a ministerial matter and did not involve any exercise of discretion, the search in this case is one that was "subject to the judgment of officers" (*id.* at 1970)—the paradigmatic circumstance where a warrant is required. Although we made this point in the petition (at 22), the State offers no response.

Court's holdings. Even absent a direct conflict in the lower courts, these erroneous rulings, which are premised on a manifest misunderstanding of this Court's doctrine but validate thousands of wrongful convictions each year, should be corrected by this Court.

Second, express conflict or not, there is pervasive confusion in the lower courts on the principles that govern this area of the law. It is revealing that each of the three courts below took different and mutually inconsistent approaches to the constitutionality of Minnesota's test-refusal statute, with the trial court finding the statute unconstitutional, the appellate court upholding it as "reasonable," and the court below opining that it is valid under the search-incident-to-arrest doctrine. Moreover, although the Minnesota Supreme Court expressly rejected the "reasonableness" analysis of the Minnesota Court of Appeals, the latter court's approach was explicitly endorsed by the North Dakota Supreme Court in *Birchfield*. And that court's related implied-consent rationale (also embraced by an appellate court in Hawaii, in a decision endorsed by the State here, see Opp. 5 & n.4) has in turn been repudiated by numerous other courts. See Pet. 23 & n.5.[4]

---

[4] Squaring the circle, a Florida appellate court expressly "disagree[d] with the Minnesota Supreme Court's conclusion and reasoning" in this case, explaining that "breath-alcohol tests are not justified by either of the rationales for the [search-incident-to-arrest] exception" and that, "[t]o the extent that an exigent circumstance is presented by the evanescent nature of BAC, that reasoning was specifically rejected in *McNeely*." *Williams* v. *State*, 2015 WL 3511222, at *7 (Fla. Dist. Ct. App. 2015). But that court nevertheless upheld warrantless administration of a breath test "under a general reasonableness test" (*ibid.*)—the

Third, given the importance of the issue presented here and the frequency with which it arises, clarity in the law is essential. The decision below confuses the meaning of the search-incident-to-arrest doctrine—an important matter in its own right (see Pet. 10)—and offers a roadmap for circumvention of this Court's holding in *McNeely*. See Pet. 15. The issue arises many thousands of times each year, in jurisdictions across the Nation. And the absence of clear guidance from this Court on the governing rules will interfere with the continuing efforts of state and local governments to implement valid and effective responses to the problem of impaired driving, an effort that, as we show in the petition (at 30-32), is currently ongoing. For all of these reasons, immediate review by this Court of the decision below and of the North Dakota Supreme Court's decision in *Birchfield* is warranted.

CONCLUSION

For these reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

---

approach that the Minnesota Supreme Court in this case had labeled "contrary to basic principles of Fourth Amendment law." Pet. App. 7a.

Respectfully submitted.

JEFFREY S. SHERIDAN
Sheridan & Dulas, P.A.
320 Eagandale Center
1380 Corporate Center Curve
Eagan, MN 55121
(651) 686-7870

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic[*]
127 Wall Street
New Haven, CT 06511
(203) 432-4992

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
PAUL W. HUGHES
MICHAEL B. KIMBERLY
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Petitioner

AUGUST 2015

[*] 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.